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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
A 2d	Atlantic Reporter Second Series
Abb.	Abbott (U S)
Abb Adm.	Abbott's Admiralty (U.S)
Abb App Dec.	Abbott's Appeals Decisions (N.Y.)
Abb Dec.	Abbott's Decisions (N Y)
Abb N Cas	Abbott's New Cases (N Y)
Abb Pr.	Abbott's Practice (N Y)
Abb Pr N S	Abbott's Practice New Series (N.Y.)
A'Beck Res. Judgm.	A'Beckett's Reserved Judgments (Vict)
[1917] A C.	[1917] Appeal Cases (Can)
[1918] A C.	Law Reports [1918] Appeal Cases (Eng)
Acton	Acton (Eng.)
Adams	Adams Reports (N H)
Adams L J.	Adams County Legal Journal (Pa)
A.D.2d	Appellate Division Second Series (N.Y.)
Add	Addison (Pa)
Add Eccl.	Addams' Ecclesiastical (Eng)
A &E	Adolphus & Ellis (Eng)
A &E Enc.L.	American & English Encyclopædia of Law
A &E Enc L &Pr.	American & English Encyclopædia of Law & Practice
Aik	Aikens (Vt)
A K Marsh.	A. K Marshall (Ky)
Ala	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb L J.	Albany Law Journal
A L C.	American Leading Cases
Alc &N	Alcott & Napier (Eng)
Alc Reg Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng)
Alison Pr.	Alison's Practice (Sc)
Allen	Allen (Mass)
Allen (N B.)	Allen, New Brunswick
Alta L.	Alberta Law
A L R.	American Law Reports
A L R.2d	American Law Reports, Second Series
Am Bankr.	American Bankruptcy (U S.)
Ambl	Ambler (Eng)
A M C.	American Maritime Cases
Am Corp Cas.	American Corporation Cases
Am Cr.	American Criminal
Am D	American Decisions
Am &E Corp Cas.	American & English Corporation Cases
Am &E Corp Cas. N S	American & English Corporation Cases New Series
Am &Eng Ency. Law	American and English Encyclopedia of Law
Am &Eng Pat. Cas	American & English Decisions in Equity
Am &E Eq D	American and English Patent Cases
Am &Eng R.R. Cas	American and English Railroad Cases
Am Electr Cas.	American Electrical Cases
Am &E R Cas	American & English Railroad Cases
Am &E.R Cas N. S	American & English Railroad Cases New Series
Am J Int L	American Journal of International Law
Am L J.	American Law Journal (Pa.)
Am L J.N.S.	American Law Journal New Series (Pa)
Am.L.Rec.	American Law Record (Ohio)
Am L Reg	American Law Register
Am L Reg N S	American Law Register New Series
Am Law Reg O S.	American Law Register Old Series
Am.L Rev	American Law Review
Am.L.T Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl Cas.	American Negligence Cases
Am.Negl R.	American Negligence Reports
A M &O	Armstrong, Macartney & Ogle (Ir.)
Am.Prob	American Probate
Am Prob N S.	American Probate New Series
Am.Pr.	American Practice
Am R	American Reports
Am.R &Corp.	American Railroad & Corporation
Am R Rep	American Railway Reports
Am.S R	American State Reports
Am.St.R D.	American Street Railway Decisions
And	Anderson (Eng)
Andr.	Andrews (Eng)
Ann Cas	American & English Annotated Cases
Ann Cas 1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng)
Anth N P.	Anthon's Nisi Prius (N Y)
App D C.	Appeal Cases (D C)
App Cas	Law Reports Appeal Cases (Eng.)
App Div	Appellate Division (N.Y.)
App Div.2d	Appellate Division, Second Series (N.Y)
Ariz	Arizona
Ark.	Arkansas
Ark Just.	Arkley's Justiciary (Sc.)
Arn	Arnold (Eng)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk	Atkyn (Eng)
Austr.C.L R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail Eq.	Bailey's Equity (S C.)
Bailey	Bailey's Law (S C)
B.&Ad.	Barnewall & Adolphus (Eng)
B &Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U S.)
Balf Pr.	Balfour's Practice (Sc.)
Ball &B	Ball & Beatty (Ir)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U S.)
Barb.	Barbour (N Y)
Barb.Ch.	Barbour's Chancery (N Y.)
B &Arn.	Barron & Arnold (Eng)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B &Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S C.)
B.&B.	Broderip & Bingham (Eng.)
B C.	British Columbia
B.&C.	Barnewall & Cresswell (Eng.)
B &Macn.	Browne & Macnamara (Eng)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)

Beav	Beavan (Eng)
Beav &Wal Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaver	Beaver County Legal Journal (Pa)
Beaw.Lex Mer.	Beawes Lex Mercatoria (Eng)
Bee	Bee (U S)
Bell.	Bellewe (Eng)
Bell App Cas.	Bell's Appeal Cases (Sc)
Bell Cas	Bell's Cases (Sc)
Bell C C	Bell's Crown Cases (Eng)
Bell Comm	Bell's Commentaries (Eng)
Bell Sc Cas.	Bell's Scotch Court of Session Cases
Ben	Benedict (U.S)
Benl	Benloe (Eng)
Benl &D.	Benloe & Dallison (Eng)
Berks	Berks County Law Journal (Pa)
B.&H Cr Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky)
Bing	Bingham (Eng)
Bing N Cas.	Bingham's New Cases (Eng)
Binn.	Binney (Pa)
Biss.	Bissell (U S)
Bitt W.&P.	Bittleson, Wise & Parnell (Eng)
Black	Black (U S)
Black L D.	Black's Law Dictionary
Blackf.	Blackford (Ind)
Blackstone Comm.	Blackstone Commentaries
Bla H	Henry Blackstone's English Common Pleas (Eng)
Blair	Blair County (Pa)
Bland	Bland (Md)
Bland's Ch.	Bland's Chancery (Md.)
Blatchf.	Blatchford (U S)
Blatchf &H.	Blatchford & Howland (U S)
Blatchf PrizeCas.	Blatchford's Prize Cases (U.S)
Bligh	Bligh (Eng)
Bligh N.S.	Bligh New Series (Eng)
B Mon.	B Monroe (Ky)
Bond	Bond (U S.)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del)
B &P.	Bosanquet & Puller (Eng)
B &P.N.R.	Bosanquet & Puller's New Reports (Eng)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf Surr.	Bradford's Surrogate (N.Y)
Brayt.	Brayton (Vt)
B R C.	British Ruling Cases
Brev.	Brevard (S C)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa)
Brightly El.Cas.	Brightly's Election Cases (Pa)
Bro Ch.	Brown's Chancery (Eng)
Brock.	Brockenbrough (U S)
Brock Cas.	Brockenbrough's Virginia Cases
Brod.&B	Broderip & Bingham (Eng)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng)
Brooke N C.	Brooke's New Cases
Bro P C	Brown's Parliament Cases (Eng)
Brown Adm.	Brown's Admiralty (U S)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown's Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng)
Browne	Browne (Pa)
Brown &L.	Browning & Lushington (Eng.)
Brownl &G.	Brownlow & Goldesborough (Eng)
Bruce	Bruce (Sc)
Brunn Coll Cas	Brunner's Collective Cases (U.S)
B.&S.	Best & Smith (Eng.)
B T.A.	Board of Tax Appeals (U.S)
Buck	Buck (Eng)
Bucks	Bucks County Law Reporter (Pa.)
Buller N P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng)
Bunb.	Bunbury (Eng)
Burn.	Burnett (Wis)
Burr	Burrows (Eng)
Burr S Cas.	Burrows' Settlement Cases (Eng)
Busb	Busbee (N C)
Busb Eq.	Busbee Equity (N C)
Bush	Bush (Ky)
B W.C.C.	Butterworth's Workmen's Compensation Cases (Eng)

C

C.	California Reports
C 2d	California Reports, Second Series
C A.	Court of Appeals (U S)
C A	California Appellate Reports
C A 2d	California Appellate Reports, Second Series
Cab &E.	Cababe & Ellis (Eng)
Cai	Caines (N Y)
Cai Cas.	Caines' Cases (N Y.)
Cald.	Caldecott (Eng)
Cal Rptr.	California Reporter
Call	Call (Va)
Calthr	Calthrop (Eng)
Cal Unrep Cas.	California Unreported Cases
Cambria	Cambria County Legal Journal (Pa)
Cam Cas	Cameron's Cases (Can)
Campb	Campbell (Eng)
Canal Zone	Canal Zone Supreme Court
Can App Cas.	Canadian Appeal Cases
Can Cr Cas.	Canadian Criminal Cases
Can Exch.	Canadian Exchequer
Can L J	Canada Law Journal
Can.L J N S.	Canada Law Journal New Series
Can L T.Occ. Notes	Canadian Law Times Occasional Notes
Can R Cas.	Canadian Railway Cases
Can S C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng)
Car &K.	Carrington & Kirwan (Eng)
Car &M.	Carrington & Marshman (Eng.)
Car &P	Carrington & Payne (Eng.)
Car H &A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng)
Cas.	Casey (Pa)
Cas t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas t.Holt	Cases temp. Holt (Eng)
Cas t King	Cases temp. King (Eng)
Cas t.Talb.	Cases temp. Talbot (Eng)
C.B.	Common Bench (Manning, Granger & Scott) (Eng)
C B N S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng)
C.C A.	Circuit Court of Appeals (U S.)
C.C.P A.	Court of Customs and Patent Appeals
Centr L J	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng)
Chamb Rep.	Chamber (Ont.)
Chandl	Chandler (Wis.)
Charlt R M.	R M. Charlton (Ga)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch Cas.	Cases in Chancery (Eng)
Ch Chamb.	Chancery Chambers (U.C.)
Ch Col.Op.	Chalmers' Colonial Opinions
Ch D.	Law Reports Chancery Division (Eng)
Chest.	Chester County (Pa.)
Chev.	Cheves (S C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N Y.)
Cinc.L Bul.	Weekly Law Bulletin (Oh.)
Cinc Super.	Cincinnati Superior Court Reporter (Oh)
City Ct R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)
Civ Proc.Rep.	Civil Procedure Reports (N.Y.)

C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C J S.	Corpus Juris Secundum
C &K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y)
Clark &F.	Clark & Finnelly (Eng)
Clark & Fin N S.	Clark's House of Lords Cases (Eng)
Clarke	Clarke's Chancery (N Y)
Clarke&S Dr Cas	Clarke & Scully's Drainage Cases (Ont)
Clarke Ch.	Clarke's Chancery (N.Y)
Clayt.	Clayton's Reports, York Assizes (Eng)
C L Chamb.	Chamber's Common Law (U.C)
Clev L Rec.	Cleveland Law Record (Oh.)
Clev L Rep.	Cleveland Law Reporter (Oh.)
Cl &F	Clark & F[illegible] (Eng)
Clif El Cas.	Clifford's [illegible] Election Cases
Clff	Clifford (U S)
C L R.	Common Law Reports (Eng)
C &M.	Carrington & Marshman (Eng)
C.M &R.	Crompton, Meeson & Roscoe (Eng)
Cock &Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N Y)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff Prob.	Coffey's Probate (Cal.)
Co Inst.	Coke's Institutes
Coke	Coke (Eng)
Col Cas.	Coleman's Cases (N Y.)
Col &C.Cas.	Coleman & Caines' Cases (N Y)
Col C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng)
Col L Rep.	Colorado Law Reporter
Col Law Review	Columbia Law Review
Coll.&E Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com Cas.	Commercial Cases (Eng)
Com L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller, Treasury Decisions
Comst.	Comstock (N Y.)
Comyns	Comyns (Eng)
Comyns Dig.	Comyns Digest (Eng)
Con &Law.	Connor & Lawson (Ir)
Conf.	Conference Reports (N C)
Conn.	Connecticut
Conn.Sup.	Connecticut Supplement
Conn Surr.	Connolly's Surrogate (N Y)
Const.	Constitutional Reports (N C.)
Cooke	Cooke (Eng)
Cooke	Cooke (Tenn)
Cooke & A.	Cooke & Alcock (Ir)
Cook Vice-Adm	Cook's Vice-Admiralty (L C)
Coop.	Cooper's Chancery (Eng.)
Coop Pr Cas	Cooper's Practice Cases (Eng)
Coop t.Brough.	Cooper's Cases temp. Brougham (Eng)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng)
Coop t.Eld.	Cooper's Cases *tempore* Eldon (Eng)
Co P C.	Coke's Reports (Eng)
Corb.&D.	Corbett & Daniell's Election Cases (Eng)
Court.&Macl.	Courtney & Maclean (Sc.)
Cow.	Cowen (N Y)
Cow Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp	Cowper (Eng.)
Cox Am T.M Cas.	Cox's American Trade-Mark Cases
Cox C C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng)
Cox &Atk.	Cox & Atkinson (Eng)
C &P.	Carrington & Payne (Eng)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App	Criminal Appeals (Eng.)
Crawf &D	Crawford & Dix (Ir.)
Crawf.&D Abr. Cas.	Crawford & Dix's Abridged Cases (Ir)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr L Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng)
C.Rob	Christopher Robinson's Admiralty (Eng)
Cro Car.	Croke Charles (Eng.)
Cro Eliz.	Croke Elizabeth (Eng)
Cro Jac.	Croke's Reports tempore James (Jacobus) (Eng)
Cromp &J.	Crompton & Jervis (Eng.)
Cromp &M	Crompton & Meeson (Eng)
Crosw.Pat Cas.	Croswell's Collection of Patent Cases (U.S)
Cr.&Ph.	Craig & Phillips (Eng)
Ct Cl	Court of Claims (U S.)
Ct Cust & Pat. App.	Court of Customs and Patent Appeals
Cumb.	Cumberland Law Journal (Pa.)
Cunn.	Cunningham (Eng.)
Curt	Curtis (U S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng)
Cush.	Cushing (Mass)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal C.P.	Dalson's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Any.Abr.	D'Anver's Abridgment (Eng.)
Dauph.	Dauphin County (Pa.)
Dav &M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D B &M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D & C.	District and County (Pa.)
D. & C.2d	District and County, Second Series (Pa.)
D Chipm.	D. Chipman (Vt.)
D.C Mun App.	Municipal Court of Appeals (D.C.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U S)
Dears &B.	Dearsley & Bell (Eng)
Dears.C C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng)
De Gex	De Gex (Eng.)
De G F &J.	De Gex, Fisher & Jones (Eng.)
De G J.&S.	De Gex, Jones & Smith (Eng)
De G &J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N Y.)
Den	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng)
Desaus.Eq.	Desaussure (S C)
Dev Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev L.	Devereux (N C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)
D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng)

Dom L R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng)
Dorion	Dorion (L C)
Dougl.	Douglas (Eng)
Dougl	Douglass (Mich)
Dougl El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng)
Dow & Cl.	Dow & Clark (Eng)
Dow & L	Dowling & Lowndes (Eng.)
Dow N S.	Dowling, New Series (Eng)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl P C.	Dowling's Practice Cases (Eng)
Dowl P.C N S.	Dowling's Practice Cases New Series (Eng)
D &R	Dowling & Ryland (Eng)
Draper	Draper (U C)
Drew	Drewry (Eng)
Drinkw	Drinkwater (Eng)
D &R Mag Cas.	Dowling & Ryland's Magistrate Cases (Eng)
D &R N P.	Dowling & Ryland s Nisi Prius (Eng)
Dr &Sm.	Drewry & Smale (Eng)
Drury	Drury (Ir.)
Dr &Wal	Drury & Walsh (Ir)
Dr &War.	Drury & Warren (Ir)
D.&Sw.	Deane & Swabey (Eng)
Dud Eq.	Dudley (S C)
Dudl.	Dudley (Ga)
Duer	Duer's Superior Court (N.Y.)
Dunl B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc)
Dunn	Dunning (Eng.)
Durie	Durie (Sc.)
Durn &E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East L R.	Eastern Law Reporter (Can)
East P.C.	East s Pleas of the Crown (Eng.)
East T.	Eastern Term (Eng)
E.&B	Ellis & Blackburn (Eng)
E.B &E.	Ellis, Blackburn & Ellis (Eng)
E.B &S.	Ellis, Best & Smith (Eng.)
E.C L	English Common Law
Eden	Eden (Eng)
Edgar	Edgar (Sc.)
Edm Sel Cas.	Edmond's Select Cases (N.Y.)
E. D Smith	E. D Smith (N.Y)
Edw.	Edwards (Eng)
Edw.	Edwards' Chancery (N Y)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng)
E &E.	Ellis & Ellis (Eng.)
Em App	Emergency Court of Appeals (U S.)
Enc.Pl &Pr.	Encyclopædia of Pleading & Practice
Ency.Law	American and English Encyclopædia of Law
Eng Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng Eccl	English Ecclesiastical Reports
Eng.Ecc R.	English Ecclesiastical Reports
Eng Exch	English Exchequer Reports
Eng L &Eq.	English Law & Equity
Eng Rep R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng &Ir.App.	Law Reports, English and Irish Appeal Cases
Eq Cas Abr.	Equity Cases Abridged (Eng.)
Eq Rep.	Equity Reports (Eng.)
E R C.	English Ruling Cases
Erie	Erie County Law Journal (Pa.)
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc)
Ex.D.	Law Reports Exchequer Division (Eng)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc &F.	Falconer & Fitzherbert (Eng)
Far	Farresley (Eng)
Fay L J.	Fayette Legal Journal (Pa.)
F Cas No	Federal Cases (U S)
F (Ct Sess)	Fraser's Court of Sessions Cases (Sc.)
F	Federal Reporter (U S)
F 2d	Federal Reporter Second Series
F R D.	Federal Rules Decisions
F Supp	Federal Supplement
Ferg Cons.	Ferguson's Consistory (Eng.)
F &F.	Foster & Finlason (Eng)
Fiduciary	Fiduciary Reporter (Pa.)
Fish Pat Cas.	Fisher's Patent Cases (U.S)
Fish Pat R	Fisher's Patent Reports (U S.)
Fish PrizeCas.	Fisher's Prize Cases (U S)
Fitzg.	Fitzgibbon (Eng)
Fitzh.	Fitzherbert's Abridgment (Eng)
Fitzh N.Br.	Fitzherbert's Natura Brevium (Eng)
Fla	Florida
Flipp.	Flippin (U S)
Fl &K.	Flanagan & Kelly (Ir)
Fonb Eq.	Fonblanque's Equity (Eng.)
Fonbl	Fonblanque (Eng)
Fonbl R.	Fonblanque's English Cases
Forbes	Forbes (Eng)
Forr	Forrest (Eng)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost	Foster (Eng)
Fost	Foster (N.H.)
Fost &Fin.	Foster & Finlason (Eng)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng)
Fox & S	Fox & Smith (Ir)
Freem.	Freeman's Chancery (Eng)
Freem.	Freeman's Chancery (Miss)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga App.	Georgia Appeals
Ga Dec.	Georgia Decisions
Gale	Gale (Eng)
Gal	Gallison (U S.)
G Coop.	G Cooper (Eng)
G &D	Gale & Davidson (Eng)
Geld &M.	Geldart & Maddock (Eng.)
Gibb Surr.	Gibbon's Surrogate (N Y.)
Giffard	Giffard (Eng)
Giff &H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn)
Gilb.	Gilbert's (Eng)
Gilb Cas.	Gilbert's Cases (Eng)
Gilb C P.	Gilbert's Common Pleas (Eng.)
Gilb Exch.	Gilbert's Exchequer (Eng)
Gill	Gill (Md)
Gill&J.	Gill & Johnson (Md.)
Gilm	Gilmer (Va)
Gilm &Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U S)
Glasc	Glascock (Ir)
Glyn&J.	Glyn & Jameson (Eng)
Godb.	Godbolt (Eng)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf	Gosford (Eng)
Gouldsb.	Gouldsborough (Eng)
Gow	Gow (Eng)
Gow N P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa)
Grant Ch	Grant's Chancery (U C)
Grant Err &App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va)
Gray	Gray (Mass)
Green Cr.	Green's Criminal Law (Eng)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd	Haddington (Eng)
Hagg Adm.	Haggard's Admiralty (Eng.)

Hagg Cons.	Haggard's Consistory (Eng.)
Hagg Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N Y.)
Hall&T	Hall & Twells (Eng.)
Halsbury L Eng	Halsbury's Law of England
Handy	Handy (Oh.)
Han (N B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S C.)
Harr.	Harrison's Chancery (Mich.)
Harr.Del	Harrington (Del.)
Harr.Mich.	Harrington's Michigan Chancery Reports
Harr &G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr &H.	Harrison & Hodgins (U C.)
Harr &J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr &W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U S.)
Havl.	Havland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii Fed.	Hawaiian Federal
Hawaii Rep.	Hawaii Reports
Hawk P C.	Hawkins' Pleas of the Crown (Eng.)
Hay Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M	Hay & Marriott (Eng.)
Hayw.	Haywood (N C.)
Hayw	Haywood (Tenn.)
Hayw &H.	Haywood & Haselton (U.S.)
Haz Reg.	Hazard's Register (Pa.)
H.Bl	Henry Blackstone (Eng.)
H &C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk	Heiskell (Tenn.)
Hem &M.	Hemming & Miller (Eng.)
Hempst	Hempstead (U S.)
Hen &M.	Hening & Munford (Va.)
Het.	Hetley (Eng.)
Het.C P.	Hetley's Common Pleas (Eng.)
H &H	Horn & Hurlstone (Eng.)
Hill	Hill (N Y.)
Hill S C	Hill (S C.)
Hill &Den	Hill & Denio (N Y.)
Hill &Den Supp.	Lalor's Supplement to Hill & Denio's (N Y.)
Hilt.	Hilton (N Y.)
Hil T	Hilary Term (Eng.)
H L Cas.	House of Lords Cases (Eng.)
H &N.	Hurlstone & Norman (Eng.)
Hob	Hobart (Eng.)
Hodg El.	Hodgins' Election (U C.)
Hodges	Hodges (Eng.)
Hoffm	Hoffman's Chancery (N Y.)
Hoffm Land Cas.	Hoffman's Land Cases (U S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U S.)
Holt's Adm.Cas.	Holt's English Admiralty Cases
Holt Eq	Holt's Equity (Eng.)
Holt K B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N Y.)
Hopk Dec.	Hopkins' Decisions (Pa.)
Hopw &C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How	Howard (U S.)
How Miss.	Howard (Miss.)
How A Cas.	Howard's Appeal Cases (N Y.)
How N P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How Pr N S.	Howard's Practice New Series (N.Y.)
How St Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N Y.)
Hurl &Gord.	Hurlstone & Gordon (Eng.)
Hurl &W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
I L E.	Indiana Law Encyclopedia
Ill	Illinois Reports
Ill 2d	Illinois Reports, Second Series
Ill App	Illinois Appellate Court Reports
Ill App 2d	Illinois Appellate Court Reports, Second Series
Ill Cir.	Illinois Circuit Court
I L P.	Illinois Law and Practice
Ind.	Indiana
Ind App	Indiana Appellate Court
Ind T.	Indian Territory
Ins L J.	Insurance Law Journal
Int Com Commn	Interstate Commerce Commission
Int Com Rep.	Interstate Commerce Reports
Int Rev Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C L	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired	Iredell (N C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir Law& Eq.	Irish Law and Equity Reports
Ir R 1894.	Irish Law Reports for Year 1894
Ir.R C L.	Irish Reports Common Law
Ir R Eq.	Irish Reports Equity
Irv Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J Bridgm.	John Bridgman (Eng.)
J &C	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J J Marsh.	J J Marshall (Ky.)
J &L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns	Johnson (N.Y.)
Johns Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N Y.)
Johns.V C.	Johnson's English Vice-Chancellors (Eng.)
Johns &H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)

Keb.	Koble (Eng.)
Keen	Keen (Eng.)
Keil.	Keilwey (Eng)
Keilw.	Keilway (Eng)
Kel C C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga)
Kelyng, J	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng)
Keyes	Keyes (N Y)
K &G.	Keane & Grant (Eng)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn)
Knapp	Knapp (Eng)
Knapp&O.	Knapp & Ombler (Eng.)
Kn &Moo.	Knapp & Moore (Eng)
Knox	Knox (N S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A (Orleans)	Court of Appeal, Parish of Orleans
La Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Bar	Lackawanna Bar (Pa.)
Lack.Jur	Lackawanna Jurist (Pa.)
Lack Leg N.	Lackawanna Legal News (Pa)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa)
Lalor	Lalor's Supplement to Hill & Denio (N Y)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.Rev	Lancaster Law Review (Pa.)
Land Dec	Land Decisions (U.S)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans Ch.	Lansing Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep N S.	Law Reports New Series (N.Y.)
Law.L.J.	Lawrence Law Journal (Pa.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng)
L.C Jur.	Lower Canada Jurist
L C L J.	Lower Canada Law Journal
L.C.Rep.S Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C C.	Leach's Crown Cases (Eng)
Lebanon	Lebanon County Legal Journal (Pa)
L.Ed.	Lawyers' Edition United States Supreme Court
L.Ed.2d	Lawyer's Edition United States Supreme Court, Second Series
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t Hardw.	Lee temp. Hardwicke (Eng)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng)
Leg.Chron.	Legal Chronicle (Pa.)
Leg Gaz	Legal Gazette (Pa.)
Leg &Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa)
Leh.L J.	Lehigh County Law Journal (Pa)
Lehigh Val L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng)
Lev.	Levinz (Eng)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel Cas.	Littell's Select Cases (Ky.)
L J.Adm.	Law Journal Admiralty New Series (Eng)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng)
L J.C P.	Law Journal Common Pleas New Series (Eng)
L J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng)
L J.Eccl.	Law Journal Ecclesiastical New Series (Eng)
L.J.Exch.	Law Journal Exchequer New Series (Eng)
L J.Exch.O.S.	Law Journal Exchequer Old Series (Eng)
L J.K B.	Law Journal King's Bench New Series (Eng.)
L J.K B.O.S	Law Journal King's Bench Old Series (Eng.)
L J.M C.	Law Journal Magistrate Cases New Series (Eng)
L J.M C O.S	Law Journal Magistrate Cases Old Series (Eng)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L J.P D &Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng)
L J.P &M.	Law Journal Probate & Matrimonial New Series (Eng)
L J.Q.B.	Law Journal Queen's Bench New Series (Eng)
L J.Rep.	Law Journal Reports (Eng.)
Ll &G t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll &G t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll &W.	Lloyd & Welsby (Eng.)
L &M.	Lowndes & Maxwell (Eng.)
L M &P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf &T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U S.)
L.R	Law Reports (U.S.)
L.R A	Lawyers' Reports Annotated
L.R.A 1915A	Lawyers' Reports Annotated 1915A
L.R.App Cas	English Law Reports, Appeal Cases (Eng)
L R.A &E	Law Reports Admiralty & Ecclesiastical (Eng.)
L R.A.N S.	Lawyers' Reports Annotated New Series
L.R C C.	Law Reports Crown Cases (Eng)
L R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L R.C.P.	Law Reports Common Pleas Cases (Eng)
L.R Eq.	Law Reports Equity Cases (Eng)
L R.Exch.	Law Reports Exchequer Cases (Eng)
L.R H L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H L Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir	Law Reports Irish
L R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L R.Q.B.	Law Reports Queen's Bench Cases (Eng)
L T.	Law Times (Pa.)
L.T.N.S.	Law Times, New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)
L.T.O.S.	Law Times, Old Series (Pa)
L T.Rep.N.S.	Law Times Reports, New Series (Eng)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng)
Lutw Reg Cas.	Lutwyche's Registration Cases (Eng.)
Lux.Leg.Obs.	Luzerne Legal Observer (Pa)
Lux Leg.Reg.	Luzerne Legal Register (Pa)
Lux.L J.	Luzerne Law Journal (Pa.)
Lycoming	Lycoming Reporter (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D C.)
MacArth.	MacArthur's District of Columbia Reports

MacAr &M.	MacArthur & Mackey s District of Columbia Reports
Maccl.	Macclesfield (Eng)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl &R.	Maclean & Robinson (Eng)
Macn &G	Macnaghten & Gordon (Eng)
Macph	Macpherson (Sc)
Macph S.&L.	Macpherson, Shirreff & Lee (Sc)
Macq.	Macqueen's Scotch Appeal Cases
Madd	Maddock (Eng)
Madd Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir)
Man	Manitoba Law
Man El Cas	Manning's Election Cases (Eng)
Man Exch Pr.	Manning's Exchequer Practice (Eng)
Man Gr &S.	Manning, Granger & Scott (Eng)
Man L J	Manitoba Law Journal
Man &Ry	Manning & Ryland (Eng)
Man &Ry Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng)
Man &S.	Manning & Scott (Eng.)
Man.Unrep Cas.	Manning's Unreported Cases (La)
Manson	Manson (Eng)
Man.t Wood	Manitoba temp. Wood
March	March (Eng)
Mar.Prov.	Maritime Province Reports (Can.)
Mars Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh J J.	J. J Marshall (Ky)
Mart.	Martin Old Series (La)
Mart	Martin (N C)
Mart N S.	Martin New Series (La.)
Mart &Y.	Martin & Yerger (Tenn.)
Marv	Marvel (Del.)
Mason	Mason (U S)
Mass.	Massachusetts
Maule & S.	Maule & Selwyn (Eng)
Mayn	Maynard (Eng)
McAll.	McAllister (U S)
McC	McCahon (Kan)
McClell	McClelland (Eng)
McClell &Y.	McClelland & Younge (Eng.)
McCord	McCord (S C)
McCrary	McCrary (U S)
McG.	McGloin (La.)
McLean	McLean (U S)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees &Ros.	Meeson & Roscoe (Eng.)
Mees &W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng)
Meigs	Meigs (Tenn)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv	Merivale (Eng)
Metc	Metcalf (Mass)
Metc.	Metcalfe (Ky)
M.&G.	Manning & Granger (Eng)
M &H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng)
Miles	Miles (Pa.)
Mill Const.	Mill's Constitutional (S C.)
Mill Dec.	Miller's Decisions (U S)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala)
Misc.	Miscellaneous Reports (N Y.)
Misc.2d	Miscellaneous Reports, Second Series (N Y.)
Miss.	Mississippi
Miss Dec.	Mississippi Decisions
Miss St.Cas.	Mississippi State Cases
M.L.P.	Michigan Law and Practice
M &M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo App.	Missouri Appeals
Moak	Moak (Eng)
Mo A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
M A L.	Modern American Law
Mod Cas L &Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Monroe L.R	Monroe Law Reports (Pa.)
Mont.	Montana
Mont.	Montagu (Eng)
Mont.Bank Rep.	Montagu's English Bankruptcy Reports
Mont.L R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng)
Mont.&C	Montagu & Chitty (Eng.)
Mont D &DeG.	Montagu, Deacon & De Gex (Eng)
Montg.	Montgomery County Law Reporter (Pa.)
Mont &M	Montagu & McArthur (Eng)
Montr Cond Rep.	Montreal Condensed Reports
Montr Leg N	Montreal Legal News
Montr Q.B.	Montreal Law Reports Queen's Bench
Montr Super.	Montreal Law Reports Superior Court
Moody C C.	Moody's Crown Cases (Eng)
Moore C.P.	Moore's Common Pleas (Eng)
Moore Indian App.	Moore's Indian Appeals (Eng)
Moore K.B.	Moore's King's Bench (Eng)
Moore P C.	Moore's Privy Council Old Series (Eng)
Moore P.C N S	Moore's Privy Council New Series (Eng)
Moore&S	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor Min Rep	Morrison's Mining Reports
Morr	Morris (Iowa)
Morr Bankr Cas	Morrell's Bankruptcy Cases (Eng)
Morr St Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M &P.	Moore & Payne (Eng)
M.&R.	Manning & Ryland (Eng)
M &Rob.	Moody & Robinson (Eng)
M &S.	Maule & Selwyn (Eng)
Mun	Municipal Law Reporter (Pa.)
Mun Corp.Cas.	Municipal Corporation Cases
Munf	Munford (Va.)
Murph.	Murphey (N C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl &C.	Mylne & Craig (Eng.)
Myl &K.	Mylne & Keen (Eng)
Myr.Prob.	Myrick's Probate (Cal)

N

Nat Bankr Reg.	National Bankruptcy Register (U.S.)
Nat Corp Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N B	New Brunswick
N Benl	New Benloe (Eng.)
N B Eq.	New Brunswick Equity
N C	North Carolina
N Chipm.	N. Chipman (Vt)
N C Conf.	North Carolina Conference
N C T.Rep.	North Carolina Term Reports
N D.	North Dakota
N E	North Eastern Reporter
N E.2d	North Eastern Reporter Second Series
Neb.	Nebraska
Neb Unoff.	Nebraska Unofficial
Nels.	Nelson (Eng)
Nels.Abr.	Nelson's Abridgment of the Common Law
Nev.	Nevada
Newb Adm.	Newberry's Admiralty (U S.)
Newfoundl	Newfoundland
Newf Sel Cas.	Newfoundland Select Cases
NewRep.	New Reports in all Courts (Eng)
NewSess Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.	New Jersey Reports
N.J Eq.	New Jersey Equity
N.J Law	New Jersey Law
N J L J.	New Jersey Law Journal
N.J Misc.	New Jersey Miscellaneous
N.J Super.	New Jersey Superior Court Reports
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)

N &Macn.	Neville & Macnamara (Eng)
Nolan	Nolan (Eng)
North.	Northington (Eng)
North.	Northampton County Reporter (Pa)
Northumb Co.Leg. N.	Northumberland County Legal News (Pa.)
Northumb L J.	Northumberland Legal Journal (Pa.)
Notes of Cas.	Notes of Cases (Eng)
Nott & McC.	Nott & McCord (S C.)
Noy	Noy (Eng)
N &P.	Nevile & Perry (Eng)
N S.	Nova Scotia
N S Dec.	Nova Scotia Decisions
N S.Wales	New South Wales
N S Wales L	New South Wales Law
N.S Wales L R Eq	New South Wales Law Reports Equity
N W	North Western Reporter
N.W 2d	North Western Reporter Second Series
N Y.	New York
N.Y 2d	New York Second Series
N Y Ann Cas.	New York Annotated Cases
N Y City Ct.	New York City Court
N Y City Ct Suppl	New York City Court Supplement
N.Y Civ.Proc	New York Civil Procedure
N Y Civ Pr Rep	New York Civil Procedure Reports
N Y Code Reports N S	New York Code Reports, New Series
N Y Cr	New York Criminal
N Y Leg.Obs.	New York Legal Observer
N Y L Rec.	New York Law Record
N.Y Month L.Bul.	New York Monthly Law Bulletin
N Y S.	New York Supplement
N Y S 2d	New York Supplement Second Series
N.Y St.	New York State Reporter
N Y Super.	New York Superior Court
N Y Wkly.Dig.	New York Weekly Digest

O

O Ben.	Old Benloe (Eng)
O Bridgm.	Orlando Bridgman (Eng.)
Off Gaz.	Official Gazette
Ohio	Ohio
Ohio App	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct N.S.	Ohio Circuit Court New Series
Ohio Cir Dec.	Ohio Circuit Decisions
Ohio Dec Reprint	Ohio Decisions (Reprint)
Ohio F Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N P	Ohio Nisi Prius
Ohio N P.N.S.	Ohio Nisi Prius New Series
Ohio O	Ohio Opinions
Ohio O.2d	Ohio Opinions, Second Series
Ohio Prob	Ohio Probate
Ohio S.&C P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Ohio Supp.	Ohio Supplement
Okl.	Oklahoma
Okl Cr.	Oklahoma Criminal
Olcott	Olcott (U S.)
Oliv.B &L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont	Ontario
Ont A	Ontario Appeals
Ont El Cas.	Ontario Election Cases
Ont L.	Ontario Law
Ont L J.	Ontario Law Journal
Ont L.J N.S.	Ontario Law Journal New Series
Ont Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor Dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng)

P

P.	Pacific Reporter
P 2d.	Pacific Reporter Second Series
[1891] P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa Corp.	Pennsylvania Corporation Reporter
Pa.C Pl.	Common Pleas (Pa.)
Pa Dist	Pennsylvania District
Pa.D &C.	Pennsylvania District and County
Pa D &C.2d	Pennsylvania District and County Second Series
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S)
Pa L J.	Pennsylvania Law Journal
Pa L.Rec.	Pennsylvania Law Record
Pa.L J R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng)
Pa Rec.	Pennsylvania Record
Park	Parker (Eng)
Park Cr.	Parker's Criminal (N Y)
Park Exch.	Parker's Exchequer (Eng)
Park Ins.	Parker's Insurance (Eng)
Pars.Eq Cas.	Parsons' Equity Cases (Pa.)
Pa Super.	Pennsylvania Superior Court
Paton App Cas.	Paton's Appeal Cases (Sc)
Patrick El Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va)
P D	Law Reports Probate Division (Eng.)
P &D.	Perry & Davison (Eng)
Peake N.P.	Peake's Nisi Prius (Eng)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa)
Peck	Peck (Tenn)
Peck El Cas.	Peckwell's Election Cases (Eng)
Pennew	Pennewill (Del)
Pennyp.	Pennypacker (Pa)
Penr &W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U S.)
Pet.Adm.	Peters' Admiralty (U S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng)
Phil.	Phillip (N C)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass)
Pig &R.	Pigott & Rodwell (Eng)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis)
Pittsb.	Pittsburgh (Pa.)
P &K.	Perry & Knapp (Eng)
P L.E.	Pennsylvania Law Encyclopedia
P L J	Pittsburgh Legal Journal (Pa.)
P L.J N.S.	Pittsburgh Legal Journal New Series (Pa)
Plowd	Plowden (Eng)
Pollexf.	Pollexfen (Eng)
Poph.	Popham (Eng)
Port.	Porter (Ala)
Posey	Posey's Unreported Cases (Tex)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow Surr.	Powers' Surrogate (N.Y)
P R &D El.Cas.	Power, Rodwell & Dew's Election Cases (Eng)
Prec Ch.	Precedents in Chancery (Eng)
Pr.Edw Isl.	Prince Edward Island
Price	Price (Eng)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid &C.	Prideaux & Cole (Eng)
Prob [1917]	Law Reports, Probate Division (Eng)
Prob Rep.	Probate Reports (Eng)
Pr.Rep.	Practice Reports (Eng.)
P Wms.	Peere-Williams (Eng)
P U R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)

[1891]Q B.	Law Reports [1891] Queen's Bench (Eng.)
Q B.D.	Law Reports Queen's Bench Division (Eng)
Queensl J.P.	Queensland Justice of the Peace
Queensl L	Queensland Law
Queensl L J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass)

R

Rand	Randolph (Va.)
Rap.Jud. Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa)
R.C L.	Ruling Case Law
R &Can.Cas.	Railway & Canal Cases (Eng.)
R &Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng)
Redf.	Redfield's Surrogate (N.Y)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng)
Redf.Surr.	Redfield's Surrogate (N.Y)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng)
Reprint	English Reprint
Rep.t Finch	Cases temp Finch (Eng)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng)
Rep t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res &Eq Judgm.	Reserved & Equity Judgments (N S. Wales)
Rev Crit.	Revue Critique (Can.)
Rev de Jur.	Revue de Jurisprudence (Can)
Rev de Legis.	Revue de Legislation (Can)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg N.S.	Revue Legale New Series (Can)
Rev.Rep.	Revised Reports (Eng)
R I.	Rhode Island
Rice	Rice (S C.)
Rich.	Richardson (S C)
Rich.C.P.	Richardson's Practice Common Pleas (Eng)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap	Ridgeway's Appeal (Ir)
Ridg L &S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg P C.	Ridgeway's Parliament Cases (Ir)
Ridg.t.Hardw.	Ridgeway temp Hardwicke (Eng)
Riley	Riley (S C.)
R &M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La)
Rob.	Robinson (Va)
Robb Pat Cas.	Robb's Patent Cases (U S.)
Robert.App Cas.	Robertson's Appeal Cases (Sc)
Rob Eccl	Robertson's Ecclesiastical (Eng)
Robin.App Cas.	Robinson's Appeal Cases (Sc)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng)
Rolle	Rolle (Eng)
Rolle Abr.	Rolle's Abridgment (Eng)
Rolls Ct Rep.	Rolls' Court Reports
Rom Cas.	Romilly's Notes of Cases (Eng)
Root	Root (Conn)
Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng)
R &R.	Russell & Ryan Crown Cases (Eng)
Russ	Russell (Eng)
Russ &C.Eq Cas.	Russell's & Chesley's Equity Cases (N S)
Russ Eq Cas.	Russell's Equity Cases (N S)
Russ &Geld.	Russell & Geldert, Nova Scotia
Russ &M.	Russell & Mylne (Eng.)
Ry &M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask L.	Saskatchewan Law
Saund.	Saunders (Eng)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S)
Saxt.	Saxton (N J)
Say.	Sayer (Eng)
S C.	South Carolina
[1907]S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch &Lef.	Schoales & Lefroy (Ir)
Sch.Leg.Rec.	Schuylkill Legal Record (Pa.)
Sch.Reg.	Schuylkill Register (Pa.)
[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Sc Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
ScotL T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr L T.	Scranton Law Times (Pa)
Sc.Sess Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S)
S D.	South Dakota
S.E	South Eastern Reporter
S E 2d	South Eastern Reporter Second Series
Searle & Sm.	Searle & Smith (Eng.)
Sel Cas Ch.	Select Cases in Chancery (Eng)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc)
Shaw & D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw,Dunl &B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc)
Sheld.	Sheldon (N Y)
Shep Abr.	Sheppard's Abridgment
Sheph Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng)
Silv A.	Silvernail's Appeals (N Y)
Silv Sup.	Silvernail's Supreme (N.Y.)
Sim	Simons (Eng.)
Sim N S.	Simons New Series (Eng)
Sim &St.	Simons & Stuart (Eng.)
Skin	Skinner (Eng)
Smale&G.	Smale & Giffard (Eng)
Smith	Smith (Ind)
Smith	Smith (N H.)
Smith&B	Smith & Batty (Ir)
Smith K.B	Smith's King's Bench (Eng)
Smith Lead Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm &M	Smedes & Marshall (Miss.)
Sm &M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir)
Sneed	Sneed (Tenn.)
So	Southern Reporter
So 2d	Southern Reporter Second Series
Sol J.	Solicitor's Journal (Eng)
Som.	Somerset Legal Journal (Pa)
Sp	Speers (S C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)
Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc)
Stark.	Starkie Nisi Prius (Eng.)
Stat at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng)

Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.2d	South Western Reporter Second Series
Swab	Swabey's Admiralty (Eng.)
Swab &Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tnw.	Tunwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trin.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.App.D.C.	United States Appeal Cases (D.C.)
U.S.Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah Reports
Utah 2d	Utah Reports Second Series

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.&B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall.Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.2d	Washington Reports, Second Series
Wash.	Washington (Va.)
Wash.St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.Co.	Washington County Reports (Pa.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B.&W.I. P.&M.	Webb, A'Beckett & Wilhams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web.Pat.Cas.	Webster's Patent Cases (Eng.)
Webster New Int.D.	Webster's New International Dictionary
Welsh.	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West.	West (Eng.)
West.	Westmoreland County Law Journal (Pa.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West.t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917]West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)
Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin Reports
Wis.2d	Wisconsin Reports, Second Series
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)

Wkly N C.	Weekly Notes of Cases (Pa.)
Wkly Rep	Weekly Reporter (Eng)
Wms.Saund.	Williams Notes to Saunders' Reports
W N.	Weekly Notes (Eng)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng)
Wolf &D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng)
Woodb &M.	Woodbury & Minot (U S)
Woods	Woods (U S)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S)
Words & Phrases	Words & Phrases
Wright	Wright (Oh)
W Rob.	William Robinson's Admiralty (Eng)
Wr Pa.	Wright (Pa)
W Va.	West Virginia
W W Harr.	W W Harrington (Del.)
W.W.&D.	Willmore, Wollaston & Davidson (Eng)
W W &H.	Willmore, Wollaston & Hodges (Eng.)
Wyo	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy &W.	Wyatt & Webb (Vict)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel Cas.	Yates Select Cases (N.Y.)
Y B	Year Book (Eng)
Y &C Exch.	Younge & Collyer's Exchequer (Eng.)
Y &Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa)
Yelv.	Yelverton (Eng)
Yerg.	Yerger (Tenn)
Y &J	Younge & Jervis (Eng.)
York	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B A Jour.	American Bar Association Journal
Ala L Rev	Alabama Law Review
Albany L Rev.	Albany Law Review
Am.J.Int Law	American Journal of International Law
Am Law S Rev.	American Law School Review
Ark.L Rev.	Arkansas Law Review
Aust L J.	Australian Law Journal
B U.L Rev	Boston University Law Review
Brooklyn L Rev.	Brooklyn Law Review
Calif L Rev.	California Law Review
Camb.L J.	Cambridge Law Journal
Chi.-Kent Rev.	Chicago-Kent Review
Colum L Rev.	Columbia Law Review
Com L J.	Commercial Law Journal
Cornell L Q.	Cornell Law Quarterly
Detroit L Rev.	Detroit Law Review
Dick L Rev.	Dickinson Law Review
Fed B A.J.	Federal Bar Association Journal
Fla.L J.	Florida Law Journal
Fordham L Rev.	Fordham Law Review
Geo.Wash L Rev.	George Washington Law Review
Geo.L J.	Georgetown Law Journal
Harv L.Rev.	Harvard Law Review
Ia L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill L Rev.	Illinois Law Review
Ind L J.	Indiana Law Journal
J Am.Jud.Soc.	Journal of the American Judicature Society
J Comp.Leg.	Journal of the Society of Comparative Legislation
J N A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub Teachers of Law
John Marshall L Q.	The John Marshall Law Quarterly
Kan.City L Rev	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky L J.	Kentucky Law Journal
L J	Law Journal
L Lib J.	Law Library Journal
Law Q Rev.	Law Quarterly Review
Law Ser.Mo Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
La L Rev.	Louisiana Law Review
Loyola L Rev.	Loyola Law Review
Marq.L.Rev.	Marquette Law Review
Md L Rev.	Maryland Law Review
Mass L Q	Massachusetts Law Quarterly
Mercer, Beasley L Rev	Mercer, Beasley Law Review
Miami L Q.	Miami Law Quarterly
Mich L Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss L J.	Mississippi Law Journal
Mo L.Rev	Missouri Law Review
Montana L.Rev.	Montana Law Review
Neb L B.	Nebraska Law Bulletin
N J L J.	New Jersey Law Journal
N J L.Rev.	New Jersey Law Review
N Y U L Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N C L Rev.	North Carolina Law Review
Okla L Rev.	Oklahoma Law Review
Oreg L Rev.	Oregon Law Review
Phil L J	Philippine Law Journal
Rocky Mt L Rev.	Rocky Mountain Law Review
Rutgers U.L Rev	Rutgers University Law Review
St. John's L Rev.	St John's Law Review
St. Louis L Rev.	St. Louis Law Review (now Washton University Law Quarterly)
So.Calif L Rev	Southern California Law Review
Southwestern L J	Southwestern Law Journal
Stanford L.Rev	Stanford Law Review
Temp L Q	Temple Law Quarterly
Tenn.L Rev.	Tennessee Law Review
Tex L Rev.	Texas Law Review
Tul L Rev	Tulane Law Review
U Chi L Rev.	University of Chicago Law Review
U.Cin L Rev	University of Cincinnati Law Review
U Detroit L J.	University of Detroit Law Journal
U.Florida L Rev.	University of Florida Law Review
U.Kan City L.Rev	University of Kansas City Law Review
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts L Rev.	University of Pittsburgh Law Review
U.Toronto L J.	University of Toronto Law Journal
Vanderbilt L Rev	Vanderbilt Law Review
Va.L Rev	Virginia Law Review
Wash L.Rev.	Washington Law Review
Wash.U L.Q.	Washington University Law Quarterly
Wash & Lee L Rev	Washington and Lee Law Review
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Wyo L J.	Wyoming Law Journal
Yale L.J.	Yale Law Journal

LIST OF TITLES
IN
CORPUS JURIS SECUNDUM

Abandonment
Abatement and Revival
Abduction
Abortion
Absentees
Abstracts of Title
Accession
Accord and Satisfaction
Account, Action on
Accounting
Account Stated
Acknowledgments
Actions
Adjoining Landowners
Admiralty
Adoption of Children
Adulteration
Adultery
Adverse Possession
Aerial Navigation
Affidavits
Affray
Agency
Agriculture
Aliens
Alteration of Instruments
Ambassadors and Consuls
Amicus Curiæ
Animals
Annuities
Appeal and Error
Appearances
Apprentices
Arbitration and Award
Architects
Army and Navy
Arrest
Arson
Assault and Battery
Assignments
Assignments for Benefit of Creditors
Assistance, Writ of
Associations
Assumpsit, Action of
Asylums
Attachment
Attorney and Client
Attorney General
Auctions and Auctioneers
Audita Querela
Bail
Bailments
Bankruptcy
Banks and Banking
Barratry
Bastards
Beneficial Associations
Bigamy
Bills and Notes
Blasphemy
Bonds
Boundaries
Bounties
Breach of Marriage Promise
Breach of the Peace
Bribery
Bridges
Brokers
Building and Loan Associations
Burglary
Business Trusts
Canals
Cancellation of Instruments
Carriers
Case, Action on
Cemeteries
Census
Certiorari
Champerty and Maintenance
Charities
Chattel Mortgages
Citizens
Civil Rights
Clerks of Courts
Clubs
Colleges and Universities
Collision
Commerce
Common Lands
Common Law
Common Scold
Compositions with Creditors
Compounding Offenses
Compromise and Settlement
Concealment of Birth or Death
Conflict of Laws
Confusion of Goods
Conspiracy
Constitutional Law
Contempt
Continuances
Contracts
Contratos
Contribution
Conversion
Convicts
Copyright and Literary Property
Coroners
Corporations
Costs
Counterfeiting
Counties
Court Commissioners
Courts
Covenant, Action of
Covenants
Creditors' Suits
Criminal Law
Crops
Culpa
Curtesy
Customs and Usages
Customs Duties
Damages
Dead Bodies
Death
Debt, Action of

Declaratory Judgments
Dedication
Deeds
Dependencies, Colonies, and British Possessions
Depositaries
Depositions
Deposits in Court
Descent and Distribution
Detectives
Detinue
Discovery
Dismissal and Nonsuit
Disorderly Conduct
Disorderly Houses
District and Prosecuting Attorneys
District of Columbia
Disturbance of Public Meetings
Divorce
Domicile
Dower
Drains
Druggists
Drunkards
Dueling
Easements
Ejectment
Election of Remedies
Elections
Electricity
Embezzlement
Embracery
Eminent Domain
Entry, Writ of
Equity
Escape
Escheat
Escrows
Estates
Estoppel
Evidence
Exchange of Property
Exchanges
Executions
Executors and Administrators
Exemptions
Explosives
Extortion
Extradition
Extraterritoriality
Factors
False Imprisonment
False Personation
False Pretenses
Federal Civil Procedure
Federal Courts
Fences
Ferries
Finding Lost Goods
Fines
Fires
Fish
Fixtures
Flags
Food
Forcible Entry and Detainer
Forfeitures
Forgery
Fornication
Franchises
Fraud
Frauds, Statute of
Fraudulent Conveyances
Game
Gaming
Garnishment
Gas
Gifts
Good Will
Grand Juries
Ground Rents
Guaranty
Guardian and Ward
Habeas Corpus
Hawkers and Peddlers
Health
Highways
Holidays
Homesteads
Homicide
Hospitals
Husband and Wife
Improvements
Incest
Indemnity
Indians
Indictments and Informations
Industrial Co-operative Societies
Infants
Injunctions
Innkeepers
Insane Persons
Insolvency
Inspection
Insurance
Insurrection and Sedition
Interest
Internal Revenue
International Law
Interpleader
Intoxicating Liquors
Joint Adventures
Joint Stock Companies
Joint Tenancy
Judges
Judgments
Judicial Sales
Juries
Justices of the Peace
Kidnapping
Landlord and Tenant
Larceny
Levees and Flood Control
Lewdness
Libel and Slander
Licenses
Liens
Limitations of Actions
Lis Pendens
Livery Stable Keepers
Logs and Logging
Lost Instruments
Lotteries
Malicious Mischief
Malicious Prosecution
Mandamus
Manufactures
Maritime Liens
Marriage
Marshaling Assets and Securities
Master and Servant
Masters' and Employers' Associations
Mayhem
Mechanics' Liens
Mercantile Agencies
Militia
Mills
Mines and Minerals
Miscegenation
Modern Civil Law
Money Lenders
Money Lent
Money Paid
Money Received
Monopolies
Mortgages
Motions and Orders
Motor Vehicles
Municipal Corporations
Names
Navigable Waters

Ne Exeat
Negligence
Neutrality Laws
Newspapers
New Trial
Notaries
Notice
Novation
Nuisances
Oaths and Affirmations
Obscenity
Obstructing Justice
Officers
Pardons
Parent and Child
Parliamentary Law
Parties
Partition
Partnership
Party Walls
Patents
Paupers
Pawnbrokers
Payment
Penalties
Pensions
Pent Roads
Peonage
Perjury
Perpetuities
Physicians and Surgeons
Pilots
Piracy
Pleading
Pledges
Poisons
Possessory Warrant
Post Office
Powers
Principal and Surety
Prisons
Private Roads
Prize Fighting
Process
Profanity
Prohibition
Property
Prostitution
Public Administrative Bodies and Procedure
Public Lands
Public Utilities
Quieting Title
Quo Warranto
Railroads
Rape
Real Actions
Receivers
Receiving Stolen Goods
Recognizances
Records
References
Reformation of Instruments
Reformatories
Registers of Deeds
Registration of Land Titles
Release
Religious Societies
Removal of Causes
Replevin
Reports
Rescue
Review
Rewards
Right of Privacy
Riot
Robbery
Sales
Salvage
Schools and School Districts
Scire Facias
Seals
Seamen
Searches and Seizures
Seduction
Sequestration
Set-Off and Counterclaim
Sheriffs and Constables
Shipping
Signatures
Slaves
Social Security and Public Welfare
Sodomy
Specific Performance
Spendthrifts
States
Statutes
Steam
Stenographers
Stipulations
Street Railroads
Submission of Controversy
Subrogation
Subscriptions
Suicide
Summary Proceedings
Sunday
Supersedeas
Taxation
Telegraphs, Telephones, Radio, and Television
Tenancy in Common
Tender
Territories
Theaters and Shows
Threats and Unlawful Communications
Time
Torts
Towage
Towns
Trade-Marks, Trade-Names, and Unfair Competition
Trade Unions
Trading Stamps and Coupons
Treason
Treaties
Trespass
Trespass to Try Title
Trial
Trover and Conversion
Trusts
Turnpikes and Toll Roads
Undertakings
United States
United States Commissioners
United States Marshals
Unlawful Assembly
Use and Occupation
Usury
Vagrancy
Vendor and Purchaser
Venue
War and National Defense
Warehousemen and Safe Depositaries
Waste
Waters
Weapons
Weights and Measures
Wharves
Wills
Witnesses
Woods and Forests
Work and Labor
Workmen's Compensation
Zoning

TITLES IN THIS VOLUME

	Page
Assistance, Writ of	2
Associations	18
Assumpsit, Action of	108
Asylums	141
Attachment	171
Attorney and Client	696
Attorney General	1213
Auctions and Auctioneers	1239
Audita Querela	1278

CORPUS JURIS SECUNDUM

VOLUME SEVEN

ASSISTANCE. As judged by common usage, the word pertains to some kind of services rendered;[1] and has been defined as act of assisting, help, aid, furtherance, succor, support;[2] aid.[3] In particular connections, it has been also defined as assistants;[4] and benefit;[5] and has been distinguished from "advice" (see Advice 2 C.J.S p 892 note 55), and "supersession."[6]

Phrases: "Ability to provide such assistance,"[7] "aid and assistance" (see Aid 3 C J S. p 502 note 13), "assistance, affection, and companionship,"[8] "assistance . . . in the preparation and execution of the necessary papers,"[9] "assistance of every kind employed,"[10] "charitable assistance and benefit,"[11] "poor person in need of assistance,"[12] "receiving aid, advice, or assistance" (see Aid 3 C.J S p 502 note 21), "special assistance,"[13] and "without the assistance of her husband."[14]

1. Mitchell v Berlin-McNitt Co, 158 P. 264, 265, 91 Wash 532

2. Webster D, quoted in Sowle v Sowle, 215 N W 122, 123, 115 Neb 795

3. Wiley v McRee, 47 N C 349, 351. 351

4. **Employment of assistance**
In a statute authorizing a public officer to employ such assistance as might be necessary, the word "assistance" was evidently intended to mean the same thing as assistants — Ray v. James, (Ky.) 112 S W. 641, 642.

5. Tappan's App, 52 Conn 412, 416

6. People v Hayne, 23 P 1, 3, 83 Cal 111, 17 Am S R 211, 7 L R A. 348

7. Peabody v Town of Holland, 178 A 888, 889, 107 Vt 237, 98 A.L R 866

8. **Loss of husband's assistance, affection and companionship**
In an action for alienation of affections, an instruction to fix the damages at such sum as would compensate plaintiff for the loss of her husband's society, "assistance, affection and companionship, and for mental suffering was held to have submitted loss of support and maintenance as a ground of recovery.— Sowle v Sowle, 215 N W 122, 123, 115 Neb 795

9. Smith v. U S., (C C A Ark) 83 F (2d) 631, 639

Preparation of papers not required
Under the statute limiting fee for "assistance in the preparation of the necessary papers" in presentation of a claim to the United States Veterans' Administration, the quoted term, "does not mean that the defendant prepared all of the papers, or that he necessarily prepared any of the papers If he gave his assistance in such preparation and execution, that is all that is required"—Negron v U S, (C C A.Porto Rico) 30 F (2d) 584, 585

10. **Municipal contract**
Under contract with city for construction work requiring contractor to pay for "assistance of every kind employed" on or about the work, meats and groceries furnished by sub-contractor who maintained a boarding house for the contractor's employees were not within the quoted term — Mitchell v Berlin-McNitt Co, 158 P 264, 91 Wash 532.

11. **Construction of bequest**
A bequest for the "charitable assistance and benefit" of indigent unmarried Protestant females uses the words "assistance" and "benefit" as synonymous — Tappan's Appeal, 52 Conn. 412, 416.

12. **Absolute destitution unnecessary**
Under a statute providing for the relief of any "poor person in need of assistance," absolute destitution is unnecessary, since "assistance" implies that the needy person may be able to bear some of the expense of his support An injured person who was in urgent need of a doctor's services and who had no money or tangible property or resources that could be made available soon enough to do him any good was prima facie a "poor person in need of assistance," though he had a bonus and federal insurance policy on which loan might be obtained — Peabody v. Town of Holland, 178 A 888, 889, 107 Vt. 237, 98 A L R 866.

13. Ray v. James, (Ky.) 112 S W 641, 642

14. **Administration of paraphernal property**
A statute providing that a wife has the right to administer personally her paraphernal property "without the assistance of her husband" means without his control, without the necessity of being thereunto authorized by him. It is not incompatible with her personal administration that she should avail herself of the assistance of her husband, if he is willing to render it, provided he act under her authority and merely as her proclaimed agent.—Miller v. Handy, 33 La.Ann. 160.

ASSISTANCE, WRIT OF

This Title includes putting in possession of real property persons adjudged to be entitled thereto or purchasers thereof under orders or decrees in equitable actions; nature and scope of the remedy in general, in what cases and to and against whom and as to what property it is allowed; issuance, requisites, and validity of writs of assistance, and execution and effect thereof.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definition, nature, origin, and status of writ—p 2
2. Propriety of writ in general—p 3
3. Persons entitled to writ—p 4
4. Against whom writ may issue—p 5
5. Property subject to writ—p 6
6. Proceedings to procure writ—p 6
7. —— Conditions precedent—p 6
8. —— Time of issuance—p 7
9. —— Defenses—p 7
10 —— Jurisdiction to issue—p 8
11. —— Notice—p 9
12. —— Application—p 9
13. —— Hearing—p 10
14. —— Issuance, form, and requisites—p 11
15. —— Alias writ—p 12
16. Execution of writ—p 12
17. Operation and effect—p 13
18. Vacation, new trial, and appeal and error—p 14

§ 1. Definition, Nature, Origin, and Status of Writ

A writ of assistance is a process by which an equity court enforces its decrees respecting the title or right to possession of land; the basis of the writ is the power of the court to give effect to its adjudications without resort to other titles and it has been a recognized device for attaining this end for many years.

A writ of assistance, in modern American practice, is a form of process issued by a court of equity to transfer the possession of property, and more specifically of lands, the title or right to which it has previously adjudicated, as a means of enforcing its decree,[1] and is the ordinary process used by a court of chancery to put a party, receiver, sequestrator, or other person into possession of property when he is entitled thereto, either upon a decree or upon an interlocutory order,[2] the equitable equivalent to the writ of possession which issues at law—the writ of habere facias possessionem.[3] Another form of process, issuing from the court of exchequer and similarly designated, which in one aspect was of frequent and oppressive use in the collection of revenue in the colonial period in this country has never been adopted by the states or the United States[4] so that no useful purpose would be served by defining it or hereafter considering it and

1. Fla.—Hair v Commercial Bank of Live Oak, 152 So 180
Ill.—Stubbs v. Austin, 2 N.E (2d) 358, 285 Ill.App 535
Ind.—Rooker v. Fidelity Trust Co., 145 N E 493, 196 Ind 373, error dismissed 46 S Ct. 354, 270 U.S 633, 657, 70 L Ed. 771.
Mont.—Beck v. Kirk, 223 P. 499, 69 Mont 592.
N.C.—Knott Warehouse Co. v. Willis, 149 S E 679, 197 N.C. 476—Southern State Bank v Leverette, 123 S.E 68, 187 N C 743.

2. Ala.—Long v. Morris, 58 So. 274, 176 Ala 371.
Neb.—Escritt v Michaelson, 106 N W. 1016, 73 Neb. 634, 10 Ann Cas 1039.
5 C J. p 1316 note 3.

3. U S.—Oneale v Caldwell, (D C) 18 F.Cas No.10,515, 3 Cranch C C. 312
Ill.—Perrell v. Liebman, 257 Ill App. 133.
N Y.—Valentine v. Teller, Hopk. 422.
N C.—Southern State Bank v Leverette, 123 S E 68, 187 N C. 743
5 C J p 1316 note 4.

4. Boyd v. U S, (N Y) 6 S Ct 524, 116 U S. 616, 29 L.Ed 746—5 C J. p 1316 notes 1, 2.

accordingly this title is limited in scope to the equity process first mentioned.

The writ is of remote origin, dating as far back as the reign of Henry VIII.[5] In the jurisprudence of this country, it has long been available to courts of equity,[6] the power to issue it existing independently of statute[7] although confirmed in some jurisdictions, at least inferentially, by general statutes with reference to the issuance of writs.[8]

The basic concept upon which the right to issue the writ is predicated is that of the power of a court of equity to enforce its decrees;[9] it is derived from the principle that the court's jurisdiction to enforce is coextensive with its jurisdiction to determine the rights of the parties to the suit[10] and is a device whereby the court is enabled to avoid the necessity of turning the party entitled over to a court of law for the effectual protection of the rights decreed to him.[11]

§ 2. Propriety of Writ in General

a. Discretionary character
b. Prior adjudication of right
c. Pendency of other proceedings

a. Discretionary Character

Except where the applicant's right is manifest, the writ is discretionary in character and should issue only when the right thereto is clearly established.

Ordinarily the relief sought by way of writ of assistance is addressed to the sound discretion of, and the issuance of the writ is largely discretionary with, the court.[12] It should be granted, however, only where the right of the applicant seeking the writ is clear; and, if it is doubtful, should be denied.[13] It may be used only when there is no equity or appearance of equity in defendant[14] and the court, in the exercise of its discretion, should satisfy itself that the applicant who comes seeking equity has done equity and deny the writ if his conduct is marked by fraud or unfair dealing.[15]

Nevertheless, the rule that issuance of the writ is discretionary is subject to the limitation that, where there is no ground for the discretionary withholding of the right, the writ issues ex debito justitiæ, and is as much a matter of course as an execution after judgment at law.[16]

b. Prior Adjudication of Right

A proper occasion arises for employment of the writ when the court has determined the rights and claims as between the parties by a prior valid decree which is final and binding upon the parties to be affected.

A proceeding for a writ presupposes that the rights of the parties are such as follow upon final decree.[17] Accordingly, the writ is properly employed wherever a court of equity, having jurisdic-

5. Southern State Bank v. Leverette, 123 S.E. 68, 187 N.C. 743—5 C.J. p. 1316 notes 7, 8.

6. Idaho—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 353
Mo.—Irwin v. Burgan, 28 S.W.(2d) 1017, 325 Mo. 309
5 C.J. p. 1316 note 9.

7. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala. 449
Idaho—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 353
N.Y.—O'Connor v. Schaeffel, 11 N.Y.S. 737, 19 N.Y.Civ.Proc. 738, 25 Abb.N.C. 344

8. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala. 449.
Ill.—Perrell v. Luebman, 257 Ill.App. 133
Mo.—Irwin v. Burgan, 28 S.W.(2d) 1017, 325 Mo. 309

9. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala. 449.
Mo.—Irwin v. Burgan, 28 S.W.(2d) 1017, 325 Mo. 309.
N.C.—Lee v. Thornton, 97 S.E. 23, 176 N.C. 208

10. Fla.—Hair v. Commercial Bank of Live Oak, 152 So. 180
Mont.—Beck v. Kirk, 223 P. 499, 69 Mont. 592
N.C.—Lee v. Thornton, 97 S.E. 23, 176 N.C. 208.
Pa.—Commonwealth v. Lewis, 98 A. 31, 253 Pa. 175
5 C.J. p. 1323 note 91.

11. Fla.—Hair v. Commmercial Bank of Live Oak, 152 So. 180
Pa.—Commonwealth v. Lewis, 98 A. 31, 253 Pa. 175
5 C.J. p. 1323 note 91 [a].

12. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala. 449.
Fla.—Oakland Properties Corporation v. Hogan, 117 So. 849, 96 Fla. 50—Bunch v. High Springs Bank, 80 So. 319, 76 Fla. 546
Idaho—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 353.
N.Y.—Cevasco v. Alexander Gazzola Realty Co., 197 N.Y.S. 94.
5 C.J. p. 1317 note 18.

13. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala. 449—Long v. Morris, 58 So. 274, 176 Ala. 371.
Fla.—Oakland Properties Corporation v. Hogan, 117 So. 849, 96 Fla. 50—Bunch v. High Springs Bank, 80 So. 319, 76 Fla. 546.
5 C.J. p. 1317 note 19.

14. Bunch v. High Springs Bank, 80 So. 319, 76 Fla. 546—5 C.J. p. 1317 note 19

The writ will never issue where there is any reasonable prospect that the party in possession may make a successful defense of his possession either at law or by the aid of equity.—Stubbs v. Austin, 2 N.E.(2d) 353, 285 Ill.App. 535.

15. Cevasco v. Alexander Gazzola Realty Co., 197 N.Y.S. 94.

16. Cal.—Skinner v. Beatty, 16 Cal. 156
Mich.—Baker v. Pierson, 5 Mich. 456
N.J.—Beatty v. De Forest, 27 N.J.Eq. 432
N.Y.—Lynde v. O'Donnell, 12 Abb.Pr. 286, 21 How.Pr. 34
Wis.—Prahl v. Rogers, 106 N.W. 287, 127 Wis. 353.
5 C.J. p. 1318 note 25.

17. Fla.—Hair v. Commercial Bank of Live Oak, 152 So. 180.
Ill.—Stubbs v. Austin, 2 N.E.(2d) 353, 285 Ill.App. 535

The statutory proceeding to require removal from a certificate of land title of a memorial of encumbrance not being a substitute for the action of ejectment or other possessory action and not purporting to provide a summary mode of placing the title holder in possession of his premises, a demurrer to a petition in such proceeding while it may admit the allegations as to title does not afford a sufficient basis for the issuance of a writ of assistance—Purchase v. Village of Desplaines, 155 N.E. 753, 324 Ill. 534.

tion of the persons and property in controversy, has determined the rights of the litigants to the title or possession of real estate,[18] or has decreed or confirmed a sale of the property,[19] and may issue as properly for a defendant successfully maintaining a cross bill as for a plaintiff[20]

The decree and the sale and proceedings thereunder must, however, be beyond suspicion, being insufficient to authorize the issuance of the writ if so tainted with irregularity or error as to create a doubt of their validity;[21] furthermore the rights of the respective parties must have been fully and finally adjudicated in the principal suit.[22] A decree or order which is a nullity[23] or one which does not dispose of the case on the merits[24] is incapable of supporting an application for, or issuance of, the writ.

The most familiar instance of the use of the writ is where land has been sold under a decree foreclosing a mortgage, a situation considered in detail in Mortgages § 770 [42 C.J. p 272 notes 61-68]; the writ is not limited to such cases, however, but extends to all actions brought for the determination of the rights of the parties to the title or possession of realty after a judgment declaring such rights,[25] the limitation recognized by some authority to cases where the underlying decree is one which passes the title[26] has elsewhere been expressly rejected.[27]

c. Pendency of Other Proceedings

The institution of other proceedings, such as forcible entry and detainer or ejectment, having the same object, does not prevent a resort to the writ as a means of obtaining possession.

The remedies given by writ of assistance and by forcible entry and detainer are concurrent, and both may be pursued at the same time until a satisfaction is had, the institution of the detainer action not sufficing to oust the chancery court of its jurisdiction in the cause;[28] and in like manner the commencement of an action of ejectment is not sufficient to bar the court from enforcing its decree by means of a writ of assistance.[29]

§ 3. Persons Entitled to Writ

The purchaser, his assigns or grantees, as well as the party to the suit, may claim the issuance of the writ, subject to the discretionary powers of the court.

While a few early cases took the view that the writ could not be regularly issued at the instance of anyone except a party to the action in which the underlying decree was entered,[30] it is well settled that the purchaser under a decree for sale is entitled to the writ even though a stranger to the record,[31] and by the weight of authority it will issue in favor of the purchaser's assignee or grantee,[32] except where it appears that by granting the writ injustice will be done to the party in possession,[33] for, of course, upon this factor, as

The writ is not a substitute for the action of ejectment, or of forcible entry and detainer—Cooper v. Cloud, 69 So. 928, 194 Ala 449.

18. Ill—Oberein v. Wells, 45 N E 294, 163 Ill 101
Mo—Farmers' Exch Bank v Thompson, 274 S W. 745, 309 Mo 669
N.Y—Devaucene v. Devaucene, 1 Edw. 272
5 C J p 1317 notes 11, 12

19. Metropolitan Life Ins. Co. v. Heany, 241 N W. 525, 122 Neb. 747—5 C J. p 1317 note 13

20. Cunningham v Winteroth, 181 N E 340, 348 Ill 391—Perrell v. Liebman, 257 Ill App. 133—5 C J. p 1313 note 27 [a].

21. Idaho.—Vermont Loan & Trust Co. v McGregor, 51 P. 104, 5 Idaho 510
Kan.—Lundstrum v. Branson, 139 P. 1172, 92 Kan. 78, 52 L R A.(N S) 697.
5 C.J. p 1317 notes 21, 22.

22. Ind.—Roach v. Clark, 48 N E 796, 150 Ind 93, 65 Am S R 353
Mich—Hayward v. Kinney, 48 N W. 170, 84 Mich. 591.
Neb—Urlau v. Ruhe, 103 N W. 670, 104 N.W. 1053, 73 Neb. 807.
N J—U. S. Presbyterian Church Bd of Home Missions v. Davis, 62 A 447, 70 N J Eq. 577, affirmed 65 A. 1117, 71 N J Eq 788
Wis—State v Burnell, 80 N.W. 460, 104 Wis 246
5 C J. p 1317 note 24.

Issuance pending appeal

(1) The writ may properly issue pending appeal of the decree where no injustice or hardship to any of the parties interested could inure from such issuance—Lambert v Livingston, 28 N E 352, 131 Ill 161

(2) However, where the appellate court is empowered to consider de novo all matters regarding the rights of the parties, and appellant gives security against any damage to appellee resulting from delay in issuance, and particularly where important public interests are involved, the right to the writ is not so clear that it is not compellable by mandamus at the instance of appellee obtaining a decree below—State v. Burnell, 80 N.W. 460, 104 Wis 240.

23. Baptiste v. Southall, 100 So. 674, 156 La 442

24. Baptiste v Southall, supra.

25. Lee v. Thornton, 97 S E. 23, 176 N C. 208.

26. Clay v. Hammond, 65 N E 352, 199 Ill. 370, 93 Am S R 146

27. Lee v. Thornton, 97 S E. 23, 176 N C 208.

28. State ex rel Goodhue County Nat Bank of Red Wing, Minn v District Court of Tenth Judicial Dist in and for Fergus County, (Mont) 31 P (2d) 837—Beck v Kirk, 223 P 499, 69 Mont. 592—5 C J p 1316 note 5

29. Keil v. West, 21 Fla 508.

30. Miss—Wilson v Polk, 21 Miss 131, 51 Am D 151.
Ohio—Stephenson v. Giltenau, 8 Ohio S. & C. P. 513, 5 Ohio N P. 419.
Wis—Gelpeke v Milwaukee, etc, R Co, 11 Wis 454

31. Idaho—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A L R 353
Md—Oliver v. Caton, 2 Md Ch 297
Mont—Beck v. Kirk, 223 P. 499, 69 Mont. 592.
5 C J p 1313 note 29

32. Beck v. Kirk, supra—5 C J. p 1313 note 30

33. Beck v Kirk, supra—5 C.J. p 1313 note 31.

upon others generally, whether the writ shall issue or not is a matter addressed to the sound judicial discretion of the judge [34]

Where a purchaser went into possession of land under a deed from his vendor before its sale on a foreclosure proceeding and before such suit was pending, and was dispossessed by a writ to the sheriff in that proceeding to which he was not a party, it was held that a petition by such purchaser for a writ of assistance to restore him to the possession of the land should be granted [35]

§ 4. Against Whom Writ May Issue

a In general
b Entrants pending suit

a. In General

A writ of assistance issues against those persons bound by the decree and also against any who have no bona fide colorable claim to possession, and against them only.

The writ of assistance will issue against a party to the suit,[36] his representatives[37] or privies,[38] or third persons generally holding through, or coming into possession under, him[39] pendente lite[40] or after a sale of the premises,[41] or against any person who holds possession as a mere intruder or trespasser;[42] and as a rule against such persons only.[43]

As otherwise stated, it issues against, and operates on, those persons, and those only, whose rights have been determined by the judgment or decree [44] Whenever the person whose possession is sought to be ousted by the writ sets up a bona fide and colorable claim of right to possession, the writ will be refused[45] and so will not issue against persons in possession before suit who were not made parties, provided they claim under an independent claim of ownership not concluded by the decree,[46] or persons who have acquired a new and independent right or title to the property, or make a prima facie showing to that effect.[47]

However, while it is not required that claimant establish the validity of his title in resisting the application,[48] where the issuance of the writ is contested on the ground of the right to possession of the person against whom it is sought, the claim of possession must be colorable or reasonable, not frivolous, collusive, or unsupported [49]

Moreover it will not issue against a sheriff merely because he has failed to execute a writ of possession [50]

34. Clark Inv Co v Lundgren, 107 N W 116, 76 Neb 59

35. Long v Morris, 58 So 274, 176 Ala 371

36. Ala —Cooper v Cloud, 69 So 928, 194 Ala 449
Ill —Vette v Brown, 166 N E 52, 334 Ill 406
5 C J p 1319 note 43

Parties not named in decree or deed
The writ will issue against all defendants who were served with process or appeared in the action, even though not mentioned by name in the decree or sheriff's deed —Frisbie v Fogarty, 34 Cal 11

37. Finger v McCaughey, 51 P 13, 119 Cal 59—5 C J p 1319 note 43

38. Ala —Cooper v Cloud, 69 So 928, 194 Ala 449
Fla —Bunch v High Springs Bank, 80 So 319, 76 Fla 546
Mo —Irwin v Burgan 28 S W (2d) 1017, 325 Mo 309
5 C J p 1319 notes 44, 46 [b]

39. Irwin v Burgan, supra—5 C J p 1319 note 45

40. Ala —Cooper v Cloud, 69 So 928, 194 Ala 449
Ill —Vette v Brown, 166 N E 52, 334 Ill 406
Mo —Irwin v Burgan, 28 S W.(2d) 1017, 325 Mo 309
S C —Pipkin v Fletcher, 162 S.E. 774, 165 S C 98
5 C.J. p 1319 note 46.

41. McVoy v Baumann, 125 A. 484, 95 N J Eq 335—5 C J. p 1320 note 47

42. Ala —Cooper v. Cloud, 69 So 928, 194 Ala 449
Cal —Pacific States Savings & Loan Co v Harwell, 268 P. 341, 204 Cal 370
5 C J p 1320 note 48

43. Ala —Cooper v. Cloud, 69 So 928, 194 Ala 449
Ill —Vette v Brown, 166 N E 52, 334 Ill 406—McDonell v. Hartnett, 153 N E 666, 323 Ill 87.
S C —Pipkin v Fletcher, 162 S E 774, 165 S C 98
5 C J p 1320 note 49.

44. Ala —Cooper v. Cloud, 69 So 928, 194 Ala 449
Fla —Bunch v High Springs Bank, 80 So 319, 76 Fla 546
Mo —Irwin v Burgan, 28 S W.(2d) 1017, 325 Mo 309
Mont —State ex rel Goodhue County Nat Bank of Red Wing, Minn v. District Court of Tenth Judicial Dist in and for Fergus County, 31 P (2d) 837
5 C J p 1320 note 50

45. Cal —Pacific States Savings & Loan Co v Harwell, 268 P. 341, 204 Cal 370
Fla —Bunch v High Springs Bank, 80 So. 319, 76 Fla 546
5 C J p 1317 note 22.

46. Ala —Cooper v. Cloud, 69 So 928, 194 Ala. 449
Fla —Bunch v. High Springs Bank, 80 So 319, 76 Fla 546
Ill —Vette v Brown, 166 N E 52, 334 Ill 406
5 C J p 1320 note 51.

47. Ark —Allison v Williams, 88 S. W (2d) 1001, 191 Ark 976.
Cal —Pacific States Savings & Loan Co v Harwell, 268 P 341, 204 Cal. 370
Mo —Irwin v. Burgan, 28 S W (2d) 1017, 325 Mo 309
Mont —State ex rel Goodhue County Nat Bank of Red Wing, Minn , v. District Court of Tenth Judicial Dist. in and for Fergus County, 31 P (2d) 837—Beck v. Kirk, 223 P. 499, 69 Mont 592.
5 C J. p 1320 notes 49 [a], 52

48. Thompson v. Smith, (C C Minn) 23 F Cas No 13,977, 1 Dill 458

49. Cal —Pacific States Savings & Loan Co v. Harwell, 268 P 341, 204 Cal. 370
Fla —Bunch v. High Springs Bank, 80 So 319, 76 Fla 546
Mont —State ex rel Goodhue County Nat. Bank of Red Wing, Minn., v. District Court of Tenth Judicial Dist in and for Fergus County, 31 P (2d) 837—Beck v Kirk, 223 P. 499, 69 Mont 592.
N J —McVoy v Baumann, 125 A 484, 95 N J.Eq 335
5 C J p 1317 note 22 [a], p 1320 note 52 [a]

50. Copley v. Conine, 3 La.Ann. 206.

b. Entrants pending Suit

Persons entering during the pendency of the suit under those concluded by the decree therein hold subject to be dispossessed by writ of assistance if they take with actual or constructive notice of the suit.

Clearly one entering under the party against whom the decree is entered takes subject to be dispossessed by a writ of assistance where a lis pendens is duly filed of record before his entry on the property[51] or where he has actual notice of the litigation,[52] but as against an entrant having no notice, actual or constructive, of the pendency of the suit, the writ may not issue.[53]

§ 5. Property Subject to Writ

Typically the writ relates to the possession of real property but, it would seem, not necessarily so.

Although the writ is ordinarily defined with express reference to real property and in application is used almost always to recover possession of that class of property as clearly appears from an examination of the authorities cited throughout this Title, it has been said to be available to compel the delivery of either personal property or realty.[54] Indeed the writ may in some cases be an appropriate remedy although the decree to be enforced thereby has nothing to do with the possession of any kind, but merely commands the specific performance of particular acts.[55]

§ 6. Proceedings to Procure Writ

An application for a writ of assistance is a summary interlocutory proceeding supplementary to the proceeding in which the decree as to the right to the property was rendered. In modern practice great liberality of procedure prevails, the formalities at one time required being largely dispensed with.

An application for a writ of assistance is a summary[56] interlocutory[57] proceeding; it is not the institution of a new suit but is simply another step in the equity suit in which title has been adjudicated, being a part of the process used in enforcing the decree itself.[58]

Under the early practice in this country, the court, on examination and after satisfying itself that possession was being withheld by some one concluded by the decree, made a decretal order that the possession be delivered to the person entitled, unless the decree itself directed that he should be put in possession, which order was served on the terre-tenant accompanied with a demand for possession, and at times with a formal writ of execution of the order for possession; the order for possession, not being complied with upon demand was then followed by an attachment, which was largely a matter of form, and was seldom served and could be dispensed with; after that there followed an order for an injunction commanding the party in possession forthwith to deliver it up, which order issued, of course, on affidavit proving the previous steps; and then, on affidavit of service of the injunction and refusal, a writ of assistance to the sheriff to put the party in possession issued of course on motion without notice.[59] The modern tendency of the courts is to dispense with the formalities mentioned, however, and to issue the writ immediately on a showing of a refusal of the tenant to surrender possession upon demand.[60] Upon a decree being rendered in his favor, applicant may obtain the writ without pursuing the complex procedure of the earlier practice of filing a supplemental petition or other proper application setting forth facts showing the necessity for the writ and petitioner's right thereto, and praying that the writ may issue,[61] indeed, the court's action in awarding the writ at the time of and as a part of an order confirming a sale has been upheld.[62]

§ 7. —— Conditions Precedent

Requirements as to confirmation of the decree, demand and refusal of possession, or the like, imposed by applicable statutes or rules of court or by the terms of the decree, expressly or by reasonable implication, constitute conditions precedent to the issuance of the writ, subject to a waiver thereof by the occupant.

Sometimes by virtue of statute or rules of court the recordation on the minutes of the court of the decree in aid of which a writ of assistance is

51. Fla.—Oakland Properties Corporation v. Hogan, 117 So. 849, 96 Fla. 50
N.J.—McVoy v. Baumann, 125 A. 484, 95 N.J.Eq. 335
S.C.—Pipkin v. Fletcher, 162 S.E. 774, 165 S.C. 93

52. McVoy v. Baumann, 125 A. 484, 95 N.J.Eq. 335—5 C.J. p. 1319 note 36 [c] (2)

53. Harlan v. Rackerby, 24 Cal. 561

54. Cooper v. Cloud, 69 So. 923, 194 Ala. 449—5 C.J. p. 1321 note 54

55. Com. v. Lewis, 93 A. 31, 253 Pa. 175.

56. Cal.—Trope v. Kerns, 23 P. 691, 83 Cal. 553
Ill.—Vette v. Brown, 166 N.E. 52, 334 Ill. 406—McDonell v. Hartnett, 153 N.E. 666, 323 Ill. 87—Stubbs v. Austin, 2 N.E.(2d) 358, 285 Ill.App. 535
Ind.—Rooker v. Fidelity Trust Co., 145 N.E. 493, 196 Ind. 373, error dismissed 46 S.Ct. 354, 270 U.S. 633, 657, 70 L.Ed. 771.

57. Rooker v. Fidelity Trust Co., supra.

58. Kessinger v. Whittaker, 82 Ill. 22—Lucas v. Smith, 201 Ill.App. 273
5 C.J. p. 1317 note 14.

59. Rooker v. Fidelity Trust Co., 145 N.E. 493, 196 Ind. 373, error dismissed 46 S.Ct. 354, 270 U.S. 633, 657, 70 L.Ed. 771—5 C.J. p. 1321 notes 59–62

60. Rooker v. Fidelity Trust Co., supra—5 C.J. p. 1321 note 62

61. Lee v. Thornton, 97 S.E. 23, 176 N.C. 208—5 C.J. p. 1322 note 64.

62. Metropolitan Life Ins. Co. v. Heany, 241 N.W. 525, 122 Neb. 747.

sought,[63] or a demand and refusal of possession,[64] is a condition precedent to the issuance of the writ; and the decree itself often states conditions to be fulfilled before the writ may issue, all of which must, of course, be fully satisfied, in consequence of which a final decree of confirmation of sale of the premises,[65] the presentation or exhibition to the occupant of the commissioner's deed,[66] and a demand of possession[67] have at times been recognized as requirements to be met before the writ may issue Moreover, even though the decree does not in terms require a demand and refusal, if other requirements from which such conditions may reasonably be implied are imposed, they have been deemed to render those circumstances necessary conditions before the writ may issue.[68]

However where, the decree itself unconditionally settles the right to the possession of land, the award of a writ of assistance need not be postponed until after delivery of possession by defendant has been demanded or refused;[69] and in the absence of such a requirement in the statutes or rules of court, or in the terms of the decree, prior confirmation of the sale is not a condition precedent to the issuance of the writ.[70]

Where a demand is necessary, it must not be made prematurely but is effective only as a satisfaction of the requirement if made at a time when demandant is entitled to the possession of the land.[71] A demand made upon the agents of the occupant who are in possession of the premises for him is sufficient.[72]

The decision of the court to grant the writ after hearing and notice has been held equivalent to a confirmation, if that is necessary;[73] and where the application alleges that the order of confirmation was exhibited to the occupant, and there was such an order in existence at the date alleged, the issuance of the writ is not to be regarded as premature merely because such order was issued on that very date, where no showing is made in contradiction of the allegation.[74]

By an unqualified refusal to deliver possession on demand, the occupant may waive the requirement that a copy of the decree be exhibited to him.[75]

§ 8. —— Time of Issuance

If a period is prescribed during which the rights under the decree remain defeasible, that period must have expired before the writ may issue.

The issuance of the writ of assistance does not immediately follow the decree adjudicating the rights of the parties in cases where those rights are not finally and irrevocably fixed at the time of the decree; if by the rules of law or the terms of the decree the rights decreed remain defeasible for a specified period, such as a period of redemption, that period must intervene before the writ may be claimed.[76]

§ 9. —— Defenses

a. Delay
b. Matters affecting decree or title

a. Delay

The applicant, by failing to make timely application for the writ, may disentitle himself thereto where such failure tends to affect or change the rights or status of the parties, and in like manner the person in possession by failing to urge defenses promptly and in due course may lose the right to assert them; but mere delay will not of itself constitute a defense to the application.

Delay in proceeding to enforce the decree by application for writ of assistance, or to comply with the conditions thereby imposed on applicant, is not of itself sufficient to establish a waiver of the right to the writ;[77] nor does it make out an estoppel, in the face of a lack of any showing of the element of justifiable reliance essential to that defense.[78] While the right to the writ may be lost by laches,[79]

63. Wilmot v. Equitable Bldg, etc, Assoc, 33 So. 447, 44 Fla 315

64. Loomis v. Wheeler, 21 Wis 271

65. Kan—Bird v. Bels, 6 P. 627, 33 Kan. 391
Mich—Howard v. Bond, 3 N W. 289, 42 Mich. 131.

66. Tucker v. Stone, 58 N W. 318, 99 Mich 419—5 C.J. p 1322 note 71.

67. Dickey v. Gibson, 53 P 704, 121 Cal. 276.

68. Mich—Howard v. Bond, 3 N W 289, 42 Mich 131
Miss—Jones v Hooper, 50 Miss 510.
N C—Knight v. Houghtalling, 94 N C. 408.

69. Cal.—Messenkop v. Duffield, 294 P. 715, 211 Cal. 222.
Ill—Perrell v. Liebman, 257 Ill App 133—5 C J. p 1322 note 77

70. Ala—Johnston v. Smith, 70 Ala 108
N Y.—Lynde v. O'Donnell, 12 Abb Pr. 286, 21 How Pr. 34
Wis—Loomis v. Wheeler, 18 Wis 524.

71. Howard v. Bond, 3 N.W 289, 42 Mich 131.

72. Ball v. Ridge Copper Co, 76 N W. 130, 118 Mich. 7.

73. State v. Evans, 75 S W. 914, 176 Mo 310.

74. Tucker v. Stone, 58 N.W. 318, 99 Mich. 419.

75. Knight v. Houghtalling, 94 N C. 408

76. Williams v. Sherman, 205 P 259, 35 Idaho 169, 21 A L.R. 352—5 C J. p 1322 note 79.

77. McVoy v. Baumann, 125 A. 484, 95 N J Eq. 335

78. McVoy v. Baumann, supra.

79. Ala.—Hooper v. Yonge, 59 Ala. 484
Cal—Langley v. Voil, 54 Cal 435
N J—New Jersey Building Loan, etc, Co. v. Schatskin, 64 A. 1036, 72 N J Eq. 175.
Tenn.—Planters' Bank v. Fowlkes, 4 Sneed 461.
5 C.J. p 1322 note 80.

mere delay in applying for the writ does not of itself constitute a defense where it does not appear that any right adverse to applicant accrued during the delay or is attributable thereto,[80] the question of what constitutes laches being for the sound discretion of the court[81] and the writ being subject to be withheld only where it is made to appear that rights have arisen or been changed by reason of some subsequent agreement or happening making it likely that issuance will work an injustice.[82]

The trial court's action in granting a writ of assistance to enforce its decree will not be reversed because of a prior foreclosure entitling the person in possession to such possession, where, being a party, he stood by without apprising the court of the foreclosure or objecting to the writ of assistance, but permitted the court to treat such mortgage as an existing prior lien, the granting of the writ not affecting the validity of such foreclosure, and the occupant being estopped to inject the issue of the prior foreclosure at the time he attempted to set it up.[83]

b. Matters Affecting Decree or Title

Matters which were, or should have been, adjudicated by the decree or which affect the regularity of deeds or returns thereunder may not be urged in opposition to the writ; but jurisdictional questions and assertions of new title may properly be raised by way of defense.

Nothing can be received as a defense to an application for a writ of assistance to affect the decree in aid of which the writ is asked, defendant, his representatives, and those claiming under him being concluded on the merits;[84] and the court will consider the decree as finally adjudicating, not only such matters as were actually determined in the suit in which the decree was rendered, but also such matters as should have been presented there for determination.[85] This rule, however, does not preclude inquiry as to the jurisdiction of the court in the original cause.[86]

The regularity of the commissioner's action in connection with execution of the deed and return of sale cannot be collaterally attacked upon an application for a writ of assistance and the commissioner will not be permitted to impeach his return or his deed.[87]

One against whom the writ is prayed may set up as a defense to its issuance a paramount title acquired by him which has not been adjudicated.[88]

§ 10. —— Jurisdiction to Issue

The writ may issue from, and only from, a court possessing original jurisdiction in equity, which must also be that court wherein the underlying decree was rendered.

The jurisdiction to issue writs of assistance is one which appertains to, and has long been exercised by, courts of chancery or any courts possessing equitable jurisdiction;[89] indeed the writ can issue only from such a court,[90] the principal distinction between a writ of assistance and a writ of possession being that the former issues from a court of equity and the latter from a court of law.[91] Courts or judicial officers of limited jurisdiction, on whom no equitable powers have been bestowed, may not grant an order for a writ of assistance.[92]

The writ, being but the execution of the final decree, can issue only from the court in which the final judgment or decree was rendered.[93] Thus in an appealed case the application should be addressed to, and the writ issued by, the court a quo, not the appellate court.[94]

A court of general original jurisdiction which reviews and affirms an order granting the writ, made by an inferior court of limited jurisdiction in excess of authority, does not thereby cure the fatal jurisdictional defect, either on the theory that it has validated the order below or that it has it-

80. Prahl v Rogers, 106 N.W. 287, 127 Wis 353
81. Clark, etc, Inv Co v Lindgren, 107 N.W. 116, 76 Neb 59
82. Fla.—Hair v Commercial Bank of Live Oak, 152 So 180
Neb.—Clark, etc, Inv. Co v. Lindgren, 107 N.W. 116, 76 Neb 59.
83. Herr v Sullivan, 56 P 175, 26 Colo 133
84. Fla.—Hair v. Commercial Bank of Live Oak, 152 So 180—West 1[illegible] Feet, etc v. City of Orlando, 91 So. 369, 80 Fla 229, reversed on other grounds 86 So 197, 80 Fla 233
Tex.—Newman v City of El Paso, (Civ.App.) 77 S.W (2d) 721.
5 C.J. p 1322 note 83.
85. Newman v. City of El Paso, (Tex Civ App.) 77 S.W (2d) 721—5 C.J. p 1323 note 84
86. Fla.—West 132 Feet, etc, v City of Orlando, 91 So 369, 80 Fla 229, reversed on other grounds 86 So 197, 80 Fla. 233.
Tex.—Newman v City of El Paso, (Civ App.) 77 S.W.(2d) 721
5 C.J. p 1323 note 85
87. Fox v Stubenrauch, 83 P. 82, 2 Cal App 88
88. Bunch v High Springs Bank, 80 So 319, 76 Fla 546.
89. Ala.—Cooper v. Cloud, 69 So 923, 194 Ala 449.
N.C.—Southern State Bank v Leverette, 123 S.E. 68, 187 N.C. 743.
Wis.—Diggle v. Boulden, 4 N.W. 673, 48 Wis 477
5 C.J. p 1323 notes 92, 93.
90. Southern State Bank v. Leverette, 123 S.E. 68, 187 N.C. 743—5 C.J. p 1323 note 94.
91. Southern State Bank v. Leverette, supra
92. Southern State Bank v. Leverette, supra.
93. Southern State Bank v. Leverette, supra—5 C.J. p 1323 note 97.
94. Ark.—Foster v. Beidler, 98 S.W. 968, 81 Ark. 274.
Mich.—Ryerson v. Eldred, 18 Mich. 195
Miss.—Harney v. Morton, 39 Miss. 508.

self issued the writ, although the reviewing court is jurisdictionally competent to issue such writ in an original proceeding, at least where the appeal is only from the order and none is taken from the underlying decree.[95] A writ of assistance being concerned only with the possession of the property, the court has no jurisdiction to try title to the property under a petition for the writ.[96]

§ 11. —— Notice

While the better practice requires that notice of the application for the writ be given, an omission to do so is generally not regarded as fatal, and, even where the giving of notice is a definite requirement, constructive notice may suffice.

The better practice requires that notice of the application for the writ should be given in all cases,[97] particularly where the person in possession was not a party to the suit,[98] and there is some authority treating notice as necessary,[99] the reason adduced in support of the giving of notice is that the rights of the parties may have changed by reason of agreement or circumstances arising between rendition of the judgment and the application for the writ.[1]

However, the giving of notice is not ordinarily regarded as an absolute requirement which must be complied with as a condition to the validity of the process.[2] The terms of the decree may be such as to dispense with any necessity of notice of the application,[3] it being proper, and indeed even usual and advisable, for the purpose of avoiding delay in procuring the writ, that the decree include a provision that it may issue without further notice.[4] The trial court may require notice to the occupant of the property, or not, as in its judgment may seem best in the particular case, if there is no statute particularly prescribing it.[5]

Even though the requirement of notice is recognized, the constructive notice which parties to a suit have of all motions, orders, or decrees in a pending cause is sufficient where the motion for the writ is made at the same term of court as the decree, to which the person in possession is a party, and relieves the movant from any necessity of giving actual notice in such a case.[6]

§ 12. —— Application

a. In general
b. Amendment

a. In General

An application, by petition or otherwise, setting forth the substantial grounds and circumstances authorizing issuance is the regular manner in which the writ is sought.

Incorporation of a provision in the decree for a writ of assistance without further application to the court has been approved;[7] but elsewhere it has been said to be the proper, if not the necessary, procedure to make separate application for the writ and not to dispose of the matter in the decree.[8]

The application need not be by way of separate petition specially claiming the writ but may be made by motion, where the person in possession has notice of all material facts and steps in the proceedings,[9] or as a part of a petition asking not only for the issuance of the writ but for other matters as well, such as confirmation of a sale.[10]

The petition or other application should set forth facts showing the necessity for the writ, and all the material conditions and circumstances establishing the applicant's right thereto.[11] It need not, however, allege with particularity immaterial details as to the manner of performance of such conditions,[12] and merely formal irregularities or defects incapable of affecting substantially the rights of the parties will not invalidate it.[13]

95. Southern State Bank v Leverette, 123 S E 68, 187 N C. 743

96. Stubbs v. Austin, 2 N E (2d) 358, 285 Ill App 535.
Necessity for the prior adjudication of right to property by the court see supra § 2 b

97. Ala.—Cooper v. Cloud, 69 So. 928, 194 Ala 449.
Idaho.—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A L R 353.
5 C J p 1324 note 99.

98. St Louis, etc., R Co v. Wear 36 S.W. 357, 658, 135 Mo. 230, 33 L R A 341—5 C.J. p 1324 note 1.

99. Williams v. Sherman, 205 P 259, 35 Idaho 169, 21 A L R 353

1. Williams v. Sherman, supra.

2. Cooper v Cloud, 69 So 928, 194 Ala 449—5 C J. p 1324 note 2

3. Perrell v. Liebman, 257 Ill App. 132—5 C J. p 1324 note 3.

4. Cal.—Sichler v Look, 29 P 220, 93 Cal 600
Kan.—Bird v. Belz, 6 P. 627, 33 Kan 391

5. Prahl v. Rogers, 106 N.W. 287, 127 Wis 353

6. Coor v Smith, 11 S E 1089, 107 N C. 430

7. Bird v. Belz, 6 P. 627, 33 Kan 391.

8. Landon v Burke, 36 Wis 378.

9. Door v Root, 104 Ill App 417.

10. Griswold v. Simmons, 50 Miss 123.

11. Ala.—Hooper v. Yonge, 69 Ala. 484.
Idaho.—Vermont L. & T. Co. v. McGregor, 51 P 104, 5 Idaho 510
Ill.—Oglesby v. Pearce, 68 Ill 220
Mich.—Howard v Bond, 3 N.W. 289, 42 Mich 131.
Miss.—Jones v. Hooper, 50 Miss 510.
Wis.—Loomis v. Wheeler, 21 Wis. 271.
5 C J. p 1324 note 12.

12. Hald v. Day, 59 P. 189, 36 Or. 189

13. **Manner of entitling papers**
Where proceedings by writ of assistance were taken on the foot of a foreclosure decree against a wife, leave being given to discontinue as against the husband, the objection that the papers were wrongly enti-

In what cause filed. Where a receiver claims, by an order of court, a right to the possession of property in the custody of another receiver appointed by the same court, his petition for a writ of assistance should be filed in the cause in which the defendant petitioner was appointed.[14]

b. Amendment

An amendment of the application which will result in retaining part of the case in equity and sending part to law is not favored.

The courts are inclined to view with disfavor a request to permit petitioner to amend his petition where the effect of the amendment would be to retain a part of the proceeding in equity while remitting another part to a law court.[15]

§ 13. —— Hearing

a. Scope
b. Answer and replication
c. Conduct in general
d. Evidence

a. Scope

All that will be considered in passing on an application for a writ of assistance is whether the applicant is entitled to be put in possession under the decree; no questions of title or of the ultimate right to possession are involved.

Upon an application for a writ of assistance, no question determined by the original decree can be litigated[16] nor can the original case be reviewed or the decree therein be modified.[17] The legal or equitable title will not be tried or adjudicated.[18] The sole question to be determined on the motion is whether applicant has a right, as against the party in possession, to use the writ to obtain possession.[19] In the absence of any claim of an independent paramount title, the only question on such application is whether the decree has or has not been complied with.[20]

Furthermore, the proceeding for the writ is not an appropriate one in which to try causes of action against applicant for the breach of collateral undertakings or contracts for which adequate relief is obtainable in another forum.[21]

b. Answer and Replication

The answer to the application and the reply thereto must be sufficient in form and in substance to controvert the substantial allegations of the pleadings which they respectively oppose.

An answer to a petition that the writ issue should set forth clearly and distinctly the facts, if any, which constitute a defense so that they may be understood by the opposite party and by the court.[22] If it fails to set up clearly and fully rights and claims of such character as constitute proper matter of defense to the application, it may be disregarded.[23] Moreover, objections to the issuance of the writ must be made in some manner sufficiently formal to bring them to the cognizance of the court, in the absence of a waiver, a mere oral statement of claim or allusion thereto by way of argument not being enough.[24]

There is some authority sanctioning the view that if the tenant puts in an answer setting up a defense, and no replication is filed, the facts set up by way of defense must be taken as true,[25] while

tled in the names of both defendants is a mere technicality, especially where it is not clear from the record whether the order of discontinuance has been entered.—Howe v. Lemon, 11 N.W. 379, 47 Mich. 544

14. Comer v. Felton, (Tenn.) 61 F 731, 10 C.C.A. 28.

15. Vanmeter v. Borden, 25 N.J.Eq. 414.

16. Ill.—Stubbs v. Austin, 2 N.E (2d) 358, 285 Ill.App 535.
Ind.—Rooker v. Fidelity Trust Co., 145 N.E 493, 196 Ind 373, error dismissed 46 S.Ct 354, 270 U.S. 633, 657, 70 L.Ed. 771.

17. Southern State Bank v Leverette, 123 S.E 68, 187 N.C. 743—5 C.J. p 1322 note 83, p 1323 note 84

18. Ill.—McDonell v. Hartnett, 153 N.E 666, 323 Ill. 87—Stubbs v Austin, 2 N.E.(2d) 358, 285 Ill.App. 535—Lucas v. Smith, 201 Ill.App 273
Ind.—Rooker v. Fidelity Trust Co, 145 N.E 493, 196 Ind 373, error dismissed 46 S.Ct. 354, 270 U.S 633, 657, 70 L.Ed 771
N.C.—Southern State Bank v Leverette, 123 S.E 68, 187 N.C 743
S.C.—Pipkin v Fletcher, 162 S.E 774, 165 S.C 93.
5 C.J. p 1325 note 20

19. Strong v. Smith, 60 A. 66, 68 A 493, 68 N.J.Eq 636, affirmed 27 S Ct. 782, 208 U.S 584, 51 L.Ed 328

20. Rooker v Fidelity Trust Co, 145 N.E 493, 196 Ind 373, error dismissed 46 S.Ct 354, 270 U.S 633, 657, 70 L.Ed 771.

21. Beck v. Kirk, 223 P. 499, 69 Mont. 592

22. West 132 Feet, etc v. City of Orlando, 86 So. 197, 80 Fla 233, reversing on other grounds 91 So 369, 90 Fla. 229—5 C.J. p 1325 note 18

23. West 132 Feet, etc v. City of Orlando, supra

24. Aldrich v. Donovan, 69 N.W. 1108, 111 Mich 525. See Lucas v. Smith, 201 Ill.App 273.

25. Fla.—West 132 Feet, etc, v. City of Orlando, 86 So 197, 80 Fla. 233, reversing on other grounds 91 So 369, 80 Fla 229
Mont.—State ex rel Goodhue County Nat. Bank of Red Wing, Minn. v. District Court of Tenth Judicial Dist in and for Fergus County, 31 P (2d) 837.
5 C.J. p 1325 note 21.

Admitted inability to disprove affidavit

Where the occupant of premises after foreclosure made an affidavit in opposition to a petition for a writ of assistance, setting forth the facts upon which his resistance to the writ was founded, and petitioner did not object to the affidavit in form, but consented to treat it as an answer, and admitted that he could not successfully deny the facts therein stated, the facts stated in the affidavit must be regarded by the court as true.—U.S Presbyterian Church Bd of Home Missions v Davis, 62 A. 447, 70 N.J.Eq 577, affirmed 65 A. 1117, 71 N.J.Eq. 788.

elsewhere the contrary view is taken, under prevailing rules of practice and pleading, that allegations of matters of defense are deemed to be denied upon a failure to file a reply,[26] but in any event where the petitioner does file a reply, denying specifically the allegations of the answer and the new matter set forth therein, they cannot be taken as true either absolutely or prima facie[27]

c. Conduct in General

The parties are entitled to be heard on the application, and the court may receive and consider oral testimony; but there is no right to a jury trial or to special findings.

The court may properly hear and consider oral testimony in passing on the application for a writ of assistance;[28] and, where allegations of an independent right are controverted, the court is under the duty of proceeding to hear testimony at least to establish prima facie the existence of the right asserted and cannot properly dismiss the application for a writ on the pleadings[29]

The parties to such a proceeding are not entitled to a jury trial[30] nor to a special finding of facts[31]

d. Evidence

To render evidence admissible on the hearing, it must be relevant under the pleadings and a proper preliminary foundation must be laid. It must be sufficient to sustain the exercise of a sound judicial discretion but will be aided by the making of reasonable inferences

Before the sheriff's deed is admissible in evidence in a proceeding for a writ of assistance by a purchaser, he must first lay a proper foundation for its admission by producing the judgment and execution to establish the validity and terms thereof.[32] Under an allegation that applicant "demanded" possession of the property, which was refused, evidence that the sheriff's certificate of sale was exhibited at the time demand was made is admissible.[33]

Sufficiency. The showing in support of an independent right or claim urged in opposition to the motion should be sufficient to call for the exercise of a judicial discretion;[34] mere allegations of new or independent title in respondent's answer are not sufficient as even a prima facie showing and do not justify refusal of the writ, at least where such allegations are controverted,[35] and, where the case made by the applicant's controverting affidavits is stronger than that made by the affidavits supporting the claim, issuance of the writ is proper.[36]

A showing of possession at the time of the decree and of a refusal to surrender it on demand coupled with the fact of application for the writ and resistance thereto on other grounds sufficiently sustains a finding that the party against whom it issues remains in possession at the time of issuance, there being no affirmative showing made that it has been delivered to applicant.[37]

§ 14. —— Issuance, Form, and Requisites

a. In general
b. Formal irregularities
c Supporting evidence or findings

a. In General

The writ may be issued by the clerk without an order or by the court in chambers or in vacation only where that is authorized by statute or rule of court.

By virtue of statutes or rules of court in some jurisdictions it has been held that a writ of assistance may be issued by the clerk of court without any order therefor issued by the court;[38] but this applies only as between parties to the suit, an order being necessary as against one not a party.[39] In the absence of any such provision by rule or statute there must, before the writ can issue, be a judicial investigation ascertaining the facts justifying such writ,[40] the issuance is a judicial act, not one merely ministerial, and so is not performable by the clerk on his own authority without any order to that effect by the court,[41] and this is so

26. Knott Warehouse Co v. Willis, 149 S E 679, 197 N C. 476 See Lucas v. Smith, 201 Ill App 273
27. State ex rel. Goodhue County Nat. Bank of Red Wing, Minn. v District Court of Tenth Judicial Dist. in and for Fergus County, (Mont.) 31 P.(2d) 337.
28. Trimble v. Patton, 5 W.Va 432
29. State ex rel Goodhue County Nat. Bank of Red Wing, Minn. v. District Court of Tenth Judicial Dist. in and for Fergus County, (Mont.) 31 P.(2d) 337.
30. Rooker v. Fidelity Trust Co, 145 N.E 493, 196 Ind. 373, error dismissed 46 S Ct 354, 270 U.S 633, 657, 70 L Ed 771.
31. Rooker v. Fidelity Trust Co, supra
32. People v. Doe, 31 Cal. 220
33. Hald v. Day, 59 P. 189, 36 Or. 189
34. State ex rel. Goodhue County Nat Bank of Red Wing, Minn v. District Court of Tenth Judicial Dist in and for Fergus County, (Mont) 31 P.(2d) 337—Beck v. Kirk, 223 P. 499, 69 Mont. 592
35. Cal.—Pacific States Savings & Loan Co v. Harwell, 268 P. 341, 204 Cal 370
Mont —State ex rel Goodhue County Nat Bank of Red Wing, Minn v District Court of Tenth Judicial Dist in and for Fergus County, 31 P (2d) 337.
N J —McVoy v Baumann, 125 A. 484, 95 N J Eq. 335.
36. Beck v. Kirk, 223 P. 499, 69 Mont 592.
37. Rooker v. Fidelity Trust Co, 145 N E 493 196 Ind. 373, error dismissed 46 S Ct. 354, 270 U S. 633, 657, 70 L Ed 771
38. Messenkop v. Duffield, 294 P. 715, 211 Cal. 222—5 C.J. p 1325 note 24.
39. Goit v. Dickerman, 20 Wis 630.
40. Cook v. Moulton, 68 Ill.App 480.
41. Williams v Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 352.

although the decree contains a provision for the surrender of the premises, with or without an alternative provision that in default of surrender the writ may issue.[42] Indeed, the view has been expressed that a provision in the decree directing the clerk to issue the writ on the application of plaintiff without further order of the court is improper[43] and that a decree, providing that, on default in surrendering possession, a writ of assistance may issue in accordance with the practice of the court, gives no right to the writ without further action by the court,[44] although elsewhere, as set forth above in section 11 of this Title, such a provision is regarded as not only proper, but even advisable, as a means of expediting the issuance of the writ.

Similarly, statutes respecting the powers of courts, particularly with respect to process, are sometimes sufficiently broad to sustain a construction authorizing the issuance of writs of assistance by the judge in chambers or in vacation;[45] but in the absence of statute they may not be thus issued.[46]

b. Formal Irregularities

Formal irregularities in the writ do not survive an attack upon it on the merits.

Mere amendable irregularities in the form of the writ, as, for example, the omission of the seal of the court, are waived by appearance and an attack of the writ on the merits.[47]

c. Supporting Evidence or Findings

An order granting the writ must be supported by findings of fact or by a preservation of the evidence in the manner required by law.

The order granting the writ must contain a sufficient recital of specific facts to sustain it or must preserve the evidence in support of the writ, pursuant to general rules applicable to chancery decrees.[48]

§ 15. —— Alias Writ

An alias writ may not be issued where the return discloses a completed execution under the original, but where it fails to do so issuance of an alias writ is proper

It has been doubted whether an alias writ can be issued where the original writ has been once returned executed, on the ground that by the execution and return of the original the decree is satisfied and the court in which it was rendered loses control of the same.[49]

However, an alias writ may properly issue, where the return of the first writ does not disclose clearly that it has been fully executed, and it is made to appear by affidavit that it has not been;[50] and, a fortiori, such issuance is proper where the return affirmatively discloses the omission of an act or element essential to execution.[51]

The adjudication on the prior application is conclusive as to the right to possession when an alias writ is applied for, at least where the person in possession sets up substantially the same defense as on the former occasion.[52]

§ 16. Execution of Writ

a. In general
b. Restraining execution

a. In General

Immediately upon delivery of the writ to the proper officer for execution, he should execute it by entry on and delivery of the premises; it may be executed as against any person against whom it might have issued.

Immediately upon receiving the writ, the sheriff has the right and duty forthwith to serve and execute such process[53] and may enter upon and take possession of the premises, expelling and excluding therefrom everyone not possessing or presenting a colorable claim to an unadjudicated independent title, and employing such force as may be reasonably necessary for that purpose.[54] There is no effective execution of the writ where all that is done by the officer having that duty, by way of delivery to the persons entitled, is to send them a statement that the premises are vacant and are delivered to them as by law commanded; the law contemplates an ef-

In Wisconsin the rule of court permitting issuance by the clerk without an order has been discontinued and accordingly no such power exists—Prahl v. Rogers, 106 N.W. 287, 127 Wis. 353.

42. Idaho—Williams v Sherman, 205 P. 259, 35 Idaho 169, 21 A L R 253
Ill.—Cook v. Moulton, 68 Ill App 480

43. Bruce v. Roney, 18 Ill 67—Smith v Brittenham, 3 Ill App. 62, affirmed 94 Ill 624, and reversed on other grounds 98 Ill. 188.

44. Cook v. Moulton, 68 Ill App 480.

45. Cal.—Chapman v. Thornburg, 23 Cal. 48
Ill—Kessinger v. Whittaker, 82 Ill. 22.
S.C—Murchison v. Miller, 42 S E 177, 64 S C. 425.

46. Cal—Chapman v. Thornburg, 23 Cal. 48
Neb—Hartsuff v Huss, 95 N W 1070, 2 Neb.(Unoff) 145.

47. Prahl v Rogers, 106 N.W. 287, 127 Wis. 353.

48. Vette v. Brown, 166 N E. 52, 334 Ill. 406

49. Ex p. Forman, 30 So. 480, 130 Ala 278.

50. Tevis v. Hicks, 33 Cal. 234.

51. Jeffers v. Davis, 107 S.W. 1175, 85 Ark 242

52. Jeffers v. Davis, supra.

53. Cal—Chapman v. Thornburgh, 17 Cal. 87, 76 Am D. 571.
Wash—State v. Frandsen, 30 P.(2d) 371

54. State v. Frandsen, supra.

fectual and not a merely formal delivery.[55]

Upon principles analogous to those governing as to persons against whom the writ may issue, it cannot lawfully be executed against a person in possession of the premises at the commencement of the action out of which it issued and who was not made a party to that action,[56] but may be executed not only against the parties defendant in the action out of which the writ arose, but also against all persons claiming by, through, or under them and against strangers and intruders.[57]

b. Restraining Execution

Possession is the criterion which determines whether persons claiming under unadjudicated rights may restrain execution of the writ.

If a person claiming title, who was not a party to the foreclosure suit, is in actual possession of the property sold, such possession may be protected upon motion to restrain the execution of the writ of assistance in favor of the purchaser;[58] but, if the claimant is not in possession, he cannot thus restrain execution of the writ.[59] It is for the court on the application to determine whether such claimant is in possession.[60]

§ 17. Operation and Effect

a Of issuance or refusal of writ
b. Of execution of writ

a. Of Issuance or Refusal of Writ

The issuance of the writ is conclusive as to the jurisdiction of the court, the validity of the decree, and the propriety of the award, but questions of title and the ultimate right to possession are unaffected by grant or refusal of the writ and may be subsequently raised by appropriate proceedings.

The writ relates to, and operates upon, those rights only that have been determined by the judgment.[61] It cannot establish in the one party or destroy in the other any rights independent of those thus determined.[62] Nothing can be settled in such a proceeding so as to become res judicata between the litigant parties except the right to take possession of the property as a result of the suit, the questions of the maintenance of the possession after the whole function of the suit has been accomplished, and of title and the permanent right of possession, being left open and entirely unaffected by the adjudication on the motion;[63] the refusal of the writ is, like its issuance, not conclusive as to questions of title or right of possession, and constitutes no bar to a subsequent action of ejectment.[64]

This proposition is to be taken subject to the qualification noticed in discussing defenses available, in section 9, with reference to jurisdictional matters; as questions of lack of jurisdiction may be urged in opposition to the motion, one who has unsuccessfully attacked the court's jurisdiction to render the decree, in the proceeding for the writ, cannot assail the validity of the decree on that ground in a subsequent action or proceeding but is concluded in that respect, even though the matters urged against the jurisdiction are different from those formerly raised.[65]

Furthermore, while it remains in effect, the writ is, as between the parties to the decree and the application, a judicial determination of their rights and claims to possession, conclusive upon them until reversed, vacated, or set aside in appropriate proceedings; and the question of the propriety of its award will not be passed upon in a collateral action.[66]

b. Of Execution of Writ

Entry of the executing officer under the writ automatically terminates preexisting rights of entry and possession of persons concluded by it.

The moment the officer executing the writ goes on the premises for that purpose, all preëxisting rights of entry or possession theretofore held by persons concluded by the writ come to an end.[67]

55. Jeffers v Davis, 107 S W 1175, 85 Ark. 242

56. State v Frandsen, (Wash.) 30 P (2d) 371

57. State v Frandsen, supra

Tenancy in common

In the execution of the writ, the officer should place the person entitled to an estate in common in possession of every part and parcel of the land jointly with the other tenants in common, but he cannot remove any of the tenants in common who hold under a title independent of him through whom the purchaser claims—Tevis v. Hicks, 38 Cal. 234

58. Hibernia Sav., etc., Soc. v. Robinson, 88 P. 720, 150 Cal. 140.

59. Hibernia Sav., etc., Soc. v. Robinson, supra

60. Hibernia Sav., etc., Soc. v. Robinson, supra

61. Cal.—Pacific States Savings & Loan Co. v. Harwell, 268 P. 341, 204 Cal. 370
Mont.—State ex rel. Goodhue County Nat. Bank of Red Wing, Minn. v. District Court of Tenth Judicial Dist. in and for Fergus County, 31 P. (2d) 837—Beck v. Kirk, 223 P. 499, 69 Mont. 592
Tex.—Newman v. City of El Paso, (Civ. App.) 77 S.W. (2d) 721.

62. Pacific States Savings & Loan Co. v. Harwell, 268 P. 341, 204 Cal. 370—5 C.J. p. 1320 note 50 [a].

63. Strong v. Smith, 60 A. 66, 63 A. 493, 68 N.J. Eq. 686, affirmed 27 S. Ct. 782, 208 U.S. 534, 51 L.Ed. 328

64. Outland v. Starr, 277 P. 694, 152 Wash. 269—5 C.J. p. 1325 note 34.

65. Peters v. Youngs, 81 N.W. 268, 122 Mich. 484.

66. Rawlsser v. Hamilton, 51 How. Pr. (N.Y.) 297.

67. State v. Frandsen, (Wash.) 30 P. (2d) 371.

§ 18. Vacation, New Trial, and Appeal and Error

The writ may and should be set aside on motion, and the person ousted restored to possession, upon a showing of matters establishing the impropriety of its issuance, which the movant is not estopped to assert.

If a writ of assistance is improperly issued or executed the trial court may, and should, on summary motion, set aside the writ or service and restore the possession,[68] as, for example, where the petitioner for vacation was neither a party, a purchaser pendente lite, nor a trespasser,[69] or where the writ was issued by the clerk without an order therefor, in excess of his authority.[70] Indeed, a motion to vacate is the only practicable redress available to the person in possession where the writ was granted ex parte[71] or where the person ousted is a stranger to the record.[72]

The order granting the writ should be set aside, however, only on a showing that it was improperly made;[73] and where the facts forming the basis of the claim for the motion to vacate rest solely on movant's information and belief, and are denied by applicant in the writ and the supporting papers show no reasonable probability that the movant's claim can be maintained, the motion is properly denied.[74] Matter which the person in possession would have been estopped, under the circumstances, to assert by way of defense to the application is not available after the award as a ground for vacating it.[75]

A motion to quash a writ of assistance issued in favor of a purchaser under a decree raises no issue as to matters litigated between the parties to the suit in which the decree was passed.[76]

If the motion to vacate is granted and the writ of assistance set aside, the movant is entitled to be restored to possession of the premises by writ of restitution or other appropriate order or process.[77]

In the titles Appeal and Error and New Trial, the principles which have been applied as to appeals from grant or refusal of the writ and as to new trials are stated and developed.

ASSISTANT.

As a Noun

A term having a fixed and well defined general meaning,[1] susceptible of considerable variety of shades of meaning, to be determined in each case by the aid of the context, the circumstances, and other materials of interpretation.[2] The noun has been defined as meaning one who helps, aids, or assists,[3] one who stands by and aids or helps another,[4] also, subordinate of one in an official position.[5] "Assistant" has been contrasted with, or distinguished from, "agent"[6] and "deputy,"[7] although the word, as used in a particular connection, has been held to mean an agent or servant,[8] and a deputy.[9] The word in the plural has been sometimes held to mean officers,[10] but also it has been

68. Ala.—Long v. Morris, 58 So. 274, 176 Ala. 371.
Idaho.—Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 353.
5 C.J. p. 1326 note 45.

69. Wiley v. Carlisle, 9 So. 288, 93 Ala. 237.

70. Williams v. Sherman, 205 P. 259, 35 Idaho 169, 21 A.L.R. 353.

71. Pignas v. Burnett, 51 P. 48, 119 Cal. 157.

72. Cal.—People v. Grant, 45 Cal. 97.
Idaho.—Mills v. Smiley, 76 P. 783, 9 Idaho 317.
A landlord may properly seek vacation of a writ under which his tenant has been dispossessed, neither having been parties to the record nor asserting a claim under such parties.—McChord v. McClintock, 5 Litt. (Ky.) 304.

73. Skinner v. Beatty, 16 Cal. 156.
Claim of homestead in opposition to purchase-money mortgage.
On the application of a mortgagor and his wife, on the ground that they had moved upon and occupied the premises as a homestead before the execution of the mortgage by the husband, where it appeared that the mortgage had been given for the purchase money of the premises, even though the wife was not a party to the foreclosure, the motion to set aside was properly denied.—Skinner v. Beatty, 16 Cal. 156.

74. Prahl v. Rogers, 106 N.W. 287, 127 Wis. 353.

75. Herr v. Sullivan, 56 P. 175, 26 Colo. 133.

76. Ray v. Trice, 37 So. 532, 48 Fla. 297.

77. Ala.—Wiley v. Carlisle, 9 So. 288, 93 Ala. 237.
Cal.—Henderson v. McTucker, 45 Cal. 647.
Ky.—McChord v. McClintock, 5 Litt. 304.
N.Y.—Chamberlain v. Choles, 35 N.Y. 477, 3 Abb. Pr. (N.S.) 118.

1. Saxby v. Sonnemann, 149 N.E. 526, 528, 318 Ill. 600.

2. State v. Longfellow, 69 S.W. 596, 598, 95 Mo. App. 660.

3. Ill.—Saxby v. Sonnemann, 149 N.E. 526, 528, 318 Ill. 600.
Tex.—Neeper v. Stewart, (Civ.App.) 66 S.W. (2d) 812, 813.
5 C.J. p. 1327 note 2.

4. Mont.—Wells-Dickey Co. v. Embody, 266 P. 869, 874, 82 Mont. 150.
Neb.—Lower v. State, 184 N.W. 174, 176, 106 Neb. 666.
5 C.J. p. 1328 note 3.

5. State v. Blake, 169 N.E. 599, 601, 121 Ohio St. 511.

6. Wells-Dickey Co. v. Embody, 266 P. 869, 874, 82 Mont. 150. See also Agency § 2.

7. Ill.—Saxby v. Sonnemann, 149 N.E. 526, 528, 318 Ill. 600.
Pa.—Maginnis v. Schottman, 114 A. 782, 784, 271 Pa. 305.
5 C.J. p. 1328 note 6 [a].

8. Com. v. Smith, 6 N.E. 89, 91, 141 Mass. 135—5 C.J. p. 1328 note 5.

9. Tex.—Murrey v. State, 87 S.W. 349, 48 Tex.Cr. 219, 220.
W.Va.—Burns v. Waldron, 76 S.E. 894, 895, 71 W.Va. 514.

10. State v. Longfellow, 69 S.W. 596, 598, 95 Mo. App. 660.

held that the term implies a presumed absence of authority to use discretionary power.[11] In particular connections, the term has been held to include assistant accountants,[12] and to exclude clerks[13] and stenographers.[14]

Phrases. "Assistant about the business of the government,"[15] "assistant to the Attorney-General,"[16] "assistant to the head of the department,"[17] "laboratory assistant,"[18] and "power . . . to designate such assistant or assistants;"[19] also "such . . . assistants as he may deem necessary,"[20] "such other assistants as are necessary,"[21] "the Commissioner of Internal Revenue, his assistants, agents, and inspectors,"[22] and "time of his assistants."[23]

As an Adjective

It has been said that the adjective carries the idea of subordination to another;[24] implies duties that ordinarily are circumscribed,[25] and to be performed in connection with, and under the direction of, the superior official;[26] a looking toward the accomplishment of the common object;[27] limited, rather than general, powers;[28] and as an adjective, the word has been defined as meaning that assists; auxiliary; helping; lending aid or support.[29]

Assistant judge. A judge of the English court of general or quarter sessions in Middlesex.[30]

Assistant teacher. An "assistant teacher" is a classroom teacher of a subject.[31]

Other phrases: "Assistant assessor,"[32] "assistant auditor,"[33] "assistant city attorney,"[34] "assistant county attorney,"[35] "assistant county superintendent,"[36] "assistant deputy sheriffs,"[37] "assistant director,"[38] "assistant district attorney,"[39] "assistant engineer,"[40] "assistant manager,"[41] "assistant principal,"[42] "assistant secretary,"[43] "assistant secretary of the treasury,"[44] "assistant solicitor,"[45] and "assistant surgeon."[46]

11. Lower v. State, 184 N.W. 174, 176, 106 Neb 666.

12. Wall & Co v. Imperial Printing & Finishing Co., (R.I.) 165 A. 898, 899

13. Maginnis v. Schottman, 114 A. 782, 784, 271 Pa. 305.

14. Wall & Co v. Imperial Printing & Finishing Co., (R.I.) 165 A. 898, 899

15. Pryor Brown Transfer Co v Gibson, 290 S.W. 33, 35, 154 Tenn 260, 51 A.L.R. 193.

Held to include a rider or driver employed by the contractor for carrying the mails—Pryor Brown Transfer Co v Gibson, 290 S.W. 33, 35, 154 Tenn. 260, 51 A.L.R 193

16. Saxby v. Sonnemann, 149 N.E. 526, 528, 318 Ill 600.

17. State v. Blake, 169 N.E. 599, 601, 121 Ohio St. 511.

18. People ex rel Becker v. Board of Education of City of New York, 162 N.Y.S. 643, 648

Not a teacher

A laboratory assistant is a helper of a teacher and does no teaching—People ex rel. Becker v. Board of Education of City of New York, 162 N.Y.S. 643, 649.

19. State v. Bolitho, 136 A. 164, 171, 103 N.J.Law 246

20. Lower v State, 184 N.W. 174, 175, 106 Neb 666.

21. Archer v People's Savings Bank, 7 So 53, 54, 88 Ala. 249.

22. U. S. v. Kasprowitz, (D.C.Mich.) 14 F.(2d) 193, 195.

23. Wall & Co v. Imperial Printing & Finishing Co., (R.I.) 165 A. 898, 899.

24. Ala.—W. T. Rawleigh Co. v. Phillips, 167 So. 271, 272

Iowa.—Carson v Chicago, M. & St. P. Ry. Co., 164 N.W. 747, 749, 181 Iowa 310.

Tex.—Neeper v. Stewart, (Civ. App.) 66 S.W.(2d) 812, 813.

25. Carson v Chicago, M. & St. P. Ry. Co., 164 N.W. 747, 749, 181 Iowa 310.

26. Neeper v. Stewart, (Tex. Civ. App.) 66 S.W.(2d) 812, 813.

27. State v. Blake, 169 N.E. 599, 601, 121 Ohio St. 571.

28. W. T. Rawleigh Co. v. Phillips, (Ala.) 167 So. 271, 272

Discretionary powers

"Assistant" does not imply large discretionary powers—Carson v. Chicago, M. & St. P. Ry. Co., 164 N.W. 747, 749, 181 Iowa 310

29. Webster New Int. D

30. Black L. D.

He differs from the other justices in being a barrister of ten years' standing, and in being salaried—Black L. D.

31. Black L. D., citing People ex rel Becker v. Board of Education of City of New York, 162 N.Y.S. 643, 649

"Laboratory assistant" distinguished

"An 'assistant teacher' is . . . not a 'laboratory assistant,' meaning a helper of a teacher who does no teaching"—Black L. D., citing People ex rel Becker v. Board of Education of City of New York, 162 N.Y.S. 643, 649.

32. Burns v. Waldron, 76 S.E. 894, 895, 71 W.Va. 514.

33. Hager v Lucas, 86 S.W. 552, 553, 120 Ky. 307, 27 Ky.L. 710.

34. Naill v. State, 129 S.W. 630, 631, 59 Tex.Cr. 484, Ann.Cas.1912A 1268.

35. Murrey v State, 87 S.W. 349, 350, 48 Tex.Cr. 219

36. Neeper v. Stewart, (Tex.Civ. App.) 66 S.W.(2d) 812.

37. People v. Milliken, 111 N.Y.S. 551, 552, 127 App.Div. 468.

38. State v. Blake, 169 N.E. 599, 601, 121 Ohio St. 511.

39. Cal.—Freeman v. Barnum, 63 P. 691, 692, 131 Cal. 386, 82 Am.S.R. 355

Pa.—Maginnis v. Schlottman, 114 A. 782, 783, 271 Pa. 305

40. Carson v. Chicago, M. & St. P. Ry. Co., 164 N.W. 747, 749, 181 Iowa 310.

41. Ala.—W. T. Rawleigh Co. v. Phillips, 167 So. 271, 272

Mont.—Wells-Dickey Co. v. Embody, 266 P. 869, 874, 82 Mont. 150

42. S.D.—Morrow v. Chamberlain Bd. of Education, 64 N.W. 1126, 1127, 7 S.D. 553

Tex.—Neeper v. Stewart, (Civ.App.) 66 S.W.(2d) 812, 813.

43. Colorado Debenture Corp. v. Lombard Inv. Co., 71 P. 584, 585 66 Kan. 251, 97 Am.S.R. 373—Leavenworth, etc., R. Co. v. Stone, 55 P. 346, 347, 60 Kan. 57.

44. John Shillito Co. v. McClung, (Ohio) 51 F. 868, 872, 2 C.C.A. 526—U. S. v. Adams, (C.C.Or.) 24 F. 348, 350.

45. Clinton v. State, 50 So. 530, 53 Fla. 23, 24.

46. U. S. v. Farenholt, (Ct.Cl.) 27 S.Ct. 629, 631, 206 U.S. 226, 230, 51 L.Ed. 1036.

ASSISUS or ASSISUM. Law Latin, fixed or certain;[47] hence rented or farmed out for a specified assise; that is, a payment of a certain assessed rent in money or provisions.[48]

ASSITHMENT. Weregild or compensation by a pecuniary mulct.[49]

ASSIZE. See Assise or Assize 6 C J.S p 1435.

ASSOCIATE.

As a Noun

One often in company with another, implying intimacy or equality; also one having an interest in common with another, as a confederate, a colleague in office; also one connected with an association or institution without the full rights or privileges of a regular member[50] While the word has among its meanings that of "partner," it does not indicate a partnership conclusively.[51] As frequently used in the plural, the word has been defined as meaning persons united, acting together by mutual consent, by compact, to the promotion of some common object;[52] and, when used in particular connections, has been said to be an ambiguous term, referring either to persons now acting with those named, or to persons who may hereafter come to be associates,[53] and to be read in connection with the legal principles involved in the case, its meaning not being extended to include a right in violation thereof.[54]

As a quasi judicial officer. An officer in each of the English courts of common law, appointed by the chief judge of the court, and holding his office during good behavior, whose duties were to superintend the entry of causes, to attend the sittings of nisi prius, and there receive and enter verdicts, and to draw up the posteas and any orders of nisi prius.[55]

Associates in office. Those who are united in action; who have a common purpose; who share the responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform the duties jointly or as a body.[56]

Another phrase: "As your associate."[57]

As a Verb

To combine, join, or unite together.[58]

Phrases: "Associate with anyone in the plumbing business,"[59] and "such persons as he may associate with him,"[60] also "associated himself with,"[61] and "cars in such train which are associated together;"[62] and also "associating oneself with."[63]

ASSOCIATED PRESS. See Newspapers § 24 [46 C. J. p 42 note 70–p 45 note 41].

ASSOCIATIO. Law Latin, a joining or uniting with any person or thing.[64]

ASSOCIATION. It has been described as a word of vague meaning used to indicate a collection of persons who have joined together for a certain object;[65] also the persons so joining.[66] The term, both in its generic sense and as commonly used, is defined and distinguished from other terms in the title Associations § 1.

In English law, a writ directing certain persons, usually the clerk and his subordinate officers, to

47. Adams Gloss.

48. Black L D.

Assisus reditus—a fixed, certain, set, or standing rent Called rent of assise—Adams Gloss, citing 2 Blackstone Comm. p 42.

49. Black L D.

50. Webster New Int. D.

51. Smith v. Maine, 260 N Y S 409, 419, 145 Misc 521

A mere employee may be an "associate" of his employer—Smith v. Maine, 260 N.Y.S. 409, 419, 145 Misc 521.

52. Lechmere Bank v. Boynton, 11 Cush (Mass.) 369

53. Mass—Lechmere Bank v. Boynton, supra
Minn—State v. Sibley, 25 Minn 387.
"Assigns" compared see Assign 6 C J.S. p 1086 note 20

54. Winton v. Amos, 51 Ct.Cl. 284, 318.

55. Black L. D.

Modern status
The "associates" are now officers of the supreme court of judicature, and are styled "Masters of the Supreme Court"—Black L. D

56. Black L D, citing Barton v. Alexander, 148 P 471, 474, 27 Idaho 286, Ann Cas 1917D 729.
"Appointee" distinguished see Appointee 6 C J S p 88 note 52

57. Smith v Maine, 260 N.Y S. 409, 417, 145 Misc 521.

58. Webster New Int D.

59. Alcock v. Alcock, 189 Ill App 153, 156

60. People v Lawley, 119 P. 1089, 1095, 17 Cal App 331

61. U S v Taliaferro, (D C Va) 290 F. 214, 218

"Allied himself with" equivalent.—U. S v. Taliaferro, (D C Va) 290 F 214, 218.

62. Lyon v Charleston, etc, R Co, 58 S E 12, 16, 77 S C 328.

Power-braked cars
"Any power-braked car is 'associated' with other like cars when its air brake is cut out and its air line is continued in use in the engineer's operation of air brakes on cars beyond it."—U S. v. Northern Pac Ry. Co, (D C Mont.) 6 F Supp 278, 279

63. U S v. Taliaferro, (D C Va) 290 F 214, 218

"Conspiring with" distinguished
However, the distinction between conspiring with and associating oneself with is said to be, under particular circumstances, "a rather fine" one—U. S v. Taliaferro, (D C.Va) 290 F. 214, 218.

64. Adams Gloss.

65. U S—U S v. Martindale, (D C. Kan) 146 F 280, 284
Ariz—Ruse v Williams, 130 P 887, 888, 14 Ariz. 445, 45 L R A (N S) 923
Fla—Van Pelt v. Hilliard, 78 So. 693, 695, 75 Fla. 792, L.R.A 1918B 639

66. Black L D.

associate themselves with the justices and sergeants for the purpose of taking the assizes.[67]

Phrases: "Articles of association" see Associations post § 11, Joint Stock Companies § 4 [33 C.J. p 884 notes 11-24], "association taxable as a corporation,"[68] "association 'voluntarily organized to transact business,'"[69] and "such an association as . . . is authorized to be sued in the name of the association,"[70] also "associations . . . as are organized exclusively for . . . educational or charitable purposes,"[71] and "trusts . . . taxable as associations;"[72] and also, when employed as an adjective, "association theory."[73]

67. Black L. D., citing 2 Blackstone Comm. p. 59

68. Monrovia Oil Co. v. Commissioner of Internal Revenue, (C.C.A.Cal.) 83 F.(2d) 417, 419, 420—Pelton v. Commissioner of Internal Revenue, (C.C.A.) 82 F.(2d) 473, 475—Commissioner of Internal Revenue v. Vandegrift Realty & Investment Co., (C.C.A.) 82 F.(2d) 387, 391—Commissioner of Internal Revenue v. Gerard, (C.C.A.) 75 F.(2d) 542, 544—Morrissey v. Commissioner of Internal Revenue, (C.C.A.) 74 F.(2d) 803, 805—Commissioner of Internal Revenue v. Kelley, (C.C.A.) 74 F.(2d) 71, 75—Commissioner of Internal Revenue v. Guitar Trust Estate, (C.C.A.Tex.) 72 F.(2d) 544, 546—Reinecke v. Kaempfer, (C.C.A.Ill.) 72 F.(2d) 469, 470—Twin Bell Oil Syndicate v. Helvering, (C.C.A.) 70 F.(2d) 402, 408—Commissioner of Internal Revenue v. Brouillard, (C.C.A.) 70 F.(2d) 154, 158—Kaempfer v. Reinecke, (D.C.Ill.) 7 F.Supp. 599—Page v. McLaughlin, (D.C.Pa.) 7 F.Supp. 75, 77—Brooklyn Trust Co. v. Corwin, (D.C.N.Y.) 5 F.Supp. 287, 290

69. Commissioner of Internal Revenue v. Combs, (C.C.A.) 76 F.(2d) 652—Swanson v. Commissioner of Internal Revenue, (C.C.A.) 76 F.(2d) 651, 652—Coleman-Gilbert Associates v. Commissioner of Internal Revenue, (C.C.A.) 76 F.(2d) 191, 194.

70. Roadway Express v. Gaston, (Tex.Civ.App.) 90 S.W.(2d) 874, 880

71. Walcott v. Parker, 146 N.Y.S. 753, 759, 84 Misc. 534.

72. Morrissey v. Commissioner of Internal Revenue, 56 S.Ct. 289, 295, 296, 296 U.S. 344, 80 L.Ed. 263—Helvering v. Combs, 56 S.Ct. 287, 289, 296 U.S. 365, 80 L.Ed. 275—Helvering v. Coleman-Gilbert Associates, 56 S.Ct. 285, 286, 296 U.S. 369, 80 L.Ed. 278—Swanson v. Commissioner of Internal Revenue, 56 S.Ct. 283, 284, 296 U.S. 362, 80 L.Ed. 273—Brooklyn Trust Co. v. Commissioner of Internal Revenue, (C.C.A.) 80 F.(2d) 865, 867—Ittleson v. Anderson, (D.C.N.Y.) 2 F.Supp. 716, 719

73. Louisville R. Co. v. Hibbitt, 129 S.W. 319, 321, 139 Ky. 43, 139 Am.S.R. 464—5 C.J. p. 1329 note 34

"Department theory" distinguished.—Louisville R. Co. v. Hibbitt, 129 S.W. 319, 322, 139 Ky. 43, 139 Am.S.R. 464. See also Master and Servant § 331 [39 C.J. p. 571 note 20—p. 573 note 32]

ASSOCIATIONS

This Title includes unincorporated associations in general; their nature, formation, and dissolution; rights, powers, duties, and liabilities of such bodies, their members and officers, as among themselves and as to others, incident to the existence of the association, and legal proceedings for enforcement thereof.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1 Definition, nature, status, and distinctions—p 19
2 Statutory provisions—p 24
3 Organization—p 24
4. Legality of object—p 25
5 Estoppel to deny existence—p 25
6 Reorganization—p 25
7 Consolidation with other organization—p 26
8 Incorporation of existing association—p 26
9. Insolvency and dissolution—p 27
10. —— Operation and effect—p 31
11. Articles of association, constitution and by-laws—p 33
12. Rights, powers, and liabilities of association—p 35
13. —— Name and seal—p 37
14. —— Taking, holding, and transfer of property—p 38
15. —— Contracts—p 41
16. —— Torts—p 42
17 —— Criminal responsibility—p 43
18. Meetings—p 43
19. Officers, agents, and committees—p 45
20. —— Powers, duties and liabilities—p 48
21. —— Compensation and reimbursement—p 55
22 Membership—p 55
23 —— Admission of members—p 56
24 —— Withdrawal of members—p 57
25. —— Expulsion, suspension or exclusion of members—p 58
26 —— Reinstatement—p 67
27. —— Interest in association property—p 69
28. —— Power to bind association—p 71
29 —— Duties and liabilities to association in general—p 72
30 —— Fraud or breach of trust—p 72
31. —— Dues, assessments, fines and penalties—p 73
32. —— Duties and liabilities to persons not members—p 74
33. —— Contribution between members—p 79
34. Judicial interference—p 79
35 Actions by association—p 82
36 Actions against association—p 88
37. Actions between association and members—p 101
38. Foreign associations—p 104
39. —— Actions—p 104

§ 1. Definition, Nature, Status, and Distinctions

a. Definitions
b. Nature and status in general
c Distinctions

a. Definitions

An "association" is a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise.

The term "association" does not have, in law, the fixed meaning accorded to "partnership" or "corporation,"[1] but is used to indicate a collection of persons who have united or joined together for some special purpose or business.[2] In other words, it signifies confederacy or union for particular purposes, good or ill.[3] In this sense it is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, or a corporate confederacy, deriving its existence from a statute, and dissoluble only by the law.[4]

As the term is commonly used, however, an "association" may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise.[5]

The term "association" is often used as synonymous with "company"[6] or "society."[7]

Particular associations, elsewhere treated in this work: Agricultural societies, see Agriculture §§ 11–15; associations for care and protection of children, see Infants § 18 [31 C.J. p 1001 notes 17–26]; associations for prevention of cruelty to animals, see Animals §§ 81–84; banking associations, see Banks and Banking § 45; bar associations, see Attorney and Client § 60; Beneficial Associations; boards of underwriters, see Insurance § 92 [32 C.J. p 1052 notes 45–52]; Building and Loan Associations; cemetery associations, see Cemeteries §§ 5–14 [11 C.J. p 53 notes 42–47]; charitable associations, see Charities § 2 [11 C.J. p 303 note 58–p 306 note 82]; clearing houses, see Banks and Banking §§ 1074–1078, Clubs; Colleges and Universities; employees' relief associations, see Master and Servant §§ 167–170 [39 C.J. p 247 note 65–p 258 note

1. W. R. Roach & Co v. Harding, 181 N.E. 331, 348 Ill. 454
"The term 'association' is a word of vague meaning."—People v. Brander, 91 N.E. 59, 244 Ill 26, 135 Am S.R. 301, 18 Ann Cas 341, quoted in Van Pelt v. Hilliard, 78 So 693, 695, 75 Fla. 792, L.R.A. 1918E 639

2. Fla.—Van Pelt v. Hilliard, 78 So 693, 695, 75 Fla. 792, L.R.A. 1918E 639
Ill.—W. R. Roach & Co v. Harding, 181 N.E. 331, 336, 348 Ill 454—People v. Brander, 91 N.E. 59, 244 Ill 26, 135 Am S.R. 301, 18 Ann Cas. 341

3. Allen v. Stevens, 54 N.Y.S. 8, 33 App Div 485, 507, reversed on other grounds 55 N.E. 568, 161 N.Y 122, per Ward, J, dissenting—Thomas v. Dakin, 22 Wend (N.Y.) 9, 104, quoting Johnson D.

4. Thomas v. Dakin, 22 Wend (N.Y.) 9, 104—5 C.J. p 1333 note 2.

5. U.S.—Hecht v. Malley, (Mass.) 44 S.Ct 462, 265 U.S. 144, 68 L.Ed. 949—Lucas v Extension Oil Co., (C.C.A.) 47 F.(2d) 65, 66—In re Lloyds of Texas, (D.C.Tex.) 43 F.(2d) 383—Alyea-Nichols Co v. U. S., (D.C.Ill.) 12 F.(2d) 998, 1004—Bobe v. Lloyds, (C.C.A.N.Y.) 10 F.(2d) 730, certiorari denied Lloyds v. Bobe, 46 S.Ct. 472, 270 U.S. 663, 70 L.Ed. 778.
Idaho.—State v. Cosgrove, 210 P. 393, 36 Idaho 278.
Ill.—W. R. Roach & Co v. Harding, 181 N.E. 331, 348 Ill. 454.
Kan.—Mellies v Heilman, 289 P. 421, 423, 131 Kan 230
Mo.—Clark v Grand Lodge of Brotherhood of Railroad Trainmen, 43 S.W.(2d) 404, 328 Mo 1084, 88 A.L.R. 50
Or.—Jubitz v. Gress, 187 P. 1111, 1113, 95 Or 332
5 C.J. p 1333 note 3.

An "unincorporated association" is an organization composed of a body of persons united without a charter for the prosecution of some common enterprise.—Meinhart v. Contresta, 194 N.Y.S. 593.

Other definitions

(1) "An organized but unchartered body analogous to but distinguished from a corporation."—Pract Stand. D, quoted in Hecht v. Malley, (Mass.) 44 S.Ct. 462, 467, 265 U.S. 144, 68 L.Ed 949.

(2) "An organized union of persons for a good purpose; a body of persons acting together for the promotion of some object of mutual interest or advantage."—In re Lloyds of Texas, (D.C.Tex.) 43 F.(2d) 383, 385.

(3) "An unincorporated organization, composed of a body of men partaking in its general form and mode of procedure of the characteristics of a corporation."—In re Irwin's Estate, 237 P. 1074, 1076, 196 Cal. 366—Knight v. Stevens, 72 N.Y.S. 215, 66 App Div. 267.

(4) "The act of a number of persons in uniting together for some purpose The persons so joining"—Bouvier L.D., quoted in Pickering v. Alyea-Nichols Co., (C.C.A.Ill.) 21 F.(2d) 501, 506.

(5) "The act of a number of persons who unite or join together for some special purpose or business. The union of a company of persons for the transaction of designated affairs, or the attainment of some common object."—Black L.D., quoted in Pickering v Alyea-Nichols Co, supra, and W. R. Roach & Co. v. Harding, 181 N.E. 331, 336, 348 Ill. 454
5 C.J. p 1333 note 3 [a].

6. Miss.—Lee Mut F. Ins Co. v. State, 60 Miss 395, 398
Tex.—Mills v. State, 23 Tex 295, 303.
5 C.J. p 1333 note 4—12 C.J. p 220 note 64 [a].

7. Sovereign Camp W.O.W. v. Downer, (Tex.Civ.App.) 241 S.W. 223—5 C.J. p 1333 note 5

"Association" is "an unincorporated society."—Black L.D., quoted in Pickering v. Alyea-Nichols Co., (C.C.A.Ill.) 21 F.(2d) 501, 506.

Fraternal benefit "society"

The word "association" has been held sufficiently comprehensive to include fraternal benefit societies and other organizations of like character.—Krubs v United Order of Foresters, 177 S.W. 766, 769, 191 Mo.App. 524.

26]; Exchanges; firemen's relief associations, see Municipal Corporations § 615 [43 C.J. p 847 note 2–p 849 note 29]; Industrial Cooperative Societies; irrigation associations, see Waters § 340 [67 C.J. p 1366 note 26–p 1367 note 38]; Joint Adventures; labor unions, see Trade Unions; Lloyd's insurance, see Insurance §§ 1410–1434 [38 C.J. p 115 note 1–p 124 note 95]; medical societies, see Physicians and Surgeons §§ 79, 80 [48 C.J. p 1175 note 76–p 1178 note 28]; news associations, see Newspapers § 24 [46 C.J. p 42 note 70–p 45 note 41]; pilots' associations, see Pilots § 17 [48 C.J. p 1203 notes 91–1]; policemen's relief associations, see Municipal Corporations § 589 [43 C.J. p 819 note 83–p 821 note 7]; Religious Societies; Schools and School Districts.

b. Nature and Status in General

An association may or may not constitute a legal entity in accordance with applicable provisions of local law.

In determining whether an association is an entity, a court of the forum will look to the state which created it,[8] and, where statutes are involved, the courts must look to the legislative intent to determine whether or not an association constitutes a legal entity.[9]

Under one view an association is regarded as a legal entity,[10] as where there are statutes, which will be considered in sections 35 and 36, providing that an association may sue or be sued as such,[11] although it is only as the association comes within the scope of the statute that it can be so recognized.[12]

As a general rule, however, and in the absence of applicable statutes to the contrary, it is held that an association is not a legal entity separate from the persons who compose it.[13]

It has been said that equity will look through the form to ascertain the real intent of an association of individuals, and will give effect to the real purposes of the organization in order to promote fair dealing and effectuate justice.[14]

Where the statutes of a state provide for and regulate business concerns of only two kinds—limited partnerships and corporations—associations doing business in such a state operate under the general laws of the land and not under statutory pro-

8. Sanchez v. Bowers, (C C A N.Y.) 70 F.(2d) 715, reversing (D.C.) 57 F.(2d) 324.

9. Hall v. Essner, (Ind.) 193 N E 86.

"The ultimate judicial inquiry is whether the legislative intent is to create a legal individuality apart from, and legally independent of, the natural persons who are interested in the enterprise in question"—Hall v. Essner, (Ind.) 193 N.E. 86, 89.

10. Jardine v Superior Court in and for Los Angeles County, 2 P.(2d) 756, 213 Cal. 301, 79 A L R 291, appeal dismissed 58 S Ct. 197, 284 U.S. 592, 76 L Ed. 510—Craig v San Fernando Furniture Co, 264 P. 784, 786, 89 Cal.App 167

"Where a group of people are conducting a business under a common name, the law recognizes that group in its entity as a legal entity, and whether the group of persons see fit to avail themselves of the provisions of the law and form a corporation, or whether they see fit to conduct that business under a common name without incorporating, the legal entity still exists and is designated by the common name adopted or used"—Craig v. San Fernando Furniture Co, supra.

11. Tex—Frank v. Tatum, 25 S.W. 409, 87 Tex 204—Brotherhood of Railroad Trainmen v. Cook, (Civ. App.) 221 S.W 1049, error refused
Vt—F. R. Patch Mfg. Co. v. Capeless, 63 A. 938, 79 Vt. 1.

12. Minn—St Paul Typothetæ v St Paul Bookbinders' Union No 37, 102 N W 725, 94 Minn. 351
Ohio—Haskins v. Alcott, 13 Ohio St 210.

13. U S—Brown v. Protestant Episcopal Church in the United States of America, (D.C La.) 8 F.(2d) 149, 150.
Del.—United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers v. Kennedy, 115 A. 537, 13 Del Ch 106
Idaho—Idaho Apple Growers' Ass'n v. Brown, 293 P 320, 50 Idaho 34
Ill—Cahill v. Plumbers, Gas and Steam Fitters' and Helpers' Local 93, 233 Ill.App 123.
Ind.—Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131, 75 N E. 877, 165 Ind 421, 423, 2 L R A.(N S) 788.
Mass—Hanley v. American Ry. Express Co, 138 N E. 323, 244 Mass. 249
Miss—Edward Hines Yellow Pine Trustees v. State, 94 So. 231, 130 Miss. 348.
Mo—Ruggles v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, 52 S W.(2d) 860, 331 Mo. 20—Newton County Farmers' & Fruit Growers' Exchange v Kansas City Southern Ry Co, 31 S.W (2d) 803, 326 Mo 617, adopting opinion in part (App.) 2 S W (2d) 125—Corbett v Milk Wagon Drivers' Union, Local No 603, (App.) 84 S W (2d) 377
N.Y.—MacAffer v. Boston & M. R. R., 273 N Y S 679, 242 App Div. 140, affirmed 197 N E 338, 268 N. Y. 400—Saxer v. Democratic County Committee of Erie County, 291 N Y S 18—Meinhart v. Contresta, 194 N Y S 593
N C—Tucker v. Eatough, 120 S E. 57, 186 N C 505.
S C—Medlin v. Ebenezer Methodist Church, 129 S E. 330, 132 S.C. 493
5 C J. p 1334 note 20.

Mere creatures of contract

Unincorporated associations are mere creatures of contract freely formed at common law without any grant from the sovereign.—People v. Norwegian Underwriters, 247 N.Y S. 707, 711, 139 Misc. 70.

In the absence of legislation, a voluntary unincorporated association is not regarded by the law as a person or entity—Brotherhood of Railroad Trainmen v. Cook, (Tex Civ. App.) 221 S W. 1049, error refused.

Committee of an unincorporated association is not a legal entity—Work v. Des Moines Coliseum Co., (Iowa) 207 N.W. 679.

14. White v. Pacific Southwest Trust & Savings Bank, (D C Cal.) 9 F.(2d) 650, affirmed in part and reversed in part on other grounds (C C A.) Johns v United Bank & Trust Co of California, 15 F.(2d) 300, certiorari denied Johns v. Pacific Southwest Trust & Savings Bank, 47 S Ct. 457, 273 U S. 753, 71 L Ed 875, and Johns v. United Bank & Trust Co, 47 S Ct. 457, 273 U S. 753, 71 L Ed. 874.

tection and restrictions, as do limited partnerships and corporations [15]

c. Distinctions

(1) Corporations
(2) Joint stock companies
(3) Partnerships
(4) Trusts

(1) Corporations

While an association may in its broadest sense include a corporation, the two terms are ordinarily used to denote different conceptions, "association" ordinarily referring to an unincorporated society. The principal distinction lies in the fact that a corporation is a legal entity deriving its existence from franchise, whereas an association, in the narrower sense of the term, is a creature of contract without a legal entity separate from the individuals composing it.

The term "association" frequently enters into the names bestowed upon corporations by the legislature or chosen by the incorporators themselves, and in its broad sense it may include "corporation." So the term as employed in statutes is frequently held, by reason of the object and scope of the statutes, to include "corporation," or to be synonymous therewith [16]

Ordinarily, however, the two terms are employed to denote different and distinct conceptions; and the term "association" is generally used in a restricted sense as relating to unincorporated societies.[17] Statutes providing that an association may be sued as such, which will be considered in section 36, do not thereby convert an unincorporated association into a corporation.[18] Associations differ from corporations in many respects. The individuals composing an association act by virtue of a mere agency, as will be shown in subsequent sections, while a corporation acts in its own person.[19] As a rule, associations, unlike corporations, are not creatures of the state, have no power of perpetual succession, no right to use a common seal, cannot contract under a corporate name, and cannot take, hold, or dispose of property as a collective whole [20] A distinction which has been drawn by the courts is that, as shown in the preceding subsection, an association is ordinarily not a legal entity distinct from its component individuals, whereas a corporation is always and necessarily a distinct and separate legal entity [21]

In determining in any case whether or not an association authorized or recognized by statute is a corporation, regard is to be had to the powers and faculties bestowed on or possessed by the association rather than to the name given to it; associations having all the essential attributes of a corporation are corporations, even though they may be declared by the legislature not to be such, and associations not possessed of such attributes are not corporations, although they may be so called [22] Where no steps were taken to incorporate an association beyond the mere signing of articles of incorporation, the association has been held to be a voluntary unincorporated association.[23]

(2) Joint Stock Companies

While the word "association" may include a "joint stock company," the terms are ordinarily employed to denote different conceptions, as an association is ordinarily unable to issue stock or transferable memberships.

15. Betts v Hackathorn, 252 S W 602, 159 Ark 621, 31 A L R 847

16. Tri-State Fair Association v Lasell, 187 N W 824, 45 S D 414 —5 C J. p 1333 notes 7–9, p 1334 note 10

Construction of statute

"If an entity with legal individuality is created, it follows that this legal person possesses the ordinary corporate advantages, unless some appropriate legislative action expressly provides otherwise On the other hand, if a legal individuality is not created by the statute which affects the conduct of the enterprise in question, then the natural persons interested in the enterprise incur all the obligations and liabilities of common-law partners, except in so far as these are limited by statute or enforceable contracts"—Hall v Essner, (Ind) 193 N E 86, 89

17. U.S.—In re Lloyds of Texas, (D C.Tex) 43 S W (2d) 383.
N Y —In re Merritt's Will, 209 N Y S 243, 249, 124 Misc 709
Wash —Engvall v Buchie, 132 P 231, 73 Wash 534
5 C J p 1334 note 11
"The word 'corporation' has a definite legal meaning, and differs essentially from an 'association,' which may or may not be incorporated"—In re Merritt's Will, supra

18. F R Patch Mfg Co. v. Capeless, 63 A 938, 79 Vt. 1.

19. Niagara County v. Peo , 7 Hill (N Y) 504

20. Ostrom v. Greene, 55 N E 919, 161 N Y. 353, 361, affirming 52 N Y S 1147, 30 App Div 621, which affirmed 45 N.Y S 852, 20 Misc 177—Branagan v. Bruckman, 122 N.Y S 610, 67 Misc 242, affirmed 130 N Y S 1106, 145 App Div 950.

21. Ostrom v Greene, 55 N E 919, 161 N Y. 353, 361, affirming 52 N. Y.S 1147, 30 App Div 621, which affirmed 45 N Y S 552, 20 Misc 177 —Branagan v. Bruckman, 133 N Y S 610, 67 Misc 242, affirmed 130 N Y S 1106, 145 App.Div 950—5 C J. p 1334 notes 19, 20—14 C.J p 68 note 40

22. U S —Liverpool, etc , L , etc , Ins. Co v Oliver, 10 Wall. 566, 19 L Ed 1029, affirming 100 Mass 531 —In re Carthage Lodge No 365, I. O O F , (D C N Y) 230 F 694—Keystone Bank v Donnelly, (D C. Pa) 196 F 832—Fargo v. Louisville, N A & C. R Co., (C C Ind) 6 F 787, 10 Biss. 273.
N J —Edgeworth v Wood, 33 A. 940, 58 N J Law 463.
N Y —Sandford v. New York, 15 How Pr 172—People v Watertown, 1 Hill 616, 25 Wend. 686
Pa —Keystone Bank v. Donnelly, 21 Pa Dist 621
14 C J p 68 notes 41, 42

23. Harris v Ashdown Potato Curing Ass'n, 284 S W. 755, 171 Ark. 399.

The term "association" may include "joint stock company,"[24] but it does not necessarily include that term,[25] and, strictly speaking, is not applicable thereto, since a voluntary association cannot issue stock, and the right of membership is not transferable, at least not without the consent of the association itself.[26]

(3) Partnerships

While an association may in a broad sense be characterized as a partnership, in its strict meaning it is distinguishable therefrom, as with respect to the effect of the death of a member as not working a dissolution of the association and the lack of power in an individual associate to bind his fellow associates.

It has been said that the word "association" is a generic term which may properly comprehend not only a corporation, as shown in the preceding subsection, but also a partnership,[27] and in a number of cases it has been broadly stated that an association, or one organized for business purposes, is essentially a partnership[28]

Strictly speaking, however, an unincorporated association is neither a partnership[29] nor, it has been said, a quasi partnership,[30] although it is rated as a partnership so far as its capacity to sue and to be sued is concerned[31] In any event, the members thereof, whatever may be their relation and liability to third persons dealing with the association, are not partners inter sese, since the bankruptcy, death, or retirement of a member does not of necessity work a dissolution of the association, and there exists no authority in a single member to bind the others[32]

This is especially true of associations which are not engaged in business enterprises and the objects of which do not contemplate profit and loss, but which are organized for moral, social, benevolent, literary, scientific, political, or other like purposes, or for the purpose of recreation or amusement.[33] As to these it is generally held that they are not partnerships, and that members are not partners,[34]

24. N Y—Austin v Searing, 16 N Y 112, 69 Am D 665.
S D—State v Taylor, 64 N W. 548, 550, 7 S.D 533, quoting Anderson L.D

25. Peo v. Brander, 91 N E. 59, 244 Ill 26, 135 Am.S R. 301, 18 Ann Cas 341

26. Ostrom v Greene, 55 N E 919, 161 N Y. 353, 361, affirming 52 N Y S 1147, 30 App Div 621, which affirmed 45 N Y S. 852, 20 Misc 177—Branagan v Buckman, 122 N.Y S. 610, 67 Misc 242, affirmed 130 N Y S. 1106, 145 App Div. 950

The New York Stock Exchange has been held to be a voluntary association of its members and not a joint stock company—Commercial Tel. Co v. Smith, 47 Hun (N Y.) 494

27. Chastain v Baxter, 31 P (2d) 21, 24, 139 Kan. 381—5 C J. p 1334 note 27.

28. U S—In re Lloyds of Texas, (D. C.Tex) 43 F.(2d) 383.
Colo—Fisher v. Colorado Central Power Co, 29 P.(2d) 641—Richardson v. Keely, 142 P. 167, 53 Colo. 47.
Pa.—McNeal v. Farmers' Market Co., 43 Pa.Super. 420.
Vt.—Houghton v. Grimes, 135 A 15, 100 Vt 99—F. R. Patch Mfg. Co. v. Capeless, 63 A. 933, 79 Vt. 1.
Wash—Engvall v. Buchie, 132 P. 231, 233, 73 Wash 534.
47 C J. p 664 notes 61, 62.
"Voluntary associations organized for business purposes have no well-defined legal status. They are not corporations, nor are they, strictly speaking, partnerships. They must, however, ex necessitate, be treated as partnerships in all things not defined and governed by their articles of association and by-laws In the absence of contravening statutes, the articles and by-laws, when not inimical to the rights of third persons nor contrary to public policy, govern the rights and relations and determine the pecuniary liability of the members inter sese"—Engvall v Buchie, supra

"At common law an unincorporated association, as regards its rights and liabilities, is fundamentally a large partnership The relation of the members composing it is to each other and to the outside world, that of partners"—Houghton v Grimes, 135 A 15, 18, 100 Vt 99—F R Patch Mfg Co v Capeless, 63 A 933, 939, 79 Vt. 1.

29. U S—In re Lloyds of Texas, (D C Tex) 43 F.(2d) 383
Idaho—State v Cosgrove, 210 P 393, 36 Idaho 273.
Kan—Chastain v Baxter, 31 P.(2d) 21, 24, 139 Kan. 381
N Y—Brower v Crimmins, 121 N Y. S 643, 67 Misc 68
Wash—Engvall v. Buchie, 132 P. 231, 73 Wash. 534.
5 C J. p 1334 note 29.

Anomalous position of association
"A nonprofit voluntary association, such as the one of which plaintiffs are members, seems to occupy an anomalous position in the law. It is not a partnership, yet, in reference to the rights of the members in the property owned by it, they are to be determined to a large extent by the application of the principles of law peculiar to partnerships."—Bentley v. Hurley, 299 S.W. 604, 606, 222 Mo.App 51.

30. Chastain v. Baxter, 31 P (2d) 21, 24, 139 Kan 381—5 C J. p 1334 note 30

31. Chastain v. Baxter, supra—5 C. J. p 1334 note 31.

32. U S—In re Lloyds of Texas, (D C Tex) 43 F (2d) 383
Idaho—State v Cosgrove, 210 P. 393, 36 Idaho 273
Kan—Chastain v Baxter, 31 P.(2d) 21, 24, 139 Kan 381
Mo—Bentley v Hurley, 299 S W. 604, 222 Mo.App 51
N.Y—Brower v Crimmins, 121 N. Y S 643, 67 Misc 68
5 C J. p 1334 note 33.

33. Kan—Chastain v Baxter, 31 P. (2d) 21, 24, 139 Kan 381
Mo—Bentley v Hurley, 299 S W. 604, 222 Mo App 51.
Pa—Franklin Paper Co v. Gorman, 76 Pa Super. 276, 280
S C—Medlin v Ebenezer Methodist Church, 129 S E 830, 132 S.C. 493
47 C J p 664 notes 65, 66, p 665 notes 67–79
"Voluntary associations, for social, political or charitable purposes, and the like, are not partnerships, nor have their members the powers and responsibilities of partners"—Franklin Paper Co. v. Gorman, supra.

34. Kan.—Chastain v. Baxter, 31 P. (2d) 21, 24, 139 Kan 381.
Mo—Bentley v Hurley, 299 S W. 604, 222 Mo App 51.
N Y—Hale v. Hirsch, 199 N.Y.S. 514, 205 App Div 308
5 C J. p 1335 note 37

Associations, the objects of which are political rather than for purposes of trade or profit, are not partner-

either as between the members themselves,[35] or as between a member and the association,[36] or as between members and third persons dealing with them or the association.[37] So no partnership exists between the members of an association organized to preserve the property of the community from destruction by fire,[38] or between members of an association of individuals or firms the objects of which are the mutual protection, benefit, and advancement of the interest of the association or its members,[39] mutual insurance,[40] avoiding competition between its members,[41] promoting business intercourse between members,[42] or to designate and maintain a uniform scale of prices and equitably to distribute work,[43] or to adopt a uniform basis of just and equitable dealings between the members of the association and their employees[44]

Where, however, the association is organized for commercial purposes, and operated for pecuniary profit, it is no more than a partnership, and the rights and liabilities incident to that relation attach to its members, as well between the members themselves,[45] as between a member and the association,[46] and as between members and third persons dealing with them or the association.[47]

Associations organized to share losses have been held not partnerships[48]

(4) Trusts

The presence of "associates" in an association and the lack thereof in a trust serves to differentiate the one from the other.

Although there is authority to the effect that a business or common-law trust is an association,[49]

ships—American Art Works v. Republican State Committee, (Okl.) 60 P.(2d) 786.

A political party organized as a voluntary, unincorporated association, is in no sense a partnership—Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 308.

35. Kan.—Chastain v. Baxter, 31 P.(2d) 21, 24, 139 Kan. 381
Mo.—Bentley v. Hurley, 299 S.W. 604, 222 Mo.App. 51
5 C.J. p. 1335 note 38

36. Kan.—Chastain v. Baxter, 31 P.(2d) 21, 24, 139 Kan. 381
Mo.—Bentley v. Hurley, 299 S.W. 604, 222 Mo.App. 51.
5 C.J. p. 1335 note 39.

37. Kan.—Chastain v. Baxter, 31 P.(2d) 21, 24, 139 Kan. 381.
Mo.—Bentley v. Hurley, 299 S.W. 604, 222 Mo.App. 51.
5 C.J. p. 1335 note 40.

38. Thomas v. Ellmaker, 1 Pars.Eq.Cas.(Pa.) 98.

39. D.C.—Rohde v. U. S., 34 App.D.C. 249
Ill.—A. J. Lindemann, etc., Co. v. Advance Stove Works, 170 Ill.App. 423.
Ind.—Laycock v. State, 36 N.E. 137, 136 Ind. 217.
Mich.—Brown v. Stoerkel, 41 N.W. 921, 74 Mich. 269, 3 L.R.A. 430.
Minn.—St. Paul Typothetæ v. St. Paul Bookbinders' Union No. 37, 102 N.W. 725, 94 Minn. 351, 3 Ann.Cas. 695
Mo.—Missouri Bottlers' Assoc. v. Fennerty, 81 Mo.App. 525
Neb.—Edgerly v. Gardner, 1 N.W. 1004, 8 Neb. 130
Pa.—Leech v. Harris, 2 Brewst. 571.
47 C.J. p. 665 note 81.

A workman's union, the objects of which are the elevation of the craft to its proper position in the ranks of the workers, to encourage a higher standard of skill among its members, to inculcate feelings of friendship in the craft, to assist in securing employment, to reduce hours of employment, to secure higher wages, etc., is not organized for any purpose of trade or profit.—Rohde v. U. S., 34 App.D.C. 249, 254. To same effect St. Paul Typothetæ v. Bookbinders' Union No. 37, 102 N.W. 725, 94 Minn. 351, 3 Ann.Cas. 695

A lodge to unite railroad trainmen to promote their general welfare, and advance their interests, social, moral, and intellectual, and to protect their families by the exercise of a systematic benevolence, etc., is not organized for trade or profit so as to constitute a partnership.—Laycock v. State, 36 N.E. 137, 136 Ind. 217.

40. People v. Security L. Ins., etc., Co., 78 N.Y. 114, 34 Am.R. 522, 7 Abb.N.Cas. 198—Bewley v. U. S. Equitable L. Assur. Soc., 61 How.Pr.(N.Y.) 344

41. State v. Kansas City Live Stock Exch., 109 S.W. 675, 211 Mo. 131, 124 Am.St.R. 776

42. Missouri Bottlers' Assoc. v. Fennerty, 81 Mo.App. 525.

43. Potter v. Morris, etc., Dredging Co., 46 A. 537, 59 N.J.Eq. 422.

44. Webster v. Taplin, 29 Ohio Cir.Ct. 543, affirmed 81 N.E. 1196, 76 Ohio St. 590

45. Ala.—Dinsmore v. J. H. Calvin Co., 108 So. 583, 214 Ala. 666.
Cal.—Burks v. Weast, 228 P. 541, 67 Cal.App. 745—Webster v. San Joaquin Fruit & Vegetable Growers' Protective Ass'n, 162 P. 654, 32 Cal.App. 264
Fla.—Johnston v. Albritton, 134 So. 563, 101 Fla. 1235, followed in 134 So. 566, 101 Fla. 1290.
Kan.—Chastain v. Baxter, 31 P.(2d) 21, 24, 139 Kan. 381.
Miss.—Boisgerard v. Wall, 9 Miss. 404.
Tex.—Oil Lease & Royalty Syndicate v. Beeler, (Civ.App.) 217 S.W. 1054, error refused
5 C.J. p. 1335 note 41.

46. Chastain v. Baxter, 31 P.(2d) 21, 24, 139 Kan. 381—5 C.J. p. 1335 note 42.

47. Chastain v. Baxter, supra—5 C.J. p. 1335 note 43

48. Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 191 N.W. 97, 195 Iowa 1200, rehearing overruled 193 N.W. 443, 195 Iowa 1200.

Association of merchants to share losses from plate glass breakage

An essential element of a partnership is the sharing of profits and losses, and hence a mutual unincorporated association, not organized for pecuniary profit, but composed of local merchants, owning real estate, for the purpose of sharing losses on the breakage of plate glass is not a partnership.—Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 191 N.W. 97, 195 Iowa 1200, rehearing overruled 193 N.W. 443, 195 Iowa 1200

49. Idaho.—State v. Cosgrove, 210 P. 393, 36 Idaho 278
Mass.—Adams v. Swig, 125 N.E. 857, 234 Mass. 584.

In Washington

A common-law business trust, the declaration of trust of which provides that the trustees shall not be personally liable for their own acts; that a certificate holder shall not be liable for the acts of other certificate holders or of the trustees; that the joint property shall be held free from the rules of tenancy in common; that the organization shall not be dissolved by death of a certificate holder or trustee; that the certificates are assignable without consent of other shareholders; that the organization shall transact business through the majority of its trustees; that the association shall

strictly speaking, the two forms of organization are not identical.

While express trusts and voluntary associations established by written instruments may in some instances run into each other and have factors in common, the former may exist without the element of association between the beneficiaries,[50] and therein lies the distinction between an "association" and a "trust"[51]

§ 2. Statutory Provisions

Reasonable statutory regulations of associations are valid.

The courts have upheld the validity of statutes permitting suits to be maintained against an association for any cause of action upon which plaintiff therein could maintain suit against the members of the association,[52] or providing that jurisdiction may be acquired over an association doing business by service of process upon one or more of its members,[53] or upon specified officers of the association,[54] or that an action may be maintained by or against an association in its common or associate name,[55] or requiring certain associations to file a list of members with constitution and membership oath[56] A statute providing that an unincorporated association may be sued without naming the individual members, by service on an agent of the association, and that the property of individual members shall be liable for satisfaction of a judgment against the association has been upheld as valid[57]

The validity of statutes regulating the practice of law by associations will be considered in § 12 infra.

§ 3. Organization

In the absence of statutory provisions and under the general rule, the organization of unincorporated asso-

have power to make by-laws and have a common seal to sue and be sued, to receive and grant, and purchase and hold lands and chattels in the names of the trustees with perpetual succession, is an "association with the powers and privileges of corporations not possessed by individuals and partnerships," within Const. art 12 § 5, defining corporations.—State v. Hinkle, 219 P 41, 43, 126 Wash 531

50. Bouchard v. First People's Trust, 148 N E 895, 253 Mass 351.

51. Morrissey v Commissioner of Internal Revenue, 56 S Ct. 289, 296 U.S 344, 80 L Ed 263, affirming (C C A.) 74 F.(2d) 803, certiorari granted 55 S.Ct 828, 295 U S. 725, 79 L Ed 1677

Term "association" implies associates and entering into joint enterprise for transaction of business, thus differing from ordinary "trust" whereby property is to be held on specified trusts for benefit of named or described persons—Morrissey v Commissioner of Internal Revenue, 56 S Ct. 289, 296 U.S 344, 80 L Ed 263, affirming (C C A) 74 F (2d) 803, certiorari granted 55 S Ct. 828, 295 U S. 725, 79 L Ed 1677.

52. Grand International Brotherhood of Locomotive Engineers v Green, 98 So. 569, 210 Ala. 496, error dismissed 44 S Ct. 636, 265 U.S. 576, 68 L Ed. 1187

The statute is remedial in character and "must be liberally construed to advance the competent legislative purpose."—Grand International Brotherhood of Locomotive Engineers v. Green, 98 So 569, 571, 210 Ala. 496, error dismissed 44 S Ct. 636, 265 U S. 576, 68 L Ed. 1187.

53. Cal—Jardine v. Superior Court in and for Los Angeles County, 2 P (2d) 756, 213 Cal 301, 79 A L R 291, appeal dismissed 52 S Ct. 197, 284 U S 592, 76 L Ed 510

Mont—State ex rel Cook v. District Court of First Judicial Dist. in and for Lewis and Clark County, 53 P (2d) 273

Statute should be liberally construed

A statute relating to service of summons on an unincorporated association should receive a liberal construction—Jardine v. Superior Court in and for Los Angeles County, 2 P (2d) 756, 213 Cal 301, 79 A L R 291, appeal dismissed 52 S Ct. 197, 284 U S. 592, 76 L Ed. 510

54. Bobe v. Lloyds, (C C A N Y) 10 F (2d) 730, certiorari denied Lloyds v Bobe, 46 S Ct. 472, 270 U S 663, 70 L Ed 778.

55. Mich—U S. Heater Co. v. Iron Moulders' Union, 88 N W. 889, 129 Mich 354

S C—Elliott v. Greer Presbyterian Church, 186 S E 651, 181 S C. 84.

Not invalid as applicable to nonlegal entity

Such statutes are not invalid as being beyond the power of the legislature in authorizing actions by associations which are not legal entities and which are not made so by statute—U. S Heater Co. v. Iron Moulders' Union, 88 N.W. 889, 129 Mich. 354.

56. People of State of New York ex rel. Bryant v. Zimmerman, 49 S Ct. 61, 278 U S. 63, 75 L Ed 184, 62 A L R 785, affirming 150 N E 497, 241 N.Y. 405, 43 A L R 909, which affirmed 210 N Y S 269, 213 App Div. 414, which affirmed People ex rel Bryant v Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859

Secret societies

Under its police power, the state "may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare The requirement in section 53 [of the N.Y. Civil Rights Law] that each association shall file with the secretary of state a sworn copy of its constitution, oath of membership, etc, with a list of members and officers is such a regulation It proceeds on the twofold theory that the state within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowledge of its default"—People of State of New York ex rel. Bryant v. Zimmerman, 49 S Ct. 61, 65, 278 U S 63, 75 L Ed 184, 62 A L R 785, affirming 150 N E. 497, 241 N Y 405, 43 A L R. 909, which affirmed 210 N Y S 269, 213 App Div. 414, which affirmed People ex rel Bryant v Sheriff of Erie County, 206 N Y S 533, 123 Misc. 859.

57. Elliott v. Greer Presbyterian Church, 186 S.E. 651, 181 S.C. 84.

ciations rests upon the contract of the associates, usually embodied in a written instrument designated "constitution" or "articles of association." In some states there are statutes providing for organization of associations.

The organization of voluntary associations, unlike that of corporations, does not, as a rule, depend upon statutory provisions, but as to manner and effect is within the discretion of the associates,[58] who may combine for any lawful purpose.[59] They are generally formed by the voluntary association of individuals under the common-law right of contract.[60] The contract of association may properly be, and generally is, embodied in an instrument termed "articles of association" or "constitution,"[61] which, when duly adopted by the associates, governs the powers and rights, and duties and liabilities, of the association and its members, in correspondence to the charter of a corporation,[62] and apart from this contract of association, whatever its form, the association has no existence[63] and no powers, as will be considered in § 12 infra.

In some states general statutes have been enacted expressly authorizing individuals to unite, for prescribed purposes, as a voluntary association under a distinguishing associate name,[64] and, as will be shown in specific titles, statutes exist in some states providing for the organization of particular kinds of associations.

§ 4. Legality of Object

The objects of an association must be legal, although where the principal purposes of an association are lawful it will not be wholly defeated by reason of the illegality of other and separable purposes.

To render the organization effectual, the objects of the association must of course be lawful, an association formed to carry out an illegal purpose is a nullity.[65] Where, however, the main purposes of the association are legal, the organization is not wholly defeated by reason of the illegality of other separable purposes; and an association whose general objects are legal is not invalidated by reason of the fact that some of its rules are contrary to public policy, but if a material part of the rules of an association are illegal, and they cannot be eliminated without defeating the avowed objects of the association, the entire organization fails.[66]

If the expressed objects of an association are lawful, the association is not rendered an unlawful one by reason of the fact that its principal officer commits illegal acts in the course of his duties.[67]

§ 5. Estoppel to Deny Existence

Either an association doing business as a legal entity, or one dealing with it as such, may be estopped to deny the existence of the association.

An association in fact doing business as a legal entity may be estopped to deny its own existence;[68] and one who deals with an association as a legal entity capable of transacting business, and in consequence receives from it money or other things of value, is estopped from denying the legality of its existence.[69]

§ 6. Reorganization

Reorganization of an association under a new name will not necessarily destroy the identity of the old organization, although where a substantial change takes place in connection with reorganization the old and the new may not be regarded as identical.

The reorganization of an association under a new name, with a partial change in the personnel of officers and members, will not necessarily destroy the identity of the old association, if the objects and purposes of the reorganized body are identical with those of the old.[70] So a subordinate society does not cease to exist because, by virtue of a change in the constitution of the parent society, its membership is changed by enlargement, and its methods of internal administration are altered, and accordingly it retains its property rights under the methods of administration.[71] Where, however, an association adopts a new constitution and a new name, elects new officers, changes the amount of dues, and transfers the assets of the old to the new association, the two associations are not identical,

58. Laycock v State, 36 N.E. 137, 136 Ind 217, 223

59. Willner v Silverman, 71 A 962, 109 Md 341, 24 L.R.A.(N.S.) 895

60. Brown v Stoerkel, 41 N.W. 921, 74 Mich 269, 3 L.R.A. 430—5 C.J. p 1336 note 49

61. Goller v Stubenhaus, 134 N.Y.S. 1043, 77 Misc 29—5 C.J. p 1336 note 51

62. Levy v. Magnolia Lodge No 29 I. O. O. F., 42 P. 887, 110 Cal. 297.

63. Kerr v. Hicks, 70 S.E. 468, 154 N.C. 265, 33 L.R.A.(N.S.) 529.

64. Davison v. Holden, 10 A. 515, 55 Conn 103, 3 Am.St.R. 40—5 C.J. p 1335 note 45

65. U.S.—Waterhouse v Comer, (C.C.Ga.) 55 F. 149, 19 L.R.A. 403. Mich.—Brown v. Stoerkel, 41 N.W. 921, 74 Mich 269, 3 L.R.A. 430. 5 C.J. p 1336 note 57.

66. Tracy v Banker, 49 N.E. 808, 170 Mass 266, 39 L.R.A. 508—5 C.J. p 1336 notes 58–60.

67. U. S v. Gomez, 8 Philippine 630.

68. Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 43 S.W.(2d) 404, 329 Mo 1084, 88 A.L.R. 150.

69. Petty v. Brunswick, etc., R. Co., 35 S.E. 82, 109 Ga. 666.

70. Crawford v. Athletic Assoc., 82 N.W. 944, 111 Iowa 736—5 C.J. p 1336 note 65

71. Monroe County Alliance v. Owens, (Miss.) 25 So. 876.

and hence members of the old association are not ipso facto members of the new.[72]

§ 7. Consolidation with Other Organization

Consolidation of an association with another amounts to a dissolution. A transfer of the members and property of one association to another to the extinguishment of the former cannot be effected by mere majority vote.

The amalgamation or consolidation of an association with another similar organization amounts practically to a disbandment and dissolution of the association.[73] A transfer of the members and property of the association to another similar organization to the extinguishment of the former cannot be effected by the vote of a mere majority,[74] especially where a quorum of the association seeks to maintain its existence.[75]

§ 8. Incorporation of Existing Association

An existing association may merge with or become a corporation under statutory or contractual authority, but not otherwise In the event of an ineffectual attempt to incorporate an association, the existence, property, and membership of the association remain distinct from any corporation which may be formed as a purported successor of such association.

In the absence of either statutory or contractual authority, an unincorporated association cannot change into a corporation.[76]

In some states statutes exist which authorize voluntary associations to become incorporated. If such a law is in existence when a voluntary association is formed, it must be deemed to be incorporated into the association agreement by necessary implication, and every member must be conclusively presumed to have impliedly agreed, in joining the association, that it might at any future time be converted into a corporation in accordance with the statutes regulating the matter.[77] In the absence of such a statute, or of some similar provision in the laws of the society, or of a resolution authorizing incorporation, neither the officers of an association,[78] nor any number of the members less than all,[79] nor a majority of the branches of an association,[80] nor a minority of the membership,[81] have or has power to incorporate the association; and if they proceed to do so without authority, equity will restrain them at the instance of the dissenting members.[82]

Where an attempt to incorporate an existing unincorporated association, or to merge such association into a corporation, is ineffectual, such action in no wise affects the existence[83] or property[84] of the association, which remains a quasi entity distinct from the entity of the new corporation,[85] and no member of the association can or does become a member of the corporation without his knowledge and consent.[86] Under such circumstances, an elec-

72. Konta v. St Louis Stock Exch., 87 S.W. 969, 189 Mo 26

73. Rosenthal v. Reinfeld, 96 N.Y S. 199, 48 Misc. 652

74. Hill v. Rauhan Aarre, 86 N.E 924, 200 Mass. 438

75. Hill v. Rauhan Aarre, supra.

76. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No. 64, Improved Order of Red Men, 114 A. 440, 92 N J Eq 593.

Resolution ineffectual

An unincorporated association cannot, by resolution or other act of the members present at a meeting, become changed into a corporation, there being neither authority therefor by statute, nor even in the contract of association.—Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No. 64, Improved Order of Red Men, 114 A. 440, 92 N.J Eq. 593

Posts subsequently organized not incorporated by incorporation of state "Legion"

The incorporation of a state department of the American Legion was held not to give corporate status to local posts thereafter organized, where the general consent of the body to incorporation was not shown, the charter did not confer corporate status on local posts, and local posts obtained charters from the national organization—American Legion, William Frank Martin Post No 185, Department of Texas, v. Big Spring Veterans, (Tex.Civ App) 73 S W (2d) 594.

77. Spiritual, etc, Temple v. Vincent, 105 N W 1026, 127 Wis 93 —5 C J p 1336 note 69

78. N Y —Rudolph v Southern Ben League, 7 N Y S 135, 23 Abb N Cas 199

S C.—Southern Steam Packet Co. v. Magrath, 16 S C Eq. 93.

79. Hamaty v. St. George Ladies Soc., 131 N E 775, 280 Mass. 58 —Balukonis v. Lithuanian Roman Catholic Ben. Soc. of Most Sacred Heart of Jesus, 172 N E 505, 272 Mass 366—5 C J. p 1337 note 72

80. First Russian National Organization of the New England States v. Zuraw, 94 A. 976, 89 Conn 616

Acceptance of charter not merging whole association

A majority of the branches of a voluntary association were held without power, under the by-laws, to bind the association by their acceptance of the charter of a corporation, so as to merge the association in the corporation.—First Russian National Organization of the New England States v Zuraw, 94 A. 976, 89 Conn. 616.

81. Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So 54, 212 Ala. 444

82. N Y —Rudolph v. Southern Ben. League, 7 N Y S 135, 23 Abb N. Cas. 199—McGlynn v. Post, 21 Abb N Cas 97

Wis —Spiritual, etc, Temple v. Vincent, 105 N W. 1026, 127 Wis. 93.

83. Great Council of Improved Order of Red Men of State of New Jersey v Mohican Tribe, No. 64, Improved Order of Red Men, 114 A 440, 92 N J Eq 593

84. N.J —Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No 64, Improved Order of Red Men, supra.

Tex —American Legion, William Frank Martin Post No 185, Department of Texas v Big Spring Veterans, (Civ App) 73 S W (2d) 594.

85. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No 64, Improved Order of Red Men, 114 A. 440, 92 N J Eq 593.

86. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No. 64,

tion of new officers by the association is lawful,[87] the books and records remain the property of the association,[88] title to the property of the association remains vested in the trustees for the benefit of the association even though they may resign as trustees of the association and be elected trustees of the corporation,[89] and in a proper case the association may be entitled to an accounting,[90] or to the appointment of a receiver of the property[91]

Members of a chapter of a national association who have recognized it after notification of its incorporation may be estopped to deny the validity of the incorporation or to contend that the incorporated association did not succeed to the rights and authority of the unincorporated association[92]

Notice of an intention to incorporate an association should be given,[93] even where a statute authorizes the incorporation of associations and no provision for notice is contained therein.[94]

Burden of proof. In a contest between a voluntary association and an alleged corporation formed in the same name by members claiming that the act of becoming incorporated was that of the association, the burden is on the alleged corporation to show clearly the authority to incorporate, or else a ratification of the incorporation by the society.[95] So the burden of proving that an association became merged in a corporation rests upon the party setting up the merger.[96]

§ 9. Insolvency and Dissolution

a. Dissolution
b. Receivers

a. Dissolution

(1) By consent of members
(2) By cesser of associate object
(3) By abandonment or nonuser
(4) By withdrawal of members
(5) By death of members
(6) By incorporation
(7) By surrender or revocation of charter of subordinate or branch body
(8) By legislative action
(9) By judicial process

Improved Order of Red Men, supra.

That association members were interested in the formation of a corporation did not preclude them from asserting rights in the association not superseded by the corporation—Balukonis v Lithuanian Roman Catholic Ben Soc of Most Sacred Heart of Jesus, 172 N.E. 505, 272 Mass. 366.

87. Hamaty v. St George Ladies Soc, 181 N.E. 775, 280 Mass 58

Old officers as precluded from attacking status of new officers

Officers of a corporation claiming to have superseded an association could not contend that they were still officers of the association, and a contention, of the corporation organized for merging the association, that suit to recover the association's property could not be maintained because plaintiffs were not officers of the association, not having been properly elected under constitution, was held unavailing—Balukonis v Lithuanian Roman Catholic Ben Soc. of Most Sacred Heart of Jesus, 172 N.E. 505, 272 Mass 366.

Right to recover property of association

Officers of an association could recover property thereof even if members of the corporation claiming to have superseded the association were still members of the association—Balukonis v. Lithuanian Roman Catholic Ben Soc of Most Sacred Heart of Jesus, 172 N.E. 505, 272 Mass. 366.

88. Hamaty v. St George Ladies Soc, 181 N.E 775, 280 Mass 58.

Bank book, check books, and record books held the property of an association, not of a corporation claiming to have superseded the association but which failed to do so—Hamaty v St George Ladies Soc. 181 N.E. 775, 280 Mass 58

89. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No 64, Improved Order of Red Men, 114 A. 440, 92 N.J.Eq. 593.

90. Hamaty v. St George Ladies Soc, 181 N.E 775, 280 Mass 58

Moneys in bank taken over by corporation

An association was held entitled to accounting of moneys to its credit in bank and taken over by officers of the corporation attempting to, but not succeeding in, superseding the association—Hamaty v St. George Ladies Soc., 181 N.E. 775, 280 Mass 58.

91. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No 64, Improved Order of Red Men, 114 A. 440, 92 N.J.Eq. 593.

Where corporation in possession of association's property

Where an unincorporated association attempted ineffectually to incorporate, and officers of the corporation were elected, and the corporation had possession of the association's property which was left without officers or agents, it was held that the court would direct the calling and holding of a meeting of the association to organize and choose officers, trustees, and agents, and would appoint a receiver to hold the association's property and deliver it to the persons so chosen—Great Council of Improved Order of Red Men of State of New Jersey v Mohican Tribe, No. 64, Improved Order of Red Men, 114 A. 440, 92 N.J.Eq 593

92. Bancroft v Cook, 162 N.E 691, 264 Mass 343

Complete cessation of an unincorporated society's action tends to prove acquiescence in a corporate merger—Bancroft v. Cook, 162 N.E 691, 264 Mass. 343

93. Rudolph v Southern Ben League, 7 N.Y.S 135, 23 Abb N Cas 199.

94. Henry v. Simanton, 74 A 153, 64 N.J.Eq 572, reversed on other grounds 61 A. 1065, 67 N.J.Eq. 606

95. Rudolph v Southern Ben League, 7 N.Y.S. 135, 23 Abb N Cas. 199.

96. Mason v. Finch, 28 Mich 282.

Burden not sustained

Evidence, in a corporation's action against the treasurer of a voluntary association for funds held by him as such treasurer, was insufficient to show that the association had merged in the corporation, so as to entitle plaintiff to such funds—First Russian National Organization of the New England States v. Zuraw, 94 A. 976, 89 Conn 616.

(1) By Consent of Members

Subject to the rights of third persons, an association may be dissolved by unanimous vote of its members, although a mere majority has been held unable to dissolve the association against the dissent of a minority.

An unincorporated association may be dissolved by the unanimous consent of its members,[97] provided the meeting held for that purpose is regularly called;[98] but it has been held that a mere majority of the members cannot dissolve the association against the wishes of the minority,[99] where the minority consists of a sufficient number to constitute the association;[1] and much less can the association be dissolved by the act of a single member in violation of the contract contained in the articles of association or constitution.[2]

As against third persons. An unincorporated association, doing business under a recognized name, and liable under the statute to be sued by such name, cannot go out of existence by the mutual consent of its members, while its contracts and obligations are outstanding, and thus avoid liability to suit thereon.[3]

(2) By Cesser of Associate Object

An association may become dissolved by reason of the cessation of its object or purpose.

Where the purpose of a voluntary association entirely fails, the society becomes dissolved.[4] Thus, where an association is formed by contributing individuals to accomplish a certain object upon the occurrence of a specified event, otherwise the contributions to be returned to the members, the association will be regarded as dissolved if the event fails to occur and the object of the association thus ceases.[5]

(3) By Abandonment or Nonuser

The abandonment or nonuser of an association may result in its dissolution; but the loss of the property and failure to hold meetings or elect officers are not of themselves such an abandonment or nonuser as necessarily to effect a dissolution.

An association may be regarded as dissolved if it abandons the purposes of its creation and ceases to exercise its functions,[6] especially where power to resume business does not exist.[7] However, neither the loss of the association's property,[8] nor a failure to hold regular meetings[9] or to elect officers,[10] nor all combined,[11] necessarily amounts to an abandonment.

The question whether the society has become dissolved by abandonment is one of law for the court.[12]

(4) By Withdrawal of Members

The withdrawal of a part of its members ordinarily will not effect the dissolution of an association.

The withdrawal of one or more members of an association does not ipso facto operate as a dissolution of that body, if it is evident that the association was designed to have a continuing existence;[13] and this is so, although the withdrawing members dispose of property, the ownership of which entitled them to admission to membership.[14] Even a withdrawal of a majority of the members in a body does not have this effect if enough members remain loyal to the association to carry out its purposes.[15]

(5) By Death of Members

The death of a member does not cause dissolution of an association.

The death of a member of an association does not work a dissolution of that body.[16]

97. Mich—Brown v. Stoerkel, 41 N W 921, 74 Mich 269, 3 L.R.A 430 N H—Duke v. Fuller, 9 N.H. 536, 32 Am D 392 S.C—Stemmermann v. Lilienthal, 32 S E 535, 54 S C. 440. 5 C J. p 1337 note 78

98. N H—St. Mary's Benev. Assoc v Lynch, 9 A. 98, 64 N.H. 213. R.I—Industrial Trust Co v Green, 23 A. 914, 17 R.I. 586, 17 L.R.A 202. 5 C J p 1337 note 79.

99. Hill v. Rauhan Aarre, 86 N.E 924, 200 Mass. 428

1. Minor v. St. John's Union Grand Lodge F. A A. Y. M, (Tex Civ App) 130 S W. 893—5 C.J. p 1337 note 81

2. Hossack v. Ottawa Dev Assoc., 91 N E 439, 244 Ill. 274—5 C.J p 1337 note 82.

3. Camden, etc, R Co v Guarantors of Pennsylvania, 35 A. 796, 59 N J Law 328.

4. Pierson v. Gardner, 36 A. 442, 31 N J Eq 505.

5. Koehler v. Brown, 2 Daly (N Y) 78—5 C J. p 1337 note 85

6. N J—Grand Lodge K. P. v. Germania Lodge No. 50, 38 A. 341, 56 N J Eq 62. Vt—Hewett v. Hatch, 57 Vt. 16—Strickland v. Prichard, 37 Vt. 324—Penfield v. Skinner, 11 Vt. 296 Wash.—Burgess v. Peth, 140 P. 351, 79 Wash. 298 5 C J. p 1337 note 87.

7. Kuehl v. Meyer, 50 Mo.App. 648

8. Kuehl v. Meyer, supra.

9. Kuehl v. Meyer, supra.

10. Kuehl v. Meyer, supra.

11. Kuehl v. Meyer, supra.

12. Kuehl v. Meyer, 42 Mo App 474.

13. Tenney v New England Protective Union, 37 Vt 64—5 C J. p 1333 note 94.

14. Troy Iron, etc, Factory v. Corning, 45 Barb (N.Y.) 231

15. McFadden v. Murphy, 21 N.E. 868, 149 Mass. 341—5 C J. p 1338 note 96

16. Ostrom v. Greene, 55 N.E. 919, 161 N Y. 353, 361, affirming 52 N. Y S. 1147, 30 App Div. 621, which affirmed 45 N Y S. 852, 20 Misc. 177—Branagan v. Buckman, 122 N. Y S. 610, 67 Misc. 242, affirmed 130 N.Y.S. 1106, 145 App Div. 950—5 C J. p 1338 note 97.

(6) By Incorporation

Creation of a corporation pursuant to unanimous vote of the members of an association to incorporate the same operates as a dissolution of the association.

If the members of an association unanimously vote to incorporate it, the creation of the corporation pursuant thereto ipso facto dissolves the association and transfers its property and rights to the corporation.[17] To have this effect, however, all the members must consent to the incorporation, the act of a mere majority in securing a corporate charter is insufficient,[18] and, where the administrative board of an association having members in several states organizes a corporation in one of the states in the name of the association, the corporation does not succeed to the property and rights of the association until it has been accepted by the vote of the associate members or their representatives, although the constitution of the association authorizes the administrative board to take out a charter for the state in which it officiates in the name of the association.[19] A special legislative act incorporating certain members of a voluntary association and their associates does not work a dissolution of the association, where the corporation is created, not as a substitute for the association, but in its aid, and the association as a body has no authority to accept the charter and organize a corporation under it, or to merge itself in a corporation organized thereunder;[20] and this is so, although the association votes to accept the charter, and in some respects assumes to be a corporation, where it in fact continues to act as a voluntary association.[21]

Incorporation of a national association will not necessarily defeat a trust in the form of a subscription agreement to create a building fund for a local chapter.[22]

Merger of association in corporation. An association is not merged in a corporation formed by a majority of its members under the same name and for the same purposes, where each organization is distinct in officers, meetings, property, and other incidents,[23] in the absence of facts creating an estoppel against the nonconsenting members,[24] or constituting a ratification by them of the act of the majority in forming the corporation.[25] The act of the majority in procuring a corporate charter cannot, of course, be ratified by those who could not in the first instance have authorized it.[26]

Statutory transfer of property. A transfer of property from an unincorporated association to a corporation composed of the same members may be worked by legislative enactment, accepted and given effect to by the two organizations.[27]

(7) By Surrender or Revocation of Charter of Subordinate or Branch Body

The voluntary surrender of its charter by a local branch of an association may dissolve such local and result in a transfer of its property to the principal body pursuant to governing provisions of the association's constitution, although revocation of the local charter by the state or national body generally effects a dissolution without transfer of property

Where an unincorporated association organizes a subordinate branch or body, there is as a rule no contractual relation between them by or under which the superior order or association may reserve to itself the right to take possession of and use as its own, property of the subordinate association in the event of lawful suspension or dissolution of the latter,[28] and where, pursuant to the laws of the order, the main association has revoked the charter of the subordinate, especially if such revocation is without sufficient cause and the right to revoke is contested, the supreme body has no power to require the subordinate body to surrender to it the funds and property thereof.[29] Where, however, the subordinate body has voluntarily relinquished its charter, the constitution or laws of the association requiring surrender of its property to the main or superior organization may be enforced,[30] and the same result follows where the subordinate body has consented to or acquiesced in a revocation of its charter by the superior association, in which case the provisions of the constitution of the association control as respect disposition of the property of the dissolved subordinate or branch association.[31] These questions frequently arise in con-

17. Conn.—First Russian National Organization of the New England States v. Zuraw, 94 A. 976, 89 Conn. 616
Mass.—Balukonis v. Lithuanian Roman Catholic Ben. Soc. of Most Sacred Heart of Jesus, 172 N.E. 505, 272 Mass. 366.
5 C.J. p. 1338 note 3.

18. Mason v. Finch, 28 Mich. 282.—5 C.J. p. 1338 note 4

19. Koprucki v. Wojciechowski, 130 N.Y.S. 736, 73 Misc. 46.

20. McFadden v. Murphy, 21 N.E. 868, 149 Mass. 341

21. McFadden v. Murphy, supra.

22. Bancroft v. Cook, 162 N.E. 691, 264 Mass. 343.

23. Mason v. Finch, 28 Mich. 282

24. Mason v. Finch, supra.

25. Mason v. Finch, supra.—5 C.J. p. 1338 note 10

26. Mason v. Finch, supra.

27. Edgefield Ladies' Benev. Soc. No. 2 v. Edgefield Benev. Soc. No. 2, 2 Tenn. Ch. 77

28. Herman v. Brooklyn Sav. Bank, 137 N.Y.S. 738, 196 App. Div. 269.

29. Brotherhood of Railroad Trainmen v. Williams, 277 S.W. 500, 211 Ky. 638

30. Brotherhood of Railroad Trainmen v. Williams, supra.

31. Brotherhood of Railroad Trainmen v. Williams, supra.

nection with beneficial associations, and further authorities dealing therewith will be considered in §§ 63 and 64 of the title Beneficial Associations [7 C.J. p 1114 note 33–p 1116 note 52].

(8) By Legislative Action

It is within the power of the legislature to enact statutes in effect dissolving associations with objects contrary to the fundamental principles of our form of government.

The state has power to eradicate, or in substance to dissolve, by appropriate legislation, any association which is in its objects opposed to the fundamental principles of our government, and is not required to await actual violation of law before enacting such legislation.[32]

(9) By Judicial Process

(a) In general
(b) Grounds
(c) Venue

(a) In General

Equity has jurisdiction to decree the dissolution of an unincorporated association, but will not exercise its powers in this respect while a majority of the members favor continuance of the association, nor in violation of lawful provisions of the association's constitution.

A court of equity has undoubted jurisdiction in a proper case to decree the dissolution of an unincorporated association,[33] but it will not dissolve a private unincorporated association organized for general purposes of public utility, and divide its assets among its members, so long as members remain who are ready and willing to execute the public trust with which the association is charged,[34] especially where the application for dissolution is made by a mere minority,[35] and, where the constitution of a society provides that it shall not be dissolved so long as a specified number of members favor its continuance, such provision is controlling in an action to obtain a dissolution.[36]

(b) Grounds

An association may be dissolved by judicial process on the ground that it is opposed to public policy, or because its operations have been abandoned, or because of differences among the members, although ordinarily dissolution will not be decreed on the latter ground so long as the association is fairly conducted in a manner conducive to execution of its purposes The wrongful expulsion of a member does not justify dissolution, unless the association in effect constitutes a partnership, in which case any ground which would justify dissolution of a partnership will warrant dissolution of such association.

An association may be dissolved on the ground that it is illegal as contrary to public policy.[37]

When the operations of an association have been discontinued, its objects being abandoned by common consent of the members, equity has jurisdiction to decree a dissolution[38] Violent dissensions and irreconcilable differences among the members of an association constitute a good ground for dissolving it at the instance of one or more of its members,[39] especially where, in consequence thereof, the objects of the association have been defeated.[40] Ordinarily, however, the courts will not interfere to dissolve an association on this ground so long as the government of the society is fairly administered, and its purposes can be carried out;[41] and in any event the member or members aggrieved should first exhaust their remedies for redress in the association itself, if any are provided, before resorting to the courts for relief by way of dissolution.[42]

"All other supplies" and "effects;" articles covered by terms

Under the charter of a voluntary association, providing that the president of a defunct lodge should deliver to the grand lodge, "charter, seal, rituals, unwritten work, and all other supplies furnished by Grand Lodge, and all effects of lodge at time of dissolution," "all other supplies" come within the rule of ejusdem generis, and "effects" include money, bonds, and other property—Brotherhood of Railroad Trainmen v Williams, 277 S.W 500, 211 Ky. 638

32. People ex rel Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859

Ku Klux Klan

"It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns, and doing things calculated to strike terror into the minds of the people It is claimed that they are organized against certain of the citizens, by reason of race or religion This, of course, cannot be tolerated under our form of government. If what is claimed of it is true, it strikes at fundamental principles of our government, principles that have been recognized as the foundation of our liberties. If they are true, the state has the power to eradicate them and is not required to await active violations before enacting legislation. It may anticipate them"—People ex rel Bryant v Sheriff of Erie County, 206 N.Y.S. 533, 535, 123 Misc. 859.

33. Ala.—Burke v. Roper, 79 Ala. 138
Cal.—Gorman v. Russell, 14 Cal. 531
Ill.—Eury v. Merrill, 42 Ill App. 193.
N.Y.—Fischer v. Raab, 57 How Pr. 87.

34. Thomas v. Ellmaker, 1 Pars Eq. Cas (Pa.) 98.

35. Thomas v. Ellmaker, supra.

36. Fischer v. Raab, 57 How Pr (N. Y.) 87.

37. Kealey v. Faulkner, 7 Ohio N P (N S.) 49.

38. Ala.—Burke v. Roper, 79 Ala. 138.
Mo.—Kuehl v. Meyer, 50 Mo App 648.

39. Fischer v. Raab, 57 How.Pr.(N Y.) 87.

40. Eury v Merrill, 42 Ill App. 193.

41. Borman v. Russell, 14 Cal. 531—5 C.J. p 1339 note 21.

42. N.Y.—Lafond v Deems, 81 N.Y. 507, 8 Abb N Cas. 344, reversing 1 Abb N.Cas 318, 52 How Pr 41—Fischer v. Raab, 57 How Pr. 87.
R.I.—Industrial Trust Co. v. Green,

The wrongful expulsion of a member from the association, while affording grounds for an equitable suit to compel reinstatement (infra § 26), does not justify a court of equity in decreeing a dissolution,[43] unless the association is of such a nature that in legal effect it constitutes a partnership,[44] in which case it may be dissolved by a court of equity upon any ground that would justify the dissolution of a partnership.[45]

A disorderly and irregular vote removing the president of an association from office, but not expelling him from membership, does not constitute ground for dissolution.[46]

(c) Venue

Generally speaking a suit to dissolve an unincorporated association should be brought in the judicial district where its property is located and its operations are conducted.

Ordinarily a suit to dissolve an unincorporated association should be brought in the judicial district where its headquarters and property are located and its business is actually transacted.[47]

b. Receivers

In accordance with general rules, a receiver may be appointed to conserve the assets of an association

In a proper case a receiver may be appointed to conserve the property of an association.[48]

In the title Receivers will be found a detailed treatment of the general grounds and circumstances for and under which such officers may be appointed.

§ 10. —— Operation and Effect

a. In general
b. Distribution of assets

a. In General

Either by virtue of statute or independently thereof a court of equitable jurisdiction may in a proper case wind up an association and duly settle its affairs.

As will appear from a reference to the statutes, and to the case cited infra this note, in some states the statutes expressly confer upon a court of equity jurisdiction to wind up voluntary associations in the manner provided for winding up insolvent corporations.[49]

Independently of statute, a court of equitable jurisdiction may interfere in a proper case to settle the affairs of an association by providing for the sale of its property and the distribution of the proceeds under the direction of the court,[50] or by distributing associate funds among the several contributing members in proportion to the amount respectively contributed by them.[51] So equity may in a proper case intervene to ascertain the liabilities of an association, and to require each member to pay his pro rata share thereof.[52] Where, however, a bill is filed by some of the members of

23 A. 914, 17 R.I. 586, 17 L.R.A. 202.
5 C.J. p 1339 note 22.

43. Ala.—Burke v. Roper, 79 Ala. 138.
Pa.—Thomas v. Ellmaker, 1 Pars.Eq. Cas. 98.

44. Gorman v. Russell, 14 Cal. 531.—5 C.J. p 1339 note 25.

45. Gorman v. Russell, 14 Cal. 531.—5 C.J. p 1339 note 17.

46. Industrial Trust Co. v. Green, 23 A. 914, 17 R.I. 586, 17 L.R.A. 202.

47. Whitaker v. Miller, 152 A. 670, 301 Pa. 410.

48. N.J.—Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No. 64, Improved Order of Red Men, 114 A. 440, 92 N.J.Eq. 593.
Ohio.—Kealey v. Faulkner, 7 Ohio N.P.(N.S.) 49.
Tex.—Payne v. Little Motor Kar Co., (Civ.App.) 266 S.W. 597.

Proper case shown

A petition alleging that trustees of an unincorporated association misappropriated large portions of the company's funds, and had issued to themselves five hundred thousand dollars of stock for which they paid nothing, showed sufficient grounds for appointment of receiver as against demurrers and exceptions thereto, under Rev.St. art. 2079.—Payne v. Little Motor Kar Co., (Tex.Civ.App.) 266 S.W. 597.

Proper case not shown

(1) In a suit against unincorporated associations and certain individuals therein, the court was held to be without jurisdiction to appoint a receiver for defendants, where no service was had on the members of such association; Crawford & M. Dig. § 1098 being unavailing.—District No. 21, United Mine Workers of America v. Bourland, 277 S.W. 546, 169 Ark. 796.

(2) Interim appointment of a receiver-trustee for an unincorporated association was held improper, where a complaint based on past acts and not on threatened irreparable injury was controverted by defendants' proofs.—Kellett v. Local No. 274, United Ass'n of Journeymen Plumbers and Steamfitters of U. S. and Canada, 168 A. 265, 114 N.J.Eq. 107.

49. In New Jersey, L.(1896) c. 185 § 118, entitled "An act concerning corporations," provides that Act (1875) entitled "An act concerning corporations," "except so far as herein expressly re-enacted, is hereby repealed." The Act of 1899 provides that the chancellor may wind up voluntary associations in the manner provided for winding up insolvent corporations under the Act of 1875. It was held that the provisions respecting the winding up of insolvent corporations contained in the Act of 1875 being substantially re-enacted in the Act of 1896, its effect was to continue them in force, notwithstanding the repealing clause, so that they could be adopted by the Act of 1899.—Henry v. Sumanton, 54 A. 153, 64 N.J.Eq. 573, reversed on other grounds 61 A. 1065, 67 N.J.Eq. 606.

50. Clerks' Inv. Co. v. Sydnor, 19 App.D.C. 89.—5 C.J. p 1339 note 29.

51. Ala.—Burke v. Roper, 79 Ala. 138.
Ohio.—Kealey v. Faulkner, 7 Ohio N.P.(N.S.) 49.
5 C.J. p 1339 note 30.

52. Hodgson v. Baldwin, 65 Ill. 532.—5 C.J. p 1339 note 31.

an association against the others to have its affairs wound up on the grounds that there are irreconcilable differences between the parties, and that defendants have wrongfully excluded complainants from the enjoyment of the property of the association, and the answer alleges that complainants were lawfully expelled, and that defendants are, under the by-laws, the lawful custodians of the property, no steps will be taken by the court before final hearing, except to restrain defendants from disposing of the property.[53]

Authority of commissioners to wind up. Commissioners appointed to wind up the affairs of a dissolved association have no authority to bind the members by a new undertaking.[54]

b. Distribution of Assets

(1) Rights of members
(2) Rights of creditors
(3) Apportionment of liability of members

(1) Rights of Members

Upon the dissolution of an association its net assets should as a rule be distributed pro rata among those who were members at the time of dissolution or the legal representatives of deceased members

Upon the dissolution of a voluntary association, unless otherwise provided by its rules,[55] its property should be distributed pro rata among its members,[56] provided the rights of third persons have not intervened, as explained below in § 10 b (2), and provided the association does not partake of the nature of a charity.[57]

One who ceased to be a member prior to the dissolution is not entitled to share in the distribution,[58] since the interest of a member in the property of the association ceases on the termination of his membership, as will be shown in § 27.

The heirs or devisees of a deceased member are not entitled to share in the distribution,[59] unless the association was dissolved before the death of such member occurred.[60]

Reversion of property to grantor. Unless so provided in the grant, the real property of an association does not revert to the grantor on dissolution of the society.[61] Accordingly, a lease held by an association does not revert to the lessor on dissolution of the society within the term,[62] but on the contrary it becomes the property of the several members who may jointly exercise their rights as lessees,[63] and this is so although the lease contains a provision against assignment.[64]

(2) Rights of Creditors

The funds and property of an association are on dissolution applicable primarily to the payment of its debts, preference being given to nonmember creditors as against member creditors The purchaser of associate property will ordinarily take it free and clear of the claims of creditors.

On dissolution of an association, its property and funds are applicable primarily to the payment of its debts;[65] and the property of the association must first be applied to pay the debts of creditors who are not members before it can be applied to the debts of those who are members.[66]

The fact that persons extending credit to the association agree to look only to its assets for the satisfaction of their claims, thus exempting the members from individual liability, does not give them a lien on the assets; and accordingly, where the association disposes of all its property and ceases to be a going concern, the purchaser thereof does not take the same impressed with a trust for the benefit of the association's creditors.[67]

(3) Apportionment of Liability of Members

After the assets of the association have been exhausted, the courts will apportion its debts among the members, each member being liable to the creditors for all such debts, although as between the members each is bound to pay only his numerical proportion.

53. Gobert v. Eckhard, (N.J.) 17 A. 805
54. Lake v. Mumford, 12 Miss 312.
55. Grand Lodge, K. P. v. Germania Lodge No. 50, 38 A. 341, 56 N.J.Eq. 63—State Council O. U. A. M. v. Sharp, 38 N.J.Eq. 24—5 C.J. p. 1339 note 34.
56. Hopkins v. Crossley, 96 N.W. 499, 132 Mich. 612—5 C.J. p. 1340 note 35.
57. Mass.—Matter of Proprietors New South Meeting House, 13 Allen 497
N.H.—Duke v. Fuller, 9 N.H. 536, 32 Am.D. 392.
Pa.—Thomas v. Ellmaker, 1 Pars. Eq. Cas. 98.
58. Burt v. Oneida Community, 33 N.E. 307, 137 N.Y. 346, 19 L.R.A. 297, 34 N.E. 288, 138 N.Y. 649, affirming 16 N.Y.S. 289, 61 Hun 626—White v. Brownell, 3 Daly (N.Y.) 329, 4 Abb.Pr. (N.S.) 162, affirming 3 Abb.Pr. (N.S.) 318
59. Mason v. Atlanta F. Co. No. 1, 70 Ga. 604, 48 Am.R. 585—5 C.J. p. 1340 note 40.
60. Hopkins v. Crossley, 96 N.W. 499, 132 Mich. 612.
61. Sommers v. Reynolds, 61 N.W. 501, 103 Mich. 307.
62. Sommers v. Reynolds, supra.
63. Sommers v. Reynolds, supra.
64. Sommers v. Reynolds, supra.
65. Mich.—Sommers v. Reynolds, 61 N.W. 501, 103 Mich. 307
N.Y.—Parks v. Knickerbocker Trust Co., 122 N.Y.S. 521, 137 App.Div. 719, affirmed 132 N.Y.S. 1140, 148 App.Div. 896.
66. Babb v. Reed, 5 Rawle (Pa.) 151, 28 Am.D. 650
67. Industrial Lumber Co. v. Texas Pine Land Assoc., 72 S.W. 875, 31 Tex.Civ.App. 275—5 C.J. p. 1340 note 48.

If the assets of the association fail to equal its debts, the courts will apportion the liabilities among the members and make assessments accordingly.[68]

As between the members of an unincorporated association, each is bound, after the exhaustion of all the assets of the company, to pay only his numerical proportion of the debts of the concern;[69] but as against the creditors each member is liable for all the debts.[70]

A statute authorizing the chancellor to wind up associations in the same manner provided for winding up insolvent corporations does not clothe the chancellor with power to enforce payment of the debts of an association by an assessment against the members thereof, where by a previous proceeding in chancery the business in which such debts were contracted has been wound up and the assets distributed.[71]

§ 11. Articles of Association, Constitution and By-Laws

a. In general
b. As contract between members
c. Amendment and repeal
d. Jurisdiction of courts as to reasonableness and construction

a. In General

The articles of association, constitution, or by-laws of an unincorporated association are designed to define the privileges and duties of the members, and if not contrary to public policy may be of whatever character the members care to adopt.

The function of the constitution and by-laws of an unincorporated association is to define the privileges secured and the duties assumed by those who have become members.[72]

The association, being solely a creature of convention between the members, has the power to adopt such articles of association or constitution and to enact such by-laws as the associates may agree upon,[73] so long as they are not contrary to public policy or the law of the land.[74]

If an association has a constitution or articles of association, no resolution can be effectively adopted in conflict therewith;[75] but an association without articles of association or constitution may adopt such by-laws as it sees fit.[76]

Revocation of the charter of a subordinate branch

68. Ill—Hodgson v Baldwin, 65 Ill 532.
Vt—Henry v. Jackson, 37 Vt. 431—Stimson v. Lewis, 36 Vt. 91.
5 C.J p 1340 note 49

69. Hodgson v Baldwin, 65 Ill. 532

70. Hodgson v Baldwin, supra.

71. Henry v Simanton, 61 A. 1065, 67 N J Eq 606, reversing 54 A. 153, 64 N J Eq 572

72. Polin v Kaplan, 177 N E. 833, 257 N Y. 277, reversing 246 N Y S 522, 231 App Div 849 and Schneider v Kaplan, 246 N Y S 524, 231 App Div 850, reargument denied Polin v Kaplan, 178 N E 803, 257 N.Y. 579

73. Louisville Bd Fire Underwriters v Johnson, 119 S W. 153, 133 Ky. 797, 24 L R A (N S) 153—5 C J p 1341 note 54

74. Gallaher v. American Legion, 277 N Y S. 81, 85, 154 Misc. 281, affirmed 271 N Y S. 1012, 242 App Div. 604—Oyster v. Slovene Nat Ben. Soc. of U S of America, 278 N.Y S 320, 154 Misc. 19—5 C.J. p 1341 note 55

"By-laws and regulations of associations must be reasonable and not contrary to law or public policy"—Gallaher v. American Legion, supra

Regulation restricting freedom of speech

Where a regulation of the American Legion provided that "Where the National Organization has taken a position on any subject under mandate of the National Convention, no Post or County Organization may adopt a resolution in conflict with that position A Post or County Organization, however, may adopt resolutions protesting against the action taken at the National Convention and petitioning that such action be amended or rescinded. Such resolution of protest, however, must not be given to the public press nor be forwarded to any public officials but must be submitted to the National Organization through channels," and a member post disregarded this resolution by transmitting to the public press a statement of the post's action in adopting a resolution which opposed the present payment of the soldiers' bonus, the gravamen of the offense being that after the national body had taken a position on this subject, the post made public a contrary stand, in holding that expulsion of the post for such action was unlawful, the court condemned the regulation as unreasonable and invalid saying: "To subject a subordinate group of the Legion, consisting of sixty-seven members, to the disgrace of banishment because its officers failed to comply with a regulation such as this, designed to suppress public expression of an independent view by a subdivision of the national body, on a matter which is wholly outside the scope of the granted powers of the American Legion as defined by its charter, is contrary to law, unsound in principle, and out of harmony with the noble ideals for which this fine organization was founded."—Gallaher v. American Legion, 277 N.Y.S 81, 84, 154 Misc 281, affirmed 271 N.Y.S. 1012, 242 App.Div 604.

By-laws held valid

(1) A by-law of an association organized under Rev St (1909) §§ 3432–3445, to promote automobile shows providing that moneys advanced for floor space should be returned only to those who had been members at or prior to the last annual meeting preceding such show was not unreasonable, arbitrary, or discriminatory.—Weber Implement & Automobile Co. v St. Louis Automobile Mfrs' & Dealers' Ass'n, (Mo.App) 181 S.W 1025.

(2) A by-law of an automobile manufacturers and dealers association organized under Rev St (1909) §§ 3432–3445, relating to refund to members of advances for floor space at shows, was not contrary to the objects of the association, as declared in its charter.—Weber Implement & Automobile Co. v. St. Louis Automobile Mfrs' & Dealers' Ass'n, supra.

75. Sackett, etc., Lith., etc., Co. v. National Assoc of Employing Lithographers, 113 N.Y.S. 110, 61 Misc 150.

76. Branagan v. Buckman, 122 N.Y S. 610, 67 Misc. 242, affirmed 130 N.Y.S. 1106, 145 App.Div. 950.

or post of an association is invalid where not in compliance with applicable provisions of the constitution of the association.[77]

b. As Contract between Members

The constitution and by-laws of an association constitute an enforceable contract between the parties.

The articles of association or constitution and the by-laws so agreed upon constitute a contract which the courts will enforce both as between the members themselves and as between the association on one side and the individual members on the other, and their rights and powers, and duties and liabilities, are measured accordingly.[78] To be binding on the members, however, the articles or constitution and the by-laws must have been assented to by them, as in the case of other contracts[79]

c. Amendment and Repeal

The articles of association or constitution of an association are subject to amendment. Amendment should be in accordance with constitutional or other provisions therefor, or by majority vote of a quorum in the absence of express provision as to amendment.

An association has power to amend its articles of association or constitution in the mode prescribed therein[80]

The by-laws of an association may ordinarily be amended or repealed at any time at the will of the members,[81] provided the alteration is not inconsistent with the fundamental scheme of the society[82] and does not destroy vested rights[83] All this is so because, on all rights and duties incident to membership, every member, by his contract of membership, pledges his assent in advance to every lawful rule adopted by the majority in furtherance of the common objects.[84]

Mode of amendment or repeal. To be effective, the amendment or repeal of the constitution or by-laws must be regularly made in the manner provided by the organic law of the association,[85] and accordingly a new constitution adopted in a mode other than that provided for in the old constitution was held void.[86] Substantial compliance, how-

77. James R Kirby Post No 50, American Legion, Department of Massachusetts v American Legion, 155 N.E. 462, 258 Mass 434

78. Ky—Brotherhood of Railroad Trainmen v. Williams, 477 S.W. 500, 311 Ky. 633
La—Butts v. Y. M. V. S, 6 La App (Orleans) 127.
Mass—Mulcahy v. Huddell, 172 N.E. 796, 272 Mass 539—Mulcahy v. Carroll, 172 N.E. 790, 272 Mass 524
Mo—South St. Joseph Live Stock Exchange v. St. Joseph Stock Yards Bank, 16 S.W.(2d) 722, 223 Mo.App. 623, 224 Mo.App 40—Hall v. Morrin, (App) 293 S.W. 435.
N.Y.—Oyster v. Slovene Nat. Ben Soc. of U. S of America, 278 N.Y.S. 320, 154 Misc. 19—Robinson v. Dahm, 159 N.Y.S. 1053, 94 Misc. 729.
Ohio—International Union of Steam and Operating Engineers v. Owens, 162 N.E. 386, 119 Ohio St 94.
Pa—Waid v. Blooming Valley Cemetery Assoc, 35 Pa.Co. 515
Tex.—Brown v. Harris County Medical Soc, (Civ.App) 194 S.W. 1179.
5 C.J. p 1341 note 58.
"The constitution, rules, and by-laws of a voluntary unincorporated association constitute a contract between the association and its members, which governs the rights and duties of the members between themselves and in their relation to the association, with reference to all matters affecting its internal government and the management of its affairs, and are measured by the terms thereof"—Des Moines City Ry Co v Amalgamated Ass'n of Street & Electric Ry. Employees of America, Division 441, of Des Moines, 213 N.W. 264, 269, 204 Iowa 1195
Affiliation constitutes agreement to be bound
"It is well established that when a person affiliates himself with a voluntary association he thereby agrees to abide by its constitution and by-laws which measure his relations to the organization and are the contract by which he is bound"—Shapiro v. Gehlman, 272 N.Y.S. 624, 628, 152 Misc. 13, reversed on other grounds 278 N.Y.S. 785, 244 App. Div. 238.
Prior agreement
A member of an association may, by prior agreement, authorize the association to act for him and bind him by subsequent by-laws, awards, and the like—Kelsey v Early Grain & Elevator Co., (Tex.Civ.App) 206 S.W. 849

79. Austin v Searing, 16 N.Y. 112, 69 Am.D 665

80. Mass.—Goulding v. Standish, 65 N.E. 803, 182 Mass 401.
N.Y.—Bachman v Harrington, 102 N.Y.S. 406, 52 Misc. 26
Pa.—Leatherman v. Wolf, 88 A. 17, 240 Pa 557.
5 C.J. p 1341 note 61.

81. McConnell v. Owyhee Ditch Co., 283 P. 755, 132 Or. 128—5 C.J. p 1341 note 62.

82. Marshall v. Pilots' Assoc, 18 Pa. Super. 644, reversed on other grounds 55 A. 916, 206 Pa. 182—5 C.J. p 1342 note 63

83. Marshall v. Pilots' Assoc, 55 A. 916, 206 Pa. 182, reversing on other grounds 18 Pa.Super. 644—5 C.J. p 1342 note 64.

84. Marshall v. Pilots' Assoc., 18 Pa.Super. 644, reversed on other grounds 55 A. 916, 206 Pa. 182.

85. Mo—Hall v. Morrin, (App) 293 S.W. 435.
N.Y.—Hillery v. Pedic Soc of State of New York, 179 N.Y.S. 62, 189 App.Div. 766.
5 C.J. p 1342 note 66.
Attempted amendment by executive committee
Where the by-laws of a society provided that they should not be altered or amended, except by a three-fourths vote of all the active members present at the annual meeting, an alleged attempt to amend by-laws at a meeting held in March, by adoption of recommendation of executive board was without force—Hillery v. Pedic Soc of State of New York, 179 N.Y.S. 62, 189 App.Div. 766
Members bound by amendments duly adopted
Members of an association are bound by amendments and additions to the constitution and by-laws subsequently adopted in accordance with existing rules—Ace Bus Transp Co. v South Hudson County Boulevard Bus Owners' Ass'n, 177 A. 360, 113 N.J.Eq. 31, affirmed 180 A. 835, 119 N.J.Eq. 37.

86. Hochreiter's Appeal, 93 Pa. 479

ever, with the organic law is sufficient.[87] By the adoption of a new constitution and by-laws covering the same grounds as the former ones and intended as a substitute for the same, the earlier constitution and by-laws are repealed;[88] but a by-law is not repealed by the adoption of a new constitution making no reference to the by-laws and not inconsistent therewith.[89]

If the by-laws of an association make no provision for their alteration or amendment, they may be altered, amended, or repealed at any meeting of the members where there is a quorum by a majority vote of those present.[90]

Usage. Evidence of an association's established method of doing business is sufficient to show acquiescence in or consent to a departure from its by-laws.[91]

d. Jurisdiction of Courts as to Reasonableness and Construction

While the courts ordinarily will not pass on the reasonableness of the articles of association or constitution, they may construe them or determine whether they were duly adopted.

If the members of an association expressly or impliedly consent to the articles of association or constitution and the by-laws, the courts ordinarily will not pass on the question of the reasonableness thereof.[92] They may, however, determine whether the by-laws have been adopted according to the rule agreed upon by the members of the association,[93] although if the issue as to whether a by-law has been adopted is merely one of fact, it is for the jury.[94]

It has uniformly been held that the courts may construe and fix the meaning of the articles or constitution and the by-laws.[95] However, the final decision of the regular tribunal of an association that a particular by-law has not become a dead letter will not ordinarily be reviewed by the courts.[96]

§ 12. Rights, Powers, and Liabilities of Association

a. In general
b. Practice of law

a. In General

The rights, powers, and liabilities of an association are governed by common or statutory law, by usage, and by the provisions of its articles of association or constitution, if any. Generally speaking, an association lacks corporate powers and cannot issue stock

It has been stated generally that an association being solely a creature of convention between the members, no check exists upon its right to transact its business in such manner as it may agree upon, so long as it does not act illegally or contrary to public policy, and the regularity of the proceedings is presumed, in the absence of a showing to the contrary.[97] The rights and powers of the asso-

87. Goulding v. Standish, 65 N E 803, 182 Mass 401—5 C J. p 1342 note 68.

88. Bachman v. Harrington, 102 N. E 406, 52 Misc. 26.

89. Herman v. Plummer, 55 P. 315, 20 Wash. 363.

90. Ace Bus Transp. Co v South Hudson County Boulevard Bus Owners' Ass'n, 177 A. 360, 118 N J Eq. 31, affirmed 180 A. 835, 119 N J Eq. 37.

91. Henry v. Jackson, 37 Vt. 431

92. Tex—Harris v. Thomas, (Civ App) 217 S W. 1068.
W Va—Simpson v Grand International Brotherhood of Locomotive Engineers, 98 S E 580, 83 W Va 355, certiorari denied 39 S Ct. 494, 250 U S. 644, 63 L Ed. 1186.
5 C J. p 1342 note 72.

93. Green v Felton, 84 N E 166, 42 Ind App. 675.

94. Cotton Jammers', etc, Assoc. v Taylor, 56 S.W. 553, 23 Tex Civ. App 367

95. Md—Smith v. Merriott, 100 A 731, 130 Md. 447.
N Y—American League Baseball Club of New York v. Johnson, 179 N.Y.S. 498, 109 Misc. 138, affirmed 179 N Y S 898, 190 App Div 932—Edgar v Halpin, 185 N Y S 307. 5 C J p 1342 note 75.

Forced construction

The court will not force a construction which will place the framers of the constitution of the American League of Professional Baseball Clubs in a position of enacting a meaningless tautology, or a provision which has no vitality, because it is redundant—American League Baseball Club of New York v. Johnson, 179 N Y S 498, 109 Misc 138, affirmed 179 N.Y S 898, 190 App Div. 932

Practical construction

The court, in construing a provision of the constitution of an association, will consider the practical construction given such provision by the association.—Edgar v. Halpin, 185 N Y.S 307.

Meaning of "trust" as employed in constitution

The word "trust," as used in the constitution of an association organized for the purpose of protecting its members against loss by reason of extending credit to those unworthy of trust, means to give credit to, and relates to a person's financial ability to pay his debts—Putnal v. Inman, 80 So. 316, 76 Fla. 553, 3 A L.R. 1580.

Preamble of constitution

(1) The preamble to the constitution of an association cannot control the words of the constitution unless the constitution itself is ambiguous—Ace Bus Transp. Co. v. South Hudson County Boulevard Bus Owners' Ass'n, 177 A 360, 118 N J Eq 31, affirmed 180 A 835, 119 N J.Eq 37.

(2) The preamble to the constitution of a bus owners' association stating an intrastate route covered by buses did not limit the powers of the association or preclude the members thereof from adopting a proposition to run buses across the state line—Ace Bus Transp. Co v. South Hudson County Boulevard Bus Owners' Ass'n, supra.

96. Yeaton v. Somersworth Grange of Patrons of Husbandry, 91 A. 868, 77 N H. 382

97. In re Tidewater Coal Exchange, (C.C A N Y) 280 F 638, affirming (D C) 274 F. 1008, 1011, and certiorari denied Delaware Steamship & Commerce Corporation v New England Coal & Coke Co, 42 S Ct. 587, 259 U S. 584, 66 L Ed. 1075

ciation depend primarily upon the established principles of the common law, as supplemented or changed by statute, as will appear more fully from an examination of subsequent sections of this Title. An association without articles, constitution, or adopted rules is governed by common parliamentary rules as respects the regularity of its meetings, and, subject to restrictions as to the right of expelling a member, can make changes in its governing rules at will at any meeting duly held [98]

Ordinarily, however, the agreement of association is embodied in a formal constitution or articles of association, and in this event the rights and powers of the society are governed by the articles or constitution so adopted, as has been shown in preceding sections, subject, of course, to such limitations as may exist either at common law or by statute.

The powers of an association may be determined by usage acquiesced in by the members thereof.[99]

An association without articles or constitution or by-laws cannot adopt any measure subversive of the objects for which the association was formed;[1] nor can it do an illegal act;[2] but in the absence of a constitution and by-laws it may adopt any lawful means to accomplish its object [3]

An association has no corporate powers, even where it is formed under a general statute authorizing individuals to unite as a voluntary association under a distinguishing associate name for trading purposes.[4] An unincorporated association cannot issue shares of stock, unless organized as a joint stock company.[5]

The capacity of an association to act as trustee will be considered in the title Trusts § 209 [65 C. J. p 571 notes 12–14].

b. Practice of Law

Legislation may properly prohibit an association from practicing law.

The courts have held that it is competent for the legislature to enact statutes forbidding the practice of law by associations,[6] and in this connection it has been pointed out that the practice of law includes both court work and "office" practice.[7] It would not be competent, however, for the

98. Ostrom v Greene, 55 N E 919, 161 N Y. 353, 362, affirming 52 N. Y S 1147, 30 App Div 631, which affirmed 45 N.Y.S 852, 20 Misc 177

99. Kerr v. Hicks, 70 S E 468, 154 N C. 265, 33 L R A (N S) 529.

1. Branagan v. Buckman, 122 N Y. S 610, 67 Misc. 242, 250, affirmed 135 N.Y S 1106, 145 App Div 95.

2. Branagan v Buckman, supra.

3. Hardy v. Carter, (Tex Civ.App.) 163 S W. 1003—5 C J. p 1343 note 88.

4. Davison v. Holden, 10 A 515, 55 Conn 103, 3 Am S.R. 40

5. Osborn v. Greene, 55 N E. 919, 161 N Y. 353, affirming 52 N.Y S 1147, 30 App Div. 62, which affirmed 45 N Y S 852, 20 Misc 177 —Branagan v. Buckman, 122 N Y. S 610, 67 Misc 242, affirmed 130 N Y.S. 1106, 145 App Div 950.

6. In re Opinion of the Justices, (Mass) 194 N E. 313. See also Attorney and Client § 16.

7. In re Opinion of the Justices, supra.

Court work

"So far as the practice of the law relates to the performance of the functions of an attorney or counsellor at law before the courts, it comprises mastery of the facts and law constituting the cause of action or legal proceeding of whatever nature, the preparation of pleadings, process, and other papers incident to such action or proceeding, and the management and trial of the action or proceeding on behalf of clients before judicial tribunals These matters closely concern the courts Legislation forbidding such practice of the law by corporations or associations, or by individuals other than members of the bar, would be within the competency of the General Court It would tend to enhance the effectiveness of the judicial department."—In re Opinion of the Justices, (Mass) 194 N E. 313, 316.

"Office" practice

"Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counsellor' (as they are described in question 2 of the order) bear an intimate relation to the administration of justice by the courts No valid distinction, so far as concerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office The work of the office lawyer is the groundwork for future possible contests in courts . . . The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counsellors at law outside of courts"—In re Opinion of the Justices, (Mass.) 194 N E 313, 317.

Lay proprietors of an automobile service association contracting with customers to furnish legal advice and assistance relating to the operation of automobiles, which assistance was to be rendered by counsel designated by the association, was held to be "practicing law"—Rhode Island Bar Ass'n v Automobile Service Ass'n, (R I) 179 A 139

Particular acts as not "practice of law"

(1) A credit men's association notifying persons, firms, or corporations, of their listing as severally unsecured creditors in a schedule in bankruptcy, whether or not such creditors were members of the association.—Rinderknecht v. Toledo Ass'n of Credit Men, (D C Ohio) 13 F Supp. 555.

legislature to enact statutes permitting the practice of law by associations [8]

§ 13. —— Name and Seal

An association has the right to adopt a distinctive name and will be protected in its exclusive use. An association is not required to possess a seal, and it has been said that it has no right to use a common seal.

An unincorporated association has the right to adopt a name by which it shall be known.[9] The name of an unincorporated association is a necessary element of its existence and the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade marks;[10] thus, in a proper case, a court of equity will protect an association in the use of its name by the issuance of an injunction,[11] although complainant association may not be carrying on a trade, or an industrial or financial business which could be injuriously affected,[12] and the right to injunction in such cases has been determined to be dependent neither upon an actual showing of specific injury nor the misleading of any particular person, the demands of the law in this respect being met when it is made to appear that there is a natural and probable tendency to mislead and confuse the public to the injury of the association having the prior right to the distinctive names and emblems.[13] However, equity will not grant injunctive relief in such cases unless plaintiff association's exclusive right to the use of such name is clearly established,[14] nor will relief be granted where laches have barred enforcement of complainant's right.[15]

(2) A credit men's association offering services in presenting proofs of claim in bankruptcy proceedings, participating in the election of a trustee, furnishing approved forms, proof of claim, and power of attorney, and suggesting the name of some person assumed by the association to be suitable as an attorney in fact—Rinderknecht v. Toledo Ass'n of Credit Men, supra.

(3) A credit men's association using powers of attorney obtained through suggesting the name of some person assumed by the association to be suitable as an attorney in fact in bankruptcy proceedings, or otherwise in the election of a trustee, who was a member or officer of the association—Rinderknecht v. Toledo Ass'n of Credit Men, supra

(4) A credit men's association appearing before a referee in bankruptcy and collecting for a reasonable fee, for the use of the association, dividends on proved and allowed claims, representation of which was obtained by the association, where the fee exacted was the reasonable and customary percentage of the amount collected—Rinderknecht v. Toledo Ass'n of Credit Men, supra

(5) A credit men's association applying with consent of the trustee, to the uses of the association, fees of the trustee, whose election was secured by the association through the use of powers of attorney obtained by the association, although such practice required the referee's critical attitude—Rinderknecht v. Toledo Ass'n of Credit Men, supra.

8. In re Opinion of the Justices, (Mass) 194 N E 313, 316.
"It would not be within the competency of the General Court to enact legislation designed to permit such practice of the law 'by corporations or associations or by individuals other than members of the bar of the Commonwealth.' Permission to practice law is within the exclusive cognizance of the judicial department"—In re Opinion of the Justices, supra

9. Conn—Davison v. Holden, 10 A 515, 55 Conn 103, 3 Am S R 40—Pease v Pease, 35 Conn. 131, 95 Am D 225
N Y—Black Rabbit Ass'n v. Munday, 21 Abb N Cas 99.
5 C J p 1343 note 90.

10. State ex rel Great American Home Sav Institution v. Lee, 233 S W 20, 286 Mo 679

11. Ga—Faisan v. Adair, 96 S E 871, 148 Ga 403, certiorari denied 39 S Ct 136, 248 U S 583, 63 L Ed 432
N J—Kline v. Knights of the Golden Eagle, 167 A. 758, 759, 113 N J Eq 513
5 C J p 1343 note 91.
"An unincorporated association is entitled to protection against pirating its name"—Kline v. Knights of the Golden Eagle, supra.

Name held colorable imitation
The name of an order calling itself the "Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America" was held a colorable and misleading imitation of the name of a previously existing order calling itself the "Ancient Arabic Order of the Nobles of the Mystic Shrine," such as authorized the granting of a temporary injunction—Faison v. Adair, 87 S E 1080, 144 Ga. 797.

Names held not too similar
The use of the name "Catholic Daughters of America" by a society does not infringe on the right of another society to the name "Daughters of America," as the word "Catholic" gives the former name a distinguishing character—State Council of New York, Daughters of America v Catholic Daughters of America, 194 N Y S 246

12. N J—Supreme Lodge of the World, Loyal Order of Moose v Independent, Benevolent, and Protective Order of Moose, 131 A. 219, 98 N J Eq 593.
Tex—Burrell v Michaux, (Civ App) 273 S W. 874, judgment affirmed 286 S W. 176, certiorari granted Ancient Egyptian Arabic Order Nobles of the Mystic Shrine v. Michaux, 47 S Ct. 472, 273 U S 690, 71 L Ed 842, and reversed on other grounds Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 49 S. Ct 485, 279 U S 737, 73 L.Ed 931.

13. Burrell v. Michaux, (Tex Civ. App) 273 S W 874, affirmed (Com. App) 286 S W. 176, certiorari granted Ancient Egyptian Arabic Order Nobles of the Mystic Shrine v Michaux, 47 S Ct. 472, 273 U.S. 690, 71 L Ed 842, reversed on other grounds Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v Michaux, 49 S Ct. 485, 279 U S 737, 73 L Ed 931.

14. Most Worshipful United Grand Lodge of Free and Accepted Masons of Maryland v. Green, 110 A. 851, 136 Md 582.

Evidence held insufficient to establish exclusive right to use of name in a suit by one colored Masonic organization to enjoin another from using the name of "Mason" or "Free Mason," on the ground that plaintiff was the only authorized Masonic organization of colored men in the state—Most Worshipful United Grand Lodge of Free and Accepted Masons of Maryland v. Green, 110 A 851, 136 Md. 582.

15. Ancient Egyptian Arabic Order Nobles of the Mystic Shrine v. Michaux, 49 S Ct 485, 279 U S 737, 73 L Ed 931, reversing Burrell v. Michaux, (Tex.Com App) 286 S W 176, which affirmed (Civ App.) 273 S.W. 874.

Dissatisfied members of an association cannot deprive it of the right to use its own name by incorporating themselves thereunder, and enjoining it from using the same[16]

An association limited to members of one race may secure an injunction against use of its name and emblems by another association limited to members of a different race.[17]

Statutes for the protection of incorporated organizations against others using the name, style, or emblems of such organizations cannot be invoked by unincorporated associations.[18]

Seal. A voluntary association is not required by law to possess a seal[19] Indeed, it has been said that an unincorporated association has no right to use a common seal,[20] at least it is not presumed to have one.[21]

§ 14. —— Taking, Holding, and Transfer of Property

a Taking and holding property
b. Conveyance or assignment of property or funds, and application thereof

a. Taking and Holding Property

(1) In general
(2) Conveyance to trustees for association or members

(1) In General

Generally speaking an unincorporated association may not, as such, take or hold property, although its members may hold property jointly as individuals.

In the absence of a statute empowering it to do so, it is ordinarily held that an unincorporated association, having no legal existence independent of the members who compose it, is incapable, as an organization, of taking or holding either real or personal property in its associate name,[22] and that a conveyance to an unincorporated association passes title to no one;[23] but there is some authority to the contrary,[24] and it has been held that an unincorporated association may take and hold personal property at least to the extent that the person giving or selling such property cannot retake it or otherwise dispose of it.[25]

In any event, the members of a voluntary association may take and hold property jointly as in-

Laches shown by thirty years' inaction and acquiescence.—Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v Michaux, 49 S Ct 485, 279 U.S 737, 73 L Ed 931, reversing Burrell v. Michaux, (Tex. Com App) 286 S.W 176, which affirmed (Civ App) 273 S W. 874.

16. Black Rabbit Ass'n v. Munday, 21 Abb N Cas (N Y) 99.

17. Burrell v. Michaux, (Tex Com App) 286 S W. 176, affirming (Civ. App) 273 S W 874, and reversed on other grounds Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v Michaux, 49 S. Ct 485, 279 U S 737, 73 L Ed 931.

Right to limit membership to white men will be protected by injunction against the use of its emblems and insignia by negroes, and "the rule would be the same if the facts were reversed and the negroes were complaining."—Burrell v. Michaux, (Tex Com App) 286 S W. 176, 181, affirming (Civ.App.) 273 S W. 874, and reversed on other grounds Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 49 S Ct. 485, 279 U.S 737, 73 L Ed 931.

18. Faisan v. Adair, 87 S E 1080, 144 Ga 797, Ann Cas 1918A 243

19. White v. Hartman, 145 P. 716, 26 Colo App. 475.

20. Osborn v. Greene, 55 N E 919, 161 N.Y. 353, affirming 52 N Y.S 1147, 30 App Div 62, which affirmed 45 N Y S 852, 20 Misc 177—Branagan v. Buckman, 122 N Y S 610, 67 Misc. 242, affirmed 130 N Y S 1106, 145 App Div. 950

21. Brower v. Crimmins, 121 N Y S 648, 67 Misc 68.

22. Idaho—Idaho Apple Growers' Ass'n v. Brown, 293 P. 320, 50 Idaho 34.

Miss—Treas v Price, 146 So 630, 167 Miss 121

Mo—Normandy Consol. School Dist of St Louis County v. Harral, 286 S W. 86, 315 Mo. 602.

N Y—In re Howells' Estate, 260 N Y S 598, 145 Misc 557, mod on other grounds 261 N.Y S 859, 146 Misc 169

Pa—Latrobe Hunting & Fishing Club, Ltd v Decker, 12 Pa Dist & Co. 63

6 C J p 1343 note 98.

Deed to Sons of Confederate Veterans

A deed by the commander of a camp of Confederate Veterans to an unincorporated camp of the Sons of Confederate Veterans and a chapter of the Daughters of the Confederacy was invalid as an attempted conveyance to an unincorporated association having no power to acquire property in its name—Lael v. Crook, (Ark) 97 S W.(2d) 436.

23. N Y.—Schein v Erasmus Realty Co., 184 N Y.S. 840, 194 App Div. 38, affirming 176 N Y.S. 608, 107 Misc 27

Pa—Hawk v. Hawk, 88 Pa Super. 581

5 C J p 1343 note 99.

Where no individual named as grantee

A deed to an unincorporated association, in which no individual was named grantee, conveyed no legal title—Schein v Erasmus Realty Co, 184 N Y S 840, 194 App Div. 38, affirming 176 N Y S 648, 107 Misc 27.

24. Town of Gravette v. Veach, 54 S W.(2d) 704, 186 Ark. 544

"At common law voluntary and unincorporated associations may hold real property, either as the donees of the legal title or the beneficiaries of a trust, and . . such associations, when organized to promote some purpose beneficial to the general public or of certain classes thereof, are to be deemed as charitable societies and governed by rules of law applicable thereto."—Town of Gravette v Veach, 54 S.W.(2d) 704, 706, 186 Ark 544

25. Hartman v. City of Pendleton, 186 P 572, 574, 96 Or 503, 8 A L R 904, modified in other respects 190 P 339, 96 Or. 503.

"We take it to be fairly well settled law, at least by the better authorities, an unincorporated association may take and hold personal property at least to the extent that the person giving or selling such

dividuals,[26] and accordingly a grant to an association name may, under the circumstances, be construed as a grant to its members,[27] and a gift to an association by name, if not impressed with any trust or charitable use, may vest in the persons composing the society.[28]

In a proper case, equity may treat the active members of an association as trustees of the associate interest in the property.[29]

(2) Conveyance to Trustees for Association or Members

Conveyance may be made to trustees for the benefit of an unincorporated association, legal title then vesting in such trustees. Where there is a sufficient designation of the members as beneficiaries, they have an equitable interest in the property.

To avoid the inconveniences resulting from the incapacity of a voluntary association to take and hold property as an organization, conveyances may be made to trustees for the use and benefit of the association or its members.[30] In such case the legal title vests in the trustees,[31] and, where two associations consolidate, the trustees of the property of one of the associations thereafter hold the same in trust for the members of the united body.[32]

If the members are sufficiently designated as beneficiaries,[33] they have an equitable interest in the property,[34] and each is entitled to the same voice in the management, control, and disposition of the property as if he were a joint owner and holder of the legal title.[35]

The trustee may be either a natural or an artificial person,[36] and the society itself may make provision for trustees in whom property may be vested for its use.[37]

A court of equity will compel the transfer of funds from former trustees of a voluntary association to trustees newly elected,[38] and, after an as-

property to it cannot retake it or otherwise dispose of it, so that if one gave a book, or money to buy a book, to the Commercial Association for its library, that person could not retake the book or reclaim the money on the pretext that the donee was incapable of holding it Such associations would be treated in equity as quasi partnerships, each member of which would be entitled to an interest in the property donated or purchased. . . . There is not a solitary reason for the holding of some courts that gifts to nonincorporated associations are invalid, except blind adherence to outworn precedents"—Hartman v. City of Pendleton, supra.

26. Conn—Curtiss v. Hoyt, 19 Conn 154, 48 Am D. 149.
Mass—Byam v. Bickford, 2 N E. 687, 140 Mass 31.
Mich—Whipple v. Parker, 29 Mich. 369.
R I—Guild v. Allen, 67 A. 855, 28 R I. 430
5 C J. p 1344 note 2.

The ownership of property delivered by members to their association has been held, in a criminal case, to vest in all members—Commonwealth v. Auman, 13 Pa.Dist. & Co 66.

27. Byam v. Bickford, 2 N E 687, 140 Mass. 31—5 C J. p 1344 note 3.

28. Guild v. Allen, 67 A. 855, 28 R.I. 430.

29. Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So 54, 212 Ala. 444

"A court of equity treats the active members of a voluntary nonbusiness association as the owners of its properties in trust for the community interest of the unincorporated society or association."—Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So. 54, 55, 212 Ala 444

Defect in conveyance not fatal

Where members of an association authorized duly elected trustees to convey property to a certain person to enable such person to execute a mortgage to avoid foreclosure of an existing mortgage, any mere defect in execution of the deed to such person, or of his mortgage, will not, in equity, be permitted to defeat the rights of those holding by mesne conveyances from such person.—Hope of Alabama Lodge of Odd Fellows v Chambless, 103 So. 54, 212 Ala. 444.

30. Cal—Ruddick v. Albertson, 98 P. 1045, 1047, 154 Cal 640
Ill—Hart v. Seymour, 35 N.E. 246, 147 Ill 598
Mo.—Normandy Consol. School Dist of St. Louis County v. Harral, 286 S W. 86, 315 Mo. 602.
5 C J p 1344 note 6.

"At common law, it is true, a deed of conveyance to an unincorporated voluntary association was bad for lack of a capable grantee, and cases will be found which hold that, where the grantee could not take directly, he or it cannot take through the medium of a trustee. But from this grew an abuse which equity was prompt to remedy. So that it is now recognized that a valid grant may be made to trustees for such an unincorporated voluntary association, and that such title will descend in perpetuity"—Ruddick v. Albertson, supra

Conveyance to commander of Confederate Veterans

A deed to a designated person as the commander of a camp of Confederate Veterans was valid as a conveyance to a trustee, notwithstanding that the camp of Confederate Veterans was an unincorporated association and as such incapable of holding title—Lael v. Crook, (Ark) 97 S W (2d) 436

31. Mass—Austin v. Shaw, 10 Allen 552
Mo—Douthitt v. Stinson, 73 Mo. 199.
5 C J. p 1344 note 7

Commander of Confederate Veterans

The invalidity of a deed from the commander of a camp of Confederate Veterans who held title as trustee, because the grantee was an unincorporated association incapable of holding property, did not affect the rights of a member of the camp of Confederate Veterans where, after execution of the deed, the property was devoted to a use that was intended in the conveyance to the commander of the camp as trustee, since the legal title remained in the successor to the commander as trustee.—Lael v. Crook, (Ark) 97 S W. (2d) 436.

32. Woolford's App., 17 A. 524, 126 Pa. 47.

33. German Land Assoc v. Scholler, 10 Minn. 331—5 C.J. p 1344 note 9.

34. Duncanson v. Howell, (Tex Com. App) 222 S.W. 232, reversing Howell v. Duncanson, (Civ App.) 195 S W. 349—5 C J. p 1344 note 10

35. Clark v Brown, (Tex.Civ.App) 108 S W. 421.

36. Liggett v. Ladd, 21 P. 133, 17 Or. 89

37. Colley v. Wilson, 86 Mo App 396—5 C J p 1344 note 13.

38. Birmingham v. Gallagher, 122 Mass. 190.

sociation has become incorporated, it has the right to demand and receive from its former trustees a conveyance of the legal title to its property.[39]

b. Conveyance or Assignment of Property or Funds, and Application Thereof

(1) Disposition of property or funds
(2) Application of property or funds

(1) Disposition of Property or Funds

While an association may not as a legal entity dispose of property held by its members jointly, an assignment made by vote at a regular meeting pursuant to the constitution and by-laws is valid and effectual. Where the property is vested in particular trustees, the members may pass the equitable but not the legal title thereto

An association cannot as a legal entity dispose of property held by its members jointly.[40] Where, however, under the constitution and by-laws, all members in good standing have sole control of the funds, an assignment of the property of the association, executed pursuant to a vote at a regular meeting by all the members in good standing, is sufficient to vest complete title thereto in the assignee.[41]

A minority cannot compel a sale and distribution of the property of the association among the members so long as it continues to be used for the purposes for which it was acquired.[42]

In case property is vested in trustees for the use of an association or its members, the members may by conveyance pass the equitable title thereto,[43] but neither they[44] nor the association[45] can convey the legal title; and in case there are several trustees all must join in the conveyance.[46]

Equity will compel a trustee who holds title to the property or funds of an association to convey or assign the same pursuant to a unanimous vote of the society[47]

(2) Application of Property or Funds

An unincorporated association may in conformity with the will of the majority devote its funds to a purpose within the purposes of the association, but may not apply funds to other purposes without unanimous consent.

An unincorporated association, acting in conformity with the will of the majority of its members, has a right to devote its funds to any purpose calculated to promote the objects of the association,[48] but it has no right to apply them to other uses, except with the unanimous consent of the members[49] Further, where a fund is subscribed for a particular purpose, a majority of the subscribers cannot devote the fund to any other purpose without the consent of the minority, although it may be composed of a single subscriber only[50]

Although the articles of association provide that the management of the concern shall be subject to rules and regulations adopted by a majority of the associates, yet an individual member may resort to a court of justice for redress in case of the fraudulent appropriation or the willful destruction of the joint property,[51] but where a fund has passed into the hands of new trustees, between whom and the original contributors there is no privity, such trus-

39. Organized Labor Hall v Gebert, 22 A. 573, 48 N.J.Eq 393

40. Ostrom v Greene, 55 N E 919, 161 N.Y. 353, affirming 52 N.Y.S. 1147, 30 App Div 621, which affirmed 45 N Y S 852, 20 Misc 177 —Brannagan v Buckman, 122 N Y S 610, 67 Misc 242, affirmed 130 N Y.S 1106, 145 App Div. 950.

41. Brown v. Stoerkel, 41 N W. 921, 74 Mich 269, 3 L R A. 430

42. Robbins v Waldo Lodge I. O O. F, 7 A 540, 78 Me. 565

43. Douthitt v. Stinson, 73 Mo. 199

44. Douthitt v. Stinson, supra

45. Austin v. Shaw, 10 Allen (Mass.) 552.

46. Austin v. Shaw, supra.

47. Mass—Birmingham v. Gallagher, 112 Mass. 190
Okl—Richardson v. Harsha, 98 P 897, 22 Okl. 405.

48. Myrick v. Holmes, 107 S.E. 324, 151 Ga 437—5 C J p 1344 note 24

49. Conn—Baines v. Church, 173 A 226, 118 Conn. 521.
Ga—Myrick v. Holmes, 107 S E 324, 151 Ga 437.
Me—Nickerson v. Houlton Lodge of Elks, No. 835, 111 A. 331, 119 Me 309.
5 C J. p 1345 note 25.

Applications held unauthorized

(1) Under Civ Code (1910) § 3755, providing that a trustee, unless expressly authorized or by consent, cannot sell or convey the trust property without an order of the court of chancery, a conveyance by the trustees of an unincorporated fraternal society, without the consent of all members or an order of court, to one who reconveyed to the trustees and others individually, was unauthorized—Myrick v. Holmes, 107 S E 324, 151 Ga. 437.

(2) Where the by-laws of a lodge provided that "financial help" would be accorded members, and that application therefor could be made by any member who is destitute and unable to procure employment and is without the necessities of life, a vote to reimburse a member who paid a fine imposed on an employee of the lodge was illegal, since the payment of the lodge's money for such purposes would be an unauthorized diversion of its funds, the by-laws providing for "help" for members having reference only to members in actual need of help—Nickerson v. Houlton Lodge of Elks, No. 835, 111 A. 331, 119 Me. 309.

Waiver held ineffectual to validate assignment

Waiver of the signers' claims in a fund collected from them and other members of an association, the trustee of which was authorized to assign the fund to a bankrupt partnership, was held not effective as an assignment of the members' title—Barnes v. Church, 173 A 226, 118 Conn 521.

50. Abels v. McKeen, 18 N J Eq. 462.

51. Dennis v. Kennedy, 19 Barb (N. Y.) 517.

tees are not accountable to them for the fund; their remedy is against the original trustees.[52]

If any part of the fund is not needed for the purpose for which it was subscribed, the contributors have a right to have it repaid to them in proportion to their contributions,[53] after deducting proper charges and expenses and unavoidable losses[54]

§ 15. —— Contracts

Strictly speaking, an association lacks capacity to make a contract unless authorized to do so by statute However, contracts made in the name of the association by its officers or members may be enforceable against such officers or members, or as against third persons on principles of estoppel Associate members will not, as a rule, be liable on unauthorized contracts entered into by their officers.

In the absence of statutes, such as those permitting suits against associations (infra § 36), which expressly or impliedly authorize an unincorporated association, as such, to enter into contracts in its own name,[55] it has no capacity to do so,[56] and is not liable, as an association, on contracts made in its name.[57]

Officers of an association who make a contract in its name, however, and members of the association who assent to the contract so made, are personally bound thereby, as will be shown hereinafter in §§ 20 and 32, respectively; and the contract is likewise binding on the other party thereto,[58] and may be sued on by the associate members, and, under some statutes, either by a duly authorized officer of the association or by the association itself in its own name, as will be explained in § 35.

Where a number of persons, firms, and corporations engaged in the business of dredging have entered into an association to maintain prices for dredging, and to distribute equitably work, the conduct of which has been put under the control of an adjuster, such adjuster is not entitled to personal relief from the fact that he had not received his just share of the work, since the distribution was entirely within his own hands[59]

An averment that an association was organized for pecuniary profit, if unchallenged by motion to make more definite, is sufficient to authorize proof of such a purpose in its formation as would authorize contracts in excess of the fund provided by the initiation fees and dues.[60]

Estoppel to deny contractual capacity. One who deals with an association as a legal entity capable of transacting business, and in consequence receives from it money or other thing of value, is estopped from denying its right to contract.[61]

Unauthorized contract. Members of an association, such as a political committee, are not liable, as such, to a third person on an unauthorized and unratified contract made by an officer of the committee while acting beyond the apparent scope of his authority.[62]

Leases. An association may, through its officers or members, enter into a valid lease of premises for its

52. Abels v. McKeen, 18 N J Eq 462

53. N J —Abels v McKeen, supra N Y —Koehler v Brown, 2 Daly 78

54. Murray v. McHugh, 9 Cush (Mass) 158

55. Court Harmony A. O F v Court Abraham Lincoln A. O F, 40 A. 606, 70 Conn 634

Compromise of suit

A statute authorizing suits against a voluntary association as such impliedly authorizes the association to compromise a suit against it, so that a note given by the association in the compromise is valid —Court Harmony A O F. v. Court Abraham Lincoln A O F, 40 A. 606, 70 Conn. 634

Liability as insurer

Where a fair association agreed, for a certain consideration, to care for and keep safely an automobile parked within the fair grounds, it was liable for the loss of the automobile while in its custody, regardless of its negligence or carelessness in the matter —Pennyroyal Fair Ass'n v. Hite, 243 S.W. 1046, 195 Ky 732.

One who furnishes supplies to an unincorporated association conducted for profit and who takes a note in payment therefor has an equitable lien on the association's property, which may be enforced by action — Slaughter v. American Baptist Publication Soc, (Tex Civ App) 150 S W. 224.

56. Reding v Anderson, 34 N.W. 300, 72 Iowa 498—5 C.J. p 1345 note 33

57. Chastain v. Baxter, 31 P (2d) 21, 24, 139 Kan 381.

58. Iowa —Reding v Anderson, 34 N W 300, 72 Iowa 498.
Mich —Detroit Light Guard Band v. First Michigan Independent Infantry, 96 N W 934, 134 Mich 598

59. Potter v Morris, etc, Dredging Co, 46 A 537, 59 N J Eq. 422

60. Ranken v Probey, 115 N.Y.S. 832, 131 App Div 328.

61. Petty v Brunswick, etc., R Co, 35 S E 32, 109 Ga 666

62. Humphrys v Republican Central Campaign Committee, 182 A. 366, 320 Pa 353.

Labor and material

A political campaign committee, whose purpose was to elect candidates after nomination, was not liable for labor and material furnished primary committees, whose objects were to nominate certain candidates, notwithstanding members, who ordered the work performed and who were individually liable, were also members of the campaign committee, where the record disclosed that the campaign committee did not ratify or confirm the purchases —Humphrys v. Republican Central Campaign Committee, 182 A. 366, 320 Pa. 353.

Apparent authority not shown

That plaintiff had furnished material in prior years on the orders of the executive officers of a political campaign committee did not justify plaintiff's reliance on the apparent authority of the officers of the primary committees, who made purchases for such committees, to purchase on behalf of the campaign committee —Humphrys v. Republican Central Campaign Committee, 182 A 366, 320 Pa. 353.

use.[63] A recital in a lease that it is made by and between an association, as landlord, and an individual, as tenant, has been held conclusive, in an action between third parties, that the association is to be regarded as landlord.[64] Where a voluntary nonprofit association as tenants had the duty under a lease to surrender premises to the landlord, all members had a joint interest in such surrender and a reciprocal duty to observe its obligations, including the duty to surrender premises at the end of the term, and for their failure to do so an agreement in the lease would be implied at the landlord's election for continued tenancy or holdover for another year.[65] Where a voluntary association, which agreed to surrender the premises to its landlord at the end of the term, vacated the premises because of a factional disagreement, leaving minority of members in control thereof, and the association failed to surrender the premises in accordance with the lease, the landlord could treat the association as holding over for the ensuing year, so as to be entitled to possession of the premises and to a personal judgment against the association for rent for the extended period.[66]

§ 16. —— Torts

An unincorporated association may be held liable for the torts of its members or employees committed in the prosecution of its business, as where the association occupies the position of principal as respects the tortfeasor, but not otherwise. An association is not responsible for the tort of a third person committed while engaged in the individual business of a member of the association.

A voluntary unincorporated association has been held liable in tort for the wrongful acts of its members when acting collectively in the prosecution of the business for which it is organized,[67] responsible for torts of its members or employees when encouraged in them, or if ratified thereafter,[68] and liable for the conversion of property intrusted to one of its officers, as such, where it has negligently allowed him to appropriate the property to his own use.[69] So, it may be held liable for the tort of an individual member when, in respect to the act complained of, the association occupies the relation of principal,[70] but not otherwise.[71]

An association may not be held responsible for the negligence of a third person employed by a member in the prosecution of the member's business.[72]

Libel. Following the general rules governing the tort liability of unincorporated associations, such an association may be liable for its libel;[73] and so the members of an unincorporated association are liable in their collective capacity for libel published by their agent with their authority while the agent is acting within the scope of his employment,[74] just as a corporation is liable under like circumstances.

An action for libel may be brought against an unincorporated association by one of its members,[75]

63. Piper v. Taylor, 188 N.W. 171, 48 N.D. 967—5 C.J. p. 1344 note 5.

64. Pupin v. Stiyachich, 158 N.Y.S. 182, 94 Misc. 259

"President" of association and "trustee" of building suing tenant in "trust" capacity

Lease of premises, held in trust for the Serb Federation Sloga by its president, reciting that it was between the federation, through its president, and the lessee, signed by the lessee and the president as such, was held to constitute a lease of the premises by the federation, as against the claim of the president in his capacity as trustee, in whom legal title was vested, that he was the landlord, and not the federation, and that rent should have been paid to him and not to the federation—Pupin v. Stiyachich, 158 N.Y.S. 182, 94 Misc. 259.

Association's failure to turn over rent to trustee

Tenant of premises, held in trust for a federation, and leased with the consent of the trustee, who was also president of the federation, could not be dispossessed by the president, because the tenant paid the rent to the association and not to the trustee and the federation, which leased with his consent, failed to pay over to the trustee the rent of the premises for a sinking fund, as it had agreed—Pupin v. Stiyachich, 158 N.Y.S. 182, 94 Misc. 259

65. Wolf v. Foley, 239 N.Y.S. 1082, 160 Misc. 688

66. Wolf v. Foley, supra.

67. Mich.—Inglis v. Millersburg Driving Assoc., 136 N.W. 443, 169 Mich. 311, Ann.Cas.1913D 1174.
N.Y.—Rourke v. Elk Drug Co., 77 N.Y.S. 373, 75 App.Div. 145.
5 C.J. p. 1345 note 51

68. United Mine Workers of America v. Coronado Coal Co., (Ark.) 258 F. 829, 169 C.C.A. 549, reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition for rehearing granted 42 S.Ct. 587.

69. Cutting v. Marlor, 78 N.Y. 454, affirming 17 Hun 573.

70. Simmonds v. Rifle Club, 52 La. Ann. 114

71. U.S.—City of Reading, (D.C.Pa.) 103 F. 696, affirmed 108 F. 679, 47 C.C.A. 581.
Colo.—Master Builders' Assoc. v. Domascio, 63 P. 782, 16 Colo.App. 25.
Ky.—Sewell v. Breathitt Lodge No. 649 F. & A.M., 150 S.W. 677, 150 Ky. 542
5 C.J. p. 1346 note 54.

72. Frierson v. Pacific Gas & Electric Co., 203 P. 788, 55 Cal.App. 397

Auto stage association

Where defendant was a member of an auto stage association, an unincorporated co-operative business association authorized by Civ.Code §§ 653b–653i, under whose by-laws each member owned and operated his own stages along the prescribed routes and retained the profits derived therefrom, although the terminals and certain other facilities were managed by the association, the owner and operator of the stage, and not the association, is the master of the driver, and liable for his negligence—Frierson v. Pacific Gas & Electric Co., 203 P. 788, 55 Cal.App. 397.

73. Peterson v. Cleaver, 181 N.W. 187, 105 Neb. 438, 15 A.L.R. 447.

74. Pandolfo v. Benson Bank, (C.C.A.Ariz.) 273 F. 48.

75. Peterson v. Cleaver, 181 N.W. 187, 105 Neb. 438, 15 A.L.R. 447—37 C.J. p. 16 note 44.

but the association is not liable to a member for the unauthorized or privileged communication of charges against the member by an officer of the association.[76]

§ 17. —— Criminal Responsibility

An association cannot, as such, commit a crime.

Only individuals or corporations can be indicted and convicted of the commission of crimes, and an unincorporated association of persons denominated as trustees cannot be indicted and convicted of crime, since, if a crime is committed, it must be committed by them as individuals.[77]

§ 18. Meetings

a. By whom called
b. Notice
c. Quorum
d. Conduct of meetings
e. Adjourned meetings

a. By Whom Called

A meeting should be called by competent authority in order to render proceedings taken thereat valid and effectual.

In order to render the proceedings at a meeting effectual, it must have been called under competent authority.[78]

An officer who has been removed cannot call a meeting, and hence a vote taken at a meeting held on a notice signed by him is of no effect.[79]

b. Notice

All members of an association should be notified of the time, place, and purpose of a meeting, irrespective of whether or not the laws of the association prescribe such notice. The time and manner of notice should comply with applicable rules, if any, of the constitution or by-laws, and if no length of time is prescribed, reasonable notice must be given. Notice may be waived.

All the members of an association must be notified of the time and place of a special meeting, and of the particular purpose for which it is called,[80] especially when business of an unusual character is to be transacted;[81] and no business should be transacted that is not specified in the notice.[82] These rules apply whether or not the laws of the association prescribe such notice.[83]

When the time or manner of giving notice of meetings is prescribed by the constitution, articles of association, or by-laws of an association, it is essential to the validity of the acts done at a meeting that the notice thereof shall have been given in the mode prescribed,[84] and where no length of time is prescribed, reasonable notice must be given.[85]

Waiver of notice. If all the members appear at a meeting and participate in the proceedings without objection, it will be deemed a waiver by each member of any defect due to insufficiency of notice;[86] but if a member having a right to be present and vote is absent,[87] or if, being present, he refuses his assent to the acts done at the meeting,[88] he does not waive irregularities in the notice, and as to him the proceedings are void.

c. Quorum

A majority of all of an indefinite number of persons comprising a society has been held unnecessary to constitute a quorum; and a quorum will be presumed to have been present at a meeting in the absence of proof to the contrary. A quorum is not essential to adjournment.

At common law a majority of all the members of an association is ordinarily not necessary to constitute a quorum, where the society is composed of an indefinite number of persons.[89] In any event, where an association, composed of an indefinite number of members, has no rule prescribing the number that shall constitute a quorum, but has been accustomed to hold its meeting pursuant to notices published in

76. Garcia v. Sociedad de Obreros, (Tex.Civ.App.) 263 S.W. 943, 944
"If the charges were sent out by the officer without the society's approval, then it was not their act, and they would not be liable, and if it was sent to appellant with the approval of the society, as contended by appellant, and as admitted in the answer, then appellee was not guilty of libel, because it was a privileged communication sent out under its laws and regulations in the discipline of a member."—Garcia v. Sociedad de Obreros, supra.

77. Edward Hines Yellow Pine Trustees v. State, 94 So. 231, 130 Miss. 348.

78. Russ v. Howard, 8 Tenn.Civ. App. 67—5 C.J. p. 1346 note 55.

79. Industrial Trust Co. v. Green, 23 A. 914, 17 R.I. 586, 17 L.R.A. 202.

80. N.Y.—Goller v. Stubenhaus, 134 N.Y.S. 1043, 77 Misc. 29, 37.
Wash.—State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79, 82.
5 C.J. p. 1346 note 58.

81. N.H.—St. Mary's Benev. Assoc. v. Lynch, 9 A. 98, 64 N.H. 213.
N.Y.—Rudolph v. Southern Ben. League, 7 N.Y.S. 135, 23 Abb.N.Cas. 199
R.I.—Industrial Trust Co. v. Green, 23 A. 914, 17 R.I. 586, 17 L.R.A. 202.

82. State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79.

83. State v. Seattle Baseball Assoc., supra.

84. Kuhl v. Meyer, 42 Mo.App. 474.

85. Me.—Buck v. Spofford, 31 Me. 24
Wash.—State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79, 31 L.R.A.(N.S.) 512.

86. Mo.—Kuhl v. Meyer, 42 Mo.App. 474.
N.Y.—Fischer v. Raab, 57 How.Pr. 87.
Wash.—State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79, 31 L.R.A.(N.S.) 512.

87. Kuhl v. Meyer, 42 Mo.App. 474.

88. Kuhl v. Meyer, supra.

89. Field v. Field, 9 Wend.(N.Y.) 394, cited in Ostrom v. Greene, 55 N.E. 919, 161 N.Y. 353, affirming 52 N.Y.S. 1147, 30 App.Div. 621, affirming 45 N.Y.S. 352, 20 Misc. 177.

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the newspapers, and to transact business thereat, regardless of the number in attendance, the members attending any such meeting constitute a quorum.[90]

Where the members attending a meeting constitute a quorum, the withdrawal from the meeting of a minority of such members because of dissatisfaction with the action of the majority does not affect the right of those remaining to proceed with the transaction of business.[91]

It is not essential to the validity of the proceedings of a society that the record should show that a quorum was present, since a quorum may be presumed to have been present unless the contrary appears.[92]

Adjournment of meeting. In the absence of anything to the contrary in the laws of the society, a meeting may properly be adjourned to a future day by the members in attendance, although they constitute less than a quorum.[93]

d. Conduct of Meetings

(1) In general
(2) Voting

(1) In General

Parliamentary rules govern the conduct of meetings of an association, in the absence of provisions in its own laws as to such matter or of a contrary usage.

In the absence of any provisions in the laws of an association prescribing the manner in which its meetings shall be conducted, common parliamentary principles in use by all deliberative assemblies may be resorted to in considering the regularity of the proceedings;[94] but the fact that strict parliamentary usages are not observed will not invalidate the proceedings, where the society is not attempting to act under parliamentary rules.[95] So, where an association has no constitution or by-laws, any usage in relation to meetings is entitled to consideration in determining questions relating thereto.[96]

The regularity of the proceedings is presumed in the absence of a showing to the contrary.[97]

The president of an association cannot prevent the transaction of business either by leaving the meeting[98] or by refusing to put a motion, duly made and seconded,[99] and in case of such refusal, the vice president may properly put the motion, although the president is still in the chair.[1]

(2) Voting

In the absence of provisions in the laws of an association regulating the matter, voting is controlled by general rules of parliamentary law.

When not prescribed by the laws of the association, a vote on a motion, duly put, may be taken in any of the modes by which such questions are determined under the general rules of parliamentary law.[2] Accordingly, members present and not voting are to be counted as voting in the affirmative,[3] where the majority of those voting vote in the affirmative,[4] provided, however, the question is put by the proper officer.[5]

The fact that illegal votes were cast will not invalidate the result if they do not change the majority.[6]

Where a majority of the members of an unincorporated association having no by-laws are present at a meeting. and the majority of those present vote favorably on a resolution, the resolution is duly passed, although those voting in favor of it do not constitute a majority of the total membership.[7]

e. Adjourned Meetings

Where there is nothing to the contrary in its laws, an association may adjourn its meetings in accordance

90. Ostrom v Greene, 45 N Y S 852, 20 Misc 177, affirmed 52 N.Y S. 1147, 30 App Div 621, affirmed 55 N E 919, 161 N Y. 353.

91. Ostrom v Greene, supra.

92. Me.—Coombs v. Harford, 59 A 529, 99 Me 426
Pa.—Com. v. Woelper, 3 Serg & R 29, 8 Am D. 623.

93. Ostrom v Greene, 55 N E. 919, 161 N Y. 353, affirming 52 N Y S 1147, 30 App Div. 621, affirming 45 N Y S 852, 20 Misc. 177.

94. Ostrom v. Greene, 55 N E. 919, 161 N.Y. 353, affirming 52 N Y S. 1147, 30 App.Div. 621, affirming 45 N.Y.S. 852, 20 Misc. 177—Francis v. Perry, 144 N.Y.S 167, 82 Misc 271. See People v. Goodall, 203 Ill. App. 189.

95. Ostrom v. Greene, 45 N Y S 852, 20 Misc. 177, affirmed 52 N Y S 1147, 30 App Div 621, affirmed 55 N E 919, 161 N Y. 353

96. Ostrom v Greene, 45 N.Y S 852, 20 Misc 177, affirmed 52 N Y S 1147, 30 App Div 621, affirmed 55 N.E. 919, 161 N.Y. 353.

97. Coombs v. Harford, 59 A. 529, 99 Me. 426

98. Ostrom v Greene, 45 N.Y.S. 852, 20 Misc. 177, affirmed 52 N Y S 1147, 30 App Div 621, affirmed 55 N E 919, 161 N Y. 353

99. Ostrom v. Greene, 45 N Y S 852, 20 Misc 177, affirmed 52 N Y S 1147, 30 App Div. 621, affirmed 55 N E. 919, 161 N.Y. 353.

1. Ostrom v. Greene, 45 N Y S 852, 20 Misc. 177, affirmed 52 N.Y.S. 1147, 30 App Div. 621, affirmed 55 N E. 919, 161 N.Y. 353.

2. Richardson v. Francestown Union Cong Soc., 58 N H. 137.

3. Richardson v. Francestown Union Cong. Soc., supra—5 C J. p 1347 note 84.

Election of officers see infra § 19.

4. Iowa.—Red Polled Cattle Club v. Red Polled Cattle Club, 78 N.W. 803, 108 Iowa 105
N J.—Abels v. McKeen, 18 N.J.Eq. 462.

5. Com. v. Green, 4 Whart.(Pa.) 531, 603.

6. Christ Church v. Pope, 8 Gray (Mass.) 140—First Parish v. Stearns, 21 Pick (Mass.) 148.

7. Francis v. Perry, 144 N.Y S. 167, 82 Misc. 271.

with common parliamentary rules, and may hold an adjourned meeting without notice to those absent from the previous meeting.

In the absence of anything to the contrary in the laws of the society, an association may adjourn its meetings from time to time according to the usual method of parliamentary bodies,[8] and may transact business at an adjourned meeting without notice to those who were absent from the previous meeting.[9]

§ 19. Officers, Agents, and Committees

a. In general
b. Appointment and election
c. Qualification and bond
d. Term of office
e. Removal or resignation of officers; vacation of office

a. In General

An association may exist without officers. While the members of an association may appoint agents for themselves as individuals, it has been said that an association cannot as such appoint an agent.

An association may exist without officers,[10] and it cannot, as such, appoint an agent,[11] although its members may do so for themselves individually.[12]

b. Appointment and Election

(1) In general
(2) Judicial interference

(1) In General

The appointment or election of officers may be controlled by the articles of association and by-laws, by usage, or by ordinary rules of parliamentary law. An election held in substantial violation of applicable rules or laws is void, although mere irregularities not affecting the result of an election will not invalidate it.

In the absence of any rules to the contrary, an association acting through its members may elect such officers as it chooses.[13] The election is ordinarily regulated by the articles of association or constitution and the by-laws of the association,[14] or, if none such exist, by the usages of the association and the resolutions adopted by it from time to time,[15] and in the absence of all these, resort may be had to the rules of parliamentary law in common use in all deliberative assemblies.[16]

An election held in substantial violation of applicable by-laws, rules, or provisions of law is invalid.[17] Thus, where the power of election is conferred on the board of directors, it must be exercised by the full board, and an election held at a meeting of which all the directors had not been notified is void.[18] However, mere irregularities in the conduct of an election which do not affect the result will not invalidate the election;[19] and, it has been held, where the election is by the members, the fact that the polls are kept open beyond the time prescribed by the constitution will not vitiate the election, if only those entitled to vote participate therein.[20] Regularity of the procedure may be presumed in the absence of evidence to the contrary.[21] Where it affirmatively appears that an officer was duly elected in compliance with applicable rules and constitutional

8. Ostrom v Greene, 55 NE 919, 161 N Y 353, affirming 52 N Y S 1147, 30 App Div. 621, affirming 45 N Y S 852, 20 Misc 177
Adjournment of a meeting by less than a quorum see supra subsection c this section

9. Ostrom v Greene, 55 N E 919, 161 N Y 353, affirming 52 N Y S 1147, 30 App Div 621, affirming 45 N Y S 852, 20 Misc. 177

10. Com v Rozen, 57 N.E 223, 176 Mass 139

11. Brower v Crimmins, 121 N.Y S 648, 67 Misc 68

Olympic games organizing committee, a corporation, was not the agent of the National Olympic Committee, but an independent committee entitled to the proceeds of games for distribution among the state, city, and county wherein the games were held, free from claims of the national committee—Xth Olympiad Committee of Games of Los Angeles, U S. A. 1932 v. American Olympic Ass'n, (Cal.) 42 P (2d) 1022

12. Brower v Crimmins, 121 N.Y S 648, 67 Misc 68.

13. Ostrom v Greene, 55 N E 919, 161 N Y. 353, affirming 52 N Y S 1147, 30 App Div. 621, affirming 45 N Y S 852, 20 Misc. 177

14. Mich.—Grand Rapids Guard v Bulkley, 57 N W. 188, 97 Mich. 610 N Y.—Strempel v. Rubing, 4 N.Y S 534.
Tex.—Gaines v. Farmer, 119 S.W 874, 55 Tex Civ App 601

15. Goller v Stubenhaus, 134 N Y.S. 1043, 77 Misc 39.

16. Ostrom v. Greene, 55 N.E. 919, 161 N Y. 353, affirming 52 N Y S. 1147, 30 App Div 621, affirming 45 N.Y S 852, 20 Misc. 177.

17. Young v. Benev. Assoc., 8 La App (Orleans) 146. See People v. Goodall, 203 Ill.App. 189

When not held at the time prescribed by the constitution and proper notice of the change of date is not given, as required by the constitution, an election is invalid.—Young v Benev Assoc, 8 La App. (Orleans) 146

Election prior to expiration of term of incumbent
Where a by-law of an association declared one year as the official term of the president of the association, the election of a president prior to the termination of the term of a previously duly elected president, who has not resigned or been removed, is void.—Societa Italiana Progresso Duca Degli Abruzzi v. Vicchiarielle, 178 N Y S. 261, 189 App. Div. 102

Estoppel to question validity of election
Former officers of a society who, together with rival claimants to office, agreed to resign and hold a special meeting, and who participated in the election held at such special meeting, were estopped to question the title of the persons elected to office.—Biega v. Rostkowski, 176 A. 703, 13 N J Misc 135.

18. Grand Rapids Guard v Bulkley, 57 N W 188, 97 Mich 610.

19. Young v. Benev. Assoc., 8 La. App (Orleans) 146

20. Rudolph v. Southern Ben. League, 7 N.Y.S 135, 23 Abb N Cas. 199

21. Coombs v. Harford, 59 So. 529, 99 Me. 426.

provisions, his election may not be successfully challenged.[22]

Power to set aside election. A by-law providing that the executive board shall serve as a court of appeal, to which shall be referred for final action all matters of difference that may arise, does not empower the board to set aside an election of officers.[23]

(2) Judicial Interference

The general rule that courts will not interfere with the internal management of an association, in the absence of fraud or prior exhaustion of remedies available within the framework of the organization, applies in respect of election of officers, although in a proper case judicial relief may be secured.

In accordance with the general rules as to judicial interference, which will be considered in § 34, the decision of an unincorporated association on the question of an election to office is a matter peculiarly and exclusively to be determined by the association, and, in the absence of fraud, is final and binding on the courts [24]

In any event, before members of a voluntary association can invoke the aid of the courts to secure them in offices to which they claim to have been elected, it must be shown that they have exhausted the remedies available to them within the association and according to its rules,[25] and the right to hold office in a society with no salary or emolument is not such a right as can be made the basis of a civil suit to contest an election thereto, where the person deprived of the office loses no civil or property right for which he could claim damages.[26] However, the court has jurisdiction, at the suit of certain members of an association against their associates, to prevent the latter from violating the terms of the agreement of the association, and to avoid an illegal election by them of a person to office, and to restrain such person from acting as an officer,[27] and, where one is deprived of the right to run for office in violation of associate regulations, equity will afford relief.[28]

c. Qualification and Bond

(1) In general

(2) Bond and liability of sureties

(1) In General

Persons elected to the office of trustee of a society may perform the duties of such office without first complying with statutory regulations as to filing a certificate of election.

A statute requiring the clerk of certain societies to deposit in the county recorder's office a certificate of election of trustees has been held not to make such action on the part of the clerk a prerequisite to the exercise of the duties of trustees by those who have been elected to such office [29]

(2) Bond and Liability of Sureties

Where a bond of office is given, it stands for the security of the association, irrespective of changes in membership, and the sureties on such a bond may be held in accordance with the general rules governing such matters.

A bond given to an association by one of its officers stands for the security of the society, whoever

22. Tonkin v Kenworthy, 170 A. 233, 112 N J Law 274.

Notice of meeting held sufficient

A resolution declaring the executive secretaryship of a state league of municipalities vacant, adopted at the same meeting prior to defendant's election to office, was not defective because notice of the meeting did not specify the election to be one of the purposes of the meeting, where notice clearly comprehended action that might remove the incumbent secretary.—Tonkin v. Kenworthy, 170 A. 233, 112 N J.Law 274.

Notice to and function of advisory board

(1) The right of the executive secretary of a state league of municipalities to hold office could not be challenged because notice of the meeting called for the purpose of an election was not given to the members of the advisory board, where the league constitution vested authority to select the secretary exclusively in the executive board—Tonkin v. Kenworthy, 170 A. 233, 112 N J Law 274.

(2) Under the constitution of a state league of municipalities, authorizing the advisory board to participate in the discussion of all questions at the meetings of the executive board, the advisory board was limited to the discussion of questions of policy relating to municipal action, administration, and problems and advancement of common welfare of the member municipalities, but could exercise no right in the selection of the league's officers—Tonkin v. Kenworthy, supra.

Eligibility as affected by incumbency of another office

The right of the executive secretary of a state league of municipalities to office could not be challenged on the ground that, when appointed, he was president of the league, since he was not required to resign the presidency to be an eligible candidate for the secretaryship—Tonkin v Kenworthy, 170 A. 233, 112 N J. Law 274.

23. Rudolph v. Southern Ben League, 7 N Y S 135, 23 Abb N. Cas. 199.

24. Ostrom v. Greene, 45 N Y S 852, 20 Misc. 177, affirmed 52 N Y S 1147, 30 App Div. 621, affirmed 55 N E. 919, 161 N.Y 353

Right to office not determinable in replevin action

The question which of two rival claimants is the president of a certain association cannot be determined in an action of replevin—Societa Italiana Progresso Duca Degli Abruzzi v. Vicchiarelle, 178 N Y S. 261, 189 App Div. 102

25. Hickey v. Baine, 81 N.E 201, 195 Mass 446

26. R I—Bennett v. Kearns, 88 A. 806
Tex—Gaines v. Farmer, 119 S.W. 874, 55 Tex.Civ App 601.
5 C J. p 1347 note 6

27. Boston Base Ball Assoc v. Brooklyn Base Ball Club, 75 N.Y.S. 1076, 37 Misc 521

28. Williams v District Executive Board, U M. W. of A, 1 Pa Dist. & Co. 31.

29. Roberts v Hill, 36 N E 843, 137 Ind. 215—5 C.J. p 1348 note 8.

may be its members for the time being, and although its membership may be constantly changing.[30] Where the by-laws of an association provide for a bond by trustees, the acceptance of the bond by the society is a sufficient approval of it.[31]

Although the by-laws require three sureties, yet a bond signed by only a principal and two sureties is valid if accepted and approved by the society, and the sureties cannot complain if they signed without any understanding that a third surety was to sign.[32] When an officer of an association is reelected and becomes his own successor, and at the commencement of his second term reports a certain sum in his hands and gives bond with sureties to account for and pay over the moneys coming into his hands during the term, his sureties will be responsible for the sum so reported in his hands, and will not be allowed to show that the defalcation occurred during the previous term.[33] An association is not bound by the false statements of one of its members, made in open meeting to one who is about to become a surety on a bond of the treasurer of the association, unless he has general authority to represent the association in taking bonds or special authority to represent the association as to the bond in question.[34] The failure of an association to give information to the surety on its treasurer's bond of facts of which the surety was ignorant does not relieve the surety from liability if such information was as accessible to him as it was to the association.[35] It is not the duty of an association or of its officers to require its treasurer to keep the association funds in any particular manner or depository, and the fact that the treasurer has failed to keep such funds separate from his own does not constitute a defense to an action against his surety.[36] A settlement or adjustment of a defalcation provided for by a resolution of the association, if not carried into effect, will not operate to discharge the surety on the defaulting officer's bond.[37]

Joint and several bonds. Where the by-laws of an association provide that the trustees shall give a joint or several bond as security, the trustees may unite in a joint bond, or each trustee may give a several bond,[38] and in the latter event, the sureties on the several bond of one of the trustees may be held liable for the personal default of their principal.[39] The sureties on a several continuing bond, given by one of the trustees of an association when the by-laws provided that the bonds of a trustee should be joint or several, are not holden after the society has changed its by-laws so as to require the trustees to give a joint and several bond.[40]

d. Term of Office

The term of an officer of an association is regulated as to duration by the laws and usages of the association, or, in the absence of either, by the pleasure of the association. An officer elected for a definite term may hold over until election and qualification of his successor.

If the laws of an association prescribe the duration of the term of an officer, such provision is controlling.[41] In the absence of any such provision, the tenure of an officer is to be determined from the usages and resolutions of the society.[42] If the duration of the term of office is fixed neither by the laws of the association, nor by its usages or resolutions, the officer holds his position merely at the pleasure of the association,[43] or at the pleasure of the particular board charged with his selection.[44]

Where the date on which his term is to commence is stated in the ballot by which an officer is elected, such date controls, although the office was vacant at the time of the election and might have been filled from that date.[45]

Holding over. An officer elected for a definite term holds over until the election and qualification of his successor,[46] at least as against third persons, where the association continues to recognize the officer as such after the time prescribed for a new election has passed without action on its part.[47]

30. Coombs v. Harford, 59 A. 529, 99 Me. 426

31. Coombs v. Harford, supra.

32. Coombs v. Harford, supra.

33. Swisher v. Maryland Fidelity, etc., Co, 164 Ill.App. 243.

34. Sewell v. Breathitt Lodge No. 649 F. & A. M., 150 S.W. 677, 150 Ky 542

35. Swisher v. Maryland Fidelity, etc., Co, 164 Ill.App. 243.

36. Swisher v. Maryland Fidelity, etc, Co, supra.

37. Swisher v. Maryland Fidelity, etc., Co, supra.

38. Coombs v. Harford, 59 A. 529, 99 Me 426.

39. Coombs v. Harford, supra.

40. Coombs v. Harford, supra.

41. N.Y.—Goller v. Stubenhaus, 134 N.Y.S. 1043, 77 Misc. 29, 39.
R.I.—Whitty v. McCarthy, 36 A. 139, 20 R.I. 792

42. Goller v Stubenhaus, 134 N.Y.S. 1043, 77 Misc 29.

43. Ostrom v. Greene, 55 N.E. 919, 161 N.Y. 353, affirming 52 N.Y.S. 1147, 30 App.Div. 621, affirming 45 N.Y.S. 852, 20 Misc. 177.

44. Tonkin v. Kenworthy, 170 A. 233, 112 N.J.Law 274

Executive secretary of state league of municipalities, who was appointed by the executive board for no definite term, held such office at the board's pleasure, power to remove being inherent in the executive board.—Tonkin v Kenworthy, 170 A. 233, 112 N.J.Law 274.

45. Loubat v. Le Roy, 40 Hun (N.Y.) 546, 15 Abb.N.Cas. 1.

46. Goller v. Stubenhaus, 134 N.Y.S. 1043, 77 Misc. 29.

47. Sangston v Gordon, 22 Gratt. (62 Va.) 755—5 C.J. p 1348 note 25.

e. Removal or Resignation of Officers; Vacation of Office

An officer holding tenure merely at the pleasure of the association may be removed without cause or prior notice, although an association officer is entitled to notice where he is to be removed for cause, and, where elected for a definite term, he cannot be removed before its expiration without cause and an opportunity to be heard. An officer is impliedly removed by the election of another to fill his place, and his resignation may become effective without formal acceptance. Irregularities in the removal of an officer are subject to waiver.

In the absence of anything to the contrary in the laws, usages, or resolutions of an association concerning the tenure of office, an officer holds his position merely at the pleasure of the association, and may be removed without either cause or notice,[48] although where he is removed for cause, he is entitled to a hearing,[49] and when he has been elected for a definite term, he can be removed only for adequate cause and after an investigation of the charges against him, of which he has been given proper notice, and to which he has been allowed an opportunity to reply[50]

An officer of an unincorporated association can be removed from an office to which he was elected by the votes of the members only by the body which elected him[51]

The action of members will not be sustained where, having withdrawn from a regular meeting merely on account of opposition to the duly elected officers, they meet and pass a resolution expelling the latter from office, and constituting themselves their successors;[52] but where officers themselves secede with no intention of further continuing to hold their positions, the remaining members, although a minority of the association, are at liberty to consider the offices vacant and to fill the same by election[53]

A formal removal may not be necessary, the incumbent of an office is impliedly removed by the election of another person to fill his place.[54]

An officer does not vacate his office by joining a rival association, although the constitution of the latter organization provides that no member thereof shall remain a member of any similar association.[55]

The resignation of a member of the executive committee of an association may become effective without a formal acceptance thereof.[56]

Waiver of irregularities. Although the removal of an officer is irregular, yet where he acquiesces therein, and makes no further claim to the office, he loses all official power.[57]

Damages for wrongful removal. No action for damages for wrongful suspension of an officer will lie against members of a committee, where an appeal has been taken to the proper association tribunal and the matter has passed out of the jurisdiction of the committee.[58]

§ 20. —— Powers, Duties and Liabilities

a. In general
b. Right to funds, books, and records
c. Power to bind association
d. Duties and liabilities

a. In General

An officer may not exercise powers granted by the constitution exclusively to others.

Broadly speaking, the powers, duties, and liabil-

48. Tonkin v Kenworthy, 170 A. 233, 112 N J Law 274—5 C J p 1348 note 26

49. Walker v. Grice, 159 S E 914, 162 S C 29

Removal for cause limits power to remove, and party to be removed is entitled to hearing—Walker v. Grice, 159 S E. 914, 162 S C 29.

What constitutes removal for cause

Removal of regularly elected secretary for "failure in performance of duty" is "removal for cause"—Walker v Grice, 159 S E. 914, 162 S C. 29

50. Bentley v Hurley, 299 S.W. 604, 222 Mo App 51—5 C J. p 1348 note 27.

51. N.Y—Tanner v Ranken, 89 N Y. S 770, 44 Misc 488

Pa.—Lowry v. Stotzer, 7 Phila. 397.

52. McCallion v. Hibernia Sav, etc, Soc., 12 P. 114, 70 Cal. 163.

53. McFadden v. Murphy, 21 N E 868, 149 Mass. 341.

54. Ostrom v. Greene, 55 N.E. 919, 161 N Y. 353, affirming 52 N Y.S 1147, 30 App Div 621, affirming 45 N Y.S. 853, 20 Misc 177.

55. Farrell v Cook, 11 N.Y.S 326, affirming 5 N Y S. 727.

56. In re Tidewater Coal Exchange, (C C A N Y.) 280 F. 638, affirming (D C) 274 F 1008, 1011, and certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co, 42 S Ct 587, 259 U S. 584, 66 L Ed. 1075

57. Industrial Trust Co. v. Green, 33 A. 914, 17 R I. 586, 17 L R A. 202.

58. Burton v. Dickson, 180 P 216, 104 Kan 594, rehearing denied 180 P. 775, 104 Kan 594.

Appeal to state grange from suspension by executive committee

"The executive committee of the Kansas State Grange of the Patrons of Husbandry, a voluntary association, such committee having authority to suspend an officer who proved inefficient or derelict in the discharge of duty, made an order suspending the worthy lecturer without having first given her an opportunity to be heard. She appealed to the state grange, which took no direct action on the appeal, but sustained a ruling of the presiding officer that a motion to hear her thereon was out of order The record of the suspension recited that it was made 'pending further investigation,' and the committee prepared for a formal hearing, but abandoned it on the ground that the appeal had deprived them of jurisdiction. Held, that the action of the state grange amounted to an affirmance of the order of suspension, and was conclusive upon the appellant, and that, if the officer's legal rights were invaded, her injury was at the hands of the grange, and that no action would lie against the members of the committee on account thereof."—Burton v Dickson, 180 P 216, 104 Kan 594, rehearing denied 180 P. 775, 104 Kan 594.

ities of the officers of an association find their basis in applicable provisions of its constitution or by-laws, usage, and general principles of law. An officer may not exercise a power which the constitution grants exclusively to a board of directors or to the member clubs of the association.[59]

b. Right to Funds, Books, and Records

The duly elected or de facto officers of an association or its trustees are ordinarily entitled to custody of its funds and records, although they may waive the right to custody thereof.

The proper officers of an association are entitled to custody of its funds,[60] and of its books and records.[61] Officers elected and installed, and actually exercising their official functions, may be entitled to custody of the association's funds, irrespective of the validity of their election.[62]

Where an association by unanimous vote appropriates money for a certain purpose, and the committee authorized to expend the fund incurs liabilities on the faith of the appropriation, their right to the fund thereupon becomes vested, and cannot be divested by the subsequent dissent of a member of the society [63]

It seems that it is no defense to an action by the president of a voluntary association to recover a fund from its former officers that it has been applied by a minority to the general purpose for which the association was organized, since the majority is entitled to control.[64]

Persons otherwise entitled to the custody of a fund as trustees for an association may by waiver lose their right to recover the same at law from a member of the society who holds the fund for the use of all members [65]

c. Power to Bind Association

(1) In general

(2) Power to bind by contract

59. American League Baseball Club of New York v Johnson, 179 N Y S 498, 109 Misc 138, affirmed 179 N Y S 898, 190 App Div 932

President of baseball league's power to discipline clubs or players

(1) The president of the American League of Professional Baseball Clubs, on discovering that the contract of a player of a club which was a member of the league, after ceasing to play for his own club, had been assigned by it to plaintiff, another member of the league, had no authority to discipline or punish the two clubs by suspending the player until further notice, as under §§ 6, 7, 10 of the league constitution such power is given exclusively to the board of directors —American League Baseball Club of New York v Johnson, 179 N.Y S 498, 109 Misc. 138, affirmed 179 N Y S 898, 190 App.Div. 932

(2) Under § 20 of the constitution of the American League of Professional Baseball Clubs, giving the president power to impose fines and penalties in way of suspension, or otherwise on any player guilty of conduct detrimental to the general welfare of the game, and § 24, giving each club the right to regulate its own affairs and suspend its players, etc, for carelessness, indifference, etc, "but not in conflict with any provision of the National Agreement or this constitution," the president of the league had no authority to suspend a player as a punishment for his alleged desertion, etc, as that power was given to the clubs, and as, in view of § 38, the offense was not included within Playing Rules (1903) § 67, notwithstanding the president's former exercise of such power —American League Baseball Club of New York v Johnson, supra

President's function as limited to transmission of complaints

Under § 36 of the constitution of the American League of Professional Baseball Clubs, lodging in the board of directors, the supervisory body of the league, the power to require a club to discipline one of its players, any function of the president of the league in connection therewith is merely to transmit complaints to the board —American League Baseball Club of New York v Johnson, 179 N Y S 498, 109 Misc 138, affirmed 179 N Y S 898, 190 App Div. 932

Directors in control as against executive committee

Where the by-laws of a syndicate formed to buy and sell oil leases provided for an executive committee, which should perform all acts necessary to complete the organization, and further provided for the election of a board of directors by the stockholders, and that such directors should assume control of the business, it was held that, despite conflicting provisions in the by-laws, which apparently would have given the executive committee continuing control, the directors elected by the stockholders are thereafter entitled to control the affairs of the association as against the executive committee —Oil Lease & Royalty Syndicate v. Beeler, (Tex Civ App.) 217 S W 1054, error refused

60. Bentley v Hurley, 299 S.W. 604, 222 Mo App 51.

Treasurer

A member of a nonprofit voluntary association has joint legal interest with all other members in the fund and property of the association in her hands as treasurer, and hence cannot be sued at law by them for conversion thereof, the law of partnership applying —Bentley v Hurley, 299 S W. 604, 222 Mo.App. 51.

61. Bentley v. Hurley, supra.

Replevin

The members of an association cannot replevy the treasurer's books and records "if she is still the treasurer of the original association, for, in that event, she is entitled to the possession of the books of that office "—Bentley v Hurley, 299 S W 604, 607, 222 Mo App 51

62. Smith v. Merriott, 100 A. 731, 130 Md 447.

Former officer's duty to turn over bank book and money

Where officers of an association have been elected and installed, and are exercising the functions and powers of their respective offices, a former officer possessing a bank book and money admitted to be the property of the association cannot restrain such officers from demanding such property on the ground that the election was invalid, as he would incur no responsibility by turning over such property to the acting officers of the association —Smith v. Merriott, 100 A 731, 130 Md 447.

63. Carter v Strafford Sav. Bank, 48 A 1083, 70 N H. 456

64. Ostrom v. Greene, 55 N E 919, 161 N Y. 353, affirming 52 N.Y.S 1147, 30 App Div 631, affirming 45 N Y.S. 852, 20 Misc 177—5 C.J p 1349 note 39

65. Smith v Moore, 129 Mass. 222.

(3) Execution of powers
(4) Ratification of unauthorized acts

(1) In General

The officers and agents of an association may bind it when acting within their powers, which are ordinarily prescribed by the articles of association, constitution, or by-laws. An association creating a subsidiary or branch may be liable for the acts of the latter.

The acts of the officers and committees of an association, within their prescribed powers, are binding on the association.[66] The power of the officers of a voluntary association to bind it, while sometimes conferred by statute, as will appear from an examination of statutory provisions and the cases cited below,[67] is generally determinable from its articles of association or constitution, and its by-laws [68] Regard may be had also to the usages of the association and to its objects or purposes, especially where the society has adopted no laws or where the laws adopted are silent on the subject [69]

Where power to bind the association is not conferred either expressly or by implication of fact, the court, in determining whether such power exists, will apply the principles of law applicable to partnership or to agency, according to whether the association is formed for profit or not, as will more fully appear from an examination of the following subsection (2) (b).

Whether or not a committee has power to bind the association is ordinarily a question of fact for the jury.[70]

Branch or subsidiary associations Where a voluntary association creates a subsidiary or branch association as an instrumentality through which to accomplish certain purposes, it is liable for the acts of such subsidiary association to the same extent as though such acts had been done by the entire membership [71]

(2) Power to Bind by Contract
(a) In general
(b) Nature and extent of power
(c) Liability of association in quasi contract

(a) In General

A duly authorized officer of an association may by contract bind all the associates including himself.

If an officer, having authority to do so, enters into a contract for, and in behalf of, the association, he thereby binds all the associates,[72] including himself,[73] but an officer cannot bind the association or its members by a contract which he is not authorized to make.[74]

66. Bersch v. Fire Underwriters Ass'n of St. Louis, (Mo.) 241 S W 428

67. Miller v. Chance, 3 Edw (N Y) 399

Power as limited by statute.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

68. Idaho—Spotswood v Morris, 85 P. 1094, 12 Idaho 360, 6 L R.A.(N S) 665

N Y.—Coney v. Brennan, 167 N Y.S 903.

Power to indorse or collect negotiable paper

A provision of the constitution of a voluntary association to the effect that the financial secretary shall collect all moneys and pay the same to the treasurer, and that "It shall be the duty of the treasurer to receive all moneys from the financial secretary," does not authorize the financial secretary to indorse or collect negotiable paper—Toadvine v. Northwest Trust & State Bank, 211 P 286, 288, 122 Wash. 609.

69. Richmond v. Judy, 6 Mo.App. 465

70. Shea v. Quaker City Wheelmen, 9 Pa Super. 225.

71. Spaulding v. Evenson, (C C. Wash) 149 F. 913, affirmed 150 F 517, 82 C.C A. 263, 9 L R A (N.S) 904.

72. N D—Vorachek v. Anderson, 211 N W. 984, 54 N D 891.

S C—Medlin v Ebenezer Methodist Church, 129 S E. 830, 132 S C. 498. 5 C J p 1349 note 48.

Conveyance by trustees chosen under common law and not under statute

Where members of voluntary, fraternal, nonbusiness association authorized duly elected trustees of the association to convey property to a certain person, to enable such person to execute a mortgage to avoid foreclosure under the existing mortgage, the mortgage so executed for such purpose was enforceable in equity, although the successors to the previous trustees of the association were not appointed by register, under Code (1907) § 6098, since such statute was not exclusive, the association having a common-law right to elect their trustees to act on behalf of the association, and to hold its properties.—Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So. 54, 212 Ala 444

Mortgage executed by de facto trustee

Where a fraternal, nonbusiness association continued to function as such, notwithstanding a prior incorporation in which less than a majority of the membership had participated, and a majority of its members, after a meeting duly called for that purpose, authorized duly elected trustees to convey the association's property to a certain person to enable such person to mortgage the property, or procure an extension of an existing mortgage, in order to prevent foreclosure of the existing mortgage, the conveyance to such person and the mortgage executed by him for such purpose will be enforced in equity, even if such trustees were not de jure trustees, since the person to whom the land was conveyed for such purpose was a de facto trustee—Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So 54, 212 Ala. 444.

73. N.D—Vorachek v. Anderson, 211 N W. 984, 54 N D 891.

S.C—Medlin v. Ebenezer Methodist Church, 129 S E 830, 132 S C. 498. 5 C J. p 1349 note 49.

74. Coney v. Brennan, 167 N.Y.S. 903.

Contract relative to insurance

The Independent Police Endowment Association of New York City being organized to secure endowment on the lives of its members, its board of directors or its executive committee was not authorized to contract with the agent of a life insurance company to pay him compensation, by way of commission, extending beyond the time when he

(b) Nature and Extent of Power

Acts of officers within the scope of the powers ordinarily conferred upon such officers will, in general, be deemed the acts of the association. While the officers and agents of an association engaged in business are, ordinarily, presumed to have authority to bind the association as to matters within the scope of such business, in the case of an association formed for moral, benevolent, political, or other noncommercial purposes, authority of its officers or agents to bind the members will not ordinarily be presumed from the existence of their general power to act for the association.

In the absence of evidence tending to show a limitation of their power, acts of the officers of an association within the scope of the powers ordinarily conferred upon such officers will be deemed to have been the acts of the association.[75] The power of officers to bind the association by particular contracts may be implied from general powers expressly conferred upon them.[76] The members of a state grange are not liable in contract to a member of a local grange for misrepresentations in the sale of goods made by an agent appointed by the former.[77]

If an association at a meeting of its members confers power upon one person to do an act, his authority is superior to and supersedes a power to do the same act previously conferred upon another person by the society's board of trustees.[78]

Purpose of association as determining authority. In determining whether or not an officer has authority to bind the association, it is material to consider the nature of the society and its object and purpose. An association engaged in commercial enterprises involving profit and loss being in many respects a partnership in legal effect (supra § 1), the authority of its officers to bind it by contract is governed by the law applicable to partnerships, and accordingly, its officers and agents are presumed to have authority to make in its behalf any contract within the scope of the business for the prosecution of which the association was formed, and the association is bound by such a contract so made.[79]

If, on the other hand, an association is formed, not for profit, but for moral, social, benevolent, literary, scientific, political, recreative, or other like purpose, its liability on contracts made by its officers or committees depends on the principles of the law of agency, and authority to create such a liability will not be presumed or implied from the existence of a general power to attend to or transact the business, or to promote the objects for which the association was formed,[80] except, it has been held, where the obligation contracted is necessary for the preservation of the society,[81] or where the fund for payment of the obligation has already been provided.[82]

(c) Liability of Association in Quasi Contract

An association receiving the benefits of articles furnished or labor performed may be held liable therefor on a contract implied in law.

Although the association may not be liable on a contract made by an officer or agent, yet, if it receives the benefit of articles furnished[83] or labor performed[84] thereunder, it is liable for the reasonable value or worth thereof on a contract implied in law, independently of any question of ratification of the unauthorized contract of the officer or agent.

(3) Execution of Powers

Officers of an association acting under limited powers can bind the society only by acts strictly conforming to the powers conferred.

Where the officers of an association act under special and limited powers, their acts must be in strict conformity therewith or the society will not be bound

rendered services in writing individual policies on each member of the association payable to it, the constitution and by-laws of the association showing no authority in the officers to make such a contract.—Coney v. Brennan, 167 N.Y.S. 903.

75. Giles v. Ortman, 11 Kan. 59—5 C.J. p 1349 note 50.

76. Ga.—Augusta Amateur Musical Club v. Cotton States Mechanics', etc., Fair Assoc., 50 Ga. 436.
Ind.—Phillip v. Aurora Lodge No. 104 I. O. G. T., 87 Ind. 505
Mass.—Willcox v. Arnold, 39 N.E. 414, 162 Mass. 577.
N.Y.—Ranken v. Probey, 115 N.Y.S. 332, 131 App.Div. 328—Deller v. Staten Island Athletic Club, 9 N.Y.S. 876—Miller v. Chance, 2 Edw. 399.
Vt.—Sawyer v. Royalton, M. E. Soc., 18 Vt. 405
5 C.J. p 1349 note 51.

77. Edgerly v. Gardner, 1 N.W. 1004, 9 Neb. 130

78. Kirwan v. Barney, 61 N.Y.S. 122, 29 Misc. 614, affirming 57 N.Y.S. 812, 27 Misc. 181.

79. Ky.—Pennyroyal Fair Ass'n v. Hite, 243 S.W. 1046, 195 Ky. 732
La.—American Nat. Bank of Shreveport v. Reclamation Oil Producing Ass'n of Louisiana, 101 So. 10.
5 C.J. p 1350 note 55
Apparent scope of gatekeeper's authority
A fair association was bound by a gatekeeper's contract to care for an automobile parked within the fair grounds, at a place designated by the gatekeeper, for a consideration, where the gatekeeper was the association's only representative present at the time, although the making of such contract was in excess of the gatekeeper's authority, the contract being within the apparent scope of his authority, and the automobile owner having no knowledge of secret limitations thereon.—Pennyroyal Fair Ass'n v. Hite, 243 S.W. 1046, 195 Ky. 732.

80. Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 303—5 C.J. p 1350 note 57.

81. McCabe v. Goodfellow, 30 N.E. 728, 133 N.Y. 89, 17 L.R.A. 204—5 C.J. p 1350 note 58

82. Hosman v. Kinnealy, 90 N.Y.S. 357, 45 Misc. 411, affirmed 93 N.Y.S. 1134, 104 App.Div. 630.

83. Allen v. Clark, 65 Barb. (N.Y.) 563—5 C.J. p 1350 note 61

84. Sullivan v. Campbell, 2 N.Y. Super. 271.

thereby.[85] So, where the board of directors has been authorized to settle the affairs of an association, it has been held that the full board must be present at the settlement, and that a majority alone cannot act,[86] although where the power to act is expressly, or by necessary implication, conferred upon an executive committee, it may bind the association just as a board of directors would bind a corporation.[87]

Where certain officers of the society have been authorized to negotiate a sale of its property, they must act jointly in order to bind it,[88] but, where a committee has been authorized to do an act, it is usually held that the act of the majority is to be taken as the act of the whole, unless there is something in the delegation of authority to the contrary,[89] and the same rule applies where managers are appointed to conduct the association's business, at least where the duty to be performed is ministerial;[90] and in this connection it has been held that discretionary powers of an executive committee may not be delegated.[91]

One member of a board of directors cannot exercise a power conferred upon the board,[92] unauthorized representations of one member of a committee are not the acts of the committee, so as to bind the association.[93] The fact that a member of an unincorporated association who indorsed a note executed to the association was also its treasurer would not make the assignment of the note one by the association, especially where he did not sign as such.[94]

(4) Ratification of Unauthorized Acts

A contract or other act of the representative of an association which was originally unauthorized may become valid and binding on due ratification thereof, although acts falling short of due ratification will not suffice.

Although the contract or other act of an officer, agent, or committee of an association was originally unauthorized, yet the society may ratify it and thus become bound thereby,[95] as where the association accepts the benefits of the unauthorized transaction.[96]

85. N.Y.—Sullivan v. Campbell, 2 N.Y. Super. 271.
Pa.—Ash v. Guie, 97 Pa. 493, 39 Am. R. 818.

86. Pease v. Sandusky Steamboat Co., 1 Ohio Dec. (Reprint) 150, 2 West L.J. 550.

87. In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.

Between annual meetings

Between annual meetings of members of a coal exchange formed by shippers of bituminous coal at the instance of the Council of National Defense during the war with Germany, it was held that the executive committee, the only body in existence capable of acting at all for the exchange, an unincorporated association, had complete authority to do everything which a normal board of directors of a corporation could do.—In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.

88. West Side Masonic Temple Assoc. v. Smith, 177 Ill.App. 161.

89. Wehr v. German Evangelical Lutheran St. Matthew's Cong., 47 Md. 177—5 C.J. p. 1350 note 68.

90. Wells v. Gates, 18 Barb. (N.Y.) 554—5 C.J. p. 1350 note 69.

91. In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.

Legal vote not shown

Where the executive committee of a bituminous coal shippers' association normally consisted of eleven members, but only nine were ever elected, and one of the nine had resigned, although his resignation was not accepted, three members of the committee, and two other persons holding proxies to act for two other members of the committee, which five united in a certain vote, did not produce a legal vote of the executive committee of the association, although the business of the committee had customarily been conducted in such manner.—In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.

92. Skinner v. Dayton, 5 Johns.Ch. (N.Y.) 351, reversed on other grounds 19 Johns. 513, 10 Am.D. 286.

One of several trustees as lacking power to act alone

One of several trustees of a fraternal organization cannot make a contract to execute a lease unless the other trustees approve or confirm it.—Bailey v. Free and Accepted Masons of South Carolina, 108 S.E. 107, 116 S.C. 263.

93. Kuteman v. Lacy, (Tex.Civ.App.) 144 S.W. 1184.

94. Nakagawa v. Okamoto, 130 P. 707, 164 Cal. 718.

95. In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075—5 C.J. p. 1350 note 73.

Ratification shown

A resolution of three of the executive committee of nine of an unincorporated association, which resolution constituted an act of bankruptcy, and was unauthorized because not passed by the requisite number of committee members, was, under the evidence, by the filing of an answer to the involuntary petition in bankruptcy by the attorney for the exchange, ratified by the other members of the committee as of the time of adoption, so that an adjudication was valid.—In re Tidewater Coal Exch., (D.C.N.Y.) 274 F. 1011, affirmed (C.C.A.) 280 F. 638, certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.

96. N.Y.—Hosman v. Kinneally, 90 N.Y.S. 357, 45 Misc. 411, affirmed 93 N.Y.S. 1134, 104 App.Div. 630.
Vt.—Henry v. Jackson, 37 Vt. 431.
5 C.J. p. 1351 note 74.

The approval of an unauthorized act does not amount to ratification unless the association had knowledge of all the material facts;[97] and, where the ratification is based on the approval given by members at a meeting of the society, it must appear that the meeting was regularly called[98] The approval of an unauthorized contract subject to changes which are never made does not render the contract binding on the society,[99] and knowledge and approval by the members of a law and order league of the retainer by its officers of a lawyer to prosecute violations of the law will not render them personally liable for the services, if they had no reason to suppose that the employment was on their credit, but expected the expenses to be met by individual contributions placed at the disposal of their officers for that purpose[1]

An unauthorized act cannot be ratified by a person or body of persons who could not have authorized the act in the first instance.[2]

d. Duties and Liabilities

(1) As to members
(2) As to third persons

(1) As to Members

The officers of an association are bound to act for the common interest of all members, should not reap secret profits at the expense of the association, and may be held personally liable for breach of their obligations toward the members of the association.

The officers of a voluntary association are bound to act for the promotion of the common interest of all members,[3] as by refusing to participate in an authorized transaction,[4] and they are individually liable to their associates for fraud or breach of trust in the conduct of the society's affairs.[5] Accordingly, they will not be allowed to reap secret profits from surreptitious dealings with or for the association, but will be compelled to account therefor at the suit of other members.[6]

Officers are liable to their associates for the conversion of property belonging to the society,[7] and an action may be maintained against the treasurer of an association to recover funds converted by him,[8] or against a former treasurer for moneys which he has refused to pay over to his successor on demand.[9]

(2) As to Third Persons
(a) Authorized contracts
(b) Unauthorized contracts
(c) Torts

(a) Authorized Contracts

While officers of an association are generally held personally liable on contracts made by them with third persons in behalf of the association, the presumption of their liability is merely one of fact, and they may escape individual responsibility on proof that credit was extended to the association and not to the officers as individuals. An agent not a member nor an officer of the association incurs no personal responsibility through contracting with a third person in behalf of his disclosed principal, the association, unless he unequivocally charges himself with liability.

It has been shown above in this section that, where an officer of an association, having authority to do so, enters into a contract in its behalf, he thereby binds all members of the society, including himself. In this event, if his liability is merely that of a mem-

97. Ga.—New Ebenezer Assoc v Gress Lumber Co, 14 S.E. 892, 89 Ga 125
N.Y.—Siff v. Forbes, 119 N.Y.S. 773, 135 App.Div. 39, reversing 117 N.Y.S. 143, 63 Misc 319.

98. Rudolph v Southern Ben. League, 7 N.Y.S. 135, 23 Abb N Cas 199

99. Barnes v. Berry, (Ohio) 169 F 225, 94 C.C.A. 501, affirming (C. C.) 157 F. 883

1. McCabe v. Goodfellow, 30 N.E. 728, 133 N.Y. 89, 17 L.R.A. 204

2. N.Y.—Siff v. Forbes, 119 N.Y.S. 773, 135 App.Div. 39, reversing 117 N.Y.S. 143, 63 Misc. 319.
Pa.—Crum's App., 66 Pa. 474.

3. Ferguson v. Crawford, 236 S.W. 837, 151 Ark. 503—5 C.J. p 1351 note 81.

4. Nickerson v. Houlton Lodge of Elks, No. 835, 111 A. 831, 119 Me 309.

Duty to refuse order for illegal expenditure
Where the vote of an association authorizing an expenditure of funds for a certain purpose was illegal, because not authorized by the by-laws, it was the exalted ruler's duty to refuse to sign the order, notwithstanding such vote—Nickerson v. Houlton Lodge of Elks, No. 835, 111 A. 831, 119 Me. 309

5. Ferguson v Crawford, 236 S.W. 837, 151 Ark 503—5 C.J. p 1351 note 82.

6. Ferguson v. Crawford, supra—5 C.J. p 1351 note 83.

On sale of oil lease
The officers of a voluntary unincorporated association are bound to act for the common interest of the members and are individually liable for a breach of trust in the conduct of its affairs, and, where an association owned an oil lease and selected members as trustees to sell the lease, such members could not reap a profit for themselves, and, while acting as trustees, as the chancellor properly found under the evidence, sell only their interests in the lease when they could have sold the entire lease for the same price proportionately, and must account to the other members for the profits they would have made if they had sold the entire lease—Ferguson v. Crawford, 236 S.W. 837, 151 Ark. 503.

7. Hamaty v. St. George Ladies Soc, 181 N.E. 775, 280 Mass. 52—5 C.J. p 1351 note 84

8. Hamaty v. St. George Ladies Soc, supra—5 C.J. p 1351 note 85

When recovery refused
Suit to recover funds alleged to have been embezzled by society treasurer will be dismissed when the testimony is conflicting and the attending circumstances corroborate in part defendant's story—Independent Friends of America v. Washington, 6 La.App. 21.

9. Gieske v. Anderson, 19 P. 421, 77 Cal 247—5 C.J. p 1351 note 86.

ber, it can be enforced only in conjunction with the liability of his associates in a suit against all, or against a few as representatives of all, or, under some statutes, in a suit against prescribed officers of the association, or against the association in its own name, as will be explained in § 36 infra.

It is generally held, however, that apart from his liability as a member, an officer who enters into a contract in behalf of the association is liable thereon as an individual, irrespective of the liability of the associate members,[10] although he does not intend to render himself liable,[11] and believes that the law does not render him so.[12] This is especially true, where he makes the contract in his individual capacity,[13] or where credit is given to him individually.[14]

But the inference that the officer binds himself is merely one of fact,[15] the question whether credit is given to the officer or to the association being for the determination of the jury,[16] and it does not follow, as a matter of law, that, in every case where the officer of a voluntary unincorporated association makes a contract with a third person in behalf of the association, he thereby renders himself personally liable.[17] On the contrary, where the officer does not contract in his individual capacity, or on his individual credit, but credit is given to the association, he is not liable on the contract except as a member in common with his associates.[18]

Where one who makes a contract professedly in behalf of an association pursuant to authority is not a member or an officer of the society, but a mere agent, he is, of course, not liable thereon,[19] any more than the agent of any other disclosed principal, unless he unequivocally charges himself with the obligation.[20]

(b) Unauthorized Contracts

An officer attempting to make an unauthorized contract in behalf of the association may be solely and individually bound. Under decisions regarding a contract purportedly in the name of an association as made in behalf of a principal unable to contract, the officer or agent entering into such contract is personally bound.

If an officer, in making a contract in the association's behalf, acts without authority or in excess of his authority, the association is not bound thereby, and accordingly, he is not bound in his capacity as a member (supra § 15), but he is bound individually on the contract, and may be proceeded against alone.[21]

There are also authorities to the effect that since an association is not a legal entity and therefore lacks

10. Miss.—Treas v. Price, 146 So. 630, 167 Miss. 121.
N.Y.—Empire City Job Printing Co v. Falk, 272 N.Y.S. 202, 151 Misc. 688, reversed on other grounds Empire City Job Print v. Falk, 277 N.Y.S 795, 244 App.Div. 6, reversing Empire City Job Print v. Harbord, 265 N.Y.S 450, 148 Misc 231.
N.D.—Vorachek v. Anderson, 211 N.W. 984, 54 N.D. 891.
Pa.—Irwin v. McCullough, 97 Pa.Super. 602—Louis A. Irwin, Inc v. McCullough, 12 Pa.Dist. & Co 571—Louis A. Irwin, Inc. v. McCullough, 11 Pa.Dist. & Co 11
S.C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.
5 C.J. p 1351 note 92.

11. Miss.—Alkahest Lyceum System v. Featherstone, 74 So. 151, 113 Miss. 226.
N.D.—Vorachek v. Anderson, 211 N.W. 984, 54 N.D. 891.
S.C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.
5 C.J. p 1351 note 92.

Officers of civic league contracting for entertainments

The officers of an unincorporated civic league, who signed a contract for the league for certain entertainments at a stipulated consideration, are individually liable for the consideration, although they did not intend to assume such liability by signing the contract.—Alkahest Lyceum System v Featherstone, 74 So 151, 113 Miss. 226

12. N.D.—Vorachek v. Anderson, 211 N.W. 984, 54 N.D. 891
S.C.—Medlin v Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498
5 C.J. p 1351 note 94

13. Del.—McKinnie v. Postles, 54 A. 798, 20 Del 16.
N.Y.—Lincoln v. Crandell, 21 Wend. 101.

14. Winona Lumber Co. v. Church, 63 N.W. 107, 6 S.D 498.

15. Fuller v Reed, 215 N.W. 147, 55 N.D. 707.

16. Empire City Job Printing Co. v. Falk, 272 N.Y.S. 202, 151 Misc 688, reversed on other grounds Empire City Job Print v. Falk, 277 N.Y.S 795, 244 App.Div. 6, reversing Empire City Job Print v Harbord, 265 N.Y.S 450, 148 Misc. 231—5 C.J. p 1352 note 98.

17. Fuller v. Reed, 215 N.W. 147, 55 N.D. 707.

Distribution committee not liable under facts

Where claimant of a reward had no dealings with a committee selected by a banker's association to distribute a reward, and where such committee's only function was to make distribution of the reward, the dissatisfied claimant could not recover of the committee even if its distribution was improperly made, as the committee members were not personally liable to such claimant, and under the facts the rule that agents of an unincorporated association may be personally liable for their acts in behalf of such association was wholly inapplicable.—Bird v Barrett, 224 N.W. 556, 207 Iowa 1158.

18. Fla.—Hunt v Adams, 149 So 24.
N.D.—Fuller v. Reed, 215 N.W. 147, 55 N.D. 707.
5 C.J. p 1352 note 97.
"Where such officer contracts solely as a representative of the association, and expressly stipulates that he is not to be bound individually, and that the other contracting party shall receive payment only out of funds received by the association from membership dues, the officer is not individually liable upon the contract."—Fuller v. Reed, 215 N.W. 147, 55 N.D. 707.

19. Morris v. Murray, 44 N.Y.S. 600, 20 Misc. 7.

20. Morris v. Murray, supra.

21. N.Y.—Bartholomae v. Kauffmann, 47 N.Y.Super. 552, affirmed 91 N.Y. 654—Sullivan v. Campbell, 2 N.Y.Super. 271—Skinner v. Dayton, 19 Johns 513, 10 Am.D. 286, reversing 5 Johns Ch 351.
Pa.—Ash v Guie, 97 Pa. 493, 39 Am. R 818
5 C.J. p 1352 note 4.

capacity to contract as such, a contract made in its name by an officer or agent is in effect a contract made by an agent in behalf of a principal without power to contract, and, therefore, binds the officer of the association individually, just as in the case of a contract made by any other agent of a principal without contractual capacity.[22]

(c) Torts

An officer of an association may be held liable for a tort committed in the course of his duties It has been held beyond the power of an officer to recover, as owner, for a tortious injury to property of the associates used by the officer. The right of an officer to limit his liability for injury to an employee has been denied.

Officers of an association are liable, as such, for a tort committed by them in the course of their duties.[23]

An officer of an unincorporated association, for whose use an automobile has been purchased and "registered" in the name of the association, has been denied the right to recover as owner for damages thereto.[24]

Limitation of liability. While the officers and trustees of an unincorporated association may limit their liability as to some torts, and even relieve the trust estate as to some, they cannot by contract exempt themselves from personal liability to an employee for injuries suffered by him through the negligence of other employees.[25]

§ 21. —— Compensation and Reimbursement

In the absence of an express contract an officer or committee member may be denied compensation for his services. An officer will be denied reimbursement for expenses incurred by him in the execution of an illegally voted dissolution of the association.

In the absence of an express contract a member of a committee is not entitled to compensation for his services.[26]

The treasurer of an association will not be allowed for expenses incurred by him in carrying out an illegal vote to dissolve the association, nor for the costs and expenses of an equity suit brought by members to restrain him from carrying into effect the illegal vote.[27] Where, notwithstanding an association's contention, as defense to plaintiff's action for salary as manager, clerk, and bookkeeper that the agreement was that plaintiff should receive a salary only if the association made a yearly profit and the evidence showed that such a profit had been made, plaintiff was held entitled to a salary.[28]

§ 22. Membership

a. Transfer of membership
b. Estoppel to deny membership
c. Contracts between members

a. Transfer of Membership

Membership in a voluntary association is not transferable in the absence of assent by the association, as through provision of its constitution or by-laws.

22. Miss.—Victor v. Adams, 106 So. 433, 140 Miss. 643
Or.—Cousin v. Taylor, 239 P. 96, 115 Or. 472, 41 A.L.R. 750
These decisions apparently overlook the point that a contract made in the name of an association may be construed as one made in behalf of all the members, and that under the latter construction the officer would be agent for the various members of the association and might therefore represent principals capable of contracting.

23. McNeal v. Farmers' Market Co., 43 Pa.Super. 420.

24. Hanley v American Ry. Express Co, 138 N.E. 323, 244 Mass. 248.
Under a strict construction of Massachusetts statutes, it has been held that, where an automobile was purchased by the members of an unincorporated association, for the use of an officer thereof, and registered in the name of the association, no one could recover against a third party for damages to such automobile. Suit brought by the officer was amended so as to make the true owners, that is, the members of the association, the plaintiffs, but the court held such amendment ineffectual, taking the view that as the car was registered in the name of the association instead of the individual members as owners in common, it was not registered in the name of the "owner" and was, therefore, a trespasser on the highways of Massachusetts, for damage to which no recovery could be had under Massachusetts justice; and pointing out that, even if registration in the name of the association was construed as in the name of the individual members as owners in common, recovery would still be denied, because the membership had changed intermediate the registration and the accident, and there had been no new registration in the names of the new owners, or members, as required by statute.—Hanley v American Ry. Express Co, 138 N.E. 323, 244 Mass. 248.
A broader construction of the Massachusetts motor vehicle registration statutes would deny recovery for damages to an improperly registered vehicle only where there was an actual intent to violate the registration law, and under such a construction recovery could have been permitted under the amended complaint in the above case, inasmuch as no actual intent to violate registration acts was shown. The decision seems sound, however, in so far as it denies to an officer of an association the right to recover as individual owner for damages to property owned in common by the members

25. Fisheries Co. v. McCoy, (Tex. Civ.App.) 202 S.W. 343

26. Security Co. v. Bennington Monument Assoc, 40 A. 43, 70 Vt. 201.
Evidence warranting denial of salary
Evidence justified findings and conclusions denying the secretary of an unincorporated voluntary association recovery of salary against other individual members, where it was shown that he relied on the earnings of the association for his salary and that such earnings were insufficient.—Fuller v. Reed, 286 N.W. 267, 60 N.D. 680.

27. St. Mary's Benev. Assoc. v. Lynch, 9 A. 98, 64 N.H. 213

28. Genco v. Union Berry & Truck Ass'n, (La.App.) 167 So. 890, setting aside order dismissing appeal 166 So. 888.

The right of membership in a voluntary association is not transferable,[29] unless the association assents thereto;[30] and hence, the transferee has no rights, as such, except what the association chooses to accord him.[31] However, the laws of the association may authorize the disposition of membership privileges, and the substitution of the transferee as a member on his signing the articles of association.[32]

b. Estoppel to Deny Membership

An association is not estopped to deny that an expelled associate was ever a member where he was not thereby misled to his injury. A person may be estopped to deny membership in an association.

An association is not equitably estopped, as against one whom it had expelled from membership, to deny that he had ever been a member, where he was not misled to his injury by such action on the part of the society.[33] However, a person may be estopped to deny his membership in an association.[34]

c. Contracts between Members

Contracts between members may be subject to the regulations of the association.

Contracts between members of an association as to matters within the scope of the associate purpose have been held subject to associate rules and regulations.[35]

Arbitration. Where provision therefor is made in the articles of association, it is competent for members to make valid and binding agreements to submit to arbitration questions in dispute connected with their membership.[36]

§ 23. —— Admission of Members

a. In general
b. When membership arises

a. In General

As a general rule, admission to membership in a voluntary association is a matter within the complete and exclusive jurisdiction of the association. Where, however, one duly elected has been arbitrarily denied admission, he may secure judicial relief.

The grant or refusal of membership in a voluntary association is a matter within the complete control of the organization,[37] which has the power to enact laws governing the admission of members,[38] and to place restrictions on the right of admission.[39]

In other words, membership is a privilege which the society may accord or withhold at its pleasure, and a court of equity will not interfere to compel the admission of a person not regularly elected,[40] even though the arbitrary rejection of the candi-

29. Ostrom v. Greene, 55 N.E. 919, 161 N.Y. 353, affirming 52 N.Y.S. 1147, 30 App.Div. 621, affirming 45 N.Y.S. 852, 20 Misc. 177.

30. N.Y.—Branagan v. Buckman, 122 N.Y.S. 610, 67 Misc. 242, affirmed 130 N.Y.S. 1106, 145 App.Div. 950.

Vt.—Stimson v. Lewis, 36 Vt. 91.

31. Branagan v. Buckman, 122 N.Y.S. 610, 67 Misc. 242, affirmed 130 N.Y.S. 1106, 145 App.Div. 950—5 C.J. p. 1353 note 24.

32. Troy Iron, etc., Factory v. Corning, 45 Barb. (N.Y.) 231.

33. Konta v. St. Louis Stock Exch., 87 S.W. 969, 189 Mo. 26.

34. Francis v. Perry, 144 N.Y.S. 167, 82 Misc. 271—5 C.J. p. 1353 note 27.

35. Standard Chemical & Oil Co. v. N. P. Sloan Co., (C.C.A.Ala.) 268 F. 225.

Sale of season's output

A contract between two members of a voluntary association for the sale of the season's output of the seller, estimated at a stated quantity, is subject to the rule of the association that the seller is required to deliver at least eighty-five per cent of the estimate, where the contract did not contain an express exception from that rule, as required by another rule of the association permitting specific written contracts at stated special conditions.—Standard Chemical & Oil Co. v. N. P. Sloan Co., (C.C.A.Ala.) 268 F. 225.

36. Cocalis v. Naxlides, 139 N.E. 95, 308 Ill. 152.

37. Simons v. Berry, 205 N.Y.S. 442, 210 App.Div. 90.

38. Harris v. Thomas, (Tex.Civ.App.) 217 S.W. 1068, 1076—5 C.J. p. 1352 note 10.

"A voluntary association has the power to enact laws governing the admission of members and to prescribe the necessary qualification for membership."—Harris v. Thomas, supra.

39. N.Y.—Importers' & Exporters' Ins. Co. v. Rhoades, 205 N.Y.S. 628, 209 App.Div. 689.

Tex.—Burrell v. Michaux, (Com.App.) 286 S.W. 176, affirming (Civ.App.) 273 S.W. 874, and reversed on other grounds Ancient Egyptian Arabic Order of the Mystic Shrine v. Michaux, 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.

5 C.J. p. 1352 notes 8, 9.

Restriction to those signing uniform agreements

The association has a right to restrict its membership to those willing to sign uniform agreements, constituting its contractual relationship with its members.—Importers' & Exporters' Ins. Co. v. Rhoades, 205 N.Y.S. 628, 209 App.Div. 689.

Restriction to town electors

Persons who had the qualifications necessary for registration as voters in a town, notwithstanding they had not been registered, were "eligible" to vote, within the constitution of a society providing that any person eligible to vote on town affairs could become a member of the society by signing the constitution.—Parker v. Oliver, 84 N.E. 860, 193 Mass. 488.

Segregation of white and black races, as by limiting membership of fraternal order to white men, may be lawfully enforced.—Burrell v. Michaux, (Tex.Com.App.) 286 S.W. 176, affirming (Civ.App.) 273 S.W. 874, and reversed on other grounds Ancient Egyptian Arabic Order of the Mystic Shrine v. Michaux, 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.

40. Cal.—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal.App. 159.

N.Y.—Simons v. Berry, 205 N.Y.S. 442, 210 App.Div. 90.

Tex.—Harris v. Thomas, (Civ.App.) 217 S.W. 1068.

5 C.J. p. 1353 note 19.

date may prejudice his material interests,[41] where no rights of property or of person are affected, and no rights of citizenship are infringed on.[42]

Where, however, one has been duly elected to membership in an association, but is arbitrarily denied admission, he acquires a legal right to membership which may be enforced by the appropriate remedy,[43] as by mandamus, the availability of which writ in such cases being reserved for consideration in § 238 of the title Mandamus [38 C. J. p 824 note 49–p 825 note 65].

b. When Membership Arises

One may become a member of an association by formally signing its articles, or in any other way that shows a mutual agreement between himself and the existing members that he is a member. But membership is a question of intent and cannot be established by any facts which fail to show the existence of a mutual intent that one shall be a member of the association.

Ordinarily, a person becomes a member by signing the articles of association or constitution of the society,[44] and that is all that is necessary.[45]

On the other hand, a person may become a member without going through the formality of signing the articles of association or constitution. It is sufficient if the existing members agree to accept him as a member, and he agrees to become such, with the mutual understanding that he shall be entitled to all the rights and privileges incidental to membership, and shall assume all the duties and obligations attaching thereto,[46] the question of membership depending on the intent and understanding of the parties.[47]

One cannot, however, become a member unless he either signs or in some way assents to its laws,[48] and the mere purchase of realty of a member of a telephone association will not of itself confer membership in the association on the purchaser,[49] nor will deposit of money with the conditional intent of acquiring membership in a colony make one a member thereof.[50]

Whether a person is or is not a member of an association is a question of fact for the jury.[51]

§ 24. —— Withdrawal of Members

The laws of an association as to the withdrawal of members are, ordinarily, controlling. In the absence of a statute or a law of the association to the contrary, a member may usually withdraw at will, subject to any existing pecuniary obligations. Withdrawal may be effected by a transfer of membership to another, although it will not be accomplished ordinarily by an abortive attempt to dissolve the association, nor by failure to exercise rights or fulfill obligations of membership, nor by joining another and similar organization.

The laws of the association sometimes provide for the withdrawal of members, in which case there can be no withdrawal except in the manner and on the conditions prescribed,[52] but, in the

41. Cal.—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal App 159.
Tex.—Harris v Thomas, (Civ App.) 217 S.W. 1068.
5 C J p 1353 note 20.
"The fact that one may suffer injury by reason of nonadmission to membership in a voluntary association, affords no ground for relief"—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 828, 71 Cal App. 159.

42. Greenwood v. Building Trades Council of Sacramento, supra—5 C J. p 1353 note 21.

43. Hillery v. Pedic Soc. of State of New York, 179 N.Y.S. 62, 189 App Div 766
Elected negro denied admission to chiropodist association
Petitioner, a negro, who applied for membership in defendant society organized to improve and regulate the practice of chiropody, and who received a majority vote of the members present at a meeting, when the by-laws in force provided for election by majority, was entitled to membership, although the chairman refused to declare him elected, and petitioner's application was rejected at a subsequent meeting, in which an attempt was made to change the by-laws, so that five adverse votes would constitute a rejection—Hillery v. Pedic Soc of State of New York, 179 N.Y.S. 62, 189 App Div. 766.

44. Me.—Beaman v. Whitney, 20 Me 413.
N Y.—Dennis v. Kennedy, 19 Barb 517.
5 C J p 1352 note 11.

45. Dennis v. Kennedy, supra.
Issuance of a certificate of stock or a scrip certificate is not a prerequisite to membership.—Dennis v. Kennedy, 19 Barb (N.Y.) 517.

46. Conn.—Bennett v. Lathrop, 42 A. 634, 71 Conn. 613, 71 Am S R 222
Mass.—Tyrrell v. Washburn, 6 Allen 466
5 C J. p 1352 note 14.

47. Iowa.—Murray v. Walker, 48 N. W. 1075, 83 Iowa 202.
N Y.—Francis v Perry, 144 N.Y S 167, 82 Misc 271
Vt.—Tarbell v Gifford, 72 A 921, 82 Vt 222, 17 Ann Cas. 1143
5 C J. p 1352 note 15

48. Konta v. St Louis Stock Exch., 87 S W. 969, 189 Mo. 26—5 C.J. p 1353 note 16.

49. Stark v. Hogan, (Iowa) 193 N. W. 273.
Different farm
One purchasing land from a member of a voluntary telephone association could not assert the privileges of a member and create another connection as an appurtenance to another and different farm.—Stark v. Hogan, (Iowa) 193 N.W. 273.
Same farm
The right of a purchaser of land, if he had any right, to retain his vendor's connection with a line of a telephone association, of which the vendor was a member, was one which he could waive or lose by refusing to include it in his purchase.—Stark v. Hogan, (Iowa) 193 N.W. 273.

50. Ferguson v. Llano Del Rio Co., 6 La App 534
Evidence held sufficient to show intent never carried out.—Ferguson v. Llano Del Rio Co., 6 La App 534.

51. Iowa.—Murray v. Walker, 48 N. W 1075, 83 Iowa 202
Mass.—Machinist's Nat. Bank v. Dean, 124 Mass. 81.
N Y.—Francis v Perry, 144 N.Y.S. 167, 82 Misc 271.

52. Troy Iron, etc., Factory v. Corning, 45 Barb.(N.Y.) 231—5 C.J. p 1353 note 31.

absence of any statute or any law of the association to the contrary, a member may resign or withdraw from the society at his pleasure,[53] and no acceptance of his resignation or withdrawal is necessary to terminate his membership, where he is under no pecuniary obligation to his associates, although an insolvent association may properly refuse to accept the withdrawal of a member until he has discharged his proportion of its indebtedness.[54]

A member may terminate his connection with the association by transferring his interest therein to another member with the society's assent.[55]

The fact that several members attempt to dissolve the association by forming a corporation for the same purpose and under the same name does not constitute a withdrawal from the association,[56] but, where an association formed a division of a national society, which prescribed and could alone change its constitution, and an opposition national society was formed, which adopted an organization and a constitution, which, while similar in their main features, differed in material respects from those of the old society, and a large majority of the members of the association favored the new society, and adopted its constitution, and attempted, in opposition to the minority, to take over to it the division as an organized body, and, claiming to be the original association, took possession of its property and maintained and carried on an organization as a division of the new society, the majority ceased to be members of the old society.[57]

The mere failure of a member to exercise the rights of membership,[58] or to participate in the management of the business of the association,[59] or to pay dues,[60] does not terminate his membership; nor is membership forfeited by joining another similar organization.[61]

§ 25. —— Expulsion, Suspension or Exclusion of Members

a. In general
b Power of association
c. Grounds
d Procedure
e Judicial interference to prevent suspension or expulsion
f. Right to damages for wrongful suspension or expulsion

a. In General

The constitution or by-laws of an association may provide for expulsion of members; but one owning a membership of pecuniary value may not be deprived thereof, except in compliance with applicable provisions of the laws of the association.

The laws of the association sometimes provide that the membership of any associate may be terminated by the unanimous vote of his fellow members,[62] but the usual method by which an association terminates a membership is by formally expelling the member.

Where the interest which one acquires by membership is of substance and value in a business aspect, and not merely sentimental or social in nature, he may not be deprived of membership, except by proceedings in accordance with the laws of the association.[63]

53. N.Y.—Arnold v. Burgess, 272 N Y.S. 534, 241 App Div 364.
Ohio—Henry v. Cox, 159 N.E. 101, 25 Ohio App. 437.
5 C.J. p 1353 note 29.

54. Stimson v Lewis, 36 Vt. 91—5 C J p 1353 note 30.

55. Stimson v. Lewis, supra.

56. Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No. 64, Improved Order of Red Men, 114 A. 440, 92 N.J.Eq. 593—5 C.J. p 1353 note 34.

Action without statutory or contractual authority

Where the members of an unincorporated association adopted a resolution to incorporate, and a certificate of incorporation was filed and subsequently ratified, but no notice was given to the members, and the action was without statutory or contractual authority, it was held that a member of the association who became a member of the corporation did not thereby lose his membership in the association nor his interest in the association's property—Great Council of Improved Order of Red Men of State of New Jersey v. Mohican Tribe, No 64, Improved Order of Red Men, 114 A. 440, 92 N.J Eq 593.

57. McFadden v. Murphy, 21 N.E 868, 149 Mass 341.

58. Harmstead v Washington F Co, 8 Phila (Pa.) 331—5 C.J. p 1354 note 36.

59. Tenney v. New England Protective Union, 27 Vt. 64.

60. Mo.—Kuhl v. Meyer, 42 Mo App 474
Ohio.—Webster v. Taplin, 29 Ohio Cir Ct. 543, affirmed 81 N.E 1196, 76 Ohio St 590.
5 C J. p 1354 note 38.

61. Bentley v. Hurley, 299 S W. 604, 222 Mo.App 51—5 C.J. p 1354 note 39.

Question of fact depending on intent

The treasurer of a nonprofit voluntary association, who assisted in organizing a rival society, refused to honor requisitions of the original society's officers, and denied its right to money and property in her possession, but kept her dues paid up and never formally resigned as a member or treasurer, was held not to have withdrawn, as a matter of law, as a member or treasurer, so as to entitle other members to recover for conversion of the association's money by her or to replevy her books and records, her withdrawal being a question of fact depending on intention—Bentley v. Hurley, 299 S. W 604, 222 Mo App. 51.

62. State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79, 31 L R A (N S.) 512.

63. Grassi Bros v. O'Rourke, 153 N Y S. 493, 89 Misc. 234.

The resolution of a community that a member has severed his connection with it and can no longer be recognized as a member does not constitute an expulsion of which he can complain, where this is based on his voluntary withdrawal, in violation of his contract and without recognizing the established practice of the community with reference to outgoing members.[64]

b. Power of Association

An association has the power to establish rules relative to exclusion of members and may suspend or expel a member for cause. If such power is vested in the association as a body, it may not be delegated, although under appropriate association laws the power of expulsion or suspension may be exercised by a committee.

An association has inherent power to suspend or expel a member for cause,[65] and an association has power to establish rules for the expulsion of members,[66] and the power of expulsion, especially in the case of noncommercial associations, is frequently conferred by the articles of association or constitution, the provisions of which are binding alike on the members and on the association.[67]

Accordingly, an association not organized for profit may lawfully expel a member on adequate grounds, although it may own property[68] and the membership may have a pecuniary value.[69]

The laws of the association may and frequently do vest the power of expulsion in a board of directors, governing committee, or other like body.[70] If the power of expulsion is vested in the association as a body, however, it cannot be delegated,[71] although it is immaterial that the order of expulsion is made by a committee where it is ratified by the association.[72]

c. Grounds

(1) In general
(2) Implied grounds
(3) Grounds prescribed by laws of association

(1) In General

Although, generally speaking, membership can be terminated only for the member's violation of duty or breach of the society's laws, yet it is competent for the articles of association to provide for expulsion of a member for mere business reasons rendering his continuance as a member undesirable.

While, as a general rule, membership in an association cannot be terminated by the society save for some violation of duty on the part of the member, either as a citizen or as a member, or for some breach on his part of the society's laws, yet it is competent for the association to provide in its articles of association or constitution that the membership of any person may be terminated by a unanimous vote of his associates if for business reasons merely such membership should be no longer desirable.[73]

(2) Implied Grounds

Broadly speaking, an association has implied power to expel a member for serious misconduct violating his duty either as a member or as a citizen.

It has been said that an association has inherent power to expel a member in three classes of cases, and three only,[74] namely: First, where the member has committed an offense which, while it has no relation to his duty as a member, is of so infamous a nature as to render him unfit for the society of honest men,[75] but before an expulsion is made for

64. Burt v. Oneida Community, 33 N.E. 307, 137 N.Y. 346, 19 L.R.A. 297, 34 N.E. 288, 138 N.Y. 649

65. La.—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 179 La. 383.
Mo.—Bersch v. Fire Underwriters Ass'n of St. Louis, 241 S.W. 428.
Neb.—Rogers v. Tangier Temple, A. A. O. N. M. S., 198 N.W. 873, 112 Neb. 166.
5 C.J. p. 1354 note 44.
"A voluntary unincorporated association has the power to suspend or expel its members for legal cause and to determine after due hearing whether the cause alleged for suspension or expulsion has been established, or to determine after due hearing whether the cause alleged is a legal cause and not one in contravention of the laws of the land." —Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 35, 179 La. 383.

Right to membership as based on agreement and not on common law
The right of membership and rights incident thereto in voluntary unincorporated associations do not flow from the common law, but from the organization agreement, and the power of the association over them is absolute, except where a civil or property right of the member is invaded.—Rogers v. Tangier Temple, A. A. O. N. M. S., 198 N.W. 873, 112 Neb. 166.

66. Jones v. State, 44 N.W. 658, 28 Neb. 495, 7 L.R.A. 825—5 C.J. p. 1354 note 46.

67. Otto v. Journeymen Tailors' Protective, etc., Union, 17 P. 217, 75 Cal. 308, 7 Am.S.R. 156—5 C.J. p. 1354 note 47.

68. Kan.—Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149
N.Y.—Franklin v. Burnham, 82 N.Y.S. 882, 40 Misc. 566.

69. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149

70. Harris v. Aiken, supra—5 C.J. p. 1354 note 50

71. Matter of Lurman, 35 N.Y.S. 956, 90 Hun 303, affirmed 44 N.E. 1125, 149 N.Y. 588

72. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149.

73. State v. Seattle Baseball Assoc., 111 P. 1055, 61 Wash. 79, 31 L.R.A.N.S. 512.

Doubtful grounds
A member in good standing may not be ousted on doubtful and technical grounds.—Butts v. Society of the Young Men Vidalia, 6 La.Ann. (Orleans) 127.

74. Peo. v. Erie County Medical Soc., 32 N.Y. 187—5 C.J. p. 1354 note 54.

75. N.Y.—Polin v. Kaplan, 177 N.E. 833, 257 N.Y. 277, reversing 246 N.Y.S. 522, 231 App.Div. 849, and

this cause, the member must have been convicted by a jury according to the law of the land.[76] Second, where the member has committed an offense against his duty as a member;[77] and, accordingly, a member may be expelled for such conduct as clearly violates the fundamental objects of the association, and which, if persisted in and allowed, would thwart those objects or bring the association into disrepute.[78] Third, where the member has committed an offense of a mixed nature, an offense against his duty as a member and also indictable by the law of the land;[79] and in this case the member may be tried and expelled for the violation of his duty as such, although an indictment based on the same transaction is pending against him,[80] and even though he has been tried on an indictment and acquitted.[81]

(3) Grounds Prescribed by Laws of Association

As a general rule, a member may be expelled for violation of a law of the association, providing for expulsion even if unreasonable. Enumeration in the by-laws of specified grounds for expulsion constitutes an implied negation of the existence of other grounds, unless the latter are within the general and inherent power of exclusion.

The laws of an association, if subscribed to, or otherwise assented to, by the members, are in the nature of a contract between each member and his associates (supra § 11), and accordingly, a member may be expelled for a violation of those laws when they so provide,[82] and a provision for expulsion, although unreasonable as a by-law as being against common right, may, if assented to by a member, be binding on him as a contract.[83] A by-law making the board of managers the sole judges of what constitutes misconduct of a member warranting expulsion has been held valid, where it was not pointed out by the expelled member wherein such provision conflicted with any law or was against public policy.[84]

If the laws of the association enumerate certain grounds for expulsion, the right to expel for other grounds, save such as are inherent in the society, as explained in the preceding subsection, is impliedly excluded;[85] and, if the laws of the association

Schneider v. Kaplan, 246 N.Y.S. 524, 231 App.Div. 850, and reargument denied Polin v. Kaplan, 178 N.E. 803, 257 N.Y. 579.

Pa.—Weiss v. Musical Mut. Protective Union, 42 A. 118, 189 Pa. 446, 69 Am.St.R. 820.

5 C.J. p. 1355 note 55.

76. Leech v. Harris, 2 Brewst.(Pa.) 571.

77. Cal.—Otto v. Journeymen Tailors' Protective & Benevolent Union, 17 P. 217, 75 Cal. 308, 7 Am.St.R. 156.

N.Y.—Polin v. Kaplan, 177 N.E. 833, 257 N.Y. 277, reversing 246 N.Y.S. 522, 231 App.Div. 849, and Schneider v. Kaplan, 246 N.Y.S. 524, 231 App.Div. 850, and reargument denied Polin v. Kaplan, 178 N.E. 803, 257 N.Y. 579.

5 C.J. p. 1355 note 57.

"In every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes, and . . . for a gross breach of this obligation the power of expulsion is impliedly conferred upon the association."—Polin v. Kaplan, 177 N.E. 833, 834, 257 N.Y. 277, reversing 246 N.Y.S. 522, 231 App.Div. 849, and Schneider v. Kaplan, 246 N.Y.S. 524, 231 App.Div. 850, and reargument denied Polin v. Kaplan, 178 N.E. 803, 257 N.Y. 579.

78. Del.—State v. Delaware Fire Co. No. 3 of Wilmington, 117 A. 129, 1 W.W.Harr. 586.

N.Y.—Polin v. Kaplan, 177 N.E. 833, 257 N.Y. 277, reversing 246 N.Y.S. 522, 231 App.Div. 849, and Schneider v. Kaplan, 246 N.Y.S. 524, 231 App.Div. 850, and reargument denied Polin v. Kaplan, 178 N.E. 803, 257 N.Y. 579.

5 C.J. p. 1355 note 58.

Kissing a female employee while the member was inebriated is misconduct constituting ground for expulsion, as against the contention that such osculatory act constituted an offense against the female employee only and not against the employing association, since such act is contrary to the decorum of the association and, therefore, an offense against it.—Yeomans v. Union League Club of Chicago, 225 Ill.App. 234.

Repeated intoxication.

Where what was done by a fire association in expelling a member for nonpayment of fines was, in regard to notice, hearing, imposition of fines, and expulsion, in accordance with the charter and by-laws, but the indirect cause of expulsion was repeated acts of intoxication, the repeated acts constituted such improper conduct as justified expulsion, and prevented reinstatement under order of court.—State v. Delaware Fire Co. No. 3 of Wilmington, 117 A. 129, 1 W.W.Harr.(Del.) 586.

79. Leech v. Harris, 2 Brewst.(Pa.) 571.—5 C.J. p. 1355 note 59.

80. Franklin v. Burnham, 82 N.Y.S. 882, 40 Misc. 566.

81. In re Smith, 10 Wend.(N.Y.) 449.

82. Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 179 La. 383.—5 C.J. p. 1355 note 63.

Cannot complain of such expulsion.

Where persons enter into a voluntary agreement and form an association to carry out objects thereof, and one member violates the rules of the association and is expelled, he cannot complain if the objects of the association are not contrary to public policy or statutory regulation and the penalty inflicted is not against natural justice and is imposed in pursuance of the regulations of the association.—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 35, 179 La. 383.

83. Elfer v. Marine Engineers Beneficial Ass'n No. 12, supra.—5 C.J. p. 1355 note 64.

"Plaintiff argues that, in addition to inquiring into the regularity of the proceedings, the courts may inquire into the reasonableness and propriety of his expulsion and the grounds therefor. But the laws of the association were assented to by plaintiff and constituted a contract between him and his associates, and his expulsion for the violation of those laws was expressly authorized therein. A provision for expulsion, although unreasonable as a by-law as being against common right, may, if assented to by a member, be binding on him as a contract."—Elfer v. Marine Engineers Beneficial Ass'n No. 12, supra.

84. Yeomans v. Union League Club of Chicago, 225 Ill.App. 234.

85. Cal.—Dingwall v. Street R. Em-

make an offense punishable by fine, it affords no ground for expulsion.[86]

A member who becomes insane is not thereby relieved from compliance with the rules of the association.[87]

d. Procedure

(1) In general
(2) Notice
(3) Accusation or charge
(4) Trial or hearing
(5) Waiver of irregularities

(1) In General

Proceedings for the expulsion of members should be conducted in conformity with the rules of the association and the law of the land However, such proceedings are to be considered without too much regard for technicalities and the form of procedure is, ordinarily, immaterial if substantial justice has been done.

A proceeding for expulsion should be conducted in accordance with the laws of the association and the law of the land,[88] thus, if the laws of the society require a two-thirds vote in order to expel a member, an expulsion by a less number is invalid.[89] However, proceedings under articles of association agreed to by all the members are to be considered without too much regard for technicalities, and substantial justice is to be kept in view rather than mere form.[90] The proceedings resulting in the suspension of a member may be summary, so long as he is accorded a fair trial on specific charges with an opportunity to defend.[91]

Prior acquittal. If a member threatened with expulsion from an association has once been tried and acquitted of the charge against him, he may not be tried again for the same offense unless the by-laws clearly and explicitly authorize such procedure.[92]

(2) Notice

While notice of intention to proceed against a member is ordinarily prerequisite to his expulsion, notice may not be required where the laws of the association provide otherwise. The time and mode of service may be governed by applicable provisions of the laws of the association, and it has been held that in the absence of provision as to such matters a member is entitled to reasonable notice personally served.

As a general rule, an association cannot expel a member without first giving him notice of its intention to proceed against him, so as to afford him an opportunity to be heard in defense,[93] even though its laws make no provision for notice;[94] and this is especially true where membership car-

ployees' Amalgamated Assoc, 88 P 597, 4 Cal App 565
N Y—Connell v. Stalker, 48 N Y S 77, 21 Misc 609, affirming 45 N Y S. 1048, 20 Misc 423
Pa—Metropolitan Base Ball Assoc v. Simmons, 1 Pa Co 134, 17 Phila 419, 17 Wkly.N C 153.

86. Otto v. San Francisco Journeymen Tailors' Protective, etc, Union, 17 P. 217, 75 Cal. 308, 7 Am S R. 156—Dingwall v. Street R Employees' Amalgamated Assoc, 88 P. 597, 4 Cal App. 565

87. Noel v. Modern Woodmen of America, 61 Ill App 597.

88. Dingwall v. Street R Employees' Amalgamated Assoc, 88 P. 597, 4 Cal App. 565

Expulsion involving battery

A member is not bound by a rule of the society governing expulsion when it involves the commission of a battery—State v. Williams, 75 N. C 134.

89. Loubat v. Le Roy, 40 Hun (N Y.) 546—5 C J. p 1355 note 70.

90. Green v. Benev. Assoc, 7 La App.(Orleans) 327—5 C.J. p 1355 note 71.

Construction of by-laws

Where forfeiture of property rights is involved, ambiguities are construed in favor of members—Butts v. Y. M. V. S, 6 La App (Orleans) 127.

91. Shapiro v. Gehlman, 272 N.Y S 624, 152 Misc 13, reversed on other grounds 278 N Y.S 785, 244 App Div. 238.

92. Rueb v Rehder, 174 P. 992, 24 N M 534, 1 A L R 423.

Where by-laws were silent on the question as to whether a member could be tried a second time for the same offense, although they did provide generally for a trial and a vote of the order on the question of the guilt or innocence of the accused, the by-laws were construed as not authorizing a second trial, and the association was without jurisdiction to try a member previously tried and acquitted of the same offense, and could not lawfully expel him therefor—Rueb v Rehder, 174 P. 992, 24 N M. 534, 1 A L R. 423.

Prior acquittal not shown

A member of an association cannot contend that a vote of eight to four of a board of managers, consisting of fifteen members, which vote was in favor of expulsion, was in fact an acquittal, there not being a two-thirds vote, when the facts showed that such vote was preliminary, to give the member an opportunity to resign, and that, when the member refused to resign, the board voted ten to two in favor of expulsion—Yeomans v. Union League Club of Chicago, 225 Ill App. 234.

93. Md—Evans v. Brown, 107 A. 535, 134 Md 519
N Y—Bricklayers', Plasterers' & Stonemasons' Union v Bowen, 183 N Y.S 855, affirmed 189 N Y S 938—Gilmore v Palmer, 179 N Y.S. 1, 109 Misc. 552.
5 C J. p 1355 note 72.

Notice held insufficient

A letter reading "Gentlemen—You are hereby cited to appear before the executive committee of the Employing Plasterers' Association on Monday, September 22, '13, at 8 o'clock, No 30 West Thirty-Third street." was insufficient as a notice of charges having been preferred against the recipient—Grassi Bros. v O'Rourke, 153 N.Y.S 493, 495, 496, 89 Misc 234.

94. Grassi Bros v. O'Rourke, supra—5 C J. p 1355 note 74

"There is no provision requiring notice of the preferring of charges to be served on an accused member; but there should be, and, since there is not, the law will insert such provision, because it would be repugnant to a sense of justice that an accused should be haled before a trial committee without being apprised of the cause."—Grassi Bros. v. O'Rourke, supra.

ries with it privileges and property rights.[95]

Where, however, the constitution of the association provides for expulsion of a member for a specified cause without trial, notice has been held not prerequisite to expulsion.[96]

Time and mode of service. If the laws of the society prescribe the time of notice, such provision must be strictly observed,[97] if they are silent on the subject reasonable notice must be given.[98]

No different mode being provided, personal service of the notice should be made,[99] even though the accused member has changed his residence without notifying the society of the change.[1]

Proof of notice. One who asserts that a member has been duly expelled bears the burden of proving that the member had due notice of the expulsory proceedings,[2] and this burden is not sustained by testimony of an officer of the association that he inclosed the notice in an envelope, coupled with the testimony of a messenger that he delivered the envelope to the accused member, where the messenger is unable to testify as to the contents of the envelope.[3]

(3) Accusation or Charge

As a rule charges must be preferred against a member prior to his expulsion. The charges should be clear and definite, although technical precision is not essential.

Before a member can be expelled, a charge against him must be made and be clearly stated.[4]

Charges will be deemed sufficiently specific where they advise the member of their nature, and enable him to prepare for his defense,[5] and it is immaterial that the charge is not reduced to writing where the member is fully informed of its nature,[6] or that the charge comes from persons who have no personal knowledge in the matter, and whom he cannot cross-examine, where he is given the right to present anything he may desire in his own behalf, and he is the only witness.[7]

(4) Trial or Hearing

As a general rule, a member cannot be expelled by an association without a fair trial before an impartial tribunal.

Before an accused member can be expelled, he must be given an opportunity to be heard in defense; he is entitled to a trial or hearing on the charges made against him,[8] even though the laws of the association make no provision therefor,[9] and this is especially true where membership entitles him to privileges and property rights.[10]

95. N.J.—Byrne v. Supreme Circle, B. U., 65 A. 839, 74 N.J.Law 258.
N.Y.—Wachtel v. Noah Widows, etc., Ben. Soc., 84 N.Y. 28, 38 Am.R. 478.

96. Bradley v. Wilson, 123 S.E. 273, 138 Va. 605.

Refusal to post forfeit

Where a baseball club, as member of a league, did not post a forfeit as required by a resolution passed at a meeting, its expulsion by resolution of the league was legal, and a provision of the league's constitution that, in case the facts as to refusal to comply with requirements of the league were disputed, a member could be expelled only after notice and trial by the board of directors as to disputed facts, did not apply, the refusal to post the forfeit not being disputed.—Bradley v. Wilson, 123 S.E. 273, 138 Va. 605.

97. Washington Ben. Soc. v. Bacher, 30 Pa. 425.

98. Cal.—Von Arx v. San Francisco Gruetli Verein, 45 P. 685, 113 Cal. 377.
Kan.—Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149
N.Y.—Fritz v. Muck, 62 How.Pr. 69.

99. Wachtel v. Noah Widows, etc., Ben. Soc., 84 N.Y. 28, 38 Am.R. 478.

1. Wachtel v. Noah Widows, etc., Ben. Soc., supra

2. Williamson v. Randolph, 96 N.Y.S. 644, 48 Misc. 96.

3. Williamson v. Randolph, supra—5 C.J. p. 1356 note 81.

4. Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234—5 C.J. p. 1356 notes 82, 83

"Charge" held too indefinite.—Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234

5. Shapiro v. Gehlman, 272 N.Y.S. 624, 152 Misc. 13, reversed on other grounds 278 N.Y.S. 785, 244 App.Div. 238—5 C.J. p. 1356 note 84.

Technical precision unnecessary

"The charges need only apprise the accused of the offense claimed with sufficient clarity to inform him of the nature of the accusation. 'To require technical precision in complaints of this character, drawn by merchants or business men, and to apply to them the strict rule of pleading in an action in a court of law would greatly embarrass and many times defeat the disciplinary regulations of such associations.'"—Shapiro v. Gehlman, 272 N.Y.S. 624, 628, 152 Misc. 13, reversed on other grounds 278 N.Y.S. 785, 244 App.Div. 238.

6. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149

7. Harris v. Aiken, supra.

8. Md.—Evans v. Brown, 107 A. 535, 134 Md. 519
N.Y.—Shapiro v. Gehlman, 278 N.Y.S. 785, 244 App.Div. 238, reversing 272 N.Y.S. 624, 628, 152 Misc. 13—Gilmore v. Palmer, 179 N.Y.S. 1, 109 Misc. 552—Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234—Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, 183 N.Y.S. 855, affirmed 189 N.Y.S. 933. 5 C.J. p. 1356 note 88.

"While it is true that the constitution and by-laws of a voluntary association constitute the sole rule which governs the relations between the association and its members, and that courts will not redress any action in expelling or suspending a member taken in accordance therewith, such proceedings must be conducted in good faith, upon notice to the accused, and an opportunity to be heard must be accorded him, otherwise, a court of equity will reverse the action of the association and restore him to membership."—Gilmore v. Palmer, 179 N.Y.S. 1, 2, 109 Misc. 552.

9. Fritz v. Muck, 62 How.Pr.(N.Y.) 69.

10. N.J.—Byrne v. Supreme Circle B. U., 65 A. 839, 74 N.J.Law 258.

While a member is entitled to a fair trial conducted in good faith,[11] technical accuracy is not essential;[12] and it has been held that a trial is not essential where the constitution of the association provides for expulsion without trial.[13]

The tribunal before whom the hearing or trial is held must be an impartial one;[14] but the fact that the members who started the investigation participate in rendering the decision does not invalidate the expulsion, where no bad faith is shown;[15] and the refusal to permit a preliminary examination of members constituting the association tribunal for the purpose of determining their competency to try the question of expulsion is no ground for the interference of a court of law.[16]

Adjournment. An accused member who has been duly notified of the proceeding to expel him is not entitled to an adjournment to enable him to make a defense, where he has full knowledge of all the particulars of the charge and yet fails to deny it, or to state that he has witnesses whom he wishes to produce;[17] by merely serving notice that he is unable to attend at the trial, he does not prevent the association from proceeding to expel him.[18]

Evidence. The association is not bound, in the trial of a member, to adhere to the legal rules of evidence applied in courts of law;[19] and it has been held that the admission of hearsay evidence in regard to a fact which has been admitted by the member is no ground for setting aside the expulsion.[20]

Effect of default in appearance. A society has no right, without proving the charges against a member, to expel him merely because he does not appear,[21] and, where an association has no jurisdiction to expel a member for conspiracy against it, the member's failure to appear at the hearing does not confer on the association authority to enter a judgment of expulsion.[22]

(5) Waiver of Irregularities

Irregularities in respect of the trial and procedure relative to expulsion of a member of an association are subject to waiver.

An irregularity in the appointment of a committee to try an accused member is waived by his appearance before the committee without objection.[23] So, it has been held that, where a member appears and examines witnesses without objection to the irregularity of the proceedings, he thereby waives formal notice of the charges against him;[24]

N.Y.—Wachtel v. Noah Widows' etc., Ben Soc., 84 N.Y. 28, 38 Am.R. 478.

11. Gilmore v. Palmer, 179 N.Y.S. 1, 109 Misc. 552—Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234—Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, 183 N.Y.S. 855, 853, affirmed 189 N.Y.S. 938, 198 App.Div. 967.

"The law insures to every member of such an association a fair trial, not only in accordance with the constitution and by-laws of the association, but also with the demands of fair play, which in the final analysis is the spirit of the law of the land."—Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, supra.

12. Yeomans v. Union League Club of Chicago, 225 Ill.App. 234, 241.

"The law does not require technical accuracy to be observed in a trial of a member for expulsion from a voluntary association. Such matters of procedure will not be reviewed by a court."—Yeomans v. Union League Club of Chicago, supra.

Specific finding as to osculatory misconduct not necessary

A club board need not make a specific finding as to a member's misconduct in kissing the female elevator operator in a club, but may properly expel him on a general finding of misconduct, where it is apparent from the evidence that he became intoxicated and kissed such female.—Yeomans v. Union League Club of Chicago, 225 Ill.App. 234.

13. Bradley v. Wilson, 123 S.E. 273, 138 Va. 605.

14. N.Y.—Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234.

Tex.—Willis v. Davis, (Civ.App.) 233 S.W. 1035.

5 C.J. p. 1356 note 91.

Presence in tribunal of man who had prejudged case

Where one of the delegates who composed a trade board and who voted for guilt and recommendation of expulsion was present and participated in the proceedings of the executive committee that acted on the recommendation, the presence and participation of this man, who had formally prejudged the case, would of itself have been sufficient denial of a fair trial to invalidate the expulsion, even if there had otherwise been a proper compliance with the requirement of a due trial on charges.—Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234.

15. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149.

16. Kopp v. White, 65 N.Y.S. 1017, 30 N.Y.Civ.Proc. 352.

17. Austin v. Dutcher, 67 N.Y.S. 819, 56 App.Div. 393.

18. Ill.—Robinson v. Yates City Lodge No. 448, A. F. & A. M., 86 Ill. 598.

N.Y.—Kopp v. White, 65 N.Y.S. 1017, 30 N.Y.Civ.Proc. 352.

5 C.J. p. 1356 note 95.

19. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 521, 123 Am.S.R. 149.

If a transcript of evidence is available to the expelling tribunal, it is sufficient, even though the evidence was actually heard by a former tribunal or board of managers, which referred the case to the new or incoming board or tribunal.—Yeomans v. Union League Club of Chicago, 225 Ill.App. 234.

20. Kopp v. White, 65 N.Y.S. 1017, 30 N.Y.Civ.Proc. 352.

21. Peo. v. Young Men's Father Matthew Ben. Soc., 65 Barb. (N.Y.) 357.

22. Dingwall v. Street R. Employees' Amalgamated Assoc., 88 P. 597, 4 Cal.Unrep.Cas. 565.

23. Sperry's App., 9 A. 473, 116 Pa. 391.

24. Harris v. Aiken, 92 P. 537, 76 Kan. 516, 123 Am.S.R. 149—5 C.J. p. 1357 note 2.

However, it has been decided that, although a member attends and enters on a defense, he does not waive his right to a notice of the charges.—Downing v. St. Columbia's R. C. T. A. B. Society, 10 Daly (N.Y.) 262.

and service of a copy of the charges is waived by a member who appears and defends on the merits without objection.[25] Similarly, the exclusion of relevant evidence by the trial committee is waived where the accused member fails to complain of the ruling on the subsequent hearing of the case by the society on the committee's report;[26] and the failure, on the hearing before the society, to read the evidence taken by the committee is waived where the member does not ask to have it read.[27]

e. Judicial Interference to Prevent Suspension or Expulsion

As a general rule the courts will not interfere with the action of an association in suspending or expelling a member, although they may do so where such action was illegal and particularly where property rights are involved. Ordinarily, a suspended or expelled member should exhaust his remedies within the association before appealing to the courts for relief.

A proceeding by an association for the suspension or expulsion of a member is quasi judicial in character,[28] the decision of an association tribunal is ordinarily conclusive,[29] and the courts will not interfere to prevent a suspension or expulsion,[30] except to ascertain whether or not the society is proceeding in good faith,[31] and in accordance with its laws[32] and the law of the land,[33] in order to permit the granting of relief to an accused member against his illegal expulsion or suspension.[34]

25. Fritz v. Knaub, 103 N Y S 1003, 57 Misc 405, affirmed 108 N Y S 1133, 124 App Div. 915—5 C J. p 1357 note 8.

26. Sperry's App., 9 A. 473, 116 Pa. 391

27. Sperry's App., supra.

28. Mo—Froelich v Musicians Mut Ben. Assoc., 93 Mo App 333
Wis—Bartlett v L Bartlett, etc., Co., 93 N W. 473, 116 Wis. 450

29. Polin v Kaplan, 177 N E 833, 257 N Y. 277, reversing 246 N Y.S 522, 231 App Div 849, and Schneider v Kaplan, 246 N Y.S 524, 231 App Div 850, and reargument denied Polin v. Kaplan, 178 N E. 803, 257 N Y. 579.
"If the contract reasonably provides that the performance of certain acts will constitute a sufficient cause for the expulsion of a member, and that charges of their performance, with notice to the member, shall be tried before a tribunal set up by the association, the provision is exclusive, and the judgment of the tribunal, rendered after a fair trial, that the member has committed the offenses charged and must be expelled, will not be reviewed by the regularly constituted courts"—Polin v. Kaplan, 177 N E 833, 834, 257 N Y. 277, reversing 246 N Y S 522, 231 App Div. 849, and Schneider v. Kaplan, 246 N Y S 524, 231 App Div. 850, and reargument denied Polin v. Kaplan, 178 N E 803, 257 N.Y. 579.

30. La—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 179 La. 383.
N Y.—Polin v. Kaplan, 177 N E. 833, 257 N Y. 277, reversing 246 N Y S 522, 231 App Div 849, and Schneider v. Kaplan, 246 N Y S 524, 231 App Div. 850, and reargument denied Polin v. Kaplan, 178 N.E. 803, 257 N Y. 579
Tex—Willis v. Davis, (Civ.App.) 233 S.W. 1035.
5 C J. p 1357 note 8.

Expulsion held in conformity with association laws
The record was held to show that the proceedings leading up to a member's expulsion from an engineers' beneficial association were regular and in strict conformity to the constitution and by-laws of the organization, precluding interference by the court—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So 32, 179 La. 383.

31. Pa—Lytle v. New Castle Agricultural Ass'n, 91 Pa Super. 152
Tex—Willis v Davis, (Civ.App.) 233 S W 1035
5 C J p 1357 note 9.

32. Pa—Williams v. District Executive Board, U. M. W. of A., 1 Pa Dist &Co 31.
Tex—Willis v. Davis, (Civ.App.) 233 S W. 1035.
5 C J p 1357 note 10.

33. Willis v. Davis, supra—5 C J p 1357 note 11.

34. Cal—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal App. 159
Md—Evans v. Brown, 107 A 535, 134 Md. 519
N Y.—Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, 183 N.Y S 855, 858, affirmed 189 N Y S 938, 198 App Div 967.
Pa.—Lytle v. New Castle Agricultural Ass'n, 91 Pa Super. 152
Tex—Willis v. Davis, (Civ App.) 233 S W. 1035.
"The law governing disputes arising in voluntary associations is simple and well settled. It proceeds upon the theory that the members are, in a sense, one family, and entitled to settle their family jars without outside interference, and in their own way Thus it is held that, where proceedings for the expulsion of a member of such an association have been conducted in accordance with its laws, the courts will in the first instance assume that the acts charged constituted cause for removal within the meaning of those laws. Such associations are not, however, above the law of the land, nor altogether a law unto themselves. Their very nature and frequent manner of operation require and find a jealous supervision, in order to prevent irreparable wrong done to members under the guise of family chastisement. It is not the policy of the law that our people shall be left to suffer without redress from the whims or at the caprice of those to whom they have in good faith temporarily intrusted themselves and their affairs Therefore the law is vigilant to prevent a violation of the constitution and by-laws of the association involved, and to see to it that suspension or expulsion is only had after fair notice to the offending member and full opportunity to be heard in his own behalf"—Bricklayers', Plasterers' & Stonemasons' Union v. Bowen, supra.

Resort to equity justified
(1) Where a member of a voluntary association has been convicted of an offense and expelled in violation of the rules and by-laws of the association, and where no by-laws or other laws of the association make any adequate allowance for relief by appeal from such conviction and expulsion, such member may resort to equity for relief—Willis v. Davis, (Tex Civ.App.) 233 S W. 1035.

(2) A member of a voluntary association who was acquitted by his local lodge of making an attack on grand officers, but who on appeal to the grand officers themselves was found guilty and ordered to be expelled, was entitled to restrain the association from expelling him, the provision of the by-laws providing for an appeal to, and another trial before, the grand officers, without the right on the part of the accused member to appeal from the judgment of such grand officers, being unreasonable and inadequate in such case.—Willis v. Davis, supra.

As a rule the courts will not interfere unless the suspension or expulsion will result in an invasion of the member's civil, pecuniary, or property rights.[35] Such rights the courts will protect;[36] but to entitle a member to protection he must have a severable interest in the property of the association; a property right which is merely incidental to his membership and which ceases with it is not sufficient.[37]

Where an association under its rules suspends or expels a member, such member must ordinarily resort to and exhaust the remedies provided by the association under its constitution and by-laws before applying to the courts for relief,[38] although where an associate tribunal suspends or expels a member without jurisdiction to act in the premises,[39] or where an appeal within the organization would obviously be futile, as where the appellate board is clearly not impartial in character,[40] the expelled member need not appeal within the order

Injunction granted

Where members of a lodge of Free and Accepted Masons had no notice that charges would be preferred against them, and no opportunity was accorded them to appear and defend the charges, the association will be enjoined from suspending them, it not appearing that any appeal from the action of the association in defending them was provided by the constitution and by-laws of the association, or any further remedy or remedies furnished by it for the alleged wrong—Evans v. Brown, 107 A 535, 134 Md 519

35. Neb—Rogers v Tangier Temple, A A O N M S, 198 N.W. 873, 112 Neb 166
Wash—People's Sav Bank v. First Nat. Bank, 173 P. 52, 102 Wash 436
5 C J p 1357 note 12

36. Rogers v Tangier Temple, A. A O N M S, 198 N.W. 873, 112 Neb. 166—5 C J p 1357 note 13.

Pecuniary rights protected

Where, under the agreement of an association, a member is entitled to pecuniary benefits under certain circumstances, equity will prevent deprivation thereof except by proceedings conducted in accordance with the rules of the society, and for that purpose will inquire into such proceedings only to determine whether or not the association is acting within its jurisdiction—Rogers v. Tangier Temple, A A O N M. S, 198 N.W. 873, 112 Neb. 166.

37. Rogers v Tangier Temple, A. A O N. M. S, supra—5 C.J. p 1357 note 14.

Severable right in funds not shown

A member has no such severable right in the funds of a voluntary unincorporated association, accruing from initiation fees, dues, and assessments, as will authorize a court of equity to interfere to prevent his wrongful suspension or expulsion from the association, his remedy, if any, being at law—Rogers v. Tangier Temple, A. A O N. M. S., 198 N.W. 873, 112 Neb. 166

38. Conn—Gardner v. East Rock Lodge, No 141, I B P O E of W., 113 A 308, 96 Conn. 198.
La—Irwin v. Lorio, 126 So 669, 169 La. 1090
Mo—Hall v. Morrin, (App) 293 S W 435
N.Y—Holt v White, 224 N.Y.S 507, 221 App Div 558, affirmed 162 N E 546, 248 N.Y 613—Andrews v Local Union No 13, Journeymen Plumbers, Gas and Steamfitters, and Sprinkler Fitters, of Rochester, N Y, 234 N.Y.S 208, 133 Misc 899.
Tex—Willis v. Davis, (Civ.App) 233 S.W. 1035—Brown v Harris County Medical Soc, (Civ App) 194 S W 1179.

Although property rights may be jeopardized by the delay, a member of an association must as a rule exhaust his remedies within the association before appealing to the courts—Andrews v Local Union No 13, Journeymen Plumbers, Gas and Steamfitters, and Sprinkler Fitters, of Rochester, N Y., 234 N.Y.S. 208, 133 Misc. 899.

Right of appeal

(1) The by-law of a lodge giving a right of appeal on "questions arising in lodges" is broad enough to include appeals from the suspension of a member, it not being limited to controversies between members or parties within the lodge, especially in view of the fact that there is no provision making the suspension of the member final—Gardner v. East Rock Lodge, No 141, I. B. P. O E of W, 113 A 308, 96 Conn. 198.

(2) Even though the provisions in a by-law for appeal from decisions of the lodges is permissive only, a member of the lodge must exhaust his right to appeal from his suspension from the lodge as a disciplinary measure which did not involve any property rights, before he can resort to the courts for redress.—Gardner v. East Rock Lodge, No. 141, I. B P. O E of W., supra.

(3) Failure of appellate tribunal in association to act on appeal from expulsion after action was commenced was not equivalent to refusal to act, so as to justify resort to courts—Holt v. White, 224 N.Y.S 507, 221 App Div. 558, affirmed 162 N.E. 546, 248 N.Y. 613.

Rule applicable where injunction sought against less than total membership

The rule that the aggrieved person must first exhaust his recourse within the society is applicable to an injunction against the majority of the members to restrain them from voting on the expulsion of a member, as well as where an injunction is sought against the association itself, or all of its members—Irwin v. Lorio, 126 So 669, 169 La. 1090

39. N M—Rueb v. Rehder, 174 P. 992, 24 N.M. 534, 1 A.L.R. 423
N Y—Rodier v Huddell, 250 N.Y.S. 336, 338, 232 App Div. 531
"The rule requiring that a member must exhaust his remedies within the organization before applying to a court of equity for relief is subject to the qualification that the suspension must have followed a legal and regular proceeding within the organization. Where the proceeding is irregular, the association acquires no jurisdiction to make the order and the person aggrieved thereby may seek redress by a direct appeal to the courts."—Rodier v. Huddell, supra.

Void suspension

(1) An order, suspending a member of the lodge until he paid a stated sum, which was beyond the jurisdiction of the lodge under the by-laws, is void, and the member is not required to exhaust his remedies by appeal within the lodge before resorting to the courts for redress against such suspension—Gardner v. East Rock Lodge, No 141, I. B P. O. E of W., 113 A. 308, 96 Conn 198

(2) Where the by-laws of a lodge fixed the penalties to be imposed by the lodge as reprimand, suspension for a definite time, expulsion, or a fine, a resolution of the lodge, suspending three members until they paid a stated sum which the lodge found to be owing by them to the lodge, was beyond the jurisdiction of the lodge, jurisdiction being the lawful power to hear and determine—Gardner v. East Rock Lodge, No 141, I. B P O. E of W, supra.

40. Rodier v. Huddell, 250 N.Y.S. 336, 232 App Div. 531.

but may resort directly to the courts. Where proceedings for expulsion have been fairly conducted in accordance with the rules of the association, the courts will, in the first instance, assume that the acts charged constituted sufficient ground for expulsion under the associate laws.[41]

f. Right to Damages for Wrongful Suspension or Expulsion

As a rule, damages may be recovered for an illegal suspension or expulsion of a member, although the right to damages has been denied in some cases.

A member who has been wrongfully suspended or expelled from an association may resort to an action against the society or its members for the damages resulting from its illegal act;[42] and this he may do even after he has been reinstated to membership by the society.[43] Some authorities, however, hold that such an action is not maintainable,[44] at least where the society, in suspending or expelling the member, acted in good faith and its error was one of judgment merely,[45] or where the member has submitted to the jurisdiction of the association by appealing from the judgment of the trial committee to the members as a body, who affirm the decision below.[46]

In determining whether or not an association and its members may be held liable to respond in damages for expulsion of a member, the court will consider the rights and duties of the members, subordinate bodies, and superior officers and tribunals of the association as defined by its rules and regulations,[47] and damages may be denied in the absence of proof of illegality or malice in the proceedings leading to expulsion,[48] even where the member was subsequently expelled after just being tried and acquitted of the same offense.[49]

In an action for damages for an alleged wrongful expulsion, plaintiff may not properly complain

41. La.—Elfer v. Marine Engineers Beneficial Ass'n No 12, 154 So. 32, 179 La. 383
N.Y.—Bricklayers', Plasterers' & Stonemasons' Union v Bowen, 183 N.Y.S. 855, affirmed 189 N.Y.S. 938, 198 App.Div. 967.

42. Gardner v. East Rock Lodge, No. 141, I.B.P.O.E. of W., 113 A. 303, 96 Conn. 198—5 C.J. p 1357 note 16.

43. Connell v. Stalker, 48 N.Y.S. 77, 21 Misc. 609, affirming 45 N.Y.S. 1048, 20 Misc. 422—5 C.J. p 1357 note 17.

44. Lavalle v. St. Jean Baptiste Soc., 24 A. 467, 17 R.I. 680, 16 L.R.A. 392, disapproved in Lahiff v. St. Joseph's Total Abstinence, etc., Soc., 57 A. 692, 76 Conn. 648, 100 Am.St.R. 1012, 65 L.R.A. 92—5 C.J. p 1357 note 18.

45. La.—Durel v. Perseverance Fire Co., 17 So. 591, 47 La.Ann. 1101.
Mo.—Albers v. Merchants' Exch., 39 S.W. 473, 138 Mo. 140

46. Peyre v. French Zouaves Mut. Relief Soc., 27 P. 191, 90 Cal. 240

47. Simpson v. Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 82 W.Va. 355, certiorari denied 39 S.Ct. 494.

"An inquiry as to the liability of an unincorporated association and members thereof, for alleged wrongful and illegal expulsion, participated in by a subordinate body acting under the orders of a superior officer constituting the official head of the association, involves consideration of the rights, duties, powers, and obligations of the members, the subordinate bodies and superior officers and tribunals, as determined by the constating articles of agreement, by-laws, rules and regulations, often designated as the constitution, statutes, and rules, and the usages and precedents of such organizations"—Simpson v. Grand International Brotherhood of locomotive engineers, supra.

48. Simpson v. Grand International Brotherhood of Locomotive Engineers, supra.

Malice not shown

(1) An inference of malice of members of a subordinate association, in voting to expel a member after voting his acquittal on charges preferred against him sufficient to sustain a verdict predicated on such theory, is not deducible from a mere change of attitude, especially where the superior officer has intervened and annulled the acquittal as being contrary to the weight of the evidence—Simpson v. Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 82 W.Va. 355, certiorari denied 39 S.Ct. 494.

(2) The presence at the expulsion of accused of a member of a subordinate lodge of an association, between whom and accused there had been a previous animosity, and who encouraged a superior officer to rescind the alleged unjustifiable acquittal, but who was excused on his own motion from voting on the expulsion, did not raise the inference of malice which would sustain a finding thereon—Simpson v. Grand International Brotherhood of Locomotive Engineers, supra.

49. Simpson v. Grand International Brotherhood of Locomotive Engineers, supra.

Exercise of appellate power after acquittal

(1) Official head of an unincorporated association, a brotherhood of locomotive engineers, by its constitution given full control over the order in general, subject to review by a triennial convention of the order, may exercise appellate power, after the acquittal of a member tried for breach of a rule justifying expulsion if guilty, and the court, in the member's action for damages for illegal expulsion, cannot deny such authority in the absence of denial by the association's tribunal of last resort—Simpson v. Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 82 W.Va. 355, certiorari denied 39 S.Ct. 494.

(2) It cannot be judicially determined by civil court that the official head of an association, such as a brotherhood of locomotive engineers, empowered to suspend the charter of a subordinate lodge in which the trial for a member's expulsion occurred, may not exercise appellate power so as to compel the expulsion or loss of charter, where the evidence on the trial afforded the basis for two honest opinions as to the innocence of accused member—Simpson v. Grand International Brotherhood of Locomotive Engineers, supra.

Legal presumption against right to enforce second trial rebutted

Any legal presumption against the right in tribunals of an unincorporated association to subject a member thereof to a second trial for the same offense is excluded by the terms of its constitution, making the enactments and decisions of its highest tribunal its supreme law.—Simpson v. Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 82 W.Va. 355, certiorari denied 39 S.Ct. 494.

of formal defects in the proceedings before the associate tribunal, where he raised no such objections before the associate tribunal,[50] nor can he recover damages where his expulsion was valid and binding under the rules of the association,[51] and the members of an executive committee of a local organization are not responsible for failure of the state organization to act directly in respect of an appeal from the order of expulsion.[52] Mere membership in a voluntary association does not make all the members liable for acts of their associates, such as wrongful expulsion of a member, done without their knowledge or approval, and liability is not to be inferred from mere membership.[53]

Where applicable statutory provisions permit recovery of damages for wrongful expulsion only when all the members are liable, a wrongfully expelled member cannot after reinstatement recover damages in the absence of allegations and proof showing liability of all members.[54]

The damages to be recovered by a member wrongfully suspended or expelled from an unincorporated society may include the loss sustained by being deprived of the use and enjoyment of the property of the society and of the privileges of membership,[55] loss of wages resulting from his inability to obtain employment by reason of his suspension,[56] and also the mental suffering caused by the wrongful expulsion and the manner in which it was effected.[57]

Where an association suspends a member without authority, and prevents him from securing any work in the city where he resides, he is under no obligation to it to accept employment outside of the city.[58]

§ 26. —— Reinstatement

a. Under laws of association
b. Judicial interference to compel reinstatement

a. Under Laws of Association

Where a member of an association has been lawfully expelled, he is entitled to reinstatement only on compliance with applicable conditions imposed by the association.

If the suspension of a member is not illegal, the association may lawfully refuse to reinstate him,[59] or it may impose such conditions on his reinstatement and prescribe such formalities therefor as it may see fit.[60] If the member complies with the laws of the society in this respect, he is restored to membership;[61] otherwise he is not.[62]

b. Judicial Interference to Compel Reinstatement

(1) By courts of law
(2) By courts of equitable cognizance

(1) By Courts of Law

Generally speaking, a suspended or expelled member may not secure reinstatement through courts of common law.

Ordinarily, no remedy exists in the common-law courts whereby a member who has been suspended or expelled may be restored to membership in the association.[63]

50. Burton v. Dickson, 180 P 216, 104 Kan 594, rehearing denied 180 P. 775, 104 Kan. 594

51. Burton v. Dickson, supra.

52. Burton v. Dickson, supra.

53. Malloy v Carroll, (Mass) 191 N.E. 661—Sweetman v. Barrows, 161 N.E. 272, 268 Mass. 349, 62 A.L.R. 311.

Joint and several liability of association and members

In an action ex delicto against an association, such as a brotherhood of locomotive engineers, and against individual members of a subordinate lodge, based on a wrongful expulsion from such lodge, the parties, if liable at all, are liable jointly and severally—Simpson v Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 82 W.Va. 355, certiorari denied 39 S.Ct. 494.

54. People ex rel. Solomon v. Brotherhood of Painters, Decorators, and Paper Hangers of America, 112 N.E. 752, 218 N.Y. 115, reversing 155 N.Y.S. 438, 169 App Div. 595

55. Lahiff v. St. Joseph's Total Abstinence, etc, Soc, 57 A. 692, 76 Conn 648, 100 Am.S.R. 1012, 65 L.R.A. 92.

56. Peo. v. Musical Mut Protective Union, 23 N.E. 129, 118 N.Y. 101—Connell v Stalker, 48 N.Y.S. 77, 21 Misc. 609, affirming 45 N.Y.S. 1048, 20 Misc. 423

Losses to business

That the resolution of an unincorporated association of architectural metal fabricators, which required members to do their own estimating on bids for metal work used in construction and to discontinue the services of a civil engineer previously used by members of the association, could be enforced by censuring members who violated the resolution and by fines or expulsion from the association did not render the association's acts illegal and made the association liable for losses caused thereby to the engineer's business—Arnold v Burgess, 272 N.Y.S. 534, 241 App Div. 364.

57. Lahiff v. St Joseph's Total Abstinence, etc, Soc, 57 A. 692, 76 Conn 648, 100 Am.S.R. 1012, 65 L.R.A. 92—5 C.J. p 1357 note 24.

58. Connell v. Stalker, 48 N.Y.S. 77, 21 Misc 609, affirming 45 N.Y.S. 1048, 20 Misc. 423

59. Saerwein v. Jamour, 65 N.Y.S. 501, 32 Misc. 701.

60. Gifford v Workmen's Ben. Assoc, 72 A. 680, 105 Me. 17, 17 Ann. Cas. 1173—5 C.J. p 1358 note 29.
Intention to reinstate not shown.—Yeomans v. Union League Club of Chicago, 225 Ill.App 234.

61. Mo.—Boward v Bankers' Union, 68 S.W. 369, 94 Mo.App 442
Neb.—Sovereign Camp W. W. v. Grandon, 89 N.W. 448, 64 Neb. 39.
N.J.—Van Houten v. Pine, 38 N.J.Eq 72.

62. State ex rel. Shiloh v. Queen of South Lodge No. 18, Independent Order Good Samaritans, and Daughters of Samaria, etc, 125 So 188, 12 La.App 240—5 C.J. p 1358 note 29

63. Mass.—Mesisco v. Giuliano, 76 N.E. 907, 190 Mass. 352.

(2) By Courts of Equitable Cognizance
- (a) In general
- (b) Necessity of exhausting remedies within association
- (c) Necessity of doing equity

(a) In General

In a proper case a court of equitable cognizance may interfere to compel the reinstatement of an expelled or suspended member of an association.

In the matter of the suspension or expulsion of a member, the association acts in a quasi judicial capacity, and where the society, fairly and in good faith, acts within its powers, and in accordance with its laws and the law of the land, its decision, like that of a judicial tribunal, is conclusive as against a collateral attack; and, accordingly, a court of equity will not interfere under such circumstances, at the suit of a member who has been suspended or expelled, to compel the association to reinstate him to membership.[64] Some courts have gone so far as to hold that, although a by-law is such that the courts would not enforce it, yet if a member is suspended thereunder equity will not reinstate him, since his right to membership is founded on his contract with the association, which, if accepted by the member, must be accepted in toto,[65] and that, if it is agreed that no one shall remain a member who refuses to comply with the association's rules, a member who has been suspended for noncompliance therewith will not be reinstated, even though his default consisted in the breach of an illegal agreement with a third person.[66]

On the other hand, a court of equity will reinstate a member, where the association, in suspending or expelling him, acted unfairly or in bad faith, or beyond its powers, and not in accordance with its laws or the law of the land, such relief being granted by way of a decree annulling the wrongful suspension or expulsion, adjudging the member to be entitled to the rights and privileges of membership, and directing his restoration or reinstatement, or enjoining the association from depriving him of such rights and privileges or interfering therewith.[67] Accordingly, the court may inquire into the power and jurisdiction of the association to suspend or expel the member,[68] the reasonableness and propriety of the suspension or expulsion[69] and the grounds thereof,[70] and the regularity of the proceedings,[71] but the court will not pass on the merits of the suspension or expulsion,[72] nor will a member be reinstated on account of irregularities which he has waived,[73] and it has been held also that the power of the courts to interfere is limited to cases in which the association possesses real or personal property, or is engaged in some pecuniary enterprise in which the members have an interest, whereby their property rights are necessarily involved.[74]

Although a member has forfeited his membership by his own act or neglect, yet, where he performs the acts required to be performed by the laws of the association as a condition of reinstatement, a court of equity has power to restore him to membership in case the society refuses to do so.[75]

The fact that a member was guilty of the acts for which he was expelled will not necessarily prevent his reinstatement, where he had once been tried and acquitted by an associate tribunal.[76]

Pa.—Thomas v. Ellmaker, 1 Pars Eq. 98.

64. Connelly v. Masonic Mut Ben. Assoc, 20 A 671, 58 Conn 552, 18 Am S R 296, 9 L.R.A. 423—5 C. J. p 1358 note 33.

65. Greer, Mills & Co v. Stoller, (C C Mo) 77 F. 1—5 C J. p 1358 note 34.

66. Lewis v. Wilson, 24 N E 474, 121 N Y. 284, affirming 2 N Y S. 806, 50 Hun 166.

67. U.S.—Burke v. Monumental Division, No 52, Brotherhood of Locomotive Engineers, (D.C.Md.) 273 F. 707

N Y—Polin v. Kaplan, 177 N E 833, 257 N Y. 277, reversing 246 N.Y.S. 522, 231 App Div 849, and Schneider v. Kaplan, 246 N.Y.S 524, 231 App Div. 850, reargument denied Polin v Kaplan, 178 N.E 803, 257 N Y 579.

Pa.—Manning v. Klein, 16 Pa Co 609.

Tex—Texas Farm Bureau Cotton Ass'n v Stovall, 253 S W 1101, 113 Tex. 273, reversing (Civ App.) 248 S W. 1109.

5 C.J. p 1358 note 36.

Since mandamus will not issue to restore to membership a member of an unincorporated association who was illegally expelled, although it might issue if the association were incorporated, an expelled member of an unincorporated association may seek redress in equity—Burke v. Monumental Division, No 52, Brotherhood of Locomotive Engineers, (D. C Md.) 273 F. 707.

68. Bachman v. Harrington, 102 N Y.S 406, 52 Misc 26

69. Fritz v. Muck, 62 How Pr (N Y.) 69—Olery v. Brown, 51 How.Pr (N.Y.) 92.

70. Manning v Klein, 16 Pa Co. 609 —5 C J p 1358 note 39.

71. Sperry's App., 9 A 478, 116 Pa 391.

72. Sperry's App., supra.

73. Sperry's App., supra.

74. Ryan v. Cudahy, 41 N E 760, 157 Ill 108, 48 Am S R 305, 49 L R A. 353—5 C J. p 1359 note 43

75. Graveson v. Cincinnati Life Assoc, 11 Ohio Dec (Reprint) 369, 26 Cinc L Bul 183, affirming 8 Ohio Cir Ct 171, 6 Ohio Cir Dec 327

76. Rueb v. Rehder, 174 P. 992, 24 N M. 534, 1 A L R 423.

Right of expulsion dependent on "conviction"

"Where a member has been once tried and acquitted of charges preferred against him in a voluntary association, and the right to expel him from such association exists only upon conviction, the fact that he was in fact guilty of violating a rule of the association is no defense

(b) Necessity of Exhausting Remedies within Association

Ordinarily, a suspended or expelled member should exhaust his remedies within the association before applying to the courts for reinstatement, although this rule does not apply where suspension or expulsion was made without jurisdiction, nor where resort to a tribunal of the association would necessarily be ineffectual.

Before applying to a court of equity for reinstatement, a disfranchised member must, as a rule, exhaust all remedies available to him under the laws of the association,[77] and the courts will not interfere in the absence of action arbitrary in character or taken in violation of rules of the association.[78] However, this rule does not apply, it has been held, where the association, in suspending or expelling the member, acted entirely without jurisdiction,[79] nor where the remedy provided by the laws of the society is not available to the member,[80] nor where there is an extremely remote possibility of its proving effective,[81] and the rule is, of course, inapplicable where no remedy is afforded by the laws of the association.[82]

(c) Necessity of Doing Equity

A member expelled for nonpayment of dues should tender the unpaid dues before applying to a court of equity for reinstatement.

In accordance with the familiar maxim that he who seeks equity must do equity, where a member of a voluntary association is expelled for nonpayment of dues, he cannot compel reinstatement until he has tendered the dues or made an unsuccessful application to learn their amount.[83]

§ 27. —— Interest in Association Property

a. In general
b. On termination of membership
c. Socialistic communities
d. Right of subordinate branch or supreme body

a. In General

Ordinarily, the property of an association belongs to the members jointly, although where rules of the association so provide the members may have severable and transferable interests in the property.

Since a voluntary association ordinarily has no separate entity, as has been explained in § 1 supra, and, therefore, cannot, as such, acquire or hold property, as shown in § 14 supra, the ownership of any property or funds acquired or held by it is vested in the members jointly,[84] and they, accordingly, have the right to manage, control, and dispose of such property or funds at their joint pleasure.[85]

By becoming a member of an association a person ordinarily acquires, not a severable right to any of its property or funds, but merely a right to the joint use and enjoyment thereof so long as he continues to be a member.[86] Accordingly, the rights of an individual member are not transmissible by assignment on his part during his lifetime,[87] and on his death do not pass to his heirs or next of kin,[88] or to his devisees or legatees,[89] unless the association has been previously dissolved, as has been explained in § 10 supra. So long as he remains a member of the association, however, he has an absolute right, which the courts will protect, to have its property and funds controlled and administered according to its organic plan, and to participate in its affairs in harmony therewith.[90]

Associations may, however, by the adoption of a constitution or other general rules, determine final-

to an action by him to secure his reinstatement, where he was subsequently retried and found guilty; such second trial being without jurisdiction"—Rueb v Rehder, 174 P. 992, 24 N.M. 534, 1 A.L.R. 423

77. Shapiro v Gehlman, 272 N.Y.S. 624, 152 Misc. 13, reversed on other grounds 278 N.Y.S. 785, 244 App. Div. 238—5 C.J. p. 1359 note 45.

78. Shapiro v. Gehlman, supra.

79. Shapiro v. Gehlman, supra—5 C.J. p. 1359 note 46

Irregular and illegal proceedings

Where the proceedings resulting in the suspension or expulsion of a member of an unincorporated association are irregular and illegal, immediate recourse may be had to the courts—Shapiro v Gehlman, 272 N.Y.S. 624, 152 Misc. 13, reversed on other grounds 278 N.Y.S. 785, 244 App. Div. 238.

80. Fritz v Knaub, 103 N.Y.S. 1003, 57 Misc. 405, affirmed 108 N.Y.S. 1133, 124 App. Div. 915

81. Loubat v Le Roy, 40 Hun (N.Y.) 546—5 C.J. p. 1359 note 48

82. Bachman v. Harrington, 102 N.Y.S. 406, 52 Misc. 26—Olery v. Brown, 51 How. Pr. (N.Y.) 92.

83. Konta v St. Louis Stock Exch., 87 S.W. 969, 189 Mo. 26

84. Idaho Apple Growers' Ass'n v Brown, 293 P. 320, 50 Idaho 34—5 C.J. p. 1359 note 57

85. Idaho Apple Growers' Ass'n v. Brown, supra—5 C.J. p. 1359 note 58

Similarity to partnership

It has been said that, while an association is not a partnership, the rights of the members in the associate property are to be determined to a large extent by the principles of law peculiar to partnerships—Bentley v. Hurley, 299 S.W. 604, 222 Mo. App. 51

86. South Shore Country Club v. Peo., 81 N.E. 805, 228 Ill. 75, 12 L.R.A.(N.S.) 519, 10 Ann.Cas. 383—5 C.J. p. 1359 note 59.

87. McMahon v. Rauhr, 47 N.Y. 67, reversing 3 Daly 116—5 C.J. p. 1360 note 60

88. Mason v. Atlanta Fire Co., 70 Ga. 604, 48 Am.R. 585—5 C.J. p. 1360 note 61

89. Mason v. Atlanta Fire Co., supra—5 C.J. p. 1360 note 62

90. Iowa—Hanley v. Elm Grove Mut. Tel. Co., 129 N.W. 807, 150 Iowa 198
N.Y.—Dennis v. Kennedy, 19 Barb. 517.
Wis.—Spiritual, etc., Temple v. Vincent, 105 N.W. 1026, 127 Wis. 93.

ly the property rights and interest of a member, or of a subordinate branch or lodge, in and to the funds and property of the association,[91] and where the rules and regulations of an association provide for severable and transferable individual interests of members, the member may transfer such interest in accordance with the regulations of the association.[92]

A member of an association owning an oil lease, who is not an officer or trustee of the association, may, it has been held, sell his own interest in the property, as he sees fit, without accounting to the other members[93]

b. On Termination of Membership

On termination of membership the right of members to property of the association ordinarily ceases, and those who remain have the sole right to such property Suspension of a member terminates his interest in the property of the association unless and until he again acquires membership

In the absence of provisions in the constitution or by-laws giving members an individual interest in the assets of a voluntary association, members who withdraw thereby lose their rights to associate property, title to which stays in the members remaining in the association,[94] and the rule applies whether membership is terminated by the member's own act or omission[95] or by the act of the society[96] This rule applies even where a number of members secede in a body,[97] and although they constitute a majority,[98] and organize a new association[99] In such case the remaining members, and only they, are entitled to the entire funds and property of the association, so long as they continue to keep it alive and adhere to its purposes.[1]

Under a by-law providing that no member of an automobile association shall be entitled to refund of money advanced by him for space at an automobile show unless he was a member at, or prior to, the last annual meeting held prior to such show, one not a member at such time is not entitled to such refund[2]

Members of an association seeking to exclude certain other members from all rights in its property on the ground of their alleged withdrawal have the burden of proving the withdrawal.[3]

A petition by an association alleging that defendants have withdrawn from the society but are wrongfully keeping its property need not contain a formal allegation of demand.[4]

Effect of suspension. While the suspension of a member does not terminate his membership in the association, it does deprive him of the rights and privileges of membership until he is reinstated in accordance with the laws of the society;[5] and accordingly, while a suspended member may have a contingent interest in the funds and property of the association,[6] he has no legal interest therein.[7]

91. Brotherhood of Railroad Trainmen v Williams, 277 S W 500, 211 Ky 638.

92. Clute v. Loveland, 9 P. 133, 68 Cal 254

Stock Exchange seat may be made the subject of a lien under applicable regulations of the exchange, a voluntary unincorporated association. —Clute v. Loveland, 9 P. 133, 68 Cal. 254

93. Ferguson v Crawford, 236 S W. 837, 151 Ark. 503

94. Mich.—Walters v. Pittsburgh & Lake Angeline Iron Co., 167 N.W 834, 201 Mich 879, 1 A L R 624
Ohio—Henry v. Cox, 159 N E 101, 25 Ohio App 487
5 C J p 1360 notes 65, 66.

95. Coombs v Harford, 59 A. 529, 99 Me 426—5 C J. p 1360 note 67.

96. Missouri Bottlers' Assoc. v. Fennerty, 81 Mo App. 535—5 C J p 1360 note 68.

97. Ostrom v. Greene, 55 N E 919, 161 N Y. 353, affirming 52 N.Y S. 1147, 30 App.Div 621, affirming 45 N Y S. 853, 20 Misc 177—5 C J p 1360 note 69.

98. Henry v Cox, 159 N E 101, 25 Ohio App. 487—5 C.J. p 1360 note 70.

Although four-fifths of the members withdrew, "they could not take with them any of the property, whether they left individually or collectively."—Henry v Cox, 159 N. E 101, 102, 25 Ohio App. 487

99. Ill—Alchenburger v. Freundschaft Lodge No. 72 D O H, 138 Ill App 204, affirmed 85 N E 653, 235 Ill 438.
Mass—McFadden v Murphy, 21 N E 568, 149 Mass 341
N J.—Altmann v. Benz, 27 N J Eq 331.

1. Ill—Alchenburger v. Freundschaft Lodge No. 72 D O. H, 138 Ill App 204, affirmed 85 N E. 653, 235 Ill 438.
Mass—McFadden v. Murphy, 21 N E. 568, 149 Mass. 341.
Mich—Schiller Commandery No 1 U. F. M v Jaennichen, 74 N W 458, 116 Mich 129.
N J—Altmann v. Benz, 27 N J Eq 331

2. Weber Implement & Automobile Co. v. St Louis Automobile Mfrs.' & Dealers' Ass'n, (Mo App) 181 S. W. 1025

Whether regarded as new or reinstated member
Under such by-law, a member who resigned from the association and whose resignation was accepted prior to the annual meeting of April, 1911, and who on its application again became a member by action of the association's board on May 4, 1911, and who advanced money for floor space at the automobile show conducted by the association in October, 1911, was not entitled to its share of the association's refund to members, since, whether it was a new member or a reinstated member, it was not a member at, or prior to, the annual meeting in April, 1911. —Weber Implement & Automobile Co. v. St. Louis Automobile Mfrs' & Dealers' Ass'n, (Mo App) 181 S W. 1025.

3. Strong v. Los Nietos, etc, Walnut Growers' Assoc., 70 P. 734, 137 Cal. 607.

4. McLaughlin v. Wall, 105 P. 33, 81 Kan 206

5. Palmetto Lodge No. 5 I O. O. F. v. Hubbell, 33 S C L. 457, 49 Am D. 604

6. Brown v. Stoerkel, 41 N.W. 921, 74 Mich 269, 3 L R A 430.

7. Brown v. Stoerkel, supra.

c. Socialistic Communities

One whose membership in a socialistic community has been legally terminated loses all right to the property owned in common, where the rules of the community so provide, although an illegally expelled member may retain his property rights irrespective of associate rules to the contrary.

The rules announced in the two preceding subsections apply to the interest of members in the common property of a socialistic community. The contract by which a member of such a community renounces his right to private ownership in any property which he may have contributed to the common fund, or in the product of his own labor, is valid and binding,[8] and a member who voluntarily withdraws or who is legally expelled,[9] or the heirs and personal representatives of a deceased member,[10] have no right to any part of such property.

It has been held, however, that such an agreement will not invalidate a demand for a proportionate share of the common property made by one who had been illegally expelled.[11]

Hawaiian land hui. It has been held that while members of an Hawaiian land hui hold the property as tenants in common, shareholders in the land take their interests subject to such valid regulations as may have been adopted by the hui with reference to holding the land in severalty.[12]

d. Right of Subordinate Branch or Supreme Body

The right of a subordinate branch, lodge, or local to association funds or property, as between it and the supreme body of an association, will ordinarily terminate on formal or actual withdrawal of the local from the main body.

The supreme body of an association, divided into local branches or lodges, may enforce its laws, properly enacted, requiring the subordinate lodge, on voluntary dissolution, to surrender its property and funds to the supreme body,[13] and where a local has in effect ceased to be a member of the main body, it may lose its rights to funds subscribed for it as such local;[14] although where the supreme body has, pursuant to the laws of the association, revoked the charter of the subordinate lodge, the supreme body may be denied the power to require the subordinate body or local to surrender its funds or property to the supreme body,[15] unless the local whose charter was revoked has acquiesced in such revocation and become defunct, in which case the property and funds of the local may be awarded to the supreme body under applicable association regulations rather than to the former members of the then defunct local.[16]

§ 28. —— Power to Bind Association

a. Individual members
b. Majority

a. Individual Members

As a general rule an individual member lacks power to bind the association.

In the absence of authority specially conferred, a single member has no power to bind the association,[17] and this is especially true where the society

8. Schwartz v. Duss, (C.C.Pa.) 93 F. 528, affirmed 103 F. 561, 43 C.C.A. 323, affirmed 23 S.Ct. 4, 187 U.S. 8, 47 L.Ed. 53—5 C.J. p. 1360 note 79.

9. U.S.—Schwartz v. Duss, (Pa.) 23 S.Ct. 4, 187 U.S. 8, 47 L.Ed. 53, affirming 103 F. 561, 43 C.C.A. 323, affirming (C.C.) 93 F. 528.
Ky.—Gass v. Wilhite, 2 Dana 170, 26 Am.D. 446.
N.Y.—Burt v. Oneida Community, 33 N.E. 807, 137 N.Y. 346, 19 L.R.A. 297, 34 N.E. 288, 138 N.Y. 649, 53 N.Y.St. 24, affirming 16 N.Y.S. 289, 61 Hun 626.
Ohio—Gasely v. Separatists' Soc., 13 Ohio St. 144.
5 C.J. p. 1360 note 80.

10. U.S.—Goesele v. Bimeler, (Ohio) 14 How. 589, 14 L.Ed. 554, affirming (C.C.) 10 F.Cas.No. 5,503, 5 McLean 223.
Pa.—Schriber v. Rapp, 5 Watts 351, 30 Am.D. 327.
5 C.J. p. 1361 note 81.

11. Nachtrieb v. Harmony Settlement, (C.C.Pa.) 17 F.Cas.No. 10,003, 3 Wall.Jr. 66.

12. De Fries v. Scott, (C.C.A.) 268 F. 952, reversing Scott v. Pilipo, 23 Hawaii 739, and certiorari denied Scott v. De Freis, 41 S.Ct. 538, 256 U.S. 700, 65 L.Ed. 1178.

Hui regarded as voluntary association

Under the law of Hawaii, while the members of an Hawaiian land hui, an association of persons in the ownership of land, hold the property as tenants in common, the adoption of regulations concerning the management of the hui and the use of the land constitutes them a voluntary association, and persons entering into the membership through the acquisition of shares in the hui, and those claiming under them, take their interest subject to such valid regulations as may have been adopted by the hui with reference to the holding of the land in severalty.—De Fries v. Scott, (C.C.A.) 268 F. 952, reversing Scott v. Pilipo, 23 Hawaii 739, and certiorari denied Scott v. De Freis, 41 S.Ct. 538, 256 U.S. 700, 65 L.Ed. 1178.

13. Brotherhood of Railroad Trainmen v. Williams, 277 S.W. 500, 211 Ky. 638.

14. Bancroft v. Cook, 162 N.E. 691, 264 Mass. 343.

Building fund

Under findings of a master that an undergraduate organization had so repudiated the principles of its national fraternity and changed in character that it ceased to be a chapter thereof, within the meaning of a trust instrument in the form of a subscription agreement creating a building fund for such chapter, it was not entitled to order enjoining interference with the possession and management of the premises or the trust fund.—Bancroft v. Cook, 162 N.E. 691, 264 Mass. 343.

15. Brotherhood of Railroad Trainmen v. Williams, 277 S.W. 500, 211 Ky. 638.

16. Brotherhood of Railroad Trainmen v. Williams, supra.

17. Spotswood v. Morris, 85 P. 1094, 12 Idaho 360, 6 L.R.A.(N.S.) 665—5 C.J. p. 1361 note 83.

has intrusted the management of its affairs to chosen officers.[18] So one member cannot, by his unauthorized acts, impose on another member a liability for tort.[19]

b. Majority

Broadly speaking a majority of the members of an association has power to control its action as to all matters expressly or impliedly within the scope of its objects; but members who neither authorize nor ratify an act of part of the membership are not bound thereby unless such act was clearly in furtherance of associate objects.

In the absence of anything to the contrary in the laws or usages of the association,[20] the majority of the members possess authority to control its action as to all matters within the scope of the objects for which it was formed,[21] whether such objects are mentioned in the articles of association or are necessarily implied therefrom;[22] and this includes the power of control over the funds of the association.[23] However, the members of an association are not bound by an act of a part of the members which they did not authorize and have not ratified, unless the act is clearly in furtherance of the objects for which the society was organized.[24]

§ 29. —— Duties and Liabilities to Association in General

An association should, ordinarily, seek redress against a member violating its rules by appropriate remedies under its own regulations. A member may be held liable on his bond for breach of a regulation of the association. A duly retiring member is not, ordinarily, responsible for association debts as between himself and other members.

The duties and liabilities of members to the association as respects fraud and breach of trust will be considered in § 30, and the matter of dues, assessments, fines, and penalties will be taken up in § 31. An association has been denied the right to enjoin a member from violating a contract between the association and a third person, to which defendant member was not a party, the court stating that the association's remedy against such member was a fine, suspension, or expulsion under applicable regulations of the association.[25]

Breach of obligation of bond. A member of an association, and his surety, may be held liable on the member's bond for breach of a valid regulation of the association covered by such bond.[26]

Liability of retiring member for debts. Where the by-laws of an association authorize the withdrawal of members on a certain notice without any reservation of liability for outstanding debts of the society, a retiring member is not, as between himself and the remaining members, liable for the association's debts.[27]

§ 30. —— Fraud or Breach of Trust

A member may be held liable to the association for his fraud or breach of trust.

A member of an association is liable for a fraud perpetrated on his associates in dealing with the common property.[28] So, until the relation of membership in the association has been terminated by some unequivocal act on their part, the members of an association are bound to act for the promotion of the common interest, and will not be allowed to deal secretly with respect to the common enterprise, either with or for the association, for their own benefit, and if they do so, all profits thereby made by them will inure to the benefit of the association, and they will be compelled to account therefor,[29] unless the association has waived the fraud.[30]

However, where no fraud nor breach of trust is shown, a member may properly make a personal

18. Lambeth v. Vawter, 6 Rob (La.) 137

19. Master Builders Assoc. v Domascio, 63 P 782, 16 Colo.App 25

20. Goller v Steubenhaus, 134 N.Y.S 1043, 77 Misc 29

21. Horton v Chester Baptist Church, 34 Vt. 309—5 C.J. p 1361 note 88

22. Goller v. Steubenhaus, 134 N.Y.S 1043, 77 Misc 29.

23. Ostrom v. Greene, 55 N.E 919, 161 N.Y. 353, affirming 52 N.Y.S 1147, 30 App Div. 621, affirming 45 N.Y.S 852, 20 Misc. 177—5 C.J. p 1361 note 90.

24. Sizer v. Daniels, 66 Barb (N.Y.) 426

25. Associated Master Plumbers of Rochester v. Warnock & Zahrndt, 260 N.Y.S 573, 236 App Div. 832, affirmed 185 N.E. 783, 261 N.Y. 665

26. Androff v Building Trades Employers' Ass'n, 148 N.E 203, 83 Ind App 294

Regulation fixing maximum wages

A member of an employer's association breaking a regulation fixing maximum wages to be paid employees, which regulation was held valid on analogy to minimum wage regulations of labor unions, was subject to liability in an action on his bond covering the matter, as was the insurance company writing such bond—Androff v. Building Trades Employers' Ass'n, 148 N.E 203, 83 Ind App 294.

27. Engvall v. Buchie, 132 P. 231, 73 Wash. 534.

28. Dennis v. Kennedy, 19 Barb.(N.Y.) 517.

29. Auto Workers' Temple Ass'n v. Janson, 198 N.W. 992, 227 Mich. 430—5 C.J. p 1361 note 95

Fraudulent profit of member, made by purchasing land for the association and as its agent at a price in excess of that for which it was available, belongs to the association.—Auto Workers' Temple Ass'n v. Janson, 198 N.W 992, 227 Mich 430.

30. McDowell v. Joice, 36 N.E. 1012, 149 Ill. 124

Waiver not shown

Where a member realized a secret profit on a purchase of land by the association, his associates did not waive the fraud by failing to rescind the purchase—McDowell v. Joice, 36 N.E 1012, 149 Ill. 124.

profit from a contract wherein the association claims an interest,[31] hence, a member, not an agent or trustee for the association, may purchase land and afterward sell it to the association at an enhanced price, provided that he makes no fraudulent misrepresentations,[32] and he may lawfully take, in his own name and for his own benefit, a lease of ground which the society had occupied as a tenant at sufferance without payment of rent, no trust in favor of the association being impressed on the lease in such case.[33]

§ 31. —— Dues, Assessments, Fines and Penalties

Liability of members for dues, assessments, fines, and penalties imposed or levied by the association depends on the contract of association as embodied in the articles of association and by-laws Where the contract between the member and the association, as embodied in its regulations, does not impose a personal liability on members for dues, assessments, fines, and penalties, there can be no recovery thereof; although recovery may be permitted where such contract does impose a personal liability, provided the association acts lawfully in levying or imposing the sum claimed.

The liability of a member of an association for dues and assessments, and for fines and penalties, depends on his contract with the association as embodied in its articles of association or constitution and by-laws. If this contract does not impose a personal obligation on the member to pay, the association's only remedy, if any exists, lies wholly within the association, and it cannot collect the sum due by action against the member.[34] Frequently, however, the contract makes the member personally liable for dues and assessments, and fines and penalties, in which event they are recoverable by action,[35] provided the association, in levying and imposing the same, acts within its powers,[36] and according to its laws,[37] and the law of the land.[38] An arbitrary assessment by way of a fine may not be recovered.[39]

31. J E Tusant & Son Co v Chas Weitz Sons, 191 N W. 884, 195 Iowa 1386—Goff & Heger v Walker, 174 N W 661, 187 Iowa 959.

Joint adventure not proved

An unincorporated master builders' association cannot by a motion duly adopted bind the absent members, without their consent, as parties to a contract of joint adventure, so as to impose an obligation on the member actually contracting to build a government cantonment to account to other members for profits realized —J. E Tusant & Son Co v Chas Weitz Sons, 191 N W. 884, 195 Iowa 1386

Proposed contract with plumbers' association never in effect

(1) Where one having a contract with the government to do plumbing work in a cantonment attempted to enter into an agreement with all the members of a master plumbers' association, whereby such members were to furnish the necessary men to do the work and were to share in the profits, and certain of the members were selected as a committee which was to formulate a contract, but no contract was formulated which was acceptable to both sides, the contractor had the right to terminate the negotiations entirely and to enter into an agreement with the members of the committee alone, without rendering himself liable to the other members of the association—Goff & Heger v Walker, 174 N.W 661, 187 Iowa 959.

(2) Where a company obtained a contract from the government to install plumbing in a cantonment and attempted to enter into an agreement with all the members of a master plumbers' association, the master plumbers to furnish men to do the work and to share in the profits, and certain members were selected by the association as an advisory committee to reduce the proposed contract between the association and the company to writing, and such committee attempted to formulate a contract which would be acceptable to both parties, but failed, any agency existing between the members of the association and the committee terminated when the company withdrew its proposition and terminated negotiations with the association, and the members of the committee could properly thereafter, without becoming liable to account to the members of the entire association, enter into an agreement with the company and share in the profits thereof, there being no bad faith or breach of duty by such members prior to the withdrawal of the proposition by the company—Goff & Heger v Walker, supra

32. Densmore Oil Co. v. Densmore, 64 Pa 43

33. Lumbard v Grant, 71 N.Y S. 459, 35 Misc 140, affirmed 71 N Y.S 1141, 62 App Div 617

34. Lafond v Deems, 81 N Y 507, 8 Abb N Cas 344, reversing 1 Abb N Cas 318, 52 How Pr 41—Nash v Russell, 5 Barb (N Y.) 556.

35. Webster v. Taplin, 29 Ohio Cir. Ct. 543, affirmed 81 N E 1196, 76 Ohio St 590—5 C J. p 1362 note 8.

36. Minn—Duluth Club v MacDonald, 76 N W 1128, 74 Minn 254, 73 Am S R. 344

N Y—Whiteside v Noyac Cottage Assoc, 37 N E 624, 142 N.Y. 585.

37. Meurer v. Detroit Musician's Benev, etc, Assoc, 54 N W 954, 95 Mich 451—5 C J. p 1362 note 5.

38. McCord v Thompson-Starrett Co, 113 N Y S 885, 129 App Div. 130, reversing 112 N.Y S 902, and affirmed 92 N E. 1090, 198 N.Y. 587 —5 C J p 1362 note 6.

39. American Men's & Boys' Clothing Mfrs' Ass'n v Proser, 179 N. Y S 207, 210, 190 App Div 164.

"It is quite competent for such an association as the plaintiff to fix penalties by way of fines for derelictions of its members, but the penalties must be determined according to some method, to which the member has agreed, at least impliedly by joining the association, not only as to the imposition of the fine, but also as to the maximum amount thereof, otherwise, the association would be allowed to assess its own damages, which would be clearly unjust and improper And a by-law imposing an excessive fine would be set aside as unreasonable."—American Men's & Boys' Clothing Mfrs.' Ass'n, v. Proser, supra

Fine held arbitrary

An association composed of clothing manufacturers, who in joining agreed to be subject, after a hearing, to a fine for any infraction of the rules and regulations of the association, was without legal authority to fix an arbitrary assessment by way of a fine against recalcitrant members, who had refused to lay off their cutters in forwarding the settlement of a strike, so that the association could not recover such fine, although a reasonable fine, fixed according to some predetermined method and in the nature of liquidated damages for injuries sustained, would be upheld. —American Men's & Boys' Clothing

An objection that the society has not exhausted all the remedies open to it under the laws of the association should be raised by answer, and not by demurrer.[40]

Commencement, duration, and termination of liability. A member is not liable for dues accruing and assessments levied before he joined the association,[41] or for dues accruing after the termination of his membership.[42] His liability continues as long as he remains a member of the association, although he may have ceased to participate in its operations;[43] he is liable for dues and assessments accruing and levied while he was a member, although his default in paying the same has worked a forfeiture of his membership,[44] and a member withdrawing from an association must pay his dues in accordance with applicable provisions of the by-laws.[45] Since the suspension of a member does not terminate his membership, he is liable for dues and assessments accruing during the period of his suspension.[46]

Where dues to an association are, by its constitution, made payable in advance, payment is not excused by the fact that the society becomes insolvent and goes into the hands of a receiver within the period for which the dues are demanded,[47] but a subscriber to the funds of an association not originally intended to be incorporated is absolved from his agreement to pay the sum subscribed by the incorporation of the association without his consent.[48]

Right of withdrawing branch to return of dues from main body. Where a branch of an association withdraws from the main body and becomes merged in a corporation, it loses the right to have returned to it the dues which have been paid by it to the treasurer of the association, and the corporation into which such branch is merged acquires no title to any part of the money held by the treasurer of the voluntary association.[49]

§ 32. —— Duties and Liabilities to Persons Not Members

a In general
b Liability on contract
c. Liability for torts

a. In General

Although liability for the acts of associates may not be predicated on membership alone, it may be established by a public act of the association or by acts of officers, agents, or members known to and approved by the member held liable.

While mere membership in an association does not of itself impose liability for the acts of the associates,[50] universal liability of members of a voluntary, unincorporated association may be established by a public act of the association itself, or by the acts of officers, agents, or members where such acts are known to the membership and actively or passively approved.[51]

b. Liability on Contract

(1) In general
(2) Proportion of liability
(3) Liability for debts incurred outside of period of membership
(4) Liability for debts beyond scope of association objects
(5) Effect of incorporation of association
(6) Particular classes of associations

(1) In General

Broadly speaking, members of an unincorporated association are not personally responsible for association

Mfrs' Ass'n v Proser, 179 N.Y.S 207, 190 App Div. 164

40. Webster v Taplin, 29 Ohio Cir Ct 543, affirmed 81 N.E. 1196, 76 Ohio St. 590

41. N.Y.—Evarts v. U. S. Mutual Acc Assoc, 16 N.Y.S. 27
Wash.—Logsdon v. Supreme Lodge F. U. A., 76 P. 293, 34 Wash. 666.

42. Westchester Golf Club v. Pinkney, 87 N.Y.S 153, 43 Misc. 333—5 C.J. p 1362 note 9.

43. Tenney v. New England Protective Union Div. No. 172, 37 Vt. 64—5 C.J. p 1362 note 10.

44. N.Y.—Smith v. Bown, 27 N.Y.S. 11, 75 Hun 231.
Ohio.—Webster v. Taplin, 29 Ohio Cir Ct. 543, affirmed 81 N.E. 1196, 76 Ohio St. 590.

45. Agricultural Publishers' Ass'n v Homestead Co., 197 N.W. 314, 197 Iowa 380

Dues for "ensuing" quarter

Under sections of by-laws of an agricultural publishers' association providing for advance quarterly payment of assessments and withdrawal by written notice to the board of directors to become effective on payment of delinquent assessments and assessments for the ensuing quarter, a member withdrawing during a quarter was required to pay for that quarter as delinquent dues and for one quarter in advance thereof as the ensuing quarter, since "ensue" means "to follow after" or "follow in order or train of events," and, therefore, the "ensuing quarter" meant the quarter following that for which he had already paid.—Agricultural Publishers' Ass'n v. Homestead Co, 197 N.W 314, 197 Iowa 380.

46. Provident Mut Relief Assoc. v. Pelissier, 45 A. 562, 69 N.H. 606—5 C.J. p 1362 note 12

47. Freedman v Chamberlain, 24 N.Y.S 388, 70 Hun 193.

48. Southern Steam Packet Co. v. Magrath, 16 S.C.Eq 98.

49. First Russian National Organization of the New England States v. Zuraw, 94 A 976, 89 Conn. 616.

50. Malloy v Carroll, (Mass.) 191 N.E. 661—Sweetman v Barrows, 161 N.E 272, 263 Mass. 349, 62 A.L.R 311.

51. Tannenbaum v Hofbauer, 253 N.Y.S. 90, 142 Misc. 120.

contracts made without authority or compliance with requisite formalities, although they may be held individually liable for contracts which they have authorized or ratified The member actually making the contract will be personally bound.

Where a member of an unincorporated association contracts in the name of such supposed principal, which has no legal existence and cannot sue or be sued, such member is himself personally bound [53] and, where it is not shown by a defendant sued on a contract made by him whether the organization for which he claims to have acted was a corporation or an association, the court will hold him personally liable on the contract.[53]

Aside from the effect of the character of the association on the liability of members, which will be taken up in subsection b (6), it may be stated broadly that the members of an unincorporated association cannot be held liable because some of its officers undertake to make all the members liable on a contract without any authority and without following the formalities necessary to bind the members,[54] but that, wherever the members of an association are personally chargeable with knowledge and authorization or ratification of an associate contract, they may be held individually liable thereon to third persons,[55] and that, under statutes providing for suit against associates in their common name, and that the judgment in such action shall bind the joint and individual property of the parties served with process, recovery may be had from the individual members of an association [56]

Addition of the words "no personal liability" to the signature of an association officer on a contract has been held insufficient of itself to relieve the members of the association from personal liability on the contract.[57]

Persons making voluntary donations to an association, without any participation in the organization or operation of the business of the association, and on the express understanding that they are not becoming members thereof, may not be held liable for obligations incurred by the association.[58]

Constitutional provisions to the effect that the term "corporation" shall include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships apply only to associations incorporated under the general laws, and an association not so incorporated is not within the benefit of laws limiting the liability of individual members of a corporation or joint-stock association.[59]

(2) Proportion of Liability

Where liability is established, each member of an association is individually liable to its creditors for the entire debt.

While, as between the members of an unincorporated association, each is bound to pay only his numerical proportion of the indebtedness of the concern, as will be shown in section 33, yet, as against the creditors, each member is individually liable for the entire debt, provided, of course, the debt is of such a nature and has been so contracted as to be binding on the associates as a whole,[60] as will be more particularly considered in subsection (6) hereof.

(3) Liability for Debts Incurred Outside of Period of Membership

Ordinarily a member of an association may not be held responsible for debts incurred before or after the period of his membership.

52. Haldeman v. Addison, (Iowa) 265 N.W. 358.

53. Franklin Paper Co. v. Gorman, 76 Pa.Super. 276.

54. Ala.—Dinsmore v. J. H. Calvin Co., 108 So. 583, 214 Ala. 666
N.Y.—Knopp v. Sherwood, 268 N.Y.S. 16, 239 App.Div. 475, affirmed 193 N.E. 334, 265 N.Y. 591.
See Whitehead & Hoag Co. v. Donovan, 210 Ill.App. 268.

Farmers' union store

Mere membership in a farmers' cooperative union would not impose liability for goods sold to a union store conducted by some of the members, since no one could bind the members of the organization as partners or parties to an enterprise or contract of such character of which they had no knowledge and to which they did not assent, although those engaging in the business, that is, becoming members of the association for the purpose of carrying on the store or reaping profit from its business, became thereby liable for its obligations.—Dinsmore v. J. H. Calvin Co., 108 So. 583, 214 Ala. 666

55. Colo.—Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irr. Co., 171 P. 72, 64 Colo. 222.
Or.—Cousin v. Taylor, 239 P. 96, 115 Or. 472, 41 A.L.R. 750.
S.D.—Robbins Co. v. Cook, 173 N.W. 445, 42 S.D. 136, 7 A.L.R. 218.

Ratification and assent shown

(1) Where the president of an unincorporated irrigation association, empowered with management, subject to directors, notified them that he had employed plaintiffs as attorneys in a suit against the association, and no director objected, the contract was ratified and binding.—Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irr. Co., 171 P. 72, 64 Colo. 222.

(2) Members of unincorporated association, knowing of hiring of attorneys, and failing to disaffirm within reasonable time, are deemed to have assented to it.—Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irr. Co., supra.

56. Zimmerman v. Prior, 188 P. 836, 46 Cal.App. 40.

57. Old River Farms Co. v. Roscoe Haegelin Co., 276 P. 1047, 98 Cal. App. 331.

58. Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

59. Old River Farms Co. v. Roscoe Haegelin Co., 276 P. 1047, 98 Cal. App. 331.

60. Cal.—Burks v. Weast, 228 P. 541, 67 Cal.App. 745.—Webster v. San Joaquin Fruit & Vegetable Growers' Protective Ass'n, 162 P. 654, 32 Cal.App. 264.
S.C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.
5 C.J. p. 1362 note 16.

To render a member liable for a debt of the association, it must have been contracted while he was a member of the society. He is not liable for a debt incurred before he became a member,[61] nor after his membership has ceased,[62] provided the creditor, at the time of extending credit, had notice of the cessation of membership.[63]

(4) Liability for Debts beyond Scope of Association Objects

In the absence of his assent or ratification, a member is not liable for a debt arising from a transaction beyond the scope and purpose of the association.

If a debt arises out of a transaction entirely without the scope of the objects and purposes of the association, a member is not liable therefor,[64] unless he, either expressly or by implication, assented to the transaction either before or at the time it was entered into, or subsequently ratified it, in either of which cases he is bound.[65]

(5) Effect of Incorporation of Association

The incorporation of an association may not relieve its members from liability for debts subsequently contracted by the association outside of the scope of its corporate powers, and an ineffectual incorporation of an association does not save the members from liability for debts subsequently contracted by the association, although persons not participating in the business of the association may be relieved from liability on the latter ground.

Since the incorporation of an existing association operates as a dissolution of the society, as has been shown in section 9, it follows that a member is not liable, by reason of his former membership, for debts subsequently contracted by the association; but the incorporation of an association does not relieve its members from individual liability for debts subsequently contracted by the association outside of the scope of its corporate powers,[66] and an irregular, and hence ineffectual, incorporation of a preexisting association does not save the members from liability for debts subsequently contracted by the association[67]

If, however, individuals intend to form a corporation, and the organization in fact operates as an unincorporated association, but it is shown that such individuals had no part in the operation of the business or the selection of agents, then they may not be held liable as partners in an association in whose activities they did not in fact participate.[68]

The fact that the payee accepted notes of an association under the mistaken belief that they were executed by a corporation of the name indicated does not estop him to assert liability against the individual members of an association operating under that name.[69]

(6) Particular Classes of Associations

(a) In general
(b) Commercial associations
(c) Noncommercial associations

(a) In General

For the purpose of determining the contractual liability of members, associations may be classified as profit or nonprofit, commercial or noncommercial.

Broadly speaking, there are two classes of associations, one organized for profit and the other organized without any hope or expectation of profit.[70] The only difference between such classes, as respects the liability of members, is that in the first, or commercial, type the members are in legal effect partners and individually liable for debts contracted in the name of the association by other members; whereas in associations of the second, or noncommercial, type the liability of the members is controlled by the law of agency, and to hold a member liable it must be shown that he actually or constructively assented to or ratified the contract on which the liability is predicated.[71]

Where the facts show that the members sued did so assent to or ratify the contract on which liability is predicated, it becomes unnecessary to determine whether the association is commercial or noncommercial in character, as under such a state of facts the members are liable in either event.[72]

61. Me.—Beaman v. Whitney, 20 Me 413.
Tenn.—Barry v. Nuckolls, 2 Humphr. 324
Vt.—F. R. Patch Mfg. Co. v. Capeless, 63 A. 938, 79 Vt. 1.
5 C.J. p 1362 note 13.
Express contract to such effect may change the rule—Lake v Munford, 12 Miss 313—Hornberger v. Orchard, 58 N.W. 425, 39 Neb. 639.

62. Vt.—F. R. Patch Mfg Co. v. Capeless, 63 A. 938, 79 Vt. 1.
Wash.—Engvall v. Buchie, 132 P 231, 73 Wash. 534.

63. Rhoads v. Fitzpatrick, 31 A. 79, 166 Pa. 294
Otherwise the member is liable for subsequent debts—Tyrrell v Washburn, 6 Allen (Mass.) 466—Park v. Spaulding, 10 Hun (N.Y.) 128

64. Iowa.—Schumacher v. Sumner Tel Co., 142 N.W. 1034, 161 Iowa 326
Mass.—Ray v. Powers, 134 Mass. 22
5 C.J. p 1362 note 21.

65. Skinner v. Dayton, 19 Johns (N.Y.) 513, 10 Am.D. 286, reversing 5 Johns Ch 351—5 C.J. p 1362 note 22.

66. Henry v. Simanton, 54 A. 153, 64 N.J.Eq 572

67. Henry v. Simanton, supra.

68. Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark 399

69. Harris v. Ashdown Potato Curing Ass'n, supra

70. Robbins Co. v. Cook, 173 N.W. 445, 42 S.D. 136, 7 A.L.R. 218.

71. Robbins Co. v. Cook, supra.

72. Robbins Co. v. Cook, supra.

(b) Commercial Associations

Members of a commercial association, or one organized for profit, may be held individually liable on association contracts as partners The liability of members is ordinarily joint and several in character.

It is elementary that several persons may conduct business as a voluntary association, using a common or trade name, and in that name be held jointly and severally liable on contracts.[73]

An unincorporated association organized for business or profit is in legal effect a mere partnership so far as the liability of its members to third persons is concerned, as has been explained in section 1. By becoming a member, each associate subjects himself to liability for all debts contracted by the association within the scope of its object and during the period of his membership[74]

The liability of the associates is joint and several,[75] and may be imposed, although the members of such an association did not agree to become partners,[76] nor hold themselves out as such,[77] nor intend to become personally bound,[78] nor hold themselves out as personally responsible,[79] and despite the fact that the creditor gave credit to the associate name.[80]

The fact that defendants did not expect to reap any personal profit from the enterprise in which they were engaged does not in any wise affect their liability as members of an association actually engaged in business.[81]

Liability on promissory note. Under a statute providing that no person is liable on a negotiable instrument whose signature does not appear thereon, except as otherwise provided, and other statutes to the effect that one may sign a negotiable instrument by an agent, members of a voluntary association for the conduct of a business may be held liable on a note which they did not personally sign, but which was signed by another associate as agent for all,[82] provided he had express or implied authority to do so, or in the absence of either, provided the nonsigning members subsequently ratified his act[83]

(c) Noncommercial Associations

The liability of members of a noncommercial association, or one organized for purposes other than profit, must be predicated on the laws of agency. Where liability exists, it may be joint or several, or joint and several.

An association not engaged in business enterprises and the objects of which do not contemplate profit or loss is not a partnership, as has been shown in section 1, and the liability of its members for debts contracted in behalf of the association is governed, not by the principles of partner-

73. Larson v. Marcy, 201 P 685, 61 Mont 1

74. Ala—Dinsmore v J. H Calvin Co, 108 So 583, 214 Ala. 666.
Cal—Burks v Weast, 228 P 541, 67 Cal App 745—Webster v San Joaquin Fruit & Vegetable Growers' Protective Ass'n, 162 P. 654, 32 Cal App 264.
Conn—Azzolina v. Order of Sons of Italy, Conte Luigi Cadorna, No 440, 179 A 201, 119 Conn 681.
Ky—Brady v Mutual Ben Department of Order of Railway Conductors of America, 284 S W 1045, 215 Ky 177—Stege v Louisville Courier Journal Co, 245 S W. 504, 196 Ky 795
Minn—Ford Motor Co v Sylte, 248 N W 55, 188 Minn 578
Tex—Stroud Motor Mfg. Co. v. Gunzer, (Civ App) 240 S W 644—Wells v Mackay Telegram-Cable Co, (Civ App) 239 S W 1001.
5 C J p 1363 note 27

Evidence held sufficient to show membership when debt contracted.—Ford Motor Co v. Sylte, 248 N W 55, 188 Minn. 578.

75. Wells v. Mackay Telegraph-Cable Co., (Tex Civ.App) 239 S W 1001, 1006.
"Whatever may be the rule in other jurisdictions, it seems to be well settled by the decisions of our courts that, when two or more persons associate themselves together for the purpose of carrying on a business enterprise for their mutual profit, the persons so associated are jointly and severally responsible for the debts incurred in the conduct of such business unless such business association is organized as a limited partnership or a corporation under our statute providing for such organizations, or specially contracts with those with whom the association deals that only the funds and property of the association shall be held liable"—Wells v. Mackay Telegraph-Cable Co, supra

76. Burks v Weast, 228 P. 541, 67 Cal App. 745—5 C J p 1363 note 27 [d]

77. Cal—Burks v Weast, supra.
Conn—Bennett v Lathrop, 42 A. 634, 71 Conn. 613, 71 Am S R. 222

78. Lawler v Murphy, 20 A. 457, 58 Conn 294, 8 L R A. 113

79. Cal—Burks v Weast, 228 P. 541, 67 Cal App 745
Conn—Bennett v Lathrop, 42 A 634, 71 Conn. 613, 71 Am S R 222

80. Cal—Burks v Weast, 228 P. 541, 67 Cal App 745.
Conn—Bennett v. Lathrop, 42 A 634, 71 Conn. 613, 71 Am S R 222.

Restaurant
Defendant and others, who simply proceeded to conduct a restaurant and reading room without any formality whatsoever, were subject to liabilities of voluntary association and were severally liable to creditors for such obligations as might be incurred by the manager in the purchase of supplies, even though creditors gave credit to the name of the association, and defendant and his associates did not agree or intend to become personally liable—Burks v. Weast, 228 P. 541, 67 Cal App 745.

81. Burks v. Weast, supra.

82. Larson v. Marcy, 201 P. 685, 61 Mont. 1.

83. Larson v. Marcy, supra.

Ratification shown
Where the general manager of a voluntary association, consisting of tenants in common of property conveyed by their father, executes a note under the common name, such act may be ratified by the other members, and, if ratified, the note becomes binding as of the date of its execution, under Rev Codes § 4994.—Larson v. Marcy, 201 P. 685, 61 Mont. 1.

ship, but by those of agency.[84] Membership, as such, imposes no personal liability for the debts of the association; but to charge a member therewith it must be shown that he has actually or constructively assented to or ratified the contract on which the liability is predicated.[85] If, however, a member, as such, directly incurs a debt, or expressly or impliedly authorizes or ratifies the transaction in which it is incurred, he is liable as a principal.[86] So a member is liable for any debt that is necessarily contracted to carry out the objects of the association.[87]

In the event that members are liable, their liability may be joint,[88] or several,[89] or joint and several,[90] or partly joint and partly several,[91] depending on the circumstances, as on how goods were purchased from plaintiff or on defendant's refusal or ratification of purchases not directly made by themselves but by one of their number; but under a joint and several liability different defendants may not be held liable in different amounts.[92] It is a question for the jury to deter-

84. Elliott v. Greer Presbyterian Church, 186 S.E. 651, 181 S.C. 84.

Political associations

Associations, objects of which are political rather than for purposes of trade or profit, not being partnerships, pecuniary liability can be fastened on individual members thereof only by reason of acts of such individuals or of their agents.—American Art Works v. Republican State Committee, (Okl.) 60 P.(2d) 786.

85. Conn.—Azzolina v. Order of Sons of Italy, Conte Luigi Cadorna, No. 440, 179 A. 201, 119 Conn. 681.

Ky.—Brady v. Mutual Ben. Department of Order of Railway Conductors of America, 284 S.W. 1045, 215 Ky. 177.—Stege v. Louisville Courier Journal Co., 245 S.W. 504, 196 Ky. 795.

Mo.—Murphy v. Holliway, 16 S.W.(2d) 107, 223 Mo.App. 714.

N.Y.—Empire City Job Print v. Harbord, 277 N.Y.S. 795, 244 App.Div. 6, reversing Empire City Job Printing Co. v. Falk, 272 N.Y.S. 202, 151 Misc. 688, reversing Empire City Job Print v. Harbord, 265 N.Y.S. 450, 148 Misc. 231.—Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 308.

Or.—Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71.

Pa.—Franklin Paper Co. v. Gorman, 76 Pa.Super. 276.

S.C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.

5 C.J. p. 1363 note 29.

Political associations

(1) Agency for an association, the objects of which are political rather than for the purpose of trade or profit, must be made out and cannot be implied from the mere fact of association.—American Art Works v. Republican State Committee, (Okl.) 60 P.(2d) 786.

(2) Only members of an association of which the object is political rather than for the purpose of trade or profit, who authorize or ratify a transaction, are liable on a contract of the club.—American Art Works v. Republican State Committee, supra.

(3) A political association and individual members thereof are not liable on a contract made by a member in a representative capacity, in the absence of knowledge on the part of members that the contract had been executed with the intention of binding the members individually, or that individual members ratified or assented to liability thereon.—American Art Works v. Republican State Committee, supra.

Members not present at meeting at which contract of nonprofit association was made, and in no way personally participating in the execution of the contract, were rightly held not liable.—Murphy v. Holliway, 16 S.W.(2d) 107, 223 Mo.App. 714.

Association auxiliary to benevolent society as beyond protection of rule

An association auxiliary to a benevolent association, and formed for the express purpose of putting on a show to raise money for the benevolent society, is not within the rule governing nonprofit associations, and the members of such auxiliary may be held liable for debts contracted for advertising space on the theories of partnership law applicable to commercial associations.—Stege v. Louisville Courier Journal Co., 245 S.W. 504, 196 Ky. 795.

86. Ala.—Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So. 54, 212 Ala. 444.

Ky.—Johnston v. Winter, 9 Ky.Op. 241.

Mo.—Murphy v. Holliway, 16 S.W.(2d) 107, 223 Mo.App. 714.

Or.—Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71.

Pa.—Franklin Paper Co. v. Gorman, 76 Pa.Super. 276.

Wis.—Vader v. Ballou, 139 N.W. 413, 151 Wis. 577, 7 A.L.R. 216.

5 C.J. p. 1364 note 30.

Acquiescence binding members to mortgage contract

Members of a voluntary, fraternal, and nonbusiness association will be bound, in a court of equity, by a mortgage of their trustees by long acquiescence with full knowledge of the fact.—Hope of Alabama Lodge of Odd Fellows v. Chambless, 103 So. 54, 212 Ala. 444.

Manner of becoming member unimportant

A member of an association participating in the execution of a contract is liable, regardless of the manner in which he became a member.—Murphy v. Holliway, 16 S.W.(2d) 107, 223 Mo.App. 714.

Failure to ascertain terms of contract

Members of an association permitting one member to order chairs in behalf of all, without ascertaining the terms of the instrument, did so at their peril.—Murphy v. Holliway, 16 S.W.(2d) 107, 223 Mo.App. 714.

87. Or.—Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71.

Wis.—Vader v. Ballou, 139 N.W. 413, 151 Wis. 577, 7 A.L.R. 216.

5 C.J. p. 1364 note 31.

88. Dunlap Printing Co. v. Ryan, 119 A. 714, 275 Pa. 556.

89. Dunlap Printing Co. v. Ryan, supra.

90. Or.—Fennell v. Hauser, 27 P.(2d) 685, 145 Or. 351.—Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71.

S.C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.

Wis.—Vader v. Ballou, 139 N.W. 413, 151 Wis. 577, 7 A.L.R. 216.

5 C.J. p. 1364 note 32.

Necessity for invoking statute

Since the liability of the members is joint and several, any individual member may be sued without proceeding under a statute permitting suit against the unincorporated association.—Medlin v. Ebenezer Methodist Church, 129 S.E. 830, 132 S.C. 498.

91. Dunlap Printing Co. v. Ryan, 119 A. 714, 275 Pa. 556.

92. Fennell v. Hauser, 27 P.(2d) 685, 145 Or. 351.

Although suit on different contracts

Members of a committee to promote the nomination of a candidate for governor, being jointly and severally liable, could be held in an action for the price of merchandise delivered them, but different defendants could not be held liable in different amounts, notwithstanding suit was on different contracts with separate individuals who assigned claims to plaintiff.—Fennell v. Hauser, 27 P.(2d) 685, 145 Or. 351.

mine whether credit was given to the members,[93] and whether the members authorized or ratified the contract in suit.[94]

c. Liability for Torts

While membership in an association does not per se impose liability on individual members for the torts of an association or its agents, the members may be held responsible for torts committed by the association within the scope of its purposes or for torts of association agents acting within the scope of their employment.

Although the mere fact of membership in an association is not of itself sufficient basis for a tort liability of individual members for the wrongful acts or omissions of an association or its agents,[95] the members are responsible for tortious acts committed by the society, where it can fairly be assumed that they were within the scope of the purposes for which the organization was formed,[96] or where they aided and abetted in the commission of the tort;[97] and they are liable for torts committed by the association's agents, acting within the scope of their employment.[98]

Where liability exists, the liability of the members has been held several for the whole amount of damages incurred by a third party and not limited to a numerical or aliquot part thereof.[99]

§ 33. —— Contribution between Members

As between members of an association each is ordinarily liable only for his aliquot share of association's indebtedness, and in a proper case may secure contribution from his comembers.

As between the members of an unincorporated association, each is bound to pay only his numerical proportion of its indebtedness,[1] and a member of an association who has been compelled to pay a debt may, when unable to obtain reimbursement from the association, enforce contribution in equity from the other members.[2]

§ 34. Judicial Interference

a. In general
b. Exhausting remedies within association

a. In General

In the absence of illegality or injustice ordinarily courts will not interfere in the internal affairs of an association, and the due decision of an association's tribunal as to such matters is controlling. Where, however, civil or property rights are involved, or where the action of the association is clearly illegal, judicial redress may be secured.

The courts will not interfere with the internal affairs of an unincorporated association so as to settle disputes between the members, or questions of policy, discipline, or internal government, so long as the government of the society is fairly and honestly administered in conformity with its laws and the law of the land, and no property or civil rights are invaded,[3] and, under such cir-

93. Fennell v. Hauser, 14 P (2d) 998, 141 Or. 71—5 C J. p 1364 note 33

94. Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71—5 C J. p 1364 note 34.

95. Johnson v Miller, 17 N W. 34, 63 Iowa 529, 50 Am R 758.

96. Pandolfo v. Bank of Benson, (C. C A Ariz) 273 F. 48—5 C.J. p 1364 note 35.

97. Johnson v Miller, 17 N.W 34, 63 Iowa 529, 50 Am R 758.

98. Pandolfo v. Bank of Benson, (C. C A Ariz.) 273 F. 48—5 C J. p 1364 note 36.

Libel

(1) The members of an unincorporated association are liable in their collective capacity for tort, and are answerable for damages for libel published by their agent with their authority, while the agent is acting within the scope of his employment. —Pandolfo v. Bank of Benson, (C. C A Ariz.) 273 F. 48.

(2) To hold the members of an unincorporated association liable for a defamatory article published by their agent, it is not necessary to show authority, expressed or implied, to the agent to publish the libel; but there must be some evidence from which authority might be implied on the part of the agent to publish the article within the general scope of his employment—Pandolfo v. Bank of Benson, supra.

99. Fisheries Co v. McCoy, (Tex. Civ App) 202 S W. 343.

1. Cal.—Burks v Weast, 228 P. 541, 67 Cal App. 745—Webster v. San Joaquin Fruit & Vegetable Growers' Protective Ass'n, 162 P. 654, 32 Cal App 264.

S C.—Medlin v. Ebenezer Methodist Church, 129 S.E. 330, 132 S C. 498.

Aliquot share

Under principle of contribution as between members of an unincorporated association, each is bound to contribute only his aliquot share.—Azzolina v. Order of Sons of Italy, Conte Luigi Cadorna, No. 440, 179 A. 201, 119 Conn. 681.

2. Conn.—Azzolina v. Order of Sons of Italy, Conte Luigi Cadorna, No. 440, supra.

S C.—Elliott v. Greer Presbyterian Church, 186 S E. 651, 181 S C. 84.

Vt.—Henry v. Jackson, 37 Vt. 431.

5 C.J. p 1364 note 37.

3. U.S.—Harris v. Missouri Pac. R Co., (D C.Ill) 1 F Supp 946.

Ala.—Shaup v. Grand International Brotherhood of Locomotive Engineers, 135 So. 327, 223 Ala. 202, followed in Jordan v. Order of Railway Conductors of America, 135 So 329, 223 Ala. 205.

Ky.—Brotherhood of Railroad Trainmen v Williams, 277 S.W 500, 211 Ky. 638.

La.—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So 32, 179 La. 383—State ex rel Shiloh v. Queen of South Lodge No 18, Independent Order Good Samaritans, and Daughters of Samaria, etc., 135 So 188, 12 La App. 240.

Md.—Smith v Merriott, 100 A. 731, 130 Md. 447.

N.J.—Ace Bus Transp Co v. South Hudson County Boulevard Bus Owners Ass'n, 180 A. 835, 119 N. J.Eq. 37, affirming 177 A. 360, 118 N J Eq 31—International Hod Carriers' Building & Common Laborers' Union of America, Local No. 426 v International Hod Carriers' Building & Common Laborers' Union of America, Local No. 502, 138 A. 532, 101 N J.Eq 474—Plemenik v. Prickitt, 127 A. 342, 97 N.J.Eq 340, 36 A.L R. 1527.

N.Y.—Rubens v. Weber, 260 N Y.S. 701, 237 App Div. 15—Kaplan v. Elliot, 261 N.Y.S. 112, 145 Misc.

cumstances, the decision of the governing body or established private tribunal of the association is binding and conclusive and not subject to review or collateral attack in the courts [4] Acts of an unincorporated association cannot be enjoined in a suit against the officers alone, in the absence of a statutory provision authorizing such procedure [5]

Nevertheless, the courts have and will exercise power to interfere in the internal affairs of an association where law and justice so require,[6] and the proceedings of the association are subject to judicial review where there is fraud, oppression, or bad faith,[7] or property or civil rights are invad-

863, modified as indicated in order and affirmed Kaplan v Elliott, 261 N Y S 975.
Okl—Chicago, R I & P Ry. Co. v Sawyer, 56 P (2d) 418.
Pa—Kenneck v. Pennock, 157 A. 613, 305 Pa 288
Tex—Fraser v. Buck, (Civ App) 234 S W. 679—Willis v. Davis, (Civ App) 233 S W 1035
Wash—Stivers v Blethen, 215 P. 7, 134 Wash 475
Wis—Hamilton v Van Laanen, 234 N W. 740, 203 Wis 559.
5 C.J p 1385 note 40.

"It is the policy of courts of equity not to interfere with the actions of voluntary and unincorporated associations where there is no evidence of fraud or oppression"—Ace Bus Transp Co. v. South Hudson County Boulevard Bus Owners' Ass'n, 177 A 360, 361, 118 N J Eq 31, affirmed 180 A. 835, 119 N J Eq 37.

Compliance of local with rules of main body

The question of whether or not a local association has complied with the requirements of the constitution and by-laws of the principal association is primarily a matter of internal jurisdiction with which a court will not concern itself where no complaint has been made by the principal association against the local or branch body—Des Moines City Ry. Co v. Amalgamated Ass'n of Street & Electric Ry Employees of America, Division 441, of Des Moines, 213 N.W 264, 204 Iowa 1195

Denial of right to engage in athletic contest

Denial by a national amateur athletic association's committee of permission to a foreign athlete to compete in certain games has been held not to authorize injunctive relief.—Gray v Ferris, 245 N.Y.S 230, 230 App Div. 416.

Disciplinary measures

(1) The operation of the constitution and by-laws of an unincorporated society, when applied as disciplinary measures, will not be interfered with by a court of equity, if they are applied justly and fairly—Grassi Bros. v. O'Rourke, 153 N Y S. 493, 89 Misc 234.

(2) Where an association is given power by its constitution to try members on charges preferred against them, courts will not restrain such trial where there is no showing of bad faith, malice, or manifest unfairness—Smith v. Merriott, 100 A. 731, 130 Md 447

Expunging vote of censure from records

Assuming that the constitution of a department of the American Legion constituted a contract between the members, a provision thereof authorizing the executive committee to suspend or remove officers or expel members did not limit its common-law right to make inquiry into, and report on, the conduct of its members, and, as its adoption and publication of a report censuring a post commander violated no contract or trust, equity has no jurisdiction by injunction to compel it to recall and expunge such report from its record—Choate v. Logan, (Mass) 133 N E. 582.

Restoration of charter of subordinate lodge

Recourse may not be had to civil courts for relief, as by mandamus or injunction, to have the officers of a grand lodge restore to a subordinate lodge its charter and rituals, where the by-laws and constitution of the order provided for an appeal from the order complained of to some higher branch which is vested with authority to determine the controversy—Brazelton v Slatten, (Tex Civ App) 255 S W. 1009.

"Social obligations"

"Courts of equity cannot undertake to regulate social obligations, or the morals of social organizations, until there are legal rights affected"—Polacheck v. Michiwaukee Golf Club, 222 N.W. 806, 807, 197 Wis. 595

Selection of a language to be used in society work is entirely within the discretion of its governing body and will not be interfered with by the courts—Plemenik v. Prickitt, 127 A. 342, 97 N J Eq. 340, 36 A L R 1527
Asking court to compel admission to membership see supra § 23 a.
Judicial interference to prevent expulsion or suspension see supra § 25 a.

4. Md—Long v. Baltimore & O. R Co, 141 A 504, 155 Md 265
Mass—Donovan v. Travers, 138 N E 705, 708
N Y—Carey v. International Brotherhood of Paper Makers, 206 N Y S 73, 123 Misc. 680—Fairchild v. Tillotson, 195 N Y S 39, 118 Misc. 639
34 C J p 881 notes 23-25

"It is settled law that members of an unincorporated, voluntary association, like the brotherhood, are bound by the determination of the association's tribunals if the decision is reached after observance of the formalities it prescribes, after fair opportunity for presenting their case, where there has been no excess of jurisdiction, no bad faith or capricious, unreasonable or arbitrary action."—Donovan v. Travers, supra.

In the absence of bad faith, the court will not interfere with the determination of a quasi judicial tribunal set up by an association to pass on questions arising within the association—Carey v. International Brotherhood of Paper Makers, 206 N. Y S. 73, 123 Misc 680.

5. Board of Railroad Com'rs v. Reed, (Mont) 58 P (2d) 271.

6. U S—Polin v Kaplan, 177 N E 833, 257 N Y 277, reargument denied 178 N E 803, 257 N Y. 579, and reversing Polin v Kaplan, 246 N Y S 522, 231 App Div. 849, followed in 246 N Y S 523, 231 App Div 844, and Schneider v Kaplan, 246 N Y S 524, 231 App Div 850—Rubens v Weber, 260 N Y.S 701, 237 App Div 15—Kaplan v Elliott, 261 N Y S 112, 145 Misc 863, modified as indicated in order and affirmed Kaplan v. Elliott, 261 N.Y. S. 975
Pa—Williams v District Executive Board, U. M W of A, 1 Pa Dist. & Co 31

Despite judicial reluctance to interfere with or direct affairs of unincorporated associations, "where there has been an injustice perpetrated, the courts will interfere to correct abuses or protect rights"—Rubens v. Weber, 260 N.Y.S 701, 705, 237 App Div. 15.

7. La—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 179 La 383
Md—Most Worshipful United Grand Lodge F. & A. M v. Murphy, 114 A. 876, 139 Md. 225
Pa—Williams v District Executive Board, U. M. W. of A, 1 Pa Dist & Co. 31.
Tex—Fraser v. Buck, (Civ App.) 234 S W. 679
5 C J p 1365 note 41.

ed,[8] or the proceedings in question are violative of the laws of the society[9] or the law of the land,[10] or ultra vires,[11] or are otherwise illegal.[12]

In this connection it has been pointed out that the rule that the courts will not interfere with the internal affairs of a voluntary association does not relieve such association from application of the general law of contracts,[13] and, while the courts will not overrule the decision of an association's tribunal merely because of a difference of opinion as to the merits, they will review the action taken sufficiently to ascertain whether such tribunal followed the procedural terms of the agreement and correctly construed and applied the substantive terms thereof.[14]

b. Exhausting Remedies within Association

A member should generally exhaust his remedies within the association before applying for judicial relief, although he may properly resort to the courts in the first instance where the action of the association has been irregular and without jurisdiction or where the procedure for relief within the association is obviously inadequate.

Even in cases otherwise warranting judicial interference the courts will not, as a rule, take jurisdiction unless the complaining member has exhausted such remedies as may be provided by the laws of the association itself.[15] However, the rule

No appeal within association from fraudulent conduct

If there is within a fraternal order no appeal from an action of the Grand Lodge, and it has acted without authority, and especially if there was fraud and gross fraudulent conduct, injured members are entitled to seek relief in a court of equity—Most Worshipful United Grand Lodge F & A M v. Murphy, 114 A. 876, 139 Md 225

8. Ark—Ward v McMath, 241 S W. 3, 153 Ark 506
La—Elfer v Marine Engineers Beneficial Ass'n No. 12, 154 So. 32, 179 La 383
Tex—Fraser v Buck, (Civ App) 234 S.W 679
5 C J p 1365 note 42

Reformation of deed

Chancery court may properly assume jurisdiction of a dispute between members of a camp of United Confederate Veterans, an unincorporated voluntary association which adopted a constitution and by-laws for its government, where the dispute involved reformation of a deed of land to the camp, some of the members seeking to enlarge the trust to include other beneficiaries than members of the camp, property rights being involved—Ward v McMath, 241 S W. 3, 153 Ark 506

Violation of regulations as prerequisite to relief

Although the court will intervene in the affairs of a voluntary association when civil or property rights are involved, it will not intervene where such rights are fixed by the rules and regulations of the association until the constitution and by-laws of the association are violated—Carey v International Brotherhood of Paper Makers, 206 N.Y.S 73, 123 Misc 680

Waiver of right to resort to courts, in disputes involving money or tangible property, must be by express agreement to arbitrate—Local Lodge No 104, of International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America v. International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America, 291 P 328, 158 Wash 480

9. La—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So 32, 179 La 383
Pa—Williams v District Executive Board, U M. W of A., 1 Pa Dist & Co 31.
Tex—Fraser v. Buck, (Civ App.) 234 S W 679
5 C J. p 1365 note 43.

If the fact of membership has once been established, and property rights are involved, the court will restrain violation of the rules governing the association at the behest of anyone suffering injury by such violations—Greenwood v. Building Trades Council of Sacramento, 233 P 823, 71 Cal App. 159

Interpretation of associate laws by associate tribunal

The courts will not review the correctness of the interpretation fairly placed on the constitution and by-laws of a voluntary association by its duly authorized tribunals, particularly where only a procedural or jurisdictional question is involved—Harris v Missouri Pac. R. Co, (D C Ill) 1 F Supp 946.

10. La—Elfer v. Marine Engineers Beneficial Ass'n No. 12, 154 So 32, 179 La 383.
Tex—Fraser v. Buck, (Civ App) 234 S W. 679.
5 C.J p 1365 note 44.

11. Williams v. District Executive Board, U M W. of A., 1 Pa Dist. & Co. 31.

12. La—Elfer v Marine Engineers Beneficial Ass'n No. 12, 154 So 32, 179 La 383
Tex—Fraser v. Buck, (Civ App) 234 S W 679.
5 C J p 1365 note 45

13. Robinson v. Dahm, 159 N.Y S 1053, 94 Misc 729

Remedies provided by constitution unjust

Where the remedies provided by the constitution and by-laws of an unincorporated association for the relief of a member do not accord with natural justice, the member will not be required to avail himself of them as a condition precedent to resorting to the courts for relief—Robinson v Dahm, 159 N Y S. 1053, 94 Misc 729

Principles governing specific performance applicable

In an action against unincorporated associations for depriving him of his position on a "priority list," in violation of the constitution and by-laws of the associations, it was held that plaintiff's rights were determinable by the principles governing actions for breach of contract, where specific performance is sought—Robinson v Dahm, 159 N Y S 1053, 94 Misc 729

14. Robinson v Dahm, supra.

Decision of associate tribunal held not binding

A decision of the tribunals of an unincorporated association was held not binding on a member, so as to prevent him from bringing suit, where it appears that it was based on an incorrect construction of the constitution and by-laws constituting the contract between the member and the association.—Robinson v Dahm, 159 N.Y S. 1053, 94 Misc. 729.

15. U S—Harris v Missouri Pac R Co, (D C Ill) 1 F Supp 946.
Cal.—Hughes v. American Trust Co, (App) 25 P.(2d) 491—Greenwood v. Building Trades Council of Sacramento, 233 P. 823, 71 Cal App. 159
Ky.—Aulich v. Craigmyle, 59 S W. (2d) 560, 248 Ky 676
La—Elfer v Marine Engineers Beneficial Ass'n, No. 12, 154 So. 32, 179 La 383
Mass—Mulcahy v Huddell, 172 N E. 796, 272 Mass 539—Malloy v Carroll, 172 N E 790, 272 Mass. 524—

requiring a member to exhaust his remedies within the organization before applying to a court of equity for relief is subject to the qualification that the act or acts complained of must have been in accord with the association's regulations, and, where the proceeding is irregular and the association acted without jurisdiction, the member aggrieved thereby may seek judicial redress by a direct appeal to the courts in the first instance;[16] and immediate resort to the courts is warranted where the procedure for relief provided under association rules is obviously inadequate.[17]

§ 35. Actions by Association

a. Who may sue
b. Venue
c. Pleadings
d. Evidence
e. Dissolution of association pendente lite

a. Who May Sue

(1) In the absence of enabling acts
(2) Under enabling acts
(3) Parties by representation

(1) In the Absence of Enabling Acts

(a) In general
(b) Agent appointed to sue
(c) Owner of res or obligee in contract
(d) Collective members

(a) In General

The general rule is that in the absence of statutory authorization an unincorporated association may not sue as such, but must bring the action in the names of its individual members.

Since an unincorporated association has no legal entity distinct from that of its members, as explained in § 1, and is not a "person" in the eyes of the law,[18] it cannot in the absence of an enabling act maintain an action in its own name,[19] but must sue in the names of all the members composing

Agrippino v. Perrotti, 169 N.E. 793, 270 Mass. 55

Mich.—Ryan v. New York Cent. R. Co., 255 N.W. 365, 267 Mich. 202

Neb.—Crisler v. Crum, 213 N.W. 366, 115 Neb. 375.

N.Y.—Polin v. Kaplan, 246 N.Y.S. 522, 231 App.Div. 849, followed in 246 N.Y.S. 523, 231 App.Div. 844, and Schneider v. Kaplan, 246 N.Y.S. 524, 231 App.Div. 850, reversed on other grounds Polin v. Kaplan, 177 N.E. 833, 257 N.Y. 277, reargument denied 178 N.E. 803, 257 N.Y. 579—Gray v. Ferris, 245 N.Y.S. 230, 230 App.Div. 416—Cabana v. Holstein-Friesian Ass'n of America, 188 N.Y.S. 277, 196 App.Div. 842, modifying 182 N.Y.S. 658, 112 Misc. 262, and affirmed 135 N.E. 953, 233 N.Y. 644—Cavanagh v. Hutcheson, 250 N.Y.S. 127, 140 Misc. 178, stay of judgment conditionally granted 252 N.Y.S. 113, 232 App.Div. 470, and affirmed 259 N.Y.S. 967, 236 App.Div. 794—Bertucci v. United Cement Masons' Union No. 1 of Greater New York and Vicinity, Local 570, 249 N.Y.S. 635, 139 Misc. 703

5 C.J. p. 1365 note 46.

"If the laws of an association provide tribunals for settlement of questions which may arise between members affecting the rights of the members in their relation to the association and to each other as members of the association, such tribunals must be appealed to before the question or dispute can be taken into the courts. The wisdom and justice of this rule cannot, we think, be questioned, and authorities in its support are almost innumerable"—Fraser v. Buck, (Tex.Civ.App.) 234 S.W. 679, 683

Rule as confined to matters of internal discipline

The rule requiring a voluntary association's members to exhaust remedies within the order before suing for relief applies primarily to controversies concerning internal discipline, and not to disputes over money or tangible property—Local Lodge No. 104, of International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America v. International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America, 291 P. 328, 158 Wash. 480

16. N.M.—Rueb v. Rehder, 174 P. 992, 24 N.M. 534, 1 A.L.R. 423.
N.Y.—Irwin v. Possehl, 257 N.Y.S. 597, 143 Misc. 855.

17. Local Lodge No. 104, of International Brotherhood of Boiler Makers, Iron Ship Builders, and Helpers of America v. International Brotherhood of Boiler Makers, Iron Shipbuilders, and Helpers of America, 291 P. 328, 158 Wash. 480

18. Moffat Tunnel League v. U. S., (Del.) 53 S.Ct. 543, 289 U.S. 113, 77 L.Ed. 1069, affirming (D.C.) 59 F.(2d) 760—5 C.J. p. 1365 note 49 [a].

19. U.S.—Moffat Tunnel League v. U. S., (Del.) 53 S.Ct. 543, 289 U.S. 113, 77 L.Ed. 1069, affirming (D.C.) 59 F.(2d) 760.

Ark.—Lewelling v. Manufacturing Wood-Workers' Underwriters, 215 S.W. 258, 140 Ark. 124

Del.—United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers v. Kennedy, 115 A. 587, 13 Del.Ch. 106.

Hawaii.—Kalihi Japanese Language School v. Matthewman, 27 Hawaii 830.

Iowa.—Wilson v. Airline Coal Co., 246 N.W. 753, 215 Iowa 855—Marshalltown Mut. Plate Glass Ins. Ass'n v. Bendlage, 191 N.W. 97, 195 Iowa 1200, rehearing overruled 193 N.W. 448, 195 Iowa 1200.

Ky.—Diamond Black Coal Co. v. United Mine Workers of America, 222 S.W. 1079, 188 Ky. 477.

Mass.—Adams v. Richardson, 167 N.E. 254, 268 Mass. 78

Mo.—Ruggles v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, 52 S.W.(2d) 860, 331 Mo. 20—Newton County Farmers' & Fruit Growers' Exchange v. Kansas City Southern Ry. Co., 31 S.W.(2d) 803, 326 Mo. 617, adopting opinion in part (App.) 2 S.W.(2d) 125—Corbett v. Milk Wagon Drivers Union, Local No. 603, (App.) 84 S.W.(2d) 377—Road Dist. No. 41, Henry Tp., Vernon County, v. Jackson, 231 S.W. 1043, 208 Mo.App. 194.

N.C.—Tucker v. Eatough, 120 S.E. 57, 186 N.C. 505.

Tex.—Southern Surety Co. v. Bus Union Station, (Civ.App.) 23 S.W.(2d) 484.

5 C.J. p. 1365 note 50.

it,[20] however numerous they may be,[21] or in the names of a portion for the benefit of all,[22] as in the case of parties by representation (infra subdivision a (3) of this section).

The rule forbidding an unincorporated association to sue as such in the absence of statutory authorization applies in both law and equity,[23] except that under equity rules a few may always represent all where the members are too numerous to be joined.[24]

If otherwise capable to sue, an association must have a legal right arising from a legal interest, denial of which inflicts or threatens a legal wrong, in order to be able to maintain an action.[25]

Waiver. The objection that an unincorporated association may not sue in its own name has been held subject to waiver,[26] although on principle, according to the doctrine of a number of cases, defendant's right to object in such a case is not waived by his failure to demur specially or to plead in abatement, but can be taken at any stage.[27]

(b) Agent Appointed to Sue

The right of an association to bring suit by agents appointed for such purpose has been both affirmed and denied.

While an unincorporated association cannot sue directly, yet it has been held that it may bring a suit through an agent specially appointed for that purpose,[28] or impliedly so authorized under the by-laws,[29] or file a bill in equity,[30] although its right to do so has also been denied.[31]

(c) Owner of Res or Obligee in Contract

An associate officer in whose name legal title to an obligation is vested for the benefit of the association may sue in his own name to enforce it.

If the legal title to an obligation is vested in an officer of the association for its benefit, he may sue in his own name to enforce it.[32] Indeed, if a contract is made with a member of an association in his own name, he alone can sue thereon,[33] and where the legal estate in property of an association is vested in trustees whose duty it is not only to hold the title but also to take charge of the property, a suit to protect the property rights of the

20. Fla.—Johnston v. Albritton, 134 So. 563, 101 Fla. 1285, followed in 134 So. 566, 101 Fla. 1290
Ill.—Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, 238 Ill.App. 123
Iowa—Presbyterian Church of Paralta, Linn County, v. Johnson, 238 N.W. 456, 213 Iowa 49.
La.—Klein v. Anderson, 4 La.App. (Orleans) 262
Mass.—Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432
Mo.—Bentley v. Hurley, 299 S.W. 604, 222 Mo.App. 51.
N.Y.—Saxer v. Democratic Committee of Erie County, 291 N.Y.S. 18
Pa.—Allied Printing Trades Council v. Telegraph Printing Co., 5 Pa. Dist. & Co. 169.
5 C.J. p. 1365 note 51.

Regarded as partnership rather than corporation

An unincorporated association cannot sue in the character of a corporation, and "such an organization is a partnership, and in law must sue and be sued in the names of all the members of the partnership, in the absence of legislative authority."—Donovan v. Danielson, 138 N.E. 811, 813, 244 Mass. 432.

21. U.S.—John L. Walker Co. v. National Underwriters' Co., (C.C.A. Ill.) 3 F.(2d) 102
Ill.—Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, 238 Ill.App. 123.
5 C.J. p. 1366 note 52.

Cumbersomeness as not justifying suit by attorney in fact

That action by reciprocal insurance association in names of all subscribers might be cumbersome and embarrassing does not vest its attorney in fact with authority to prosecute such action in its own name.—John L. Walker Co. v. National Underwriters' Co., (C.C.A.Ill.) 3 F.(2d) 102
Action by agent appointed to sue see infra subdivision (b).

22. Presbyterian Church of Paralta, Linn County, v. Johnson, 238 N.W. 456, 213 Iowa 49

23. Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432

24. U.S.—Merchants, etc., Traffic Assoc. v. U. S., (D.C.Cal.) 231 F. 292
Mass.—Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432
Mo.—Lindsay v. Hotchkiss, 193 S.W. 902, 195 Mo.App. 563
N.J.—Kline v. Knights of the Golden Eagle, 167 A. 758, 113 N.J.Eq. 513

25. Moffat Tunnel League v. U.S., (D.C.Del.) 59 F.(2d) 760, affirmed 53 S.Ct. 543, 289 U.S. 113, 77 L.Ed. 1069

26. Cal.—Agricultural Extension Club of Nevada County v. M. Hirsch & Son, 179 P. 430, 39 Cal.App. 433.
Pa.—Morse v. Chase, 4 Watts 456—Porter v. Cresson, 10 Serg. & R. 257.
Wis.—Bennett v. Child, 19 Wis. 362, 88 Am.D. 692
"The designation of an unincorporated association as a party litigant in its associate name is at most a procedural defect and not one of substance. If not taken advantage of it is deemed to be waived."—Kalihi Japanese Language School v. Matthewman, 27 Hawaii 830, 833

27. Pollock v. Dunning, 54 Ind. 115—Hughes v. Walker, 4 Blackf. (Ind.) 50—Hays v. Lanier, 3 Blackf. (Ind.) 322, 323.

28. Ill.—Guilford v. Arthur, 41 N.E. 1009, 158 Ill. 600
Me.—Pierce v. Robie, 39 Me. 205, 63 Am.D. 614
Pa.—Klein v. Rand, 35 Pa.Super. 263
5 C.J. p. 1366 note 53

29. In re Muth's Estate, 233 Ill.App. 19

30. Kline v. Knights of the Golden Eagle, 167 A. 758, 113 N.J.Eq. 513

31. Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432

Bill not alleging members too numerous to be joined

Where a bill in equity did not allege that the individual members of an association were too numerous to be joined as plaintiffs, the association was without power, despite purported authorization in its constitution and laws, to authorize its executive council to sue in its name.—Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432.

32. Me.—Pierce v. Robie, 39 Me. 205, 63 Am.D. 614.
Neb.—Egan v. Bonacum, 57 N.W. 283, 38 Neb. 577.
5 C.J. p. 1366 note 54.

33. Corbett v. Schumacer, 83 Ill. 403.

association should be brought in the name of the trustees.[34]

(d) Collective Members

Members of an association have the right to sue, as individuals having a common interest, in respect of matters affecting such interest, although such suit should be brought in the name of all and not of one alone.

Of course, as has been intimated, the members of an unincorporated association are entitled as individuals having a common interest to sue in regard to matters affecting their interests.[35] However, such an action should be brought in the names of all the members composing it; and not by one member in his own name.[36]

(2) Under Enabling Acts

(a) Actions in names of officers or agents

(b) Actions in name of association

(c) Actions in name of trustee of express trust

(a) Actions in Names of Officers or Agents

Under statutes expressly providing that designated officers of an association may sue in its behalf, the action may be brought by the officer in his own name as such officer whenever the members could sue, although not otherwise. An agent appointed to make contracts for an association may sue thereon under statutes providing generally that one person may sue for all where the matter is of common interest.

Under statutes in some jurisdictions it is expressly provided that actions may be brought by an unincorporated association in the names of designated officers. The purpose of such statutes is to obviate the inconvenience of suing in the names of all the members,[37] and under such statutes the designated officer, as plaintiff, may maintain the action if the members could,[38] although such statutes confer upon the officer specified no right to sue except in cases where the associates could previously have prosecuted, the legislative intent being merely to obviate the inconvenience of joining all the associates as parties and to facilitate rights of action as they previously existed.[39]

Under statutes permitting one to sue for the benefit of all, where the matter is of common interest to many persons, an agent appointed to make contracts for an association may sue thereon in behalf of the associates.[40]

(b) Actions in Name of Association

An association may bring suit in its associate name where empowered to do so by statute, although statutes authorizing suit against an association as such do not authorize a suit in its behalf.

Where, under statutes, an association is recognized as a legal entity it may be accorded the implicit right to sue in its associate name.[41]

In some states are to be found statutes which, while they vary in their terms, are to the general effect that, where several persons form a voluntary unincorporated association, known by some distinguishing name, such association may sue by such common or distinguishing name.[42] Such statutes

34. Wolfe v. Limestone Council No. 373, 82 A. 499, 233 Pa. 357

35. National Shutter Bar Co. v. Zimmerman, 73 A. 19, 110 Md. 312—5 C.J. p. 1366 note 57

36. La.—Soller v. Mouton, 3 La.Ann. 541.

N.Y.—Thompson v. Colonial Assur Co., 70 N.Y.S. 35, 60 App.Div. 325 5 C.J. p. 1366 notes 58, 59.

Every member is a necessary party plaintiff, where the members sue as joint contractors—O'Rourke v. Kelly The Printer Corp., 135 S.W. 1011, 156 Mo.App. 91.

37. Elm City Club v. Howes, 42 A. 392, 92 Me. 211, 212.

38. Conboy v. Mathews, 160 N.Y.S. 533, 174 App.Div. 523—5 C.J. p. 1366 note 61.

Intervention petition in name of an unincorporated association must be made by its president or treasurer. —U. S. v. Houde Engineering Corporation, (D.C.N.Y.) 9 F.Supp. 843.

Designation of "plaintiff"

A complaint drawn in the name of A. B, treasurer of X. Y. association, is good on demurrer as against the contention that the action should have been brought by X. Y. association by A. B, its treasurer—Johnson v. Case, 162 N.Y.S. 841, 97 Misc. 247, affirmed 165 N.Y.S. 1093.

39. Corning v. Greene, 23 Barb. 33, affirmed 26 N.Y. 472 note—5 C.J. p. 1367 note 62.

40. De Queen & E. R. Co. v. Park, 225 S.W. 614, 146 Ark. 350—St. Louis, I. M. & S. Ry. Co. v. Cumbie, 141 S.W. 939, 101 Ark. 172.

Agent for sale and shipment of fruit

(1) Where a number of farmers had associated themselves together for the purpose of growing and shipping fruit, and had selected one of their number as agent to sell and ship their products, he might sue in behalf of himself and all the others on a cause of action concerning a shipment—De Queen & E. R. Co. v. Park, 225 S.W. 614, 146 Ark. 350.

(2) Where a number of farmers associated themselves together for the purpose of growing and shipping fruit, and selected one of their number as an agent to sell and ship their products, refusal, in agent's action against railroad on behalf of the persons so associated together, to strike from the complaint the names of all persons having an interest in the cause of action except such agent was proper—De Queen & E. R. Co. v. Park, supra.

41. U.S.—Hansel v. Purnell, (C.C.A. Mich.) 1 F.(2d) 266.

Ohio—Citizens' Loan & Savings Ass'n of Greenville v. Krickenberger, 138 N.E. 396, 46 Ohio App. 228

Foreign language schools held not within rule, not being recognized as legal entities under statute relative to such schools—Kalihi Japanese Language School v. Matthewman, 27 Hawaii 330.

42. Ala.—Sentell v. Friendship Baptist Church No. 2, 108 So. 517, 214 Ala. 584

Pa.—Allied Printing Trades Council v. Telegraph Printing Co., 5 Pa.Dist. & Co. 169.

Tex.—Kansas Life Ins. Co. v. First Bank of Truscott, (Civ.App.) 47 S.W.(2d) 675, affirmed 78 S.W.(2d) 584, 124 Tex. 409

5 C.J. p. 1367 note 63.

should receive the liberal construction ordinarily accorded statutes of a remedial character,[43] although they are intended merely to furnish a convenient method of conducting suits and should not be extended by judicial construction to change the legal status of an association nor to alter the substantive law of contracts as affecting unincorporated associations,[44] nor to permit suit in the associate name to redress the purely several wrongs of individual members[45]

Such a statute does not apply to an association formed for an illegal purpose.[46]

The procedure prescribed by the statute must be strictly followed[47]

Statutes restricted to business associations. Some statutes of this description specifically grant the right to sue in the association name to unincorporated associations which are organized for business purposes,[48] and under statutes of the latter description an unincorporated association which is not organized to carry on some trade or business in the state or to hold property therein, and does not in fact carry on a trade or business in the state or hold property therein, cannot sue in the associate name,[49] nor may a suit be maintained in the associate name where no property right of the association nor business interest thereof is involved[50]

Statutes permitting suit to be brought against an association in its common or associate name, which will be further considered in § 36, have been construed as not authorizing a suit to be brought by an association in such name.[51]

Contract with third party may be sued upon by the association itself in its own name—Detroit Light Guard Band v First Michigan Independent Infantry, 96 N W 934, 134 Mich 598

43. Sentell v Friendship Baptist Church No 2, 108 So. 517, 214 Ala 584

44. Mayhew & Isbell Lumber Co v Valley Wells Truck Growers' Ass'n, (Tex Civ App) 216 S W. 225

45. San Antonio Fire Fighters' Local Union No 84 v. Bell, (Tex Civ App) 223 S W 506

Purpose restricted to conservation of joint rights

Rev St art 6149, is based upon convenience and economy in permitting all the members of a joint-stock company or association to sue in the name of the association in order to conserve a joint right or redress a joint wrong, and it was never intended that the name of the association could be used to ascertain and protect the several rights of the members or redress their several wrongs—San Antonio Fire Fighters' Local Union No 84 v Bell, (Tex Civ App) 223 S W 506, error refused

46. Jackson v Akron Brick Assoc, 41 N E 257, 53 Ohio St 303, 53 Am S R 638, 35 L R A 287—5 C J p 1367 note 67

47. Meyer v Omaha Furniture, etc, Co, 107 N W 767, 76 Neb 405

48. Kansas Life Ins Co v. First Bank of Truscott, (Civ App) 47 S W (2d) 675, 677, affirmed 78 S W (2d) 584, 124 Tex 409

"The rule may be stated to be that, under authorization of said statute, an unincorporated association, organized for the purpose of conducting a business, can sue and be sued upon causes of action affecting the entire membership alike in the association name alone."—Kansas Life Ins Co. v. First Bank of Truscott, supra

Liability as partners

Where the organization bringing suit under such a statute is a business association, and not a partnership, it may sue in the associate name as an association without setting forth the names of members, as would be required in a suit brought by a partnership, and in such a case "it is immaterial that the members of the association may have been held to a liability as partners"—Kansas Life Ins Co v First Bank of Truscott, (Civ App) 47 S W (2d) 675, 677, affirmed 78 S W.(2d) 584, 124 Tex 409

49. Neb—Cleland v. Anderson, 92 N W. 306, 96 N W. 306, 98 N W 1075, 66 Neb 252, 5 L R A (N S) 136, reversed 105 N W 1092, 75 Neb 273, 5 L R A (N S) 136

Ohio—Haskins v Alcott, 13 Ohio St 210

Recognizing this rule see St Paul Typothetæ v St Paul Bookbinder's Union No 37, 102 N W. 725, 94 Minn 351, 3 Ann Cas 695

50. San Antonio Fire Fighters' Local Union No 84 v Bell, (Tex Civ. App) 223 S W 506, 508, error refused

"The very language of the statute seems to imply that the company or association can sue or be sued only about property rights, for it limits the right to those companies 'doing business in the state,' showing an intent to confine such suits to matters of business"—San Antonio Fire Fighters' Local Union No 84 v Bell, supra

51. Minn—St Paul Typothetæ v. St Paul Bookbinder's Union No 37, 102 N W 725, 94 Minn 351, 3 Ann Cas 695—Dimond v Minnesota Savings Bank, 73 N W. 132, 70 Minn. 298.

N J—Kline v Knights of the Golden Eagle, 167 A. 758, 113 N J.Eq 513

"Plaintiff in the cause at bar is not a legal entity such as a corporation or joint-stock company, and in the absence of statutory authority, there is no escape, in our opinion, from the conclusion that it has no legal capacity to sue in its common or adopted name In order to sustain the contention that plaintiff has the legal capacity to maintain this cause we would have to hold that the Legislature, when it amended in 1915 (Laws 1915, p. 225) what is now section 1186, authorizing suits against unincorporated associations, intended also that such associations would be by the act given the legal capacity to sue We cannot agree that the Legislature intended by the act of 1915 to authorize unincorporated associations to sue the same as corporations or natural persons To us it seems unreasonable that the Legislature, when it had before it the question of authorizing unincorporated associations to be sued, could have overlooked the question of the legal capacity of such associations to maintain a suit in the adopted name Had the Legislature intended to grant or create such legal capacity, we think it reasonable to conclude that such would have been specifically granted The statute, section 1186, authorizes voluntary or unincorporated associations to be sued in the adopted or selected name, but does not authorize such association to sue in such name."—Newton County Farmers' & Fruit Growers' Exchange v Kansas City Southern Ry Co., (App) 2 S.W (2d) 125, 128, opinion adopted in part 31 S W (2d) 303, 326 Mo 617.

Amendment permitting suit as confined to actions at law

Pract Act provision authorizing unincorporated organizations to be sued, amended to allow them to sue

(c) Actions in Name of Trustee of Express Trust

Under statutory authority in some jurisdictions a suit may be brought for an unincorporated association in the names of its trustees.

The provision common to most of the codes authorizing a suit in his own name by the trustee of an express trust applies to a trustee for the benefit of an unincorporated association,[52] and under appropriate statutory provisions a suit in behalf of an association may or must be brought in the names of its trustees, if any.[53] Accordingly an action may be maintained in his own name by any associate officer in whom the title to property is vested for its benefit,[54] or upon whom is imposed the duty of enforcing for its benefit such obligations as may become due to the association.[55]

(3) Parties by Representation

As a general rule, some members of an unincorporated association may bring a suit as representatives of all, where there is a common interest in the subject matter of the suit, or where the number of members makes it impracticable to join all as parties plaintiff.

The strict common-law rule, referred to supra in subdivision a (1) (a), has been modified under the influence of equity practice,[56] and irrespective of statute, it is generally held that an action may be brought by one or more of the members of an unincorporated association for the benefit of all, where the members have a common or general interest in the subject matter of the suit, or where the members are numerous and it is impracticable to bring them all before the court,[57] since those who sue may fairly be presumed to represent the rights and interests of the whole.[58]

In such case it is not material that some of the named plaintiffs have died or ceased to be members, or are minors or married women; they may be disregarded as unnecessary parties.[59]

However, it has been held that, in order that a suit may be brought in this form, it must appear that the members of the association have such a common interest that, were they all before the court, they would be entitled to bring the action in their individual names,[60] and an action by a part of the members cannot be maintained unless it is filed in behalf of all or the others are made parties defendant.[61]

b. Venue

An action brought in behalf of an association by an officer thereof may, it has been held, be brought in the county of the officer's residence.

The officer suing in behalf of the association is the "party" within a statute requiring an action to be brought in the county or district in which one of the parties resides[62]

also, was held to relate only to suits at law and not to permit a suit in equity—Kline v Knights of the Golden Eagle, 167 A. 753, 113 N.J Eq 513.

52. Laughlin v. Greene, 14 Iowa 92

53. Ill.—Palmer v. Baum, 238 Ill. App 472
Iowa—Presbyterian Church of Paralta, Linn County v Johnson, 238 N.W. 456, 213 Iowa 49
Me—Elm City Club v. Howes, 42 A. 392, 92 Me. 211.

54. Colo—Merchants' Bank v McClelland, 13 P. 723, 9 Colo. 603.
Mo—Colley v. Wilson, 86 Mo App 396—Kuhl v. Meyer, 35 Mo.App 206, 50 Mo App. 648.

55. Mo—Colley v. Wilson, 86 Mo App. 396—Kuhl v. Meyer, 35 Mo App 206.
N.Y.—Humphreys v New York, etc., R. Co, 10 N Y S. 461, 56 Hun 634.

56. Allied Printing Trades Council v Telegraph Printing Co, 5 Pa. Dist. & Co. 169—5 C.J. p 1367 note 74 [a].

57. Del—Kennedy v. Roberts, 140 A 656, 15 Del Ch. 401, affirming Roberts v Kennedy, 140 A. 654, 15 Del Ch. 24, and 141 A. 319, 15 Del Ch. 100.
Fla—Meier v. Johnston, 149 So 185, 110 Fla 374
Ill—Durburow v. Niehoff, 37 Ill App. 403
Ohio—Kealey v. Faulkner, 7 Ohio N. P (N.S) 49.
Pa—Hasinger v. New York Central Mut. Fire Ins. Co., 178 A. 153, followed in Hasinger v. Home Mutual Fire Ins Co, 178 A 155—Allied Printing Trades Council v Telegraph Printing Co, 5 Pa Dist & Co 169—Powell v. Dunn, 21 Pa Co. 65
Tex—Davis v. Hudgins, (Civ App) 235 S.W. 73.
5 C.J. p 1367 note 74.

Member in good standing

"When the membership is so numerous that to require the presence as parties of every individual composing it, would result in a practical denial of justice, the suit may be conducted by one or more of the parties interested in behalf of all," and in such a case a member in good standing of an unincorporated association of individuals has such an interest in its affairs and finances as entitles him to sue for the wrongful taking and misapplication of money and property of the association.—United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers v. Kennedy, 115 A 587, 588, 13 Del Ch. 106

58. Ill—Martin v. Dryden, 6 Ill. 187
N Y—Blakely v. Curcaden, 2 Edm. Sel Cas 338.

59. Lilly v Tobbein, 15 S W 618, 103 Mo 477, 23 Am S R. 887, affirming 13 S.W 1060.

60. Habicht v. Pemberton, 6 N Y. Super. 657.

61. Whitney v. Mayo, 15 Ill. 251.

Suit in behalf of those "desiring to join"

Under Chancery Rules, rule 113, authorizing one or more of a numerous class to sue for all, members of an unincorporated association may not sue in behalf of themselves and such other members "as may desire to join," as the decree would not bind all and the result might be to subject defendants to a great multiplicity of suits growing out of the same transaction. In other words, all members must be made parties, by representation or otherwise.—Roberts v. Kennedy, 116 A. 253, 13 Del Ch. 133.

62. Bacon v. Dinsmore, 42 How Pr. (N Y.) 368.
Venue of actions generally see the title Venue.

c. Pleadings
- (1) Declaration or complaint
- (2) Answer
- (3) Amendment

(1) Declaration or Complaint
- (a) Setting out names of members
- (b) Averment of facts authorizing suit by some members in behalf of all
- (c) Averments bringing case within statute

(a) Setting Out Names of Members

A declaration or complaint in behalf of an association should set forth the names of all the members unless facts are averred bringing the case within exceptions to such rule, as in the case of a representative suit or suit under statute.

The declaration in an action at common law by an unincorporated association should set out the names of all the individuals who are members of such association,[63] and this also seems to be necessary in a bill in equity by such associations,[64] except where the suit is brought by a part of the members on behalf of the association.[65]

However, a petition is sufficient which describes the society in the name of which suit is brought as a voluntary association composed of certain named persons as plaintiffs,[66] or which shows that the action is brought by an association of individuals as an entirety, the character of which is fully described, but in their own names.[67] Also, where a voluntary association appears in the bill as complainant, but the bill is signed and specifically consented to by an indorsement thereon by all the individual members of the association, such members are deemed thereby to have become parties complainant.[68]

Actions under statute. Where, unincorporated associations are expressly authorized by statute to sue in the usual name by which the association is known, it is unnecessary to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company or association.[69] Likewise, in an action by an unincorporated association under a statute authorizing such associations consisting of seven or more persons to sue in the name of a certain officer or officers, the complaint need not state the names of seven of the associates; it is sufficient if it avers that the association consists of seven members or upward.[70]

(b) Averment of Facts Authorizing Suit by Some Members in Behalf of All

A bill, petition, or complaint brought by some members in behalf of all should aver facts justifying such procedure, and the fact that they are suing in behalf of all.

Where a part of the members of an unincorporated association sue in behalf of all, the bill, petition, or complaint should set forth the facts justifying such course,[71] and the fact that plaintiff or plaintiffs are suing in behalf of all must be averred.[72]

As regards form, in cases of unincorporated associations the membership of which is large, suits may be brought either in the names of certain of the members "in behalf of themselves and all others interested" in the association, naming it, or in the name of the association by certain of its members, naming them; the former is the usual form, and is preferable by reason of its established use.[73]

Where, however, an officer of an association brings suit in its behalf, he need not allege that the parties in interest are too numerous to be all brought in, but it is sufficient if he alleges that the suit is brought for the benefit of all.[74] So a bill filed by the members of a voluntary association is not defective because it does not allege that plaintiffs were officers of their society or represented their associates, where it contains proper allegations as to why all the members of the society are not joined.[75] A declaration under a statute authorizing actions by the trustees of an association which shows in substance that the action is brought in the names of the trustees is sufficient, although inartificially drawn.[76]

63. Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, 238 Ill.App. 123—5 C.J. p. 1368 note 80.

64. Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, supra—5 C.J. p. 1368 note 81.

65. Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, supra.

66. Ackermann v. Ackermann Schuetzen Verein, (Tex.Civ.App.) 60 S.W. 366.

67. McLaughlin v. Wall, 105 P. 33, 81 Kan. 206.

68. Franklin Union No. 4 v. People, 121 Ill.App. 647, affirmed 77 N.E. 176, 220 Ill. 355, 4 L.R.A.N.S. 1001.

69. Barr v. People's Bank, 43 N.W. 347, 27 Neb. 577—5 C.J. p. 1368 note 87.

70. Tibbetts v. Blood, 21 Barb. (N.Y.) 650.

71. Donovan v. Danielson, 138 N.E. 811, 244 Mass. 432—5 C.J. p. 1368 note 89.

72. Blakely v. Curcaden, 2 Edm.Sel.Cas.(N.Y.) 388.

73. Liederkranz Singing Soc. v. Germania Turn-Verein, 29 A. 918, 153 Pa. 265, 43 Am.S.R. 798.

74. Blakely v. Curcaden, 2 Edm.Sel.Cas.(N.Y.) 388.

75. Wilkinson v. Stitt, 56 N.E. 830, 175 Mass. 581.

76. Elm City Club v. Howes, 42 A. 392, 92 Me. 211.

(c) Averments Bringing Case within Statute

The plaintiff's initial pleading should contain allegations bringing the case within the purview of any applicable statutory provisions.

In actions under statutes changing the common-law rule as to actions by unincorporated associations and authorizing suits by such associations in the company name by or in the name of certain officers of the association, the petition or complaint should contain averments bringing the case within the statute.[77]

(2) Answer

Plaintiff's capacity to sue may be put in issue by a denial in the answer of the existence of the association.

In an action by one as the officer of an unincorporated association, under a statute authorizing suits in the name of certain officers of such an association when the latter consists of seven or more members, defendant, although he may not question at the trial the capacity of plaintiff to sue, may, by a denial in his answer of the existence of the association, put such fact in issue.[78]

(3) Amendment

After suit has been brought in the name of an association, incompetent to sue, there may be an amendment substituting certain members as parties plaintiff. But a writ issued in the name of an unincorporated association may not be amended to substitute the name of a corporation. An amendment may be allowed to show that plaintiffs are suing in a representative capacity as associate officials and not as individuals.

Where suit is brought in the name of the association itself, which is incompetent to sue, it is proper to allow an amendment substituting as plaintiffs certain of its members.[79]

But if a writ is issued in the name of an unincorporated association, it cannot be amended by inserting the name of a corporation as plaintiff, where the association had become incorporated before the issuance of the writ.[80]

In trespass quare clausum, plaintiffs may amend their writ, which charges defendant for an injury to their own property, by setting forth that they sue as deacons and overseers of a society of Shakers.[81]

d. Evidence

General rules of evidence control in actions brought by or on behalf of an association.

The general rules governing evidence apply in actions by or on behalf of an association.[82]

e. Dissolution of Association Pendente Lite

Reduction of the number of members of an association after the institution of suit to less than the number required as a quorum will not constitute a defense to an action by the trustees of the association for property placed in their custody.

The right of the trustees of an unincorporated association to maintain a suit for property placed in their custody must be determined by the status of the society at the time when the suit was brought; the fact that the number of members of the association is reduced after the institution of the suit to less than the number required as a quorum for the transaction of the business of the society will not constitute a defense to such an action.[83]

§ 36. Actions against Association

a. Parties
b. Jurisdiction and venue
c. Service of process
d. Condition precedent to action against individual member of association
e. Pleading
f. Evidence
g. Trial
h. Judgment and enforcement

a. Parties

(1) In the absence of enabling acts
(2) Under enabling acts
(3) Parties by representation

(1) In the Absence of Enabling Acts

Generally speaking, an association may not be sued as such in the absence of statute changing the rule. But the trend of modern decisions is to permit suit against

77. Neb.—Meyer v. Omaha Furniture, etc, Co., 107 N.W. 767, 76 Neb 405
Ohio—Haskins v. Alcott, 13 Ohio St 210
5 C.J. p 1369 note 95.

78. Tiffany v. Williams, 10 Abb Pr (N.Y.) 204.

79. Hawaii—Kalihi Japanese Language School v. Matthewman, 27 Hawaii 330
Mo—Lilly v. Tobbein, 15 S.W. 618, 103 Mo 477, 23 Am S.R. 887, affirming 13 S.W. 1060.

80. Marsh River Lodge F. & A. M v. Brooks, 61 Me 585.

81. Anderson v. Brock, 3 Me. 243.

82. Admissibility
In a suit by a Masonic lodge to have a rival lodge restrained from doing business in the state, where the claims of both lodges rest upon the legality of defendant's organization, the charter of defendant was properly excluded, although had it been admitted it would show illegality of defendant's organization, and thus have put both parties out of court.—Most Worshipful King Solomon Grand Lodge A. F. & A. Y. M., in and for State of Kansas and Jurisdiction Thereunto Belonging on Continent of North America v. Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction, 232 P. 664, 76 Colo. 469.

83. Kuehl v. Meyer, 50 Mo.App. 648.

an association where there are grounds of estoppel or waiver, or where the case is one demanding an extension of the equitable doctrine of representation of parties.

An unincorporated association cannot, in the absence of statute, be sued in its society or company name, but all the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct from that of their members.[84] As just intimated, the members may be sued collectively, provided there is a joint liability.[85]

Another mode of suit may be authorized by the articles of association, however.[86] Thus, an unincorporated society may provide for trustees in whom their property may be vested, and against whom all suits pertaining to the business of the company may be prosecuted,[87] but a judgment enforceable by execution against the property of an unincorporated association cannot, it has been held, be obtained in an action at law against the trustees of the property of the association.[88]

Doctrine of representation. Equitable procedure, adapting itself to modern needs, has grown to recognize the need of representation by one person of many, too numerous to be sued, and this has had its influence on the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of an unincorporated association with numerous members has come to be recognized in many jurisdictions, and under this doctrine the association may be sued as an artificial person,[89] or certain members may be sued as representatives of all in accordance with the rule which will be considered in subsection a (3).

Waiver and estoppel. An association doing business as a legal entity may be estopped to deny that it is a legal entity for purposes of being sued in respect of such business,[90] or the objection may

84. U S—Brown v. Protestant Episcopal Church in U S of America, (D C La.) 8 F (2d) 149
Ala—Grand International Brotherhood of Locomotive Engineers v Green, 89 So 435, 206 Ala 196
Ark—District No 21, United Mine Workers of America v Bourland, 277 S.W 546, 169 Ark 796—Baskins v United Mine Workers of America, 234 S W 464, 150 Ark 398—Lewelling v. Manufacturing Wood-Workers' Underwriters, 215 S W 258, 140 Ark 124
Cal—Herald v Glendale Lodge No 1289, B P. O E of United States, 189 P 329, 46 Cal App 325
Fla—Johnston v. Albritton, 134 So 563, 101 Fla 1285, followed in 134 So. 566, 101 Fla 1290
Ga—Barbour v Albany Lodge No 24, F & A. M., 73 Ga 471
Hawaii—Kalihi Japanese Language School v. Matthewman, 27 Hawaii 330
Ill—Cahill v. Plumbers', Gas and Steam Fitters', and Helpers' Local 93, 238 Ill App 123—Moskal v New Era Commercial Assoc, 228 Ill App 278
Ind—Stusser v Romine, (App.) 200 N E 731—Colt v Hicks, (App.) 179 N E 335
Iowa—Wilson v Airline Coal Co, 246 N W 753, 215 Iowa 855.
Ky—Diamond Block Coal Co. v. United Mine Workers of America, 222 S W 1079, 188 Ky 477
Mass—Malloy v Carroll, 191 N E 661—Tyler v Boot and Shoe Workers' Union, 188 N E 509—Edwards v Warren Linoline, etc, Works, 47 N E 502, 168 Mass 564, 38 L R A 791
Miss—Varnado v Whitney, 147 So. 479, 166 Miss 668.
Mo.—Ruggles v International Ass'n of Bridge, Structural and Ornamental Iron Workers, 52 S.W (2d) 860, 331 Mo 20—Clark v Grand Lodge of Brotherhood of Railroad Trainmen, 43 S W (2d) 404, 328 Mo 1084, 88 A L R 150—Corbett v Milk Wagon Drivers Union, Local No. 603, (App.) 84 S W (2d) 377—Road Dist No 41, Henry Tp., Vernon County v Jackson, 231 S W 1043, 208 Mo App 194.
N Y—Saxer v Democratic County Committee of Erie County, 291 N Y S 18
N C—Tucker v Eatough, 120 S E. 57, 186 N C 505
Or—In re Waters of Willow Creek, 236 P 487, 119 Or 487, order extending time to petition for rehearing modified 236 P 763, 119 Or 155, rehearing denied 237 P 682, 119 Or 155.
Pa—Oster v Brotherhood of Locomotive Firemen and Enginemen, 114 A 377, 271 Pa 419—Kurie v. Dodson Day School, 9 Pa.Dist & Co 451—Hopkins v L. A. H U S A, 24 Pa Dist 442—Fairweather v Rocke, 18 Pa Dist 1003
Tex—Frank v Tatum, 25 S W. 409, 87 Tex 204—Community of Priests of St Basil v. Byrne, (Civ.App.) 236 S W 1016, reversed on other grounds (Com App.) 255 S W 601
W Va—West v Baltimore & O R Co., 137 S E 654, 103 W Va 417—Mitch v. United Mine Workers of America, 104 S E. 292, 87 W Va 119—Simpson v Grand International Brotherhood of Locomotive Engineers, 98 S E 580, 83 W Va 355, certiorari denied 39 S Ct 494
5 C J. p 1369 note 4

Committee of unincorporated organization is not suable for tort—Work v Des Moines Coliseum Co, (Iowa) 207 N W 679.

85. Cahill v. Plumbers', Gas & Steam Fitters', and Helpers' Local 93, 238 Ill App 123—5 C J p 1369 notes 5, 6

Voluntary nonprofit association could only be sued where there was a joint interest in the subject matter and joint liability on part of all members—Wolf v Foley, 289 N Y.S 1082, 160 Misc 633.

86. Farmers' Mutual v Reser, 88 N. E 353, 43 Ind App 733—Farmers' Mutual v. Reser, 88 N E 349, 43 Ind App 634.

87. Colley v. Wilson, 86 Mo App 396—5 C J p 1369 note 8

88. Moore v Stemmons, 95 S W 313, 119 Mo App 162—T. A Miller Lumber Co v Oliver, 65 Mo App. 435.

89. United Mine Workers of America v. Coronado Coal Co., 42 S Ct. 570, 259 U S. 344, 66 L Ed 975, 27 A L R 762.

90. Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 43 S W (2d) 404, 413, 329 Mo. 1084, 88 A L R 150
"We think also that the doctrine of estoppel might well be applied to a case like this This association, having over one hundred thousand members, with regularly constituted officers and a perfect working organization, has the appearance, form, and method of doing business of a corporation or legal entity. It has chosen a name and does business as a legal entity under and by the use of the name It holds itself out as capable of contracting in that name, and by that name does enter into insurance contracts, and in that name collects the premiums and accumulates funds to meet such contract obligations When sued on such contracts in the name which it has used

be waived.[91]

Equitable lien. An action may be maintained against an unincorporated association for the purpose of subjecting its property to an equitable lien where no personal judgment is sought against the association.[92]

(2) Under Enabling Acts

(a) Actions against officers
(b) Actions against association by name

(a) Actions against Officers

Under some statutes an action against an association may be brought against designated association officers as parties defendant.

In some jurisdictions it is provided by statute that an unincorporated association may be sued in the names of certain of its officers, a typical statute of this kind being one which provides that an association consisting of a certain number of members or more may be sued in the name of its president or its treasurer.[93] The purpose of such a provision is to do away with the inconvenience of having each individual member of the association named as a party to the action and process served upon him.[94] To sustain such an action the debt to be recovered must be one upon which the creditor might maintain an action against all the members by reason of their liability therefor, either jointly or severally.[95] In order that the action may be maintained it is not necessary that the president or treasurer should be a member of the association or interested therein.[96] In such an action it is not necessary to make the members additional parties,[97] but the fact that some of the members are joined has been held not to defeat the action as against the proper officer,[98] although the plaintiff may be required to elect whether it will proceed against the association, through its officer as party defendant, or against the individual members.[99] An action may be maintained against the president or treasurer to recover for a tort as well as upon contract, where all the members are joint tort-feasors,[1] but not otherwise.[2] Technically, in an action thus brought against the president or treasurer, the officer so sued, and not the association, is the party defendant;[3] but in effect an action of this character is an action against the association, and not against the individual named as

in making same, it ought not to be allowed to say that it is a mere myth—an intangible nonentity incapable of being sued"—Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, supra

91. Herald v Glendale Lodge No. 1289, B P. O. E of United States, 189 P. 329, 46 Cal App. 325

Irrespective of whether statutes granted the right to sue an association as such, failure to object at the right time and in the right way constituted a waiver of the point that suit was against an association in its common name, the court saying "The question presented does not involve the sufficiency of the cause of action as pleaded, or jurisdiction of the court, particularly in view of the fact that it is not the circumstance that defendant is an unincorporated association, but the class of unincorporated associations to which it belongs, that is the test of the liability to suit under the association name. An appearance was entered here by the defendant in the name under which suit was brought, without, by motion, demurrer, or answer, raising the point of misnomer or misjoinder or legal capacity of parties. Under section 434 of the Code of Civil Procedure, all objections not so taken, and not going to the sufficiency of the cause of action or the jurisdiction of the court, are waived"—Herald v. Glendale Lodge No. 1289, B. P. O. E. of United States, 189 P. 329, 331, 46 Cal App. 325.

92. Realty Trust Co v. First Baptist Church of Haskell, (Tex Civ. App.) 46 S.W.(2d) 1009.

93. Ostrom v Greene, 55 N.E. 919, 161 N.Y. 353, affirming 52 N.Y.S. 1147, 30 App Div 621, affirming 45 N.Y.S. 852, 20 Misc. 177—5 C.J. p 1369 note 11.

In New York, under Code Civ.Proc. § 1919, if judgment against an association is sought, its president or treasurer should be sued, and if against its branch then its president.—Stewart v Thorburn, 157 N.Y.S. 242, 171 App Div. 253—5 C.J. p 1369 note 11.

94. Meinhart v. Contresta, 194 N.Y. S. 592—5 C.J. p 1369 note 11.

95. J. Friedman & Co. v. Amalgamated Clothing Workers of America, 188 N.Y.S. 879, 115 Misc. 44—5 C.J. p 1370 note 12

96. Duncan v. Jones, 32 Hun (N.Y.) 12.

97. Schein v. Erasmus Realty Co., 134 N.Y.S. 840, 194 App Div 38, affirming 176 N.Y.S. 648, 107 Misc 27—Tibbetts v Blood, 21 Barb.(N.Y.) 650—5 C.J. p 1370 note 14.

98. Rourke v. Elk Drug Co., 77 N.Y.S. 373, 75 App.Div. 145

99. Mandell v. Moses, 205 N.Y.S. 254, 209 App Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

Judgment must be returned unsatisfied before subjecting members to liability

Under Gen.Assoc.L. § 16, as added by L.(1920) c 915 § 6, where suit is brought against the president of an unincorporated association, and thus against the association, its members cannot be sued for same cause until final judgment in first action is returned partly or wholly unsatisfied, and plaintiff was therefore properly required to elect against whom it should prosecute action wherein association and members were joined as defendants—Mandell v Moses, 205 N.Y.S. 254, 209 App Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

1. Rourke v. Elk Drug Co., 77 N.Y.S. 373, 75 App.Div. 145

2. Mazurajtis v Maknawyce, 157 N.Y.S. 151, 93 Misc. 337.

Action for assault not maintainable

Under Code Civ Proc §§ 1919, 1921–1923, it was held that an action for assault by members of unincorporated association, brought against its president and treasurer, could not be maintained in that form, because not alleging that the assault was committed by all its members through the association.—Mazurajtis v. Maknawyce, 157 N.Y.S. 151, 93 Misc. 337.

3. U.S.—Whitman v. Hubbell, (C.C.N.Y.) 30 F. 81.
N.Y.—Woods v. De Figaniere, 24 N.Y.Super 607.
5 C.J. p 1370 note 17.

president or treasurer.[4] The defense that the association does not in fact include the designated number of members must be affirmatively established by defendant.[5]

Suit as at common law notwithstanding statute

The statute does not abrogate the common-law right to sue all members of the association if plaintiff sees fit to do so.[6] A provision that, where an action has been brought against an officer of the association, another action for the same cause shall not be brought against the members thereof until after final judgment in the first action, and the return wholly or partly unsatisfied of an execution issued thereon, was held to apply only to the liability of the members as such; and accordingly, it has been held that an action may be maintained against both the officer and the individual members to recover damages for a tort where the individual defendants are charged with personal wrongdoing.[7]

(b) Actions against Association by Name

Statutes in many jurisdictions permit actions against unincorporated associations. These statutes in some instances contain an express provision to the effect that an association may be sued in its common or associate name; and in other instances the same result is reached by judicial implication of liability to suit from statutory provisions merely recognizing the legal entity of the association. The common-law right to sue the individual members of an association may coexist with the statutory right to sue the association.

It has been said that it is only by virtue of statute that an unincorporated association may be sued as an entity.[8] In some states statutes have been enacted which expressly or impliedly authorize the bringing of actions against unincorporated associations in their common name,[9] and where suit is brought under statutes of this character it is not necessary to join all members of the association as parties defendant.[10] These statutes, being in derogation of the common law, are strictly construed,[11] and the prescribed method of procedure must be strictly followed.[12] Accordingly, an action may be maintained against the association only in the name under which it transacts its business,[13] and where the statute, in one form or another, is by its terms applicable only to associations organized for, or in fact transacting, business, no association falling without the terms of the statute in such respect may be sued thereunder,[14] although such statutes have been construed as not restricted in their application to associations organized primarily for business purposes, but as permitting suit against an association formed for other purposes but actually transacting business.[15]

4. Peckner v Webb, 71 N Y S 763, 35 Misc 291—Mason v Holmes, 64 N Y S. 696, 30 Misc 719.

5. Boyd v. Gernant, 81 N Y S. 835, 82 App Div. 456

6. Skolny v Hillman, 187 N Y S 706, 114 Misc 571, affirmed 189 N Y.S 955—5 C J p 1370 note 20.

Choice of method

In suits against unincorporated associations, Code Civ Proc § 1919, permits an action to be maintained against either the president or treasurer to bring the entire membership before the court, although both cannot be sued, and if that method is not followed § 1923 preserves the common-law right of suing all, thereby giving plaintiff a choice of method.—Skolny v Hillman, 187 N Y S. 706, 114 Misc 571, affirmed 189 N Y S. 955.

Under earlier statutes of New York

(1) Action could not be maintained against the individual members of an unincorporated association unless an action had first been brought against the president or treasurer thereof—Witherhead v. Allen, 4 Abb. Dec (N.Y.) 628, 3 Keyes 562, 3 Transcr A. 258, 8 Abb Pr N S 164, 33 How Pr. 620—5 C J p 1370 note 21

(2) The later statutes contained no such requirement—McCabe v. Goodfellow, 80 N.E 728, 188 N Y. 89, 17 L R A 204, overruling Flagg v Swift, 25 Hun 623, criticising Park v. Spaulding, 10 Hun (N Y) 128—5 C J p 1370 note 22

7. April v Baird 52 N Y S 973, 32 App Div 226, 28 N Y Civ Proc 20, 6 N Y Ann Cas. 139

8. International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v Wood, (Va.) 175 S E 45

9. U S—Hansel v. Purnell, (C C A Mich.) 1 F (2d) 266, certiorari denied Purnell v. Hansel, 45 S Ct 98, 266 U S 617, 69 L Ed. 470

Ark—Lewelling v Manufacturing Wood-Workers' Underwriters, 215 S W 258, 140 Ark 124.

Minn—Taylor v Order of Railway Conductors, 94 N W 684, 89 Minn 222.

Mo—Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 43 S W.(2d) 404, 328 Mo 1084, 88 A L R 150

Mont—Gardiner v. Eclipse Grocery Co, 234 P 490

Tex—Andrews v. Manhattan Texas Petroleum Co, (Civ App) 252 S W. 878—St. Louis Southwestern Ry. Co of Texas v Thompson, (Civ.App.) 192 S W. 1095, error refused

Vt—F R Patch Mfg Co. v. Capeless, 63 A 938, 79 Vt. 1.

5 C J. p 1370 note 25.

10. McIntyre v. Live Stock Shipping Ass'n, 11 S.W (2d) 77, 222 Mo.App. 935.

11. Cal—King v. Randlett, 33 Cal. 318

Neb—Meyer v. Omaha Furniture, etc., Co, 107 N W. 767, 76 Neb 405—Burlington, etc., R Co v. Dick, 7 Neb 242.

12. Meyer v Omaha Furniture, etc., Co, 107 N W 767, 76 Neb 405

13. King v Randlett, 33 Cal 318—5 C J. p 1371 note 29

14. Cal—Warman Steel Casting Co v Redondo Beach Chamber of Commerce, 166 P 856, 34 Cal App 37.

Tex—Realty Trust Co. v First Baptist Church of Haskell, (Civ.App.) 46 S W.(2d) 1009

5 C J p 1370 note 24.

Chamber of commerce, voluntary association organized to promote common welfare, from which members derive no individual profit, is not engaged in any business, within Code Civ Proc. § 383, providing that persons associated in business and transacting it under common name may be sued by such name—Warman Steel Casting Co v. Redondo Beach Chamber of Commerce, 166 P. 856, 34 Cal App 37.

15. Herald v Glendale Lodge No. 1239, B P. O. E of United States, 189 P 329, 46 Cal App. 325.

Elks' club

In permitting suit against an Elks' Club, the court said: "We see no

Associations and partnerships. Statutes in terms permitting suit against an association have been held applicable to associations which are not partnerships,[16] and statutes in terms permitting suits against partnerships in the partnership name, which will be considered in the title Partnership § 200, have been construed as permitting suits against an association on the theory that the latter is in effect a partnership as respects third persons.[17]

Right to sue implied from statutory recognition of association as entity. Following a doctrine first promulgated in the English decision of Taff Vale Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, in some cases where the statutes do not expressly provide that an unincorporated association may be sued as such, the courts have implied its liability to suit from statutory provisions recognizing the association as a legal entity,[18] as where the statute permits it to contract in its own name,[19] or provides for service of process upon a state official in respect of suits on contracts made by an association.[20]

Suit as at common law notwithstanding statute. As in the case of statutes authorizing suits in the names of officers, the provision under consideration does not take away the right previously existing at common law. The individuals composing such an association do not, by force of such statutes, acquire any immunity from individual liability, and it is optional with a creditor to sue either the association as such or the individuals composing it.[21] Accordingly a statute which thus gives a creditor an additional remedy, and so allows him to sue either the association in the common name or the members jointly, is not invalid as being beyond the power of the legislature, although it fails to give the association power to sue in the associate name, since additional remedies which do not take away or impair a right may lawfully be granted,[22] and furthermore the creditor may maintain an action against the association and the members thereof jointly.[23]

sufficient reason for restricting section 388 of the Code of Civil Procedure to associations formed for commercial business. As already pointed out, the term 'business' has a common and general application to all sorts of enterprises which engage people's attention and energies. When a number of persons are associated under a common name in an undertaking in which the associates incur obligations for which they are legally liable, why should they not be sued in the common name which they have adopted, whether it is a money-making concern or otherwise? Indeed, the question of profit is the only distinction that exists between the two classes of associations suggested. If a number of persons were associated together, furnishing to their patrons for pay precisely the same accommodations, entertainment and service that the Elks' lodge furnishes its members, there would be no question but that they were engaged in a 'business.' Why should a different rule of liability exist because the associates happen to contract their liabilities in an enterprise in which they are catering to themselves? The word 'business,' in its broad sense, embraces everything about which one can be employed, and in its narrower sense it signifies a calling for the purposes of livelihood or profit. . . . Where the sense in which the word is used is open to construction, it should be accepted with the meaning most in harmony with the context"—Herald v. Glendale Lodge No. 1239, B. P. O. E. of United States, 189 P. 329, 331, 46 Cal.App. 325.

16. Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540.

Transacting business under common name

An association which is not a partnership, but which transacts business under a common name, is suable by that name, under code provisions permitting suit against associations.—Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540.

17. Seasongood & Mayer v. Riddle, 18 Ohio App. 88.

18. United Mine Workers of America v. Coronado Coal Co., (Ark.) 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762—Hansel v. Purnell, (C.C.A.Mich.) 1 F.(2d) 266, certiorari denied Purnell v. Hansell, 45 S.Ct. 98, 266 U.S. 617, 69 L.Ed. 470.

19. Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 43 S.W.(2d) 404, 409, 328 Mo. 1034, 88 A.L.R. 150.

"Contracts are not contracts unless they are enforceable. To say that an association like defendant can make contracts necessarily means valid contracts—contracts that are binding on the parties and enforceable against them. It is an absurdity to say that defendant can make contracts of insurance but cannot be sued thereon. If defendant has legal capacity to make a contract of insurance, it has legal capacity to be sued thereon. If it is a legal entity when making such contracts, it retains such legal entity when sued thereon"—Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, supra.

20. Lewelling v. Manufacturing Wood-Workers' Underwriters, 215 S.W. 258, 259, 140 Ark. 124.

"It is true the act does not, in express terms, provide that suit shall be brought against the association under its associated name, but such is, we think, the effect of the statute when all its parts are read in the light of each other. It would be a vain and idle thing to provide that service of process should be had upon the insurance commissioner in all suits in this state arising out of such policies and contracts, and that such service should be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through the attorney in fact if the plaintiffs had to resort to the common-law method of procedure as to the parties to the suit. In order words, it would be useless to provide that suits should be brought against each subscriber in his individual name and that service might be had upon the insurance commissioner."—Lewelling v. Manufacturing Wood-Workers' Underwriters, supra.

21. Conn.—Davison v. Holden, 10 A. 515, 55 Conn. 103, 3 Am.S.R. 40. Mich.—U. S. Heater Co. v. Iron Molders' Union, 88 N.W. 889, 129 Mich. 354—Jenkinson v. Wysner, 83 N.W. 1012, 125 Mich. 89.

5 C.J. p. 1371 note 30.

22. U. S. Heater Co. v. Iron Molders' Union, 88 N.W. 889, 129 Mich. 354.

23. Detroit Light Guard Band v. First Michigan Independent Infantry, 96 N.W. 934, 134 Mich. 598.

(3) Parties by Representation

Under the doctrine of representation, which is of equitable origin, one or more members of an unincorporated association may be sued as representatives of all.

The equitable doctrine of parties by representation, embodied in most if not all of the codes, that where the question is one of a common or general interest to many persons, or where the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, is applicable in actions against unincorporated societies, and a few members are permitted to represent all the others as defendants, when their number is great or when some of them are unknown [24] In such case the court must be satisfied at the hearing that those against whom the suit is brought fairly represent the members of the association.[25]

b. Jurisdiction and Venue

The court may properly retain jurisdiction of an action against an association as such and its members as individuals, after dismissal of the action as against the individual members. The general rules controlling venue apply to actions against associations or their members.

Jurisdiction over a suit brought against an association as a distinct legal entity and against the members as individuals, is not lost by dismissal of the action as against the individuals.[26]

Venue. Constitutional provisions to the effect that an association may be sued in the county wherein the contract was made or to be performed, or where the obligation or liability arose or the breach occurred, have been construed as permissive rather than mandatory and as not preventing the beginning of an action in any other county within the state,[27] and it has been held that such a constitutional provision does not apply to a personal action brought against the individual members of an association.[28]

The officer sued is the "party" within a statute requiring an action to be brought in the county or place of residence of one of the parties.[29]

Under statutes to the effect that suits against an association may be brought in any county in which the cause of action, or a part thereof, arose, the "cause of action" referred to comprises every fact necessary to be proved to authorize and support the judgment [30]

c. Service of Process

(1) In general

(2) Effect of statutory provisions

(1) In General

To confer jurisdiction, process must be served upon individual members of an association where no different provision is made by statute. The strict common-law rule requires service upon all members to bring them into court, and ordinarily such rule applies unless changed by statute or by application of the doctrine of representation

In the absence of express statutory provisions as to the manner of serving process upon defendants in actions against unincorporated societies, the usual rules as to the service of process apply, and to confer jurisdiction the members composing the association, or some of them, must be named as parties and process must be served upon them individually.[31]

At common law and in the absence of representation or of statutes changing the general rule, service of process upon some individual members of an unincorporated association is insufficient to institute suit against all, or against the association [32] Thus, service of summons on the agent of a voluntary association is insufficient for the purpose of bringing the association into court, in the absence of any statute

24. Ill—Cahill v. Plumbers', Gas and Steam Fitters', and Helpers' Local 93, 238 Ill App. 123
Ind—Slusser v. Romine, (App) 200 N E. 731.
Mass—Maguire v Reough, 180 N E. 270, 288 Mass. 98.
Ohio—Kealey v. Faulkner, 7 Ohio N P (N S) 49.
Pa.—Oster v Brotherhood of Locomotive Firemen and Enginemen, 114 A. 877, 271 Pa. 419
Tex—Wells v Mackay Telegraph-Cable Co, (Civ App) 239 S W 1001 —Davis v Hudgins, (Civ App) 225 S.W 73
5 C J p 1371 note 86.

Codification of equity rule

Although an unincorporated association could not be sued at common law by its name, and all parties were necessarily parties defendant, a statute authorizing suits by and against one or more of numerous persons incorporated the equity rule of procedure which authorized suits by and against representatives of the members of an unincorporated association of a large number of persons—Slusser v. Romine, (Ind App) 200 N E 731.

25. Wilkinson v. Stitt, 56 N.E. 330, 175 Mass. 581.

26. Camm v. Justice's Court of Santa Rosa Tp, 170 P. 409, 35 Cal App 293

Right to sue either

Where plaintiff sued an association and its individual members and dismissed as to the individuals, the court did not lose jurisdiction, since it was plaintiff's right to proceed either against the association or its members—Camm v. Justice's Court of Santa Rosa Tp, 170 P. 409, 35 Cal.App. 293.

27. Hobson v. Metropolitan Casualty Ins Co. of New York, 300 P. 87, 114 Cal.App 349

28. Henry v. Willett, 212 P. 698, 60 Cal App 244.

29. Brooks v. Dinsmore, 8 N Y S 103, 15 Daly 428—Bacon v. Dinsmore, 42 How Pr (N Y) 368

30. Union Trust Estate v Orr, (Tex Civ App) 3 S W (2d) 472

31. West v Baltimore & O. R Co., 137 S E 654, 103 W Va 417

32. Johnston v Albritton, 134 So. 563, 101 Fla 1285, followed in 134 So 566, 101 Fla. 1290

"Service on one member would no more bring the association into court than service on a stockholder would bring in a corporation"—Johnston v. Albritton, 134 So. 563, 565, 101 Fla. 1285.

authorizing such service,[33] and where the association cannot be sued by its society name, service of a summons on one of its agents is insufficient for the purpose of bringing the association into court.[34] It has been held, however, that it is sufficient to serve a member who has charge of the society's affairs.[35]

Service where part defend for all. Where, in accordance with the equitable doctrine of representation, a part of the members of an unincorporated society defend for the benefit of all, service upon a part acting for all as well as for themselves is sufficient.[36] In such case there must, however, be a due allegation of the representative character of the individual served.[37]

(2) Effect of Statutory Provisions

Where statutes provide upon whom service of process should be made in an action against an association, compliance should be made with such statutory provisions. In the absence of provision as to service of process in a statute expressly permitting suit against an association as such, it would seem that service may be made as in the case of corporations.

Statutes which change the common-law rule as to parties defendant in actions against unincorporated societies by authorizing suits against certain officers thereof, or against the society by its name, usually prescribe the persons upon whom service shall be had,[38] and where the statute prescribes the person or persons upon whom service should be made, such provision is mandatory.[39]

Action against association in associate name. In those states where actions are authorized to be brought against unincorporated associations in their associate names it is usually provided that process may be served upon certain designated persons. Service in compliance with the particular statute will be sufficient when made on the person or persons therein designated, such as service on one or more of the associates,[40] or upon any officer or trustee,[41] or upon designated officers,[42] upon the manager of

33. State v Staed, 64 Mo App 28.

34. Ark—Baskins v. United Mine Workers of America, 234 S.W. 464, 150 Ark 398
N C—Tucker v. Eatough, 120 S E 57, 186 N C. 505.

A summons to E and E as agent and organizer of an unincorporated association was properly dismissed by the judge ex mero motu—Tucker v. Eatough, 120 S E 57, 186 N C 505

Acknowledgment of service ineffectual

Where summons was issued against E and E as agent and organizer of an unincorporated association, such association, having no legal existence, could not appear, and there could be no service as to them, and hence a demurrer by whomsoever filed, was not an acknowledgment of service—Tucker v Eatough, 120 S. E 57, 186 N.C 505.

35. Slaughter v. American Baptist Publication Soc., (Tex Civ App) 150 S W. 224.

36. National Harness Mfrs' Ass'n v. Federal Trade Commission, (C C A Ohio) 268 F. 705—5 C J. p 1372 note 43

An association "having many members may be brought into court by service on its officers and such of its members as are known and can be conveniently reached, sufficient being served to represent all the diverse interests"—National Harness Mfrs' Ass'n v Federal Trade Commission, (C C.A.Ohio) 268 F. 705, 709

37. Ferry v. North Pacific Stages, 296 P 679, 112 Cal App 348

Description as "member" insufficient

Where complaint alleged individual defendants were associated together and doing business under firm name of certain company, and service of summons was on an individual defendant described as member of said association, company as separate entity was not party defendant either as association or partnership—Ferry v North Pacific Stages, 296 P. 679, 112 Cal.App 348.

38. "The right of action being statutory, those same statutes which create the right of action almost uniformly provide the method of service"—but this is not the case in Delaware—Hamilton v. Delaware Motor Trades, 155 A. 595, 4 W.W. Harr.(Del.) 436.

39. S C.—Medlin v. Ebenezer Methodist Church, 129 S.E 330, 132 S. C 498
Va—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, 175 S E. 45.

40. Cal—Camm v Justice's Court of Santa Rosa Tp, 170 P. 409, 35 Cal App 293
Minn.—Fitzpatrick v. International Typographical Union of North America, 184 N W. 17, 149 Minn. 401.
5 C J. p 1372 note 45.

Service of summons on one of the associates is a service on the association.—Camm v. Justice's Court of Santa Rosa Tp, 170 P. 409, 35 Cal. App. 293.

41. International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, (Va) 175 S E 45.

Service upon a mere agent is not sufficient under such a statute.—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, (Va.) 175 S.E. 45.

Service on officer of subordinate lodge is not sufficient to confer jurisdiction over the grand lodge, since "no presumption or inference that a person is an officer of a grand lodge . . . arises from the mere fact that he is an officer of a subordinate lodge"—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, (Va) 175 S E. 45, 48.

42. N J—Saunders v Adams Express Co, 58 A. 1101, 71 N.J Law 520, affirming 57 A. 899, 71 N J. Law 270
Tex.—Slaughter v. American Baptist Publication Soc, (Civ.App) 150 S. W. 244
Vt—F. R. Patch Mfg Co. v. Capeless, 63 A 938, 79 Vt. 1.
5 C J. p 1372 note 46.

Service on "assistant" not service on "secretary"

Service of writ of garnishment on assistant secretary was held ineffective under a statute permitting service of process on a "secretary" of a corporation or association.—Walker v. Illinois Torpedo Co., (Tex Civ. App) 278 S.W. 456.

the society[43] or its agent,[44] or upon its clerk[45] or the person in charge of its business,[46] as the case may be.

Where the statute expressly permits suit to be brought against the association as such, but is silent as to service of process, it has been said that the question of service should be answered on analogy to the law of corporations as to service of process under statutes, where no method of serving the corporate defendant has been expressly provided,[47] and in such a case it has been held that personal service upon the president of the association is sufficient.[48]

Action against officers of association. Where the statutes provide that unincorporated associations may be sued in the names of certain specified officers, service of process may and should be made upon such officers.[49] Although a statute requires that in suits against an unincorporated association service shall be made on the president or treasurer, yet service made on the chairman and presiding officer of the association is sufficient, if the society has no officer called president or treasurer,[50] but under such a statute it is not sufficient to make service on the secretary of the association,[51] and service of process upon a former officer is also insufficient, although he himself is an association member and a defendant, since the service upon the officer required by the statute is representative in its nature, and the debt is not his as an individual, and is not enforceable against him alone.[52]

If the summons is entitled against the president of the association, and service is made on the treasurer, judgment thereon is irregular, it has been held,[53] although more recent authority holds that the defect is no more than an irregularity, which may be cured by amendment, and does not deprive the court of jurisdiction;[54] in other words, the association is the real party defendant, and a summons directed to one officer may be served upon either.[55] Service upon A B, the treasurer, of a process directed to C D, individually and as president, constitutes a valid service as against the association, but not as against C D, individually.[56]

Where a corporation is the treasurer of an unincorporated association, due service upon such corporation, as by service on its managing agent, constitutes service upon the association within the meaning of the statute.[57]

Statutes as to particular kind of association. Statutes providing that associations that issue policies or certificates of insurance to their members shall be suable in any county where they do business, and that summons may be executed upon them by serving a copy of the summons and complaint upon any officer of such association, do not apply to associations which do not issue such insurance, and service upon an officer of a noninsurance association is insufficient to bring the association into court.[58] Service of summons on a nonresident association doing business in the state may, under some statutes, be effected by service on agent within the state, without service on any member of the association.[59] Statutory provision for service of summons in a suit against a "non-resident joint-

43. Camden, etc, R Co. v. Pennsylvania Guarantors, 35 A. 796, 59 N. J.Law 328.

44. Ex p. Baylor, 77 S.E. 59, 93 S. C. 414—5 C.J. p 1372 note 48

Private member of an association, occupying no official relation to the organization, is not an "agent" who may be served with process—Medlin v. Ebenezer Methodist Church, 129 S. E. 330, 132 S.C. 498.

Service on executors of deceased treasurer of association is not service on an "agent" of the association. —Medlin v. Ebenezer Methodist Church, 129 S.E. 330, 132 S.C. 498.

45. Rosenbaum v. Hayden, 36 N.W. 147, 22 Neb. 744—Burlington, etc., R. Co. v. Dick, 7 Neb. 242

46. Camden, etc., R Co. v. Pennsylvania Guarantors, 35 A. 796, 59 N. J.Law 328.

47. Hamilton v. Delaware Motor Trades, 155 A. 595, 4 W.W.Harr. (Del.) 486.

48. Hamilton v. Delaware Motor Trades, supra.

49. Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555—5 C.J. p 1372 note 51.

50. Hatheway v. American Min. Stock Exch., 31 Hun (N.Y.) 575.

51. Hanke v. Cigar Makers' International Union, 58 N.Y.S. 412, 27 Misc. 529.

52. Mason v. Holmes, 64 N.Y.S. 596, 30 Misc. 719.

53. Berndt v. Gilmore, Daily Reg. Nov. 24, 1886, cited 4 Brightly N. Y.Dig. p 7569.

54. McGinn v. Morrin, 286 N.Y.S. 410, 158 Misc. 666, affirmed (App. Div.) 286 N.Y.S. 411.

55. McGinn v. Morrin, supra.

56. McGinn v. Morrin, supra.

57. Bobe v. Lloyds, (C.C.A.N.Y.) 10 F.(2d) 730, certiorari denied Lloyds v. Bobe, 46 S.Ct. 472, 270 U.S. 663, 70 L.Ed. 778

58. Grand International Brotherhood of Locomotive Engineers v. Green, 89 So. 435, 206 Ala. 196.

Trade union requiring members to take out insurance in a different association

Acts Sp.Sess.(1909) p 279, relative to the service of process on certain unincorporated associations, applying only to associations that issue policies or certificates of insurance to their members, service of process on the chief engineer and executive officer of a local division of an international trade union, which, although it required its members to take policies in an insurance association commonly referred to as its insurance department, issued no policies or certificates of insurance, itself, although the assessments were collected through an officer of the union, and the president and secretary-treasurer of such association were ex officio members of the supreme governing body of the union, was insufficient to give the court jurisdiction of defendant—Grand International Brotherhood of Locomotive Engineers v. Green, 89 So. 435, 206 Ala. 196

59. State ex rel. Cook v. District

stock company or association" doing business in the state by delivering copy of summons to the local agent was applicable to associations other than joint-stock associations.[60]

Statutes as to partnerships. Statutes to the effect that "several persons composing a mercantile or other firm" may be brought into court by service of process on any one of its members, have been held inapplicable to an unincorporated association not constituting a partnership.[61]

d. Condition Precedent to Action against Individual Member of Association

Under a statute a return of an execution unsatisfied on a judgment against the association may be a condition precedent to the bringing of an action against an individual member on the same cause.

Under a statute providing that, where an action has been brought against an officer of an association, another action for the same cause shall not be brought against the members of the association, or any of them, until after final judgment in the first action and the return, wholly or partly unsatisfied, of an execution issued thereon, a complaint should be dismissed as to an associate individually where the statutory condition precedent has not been complied with[62]

e. Pleading

The complaint in a common-law action against associates should set forth the names of the individual members; where suit is brought against some as representative of all, the facts warranting such procedure should be alleged; and under statutes authorizing suits against an association by action brought against the officers, the complaint should allege the joint or several liability of the individual members. General rules apply as to amending pleadings, and as to issues, proof and variance.

The general rules of pleading apply as respects the sufficiency of the declaration or complaint in an action against an association or the members thereof.[63]

At common law, in actions against an unincorporated association, the names of the members thereof should be set out in the declaration.[64] So a bill against several associations by name, which also joins with them as defendants in its caption a large number of individuals, but which contains no allegations showing that such individuals compose or are members of the defendant associations, is defective as against the latter[65] But where the individuals and corporations composing a voluntary association are made joint defendants, the fact that they are referred to by the associate name to distinguish them in their associated capacity does not render the complaint objectionable as an attempt to sue a nonlegal entity[66]

Under statutes permitting actions against unincorporated associations in the associate name, it is not necessary to set out in the process or pleading the names of the persons composing the society[67] Thus, in an action against the president or treasurer of an unincorporated association composed of seven or more persons, it is not necessary that the individuals composing the membership should be made parties defendant; and where it appears from the body of the complaint that an action is against a voluntary association of which a designated person is alleged to be president, the words "and others" in the title may be regarded as immaterial, since the body of the complaint controls the title.[68]

Under a statute authorizing an action against the president or treasurer of an unincorporated association consisting of seven or more persons upon any cause of action for which plaintiff could maintain an action against all the associates, plaintiff must, in order to maintain the action, allege and prove that all the members of the association are liable, either jointly or severally, to pay his claim.[69]

Court of First Judicial Dist. in and for Lewis and Clark County, (Mont.) 58 P.(2d) 273.

60. State ex rel. Cook v. District Court of First Judicial Dist. in and for Lewis and Clark County, supra.

61. Johnston v. Albritton, 134 So 563, 101 Fla 1285, followed in 134 So 566, 101 Fla. 1290
Statute is too restrictive in its terms to be applied to associations by interpretation.—Johnston v Albritton, 134 So. 563, 101 Fla. 1285

62. Institute for Public Service v Winter, 252 N.Y.S. 109, 233 App Div. 1.

63. Complaint held sufficient
Complaint against convention committee of veterans' organization was held to state an action against the individual defendants as members of an unincorporated association.—Burrell v. Capt H A. Crow Post No. 884, Veterans of Foreign Wars Convention Committee, 283 P. 370, 102 Cal App. 716.

64. Ind.—Hays v. Lanier, 3 Blackf 322.
Tex.—Osborne v Holland, 1 Tex App Civ Cas. § 1087.
5 C.J. p 1372 note 56.

65. American Steel, etc, Co. v. Wire Drawers', etc., Makers' Unions Nos 1 & 3, (C C Ohio) 90 F. 598.

66. State v Kansas City Live Stock Exch, 109 S W. 675, 211 Mo. 181, 124 Am S R. 776.

67. Herron v. Cole, 41 N.W. 765, 25 Neb 692.

68. Olery v. Brown, 51 How Pr (N. Y.) 92.

69. Empire City Job Print v. Harbord, 265 N Y S 450, 148 Misc 231, reversed Empire City Job Printing Co. v. Falk, 272 N Y S 202, 151 Misc. 688, reversed Empire City Job Print v. Falk, 277 N Y S 795, 244 App Div. 6—Tannenbaum v Hofbauer, 253 N Y S. 90, 142 Misc 120—Coney v. Brennan, 167 N Y S. 902—5 C.J. p 1373 note 61.

Where suit is brought against several of the members of an association as representing the entire membership, the bill must contain proper allegations as to why all the members are not joined.[70]

Although the articles of an unincorporated association authorize the bringing of an action on its contracts against its trustees, a complaint in such an action which makes the trustees defendants, but does not aver that they are sued as such, states no cause of action against them.[71] That a manufacturer, suing for an injunction against a labor union to prevent picketing, sued the president of the Amalgamated Clothing Workers of America individually as well as president, and the secretary individually as well, thereby deviating from the provisions of Code Civil Procedure, was held not fatal to right to injunction, where in fact a cause of action was alleged against the president.[72]

Amendment. In accordance with general rules as to amendments curing a misnomer or misdescription of parties, which will be considered in § 155 of the title Parties [47 C.J. p 238 note 24–p 242 note 73], a mere misdescription of an unincorporated association as a corporation is subject to amendment,[73] although it has also been held that where suit is brought against a named organization alleged to be a corporation and it subsequently develops that the organization is an unincorporated association, and not a legal entity under the law, the defect cannot be cured by amendment as there is no party defendant before the court and nothing to amend.[74]

It has been held that a complaint originally brought against an unincorporated association, which could not be sued as such, may be amended by adding as defendants the members thereof,[75] or the individuals personally liable on the contract in suit,[76] or by allegations showing that the action was brought against an officer under statute.[77]

Where a voluntary association when sued purported to come into court and litigate the merits of the action, it would be assumed that its defense was made by and for the benefit of the members of its board of directors and plaintiff could substitute the members who were directors when the answer was filed as defendants.[78]

Where a judgment in an action against an unincorporated association is set aside because the summons was entitled against the president of the society and service was made on the treasurer, leave may be granted to amend by substituting the name and title of the treasurer as defendant.[79]

Where an action is brought against the members of a voluntary association, the names of members who are not liable upon the contract sued on may be properly stricken out.[80]

Issues, proof, and variance. General rules as to issues, proof, and variance, which will be taken up in §§ 512–546 of the title Pleading [49 C.J. p 780 note 50–p 818 note 81], control in actions brought against an unincorporated association or

70. Wilkinson v. Stitt, 56 N.E. 330, 175 Mass. 581—5 C.J. p 1373 note 62

71. Farmers' Mutual v. Reser, 88 N.E. 349, 353, 43 Ind.App. 634, 738

72. Skolny v. Hillman, 187 N.Y.S. 706, 114 Misc. 571, affirmed 189 N.Y.S. 955

73. Ark.—Lewelling v. Manufacturing Wood-Workers' Underwriters, 215 S.W. 258

N.Y.—Munsinger v. Courier Co., 82 Hun 575, 24 N.Y.Civ.Proc. 175, 1 N.Y.Ann.Cas. 32, 31 N.Y.Supp. 737—Evoy v. Expressmen's Aid Soc., 21 N.Y.S. 611

Pa.—House v. Bd. of Trade, 18 Pa.Dist. 1080

Tenn.—Whittaker v. Spoke, 6 Tenn.Civ.App. 26

On motion

Where plaintiff endeavors to bring into court an unincorporated association, designating it in the summons by its name, and alleging in the complaint that it is a corporation, he may, on motion, if the president of the association has been served with process, be allowed to remedy the defect and have an order substituting the president of the association as defendant in the action, and the complaint will be amended by striking out the allegation of the incorporation of defendant and inserting in its place an allegation that defendant is an unincorporated association.—Munsinger v. Courier Co., 31 N.Y.S. 737, 82 Hun 575, 24 N.Y.Civ.Proc. 175, 1 N.Y.Ann.Cas. 32

Sued right body under wrong name

In an action on a certificate of insurance issued by the "E. Society," plaintiff sued defendant as a foreign corporation. The answer alleged that defendant was a voluntary association, and not a corporation. It was held that plaintiff's motion to amend the title of the summons so as to substitute as defendants the names of the persons constituting this association was properly granted, plaintiff having sued the right body of persons, but under the wrong name, being misled by the conduct of the parties carrying on the business in the name of the "E. Society."—Evoy v. Expressmen's Aid Soc., 21 N.Y.S. 641, 66 Hun 636.

74. Maisch v. Order of Americus, 72 A. 528, 223 Pa. 199

75. Grand Lodge of Alabama, A. F. & A. M., v. Goodwin, (Ala.) 35 So. 553.

76. Becker v. Woodcock, 121 N.Y.S. 71, 136 App.Div. 589

77. McKane v. Kings County Democratic General Committee, 1 N.Y.S. 580, 14 N.Y.Civ.Proc. 128, 21 Abb.N.Cas. 91.

Failure to add the name of the president or treasurer of defendant association in entitling the summons is merely a mistake in the name of a party, and may be corrected by amendment.—Mack v. American Exp. Co., 45 N.Y.S. 362, 20 Misc. 215.

78. Crawley v. American Soc. of Equity of America, 139 N.W. 734, 153 Wis. 13.

79. Berndt v. Gilmore, Daily Reg. Nov. 24, 1886, cited 4 Brightly Dig. N.Y. p 7569.

80. Bartholomae v. Kauffmann, 47 N.Y.Super. 552, affirmed 91 N.Y. 654.

its members.[81] Thus in an action on a lease in the name of a voluntary association, the real parties who are liable thereunder may be shown under an allegation of copartnership or voluntary association, and the lessor may show that those who executed the instrument acted for others who did not sign.[82]

Affidavit denying existence of association. A rule of court providing that in actions against partners, the partnership shall be taken to be admitted as alleged, unless an affidavit be filed denying the existence of the partnership in relation to the subject matter of the action, applies in an action against an unincorporated association, if it is in legal effect a partnership.[83]

f. Evidence

(1) Burden of proof and presumptions
(2) Admissibility
(3) Weight and sufficiency

(1) Burden of Proof and Presumptions

The burden rests upon a plaintiff to show the liability of an association on a contract made in its behalf by a member, although the contracting member has the burden of establishing his own lack of personal liability. Transactions for the benefit of an association are, it has been held, presumptively made with the knowledge and for the benefit of all members thereof.

A plaintiff suing an association or its members on a contract alleged to have been made in its behalf by a member has the burden of proving the liability of the association or its members as by proof of the authority of the contracting member to represent the others or by showing their approval of his acts,[84] although the member making the contract has the burden of showing that he acted only for the association and incurred no personal liability.[85]

Where transactions were for the benefit of an association, all of its members may be presumed to have had knowledge of such transaction and to have enjoyed the benefit thereof.[86]

(2) Admissibility

Anything said or done in the formation of an association may be admitted to show the nature of the organization. Pleadings and judgments in prior suits against associates have been held competent to show that they held themselves out as possessing the capacity to be sued.

In order to determine the character of the organization, it is competent to prove anything that the parties said or did in the formation of an association.[87]

On the issue of capacity to be sued, it has been held proper to admit pleadings and judgments in prior actions against associates to show that they had held themselves out as having capacity to be sued.[88]

(3) Weight and Sufficiency

The general rules as to weight and sufficiency of evidence control in actions against an association or its members.

81. **Pleading warranting admission of evidence as to ratification**
Where an association adopted and ratified the act of plaintiff broker in effecting a sale of its property, it was permissible to plead that the contract of sale was made by the association in analogy to pleading that a contract executed by promoters and ratified by a corporation was a corporate contract, and such pleading was sufficient to warrant admission of evidence of the act of the company or association showing an adoption and authority to employ an agent.—Waurika Oil Ass'n No 1 v Ellis, (Tex.Civ App.) 232 S.W. 364, motion overruled 254 S.W. 1032.

82. Korstad v. Williams, 141 P. 881, 80 Wash. 452.

83. Cronkrite v. Trexler, 41 A. 22, 187 Pa. 100.

84. Davis v. Wansleben, 271 P. 882, 94 Cal.App. 427.

Authority
In a suit against a political campaign committee for labor and material allegedly furnished for its benefit, the burden was on plaintiff to show authority from the committee or persons to whom plaintiff sold labor and material.—Humphrys v. Republican Central Campaign Committee, 132 A. 366, 320 Pa. 353.

Approval
Seller, to recover for goods sold and delivered an unincorporated association, on the theory that the act of a promoter of public entertainments in making the purchase was approved by the association, and that the latter was estopped from denying liability, had the burden of proof.—Davis v. Wansleben, 271 P. 882, 94 Cal.App. 427.

85. Haldeman v. Addison, (Iowa) 265 N.W. 358

Must show agreement eliminating personal liability
"In order to avoid personal liability, one who has contracted in the name of such a principal [an unincorporated association] has the burden of showing that there was an agreement with the person with whom the contract was made that he was not to be personally bound."—Haldeman v. Addison, (Iowa) 265 N.W. 358, 359.

86. Reynolds v. St. John's Grand Lodge, A. F. & A. M., 131 So. 186, 171 La. 895.

87. Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

Erasure of words indicating attempt to form corporation
In an action against subscribers of an association on a note executed in name of association, it was competent to prove that words in the articles of association, indicating an attempt to form a corporation, were erased and others substituted which could be construed as an intention to form an unincorporated association.—Harris v Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

Vote as to incorporation
In an action against subscribers of an association on notes executed in name of association, exclusion of evidence that vote was taken at meeting whether corporation or unincorporated association should be formed was held error.—Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

88. Brooks v. Owen, 202 N.W. 505, 200 Iowa 1151, opinion modified on motion for rehearing.

In accordance with the general rules governing weight and sufficiency of evidence, the evidence in particular cases has been held sufficient or insufficient to show an agreement that a member contracting in behalf of an association was not to be personally bound,[89] or to show that associate directors were personally bound,[90] or to show authorization or approval by an association of a contract alleged to have been made in its behalf,[91] or to show that a purported principal for whom a person signed a contract was not a fictitious name but was an existing voluntary association.[92]

g. Trial

Actions against associations or their members are subject to the general rules in respect of questions for the jury and instructions.

On conflicting evidence it is for the jury to decide questions of fact as to the existence of an association,[93] authority of an officer to represent the association in certain respects,[94] execution of a contract in its behalf,[95] membership of individual defendants in an association,[96] and personal liability of members of an association.[97]

The usual rules govern as to instructions.[98]

h. Judgment and Enforcement

(1) In general
(2) Enforcement of judgment
(3) Remedy against members after return of execution unsatisfied

(1) In general

At common law no judgment may be rendered against an association as an entity, although under statute such a judgment may be rendered which will bind the joint property of all the associates.

At common law a judgment against an unincorporated association is void and cannot be enforced against the joint property.[99] Judgment entered in action on a contract signed by certain of the officers and members of an unincorporated association

89. **Evidence held insufficient** to show existence of agreement between seller of piano and superintendent of Epworth League, which was an unincorporated association, that the superintendent would not be personally bound on a note given in payment of piano purchased for the league, signed by the superintendent "Pleasantville Epworth League, E L. Supt W. D. Addison," so as to relieve the superintendent of liability on the note—Haldeman v. Addison, (Iowa) 265 N.W. 858.

90. **Evidence held sufficient**
In an action against a cooperative association and the members of its board of directors on a note of the association indorsed by the directors, evidence was held to sustain a finding that the directors indorsed the note as individuals, and not merely as evidence of authority of the president and secretary of the association to sign and issue it, apart from the presumption created by Neg Instr L. § 17 par 6—Herring v. Farmers' Co-op. Ass'n, 87 So. 271, 148 La. 557.

91. **Evidence held sufficient**
(1) To support court's conclusion that president of association had authority to sign note for it.—Roper v Alamo Oil & Refining Co., (Tex.Civ. App.) 284 S.W. 305

(2) To warrant finding that defendant fruit company, a voluntary partnership association, was bound by acts of acting treasurer signing and indorsing notes—Horgan v. Morgan, (Mass.) 124 N.E. 32.

Evidence held insufficient to support a claim for goods sold against an association because purchase was approved, and association was estopped from denying liability—Davis v. Wansleben, 271 P. 382, 94 Cal.App. 427

92. **Evidence held sufficient** to show that company, for which president signed its name to note, was not fictitious, so as to render him personally liable, but was a voluntary association—Roper v. Alamo Oil & Refining Co., (Tex.Civ.App.) 284 S.W. 305.

93. Fennell v. Hauser, (Or.) 27 P.(2d) 685.

94. Toadvine v. Northwest Trust & State Bank, 211 P. 286, 122 Wash. 609

Financial secretary's ostensible authority to act as treasurer
Whether a financial secretary of an association, who was authorized to "collect all moneys and pay same to the treasurer," although not empowered to indorse and collect negotiable instruments, and had during the successive terms of two treasurers performed the duties of treasurer, was held out as having authority to indorse and collect checks, was held for the jury—Toadvine v. Northwest Trust & State Bank, 211 P. 286, 122 Wash. 609.

95. Pennyroyal Fair Ass'n v. Hite, 243 S.W. 1046, 195 Ky. 732.

Contract to care for car
In action against fair association for loss of automobile parked within fair grounds, whether association contracted to safely care for and keep the automobile for a certain consideration was held for the jury—Pennyroyal Fair Ass'n v. Hite, 243 S.W. 1046, 195 Ky. 732

96. Ark.—Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399
Or.—Fennell v. Hauser, 27 P.(2d) 685

97. N.Y.—Empire City Job Printing Co. v. Falk, 272 N.Y.S. 202, 151 Misc. 688, reversed Empire City Job Print v. Falk, 277 N.Y.S. 795, 244 App.Div. 6, reversing Empire City Job Print v. Harbord, 265 N.Y.S. 450, 148 Misc. 231
Or.—Fennell v. Hauser, 14 P.(2d) 998, 141 Or. 71.

98. **Confusing instructions**
Instructions that purchasers of space in a potato curing house would not be liable as partners for the obligations of a potato curing association was held erroneous and confusing, since if the subscription list was intended for the purpose of organizing an unincorporated association, those participating in the business would be liable for the obligations of the association—Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399.

Instruction held erroneous under evidence
In an action against subscribers of an association on notes executed in name of association, an instruction to find for defendants if the business was conducted in name of proposed corporation was held erroneous under the evidence—Harris v. Ashdown Potato Curing Ass'n, 284 S.W. 755, 171 Ark. 399

99. West v. Baltimore & O. R. Co., 137 S.E. 654, 103 W.Va. 417—Simpson v. Grand International Brotherhood of Locomotive Engineers, 93 S.E. 580, 83 W.Va. 355, certiorari denied 39 S.Ct. 494—5 C.J. p. 1373 note 69.

has been held valid as to such members, subject to be stricken as to other members who did not sign the contract.[1]

The names of members of a voluntary association against whom awards of damages are made and executions are to issue should be determined before the awards are made, and their names inserted in the final decree.[2]

Where members of a voluntary association, formed for business purposes, are liable to third persons as if partners, a joint judgment against the members is justified.[3]

Under statutes authorizing actions against unincorporated societies in the society's name or in the name of certain of its officers, the judgment in such an action is against the association as such and binding upon the joint property of all the associates,[4] in the same manner as if all had been named defendants and had been sued upon their joint liability.[5]

Where the record shows that an officer of an association was summoned individually, so that he individually, and not the association, was in court, under statutes permitting suit against an association by its associate name, a judgment rendered against the association is coram non judice and necessarily a nullity.[6]

Where an action is not brought against real estate, but against the members of an association, the absence of a decision therein affirmatively sustaining an attachment does not invalidate the judgment against the members, which may stand as though no attachment had been commenced.[7]

Amount of judgment. An award of one thousand dollars for services rendered during the year, as manager, clerk, and bookkeeper for an association was not excessive, especially where plaintiff had been receiving two thousand dollars per year prior thereto.[8]

(2) Enforcement of Judgment

Under a judgment against an association, execution may issue against its joint property, but not against the individual property of its officers or members.

Judgments against an unincorporated society may be enforced by execution against the joint property of the association,[9] although only the joint property of the association, sued as such, is subject to execution thereunder,[10] and, if the judgment is against the president of the association, his individual property cannot be taken thereunder as president.[11]

The property of a voluntary association represented by certificates and held by trustees may be reached and sold by a court of equity;[12] but a judgment obtained in an action at law against trustees for an association cannot be enforced by the issuance of an execution against property, title to which is vested in the trustees for the association.[13]

(3) Remedy against Members after Return of Execution Unsatisfied

Statutes in some jurisdictions provide for actions against individual members after return unsatisfied of an execution on a judgment against the association In the suit against the individual, the judgment against the association may or may not be conclusive of his liability.

In some states the statutes provide for an action against the members of the association after the return unsatisfied of an execution issued on the judgment obtained against the association.

1. Mahler v. Freeman, 61 Pa Super. 225

2. Malloy v. Carroll, (Mass.) 191 N. E. 661.

Decree against defendants becoming parties only as members of class ineffective

A decree against defendants generally who became parties only as members of class and are not identified by a finding as to their names is ineffective, since their identity is a matter for judicial determination, and its lack cannot be supplied by the clerk of court in making entry of an award of damages or in issuing execution—Malloy v. Carroll, (Mass.) 191 N.E. 661.

3. Azzolina v. Order of Sons of Italy, Conte Luigi Cadorna, No. 440, 179 A. 201, 119 Conn. 681.

4. U S—Morgan v. Halberstadt, (N. Y.) 60 F 592, 9 C C A 147
Cal—Davidson v. Knox, 7 P. 413, 67 Cal 143.
N.J.—Camden, etc., R Co v. Guarantors of Pennsylvania, 35 A 796, 59 N J Law 328.
N.Y—Schuylerville Nat Bank v. Van Derwerker, 74 N.Y. 234.
5 C J. p 1373 note 70.

5. Cal—Swift v. San Francisco Stock, etc., Bd., 8 P 94, 67 Cal 567—Davidson v. Knox, 7 P. 413, 67 Cal 143.
Minn.—Gale v. Townsend, 47 N.W. 1064, 45 Minn 357

6. Bogan v. Progressive Home Bldg Ass'n, 112 A. 861, 95 N.J Law 346

7. Slusser v. Romine, (Ind App.) 200 N E 731.

8. Genco v. Union Berry & Truck Ass'n, (La App.) 167 So. 890, setting aside order dismissing appeal 166 So 888.

9. Cal—Welsh v. Kirkpatrick, 30 Cal. 202, 89 Am D. 85.
Neb—Rosenbaum v. Hayden, 36 N W. 147, 22 Neb. 744
N Y—Mertz v. Fenouillet, 43 N Y S. 217, 13 App Div. 223, 26 N.Y.Civ. Proc. 178, 3 N Y Ann Cas 353.
5 C.J. p 1374 note 74.

10. Mandell v. Moses, 205 N Y S 254, 209 App Div. 531, affirmed 147 N E. 192, 239 N.Y. 555—5 C J. p 1373 note 72.

11. Schuylerville Nat Bank v. Van Derwerker, 74 N.Y. 234—5 C.J. p 1373 note 73.

12. Frost v. Thompson, 106 N.E. 1009, 219 Mass 360

13. Moore v. Stemmons, 95 S.W. 313, 119 Mo App 162.

Such a suit may be brought against one or more of the members without making them all parties defendant.[14]

Under such a statute, it has been held that a judgment recovered against the president or treasurer of an association for a debt owing by it does not estop the individual members, when sued for the same debt after the return of execution unsatisfied, from contesting their liability for debts of the association,[15] and, accordingly, where an action is brought against the individual members of an unincorporated association after a judgment in an action against the president thereof and the return of an execution unsatisfied, plaintiff must allege and prove, not only the original judgment and the return of execution unsatisfied, but also facts sufficient to make out the original cause of action against the association; and where the liability of the association is founded on a written instrument signed by an individual and bearing the seal of the association, plaintiff must show that such individual had been authorized to sign the instrument and bind the association, on the authority of such person being questioned.[16]

However, under another such statute it was held that a judgment obtained against an unincorporated association in the associate name was conclusive against all persons who were members when the liability merged in the judgment was created,[17] but persons whose membership had not then commenced or had then ceased are not thus bound by the judgment against the association.[18] The liability of the members under this statute is contractual in its nature, and therefore they may be proceeded against by trustee process.[19]

As has been pointed out in subsection d of § 36, return of an execution against the association unsatisfied may be a condition precedent to suing an individual member under such a statute.

§ 37. Actions between Association and Members

a. Right of action
b. Parties
c. Jurisdiction and venue
d. Pleading and proof

a. Right of Action

At common law, subject to some qualifications herein noted, actions concerning association matters will not lie between an association and its members. In equity and under applicatory statutes such suits have been allowed.

It is commonly said that, since an unincorporated association is in legal effect a mere partnership, the common-law rule forbidding actions between partners on partnership demands applies to actions between such associations and the members thereof.[20] This statement, however, seems too broad, since all associations are not partnerships, as explained in § 1. While the rule undoubtedly applies to associations formed for business purposes, a noncommercial association is in no sense a partnership, as has been shown in § 1, and accordingly it may sue a member thereof or be sued by him.[21] In any event an action will lie by a voluntary association against a former member thereof to recover funds or property in his hands belonging to the society,[22] or, subject to rules heretofore considered in § 31, to collect dues and assessments, and if the society loans its funds to a member, and he gives his note as security, payable to its officers or trustees, an action may be maintained on the note in the name of the payees.[23]

The rule against the maintenance of actions between associations and their members applies, of course, only at law, and does not prevent suits in equity between them.[24]

Where by the articles of association each member severally binds himself to pay a ratable proportion

14. Tarbell v Gifford, 65 A. 80, 79 Vt 369

15. Allen v. Clark, 65 Barb (N Y) 563

16. Barasch v Riemer, 110 N Y S 1053, 59 Misc 453

17. Tarbell v Gifford, 72 A 921, 82 Vt. 222, 17 Ann Cas 1143

18. F. R Patch Mfg Co v. Capeless, 63 A 938, 79 Vt 1.

19. F. R. Patch Mfg Co. v. Capeless, supra.

20. Price v. Spencer, 7 Phila.,(Pa.) 179—5 C J p 1374 note 86.

When dismissal of action not warranted

Where plaintiff, a member of a voluntary association, sued certain other members as indorsers of the association's note, the court, instead of dismissing the suit, on the ground that an action would not lie between partners on an obligation for which plaintiff associate was also liable, should have ordered that all the members be made parties under St (1911) § 2610, and all the differences settled.—Conway v. Zender, 143 N W. 162, 154 Wis 479.

21. Me.—Simpson v. Ritchie, 86 A. 124, 110 Me 299.

N.Y.—Boston Baseball Assoc. v. Brooklyn Baseball Club, 75 N Y S 1076, 37 Misc. 521.

22. Kan.—McLaughlin v. Wall, 105 P. 33, 81 Kan 206

R.I.—Local Union No. 1 Textile Workers v Barret, 86 A. 5, 19 R. I 663.

Collusion of trustees; right of one trustee to urge defense

In an action on a note given by trustees of an association, one of the trustees, representing himself and other shareholders, is entitled to maintain a defense on a showing that the other trustees were acting in collusion with plaintiff in attempting to enforce a note on which the consideration had failed.—McMillan v Greenamyer, 195 P. 734, 50 Cal. App 601

23. Pierce v. Robie, 39 Me 205, 63 Am D 614—Whitcomb v. Smart, 38 Me 264

24. Price v. Spencer, 9 Phila.(Pa.) 231—5 C J. p 1374 note 95.

of all expenditures made by the association in carrying out the common object, the undertaking is mutual, the covenants of the associates being made with each other, and accordingly if one member fails to perform his covenant the others may enforce it by an action against him.[25]

Under statutes which authorize actions by and against an unincorporated association in the names of its officers or in the name of the association, it has been held that the statute gave the same right of action as in the case of actions between the association and third persons.[26] A statute allowing suits to be brought by one firm against another, although there are members common to both, does not authorize the bringing of an action by an association against one of its members, the party sued being named both as plaintiff and defendant.[27]

Suit to redress wrongs against association. The rule of corporate law that a stockholder may not sue to redress wrongs against the corporation unless and until it refuses to act on request, as set forth in Corporations § 564 [14 C.J. p 930 note 71–p 936 note 39], is inapplicable to a suit by a member of an unincorporated association against an officer thereof, brought in behalf of his associates and himself.[28]

b. Parties

The common-law rule barring actions against an association eo nomine applies to bar an action by a member of the association as such. Under the equitable doctrine of representation, however, suits between an association and its members may be brought by or against some of the members as representatives of all. Statutes regulating suits as to corporate office may be inapplicable to office in an association.

The common-law rule barring actions against an association eo nomine, as heretofore considered in § 36, ordinarily applies to bar an action by a member against the association as such,[29] and a member of an unincorporated association cannot sue the society as a partnership, even though it may be treated as such by other persons who have dealt with it, without making the individual members parties defendant, in which case it would be proper to name the association as a defendant.[30] The rule that an association can sue only in the individual names of all the members who compose it, as set forth in § 35, does not apply to bar an action by an association officer to recover property of the association wrongfully withheld by a member.[31]

Under the equitable doctrine of representation, suits may be brought by or against some of the members as representatives of all[32] Thus a bill

25. Idaho Apple Growers' Ass'n v. Brown, 293 P. 320, 323, 50 Idaho 34—5 C.J. p 1374 note 94.

26. Westcott v. Fargo, 61 N.Y. 542, 19 Am.R. 300—5 C.J. p 1375 note 97.

Particular statute construed

Conn.Gen.St. § 979, which provided that "any number of persons associated together in a voluntary association, not having corporate powers, but known by some distinguishing name, may sue and be sued, plead and be impleaded, by such name," did not authorize such procedure where without it the action could not have been maintained.—Huth v. Humboldt Stamm No. 153, 23 A. 1084, 61 Conn. 227

27. Scott v. Gunnison, 4 Brewst. (Pa.) 101.

28. Roberts v. Kennedy, 116 A. 253, 254, 13 Del.Ch. 133

"It is the opinion of the court that the rule referred to can have no analogous application to a case of the kind now before the court. This view is entertained because of the fundamental difference existing between a corporation on the one hand and an unincorporated association of individuals on the other The corporation, being an artificial person, has a distinct entity of its own, can hold and possess property, own choses in action, and sue and be sued in its own name Therefore, when its stockholders undertake to sue in its behalf, they assert rights that are the corporation's and which the corporation is capable of litigating in its own name Hence while the stockholders have an interest in the corporation's property, or interest which a court of equity will in proper cases protect, they cannot, in the absence of exceptional circumstances, litigate such interest unless the corporation, through its proper officers, first refuses to do so . But an unincorporated association of individuals such as is the Brotherhood in this case, has no identity of its own and cannot sue. The property and rights which are said to belong to it, belong in fact to its members . . . The interest which a member of such an association has in the common property is therefore in no sense indirect or derivative as is so with respect to the interest of a stockholder in a corporation. The members have a direct and primary interest of their own, which any one may assert in behalf of himself and all others against an officer charged with wrongfully using the common property without first applying to the so-called officers of the organization If the law of the organization provided that designated officers or members and only those could sue in behalf of all, a different view might prevail. But there is nothing of this nature appearing in this case"—Roberts v. Kennedy, supra

29. McDonnell v. Jones, 24 Pa.Co. 40.

30. Hanley v. Elm Grove Mut. Tel. Co., 129 N.W. 807, 150 Iowa 198.

31. Klein v. Anderson, 4 La.App. (Orleans) 262

Union card

Secretary of association responsible for identification cards of members may sue in his own name to recover such card from one who has forfeited his right to it.—Klein v. Anderson, 4 La.App. (Orleans) 262

32. Del.—Roberts v. Kennedy, 116 A. 253, 13 Del.Ch. 133.

La.—Executive Committee of French Opera Trades Ball v. Tarrant, 113 So. 774, 164 La. 83, 53 A.L.R. 1233.

"We understand it is well established that suits in equity may be brought by or against some of the members of an association or trust like the one under consideration as representatives of all the members. This seems to be especially true in such cases where, as here, the defendants were managing officers or trustees Such cases simply declare the equitable doctrine of virtual representation, and the doctrine has in many cases been applied to members of unincorporated associations"—Davis v. Hudgins, (Tex.Civ.App.) 225 S.W. 73, 76.

may be filed by part of a numerous body of members in an unincorporated association to enforce a common benefit in behalf of all against a few of their associates who are specially charged with fraud, it not being necessary that all the parties in interest be made parties to the bill.[33] Where an association has ceased to do business, and has applied all its assets, and an indebtedness remains, and certain members file a bill against others to ascertain the indebtedness and to have the liability of the individual members apportioned, it is immaterial that the creditors are not made parties if the decree requires the members to pay the sum adjudged against them to an officer of the association, who is required to give security for the application of the moneys coming into his hands, since such officer is thus made a trustee for the creditors.[34]

Election of officer. An action by some members of an unincorporated association to restrain certain other members from illegally electing an officer of the association is not an action to determine title to office within the meaning of statutes regulating corporations, which must be brought by the people.[35]

c. Jurisdiction and Venue

By virtue of statutory provisions jurisdiction over an association may be acquired by service of process on a member. It has been held that an action for unpaid dues may be brought in the county wherein the association's treasurer maintains his principal place of business.

Under statutes providing for service of process on one when two or more do business as associates under a common name, jurisdiction over an unincorporated association may be acquired by service on a member thereof.[36]

An action by the treasurer of an association against a member to recover from the latter an unpaid proportionate share of the association's operating expenses is transitory in character, and, where association regulations provide that such money shall be paid to the treasurer, the venue of such action is properly laid in the county wherein the treasurer maintained his place of business as against the contention that it should have been brought where defendant member maintained its own principal place of business.[37]

d. Pleading and Proof

The general rules of pleading and evidence control in actions by and between associations and their members. A plaintiff suing on behalf of an association should aver that he is a member in good standing; and a member suing the association on a contract made with its agents should plead and prove their authority to bind the association

The usual rules of pleading apply in actions by and between associations and their members.[38]

A member bringing a suit on behalf of an association for misapplication of its funds must aver not only that he is a member, but that he is a member in good standing.[39]

A plaintiff, himself a member, suing an unincorporated association on a contract made by an agent thereof is presumed to have known limitations on the agency of those with whom he dealt, and must plead and prove the authority of the agent to create an association liability.[40]

General rules of evidence apply[41]

Accounting

(1) An unincorporated association is not an indispensable complainant in a suit by members for an accounting and to enjoin misapplication of its funds and misuse of its property —Roberts v. Kennedy, 116 A. 253, 13 Del Ch. 133.

(2) A properly designated officer of an unincorporated association may sue members, agents, and subordinate officers for an accounting, and to enjoin misapplication of its funds and misuse of its property, in the names of himself and other members in behalf of all.—Roberts v. Kennedy, supra

33. McDowell v. Joice, 86 N.E. 1012, 149 Ill. 124.

34. Hodgson v. Baldwin, 65 Ill 532.

35. Boston Baseball Assoc v. Brooklyn Baseball Club, 75 N.Y.S 1076, 37 Misc 521.

36. Fitzpatrick v. International Typographical Union of North America, 184 N.W. 17, 149 Minn. 401.

37. Kaupke v Lemoore Canal & Irrigation Co, (Cal.App.) 46 P.(2d) 204.

38. **Bill held sufficient**

A bill by members of subordinate lodges against the grand lodge and officers thereof, seeking relief from reprimand and suspension arising out of an alleged interference of the grand lodge with another independent organization, was held to state a cause of action.—Most Worshipful United Grand Lodge F. & A. M. v. Murphy, 114 A. 876, 139 Md. 225.

Answer held insufficient to state defense to action on an unpaid subscription to life membership in an association.—Philadelphia Motor Speedway Ass'n v. Murphy, 71 Pa. Super. 451—Philadelphia Motor Speedway Ass'n v. Paulson, 69 Pa. Super. 333.

39. United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers v Kennedy, 115 A. 587, 13 Del Ch. 106.

40. Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 308.

Complaint held insufficient

In action against members of unincorporated political party on agreement signed by certain officers, where the agreement annexed showed no intention to bind individual members, and the complaint did not definitely allege that the officers had such authority, it was insufficient.—Hale v. Hirsch, 199 N.Y.S. 514, 205 App.Div. 308.

41. **Agreement not to collect certificate**

A member's agreement not to collect a corporation's certificates of indebtedness, purchased with money contributed to the association, was held not established.—Houghton v Grimes, 135 A. 15, 100 Vt. 99.

§ 38. Foreign Associations

Decisions as to foreign associations ordinarily involve the subject of "actions," which will be considered in the next section. Later cases as to foreign associations involving other subjects than "actions" will be found in the Pocket Parts.

§ 39. —— Actions

a. In general
b. Service of process

a. In General

As respects actions by or against foreign associations, the statutes of the forum, and not the statutes of the state of organization, control.

In some states local statutes permitting an association to bring suits in its own name, as heretofore considered in § 35, have been held to apply to foreign associations.[42]

Statutes authorizing suits against unincorporated societies without making all the members thereof parties defendant, heretofore considered in § 36, are purely local in their operation and are not binding in other states,[43] and, where a statute of the state of the forum provides a method of suing an unincorporated association by its recognized name, the courts of that state are not bound to, although they may through comity, follow the methods of procedure sanctioned by the domicile of the association, prescribing suit in the name of the president or treasurer of the society, to the exclusion of the method provided by the local statute.[44]

The courts of the forum may have jurisdiction over unincorporated associations organized under the laws of another state and doing business in the state of the forum when there has been a compliance with local statutory provisions as to bringing suit against a voluntary association,[45] and a foreign unincorporated association doing business within the state of the forum may be sued as an entity under statutes of the forum permitting suits against unincorporated associations eo nomine or by action against an officer thereof.[46]

b. Service of Process

Jurisdiction over a foreign association may be secured by service of process on a resident agent in compliance with the law of the forum.

Where a foreign association is doing business within the state of the forum, service of process on its agent has been held sufficient,[47] and, where a foreign unincorporated association doing business within the state of the forum has failed to comply with local statutory requirements as to appointment of an agent to receive service of process, the courts will treat it as a quasi corporation for the purposes of process, and will accept as sufficient, service of process on any agent or representative of the association whose character in relation thereto is such that he could reasonably be expected to give notice of the suit to his association.[48]

Service on a resident corporate treasurer of an unincorporated association composed of nonresidents has been held sufficient, under statutes permitting suit against an association through suit against its president or treasurer, to confer jurisdiction on the court of the forum as respects the association of nonresidents.[49]

Fact of membership

Evidence held insufficient to prove membership of a person who deposited money with the intention of taking membership in a colony if his health permitted.—Ferguson v. Llano Del Rio Co., 6 La.App. 534.

Participation in vote for resolution

Complainant's testimony that he did not vote for a particular resolution was held insufficient to overcome the official record and invalidate the resolution required to be unanimously adopted.—Plemenik v. Prickitt, 127 A. 342, 97 N.J.Eq. 340, 36 A.L.R. 1527.

42. N.Y.—Clancy v. Terhune, 1 N.Y. City Ct. 239.
Ohio—King v. Nichols, 2 Ohio Dec. (Reprint) 564, 4 West L.J. 25.
5 C.J. p. 1367 note 73.

43. Edwards v. Warren Linoline, etc., Works, 47 N.E. 502, 168 Mass. 564, 38 L.R.A. 791—5 C.J. p. 1371 note 33.

44. Saunders v. Adams Express Co., 57 A. 899, 71 N.J.Law 270, affirmed 58 A. 1101, 71 N.J.Law 520.

45. MacPherson v. Joint Sec. Corporation, 242 N.Y.S. 722, 137 Misc. 546.

46. U.S.—Gaunt v. Lloyds America of San Antonio, (D.C.Tex.) 11 F.Supp. 787.
N.Y.—MacPherson v. Joint Security Corporation, 242 N.Y.S. 722, 137 Misc. 546.

47. Pacific Typesetting Co. v. International Typographical Union, 216 P. 358, 125 Wash. 273, 32 A.L.R. 767.

48. Brotherhood of Railroad Trainmen v. Agnew, (Miss.) 155 So. 205.

49. Bobe v. Lloyds, (C.C.A.N.Y.) 10 F.(2d) 730, certiorari denied Lloyds v. Bobe, 46 S.Ct. 472, 270 U.S. 663, 70 L.Ed. 778, and distinguishing Flexner v. Farson, 39 S.Ct. 97, 248 U.S. 289, 63 L.Ed. 250. But it was held that a syndicate of nonresident underwriters, each of whom contracted individually, which syndicate the state had made no effort to license, could not be sued by serving a corporation which exercised general supervision over the underwriters on theory that it was their treasurer, under N.Y. Gen. Assoc. L. § 13, permitting suits against associations by suing the treasurer.—U. S. & Cuban Allied Works Engineering Corporation v. Lloyds, (D.C.N.Y.) 291 F. 889.

ASSOCIÉ EN NOM. In French law, in a "société en commandité" an "associé en nom" is one who is liable for the engagements of the undertaking to the whole extent of his property.[1]

ASSOILE. Law French, to absolve, acquit, to set free or to deliver from excommunication.[2]

ASSOILZIE. In Scotch law, to acquit defendant in an action; to find a criminal not guilty.[3]

ASSORT. To separate and distribute into classes.[4]

Assorted cargo. As generally understood, the phrase imports the idea of a miscellaneous cargo, a freight distributed into various sorts, or kinds, or classes, any cargo constituted of different articles, or a fair assortment of different articles.[5]

ASSOUTH. Law French, quit, free, discharged.[6]

ASSUME.

Present Tense

It has been said that "assume" is derived from the same root as the word which designates the form of action based upon a promise,[7] and that its etymological meaning is "to take on."[8] In its primary sense, the word has been defined as meaning to adopt, receive or take up or into;[9] to adopt, to become bound as another is bound, or to put one's self in the place of another as to an obligation or liability,[10] to engage, promise or undertake;[11] to put on, or to take formally and demonstratively;[12] to take to or on one's self, to take upon one's self or to undertake, as to assume a responsibility.[13] In its derived sense, the word has been defined as to take in appearance only;[14] to affect, presume or pretend,[15] to outwardly seem, put on deceitfully or take the semblance of,[16] to pretend to possess;[17] to take fictitiously, as to assume the garb of humility,[18] giving the impress of an act calculated to mislead or baffle inquiry.[19] The term implies knowledge or information.[20] In particular connections, where supported by the context,[21] the word includes the duty of payment,[22] imports a personal liability,[23] and has been said to mean the same as the term "assumes to pay," or "assumes and agrees to pay."[24] "Assume" has been held synonymous with "affect," "appropriate," "arrogate," "claim," "counterfeit," "feign," "postulate," "pretend," "put on," "sham," "take," and "usurp;"[25] and has been contrasted with, or distinguished from, "conceal," "deny," "repudiate,"[26] and also "taking subject to."[27]

1. Black L D.
Reason for the name
This expression arises from the fact that the names of the "associés" so liable figure in the firm name or form part of the "société en nom collectif."—Black L D
2. Black L D.
Spelled also "assoile," "absoile," and "assoilyie"—Black L D
3. Black L D.
4. Webster New Int D
5. Roberts v Opdyke, 40 N Y 259, 262, 271, affirming 24 N.Y Super. 287.
6. Adams Gloss
7. Hopkins v Erskine, 107 A 829, 830, 118 Me. 276
8. Sharon v. Sharon, 16 P 345, 378, 75 Cal 1.
9. Webster New Int. D quoted in Nickell v State, 238 N W 508, 510, 205 Wis 614.
10. Lenz v Chicago & N W R. Co., 86 N W. 607, 609, 111 Wis 193.
11. Black L D, quoted in Alvord v. Banfield, 166 P 549, 553, 85 Or 49, and Petteys v Comer, 54 P 813, 814, 34 Or 36
12. Webster New Int D quoted in Nickell v State, 238 N W 508, 510, 205 Wis 614
13. Iowa—Northwestern Classical Academy v Edmonds, 242 N W 49, 50, 214 Iowa 810—Hakes v Franke, 231 N W 1, 5, 210 Iowa 1169.
Kan—Proctor Trust Co v Neihart, 288 P 574, 577, 130 Kan 693
Me—Hopkins v Erskine, 107 A. 829, 830, 118 Me 276
Mich—International Mill & Timber Co v Kensington Heights Homes Co, 183 N W 793, 794, 215 Mich 178, quoting Standard D
N J—Montclair Sav Bank v Partridge, 11 A 739, 740, 92 N J Eq 51
N Y—Mann v. Ferdinand Munch Brewery, 121 N E 746, 748, 225 N Y 189
Okl—Anicker v Doyle, 202 P 281, 284, 84 Okl. 62, quoting Bouvier L D
Or—Alvord v Banfield, 166 P 549, 552, 85 Or 49.
Pa—Collins v Oliver, 149 A. 647, 649, 299 Pa 372—Bell Telephone Co of Pennsylvania v. Public Service Commission of Pennsylvania, 181 A 73, 75, 119 Pa Super. 292
Wis—Lenz v Chicago & N. W R Co, 86 N W 607, 609, 111 Wis 193
5 C J p 1375 note 5, p 1376 note 16
14. Webster D, quoted in Sharon v Sharon, 16 P 345, 378, 75 Cal 1
15. Iowa—State v. Berlovich, 263 N W 853, 856
Me—Hopkins v Erskine, 107 A. 829, 830, 118 Me 276
Wis—Nickell v State, 238 N.W. 508, 510, 205 Wis 614
5 C J p 1376 note 9.
16. New Standard D. quoted in Nickell v State, 238 N W. 508, 510, 205 Wis 614
17. Cal—Sharon v. Sharon, 16 P. 345, 378, 75 Cal 1
Wis—Nickell v State, 238 N W. 508, 510, 205 Wis 614.
18. Century D, quoted in Jennette v. Coppersmith, 97 S E. 54, 55, 176 N C 82
19. Jennette v. Coppersmith, supra.
20. Proctor Trust Co v Neihart, 288 P 574, 577, 130 Kan 693.
21. Springer v. De Wolf, 62 N E 542, 543, 194 Ill. 218, 88 Am S R. 155, 56 L R A 465—5 C J p 1376 note 17, p 1377 notes 18–31.
22. Lenz v Chicago & N W R Co, 86 N W. 607, 609, 111 Wis 193
23. Schley v Fryer, 2 N.E 280, 100 N Y 71—5 C J. p 1375 note 6 [b].
24. Fla—George E Sebring Co v. Hooker Hammock Farms, 134 So 199, 200, 101 Fla 388
Pa—Collins v Oliver, 149 A. 647, 649, 299 Pa. 372.
5 C.J. p 1375 note 6 [a], [c].
25. Cal—Sharon v Sharon, 16 P. 345, 378, 75 Cal 1.
Wis—Nickell v State, 238 N W 508, 510, 205 Wis 614
26. Sharon v. Sharon, 16 P. 345, 378, 75 Cal. 1
27. Klegman v Moyer, 266 P. 1009, 1012, 91 Cal App 382.

Phrases: "Agrees to assume,"[28] "assume 'a first lien note,'"[29] "assume a lease,"[30] "assume all responsibility for damages,"[31] "assume all risk of accident,"[32] "assume a mortgage,"[33] "assume an aggregate indebtedness,"[34] "assume a note and deed of trust,"[35] "'assume' her equitable proportion of the public debt,"[36] "assume liability,"[37] and "wilfully use and assume the title of Doctor;"[38] and also "assumes all the risks,"[39] "assumes or claims nothing on bal.,"[40] "assumes the payment of the mortgage debt,"[41] "assumes the risk,"[42] and "which the said party of the second part assumes."[43]

Assumed

Accepted or took to itself;[44] claimed;[45] pretended or supposed.[46] In a particular connection, "assumed" ordinarily signifies promise to pay.[47]

Phrases: "Assumed all the lessor's obligations,"[48] "assumed and agreed,"[49] "assumed and promised and agreed to pay,"[50] "assumed by party of the second part,"[51] "assumed in the absence of evidence to the contrary,"[52] "assumed the chattel mortgage and note,"[53] "assumed to be the guardian,"[54] "facts which are assumed,"[55] "risks he assumed,"[56] "transferred to and assumed by,"[57] and "which mortgages are assumed by the purchaser,"[58] and also, as a participial adjective, "assumed capacity,"[59] "assumed name,"[60] and "assumed risk"[61]

28. Iowa.—Northwestern Classical Academy v Edmonds, 242 N.W. 49, 50, 214 Iowa 310

Pa.—Collins v. Oliver, 149 A. 647, 649, 299 Pa. 372

29. Townsend v Milliken, (Tex Civ App) 294 S.W. 938, 940

30. N.Y.—Mann v. Ferdinand Munch Brewery, 121 N.E. 746, 748, 225 N.Y. 189

Ohio.—Cincinnati, etc., R. Co. v Indiana, etc., R. Co., 7 N.E. 139, 152, 44 Ohio St. 287.

31. Corrigan Transit Co v Sanitary Dist. of Chicago, (Ill.) 137 F. 851, 855, 70 C.C.A. 381

32. St. Louis & S. Ry. Co. v Stewart, (Mo.) 187 S.W. 836, 839

33. Fla.—George E. Sebring Co. v Hooker Hammock Farms, 134 So. 199, 200, 101 Fla. 388

Ind.—Hancock v Fleming, 8 N.E. 254, 255, 103 Ind. 533

34. Iowa.—Stout v Folger, 34 Iowa 71, 75, 11 Am.R. 138

Ohio.—Tiffin v Griffith, 77 N.E. 1075, 1076, 74 Ohio St. 219

35. Klegman v Moyer, 266 P. 1009, 1012, 91 Cal.App. 333

"Taking of property subject to encumbrance" distinguished.—Klegman v. Moyer, 266 P. 1009, 1012, 91 Cal.App. 333

36. Commonwealth of Virginia v. State of West Virginia, 35 S.Ct. 795, 808, 238 U.S. 202, 59 L.Ed. 1272

"Undertaking to pay a percentage of principal of public debt" distinguished.—Commonwealth of Virginia v. State of West Virginia, 35 S.Ct. 795, 808, 238 U.S. 202, 59 L.Ed. 1272

37. La.—U-Drive-It Car Co. v. Freidman, (App.) 153 So. 500, 502

Pa.—Bell Telephone Co. of Pennsylvania v. Public Service Commission of Pennsylvania, 119 Pa.Super. 292, 181 A. 73, 75.

"Guarantee" equivalent.—Bell Telephone Co. of Pennsylvania v. Public Service Commission of Pennsylvania, 181 A. 73, 75, 119 Pa.Super. 292

"To contract an obligation" equivalent.—U-Drive-It Car Co. v. Freidman, (La.App.) 153 So. 500, 502

38. Nickell v. State, 238 N.W. 508, 510, 205 Wis. 614

39. Morgan v. Missouri, etc., R. Co., 110 S.W. 978, 983, 50 Tex.Civ.App. 420

40. Anicker v Doyle, 202 P. 281, 284, 84 Okl. 62

41. Hakes v. Franke, 231 N.W. 1, 5, 210 Iowa 1169

"Novation" distinguished.—Hakes v. Franke, 231 N.W. 1, 5, 210 Iowa 1169

42. Southern Pac. Co. v. McCready, (C.C.A.Cal.) 47 F.(2d) 673, 676

"Encounters the risk" distinguished.—Southern Pac. Co. v. McCready, (C.C.A.Cal.) 47 F.(2d) 673, 676—Tinkle v St. Louis & S.F.R. Co., 110 S.W. 1086, 1093, 212 Mo. 445.

43. Montclair Sav. Bank v Partridge, 111 A. 739, 740, 92 N.J.Eq. 51.

44. Cincinnati, S. & C.R. Co. v. Indiana, B. & W. Ry. Co., 7 N.E. 139, 152, 44 Ohio St. 287.

45. Jenkins v. State, 21 N.W. 232, 239, 62 Wis. 49.

46. Webster New Int. D. quoted in Mangan v. Schuylkill County, 116 A. 920, 921, 273 Pa. 310

47. State Bank of Avon v. Sheldon, 223 N.Y.S. 634, 635, 130 Misc. 64

48. Alvord v. Banfield, 166 P. 549, 553, 85 Or. 49

49. Jones v Eddy, 27 P. 190, 191, 90 Cal. 147

50. Lenz v Chicago & N.W.R. Co., 86 N.W. 607, 608, 111 Wis. 193

51. Proctor Trust Co. v. Neihart, 288 P. 574, 577, 130 Kan. 698

52. State v Berlovich, (Iowa) 263 N.W. 853, 856.

53. State Bank of Avon v Sheldon, 223 N.Y.S. 634, 635, 130 Misc. 64.

54. Hopkins v. Erskine, 107 A. 829, 830, 118 Me. 276

55. Jenkins v State, 21 N.W. 232, 239, 62 Wis. 49.—5 C.J. p. 1376 note 15.

56. Willever v. Delaware, L. & W.R. Co., 99 A. 321, 324, 89 N.J.Law 697

"Dangers he undertook to look out for" equivalent.—Willever v. Delaware, L. & W.R. Co., 99 A. 321, 324, 89 N.J.Law 697.

57. International Mill & Timber Co. v Kensington Heights Homes Co., 133 N.W. 793, 794, 215 Mich. 178.

58. Chase v Brandis, 264 N.Y.S. 509, 512, 238 App.Div. 440.

Covenant to pay

"The plain meaning of the term 'assumed' . . . was that the grantee, as a condition of his acquiring the property, covenanted to become primarily liable for the payment of the mortgage indebtedness"—Chase v. Brandis, 264 N.Y.S. 509, 512, 238 App.Div. 440

59. Hopkins v Erskine, 107 A. 829, 830, 118 Me. 276

60. U.S.—In re Richards Bros., (D.C.Mich.) 206 F. 932, 933

N.C.—Befarah v Spell, 96 S.E. 949, 176 N.C. 193—Jennette v Coppersmith, 97 S.E. 54, 55, 176 N.C. 82

Pa.—Mangan v Schuylkill County, 116 A. 920, 921, 273 Pa. 310

Wash.—McCreery v Graham, 209 P. 692, 694, 121 Wash. 466.

5 C.J. p. 1376 note 12

"Fictitious name" equivalent.—Mangan v Schuylkill County, 116 A. 920, 921, 273 Pa. 310

"Real name" contrasted.—Mangan v Schuylkill County, 116 A. 920, 921, 273 Pa. 310.

61. Ind.—City of Linton v. Maddox, 130 N.E. 810, 812, 75 Ind.App. 449.

Ky.—Norfolk & W. Ry. Co. v. Robinette, 78 S.W.(2d) 802, 803, 257 Ky. 553—Adams' Adm'r v Callis & Hughes, 69 S.W.(2d) 711, 712, 253 Ky. 382—Robinette v. Norfolk &

Assuming

Present participle of "assume."[62]

Phrases: "Assuming the master's negligence,"[63] "assuming the payment of the mortgage,"[64] and "assuming the plaintiff was a credible witness."[65]

ASSUMPSIT. Latin, literally, he undertook; he promised; hence a promise or engagement by which one person assumes or undertakes to do some act or to pay something to another.[66]

W. Ry. Co, 60 S W (2d) 344, 249 Ky 93—Burton Const Co v Metcalfe, 172 S W. 698, 702. 162 Ky 366.

N H—Vidal v Town of Errol, 162 A 232, 236, 86 N H. 1.

"Incurred risk" distinguished.—Pittsburgh, C, C & St. L Ry Co v. Hoffman, 107 N E. 315, 317, 57 Ind. App. 481.

62. Webster New Int D.

63. Hunter v. Colfax Consol. Coal Co, 154 N W 1037, 1044, 175 Iowa 245, L R A 1917D 15, Ann Cas 1917E 803.

64. Hancock v. Fleming, 3 N.E. 254, 255, 103 Ind. 533

"Buying subject to the mortgage" distinguished.—Hancock v Fleming, 3 N E 254, 255, 103 Ind. 533.

65. Simmons v. Brooks, 34 N E. 175, 176, 159 Mass. 219.

66. Black L. D See also Assumpsit, Action of § 1.

Assumpsit pro rata—he undertook according to the proportion.—Adams Gloss.

ASSUMPSIT, ACTION OF

This Title includes actions of assumpsit, as distinguished from other forms of action; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom they may be maintained; proceedings therein; review of proceedings; and costs in such actions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Nature and scope of remedy—p 109
2. —— General assumpsit and common counts—p 109
3. —— Special assumpsit—p 110
4. —— Contract essential—p 111
5. Grounds and form of action appropriate thereto—p 112
6. —— Express contracts in general—p 112
7. —— Contracts of record—p 113
8. —— Instruments under seal—p 113
9 —— Implied promises—p 113
10. —— Original or collateral undertaking—p 118
11. —— Determination of title to land—p 118
12 —— Torts—p 119
13 Persons entitled to sue—p 119
14. Persons liable—p 120
15. Conditions precedent—p 120
16. Time to sue and limitations—p 120
17. Defenses—p 120
18. Jurisdiction and venue—p 120
19. Parties—p 121
20. Process—p 121
21. Pleading—p 121
22. —— Declaration—p 121
23. —— Plea or affidavit of defense—p 126
24. —— Replication and subsequent pleadings—p 129
25. —— Amendments—p 129
26. —— Issues, proof, and variance—p 129
27. —— Defects, objections, and aider by verdict or judgment—p 133
28 Evidence—p 133
29. Trial—p 134
30 —— Questions of law and fact—p 134
31. —— Instructions—p 134
32. —— Verdict—p 134
33. Judgment—p 135
34. Review—p 135
35. Costs—p 135
36. Damages—p 135

§ 1. Nature and Scope of Remedy

The action of assumpsit is the common-law remedy for the recovery of money damages for the breach of a simple contract.

The action of assumpsit[1] is an action for the recovery of damages for the nonperformance of an oral or simple written contract.[2] While in its origin and early development, assumpsit was an action ex delicto, a species of the action of trespass on the case, it has become, as discussed in the title Actions § 33, strictly an action ex contractu, a remedy for the enforcement of simple contracts expressed by the parties or implied by the law from their acts.[3]

Assumpsit is divided into two distinct branches, namely, general assumpsit, which is the remedy for implied contracts, and special assumpsit, which is based on an express contract.[4]

§ 2. —— General Assumpsit and Common Counts

General assumpsit, or the common counts, is a remedy of equitable character, although one at law, to enforce implied promises or contracts.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases.[5] In this form of action plaintiff ignores the express undertaking, if any, and grounds his action on an implied contract springing from a consideration received.[6]

General assumpsit embraces what are known as the common counts, so called because they are general forms commonly used in practice for the various classes of claims arising most frequently in assumpsit.[7] These counts have been classified as (1) indebitatus assumpsit, (2) quantum meruit,

1. Assumpsit

(1) "Assumpsit" substantively "is a promise or undertaking, either express or implied, made either orally or in writing not under seal"—Holcomb v. Kentucky Union Co, 90 S W. (2d) 25, 27, 262 Ky. 192—5 C J. p 1380 note 1.

(2) "Express assumpsit," by the common law, is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.—Board of Highway Com'rs v. City of Bloomington, 97 N E 280, 253 Ill. 164—Anderson v Biesman & Carrick Co, (Ill App) 4 N E (2d) 639

(3) "Implied assumpsit" at common law is an undertaking presumed, in law, to have been made by the party from his conduct, although he has not made any express promise. —Board of Highway Com'rs v. City of Bloomington, supra—Anderson v. Biesman & Carrick Co, supra—Willenborg v. Illinois Cent. R. Co., 11 Ill.App 298, 302.

2. Del—Hurlock v. Murphy, 2 Houst 550.
Fla—Hillsborough County v Kensett, 144 So 393, 138 So. 400, 107 Fla 237—Hazen v Cobb, 117 So 853, 96 Fla 151—Borden Lumber Co v South Atlantic Dry Dock Co, 101 So 846, 88 Fla 166
Ill—Bates v Bates Mach Co, 82 N E. 911, 230 Ill. 619, reversing 130 Ill App 568
S C—Welborn v. Dixon, 49 S E 232, 70 S C 108, 3 Ann Cas. 407—Rose v. Beatie, 11 S.C.L. 538.
Tenn—Town of Franklin v Hermitage Engineering Co, 12 Tenn App 434
5 C J p 1380 note 4.
"Assumpsit is a proper remedy for the breach of any simple or unsealed contract, whether verbal or written, express or implied."—Town of Franklin v. Hermitage Engineering Co, supra

3. Fla.—Hillsborough County v Kensett, 144 So 393, 107 Fla 237—Hazen v. Cobb, 117 So 853, 96 Fla 151—Borden Lumber Co v South Atlantic Dry Dock Co, 101 So 846, 88 Fla. 166.
Hawaii—Braham v. Honolulu Amusement Co, 21 Hawaii 583.
5 C J p 1381 note 25
See Eldred v. Colvin, 206 Ill.App 2.

Agreement in lieu of alimony
Action held not to be an action of assumpsit to recover alimony, but an action to recover sums in lieu thereof, which became due and payable under the terms of an agreement between the parties—Newman v. McComb, 71 S E. 624, 112 Va. 408

4. Fla—Hazen v. Cobb, 117 So. 853, 96 Fla 151.
Ill—Board of Highway Com'rs v. City of Bloomington, 97 N E. 280, 253 Ill 164, Ann Cas 1913A 471—Anderson v. Biesman & Carrick Co, (App) 4 N E (2d) 639
Ky—Holcomb v. Kentucky Union Co, 90 S W (2d) 25, 262 Ky. 192
Mich—Kristoffy v Iwanski, 237 N W 33, 255 Mich 25.
S C—Byers v Bostwick, 9 S C L 75
5 C J p 1380 notes 5, 6.

5. Bouvier L. D—5 C J. p. 1380 note 7
Contracts in fact are sometimes implied in law—City of Norfolk v. Norfolk County, 91 S E 820, 120 Va. 356.

6. Ala—Allen v M Mendelsohn & Son, 93 So 416, 207 Ala 537.
Fla—Hazen v. Cobb, 117 So 853, 96 Fla 151
Ky—Holcomb v. Kentucky Union Co, 90 S W (2d) 25, 28, 262 Ky 192
Mich—De Croupet v Frank, 180 N. W. 363, 212 Mich 465.
Or—Smith v Rubel, 13 P (2d) 1078, 140 Or 422, 87 A.L.R. 644.
Pa—Witten v. Stout, 131 A. 360, 284 Pa 410.
Va—City of Norfolk v. Norfolk County, 91 S E 820, 120 Va. 356
5 C J p 1380 note 8
See Garmire v McDonough & Co, 197 Ill.App. 527
"The action of assumpsit predicated on a contract implied in law is not a contract obligation in the true sense, but a quasi contract, constructively imparted by law, as where one has received money or service or property under such circumstances that in equity and good conscience he ought not to retain it, in which case the plaintiff may recover in an action in form ex contractu"—Holcomb v. Kentucky Union Co, supra.

7. Hazen v. Cobb, 117 So 853, 96 Fla 151
Common counts:
For
Goods sold and delivered see Sales § 440 [55 C J. p 954 note 39-p 955 note 69]
Money
Lent see Money Lent § 1 et seq [41 C.J p 2 note 2 et seq].
Paid see Money Paid § 6 et seq [41 C J p 20 note 82 et seq].
Received see Money Received § 1 et seq [41 C J. p 28 note 2 et seq].
Use and occupation see Use and Occupation § 1 et seq [66 C.J. p 81 note 8 et seq].
Work and labor see Work and Labor § 37 et seq [71 C J p 110 note 35 et seq]
On account stated see Account Stated § 58 et seq.
Suit on original consideration where instrument materially altered see Alteration of Instruments § 9.

(3) quantum valebant, and (4) insimul computassent, or account stated.[8] However, two of these counts, quantum meruit and quantum valebant, are practically obsolete, and are regarded as being unnecessary in any case[9] since plaintiff may recover under an indebitatus count, although the amount is not fixed or certain[10] Of the two remaining counts—one, insimul computassent or account stated, is treated specifically in the title Account Stated § 58 et seq. Therefore, in this Title, when the terms "general assumpsit" or "common counts" are employed, they will ordinarily mean indebitatus assumpsit, or the indebitatus counts. Indeed, the three terms, "general assumpsit," "common counts," and "indebitatus assumpsit," have become, for all practical purposes, interchangeable, and are employed by the courts without discrimination.[11]

General assumpsit, although an action at law,[12] is a remedy of equitable character,[13] liberal in form,[14] and greatly favored by the courts[15] Notwithstanding, however, its equitable nature, it is not a substitute for a proceeding in equity to correct mistakes,[16] nor does it supply the purpose of an action on the case for fraud and deceit.[17]

§ 3. —— Special Assumpsit

Special assumpsit is an action of assumpsit which is grounded on the breach of an express promise.

Special assumpsit is an action of assumpsit brought upon an express contract or promise[18] In special assumpsit plaintiff's action is necessarily founded on some actual express undertaking or promise to pay money or to do or to omit doing some particular thing.[19] Whether the considera-

8. Nugent v. Teachout, 35 N W 254, 67 Mich. 571—5 C.J p 1381 notes 10–13

9. Parkersburg & Marietta Sand Co v. Smith, 85 S E 516, 76 W Va. 246—5 C J p 1381 notes 14, 15.

10. Fla—Borden Lumber Co v South Atlantic Dry Dock Co, 101 So. 846, 88 Fla 166
R I—Parker v. Macomber, 24 A 464, 17 R I 674
Tenn—Thompson v. French, 10 Yerger 452
5 C J. p 1381 note 16.

11. **Terms used without discrimination**
(1) "General assumpsit."—Robertson v Business Boosters, 93 So. 272, 210 Ala 460—Town of Albertville v Hooper, 72 So. 258, 196 Ala. 642—Vermont Mut. Ins Co. v. Van Dyke, 165 A 906, 105 Vt. 257.

(2) "Common counts."—International Shoe Co. v. Dodd, (Ala App) 152 So. 260—De Croupet v. Frank, 180 N.W. 363, 212 Mich 465—Parkersburg & Marietta Sand Co v. Smith, 85 S E. 516, 75 W.Va. 246.

(3) "Indebitatus assumpsit."—Garmire v. McDonough & Co, 197 Ill. App. 527—Tripp v. Park St Motor Corp, 118 A. 793, 122 Me. 59—Sanders v. Ragan, 90 S.E. 777, 172 N C 612, L R A 1917B 681.

12. Philpott v. Superior Court in and for Los Angeles County, (Cal.) 36 P.(2d) 635, 640
"The action is in form ex contractu, but the alleged contract being purely fictitious, the right to recover does not depend upon the principles of privity of contract between the plaintiff and the defendant, and no privity is necessary. . . . The right to recover is governed by principles of equity, although the action is at law The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it, and which, ex aequo et bono, belongs to another"—Philpott v. Superior Court in and for Los Angeles County, supra.

13. Ala—McCoy v. Jefferson County, 169 So. 305, 307—Robertson v Business Boosters' Country Club, 93 So 272, 210 Ala 460—Allen v M. Mendelsohn & Son, 93 So 416, 207 Ala. 527, 31 A.L R 1063—Town of Albertville v. Hooper, 72 So 258, 196 Ala. 642
Fla—Brevard County Building & Loan Ass'n v. Sumrall, 133 So. 888, 101 Fla 1189.
Mass—Proprietors of Quincy Canal Co. v. Newcomb, 7 Metc. 276, 39 Am D. 778.
Mich—De Croupet v Frank, 180 N W. 363, 212 Mich 465.
N C—Sanders v. Ragan, 90 S E. 777, 172 N C. 612, L R A 1917B 681.
Ohio.—Bates v Winifrede Coal Co, 4 Ohio N P (N S) 265.
Or.—Smith v. Rubel, 13 P.(2d) 1078, 140 Or. 422, 87 A.L R 644.
Vt—Green Mountain Mut Fire Ins. Co. v. Van Dyke, 165 A. 909, 105 Vt. 264—Vermont Mut. Fire Ins. Co. v. Van Dyke, 165 A. 906, 105 Vt. 257
W.Va.—Davis v. International Harvester Co. of America, 157 S E. 584, 110 W Va 121, 83 A L R. 994—Burke v. Nutter, 91 S.E. 812, 79 W. Va. 743.
5 C J. p 1381 note 18.

14. Ala—Tipton v. Duke, 127 So 524, 221 Ala. 77—Allen v. M. Mendelsohn & Son, 93 So. 416, 207 Ala. 527, 31 A L R. 1063.
Or.—Smith v. Rubel, 13 P (2d) 1078, 140 Or. 422, 87 A L R 644.
5 C.J. p 1381 note 19.

15. Ala.—Tipton v. Duke, 127 So. 524, 221 Ala. 77—Allen v. M Mendelsohn & Son, 93 So 416, 207 Ala. 527, 31 A L R 1063
N H—Sceva v. True, 53 N.H. 627.
Or—Smith v Rubel, 13 P.(2d) 1078, 140 Or 422, 87 A L R 644.
5 C J p 1381 note 20

16. Eidman v. Drewes, 269 Ill App. 264
Accounting and settlement
Assumpsit does not lie to impeach an accounting and settlement for alleged fraud or mistake—Town of Morgantown v. Millner, 107 S E 209, 181 N C. 364.
Fraud in the inducement
A grantee of realty, who by terms of deed assumed mortgages, cannot recover in assumpsit interest fraudulently represented by the grantor-defendant to have been paid, his remedy being reformation in equity. —Eidman v. Drewes, 269 Ill App. 264.
Partnership settlement
(1) Assumpsit does not lie for the purpose of reviewing and revising a partnership settlement—Pfiffer v. Bauer, 122 Ill.App 625.

(2) However, the mere fact that plaintiff was to be compensated by a percentage of the profits does not in itself establish a partnership, and in such a case assumpsit will lie.—Page v Koons, 32 Pa.Co 496

17. Brevard County Building & Loan Ass'n v Sumrall, 133 So. 888, 101 Fla 1189 See Tolman v. Steele, 209 Ill App 554.

18. Fla—Realty Holding Corporation v. Noggle, 121 So 883, 97 Fla. 643—Ackley v. Noggle, 121 So. 883, 97 Fla 643.
Ky—Holcomb v. Kentucky Union Co, 90 S W (2d) 25, 262 Ky. 192.
5 C J. p 1380 note 5.

19. Fla—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.
Ky—Holcomb v. Kentucky Union Co, 90 S W.(2d) 25, 262 Ky. 192.
Tenn—Thompson v. French, 10 Yerg. 452.
5 C J. p 1380 note 6.

tion be executed or executory is immaterial.[20]

It is the only remedy which is strictly grounded on the breach of an express simple contract,[21] and, where such a contract exists open and unexecuted, special assumpsit is, subject to certain exceptions hereinafter discussed in § 9, the only form of assumpsit available.

§ 4. —— Contract Essential

A contract, express or implied, is necessary to support assumpsit.

The action of assumpsit, as the derivation of the word implies,[22] is founded on an undertaking or promise,[23] and the courts have frequently and repeatedly stated that a contract, express or implied, is necessary to support it.[24]

While originally the action of assumpsit was limited in its scope to true contracts,[25] a true contract, in the sense that the parties have entered into an actual agreement, is not now considered essential,[26] as the courts have extended the remedy to include cases where the obligation arises not out of contract, but from the application of equitable principles to the circumstances.[27] In such a case the obligation and the fictitious promise out of which it, in theory, springs are imposed by the law without reference to the intentions of the parties and often against their expressed intentions, for the purpose of allowing the remedy by action of assumpsit.[28]

20. Thompson v French, supra.

21. Hazen v. Cobb, 117 So. 853, 96 Fla. 151.

22. "Assumpsit" is a latin word, meaning "he has undertaken."—Bouvier L. D.

23. Ala.—Ivy Coal, etc., Co v. Long, 36 So 722, 139 Ala. 535
Me.—Tripp v. Park Street Motor Corp., 118 A. 793, 122 Me 59.

24. Ill.—People v. Old Second Nat Bank, 180 N.E. 408, 347 Ill 640—Board of Highway Com'rs v City of Bloomington, 97 N.E. 280, 253 Ill. 164.
Me.—Tripp v. Park Street Motor Corp'n, 118 A. 793, 122 Me 59.
Md.—Houston v. Monumental Radio, 148 A. 536, 158 Md 292
Mo.—Peters v McDonough, 37 S.W. (2d) 530, 327 Mo 487.
Va.—Casey v Walker & Mosby, 95 S.E. 434, 122 Va. 465.
5 C.J. p 1381 note 28.
Implied contracts generally see Contracts § 4 [13 C.J. p 240 note 26—p 245 note 73].

Criticism of broad use of term "implied contracts"

(1) "It is urged with much force that treating the action as in assumpsit, it is based upon a quasi contract, which it is a misnomer to call an implied contract, wanting, as it is, in most of the elements of a true contract. . . . It does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties. But, however unscientific such a classification is, simple implied contracts are usually subdivided into contracts implied in fact and contracts implied in law. The first, it is needless to say, is a true contract, the agreement of the parties being inferred from the circumstances, the latter but a duty imposed by law and treated as a contract for the purposes of the remedy only"—Nevada Co. v. Farnsworth, (C.C.Utah) 89 F. 164, 165.

(2) Excellent discussions of same question—Woods v Ayres, 39 Mich. 345, 33 Am.R. 396—Sceva v. True, 53 N.H. 627—Willard v Doran, 48 Hun (N.Y.) 402—Hertzog v. Hertzog, 29 Pa. 465

Salary due under city ordinance

Under an act for the incorporation of cities, providing that the salaries of all city officers must be fixed by ordinance by the common council, it has been held that a city officer cannot sue in assumpsit, as on an implied contract to recover an alleged balance on salary as such officer there being no such implied contract.—Brasil v. McBride, 69 Ind 244.

25. Mich.—Woods v. Ayres, 39 Mich 345, 33 Am.R. 396
Okl.—Thurlwell v Rabbit, 235 P. 923, 110 Okl 285—Allsman v. Oklahoma City, 93 P 468, 21 Okl 142, 68 L.R.A.(N.S.) 511, 17 Ann.Cas 184.
Va.—City of Norfolk v. Norfolk County, 91 S.E. 820, 120 Va. 356

26. **Contract in fact unnecessary**

"It was not essential that there was in fact a contract in the sense that the parties had entered into an agreement, either express or implied, as to the subject-matter of plaintiff's cause of action All that was necessary was that defendant had received benefits which imposed upon him a duty to the plaintiff, so that upon equitable grounds a promise was implied by law that the defendant should respond to the extent of the benefits received Such a relation between the parties, because of the promise which had not been made in fact, but which the law implied, has been termed a quasi-contract"—Anderson v. Caldwell, 146 S.W. 444, 242 Mo 201, 207.

27. Ala.—Connecticut General Life Ins. Co. v. Smith, 145 So. 651, 226 Ala 142—Allen v M. Mendelsohn & Son, 93 So 416, 207 Ala 537.
Cal.—Philpott v. Superior Court in and for Los Angeles County, 36 P. (2d) 635.
Ill.—Board of Highway Com'rs v. City of Bloomington, 97 N.E. 280, 253 Ill. 164. See Garmire v. McDonough & Co., 197 Ill.App. 527.
Mich.—Woods v. Ayres, 39 Mich. 345, 33 Am.R. 396
N.C.—Town of Morgantown v. Millner, 107 S.E. 209, 181 N.C. 364—Sanders v Ragan, 90 S.E. 777, 172 N.C. 612, L.R.A.1917B 681.
Okl.—Thurlwell v. Rabbit, 235 P. 923, 110 Okl 285.
Vt.—Beauregard v. Orleans Trust Co., 182 A. 182
Va.—City of Norfolk v Norfolk County, 91 S.E. 820, 120 Va. 356—Lawson's Executor v. Lawson, 16 Gratt (57 Va.) 230, 80 Am.D 702
W.Va.—Burke v. Nutter, 91 S.E. 812, 79 W.Va. 743.

Simple or implied by law

Assumpsit may be maintained for the recovery of damages for the breach of nonperformance of a simple contract or on a contract implied by law from the acts and conduct of the parties—Hillsborough County v. Kensett, 144 So. 393, 107 Fla. 237, affirming 138 So. 400, 107 Fla. 237.

28. U.S.—Nevada Co. v. Farnsworth, (C.C.Utah) 89 F. 164.
Ala.—Allen v. M. Mendelsohn & Son, 93 So. 416, 207 Ala. 537.
Cal.—Philpott v. Superior Court in and for Los Angeles County, 36 P. (2d) 635.
Ill.—Board of Highway Com'rs v. City of Bloomington, 97 N.E. 280, 253 Ill. 164.
Ky.—Holcomb v. Kentucky Union Co., 90 S.W.(2d) 25, 262 Ky 193.
Mich.—Woods v Ayres, 39 Mich. 345, 33 Am.R. 396.
N.H.—Sceva v. True, 53 N.H. 627—Bixby v. Moor, 51 N.H. 402.

Consideration. The necessity of consideration, however, is by no means dispensed with,[29] a valuable consideration is absolutely essential to support the action of assumpsit.[30]

An equitable estoppel may enable a party to maintain assumpsit, where in fact, there was no contract.[31]

§ 5. Grounds and Form of Action Appropriate Thereto

The violation of any simple contractual or quasi contractual obligation furnishes a ground for an action of assumpsit.

As previously stated in section 1, the action of assumpsit is an action for the recovery of damages for the nonperformance of an oral or simple written contract; this contract may be express or implied, or for the payment of money, or for the performance or omission of any other act.[32] In the absence of special statutory authorization assumpsit will not lie in any other cases.[33] The form of action for installments already accrued is not affected by the fact that plaintiff has certain articles of defendant which he was required to deliver on termination of the contract.[34]

§ 6. —— Express Contracts in General

Generally only special assumpsit can be grounded on an unexecuted express simple contract.

In general, if an express simple contract still unexecuted on plaintiff's side exists, the only remedy at law touching the subject matter of the contract is special assumpsit. Indebitatus assumpsit will not lie.[35] The several exceptions to this rule are discussed under § 9 infra.

Plaintiff may be held to affirm the contract with all its incidents when he brings assumpsit,[36] and a cause of action under an express contract cannot be so divided that recovery can be had partly on a general count and partly on a special.[37]

Or—Smith v Rubel, 12 P (2d) 1078, 140 Or 422, 87 A L R 644
Pa—Hertzog v Hertzog, 29 Pa. 465.
Vt—Beauregard v. Orleans Trust Co, 132 A. 132—Morse v. Kenney, 89 A 865, 87 Vt. 445.

Fictitious promise

"The legal obligation springs from the promise, in this case, implied by law"—Tripp v Park Street Motor Corporation, 118 A. 793, 794, 122 Me 59

Independent of agreement

"Liability exists from implication of law arising from facts and circumstances independent of agreement or presumed intention, based on the doctrine that one shall not be allowed to enrich himself unjustly at the expense of another, the implied agreement being one defining the duty of the defendant rather than his intention"—Beauregard v Orleans Trust Co, (Vt) 132 A 132, 133

Express declarations immaterial

A promise may be implied by law notwithstanding contrary express declarations—Central Bridge Corp v. Abbott, 4 Cush (Mass) 473.

29. City of Norfolk v Norfolk County, 91 S E 820, 120 Va. 356.

30. Ala—Ivy Coal, etc., Co. v Long, 86 So 722, 139 Ala 535
Va—City of Norfolk v. Norfolk County, 91 S E 820, 120 Va. 356.
5 C J p 1382 note 30.

31. Elliot Hospital v. Turcotte, 105 A 361, 79 N H 110

Estopped to deny promise

If a hospital patient accepted board and treatment, his concealment of an understanding with his employer that the employer would pay, and that he would not be liable therefor, created an estoppel to deny his promise to pay, upon which assumpsit lies—Elliot Hospital v Turcotte, 105 A. 361, 79 N H. 110

32. Ky.—Ellis v Henry, 5 J.J Marsh. 247.
N H—Hill v. Davis, 3 N H 384—Chauncey v. Yeaton, 1 N H 151.
5 C J p 1383 note 36.

Money admittedly due

Where defendant admitted that certain money belonged to plaintiff and promised to pay it, assumpsit was the proper remedy.—M H Hoffman, Inc v Bernstein Film Productions, 183 P. 293, 42 Cal App 12.

Reward or prize

(1) Assumpsit is the ordinary form of action for the recovery of a reward—Madison First Nat Bank v. Hart, 55 Ill. 62—Symmes v. Frazier, 6 Mass 344, 4 Am D 142—Furman v Parke, 21 N J Law 310—Fitch v Snedaker, 38 N Y. 248, 97 Am D 791.

(2) It will also lie for the recovery of a prize—Minton v F G Smith Piano Co, 36 App D C 137, 33 L R A (N S) 305.

33. Kinney v. McNabb, 44 App D C. 340—5 C J. p 1383 note 37.

34. A. P. Carrico & Son v. J. E Duval Printing Co., 121 So 59, 219 Ala. 65.

35. Colo—Alta Investment Co v Worden, 53 P 1047, 25 Colo 215
Fla—Hasen v. Cobb, 117 So. 853, 96 Fla. 151.
Ga—Thomas N Baker Lumber Co v Atlantic Mill & Lumber Co, 102 S E. 135, 24 Ga App 749
Ill—Seigo v. Bloch, 263 Ill App 198—Peyton v. McLennan, 129 Ill App 654.
Ind—Hoagland v. Moore, 2 Blackf. 167—Cranmer v. Graham, 1 Blackf. 406
Iowa—Boyce v. Timpe, 89 N W 83.
Me—Weston v. Davis, 24 Me 374
Md—Waddell v. Phillips, 105 A 771, 133 Md 497—Oldewurtel v. Bevan, 84 A 66, 117 Md 645
Mich—Mitchell v Reolds Farms Co, 256 N W 445, 268 Mich 301—Pierson v. Spaulding, 27 N W. 865, 61 Mich 90
Miss—Drake v. Surget, 36 Miss. 458.
N Y—Mead v. Delgoyer, 16 Wend. 632
N C—Harris v. Buie, 163 S E. 693, 202 N C 634.
Ohio—Ginther v. Schultz, 40 Ohio St 104
R I—Massachusetts Collecting & Rating Agency v. Crudeli, 74 A. 177, 30 R I 193
Vt—Royalton v Royalton, etc, Turnpike Co, 14 Vt 311
W Va—Max Biederman, Inc v. Henderson, 176 S E 433—Minotti v. Young, 127 S E 913, 99 W Va 97—Whitaker-Glessner Co. v. Suburban Brick Co, 104 S E 62, 86 W. Va 621—Standard Fashion Co. v. Lopinsky, 101 S E 152, 84 W.Va. 523—Thomas v. Mott, 88 S.E. 651, 78 W Va 113.
Wis—Simmons v. Putnam, 11 Wis. 201
5 C J. p 1386 note 68.

36. Conn—Shoninger v Peabody, 17 A. 278, 57 Conn 42, 14 Am S R. 88.
Pa—Rutter v. Gable, 1 Watts & S. 108
5 C J p 1386 note 70 [a]

37. Mich—Beecher v. Pettee, 40 Mich. 181
N Y—Hogg v. Larchmont Yacht Club, 134 N Y S 1079.

§ 7. —— Contracts of Record

Assumpsit will not lie on a claim of record.

Where a claim exists only as a matter of record, as a general rule, assumpsit does not lie to recover it[38] Under such circumstances an action of debt is the remedy, as shown in the title Debt § 2 [18 C J p 7 note 87], and in the title Judgments § 851 [34 C J. p 1083 note 37], § 870 [p 1108 note 28] The rule extends to cases where there has been a subsequent express promise to pay the debt[39]

§ 8. —— Instruments under Seal

In the absence of statute, assumpsit will not lie upon a sealed obligation

In the absence of a statute permitting it,[40] assumpsit can never be grounded upon a sealed instrument[41] If, however, there is a subsequent agreement, founded upon some new consideration to pay the debt or perform the contract or if the terms of the sealed instrument are varied by a subsequent simple contract, or by other proceedings constituting an abandonment or waiver of its provisions, assumpsit will lie on the new or modified contract.[42]

Where plaintiff has executed the consideration for defendant's covenant and defendant has failed to perform, it has been held that assumpsit will lie to recover the consideration paid.[43] Also, where promissory notes were given to secure the performance of a covenant, it was held that a merger was not effected, and that assumpsit would lie on the notes.[44] Further, it has been held that, if a contract, under seal, is so executed that it will not authorize a party injured by its breach to sue upon it,[45] if it is not the cause but only the inducement to the action,[46] if it contains no covenant for payment or performance to the party to be benefited, or to some other person for his use,[47] or if the action is against the grantee of a deed poll, although the promise is expressed therein,[48] assumpsit will lie.

Assumpsit will lie against a principal, where the sealed instrument was executed by an agent whose authority was not under seal, since in such a case the principal cannot be bound otherwise than on a simple contract[49] Likewise, it has been held that an instrument having both the form and substance of a bond, with the exception of the seals of the parties, may be declared on in assumpsit as a simple contract[50] It has also been held that an action for work done and materials furnished under contracts, one of which was under seal, where it appeared that there was nothing due on the contract under seal when suit was brought, could properly be treated as in assumpsit.[51]

§ 9. —— Implied Promises

a. In general
b. Promises implied in fact
c. Promises implied by law

a. In General

General assumpsit is the proper form of action when the ground is an implied promise, whether the same be implied in fact or implied by law.

Implied promises are enforceable in general assumpsit only[52] Implied promises which may be the basis of an action of assumpsit are of two

38. Woods v. Pettis, 4 Vt 556—5 C J. p 1383 note 40

39. Andrews v. Montgomery, 19 Johns (N.Y) 162, 10 Am D 213

40. Cracowaner v. Carlton Nat Bank, 124 So. 275, 98 Fla 792—5 C J p 1383 note 47.

41. D.C—Kinney v. McNabb, 44 App D C. 340
Me—Van Buren Light & Power Co v Inhabitants of Van Buren, 109 A 3, 118 Me. 458
Md—Merryman v. Wheeler, 101 A 551, 130 Md 566
5 C J p 1384 note 48
"There is no principle of the common law better settled than that an action of assumpsit will not lie upon a sealed obligation for the payment of money or the performance of duty"—Magruder v. Belt, 7 App D C 303, 311

42. Conroy v Equitable Acc Co, 63 A 356, 27 R I. 467—5 C J p 1384 notes 49-51.

Rescission of contract
(1) Where performance was prevented by defendant, plaintiff may rescind and bring assumpsit—Butts v Huntley, 2 Ill 410
(2) Other examples of assumpsit upon rescission of the sealed contract—5 C J p 1384 note 51 [a]

43. Weaver v. Bentley, 1 Cai. (N.Y.) 47

Payment in consequence of breach of covenant
A person who has been compelled to pay money in consequence of another's breach of covenant may recover the money in an action of assumpsit—Douglas v. Weir, Anth N P (N Y) 179

44. Byrd v Knighton, 7 Mo 443

45. Hitchcock v Lukens, 8 Port (Ala.) 333—5 C J p 1384 note 53

46. Baird v Blaigrove, 1 Wash (1 Va.) 170—5 C J p 1385 note 54

47. Baldwin v Emery, 36 A 994, 89 Me 496—Varney v Bradford, 30 A 115, 86 Me 510

48. Ackley v Noggle, 121 So. 882, 97 Fla 693

49. Md—Horner v Beasley, 65 A. 830, 105 Md 193
N J—Wagoner v Watts, 44 N J Law 126
Pa—Jones v. Horner, 60 Pa. 214
5 C J. p 1385 note 56

50. Cox v. Vogh, 33 Miss 187.
The use of the word "covenants" in a contract for services which, in the absence of such word, would be a simple contract, will not change its character to that of a specialty, notwithstanding the existence of a statute providing that in conveyances of land the use of the word "covenant" should have the same effect as though a seal were affixed, and an action thereon is properly brought in assumpsit and not in covenant— Provident Tel Pub Co v Crahan Engraving Co, 52 A 804, 24 R I 175

51. Meyer v. Frenkil, 77 A 369, 113 Md 36

52. Fla—Hazen v. Cobb, 117 So 853, 96 Fla. 151
Tenn—Thompson v. French, 10 Yerg. 452.

distinct classes, namely, promises implied in fact, and those implied by law purely.[53]

b. Promises Implied in Fact

Assumpsit will lie upon a promise implied in fact arising from the circumstances and intent of the parties

In accordance with the general rules governing contracts implied in fact, as discussed in the title Contracts § 4 [13 C.J. p 241 note 37 et seq], where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract, an action of assumpsit will lie upon the contract which the court will imply, called a contract implied in fact.[54] It differs from a promise implied by law in that the latter is fictitious, created by the law, irrespective of the intentions of the parties, for the purpose of the remedy in assumpsit,[55] whereas the existence of a promise implied in fact depends entirely upon the intention of the parties as manifested.[56] In keeping with this principle, it has been repeatedly held that no promise implied in fact can exist to support an action of assumpsit against the express declarations of the party to be charged, made at the time of the supposed undertaking,[57] unless such party is under legal obligation, paramount to his will, to perform some duty.[58]

c. Promises Implied by Law

(1) In general
(2) Existence of express contract

(1) In General

Applying the doctrine that one shall not be inequitably enriched at another's expense, under certain circumstances the law imposes a quasi contractual obligation, resorting to the fiction of an implied promise in order to make the remedy in general assumpsit available.

Since the remedy of general assumpsit includes obligations arising from the application of equitable principles to the circumstances, as already discussed in sections 2 and 4, and in accordance with the rules governing quasi contracts generally, as discussed in the title Contracts § 6 [13 C.J. p 244 note 62 et seq], assumpsit will lie upon a promise implied by law, which arises to prevent one man from being inequitably enriched at another's expense,[59] and it is essential to the existence of this quasi contractual obligation that defendant has received a benefit from plaintiff, the retention of which is inequitable.[60] The promise is a legal fiction, resorted to in order to promote the ends of justice.[61]

53. Board of Highway Commissioners v City of Bloomington, 97 N E. 280, 253 Ill 164
Classification and distinctions of implied contracts generally see Contracts § 4 [13 C.J. p 240 note 26 et seq].

54. Ill.—Board of Highway Com'rs v. City of Bloomington, 97 N E 280, 253 Ill. 164
Va.—Boyles v Reaser, 92 S E 459, 460, 80 W Va 303
5 C J p 1385 note 63.

Express employment

The common counts is an appropriate remedy for work performed and professional services rendered under an express employment to pay a compensation not determined of a named value which defendant has never paid—Douglas v. Brandt, 121 A. 179, 99 Conn 161.

55. U S—Nevada Co. v Farnsworth, (C C Utah) 59 F. 164
Ill—Board of Highway Com'rs v City of Bloomington, 97 N E 280, 253 Ill. 164.
Ky—Holcomb v Kentucky Union Co., 90 S W (2d) 25, 262 Ky 192
Mich—Woods v Ayres, 39 Mich 345, 33 Am R 396
N H—Sceva v. True, 53 N H 627—Bixby v. Moor, 51 N H 402
Vt—Morse v. Kenney, 87 A 865, 87 Vt. 445.

"In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy, in the other it is a fact legitimately inferred. In one, the intention is disregarded, in the other, it is ascertained and enforced"—Hertzog v. Hertzog, 29 Pa 465, 468

56. N H.—Bixby v. Moor, 51 N.H 402
Pa.—Hertzog v Hertzog, 29 Pa 465.
As to whether such a promise or contract exists it has been well said: "Every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances If such circumstances demand the conclusion of a contract to account for them, a contract is proved, if not, not."—Hertzog v. Hertzog, 29 Pa 465, 469.

57. Lamson Consol Store Service Co v Weil, 15 Daly 498, 8 N Y S 336, 29 N.Y St 307—5 C J p 1385 note 64.

58. Central Bridge Corp. v. Abbott, 4 Cush.(Mass) 473

59. Ill.—Board of Highway Com'rs v. City of Bloomington, 97 N.E 280, 253 Ill. 164.
Ky—Holcomb v. Kentucky Union Co, 90 S W (2d) 25, 262 Ky 192
N C—Town of Morganton v. Millner, 107 S E 209, 181 N C. 264—Armfield Co v Saleeby, 100 S E 611, 178 N C 298—Blackwood v Southern Railway Co, 100 S.E. 610, 178 N C. 342—Sanders v. Ragan, 90 S E 777, 172 N.C 612, L R A 1917B 681.
Or—L B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 122 Or 579
Vt—Beauregard v. Orleans Trust Co, 182 A 182—Morse v. Kenney, 89 A 865, 87 Vt 445.
Contracts implied by law generally see Contracts § 6 [13 C.J. p 244 notes 62–78].

Withholding money

"Assumpsit" is an equitable action maintainable ordinarily in any case involving the withholding of money by defendant to which plaintiff is entitled—Keener v Bank of Gassaway, (W.Va.) 173 S E 884. To same effect International Shoe Co. v. Dodd, 152 So 260, 26 Ala App. 46, certiorari denied 152 So 262, 228 Ala. 106

However, by voluntarily performing a service or expending money for another one cannot make such other his debtor, from whom recovery may be had in assumpsit—Stavrelis v. Zacharias, 106 A 306, 79 N H. 146.

60. Second Nat. Bank v. M Samuel & Sons, (C C A N Y) 12 F (2d) 963, 53 A L R. 49, certiorari denied M. Samuel & Sons v Second Nat. Bank, 47 S Ct. 110, 273 U S. 720, 71 L Ed. 857.

61. Ala.—Allen v. M Mendelsohn & Son, 93 So 416, 207 Ala. 527, 31 A L.R. 1063.
Pa.—Hertzog v. Hertzog, 29 Pa. 465.

Included among the many classes of cases where it has been held that general assumpsit would lie, on the theory of a promise implied by law, are those of money paid by mistake,[62] claims arising from contracts unenforceable as within the statute of frauds,[63] consideration paid on a contract which has been rescinded and where the party rescinding has received nothing of value,[64] consideration obtained through fraud,[65] money paid as taxes under an invalid tax law,[66] sums mistakenly omitted in computing an account, notwithstanding a subsequent account stated between the parties,[67] obligations created by statute[68] although it has been held that in such a case the declaration must specify the statutory facts,[69] and, as shown in subsequent divisions of this section, some cases where there was a valid express promise.

(2) Existence of Express Contract

(a) General rule
(b) Limitations and exceptions

(a) General Rule

Ordinarily, the law will not imply a promise which may be a basis for an action of assumpsit where an express promise exists.

It may be stated as a general rule, subject to certain exceptions, that the law will not imply an undertaking, which may be the basis of an action of assumpsit, where an express promise exists;[70] but this rule is subject to a number of important limitations and exceptions, as pointed out in the following subdivision of this section.

(b) Limitations and Exceptions

aa. Express promise merely declaratory of what law would imply
bb. Express contract fully performed by plaintiff
cc. Performance not in compliance with express contract
dd. Termination of partly performed contract by mutual consent or by wrongful act of defendant
ee Liquidated damages

aa. Express Promise Merely Declaratory of What Law Would Imply

Where the express promise is, in effect, merely declaratory of what the law implies in the absence of a promise, plaintiff may elect either general or special assumpsit.

Where, by its terms, the express promise does not differ from the obligation which the law imposes under such circumstances in the absence of an express promise, plaintiff may, at his election, proceed in general assumpsit on the implied promise.[71]

Va.—City of Norfolk v. Norfolk County, 91 S E 820, 120 Va 356

Law creates promise

Whenever a legal liability exists, the law creates a promise upon which assumpsit will lie—Meriwether v. Bell, 58 S W. 987, 139 Ky. 402, 22 Ky.L. 844.

62. Middletown & Swatara Consolidated Water Co. v. Middletown Borough, 3 Pa Dist. & Co. 587

63. Ind.—Miller v Eldridge, 27 N E. 132, 126 Ind. 461.
Ky.—Holcomb v. Kentucky Union Co., 90 S W.(2d) 25, 262 Ky. 192
Mich.—De Croupet v Frank, 180 N W. 363, 212 Mich 465—Cadman v Markle, 43 N W. 315, 76 Mich. 448, 15 L R A. 707—Fuller v. Rice, 18 N W. 204, 52 Mich 435
Tex.—Raycraft v. Johnston, 93 S W 237, 41 Tex Civ App 466.

64. McCall v. Superior Court in and for Imperial County, (Cal) 36 P (2d) 642—Philpott v. Superior Court in and for Los Angeles County, (Cal.) 36 P (2d) 636.

Limitations of rule

While the common counts are sufficient where the action is merely to procure a return of the consideration paid and the party rescinding has received nothing of value, the rule should not be extended to other classes of rescission—McCall v. Superior Court in and for Imperial County, (Cal) 36 P (2d) 642

65. McCall v Superior Court in and for Imperial County, supra.

Gift made in anticipation of marriage

Money advanced by plaintiff to defendant, to whom he was then engaged to be married, and in expectation of marriage, whether understood and intended as a loan or gift, was recoverable in assumpsit upon the common counts, where defendant thereafter broke the engagement without plaintiff's fault—Burke v. Nutter, 91 S E. 812, 79 W.Va. 743

Goods obtained through letter of credit

A purchaser of goods, furnishing an irrevocable letter of credit, and later inducing the bank wrongfully to refuse payment of a draft drawn against such credit, was liable at law in indebitatus assumpsit—Second Nat Bank v. M Samuel & Sons, (C C A N Y) 12 F (2d) 963, 53 A L R. 49, certiorari denied M. Samuel & Sons v Second Nat Bank, 47 S Ct. 110, 273 U S 730, 71 L Ed 857

66. Ward v First Nat Bank, 142 So 93, 225 Ala 10.

67. Salter v Marsh, 270 P. 735, 94 Cal App. 124

68. Turk v. City of Chicago, 135 N. E. 258, 352 Ill 171—5 C J. p 1385 note 67.

69. Chicago & N E R Co v. Sturgis, 7 N W 213, 44 Mich 538.

70. U S—Wolfe v Prairie Oil & Gas Co, (C C A Okl) 33 F.(2d) 434.
Fla—Brevard County Building & Loan Ass'n v Sumrall, 133 So 888, 101 Fla. 1189—Hazen v. Cobb, 117 So 853, 96 Fla. 151
Ill—Brougham v. Paul, 138 Ill App. 455.
Me—Holden Steam Mill Co. v. Westervelt, 67 Me 446.
Tenn—Thompson v. French, 10 Yerg. 452.
5 C J p 1386 note 69.
Existence of express contract as affecting existence of implied contract generally see Contracts § 5 [13 C.J. p 248 note 54-p 244 note 61].

71. Gibbs v. Bryant, 1 Pick.(Mass.) 118—5 C J. p 1388 note 89.

bb. Express Contract Fully Performed by Plaintiff

Where the contract has been fully performed on plaintiff's part, and nothing remains to be done under it except the payment of money by defendant to plaintiff, which is nothing more than the law would imply against him, general assumpsit will lie notwithstanding the express contract.

Where an express contract has been fully performed on plaintiff's part, and nothing remains to be done under it but the payment of money by defendant, which is nothing more than the law would imply against him, plaintiff may declare specially on the original contract, or generally in indebitatus assumpsit on the promise implied by law, at his election.[72] Under these circumstances defendant will not be permitted to assert that an express contract exists, for the purpose of defeating a recovery on the implied promise.[73] Where the contract is divisible and plaintiff has completely performed with respect to any distinct part, the same considerations are involved.[74]

The ground of the action, where recovery is allowed under this exception to the rule, has been declared to be the promise which the law implies because of the situation of the parties.[75] The existence of an express promise does not make the remedy in general assumpsit available where, in the absence of the express promise, it would not have lain;[76] or, in other words, the facts and cir-

72. U S—Wolfe v. Prairie Oil & Gas Co., (C C A Okl) 82 F (2d) 434—U S. Potash Co v. McNutt, (C C A N M.) 70 F (2d) 126, costs taxed 70 F (2d) 1003—City of Charlotte v. Atlantic Bituluthic Co, (N C) 228 F 456, 143 C C A. 38

Ala—Standard Oil Co v. Myers, 169 So 312, 232 Ala 662—Robinson v Solomon Bros Co, 155 So. 553—Alabama Power Co. v Capps, 147 So 156, 226 Ala 362—Standard Lumber Co v. Hosmer, 142 So 825, 225 Ala. 321—A P Carrico & Son v. J E Duval Printing Co, 121 So. 59, 219 Ala 65—Catts v Phillips, 117 So. 34, 217 Ala 488—McCormick v. Badham, 85 So. 401, 204 Ala 2—Montgomery County v. New Farley Nat Bank, 75 So 918, 200 Ala. 170—Barnes v Marshall 69 So. 436, 193 Ala. 94—Elrod Lumber Co v Moore, 65 So 175, 186 Ala 430—Birmingham & A R. Co v. Maddox & Adams, 46 So 780, 155 Ala. 292

Conn—Voorhees Rubber Mfg Co. v. Cheeney, 95 A. 5, 89 Conn. 711

D C—Campbell v. Dist. of Columbia, 2 MacArth. 533.

Fla—Everglade Lumber Co. v. Nettleton Lumber Co., 149 So 736—Cox v Grose, 122 So 513, 97 Fla. 848, followed in Hilliard v Futch, 127 So 341, 99 Fla. 654—Hazen v. Cobb, 117 So 853, 96 Fla. 151.

Ga—Hudson v. Hudson, 16 S E 349, 90 Ga. 581

Hawaii—Testa v. Kahahawai, 18 Hawaii 209.

Ill.—Union El. R Co v. Nixon, 65 N E 314, 199 Ill. 235, affirming 99 Ill App 502—Fowler v. Deakman, 84 Ill. 130—Seigo v. Bloch, 263 Ill App 198—Hardy v. Dobler, 248 Ill App. 361—Early v. Cassens, 216 Ill. App. 581—American Spirits Mfg. Co v. Western Mfg. & Oil Co, 210 Ill App 454—Miller v. Thomas, 200 Ill App. 125—Levin v. Strempler, 194 Ill App 299—Gibson v. O'Gara Coal Co., 151 Ill App. 424. See Boyd v Schnell, 209 Ill App. 187—Chicago Warehouse & Silo Fixture Co. v Highland Planing Mill & Lumber Co, 206 Ill App 458—McIlvrid v Murphy, 190 Ill App 515

Ind—Shilling v Templeton, 66 Ind 585—Pedan v. Scott, 73 N E. 1099, 35 Ind App 370

Md—Alexander v Capital Paint Co, 111 A 140, 136 Md 658—Conservation Co v Stimpson, 110 A 495, 136 Md 314—Waddell v. Phillips, 105 A 771, 133 Md 497

Mass—Holman v Updike, 94 N E 689, 208 Mass 456—Lovell v Earle, 127 Mass 546—Hall v Wood, 9 Gray 60—Proprietors of Quincy Canal v. Newcomb, 7 Metc. 276, 39 Am D 778—Bates v. Curtis, 21 Pick 247—Baker v. Corey, 19 Pick 496—President, etc, of State Bank v Hurd, 12 Mass 172

Mich—Nierman v White's Motor Parts, 257 N W 751, 269 Mich 603—Taepke v. Globe Finance Corporation, 251 N W. 386, 265 Mich 230—Hurd Lumber & Woodwork Co v Friedman, 241 N W. 825, 258 Mich 64, reversed in part on other grounds 246 N.W. 187, 261 Mich. 245—Siewek v F. Joseph Lamb Co, 241 N.W 807, 257 Mich 670—Sharrer v Nestle, 193 N W. 239, 223 Mich 538—Feist v. Root, 155 N W. 491, 189 Mich. 595—Burt v Greene, 84 N W 317, 7 Detroit Leg N 545, 125 Mich 328—Pierson v. Spaulding, 27 N W. 865, 61 Mich 90.

Miss—Wellford & Withers v. Arnold, 140 So. 220, 162 Miss 786—Arnett v. Evans' Adm'rs, 1 Miss. 471.

Mo—Murphy v. Holliway, 16 S.W. (2d) 107, 223 Mo App 714—Daniels v. McDaniels, (App) 171 S W. 14—Barnett v Swearingen, 77 Mo. App 64—Crump v. Rebstock, 20 Mo App. 37—Fox v. Pullman Palace Car Co, 16 Mo App 122

N Y.—Gillies v. Manhattan Beach Imp. Co., 26 N Y.S. 331, 73 Hun 507, 56 N Y St 206

Or—Sharp v. McCargar, 236 P. 262, 114 Or 435.

R I—Tuller v. Kapstein, 169 A. 120—Morris Plan Co of Rhode Island v. Di Stefano, 165 A 365, 53 R I. 190—Downing v Grady, 157 A. 573, 52 R I. 83—Freese v. Pavloski, 99 A 13, 39 R I 512

Tenn—Sublett v McLin, 10 Humphr. 181—Thompson v. French, 10 Yerg. 452.

Vt—F S. Fuller & Co. v. Morrison, 169 A 7, 106 Vt 17.

Va—Carpenter v Smithey, 83 S.E. 321, 118 Va. 533

W.Va—Wise v. Wise, 132 S E. 369, 100 W Va. 186

Wyo.—E D. Metcalf Co. v. Gilbert, 116 P 1017, 19 Wyo. 331.

5 C J. p 1386 note 71.

Past, completed, or executed consideration

It is generally sufficient to declare upon common indebitatus counts where the claim is merely of a pecuniary nature founded on a past, completed, or executed consideration. —Davis v. International Harvester Co. of America, 157 S E 584, 110 W. Va. 121, 83 A.L R. 994.

Sliding scale of charges

A provision in the contract for a sliding scale of charges dependent upon the number of lines of advertising space used does not take an action for a balance due out of the general rule that when a contract has been fully executed, and nothing remains but the payment of an agreed price, plaintiff may declare specially on the contract or rely on the common counts—Freese v. Pavloski, 99 A. 13, 39 R I 512.

73. Booker v. Wolf, 63 N E 265, 195 Ill 365.

74. U S—Perkins v. Hart, (Ohio) 11 Wheat. 237, 6 L Ed 463

Ala—A. P Carrico & Son v. J. E Duval Printing Co., 121 So. 59, 219 Ala. 65.

75. Hazen v. Cobb, 117 So. 853, 96 Fla 151.

76. Richards v. Richman, 64 A. 238, 242, 5 Pennew (Del.) 553—5 C.J. p 1388 notes 76, 77.

cumstances, aside from the express promise, must be such that the law will raise therefrom an implied promise.[77] There are cases, however, which, while not mentioning this rule, apparently do not follow it, and recovery in general assumpsit has been allowed even though under the facts it is doubtful whether such recovery would have been permitted in the absence of the express promise.[78] Accordingly it has been held, where defendant promised plaintiff that he would repay him his expenses if he took a trip to Europe, which plaintiff did, that indebitatus assumpsit would lie, since plaintiff had performed his part of the contract and nothing remained to be done but that defendant pay over the money.[79] Likewise, where the contract was for defendant to pay and for plaintiff to accept a certain sum of money in satisfaction of a claim existing in plaintiff's favor and against defendant, it was held that there was nothing for plaintiff to perform under the contract and that he might recover under the common counts.[80]

If something other than the payment of money was expressly undertaken by defendant, ordinarily the remedy must be on the express promise, and general assumpsit will not lie.[81] However, where the obligation was to pay tobacco, and at the time and place tobacco passed as currently as money, and judgments for tobacco were rendered, the rule was held inapplicable.[82] It has also been held that where defendant promised to give plaintiff a mortgage to secure a money obligation, a declaration in general assumpsit was unobjectionable.[83] Some decisions go even further, and allow recovery in general assumpsit of money judgments, where the demand was in express terms payable in property other than currency.[84]

cc. Performance Not in Compliance with Express Contract

Where, due to incomplete or inexact performance, the plaintiff is precluded from recovering the contract price, but is in equity and good conscience entitled to compensation, general assumpsit may lie.

In some cases where the express contract has not been performed according to its terms, but the performance of plaintiff, in so far as it went, was of benefit to defendant, the law will allow a recovery in general assumpsit to compensate plaintiff for the partial[85] or inexact[86] performance.

Similarly, plaintiff may recover upon the common counts, if that which has been done by him is beneficial to defendant, and has been accepted and enjoyed, or if his default has been waived.[87] A

Denial of specific performance
Relief that will be denied under a complaint for specific performance, setting forth all the facts, cannot be granted in an action in assumpsit depending upon the same facts—Laugharn v. Bryant, (Cal App.) 43 P (2d) 312

77. Miller v. Wilbur, 56 A. 280, 76 Vt 73—Hersey v Northern Assurance Co, 56 A. 95, 75 Vt 441.

Promise of vendee of original buyer
The common count in assumpsit, which declares on a promise to pay for goods sold and delivered, is not applicable to a case where a seller of goods, who has taken a mortgage back, after having foreclosed, sues the vendee of the original buyer for a balance due, on the vendee's assumption of the debt for the original price, and promise to pay the same, in consideration of which the seller forbore for a time to take possession of the goods—Miller v Wilbur, 56 A 280, 76 Vt 73

78. If insurer's recalling a check from the beneficiary of a life policy as being for too much was improper, the beneficiary could recover on common counts—Atlanta Life Ins. Co v Canady, 143 So 561, 225 Ala 377

79. Devecmon v. Shaw, 14 A. 464, 69 Md 199.

80. Priebe v. Southern Ry. Co, 66 So. 573, 189 Ala. 427—Marsh v Fricke, 56 So. 110, 1 Ala.App. 649.

81. U S—Ogden v. Ruhm, (C C A N Y) 7 F (2d) 1007, certiorari denied Ruhn v. Ogden, 46 S Ct. 26, 269 U S. 571, 70 L Ed. 417.

Mich—Taepke v. Globe Finance Corporation, 251 N W 386, 265 Mich 280—Cook v. Dade, 158 N W 175, 191 Mich 561.

Tenn—Sublett v. McLin, 10 Humphr. 181—Thompson v. French, 10 Yerg 452

5 C J p 1388 note 78.

See Power Equipment Co. v. Gale Installation Co, 210 Ill App. 147.

Use of horses
Where plaintiff claimed that defendant agreed to let him use horses for a time sufficient to pay for care and breaking them, but took them wrongfully or by fraud when he had used them only one week, after caring for them ten weeks, the action was for breach of a contract other than for the payment of money, and could not be sustained under common counts—Cook v Dade, 158 N W 175, 191 Mich 561.

82. Marshall v McPherson, 8 Gill & J (Md) 332

83. Nye v Perry, (R I) 132 A 134, reargument denied 132 A 386

84. Vanderhoef v Parker Bros Co, 255 N W 449, 267 Mich 672—Nugent v Teachout, 35 N.W 254, 67 Mich 571—5 C.J p 1388 note 79.

Promise to exchange chattel sold
Plaintiff was entitled to recover on common counts in assumpsit one hundred and fifty dollars he had paid for a horse, which he returned for replacement with the sellers' consent, and which was not replaced—Taylor v Belton, 154 N W 149, 188 Mich. 302

85. Viles v Barre, etc, Traction, etc, Co, 65 A 104, 79 Vt 311

Recovery in quantum meruit for work and labor for part performance see Work and Labor § 35 [71 C J p 108 notes 3-7]

86. Viles v Barre, etc, Traction, etc, Co, 65 A 104, 79 Vt. 311.

87. Ala—Dickson v. Alabama Machinery & Supply Co, 84 So 416, 17 Ala App 195

Ga—Dolan v. Lifsey, 91 S E 913, 19 Ga App 518

Md—Waddell v. Phillips, 105 A. 771, 133 Md 497

5 C J p 1389 note 83

Contract under seal
In this respect it apparently makes no difference that the express contract was under seal.—Kendrick v. Warren Bros Co, 72 A 401, 110 Md 47

Where the acceptance of the work is unavoidable the rule under consideration has no application—Dees v Self, 51 So. 735, 165 Ala 225.

benefit of that sort, if it is not a perfect compliance with what it is stipulated for, cannot be accepted and utilized without making reasonable compensation.[88] Because something of value has been received and retained by one party to the contract, the law will not leave the other, who has contributed the valuable thing, wholly without remedy on account of imperfect discharge of his duty. It will deny him a remedy on a contract whose terms he has failed to observe, but will give him as much compensation as is fairly merited by his performance as far as it went, to be measured by the reasonable value of the benefit accruing from it.[89]

dd. Termination of Partly Performed Contract by Mutual Consent or by Wrongful Act of Defendant

The common counts will lie where the contract has been mutually rescinded or varied, or where performance is prevented by defendant's wrongful act.

The common counts will lie where a special contract partly performed by plaintiff has been put to an end by mutual consent of the parties, or where the original contract has been modified by a subsequent agreement,[90] and where full performance has been excused or rendered impossible by the act of defendant,[91] but only to the extent of the performance already rendered.[92]

ee. Liquidated Damages

The common counts will lie for a breach of a special contract where the damages are liquidated.

A recovery may also be had on the common counts although there is a special contract, whenever by its breach plaintiff is entitled to recover a sum in numero, or which can be rendered certain by a mere calculation.[93]

§ 10. —— Original or Collateral Undertaking

General assumpsit will not lie upon a collateral promise, the declaration must be special.

If the promise sued on is a collateral undertaking, the declaration must be special; but if an original undertaking, a recovery may in a proper case be had under the common counts.[94]

§ 11. —— Determination of Title to Land

Assumpsit will not lie to determine title to real property.

Assumpsit is not the proper form of action to determine title to land.[95] It has been held, however, that, if the question of title arises incidentally and the rights of the parties require it, it may be passed on ex necessitate rei.[96]

88. Yeats v. Ballentine, 56 Mo 530—Cann v Church of Redeemer, 85 S.W. 994, 111 Mo App. 164.

89. Cann v. Church of Redeemer, supra.

90. Ala—Hutchisson v. Cullum, 23 Ala. 622
Ill—Chicago Great Western R. Co. v American McKenna Process Co., 200 Ill App 166.
Md—Howard v. Wilmington, etc., R. Co., 1 Gill 311.
5 C J p 1388 note 81.

91. Ala—Hall v Gunter, 47 So. 155, 157 Ala 375—Beckwith v. Baldwin, 12 Ala. 720—Hunt v. Test, 8 Ala 713, 42 Am.D. 659.
Cal—Sessions v. Pacific Improvement Co., 206 P. 653, 57 Cal App 1.
Ill—Stoneking v Long, 142 Ill App. 203—Wabash Portland Cement Co v Bracey, 160 Ill App 18—Anglo-Wyoming Oil Fields v. Miller, 117 Ill App 552, affirmed 74 N.E. 821, 216 Ill 272
Me.—Poland v. Thomaston Face & Ornamental Brick Co., 60 A. 795, 100 Me 133
Md—Waddell v. Phillips, 105 A. 771, 133 Md. 497—Oldewurtel v. Bevan, 84 A. 66, 117 Md 645.
Mich—Hemminger v. Western Assur. Co., 54 N.W. 949, 95 Mich. 355.
Pa—Philadelphia v. Tripple, 79 A. 703, 230 Pa 480
5 C J p 1388 note 81.
Quantum meruit for work and labor performed where further performance of contract prevented by act of defendant see Work and Labor § 35 [71 C J. p 104 note 76 et seq]

Building contract

It has been held, however, that recovery for part performance of a building contract cannot be had under the common counts, notwithstanding full performance was prevented by defendant.—Hardy v. Dobler, 248 Ill App. 361.

92. Hazen v. Cobb, 117 So. 853, 96 Fla 151.

93. Gillis v White, 106 So. 166, 214 Ala 22—Sprague v. Morgan, 7 Ala 952

94. Ala—Robinson v. Solomon Bros Co., 155 So. 553.
Ill—Robinson v. Holmes, 75 Ill App 203
5 C J p 1388 notes 88, 89

A contract by the purchaser of property as part of the purchase price to pay certain debts of the seller is not a "collateral" agreement within the rule that the common counts are available only to recover the amount due by the original agreement.—Robinson v. Solomon Bros. Co., (Ala.) 155 So. 553

Form of remedy against indorser

(1) Common counts are not applicable in an action against an indorser of a negotiable promissory note.—Worley v. Johnson, 53 So. 543, 60 Fla 294, 33 L.R.A.(N.S.) 63.

(2) However, an accommodation indorser who waived demand and notice, could be sued as maker and by the use of common counts.—Commercial Finance Corporation v. Gale, 162 A. 899, 105 Vt. 3.

Request of defendant

Where plaintiff, a physician, rendered professional services to a third person, at the request of defendant who promised to "pay all bills," the undertaking was original and not collateral and the common counts would lie—Douglas v Brandt, 121 A. 179, 99 Conn 161.

The word "surety" after a signature on a note is not conclusive as to the nature of the promise so as to prevent recovery on the common counts.—Vaughn v Rugg, 52 Vt. 235

95. Parks v. Morris, etc., Co., 59 S.E. 753, 62 W.Va. 51—5 C.J. p 1389 note 92.

96. Lewis v. Robinson, 10 Watts (Pa.) 338—5 C.J. p 1390 note 93.

§ 12. —— Torts

Where the same transaction constitutes a breach of contract, express or implied, and a tort, the tort may be waived and action in assumpsit maintained.

In accordance with the general rules discussed in the title Actions § 50 a, if there is in fact a contract, and the same act or transaction constitutes both a tort and a breach of contract, the injured party may waive the tort and bring an action in assumpsit [97]

It was originally held that what was a tort in its inception could not by a subsequent transaction be made the foundation of an implied assumpsit,[98] and in general, under the modern rule, a tort cannot be the foundation of an action in assumpsit [99] It has also been stated as a general rule that the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained.[1] On the other hand, in accordance with the rule discussed in the title Actions § 50 b (1), even where there is no express contract, and the cause of action arises out of tort, the tort may be waived and an action of assumpsit brought where the law will imply a promise on the part of the wrongdoer to reimburse the party injured by his act, but the ground of the action in all such cases is the quasi contractual obligation to restore the benefit received.[2]

§ 13. Persons Entitled to Sue

a. In general

b. Third person beneficiary

a. In General

General rules governing the right to maintain an action on a contract apply to actions in assumpsit.

The general rules governing the right to bring an action, as discussed in the titles Parties and Contracts, ordinarily apply to actions in assumpsit. Accordingly assumpsit must be brought in the name of the real party in interest, except in jurisdictions which hold that plaintiff must be privy to the express or implied promise declared upon, in which case the action must be brought in the name of the party who is privy to the promise declared upon.[3] Generally, assumpsit lies only on behalf of one who claims ownership.[4]

According to some authority a person having privity of estate but no privity of contract may maintain assumpsit to enforce the contract,[5] but according to other authority this right is denied [6]

b. Third Person Beneficiary

It is generally held that one for whose benefit a contract has been made may enforce it in assumpsit, notwithstanding he was not a party thereto.

In accordance with the rules governing the right to bring actions on contracts generally, as discussed in the title Contracts § 519 [13 C.J. p 703 note 88 et seq], although, in the absence of a statute to the contrary, the right is denied in some jurisdictions,[7] it is generally held that a third person may bring assumpsit to enforce a contract, made by others for his benefit, if it is manifest from

97. Renner v. Puritan Stationery Co., (Pa Super.) 181 A. 366

98. Jones v. Hoar, 5 Pick (Mass) 285.

99. In Vermont

(1) Assumpsit will not lie for the wrongful detention of personal property, nor for the wrongful conversion of it, unless money or its equivalent has been received therefor — Capital Garage Co. v. Powell, 118 A 383, 96 Vt. 227.

(2) However, where a coowner of hay ratified an unauthorized sale of the hay by another coowner, the buyer of the hay was not a tort-feasor, and such coowner could sue for his interest in the hay in an action of assumpsit for goods sold and delivered — Martin v. Rutledge, 110 A 222, 94 Vt 258.

1. Ill — Ingersoll v Moss, 44 Ill App. 72.

Me. — Prest v. Inhabitants of Town of Farmington, 104 A 531, 117 Me 348, 2 A.L.R 1390

Nev. — Knickerbocker, etc., Silver Min. Co. v. Hall, 3 Nev. 194.

Misfeasance or nonfeasance of public officer

Assumpsit, as on a promise implied by law, is not an appropriate remedy against a public officer for misfeasance or nonfeasance in the execution of his official duties — Sanford School Dist No 2 v Tebbetts, 67 Me 239 — McMillan v. Eastman, 4 Mass 378 — Charleston v. Stacy, 10 Vt. 562 — 5 C J p 1390 note 97

2. Miller v. Murphy, 248 P 934, 78 Cal App 751.

Conversion

A recovery in assumpsit does not require proof of an express promise since the law implies the promise where there has been a conversion — Pacific Fruit Exchange v. F. E Booth Co, 283 P 944, 103 Cal App 54.

In Michigan, by statute, to waive a tort and sue in assumpsit, plaintiff must set up a special count, the common counts being insufficient — Kristoffy v. Iwanski, 237 N W. 33, 255 Mich 25 — Kirker v Larson, 236 N.W 896, 254 Mich 648

3. Ala — Hill v. Nichols, 50 Ala 336. Ark. — Cummins v. James, 4 Ark 616 5 C J. p 1392 note 8.

Person having legal title

"Although it is not in this contract expressly stated to whom the promise is made, yet it appears, that the money, which constituted the consideration for the promise of the defendant's testator, was received by him of the plaintiff, and also, that it was money, the legal title to which was in the plaintiff He, therefore, is to be considered the person to whom the promise is made, and the party to the contract in whom is vested the legal interest in it. Hence it results, that the alleged violation of it is an injury to his legal rights, for which he is the proper person to bring this suit" — Treat v. Stanton, 14 Conn 445, 452

4. Randall v. Hiebee, 37 Mich 40

Mortgagee cannot base an action in assumpsit on his interest as such — Warner v Beebe, 11 N.W. 258, 47 Mich 435.

5. Hurst v. Spotts, 144 A. 91, 294 Pa 231

6. Mayo v. Dearborn, 163 A. 779, 131 Me 455

7. Warren v. Batchelder, 15 N H. 129 — 5 C J. p 1382 notes 31, 32.

the nature or terms of the contract, that the parties intended to treat him as the person primarily interested.[8] It has been said that there must, nevertheless, always be something to connect the party sought to be charged with the transaction upon which the suit is based.[9]

§ 14. Persons Liable

Persons liable to an action of assumpsit have been considered in the preceding sections as the persons against whom the action will lie.

§ 15. Conditions Precedent

It is a condition precedent to bringing assumpsit that the demand be due at the commencement of the action if the claim is one that arises only on demand, such demand is a condition precedent to bringing assumpsit

Assumpsit cannot be maintained on a demand not due at the commencement of the action,[10] but this does not mean that a fixed or liquidated amount must be due.[11]

If the promise is made or the undertaking is implied in consequence of a precedent debt or duty, there is created eo instante the liability to pay or perform, and no demand before action brought is necessary.[12] If, however, by the express or implied terms of the agreement, the obligation to pay or to perform is to arise only upon request, the request becomes a part of the agreement and is a condition precedent to action.[13]

§ 16. Time to Sue and Limitations

An action of assumpsit must be commenced within the time prescribed by statute.

Following the rules governing civil actions generally, an action of assumpsit must be brought before the claim is barred by an applicable statute of limitations.[14]

§ 17. Defenses

General assumpsit is open to defenses of an equitable nature

In some jurisdictions strictly equitable defenses are admissible in actions at law, and in such a jurisdiction an action of assumpsit may be met by a defense which would not be recognized.[15] Even where equitable defenses are not ordinarily admissible in actions at law, it has been laid down that general assumpsit, being an action of an equitable nature, admits of almost every defense to which the defendant is in equity and good conscience entitled.[16]

§ 18. Jurisdiction and Venue

Assumpsit is a transitory action.

Assumpsit is a transitory action,[17] although, in

In Massachusetts

(1) It was formerly held that the action would lie—Brewer v Dyer, 7 Cush 337—Carnegie v. Morrison, 2 Metc 381

(2) It is now, however, well established in this jurisdiction that the beneficiary, as such, has no standing in a law court—Morrill v Lane, 136 Mass 93—Rogers v Union Stone Co, 130 Mass 581, 39 Am R 478—Gamwell v. Pomeroy, 121 Mass 207—Exchange Bank v Rice, 107 Mass 37, 9 Am R 1—Hills v Snell, 104 Mass 173, 6 Am R 216—Ladd v Rogers, 11 Allen 209; Dow v Clark, 7 Gray 198

8. Ala—Maury v Unruh, 126 So 113, 220 Ala 455
Mo—State Bank v. Benoist, 10 Mo. 520
N Y—Schemerhorn v Vanderheyden, 1 Johns 139, 3 Am D 304
S C—Brown v. O'Brien, 30 S C.L. 268, 44 Am D 254
5 C J p 1382 note 33

9. St Clair Foundry v. People's Bank, 186 Ill App 41—5 C J p 1383 note 34.

10. Rainey v Long, 9 Ala. 754—5 C J p 1390 note 1.
Recovery of installments see Actions § 103 b (1)

11. **Court will determine amount**
Under contract between plaintiff, a boom company, and defendant, the latter took possession of plaintiff's boom and operated it for a series of years, the contract providing that under such circumstances defendant should collect the expense of receiving and delivering the logs from other firms and corporations, and should pay to the boom company its proportionate share of the ten per cent earned on the capital stock of the plaintiff The term "proportionate part of said ten per cent" was defined in the contract to be a proportion determined by the proportion which the defendant's logs and other lumber handled in any year bore to the whole number of logs and other lumber so handled It was held that, by virtue of Rev St c 94 § 10, an action of assumpsit would lie to recover the unpaid rental, although the parties had never been able to determine what items should constitute the net cost—Rumford Falls Boom Co. v Rumford Falls Paper Co, 51 A 810, 96 Me. 96.

12. Farmers' & Merchants' Bank v. Bennet, 48 S.E 398, 120 Ga 1012—5 C J p 1391 note 4.

13. Sergo v. Bloch, 268 Ill.App. 198—5 C J p 1391 note 5.

Demand held necessary
Where goods came into possession of defendant without an order or contract to purchase from plaintiff, and without knowing they were furnished by him, plaintiff could not maintain assumpsit therefor, unless he showed a subsequent demand and refusal or conversion—School Sisters of Notre Dame v Kusnitt, 93 A. 928, 125 Md 323, L R A 1916D 792

14. Metropolitan R Co v District of Columbia, (D C) 10 S Ct 19, 132 U S 1, 33 L Ed 231—5 C J p 1391 note 7.

15. Montgomery v. City of Philadelphia, (D C Pa.) 253 F 473—Shaffer v Federal Cement Co, (D C Pa.) 225 F. 893, reversed on other grounds Federal Cement Co v. Shaffer, 229 F. 1021, 143 C.C.A. 662

Action transformed
Under the Pennsylvania practice, an action in assumpsit is open to equitable defenses, and when the real issue is not whether the defendant owes, or how much, but to whom the money owed rightfully belongs, the action is transformed from one in debt to an interpleader proceeding between the respective claimants—Montgomery v City of Philadelphia, (D C Pa.) 253 F 473

16. Traweek v. Hagler, 75 So 152, 199 Ala 664—Town of Albertville v. Hooper, 72 So 258, 196 Ala 642—5 C.J. p 1390 note 99

17. National Coal Co. v Cincinnati Gas, etc., Co., 131 N.W. 580, 168 Mich. 195.

selecting the court in which to sue, due respect to the various statutes relative to venue and jurisdiction must be exercised.[18]

§ 19. Parties

a Plaintiff
b Defendant

a. Plaintiff

All joint creditors or promisees must join as parties plaintiff in assumpsit.

In an action of assumpsit all joint promisees must be joined as parties plaintiff or legal excuse for the nonjoinder alleged Otherwise there will be a fatal variance between the pleadings and the proof under a plea of general issue.[19] In keeping with the rules governing civil actions generally, as discussed in the title Parties § 130 [47 C J p 214 notes 32, 33], a defect relating to nonjoinder of parties plaintiff in an action of assumpsit may be raised by demurrer if the defect appears on the face of the declaration,[20] and if the nonjoinder does not appear on the face of the declaration a demurrer to the evidence will be sustained.[21] An additional method of taking advantage of such nonjoinder is by plea in abatement.[22]

b. Defendant

All joint debtors or promisors should be joined as parties defendant, but the defect is cured by a plea to the merits of the case.

Following the rules governing the joinder of defendants in civil actions generally, as discussed in the title Parties § 33 et seq [47 C.J. p 67 note 84 et seq], in an action of assumpsit, joint promisors should be jointly sued,[23] or a showing made that a promisor not joined is incapable of being sued.[24] In the absence of a statute to the contrary, advantage can be taken of the nonjoinder of defendants, however, only by a plea in abatement.[25]

§ 20. Process

The rules governing process in civil actions generally are applicable to actions of assumpsit.

The rules and statutes governing process in civil actions generally, as discussed in the title Process, ordinarily apply to actions of assumpsit.[26]

§ 21. Pleading

In the absence of statutory modification, the general rules of common-law pleading apply to actions of assumpsit

The rules of pleading applicable to common law actions generally, except as hereinafter pointed out, apply to actions of assumpsit. In the absence of statute, the common-law rules governing the pleadings in actions of assumpsit apply. These rules, however, have been modified by statute in most jurisdictions, and the statutory requirements in the particular jurisdiction must be observed.[27]

§ 22. —— Declaration

a. In general
b Particular allegations
c. Joinder of counts

a. In General

The declaration must contain all the facts necessary to constitute a cause of action in assumpsit

Generally, it may be said that the declaration must contain all that it is necessary for plaintiff to

18. Thayer v. Paddleford, 41 A 447, 69 N H 301—5 C J. p 1391 note 6.

19. Bryant v Wells, 56 N H 152—Pitkin v Roby, 43 N H 138—5 C J p 1392 note 9

May join as plaintiffs

(1) Two incorporated companies may unite to recover a sum of money deposited in a bank in their joint names—New York, etc, Canal Co. v Fulton Bank, 7 Wend (N Y) 412

(2) And several parties for whose benefit a contract is executed in the name of one of them may be joined in a general indebitatus assumpsit count to recover the money advanced by them under such contract to defendant—Cottingham v Owens, 71 Ill 397.

20. Ala—Jones v. Adler, 56 So 577, 175 Ala. 80
N H—Pitkin v. Roby, 43 N H. 138

21. Peters v. McDonough, 37 S W. (2d) 530, 327 Mo 487.

22. Bryant v Wells, 56 N H 152, discrediting White v Brooks, 43 N H 402—Pitkin v Roby, 43 N H 138

23. Robertson v Smith, 18 Johns (N.Y) 459, 9 Am D 227—5 C J p 1392 note 12.

In Alabama, by statute, partners need not be joined as parties defendant—Alabama Power Co v Capps, 147 So 156, 226 Ala. 362

24. Harwood v Roberts, 5 Me 441—5 C J p 1392 note 13

25. David Rutter & Co v McLaughlin, 169 Ill App 430, affirmed 100 N E 509, 257 Ill 199—5 C J p 1393 note 14.

26. **In Pennsylvania**, an action in assumpsit is not properly commenced by the service of a plaintiff's statement in accordance with the provisions of Pract Act (1915) (P L. p 483, Pa St [1920] §§ 17181–17204) It is still necessary to issue a writ of summons—Spang & Co. v Adams Express Co, 75 Pa.Super 107

27. Williams v Notopolos, 103 A 290, 259 Pa. 469

Framing of formal issue

Practice Act May 14, 1915 (P.L p 483) § 2 provides that in actions of assumpsit "the pleadings shall consist of the plaintiff's statement of claim, the defendant's affidavit of defense, and, where a set-off or counterclaim is pleaded, the plaintiff's reply thereto Under this statute, a record containing a statement of claim, an answer in the form of a petition to open up the judgment, and a reply thereto is sufficient, although it was declared by the court that the better practice to have the issue formally stated, and to incorporate the questions to be decided by the jury into the order, so that they may be answered specifically by the jury—Williams v. Notopolos, 103 A. 290, 259 Pa. 469.

prove under the plea of the general issue.[28] Statutory requirements as to the manner of setting out the demand must, of course, be observed,[29] but a complaint, under the codes and practice acts, in the common-law form is generally held sufficient,[30] although according to some authority a complaint in the common counts is insufficient as being inconsistent with the theory of code pleading.[31] Accordingly counts in assumpsit, which contain averments of defendant's undertaking and a legal consideration therefor, the breach of defendant in failing to keep that undertaking, and the injury to plaintiff therefrom, are generally sufficient.[32] Likewise, the common counts are generally not demurrable,[33] nor do extraneous matters in connection with the common counts, which are matters of defense, render them demurrable.[34]

If there is one good count the declaration will be upheld as against a general demurrer.[35]

Averment of jurisdiction. It has been held that in declaring in a court of limited jurisdiction, the consideration as well as the promise must be averred to have been within the jurisdiction of the court.[36]

Matters of aggravation. A declaration is not changed from one in assumpsit to one of tort merely by setting up matters by way of aggravation.[37]

Special agreement In accordance with the rules already set out in section 6, plaintiff, pleading a breach of a simple unexecuted contract, must declare specially.[38] In so declaring specially on an express agreement, the agreement should be set out either in terms or in substance.[39] While it has been held that plaintiff's statement of claim must set forth whether the contract was oral or written,[40] it is not necessary that the contract should be set out in totidem verbis.[41] The statement of the agreement need not be repeated in subsequent

28. Bond v. Priest, 88 S.E. 114, 77 W.Va. 671—5 C.J. p. 1393 note 18

No violation of contractual rights

A demurrer to a special count in a declaration in assumpsit was well taken, where the count showed no violation of any contractual rights of plaintiff.—Bond v. Priest, 88 S.E. 114, 77 W.Va. 671

Sealed instrument

A declaration which shows on its face that it is based upon a sealed instrument is insufficient.—Merryman v. Wheeler, 101 A. 551, 130 Md. 566

29. Christlake v. Cardile, 6 Pa.Dist. & Co. 555—Fearon v. Meads, 3 Pa.Dist. & Co. 243—Mann v. Mann, 3 Pa.Dist. & Co. 586—Boush v. Dreese, 28 Pa.Dist. 83—5 C.J. p. 1393 note 22.

30. Cal.—Smith v. Benson, 15 P.(2d) 910, 127 Cal.App.(Supp.) 289.
Colo.—Silverberg v. Kiesler, 217 P. 70, 74 Colo. 21—Henry Inv. Co. v. Semonian, 90 P. 682, 40 Colo. 269
Mass.—Krupp v. Craig, 142 N.E. 69, 247 Mass. 273.
N.Y.—Maxherman Co. v. Alper, 206 N.Y.S. 233, 210 App.Div. 389, reversing 200 N.Y.S. 311, 120 Misc. 715
5 C.J. p. 1393 note 23.

31. Ohio—Lape v. Linton, 11 Ohio N.P.(N.S.) 503.
Or.—Buchanan v. Beck, 16 P. 422, 15 Or. 563—Bowen v. Emmerson, 3 Or. 452

32. Ballas v. Lake Weir Light & Water Co., 130 So. 421, 100 Fla. 913—Hazen v. Cobb, 117 So. 853, 96 Fla. 151—Borden Lumber Co. v. South Atlantic Dry Dock Co., 101 So. 546, 88 Fla. 166—5 C.J. p. 1393 note 19.

33. Cal.—Smith v. Benson, 15 P.(2d) 910, 127 Cal.App.(Supp.) 789.
Fla.—La Floridienne, J. Buttgenbach & Co., Société Anonyme v. Atlantic Coast Line R. Co., 58 So. 185, 63 Fla. 208, 212
Ill.—Ross v. Knapp, etc., Co., 77 Ill. App. 424.
Va.—City of Norfolk v. Norfolk County, 91 S.E. 820, 120 Va. 356
W.Va.—Baker v. Letzkus, 168 S.E. 806.

In Alabama, where statutory forms for the various common counts exist, counts in substantial compliance with those forms are not demurrable.—Broyles v. Loveman, Joseph & Loeb, 156 So. 842—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Knight Iron & Metal Co. v. Orr, 81 So. 633, 202 Ala. 677—Merrill v. Worthington, 46 So. 477, 155 Ala. 281—Bush v. Moore, 95 So. 62, 19 Ala.App. 88.

34. Bannister v. Victoria Coal & Coke Co., 61 S.E. 338, 63 W.Va. 502—5 C.J. p. 1396 note 53.

Account annexed

Defects appearing in an account annexed do not render the declaration demurrable.—City of Norfolk v. Norfolk County, 91 S.E. 820, 120 Va. 356

Bill of particulars

Disclosures in the bill of particulars or specifications added, not being a part of a count alleging the common counts, do not render the common counts demurrable.—Bean v. Camden Lumber & Fuel Co., 126 A. 285, 124 Me. 102—Minotti v. Young, 127 S.E. 913, 99 W.Va. 97—Robinson v. Bd. of Education of Dist. of Cabin Creek, 72 S.E. 337, 70 W.Va. 66.

Reference to special count

A common count is not rendered demurrable because, by reference to a special count, it appears that the facts do not make a case wherein the common count will lie.—Bannister v. Victoria Coal & Coke Co., 61 S.E. 338, 63 W.Va. 502—5 C.J. p. 1402 note 17 [a].

35. Ballas v. Lake Weir Light & Water Co., 130 So. 421, 100 Fla. 913—5 C.J. p. 1393 note 21

36. Grover v. Gould, 20 Wend.(N.Y.) 227, 32 Am.D. 532—5 C.J. p. 1393 note 24.

37. Straus Land Corporation v. Dupuis, 174 N.W. 129, 207 Mich. 399—5 C.J. p. 1399 note 34.

38. Hazen v. Cobb, 117 So. 853, 96 Fla. 151

39. Franklin Sugar Refining Co. v. David Spruks Co., 3 Pa.Dist. & Co. 87—5 C.J. p. 1396 note 49.

Technical terms

If the contract is set out expressly it is sufficient, although terms contained therein are abbreviated technical trade terms, unintelligible to one not in the trade.—Franklin Sugar Refining Co. v. David Spruks Co., 3 Pa.Dist. & Co. 87

Either form of statement, however, will be sufficient.—White v. Thomas, 39 Ill. 227.

40. Pomeroy's, Inc., v. Lavine, 17 Pa.Dist. & Co. 161—Williamsport Die & Machine Co. v. Steel Shelving & Partition Co., 16 Pa.Dist. & Co. 472—Kochersperger v. Farmers' Bank of Mifflinburg, 16 Pa.Dist. & Co. 263.

41. Stultz v. Locke, 47 Md. 562—Rich v. Boyce, 39 Md. 314—Middlekauff v. Smith, 1 Md. 329—Berry v. Harper, 4 Gill & J.(Md.) 467.

counts if it sufficiently appears in the first count.[42]

Surplusage will not vitiate a count containing sufficient averments.[43] If the essential facts are alleged, the fact that the pleader, in addition, places an erroneous interpretation upon their legal effect will not render the count materially defective.[44]

Tort and waiver thereof. Where the action is in assumpsit, it is proper to allege the facts which constitute a tort, and it is not necessary to allege in terms a waiver of the tort.[45]

b. Particular Allegations

(1) Allegation of promise
(2) Allegation of consideration
(3) Allegation of indebtedness
(4) Allegation of performance by plaintiff
(5) Allegation of demand or request
(6) Allegation of breach
(7) Allegation of damages

(1) Allegation of Promise

(a) Necessity and sufficiency
(b) By and to whom made
(c) Time and place

(a) Necessity and Sufficiency

The declaration in assumpsit must generally contain a direct allegation of a promise by the defendant, although under some statutes an allegation of facts sufficient to imply a promise is sufficient.

The general rule is that the declaration must contain a direct allegation of a promise by defendant. It will not be sufficient to allege facts from which a promise may be inferred,[46] although there is dictum to the contrary.[47] No distinction in this respect exists in common-law pleading between an implied promise and an express promise.[48] In every case, where the agreement is not in writing, the same words of description are employed to describe an implied as well as an express promise.[49] The word "promise," however, is not indispensable, and any word of the same import will suffice.[50]

This doctrine, as far as general assumpsit is concerned, it is said, is the result of the historical evolution of that form of action and the resort to fictions, so usual in the early history of the common law, in order to work substantial justice and meet growing needs without departing from the established forms.[51]

Where plaintiff's claim consists of several items which are set out, it is not necessary to aver separately promises to pay the several amounts, nor is it necessary that the amount averred exactly equal the aggregate of the items.[52]

A limitation on the general rule, recognized by some decisions, is that, where the declaration states in hæc verba an instrument which itself contains a promise or undertaking to pay, or some expression equivalent to a promise to pay, it is not necessary to set forth formally another promise.[53]

The effect of a failure sufficiently to allege a promise, it is held, is to render the declaration bad on special demurrer.[54]

Statutory modifications. In some jurisdictions the necessity of alleging a promise has been dispensed with by statutory provision.[55]

42. Griswold v. National Ins. Co, 8 Cow (N Y) 96

43. Hall v Philadelphia Co, 81 S E 727, 74 W Va 172—5 C.J. p 1393 note 20.

44. Md—Rosenthal v. Heft, 142 A 598, 155 Md 410
W Va—Union Stoppe Co v Wood, 66 S E 702, 66 W Va. 461

45. Ill—Arnold v. Dodson, 112 N E 70, 272 Ill 377, affirming 193 Ill App 62
W.Va.—Hall v. Philadelphia Co, 81 S E. 727, 74 W Va 172
5 C J. p 1399 notes 85, 86.

46. Pa—Wilson v. Sutton, 25 Pa Co 29
W.Va—Danser v. Mallonee, 86 S E 895, 77 W Va 26
5 C J. p 1393 note 25.

47. "While an allegation of a promise to pay has been held not to be absolutely essential where the facts alleged raise an implied promise, yet it is the proper form of pleading."—Clements v Second Nat Bank, 266 Ill App 225, 229

48. Me—Tripp v Park Street Motor Corporation, 118 A 793, 122 Me 59.
W Va.—Danser v Mallonee, 86 S E 895, 77 W Va 26
5 C J p 1394 note 26

49. Va—Payne v Grant, 81 Va 164
W Va—Waid v. Dixon, 46 S E 918, 55 W Va 191

50. Hill v. Wilson, 216 P. 751, 108 Or 631—5 C J p 1394 note 29

51. Wo Sing v. Kwong Chong Wai Co, 16 Hawaii 17.

52. Parkersburg & Marietta Sand Co v. Smith, 85 S E 516, 76 W Va 246, Ann Cas 1918E 449

A special count was held not demurrable for failure to aver a promise to pay respectively two sums demanded, where such promises were comprehended under the general averment of a promise to pay a larger sum than the aggregate of both items—Parkersburg & Marietta Sand Co v. Smith, 85 S E. 516, 76 W.Va. 246

53. Ill—Keyes v. Bunkert, 48 Ill App 259
Tenn—Woodson v. Moody, 4 Humphr 303
5 C J p 1395 note 34

Equivalent to promise

Where the contract is set out in hæc verba and it sufficiently appears from the whole declaration that what is the equivalent of a promise has taken place, a general demurrer is properly overruled—North v. Kizer, 72 Ill 172

54. Massachusetts Mut L. Ins. Co. v. Kellogg, 82 Ill 614.

Promise implied by law

A failure to allege a promise implied by law can be reached only by a special demurrer—Arnold v Dodson, 112 N.E. 70, 272 Ill. 377, affirming 193 Ill App. 62.

55. Swem v. Sharretts, 48 Md 408.

In Alabama statutory forms of common counts exist, and these

It has been held that necessity for alleging a promise has not been done away with by a statute providing that "the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there is omitted something so essential to the action of defense that judgment, according to law and the very right of the cause, cannot be given;"[56] but under an identical statute, the opposite result has been reached.[57]

In the jurisdictions which have adopted the code system of pleading, it is not necessary to allege in terms a promise to pay, but it is sufficient to state facts upon which the law raises an implied promise.[58] Nevertheless, either an express promise should be alleged, or the facts from which it may be implied, otherwise the complaint will be fatally defective.[59]

(b) By and to Whom Made

The promise should be alleged as having been made by the defendant to the plaintiff.

When an allegation of promise is necessary, the declaration should allege that the promise was made by defendant to plaintiff.[60] In the absence of an allegation that the promise was made to plaintiff, it may be presumed that the promise was made to him from whom the consideration proceeded.[61]

(c) Time and Place

The promise should be alleged as having been made at a certain time and place.

Following the general rule of pleading, that the declaration should state the time and place of every material traversable fact, in declaring in assumpsit, the time and place of making the promise should be alleged.[62] The precise time, however, is not material,[63] unless it constitutes a material part of the promise declared on or the description thereof.[64]

Where an express contract to pay interest does not form the basis of the action, an averment of time from which interest is to run is immaterial, since interest is only an incident to the recovery of the principal debt.[65]

(2) Allegation of Consideration

The declaration must state facts sufficient to show a consideration for the promise alleged.

In view of the fact that the action of assumpsit is based upon a contract or upon a consideration received by defendant which would be inequitable for him to retain, the declaration must show the existence of a consideration in support of the alleged promise,[66] except in the case of bills of exchange, promissory notes, and such other contracts as import consideration, in which event the mere statement of the liability is sufficient.[67] In alleging the consideration for a special agreement, the whole of it should be correctly and explicitly stated.[68]

While the mere incorporation of a simple contract in hæc verba in a declaration in assumpsit does not satisfy the requirement that consideration must be distinctly and fully pleaded,[69] it is sufficient to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration of the act, and the entire act, to be done by virtue of such consideration.[70]

Matters collateral merely, or which only go to limit

forms do not contain the allegation of a promise—Murrill v Worthington, 46 So 477, 155 Ala 281

56. Waid v. Dixon, 46 S E 918, 55 W Va. 191, 197.

57. City of Newport News v. Potter, (Va.) 122 F 321, 58 C C A. 483

58. Cal—Smith v. Bentson, 15 P (2d) 910, 127 Cal.App (Supp) 789
Ohio—Lape v. Linton, 11 Ohio N P. (N S.) 503
5 C J p 1395 note 35.

The considerations supporting the rule are that the promise to pay, alleged in assumpsit, was a mere conclusion of law from the facts stated, and as the codes only require the facts to be stated, they are sufficient without setting forth the conclusions of the law arising from those facts—Wilkins v. Stidger, 22 Cal 231, 83 Am D. 64—Kansas City First Nat. Bank v. Landis, 34 Mo. App. 433—5 C J. p 1395 note 37.

59. Smith v. Bentson, 15 P.(2d) 910, 127 Cal App (Supp.) 789—5 C J. p 1395 note 38.

Reason for this rule is that the code does not require such a liberal construction as will read into the pleading a substantive allegation which has been omitted therefrom Substance is just as essential under the code as at the common law—Conrad Nat. Bank v. Great Northern R. Co., 61 P. 1, 24 Mont. 178

60. Ind—Salmon v. Brown, 6 Blackf. 347
Ky—Blackwell v. Irvin, 4 Dana 187.

61. Blackwell v. Irvin, supra.

62. Me—Armstrong v Bangor Mill Supply Corporation, 142 A 734
Pa—Bloser v. Market, 26 Pa Dist & Co 97.
5 C J. p 1396 note 46.

63. Biven v. Bostwick, 11 P 790, 70 Cal. 639—5 C J. p 1396 note 47.

64. Ala.—Lawson v. Townes, 2 Ala. 373.
Conn—Story v. Barrell, 2 Conn 665

Ky.—Bannister v. Weatherford, 7 B. Mon 271
N H—Drown v. Smith, 3 N.H 299

65. **Prior date**
A special count was not bad on demurrer because it averred a promise to pay interest on a sum sued for from a date anterior to the making of the second of two contracts sued on—Parkersburg & Marietta Sand Co. v. Smith, 85 S E 516, 76 W.Va. 246

66. Beall v. Morgantown & Kingwood R Co, (W Va) 182 S E. 295—5 C J. p 1396 notes 54, 55

67. Schwerdt v. Schwerdt, 141 Ill. App 386, affirmed 85 N E. 613, 235 Ill. 386—5 C J. p 1397 note 56.

68. Thurmond v. Guyan Valley Coal Co, 102 S E 221, 85 W.Va 501—5 C J. p 1397 note 58

69. Beall v. Morgantown & Kingwood R. Co, (W Va) 182 S E 295.

70. N H—Favor v. Philbrick, 7 N H. 326
N Y.—Grants v. Clark, 8 Cow. 36.

the future responsibility of the defendants, and do not enter into the consideration of their original undertaking, need not be stated.[71]

Past consideration. In a declaration upon a promise based on a consideration which was previously executed, it is necessary to allege that the act performed or sum paid was performed or paid at the request of defendant,[72] except where a beneficial consideration and a request are necessarily implied from the moral obligation under which defendant was placed.[73]

Raising objection Where the declaration shows no legal and sufficient consideration on the face of it, the defect may be taken advantage of by demurrer,[74] motion in arrest of judgment,[75] or writ of error.[76]

(3) Allegation of Indebtedness

A declaration on the common counts should allege an indebtedness to plaintiff.

If the promise declared on is one for the payment of money, as when the indebitatus counts are employed, it should appear from the declaration that the debt is due and unpaid,[77] together with the facts out of which the indebtedness arises.[78] In declaring, however, on a contract which has been performed and which has resulted in a simple obligation to pay money, it is sufficient to set out the indebtedness without specially stating the contract from which it arises.[79]

(4) Allegation of Performance by Plaintiff

If defendant's promise is dependent on plaintiff's performance, plaintiff must aver performance of his part of the contract or a legal excuse for nonperformance.

If by construction of the contract, defendant's liability is dependent on plaintiff's performance, performance or a legal excuse for nonperformance must be pleaded in the declaration.[80]

If, however, defendant's promise is independent, performance need not be alleged.[81]

(5) Allegation of Demand or Request

If demand is a condition precedent to the action, it must be pleaded explicitly. In other cases the general averment "though often requested, etc," is sufficient.

If a demand is a condition precedent to the action, it must be specially alleged in the declaration. In such case the general averment of "often requested" is not enough.[82] If a special request is necessary, it should be stated with time and place by and to whom it was made, in order that the court may judge whether it was sufficient, but failure to do so, however, can only be taken advantage of by special demurrer.[83]

If the promise is made, or the undertaking is implied, in consequence of a precedent debt or duty, as in the case of the common counts, it is not necessary to allege a special request; the phrase "often requested" is sufficient.[84]

(6) Allegation of Breach

The declaration must contain an allegation of a breach of the promise by the defendant.

It is a further essential to a declaration that a breach of the promise be assigned.[85]

The breach may be assigned in the words of the promise, either affirmatively or negatively,[86] or according to its legal effect;[87] but the allegation must be reasonably certain and definite.[88]

71. Brenan v Shelton, 18 S C L 152

72. City of Redding v Shasta County, 171 P. 806, 36 Cal App 48—5 C J p 1397 note 61.

73. City of Redding v Shasta County, supra—Donegan v Houston, 90 P 1073, 5 Cal App. 626—5 C J. p 1397 note 62

74. Ill—Schwerdt v. Schwerdt, 141 Ill App 386, affirmed 85 N.E 613, 235 Ill 386
N Y—Burnet v Bisco, 4 Johns 235.
5 C J p 1396 note 54.

75. McNulty v Collins, 7 Mo 69—Muldrow v. Tappan, 6 Mo 276

76. Bruner v. Stout, Hard (Ky) 225

77. Brickey v Irwin, 23 N.E. 694, 122 Ind. 51—5 C J p 1398 note 73

78. Conn—Brooks v Holland, 21 Conn 388—Bradley v Davenport, 6 Conn 1
Mass—Brown v. Webber, 6 Cush 560
5 C.J. p 1398 note 74.

79. Hurd Lumber & Woodwork Co v Friedman, 241 N W 825, 258 Mich 64, reversed in part on other grounds 246 N W 187, 261 Mich 245—5 C J. p 1398 note 75.

80. Witten v Stout, 131 A 360, 284 Pa 410—5 C J p 1398 note 77

Value of services rendered

A party seeking the value of services rendered under the terms of an express contract must aver and prove the contract and either its full performance or an excuse for failure to perform in full—Witten v Stout, 131 A. 360, 284 Pa 410

81. Dey v Dox, 9 Wend (N Y) 129, 24 Am D. 137—5 C J. p 1398 note 76

82. Byrd v. Cummins, 3 Ark. 592, 593—5 C J. p 1399 note 78

83. Forrest v. Jones, 7 Ala 493.

84. Ala—Henderson v Howard, 2 Ala 342
Mass—Dyer v. Rich, 1 Meta. 180.
N Y—Thomas v. Roosa, 7 Johns 461.
5 C J p 1399 notes 82, 83

85. Smoot v McCraw, 35 S E 914, 48 W Va. 144—5 C J p 1397 note 65

In Georgia it has been declared that a different rule from that stated in the text prevails In this jurisdiction payment is an affirmative defense to be set up and proved by defendant and accordingly nonpayment need not be alleged in the declaration—Douglas v. Stephens, 108 S E 833, 27 Ga App 485.

86. Hazen v. Cobb, 117 So 853, 96 Fla. 151—5 C J. p 1397 note 66.

87. Hazen v. Cobb, supra—5 C J. p 1397 note 67

88. Fla—Hazen v. Cobb, supra.
Pa—Burnett v Shooster, 10 Pa Dist. & Co. 224
5 C J p 1398 note 68

Allegation held sufficient

A declaration in assumpsit by the

While several breaches of the same contract may be assigned in one count,[89] if there are several counts in the declaration, defendant should be charged with having failed to pay the several sums.[90] If one breach is well assigned, and others are not, defendant cannot demur to the defective averments but may, under the plea of non assumpsit, object on the trial against receiving evidence or assessing damages on any breach other than the one well pleaded.[91]

Both the breach and the promise must be alleged to have been made before the commencement of the action, if alleged to have been made after the declaration will be defective in any stage of the case.[92]

(7) Allegation of Damages

A specific allegation of damages is necessary only when special damages are sought.

Where from the fact of the breach the law would impute certain damages as the natural, necessary, and logical consequence thereof, such damages need not be specifically alleged, but are recoverable under a general claim for damages.[93] Special damages, or damages other than those naturally necessarily, and logically flowing from the breach alleged, must, however, be particularly averred in the declaration.[94]

c. Joinder of Counts

It is permissible to join the common counts with a special count. It is also permissible to join in one count a number or all of the common counts.

In accordance with the rule governing civil actions generally, discussed in the title Pleading § 87 [49 C.J. p 157 note 90–p 158 note 95], a special count in assumpsit may be joined with the common counts,[95] and, although the party seeking to recover on the special count fails altogether, he may recover on the common counts, provided the case is such that, supposing that there had been no special contract, he might still have recovered.[96] A declaration combining in one count several or all of the common counts is proper.[97]

§ 23. —— Plea or Affidavit of Defense

a. Plea
b. Affidavit of defense

a. Plea

(1) In general
(2) The general issue
(3) Special pleas

(1) In General

The general rules of pleading apply to pleas in actions in assumpsit.

The general rules of pleading as discussed in that title, apply to pleas in actions in assumpsit. Accordingly, the plea in assumpsit should be an answer

lessor in a coal mining lease for breach of lessee's covenant properly and diligently to develop the mine property, which sets forth the lessee's covenants to pay the specified royalties, to mine the coal in an effective, workmanlike, and proper manner, to develop the coal diligently and properly, and to produce the coal so the plaintiff might receive an income and royalties therefrom, and alleging that defendant has failed and refused to keep any and all of the covenants, is not subject to demurrer for lack of definiteness in the breaches assigned—Hamrick v. Nutter, 116 S E 75, 93 W Va 115

89. N H—Smith v Boston, etc, R Co, 36 N.H. 458
W Va.—McCray v. Craig, 75 S E 79, 70 W.Va. 735.

90. Ellis v Turner, 5 Munf (19 Va.) 196.

91. Pettibone v. Stevens, 6 Hill (N. Y.) 258.

92. Roud v. Griffith, 11 Serg & R (Pa.) 130—5 C J. p 1398 note 71

93. Andersen v. Thude, (Ariz.) 25 P.(2d) 272

94. N H.—Woodbury v. Jones, 44 N H. 206.

N Y—Vanderslice v. Newton, 4 N Y. 130

95. Cal—Philpott v. Superior Court in and for Los Angeles County, 36 P (2d) 635
Me—Bean v Camden Lumber & Fuel Co, 126 A. 285, 124 Me 102.
Md—Alexander v. Capital Paint Co., 111 A 140, 136 Md 658.
Mich—Kirker v. Larson, 236 N W 896, 254 Mich 648
Miss—Excello Feed Milling Co. v Warren County, 131 So. 270, 159 Miss 167.
Tex—Fant v. Andrews, (Civ App.) 46 S W. 909
Vt—Globe Granite Co. v. Clements, 104 A. 104, 92 Vt. 383.
5 C J. p 1399 note 88.

Assumpsit based on fraud
In Michigan in an action in assumpsit based on fraud, granted by Comp L (1929) § 14007, joinder of common counts with a special count is permissible—Kirker v. Larson, 236 N.W. 896, 254 Mich 648.
Joinder of actions see Actions § 33.

96. Hazen v. Cobb, 117 So. 853, 96 Fla. 151—5 C J p 1400 note 89
See Millett v. McDonald, 200 Ill. App 149.

In Maryland
(1) It has been stated that a plaintiff cannot recover in the same action of assumpsit both on an implied and an express contract, and, having alleged both, the thing to be considered is whether the proof shows the express contract alleged, or whether there is a variance.—Bethlehem Steel Co. v. Dornberg, 108 A 474, 135 Md 121.

(2) In a subsequent case, however, the court said that the common counts may be joined with a declaration on a special contract, although there can be no recovery on the common counts if a special contract is established, since the evidence may fail to show a special contract but still establish services rendered under an agreement for which defendant is bound to pay compensation.—Conservation Co. v. Stimpson, 110 A. 495, 136 Md 314.

In Pennsylvania, apparently plaintiff cannot protect himself by adding the common counts, but must elect.—Lenderman v. Shuster, 18 Pa Dist. & Co. 371.

97. South Atlantic Dry Dock Co. v U S Shipping Board Emergency Fleet Corporation, (D C Fla.) 284 F. 723—5 C J. p 1400 note 90.

to all that portion of plaintiff's declaration which it assumes to answer[98] A plea which professes to answer the whole declaration, but which, in fact, answers only a special count, is bad[99]

Severance in plea. Defendants sued on a joint promise should not sever in their pleas,[1] except that a defendant may file a several special plea which goes to his personal discharge, such as infancy, bankruptcy, ne unques executor, and the like;[2] and if one defendant has matter of defense personal to himself, which matter is admissible under the general issue, he may avail himself of that defense, under the general issue, without severance.[3]

Demurrer. To a count assigning several breaches, defendant cannot demur to one branch and plead to others. He must plead or demur to the whole count.[4]

(2) The General Issue

The plea of the general issue in assumpsit is non assumpsit.

The plea of non assumpsit is, at common law, the general issue in assumpsit.[5] However, by some statutes the plea of nunquam indebitatus has been substituted for non assumpsit as a general issue to the common counts,[6] and in one jurisdiction the statutory general issue is "an averment that the allegations of the complaint are untrue."[7]

Pleas of nil debet,[8] non est factum,[9] or not guilty,[10] are not appropriate as pleas of the general issue in assumpsit. Nevertheless, it has been held that the plea of not guilty, while irregular, does present a substantial issue, and must be attacked by a proper and timely objection.[11]

Admissions by plea of general issue. Following the rules relating to admissions by pleas of the general issue generally, discussed in the title Pleading § 156 [49 C.J. p 280 note 26-p 281 note 36], it is generally held that a plea of the general issue admits plaintiff's capacity to sue,[12] and, under most circumstances, the character in which he sues,[13] although not always.[14]

As pointed out in § 26, infra, a plea of the general issue in assumpsit puts in issue every material traversable fact in the declaration, and in addition, a number of affirmative defenses may be shown thereunder.

(3) Special Pleas

Affirmative defenses may be pleaded specially, notwithstanding their availability under the general issue. A few affirmative defenses must be pleaded specially.

While as a general rule a special plea which sets up matter which is in effect a denial of the truth of the declaration may be considered bad as amounting to the general issue,[15] defendant is at liberty to plead specially any matter which admits that, in fact, a contract was made as alleged in the declaration, but shows that it was void or voidable for any

98. Everroad v. Schwartzkopf, 23 N. E. 969, 123 Ind. 35—5 C.J. p 1402 note 18

If a plea is patently defective, a demurrer thereto is properly sustained—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473

99. Hartzell v Cincinnati, H & D Ry. Co., 218 Ill App 553—5 C.J. p 1403 note 19.

1. Ward v. Johnson, 13 Mass. 148—Meagher v Bachelder, 6 Mass. 444—5 C.J. p 1404 note 48.

2. Moore v. Knowles, 65 Me. 493—Cutts v. Gordon, 13 Me 474, 29 Am.D. 520—5 C.J. p 1404 note 49.

3. Peebles v. Rand, 43 N.H. 337.

4. Pettibone v. Stevens, 6 Hill (N. Y.) 258—5 C.J. p 1402 note 17.

5. U S—Koltonski v Electric Goods Mfg Co., (Me.) 182 F. 208, 105 C. C.A 48.
W.Va—State v. Harmon, 15 W.Va. 115.
5 C.J. p 1402 note 21.

6. Davis v. Turner, (Fla.) 160 So. 376—Logan v. Board of Public Instruction for Polk County, (Fla.) 158 So. 720—Everglade Lumber Co. v. Nettleton Lumber Co., (Fla.) 149 So 736—5 C.J. p 1403 note 31.

7. Hill v. Hyde, 121 So. 510, 219 Ala. 155.

8. D.C—District of Columbia v. Washington, etc., R. Co., 1 Mackey 361.
Ill—Koch v. Merk, 48 Ill App 26
Ky—Conduct v. Stevens, 1 T B Mon 73.
Wis.—Crane Bros. Mfg Co. v. Morse, 5 N.W. 815, 49 Wis. 368.

9. Colo—Heaton v. Myers, 4 Colo. 59.
Ill—Windsor v Hallett, 97 Ill. 204.
5 C.J. p 1403 note 26.

10. Hill v. Hyde, 121 So. 510, 219 Ala. 155—5 C.J. p 1403 note 27.

11. Hill v. Hyde, 121 So 510, 219 Ala. 155—Espalla v. Richard, 10 So. 137, 94 Ala. 159—5 C.J. p 1403 note 28.

12. Swift River, etc., Impr Co. v Brown, 77 Me 40—Penobscot R Co. v. Mayo, 60 Me. 306—5 C.J. p 1403 note 22

13. U S—Champlin v. Tilley, (C.C.) 5 F Cas.No 2,586, 1 Brunn Coll.Cas 71, 3 Day (Conn) 303
Ala.—Espalla v. Richard, 10 So. 137, 94 Ala. 159—Strickland v. Burns, 14 Ala. 511.
Ohio—Cincinnati M. E Church v. Wood, 5 Ohio 283, Wright 12.

14. Md—Winchester v Union Bank, 2 Gill & J 73, 19 Am D. 253
N Y—Best v Strong, 2 Wend. 319, 20 Am D. 607

15. Dudley v. Carter Red Ash Collieries Co, 100 S E 466, 125 Va. 701—5 C.J. p 1403 note 32.
In Alabama
(1) When defendant's plea is in effect a plea of general issue, a demurrer on the ground that "it is no more than the general issue," is properly overruled—Trawick v. Hagler, 75 So. 152, 199 Ala. 664.
(2) The proper method of taking advantage of such a plea is by motion to strike—Denson v Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.
(3) However, if the general issue is pleaded, and in addition thereto a number of special pleas, amounting to the general issue, are filed, the lower court will not be put in error for sustaining demurrers to the latter—Denson v. Kirkpatrick Drilling Co., supra.

cause,[16] such as coverture,[17] duress,[18] illegality or want of consideration,[19] infancy,[20] or insanity,[21] notwithstanding the defense might have been available under the general issue.

Likewise, matters in discharge of the action, such as accord and satisfaction,[22] foreign attachment,[23] former recovery for the same cause of action,[24] payment,[25] performance,[26] or release,[27] may, at defendant's election, be pleaded specially.

It has been held permissible to traverse plaintiff's allegation of performance of a condition precedent by a special denial, although this under the general rule of pleading would be clearly demurrable as amounting to the general issue.[28]

It has also been held that a court will not be put in error for refusing to give leave to file special pleas, where the matter contained therein could be shown under the general issue, already pleaded.[29]

As illustrated in § 26 infra, some matters, such as tender, set-off, recoupment, discharge in bankruptcy, statute of limitations, etc., which cannot be shown under the general issue must be specially pleaded. As shown in the title Frauds, Statute of, § 265 [27 C.J. p. 369 note 13 et seq.] the statute of frauds may, and according to some authorities must, be specially pleaded.

b. Affidavit of Defense

Where a statute requires an affidavit of defense in place of a plea, the affidavit must be in compliance with the statutory requirements.

An affidavit of defense, in jurisdictions where such an affidavit is required, must be direct and certain, and the allegations must comply, at least substantially, with the provisions of the statute prescribing what shall be stated.[30]

However, judgment will not be rendered for plaintiff, notwithstanding the affidavit of defense is insufficient on the merits, where defendant filed in connection therewith a counterclaim in excess of plaintiff's claim, which plaintiff did not answer.[31] Likewise, judgment will not be rendered for plaintiff because of the insufficiency of the affidavit, if the statement of plaintiff's claim is not in the concise form required by statute.[32]

A statutory requirement that in assumpsit on a contract for the payment of money there shall be an inquiry of damages, unless defendant files with his plea an affidavit that plaintiff is not entitled to recover anything on his claim, etc., may be waived by plaintiff,[33] or he may by his conduct be estopped from setting up the statute.[34] It has also been stated that failure to object to an unsigned affidavit of defense waives the point.[35]

16. Sublett v. McLin, 10 Humphr (Tenn.) 181—5 C.J. p. 1403 note 33.

17. Md.—Barr v. Perry, 3 Gill 313
Tenn.—Sublett v. McLin, 10 Humphr 181.

18. Sublett v. McLin, supra.

19. U.S.—Dibble v. Duncan, (C.C. Ohio) 7 F.Cas.No.3,880, 2 McLean 553
Tenn.—Sublett v. McLin, 10 Humphr 181
5 C.J. p. 1403 note 36.

20. U.S.—Dibble v. Duncan, (C.C. Ohio) 7 F.Cas.No.3,880, 2 McLean 553
Md.—Barr v. Perry, 3 Gill 313
Tenn.—Sublett v. McLin, 10 Humphr 181.

21. Mass.—Mitchell v. Kingman, 5 Pick. 431
Tenn.—Sublett v. McLin, 10 Humphr 181.

22. U.S.—Dibble v. Duncan, (C.C. Ohio) 7 F.Cas.No.3,880, 2 McLean 553
Tenn.—Sublett v. McLin, 10 Humphr 181.
W.Va.—Wellsburg First Nat. Bank v. Kimberlands, 16 W.Va. 555
Pleading accord and satisfaction specially where it may be shown under the general issue generally see Accord and Satisfaction § 47 c (1) note 4.

23. Dibble v. Duncan, (C.C. Ohio) 7 F.Cas.No.3,880, 2 McLean 553

24. U.S.—New York Mut. L. Ins. Co. v. Harris, (Md.) 97 U.S. 331, 24 L. Ed. 959
N.Y.—Young v. Rummell, 2 Hill 478, 38 Am.D. 594.
5 C.J. p. 1403 note 41.

25. Surface v. Chicago, M. & St. P. Ry. Co., 191 Ill.App. 261—5 C.J. p. 1403 note 42

26. Sublett v. McLin, 10 Humphr. (Tenn.) 181

27. U.S.—Dibble v. Duncan, (C.C. Ohio) 7 F.Cas.No.3,880, 2 McLean 553
Md.—Barr v. Perry, 3 Gill 313
Tenn.—Sublett v. McLin, 10 Humphr. 181.

28. Dewees v. Manhattan Ins. Co., 34 N.J. Law 244

29. Richmond Union Passenger R. Co. v. New York Seabeach R. Co., 28 S.E. 573, 95 Va. 336

30. **Affidavits held sufficient.**—Imhoff v. Fretz, 24 Pa.Dist. 98—Freeman v. Refowich, 20 Pa.Co. 17—Levitin v. Norfolk Nat. Bank of Commerce & Trusts, (Va.) 177 S.E. 205—5 C.J. p. 1404 note 52 [a].

Affidavits held insufficient.—Northwestern Consol. Milling Co. v. Young, 104 A. 550, 261 Pa. 177—Kann v. Kann, 100 A. 582, 256 Pa. 103—McGowan v. Boney, 74 Pa.Super. 123—Cohen v. Smith, 10 Pa.Dist. & Co. 81—Chandler v. Fleming, 9 Pa.Dist. & Co. 739—McGuire v. Lawton, 9 Pa.Dist. & Co. 730—Franklin Paper Co. v. Southern Cornice Works, 25 Pa.Dist. 576—5 C.J. p. 1404 note 52 [b].

31. Farmers' & Breeders' Mut. Fund, etc., Co. v. Elliott, 26 Pa.Dist. 436.

32. McCleary v. Wilkins, 44 Pa.Co. 613—Freeman v. Refowich, 20 Pa.Co. 17—5 C.J. p. 1404 note 53.

Contract or tort origin of claim.

(1) When the action of assumpsit is founded solely on waiver of tort, no affidavit of defense is required—Webber v. Federal Reserve Bank of Philadelphia, 16 Pa.Dist. & Co. 11—Zimmerman v. Drake, 17 Pa.Dist. 754—Johnson v. Wells, 17 Pa.Dist. 725—5 C.J. p. 1404 note 53 [a].

(2) However, if the act or circumstance amounts to a breach of a contract existing between the parties, the fact that it also constitutes a tort is immaterial, and an affidavit of defense is necessary—Ridgway Grain Co. v. Pennsylvania R. Co., 17 Pa.Dist. 967.

33. Gehl v. Baker, 92 S.E. 852, 121 Va. 23—Jackson v. Dotson, 65 S.E. 484, 110 Va. 46.

34. Gehl v. Baker, 92 S.E. 852, 121 Va. 23.

35. American Oil Co. v. Walser, 159 A. 339, 104 Pa.Super. 39.

§ 24. —— Replication and Subsequent Pleadings

The general rules of pleading ordinarily apply to replications and subsequent pleadings in actions in assumpsit.

Following the general rules of pleading, it has been held that the cause should not be tried without a replication to a good special plea, since otherwise issue is not joined.[36] As in other actions, the replication must answer as much of the plea as it professes to answer,[37] and where there are several pleas it must indicate with sufficient certainty the plea or pleas to which it is directed.[38] If a conclusion to the country is proper, it must deny in express words the allegations of the plea.[39] It is bad if it contains a departure from the declaration,[40] or is double.[41] Stating the cause of action in the replication is not permissible.[42]

Rejoinder. As is the rule generally, a rejoinder in assumpsit must answer material allegations of the replication by stating material facts.[43] It must not contain a departure from the plea,[44] nor be double.[45]

§ 25. —— Amendments

Amendment of pleadings in assumpsit is allowable as in other forms of action.

In keeping with the rules relating to amendment of pleadings generally, discussed in the title Pleading §§ 275–322 [49 C.J. p 466 note 88 et seq], the declaration may be amended so as to increase the amount of damages claimed,[46] to change the alleged date of the promise,[47] by adding averments necessary to show a cause of action against both defendants,[48] by adding or striking out a party,[49] by the annexing of a bill of particulars,[50] or by the addition of a count,[51] provided no new cause of action is thereby introduced.[52]

An amendment changing the form of the action cannot be made, however,[53] in the absence of a statute permitting it.[54]

Amendment of plea. Defendant may also be permitted to amend or substitute his plea.[55]

§ 26. —— Issues, Proof, and Variance

a. In general
b. Matters admissible under pleadings
c. Variance

a. In General

Proof may be made of issues raised by the pleadings, and of such issues only.

Following the general rules of pleading, the pleadings in assumpsit must put in issue the fact concerning which proof is offered, or it will be rejected.[56]

36. Miles v Rose, (Super Ark Terr.) 17 F Cas No 9,544a, Hempst. 37—5 C J p 1404 note 55

Pleadings held sufficient

Under a statute providing that in actions of assumpsit the pleadings shall consist of plaintiff's statement of claim, defendant's affidavit of defense, and, where a set-off or counterclaim is pleaded, plaintiff's reply thereto, a record showing a statement of claim and answer by defendant in the form of a petition to open a judgment and a reply thereto by plaintiff was sufficient.—Williams v. Notopolos, 103 A 290, 259 Pa 469

37. Satterlee v Sterling, 8 Cow (N Y) 233—Bradner v. Demick, 20 Johns (N Y) 404—5 C J p 1404 note 57

38. Carey v Hanchet, 1 Cow (N Y.) 154

39. Austin v Walker, 26 N H. 456—5 C J. p 1405 note 58.

40. Allen v Mayson, 5 S C.L. 207—5 C J p 1405 note 59.

41. Wadleigh v. Pillsbury, 14 N H. 373—5 C J. p 1405 note 60.

42. Hatfield v. Thomas Iron Co, 57 A. 950, 208 Pa. 478—5 C.J. p 1405 note 61.

43. Satterlee v. Sterling, 8 Cow. (N. Y) 233—5 C J. p 1405 note 62.

44. Sterns v. Patterson, 14 Johns (N Y) 132.

45. Satterlee v. Sterling, 8 Cow (N Y.) 233.

46. Ala.—McCreary v. Brown, 50 So 402, 162 Ala. 442.
Ind.—Billingsley v. Dean, 11 Ind 331 5 C J p 1400 note 91.

47. Bailey v. Musgrave, 2 Serg. & R (Pa.) 219.

48. Quinter v. Quinter, 26 Pa.Dist 716

49. Quinter v. Quinter, supra—5 C J. p 1392 note 8 [a].

50. Tarbell v. Dickinson, 3 Cush (Mass.) 345.

51. Bean v. Camden Lumber & Fuel Co, 126 A. 285, 124 Me. 102—5 C J. p 1400 note 92.

A declaration, counting upon a several promise may be amended by counts declaring upon a joint promise.—Carter v. Hosford, 48 Vt. 433.

New counts are not to be regarded as for a new cause of action, when plaintiff, in all the counts, attempts to assert rights and enforce claims growing out of the same transaction, act, agreement, or contract.—Smith v. Palmer, 6 Cush (Mass.) 513.

52. Thompson v. Phelan, 22 N.H 339—5 C J. p 1400 note 93.

53. City of Chicago v. Chicago Railways Co, 228 Ill App 579—5 C.J. p 1400 note 94

Special to general assumpsit

Where plaintiff has sued in special assumpsit on an express contract he may amend his declaration to make it one in general assumpsit on an implied contract.—Town of Franklin v Engineering Co., 12 Tenn App 434.

54. Baltimore F. Ins. Co v. McGowan, 16 Md. 47—5 C J. p 1400 note 95.

55. Globe Granite Co v. Clements, 104 A. 104, 92 Vt. 383—5 C J. p 1404 note 51.

56. Ala.—Bush v. Moore, 95 So. 62, 19 Ala App 88.
Me.—Dufour v. Stebbins, 145 A. 893, 128 Me 133.
Pa.—McBride v. McBride, 83 Pa Super 24.

New contract

A new contract relied upon as a defense, must be set up in the affidavit of defense, or else it is not in issue.—Steinberg v. Schwartz, 219 Ill App. 133.

Statute of limitations

Under a general replication to defendant's plea of the statute of limitations of three years, the issue was whether the promise was made within the three years, and proof showing a promise which was of a higher nature, and valid for six years, made

Where, however, the pleadings do raise the issue, matter in proof thereof is relevant.[57] Accordingly, where plaintiff has employed the common counts he may prove thereunder matters which, although not specifically set out, are embraced in the broad language of the counts.[58]

b. Matters Admissible under Pleadings

The general issue in assumpsit being very comprehensive, under it may be proven almost every defense existing at the time suit was brought.

In practice the plea of the general issue is comprehensive;[59] under it defendant is permitted to show almost every defense which tends to prove that no cause of action existed at the time when the suit was brought, whether such defense arises from an inherent defect in the original promise, or from a subsequent extinguishment of the liability after it was incurred.[60]

On a strict construction of the language of the plea of non assumpsit it would naturally operate only as a denial of the express promise, where one is alleged, or of the existence of circumstances from which a promise might be implied by law,[61] and this was formerly the law.[62] However, a practice grew up and came to be firmly established of allowing under the plea of non assumpsit evidence of various defenses, which admitted all the essential facts stated in the declaration but avoided their effect.[63]

Applying this rule, defendant may generally give in evidence, under the plea of non assumpsit, accord and satisfaction,[64] coverture,[65] drunkenness,[66] foreign attachment or garnishment,[67] former recovery,[68] fraud,[69] infancy,[70] insanity,[71] payment,[72] per-

five years before, was not relevant, and therefore properly rejected—McDermott v McCormick, 4 Harr.(Del.) 543.

57. Bean v. Camden Lumber & Fuel Co, 126 A 285, 124 Me 102

Evidence held admissible

In assumpsit upon the common counts for services rendered and materials furnished, with a special count for damages to personal property by reason of defendant's failure to keep leased premises in tenantable condition, where defendant pleaded non assumpsit, evidence relevant and material under the special count was relevant and material to the issues raised by the pleadings—Wilson Bros Garage v. Larrow, 98 A. 902, 90 Vt. 413.

58. Flannigan v. Monongahela Tie & Lumber Co, 87 S E 165, 77 W. Va. 158.

Not restricted to express contract

Where the declaration contains the common counts, and plaintiff introduces evidence of an express contract, he is not confined to establishing the express contract, but may recover on any proof which supports his declaration—Humphreys v. Orrey, 220 Ill App. 523.

59. Dudley v. Carter Red Ash Collieries Co, 100 S E 466, 125 Va 701—5 C.J. p 1405 note 67.

Broadest issue known

"The general issue of non assumpsit on an unsealed contract is one of the broadest general issues known to our system of pleading."—Dudley v. Carter Red Ash Collieries Co., 100 S E. 466, 468, 125 Va. 701.

60. U S.—Wilkinson v. Pomeroy, (C. C N.Y.) 29 F.Cas No.17,674, 9 Blatchf. 513.
Ala.—Escambia County v. Dixie Chemical Products Co., 156 So 631—Bozeman v. J. B. Colt Co., 95 So. 588, 19 Ala.App 126.
Ill—Benes v. Bankers' Life Ins. Co., 118 N E 443, 282 Ill. 236, reversing 204 Ill App 425.
Me—Williams v. Sweat, 115 A. 895, 121 Me 118
Okl.—Harn v Patterson, 160 P 924, 58 Okl 694.
Pa.—Jackson v Uts, 18 Pa Dist 163
R I—Wholey Boiler Works v. Lewis, 123 A. 595, 45 R I 441
Tenn—Illinois Central R Co. v. Wade, 1 Tenn.Civ App 780.
Va—Dudley v. Carter Red Ash Collieries Co, 100 S E 466, 125 Va. 701.
5 C.J p 1402 note 24, p 1405 note 68.

Demand due and unpaid

Where a complaint in assumpsit alleged that the demand was due and unpaid, defendant's plea of the general issue put that fact in issue—Outcault Adv. Co. v. Hooten, (Ala App.) 66 So. 901.

Inconsistent statements

Previous statements or admissions made by plaintiff, inconsistent with his testimony, to the effect that defendant was indebted to him, and tending to prove that plaintiff was not in fact a creditor of defendant, are admissible on this issue.—Myrick v. Wallace, 59 So 704, 5 Ala App. 398.

Issuable defense

A plea of the general issue in general assumpsit presents an issuable defense, the issue being the indebtedness of defendant to plaintiff—Causey v. Cooper, 41 Ga. 409

61. Shanklin's Adm'r v. Crisamore, 4 W.Va 134.

62. Maverick v. Gibbs, 14 S C L. 315

In Alabama, by statute, the general issue in assumpsit now puts in issue only the truth of the allegations of the complaint (Code [1923] § 9470).—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala 473.

63. McKyring v. Bull, 16 N Y. 297, 300, 69 Am D 696 and note—5 C. J p 1405 note 66.

64. Ill—Benes v Bankers' Life Ins. Co, 118 N E 443, 282 Ill 236
W Va—Zogg v. Kern Oil, etc, Co, 117 S E. 620
5 C J p 1406 note 69.

65. Streeter v Streeter, 43 Ill. 155—5 C J p 1406 note 70

66. Peebles v. Rand, 43 N H 337.

67. Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am D 594—Clark v. Yale, 12 Wend (N Y) 470.

68. International Coal Min Co v. Pennsylvania R Co, 15 Pa.Dist. 225—5 C J. p 1406 note 73

69. Thomas v. Grise, 41 A. 883, 17 Del. 331—5 C.J. p 1406 note 74

70. Stansbury v. Marks, 4 Dall (U S) 130, 1 L Ed 771—5 C.J. p 1406 note 75.

71. Arkansas Grand Prairie Oil & Gas Co v. Davidson, (C.C A Pa) 233 F. 641—5 C J p 1406 note 76.

72. Cal—Snodgrass v Snodgrass, 253 P. 755, 81 Cal App. 360.
Ill.—Kassing v. International Bank, 74 Ill. 16—Surface v. Chicago, M, & St. P. R Co, 191 Ill.App 261—Teuber v. Schmuacher, 44 Ill.App. 577.
W.Va—Zogg v Kern Oil & Gas Co., 117 S E 620, 94 W.Va 17.
5 C J p 1406 note 77.

Part payment in property is admissible under the general issue—Munn v. Pope, 2 Stew.(Ala.) 498

Payment and accord and satisfaction distinguished

Under a statute providing that accords must be specially pleaded, satisfaction and payment are distinguishable—Brace v. Catlin, 1 Day (Conn.) 275.

In Mississippi, by statute, an administrator of an estate in any ac-

formance,[73] prevention of performance by plaintiff,[74] release,[75] waiver or estoppel,[76] usury[77] want, illegality, or failure of consideration,[78] nonperformance by plaintiff,[79] also absence of joint liability of defendants,[80] existence of an unfulfilled condition precedent,[81] plaintiff's capacity to sue,[82] rescission,[83] that plaintiff has no title to the chose in action in question,[84] or that the action was prematurely brought.[85]

On the other hand, since such defenses as a discharge in bankruptcy,[86] the statute of limitations,[87] and tender[88] do not contest liability, showing only that no action can be maintained, they cannot be shown under the general issue, such matters, to be available, must be pleaded specially. According to some authorities, evidence showing that the agreement was within the statute of frauds is admissible under the general issue, while other authorities hold that the statute must be specially pleaded, see the title Frauds, Statute of § 265 [27 C.J. p 369 note 13 et seq].

Cross demands, whether set-off[89] or recoupment,[90] cannot be set up under the general issue. This does not mean, however, that defendant cannot introduce matters showing the absence of liability on his part, as such matters are admissible under the general issue[91]

Matters of defense arising after suit brought can-

tion at law may prove any defense under the general issue, and this statute applies to actions of assumpsit—Gray v. Thomas, 12 Sm. & M. 111.

In West Virginia

(1) By construction of statute, payment in full, or general payment, is admissible under the general issue, as at common law, but partial payment must be specially pleaded—Schmulbach v. Williams, 120 S.E. 600, 95 W.Va. 281—Zogg v. Kern Oil, etc, Co., 117 S.E. 620, 94 W.Va. 17—Shuman v. Shuman, 91 S.E. 264, 79 W.Va. 445—Shore v. Powell, 76 S.E. 126, 71 W.Va. 61—Shanklin's Administrator v. Crisamore, 4 W.Va. 134

(2) Accordingly, in assumpsit to recover money loaned, defendant's testimony that check, alleged evidence of loan, constituted payment of indebtedness owing by plaintiff, was admissible under the general issue as not constituting matter of set-off or partial payment required by statute to be specified—Bielec v. Romanek, 169 S.E. 409

(3) Single payments which separately discharge in full each of several independent claims may be shown, since they are not properly partial payments—Schmulbach v. Williams, supra.

73. Todd v. Summers, 2 Gratt (43 Va.) 167, 44 Am.D. 379—5 C.J. p 1406 note 78.

74. Kelly v. Fahrney, 123 F. 280, 59 C.C.A. 298—5 C.J. p 1406 note 79

75. Barr v. Perry, 3 Gill (Md.) 313—5 C.J. p 1406 note 80.

In Michigan, where the general issue was pleaded before the adoption of Cir.Ct.Rules, rule 7, providing that an affirmative defense, such as release, must be plainly set forth in a notice attached to defendant's plea, evidence of a release of defendant, executed for a valuable consideration before the commencement of the action, was admissible.—Cleveland v. Rothschild, 94 N.W. 184, 132 Mich. 625.

76. Ill.—McKenna v. McKenna, 118 Ill.App. 240
W.Va.—Buckhannon Bank v. O'Brien & Hall, 180 S.E. 258
5 C.J. p 1406 note 81.

77. Del.—Cleaden v. Webb, 9 Del. 473.
N.J.—New Jersey Patent Tanning Co. v. Turner, 14 N.J.Eq. 326
S.C.—Talbert v. Cason, 3 S.C.L. 298

78. U.S.—Watson v. Bayley, (D.C.) 29 F.Cas.No.17,276, 2 Cranch C.C. 67.
Md.—Morgan v. Cleaver, 101 A. 610, 130 Md. 617.
Or.—Gress v. Wessinger, 172 P. 495, 88 Or. 625
5 C.J. p 1407 note 85.

Gambling debt

Proof of the fact that a note was given for money won at gaming is admissible under the general issue—Watson v. Bayley, (D.C.) 29 F.Cas.No.17,276, 2 Cranch C.C. 67.

79. Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—5 C.J. p 1407 note 87.

80. Hamilton v. Century Mfg. Co., 180 Ill.App. 100—5 C.J. p 1406 note 82

81. Ala.—George v. Roberts, 65 So. 345
Ill.—Ward v. Athens Mining Co., 98 Ill.App. 227.

82. Benes v. Bankers' Life Ins. Co., 113 N.E. 443, 282 Ill. 236.

83. Ward v. Athens Min. Co., 98 Ill. App. 227.

84. Poirot v. Gundlach, (Ill.App.) 1 N.E.(2d) 801.

85. U.S.—Stitzer v. U.S., (Pa.) 182 F. 513, 105 C.C.A. 51
Ala.—Rainey v. Long, 9 Ala. 754
Ill.—Kahn v. Cook, 22 Ill.App. 559.
5 C.J. p 1407 note 89.

86. Ill.—Benes v. Bankers' Life Ins. Co., 113 N.E. 443, 282 Ill. 236
Va.—Dudley v. Carter Red Ash Collieries Co., 100 S.E. 466, 125 Va. 701
5 C.J. p 1407 note 91.

In New York

(1) It has been held that an insolvent's discharge was admissible under the general issue—Bradley v. Field, 3 Wend. 272.

(2) However, a later decision, by way of dictum, recognizes and states the general rule that such defense must be specially pleaded—Young v. Rummell, 2 Hill 478.

87. Ill.—Benes v. Bankers' Life Ins. Co., 113 N.E. 443, 282 Ill. 236
Me.—Longfellow v. Longfellow, 54 Me. 240
Va.—Dudley v. Carter Red Ash Collieries Co., 100 S.E. 466, 125 Va. 701
5 C.J. p 1407 note 94.

88. Dudley v. Carter Red Ash Collieries Co., supra—5 C.J. p 1407 note 95.

89. Manville v. Gay, 1 Wis. 250, 60 Am.D. 379—5 C.J. p 1407 note 92.

Work unskillfully done

Defendant in assumpsit may show under the general issue, by way of reduction of damages, that work was unskillfully done or that goods were not of the quality warranted, but he cannot show a breach by plaintiff of stipulations independent of those on which plaintiff seeks to recover, even though they are included in the same contract on which the action is brought—Keyes v. Western Vermont Slate Co., 34 Vt. 31.

90. Keyes v. Western Vermont Slate Co., 34 Vt. 31—5 C.J. p 1407 note 93.

In Maryland, defendant in assumpsit may, under the general issue, show injury by way of recoupment.—Impervious Products Co. v. Gray, 96 A. 1, 127 Md. 64—Sullivan v. Boswell, 89 A. 940, 122 Md. 539

91. Pa.—Heck v. Shener, 4 Serg. & R.(Pa.) 249, 8 Am.D. 700
Va.—Lackey v. Price, 123 S.E. 268, 142 Va. 789.

not be given in evidence under the general issue to defeat the action,[92] but may be shown thereunder for the purpose of reducing the amount of recovery.[93]

c. Variance

A material variance between the allegations in the declaration and the proof is fatal.

Following the rules governing civil actions generally, in assumpsit the proof must conform to the pleadings.[94] A party does not recover on the proofs alone; he recovers secundum allegata et probata.[95] It is not enough that the evidence may show a cause of action; it must show the cause of action pleaded.[96]

Plaintiff, however, is not bound to prove all the causes of action set out in his declaration,[97] nor is he required to adhere rigidly to allegations not of the essence of his cause of action.[98] Accordingly, a variance with regard to the amount due,[99] the time of the promise,[1] or the place where the promise was made,[2] is immaterial.

Although the allegata and probata may not entirely agree, if defendant is not misled, and the variance does not in any manner affect the trial on its merits, or set up a different cause of action, or impose a different burden on defendant, the variance will not be fatal.[3]

In promise or agreement. If the declaration is special the contract offered in evidence must be an express contract, corresponding in substance and in terms with the allegations of the declaration; variance in this respect is fatal, if insisted on.[4] Accordingly a variance between an allegation based solely upon the breach of a special contract and proof of the breach of an implied contract is fatal.[5] On the other hand, if plaintiff declares on a special contract, proof of an implied contract under a general count is not a fatal variance.[6] Also, plaintiff may, in a proper case, sustain the allegations of a common count by proof of an express contract,[7] and it has been held that a declaration in general assumpsit could be supported by proof of either an express or implied contract, in the absence of objection.[8]

Under a declaration against joint promisors, plaintiff must prove a case against all who are served, unless one sets up a defense which goes to his personal discharge.[9] Notwithstanding no plea denying joint liability is interposed in an action of assumpsit, yet there can be no recovery by plaintiff unless the evidence shows the joint liability of all the defendants to the action.[10] Conversely, where plaintiffs sue jointly, proof of a liability from defendant to only one plaintiff will be rejected, as it does not support the cause of action disclosed in the declaration.[11]

92. Hutchinson v. Hendrickson, 29 N.J.Law 180—5 C.J. p. 1407 note 93.

93. Ala.—McMillian v. Wallace, 3 Stew 185
N.J.—Hutchinson v. Hendrickson, 29 N.J.Law 180

94. Zullinger v. Grebe, 72 Pa.Super 209—Skinner v. Undergust, 3 Pa. Dist & Co. 569—5 C.J. p. 1408 note 99.

Indebtedness running to third party
Although the plaintiff in assumpsit proved indebtedness due from defendant to another, she could not recover where she failed to show any indebtedness to herself, or how or why she should recover a judgment or recover on an indebtedness due the other—Mobile West Shore Traction Co. v. Austill, 73 So. 4, 197 Ala. 432

Tenancy alleged
Where the declaration in assumpsit for use and occupation proceeds on the theory of a tenancy, proof of trespass and tortious occupation is a variance, and plaintiff's case is properly excluded from the jury.—Smith v. Haight, 154 N.W. 563, 188 Mich. 512.

95. Hale v. Hale, 32 Pa.Super. 37

96. Zullinger v. Grebe, 72 Pa.Super 209.

97. Bailey v. Freeman, 4 Johns (N.Y.) 280—5 C.J. p. 1408 note 2.

98. American Spirits Mfg. Co. v. Western Mfg. & Oil Co., 213 Ill.App. 612.

99. Lafferty v. Day, 7 Ark. 258.

Fixed amount alleged
Although the plaintiff alleges a contract with a fixed amount of compensation, he may prove a contract wherein the compensation was not fixed.—Chapman v. Currie, 51 Mo.App. 40.

1. Bartlett v. Bank of Mannington, (W.Va.) 87 S.E. 444.

2. Mankin v. Jones, 60 S.E. 248, 63 W.Va. 373, 15 L.R.A.(N.S.) 214

3. **Proof may go beyond allegations**
Where, in assumpsit, plaintiff's statement sets forth an oral contract, and the proofs establish the oral contract, and further show a confirmatory letter addressed to defendant and in his possession, the failure of the statement to set forth the letter is not a fatal variance.—Tarentum Lumber Co. v. Marvin, 61 Pa.Super. 294.

4. Fowler v. Austin, 2 Miss. 156, 26 Am.D. 701—5 C.J. p. 1408 note 4.

5. Mo.—Roll v. English, 279 S.W. 769, 220 Mo.App. 1077.
Neb.—Mayer v. Ver Bryck, 64 N.W. 691, 46 Neb. 221.
5 C.J. p. 1408 note 5.

6. Ill.—Awotin v. Atlas Exchange Nat. Bank of Chicago, 265 Ill.App. 238.
Mich.—Fuller v. Rice, 18 N.W. 204, 52 Mich. 435.
5 C.J. p. 1408 note 6.

7. U.S.—U. S. Potash Co. v. McNutt, (C.C.A.N.M.) 70 F.(2d) 126, costs taxed 70 F.(2d) 1003
Ala.—Bush v. Moore, 95 So. 62, 19 Ala.App. 88.
N.Y.—Fells v. Vestvali, 2 Keyes 152.
5 C.J. p. 1388 notes 74, 75.
As to when common counts lie notwithstanding existence of express contract see supra § 9 c (2) (b).

8. Peters v. McDonough, 37 S.W.(2d) 530, 327 Mo. 487. See Northam v. F. J. Lewis Mfg. Co., 208 Ill.App. 229.

9. Beaudette v. Cavedon, 145 A. 874, 50 R.I. 140—5 C.J. p. 1408 note 7.

Joint plea
If plaintiff declares on a joint liability, and there is a joint plea by defendants, plaintiff's proof of a several contract is a variance, and under it he cannot recover at all.—Sullivan v. Mulvihill, 252 Ill.App. 567.

10. M. W. Powell Co. v. Finn, 64 N.E. 1036, 198 Ill. 567—5 C.J. p. 1409 note 8.

11. Ulmer v. Cunningham, 2 Me. 117—5 C.J. p. 1409 note 9.

The consideration of the promise must be proved as laid in the declaration,[12] and, if plaintiff declares on two considerations, he must aver and prove performance of both, for the assumpsit on the part of defendant is presumed to be founded on both, taken together.[13] Thus, an allegation of consideration in addition to the true one results in a fatal variance.[14]

§ 27. —— Defects, Objections, and Aider by Verdict or Judgment

Technical defects in the pleadings, or slight variances in the proof, to which there has been no objection, may be cured by the verdict or judgment.

In accordance with the rule in civil actions generally governing defects in and objection to the pleadings and cure or waiver thereof, as discussed in the title Pleading § 547 et seq [49 C.J. p 818 note 83 et seq], it may be stated as a general rule that in assumpsit, as in other common law actions, mere technical defects in a pleading, notwithstanding they might have been reached by demurrer, are cured by a verdict,[15] such as a defective allegation of a promise made by defendant,[16] a defective allegation of the breach of defendant's promise,[17] a failure to allege that the consideration was executed at the request of defendant,[18] a failure to allege a special demand on defendant,[19] a defective plea of not guilty,[20] a failure to attack a plea as not being the general issue.[21] However, a pleading which does not state a cause of action or a defense is not so cured;[22] but it has been held that a judgment founded upon mispleading so gross that no issue was presented would not be disturbed on writ of error, the mispleading being cured by the verdict, under the statute of jeofails.[23]

Likewise, it has been held that a slight variance between the allegations and the proof may be cured by failure to object at the time the evidence is offered.[24]

§ 28. Evidence

The general rules concerning evidence in civil actions apply to actions of assumpsit.

As in other civil actions, the burden is on the party who affirmatively sets up any matter upon which issue is taken to establish it[25] by evidence sufficiently clear and satisfactory to enable the jury to intelligently make the necessary findings.[26] Accordingly, if the evidence adduced by plaintiff is so vague and unsatisfactory that no finding can be intelligently based upon it, the necessary result will be a verdict for defendant.[27]

The presumption of an implied assumpsit arising from the facts shown may be repelled by evidence of an express agreement, of general usage, or of the relations between the parties and surrounding circumstances.[28]

Admissibility. Following general rules, evidence which is relevant and material is admissible, and that which is irrelevant or immaterial is inadmissible.[29] Where plaintiff's action on the common

12. Bromley v. Goff, 42 N.W. 810, 75 Mich. 213—5 C.J. p 1409 note 10

Substantially conforming

It has been held that if the consideration proved is substantially the same as that alleged the variance is not fatal.—McKenna v. McKenna, 118 Ill.App. 240.

13. Ky.—Carrell v. Collins, 2 Bibb 429.
N.Y.—Lansing v. McKillip, 3 Cai. 286.

14. Stone v. Knowlton, 3 Wend (N.Y.) 374.

15. Drake v. Semonin, 82 Ky. 291—5 C.J. p 1397 note 64 [a], p 1400 note 96.

16. Hoard v. Little, 7 Mich. 468—5 C.J. p 1394 note 33.

Early decisions held that such declaration was bad even after verdict and judgment.—McNulty v. Collins, 7 Mo. 69—Muldrow v. Tappan, 6 Mo. 276—Candler v. Rossiter, 10 Wend (N.Y.) 487.

17. N.Y.—Thomas v. Roose, 7 Johns. 461.
Pa.—Waigley v. Weir, 7 Serg. & R. 309.

18. Stoever v. Stoever, 9 Serg. & R. (Pa.) 434.

19. N.Y.—Leffingwell v. White, 1 Johns.Cas. 99, 1 Am.D. 97.
Tenn.—Rodgers v. Love, 2 Humphr. 416.
5 C.J. p 1399 note 81.

20. Pa.—Cavene v. McMichael, 8 Serg. & R. 441.
W.Va.—Bannister v. Victoria Coal, etc., Co., 61 S.E. 333, 63 W.Va. 502.
5 C.J. p 1403 note 29.

21. Bannister v. Victoria Coal, etc., Co., supra.

22. McNulty v. Collins, 7 Mo. 69—5 C.J. p 1400 note 97.

23. Henry v. Hoover, 14 Miss. 417

24. Phelps v. Conant, 30 Vt. 277.

25. Ala.—Olive v. Fenner & Beane, 157 So. 673, 229 Ala. 464—Martin v. Powell, 75 So. 358, 200 Ala. 46.
Fla.—Exchange Nat. Bank of Tampa v. Bryan, 165 So. 685.
Ill.—Reeb v. Bronson, 196 Ill.App. 513.
5 C.J. p 1409 notes 15, 17, 18.

Proof of special contract

To recover on common counts for work done under contract, the burden was on plaintiff to show that contract was made with defendant, and if entire, was fully performed, except for payment of agreed price.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.

Title

In assumpsit to recover the value of personal property claimed to have been converted by defendant, it is not enough that plaintiff merely discredit defendant's title, but plaintiff must establish his own title.—Capital Garage Co. v. Powell, 118 A. 883, 96 Vt. 227.

26. Keller v. Smith, 134 S.E. 592, 102 W.Va. 103—5 C.J. p 1409 note 16.

27. Keller v. Smith, supra—5 C.J. p 1409 note 16.

28. Peters v. Gallagher, 37 Mich. 406.

29. Ala.—Williams v. Shows, 73 So. 99, 197 Ala. 596.
N.H.—Fellows v. Champion International Co., 83 A. 1091, 76 N.H. 457
See Tolman v. Steele, 209 Ill.App. 554.

Evidence held admissible

(1) In an action to recover a sum of money equal to what certain work

counts grows out of an express contract, the express contract, or matter evidencing it,[30] is admissible to show the terms of the contract and to fix the amount due,[31] since ordinarily the contract price or rate is the best evidence of such amount,[32] and prima facie establishes it.[33]

Sufficiency. The evidence must be sufficient to sustain a verdict.[34]

§ 29. Trial

The general rules of trial are treated in the title Trial. See also infra §§ 30–32.

§ 30. —— Questions of Law and Fact

Questions of law are for the court, and questions of fact are for the jury.

In assumpsit, as in other civil actions, questions of law are for the court, while questions of fact are for the jury.[35]

§ 31. —— Instructions

General rules concerning instructions apply to assumpsit.

The principles governing instructions in civil actions generally, as treated in the title Trial, apply in actions of assumpsit.[36]

§ 32. —— Verdict

The general rules relating to verdicts apply to actions of assumpsit

As in civil actions generally, the verdict must

would have cost, if performed, upon the hypothesis of an agreement to pay such sum, proof of a substantial portion of such estimated cost is admissible, notwithstanding its insufficiency to establish the full or exact amount thereof, and the inability of plaintiff to do so by other evidence—Cochran v. Craig, 106 S.E. 633, 88 W.Va. 281.

(2) In an action based on plaintiff's agreement to pay a debt of a third person to defendant, there was no reversible error in allowing debtor to testify as to what property was included in his mortgage to defendant.—Williams v. Shows, 73 So. 99, 197 Ala. 596.

(3) In an action of assumpsit for money due plaintiff under an agreement to pay defendant debt of a third person, it was proper to permit defendant to show by debtor's testimony how much the debtor owed defendant.—Williams v. Shows, supra.

(4) Where plaintiff declared in assumpsit for goods sold and delivered, and not upon a written contract, a written order for the goods, signed by defendant was held admissible.—Simons v. American Box Ball Co., 166 S.W. 224, 158 Ky. 631.

Evidence held immaterial

In an action of assumpsit, evidence as to whether a third party suing defendant had a lien on the cotton involved was immaterial.—Williams v. Shows, 73 So. 99, 197 Ala. 596.

30. U.S.—Jamieson v. Alexander, (C.C.D.C.) 13 F.Cas.No.7,303, 1 Cranch C.C. 6.
Cal.—Sessions v. Pacific Improvement Co., 206 P. 653, 57 Cal.App. 1.
Fla.—Hasen v. Cobb, 117 So. 853, 96 Fla. 151—Borden Lumber Co. v. South Atlantic Dry Dock Co., 101 So. 846, 88 Fla. 166.
Ill.—Evans v. Howell, 71 N.E. 854, 211 Ill. 85, affirming 111 Ill.App. 167—Mercer County v. Hubbard, 45 Ill. 139. See McIlvrid v. Murphy, 190 Ill.App. 515.
Me.—Bean v. Camden Lumber & Fuel Co., 126 A. 285, 124 Me. 102.
Mo.—American Surety Co. of New York v. Fruin-Bambrick Const. Co., 166 S.W. 333, 182 Mo.App. 667, 673.
Or.—Ton Toy v. John Gong, 170 P. 936, 87 Or. 454.
Vt.—F. S. Fuller & Co. v. Morrison, 169 A. 7, 106 Vt. 17.
As to right to bring indebitatus assumpsit when express contract exists see § 9 c (2) supra.

31. Cal.—Friermuth v. Friermuth, 46 Cal. 42—Sessions v. Pacific Improvement Co., 206 P. 653, 57 Cal.App. 1—San Joaquin Light & Power Co. v. Barlow, 184 P. 899, 43 Cal.App. 241.
Fla.—Hasen v. Cobb, 117 So. 853, 96 Fla. 151.
Ill.—American Splane Co. v. Barber, 62 N.E. 597, 194 Ill. 171.
N.J.—Weart v. Hoagland, 22 N.J.Law 517.
5 C.J. p. 1409 note 21.

Contract held admissible

In assumpsit on an account annexed and on the money counts for the price of logs, where defendant admitted delivery of more logs than were called for by a special agreement, defendant's objections to the form of the action and to the admission of the agreement in evidence cannot be sustained.—Mercier v. James Murchie's Sons Co., 90 A. 722, 112 Me. 72.

Services under contract

Plaintiffs, who rendered services under an express contract, may sue in assumpsit on the quantum meruit, and give in evidence the special contract for the purpose of fixing the value of their services.—Hollander v. Kaufmann, 158 N.Y.S. 195, 172 App.Div. 218.

32. Wilson v. Wilson, 80 S.W. 711, 106 Mo.App. 501.

Contract not renewed

Where there was an express contract for services, which had expired, and the services continued without an express renewal, it was held that the amount fixed by the parties in the original contract was the best evidence of the value of the services in a suit on the common counts.—Wallace v. Floyd, 29 Pa. 184, 72 Am.D. 620.

33. Holloway v. White-Dunham Shoe Co., (Ill.) 151 F. 216, 80 C.C.A. 568, 10 L.R.A.(N.S.) 704.

34. Hilker v. Radcliff, 274 Ill.App. 463.

Evidence held sufficient to sustain verdict for plaintiff.—Cohen v. Bogatsky, 131 A. 31, 146 Md. 134.—5 C.J. p. 1409 note 14 [a].

Evidence held insufficient to sustain verdict for plaintiff.—Gore v. Gore, 96 A. 780, 114 Me. 553. See Graff v. Moench, 201 Ill.App. 140.

Evidence held sufficient to sustain verdict for defendant.—Hartzell v. Murray, 127 Ill.App. 608, affirmed 79 N.E. 674, 224 Ill. 377.

Evidence held insufficient to sustain verdict for defendant.—Boyles v. Reaser, 92 S.E. 459, 80 W.Va. 303.

35. Crystal Beach Development Co. v. Alvord, 133 So. 858, 101 Fla. 1403, affirmed 136 So. 669, 101 Fla. 1411.—5 C.J. p. 1410 note 28.

Question for jury

In an action of assumpsit, wherein defendant sought to set off claim for board furnished to plaintiff, whether plaintiff was a guest of defendant at his invitation and whether payment of board was ever agreed to or anticipated was held for the jury.—Joyner v. McMurphy, (Ala.App.) 163 So. 533.

36. Weaver v. Murray, 128 N.W. 1088, 163 Mich. 660.—5 C.J. p. 1410 note 30.

Ignoring issues or evidence

A charge that if the jury find that

be responsive to the issues raised by the pleadings[37]

A general verdict will be upheld where there are several counts, if any one of the counts is good.[38]

Where special findings are manifestly inconsistent with each other or with the general verdict, the whole verdict will be set aside.[39]

A verdict for plaintiff should assess the amount of damages to which he is entitled; a mere finding for him is not a sufficient foundation for a judgment.[40]

§ 33. Judgment

A proper judgment should be entered.

A judgment in plaintiff's favor in assumpsit is that he shall recover a specified sum for damages sustained by reason of defendant's nonperformance of his promises and undertakings.[41]

It has also been held that a judgment substantially expressing the conclusions of the court is sufficient, although not expressed with technical nicety.[42]

By default. In the absence of special regulation by statute or of established practice of court, a jury should be called to assess damages when a default is entered[43] Upon the trial of the issue of damages under a writ of inquiry a defense which goes to the right of recovery cannot be made.[44]

On demurrer. In like manner it has been held that, on the overruling of a demurrer to a declaration containing the common counts, final judgment cannot be rendered without a writ of inquiry to ascertain the damages.[45] It has also been held that final judgment cannot be taken, on the overruling of a demurrer to a count of the declaration, if defendant has interposed a plea to another count, and the issue raised by such plea has not been disposed of.[46]

§ 34. Review

The general rules of review, although involving actions in assumpsit, are considered in the title Appeal and Error. For future cases, if any, raising questions peculiar to the action of assumpsit, examine Pocket Parts.

§ 35. Costs

The rules of civil actions generally govern the taxation of costs in actions of assumpsit.

Following rules applicable to civil actions generally, it has been held in an action against joint promisors, notwithstanding that an improper severance in pleas was allowed by plaintiff without objection, that the costs of defendants could not be taxed severally[47] According to some authority, in an action of assumpsit, attorneys' commissions should be allowed as costs in favor of the prevailing party.[48]

§ 36. Damages

In assumpsit plaintiff is limited to a recovery of damages arising directly from the breach of the contract, or the value of the consideration from which the promise is implied.

The damages to be recovered must always depend upon the nature of the action and the circumstances of the case.[49] Ordinarily plaintiff is limited to damages arising directly from the breach of the contract; the willfulness or wantonness of the breach and other circumstances incidentally connected therewith have nothing to do with the case; the sole question is what is the pecuniary value of the contract right taken from plaintiff.[50]

there was a contract for materials to be furnished and work done by plaintiff for defendant for a special sum, and that other materials in question were furnished and other work done by plaintiff for defendant, they must find for plaintiff for the sum, if any, due under the contract, was erroneous as allowing a recovery in general assumpsit where plaintiff has not performed his part of the contract, without submitting the questions whether his failure was due to defendant's fault, or whether the work actually done was accepted by defendant.—Meyer v. Frenkil, 77 A. 869, 113 Md. 36.

37. Blackburn v. Young, 16 Pa.Dist. 191—5 C.J. p 1410 note 34 [a].

Theory of trial

Responsiveness to the theory of trial is not necessary—Blackburn v Young, 16 Pa.Dist. 191

38. Bulkley v. Andrews, 39 Conn 523—5 C.J. p 1410 note 34.

39. Jackson v. Haverford Cycle Co., 160 N.W. 578, 194 Mich 286.

Findings held consistent

A general verdict for plaintiff in assumpsit with special findings that plaintiff demanded and was refused the property and that he demanded back only the money he had paid defendant therefor was held consistent upon the theory that the money demand was made after the property had been demanded and refused.—Jackson v. Haverford Cycle Co., 160 N.W. 578, 194 Mich. 286.

40. Nev.—Knickerbocker, etc., Silver Min. Co. v. Hall, 2 Nev. 194 Ohio—Ames v. Sloat, Wright 577. 5 C.J. p 1410 note 33.

41. Chitty Pl (16th Am Ed.) p 158—5 C.J. p 1411 note 35.

42. Sears v. Sears, 8 Ill. 47.

43. Ala.—Porter v. Burleson, 33 Ala 343.

Ind.—Starbuck v. Lazenby, 7 Blackf. 263.

5 C.J. p 1411 note 39.

44. New York City Third Nat. Bank v. Dorset Marble Co., 3 A. 329, 58 Vt. 70—5 C.J. p 1411 note 40.

45. Stanton v. Henderson, 1 Ind. 69—5 C.J. p 1411 note 41.

46. Ewing v. Codding, 5 Blackf. (Ind.) 432—5 C.J. p 1411 note 42 [a].

47. Ward v. Johnson, 13 Mass 148—Meagher v. Bachelder, 6 Mass. 444.

48. Braham v. Honolulu Amusement Co., 21 Hawaii 583.

49. Welborn v. Dixon, 49 S.E. 232, 70 S.C. 103, 3 Ann.Cas. 407—Rose v. Beatie, 11 S.C.L. 538.

50. Frankfort Land Co. v. Hughett, 191 S.W. 530, 137 Tenn. 32—5 C.J. p 1411 note 44.

Special damages are not recoverable under the common counts; the amount recoverable is ordinarily the actual value of the services or goods, or the sum received or paid, etc.[51]

Where an express contract has been fully performed on plaintiff's part and nothing remains to be done under it but the payment of money by defendant, and plaintiff elects to sue in general assumpsit instead of declaring specially on the express contract, the measure of damages will ordinarily be the rate of recompense fixed by the special contract.[52] A recovery of a larger amount than that stipulated in the special contract is not permissible.[53] Where work has been done or goods furnished under a special contract, in an action in quantum meruit based on the default of the other party, the price is governed by the stipulation, if any, in the abandoned contract.[54]

Limitation by amount laid. Plaintiff may recover less,[55] but not more,[56] damages than are laid in the declaration, and if a larger sum is awarded than claimed, a new trial should be granted, unless plaintiff remits the excess of damages,[57] as he has the right to do.[58]

Interest. It has been held that interest is due after a default to pay upon demand made, or, if no demand is made, from the commencement of the suit.[59]

ASSUMPTIO. In Latin, generally a taking, receiving, assumption; but in juridical Latin, an addition, circumstance.[1]

ASSUMPTION. It has been said that "assumption" implies knowledge,[2] imports a contract, or some kindred act of an unconstrained will,[3] and, when applied to the payment of a debt, is broader than and includes a promise and the duty to pay.[4] The word has been defined as meaning the act of assuming or taking to or upon one's self;[5] agreement of the transferee of property to pay obligations of the transferor which are chargeable on it,[6] or undertaking or adoption of a debt or obligation resting upon another;[7] also the pretension of having or possessing or the taking on in appearance but not in reality;[8]

51. Ind—Alburn v. Burge, 117 N E 257, 186 Ind 559—Michigan Cent. R Co v State, 155 N.E. 50, 85 Ind App. 557
Me—Clements v. Murphy, 131 A. 136, 125 Me. 105
Mich—Bowen v. Detroit United Ry., 180 N W. 495, 212 Mich 432
Pa—Renner v. Puritan Stationery Co., 131 A. 366, 119 Pa Super. 390
5 C J p 1412 note 47
See Waitkus v. Olszewski, 189 Ill. App 322.

Loss of profits by breach of contract is not recoverable under the common counts—Doyle v. Desenberg, 41 N.W 866, 74 Mich. 79.

Waiver of tort

Where plaintiff elects to waive a conversion and sue in assumpsit on the theory of implied contract, the measure of damages is the benefit which the wrongdoer has received, which is generally held to be the value of the property on the date of conversion with interest from that date—Wolfe v. Shell Petroleum Corporation, (C C A.Okl) 33 F.(2d) 438, certiorari denied 57 S.Ct. 19.

Nominal damages

In assumpsit to recover for material sold and delivered, refusal of defendant's prayers intended as demurrers to evidence was held not erroneous, where there was positive evidence that some of material had been delivered to defendant and used by him, and, even in absence of proof as to value, plaintiff would have been entitled to judgment for at least nominal damages—Cohen v. Bogatzky, 131 A. 31, 146 Md. 134—5 C J p 1411 note 45 [c].

52. Ark—Littl v. Brown, 283 P. 924, 36 Ariz. 194.
Cal—Detwiler v. Clune, (App.) 247 P. 265.
Minn—Boydstun v. Hackney Land Credit Co, 177 N.W. 779, 145 Minn 392
Or—Ton Toy v. John Gong, 170 P. 936, 87 Or 454
5 C J p 1411 note 45.

53. U S—Wolfe v Prairie Oil & Gas Co, (C.C A.Okl) 33 F (2d) 434
D C—Campbell v District of Columbia, 2 MacArth 533.
5 C J. p 1412 note 46.

54. Edward Thompson Co. v. Decker, 200 Ill App 179.

55. Parker v Macomber, 24 A. 464, 17 R I 674, 16 L R A. 858—5 C J p 1412 note 49.

56. Kelley v Chicago Third Nat Bank, 64 Ill. 541—5 C J. p 1412 note 50.

57. Ind—Roberts v. Muir, 7 Ind 544
N.H—Holt v. Maloney, 2 N H 322
Va—Tennant v. Gray, 5 Munf.(19 Va.) 494.

58. Cahill v. Pintony, 4 Munf.(18 Va.) 371.

59. N H—McIlvaine v. Wilkins, 12 N H. 474
N.Y—Anonymous, 1 Johns. 315.
5 C J p 1412 note 48.

1. Adams Gloss.

2. Coal Bluff Mining Co. v. Akers, 80 N E. 545, 546, 39 Ind.App. 617.

3. U S—Southern Pac Co. v. McCready, (C.C.A Cal) 47 F (2d) 673, 676.
Fla—City of Jacksonville Beach v. Jones, 133 So. 562, 563, 101 Fla. 96.
Mo—Tinkle v. St. Louis & S F. R. Co, 110 S W 1086, 1093, 212 Mo. 445—Fillingham v. St Louis Transit Co, 77 S W. 314, 316, 102 Mo. App. 573.

4. Tex—Newman v. San Antonio, etc, Co., (Civ.App.) 155 S.W. 688, 690
Wis—Lenz v. Chicago, etc, R Co, 86 N W. 607, 609, 111 Wis. 198

5. Cal—Sharon v. Sharon, 16 P. 345, 378, 75 Cal 1.
Pa—Bell Telephone Co. of Pennsylvania v. Public Service Commission of Pennsylvania, 131 A. 73, 75, 119 Pa Super. 292.
Wis—Lenz v. Chicago & N W R Co., 86 N W. 607, 609, 111 Wis 198.

6. Century D., quoted in Springer v De Wolf, 93 Ill App. 260, 263, affirmed 62 N E. 542, 543, 194 Ill 218, 88 Am S R 155, 56 L R A 465

7. Black L. D, quoted in Bell Telephone Co of Pennsylvania v. Public Service Commission of Pennsylvania, 131 A. 73, 75, 119 Pa.Super. 292.

8. Sharon v. Sharon, 16 P. 345, 378, 75 Cal. 1.

a taking for granted;[9] hypothesis.[10] The word has been held to be substantially synonymous with, or equivalent to, "inference," "presumption," "probability,"[11] and "understanding;"[12] and has been contrasted with "concealment," "denial," and "repudiation."[13]

Assumption of risk. The term usually applies to the relation of master and servant, but may apply to other relations.[14] As applied in the master and servant relation, it is defined and distinguished from other terms, see Master and Servant §§ 357–420 [39 C.J. p 684 note 1–p 813 note 67], and, as applied to negligence see Negligence § 174 [45 C.J. p 1043 note 63–p 1044 note 77]. It has been said that while the term technically connotes a consequence of contract,[15] courts have sometimes used this term interchangeably with phrases such as "taking the risk" or "incurring the risk," and that the thought behind these phrases, as thus used, has frequently been indicated in the law by the maxim "volenti non fit injuria."[16] The term presupposes some danger,[17] a knowledge thereof,[18] a reasonable opportunity to ascertain the nature of the risk,[19] and ordinarily implies appreciation thereof,[20] and acquiescence therein;[21] and has been defined as the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract.[22] Also it has been said that the term implies the existence of a cause outside plaintiff, and that it is used with reference to fault on the part of another and as an answer to a claim that defendant is chargeable with such fault as a breach of duty owed to plaintiff.[23]

Assumption of skill. The doctrine known as the "assumption of skill" on the part of the master sometimes makes the knowledge implied against the master relative to the safety of the place of work, and the nature, constituents, and general characteristics of the things used in the business, superior to that implied against the servant, especially where the servant is inexperienced.[24]

Other phrases: "Assumption . . . of all the existing debts, liabilities, and obligations,"[25] "assumption of an obligation or liability,"[26] "assumption of liability,"[27] "assumption of marital rights, duties or obligations,"[28] "assumption of mortgage,"[29] "assumption of the mortgage debt,"[30] "assumption that the lease will be signed,"[31] "contractual assumption of risk,"[32] and "pro tanto assumption of a future

9. Standard D, quoted in Gordon v. Schellhorn, 123 A. 549, 552, 95 N J Eq 563.

10. State v. Harras, 65 P. 774, 775, 25 Wash 416

11. Ohio Bldg Safety Vault Co. v Industrial Board of Illinois, 115 N. E 149, 154, 277 Ill 96

12. Brichetto v. Raney, 245 P. 235, 241, 76 Cal App 232

13. Repugnant to those ideas
"Neither in the works of any standard author, nor in the common speech of intelligent people, can any instance be found where . . . 'assumption' . . . has been used in any sense consistent with, or in any sense other than repugnant to, the idea of concealment, denial, or repudiation"—Sharon v. Sharon, 16 P. 345, 378, 75 Cal 1.

14. Indiana Natural Gas, etc, Co v O'Brien, 65 N E 918, 920, 66 N E 742, 160 Ind 266—5 C J. p 1413 note 14.

15. Ohio—Troop A Riding Academy v Miller, 189 N E 647, 650, 127 Ohio St 545
S C—Hice v. Dobson Lumber Co, 185 S E 742, 745, 180 S C 259.
Connoting a relation of privity
The phrase "assumption of risk" refers to a doctrine usually bottomed on contract, express or implied, and connoting a relation of privity between him who invokes the doctrine and one against whom it is invoked—Burt v. Nichols, 178 S.W. 681, 683, 264 Mo. 1, L.R.A.1917E, 250.
"Contractual assumption of risk" defined and distinguished from noncontractual assumption of risk—Cronan v. Armitage, 190 N E. 12, 15, 285 Mass. 520

16. Troop A Riding Academy v Miller, 189 N E. 647, 650, 127 Ohio St. 545

17. Anderson v. Lusk, (Mo App.) 202 S W. 304, 307.

18. Ala—Southern Ry. Co v. Chestnutt, 97 So 905, 907, 210 Ala 282.
Ind—New York, C. & St. L R. Co. v. Connaughton, (App.) 2 N E.(2d) 423, 426
N C—Horton v. Seaboard Air Line Ry. Co, 95 S E. 883, 885, 175 N C. 472
Tex—Galveston, H. & S. A. Ry. Co v. Dickens, (Civ App.) 170 S W 835, 837.

19. York v. Chicago, M. & St P Ry. Co, 198 N W. 377, 381, 184 Wis. 110.

20. Okl—Alko-Nak Coal Co v. Barton, 212 P. 591, 594, 88 Okl 212.
Wis—York v. Chicago, M. & St. P. Ry Co., 198 N W. 377, 381, 184 Wis. 110.

21. Alko-Nak Coal Co. v. Barton, 212 P. 591, 594, 88 Okl. 212.

22. Narramore v. Cleveland, C. C. & St. L Ry Co, (Ohio) 96 F. 298, 304, 37 C.C.A. 499, 48 L.R.A. 68—5 C J. p 1413 note 8.

23. Ouelette v. J H Mendell Engineering & Construction Co., 105 A. 414, 415, 79 N H. 112.

24. Black L D, citing Hines v. Little, 105 S E 618, 26 Ga.App. 136, and Burton v. Wadley Southern Ry. Co, 103 S E. 881, 883, 25 Ga. App 380

25. Lenz v Chicago & N. W. R. Co, 86 N.W. 607, 608, 111 Wis. 193.

26. Bell Telephone Co. of Pennsylvania v. Public Service Commission of Pennsylvania, 181 A. 73, 75, 119 Pa Super. 292.

27. U-Drive-It Car Co. v. Friedman, (La App.) 153 So. 500, 502.
"Admission of fault" distinguished.—U-Drive-It Car Co. v. Friedman (La App.) 153 So. 500, 502.

28. Sharon v. Sharon, 16 P. 345, 378, 75 Cal 1.

29. Klegman v. Moyer, 266 P 1009, 1012, 91 Cal App 333—Brichetto v. Raney, 245 P. 235, 241, 76 Cal App. 232.
"Execution of a mortgage" sometimes equivalent.—Klegman v. Moyer, 266 P 1009, 1012, 91 Cal App 333
"Taking of property subject to mortgage" distinguished.—Brichetto v. Raney, 245 P. 235, 241, 76 Cal App. 232.

30. Lang v. Dietz, 60 N E. 841, 842, 191 Ill. 161.

31. Gordon v. Schellhorn, 123 A. 549, 552, 95 N J Eq. 563.

32. Cronan v. Armitage, 190 N E. 12, 15, 285 Mass. 520
"Noncontractual assumption of risk" distinguished see supra note 15.

debt;"[33] and also, where "assumption" is used adjectively, "assumption agreement."[34]

ASSURANCE. It has been said that "assurance" is a term having several distinct meanings;[35] and that the primary meaning of the word is act or declaration of assuring, or that which is designed to give confidence.[36] It has also been defined generally as a promise;[37] a representation, declaration, or persuasion,[38] also, a making secure; insurance.[39] In conveyancing, the word has been defined as a conveyance,[40] any instrument which confirms the title to real estate;[41] the legal evidence of the transfer of property.[42] In commercial law, a pledge, guaranty, or surety.[43]

Common assurance. The legal evidences of the translation of property, whereby every person's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.[44]

Other phrases: "Assurance of goods and chattels,[45] "assurance of lands,"[46] "assurance of safety,"[47] "assurance of title,"[48] "covenant for further assurance" see Covenants § 46 [15 C.J. p 1236 note 80–p 1237 note 4], "on the assurance,"[49] "personal assurance,"[50] and "relying upon the assurance."[51]

ASSURANTIA. Law Latin, an assurance; in common law, insurance; in conveyancing, a deed or instrument of conveyancing.[52]

ASSURARE. Law Latin, to assure; to make sure or secure; to confirm or establish; to insure; to convey.[53]

ASSURE. To make certain and put beyond doubt;[54] also, to convey.[55]

Assured

In general use, the word has been defined as meaning made certain and put beyond doubt;[56] made sure, safe, indubitable, or not doubting,[57] undoubted.[58] The word, however, has been said not to mean "absolute certainty."[59] As an insurance term, referring to the person insured, the word is defined in the title Insurance § 49 [5 C.J. p 1414 notes 27–30].

Phrases: "Assured clear distance ahead,"[60] and "in order that the safety of the public may be assured"[61]

33. Kinney v City of Astoria, 217 P. 840, 847, 103 Or. 514

34. Hakes v Franke, 231 N.W. 1, 5, 210 Iowa 1169.

35. State v. Farrand, 8 N.J.Law, 333, 335.

36. Mo.—Olbert v. Key, (App.) 93 S.W.(2d) 1048, 1053.
Tex.—Texas & N. O. Ry. Co. v. New, (Civ.App.) 95 S.W.(2d) 170, 175

37. State v. Farrand, 8 N.J.Law 333, 335

"Promise to deliver at a future day" distinguished.—State v. Farrand, 8 N.J.Law 333, 335.

38. Fieseler v. Stege, 33 N.Y.S. 749, 750, 86 Hun 595.

39. Black L. D.

Use by insurance companies

The term was formerly of very frequent use in the modern sense of insurance, particularly in English maritime law, and still appears in the policies of some companies, but is otherwise seldom seen of late years. There seems to be a tendency, however, to use "assurance" for the contracts of life insurance companies, and "insurance" for risks upon property.—Black L. D.

40. N.J.—State v. Farrand, 8 N.J.Law 333, 335
N.C.—Vann v. Edwards, 47 S.E. 784, 787, 135 N.C. 661, 67 L.R.A. 461.
5 C.J. p 1413 note 20

As referring to the instrument itself rather than to what it accomplishes.—State v. Rhodes, 93 P. 610, 612, 77 Kan. 202.

"Mortgage" distinguished.—State v. Rhodes, 93 P. 610, 612, 77 Kan. 202.

41. Bouvier L. D., quoted in State v. Rhodes, supra.

42. State v. Farrand, 8 N.J.Law 333, 335, citing 2 Blackstone Comm. p 294

Anomalously applied to chattels

While generally used in this connection as referring to real estate, it has been used with reference to personal property, although it has been said that the term "assurance," as applied to goods and chattels, is peculiar and anomalous.—State v. Farrand, 8 N.J.Law 333, 334.

"Receipt for goods" distinguished.—State v. Farrand, 8 N.J.Law 333, 334.

43. Century D., quoted in National Watch Co. v. Weiss, 163 N.Y.S. 46, 47, 93 Misc. 453

44. State v. Farrand, 8 N.J.Law 333, 335, quoting 2 Blackstone Comm. p 249.

45. State v. Farrand, 8 N.J.Law 333, 334, 335.

46. State v. Farrand, supra.

47. Gallagher v. Montpelier & Wells River R. R., 137 A. 207, 209, 100 Vt. 299

48. Southern Iron, etc., Co. v. Schwoon, 135 S.W. 785, 792, 124 Tenn. 176.

49. Fieseler v. Stege, 33 N.Y.S. 749, 750, 86 Hun 595

50. National Watch Co. v. Weiss, 163 N.Y.S. 46, 47, 93 Misc. 453

51. Texas & N. O. Ry. Co. v. New, (Tex.Civ.App.) 95 S.W.(2d) 170, 174

52. Adams Gloss., citing 2 Blackstone Comm. p 294.

53. Adams Gloss.

54. Black L. D., citing Armour & Co. v. New York, N. H. & H. R. Co., 103 A. 1031, 1033, 41 R.I. 361.

55. "Convey" compared

Convey "is a word of general meaning, denoting any act by which real property is passed from one person to another—a rather more modern term than . . . 'assure' but having the same meaning"—Cunliffe v. Brancker, 3 Ch.D. 393, 402

56. Armour & Co. v. New York, New Haven & Hartford R. Co., 103 A. 1031, 1033, 41 R.I. 361.

57. Webster New Int. D.

58. Sidle v. Baker, 3 N.E.(2d) 537, 541, 52 Ohio App. 89

59. Sidle v. Baker, supra.

60. Iowa.—Kadlec v. Al. Johnson Const. Co., 252 N.W. 103, 105—Ellis v. Bruce, 252 N.W. 101, 102—Lindquist v. Thierman, 248 N.W. 504, 508, 87 A.L.R. 893.
Ohio.—Sidle v. Baker, 3 N.E.(2d) 537, 541, 52 Ohio App. 89—Shaeffer-Weaver Co. v. Mallonn, 186 N.E. 514, 516, 45 Ohio App. 1.

61. Armour & Co. v. New York, N. H. & H. R. Co., 103 A. 1031, 1033, 41 R.I. 361.

ASSURER. An insurer against certain perils and dangers; an underwriter; an indemnifier.[62]

ASSYTHMENT. In Scotch law indemnification for killing, maiming, or laming a person;[63] damages awarded to the relative of a murdered person from the guilty party, who has not been convicted and punished.[64]

ASTIPULATION. A mutual agreement, assent, and consent between parties; also a witness or record.[65]

ASTIPULATOR. In juridical language, one who joins another in a stipulation; a surety.[66]

ASTITRARIUS HÆRES. An heir apparent who has been placed, by conveyance, in possession of his ancestor's estate during such ancestor's lifetime.[67]

ASTITUTION. An arraignment.[68]

ASTRACHAN. Fabrics composed of cotton and hair, made in imitation of the coat of the Astrachan lamb; a rough fabric, with a long, closely curled pile in imitation of the fur.[69]

Phrase: "Astrachan trimmings."[70]

ASTRARIUS. A householder; belonging to the house; a person in actual possession of a house.[71]

ASTRE. Law French, a hearth, a fireplace, or a house.[72]

ASTRER. In old English law, a householder, or occupant of a house or hearth.[73]

ASTRICT. In Scotch law, to assign to a particular mill.[74]

ASTRICTION TO A MILL. A servitude by which grain growing on certain lands or brought within them must be carried to a certain mill to be ground, a certain multure or price being paid for the same.[75]

ASTRIHILTET. In Saxon law, a penalty for a wrong done by one in the king's peace.[76]

ASTROLOGY. The pseudoscience which treats of the influences of the stars upon human affairs, and of foretelling terrestrial events by their position and aspects.[77]

ASTRONOMICAL DAY. From noon to noon.[78]

ASTRUM. A house, or place of habitation.[79]

AST SI INTESTATO MORITUR, CUI SUUS HERES NEC EXTABIT, AGNATUS PROXIMUS FAMILIAM HABETO.[80]

A SUMMO REMEDIO AD INFERIOREM ACTIONEM NON HABETUR REGRESSUS, NEQUE AUXILIUM.[81]

ASUNTO. Affair; matter, subject or subject matter. In Spanish law the word is sometimes used as the equivalent of "cause," "action," "suit."[82]

ASYLUM. The word "asylum" always has had a common and well understood signification; and has been generally defined as a place where persons flee for protection;[83] and more specifically a sanctuary or place of refuge and protection where criminals and debtors found shelter, and from which they could not be taken without sacrilege.[84] The word includes

62. Black L. D.

63. Burrill L. D., citing Bell D., Erskine Inst. bk IV tit 4 § 105, and 1 Forbes Inst. bk III pt II c 1 tit 10.

64. Black L. D.

65. Black L. D.

66. Adams Gloss.

67. Black L. D. citing Coke Litt p 8.

68. Black L. D.

69. Century D., quoted in In re Herrman, (D.C.N.Y.) 52 F. 941, 943

70. Lowenthal v. U. S., (N.Y.) 71 F. 692, 18 C.C.A. 299.

71. Black L. D.

Astrarius hæres—an heir placed by the ancestor in the house (astrum) which he was to inherit—Adams Gloss., citing Coke Litt. p 8 b.

Astrarii in atrio sive in astro—those who are domiciled together in the hall and on the hearth—Adams Gloss., citing Bracton fol 267 b.

72. Adams Gloss.

73. Black L. D.

74. Black L. D.

75. Black L. D.

76. Black L. D

77. Webster New Int D.

"Fortune telling" compared.—State v. Neitzel, 125 P. 939, 69 Wash. 567, 568, 569, 43 L.R.A. (N.S.) 203, Ann. Cas.1914A 899.

78. See Time § 12.

79. Black L. D.

80. A maxim meaning "Moreover, if any one (a paterfamilias) die intestate, and he shall leave no lineal descent (i. e. through males under his power to take the succession), his nearest agnate shall have the succession"—Adams Gloss., citing 4 Kent Comm. p 378 note (a).

81. A maxim meaning "From, i. e. after using, the highest remedy, there can be no recourse [going back] to an inferior action, nor assistance [derived from it]."—Adams Gloss.

82. Velásquez Spanish-English D.

83. State v. Bacon, 6 Neb. 286, 291

84. Black L. D., citing Cromie v. Institution of Mercy, 3 Bush (Ky.) 391—5 C.J. p. 1416 note 1, p. 1417 note 4.

In a foreign country

(1) A fugitive from justice, who has committed a crime in a foreign country, "seeks an asylum" at all times when he claims the use of the territories of the United States—Black L. D., citing In re De Giacomo, (C.C.N.Y.) 7 F.Cas.No.3,747, 12 Blatchf. 391, 395.

not only place, but also shelter, security, protection.[85]

In time of war, a place of refuge in neutral territory for belligerent warships.[86]

As an institution for the relief of the unfortunate, the term is defined in section 1 of the title Asylums.

(2) Every sovereign state has the right to offer an asylum to fugitives from other countries, but there is no corresponding right on the part of the alien to claim asylum. In recent years this right of asylum has been voluntarily limited by most states by treaties providing for the extradition of fugitive criminals.—Black L. D.

85. Black L. D, citing In re De Giacomo, (C C N Y.) 7 F Cas.No. 3,747, 12 Blatchf. 391, 395.

86. Black L. D.

ASYLUMS

This Title includes institutions for protection or relief of afflicted or unfortunate persons, whether founded or maintained by private means or in part or wholly by government; establishment, maintenance, regulation, and management of such institutions; and rights, powers, duties, and liabilities of managers and other officers, etc., thereof.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definition and classification—p 141
2. Establishment, ownership, and maintenance—p 142
3. —— Private asylum—p 142
4. —— Public asylum—p 142
5. Regulation and supervision—p 145
6. Officers—p 147
7. Inmates—p 148
8. Management—p 149
9. Liabilities of proprietors, officers and employees—p 150
10. Actions—p 152

§ 1. Definition and Classification

An asylum is an institution for the relief and assistance of unfortunate or afflicted persons; its status as such depends on its true nature and character and not on the name by which it is called or the motive prompting its establishment.

An asylum has been defined as an institution for the protection or relief of the unfortunate, as an asylum for the poor, for the deaf and dumb, or for the insane;[1] an institution for receiving, maintaining, and, so far as possible, ameliorating the condition of persons suffering from bodily defects, mental maladies, or other misfortunes, as an orphan asylum, an asylum for the blind, for the insane, etc.;[2] a refuge, sanctuary, or charitable institution.[3] Sometimes, from the context in which it is used, the word may be deemed as the substantial equivalent of, and be intended to denote, an institution in the nature of a hospital.[4]

When used in constitutional or legislative provisions relating to public institutions, the term has been construed as embracing all institutions, established and maintained at the public expense, for the care, education, and support of the unfortunate.[5]

If the institution is in fact of the character described, its status as an asylum is not affected by the motive prompting its erection and maintenance;[6] neither is it material whether it is called a school, a retreat, a home, a society or an asylum;[7] what is material is the nature, and not the name, of the institution.[8]

On the other hand, the fact that in some of its incidental features, such as the reception of children, an institution performs a similar service to that rendered by an asylum, does not make it one, if in its

1. Idaho.—Powell v. Spackman, 65 P. 503, 507, 7 Idaho 692, 54 L.R.A. 378.
Kan.—Lawrence v. Leidigh, 50 P. 600, 58 Kan. 594, 599, 62 Am.S.R. 631.

2. D.C.—French v. Ass'n for Works of Mercy, 39 App.D.C. 406, 411, Ann.Cas.1913E 855
Neb.—Curtis v. Allen, 61 N.W. 568, 48 Neb. 184, 189.

3. Cromie v. Louisville Orphans' Home Soc., 3 Bush (Ky.) 365, 391

4. French v. Ass'n for Works of Mercy, 39 App.D.C. 406, Ann.Cas. 1913E 855

In the Spanish language, "hospital" and "asilo" are, in the vernacular, lightly interchangeable, "hospital" being defined by Escriche as "houses destined to shelter and receive wanderers and poor persons, to raise and educate children without homes and to cure sick people who lack means," so that, under the cy pres doctrine, a legacy to a "hospital de caridad" was properly awarded to an institution which was in the nature of an asylum or refuge.—Succession of Serrallés v. Asilo de Damas, 18 Porto Rico 484

5. Kan.—Lawrence v. Leidigh, 50 P. 600, 58 Kan. 594, 62 Am.S.R. 631
Mich.—Wolcott v. Holcomb, 56 N.W. 837, 97 Mich. 361, 23 L.R.A. 215.

6. Kan.—Lawrence v. Leidigh, 50 P. 600, 58 Kan. 594, 62 Am.S.R. 631.
Mich.—Wolcott v. Holcomb, 56 N.W. 837, 97 Mich. 361, 23 L.R.A. 215.

7. Society as asylum.—Doughten v. Vandever, 5 Del.Ch. 51.—Lawrence v. Leidigh, 50 P. 600, 58 Kan. 594, 62 Am.S.R. 631.—Wolcott v. Holcomb, 56 N.W. 837, 97 Mich. 361, 23 L.R.A. 215.—Matter of Smith, 89 N.Y.S. 1006, 44 Misc. 384.

Soldiers' homes

A home for the indigent veterans of wars has been held to be an asylum within the meaning of constitutional provisions.—Matter of Smith, 89 N.Y.S. 1006, 44 Misc. 384.—In re Registration, 21 Pa.Co. 473.—5 C.J. p 1416 note 2 [c]

8. Doughten v. Vandever, 5 Del.Ch. 51.

primary purpose it is different and does not operate in the manner characteristic of asylums.[9]

§ 2. Establishment, Ownership, and Maintenance

Subject to any relevant constitutional limitations, the public duty of assisting the unfortunate and afflicted may be discharged by contributing to the support of asylums maintained by other agencies or by establishing asylums whose management is confided to others as well as by their establishment and operation directly.

Unless some constitutional inhibition of such a course of conduct exists, the state may discharge its duty of assisting or maintaining the unfortunate by contributions to asylums founded or primarily maintained by its political subdivisions or by private bounty and need not establish its own asylums for that purpose.[10] The state also may establish a state asylum, entrusting the management thereof to a private corporation organized for like purposes.[11]

§ 3. —— Private Asylum

Private corporations to conduct asylums may ordinarily hold whatever property is requisite for that purpose. Constitutional provisions forbidding state aid to sectarian or private organizations ordinarily prohibit contributions of public funds toward the maintenance of private asylums, save in so far as express exception is made therefor.

Under statutes authorizing corporations to hold all property, real or personal, necessary for the purposes of their creation, a corporation may take and own the land requisite for an asylum, where the conduct of such an institution is included among its charter powers.[12]

Constitutional prohibitions of state aid to sectarian institutions or to individuals apply to render unconstitutional contributions by a state or any of its political subdivisions toward the maintenance of asylums established by, and belonging to, religious organizations or private charitable enterprise, even though grants of aid are made in connection with power given the government to commit inmates to such asylums.[13] Where an express exception is made by the constitution, however, of payments for designated purposes to particular classes of asylums, as under a provision authorizing the payment to orphan asylums of funds for the education of inmates, the state or its subdivisions may contribute to the maintenance of an asylum to the extent of, and for the purposes embraced by, such prohibition, and the asylum has a right to claim that measure of support provided by law,[14] provided, of course, the asylum has complied with the regulations imposed by the legislature as a condition of the assistance.[15] In cases falling within such exceptions and legislation enacted pursuant thereto, the contribution made by the state to the maintenance of the asylum is not a "charity" but should be considered in the light of the performance of a duty by the state to care for its citizens who are unable to care for themselves.[16]

§ 4. —— Public Asylum

a. Ownership and status
b. Establishment and maintenance

a. Ownership and Status

Public asylums are public governmental institutions; if established by the state, they are state institutions and owned by the state absolutely or subject to trusts, as the case may be, but if established by governmental subdivisions, with the state merely contributing to their maintenance, they are not.

An asylum established and maintained by the state or any of its subdivisions is unquestionably a public institution[17] and is indeed one which is strictly governmental in character.[18] Moreover, it is a state institution when it is an arm of the state, tracing its existence thereto and subserving objects which are statewide in character;[19] and this may be so although the administration of the institution is entrusted to, and a considerable part of the funds for its support are derived from, a private charitable enterprise;[20] but, where in origin and the scope of its services, it is referable to some subdivision of the state, such as a county, it is not to be deemed a state institution, even though the state is under the constitutional duty of supporting institutions of the character in question and does in fact contribute to

9. French v. Ass'n for Works of Mercy, 39 App D.C. 406, Ann Cas. 1913E 855.

10. Chalfant v. State, 37 Ohio St. 60.

11. Society of Home for the Friendless v. State, 78 N.W. 726, 58 Neb. 447.

12. Eaton v. Methodist Episcopal Church Woman's Home Missionary Soc., 105 N.E. 746, 264 Ill. 88.

13. Ill.—Chicago Washingtonian Home v. Chicago, 41 N.E. 898, 157 Ill 414, 29 L.R.A. 798—Cook County v. Chicago Industrial School, 18 N.E 183, 125 Ill. 540, 8 Am S.R 386, 1 L.R.A. 437.
Nev.—State v Hallock, 16 Nev. 373
Contrary view.—State v New Castle County Levy Ct., 42 A. 522, 17 Del. 597.

14. Sargent v. Rochester Bd. of Education, 69 N.E 722, 177 N.Y 317, affirming 79 N.Y.S. 127, 76 App.Div. 588, affirming 71 N.Y.S. 954, 35 Misc. 321—5 C.J. p 1413 note 25.

15. People v Glowacki, 2 Thomps. & C.(N.Y.) 436.

16. Sacramento Orphanage, etc., v. Chambers, (Cal App.) 144 P. 317.

17. Ohio—Chalfant v. State, 37 Ohio St. 60
Or.—State v. Metschan, 46 P. 791, 53 P. 1071, 32 Or. 372, 41 L.R.A. 692.

18. State v. Metschan, supra.

19. Neb.—Society of Home for the Friendless v State, 78 N.W. 726, 58 Neb 447.
Or.—State v Metschan, 46 P 791, 53 P. 1071, 32 Or 372, 41 L.R.A. 692.

20. Society of Home for the Friendless v. State, 78 N.W. 726, 58 Neb. 447.

the support of the asylum, and although the institution is subject to legislative control.[21]

The real ownership of the property occupied by a state asylum is in the state.[22] This is true, although the nominal title is in a corporation created by law to conduct the asylum, where the state is the sole member of the corporation;[23] and, unless restrained by the terms of the instruments under which the property is acquired, the legislature may require the corporation to transfer it to the state, but such conveyance would in no way alter the state's interest in the property.[24]

The nature of the state's interests in the realty depends on the deeds under which the property is held and the terms of contracts or wills by which property has been given to, and accepted for, the institution, being a fee simple title with complete and absolute control, extending even to the diversion of the property to other uses, in the absence of trusts or limitations expressed in the deeds or arising out of donations or bequests accepted for the asylum.[25]

If an act for the purchase of real estate and the erection of an asylum provides for control by a private corporation, such corporation has a mere privilege revocable by the state, and not a vested, irrevocable right; the state could not lawfully purchase the land in trust for a private corporation, and the title, both legal and equitable, is necessarily in the state.[26]

b. Establishment and Maintenance

(1) In general
(2) Support and upkeep

(1) In General

Subject to constitutional limitations, the propriety of the acts of boards or officials in connection with the location, establishment, or maintenance of public asylums is dependent on the terms of relevant statutes, whether specific or general.

Under constitutional provisions in some states, for example, where it is provided that all public institutions shall be located at the seat of government, the legislature has no discretion as to the location of state asylums, being limited to a decision whether such institutions shall be established at all and, if that decision is in the affirmative, being required to heed the constitutional injunction in the matter of their location.[27] In the absence of such provisions, the legislature has the power itself to designate a place where the institution shall be located;[28] or it may, as has commonly been done, delegate this authority to a committee or commission appointed for the purpose.[29]

A commission selected, pursuant to statute, for the establishment of a state asylum can act only as to the matters, and must act in the manner, specified in its legislative mandate, and thus, if the commission is empowered only to select a site of a described character, it has no power to purchase or to fix a price to be paid by the state for land deemed by it to be suitable for the location of the asylum; having chosen a site, its power is exhausted.[30] It is not exhausted, however, by a merely partial or incomplete location; hence, up until the time a precise tract or parcel of ground on which the asylum shall be located has been fixed on, the commission may reconsider and revoke its prior determinations, not being bound by any prior designation of the general region or community wherein the institution shall be established.[31]

Where, in addition to the power of selecting a location, the commission is expressly authorized to purchase or acquire the land selected for asylum purposes, it may, of course, bargain for and accept a deed of the premises,[32] but, in the absence of any such specific grant of power, the land selected for the purpose can be obtained only in such manner, by condemnation or otherwise, as is by statute provided for the acquisition of land by the state.[33]

Commissioners entrusted with the duty of seeing to the construction of the buildings requisite for the asylum and directed to accept the lowest responsible bid for such work are given judicial and discretionary, not merely ministerial, powers; they are not required to award the contract to the lowest bidder but are to deliberate and decide as to the responsible character of the several bidders, giving due allowance to all relevant factors and considerations bearing on the question.[34]

Where the statutes empower counties, in establishing asylums, either to purchase land and erect the requisite buildings, or to purchase land and buildings, the county may, if it elects the latter alternative, con-

21. Cal.—In re Johnston's Estate, 239 P. 397, 197 Cal. 23.
Ohio.—Chalfant v. State, 37 Ohio St. 60—State ex rel. Campbell v. Wesselman, 18 Ohio N.P.(N.S.) 564.
22. Opinion of Justices, 50 A. 328, 70 N.H. 638.
23. Opinion of Justices, supra.
24. Opinion of Justices, supra.
25. Opinion of Justices, supra.
26. Home For Friendless Soc. v. State, 78 N.W. 726, 58 Neb 447.
27. State v. Metschan, 46 P. 791, 53 P. 1071, 32 Or. 372, 41 L.R.A. 692.
28. Hornaday v. State, 62 P. 329, 62 Kan. 822.
29. Hornaday v. State, supra.
30. Hornaday v. State, supra.
31. State v. Bondy, 68 N.W. 1075, 66 Minn. 240.
32. State v. Bondy, supra.
33. Hornaday v. State, 62 P. 329, 62 Kan. 822.
34. Hoole v. Kinkead, 16 Nev. 217.

tract for such improvements in the buildings as are necessary to fit them for the purpose of an asylum.[35] They are not required, in so contracting, to submit the project to competitive public bidding in the absence of any statute so requiring, but may let it on private contract on a cost plus basis or otherwise;[36] and a statute requiring competitive bidding, where the contract is one for erection of a building or for repairs, has no application.[37]

Maintenance. Where control of state penal and charitable institutions is vested in the same board, with no distinction made between the two classes of institutions in defining the board's powers and duties, its functions with respect to the maintenance of state asylums under its control are the same, and are to be exercised in the same manner, as are those relating to penal institutions.[38]

Maintenance properly includes the making of whatever repairs and replacements are requisite for the operation of the institution,[39] the term will be viewed rather liberally as not being confined to the preservation of the asylum in its original state, but as inclusive of whatever is necessary to its reasonably efficient functioning in the light of modern knowledge, including the making of any changes in the plant which in fact relate to the proper maintenance of the institution or its inmates, although they involve a substitution of modern processes or devices unknown at the time of the establishment of the asylum.[40] Specifically, it comprehends expenses incurred for the food, clothing, and care of inmates, and for repairs to buildings and equipment;[41] but it does not comprehend the purchase of additional land, the erection of additional buildings, or the furnishing and equipment thereof.[42]

It has thus been held that authority to construct buildings at an asylum is not to be implied from the usual powers incident to its control and supervision, even though such buildings be necessary for the proper maintenance of the institution, such building expense being an extraordinary expenditure requiring a special appropriation.[43] Where such an appropriation is made with no provisions as to the erection of the building, the responsible boards or officials have implied authority to resort to any proper method for accomplishing that object,[44] but the expenditure must be made in the manner prescribed by statutes applicable to such boards or officials, where there are applicable statutes.[45]

Where the legislature authorizes the erection of additional buildings and appoints a special board to have charge thereof, the regular board will, nevertheless, be presumed to retain its power, except in so far as those powers are expressly withdrawn, and as to matters not expressly intrusted to the special board, its decision controls, for example, in the matter of the location of the proposed building, where no power as to location has been expressly given.[46]

Authority given designated county officials to erect, repair, or improve "necessary buildings" and to borrow money therefor after an election and other prescribed steps is sufficient to entitle such officials to issue bonds for the purpose of erecting or repairing the buildings necessary for a county asylum, after compliance with all procedural requisites, although such institution is not specifically named.[47]

(2) Support and Upkeep

Subject to such constitutional limitations as may exist, a state asylum may be supported either by general taxation throughout the state as a whole, or by allocation of a part or the whole of the costs among political subdivisions or to the inmates of the asylum, in the legislative discretion.

It is within the power of the legislature to take charge of, and provide for, the indigent, insane, and feeble-minded persons within its boundaries by general taxation, and to relieve the several counties from such burden, except as they bear their proportion through such taxation.[48]

The mere fact that the asylum is owned and controlled by the state does not, necessarily, make its maintenance and the maintenance of its inmates a state charge, however,[49] and it is equally within the

35. Ruggles v. Moore, 97 Pa Super. 47.

36. Ruggles v. Moore, supra.

37. Ruggles v. Moore, supra.

38. State ex rel Collins v. Halladay, (S D.) 252 N.W. 733.

39. In re Opinion Attorney-General, 32 Pa.Co 657.

40. In re Op. Attorney-General, supra

41. In re Warren Hospital for the Insane, 15 Pa Co 33.

42. In re Warren Hospital for the Insane, supra.

43. State ex rel Collins v. Halladay, (S D.) 252 N.W. 733.

44. State ex rel. Collins v. Halladay, supra.

45. State ex rel. Collins v. Halladay, supra.

Contract with lowest responsible bidder

If the board in charge of a state asylum is required to contract for the erection of buildings by letting the work to the lowest responsible bidder, it must pursue that method but need not let a single contract for the entire construction, being at liberty to award several contracts for the several portions of the work — State ex rel Collins v Halladay, (S D.) 252 N W. 733.

46. Long v. Kentucky Cent Lunatic Asylum, 6 S.W. 335, 9 Ky L. 699.

47. State of Ohio, ex rel. Campbell v. Wesselmann, 18 Ohio N P.(N S) 564.

48. State v. Lewis, 119 N.W. 1037, 18 N D. 125

49. State v. Lewis, supra.

power of the legislature to require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so doing.[50] The fact that the institution is a state institution in no manner restricts or limits the legislature in the exercise of such power;[51] and statutes requiring the counties from which inmates have been admitted, or the inmates themselves, if financially able, to contribute to the maintenance of such inmates in state asylums are not obnoxious to constitutional provisions providing that such institutions shall be supported by the state,[52] confiding to local authorities the control of local taxation or fiscal affairs,[53] or forbidding double taxation.[54]

It is within the discretion of the legislature whether the counties shall be required to pay such sum as may reimburse the state or to pay a fixed sum which shall be less than the total proportional share of the upkeep of the inmates;[55] and, when payment of a fixed sum is required, it is no objection to the validity of the provision that any unexpended surplus of such fund is directed to be covered into the general maintenance fund of the asylum.[56] The amount required to be paid is a matter within the legislative discretion, which will not be disturbed unless clearly unreasonable.[57] It is no defense to the liability of a county that the institution has sufficient money in its maintenance fund derived from the state appropriation, or from such fund plus voluntary payments by other counties and by individuals.[58]

The determination in the first instance as to the county of the inmate's residence, which is, accordingly, chargeable for his upkeep, may appropriately be confided to the board in charge of the institution, the right to a review by the courts being duly preserved.[59]

Where certain designated supplies are required to be furnished at the expense of the inmates personally, the obligation is a continuing one relating to the whole duration of the stay in the asylum and not merely to conditions at the time of admittance.[60] Before an individual will be held to answer for any of the charges of maintaining an inmate in an asylum, however, there must be a clear statutory declaration establishing such liability.[61]

§ 5. Regulation and Supervision

a. In general
b. Investigation
c. Audit and allowance of claims

a. In General

The power of regulating asylums, public or private, resides in the legislature, subject always to the requirement that the regulations may not be unconstitutional or unreasonable, and, under it, in the boards chosen to have charge of the institutions, in so far as they are authorized to act by the statutes conferring their authority.

As to state asylums, the legislature may enact any regulations with respect to their control and management not in conflict with constitutional provisions.[62] Where a state, by a general and comprehensive act, sets up a system of caring for a particular class of citizens in asylums and, by later statutes, authorizes the establishment of additional asylums which refer to the basic act for all matters, except the construction of buildings, the general act is controlling on questions concerning the government of such institutions, regulations for the admission and discharge of inmates, etc.[63]

Moreover, under the police power, the legislative authority of the state or of its political subdivisions may regulate the establishment and operation of private asylums,[64] but any such regulation, to be valid, must be reasonable.[65] While the state may properly require the procuring of a license for the conduct of such an institution and make its issuance discretionary with the licensing board,[66] it cannot, on the pre-

50. Neb.—State v. Stanton County, 161 N.W. 264, 100 Neb. 747, followed in State v. Gage County, 161 N.W. 267, 100 Neb. 753
N.D.—State v. Lewis, 119 N.W. 1037, 18 N.D. 125.

51. State v. Lewis, supra.

52. State v. Huwe, 137 N.E. 167, 105 Ohio St. 304—State v. Kiesewetter, 37 Ohio St. 546—Rice v. State, 14 Ohio App. 9

53. N.D.—State v. Lewis, 119 N.W. 1037, 18 N.D. 125
Ohio—State v. Huwe, 137 N.E. 167, 105 Ohio St. 304

54. State v. Stanton County, 161 N.W. 264, 100 Neb. 747, followed in State v. Gage County, 161 N.W. 267, 100 Neb. 753.

55. State v. Lewis, 119 N.W. 1037, 18 N.D. 125

56. State v. Lewis, supra.

57. State v. Lewis, supra.

58. State v. Lewis, supra.

59. State v. Dodge County, 13 N.W. 680, 56 Wis. 79.

60. State v. Kiesewetter, 37 Ohio St. 546.

61. State v. Hardesty, 50 P.(2d) 982, 142 Kan. 579

62. State v. Bryan, 39 So. 929, 50 Fla. 293.

Federal asylums not subject to state regulation
Institutions established by the United States are not subject to control by the state governments as to internal regulations.—Ohio v. Thomas, (Ohio) 19 S.Ct. 453, 173 U.S. 276, 43 L.Ed. 699, affirming 87 F. 453, 31 C.C.A. 30.

63. State v. Gage County, 161 N.W. 267, 100 Neb. 753

64. Diepenbrock v. State Board of Health, 135 A. 531, 82 N.H. 451.—5 C.J. p. 1418 note 28.

65. Ex parte Whitwell, 32 P. 370, 93 Cal. 73, 35 Am.S.R. 152, 19 L.R.A. 727.

66. Diepenbrock v. State Board of Health, 135 A. 531, 82 N.H. 451.

Chiropractic license no substitute
A duly qualified chiropractor is subject to a statute requiring a license by the state health board be-

text of regulation, prohibit either directly or indirectly the business of operating a private asylum, which is a lawful one,[67] nor can it make or enforce unreasonable or arbitrary requirements as to the construction or location of such institutions or the classification and character of inmates admitted.[68]

The board of managers of such an asylum also has power to make all necessary by-laws and regulations, not inconsistent with the constitution and laws of a state or the United States, for the government of such institutions, officers, employees, and inmates,[69] and such board, rather than the executive officers employed by it for the day-to-day operation of the institution, is responsible for, and in control of, the policies and general administration of the asylum.[70] The board in charge of a public asylum cannot, however, confer upon itself power for the transaction of any business not confided to it by the statutes establishing it.[71]

The courts will not undertake to prescribe rules for the government of institutions of this character or to interfere with those made by the duly constituted authorities, except when the latter are unreasonable and subversive of the purposes for which such institutions are established and maintained,[72] and this is true even as to inmates committed to the institution by court order.[73] Also, the governor of the state may not, as such, or as ex officio head of the board, ignore or override the regulations duly made.[74]

b. Investigation

Authority to direct the investigation of asylums resides in the legislature.

The power to order an investigation of the handling of the affairs of a public asylum by the employees in charge thereof rests with the legislature alone; it may not be undertaken at will by private individuals.[75] Moreover, when an investigation is being made by a private individual, the board in charge of the institution may prescribe reasonable regulations conditioning access to the records and plant and communications with employees and inmates, in order that the records or property may not be disturbed or the orderly operation of the asylum interfered with.[76]

Even as to asylums operated by private corporations, the legislature has the power to direct an investigation of their affairs, financial or otherwise, at least in so far as is necessary to protect any interest the state may have in the institution, and to appoint a commission for that purpose;[77] the power of commissioners appointed for that purpose is quasi-judicial and wholly discretionary, and if, in their judgment, the situation requires the sequestration of the records and funds of the asylum, that decision will not be interfered with, in the absence of an abuse of discretion.[78]

A visiting committee appointed, pursuant to statute, to inspect state asylums does not, by reason of its being empowered to examine witnesses under oath, have the further power to punish for contempts, that power not being expressly given and not arising by implication from the power which is given.[79]

c. Audit and Allowance of Claims

When, and as, directed by statute, the state auditor is to examine into the fiscal affairs of state asylums and issue warrants in discharge of claims.

Where expenditures are intrusted to the good faith and official responsibility of the asylum managers, the state auditor is not required to examine into the legality of the bills incurred by such managers before drawing his warrant for the amounts claimed.[80]

Where, however, the auditor is required by statute to audit all vouchers for expenditures which appear to be for lawful purposes, the necessary implication is that he shall not audit claims for unlawful expenditures, and this without regard to the motives or good faith of the officers by whom the expenditures were made.[81]

Under a statute allowing the auditor to issue warrants for only the amount of debts and liabilities existing, a warrant can legally be issued only after the expense or liability is actually incurred;[82] and if an appropriation is to be diminished by an unex-

fore he can maintain an asylum or sanitarium, no exception having been established by the statute as to licensed physicians or chiropractors—Diepenbrock v. State Board of Health, 135 A. 531, 82 N.H. 451

67. Ex parte Whitwell, 32 P. 870, 98 Cal. 73, 35 Am.S.R. 152, 19 L.R.A. 727.

68. Ex parte Whitwell, supra.

69. Pierson v. Times-Picayune Pub. Co., 88 So. 77, 148 La. 817—5 C.J. p. 1418 note 30.

70. Pierson v. Times-Picayune Pub. Co., supra.

71. Wall v. Deaf, etc., Asylum Bd. of Directors, 73 P. 951, 145 Cal. 468

72. Doren v. Fleming, 27 Ohio Cir. Ct. 737.

73. Matter of Thaw, 143 N.Y.S. 854, 158 App.Div. 571

74. Pierson v. Times-Picayune Pub. Co., 88 So. 77, 148 La. 817.

75. Pierson v. Times-Picayune Pub. Co., 88 So. 77, 148 La. 817.

76. Pierson v. Times-Picayune Pub. Co., supra.

77. People v. Osborn, 57 Barb.(N.Y.) 663.

78. People v. Osborn, supra.

79. Brown v. Davidson, 13 N.W. 442, 59 Iowa 461.

80. State v. State Auditor, 46 Mo. 326.

81. Phelps v. Auditor-Gen., 99 N.W. 374, 136 Mich. 439.

82. Tandy v. Norman, 27 S.W. 861, 16 Ky.L. 290.

pended balance, the auditor may determine by any competent means, either by reports of officers or otherwise, what that balance is.[83]

§ 6. Officers

a. Status, employment, and tenure
b. Bonds

a. Status, Employment, and Tenure

The status of asylum officers, and all questions as to appointment, tenure, and removal or other termination of employment, are determined by an application of the rules applicable to other officers generally, and of relevant statutes construed in the light of such rules.

The status of a particular person as officer or employee is to be determined by the tests governing in that connection generally, which are stated in Officers § 5 [46 C.J. p 928 note 91–p 932 note 34], including the manner of creation of the position and the nature of the duties attached.[84]

Officers appointable by the board having charge of asylums can only be appointed by action of the board duly constituted and acting as such, and not on the authority of a majority of the board members acting individually in concurring in the appointment.[85] A constitutionally prescribed mode for selecting the officers of state institutions need not be pursued in choosing the officials of asylums, even those publicly maintained, which are not strictly state institutions.[86]

In the absence of any specification in the constitution, the power of fixing the terms of officials of public asylums is vested in the legislature.[87] Where prior statutes governing state asylums and fixing a specified term for official appointments are superseded by a code completely covering the affairs of such institutions, which contains no such specification, the offices in question are of indefinite tenure, despite the absence of any provisions to that effect in the new code, and appointees are subject to the general rules respecting the duration and termination of appointments to offices of that character;[88] and, of course, as to matters respecting tenure and removal wherein a later statute contains provisions necessarily inconsistent with a prior one, the earlier statute is repealed.[89]

Filling vacancies. A vacancy occurring in any of the offices connected with the administration of state asylums, whether by failure to designate a successor to the incumbent in office or otherwise is to be filled by appointment by the official or board vested by the constitution or by statute with the power of appointment generally,[90] or under the particular state of facts which is involved, if it is specifically dealt with.[91] Such interim appointment is not necessarily for the full term attached to the office or even for the full balance of the unexpired term to fill which the appointment is made, but is only for such time as the relevant statutes prescribe.[92] While the boards or officials authorized to appoint officers of asylums may make such appointments for the statutory term, even though they should in part extend beyond the period of their own incumbency,[93] they cannot make appointments to commence in the future after their own terms of office expire, in the absence of any necessity for so doing.[94]

Termination of employment. Where the board in charge of a public asylum is authorized to elect to a particular office for a stated term, the implication is that the person elected is not to be removed by it during the term prescribed,[95] and this implication is strengthened by the existence of other statutes giving it the power to discharge other employees and those providing a method for removal of officers generally.[96] So, too, where authorized to remove the officer for specified causes, he is not removable at the board's pleasure but only on the establishment of a specified cause.[97] On the other hand, where the statute provides for appointment by a given authority and is totally silent as to removal, or where it expressly authorizes removal at the pleasure of the appointing authority, the power of removal is incident to the power of appointment, and the appointing authority may remove at will,[98] and

83. Norman v. Central Kentucky Lunatic Asylum, 17 S.W. 150, 92 Ky 10, 13 Ky.L. 310.
84. Ark.—Lucas v. Futrall, 106 S.W. 667, 84 Ark. 540.
Cal.—Wall v. Board of Directors of Deaf, Dumb & Blind Asylum, 78 P. 951, 145 Cal. 468.
85. Lucas v. Futrall, 106 S.W. 667, 84 Ark. 540.
86. Chalfant v. State, 37 Ohio St 60.
87. Cowell v. Ayers, 220 S.W. 764, 110 Tex 348, answers to certified questions conformed to (Civ App.) 224 S.W. 1119.
88. Sponogle v. Curnow, 69 P. 255, 136 Cal. 580.
89. Lucas v. Futrall, 106 S.W. 667, 84 Ark. 540.
90. People v. Langdon, 8 Cal. 1—People v. Raine, 6 Cal. 509—People v. Reid, 6 Cal. 288.
91. People v. Parker, 37 Cal. 639.
92. People v. Langdon, 8 Cal. 1.
93. Board of Com'rs of Kingfisher County v. Eads, 152 P. 821, 52 Okl 95.
94. Board of Com'rs of Kingfisher County v. Eads, supra.
95. Wall v. Board of Directors of Deaf, Dumb & Blind Asylum, 78 P. 951, 145 Cal. 468.
96. Wall v. Board of Directors of Deaf, Dumb & Blind Asylum, supra
97. State v. Geiger, 133 S.W. 123, 152 Mo.App. 202.
98. Ohio—Littleton v. Board of Infirmary Directors, 18 Ohio Cir.Ct. 891, 9 Ohio Cir.Dec. 850
Tex.—Keenan v. Perry, 24 Tex. 253.

this, even though, at the time the employment commenced, the officer and the appointing authority entered into a contract of employment for a stated term.[99] A statutory provision that asylum officers are to be removed only for cause and after a hearing must yield to a constitutional provision that officers not holding for a fixed term are removable at the pleasure of the appointing authority, so that one appointed by the board in charge of such institutions to an office having no stated term may be removed therefrom for such reasons and in such manner as the board thinks fit.[1] Although the statute prescribes a term not in excess of a fixed period and that the officer shall only be removable for cause, if the employment is under an express contract for a stated term less than that mentioned by the statute, the officer cannot complain of being superseded by another after expiration of the contractual time but before expiration of the statutory period.[2]

Where an officer of an institution holds not merely at pleasure, but during good behavior or subject to removal for specified causes, then, it has been held, he can only be removed on the specified grounds, and, before such removal, there must be notice and a hearing given to him.[3] Moreover, after charges have been preferred and acted on favorably to the officer, they cannot be reopened and reconsidered without further notice,[4] but there is some early authority to the effect that the discretion of the appointing authority as to the existence of cause for removal is uncontrollable and, hence, no reason need be assigned or proceedings had, the general effect being just as if he were removable at pleasure.[5] Of course, where a power of summary removal is expressly conferred by statute, its exercise in a given case cannot be inquired into or questioned by the courts.[6]

Revocation of a valid election or appointment finally made is the equivalent of a removal from office, within the meaning and application of the rules here set forth;[7] and so is the appointment of a successor to an office already occupied at the time of the appointment.[8]

One employed as superintendent of a private asylum under a contract for a fixed period is not entitled to demand full compliance therewith at all hazards but may be discharged by those employing him for good cause, such as gross immorality, theft, embezzlement, or other criminal conduct rendering him unfaithful or unfit for the performance of his duties; they have the right, and indeed are under the duty, of examining into such matters and where, after such investigation, they reach a decision, which is warranted by the facts and not merely arbitrary, that such cause for discharge exists, they may remove him.[9]

b. Bonds

Recovery on bonds, commonly required of officers of public asylums, must be predicated on some breach of duty by the bonded officer.

In a number of jurisdictions, the giving of a bond by the officers, or by designated officers, of public asylums, is required by virtue of statutory requirements, some of which have received judicial interpretation.[10] No recovery can be had on such a bond unless a breach of official duty by the bonded officer is affirmatively shown, and so, neither the sureties nor the superintendent can be held responsible for breaches of duty by the trustees.[11]

§ 7. Inmates

The board in charge of an asylum may make and enforce suitable regulations governing the admission and discharge of inmates and their conduct and privileges while in the asylum except that it may not retain against his will one voluntarily admitted.

Where a public asylum is established for the reception of a designated class of persons, any person of the class therein named is eligible for admission; and, in the absence of explicit legislation on the subject, it is for those to whom control of the institution is committed to determine whether any particular person comes within such class and to fix the method by which such determination shall be made.[12]

An inmate may properly be expelled from the institution for conduct prohibited by the by-laws under penalty of dismissal, at least where such by-laws are

99. Smith v. Directors of Insane Asylum of New Mexico, 141 P. 608, 19 N.M. 137.

1. Sponogle v. Curnow, 69 P. 255, 136 Cal. 580.

2. Taber v. Pennsylvania State Hospital for Insane, (Pa.) 138 F. 865, 71 C C A 229.

3. Ark.—Lucas v. Futrall, 106 S.W. 667, 84 Ark 540
Mo.—State v Geiger, 138 S.W. 123, 152 Mo App 202.

4. State v. Geiger, supra.

5. Ill—Peo v. Higgins, 15 Ill. 110
Tex.—Keenan v. Perry, 24 Tex. 253

6. Smith v. New Mexico Insane Asylum, 141 P. 608, 19 N M. 137.

7. Lucas v. Futrall, 106 S.W. 667, 84 Ark 540.

8. Keenan v. Perry, 24 Tex. 253.

9. Texarkana Baptist Orphanage v. Wilson, (Ark) 74 S W.(2d) 224.

10. Ark—Lucas v. Futrall, 106 S. W. 667, 84 Ark. 540.
Ill.—Ramsay v. Peo., 64 N E. 555, 197 Ill. 594, affirming 97 Ill App 296.
Ind—State v. Galbraith, 28 N.E. 127, 128 Ind 501.
Tex—Keenan v. Perry, 24 Tex. 253

11. State v. Galbraith, 28 N.E. 127, 128 Ind. 501.

12. Doren v. Fleming, 27 Ohio Cir Ct. 737.

reasonable.[13] Such dismissal may not, however, be ordered by the administrative agent in charge of the asylum solely on his own authority, but only with the concurrence or assent of the corporate or governmental board having the government and control of the institution,[14] nor may it be ordered without affording the inmate notice and an opportunity to be heard;[15] but admission to an asylum does not create any valuable vested right, and it has been held that a person so admitted may be expelled by vote of the board, on the ground of insubordination, without notice or hearing, where there is no provision either in the statutes or the by-laws specifying the grounds for expulsion, and the whole matter is thus confided to the discretion of the board.[16]

A rule that inmates are, so far as dismissal is concerned, to be entirely subject to persons in loco parentis and subject to discharge only at the direction of such persons and not at their own volition has been sustained as reasonable and salutary;[17] and no legal wrong can be predicated on the apprehension and return of one who has escaped or departed from the institution without such an order for discharge.[18]

There is, however, one exception to the rule that the board may fix and enforce regulations for the detention or dismissal of inmates, springing from the principle that no man can, by agreement, lose his liberty, and that is the situation where an inmate enters under a voluntary agreement to remain for a fixed time, in which case the managers of an asylum cannot compel compliance with the agreement, even though the regulations of the asylum require the signing of such agreement by all persons seeking admittance voluntarily.[19]

Where the right of the inmate is made dependent on residence, it depends on residence at the time of commitment, and hence an infant duly committed is not to be discharged merely because of the removal of his parents from the state.[20]

Inmates have no right to receive or confer with visitors at a time or in a place or manner contrary to the regulations on that subject established by those in charge of the asylum.[21]

§ 8. Management

In anything within the scope of the authority, usually quite broad, which is conferred upon them, the boards or officials in charge of asylums have the power of management or control; but not as to matters not entrusted to them or expressly withheld from them.

The usual, and, indeed, practically universal, practice is for the legislature to confide the management of state asylums to designated boards or officials.[22] Where that is done, such boards or officials have a complete and unlimited discretion with respect to the management and control of such institutions, subject only to whatever express directions may be given them by statute and to the requirement that any rules made by them shall be reasonable.[23] The presumption of regularity is extended to the acts of boards or officials in charge of the conduct and management of asylums when acting in fulfilment of the duties confided to them, and their action cannot be assailed for irregularity unless the same is established.[24]

Of course, where the statutes command the doing of particular acts by those having charge of asylums, leaving them in such particulars no discretion but only the duty of acting ministerially, the expression of the legislative will prevails and the officials in question must do what is thus prescribed.[25] The repeal of an act prescribing certain conduct on the part of the responsible official in charge of an asylum and its replacement by another giving a large discretion absolves him from the duty of performance of the specific acts required under the former statute.[26]

While the board may secure expert assistants, and invest them with considerable duties in carrying out the various enterprises connected with the asylums under its care, it cannot surrender to such assistants its responsibilities of management, but must itself actively and actually assume the actual direction of affairs.[27]

Ordinarily, the purposes for which the sums appropriated for the support of public asylums shall be expended is a matter wholly within the jurisdiction of the board if there is no express legislative direc-

13. People v Sailors' Snug Harbor, 54 Barb (N Y) 532, 5 Abb.Pr.(N. S) 119.
14. People v. Sailors' Snug Harbor, supra
15. People v. Sailors' Snug Harbor, supra.
16. Tuck v. Industrial Home Bd. of Directors, 39 P. 607, 106 Cal. 216
17. Doren v. Fleming, 27 Ohio Cir. Ct. 737.
18. Doren v. Fleming, supra.
19. Matter of Baker, 29 How.Pr.(N Y) 435
20. Opinion of Judges, 4 R I. 587.
21. In re Thaw, 143 N.Y.S. 854, 158 App Div. 571.
22. Wicks v City and County of Denver, 156 P. 1100, 61 Colo. 266
23. Colo.—Wicks v City and County of Denver, supra
La.—Pierson v. Times-Picayune Pub. Co., 88 So. 77, 148 La. 817.
24. Wall v. Board of Directors of Deaf, Dumb & Blind Asylum, 78 P. 951, 145 Cal 768
25. Furnish v Satterwhite, 72 S. W. 309, 114 Ky. 905, 24 Ky L. 1723.
26. Wicks v City and County of Denver, 156 P. 1100, 61 Colo 266
27. Shipman v. State, 43 Wis. 343

tion on that score[28] However, money which has been appropriated by the legislature for certain named purposes cannot be diverted by the authorities of the institutions from these purposes,[29] nor have they power to obligate the state to pay for services for which they had no authority to contract.[30] Furthermore, they have no authority to borrow money or contract debts beyond the appropriations made by the legislature for the support and operation of their respective institutions.[31]

It is a proper exercise of discretion to provide that the asylum shall not receive more inmates than there are adequate facilities to accommodate,[32] and further, to provide a plan of allotment among the several subdivisions of the state in a fair and equitable manner, in case there are not facilities to care for all.[33] The officials in charge need not receive inmates up to the utmost physical capacity of the asylum, if to do so would in their judgment be detrimental to those admitted[34]

Boards or officials authorized to execute conveyances of or affecting asylum property ordinarily have power to give or withhold their assent to the terms of a proposed conveyance so to exact such qualifications or restrictions on the grant as, in the exercise of a reasonable discretion, they deem proper; but once having acted affirmatively on a proposed conveyance, their power is exhausted, and they cannot thereafter modify or alter the terms of the conveyance without further authorization.[35]

Although the management of an asylum, established by the state is confided by the legislation establishing it to a private eleemosynary corporation, the legislature may by subsequent action withdraw the management from such corporation and place the institution directly under the control of state employees or officials.[36]

§ 9. Liabilities of Proprietors, Officers and Employees

Liability attaches to asylums in contract or tort on the same grounds as to other public corporations or governmental instrumentalities, and to their officers or employees for their own acts personally chargeable to them, which give right to a cause of action; neither may be held to answer under the doctrine of respondeat superior.

A public asylum may, through its officers, make contracts for supplies for its inmates and incur liabilities on that account, just as for the proper maintenance of the institution it may sue for debts due it, or to enforce any right allowed by law;[37] and, even as to contracts in excess of authority, it may be answerable in quantum meruit for goods and services received to the use and benefit of the asylum[38] It may, likewise, incur liability in damages for creating and maintaining public nuisances which endanger human life, or destroy or injure the land of another, and may be sued to enforce such liability.[39]

However, such an institution being a mere instrumentality of the state government, brought into being to aid in the performance of governmental duty, the rule of respondeat superior does not apply to it;[40] and, therefore, it cannot be made to respond in damages for a personal injury inflicted on another by one of its inmates or employees,[41] although such injury results from negligence or mali-

28. Pierson v. Times-Picayune Pub. Co., 38 So 77, 148 La. 817.

County asylums

Under a statute authorizing county asylums providing for state assistance thereto, creating a board of trustees appointable by the governor, and declaring inter alia that the board of supervisors of any county taking advantage of the statute should be under the duty of appropriating such funds "as may be necessary for improvement of the grounds and buildings . . . such appropriation . . . (to) be paid . . . on the order of said board of trustees," while the county board of supervisors has the right to determine whether any, and how much, money should be appropriated for improvements, the board of trustees provided by the statute, and not the supervisors, is empowered to select the improvements to be made and to contract therefor and to control the making of the improvements and the related expenditures—Milwaukee County v Paul, 18 N.W. 321, 322, 59 Wis 341.

29. Kentucky Inst for Education of Blind v Murray, 160 S.W. 245, 155 Ky. 658

30. Phelps v. Auditor-Gen., 99 N.W. 374, 136 Mich. 439, 441.

31. State v. Mills, 12 N.W. 359, 55 Wis 229.

32. Wicks v. City & County of Denver, 156 P 1100, 61 Colo. 266

33. Wicks v. City & County of Denver, supra

34. Wicks v. City & County of Denver, supra

35. State of Ohio v. Toledo & Ohio Central Ry. Co., 3 Ohio N.P.(N.S.) 234.

36. Society of Home for the Friendless v. State, 78 N.W. 726, 58 Neb. 447.

37. Ky.—Leavell v. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky 213, 28 Ky L. 1129, 4 L.R.A (N.S.) 269, 12 Ann Cas 827.
Wis—Shipman v. State, 42 Wis. 377.

38. Shipman v. State, supra.

38. Leavell v. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky 213, 28 Ky L 1129, 4 L.R.A (N.S.) 269, 12 Ann Cas. 827—Herr v. Central Kentucky Lunatic Asylum, 80 S.W 971, 97 Ky 458, 17 Ky L 320, 53 Am S.R. 414, 28 L.R.A. 394—5 C.J. p 1420 note 59

Execution sales

While it would not be lawful to levy upon and sell property of an asylum indispensable to its operation and the maintenance of the inmates, other property, not clearly appearing to possess that quality, is subject to execution for the purpose of enforcing judgments against such an institution for injury to the property of others—Hauns v. Central Kentucky Lunatic Asylum, 45 S.W. 890, 103 Ky. 562, 20 Ky L 246.

40. Leavell v. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky. 213, 28 Ky.L. 1129, 4 L.R.A (N.S.) 269, 12 Ann.Cas. 827.

41. Cappel v. Pierson, 132 So 391, 15 La.App. 524—5 C.J. p 1420 note 61.

cious acts on the part of such inmate or employee,[42] and although the statute creating it provides that it may sue and be sued.[43] The liability for such acts is on the individual personally guilty of the negligence or misconduct causing the injury.[44] This has been held alike as to injuries sustained by an inmate through the negligence or wrongdoing of its employees[45] as to injuries to third persons by reason of negligent or wilful misconduct of employees or of inmates,[46] and as to injuries done employees by inmates.[47]

Moreover, acquiescence or other matters which would constitute a defense were the liability claimed against a private individual are available by way of defense to an asylum against which a similar liability is asserted.[48]

While an officer cannot be held liable for any mistake made when acting in a judicial or quasi-judicial capacity,[49] and thus is not liable on the doctrine of respondeat superior for personal injuries occasioned by an employee appointed by him,[50] this rule does not apply to ministerial acts in excess of authority.[51] Hence, such an officer is liable to an inmate for money taken from the person of the latter at the time of his admission and delivered to a third person presenting an adverse claim to it, not being protected in such action by a regulation authorizing delivery of effects taken from inmates to persons interested in them and looking after their welfare.[52] Such an official will be personally liable for his own conduct in the event he improperly restrains in the asylum one not duly committed,[53] but he may not be held to answer in damages for merely performing the duties confided to him in a lawful and proper manner, even though that involves a wrongful imprisonment.[54] An officer who without legislative authority borrows money, even though it is intended for, and devoted to, asylum purposes, is personally liable therefor.[55]

There is no liability for breach of contract imposed on the board by reason of the discharge of an employee or officer before the expiration of the time stipulated by his contract of employment, where the board, in so acting, was within the authority conferred upon it with reference to removals,[56] nor by reason of the appointment of another to succeed an incumbent holding over beyond the expiration of the term fixed by his contract, under circumstances negativing the existence of an implied contract of reemployment for a like term in the future.[57] A failure to resort to physical force or court procedure to oust him from the possession or premises of the asylum does not estop the board from denying liability for breach of contract;[58] in fact, it has a claim against him for the reasonable value of his upkeep for the time he wrongfully remains in possession, enforceable by set-off against arrears of salary unpaid at the time of his discharge or by any other lawful means.[59]

42. Leavell v. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky. 213, 28 Ky.L. 1129, 4 L.R.A.(N.S.) 269, 12 Ann.Cas. 827.

43. Ky.—Leavell v. Western Kentucky Insane Asylum, supra.
Va.—Maia v. Eastern State Hospital, 34 S.E. 617, 97 Va. 507, 47 L.R.A. 577.

44. Johnson v. Hamilton County, 1 S.W.(2d) 528, 156 Tenn. 293—5 C.J. p. 1420 note 64.

45. Ky.—Ketterer v. State Bd. of Control, 115 S.W. 200, 131 Ky. 287, 20 L.R.A.(N.S.) 274.
Va.—Maia v. Eastern State Hospital, 34 S.E. 617, 97 Va. 507, 47 L.R.A. 577.

46. Ky.—Leavell v. Western Kentucky Insane Asylum, 91 S.W. 671, 122 Ky. 213, 28 Ky.L. 1129, 4 L.R.A.(N.S.) 269, 12 Ann.Cas. 827.
Tex.—Clough v. Worsham, 74 S.W. 350, 32 Tex.Civ.App. 187.

47. Cappel v. Pierson, 132 So. 391, 15 La.App. 524.

48. Herr v. Central Kentucky Lunatic Asylum, 61 S.W. 283, 110 Ky. 282, 22 Ky.L. 1722.

49. Cappel v. Pierson, 132 So. 391, 15 La.App. 524—5 C.J. p. 1420 note 65.

Allowing inmate of asylum to go at large

Where there is no provision requiring lunatics to be confined on the grounds of the asylum, it is not negligence per se for the officers of a lunatic asylum to allow an inmate to go at large, if under restraint.—Clough v. Worsham, 74 S.W. 350, 32 Tex.Civ.App. 187.

Release of inmate

The superintendent of a state hospital for the insane, permitted by statute to release patients in his discretion, who released an insane person on his mother's undertaking to be responsible for his actions is not liable in damages to one thereafter shot by such insane person.—Emery v. Littlejohn, (Wash.) 145 P. 423.

Good faith as subject of inquiry

The good faith of the superintendent of a state insane asylum, who exercised his discretionary authority or a quasi-judicial nature in releasing an inmate, cannot be questioned in an action for death caused by such inmate, even under the charge that the superintendent acted maliciously, or disregarded the rights of the public.—Cappel v. Pierson, 132 So. 391, 15 La.App. 524.

50. Ky.—Ketterer v. State Bd. of Control, 115 S.W. 200, 131 Ky. 287, 20 L.R.A.(N.S.) 274.
Tex.—Clough v. Worsham, 74 S.W. 350, 32 Tex.Civ.App. 187.

Superintendent without the power of appointment is, a fortiori, not liable for the torts of subordinate employees.—Zinkhan v. District of Columbia, 50 App.D.C. 312, 271 F. 542.

51. Worsham v. Votgsberger, (Tex.Civ.App.) 129 S.W. 157.

52. Worsham v. Votgsberger, supra.

53. Zinkhan v. District of Columbia, 50 App.D.C. 312, 271 F. 542.

54. Zinkhan v. District of Columbia, supra.

55. State v. Mills, 12 N.W. 359, 55 Wis. 229.

56. Ark.—Texarkana Baptist Orphanage v. Wilson, 74 S.W.(2d) 224.
N.M.—Smith v. Directors of Insane Asylum of New Mexico, 141 P. 608, 19 N.M. 137.

57. Taber v. Pennsylvania State Hospital for Insane, (Pa.) 138 F. 865, 71 C.C.A. 239.

58. Texarkana Baptist Orphanage v. Wilson, (Ark.) 74 S.W.(2d) 224.

59. Texarkana Baptist Orphanage v. Wilson, supra.

§ 10. Actions

Asylums may sue and be sued if the legislature assents, the suits to be brought in such manner as the statutes prescribe or, if none is prescribed, in the ordinary appropriate actions.

A state asylum being merely an agency or instrumentality of the state, may be sued with the consent of the legislature, express or implied;[60] but, in the absence of consent, a judgment against such an institution is not binding on, or conclusive against, the state.[61]

Enforceable claims, contractual or otherwise, against the board of trustees of an asylum, which is constituted a corporation with power to sue and be sued, may be recovered by action in the same manner as any other claim against a corporation.[62] Where a statutory method for obtaining reimbursement of outlays for inmates, made by the state but chargeable to the inmates or others, is provided, the remedy thus indicated by the legislature must be pursued.[63]

AT.

In General

A preposition[1] of extremely various use,[2] to which lexicographers have given many definitions and shades of meaning.[3] It is a word of great relativity and elasticity of meaning[4] and is somewhat indefinite,[5] shaping itself easily to varying contexts and circumstances,[6] and taking its color from the circumstances and situation[7] under which it is necessary to apply it to surrounding objects.[8] Aside from its context, it is not a word of precise and accurate meaning, or of clean, clear-cut definition,[9] and it has been said that the connection furnishes the best definition.[10] Primarily, "at" denotes simple occupancy of a point in space, whence arise numerous allied and figurative meanings, as of time, direction, etc, by which the word partakes of the meanings of numerous other prepositions and prepositional

60. Ky—Leavell v. Western Kentucky Insane Asylum, 91 S W 671, 122 Ky. 213, 28 Ky L. 1129, 4 L R A (N S) 269, 12 Ann Cas 827.
Minn—St. Paul, etc., R. Co. v Brown, 24 Minn. 517
Va—Maia v Eastern State Hospital, 34 S E. 617, 97 Va 507, 47 L R A 577.

61. Peck v. State, 33 N E 317, 137 N.Y. 372, 33 Am S R. 738

62. Kentucky Institution for Education of Blind v. Murray, 160 S W 245, 155 Ky 658.

63. State v. Kiesewetter, 37 Ohio St 546.

1. Anderson L. D, quoted in Counts v Medley, 146 S W 465, 467, 163 Mo A. 546—5 C.J. p 1420 note 3.

2. Jones v Continental Casualty Co, 179 N W 203, 209, 189 Iowa 678, 18 A.L R 1329—5 C J. p 1420 note 4.

3. Cone v Texas Employers' Ins Ass'n, (Tex Civ App) 251 S W 262, 264

4. U S—Ex parte Szumrak, (D.C Mich) 278 F. 803, 810
Ark—Fenolio v Sebastian Bridge Dist, 200 S W. 501, 504, 133 Ark 380
Cal—In re Clark's Estate, (App) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75
Ga—Barnett v Strain, 107 S E. 530, 532, 151 Ga 553—Redding v State, 35 S E 278, 279, 16 Ga App 315
Idaho.—Abernathy v Peterson, 225 P 132, 133, 38 Idaho 727.
Iowa—Jones v. Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329
N J.—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N J Law 286.
5 C.J. p 1422 note 38, 39.

5. U S—Ex parte Szumrak, (D.C Mich) 278 F 803, 810
Cal.—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75—McKinley v. Dalton, 17 P (2d) 160, 162, 128 Cal App 298.
Ga—Barnett v. Strain, 107 S E. 530, 532, 151 Ga. 553
Iowa—Jones v Continental Casualty Co., 179 N W 203, 209, 189 Iowa 678, 18 A L R 1329.
Ky—Fayette County Board of Education v. Tompkins, 280 S W. 114, 116, 212 Ky. 751.
5 C.J. p 1422 note 40.

6. U S—Ex parte Szumrak, (D C Mich) 278 F. 803, 810
Cal—In re Clark's Estate, (App.) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75.
Ga—Redding v. State, 35 S E. 278, 279, 16 Ga App 315.
Idaho—Abernathy v. Peterson, 225 P 132, 133, 38 Idaho 727.
Iowa—Jones v. Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A.L R 1329
N J—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N J Law 286.
Tex—Cone v. Texas Employers' Ins Ass'n, (Civ App) 251 S.W. 262, 264
5 C J p 1422 note 41.

7. U S—Ex parte Szumrak, (D C. Mich.) 278 F. 803, 810.
Cal—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75.
Ga—Redding v. State, 35 S E. 278, 279, 16 Ga App 315
Idaho—Abernathy v. Peterson, 225 P. 132, 133, 38 Idaho 727.
Miss—Board of Sup'rs of Stone County v. O'Neal, 93 So. 483, 484, 130 Miss 57
Ohio—Columbus Mut. Life Ins Co. v. Klein, 175 N.E. 878, 879, 38 Ohio App 157
5 C J p 1423 note 42.

8. U S—Ex parte Szumrak, (D.C. Mich) 278 F 803, 810
Cal—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P.(2d) 73, 75.
Ga—Redding v. State, 35 S E. 278, 279, 16 Ga App 315.
5 C J p 1423 note 43.

9. Cal—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P.(2d) 73, 75
Ga—Barnett v Strain, 107 S E. 530, 532, 151 Ga. 553
Iowa—Jones v. Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329
N J—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N J Law 286
5 C J p 1423 notes 44, 46, 47.

10. U S—Ex parte Szumrak, (D C. Mich) 278 F 803, 810
Cal—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75
Ga—Barnett v Strain, 107 S E. 530, 532, 151 Ga. 553
Iowa—Jones v. Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329
Tenn—Knoxville, etc, R Co v. Beeler, 18 S W. 391, 392, 90 Tenn. 548.

phrases[11] In its various senses, hereinafter discussed, the word may be expressive of exactness or precision, or it may be used to express the idea of approximation or nearness Primarily, "at" is said to have much the sense of "to," without implication, in itself, of motion,[12] but, being less restricted as to relative position than other prepositions, it may in different constructions assume their office,[13] and so become equivalent, according to the context, to "about."[14] "by,"[15] "close to,"[16] "coexistent with,"[17] "from," "over," "through," "toward," "under,"[18] "if,"[19] "in,"[20] "in or near,"[21] "into,"[22] "near,"[23] "near approach,"[24] "near to,"[25] "on,"[26] "within,"[27] and "within the limits of."[28]

Place

Primarily, "at" is a preposition of simple local position.[29] In this sense it has been variously defined, depending on the context,[30] as meaning about;[31] adjacent to;[32] anywhere within;[33] around;[34] by;[35] by and near; close to;[36] "in;"[37] in front of;[38] in or about;[39] in proximity to; in the

11. Standard D, quoted in In re Clark's Estate, (Cal App) 61 P (2d) 1221, 1222

12. Ill—Ravenswood Hospital v Maryland Casualty Co, 117 N E 485, 488, 280 Ill 103.
Ky—Fayette County Board of Education v Tompkins, 280 S W. 114, 116, 212 Ky. 751
5 C J p 1420 note 5.

13. Iowa—Jones v. Continental Casualty Co, 179 N.W 203, 209, 189 Iowa 678, 18 A L.R 1329
Or—Murdoch v Klamath County Ct., 126 P 6, 7, 62 Or. 483, 487, quoting Century D.

14. Ariz—Moreno v. Moore, 57 P. (2d) 316, 317
Ky—Fayette County Board of Education v. Tompkins, 280 S W. 114, 117, 212 Ky. 751.
5 C.J. p 1422 note 19
See also About 1 C J S p 343 note 25

15. Kitchel v Gallagher, 270 P 488, 490, 126 Or. 373—5 C J p 1421 note 14

16. Iowa—Jones v Continental Casualty Co, 179 N W 203, 209, 189 Iowa 678, 18 A L R 1329
Neb—Bursow v Doerr, 147 N W 474, 96 Neb 219, 221, quoting Standard D.

17. Jenks v State, 39 Ind 1, 9

18. Miss—State to Use of Johnston v. Cunningham, 65 So 115, 117, 107 Miss 140, 51 L R A (N S) 1179
Or—Murdoch v Klamath County Ct, 126 P 6, 7, 62 Or. 483.

19. Conn—Colt v. Hubbard, 33 Conn 281, 285.
N J—Post v Herbert, 27 N J.Eq. 540, 543

20. Ariz—Moreno v. Moore, 57 P (2d) 316, 317.
Iowa—Jones v. Continental Casualty Co, 179 N.W. 203, 209, 189 Iowa 678, 18 A L.R. 1329.
Or.—Nicholas v. Yamhill County, 203 P. 593, 597, 102 Or. 615.
Wash—Mitchell v. Blue Star Min Co, 167 P. 130, 131, 93 Wash. 191
5 C J p 1420 note 6, p 1421 note 7, p 1422 note 40 [a].

21. Iowa—Jones v. Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329.
Mont—Abell v Bishop, 284 P. 525, 531, 86 Mont 478
5 C J p 1421 note 10.

22. Blackwell v State, 17 S.W. 1061, 30 Tex App. 416, 418—5 C J p 1421 note 11.

23. Ga—Howell v State, 138 S E 206, 209, 164 Ga 204
Or—Kitchel v Gallagher, 270 P. 488, 490, 126 Or 373
Wash—Mitchell v Blue Star Min. Co., 167 P. 130, 131, 93 Wash. 191.
5 C.J p 1421 note 16.

24. Richardson Eng D, quoted in Minter v State, 30 S.E 989, 992, 104 Ga. 742—5 C J p 1422 note 18

25. Shephard v. Hopson, (Ark) 86 S W (2d) 30, 34.

26. Iowa—In re Phearman's Estate, 232 N W 826, 829, 211 Iowa 1137—Dowd v Scally, 184 N W 340, 342
Ky—Blair v. Lefler, 276 S W. 847, 210 Ky 772
5 C J p 1421 note 12.

27. Cal—Throop v. McGregor, (App) 34 P.(2d) 187, 188.
Ky—Fayette County Board of Education v Tompkins, 280 S W. 114, 117, 212 Ky 751
La—Wyble v. Lafleur, (App.) 164 So. 461, 463
Miss—Mississippi Power Co. v. Bennett, 161 So 301, 308
Or—Nicholas v Yamhill County, 203 P. 593, 597, 102 Or 615
5 C J p 1421 note 8.

28. Standard D., quoted in Farmers' Cotton Oil Co v Brooke, 82 S E. 372, 373, 14 Ga App 778, 782

29. Century D., quoted in Murdoch v. Klamath County Ct., 126 P. 6, 7, 62 Or. 483

Denoting locality

It has been said that "at" emphasizes locality—Field v. Webber, 169 A. 732, 736, 132 Me. 236

30. The exact definition must often be determined from the context.—Cone v. Texas Employers' Ins Ass'n, (Tex Civ App) 251 S W. 262, 264

31. Ga—Howell v. State, 138 S.E 206, 209, 164 Ga. 204—Etheridge v Peak, 162 S E. 402, 44 Ga.App. 575
Ky—Clark County Fiscal Court v. Powell County Fiscal Court, 2 S W (2d) 1039, 1041, 223 Ky. 10—Fayette County Board of Education v Tompkins, 280 S W. 114, 117, 212 Ky 751
5 C J. p 1425 note 67, p 1426 note 81.

32. Homer v. Homer, 8 Ch D. 758, 773.

33. Bare v Commonwealth, 94 S E 168, 172, 122 Va 783.

34. Smith v. State, 74 S.E. 711, 712, 11 Ga App 89.

35. Kitchel v. Gallagher, 270 P. 488, 490, 126 Or. 373

36. Standard D, quoted in Bursow v Doerr, 147 N.W. 474, 96 Neb 219, 221.

37. U S.—Pennsylvania R. Co. v. Knox, (Pa.) 218 F. 748, 750, 134 C. C A. 426.
Ala—Feore v. Trammel, 102 So. 529, 531, 212 Ala. 325
Ga—Howell v State, 138 S.E 206, 209, 164 Ga. 204.
Ind—Milikan v. Security Trust Co, 118 N E. 568, 569, 187 Ind. 307.
Ky—Fayette County Board of Education v. Tompkins, 280 S W. 114, 116, 212 Ky. 751
Me—Field v. Webber, 169 A. 732, 736, 132 Me. 236.
Miss—Board of Sup'rs of Stone County v. O'Neal, 93 So. 483, 484, 130 Miss. 57.
Or—Nicholas v. Yamhill County, 203 P. 593, 597, 102 Or. 615.
Wash—Mitchell v. Blue Star Min Co., 167 P 130, 131, 93 Wash. 191.
5 C.J. p 1423 note 56, p 1425 notes 72, 76.

Preceding the name of a place.—Harris v State, 18 So 387, 388, 72 Miss. 960, 33 L.R A. 85—5 C.J p 1425 note 73.

Applied to a thing including another thing.—Homer v. Homer, 8 Ch D 758, 764.

38. Ala—Napier v. State, 50 Ala. 168, 170.
Or.—Albany College v. Monteith, 130 P. 633, 636, 64 Or. 356.

39. Moreno v. Moore, (Ariz) 57 P. (2d) 316, 317.

vicinity or region of;[40] inside;[41] in the neighborhood of,[42] near;[43] nearby;[44] near to;[45] and within;[46] and has been said to denote contact or direction towards,[47] near approach,[48] nearness,[49] position,[50] presence,[51] relation of proximity to, or of presence in or on,[52] and situation;[53] but not to demand an exact coincidence.[54] Under some circumstances, the word may refer to a point in space,[55] a mere point,[56] or to a fixed, definite place,[57] or to a place conceived of as a mere geographical point.[58] However, it has been said that the word is not definitely locative when applied to the place or location of an object,[59] and so used is less definite than "in" or "on,"[60] having a much wider signification or a

40. Ark.—Shephard v Hopson, 36 S W (2d) 30, 34
Idaho—Abernathy v Peterson, 225 P 132, 133, 38 Idaho 727
Neb—Bursow v Doerr, 147 N W 474, 96 Neb 219, 221, quoting Standard D
5 C J p 1422 note 26.

41. Kaler v. Tufts, 16 A. 336, 337, 81 Me 63.

42. Western Union Tel Co. v. Roberts, 78 S W. 522, 524, 34 Tex 76

43. Ga.—Howell v. State, 138 S E 206, 209, 164 Ga 204—Smeltzer v Atlanta Coach Co, 160 S E 665, 666, 44 Ga App 53.
Idaho—Abernathy v Peterson, 225 P 132, 133, 38 Idaho 727
Ill—People v Washington, 154 N.E 435, 436, 323 Ill 617.
Iowa—Jones v Continental Casualty Co., 179 N W 203, 209, 189 Iowa 678, 18 A L R 1329
Ky—Clark County Fiscal Court v Powell County Fiscal Court, 2 S W (2d) 1039, 1041, 223 Ky 10—Fayette County Board of Education v Tompkins, 280 S W. 114, 117, 212 Ky 751
Or—Kitchel v. Gallagher, 270 P. 488, 490, 126 Or. 373
Wash—Mitchell v. Blue Star Min Co., 167 P 130, 131, 98 Wash 191
5 C J p 1425 note 66, p 1426 note 79

"Near" compared.—Jenkins v State, 62 S.E 574, 575, 4 Ga App. 859.

44. Farmers' Cotton Oil Co v. Brooke, 82 S E 372, 373, 14 Ga App 773—5 C J p 1422 note 17.

45. Chesapeake & O Ry Co v. Hill, 284 S W. 1047, 1048, 215 Ky. 222, 48 A L R 327.

46. Ga.—Howell v. State, 138 S E. 206, 209, 164 Ga 204.
Ky—Fayette County Board of Education v Tompkins, 280 S.W 114, 116, 212 Ky. 751
Me—Field v Webber, 169 A. 732, 736, 132 Me 236
Or—Nicholas v Yamhill County, 203 P. 593, 597, 102 Or. 615.
5 C J. p 1424 note 57, p 1426 note 78.

47. Cal.—In re Clark's Estate, (App) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App.) 61 P.(2d) 73, 75
Ky—Fayette County Board of Education v. Tompkins, 280 S W. 114, 116, 212 Ky. 751, quoting Webster D.
5 C J p 1423 note 52, p 1425 note 70.

48. Smeltzer v. Atlanta Coach Co., 160 S E 665, 666, 44 Ga App 53—5 C J. p 1425 note 68

49. Ga.—Howell v. State, 138 S E 206, 209, 164 Ga 204.
Idaho—Abernathy v. Peterson, 225 P 132, 133, 38 Idaho 727
Iowa—Jones v Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329
Ky—Clark County Fiscal Court v. Powell County Fiscal Court, 2 S W (2d) 1039, 1041, 223 Ky 10—Fayette County Board of Education v Tompkins, 280 S.W. 114, 116, 212 Ky 751—Blair v. Lefler, 276 S W. 847, 210 Ky. 772
Me—Field v Webber, 169 A. 732, 736, 132 Me. 236
Miss—Whitaker v State, 106 So 96, 97, 141 Miss 788.
Wash—Lino v Hode, 291 P. 1079, 1080, 159 Wash 16—State v. Superior Court for Kittitas County, 146 P. 834, 836, 84 Wash 392
5 C J p 1423 note 54, p 1424 note 62

50. Ray v. State, 50 Ala. 172, 173

51. Ill.—Howe v. Warren, 40 N E 472, 154 Ill 227, 247.
Mo—Counts v. Medley, 146 S W. 465, 467, 163 Mo App. 546, quoting Webster D
N H.—Bartlett v. Jenkins, 22 N H. 53, 63.
5 C J p 1423 note 53.

52. Cal.—In re Clark's Estate, (App.) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75.
Ga—Howell v State, 138 S E 206, 209, 164 Ga. 204
Ky—Clark County Fiscal Court v. Powell County Fiscal Court, 2 S W (2d) 1039, 1041, 223 Ky 10—Chesapeake & O Ry Co v Hill, 284 S W. 1047, 1048, 215 Ky 222, 48 A. L R 327—Fayette County Board of Education v. Tompkins, 280 S W. 114, 116, 212 Ky 751.
Me—Field v. Webber, 169 A. 732, 736, 132 Me. 236
Wash—Lino v. Hode, 291 P. 1079, 1080, 159 Wash. 16—Gonmon v. Lee, 206 P 2, 4, 119 Wash 471—State v Superior Court for Kittitas County, 146 P. 834, 836, 84 Wash. 392
5 C J. p 1425 notes 63-65.

53. Harris v. State, 18 So 387, 388, 72 Miss 960, 33 L R.A. 85—5 C.J. p 1425 note 74.

54. In re Clark's Estate, (Cal App) 61 P (2d) 1221, 1222—In re Clark's Estate, (Cal App) 61 P (2d) 73, 75—5 C J p 1423 note 55

55. Bursow v. Doerr, 147 N W 474, 96 Neb 219, 221

56. Murdoch v. Klamath County Court, 126 P. 6, 8, 62 Or. 483

57. Iowa—Jones v Continental Casualty Co, 179 N W 203, 209, 189 Iowa 687, 18 A L R 1329
Miss—Board of Sup'rs of Stone County v O'Neal, 93 So 483, 484, 130 Miss 57
Tex—Cone v Texas Employers' Ins Ass'n, (Civ App) 251 S W. 262, 264
5 C J p 1425 note 64 [a], p 1426 note 83

Referring to location already known

While, in connection with another word, "at" may be vague and indefinite as a description of the location of a point or place, the meaning may be limited and defined by the context, as where, for example, it has reference to a location already known—Birmingham, E & B R Co v Wilson, 69 So 312, 313, 14 Ala App 235.

58. Cone v Texas Employers' Ins. Ass'n, (Tex Civ App) 251 S W. 262, 264—5 C J. p 1426 note 84

59. Ark.—Fenolio v. Sebastian Bridge Dist, 200 S W. 501, 504, 133 Ark 380
Cal—Los Angeles County v. Hannon, 112 P. 878, 881, 159 Cal. 37, Ann. Cas 1912B 1065.
Iowa—Jones v Continental Casualty Co, 179 N.W. 203, 209, 189 Iowa 678, 18 A L R. 1329.

Not confined to a point

"At" can hardly be said to mean exclusively "contiguous to" or "attached to"—Abernathy v. Peterson, 225 P. 132, 133, 38 Idaho 727.

60. Iowa—Jones v Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R 1329
Ky—Fayette County Board of Education v. Tompkins, 280 S W. 114, 116, 212 Ky. 751
Me—Field v Webber, 169 A. 732, 736, 132 Me. 236
Wash.—Lino v. Hode, 291 P. 1079, 1080, 159 Wash 16—Vaughan v. Fifer, 158 P. 93, 95, 91 Wash 553—State v. Superior Court for Kittitas County, 146 P. 834, 836, 84 Wash. 392.
Wis.—Hilgers v. Quinney, 8 N W. 17, 19, 51 Wis 62
5 C J. p 1424 note 59.

May include all that "in" would include, and less than "in and near."

much wider meaning[61] and usually negativing the idea that precision[62] or an exact coincidence[63] is intended. As distinguished from a mere geographical point, the word is often used to denote space,[64] and so used has in general an inclusive,[65] and not an exclusive,[66] signification. When used inclusively it does not mean "without" or "at the utmost verge of;"[67] but, where the context requires, it may be construed as excluding the place named,[68] and to mean just outside,[69] or within a convenient[70] or reasonable[71] distance from the named place, as, just outside a gate, door, or other barrier,[72] in both cases excluding the meaning of "inside."

At sea. The term may have different meanings according to the connection in which it is used.[73] As a phrase expressive of circumstance or condition, "at sea" is defined infra. As a phrase of place, the term has been defined as meaning out of the limits of our ports, or harbours, extra fauces terrae, vel portus.[74] As applied to persons, "at sea" is a term of rather elastic meaning, including persons in actual sea service whether in port[75] or in arms of the sea where the tide ebbs and flows.[76] Under particular circumstances, it has been held that the term includes a river or canal communicating with the ocean,[77] and that it does not include the open roadstead.[78]

The phrase occurs in connection with other words, as follows: "Any mariner or seaman, being at sea,"[79] "by a mariner, while at sea,"[80] "offences . . . punishable when committed at sea,"[81] and "services performed at sea."[82]

Other phrases: "At a courthouse,"[83] "at all intersections,"[84] "at all or any port or place on the coast of,"[85] "at anchor" (see Anchor 3 C.J.S. p. 1065 note 1), "at and from,"[86] "at an office or banking-house,"[87] "at any crossing,"[88] "at any intersection,"[89] "at any point,"[90] "at any tax sale,"[91] "at a point,"[92] "at a private residence,"[93] "at a public bathing

—Redding v. State, 85 S.E. 273, 279, 16 Ga.App. 315—Jenkins v. State, 62 S.E. 574, 575, 4 Ga.App. 359—Jones v. Continental Casualty Co., 179 N.W. 203, 209, 189 Iowa 678, 18 A.L.R. 1329

"In" and "within" compared and distinguished—Standard D., quoted in Rogers v. Galloway Female College, 44 S.W. 454, 455, 64 Ark. 627, 39 L.R.A. 636—5 C.J. p. 1423 note 56 [b], [c], p. 1424 notes 57 [a]-[c], 61 [a], p. 1425 note 76 [c], [d]

61. Iowa—Jones v. Continental Casualty Co., 179 N.W. 203, 209, 189 Iowa 678, 18 A.L.R. 1329
Neb.—Bursow v. Doerr, 147 N.W. 474, 96 Neb. 219, 221.

62. Cal.—Perry v. Gross, 156 P. 1031, 1032, 172 Cal. 468—In re Clark's Estate, (App.) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App.) 61 P.(2d) 73, 75
Iowa—Jones v. Continental Casualty Co., 179 N.W. 203, 209, 189 Iowa 678, 18 A.L.R. 1329.
Miss.—Whitaker v. State, 106 So. 96, 97, 141 Miss. 788

63. Cal.—In re Clark's Estate, (App.) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App.) 61 P.(2d) 73, 75
Tex.—Gulf, etc., R. Co. v. Warner, 35 S.W. 364, 366, 89 Tex. 475.
5 C.J. p. 1423 note 55

64. Rogers v. Galloway Female College, 44 S.W. 454, 456, 64 Ark. 627, 39 L.R.A. 636.

65. U.S.—Union Pac. R. Co. v. Hall, (Iowa) 91 U.S. 343, 348, 23 L.Ed. 428.
Va.—Bare v. Commonwealth, 94 S.E. 168, 172, 122 Va. 783.

66. Chesapeake & O. Canal Co. v. Key, (D.C.) 5 F.Cas.No. 2,649, 3 Cranch C.C. 599

67. State v. Old Town Bridge Corp., 26 A. 947, 950, 85 Me. 17

"Without" compared and distinguished—Knoxville, etc., R. Co. v. Beeler, 18 S.W. 391, 392, 90 Tenn. 548

68. Knoxville, etc., R. Co. v. Beeler, 18 S.W. 391, 392, 90 Tenn. 548—5 C.J. p. 1426 note 89

69. Duckham v. Smith, 5 T.B.Mon. (Ky.) 372, 374.

70. Frey v. Ft. Worth, etc., R. Co., 24 S.W. 950, 951, 6 Tex.Civ.App. 29

71. Wyble v. Lafleur, (La.App.) 164 So. 461, 463.

72. S.D.—Hobart v. Scott, 125 N.W. 134, 25 S.D. 20, 21
Eng.—Homer v. Homer, 8 Ch.D. 758, 764.

73. Mass.—Bowen v. Hope Ins. Co., 20 Pick. 275, 278, 33 Am.D. 213.
Pa.—Eyre v. Marine Ins. Co., 6 Whart. 247, 255

74. The Harriet, (D.C.Me.) 11 F.Cas.No. 6,099, 1 Story 251, 259.

75. U.S. v. Barnette, (Ct.Cl.) 17 S.Ct. 286, 288, 165 U.S. 174, 41 L.Ed. 675—5 C.J. p. 1440 note 9

"Upon the high seas" distinguished.—U.S. v. Barnette, (Ct.Cl.) 17 S.Ct. 286, 288, 165 U.S. 174, 41 L.Ed. 675—5 C.J. p. 1440 note 9 [c].

76. Hubbard v. Hubbard, 8 N.Y. 196, 199, Seld. 89—5 C.J. p. 1441 note 10.

77. Union Ins. Co. v. Tysen, 3 Hill (N.Y.) 118, 126.

78. Cole v. Union Mut. Ins. Co., 12 Gray (Mass.) 501, 519, 74 Am.D. 609.

79. Ex parte Thompson, 4 Bradf. Surr. (N.Y.) 154, 158—5 C.J. p. 1441 note 10 [a].

80. Ex parte Thompson, 4 Bradf. Surr. (N.Y.) 154, 158

81. Anonymous, (C.C.Mo.) 1 F.Cas.No. 447, Hempst. 413, 416

82. U.S. v. Symonds, (Ct.Cl.) 7 S.Ct. 411, 412, 120 U.S. 46, 30 L.Ed. 557—5 C.J. p. 1440 note 9 [c]

83. Etheridge v. Peak, 162 S.E. 402, 44 Ga.App. 575

84. Smeltzer v. Atlanta Coach Co., 160 S.E. 665, 666, 44 Ga.App. 53

"Upon approaching intersections" equivalent.—Smeltzer v. Atlanta Coach Co., 160 S.E. 665, 666, 44 Ga. App. 53.

85. Robertson v. French, 4 East 130, 140, 102 Reprint 779

86. Smith v. Automobile Ins. Co. of Hartford, 143 A. 165, 167, 108 Conn. 349—5 C.J. p. 1429 note 86

87. Merchants' Nat. Bank v. State Nat. Bank, (Mass.) 10 Wall. (U.S.) 604, 606, 19 L.Ed. 1008.

88. Gonnon v. Lee, 206 P. 2, 4, 119 Wash. 471.

89. La.—Wyble v. Lafleur, (App.) 164 So. 461, 463.
Me.—Field v. Webber, 169 A. 732, 736, 132 Me. 286

90. Com. v. Cross Cut R. Co., 53 Pa. 62, 68.

91. Nesbit v. Bearman, 109 P. 1085, 1086, 83 Kan. 122

92. Conn.—Wood v. Stafford Springs, 51 A. 129, 130, 74 Conn. 427
Ky.—Chesapeake & O. Ry. Co. v. Hill, 284 S.W. 1047, 1048, 215 Ky. 222, 48 A.L.R. 327

93. Hipp v. State, 75 S.W. 28, 29, 45 Tex.Cr. 200, 62 L.R.A. 973—5 C.J. p. 1430 note 47.

beach,"[94] "at a public place,"[95] "at a road,"[96] "at a special place,"[97] "at a storehouse,"[98] "at a town,"[99] "at a warehouse,"[1] "at back of garden,"[2] "at bank,"[3] "at . . . booms in the river,"[4] "at Boonsborough warehouse,"[5] "at chambers,"[6] "at Concord church,"[7] "at four public places,"[8] "at Hickory Grove schoolhouse,"[9] "at his home,"[10] "at his house of usual abode,"[11] "at his usual place of abode,"[12] "at his usual place of residence,"[13] "at home,"[14] "at, in, or near Snig Hill,"[15] "at Linkville,"[16] "at Milledgeville,"[17] "at Montebello,"[18] "at no great distance,"[19] "at one of these fords,"[20] "at or above the ankle,"[21] "at or above the knee,"[22] "at or above the second joint,"[23] "at or into the dwelling,"[24] "at or near,"[25] "at or off discharging port,"[26] "at or within,"[27] "at ships,"[28] "at some convenient place,"[29] "at such place near the Massachusetts line,"[30] "at the bank,"[31] "at the base,"[32] "at the coal shed,"[33] "at the corner,"[34] "at the county seat,"[35] "at the courthouse,"[36] "at the courthouse door,"[37] "at the District of Columbia,"[38] "at the dwelling-house,"[39] "'at the end' of a will,"[40] "at the Farmers' & Merchants' National Bank,"[41] "at the foot of Garrison Avenue,"[42] "at the foot or end thereof,"[43] "at the gin,"[44] "at the house,"[45] "at the inside door of the treasurer's office,"[46] "at the intersection of Conti and Bayou streets,"[47] "at their place of business,"[48] "at the

As a society phrase

"Not at home," is understood by everybody to mean simply that one is not ready to receive visitors. It does not necessarily refer to a domicile."—Duke v. Duke, 62 A. 466, 468, 70 N J Eq 135.

"In close proximity" and "in the immediate vicinity" equivalent.—Ward v. Wilmington, etc, R. Co, 18 S E. 926, 928, 109 N C. 358.

"In or near" equivalent.—Montreal, etc, R. Co v Ottawa, 4 Ont.L. 56, 64, affirmed 33 Can S C. 376.

"In the house" distinguished.—Lino v. Hole, 291 P. 1079, 1080, 159 Wash. 16.

94. Columbus Mut. Life Ins Co. v Klein, 175 N E 878, 38 Ohio App 157.
95. Allen v. Allen, 91 N.W. 218, 220, 114 Wis. 615—5 C J. p 1430 note 48.
96. Lee v. Lee, 27 Hun (N.Y.) 1, 4.
97. Parker v. Mazur, (Tex Civ App) 13 S W.(2d) 174, 175.
98. Napier v State, 50 Ala. 168, 171.
99. Frey v. Ft. Worth, etc, R. Co, 24 S.W. 950, 951, 6 Tex Civ.App 29.
1. Duckham v. Smith, 5 T B Mon (Ky) 372, 374.
2. Knoxville, etc, R. Co v. Beeler, 18 S W 391, 392, 90 Tenn 548.
3. Hazard v Spencer, 23 A. 729, 731, 17 R I. 561, 566
4. Supple v. Gilmour, 5 U C C P (Ont) 318, 336.
5. Duckham v Smith, 5 T B Mon (Ky) 372, 374
6. Von Schmidt v Widber, 34 P. 109, 110, 99 Cal. 511—5 C J p 1430 note 54
7. Minter v. State, 30 S E. 989, 991, 104 Ga. 743
8. Helgers v. Quinney, 8 N.W. 17, 19, 51 Wis. 62
9. Blackwell v State, 17 S.W. 1061, 30 Tex App 416, 417.
10. **Construed as meaning** "anywhere within the curtilage . . . [including] the entire cluster of buildings used by the family as a habitation."—Bare v. Commonwealth, 94 S.E 168, 172, 173, 122 Va 783
11. Lovin v. Hicks, 133 N W. 575, 576, 116 Minn 179.
12. Kaler v. Tufts, 16 A. 336, 337, 81 Me. 63.
13. Heiny v. Sommers, 268 P. 237, 290, 131 Okl 214.
14. Pennsylvania R. Co. v. Knox, (Pa.) 218 F. 748, 750, 134 C C.A 426.
15. Doe v. Bower, 3 B. & Ad 453, 23 E C L. 203, 110 Reprint 163.
16. Murdoch v. Klamath County Court, 126 P. 6, 7, 62 Or. 483
17. Howell v. State, 133 S E. 206, 209, 164 Ga. 204.
18. Hurley v. Marsh, 2 Ill 328, 329
19. Ward v. Wilmington, etc, R Co, 18 S E. 926, 928, 109 N C 358
20. Clark County Fiscal Court v. Powell County Fiscal Court, 2 S W. (2d) 1039, 1041, 223 Ky. 10.
21. Jones v. Continental Casualty Co, 179 N.W. 203, 209, 189 Iowa 678, 18 A L R 1329.
22. Cone v. Texas Employers' Ins Ass'n, (Tex.Civ App) 251 S W. 262, 264.
23. Ramondetta's Case, 134 N E. 249, 250, 240 Mass. 492.
24. English v. State, 74 S E. 286, 10 Ga App 791.
25. Birmingham, E & B R Co. v. Wilson, 69 So 812, 813, 14 Ala App. 235—5 C J. p 1431 note 84 "In or near" equivalent.—Montreal, etc, R. Co v Ottawa, 4 Ont.L. 56, 64, affirmed 33 Can S C. 376.
26. Yone Suzuki v. Central Argentine Ry., (C.C.A N Y.) 27 F (2d) 795, 802.
27. Homer v. Homer, 8 Ch D. 758, 764.
28. An unusual term construed to mean a delivery "at ship's side"—Stineman Coal & Coke Co. v. U. S., (D C Pa) 290 F 1021, 1023.
29. Kaler v. Tufts, 16 A. 336, 337, 81 Me. 63.
30. Griffen v. House, 18 Johns (N Y.) 397, 398.
31. Halstead v. Woods, 95 N.E. 429, 431, 48 Ind App. 127—5 C.J. p 1433 note 1.
32. Banks v. Blades Lumber Co, 54 S.E 844, 845, 142 N C 49.
33. Goderich v. Holmes, 32 Can S. C. 211, 213.
34. West Chicago St R. Co. v. Manning, 70 Ill App 239, 242.
35. Fayette County Board of Education v. Tompkins, 280 S.W. 114, 116, 212 Ky. 751
36. Miss—Whitaker v. State, 106 So 96, 97, 141 Miss 788
Or—Nicholas v. Yamhill County, 203 P. 593, 597, 102 Or. 615.
5 C J p 1433 note 6.
37. Blair v. Lefler, 276 S E 847, 210 Ky. 772—5 C J. p 1433 note 7.
38. Chesapeake & O Canal Co. v. Key, (D C) 5 F Cas No 2,649, 3 Cranch C C. 599.
39. Kibbe v. Benson, (Ill) 17 Wall. (U S) 624, 629, 21 L Ed 741.
40. Baker's App, 107 Pa. 381, 392, 52 Am R 478—5 C J. p 1433 note 10 [b], [c].
41. W. C Biggers & Co. v. Farmers' & Merchants' Nat Bank, (Tex Civ. App) 16 S.W.(2d) 324.
42. Fenolio v Sebastian Bridge Dist, 200 S W. 501, 504, 133 Ark 380.
43. In re Dallow, L. R. P & D. 189, 191—5 C J. p 1434 note 14
44. Norman v. Key, (Mo App) 222 S W 499, 500.
45. Lino v Hole, 291 P. 1079, 1080, 159 Wash 16—State v Superior Court for Kittitas County, 146 P. 834, 836, 84 Wash 392—5 C J. p 1434 note 16.
46. Allen v. Allen, 91 N.W. 218, 220, 114 Wis. 615.
47. Feore v. Trammel, 102 So. 529, 531, 212 Ala. 325.
48. Redding v. State, 85 S.E. 278, 279, 16 Ga.App. 315—5 C J. p 1435 note 21.

mill,"[49] "at the mine,"[50] "at the office of,"[51] "at the place specified,"[52] "at the point,"[53] "at the point of intersection,"[54] "at the postoffice,"[55] "at the same time and place,"[56] "at the schoolhouse,"[57] "at the seat of government,"[58] "at the shop,"[59] "at the stump,"[60] "at the terminus,"[61] "at the town,"[62] "'at' the tree,"[63] "at the usual place of abode,"[64] "at the wall,"[65] "at the warehouse,"[66] "at which,"[67] "at your house,"[68] "between and at,"[69] and "lying at anchor" (see Anchor 3 C J S. p 1065 note 2).

Time

As a preposition of time, the word is said to indicate a considerable latitude,[70] to denote closeness and proximity to the time named,[71] and to express the relation of nearness[72] and presence[73] in time. It has been held that the use of the word usually negatives the idea that precision or an exact coincidence of time is intended;[74] that it does not necessarily mean "eo instanti,"[75] or "punctum temporis,"[76] or the identical time named, or even a fixed, definite moment,[77] nor necessarily the exact moment or day;[78] but that it may mean within a reasonable time before[79] or after[80] the event contemplated, or a time near, or about, the time named.[81] The word, however, may refer to a point of time rather than to a period,[82] and, when so used in common speech, may mean the exact day,[83] the exact moment,[84] up-

49. Idaho—Abernathy v. Peterson, 225 P. 132, 133, 38 Idaho 727
Wash—Vaughan v Fifer, 158 P. 93, 95, 91 Wash 553

It has been distinguished from "contiguous to the mill" and "attached to the mill;" and "near the mill," "in the vicinity of the mill," and "connected with the mill" have been held to be equivalent.—Abernathy v Peterson, 225 P. 132, 133, 38 Idaho 727.

50. Moreno v. Moore, (Ariz) 57 P. (2d) 316, 317.

"'In or about' the mine" equivalent.—Moreno v. Moore, (Ariz) 57 P. (2d) 316, 317.

51. Ind—Millikan v. Security Trust Co., 113 N.E. 568, 569, 187 Ind 307.
Wash.—Mitchell v. Blue Star Min. Co., 167 P. 130, 131, 98 Wash. 191.
"In the office of" equivalent.—Millikan v. Security Trust Co, 113 N.E. 568, 569, 187 Ind 307.

52. Territory v. Logan County High School, 76 P. 165, 168, 13 Okl 605.

53. Anderson v. Oregon R. Co, 77 P 119, 123, 45 Or 211.

54. Gendron v. Glidden, 148 A. 461, 464, 84 N H 162.

Area included
"The word 'point' is not here used in its limited mathematical sense, but as indicating the whole area common to both intersecting streets" —Gendron v. Glidden, 148 A. 461, 464, 84 N H 162

55. Allen v Allen, 91 N W. 218, 220, 114 Wis 615

56. Dryburg v Mercur Gold Min, etc, Co, 55 P 367, 371, 18 Utah 410—5 C J p 1423 note 55 [a].

57. Board of Sup'rs of Stone County v O'Neil, 93 So 483, 130 Miss. 57.

58. Murdoch v. Klamath County Ct., 126 P. 6, 8, 62 Or. 483.

59. Kaler v. Tufts, 16 A. 336, 337, 81 Me. 63.

60. Turner v. Bissell, 126 N Y S 234, 237, 69 Misc. 167.

61. West Jersey R. Co. v. Camden, 38 N.J Law 299, 300, 302.

62. Ill—Hurley v. Marsh, 2 Ill. 328, 329
Or—Murdoch v. Klamath County Ct, 126 P. 6, 8, 62 Or. 483.

63. Stewart v. Patrick, 68 N Y. 450, 454

64. Shephard v. Hopson, (Ark.) 86 S W (2d) 30, 34.

65. Christian v. State, 11 So. 338, 96 Ala 89, 91.

66. Duckham v. Smith, 5 T B.Mon (Ky) 372, 374.

67. Eversole v. Brown, 53 S W. 527, 21 Ky.L. 925—5 C.J. p 1436 note 54.

"Annual election at which" has been held to mean both when and where—Eversole v. Brown, 53 S W 527, 21 Ky.L 925.

68. Jordan Marsh Co. v. Beals, 37 N.E. 471, 201 Mass. 163.

69. Chapman v. Pittsburgh, etc, R. Co, 26 W.Va. 299, 309.

70. Lorraine Mfg Co. v. Oshinsky, (C C N.Y.) 182 F. 407, 408.

71. N Y—De Pass v. Stoddard, 144 N Y S 410, 412, 83 Misc. 12.
Or—Childers v. Brown, 158 P. 166, 169, 81 Or 1, Ann Cas 1918B 170

72. Childers v. Brown, supra—5 C J. p 1423 note 54, p 1427 note 94

73. Howe v. Warren, 40 N.E. 472, 473, 154 Ill. 227—5 C J. p 1423 note 53.

74. U S—Ex parte Szumrak, (D.C Mich.) 278 F. 803, 810.
Cal—Perry v. Gross, 156 P. 1031, 1032, 172 Cal. 468—In re Clark's Estate, (App) 61 P (2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75
Iowa—Jones v Continental Casualty Co, 179 N W. 203, 209, 189 Iowa 678, 18 A L R. 1329.
N.J.—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N.J Law 286.
5 C J. p 1423 notes 47, 55.

75. Cal—In re Clark's Estate, (App) 61 P (2d) 1221, 1223—In re Clark's Estate, (App) 61 P (2d) 73, 75
Ga—Barnett v Strain, 107 S E. 530, 532, 151 Ga. 553
5 C J p 1423 note 48.

76. Cal—In re Clark's Estate, (App) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75
Ill—Lake Shore, etc, R Co v. Johnsen, 26 N.E 510, 512, 135 Ill. 641.
Mont—Abell v. Bishop, 284 P. 525, 531, 86 Mont. 478

77. Cal—In re Clark's Estate, (App) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App) 61 P (2d) 73, 75.
Ga.—Barnett v. Strain, 107 S E 530, 532, 151 Ga 553
Ky—Magoffin v Holt, 1 Duv 95, 96.
5 C.J p 1423 note 50.

78. U S—Ex parte Szumrak, (D.C. Mich) 278 F 803, 810.
Ga—Barnett v. Strain, 107 S.E 530, 532, 151 Ga. 553
Or.—Childers v. Brown, 158 P 166, 169, 81 Or. 1, Ann Cas 1918B 170.
5 C J. p 1427 note 4

79. Abell v. Bishop, 284 P 525, 531, 86 Mont 478—5 C J. p 1423 note 5.

80. U.S—Ex parte Szumrak, (D C. Mich) 278 F. 803, 810
Ariz—Weber Showcase & Fixture Co. v. Kaufman, 44 P (2d) 158, 161.
Or.—Childers v. Brown, 158 P 166, 169, 81 Or. 1, Ann.Cas 1918B 170.
5 C J p 1423 note 6.

81. Lorraine Mfg. Co v Oshinsky, (C C N Y) 182 F. 407, 408—5 C J. p 1427 notes 1, 2.

82. People v Fochtman, 197 N.W. 166, 169, 226 Mich 53

83. People v. Fochtman, supra.

84. U S—Castle v Castle, (C C.A. Hawaii) 267 F. 521, 522
Minn.—Davis v Godart, 154 N.W. 1091, 1092, 131 Minn. 221.
5 C J. p 1427 note 97.

on the stroke of,[85] being used in the sense of "at the time of," not "before,"[86] and denoting simultaneousness, as distinguished from subsequence or priority.[87] In line with the foregoing observations, and depending upon the context, "at" has been variously defined as meaning after,[88] coexistent with;[89] during,[90] from and after;[91] on occasion of; on the happening of;[92] the instant that,[93] until;[94] upon;[95] upon the coming of;[96] up to.[97] Also, the word may indicate the limits of a period of time,[98] and be taken as a word of enlargement, permission, and privilege, in the sense of "even at," or "as early as."[99] Sometimes it is used to mark the commencement of a period in the sense of "after,"[1] "as soon after as may be required by the custom of a particular business,"[2] "at or after,"[3] "beginning at,"[4] "forthwith" or "immediately,"[5] "from,"[6] "not before,"[7] "so immediately that the object sought by the notice can be attained,"[8] or "within a reasonable time thereafter."[9] At other times "at" is used to mark the close of a period,[10] in the sense of "at or before,"[11] "before,"[12] "ending at,"[13] or "until."[14] Under other circumstances "at" may be used to refer to an entire period,[15] including both its commencement and close;[16] or to a period between two indicated times, in the sense of "during;"[17] or to a period taken as a point, in the sense of "in;"[18] or to an indefinite period, without indicating either commencement or close, in the sense of "from time to time,"[19] It has also been construed to refer to one and the same continuous transaction, including all its parts, without reference to the time when the parts occurred.[20]

At any time. A relative and flexible term, not susceptible of a precise definition. It has been said that its intendment in a particular case necessarily depends upon the context and the attending circumstances;[21] and under the particular circumstances, it has been defined as meaning immediately or at once,[22] also, a reasonable time,[23] implying an in-

85. People v. Washington, 154 N E 435, 436, 323 Ill 617

86. U S—Castle v. Castle, (C C A. Hawaii) 267 F. 521, 522
Fla—Arnold v Wells, 131 So 400, 406, 100 Fla 1470
Minn—Davis v Godart, 154 N W. 1091, 1092, 131 Minn 221
Mont—Roush v District Court of Eighth Judicial Dist Cascade County, 53 P.(2d) 96, 97, 101 Mont. 166.
Neb—In re Hanson's Estate, 224 N W. 2, 4, 118 Neb. 208
5 C J p 1427 note 98

87. People v. Blanding, 63 Cal 333, 339—5 C J. p 1427 note 3

88. Ex parte Szumrak, (D C Mich) 278 F. 803, 810

89. Jenks v State, 39 Ind. 1, 9.

90. Coddington v Coddington, 20 N J Eq 263, 265—5 C.J p 1422 note 34

91. In re Phearman's Estate, 232 N. W. 826, 829, 211 Iowa 1137.

92. Standard D., quoted in In re Clark's Estate, (Cal App) 61 P. (2d) 1221, 1223.

93. Castle v. Castle, (C C.A Hawaii) 267 F 521, 522.

94. Haggerty v. Hockenberry, 30 A 88, 89, 52 N J Eq. 354.

95. Ex parte Szumrak, (D C Mich.) 278 F. 803, 810—5 C J. p 1421 note 13

96. Standard D, quoted in In re Clark's Estate, (Cal App) 61 P. (2d) 1221, 1223.

97. Howe v. Warren, 40 N E 472, 473, 154 Ill. 227.

98. N Y—Ferree v. Moquin-Offerman-Hessenbuttel Coal Co, 61 N. Y.S 120, 122, 29 Misc 624.
Pa—Lomancik v. Youghiogheny & Ohio Co, 180 A 731, 732, 119 Pa. Super. 263
W Va—Alexander v. State Compensation Com'r, 167 S E. 589, 590.

99. Wilson v. Wilson, 36 N W. 661, 664, 23 Neb. 455

1. Rogers v Burr, 25 S E 339, 341, 97 Ga 10, 14—5 C J. p 1428 note 14

2. Bradford v. Drew, 5 Metc (Mass) 188, 190

3. In re Ruddy, L R. 2 P. & D. 330, 332

4. Cranston Town Council's Pet, 28 A 608, 610, 18 R I. 417.

5. Brown v. Smith, 102 N.W. 171, 173, 13 N.D. 580

6. Seamans v. Loring, (C.C Mass) 21 F Cas.No 12,583, 1 Mason 127, 139

7. Post v Herbert, 27 N J Eq 540, 546—5 C J p 1428 note 9.

8. Kan—Goggin v. Kansas Pac R Co, 12 Kan 416, 419
Mo—Rice v. Kansas Pac. R. Co., 63 Mo 314, 323

9. Cal.—In re Clark's Estate, (App.) 61 P.(2d) 1221, 1222—In re Clark's Estate, (App) 61 P.(2d) 73, 75—Throop v McGregor, (App) 34 P. (2d) 187, 188
Miss—Mississippi Power Co. v Bennett, 161 So 301, 303
N J—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N J Law 286.
5 C J p 1428 note 16.

10. U S—Richard v. National City Bank of New York, (D.C.N.Y.) 6 F Supp 156, 158
W Va—Alexander v. State Compensation Com'r, 167 S E. 589, 590.
5 C J p 1428 note 19.

11. L X L Furniture, etc., Installment House v Beretz, 91 P 279, 282, 32 Utah 454

12. U S—Richard v. National City Bank of New York, (D C N.Y.) 6 F Supp. 156, 158
Cal—People v. Blanding, 63 Cal 333, 339.
W.Va—Alexander v State Compensation Com'r, 167 S E 589, 590.

13. Doe v. Provoost, 4 Johns.(N.Y.) 61, 64, 4 Am D 249

14. Haggerty v Hockenberry, 30 A. 88, 89, 52 N J Eq 354

15. Lomancik v Youghiogheny & Ohio Coal Co, 180 A 731, 732, 119 Pa Super 263—5 C J p 1429 note 24

16. Lomancik v. Youghiogheny & Ohio Coal Co, supra—5 C J. p 1429 note 25.

17. N D—State ex rel Weeks v. Olson, (N D) 259 N W 83, 85
Pa—Lomancik v. Youghiogheny & Ohio Coal Co, 180 A. 731, 732, 119 Pa Super 263
5 C J p 1429 note 26.

18. N Y.—Ferree v Moquin-Offerman-Hessenbuttel Coal Co, 61 N.Y. S 120, 122, 29 Misc. 624.
R I—Warwick, etc, Water Co v Carr, 52 A. 1030, 1031, 24 R I. 226

19. Smith v. Howell, 38 A. 180, 181, 60 N J Law 384

20. Hunter v. Wetsell, 84 N.Y. 549, 554, 38 Am R 544

21. Edge v. Boardwalk Securities Corporation, 179 A 270, 272, 115 N J.Law 286 See also Any 3 C.J S p 1421 notes 28-48.

22. State ex rel. Weeks v. Olson, (N D) 259 N W. 83, 85.

23. Cal—Throop v. McGregor, (App.) 34 P.(2d) 187, 188.

definite,[24] but limited,[25] continuance; also, a time limited to a fixed period,[26] or to a period beginning at a fixed time,[27] or to a definite period within limits implied from the context.[28] This phrase also forms part of other phrases which have received judicial construction, such as: "Agree . . . to sell . . . at any time before the expiration of the lease,"[29] "appropriate at any time so much of the land,"[30] "at any time after a . . . certificate has been issued,"[31] "at any time before a final settlement,"[32] "at any time before the jury retires,"[33] "at any time before the trial thereof,"[34] "at any time die without issue,"[35] "at any time . . . return you the par value of this stock,"[36] "at any time thereafter pay,"[37] "at any time within three years after entry,"[38] "cancel said lease . . . at any time,"[39] "commissioners may, at any time, . . . sell such property,"[40] "creditors . . . may at any time enter their appearance,"[41] "delivery . . . at any time not later than,"[42] "issuance of process . . . at any time,"[43] "may at any time review and modify,"[44] "may be 'at any time' reviewed by certiorari,"[45] "may remove . . . at any time,"[46] "modified at any time by a subsequent agreement,"[47] "notice at any time that the arrangement would not be continued,"[48] "paid off the notes at any time,"[49] "return . . . investment at any time . . . desired,"[50] "should you wish to cash in . . . at any time,"[51] "the state may

Miss.—Mississippi Power Co. v. Bennett, 161 So. 301, 303.
N.J.—Edge v. Boardwalk Securities Corporation, 179 A. 270, 272, 115 N. J. Law 286.
N.Y.—Hawkins v. Duvall, 177 N.Y.S. 534, 536, 103 Misc. 333.
Or.—Parsons v. Boggie, 11 P.(2d) 280, 281, 139 Or. 469.
Pa.—City of Erie v. Pennsylvania R. Co., 92 A. 192, 194, 246 Pa. 238.
Tex.—Terry v. Crosswy, (Civ.App.) 264 S.W. 718, 720.
Va.—Grace Securities Corporation v. Roberts, 164 S.E. 700, 704, 158 Va. 792.

"What is intended by that term is 'a reasonable time,' and what is a reasonable time is 'so much time as is necessary under the circumstances . . . what the . . . duty requires should be done in a particular case.'"—State v. Board of Com'rs of Cascade County, 296 P. 1, 9, 89 Mont. 37.

Delay contemplated

"At any time" has been said to show that, under the circumstances, delay rather than prompt action was contemplated.—Kaplan v. Reid Bros., 285 P. 868, 869, 104 Cal.App. 268.

24. Kan.—Phoenix Ins. Co. v. Ireland, 58 P. 1024, 1025, 9 Kan.App. 644.
Md.—Maughlin v. Perry, 35 Md. 352, 356.

25. Throop v. McGregor, (Cal.App.) 34 P.(2d) 187, 188.

26. In re Farley, 103 N.E. 417, 418, 214 N.Y. 212.

Periods implied

(1) Pendency of proceedings.—Bosquet v. Howe Scale Co., 120 A. 171, 173, 96 Vt. 364.

(2) Prior to or during the hearing.—In re Mackey, (D.C.Del.) 110 F. 355, 363.

(3) Within the maximum periods provided for in the statute.—Lomanick v. Youghiogheny & Ohio Coal Co., 130 A. 731, 732, 119 Pa.Super. 263.

Extension of remedy

(1) "At any time," as applied to a statutory remedy, has been construed to extend the remedy, not to defeat it by shortening the limitation of time for recovery.—Steele v. Newark, 40 N.J.Law 92, 95.

(2) But the phrase is not construed to imply liability in the absence of conditions imposing it.—Levant American Commercial Co. v. W. Wells & Co., 174 N.Y.S. 303, 305, 186 App.Div. 497.

27. State v. Moore, 136 P. 233, 235, 90 Kan. 751, 755.

28. Melody v. Bornot, Inc., 170 A. 408, 410, 112 Pa.Super. 174.

During pendency of agreement or order

"At any time" has been construed, under particular circumstances, as limited to the period the agreement or order has to run.—Zupicick v. Philadelphia & Reading Coal & Iron Co., 164 A. 731, 733, 108 Pa.Super. 165.

29. Maughlin v. Perry, 35 Md. 352, 356.

30. City of Erie v. Pennsylvania R. Co., 92 A. 192, 194, 246 Pa. 238.

31. In re Farley, 103 N.E. 417, 214 N.Y. 212.

32. Ex parte McLendon, 102 So. 696, 698, 212 Ala. 403.

33. Darby v. Pidgeon Thomas Iron Co., 232 S.W. 75, 144 Tenn. 298.

34. Richard v. National City Bank of New York, (D.C.N.Y.) 6 F.Supp. 156, 158.

35. In re Miller's Estate, 22 A. 1044, 145 Pa. 561.

36. Kaplan v. Reid Bros., 285 P. 868, 869, 104 Cal.App. 268.

37. Prout v. Roby, (D.C.) 15 Wall. (U.S.) 471, 473.

38. U. S. ex rel. Giuricin v. Day, (C.C.A.N.Y.) 54 F.(2d) 862, 863.

39. Throop v. McGregor, (Cal.App.) 34 P.(2d) 187.

40. State v. Board of Com'rs of Cascade County, 296 P. 1, 6, 89 Mont. 37.

41. In re Plymouth Cordage Co., (Okl.) 135 F. 1000, 1006, 68 C.C.A. 434.—In re Mackey, (D.C.Del.) 110 F. 355, 363.—In re Romanow, (D.C. Mass.) 92 F. 510, 511.

Period limited

(1) Before petition is dismissed.—In re Romanow, (D.C.Mass.) 92 F. 510, 511.

(2) Prior to adjudication.—In re Bedingfield, (D.C.Ga.) 96 F. 190, 191, 2 Am.Bankr. 355.

42. Levant American Commercial Co. v. W. Wells & Co., 174 N.Y.S. 303, 304, 186 App.Div. 497.

43. Seals v. State, 11 S.W.(2d) 879, 880, 157 Tenn. 538.

44. Pa.—Zupicick v. Philadelphia & Reading Coal & Iron Co., 164 A. 731, 732, 108 Pa.Super. 165.
Vt.—Bosquet v. Howe Scale Co., 120 A. 171, 173, 96 Vt. 364.

45. Steele v. Newark, 40 N.J.Law 92, 95.

46. N.Y.—Hawkins v. Duvall, 177 N.Y.S. 534, 535, 103 Misc. 333.
N.D.—State ex rel. Weeks v. Olson, 259 N.W. 83, 85.
Or.—Parsons v. Boggie, 11 P.(2d) 280, 139 Or. 469.
Tex.—Terry v. Crosswy, (Civ.App.) 264 S.W. 718, 720.

47. Luszcz v. Seaboard By-Products Co., 127 A. 212, 213, 101 N.J.Law 170.

48. Phoenix Ins. Co. v. Ireland, 58 P. 1024, 1025, 9 Kan.App. 644.

49. Bocher v. Anderson, (Tex.Civ.App.) 86 S.W. 956.

50. Miss.—Mississippi Power Co. v. Bennett, 161 So. 301, 307.
Va.—Grace Securities Corporation v. Roberts, 164 S.E. 700, 704, 158 Va. 792.

51. Edge v. Boardwalk Securities Corporation, 179 A. 270, 271, 115 N.J.Law 286.

at any time recover,"[52] and "upon due proof, at any time, . . . must make an order."[53]

At once. An adverbial phrase, sometimes almost literally construed,[54] importing immediate action,[55] but having reference to what is possible[56] or reasonable[57] under the circumstances. As commonly used, it has been said to signify all reasonable haste, as distinguished from in a reasonable time,[58] although, in distinguishing it from other words or phrases importing immediate or instantaneous action, courts have declared without qualification that it signified in a reasonable time.[59] The phrase has been variously defined as meaning as promptly as the circumstances will permit;[60] as soon as possible;[61] as soon as, under the circumstances, an act can be done;[62] at one and the same time;[63] directly, simultaneously, without delay, or at the same point of time;[64] forthwith;[65] immediately;[66] immediately and without delay;[67] presently, or without any substantial interval;[68] promptly;[69] today;[70] with greater celerity than is ordinarily comprehended by a reasonable time;[71] within such reasonable time as shall be required under all the circumstances for doing the particular thing,[72] with no delay, no postponement.[73] In particular connections, it has been said that the phrase has been construed by a majority of the courts as signifying time and not causation,[74] and, under particular circumstances, it has been held to imply a preparedness to act with the promptness required by the phrase.[75] This phrase also occurs with other words in phrases which have received judicial construction, such as: "At

52. State v Moore, 136 P. 233, 235, 90 Kan 751, 755

53. Belch v Delaware & Hudson Co, 160 N.Y.S 74, 75, 173 App Div. 867.

54. Ala—Continental Casualty Co v. Ogburn, 57 So. 852, 853, 175 Ala 357, Ann Cas 1914D 377.
Ariz—Arizona Power Co. v. State, 166 P 275, 277, 19 Ariz 114.

55. Ga—Georgia Agricultural Works v. Price, 74 S.E. 718, 720, 11 Ga. App 80

56. Georgia Agricultural Works v. Price, supra—5 C J. p 1439 note 91 [c].

57. Oklahoma Vinegar Co v Hamilton, 32 So. 306, 307, 132 Ala 593, 595—5 C J p 1439 note 91 [b].

58. Bowser v Atkinson, 143 S W. 75, 76, 161 Mo App 450

59. Cohen v Silverman, 40 N Y S 8, 10, 4 App Div 503—5 C J. p 1439 note 91 [b].

60. Last Chance Ranch Co v Erickson, (Utah) 25 P (2d) 952, 959.

61. Harris v Bills, 213 N W 929, 932, 203 Iowa 1034—5 C J p 1439 note 87
"As soon as possible" synonymous see As 6 C J S p 783 note 41.
"Instantaneously" distinguished.—Wichita Mill & Elevator Co v. Liberal Elevator Co, (C C A Kan.) 243 F 99, 102—National Live Stock Ins Co v. Simmons, 111 N E 18, 19, 62 Ind App 15—Harris v. Bills, 213 N. W. 929, 932, 203 Iowa 1034—Gladney Milling Co v Dement, (Tex Civ. App) 230 S.W. 1038, 1040.

62. Monroe & Monroe v Cowne, 112 S E 843, 851, 133 Va. 181.

63. Gladney Milling Co v Dement, (Tex Civ App.) 230 S W. 1038, 1040 —5 C J. p 1439 note 86

64. Tex.—Gladney Milling Co. v. Dement, (Civ.App) 230 S W. 1038, 1040.
Utah—Last Chance Ranch Co v. Erickson, 25 P (2d) 952, 959
5 C J p 1439 note 89.
"Simultaneously" distinguished.—Virginia Hardwood Lumber Co v Hughes, 124 S E 283, 285, 140 Va 249.

65. Board of Education of Salt Lake City v. Wright-Osborn Co, 164 P 1033, 1036, 49 Utah 453—5 C J. p 1439 note 83.

66. U S—Empire State Surety Co v Northwest Lumber Co, (Wash) 203 F. 417, 420, 121 C C A 527
Tex—Gladney Milling Co v Dement, (Civ.App) 230 S W. 1038, 1040
Utah—Last Chance Ranch Co v. Erickson, 25 P (2d) 952, 959
Va—Virginia Hardwood Lumber Co v. Hughes, 124 S E. 283, 285, 140 Va 249
5 C J p 1439 note 84
"Immediately" distinguished.—Thomas v Mutual Ben. Health & Accident Ass'n, 18 P (2d) 151, 153, 136 Kan 802—United Commercial Travelers v Barnes, 80 P. 1020, 1023, 82 P 1099, 72 Kan 293, 7 Ann Cas 809—Rathbun v. Globe Indemnity Co, 184 N W. 903, 908, 107 Neb 18, 24 A L R 191.

67. Board of Education of Salt Lake City v. Wright-Osborn Co., 164 P. 1033, 1037, 49 Utah 453.

68. Continental Casualty Co v. Ogburn, 57 So. 852, 853, 175 Ala. 357, 361, Ann Cas 1914D 377.

69. Tex.—Dixon v. U. S. Fidelity & Guaranty Co, (Civ App) 293 S W. 291, 294
Va—Virginia Hardwood Lumber Co v. Hughes, 124 S E. 283, 285, 140 Va 249
5 C J p 1439 note 82
"Promptly" substantially equivalent.—Binger Co v. Blumberg, 134 N. Y.S 1115, 76 Misc 432

70. Patterson v. Missouri Pacific R Co, 94 P. 138, 140, 77 Kan. 236, 15 L R A (N S) 733.

71. Rouleau v. Continental Life Ins. & Inv Co, 144 P. 1096, 1099, 45 Utah 234—5 C J. p 1439 note 90

72. U S—Christenson v Gorton-Pew Fisheries Co, (C C A N Y) 8 F (2d) 689, 691—Wichita Mill & Elevator Co v. Liberal Elevator Co, (C C A Kan.) 243 F 99, 102
Ark—B A. Collins & Co v. Gus Blass Co, 242 S W. 70, 154 Ark. 244
Cal—Union Trust Co. of San Francisco v Dickinson, 157 P. 615, 617, 30 Cal App 91.
Ill—Wood, Stubbs & Co. v. Kaufmann, 233 Ill App 138, 142.
Ind—National Live Stock Ins Co. v. Simmons, 111 N E 18, 19, 62 Ind. App. 15—National Live Stock Ins. Co v Bartlow, 110 N.E. 224, 225, 60 Ind App 233
Iowa—Harris v Bills, 213 N.W. 929, 932, 203 Iowa 1034.
Neb—George v. Ætna Casualty & Surety Co., 238 N.W. 36, 39, 121 Neb 647.
Tex—Gladney Milling Co. v. Dement, (Civ.App) 230 S W. 1038, 1040
Utah—Last Chance Ranch Co. v. Erickson, 25 P (2d) 952, 959.
Va—Monroe & Monroe v. Cowne, 112 S E 843, 855, 133 Va. 181—Lawson v Hobbs, 91 S E. 750, 752, 120 Va. 690
5 C J. p 1439 note 91.
Reasonable time not implied
A reasonable time to do an act which the statute does not require to be done is not implied.—State ex rel Conway v. Nolte, (Mo) 218 S.W 862, 863.

73. Arizona Power Co. v. State, 166 P. 275, 277, 19 Ariz. 114.

74. Continental Casualty Co. v. Ogburn, 57 So 852, 853, 175 Ala 357, Ann Cas.1914D 377.

75. Bowser v. Atkinson, 143 S.W. 75, 76, 161 Mo.App. 450, 456.

once after adjournment,"[76] "at once as ready,"[77] "at once elect to buy,"[78] "at once remit,"[79] "at once to terminate the employment,"[80] "beginning at once,"[81] "closed at once,"[82] "delivery . . . at once,"[83] "failure to give notice at once,"[84] "notice or proof of death . . . at once,"[85] "proceed . . . at once against the undersigned,"[86] "render at once notice . . . of such sickness,"[87] "return the goods at once,"[88] "shall at once certify,"[89] "ship at once,"[90] "transfer it at once,"[91] and "wages shall be paid at once"[92]

At the expiration of. A phrase held to define a limit of time,[93] marking either the close[94] or the beginning[95] of a period It is sometimes used to denote a fixed and definite time,[96] at other times to denote a reasonable time before[97] or after[98] the expiration of the period. The phrase has been defined as meaning after the expiration of;[99] at or after;[1] at or before;[2] and not sooner than.[3] This phrase also forms part of other phrases, such as "A lease terminable 'at the expiration of one year,'"[4] "at the expiration of five months,"[5] "at the expiration of his sentence,"[6] "at the expiration of their terms,"[7] "at the expiration of the term of this lease,"[8] "at the expiration of three days,"[9] "at the expiration of three months,"[10] "at the expiration of three years,"[11] and "at the expiration of twelve calendar months."[12]

At the time. As sometimes used, the phrase has been held to mean at the moment;[13] forthwith; immediately;[14] denoting coincidence of time.[15] So used, the phrase may refer to the moment of happening or the moment before,[16] implying prompt, vigorous action without any delay;[17] but it is not always rigidly construed to mean "eo instante,"[18]

76. Washington v State, 216 S W 869, 86 Tex Cr 327

77. B. A. Collins & Co v Gus Blass Co, 242 S W 70, 154 Ark 244

78. Wichita Mill & Elevator Co. v. Liberal Elevator Co, (C C A Kan) 243 F. 99, 102

79. Rouleau v. Continental Life Ins & Inv Co, 144 P. 1096, 1098, 45 Utah 234.

80. Board of Education of Salt Lake City v. Wright-Osborn Co, 164 P. 1033, 1036, 49 Utah 453.

81. Dixon v. U S Fidelity & Guaranty Co, (Tex Civ App) 293 S W. 291, 294.

82. Harris v. Bills, 213 N.W. 929, 931, 203 Iowa 1034.

83. Christenson v. Gorton-Pew Fisheries Co, (C C A N.Y.) 8 F (2d) 689, 690

84. Monroe & Monroe v Cowne, 112 S E. 848, 851, 133 Va 181

85. George v Ætna Casualty & Surety Co, 238 N W. 36, 39, 121 Neb 647.

86. Union Trust Co of San Francisco v. Dickinson, 157 P. 615, 616, 30 Cal App 91.

87. National Live Stock Ins. Co. v Bartlow, 110 N E 224, 225, 60 Ind App 233

88. Wood, Stubbs & Co. v. Kaufmann, 238 Ill App 138, 142

89. State ex rel Conway v. Nolte, (Mo) 218 S W 862, 863.

90. Tex—Gladney Milling Co. v. Dement, (Civ App) 230 S W. 1038, 1040.
Va.—Virginia Hardwood Lumber Co v. Hughes, 124 S E 283, 285, 140 Va. 249—Lawson v Hobbs, 91 S.E. 750, 752, 120 Va 690
Wash.—Grays Harbor Commercial Co v. Yakima Valley Producers' Association, 228 P. 600, 601, 130 Wash 567

91. Last Chance Ranch Co. v Erickson, (Utah) 25 P.(2d) 952, 959

92. Arizona Power Co v State, 166 P 975 977. 19 Ariz 114.

93. Mont—Abell v Bishop, 284 P 525, 531, 86 Mont 478.
N Y—M Fine Realty Co. v. New York, 103 N Y S 115, 116, 53 Misc 246—Ferree v Moquin-Offerman-Hessenbuttel Coal Co, 61 N Y S 120, 122, 29 Misc 624

94. Mo—Hollmann v Conlon, 45 S W. 275, 278, 143 Mo 369.
Mont—Abell v. Bishop, 284 P. 525, 531, 86 Mont. 478
N Y—M Fine Realty Co. v New York, 103 N Y S 115, 116, 53 Misc 246—Ferree v Moquin-Offerman-Hessenbuttel Coal Co, 61 N Y S 120, 122, 29 Misc 624

95. U S—Ex parte Szumrak, (D C Mich) 278 F 803, 810
N Y—De Pass v Stoddard, 144 N Y S. 410, 412, 83 Misc 12.

96. Ky—Magoffin v Holt, 1 Duv 95, 97
Mo—Hollmann v Conlon, 45 S W. 275, 278, 143 Mo 369.
5 C J p 1434 note 12

97. People v Blanding, 63 Cal. 333, 339

98. Ga—Rogers v. Burr, 25 S E. 339, 341, 97 Ga. 10
N Y—De Pass v Stoddard, 144 N Y. S 410, 412, 83 Misc 12

99. Rogers v. Burr, 25 S E 339, 341, 97 Ga 10.

1. In re Ruddy, L. R. 2 P. & D. 330, 331, 332

2. I X L Furniture & Carpet Instalment House v. Berets, 91 P. 279, 282, 32 Utah 454

3. Weber Showcase & Fixture Co v. Kaufman, (Ariz.) 44 P.(2d) 158, 161.

4. M. Fine Realty Co. v New York, 103 N.Y.S 115, 116, 53 Misc. 246.

5. De Pass v. Stoddard, 144 N.Y.S 410, 412, 83 Misc. 12.

6. Ex parte Szumrak, (D C Mich.) 278 F. 803, 810.

7. People v. Blanding, 63 Cal. 333, 339.

8. I X L Furniture & Carpet Instalment House v. Berets, 91 P 279, 282, 32 Utah 454.

9. Weber Showcase & Fixture Co v Kaufman, (Ariz) 44 P (2d) 158, 161.

10. Mo—Hollmann v. Conlon, 45 S W. 275, 278, 143 Mo. 369
N Y—Ferree v. Moquin-Offerman-Hessenbuttel Coal Co, 61 N.Y S 120, 122, 29 Misc. 624.

11. Magoffin v Holt, 1 Duv (Ky) 95, 97—5 C J. p 1433 note 6 [a] (1).

12. In re Ruddy, L. R. 2 P & D 330, 331, 332

13. See Franklin v Matoa Gold Min Co, 158 F 941, 944, 86 C C A 145, 16 L R A (N S) 381, 14 Ann Cas 302—5 C J p 1435 note 42

14. Brown v. Smith, 102 N.W. 171, 173, 13 N D. 580

15. Seattle Lumber Co v Richardson, etc, Co, 120 P. 517, 518, 66 Wash 671—Heim v. Elliott, 119 P 826, 827, 66 Wash 361—5 C.J p 1435 note 42 [e], [f].
"On the occasion" equivalent.—Mackey v Queen City Wood Works & Lumber Co, 261 S.W. 132, 134, 216 Mo App 205.

16. Barnett v. Strain, 107 S E. 530, 532, 151 Ga. 553

17. Brown v. Smith, 102 N.W. 171, 173, 13 N D. 580.

18. U S—U. S. v Buchanan, (D C N C) 9 F 689, 691, 4 Hughes 487
N.Y—Hunter v. Wetsell, 84 N.Y. 549, 554, 38 Am.R. 544.

and may include a convenient time under the circumstances,[19] within reasonable limits,[20] or, more strictly, within a time so immediate that the object can be attained.[21] "At the time" may signify a period of time, as distinguished from a point of time.[22] Used in this sense, the phrase refers to an entire transaction[23] covering the whole time,[24] and every part of it,[25] and includes all that occurred,[26] or all the steps taken[27] during the period.

With other words, it occurs in phrases which have been judicially construed, such as: "At the time of emptying such cask,"[28] "at the time of her death,"[29] "at the time of sale,"[30] "at the time of the death of the husband,"[31] "at the time of the desertion,"[32] "at the time of the execution of the deed,"[33] "at the time of the happening,"[34] "at the time of the injury,"[35] "at the time of the injury and death,"[36] "at the time of the levy,"[37] "at the time of the passage of this act,"[38] "at the time of the trial,"[39] "at the time ordered by the town,"[40] "at the time recovered,"[41] "at the time seized in fee simple,"[42] "at the time the accident happened,"[43] "at the time the debt was created,"[44] "at the time the material is delivered,"[45] "at the time the truck struck plaintiff,"[46] "at the time to satisfy the requirements of the statute of frauds,"[47] "at the time (when descent is cast) be a bona fide resident of the United States,"[48] and "living in adultery at the time of her husband's death."[49]

Other phrases. "At a certain day,"[50] "at a fixed or determinable future time,"[51] "at all other times,"[52] "at all times,"[53] "at any and all times,"[54] "at any stage of the cause,"[55] "at a port,"[56] "at a proper time,"[57] "at a time,"[58] "at 5.22 A. M.,"[59] "at her death,"[60] "at intervals,"[61] "at its maturity,"[62] "at

19. U. S. v. Buchanan, (D C.N C) 9 F 689, 691, 4 Hughes 487

20. La.—Gregory v. Standard Oil Co. of Louisiana, 91 So. 717, 719, 151 La. 228.
N.Y.—Hunter v Wetsell, 84 N.Y. 549, 554, 38 Am R 544
Ohio—State ex rel Kildow v Industrial Commission of Ohio, 192 N E 873, 876, 128 Ohio St 573
W Va.—Alexander v. State Compensation Com'r, 167 S.E 589, 590.

21. Brown v. Smith, 102 N W. 171, 173, 13 N.D. 580

22. Matteson v. Warwick, etc, Water Co, 68 A. 577, 580, 28 R I. 570—Warwick, etc, Water Co. v. Carr, 52 A. 1030, 1031, 24 R.I 226

23. Lake Shore, etc., R Co. v Ouska, 87 N E 897, 898, 151 Ill. 232, 238—Lake Shore & M S. Ry. Co. v. Johnson, 26 N.E. 510, 512, 135 Ill. 641.

24. Sanders v. Sanders, 29 N J.Eq. 410—Coddington v. Coddington, 20 N J.Eq. 263, 265.

25. Coddington v. Coddington, supra.

26. Lake Shore & M. S. Ry Co. v. Ouska, 87 N E 897, 898, 151 Ill 232—Lake Shore & M S Ry. Co. v. Johnson, 26 N.E. 510, 512, 135 Ill 641.

27. Jenks v. State, 39 Ind 1, 9.

28. U. S. v. Buchanan, (D C N C) 9 F. 689, 690, 4 Hughes 487

29. Doe v. Provost, 4 Johns (N.Y.) 61, 64, 4 Am D 249

30. Brown v. Smith, 102 N.W. 171, 173, 13 N D 580.

31. Castle v. Castle, (C C A Hawaii) 267 F. 521, 522.

32. Sanders v. Sanders, 29 N J Eq. 410—Coddington v. Coddington, 20 N.J.Eq. 263, 265.

33. Barnett v. Strain, 107 S E 530, 532, 151 Ga. 553

34. Brown v. Wilkinson, 15 M. & W. 391, 392, 393

35. State ex rel Kildow v. Industrial Commission of Ohio, 192 N E 873, 875, 128 Ohio St 573—5 C J. p 1435 note 42 [b].

36. La.—Gregory v. Standard Oil Co. of Louisiana, 91 So. 717, 719, 151 La. 228
W Va.—Alexander v. State Compensation Com'r, 167 S E 589, 590

37. Childers v. Brown, 158 P. 166, 169, 81 Or. 1, Ann Cas 1918B 170

38. State v. Pinson, 85 S.E 786, 76 W.Va. 572.

39. Jenks v. State, 39 Ind. 1, 9.

40. Matteson v. Warwick, etc, Water Co, 68 A. 577, 580, 28 R I 570—Warwick, etc, Water Co v. Carr, 52 A. 1030, 1031, 24 R I 226.

41. Behnke v Rathsam, (Mo App) 251 S W 391, 392.
Held equivalent to "when recovered" and "as recovered"—Behnke v. Rathsam, (Mo App) 251 S.W. 391, 392.

42. Gourley v. Countryman, 90 P. 427, 430, 18 Okl 220.

43. Continental Casualty Co. v. Wade, 105 S.W. 35, 101 Tex 102.

44. Wheatley v. Glover, 54 S E. 626, 630, 125 Ga. 710

45. Heim v. Elliott, 119 P. 826, 827, 66 Wash. 361.

46. Mackey v Queen City Wood Works & Lumber Co, 261 S.W. 132, 134, 216 Mo.App 205

47. Hunter v. Wetsell, 84 N.Y. 549, 554, 38 Am R. 544

48. Donaldson v. State, 101 N.E. 485, 490, 182 Ind. 615.

49. Spade v Hawkins, 110 N E 1010, 1012, 60 Ind App 388

50. Lloyd v Gregory, Cro Car. 501, 502, 79 Reprint 1032

51. Union Stock Yards Nat Bank v. Bolan, 93 P 508, 510, 14 Idaho 87, 125 Am S R. 146

52. Chesapeake Beach Hotel Co. v. Hall, 89 A. 445, 449, 121 Md. 643.

53. Brewster v. Lanyon Zinc Co, (Kan) 140 F. 801, 809, 72 C C A. 213—5 C J. p 1429 note 34.

54. Self v. Langley Mills, 115 S.E. 754, 759, 128 S C 179. See also Any 3 C J S. p 1421 note 35.

55. Georgia Motor Sales v. Wade, 138 S E. 797, 798, 37 Ga App. 24.

56. Snyder v. Atlantic Mut. Ins. Co., 95 N.Y. 196, 202, 47 Am.R 29.

57. Joslin v. Shaffer, 225 P. 307, 309, 66 Cal.App. 69.

58. Mullins v. Com., 67 S.W. 824, 825, 23 Ky.L. 2433

59. People v. Washington, 154 N E. 435, 436, 328 Ill. 617.

60. Kan.—Sinke v Muncie, 203 P. 1103, 1108, 110 Kan. 345, 20 A L R. 383.
Neb.—In re Hanson's Estate, 224 N W. 2, 4, 113 Neb 208
5 C J. p 1430 notes 58, 59 [b].

61. U S.—Byrne v Kansas City, Ft S. & M R. Co, (Tenn.) 61 F. 605, 613, 9 C C A. 666, 24 L.R.A. 693
Ind.—Spade v. Hawkins, 110 N.E. 1010, 1012, 60 Ind App. 388.
Tenn.—Louisville, etc, R. Co. v. Gardner, 1 Lea 688, 690.
Held equivalent to "from time to time," "now and then," and "occasionally"—Spade v. Hawkins, 110 N. E. 1010, 1012, 60 Ind App. 388.

62. McKeany v. Black, 49 P. 710, 117 Cal. 587, 592.

least,"[63] "at maturity,"[64] "at my decease,"[65] "at noon,"[66] "at November 15th,"[67] "at or about the same time,"[68] "at or after,"[69] "at or before,"[70] "at or prior to my decease,"[71] "at or upon,"[72] "at [port] . . . or sailed,"[73] "at present organized,"[74] "at said time,"[75] "at settlement,"[76] "at sight" see Bills and Notes § 247 [8 C.J. p 404 note 56], "at such time,"[77] "at that date,"[78] "at that time,"[79] "at the birth,"[80] "at the date of its passage,"[81] "at the date of the agreement,"[82] "'at the date of the assignment,'"[83] "at the death of my said wife,"[84] "at the end,"[85] "at the first term,"[86] "at their pleasure,"[87] "at the next annual assessment,"[88] "at the next succeeding assessment period,"[89] "at the pleasure of the Company,"[90] "at the preceding election,"[91] "at the same term of said court,"[92] "at the same time,"[93] "at the same time and place,"[94] "at the term,"[95] "at this date,"[96] "at this time,"[97] "at twenty-one,"[98] "at which,"[99] "at which time,"[1] and "before or at."[2]

Circumstance, Condition, or Mode

It has been said that "at" is a preposition of circumstantial position, state, condition, manner, environment, etc., in a great variety of relations developed from the local sense.[3] When so used, the word denotes adjunction or conjunction, association or consociation, connection,[4] and has been defined as meaning connected with;[5] in a state or condition of;[6] object or end directed toward.[7]

63. Md.—Owens v. Graetzel, 126 A. 224, 229, 146 Md. 361, 39 A.L.R. 943.
Miss.—Miller v. State, 94 So. 706, 709, 130 Miss. 564.
Pa.—Derringe v. Walton, 13 Pa. Dist. & Co. 82—Bevilacque v. Goldman, 42 Pa. Co. 276, 277.
5 C.J. p. 1438 note 81 [a], [c], [d].
See also Time §§ 12, 13 [62 C.J. p. 935 notes 87–95].

64. U.S. v. Union Pac. R. Co., (Ct. Cl.) 91 U.S. 72, 85, 23 L.Ed. 224—Cincinnati Third Nat. Bank v. Humphreys, (C.C.Ohio) 66 F. 872, 876.
"According to their tenor and effect" equivalent.—Cincinnati Third Nat. Bank v. Humphreys, (C.C.Ohio) 66 F. 872, 876.

65. Martin v. Stone, 29 A. 845, 67 N.H. 367.

66. Goodman v. Caledonian Ins. Co. of Scotland, 118 N.E. 523, 524, 222 N.Y. 121.

67. Lorraine Mfg. Co. v. Oshinsky, (C.C.N.Y.) 182 F. 407, 408.

68. People v. Fochtman, 197 N.W. 166, 169, 226 Mich. 53.

69. Boswell v. Citizens' Sav. Bank, 96 S.W. 797, 800, 123 Ky. 485, 29 Ky.L. 988.

70. Ala.—Brown v. State, 133 So. 913, 914, 222 Ala. 623.
Ga.—Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga.App. 679.
Pa.—Ohlinger v. Maidencreek Tp., Berks County, 167 A. 882, 884, 312 Pa. 289, 90 A.L.R. 1227.
5 C.J. p. 1437 note 3 [e], p. 1431 note 88.
"Not later than" equivalent.—Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga.App. 679.
"On or before" equivalent.—Leader v. Plante, 50 A. 54, 95 Me. 339, 341, 85 Am.S.R. 415.
"Within" equivalent.—Leader v. Plante, 50 A. 54, 95 Me. 339, 85 Am.S.R. 415.

71. In re Clark's Estate, (Cal.App.) 61 P.(2d) 1221, 1222—In re Clark's Estate, (Cal.App.) 61 P.(2d) 73, 74.

72. Guynn v. Whetcroft, 3 Harr. & M.(Md.) 136, 137, 1 Am.D. 375—McHard v. Whetcroft, 3 Harr. & M.(Md.) 85.

73. Olsen v. Hunter-Benn & Co., (D.C.Ala.) 54 F. 530, 531.

74. People v. Hinrichsen, 43 N.E. 973, 974, 161 Ill. 223.

75. Mass.—Lyons v. Elston, 98 N.E. 93, 94, 211 Mass. 478.
Or.—Kitchel v. Gallagher, 270 P. 488, 490, 126 Or. 373.

76. Georgia State Bldg., etc., Assoc. v. Grant, 34 So. 84, 86, 82 Miss. 424.

77. Okl.—Hales v. Zander, 103 P. 669, 24 Okl. 246, 247, 133 Am.S.R. 879.
Or.—Fleck v. Russell, 269 P. 883, 126 Or. 341.

78. Park v. Whitney, 19 N.E. 161, 148 Mass. 278, 280.

79. Park v. Whitney, supra.

80. Comstock v. Weed, 2 Conn. 155, 157.

81. Bassett v. U.S., 2 Ct.Cl. 443, 449, 450.

82. Farwell v. Rogers, 4 Cush. (Mass.) 460, 466.

83. Howe v. Warren, 40 N.E. 472, 473, 154 Ill. 227.

84. In re Phearman's Estate, 232 N.W. 826, 829, 211 Iowa 1137—Dowd v. Scally, (Iowa) 184 N.W. 340, 342.

85. Davis v. Godart, 154 N.W. 1091, 1092, 131 Minn. 221—5 C.J. p. 1427 note 3, p. 1433 note 16 [a], p. 1433 note 10.

86. Hamilton v. Ritchie, (Tenn.Ch.App.) 53 S.W. 198, 205.

87. Commonwealth v. McGann, 100 N.E. 355, 356, 213 Mass. 213.

88. Cranston Town Council's Pet., 23 A. 608, 610, 18 R.I. 417.

89. Johnson City v. Clinchfield R. Co., 43 S.W.(2d) 386, 387, 163 Tenn. 333.

90. Bullingham v. E. P. Gleason Mfg. Co., 91 N.Y.S. 1046, 1048, 101 App.Div. 476.

91. Mills v. Nickeus, 142 P. 1145, 1147, 81 Wash. 409.

92. Wilson v. Wilson, 36 N.W. 661, 664, 23 Neb. 455.

93. Perry v. Gross, 156 P. 1031, 1032, 172 Cal. 462—5 C.J. p. 1435 note 35.

94. Dryburg v. Mercur Gold Min. etc., Co., 55 P. 367, 371, 18 Utah 410—5 C.J. p. 1423 note 55 [a], p. 1435 note 36.

95. Lawver v. Langhans, 85 Ill. 138, 141.

96. Moore v. Korty, 11 Ind. 341, 343.

97. Todd v. Southern Casualty Co., (Tex.Civ.App.) 13 S.W.(2d) 695, 696.

98. Conn.—Colt v. Hubbard, 33 Conn. 281, 286.
N.J.—Post v. Herbert, 27 N.J.Eq. 540, 546.

99. Eversole v. Brown, 53 S.W. 527, 21 Ky.L. 925—5 C.J. p. 1436 note 54.

1. Biddle v. Coryell, 13 N.J.Law 377, 379, 33 Am.D. 521.

2. Rice v. Kansas Pac. R. Co., 63 Mo. 314, 323.

3. Century D. See Columbus Mut. Life Insurance Co. v. Klein, 175 N.E. 878, 879, 38 Ohio App. 157.

4. Vaughan v. Fifer, 158 P. 93, 95, 91 Wash. 553—5 C.J. p. 1425 note 71.
As owner, employee, or guest.
As sometimes used, "at" is not merely a word denoting accidental or casual proximity to a certain spot but means that the person referred to must have had some connection or association with the place as owner, employee, or guest.—Columbus Mut. Life Ins. Co. v. Klein, 175 N.E. 878, 879, 38 Ohio App. 157.

5. Abernathy v. Peterson, 225 P. 132, 133, 38 Idaho 727.

6. People v. Washington, 154 N.E. 435, 436, 323 Ill. 617.

7. Webster D., quoted in Durham v. Commonwealth, 31 S.W.(2d) 603, 604, 235 Ky. 366.

At arm's length. Beyond the reach of personal influence or control.[8]

At bar. Before the court, as in the phrase, "the case at bar."[9]

At large. Not limited to any particular matter, point, or question; not under physical restraint,[10] without restraint or confinement.[11] In another sense, openly;[12] not limited to any particular place, district, person, matter, or question.[13]

The phrase forms part of other phrases which have received judicial construction, such as: "At large and not concealed,"[14] "corporation at large,"[15] "elected by the State at large,"[16] "going at large,"[17] "insane persons found at large,"[18] "prohibited from running at large,"[19] "running at large" (see Animals § 130), and "to go at large."[20]

At law. According to law; by, for, or in law.[21] The term refers generally to the American system of jurisprudence, whether legal or equitable,[22] as in the phrases: "At law and in equity,"[23] "remedy at law,"[24] and "valid at law."[25]

At right angles. Directly across,[26] as in the phrase: "Drill at right angles."[27] In a nautical sense, abeam.[28]

At sea. As an expression of place, the phrase has been defined supra. As expressive of circumstance or condition, it has been defined as in the prosecution of a voyage or passage;[29] on a ship's voyage, and pursuing the business of it;[30] open to the hazard of a sea voyage;[31] prosecuting her voyage to her port of final destination;[32] sailing.[33] It has been held that "on a passage"[34] or "on a voyage"[35] are equivalent terms; and that "arrival in port" (see Arrival 6 C.J.S. p 715 note 45) or "being in port"[36] are terms in opposition.

Other phrases. "At a good speed,"[37] "at anchor" (see Anchor 3 C.J.S. p 1065 note 1), "at command,"[38] "at complainant's costs,"[39] "at consignee's risk,"[40] "at his death,"[41] "at his option,"[42] "at his own

8. Black L. D.

Formality implied

Parties are said to deal "at arm's length" when each stands upon the strict letter of his rights, and conducts the business in a formal manner, without trusting to the other's fairness or integrity, and without being subject to the other's control or overmastering influence—Black L. D.

9. Black L. D., citing Dyer p 31.

10. Koshkonong v. Boak, 158 S.W. 874, 876, 173 Mo.App. 310.

11. Webster D., quoted in Koshkonong v. Boak, supra—6 C.J. p 1437 note 68.

12. Weldon v. Wood, 9 R.I. 241, 245.

"Concealed" distinguished.—Weldon v. Wood, 9 R.I. 241, 245.

13. Black L. D., quoted in State v. Welsh, 87 N.W. 529, 531, 62 Neb. 721.

14. Weldon v. Wood, 9 R.I. 241, 244.

15. Richards v. Clarksburg, 4 S.E. 774, 780, 30 W.Va. 491.

16. Koenig v. Flynn, (N.Y.) 52 S.Ct. 403, 285 U.S. 375, 76 L.Ed. 805—Smiley v. Holm, (Minn.) 52 S.Ct. 397, 402, 285 U.S. 355, 76 L.Ed. 795.

17. Koshkonong v. Boak, 158 S.W. 874, 876, 173 Mo.App. 310.

18. St. Louis, etc., R. Co. v. Woodruff, 115 S.W. 953, 956, 89 Ark. 9.

19. McAfee v. Walker, 107 P. 637, 638, 82 Kan. 132, 27 L.R.A.(N.S.) 226.

"Confined" compared and contrasted.—McAfee v. Walker, 107 P. 637, 638, 82 Kan. 132, 27 L.R.A.(N.S.) 226—Iola Electric R. Co. v. Jackson, 79 P. 662, 663, 70 Kan. 791—Missouri Pac. R. Co. v. Shumaker, 27 P. 126, 128, 46 Kan. 769—Osborne v. Kimball, 21 P. 163, 164, 41 Kan. 137—Atchison, etc., R. Co. v. Riggs, 3 P. 305, 310, 31 Kan. 622—St. Louis, etc., R. Co. v. Mossman, 2 P. 146, 150, 30 Kan. 336.

20. Webster D., quoted in Koshkonong v. Boak, 158 S.W. 874, 876, 173 Mo.App. 310.

21. Burrill L. D.

22. Hooker v. Nichols, 21 S.E. 207, 208, 116 N.C. 157.

23. Wisconsin River Impr. Co. v. Pier, 118 N.W. 857, 859, 137 Wis. 325, 21 L.R.A.(N.S.) 538.

Embraces all power, judicial and quasi judicial, exercised by courts and conferred on them by statutes, common law, or rules of equity—Wisconsin River Impr. Co. v. Pier, 118 N.W. 857, 859, 137 Wis. 325, 21 L.R.A.(N.S.) 538.

24. Webb v. Ridgely, 38 Md. 364, 372.

25. Hooker v. Nichols, 21 S.E. 207, 208, 116 N.C. 157—Fleming v. Burgin, 37 N.C. 584, 589.

26. Knorpp v. Wagner, 93 S.W. 961, 964, 195 Mo. 637.

27. Knorpp v. Wagner, supra.

28. The Hugo, (D.C.N.Y.) 57 F. 403, 410. See also Atravesados post.

29. Mass.—Bowen v. Hope Ins. Co., 20 Pick. 275, 279, 32 Am.D. 213.

N.Y.—American Ins. Co. v. Hutton, 24 Wend. 330, 336, affirmed Hutton v. American Ins. Co., 7 Hill 321, 329.

30. Wood v. New England Mar. Ins. Co., 14 Mass. 31, 35, 7 Am.D. 182—5 C.J. p 1440 note 3.

31. American Ins. Co. v. Hutton, 24 Wend. (N.Y.) 330, 335, affirmed Hutton v. American Ins. Co., 7 Hill 321, 329.

32. Mass.—Washington Ins. Co. v. White, 103 Mass. 238, 241, 4 Am.R. 543.

Pa.—Eyre v. Marine Ins. Co., 6 Whart. 247, 254.

33. American Ins. Co. v. Hutton, 24 Wend. (N.Y.) 330, 335, affirmed Hutton v. American Ins. Co., 7 Hill 321.

34. Mass.—Wales v. China Mut. Ins. Co., 8 Allen 330, 333.

N.Y.—American Ins. Co. v. Hutton, 24 Wend. 330, 334.

See also Insurance § 334 [38 C.J. p 1041 notes 19–29].

35. Wales v. China Mut. Ins. Co., 8 Allen (Mass.) 330, 333—5 C.J. p 1440 note 6. See also Insurance § 334 [38 C.J. p 1041 notes 19–29].

36. Cole v. Union Mut. Mar. Ins. Co., 12 Gray (Mass.) 501, 515, 74 Am.D. 609—5 C.J. p 1440 note 8.

37. McKinley v. Dalton, 17 P.(2d) 160, 162, 128 Cal.App. 298.

38. Seagrave's App., 17 A. 412, 417, 125 Pa. 362.

39. Kellogg Switchboard & Supply Co. v. Glen Tel. Co., (C.C.N.Y.) 121 F. 174, 177.

40. The St. Georg, (D.C.S.C.) 95 F. 172, 177.

41. Arnold v. Wells, 131 So. 400, 406, 100 Fla. 1470—5 C.J. p 1430 notes 58 [a], 59.

"In case of his death" equivalent.—Katzenberger v. Weaver, 75 S.W. 937, 939, 110 Tenn. 620—Ewing v. Winters, 11 S.E. 718, 719, 34 W.Va. 23, 28.

42. City of Knoxville v. Gervin, (Tenn.) 89 S.W.(2d) 348, 353.

risk,"[43] "at his own sale,"[44] "at his special instance and request,"[45] "at issue,"[46] "at its own cost,"[47] "at its own costs,"[48] "at its own expense,"[49] "at liberty,"[50] "at owner's risk,"[51] "at private entry,"[52] "at the cost of,"[53] "at the expense of the municipal treasury,"[54] "at the hands of justice,"[55] "at the instance of,"[56] "at their discretion,"[57] "at the option of either party,"[58] "at the pleasure,"[59] "at the same rental,"[60] "at the trial,"[61] "at war,"[62] "fixes his punishment 'at death,'"[63] "lying at anchor" (see Anchor 3 C.J.S. p 1065 note 2), "shooting at another,"[64] "to aim at a mark,"[65] and "to look at it."[66]

Degree, Number, or Value

In this sense, "at" has been defined as meaning point or position in a series or scale; relative order, degree, rate, or value.[67]

At least. An adverbial phrase meaning at the lowest estimate; at the smallest concession or claim; in the smallest or lowest degree, at the smallest number;[68] and sometimes used in the sense of clearly.[69] It is a phrase of emphasis, expressive of a minimum,[70] and implies the possibility of more.[71] It imports uncertainty,[72] taking its meaning from the context,[73] and hence, under particular circumstances, has been held equivalent to "at most,"[74] "at the least,"[75] "fully,"[76] "not less than,"[77] and "not to exceed."[78] In a particular connection, it has been said that the phrase is a deprecatory rather than an inflammatory expletive, and that it does not amount to an intimation of opinion as to the guilt of accused on the part of the presiding judge.[79]

This phrase also forms part of other phrases which have received judicial construction, such as: "At least five feet high,"[80] "at least five relations,"[81] "at

43. Stinson v. New York Cent R Co, 32 N.Y. 333, 337, 88 Am D 332

44. Ala.—Randolph v. Vails, 60 So 159, 162, 180 Ala. 82.
Okl.—Turner v Turner, 125 P. 730, 734, 34 Okl. 284.

45. Prows v Hawley, 271 P. 31, 35, 72 Utah 444

46. U S.—Knaggs v Cleveland-Cliffs Iron Co, (C C A Ohio) 287 F. 314, 316.
Ariz.—Arnett v. Hardwick, 231 P. 922, 923, 27 Ariz 179
Fla.—Young v. Curtis, 146 So. 543, 544, 108 Fla 348
Ill.—Willard v. Zehr, 74 N.E 107, 108, 215 Ill 154.
Mont.—Roush v District Court of Eighth Judicial Dist for Cascade County, 53 P (2d) 96, 97.
5 C J p 1430 note 66

47. U S.—Maryland Casualty Co. v. Omaha Electric Light & Power Co, (Neb) 157 F. 514, 518, 85 C C A. 106
Ill.—Ravenswood Hospital v. Maryland Casualty Co, 117 N E. 485, 488, 280 Ill 103

"At its own costs" contrasted.—Maryland Casualty Co v. Omaha Electric Light & Power Co., (Neb) 157 F 514, 518, 85 C C A 106.

48. Maryland Casualty Co v. Omaha Electric Light & Power Co, (Neb) 157 F. 514, 518, 85 C C.A. 106

49. U S.—Maryland Casualty Co v Omaha Electric Light & Power Co, supra
Tenn.—Casey-Hedges Co v. Southwestern Surety Co., 201 S W 137, 138, 139 Tenn. 63, L.R A 1918D 184

"At the cost of" equivalent.—Casey-Hedges Co. v. Southwestern Surety Co, 201 S.W. 137, 138, 139 Tenn 63, L.R.A.1918D 184.

50. Nicholson v Merritt, 67 S W. 5, 6, 23 Ky L. 2281.

51. Compañia de Navigacion la Flecha v. Brauer, (N Y) 18 S Ct 12, 17, 168 U S 104, 42 L Ed 398—5 C J. p 1432 note 87

52. Jordan v McClure Lumber Co, 54 So 415, 423, 170 Ala. 289, 316

53. U S.—Christensen v. General Electric Co, (D C.N Y.) 248 F 284, 289
Tenn.—Casey-Hedges Co. v Southwestern Surety Co, 201 S W. 137, 138, 139 Tenn. 63, L R A 1918D 184

54. McComb City v. Pike County, 45 So 871, 872, 91 Miss. 736.

55. Supreme Lodge K P v Crenshaw, 58 S E 628, 629, 129 Ga 195, 121 Am S R 216, 13 L R A (N S.) 258, 12 Ann Cas 307.

56. U. S. v. Castañares, 18 Philippine 210 213.

"Procured" equivalent.—Goldstein v. New York Life Ins. Co, 234 N.Y S 250, 257, 225 App Div 642.

57. Lembeck v Lembeck, 68 A. 337, 340, 73 N J Eq 427

58. Union Trust Co v Michigan Electric Co., 103 N W. 556, 557, 140 Mich 131

59. Cal.—Taylor v. Spear, 238 P. 1038, 1043, 196 Cal. 709
Mich.—MacDonald v De Waele, 248 N W. 605, 606, 263 Mich 233
N Y.—People ex rel Curtis v. Hogeboom, 173 N.Y S. 417, 418, 185 App Div 777.
5 C J. p 1435 note 28.

60. Rosenbaum Estate Co. v. Robert Dollar Co, 161 P. 10, 11, 31 Cal App 576

61. U S v. Beechman, 23 Philippine 258, 265—5 C J p 1436 note 48.

62. People v. Washington, 154 N E 435, 436, 323 Ill 617.

63. People v. Washington, supra.

64. Durham v Commonwealth, 31 S. W (2d) 603, 604, 235 Ky. 366.

65. Durham v. Commonwealth, supra

66. Durham v. Commonwealth, supra.

67. Webster New Int. D See Huntington v. Attrill, 23 N E 544, 548, 118 N.Y. 365

68. Browne v Franklin Fire Ins. Co, 37 S W (2d) 977, 979, 225 Mo. App 665—5 C.J. p 1438 notes 78–81.
Denoting time see supra p 163 note 63

69. State v Kennedy, 91 N.C 572, 580—5 C J. p 1438 note 79 [a].

70. Polk v Lane, 4 Yerg (Tenn) 36, 38.

71. Mo.—Browne v. Franklin Ins. Co, 37 S.W (2d) 977, 979, 225 Mo. App 665
Pa.—Roberts v. Wilcock, 8 Watts & S 464, 470
5 C J p 1438 note 78 [a].

72. Roberts v Wilcock, supra.

73. Warren Mfg. Co. v. Hoffman, 62 Md 165, 170.

74. Warren Mfg. Co. v. Hoffman, supra

75. Courson v Parker, 20 S E 533, 534, 39 W Va 531—Altmeyer v. Caulfield, 17 S.E 409, 410, 37 W. Va. 847

76. Roberts v. Wilcock, 8 Watts & S (Pa) 464, 470.

77. Roberts v Wilcock, supra

78. Warren Mfg. Co v. Hoffman, 62 Md 165, 170

79. Lee v State, 58 S E 676, 677, 2 Ga App 481.

80. Polk v. Lane, 4 Yerg. (Tenn.) 36, 38.

81. Succession of Carbajal, 36 So. 41, 45, 111 La. 944.

least guilty of manslaughter,"[82] "eight feet wide 'at least,'"[83] "shall at least provide,"[84] and "shall provide . . . at least one house of legislation."[85]

At par. The phrase refers to securities and their value on sale,[86] and implies a value in money, with legal tender as the standard.[87] It has been defined as meaning a dollar in money for every dollar of security;[88] at face value or for nominal value,[89] at their nominal amount for coin or its equivalent,[90] at the rate of a dollar in money for a dollar in bonds;[91] without discount or premium.[92]

Other phrases. "At its fair cash value,"[93] "at its fair value,"[94] "at its just, honest, equitable, or reasonable worth or price,"[95] "at its true value in cash,"[96] "at most,"[97] "at not less than par,"[98] "at their value,"[99] "at the least,"[1] "at the rate of,"[2] "at the same rental,"[3] and "at the same stipulated price."[4]

ATAMITA. In the civil law, a great-great-great-grandfather's sister.[5]

ATAVIA. In the civil law, a great-grandmother's grandmother.[6]

ATAVUNCULUS. The brother of a great-grandfather's grandmother, or a great-great-great-grandfather's brother.[7]

ATAVUS. The male ascendant in the fifth degree; the great-grandfather's or great-grandmother's grandfather; a fourth grandfather.[8]

ATENTADO. In Spanish law, any act or step in a proceeding by a judge with insufficient jurisdiction or against the form or order provided by law; also any grave crime, excess, or wrong.[9]

ATENUACIÓN. In Spanish law, the mitigation or diminution of the seriousness of a crime.[10]

ATHA. In Saxon law, an oath; the power or privilege of exacting and administering an oath.[11]

ATHEIST. One who does not believe in the existence of a God.[12] The term connotes belief, as distinguished from conduct.[13]

ATHLETIC. Of or pertaining to athletes or the exercises practiced by them,[14] as in the phrase "social, sporting, or athletic organization."[15]

82. State v Kennedy, 91 N C. 573, 580—5 C.J p 1438 note 79 [a] (2)

83. Roberts v. Wilcock, 8 Watts & S (Pa.) 464, 470.

84. Metropolitan Life Ins. Co v Peeler, 176 P. 939, 943, 71 Okl 238

85. Pitman v. Drabelle, 183 S W 1055, 1057, 267 Mo. 78, Ann Cas 1918D 601.

Scope of restriction

"The use of the words 'at least' ex vi termini is only a restriction against dispensing with one house of legislation, but does not forbid nor prohibit the use of more than one house of legislation"—Pitman v. Drabelle, 183 S W. 1055, 1057, 267 Mo. 78, Ann Cas.1918D 601.

86. Ft Edward v Fish, 50 N E 973, 974, 156 N.Y. 363—5 C J. p 1432 note 88

87. Galloway v. Jenkins, 63 N C. 147, 160—5 C.J. p 1432 note 88 [d]

88. Delafield v. Illinois, 2 Hill (N Y) 159, 172.

89. Evans v. Tillman, 17 S E 49, 53, 38 S C 238.

90. Webster D., quoted in Delafield v Illinois, 2 Hill (N.Y) 159, 172

91. Ft Edward v. Fish, 50 N E. 973, 974, 156 N.Y. 363.

92. Smith v. Elder, 15 Miss. 507, 517.

93. Ankeny v. Blakley, 74 P. 485, 488, 44 Or 78.

94. Nev—State v. Central Pac. R. Co, 7 Nev 99, 103
N Y—Huntington v. Attrill, 33 N E 544, 548, 118 N Y 365
"At its just, honest, equitable, or reasonable worth or price" equivalent. —State v. Central Pacific R Co, 7 Nev. 99, 103

95. State v. Central Pacific R. Co, 7 Nev. 99, 103.

96. Ankeny v. Blakley, 74 P. 485, 488, 44 Or 78
"At its fair cash value" equivalent. —Ankeny v Blakley, 74 P. 485, 488, 44 Or. 78.

97. Warren Mfg. Co. v. Hoffman, 62 Md 165, 170

98. Castle v. Kapena, 5 Hawaii 27, 29.

99. Ankeny v. Blakley, 74 P. 485, 488, 44 Or 78
Construed as meaning at their true value in cash, and not their book value—Ankeny v. Blakley, 74 P 485, 488, 44 Or 78.

1. Courson v Parker, 20 S E. 583, 584, 39 W.Va. 521—Altmeyer v Caulfield, 17 S E. 409, 410, 37 W. Va 847.

2. San Francisco Credit Clearing-House v MacDonald, 122 P. 964, 966, 18 Cal App 212—5 C.J. p 1435 note 32.

3. Construed to cover both the amount of the rent and the time of its payment.—Rosenbaum Estate Co. v. Robert Dollar Co., 161 P. 10, 11, 31 Cal.App 576

4. Town of Lonoke v W Y. Bransford & Son, 216 S.W. 38, 40, 141 Ark 18.

5. Black L D.

6. Black L D.

7. Black L D.

8. Black L D
The ascending line of lineal ancestry runs thus Pater, avus, proavus, abavus, atavus, tritavus. The seventh generation in the ascending scale will be tritavi-pater, and the next above it proavi-atavus.—Black L D

9. Escriche Diccionario.

10. Escriche Diccionario. See also Circumstancias Atenuantes [11 C J. p 768 note 40].

11. Black L D.
Spelled also "atta," "atha," and "atte."—Black L.D.

12. Gibson v. American Mut. L. Ins. Co, 37 N Y. 580, 583, 5 Transcr. App. 261—5 C.J. p 1437 note 63
"Christian" distinguished.—Hale v. Everett, 53 N.H. 9, 59, 16 Am.R 82
"Deist" compared.—Hale v. Everett, 53 N H. 9, 54, 16 Am R. 82.
"Infidel" compared.—Thurston v. Whitney, 2 Cush (Mass.) 104, 110—Gibson v. American Mut L Ins. Co, 37 N Y. 580, 583, 584, 5 Transcr.App. 261.

13. Gibson v. American Mut. L. Ins. Co, supra.

14. Webster New Int. D.

15. Century Club v U S, (Ct.Cl.) 12 F.Supp. 617, 630.

ATIA. Hatred or ill-will.[16]

ATILIUM. The tackle or rigging of a ship; the harness or tackle of a plow.[17]

ATLANTIC. Designating, or pertaining to, the ocean which lies between Europe and Africa on the east and America on the west.[18]

Atlantic Ocean. Geographically that branch of the general ocean which separates the continents of Europe and Africa from America.[19] In a particular connection, the term has been held to include all the waters between ports in Europe and America.[20]

Other phrases: "Atlantic coast,"[21] "Atlantic seaboard,"[22] and "Atlantic trade."[23]

ATLAS. In anatomy, one of the two top vertebræ of the neck, those at the base of the skull.[24] In geography, a bound collection of maps.[25]

ATMATERTERA. A great-grandfather's grandmother's sister (ataviæ soror).[26]

ATOMIZE. To reduce to atoms or atom-like particles; pulverize; spray;[27] to reduce to atoms, or to a fine spray.[28]

Atomized

In ordinary use, "atomized" has a special and well-known meaning, and expresses the form that liquids assume when they are projected by a blast of air or gas or steam, breaking up the liquid into very small particles and carrying them along to their destination.[29]

ATOMIZER. As applied to liquids, an atomizer is a device that reduces them to a fine spray.[30]

ATPATRUUS. The brother of a great-grandfather's grandfather.[31]

ATRAVESADOS. In Spanish literally, crosswise.[32] In ordinary use the word has been said to mean at right angles.[33] In maritime law, the Spanish term signifies athwart, at right angles, or abeam; sometimes used as descriptive of the position of a vessel which is "lying to."[34]

ATROCIOUS. Outrageously or wantonly wicked, criminal, vile or cruel; extremely heinous; hence horrible, shocking.[35]

ATROCITY. Great cruelty or reckless wickedness; enormity of crime; heinousness,[36] implying conduct that is outrageously or wantonly wicked, criminal, vile, cruel, extremely horrible and shocking.[37]

Phrases: "Extreme atrocity or cruelty,"[38] and "would commit the same atrocities."[39]

ATROX INJURIA ÆSTIMATUR AUT LOCO, AUT TEMPORE, AUT PERSONA.[40]

ATS. See Abbreviations 1 C.J.S. p 276 note 5.

ATTACH. The word "attach" is derived remotely

16. Black L. D.

17. Black L. D.

18. Webster New Int. D. See Merchants' Mut. Ins. Co. v. Allen, (La.) 7 S.Ct. 821, 822, 121 U.S. 67, 30 L.Ed. 858.

19. The Orient, (C.C.La.) 16 F. 916, 920, 4 Woods 255.

20. Merchants' Mut. Ins. Co. v. Allen, (La.) 7 S.Ct. 821, 822, 121 U.S. 67, 30 L.Ed. 858.

21. New Haven Steam Saw-Mill Co. v. Security Ins. Co., (D.C.Conn.) 7 F. 847, 849.

22. Fisheries Co. v. Lennen, (Conn.) 130 F. 533, 535, 65 C.C.A. 79.

Including indentations

"The term 'Atlantic seaboard,' in its ordinary interpretation, would seem to be broad enough to include such indentations in the coast as Delaware, New York, or Massachusetts Bay, and, at least, such a location on Chesapeake Bay."—Fisheries Co. v. Lennen, (Conn.) 130 F. 533, 535, 65 C.C.A. 79.

23. Merchants' Mut. Ins. Co. v. Allen, (La.) 7 S.Ct. 821, 822, 121 U.S. 67, 30 L.Ed. 858.

24. Simon v. Black Lake Lumber Co., 54 So. 354, 356, 127 La. 1071—5 C.J. p. 1438 note 76.

25. Century D.

26. Black L. D.

Called by Bracton "atmatertera magna."—Black L. D., citing Bracton fol. 68 b.

27. New Standard D., quoted in In re Preble, (Cust. & Pat. App.) 45 F. (2d) 1007, 1009.

28. Webster D., quoted in Stearns-Roger Mfg. Co. v. Greenawalt, (C.C.A.Colo.) 62 F.(2d) 1033, 1039.

29. Graphic Arts Co. v. Photo-Chromotype Engraving Co., (C.C.A.Pa.) 231 F. 146, 155.

30. Stearns-Roger Mfg. Co. v. Greenawalt, (C.C.A.Colo.) 62 F.(2d) 1033, 1039.

"Impregnator" sometimes synonymous.—Stearns-Roger Mfg. Co. v. Greenawalt, (C.C.A.Colo.) 62 F.(2d) 1033, 1039.

"Impeller" distinguished.—Stearns-Roger Mfg. Co. v. Greenawalt, (C.C.A.Colo.) 62 F.(2d) 1033, 1039.

31. Black L. D.

32. Velásquez Spanish-English D.

33. The Hugo, (D.C.N.Y.) 57 F. 403, 410. See also At ante p. 164 note 28.

34. Black L. D., citing The Hugo, supra.

35. State v. Wyman, 186 P. 1, 2, 56 Mont. 600. See also State v. Staw, 116 A. 425, 97 N.J.Law 349.

36. State v. Wyman, 186 P. 1, 2, 56 Mont. 600.

37. Mass.—Commonwealth v. Gilbert, 42 N.E. 336, 337, 165 Mass. 45, 58, 59.

Mont.—State v. Wyman, 186 P. 1, 2, 56 Mont. 600.

38. Com. v. Gilbert, 42 N.E. 336, 337, 165 Mass. 45.

39. State v. Wyman, 186 P. 1, 2, 56 Mont. 600.

40. A maxim meaning "A wrong is considered atrocious, according to the place where, the time when, or the person against whom it is committed."—Adams Gloss.

from the Latin term "attingo," and more immediately from the French "attacher."[41] It has been defined as meaning to annex;[42] to bind, fasten, or tie;[43] to connect with;[44] also, in a somewhat different sense, to seize, take, take actual possession of, or to touch;[45] to take, seize, or lay hold on by moral force, as by affection or interest; fasten or bind by moral influence.[46] In a technical sense, the word has been defined as meaning to take or apprehend by commandment of a writ or precept commonly called an attachment.[47] As distinguished from the narrow signification indicating a seizure on mesne process, discussed in the title Attachment, the word "attach" has a broad, recognized meaning and indicates any seizure of property for the purpose of bringing it within the custody of the court.[48]

Attached

A term describing the physical union of two otherwise independent structures or objects, or the relation between two parts of a single structure, each having its own function.[49] The word has been variously defined;[50] and its meaning necessarily varies as applied to attachment proceedings,[51] crops,[52] exemptions or homestead rights,[53] school districts,[54] or the annexation of territory.[55] In its most commonly accepted meaning it embodies the idea of annexation, connection,[56] or the taking into possession;[57] and has been defined as meaning adjacent;[58] annexed;[59] connected with;[60] and joined to;[61] also in another sense, having regard and affection for.[62] In a technical sense, the word has been defined as meaning held on mesne process.[63] As used in particular connections, "attached" may imply an acquisition of title to property,[64] or the initiation by proper proceedings of an inchoate right in land;[65] or it may convey the conception of possibility of removal[66] or of detachment[67] as well as of union; and is properly used to describe the relation between and function of the separate parts of a structure.[68] Also, in a particular context, the word may have reference to a fixed time.[69]

Phrases: "Additions attached,"[70] "attached for judicial purposes,"[71] "attached in any suit,"[72] "at-

41. Buckeye Pipe Line Co v Fee, 57 N E 446, 448, 62 Ohio St 543, 78 Am S R. 742—5 C J. p 1441 note 17 [a]

42. Elliott Common School Dist No 48 v. County Board of School Trustees, (Tex Civ App) 76 S.W (2d) 786, 789

43. U S —U S. v Union Pac R Co, (C C Kan) 61 F 143, 145

Pa —Commonwealth v. Dumbauld, 97 Pa. 293, 303.

44. Albin v West Branch, 12 N W. 134, 136, 58 Iowa 77—5 C.J. p 1441 note 14.

45. Buckeye Pipe Line Co v. Fee, 57 N E 446, 448, 62 Ohio St 543, 78 Am S R. 742—5 C.J. p 1441 notes 16–19.

46. Century D. See In re Saralieff, (D C Mo) 59 F (2d) 436, 437—In re Nagy, (D C Tex) 3 F (2d) 77—In re Bevelacqua, (D C.Mass) 295 F 862, 863—In re Siem, (D C Mont) 284 F. 868, 871—In re Shanin, (D C Mass) 278 F. 739, 740.

47. Burrill L. D See also Attachment § 1.

"Levy" distinguished.—Tefft v. Providence Washington Insurance Co, 32 A. 914, 19 R I. 135, 61 Am S R. 761.

48. In re Clark, (D C Mich) 11 F. (2d) 540, 542—In re Safady Bros, (D C.Wis) 228 F. 538, 541.

49. Black L. D, citing National Brake & Electric Co. v. Christensen, (Wis.) 229 F. 564, 570, 144 C C A. 24.

"On reverse side" not "attached" The word "attached," in an affidavit of service of a notice, used to designate a notice appearing on the reverse side of the affidavit, is improper—Black L D, citing Wood v Yearous, 140 N W. 362, 364, 159 Iowa 211.

50. Sun Lumber Co v Bradfield, 10 P (2d) 183, 185, 122 Cal App 391—5 C.J. p 1442 notes 25–31.

51. Buckeye Pipe Line Co. v. Fee, 57 N E 446, 448, 62 Ohio St. 543, 78 Am S R 742—5 C.J. p 1442 note 25.

52. State v. Green, 30 So. 898, 106 La 440, 441.

53. Sioux City & I F Town-Lot & Land Co. v. Griffey, (Iowa) 12 S. Ct 362, 364, 143 U S 32, 36 L Ed. 64—5 C J. p 1442 note 28.

54. Iowa.—Albin v. West Branch Board of Directors, 12 N W. 134, 136, 58 Iowa 77.

Tex —Elliott Common School District No 48 v. County Board of School Trustees, (Civ.App) 76 S W.(2d) 786, 789.

55. Sadler v. Tatti, 30 P. 1082, 1083, 17 Nev. 429.

56. Albin v. West Branch, 12 N.W. 134, 136, 58 Iowa 77.

57. Conn —Hollister v. Goodale, 8 Conn. 332, 334, 21 Am D. 674.

Pa —Pennsylvania R. Co. v. Pennock, 51 Pa. 244, 253.

58. In re Bridge Bonds, Ratliff Tp, Johnston County, 128 P. 681, 682, 35 Okl. 192.

59. Williams Mfg. Co. v. Insurance Co. of North America, 106 A. 657, 659, 93 Vt. 161—5 C.J. p 1441 note 21.

60. Maisel v. Philadelphia Fire Assoc, 69 N Y S 181, 182, 59 App Div. 461

"Connected with" distinguished.—Williams Mfg. Co v Insurance Co. of North America, 106 A. 657, 659, 93 Vt 161

61. Montana Stables v. Union Assur. Soc., 101 P. 882, 883, 53 Wash. 274

62. In re Siem, (D C Mont.) 284 F. 868, 871.

63. Howard v. Crandall, 39 Conn 213, 216.

64. Sun Lumber Co. v. Bradfield, (Cal App) 10 P (2d) 183, 185.

65. Southern Pac R Co. v. Ambler Grain & Milling Co., (C.C.A Cal) 66 F.(2d) 670, 673.

66. Cohoes Iron Foundry & Machine Co. v. Glavin, 179 N Y S. 357, 358, 190 App Div. 87—Cutler Mail Chute Co. v. Crawford, 152 N.Y.S 750, 752, 167 App Div. 246.

67. National Brake & Electric Co. v. Christensen, (C.C.A.Wis.) 229 F. 564, 570.

68. National Brake & Electric Co. v. Christensen, supra.

69. Sup v. Cervenka, 163 N.E. 396, 398, 331 Ill. 459.

70. Maisel v. Philadelphia Fire Assoc., 69 N.Y.S. 181, 182, 59 App. Div. 461.

71. Sadler v. Tatti, 30 P. 1082, 1083, 17 Nev. 429.

72. Howard v. Crandall, 39 Conn. 213, 216.

tached to or used in connection with the premises,"[73] "attached to the building,"[74] "attached to the principles of the Constitution,"[75] "chattels attached . . . to a building,"[76] "chattels attached . . . to realty,"[77] "gear case attached to said frame,"[78] "growing thereon or attached thereto,"[79] "incumbrances which may have attached subsequently,"[80] "salary attached to the rank . . . at the date of his retirement,"[81] "to which a preemption or homestead claim may not have attached,"[82] "when partnership property is attached,"[83] and "with boiler house attached."[84]

Attaching

The present participle of the verb "attach," sometimes used adjectively, as in the phrase: "Attaching creditor."[85]

ATTACHÉ. In international law, one attached to the suite of an ambassador, or a person attached to a foreign legation,[86] who, under particular circumstances, has been held to be a diplomatic official;[87] and also anyone recognized as a necessary adjunct to a court, tribunal, or office.[88]

Phrases: "Commercial attaché,"[89] "officer or attaché of the county,"[90] and "person of the attaché;"[91] also "their clerks and attachés."[92]

ATTACHIAMENTA. Law Latin, attachment.[93]

ATTACHIAMENTUM. Law Latin, an attachment.[94]

ATTACHMENT. In a popular sense, it has been defined as meaning close adherence or affection; fidelity; regard; any passion or affection that binds a person.[95] It has been said that it is a stronger word than "well disposed," and, in a particular connection, implies depth of conviction.[96] Used in a mechanical sense, it has been defined as meaning something attached; some adjunct attached to an instrument, machine, or other object.[97] As technically used, signifying a seizure of property and bringing it into the custody of the court, the word is defined and the subject matter fully treated in the title Attachment; and in Garnishment §§ 1, 11 [28 C.J. p 16 notes 6–11, p 33 notes 97–2].

Attachment of privilege. In English law, a process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs, and who has the privilege to answer there.[98]

Attachment of the forest. One of the three courts formerly held in forests. The highest court was called "justice in eyre's seat;" the middle, "the swainmote;" and the lowest, the "attachment."[99]

73. Shelton Holding Corporation v 150 East Forty-eighth St Corporation, 191 N.E 8, 11, 264 N.Y. 339

74. Crocker-Wheeler Co v. Genesee Recreation Co, 125 N.Y.S 721, 724, 140 App Div. 726.

75. In re Saralieff, (D.C.Mo.) 59 F (2d) 436, 437—In re Nagy, (D.C Tex.) 3 F (2d) 77—In re Bevelacqua, (D.C Mass.) 295 F 862, 863—In re Siem, (D.C Mont.) 284 F 868, 871—In re Shanin, (D.C Mass.) 278 F 739, 740 See also Aliens §§ 126, 128.

76. Cohoes Iron Foundry & Machine Co v. Glavin, 179 N.Y.S 357, 358, 190 App Div. 87—Cutler Mail Chute Co v Crawford, 152 N.Y.S 750, 752, 167 App Div. 246.

77. In re Banos, (D.C Pa.) 8 F (2d) 95, 96.

78. National Brake & Electric Co. v Christensen, (C.C.A Wis.) 229 F. 564, 569.

79. State v. Green, 30 So. 893, 106 La. 440.

80. Sun Lumber Co. v. Bradfield, (Cal.) 10 P.(2d) 183, 185.

81. Sup v. Cervenka, 163 N.E. 396, 398, 331 Ill. 459.

82. Southern Pac. R. Co. v. Ambler Grain & Milling Co., (C.C.A Cal.) 66 F.(2d) 670, 673.

83. In re Clark, (D.C.Mich.) 11 F (2d) 540, 542—In re Safady Bros., (D.C Wis.) 228 F. 538, 541.

84. Williams Mfg. Co. v Insurance Co. of North America, 106 A 657, 659, 93 Vt 161.

85. Gilson v Carroll, (Mo App.) 97 S.W (2d) 146, 149.

86. Adams Gloss., citing Baldwin R pp 230, 240

87. Girardon v Angelone, 254 N.Y.S 657, 659, 234 App Div 351 See generally Ambassadors and Consuls §§ 1, 2.

88. Elder v McDougald, 79 P 429, 432, 145 Cal. 740

89. Girardon v Angelone, 254 N.Y.S 657, 659, 234 App Div. 351.

90. Noel v Lewis, 170 P 857, 859, 35 Cal App 658.

91. Nankivel v. Omsk All Russian Government, 197 N.Y.S. 467, 472, 203 App Div. 740.

92. Elder v McDougald, 79 P. 429, 432, 145 Cal 740.

93. Black L. D.
Attachiamenta bonorum—a distress formerly taken upon goods and chattels, by the legal attachiators or bailiffs, as security to answer an action for personal estate or debt—Black L. D.
Attachiamenta de placitus coronæ—attachment of pleas of the crown—Black L. D., citing Jewison v. Dyson, 9 M. & W. 544.
Attachiamenta de spinis et boscis—a privilege granted to the officers of a forest to take to their own use thorns, brush, and windfalls, within their precincts—Black L. D.

94. Adams Gloss., citing Bracton fol 439 *beq.*
Attachiamentum bonorum—an attachment or distress of goods.—Adams Gloss.
Attachiamentum de spinis et boscis—an attachment of the thorns and wood—Adams Gloss.
Attachiamentum forinsecum—a foreign attachment, in English law, a process used to attach the goods of a foreign or absent debtor, found within some liberty or city, to satisfy creditors—Adams Gloss.

95. Webster New Int D

96. In re Saralieff, (D.C Mo.) 59 F. (2d) 436—In re Bevelacqua, (D.C. Mass.) 295 F 862, 863—In re Shanin, (D.C Mass.) 278 F. 739, 740.

97. Webster New Int D See Pearl City Packet Co. v. Towery, 43 S.W. (2d) 1086, 184 Ark. 966.

98. Black L. D.
A writ issued to apprehend a person in a privileged place.—Black L. D.

99. Black L. D.

Other phrases: "Attachment execution,"[1] "attachment to the principles of the Constitution" (see Aliens §§ 126, 128); and also "attachments for its derrick."[2]

1. Williams v. Ricca, (Pa.) 187 A. 722, 723—Joseph Melnick Building & Loan Ass'n, to Use of Melnick, v. Melnick, 178 A. 144, 318 Pa. 120—Aarons v. Public Service Building & Loan Ass'n, 178 A. 141, 143, 318 Pa. 113—Kennedy v. Agricultural Ins. Co., 30 A. 724, 165 Pa. 178—Appeal of Lane, 105 Pa. 61, 51 Am.R. 166

2. Pearl City Packet Co. v. Towery, 43 S.W.(2d) 1036, 184 Ark. 966.

ATTACHMENT

This Title includes taking and keeping in legal custody property of defendants in civil actions as security for payment of judgments that may be recovered against them therein; nature and scope of the remedy in general; in what cases and to and against whom it is allowed, and property subject thereto; grounds of attachment, and jurisdiction over and proceedings to obtain attachments; issuance, requisites, and validity of writs, warrants, etc., of attachment, and amendment thereof; levy or service, and proceedings incident thereto, and lien of attachments; quashing, vacating, or setting aside writs, warrants, etc., of attachment, dissolution thereof or discharge of property from levy on giving security, and abandonment of attachment or of levy; claims of third persons to property levied on, interventions, and trial of right of property; return of warrants, writs, etc.; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., attachments; and liabilities of persons other than officers for wrongfully procuring issuance, levy, etc., of attachments

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES, §§ 1–22

II. GROUNDS OF ATTACHMENT, §§ 23–70

III. PROPERTY SUBJECT TO ATTACHMENT, §§ 71–90

IV. PROCEEDINGS TO PROCURE, §§ 91–179
- A. Jurisdiction, Venue, and Authority to Issue, §§ 91–103
- B. Affidavits and Application, §§ 104–144
- C. Attachment Bond or Other Security, §§ 145–179

V. WRIT OR WARRANT, §§ 180–200

VI. LEVY OF ATTACHMENT, §§ 201–243

VII. RETURN, §§ 244–253

VIII. CREATION, NATURE, AND DURATION OF LIEN, AND PRIORITIES, §§ 254–279

IX. CUSTODY AND DISPOSITION OF PROPERTY, §§ 280–338
- A. In General, §§ 280–281
- B. Rights and Duties of Attaching Officer, §§ 282–295
- C. Delivery to Receiptor or Bailee, §§ 296–302
- D. Release on Security, §§ 303–317
- E. Sale and Disposition of Property or Proceeds, §§ 318–335
- F. Proceedings by Trustees or Auditors, §§ 336–338

X. CLAIMS OF THIRD PERSONS, §§ 339–405
- A. Presentation and Determination of Claims, §§ 339–366
  1. *In General,* §§ 339–348
  2. *Actions or Proceedings to Establish Title or Recover Possession,* §§ 349–366
- B. Claimant's Bond or Other Security for Possession or Release of Property, §§ 367–392
  1. *In General,* §§ 367–373
  2. *Liabilities on Bonds,* §§ 374–392
- C. Recovery of Damages for Dispossession, §§ 393–405

XI. DISSOLUTION, QUASHAL, OR VACATION, §§ 406-480
A. In General, §§ 406-428
B. Jurisdiction and Form of Remedy, §§ 429-434
C. Persons Entitled to Move or Plead, §§ 435-446
D. Proceedings, §§ 447-469
E. Effect of Dissolution or Refusal to Dissolve, and Review Thereof, §§ 470-480

XII. PROCEEDINGS IN MAIN ACTION, §§ 481-499

XIII. PROCEEDINGS IN AID OF AND EQUITABLE RELIEF AGAINST ATTACHMENT, §§ 500-502

XIV. WRONGFUL ATTACHMENT, §§ 503-565
A. Under Irregular or Void Process, §§ 503-515
B. Under Regular Process, §§ 516-565
1. *Liability,* §§ 516-534
2. *Actions,* §§ 535-565

Sub-Analysis

I. NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES—p 185

§ 1. Definition—p 185
2. Nature and purpose—p 186
3. What law governs—p 190
4. Constitutional and statutory provisions—p 190
5. Existence of or resort to other remedy—p 193
6. —— Arrest as concurrent remedy—p 193
7. Extraterritorial operation—p 193
8. Causes of action or demands authorizing attachment—p 193
9. —— Amount of claim—p 196
10. —— Demand for money or damages—p 196
11. —— Demand arising out of express contract—p 196
12. —— Demand arising out of implied contract—p 199
13. —— Demand arising ex delicto—p 201
14. —— Demand not liquidated—p 203
15. —— Demand not matured—p 204
16. —— Contingent demand—p 206
17. —— Demand otherwise secured—p 206
18. —— Statutory liability—p 208
19. —— Joining cause not authorizing with one authorizing attachment—p 208
20. Persons entitled—p 209
21. Persons liable—p 210
22. —— Joint debtors or codefendants—p 212

II. GROUNDS OF ATTACHMENT—p 213

§ 23. In general—p 213
24. Absconding, absence or concealment—p 213
25. —— What constitutes absconding—p 214
26. —— Nature of absence—p 214
27. —— What constitutes concealment—p 215
28 —— Intended departure—p 215
29. Nonresidence—p 216
30. —— In case of joint debtors—p 217

II. GROUNDS OF ATTACHMENT—Continued

§ 31. —— Time at which ground must exist—p 217
32. —— What constitutes residence or nonresidence—p 217
33. —— Acquisition of residence—p 218
34. —— Loss of residence—p 219
35. Fraudulent transfer or disposition of property—p 219
36. —— Intent of debtor—p 220
37. —— Property whose transfer may afford ground for attachment—p 221
38. —— Amount of property transferred or disposed of—p 221
39. —— Time of transfer or disposition—p 221
40. —— Necessity for injury to attaching creditor—p 221
41. —— Insolvency of debtor—p 221
42. —— What constitutes transfer in general—p 221
43. —— Sale—p 222
44. —— Mortgage or pledge—p 222
45. —— Judgments and executions—p 223
46. —— Assignment for benefit of creditors—p 223
47. —— Preference to creditors—p 223
48. —— Transfer to relatives—p 224
49. —— Transactions in relation to exempt property—p 224
50. —— Intended transfer or disposition—p 224
51. Removal or concealment of property—p 225
52. —— Intent of debtor—p 226
53. —— What constitutes removal—p 226
54. —— What constitutes concealment—p 227
55. —— Intended removal—p 227
56. Other grounds—p 227
57. —— Acts in official or fiduciary capacity—p 228
58. —— Criminal act in incurring liability—p 228
59. —— Death of nonresident debtor leaving property in state—p 228
60. —— Demand not otherwise secured—p 228
61. —— Failure to pay for goods on delivery—p 229
62. —— Failure to pay for labor on performance—p 229
63. —— Fraud in incurring liability—p 230
64. —— Impairment of security—p 232
65. —— Insufficient property in state to satisfy demand—p 232
66. —— Overdue instrument for direct payment of money, or book account—p 233
67. —— Refusal to pay or secure debt—p 233
68 —— Return of "not found" on ordinary process—p 234
69. Evidence as to grounds—p 234
70. Waiver or loss of right to assert—p 243

III. PROPERTY SUBJECT TO ATTACHMENT—p 244

§ 71. In general—p 244
72. Personal property and interests therein in general—p 244
73. —— Pledged, mortgaged or encumbered personal property—p 245
74. —— Particular kinds of personal property—p 247
75. Real property and interests therein in general—p 251
76. —— Exhaustion of personal property—p 252
77. —— Mortgaged property—p 252
78. —— Particular interests in real property—p 252
79. Corporate stock—p 253
80. Interest under contract—p 254

III. PROPERTY SUBJECT TO ATTACHMENT—Continued

§ 81. Equitable estate or interest in general—p 256
82. Property held in trust—p 256
83. Interest secured by lien—p 257
84. Interest of heir or distributee—p 257
85. Interest of devisee or legatee—p 257
86. Rights of action in general—p 257
87. Instrument or security for payment of money—p 258
88. Property in custody of the law—p 258
89 Property fraudulently conveyed—p 260
90. Property held jointly—p 260

IV. PROCEEDINGS TO PROCURE—p 261

A. JURISDICTION, VENUE, AND AUTHORITY TO ISSUE—p 261

§ 91. Jurisdiction in general—p 261
92. Necessity of presence of property—p 262
93. Jurisdiction of subject matter of action—p 264
94. Jurisdiction of principal action—p 265
95. Jurisdiction of person of defendant—p 265
96. Nature of jurisdiction on transfer of cause—p 265
97. Jurisdiction in equity—p 265
98. Venue—p 266
99. Objections and waiver thereof—p 267
100 Authority and duty to issue writ—p 268
101 —— Delegation of authority—p 269
102. —— Order for attachment—p 269
103. Disqualification of officer—p 270

B. AFFIDAVITS AND APPLICATION—p 271

§ 104. Necessity—p 271
105. Accompanying pleadings—p 272
106. Who may make—p 273
107. Who may take—p 273
108. Time and place of making—p 274
109. Operation and effect of affidavit in general—p 275
110. Collateral attack on affidavit—p 275
111. Form and requisites in general—p 276
112. Mode of allegation—p 277
113. —— Statutory language—p 277
114. —— Affidavit on knowledge—p 278
115. —— Affidavit on information and belief—p 280
116. —— Reference to pleadings or papers—p 282
117. Specific requisites, statements, and allegations—p 282
118. —— Venue—p 283
119. —— Entitling—p 284
120. —— Identification and description of parties—p 284
121. —— Nature or cause of action or demand—p 286
122. —— Ownership of claim—p 288
123. —— Identification of cause—p 288
124 —— Showing pendency of action—p 289
125. —— Showing as to claim or indebtedness—p 289
126. —— Showing grounds of attachment—p 295

IV. PROCEEDINGS TO PROCURE—Continued

B. AFFIDAVITS AND APPLICATION—Continued

§ 127. —— Negation of improper motive—p 303
128. —— Danger of loss or debt—p 304
129. —— Lack of security for indebtedness—p 304
130 —— Averments as to property of defendant—p 305
131. —— Prayer—p 306
132. —— Signature and verification—p 306
133. —— Approval—p 307
134 Examination of plaintiff and indorsement on application—p 307
135 Presentation and filing in general—p 308
136. Producing evidence of debt—p 308
137. Effect of delay after making—p 309
138 Laches of clerk or other officer—p 309
139 Variance between affidavit and pleading—p 310
140. Variance between affidavit and evidence—p 311
141. Defects, objections, and waiver—p 311
142. Effect of determination of insufficiency—p 316
143. Amendments and supplemental affidavits—p 316
144. Application in addition to affidavit—p 325

C. ATTACHMENT BOND OR OTHER SECURITY—p 326

§ 145. Necessity—p 326
146. Time for giving—p 327
147. Form and requisites—p 328
148. —— Liability on bond not in conformity to statute—p 329
149. Amount—p 330
150. Conditions—p 332
151. Obligee—p 332
152. Obligor—p 333
153. Sureties—p 333
154. Execution in general—p 334
155. Signing and sealing—p 336
156. Attestation and acknowledgment—p 337
157. Justification of sureties—p 337
158. Approval—p 338
159 Amendment of insufficient bond—p 338
160. Waiver of insufficient bond—p 339
161. Additional or new security—p 340
162 Deposit as security—p 342
163. Liability on bond—p 342
164. Rights and remedies of sureties—p 345
165. Discharge of sureties—p 345
166. Enforcement of liability—p 346
167. —— Nature and form of remedy—p 346
168 —— Right of action—p 346
169. —— Conditions precedent—p 347
170 —— Defenses—p 348
171. —— Jurisdiction and venue—p 351
172. —— Time to sue and limitations—p 352
173. —— Parties, process, and appearance—p 352
174. —— Pleading—p 353
175. —— Evidence—p 358

IV. PROCEEDINGS TO PROCURE—Continued

C. ATTACHMENT BOND OR OTHER SECURITY—Continued

§ 176. —— Trial—p 364
177. —— Judgment—p 365
178. —— Appeal and error—p 366
179. —— Damages—p 366

V. WRIT OR WARRANT—p 376

§ 180. Nature and necessity—p 376
181. Time for issuance—p 376
182. —— In vacation—p 378
183. Issuance and record—p 378
184. Form and requisites—p 379
185. —— Style of writ—p 379
186. —— To whom directed—p 380
187. —— Description of parties—p 380
188. —— Recitals in general—p 380
189. —— Recitals as to proceedings to procure attachment—p 381
190. —— Recitals as to action in which writ issued—p 381
191. —— Recitals as to amount of claim—p 381
192. —— Recitals as to grounds of attachment—p 382
193. —— Commands to officer—p 382
194. —— Description of property—p 383
195. —— Date, teste, signature, and seal—p 383
196 —— Variance between writ and other papers—p 384
197. —— Defects, objections, and waiver—p 385
198 —— Amendments—p 386
199. Simultaneous writs—p 386
200 Successive or alias writs—p 386

VI. LEVY OF ATTACHMENT—p 388

§ 201. Necessity—p 388
202. —— To acquisition of jurisdiction—p 388
203. —— To creation of lien—p 388
204. Who may levy, and basis and duration of authority—p 388
205. —— Particular officers—p 389
206. —— Disqualification by interest—p 390
207. Duty to levy—p 390
208. —— On property subsequently acquired or discovered—p 390
209. —— Where bond given to prevent levy—p 390
210. Time of levy—p 391
211. Order of levy—p 391
212. Rights and powers of levying officer—p 391
213. —— To what property levy confined in general—p 392
214. —— Effect of specific directions to officer—p 392
215. —— Use of force generally—p 393
216. —— Breaking or entering buildings and opening receptacles—p 393
217. Manner of levy in general—p 394
218. —— Compliance with statutory requirements—p 394
219. —— Necessity of openness and notoriety—p 395
220. —— Notice of levy—p 395
221. Levy on personalty—p 397

VI. LEVY OF ATTACHMENT—Continued

§ 222. —— Service of writ or warrant—p 397
223. —— Taking possession and removing property in general—p 398
224. —— Shares of corporate stock—p 403
225. —— Having property in view—p 404
226 —— Mortgaged or pledged property—p 404
227. Levy on realty—p 405
228. —— Service of writ and description—p 405
229. —— Declaration on premises in presence of witnesses—p 406
230. —— Indorsement on writ—p 406
231. —— Posting copy of writ or order upon property—p 406
232. —— Filing and recording—p 406
233. Levy on interest in land—p 407
234. Levy on property held jointly—p 407
235. Amount of property to be attached and excessive levy—p 408
236. Inventory and appraisal—p 409
237. Property levied on under other process—p 411
238 Successive levies under same writ—p 412
239. Effect of levy—p 412
240. —— On title to property—p 415
241. —— As satisfaction of debt or judgment—p 415
242. —— Where effected by improper means—p 415
243. Defects, objections and waiver—p 415

VII. RETURN—p 417

§ 244. Necessity—p 417
245. By whom made—p 417
246. To what court made—p 418
2 7. Time for making—p 418
248. Form and requisites—p 418
249. Defects, objections, and waiver—p 422
250. Amendment—p 424
251. Recording—p 426
252. Operation and effect of return—p 428
253. Effect of failure to make return—p 430

VIII. CREATION, NATURE, AND DURATION OF LIEN, AND PRIORITIES—p 430

§ 254. Creation and existence of lien—p 430
255. —— Date of origin—p 431
256. Nature of lien—p 433
257. Extent of lien—p 433
258. —— Property or interest covered—p 433
259. —— Amount for which property bound—p 436
260 Duration of lien in general—p 436
261. Release or discharge—p 437
262. —— By act of creditor or his attorney—p 438
263. —— By act of debtor—p 441
264 —— By act or omission of levying officer—p 441
265 —— By act of third person—p 442
266. —— By death—p 442
267. —— By judicial proceedings generally—p 443
268. —— By proceedings in main action—p 443
269. —— By legislative enactment—p 446

VIII. CREATION, NATURE, AND DURATION OF LIEN, AND PRIORITIES—Continued

§ 270. —— Other matters effecting release or discharge—p 446
271. Restoration of lien—p 447
272. Priorities between attachments and other liens or claims—p 447
273. —— Sale, conveyances, and assignments—p 455
274. —— Property fraudulently obtained by debtor—p 457
275. —— Property fraudulently conveyed by debtor—p 457
276. —— Effect of statutory requirements as to recording of transfers or encumbrances—p 457
277. Priorities between successive attachments—p 461
278. Priorities between simultaneous attachments—p 466
279. Proceedings for determination of priorities—p 466

IX. CUSTODY AND DISPOSITION OF PROPERTY—p 468

A. In General—p 468

§ 280. Nature and effect of custody—p 468
281. Liabilities for loss or destruction of property—p 469

B. Rights and Duties of Attaching Officer—p 470

§ 282. In general—p 470
283. Nature of taking and possession—p 470
284. —— Delivery to keeper, servant, or agent—p 471
285. —— Allowing debtor to use property—p 471
286. —— Delivery of property to claimant—p 471
287. —— Return of property to debtor—p 472
288 Place of custody—p 472
289. Extent of officer's interest—p 472
290 Payment into court—p 473
291. Permitting examination of books and papers—p 473
292. Actions for violation of possession—p 473
293. Charges for care of property—p 476
294. Release of property by direction of parties—p 481
295 Release of surplus property or proceeds—p 481

C. Delivery to Receiptor or Bailee—p 481

§ 296. In general—p 481
297. Form and requisites of receipt—p 482
298. Effect of receipt—p 482
299 Rights, duties, and liabilities of receiptor—p 484
300. Release and discharge of receiptor—p 486
301. Actions to protect possession of receiptor—p 487
302. Actions on receipts—p 487

D. Release on Security—p 491

§ 303. Discretion of officer independent of statute—p 491
304. Special bail—p 491
305. Forthcoming, replevy, or dissolution bond—p 492
306. —— Consideration—p 493
307. —— Time for giving—p 494
308. —— By and to whom given in general—p 494
309 —— Sureties—p 495
310. —— Form and sufficiency—p 496

IX. CUSTODY AND DISPOSITION OF PROPERTY—Continued

D. RELEASE ON SECURITY—Continued

§ 311. —— Amount—p 498
312. —— Approval of bond and order of discharge—p 498
313. —— Construction and effect—p 499
314. —— Effect of appeal, supersedeas, or stay bond—p 505
315. —— Liability of obligors—p 505
316. —— Discharge of sureties—p 510
317. —— Enforcement of liability—p 518

E. SALE AND DISPOSITION OF PROPERTY OR PROCEEDS—p 531

§ 318. Sale in general—p 531
319 —— Where property perishable, liable to depreciation, or expensive to keep —p 532
320. —— Nature and effect of sale—p 532
321. Sale after replevy or dissolution of attachment—p 533
322. Sale by consent—p 533
323. Duty of officer to sell—p 533
324. Proceedings—p 533
325. —— Order of sale—p 534
326. —— Notice of appraisal and sale—p 535
327. —— Time of sale—p 536
328. —— Terms, and mode and conduct of sale—p 536
329. —— Sale of part of property—p 536
330. —— Sale of real estate—p 537
331. —— Indemnity bond—p 537
332. —— Return and confirmation—p 537
333. —— Recovery of purchase money—p 538
334. Title, rights, and liabilities of purchaser—p 538
335. Disposition of proceeds or property—p 539

F. PROCEEDINGS BY TRUSTEES OR AUDITORS—p 541

§ 336. In general—p 541
337. Powers, duties, and liabilities—p 541
338. Report and action thereon—p 542

X. CLAIMS OF THIRD PERSONS—p 542

A. PRESENTATION AND DETERMINATION OF CLAIMS—p 542

1. *In General*—p 542

§ 339. Rights of third persons in general—p 542
340. Who may intervene—p 544
341. —— Particular persons—p 546
342. —— Estoppel to assert claim—p 548
343. Nature and subject-matter of claim—p 550
344. Time for intervening—p 550
345. Notice of claim or demand of property—p 551
346. Account—p 554
347. Indemnity bond—p 555
348. Operation and effect of determination—p 556

X. CLAIMS OF THIRD PERSONS—Continued

A. PRESENTATION AND DETERMINATION OF CLAIMS—Continued

2. *Actions or Proceedings to Establish Title or Recover Possession*—p 556

§ 349. Form of remedy—p 556
350. —— Election—p 557
351. Nature of intervention proceedings—p 557
352. Conditions precedent—p 558
353. Defenses—p 559
354. Jurisdiction and venue—p 559
355. Time to sue and limitations—p 560
356. Parties and process—p 560
357. Pleading—p 561
358. Evidence—p 567
359. —— Presumptions and burden of proof—p 567
360. —— Admissibility—p 569
361. —— Weight and sufficiency—p 571
362. Trial—p 574
363. Judgment and enforcement thereof—p 578
364. Appeal and error—p 581
365. Costs—p 582
366. Damages—p 583

B. CLAIMANT'S BOND OR OTHER SECURITY FOR POSSESSION OR RELEASE OF PROPERTY—p 584

1. *In General*—p 584

§ 367. Right to obtain release of property on giving bond—p 584
368. Form and requisites of bond—p 584
369. —— Amendment—p 585
370. —— Waiver of defects—p 585
371. Filing of bond—p 585
372. Operation and effect of bond—p 586
373. Release of security—p 586

2. *Liabilities on Bonds*—p 587

§ 374. Liability of claimant—p 587
375. Liability of sureties—p 588
376. Discharge of sureties—p 589
377. Enforcement of liability—p 589
378. —— Nature and form of remedy—p 590
379. —— Right of action—p 590
380. —— Conditions precedent—p 590
381. —— Defenses—p 590
382. —— Jurisdiction and venue—p 590
383. —— Time to sue and limitations—p 591
384. —— Parties, process, and appearance—p 591
385. —— Pleading—p 591
386. —— Evidence in general—p 592
387. —— Admissibility of evidence—p 592
388. —— Weight and sufficiency of evidence—p 592
389. —— Trial—p 592
390. —— Judgment—p 593

X. CLAIMS OF THIRD PERSONS—Continued

B. CLAIMANT'S BOND OR OTHER SECURITY FOR POSSESSION OR RELEASE OF PROPERTY—Continued

2. *Liabilities on Bonds*—Continued

§ 391. —— Appeal and error—p 593
392. —— Damages—p 593

C. RECOVERY OF DAMAGES FOR DISPOSSESSION—p 594

§ 393 Right to recover—p 594
394. Persons liable—p 595
395. —— Levying officer—p 595
396. —— Attaching creditor—p 595
397 —— Sureties on attachment bond—p 596
398. Actions—p 597
399. —— Nature and form of remedy—p 597
400. —— Defenses—p 598
401. —— Parties—p 598
402. —— Pleading—p 598
403. —— Evidence—p 600
404. —— Trial—p 602
405. —— Damages—p 602

XI. DISSOLUTION, QUASHAL, OR VACATION—p 605

A. IN GENERAL—p 605

§ 406. General statement—p 605
407. Matters operating as dissolution or discharge—p 605
408. —— Appearance—p 605
409. —— Causes subsequent to attachment in general—p 606
410. —— Proceedings in action—p 606
411. —— Termination of action without judgment—p 606
412. —— Judgment for plaintiff—p 606
413. —— Judgment for defendant—p 606
414. —— Failure to issue, levy, or enforce execution—p 606
415. —— Death of party—p 606
416. Grounds for dissolution or discharge—p 606
417. —— Failure of plaintiff to show cause of action—p 607
418. —— Insufficiency of cause of action to support attachment—p 607
419. —— Errors or variance as to amount of claim and excessive claim—p 607
420. —— Nonexistence of grounds of attachment—p 608
421. —— Want of jurisdiction—p 609
422. —— Improper levy—p 609
423. —— Defects in proceedings to obtain attachment—p 609
424. —— Fraud—p 612
425. —— Pendency of another action—p 612
426. —— Lack of interest in attached property—p 612
427. —— Property not subject to attachment—p 613
428 —— Miscellaneous grounds—p 613

B. JURISDICTION AND FORM OF REMEDY—p 614

§ 429 Jurisdiction to quash, vacate, or dissolve—p 614
430. Form of remedy in general—p 614
431. Action by court ex mero motu—p 615

XI. DISSOLUTION, QUASHAL, OR VACATION—Continued

B. Jurisdiction and Form of Remedy—Continued

§ 432. Motion to modify attachment—p 615
433. Motion or rule to show cause—p 615
434. Plea in abatement—p 615

C. Persons Entitled to Move or Plead—p 616

§ 435. Defendant in attachment—p 616
436. —— Ownership of property as bearing on right—p 616
437. —— Waiver or estoppel—p 617
438. Assignee or grantee of defendant—p 617
439. Receiver, trustee in insolvency, or personal representative, of defendant—p 618
440. Creditors of defendant—p 618
441. Holder of lien on property attached—p 618
442. Claimant of attached property—p 618
443. Sureties on replevy bond—p 618
444. Garnishee—p 618
445. Plaintiff in attachment—p 618
446. Other persons—p 619

D. Proceedings—p 619

§ 447 Proceedings on motion—p 619
448 —— Necessity for general appearance in action—p 619
449 —— Time for motion—p 619
450 —— Notice of motion—p 620
451 —— Requisites of motion—p 620
452. —— Supporting affidavits—p 621
453. —— Opposing affidavits—p 622
454. —— Issues—p 623
455. —— Evidence—p 624
456. —— Hearing, reference and determination—p 627
457. —— Order granting or denying motion—p 629
458 —— Rehearing—p 630
459. —— Renewal of motion—p 630
460. Proceedings on plea in abatement—p 631
461. —— Time for filing—p 631
462. —— Requisites and sufficiency of plea—p 631
463. —— Amendment, withdrawal, or abandonment of plea—p 632
464. —— Similiter or replication to plea—p 632
465. —— Issues—p 632
466. —— Evidence—p 632
467. —— Time and place of hearing—p 633
468. —— Hearing and determination—p 633
469. —— Judgment—p 634

E. Effect of Dissolution or Refusal to Dissolve, and Review Thereof—p 634

§ 470. Effect of dissolution in general—p 634
471. On main action—p 635
472. In respect to attached property—p 636
473. On rights of other attaching creditors or execution creditors—p 637
474. On rights of intervening claimant—p 637
475. Liability on release or forthcoming bond—p 637

XI. DISSOLUTION, QUASHAL, OR VACATION—Continued

E. Effect of Dissolution or Refusal to Dissolve, and Review Thereof—Continued

§ 476. On right to attach property in other proceedings—p 638
477. Effect of refusal to dissolve—p 638
478. Review of action on motion—p 638
479 Damages and costs on dissolution—p 638
480. Reinstatement—p 639

XII. PROCEEDINGS IN MAIN ACTION—p 640

§ 481. Prosecution of action in general—p 640
482. Process or notice—p 640
483. —— Necessity for—p 640
484. —— Requisites and sufficiency—p 641
485. —— Inclusion of summons clause in writ—p 641
486. —— Time for service—p 641
487. —— Personal service and proof thereof—p 641
488 —— Substituted service—p 642
489. —— Service by publication and proof thereof—p 643
490 —— Effect of service—p 646
491. Appearance—p 646
492. Parties—p 647
493. Pleading—p 648
494. Evidence—p 651
495. Trial—p 652
496. Reference—p 653
497. Judgment—p 653
498. Amount of recovery and writ of inquiry—p 657
499. Execution—p 658

XIII. PROCEEDINGS IN AID OF AND EQUITABLE RELIEF AGAINST ATTACHMENT—p 658

§ 500. Proceedings in aid of attachment—p 658
501. —— Equitable relief—p 659
502. Equitable relief against attachment—p 660

XIV. WRONGFUL ATTACHMENT—p 661

A. Under Irregular or Void Process—p 661

§ 503. Liability in general—p 661
504. Necessity for setting aside of process—p 661
505. Actions—p 661
506. —— Conditions precedent—p 661
507. —— Matters of defense and in mitigation—p 661
508. —— Jurisdiction and venue—p 662
509. —— Time to sue and limitations—p 662
510 —— Parties—p 662
511. —— Pleadings—p 662
512. —— Evidence—p 662
513. —— Trial—p 662
514. —— Judgment and review—p 662
515. —— Damages—p 663

XIV. WRONGFUL ATTACHMENT—Continued

B. Under Regular Process—p 663

1. *Liability*—p 663

§ 516. Nature and grounds—p 663
517. —— Wrongfulness of attachment—p 664
518. —— Wrongful or excessive levy—p 665
519. —— Actual levy—p 665
520. —— Damage from levy—p 665
521. —— In action on bond—p 666
522. Accrual of right of action—p 666
523. —— Prior to dissolution of attachment—p 666
524. —— On dissolution of attachment—p 666
525. —— On termination of main action in defendant's favor—p 666
526. Persons entitled to recover—p 666
527. —— Attachment defendant in general—p 666
528. —— Waiver or estoppel—p 667
529. —— Assignee in bankruptcy of attachment defendant—p 667
530. —— Owner of property attached—p 667
531. —— Garnishees—p 667
532. —— Officer levying attachment—p 667
533. Persons liable—p 667
534. —— Liability of principal for act of agent or attorney—p 668

2. *Actions*—p 668

§ 535. Methods of enforcing liability—p 668
536. —— Proceedings in main action—p 668
537. —— Proceedings subsequent to main action—p 670
538. —— Election of remedies and effect thereof—p 670
539. Conditions precedent—p 671
540. Defenses—p 671
541. Jurisdiction and venue—p 673
542. Time to sue and limitations—p 673
543. Parties—p 673
544. Pleading—p 673
545. —— On behalf of defendant in attachment—p 674
546. —— On behalf of plaintiff in attachment—p 675
547. —— Issues, proof, and variance—p 675
548. Evidence—p 676
549. —— Presumptions and burden of proof—p 676
550. —— Admissibility—p 676
551. —— Weight and sufficiency—p 678
552. Trial—p 679
553. Judgment—p 680
554 Appeal and error—p 680
555. Damages—p 680
556. —— Actual or compensatory damages—p 680
557. —— Nominal damages—p 681
558. —— Exemplary or punitive damages—p 681
559. —— Elements or items of damages in general—p 681
560. —— Expenses of litigation—p 684
561. —— Matters in mitigation—p 685
562. —— Amount of allowance in general—p 685
563. —— Limitation to amount claimed in pleading—p 686
564. —— Set-offs—p 686
565. Costs—p 687

I. NATURE OF REMEDY, CAUSES OF ACTION, AND PARTIES

§ 1. Definition

An attachment is a proceeding to take a defendant's property into legal custody to satisfy a plaintiff's demand.

"Attachment," as the term is used in this Title, may be defined as a proceeding, or the writ by which the purpose of such proceeding is accomplished, the object of which is to hold property to abide the order of the court for the payment of a judgment in the event a debt shall be established,[1] and in this meaning it is used to describe a security given by law to a plaintiff for the purpose of satisfying such judgment or decree as he may obtain,[2] it being procedural in its character[3] and a remedy or a part of a remedy for the collection of a debt.[4] In a broader sense the term is employed with reference to the taking and holding of either a person or property on mesne process, subject either to the further order of the court or to final judgment in the case,[5] but as so used with reference to the seizure of a person, as distinguished from a seizure of property, it is discussed in other titles, the arrest of a defendant on mesne process in civil actions having been considered in the title Arrest §§ 23–86, while attachment in proceedings to punish for contempt will be treated in the title Contempt §§ 76–80 [13 C.J. p 68 note 33–p 72 note 5], and the attachment of a juror or a witness in order to secure his attendance will be treated in the titles Juries § 203 [35 C.J. p 305 note 53–p 306 note 61] and Witnesses § 29 [70 C.J. p 62 note 61–p 64 note 11].

In its broader sense the verb "attach" is used with reference to any seizure of property for the purpose of bringing it within the custody of the court.[6]

Ancillary attachment is an attachment sued out in aid of a suit already brought,[7] a proceeding in aid of the personal action when the debtor has been served or has appeared in court so as to be liable to a personal judgment.[8]

1. Wilder v. Inter-Island Navigation Co., (Hawaii) 29 S.Ct. 58, 211 U.S. 239, 53 L.Ed. 164, 15 Ann.Cas. 127—6 C.J. p 28 note 1, p 29 notes 2, 6.

Writ issued at the institution of, or during the progress of, an action commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of defendant to satisfy the demands of plaintiff—Beardsley v. Beecher, 47 Conn. 408

"An ancillary proceeding to preserve intact the defendant's title to the attached property so that it may be applied to the plaintiff's debt when established"—Stewart v. Rockdale State Bank, (Civ.App.) 52 S.W. (2d) 915, 916, affirmed 79 S.W.(2d) 116, 124 Tex. 431.

2. Marsh v. Moore, 161 A. 227, 238, 52 R.I. 458—6 C.J. p 29 note 5

Assignment for benefit of creditors distinguished see Assignments for Benefit of Creditors § 4

Appointment of receiver distinguished

"(1) An attachment issues, as it were, of right upon the application of the plaintiff, whilst the appointment of a receiver lies largely in the discretion of the trial judge; (2) an attachment issues ex parte, whilst a receiver can be appointed only after a hearing of the other party; (3) an attachment inures exclusively to the benefit of plaintiff and gives him a preference over other creditors, whilst a receiver inures to the benefit of all creditors alike and gives no preference to plaintiff, (4) an attachment protects plaintiff alone, whilst a receivership protects all creditors, and often even the defendant itself against the importunity of creditors, and (5) above all an attachment remains under sole control of plaintiff, who may persist in it or recall it as he thinks proper, whilst a receivership puts the property in the hands of the court itself for the benefit of all, and neither the duration of the receivership, nor the acts of the receiver, are in any manner subject to the wishes of the plaintiff"—Uncle Sam Planting & Mfg. Co. v. Reynaud, 103 So. 276, 277, 157 La. 955

3. State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 388, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232

4. McInnes v. McKay, 141 A. 699, 127 Me. 110, affirmed McKay v. McInnes, 49 S.Ct. 344, 279 U.S. 820, 73 L.Ed. 975.

As "action"

A proceeding by attachment to collect a debt is an action in the full legal sense of the word—Jacoby v. Shafer, 105 Pa. 610, 615—Allan v. Partlow, 3 S.C. 417, 418—6 C.J. p 31 note 14 [h].

5. Beardsley v. Beecher, 47 Conn. 408

"The original purpose of an attachment is defined in Bouvier's Law Dictionary as follows. 'Taking into the custody of the law the person or property of one already before the court, or one whom it is sought to bring before it.'"—Nicely v. Nicely, 8 Tenn.App. 134, 136.

Attachment to compel appearance was a common-law writ called attachment or pone from its language, "pone per vadium et salvos plegios," put by gage and safe pledges A. B. defendant, etc. This was a writ, not issuing out of chancery, but out of the court of common pleas, being grounded on the nonappearance of defendant at the return of the original writ, and thereby the sheriff was commended to attach him, by taking gage, that is, certain of his goods, which he was to forfeit if he did not appear, or by making him find safe pledges or sureties, who were to be amerced in case of his nonappearance. This was the second process in an ordinary suit, then following the summons, and the first process in actions of trespass vi et armis or for other trespasses against the peace, such as deceit or conspiracy, where the violence of the wrong required a more speedy remedy—Bond v. Ward, 7 Mass. 123, 5 Am.D. 28—Penoyar v. Kelsey, 44 N.E. 788, 150 N.Y. 77, 34 L.R.A. 248—6 C.J. p 30 note 9.

6. In re Safady Bros., (D.C.Wis.) 228 F. 538.

7. Templeton v. Mason, 65 S.W. 25, 107 Tenn. 625—6 C.J. p 29 note 3.

8. Southern California Fruit Exch. v. Stamm, 54 P. 345, 9 N.M. 361—6 C.J. p 29 note 4.

Auxiliary and judicial writs distinguished. In some jurisdictions a distinction is drawn between an original or judicial attachment and an auxiliary writ, in that a judicial attachment performs the office of conferring jurisdiction on the court in which the creditor seeks satisfaction of his debt by seizing the debtor's property located within the state, the proceeding being a direct one to give jurisdiction to the court both of the person and subject matter in controversy to the extent of appropriating the property seized to the satisfaction of the judgment for money which the plaintiff recovers, while an auxiliary writ, when properly issued and served, merely enables plaintiff to hold, pending final judgment, property belonging to defendant out of the proceeds of the sale of which he would be entitled to have his judgment satisfied.[9]

Foreign attachment is a process by which the property of a foreign debtor is attached for the satisfaction of a debt due from him to plaintiff.[10]

"General" or "special." There is, in the absence of a statutory definition to that effect, no division of attachment into "general" and "special," or writs directed against all, or against particular, property only; the only kind of attachment is a writ in which the sheriff is commanded to seize the property of the debtor, generally, to satisfy the demand of the attaching creditor.[11]

"Execution" distinguished. Attachment is a form of execution issued before judgment,[12] or, as otherwise described, it is in the nature of a preliminary execution to secure satisfaction of plaintiff's claim.[13] The writs of attachment and execution are essentially different, however; the former is issued for the purpose of seizing property and holding it in order that, if a judgment should be obtained, the property thus seized will be forthcoming to satisfy such judgment, while the latter is a writ issued for the purpose of enforcing a judgment that has been obtained.[14]

"Garnishment" distinguished. Generally speaking, garnishment is but a form of attachment looking to the impounding of debts due a defendant in a civil action for the recovery of money, pending the rendering of final judgment therein, in effect the same as physical property capable of delivery is seized to that end by ordinary attachment.[15] A garnishment, however, differs from an attachment in that in garnishment usually there is no actual seizure of the property and no specific lien is acquired thereon.[16] The result is that, while seizure of property under attachment may cause its entire loss or considerable injury, garnishment merely impounds the property in the garnishee's possession and maintains its status quo until determination of the main action.[17] Furthermore, garnishment proceedings are usually directed to personal property.[18] Garnishment proceedings have been held to be included within the term "attachment" as used in statutes generally,[19] but are not within the meaning of a statute which has reference to real estate only.[20]

§ 2. Nature and Purpose

a. Nature
b. Purpose

a. Nature

(1) In general
(2) Original or Auxiliary Process
(3) Mesne or Final Process
(4) Legal or Equitable Proceeding
(5) In Rem or in Personam

(1) In General

Attachment is a purely statutory proceeding in derogation of the common law.

Attachment to seize and hold the property of defendant for the payment of the debt to collect which suit is brought is a proceeding unknown to the common law. It had its origin in the civil

9. Farmers' Nat Bank of Stephenville v. Daggett, (Tex Com App.) 2 S.W.(2d) 834, 838, affirming Daggett v Farmers' Nat Bank, (Civ App.) 259 S.W. 198—6 C.J. p 28 note 1 [h].

10. Stewart v Parnell, 8 Pa Co. 604, 605—6 C J p 28 note 1 [g].
Garnishment see Garnishment § 1 [28 C J p 16 notes 8–11]

11. Ornelas v. Silvan Newburger & Co., 72 So. 372, 139 La 832

12. Stewart v. Rockdale State Bank, (Civ App.) 52 S W (2d) 915, affirmed 79 S W (2d) 116, 124 Tex. 431

13. Chinnis v Cobb, 185 S E 638, 210 N C 104—Saliba v. Mother M Agnes, 136 S E 706, 192 N C. 251—6 C J p 28 note 1 [f]

Acquisition of title
Attachment laws are legal modes of acquiring title to property by operation of law—Chinnis v. Cobb, 185 S E 638, 210 N C. 104.

14. Okl—Mount v. Trammel, 175 P 232, 73 Okl 96.
Tex—J. M. Radford Grocery Co. v. Owenby, (Civ.App.) 34 S W.(2d) 385, 387.
6 C J. p 28 note 1 [i].

15. Dean v Opdycke, 276 P. 545, 546, 151 Wash. 504.

16. Watson v. Goldstein, 222 N.W. 509, 176 Minn. 18—6 C.J. p 28 note 1 [j].

17. Robison v. La Forge, 17 P.(2d) 843, 170 Wash 678.

18. Watson v. Goldstein, 222 N.W. 509, 176 Minn. 18.

19. Me—Smith v. Smith, 115 A. 87, 120 Me 379.
Miss—First Nat. Bank v. Ellison, 99 So 573, 135 Miss 42
Okl.—Egolf v. Rice, 246 P. 858, 117 Okl. 234—Berry-Beall Dry Goods Co. v. Adams, 211 P. 79, 87 Okl. 54.
Wash—Dean v. Opdycke, 276 P. 545, 151 Wash. 504.

20. Watson v. Goldstein, 222 N.W. 509, 176 Minn. 18.

law, and first arose in England in the form of a local custom of London merchants, out of which, as modified and extended by statute, has grown the modern law of attachment.[21]

The proceeding as it exists in the United States to-day is deemed to be a summary and extraordinary remedy in derogation of the common law and has been said to owe its existence entirely to statutory enactment,[22] and it follows that no right or title can be acquired by its exercise unless there has been a strict compliance with the provisions of the statute, or a substantial compliance in those states where it is provided that attachment statutes shall be liberally construed.[23]

(2) Original or Auxiliary Process

Ordinarily, the attachment is a mere provisional remedy ancillary to an action, although in some jurisdictions it may also be used as an original process commencing suit.

Although under some statutes an attachment may be made an original process for the commencement of a suit,[24] the proceeding is usually a mere pro-

21. U S—In re Dukes, (D C.Del.) 276 F 724
Or—Bankers' Discount Corporation v Noe, 242 P. 610, 116 Or. 570.
6 C.J p 30 note 10.

22. U S—Miller v Smith, (C C A. Mo) 1 F (2d) 292—In re Dukes, (D C Del) 276 F 724—Bucyrus Co v McArthur, (D.C Tenn.) 219 F 266
Ariz—Porter v. Duke, 270 P. 625, 34 Ariz 217.
Idaho—Greene v. Rice, 186 P. 249, 32 Idaho 504
Ind—J. S Cruse Realty Co v. Imfeld, 184 N E. 407
Iowa—Olds v. Olds, 261 N W. 488, supplementing 260 N W. 1—Edwards v. Tracy, 212 N.W 317, 203 Iowa 1083.
Me—McInnes v. McKay, 141 A 699, 127 Me 110, affirmed McKay v McInnes, 49 S Ct 344, 279 U S 820, 73 L Ed 975.
Mass—Lipsitt v. Walmsley, 193 N E. 793
Mont—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486—Daley v Torrey, 280 P. 782, 71 Mont. 513—Duluth Brewing & Malting Co v. Allen, 149 P. 494, 51 Mont. 89
N J—Levinson v. Seeman Bros, 166 A. 630, 11 N J Misc. 402—Black v. Emack, 166 A. 513, 11 N.J Misc 363.
N Y.—Sicklick v Schasseur, 225 N Y.S. 279, 221 App Div 742
Nev—Green v. Hooper, 167 P. 23, 41 Nev 12
Ohio—Meade v. Rice, 19 Ohio N P. (N S) 173.
Or—Johnson v. Curl, 34 P (2d) 975, denying rehearing 33 P (2d) 237
R I—Everett v Cutler Mills, 160 A. 924, 925, 52 R I 330
Tex—Tanner v. Drake, (Civ App) 47 S.W (2d) 455
Va—Winfree v. Mann, 153 S E 837, 154 Va 683
6 C.J p 30 note 11.

23. U S—Harwood v. U. S Shipping Board Emergency Fleet Corporation, (D.C Conn) 300 F. 423.
Cal—Anaheim Nat. Bank v. Kraemer, 7 P (2d) 765, 120 Cal App. 63—Bentinck v. Menotti, 275 P. 849, 97 Cal App. 409—Standard Auto Sales Co. v. Lehman, 186 P. 178, 43 Cal App. 763
Del—Cantor v. Sachs, 162 A. 73, 13 Del Ch 359
Idaho—American Fruit Growers v. Walmstad, 260 P. 168, 44 Idaho 786.
Ill—Rabbitt v. Frank C. Weber & Co, 130 N E. 787, 297 Ill 491—Newport v. McPherson, 203 Ill. App 208.
Ky—Glass v. Alcorn, 70 S W (2d) 964, 254 Ky 16—Garnett v. Oliver, 45 S W.(2d) 315, 242 Ky. 25—Colovas v Allen Motor Co, 45 S. W (2d) 809, 242 Ky. 93
La—Smith v. Wilson, 128 So 632, 13 La App 679, reversing 125 So. 302, 13 La App 437
Md—Gill v. Physicians' and Surgeons' Bldg, 138 A. 674, 153 Md 394.
Miss—Ringold v Goyer Co, 144 So 706, 164 Miss. 261.
Mo—Vittert v. Melton, (App.) 78 S W (2d) 467—Trinidad Asphalt Mfg Co. v. Standard Oil Co., 258 S W 64, 214 Mo App 115
Mont—Jenkins v First Nat Bank, 236 P. 1035, 73 Mont 110—Keith v Ramage, 214 P 326, 66 Mont. 578—Duluth Brewing & Malting Co v. Allen, 149 P 494, 51 Mont 89
N.J—Little v. Long, 107 A. 412, 93 N J Law 99—Edwards v. Stein, 119 A 504, 94 N J Eq 251—Black v Emack, 166 A 513, 11 N J.Misc 363
N.Y—Rome Trust Co v Cummings, 206 N Y S 728, 123 Misc 884
N D—Dickinson v First Nat. Bank, 252 N.W. 54
Ohio—Meade v. Rice, 19 Ohio N.P. (N.S) 173.
Or—Macleay Estate Co v. Churchill, 284 P. 286, 132 Or. 63—Bankers' Discount Corporation v. Noe, 242 P 610, 116 Or 570—Murphy v. Bjelik, 169 P. 520, 87 Or. 329, rehearing denied 170 P 723, 87 Or. 329—Spores v. Maude, 158 P. 169, 81 Or 11.
Pa—Wolf v. Zentz, 5 Pa Dist. & Co 276—Straussman v. Segal, 22 Pa Dist. 941, 41 Pa Co. 561—Locke Regulator Co. v. Dragon Automobile Co., 35 Pa.Co. 639.
Tex—Nail v Compton, (Com.App.) 55 S W (2d) 1038, affirming (Civ. App) Butler v. Nail, 36 S W (2d) 307—Midland Nat Bank v Goldsmith, (Civ App) 81 S.W (2d) 120
Va—Fauquier Nat. Bank v Hazelwood Savings & Trust Co., 182 S E 568—Fauquier Nat Bank v. Hazelwood Savings & Trust Co., 182 S. E. 566
6 C.J p 31 note 12.

Statute applicable
Provisions of the District Court Act concerning attachments provide a separate and distinct mode of procedure regarding attachments issuing out of district courts, and attachments issued must be tested by whether there has been compliance with the letter and spirit of the provisions of the act.—Nanuet Logging Co. v. Hanson, 186 A 573, 14 N J Misc. 631.

Validity determined under law
"Since the suit by attachment is purely statutory, the validity of the attachment must be considered in the light of our statutory law"—Industrial Loan & Investment Co. v. Missouri State Life Ins Co., 3 S W. (2d) 1046, 1048, 222 Mo App 1228.

24. U S—Hoosier Veneer Co. v Trusts & Guarantee Co, (C.C A Ill) 283 F 1, certiorari denied Trust & Guarantee Co. v Hoosier Veneer Co, 43 S Ct. 97, 260 U S 738, 67 L Ed 489
Pa—Longbotham v. Longbotham, 18 Pa Co. 460.
6 C J. p 31 note 13—p 34 note 32 [d].

In Louisiana
(1) Under Code Pract arts 254, 255, a writ of attachment in the case of a nonresident is not merely a conservatory writ, but the basis and foundation of the jurisdiction, which cannot be acquired except under the very letter of the law—Latham v. Glasscock, 108 So. 100, 160 La 1089—Pugh v. Flannery, 92 So. 699, 151 La 1063.
(2) "There are two classes of attachments: (1) Where the writ is merely incidental to a demand in personam, (2) where the proceeding is in rem, operating only upon the

visional remedy, ancillary to an action commenced at or before the time when the attachment is sued out.[25] Being of this nature, the attachment does not affect the decision of the case on the merits;[26] the right to recover judgment on the alleged indebtedness and the right to attach the property of the debtor are entirely separate and distinct,[27] and the judgment in the main action neither changes the nature, nor determines the validity, of the attachment.[28] If the attachment be dissolved, this alone will not necessarily defeat the action;[29] although it has been said that the abatement of the main suit discharges the attachment and restores the property to defendant.[30]

After a suit has abated, it is not competent to sue out an attachment in that cause, because such affidavit and attachment must be sued out in a pending cause.[31]

Foreign attachment statutes are intended to compel the constructive presence in court of defendant, who, by reason of his absence from its jurisdiction without a dwelling-place therein, cannot be served with a summons.[32]

(3) Mesne or Final Process

The writ is mesne process.

A writ of attachment is mesne and not final process.[33]

(4) Legal or Equitable Proceeding

Attachment is in general essentially a legal proceeding.

As a general rule attachment is essentially a legal proceeding, and is in no way appropriate to ascertain and settle equitable rights;[34] and in a case where, from a conflict of jurisdiction or from other causes, the remedy by attachment is not full and complete, a court of equity will have no power

property seized. In the first class, the proceeding is a conservatory process provided by law in aid of and to protect the creditor's right under certain circumstances in a suit against the debtor The citation is the basis of the action, with the attachment merely as an incident thereof In the second class, the action is unconnected with any personal demand, and is binding only upon the property seized The attachment itself is the principal demand, is the very foundation of the suit, and stands in the place of the citation required in ordinary proceedings"—Burgin Bros. & McCane v. Barker Baking Co., 95 So 227, 229, 152 La. 1075.

25. U S—In re Stark, (D C N Y.) 36 F (2d) 280.
Idaho.—W. G. Jenkins & Co v. McKenzie, 226 P. 1069, 39 Idaho 291.
Ill—G. W. Bull & Co v Boston & M. R. R., 175 N.E. 337, 344 Ill. 11
Ind—Boyer v. Meeks, 164 N E. 501, 88 Ind App. 450
Iowa—A. D Fletcher & Son v. Gordon, 259 N W 204—Pickler v. Lanphere, 227 N W. 526, 209 Iowa 910—Edwards v. Tracy, 212 N.W. 317, 203 Iowa 1083.
Ky—Garnett v Oliver, 45 S W.(2d) 815, 242 Ky. 25.
La.—Poulan v. Gallagher, (App.) 147 So. 723, rehearing denied 148 So. 511.
Mass—Lipsitt v. Walmsley, 193 N.E. 792
Mo—Fields' Estate, 6 S.W.(2d) 68, 222 Mo App. 1051.
Mont.—Daley v. Torrey, 230 P. 782, 71 Mont. 513—American Surety Co of New York v. Kartowitz, 166 P 685, 54 Mont. 92—Duluth Brewing & Malting Co. v. Allen, 149 P. 494, 51 Mont. 89.
Nev.—Nevada First Nat Bank of Tonopah v. Lamb, 271 P. 691, 51 Nev 162.
N C.—Pierce v. Mallard, 150 S E 342, 197 N C. 679—Bizzell v Mitchell, 142 S E 706, 195 N C. 484
Or—Johnson v. Curl, 34 P.(2d) 975, denying rehearing 33 P.(2d) 237—Spores v. Maude, 158 P. 169, 81 Or. 11
Pa.—Harkinson v. Harkinson, 16 Pa Dist. 361—McCarty v. Dougherty, 4 Pa Dist 267.
R I.—Everett v. Cutler Mills, 160 A. 924, 52 R I 330.
S D—First Nat Bank & Trust Co of Vermillion v. Kirby, 253 N W. 616.
Tenn—Rosenbaum v. Herron, 5 Tenn.Civ.App 630.
Wash—State v. Superior Court of Spokane County, 187 P. 708, 110 Wash 49
6 C J. p 31 note 14.
"An attachment proceeding is a collateral process and not a multiplication of suits against the debtor"—Roth v. Pechin, 103 A. 894, 896, 260 Pa 450.

"The necessary requisites for an attachment are: First, the pendency of an action on a contract, express or implied, for the direct payment of money; and, second, an outstanding valid summons issued in such action."—American Surety Co. of New York v. Kartowitz, 166 P. 685, 686, 54 Mont. 92.

Party not brought in

"Attachment" is a provisional remedy and does not bring party into court—Edwards v. Tracy, 212 N.W. 317, 203 Iowa 1083.

26. Ala—Rhodes v. Sewell, 109 So. 179, 21 Ala.App. 441.
Iowa—A. D. Fletcher & Son v. Gordon, 259 N W. 204—Edwards v. Tracy, 212 N.W. 317, 203 Iowa 1083
Nev—Nevada First Nat Bank of Tonopah v. Lamb, 271 P. 691, 51 Nev 162
N C.—Bizzell v. Mitchell, 142 S E 706, 195 N C 484—Mohn v. Cressey, 137 S E 718, 193 N C. 568.
6 C J p 32 note 15.

27. Mims v Garvin, 91 S.E. 239, 106 S C 381.

Method of citation immaterial

In the absence of a statute to the contrary, the right to attachment is not dependent on the method of citation.—Poulan v. Gallagher, (La. App.) 147 So. 723, rehearing denied 148 So. 511.

28. Nail v. Los Angeles County Super. Ct, 103 P. 902, 11 Cal.App. 27.

29. Kan.—Boston v. Wright, 3 Kan. 227.
Miss—Holman v. Fisher, 49 Miss. 472.
Neb.—Reed v. Maben, 33 N W. 252, 21 Neb. 696.

30. Edwards v Tracy, 212 N.W. 317, 203 Iowa 1083.

31. Steele v. Harkness, 9 W.Va 13.

32. Atlantic Refining Co. v. Fabian, 2 Pa Dist. & Co 16, 18.

33. Edwards v. Tracy, 212 N W. 317, 203 Iowa 1083—6 C J. p 32 note 20.
Execution distinguished see supra § 1.

34. U S—Lafkowitz v. Jackson, (C. C A Mo.) 13 F.(2d) 370.
Ill—Pearson v. Tucson Farms Co., 204 Ill App. 276.
Or—Johnson v. Curl, 34 P.(2d) 975, denying rehearing 33 P (2d) 237—Spores v. Maude, 158 P. 169, 81 Or. 11.
6 C.J. p 32 note 21.

to pass any order to aid or perfect it,[35] although the lien obtained by the levying of an attachment affords to plaintiff in attachment the footing requisite to enable him to maintain a bill in equity to set aside a fraudulent deed which impedes the operation of the writ.[36] The question of whether an attachment may be had in proceedings in equity will be considered in section 8 b.

(5) In Rem or in Personam

Attachment proceedings partake of the nature both of a proceeding in rem and of an action in personam.

Attachment is sometimes spoken of as being in rem;[37] but, strictly speaking, this is incorrect, as a proceeding in rem is taken irrespective of parties and is binding on the whole world, while the attachment affects the particular debtor only and is binding on him alone,[38] and the property is brought before the court merely in aid of the remedy against the individual sued.[39] The fact is that the proceeding by attachment is of a dual nature, partaking of the nature of a proceeding in rem and also of an action in personam.[40] When no jurisdiction is obtained over the debtor's person, the remedy partakes of the nature of a proceeding in rem, in that it proceeds against the property in the custody of the court and the judgment binds such property only; but where jurisdiction of the debtor's person is obtained, either by personal service or appearance, the action in which the proceeding is had is, ordinarily, in personam and a personal judgment is rendered without regard to the attachment.[41] Accordingly, the fact that property was attached for security does not affect the character of the main action as a personal one where there was personal service therein.[42]

b. Purpose

The purpose of attachment is to compel defendant's appearance and secure a contingent lien on his property.

Originally, the purpose of the attachment laws seems to have been simply to compel the appearance of a debtor over whose person jurisdiction could not be obtained by ordinary process;[43] but at an early date the remedy was generally extended by statute so as to serve the double purpose of compelling defendant's appearance and securing to plaintiff the benefit of such judgment as he might recover.[44] Under the present statutes, in most jurisdictions, the chief purpose served by the remedy is to secure a contingent lien on defendant's property until plaintiff can, by appropriate proceedings, obtain a judgment and have such property applied to its satisfaction,[45] or to make some provision for unsecured debts in cases where the means of satisfaction thereof are liable to be removed beyond the jurisdiction, or improperly disposed of or concealed, or otherwise placed beyond the reach of

35. McPherson v. Snowden, 19 Md 197—6 C.J. p 32 note 22

36. Allen v. Richman, 61 A. 706, 70 N J Eq 355.

37. Clark v Louisville & N. R. Co., 130 So 302, 158 Miss. 287—6 C J. p 33 note 25.

"A foreign attachment is primarily a proceeding in rem"—Nazareth Cement Co. v. Union Indemnity Co., 177 A. 64, 66, 116 Pa Super. 506.

38. Ala.—Spokane Exch. Nat. Bank v. Clement, 19 So. 814, 109 Ala 270
N D—Rhode Island Hospital Trust Co. v. Keeney, 48 N.W. 341, 1 N. D. 411.
6 C J. p 33 note 26.

39. Bray v. McClury, 55 Mo. 128.

In Tennessee, attachment is not a proceeding strictly in rem, it being always necessary to make the property owner a party to the suit wherein the property is sought to be attached—Fischer Lime & Cement Co. v. Kaucher, 51 S W.(2d) 492, 164 Tenn. 657—Warner v. A H. Yates & Co., 102 S.W. 92, 113 Tenn. 550

40. Hines v. Fulton, 140 S E. 537, 104 W Va. 561—6 C J. p 33 note 28.

41. Allen v. Rouseville Cooperage Co., 161 S E 50, 157 Va. 355—6 C J. p 33 notes 29, 30.

42. Rederiaktiebolaget Amie v Universal Transp. Co., (N Y) 245 F. 282, 157 C C A. 474

43. Longbotham v. Longbotham, 18 Pa Co. 460—6 C J p 34 note 31.

44. Mohn v. Cressey, 137 S E. 718, 193 N C 568—6 C J. p 34 note 32

Foreign attachment

The purpose of the Pennsylvania statutes providing for foreign attachments is twofold: First, to compel the appearance of the debtor, and, second, to render his effects within the state subject to the demands of creditors—Nazareth Cement Co. v Union Indemnity Co., 177 A. 64, 116 Pa Super. 506—6 C.J. p 34 note 32 [a].

45. Iowa—Edwards v Tracy, 212 N. W. 317, 203 Iowa 1033
Kan.—Farmers' & Merchants' Nat. Bank v. Sprout, 179 P. 301, 104 Kan. 348.
La.—Poulan v. Gallagher, 147 So 723, (App.) rehearing denied 148 So. 511.
Me.—McInnes v. McKay, 141 A. 699, 127 Me. 110, affirmed McKay v McInnes, 49 S Ct 344, 279 U S 820, 73 L Ed 975.
Mich.—Feldman v. Preston, 160 N. W. 655, 194 Mich 352
N Y.—Matthews v Matthews, 206 N Y.S. 537, 210 App Div. 652, affirmed and certified questions answered 147 N E 237, 240 N.Y. 28, 38 A L R 1079.
N C—Bizzell v Mitchell, 142 S.E. 706, 195 N C. 434
N D—Morton v Stensby, 232 N.W. 6, 59 N D 784
6 C J p 34 note 33.

"An attachment only serves the purpose of seizing the attached property and bringing it into court for the purpose of subsequent disposition."—Hunt v. Starks, 75 S.W.(2d) 787, 789, 256 Ky 130—Marcum v. Edwards, 205 S W. 798, 800, 181 Ky. 683.

"The office of the writ of attachment is to impound and bring into the custody and jurisdiction of the court the property against which rights are asserted"—Arnstein Realty Co. v. Williams, 40 S W.(2d) 1007, 1008, 163 Tenn. 69.

Attachment against nonresidents

The purpose of the law authorizing attachments against property of nonresidents, is to furnish resident creditors a process whereby they may enforce their demands against nonresident debtors, at least to the extent of the property seized—Burgin Bros & McCane v. Barker Baking Co., 95 So. 227, 152 La. 1057.

creditors[46] It is not the purpose of an attachment to deplete the fund or pay out the property attached, or its proceeds;[47] and the security provided is not for the debt, but for the satisfaction of the judgment which results from the prosecution of the action, and it is given to the creditor by law, not by voluntary action of the debtor.[48] Attachment is not a proper remedy by which to recover specific property.[49]

§ 3. What Law Governs

The law of the forum controls the validity and effect of attachment proceedings as to property within the jurisdiction.

As remedies are governed exclusively by the laws of the place where they are prosecuted, the validity and effect of attachment proceedings must be determined by the laws of the state in which they are brought, provided the property attached is within the jurisdiction of such state.[50] Accordingly, where land of a nonresident has been attached in proceedings commenced in the state in which the land was situated, such nonresident cannot, in a subsequent action by him in the state of his domicile, obtain relief under the attachment laws of the latter state.[51]

§ 4. Constitutional and Statutory Provisions

a. In general
b. Construction
c. Restrospective operation
d. Repeal

a. In General

The remedy of attachment being statutory, it is ordinarily within the power of the legislature to impose such limitations and restrictions on it as it may deem proper.

The remedy by attachment, being, as has been seen in section 2, of purely statutory creation and origin, it is within the legislative power, subject to such restrictions as may be imposed by the provisions of the state and federal constitutions, to determine the actions in, and the conditions under, which it may be resorted to and to place such restrictions and limitations on the rights of attaching creditors as may be deemed advisable,[52] the right to the remedy not being absolute.[53] Thus, statutes have been upheld which permit the remedy in actions for the direct payment of money by reason of a breach of contract, but do not afford the remedy in cases of breaches of a different character;[54] or which authorize attachments in chancery against the property of nonresidents,[55] or attachments against nonresidents alone,[56] or attachment without the requirement of an affidavit or bond;[57] or permit nonattaching creditors to share pro rata with attaching creditors, where the proceeds of defendant's property are insufficient to pay all judgments against him.[58]

b. Construction

(1) Strict construction
(2) Liberal construction

(1) Strict Construction

In some jurisdictions statutory provisions affording the right to attachment, as distinguished from those providing the means by which attachment may be resisted, are to be construed strictly.

Attachment being an extraordinary and summary remedy in derogation of the common law, the courts will usually, in the absence of any statutory requirement to the contrary, construe the statutes strictly in favor of those against whom the proceeding is employed, both as to the subject matter of the attachment and the method of enforcing the remedy, and will exact of plaintiff a strict compliance with all the statutory requirements.[59]

46. Fulwider v. Benda, (S.D.) 253 N.W. 154.

47. Matthews v. Matthews, 206 N Y S. 537, 210 App.Div. 652, affirmed and certified questions answered 147 N E 237, 240 N Y. 28, 38 A.L R. 1079.

48. Everett v. Cutler Mills, 160 A. 924, 52 R I. 330.

49. Ark.—Gates v. Bennett, 33 Ark. 475
La.—Hanna v Loring, 11 Mart 276.
Mich—Mendelsohn v. Smith, 27 Mich 2.

50. Green v. Van Buskirk, (N Y.) 5 Wall.(U.S) 307, 18 L Ed 599—6 C. J. p 37 note 57, p 286 note 18 [a], p 307 note 65.

51. Brand v Eubank, (Tex Civ.App) 81 S.W.(2d) 1023, error dismissed.

52. Idaho—Greene v. Rice, 186 P. 249, 32 Idaho 504
Me—McInnes v. McKay, 141 A. 699, 127 Me 110, affirmed McKay v. McInnes, 49 S Ct 344, 279 U.S. 820, 73 L Ed 975.

53. McInnes v McKay, 141 A. 699, 127 Me 110, affirmed McKay v. McInnes, 49 S Ct. 344, 279 U S. 820, 73 L.Ed. 975

54. Greenebaum v. Smith, 197 P. 675, 51 Cal App 692, error dismissed Smith v Greenebaum, 44 S Ct. 332, 264 U S. 599, 68 L Ed 869

55. Dinwiddie v. Glass, 71 So. 745, 111 Miss. 449.

56. Clark v. Louisville & N. R. Co., 130 So. 302, 158 Miss. 287.

57. McInnes v. McKay, 141 A. 699, 127 Me. 110, affirmed McKay v. McInnes, 49 S Ct. 344, 279 U.S. 820, 73 L Ed 975.

58. Greene v. Rice, 186 P. 249, 32 Idaho 504.

59. U S—U. S v. Pacific Forwarding Co, (D C.Wash) 8 F Supp 647.
Cal—Standard Auto Sales Co v. Lehman, 186 P. 178, 43 Cal App. 763.
Del—Woods v. Spoturno, 133 A 319.
Ky—Clolinger v. Callahan, 263 S. W. 700, 204 Ky 33.
N Y.—Nolan v. Louis Workman Co., 261 N Y S 534, 146 Misc. 99—O'Hora v. Tarby, 252 N.Y.S. 646, 141 Misc. 402.
6 C.J. p 36 note 46.

In Alabama
(1) Attachment being a harsh and extraordinary remedy, the statutes authorizing and regulating it are

The remedy must be closely confined within the limits assigned by the legislature and cannot be extended by implication beyond the terms of the statute creating it,[60] but the court will not push the strict construction so far as to nullify the beneficial intent of the statute and leave the creditor remediless.[61] No presumptions will be indulged in support of an attachment where there is an apparent departure from the statute,[62] but the proceedings must on their face show affirmatively that the requirements of the statute have been complied with.[63]

A statute providing means for resisting an attachment is not subject to the rule of strict construction.[64]

(2) Liberal Construction

In some jurisdictions, either by express legislative requirement or by judicial interpretation, a liberal construction is afforded to attachment statutes.

In a number of jurisdictions, under express provision of the statutes, attachment laws are liberally construed,[65] while in other states the courts, having regard to the intention of the legislatures, have

construed strictly in favor of those against whom they are employed—Herrick v. Herrick, 65 So. 146, 186 Ala. 439.

(2) In an early case a general statutory declaration that "the attachment law of this state shall not be rigidly construed" was applied in the case of an act making the remedy available in a suit in chancery.—Flake v. Day, 22 Ala. 132

(3) Under the aforementioned statute, it was said that the remedy assumed a more favorable attitude than theretofore in the system of jurisprudence—Pearsoll v. Middlebrook, 2 Stew & P. 406.

In Texas

(1) Attachment proceedings are strictly juris and a compliance with the requisites of the statute is essential to their validity—Massman v. Snyder, (CCA) 37 F(2d) 825, affirming (DC) 27 F.(2d) 542—Kildare Lumber Co v. Atlanta Bank, 41 SW. 64, 91 Tex. 95—Givens v. Taylor, 6 Tex 315—Wooster v. McGee, 1 Tex 17—Sloo v. Powell, Dall. 467.

(2) On the other hand, it has been held that, under a general statutory provision that attachment proceedings shall be liberally construed to effect their objects and promote justice, strictness in attachment proceedings is exacted only so far as to require substantial compliance with the material provisions of the law—Lewis v. Stewart, 62 Tex. 352

(3) Any material variation from the letter of the law will vitiate all subsequent proceedings—Burch v. Watts, 37 Tex 135—Raquet v. Nixon, Dall. 386—Whitley v. Jackson, 1 Tex. App Civ Cas. § 574.

(4) Every uncertainty must be explained, if at all, by the proceedings themselves—Focke v. Hardeman, 2 S.W. 363, 67 Tex. 173.

(5) There should be an exact and literal compliance with the statutory requirements.—Caldwell v. Haley, 3 Tex. 317.

60. Ponsonby v. Sacramento Suburban Fruit Lands Co, 291 P. 167, 210 Cal. 229—6 C.J. p 36 note 47.

61. Porto Rico—Cruz v. Iriarte, 29 Porto Rico 904
S D—Fulwider v. Benda, 253 N W. 154
6 C J p 37 note 48.

62. N.Y—Smith v Union Milk Co, 24 N Y S 79, 70 Hun 343, affirmed 37 N E 827, 143 N Y 622.
Tex—Focke v. Hardeman, 2 S W 363, 67 Tex. 173
Wis—Lederer v Rosenthal, 74 N.W. 971, 99 Wis 235.
6 C J p 37 note 49.

63. Coward v Dillinger, 56 Md 59—6 C J. p 37 note 50

64. Ark—Mitchell v. Woods, 11 Ark. 130
Tex—Sydnor v. Chambers, Dall 601
6 C.J. p 37 note 51.

65. Miller v. Alaska-Canadian Oil, etc, Co, 4 Alaska 439.

In Georgia

(1) The old doctrine of strict construction is intentionally overturned by a statute providing that a substantial compliance with its provisions shall be sufficient—Force v. Hubbard, 26 Ga 289—Irvin v. Howard, 37 Ga. 18—Kennon v. Evans, 36 Ga. 89.

(2) Formerly attachment laws were construed strictly—Force v. Hubbard, supra—Clark v. Tuggle, 18 Ga. 604—Mills v Findlay, 14 Ga. 230—Levy v. Millman, 7 Ga 167.

In Iowa

(1) Under statutes expressly so providing, attachment laws are liberally construed—Farmers' and Merchants' Bank of Aurora v. Wells & Potter, 179 N W 838, 189 Iowa 1312—Donnelly v. Dripps, 167 N W. 102—Magoon v. Gillett, 6 N.W. 131, 54 Iowa 54

(2) Prior to the enactment of the statute, a strict construction was resorted to—Tiffany v. Glover, 3 Greene 337—Musgrave v. Brady, Morr. 456—Wilkie v. Jones, Morr. 97.

(3) The doctrine of strict construction is not to be carried to an extent operating to suspend the law and leave attaching creditors remediless—Bretney v. Jones, 1 Greene 366.

In Mississippi

(1) Under statutory provisions requiring the attachment law to be construed in the most liberal manner, the court will consider whatever is the fair meaning of the law and, where necessary, will expound it differently from its letter in order to preserve its intent.—Saunders v. Columbus L, etc, Ins. Co., 43 Miss 583—Augusta Bank v. Conrey, 28 Miss. 667—Bryan v. Lashley, 21 Miss 284—Dandridge v. Stevens, 20 Miss. 723

(2) The fact that the statute does not in terms apply to antecedent transactions will not prevent the court from giving it a retroactive effect—Green v. Anderson, 29 Miss. 359

(3) All the provisions of the statute must be strictly observed—Rankin v Dulaney, 43 Miss 197—Wolley v. Bowie, 41 Miss 553—Foster v. Simmons, 40 Miss 585—Robertson v. Johnson, 40 Miss 500—Gates v Flint, 39 Miss. 365—Roy v. Heard, 38 Miss. 544—Jefferies v Harvie, 38 Miss 97—Hopkins v. Grissom, 26 Miss 143.

(4) The fact that an affidavit does not pursue the precise language of the statute is not ground for quashing the attachment where the sense is the same—Lee v. Peters, 9 Miss. 503

In New Jersey

(1) Under its express terms, the attachment statute must be liberally construed in favor of creditors.—Lastowski v. Lawnicki, 179 A 266, 115 N J Law 230—Devlan v. Wells, 47 A. 467, 65 N.J Law 213—Jersey City v. Horton, 38 N J.Law 38—Thompson v. Eastburn, 16 N.J Law 100.

(2) On the other hand, it has been said that the right should not be extended by construction—Pullinger v. Van Emburgh, 16 N J.Law 457—Levinson v. Seeman Bros., 166 A. 630. 11 N.J Misc. 402.

In Ohio

(1) Under a general provision of Gen.Code § 10214, to the effect that

inclined to adopt liberal construction independently of express statutory provisions.[66] In any case, however, a person seeking the benefit of this summary remedy must bring himself clearly within the material provisions of the statute.[67]

The policy of mesne attachment should be adjusted to other policies, and, in ascertaining the legislative will, notice should be taken of conflicting policies.[68]

c. Retrospective Operation

A remedy created by an attachment statute may, in the absence of a showing of a contrary statutory intent, be resorted to as to acts before its enactment.

It has been held in some cases that a statute giving the remedy by attachment, in cases where it had not previously existed, may operate retrospectively so as to embrace acts committed before its passage;[69] but, when the statute is not intended to be retroactive, it will have no effect on proceedings commenced previous to its going into operation.[70]

d. Repeal

An attachment statute may be expressly or impliedly repealed, although vested rights will be protected.

An attachment statute may, like any other statute, be repealed by implication, where the legislature enacts a subsequent statute inconsistent therewith,[71] but the general rule that repeals by implication are not favored applies to such statutes, so that the earlier statute will not be held to be repealed, where the provisions of the later statute

the remedial provisions of the code shall be liberally construed, and that the common-law rule of strict construction of statutes in derogation thereof shall have no application to remedial statutes, attachment laws must be liberally construed.—Smith v. Buck, 162 N E 382, 119 Ohio St 101, 61 A.L R. 1343—Hart v. Andrews, 132 N E. 846, 103 Ohio St 218—Weirick v. Mansfield Lumber Co, 117 N E 362, 96 Ohio St 386—Bridge v. Ring, 157 N.E. 496, 25 Ohio App 149

(2) On the other hand, it has been held that attachment, being an extraordinary remedy, the provision of the statute allowing it should be strictly construed—Taylor v. McDonald, 4 Ohio 149—West Side Motor Co. v. Politz Bros, 161 N E. 22, 27 Ohio App 116—Humphrey v. Wood, Wright 566—Orlopp v Schueller, 26 Ohio Cir Ct. 127—Hoyman v Beverstock, 8 Ohio Cir Ct. 473, 4 Ohio Cir Dec. 491—L L LeVeque Co v Ross, 31 Ohio N P.(N S) 185—Meade v. Rice, 19 Ohio N P (N S) 173—Harris v. Cincinnati, Hamilton & Dayton Ry Co, 5 Ohio N P.(N S) 173

In Tennessee the attachment law, by express direction of statute, is liberally construed.—Neihaus v. C B Barker Construction Co, 186 S W. 461, 135 Tenn. 382, Ann Cas.1918B 23—6 C J. p 37 note 52

66. Gilna v. Barker, 254 P. 169, 78 Mont. 342—6 C J. p 37 note 53.

Equitable proceedings

A statute providing for attachment in equitable proceedings, being remedial, is entitled to a liberal interpretation.—Marah v. Moore, 161 A. 227, 52 R.I. 458.

In Illinois

(1) In view of the liberal nature of the attachment laws, a strict construction would defeat the evident intention of the legislature.—Hannibal, etc., R Co. v. Crane, 102 Ill. 249, 40 Am R. 581.

(2) The remedies by attachment, being in derogation of the common law, should not be extended by implication—G. W. Bull & Co. v. Boston & Maine R. R., 175 N E. 337, 344 Ill. 11.

(3) In early cases, a strict construction was placed on the statutes as providing a remedy in derogation of the common law—May v. Baker, 15 Ill 89—Rowley v Berrian, 12 Ill. 198—Moore v Hamilton, 7 Ill 429—Britton v. Gregg, 96 Ill App 29, affirmed 61 N E 1024, 193 Ill 394. See Weber Chimney Co. v. Johnson, 205 Ill App 348.

In Maryland

(1) The principal has been firmly established that the attachment statute will be liberally construed in determining what steps must be taken to confer jurisdiction on the court issuing the attachment.—Gill v Physicians' and Surgeons' Bldg, 138 A. 674, 153 Md. 394—Turner v Lytle, 59 Md. 199—McPherson v Snowden, 19 Md 197—Brown v. Somerville, 8 Md. 444.

(2) The statute will be more liberally construed on the question of whether the acts of an attaching creditor amount to a compliance with its requirements—Gill v Physicians' and Surgeons' Bldg, supra.

(3) A substantial compliance with the statute is deemed sufficient.—Hedrick v Markham, 103 A. 98, 132 Md 160—Tonns v. Collins, 81 A. 219, 116 Md 55—Gunby v Porter, 31 A. 324, 80 Md. 402—Randle v. Mellen, 8 A. 573, 67 Md 181—Hoffman v. Reed, 57 Md. 370—Coward v. Dillinger, 56 Md. 59—Evesson v. Selby, 32 Md. 340—Mears v. Adreon, 31 Md. 229—White v. Solomonsky, 30 Md. 585—Shivers v. Wilson, 5 Harr. & J. 130, 9 Am D. 497

In North Carolina

(1) It is held that attachment is a statutory remedy in derogation of common law, and hence must be strictly construed—Bethell v. Lee, 158 S E 493, 200 N C. 755—Carson v. Woodrow, 75 S E 996, 160 N C. 143—Parker v Scott, 64 N C. 118—Leak v. Moorman, 61 N.C. 168.

(2) Notwithstanding, substantial compliance with the requirements of the statute is sufficient—Bethell v. Lee, supra—Best v. British, etc., Co, 38 S E 923, 128 N C. 351—Grant v. Burgwyn, 79 N.C. 513.

In Utah

(1) Attachment statutes are to be construed liberally to effect their purpose, but, where a failure to observe a statutory requirement constitutes a jurisdictional defect, the courts cannot disregard it.—Cole v Utah Sugar Co., 99 P. 681, 35 Utah 143.

(2) "The process of attachment is a special statutory remedy, and, in resorting to it, the terms of the law conferring it must be strictly pursued"—Bowers v. London Bank of Utah, 4 P. 225, 226, 3 Utah 417.

67. Gilna v. Barker, 254 P 169, 78 Mont. 342—6 C.J. p 37 note 54.

68. Dupont v. Moore, 166 A. 417, 86 N H. 254.

69. Kuehn v Paroni, 19 P. 273, 20 Nev. 203—6 C J. p 37 note 59.

70. Ala.—Frankenheimer v. Slocum, 24 Ala 373
Md.—Risewick v. Davis, 19 Md. 82
Minn.—Parkinson v. Brandenburg, 28 N.W. 919, 35 Minn. 294, 59 Am R 326—Greenleaf v. Edes, 2 Minn. 264.
6 C J. p 37 note 60.

71. Henrietta Min, etc., Co. v. Gardner, 19 S Ct. 327, 173 U S 123, 43 L Ed 637, reversing 31 P. 1126, 5 Ariz. 211—6 C.J. p 38 note 61.

are not so plainly inconsistent therewith that both cannot stand.[72]

It has been held that the repeal of an act authorizing attachment, or the repeal of one of the grounds of attachment, pending proceedings thereunder but before the attachment lien has been perfected by judgment, will operate to divest the lien in the absence of any saving clause excepting pending attachments,[73] but, where the lien of the attachment has been perfected by judgment, it becomes a vested right which cannot be taken away by subsequent legislation.[74]

§ 5. Existence of or Resort to Other Remedy

The availability of other remedies is immaterial where attachment proceedings are rightfully brought.

Where plaintiff is entitled to an attachment as of right, the availability of other remedies is immaterial.[75] Accordingly, an attachment may issue against the principal of a note alone, although there is a surety thereon, amply able to pay,[76] and in an action on a judgment, foreign attachment may issue to secure property of the debtor which cannot be taken by execution, although he has visible property on which execution may be levied.[77] An attachment proceeding in one county to acquire a lien on defendant's property is not irregular because of a pending suit in assumpsit elsewhere for the same debt.[78]

§ 6. —— Arrest as Concurrent Remedy

Attachment and arrest are concurrent remedies, but property and body attachments will not lie on the same writ.

Attachment lies against defendant's property, although he has been previously arrested on process issued in the same cause,[79] but defendant's property cannot be attached and his body taken on the same writ.[80]

Where the writ is against two defendants, one of them may be arrested and the property of the other attached.[81]

§ 7. Extraterritorial Operation

An attachment has in itself no extraterritorial operation in personam.

The process of attachment is effectual for the direct and legitimate purpose of enforcing the application of the property attached according to the laws of the state where it is found, although defendant in the attachment proceeding is a nonresident,[82] but a judgment rendered in one state on an attachment of property, where there has been no personal service of process on defendant, and no appearance by him, has no extraterritorial validity so far as the person of defendant is concerned.[83]

Where defendant is served with process or appears in the action and submits to the jurisdiction of the court, the judgment in an attachment case must be given the same effect outside of the state as any other judgment.[84]

§ 8. Causes of Action or Demands Authorizing Attachment

a. In general
b. Legal or equitable

a. In General

Attachment will lie only in the case of causes of action or demands within the intent of the statute affording the remedy.

In order to warrant the issuance of a writ of attachment there must be a cause of action in plaintiff against defendant,[85] which must be of the character to which the statutes under which the proceedings are had apply.[86] The fact that a statute

72. Hotel Registry Realty Corp v Stafford, 57 A. 145, 70 N J Law 528—6 C J p 38 note 62

73. U S—Evans-Snider-Buel Co. v McFadden, (Ind T) 105 F. 293, 44 C.C A 494, 58 L R A. 900, affirmed 22 S Ct 758, 185 U S 505, 46 L Ed 1012
Ga.—Lears v. Seaboard Air-Line R Co., 60 S E 343, 3 Ga.App 614.
6 C.J. p 38 note 64.

74. McFadden v Blocker, 48 S W. 1043, 2 Ind T. 260.

75. McNelus v. Stillman, 158 N Y S 428, 172 App Div. 307—Shepherd v. Shepherd, 100 N.Y S. 401, 51 Misc. 418, affirmed 103 N.Y.S. 1141, 117 App Div. 924.
"Pendency of a suit at common law does not preclude the suing out of an attachment against the defendant."—S K Johnson & Son v. Friedman-Shelby Shoe Co, 83 S E. 969, 15 Ga App 561

76. Richardson v. Probst, 72 N.W. 521, 103 Iowa 241.

77. Morse v. Pearl, 36 A. 255, 67 N H 317, 68 Am S R. 672

78. Roth v. Pechin, 103 A. 394, 260 Pa. 450.

79. Ala.—Massey v. Walker, 2 Ala. 167.
Ga.—Wood v. Carter, 29 Ga. 580.
5 C J. p 461 note 84.

80. Conn.—Daniels v. Wilcox, 2 Root 346
Me.—Trafton v. Gardiner, 29 Me. 501.
Mass.—Almy v. Wolcott, 13 Mass. 73—Brinley v. Allen, 3 Mass. 561.
Vt.—Cleft v Hosford, 12 Vt. 296.
6 C.J. p 35 note 39.

81. Connor v. Madden, 57 Me. 410.

82. Southern Pac. Ry Co. v. Di Cristina, 127 S E. 151, 33 Ga.App. 439—6 C J. p 35 note 41.

83. St. Clair v. Cox, (Mich) 1 S. Ct 354, 106 U S 350, 27 L Ed. 222—6 C J. p 35 note 42

84. Downer v. Shaw, 22 N.H. 277—6 C.J p 35 note 43.

85. U S—German v. Universal Oil Products Co., (D C.Mo.) 6 F.Supp. 53
S.C.—Skalowski v. Joe Fisher, Inc, 149 S E 340, 152 S.C. 108, 65 A. L R 1427.
6 C J. p 74 note 49.

86. Cal.—King v. Cline, 194 P. 290, 49 Cal App 696.
Or.—Wheeler Lumber, Bridge & Supply Co v. Shelton, 29 P (2d) 1013, rehearing denied 31 P.(2d) 163.

prescribing the grounds on which an attachment may issue does not authorize the issuance of an attachment in some cases, in which, if an attachment were authorized, the general statute prescribing the venue of attachment proceedings would be broad enough to lay the venue thereof, may not properly be said to constitute a conflict between the two statutes requiring the first-mentioned statute to be construed in harmony with it and as permitting an attachment in such additional cases.[87]

b. Legal or Equitable

An attachment cannot, in the absence of express statutory permission, be had in proceedings in equity although its issuance will not be precluded in some jurisdictions by the fact that equitable relief is incidentally involved in a proceeding otherwise within the attachment statutes.

In some jurisdictions the statutes governing attachments have been construed to restrict the issuance of writs of attachment to actions at law,[88] while in other jurisdictions, either by express provision of the statutes or judicial construction thereof, they have been construed to permit the remedy in equity as well as at law.[89] So, under a statute which permits that an attachment may issue in any action, and where in the particular jurisdiction the distinction between law and equity has been abolished by the code, an attachment may issue in equity actions.[90] Under a statute permitting attachment in actions on claims arising out of contract, it is not material whether the petition states an action in law or one in equity,[91] and, under a statute permitting an attachment in proceedings for the recovery of money, it has been held that attachment may issue in a proceeding of an equitable character as well as in an action at law.[92] So, where the statute permits the ancillary remedy of attachment in actions on contract, express or implied, for the direct payment of money, and does not in terms prescribe that the action must be in law or that it may not be in equity or that it may not be one of either law or equity or both, it is not necessary, to uphold a writ of attachment, to establish the proposition that the action is either legal or equitable.[93] The fact that an attachment cannot be had in a proceeding wherein equitable relief as such is sought will not preclude an attachment in proceedings wherein some exercise of equitable

SC—Twin City Motor Co. v. Fallaw, 175 S.E. 809, 173 S.C. 353. 6 C.J. p 74 note 51.

Attachment in aid of pending actions

Illinois Attachment Act § 31, authorizing attachments in aid of pending actions of assumpsit, debt, covenant, trespass, or trespass on the case, on the filing of bond and affidavit showing right to attachment under § 1, does not limit attachments in aid of pending actions to actions on an indebtedness in which original attachment is authorized under § 1, but merely requires that one of the grounds of attachment specified in § 1, such as nonresidence, fraudulent transfer, etc., shall exist.—Hoosier Veneer Co. v. Trusts & Guarantee Co., (C.C.A.Ill.) 283 F. 1, certiorari denied Trusts & Guarantee Co. v. Hoosier Veneer Co., 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489.

"Nature, character or origin" of "claim"

In a statute providing that "in all suits . . . in which the demand is for a money judgment and the defendant is a nonresident of this State, or when the defendant is not domiciled in this State, whatever may be the nature, character or origin of the plaintiff's claim, the plaintiff shall have the right to sue out a writ of attachment," the word "claim" refers to the facts giving rise to the demand which show the right asserted, and is synonymous with "cause of action," the word "nature" enlarges the right of attachment to embrace every description of legal demand for money, whether arising ex contractu, quasi ex contractu, or from tort, the word "character" means class or division to which the claim belongs, such as contract or tort; and the word "origin" does not mean the facts from which the action arises, but the place or locality where the cause of action arose.—Jackson State Nat. Bank of Jackson, Miss. v. Merchants' Bank & Trust Co. of Jackson, Miss., 149 So. 539, 540, 177 La. 975

87. Winfree v. Mann, 153 S.E. 837, 154 Va. 683.

88. U.S.—Thompson v. Terminal Shares, (D.C.Mo.) 14 F.Supp. 459—German v. Universal Oil Products Co., (D.C.Mo.) 6 F.Supp. 53
Del.—Skinner v. Educational Pictures Securities Corporation, 129 A. 857, 14 Del.Ch. 417.
6 C.J. p 32 notes 21, 22, p 93 note 6. Nature of attachment as legal or equitable see supra § 2 a (4).

89. Cal.—Stanford Hotel Co. v. M. Schwind Co., 181 P. 780, 180 Cal. 348.
Iowa.—Coffin v. Younker, 195 N.W. 591, 196 Iowa 1021.
Miss.—Dinwiddie v. Glass, 71 So. 745, 111 Miss. 449
Ohio.—Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E. 755, 38 Ohio App. 151.
R.I.—Marsh v. Moore, 161 A. 227, 52 R.I. 458
Wash.—State v. Superior Court of State of Washington, King County, 197 P. 321, 115 Wash. 359.

6 C.J. p 32 note 23, p 93 note 7, p 94 note 8

Foreign attachment

(1) Where a writ of foreign attachment issues in a suit in equity in accordance with the act of March 28, 1887, an independent action at law begins which awaits the result of the suit in equity and is determined thereby.—Stewart v. Parnell, 8 Pa.Co. 604.

(2) Under a statute undertaking to provide for equity a proceeding analogous to that of foreign attachment at law, a complainant must bring his case within the plain purview of its terms.—Cantor v. Sachs, 162 A. 73, 13 Del.Ch. 359.

Procedure distinct

Attachment statutes are inapplicable to attachments in chancery, wherein pleadings, practice, and procedure are that of chancery court, except where otherwise provided by statutes.—Craig v. Gaddis, (Miss.) 157 So. 684, 95 A.L.R. 1494.

90. State v. Superior Court of State of Washington, King County, 197 P. 321, 115 Wash. 359—6 C.J. p 93 note 7 [b].

91. Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E. 755, 38 Ohio App. 151.

92. Coffin v. Younker, 195 N.W. 591, 196 Iowa 1021—Baldwin v. Buchanan, 10 Iowa 277.

93. Stanford Hotel Co. v. M. Schwind Co., 181 P. 780, 180 Cal. 348—Grotheer v. Meyer Rosenberg, Inc., (Cal.App.) 53 P.(2d) 996.

powers is incidentally involved in the action if in other respects the pleadings warrant it,[94] and an attachment will issue where the complaint shows that the action is for the recovery of a specific sum of money on a contract, express or implied, although the equitable powers of the court are incidentally involved,[95] as where, in an action for a return of consideration paid, based on a promise implied by law because of fraud, plaintiff, in addition to a money judgment, prays for equitable relief,[96] or where, in an action for a sum due for goods sold and delivered to a corporation, plaintiff seeks equitable relief against, and seeks to attach the property of, one whom he claims to be the sole owner of such corporation.[97] So, an attachment may be had in an action for the recovery of money, notwithstanding other specific relief, equitable in its character, is also demanded.[98]

In the application of the rules hereinbefore stated, it has been held that an action for an accounting, being one in equity, will not support a writ of attachment,[99] except as it may be authorized by statute,[1] and that an attachment cannot be had in such an action under a statute giving the remedy by attachment in actions to recover a sum of money only;[2] but, under the rule that, when in other respects the action is such that an attachment is warranted, its issuance will not be precluded by the fact that an exercise of equitable powers is incidentally involved, an attachment may be had in an action for a money judgment, although an accounting is necessary,[3] as, for example, where, in an action on an implied contract for the payment of money, the exercise of equitable powers in settling accounts and striking a balance is involved,[4] or where, in an action by an agent for commissions of which he does not know the exact amount although the principal knows and refuses to inform him, he seeks an accounting and a judgment for the amount which he alleges and believes to be due to him.[5]

A proceeding for foreclosure of a mortgage on realty is one in which an attachment may be had in some jurisdictions under statutes permitting attachment in actions for the recovery of money,[6] and a similar holding has been made with relation to a proceeding for foreclosure of a mechanic's lien,[7] although in other jurisdictions a contrary conclusion has been reached with relation to a proceeding to foreclose a mortgage.[8] Under a statute permitting an attachment in any action where the requisite grounds are present, it may issue in an action to foreclose a mortgage.[9] An attachment has been held proper in proceedings to foreclose a chattel mortgage, under a statute allowing the remedy in actions to recover on a contract express or implied.[10]

A suit for specific performance is not one in which an attachment may be had under a statute authorizing attachment in actions to recover only a sum of money.[11]

94. Hallidie v. Enginger, 166 P. 1, 175 Cal. 505—6 C.J. p 93 note 6 [e]

95. Bennett v. Superior Court in and for Los Angeles County, 21 P.(2d) 946, 218 Cal. 153.

Rescission

Purchasers suing for the rescission of a land contract, on the ground of the vendor's nonperformance, and for the return of the purchase money paid, are entitled, on the filing of a proper affidavit therefor, to a writ of attachment against the vendor's property.—Bennett v. Superior Court in and for Los Angeles County, 21 P. (2d) 946, 218 Cal. 153

96. McCall v. Superior Court in and for Imperial County, (Cal.) 36 P (2d) 642.

97. Weintraub v. Superior Court Within and For Los Angeles County, 267 P. 733, 91 Cal.App. 763

98. Graham v. Schooler, 194 P 1080, 80 Okl 124—6 C.J. p 93 note 24, p 93 note 6 [e], [f].

99. German v. Universal Oil Products Co., (D.C.Mo.) 6 F.Supp. 53.

1. Marsh v. Moore, 161 A. 227, 52 R.I. 458.

Speculative damages

Since a suit for an administrator's accounting, where respondents were charged with participation in a joint fraud, is cognizable in equity, the issuance of a writ of attachment therein is proper and it will not be quashed on the contention that the damages claimed were too speculative when, although the amount thereof is uncertain, it is determinable by established rules of law and equity.—Marsh v. Moore, 161 A. 227, 52 R.I. 458.

2. Shiel v. Patrick, (N.Y.) 59 F. 992, 8 C.C.A. 440—6 C.J. p 93 note 6 [b]

3. Graham v. Schooler, 194 P. 1080, 80 Okl. 124.

4. Hallidie v. Enginger, 166 P. 1, 175 Cal. 505.

5. Beeson v. Schloss, 192 P. 292, 183 Cal. 613.

6. Coffin v. Younker, 195 N.W. 591, 196 Iowa 1021—6 C.J. p 93 note 6 [d].

7. Gillespie v. Lovell, 7 Kan. 419.

8. N.Y.—Smyth v. Mayer, 174 N.Y.S. 197, 105 Misc. 391, affirmed 176 N.Y.S. 922, 188 App.Div. 954.

N.D.—Grand Lodge, A. O. U. W., of North Dakota v. Wahlin, 237 N.W. 878, 61 N.D. 383, 76 A.L.R. 1442.

6 C.J. p 93 note 6 [d]

9. Charles Mix County Bank v. Calta, 189 N.W. 527, 45 S.D. 564.

10. Yamada v. Hall, 260 P. 243, 145 Wash. 365

11. Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, reversing 239 N.Y.S. 839, 228 App.Div. 875, motion granted 177 N.E. 134, 256 N.Y. 646.

Cause of action for specific performance stated

A complaint alleging employment of plaintiff broker to sell property for a commission payable in the kind of property received, that a sale was made for corporate stock, that stock of a specified value was due from defendant, and demanding judgment for it or its value, if transferred, stated a cause of action for specific performance, and not for a sum of money so as to authorize attachment. —Olsen v. U. S. Fidelity & Guaranty Co., 128 N.E. 908, 230 N.Y. 31, modifying 173 N.Y.S. 916, 187 App.Div. 882.

A proceeding to set aside a fraudulent transfer is not one in which an attachment may be had under a statute allowing attachment in actions for the recovery of money only or for a wrongful conversion of personal property or for damages,[12] although there is authority to the contrary under a statute permitting an attachment in any action for the recovery of money or for the recovery of property.[13]

§ 9. —— Amount of Claim

The claim must be for a sufficient amount as required by statute.

Where statutes limit the right to attachment to cases in which the claim reaches or exceeds a certain amount, the claim must be of such amount.[14]

§ 10. —— Demand for Money or Damages

Attachment is confined to proceedings for the recovery of money only where the statute so provides.

Where the statute so provides, a remedy by attachment is limited to actions to recover a sum of money only,[15] and in such case it cannot be employed as a means of recovering specific property;[16] but under a statute giving the remedy in any suit pending for "damages," under certain conditions the attachment may issue in actions for money had and received and for debt as well as for compensation for a tort or breach of contract.[17]

§ 11. —— Demand Arising Out of Express Contract

a. In general
b. Direct payment of money
c. Contracts made or payable within state
d. Breach of promise of marriage

a. In General

Attachment is, ordinarily, expressly permitted in, and in some instances specifically restricted to, actions arising out of contracts, in which case it will issue in actions on express contracts.

Under a statute extending the remedy of attachment to actions ex contractu, it may be availed of in actions on demands arising out of contracts[18] and if the statute confines it to such actions it cannot be availed of in actions not so arising;[19] and, where this is the case, in order for plaintiff to be entitled to the writ, it is essential that contractual relations exist between him and defendant,[20] or else that the contract be made for his benefit.[21] Among other actions ex contractu with reference to which it has been held that attachment may properly issue may be mentioned actions on account stated,[22] bills of exchange or promissory notes,[23] bonds or undertakings,[24] coupons and scrip certificates;[25] actions for breach of contract generally,[26] or of contracts of purchase[27] or of sale,[28] or of breach of contracts of warranty,[29] or for the violation of a lease;[30] and actions for compensation for services,[31] or for the price of goods sold,[32] or

12. Security Nat. Bank of Fargo v. Bothne, 217 N.W. 148, 56 N.D. 269.

13. National Exch. Bank v. Stelling, 9 S.E. 1028, 31 S.C. 360.

14. Dix v. Nicholls, (D.C.) 7 F.Cas. No. 3,926, 2 Cranch C.C. 581—6 C.J. p. 74 note 54

15. Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406, reversing 239 N.Y.S. 889, 228 App.Div. 875, motion granted 177 N.E. 134, 256 N.Y. 546—Olsen v. U. S. Fidelity & Guaranty Co., 128 N.E. 908, 230 N.Y. 31, modifying 173 N.Y.S. 916, 187 App.Div. 882—6 C.J. p. 75 note 56.

Action to:
Foreclose mortgage see supra § 8 b
Set aside fraudulent conveyance see supra § 8 b

16. Ark.—Gates v. Bennett, 38 Ark. 475.
N.Y.—Avery v. Avery, 104 N.Y.S. 290, 119 App.Div. 698.
6 C.J. p. 75 note 57.

17. Rice v. Sanger Bros., 229 P. 397, 27 Ariz. 15

18. Daniels v. Taylor, 13 Ohio Cir. Ct.(N.S.) 116—6 C.J. p. 75 note 58.

Independent cause

Under Remington & B.Code § 648, authorizing the issuance of a writ of attachment on affidavit showing the indebtedness of defendant to plaintiff, and, among other things, that defendant is a nonresident of the state, or that the damages for which the action is brought are for injuries arising from the commission of some felony or for the seduction of some female, where the affidavit for attachment shows that defendant is a nonresident of the state, the provision of the section as to damages from commission of the felony does not exclude the right to attachment for damages from breach of a written contract—State v. Superior Court for King County, 159 P. 1193, 93 Wash. 98.

19. Pope v. Hibernia Ins. Co., 24 Ohio St. 481—6 C.J. p. 75 note 59.

20. Stewart v. Blue Grass Canning Co., 117 S.W. 401, 133 Ky. 118, 124, rehearing denied 120 S.W. 375—6 C.J. p. 75 note 60.

21. Ky.—Stewart v. Blue Grass Canning Co., supra.
N.Y.—Edick v. Green, 38 Hun 202.

22. Johnston v. Ferris, 14 Daly 302, 12 N.Y.St. 666—6 C.J. p. 75 note 64.

23. Yamada v. Hall, 260 P. 243, 145 Wash. 365—6 C.J. p. 75 note 68.

24. Monterey County v. McKee, 51 Cal. 255—6 C.J. p. 75 note 62.

25. Seeley v. Missouri, etc., R. Co., (C.C.N.Y.) 39 F. 252

26. Hamburger v. Halperm, 152 P. 61, 28 Cal.App. 317—6 C.J. p. 76 note 69.

27. Donnelly v. Strueven, 63 Cal. 182—6 C.J. p. 76 note 70

28. Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E. 755, 38 Ohio App. 151—6 C.J. p. 76 note 71.

29. State v. Superior Court for King County, 159 P. 1193, 93 Wash. 98—6 C.J. p. 76 note 72.

30. Doblinger v. Dickson, (C.C.Ohio) 71 F. 635—6 C.J. p. 76 note 73.

31. Citizens Sav. & Trust Co. v. Grossmer, 17 Ohio Cir.Ct (N.S.) 37—6 C.J. p. 76 note 68.

Commissions on sales—Appliance Co. v. Hallett, 16 Ohio Cir.Ct (N.S.) 342.

32. Mo.—Napa Valley Wine Co. v. Rinehart, 42 Mo.App. 171.

for the value of property fraudulently obtained,[33] or to recover a balance due on a subscription to corporate stock,[34] or to enforce the liability of a stockholder of an insolvent corporation[35]

Effect of presence of tortious elements. Where the claim grows out of contract, its character as such is not affected, so as to preclude an attachment, by the fact that tortious elements are involved.[36]

b. Direct Payment of Money

Where the contract is for the direct payment of money an attachment may be had under statutes so providing.

Under statutes providing that attachment may be had in actions on contract, express or implied, for the direct payment of money, an attachment may be had in an action on an express contract of this character.[37] The contract contemplated by such a statute is one the obligation of which is for a definite sum payable unconditionally and at a specific time.[38] According to some authorities, the requirement that the contract shall be for direct payment of money precludes a contract which is a collateral agreement or which is dependent on any other agreement,[39] although other authorities are to the contrary.[40]

The remedy has been held available in an action for damages for breach of contract where the damages are readily ascertainable by reference to the contract and the basis of computation is reasonable and definite[41]

Among instances of obligations or contracts on which attachment will lie may be mentioned actions on bail bonds,[42] depositary's bonds,[43] appeal

N Y.—Huelet v. Reyns, 1 Abb Pr.(N. S) 27.
6 C.J p 76 note 66.

33. Bridge v. Ring, 157 N E 496, 25 Ohio App. 149—6 C J. p 76 note 67.

Ratification of conveyance

Where a life tenant was allegedly fraudulently induced to convey property to remaindermen by an instrument represented to be a lease and the remaindermen thereafter conveyed the property to a third party, the life tenant's action against the remaindermen to recover the difference between the value of the property and the amount received is a ratification of the conveyance, and attachment for such sum is based on a "demand arising on contract," since as respects attachment, a deed, on being executed and delivered, becomes a contract—Bridge v. Ring, 157 N E 496, 25 Ohio App. 149.

34. Kohler v. Agassiz, 33 P. 741, 99 Cal 9

35. Kennedy v. State Sav Bank, 31 P. 846, 97 Cal. 93, 33 Am S R. 163—6 C J. p 76 note 75
Attachment in proceedings to enforce stockholder's liability generally see Corporations § 676 [14 C J. p 1080 note 33-p 1083 note 71].

36. Ark—McClelland v. Linton, 130 S W. 482, 121 Ark. 79.
Ohio—Hart v. Andrews, 132 N E 846, 103 Ohio St 213—Weirick v Mansfield Lumber Co, 117 N.E 362, 96 Ohio St. 386.
6 C J. p 76 note 76

37. Ross v. Gold Ridge Min. Co., 95 P. 821, 14 Idaho 687—6 C J. p 76 note 77.

38. Gilna v. Barker, 254 P. 169, 78 Mont. 343—Square Butte State Bank v Ballard, 210 P. 889, 64 Mont. 554.

No sum stipulated

A contract under the terms of which no sum of money is stipulated as payable from either party to the other, which is affirmed by assumpsit for money had and received waiving deceit, will not support attachment—San Francisco Iron & Metal Co v. Abraham, 296 P 82, 211 Cal 552.

39. Gilna v Barker, 254 P. 169, 78 Mont 343—Wall v. Brookman, 232 P 774, 72 Mont 223—Square Butte State Bank v. Ballard, 210 P. 889, 64 Mont 554—Ancient Order of Hibernians, Division No 1, of Anaconda, v. Sparrow, 74 P. 197, 29 Mont 132, 64 L R A. 128, 101 Am St R. 563, 1 Ann Cas. 144.

40. Ariz—Herndon v. Hammons, 264 P 692, 33 Ariz 323—Fredericks v. Hammons, 264 P 687, 33 Ariz 310.
Cal—Hathaway v. Davis, 33 Cal 161

41. Cal—Force v. Hart, 272 P. 583, 205 Cal 670.
Mont—Gilna v. Barker, 254 P. 169, 78 Mont 343.

Building contract

In a contractor's suit for damages for defendant's breach of contract to employ the contractor to construct a building, where the obligation of defendant to pay money in a specific amount was fixed by the contract, and the difference between the contract price and the cost of building, conceded to be the measure of damages, appeared, and the damages were the direct consequence of the repudiation of the contract by defendant, and the cost of labor and materials for constructing the building were capable of definite ascertainment, a motion to discharge the attachment by plaintiff on the ground that the sums due were not definite, liquidated, or capable of being made definite, was properly denied—Force v. Hart, 272 P. 583, 205 Cal 670

Charter contract

Where defendant charterer agreed to ship cargo, of which the freight would be thirty thousand dollars, and totally failed to do so, and the ship sailed empty, an action by the owner for breach of the contract for damages in the amount of twenty-eight thousand dollars, two thousand dollars being the cost of loading and unloading such a cargo, is one for the breach of a contract for the direct payment of money, and an attachment may issue under Code Civ Proc § 537, the damages being easily ascertainable according to fixed standards supplied by the contract or the law acting on it.—Greenebaum v. Smith, 197 P. 675, 51 Cal App 692, error dismissed Smith v. Greenebaum, 44 S Ct. 332, 264 U S. 599, 68 L.Ed 869

Mining lease

An action based on a lease of mining property from defendant to plaintiff providing that plaintiff was to mine and extract ore therefrom, the ore to be shipped to a smelter for treatment, and plaintiff to be entitled to sixty-five per cent of the net proceeds after treatment, is an action on a contract for the direct payment of money—Gilna v Barker, 254 P 169, 78 Mont 343.

Sale of realty

An action for damages for the purchaser's breach of a contract for the sale of realty is an action for the "direct payment of money" so as to entitle plaintiff to an attachment.—MacDonald v. Crawford, 288 P. 1088, 106 Cal App 193.
Unliquidated demands see infra § 14.

42. San Francisco v. Brader, 50 Cal. 506.

43. Mont—State v. Pondera Valley State Bank, 248 P. 207, 77 Mont. 1

bonds,[44] official bonds,[45] promissory notes providing for reasonable attorney's fees,[46] and the contract of an indorser or a guarantor of a promissory note or a bill of exchange.[47] On the other hand, on the theory that the obligation is conditional and binds the principal and sureties to pay, not an ascertained liquidated amount, but an amount determinable by the loss sustained by the payee on condition broken, it has been held that attachment will not issue in an action against the sureties on an indemnity bond for the faithful performance of an obligation,[48] nor on a contract guaranteeing the collection and payment of a note,[49] nor against the sureties on a bond conditioned to be void if the principal shall comply with the terms of a building contract.[50]

In determining the character of the action as falling within the intent of statutes of the kind under consideration, the allegations of the complaint are informative[51] and according to some authorities are alone to be considered.[52]

"Overdue" instrument. Under a statute authorizing a writ of attachment in actions brought on overdue promissory notes, bills of exchange, other written instruments for the payment of money, and on book accounts, an attachment cannot be had in an action on an appeal bond[53] or on an administrator's bond conditioned for the faithful performance of his duties,[54] since the statute contemplates instruments of the nature of those specifically mentioned which provide for an absolute and unconditional payment.[55]

c. Contracts Made or Payable within State

By statute the remedy by attachment may be limited to actions on contracts made or payable within the state.

In determining whether the remedy of attachment will lie, statutes limiting the right to actions on contracts which were made, or under which payment should be made, within the state, must be regarded,[56] and under such a provision it has been held that, where the contract was made outside of the state, it must provide by express stipulation or necessary implication for payment within the state in order to warrant an attachment,[57] and it is not enough that the money be payable wherever defendant may be found, and, therefore, payable in the state if he is found there.[58] The fact that some of several claims sued on were payable in another state does not, however, affect plaintiff's right to attachment on such of his claims as were payable in the state in which the attachment was sought.[59]

d. Breach of Promise of Marriage

In some jurisdictions attachment is available in an action for breach of a marriage promise, but elsewhere the rule is otherwise

Although attachment has been held available in an action for breach of promise of marriage, under a statute giving the remedy in actions of assump-

—Jenkins v. First Nat. Bank, 236 P. 1085, 73 Mont. 110—State v. Reynolds, 220 P. 525, 68 Mont. 572.

Contract of guaranty distinguished

A bond executed by a bank as principal in favor of a county treasurer, conditioned that the bank should repay "all funds and money so deposited with it, either on legal order or on check or draft," wherein the sureties agree to indemnify against any and all losses sustained, is one of suretyship, and not of guaranty, as the two are defined by Rev. Codes (1921) §§ 8171, 8195, which created an absolute liability on the part of the sureties immediately on the default of the bank, and is sufficient to sustain an attachment of the sureties' property under § 9256, authorizing attachments in "actions on a contract express or implied for the direct payment of money."—State v. Reynolds, 220 P. 525, 68 Mont. 572.

44. Hathaway v. Davis, 33 Cal. 161.

45. Monterey County v. McKee, 51 Cal. 355.

46. Twin Falls Nat. Bank v. Reed, 258 P. 526, 44 Idaho 573.

47. Armstrong v. Slick, 93 P. 775, 14 Idaho 208.

48. Wall v. Brookman, 233 P. 774, 73 Mont. 328—Ancient Order of Hibernians, Division No. 1 of Anaconda v. Sparrow, 74 P. 197, 29 Mont. 132, 101 Am. St. R. 563, 64 L. R. A. 128, 1 Ann. Cas. 144.

49. Square Butte State Bank v. Ballard, 210 P. 889, 64 Mont. 554.

50. Ancient Order of Hibernians, Division No. 1 of Anaconda v. Sparrow, 74 P. 197, 29 Mont. 132, 62 L. R. A. 128, 101 Am. St. R. 563, 1 Ann. Cas. 144.

51. Powers v. Freeland, 299 P. 736, 114 Cal. App. 146.

52. Heffron v. Thomas, 201 P. 572, 61 Mont. 10.

53. Hurd v. McClellan, 23 P. 792, 14 Colo. 213.

54. People v. Boylan, (C. C. Colo.) 25 F. 594—6 C. J. p. 77 note 84.

55. Hurd v. McClellan, 23 P. 792, 14 Colo. 213.

56. Allison v. T. A. Snyder Preserve Co., 45 N. Y. S. 923, 20 Misc. 367—6 C. J. p. 77 note 86.

Superseded contracts

Where the parties to a contract for the sale of motor trucks, providing that it should be deemed executed in Michigan and governed by the laws thereof, made a new contract reciting that it was executed at San Francisco, the obligations of the first contract were superseded and the place of performance, as respected the right to attachment, changed to the state of California, so that a corporation selling motor trucks under the contract, and making sales and advancements to buyers pursuant to the substituted contract, is entitled to an attachment in California as to claims accruing under such contract, notwithstanding a clause in a third contract, superseding all former agreements and orders "relative to the sale of [such] trucks," that the place of making and performance was the state of Michigan, the latter contract not referring to consummated transactions or liabilities already fully matured.—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal. 492.

57. Snapp v. Kidder, 255 P. 183, 200 Cal. 724—6 C. J. p. 77 note 87.

58. Snapp v. Kidder, supra.

59. Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal. 492.

suit[60] or on money demands,[61] or debts or demands arising on contract,[62] the more general rule is that attachment will not be allowed in an action of this character.[63]

§ 12. —— Demand Arising Out of Implied Contract

a. In general
b Judgments

a. In General

Attachment is generally available in actions on implied contracts even though the demand involves tortious elements.

As a general rule under the statutes the right of attachment is not confined to cases in which the claim sued on is based on an express contract, but the remedy is also available in an action on an implied contract,[64] and this principle is applicable to a case where the contract is implied in law as well as where it is implied in fact.[65] Accordingly, attachment has been held an available remedy in an action to recover customs duties,[66] an action on an unliquidated demand for a breach of contract to exchange property,[67] an action to enforce the individual liability of bank stockholders for the debts of the corporation;[68] an action to enforce a claim acquired by subrogation,[69] and an action against a factor to recover the difference between the price at which goods sold and that authorized by contract.[70]

The fact that the demand involves tortious elements will not preclude the right to the writ if plaintiff elects to waive the tort and sue on the implied contract.[71] Accordingly, attachment has been held available in an action sounding in contract for money stolen,[72] embezzled,[73] won at gambling,[74] or obtained by fraud[75] or wrongful use of the process of attachment or garnishment;[76] for the value of timber wrongfully cut and removed,[77] for money[78] or property[79] converted; for damages to a common carrier or loss of goods by such carrier;[80] and for personal injuries to a passenger.[81]

Contracts for direct payment of money. Under a statute authorizing the issuance of a writ of attachment in an action on a contract, express or implied, for the direct payment of money, an attachment is available in an action on such an implied contract,[82] and a contract implied in law as well as one implied from the facts of the case is an implied contract within the act.[83] The statute should

60. Yalovec v. Furcich, 229 Ill App 396

61. Morton v. Pearman, 28 Ga 323

62. Caldwell v. Spillman, 1 Ohio Dec (Reprint) 808, 7 West L J. 149 —Halbert v Armstrong, 14 Ohio Cir Ct. 296, 7 Ohio Cir Dec 705—6 C J. p 77 note 89

63. Mich —Roelofson v. Hatch, 3 Mich 277.
N.Y.—Barnes v. Buck, 1 Lans 268.
N C—Price v. Cox, 83 N C 261—Maxwell v. McBrayer, 61 N C 527
Pa —Isett v Binder, 2 Chest Co. 430.
R I —Mains v. Lederer, 51 A 1044, 24 R L 23, 96 Am S R 702, 59 L R A. 954
6 C J. p 77 note 90.

64. Ky —Mason v. Moore, 298 S W 1100, 221 Ky. 481
Tex —Devoe v Stewart, 32 Tex 712
6 C.J. p 77 note 91.

Money due on contract

Where the statute authorizes the proceeding in an action for the recovery of money due on a contract, and does not distinguish between express or implied contract, attachment will lie in an action on an implied contract.—Mason v. Moore, 298 S W. 1100, 221 Ky. 481.

65. Nevada Co. v. Farnsworth, (C C Utah) 89 F. 164—6 C.J p 77 note 91 [b].

66. U S. v. Graff, 4 Hun (N Y.) 634, 67 Barb. 304—6 C J. p 77 note 92.

67. Patterson v McMinn, (Tex Civ App) 152 S W 223

68. Broderick v. Normandie Nat. Securities Corporation, 269 N Y S 718, 240 App Div 409, affirmed 193 N E 310, 265 N Y. 540—6 C J. p 78 note 96.

"Debt" or "demand"

The liability of a stockholder in a national bank for an assessment arises out of a contractual relationship and is a "debt" or "demand" under the Texas statute, authorizing the issuance of an attachment on showing that defendant is justly indebted to plaintiff and the amount of the demand —Caldwell v. Morfa, (D C Tex) 24 F (2d) 106

Attachment as remedy to enforce stockholder's liability generally see Corporations § 676 [14 C J. p 1080 note 33-p 1083 note 71].

69. Alford v Cobb, 28 Hun (N.Y) 22—6 C J p 78 note 97

70. Hanson v. Watson, 13 Wkly N C. (Pa) 534.

71. Piedmont Grocery Co. v. Hawkins, 98 S E. 152, 83 W Va 180, 4 A L R 828—6 C J p 78 note 99

72. N Y —Adam Hat Stores v. Lang, 280 N Y S. 100, 155 Misc. 587
Pa —O'Neill v. Brown, 17 Pa.Dist. 1062
6 C J p 78 note 1.

73. Piedmont Grocery Co. v. Hawkins, 98 S E 152, 83 W Va 180, 4 A L R 828—6 C J. p 78 note 2.

74. Jenks v. Richardson, (C C Ohio) 71 F. 865

75. Piedmont Grocery Co. v Hawkins, 98 S E 152, 83 W Va 180, 4 A L R 828—6 C J. p 78 note 4.

76. Garrott v. Jaffray, 10 Bush (Ky) 413.

77. W D. Reeves Lumber Co v Leavenworth, (Miss) 248 F. 686, 160 C.C.A 586

78. Nevada Co v Farnsworth, (C.C Utah) 89 F 164—6 C J. p 78 note 6.

79. Md —Turner & Thomas v. William Schwarz & Sons, 117 A. 904, 140 Md 465, 24 A L R 444.
Wash —State v. Superior Court for King County, 178 P 827, 105 Wash 676.
6 C J p 78 note 7.

80. Ind.—Bausman v. Smith, 2 Ind. 374
La —Hunt v. Morris, 4 Mart. 517.
Contra Atlantic Mut Ins. Co v. McLoon, 48 Barb (N.Y.) 27

81. Pennsylvania R. Co. v. Peoples, 31 Ohio St. 537.

82. Meyr v. Federal Surety Co of Davenport, Iowa, 34 P (2d) 982, 97 Mont 503, certiorari granted Clark v. Willard, 55 S Ct 118, 293 U S. 546, 79 L Ed. 650, affirmed 55 S.Ct. 356, 294 U S. 211, 79 L Ed. 865, 98 A.L R. 347

83. McCall v Superior Court in and for Imperial County, (Cal) 36 P. (2d) 642.

be given a liberal rather than a technical meaning; and the rule, stated supra § 11 b, that the contract contemplated by the statute is such only as requires the payment unconditionally and absolutely of a definite sum applies in determining whether an action on an implied contract will justify the issuance of an attachment.[84]

Actions which have been held to be on an implied contract for the direct payment of money within the statutory provision include: An action against a husband for necessaries furnished to his wife with whom he was living at the time,[85] and an action by a surety who has paid the principal's obligation against a cosurety for contribution.[86] The remedy is also available in an action to enforce the statutory liability of a bank stockholder to make good an impairment of the capital stock;[87] and it has been held[88] and denied[89] that attachment would issue in an action on an implied contract to enforce the double liability of such stockholders. Attachment properly issues under the statute in an action to recover money paid on a contract wrongfully rescinded,[90] or the consideration of which has totally failed,[91] as where the contract was induced by fraud and plaintiff has received nothing of value;[92] but an implied contract to repay money received under contract, the consideration for which has entirely failed, may be considered a contract for the direct payment of money as basis for attachment proceedings only where nothing has been received in consideration for the amount sought to be recovered, and where the damages may be said to be liquidated and definitely ascertainable.[93] Plaintiff by waiving the tort and suing on an implied contract cannot, for the purpose of procuring an attachment, convert a tort action into an action ex contractu;[94] and where an exchange agreement was induced by misrepresentations regarding the value of property exchanged, and the exchange was voluntarily executed and not disavowed by either party, the injured party cannot waive the tort and recover on an implied contract, and hence an action brought by him must be on tort, which will not support an attachment.[95] An action for a breach of warranty in a contract of sale is not on an implied contract for the direct payment of money;[96] and neither is an action by the buyer of personalty against the sellers for

84. Wall v. Brookman, 232 P 774, 72 Mont. 223

85. McQuay v. McQuay, 284 P. 532, 86 Mont. 535

Medical and hospital care

Causes of action for medical and hospital care furnished to a wife living with her husband are based on "contracts express or implied for the direct payment of money," within the statute, authorizing attachment of the husband's funds—McQuay v McQuay, 284 P. 532, 86 Mont. 535.

86. Wall v. Brookman, 232 P. 774, 776, 72 Mont 223

"Contracts contemplated by our statute . . . 'are such only as require the payment unconditionally and absolutely of a definite sum.' Now, the implied contract in the instant case, based as it is upon the statute, requires the defendant as a cosurety of the plaintiff to make contribution to the plaintiff unconditionally and absolutely in a definite sum of money, to wit, one-third of the amount of the judgment which the plaintiff was required to pay Therefore, attachment for the amount due the plaintiff is warranted as upon an implied contract for the direct payment of money."—Wall v. Brookman, supra.

87. Home State Bank of Manhattan v. Swartz, 234 P. 281, 72 Mont. 425

Attachment as remedy to enforce stockholder's liability generally see Corporations § 676 [14 C.J. p 1080 note 32—p 1083 note 71].

88. Ariz—Herndon v. Hammons, 264 P. 692, 33 Ariz 323—Fredericks v. Hammons, 264 P. 687, 33 Ariz 310.

Colo—Adams v. Clark, 85 P. 642, 36 Colo 65, 10 Ann Cas 774.

Liability held contractual

A bank stockholder's double liability is "contractual," within the statute authorizing attachment when the action is on a contract for the direct payments of money—Herndon v. Hammons, 264 P 692, 33 Ariz 323—Fredericks v. Hammons, 264 P 687, 33 Ariz 310—Adams v Clark, 85 P. 642, 36 Colo. 65, 10 Ann Cas. 774.

89. Muri v. Young, 245 P. 956, 75 Mont. 213.

Reason for rule

The liability imposed by statute and assumed by defendant is in the nature of a guaranty, and under the holdings of this state a contract of guaranty is not one for the direct payment of money within the meaning of the attachment statute—Muri v. Young, 245 P. 956, 75 Mont. 213

Cases distinguished

"This conclusion is not at all in conflict with the decision in Home State Bank v. Schwartz, 234 P. 281, 72 Mont. 425 [supra]. The liability imposed by section 6109d, as added by Laws 1923, c. 90, which was then under consideration, differs from that involved in this case, in that the former imposes upon the stockholder a primary obligation running directly from him to the corporation, and has none of the elements of a guaranty"—Muri v. Young, 245 P. 956, 958, 75 Mont. 213.

90. Hanley v. Combs, 87 P. 143, 48 Or 409.

91. Bennett v. Superior Court in and for Los Angeles County, 21 P (2d) 946, 218 Cal. 153—6 C.J. p 77 note 94

Partial failure of consideration

To establish an implied contract to repay the purchase price of corporate stock on the ground of failure of consideration, so as to render attachment available, there must be a total failure of consideration, that is, the stock must be valueless, and where plaintiff's allegations show that a cash dividend on the stock had been received the hypothesis that the stock was valueless is negatived, and hence attachment is not available—Powers v. Freeland, 299 P. 736, 114 Cal.App. 146.

92. California Treasure Box v Superior Court in and for Los Angeles County, (Cal.App.) 37 P (2d) 731—McCall v. Superior Court in and for Imperial County, (Cal.) 36 P (2d) 642.

93. Doud v. Jackson, 283 P. 107, 102 Cal.App. 213.

94. Rosenberg v. Bullard, 15 P (2d) 870, 127 Cal.App. 215.

95. Bullard v. Rosenberg, 20 P.(2d) 104, 130 Cal.App 542.

96. Cal—Sturtevant v. K. Hovden Co, 214 P. 244, 60 Cal.App. 696.

Mont—Heffron v. Thomas, 201 P. 572, 61 Mont. 10.

damages from failure to deliver the full contract quantity where there was no express contract on defendant's part to pay money.[97] So, an action to recover a sum of money which plaintiff entrusted to his clerk, who lost it to defendant in gambling, will not support an attachment under the statute[98]

b. Judgments

Attachment may generally be issued in an action based on a judgment.

An action on a money judgment is one "arising on contract" within the meaning of the attachment statutes, whether such judgment was recovered on a contract or for a tort.[99] Accordingly, an attachment may, as a general rule, be issued in an action which is based on a judgment,[1] either domestic[2] or foreign,[3] even though plaintiff is entitled to execution on the judgment at the time of issuing the writ,[4] and defendant has visible property on which execution might be levied[5] Under statutes limiting the right to actions on contracts payable within the state, however, attachment is not warranted in an action on a foreign judgment, unless it in terms provides that payment shall be made in the state in which it is sought to be enforced.[6]

§ 13. —— Demand Arising Ex Delicto

a. Absence of express statutory provision

b. Statutes authorizing attachment

a. Absence of Express Statutory Provision

Attachment will not lie on demands arising ex delicto unless the remedy is extended to such cases by statute.

It is well settled as a general rule that attachment will not lie on demands arising ex delicto, unless it very clearly appears from the language of the statute that the legislature intended to extend the remedy to such cases,[7] and it is immaterial that the same measure of damages might be applied as would govern in case of a breach of contract[8] A fortiori, when it can be seen from the wording of the statute that it intends to require the relationship of debtor and creditor to exist between the parties, no attachment will lie on demands sounding in tort.[9] Moreover, the remedy cannot be made available by pleading a tort action as one sounding in contract.[10] Although, where actions in contract and tort joined in one complaint arise out of the same transaction, the availability of attachment is determined by specific allegations,[11] whether the action is founded in tort or on contract is not to be determined exclusively from the particular language in the complaint, if it be made to appear that the nature of the obligation sued on constitutes a tort; and if any doubt arises, the action shall be construed as tort.[12]

If an attachment is issued in such an action without statutory authority, a judgment against the at-

97. Willett & Burr v Alpert, 185 P 976, 181 Cal. 652—California Packing Corporation v. Kato, 188 P. 57, 45 Cal App 491.

98. Babcock v Briggs, 52 Cal 502

99. Cal—Grotheer v. Meyer Rosenberg, Inc., (App) 53 P.(2d) 996

N Y—Shipman Coal Co v Delaware & Hudson Co, 219 N Y.S 628, 219 App Div 312, affirmed 157 N.E 859, 245 N Y 567.

6 C J. p 79 note 15

1. Price Hill Colliery Co v. Old Ben Coal Corporation, 175 N E 755, 38 Ohio App 151—6 C J. p 78 note 10

2. Ill—Young v Cooper, 59 Ill 121

N H—Morse v. Pearl, 36 A. 255, 67 N H 317, 68 Am S R 672

Pa—Harter v. Harter, 4 Pa.Dist 211

3. N Y—Shipman Coal Co v Delaware & Hudson Co, 219 N Y S 628, 219 App Div 312, affirmed 157 N.E. 859, 245 N Y. 567

Pa—Nav. Co v. Coal Co., 28 Pa Dist 28

6 C J p 79 note 12.

4. Young v Cooper, 59 Ill. 121—6 C J. p 79 note 13

5. Morse v. Pearl, 36 A 255, 67 N H 317, 68 Am S R 672—6 C J. p 79 note 14

6. Erickson v Erickson, 190 P. 464, 47 Cal App 319.

7. Cal—San Francisco Iron & Metal Co v Abraham, 296 P 82, 211 Cal 552—Jacobs, Malcolm & Burtt v Northern Pac Ry Co, 234 P 328, 71 Cal App 42

Colo—Thuringer v Bonner, 222 P. 1113, 74 Colo 539—Donald Co v. Dubinsky, 219 P 209, 74 Colo 128

Idaho—Sunderlin v. Warner, 246 P. 1, 42 Idaho 479

Ky—Sally v Brown, 295 S.W. 890, 220 Ky. 576

N J—Levinson v Seeman Bros, 166 A 630, 11 N J Misc 402

Ohio—Ross v Poor, 22 Ohio N.P (N S) 59—Gillett v Pullman Co, 10 Ohio N P (N S) 592

Pa—Com v Rarick, 43 Pa Co 632—Wood v. Springs Co, 25 Pa Co 626.

6 C J. p 79 note 17

8. Sunderlin v Warner, 246 P. 1, 42 Idaho 479—6 C J p 80 note 18.

9. Sunderlin v Warner, supra—6 C J. p 80 note 19

10. Powers v. Freeland, 299 P. 736, 114 Cal App 146

11. Powers v Freeland, supra.

12. Jacobs, Malcolm & Burtt v Northern Pac Ry. Co, 234 P. 328, 71 Cal App. 42.

Actions sounding in contract

(1) In determining whether an action was in contract or in tort as bearing on the question whether issuance of attachment was proper, an allegation that, in consideration of reasonable hire, a carrier agreed to transport potatoes under standard ventilation, which meant that ventilators should be closed at thirty-two degrees above zero and opened above that temperature, in the absence of a legal showing to the contrary, imposed on the carrier a greater duty than the law imposed, and made the action sound in contract rather than in tort for violation of a public duty—Jacobs, Malcolm & Burtt v. Northern Pac. Ry. Co., 234 P. 328, 71 Cal App 42

(2) An action for breach of trust, to hold a constructive trustee to account for moneys received under a contract does not sound in tort—McClelland v. Linton, 180 S W. 482, 121 Ark 79.

Actions sounding in tort

(1) A cause of action for the procurement of a judgment by extrinsic fraud in the use of a false affidavit of service—Rosenberg v Bullard, 15 P (2d) 870, 127 Cal App. 315.

(2) Plaintiff, alleging fraud in the purchase of corporate stock and seeking rescission, is not entitled to

tached property is void and may be collaterally attacked.[13]

b. Statutes Authorizing Attachment

Where statutes extend the remedy to demands arising ex delicto, attachment will be issued only in cases within the statute.

In a number of states the statutes now extend the remedy by attachment to claims arising ex delicto. Some of the statutes, in authorizing a resort to the remedy by attachment in actions sounding in tort, specify demands of a certain character, such as for the wrongful conversion of personal property, or personal injury, or injury to property in consequence of negligence, fraud, or other wrongful act; trespass or trespass on the case; or outrageous battery; and where this is the case attachment will lie in actions coming within the terms of the statute,[14] but the remedy will not be

attachment, and the fact that the second count of the complaint was in the form of a common count for money had and received did not entitle plaintiff to attachment, where the first count showed that plaintiff's only cause of action was one founded on the alleged fraud—Stone v Superior Court in and for Los Angeles County, 4 P (2d) 777, 214 Cal 272, 77 A.L.R. 743

(3) In a suit, by plaintiff as trustee for the stockholders of a corporation which had forfeited its charter, where the complaint alleged that defendant, while acting in a fiduciary capacity, by fraudulent misrepresentations and acts induced the corporation to sell to defendant shares of stock in another corporation for a fraction of their value, the action was ex delicto as respects the right to an attachment—Hallidie v. Enginger, 166 P. 1, 175 Cal 505

(4) A complaint to recover money paid to a copartnership merely stating a cause of action in deceit, precludes the right to attachment—San Francisco Iron & Metal Co. v. Abraham, 296 P 82, 211 Cal 552

(5) An employer's action against an employee for damages to a truck driven by him through his negligence is not an action for money due under the contract of employment, the action being one for damages which were contingent upon the employee's failure to perform his contract.—King v. Cline, 194 P. 290, 49 Cal App. 696

(6) A claim against a town for the balance due a contractor based on the negligent failure of the town to levy a tax on the improvement districts to pay the contractor is one ex delicto, and not ex contractu, and is not subject to attachment—Neilson v Title Guaranty & Surety Co., 199 P. 948, 101 Or 262.

(7) A complaint, alleging that defendant assigned an interest in a claim to plaintiff and agreed not to settle without his knowledge and approval, and thereafter recovered judgment on the claim and without the knowledge or approval of plaintiff settled the claim, received a large sum of money therefor, and refused to pay any part of it to plaintiff, and that defendant made the settlement without authority, maliciously and fraudulently intending to convert the same, etc., and asking exemplary damages and a body execution, alleges a cause of action ex delicto, and an attachment was rightfully dissolved—Thuringer v. Bonner, 222 P. 1118, 74 Colo 539

Claim not arising in tort

A claim for damages for use of property under a contract providing therefor is not one arising ex delicto, and may be asserted against a nonresident defendant by a bill in chancery supported by attachment under a statute authorizing attachments in equity against a nonresident but not embracing damages for a tort—Perkins v Friedberg, 110 S E 618, 90 W Va. 185

13. Mudge v. Steinhart, 20 P 147, 78 Cal 34, 12 Am.S R. 17—6 C J. p 80 note 20

14. Ky—Taulbee v. Campbell, 44 S W.(2d) 275, 241 Ky 410
Mont.—Daley v. Torrey, 230 P. 782, 71 Mont. 513.
Pa.—Longbotham v. Longbotham, 18 Pa Co 460
6 C J p 80 notes 21-23, p 81 note 24

Fraud or other wrongful act

Plaintiff, suing to recover money only for alleged fraud or other wrongful act, was entitled to a warrant of attachment under Civ Pract Act § 902, authorizing the remedy in such case—Gobel v Gobel Estate Corporation, 280 N Y S 32, 224 App Div. 761.

Personal injury

(1) The words "personal injury by wrongful act," within the meaning of a statute allowing attachment in actions for such injury, comprehend injuries by libel or slander—Smith v Buck, 162 N.E 382, 119 Ohio St. 101, 61 A L R. 1343.

(2) So, where the statute provides for an attachment in actions for any "injury to the person, caused by negligence or wrongful act"—Tisdale v Eubanks, 104 S E 339, 180 N C. 153, 11 A.L.R. 374.

(3) Under the act providing an action for causing the death of another, but one cause of action is contemplated, and the injury to the person causing the death continues to be a constituent and essential feature of the action, and has the effect of permitting an attachment of property under a statute giving the right of attachment in actions for an injury to the person by negligence or any wrongful act—Mitchell v. Talley, 109 S E 882, 182 N C 683.

Injury to property

(1) "Property," as used in the attachment statute, includes every species of estate, both real and personal, whether choate or inchoate, and is sometimes used in the sense of "estate," and the wrongful diminution of the owner's estate by fraud and deceit of another constitutes "injury to property" within the statute. So, where a nonresident relying on alleged fraud transferred land in another state for land in this state and built improvements thereon, there was an injury to property located "in this state" within the act—Ponsonby v. Sacramento Suburban Fruit Lands Co., 291 P. 167, 210 Cal 229.

(2) An action for the wrongful occupancy of premises by refusing to remove occupant's property therefrom, after permission to keep it there was revoked, was an action for "injury to property," within Civ Pract. Act § 902, specifying the actions in which attachment is authorized—Zenith Bathing Pavilion v Fair Oaks S. S Corporation, 207 N Y S. 306, 211 App Div 492, reversed on other grounds 148 N E. 532, 240 N Y. 307.

"Trespass on the case"

An action of trover is a species of action on the case, and consequently warrants the issuance of a writ of attachment under a statute authorizing such writ in aid of an action of "trespass or trespass on the case"—Wholesale Grocers Corporation v. Richheimer Brokerage Co, 233 Ill. App 64 Contra Meyer v. Meyer, 215 Ill App. 203.

"Outrageous battery" within the practice act providing for the issuance of attachment in such cases has a legislative meaning, and the act complained of must be malicious and akin to mayhem. An administrator's affidavit, alleging that defendant shot the administrator's wife, killing her instantly, establishes an "outrageous battery," within the meaning of such act—Messina v. Petroli, 167 A. 767, 11 N J.Misc. 583.

Special statutory action

An attachment writ may issue in an action to cancel an oil lease and

extended by construction beyond the clear intention of the statute.[15] Under a statute authorizing attachment in "actions for the recovery of money," an attachment is authorized in tort for damages;[16] and where the legislature authorizes an attachment in all actions for the recovery of money except those for certain specified wrongs, the remedy is available in any tort action not expressly excepted.[17]

Liability criminally incurred. Under a statute allowing the remedy where defendant's liability was criminally incurred, attachment will lie in an action to recover unliquidated damages for assault and battery,[18] to recover money lost at gambling,[19] or to recover on a demand arising out of a rape on plaintiff's daughter.[20] The mere commission of a criminal offense by defendant is not, however, sufficient to warrant an attachment under such a statute, but there must also have been some damage resulting to plaintiff from such act.[21]

§ 14. —— Demand Not Liquidated

Generally, attachment will not lie where the damages claimed are so uncertain that the amount cannot be definitely stated.

The remedy by attachment is not confined to cases where a debt, in the technical sense, exists; usually it extends to every demand arising ex contractu where any fixed standard for determining the amount is supplied by the contract itself or the law acting on it,[22] and it is immaterial in such cases that the amount of the damages must be proved at the trial,[23] the fact that the damages are

recover a penalty and damages for commission of a tort, under a special statute providing therefor, the general attachment statute restricting attachment to contract actions being inapplicable; and failure of the former statute to provide a form of affidavit is immaterial, in view of the code provision that, where the course of proceeding is not specifically pointed out, any suitable mode may be adopted.—Daley v. Torrey, 230 P. 782, 71 Mont. 513.

Fraud in execution or performance of contract

Under 1 Comp St (1910) p 133 § 1, authorizing the order for attachment on proof of fraud warranting an order for capias ad respondendum, and Pract.Act (1908) § 57 (3 Comp St [1910] p 4069 § 57), providing that a capias may issue where it is shown that defendant fraudulently contracted the debt or incurred the demand, a motion to vacate an order appointing an auditor and directing the giving of notice of the issuance of a writ of attachment was denied, as against the contention that, because the basis of the action was fraud in the execution or performance of the contract, the action sounded in tort and not in contract, and that the amount sought to be recovered was for unliquidated damages.—Williams & Davis v Davis, 147 A 337, 105 N J Law 542.

Specification of particular tort not controlling

Remington Code (1915) § 648 subd 9, by specifying as ground for attachment that the action is brought for injuries from the commission of some felony or for the seduction of some female, does not, by the inclusion of such torts, exclude all others from the attachment statute not limiting the causes for which an attachment may be issued, as it is one of nine independent causes.—State v. Superior Court of State of Washington, King County, 197 P. 331, 115 Wash. 359.

15. Meyer v Meyer, 215 Ill App. 203.—6 C J p 80 note 23, p 81 notes 24, 25

16. Shedd v Calumet Const Co., (C C A Ind) 270 F 942, certiorari denied 41 S Ct. 450, 256 U S. 691, 65 L Ed 1174

17. Quevli Farms of Lakefield v. Union Sav Bank & Trust Co of Davenport, Iowa, 226 N.W 191, 178 Minn 27.—Stockhaus v. Lind, 183 N W. 844, 149 Minn 423.

Alienation of affections

A writ of attachment may issue in an action for alienation of affections, wherein it was properly alleged that defendant had debauched plaintiff's wife, although the legislature has expressly excepted an action for seduction from the operation of the act.—Stockhaus v. Lind, 183 N.W. 844, 149 Minn 423.

Slander of title

"The statute, Mason's Minn.St 1927, § 9342, authorizes an attachment in all actions for the recovery of money except those for certain specified wrongs It expressly excepts from its operations actions for libel or slander, but not actions for slander of title. As actions for slander of title are not actions for defamation, but for the recovery of actual pecuniary loss resulting from malicious and groundless disparagement of title or property, they are not actions for libel or slander within the meaning of the statute, and an attachment may issue therein."—Quevli Farms of Lakefield v Union Sav Bank & Trust Co of Davenport, Iowa, 226 N W. 191, 178 Minn. 27.

18. Kirk v. Whitaker, 22 Ohio St 115.—Sturdevant v Tuttle, 22 Ohio St 111.—6 C J. p 81 note 27.

19. U S.—Jenks v Richardson, (C C.Ohio) 71 F. 365.

Ohio.—Wise v Martin, 5 Ohio S. & C. P 550, 7 Ohio N P. 660.

6 C J p 81 note 29

20. Kuehm v. Paroni, 19 P. 273, 20 Nev 203.

21. Conran v Fenn, 140 S W. 32, 159 Mo App. 664.

22. Cal.—Greenebaum v. Smith, 197 P 675, 51 Cal App. 693, error dismissed Smith v. Greenebaum, 44 S Ct 332, 264 U S 599, 68 L Ed. 869.
Ill.—Phelps v. Columbia Phonograph Broadcasting System, 255 Ill App. 294. See Lepman & Heggie v. Interstate Produce Co, 205 Ill App. 270.
La.—Chapman v. Irwin, 103 So. 263, 157 La. 920.
Tex.—Gray v Merritt, (Com App.) 276 S W 187, reversing Merritt v. Gray, (Civ App.) 262 S W. 538.
6 C.J. p 81 note 32.

Claims held sufficiently certain

(1) As plaintiff, who sued for breach of contract on which he advanced money and received nothing, could recover as damages the money so paid, the sum was certain and liquidated, so that attachment may issue.—Hamilton v. Baker-Hansen Mfg Co, 169 P. 238, 176 Cal 569

(2) Where it was necessary only to add up the items of an account to ascertain the total amount, and neither the existence of the debt nor its amount depended on any unascertained contingency, the amount was liquidated within the meaning of the attachment statutes.—Russell Co v. Wachman, 213 Ill App 348.

(3) A claim for breach of a contract to deliver a certain amount of bosh plates for a fixed amount is one for liquidated damages.—Howe v. Smeeth Copper & Bronze Co, (N.J.) 43 A. 24.

23. MacDonald v. Crawford, 288 P. 1088, 108 Cal App. 193. But see Lepman & Heggie v Interstate Produce Co, 205 Ill App. 270.

in that sense unliquidated not being determinative.[24] As a general rule, however, no attachment will lie where the contract itself does not furnish the measure of defendant's liability and the damages claimed are speculative or so uncertain that plaintiff cannot swear with any certainty to the amount that will be found due him.[25] Nevertheless, there are a number of cases in which attachment has been considered available, although the amount which plaintiff, if successful, should recover could not be definitely stated,[26] and the remedy is available, where it is expressly provided by statute, in cases involving unliquidated damages.[27]

§ 15. —— Demand Not Matured

a. Absence of express statutory provision

b. Statutes authorizing attachment

a. Absence of Express Statutory Provision

(1) In general

(2) Rescission of contract by plaintiff

(1) In General

Attachment is not ordinarily regarded as available in actions on unmatured demands unless the statutes expressly so provide.

The general rule is that, unless the statute expressly so provides, the remedy by attachment is not available in respect to a demand which is not due and payable,[28] and, if an attachment is issued

24. Force v. Hart, 272 P. 583, 205 Cal. 670.

25. U S—Dicks-David Co v. Edward Maurer Co., (D C N J) 279 F. 281.
Cal—Force v Hart, 272 P 583, 205 Cal. 670—MacDonald v. Crawford, 288 P. 1088, 106 Cal App 193—Ewer v. Jackson, 283 P. 110, 102 Cal App. 793—Doud v. Jackson, 283 P. 107, 102 Cal App 213
Mont—Heffron v Thomas, 201 P. 572, 61 Mont 10—Carter v Bankers' Ins. Co, 192 P. 827, 58 Mont. 319—Beartooth Stock Co v. Grosscup, 189 P. 773, 57 Mont. 595.
N J.—Sher v. Church, 107 A. 57, 93 N J Law 73—Skratt v. Carnera, 175 A. 366, 12 N J.Misc. 826—Park Lane Realty Co. v Davega, 167 A 30, 11 N J Misc 556—Levinson v. Seeman Bros, 166 A. 630, 11 N J. Misc 402.
N Y.—Carnera v. Schmeling, 260 N.Y S 82, 236 App Div. 460
Or—Osburn v. De Force, 257 P. 685, 122 Or 360, motion denied 262 P 222, 123 Or 352—Ruby v Whitten, 243 P. 559, 117 Or 271—Neilson v Title Guaranty & Surety Co, 199 P 948, 101 Or. 262
6 C J p 82 note 32
See Lepman & Heggie v Interstate Produce Co, 205 Ill App. 270.

Prospective profits

Attachment will not lie, in an action for breach of contract to buy the entire output of plaintiff's plant, in which the damage alleged was the loss of prospective profits, such damages being unliquidated—Noah MacDowell & Co. v. Edward & John Burke, Limited, 130 A. 199, 3 N.J. Misc. 740.

Jury question involved

A suit for damages for the failure to deliver goods pursuant to an executory contract of sale was for unliquidated damages, although plaintiff purchased from others at a higher price more than a month after the time for completion of delivery had elapsed, since whether the price paid was the fair market value at the time of delivery, and whether the goods purchased were of the same character and value as those contracted for, were questions for jury—T. J Parker, Inc v. Anthony-Hammond Chemical Works, 107 A 44, 93 N J.Law 11

26. Walton v. Walton, 100 S E. 176, 178 N C 73—6 C J. p 83 note 34

Breach of contract

In some jurisdictions, an attachment lies for unliquidated damages arising out of breach of contract—Walton v. Walton, 100 S E 176, 178 N C 73—6 C J. p 83 note 34 [a].

Illinois statute construed and applied

(1) Under Illinois Attachment Act § 1, entitling a creditor to an attachment against the property of his debtor, and § 31, authorizing attachments in aid of actions of assumpsit, debt, covenant, trespass, or trespass on the case, when the attachment is issued in aid of a pending action, it is immaterial whether there is any relation of creditor and debtor, or any liquidated indebtedness—Hoosier Veneer Co v Trusts & Guarantee Co., (C C.A Ill) 283 F 1, certiorari denied Trusts & Guarantee Co v. Hoosier Veneer Co, 43 S Ct. 97, 260 U S 733, 67 L Ed. 489.

(2) Accordingly, attachments in aid, in assumpsit, will lie even though the damages claimed are unliquidated, as in an action for breach of a contract to marry—Yalovec v. Furcich, 229 Ill App 396.

Alienation of affections

Under Remington Code (1915) §§ 647, 648, a demand for unliquidated damages for the alienation of affections of a husband will sustain an attachment where plaintiff has made an affidavit that the amount sued for is justly due, specifying it, there being no distinction between unliquidated damages for breach of contract or for torts for the conversion of property and unliquidated damages for alienation of affections, as constituting an "indebtedness" or "debt" within § 648, requiring a showing that defendant is indebted to plaintiff—State v. Superior Court of State of Washington, King County, 197 P. 321, 115 Wash. 359.

Against nonresident

The issuance of the writ of attachment against defendants, nonresidents, on an unliquidated claim, is authorized in Louisiana under the provisions of Act (1920) No. 215 which declares: "That in all suits instituted in any of the courts of this state, in which the demand is for damages arising from an offense, quasi offense or tort, where the defendant . . . is a non-resident of the state . . . the plaintiff shall have the right to sue out an attachment against the property of the defendant upon making affidavit and giving bond as now required by law in suits against non-resident defendants for other causes of action"—Yates v. Tessier, 5 La App. 214

27. Mueller v. Gollober, (Tex.Civ. App) 252 S.W. 1076.

28. Ga—Hensley v. Minehan, 114 S. E. 647, 29 Ga App 251.
Pa—Meyers v. Rauch, 4 Pa Dist. 333.
Tex.—Tsesmelis v. Sinton State Bank, (Com.App) 53 S W.(2d) 461, 85 A.L R 319, affirmed (Civ App) 35 S W.(2d) 451.
6 C J. p 83 note 35.

Demand held matured

(1) After a settlement by sales agents with a contractor for the royalty accruing to them under the terms of a contract, and releasing him from further liability thereon and accepting in lieu thereof the obligation of the city for whom the work was done, the compensation to which they were entitled under the contract became due so as to authorize an attachment therefor—

upon such a demand without statutory authority, it is void.[29] It has been held, however, that in an action for breach of contract of employment, an attachment may be granted for the balance of the salary due or to become due under the contract.[30]

(2) Rescission of Contract by Plaintiff

Where plaintiff rightfully rescinds a contract he may in a proper case resort to attachment notwithstanding the immaturity of the rescinded contract.

Where a party to a contract not yet matured is guilty of fraud or other conduct entitling the other party to rescind, and the latter does rescind, a cause of action arises in his favor which is immediately enforceable, and if such cause of action, left to plaintiff after rescission, is of a nature to warrant the issue of an attachment, he may resort to that remedy, notwithstanding the immaturity of the rescinded contract.[31]

b. Statutes Authorizing Attachment

(1) In general
(2) Joinder of demands due and demands not due

(1) In General

Statutes allowing attachment in the case of immature demands are strictly construed, and the remedy is available only as to such demands and to the extent that the statute contemplates.

In a number of states provision has been made by statute for the issue of attachments in certain cases where the demand sued on is not yet due, and in such cases plaintiff can proceed in attachment as though the debt were matured.[32] Such statutes usually limit the remedy on such demands within specified limits prescribing the conditions which must exist to authorize it, and where the grounds on which the attachment may issue in this class of cases are specially enumerated, the remedy is available only where one or more of the specified grounds exists.[33]

Although under some statutes it seems that the case may proceed to final judgment but that execution upon the judgment shall be stayed until the debt is due,[34] generally the proceedings can go no further before maturity of the debt than to create a lien, and no final judgment can be rendered until after maturity of the demand,[35] and as the power to attach furnishes the only authority to sue on a demand not due, it follows that if the attachment is invalid the action must abate,[36] while if the issue of an attachment is discretionary with the court or judge, and an attachment is refused, the action must be dismissed.[37]

Statutes allowing attachment before the debt has become due are not applicable to attachments based on matured obligations.[38]

Strict construction of statutes. It has been con-

Hunt v. Gardner, 112 So. 7, 147 Miss 374.

(2) Where, under the terms of a mortgage, plaintiff mortgagee was authorized to take possession of the mortgaged property whenever it considered possession essential to security of the note, and at its option to declare the note due and enforce collection of the balance due, and it did so, there was an indebtedness due upon an express contract for the payment of money, entitling plaintiff to an attachment action—Union Bank & Trust Co. v. Hummelbauer, 181 P. 332, 56 Mont. 82.

29. Kleine v. Nie, 11 S.W. 590, 88 Ky. 542, 11 Ky.L. 583—6 C.J. p. 83 note 36.

30. Cohen v. Walker, 77 N.Y.S. 105, 38 Misc. 114—Meinhart v. Contresta, 194 N.Y.S. 593.

31. Russell v. Gregory, 62 Ala. 454—6 C.J. p. 83 notes 37, 38, p. 84 note 39.

32. Fla.—Caldwell v. People's Bank of Sanford, 75 So. 848, 73 Fla. 1165
Ga.—Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251.
Tex.—Green v. Hoppe, (Civ.App.) 175 S.W. 1117.
6 C.J. p. 84 note 40.

Intent to defraud creditors

Where the complaint in an action on a note not yet due, and the affidavit for attachment, alleged that defendants had disposed of their property with intent to delay and defraud their creditors, and had converted their property or a part thereof into money to place it beyond the reach of their creditors, and that nothing but time was wanting to fix absolute indebtedness between plaintiff and defendants, such allegations bring plaintiff within provisions of Remington Code (1915) § 649, allowing attachment previous to time debt becomes due—Protzman v. Billings, 206 P. 848, 120 Wash. 123.

33. Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251—6 C.J. p. 84 notes 41, 42.

"It is only in the exceptional cases of fraud on the part of the debtor, mentioned in sec. 237 of the code of civil procedure, Gen.Stat., 564, that an action can be properly commenced on a claim before it is due"—Green v. Raymond, 2 N.W. 881, 9 Neb. 295, 297.

34. Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251.

35. Cox v. Peoria Mfg. Co., 60 N.W. 933, 42 Neb. 660—6 C.J. p. 85 note 43.

36. Streissguth v. Reigelman, 43 N.W. 1116, 75 Wis. 212, approving Gowan v. Hanson, 13 N.W. 238, 55 Wis. 341.

Action dependent upon attachment

In order to bring suit upon notes and mortgages before maturity on the ground of fraud under a statute, providing that when the debt was incurred for property obtained under false pretenses a creditor may sue on a claim before it is due and have attachment against debtor's property, it is necessary to have attachments of the debtor's property issued, the purpose of the statute being not to allow the bringing of an action before the debt is due, but to provide the means whereby a creditor might protect himself by getting his property into the custody of the court, to be held to secure such judgment as might eventually be rendered—Birken v. Hickey, 176 N.W. 137, 42 S.D. 472.

37. Cox v. Peoria Mfg. Co., 60 N.W. 933, 42 Neb. 660.

38. Union Bank & Trust Co. v. Hummelbauer, 181 P. 332, 56 Mont. 82.

sidered that the rule stated supra § 4 b (1) requiring attachment proceedings to be confined strictly within the limits of the statute by which they are authorized is especially applicable to a case where the debt in aid of which the remedy is sought is not due.[39]

(2) Joinder of Demands Due and Demands Not Due

Attachment may, under some statutes, issue for the aggregate amount of demands due and demands not due.

Under some statutes it is held that a debt not due may be joined with one that is due, and an attachment be issued for the aggregate amount, where grounds of attachment applicable to both debts are stated in the affidavit.[40]

§ 16. —— Contingent Demand

Attachment is not available where plaintiff's claim is not fixed and depends on a contingency which may never happen.

In order to warrant attachment upon a demand not matured, the debt must be one which will certainly become due in the future, and accordingly the remedy is not available where the indebtedness of defendant to plaintiff depends upon a contingency which may never happen,[41] nor will the improper issue of an attachment on such a demand be cured by the subsequent happening of the contingency which fixes defendant's liability.[42]

Fixed indebtedness subject to be defeated. The rule just stated applies only where the happening of a contingency is a prerequisite to the fixing of an absolute indebtedness, and does not prevent attachment upon an indebtedness which has already become fixed merely because it may be reduced or defeated in the event of the happening of a certain contingency;[43] and so where the contingency was to take place at the expiration of the contract, and plaintiff set forth the contract, which showed that defendant had breached the contract and rendered it terminated, and stated in his affidavit that defendant was justly indebted, the court erred in abating the attachment on the ground that it was levied on a contingency.[44]

§ 17. —— Demand Otherwise Secured

a. In general
b. Statutes limiting right

a. In General

In absence of statutes to the contrary the right to attachment is not defeated by the fact that the demand in suit is otherwise secured.

In the absence of any statutory provision to the contrary, the fact that a demand is otherwise secured will not prevent the issuance of an attachment in aid of an action thereon,[45] and accordingly the fact that a landlord has a lien for his rent does not preclude him from proceeding by attachment,[46] and a creditor whose claim is secured by a mortgage on personal property may waive his lien under the mortgage and maintain attachment against the debtor's property.[47]

In some jurisdictions it is held that the creditor must elect whether he will proceed by attachment or sustain his rights by virtue of the security,[48] but there is authority to the effect that he need not waive his security to avail himself of the remedy of attachment.[49]

39. Lederer v. Rosenthal, 74 N.W 971, 99 Wis 285.

40. Ala.—Kahn v. Kuhn, 44 Ark 404
Ga.—Selleck v. Twesdall, Dudl 196
6 C J p 85 note 49

41. Henderson v Thornton, 37 Miss. 448, 75 Am.D. 70—6 C J. p 85 note 50.

Demand held not contingent

Where a note secured by a lien was an unconditional promise to pay a certain sum the payee's claim was not a "contingent" claim rendering the issuance of the attachment void—Walden v Locke, (Tex. Civ App) 49 S W (2d) 832

42. Barth v Graf, 76 N.W 1100, 101 Wis 27—6 C.J. p 86 note 51.

43. Brown v. Cairns, 77 N W. 478, 107 Iowa 727—6 C.J. p 86 note 52.

44. Paxton v Trabue, (Tex.Civ. App) 216 S.W. 399.

45. Kan—State Bank v Mottin, 28 P 200, 47 Kan 455, 27 Am S R 306
Tex.—Stanley v Hoffman, (Civ App) 57 S.W (2d) 270—Walden v Locke, (Civ App) 49 S W (2d) 832.
6 C J. p 86 note 53

46. Ragsdale v. Kinney, 24 So. 443, 119 Ala. 454—6 C.J p 87 note 55

47. Pech Mfg. Co v Groves, 62 N W. 109, 6 S D 504—6 C J p 86 note 54.

48. Ottumwa Bank v. Totten, 68 S W 386, 94 Mo App. 596—6 C J. p 86 note 54 [a]

49. Walden v. Locke, (Tex Civ App.) 49 S W (2d) 832.

In Washington

(1) Under Ballinger Codes & St Annot § 5893, made applicable to chattel mortgage foreclosures by § 5879, and providing that plaintiff shall not prosecute any other action for the same matter while he is foreclosing his mortgage, and § 5351, requiring the affidavit for attachment to specify the amount of indebtedness, plaintiff in an action to foreclose a chattel mortgage may not have a writ of attachment issued against additional property before judgment, although an attachment is an ancillary proceeding, the intent of § 5893 being to prevent a mortgagee securing an additional remedy in anticipation of a deficiency judgment, while looking to the mortgage security, and before exhausting the same, and it being impossible for plaintiff, prior to a deficiency judgment, to state in his affidavit the amount of indebtedness, that is, the deficiency.—Advance Thresher Co. v. Schimke, 91 P. 645, 47 Wash. 162.

(2) The statute does not, however, prevent a lienholder from using the remedy of attachment to seize the property on which his lien was being foreclosed.—Market Operating

Where parties agree upon security for a debt, such security will not be presumed to be of value sufficient to support such debt, preventing resort to attachment proceedings,[50] and plaintiff seeking foreclosure of a trust deed is not required to show the value of the existing security and to limit an additionally sought attachment on an unencumbered tract to the deficiency in the existing security.[51]

b. Statutes Limiting Right

To preclude an attachment under statutes denying the right where plaintiff's claim is secured, the security must be of the kind contemplated by statute.

In some jurisdictions, the statutes deny the right to proceed by attachment to a creditor whose demand is secured by mortgage, lien, pledge, or otherwise; but in order that such a provision should preclude an attachment, the security given must be of the kind contemplated by the statute,[52] valid,[53] and of a fixed, determinate character, capable of

Corporation v. Crull, 5 P.(2d) 340, 165 Wash. 306.

50. Walden v. Locke, (Tex.Civ.App.) 49 S.W.(2d) 332.

51. Stanley v. Hoffman, (Tex.Civ.App.) 57 S.W.(2d) 270.

52. W. Fine & Son v. Hall, (Cal.App.) 21 P.(2d) 697—Standard Auto Sales Co. v. Lehman, 186 P. 178, 43 Cal.App. 763—6 C.J. p. 87 notes 56, 57.

Circumstances not precluding remedy

In an action to enforce a stockholder's liability, based on the corporation's issuance of negotiable warehouse receipts, plaintiff's right to attachment against the stockholder's property is not barred by reason of having filed a claim in bankruptcy court or because a bond covered warehousemen's liability.—W. Fine & Son v. Hall, (Cal.App.) 21 P.(2d) 697.

Assignment for benefit of creditors

Where a statute provides, among other things, that an attachment may issue, if the party applying for the same is not secured by mortgage, lien, or pledge upon real or personal property, a creditor of an insolvent, after consenting to an assignment by him of all his property for the benefit of creditors under which he is a preferred creditor, and certain to receive his proportion of property assigned, cannot, without attacking the assignment for fraud or otherwise, procure an attachment against the insolvent's property. An assignment under such circumstances is the very best security a creditor may have.—Elling v. Kirkpatrick, 9 P. 900, 6 Mont. 119.

Stockholder of mortgagor corporation

(1) The liability of a stockholder, arising under Const. art. 12 § 3, and Civ.Code § 322, declaring him individually and personally liable for his proportion of every debt contracted by the corporation during the time he is a stockholder, is one on the contract of the stockholder, arising from his implied offer when he becomes a stockholder, accepted by the creditor when he extends credit, and is direct, primary, and independent of that of the corporation, and so unsecured by mortgage, although the corporation's debt is so secured, so that in an action thereon the stockholder's property may be attached.—Aronson & Co. v. Pearson, 249 P. 188, 199 Cal. 286, 51 A.L.R. 1380—6 C.J. p. 87 note 57 [f] Contra Foreign Mines Dev. Co. v. Boyes, (C.C.Cal.) 180 F. 594.

(2) The fact that the stockholder owns all but three of corporation's five thousand shares does not make him and it the same entity and its mortgage his, and so prevent attachment in the creditor's action on his stockholder's liability.—Aronson & Co. v. Pearson, 249 P. 188, 199 Cal. 286, 51 A.L.R. 1380.

Retention of title by vendor or seller

(1) Code Civ.Proc. § 537, prohibiting attachments to enforce obligations secured by a mortgage, lien, or pledge unless such security has become valueless, etc., contemplates only the forms of security therein named, and does not preclude attachment by the seller of an automobile under a contract by which he retained title and right to retake possession upon default in payment, since such contract does not create a "mortgage," nor is it a "lien" or a "pledge."—Standard Auto Sales Co. v. Lehman, 186 P. 178, 43 Cal.App. 763.

(2) So where plaintiff and defendant entered into an executory contract of sale, under which plaintiff retained title until defendant had complied with the terms thereof, as plaintiff retained title, he had no lien, and in an action by plaintiff on purchase-money note, it not being secured by a mortgage or lien on the property, plaintiff was entitled to a writ of attachment.—Smith v. Bunston, 234 P. 836, 72 Mont. 535.

(3) It has been held, however, that a vendor of land retaining title until all payments should be made had security at least equal to that of a vendor's lien or mortgage, and, in his action to recover unpaid installments, was not entitled to attach defendant's personal property.—Richvale Land Co. v. Johnson, 152 P. 212, 28 Cal.App. 296.

(4) A vendor under an executory land contract, having retained title as security for purchase price, is not entitled to an attachment in an action for balance due.—Title Guarantee & Trust Co. v. Stahler, (Cal.App.) 59 P.(2d) 515—6 C.J. p. 87 note 56 [d] (1).

Equitable lien

Where plaintiffs, alleging rescission of a land purchase contract in pais, sought return of the money paid by them because of alleged fraud and partial failure of consideration, they were not entitled to attachment in the absence of a showing that their equitable lien arising out of the fraud was or had become valueless.—McCall v. Superior Court in and for Imperial County, (Cal.) 36 P.(2d) 642.

Pledge

Under Rev.Codes §§ 6656, 6657, authorizing an attachment in an action on contract, etc., where the contract is not secured by any pledge, etc., of personal property, or where such security has become valueless, an instrument transferring accounts from a debtor to a creditor with authority to collect them and apply the proceeds on the indebtedness and naming a third person to collect the accounts and remit sixty-five per cent to the creditor, and thirty-five per cent to the debtor, but reserving to both parties the right to collect accounts, constituted a "pledge" securing payment of the indebtedness; and hence an attachment could not be sustained on an affidavit reciting that the claim was not and never had been secured by any mortgage, lien, or pledge, although under § 5776 the lien of a pledge depends on possession, especially as § 5794 apparently recognizes constructive delivery of property not capable of manual delivery.—Savage Tire Sales Co. v. Stuart, 203 P. 364, 61 Mont. 524.

53. Bowman v. Wade, 103 P. 72, 54 Or. 347—6 C.J. p. 87 note 58.

Void or insufficient mortgage

Plaintiff, suing on a note, may obtain an attachment, notwithstanding the statute, where a chattel mortgage securing the note is void,

being enforced with certainty and depending on no conditions.[54]

§ 18. —— Statutory Liability

Attachment will lie in a suit to enforce a statutory liability only when the demand is one contemplated by the attachment statute.

Where defendant's liability to plaintiff arises purely from statute it is not ordinarily regarded as a demand on which an attachment will lie under a statute authorizing the remedy only on causes arising out of contract, express or implied,[55] but, where the demand is regarded as arising on contract as well as by virtue of the statute, attachment will lie.[56] Under a statute authorizing attachment for "any money demand" the remedy will lie on a statutory penalty where the amount is fixed or can be certainly ascertained.[57] Under United States Revised Statutes § 915 (28 U.S.C.A. § 726), providing that in common-law causes in the district courts plaintiff shall be entitled to similar remedies by way of attachment as are provided by the laws of the state in which such court is held for the courts thereof, a federal district court sitting as a common-law court, as distinguished from an admiralty or an equity court, may authorize the issuance of a writ of attachment in causes of action arising under statutes as well as in causes arising under the common law,[58] although there is also authority for a more narrow construction limiting the right of attachment to causes of action arising under the common law.[59]

§ 19. —— Joining Cause Not Authorizing with One Authorizing Attachment

Plaintiff cannot obtain an attachment covering both claims contemplated by the statute and claims not within its scope.

A party holding a claim on which attachment lies cannot join with it another claim on which the remedy will not lie and then obtain an attachment covering both,[60] and if an attachment is obtained under such circumstances it may be dissolved in toto.[61] The mere fact that plaintiff has demanded in his complaint other sums than those for which an attachment will lie but for which no attachment is asked, however, does not affect his right to the attachment, since the indebtedness set up in the affidavit need not include all the damages claimed in the complaint.[62]

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or, if valid, insufficient as full security—Edwards v. Dealers' Ice & Cold Storage Co., 148 P. 908, 17 Ariz 98.

54. Edwards v. Dealers' Ice & Cold Storage Co., supra—6 C.J. p 87 note 59.

55. Butler v Peters, 205 P. 247, 62 Mont. 381, 26 A.L.R. 560—6 C.J. p 88 note 65.

Failure to file annual report

An action by a corporation's creditor against a director under Rev Codes (1921) § 6003, making the director liable for the corporation's debts on failure to make and file an annual financial report, is not an "action upon a contract express or implied," within Rev Codes (1921) §§ 9256, 9257, authorizing issuance of an attachment in such an action, the action being one to recover a statutory penalty—Butler v. Peters, 205 P. 247, 62 Mont. 381, 26 A.L.R. 560.

Illegal distribution of corporate assets

An action by a corporation to enforce the liability prescribed by statute for illegally distributing its assets to stockholders is not an action on a contract, express or implied—Talcott Land Co. v Hershiser, 195 P. 653, 184 Cal. 748

Violation of anti-trust law

An attachment will not lie in a suit by the attorney-general against a nonresident to recover penalties for violating the anti-trust laws under a statute providing that an attachment shall not be granted against a nonresident except on a debt or demand arising on contract.—State v Ehle, 166 S.W. 535, 112 Ark. 385.

56. Kohler v. Agassiz, 33 P. 741, 99 Cal. 9—6 C.J. p 88 note 66.

Liability of:

Bank stockholder see supra § 12.

Corporate stockholder generally see Corporations § 676 [14 C.J. p 1080 note 33—p 1083 note 71]

57. Dittman Boot, etc., Co. v. Mixon, 24 So 847, 120 Ala. 206—6 C.J. p 88 note 67.

Penalty for liquor selling

Under the Mississippi statute an attachment may be had in an action to recover the penalty for the violation of a statute which forbids any person to sell or give away unlawfully intoxicating liquors at his place of business—State v Marshall, 56 So. 792, 100 Miss 626, Ann Cas. 1914A 434—Adams v. Evans, (Miss.) 19 So 834—6 C.J. p 88 note 67 [a].

Violation of anti-trust law

The words "demands founded upon any indebtedness, whether the same be legal or equitable," contained in Code (1906) § 536 (Hemingway Code § 393), authorizing attachments in chancery against nonresidents, embrace statutory penalties for violating the Anti-Trust Law.—Ætna Ins Co v. Robertson, 88 So 833, 126 Miss 387.

58. Little v. Grieco-Gibbs, Inc., (D.C Mass.) 12 F Supp. 798.

59. Dixon v. Corinne Runkel Stock Co., (D.C.N.C.) 214 F. 413.

Infringement of copyright

Since no authority exists in the United States for obtaining a copyright beyond the extent to which congress has authorized it, a suit for infringement of a copyright is not a "common-law cause" in which plaintiff is entitled to an attachment—Dixon v. Corinne Runkel Stock Co., (D.C.N.C.) 214 F. 413.

60. Baldwin v. Napa, etc., Wine Co., 70 P. 732, 137 Cal 646—6 C.J. p 88 note 70

61. Vollmer v. Spencer, 51 P. 609, 5 Idaho 557—6 C.J. p 88 note 71.

In New Jersey the decisions distinguish between quashing the writ which ends the suit, and releasing property unlawfully attached under it, and where part of plaintiff's demand is for unliquidated, and part for liquidated, damages, after defendant enters a general appearance, the writ cannot be quashed, but the proper remedy is to have the attached property released from any lien for the claim so far as it was one for unliquidated damages—Laura v. Puncerelli, 102 A. 433, 91 N.J.Law 38, affirmed 105 A. 894, 92 N.J.Law 518—Sullivan v. Moffatt, 52 A. 291, 68 N.J. Law 211—Moore v. Richardson, 47 A. 424, 65 N.J.Law 531—Hecksher v. Trotter, 5 A. 581, 48 N.J.Law 419.

62. Hamilton v. Baker-Hansen Mfg. Co., 169 P. 238, 176 Cal 5—Ewer v. Jackson, 283 P. 110, 102 Cal.App.

§ 20. Persons Entitled

a. In general
b. Foreigners and nonresidents
c. Debtor against himself

a. In General

Generally any creditor who has not agreed to forbear pressing his claim, whether he is the original creditor or has succeeded by assignment to the rights of others, or whether he is the plaintiff or the defendant in the action before the court, is entitled, where proper grounds exist, to the issuance of an attachment.

The right to process of attachment is ordinarily given to creditors alone[63] As a rule, however, when proper statutory grounds for the issuance of an attachment exist, any creditor is held to be entitled to the remedy,[64] regardless of whether he is an original creditor whose claim arises out of transactions between himself and the debtor or has succeeded by assignment or otherwise to the claim of a third person against the debtor[65] Where, however, plaintiff, who sued out the writ for his sole benefit, was not sole owner of the cause of action sued on, the writ of attachment must be quashed and vacated,[66] and since a suit cannot be maintained in equity in the name of one party for the use of another, an attachment in equity on a claim owned jointly by plaintiff and another will be limited to the interest of plaintiff.[67]

Assignee of debt fraudulently contracted. Where the common-law principle that such fraud is personal to the contracting parties and does not follow the assignment is still in force, the assignee of a debt fraudulently contracted is not entitled to an attachment against the debtor,[68] but the rule is otherwise where the underlying principle has been abrogated;[69] and the rule first stated in this paragraph is not applicable where the assignee is not the owner of the claim by purchase, but for the purpose of collection only, since the assignor still has a beneficial interest in it carrying the right of attachment into the hands of his assignee.[70]

A surety suing the principal to compel him to discharge the debt or to give indemnity may have an attachment against the principal, notwithstanding there is an action pending against him and his principal seeking a common-law judgment against them for the debt.[71]

Under counterclaim or cross complaint. A defendant who interposes a counterclaim or cross petition may, under the code practice, enforce it by attachment, although the statute in terms gives the right only to "plaintiff," the word being there used in the sense of "claimant" or "moving party."[72] So a defendant in interpleader filing a cross complaint against plaintiff may attach the fund in dispute.[73]

Agreement for forbearance. Where a creditor expressly agrees, upon sufficient consideration, to take no step to collect his debt within a given time, he cannot maintain an attachment thereon within the time specified.[74]

b. Foreigners and Nonresidents

Subject to prevailing statutory provisions, the right to an attachment is not ordinarily affected by questions of citizenship or residence.

Under statutes so providing the right to proceed by process of attachment may be limited to a citizen of the state or to a citizen of some other of

793—Doud v Jackson, 283 P. 107, 102 Cal App 213

63. Crom v Henderson, 175 N W. 983, 188 Iowa 227—6 C J. p 38 note 67

Debt evidenced by notes to corporate officers

Where a corporation is the owner of a debt evidenced by notes which for convenience are taken in the name of its officers it may be entitled to an attachment—Maryville Mercantile Co. v. Hedgecock, (Mo App) 186 S W. 55

Debt for rent sufficient

A debt for rent owed plaintiff by defendant is sufficient to establish the debtor-creditor relationship so as to support an attachment suit questioning the right of defendant and his vendee to merchandise sold defendant by plaintiff—Maryville Mercantile Co. v. Hedgecock, (Mo App) 186 S W. 55

64. Gould v. Statesboro Bank, 31 S E 548, 105 Ga 373—6 C J p 38 note 69

65. McLane v Colburn, 2 Ohio N P. (N S) 257—6 C J p 39 note 70

66. Haley v. Pearson, (Tex Civ App) 14 S W (2d) 313 But see Levy v Payne, 208 Ill App 141

67. Leatherman v. Sanders, (W Va) 185 S E 556

68. U S—Cheshire Provident Inst. v Johnston, (C C Minn) 5 F Cas No 2,659

Okl—Thwing v. Humphrey, 75 P. 1127, 13 Okl 646—Thwing v. Winkler, 75 P. 1126, 13 Okl. 643

69. Jandera v. Lakefield Farmers' Union, 185 N.W. 656, 150 Minn. 476.

70. Remington v Fragulius, 208 P. 65, 120 Wash 563

71. Engleman v. Ball, 4 Ky Op. 49

72. Cal—Allers v. Beverly Hills Laundry, 277 P. 337, 93 Cal App. 580

Kan—Johnson v. Hay, 190 P. 613, 107 Kan 148
6 C.J p 39 note 74.

Cross petition against codefendant

"Because the provisions of the Code authorize the plaintiff, in certain cases, to have an attachment against the property of the defendant, it is seriously urged that the bank, being a defendant, could not procure an attachment against a codefendant. Although named as a defendant in the action, the bank occupied the position of a plaintiff in its cross-action against Hay, and was entitled to procure an attachment the same as if the action had been brought originally by it as plaintiff."—Johnson v. Hay, 190 P. 613, 615, 107 Kan. 148

73. Interlocking Stone Co. v Scribner, 126 P. 178, 19 Cal.App 344.

74. Craigmiles v. Hays, 7 Lea (Tenn.) 720.

the United States,[75] but as a rule at the present time the right is not ordinarily affected by the question of citizenship.[76] So although the right to invoke the remedy is, in some states, restricted within narrower limits in the case of a nonresident than in that of a resident,[77] generally the remedy is available to nonresident creditors.[78] The exercise of the right by a nonresident will not, however, be permitted to prejudice domestic creditors.[79]

c. Debtor against Himself

Under some circumstances a debtor may attach his own property for the benefit of a creditor.

In some states, in the absence of fraud, a debtor may attach his own property for the benefit of a creditor, where authority has been given him so to do, or where there has been a subsequent ratification of his act by the creditor, and such attachment is binding on subsequently attaching creditors.[80]

§ 21. Persons Liable

a In general
b. Women
c. Persons under disability
d Persons in fiduciary capacity
e. Devisees

a. In General

Attachment is available against any natural or artificial person contemplated by the attachment statutes.

The remedy by attachment is available only against the property of persons natural or artificial,[81] and, as a general rule, the party against whom an attachment is available must stand in the relation of debtor to the plaintiff in the action.[82] However, where the statutes so provide, the property of all persons and corporations other than those excepted may be subject to attachment.[83] Under a statute authorizing attachment only in actions against a natural person or a domestic or foreign corporation, an attachment may issue in an action against an unincorporated association sued in the name of its president.[84] Enforcement of the remedy will not ordinarily be denied solely because defendant is a nonresident,[85] alien,[86] or foreigner,[87] but an attachment issued against a deceased person is void,[88] and a person in the naval service of the United States is not within a statute exempting soldiers in the actual military service from the process.[89]

75. Stockbridge v. Fahnestock, 39 A. 95, 87 Md 137—6 C J. p 39 note 78.

76. N Brenner & Co, Ltd v Erie Iron and Metal Co, 28 Pa Dist. 927—6 C J. p 39 note 79.

77. Hazard v Jordan, 12 Ala. 130—6 C J. p 39 note 81.

78. Miss—Hunt v. Gardner, 112 So 7, 147 Miss 374.
Mo—State ex rel Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S.W (2d) 28, 331 Mo. 1015, 85 A L. R 1378, certiorari denied Ferrocarriles Nacionales de Mexico v Rutledge, 53 S Ct. 689, 289 U S 746, 77 L Ed. 1492.
Mont—Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P (2d) 932, 97 Mont. 503, certiorari granted Clark v Willard, 55 S Ct 118, 293 U.S 546, 79 L Ed 650, affirmed 55 S Ct. 356, 294 U S. 211, 79 L.Ed. 865, 98 A L R 347
Pa—Brenner v. Iron, etc., Co., 28 Pa Dist. 927.
6 C.J. p 39 note 80

79. Disconto Gesellschaft, v Umbreit, (Wis) 28 S.Ct. 337, 208 U S. 570, 52 L Ed 625.

80. Bayley v. Bryant, 24 Pick. (Mass) 198—6 C J. p 40 note 83.

81. Muller v. Leeds, 19 A. 261, 52 N.J Law 366—6 C J p 40 note 86

82. Ga.—Wiley v. Sledge, 8 Ga. 532.
Mo—Beeler v. Perry, 107 S W. 1008, 128 Mo App. 234.
Ohio—Gaughan v. Squares, 8 Ohio Dec (Reprint) 142, 1 Cinc L Bul 164
Tex—Kildare Lumber Co v. Atlanta Bank, 41 S W 64, 91 Tex 95.
6 C J p 40 note 87.
Wife of debtor
In an action against husband and wife on a contract binding only the husband, it was not error to carry an attachment running against both husband and wife into the judgment where it was levied on community property alone, since in such a case it was not necessary to name the wife as a party to the attachment—Godefroy v. Hupp, 160 P. 1056, 93 Wash. 371.

83. Mieyr v. Federal Surety Co of Davenport, Iowa, 34 P.(2d) 932, 97 Mont. 503, certiorari granted Clark v Willard, 55 S Ct. 118, 293 U.S. 546, 79 L Ed 650, affirmed 55 S Ct. 356, 294 U S. 211, 79 L.Ed. 865, 98 A.L R. 347
Attachment of corporation see Corporations §§ 1348, 1930 [14 a C J. p 868 note 71—p 870 note 24, p 1391 note 80—p 1397 note 55].
School district
Public funds belonging to a school district are not subject to attachment—Auran v. Mentor School Dist. No. 1 of Divide County, 228 N W. 435, 58 N.D. 934.

84. Meinhart v. Contresta, 194 N.Y. S. 593.
However, it has been held that in such an action a writ of attachment against defendant as president, and not against the property belonging to the association or owned jointly or in common by all the members thereof, must be vacated—Mertz v Fenouillet, 43 N Y S 217, 18 App Div. 222.

85. Ga—Southern Pac. Co. v. Di Cristina, 127 S E. 151, 33 Ga App. 439
Miss—Hunt v. Gardiner, 112 So. 7, 147 Miss. 374.
Mo—State ex rel Ferrocarriles Nacionales De Mexico v. Rutledge, 56 S W (2d) 28, 331 Mo 1015, 85 A L. R. 1378, certiorari denied Ferrocarriles Nacionales de Mexico v. Rutledge, 53 S Ct. 689, 289 U S. 746, 77 L Ed. 1492
Mont—Mieyr v. Federal Surety Co of Davenport, Iowa, 34 P.(2d) 932, 97 Mont. 503, certiorari granted Clark v. Willard, 55 S Ct 118, 293 U S 546, 79 L Ed 650, affirmed 55 S Ct. 356, 294 U.S. 211, 79 L Ed. 865, 98 A L R. 347.
6 C.J p 40 note 86 [c].

86. Md.—Field v. Adreon, 7 Md. 209.
N Y.—Olcott v. Maclean, 73 N.Y. 228.
2 C J p 1073 note 82 [c].

87. Willis v. Pearce, 6 Harr. & J. (Md) 191.

88. Purnell v. Frank, 10 So. 60, 68 Miss. 639.

89. Abrahams v. Bartlet, 18 Iowa 513.

Where, as is usually the case, the attachment is merely an ancillary remedy and its object is to obtain security for such judgment as may be rendered, it may properly issue, although personal service is also had on defendant;[90] but, if the statute authorizing attachment limits the remedy to cases where defendant is beyond the reach of ordinary process, it will not lie against a debtor who can be personally served,[91] although the fact that it becomes practicable after issue and service of the writ to give personal notice to defendant will not deprive plaintiff of his remedy by attachment.[92] A foreign attachment is available only against a nonresident.[93]

b. Women

Women are exempt from attachment under statutes exempting them from arrest in civil actions or being held in bail where the attachment acts presuppose the power so to treat the defendant.

In the absence of an express provision making the attachment law applicable to women, it has been held that they are exempt from its operation in a jurisdiction in which they cannot be held to bail and where a defendant in attachment cannot defend without putting in special bail,[94] and that, in a jurisdiction where it is unlawful to arrest a female in a civil action, an attachment cannot be had against a female under a statute authorizing an order by a commissioner of a writ of attachment where a capias ad respondendum might issue.[95]

c. Persons under Disability

(1) Infants
(2) Lunatics

(1) Infants

Unless specially exempted, infants are liable to attachment.

In the absence of a provision to the contrary an attachment may be had against the property of an infant.[96]

(2) Lunatics

Lunatics are subject to attachment except where the ground thereof necessitates a mental attitude of which the defendant is incapable.

Inasmuch as a personal suit at law can be maintained against a lunatic, there is no reason why an attachment may not, in a proper case, be issued against him, and in such case the conservator is not a necessary or proper party to the proceedings.[97] When, however, the ground for the attachment necessitates a certain mental attitude, for example, an intent to defraud creditors, it is a defense to show that defendant was insane and therefore incapable of such attitude.[98]

d. Persons in Fiduciary Capacity

(1) Executors and administrators
(2) Guardians
(3) Trustees

(1) Executors and Administrators

Although attachment is proper where a personal liability of executors and administrators is being enforced, it is, in the absence of statutory authority, inappropriate to enforce a demand against a decedent's estate.

The remedy of a creditor by attachment being obviously inconsistent with the usual administration of the assets of an estate, it is not, in the absence of express statutory authorization, available against an executor or administrator with respect to a demand against the estate of the decedent.[99] Such proceeding is, however, sometimes authorized by statute under which the process may issue against personal representatives in all cases which are within the purview of the act.[1]

Where it is sought to enforce a personal liability of the executor or administrator, although incurred

90. Boyd v Buckingham, 10 Humphr (Tenn.) 433.

91. Funk v. McCullough, 24 Miss 481—6 C J. p 40 note 89

92. Ill—Field v. Shoop, 6 Ill App 445.
Tenn—Grubbs v. Colter, 7 Baxt 432

93. Lyle v. Foreman, 1 Dall (U S) 480, 1 L Ed. 232—Barnet's Case, 1 Dall.(U S) 152, 1 L.Ed 77.

94. Pullinger v. Van Emburgh, 16 N J.Law 457.

Rule changed by statute

Soon after this decision, however, a supplement to the attachment act was passed, providing that the writ might issue against any absconding or absent female, changing the condition of the bond into the due and safe return of the goods, etc, and leaving out the surrender of defendant to the constable—Davis v Mahany, 38 N J Law 104—Hackettstown Bank v. Mitchell, 28 N J Law 516.

95. E S Higgins Carpet Co. v. Hamilton, (N J) 28 A. 716

96. Dillon v Burnham, 22 P. 1016, 43 Kan 77

97. Geipelt v Geipelt, 215 Ill.App 21—6 C J. p 41 note 1.

98. Chambers, etc, Glass Co. v. Roberts, 38 N Y S 301, 4 App Div. 20—6 C J. p 41 note 2

99. Ill—Carpenter v. Commonwealth Trust Co., 161 Ill App. 398.
Ky—Miller's Ex'x v People's Bank, 41 S W (2d) 1096, 240 Ky 185.
Pa.—East Bangor Consol. Slate Co. v. Badger, 95 A 559, 250 Pa. 422.
6 C J. p 41 notes 3, 4 [a]

Remedies available

"If the executor was not proceeding properly or there was danger of the estate being wasted, the remedy of the creditors was by action to settle the estate or to require the executor to give bond, or, if necessary, by proper injunctive proceedings."—Miller's Ex'x v People's Bank, 41 S. W (2d) 1096, 1099, 240 Ky. 185.

1. Cox v. Felder, 36 Ga. 597—6 C.J. p 41 note 4.

in the course of administration, an attachment is permissible if the grounds therefor exist.[2]

(2) Guardians

A guardian ordinarily cannot be proceeded against as such by attachment.

As a guardian holds the property of his ward in a representative capacity, he is not, as a general rule, liable to be proceeded against as such by attachment.[3]

(3) Trustees

Attachment will not issue against trustees as such.

An attachment ordinarily will not issue against a trustee in his representative capacity.[4]

e. Devisees

Attachment may in some instances lie against the devisees for a debt of their testator.

Attachment lies against a devisee for a debt of the testator only when the latter was liable to attachment therefor at the time of his death.[5]

§ 22. —— Joint Debtors or Codefendants

a. In general
b. Effect of solvency of codebtor

a. In General

Ordinarily a party may pursue the remedy of attachment against one of several joint debtors or codefendants without including the others.

While the statutes regulating attachments against joint obligors are not uniform, and a contrary result has been reached under some of them,[6] it is usually permissible to pursue the remedy against a part, without including all, where the ground for attachment exists as to some, but not as to others,[7] or where it is to the creditor's interest to proceed against one or a part of the debtors only;[8] and so where a warrant is granted against several defendants, the fact that it was not justified as against some of them does not vitiate it as against those as to whom it was justified.[9]

A surety undertakes to pay the debt of his principal, and does it with the knowledge that the law will authorize an attachment against his property if his principal does any of the acts which the law declares shall authorize such a proceeding.[10]

In a proper case it seems that plaintiff may have an attachment in an action brought in the alternative against several defendants,[11] but to justify the issuance of a warrant against defendants sued in the alternative, the evidence must be such as would sustain the warrant if each had been separately sued instead of all of them together; mere rumor and suspicion connecting one of the parties sued with the cause of action does not justify issuance of the warrant against him.[12]

Cross action against codefendant. A party joined as a defendant who files a cross petition against his codefendant is entitled, on a proper showing, to have an attachment issued against the property of his codefendant.[13]

b. Effect of Solvency of Codebtor

The solvency of the defendant's coobligors does not affect the plaintiff's right to proceed in attachment against the defendant.

The mere fact that a defendant's coöbligors are solvent does not affect plaintiff's right to proceed against such defendant by attachment.[14]

2. Matter of Galloway, 21 Wend (N Y) 32, 34 Am D. 209—6 C.J. p 42 note 5.

3. Stevenson v. Dunlap, 11 S E 1017, 38 S.C. 350—6 C J. p 42 note 6.

4. Cox v Henry, 38 S E 856, 113 Ga. 259—6 C.J. p 42 note 7.

5. Jordan v Moore, 78 A. 1048, 81 N J Law 118

6. Mich —Cottrell v. Hatheway, 66 N.W 596, 108 Mich. 619—Edwards v. Hughes, 20 Mich 289
Ohio.—Taylor v. McDonald, 4 Ohio 149—Cowdin v. Hurford, 4 Ohio 132.

7. House v. Rouse, (Tex Civ App.) 183 S W. 379—6 C.J. p 41 note 93

In Georgia

(1) The holder of a joint obligation may proceed by attachment against a joint obligor, rendering himself liable to attachment, without making other joint obligors parties under the code provision that in cases of joint contractors, where one of them shall render himself liable to attachment, attachment may issue against him, on compliance with the provisions relating to the issuing of attachments —Clark v Maddox, 154 S E 728, 41 Ga App. 807.

(2) "The prior contrary decision of the Supreme Court in Wiley v. Sledge, 8 Ga 532, was rendered before the passage of the act of March 4, 1856 (Acts 1855–56, p 31), now embodied in the Code section."—Clark v. Maddox, supra.

(3) Where an attachment is sued out against two persons who were declared against as joint debtors, however, the evidence must establish a joint liability or there can be no recovery —Harriman v. Bryan First Baptist Church, 63 Ga. 186, 36 Am. R. 117.

8. Leach v. Swann, 8 Blackf.(Ind.) 68—6 C.J. p 41 note 94.

9. Zenith Bathing Pavilion v. Fair Oaks S. S. Corporation, 148 N E. 532, 240 N Y. 307, reversing 207 N Y S. 306, 211 App Div. 492

10. Louisville Bank v. Smothers, 9 Ky Op. 4.

11. Zenith Bathing Pavilion v. Fair Oaks S S Corporation, 207 N.Y S 306, 211 App Div. 492, reversed on other grounds 148 N.E. 532, 240 N Y. 307.

Question left open

"We do not need to say that alternative liabilities can never be the basis of an attachment as to each of two or more defendants. We leave that question open"—Zenith Bathing Pavilion v. Fair Oaks S S. Corporation, 148 N E. 532, 534, 240 N Y 307, reversing 207 N.Y S. 306, 211 App Div. 492.

12. Zenith Bathing Pavilion v. Fair Oaks S S. Corporation, supra

13. Johnson v. Hay, 190 P. 613, 107 Kan. 148.

14. Iowa —Richardson v. Probst, 73 N.W. 521, 103 Iowa 241—Chittenden v. Hobbs, 9 Iowa 417.

II. GROUNDS OF ATTACHMENT

§ 23. In General

Attachment is available only when a statutory ground exists.

Attachment, being a purely statutory remedy, is available only where one or more of the grounds enumerated in the statute exist[15] at the time when the writ is sued out,[16] and, if the writ is issued without statutory authority, no valid lien is created, even though the proceedings are sufficient in form and substance and the levy properly made.[17]

§ 24. Absconding, Absence or Concealment

a. In general
b. Against whom ground available
c. Intent

a. In General

That the debtor has absconded or absents or conceals himself with the intent to defraud creditors is a ground for attachment under some statutes

An attachment may issue on the ground that the debtor has absconded, or absents himself, or keeps himself concealed for the purpose of defrauding his creditors or avoiding service of process, where the statutes so provide,[18] and where the departure of defendant from the state is relied on as ground for attachment, it is not necessary to show that plaintiff is in danger of losing his claim.[19]

b. Against Whom Ground Available

(1) Resident or nonresident debtors
(2) Indorser or surety

(1) Resident or Nonresident Debtors

Generally the ground is held to apply only to residents of the state.

While there is authority for the view that a nonresident of a state may be an absconder from the state,[20] the statutes in question are usually held to apply only to debtors who are residents of the state and not to nonresident debtors;[21] and although the attachment act provides that attachment may issue where plaintiff or agent shall make affidavit that he verily believes the debtor absconds from his creditors, "and" is not, to deponent's knowledge or belief, resident in the state at the time, an absconding person is liable, although a resident in the state.[22]

(2) Indorser or Surety

Attachment is available against an absconding surety or a surety not participating in the fraud where the principal has absconded.

If a surety has left the jurisdiction, his property may be attached, although the principal remains within the jurisdiction.[23] Moreover the absence of the principal from the state to avoid the service of process has been held a ground for an attachment against an indorser or surety not absent from the state or participating in any fraud.[24]

c. Intent

Where intent is a necessary element it must appear, although it may be inferred from the circumstances

If by statute an intent to avoid service of process or defraud creditors is a necessary element of the concealment or absence which is a ground for attachment, such intent must appear,[25] and the process cannot issue where the debtor left the

La.—Maxwell v. Gunn, 2 Mart (N S) 140
6 C.J. p 41 note 97.

15. C. & E. Marshall Co. v. Leon, 267 Ill.App. 242—6 C.J. p 42 note 9

Possibility of fruitless recovery

(1) The Kentucky statutes contemplate the remedy of attachment in every situation where plaintiff's ultimate recovery might otherwise be made fruitless by defendant's acts —Garnett v. Oliver, 45 S.W.(2d) 815, 242 Ky. 25.

(2) Accordingly, the right of a landlord to an attachment against his tenant depends on whether he has reasonable grounds to believe that his debt will be lost unless an attachment issues.—Mattingly v. Mattingly, 8 Ky.Op. 777.

Reasonable cause required

Attachment is a drastic remedy, which should not be permitted without reasonable cause, particularly when personal property, seizure of which would cause considerable injury, is levied on.—Hogue v. McAllister, 210 P. 671, 122 Wash. 347.

16. La.—Bird v. Dawkins, 6 La.App. 244
Md.—Obrecht v. White, 159 A. 899, 162 Md. 391
Tex.—Anderson v. Byrum, (Civ.App.) 73 S.W.(2d) 571
6 C.J. p 43 note 10

Actual existence of facts

Plaintiff's right in attachment to the issue of the writ is dependent upon the actual existence of the facts for which the attachment writ issues.—Melvin v. Scowley, 104 So. 817, 213 Ala. 414.

Subsequent events

An attachment writ must stand or fall upon the state of facts existing at the date of issuance, and cannot be cured by subsequent events.—Ansman v. Nagle, 143 So. 885, 177 La. 583—6 C.J. p 43 note 10 [a], [b].

17. Sims v. Charleston Bank, 3 W.Va. 415.

18. Salsman v. Robinson, 157 A. 547, 10 N.J.Misc. 51—6 C.J. p 43 note 14.

19. Wright v. Smith, 19 Tex. 297—Messner v. Hutchins, 17 Tex. 597.

20. Ala.—Middlebrook v. Ames, 5 Stew. & P. 158.
Ga.—Johnson v. Lowry, 47 Ga. 560, 15 Am.R. 655.

21. Lagerwahl v. White, 156 S.W. 1079, 154 Ky. 162—6 C.J. p 43 note 16

22. Salsman v. Robinson, 157 A. 547, 10 N.J.Misc. 51.

23. Loop v. Summers, 3 Rand. (24 Va.) 511

24. Louisville Bank v. Smothers, 9 Ky.Op. 4.

25. Johnson v. Kaufman, 47 S.W. 324, 104 Ky. 494, 20 Ky.L. 634—6 C.J. p 44 note 19.

state while insane,[26] nor does flight to escape a criminal prosecution or arrest justify an attachment, under one view,[27] although it has been held that where such flight has the effect of preventing the service of summons to answer in a civil action for the same wrong, the creditor is entitled to his attachment,[28] and that where the statute authorizes an attachment against any one who "secretes himself so that the ordinary process of law cannot be served on him," an attachment may issue against one who so secretes himself, although solely to avoid a criminal prosecution.[29]

Intent may be inferred. In all cases where the intent is a necessary element it may be presumed from the various circumstances and incidents attending the debtor's absence or departure.[30]

§ 25. —— What Constitutes Absconding

"Absconding" as used in the attachment statutes means hiding or absenting oneself clandestinely to avoid service of legal process.

Where the term "absconding debtor" is defined by statute, the statutory definition should be applied in recognition and pursuit of the purpose of the attachment law to enable a creditor, by seizing the property of a debtor to compel his appearance to answer the creditor's demands.[31] A party absconds in a legal sense when he hides, conceals, or absents himself clandestinely, with the intent to avoid the service of legal process.[32]

Absence from the state does not, of itself, amount to absconding;[33] nor, on the other hand, is it necessary that the debtor should leave the limits of the state in order to become an absconder.[34]

Open and notorious departure usually negatives the intention necessary to constitute an absconding,[35] but it has been held nevertheless that one may depart openly and still abscond if the required intent is made out.[36]

§ 26. —— Nature of Absence

a. Absence from state
b. Temporary absence
c. Enticement out of state
d. Establishment of new residence

a. Absence from State

Where the statutes require absence from the state, absence from the county does not warrant the relief, although mere delay in leaving the state does not defeat it.

Where the statutes authorize attachment only in case the debtor absents himself from the state, his mere absence from the county is not ground for attachment,[37] but the remedy should be granted where he actually consummates his intention of leaving the state although after a delay.[38]

b. Temporary Absence

Mere temporary absence does not authorize an attachment.

It is not the purpose of the attachment statutes that a debtor should be at all times physically present in the state or else be subject to have his property seized under attachment, and hence it is generally held that an attachment is authorized only by an absence of a permanent nature and not by a mere temporary absence for the purpose of business, health, or pleasure, although during such temporary absence an officer armed with a writ could not serve it on him,[39] or although the debtor does not inform his creditors of his absence.[40] When service can be had on defendant in ample time for due return on the writ, that is sufficient, and there is no ground for attachment on account of his absence.[41] A person has "removed himself out

26. Chambers, etc., Glass Co. v. Roberts, 38 N.Y.S. 301, 4 App. Div. 20.

27. Evans v. Saul, 8 Mart. N.S. (La.) 247—6 C.J. p. 44 note 20.

28. Bank of Commerce v. Payne, 8 S.W. 356, 86 Ky. 446, 10 Ky. L. 43.

29. Malone v. Handley, 8 So. 189, 81 Ala. 117—6 C.J. p. 44 note 20 [a] (2).

30. Ross v. Clark, 32 Mo. 296—6 C.J. p. 44 note 22.

31. Obrecht v. White, 159 A. 899, 162 Md. 391.

32. McMorran v. Moore, 71 N.W. 505, 113 Mich. 101—6 C.J. p. 44 note 23.

Facts justifying inference

In an attachment suit, the debtor's three days' absence from his residence and business in a place unknown to those in charge of his property justified proceeding on the assumption that he had absconded.—Obrecht v. White, 159 A. 899, 162 Md. 391.

33. Collier v. Chamblee, 101 So. 372, 136 Miss. 257—6 C.J. p. 45 note 24.

34. Stafford v. Mills, 32 A. 7, 57 N.J. Law 574.

35. N.Y.—Castellanos v. Jones, 5 N.Y. 164—Swezey v. Bartlett, 3 Abb. Pr. N.S. 444.
Tenn.—Dunn v. Myres, 3 Yerg. 413.
6 C.J. p. 45 note 26.

36. Morgan v. Avery, 7 Barb. (N.Y.) 656, 2 Code Rep. 91, affirmed 2 Code Rep. 121.

37. H. H. Forbes Piano Co. v. Owens, 47 S.E. 938, 120 Ga. 449.

38. Spalding v. Simms, 4 Metc. (Ky.) 285, 289—6 C.J. p. 45 note 28 [a].

39. La.—Guzman v. Lamothe, 8 La. App. 490.
Mo.—Martin v. Barrett, (App.) 204 S.W. 410.
S.D.—Brekke v. Waite, 153 N.W. 901, 36 S.D. 26.
6 C.J. p. 46 note 40.

40. Vandiver v. Waller, 39 So. 136, 146 Ala. 411—6 C.J. p. 46 note 41.

41. Martin v. Barrett, (Mo. App.) 204 S.W. 410.
"Mere absence from the state, coupled with the fact that the creditor does not know where the defendant is, does not authorize attachment against the defendant, if process may be served under the provisions of section 2933, Hemingway's Code (section 3926, Code of 1906). To authorize attachment because of removal from the state, or absence from domicile, there must be an inability to serve the summons in the manner provided by law to obtain jurisdiction of the

of the state," within the meaning of the attachment act, however, when he is absent therefrom with no definite intention of returning thereto.[42]

Military service. A debtor who leaves his residence in order to enter the military service of his country is not within the attachment law,[43] but it has been held otherwise as to one who leaves for the purpose of joining a hostile army.[44]

c. Enticement out of State

An attachment grounded on absence from the state is unwarranted where the debtor was enticed out in order to afford the grounds.

An attachment on the ground of the debtor's absence from the state cannot be sustained where he was enticed out of the state in order that his property might be seized.[45]

d. Establishment of New Residence

Establishment of a new residence is not necessary to authorize the remedy.

Where the statute makes removal out of the state ground for attachment, it is not necessary that the debtor should have determined upon a new residence or home elsewhere.[46]

§ 27. —— What Constitutes Concealment

A debtor's voluntary act of secreting himself to avoid service of process constitutes a concealment within the attachment statutes.

To authorize an attachment because of the concealment of the debtor it must appear that there was an intent to avoid service of process, and that the concealment was voluntary;[47] but the duration of the concealment is immaterial.[48] There is a concealment where the debtor secretes or shuts himself up, whether at his place of abode, or elsewhere either in or out of the county of his residence;[49] but a mere refusal to see callers is not concealment.[50] Permanent residence out of the county is not concealment,[51] but there is concealment where the debtor requests false information to be given as to his movements after his departure.[52]

Concealment preceding indebtedness The acts relied upon as constituting a concealment usually must follow the accrual of indebtedness, and if the alleged concealment precedes the indebtedness, it does not come within the terms of the attachment statute, unless it be proved that it was merely a step in a fraudulent scheme to defraud creditors.[53]

§ 28. —— Intended Departure

Attachment will lie, under statutory authority, where it is shown that a debtor, to defraud his creditors, intends to depart from the state.

The statutes very generally permit an attachment where the debtor intends to abscond or depart from the state, and where an intended departure is shown the remedy will lie,[54] but such intention is not sufficient where the language of the statute is such as to show a legislative intent that the remedy shall be available only where the absconding or departure has become an accomplished fact;[55] and

person"—Collier v Chamblee, 101 So 372, 136 Miss 257.

42. American Oil Co v H. Booth Lumber Co, 102 So 262, 137 Miss. 404

43. Abrams v Pender, 44 N C 260.

44. U S—Ludlow v. Ramsey, (Tenn) 11 Wall 581, 20 L Ed 216—Jenkins v Hannan, (D C N Y.) 26 F 657 Kan—Foreman v Carter, 9 Kan 657. 6 C J p 46 note 43.

45. Nason v Esten, 2 R L 337—6 C. J. p 46 note 44

46. Troy v. Rogers, 20 So. 999, 113 Ala. 131.

47. Johnson v. Kaufman, 47 S W. 334, 104 Ky. 494, 20 Ky.L 684—6 C J. p 45 note 28

Fraudulent purpose

The term "concealment" implies an act designed to accomplish a fraudulent purpose—Morelli v. Thombs, 172 N.E 331, 35 Ohio App. 233.

Facts showing concealment

(1) Defendant withdrew from his business about seventy-seven hundred dollars in cash, stating to his partner that he would return it in a short time, and that he needed it for a real estate transaction The defendant, however, appropriated seven hundred dollars to his own use, and divided what was left between his wife his mother and his brother-in-law, giving forty-two hundred dollars in cash to his wife Defendant, having left his office with this seventy-seven hundred dollars, did not return to his office that day or the following day Later defendant met some of his creditors, his partner and counsel and made an agreement to meet his creditors again at eleven o'clock. His partner accompanied him, but defendant eluded his partner and has not returned to his residence Afterward defendant notified some of his creditors of his address, but others were unable to find him It was held that defendant concealed himself to defraud his creditors—Ninth Nat Bank v. Sonneborn, 9 Pa Dist. 741.

(2) Where the debtor left the county of his residence and so concealed himself that a summons could not be served upon him, there is a concealment within the meaning of the statute—Miller's Ex'x v People's Bank, 41 S.W.(2d) 1096, 240 Ky 185

48. Cammann v. Tompkins, 2 Edm Sel Cas (N Y.) 237, 230—6 C.J p 45 note 29

"It is a concealment to avoid the service of process, no matter whether for an hour, a day, or a week, no matter whether with a view to defraud creditors, or merely to have time to make a disposition, lawful or otherwise, of his property before his creditors got at him It is placing himself designedly so that his creditors cannot reach him with process, and that, it seems to me, is clearly the concealment which the statute contemplates."—Cammann v. Tompkins, supra.

49. Dunn v Salter, 1 Duv.(Ky) 342—6 C J p 45 notes 30, 31.

50. Wallach v Sippilli, 65 How.Pr (N Y) 501

51. Boggs v. Bindskoff, 23 Ill. 66.

52. North v. McDonald, (C C.Ill) 18 F Cas.No 10,312, 1 Biss 57

53. Morelli v. Thombs, 172 N E 331, 35 Ohio App 233.

54. American Hardwood Lumber Co. v. Kesterson, 86 So 285, 147 La. 340—6 C J. p 46 note 46.

55. Hale v. Richardson, 89 N C. 62—6 C J. p 47 note 47.

an attachment will not lie where defendant has appeared in the case.[56] Under some statutes the gist of the action is held to be the intent to hinder, delay, and defraud creditors, and an attachment will not be granted where the debtor acts for a lawful and legitimate purpose.[57]

In an action on the joint obligation of a husband and wife it is sufficient to warrant an attachment that the husband had formed the intention to leave the state although there was no such intention on the part of the wife.[58]

§ 29. Nonresidence

Where nonresidence is made a ground for attachment by statute, the fact of nonresidence is itself sufficient to warrant the remedy in actions on claims contemplated by the attachment act.

The statutes very generally make it a ground of attachment that the debtor is a nonresident of the state where the action is instituted, although some of them limit it to such nonresidents as have designated no agent to receive service of process for them within the state.

Under such statutes where the cause of action is on a claim contemplated by the act,[59] the fact that the debtor is a nonresident, together with the fact, when this is made a condition to the remedy, that he has designated no one to accept service of process for him within the state, is of itself sufficient to warrant the attachment,[60] and it is not necessary to show that defendant has or had any intent to defraud,[61] that plaintiff is in danger of losing his debt,[62] that defendant is a resident elsewhere,[63] or that it is impossible to serve process on defendant in the state of his residence[64] or the state where the action is brought,[65] nor does the fact that defendant was personally served defeat the right to attachment.[66] So it has been held that an attachment on this ground may be obtained, although the nonresident is present in the state where the attachment is sought;[67] but in some jurisdictions the rule is that actual absence from the jurisdiction is essential to the validity of the writ.[68] Transferring to a resident an undivided interest in property will not deprive the creditor of his right to attachment against the interest of a nonresident.[69] Where the statute giving the right provides that it shall not apply where the nonresident defendant has appointed an agent in the state upon whom process may be served, the right is not defeated, as against a nonresident motorist, by another statute providing that the operation of a motor vehicle on the state highways by a nonresi-

56. O'Rourke v Rankin, 184 N.Y.S 845, 193 App Div. 494.

57. Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394.

58. Ware v. Flory, 201 S.W. 593, 199 Mo App 60.

59. Crom v. Henderson, 175 N.W 983, 188 Iowa 227—6 C.J. p 48 note 52

Nothing due plaintiff

The seller of land suing the buyer for specific performance, who knew that he had procured the buyer to make the contract by fraud and misrepresentations, was not entitled to sue out attachment against the buyer's property on the ground that he was a nonresident, there being nothing due the seller from the buyer as required by statute—Crom v. Henderson, 175 N.W. 983, 188 Iowa 227.

60. Ga.—Edwards Mfg Co. v. Hood, 145 S.E 87, 167 Ga 144
La.—Allison v. Brown, 87 So. 262, 148 La 530
Mo.—Kinsley Bank of Kinsley, Kan v. Woods, (App.) 61 S.W (2d) 334
N.Y.—Judis v Martin, 218 N.Y.S 433, 218 App Div 402, motion granted 155 N.E 916, 244 N.Y 605.
N.D.—Moen v. Melin, 223 N.W. 702, 57 N.D. 630
Ohio.—Daniels v. Taylor, 13 Ohio Cir. Ct.(N.S.) 116—Harlan v. Capital Investment Co., 11 Ohio N.P.(N.S.) 492.
S.C.—J. W. Copeland Co v. Brown, 87 S.E 1002, 103 S.C. 177
Wash.—State v. Superior Court of State of Washington, King County, 197 P 321, 115 Wash 359
6 C.J. p 47 note 50, p 48 note 53.

"In which attachment is"

Under a statute providing that it is a sufficient ground for attachment that defendant is a nonresident of the state and has estate within the county or city "in which the attachment is," the quoted words mean "in which attachment proceeding is instituted" and not "in which the writ of attachment is levied or served"—Winfree v. Mann, 153 S.E 837, 154 Va 683.

Where party is not nonresident the attachment cannot be had on this ground—Bank of Dover v. Jones, (Ark.) 95 S.W.(2d) 92—6 C.J. p 47 note 50 [c].

61. Mitchell v. Shook, 72 Ill 492.

62. Messner v. Hutchins, 17 Tex 597—Goldsoll v Votaw, 1 Tex Unrep Cas 90—Sydnor v. Chambers, Dall (Tex.) 601.

63. First Nat Bank of Roswell v. Payton, 180 P. 979, 25 N.M 264.

64. Ga.—Hickson v. Brown, 17 S.E 1035, 92 Ga 225
La.—De Poret v Guzman, 20 La.Ann 930.

65. Phœbus Bank v. Byrum, 67 S.E 349, 110 Va. 708, 135 Am.S.R. 953, 27 L.R.A.(N.S.) 436—6 C.J. p 48 note 55

66. La.—Poulan v. Gallagher, (App.) 147 So 723, rehearing denied 148 So 511.
Tex.—Stringfellow v. Patterson, (Civ.App.) 192 S.W. 555, error refused.

67. Jackson v. Perry, 13 B.Mon. (Ky.) 231—6 C.J. p 48 note 58

68. Milton v Spinning Co., 28 Pa. Dist 53—Bloom v Littman, 24 Pa Dist 1105, 44 Pa.Co 24—Wight v Hovey, 17 Pa.Dist 1019—Kauffman v. Musin, 9 Pa.Co 414—Fair v Hamlin, 9 Pa.Co. 8—6 C.J. p 48 note 58 [c].

Immunity from service

The fact that defendant was present in the county as a witness in attendance upon court, and, therefore, privileged from service of process, does not change the effect of his presence and make the attachment valid—Wight v. Hovey, 17 Pa.Dist 1019.

Time of issuance

In order to avoid an attachment on the ground that defendant was not absent, he must show his presence in the jurisdiction at the precise time when the writ was issued—Melchoir v Stewart, 42 Pa.Co. 366—6 C.J. p 48 note 58 [c] (2).

69. Stevenson v. Prather, 23 La. Ann. 434.

dent constitutes an appointment of the secretary of state as his attorney for the service of process.[70]

Nonresidence in the county in which the action is brought is not, unless the statute so provides, a ground of attachment,[71] although property of a nonresident of a county may be attached where the statutes specifically authorize the remedy in such cases.[72]

§ 30. —— In Case of Joint Debtors

Attachment will not usually issue against the joint or partnership property of creditors, unless all are nonresidents, although the individual property of the nonresident may be attached.

An attachment on the ground of nonresidence will not ordinarily issue against partnership property, where only one or a part of the partners resides without the state,[73] but, although a contrary view has been taken,[74] it is usually held that the individual property of a nonresident joint debtor may be attached, although his codebtor is a resident of the state.[75]

§ 31. —— Time at Which Ground Must Exist

To be ground for attachment, nonresidence must exist when the writ issues.

The nonresidence which is a ground for attachment is that existing at the time when the writ is issued.[76] If that is made to appear, the fact that defendant was previously a resident of the state will not prevent the attachment,[77] nor does the fact that defendant subsequently becomes a resident of the state require that the attachment be dissolved.[78]

§ 32. —— What Constitutes Residence or Nonresidence

a. In general
b. Place of abode
c. Residence and domicile distinguished
d. Residence and place of business distinguished
e. Intention as bearing on question of residence

a. In General

The question of whether defendant is a resident depends on the facts and circumstances of each case.

In determining the question of residence, it is impossible, in the last analysis, to lay down any fixed and unalterable rule which will govern in all cases; but the question whether one is, or is not, a resident within the meaning of the attachment statutes must be determined according to the facts and circumstances in each individual case.[79] The general rules stated in the following paragraphs, however, are useful as aids in deciding the matter in any particular case.

b. Place of Abode

Residence is a place of abode either of a temporary or permanent character.

Residence is a place of abode and the location of one's fixed place of abode is an important, if not conclusive, consideration in determining his residence.[80] To be a resident the debtor must have a place of abode in the state, either of a temporary or permanent character, at which a service of summons may lawfully be made,[81] and the lack of such place of abode renders one a nonresident.[82] Mere casual visits for personal reasons or regular business trips in a state do not make a person a resident thereof.[83]

70. Poulan v Gallagher, (La App) 147 So 723, rehearing denied 148 So. 511.

71. Kan—Dickenson v. Cowley, 15 Kan 269
La—Hornbeck v. Gilmer, 34 So. 651, 110 La. 500.
6 C.J. p 48 note 59.

72. Citizens Sav. & Trust Co v. Grossmer, 17 Ohio Cir Ct (N S) 87—6 C J. p 48 note 59 [a].

73. La.—Weil v. Adams, 52 So 757, 126 La. 532
Miss—Barney v. Moore-Haggerty Lumber Co., 48 So. 232, 95 Miss 118.
6 C.J. p 48 note 60.

74. Corbit v Corbit, 13 A 178, 50 N J.Law 363—Thayer v. Treat, 39 N J Law 150—Barber v. Robeson, 15 N J.Law 17—Curtis v. Hollingshead, 14 N J Law 402—Bray v. General Engineering Co., 78 A 563, 75 N J Eq 443

75. Mo—Searcy v. Platte County, 10 Mo 269.
N Y—Baird v Walker, 12 Barb 298, Code Rep (N S) 329, 2 Edm.Sel Cas 268

76. Ill—Witbeck v Marshall-Wells Hardware Co, 58 N.E 929, 188 Ill 154, affirming 88 Ill App 101
N J—State v. Mills, 31 A. 1023, 57 N J Law 570
6 C.J. p 48 note 62.

77. Barth v. Burnham, 81 N W. 809, 105 Wis 542—6 C J. p 49 note 63

78. Larimer v Kelley, 10 Kan 298—6 C J p 49 note 64

79. Ark—Jarrell v. Leeper, 9 S.W. (2d) 778, 178 Ark 6
S D—Pfeifer v Sheehan, 189 N.W. 310, 45 S D 528.
6 C J p 51 notes 83, 84.

80. Ark.—Jarrell v. Leeper, 9 S W. (2d) 778, 178 Ark 6
Iowa—Mann v. Taylor, 43 N.W. 220, 78 Iowa 355, 362
N Y—Zenatello v. Pons, 256 N Y S. 763, 235 App Div 231—O'Hora v. Tarby, 252 N Y S. 646, 141 Misc 402
6 C J p 49 note 65.

81. N Y—O'Hora v. Tarby, 252 N Y. S. 646, 141 Misc 402
Pa—Saunders Coffee Co. v. Menges, 24 Pa.Dist 434
6 C.J. p 49 note 66

82. Stafford v. Wills, 220 Ill App. 22—6 C.J. p 49 note 67.

83. Pfeifer v. Sheehan, 189 N W. 310, 45 S D. 528—6 C J. p 51 note 87 [b]
Facts showing nonresidence
Where defendant, a traveling salesman, had his headquarters, his busi-

The place of residence of a man's family is prima facie his residence.[84]

c. Residence and Domicile Distinguished

Attachment statutes contemplate actual residence only, without regard to domicile which, besides residence, embraces an intention to remain.

While the term "residence" as used in the attachment acts is sometimes considered as synonymous, with "domicile"[85] they are not, when accurately used, convertible terms,[86] for, to constitute domicile, two things must concur, the fact of residence and an intention to remain.[87] Attachment statutes contemplate actual residence without regard to domicile,[88] and a person may, with regard to the application of an attachment statute, have his domicile in one state and his residence in another.[89] Accordingly, an actual resident with a foreign domicile is not subject to attachment as a nonresident,[90] and the fact that a resident is an alien temporarily within this country and incapable under the immigration laws of becoming an American citizen does not render him subject to attachment.[91]

d. Residence and Place of Business Distinguished

A place of business does not of itself constitute a residence.

A place of business does not alone constitute a residence, and accordingly a person may be a nonresident within the attachment laws, although he has a regular place of business within the state.[92] Conversely, a debtor is not liable to attachment in the state of his residence because he has a regular place of business in another state[93]

e. Intention as Bearing on Question of Residence

Defendant's intention alone does not fix his residence.

Although, as will be shown in §§ 33, 34, intention coupled with affirmative action is usually determinative, a person's intention as to the future does not, of itself, affect the question of his residence[94] So where one is a resident the fact that he intends to remove from the state will not make him a nonresident,[95] and conversely, where one, even though present in the state, has never become a resident, the fact that he intends to remain and become such does not make him a resident.[96]

§ 33. —— Acquisition of Residence

Intention to acquire a residence combined with actual residence, however short, is determinative of the question of residence.

A residence is acquired by actual presence in the state[97] coupled with an intention to remain there

ness address, and a checking account in a city out of the jurisdiction, and had registered for military purposes in that city, and had not been listed as a taxpayer in the jurisdiction, and had not voted therein within two years, and had paid no personal taxes there, the fact that he maintained a business within the jurisdiction and transacted business therein, and at intervals visited his parents therein, did not render an attachment founded on an affidavit that defendant was not a resident of the jurisdiction void—Pfeifer v. Sheehan, 189 N.W. 310, 45 S.D. 528.

84. Kan.—Keith v. Stetter, 25 Kan. 100—Hatch v. Smith, 49 P. 698, 6 Kan.App. 645.
N.Y.—McKinlay v. Fowler, 1 How. Pr. (N.S.) 282
6 C.J. p. 49 note 68

85. Houghton v. Ault, 16 How.Pr. (N.Y.) 77—6 C.J. p. 49 note 69.

86. Ark.—Jarrell v. Leeper, 9 S.W. (2d) 778, 178 Ark. 6
Mo.—Hamill v. Talbott, 81 Mo.App. 210
Pa.—Eberly v. Rowland, 1 Pearson 312
6 C.J. p. 49 note 70

87. McDowell v. Friedman Bros. Shoe Co., 115 S.W. 1028, 135 Mo.App. 276—6 C.J. p. 49 note 71.

88. Neb.—National Surety Co. v. Love, 168 N.W. 597, 102 Neb. 633
N.Y.—Zenatello v. Pons, 256 N.Y.S. 763, 235 App.Div. 221—O'Hora v. Tarby, 252 N.Y.S. 646, 141 Misc. 402
Pa.—Atlantic Refining Co. v. Fabian, 2 Pa.Dist. & Co. 16
S.D.—Pfeifer v. Sheehan, 189 N.W. 310, 45 S.D. 528
6 C.J. p. 49 note 72

89. Ark.—Jarrell v. Leeper, 9 S.W. (2d) 778, 178 Ark. 6.
N.C.—Brann v. Hanes, 140 S.E. 292, 194 N.C. 571.
Tenn.—Gilbert v. Smith, 14 Tenn.App. 500
6 C.J. p. 50 note 73.

90. Ark.—Jarrell v. Leeper, 9 S.W. (2d) 778, 178 Ark. 6
N.Y.—Zenatello v. Pons, 256 N.Y.S. 763, 235 App.Div. 221.
6 C.J. p. 50 note 73 [c].

91. Zenatello v. Pons, supra

92. Ill.—Stafford v. Wills, 220 Ill.App. 22.
Pa.—Saunders Coffee Co. v. Menges, 24 Pa.Dist. 434
S.D.—Pfeifer v. Sheehan, 189 N.W. 310, 45 S.D. 528
6 C.J. p. 50 notes 74, 75.

Congressman

A member of Congress brought to the District of Columbia solely by his public duties must, in the absence of a plain, unequivocal showing to the contrary, be regarded as an inhabitant and resident of the state which he represents in congress, only a visitor to the District of Columbia, and therefore a nonresident of the latter within the meaning of the attachment statute—Howard v. Citizens' Bank, etc., Co., 12 App.D.C. 222.

Stockholder in corporation

That defendant residing in another state was a stockholder in an Illinois corporation does not make him a resident of Illinois within the attachment law.—Stafford v. Wills, 220 Ill.App. 22.

93. Leonard v. Stout, 36 N.J.Law 370—Del Hoyo v. Brundred, 20 N.J.Law 328.

94. Wood v. Hamilton, 14 Daly 41, 1 N.Y.St. 779—6 C.J. p. 50 note 79.

95. Labe v. Brauss, 12 Pa.Co. 255—6 C.J. p. 50 note 80.

96. Hickson v. Brown, 17 S.E. 1035, 92 Ga. 225—6 C.J. p. 51 note 81

97. Adams v. Evans, 19 Kan. 174—6 C.J. p. 51 note 85.

permanently,[98] or for an indefinite period,[99] and it has been held that a person who has abandoned his native land and is living in a state with no intention of going elsewhere is a resident of that state.[1]

§ 34. —— Loss of Residence

a. In general
b. Effect of absence

a. In General

Residence is lost by leaving the state with the intention of becoming a nonresident.

A resident of a state becomes a nonresident by actually leaving the state[2] with the intention of becoming a nonresident.[3] The fact that a person moves his wife and children out of the state, together with certain exempt property, but himself remains in the state with no intention of abandoning his residence, does not constitute him a nonresident of the state.[4]

b. Effect of Absence

(1) Temporary
(2) Prolonged

(1) Temporary

Mere temporary absences do not ordinarily entail loss of residence.

Mere casual or temporary absence from the state will not make the absentee a nonresident,[5] especially where he has and retains a place of abode within the state,[6] or lacks any intention of acquiring a fixed residence elsewhere.[7]

Recurring temporary absences at periodic intervals do not make the absentee a nonresident,[8] unless his stays within the state are so short in duration as to amount only to a succession of visits.[9]

(2) Prolonged

Residence may be lost by prolonged absence from the state.

An absence from the state prolonged for an indefinite period, makes the absentee a nonresident,[10] particularly where, during his absence, he has no place of abode within the state,[11] or where he has no intention of returning within a reasonably definite period.[12] The fact that he may have a general intention to return at some future time is immaterial,[13] and such general intention becomes even less important when the absentee acquires a place of abode in another state[14] So the cause of his absence does not affect the rule if such absence prevents personal service for an indefinite length of time[15]

§ 35. Fraudulent Transfer or Disposition of Property

Fraudulent transfer or disposition of property is a distinct ground of attachment under some statutes.

98. First Nat Bank v. Pierson, 146 So 749, 750, 176 La 792—6 C J p 51 note 86
"Intention to acquire a permanent residence in the state combined with the fact of residence, even for a short period, fixes the domicile here, and renders one's property not subject to attachment on the ground of nonresidence"—First Nat Bank v. Pierson, supra

99. Jacobson v. Kill, 221 P 21, 94 Okl. 146—6 C J. p 51 note 87.
"To establish a residence in a state it is not necessary that one be required to live or reside therein for any specified length of time, but such residence is established by actual presence in such state, coupled with the bona fide intention to remain there permanently or indefinitely."—Jacobson v. Kill, supra

1. Heidenbach v. Schland, 10 How Pr (N Y) 477.

2. Mann v. Taylor, 43 N W 220, 78 Iowa 355—6 C J. p 52 note 88

3. Pa.—Graybill v. Hoover, 28 Pa Dist. 389
W Va.—Lyon v Vance, 84 S E 761, 46 W Va 781.
6 C J. p 52 note 89.

4. Carr-Lowry Lumber Co v Martin, 109 So 849, 144 Miss 106

5. Md.—Winakur v Hazard, 116 A 850, 140 Md. 102, 26 A L R 177
Pa.—Graybill v. Hoover, 28 Pa Dist 389—Bloom v. Littman, 24 Pa Dist 1105, 44 Pa Co 24
W Va.—Kanawha Banking & Trust Co. v Swisher, 144 S E 294, 105 W Va. 476
6 C J. p 52 note 90

6. Silva v. Superior Court, 128 A 213, 46 R I. 342—6 C J p 52 note 91

7. Wolf v. Dietz, 10 Pa Dist. & Co 693—Graybill v Hoover, 28 Pa Dist. 389—6 C J p 52 note 92.

8. Bloom v. Littman, 24 Pa Dist. 1105, 44 Pa Co 24—6 C J. p 53 note 93

9. Southern R. Co. v McDonald, (Tenn Ch App) 59 S W. 370

10. Brann v Hanes, 140 S E 292, 194 N C. 571—6 C J. p 53 note 95

11. Ill.—Stafford v. Wills, 220 Ill App 22
Pa.—Atlantic Refining Co. v. Fabian, 2 Pa Dist & Co 16.
6 C.J. p 53 note 96.
Room in father's house
The fact that there is a room in his father's house which defendant always occupies while he is in the state does not make him a resident thereof where he was at the time of the attachment living in another state and intended to do so for an indefinite period.—Stafford v Wills, 220 Ill App 22

12. Ill.—Stafford v. Wills, 220 Ill App. 22.
N.C.—Brann v. Hanes, 140 S E 292, 194 N C. 571
Return dependent on convalescence
Where a defendant in an attachment proceeding had been absent from the state for over a year, and was so ill that the time of his return to the state, even if he were ever able to return, was uncertain, he was a "nonresident" of the state within the meaning of the statute relating to attachment of property of nonresident.—Brann v. Hanes, 140 S.E 292, 194 N C 571.

13. Brann v. Hanes, supra—6 C J. p 53 note 97.

14. Stevens v Ellsworth, 63 N W 683, 95 Iowa 231—6 C J. p 53 note 98

15. Brann v. Hanes, 140 S E. 292, 194 N C 571.

An attachment will lie for a fraudulent transfer or disposition of his property by a debtor where the statutes make this a ground for invoking the remedy.[16] The fact that the creditor in good faith believed that defendant fraudulently disposed of his property will not justify an attachment on this ground; the determinative question is whether he actually did so dispose of it.[17]

This ground of attachment is distinct from the grounds that the debt was fraudulently contracted or that the debtor had concealed or secreted the property[18] or intended to dispose of it fraudulently,[19] although not inconsistent therewith.[20]

§ 36. —— Intent of Debtor

Fraudulent intent on the part of the debtor being the gist of the ground, mere constructive fraud does not ordinarily warrant the attachment.

A fraudulent intent is the gist of this ground of attachment[21] and as a general rule fraud in law or constructive fraud in making the conveyance is not sufficient to constitute it a fraudulent transfer within the meaning of the attachment statutes, but must be actuated by an actual fraudulent purpose or intent.[22] In some jurisdictions, however, if a conveyance or transfer has the effect of hindering and delaying creditors, this is sufficient regardless of the debtor's intention.[23]

There is a sufficient fraudulent intent, where the debtor intends to delay his creditors,[24] to place his property so that one creditor cannot attach and get all,[25] or to force creditors to compromise by means of the conveyance;[26] but a transfer, the only purpose of which was to compel the creditor to seek the enforcement of his claim in the state of the debtor's domicile, has been held not to furnish a ground for attachment.[27]

16. Carney v Security Credit Corporation, 135 So. 915, 172 La. 911 —6 C.J. p 55 note 17.

17. Lang v Shanawolf, 111 A. 117, 137 Md 17.

18. Boyd v. Lippencott, 2 Pa.Co. 585 —6 C.J. p 56 note 18.

In Missouri the ground of attachment that "defendant had fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors" is distinct from the ground that "defendant has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors," and a different state of facts is required for each —Douglass Candy Co. v Shenk, 194 S.W. 754, 195 Mo App. 592

19. Dunnenbaum v. Schram, 59 Tex 231

20. Kendall v Kennedy, 8 Ky L 532 —6 C.J p 56 note 20

21. Ky.—McCollum v Parsons, 266 S.W 43, 205 Ky 450.
La.—General Motors Acceptance Corporation v Sneed, 131 So 254, 9 La.App 471, modified on other grounds 119 So 417, 167 La. 432—Bennett v Bilberry, 4 La.App 264.
Wyo.—Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo 394.
6 C.J. p 57 note 42.

22. Ill.—C. & E. Marshall Co. v. Leon, 267 Ill App. 242
Minn.—Harris v. Spencer, 153 N.W. 125, 130 Minn 141
N.Y.—Millang v. Lambros, 153 N.Y.S. 944, 90 Misc. 638
Pa.—Stowers Pork Packing and Provision Co. v. Shoener, 15 Pa Dist. 141.
S.D.—Brekke v. Waite, 153 N.W. 901, 26 S.D. 26.
6 C.J. p 54 note 8 [a], [c], [d], p 57 note 43.
"The intent to defraud must exist as a fact"—Guaranty State Bank of Sisseton v Varland, 207 N.W. 152, 153, 49 S.D 336.
In Missouri
(1) The cases are in conflict as to whether an actual fraudulent intent is necessary in order for an attachment to lie on the statutory ground that "defendant had fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors The rule of the text has found support in cases holding that there must be both a fraudulent intent on the part of the debtor, and the effect of the conveyance must be to hinder or delay creditors; either alone is not sufficient, both must concur—Conran v. Fenn, 140 S.W. 82, 159 Mo.App. 664—Belcher-Brown Lumber & Mercantile Co. v. Drane, 80 S.W 307, 107 Mo.App. 56.
(2) So it has been held that where the deed itself appeared to be fair and made in good faith, the intent to delay creditors was necessary to constitute it a fraud upon them—Spencer v. Deagle, 34 Mo. 455.
(3) On the other hand, it has been said, "The term fraud, as understood in the statute concerning fraudulent conveyances, has the same meaning in the attachment law, and it is not necessary to show that the act originated in any meditated design to commit a positive fraud or to injure other persons"—Reed v. Pelletier, 28 Mo. 173, 177.
(4) Accordingly, several cases hold that it is not necessary that there be an actual fraudulent intent. When a voluntary deed is made by a debtor in embarrassed circumstances, the law does not concern itself about his private or secret motives, but if that deed hinders or delays his creditors the law presumes it was made with fraudulent intent, however pure in reality the motives of the debtor may have been, and an attachment is warranted thereby—Potter v McDowell, 31 Mo 62—Simmons Hardware Co v Fighting the Flames Co, 115 S.W 467, 135 Mo App 266—Dunham-Buckley v. Halberg, 69 Mo App. 509—Glacier v. Walker, 69 Mo App. 288—Gens v. Hargadine, 56 Mo App 245—Farmers, etc, Bank v Price, 41 Mo App 291—Cooper v. Standley, 40 Mo App 138—Douglass v Cissna, 17 Mo App. 44.
(5) "While the motive which actuates the making of a fraudulent conveyance which results in hindering or delaying the grantor's creditors is wholly immaterial, yet the conveyance must be fraudulent, in law or in fact, if it constitutes a ground for attachment"—State ex rel First Nat Bank v Trimble, 287 S.W. 432, 434, 315 Mo 966, quashing certiorari First Nat. Bank of Milan v Kibble, 273 S.W. 148, 221 Mo App 311.

23. Kingman First Nat Bank v. Gerson, 32 P. 908, 50 Kan. 589—6 C.J. p 54 note 8 [b].

24. Asiatic Min & Mill. Co v. Stephenson, 165 P 773, 63 Colo. 301—6 C.J. p 58 note 44.

25. Mich.—McBryan v. Trowbridge, 84 N.W 1084, 125 Mich 542
Neb.—Kingman v. Weiser, 67 N.W. 941, 48 Neb 834.

26. Collier v. Hanna, 17 A. 1017, 72 Md 253.

27. Harding v. Elliott, 33 N.Y.S. 1095, 12 Misc 521, reversed on other grounds 36 N.Y.S. 648, 91 Hun 502.

The intention of the transferee who receives the property is immaterial.[28]

§ 37. —— Property Whose Transfer May Afford Ground for Attachment

Property fraudulently transferred within the statute may include choses in action, judgments or property outside the state.

A chose in action,[29] a judgment,[30] or property situated outside of the state[31] may be fraudulently transferred so as to afford a ground for attachment. But a fraudulent transfer of land has been held not a ground for attachment.[32]

§ 38. —— Amount of Property Transferred or Disposed of

A debtor's disposition of a part of his property warrants the attachment.

It is not necessary that the debtor should dispose of all of his property,[33] but if he fraudulently disposes of, conveys, or secretes only a part of his property, an attachment may be had.[34] It is not necessary in order to sustain an attachment, for plaintiff to show that defendant's property remaining after such disposition is insufficient to pay his debts.[35]

§ 39. —— Time of Transfer or Disposition

The disposition relied upon must ordinarily have been made after plaintiff's claim existed, although if made before, it may under some circumstances form the basis of the remedy.

In order to warrant an attachment the transfer or disposition of property must, ordinarily, have been made after plaintiff's claim was in existence,[36] although a previous transfer might be sufficient where the debtor intended at the time to contract the particular debt for which attachment is sought and defraud the creditor.[37]

§ 40. —— Necessity for Injury to Attaching Creditor

To warrant an attachment, the transfer must have injured the attaching creditor.

In order to support an attachment on the ground under consideration, it must be made to appear that the attaching creditor is injured by the transfer or disposition relied on.[38]

§ 41. —— Insolvency of Debtor

Solvency of the debtor or his surety does not defeat the remedy if a material portion of his property has passed.

It is not essential to an attachment on the ground that the debtor has fraudulently transferred or disposed of property that the debtor should be insolvent,[39] although, where he is not so, it must be shown that a material portion of his property has passed.[40] The solvency of a surety of the debtor does not affect the right to attachment on this ground.[41]

§ 42. —— What Constitutes Transfer in General

A transfer within the attachment statute ordinarily imports a voluntary alienation of his own title by defendant.

To constitute a transfer within the meaning of the attachment acts there must be a voluntary[42] alienation of title[43] by defendant[44] of his own property.[45]

"Disposition." The word "disposition" has been said to have a broad signification and include all

28. Shull v Kallauner, 300 S.W. 554, 222 Mo.App. 64—6 C.J. p. 58 note 48

29. Ky.—Bibb v. Smith, 1 Dana 580
Tenn.—Wilson v. Beadle, 2 Head 510

30. Gribble v. Ford, (Tenn.Ch.App.) 52 S.W. 1007.

31. Kibbe v. Wetmore, 31 Hun (N.Y.) 424.

32. Continental Nat. Bank v. Draper, 89 Pa. 446—Kline v. O'Donnell, 1 Pa.Dist. 741, 11 Pa.Co. 38

33. Johnson v. Laughlin, 7 Kan. 359—6 C.J. p. 56 note 32.

34. Taylor v. Myers, 34 Mo. 31, 32—6 C.J. p. 56 note 33

35. Ind.—Hoffman v. Henderson, 44 N.E. 629, 145 Ind. 613
Mo.—Barry County Bank v. Russey, 74 Mo.App. 651.

36. Hershfield v. Lowenthal, 11 P. 173, 35 Kan. 407—6 C.J. p. 57 note 35

37. Bergson v. Dunham, (Tex.Civ.App.) 40 S.W. 17.

38. Ill.—Zeigler v. Cox, 62 Ill. 48
Tex.—Sheffield v. Gay, 32 Tex. 225.
6 C.J. p. 57 note 39.

39. Hoffman v. Henderson, 44 N.E. 629, 145 Ind. 613—6 C.J. p. 57 note 40

40. Parrott v. Mayer, 64 N.Y.S. 649, 31 Misc. 50.

41. Perkins v. Scott, 13 Ky.Op. 931

42. McMorran v. Moore, 71 N.W. 505, 113 Mich. 101—6 C.J. p. 56 note 21.

43. Couldren v. Caughey, 29 Wis. 317—6 C.J. p. 56 note 22.

Converting land to homestead
That defendants were moving on land to make it their statutory homestead does not justify an attachment in the absence of a showing of extrinsic facts tending to establish actual fraud.—Stricker v. Trullinger, 216 N.W. 231, 172 Minn. 547.

Attempt to reconvey
That defendants more than a year prior to attachment attempted to reconvey land to the creditor in satisfaction of the note sued on given for such land does not justify attachment, the creditor having refused to accept such reconveyance.—Stricker v. Trullinger, 216 N.W. 231, 172 Minn. 547.

44. Albuquerque First Nat. Bank v. Lesser, 53 P. 345, 9 N.M. 604—6 C.J. p. 56 note 23

45. N.Y.—Empire Warehouse Co. v. Mallett, 32 N.Y.S. 861, 84 Hun 561.
Wis.—Campbell v. Jackson, 49 N.W. 121, 80 Wis. 48
6 C.J. p. 56 note 24.

fraudulent transfers of property,[46] although it has also been regarded as including only alienations of property which may be effected by mere delivery without a written instrument.[47]

"Assignment." Where the statute makes the ground that defendant has fraudulently "conveyed or assigned" his property distinct from the ground that he has fraudulently "concealed, removed, or disposed of" his property, the word "assigned" refers to an assignment in its limited sense, that is an assignment by writing, and not to a verbal sale.[48]

§ 43. —— Sale

A sale whether in ordinary course of trade or in bulk will not warrant an attachment unless made with fraudulent intent which, however, may be inferred from secrecy, inadequacy of consideration, or fraudulent disposition of proceeds.

To support an attachment on the ground that defendant has fraudulently transferred or disposed of his property, it is not enough that plaintiff shows that defendant had sold or conveyed his property.[49] Sales by a debtor in the ordinary course of trade are usually not regarded as fraudulent,[50] even though the goods are sold cheaply[51] or the debtor is insolvent,[52] and the application of the proceeds to pay debts rebuts any inference of fraud.[53] But a sale made with a fraudulent intent as to creditors will justify an attachment, even though made in the usual course of business.[54]

Secret sales will usually justify an inference of fraudulent intent,[55] as will also a marked inadequacy of consideration,[56] or a fraudulent disposition of the proceeds.[57]

A failure to make delivery sufficient to pass title to the purchaser as against the creditors of the seller has been held not to make the sale fraudulent so as to warrant an attachment.[58]

Under Bulk Sales Law. Since a creditor has no right to control an individual in the sale of his merchandise in the absence of fraud, an attachment will not lie during the statutory period when the sale is in suspense to prevent a sale fully complying with the Bulk Sales Act.[59] Moreover, noncompliance with the requirements of the act, standing alone, has been held no such badge of fraud as to justify an attachment,[60] but there is authority to the contrary;[61] and the fact that certain debts were omitted from the list of creditors furnished by defendant to the purchaser attempting to comply with the act is not ground for an attachment.[62]

§ 44. —— Mortgage or Pledge

Execution of a mortgage by a debtor will warrant an attachment only when done with fraudulent intent.

The fact that a debtor has executed a mortgage upon the property is not of itself ground for an attachment,[63] even though there be a great disproportion of the value of the property mortgaged and the amount secured thereby,[64] and, as shown infra § 47, even though done to prefer creditors. But a mortgage is such a transfer as will warrant attachment, when it was made for the purpose of defrauding creditors[65] or of hindering or delaying

46. Howard v Caperon, 3 Willson, Civ Cas Ct App (Tex) § 313

47. Bullene v Smith, 73 Mo 151—6 C J. p 56 note 26

48. Douglass Candy Co. v. Shenk, 194 S W 754, 195 Mo.App 592.

49. McCollum v Parsons, 266 S.W 43, 205 Ky. 450.

50. Arkansas Nat Bank v. Stuckey, 181 S W 913, 121 Ark. 302—6 C J p 60 note 83

Sale by bank cashier

The sale of his homestead by a bank cashier is not in the usual course of business since he was not a dealer in real estate or engaged in the business of buying and selling real estate—Metcalf v Jelks, 8 S W (2d) 462, 177 Ark 1023

51. Wando Phosphate Co. v. Rosenberg, 9 S E 969, 31 S C. 301—6 C J p 60 note 84.

52. Arkansas Nat Bank v Stuckey, 181 S W. 913, 121 Ark. 302—6 C J. p 60 note 83 [a]

53. Blakemore v. Eagle, 84 S.W 637, 73 Ark 477.

54. Farris v Gross, 87 S W. 633, 75 Ark. 391, 5 Ann Cas 616

55. Harbour-Pitt Shoe Co v Dixon, 60 S W 186, 22 Ky.L. 1169

56. Neb—Robinson Notion Co. v Ormsby, 50 N.W. 952, 33 Neb 665
Wyo—Cheyenne First Nat Bank v. Swan, 23 P. 743, 3 Wyo 356
6 C J. p 60 note 88.

57. Farris v Gross, 87 S W 633, 75 Ark. 391, 5 Ann Cas 616—6 C J. p 60 note 89.

58. Ill—Schwabacker v. Rush, 81 Ill 310
Ky.—Taylor v Smith, 17 B.Mon 536
Mo—Simmons Hardware Co. v. Pfeil, 35 Mo App 256
6 C J. p 60 note 90.

59. C. & E Marshall Co. v. Leon, 267 Ill App. 242.

60. N.J—Leventon v. Davison, 130 A. 632, 102 N J Law 144, affirming (N.J.) 127 A 787.
N Y—Millang v. Lambros, 153 N.Y.S. 944, 90 Misc. 638.

Pa.—Stowers Pork Packing and Provision Co. v. Shoener, 15 Pa.Dist 141

Reason for rule

A sale in bulk contrary to the statute is constructive fraud and not such actual fraud as constitutes ground for attachment—Stowers Pork Packing and Provision Co. v. Shoener, 15 Pa Dist 141.

61. Galbraith v. Oklahoma State Bank, 130 P. 541, 36 Okl 807.

62. Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394.

63. Ivy v. Caston, 21 S.C. 583—6 C. J p 60 note 91.

64. Dayton Spice-Mills Co. v. Sloan, 68 N W. 1040, 49 Neb 622—Smith v. Boyer, 52 N W 581, 35 Neb. 46, reversing 45 N W. 265, 29 Neb 76, 26 Am S R 373—Grimes v. Farrington, 26 N.W. 618, 19 Neb. 44.

65. Millus v. Lowrey Bros, 164 P. 663, 63 Okl 261, L R A 1918B 336—6 C.J. p 61 note 93.

them, even though the mortgagor did not intend eventually to defeat them, and even though the debt secured by the mortgage was valid;[66] and such an intention is apparent, where the amount of the mortgage greatly exceeds the debt secured thereby,[67] or, as it has been held, where the debtor and mortgagor is permitted to retain possession of and sell the mortgaged property,[68] although there is contrary authority.[69] A transfer of property to secure a debt, where the value of the property is less than the debt, cannot however, be considered a transfer with intent to defraud within the spirit of the attachment statute.[70]

§ 45. —— Judgments and Executions

A fraudulent confession of judgment warrants attachment.

A confession of judgment is usually regarded as a voluntary transfer within the attachment statutes[71] and when fraudulently made will warrant the issuance of a writ,[72] although, as will be shown infra § 47, thus preferring a creditor is not, in the absence of fraud, a ground for attachment.

§ 46. —— Assignment for Benefit of Creditors

An assignment for the benefit of creditors does not justify an attachment unless fraudulently made

The fact that a debtor has made a general assignment for the benefit of creditors does not warrant an attachment on the ground that he has fraudulently transferred or disposed of his property,[73] even though such assignment is void,[74] nor is the remedy warranted by the fact that the debtor was disposing of his property to devote it to the payment of his creditors, thereby accomplishing the same result.[75]

An assignment for the benefit of creditors is a sufficient transfer to warrant an attachment, however, where it is tainted with a fraudulent intent,[76] as where it includes fictitious claims,[77] reserves benefits to the assignor,[78] or allows him to retain possession of the assigned property.[79]

§ 47. —— Preference to Creditors

An attachment is not warranted by the mere fact that defendant has preferred some creditors over others.

It is not, ordinarily considered, a fraudulent transfer justifying attachment for a debtor to prefer one creditor over others,[80] whether this is done by way of absolute conveyance of property in

66. First Nat Bank v. Poor, (Colo.) 29 P.(2d) 713—Hafelfinger v. Perry, 121 P. 1021, 52 Colo. 444

67. Kan.—Marbourg v. Lewis Cook Mfg. Co., 5 P. 181, 32 Kan. 629—Taylor v. Kuhuke, 26 Kan. 132
Mich.—King v. Hubbell, 4 N.W. 440, 42 Mich. 597.
S.C.—Tabb, etc., Hardware Co. v. Gelzer, 21 S.E. 261, 43 S.C. 242
Wis.—Rice v. Morner, 25 N.W. 668, 64 Wis. 599
6 C.J. p. 61 note 94.

68. Ranney-Alton Mercantile Co. v. Watson, 65 P. 98, 10 Okl. 675—6 C.J. p. 61 note 95.

69. Cox v. Birmingham Dry Goods Co., 28 So. 456, 125 Ala. 320, 82 Am.S.R. 238—6 C.J. p. 61 note 95

70. Van Dam v. Baker, 204 N.W. 633, 164 Minn. 130

71. Meyers v. Rauch, 4 Pa.Dist. 333—6 C.J. p. 56 note 21 [a].

72. McGonagle v. Hallman, 18 Pa.Co. 383—6 C.J. p. 63 note 6 [a].

73. Lang v. Shanawolf, 111 A. 117, 137 Md. 17—6 C.J. p. 61 note 96

74. German Bank v. Folds, 68 N.W. 747, 9 S.D. 295—6 C.J. p. 62 note 97.

75. Lang v. Shanawolf, 111 A. 117, 137 Md. 17.

76. Ky.—Louisville Banking Co. v. Etheridge Mfg. Co., 43 S.W. 169, 19 Ky.L. 908.
N.Y.—Skinner v. Oettinger, 14 Abb. Pr. 109
Or.—Dawson v. Coffey, 8 P. 838, 12 Or. 513
S.D.—German Bank v. Folds, 68 N.W. 747, 9 S.D. 295
6 C.J. p. 62 note 98.

77. Bickham v. Lake, (D.C.Miss.) 51 F. 892—6 C.J. p. 62 note 99

78. Whedbee v. Stewart, 40 Md. 414—6 C.J. p. 62 note 1.

79. Ky.—Robinson v. Worley, 42 S.W. 95, 19 Ky.L. 791
Wyo.—Roy v. Union Mercantile Co., 26 P. 996, 3 Wyo. 417.

80. Minn.—Van Dam v. Baker, 204 N.W. 633, 164 Minn. 130
Miss.—Ringold v. Goyer Co., 144 So. 706, 164 Miss. 261
N.Y.—Thomas v. Blizzard, 170 N.Y.S. 11.
S.D.—People's State Bank v. Karlen, 182 N.W. 531, 44 S.D. 82.
6 C.J. p. 62 note 4.

"Unfair preference"

(1) In construing a Mississippi statute which enumerated, as one of the grounds of attachment, a disposition of his property by the debtor "with intent to defraud his creditors, or give an unfair preference to some of them," it was decided that no preference could be held to be unfair which, tested by the rules of law, is legal; and that, as to be illegal it must be fraudulent, and as all fraudulent dispositions of his property by a debtor are prohibited in other words, the clause relating to unfair preference is mere surplusage, this construction being confirmed by the fact that the words in question were omitted from the code of 1830 by the legislature of Mississippi.—Fitzpatrick v. Flannagan, (Miss.) 1 S.Ct. 389, 106 U.S. 648, 27 L.Ed. 211.

(2) Under the Louisiana statute providing that a creditor may attach his debtor's property where the latter has "mortgaged, assigned or disposed of, or is about to mortgage, assign or dispose of his property, rights or credits, or some part thereof with intent to . . . give an unfair preference to some of [his creditors]" In order to sustain an attachment on this ground, the creditor must show an intent on the part of his debtor to "give an unfair preference"—State Bank of New Iberia v. Martin, 28 So. 130, 52 La.Ann. 1628—Winter v. Davis, 19 So. 263, 48 La.Ann. 260.

(3) The attachment must be supported by proof of some act or declaration of purpose from which a fraudulent intent of the debtor may be reasonably gathered.—State Bank of New Iberia v. Martin, supra.

(4) Attachment therefore on this ground cannot be sustained where the proof merely shows intent to

liquidation of the debt,[81] by confessing a judgment in the creditor's favor,[82] by way of mortgage to secure payment,[83] or by way of actual payment of the debt.[84]

The transfer is fraudulent, however, if the debtor intends to secure benefits to himself thereby,[85] or intends to hinder and delay his other creditors,[86] or avoid the payment of his debts due other creditors[87]

§ 48. —— Transfer to Relatives

A transfer to relatives is not of itself ground for attachment although in conjunction with other circumstances it may give rise to a presumption of fraud.

The circumstance that relationship exists between the parties to a conveyance alleged to be fraudulent does not of itself show fraud,[88] but where the good faith of a transfer is in question the relationship of the parties is a fact for the consideration of the jury,[89] and a presumption of fraud may arise from the fact that the sale was a secret one,[90] or was made to pay an alleged debt which did not appear on the debtor's account books,[91] or from the debtor's financial worthlessness at the time.[92]

§ 49. —— Transactions in Relation to Exempt Property

Attachments cannot be grounded upon transactions relating to exempt property.

A debtor may dispose of exempt property without subjecting himself to attachment therefor, as his creditors have no rights to or interest in such property unless secured by contract[93] It has also been held not a fraudulent transfer for an insolvent debtor to use money to pay off a mortgage on his homestead,[94] or to exchange for stock which will be exempt.[95]

§ 50. —— Intended Transfer or Disposition

a. In general
b. What constitutes being "about" to dispose of property
c. Fraudulent intent

a. In General

Under some statutes it is a ground for attachment that the debtor is about to dispose of his property in fraud of creditors.

That a debtor is about to dispose of his property for the purpose of defrauding his creditors is a ground for attachment to issue against his property where the statutes make it so;[96] and, where an attachment is sought on this ground, it is not necessary that the debtor should be a resident within the state[97]

It is the actual facts as to defendant's fraudulent intention which govern in determining whether an attachment should issue on this ground; and the

make preference without showing that such preference was "unfair."—State Bank of New Iberia v Martin, supra—Seelingson v. Rigmaiden, 37 La.Ann. 722

(5) A fortiori, where the proof shows no intent to make any preference either fair or unfair—Lehman v. McFarland, 35 La.Ann. 624

(6) Where the proof does show an intent to make an "unfair preference," an attachment can be sustained on this ground—Bowling v. Colvin, 22 So. 374, 49 La.Ann. 1340.

(7) An "unfair preference" has been held to exist where it was shown that the creditor knew or had reason to know, that the debtor was insolvent, and that the transaction actually gave the creditor some advantage over other creditors—Patterson Bank v. Urban Co., 38 So. 561, 114 La. 788.

(8) So there is an "unfair preference" where the proof showed that the debtor making the preference had been deceiving his creditors and attempting to evade payment of his debts.—Stevens v. Helpman, 29 La. Ann. 635.

81. Ernest Wolff Mfg. Co. v. Batreal Shoe Co., 130 S W. 396, 192 Mo App 113—6 C J. p 62 note 5.

82. Wyman v. Wilmarth, 46 N W 190, 1 S D. 172—6 C.J. p 63 note 6

83. Hills v. Stockwell, etc, Furniture Co, (C C.Mich) 23 F. 432—6 C J p 63 note 7.

84. People's State Bank v. Karlen, 132 N W 531, 44 S D 82—6 C.J. p 63 note 8.

Writing checks

"The fact that a resident debtor has written, or is about to write, checks to pay a portion of his indebtedness, and at the same time refuses to pay other creditors, does not constitute . . . assigning or disposing of his property with intent to defraud his creditors"—Stephens Howard Co v. Baer, 166 S E 77, 78, 203 N.C. 355.

85. Ga—Hobbs v. Greenfield, 30 S E 257, 103 Ga. 1.
N Y—Nichthauser v. Lehman, 39 N. Y.S. 1091, 17 Misc 336
6 C.J. p 63 notes 9, 10 [d].

86. Metcalf v. Jelks, 8 S.W (2d) 462, 177 Ark 1022—6 C.J. p 63 note 10 [c], [d]
"It is the intent of the debtor in making the conveyance that is at issue, and if that is found to be fraudulent the attachment should be sustained"—Barry County Bank v. Russey, 74 Mo App. 651, 656

87. Hobbs v. Greenfield, 30 S E 257, 103 Ga. 1.

88. People's State Bank v. Karlen, 132 N W. 531, 44 S.D. 82—6 C.J p 63 note 11.

89. Hough v Dickinson, 24 N.W. 809, 58 Mich. 89—6 C J. p 64 note 12

90. Lustig v. McCullouch, 50 P. 43, 10 Colo App 41.

91. Lowenstein v. Powell, 8 So 269, 63 Miss 73—6 C J. p 64 note 14.

92. Keigher v. McCormick, 11 Minn. 545—6 C J. p 64 note 15.

93. Carr-Lowry Lumber Co. v. Martin, 109 So 849, 144 Miss. 106—6 C J. p 64 note 16.

94. Palmer v. Hawes, 50 N W. 341, 80 Wis 474.

95. Long v. Hopper, 38 P. 809, 54 Kan. 572.

96. Ky—Taulbee v. Campbell, 44 S. W.(2d) 275, 241 Ky. 410.
Pa—Boyd v. Lippencott, 2 Pa.Co. 585.
6 C J. p 64 note 20.

97. Bray Clothing Co. v. Shealy, 30 S.E. 620, 53 S C. 12.

remedy is justified neither by mere suspicions and conclusions as to such intentions on the part of plaintiff[98] nor by a bona fide belief on his part.[99]

b. What Constitutes Being "About" to Dispose of Property

A debtor who has decided to dispose of his property and intends to do so soon is "about" to dispose of it.

A debtor who has formed a design to dispose of his property and intends soon to carry it out is "about" to dispose of his property within the meaning of the attachment statutes;[1] and it is not necessary that there should be an actual transfer,[2] or any overt act on the part of the debtor,[3] nor is the particular mode of disposition contemplated by the debtor material.[4]

c. Fraudulent Intent

To justify an attachment on the ground of contemplated fraudulent disposition, the debtor at the time of the issuance thereof must be possessed of the intent which moves a debtor making an actual fraudulent transfer.

Where the attachment is based on a contemplated fraudulent disposal of his property by a debtor, the fraudulent intent is the gist of the matter;[5] and to justify the remedy such intent must exist at the time the attachment issues,[6] and must be in all respects similar to the intent which actuates a debtor making an actual fraudulent transfer of his property.[7]

§ 51. Removal or Concealment of Property

Actual or contemplated removal or concealment of property by a debtor is usually a ground of attachment when made with fraudulent intent or when injury to the creditors results.

Although mere removal of property of itself will not warrant the issuance of a writ of attachment[8] unless the statute expressly makes this a ground,[9] applying the attachment acts it is usually held that where creditors are threatened with loss thereby or where the acts were done with fraudulent intent, a creditor is entitled to an attachment on the ground that the debtor has actually removed or contemplates removal of his property from the jurisdiction of the court,[10] or has concealed his property and effects.[11] So where plaintiff has just grounds to fear that defendant will move his property out of the state without paying him, he may resort to the writ.[12] In some jurisdictions, however, there must be both a concealment and an unjust refusal to apply to the payment of debts.[13]

This ground is distinct from the ground that the debt was fraudulently contracted and both need not exist to enable plaintiff to issue an attachment.[14]

Exempt property may be removed out of the state by a debtor without subjecting himself to attachment, since such property is beyond the reach of creditors who have not secured it by contract,[15] and where the nature of the property is such that it must be taken from the state in order to be used or disposed of, the statutes in question have been held not applicable.[16]

98. Nolan v Louis Workman Co, 261 N Y S 534, 146 Misc 99

99. Lang v Shanawolf, 111 A. 117, 137 Md 17—6 C J p 64 note 22

1. Dueber Watch Case Mfg Co v. Young, 40 N E 582, 155 Ill. 226, affirming 54 Ill App 382—6 C J. p 64 note 23

2. U S—Waples-Platter Co. v Low, (Ind T) 54 F. 93, 4 C C A. 205
Pa—Ditchburn v Jermyn, etc., Co-op Assoc, 13 Pa Co 1.
6 C J. p 64 note 24

3. Hardee v. Langford, 6 Fla 13

4. Parsons v. Stockbridge, 42 Ind 121

5. Stockgrowers' State Bank of Worland v. Millard, 186 P 121, 26 Wyo 394

6. Bird v Dawkins, 6 La App. 244.

Remote intention

A paper title from husband to wife of a portion of real property recorded five months before issuance of the writ of attachment furnishes no ground therefor, since it is too remote to show present intention.—Bird v. Dawkins, 6 La App. 244.

7. La—Chaffe v Mackenzie, 10 So 369, 43 La Ann 1062
Mo—Simmons Hardware Co. v. Fighting the Flames Co, 115 S.W. 467, 135 Mo App 266.
6 C J p 64 note 27.

8. Antrim Lumber Co v Hazel, 246 P. 476, 118 Okl 71—Jacobson v Kill, 221 P 21, 94 Okl 146—Dunn v. Claunch, 76 P. 143, 13 Okl. 577

9. Bush v Dean, 86 S E 1075, 17 Ga App 364.

10. Pa—Boyd v. Lippencott, 2 Pa. Co 585
Va—Stuart v. Johnson, 140 S E 269, 149 Va 157.
6 C J. p 66 notes 58–60.

Personal representative of deceased

Under a statute providing that the process of attachment may issue in such case, the court has jurisdiction in attachment proceedings against a nonresident administratrix, where the evidence showed the administratrix was about to remove property from the state—Hartley v. Hartley, 161 S E. 358, 173 Ga. 710.

Proceedings between cosureties

Where plaintiff and defendant are cosureties on replevy bonds of an insolvent principal, attachment will lie on the ground that defendant is removing his property from the state fraudulently to avoid payment—Hanley v. Wallace, 3 B Mon (Ky) 134.

11. Ky—Kleine v Nie, 11 S W. 590, 88 Ky. 542, 11 Ky.L. 583.
Mo—Dodson-Hills Manufacturing Co. v. Payton, 65 Mo App. 311.
Pa—Boyd v. Lippencott, 2 Pa Co. 555
6 C.J p 67 note 61.

12. Crawford v Robbins & Kennedy, 132 So 662, 16 La App 701.

13. Crooke v Deas & Duke, 111 So. 293, 146 Miss 260—Roach v. Brannon, 57 Miss. 490.

14. Franklin Trust Co. v. Hegh, 6 Pa Dist & Co. 231.

15. Carr-Lowry Lumber Co. v. Martin, 109 So. 849, 144 Miss. 106.

16. Russell v. Wilson, 13 La. 367—6 C J. p 67 note 62.

§ 52. —— Intent of Debtor

In some jurisdictions to warrant attachment there must be a fraudulent intent; in others, intent is immaterial.

In some jurisdictions it is held that the gist of this ground is the fraudulent intent of the debtor[17] and that the removal must be made with a fraudulent intent in order to warrant attachment.[18] In other jurisdictions, however, the purpose of the removal and the bona fides of the transaction are immaterial,[19] and in still others the intent is not material if, by the removal, the creditor is threatened with the loss of his debt[20]

§ 53. —— What Constitutes Removal

a. In general
b. Amount of property removed
c. Period of removal

a. In General

Removal to justify an attachment ordinarily contemplates actual physical removal, although shipments made in the usual course of trade or to a bona fide creditor do not ordinarily give rise to the remedy.

An attachment sought on the ground of actual removal of property is justified where there is an actual physical removal thereof by the debtor.[21] It is not sufficient that the debtor has sold property and appropriated the proceeds[22] or falsely denied the receipt of certain funds[23]

Ordinary sales in the usual course of business do not necessarily furnish grounds for attachment, although shipments are made to points outside of the state,[24] but, on the other hand, shipments in the regular course of trade may be made under such circumstances as to warrant attachment.[25]

A shipment to a bona fide creditor outside of the state of goods in payment of the debt is not a fraudulent removal warranting attachment.[26]

b. Amount of Property Removed

To warrant an attachment in some jurisdictions the defendant must have removed a material part of his property, but elsewhere the amount removed does not affect the plaintiff's right to the remedy.

While it has been held not a defense to an attachment on the ground of fraudulent removal or

17. Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394

18. La.—General Motors Acceptance Corporation v. Sneed, 121 So 254, 9 La App 471, modified on other grounds, 119 So 417, 167 La. 432—Bennett v. Bilberry, 4 La App 364
Okl.—Antrim Lumber Co v. Hazel, 246 P 476, 118 Okl 71—Jacobson v. Kill, 221 P. 21, 94 Okl 146.
Wyo.—Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394.
6 C.J. p 67 note 63.

Proceedings before debt due

In attachment proceedings before debt due, removal of property, specified as a ground for attachment, must be to hinder, delay, and defraud creditors.—McCartney v. McCartney, (Neb.) 260 N.W 184—Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394.

In Missouri

(1) Where the attachment is based on the tenth ground of the statute, viz. that "defendant is about fraudulently to conceal, remove or dispose of his property or effects, so as to hinder or delay his creditors," the actual intent of the debtor is not controlling; it is enough if his acts are constructively fraudulent, or fraudulent in law, and tend to hinder or delay existing creditors in the enforcement of their demands.—Mathewson v. Larson-Myers Co., (App.) 217 S.W. 609—Matthews v. Loth, 45 Mo.App. 455.

(2) Where the attachment is based on the eighth ground of the statute, namely, that "defendant has fraudulently concealed, removed or disposed of his property or effects, so as to hinder or delay his creditors," the same rule applies.—Matthews v. Loth, supra.

(3) Accordingly the concealment of the debtor's effects from his creditors, although for the purpose of subsequently using them toward the discharge of valid claims against himself, is ground for an attachment based on the eighth ground.—Dodson-Hills Mfg. Co. v. Payton, 65 Mo App. 311.

(4) Nor is it a defense that money was concealed for the purpose of using it to defend against prospective attachments in order that creditors who did not attach might not suffer a disadvantage at the hands of those who saw fit to attach.—Matthews v. Loth, supra.

(5) But when the action is founded on the fifth ground, to wit, that "defendant is about to remove his property or effects out of this state with the intent to defraud, hinder or delay his creditors," an actual purpose to defraud, hinder, or delay must appear.—Simmons Hardware Co. v Fighting the Flames Co., 115 S.W. 467, 135 Mo.App. 266.

Fraudulent intent not shown

A contemplated removal of a truck from the county by defendant, whose place of business was in another county, which followed the bringing of an action of replevin, in which bond to this plaintiff with approved surety in double the value of the truck was filed, is not removal with intent to defraud creditors, so as to justify issuance of fraudulent debtor's attachment.—Locey v. Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super 148

19. Bush v. Dean, 86 S E 1075, 17 Ga App 364.

20. Fulwider v Benda, (S D.) 253 N W. 154.—6 C J. p 67 note 64

21. McTaggert v Putnam Corset Co., 3 N Y.S 800, 5 Silv Sup. 473.—6 C J. p 67 notes 65, 66

22. Monroe v. Cutter, 9 Dana (Ky.) 93.

23. Rohan Bros Boiler Mfg Co v. Latimore, 18 Mo App 16.

24. People's State Bank v. Karlen, 182 N W 531, 44 S D 82.—6 C.J. p 68 note 69.

25. U S.—Mack v McDaniel, (C C. Ark.) 4 F. 294, 2 McCrary 198
Miss.—Queen City Mfg Co. v. Blalack, 18 So. 800.—Wilkinson v. Dockery, 12 So 535.
6 C J. p 68 note 70.

Breach of contract

Where defendant had promised to assign to plaintiff the bill of lading on its lumber manufactured for it by plaintiff, and was, without plaintiff's knowledge or consent, shipping the lumber out of the state without having assigned the bill of lading, a writ of attachment on the lumber was properly issued in plaintiff's action for compensation for manufacture of the lumber.—Morganton Mfg. & Trading Co v Foy-Seawell Lumber Co., 99 S E 104, 177 N C. 404.

26. Ark.—Rice v. Pertuis, 40 Ark. 157.
Miss.—Lowenstein v. Bew, 8 So 674, 68 Miss. 265, 24 Am S.R. 269.

concealment that defendant has other property out of which he might make his debt,[27] that being rather a matter going to the issue of good faith with reference to the alleged acts on which the attachment is grounded,[28] in some jurisdictions it is held that in order to warrant an attachment defendant must have removed such a material part of his property as to endanger the collection of plaintiff's claim,[29] but according to some authorities this condition exists and an attachment is warranted, if defendant has not enough property left within the state to pay all his creditors.[30]

c. Period of Removal

The removal contemplated is a permanent, and not a temporary, one.

The removal which the statutes contemplate as a ground for attachment is a permanent taking away and not a mere temporary removal or use of the property by the owner outside of the state.[31]

§ 54. —— What Constitutes Concealment

Concealment within the act is a physical hiding or secreting defeating seizure by the creditors.

To constitute concealment within the meaning of attachment statutes, it is necessary that there should be a physical hiding or secreting of property so that it cannot be seized to satisfy creditors' claims.[32] Thus a solvent merchant may use the proceeds of the sale of his goods for his private purposes, even though he places them beyond the reach of his creditors, without being guilty of fraudulent concealment of his property;[33] but the fact that a stock of goods has been converted into money, and the stock greatly reduced, has been held to be a fraudulent concealment.[34] When the plaintiff is entitled to a part of the proceeds of a sale, and the defendant, having received it all, refuses to pay plaintiff his share, this is a concealment which will support an attachment.[35] Paying some creditors and at the same time refusing to pay others does not constitute secreting with fraudulent intent.[36]

An unsuccessful attempt to conceal will sustain an attachment.[37]

Concealment and refusal to pay. Where both concealment and refusal to apply in payment are required, there must be an affirmative act of concealing as well as a negative omission to pay.[38]

§ 55. —— Intended Removal

A debtor's act in preparing to carry out his purpose of removing his property entitles a creditor who would probably be injured thereby to an attachment.

As has been shown supra § 51, the fact that defendant contemplates removal of his property is ordinarily a ground for attachment. Where the debtor entertains the purpose of removing his property and is making preparations to carry it out, there is such intended or contemplated removal as entitles the creditor to attachment, within the rule there stated,[39] provided he shows a probable injury to him, if the removal should be effected,[40] and the mere fact that the defendant may be solvent will not defeat the attachment.[41]

§ 56. Other Grounds

Insolvency or bankruptcy is not a ground for attachment unless the statutes so provide.

In addition to the common grounds of attachment discussed supra §§ 24–55, other grounds less generally provided will be considered in this section and §§ 57–68. The mere fact that a debtor is insolvent[42] or has filed a petition in bankruptcy[43] will not justify a resort to attachment, where that is not one of the specified grounds therefor. Under some statutes, however, as will be seen in-

27. Ga—Bush v. Dean, 86 S E 1075, 17 Ga App 364.
Mo—Mathewson v. Larson-Myers Co, (App) 217 S W. 609.

28. Mathewson v. Larson-Myers Co, supra

29. Sutton v. Hancock, 8 Ky Op. 359—6 C J. p 68 note 72.

30. Ark—Simon v Sevier Assoc, 14 S W. 1101, 54 Ark 58—Holliday v Cohen, 34 Ark 707.
Tenn—Freidlander v. Pollock, 5 Coldw. 490
6 C J. p 68 note 73.

31. Freidlander v. Pollock, 5 Coldw (Tenn) 490—6 C J. p 68 note 74

32. Minn—Guile v McNanny, 14 Minn 520, 100 Am D 244.
Tex—Pearre v. Hawkins, 62 Tex 434.
6 C J. p 68 note 77, p 69 note 78.

33. Mo—Union Nat Bank v Mead Mercantile Co, 52 S W 196, 151 Mo 149
Tex—Willis v. Lowry, 2 S W. 449, 66 Tex. 540

34. Reed Bros Co v Weeping Water First Nat Bank, 64 N W. 701, 46 Neb. 168.

35. Ziegler v Ziegler, 22 N Y S 812, 68 Hun 177.

36. Stephens Howard Co v. Baer, 166 S E 77, 203 N C 355

37. Gray v. Valley, 101 So 855, 136 Miss 886.

38. Roach v Brannon, 57 Miss 490

39. Myers v. Farrell, 47 Miss. 281—6 C J. p 68 note 75.

40. Ill—White v Williams, 10 Ill 25—White v. Williams, 10 Ill. 21.
Ky—Montgomery v. Tilley, 1 B Mon. 155
Ohio—Harrison v. King, 9 Ohio St 388.

41. Mathewson v. Larson-Myers Co, (Mo App) 217 S W 609.

42. Ark—Arkansas Nat Bank v Stuckey, 181 S W. 913, 121 Ark 302
La—General Motors Acceptance Corporation v. Sneed, 131 So. 254, 9 La App. 471, modified on other grounds 119 So. 417, 167 La. 432.
Utah—Western Auto Co v. Gurnea, 274 P 863, 73 Utah 423.
6 C J. p 43 note 12.

43. General Motors Acceptance Corporation v Sneed, 131 So 254, 9 La App. 471, modified on other grounds 119 So 417, 167 La. 432.

fra § 65, the fact that defendant has insufficient property in the state to satisfy plaintiff's demand is a ground for attachment. Where no statutory ground therefor exists, attachment will not lie merely to enable the creditor to make his obligation a preferred claim and prevent the debtor from applying his property to the payment of other debts.[44]

§ 57. —— Acts in Official or Fiduciary Capacity

Attachment being, as stated supra § 2, purely a statutory remedy, it must follow that acts committed by defendant in an official or fiduciary capacity not otherwise falling within the statutory grounds afford no ground for the issuance of the writ unless the statute so provides. That an action based on a breach of trust will support an attachment where proper grounds exist, however, is shown supra § 11, and that persons in fiduciary capacity may under some circumstances, although not ordinarily, be liable in attachment proceedings is shown supra § 21 d.

§ 58. —— Criminal Act in Incurring Liability

The fact that the plaintiff's damages resulted from a criminal act of the defendant is ground for attachment under some statutes.

Where the attachment statutes make the fact that the debt or obligation in suit has been criminally contracted or incurred a ground for issuing an attachment, plaintiff bringing himself within the statute is entitled to the relief.[45] The term "obligation" as employed in such statutes is equivalent to "liability," and although the statute refers to obligations "fraudulently or criminally incurred," plaintiff is entitled to the remedy where the ingredient of criminality is present without that of fraud.[46] Accordingly, it has been held that attachment is properly granted in civil actions arising out of assault and battery,[47] rape,[48] or the operation of a motor vehicle in a manner prohibited by law and punishable as a misdemeanor;[49] but an action for damages for malicious prosecution will not justify an attachment under the statute.[50]

Injuries to property as well as to the person are within the statute;[51] and it has been held not necessary that the action be technically founded on the wrong relied on as ground for the attachment, but an action by the surety in a fidelity bond against the principal to recover the amount paid by plaintiff on account of defendant's embezzlement is within the provisions of an act authorizing an attachment where the damages arise "from the commission of a felony."[52]

§ 59. —— Death of Nonresident Debtor Leaving Property in State

In a proper case a creditor may attach property left by a deceased nonresident.

Under statutes making this a ground for the remedy an attachment is properly issued where any person liable for any debt or demand, residing out of the state, dies, leaving property in the state.[53] Attachment in such case is intended to afford the creditor a simple and speedy remedy for the collection of his debt where administration was not granted, too expensive, or unnecessary, but cannot be employed to provide a method by which one creditor might, by diligence, obtain priority over other creditors where suggestion of insolvency has been made by the administrator of the debtor.[54] Where the creditor invoking the statute resides out of the state and in the same state as the heirs of the deceased debtor, his rights thereunder are subject to the provision of another statute that if the debtor and creditor are both nonresidents of the state and residents of the same state the creditor cannot have an attachment unless he swear that the property was fraudulently removed from the state of the debtor's residence.[55]

§ 60. —— Demand Not Otherwise Secured

Under statutes authorizing an attachment where the plaintiff's claim is not secured or security given therefor has become valueless, the statutory facts must be shown to warrant the remedy.

In some jurisdictions the statutes provide that plaintiff may have an attachment in certain actions

44. Ringold v. Goyer Co., 144 So 706, 164 Miss 261.

45. Montanari v. Haworth, 140 N E 319, 108 Ohio St. 8—6 C.J. p 72 note 29.

46. Montanari v. Haworth, supra.

47. Creasser v. Young, 31 Ohio St. 57—Kirk v. Whitaker, 22 Ohio St 115—Sturdevant v. Tuttle, 22 Ohio St. 111.

48. Kuehn v. Paroni, 19 P. 273, 20 Nev. 203.

49. Montanari v Haworth, 140 N.E. 319, 108 Ohio St 8.

50. Glidden, etc., Varnish Co. v. Joy, 8 Ohio Cir Ct. 157, 4 Ohio Cir.Dec 323

51. Brandenstein v. Way, 49 P. 511, 17 Wash 293

52. American Surety Co. v. Haynes, (C.C.) 91 F. 90, disapproving Deering v. Collins, 38 Mo App 73

53. Boyd v. Martin, 9 Heisk (Tenn.) 382—Sharp v. Hunter, 7 Coldw (Tenn.) 389.

54. Bacchus v. Peters, 4 S W 833, 85 Tenn. 673.

55. Merchant v. Preston, 1 Lea (Tenn.) 280.

when his claim is not secured, or, if originally secured, when the security has, without his fault, become valueless In order to sustain the attachment on this ground either of two facts must be established· (a) That the debt had not been secured originally, or (b) that, if secured in the beginning, the security later became valueless[56] A surrender by the creditor of any security given for the debt, however, entitles him to sue out an attachment[57]

Where security has become valueless. A security becomes worthless without fault on the part of the creditor, so as to entitle him to maintain an action under the statutes under consideration, where a vendee's lien becomes subordinate to a mortgage given to a good-faith incumbrancer,[58] where the property securing plaintiff's mortgage is sold by the mortgagor with the consent of the mortgagee,[59] or, in the case of a pledge, by the pledgee in accordance with the conditions of the pledge,[60] or where property embraced in a chattel mortgage was not mortgageable and other creditors have levied attachments on it to an extent exceeding its value.[61] Waiver of his security by act of a conditional seller in passing title to the buyer, however, does not bring him within the statute.[62] and such a provision is not applicable to a case where the security was originally worthless,[63] or has become so through lapse of time,[64] although where pretended security is valueless because the property which it purports to cover had no tangible existence at the time the security was given, the attachment will lie.[65]

§ 61. —— Failure to Pay for Goods on Delivery

Under some statutes a seller delivering goods and demanding payment under an unconditional contract to pay for them on delivery is entitled to an attachment where the buyer fails to pay for them.

It is sometimes made a ground for attachment that defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for on the delivery thereof. The right to an attachment under such a statute belongs to the seller alone;[66] and to warrant the remedy, the thing must have been delivered,[67] there must have been no credit given;[68] there must have been a contract to pay on delivery,[69] which contract must have been unconditional;[70] and payment must have been demanded.[71]

§ 62. —— Failure to Pay for Labor on Performance

The plaintiff in a proper case is entitled to an attachment although not claiming a lien where the statute authorizes the remedy on failure, on its completion, to pay for work performed when payment is required by contract at such time.

Failure to pay for work or labor performed at the time of its completion, when the contract requires payment at such time, is sometimes made a ground of attachment. This is an independent ground, and plaintiff is entitled to an attachment on proving his claim thereunder regardless of his failure to prove any facts constituting other proper grounds[72] So an attachment is warranted on this ground after demand for the amount due where by contract plaintiff is employed to work for defendant, by day or month, and nothing is said as to the time of payment for services rendered;[73] and no lien claim is required to be set out to enable plaintiff to attach defendant's property under such statutes.[74]

56. Giandelmi v Ramirez, (Cal App) 54 P (2d) 91

57. Idaho —Wooddy v. Jamieson, 40 P 61, 4 Idaho 448
Mont —Parberry v Woodson Sheep Co , 45 P 278, 18 Mont 317

58 Bennett v Superior Court in and for Los Angeles County, 21 P (2d) 946, 218 Cal 153

59. Farmers' State Bank of Star v Gray, 210 P 1006, 36 Idaho 49

60. Williams v Hahn, 45 P 815, 113 Cal 475

61. Republic Truck Sales Corporation v. Peak, 229 P 331, 194 Cal 492.

62. Mark Means Transfer Co. v Mackenzie, 73 P 135, 9 Idaho 165

63. Giandelmi v Ramirez, (Cal App) 54 P.(2d) 91—6 C J. p 88 note 63

64. Page v Latham, 63 Cal 75—6 C J. p 88 note 64.

65. McPhee v Townsend, 73 P. 534, 139 Cal 638

66. Richardson's Missouri Express Co v Cunningham, 25 Mo 396—6 C J. p 73 note 35 [a]

67. Miller v Godfrey, 27 P. 1016, 1 Colo App 177—6 C J p 73 note 36.

68. Miller v. Godfrey, supra.

What constitutes cash transaction

Where plaintiff delivered a car to defendant after banking hours on Saturday, accepted her check and gave a receipt, after which defendant suggested that her bank account was short of the amount necessary to cover the check, and in fact her account at that time did not contain sufficient funds for the purpose, if the deal was closed prior to her assertion that she would deposit sufficient funds on Monday to take care of the matter, it was a cash transaction, and the statutory ground of attachment, that defendant failed and refused to pay the price which should have been paid on delivery is supported —Allen v Gilman, 218 P 1044, 74 Colo 116

69. Young v. Lynch, 1 P 503, 30 Kan 205—6 C J p 73 note 38.

70. Colo —Miller v Godfrey, 27 P. 1016, 1 Colo App 177.

Mo —Harlow v Sass, 38 Mo 34

6 C J. p 73 note 39

71. Miller v Godfrey, 27 P 1016, 1 Colo App 177.

72. Schloupt v. Thompson, 16 Ohio Cir Ct. (N S) 418.

73. De Lappe v. Sullivan, 2 P. 926, 7 Colo. 182—6 C J. p 73 note 38 [a]

74. Martin v. Jesse L Hedden Co., 76 A. 935, 106 Me 498.

An attachment cannot be maintained, however, when the whole transaction shows a mutual account, consisting of debits and credits.[75]

§ 63. —— Fraud in Incurring Liability

a. In general
b. What constitutes fraud
c. Fraudulent written statement

a. In General

Fraud in incurring liability is a ground for attachment in some jurisdictions available in an action on the fraudulently incurred liability between the original parties to the transaction.

Statutes in some jurisdictions make fraud on the part of a debtor in contracting a debt a ground for attachment in an action on the obligation thus created, and where plaintiff establishes such fraud, he is entitled to an attachment thereunder.[76]

It has been held that, where an attachment on this ground is sought, only the fraudulently incurred liability can be included in the attachment suit,[77] but there is also authority for the view that attachment is an available remedy, where only a part of the indebtedness sued on was fraudulently contracted,[78] although in such case the attachment could be for only such part as was affected by the fraud.[79] Where plaintiff deliberately undertakes to issue an attachment for his entire claim, part of which he knows was lawfully contracted, the court will not separate the lawful part from the fraudulent, but the entire attachment will fail.[80]

Intent. In order to support an attachment, there must have been an intent to defraud on the part of the debtor.[81]

The right of an assignee of a chose in action to procure a writ of attachment on the ground that the debt or obligation was fraudulently incurred exists only against his immediate assignor,[82] for, as shown supra § 20 a, the assignee of a debt fraudulently contracted is not ordinarily entitled to an attachment against the original obligor.

b. What Constitutes Fraud

(1) In general
(2) False representations

(1) In General

An intent not to pay a debt or to keep collateral agreements entertained at the time of contracting the debt or a conspiracy to borrow money on worthless security constitutes fraud, but a subsequent breach of the agreement not intended at the inception of the contract does not.

A debt is fraudulently contracted if at the time of contracting it, the debtor entertained an intention not to pay,[83] or an intention not to keep a collateral agreement regarding the disposition of property purchased on credit;[84] and a conspiracy to borrow money on worthless security upon which the lender relied in making the loan is fraud within the meaning of the statute.[85] The fraudulent intent must, however, have existed at the time of the inception of the debt or making of the contract.[86]

75. Morris v Elverly, 36 P 150, 19 Colo. 529—6 C.J. p 73 note 34.

76. Ohio—Benjamin Emmerman v The Ohio Iron & Metal Co, 25 Ohio Cir Ct (N S) 70
Pa—Franklin Trust Co. v Hegh, 6 Pa Dist & Co 231—Boyd v. Lippencott, 2 Pa Co. 585
6 C J p 69 note 92.

Fraudulent sale by defendant
In an action on a claim for damages sustained by plaintiff by reason of the fraudulent sale by defendant to plaintiff of a quantity of steel scrap, in billing and collecting from plaintiff for ninety three thousand and six hundred pounds and fraudulently shipping only thirty six thousand and sixty pounds of said scrap, an attachment is justified under the statute—Benjamin Emmerman v. The Ohio Iron & Metal Co., 25 Ohio Cir Ct (N S) 70.

77. Estlow v. Hanna, 42 N W 812, 75 Mich 219—6 C.J. p 70 note 93

78. Mo—Mackey v. Hyatt, 42 Mo App 443.
Wis—Teweles v. Luna, 74 N W. 122, 98 Wis. 453.

79. Teweles v. Luna, supra—6 C J. p 70 note 95

80. Brewing Co v. Bomgardner, 18 Pa Co 130—6 C J. p 70 note 93 [a]

81. Crooke v. Deas & Duke, 111 So 293, 146 Miss 260—6 C J. p 70 note 96.

82. Thwing v Humphrey, 75 P. 1127, 13 Okl 646—Thwing v. Winkler, 75 P 1126, 13 Okl 643.

83. Miller v. White, 33 S E 332, 46 W Va. 67, 76 Am S R 791—6 C.J p 70 note 98.

Embezzlement
An officer of a private corporation, intrusted with its funds and property, who improperly converts them to his own use, is guilty of fraudulently contracting a debt or incurring a liability to the corporation which will be the basis of an attachment—Piedmont Grocery Co. v. Hawkins, 98 S E 152, 83 W.Va 180, 4 A L R. 828—6 C J. p 70 note 98 [d]

84. N Y—Weiller v. Schreiber, 63 How Pr. 491
Pa—Campbell v. Walls, 17 Wkly N.C 524

85. Lancaster v. Corsicana Nat. Bank, (Tex Civ App) 229 S W 580, reversed on other grounds (Com. App) 240 S W 807

86. Md—Turner v Spencer, 111 A 109, 136 Md 593
Miss—Crooke v Deas & Duke, 111 So 293, 146 Miss 260
Pa—Locey v Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super 148
S D—People's State Bank v. Karlen, 182 N W. 531, 44 S D. 82.
6 C.J. p 70 note 1.

Change of relationship
To authorize attachment against a broker by a customer, where the broker, to whom the customer pledged stock for the unpaid part of the price, with agreement by the broker to return securities of like kind and amount, on payment or tender of the amount secured, repledged the stock for a greater amount than the customer owed him, and deprived himself of the power to perform his contract for the return thereof, it is not necessary that there should have been fraud, or intention to defraud, on the part of the broker, at the time of such contract; but such acts of

The fraud necessary to authorize an attachment is not shown by a breach of a bona fide promise to give security[87] or to deposit the proceeds of subsequent sales with the creditor in accordance with an agreement extending credit,[88] nor is it shown by a breach of warranty,[89] a mere failure to pay the debt at maturity,[90] a breach of an agreement to pay a debt out of a certain fund[91] or to apply money to the satisfaction of a certain debt,[92] or mere insolvency at the time the debt was created unaccompanied by some artifice practiced to consummate the transaction.[93]

The nature of the cause of action negatives the existence of such fraud as will warrant attachment where plaintiff seeks a recovery for malicious prosecution,[94] negligence or misconduct of a professional man,[95] or a conversion of property;[96] and an action by the surety in a fidelity bond against the principal to recover the amount paid by plaintiff on account of an embezzlement by defendant from the obligee is based upon an implied contract to repay such amount, and the debt is not one "fraudulently contracted," within the meaning of an attachment statute.[97]

(2) False Representations

(a) In general

(b) As to financial condition

(a) In General

Obtaining property or credit by false representations as to material facts made by the defendant to the plaintiff with intent to deceive constitutes fraud warranting attachment.

Securing property or credit by false representations regarding existing ascertainable facts constitutes such fraud as will warrant attachment.[98] Mere expressions of opinion are not sufficient, however, to warrant the remedy on this ground,[99] particularly when made with a belief in their truth,[1] and neither are statements as to the future success of a business.[2] In order to warrant the remedy the false representations must be made to plaintiff[3] by defendant[4] with an intention to deceive,[5] and they must also be material,[6] and must be relied on by plaintiff in giving credit.[7]

An intention not to pay, existing at the time when the debt was contracted, is not necessary to warrant an attachment where the credit was secured by false representations.[8]

(b) As to Financial Condition

False representations by a debtor as to his financial condition generally warrant an attachment on the ground of fraud, but mere failure to disclose such condition does not.

Fraud is not shown by the mere failure of defendant to disclose that he is doing business on borrowed capital,[9] or by his failure to disclose insolvency which is not hopelessly irremediable at the time the debt was created;[10] but generally an attachment is warranted by false representations by the debtor as to his financial condition,[11] such as a false allegation of solvency[12] or a false state-

repledging, constituting a conversion of the stock, and thereby making the broker a debtor of the customer, were also a fraud, simultaneous with the creation of the debt, sufficient for attachment.—Turner & Thomas v William Schwarz & Sons, 117 A 904, 140 Md. 465, 24 A.L.R. 444

87. Johnson v. Stockham, 43 A 920, 89 Md. 358—6 C.J. p 70 note 2

88. People's State Bank v. Karlen, 182 N.W. 531, 44 S.D. 82.

89. Locey v Sterling Motor Truck Co of Pittsburgh, 156 A 730, 102 Pa Super. 143.

90. Staed v. Mahon, 70 Mo App 400—Seymour Mfg. Co v. Sheahan, 13 Mo App 577—St. Louis Type Fdy v Union Printing, etc., Co., 13 Mo App 142—6 C.J. p 70 note 3

91. Rohan Bros Boiler Mfg. Co v. Latimore, 18 Mo App 16—6 C.J. p 70 note 4.

92. Turner v. Spencer, 111 A. 109, 136 Md 593—6 C.J. p 70 note 5

93. Miller v. Shapiro, 12 Pa Co. 526.

94. Glidden, etc., Varnish Co v. Joy, 8 Ohio Cir.Ct. 157, 4 Ohio Cir Dec 323.

95. Rawlings v. Powers, 41 N.W. 651, 25 Neb 681—6 C.J. p 71 note 7

96. Taylor v. Crow Motor Car Co., 16 Ohio N.P. (N.S.) 557—6 C.J. p 71 note 8.

97. American Surety Co. v Haynes, (C.C.Mo.) 91 F. 90

98. Ill.—Yates v Dodge, 13 N.E. 847, 123 Ill. 50, affirming 21 Ill App 547, 23 Ill App 338.
Iowa.—Stanhope v Swafford, 42 N.W. 450, 77 Iowa 594
6 C.J. p 71 notes 10–12

99. Cheyenne First Nat. Bank v Swan, 23 P. 743, 3 Wyo 356.

1. Norfolk & N.B. Hosiery Co v Arnold, 18 N.Y.S. 910.

2. Rice v. Warren, 3 Del.Co. (Pa.) 283.

3. Long v West, 1 P. 545, 31 Kan 298—6 C.J. p 71 note 13.

4. Lodge v Rose Valley Mills, 1 Pa.Dist. 811, 11 Pa.Co. 667—Hooven Mercantile Co v. Backley, 7 Kulp (Pa.) 552.
Unauthorized acts of another
False statements made by defendant's minor son, without defendant's knowledge or authority, in order to get credit for defendant, will not support an attachment on the ground that the debt was fraudulently contracted.—Hooven Mercantile Co. v. Backley, 7 Kulp (Pa.) 552.

5. Mo.—Tootle v. Lysaght, 65 Mo. App 139
N.J.—Liveright v Greenhouse, 38 A. 697, 61 N.J.Law 156.
6 C.J. p 71 note 15

6. Cheyenne First Nat. Bank v. Swan, 23 P. 743, 3 Wyo 356—6 C.J. p 71 note 16.

7. Penoyar v. Kelsey, 44 N.E. 788, 150 N.Y. 77, 34 L.R.A. 248—6 C.J. p 71 note 17.

8. Marks v. Stoner, (Miss.) 11 So. 186

9. Dieckerhoff v. Brown, (Md.) 2 A. 723.

10. Kan.—Kelsey v. Harrison, 29 Kan. 143.
N.Y.—Nichols v. Pinner, 18 N.Y. 295.
6 C.J. p 71 note 19.

11. Netter v. Harding, 6 Pa.Dist. 169, 18 Pa.Co. 352—6 C.J. p 72 note 20 [f].

12. Warner v. Kade, 15 Mo.App. 600—6 C.J. p 72 note 20.

ment regarding the ownership[13] or value[14] of property. Where the attachment is based on this ground it must appear that the obligation sued on was created in reliance on the false statement.[15]

c. Fraudulent Written Statement

Written, signed statements constituting fraud required by some acts to warrant attachment must contain at least the substance of the fraudulent statement relied upon and must bear the defendant's signature.

Where the statute authorizes an attachment provided the statements of the debtor, his agent or attorney, which constitute the fraud, shall have been reduced to writing and his signature attached thereto by himself, agent, or attorney, the written statement need not contain everything that is said nor all the devices that may be used to complete the fraud and need not be reduced to writing for the purpose of furnishing evidence of the fraud. It is enough if the writing contain the substance in general of the statements which constituted the fraud; and if the fraud is consummated and the writing is given at the time, after the verbal statements which induced the fraud are made, it will be sufficient.[16]

A written statement made by defendant's agents, to which defendant's signature is not attached, is not, however, such a statement as the statute contemplates,[17] and neither is the act of defendant in forging the name of the payee on the back of a check, or a subsequent letter written over the signature of his attorney, admitting the previous wrongdoing and expressing a desire to make amends.[18]

§ 64. —— Impairment of Security

Mistaken belief of the plaintiff as to property covered by security, and act of the defendant placing pledged property in escrow, do not warrant attachment on the ground that the security was impaired.

It is sometimes made a ground of attachment that the security of plaintiff has been impaired or rendered nugatory by the act of defendant. The mere fact that plaintiff believed that certain property belonged to defendant and was included in a bill of sale securing plaintiff's debt, when in fact it belonged to another and was not included therein, does not warrant an attachment on this ground,[19] and neither does the act of defendant in placing in escrow certain stock certificates which had been pledged to plaintiff.[20]

§ 65. —— Insufficient Property in State to Satisfy Demand

Under statutes so providing, the plaintiff is entitled to an attachment where it appears that the defendant's property in the state, subject to execution, is insufficient to pay the plaintiff's demand, and the collection thereof will be endangered by delay in obtaining judgment.

As has been shown in § 56, insolvency or bankruptcy is not a ground for attachment unless the statutes so provide. Under some statutes an attachment is authorized in an action for the recovery of money due upon a contract, judgment, or award, if defendant has no property in the state subject to execution or not enough to satisfy plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. In order to sustain an attachment on this ground both conditions of the statute, namely, the insufficiency of the property and the danger of delay, must be made to appear,[21] and when they are satisfactorily shown the attachment should be granted.[22] One of these conditions is not necessarily the concomitant of the other, although it may be so.[23]

Ability to meet check

Where the buyer of an automobile gave a check for more than the amount on deposit, which was accepted on her statement that she had a certain contest fund sufficient to meet the check which would be deposited on the next banking day, when in fact the contest fund was insufficient for that purpose, attachment was warranted on the ground that the automobile was procured by false representations—Allen v. Gilman, 218 P. 1044, 74 Colo. 116.

13. Neb—Askwith v. Allen, 50 N. W 267, 33 Neb 413
Tex—Cohen v. Grimes, 45 S W. 210, 18 Tex Civ App 327.
6 C J. p 72 note 21.

14. Netter v. Harding, 6 Pa Dist 169, 18 Pa.Co. 353—6 C J. p 72 note 22

15. Abe Cohen Co v Leon Fruit Co., 250 N.Y S. 597, 140 Misc. 416.

16. Dodge v. Yates, 21 Ill App 547, affirmed 13 N E 847, 123 Ill 50.

Receipt may be sufficient.—Dodge v Yates, 21 Ill App 547, affirmed 13 N E 847, 123 Ill. 50.

17. Fisher v. Secrist, (C C Ill.) 48 F 264.

18. Jappas v. Williams, 248 Ill App. 596

19. Whitehead v. New York, etc, Min. Co, 1 Alaska 245.

20. First Nat. Bank of Goldfield v. Murphy, 125 P. 365, 24 Nev. 461.

Reason for rule

"If the placing of the stock certificate in escrow rendered the security nugatory, the plaintiff was as much the cause thereof as the defendant, for the plaintiff, holding the certificate of stock as a pledge, had to consent to any modification of the conditions of its security."—First Nat Bank of Goldfield v. Murphy, 125 P 365, 366, 24 Nev. 461.

21. Walker v Grayson County State Bank, 35 S W.(2d) 350, 237 Ky. 449—6 C J p 53 note 1.

22. Huffman v. Martin, 10 S W (2d) 636, 226 Ky. 137—Mammoth Garage v. Taylor, 295 S W 429, 220 Ky. 499—6 C J. p 53 note 1.

Solvency or insolvency of debtors when attachment was issued was immaterial in determining whether attachment would issue on ground that debtors had insufficient property subject to execution to satisfy creditor's demand and that collection of demand would be endangered by delay in obtaining judgment of return of no property found—Cannon Ball Cab & Bus Co. v. Maryland Casualty Co., 96 S.W.(2d) 760, 265 Ky. 256.

23. Walker v. Grayson County State Bank, 35 S.W (2d) 350, 237 Ky. 449.

The statute does not warrant the adding of all the debts together and authorize an attachment if the defendant's property is not sufficient to pay all the debts. The rule is that in each case the attachment cannot stand if the defendant's property which is subject to execution is sufficient to pay that debt.[24] So it is not sufficient to authorize an attachment under this statute that the debtor is insolvent,[25] or has not enough property in the state to satisfy the demand against him;[26] but plaintiff must show that the collection of his demand will be endangered unless the attachment issues.[27]

This statute does not authorize attachment for immaterial demands[28] or demands sounding in tort.[29]

Intent. No intent on the part of the debtor to defraud his creditors is necessary when an attachment is sought on this ground.[30]

Joint liability. In an action on a joint cause of action against two or more defendants, an attachment cannot be sustained against one of them on the sole ground that he has not sufficient property subject to execution to pay the debt. To warrant an attachment, it must appear that none of the obligors within the jurisdiction have enough property for this purpose.[31]

§ 66. —— Overdue Instrument for Direct Payment of Money, or Book Account

That action is brought on an overdue instrument for direct payment of money or on a book account is ground for attachment when specifically made so.

The fact that the action is brought upon an overdue promissory note, bill of exchange, other written instrument for the direct payment of money, or upon book account, will support an attachment where this is made a specific ground therefor.[32] A certified check payment of which has been refused is a written instrument contemplated by the statute,[33] and so is a written agreement to pay a mortgage given as security for a promissory note,[34] but an appeal bond is not.[35]

§ 67. —— Refusal to Pay or Secure Debt

Refusal to pay or secure a debt is not ground for attachment unless statutes so provide.

In the absence of statutes making it so, it is not a ground for attachment simply that defendant owes a debt and obstinately, for whatever reason, fails to pay it promptly,[36] or fails to perform a verbal promise to secure plaintiff who was liable as a surety thereon.[37] Statutes sometimes make it a ground for attachment, however, that one indebted on contract will not, on demand, either pay or secure the debt, and where plaintiff establishes a case within such statute, the remedy will lie;[38] but no attachment will be allowed thereunder if the debtor is willing to give reasonable security for the debt, even though the creditor cannot convert such security into cash as quickly as he might desire.[39]

24. Miller's Ex'x v. People's Bank, 41 S.W.(2d) 1096, 240 Ky. 185—6 C.J. p. 53 note 1 [a], [b].

Property considered

The value of motor vehicle permits owned by a cab and bus company would not be considered in determining whether attachment would issue against the cab and bus company on the ground that the company had insufficient property subject to execution to satisfy plaintiff's demand and that collection of the demand would be endangered by delay in obtaining judgment of return of no property found since such permits were not subject to execution.—Cannon Ball Cab & Bus Co. v. Maryland Casualty Co., 96 S.W.(2d) 760, 265 Ky. 256.

25. Miller's Ex'x v. People's Bank, 41 S.W.(2d) 1096, 240 Ky. 185—Walker v. Grayson County State Bank, 35 S.W.(2d) 850, 851, 237 Ky. 449—6 C.J. p. 54 note 5.

"Even though the plaintiff may be insolvent, yet, if he shows ample property subject to execution, and is not endeavoring to defeat or defraud his creditors, his insolvency may be immaterial."—Walker v. Grayson County State Bank, supra.

26. Dunn v. McAlpin, 13 S.W. 363, 90 Ky. 73, 11 Ky.L. 884—McCulloch v. Cook, 15 Ky.L. 207—6 C.J. p. 54 note 6.

27. Downs v. Ringgold, 41 S.W. 317, 101 Ky. 392, 19 Ky.L. 639—6 C.J. p. 54 note 7.

28. Wolfstein v. Steinharter, 10 Ky.L. 635—McChord v. Barker, 8 Ky.L. 790—Simpson v. Starnes, 8 Ky.L. 357—Cowherd v. Harding, 7 Ky.L. 217.

29. U.S. v. Lilly, 6 Ky.L. 582—6 C.J. p. 54 note 4.

30. Burdett v. Phillips, 78 Ky. 246.

31. Miller's Ex'x v. People's Bank, 41 S.W.(2d) 1096, 240 Ky. 185—Francis v. Burnett, 84 Ky. 23, 7 Ky.L. 715—Dunn v. McAlpin, 10 Ky.L. 874.

32. Gurley v. Tomkins, 30 P. 344, 17 Colo. 437—Herfort v. Cramer, 4 P. 896, 7 Colo. 483—Simmons v. California Powder Works, 3 P. 420, 7 Colo. 285.

33. Breene v. Merchants', etc., Bank, 17 P. 280, 11 Colo. 97.

34. Stuyvesant v. Western Mortgage, etc., Co., 43 P. 144, 22 Colo. 28.

35. Hurd v. McClellan, 28 P. 792, 14 Colo. 213.

36. Miss.—Crooke v. Deas & Duke, 111 So. 293, 146 Miss. 260.
Tex.—Anderson v. Byrum, (Civ.App.) 73 S.W.(2d) 571.
6 C.J. p. 55 note 15 [c].

37. Lincoln Bank & Trust Co. v. Arnold, 75 S.W.(2d) 751, 256 Ky. 80.

38. State v. Morris, 50 Iowa 203—Raver v. Webster, 3 Iowa 502, 66 Am.D. 96—6 C.J. p. 55 notes 13–15.

Failure to pay for board furnished

An attachment of wages under a statute authorizing the remedy in an action for board and lodging has been held to lie only where the claim is for board furnished defendant, and not in an action on a claim for board of his minor children.—Donohue v. Redding, 42 Pa.Co. 382.

39. Drummond v. Stewart, 8 Iowa 341.

§ 68. —— Return of "Not Found" on Ordinary Process

A "judicial" attachment taking the place of personal service may issue in some jurisdictions where ordinary process has been issued and returned "not found."

Under that class of attachment statutes whose principal object is to compel the appearance of a debtor who cannot be reached by ordinary process, where ordinary process has been issued and returned by the officer "not found," a so-called "judicial" attachment may issue.[40] In such case the attachment is sued out to take the place of personal service,[41] and it has been held that a judicial attachment lies only against residents [42]

§ 69. Evidence as to Grounds

a. Presumptions and burden of proof
b. Admissibility
c Weight and sufficiency

a. Presumptions and Burden of Proof

The burden of proof as to grounds of attachment is on the plaintiff, but shifts to the defendant when the plaintiff makes out a prima facie case.

The burden is on plaintiff to prove the grounds of his attachment where the existence of the grounds is properly denied by defendant.[43] Thus when that is the ground relied on plaintiff has the burden of proving that defendant had transferred or disposed of his property to hinder or delay creditors, or was about to do so,[44] defendant's fraud in contracting the debt or incurring the obligation,[45] nonresidence of defendant,[46] the removal of property from the jurisdiction,[47] or inability to serve the summons in the manner provided by law,[48] and where the attachment is based on defendant's failure to pay for work or labor performed at the time of its completion, the burden is on plaintiff to show, as against defendant's traverse, that the contract requires payment at such time.[49] Where defendant has not controverted allegations as to grounds, however, they stand admitted, and it is not necessary for plaintiff to prove them [50]

Fraudulent intent. There is no presumption of fraud,[51] and accordingly the burden is on plaintiff

40. Ky—Mason v. Anderson, 3 T B Mon. 293
Miss—McNair v. Kaiser, 62 Miss 733.
Tenn.—Grewar v. Henderson, 1 Tenn Ch 76.
6 C J p 73 note 45

41. Briggs v. Smith, 13 Tex. 269—6 C J p 74 note 46.

42. Deaver v Keith, 61 N C 428—6 C J p 74 note 47

43. Ga—Sutton v. Cook, 126 S E 473, 159 Ga. 505
Ky—Lewis v Browning, 4 S.W (2d) 734, 223 Ky 771.
Minn—Burkhard v Barnes, 208 N W. 192, 167 Minn 23—Sweeney v McMahon, 177 N W 861, 145 Minn. 334.
Miss.—Crooke v Deas & Duke, 111 So 293, 146 Miss 260.
N Y—O'Rourke v Rankin, 184 N.Y. S 845, 193 App.Div. 494.
N D—Baird v Irvine, 237 N W. 333, 61 N D 319—Page v. Steinke, 236 N W 261, 60 N D 685—Gamble-Robinson Minot Co v Mauratis, 214 N W 913, 55 N.D 616—Peterson v Ogland, 184 N W 981, 48 N. D. 443
Ohio.—Morelli v. Thombs, 172 N.E. 881, 35 Ohio App 233—Young v. Clark, 13 Ohio Cir Ct (N S) 284—Cartmell v. The Rudolph Wurlitzer Co, 5 Ohio N P (N S) 604—American Engineering Specialty Co. v. O'Brien, 2 Ohio N P.(N S.) 550
Okl—Smith v. Stricker Radio & Music Shoppe, 251 P. 1015, 128 Okl 95—Mitchell v Fahey, 240 P 612, 113 Okl. 251—Mott v Zimmerman, 29 P. 227, 100 Okl. 299—Krepps v. First Nat Bank, 225 P 711, 99 Okl 81—Brown v Williams, 157 P 311, 57 Okl 699
Pa—Lopez v Donohue, 15 Pa Dist 349, 32 Pa Co 532
S D—Fulwider v Benda, 253 N W 154—Catlett v Ehrler, 156 N W. 81, 36 S D 591.
Utah—Western Auto Co v. Gurnea, 274 P 863, 73 Utah 423
6 C J p 42 note 9 [q], p 54 note 7 [a], [b], p 451 note 28, p 483 note 66.
See Weber Chimney Co. v. Johnson, 205 Ill App 348

Proof by affidavit
On the coming in of defendant's denial to plaintiff's affidavit of attachment, plaintiff must prove, by affidavit, the allegations of the original affidavit.—Callanan v. Callanan, 243 N.W. 45, 188 Minn. 609

44. Colo—First Nat. Bank v. Poor, 29 P.(2d) 713.
Minn—Larson v. Soller, 208 N W 759, 167 Minn 181—Clarke & Simmons v. Rule, 185 N W 947, 151 Minn. 30—Tereau v Madison, 160 N W. 1024, 135 Minn 469.
S D—Guaranty State Bank of Sisseton v. Varland, 207 N W. 152, 49 S D. 336.
Wash—Hall v. Raettig, 233 P. 14, 132 Wash 637.

45. Mich—Feldman v. Preston, 160 N.W 655, 194 Mich. 252.
Pa—Locey v Sterling Motor Truck Co of Pittsburgh, 156 A 730, 102 Pa.Super 148—Wolf v. Zentz, 5 Pa. Dist. & Co 276—Flagg v Mitchell, 5 Pa Dist. 774, 19 Pa.Co. 32.
6 C.J. p 72 note 23.

46. N Y—O'Hora v Tarby, 252 N. Y S 646, 141 Misc 402
Pa—Tredway v Eldridge, 7 Pa Dist. & Co 401—Milton v Spinning Co, 23 Pa Dist 53—Wight v Hovey, 17 Pa Dist 1019—Lopez v. Donohue, 15 Pa Dist 349—Wight v. Hovey, 35 Pa.Co. 647.

47. Moss v Earnest, 154 S E 455, 41 Ga App 740, followed in Silver v. Earnest, 154 S E 456, 41 Ga App. 741

48. Collier v Chamblee, 101 So 372, 136 Miss 257

49. Drake v. Avanzini, 36 P. 846, 20 Colo 104

50. Boone v. Evans, 31 S W (2d) 723, 235 Ky 487

Allegations controverted in part
Where the grounds of the attachment are that defendant has not property in the state subject to execution or a sufficiency to satisfy the demand of appellee, and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found, and defendant did not controvert the allegation that he had not property subject to execution sufficient to satisfy the debt, but did controvert the statement that the collection would be endangered by delay, the burden of proving this issue was held to be on defendant—Moore v. Kentucky Electrical Co, 208 S W 15, 182 Ky. 825

51. Anderson v. Malley, 181 N Y S. 739, 191 App Div 573—6 C J p 58 note 49 [a], p 64 note 28 [c].

to prove that defendant acted with fraudulent intent where the attachment is sought on the ground that defendant has fraudulently transferred or disposed of his property or is about to do so,[52] or that he has removed or is about to remove his property out of the jurisdiction of the court.[53]

Where plaintiff fails to sustain his burden, the attachment must be discharged,[54] even though there is no defense to the action on the merits.[55]

Shifting of burden. In accordance with the general rules as to the shifting of the burden of proof or the burden of going forward with the evidence, where plaintiff has established a prima facie case, it devolves on defendant to meet the case made; and thus, where the attachment was based on removal of property from the state defendant should show, in response to plaintiff's evidence, that he has ample visible property to answer the demands of his creditors.[56] So where defendant is shown to be insolvent, a presumption arises that the collection of plaintiff's demand will be endangered by delay,[57] and the burden of overcoming this presumption rests on defendant.[58] Where it was conceded that defendant was a nonresident before he came into the state, the burden rested on him to prove his claim that he had become a resident prior to the issuance of the attachment based on his alleged nonresidence.[59]

b. Admissibility

(1) In general
(2) Absconding, absence, or concealment
(3) Nonresidence
(4) Fraudulent transfer or disposition of property
(5) Removal or concealment of property
(6) Fraud in incurring liability
(7) Insufficient property in state to satisfy demand

(1) In General

Any proper evidence as to grounds is competent.

When the validity of an attachment or plaintiff's right thereto is in issue, plaintiff may introduce any proper evidence tending to show that the grounds of attachment on which he relied existed at the time when the writ was sued out.[60] As the validity of an attachment must be determined by the facts existing at the date when it issues, proof of matters transpiring since the attachment was issued, however, cannot be considered[61] except, as will be shown in subdivision (4) of this subsection, as it may bear upon defendant's fraudulent intent.

Where defendant in attachment reconvenes in the main action for damages for wrongful attachment, the affidavit for attachment is not evidence of the alleged causes on which the attachment was sued out.[62]

(2) Absconding, Absence, or Concealment

Evidence of acts or declarations of the defendant ante litem motam and of the surrounding facts is admissible to show whether the issuance of an attachment on the ground of absconding or concealment was warranted.

On the issue as to whether defendant was ab-

52. Ky.—McCollum v. Parsons, 266 S.W. 43, 205 Ky. 450
La.—Levy Sons v. Hacker & Fife, 6 La.App. 592
N.Y.—Anderson v. Malley, 181 N.Y.S. 729, 191 App.Div. 573
N.D.—Page v. Steinke, 236 N.W. 261, 60 N.D. 685—Gamble-Robinson Minot Co. v. Mauratis, 214 N.W. 913, 55 N.D. 616
Ohio—American Engineering Specialty Co. v. O'Brien, 2 Ohio N.P. (N.S.) 550.
Okl.—Antrim Lumber Co. v. Hazel, 246 P. 476, 118 Okl. 71.
6 C.J. p. 58 note 49, p. 64 note 28.

53. Jacobson v. Kill, 221 P. 21, 94 Okl. 146—6 C.J. p. 67 note 68 [a].

54. Ky.—Bush v. Niblack, 43 S.W. (2d) 505, 241 Ky. 113.
Minn.—Tereau v. Madison, 160 N.W. 1024, 135 Minn. 469.
N.D.—Baird v. Irvine, 237 N.W. 833, 61 N.D. 819—Page v. Steinke, 236 N.W. 261, 60 N.D. 685—Peterson v. Ogland, 184 N.W. 981, 48 N.D. 443.
Okl.—Smith v. Stricker Radio & Music Shoppe, 251 P. 1015, 123 Okl. 93—Mott v. Zimmerman, 29 P. 227, 100 Okl. 299.
S.D.—First Nat. Bank of Hecla v. Michael, 157 N.W. 989, 37 S.D. 279—Farmers' & Merchants' State Bank of Hecla v. Michael, 157 N.W. 988, 37 S.D. 276

55. Jones v. Hoefs, 103 N.W. 751, 14 N.D. 232—6 C.J. p. 452 note 30

56. Pickard v. Samuels, 2 So. 250, 64 Miss. 822.

57. Walker v. Grayson County State Bank, 35 S.W. (2d) 850, 227 Ky. 449—Huffman v. Martin, 10 S.W. (2d) 636, 226 Ky. 137—6 C.J. p. 54 note 5 [a]

58. Huffman v. Martin, supra.

59. Texana Oil & Refining Co. v. Belchic, 90 So. 522, 150 La. 88.

60. Parker v. Luce, 14 Mich. 9—6 C.J. p. 453 note 42.

Financial condition

(1) Where an intent to defraud creditors is charged, testimony as to the financial condition of defendant, although not known to plaintiff is admissible as bearing on the charge.—Ruthven v. Beckwith, 45 N.W. 1073, 51 N.W. 153, 84 Iowa 715.

(2) So evidence that defendant had taken advantage of the bankruptcy law about the time that the business transactions involved in the suit began was admissible on the issue of intent.—Ricker v. Davis, 139 N.W. 1110, 160 Iowa 37.

Course of business

Where defendant was engaged in the business of baling and shipping hay, evidence as to delays in getting cars for the shipment of defendant's merchandise is admissible as showing the general course of business and as bearing on the intent to defraud, but testimony as to what defendant was doing in his business is competent only so far as it expresses his intentions as known to plaintiff in attachment.—Ruthven v. Beckwith, 45 N.W. 1073, 51 N.W. 153, 84 Iowa 715.

61. Smith v. Stricker Radio & Music Shoppe, 251 P. 1015, 123 Okl. 95—6 C.J. p. 454 note 43 [a] (1).

62. Dupree v. Gunter, 33 Tex. 618.

sconding at the time of the attachment, evidence as to his purpose in leaving his place of residence is competent, and so is the publicity or secrecy of his living at a different place after his departure.[63] Admissions and declarations of defendant tending to show that he was about to remove at the time the attachment was sued out are admissible in behalf of plaintiff[64] if made before the suing out of the writ,[65] and plaintiff is also entitled to prove efforts of defendant to sell his property.[66] Evidence that other creditors sued out attachments about the time plaintiff did is not admissible, however,[67] and neither is evidence that several years after his alleged removal defendant was living outside the jurisdiction.[68]

As bearing on intent to remove and tending to disprove existence of the ground of attachment, the declarations of defendant made shortly before leaving the place of his residence, that his absence would be only temporary, are admissible,[69] and it is competent for him to prove that in connection with his going he had stated the purpose thereof and sought to borrow money to pay his expenses going and returning, and that he did return.[70] Moreover, where it is admitted that defendant left the state in the summer in which the attachment was sued out, he may show that it was his habit to leave the state on a visit every summer.[71] He cannot, however, introduce opinion evidence of another as to his intentions; nor is it competent for him to testify as to an uncommunicated intention to remain within the state.[72] Evidence of his declarations that he had no intention of removing from the jurisdiction is admissible where it appears that they were made before he knew the attachment had been issued,[73] but declarations of defendant, made after he knew that the attachment had been issued, that he had no intention of removing, are not admissible.[74]

Evidence of the character or reputation of defendant is incompetent,[75] and he cannot show that it was generally reputed in the neighborhood in which he lived that he was merely leaving the state on a temporary visit.[76]

(3) Nonresidence

Evidence tending to show the defendant's nonresidence or residence is admissible to sustain or defeat an attachment based on nonresidence.

Where the attachment was issued on the ground of nonresidence, defendant may show an intention to reside in the jurisdiction,[77] and after defendant introduces evidence that he became a resident at a certain time, plaintiff in rebuttal can show that thereafter, prior to the attachment, he became a nonresident.[78] Defendant's certificate of automobile registration made ante litem motam may be considered;[79] and where defendant's absence is shown he may testify that it was only temporary and that he intended to come back to live.[80]

(4) Fraudulent Transfer or Disposition of Property

Any proper evidence tending to prove or disprove a fraudulent transfer or disposition of property is competent.

The evidence should be confined to the ground of attachment alleged; and where the only ground alleged is that defendant was about to make a fraudulent disposition, evidence as to past conveyances or sales is admissible only as it tends to show further contemplated conveyances and characterize them as fraudulent.[81] Evidence of conveyances forced upon him is incompetent; only voluntary conveyances may be shown.[82]

On the issue of fraudulent intent, it is permissible to show the acts and declarations of the debt-

63. Dale v Beasley, 81 S E 849, 141 Ga. 594—6 C J p 43 note 14 [f]

64. Perryman v. Pope, 31 S E 87, 102 Ga 502

65. Baldwin v. Walker, 10 So. 391, 94 Ala. 514—6 C J. p 525 note 74.

66. Troy v. Rogers, 20 So 999, 113 Ala. 131—6 C.J. p 525 note 75

67. Dale v. Beasley, 81 S E. 849, 141 Ga. 594.

68. Alvaton Mercantile Co v. Caldwell, 128 S E 781, 34 Ga App 151.

69. Offutt v. Edwards, 9 Rob (La.) 90—6 C J. p 524 note 69.

70. Alvaton Mercantile Co. v. Caldwell, 128 S E. 781, 34 Ga App. 151.

71. Baldwin v. Walker, 10 So 391, 94 Ala 514—6 C J. p 524 note 70.

72. Baldwin v Walker, supra—6 C. J. p 524 note 72, p 525 note 73.

73. Alvaton Mercantile Co v. Caldwell, 128 S E 781, 34 Ga App. 151

74. Perryman v. Pope, 31 S E. 87, 102 Ga. 502.

75. Mitchell v. Fahey, 240 P. 612, 112 Okl. 251.

76. Havis v Taylor, 13 Ala 324.

77. First Nat Bank v. Pierson, 146 So. 749, 176 La. 792.

Circumstantial proof
On the issue of the right to attach property, defendant could show his intention to reside in the state by circumstances, without having filed an affidavit showing such intention — First Nat Bank v. Pierson, 146 So 749, 176 La. 792.

78. Gillip v. Butts, (Mo App.) 77 S. W (2d) 1014.

79. O'Hora v. Tarby, 252 N.Y S. 646, 141 Misc. 402.

80. Alvaton Mercantile Co. v. Caldwell, 128 S E. 781, 34 Ga App 151.

81. Mathewson v. Larson-Myers Co., (Mo.App.) 217 S.W. 609.

82. Mathewson v. Larson-Myers Co, supra.

or,[83] whether before or after the attachment,[84] or before or at the time of the transfer alleged to be fraudulent,[85] and it has also been held permissible to show his acts and declarations subsequent to such transfer.[86] But declarations of the transferee are not sufficient to show an intent to defraud on the part of the transferor.[87] On the issue of fraudulent intent it is also competent to show the insolvency of the debtor,[88] a failure to keep systematic books of account,[89] an assignment previously made,[90] the withholding of a deed or mortgage from record,[91] and false or contradicting statements made by the debtor[92] or by the transferee;[93] but the mere fact that defendant was embarrassed in his pecuniary affairs and was pressed for money when the writ issued cannot be shown unless the relevancy of such evidence is shown by its connection with some question of fraud.[94] Defendant may be asked whether his intention was to put the property beyond the reach of his creditors,[95] and a third person may be questioned as to the purpose for which he looked over defendant's property, when it is claimed that the purpose was to receive it by way of fraudulent conveyance.[96] So plaintiff may question the person to whom the goods were conveyed as to the price paid, to determine the question of defendant's good faith, and the memory of the witness may be refreshed by showing him an invoice of the goods.[97]

Defendant's account books have been held not admissible to prove intent,[98] although they are competent to show the amount of indebtedness.[99]

As tending to disprove fraudulent intent defendant may show his own acts prior to the application for attachment, which tend to establish his intention to pay his debts, and that all the money received by him in his business, other than that necessary for his family, was used to pay his debts,[1] so he may show his own lack of knowledge regarding his indebtedness,[2] or that the attaching creditor holds collateral security for the debt;[3] but he cannot testify that a certain act, done by him after the attachment, was caused thereby, where nothing appears to show that this was other than a secret and uncommunicative motive,[4] or introduce evidence of secret instructions given only to his employees in regard to the conduct of the business.[5] Neither should proof of his subsequent payment of debts be allowed.[6] General knowledge in the neighborhood of his purpose to dispose of his property is admissible in behalf of defendant,[7] but a witness for him cannot testify that he had heard no suspicions expressed by others that defendant was trying to defraud his creditors.[8]

An offer to convey property to the attaching creditor in settlement of his debt and the refusal of such offer cannot be shown.[9]

83. Ill—McNeil, etc, Co v Plows, 83 Ill App 186
N Y.—Hill v Martin, 88 N Y S. 708—Seckendorf v. Ketcham, 67 How Pr 526
S C—Rodde v. Erwin, 9 S E 729, 31 S C. 36
Tex—Pate v. Vardeman, (Civ App) 158 S W 1183.
6 C J p 58 note 54

Conduct towards other creditors

Evidence that defendants had refused to pay or secure debts to others than plaintiff, that judgment had been obtained against them, and that they had not acted as honest men ordinarily would have done has been held not objectionable, on the ground of it being immaterial how defendants were indebted to others, or because it related to a part only of defendants—Dent v. Smith, 5 N W 143, 53 Iowa 262

84. Iowa—Citizens' Nat Bank v. Converse, 75 N W 506, 105 Iowa 669—Mayne v Council Bluffs Sav. Bank, 45 N W 1057, 80 Iowa 710.
Tex—Pate v Vardeman, (Civ.App) 158 S W 1183.
6 C J p 525 note 78.

Conveyances

Where defendant's property was attached upon a claim that he was fraudulently disposing of it, evidence of conveyances made shortly after the attachment was admissible to prove this intent.—Jackson v. Roanoke Banking Co, 72 So. 530, 197 Ala 349.

85. Mich—Buckingham v Tyler, 41 N W 868, 74 Mich 101—Angell v. Pickard, 28 N W 680, 61 Mich 561
N Y.—Cooney v. Whitfield, 41 How Pr. 6.

86. Jackson v Roanoke Banking Co., 72 So. 530, 197 Ala 349—6 C.J. p 58 note 56, p 453 note 40 [b].

87. Salzberg v Mandelbaum, 35 N. Y.S 1014, 89 Hun 497

88. Arkansas Nat Bank v Stuckey, 131 S W. 913, 121 Ark 302—6 C J. p 59 note 58

89. Senour Mfg Co v. Clarke, 71 N. W 883, 96 Wis 469

90. German Bank v. Folds, 69 N W 823, 9 S D. 447.

91. Rabb v. White, (Tex.Civ App) 45 S W 850—6 C J. p 59 note 61, p 525 note 84.

92. La—Hardie v. Colvin, 9 So. 745, 43 La.Ann 851
N Y—Johnston v Ferris, 12 N.Y St 666, 14 Daly 302—Boyd v. Miller, 34 N Y S 1026
W Va—Lewis v Bragg, 35 S.E. 943, 47 W Va. 707

93. Wessinger v. Mausur, etc, Impl. Co, 21 So 757, 75 Miss 64—6 C.J. p 59 note 63

94. Floyd v. Hamilton, 33 Ala. 235.

95. Pierce v White, 10 Ohio Dec. (Reprint) 552, 22 Cinc L.Bul 98—6 C J. p 59 note 64.

96. Parker v Luce, 14 Mich. 9.

97. Marx v. Leinkauff, 9 So. 813, 93 Ala 453

98. Wolfstein v. Steinharter, 10 Ky. L 635

99. Meridian Fertilizer Factory v. Bush, 27 So 645, 77 Miss. 697.

1. Kaufman v. Armstrong, 11 S.W. 1043, 74 Tex. 65.

2. Hyde v Nelson, 11 Mich 353

3. Brown v. Blanchard, 39 Mich 790

4. Adams v. Thornton, 3 So 20, 82 Ala. 260—6 C J p 525 note 82

5. Deere v Bagley, 45 N W. 557, 80 Iowa 197.

6. Lister v. Campbell, (Tex Civ. App) 46 S W. 876.

7. Lister v. Campbell, supra

8. White v. Beck, 19 N W 372, 64 Iowa 122

9. Jefferson County Sav. Bank v. Eborn, 4 So. 386, 84 Ala. 529.

In an action on an attachment bond, where the attachment was based on the fraudulent transfer or disposition of property, defendant in attachment may testify as to the consent of plaintiff in attachment so to dispose of certain property and the latter may then testify that the attachment was not grounded on the disposition of that particular property.[10]

(5) Removal or Concealment of Property

Evidence of acts, declarations, or omissions of the defendant is competent when it tends to prove or disprove actual or intended removal or concealment of property to defeat creditors.

Where the attachment is based on the ground of removal of property to defraud creditors, any evidence tending to show that defendant was removing his property, and that at the time he was clouding the title as to a part of the property so to be removed is admissible to show fraudulent intent on his part;[11] and where the attachment is based on the ground of intended removal, testimony of any declaration or admission of defendant tending to show an intention on his part to leave the jurisdiction, or to remove his property therefrom, or to defeat his creditors in the collection of his indebtedness to them, is competent evidence, but testimony by plaintiff in his own behalf, that another witness had stated that defendant told him he was about to remove property, and that plaintiff believed such statement, is immaterial and incompetent.[12]

Failure to keep a cash book may be evidence of concealment in a doubtful case,[13] and the hiding of books of account is evidence of actual or threatened concealment where it was done by defendant's authority;[14] but evidence of the amount of money paid by defendant to plaintiff during their business dealings is not admissible on the question of fraudulent concealment,[15] and the fact that defendant once dealt, or was suspected of having dealt, in counterfeit money has no bearing on the issue.[16]

Defendant may show in his own behalf that he had paid out large sums to creditors during the year preceding the levy,[17] or that at the time the attachment was sued out he was a man of large means, and had a large amount of property about him and under his control, claiming it openly and notoriously as his own,[18] but where plaintiff has shown certain judgments against defendant and executions issued thereon, and introduced the testimony of the officer that defendant told them, when they were sent to him to collect the judgment, that he had no property subject to execution, it is not proper to permit defendant to show that such judgments were against him as an accommodation indorser.[19]

(6) Fraud in Incurring Liability

Fraudulent statements relied on by the plaintiff are admissible in evidence, but offers by the defendant to settle the plaintiff's claim are not.

Statements made to commercial agencies by the debtor, as to his financial standing, are admissible in evidence on the question of fraud in contracting the debt,[20] provided they were made with a fraudulent purpose,[21] and were relied on by plaintiff;[22] but offers on the part of defendant to settle plaintiff's claim have no bearing on the question and are not admissible in evidence.[23]

(7) Insufficient Property in State to Satisfy Demand

Evidence showing the defendant was about to dispose of property with intent to defeat the creditors is competent.

Where the attachment is grounded on insufficiency of property in the state to meet plaintiff's demand, evidence tending to establish that defendant was about to dispose of property with intent to defeat creditors can be considered in determining whether or not the collection of plaintiff's demand would be endangered by delay in obtaining judgment or return of no property found.[24]

10. Harris v. White, 101 So. 751, 212 Ala. 54.

11. O'Neil v Wills Point Bank, 2 S W 754, 67 Tex 36

12. Chism v. C W. Hall Motor Co, (Tex Civ App) 278 S W 350

13. Lippincott v. Prendergast, 2 Del. Co (Pa.) 322.

14. Dodson-Hills Manufacturing Co v. Payton, 65 Mo App 311—6 C J. p 69 note 88.

15. Finlay Brewing Co v. Prost, 70 N W 137, 111 Mich 635.

16. Ball v. Lignoski, 24 La.Ann 434

17. Birmingham Dry-Goods Co. v Finley, 26 So 138, 122 Ala 534—6 C J. p 525 note 90.

18. Burton v Smith, 49 Ala 293.

19. Finlay Brewing Co v Prost, 70 N W 137, 111 Mich 635—6 C J. p 69 note 91

20. Mich.—Emerson v. Detroit Steel, etc, Co., 58 N.W. 659, 100 Mich. 127.
Mo.—Gries v. Blackman, 30 Mo App 2—Holmes v. Harrington, 20 Mo App 661.

21. Victor v Henlien, 33 Hun (N.Y.) 549.

22. Genesee County Sav. Bank v. Michigan Barge Co., 17 N.W. 790, 52 Mich. 164.

23. Finlay Brewing Co. v. Prost, 70 N W 137, 111 Mich. 635—6 C J. p 72 note 25

24. Brown v. Cooper's Adm'r, 26 S. W.(2d) 745, 233 Ky 789.

Opinion of plaintiff's agent that plaintiff was not in danger of losing anything when agent turned account over to attorneys for collection is immaterial in determining whether attachment would issue on the ground that debtor had insufficient property subject to execution to satisfy plaintiff's demand and that collection of demand would be endangered by delay in obtaining judgment or return of no property found.—Cannon Ball Cab & Bus Co. v. Mary-

c. Weight and Sufficiency

(1) In general
(2) Absconding, absence, or concealment
(3) Fraudulent transfer or disposition of property
(4) Removal or concealment of property
(5) Fraud in incurring liability
(6) Insufficient property in state to satisfy plaintiff's demand

(1) In General

The grounds of attachment must be proved by a preponderance of the evidence

Plaintiff's burden of proving the grounds of his attachment must be sustained by a preponderance of the evidence,[25] but he is entitled to his attachment if he establishes any one of the statutory grounds.[26] These rules have been applied in considering the weight and sufficiency of evidence to sustain an attachment on the ground that defendant is a nonresident,[27] as well as on other grounds hereinafter more fully discussed.

(2) Absconding, Absence, or Concealment

Although the creditor must establish absconding or concealment by a preponderance of the evidence, positive proof is not necessary.

The general rules considered in the preceding section apply where the attachment is based on the ground that the debtor has absconded, absented, or concealed himself.[28] Positive proof is not necessary to make out a concealment;[29] but evidence of a mere failure to find the debtor does not show concealment,[30] unless, perhaps, where diligent search has been made without success[31]

land Casualty Co, 96 S W (2d) 760, 265 Ky. 256

25. Colo—First Nat. Bank v. Poor, 29 P (2d) 713
Mich—Feldman v Preston, 160 N W 655, 194 Mich. 352
Ohio—Young v Clark, 13 Ohio Cir Ct (N S) 284
Okl—Smith v. Stricker Radio & Music Shoppe, 251 P 1015, 123 Okl 95—Mott v Zimmerman, 229 P 227, 100 Okl 299
S D—Guaranty State Bank of Sisseton v Varland, 207 N W. 152, 49 S D. 336
6 C J p 452 note 29.

Evidence held sufficient

(1) To sustain attachment—Federal Land Bank of St. Louis v. Wright, 299 S W 384, 175 Ark 401—Roberts v Allen, 50 S W (2d) 965, 244 Ky 353—Evans v. Fielder, (Okl) 87 P. (2d) 430—6 C J p 454 note 44 [a].

(2) To support judgment dissolving attachment—Antrim Lumber Co. v. Hazel, 246 P. 476, 118 Okl 71

(3) To support decision overruling motion to dissolve attachment issued upon grounds of having criminally or fraudulently contracted obligation—Rothman v. L. Seldin & Kneller, 174 N E. 794, 37 Ohio App 408.

Evidence held insufficient to warrant attachment—Russellville Bank & Trust Co v. McGhee, 65 S W (2d) 202, 16 Tenn App 460—Western Auto Co v. Gurnea, 274 P. 863, 73 Utah 423—6 C.J. p 454 note 44 [b]

26. Peck v. Toland, 27 S D 406, 131 N W 402.

27. **Evidence held sufficient**

(1) To show residence of defendant—First Nat. Bank v. Pierson, 146 So. 749, 176 La. 792—First Nat Bank v. Payton, 180 P. 979, 25 N M 264—O'Hora v. Tarby, 252 N.Y.S. 646, 141 Misc 402. See Weber Chimney Co v. Johnson, 205 Ill.App. 343.

(2) To show nonresidence of defendant
Ark—Nelon v. J. B Duncan Co, 273 S W 18, 168 Ark. 1168
Ga—Biggers v. Bank of Ringgold, 144 S E 397, 38 Ga App. 521.
Iowa—Bond v. White, 192 N W. 311
Miss.—Lee v McConnell, 69 So. 706, 109 Miss 339.
Neb—National Surety Co v. Love, 168 N W 597, 102 Neb 633
N Y—Gotham Nat. Bank of New York v. Martin, 152 N Y S. 654, 167 App Div. 271.
N C—Citizens' Bank & Trust Co. v McCoin, 173 S E 345, 206 N.C. 272—Farmers' Federation v Lockman, 150 S E. 673, 193 N C 77.
S C—Moore v. McElrath, 122 S E 374, 133 S C 392 See Wottowa v. Ridgly, 202 Ill App 384

Evidence held insufficient

(1) To show residence of defendant—Modisette & Adams v. Lorense, 113 So 397, 163 La. 505.

(2) To show nonresidence of defendant—McCleery v Davidson, 195 N W 1015, 157 Minn. 283—People's State Bank of Bradley v Nordness, 208 N W. 984, 50 S D 218 (second case)

(3) To show defendant's intent to change his legal residence.—Stockgrowers' State Bank of Worland v. Millard, 186 P 121, 26 Wyo. 394.

(4) To overcome the presumption that the domicile of defendant's origin continued—Texana Oil & Refining Co v. Belchic, 90 So 532, 150 La. 88.

Ownership of property

In attachment by one nonresident against another, wherein plaintiff alleged that defendant has not sufficient property within the state of his residence to satisfy plaintiff's debt, defendant's testimony that he owned property in the state of his residence meant that he was in possession thereof, "own" being synonymous with "possess"—Melvin v. Scowley, 104 So. 817, 213 Ala. 414.

28. **Evidence held sufficient** to warrant the inference that defendants were absconding debtors liable to attachment—Salsman v. Robinson, 157 A. 547, 10 N J Misc. 51.

Evidence held insufficient

(1) To warrant an attachment on the ground that defendant had left the city or had departed therefrom with intent to defraud—Thomas v. Blizzard, 170 N Y S 11.

(2) To show an intention to abandon the county of residence—McCleery v. Davidson, 195 N.W. 1015, 157 Minn. 283.

(3) To show that defendant was about to depart from the jurisdiction to defraud his creditors—T. E Newsom & Co v. Smith, 120 So 248, 9 La App 693—Millang v. Lambros, 153 N Y S 944, 90 Misc 638

29. Brewer v Mock, 60 P 578, 14 Colo App. 454—6 C J p 45 note 35.

Evidence held sufficient

(1) To show a concealment with intent to defraud or delay creditors.—Russell Co. v. Wachman, 213 Ill. App. 348.

(2) To disprove allegations in respect to defendant concealing himself—Morelli v Thombs, 172 N E. 331, 35 Ohio App. 233

Evidence held insufficient to show concealment to defraud creditors.—Milling v. Lambros, 153 N Y.S. 944, 90 Misc 638.

30. Reynolds v. Horton, 22 N Y S. 18, 67 Hun 122, affirmed 36 N.E. 739, 141 N.Y. 585—Head v Wollner, 6 N Y S. 916, 53 Hun 615—Thomas v. Dickerson, 11 N.Y S. 436.

31. Hall v. Anderson, 40 N Y.S 354, 17 Misc 270—Finn v. Mehrbach, 65 N.Y S. 250.

(3) Fraudulent Transfer or Disposition of Property

A fraudulent conveyance need not be positively proved but may be shown by circumstances or inferred from the acts and conduct of the defendant; however, there must be something more than mere surmise or appearance of fraud.

When an attachment is based on the ground that defendant had fraudulently transfered or disposed of his property, or was about to do so, the question of fraudulent intent is one of fact[32] which must depend largely upon the particular facts and circumstances of each case.[33] It is not necessary that such intention should be positively proved, but it may be shown by circumstances or inferred from the acts and conduct of the party[34] by an application of the rule that a person is presumed to intend the necessary and natural consequences of his voluntary acts;[35] and an instruction that fraud is not lightly imputed but must be plainly proved requires too high a degree of proof.[36] However, there must be something more than mere surmise[37] or appearance of fraudulent intent;[38] and indeed it has been said generally that circumstances which may create a strong suspicion of fraudulent intent, but yet fall short of prima facie proof, are not sufficient.[39]

The fraudulent intent of a debtor may be inferred from his threats not to pay if sued, or to dispose of his property,[40] or from a failure to carry out a promise as to the application of specific property.[41]

It is not sufficient to establish a fraudulent intent that defendant is heavily indebted, and repeated efforts to serve him with summons have failed,[42] that he made a promise to pay which he had no reasonable expectation of being able to keep,[43] that he has failed to pay a debt according to his promise,[44] that he has made no effort to pay the debt sued on,[45] that he has refused to secure a creditor;[46] that he has offered to sell his prop-

32. Ill.—Hargadine-McKittrick Dry Goods Co. v Belt, 74 Ill App. 581
Miss.—Roach v. Brannon, 57 Miss 490
Wis.—Germania Nat. Bank v. Lachenmaier, 146 N.W. 779, 156 Wis 573
6 C.J. p 59 note 30

33. Levy v. Goldstein, 43 N.Y.S. 774, 18 Misc 639.

Evidence held sufficient
(1) To show fraudulent intent.
Colo.—Asiatic Min. & Mill Co v Shephenson, 165 P. 773, 63 Colo 301
Ill.—Russell Co v Wachman, 213 Ill App. 348 See Harpman v. Andalman, 190 Ill App 29
Ky.—Lincoln Bank & Trust Co v Arnold, 75 S.W.(2d) 751, 256 Ky 80
La.—Wright v. Whatley, 37 So 498, 148 La 635.
Minn.—Callanan v Callanan, 248 N.W. 45, 188 Minn 609—Reed v Union Cent Lumber Co, 179 N.W. 895, 147 Minn 210
Mo.—East Side Packing Co. v. Mertz, (App.) 218 S.W. 436
6 C.J. p 59 note 31

(2) To show that defendant had fraudulently disposed of his property so as to afford ground for attachment—Crooke v. Deas & Duke, 111 So 293, 146 Miss 260—Stockgrowers' State Bank of Worland v. Millard, 186 P. 131, 26 Wyo 394.

Evidence held insufficient
(1) To show that debtors intended to defraud creditors.
Ark.—Arkansas Nat. Bank v Stuckey, 181 S.W. 913, 121 Ark 302.
Kan.—Farmers' State Bank v. Schuette, 168 P. 1073, 100 Kan. 45.
Ky.—Sally v Brown, 295 S.W. 890, 220 Ky. 576
La.—W. F. Taylor Co v. Campisi, 128 So. 706, 14 La.App. 210
Minn.—First Nat. Bank v. Morrow, 201 N.W. 442, 161 Minn 358—Jandera v. Lakefield Farmers' Union, 185 N.W. 656, 150 Minn 476.
Miss.—Forest Products Mfg. Co. v Potts-Hamilton Hardware Co., 69 So. 593, 109 Miss. 750
N.Y.—Krotosky v. Krotosky, 155 N.Y.S. 625, 169 App.Div. 850—Nolan v. Louis Workman Co., 261 N.Y.S. 534, 146 Misc. 99—Ribak v. Worhaftig, 155 N.Y.S. 408
N.D.—Gamble-Robinson Minot Co v Mauratis, 214 N.W. 913, 55 N.D. 616.
Pa.—Ross v. Roth, 13 Pa.Co. 14.
Va.—Cropp v. Kinsey, 157 S.E. 551, 156 Va. 102.
Wash.—Hogue v. McAllister, 210 P. 671, 122 Wash. 347.
6 C.J. p 60 note 32
See Studtmann v. Union Grove Creamery Co., 192 Ill.App. 248

(2) To show that defendant was about to dispose of his property to delay or defraud his creditors—Larson v. Soller, 208 N.W. 759, 167 Minn 181—Hall v. Raettig, 233 P. 14, 132 Wash. 687.

(3) To sustain the ground of attachment that defendant was fraudulently shipping the goods out of the state or disposing of the goods, or had failed to pay the prices or value of articles delivered which it should have paid on delivery—Poe v. Western Buyers' Ass'n Wholesale Grocers, (Mo.App.) 238 S.W. 547.

(4) To justify discharging attachment—Farmers State Bank of Lexington v. Lemmer, (Neb.) 264 N.W. 415

34. Kan.—Farmers' State Bank v. Schuette, 168 P. 1073, 100 Kan 45
Ky.—McCollum v Parsons, 266 S.W. 43, 205 Ky 450
6 C.J. p 58 notes 51, 52, p 65 note 29.

35. Ark.—Winter v. Kirby, 60 S.W. 34, 68 Ark 471
Colo.—Curran v Rothschild, 60 P. 1111, 14 Colo.App. 497.
Kan.—Cook v Burnham, 44 P. 447, 3 Kan.App. 27.
Mo.—Potter v McDowell, 31 Mo. 62—Gens v Hargadine, 56 Mo.App. 245.
6 C.J. p 58 note 53

36. Jackson v Roanoke Banking Co., 72 So. 530, 197 Ala. 349.

37. McCollum v. Parsons, 266 S.W. 43, 205 Ky 450

38. Bird v. Dawkins, 6 La.App. 244

39. Hill v. Atanasio, 127 N.Y.S. 344—6 C.J. p 60 note 32 [a].

40. Lawler v. Herren, 210 Ill.App. 203—6 C.J. p 65 notes 30, 31

41. Rice v. Tolbert, 47 S.W. 323, 20 Ky.L. 674—6 C.J. p 65 note 32

42. Galligan v. Groten, 42 N.Y.S. 22, 18 Misc 423.

43. Parsons v. Stockbridge, 42 Ind. 121.

44. Link v. Hathway, 127 S.W. 913, 143 Mo.App. 502—6 C.J. p 65 note 35.

45. First Nat. Bank v. Tarboro Cotton Factory, 104 S.E. 129, 180 N.C. 128, denying rehearing 102 S.E. 195, 179 N.C. 203.

46. Ellison v. Bernstein, 60 How.Pr. (N.Y.) 145, affirmed 23 Hun 148—6 C.J. p 65 note 37.

erty,[47] to make a voluntary assignment for the benefit of all his creditors,[48] or to secure a bona fide creditor by mortgage;[49] that he has made false statements in reference to his financial condition at the date of maturity of his debt, in order to secure an extension of time to enable him to raise the money to pay his debts,[50] that he has attempted to borrow money with which to speculate,[51] that he has purchased worthless mining stock,[52] that he has not paid an admitted debt frequently demanded, and has offered to sell part of his personal property for cash,[53] that he has transferred property;[54] that he has sold property for the benefit of creditors;[55] that he has included in an assignment debts which he had not disclosed to plaintiff,[56] or has made a conveyance within sixty days prior to an assignment;[57] that he has fraudulently conveyed or concealed property immediately after the writ of attachment was sued out,[58] or that he has confessed judgment thereafter;[59] that he has preferred other creditors[60] or has paid other debts,[61] that he has shipped his property out of the state;[62] or that he has stated that the owner of a judgment against him will not issue execution except to protect him from his other creditors.[63] So a mere decrease in the debtor's assets will not, of itself, justify the conclusion that he has made a fraudulent conveyance,[64] unless the decrease is sudden and to a very considerable amount.[65] Nor is a fraudulent intent shown by a mere breach of contract[66] by the debtor, defendant's previous bad record,[67] his having deposited money as security with the obligor on a bail bond,[68] or by the fact that execution was issued on certain judgments against defendant or that he failed to use a small piece of land belonging to him, and failed to pay taxes thereon.[69]

Proof that defendant had more than enough cash in a bank to satisfy the debt is not proof that he had no intention to convey or dispose of his property.[70]

Consideration for intended transfer. No inference of fraudulent intent is justified where a contemplated transfer is to be made for an adequate consideration;[71] but such an inference may be

47. Lutman v. Fields, 162 S W 291, 175 Mo App 323—Link v Hathway, 127 S W. 913, 143 Mo App 502—6 C J p 65 note 39

48. Kemper, etc, Dry Goods Co. v. Fischel, 44 P 205, 4 Okl. 250.

49. C D Smith Drug Co v Casper Drug Co, 40 P 979, 42 P. 213, 5 Wyo 510—6 C J. p 65 note 41.

50. Kemper, etc, Dry Goods Co. v. Fischel, 44 P. 205, 4 Okl 250.

51. Galligan v. Groten, 42 N Y S. 22, 18 Misc. 428, 26 N Y.Civ Proc 78

52. Thurber v. Sexauer, 19 N W 493, 15 Neb 541.

53. Meyers v. Boyd, 37 Mo App. 532

54. General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La. 432, modifying 121 So 254, 9 La App 471—6 C J p 59 note 71.

Ordinary course of business

Evidence of sales and mortgages made in the ordinary course of business is not sufficient to show an intent to defraud a creditor seeking an attachment—General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La. 432, modifying 121 So. 254, 9 La App. 471.

Chattel mortgage

The giving of a chattel mortgage to a third party was insufficient of itself to prove a debtors' intent to hinder or delay a creditor in the collection of his debt so as to warrant attachment.—First Nat Bank v. Poor, (Colo.) 29 P.(2d) 713

55. Lang v Shanawolf, 111 A. 117, 137 Md 17

Use of proceeds to pay debts

That a defendant has disposed of most of his property for the purpose of paying his debts and used the proceeds for that purpose does not show a fraudulent intent, and is not ground for attachment—Stockgrowers' State Bank of Worland v Millard, 186 P 121, 26 Wyo. 394—6 C J p 59 note 75

Payment to plaintiff

That defendant conveyed, with fraudulent intent, warranting attachment for unmatured indebtedness, was not shown, where it was proved that defendant merely sold personal property, using the proceeds to pay interest due plaintiff—Huffman v. Martin, 10 S W (2d) 636, 226 Ky. 137.

Evidence held sufficient

(1) To show that a sale or conveyance of property by the debtor was in good faith, so that there was no ground for attachment—McCollum v. Parsons, 266 S W 43, 205 Ky 450

(2) To show that defendant sold his business with the honest intent to pay his creditors—Stockgrowers' State Bank of Worland v. Millard, 186 P. 121, 26 Wyo. 394

56. Freeman v. Campbell, 1 N.Y St. 728.

57. Wachter v. Famachon, 22 N W. 160, 62 Wis 117.

58. Scudder v Payton, 65 Mo App 314—6 C J p 66 note 45

59. Cropp v. Kinsey, 157 S.E. 551, 156 Va. 102.

60. Guaranty State Bank of Sisseton v. Varland, 207 N W. 152, 49 S D. 336.

61. General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La 432, modifying 121 So. 254, 9 La App 471

62. Terry v. Jolly, 75 So. 756, 115 Miss. 26

63. Liveright v Greenhouse, 33 A. 697, 61 N J Law 156

64. Thompson v Dater, 11 N Y S. 613, 57 Hun 316, appeal dismissed 27 N E 408, 125 N Y 749—Stamp v. Herpich, 8 N.Y St 446

65. Tannenbaum v. Gottlieb, 43 N Y. S 469, 14 App Div 105—Strauss v. Vogt, 25 N Y S 801, 4 Misc 612—Talcott v Rosenberg, 8 Abb Pr N. S.(N Y) 237—6 C J p 59 note 69.

66. Powers v O'Brien, 6 N W. 679, 44 Mich. 317.

67. Hegwer v Kiff, 2 P 553, 31 Kan. 440

68. Howland v. Marshall, 37 S E. 462, 127 N C 427.

69. First Nat Bank v. Tarboro Cotton Factory, 104 S E. 129, 180 N C. 128, denying rehearing 102 S E. 195, 179 N C 203.

70. Lawler v. Herren, 210 Ill.App. 203

71. Minn.—Eaton v. Wells, 18 Minn. 410

Ohio.—Pierce v White, 10 Ohio Dec. (Reprint) 552, 22 Cinc.L.Bul. 93.

drawn from the fact that the transfer is to be gratuitous,[72] or for an insignificant price.[73]

Threatened assignment. Fraudulent intent is not necessarily shown from the fact that a debtor threatens to make an assignment,[74] even though preferences are contemplated therein,[75] but the circumstances under which the threat is made may justify an inference of fraud.[76]

(4) Removal or Concealment of Property

Removal or concealment of property may be sufficiently proved by evidence of acts or declarations of the defendant.

The general rules as to weight and sufficiency of evidence apply in determining whether plaintiff is entitled to an attachment on the ground of removal or concealment of property.[77] So it has been held that concealment was made out by evidence that defendant boasted that he had money in a safe place and would not pay,[78] or that he was going to sell everything and leave and that plaintiff would collect nothing,[79] and by evidence of a hurried division of property followed by placing it in various different places.[80] It is necessary only to show that defendant concealed or was guilty of conduct which was intended to and calculated to conceal,[81] and proof of failure to make a return of a large cash sale of goods consigned to a debtor by his creditor to sell and account for the proceeds,[82] or of the transmission of money through the post office[83] tends to show concealment.

Receipt of a large amount of merchandise, which was not accounted for in a subsequent assignment to creditors, is not in itself sufficient, however, to support allegations of fraudulent concealment;[84] and a mere showing of departure from the state is insufficient—it must further be shown that property was concealed or removed from the state with fraudulent intent.[85]

A delay of two weeks between the time of the execution and filing of affidavits charging that defendant was about to convert his property into money and place it beyond the reach of his creditors does not authorize the inference that the facts stated had ceased to exist when the affidavits were filed.[86]

Threatened removal is proved by evidence of an attempted assignment of a bank deposit representing money stolen by defendant from plaintiff.[87]

Removal from the state is not proved by evidence merely showing the issuance of bills of lading covering interstate shipments naming defendant as consignor and a third person as consignee, since the presumption is that title of the goods passed from defendant to the consignee on delivery to the carrier and that the carrier then removed the goods for the consignee, and not for the consignor.[88]

72. Ky—Clark v. Smith, 7 B Mon 273.
Neb—Askwith v. Allen, 50 N W 267, 33 Neb 418
Tenn—Johnson v. Rankin, (Ch App.) 59 S.W 638
6 C J p 66 note 52.

73. Boyd v. Labranche, 35 La Ann 285

74. N M—Torlina v. Trorlicht, 27 P. 794, 6 N M 54, affirming 21 P. 68, 5 N M 148
Okl—Kemper, etc., Dry Goods Co. v Fischel, 44 P 205, 4 Okl 250
Va—Wingo v. Purdy, 12 S E 970, 87 Va 472
Wis—Stevens Point First Nat. Bank v Rosenfeld, 28 N.W. 370, 66 Wis 293.
6 C J. p 66 note 54.

75. Atlas Furniture Co. v. Freeman, 23 N Y S 1131, 70 Hun 13—6 C.J. p 66 note 55.

Reason for rule
An intention to prefer is legitimate—McLoughlin v. Utica Consumers' Brewing Co, 45 N Y S 716, 20 Misc. 144—Easterline v. Jones, 2 Kulp (Pa.) 121

76. Ky—Parson v. Plew, 105 S.W 377, 32 Ky.L. 77.
La.—Newman v. Kraim, 34 La.Ann. 910.
N Y—New York Nat Park Bank v. Whitmore, 10 N E 524, 104 N Y. 297.
6 C J. p 66 note 57.

77. **Evidence held sufficient**
(1) To sustain an attachment—Hutchison v First Nat Bank, 246 S W 484, 156 Ark 142—6 C J p 67 note 63 [c], p 68 note 73 [b] (2).

(2) To disprove allegations as to concealment—Morelli v Thombs, 172 N E. 331, 35 Ohio App 233

Evidence held insufficient
(1) To sustain attachment on ground of concealment—Crooke v. Deas & Duke, 111 So. 293, 146 Miss. 260.

(2) To show that defendant was about to remove property from state or dispose of it to hinder creditors—Ford v. Wilson, 288 S W. 712, 172 Ark 335—Wolf v. Zentz, 5 Pa Dist. & Co 276—6 C J. p 66 note 58 [d], p 67 note 63 [e], p 68 note 75 [d].

(3) To justify discharging attachment—Farmers State Bank of Lexington v. Lemmer, (Neb.) 264 N.W. 415.

78. Ziegler v. Ziegler, 22 N.Y.S. 812, 68 Hun 177.

79. Wilson v. Bryant, (Tenn.) 67 S. W.(2d) 133.

80. McDonald v Marquardt, 73 N W. 288, 52 Neb 820

81. Gray v. Valley, 101 So 855, 136 Miss 836.

82. Powell v. Matthews, 10 Mo. 49

83. Albuquerque First Nat Bank v. Lesser, 58 P 845, 9 N M 604.

84. Albuquerque First Nat Bank v. Lesser, 65 P. 179, 10 N M 700.

85. Bush v Niblack, 43 S.W.(2d) 505, 241 Ky 113.

Giving up business
Proof that a resident of the state gave up his business and engaged passage by sea to Australia did not make out a removal of his property to defraud his creditors, justifying an attachment, especially where substantially all his property was left in local banks and trust companies and all known debts were paid—O'Rourke v. Rankin, 134 N Y.S. 845, 193 App Div 494.

86. Miller v. L. Wolff Mfg. Co of Texas, (Tex.Civ.App.) 225 S W. 212

87. Adam Hat Stores v. Lang, 280 N.Y.S. 100, 155 Misc. 587.

88. Moss v. Earnest, 154 S E 455, 41 Ga App. 740, followed in Silver v. Earnest, 154 S E. 456, 41 Ga. App. 741.

(5) Fraud in Incurring Liability

Circumstantial evidence may sufficiently prove fraud in incurring liability.

Where an attachment is grounded on defendant's fraud in contracting the debt or incurring liability, the fraudulent intent of defendant in incurring the liability may be gathered from circumstantial evidence;[89] and it is not necessary to show that defendant disposed of his property with intent to hinder, delay, and defraud his creditors.[90]

(6) Insufficient Property in State to Satisfy Plaintiff's Demand

To invalidate attachment grounded on insufficient property to meet the plaintiff's demand, the defendant must clearly show sufficient property.

Where an attachment is granted on the ground that defendant has insufficient property in the state to satisfy plaintiff's demand, defendant must make a clear disclosure of sufficient property to invalidate the attachment.[91]

§ 70. Waiver or Loss of Right to Assert

A creditor may lose his right to assert various grounds of attachment by failure timely to prosecute it, by accepting security or benefits from the debtor, or by waiving other rights on which the remedy depends.

A creditor loses his right to an attachment based on the ground of the debtor's fraudulent disposition of his property by failure to seek it within a reasonable time after the transfer relied on,[92] or within the statutory period thereafter if one is prescribed.[93] So one accepting benefits under a fraudulent assignment for the benefit of creditors cannot avail himself of it as a ground for attachment.[94] Where plaintiff waives the right to demand payment of goods on delivery, he loses his right to an attachment on the ground that defendant has failed or refused to pay the price of goods delivered under a contract requiring payment on delivery.[95] And in some jurisdictions, as has been shown supra in §§ 17, 60, a creditor who would otherwise be entitled to the remedy of attachment loses his right by accepting security for his demand.

Negligence on the part of plaintiff in failing to discover the truth of false representations on which he relied will not, however, defeat his right to an attachment on the ground of fraud in incurring the liability.[96]

89. Johnson v. Stockham, 43 A. 920, 89 Md. 358—6 C J p 72 note 24

Evidence held sufficient

(1) To show fraud in incurring the liability—Jandera v Lakefield Farmers' Union, 185 N W. 656, 150 Minn 476—Landwehr v. Lingenfelder, (Mo App.) 249 S.W. 727.

(2) To establish that the debt sued on was not fraudulently contracted. —Leib v. Bostwick, 239 N.W 405, 256 Mich 277.

(3) To sustain orders vacating an attachment and dissolving the levy. —Burkhard v. Barnes, 208 N W. 192, 167 Minn. 23.

Evidence held insufficient

(1) To show that the debt was fraudulently contracted or the liability fraudulently incurred—Turner v. Spencer, 111 A 109, 136 Md 593—Feldman v. Preston, 160 N W 655, 194 Mich. 352—Crooke v Deas & Duke, 111 So. 293, 146 Miss 260

(2) To show intent of defendant, when the obligation was incurred, to defraud plaintiff—People's State Bank v. Karlen, 182 N.W. 531, 44 S. D. 82.

(3) To show that the obligation sued on was created in reliance on false statements as to financial responsibility or standing—Abe Cohen Co v Leon Fruit Co, 250 N Y S 597, 140 Misc 416.

(4) To show a design not to pay for the goods at the time credit was obtained—Reynolds v Horton, 22 N Y S 18, 67 Hun 122, affirmed 36 N E 739, 141 N Y. 585

90. Schmidt v. Storts, 236 S W. 694, 208 Mo App. 439

91. Walker v. Grayson County State Bank, 35 S W (2d) 850, 237 Ky. 449

Evidence held sufficient to sustain the attachment—Cannon Ball Cab & Bus Co v Maryland Casualty Co, 96 S W (2d) 760, 265 Ky 256—Brown v Cooper's Adm'r, 26 S W (2d) 745, 233 Ky 789—Jennings v Sanders Deposit Bank, 281 S W. 476, 213 Ky. 479—6 C J p 54 note 7 [c].

Evidence held insufficient

(1) To sustain the attachment—Downs v. Ringgold, 41 S W 317, 101 Ky 392, 19 Ky L 639—Robinson v McInteer, 15 Ky L. 128—6 C J. p 54 note 7 [d].

(2) To overcome the presumption that the creditor's collection of a past-due debt will be endangered by delay in obtaining judgment where defendant is insolvent—Walker v. Grayson County State Bank, 35 S W. (2d) 850, 237 Ky 449—Huffman v. Martin, 10 S W (2d) 636, 226 Ky. 137.

92. General Motors Acceptance Corporation v Sneed, 121 So. 254, 9 La App 471, modified on other grounds 119 So. 417, 167 La. 432—6 C J p 57 note 37.

Delay of five months

Where plaintiff did not institute suit until almost five months after the date of the judgment by confession relied on as constituting a fraudulent disposition, the act complained of happened too long before the writs were issued to support them—General Motors Acceptance Corporation v Sneed 121 So 254, 9 La App 471, modified on other grounds 119 So. 417, 167 La. 432

93. Nelson v. Leiter, 60 N E 851, 190 Ill 44, 83 Am S R 142, affirming 93 Ill.App 176—Hanford v. Richart, 66 Ill App 443—Strauss Bros Co v. White, 61 Ill App. 171.

94. Richards v. White, 7 Minn 345—6 C J. p 62 note 3.

95. Young v. Lynch, 1 P 503, 30 Kan 205

96. Richards v. Harrison, 71 Mo. App. 224.

III. PROPERTY SUBJECT TO ATTACHMENT

§ 71. In General

All goods and chattels of a defendant are subject to attachment for his debts unless exempted by statute or some broad principle of law or public policy.

Except such property as is exempted by statutes, which will be discussed in the titles Exemptions §§ 26-69 [25 C.J. p 42 note 57-p 93 note 64] and Homesteads §§ 52-92 [29 C.J. p 821 note 75-p 855 note 2], or by virtue of some broad principle of law or public policy (see infra § 74 b), all the goods and chattels of a defendant are subject to attachment for his debts.[97]

§ 72. Personal Property and Interests Therein in General

Personal property to be liable to attachment must be of such character that it would be liable to seizure under execution, and defendant must have some right or title thereto.

The general rule is that in order for personal property to be liable to seizure under attachment, it is necessary that it should be of such character that it would be liable to be seized under execution,[98] and that defendant in the attachment proceeding should have some right or title, legal or equitable, thereto,[99] and where an attachment is levied on goods not belonging to the attachment debtor, the attachment will not hold such goods even though such debtor afterward acquires title thereto.[1] However, it has been held immaterial that the precise right or interest of defendant is unknown to the plaintiff or to the attaching officer at the time of seizure,[2] although only the interest which the debtor has at the time the attachment is sought can be attached.[3]

Tests applied. It has been said that if an interest can be disposed of by will, contract, or other conveyance under the statute, there would seem to be no valid objection to its attachment,[4] and a usual test as to whether attachment will lie is as to whether the debtor in the attachment suit could have sued to recover the property against which the attachment is directed.[5]

Possession in defendant or in third person. The mere fact that the attachment defendant is in possession of property does not render it subject to the attachment, when such possession is held under another who is the true owner.[6] However, the fact that property of the attachment defendant

97. Mass.—Lupsitt v. Walmsley, 193 N.E. 792.
Mo.—Adamson v. Fogelstrom, 300 S.W. 841, 221 Mo.App. 1243.
6 C.J. p 196 note 77.

Property other than personal earnings may be attached on a claim for judgment for necessaries.—Corbett v. Goldwender, 20 Ohio Cir.Ct.(N.S.) 451.

Attachment of property returnable from alien property custodian see War § 26 [67 C.J. p 399 note 39].

98. N.C.—Chinnis v. Cobb, 185 S.E. 638.
Tex.—Hoffman v. Rose, (Civ.App.) 217 S.W. 424, error refused.
6 C.J. p 193 note 67, p 193 note 68.

Correlation of statutes

As to nature of property subject to attachment, statutes governing attachment and execution must be correlative.—Fredrick v. Chicago Bearing Metal Co., 224 N.Y.S. 629, 221 App.Div. 588, reversing 223 N.Y.S. 324, 130 Misc. 366.

99. U.S.—Cavalliotis v. La Fonciere de France et des Colonies, (C.C.A. N.Y.) 272 F. 803.
Ala.—Flaherty v. People's Bank of Mobile, 113 So. 910, 216 Ala. 542.
Ark.—Cotton Plant Lumber Co. v. Ash Grove Baptist Church, 242 S.W. 820, 154 Ark. 427.
Cal.—Bosbyshell v. Cline, 196 P. 274, 51 Cal.App. 109.
Ky.—Amick v. Goodykoontz, 43 S.W. (2d) 1000, 241 Ky. 315.—Cozine v. Kennedy, 6 Ky.Op. 706.
Mass.—Weinberg v. Brother, 160 N.E. 403, 263 Mass. 61.
Miss.—Robinson Lumber Co. v. R. W. Hinton Co., 73 So. 886, 113 Miss. 144.
N.J.—G. O. K. Enterprises v. Moos, 168 A. 596, 114 N.J.Eq. 189, reversed on other grounds 172 A. 745, 116 N.J.Eq. 175.
N.Y.—Schmid v. Berkheimer, 224 N.Y.S. 726, 222 App.Div. 694.—Friede v. National City Bank of New York, 227 N.Y.S. 378, 222 App.Div. 645, affirmed 165 N.E. 452, 250 N.Y. 288.
S.C.—Cleveland v. Cannady, 100 S.E. 147, 112 S.C. 477.
Wis.—American Nat. Bank of Milwaukee v. Lewis, 225 N.W. 751, 199 Wis. 76.
6 C.J. p 193 note 69.

Corporate funds deposited in name of president

Where the president, to facilitate the operation of the corporation's business during the illness and absence of officers whose signatures were necessary to the corporation's check, deposited the corporation's receipts in the president's name, the fund so created could not be attached for satisfaction of a judgment against the president individually.—G. O. K. Enterprises v. Moos, 168 A. 596, 114 N.J.Eq. 189, reversed on other grounds 172 A. 745, 116 N.J.Eq. 175.

Money to be collected to be paid to third party

Agreement whereby third person is to be paid money to be collected by attorneys for first party does not vest title to the proceeds in third party, so as to prevent attachment of it as property of first party.—American Nat. Bank v. Owens, 3 La.App. 578.

Property taken from plaintiff by defendant

Where defendant took a wagon out of possession of plaintiff under a claim of ownership, plaintiff had a right to treat it as defendant's property and attach it as such, and did not thereby estop himself from claiming that he had title when it was taken from him.—Lewis v. Morse, 20 Conn. 211.

1. Early-Foster Co. v. Latham & Co., (Tex.Civ.App.) 253 S.W. 663.
2. Woods v. Spoturno, (Del.Super.) 183 A. 319.
3. Ft. Pitt Nat. Bank v. Williams, 9 So. 117, 43 La.Ann. 418.—6 C.J. p 195 note 71.
4. Wood v. Watson, 37 A. 1030, 20 R.I. 232.—6 C.J. p 195 note 74.
5. Davis v. Claxton, 268 P. 787, 82 Mont. 574.
6. Bosbyshell v. Cline, 196 P. 274, 51 Cal.App. 109.—6 C.J. p 195 note 70, p 1151 note 64 [b].

is in the possession of a third person does not usually exempt it from attachment,[7] although it has been held that where property has been bailed for hire for a specific time a creditor of the bailor cannot attach the property and take it from the custody of the bailee during the term of such bailment,[8] and that property in the possession of a bailee having a lien thereon cannot be taken from his possession on attachment against the bailor.[9] On the other hand, it has been held that one who is in possession of property as a bailee merely cannot recover its possession as against attaching creditors of the real owner,[10] and that property in the hands of a bailee in excess of the amount necessary to satisfy the bailee's lien may be reached by attachment,[11] and, where the statute so provides, property in the hands of a bailee may be attached subject to the right of the bailee to retain possession during the term of the bailment.[12]

Previous title or ownership of defendant in attachment will not subject the property to seizure if he has parted with such title or ownership prior to the institution of the attachment proceeding,[13] and there is no showing of any fraudulent intent in the transfer of the title.[14]

Mere contingent interests or remote possibilities are not the subject of attachment.[15]

Attachment against grantee pending suit to set aside conveyance. Liens obtained by creditors of a grantee by virtue of attachment writs against him, issued during the pendency of a suit by others against him to set aside a deed to him, are unavailing against such complainants, the deed being set aside.[16]

§ 73. —— Pledged, Mortgaged or Encumbered Personal Property

a. In general
b Mortgaged property
c Pledged property

a. In General

Personal property on which there exist encumbrances in an amount equivalent to, or greater than, the value thereof is not subject to attachment.

Transfer from son to mother

(1) Where no part of the property transferred by a son to his mother was made subject to the levy of attachment, it is immaterial whether or not there was an immediate delivery followed by an actual continued change of possession as required by statute in order to prevent the transfer from being deemed void —Bosbyshell v Cline, 196 P 274, 51 Cal App 109

(2) The fact that the attachment debtor, who was employed by his mother on a salary to manage her dairy farm, gave in his own name a mortgage for part of the purchase price of cattle paid for with the mother's money, does not subject such stock to attachment for the son's debts.—Bosbyshell v. Cline, supra.

(3) The fact that a son, when asking for exemption from military duty, claimed his mother was dependent on him, if competent evidence in determining the right to attach property as his under a writ levied before he made such claim, has no weight to show his ownership of the property, where the mother was more than seventy years of age and feeble, so that she might be dependent on him, although she had property sufficient for her support.—Bosbyshell v. Cline, supra.

7. Harriman v. Richardson, 51 App D C. 24, 273 F. 752—6 C.J. p 196 note 87.

Property in hands of plaintiff

A statute providing for the attachment of property of defendant in a third person's hands has been held intended to authorize attachment of chattels in possession of a stranger, but it does not impliedly prohibit the levy of attachment on defendant's chattels which are in plaintiff's possession —Harriman v Richardson, 51 App D C 24, 273 F 752

Merchandise or proceeds in hands of consignee

The creditors of a consignor may attach merchandise or its proceeds in the hands of the consignee until instructions to pay the proceeds to a third party have been communicated to, and the stipulation in his favor accepted by, him —Relf v. Boro, 17 La Ann 258

Possession of reclamation or irrigation district

Defendants' property in the possession of reclamation or irrigation district may be attached before judgment has been entered in the principal action —Doty v. Saddler, 276 P. 891, 151 Wash 542

Goods in possession of a carrier see infra § 74 c.

8. Chowning v Madison Land & Irrigation Co, 276 P 946, 84 Mont 494—6 C J. p 196 note 88, p 1151 notes 62, 63

9. Truslow v. Putnam, 4 Abb Dec (N Y) 425, 1 Keyes 563—6 C J. p 1151 note 62.

10. Anheuser-Busch Brewing Ass'n v. Daviess County Distilling Co, 49 S W 541, 20 Ky.L. 1522

11. Patterson v. Perry, 10 Abb Pr (N Y.) 82.

12. Brigham v Avery, 48 Vt. 602

13. Ala —Flaherty v. People's Bank of Mobile, 113 So. 910, 216 Ala. 542. Cal —Bosbyshell v. Cline, 196 P 274, 51 Cal App 109

Conn —Sunderlin v. Terry, 112 A. 642, 95 Conn. 713.

6 C.J. p 195 note 72

Transfer subject to liabilities

A provision, in a bill of sale transferring the property used in a business to a corporation organized to carry on the business, that the transfer should be subject to liabilities incurred in transacting the business does not make the property so transferred liable to attachment as the property of the transferor in a suit by a creditor who had a claim against the owner at the time of the transfer —Sunderlin v. Terry, 112 A. 642, 95 Conn. 713

14. R I.—Beckwith v. Burrough, 13 R I 294.

Tex —Parlin, etc, Co v. Vawter, 88 S W. 107, 39 Tex Civ App. 520

Attachment of property fraudulently conveyed see Fraudulent Conveyances § 309 [27 C J p 706 note 42—p 708 note 65].

15. U S —Farmers' Loan & Trust Co v. Miller, (D.C N Y) 2 F (2d) 493.

S C —LePrince v. Guillemot, 13 S C. Eq 137.

Interest under invalid mortgage not uncertain or contingent

Interest of debtor in property attached is not rendered so uncertain and contingent by chattel mortgage, invalid as against attaching creditor, as to render property incapable of being attached —Safford v. McNeil, 129 A. 721, 102 Conn 684.

16. Kinnah v. Kinnah, 56 N E. 376, 184 Ill. 284.

Personal property on which there exist vendor's liens for unpaid purchase money in an amount equivalent to, or greater than, the value thereof is not subject to attachment, defendant in such case, having no attachable interest therein.[17]

b. Mortgaged Property

(1) In general
(2) Property in possession of mortgagee
(3) Interest of mortgagee

(1) In General

Generally, mortgaged personal property is subject to attachment, when in the hands of the mortgagor.

While at common law the mortgagor of personalty was held not to have such an interest therein that the chattel could be taken by attachment in an action against him;[18] at the present time the interest of a mortgagor of chattels is, in a number of states, held subject to attachment,[19] either because of the recognition of a legal, as well as an equitable, right of property in the mortgagor,[20] or by virtue of statutes, on compliance with the conditions thereof.[21] The courts are not, however, uniform in determining just what interest the mortgagor must have in the property before it is attachable. It is usually held liable so long as the mortgagor's direct interest is coupled with the legal right to possession;[22] and in some jurisdictions, possession or possessory right to the chattel is expressly adjudged to be essential,[23] and the right does not exist after condition broken.[24] In other jurisdictions the statutes seem to authorize the attachment of mere equities of redemption,[25] and the mortgagor's interest would, it has been held, be attachable after condition broken.[26]

Mortgage lien waived. Personal property on which a mortgagee has waived his lien, by permitting its removal to another state, has been held subject to attachment by the mortgagor's creditors on its arrival in the other state.[27]

(2) Property in Possession of Mortgagee

Generally, personal property that is mortgaged and in the hands of the mortgagee is not subject to attachment.

If by virtue of the mortgage the mortgagee is in rightful possession of the property, it cannot as a rule be taken on an attachment against the mortgagor,[28] especially after the time for payment has expired and the mortgage has, by its terms, become absolute.[29] However, it has been considered that if the property has not been applied to the satisfaction of the claim it would be attachable when in the possession of the mortgagee,[30] and, under statutes in some jurisdictions, property that is mortgaged and is in the possession of the mortgagee is not exempt from attachment;[31] further, although the mortgagee cannot be deprived of his possession, he cannot complain of a lawful levy.[32]

17. Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47.

Bill of sale

When attachment defendant has made an unconditional bill of sale of the property, even though intended as security the property is not subject to attachment when at the time levy was made the claim secured by the bill of sale had not been satisfied —Lawrence v. Beattie, 176 N.W. 570, 209 Mich 128

18. Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204—6 C.J. p 199 note 9.

19. Mo —Green v. Powell, (App.) 46 S.W.(2d) 915
N.Y —Hall v Sampson, 35 N.Y. 274, 91 Am.D. 56
Tex.—Baldwin Motor Co. v. De Ford, (Civ.App.) 282 S.W. 832.
6 C.J. p 199 note 10.

20. Green v. Powell, (Mo.App.) 46 S.W.(2d) 915—6 C.J. p 199 note 11.

21. Ala.—Moody v U. S Fidelity & Guaranty Co., 137 So. 308, 223 Ala. 507.
Cal.—Kuehn v. Don Carlos, (App.) 41 P.(2d) 585
Mass.—S. Samuels & Co. v. Charles E. Fogg Co., 155 N.E. 429, 253 Mass. 402
R.I.—Zimmerman v. Andrews, 153 A. 307, 51 R.I. 204.
Tex.—Baldwin Motor Co. v. De Ford, (Civ.App.) 282 S.W. 832.
6 C.J. p 199 note 12.

Effect of default on mortgage

The levy of an attachment on personal property which had been mortgaged, but in which the mortgagor had an equity of redemption, has been held not void after a default by the mortgagor.—Moody v U. S Fidelity & Guaranty Co., 137 So. 308, 223 Ala. 507.

Payment or tender of amount due mortgagee as essential to valid levy see infra § 226.

22. Green v. Powell, (Mo.App.) 46 S.W.(2d) 915—6 C.J. p 199 note 13.

23. Green v. Powell, supra—6 C.J. p 199 note 14.

24. Green v. Powell, supra—6 C.J. p 200 note 15.

25. Me.—Sawyer v. Mason, 19 Me. 49.
N.Y.—Hall v. Samson, 21 How.Pr. 84.

26. Neb.—Burnham v. Doolittle, 15 N.W. 606, 14 Neb. 214, modifying Peckinbaugh v. Quillin, 12 N.W. 104, 12 Neb. 586
Ohio.—Carty v. Fenstemaker, 14 Ohio St. 457.

27. Adamson v. Fogelstrom, 300 S.W. 841, 221 Mo.App. 1243

28. N.Y.—Cutler v. James Goold Co., 43 Hun 516.
Tex.—Stiles v. Hill, 62 Tex. 429.
6 C.J. p 200 note 18

29. Bacon v. Kimmel, 14 Mich. 201.

30. Prout v. Root, 116 Mass. 410—6 C.J. p 200 note 20.

31. Sanders v. Farrier, (Tex.Civ.App.) 271 S.W. 293—Briggs v. Briggs, (Tex.Civ.App.) 227 S.W. 511.

Equity of redemption

While mortgagee is entitled to remain in possession of mortgaged property, attaching creditor is entitled to equity of redemption of mortgagor and to have equity interest sold under his attachment lien.—Sanders v. Farrier, (Tex.Civ.App.) 271 S.W. 293.

32. Briggs v. Briggs, (Tex.Civ.App.) 227 S.W. 511.

(3) Interest of Mortgagee

Mortgaged personalty not applied in satisfaction of the debt is not subject to attachment by the mortgagee's creditors.

Personal property, while the possession or right of redemption remains in the mortgagor, is not only not liable to attachment in a suit against the mortgagee[33] but, it would seem, cannot be thus taken, although the mortgagee has possession, and after condition broken, if it has not in fact been applied to the satisfaction of the debt by foreclosure or otherwise.[34]

c. Pledged Property

Conflict of authority exists as to whether property pledged is subject to attachment by pledgor's creditors, in absence of statutes.

While it has been held that a chattel, pledged on sufficient consideration, is not liable to attachment in an action against a pledgor,[35] it has also been held that personal property that is pledged is liable to an attachment in an action against the pledgor on discharging the debt for which the property is held as security.[36] The statutes in some jurisdictions authorize attachment of such property on discharge of the debt secured by the pledge[37] and although the pledgee cannot be deprived of his possession, he cannot complain of a lawful levy of attachment.[38]

Attachment by pledgee. Property pledged to secure a debt or obligation may be attached by the pledgee as the property of the pledgor,[39] notwithstanding the obligation is not fixed and certain and the pledgee is not in possession.[40]

The interest of the pledgee has been held to be attachable in an action against him by his creditors.[41]

§ 74. —— Particular Kinds of Persona. Property

a. Property subject to attachment
b. Goods not subject to attachment
c. Goods in transit under bill of lading

a. Property Subject to Attachment

(1) In general
(2) Bank deposits
(3) Money
(4) Commingled goods
(5) Growing crops
(6) Perishable property
(7) Rolling stock and income of carriers
(8) Water craft
(9) Liquor license
(10) Intoxicating liquor

(1) In General

Various items of personal property have been held subject to attachment, such as an advertising sign, fixtures in a store, etc.

In accordance with the general rule that all the goods and chattels of a debtor are subject to attachment for his debts, it has been held that such process may be levied on an advertising sign,[42] a membership of a nonresident in a chamber of

33. Berry v. Ellis, 156 S E 487, 200 N.C 283—6 C J p 200 note 21

34. Mass—Prout v. Root, 116 Mass 410.
Wash—Voorhies v. Hennessy, 34 P. 931, 7 Wash. 243
6 C J. p 200 note 22

35. Ky—Sabel v. Planters Nat. Bank, 61 S W 367, 110 Ky 299
Me—Sargent v. Carr, 12 Me 396, 397 —Thompson v Stevens, 10 Me. 27
6 C.J. p 200 note 25.
Consideration sufficient
Property pledged, to secure a person for the liability incurred in procuring the discharge of other property of the debtor which had been attached, is supported by a sufficient consideration and is not subject to attachment by other creditors of the pledgor.—Thompson v. Stevens, 10 Me. 27.

36. Mo—Ottumwa Nat. Bank v. Totten, 89 S W. 65, 66, 114 Mo App. 97.
N.Y.—Clements v. Doblin, 204 N Y S. 413, 209 App Div. 208, affirmed 147 N E 180, 239 N.Y. 526.
6 C.J. p 201 notes 26, 28.
"The law is universal that the pledgor of personal property still retains ownership of the goods, qualified, of course, by the rights of the pawnee The pledgee, by taking the goods into his possession, becomes a lienor to the extent of the debt for which he holds the goods as security The interest of the owner or pledgor is a vendible property interest, subject to the pledge, and is as much a proper subject of attachment and levy of execution against the owner as any other property rights of the proprietor"—Ottumwa Nat. Bank v. Totten, supra.
In the Philippines, property that is pledged may be attached where evidence of the date of the pledge does not appear in a public instrument—Tee Bi v. Bank, 41 Philippine 596
Payment or tender of amount due pledgee as essential to a valid levy see infra § 226.

37. Me.—Sargent v. Carr, 12 Me. 396.
Mass—Pomeroy v. Smith, 17 Pick 85, distinguishing Boyden v. Moore, 11 Pick. 362
Nev—Persing v. Reno Stock Brokerage Co, 96 P 1054, 30 Nev. 342.
6 C.J. p 201 note 27.

38. Briggs v Briggs, (Tex Civ App.) 227 S.W. 511.

39. Mo—Ottumwa Nat Bank v. Totten, 89 S W 65, 114 Mo App 97
Vt—Wright v. Guilmette, 111 A. 459, 94 Vt 372.

40. Wright v. Guilmette, supra.

41. La Varre v. International Paper Co, (D C S C) 37 F.(2d) 141—6 C. J. p 201 note 30.
Pledge for joint indebtedness
Joint enterprise in purchasing papers and pledging stock to secure loan created joint indebtedness and attachment of creditor's interest in stock attached indebtedness of both debtors—La Varre v. International Paper Co., (D C S.C.) 37 F (2d) 141.

42. Wallace v. Barker, 8 Vt. 440.

commerce,[43] tools of a mechanic,[44] merchandise kept in a store for sale,[45] fixtures which a tenant may remove,[46] hay in a barn,[47] and a sealed parcel or locked safety deposit box belonging to defendant.[48] It seems that property in a trade-mark is not subject to attachment apart from the business in which it is used.[49]

Alimony. Money received by a wife from her husband under an agreement, as her share of their estate in full settlement of her rights, including alimony, has been held not exempt from attachment as constituting alimony, a divorce being subsequently granted for her fault and without any allowance to her,[50] and property received by a wife as alimony is subject to attachment by a creditor whose judgment was obtained for a wrong which followed the divorce decree.[51]

Rent notes, payable to a mortgagor under a lease of the property during the year allowed for redemption after mortgage foreclosure sale, have been held not exempt from attachment on other debts.[52]

(2) Bank Deposits

A bank deposit may, ordinarily, be attached as in the case of other personalty

As a deposit is a debt due from the bank to the depositor, it may be attached by the depositor's creditors like any other property belonging to him,[53] and when it is so attached, it becomes the bank's duty to retain the deposit until the court has made a proper order concerning its disposition.[54] After a deposit has been attached, the bank cannot apply it on an unmatured debt due to itself.[55]

(3) Money

Money, in specie or bank notes, may be subject to attachment.

Money,[56] whether in specie,[57] treasury notes,[58] or bank notes,[59] is subject to attachment.

(4) Commingled Goods

Goods of a debtor intermingled with those of another are subject to attachment.

If the goods of a debtor are so intermingled with those of another that they cannot be distinguished or identified, the whole mass may be taken by attachment in an action against the debtor.[60] The officer may, however, retain possession of the goods other than the debtor's only until they are identified or pointed out to him.[61]

(5) Growing Crops

A conflict of authority exists as to whether growing, immature crops may be attached.

While in at least one jurisdiction, a growing, immature crop has been held not properly attachable,[62] in other jurisdictions annual growing crops which are the product of industry and care have been held to be properly attachable as the personal property of the owner,[63] although it has been considered that, in order to be attachable, such crops should be fit for harvest.[64]

43. Wagner v Farmers' Co-op Exch Co. of Good Thunder, 180 N.W. 231, 147 Minn. 376, 14 A.L.R 279

44. N C—Martindale v. Whitehead, 46 N C 64.
Tenn—Bell v. Douglass, 1 Yerg. 397.

45. Batchelder v Frank, 49 Vt. 90

46. Morey v. Hoyt, 26 A 127, 62 Conn. 542, 19 L R A. 611—6 C J p 196 note 81

47. Mass—Campbell v. Johnson, 11 Mass 184.
N H—Barrett v. White, 3 N.H 210, 14 Am D 352
6 C J p 196 note 82.

48. West Cache Sugar Co v Hendrickson, 190 P 946, 56 Utah 327, 11 A L R. 216—6 C J. p 196 note 84

49. Milliken v. Dart, 26 Hun (N Y) 24—Hegeman v. Hegeman, 8 Daly (N Y.) 1—63 C J. p 520 note 63

50. Milberger v Veselsky, 155 P 957, 97 Kan. 433

51. Zander v Bright, 52 P (2d) 368, 142 Kan. 833

52. Clouse v. Reeves, 217 N W. 833, 205 Iowa 154.

Product of exempt property
The product of real property usually becomes personal property, and the fact that property is the product of exempt real property does not extend the exemption to the personalty.—Clouse v Reeves, 217 N.W. 833, 205 Iowa 154.

53. Stair v. York Nat Bank, 55 Pa 364, 93 Am D. 759—7 C J. p 671 note 50

54. Cal—John M C. Marble Co. v. Merchants' Nat. Bank, 115 P. 59, 15 Cal App 347
N Y—Gibson v. National Park Bank, 98 N.Y 87.
7 C J p 671 note 51.

55. Ala—Birmingham Nat Bank v. Mayer, 16 So 520, 104 Ala 634.
Pa—Manufacturers' Nat. Bank v. Jones, 2 Pennyp. 377.

56. Wright v. Guilmette, 111 A 459, 94 Vt 372—6 C J p 196 note 89.

57. Mass—Sheldon v. Root, 16 Pick 567, 28 Am.D. 266
N J—Crane v. Freese, 16 N J.Law 305.
6 C J p 196 note 90

58. State v. Lawson, 7 Ark. 391, 46 Am D 293

59. Wright v. Guilmette, 111 A 459, 94 Vt. 372—6 C J. p 196 note 92

60. Mo—Kelly-Goodfellow Shoe Co. v. Sally, 89 S W. 889, 114 Mo App. 222
N H—Taylor v. Jones, 42 N H 25
Utah—Johnson v. Emery, 86 P 869, 31 Utah 126, 11 Ann Cas. 23.
6 C J. p 197 note 96.

61. Me—Yates v. Wormell, 60 Me 495
Mass—Shumway v. Rutter, 8 Pick. 443, 19 Am D 340.
N H—Taylor v. Jones, 42 N H 25

62. Blattler v. Westerman, 286 P 217, 130 Kan 415—C C. Isely Lumber Co v. Kitch, 256 P. 133, 123 Kan. 441.

63. Kelly v. Stockgrowers Credit Corporation, (N D) 263 N.W. 717—6 C J p 197 note 98.

64. Heard v. Fairbanks, 5 Metc. (Mass) 111, 38 Am.D. 394—6 C.J. p 197 note 99.

(6) Perishable Property

Statutes in some jurisdictions permit perishable goods to be attached.

While perishable goods have been held not subject to attachment,[65] some statutes permit such property to be seized under this process, and make provision for its sale so that the proceeds may stand in its place;[66] and it has also been held that such goods may be seized, although no provision is made for their sale.[67]

(7) Rolling Stock and Income of Carriers

Rolling stock of carriers may be attached when not in use.

The engines or the freight and passenger cars of a railroad corporation are liable to attachment when not in use, the same as other personal property,[68] and the same has been true of a stagecoach not actually in transit.[69]

The income and revenues of a railroad company which are pledged for the payment of outstanding bonds are not liable to attachment by creditors of the company, and equity will enjoin an attempted levy thereon.[70]

(8) Water Craft

Steamboats and other vessels may be attachable.

As a general rule there is no discrimination between vessels or steamboats and other species of personal property, when the kind of property subject to attachment is considered.[71]

(9) Liquor License

Liquor license and the franchise evidenced thereby may be attached.

A statute authorizing the attachment of liquor licenses has been held to refer to both the certificate and the franchise evidenced thereby.[72] An amendment of a statute authorizing attachment of a liquor license so as to bind any renewal thereof has been held to apply only to attachments made after it went into effect.[73]

(10) Intoxicating Liquor

Attachment may be levied on intoxicating liquor lawfully kept.

Where the keeping of intoxicating liquor is lawful, such property may be attached like any other property.[74]

b. Goods Not Subject to Attachment

(1) In general
(2) Books of account and private papers
(3) Property illegally kept
(4) Property in course of manufacture
(5) Property carried or worn by person or taken from him
(6) Property held for payment of duty
(7) Money due from state
(8) Property used in transportation of mail
(9) Copyright and literary property

(1) In General

While certain property, by virtue of statutory provisions, is not subject to attachment as elsewhere shown in this work (see Exemptions, Homesteads), courts, on some broad principle of law or public policy, have also held certain property to be exempt from attachment (see infra § 74 b (2)–(9)).

(2) Books of Account and Private Papers

Books of account and private papers are generally not subject to attachment.

Books of account, inasmuch as a seizure and sale thereof would be productive of great injury to the debtor, without a corresponding benefit to

65. Ala.—Vandiver v. Waller, 39 So. 136, 143 Ala. 411
Mich.—McLaughlin v. Jackson Cir. Judge, 110 N.W. 1079, 147 Mich. 379

66. Batchelder v. Frank, 49 Vt. 90

67. Culley v. Jenness, 2 N.H. 87—6 C.J. p. 197 note 3.

68. Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518—6 C.J. p. 197 note 4—51 C.J. p. 887 note 28.

Property of foreign corporation
The rule stated in the text is applicable to the rolling stock of a foreign railroad corporation.—Chitty v. Pennsylvania R. Co., 40 S.E. 944, 62 S.C. 526—6 C.J. p. 197 note 4 [a].

Right of domestic railroad to use car of foreign road on return trip
The right of a domestic railroad to use, on its return trip, the car of a foreign railroad, which it has unloaded, has been held superior to the right of an attaching creditor of the foreign road.—Dye v. Denver & R. G. R. Co., 153 P. 502, 96 Kan. 676.

(2) This right has been held not waived by an agent of the domestic road requesting the officer to remove the car from the tracks or by setting the car on stub tracks so as to be under the control of the officer.—Dye v. Denver & R. G. R. Co., supra.

69. Potter v. Hall, 3 Pick. (Mass.) 368, 15 Am.D. 226.

70. Dunham v. Isett, 15 Iowa 284.

71. H. T. Cottam & Co. v. Comision Reguladora del Mercado de Henequen, 90 So. 392, 149 La. 1026—6 C.J. p. 198 note 6.

Transfer of foreign ship
A foreign ship within the state is subject to attachment by creditors of her owner, after he has transferred her at her home port and before the assignee has taken actual possession.—H. T. Cottam & Co. v. Comision Reguladora del Mercado de Henequen, 90 So. 392, 149 La. 1026

72. Quinnipiac Brewing Co. v. Hackbarth, 50 A. 1023, 74 Conn. 392.

73. In re Fuetl, (D.C.Conn.) 247 F. 829.

74. Iowa.—Monty v. Arneson, 25 Iowa 383.
Vt.—Nutt v. Wheeler, 30 Vt. 436, 73 Am.D. 316.
Intoxicating liquor illegally kept see infra § 74 b (3).

the creditor, have been held not subject to attachment.[75]

The private papers of a debtor have been held not attachable.[76]

(3) Property Illegally Kept

Authority is conflicting as to right to levy attachment on property illegally kept

Since an attachment can be made fully effective only by sale, and since such sale would defeat the right of forfeiture, which is often provided for, as well as violate the statute itself in jurisdictions where the sale of intoxicating liquor is prohibited, it has been held that such liquor is not subject to attachment,[77] although in some jurisdictions the attachment has been upheld, notwithstanding the statute, apparently on the ground that such property did not lose its character of property by being illegally kept for sale.[78]

(4) Property in Course of Manufacture

Attachment may not be levied on goods in the course of manufacture where effect would be to render goods nearly valueless.

It has been held that property cannot be attached when it is in such a state of manufacture that if taken it could not be returned to defendant in the same condition should plaintiff's claim fail,[79] or when it would be rendered nearly or entirely valueless by the arrest of the manufacturing process, and care or skill is required in its completion.[80]

(5) Property Carried or Worn by Person or Taken from Him

Attachment may not be levied on property carried or worn by a person so that it could not be taken without an assault or violating of his personal security.

Property which is being carried or worn by a person in such position or manner that it cannot be taken without an assault or violating his personal security is not liable to attachment.[81] However, money which is properly taken from a prisoner by the superintendent of a penitentiary, to which the prisoner, charged with robbing a bank, is taken for safekeeping, is not in the prisoner's possession or custody, but is sequestered and subject to attachment at the bank's instance, notwithstanding the money does not constitute a part of the identical bills stolen.[82]

(6) Property Held for Payment of Duty

Property in custody of federal government for nonpayment of duty is not liable to attachment.

Imported goods, while they are in the custody of the United States customhouse officials and before the duty thereon is paid or secured, are held to be not liable to attachment at the hands of a state officer.[83]

(7) Money Due from State

Attachment may not be levied on money due from the state to a defendant.

A fund in the hands of the state treasurer and alleged to be due from the state to defendant in attachment has been held not subject to attachment.[84]

(8) Property Used in Transportation of Mail

Any vehicle or vessel actually engaged in transportation of the mails is exempt from attachment.

The willful obstruction of the mails being expressly prohibited by congress, any vehicle or vessel which is actually engaged in such service is, during such time, exempt from attachment.[85]

(9) Copyright and Literary Property

Copyrights and literary property are not proper subjects of attachment.

A copyright is not subject to attachment,[86] and if the plate or physical means of reproduction is so seized and sold, the purchaser may not use it

75. Ky.—Bradford v. Gillaspie, 8 Dana 67
Mich.—Rosenthal v. Dickerman, 57 N.W. 112, 93 Mich. 208, 39 Am.S.R. 535, 23 L.R.A. 693.

76. Oystead v. Shed, 12 Mass. 506.

77. Me.—Nichols v. Valentine, 36 Me. 322
Mass.—Kiff v. Old Colony, etc., R. Co., 117 Mass. 591, 19 Am.R. 429—Ingalls v. Baker, 13 Allen 449
R.I.—Barron v. Arnold, 11 A. 298, 16 R.I. 23
S.C.—Lanahan v. Bailey, 21 S.E. 332, 53 S.C. 489, 69 Am.S.R. 884, 42 L.R.A. 297
Attachment where sale lawful see supra § 74 b (10).

78. N.H.—Tucker v. Adams, 63 N.H. 361.
Vt.—Howe v. Stewart, 40 Vt. 145.

79. Bond v. Ward, 7 Mass. 123, 5 Am.D. 28.

80. Wilds v. Blanchard, 7 Vt. 138—6 C.J. p. 209 note 15.

81. Mass.—Mack v. Parks, 8 Gray 517, 69 Am.D. 267.
Vt.—Lovejoy v. Lee, 35 Vt. 430.
6 C.J. p. 209 note 16.

82. Palmetto State Bank v. English, (S.C.) 186 S.E. 638.

83. U.S.—Harris v. Dennie, 3 Pet. 292, 7 L.Ed. 683, reversing 5 Pick. (Mass.) 120.

Me.—Peabody v. Maguire, 12 A. 630, 79 Me. 572
Mass.—Dennie v. Harris, 9 Pick. 364.
6 C.J. p. 209 note 17
Imported goods in possession of government as in custody of law and not liable to attachment see infra § 88.

84. Lodor v. Baker, 39 N.J.Law 49.

85. Harmon v. Moore, 59 Me. 428—6 C.J. p. 209 note 19.

86. U.S.—Stevens v. Gladding, (R.I.) 17 How. 447, 15 L.Ed. 155—Stephens v. Cady, (R.I.) 14 How. 528, 14 L.Ed. 528
Ky.—Cooper v. Gunn, 4 B.Mon. 594.
Mich.—Dart v. Woodhouse, 40 Mich. 399, 29 Am.R. 544.

for the purpose of multiplying copies.[87] Also, since the law will not permit the right of the owner of a manuscript to publish it or to keep it back from publication to be interfered with, it has been held that an unpublished manuscript cannot be seized on attachment.[88]

c. Goods in Transit under Bill of Lading

By virtue of statutory provisions, goods in possession of a carrier under a negotiable bill of lading may not be subject to attachment until the bill is surrendered or its negotiation enjoined.

While, ordinarily, goods in transit are subject to attachment,[89] provided the owner has not lost control over the property and his right to change their destination,[90] under a federal statute and statutes in some jurisdictions practically identical therewith, goods shipped under a negotiable bill of lading are protected from attachment, while in the possession of the carrier, until the bill is surrendered or its negotiation enjoined, and compliance with these conditions is essential to render such goods subject to attachment.[91] However, where the consignee refused the bill of lading, such goods have been held subject to attachment, notwithstanding the bill of lading was assigned and not impounded,[92] and where the consignor uses a straight bill of lading, thereby retaining control over the goods, such goods are subject to attachment by the consignor's creditors while in possession of the carrier,[93] unless the consignor has previously transferred the bill of lading and notice thereof has been given to the carrier.[94]

§ 75. Real Property and Interests Therein in General

Real property of an attachment debtor is generally liable to seizure under the process.

While at common law an attachment, like an execution, would not run against land,[95] at the present time real property of a defendant in attachment proceedings is generally liable to seizure under the process,[96] unless by the terms of the statute it clearly appears that the intention of the legislature is otherwise.[97] However, the general rule is that for real property to be liable to attachment, it is necessary that it should be of such character that it would be liable to be seized under execution,[98] and also that the defendant in the attachment proceeding has some right or title, legal or equitable, thereto.[99]

87. Stevens v Gladding, (R I) 17 How.(U S) 447, 15 L Ed 155—Stephens v Cady, (R I) 14 How (U S) 528, 14 L Ed 528—Patterson v. J. S Ogilvie Pub Co, (C C N Y) 119 F. 451—13 C J p 1100 note 93

88. Harper v. Donohue, (C C Ill) 144 F 491, affirmed 146 F 1023, 76 C C A 678—Bartlett v Crittenden, (C C.Ohio) 2 F Cas No 1,076, 5 McLean 32—13 C.J. p 950 note 53

89. Santa Fé Pac R Co v. Bossut, 62 P. 977, 10 N M 322

Government operation of railroad

Goods or property in the possession of a railroad operated by the federal government in possession and control of such railroad have been held not subject to attachment—Spruks & Co v. Belden & Co, 29 Pa Dist 30

90. Cammack v Floyd, 10 La Ann 351—Hill v Simpson, 8 La Ann 45—Oliver v. Lake, 3 La Ann 78—St Mary's Bank v. Morton, 12 Rob (La) 409—Urie v. Stevens, 2 Rob (La) 251—Hepp v Glover, 15 La. 461, 35 Am D 206—Russell v. Gale, 4 La 183—Babcock v. Malbie, 7 Mart N S.(La) 137.

91. Ill—Keith v. J. F. Arnold & Co, 254 Ill App. 115.
Iowa—Bell v. Courteen Seed Co of Milwaukee, Wis., 196 N.W. 1006, 197 Iowa 120.
N J—Brimberg v. Hartenfeld Bag Co., 105 A. 68, 89 N J Eq. 425.
N Y—Meyers Lumber Co v Wayne Machinery Co, 206 N Y S 1, 123 Misc 517
Pa—Stamford Rolling Mills Co. v. Erie R. Co., 101 A. 823, 257 Pa. 507
Vt—Quigley v Wiley, 179 A. 206, 107 Vt 253.

Bill of lading is the res rather than the goods—Brimberg v Hartenfeld Bag Co, 105 A. 68, 89 N J Eq. 425

Impounding bill of lading prevents the transferee thereof from vacating the attachment, made after delivery by the carrier, where there was no indorsement by the consignee—Neumann v Reiss, 245 N Y S 464, 138 Misc 576.

Possession of carrier

(1) Cotton, which had been shipped under uniform order bill of lading and had been unloaded at point of destination and stored on railroad's premises for thirty-day period, was not, while so stored, subject to attachment, being in the "possession" of the carrier—Cooper v. Crowder, 126 S E. 436, 131 S C. 30.

(2) Goods in custody of stevedoring company were in "possession of carrier" within the statute restricting attachment of goods represented by negotiable bill of lading.—Neumann v. Reiss, 245 N.Y.S. 464, 138 Misc. 576.

(3) Possession by bonded warehouse to which collector of customs delivered merchandise has been held not "possession of carrier" within the statute restricting attachment of goods covered by negotiable bill of lading—Neumann v Reiss, supra.

92. Neumann v. Reiss, supra

93. Tennessee Egg Co. v. Monroe, 268 S W 372, 151 Tenn 121, certiorari denied L J Schwaub & Sons v Tennessee Egg Co, 46 S Ct. 105, 269 U S. 580, 70 L Ed. 422

94. Tennessee Egg Co v Monroe, 268 S W 372, 151 Tenn 121, certiorari denied L. J. Schwaub & Sons v Tennessee Egg Co, 46 S Ct. 105, 269 U S. 580, 70 L Ed 422.

95. Willis v Anderson, 124 S E 834, 188 N C. 279—6 C J. p 201 note 32.

96. Willis v Anderson, supra—6 C J p 201 notes 34, 35

Attachment issued out of the county court can be levied on real estate in view of Vernon's Sayles Civ St Annot.(1914) art 268, providing for enforcement of the lien of attachment issued from a county court and levied on land—Sewell v. Taylor, (Tex Civ App) 224 S W. 530.

97. Willis v. Anderson, 124 S.E 834, 188 N C 279—6 C J. p 201 note 36.

98. Hoffman v. Rose, (Tex Civ App) 217 S.W. 424, error refused—6 C. J. p 198 note 68, p 201 note 35 [a].

99. Mass—Piantadori v Nally, 133 N E 506, 233 Mass 158
Miss—Slattery v. P. L. Renoudet

§ 76. —— Exhaustion of Personal Property

In the absence of statute requiring it, the exhaustion of personalty is not necessary prior to seizure of realty.

In the absence of any positive statutory limitations exempting real estate from attachment until the debtor's personalty is exhausted, such lands would be liable to attachment regardless of the amount of personalty the debtor may possess.[1]

§ 77. —— Mortgaged Property

a. Interest of mortgagor
b. Interest of mortgagee

a. Interest of Mortgagor

The equity of redemption of a mortgagor of realty is now generally liable to attachment.

While the mortgagor's equity of redemption was usually held not liable to attachment at common law,[2] the rule has been very generally changed by statute so that at the present time such interest is attachable,[3] although in some jurisdictions, payment or tender of the amount due the mortgagee is essential (see infra § 233).

b. Interest of Mortgagee

While a mortgage is open and subsisting, the interest of a mortgagee is not subject to attachment.

The interest of the mortgagee in land, while the mortgage is open and subsisting is not of such nature as to be liable to attachment.[4] Some of the cases, however, seem to be limited to the particular facts before the court, and do not expressly affirm the nonliability of his interests to attachment after entry but before foreclosure;[5] but inasmuch as the inconveniences and difficulties which would result from the attachment before entry would still prevail in case of attachment after entry and before foreclosure,[6] the distinction, if ever made, does not rest on sound legal principles, and does not, it is believed, now exist.[7]

§ 78. —— Particular Interests in Real Property

a. In general
b. Estate by curtesy
c Unassigned dower
d. Remainders, reversions, and the like
e. Interest of preëmptioner or entryman of land

a. In General

Real property subject to attachment generally includes all rights issuing out of, annexed to, and exercisable within or about, the land.

While the bare legal title,[8] or instantaneous

Lumber Co., 87 So. 888, 125 Miss 229
N C —Chinnis v. Cobb, 185 S E 638
Okl—First Nat Bank v. Coates, 168 P. 714, 65 Okl 94.

Debtor's property standing in name of third person

Property standing in the name of one person, but owned by the debtor, may be attached at the suit of the creditor—Horan v. Varian, 268 P 637, 204 Cal. 391, recalled 276 P. 1002, 207 Cal 7.

Levy on life estate to pay remainderman's debts

Levy of attachment on life estate in land to pay remainderman's debt is erroneous—First Nat Bank v Stabler, 223 N W. 794, 118 Neb. 142, followed in Rosalie State Bank v Stabler, 223 N W 796, 118 Neb. 148.

Transfer prior to attachment

Bank suing out attachment long after recording of valid deed to attachment debtor's husband had no lien on land for amount of wife's note.—Ballard v. Security State Bank, 293 S.W. 950, 219 Ky. 468.

Grantee assuming debt

An attachment lien on property may be properly granted to a creditor who erected a dwelling thereon, grantee having assumed grantor's obligation to creditor—McIntosh v. Turner, 39 S.W.(2d) 966, 239 Ky. 495.

Recording of instrument evidencing equitable interest not necessary

An instrument, although entitled to registration, need not be recorded unless required by statute in order to protect an equitable title, evidenced thereby, against attaching creditors of the holder of the legal title.—Johnson v. Darr, 272 S W 1093, 114 Tex 516, affirming Darr v. Johnson, (Civ App) 257 S.W. 682—South Texas Lumber Co v Nicoletti, (Tex Civ App) 54 S W (2d) 893.

1. Boggess v. Gamble, 3 Coldw (Tenn.) 148—6 C J. p 201 note 37.

2. Piatt v. Oliver, (C C Ohio) 19 F. Cas No 11,115, 2 McLean 267, affirmed 3 How. 333, 11 L Ed 622

3. Ala.—Central Min, etc., Co. v. Stoven, 45 Ala 594.
Ga.—Smith v Fourth Nat. Bank, 39 S E 762, 145 Ga. 741—Robinson v. Clifton, 136 S E. 90, 36 Ga App. 188
Mont.—Doggett v. Johnson, 267 P. 292, 82 Mont. 338—Isom v. Larson, 255 P. 1049, 73 Mont 395—State v. Stephens, 206 P 1094, 63 Mont. 318—Banking Corp of Montana v. Hein, 156 P. 1085, 52 Mont. 238.
6 C.J. p 203 note 49.

Statutory right of redemption is not subject to a levy of attachment, although the inclusion of such in the return of the officer cannot vitiate the levy on proper subjects—Central Min, etc, Co v Stoven, 45 Ala. 594—Isom v. Larson, 255 P 1049, 73 Mont. 395—State v. Stephens, 206 P 1094, 63 Mont 318—Banking Corp of Montana v Hein, 156 P. 1085, 52 Mont. 238—6 C J. p 203 note 49 [d]

4. Mich.—Feldman v. Preston, 160 N W 655, 194 Mich 352
N C—Willis v. Anderson, 124 S E 834, 188 N C 479—Stevens v. Turner, 119 S E 210, 186 N C. 191.
6 C J. p 203 note 50

Unenforceable mortgage

Where debtor holds only naked legal title, vested in him only as mortgagee, and mortgage is unenforceable, attaching creditor cannot subject such property to liabilities of debtor—Saylor v. Crooker, 156 P. 737, 97 Kan. 624.

5. Ala.—Morris v. Barker, 2 So 335, 82 Ala 272.
Mass.—Eaton v. Whiting, 3 Pick 484
6 C J. p 204 note 51.

6. Me.—Smith v. People's Bank, 24 Me. 185
Mass.—Eaton v. Whiting, 3 Pick. 484

7. Brown v. Bates, 55 Me 520, 92 Am D. 613—Lincoln v White, 30 Me 291—Smith v. People's Bank, 24 Me. 185.

8. Willis v. Anderson, 124 S E 834, 188 N.C. 479—6 C.J. p 202 note 39.

seizin,[9] has been held insufficient to constitute an attachable interest at least as against the equitable owners, where the attaching party has, or is bound by law to take, notice of the paramount outstanding equitable title,[10] real property within the meaning of the statutes has been held to include not only land and things erected or growing thereon, or affixed thereto, but all rights issuing out of, annexed to, and exercisable within or about, the land,[11] and generally, real property rights are subject to attachment process, although the precise right or interest of defendant is unknown to both plaintiff and attaching officer at the time of seizure and sale.[12]

The interest acquired by a judgment creditor in his levy on land has been held not attachable during the time allowed by law for its redemption;[13] and a purchaser at an execution sale has been held to have no attachable interest during the time allowed the debtor for redemption.[14]

b. Estate by Curtesy

Estate of tenant by curtesy initiate may be attached in the absence of statute to the contrary.

In the absence of a statute rendering it exempt,[15] the estate of a tenant by curtesy initiate is, like all other certain and vested legal estates, subject to attachment.[16]

c. Unassigned Dower

Dower interest not assigned or admeasured is not subject to attachment, in the absence of statutory provision permitting attachment thereof.

At common law and in the absence of statute showing a different legislative intent, a widow's interest in dower which has not been assigned or admeasured is not subject to attachment;[17] but a statute providing for the attachment of any interest in realty, which is capable of being aliened by defendant, whether vested or not vested, has been held to make such interest attachable.[18]

d. Remainders, Reversions, and the Like

Attachment may be levied on vested remainders, but not on uncertain and contingent interests in realty.

A vested remainder is such an interest as is subject to attachment;[19] but contingent remainders or other uncertain and contingent interests cannot be attached.[20]

It has been held that a reversionary interest in land is attachable.[21]

e. Interest of Preëmptioner or Entryman of Land

Interest of preemptioner of land is not liable to attachment.

Inasmuch as the interest of a preëmptioner of land is unassignable before the issue of the patent, such interest is not liable to attachment during that time.[22] Similarly, the interest of an entryman prior to compliance with all the preliminary acts prescribed by law for acquisition of title has been held not subject to attachment,[23] but where a claimant of land has been adjudged entitled to such land, although the deed has not been delivered pending his protest as to fees, it has been held that he had both legal and equitable title and an attachable interest therein.[24]

§ 79. Corporate Stock

In the absence of statutes so providing, shares of stock of a private corporation are not subject to attachment.

Stocks of a domestic or foreign corporation were not subject to levy at common law, and hence, in the absence of an enabling statute, are not liable to attachment.[25] However, in most jurisdictions,

9. Willis v. Anderson, supra—6 C.J. p 202 note 40.

10. Willis v. Anderson, supra—6 C J. p 202 note 41.

11. State v. Superior Court for Chelan County, 280 P. 350, 154 Wash 10—6 C J. p 201 note 84 [a], p 202 note 42.

Interest under contract see infra § 80

12. Woods v. Spoturno, (Del.Super.) 133 A 319.

13. Kidder v. Orcutt, 40 Me 589.

14. Rogers v. Wingate, 46 Me. 436—Thornton v. Wood, 42 Me. 282

15. Sill v. White, 26 A. 396, 62 Conn. 430, 20 L.R.A. 821—6 C J. p 204 note 54.

16. Miss.—Day v. Cochran, 24 Miss. 261.

Pa.—Lancaster County Bank v. Stauffer, 10 Pa 398

Philippine—Reyes v. Grey, 21 Philippine 73

17. Ill.—Newman v Willetts, 48 Ill 534.

Me.—Nason v. Allen, 5 Me. 479.

6 C J. p 204 note 56.

18. Latourette v. Latourette, 65 N Y S 8, 52 App.Div. 192.

19. Ky.—Ernst v Northern Bank, 49 S W 333, 20 Ky.L. 1334.

Md.—Armiger v. Reits, 46 A. 990, 91 Md. 334.

6 C J. p 204 note 58.

20. Conn.—Smith v. Gilbert, 41 A. 284, 71 Conn 149, 71 Am S R. 163.

Va.—Young v. Young, 17 S E. 470, 89 Va. 675, 23 L R A. 642.

Wash.—Boyer v. Robison, 86 P. 385, 43 Wash. 97

6 C.J p 204 note 59

21. Moore v. Richardson, 37 Me. 438

22. McMillen v. Gerstle, 34 P. 681, 19 Colo 98

23. Stockmen's Nat. Bank of Ft. Benton v. Hofeldt, 169 P 43, 54 Mont. 205

24. Richardson v. Carr, 171 P. 476, 63 Okl. 46.

25. Ky.—Husband v. Linehan, 181 S W. 1089, 168 Ky. 304, Ann Cas 1917D 954.

N.H.—Dupont v. Moore, 166 A. 417, 86 N H 254.

Pa.—Moys v. Union Trust Co. of Pittsburgh, 119 A 733, 276 Pa. 58—Cherkasky v. Pride, 10 Pa.Dist. & Co 133.

6 C.J. p 212 note 87.

there are statutes by virtue of which shares of stock in incorporated companies may be attached.[26] While it has been held that statutes authorizing the attachment of corporate stock will not be extended by construction to include stock of a foreign corporation,[27] there is authority to the contrary.[28]

Legal or equitable interest. While it has been held, under some statutes, that only the legal and not the equitable interest is attachable,[29] statutes not only making shares of stock subject to attachment, but also rights in such stock, or option to acquire shares, or right or interest in such, have been held to include equitable as well as mere legal interests in stock.[30]

Certificates of stock While certificates of stock may, to some extent, be regarded as property, they are distinct from the holder's interest in the capital stock of the corporation, and are not "goods and effects" within the meaning of a statute relating to property subject to attachment,[31] and a stock certificate has been held not subject to attachment except in connection with a levy directly on the shares of stock.[32]

§ 80. Interest under Contract

a. In general
b. Lease

a. In General

Vested, but not contingent, interests under contracts may be attached.

In determining whether or not a contractual interest relative to property is of such nature as to be attachable each case must be governed by its own facts and statutory provisions relating to attachment. It would seem, however, that, when a debtor's pecuniary interest under a contract is dependent on a mere contingency,[33] it is not attachable, and this is apparently true even though the debtor is entitled to defend his possession against a wrongdoer or intruder;[34] but a vested and certain interest under a contract is attachable.[35] The right of an importer, who had parted with the title to goods, to regain the goods and title thereto on payment of a draft for the purchase price, has been held not such an interest in the property as was subject to attachment[36]

26. Ky.—Husband v. Linehan, 181 S.W. 1089, 168 Ky. 304, Ann.Cas. 1917D 954
Okl.—Harris v. Mid-Continent Life Ins. Co., 182 P. 85, 75 Okl. 105
Pa.—Cherkasky v. Pride, 10 Pa.Dist. & Co. 133—Bank v. Kountz, 6 Pa.Co. 249
6 C.J. p. 212 note 38
Situs of corporate stock for purposes of attachment see infra § 92 b

Appearance on corporate records
A statute providing for service of process for attachment of shares of corporate stock, stock options, or interest in stock, and requiring attaching officer to give certificate showing interest of debtor is intended merely to identify the shares of corporate stock, stock options, or rights, or interests in stock, when attached and sold, only when corporate records make identification possible and not as limiting rights or interests in corporate stock subject to attachment—Woods v. Spoturno, (Del.Super.) 183 A. 319.

Strict construction
Statutes providing for attachment of corporate stock are to be construed strictly as in derogation of the common law, and a case not plainly within the terms expressed cannot be considered as embraced therein, especially where courts of law and equity are separate tribunals, having separate jurisdictions.—Woods v. Spoturno, (Del.Super.) 183 A. 319.

Shares in an incorporated building and loan association are stock within the meaning of a statute making shares of stock subject to attachment.—Central Nat. Bank of Wilmington v. Rubenstein, (Del.Super.) 160 A. 871
Attachment of corporate property see Corporations §§ 1348–1354 [14A C.J. p. 868 note 71–p. 870 note 24]

27. N.H.—Dupont v. Moore, 166 A. 417, 86 N.H. 254
Pa.—Moys v. Union Trust Co. of Pittsburgh, 119 A. 738, 276 Pa. 58.
Necessity of presence of property see infra § 92 b.

28. Cotnareanu v. National City Bank of New York, 3 N.E.(2d) 451, 271 N.Y. 619, modifying 283 N.Y.S. 1018, 246 App.Div. 572, and 283 N.Y.S. 1019, 246 App.Div. 572, and following Cotnareanu v. Chase Nat. Bank of City of New York, 2 N.E.(2d) 664, 271 N.Y. 294

29. Mich.—Gypsum, etc., Co. v. Kent Cir. Judge, 57 N.W. 191, 97 Mich. 631—Van Norman v. Jackson Cir. Judge, 7 N.W. 796, 45 Mich. 204—Newberry v. Detroit, etc., Iron Mfg. Co., 17 Mich. 141.
R.I.—Lippitt v. American Wood Paper Co., 23 A. 111, 15 R.I. 141, 2 Am.S.R. 886—Beckwith v. Burrough, 13 R.I. 294; Id., 14 R.I. 366, 51 Am.R. 392.
S.C.—Pelzer Mfg. Co. v. Pitts, 57 S.E. 29, 76 S.C. 349, 11 Ann.Cas. 665.
6 C.J. p. 212 note 39

30. Conn.—Middletown Sav. Bank v. Jarvis, 33 Conn. 372
Del.—Woods v. Spoturno, 183 A. 319.

Statute not invalid
A statute providing for the attachment of equitable interests in property has been held not invalid.—Woods v. Spoturno, (Del.Super.) 183 A. 319

31. Harris v. Mid-Continent Life Ins. Co., 182 P. 85, 75 Okl. 105
Certificate of stock as property generally see Corporations § 258 [14 C.J. p. 479 note 51–p. 480 note 67].
Definition and nature of shares of stock see Corporations § 194 [14 C.J. p. 384 note 45–p. 385 note 50].

32. Kennedy v. Prunty, (W.Va.) 174 S.E. 369.

33. Brick, etc., Co. v. Haines, 5 Pa.Co. 631—6 C.J. p. 206 note 77.

34. Vose v. Stickney, 8 Minn. 75—6 C.J. p. 206 note 78

35. Excelsior Brick, etc., Co. v. Haines, 5 Pa.Co. 631—6 C.J. p. 206 note 79.

Illegal and void contract
Where the purchaser of an agency contract, void as against public policy, gave a deed to secure the price, the attaching creditor of grantee could not subject the land, since that would, in effect, enforce the void contract.—Saylor v. Crooker, 156 P. 737, 97 Kan. 624
Attachable interest of vendor after making contract or bond for title see Vendor and Purchaser § 307 [66 C.J. p. 1063 note 64–p. 1064 note 76].
Attachment of interest of purchaser under contract for sale of land see Vendor and Purchaser § 315 [66 C.J. p. 1083 notes 97–14].

36. Wickens v. Scheuer, 204 P. 780, 118 Wash. 614.

Insurance policies. While, in some cases the assured's interest in an immatured policy of life insurance has been held not such as can be reached by attachment,[37] where the policy has, at the time the attachment is issued, a cash surrender value, it has been held that such interest may be attached,[38] under a statute authorizing attachment of specified property and "other property, real, personal and mixed"[39] However, an insured's option to take the surrender value of a policy has been held not evidence of a debt within the meaning of those words as used in a statute authorizing attachment, at least not until such option is exercised.[40]

Money due on a matured insurance policy written by an ordinary life insurance company on the life of a husband, and payable to his wife, is subject to levy under a warrant of attachment issued against the property of the wife in an action to recover a debt owing by her.[41]

Where a mortgagee clause is expressly limited to insurance on a building, insurance on personal property, after loss, is subject to attachment.[42]

Interest under conditional sales contract. While in the absence of statute, it has been held that the interest of the buyer under a conditional sales contract is not subject to attachment,[43] especially where he is in default,[44] and the seller has repossessed himself of the property for the default of the buyer,[45] it has also been held, sometimes by virtue of statutory provisions, that the interest of a buyer in possession and not in default is subject to attachment,[46] and such an attachment it not rendered illegal because of any erroneous view the officer may have had as to the extent of the debtor's interest.[47]

b. Lease

Interest of a lessee may, in a proper case, be attached, depending on provisions of lease and terms of the statutes relating to attachment.

The interest of a lessee in a lease of property may, in a proper case, be attached,[48] and whether or not property or an interest therein held under a lease is attachable in an action against the lessee is dependent not only on the statute, but on the terms of the lease as well.[49] Under a statute making only such property attachable as is subject to execution, it has been held that a leasehold estate is not attachable where it does not give the lessee general power to sublet.[50] If by the terms of the lease the property or produce is to be held for rent at the disposal of the lessor, who may enter and take it in case of a default, it would seem that such an agreement, not being accompanied by a delivery of possession, would not hold against the lessee's creditors, who could, before such entry, maintain an attachment on the term demised.[51] On the other hand, if the agreement is such that the property or produce is to remain in the lessor until the payment of the rent, and no entry is required to vest it in him,[52] or if the right of the lessee to the property does not become perfected

37. N Y—Marks v Equitable L Assur. Soc, 96 N Y S 551, 109 App Div 675, following Columbia Bank v. Equitable L Assur Soc., 80 N Y S 428, 79 App Div. 601.
Pa—Day v. New England L Ins Co, 4 A 748, 111 Pa. 507, 56 Am R 297.

38. Industrial Loan & Investment Co v. Missouri State Life Ins Co., 3 S W (2d) 1046, 222 Mo App. 1228—6 C J. p 206 note 82

Policy already surrendered
Where insured in a policy of life insurance accepted cash surrender value and company had forwarded a check to its agent to be delivered on execution of a proper release, the fund was subject to attachment as property of insured—Cooper v. West, 190 S W. 1085, 178 Ky. 289

39. Industrial Loan & Investment Co v. Missouri State Life Ins Co, 3 S W.(2d) 1046, 222 Mo App. 1228

40. Industrial Loan & Investment Co v. Missouri State Life Ins. Co, supra.

41. Amberg v. Manhattan L. Ins. Co, 63 N.E. 1111, 171 N Y. 314, reversing 67 N.Y S. 873, 56 App Div. 343.

42. Clarke v. Real, 159 A. 454, 105 Pa.Super. 102

43. Picone v. Freeman, 115 N Y S. 128—55 C J. p 1328 notes 1, 3

Attachment in aid of action by seller to recover price or value see Sales § 613 [55 C J p 1304 notes 64–74].

44. McIver v. Williamson-Halsell-Frazier Co, 92 P 170, 19 Okl 454, 13 L R A (N S) 696 and note—55 C. J. p 1328 note 3.

45. Martin v. Eames, 26 Vt. 476.

46. Conn.—Collins v. Lewis, 149 A. 668, 111 Conn. 299.
Nev.—Nevada Motor Co v. Bream, 269 P. 602, 51 Nev. 39, 61 A L R. 776.
N Y.—Arter v Jacobs, 234 N Y S 357, 226 App.Div. 343, construing Rhode Island statute
Wash—Hess v Starwich, 272 P. 75, 149 Wash 679
55 C J. p 1328 notes 6, 7, 9.

47. Collins v. Lewis, 149 A 668, 111 Conn. 299.

48. Mass—Shelton v. Codman, 3 Cush 318—Wheeler v. Train, 3 Pick 255.
Neb—Gregory v. American Bank Bldg Co, 188 N W. 191, 108 Neb. 507.

Right of lessee under oil and gas lease
Right of lessee under an oil and gas lease was held "interest in real estate" within a statute relative to attachment of realty; hence, lessee could recover damages, if any, suffered by reason of a wrongfully issued attachment—Willhard v Federal Surety Co., 8 P.(2d) 633, 91 Mont. 465.

49. Cal.—Tuohy v. Wingfield, 52 Cal. 319
Me.—Potter v. Cunningham, 34 Me. 192
6 C J. p 207 note 90.

50. Boone v Waxahachie First Nat Bank, 43 S.W. 594, 17 Tex Civ App. 365—6 C.J. p 207 note 91.

51. Munsell v. Carew, 2 Cush (Mass) 50, distinguishing Lewis v. Lyman, 22 Pick (Mass) 437—Butterfield v. Baker, 5 Pick (Mass) 522.

52. Me.—Kelley v. Weston, 20 Me. 232, distinguishing Dockham v. Parker, 9 Me. 137, 23 Am.D. 547,

until a certain part of the contract is performed,[53] it would not be attachable as the tenant's.

§ 81. Equitable Estate or Interest in General

In the absence of a statutory provision to the contrary, equitable interests in land are not subject to attachment.

In the absence of statutory provision to the contrary, it has been held that an attachment can only reach equitable assets that are capable of manual delivery,[54] and an equitable interest in land, not being capable of manual delivery and not liable to be taken in execution at common law, is still exempt from attachment.[55] In a number of jurisdictions, however, this rule has been changed by statutes under which such interests are attachable,[56] although in a few jurisdictions it is still necessary to resort to a court of equity to subject such interests to payment of a debt.[57]

§ 82. Property Held in Trust

Creditors of trustee may not attach property held by him merely as trustee. Property held in trust other than under a spendthrift trust is subject to attachment by creditors of beneficiary in some jurisdictions, but not in others.

While property held by a trustee, who is also the sole beneficiary under the trust, is attachable in an action against such trustee,[58] where a defendant holds the title to property merely as a trustee, it is not subject to attachment for his debts,[59] whether the trusteeship is active or passive,[60] and notwithstanding the fact that the attaching creditor had no notice of the trust prior to his attachment.[61] However, where credit was given in good faith because of the trustee's apparent title,[62] or where the trust was a secret trust,[63] it seems that the property would be subject to attachment in an action against the trustee; and this is the rule by virtue of statutes in some jurisdictions.[64]

By creditors of beneficiary. While the principal or interest of a trust estate, not a spendthrift trust, has been held subject to attachment,[65] it has also been held that the proceeding to reach trust income should be in equity and not in law and attachment,[66] and under the statutes in some jurisdictions, the income of a trust fund may not be levied on under a warrant of attachment.[67]

The principal or income of a spendthrift trust

and Bailey v Tillebrown, 9 Me 12, 23 Am D 529
Mass—Whitcomb v. Tower, 12 Metc. 487—Lewis v. Lyman, 22 Pick 439.

53. Mass—Chandler v. Thurston, 10 Pick. 205
Vt—Smith v. Meech, 26 Vt. 233—Paris v. Vail, 18 Vt. 277.

54. Fidelity & Deposit Co of Maryland v. Hickler, 198 N.Y.S. 499.

55. N.Y—Fidelity & Deposit Co. of Maryland v. Hickler, supra
Ohio—Warner v. York, 1 Ohio Cir. Ct.(N.S.) 73
6 C.J. p 202 note 45.

56. R.I—Mitchell v. Campbell, 136 A. 249, 48 R.I. 120
Tex—Hoover v First Nat. Bank, (Civ App.) 192 S.W. 1149.
6 C.J. p 193 note 69 [h], p 202 note 46.

Circumstances showing attachable interest

One not holding the legal title of real estate but to whom the record owner has promised a portion of proceeds obtained from a proposed sale thereof, has an attachable interest in the property—Hoover v. First Nat. Bank, (Tex Civ App.) 192 S.W. 1149—6 C.J. p 202 note 46 [c]
Equitable interests in corporate stock see supra § 79.

57. Shoemaker v. Harvey, 61 N.W. 109, 43 Neb 75, approved and distinguished in Westervelt v. Hagge, 85 N.W. 852, 61 Neb. 647—6 C.J. p 203 note 47.

58. Cunningham v Bright, 117 N.E. 909, 228 Mass 385.

59. Colo—Smith v. Straub, 237 P. 149, 77 Colo 433.
Ga.—Smith v. Riley, 82 Ga. 356
Me—Lambert v. Allard, 136 A. 121, 126 Me 49.
N.Y.—Finn v. Dillon, 237 N.Y.S. 858
Okl—Mundell v. Colony Mercantile Co., 4 P.(2d) 1059, 153 Okl. 79.
6 C.J. p 206 note 75.

Constructive trust

Where the record title of land is obtained from a grantor by the fraud of the grantee so that the grantee becomes a constructive trustee for the grantor, an attachment of the land by a creditor of such trustee cannot be upheld—Raasch v Lund Land Co., 170 N.W. 836, 103 Neb. 157.

Fiscal agent

Funds deposited by a corporation with a fiscal agent pursuant to indentures providing for such deposits to cover payments on due dates of interest and principal on the corporation's notes, being funds held in trust for noteholders, were not subject to attachment, even as to unclaimed deposits, where the corporation had not furnished the agent funds to advertise intended return of such deposits to corporation pursuant to provisions of indentures authorizing agent to so advertise at the corporation's expense before returning deposits, and the corporation had moreover defaulted in interest payment and hence was not entitled to return of deposits.—Finn v. Dillon, 237 N.Y.S. 858.

Property held not trust property

Property adjudicated to be a wife's sole and separate estate in a divorce decree, no specific amount being awarded for support of children, has been held not to be trust property in favor of the children so as to render it not subject to attachment by the wife's creditor—Zander v. Bright, 52 P.(2d) 368, 142 Kan 833.

60. Lambert v. Allard, 136 A. 121, 126 Me 49.

61. Me—Houghton v. Davenport, 74 Me 590
Mo—Guthrie v. Waite, 107 S.W. 1110, 129 Mo App 537
Vt.—Hart v. Farmers', etc., Bank, 33 Vt. 252.

62. Lambert v. Allard, 136 A. 121, 126 Me 49.

63. Porter v. Rutland Bank, 19 Vt. 410

64. McDermott v. Hayes, (Mass.) 197 F. 129, 116 C.C.A. 553.

65. Conn—Coyne v. Plume, 97 A. 337, 90 Conn. 293.
Pa—Moys v. Union Trust Co. of Pittsburgh, 119 A. 738, 276 Pa. 58—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa. Super. 363.

66. Johnston v. Smith, 80 So. 134, 76 Fla. 474—65 C.J. p 562 note 82 [a].

Separate use trust.—Sharboro's Estate, 25 Pa.Dist. & Co. 443

67. Judis v. Martin, 218 N.Y.S. 423, 218 App.Div. 402, motion granted 155 N.E. 916, 244 N.Y. 605.

has been held not attachable by the creditors of the cestui que trust[68] in an action at law.[69]

§ 83. Interest Secured by Lien

The interest of a factor secured by a lien on goods consigned to him for sale is not attachable.

The interest of a factor secured by a lien on goods consigned to him for sale is not attachable by the creditors of the factor.[70]

§ 84. Interest of Heir or Distributee

Interest of heirs and distributees is generally subject to attachment.

The interest of heirs or distributees in the property descended is attachable,[71] and where there are several heirs, the undivided interest of one of them may be attached,[72] and the attachment cannot be defeated by any partition among them, or any assignment of the debtor's share to the other heirs,[73] although where, pending the settlement of the estate, advancements were made to an heir with the assent of the coheirs, which were accepted as in full of his share, such heir thereafter has no attachable interest in the real estate of the decedent.[74]

§ 85. Interest of Devisee or Legatee

Vested interest of devisee or legatee is generally subject to attachment.

Although the question is dependent on statute, and the authorities are not uniform, the more general rule appears to be that the interest of a devisee or legatee, when vested, is subject to attachment,[75] although the property is still in the hands of the executor or administrator of the testator for the payment of debts.[76] However, a judgment creditor of a predeceased devisee cannot proceed directly by attachment but must claim through the devisee's administrator.[77]

§ 86. Rights of Action in General

Under statutes in most jurisdictions, a chose in action is now subject to attachment.

At common law, a debt or chose in action could not be attached,[78] but under statutes in most jurisdictions, a debt or chose in action is subject to attachment as the property of the person to whom such debt is due,[79] and this has been held true al-

68. Conn.—Reilly v State, 177 A 528, 119 Conn 508—Bridgeport-City Trust Co v Beach, 174 A 308, 119 Conn 131.
N C—Chinnis v. Cobb, 185 S E 638.
Tex.—Hoffman v Rose, (Civ.App.) 217 S.W. 424, error refused.

Prior to record of will

The fact that an attempted levy by a creditor of the beneficiary of a spendthrift trust created by will on trust property was made prior to the recording of the will does not create a lien against the trust property, since the beneficiary had no interest therein on which attachment could be levied.—Chinnis v. Cobb, (N.C.) 185 S.E. 638

69. Town of Shrewsbury v Bucklin, 163 A. 626, 105 Vt. 188, 86 A.L.R. 133.

70. Mass.—Holly v. Huggeford, 8 Pick 73, 19 Am.D 303
Neb.—Shaughnessey v. Linnnger, etc., Co., 52 N.W. 717, 34 Neb 747
N.Y.—Hampton, etc., R., etc., Co v Sizer, 64 N.Y.S. 553, 31 Misc. 499

71. Thomas v Morristown State Bank, 221 N.W. 257, 53 S.D. 499—6 C.J. p 204 note 61.

Interest in homestead

Interest of nonresident heir in homestead is subject to attachment during continuance of mother's homestead rights, there being no minor children to share homestead.—Taylor v Greene, 56 S.W.(2d) 422, 186 Ark. 817.

72. Thomas v. Morristown State Bank, 221 N.W. 257, 53 S.D. 499—6 C.J. p 204 note 62

73. McMechan v Griffing, 9 Pick. (Mass.) 537—Procter v. Newhall, 17 Mass. 81.

74. Security Inv. Co v. Lottridge, 39 N.W. 298, 2 Neb. (Unoff.) 489.

75. Cal.—McGee v. Allen, 60 P.(2d) 1026
Ky.—Fischer v. Porter, 92 S.W.(2d) 368, 263 Ky. 372
Pa.—Butler County Nat. Bank v. MacMullen, 141 A. 484, 292 Pa. 556—Wheaton Coal Co v Harris, 135 A. 637, 288 Pa. 294—McClure's Est., 26 Pa.Dist. 892.
Tex.—Sewell v. Taylor, (Civ.App.) 224 S.W. 530.
6 C.J. p 204 note 66

Present right to future possession

Present right of son and grandchildren of testator to future possession of portion of estate held by life tenant, being vested, is subject to attachment.—Wheaton Coal Co. v. Harris, 135 A. 637, 288 Pa. 294.

Possibility not coupled with an interest

Under will by which testator devised equitable estates tail to his children, grandchild's interest in trust estate during his father's lifetime was held a possibility not coupled with an interest, and hence not subject to attachment.—Sackett v. Paine, 128 A. 209, 46 R.I. 439.

Remainders or reversionary interests as subject to attachment see supra § 78 d.

76. Taylor v. Bacon, 142 S.W. 1128, 102 Ark. 97—6 C.J. p 205 note 67

77. Godley's Estate, 25 Pa.Dist. & Co. 555

78. U.S.—In re Dukes, (D.C.Del.) 276 F. 724
N.Y.—Sheehy v. Madison Square Garden Corporation, 193 N.E. 633, 266 N.Y. 44, reversing 272 N.Y.S. 433, 241 App.Div. 504.

79. U.S.—La Varre v. International Paper Co., (D.C.S.C.) 37 F.(2d) 141
Or.—Pierce v. Pierce, 56 P.(2d) 336.

Choses in action beyond those specifically mentioned in a statute have been held impliedly subject to attachment.—Fredrick v. Chicago Bearing Metal Co., 223 N.Y.S. 824, 130 Misc. 366, reversed on other grounds 224 N.Y.S. 629, 221 App.Div. 583.

Consignor's right to an accounting by an agent is intangible property which is subject to attachment.—Raftes v. Argyropulo, 206 N.Y.S. 284, 123 Misc. 738.

Money payable on a contingency

(1) Contract to produce rodeo for sum payable in installments gave rise to no property right in nature of chose in action or cause of action subject to attachment before payments were due or earned.—Sheehy v. Madison Square Garden Corporation, 193 N.E. 633, 266 N.Y. 44, reversing 272 N.Y.S. 433, 241 App.Div. 504.

(2) A contract interest in future profits has been held a contingent right, not subject to attachment as

though the debt is due by plaintiff himself;[80] but with respect to this latter proposition it should be noted that there is contrary authority.[81] Where the statute so provides, debts secured by bills of exchange or negotiable notes are exempt from attachment.[82]

While a judgment in favor of the attachment debtor has been held not subject to levy,[83] it has also been held that a money judgment, whether in a contract or tort action, is subject to attachment as a "debt, cause of action or demand,"[84] but a cause of action for personal injuries is not attachable as a "debt" or "chose in action" such as might be classed as personal property.[85]

Credit arrangements. Where the owner of property made arrangements for an advancement of money on his orders for the erection of a building and gave a mortgage as security, nonpayment of an order has been held to create an indebtedness subject to attachment,[86] but where all orders are paid, money not advanced under the agreement has been held not subject to attachment to satisfy the claims of laborers and materialmen, the owner not performing his part of such agreement,[87] and a credit arranged for the benefit of third persons to be paid on certain conditions performed by defendant in attachment proceedings has been held not subject to attachment.[88]

§ 87. Instrument or Security for Payment of Money

Generally, promissory notes, bonds, etc., are attachable

As a general rule, instruments evidencing a debt and providing for the payment of money such as promissory notes,[89] bonds,[90] and county orders[91] are attachable. However, an undelivered check, draft, or bond is not subject to attachment.[92]

§ 88. Property in Custody of the Law

a Rule stated
b. Applications of rule

a. Rule Stated

As a general rule, property that is in custodia legis is not subject to attachment prior to fulfillment of the purpose for which it is held.

In the absence of statutes providing therefor, as a general rule, property that is in custodia legis is not subject to attachment[93] without leave of

a cause of action—Fredrick v Chicago Bearing Metal Co., 224 N.Y.S. 629, 221 App.Div. 538, reversing 223 N.Y.S. 824, 130 Misc. 366

80. La Varre v. International Paper Co., (D.C.S.C.) 37 F.(2d) 141.

Debt due nonresident corporation

Indebtedness due by plaintiff to nonresident corporation secured by stock in local corporation is subject to attachment by plaintiff.—La Varre v. International Paper Co., (D.C.S.C.) 37 F.(2d) 141.

81. Baugh & Sons Co. v. Crowell Corporation, 151 A. 718, 4 W.W. Harr. (Del.) 231.

New York statutes authorizing attachment of a cause of action do not authorize plaintiff to attach a debt owed by himself.—Baugh & Sons Co. v. Crowell Corporation, 151 A. 718, 4 W.W.Harr.(Del.) 231.

82. Martin v James B Berry Sons' Co., (C.C.A.R.I.) 33 F.(2d) 857.

83. Needham v. Cooney, (Tex.Civ. App.) 173 S.W. 979.

84. Shipman Coal Co. v. Delaware & Hudson Co., 219 N.Y.S. 628, 219 App.Div. 312, affirmed 157 N.E. 859, 245 N.Y. 567—Rogers v. Logan, 188 N.Y.S. 337.

85. Coty v. Cogswell, (Mont.) 50 P.(2d) 249—17 C.J. p. 1228 note 6.

86. Holder Lumber Co v Scarborough, 151 P. 674, 28 Cal.App. 152.

87. Kentucky Lumber & Mill Work Co. v. Kentucky Title Savings Bank & Trust Co., 211 S.W. 765, 184 Ky. 244, 5 A.L.R. 391.

88. Rosenberg v Occidental Trading Co., 178 N.Y.S. 477, 189 App. Div. 330

Restricted credit

Where one bank authorized another bank to pay a certain company up to a certain amount on presentation of bills of lading indorsed to first bank's client, such credit was not subject to attachment under Code Civ.Proc. § 648, in an action against such client, no credit being given until presentation of the proper documents, and the money under no circumstances being payable to such client.—Rosenberg v. Occidental Trading Co., 178 N.Y.S. 477, 189 App. Div. 330.

89. N.Y.—Schmid v Berkheimer, 224 N.Y.S. 726, 222 App.Div. 694.
Or.—Whitney v. Day, 168 P. 295, 86 Or. 268.
6 C.J. p. 197 note 93.

Previous transfer to bona fide holder

Attachment and levy on note, transferred to bona fide holder, is ineffective.—Schmid v Berkheimer, 224 N.Y.S. 726, 222 App.Div. 694.

Other evidences of debt

Law authorizing seizure of certain property and "other evidences of debt" limits seizure to evidences of debt of like kind and character.—Industrial Loan & Investment Co. v. Missouri State Life Ins. Co., 3 S.W.(2d) 1046, 222 Mo.App. 1228.

90. Williamson v Eastern Bldg. etc., Assoc., 32 S.E. 765, 54 S.C. 582, 71 Am.St.R. 823—6 C.J. p. 197 note 94—9 C.J. p. 16 note 56 [b].

91. Danischefsky v. Klein-Watson Co., 244 N.W. 772, 209 Wis. 210

92. Erskine v. Nemours Trading Corporation, 145 N.E. 273, 239 N.Y. 32, reversing 204 N.Y.S. 906, 208 App.Div. 835—Dos Passos v Morton, 218 N.Y.S. 17, 218 App.Div. 154—Sickles v Richardson, 23 Hun (N.Y.) 559—Steese v. Steese, 251 N.Y.S. 164, 140 Misc. 611

Certified check cannot be attached by payee in hands of third person to whom it was delivered without indorsement as property of the drawer.—Sokoloff v. Weisberg, 3 Pa.Dist. & Co. 363.

Check drawn to the order of defendant's debtor, and intended by the debtor to be used to pay her indebtedness to defendant, was not attachable as the property of defendant.—Korytkowski v. Greniewicki, 221 N.Y.S. 119, 220 App.Div. 237.

93. U.S.—In re Chakos, (D.C.Wis.) 36 F.(2d) 776.
Alaska—Loussac v. Jacobsen, 7 Alaska 593
Cal.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, (App.) 38 P.(2d) 442
Iowa.—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 315.
Md.—Outerbridge Horsey Co. v. Martin, 130 A. 235, 142 Md. 52.

court,[94] but after the fulfillment of the specific purpose for which the fund or property is held, the writ may be enforced against it,[95] or any surplus remaining,[96] unless the court otherwise directs.[97]

b. Applications of Rule

(1) Property delivered on claimant's bond

(2) Property held under prior levy

(3) Property taken in replevin

Mo—Hill v Barton, 188 S W 1105, 194 Mo App 325
N J—Hoffman v Kahn, (Ch) 181 A. 527
N Y—Florea v Schultz, 217 N Y S 764, 128 Misc 77
Ohio—Remelin v Butterworth, 152 N E 193, 20 Ohio App 356
Pa—Patterson v Harkless, 97 Pa Super 141—Buono v McCullough, 14 Pa Dist & Co 813—Meyers v Rauch, 4 Pa Dist 333—Hall v. Brookes, 4 Pa Dist 5
Philippine—Springer v Odlin, 2 Philippine 344, 2 Off Gaz 327
R I—Stiness v. Henderson, 119 A 319, 44 R I 514
S C—Maxwell v. Greene, 173 S E 146, 171 S C 253.
Tenn—Scott County Nat Bank v Robinson, 226 S W. 218, 143 Tenn 356
W Va—State v George, 181 S E. 713
Wis—In re Kohl's Guardianship, 266 N W. 800
6 C.J. p 210 note 21.

Property to which rule applies

(1) The property of a decedent while in the course of administration—Griggs v Nadeau, (Minn) 221 F 331, 137 C C A. 189—Hill v. Barton, 188 S.W. 1105, 194 Mo App 325—Ritz v. May, 3 N E (2d) 816, 52 Ohio App. 399—Hawk v. Kiser, 1 N E (2d) 157, 51 Ohio App. 359—Maxwell v Greene, 173 S E 146, 171 S C. 253.

(2) Property of decedent shipped into another state for sale thereof—Hill v. Barton, supra.

(3) Chattels in possession of guardians in official capacity—Lousaac v. Jacobsen, 7 Alaska 598

(4) Property in legal custody of clerk of court—Union Bank & Trust Co of Los Angeles v. Los Angeles County, (Cal App) 38 P (2d) 442.

(5) Public record, as of chattel mortgage—Gem State Lumber Co. v Galion Irrigated Land Co, (Idaho) 41 P (2d) 620

(6) Property shipped into this country, while in the possession of the United States in bonded warehouse to await payment of duties or reshipment without payment of duties—Rafts v Argyropulo, 206 N Y S 284, 123 Misc. 738—6 C.J. p 210 note 21 [b], [e].

(7) Bankrupt's property after filing of petition see Bankruptcy § 140 [7 C.J. p 91 note 29].

(8) Property in possession of customhouse officials not attachable because of interference with government lien thereon see supra § 74 b (6).

Money taken from person of one arrested

(1) It has been held that, where an officer took property from the person of the prisoner in good faith, he may lawfully attach such property on a valid writ, no question being raised as to the property being in custodia legis—Closson v Morrison, 47 N H 482, 93 Am D. 459.

(2) Generally, property on the person of a prisoner that is taken over by the officer on the incarceration of such person is in custodia legis and not subject to attachment—Emmanuel v Sichofsky, 247 P. 205, 198 Cal 713, 48 A L R 580—Golden Gate Candy Products Co. v Superior Court in and for City and County of San Francisco, (Cal App) 36 P (2d) 834—Outerbridge Horsey Co v. Martin, 120 A 235, 142 Md 52—Dahms v. Sears, 11 P 851, 13 Or 47—State v. George, (W Va) 181 S E 713.

(3) The exemption of such money on the person of the prisoner from attachment is based on public policy to prevent misuse of criminal process in causing arrests in order to reach such money—Emmanuel v. Sichofsky, 247 P. 205, 198 Cal. 713, 48 A L R. 580—Golden Gate Candy Products Co v. Superior Court in and for City of San Francisco, (Cal. App) 36 P (2d) 834.

(4) Such exemption terminates in some jurisdictions on final conviction of the prisoner in the criminal case, the purpose of the legal custody presumably being accomplished—Emmanuel v. Sichofsky, supra—Golden Gate Candy Products Co. v. Superior Court in and for City and County of San Francisco, supra

(5) As to the preceding proposition, there is authority to the contrary—Outerbridge Horsey Co. v. Martin, 120 A 235, 142 Md 52

(6) Money taken from a person arrested and held in lieu of bond without the amount of the bond required being entered on the docket or any entry showing the deposit to meet the recognizance as fixed has been held to be the property of the accused and subject to attachment—Puchuneicz v. Chellis, 27 Ohio N P. (N.S.) 494
6 C J p 220 note 21 [h].

When property not in custody of law

(1) Mortgaged personality is not in custodia legis, so as to prevent attachment thereof pending foreclosure suit, where mortgagee had no receiver appointed, although mortgagor was enjoined from transferring or encumbering property before attachment creditor intervened—Griffiths v Thrasher, 26 P.(2d) 983, 95 Mont. 238

(2) Money in sheriff's possession for redemption of property sold under mortgage foreclosure is subject to attachment by creditor of holder of certificate of sale, where no duty rests on sheriff except to pay money to such holder.—Allen v. Larson, (N. D.) 256 N W. 178

(3) Money paid to a deputy sheriff by a corporate defendant's attorney to dissolve attachments as loan to a corporation rather than for the officer's indemnification is subject to successive attachments against the corporation while the officer held the money—Lipsitt v. Walmsley, (Mass) 193 N E 792.

(4) Where land was converted by sale by a master in partition and distribution of the proceeds was made and confirmed, but before money was paid the share of one distributee was attached in the master's hands, it was held that the money was not in custodia legis and was attachable—Piper v. Piper, 20 Pa Co. 372.
6 C.J. p 210 note 21 [f].

94. Union Bank & Trust Co of Los Angeles v Los Angeles County, (Cal App) 38 P.(2d) 442.

95. Cal—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, supra
Pa—Piper v Piper, 20 Pa.Co. 372
6 C J. p 211 note 22

Money paid in court by garnishee and held by clerk subject to court's order was subject to attachment—Champion v Ferguson, 43 S.W (2d) 719, 241 Ky. 303.

96. Sugg v. St. Mary's Oil Engine Co, 138 S E 169, 193 N C. 814

Payee's interest in money paid into court on note transferred as collateral

Indorsee owned only so much of amount maker paid into court on note as was required to pay the balance due on notes secured thereby, and the excess is subject to attachment as payee's property—Sugg v. St Mary's Oil Engine Co, 138 S.E. 169, 193 N.C. 814.

97. Union Bank & Trust Co. of Los Angeles v. Los Angeles County, (Cal App) 38 P (2d) 442.

(1) Property Delivered on Claimant's Bond

Property redelivered after seizure, on a bond conditioned to hold the property subject to an order of the court, is not attachable.

Where property is delivered to a claimant on the execution of a forthcoming or delivery bond, if the bond is conditioned to hold the property subject to the order of the court,[98] or to return the property, should claimant fail in his claim,[99] such property would not be attachable. On the other hand, if the bond operates as an absolute discharge of the property and a relinquishment of the lien thereon it would then be liable to a subsequent attachment,[1] in the absence of a statute declaring otherwise.[2]

(2) Property Held under Prior Levy

In the absence of statutes so providing, property held by an officer under a levy is generally not subject to attachment.

Property which is held by an officer under a levy of a valid writ of attachment is in the constructive possession of the court and, pending such litigation, has been held not subject to attachment by another officer,[3] although under the statutes of some states, an officer may attach such property subject to the operation of the first attachment,[4] and, since this rule arises from the unwillingness of the court to allow its jurisdiction or administration of justice to be interfered with, and no confusion will result from allowing the officer in possession to levy subsequent writs, such a levy is sometimes permitted.[5] If the attaching officer unlawfully releases his possession of the property,[6] or fails to take execution on it within the time prescribed by law,[7] it ceases to be within the custody of the law and becomes attachable.

Funds in the hands of an officer who collected them on execution are not subject to attachment.[8]

Surplus. The principle of custodia legis does not apply to a surplus which the officer has after satisfying the execution, and, therefore, where the property seized under the attachment greatly exceeds in value the claim under which it is seized, the excess, nothing else being in the way, is liable for the debtor's debts and may be seized under junior attachments.[9]

(3) Property Taken in Replevin

Property acquired by a claimant in a replevin suit on the giving of a proper bond therefor is not subject to attachment during the pendency of such suit.

Property acquired by a plaintiff in a claim and delivery action, which has not been finally determined, is not subject to attachment,[10] and, as a general rule, where property held by an officer under a levy is replevied from him by a claimant thereof and the proper bond given for its redelivery, it is not, during the pendency of the replevin suit, subject to attachment.[11] If, however, the levy and replevin suits are fraudulently brought, such property is not in custodia legis, and would be liable to attachment by bona fide creditors.[12]

§ 89. Property Fraudulently Conveyed

Attachment of property fraudulently conveyed is treated elsewhere in this work in the title Fraudulent Conveyances § 309 [27 C.J. p 706 note 42-p 708 note 65].

§ 90. Property Held Jointly

a. In general
b. As tenants in common

98. Kane v. Pilcher, 7 B Mon (Ky) 651.

99. Kan.—Tyler v. Safford, 24 Kan 530
Wash.—Eidson v Woolery, 38 P. 1025, 10 Wash 225

1. Iowa.—Jones v. Peasley, 3 Greene 52.
Or.—Duncan v. Thomas, 1 Or 314.

2. In Texas
(1) By virtue of a statute passed in 1887, the property is considered as still being in custodia legis after delivery on a bond.—U. S Carriage Co. v. Bay City Buggy Works, 33 S. W. 881, 12 Tex Civ App. 52.
(2) Prior thereto it was held that such property was subject to attachment after delivery on such bond.—Frieberg v Elliott, 64 Tex. 367—Brown Mfg. Co v. Watson, 3 Tex. App.Civ.Cas. § 330.

3. N Y.—Flores v Schultz, 217 N Y. S. 764, 128 Misc 77
Pa.—Commonwealth v. Kelly, 23 Pa Co. 357
6 C J. p 211 note 28.

4. Ill.—White v. Culter, 12 Ill App 38.
Mo.—State v. Curran, 45 Mo App. 142

5. Inter City Express Lines v Guarisco, (La App.) 165 So. 727—6 C.J. p 211 note 29.

6. N H.—Chadbourne v Sumner, 16 N H 129, 41 Am D. 720—Young v. Walker, 12 N H 502
Ohio.—Root v. Columbus, etc., R. Co., 12 N E 812, 45 Ohio St. 222
Vt.—Pond v. Baker, 2 A. 164, 58 Vt. 293
6 C J. p 211 note 30.

7. Pond v. Baker, supra.

8. Thompson v. Brown, 17 Pick (Mass.) 462.

9. Ala.—Sackhoff v Vandegrift, 13 So 495, 98 Ala 192.
S C.—Roddey v. Erwin, 9 S E. 729, 31 S C. 36.

10. Bisconer v. Billing, 236 P. 329, 71 Cal App. 779.

11. Ala.—Powell v. Rankin, 80 Ala 316—Scarborough v. Malone, 67 Ala. 570—Cordaman v. Malone, 63 Ala. 556.
Kan.—Kinney v. Purcell, 28 Kan 446
Neb.—Shull v. Barton, 77 N W. 132, 56 Neb. 716, 71 Am S R 693
Or.—Coos Bay R. Co. v. Wieder, 38 P. 338, 26 Or. 453
6 C J. p 212 note 34.

12. Kan.—Kingman First Nat Bank v. Gerson, 32 P. 905, 50 Kan. 582.
Tenn.—Jacobi v. Schloss, 7 Coldw. 385.

a. In General

The interest of a person in property held jointly with others is subject to attachment in an action against him.

The interest of a party in property held jointly with others is liable to attachment in an action against him, and an officer may take possession of the whole;[13] and it has been held that, if the enforcement of a joint liability is sought, the joint property of the debtors may be attached and sold, although summons is served on one of the debtors only.[14] Also, where, although the ownership and possession of a farm is joint, each cotenant's share of the crops has been set apart to him and is in his custody, the share of one cannot be taken under attachment by a creditor of another.[15]

b. As Tenants in Common

The interest of a tenant in common of property may be attached in an action against him.

The interest of a tenant in common of property may be attached in an action against him,[16] although such property is in the possession of the other tenant in common;[17] and the property may be removed, notwithstanding the rights arising between the parties from their agreements are thereby impaired.[18] Where the property so held in common is severable, an officer may lawfully seize and sever defendant's share therein.[19]

IV. PROCEEDINGS TO PROCURE

A. JURISDICTION, VENUE, AND AUTHORITY TO ISSUE

§ 91. Jurisdiction in General

The jurisdiction of proceedings in attachment is dependent on, and is derived from, the statutes, and a compliance with the statutory procedure is essential.

Attachment proceedings being in derogation of the common law, jurisdiction thereof is special and limited, and courts, even those of general jurisdiction, cannot proceed by attachment unless the power rests on express statutory sanction.[20] Statutes granting this jurisdiction are to be construed strictly,[21] and the court can act only under the special power limited to it by the particular statute and according to the forms of procedure it prescribes.[22] Where jurisdiction is expressly conferred upon particular courts, this will not necessarily abolish the jurisdiction of other courts already recognized by law, as exclusive jurisdiction cannot be implied.[23] Where the statutes confer upon certain officers or courts all powers and jurisdiction to the same extent as they are possessed by other officers or designated courts, jurisdiction is thereby conferred by necessary implication upon the former to entertain proceedings by attachment when such jurisdiction is possessed by the courts whose powers furnish the measure of those which the act purports to confer.[24]

Since, as already noted in § 2, attachment is an extraordinary remedy, owing its existence entirely to statutory enactment, the jurisdiction of attachment proceedings cannot be legitimately exercised unless the attaching creditor pursues substantially the essential requirements of the statute.[25]

Although an attachment is authorized and is instituted under an act of the legislature, it does not prevent the debtor from showing irregularities in the issuance of the attachment.[26]

Meaning of jurisdiction. The term "jurisdiction," as used in attachment cases, refers both to the power of the court to move in any event by means of this particular process and to the authority to move in the proceeding, conceding the power to adopt the particular form of process, as dependent on compliance with the formalities prescribed,

13. Dover Trust Co. v. Brooks, 160 A. 890, 111 N.J.Eq. 40—6 C.J. p. 208 note 96.

Mortgagee of an interest in property need not pursue the property attached by the officer and attempt to reclaim it from him.—Gaar v. Hurd, 92 Ill. 315.

14. Yerkes v. McFadden, 36 N.E. 7, 141 N.Y. 136, reversing 22 N.Y.S. 1119, 66 Hun 630—6 C.J. p. 208 note 97.

15. Hawkins v. Hewitt, 56 Vt. 430

16. Johnston v. Shaw, (Alaska) 190 F. 466, 111 C.C.A. 298—6 C.J. p. 208 note 99.

17. Johnston v. Shaw, supra

18. Remmington v. Cady, 10 Conn. 44

19. Newton v. Howe, 29 Wis. 531, 9 Am.R. 616.

20. Iowa—A. D. Fletcher & Son v. Gordon, 259 N.W. 204.
N.J.—Edwards v. Stein, 119 A. 504, 94 N.J.Eq. 251.
6 C.J. p. 89 notes 78, 79.

21. A. D. Fletcher & Son v. Gordon, (Iowa) 259 N.W. 204.
Construction of attachment statutes generally see supra § 4

22. Mo.—Trinidad Asphalt Mfg. Co. v. Standard Oil Co., 258 S.W. 64, 214 Mo.App. 115.
Pa.—Locke Regulator Co. v. Dragon Auto Co., 35 Pa.Co. 639.
6 C.J. p. 89 note 78

23. Shillaber v. Waldo, 1 Hawaii 31—6 C.J. p. 90 note 81.

24. Bain v. Mitchell, 2 So. 706, 82 Ala. 304—6 C.J. p. 90 note 82

25. Iowa—A. D. Fletcher & Son v. Gordon, 259 N.W. 204.
Mont.—Jenkins v. First Nat. Bank, 236 P. 1085, 73 Mont. 110
Pa.—Wolf v. Zentz, 5 Pa.Dist. & Co. 276
Va.—Winfree v. Mann, 153 S.E. 837, 154 Va. 683.
6 C.J. p. 89 note 72.

26. Beasley v. Mershon, 3 Ky.Op. 21.

or the existence of peculiar grounds at the time the remedy is invoked.[27]

No presumption. The jurisdiction in attachment is placed on the same footing with that of courts of limited and special jurisdiction, and no presumption is indulged in its favor.[28]

§ 92. Necessity of Presence of Property

a. In general
b. Corporate stock
c. Debts
d. Judgments

a. In General

The property sought to be subjected to an attachment must be present within the territorial limits over which the court may exercise its power.

Since an attachment is somewhat in the nature of a proceeding in rem, in order that a court may have jurisdiction to attach property, it is indispensable that property owned or belonging to defendant be present,[29] actually or constructively,[30] within the territorial limits over which the court may exercise its power. Stating the rule conversely, the court cannot attach property which is not within the territorial limits of its jurisdiction.[31]

The issue of the writ and its levy on the property within the territorial limit of the court's jurisdiction brings the property under the jurisdiction of the court,[32] and also gives the court jurisdiction over defendant to the extent of the value of the property.[33] Where property is physically within the jurisdiction of the court, it is "present" so as to be subject to attachment, and, accordingly, where property which had been sold under a conditional sales contract remained in the state after the contract for its sale had been rescinded by resident plaintiff, there was jurisdiction to attach it.[34]

County warrants payable to bearer and capable of transfer without indorsement have been held seizable as the res in the state where they are found.[35]

Fraud or device. Even though property is physically present within the jurisdiction, the court will not attach it where it was fraudulently brought within its jurisdiction for the purpose of levying an attachment thereon.[36] It has even been held that actual fraud is not necessary to invoke this rule, and that if the jurisdiction over the property arises out of any device, stratagem, or arrangement by plaintiff by which the property is brought from a foreign state into the jurisdiction of the home court solely to give that court jurisdiction, the

27. Leung Ben v. O'Brien, 38 Philippine 182—6 C.J. p. 89 notes 76, 77.

28. Ala.—Pullman Palace Car Co. v. Harrison, 25 So. 697, 122 Ala. 149, 82 Am.S.R. 68
Md.—Randle v. Mellen, 8 A. 573, 67 Md. 181
6 C.J. p. 97 note 32.

29. La.—Colligan v. Benoit, 128 So. 688, 13 La.App. 612
Pa.—American Trust Co. v. Kaufman, 119 A. 749, 276 Pa. 35
Va.—Abel v. Smith, 144 S.E. 616, 151 Va. 568
6 C.J. p. 90 note 83.
"An attachment is in the nature of a proceeding in rem, and the jurisdiction of the court to proceed with that incidental branch of the case depends upon whether there is a res brought into court upon which the court may act"—Barnhart Bros. & Spindler v. Dollarhide, (Mo.App.) 186 S.W. 564, 565.

County where suit is brought
In Missouri, where suit is commenced by attachment against property of defendant alone, the court is without jurisdiction, unless such property is found and attached within the county where suit is brought.—Trinidad Asphalt Mfg. Co. v. Standard Oil Co., 258 S.W. 64, 214 Mo.App. 115.

30. N.Y.—Plimpton v. Bigelow, 93 N.Y. 592
S.C.—Smith v. Russ Mfg. Co., 166 S.E. 607, 167 S.C. 464.

Option before performance
Where plaintiff and defendant entered into a contract whereby it was agreed that plaintiff was to transfer to defendant certain options, and defendant made a part payment under this contract at the time of its execution, and later, before performance of the option contract plaintiff, in New York, sued defendant, a nonresident, and levied an attachment on the options, it was held that the attachment of the option in New York was proper, since defendant, although a nonresident of New York, had certain rights in the options, that is, the right of performance, and the fact that defendant might not have performed under the option contract does not defeat the right of plaintiff to make the attachment, nor does the fact that plaintiff left the jurisdiction of New York after the levy was made vitiate the attachment.—Stagg v. British Controlled Oilfields, 192 N.Y.S. 596, 117 Misc. 474.

31. N.Y.—Bluebird Undergarment Corporation v. Gomez, 249 N.Y.S. 319, 139 Misc. 742—Saltzman v. Indemnity Ins. Co. of North America, 274 N.Y.S. 806.
R.I.—Taft v. Mills, 5 R.I. 393.

Money sent by telegraph
Money forwarded to a nonresident outside of the state by means of telegraph before execution of the warrant of attachment, since it is outside of the state, is not subject to attachment.—Stricklin v. Hodgen, 172 S.E. 770, 172 S.C. 37.

Note
Attachment and levy on a note, not within the court's jurisdiction, was ineffective.—Schmid v. Berkheimer, 234 N.Y.S. 726, 222 App.Div. 694

32. Iowa.—Security Sav. Bank v. Cimprich, 203 N.W. 24, 199 Iowa 1061.
Mo.—First Nat. Bank of Appleton City v. Griffith, 182 S.W. 805, 192 Mo.App. 443
Mont.—Patch v. Stewart, 253 P. 254, 78 Mont. 192, followed in Bancroft v. Leverty, 254 P. 1113, 78 Mont. 559.
6 C.J. p. 91 note 84.

33. Brand v. Brand, 76 S.W. 868, 116 Ky. 785, 25 Ky.L. 987, 63 L.R.A. 206—6 C.J. p. 91 note 85.

34. Smith v. Russ Mfg. Co., 166 S.E. 607, 167 S.C. 464.

35. Thum v. Pingree, 61 P. 18, 21 Utah 348.

36. Sea-Gate Tire & Rubber Co. v. Moseley, 18 P.(2d) 276, 161 Okl. 256—6 C.J. p. 91 note 83 [b].

defense may be made that the jurisdiction was unfairly and illegally procured.[37]

b. Corporate Stock

Corporate stock is generally present, and subject to attachment, at the domicile of the corporation.

It seems to be well settled that, for purposes of attachment, the situs of shares of stock is within the state where the corporation resides, and that they may lawfully be levied on in such state.[38] Accordingly, the stock of a domestic corporation is subject to attachment in the state of its domicile, although it is owned by a nonresident,[39] and although the certificate of stock is in the possession of a debtor outside of the state;[40] and even where stocks of a domestic corporation are pledged by plaintiff debtor as security to a nonresident defendant creditor, they are present at the domicile of the corporation for purposes of attachment.[41]

According to some authority, the fact that a foreign corporation is doing business within the state does not create a presence of its stock within the state for purposes of attachment,[42] even though the statute authorizes the "attachment of the shares of the defendant in any corporation"[43] According to other authority, however, a statute authorizing attachment on "any" shares of stock authorizes an attachment on the shares of stock of a foreign corporation doing business within the state[44] Under this view, the certificate of stock has been considered as nothing more than the evidence of the interest held by the stockholder, and where he admits his ownership of such interest, the shares of stock of a foreign corporation doing business within the state are subject to attachment, even though the stock certificates are not within the state[45]

According to some authority shares of stock cannot be attached in a state other than the one which has granted the charter to the corporation[46] According to other authority the presence of the stock certificates of a foreign corporation in the state confers jurisdiction upon the courts of the state over the stock for attachment purposes[47]

Under the Uniform Stock Transfer Act the stock of a corporation must be attached, if at all, at the place where it is found.[48]

c. Debts

For purposes of attachment a debt may be regarded as having its presence either at the domicile of the debtor or at the domicile of the creditor.

As in the case of an attachment generally, a debt, in order that it may be attached, must be present within the jurisdiction of the court making the attachment, since a debt cannot be attached where its situs is foreign to the state in which the action is brought,[49] even though the evidence of the debt is within the state.[50] Conversely, where the statute gives a creditor living within the state the right to attach a debt, it is immaterial that the evidence of the debt is held in another state.[51]

37. Abel v. Smith, 144 S E 616, 151 Va 568

Deposit made for purpose of attachment

One indebted to a nonresident cannot place money on deposit in a bank in defiance of his creditors' wishes for the purpose of conferring jurisdiction in attachment upon the court where the bank is located—Saxony Mills v Wagner, 47 So 899, 94 Miss 283, 136 Am S R 575, 23 L R A (N S) 834

Purchase of note

An arrangement whereby a resident friend of attaching plaintiffs purchased a note which was given by nonresident defendants, with the attached collateral note payable to them, from a holder outside of the state and brought it into the state solely for the purpose of sustaining the attachment thereon, was an unlawful device to create jurisdiction—Abel v. Smith, 144 S E 616, 151 Va. 568.

38. Del.—Morgan v. Ownbey, 100 A. 411, 6 Boyce 379, affirmed Ownbey v. Morgan, 105 A 838, 7 Boyce 297.
Okl—Harris v. Mid-Continent Life Ins. Co., 182 P 85, 75 Okl. 105.
6 C J. p 91 note 86.

Legislature may fix situs of stock of domestic corporation at its domicile for purposes of attachment.— Grenada Bank v. Glass, 116 So 740, 150 Miss 164

Corporate stock as property subject to attachment see supra § 79

39. Miss—Grenada Bank v. Glass, supra
Okl—Harris v. Mid-Continent Life Ins Co, 182 P 85, 75 Okl 105
6 C J. p 92 note 89, p 212 note 40 [a]

40. Cord v. Newlin, 59 A 22, 71 N.J. Law 433

41. La Varre v. International Paper Co, (D C S C.) 37 F (2d) 141.

42. New Jersey Sheep, etc, Co v. Traders' Deposit Bank, 46 S W 677, 104 Ky 90, 20 Ky L 565—6 C.J. p 92 note 88

43. Ireland v. Globe Milling, etc, Co, 32 A 921, 19 R I 180, 61 Am S R 756, 29 L R A. 429.

44. Smith v. Pilot Min. Co., 47 Mo App 409.

45. Parks-Cramer Co. v. Southern Express Co, 117 S E. 505, 135 N C. 428, certiorari denied Southern Exp Co v Parks-Cramer Co, 44 S Ct 180, 263 U.S 717, 68 L Ed. 522.

46. Pa—Weaver v. Manville, 21 Pa. Co. 218.
Tex—B & A Drilling Co v Norton, (Civ App) 20 S W (2d) 413, reversed on other grounds Norton v. B. & A. Drilling Co., (Com App.) 34 S W.(2d) 1095
6 C J. p 92 note 87, p 212 note 40

47. Cotnareanu v. Woods, 278 N Y. S. 589, 155 Misc 95—6 C J. p 91 note 86 [b] (2). p 92 note 87 [b], p 212 note 40 [b].

48. Bloch-Daneman Co. v. J Mandelker & Son, 238 N W. 831, 205 Wis 641.

49. Neb—Salyers Auto Co v De Vore, 217 N W. 94, 116 Neb 317, 56 A L R 594
N.Y.—Gerard Investing Co. v. National Rys. of Mexico, 276 N Y S. 1002, 243 App Div. 294.
Pa—Somerset Coal Co. v Diamond State Steel Co, 17 Pa Dist 536
6 C.J. p 92 note 93.

50. N.Y—Bates v. New Orleans, etc, R Co., 4 Abb.Pr. 72, 13 How. Pr. 516
Ohio—Owen v. Miller, 10 Ohio St. 136, 75 Am D. 502.
6 C.J. p 92 note 94.

51. Olcott v. Guerinck, 19 Ohio Cir.

For purposes of attachment, a court may regard a debt as being present or having its situs at the domicile of the debtor, and subject to attachment there,[52] or it may regard the debt as being present at the domicile of the creditor and, consequently, subject to attachment there.[53] Even though both the debtor and the creditor have their domiciles outside the state, a debt is present within the state and subject to attachment therein if the debt arises from a contract made payable within the state issuing the attachment,[54] or where the debt is made payable in the state where the attachment is made and the nonresident defendant whose debt is attached is doing business within the state.[55] A debt due from a nonresident debtor temporarily within the state to a nonresident plaintiff, which arose outside of the state and thus had its situs there, is not attachable within the state,[56] and, similarly, a debt owing to a nonresident defendant by a foreign corporation doing business within the state, which arose outside of the state, cannot be attached in the state.[57]

d. Judgments

For purposes of attachment a judgment is generally regarded as being present in the state of its rendition.

It is generally held that a judgment has its legal situs in the state of its rendition and cannot be reached by attachment proceedings in another state, although the debt on which it is based had its situs in such state.[58]

Where, however, the only requirement in the attachment statute as to the situs of property made subject to attachment is that it must be "found" within the county in which the levy is made, a foreign judgment against a resident is an indebtedness "found" within the court's jurisdiction.[59]

§ 93. Jurisdiction of Subject Matter of Action

The court must have jurisdiction of the subject matter of the action in order to exercise jurisdiction of the attachment proceeding.

The jurisdiction over attachment proceedings is not entirely apart from and independent of the jurisdiction which the court may otherwise exercise over the subject matter of the suit, that is to say, if the cause of action itself is beyond the pale of the court's jurisdiction, such court cannot assume to exercise jurisdiction over the cause simply because the party has invoked it through the process of attachment,[60] and if, under particular circumstances, plaintiff may sue out an attachment, while in the absence of such circumstances he could not sue, as where the debt is not due, then, if the attachment is wrongly sued out because of the nonexistence of the required condition, the writ and the action must fall together.[61] So long, however, as the action remains pending, a failure to serve process in the main case does not result in a loss of jurisdiction over the attached property.[62]

Where no jurisdiction over the subject matter exists, mere consent to attachment cannot confer such jurisdiction.[63]

Amount in controversy. When the jurisdiction of particular causes, as between different courts, depends on the amount in controversy, the same consideration will control the power to proceed by

Ct 32, 10 Ohio Cir Dec 131, approving Wilson v. Gifford, 12 Ohio Cir Ct 597, 5 Ohio Cir Dec 680.

52. Neb.—Salyers Auto Co. v. De Vore, 217 N.W. 94, 116 Neb. 317, 56 A.L.R. 594
N.Y.—Zuhlke v. Prudential Life Ins. Co. of America, 279 N.Y.S. 833, 244 App. Div. 549—Shipman Coal Co. v. Delaware & Hudson Co., 219 N.Y.S. 628, 219 App. Div. 312, affirmed 157 N.E. 859, 245 N.Y. 567.
6 C.J. p. 92 note 91.

Situs of debt owed by a branch bank

"A branch bank being separately indebted to its depositor, the existing obligation lies primarily between such branch bank and its depositor. The conclusion follows as a necessary corollary that the debt owed by a branch finds its situs within the territorial jurisdiction of such branch. Although the branch deposit be the ultimate debt of the parent bank, the obligation to its customer, however, is localized so as to be confined primarily to the branch where it originated"—Bluebird Undergarment Corporation v. Gomez, 249 N.Y.S. 319, 322, 139 Misc. 742.

53. Glower v. Glidden Varnish Co., 43 S.E. 355, 120 Ga. 983—High v. Padrosa, 46 S.E. 859, 119 Ga. 648.

54. Lancaster v. Spotswood, 33 N.Y.S. 572, 41 Misc. 19, affirmed 33 N.Y.S. 1109, 86 App. Div. 627.

55. Flynn v. White, 107 N.Y.S. 860, 122 App. Div. 780.

56. Carr v. Corcoran, 60 N.Y.S. 763, 44 App. Div. 97.

57. Dos Passos v. Morton, 218 N.Y.S. 17, 218 App. Div. 154.

58. Barr v. Thacher, (Va.) 173 S.E. 790—6 C.J. p. 92 note 96.

59. Shipman Coal Co. v. Delaware & H. Co., 157 N.E. 859, 245 N.Y. 567, affirming 219 N.Y.S. 628, 219 App. Div. 312.

60. U.S.—Louisville & N. R. Co. v. Deutsche Dampfschiffarts-Gesellschaft, (D.C.Ala.) 43 F.(2d) 651.
N.Y.—Swift & Co. v. Karline, 157 N.E. 861, 245 N.Y. 570, affirming 220 N.Y.S. 933, 219 App. Div. 821.
6 C.J. p. 93 note 99.

Court held to have jurisdiction

Where an employee of a street railway system, operating in Missouri and Kansas although resident in Missouri, could have maintained an action for wages in Kansas, the Kansas courts had jurisdiction to impound his credits there by attachment—Kansas City Rys. Co. v. McCardle, 232 S.W. 464, 288 Mo. 354.

61. Neb.—Seidentopf v. Annabil, 6 Neb. 524
Ohio—Harrison v. King, 9 Ohio St. 388.
Tenn.—August v. Seeskind, 6 Coldw. 166.

62. Rackman v. Clapp, 70 N.W. 259, 50 Neb. 648

63. Abernathy v. Moore, 33 Mo. 65—Rocheport Bank v. Doak, 75 Mo. App. 332.

attachment,[64] and for the purpose of determining jurisdiction it is the amount of the alleged indebtedness rather than the value of the property attached which governs.[65]

§ 94. Jurisdiction of Principal Action

Where the statute so requires, attachment must issue from the court wherein the principal action is brought or pending.

Where the statute so requires, the special proceeding by attachment must be in the same court as that in which the principal action is pending and to which the attachment is auxiliary.[66] In the absence of such a requirement, however, apparently the attachment proceeding may be in a court other than the one in which the principal action is pending.[67]

§ 95. Jurisdiction of Person of Defendant

Where jurisdiction of the person of the defendant is necessary, and it has not been acquired, no writ of attachment can issue.

Where jurisdiction of the person of defendant is necessary in order to issue an attachment, and it appears that such jurisdiction has not been obtained, the court must dismiss the attachment proceedings [68]

Under a statute providing that a person sued in a county other than that in which he has his domicile may file a plea of privilege to be sued in the county of his residence and that, if the plea is sustained, the cause shall not be dismissed but shall be transferred to the court having jurisdiction of defendant's person, after a plea of privilege has been filed and stands uncontroverted, the court does not have jurisdiction to issue a writ of attachment, notwithstanding a statute permitting the issuance of an attachment in a proper case at any time during the progess of the suit, since the requirement that the court must have jurisdiction is implied.[69]

§ 96. Nature of Jurisdiction on Transfer of Cause

Where an inferior court, although having jurisdiction of an attachment proceeding, is compelled to transfer the action to a higher court, the jurisdiction of the latter court is regarded as original.

If the writ of attachment is issued by an inferior court having jurisdiction, but by reason of the character of the levy, as where the levy is made on land, the proceedings must be transferred to a court of higher jurisdiction, the jurisdiction of the latter court is considered original.[70]

§ 97. Jurisdiction in Equity

In the absence of a statute granting such power, a court of equity does not have jurisdiction to entertain attachment proceedings.

As has been said in section 2 a (4), attachment is essentially a legal proceeding and it is unknown to the immemorial practice and usage of the courts of equity either in England or in the United States, being unavailable in equity in the absence of authority either of a statute or of the equity rules of the court.[71] Under some statutes, however, proceedings by attachment in suits in equity, or in suits of an equitable nature, as well as in actions at law, are authorized where the grounds of attachment exist.[72] Such jurisdiction depends on the

64. Stewart v Vaughn, 3 Coldw (Tenn) 22—6 C J p 93 note 2.

65. Barnett v. Rayburn, (Tex App) 16 S W. 537

66. Garnett v. Oliver, 45 S W (2d) 815, 242 Ky. 25—6 C.J. p 92 note 93

67. Webb v. Bailey, 54 N Y 164—Farquhar v Wisconsin Condensed Milk Co, 62 N Y S 305, 30 Misc 270, affirmed 53 App Div. 641, 66 N Y S 1130

68. Ala.—Melvin v. Scowley, 104 So 817, 213 Ala. 414.
Va.—Winfree v Mann, 153 S E. 837, 154 Va. 683.

In the federal courts

"In this (the federal) court an attachment in rem is not effective against property of a nonresident defendant who has not been personally served with process in a plenary action, or who has not voluntarily submitted himself to the jurisdiction of the court"—In re Stark, (D C N Y) 36 F (2d) 280

69. Ledger Co v Tweedy, (C C A Tex) 69 F (2d) 198

70. Vancleve v Wilson, 2 Ohio 202

Necessity of original jurisdiction

Where a statute provides, in a case where an order of attachment has been issued by a justice of the peace, and it appears by the return of the officer that defendant has no personal property in the county but is the owner of real estate situated in the county, that the justice shall certify his proceedings to the court of common pleas, where the action shall be proceeded with as if it had originated therein, except that in all actions under such section for any sum of which the justice of the peace has exclusive original jurisdiction, if defendant be a nonresident of the county, such fact shall be a ground of attachment in the court of common pleas, it was held that the legislature did not intend to make nonresidence of the county a ground of attachment in the common pleas court in those cases of which the justice of the peace did not have exclusive original jurisdiction—Barnard v. Anselm, 5 Ohio N P (N S.) 155.

71. U S—Martin v James B Berry Sons Co, (C C A R I.) 83 F (2d) 857—Bucyrus Co v McArthur, (D C. Tenn) 219 F. 286
Ga.—Tennessee Fertilizer Co. v. Hand, 95 S.E 81, 147 Ga. 588
Or—Spores v Maude, 158 P. 169, 81 Or 11
6 C J. p 93 notes 5, 6.

72. New York Casualty Co. v. Lawson, 24 S.W.(2d) 881, 160 Tenn. 329—6 C.J. p 93 note 7, p 94 note 8.
Causes or demands authorizing attachment in equity see supra § 8.

Attachment both at law and in equity

A plaintiff who has attached a party's effects, both at law and equity, may dismiss his attachment at law and proceed in equity.—Niehaus v.

statute,[73] and the statute will be strictly construed.[74]

If the demand is purely legal, a bill will not lie where the remedy by attachment at law is adequate,[75] and the doctrine that the court of equity should take jurisdiction in analogy to the proceeding at law can be applied only where the demand is equitable or there is some special ground for equitable interference.[76]

Procedure. Where attachment in equity suits is permissible under the statutes, the procedure therein must be in accord with that of the chancery court, and statutes regulating attachments at law do not apply.[77]

Retention of jurisdiction for complete relief. If the court obtains jurisdiction for the purpose of issuing the attachment, it will retain jurisdiction for all purposes.[78]

§ 98. Venue

a. In general
b. Nonresident defendant
c. Change of venue

a. In General

The proper venue for an attachment proceeding is ordinarily in the county in which a resident defendant resides, or under some statutes in the county wherein his property is located.

In order to give jurisdiction an attachment on the property of a resident must be issued where defendant, or one of the defendants, resides or may be found, or where he has property,[79] and a writ of attachment issued from the wrong county will be void,[80] although in some jurisdictions the general venue statute fixing the venue in county of defendant's residence does not apply to actions commenced by attachment.[81]

Where there is personal service or defendant is not a nonresident, the statutes fixing the venue of actions in the county of defendant's residence or where he may be found, or at the place where the contract is to be performed, are held to control, notwithstanding property subject to seizure may be situated elsewhere,[82] and the fact that property is attached in another county will not give the courts of the latter county jurisdiction, when defendant is served with process.[83] Under other statutes, however, the presence of property in a county furnishes sufficient basis for suing there without regard to the residence of defendant. If grounds for the attachment exist, the seizure of the property gives jurisdiction,[84] and an attachment suit, in a county in which the property of defendant in the possession of a third person is attached, is not removable to the county of defendant's residence, even though such defendant is a freeholder of the county of his residence.[85]

A writ cannot be sued out to attach property in a foreign county, beyond the territorial jurisdiction of the court, unless there is an attachment of property within the county where the suit is brought, or personal service on defendant within the county to give the court jurisdiction,[86] or un-

C B Barker Const. Co., 186 S.W. 461, 135 Tenn. 382.

73. Martin v. James B. Berry Sons' Co., (C.C.A.R.I.) 83 F.(2d) 857—6 C.J. p. 94 note 9.

Ex contractu

The jurisdiction conferred on the equity courts to issue a writ of attachment is limited to suits where the cause of action is one ex contractu, and such jurisdiction does not exist where the cause of action is ex delicto.—Piedmont Grocery Co. v. Hawkins, 98 S.E. 152, 83 W.Va. 180—6 C.J. p. 94 note 9 [e]

74. Mabie v. Moore, 84 S.E. 788, 75 W.Va. 761.

75. Peyton v. Cabell, 25 W.Va. 540.

76. Ala.—Smith v. Moore, 35 Ala. 76.
W.Va.—Sims v. Charleston Bank, 3 W.Va. 415.
6 C.J. p. 94 note 11.

77. Inman v. Travelers' Ins. Co., 121 So. 107, 153 Miss. 405, motion to retax costs overruled 122 So. 537, 154 Miss. 611.

78. McHaney v. Cawthorn, 4 Heisk. (Tenn.) 508.

79. Brewster v. Emlet, 122 So. 54, 168 La. 326—6 C.J. p. 95 note 19.

Property carried into county

Where plaintiff sued resident defendant in a county wherein defendant did not reside, plaintiff could not, in the absence of any express authorization to such effect, subject property of defendant to attachment in the county wherein the suit was brought, by hauling property of defendant into such county, under a hauling contract, merely for the purpose of laying venue in such county.—Johnson v. Fuqua, 148 So. 422, 25 Ala.App. 292, certiorari denied 148 So. 424, 227 Ala. 76.

Change of boundary after levy on land

After a court has obtained jurisdiction by an attachment of real estate within the county, a change of county lines, putting the attached property outside the county, does not defeat the jurisdiction.—Tyrell v. Rountree, (C.C.Tenn.) 24 F.Cas.No. 14,313, 1 McLean 95.

80. Ledger Co. v. Tweedy, (C.C.A. Tex.) 69 F.(2d) 198—6 C.J. p. 95 note 20

81. Henderson v. Alabama Auto Co., 96 So. 627, 209 Ala. 482—Rogers v. C. E. Green Motor Co., 113 So. 641, 22 Ala.App. 168—6 C.J. p. 96 note 25 [a].

82. Barnard v. Anselm, 5 Ohio N.P. (N.S.) 155—6 C.J. p. 96 note 23.

83. Chevallier v. Williams, 2 Tex. 239—6 C.J. p. 96 note 24.

84. Clark v. Louisville & N. R. Co., 130 So. 302, 158 Miss. 287—6 C.J. p. 96 note 25.

85. Clark v. Louisville & N. R. Co., supra.

86. La.—Tatum v. McWilliams, 7 La.App. 91
Mo.App.—Trinidad Asphalt Mfg. Co. v. Standard Oil Co., 253 S.W. 64, 214 Mo.App. 115.
6 C.J. p. 89 note 76 [c], p. 96 note 26.

Authority restricted to particular county

Under a statute requiring the clerk "to issue a writ of attachment to be directed to the sheriff of his county,"

less where defendant, at the time suit is begun, is removing his property from the county and the officer may pursue it.[87] Where, however, jurisdiction over defendant has once been properly obtained, writs may issue against him to other counties where he has property, or against codefendants in the counties of their residence, or where they have property,[88] and the fact that the property in the county where the action is brought is subsequently exhausted in satisfying prior attachment liens does not invalidate the attachment in the other county.[89]

An attachment suit against joint defendants must be brought in the county wherein one of them resides;[90] and under a statute requiring an attachment to be issued in the county in which defendant resides, it is sufficient that one of joint defendants resided and was served in the jurisdiction of the court from which the attachment issued.[91]

Absconding debtor. Where a debtor absconds, it has been held that the proper place in which to bring attachment proceedings is in the county from which the debtor has removed, and in which he has his property,[92] or in the county through which the debtor is privately passing or wherein he is hiding at the time of its issue.[93]

b. Nonresident Defendant

Where the defendant is a nonresident, an attachment should generally be brought in a county in which he has property.

In the case of nonresident defendants, statutes very generally require attachment proceedings to be brought in any county in which the property of defendant may be found,[94] and in the absence of a permissive statute, a court of the county where a cause of action arises cannot issue an attachment writ where defendant is a nonresident and his only property in the state is situated in another county.[95] Under some statutes, however, where defendant is a nonresident, attachment proceedings may be brought in any county in the state and the writ may be served in any county in which he has property.[96]

Where one of two defendants resides in the county in which suit is brought, the court of that county can issue an attachment on the property in another county of the other nonresident defendant.[97]

c. Change of Venue

The parties to an attachment proceeding may consent to a change of venue.

By consent of the parties an attachment suit may be transferred from one county to another,[98] and such a change of venue carries the whole cause and every incident belonging to it to the court to which it is transferred.[99] Where, however, the proceedings are brought in the wrong county and the court has no jurisdiction, a change of venue to another county will confer no jurisdiction upon the court there,[1] and if the attachment issues before the action is transferred to the proper county it is void.[2]

§ 99. Objections and Waiver Thereof

Objection to jurisdictional defects or omissions in the proceedings may be raised at any time, but objections to mere irregularities therein must be raised at the proper time.

Where, through some fatal defect or omission in the proceedings, the court has not acquired jurisdiction, the objection may be raised at any stage of the cause,[3] or even collaterally.[4] On the other hand, where the defects are considered mere ir-

when certain prerequisites were complied with, a counterpart writ running into another county, issued by the clerk, is without authority and can give no jurisdiction of the person or property of defendant—Smith v Block, 7 Ark. 358

87. Ill—House v. Hamilton, 43 Ill 185
Kan—Taylor v. Carney, 4 Kan 542.

88. La—Tatum v. McWilliams, 7 La App. 91.
Mo—Trinidad Asphalt Mfg Co. v. Standard Oil Co, 258 S W 64, 214 Mo App. 115—State ex rel. Leahy v. Barnett, 180 S W. 458, 193 Mo. App. 36
6 C J. p 97 note 28.

89. Platt, etc, Refining Co v. Smith, 10 Ohio Dec (Reprint) 424, 21 Cinc. L.Bul. 132.

90. Boorum v. Ray, 72 Ind 151.

91. Collier v Hanna, 17 A 1017, 71 Md 253, affirming 17 A. 390.

92. Neb—Smith v. Johnson, 62 N W 217, 43 Neb 754—Gandy v. Volly, 52 N.W 276, 34 Neb 536
N C—Skinner v Moore, 19 N C. 138, 30 Am D 155.

93. Barnett v. Darnielle, 3 Call (7 Va.) 413.

94. Barnard v. Anselm, 5 Ohio N.P. (N S) 155—6 C J. p 95 note 21.

Real property
An attachment on the real property of a nonresident must issue from the court of the county where the property is located, and an attachment from any other county is void.—Wright v. Ankeny, (D C.Wash) 217 F. 933.

95. Winfree v. Mann, 153 S.E. 837, 154 Va. 683.

96. Gaston v. Jackson Nat Bank, 163 S E. 265, 45 Ga App. 106

97. Clements v. Utley, 98 N.W. 133, 91 Minn. 352.

98. Wessinger v. Mausur, etc., Impl. Co, 21 So 757, 75 Miss 64—6 C.J. p 97 note 30.

99. Ex parte Haley, 12 S W 667, 99 Mo. 150—6 C.J. p 97 note 30 [b].

1. Boorum v Ray, 72 Ind 151—6 C. J. p 97 note 31.

2. Wasson v Millsap, 30 N W. 612, 70 Iowa 348

3. Ala—Dew v. State Bank, 9 Ala. 323
Md—Bruce v. Cook, 6 Gill & J. 345.
6 C.J. p 97 note 32.

4. Mudge v. Steinhart, 20 P. 147, 78 Cal 34, 19 Am.S.R. 17—6 C.J. p 97 note 34.

regularities, and the parties are before the court, they must raise the objection at the proper time and in appropriate form,[5] and the lien of the attachment cannot be displaced by showing such irregularities in the process as would have entitled defendant in the writ to abate it on plea.[6] Also, such an attachment cannot be attacked collaterally.[7]

A subsequent attaching creditor cannot object to the jurisdiction if the attachment defendant does not.[8]

Effect of irregularities in progress of action. After compliance with the preliminary steps which lead to the acquirement of jurisdiction by the actual seizure of the property, irregularities in the further progress of the cause will not render the judgment void.[9]

§ 100. Authority and Duty to Issue Writ

a. Authority to issue writ
b. Duty to issue writ

a. Authority to Issue Writ

(1) In general
(2) Issuance by officer other than one before whom returnable

(1) In General

The authority to issue an attachment must be found in the statute.

The authority to issue an attachment, like the jurisdiction of the court over such proceedings, must be found in the statute. Unless there is authority in the statute, there is no power to issue the writ, and such authority as the statute confers must be strictly pursued.[10] The officers usually designated by statute to issue the writ are judges,[11] justices of the peace,[12] and, as noted later in this section, clerks of the court. The statutes in some states also give authority to probate judges to issue a writ of attachment,[13] but in the absence of a statute granting such authority, the probate judge is without authority to issue a writ of attachment.[14]

Issuance by clerk of court. In the absence of statutory authority, a clerk of the court has no power to issue a writ of attachment;[15] where, however, the issuance of an attachment on proper application being made is a ministerial, rather than a judicial, act,[16] where permitted by statute, he may issue such a writ,[17] but only in the instances permitted by the statute.[18] Where the court is vested with jurisdiction over attachment proceedings, and the clerk of the court is the person designated by law to issue all process out of the court, it is held that the clerk is sufficiently vested with authority to issue writs of attachment;[19] but a mere broadening of the jurisdiction of an inferior court over attachments to the extent previously possessed by a court of superior jurisdiction will not confer upon the clerk of the lower court the

5. Cherry v. Nelson, 52 N.C. 141—6 C.J. p. 97 note 35.
6. Kirkman v. Patton, 19 Ala. 32—6 C.J. p. 98 note 36.
7. Winchell v. McKinzie, 53 N.W. 975, 35 Neb. 813.
8. Payne v. Dicus, 55 N.W. 483, 88 Iowa 423.
9. N.Y.—Gere v. Gundlach, 57 Barb. 13.
N.C.—Spillman v. Williams, 91 N.C. 483.
Ohio—Cochran v. Loring, 17 Ohio 409—Paine v. Mooreland, 15 Ohio 435, 45 Am.D. 585.
6 C.J. p. 98 note 37.
10. Ferson v. Armour & Co., 174 N.W. 425, 103 Neb. 809—6 C.J. p. 98 note 43.
11. Md.—Dirickson v. Showell, 28 A. 896, 79 Md. 49.
Neb.—Reed v. Bagley, 38 N.W. 827, 24 Neb. 332.
Va.—Myers v. McCormick, 63 S.E. 427, 109 Va. 160.
6 C.J. p. 99 note 44.

Supreme court judge or county judge

In Nebraska, neither the county judge nor the judges of the supreme court can allow an attachment in an action pending in district court when a judge of that court is present in the county where the action is pending and is capable of acting.—Ferson v. Armour & Co., 174 N.W. 425, 103 Neb. 809.

12. Merriman v. Sarlo, 37 S.W. 879, 63 Ark. 151—6 C.J. p. 99 note 45.

Attachment proceedings before justices of the peace see Justices of the Peace § 77 [35 C.J. p. 590 note 14—p. 602 note 85].

13. Reed v. Bagley, 38 N.W. 827, 24 Neb. 332—6 C.J. p. 99 note 44 [b] (1), (2).

Statute valid

The provision in the organic act of Oklahoma conferring on the supreme court and district courts "chancery as well as common-law jurisdiction" does not give such courts exclusive jurisdiction to issue attachments, so as to render void an act of the legislature authorizing the probate judge to issue attachments, for the issuance of attachments under the Oklahoma statutes is a ministerial, and not a judicial, act.—Central L. & T. Co. v. Campbell Commn. Co., 19 S.Ct. 346, 173 U.S. 84, 43 L.Ed. 622, reversing 49 P. 48, 5 Okl. 396.

14. Noyes v. Phipps, 63 P. 659, 10 Kan.App. 580.
15. Morris v. Davis, 4 Sneed (Tenn.) 452—6 C.J. p. 99 note 48 [k], [m], [n].
16. Reyburn v. Brackett, 2 Kan. 221, 83 Am.D. 457.

Duty ministerial

The duty of a clerk of court in issuing a writ of attachment is ministerial.—Adams v. Hosmer, 56 N.W. 1051, 98 Mich. 51—6 C.J. p. 99 note 48 [1].

17. Tenn.—Campbell v. Brady, 11 S.W. (2d) 687, 158 Tenn. 98.
Tex.—Byers v. Brannon, (Civ.App.) 19 S.W. 1091—Bull v. Forest, 1 White & W.Civ.Cas.Ct.App. § 179.
6 C.J. p. 99 note 48.
18. Atkinson v. James, 10 So. 846, 96 Ala. 214.

Debt due

Where the debt was due when the action was commenced, the clerk can make the order of attachment.—Scott v. Doneghy, 17 B.Mon.(Ky.) 321.

General and specific attachment

Under Code Civ.Pract. § 238, the clerk is not authorized to issue a specific attachment, although he may issue a general attachment. Specific attachments are regulated by § 251, and the order for a specific attachment may not be made by the clerk.—Samples v. Rogers, 107 S.W. 222, 32 Ky.L. 784.

19. Shillaber v. Waldo, 1 Hawaii 31.

powers which had previously been committed to the clerk of the higher court.[20]

(2) Issuance by Officer Other than One before Whom Returnable

Unless a statute so authorizes, a writ of attachment cannot be issued by an officer of one court returnable in another.

In the absence of statutory authority an officer of one court may not issue an attachment returnable to another court,[21] and a general grant of authority to issue the writ is not to be construed to enlarge the scope of the jurisdiction of the officer upon whom the power is conferred.[22] Under some statutes, however, the power to issue the writ of attachment is often conferred upon officers and judges other than those before whom the writ is made returnable,[23] and in such case it is immaterial that the officer issuing the writ would not have jurisdiction, in his judicial character, of the subject matter of the cause.[24]

b. Duty to Issue Writ

Where the issuance of an attachment on a proper application is purely a ministerial act, on a proper application the judge or officer is under a duty to issue the writ.

When the evidence which entitles one to an attachment is presented to the proper officer, and where the issuance of the writ under such circumstances is a ministerial, rather than a judicial, act, he is not concerned with the validity or justice of the cause of action, but should issue the writ without reference to such an inquiry.[25] Where the moving papers fairly call for the exercise of judgment on the part of the officer who is to grant the writ, the proceeding will not be void for want of jurisdiction, although the officer errs in his judgment on the weight of evidence.[26] The officer has no discretion when the affidavit which the statute prescribes is presented, but he must then issue the writ.[27] If there are several applications it is the duty of the officer to issue the writs in the order in which the applications on proper papers are presented to him.[28]

§ 101. —— Delegation of Authority

Under proper statutory authorization a deputy clerk may issue the writ for the clerk of the court.

Where the clerk of the court is authorized to issue writs of attachment, and under statutes authorizing the deputy clerk to perform the duties of the clerk, the writ may be issued for him by a deputy acting in the name of his principal.[29]

§ 102. —— Order for Attachment

a. In general
b. Form and sufficiency

a. In General

If an order is required by statute, it usually must be made before attachment can issue, but where the officer issuing the writ is also the one to make the order, he may in some jurisdictions issue the writ before making the order.

Where the statute contemplates or requires an application for a writ of attachment and an order of allowance by a judge, the making of the order is a judicial act,[30] and in such cases the clerk of the court cannot in the first instance allow the writ, but there must be an order granting it.[31] On the other hand, where not required by statute, an order

20. Stevenson v. O'Hara, 27 Ala. 362—6 C.J. p. 100 note 50

21. Rome First Nat. Bank v. Ragan, 18 S.E. 295, 92 Ga. 332.

22. Caldwell v. Meador, 4 Ala. 755

23. Ga.—Wanet v. Corbet, 13 Ga. 441
Minn.—Clements v. Utley, 98 N.W. 188, 91 Minn. 352
Miss.—Armitage v. Rector, 62 Miss. 600
6 C.J. p. 100 note 55.

24. N.Y.—Matter of Fitch, 2 Wend. 298
Tenn.—Galbraith v. McFarland, 3 Coldw. 267, 91 Am.D. 281.

25. Alexander v. Brown, 2 Disn. (Ohio) 395.

26. Ga.—Haslett v. Rodgers, 33 S.E. 44, 107 Ga. 239
N.Y.—Matter of Faulkner, 4 Hill 598

27. Mayhew v. Dudley, 1 Pinn. (Wis.) 95.

28. Lick v. Madden, 25 Cal. 202—6 C.J. p. 102 note 75

29. Minniece v. Jeter, 65 Ala. 222—6 C.J. p. 100 note 53

30. Ga.—Haslett v. Rodgers, 33 S.E. 44, 107 Ga. 239
Neb.—Merchants' Nat. Bank v. Jaffray, 54 N.W. 258, 38 Neb. 218, 19 L.R.A. 316
6 C.J. p. 100 note 59.

Chip attachment

Plaintiff need not secure the preliminary permission of the probate court, in order to make a chip attachment of the decedent's property.—Coldwell v. New England Trust Co., 181 N.E. 677, 282 Mass. 45

Specific attachment

An order for a specific attachment cannot be regarded as a general order of attachment where no grounds for either were alleged.—Ford v. Witty, 245 S.W. 846, 197 Ky. 86.

31. Kleine v. Nie, 11 S.W. 590, 88 Ky. 542, 11 Ky.L. 533—6 C.J. p. 100 note 60.

Clerical servant

A clerk of the superior court has no authority to issue an attachment sued out under the statute unless the judge, in granting the attachment, expressly so directs. Under a special order commanding the clerk to issue the writ, he may do so as the clerical servant of the judge, but in the absence of such an order he cannot, there being no provision of law authorizing him to issue writs of this kind.—Bates v. Shelton, 25 S.E. 16, 99 Ga. 164—6 C.J. p. 100 note 60 [f]

Equitable attachments

As an incident to its powers with respect to extraordinary process, a chancery court may issue attachments of property. These are sometimes called equitable attachments, and they cannot issue except on the fiat of a chancellor or judge. Where, however, the clerk is authorized to issue attachments, he may do so without a fiat.—New York Casualty Co. v. Lawson, 24 S.W.(2d) 881, 166 Tenn. 329

is not necessary to warrant the issuance of an attachment by the clerk.[32]

Where the judge issues as well as grants the writ, it is not necessary that he should spread on his docket the order allowing it.[33] Where the statute gives the clerk authority to make an order of attachment, according to some authority he may issue the writ directly without first granting an order on himself for its issue;[34] but it has also been held, where a registrar was given the authority to make an order and to issue an attachment, that an issue by the registrar, without an order on himself, is void.[35]

The jurisdiction by a commissioner, to order a writ of attachment on the proofs, must be formal and precise, and must appear in the order.[36]

Presumption as to regularity. Where a district judge allows an order of attachment on a debt not due, the presumption is, in the absence of a contrary showing, that it was made while the court was in session, and especially so, where the judge, at the time of the granting of the writ, was presiding at a regular term of the district court in which such action was brought.[37]

b. Form and Sufficiency

The order granting the attachment must be sufficient in form to meet the statutory requirements.

The order for attachment should be made and entered in the manner prescribed by statute,[38] and show on its face the statutory requisites.[39] It should be in writing,[40] but, under some statutes, it may be informal and in general terms.[41] An order for attachment directing it to issue for the amount claimed in the petition is sufficient without specifying such amount;[42] but, where the law fixes the amount of the bond, it need not be fixed in the order for attachment.[43] Where not required by statute the order need not recite the making of the necessary affidavit or the giving of the undertaking required by law, but it is better form for it to do so.[44] The order of a clerk granting a writ of attachment need not be under the seal of the court,[45] and, accordingly, the failure of a judge granting an order to attach thereto the seal of the court does not render the order void.[46]

Mere surplusage contained in the order may be disregarded, and its presence in the order does not invalidate it.[47]

§ 103. Disqualification of Officer

An officer who stands in any relation of interest to a party applying for an order of attachment may be disqualified from granting the attachment.

It is improper that an attachment should be granted by an officer who stands in any relation of interest to the party applying therefor,[48] and where the statute prohibits any judicial officer from acting in a cause in which he is pecuniarily interested, or where he has been the counsel for either party, such an officer, although he has authority to issue writs of attachment, cannot exercise such authority in such a cause.[49] Where, however, the clerk acts ministerially in the issue of a writ of attachment, he may issue the writ in an action in his own behalf.[50] Where a statute prohibited sheriffs from making or filing up any process and provided that all such acts done by them should be void, it was held that an attachment and levy on land was defeated as to persons not parties to the action who claimed by an intermediate conveyance by the owner, where the original writ was drawn and issued by the deputy sheriff who served it.[51]

32. Abney v. Ohio Lumber, etc., Co., 32 S E 256, 45 W.Va. 446—6 C J. p 101 note 64

33. Winchell v. McKinzie, 53 N W. 975, 35 Neb 813—6 C J. p 101 note 61

34. Smith v Ruth, 209 S W 850, 183 Ky. 566—6 C J. p 101 note 63.

35. McKenzie v. Bentley, 30 Ala. 139.

36. James Mitchell, Inc., v. Kreuger's Unknown Executors, 163 A. 10, 10 N J Misc. 1176—6 C J p 101 note 65.

37. Cox v Peoria Mfg. Co., 60 N W 933, 42 Neb. 660

38. Howell v. Muskegon Cir. Judge, 50 N W. 308, 88 Mich. 369

Form of order defective

An order for a writ of attachment stating merely that the writ of attachment issue out of the supreme court of the state of New Jersey, in the sum of one hundred thousand dollars to be awarded to the plaintiff, is insufficient, where it does not award the writ against the goods and lands, rights and credits, moneys and effects, of defendant, as required by statute.—Henry v Freeman, 145 A. 107, 7 N J Misc 263.

39. Hisor v Vandiver, 85 A. 181, 83 N J Law 433—Hufty v Wilson, 74 A. 137, 78 N J Law 241

40. Loeb v. Smith, 3 S E. 458, 78 Ga. 504—6 C J. p 101 note 66.

41. Howard v. Jenkins, 5 Lea (Tenn.) 176—6 C.J. p 101 note 67.

Omission in order immaterial

The fact that an order of attachment directed to a sheriff omits the words "in your county," required by statute, does not make the order fatally defective since the sheriff could only execute the writ in his own county.—Schultz v. Stiner, 155 P. 1073, 97 Kan 555, rehearing denied 157 P 265, 98 Kan 45.

42. Kleine v Nie, 11 S W 590, 88 Ky 542, 11 Ky L. 583.

43. Meyer v. Cole, Mann Unrep Cas. (La.) 276.

44. Tessier v. Crowley, 20 N W. 264, 16 Neb 369.

45. Seeligson v. Rigmaiden, 37 La. Ann 722

46. Winchell v. McKinzie, 53 N.W. 975, 35 Neb. 813

47. McCoy v. Boyle, 10 Md 391.

48. Hurd v. Jarvis, 1 Pinn (Wis.) 475—6 C J. p 102 note 69.

49. King v. Thompson, 59 Ga 380—Wilkowski v Halle, 37 Ga. 678, 95 Am D. 374—6 C J p 102 note 70.

50. Evans v. Etheridge, 1 S E. 633, 96 N C. 42.

51. Smith v. Saxton, 6 Pick. (Mass.) 483.

B. AFFIDAVITS AND APPLICATION

§ 104. Necessity

a. In general
b. Verified pleading as substitute
c. New or additional affidavits

a. In General

Plaintiff who seeks an attachment is generally required to set forth his basis for an attachment in a proper affidavit or petition.

The statutes very generally require, as a basis for the issuance of a writ of attachment, an affidavit on behalf of plaintiff setting forth the basis of his claim to avail himself of this process. Where such a requirement exists, such an affidavit is essential,[53] constituting the jurisdictional basis of the proceeding,[58] and if there is no sufficient affidavit, the writ of attachment and all subsequent proceedings, orders, and judgments based thereon are absolutely void,[54] and subject to collateral attack.[55] In some instances, however, an attachment may issue without affidavit, either under a statute expressly dispensing with it in a particular case,[56] as, for example, where the action is brought by the state,[57] or under a statute authorizing an attachment without requiring an affidavit.[58] Also, where it is the levy of the attachment which gives the court jurisdiction over the property of a nonresident defendant, a failure to make the affidavit will not defeat its jurisdiction, where the writ of attachment has been issued and levied on defendant's property.[59]

The affidavit is a part of the record,[60] and it has been held that if no affidavit appears in the record no evidence is admissible to prove that one was made,[61] except, perhaps, in the case of loss or destruction.[62] The mere absence of an affidavit from the record, however, cannot be made the ground of an objection in a collateral proceeding, where it appears that there was in fact an affidavit.[63]

Separate petition. Under a statute providing that, if attachment is sought subsequent to the commencement of the principal action, "a separate petition must be filed," a separate petition is essential, an amendment to the petition in the original action being insufficient, and the word "must" in such statute cannot be construed as "may."[64]

b. Verified Pleading as Substitute

In some jurisdictions plaintiff may set forth his basis for an attachment in a properly verified complaint.

In some jurisdictions, if facts sufficient to justify the issuance of a writ of attachment are alleged

52. U S—Sandusky Cement Co. v. A. R Hamilton & Co., (D C.Ohio) 273 F. 596
Ky—Smith v. Dungey, 199 S W. 777, 178 Ky 702—Kerr v. Smith, 5 B Mon 552
Mont—Continental Oil Co v Jameson, 164 P 727, 53 Mont. 466
S C—Skalowski v Joe Fisher Inc., 149 S E 340, 152 S C. 108, 65 A.L. R 1427.
Tenn—Campbell v. Brady, 11 S W. (2d) 687, 158 Tenn 98
Tex—Farmers' Nat Bank of Stephenville v Daggett, (Com App) 2 S W (2d) 834, affirming Daggett v. Farmer's Nat Bank, (Civ App) 259 S W. 198.
Wash—Tahoma Finance Co v Shannon, 244 P 271, 133 Wash 90.
6 C.J. p 102 note 77.

53. Ga—Nix v. Citizens' Bank of Moultrie, 130 S E 597, 34 Ga.App 546
Okl—Beam v. Berryman, 293 P 550, 146 Okl. 94.
W Va—O'Brien v. Pope, 114 S E. 239, 91 W.Va. 590.
6 C.J. p 103 note 78.

Dissolved on motion
Affidavit for attachment being jurisdictional, without it attachment should be dissolved on motion.—Beam v. Berryman, 293 P. 550, 146 Okl. 94.

54. U S—Cleveland & Western Coal Co v J. H Hillman & Sons Co., (D C.Ohio) 245 F 200
Ky—Howard v. Howard, 39 S W (2d) 245, 239 Ky 160
Ohio—Barnard v Anselm, 5 Ohio N. P (N S) 155
Pa—McBride v. Bartol, 5 Pa Dist. & Co. 71
Tenn—Campbell v. Brady, 11 S.W. (2d) 687, 158 Tenn. 98.
6 C J. p 103 note 79.

Appearance immaterial
An attachment not based on an affidavit and bond is void, and the defect is not cured by defendant's appearance and interposition of a plea.—Tyson v. Hamer, 3 Miss. 669.

55. Duxbury v. Dahle, 81 N W 198, 78 Minn 427, 79 Am S R. 403—6 C J p 153 note 99 [1].

56. Lewis v. Ounnker, 2 Metc (Ky.) 284.

Affidavit or testimony
Under a statute providing that an attachment may be issued, on the petition of the creditor, supported by "affidavit, or testimony if he can control the same," if the affidavit is void as an affidavit verifying the petition, the judge may consider it as sufficient "testimony" in support of the allegations of the petition, and grant the attachment—Strother v. Southern States Phosphate & Fertilizer Co, 125 S E 786, 33 Ga App 314

Facts not excusing affidavit
Where, by statute, it was provided that a judgment creditor beginning equitable proceedings after an execution returned of "no property found" may have an attachment without affidavit, it was held that the mere statement that execution was issued and returned with a "no property found," is not sufficient to allow the attachment without an affidavit—Maddox v. Fox, 8 Bush (Ky.) 402

57. Ex parte McDonald, 76 Ala. 603.

58. Everly v. Rowland, 1 Pearson (Pa.) 312

59. Hester v. Baskin, (Tex Civ App.) 184 S W. 726

60. Caldwell v. People's Bank of Sanford, 75 So 848, 73 Fla. 1165—6 C J. p 103 note 80.

61. Bond v. Patterson, 1 Blackf. (Ind.) 34

62. Bond v. Patterson, supra.

63. U S.—Biggs v. Blue, (C C Ohio) 3 F Cas.No 1,403, 5 McLean 143.
Mo.—Sloan v. Mitchell, 84 Mo. 546.

64. A. D. Fletcher & Son v. Gordon, (Iowa) 259 N.W. 204.

in a duly verified bill or petition, the writ may issue without a separate affidavit setting forth such facts.[65] In such a case the complaint must be duly verified, and if the facts are only set forth without verification, and there is no affidavit, an attachment cannot issue.[66]

c. New or Additional Affidavits

After a proper and sufficient affidavit has been filed, plaintiff is ordinarily not required to file a new or additional affidavit in order to obtain another or second attachment.

Under permissive statutes, where one sufficient affidavit is made and filed, it is not necessary to make or file new or additional affidavits, in order to issue writs to different counties,[67] or where a second attachment is rendered necessary because of failure to serve the summons within a prescribed time after the first was granted[68] or after it has been vacated,[69] or upon the revivor of an action by the personal representative of a plaintiff who died before service of the writ.[70] So, also, where several orders of attachment may be issued at the same time, or in succession, a single affidavit will be sufficient,[71] although it in no way affects the proceedings that a second unnecessary affidavit was presented or filed.[72] Where property has been seized under the original writ, and a second or alias writ is issued for the purpose of summoning defendants, under some statutes a new affidavit is not required,[73] and it has been held that the same affidavit may be read in support of applications by separate defendants for attachments against the same absconding debtor.[74] If the affidavit sets forth sufficient facts to authorize the issuance of the writ and of an order of publication both the writ and the order may be granted without the filing of another affidavit.[75]

Under some statutes an additional affidavit is required so as to enable the court to determine the amount for which the levy must be made,[76] but a failure to file this affidavit is a mere irregularity, affecting only the levy, and may be waived by a general appearance.[77]

§ 105. Accompanying Pleadings

If required by statute, a declaration or complaint must accompany the affidavit.

Where the statute requires that plaintiff shall file or present a complaint or declaration, or that it shall accompany the affidavit, noncompliance with the requirement is fatal,[78] but no declaration or complaint need be presented or filed in the absence of a requirement to that effect.[79] The complaint or declaration, where required or necessary, must be sufficient with respect to the statement of facts and allegations to justify the issuance of a writ of attachment, and it is sufficient if it does so.[80] Where, however, the statute does not require that

65. Smith v Dungey, 199 S W 777, 173 Ky 702—6 C J p 103 note 85. Verified pleadings as affidavits generally see Affidavits § 1 b (2)

66. Appleman v. Lynch Nat. Bank, 298 S W. 1097, 221 Ky. 415

67. Simpson v. East, 27 So 436, 124 Ala 293

68. Mojarrieta v Saenz, 80 N Y. 547, 58 How Pr. 505

69. Acker v Jackson, 3 How Pr (N. S) (N.Y) 160.

70. Rhenbottom v. Sadler, 19 Ark 491

71. Thompson v Stetson, 17 N W. 368, 15 Neb. 112

72. Wharton v. Conger, 17 Miss 510

73. Van Benschoten v Fales, 85 N. W 476, 126 Mich 176.

74. Hallock v. Van Camp, 8 N.Y S. 588, 55 Hun 1.

75. Avery v. Good, 21 S W. 815, 114 Mo. 290—Burnett v McCluey, 4 S W 694, 92 Mo 230—Bray v. Marshall, 75 Mo 327

76. Corona Coal, etc., Co. v. Lucas E Moore Stave Co., 65 So 51, 186 Ala. 593—6 C J p 104 note 95.

77. Corona Coal, etc, Co v. Lucas E. Moore Stave Co, supra.

78. Ala—Corona Coal, etc, Co. v Lucas E Moore Stave Co, 65 So 51, 186 Ala. 593—Jones v Howard, 42 Ala 483.
Miss—Beck v. Irby, 86 Miss 188.

Separate petition mandatory

Where it is provided by statute that a separate petition "must" be filed in order to justify an attachment after the commencement of the action, such a provision is mandatory and necessary to the jurisdiction of the court, the word "must" as used in the statute not being equivalent to "may"—Andrew v. Miller, (Iowa) 263 N W. 845, modified on other grounds and rehearing denied 266 N W. 716—A D. Fletcher & Son v. Gordon, (Iowa) 259 N W. 204

79. Winchell v. McKenzie, 53 N W 975, 35 Neb 813—6 C J. p 104 note 1.

80. Md—Gill v. Physicians' and Surgeons' Bldg, 133 A. 674, 153 Md 394
N Y.—Fraser v Copake Lake Pure Ice Corporation, 216 N.Y S. 496, 127 Misc 810
S C—Haley v Nox-Glare Shield Co., 148 S E 718, 151 S.C 97.

Complaint insufficient

Where the complaint was insufficient to support the action, the writ of attachment fell with the complaint—Syrett v Strickland, 261 P. 484, 86 Cal App 623

Exhibits annexed

Where exhibits annexed to, and incorporated in, the complaint furnished some allegation of fact as to the damage, the papers were not jurisdictionally defective, as against a motion to vacate warrant of attachment—Jones v Obcanska Zalozna V Karline, 212 N Y S 557, 126 Misc 806, affirmed 214 N Y.S. 860, 216 App Div. 704

Premature filing

A complaint in attachment before the maturity of the debt is insufficient, unless it shows on its face the reason for its premature filing—Johnson v. Muens, 137 P. 126, 76 Wash 526.

Tender of stock before trial

Where plaintiff suing to recover the purchase price paid for stock, on the theory of rescission for fraud, failed to show a tender of such stock before trial, his complaint did not state a cause of action sufficient to sustain an attachment—Fraser v. Copake Lake Pure Ice Corporation, 216 N Y S. 496, 127 Misc. 810.

a complaint stating a cause of action accompany the affidavit, where the affidavit and bond for attachment are sufficient, the fact that the petition is subject to general demurrer will not render the attachment void.[81]

In some jurisdictions an affidavit containing the requisites of both an affidavit and a complaint will dispense with the requirement of a separate complaint,[82] or the absence of a complaint under such circumstances will be regarded as a mere irregularity curable by amendment.[83]

§ 106. Who May Make

If an affidavit is required, it must be made by the person designated by statute. It usually, under the statutes, may be made by plaintiff or his agent.

In view of the fact that attachment is a statutory proceeding, the statute, of course, determines who may make the affidavit, if any be required. Generally, plaintiff may show the facts on which he bases his right to an attachment by his own affidavit, or by the affidavit of his agent, attorney in fact or at law, or of others having knowledge of the facts.[84] The propriety of an affidavit by an attorney in an attachment proceeding has been questioned, however,[85] and where the statute expressly requires the affidavit of plaintiff, no affidavit other than that of plaintiff will authorize the attachment.[86]

A usual statutory ground for allowing an affidavit by an attorney or agent is the absence,[87] or disability,[88] of the principal. Where plaintiffs' absence from the county was assigned as the reason for an affidavit by their attorney in an attachment proceeding, and it later appeared that one plaintiff was actually in the county, the attachment was void, even though the attorney believed that all the plaintiffs were absent from the county.[89]

While all plaintiffs in the principal action need not join in the attachment proceedings, under some statutes, each plaintiff who claims the benefit of the attachment must join in making the affidavit,[90] although under other statutes one of several plaintiffs is competent to make the affidavit in behalf of all.[91]

Subsequent ratification. Where the statute permitting an agent to make the affidavit contemplates the existence of the relationship of principal at the time the affidavit is filed, an affidavit filed by an unauthorized agent cannot sustain the attachment, even though it is subsequently ratified by plaintiff.[92]

§ 107. Who May Take

An affidavit for an attachment can only be taken before an officer designated by statute, or, in the absence of such designation, before an officer invested with the power of administering oaths.

If the statute does not prescribe the officer before whom the affidavit shall be sworn, it may be taken before any officer acting within his jurisdiction and invested with the power to administer oaths;[93] but if the statute expressly provides before whom it may or may not be verified it will be of no avail unless sworn to before the qualified officer.[94]

81. Finley v. Pew, 205 P 310, 314, 28 Wyo 342, rehearing denied 206 P. 148, 28 Wyo. 342—6 C J. p 104 note 2.

82. Ark.—Sannoner v. Jacobson, 14 S W. 458, 47 Ark. 31—Kurtz v Dunn, 36 Ark 648.
Ind.—Dunn v Crocker, 22 Ind. 324
Ind T.—Handley v Anderson, 82 S.W 716, 5 Ind T 186.
6 C J p 104 note 98.

83. Lehman v. Lowman, 8 S W. 187, 50 Ark 444—6 C J. p 104 note 99

84. Butler v. Nail, (Tex Civ App.) 36 S W (2d) 307, affirmed Nail v Compton, (Com App.) 55 S W.(2d) 1028—6 C J. p 104 note 4.

85. Foulks v Falls, 91 Ind. 315.

86. Ky.—Pool v. Webster, 3 Metc 278
Va.—Mantz v Hendley, 2 Hen. & M (12 Va.) 303.

Affidavit by agent allowed

Where it was required by statute that "complainant or complainants, or some one of them," should make the necessary oath in a proceeding for an attachment, it was held that such statute would not be construed so as to exclude an affidavit by an agent of the parties, especially in view of the general statutory declaration that the "attachment law . . shall not be rigidly construed" —Flake v. Day, 22 Ala 132

87. Moore v. Gordon, (La App.) 153 So 485—6 C J. p 104 note 4 [1], p 105 note 7.

Statute not changing rule

In Louisiana, the requirement that an attachment shall issue only on the oath of the petitioner himself, unless he is absent, is not repealed by a provision in the Pleading and Practice Act to the effect that pleadings may be verified by the attorney "in all cases" and hence an affidavit may not be sworn to by his attorney where plaintiff himself is in the parish.—Bass v Baskowitz, 129 So. 201, 170 La. 779.

88. Schneider v. Vercker, 11 La Ann 274

89. Harbour-Pitt Shoe Co. v Dixon, 60 S W 186, 22 Ky L 1169.

90. Butler v. Nail, (Tex Civ App.) 36 S W (2d) 307, affirmed Nail v. Compton, (Com App.) 55 S W (2d) 1028

91. U S.—Birch v. Butler, (C C D C.) 3 F Cas No 1,425, 1 Cranch C C 319.
N Y.—Acker v. Jackson, 3 How Pr (N. S.) 160.
6 C J p 105 note 8.

92. U S.—Johnson v. Johnson, (C C. Ky.) 31 F 700
La.—Grove v Harvey, 12 Rob. 221.

93. Harbour-Pitt Shoe Co v. Dixon, 60 S W. 186, 22 Ky L. 1169—6 C.J. p 107 note 20

94. Campbell v Brady, 11 S W.(2d) 687, 158 Tenn 98—6 C J. p 108 note 21

Clerk of court

(1) In Georgia, a clerk of the superior court, although having power to administer oaths generally, is not permitted to take an affidavit in attachment.—Falligant v Blitch, 91 S. E 1057, 19 Ga App 675—6 C.J. p 107 note 20 [c]

(2) The clerk, however, may veri-

Where it appears that the affidavit was made in a county where the officer had jurisdiction to take oaths, it is sufficient, even though the caption states that it was made in another county.[95]

In the absence of a statute requiring it, the affidavit need not necessarily be taken before the officer issuing the writ.[96]

Under a statute providing that the officer before whom depositions are taken must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding, an affidavit in attachment cannot be made before a notary public who is the attorney for one of the parties in the action,[97] and the fact that on objection another attorney is substituted for him to represent plaintiff in the proceedings does not validate the affidavit.[98] Under such a statute, however, a clerk of such attorney, not otherwise interested, is not disqualified.[99] Where there is no statute disqualifying the attorney of an interested party from taking the affidavit in an attachment proceeding, although it may be improper for the attorney who is a notary to swear his client to such affidavit,[1] it is, nevertheless, not a nullity.[2]

De facto officer. An oath administered by a notary who has failed to comply with all the statutory requirements authorizing him to administer oaths is good against collateral attack, since it is the act of a de facto officer.[3]

Officers outside of jurisdiction. Unless the officer who may take the affidavit is expressly designated, and where the simple administration of an oath is all that is required, affidavits taken before nonresident commissioners of the state, or officers in other jurisdictions having general authority to administer oaths, will be sufficient.[4]

§ 108. Time and Place of Making

The affidavit on which the attachment is based must, ordinarily, be made at the time of, or prior to, the issuance of the writ.

The statutes generally require that the affidavit setting forth the facts and the grounds on which the attachment is sought shall be made prior to, or contemporaneously with, the issuance of the writ, and under such statutes an affidavit made subsequently to the issuance of the writ is ineffective.[5] A statute, however, requiring that, before writs of attachment are issued, plaintiff shall make an affidavit to be indorsed thereon or annexed thereto that he has a just claim against defendant, has been held to be intended to afford defendant some measure of protection from having his property encumbered at the instance of plaintiff whose claim may be groundless; and the purpose of the statute is fulfilled if the writ, when it is delivered to the officer for service, has indorsed thereon or annexed thereto the required affidavit, even though the date of the affidavit be subsequent to the date of the writ.[6] Also, under statutes providing in effect that, when any suit is instituted, plaintiff may forthwith sue out an attachment against the estate of a nonresident, it is held that the affidavit may

fy an amendment to defective grounds of attachment where the original affidavit has been verified and the writ issued before a proper officer—Hensley v Minehan, 114 S.E. 647, 29 Ga.App. 251.

(3) Qualification of clerk to administer oath in other jurisdictions see 6 C.J. p. 107 note 20 [d]–[g], [i], [j].

Commercial notary

In Georgia, under the general law attachments issued on affidavits administered by commercial notaries are void. Under L.(1913) p. 145 §§ 27, 28, creating the municipal court of Atlanta, an exception to the general law is created, and under this statute commercial notaries are qualified to administer the oath of attachment affidavits, where the writ issues from that court. This statute applies also to attachments issued from the municipal court returnable to the superior court—E. J. Brach & Sons v. Oglesby Grocery Co., 127 S.E. 157, 33 Ga.App. 481.

Notary

Under a statute providing that the attachment affidavit should be made before a judge, clerk, or justice of the peace, a notary does not have power to administer the oath—Campbell v. Brady, 11 S.W.(2d) 687, 158 Tenn. 98.

95. First Nat. Bank of Appleton City v. Griffith, 182 S.W. 805, 192 Mo.App. 443.

96. Ala.—Wright v. Smith, 66 Ala. 545.
Ky.—Harbour-Pitt Shoe Co. v. Dixon, 60 S.W. 186, 22 Ky.L. 1169.

97. Peoples Credit Clothing Store v. Brunner, 30 Ohio N.P.(N.S.) 223—6 C.J. p. 108 note 22.

98. Joslin-Schmidt Co. v. Herrmann, 26 Ohio Cir.Ct.(N.S.) 348.

99. Paper Co. v. Min. Co., 15 Ohio Cir.Ct.(N.S.) 286.

1. Lundy v. Little, (Tex.Civ.App.) 237 S.W. 538—6 C.J. p. 108 note 22 [a].

2. Vreeland v. Pennsylvania Tanning Co., 141 N.Y.S. 1002, 180 App.Div. 405.

Attorney's fee

Where a note was placed in the hands of an attorney who was a duly qualified notary public, and the note provided for ten per cent attorney's fees to be paid by the debtor, it was held that the attorney was not interested in the results of the suit to such an extent as to be disqualified to swear plaintiff, or his agent, to an affidavit for a writ of attachment, since the taking of the affidavit was a purely ministerial act.—Walden v. Locke, (Tex.Civ.App.) 49 S.W.(2d) 832.

3. Schiff v. Leipziger Bank, 72 N.Y.S. 513, 65 App.Div. 33.

4. Rosen v. Levy, 148 So. 893, 109 Fla. 523—6 C.J. p. 108 note 23.

Certificate of authority

The authority of a notary public of a foreign state to take an affidavit in an attachment proceeding in such state may be shown by a certificate of the county clerk of such state—Rosen v. Levy, 148 So. 893, 109 Fla. 523—6 C.J. p. 108 note 23 [d].

5. Murphy, etc., Co. v. Zaspel, 81 P. 301, 11 Idaho 145—6 C.J. p. 108 note 24.

6. Bradford Estate Co. v. Brown, 157 A. 874, 52 R.I. 103.

be made either before or after the filing of the bill,[7] before abatement of the suit by return of the officer,[8] or before rights have accrued in favor of third person.[9]

Where the acts in substance amount to a single transaction, it has been held that the fact that the affidavit is executed before the complaint is filed does not render the attachment void.[10]

§ 109. Operation and Effect of Affidavit in General

An affidavit in conformance to the requirements of the statute serves as the basis for the attachment.

An affidavit sufficient on its face has the effect of conferring jurisdiction on the court to issue a writ of attachment.[11]

Where the facts justifying an attachment are properly stated in the affidavit, it will operate as the basis for an attachment, even though the facts stated are not true, since the validity of an attachment does not depend on the truth of the facts stated in the affidavit, but on the fact that they are stated in compliance with the statute,[13] and that they are stated to be true.[13] Accordingly, it has been held that the truth of the matters contained in the affidavit for a writ of attachment cannot be controverted by a motion for new trial,[14] nor can they be controverted for the purpose of abating the writ,[15] even though the allegations in the affidavit are false.[16]

It has been held, where plaintiff based his writ for an attachment on the nonresidence of defendant, that plaintiff is bound by such ground alleged in his affidavit.[17]

§ 110. Collateral Attack on Affidavit

An affidavit sufficient to give jurisdiction is not open to a collateral attack, but an affidavit insufficient to give the court jurisdiction over the res may be so attacked.

Where an affidavit is sufficient to give the court jurisdiction over the res, the fact that irregularities, informalities, or clerical errors appear therein will not subject the affidavit or attachment to attack in a collateral proceeding.[18] Where, however, the affidavit does not substantially conform to the essential statutory requirements, and is insufficient to confer jurisdiction over the res upon the court, it is open to attack in a collateral proceeding.[19] In accordance with these rules, an affidavit

7. Va.—O'Brien v. Stephens, 11 Gratt (52 Va.) 610.
W.Va.—Hall v. Hall, 12 W.Va. 1.
6 C.J. p. 108 note 25

8. Pulliam v. Aler, 15 Gratt (56 Va.) 54.

9. Cirode v. Buchanan, 22 Gratt (63 Va.) 205—6 C.J. p. 108 note 27.

10. Booth v. Heberlie, 2 P. (2d) 1108, 137 Or. 354

11. Mitchell v. Ada Inv. Co., 246 P. 10, 42 Idaho 421

Falsity of allegations not established

An attachment is valid, where the falsity of the allegations in the procuring affidavit, that the affidavit sought and the action prosecuted were not to hinder or defraud defendant's creditors, was not established by controverting affidavits.—Market Operating Corporation v. Crull, 5 P. (2d) 340, 165 Wash. 306.

12. Tsesmelis v. Sinton State Bank, (Tex.Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ.App.) 35 S.W.(2d) 451—Walden v. Locke, (Tex.Civ.App.) 49 S.W.(2d) 332—Green v. Hoppe, (Tex.Civ.App.) 175 S.W. 1117.

In Arizona

(1) It is provided by statute that in the case of an attachment for a debt not due, the facts set forth in the affidavit for attachment may be traversed by defendant.—O'Malley Lumber Co. v. Martin, 43 P.(2d) 200, 203

(2) Since no provision is made allowing a traverse in the case of a debt due, no traverse of an affidavit may be made when the debt is due.—Olsen v. Mading, 45 P.(2d) 23—O'Malley Lumber Co. v. Martin, supra.

(3) The reason given for this distinction is that "when the debt is already due the case can and presumably will be promptly determined on its merits, and since the plaintiff in attachment must give bond to protect the defendant before the attachment is permitted, the probability is that no great and irremediable harm will be done to the latter by allowing the attachment to stand awaiting a determination of the case on its merits. On the other hand, the legislature may well have assumed that since, when the debt is not due, the case cannot proceed to final judgment until it becomes due, it might work a much greater injustice on a defendant to tie up his property for an indefinite period and so has permitted him the right to controvert the allegations in the affidavit, which alone authorize the attachment, and to try that issue out while awaiting the time when the main issue in the case can be determined."—O'Malley Lumber Co. v. Martin, supra.

13. Craig v. Taylor, (Tex.Civ.App.) 46 S.W.(2d) 353.

14. Craig v. Taylor, supra.

15. Tsesmelis v. Sinton State Bank, (Tex.Civ.App.) 35 S.W.(2d) 451, affirmed (Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319

16. Paxton v. Trabue, (Tex.Civ.App.) 216 S.W. 393.

17. Palmer v. Leivy, (Mo.App.) 205 S.W. 214

18. Ill.—Hogue v. Corbit, 41 N.E. 219, 156 Ill. 540, 47 Am.S.R. 232
Ohio.—Pennsylvania R. Co. v. Bell, 153 N.E. 293, 22 Ohio App. 67.
Tex.—Lorenz v. Mingus State Bank, (Civ.App.) 60 S.W.(2d) 463.
6 C.J. p. 153 note 99
Who may raise objections to defects in affidavit see infra § 141 d (1).

Omission to state that claim is just

A sale of land in attachment proceedings based on an affidavit which describes the debt and demand, but which fails to state that the claim is a "just" one, cannot be collaterally attacked where plaintiff annexed to his declaration an itemized account, sworn to as "true, just, and correct."—McElwee v. Steelman, (Tenn.Ch.App.) 38 S.W. 275.

19. Duxbury v. Dahle, 81 N.W. 198, 78 Minn. 427, 79 Am.S.R. 408.

Right to make collateral attack not waived

A jurisdictional defect in an affidavit to procure an attachment is not waived so as to preclude a collateral attack, by the failure of defendant to take an objection to the affidavit on that ground.—Murray v. Hankin, 30 Hun (N.Y.) 37, 3 N.Y.Civ.Proc. 342, 65 How.Pr. 511.

for attachment, which is good on its face, cannot be collaterally attacked,[20] except for fraud or collusion.[21] Accordingly, it has been held that an affidavit for attachment cannot be collaterally attacked because the affidavit lacks a venue,[22] or because it does not state the nature of the indebtedness;[23] but an affidavit which is defective because it omits to state the nature or cause of action, as required by statute, is substantially defective, and is subject to collateral attack.[24]

The authority of an agent to sign an affidavit to procure an attachment cannot be collaterally attacked after judgment.[25]

§ 111. Form and Requisites in General

The affidavit or application in an attachment proceeding must conform to the requirements of the statute

An affidavit for an attachment must be made in compliance with the forms and requisites prescribed by statute,[26] and the matters required by statute to be in the affidavit must substantially appear therein with the required particularity, or the court acquires no jurisdiction to issue the writ.[27] An affidavit, however, is sufficient if on its face it complies with the statutory requirements,[28] and if the facts and circumstances stated in the affidavit have a legal tendency to make out a good reason for issuing an attachment and fairly call on the judge or officer to whom it is presented to exercise his judgment on the weight of the evidence, the proceeding is not void for lack of jurisdiction, although the officer may have erred in his estimate as to the weight of the evidence.[29]

A statute providing that an attachment shall not be quashed or dismissed because of formal defects does not destroy other mandatory procedural requirements of the statute, and, accordingly, a failure to make a necessary person a party to an attachment petition will invalidate an attachment.[30]

Except where the affidavit stands as a pleading,[31] it is not to be construed by the rules applicable to pleadings, nor is the same particularity of statement required.[32] The affidavit should, however, be reasonably specific,[33] as it is intended to be a safeguard against abuse of the right of attachment and a protection to the debtor against the wrongful employment of that remedy,[34] and it should be so direct and unequivocal that perjury can be assigned for swearing to it falsely.[35]

Only the facts specified in the statute need be set forth,[36] and hence an affidavit conforming to the provisions of the statute describing what it shall state need not show the existence of conditions required by other provisions.[37]

An affidavit for an ancillary attachment must sufficiently refer to the suit in aid of which it is brought.[38]

Necessity for writing. Where the statute only requires that plaintiff take an oath, the oath may be taken orally before the proper officer, and a writing is not necessary.[39] Where, however, an affi-

20. Barth v. Burnham, 81 N.W 809, 105 Wis 548—6 C J. p 160 note 34

21. Barth v. Burnham, supra—6 C J. p 160 note 35.

22. Mo—Avery v. Good, 21 S W. 815, 114 Mo. 290
Neb.—Crowell v. Johnson, 2 Neb 146

23. Hogue v Corbit, 41 N.E 219, 156 Ill. 540, 47 Am S R. 232

24. Sullivan v. Fugate, 1 Heisk. (Tenn) 30.

25. Augusta Bank v. Jaudon, 9 La Ann. 8.

26. Ky.—Smith v. Dungey, 199 S W 777, 178 Ky. 702.
Md—Hedrick v. Markham, 103 A. 98, 132 Md 160
Mo—First Nat. Bank of Appleton City v. Griffith, 182 S W. 805, 192 Mo App 443
Mont—Continental Oil Co v Jameson, 164 P 727, 53 Mont 466.
Ohio—Miller v Veldhuyzen, Van Zanten & Zonen, 18 Ohio N P (N S) 546—Constable v White, 1 Handy 44, 12 Ohio Dec (Reprint) 18
Pa—Mindlin v Saxony Spinning Co., 104 A. 598, 261 Pa 354.
Forms of affidavits in whole or in part—Robinson v. Mellon, 126 A 863, 2 N.J Misc. 1184—6 C J. p 108 note 28 [a]

27. Pa—Kahn v. Bodenmann Manufacturing Co, 26 Pa Dist 723
Tenn—New York Casualty Co. v. Lawson, 24 S W.(2d) 881, 160 Tenn 329
6 C J p 109 note 29.

28. Cal—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal 492
Ohio—Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E 755, 38 Ohio App. 151.

29. Schoonmaker v. Spencer, 54 N Y. 366—6 C J p 109 note 31.

30. Fauquier Nat Bank v. Hazelwood Savings & Trust Co, (Va) 182 S E 568—Fauquier Nat. Bank v. Hazelwood Savings & Trust Co, (Va) 183 S E 566.

31. Goss v. Boulder County, 4 Colo 468

32. Citizens' Bank v. Corkings, 72 N.W 99, 10 S D. 98, reversing 70 N W. 1059, 9 S D 614, 62 Am S R 891—6 C J. p 110 note 33.

Particularity required in statement of nature or cause of action or demand see infra § 121.

33. Goodman v Henry, 26 S E 528, 42 W Va 526, 35 L.R A. 847—6 C J. p 110 note 34.

34. R I—Bradford Estate Co. v. Brown, 157 A 874, 52 R I 103
W Va—W. T Rawleigh Co v McMillan, 157 S E. 87, 110 W.Va 148.
6 C J. p 110 note 35.

35. Goodyear Rubber Co. v Knapp, 20 N W. 651, 61 Wis 103—6 C J p 110 note 36.

36. Ross v. Gold Ridge Min. Co, 95 P 831, 14 Idaho 687—6 C J. p 110 note 37.

37. N J.—Shadduck v. Marsh, 21 N. J Law 434
N C—Branch v. Frank, 81 N.C. 180
6 C J. p 110 note 38.

38. New York Casualty Co. v. Lawson, 24 S W.(2d) 881, 160 Tenn 329.

39. Goss v. Gowing, 39 S C L. 477—McKenzie v. Buckan, 10 S C L. 205—6 C J. p 110 note 42.

davit is required by the statute, a written affidavit is necessary [40]

Rules of bail affidavits applicable. Affidavits in attachment proceedings are sometimes placed on the same footing as affidavits submitted in an order for bail, and are consequently regarded as being subject to the same rules.[41]

Surplusage in the affidavit will not vitiate it,[42] unless it substantially affects the conformity of the affidavit to the statutory requirements [43]

The formal requisites of an affidavit for attachment are the title, venue, signature, jurat, and authentication [44]

§ 112. Mode of Allegation

An affidavit for attachment must properly allege the facts prescribed by the statute.

To entitle plaintiff to an attachment the affidavit or affidavits presented or filed must allege all the material facts[45] and must contain any special allegation,[46] prescribed by statute, and such facts must be shown by legal evidence.[47] According to some authority, where the statute requires proof to be made, in an affidavit for attachment, of the existence of certain facts, it means competent evidence, which would be admissible in the trial of the case.[48] According to other authority, however, the court will not refuse an attachment merely because some of the evidence contained in the affidavits on which the attachment is sought might be excluded, if objected to on the trial, unless something further is shown [49]

The affidavit for attachment must be clear and explicit on all the material matters,[50] and it has been held that an affidavit practically stating the ultimate facts of the complaint without stating the evidentiary facts is insufficient.[51] Where the affidavit for attachment alleges merely a legal conclusion,[52] or supports the allegation by hearsay testimony,[53] and fails properly to set out the evidentiary facts, the affidavit is insufficient.

Letter in foreign language. Under a statute providing that affidavits and other papers must be in the English language, an affidavit for attachment which bases plaintiff's right to recovery on an untranslated letter in the French language is insufficient.[54]

§ 113. —— Statutory Language

In the absence of a statute prescribing the form of the affidavit, it need not be made in the exact statutory language, although, if the language used in the statute is sufficient to allege the necessary averments, it is sufficient if it does so.

Unless the statute requires the affidavit to be

40. Windley v. Bradway, 77 N C 333.

41. N J —Rauschbach v. Duval Food Products Co, 168 A. 591, 11 N J Misc 900.
Pa —Sperry v. Ollie, 32 Pa Co 71.

42. Garbett v. Mountford, (N J.) 54 A. 872—6 C J. p 110 note 39.

43. Ohio —Emmitt v. Yeigh, 12 Ohio St 335
Wis —Streissguth v. Reigelman, 43 N.W 1116, 75 Wis. 212

44. Beebe v. Morrell, 42 N W 1119, 76 Mich 114, 15 Am S R 288

45. Ill —Rabbitt v Frank C Weber & Co, 130 N E 787, 297 Ill. 491
N J —James Mitchell, Inc v Kreuger's Unknown Executors, 163 A. 10, 10 N J Misc 1176—C Cedar Cove v. Staub, 158 A. 97, 10 N J Misc. 120
6 C J. p 109 note 29
"In a foreign attachment the affidavit must set out a good cause of action and such facts as give the court jurisdiction, and must not be ambiguous nor depend on conjecture or inference"—Mindlin v Saxony Spinning Co, 104 A 593, 261 Pa 354.
Rights of other creditors affected
The attaching party should show he is fairly and strictly within his rights to be entitled to attachment, where there are other creditors who may be affected thereby—San Francisco Iron & Metal Co. v. Abraham, 296 P. 82, 211 Cal. 552

46. Dillon v Carlisle Garment Co, 5 Ohio App 347—6 C J. p 110 note 32
Negative exceptions
An affidavit for attachment which does not negative the exceptions found in the statute is clearly defective—Dillon v. Carlisle Garment Co, 5 Ohio App 347.

47. N J —James Mitchell, Inc. v Kreuger's Unknown Executors, 163 A. 10, 10 N J Misc 1176.
N Y —Willson v Lloyd, 205 N Y S 496, 210 App Div 210—Reinhardt v. Horace L Day Co., 213 N Y.S 130, 126 Misc 367
Ohio —Meade v Rice, 19 Ohio N P (N S) 173.
Pa —Mindlin v Saxony Spinning Co, 104 A 593, 261 Pa 354—Kahn v. Bodenmann Mfg Co., 26 Pa Dist 723.
W Va —W. T Rawleigh Co. v. McMillan, 157 S E 87, 110 W.Va 148

48. Jaudel v. Schoelzke, 112 A. 328, 95 N J.Law 171—Jones v. Ellis, 139 A. 419, 5 N J Misc. 1028

49. Salembier, Levin & Co v. North Adams Mfg Co, 178 N Y S 607

50. Sperry v. Ollie, 15 Pa Dist. 623 —Blair v. Osborn, 17 Pa Co. 545

51. Abdun-Nur v. Arbeed, 191 N.Y. S 38, 198 App Div 795.

52. Commercial Credit Co v Collier, 145 S E 330, 106 W.Va 252—6 C J. p 123 note 40 [j]
Offer and acceptance
A statement in an affidavit for a writ of attachment that an alleged agent of defendant, on direction of deponent, sent a telegram to defendant making an offer for land and advised that defendant, if he desired to accept the offer, wire his acceptance to deponent, was purely a conclusion as to what the telegram contained, and was incompetent as proof of a valid offer to purchase the premises, and would not support the awarding of a writ of attachment Likewise, a statement "that at 11:37 a m of the same day plaintiff received a telegram from said S accepting said offer," was only a conclusion of the affiant drawn from an assumption of facts, and, such facts not being set forth, the affidavit was insufficient to warrant the awarding of the writ—Jaudel v. Schoelzke, 112 A. 328, 95 N J Law 171.

53. James Mitchell, Inc, v. Kreuger's Unknown Executors, 163 A. 10, 10 N.J.Misc. 1176

54. Friedman v Prescetti, 192 N.Y. S. 55, 199 App Div. 385.

made by a specified formula no particular language is necessary,[55] and, as a rule, it is sufficient in this respect if the affidavit either follows or substantially follows, by equivalent words, the language of the statute respecting the nature of the action, the requirement as to the statement of plaintiff's claim, the grounds on which the attachment is sought, and the like.[56] Mere technical defects, verbal inaccuracies, and immaterial departures from the words of the statute may be disregarded if the material requirements of the act are fulfilled; but, where language other than that of the statute is used, it should be unequivocally identical in meaning with the language of the statute,[57] and the omission of any word which the statute makes essential is fatal.[58]

Where the statute specifies several allegations, some of which must be contained in an affidavit to support an attachment, and some of which are inconsistent, an affidavit incorporating all of such allegations is insufficient.[59]

If perjury cannot be assigned on the affidavit, it will not be sufficient even though it is in the exact language of the statute.[60]

§ 114. —— Affidavit on Knowledge

a. In general
b. Means of knowledge

a. In General

Under a statute so requiring, matters within the knowledge of affiant must be stated positively and on knowledge.

As a general rule, where the ground on which the attachment is sought is of such a character as to admit of definite statements respecting its existence, the allegations relative thereto in the affidavit or verified complaint must set out such facts and circumstances as may be necessary to establish the ground relied on, positively and unequivocally, on knowledge, and not simply on belief, or on information and belief,[61] but if sufficient is shown to authorize the issue of an attachment, other statements on information and belief may be disregarded as immaterial.[62] Accordingly, it has been held that the fact that defendant is a nonresident,[63] that defendant has not sufficient property in the state,[64] that the amount demanded is actually due,[65] that the debt sued on is due,[66] or that defendant debtor intends to abscond from the state with intent to defraud his creditors,[67] must be stated positively, and not on information and belief, as must also the facts in a tort action in which an attachment is sought.[68] Also, plaintiff is required to state positively and on knowledge the sum of money he is entitled to recover,[69] but in some jurisdictions this rule has been relaxed on behalf of attorneys and agents, so as to permit them to swear to the same on information and belief.[70]

The verification as to the truth of the complaint or affidavit should clearly relate to all the necessary and material matters contained therein; and,

55. Whitemore v. Wilson, 1 Tex Unrep Cas 213

56. Cal.—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal. 492.
Pa.—Green v. Haar, 17 Pa Dist. & Co 361—Lit v. Williams, 32 Pa Co 151
Tex.—Walden v. Locke, (Civ App.) 49 S W (2d) 332.
W Va.—Deming Nat Bank v. Baker, 98 S E 438, 83 W.Va 429
Wyo.—Wakefield & Co v. Bell, 294 P. 785, 42 Wyo 355
6 C.J p 110 note 45.

That claim is just

A statutory requirement that an affidavit for attachment shall show that plaintiff's claim "is just" is satisfied by an allegation in the language of the section that it "is just."—Millus v. Lowrey Bros, 164 P. 663, 63 Okl. 261, L R A 1918B 336.

57. Alaska.—Miller v. Alaska-Canadian Oil & Coal Co, 4 Alaska 439.
Ky.—Lincoln Bank & Trust Co v Arnold, 75 S.W.(2d) 751, 256 Ky. 80
N D.—Weil v. Quam, 131 N W. 244, 21 N D. 344.
6 C.J. p 111 note 46, p 112 note 47.

58. Clolinger v. Callahan, 263 S W. 700, 204 Ky. 33—6 C J. p 112 note 48.

59. Gilbert v. Hudgens, 22 P (2d) 858, 92 Colo. 571

60. Miller v. Munson, 34 Wis 579, 17 Am.R. 461

61. Ga.—Hensley v. Minehan, 114 S. E. 647, 29 Ga App 251.
Ky.—Colovas v. Allen Motor Co, 45 S W (2d) 809, 242 Ky. 93
N.Y.—Willson v Lloyd, 205 N.Y S. 496, 210 App Div 96.
6 C J p 114 note 60

62. Allen v. Meyer, 7 Daly (N Y) 229—Patterson v. Delaney, 14 N Y S 100, 20 N Y Civ Proc 427—Steele v. Raphael, 13 N.Y.S. 664—6 C.J p 114 note 61.

63. Idaho.—Heaton v. Panhandle Smelting Co, 179 P. 510, 32 Idaho 146
Pa.—American Fruit Growers, Inc v Pacific Electric Ry Co., 11 Pa. Dist & Co 291—Airston v. Bollinger, 7 Pa Dist & Co. 414.
W Va.—W T Rawleigh Co. v. McMillan, 157 S E. 87, 110 W.Va 148
6 C J. p 114 note 60 [c].

64. Colovas v. Allen Motor Co., 45 S W (2d) 809, 242 Ky 93

65. Ross v Steen, 20 Fla 443.

66. Galward v. Wheeler, 77 P 23, 10 Idaho 66.

67. Bixler v. McCormick, 6 Pa Dist. 566, 19 Pa.Co. 618—6 C J. p 114 note 60 [a].

68. McCrea v. Russell, 58 N.W. 1118, 100 Mich. 375

69. Crozer v Scott, 61 S W (2d) 896, 250 Ky. 48—Daffron v. Smock, 56 S W (2d) 712, 247 Ky 98—Kengreen Gas Utilities Corporation v. Crozer, 51 S W.(2d) 262, 244 Ky. 440

70. Friedman v. First Nat. Bank, 122 S E. 81, 31 Ga App. 742—Hensley v Minehan, 114 S E 647, 29 Ga. App 251—6 C J. p 128 note 67.

In Louisiana under the code of practice an agent is required to swear as to the amount of the claim set forth in the affidavit, from his own knowledge, and not from his mere belief as was formerly permissible—Hicks v. Duncan, 4 Mart.(N. S) 314.

accordingly, where it is clear that some matters are sworn to on knowledge, and other matters are sworn to on information and belief, and it is not clear whether necessary matters are sworn to on knowledge as required, the affidavit and verified complaint is insufficient.[71]

An affidavit which avers the facts as affiant's own personal knowledge does not prove such of the averments as relate to transactions with which affiant was not apparently connected.[72]

The knowledge required by law in affidavits on attachment is not necessarily based on the personal observation of affiant;[73] hence, if the instruments on which an attachment is based are in his possession, his assertion of knowledge of the facts which they evidence is not unfounded, but is such as is contemplated by the statute.[74]

Where the statements and allegations in a petition for an attachment are made positively, it has been held that it is sufficient, even though the pleader is acting on information and belief,[75] and where an attachment affidavit states that affiant believes the facts therein but swears to the affidavit as true, or where the affidavit states the facts directly and is sworn to on information and belief, the affidavit is sufficient.[76]

Actual knowledge of the facts set forth in the affidavit may sometimes be presumed, as where from the circumstances it appears that affiant has such knowledge, or the circumstances are such that knowledge can be inferred,[77] where the relation of affiant to the parties or to the transactions is such as to warrant an inference of personal knowledge,[78] or, in some states, in the absence of a statutory requirement that affiant shall state whether or not the averments of the affidavit are based on direct knowledge, or on information and belief.[79]

b. Means of Knowledge

Where the circumstances set forth in the affidavit do not necessarily show that affiant has a personal knowledge of the facts, generally, he should set forth his means of knowledge.

Where the nature of the case is not such as will necessarily import personal knowledge by affiant of the matters set forth in his affidavit for an attachment, according to some authority affiant must, if he assumes to speak of his own personal knowledge, disclose the means by which he acquired such knowledge,[80] but according to other authority, where affiant states matters on his own knowledge, he need not set forth the means by which it was acquired.[81]

Although an unqualified allegation of facts may give rise to an implication of personal knowledge[82] where affiant has the means of knowledge,[83] such a statement will not be sufficient, if it is apparent that affiant's relation to the parties or to the transaction is not such as to import personal knowledge or it appears affirmatively, or by fair inference, that the allegations therein could not have been and were not made on such knowledge.[84] Accordingly, where affiant sets forth no circumstances showing personal knowledge,[85] or where it is apparent from the affidavit that affiant is a stranger to the transaction whereof he speaks,[86] as where he is merely an assignee of the claim,[87] or a third person who is not necessarily familiar with the facts whereof he speaks,[88] and the means or source of affiant's

71. Heaton v. Panhandle Smelting Co, 179 P. 510, 32 Idaho 146

72. Tucker v. E L Goodsell Co, 43 N Y S 460, 14 App.Div. 89, 4 N Y Ann Cas 86.

73. Ladenburg v. Newfoundland Commercial Bank, 39 N Y S 119, 5 App Div 219—Foster v. Rogers, 64 N.Y S 652, 31 Misc. 14.

74. Ladenburg v. Newfoundland Commercial Bank, 39 N Y S 119, 5 App Div. 219—Foster v. Rogers, 64 N Y.S 652, 31 Misc. 14—6 C J p 113 note 53.

75. Lincoln Bank & Trust Co v. Arnold, 75 S W.(2d) 751, 256 Ky 80.

76. Lincoln Bank & Trust Co. v Arnold, supra—Colovas v. Allen Motor Co., 45 S.W.(2d) 309, 242 Ky 93.

77. Geduld v. Baltimore & O. R Co., 127 N.Y.S. 317, 70 Misc 495—Miller v. Jones, 152 N.Y S. 739—6 C J. p 113 notes 54, 57 [c].

Allegation of nonresidence

An allegation of nonresidence, when made by a principal in the transaction, and not by his assignee, is presumed to be made on knowledge, and is sufficient proof of the fact, although standing alone, to sustain an attachment.—Geduld v Baltimore, etc, R Co., 127 N Y S. 317, 70 Misc. 495—6 C J. p 113 note 57 [b]

78. Hanson v Marcus, 40 N Y S 951, 8 App Div. 318—6 C.J. p 113 note 55

79. Cal.—Simpson v. McCarty, 20 P. 406, 78 Cal. 175, 12 Am.S R 37
Mich.—Nicolls v. Lawrence, 30 Mich 395

80. Wallace v. Baring, 48 N Y S 692, 21 App Div 477—Shuler v. Birdsall, etc, Mfg Co, 45 N Y.S. 725, 17 App Div. 228—6 C J. p 112 note 50.

81. D C.—Matthai v. Conway, 2 App. D C 45.
Miss.—Jones v. Leake, 19 Miss. 591.

82. Foster v. Rogers, 64 N Y S 652, 31 Misc. 14—6 C.J p 113 note 57.

83. Taintor v. Charles Beseler Co, 68 N Y S 980, 33 Misc 720, affirmed 71 N Y S. 1149, 62 App Div. 617—Globe Yarn Mills v. Bilbrough, 21 N Y.S 2, 2 Misc 100.

84. Godwin v. Richardson, 117 S E 202, 128 S C. 494—6 C J. p 113 note 59

85. James v Signell, 69 N Y S. 680, 60 App Div 75, 32 N Y Civ.Proc 38—Hoorman v Climax Cycle Co, 41 N Y S 710, 9 App Div 579, affirming 40 N Y S 1067, 17 Misc. 734, 26 N.Y Civ Proc. 25, 3 N.Y.Ann.Cas. 201.

86. Finchley, Inc v. Cooper & Co., 190 N.Y S. 414, 198 App Div. 369—6 C J p 113 note 50 [b].

87. Gedult v. Baltimore & O. R Co, 127 N.Y S. 317, 70 Misc. 495

88. Finchley, Inc v. Cooper & Co, 190 N.Y.S. 414, 198 App Div 369.

knowledge is not disclosed, the affidavit is insufficient; and this is true, notwithstanding such statements are made positively,[89] or apparently on the personal knowledge of affiant.[90]

Where the affidavit is made by an individual plaintiff or by an officer of a corporation on personal knowledge, and the affidavit indicates that affiant is necessarily familiar with the facts of his own knowledge, he need not give the sources of his information.[91]

§ 115. —— Affidavit on Information and Belief

a. In general
b. Source of information and ground of belief
c. Excusing nonproduction of best evidence

a. In General

Where the circumstances are such as not to permit actual knowledge, or where the statute does not require that affiant swear that the facts are to his knowledge, the affidavit may be on information and belief.

Where the circumstances are such that it is not practicable to obtain an affidavit based on positive knowledge, or where the statute does not require such an affidavit, attachment may be had on an affidavit based on information and belief.[92]

Where the statute prescribes the form in which the belief of affiant may be stated, there must be a substantial compliance with such form, or the affidavit will be insufficient.[93] Accordingly, where the statute requires that affiant state that he believes the grounds for an attachment exist, a statement that affiant is informed that such grounds exist is insufficient.[94]

The belief of affiant must be based on credible grounds. Accordingly, a mere belief in the truth of the facts charged as the basis for an attachment is not sufficient, but such belief must be founded on stated facts and circumstances within the knowledge of the attaching party which are sufficient to induce such belief in the mind of a person of ordinary prudence, judgment, and foresight.[95] Similarly, the source of the information must be reliable, and must be supported by sufficient and competent evidence,[96] and where affiant obtained his information from a third person, it must appear that affiant's informer had knowledge of the facts which he communicated.[97]

Where the source of information is an affidavit made in a legal proceeding, it has been held not to be necessary that an affidavit on information and belief should state that affiant believes the information.[98]

An agent or attorney is sometimes permitted to swear positively to the indebtedness without disclosing a knowledge of the facts on which he bases his allegations,[99] but, where the affidavit by an agent or attorney, after positively alleging the amount of an indebtedness, proceeds to disclose the source of such information, and it appears that such information is insufficient, the affidavit is deficient in this respect.[1]

89. Hoorman v Climax Cycle Co., 41 N.Y.S. 710, 9 App Div. 579, affirming 40 N.Y.S 1067, 17 Misc 734, 26 N.Y Civ Proc. 25, 3 N.Y Ann.Cas 201.

90. James v. Signell, 69 N.Y.S. 680, 60 App Div 75, 32 N.Y.Civ Proc 38

91. Finchley, Inc v Cooper & Co., 190 N.Y S 414, 198 App Div. 869.

92 Fla.—Rosen v. Levy, 148 So 393, 109 Fla 523
Mo.—Elliott v McCormick, 19 S.W (2d) 654, 323 Mo 263.
6 C J p 114 note 62

Grounds of the attachment may be shown to be on the belief of affiant, but the statement of facts relied on to show the existence of the grounds, on which the application for the attachment is based, must be positive and on the knowledge of affiant, and not on information.—Littlestown Sav Inst. v. Bream, 121 S.E 169, 95 W.Va. 351.

Statement on information not hearsay
Where plaintiff stated that he was informed that certain goods sold for a particular price, the statement that plaintiff was "informed" was held not to indicate that plaintiff made such statement on hearsay, but rather showed that plaintiff was informed on his subject.—L B. Foster Co v. Koppel Industrial Car & Equipment Co, 215 N.Y.S. 214, 127 Misc. 51

93. Delaplain v. Armstrong, 21 W. Va 211.—6 C J. p 115 note 63.

94. Littlestown Sav. Inst v Bream, 121 S E 169, 95 W Va 351.

95. Palo Sav Bank v Cameron, 168 N W. 769, 184 Iowa 183.—6 C J. p 116 note 69.

96 Hart v Page Mfg. Co, 175 N.Y. S 502, 187 App Div 296.

Facts in affidavit "ascertained"
Affidavit in attachment proceeding, containing evidence in support of allegations of complaint and stating that such facts were "ascertained" in the course of bankruptcy proceedings, will not sustain writ of attachment.—Hart v. Page Mfg Co., 175 N.Y S. 502, 187 App.Div. 296.

Sufficient to support judgment
The evidence required to support an attachment must be the same as that necessary to support a judgment or decision of the court on trial of an action, except that secondary or hearsay evidence is sometimes allowable; but such evidence will be allowed only when primary evidence cannot be secured, and the judge may determine whether the information has been competently derived and has such probative force as to justify issuance of warrant.—Hart v. Page Mfg Co., 175 N Y S. 502, 187 App Div 296.

97. Nevada Bank v. Cregan, 40 N Y. S. 1065, 17 Misc. 241.

98. Levy v. Goldstein, 43 N Y S. 774, 18 Misc 639.—6 C J. p 115 note 64

99. Barber v. Smith, 1 N W 992, 41 Mich 138.—6 C J p 128 note 68.

1. Trautmann v Schwalm, 50 N.W 99, 80 Wis 275.—Streissguth v Reigelman, 42 N.W 1116, 75 Wis. 212.—6 C.J. p 128 note 68 [b].

b. Source of Information and Ground of Belief

(1) In general

(2) As to intent

(1) In General

Where the affidavit is made on information and belief, affiant is generally required to state the source of, and grounds for, his information and belief.

In an affidavit on information and belief it must, as a general rule, appear that affiant's information was derived from a competent source, that is, the sources of information together with the grounds of the belief must be disclosed in such a manner as to enable the court to decide on the probable truth of the statements and the authenticity of the jurisdictional facts;[2] but the circumstances may excuse affiant from disclosing his source of information.[3] Affiant is required to state the source of his information, notwithstanding the facts in the affidavit are positively stated, where it is clear that such statements are not predicated on personal knowledge,[4] or where it is clear that affiant could not know such matters positively,[5] but where a fact, concerning which affiant could have positive knowledge, is directly and positively alleged, he is not required to give the source of his knowledge.[6]

The names of third persons from whom the alleged information is derived should be given,[7] or their affidavits should be presented;[8] and, where information is derived from books or papers they should be produced, if practicable, or, if not, copies or extracts should be furnished with appropriate reference thereto.[9]

An affidavit for attachment, made on information and belief derived from a written admission of defendant in affiant's possession, is sufficient,[10] as is also an affidavit based on information transmitted by telephone, where it appears that affiant recognized the voice of his informer, or otherwise knew his identity[11]

(2) As to Intent

Where an allegation is made in an affidavit for attachment concerning the existence or nature of defendant's intent, the facts on which such belief is based must be set forth in the affidavit.

Intent to depart, to remove, or to dispose of property, or to defraud creditors, is not usually the subject of direct or positive proof, but is to be inferred from the acts and conduct of the debtor, and in order to authorize such an inference there must be appropriate allegation of such facts, circumstances, acts, or declarations as will enable the court or officer to judge whether or not such an intent may be implied,[12] and, if the allegations

2. N Y—Willson v. Lloyd, 205 N Y S 499, 210 App Div 210.
S C—J H Witherspoon Co v. Bell, 128 S E 503, 132 S C. 303
S D—Black Hills Mercantile Co v Bender, 238 N W. 883, 59 S D 241, 86 A L R 585
6 C J. p 115 note 65

Letters from defendant insufficient

An averment in an affidavit stating, "The defendant is not a resident of this state, but resides in the state of Michigan at Provemont, Mich, as I am informed and verily believe. The sources of my information and the grounds of my belief are communications in writing had with the said defendant at Provemont, Mich, which communications, including letters received from the said defendant at Provemont, Mich, are in my possession" does not give a basis for finding that defendant is a resident of Provemont, Mich—Severn v. Otto, 161 N Y.S. 340

3. Hess v. Brower, 79 N C 428, 429
"It is not always convenient or prudent to state the source of one's information in the affidavit, yet it may be a sufficient ground of belief to authorise the Clerk to issue the warrant of attachment If the affiant in point of fact had received no such information and had no reasonable grounds for his belief we see no reason why he could not be indicted for perjury in this particular"—Hess v. Brower, supra

4. Stewart v Sandall, 171 N Y S 464, 184 App Div 446—Rome Trust Co v Cummings, 206 N.Y S 728, 123 Misc 884

5. Godwin v. Richardson, 117 S E 202, 123 S C 494

6. J. W. Copeland Co. v. Brown, 87 S E 1002, 103 S C 177

7. Acker v. Saynisch, 54 N Y S 937, 25 Misc. 415, affirmed 56 N Y S 1035, 26 Misc 836.

8. Sill Stove Works v. Scott, 71 N Y S 181, 62 App Div 566—Pride v Indianapolis, etc, R Co, 4 N Y S 15—Wallach v. Sippilli, 65 How Pr (N Y) 501—Matter of Bliss, 7 Hill (N.Y.) 187—6 C J. p 116 note 67.

9. Parker v Robert Wallace & Co of Belfast, 201 N Y S. 416, 206 App Div. 465—6 C J. p 116 note 68.

10. Howell v. Kingsbury, 15 Wis 272.

11. Murphy v. Jack, 36 N E. 882, 142 N.Y. 215, 40 Am.S R 590, reversing 27 N Y S 802, 76 Hun 356

12. S C—Godwin v. Richardson, 117 S.E. 202, 123 S C 494
S D—Black Hills Mercantile Co v Bender, 238 N.W. 883, 59 S.D 241, 86 A L R 585
6 C J p 117 note 70

Affidavits insufficient

(1) Where the ground on which attachment was originally issued was that defendant was about to assign, dispose of, and secrete its property to defraud creditors, and neither in the original affidavit, on which attachment was issued, nor in the supplemental affidavit, used on hearing, did plaintiff set out the grounds on which its belief was based, to enable the court to pass on their sufficiency, such affidavits were insufficient to sustain attachment—First Nat Bank v. Tarboro Cotton Factory, 104 S E. 129, 180 N C 128, denying rehearing 102 S E. 195, 179 N C 203.

(2) Affidavit in attachment, alleging "deponent is informed and believes [defendant] is about to remove himself and property [from the state] . . . with intent to defraud his creditors . . . that defendant has assigned and disposed of . . . his personal property with like intent, that deponent derived the information that the defendant is about to remove [from the state], and the information that he has sold and is about to sell certain of his property as aforesaid, from the defendant himself," is insufficient, where no facts are alleged to show the fraudulent intent, and no source of information is stated as to such intent—J H Witherspoon Co. v Bell, 128 S E. 503, 132 S.C. 303.

are as consistent with an honest purpose as with a dishonest intent, an attachment should not be granted on mere conjecture.[13]

c. Excusing Nonproduction of Best Evidence

Satisfactory reasons should be given for not producing the best evidence of grounds of information and belief, where affiant does not produce such evidence.

If the affidavit of the informant or other source of information is not produced, satisfactory reasons should be given for the failure so to do.[14] However, if the inability to procure the testimony of the informant,[15] or, although not so stated in terms, the impracticability of producing his affidavit[16] fairly appears from the moving papers, a sufficient excuse is presented; but mere inconvenience in procuring the affidavits of persons from whom the information was obtained,[17] or lack of time to procure such affidavits,[18] is not a sufficient excuse.

§ 116. —— Reference to Pleadings or Papers

Reference may sometimes properly be made in an affidavit for attachment to papers or pleadings already on file, which relate to the attachment proceeding.

Copies of, or extracts from, the pleadings, affidavits, or depositions on file may properly be considered where the applicant is unable to procure the affidavits of the persons who made the originals,[19] and in support of the affidavits presented on the application the court may consider affidavits made or filed by other parties at the same time in similar proceedings against the same debtor.[20] However, a mere reference to another affidavit on file without setting out extracts therefrom bearing on the facts relied on is insufficient,[21] as is also a reference to affidavits without annexing a copy thereof or stating them to be on file,[22] or a mere reference to, without a copy of, a general assignment and inventory made by the debtor which are filed in another court.[23]

Where permissible under the statute, where the affidavit refers to the complaint, it may properly be deemed a part of the affidavit, and it will be sufficient to show the ground on which the action is brought, or to show the grounds of attachment,[24] particularly where the complaint is also verified.[25] On the other hand, where the affidavit makes no reference to the complaint or petition, it is no part of the affidavit,[26] and where the statute requires the affidavit to show that a cause of action exists against defendant, specifying the amount of the claim and the grounds thereof, a failure to show such matters in the affidavit is not supplied by reference to an annexed complaint which is not duly verified.[27] If the affidavit lacks precision in stating plaintiff's demand, it will be sufficient if the allegations of the complaint in this connection, which are sufficiently made, are incorporated in or annexed to the affidavit or are referred to expressly or by fair implication.[28]

An affidavit to the effect that the allegations in the petition which is defective are true cannot be aided by a subsequent amendment to the petition.[29]

§ 117. Specific Requisites, Statements, and Allegations

a. In general
b. Affidavits made by agents

a. In General

The affidavit must contain all the statements and allegations which are essential under the statute.

Since attachment is a statutory remedy, in order to invoke jurisdiction to issue the writ, the affidavit, if required by statute, must contain all the essential allegations, and must show all matters required by the statute, the specific requisites, statements, and allegations required will be discussed hereinafter in this section and the sections immediately following.

13. Bernhard v. Cohen, 58 N.Y.S. 363, 27 Misc. 794.

14. Pedro y Seltzer, Inc., v. Brivio, 180 N.Y.S. 706, 191 App.Div. 110—6 C.J. p. 117 note 72.

15. Buell v. Van Camp, 8 N.Y.S. 207, 3 Silv.Sup. 593.

16. Levy v. Goldstein, 43 N.Y.S. 774, 18 Misc. 639.

17. Brewster v. Van Camp, 8 N.Y.S. 588, 55 Hun 603.

18. Thomas v. Dickerson, 11 N.Y.S. 436.

19. James v. Richardson, 39 Hun (N.Y.) 399—Whitney v. Hirsch, 39 Hun (N.Y.) 325—Bennett v. Edwards, 27 Hun (N.Y.) 352—Moore v. Richardson, 3 How.Pr.N.S. (N.Y.) 238—6 C.J. p. 117 note 76.

20. Hallock v. Van Camp, 8 N.Y.S. 588, 55 Hun 1—Levy v. Goldstein, 43 N.Y.S. 774, 18 Misc. 639—Colver v. Van Valen, 6 How.Pr.(N.Y.) 102.

21. Wilmerding v. Cunningham, 65 How.Pr.(N.Y.) 344—6 C.J. p. 118 note 78.

22. Fitzgerald v. Belden, 49 How.Pr.(N.Y.) 225.

23. Smith v. Arnold, 33 Hun (N.Y.) 484, appeal dismissed 100 N.Y. 640.

24. N. V. Tonerde Maatschappij Voor Montaan-Chemie v. Great Lakes Coal & Coke Co., 276 N.Y.S. 895, 243 App.Div. 640—6 C.J. p. 118 notes 82, 83, p. 154 note 26.

Aider by petition see infra § 141 b (2).

25. Woodworth v. Skeen, 150 S.E. 764, 153 S.C. 362.

26. Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E. 755, 38 Ohio App. 151.

27. Josey v. Reynolds, 150 S.E. 67, 152 S.C. 339—6 C.J. p. 118 notes 82 [c], 87 [b], p. 154 note 25 [b].

28. Simon v. Temple Lumber Co., (Tex.Civ.App.) 146 S.W. 592—6 C.J. p. 118 note 84.

29. Avery v. Zander, 13 S.W. 971, 77 Tex. 207—Marx v. Abramson, 53 Tex. 264.

The affidavits of different creditors filing under an attachment proceeding need not be based on the same cause of attachment.[30]

Indebtedness or cause of action arising within state. If the attachment cannot issue unless the cause of action arose within the state,[31] or the county,[32] the omission of an allegation to that effect is fatal. Where, to authorize the attachment, it should appear that defendant was indebted within the state, that fact may be shown by alleging that the contract was made within the state or that the creditors were residents thereof.[33]

b. Affidavits Made by Agents

Although, in the absence of a statute so requiring, where the affidavit is made by a person other than plaintiff, his authority to make the affidavit, that it is made on behalf of plaintiff, and his reason for making the affidavit need not be shown, under a statute requiring the affidavit to contain such matters, they are essential.

Where required by statute, when a person other than plaintiff makes the affidavit, his authority to make it should appear expressly,[34] or by recitals showing the capacity in which affiant acts.[35] On the other hand, while parties suing out an attachment writ may not do less, but need not do more, than the statute requires, and, in the absence of any implied necessity from the statute that affiant's authority should appear, a statement thereof is unnecessary.[36]

Where the statute requires that the affidavit be made by plaintiff, or by some one in his behalf, if the affidavit is not made by plaintiff, an averment that it is made on his behalf is essential,[37] and the fact that the affidavit was made on plaintiff's behalf should appear on the face of the affidavit.[38] In the absence of such a statutory requirement, however, the affidavit need not state that it is made on plaintiff's behalf.[39]

Although in the absence of a statute so requiring such a statement is not necessary,[40] under some statutes the reason why the affidavit is not made by plaintiff, if it is made by another, should be set forth in the affidavit.[41] Accordingly, where it is made by another by reason of plaintiff's absence, such absence must be shown.[42] Under a general statute providing that when an oath of a party is required, it may, in case of the absence of such party, be made by his agent or attorney, it has been held that an agent in making an attachment affidavit need not recite therein that plaintiff was absent from the jurisdiction, as such fact may be otherwise shown.[43]

§ 118. —— Venue

The affidavit should show the venue of the officer before whom it was taken.

For the purpose of showing that the oath was administered in the jurisdiction of the officer before whom the affidavit was taken, the venue or place of the taking should appear,[44] but it has been held that, if it appears that the oath was administered by an officer of a designated county, the absence of a formal statement of the venue is immaterial.[45] The fact that the venue is omitted

30. Ryan v. Burkam, 42 Ind. 507.

31. Allison v T. A Snider Preserve Co., 45 N Y S 923, 20 Misc 367—6 C J. p 145 note 15.

32. Parkinson v. Crawford, 13 Ohio N P.(N S) 73

33. People v St Nicholas Bank, 60 N Y S 719, 44 App Div 313—Matter of Fitch, 2 Wend (N Y) 298—6 C J p 145 note 16.

34. Nail v Compton, (Tex Com App) 55 S W (2d) 1028, affirming Butler v Nail, (Civ App) 36 S W (2d) 307—6 C J p 106 note 14.

35. Nail v Compton, (Tex Com App) 55 S W (2d) 1028, affirming Butler v Nail, (Civ.App.) 36 S W. (2d) 307—Spencer v Davis, (Tex Civ App) 298 S W. 443—6 C J. p 106 note 15

Agency sufficiently shown

An affidavit will be regarded as containing a sworn statement that affiant is the agent of the creditor therein named when the affidavit is made in the following language. "State of Georgia, Richmond County Personally appeared before me, the undersigned justice of the peace in and for said county, H C Bryson He is agent for Geo S. Lombard, who, being duly sworn, on oath says that A. F Green is justly indebted to Geo S Lombard"—Greene v Lombard, 126 S E 890, 33 Ga App 518

Designation sufficient

Where the word "attorney" follows the name of affiant in the attachment affidavit, the affidavit is sufficient, where the pleadings show affiant to be plaintiff's attorney at law or in fact—Harmon v. Wiggins, (Ga App) 172 S E 847.

36. Porter v. Duke, 270 P. 625, 34 Ariz. 217—6 C J p 106 note 16

37. Borland v. Kingsbury, 31 N W. 620, 65 Mich 59—6 C J p 107 note 17.

38. Maguire v. Bolen, 68 N W 408, 94 Wis. 48—6 C J. p 107 note 17 [a].

39. Ark—Mandel v. Peet, 13 Ark. 236.
Cal—Simpson v. McCarty, 20 P 406, 78 Cal. 175, 12 Am S R. 37.

40. Ariz—Porter v. Duke, 270 P 625, 34 Ariz 217
N C—T. C May Co. v Menzies Shoe Co, 119 S E 227, 186 N C. 144.
6 C.J. p 107 note 18 [a], [b].

41. N Y—Raymond v. Ganss, 13 N Y S 609—Gribbon v Ganss, 13 N. Y S 608
Ohio—Phelps v. Wetherby, 3 Ohio Dec (Reprint) 305, 4 Wkly L Gaz 385.

42. Ky—Pool v. Webster, 3 Metc 378
N J—Westcott v. Sharp, 13 A. 243, 50 N.J Law 392.

43. Moore v. Gordon, (La App) 153 So. 485

44. Mich—Beebe v Morrell, 42 N. W. 1119, 76 Mich 114, 15 Am S R. 288
Mo—Englehart-Davidson Mercantile Co v Burrell, 66 Mo App. 117
Neb—Rudolf v. McDonald, 6 Neb 163
6 C J. p 119 note 93

45. Kesler v. Lapham, 33 S E 289, 46 W Va 293.

from the affidavit will not render it void where the notary's seal is affixed, showing that the affidavit was taken within his jurisdiction [46]

In aid of the affidavit it will be presumed to have been sworn to in the county designated in the venue,[47] that the officer had jurisdiction to administer the oath within the county stated,[48] and that, although the county and state are not definitely set out, the oath was administered within the proper county.[49]

§ 119. —— Entitling

An affidavit for an attachment should show the title of the cause and specify the court wherein the action is pending, although a failure to so entitle the affidavit may not be fatal where these facts appear elsewhere.

The general rule is that the affidavit should contain in its caption the title of the cause and should designate the court where the action is pending.[50] An omission to entitle the affidavit is, however, of no importance, if the court in which the remedy is sought sufficiently appears elsewhere,[51] or the body of the affidavit sufficiently designates the parties.[52] Indeed, the want of the formality of a title is of no consequence where the affidavit is attached to the writ, since the title is for the purpose of identifying the suit in which the affidavit is designed to be used [53]

On the other hand, some courts take a stricter view on the necessity for entitling, and where it is impossible to separate the heading from the body of the affidavit, it has been held insufficient [54]

Under a statute providing that an affidavit, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding, an affidavit is sufficient, although not entitled at all, if it makes intelligent reference to the action.[55]

A mere clerical error in the name of the court is immaterial.[56]

Cause not commenced. An affidavit should not be entitled in a cause which is not pending at the time the affidavit is made, since no perjury can be assigned thereon [57]

§ 120. —— Identification and Description of Parties

a. In general
b. Plaintiff
c. Defendant

a. In General

The affidavit for attachment must generally show which of the parties is the plaintiff and which is the defendant.

The affidavit should show which of the parties named is plaintiff and which defendant;[58] but their identity or relation to each other may be sufficiently shown by a reference to the caption,[59] or by resort to the record or other papers.[60] The omission of affiant's name from the body of the affidavit has been held immaterial where he subscribed it [61]

b. Plaintiff

(1) In general
(2) Residence

(1) In General

The affidavit for attachment should identify the plaintiff.

The affidavit should identify plaintiff,[62] but if plaintiff is sufficiently identified from other papers

46. Englehart-Davidson Mercantile Co v. Burrell, 66 Mo App 117

47. Kesler v. Lapham, 33 S E 289, 46 W Va 293

48. Englehart-Davidson Mercantile Co. v. Burrell, 66 Mo App. 117

49. Snell v Eckerson, 81 Iowa 284.

50. Beebe v. Morrell, 42 N W. 1119, 76 Mich 114, 15 Am S R 288—6 C J p 119 note 98

Entitling defective

An entitling in an affidavit is defective where it describes an action as being of the October term, when in fact it is of the preceding April term, and as being sworn to in the June term—Quarles v. Robinson, 2 Pinn (Wis) 97, 1 Chandl 29

51. Burnham v Doolittle, 15 N.W 606, 14 Neb. 214—6 C J. p 119 note 99.

52. Ark—Cheadle v. Riddle, 6 Ark 480.

Ind—Fargo v. Cutshaw, 39 N E 532, 12 Ind App. 392

53. Beebe v. Morrell, 42 N W. 1119, 76 Mich 114, 15 Am S R 288

54. Rauschbach v Duval Food Products Co., 168 A. 591, 11 N.J Misc 900.

55. Union Bank & Trust Co v. Himmelbauer, 181 P 332, 56 Mont 82

56. Bernard v. McClanahan, 79 S E. 1059, 115 Va. 453.

Error not fatal

That an affidavit was written on a printed form containing the name "Corporation Court," instead of "Court of Law and Chancery," at the top of the paper did not invalidate the affidavit, where such mistake was not repeated elsewhere in the paper, and the clerk certified that the affidavit was filed in the court of law and chancery—Bernard v. McClanahan, 79 S E. 1059, 115 Va. 453.

57. Burleigh v. Sartain, 176 A 169, 114 N J Law 151—6 C J p 119 note 96

58. Burgess v. Stitt, 12 How Pr (N. Y) 401

59. Rubinsky v Ullman, 4 Pa Dist. 126—6 C J. p 119 note 3

60. Robinson v Hesser, 13 P 204, 4 N M. 144—6 C.J p 119 note 4

61. Rudolf v. McDonald, 6 Neb. 163

62. Burnside v. Davis, 31 N W. 619, 65 Mich. 74—6 C J. p 119 note 6.

Citizenship of plaintiff

(1) Where the fact that plaintiff was a citizen of the state was necessary to be shown to entitle him to an attachment, failure of the affidavit to contain a sufficient allegation of that fact has been held to render it defective.—Boarman v. Patterson, 1 Gill (Md) 372—Mandeville v. Jarrett, 6 Harr. & J.(Md.) 497—Shivers v.

in the action the fact that he is not named in the affidavit,[63] or that it contains no direct allegation that affiant is the plaintiff, or one of them,[64] is not a fatal defect.

(2) Residence

Under the prevailing statutes, the affidavit usually does not have to show the plaintiff's residence.

Where a nonresident as well as a resident plaintiff is entitled to sue out an attachment, it is not necessary that the affidavit should contain any averment as to the residence of plaintiff,[65] and even though the law allows only residents to obtain attachments, it has been considered not necessary that the residence of plaintiff should appear in the affidavit, but sufficient if that fact is shown in any part of the proceedings.[66] Where, however, an affidavit can be made by an agent only where plaintiff is absent from or resides out of the state, such nonresidence or absence must appear in an affidavit by an agent.[67]

c. Defendant

(1) In general
(2) Citizenship and residence
(3) Defendant an adult

(1) In General

The affidavit for attachment should identify the defendant.

The affidavit should identify or describe defendant,[68] but extreme particularity is not required,[69] and the fact that plaintiff's pleading varies from the affidavit in naming or describing the debtors is immaterial where it is apparent that the same parties are intended.[70] Where his name appears in the caption it is not necessary that the defendant should be named in the body of the affidavit.[71]

The fact that two of the persons named as defendants in the caption are not connected with the transaction out of which the claim arose does not furnish a ground for disturbing the attachment.[72]

(2) Citizenship and Residence

Where the statute so requires, the affidavit for attachment must allege the citizenship and residence of the defendant.

If the statute requires that the citizenship of defendant shall be alleged, the absence of such an averment is a fatal defect;[73] but if an allegation of defendant's residence is not a prescribed part of the affidavit, it is unnecessary,[74] even though the statute prescribes that a debtor must be sued in the county of his residence.[75] Where, however, defendant's nonresidence is a prerequisite to the issuance of a writ of attachment, such fact must sufficiently appear;[76] and where an attachment may issue for a debt not due only in the county where the debtor resides, last resided, or where his property may be found, the affidavit must state his residence, last residence, or the location of the property.[77] An affidavit for attachment which alleges that defendant is a nonresident need not, where the statute does not prescribe it, state the place of defendant's residence if such fact is known, or that the place of his residence is unknown, where such is the fact.[78]

Wilson, 5 Harr. & J (Md.) 130, 9 Am. D 497—6 C.J. p 120 note 9.

(2) This allegation seems no longer to be necessary in the jurisdictions in which it was formerly required—Birch v. Butler, (D.C.) 3 F.Cas.No 1,425, 1 Cranch C.C. 319—Hard v Stone, (D.C.) 11 F.Cas.No 6,046, 5 Cranch C.C. 503—Kurtz v Jones, (D.C.) 14 F.Cas.No 7,954, 2 Cranch C.C. 433—McCoy v Boyle, 10 Md. 391. 6 C.J. p 120 note 10.

63. Stringer v Dean, 27 N.W. 886, 61 Mich. 196—6 C.J. p 119 note 7

64. Tessier v. Englehart, 24 N.W. 734, 18 Neb. 167.

65. Ala.—Jackson v. Stanley, 2 Ala. 326
N.Y.—Hawkins v. Pakas, 57 N.Y.S. 317, 39 App.Div. 506.
6 C.J. p 120 note 11.

66. Peters v. Bower, Minor (Ala.) 69, approved in Jackson v. Stanley, 2 Ala. 326.

67. Morrel v. Fearing, 20 N.J.Law 670.

68. Black v Scanlon, 48 Ga. 12—6 C.J. p 120 note 17.

One of several defendants

Where an affidavit of attachment, in an action against three defendants, stated that it was not sought to hinder, delay, or defraud any creditor or creditors of "said defendant," it was held to be irregular and defective—Peterson v. Beggs, 148 P. 541, 26 Cal.App. 760

69. Belcher-Stine Lumber Co v. Burns, 123 N.W. 1123, 159 Mich. 466—6 C.J. p 120 note 18.

Initials of defendant

(1) A designation of defendant in an affidavit for an attachment is sufficient even though he is sued by his initials instead of by his full christian and middle names, where it appears that defendant has been in the habit of using his initials in business transactions, and has been commonly designated by his initials, and was known by his initials to plaintiff in his dealings with him, and it was clearly apparent who was meant.—Kinsey Co v. Heimerdinger, 13 Ohio Cir.Ct.(N.S.) 195—Daniels v. Taylor, 13 Ohio Cir.Ct.(N.S.) 116.

(2) In the absence of statutory provision to the contrary, an affidavit in which an initial instead of the christian name of defendant is used, is insufficient—McGrew v. Steiner, 71 A. 1122, 77 N.J.Law 377

70. Clanton v. Laird, 20 Miss. 562—6 C.J. p 120 note 19

71. Boyd v Lippencott, 2 Pa.Co. 585, 44 Leg.Int. 46.

72. Cunningham v. Von Pustan, 9 N.Y.S. 255

73. Boarman v. Patterson, 1 Gill (Md.) 372.

74. Wray v. Gilmore, 1 Miles (Pa.) 75.

75. Ark.—Toby v. Bowen, 3 Ark. 352.
Tex.—Primrose v Roden, 14 Tex. 1
6 C.J. p 121 note 23.

76. Tintner v. Zuccare, 41 Pa.Co. 336.

77. Yale v McDaniel, 12 So. 556, 69 Miss. 337.

78. Glasgow v. Peyton, 159 P. 670, 22 N.M. 97.

(3) Defendant an Adult

The affidavit need not expressly state that the defendant is an adult.

Even though the statute in effect prohibits the issue of an attachment against the property of a minor, it seems that the affidavit need not specifically state that defendant is an adult;[79] but that it will be sufficient if that fact appears by implication,[80] and even where such an allegation was considered necessary, the court has permitted supplemental proof.[81]

§ 121. —— Nature or Cause of Action or Demand

The affidavit for attachment must set forth the nature or cause of action or demand with the particularity required by statute.

Where required by statute, the cause of action or nature of the claim should be definitely stated in the affidavit, for the reason, among others, that it may appear that the action is one of those specified as a case in which an attachment may be granted,[82] but in the absence of a statute requiring that the cause of action or nature of the claim be stated in the affidavit, a failure to make such a statement in the affidavit is not fatal.[83] While such facts should be alleged as will enable the court or officer to judge of the existence of a cause of action on which the issuance of an attachment will be warranted,[84] and, while ordinarily a statement

79. Hall v Anderson, 40 N Y S 354, 17 Misc 270—Wentzler v. Ross, 59 How Pr (N.Y.) 397.

80. Doctor v Schnepp, 7 N Y Civ. Proc 144, 2 How Pr (N S) 52—6 C J p 121 note 25

81. American Mills Co v. Schnitzer, 7 N Y.Civ Proc 150—6 C.J. p 121 note 26

82. U S—Stephenson v Kirtley, (W. Va.) 46 S Ct. 50, 269 U S 162, 70 L. Ed 213.
Ky—Lewis v Browning, 4 S W (2d) 734, 223 Ky 771
N Y.—Hart v Pege Mfg Co, 175 N. Y S 503, 187 App Div 296.
S C—Williams v. Carlson, 110 S E. 69, 118 S C. 46.
W Va—Littlestown Sav Inst. v. Bream, 121 S E 169, 95 W Va. 351.
See Lepman & Heggie v. Interstate Produce Co, 205 Ill App. 270.
6 C.J p 121 note 38.

Civil action for recovery of money

Where a showing that a particular action was a civil action for the recovery of money was necessary, in order to entitle plaintiff to an attachment, and the affidavit stated that "plaintiff has commenced said action against said defendant for the recovery of $322 00, that the defendant is indebted to said plaintiff in said sum, that said sum is just and due and is wholly unpaid," it was held that such affidavit sufficiently showed that the nature of the action was a civil one, and that it was brought for the recovery of money—Millus v Lowrey Bros, 164 P 668, 63 Okl. 261, L R A 1918B 336

Reference to decree

Statements in an affidavit for attachment, referring to a decree as showing the amount due, did not warrant a presumption that plaintiff had a personal decree against defendant on which execution could issue and that therefore attachment would not lie—Deitz v. Whyte, 109 S E 212, 131 Va. 19

Statements of nature of claim held sufficient.—Cartmell v The Rudolph Wurlitzer Co, 5 Ohio N P (N S) 604—Preston County Power Co v. Franklin Coal & Coke Co, 114 S E 873, 92 W Va 308—Norman v. Willis, 106 S E 252, 88 W.Va. 76.

Statement of nature of claim insufficient.—Horatter v. Rowlesburg Lumber Co, 130 S E. 662, 100 W Va. 449

83. Robinson v Mellon, 126 A 863, 2 N J Misc 1184—6 C.J. p 121 note 37

Liquidated damages

In the absence of a showing that the damages charged to be due in the affidavit are unliquidated, the affidavit is sufficient in this respect.—Robinson v. Mellon, 126 A. 863, 2 N J Misc 1184

Statement of statutory ground

Where the statute does not require the affidavit to state a cause of action, a statement of one or more of the grounds of attachment enumerated in the statute is sufficient—Hemmi v. Grover, 120 N W. 561, 18 N D. 578.

84. N Y—Miller Bros. Const. Co. v. Thew Shovel Co, 288 N Y S 944—Sorensen v S A. Companhia General Commercial De Santos, Santos, Brazil, 180 N Y S 201
W.Va—Deming Nat Bank v. Baker, 98 S E 438, 83 W Va. 429.
6 C J p 123 note 40.

Action on note

(1) An attachment affidavit in a suit against an indorser of a note, must allege presentation at time and place appointed and within the proper hours, demand of payment, and due notice of indorser, and if payable at a bank the affidavit should, pursuant to Uniform Negotiable Instruments Law, allege presentation at the bank during business hours before close of bank in the event contemplated by statute, it not being sufficient merely to allege due protest—Deming Nat Bank v. Baker, 98 S.E. 438, 83 W.Va. 429.

(2) Other requisites of allegation on note see 6 C J. p 121 note 38 [f].

Action upon guaranty

Where an action against a nonresident upon an alleged written guaranty was begun by attachment, and the affidavit did not set forth the evidentiary facts showing defendant's liability upon the guaranty, the affidavit was insufficient—Friedman v. Prescetti, 192 N.Y.S. 55, 199 App.Div. 385

Conversion

As regards the issuance of a warrant of attachment against a foreign corporation to which two shovel cranes had been shipped, in a suit for conversion of the cranes, affidavits in support of attachment which fail to set forth any evidence supporting the allegations of the complaint charging conversion of cranes are fatally defective—Miller Bros Const Co v. Thew Shovel Co, 288 N Y S. 944.

Employment

(1) Where plaintiff brought action to recover a fee for services in adjusting an income tax claim against defendants' deceased ancestor, but failed to allege that plaintiff was employed by defendants to perform services for them or for decedent's estate, plaintiff did not make out a cause of action and was not entitled to an attachment—Price v. Foster, 161 So 161, 182 La 79

(2) Also, an attorney suing for the reasonable value of services must set forth in his affidavit on which attachment is based the facts showing employment, services, and value thereof, and evidence proving damages—Shapiro v Loft, Inc., 254 N.Y. S. 197, 142 Misc 144.

Facts not showing agency

An affidavit for a writ of attachment setting forth that a certain person "was authorized" by defendant to solicit offers for the sale of certain lands and premises was insufficient to prove the relation of principal and agent between such person

which would suffice in a pleading setting up the cause of action is sufficient,[85] extreme particularity in the statement of the existence and nature of plaintiff's cause of action is not required;[86] and generally it may be said that the requirement will be satisfied by any language from which conformity to the statute may be gathered.[87]

Under a statute requiring plaintiff in his affidavit to state the nature of his claim, the affidavit need not descend to details, but is sufficient if it shows a valid cause of action and defendant's liability thereon.[88] Under such statutes, or similar statutes having the effect of requiring plaintiff to set forth in his affidavit the essential evidentiary facts upon which he relies, it is sufficient if the affidavit states a prima facie case,[89] or facts from which the right to attachment may be inferred,[90] or contains evidence from which the court can determine that a necessary ultimate fact can be substantiated.[91]

Under statutes having the effect of requiring plaintiff to show a right to attachment in his affidavit, where an attachment is sought in a cause of action arising from contract, the affidavit should set forth facts showing its existence,[92] and defendant's liability on the contract,[93] that plaintiff duly performed,[94] or that he is willing to perform,[95] and that defendant failed to perform his part of the contract.[96] Where plaintiff must, in his attachment papers, show the evidentiary facts by which he seeks to establish the cause of action, if he relies upon a written contract, the writing should be a part of the attachment papers, a mere state-

and defendant without further explanation, although it would have been sufficient had affiant stated that he had obtained the information from defendant, nor did a statement that the alleged agent, on the direction of deponent, sent a telegram to defendant making an offer for the land and advised that defendant, if he desired to accept it, wire his acceptance to deponent, prove agency—Jaudel v. Schoelske, 112 A. 328, 95 N.J.Law 171.

85. Hale v. Grow, 106 S.E. 409, 88 W.Va. 173.

86. Ohio—Weirick v. Mansfield Lumber Co., 117 N.E. 362, 96 Ohio St. 336.
Pa.—Lett v. Wyland Co., 18 Pa.Co. 535.
6 C.J. p. 123 note 39.
"This statute must be applied to the affidavit in question not with the strictness required in a criminal proceeding nor with the particularity essential in a formal pleading. It is enough if the owner is substantially advised as to the matters set forth in said section providing for the affidavit."—Weirick v. Mansfield Lumber Co., 117 N.E. 362, 365, 96 Ohio St. 336.
Particularity required in affidavit generally see supra § 111.

Auction sale
An affidavit for an attachment need not allege all the facts with respect to how an auction sale was conducted, especially where it is not claimed it was not properly conducted.—Crook v. Lupton, 170 N.Y.S. 845, 182 App.Div. 858.

In West Virginia, however, under Code (1913) c. 106 § 1 (§ 4455) it is held that plaintiff in stating the nature of his claim should state it with as much particularity, though not in detail, as is required in the declaration or bill, so that it may thereby be made to appear that he has a valid cause of action against defendant.—Deming Nat. Bank v. Baker, 98 S.E. 438, 83 W.Va. 429.

87. Stephenson v. Kirtley, (W.Va.) 46 S.Ct. 50, 269 U.S. 163, 70 L.Ed. 213—6 C.J. p. 124 note 42.

Affidavits held sufficient.—Albee v. Schmied, 230 N.W. 146, 250 Mich. 270—Miller v. Jones, 152 N.Y.S. 739—6 C.J. p. 124 note 42 [a].

Affidavits held insufficient.—Jaudel v. Schoelske, 112 A. 328, 95 N.J.Law 171—Barkley v. Muller, 152 N.Y.S. 928, 168 App.Div. 110—6 C.J. p. 124 note 41 [1].

88. Preston County Power Co. v. Franklin Coal & Coke Co., 114 S.E. 878, 92 W.Va. 308.

89. U.S.—Siegel v. Waynesboro Knitting Co., (D.C.N.Y.) 7 F.Supp. 692.
N.Y.—Salembier, Levin & Co. v. North Adams Mfg. Co., 178 N.Y.S. 607.
6 C.J. p. 109 note 30.

90. Ross v. Poor, 12 Ohio App. 496.

91. Abdun-Nur v. Arbeed, 191 N.Y.S. 38, 198 App.Div. 795—Nerenberg v. Keith, 167 N.Y.S. 612, 101 Misc. 551—Miller Bros. Const. Co. v. Thew Shovel Co., 288 N.Y.S. 944.

92. N.Y.—Schreiber v. Gem Stopper Co., 153 N.Y.S. 878, 168 App.Div. 60—Sorensen v. S.A. Companhia General Commercial De Santos, Santos, Brazil, 180 N.Y.S. 201.
W.Va.—Millar v. Whittington, 87 S.E. 164.
6 C.J. p. 124 note 41.

Contract not stated
A petition in an action against a nonresident, in which an attachment is sought, alleging that plaintiff is entitled to the payment to her of one-half of the proceeds of a life insurance policy, and that defendant collected and appropriated to her own use the portion of said sum coming to plaintiff, does not state an express or implied contract between plaintiff and defendant.—Ross v. Poor, 12 Ohio App. 496.

Torts
The Michigan statute (3 Comp.L. [1915] § 13049) relating to actions for tort, and providing that plaintiff shall set forth in his affidavit in detail his cause of action, applies only to tort actions, and not to actions in assumpsit on implied contract.—Albee v. Schmied, 230 N.W. 146, 250 Mich. 270.

93. N.Y.—Makepeace v. Dilltown Smokeless Coal Co., 167 N.Y.S. 83, 179 App.Div. 662.
W.Va.—Preston County Power Co. v. Franklin Coal & Coke Co., 114 S.E. 878, 92 W.Va. 308.

Liability and breach of contract
Affidavit in foreign attachment for breach of contract of sale of yarn, based on a written order, must state the acceptance of the order either in writing or by parol and the facts constituting the breach of the contract, and also when the goods should have been delivered, and the market price at such time.—Mindlin v. Saxony Spinning Co., 104 A. 598, 261 Pa. 354.

94. Pottash v. Victor, 118 A. 215, 274 Pa. 346.

Allegation sufficient
A buyer's allegation, in an affidavit for attachment, that it performed all the conditions of the contract, was a sufficient allegation of performance.—L. B. Foster Co. v. Koppel Industrial Car & Equipment Co., 215 N.Y.S. 214, 127 Misc. 51.

95. Metropolis Woolen Co. v. Nemcof, 174 N.Y.S. 649.

96. Mindlin v. Saxony Spinning Co., 104 A. 598, 261 Pa. 354.

Affidavit held to show breach.—Suter v. Lockwood Dental Co., 45 App.D.C. 92.

ment of its contents being insufficient,[97] although a copy may be sufficient.[98] If, however, the statute does not require that the attachment papers include a copy of the contract, or the contract itself, it is not essential to jurisdiction, and may subsequently be supplied.[99]

Where it need not appear in the affidavit whether the contract is express or implied, a statement in the affidavit that the money is due upon an implied contract, when in fact it is due upon an express contract, does not make the affidavit defective, since, if it states that it is a contract for the direct payment of money, it is sufficient, and anything stated further may be disregarded as surplusage.[1]

Where an attachment is sought in a cause of action arising from the negligent acts of defendant, the facts constituting such negligence must be set out.[2]

Cause not pleaded Where the declaration or petition is filed with the affidavit, attachment cannot issue on a cause of action contained in the affidavit but not pleaded in the accompanying pleadings.[3]

§ 122. —— Ownership of Claim

If required by statute, the affidavit for attachment must show that the plaintiff owns, or is entitled to recover, upon his demand.

If required by statute, it should also appear from the affidavit that plaintiff is a creditor of defendant and that he is entitled as such to recover the claim or demand for which the action is brought,[4] but where there were several plaintiffs, an affidavit by one of them stating that he ought to recover has been held not fatally defective because asserting an indebtedness to him personally.[5] Where an affidavit charges an indebtedness with the agent and not with the real plaintiff, the affidavit is insufficient.[6] An affidavit by plaintiff stating that he is now the owner and holder of the demand sued on under an assignment by the assignee to whom the original holder had transferred it, together with an affidavit by such original holder stating that he informed defendant that the claim had been duly assigned to plaintiff, is sufficient to show the assignee plaintiff's ownership of the claim.[7]

§ 123. —— Identification of Cause

Where required by statute the affidavit must identify the principal action.

If the statute requires that the affidavit shall identify the action in which the auxiliary remedy is sought, the affidavit must so describe it as to show unmistakably that it is an adjunct of that particular proceeding;[8] but an affidavit which has this effect is sufficient,[9] although it fails to use

97. Makepeace v Hinkown Smokeless Coal Co, 167 N Y S 83, 179 App Div. 662—Sorensen v S A Companhia General Commercial De Santos, Santos, Brazil, 180 N Y S. 201.

Where a verified complaint is sufficient of itself as an affidavit for attachment, in pleading the contract it is sufficient to state its legal effect—Condouris v Imperial Turkish Tobacco, etc, Co, 22 N Y S. 695, 3 Misc 66

98. Salembier, Levin & Co v North Adams Mfg Co, 178 N.Y S 607

Excerpts sufficient

Where objection was raised to an affidavit of attachment because it failed to annex complete copies of the various letters upon which the cause of action was based, but merely set forth the excerpts from such letters, it was held that even though it was possible that the omitted portions of such letters contained something which would contradict or qualify those parts of the letters, which were set forth, yet such possibility was not sufficient to require the entire letters to be set forth—Salembier, Levin & Co. v. North Adams Mfg. Co, 178 N Y.S. 607.

99. Dexter & Carpenter v. Lake & Export Coal Corporation, 188 N.Y. S. 623, 196 App Div. 766.

1. Hamilton v Baker-Hansen Mfg Co, 169 P 238, 176 Cal. 569

2. American Fruit Growers, Inc. v Pacific Electric Ry. Co., 11 Pa Dist. & Co 291—Sabarof & Son v. Central of Georgia Ry. Co, 9 Pa Dist & Co 238.

Acts of negligence

(1) Where the principal action was in tort for negligence in driving an automobile at a speed in violation of statute, where neither attachment nor supporting affidavit alleged that defendant's automobile was traveling in excess of the speed permitted by statute, at time of collision, attachment levied thereon was invalid—Keller v. Federal Bob Brannon Truck Co, 269 S W. 914, 151 Tenn. 427

(2) Where the affidavit for attachment merely averred that an automobile was being driven in violation of law at a speed rendered dangerous by the circumstances, without detailing the circumstances, it did not state a cause of action—Woodworth v. Skeen, 150 S E 764, 158 S.C. 362.

3. Cable v. Olson, 15 P (2d) 737, 52 Idaho 389.

4. Green v. Abdill, 6 Pa.Co. 666—6 C J. p 124 note 42

Plaintiff and defendants entitled to recover

In an action by one joint adventurer to recover money due to him and his associates, in which the associates refused to join and were made defendants in compliance with the statutory requirements, the fact that plaintiff in his complaint and affidavit for attachment stated that plaintiff and certain named defendants, his associates, were justly entitled to recover from the other defendant, instead of alleging that plaintiff alone was entitled to recover, did not render the affidavit and petition insufficient for an attachment—Friede v. Azovsko Donskoi Kommercheske Bank, (D C.N.Y.) 266 F 131.

Use and legal plaintiff

Where there was an attachment in the name of a party, as treasurer, for the use of a church, and it nowhere appeared that the real plaintiff had the same rights as were possessed by the use plaintiff, the affidavit was insufficient—Green v. Abdill, 6 Pa Co. 666.

5. Fairbanks v Lorig, 29 N E. 452, 4 Ind App. 451.

6. Stark v. Lewis, 7 Ky Op 711.

7. Hall v. Stryker, 27 N.Y. 596

8. New York Casualty Co. v Lawson, 24 S.W (2d) 881, 160 Tenn. 329—6 C.J. p 125 note 46.

9. Munzenheimer v. Manhattan Cloak, etc, Co, 15 S.W. 389, 79 Tex. 318—6 C J. p 125 note 47.

technical language,[10] to refer specifically to the petition,[11] or to give the number of the case.[12]

§ 124. —— Showing Pendency of Action

Where the statute so requires, the affidavit must state the commencement or pendency of the action to which the attachment is auxiliary.

In the absence of a statute so requiring, a specific showing in the affidavit that the action has actually been commenced[13] or that the summons has been issued or served,[14] is not essential. If the statute requires the commencement or pendency of the action to be alleged, any statement substantially showing its institution or subsequent prosecution will be sufficient;[15] and where the statute requires that the affidavit together with the bond and attachment shall be returned to the court in which the suit was originally commenced, and filed with the papers in the original case, it is not necessary to allege the existence of a suit.[16]

§ 125. —— Showing as to Claim or Indebtedness

a. In general
b. Facts and particulars of indebtedness
c. Maturity of the debt
d. Justice of claim
e. Credits, offsets, and counterclaims

a. In General

An affidavit for attachment should ordinarily state the fact that the defendant is indebted to the plaintiff, and should also set out the amount of such indebtedness.

Although in the absence of a statute so requiring, the affidavit need not state the damages sought,[17] where required by statute, as it usually is, the affidavit or petition in an attachment proceeding must state that defendant is indebted to plaintiff,[18] and it must also contain a precise or reasonably certain statement of the amount of the indebtedness claimed.[19]

10. Altmeyer v. Caulfield, 17 S.E. 409, 37 W.Va. 847

11. White Day Furniture Co. v. Dallas First State Bank, (Tex.Civ.App.) 114 S.W. 1159.

Affidavit sufficient

An affidavit for attachment, which is appropriately styled and numbered with the style and number of the case and states that it is made at the instance of plaintiff and is filed among the papers in the suit, sufficiently identifies the suit, and the fact that the petition is not referred to in express words or made a part of the affidavit will not vitiate the attachment proceedings.—White Day Furniture Co. v. Dallas First State Bank, (Tex.Civ.App.) 114 S.W. 1159.

12. Bridges v. Center First Nat. Bank, 105 S.W. 1018, 47 Tex.Civ. App. 454.

13. Blake v. Sherman, 12 Minn. 420.

14. Wallace v. Castle, 68 N.Y. 370—6 C.J. p. 125 note 52.

15. Jansen v. Mundt, 30 N.W. 53, 20 Neb. 320—6 C.J. p. 125 note 51.

16. Hounshell v. Phares, 1 Ala. 580

17. Porter v. Duke, 270 P. 625, 34 Ariz. 217.

18. Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108
Md.—Lanasa v. Beggs, 151 A. 21, 159 Md. 311.
Tex.—Butler v. Nail, (Civ.App.) 36 S.W.(2d) 307, affirmed Nail v. Compton, (Com.App.) 55 S.W.(2d) 1028.
6 C.J. p. 125 note 55.

"Actual"

Where the statute provides that a writ of attachment shall issue whenever plaintiff "shall make an affidavit showing that the sum for which the attachment is asked is an actual, bona fide, existing debt," the omission of the word "actual" in the affidavit is not fatal if the allegations and facts stated in the affidavit show that it is an "actual," bona fide, existing debt, without repeating the exact words of the statute.—Miller v. Alaska-Canadian Oil & Coal Co., 4 Alaska 439.

"Indebtedness" including liability for damages

In a statute requiring the affidavit for an attachment to specify the amount of indebtedness, "indebtedness" includes liability for damages from breach of written contract.—State v. Superior Court for King County, 159 P. 1193, 93 Wash. 98.

"Owes"

Where an affidavit for an attachment stated that defendant "owes" plaintiff a specified sum, it was held such affidavit sufficiently complied with a statutory requirement that such affidavit should aver that the debtor owed plaintiff.—Dicks-David Co. v. Edward Maurer Co., (D.C.N.J.) 279 F. 231

19. Ala.—Georgia Cotton Oil Co. v. Carlisle Seed Co., 75 So. 984, 200 Ala. 226.
Idaho.—Sunderlin v. Warner, 246 P. 1, 43 Idaho 479
Ky.—Miller's Ex'x v. People's Bank, 41 S.W.(2d) 1096, 240 Ky. 185—Howard v. Howard, 39 S.W.(2d) 245, 239 Ky. 160—Hart County Deposit Bank v. Hatfield, 33 S.W.(2d) 660, 236 Ky. 725
Md.—Lanasa v. Beggs, 151 A. 21, 159 Md. 311—Hedrick v. Markham, 103 A. 93, 132 Md. 160.
S.C.—Williams v. Carlson, 110 S.E. 69, 118 S.C. 46.
Tex.—Evans v. Lawson, 64 Tex. 199—Farmer's Nat. Bank of Stephenville v. Daggett, (Com.App.) 2 S.W.(2d) 834, affirming Daggett v. Farmers' Nat. Bank, (Civ.App.) 259 S.W. 198—Butler v. Nail, (Civ.App.) 36 S.W.(2d) 307, affirmed Nail v. Compton, (Com.App.) 55 S.W.(2d) 1028.
6 C.J. p. 126 note 56.

Approximate damage

While the proof of cause and damage need not be as direct and positive in affidavits for attachment as is required on the trial, there must be something more than an assertion of "approximate damage" to justify the warrant.—Parker v. Robert Wallace & Co., of Belfast, 201 N.Y.S. 416, 206 App.Div. 465.

Sum sought instead of sum due

The fact that a surety, in an affidavit for an attachment, stated the sum she sought to recover instead of the sum defendant should pay as required by statute, was immaterial, where the amount of the note was specifically stated and it was obvious that such was the amount defendant should pay.—Lincoln Bank & Trust Co. v. Arnold, 75 S.W.(2d) 751, 256 Ky. 80.

Omission of word "amount"

An affidavit for an attachment filed in a suit in equity against a real debtor and others who are merely formal defendants is not vitiated on the ground that it omits the word "amount," where it uses the words, "that in said suit the plaintiffs, as affiant verily believes, are justly entitled to recover, at the least, against the defendant [naming the debtor], the said sum" demanded, specifying the amount thereof.—Hale v. Grow, 106 S.E. 409, 88 W.Va. 173.

Under such statutes a general averment of damage is insufficient and the indebtedness or amount claimed should be specifically stated;[20] but the amount claimed need not be stated with absolute accuracy,[21] and accordingly it has been held that the omission to state the amount of interest will not render the affidavit defective.[22] Also, in the absence of a statute so requiring, plaintiff need not state in his affidavit or petition data by which a mathematical computation can be made of the amount of the demand.[23] A slight variance between the amount claimed and the actual indebtedness, caused by miscalculation or inadvertence, will be disregarded, where it is evident that plaintiff has acted in good faith. A fortiori, it is not a ground of objection that the affidavit shows plaintiff to be entitled to a larger sum than he demands.[24] The sum stated must not, however, be merely conjectural, for in such case no attachment would lie.[25]

Affidavit on behalf of joint parties. One joint plaintiff may state that no counterclaims exist to the knowledge of all the plaintiffs,[26] for in such a case it will be presumed that matters positively sworn to were within the personal knowledge of affiant, unless it is apparent that he could not have such knowledge.[27]

Joint indebtedness. An allegation that two defendants named are indebted to plaintiffs,[28] or that defendants are copartners,[29] sufficiently alleges a joint indebtedness. Where it is sought to attach the property of one joint debtor the affidavit need not state a joint indebtedness or take notice of the other,[30] and if the property of one joint debtor may be attached, an affidavit alleging the indebtedness of both is sufficient to authorize a judgment against one.[31]

Mere surplusage in the allegations of claim or indebtedness, if the statement is otherwise sufficient and not rendered uncertain thereby, is immaterial.[32]

Reference to petition. Where reference may be made to the petition, in accordance with the rules already discussed in § 116, a reference in the affidavit to the petition may be sufficient where the amount of the claim is required to be, and is, set forth in the petition.[33]

b. Facts and Particulars of Indebtedness

(1) In general
(2) Where demand unliquidated

(1) In General

Where the statute so requires, the affidavit for attachment must set forth the facts and particulars out of which the indebtedness arose.

Where the statute so requires, the particulars of the debt should be given, or facts should be stated, which will satisfy the officer of the existence of the indebtedness claimed,[34] although in

Lump sum including unliquidated amount

Where the affidavit for attachment included in the lump sum stated, unliquidated damages, the affidavit was defective because it did not state the amount of defendant's indebtedness —Ewer v. Jackson, 283 P. 110, 102 Cal App. 793—Doud v Jackson, 283 P. 107, 102 Cal App. 213

Prima facie showing sufficient

Where affidavits made a prima facie showing sufficient to sustain an attachment in full, a motion to reduce the amount thereof was properly denied, since the accuracy of defendant's computations should await trial.—N V. Tonerde Maatschappij Voor Montaan-Chemie v. Great Lakes Coal & Coke Co., 276 N.Y.S. 895, 243 App Div 640.

20. Williams v. Carlson, 110 S.E. 69, 118 S.C. 46—6 C.J. p 127 note 57.

21. Robinson v. Mellon, 126 A. 863, 2 N.J Misc. 1134—6 C.J. p 127 note 58

22. State v. Pondera Valley State Bank, 248 P. 207, 77 Mont. 1—6 C. J. p 127 note 58 [a].

Reference to interest

An affidavit which alleges a specific indebtedness of defendant to plaintiff in a principal sum, is not rendered uncertain by a reference to the amount of interest that should be added, computed at a specified rate upon certain daily balances.—State v Pondera Valley State Bank, 248 P. 207, 77 Mont. 1.

23. Garvey v Guaranty Bank & Trust Co., (Tex.Civ App.) 298 S.W. 303.

24. Cal.—Hamilton v. Baker-Hansen Mfg Co., 169 P 238, 176 Cal 569.
Idaho.—McCall v First Nat. Bank, 277 P 562, 47 Idaho 519.
6 C.J p 127 notes 59, 60.

25. Prentiss v. Greene, 184 N.Y.S. 558, 193 App Div. 672—6 C.J. p 127 note 61.

26. Doctor v. Schnepp, 7 N.Y Civ. Proc 144, 2 How Pr.(N.S.) 52—Barton v. Saalfield, 1 How Pr.(N.S.)(N.Y.) 276

27. Doctor v Schnepp, 7 N.Y Civ. Proc. 144, 2 How Pr.(N.S.) 52.

28. Sword v. Lenawee Cir. Judge, 38 N.W 870, 71 Mich. 284—6 C.J. p 130 note 73.

29. People v Judge Bay County Cir Ct., 2 N.W. 26, 41 Mich. 326—6 C.J. p 130 note 74

30. Dobbs v. Justices Murray County Inferior Ct., 17 Ga 624

31. Geiges v Greiner, 36 N.W. 48, 68 Mich 153

32. **Reference to "other claims"**

Where an affidavit stated that defendant owed plaintiff three hundred seventy five dollars, the fact that such affidavit further added "in addition to certain claims for damages for breach of contract hereinafter referred to" did not render the amount uncertain, since such latter statement could be regarded as mere surplusage.—Hamilton v. Baker-Hansen Mfg Co., 169 P 238, 176 Cal 569

33. Morgan v. Johnson, 15 Tex 568 —6 C.J. p 128 note 65.

34. N.J.—Sternberg v Poole, 152 A. 703, 9 N.J.Misc 111
N.Y.—California Packing Corporation v. Kelly Storage & Distributing Co., 126 N.E 269, 228 N.Y. 49, reversing California Packing Corporation v. Phoenix & Third Nat. Bank of Lexington, Ky., 177 N.Y.S. 37, 188 App Div 475—Wesley v. Drake, 269 N.Y.S 174, 240 App. Div. 59.
Pa.—Irvine v. May Oil Burner Corporation, 17 Pa.Dist. & Co. 711—

the absence of such a statute the ultimate fact only need be stated, and not the probative facts out of which the indebtedness arose.[35]

In some states the affidavit must allege that the contract sued on has not been secured by mortgage or otherwise, if such is the case.[36]

(2) Where Demand Unliquidated

Where so required by statute, in an action for unliquidated damages, the affidavit should state facts sufficient to enable the court to judge of the probable amount of damages due.

Where the statute expressly or impliedly so requires, in an action to recover unliquidated damages, special facts and circumstances should be set out, so as to enable the court to judge of the probable amount of damages sustained and recoverable, and to determine the amount for which the levy may be made.[37] And where there is merely a statement of the conclusion of damages without evidence establishing substantial damages, the affidavit is insufficient.[38] It has also been held that an affidavit which adopts a certain measure of damages as the amount of recovery must state the evidence relied on to establish such recovery.[39] Where the amount of damages sought is the difference between the contract price and the market price, it has been held that the affidavit must set forth the market price at the time the breach of contract occurred.[40]

In an action ex delicto, under some statutes, it

Wolf v Zents, 5 Pa Dist. & Co 276—International Oil Wks v. Wells, 7 Pa Co 271

6 C J. p 123 note 40 [b], p 128 note 69

Affidavit sufficient

(1) An affidavit for attachment, stating that the indebtedness arose upon express contracts for the direct payment of money, that the contracts were promissory notes for definite amounts, that the said sums are an actual, bona fide, existing debt due and owing from defendants to plaintiff, is sufficient—McMaster v Ruby, 157 P. 732, 80 Or 476.

(2) A statement that a claim in which an attachment is sought, is for "board, washing, and lodging," is sufficient as against a motion to discharge an attachment, but the facts from which such claim arose must be stated with greater particularity in a bill of particulars—Parkinson v Crawford, 13 Ohio N P.(N S) 73.

Affidavit insufficient

(1) Where plaintiff, an attorney, brought action to recover for the reasonable value of his services, and he generally stated in his affidavit that such services were furnished from 1931–1933, and that he defended actions and performed various other legal services for defendant it was held the affidavit did not state with sufficient particularity the facts out of which defendant's alleged indebtedness arose—Wesley v Drake, 269 N Y S 174, 240 App Div. 59.

(2) A statement in his affidavit for an attachment by plaintiff, that he lent a sum aggregating seven thousand three hundred forty-one dollars to defendant, and that defendant promised to repay such amount upon demand, and that upon demand, defendant refused to repay such amount, is not a sufficient statement of the nature and particulars of the debt or demand and will not support an attachment—Stenberg v Poole, 152 A 703, 9 N J Misc 111.

(3) A mere averment that plaintiff is entitled to recover a sum of money for the value of goods sold and delivered to defendant, in the absence of any averment that plaintiff sold and delivered such goods, and in the absence of any statement as to the price agreed upon is insufficient to support an attachment—Swift v. Martini, 162 N Y S 136.

Items specified

Where an affidavit for an attachment stated that the action was one for money due on a contract, and contained in addition a specification of the items of the account sued on, the affidavit was sufficient to support the attachment—Flannigan v. Monongahela Tie & Lumber Co, (W Va.) 87 S E 165

35. McMaster v. Ruby, 157 P. 732, 80 Or 476—6 C J p 121 note 37, p 129 note 70.

36. Nichols v. Davis, 137 P. 41, 23 Cal App 67

37. Sicklick v Schasseur, 225 N Y S 279, 231 App Div 742—Robinson v Archer Strauss Rubber Co, 191 N. Y.S. 289, 198 App Div 822—Prentiss v Greene, 184 N Y S 558, 193 App Div. 672—Pedro y Seltzer, Inc, v. Brivio, 180 N Y S. 706, 191 App Div 110—Stiner v Tennessee Copper Co, 161 N.Y S 986, 176 App Div 209—Shapiro v. Loft, Inc, 254 N Y S 197, 142 Misc 144—Salembier, Levin & Co v. North Adams Mfg Co, 178 N.Y.S 607—6 C J. p 121 note 38 [1], p 129 note 71.

Right to attachment on a nonliquidated demand see supra § 14

Affidavits held sufficient

(1) In an action for breach of a contract to deliver sulphuric acid and of warranty of quality, allegations in the affidavits for attachment, that defendant failed to deliver a specified number of tons, that the market value was eighty dollars per ton, that plaintiffs were damaged in the amount of seventy-nine thousand seven hundred sixty five dollars and thirty five cents, that the contract price was thirty-one dollars per ton, that the contract percentage of acid was ninety-seven and one half, that the acid delivered was of lower percentage, and only of the value of twenty dollars per ton, and that the difference in the value of the contract and actual quality was sixty dollars per ton, sufficiently shows evidentiary facts as to damages sustained to support the attachment.—Stiner v. Tennessee Copper Co, 161 N.Y S. 986, 176 App Div. 209

(2) Other affidavits held sufficient.—6 C J. p 129 note 71 [b].

Affidavits held insufficient

(1) A warrant of attachment for damages in inducing plaintiff by misrepresentations to purchase stock must be supported by at least prima facie evidence of the damages demanded, and the mere allegation that the stock has not been sold on the stock markets and that plaintiff was unable to find a person willing to purchase, is insufficient.—Reinhardt v Horace L Day Co, 213 N Y S 130, 126 Misc 367

(2) Other affidavits held insufficient—6 C J p 129 note 71 [a].

Time of proving grounds

The appropriate time to prove the facts alleged in the attachment papers as grounds of attachment in an action for unliquidated damages for fraud and deceit was at the time of applying for the writ of attachment—Sicklick v Schasseur, 225 N.Y.S 279, 231 App.Div 742.

38. Sicklick v. Schasseur, supra.

39. Delafield v. J K Armsby Co, 71 N Y.S 14, 62 App.Div 262

40. Pedro y Seltzer, Inc., v. Brivio, 180 N.Y S. 706, 191 App.Div 110

See Lepman & Heggie v Interstate Produce Co, 205 Ill App 270.

is sufficient to state the amount of damages claimed,[41] and where the claim is for injuries to property, it is not necessary for the affidavit to state the value of the property, but only the amount of the damages.[42]

c. Maturity of the Debt

(1) In general
(2) Where debt sued on not matured
(3) Setting forth both matured and immatured debts

(1) In General

If the statute so requires, plaintiff must state in his affidavit for attachment that the debt has matured.

If under the statute attachment issues only where there is a present indebtedness, as already considered in § 15, and, where the statute so requires, the affidavit must affirmatively show that the debt upon which the action is brought is actually due at the time the action was commenced, or the affidavit made,[43] and a failure to make such a statement is fatal.[44] It is, however, not necessary that the maturity of the debt shall be stated in express terms,[45] and the requirement is satisfied by a statement that defendant is indebted,[46] or that the sum claimed is justly due;[47] although it has also been held that a statement that defendant is "indebted" is not equivalent to a statement that defendant's debt is due at the time the affidavit is made.[48] It has been held that the statement of a cause of action in the petition, showing the right to immediate compensation, will control a statement in the affidavit that the debt has not matured.[49] If the debt, although treated as due, has not actually matured, it may be shown that it was agreed that it should become due on the happening of a certain contingency, and that the contemplated contingency has occurred[50]

(2) Where Debt Sued on Not Matured

Where an attachment is sought for a debt which has not yet matured, the affidavit must allege the facts required by the statute in regard to the claim or indebtedness.

Where plaintiff may secure an attachment upon a debt which is not due and payable, as already discussed in § 15, if the statute so requires he must state the fact in his affidavit that the debt is not due, and a failure to do so is fatal.[51] Where the statute so requires, he must also state in his affidavit the time of the debt's maturity.[52] In the absence of a requirement in the statute, however, that the affidavit state that the debt is not due, such a statement is not necessary, since the court has no right to prescribe additional requirements to be complied with in order that a party may avail himself of this process.[53] Accordingly, under such a statute, where the instrument sued on shows on its face that it has not matured, it is not necessary that the affidavit should allege the immaturity of the debt.[54]

In accordance with the rules already discussed in subdivision b (1) of this section, if required by the statute the affidavit must also set up the existence of the particular ground or grounds upon which an attachment to secure this class of debts may issue,[55] and must set up facts or allege reasons for the immediate issue of the writ sufficient to satisfy the officer to whom application is made of the propriety of allowing it to issue.[56]

(3) Setting Forth Both Matured and Immatured Debts

Where permitted by statute, an affidavit setting forth both matured and immatured debts is not fatally defective

Under a permissive statute, an affidavit setting forth both matured and immatured debts is not

41. Kan.—Cain v. Perfect, 131 P 573, 89 Kan 361.
Tenn.—Thompson v. Carper, 11 Humphr 542
6 C.J. p 128 note 63.

42. Chitty v. Pennsylvania R. Co., 40 S.E. 944, 62 S.C. 526

43. Rosen v. Levy, 148 So. 393, 109 Fla. 523—6 C.J. p 130 note 78.

Allegation held sufficient

An attachment affidavit, alleging that the debt is an "actually existing debt and . . . now due" is the equivalent of the required allegation that the debt "is actually due"—Rosen v. Levy, 148 So. 393, 109 Fla. 523

In Georgia, under Civ. Code (1910) § 5084, an attachment for purchase money cannot issue until the debt is due, and, where the affidavit for the attachment does not so allege, the attachment is subject to dismissal. The rule is otherwise in attachments based upon other grounds.—Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251

44. Mathews v. Densmore, 5 N.W. 669, 43 Mich. 461

45. Avery v. Pope, 79 S.E. 946, 13 Ga.App. 743—6 C.J. p 130 note 79.

46. Ross v. Gold Ridge Min. Co., 95 P. 821, 14 Idaho 687—6 C.J. p 130 note 80

47. Nicolls v. Lawrence, 30 Mich. 395.

48. Cross v. McMaken, 17 Mich. 511, 97 Am.D. 203.

49. Aultman v. Daggs, 50 Mo.App. 230.

50. Merchants' Nat. Bank v. Columbia Spinning Co., 47 N.Y.S. 442, 21 App.Div. 383—6 C.J. p 130 note 83

51. Lederer v. Rosenthal, 74 N.W. 971, 99 Wis. 235—6 C.J. p 130 note 85

52. Ruhl v. Rogers, 2 S.E. 793, 29 W.Va. 779—6 C.J. p 131 note 86

53. Gimbel v. Gomprecht, 35 S.W. 470, 89 Tex. 497, overruling Avery v. Zander, 13 S.W. 971, 77 Tex. 207, and Cox v. Reinhardt, 41 Tex. 591.

54. Panhandle Nat. Bank v. Still, 19 S.W. 479, 84 Tex. 339.

55. Deering v. Warren, 44 N.W. 1068, 1 S.D. 35—6 C.J. p 131 note 87.

56. Caldwell v. People's Bank of Sanford, 75 So. 848, 73 Fla. 1165—6 C.J. p 131 notes 88, 89.

defective for that reason,[57] or for the reason that it discloses that a part of the demand is not yet due;[58] but under some statutes it is necessary that the affidavit show how much of the debt is due and how much is not due.[59]

If the affidavit is sufficient as to one claim and defective as to the other, it may be sustained as to the former and disregarded as to the latter,[60] or the insufficient allegations may be regarded as surplusage.[61]

d. Justice of Claim

Where required by statute, plaintiff's affidavit should state that his claim is just.

The omission of the affidavit to conform to a statutory requirement that it shall state that plaintiff's claim "is just,"[62] that defendant "is justly indebted" to plaintiff,[63] or that affiant believes that plaintiff is justly entitled to recover[64] will render it insufficient. On the other hand, the exact language of the statute need not be employed, and an implication of the justice of the demand necessarily arising from the language employed is sufficient,[65] especially where the substance of the necessary allegation appears by the duly verified declaration in the action.[66] According to some authority, where the affidavit must state that the claim is just, the express statement is essential, and it is insufficient to merely state facts showing that the claim is in fact just.[67] According to other authority, if the indebtedness of defendant is clearly and positively stated and sworn to, it is sufficient.[68]

e. Credits, Offsets, and Counterclaims

If the statute so requires, the affidavit must allege, either in the statutory words or their equivalent, that the claim is due over and above all counterclaims and set-offs.

Where the statute requires the affidavit to show that defendant is indebted to plaintiff in an amount specified, or that the latter is entitled to recover such an amount, over and above all legal payments, set-offs, or counterclaims, compliance with this requirement is essential to confer jurisdiction to issue the writ,[69] but the absence of the counterclaim need not necessarily be stated in the language of

57. Selleck v Twesdall, Dudl (Ga) 196

58. Mich—Emerson v Detroit Steel, etc, Co, 58 N W 659, 100 Mich 127
Neb—Tessier v Englehart, 24 N W 734, 18 Neb 167
6 C J p 131 note 91

59. Friedlander v Myers, 2 La Ann 920
In Texas
(1) Plaintiff seeking an attachment for a debt or demand, due in part and not due as to the remainder, is not required to state either in his affidavit or petition, what part of the debt is due, and what part of the debt is not due—Gimbel v. Gomprecht, 35 S W 470, 89 Tex 497—Willis v Mooring, 63 Tex 340—Tootle v Alexander, 35 S W 821, 13 Tex Civ App 615—Cohen v. Grimes, 45 S.W. 210, 18 Tex Civ App 327.
(2) The rule in this jurisdiction was formerly otherwise—Avery v. Zander, 13 S W. 971, 77 Tex 207—Sydnor v. Totman, 6 Tex. 189

60. Danforth v. Carter, 1 Iowa 546

61. Tanner, etc, Engine Co. v. Hall, 22 Fla 391.

62. Collett v. Helton, (Ky) 94 S W (2d) 603—Miller's Ex'x v. People's Bank, 41 S W (2d) 1096, 240 Ky 185—Lewis v Browning, 4 S W (2d) 734, 223 Ky 771—Goodin & Barney Coal Co. v Southern Elkhorn Coal Co, 294 S W 792, 219 Ky. 827—6 C J p 131 note 95
Omission in verified petition
Where an attachment may issue upon a properly verified petition, the failure to state in the petition that the claim is just, will render the petition defective—United Collieries v. Martin, 60 S W (2d) 125, 248 Ky 803, 89 A L R 808, 89 A L R 971.

63. Farmers' Nat Bank of Stephenville v Daggett, (Tex Com App) 2 S W (2d) 834, affirming Daggett v Farmers' Nat Bank, (Civ App) 259 S W 198—6 C J. p 132 note 96

64. Commercial Credit Co v. Collier, 145 S E 880, 106 W Va 252—6 C.J. p 132 note 97.
"Justly entitled to recover"
"The statute uses both the words 'justly' and 'recover,' and it is not enough to say that the plaintiff is entitled to recover The word 'justly' is designed to more deeply search the conscience, and guard against flimsy, unjust demands, by compelling the sworn conscience to explicitly state that the demand is just It performs a material office, and is indispensable . The affidavit says that the affiant believes that plaintiff 'should' recover, instead of 'entitled' to recover Are 'should' and 'entitled' tantamount? The word 'entitled' means that the party has legal ground to recover, while 'should' may mean merely the expression of the affiant's opinion I do not think this will do under the rigid doctrines relating to attachments—Sommers v Allen, 28 S E 787, 788, 44 W Va 120

65. Clinch River Mineral Co v Harrison, 21 S E 660, 91 Va. 122—6 C.J. p 132 note 98.

66. Tenn—McElwee v. Steelman, (Ch App) 38 S W. 275.
Tex—H B Claflin Co v. Kamsler, (Civ App) 36 S W. 1018.

67. **In Kentucky,** where it is provided by statute that plaintiff must, in his affidavit for an attachment, show that his claim is just, it has been held that the affidavit must expressly state that the claim is just, and a mere statement of facts showing that the claim is just is not sufficient, notwithstanding the fact that the statute does not require that plaintiff state his claim is just but requires only that he show his claim is just—Frick & Lindsay Co v. Lantz & Ogden, 251 S W 196, 199 Ky. 354

68. Kennedy v. Morrison, 31 Tex. 207.

69. Anderson v. Malley, 131 N Y S 739, 191 App Div. 573—6 C J. p 132 notes 2, 3
Affidavit held sufficient.—Rickerson v Bunker, 56 N Y S 202, 26 Misc. 383—6 C J p 133 note 7 [b]
Argumentative allegation insufficient
An affidavit for warrant of attachment, which stated plaintiff "is entitled to recover the sum of $6,000, with interest, over and above all counterclaims known to him inasmuch as set forth in the foregoing paragraphs, the defendants owe him $6,000 as commission," etc, "and none of the defendants has claimed to have any counterclaim," is defective, since the statute requires such statement to be made positively, on the knowledge of plaintiff, and not

the statute,[70] and a bare statement by plaintiff that the amount is due over and above all counterclaims is sufficient, without the addition of a statement as to the knowledge of the nonexistence of counterclaims.[71] If there are no counterclaims, plaintiff should state that fact, or if there are counterclaims existing, the affidavit should state them, and then the amount due over them, if any, would be apparent. A mere statement of a legal conclusion in the language of the statute that there is a sum due plaintiff over and above all counterclaims known to plaintiff is insufficient.[72]

An affidavit which alleges that defendant is indebted in a certain amount "over and above all discounts" has been held not equivalent to an allegation that defendant is indebted "over all payments and set-offs"[73] Where the action is brought upon several distinct claims the affidavit need not state the nonexistence of counterclaims as to each item.[74]

Where plaintiff is required to allege in his affidavit that the amount claimed is due over and above all counterclaims known to plaintiff, such a requirement means that the sum claimed is due above all counterclaims plaintiff thinks just, and the fact that defendant has interposed a counterclaim in another action between the parties does not require the attachment to be vacated because of the falsity of the allegation[75]

In some jurisdictions it is sufficient to specify the amount of the indebtedness, over and above all legal set-offs, "as near as may be," either in the language of the statute,[76] or by expressions substantially equivalent,[77] but the use of other words which introduces an element of uncertainty in the affidavit is insufficient.[78]

An uncertain allegation as to the amount of an offset existing in defendant's favor may be excused where it is due to inability to specify the exact amount.[79]

Action by assignee of claim With respect to assignees of claims, who are themselves plaintiffs, it is sufficient, under the statutes under consideration, for them to state the nonexistence of counterclaims as to their knowledge, and it is not necessary to make any statements as to the existence of counterclaims against their assignors.[80] On the other hand it is not sufficient to show that at the time of the assignment the amount was due and owing to the assignor over and above all counterclaims, since the fact that the sum is due and owing over any counterclaim against plaintiff must also be shown[81]

Affidavit by person other than plaintiff. Where the affidavit is made by a person other than plaintiff, a mere statement that the amount is due over and above all counterclaims known to deponent is wholly insufficient,[82] unless it appears from the affidavit that the affiant had charge of the transactions out of which the cause of action arose, and is so conversant with plaintiff's affairs that his knowledge is as full as plaintiff's.[83] Where the affidavit is made by an agent or attorney, he should set forth such facts in his affidavit as will enable the court to see how he knew or could have known that plaintiff was entitled to the debt over and above all discounts and set-offs,[84] but if affiant establishes that he is possessed of sufficient knowledge on the

argumentatively—Anderson v. Malley, 181 N.Y.S. 729, 191 App.Div. 573

Known to defendant

Under a statute providing that an attachment affidavit must show that plaintiff is entitled to recover a sum stated therein over and above all counterclaims known to plaintiff, an affidavit stating that deponent is justly entitled to recover a sum from defendant over and above all counterclaims "known to defendant" is fatally defective—Reynolds v. Bean, 138 N.Y.S. 1101

"On the following facts"

Papers for attachment, alleging that defendant is indebted to plaintiff in a certain sum for damages for the breach of a contract, which amount is now owing and due from defendant over and above all counterclaims, known to plaintiff "on the following facts," are not open to the objection of containing no particular allegation that the sum claimed to be due is over and above all counterclaims, the words "on the following facts" referring, not to the counterclaims known by plaintiff, but to plaintiff's right to recover damages, claim to which is based on the facts thereinafter set forth—Crook v. Lipton, 170 N.Y.S. 345, 182 App.Div. 858

70. Farlee v. Farlee, 235 N.Y.S. 239, 134 Misc. 275

71. Lamkin v. Douglass, 27 Hun (N.Y.) 517—6 C.J. p. 133 note 8

72. Livingston v. Lakwitz, 53 N.Y.S. 1083, 25 Misc. 119.

73. Solinger v. Patrick, 7 Daly (N.Y.) 408

74. U.S. Net, etc., Co. v. Alexander, 18 N.Y.S. 147, disapproving Murray v. Hankin, 30 Hun 37, 3 N.Y. Civ.Proc. 342, 65 How.Pr. 511.

75. Bloom v. Wrought Iron Novelty Corporation, 219 N.Y.S. 92, 128 Misc. 460.

76. Estlow v. Hanna, 42 N.W. 812, 75 Mich. 219—6 C.J. p. 133 note 9.

77. Nicolls v. Laurence, 30 Mich. 395—Barker v. Thorn, 20 Mich. 264.

78. Hawes v. Clement, 25 N.W. 21, 64 Wis. 152—Lathrop v. Snyder, 16 Wis. 293

79. Holston Mfg. Co. v. Lea, 18 Ga. 647—6 C.J. p. 132 note 5

80. Bremer v. Ring, 181 N.Y.S. 487, 146 App.Div. 724—6 C.J. p. 133 note 12

81. Smith v. Holt, 55 N.Y.S. 731, 37 App.Div. 24

82. Mitchell v. Anderson, 66 N.Y.S. 118, 32 Misc. 13—6 C.J. p. 133 note 17.

83. Washburn v. Carthage Nat. Bank, 33 N.Y.S. 505, 86 Hun 396, affirmed 50 N.E. 1123, 155 N.Y. 690 and followed in Steele v. Gilmour Mfg. Co., 78 N.Y.S. 1073, 77 App.Div. 199.

84. Buhl v. Ball, 41 Hun (N.Y.) 61—Cribben v. Schillinger, 30 Hun (N.Y.) 248—Lee v. U.S. Co-op. Life, etc., Assoc., 2 N.Y.S. 864, affirmed 21 N.E. 414, 113 N.Y. 642—Lampkin v. Douglass, 10 Abb.N.Cas. (N.Y.) 342, 63 How.Pr. 47, reversed on

subject, his statement as to the nonexistence of counterclaim will be sufficient.[85]

Where the affidavit is made by an agent of plaintiff, who acted for him in the transaction and knows all the facts, and who states positively and without qualification that the amount claimed is due over and above all offsets and counterclaims, it is not defective because of a failure to state that the facts with respect to counterclaims are known to plaintiff.[86]

§ 126. —— Showing Grounds of Attachment

a. In general
b Allegation of more than one ground
c. Allegations as to particular grounds

a. In General

If required by statute, the affidavit for attachment must show the existence of the grounds authorizing the issuance of the writ.

A compliance with a statute requiring that plaintiff make an affidavit alleging or showing one or more of the statutory grounds for attachment is essential,[87] although an immaterial omission in stating the grounds of attachment is not fatal.[88]

A statement of a single ground is sufficient without including in the affidavit any averments as to other grounds on which the writ might issue,[89] and in the absence of a statute to the contrary, although the petition may state facts authorizing an attachment, plaintiff is not confined to the ground so disclosed, but may, in his affidavit, rely on other statutory grounds.[90]

Probative facts. Under some of the statutes an affidavit setting forth the existence of the grounds of attachment in the words of the statute is sufficient without any further statements of facts showing the existence of such grounds;[91] but under other statutes it is necessary that the affidavit should show facts and circumstances tending to establish the existence of the grounds relied on.[92]

Exhaustion of legal remedies. Under a statute authorizing the enforcement of a foreign judgment against a nonresident by a bill in equity, where the creditor has exhausted his legal remedies, it must appear that he has resorted to and exhausted such remedies against the debtor in the state of their common residence.[93]

Refusal to pay or secure debt. Under a statute permitting an attachment on the ground that defendant has property which he refuses to give either in payment or security for the debt it is not necessary for the affidavit to state the place where the demand for payment or security was made,[94] or an intent to defraud creditors.[95]

b. Allegation of More than One Ground

(1) In general
(2) Disjunctive allegations

(1) In General

The affidavit for an attachment may allege more than one ground for an attachment

Although the contrary has been held,[96] plaintiff may generally allege as many distinct and separate grounds for the attachment within the terms of the statute as he may deem expedient,[97] provided the grounds relied on are consistent with each other.[98]

other grounds 37 Hun 517—6 C J p 133 note 14.

85. Steele v R M Gilmour Mfg Co, 78 N.Y S 1078, 77 App Div 199—6 C J. p 133 note 15.

86. Billwiller v Marks, 16 N Y S 541, 543, 21 N.Y Civ.Proc 162—6 C. J. p 134 note 19.

87. Colo —Gibson v. Gagnon, 257 P 348, 82 Colo 108
Ga —Higgins v. Gosden, (App) 185 S E 574
S C —Munn v. Munn, 143 S E 879, 146 S.C 290.
Va —Winfree v. Mann, 153 S E. 837, 154 Va 683.
6 C J. p 134 notes 24, 25
Grounds for attachment see supra §§ 23–70.

88. Collett v. Helton, (Ky) 94 S W (2d) 603—Clolinger v. Callahan, 263 S W. 700, 702, 204 Ky. 33.

89. Danforth v. Carter, 1 Iowa 546—6 C J. p 135 note 29.

90. Houston v. Wooley, 37 Mo App 15.

91. Wesley v Drake, 269 N Y S 174, 240 App Div 59—6 C J. p 135 note 31.

92. McMaster v Ruby, 157 P 782, 80 Or 476—6 C J. p 135 note 32

93. Brown v Pace, (Tenn Ch App) 49 S W. 355

94. Hart v. Cummins, 1 Iowa 564

95. Bates v Robinson, 8 Iowa 318

96. Cannon v. Logan, 5 Port.(Ala.) 77.

97. La —National Park Bank v Concordia Land & Timber Co., 97 So. 272, 154 La 31
Mo —Shelton v Smith, 257 S.W. 509, 214 Mo App. 519
6 C.J. p 135 note 34.

98. Colo —Gilbert v Hudgens, 22 P (2d) 858, 92 Colo 571
Tex —Alvey v. Smith, (Civ App) 28 S W (2d) 267
6 C.J. p 135 note 35.

Statements consistent

(1) An attachment affidavit charging that defendant "has assigned, secreted, or disposed of his property and is about to further do so with the intent to delay and defraud" his creditors is not defective as charging two inconsistent grounds therefor —Clarke & Simmons v. Rule, 185 N W. 947, 151 Minn 30

(2) Where an affidavit alleged that defendants had "secreted, incumbered, transferred, or otherwise disposed of and are about to secrete, incumber, transfer, or otherwise dispose of their property with intent to defraud or delay their creditors," and "have removed and are about to remove some of their property from the state with intent to defraud or delay their creditors, and that the debt upon which this action is founded was incurred for property obtained under false pretenses," the allegation is not inconsistent.—People's State Bank v. Karlen, 182 N W 531, 532, 44 S D 82.

(3) The statements, "First. That the said defendant is about to secrete his property for the purpose

In such case, however, the grounds should be set forth cumulatively or conjunctively.[99]

If one of several grounds relied on is properly alleged, the affidavit is sufficient to warrant the issuance of the attachment, although the statement as to other grounds is defective.[1] Accordingly, an attachment is not subject to general demurrer where it contains one valid ground, although it contains an invalid ground.[2] So also the attachment will be upheld if plaintiff sustains one of the grounds alleged,[3] or if defendant leaves one of such grounds uncontested.[4]

(2) Disjunctive Allegations

The affidavit should not allege disjunctively two or more grounds for attachment which are separate and distinct and which are in no sense a phase of the same general act.

In stating two or more grounds care must be taken to avoid inconsistency or contradiction which would introduce an element of uncertainty and indefiniteness and render it impossible to determine which ground is relied on,[5] and consequently, if two or more separate and distinct grounds which are in no sense a phase of the same general act, are alleged in the alternative, the affidavit is useless for any purpose,[6] although either of such grounds would have been sufficient for the attachment had they been stated singly or united by the conjunction "and."[7] The fact that one of several grounds alleged in the alternative is insufficiently stated will not save the affidavit.[8]

Two or more phases of the same fact, or different facts of the same nature, which constitute but a single ground for attachment, may be stated disjunctively.[9] So an affidavit is not fatally defective because it states in the alternative different

of defrauding his creditors, and Second. That defendant is about to remove his property or a part thereof out of Young County, where suit is brought, with intent to defraud his creditors, and Third That defendant is about to convert his property or a part thereof, into money for the purpose of placing it beyond the reach of his creditors," are not incompatible or inconsistent with each other—Alvey v Smith, (Tex Civ App) 28 S. W.(2d) 267, 268.

(4) A declaration in an affidavit for attachment that defendant is about to dispose of his property with intent to defraud his creditors is not inconsistent with a declaration that the debt due plaintiffs was for property obtained under false pretenses—Butler v Nail, (Tex Civ App) 36 S W. (2d) 307, affirmed Nail v Compton, (Com.App) 55 S W (2d) 1028

(5) Other examples see 6 C J. p 135 note 35 [a]

Statement inconsistent

(1) Where plaintiff in his affidavit for an attachment alleged that defendant had disposed of all of her property and was about to dispose of the remainder, the grounds asserted were self contradictory and the affidavit was insufficient—Schavrien v. Reich, 155 N Y.S 365

(2) Other examples see 6 C.J. p 135 note 35 [b].

99. Alvey v. Smith, (Tex Civ App.) 28 S W (2d) 267—6 C J. p 136 note 36.

1. Market Operating Corporation v. Crull, 5 P (2d) 340, 165 Wash. 306—6 C J. p 136 note 37

2. Cleveland-Manning Piano Co. v Stewart, 84 S E 174, 15 Ga App 657.

3. La.—National Park Bank v. Concordia Land & Timber Co, 97 So 272, 154 La 31

Wash—Market Operating Corporation v Crull, 5 P (2d) 340, 165 Wash 306.

6 C J. p 136 note 38.

4. Keith v Stetter, 25 Kan. 100—6 C J p 136 note 39.

5. Idaho—Heaton v. Panhandle Smelting Co, 179 P 510, 32 Idaho 146

Minn—First State Bank of New Germany v. Hultgren, 245 N W. 829, 187 Minn 502

W Va—Piedmont Grocery Co v. Hawkins, 98 S E 152, 83 W Va. 180, 4 A L R 828.

6 C.J p 136 note 40

6. Cal—Rosenberg v Bullard, 15 P (2d) 870, 127 Cal App 315

Idaho—Heaton v Panhandle Smelting Co, 179 P. 510, 32 Idaho 146

Mich—Pierce v. Boyle, 218 N W. 756, 242 Mich 149

Mont—Patch v. Stewart, 253 P 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1118, 78 Mont 559

Tex—Alvey v. Smith, (Civ App) 28 S W (2d) 267

W Va—Hatfield v. Blount, 103 S E 203, 86 W Va. 411

6 C J p 136 note 41.

Lack of security for claim

Where an affidavit for an attachment stated that the payment of the claim sued upon had not been secured, or if secured, that such security had become valueless, since two distinct grounds were stated in the alternative, such affidavit could not support an attachment—Heaton v. Panhandle Smelting Co, 179 P. 510, 32 Idaho 146—Patch v. Stewart, 253 P 254, 78 Mont. 192, followed in Bancroft v. Leverty, 254 P. 1118, 78 Mont 559—6 C J. p 136 note 41 [a] (1), p 146 note 34 [b]

Nonresidence, disposition of property, or removal from state

An affidavit which alleges that the defendant is a nonresident, or that he is about to dispose of his property with the purpose of defrauding his creditors, or that he is about to remove from the state is defective because alleging the grounds for an attachment in the alternative—Pierce v Boyle, 218 N W. 756, 242 Mich 149—6 C J p 136 note 41 [a] (2).

7. Minn—First State Bank of New Germany v Hultgren, 245 N W. 829, 187 Minn. 502

W Va—Piedmont Grocery Co. v. Hawkins, 98 S E. 152, 83 W.Va. 180, 4 A L R 828

6 C J p 136 note 42.

Grounds united by conjunctive

An affidavit which alleges that defendant "has assigned, secreted, or disposed of his property and is about to assign, secrete and dispose of other property" is not defective, but if defendant had stated such grounds in the alternative the affidavit would have been defective because alleging inconsistent grounds for attachment. —First State Bank of New Germany v Hultgren, 245 N W. 829, 830, 187 Minn 502

8. Iowa—Stacy v. Stuchton, 9 Iowa 399

Ky—Monroe v. Cutter, 9 Dana 93—Barnard v. Sebre, 2 A K.Marsh 151.

9. Minn—American Nat. Bank of Lake Crystal v. Klust, 192 N W. 190, 155 Minn. 68—Blevins v. Rice, 163 N W. 770, 137 Minn. 430

W Va—Hatfield v. Blount, 103 S E. 203, 86 W.Va 411—Piedmont Grocery Co v. Hawkins, 98 S E. 152, 83 W Va 180, 4 A L.R. 828.

6 C.J. p 136 note 43.

Removal or absconding as one act

(1) An affidavit for attachment, stating the the debtor had removed

modes of effecting a stated purpose or intent,[10] especially where in so doing it follows the language of the statute;[11] nor is it a fatal defect that the affidavit states that defendant intends to commit or has consummated an act which furnishes a ground of attachment;[12] but it has also been held that an affidavit for attachment which alleges that defendant has disposed, or is about to dispose, of his property, states two distinct acts, and is in consequence defective if stated in the alternative[13]

It is also held that the inconsistency is not fatal if one averment does not necessarily negative the other,[14] and an affidavit is not defective because of statements in the disjunctive, where it is beyond the power of plaintiff to designate the precise mode, because of doubt as to the purpose or intent of the debtor, or for any other sufficient reason,[15] or where it is evident that defendant could not be surprised or prejudiced by the alternative statement[16]

c. Allegations as to Particular Grounds

(1) Absence, absconding, or concealment
(2) Fraud in incurring liability
(3) Fraudulent removal, disposition, or concealment of property
(4) Nonresidence

(1) Absence, Absconding, or Concealment

If the defendant's absence, absconding, or concealment is relied upon as a ground for attachment, if required by statute, the plaintiff's affidavit must charge that fact in a manner sufficient to comply with the statute.

If the ground of the application is the contemplated or actual departure or absconding of the debtor from the state or jurisdiction, or his concealment therein with intent to injure or defraud his creditors or to avoid the service of process, where the statute so requires, the affidavit must

from the state as affiant believes to defraud his creditors or avoid summons or keeps himself concealed with such intent, is not bad as stating separate grounds in the alternative—Blevins v. Rice, 163 N W 770, 137 Minn 430—6 C J p 137 note 46 [b].

(2) In commenting upon Blevins v Rice, supra, the Minnesota court in a subsequent case said that "a single act was the basis for the attachment The intention the debtor had in mind when he acted could not be known save as it might be inferred from his act For this reason it was held that his intent might be averred in the alternative as different phases of the same act"—American Nat Bank of Lake Crystal v. Klist, 192 N W 190, 191, 155 Minn 68

10. Minn—Blevins v Rice, 163 N W. 770, 137 Minn. 430
W Va—Hatfield v Blount, 103 S E 203, 86 W Va 411.
6 C J. p 137 note 44

11. Swift & Co. v Bonvillain, 71 So 849, 139 La. 553—6 C J. p 137 note 45.

Following words of statute

Where the statute requiring a statement of nonsecurity was in the following terms "that the payment of the same has not been secured by any mortgage or lien upon real or personal property; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless," the court in construing this statute with reference to the sufficiency of an affidavit said: "It would be proper to follow the language of the statute, in saying that payment had not been secured by any morigage or lien upon real or personal property . . . because it includes two or more phases of the same fact, attended with the same results, namely, that no security had ever been given; but to use the above language, and then say, 'or if originally so secured, such security has become valueless' is not to state either with certainty. It does not say that no security was ever given; neither does it say that security was given, but that the same has become valueless"—Wilke v. Cohn, 54 Cal 212, 213.

12. S D—People's State Bank v. Karlen, 182 N W 531, 44 S D 82
W Va—Hatfield v Blount, 103 S E 203, 86 W Va 411
6 C J p 137 note 46

"Converting or about to convert"

An attachment sued on the ground that defendant has converted or is about to convert his property or a material part thereof into money with intent to defraud creditors, will not be quashed because the affidavit states that he is converting or about to convert his property or a material part thereof into money or other securities, as that is but a declaration of two phases of the same fact constituting the basis of attachment.—Hatfield v Blount, 103 S E 203, 86 W Va 411.

Assignment, disposal, or concealment

Where an affidavit, as a ground for attachment, states that defendant "has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors," the affidavit is not deficient as stating separate and distinct grounds in the alternative.—McCarthy Bros. Co v McLean County Farmers' El Co, 118 N W 1049, 1051, 18 N.D 176, 138 Am S R. 757, 20 Ann Cas 574—6 C.J p 137 note 46 [a]

13. Porter v. Boehme, 199 N W 895, 160 Minn. 127—American Nat. Bank of Lake Crystal v Klist, 192 N W 190, 155 Minn 68—Guile v McNanny, 14 Minn. 520, 100 Am D 244

Has disposed of or is about to dispose of

An affidavit for attachment, specifying as the ground thereof that defendant has assigned, secreted, or disposed of his property, or is about to do so with intent to delay or defraud his creditors, states two distinct grounds for attachment in the alternative, and is bad for that reason—American Nat Bank of Lake Crystal v. Klist, 192 N W. 190, 155 Minn 68

14. Holloway v Herryford, 9 Iowa 353

15. Minn—American Nat Bank of Lake Crystal v Klist, 192 N W 190, 155 Minn 68.
Philippine—Pepperell v. Taylor, 5 Philippine 536, 4 Off Gaz. 154
6 C.J p 138 note 48.
"It is impossible, frequently, for a creditor to ascertain whether a debtor has actually consummated a fraudulent transfer of his property, or whether he is about to do so; and therefore the Legislature has made these one ground for attachment. Fraudulent sales are generally secret, and it may be very difficult to say, at a given moment, whether they are fully accomplished or not Hence a party is permitted to state his case in the alternative, that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, his property, with intent to defraud his creditors"—Klenk v. Schwalm, 19 Wis 111, 113, quoted with approval in People's State Bank v Karlen, 182 N W. 531, 532, 44 S D. 82.

16. Wood v. Wells, 2 Bush (Ky) 197.

allege such acts or conduct on the part of the debtor as will satisfactorily show the existence of the statutory ground.[17] As a rule, however, no more is required than that there shall be a substantial compliance with the requirements of the statute respecting this ground therefor[18] by the statement of facts from which the court or officer can determine whether the departure, contemplated departure, or concealment, as the case may be, is sufficiently shown to entitle plaintiff to an attachment[19]

Where the statute permits an attachment only where defendant has departed from the state, an affidavit stating that defendant is "about" to depart is insufficient[20] On the other hand, where the fact that defendant is about to depart from the jurisdiction is a ground for attachment, such an averment is sufficient.[21]

An affidavit made in good faith on belief that defendant absconded from his creditors may be sufficient to sustain the attachment, although in fact at the time defendant resided within the state[22]

Where the seller in an action for the price of goods also sought an attachment upon the ground that defendant was about to remove from the state with the intent of defrauding his creditors, and the affidavit did not aver that the seller claimed a lien upon the property, as required by statute, the affidavit was insufficient to sustain an attachment[23]

Citizenship or residence of parties. If it is required that the creditor,[24] or the absconding or concealed debtor,[25] be a citizen or a resident of the state or some prescribed portion thereof, those facts must appear by appropriate allegations. It has been held, however, sufficient to state that the debtor has absconded from his usual place of abode without stating his residence positively,[26] and the fact of residence within the state may be implied from statements that the defendant conceals himself therein[27]

Time of absconding. When it is required to be shown that defendant absconded within a prescribed time after the injury complained of, such fact must be sufficiently averred or appear by fair inference.[28]

Intent. If the creditor relies on the fact or is required to state that the contemplated or actual departure or the concealment is with intent to avoid the service of process,[29] or that a removal of

17. N J —Henry v Freeman, 145 A. 107, 7 N J.Misc 263
N D —Grewer v Kinnischtzke, 226 N. W 812, 58 N D 622
6 C J p 138 note 54

Absconding from debtors

An affidavit, which expressly charged defendant with the unique and unusual proceeding of absconding from his debtors, is not a sufficient basis for the issuance of an attachment —Little v. Long, 107 A 412, 93 N J Law 99

Affidavits insufficient

(1) An affidavit merely alleging that defendant "absconds from his creditors, and is not a resident of the state of New Jersey, and that the summons cannot be served in this cause." without setting out any facts tending to prove such allegations, is insufficient —Henry v. Freeman, 145 A. 107, 7 N J Misc. 263.

(2) Under a statute authorizing an attachment where the debtor is an inhabitant of the state and has secretly departed from the state with intent to defraud his creditors or to avoid the service of summons, or keeps himself concealed within the state with the like intent, an affidavit and application for attachment, merely alleging that the debtor "formerly residing in the city of New York, but now absent therefrom or concealed therein, is an absconding or concealed debtor, and cannot be found," is insufficient —Castellanos v. Jones, 5 N Y. 164.

As against demurrer

An affidavit for attachment which sets forth that defendant is about to remove from the county is good against a general demurrer —Lawrence v Lee's Department Store, (Ga App) 172 S E 471

As explaining "conceal" and "abscond"

Where it was provided by statute that an attachment might issue upon complaint being made that "any person hath removed or is removing himself out of the county, 'privately,' or so absconds or conceals himself that the ordinary process of law cannot be served on such debtor," and where plaintiff in his affidavit alleged that defendant was "removing privately out of the county," to the best of his knowledge and belief, and that defendant was indebted to plaintiff, the affidavit was sufficient to sustain an attachment since the phrase "ordinary process of law cannot be served" relates to, and explains the meaning of the words "abscond" and "conceal."—Bank of Alabama v. Berry, 2 Humphr (Tenn) 442, 443.

Personal service outside of state

A statute regulating attachment, where defendant has left the state or has assigned property to defraud his creditors, is inapplicable, where personal service is made upon defendant without the state —Farlee v Farlee, 235 N Y.S 239, 134 Misc. 275.

18. Lee v Peters, 9 Miss. 502—6 C. J. p 139 note 55.

19. Sommers v. Allen, 28 S E 787, 44 W Va 120—6 C J p 139 note 56

20. Porter v Boehme, 199 N W. 895, 160 Minn 127—6 C J p 138 note 54 [h].

21. Barnett v. Findley, 162 S E 288, 44 Ga App 545

22. Walker v Anderson, 18 N J.Law 217.

23. E B Roddey & Co v. Bell, 126 S E 427, 131 S C 136

24. Staples v Fairchild, 3 N Y 41—6 C J. p 139 note 59

25. Hotel Touraine, Inc. v Waite, 113 N Y S 19, 61 Misc. 54—6 C J. p 139 notes 60, 61.

26. Wagonhorst v. Dankel, 1 Woodw. (Pa) 221

27. N Y —Matter of Warner, 3 Wend. 325
Tex —Griffith v. Robinson, 19 Tex. 219.

28. N.Y —Lichenstein v. Lorge, 137 N Y S 1.
N C —Webb v. Bowler, 50 N C. 362

29. Breakstone Bros Bronx Branch v Hyman, 157 N Y S. 893, 94 Misc. 171—6 C J p 140 note 64.

Avoidance of service not shown

Where plaintiff in his affidavit for an attachment, on the ground that defendant was concealing himself in order to avoid service of summons, failed to set out any facts showing defendant knew that service of summons was sought to be made upon him, and it merely appeared that de-

property was with intent to avoid service,[30] he must allege it in such a manner that the intent can be judicially inferred. It has been held, however, not necessary to show that the concealment is to avoid service of a summons in the particular action in which the attachment is sought.[31]

Where plaintiff is required by statute to charge that defendant is acting with the intent of defrauding his creditors,[32] or that defendant is acting to the injury of his creditors,[33] and the affidavit fails so to charge, it is insufficient to sustain an attachment. Such a recital, however, is unnecessary where the statute authorizes attachment regardless of the intention with which the debtor absconded or the effect of his departure upon his creditors,[34] and, where the object of the concealment is alleged to be for the purpose of avoiding the service of summons which is a sufficient ground for attachment, a further allegation of an intent to defraud creditors is not necessary.[35]

Negativing matters of defense. It is not necessary to state the period of defendant's absence, or that an attempt has been made to conceal his absence, where the residence of the debtor within the state during such period is a matter of defense.[36]

(2) Fraud in Incurring Liability

Where an attachment is sought upon the ground that the debtor acted fraudulently, if the statute so requires the affidavit must set forth the facts constituting such fraud, although in the absence of such a requirement a positive allegation of fraud is sufficient.

Where the statute does not require that plaintiff set out the facts in his affidavit, a general charge of fraud or that the debt sued on was fraudulently contracted will be sufficient.[37] Where, however,

fendant was absent from his home at 9 p m when service was attempted upon him, the affidavit did not allege facts showing defendant concealed himself from service—Breakstone Bros. Bronx Branch v Hyman, 157 N.Y.S 898, 94 Misc. 171

30. Bryan v Norfolk, etc, R Co, 104 S.W. 523, 119 Tenn 349

31. Finn v Mehrbach, 65 N.Y.S 250, 30 N.Y.Civ Proc 242.

32. Grewer v. Kinnischtske, 226 N W. 812, 58 N.D. 622—6 C.J. p 140 note 67.

Affidavit insufficient

An affidavit which avers that plaintiff has reason to believe, and does believe, that defendant is about to dispose of all his liquid assets to remove them beyond the reach of plaintiff so as to prevent plaintiff from collecting his debt, and which fails to set forth any facts as a basis for such belief, is insufficient—Stephens Howard Co. v. Baer, 166 S E 77, 203 N.C. 355.

Intent inferred

An intent to defraud his creditors may be inferred from facts set forth in plaintiff's affidavit showing conduct on defendant's part inconsistent with fair dealing—Grewer v Kinnischtske, 226 N.W. 812, 58 N.D 622.

33. Hewitt v. Terry, 28 N W. 326, 56 Mich 591.

34. Hawes v. Clement, 25 N.W. 21, 64 Wis. 152

35. Finn v. Mehrbach, 65 N Y.S. 250, 30 N Y Civ.Proc. 242

36. Frantz v. Wendel, 28 Ind. 391.

37. Thwing v. Humphrey, 75 P. 1127, 13 Okl. 646—6 C.J. p 140 note 72.

In Pennsylvania

(1) An affidavit for an attachment under the act of 1869 is sufficient if it is made in the words of the act, or substantially in the words of the act, without setting out the specific acts constituting the fraud—Sharpless v Ziegler, 92 Pa 467—Holland v. Atzerodt, 1 Walk 237—Lit v. Williams, 15 Pa Dist 24, 32 Pa Co 151.

(2) Such affidavit is sufficient since the "design of the act, in this particular, was not so much to satisfy the mind of the prothonotary as to the rectitude of the application 'as to commit on oath the applicant to the truth of his allegations, in order that he might thereafter be legally liable therefor'" And accordingly an affidavit which alleges "that said goods were bought under false and fraudulent misrepresentations," and "that deponent is informed and believes that said defendant is about to assign and transfer his goods and chattels and property fraudulently, with the intent to cheat and defraud his creditors," substantially in the language of the statute, is sufficient—Goodman v. Sondheim, 3 Kulp 87, 88

(3) If, however, there is added by way of explanation, a charge of specific fraudulent acts, then the addition must be such that, taken by itself, it would be a good ground for an attachment.—Wolf v. Wentz, 5 Pa.Dist & Co 276—Boyd v Bright, 4 Pa Co. 518—6 C J p 140 note 73 [a].

(4) Where the affidavit is in the words of the act of 1869, proof can subsequently be taken by deposition, setting forth the particular acts constituting the fraud.—Harris v. Wood, 1 Pa Dist. 33.

(5) In such case plaintiff may establish the specific acts constituting the fraud at the hearing—Netter v. Harding, 6 Pa Dist. 169, 18 Pa.Co. 353.

(6) Similarly he may prove such specific acts upon a motion to dissolve the attachment—Hall v. Kintz, 18 Pa Co 24

(7) A general charge that defendants fraudulently contracted a debt, not made in the words of the statute, nor setting forth the specific acts constituting the fraud, such as artifice or false pretenses in contracting the debt is insufficient to sustain an attachment of property—Biddle v. Black, 99 Pa 330—Harrisburg Boot, etc, Co. v. Johnson, 3 Pa.Dist. 432—Miller v Shapiro, 12 Pa.Co 526—Chase v. Lennox, 2 Wkly N.C. 487—Bond v. Wheeler, 1 Wkly.N.C 282

(8) If the fraud is merely charged in the words of the act without allegations of specific acts, a general denial by defendant will justify the dissolution of the attachment if no testimony is taken—Netter v. Harding, 6 Pa Dist. 169, 18 Pa.Co. 353.

(9) In commenting upon the above rule the court has said, "We were at first inclined to think that the case of Biddle v Black, 99 Pa 330, modified the principle decided in the case of Sharpless v Ziegler, but, after a thorough examination of both cases, we are satisfied that there is no conflict whatever between them. In the latter case, the affidavit was held defective and the attachment was dissolved. The court, in its opinion, says: 'It does not set forth specifically the fraudulent acts of the defendant, nor is it made in the words of the statute. It does not sufficiently describe the kind of property, and is wholly silent as to the time the merchandise was purchased. The evidence did not establish that possession of the goods was obtained by artifice or false pretences, indicating an intention to defraud the vendors.' If this latter case proves anything, it proves that the affidavit must either set forth specifically the fraud-

it is required by the statute, the specific facts relied on to establish the fraud, or from which the court is asked to draw the inference of fraud, must be set out in such a manner as to justify the court or officer in granting the application.[38] The facts alleged must exclude every reasonable conclusion that the act was proper and innocent, and if they leave it doubtful whether the act was fraudulent or innocent, the affidavit will be insufficient.[39]

It is the better practice to state the place where the debt was contracted,[40] but the omission of such a statement will not vitiate the affidavit.[41]

Where it is necessary to show that alleged fraudulent statements were in writing, signed by the debtor or his agent, the statement must be attached to the affidavit or its substance set out.[42]

(3) Fraudulent Removal, Disposition, or Concealment of Property

(a) In general

(b) Intent

(c) Description of property removed

(a) In General

If fraudulent removal, disposition or concealment of property is relied upon as a ground for attachment, the affidavit for attachment must set forth such facts as the statute requires in regard thereto.

Where the statute does not require plaintiff to set out the facts upon which he relies in his affidavit for attachment, a positive statement in the affidavit that the debtor is fraudulently concealing or removing his assets from the jurisdiction is sufficient without setting forth the facts upon which plaintiff relies.[43] On the other hand, where the statute requires plaintiff to set forth the facts upon which he relies, an affidavit, based on the disposition, removal, or concealment by a debtor of his property, or his purpose to dispose of or secrete the same, with intent to defraud, hinder, or delay his creditors in the collection of their just claims, should state such specific facts and circumstances as will justify a conclusion as to the commission of the overt acts charged, and the existence of the fraudulent intent.[44] Although it is the better practice to set out this ground according to the terms

ulent acts of the defendant or must be made in the words of the statute; and if made in the words of the statute, then the evidence must establish the specific acts of fraud, indicating an intention to defraud his creditors; otherwise, the attachment would be dissolved. It is true, there are a number of Common Pleas decisions which hold that where the affidavit specifically sets forth allegations of fraudulent acts, they must of themselves be sufficient ground to sustain the attachment, and this though there be a general charge of fraud within the words of the Act. In these opinions, however, it will be found, upon examination, that the judges deciding these principles at the same time conceded that it was sufficient if the affidavit had stopped after having made the charges of fraud, either literally or substantially in the language of the Act of Assembly, but that the affiant having undertaken to set out the particular acts of fraud, he was bound by them, and if they were insufficient to justify the proceedings that the attachment should be dissolved. Bank v. Tasker, 1 C.C. 173, Boyd v. Bright, 4 C.C. 518, and others"—Netter v Harding, 6 Pa.Dist. 169, 171, 18 Pa. Co. 353.

38. Commercial Credit Co. v. Collier, 145 S.E. 880, 106 W.Va. 252—Teter v. George, 103 S.E. 275, 86 W. Va. 454—Elkins Nat. Bank v. Simmons, 49 S.E. 893, 57 W.Va. 1—6 C. J. p. 140 notes 73, 74.

Affidavit held sufficient

Where the affidavit for attachment alleged, not only that defendant and his partner agreed to transfer their property to secure payment of the debts, but also represented the property could be sold for two thousand dollars or more clear of all debts and liabilities, whereas it was not worth to exceed three hundred dollars to four hundred dollars, which amounted in effect to a representation of solvency or the ownership and value of property, the affidavit was sufficient to sustain an attachment on the ground of fraud—Remington v. Fragulius, 208 P. 65, 120 Wash. 563.

Affidavit insufficient

A general charge of the borrower's intent not to return the loan, supported only by an averment of a plea of nonliability for debt in an action thereon, does not amount to a sufficient statement of facts in an attachment affidavit setting up as ground for attachment a fraudulent contraction of the debt—Teter v. George, 103 S.E. 275, 86 W.Va. 454.

39. Teter v. George, supra.

40. Hall v. Kintz, 13 Pa.Co. 24.

41. Hall v. Kintz, supra.

42. Fisher v. Secrist, (C.C.Ill.) 48 F. 264.

43. D.C.—Wielar v. Garner, 4 App. D.C. 329.

Ohio—Gans v. Thompson, 11 Ohio St. 579.

44. Fla.—Caldwell v. People's Bank of Sanford, 75 So. 848, 73 Fla. 1165.

N.Y.—Anderson v. Malley, 131 N.Y.S. 729, 191 App.Div. 573

N.C.—Stephens Howard Co. v. Baer, 166 S.E. 77, 203 N.C. 355.

S.C.—Sabb v. Richardson, 117 S.E. 200, 124 S.C. 64.

W.Va.—Littlestown Sav. Inst. v. Bream, 121 S.E. 169, 95 W.Va. 351

6 C.J. p. 135 note 32 [a], p. 141 note 83

Affidavits held sufficient

(1) Where plaintiff sought an attachment upon the ground that defendant was secreting and disposing of his property with the intent of defrauding his creditors, and alleged that defendant locked up his chattels and would not permit plaintiff to inspect them, his affidavit was sufficient to sustain an attachment—Lomin Corporation v. Kohlhepp, 271 N.Y.S. 709, 151 Misc. 545.

(2) Where an affidavit for attachment stated that one of defendants in the action stated that the officers of defendant unincorporated association had made arrangements to transfer the funds of the council to a private party, and that, if plaintiff did not bring suit, there would be no funds in the treasury with which to pay any money which might be recovered by plaintiff, the affidavit, setting forth facts that plaintiff was a creditor of defendants, and that they were about to assign or dispose of their property with intent to defraud plaintiff, was sufficient—Meinhart v. Contresta, 194 N.Y.S. 593.

Affidavit insufficient

That defendant was shipping lumber out of the state, which he had bought of plaintiff, with fraudulent intent, authorizing an attachment, was not shown by an affidavit alleging his failure to pay as per contract; the delivery of all the lumber to defendant; that the whole price

of the statute, yet mere informalities or clerical omissions in the statements made are insufficient to defeat the right to the attachment if the requirements are substantially complied with,[45] but the omission of material statements or the failure to state in substance the essential requirements of the statute will render the affidavit insufficient.[46]

Where the specific facts constituting the fraudulent intent to dispose of property in order to defeat the claims of creditors must be set out by competent evidence, an affidavit showing facts based upon hearsay only,[47] or alleging only legal conclusions without setting out any ultimate facts,[48] is insufficient to sustain an attachment.

Where a statute authorizes the attachment if defendant is about to remove or has removed his property or a material part thereof out of the state, not leaving enough therein to satisfy plaintiff's claim, or the claim of defendant's creditors, the fact that there is insufficient property remaining to satisfy claims is material and must be set forth in the affidavit.[49]

Allegations not required by statute. Where the statute does not require such allegations it is not necessary for the affidavit to set forth that defendant cannot be found within the state,[50] that ordinary process of law cannot be secured,[51] that defendant is insolvent or a nonresident,[52] that there was an intent to defraud creditors,[53] the place of concealment,[54] or that the property disposed of was not a part of the debtor's homestead.[55] The presence of an unnecessary averment will not, however, invalidate the affidavit.[56]

(b) Intent

If the statute so requires, plaintiff must set forth in his affidavit that the transfer was made with fraudulent intent and the facts upon which he relies.

was due; that plaintiff had "learned" that defendant had shipped to another place, which was mere hearsay, that defendant's residence in the locality had been short, that defendant had declared his intention to continue shipping, without first paying, and that plaintiff thought defendant had little or no financial standing—Virginia-Carolina Chemical Co v Wilkins, 89 S E 659, 105 S C. 291

Violation of Bulk Sales Act

Where it is provided by statute that an attachment may issue upon proof by affidavit that defendant has disposed of his property with intent to defraud his creditors, and plaintiff in his affidavit avers that defendant has disposed of his property with a fraudulent intent, since he has disposed of it in violation of the Bulk Sales Law, such affidavit is insufficient, in the absence of any proof of an actual fraudulent intent on the part of defendant and in the absence of any statutory provision that such sale is fraudulent—Leventon v Davison, 127 A 787, affirmed 130 A 632, 102 N J Law 144.

45. Broocks v First Nat. Bank, (Tex Civ.App.) 65 S.W (2d) 521—6 C J. p 141 note 84.

Conversion of "this" instead of "his" property

A writ of attachment and the judgment foreclosing it are not void because the affidavit stated that defendant was about to convert "this," instead of "his," property into money for the purpose of placing it beyond his creditors' reach—Broocks v. First Nat. Bank, (Tex Civ App.) 65 S W (2d) 521.

46. Littlestown Sav Inst v. Bream, 121 S E 169, 95 W.Va. 351—6 C.J. p 142 note 85.

"About to convert" and "attempting to convert" not equivalent

Where the statute prescribes that plaintiff in order to entitle himself to an attachment must allege in his affidavit that defendant is "about to convert" his property with intent to defraud his creditors, an allegation that defendant is "attempting to convert" his property with such intent is insufficient, and will not sustain an attachment—Littlestown Sav Inst v. Bream, 121 S E 169, 95 W.Va 351

Omission of "by delay"

An affidavit for attachment omitting the words "by delay" before the words "in obtaining judgment or a return of no property found" is insufficient—Champion v. Ferguson, 43 S W (2d) 719, 241 Ky. 303.

47. Anderson v Malley, 181 N Y.S 729, 191 App Div 573.

Hearsay

(1) Where plaintiff sought an attachment upon the ground that defendant was about to assign and dispose of his property in order to defraud his creditors, and plaintiff in his affidavit set forth no acts constituting such fraud and only gave certain hearsay statements to the effect that such transfer was to be made, the affidavit was insufficient to sustain an attachment—Anderson v Malley, 181 N Y.S 729, 191 App Div. 573.

(2) Where plaintiff sought an attachment upon the ground that defendant was threatening to dispose of his property with intent to defraud his creditors, and plaintiff in his affidavit principally relied upon the statements of third persons, who were not shown to have refused on request to make affidavits, and it appeared from such affidavit that the only property which defendant was offering for sale and selling was that which defendant had presumably bought for resale, the affidavit was insufficient.—National Milk Products Mfg Co v. Gerard, 191 N.Y.S. 142, 199 App Div 958.

48. Rockfall Apartments v. Posner, 153 N Y.S 979.

Legal conclusion insufficient

Where action is brought to recover a debt, and not to foreclose upon the security, an affidavit which merely alleges that defendant is about to remove his property from the state with intent to defraud his creditors without setting forth any facts constituting such act, is insufficient—Rockfall Apartments v. Posner, 153 N.Y S. 979.

49. Hey v. Harding, 53 S W. 33, 21 Ky L. 771.

50. Luttrell v. Martin, 17 S E. 573, 112 N C 593—6 C J. p 142 note 86

51. Ga.—Shockley v. Bulloch, 18 Ga. 283.
Miss.—Wharton v. Conger, 17 Miss 510.

52. Ky.—George v Hoskins, 30 S W 406, 17 Ky L 63
La.—Swift & Co v Bonvillain, 71 So. 849, 139 La. 558

53. Sherrill v Fay, 14 Iowa 292—State Branch Bank v. White, 12 Iowa 141.

54. Wielar v. Garner, 4 App.D C. 329.

55. Grollman v Lipsitz, 21 S E. 272, 43 S C. 329.

56. Spear v. King, 14 Miss. 276.

Where an attachment is sought upon the ground that defendant is transferring or disposing of his property in order to defraud his creditors, defendant's fraudulent intent is an essential element and must be averred[57] This averment of defendant's fraudulent intent should be made substantially in the language of the statute,[58] but the exact words of the statute have been held unnecessary where words of an equivalent meaning are used[59] Where the statute requires the affidavit to set forth the facts upon which the conclusion of fraudulent intent is based, a mere averment of such intent without a showing of its factual basis is insufficient,[60] although such fraudulent intent need not be conclusively established by the facts so stated, it being sufficient if a fair inference of the existence of the intent can be inferred.[61]

Where the statute does not so require it is not necessary to show that the alleged fraudulent disposition was to avoid payment of a debt due to plaintiff.[62]

If the facts alleged are consistent with an honest purpose on the part of creditors to secure their just claims,[63] or are as consistent with an honest intent on defendant's part as with a dishonest one,[64] as where a disposition of property was not necessarily fraudulent, and plaintiff failed to negative defendant's good faith,[65] the attachment should not issue.

(c) Description of Property Removed

If the statute so requires, the affidavit must describe or designate the property which the defendant is disposing of or intends to dispose of with an intent to defraud.

If the statute so requires, it is necessary to describe or designate the property which has been or is about to be disposed of.[66] This description of the property must be sufficiently specific to identify and individuate the property about to be removed, and, accordingly, a mere averment that defendant is about to remove all his property, is insufficient.[67]

(4) Nonresidence

The affidavit must contain all the allegations in regard to residence of the parties required by statute.

Where an attachment is sought on the ground of defendant's nonresidence, if the statute so requires, the fact of nonresidence must be stated in the affidavit.[68] Under some statutes it is sufficient to state the ultimate fact of nonresidence, without setting out in detail the facts upon which such statement is based,[69] but under other statutes, an affidavit for an attachment on this ground should properly state facts and circumstances sufficient to authorize an inference that the debtor is a nonresident within the terms of the statute.[70]

57. Pa.—Lehmann v. Steffey, 18 Pa. Dist. & Co 574
S.C—Skalowski v. Joe Fisher, Inc., 149 S E 340, 152 S C 108, 65 A L R 1427.
W Va—Littlestown Sav Inst v Bream, 121 S E 169, 95 W.Va 351
6 C J p 142 note 94.

Insolvency

A mere averment of insolvency, in an affidavit for attachment, on the part of the debtor at the time of his purchase, unaccompanied by any allegation of false representation or artifice, is insufficient—Miller v. Shapiro, 12 Pa Co 526.

58. Hey v. Harding, 53 S.W 33, 21 Ky L. 771—O'Connor v. Sherley, 53 S W 1056, 107 Ky 70, 21 Ky.L. 735.

59. Clolinger v. Callahan, 263 S W. 700, 204 Ky 33

Omission of word "intent"

Where an affidavit for an attachment alleged that "defendants . . have sold, conveyed, or otherwise disposed of their property with the fraudulent to cheat, hinder and delay their creditors" the affidavit was sufficient even though the word "intent" was omitted, since no one could "cheat" his creditors without having a "fraudulent intent"—Clolinger v Callahan, 263 S W. 700, 204 Ky. 33

60. Sabb v. Richardson, 117 S E 200, 124 S C 64—Cook v Cook, 93 S E 138, 107 S C 441—Virginia-Carolina Chemical Co. v Wilkins, 89 S E 659, 105 S C 291

61. Kipling v Corbin, 66 How Pr.(N Y) 12—Cooney v. Whitfield, 41 How Pr.(N Y.) 6—6 C J p 143 note 95.

62. Tanner, etc., Engine Co. v Hall, 22 Fla 391.

63. Pierce v Johnson, 53 N W. 16, 93 Mich 125, 18 L R A 486

64. Littlestown Sav Inst v Bream, 121 S E 169, 95 W.Va 351—6 C J p 143 note 99.

65. Littlestown Sav. Inst. v. Bream, supra.

66. McDougal v McGee, 14 Pa Dist 500—6 C J p 143 note 1.

Quantity of property

(1) It has been held that an affidavit for an attachment, based upon the ground that defendant is removing his property beyond the jurisdiction in order to defraud his creditors, need not state the quantity of the goods removed—Weilar v. Garner, 4 App D C 329.

(2) But there is an intimation in the language used in another case, that the quantity of the property removed must be given, the court saying: "There is an indefinite statement that the defendant in each case has removed some property at some time previous to the filing of the affidavit from the jurisdiction of this court for the purpose of having it sold at auction. That is so indefinite as to time, as to quantity and as to the surrounding circumstances as to make it, in the way of testimony, of scarcely any value whatever."—Boulter v Behrend, 20 D C 567, 568.

67. McDougal v McGee, 14 Pa Dist. 500.

68. Mo—Ellrod v. Carroll, 202 S. W. 4
Pa—Mindlin v Saxony Spinning Co, 104 A 598, 261 Pa. 354—Schueck v. Freeman, 55 Pa Super 38.
6 C J p 143 note 5

Allegation held sufficient

An affidavit for attachment stating "affiant has good reason to believe, and does believe, that the defendant is not a resident of the state of Missouri," conforms to the statute and is sufficient—Ellrod v. Carroll, (Mo) 202 S W. 4.

69. Citizens' State Bank v Porter, 93 N.W 391, 4 Neb (Unoff) 72—6 C J p 143 note 6.

70. Miller v Weiner, 167 A 863, 11 N J Misc. 816—6 C J p 144 note 7.

Knowledge of nonresidence inferred

Where an allegation is made on personal knowledge that plaintiff knows defendant, that he is a nonres-

Where attachment cannot issue against a nonresident joint debtor where the other joint debtors are residents, an affidavit in a proceeding against one nonresident joint debtor should affirmatively show the nonresidence of the other joint debtors [71]

In addition to the allegation of nonresidence, plaintiff is sometimes required to allege in his affidavit for attachment that defendant is not present within the county; and where such a requirement exists an affidavit which merely alleges that defendant is a nonresident, is insufficient.[72]

An averment of nonresidence in an affidavit for attachment is not conclusive between the parties or their privies,[73] and if the statement as to nonresidence proves untrue the attachment is wrongful and the proceedings are void.[74]

Residence of plaintiff. Where the ground of the application is that defendant is a nonresident, it is sometimes required by statute that plaintiff should show that he is a resident of the state, and if this allegation is necessary its absence will invalidate the affidavit.[75]

Place of defendant's residence. If not required by statute the place of defendant's residence, other than an averment of his nonresidence, is not essential and need not be stated in the affidavit for attachment.[76] If required by the statute, however, defendant's place of residence must be alleged,[77] or the affidavit must state that on diligent inquiry it cannot be ascertained.[78] Under such a statute, where there are several defendants, the place of residence of each defendant, or the fact that the place of residence of each cannot be ascertained, should be alleged.[79]

Inability to serve process. It is sometimes required that the affidavit shall show that, because of defendant's nonresidence, plaintiff is unable to serve process upon him;[80] and even if the statute does not require such an allegation the addition thereof is mere surplusage and not ground for quashing the attachment.[81]

§ 127. —— Negation of Improper Motive

Where the statute so requires, the plaintiff must allege in his affidavit that the attachment is not sought for the purpose of injuring the defendant or his creditors.

The affidavit is fatally defective where it fails to comply, at least substantially, with a statutory requirement that it shall allege that the attachment is not sued out for the purpose of injuring or harassing defendant,[82] or prosecuted in order to hinder, delay, or defraud any creditor of defendant [83] Where it appears that there are two or more defendants against whom the attachment is sought, the affidavit must negative the existence of an improper motive as against all of the defendants; and accordingly a mere statement that an attachment was not sued out to harass defendant is insufficient [84] Where an attachment is sought against several defendants, and the statute requires the affidavit to negative an intent to hinder any creditor of any defendant against whom the attachment runs, an affidavit which fails to negative an intention to hinder any creditor of any number less than all of defendants is fatally defective [85]

On the other hand, a false allegation in the affidavit that the attachment was not sought for the purpose of hindering or defrauding creditors was immaterial, where it did not appear that the rights of creditors were fraudulently invaded by obtaining the attachment.[86]

ident, and that he resides in a certain town in an adjoining state, the affidavit is sufficient to justify an inference of satisfactory knowledge of nonresidence, although plaintiff was a stranger to the original transaction —Foster v. Rogers, 64 N Y S 652, 31 Misc. 14

71. Corbit v Corbit, 13 A 178, 50 N J Law 363—6 C J. p 144 note 8.

72. Milton v. Meadville Spinning Co, 28 Pa Dist 53

73. Barr v. Perry, 3 Gill (Md.) 313 —6 C.J. p 146 note 24.

74. German Nat Bank v Kautter, 75 N W. 566, 55 Neb. 103, 70 Am S R. 371.

75. Talcott v. American Credit Indemnity Co., 30 N.Y S. 1113, 81 Hun 577—6 C J. p 145 note 11.

76. Ga.—Miller v. Swilley, 100 S E 641, 24 Ga App 278
Miss.—James v. Dowell, 15 Miss. 333.

77. Cantrell v. Letwinger, 44 Miss 437.

78. Smith v. Huntoon, 24 N E 971, 134 Ill 24, 23 Am S R. 646—6 C.J. p 145 note 14

79. Britton v. Gregg, 96 Ill App 29, affirmed 61 N E 1024, 193 Ill 394

80. Goeringer v. Young, 134 A 756, 4 N J Misc 359—6 C J. p 145 note 17.

81. McMahon v. Boardman, 29 Tex. 170

82. Surf Cap Co v. B F. Goodrich Rubber Co, (Tex Civ.App) 16 S.W. (2d) 567—6 C J. p 146 note 28.

83. Metropolitan Investment & Improvement Co v. Schouweiler, 168 P. 599, 83 Or 695, affirmed 164 P. 370, 83 Or. 695—6 C J. p 146 note 29

84. Spencer v. Davis, (Tex Civ App) 298 S W. 443—6 C.J. p 146 note 28 [a].

Addition of words "or either of them"

Where it was provided by statute that the affidavit for an attachment should state that it was not sued out for the purpose of injuring or harassing defendant, and it was also provided by statute that in construing a statute the singular and plural should each include the other, unless otherwise expressly provided, it was held that an affidavit for an attachment against several defendants was sufficient where it alleged that the attachment was not sued out to injure or harass "defendants" without adding the words "or either of them."—Doty v. Moore, 112 S.W. 1038, 102 Tex 48, overruling (Civ. App) 113 S W. 955—6 C.J p 146 note 28 [b].

85. Pajaro Valley Bank v. Scurich, 95 P. 911, 7 Cal App. 732.

86. Title Ins. & Trust Co. v California Development Co., 152 P. 542, 171 Cal. 173.

§ 128. —— Danger of Loss or Debt

If the statute so requires, the plaintiff in his affidavit for an attachment must allege that he is in danger of losing his debt.

Where plaintiff is required to show that there is a probability of losing his debt that fact should appear by a sufficient allegation.[87] The reasons for the apprehension of losing the debt should be shown by a statement of facts upon which the fear of loss is based,[88] and facts should be set forth showing that the property owned or possessed by defendant subject to attachment probably will not be available to execution when judgment is had.[89] However, an allegation to the effect that plaintiff is about to lose his debt has been held unnecessary where the attachment is sought on the ground of removal of property,[90] or the absconding, absence, or concealment of the debtor.[91]

Where there are several plaintiffs seeking an attachment, an affidavit by them alleging in the singular that "plaintiff" will probably lose his debt is insufficient.[92]

Where the statutory ground relied upon for attachment is that defendant does not have sufficient property to satisfy plaintiff's demand and the consequent endangering of its collection, and where the action is brought against joint obligors, an affidavit which alleges that one obligor does not have sufficient property to satisfy the demand without making a similar allegation as to the other defendant, does not state a good ground for attachment.[93]

§ 129. —— Lack of Security for Indebtedness

If the statute so requires, plaintiff must state that he has received no security for the indebtedness.

Plaintiff need not negative the existence of security where he is not required to do so by statute,[94] and accordingly, where the debt sued on was incurred prior to the passage of the statute requiring such an allegation,[95] or where plaintiff in a particular case is only required to show defendant's nonresidence,[96] the affidavit need not allege a lack of security; nor is plaintiff required to show by affidavit that the existing security is insufficient to discharge the debt sued on, in the absence of a statute prescribing such showing.[97]

An affidavit is fatally defective, however, where it fails to comply, at least substantially, with a statutory requirement that it shall state that the indebtedness for which the action is brought has not been secured by any mortgage or lien on real or personal property, or any pledge of personal property,[98] or that, although security was given, it has become valueless;[99] and to the latter allegation plaintiff is sometimes required to add that the security has become valueless without any act on his part.[1] Where plaintiff is required by statute to allege in his affidavit for an attachment that the debt "has not been secured," the affidavit is insufficient where it merely alleges that the "debt is not secured."[2] The fact that the allegation relative to the nonsecurity of the debt is made in the alternative, although rendering the attachment proceedings voidable, will not render such proceedings void.[3]

The affidavit for an attachment must follow the statutory requirement by negativing the existence of all the forms or means of security enumerated by it. Accordingly, where an affidavit alleges only that the debt is not secured by a mortgage, and fails to negative the existence of the other kinds

87. Western Auto Co v. Gurnea, 274 P. 863, 73 Utah 423—6 C.J. p 146 note 30.

88. Keigher v. McCormick, 11 Minn 545

89. Western Auto Co v. Gurnea, 274 P 863, 73 Utah 423

90. Wright v. Smith, 19 Tex. 297.

91. Wright v. Smith, supra.—Messner v. Hutchins, 17 Tex. 597.

92. Sarrazin v Hotmann, 40 S.W. 629, 16 Tex Civ App 351.

93. Lewis v Browning, 4 S.W.(2d) 734, 223 Ky. 771.

94. Barbee v. Holder, 24 Tex. 225.

95. Williams v. Glasgow, 1 Nev. 533

96. Title Ins & Trust Co v. California Development Co., 152 P. 542, 171 Cal. 173—6 C.J. p 147 note 35.

97. Staley v. Hoffman, (Tex Civ. App.) 57 S.W.(2d) 270.

98. Cal.—Anaheim Nat Bank v. Kraemer, 7 P.(2d) 765, 120 Cal. App 63

Mont.—Patch v Stewart, 253 P. 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1118, 78 Mont. 559

Or.—Metropolitan Investment & Improvement Co v Schouweiler, 168 P 599, 83 Or 695, affirmed 164 P. 370, 83 Or 695

6 C.J. p 146 note 33.

99. Idaho.—Bear Lake State Bank v. Wilcox, 279 P 1090, 48 Idaho 147

Mont.—Home State Bank of Manhattan v. Swartz, 234 P. 281, 72 Mont. 425.

6 C.J. p 146 note 34.

Averment held sufficient

An averment that the security for the indebtedness sued on "has been fully exhausted," although not in the statutory language, sufficiently conforms to the wording of the statute and is sufficient.—Corum v Superior Court in and for Alameda County, 300 P 837, 114 Cal.App 741

1. Idaho.—Bear Lake State Bank v. Wilcox, 279 P 1090, 48 Idaho 147.—Bellevue State Bank v. Lilya, 205 P. 893, 35 Idaho 270.

Mont.—Home State Bank of Manhattan v Swartz, 234 P. 281, 72 Mont. 425

2. Jenkins v. First Nat Bank, 236 P. 1085, 73 Mont. 110.—American Surety Co of New York v Kartowitz, 195 P. 99, 59 Mont 1.—Continental Oil Co v. Jameson, 164 P. 727, 53 Mont 466

3. Patch v Stewart, 253 P 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1118, 78 Mont. 559.

of security, the affidavit is insufficient.[4]

A statutory ground for attachment, required to be set out in the affidavit, that defendant is indebted to plaintiff and that the payment of the debt has not been secured by any mortgage or lien on real or personal property, or any pledge of personal property, or if originally secured, that such security has, without any act of plaintiff, or the person to whom the security was given, become valueless, has been held to provide for two classes of affidavits. In neither class is one required to state the facts stated in the other class. The first class is where the debt has not been secured. Under such circumstances the affidavit must state that the payment of the debt has not been secured by any lien on real or personal property or any pledge of personal property.[5] The other class is where the debt has been secured, and there the affidavit must state the fact that security has been given, and also that such security has, without any act of plaintiff or the person to whom the security was given, become valueless. In this class it is not necessary to state that the debt has not been secured by any other mortgage or lien on real or personal property, or any pledge of personal property.[6] According to other authority, however, under a similar statute, this distinction is not recognized, and where an attaching creditor states in his affidavit that the indebtedness was originally secured and that the security has become valueless, he must also state that no further security has been given.[7]

§ 130. —— Averments As to Property of I fendant

An affidavit for attachment must contain all averments required by statute respecting the exister ownership, and character of defendant's property.

In the absence of any express or implied requi ment of the statute to that effect, it is not g erally necessary that an affidavit for attachm should show that defendant has real or perso property within the jurisdiction or within the stat or subject to execution within the jurisdiction the court.[9]

A compliance with a statutory requirement t the affidavit shall show that a nonresident deb has property within the state subject to atta ment,[10] or, where both parties are nonresider that defendant does not have sufficient prope within the state of his residence to satisfy t debt,[11] is essential. In case of foreign attachme where the statute so requires, it is also necessa that the affidavit should show that defendant is t owner of the property sought to be attached and where a petition for an attachment states fa showing that the property defendant is about place beyond plaintiff's reach and convert it money, is the property of the petitioning plaint no attachment can issue.[12]

Where plaintiff is required to state defendar title to property in his affidavit for attachment, has been held that he need not state it as ful or with the same degree of accuracy, as is requir where he is asserting his own title, because t character of the title of defendant lies peculia within his own knowledge.[14]

4. Bellevue State Bank v. Lilya, 205 P 893, 35 Idaho 270—Knutsen v Phillips, 101 P 596, 16 Idaho 267

Affidavit sufficient

An attachment affidavit reciting that the original indebtedness had been secured by a chattel mortgage, property had been sold, and proceeds applied to payment of note, and that the balance set forth is the amount due, and that the payment of such balance has not been secured by any mortgage or lien on real or personal property, or any pledge of personal property, is not subject to the objection that it does not allege the note was not secured by some other mortgage or pledge—Union Bank & Trust Co v. Himmelbauer, 181 P 332, 56 Mont. 82

5. Knutsen v Phillips, 101 P. 596, 16 Idaho 267.

6. Mitchell v Ada Inv Co, 246 P. 10, 42 Idaho 421—Farmers' State Bank of Star v. Gray, 210 P. 1006, 36 Idaho 49.

7. Anaheim Nat Bank v Kraemer, 7 P (2d) 765, 120 Cal App 63

8. Moen v. Melin, 223 N W 702, 57 N D 630—6 C J. p 147 note 38.

Allegation of possession

(1) If by statute plaintiff is entitled to a purchase-money attachment where the debtor has not paid for the property and is in possession of some portion of the property, or where the debtor has sold and is not in possession of a part of said property and has not been paid for the same, the fact that plaintiff, seeking a purchase money attachment, alleged in his affidavit that the property sold by him to defendant still remained in the hands of defendant, did not necessarily mean that defendant in possession had not parted with title to a third person—Ivey v. Kerce, 156 S E. 239, 42 Ga App. 336

(2) On the other hand, under such a statute, an allegation that the purchase money is due and that the purchaser has constructive possession of the property purchased, although the property is stored with plain at defendant's request, is sufficient show the existence of the ground attachment—Cochran Furniture v. Corbett, (Ga App) 176 S E 827

9. U S—Bigelow v. Chattert (Minn) 51 F 614, 2 C C A 402 Ind—U. S. Capsule Co v Isaacs, N E 832, 23 Ind App 533. 6 C J. p 147 note 39

10. Mindlin v Saxony Spinning (104 A. 598, 261 Pa. 354—6 C J 145 note 19

11. Cobb v. Miller, 9 Ala 499—C v Force, 6 Ala. 468—6 C J. p note 20

12. Klein v. Gaston de Paris, Pa Super. 357—6 C J p 147 note

13. Ornelas v Silvan Newburge Co, 72 So. 372, 139 La 832.

14. Hale v Grow, 106 S.E. 409, W Va 173.

Assignment of lease

In an affidavit for an attachn against an assignee of a lease, rentals accrued under the te

While it has been held that an affidavit for a foreign attachment against the heirs of a judgment debtor must show, where no direct declaration is filed, that there is no personal representative or that there are no personal assets to discharge the debt,[15] it has also been held that in suing out an attachment against the heirs of a nonresident debtor it is not necessary to allege that there are no personal assets within the state, at least where the want of personal assets is sufficiently shown in the declaration.[16]

An affidavit based on a statute, providing that attachment may issue where defendant has no property in the state subject to execution, or not enough thereof to satisfy plaintiff's demand, is insufficient if it does not set forth such fact[17] It is not necessary that the affidavit use the exact statutory language in setting forth this fact, however, as other language conveying the same meaning is sufficient.[18]

Description of property. Where a description of property is necessary to inform the officer as to what property he is authorized to levy on, the affidavit must contain a description sufficient for that purpose,[19] which must be sworn to positively,[20] but, under a statute requiring plaintiff to state that defendant has property not exempt from execution which he refuses to give either in security or payment, it has been held that the affidavit need not describe the exempt property.[21] Also, where a general order of attachment was issued, plaintiff's failure to describe defendant's real property in his petition for attachment has been held immaterial[22]

Negativing exemption If the wages of a debtor within a certain amount are exempt the affidavit should contain a positive statement that the wages of the debtor exceed the amount which is exempt and that the excess only is sought to be attached[23] Where plaintiff fails to state in his affidavit that he is seeking to attach only the exempt property of defendant, it will be presumed that he is seeking to attach all of defendant's property;[24] and likewise, in the absence of a statement to the contrary in plaintiff's affidavit, it will be presumed that defendant is the head or support of a family, or the support of a widowed mother wholly dependent on him[25]

§ 131. —— Prayer

Generally, the petition or affidavit should contain a prayer for a writ of attachment.

The petition or affidavit should specifically ask that a writ of attachment be granted;[26] but in the absence of a statute requiring that the petition contain a prayer for attachment, such a prayer in the petition is unnecessary.[27]

§ 132. —— Signature and Verification

There must be a compliance with statutory requirements in regard to signature and verification

As discussed in the title Affidavits § 20 a, the object of a signature is to identify the person swearing to the affidavit, and in the absence of a statute requiring that the affidavit be signed, a signature is not generally necessary where the identity of affiant as such is otherwise sufficiently shown This rule applies to affidavits of attachment, and where the statute does not require that the affidavit or oath be signed, an omission of the signature is not fatal[28] Indeed, an attachment has been sustained where the affidavit was neither signed by affiant nor certified by the clerk of the court, the judge being satisfied from the evidence that the affidavit was, in fact, sworn to before the writ issued, and that the omission of plaintiff to sign, and the clerk to certify, the affidavit was an oversight[29] On the other hand, where the stat-

thereof, and in a bill in equity filed in the suit in which the affidavit was filed, it suffices, as to the assignment required by law to be effected by deed, to state and allege that the lease had been assigned and conveyed to defendant—Hale v Grow, 106 S E 409, 88 W.Va. 178

15. Powers v. Hurst, 3 Blackf (Ind) 229.

16. Reed v. Kentucky Bank, 5 Blackf (Ind) 227

17. Goodin & Barney Coal Co. v Southern Elkhorn Coal Co., 294 S. W. 792, 219 Ky. 827

18. Lincoln Bank & Trust Co v Arnold, 75 S W (2d) 751, 256 Ky. 80

19. Nix v. Citizens' Bank of Moultrie, 130 S E 597, 34 Ga App. 546—6 C J. p 147 note 41.

Description insufficient

An affidavit for a purchase-money attachment, describing property as "45,023 feet of pine board lumber located on the grounds of Corbett Planing Mill in the city of Nashville, Ga," is not a sufficient description of the property sought to be attached, at least where it appeared that there was more lumber of a like kind on the property—Nix v. Citizens' Bank of Moultrie, 130 S E. 597, 34 Ga.App. 546.

20. Bruce v. Conyers, 54 Ga 673.

21. Hart v. Cummins, 1 Iowa 564.

22. Boone v Evans, 31 S.W.(2d) 723, 235 Ky 487.

23. Meade v. Rice, 19 Ohio N P.(N. S.) 173—6 C J p 147 note 44.

24. Barrow v Williams, 12 Ohio N. P (N S) 518

25. Barrow v. Williams, supra

26. Iowa—Dawson v Jewett, 4 Greene 157—Queen v. Griffith, 4 Greene, 113.
La.—Kelly v Bently, 9 La Ann 586
6 C J p 147 note 45

27. Harbour-Pitt Shoe Co v. Dixon, 60 S.W. 186, 22 Ky L 1169.

28. Simmons Hardware Co. v Alturas Commercial Co, 39 P. 550, 4 Idaho 334, 95 Am S R 66—6 C.J. p 147 note 48.

29. Ark.—Fortenheim v. Claflin, 14 S W. 462, 47 Ark 49.
Iowa—Stout v. Folger, 34 Iowa 71, 11 Am R. 138
Md.—Farrow v Hayes, 51 Md. 498.
6 C J. p 148 note 49.

ute requires that the affidavit for attachment be signed, the lack of a signature thereto by the party purporting to make it is fatal,[30] and under some statutes, where an affidavit is purportedly made by several plaintiffs, the affidavit must be signed by each plaintiff personally, or by his agent or attorney.[31]

The affidavit is not invalidated by a slight variance in the spelling of affiant's name,[32] or the signature of the affidavit in the name of the person designated as affiant and of another not named.[33]

A failure to show that the affidavit was taken within the officer's jurisdiction has been held not to be a fatal defect.[34]

Authentication. Where the affidavit is taken without the jurisdiction, or in another state, the authority of the officer to administer the oath must be authenticated in a mode prescribed by the laws of the state where it is proposed to use the affidavit.[35]

Seal of officer. It has been held that an affidavit taken before a notary in the county in which the action is brought need not be authenticated under his notarial seal.[36]

Verification. The oath is an essential to an affidavit for attachment, and the affidavit should show that it was duly sworn to.[37] This should appear by the jurat or certificate of the officer by whom the oath is administered, which, where the statute so requires, should be signed by him with his official designation,[38] since an omission from the jurat which cannot be supplied by implication from the context is fatal.[39] Where, however, there is not a mandatory statute requiring the signature of the official administering the oath, if it appears that the oath was in fact administered, the omission of the officer to sign and certify the affidavit is not fatal,[40] but may be cured before the return of the writ,[41] or the officer may be permitted to sign the jurat nunc pro tunc.[42]

Where the official character of the officer taking the affidavit is not stated in the jurat, but sufficiently appears from a reference to the other papers in the record, the affidavit is sufficient.[43] Also, where the oath is administered by the clerk of court, an omission in the jurat of his official character, and a failure to place the seal of the court on the paper, is not such a defect as to render the affidavit void, since the affidavit is not a process intended to be taken beyond the custody of the clerk and judge, and there served.[44]

§ 133. —— Approval

If the statute so requires, the affidavit should bear a sufficient indorsement by the proper officer showing his approval thereof.

If it is required that satisfaction with the affidavit should appear by a certificate indorsed thereon, the affidavit should bear a sufficient indorsement by the proper officer showing his approval thereof.[45] An indorsement that the officer was satisfied that the matters set forth in the affidavit were true has been held sufficient to authorize the issuance of the writ, although the ground therefor was alleged on information and belief.[46]

§ 134. Examination of Plaintiff and Indorsement on Application

Where the statute so requires plaintiff must submit to an examination and obtain the indorsement of the judge as to the amount for which the writ shall issue.

30. Davis v. Sherrill, 113 S.W. 556, 52 Tex.Civ.App. 259—6 C.J. p 147 note 47

Signature held sufficient.—Lundy v. Little, (Tex.Civ.App.) 227 S.W. 538

31. Butler v. Nail, (Tex.Civ.App.) 36 S.W.(2d) 307, affirmed Nail v. Compton, (Com.App.) 55 S.W.(2d) 1028.

32. Kahn v. Henman, 3 Ga. 266

33. Fortenheim v. Claflin, 14 S.W. 462, 47 Ark. 49.

34. Albright v. United Clay Production Co., 62 A. 726, 21 Del. 198.

35. Bolton v. White, (D.C.) 3 F.Cas. No.1,616, 2 Cranch C.C. 426—6 C.J. p 148 notes 59, 60.

36. Dyer v. Flint, 21 Ill. 80, 74 Am.D. 73.

37. Maguire v. Bolen, 68 N.W. 408, 94 Wis. 48—6 C.J. p 148 note 53.

Verification of voucher or bill of particulars

A verification is not fatally defective even though the affidavit to the declaration verifies only the voucher or the bill of particulars, and contains no specific reference to the declaration itself, where under the circumstances the verification implicitly extended to the declaration —Gill v. Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md. 394.

38. Ky.—Smith v. Dungey, 199 S.W. 777, 178 Ky. 702
Mont.—Continental Oil Co. v. Jameson, 164 P. 727, 53 Mont. 466.
6 C.J. p 148 note 54.

39. Ga.—Birdsong v. McLaren, 8 Ga. 521.
Iowa.—Cooper v. Smith, 25 Iowa 269
Tenn.—Watt v. Carnes, 4 Heisk. 532
Wash.—Tacoma Grocery Co. v. Draham, 36 P. 31, 8 Wash. 263, 40 Am.S.R. 907

40. Cook v. Jenkins, 30 Iowa 452—6 C.J. p 148 note 55

41. Farrow v. Hayes, 51 Md. 498

42. Young v. Wooden, (Ky.) 265 S.W. 24—6 C.J. p 148 note 57

43. Singleton v. Wofford, 4 Ill. 576.

44. Simon v. Stetter, 25 Kan. 155.

Judicial notice

Since the court or judge should judicially take notice of who is the clerk, and of his signature, there is no overwhelming necessity for the clerk to describe himself or his office very particularly, or to place the seal of the court on the paper.—Simon v. Stetter, 25 Kan. 155

45. Slaughter v. Bevans, 1 Pinn.(Wis.) 348—Morrison v. Fake, 1 Pinn.(Wis.) 133—Mayhew v. Dudley, 1 Pinn.(Wis.) 95—6 C.J. p 149 note 61.

46. Clark v. Gilbert, 1 Pinn.(Wis.) 354.

As a prerequisite to obtaining a writ of attachment plaintiff is sometimes required by statute to apply therefor to a judge or master in chancery, who shall examine him under oath concerning his cause of action, and who, thereupon, if he finds plaintiff entitled to an attachment, shall indorse on the application the amount for which the writ shall issue.[47] A statute so providing has been held not to contemplate an examination before a court in session and a record of the proceedings,[48] and where the judge has ordered the writ, it must be presumed, in the absence of a showing to the contrary, that he heard such evidence and made such examination as the statute requires.[49]

§ 135. Presentation and Filing in General

Plaintiff should comply with the statutory requirements, if any, in regard to filing the affidavit and declaration.

The statutes sometimes require the filing of the affidavit A failure to comply with a mandatory statute requiring that the affidavit be filed at the time of the issue of the writ of attachment, or within a prescribed time thereafter, will generally invalidate the proceedings[50] The motive of the provisions of such a statute is to insure to defendant in attachment the right to inspect the affidavits on which the warrant of attachment was issued,[51] to prevent the abuse of the process of the law, and to provide against a wanton and groundless seizure of the defendant's effects[52] A statute requiring an affidavit to be filed is not satisfied by filing a copy of the affidavit,[53] or by serving a copy of the affidavit on defendant,[54] although a handing of a copy of the declaration to the clerk of the court or deputy to be filed is a sufficient compliance with a statutory requirement that it be filed.[55]

Under an appropriate statute, where an affidavit in an attachment proceeding is properly filed and not withdrawn, any number of attachments can issue therefrom until a levy is made under the warrant, and it is not necessary that a new affidavit be filed each time a warrant is issued.[56]

On the other hand, where the validity of the warrant or the proceedings on it are not made to depend on a compliance with a direction as to the filing of the affidavits, a failure to file the affidavit within the time prescribed by statute does not invalidate the attachment.[57]

It has also been held that the judgment cannot be collaterally attacked because the record fails to show that the affidavit was filed[58]

Under some statutes a declaration in attachment may be filed at any time during the term to which the attachment is returnable.[59]

§ 136. Producing Evidence of Debt

If the statute so requires, plaintiff must produce the evidence of his debt at the time of presenting the affidavit.

To be entitled to a writ of attachment plaintiff must comply with a statutory requirement that he produce the evidence of the debt at the time of presenting the affidavit.[60] Under such a statute, it is not necessary that plaintiff should produce all the evidence on which he relies to establish his claim at the trial,[61] and so an attachment may issue against the indorser of a negotiable promissory note on production of the note without proof of its indorsement by the debtor,[62] or on a note written in a foreign language unaccompanied by a translation thereof,[63] and it is sufficient if plaintiff produces an agreement containing dependent covenants sued on,[64] or if he files his cause of action and this shows on its face the specific, liquidated,

47. Jacobs v. Marks, 56 N E 154, 183 Ill. 533, affirming 83 Ill App 156, and affirmed 21 S Ct. 865, 182 U S. 583, 45 L Ed 1241

48. Jacobs v Marks, supra.

49. Jacobs v. Marks, supra.

50. Pa.—Milton v. Spinning Co., 28 Pa Dist 53
S C—J C Hambright & Co v Robert R Team Co., 117 S E 717, 124 S C 500—Lester v Fox Film Corporation, 103 S E 775, 114 S C 414
6 C.J p 149 notes 63, 64, 65

"Receiving" equivalent to "filing"

A statute providing that "the clerk of court must issue the writ of attachment on receiving an affidavit" has been held equivalent to a requirement that the affidavit be filed with the clerk—Zurich General Accident & Liability Ins. Co. v. Metropolitan Casualty Ins Co of New York, 282 P. 418, 102 Cal App. 107.

51. Hall v. Lemmond, 89 S E. 545, 105 S C. 154

52. Borough v. Jones, 18 Pa Co. 261

53. Wagener v. Booker, 9 S E. 1055, 31 S C. 375.

54. Ketchin v. Landecker, 10 S E. 936, 32 S C 165

55. King v Knight, 155 S E 784, 42 Ga App 269

56. Hall v Lemmond, 89 S E. 545, 105 S C 154.

57. Woodward v. Stearns, 10 Abb Pr N S (N Y) 395—6 C J. p 149 note 65 [a].

58. Biggs v. Blue, (C C Ohio) 3 F. Cas No 1,403, 5 McLean 148.

59. Greene v. Lombard, 126 S E. 890, 33 Ga App. 518

Where attachment was returnable to the October term, 1923, and was returned during that term, although after the first day thereof, and the declaration was filed on the same date, neither the declaration nor the attachment was subject to dismissal on the ground that the declaration was filed too late—Greene v. Lombard, 126 S E 890, 33 Ga App 518

60. Hedrick v. Markham, 103 A 99, 132 Md 160—6 C.J. p 149 note 67

61. Hedrick v. Markham, supra—6 C.J. p 149 note 69

62. Dawson v. Brown, 12 Gill & J. (Md) 53—Smith v Greenleaf, 4 Harr. & M (Md) 291.

63. De Bebian v. Gola, 21 A 275, 64 Md 262

64. Dawson v. Brown, 12 Gill & J. (Md) 53.

and ascertained debt sued for.[65] Under such a statute an attachment may issue on the record of a foreign judgment,[66] or transcript of a judgment rendered in another state.[67] Although the statute requires the production of the voucher and evidence of the debt, it has been held that there is sufficient evidence to support the writ where an itemized account with all the debits and credits is filed along with the contract.[68] Such a provision, however, has been held to make it necessary for an assignee to produce the assignment of the claim by the original creditor.[69]

§ 137. Effect of Delay after Making

Delay between the time of the making of the affidavit for attachment and the time of the issuance of the writ, may render the affidavit ineffective.

The affidavit should be made at or as near the time of the issuance of the writ as is practicable,[70] and since the ground of attachment must exist at the time the warrant is issued, any delay between the making of the affidavit and its presentation or filing, during which a change in condition may have taken place, may render the affidavit ineffectual.[71] Such a delay, however, does not necessarily render the affidavit ineffectual,[72] and accordingly, the proceedings may be upheld, notwithstanding a failure promptly to present or file the affidavit, where it is apparent that no substantial change in condition could have taken place,[73] or where the delay was caused by the fact that affiant resided in a distant jurisdiction.[74] Similarly, it has been held that a delay between the filing of the affidavit and the execution of the warrant does not invalidate the attachment,[75] and where the affidavit charges some fact which, having occurred, is not subject to change, as, for example, where it is alleged that a debt was fraudulently contracted, the fact that such affidavit was sworn to some time before the action was commenced will not render it ineffectual.[76]

§ 138. Laches of Clerk or Other Officer

Where plaintiff has observed all the statutory requirements respecting the filing and signing of the affidavit or petition for attachment, failure of the clerk to file or properly sign it will not generally invalidate the proceedings.

If plaintiff has observed the requirements of the statute, the neglect of the clerk or of the officer charged with that duty to place the affidavit on file, as required by law, and to keep it on file, will generally not affect the validity of the proceedings, where no injury has been caused by such neglect.[77] The failure of a clerk to indorse on the petition the time of its filing, does not, ipso facto, destroy the validity of attachment.[78] Where plaintiff was required to file his declaration in attachment, and it was established that he actually gave it to the proper officer for the purpose of filing, the fact that the declaration was not filed, did not invalidate the proceeding, since such defect could be cured by a nunc pro tunc order.[79] Similarly, where it was shown that the clerk inadvertently failed to enter the date of filing on the declaration in attachment, it was held that the clerk could be ordered to enter the declaration filed as of the true date, nunc pro tunc.[80] If the affidavit, however, is not delivered to the clerk as clerk to be filed, and the clerk as clerk does not receive it to be kept on file, it is not filed as a matter of law.[81]

65. Hedrick v Markham, 103 A. 98, 132 Md 160

66. Neptune Ins. Co. v. Montell, 8 Gill (Md.) 228

67. Cockey v Milne, 16 Md 200

68. Hedrick v. Markham, 103 A 98, 132 Md 160

69. Cumberland Coal, etc, Co v Hoffman Steam Coal Co, 22 Md 495

70. Murphy v Zaspel, 81 P. 301, 11 Idaho 145—6 C J p 150 note 76.

71. Murphy v. Zaspel, supra—6 C J p 150 note 77

72. Md.—Tonn v Collins, 81 A 219, 116 Md 52—Hadden v. Linville, 38 A. 37, 900, 86 Md 210
Mo.—Graham v. Bradbury, 7 Mo. 281.

73. Miller v. L. Wolff Mfg. Co., (Tex Civ App.) 225 S W. 212—6 C. J. p 150 note 78

74. Wright v. Ragland, 18 Tex. 289.

75. Hall v Lemmond, 89 S E. 545, 105 S C 154

Delay not fatal
Where an affidavit for attachment was filed with the clerk on June 2, 1915, and, at the time of filing, a warrant of attachment was issued but not executed, and was later withdrawn, and another warrant of attachment was issued on such affidavit on Sept. 1, 1915, and was withdrawn without being executed, and a third warrant was issued Oct 6, and executed Nov 26, 1915, it was held that such delay between the filing of the affidavit and the execution of the warrant of attachment did not vitiate the attachment.—Hall v. Lemmond, 89 S E. 545, 105 S C 154.

76. Adams v. Lockwood, etc, Co, 2 P 626, 30 Kan. 373

77. Ark.—Hughes v Stinnett, 9 Ark 211.
Mich.—Beebe v. Morrell, 42 N W 1119, 76 Mich 114, 15 Am S.R. 283.
Miss.—Augusta Bank v. Conrey, 28 Miss 667
6 C J. p 150 note 80

78. Green v. Preston, 7 Ky Op. 639

79. King v Knight, 155 S E 784, 42 Ga App. 269—6 C.J p 150 note 80 [b].

80. Crawford v Jackson, 126 S E 890, 33 Ga App 533

81. Townsend v. Sparks, 27 S E. 801, 50 S C 380.

Without instructions
Where plaintiff's affidavit was on the same sheet of paper as that which contained the warrant issued for the attachment, and where the sheet was left with the clerk without instructions, and he made no indorsement of filing on the affidavit, but delivered the sheet to the sheriff, and where the sheet was not in the clerk's custody within the time required for it to be filed, it was not filed within the prescribed time.—Townsend v. Sparks, 27 S E. 801, 50 S.C. 380.

§ 139. Variance between Affidavit and Pleading

A material variance between the allegations in the declaration or petition and the affidavit for attachment may be fatal.

A material inconsistency between the claim stated in an affidavit for an attachment and the demand set up in the declaration constitutes a variance fatal to the attachment,[82] although an immaterial variance in this regard is not necessarily fatal.[83] Accordingly, a substantial variance between the statements of the affidavit and the complaint or declaration as to the amount of the claim may be fatal,[84] although, according to some authority, no advantage can be taken of such a variance, except where the declaration counts on a different cause of action from that stated in the affidavit.[85] It has also been indicated that plaintiff may secure an attachment for a sum less than the total amount claimed in the petition, and accordingly, such a variance is not fatal.[86]

Although a slight variance between the statement of the amount in the affidavit and petition, which could not be held to be immaterial under the circumstances, has been held to be fatal,[87] the general rule is that a slight variance between the affidavit and the declaration or complaint in stating the amount of the indebtedness claimed,[88] or a claim in the pleading of an amount greater[89] or even in some cases less[90] than that alleged in the affidavit will not ordinarily vitiate the proceedings, especially where the sum claimed can be ascertained by computation,[91] and the dissolution of an attachment has been refused where the affidavit and petition claimed a larger amount than the bill of items annexed to the petition.[92]

A material variance between the name of plaintiff in the petition and in the affidavit for attachment is also fatal.[93] Accordingly, an attachment proceeding on an affidavit in the name of an individual will not support a declaration in the name of a partnership in the absence of any waiver of such variance.[94]

According to some authority, an affidavit for at-

82. Snowden v Thompson, 126 S E 405, 93 W Va 77—6 C J. p 151 note 82

83. Fraud

(1) Where plaintiff is given the right to an attachment if the affidavit shows that a debt is due for property obtained by false pretenses, and plaintiff in his petition alleges only an action for debt, and the statute does not require the action to be predicated on false pretenses, the fact that the affidavit alleges that the debt was fraudulently contracted does not constitute a fatal variance between the petition and the affidavit, the court saying "it might appear anomalous to compel the plaintiff to allege such fraud as a constituent of his cause of action, when he is clearly entitled to simple action of debt upon the guaranty, without setting out the fraud inducing the debt."—Slaughter v Morton, (Tex Civ App.) 185 S.W. 905, 906, error refused.

(2) Where an attachment issued on the ground of fraud in procuring the debt sued on as shown by the affidavit, the attachment will not be discharged because the complaint in the suit did not allege the fraud on which the attachment was based, where both the complaint and affidavit stated that defendant incurred a debt with plaintiff, and the affidavit alone added that such debt was contracted in consequence of defendant's fraud—Remington v. Fragulius, 208 P. 65, 120 Wash. 563.

Variance in recital on writ

Where the writ of attachment issued by the clerk and his subsequent schedule of goods attached were on forms reciting that the debtor was a nonresident, and plaintiff had obtained his attachment on the ground that the debtor had absconded, such inconsistency did not affect plaintiff's right to the attachment and he was only required to maintain his allegation that defendant had absconded —Obrecht v. White, 159 A. 899, 162 Md 391

84. Butler v Nail, (Tex Civ App) 36 S W (2d) 307, affirmed Nail v Compton, (Com App) 55 S W (2d) 1028—6 C J. p 151 note 83.

Variance as to amount

Where it was stated in the petition for attachment that defendant owed each of the six plaintiffs one thousand six hundred and twenty-five dollars, aggregating nine thousand seven hundred and fifty dollars, and it was stated in the affidavit for attachment, signed by only five plaintiffs, that an attachment was sought for nine thousand seven hundred and fifty dollars, it was held that such statement in the affidavit was a variance from the amount stated as being due to each of the six plaintiffs in the petition, and such variance constituted a fatal defect—Butler v. Nail, (Tex Civ App) 36 S W (2d) 307, affirmed Nail v Compton, (Com App) 55 S W (2d) 1028

85. Plato v Turrill, 18 Ill. 273—Hughes v. Foreman, 78 Ill App. 460

86. Butler v Nail, (Tex Civ App) 36 S W (2d) 307, affirmed Nail v. Compton, (Com.App) 55 S.W.(2d) 1028.

Amount separable

Where the amount for which plaintiffs seek to enforce attachment proceedings may be segregated from the rest of the total demand of plaintiffs, the validity of the attachment must be tested with reference to the segregated amount alone—Butler v Nail, (Tex Civ App) 36 S W (2d) 307, affirmed Nail v Compton, (Com App) 55 S W.(2d) 1028

87. Sanger v. Texas Gin, etc, Co, (Tex Civ App) 47 S W 740

88. Grotte v Nagle, 69 N W 973, 50 Neb 363—6 C J p 151 note 84

89. Butler v Nail, (Tex Civ App) 36 S W (2d) 307, affirmed Nail v. Compton, (Com App) 55 S W (2d) 1028—Paragon Oil Syndicate v. Rhoades Drilling Co, (Civ App) 282 S W 903, certified questions answered (Com App) 277 S W 1036, 115 Tex. 149—6 C J. p 151 note 85

90. Grotte v Nagle, 69 N W. 973, 50 Neb. 363

91. Hall v. Parry, 118 S.W 561, 55 Tex Civ App 40—Rogers v East Line Lumber Co, 33 S.W. 312, 11 Tex Civ App 108

92. Donnelly v. Elser, 6 S.W. 563, 69 Tex 282

93. Hale v. First State Bank, (Tex. Civ App) 293 S W. 229

94. Holston Box & Lumber Co. v. Vonberg & Bates, 129 S E. 562, 34 Ga App 293, conforming to answer to certified questions 129 S E 92, 160 Ga. 813—A. W Busby & Son v. Elliott, 95 S.E 1014, 22 Ga.App. 391.

tachment will not control contrary allegations in the petition,[95] and the meaning and nature of the cause of action as stated in the petition cannot be varied by the affidavits,[96] but it has also been held that the allegations in the petition will not control the allegations in the affidavit where there is a variance between the petition and the affidavit as to the ground for the attachment[97]

Interest. Where the affidavit differs from the complaint and writ, in that it does not claim interest from a certain date on the amount of indebtedness, there is no substantial variance[98]

Time to raise objection An objection for a variance curable by amendment should be timely raised[99]

§ 140. Variance between Affidavit and Evidence

The allegations and contents of the affidavit for attachment must be substantially sustained by the evidence.

The matters stated in the affidavit for attachment must be substantially sustained by the evidence,[1] and an affidavit for attachment on one ground cannot be sustained by proof of the existence of another ground.[2] Also, where the grounds relied on in the affidavit are not sustained, the attachment cannot be saved by the fact that the evidence strongly tends to indicate the existence of another ground not alleged in the affidavit[3] Likewise, where an attachment issued on two causes of action is an entirety, and the proof shows that one of the causes would not support an attachment, the attachment must be dissolved in toto[4]

Where a charge in an affidavit that defendant is about to do a certain thing is a distinct ground for attachment in itself, independent of the ground that he has actually done such thing, proof of one does not sustain the other. Accordingly, a ground asserted in an affidavit for attachment that defendant is about to assign or secrete his property in order to defraud his creditors, is not supported by proof that defendant has assigned his property.[5]

On the other hand, a slight discrepancy between the amount claimed in an affidavit for attachment and the amount shown to be actually due will not vitiate the proceeding[6]

Where a ground for an attachment is proved and found to have existed as to part of a debt and not as to the remainder of the debt, the attachment will only be sustained as to the amount for which grounds for attachment exist[7]

§ 141. Defects, Objections, and Waiver

a. In general
b Defects cured
c Waiver
d. Objections

a. In General

A defect in an affidavit for attachment which defeats jurisdiction is fatal, but mere clerical errors or defects of form may be disregarded.

It may be stated as a general rule that an affidavit for attachment which is materially defective, in that it does not substantially comply with the essential statutory requirements, so as to deprive the court of jurisdiction, is void and insufficient to serve as a basis for attachment, and the attachment and all proceedings subsequent thereto, which are dependent thereon, are also void.[8] Mere informalities, defects, or clerical errors or misprisions in affidavits for an attachment, however, which do not prejudice substantial rights may be disregarded[9] An affidavit may be defective in

Estopped from setting up variance
In view of Civ Code (1910) §§ 5103, 5121, where defendant has entered a replevy bond payable to a partnership, he is estopped from setting up a variance, and an action in the name of an individual will proceed as at common law, although attachment and levy thereunder be dismissed—A W Busby & Son v Elliott, 95 S E 1014, 22 Ga App. 391

95. Ross v. Poor, 12 Ohio App. 496

96. Olsen v. U. S. Fidelity & Guaranty Co., 128 N.E 908, 230 N.Y. 31, modifying 173 N Y S 916, 187 App Div 882

97. Hemmi v. Grover, 120 N.W. 561, 18 N.D. 578.

98. O'Conor v. Witherby, 44 P. 805, 112 Cal. 38, 53 Am S R 155—O'Conor v. Roark, 41 P. 465, 108 Cal 173.

99. Zeigler v Cox, 63 Ill. 48—6 C J. p 151 note 89

1. First Nat Bank v Kibble, 273 S W 148, 221 Mo App 311, certiorari quashed State ex rel First Nat Bank v. Trimble, (Mo) 287 S W 432.

2. First Nat Bank v. Morrow, 201 N W 442, 161 Minn. 358—6 C J. p 151 note 91.

3. Dumay v. Sanchez, 18 A. 890, 71 Md 508

4. Vollmer v. Spencer, 51 P. 609, 5 Idaho 557

5. Minn—Van Dam v Baker, 204 N W 633, 164 Minn 130—First Nat. Bank v. Morrow, 201 N W. 442, 161 Minn. 358

Mo—Mathewson v. Larson-Myers Co, (App) 217 S W. 609

6. Neb—Grotte v. Nagle, 69 N.W. 973, 50 Neb. 363

Tex.—Byrne v Lake Charles First Nat Bank, 49 S.W. 706, 20 Tex.Civ. App. 194.

7. Teweles v. Lans, 74 N W. 122, 98 Wis 453

8. Ala—Canty v. Sims, 109 So 373, 21 Ala App. 469

Ky—Clolinger v. Callahan, 263 S W. 700, 204 Ky 33

6 C J p 152 note 95.

9. Clolinger v. Callahan, supra—6 C J p 152 note 92.

Clerical error
Where an affidavit for attachment had all the formal and substantial facts set forth necessary to obtain a warrant of attachment, and it recited, "M . . . being duly sworn," but it was in fact signed by B, such error was held to be clerical only and not to affect the validity of the attachment, in view of a statute pro-

respect to some substantive particular, and yet not be absolutely void, where it clearly appears that there has been an honest attempt to follow the statute,[10] and where the court acquires jurisdiction by the levy of the writ, it does not lose such jurisdiction because of defects in the affidavit.[11]

Any defect in an attachment affidavit can only affect the attachment proceedings, and not the suit or action on which the attachment issued.[12]

Advertisement and affidavit. Where notice advertising the fact that an attachment has been issued, in order that any person having a greater demand against the debtor than is cognizable before the court issuing the attachment may have an opportunity to take out an attachment, is necessary, a description of the debtor as an absconding debtor in the advertisement, when the affidavit for attachment has described him as a nonresident, is not such a variance as will vitiate the writ, since the affidavit is the foundation on which the writ is issued.[13]

Effect of statute making affidavit sufficient evidence. If, by statute, the affidavit is made sufficient evidence of the facts therein stated, its truth cannot be called in question, defendant being confined to his remedy on the bond.[14]

No presumption can be indulged to support an affidavit defective in any substantial particulars.[15]

b. Defects Cured

(1) In general
(2) Aider by pleadings

(1) In General

A defect in an affidavit or petition for attachment may sometimes be cured on the hearing or subsequent proceeding.

A defect or omission in plaintiff's affidavit for attachment may be cured by defendant's affidavit, where the omitted matter appears therein,[16] or the defect may be cured by the evidence adduced at the trial.[17] Accordingly, it has been held that if the evidence on the hearing supplies the defects in the affidavit, it will be sufficient where the motion to quash is not made on plaintiff's papers.[18] The failure of an affidavit for attachment against partners to state that the individuals have not enough property to satisfy the demand sued on, may be cured by a judgment sustaining the attachment, at least where no motion has been made during the progress of the action to discharge the attachment on that ground.[19]

viding that any error or defect in a proceeding which does not affect the substantial rights of the adverse party shall be disregarded—T C May Co v. Mennies Shoe Co., 119 S E 227, 186 N C 144.

Defect not fatal

An affidavit of nonresidence and indebtedness was sufficient, and an attachment properly issued thereon, where the affidavit and writ pointed to the beginning of an action under the attachment statute, although the complaint was filed out of time, without filing bond, or without obtaining order fixing amount thereof.—Park Lane Realty Co v. Davega, 167 A 30, 11 N.J Misc 556

10. Corum v Superior Court in and for Alameda County, 300 P. 537, 114 Cal App. 741

Void affidavit considered as testimony

Where a creditor, by petition to the judge sought and obtained an attachment, and after issuance of the writ defendant demurred to the attachment because the affidavit was defectively verified, it was held, under a statute permitting the issuance of an attachment on petition of the creditor supported by an affidavit, or testimony, that the affidavit, although void as an affidavit, might be considered as testimony in support of the allegations in the petition—Strother v So States Phosphate & Fertilizer Co, 125 S E 786, 33 Ga App 314

11. U S—Stephenson v Kirtley, (W Va) 46 S Ct. 50, 269 U S 163, 70 L Ed 213

Mont—Patch v. Stewart, 253 P 254, 78 Mont. 192, followed in Bancroft v. Leverty, 254 P. 1118, 78 Mont 559

6 C.J p 152 note 93 [a], [b]

"Furthermore, where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be defective and an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ"—Stephenson v. Kirtley, (W Va) 46 S Ct. 50, 51, 269 U.S. 163, 70 L Ed. 213.

Voidable

An order of sale on an attachment issued on a defective affidavit is not void but voidable The proceeding is irregular and is ineffectual in respect to bona fide liens subsequently acquired on the property until corrected—United Collieries v. Martin, 60 S W (2d) 125, 243 Ky 808, 89 A L R 971.

12. Elliott v. Mitchell, 3 Greene (Iowa) 237.

13. Nanuet Logging Co v Hanson, 186 A 573, 14 N J Misc 631

14. Mandel v. Peet, 13 Ark 236—Taylor v Ricards, 9 Ark 378

15. Nail v Compton, (Tex Com. App) 55 S W (2d) 1028, affirming Butler v. Nail, (Civ App) 36 S W. (2d) 307

16. Herman v. Bailey, 45 N Y S. 83, 20 Misc 94.

17. Millus v. Lowrey Bros., 164 P 663, 63 Okl. 261, L R A 1918B 336.

18. Hodson v Tootle, 28 Kan 317.

Defect cured by admission

A defect in the proof given by plaintiff as to defendant's residence may be cured by an admission made by defendant in his affidavit in support of his motion to vacate the attachment—Vogelman v. Lewit, 96 N. Y S 207, 48 Misc 625.

Notice not curing defect

Under a statute requiring plaintiff to state in his affidavit for attachment that an attachment is only sought of the ten per cent of the debtor's wage which is not exempt, the failure of plaintiff to so state in his affidavit is not cured by the fact that plaintiff gave notice that the attachment was only sought on the ten per cent—Meade v. Rice, 19 Ohio N P (N S) 173

19. O'Connor v. Sherley, 52 S W. 1056, 107 Ky. 70, 21 Ky L 735.

(2) Aider by Pleadings

Where permissible under the statute, a defect in the affidavit may be cured or supplied by the pleadings.

Where it is permissible under the statute, the affidavit and the complaint in the action may be read together for the purpose of determining whether the right to attachment exists,[20] particularly where the complaint is referred to in the affidavit, as already considered in § 116, where the complaint is also verified,[21] or where it is filed therewith.[22] Also, under some statutes, an insufficient allegation in an affidavit for attachment may be aided by the answer filed by defendant.[23]

On the other hand, in view of the fact that attachment is a harsh statutory remedy and is strictly construed, where the statute requires the affidavit to state the nature of plaintiff's claim, a failure to do so is fatal, and the court cannot look to the declaration or complaint to supply this deficiency,[24] or to process or papers in proceedings subsequently prepared or filed.[25]

If there are ambiguous statements in the affidavit, which are explained in the allegations of the petition, the petition may be considered as explanatory of those statements.[26] In the absence of a permissive statute, however, the petition is not a part of the affidavit for attachment, and where the affidavit is not ambiguous, reference cannot be had to the petition to explain the affidavit.[27]

Claim or indebtedness. Under a permissive statute, if the affidavit, otherwise sufficient to show grounds for attachment, lacks precision in stating plaintiff's demand, recourse may be had to the declaration or complaint, and if that pleading is sufficiently specific the proceedings will not be affected by the deficiencies of the affidavit.[28] Where the complaint and affidavit are both on file, and where the statement of plaintiff's claim in the affidavit shows that it is one for which an attachment may issue, but is not as full as might be desired, reference may also be had to the complaint to ascertain the precise nature of plaintiff's claim.[29]

Collateral attack It has also been held that, on collateral attack, reference may be had to the bond and petition to explain an allegation of nonresidence contained in the affidavit.[30]

Time of maturity of debt. Under some statutes it is unnecessary that the affidavit shall state when the debt matured, but it will be sufficient if the petition shows that fact,[31] or if the petition sets forth the contract sued on so that the date of its maturity can be determined.[32]

c. Waiver

Nonjurisdictional defects in the affidavit for attachment may be waived.

Nonjurisdictional defects or irregularities in the affidavit for attachment, which can be waived by defendant, may be waived by a failure to raise

20. Mo.—Conran v. Fenn, 140 S.W. 82, 159 Mo.App. 664
N.Y.—Ingalls v. Nutter, 172 N.Y.S. 210.
6 C.J. p. 118 note 81, p. 154 note 25

Affidavit and complaint stating cause for attachment

Where the affidavit in an attachment proceeding alleged plaintiff sold goods to defendant, that defendant failed and refused to pay for them, and that defendant was about to remove such goods out of the state, and where the complaint alleged the same facts, and in addition alleged that defendant was removing such property out of the state with intent to cheat and defraud the owners thereof, the court held that the allegations in the affidavit, supplemented by the allegations in the complaint, were sufficient to support the inference that defendant was about to remove his property out of the state with intent to defraud his creditors.—Ingalls v. Nutter, 172 N.Y.S. 210

21. Woodworth v. Skeen, 150 S.E. 764, 153 S.C. 362.—6 C.J. p. 118 notes 87, 89, p. 154 note 25 [b]

22. Walden v. Locke, (Tex.Civ.App.) 49 S.W.(2d) 832.—6 C.J. p. 154 note 27

23. Millus v. Lowery Bros., 164 P. 668, 63 Okl. 261, L.R.A.1918B 336

24. Hovatter v. Rowlesburg Lumber Co., 130 S.E. 662, 100 W.Va. 449.—Littlestown Sav. Inst. v. Bream, 121 S.E. 169, 95 W.Va. 351.—6 C.J. p. 154 note 28

Absconding or concealment

An omission in the affidavit of a statement that the absconding or concealment occurred within a prescribed time after the injury, as required by the statute, cannot be supplied by an allegation sufficient in that respect contained in the declaration.—Webb v. Bowler, 50 N.C. 362

Aider by answer

Where an affidavit in an attachment was defective in failing to state the grounds on which plaintiff's belief that defendant was about to dispose of money with intent to defraud creditors was based, the court held that it was not aided by the answer of defendant.—First Nat. Bank v. Tarboro Cotton Factory, 102 S.E. 195, 179 N.C. 203, rehearing denied 104 S.E. 129, 180 N.C. 128

25. Burgess v. Stitt, 12 How.Pr.(N.Y.) 401.

26. Price Hill Colliery Co. v. Old Ben Coal Corporation, 175 N.E. 755, 38 Ohio App. 151.

27. Price Hill Colliery Co. v. Old Ben Coal Corporation, supra

28. Harlow v. Becktle, 1 Blackf. (Ind.) 237.—6 C.J. p. 118 note 82.

29. Ind.—U. S. Capsule Company v. Isaacs, 55 N.E. 832, 23 Ind.App. 533
Neb.—Hart v. Barnes, 40 N.W. 322, 24 Neb. 782.
6 C.J. p. 118 note 82

30. Avery v. Good, 21 S.W. 815, 114 Mo. 290

31. Bennett v. Rosenthal, 8 Willson, Civ.Cas.Ct.App. § 156.

32. Cohen v. Grimes, 45 S.W. 210, 18 Tex.Civ.App. 327.

timely objection;[33] by appearing generally[34] and replevying the attached property,[35] by pleading to, or defending on, the merits[36] or confessing judgment;[37] by filing a plea in abatement,[38] by taking issue on the allegation of facts contained in the affidavit,[39] and going to trial on the issues so raised;[40] by agreeing that the attachment as to certain property shall be valid;[41] or by failing to request an adjudication as to the sufficiency of the grounds alleged on motion to discharge the attachment for an insufficient statement thereof[42]

On the other hand, where the defect is of such a character as to prevent the court from acquiring jurisdiction, it cannot be waived[43] Consequently, defects consisting of the want of affiant's signature or that of the clerk or the seal of the court, where they are jurisdictional, are not waived by the fact that defendant appeared and pleaded to an amended affidavit subsequently filed after a motion to dismiss the attachment on that ground had been overruled[44]

d. Objections

(1) Who may object
(2) Time of taking
(3) Mode of objecting

(1) Who May Object

Where the affidavit for attachment is sufficient to confer jurisdiction upon the court, only a party to the proceeding may ordinarily object to defects appearing therein.

33. Mont—Patch v Stewart, 253 P 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1118, 78 Mont 559.
Tex—Hester v. Baskin, (Civ App) 184 S W 726
6 C J. p 154 note 15
See Gans v. Lincoln Stars, 209 Ill. App. 400
Time for taking objections see infra subdivision d (2) of this section.

Failure to swear to affidavit
The failure to swear to an affidavit for attachment against a nonresident is a defect which can be urged against the proceedings before trial, but it is a matter which the defendant can waive, and it will not render the judgment foreclosing the attachment lien void.—Hester v. Baskin, (Tex.Civ App.) 184 S W. 726

Failure to traverse
Where defendant fails to traverse the charges in an affidavit for attachment, the rule requiring plaintiff to prove such charges by further evidence does not apply—Jandera v Lakefield Farmers' Union, 185 N.W. 656, 150 Minn. 476

34. Borough v Jones, 18 Pa Co 261—6 C J p 154 note 16

35. De Leon v Heller, 77 Ga. 740.

36. Carter Grocery Co v Wilson, 153 S E 566, 156 S C 546, 72 A L R 118—6 C J p 154 note 18.

Affidavit defending on merits
Where defendant, before serving notice of a motion to vacate an attachment, served an affidavit on the sheriff alleging that the amount claimed by plaintiff was unjust, he waived his objection to defects or irregularities in the affidavit on which the attachment was granted—Reames v. Lawrence, 106 S E 31, 115 S C. 419.

Matters in abatement
It is not sufficient merely to put in issue the grounds alleged for an attachment by answer, and the filing of an answer is a waiver of matters which go in abatement of the writ Accordingly, the chancellor correctly sustained an attachment levied on property of defendant, where no plea in abatement was filed traversing the grounds alleged for the issuance of the attachment—Cate v Popejoy, (Tenn App) 94 S W (2d) 51

37. Hearn v. Crutcher, 4 Yerg (Tenn) 461.

38. Mo—Henderson v. Drace, 30 Mo 358
Nev—Williams v. Glasgow, 1 Nev 532

39. Rice v Morner, 25 N W 668, 64 Wis. 599—6 C J p 154 note 21

40. Hester v Basken, (Tex Civ App) 184 S W 726—6 C.J. p 154 note 22, p 155 note 33 [1]

41. Union Trust Company v. Biggs, 137 A. 509, 153 Md 50.

Agreement constituting waiver
Where it was agreed between the creditor and the debtor against whom an attachment was obtained that the attachment should be released as to a part of the property levied on, and that it should be "retained as a valid attachment against the remainder of the tract," the court said that whatever the substance of the objection of defendant to the affidavit, short note, declaration, voucher, pleading and interrogatory in the attachment proceedings, such objections were waived by such written agreement.—Union Trust Co. v. Biggs, 137 A. 509, 153 Md 50.

42. Cheyenne First Nat Bank v. Swan, 23 P 743, 3 Wyo 356.

43. United Collieries v. Martin, 60 S W.(2d) 125, 248 Ky. 808, 89 A L R. 971.

Effect of judgment
An attachment, void because of the insufficiency of the affidavit, is not made valid by the subsequent rendition of a judgment for plaintiff—Maguire v. Bolen, 68 N W. 408, 94 Wis. 48.

44. Sedalia Third Nat Bank v Garton, 40 Mo App 113, 122, 123
"Plaintiff's counsel, however, insists, that, even to admit that the writ of attachment was issued in the absence of an affidavit, yet that defendants waived the necessity thereof by appearing and pleading to an affidavit, subsequently filed in the court We cannot concur with counsel on the position, thus taken. It is well understood that, in the matter of jurisdiction over the person, a defendant may appear in court and submit himself to the jurisdiction thereof in the face of defective, or even void, process, and that he cannot thereafter complain of such want of process, since he will be deemed to have waived the necessity thereof. However, this rule has no application here, in a proceeding in its nature in rem—where the court seeks by its process to bring the thing in court, with the purpose of subjecting such thing to the payment of plaintiff's claim. It is an extraordinary process, and the statute law has provided a means whereby the res may be brought into the jurisdiction of the court The presence or absence of defendant in the suit has nothing to do with the presence or absence of the attached property. In other words the defendant may be present and yet the defendant's property absent, or not within the court's jurisdiction. . . . In our opinion then the writ of attachment, issued in this cause, was an attempted process without jurisdiction The court did not thereby acquire jurisdiction over the subject-matter. It was a void proceeding from the beginning, and, as jurisdiction never attached, advantage thereof could be taken at any time. . . . And since the court never acquired, under the law, jurisdiction of the subject-matter, consent of the parties cannot confer jurisdiction"—Sedalia Third Nat Bank v. Garton, supra.

In the absence of a statute to the contrary,[45] if the defects in the affidavit consist of mere informalities or irregularities, the proceedings are regarded as voidable only at the instance of a party to the proceeding in which the attachment is issued,[46] and, in the absence of fraud or collusion, no objection on account of irregularities can be raised by strangers to the action.[47]

(2) Time of Taking

Objections to the affidavit for attachment not going to the jurisdiction of the court must be timely raised.

Objections to the sufficiency of the affidavit for attachment, if not raising jurisdictional questions, must be made timely,[48] and where defendant failed to object to the falsity of an affidavit for an attachment in the proceedings therefor, he could not, for the first time raise such objection after judgment, at least in the absence of plaintiff's fraud or collusion.[49] However, unless otherwise provided by statute, objections for insufficiency to confer jurisdiction may be made at any stage of the proceedings,[50] but if the statute requires defendant to appear and plead before he can except to the sufficiency of the affidavit, an exception taken before he pleads is premature.[51]

After issue made and trial begun on the merits of a case, it is too late for an objection to the petition for want of verification where, under the statute, verification is not essential to jurisdiction.[52]

(3) Mode of Objecting

An objection to a defect in an affidavit for attachment must be made in the mode prescribed by statute.

The mode of raising objection to an insufficient affidavit for attachment depends primarily on the statutes and practice in the particular jurisdiction. In some jurisdictions such objection must be taken by plea in abatement,[53] and accordingly, it has been held in such a jurisdiction that the truth of the ground of attachment stated in the affidavit may only be inquired into by such plea.[54] In other jurisdictions the proceeding is by a motion to dissolve the attachment,[55] or by motion to quash.[56] Alleged defects will not be considered on mandamus,[57] nor can the sufficiency of the facts stated be tested by demurrer to a petition containing similar statements.[58] If the affidavit in an action commenced by attachment alleges a cause of action as for a trespass to land, and the complaint is for conversion, demurrer will not lie, but a summary application to set the declaration aside should be made.[59] It is not proper to strike out statements in the affidavit because they are immaterial or disclose no ground for attachment.[60] Under a statute providing that the facts stated as the cause of attachment cannot be contested by a mere denial, it has been held that defendant cannot interpose a defense by a mere denial, or by an answer specifically traversing the allegations of the petition with respect to the said grounds of attachment.[61]

45. **Statute extending right**
In Iowa, it is provided by statute that "any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition, verified by oath to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in or lien on it, under any other attachment or otherwise, and setting forth the facts upon which the claim is founded"—Thielen v Schechinger, 230 N W 516, 517, 210 Iowa 224
Collateral attack on affidavit see supra § 110

46. Mont—Patch v Stewart, 253 P 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1113, 78 Mont 559
Tex—Lorenz v Mingus State Bank, (Civ App) 60 S W (2d) 462.
6 C J. p 152 note 98.

Objection by person other than party
Where plaintiff company brought suit against defendant and attached his property, and later, in another proceeding, another company, as plaintiff, also brought an action and had an attachment levied on the property of defendant, the fact that the affidavit for an attachment made by the first company in its proceeding was defective in not properly negativing the existence of security for the indebtedness, where not objected to by defendant in such proceeding, could not be objected to by the second company, in their proceeding, where the defect in the affidavit in the original proceeding did not deprive the court of its jurisdiction—Patch v. Stewart, 253 P. 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P 1113, 78 Mont 559.

47. Harvey v Foster, 30 P 849, 64 Cal 296—6 C J p 153 note 99 [g]

48. Idaho—Mitchell v Ada Inv Co., 246 P 10, 42 Idaho 421
Tex—Lorenz v Mingus State Bank, (Civ App) 60 S W (2d) 462

49. Mitchell v. Ada Inv. Co., 246 P. 10, 42 Idaho 421.

50. Bruce v. Cook, 6 Gill & J.(Md) 345—6 C J. p 153 note 1.

51. Heard v Lowry, 5 Ark 522—De'ano v Kennedy, 5 Ark 457—Hynson v. Taylor, 3 Ark 552

52. Lynch v Shepherd, 2 Ky Op 133

53. Cooper v Owen, 161 So 93, 230 Ala 316—6 C J p 153 note 5.

54. Cooper v. Owen, supra

55. Bank of Commerce v. Latham, 57 P 134, 8 Wyo 316.

56. Iowa—Holloway v. Herryford, 9 Iowa 353—Hunt v Collins, 4 Iowa 56—Carothers v. Click, Morr. 54
Va—Anderson v. Johnson, 32 Gratt. (73 Va) 558.

57. Nederlander v. Wayne Cir Judge, 21 N W. 912, 55 Mich 411

58. Ala—Odom v. Shackleford, 44 Ala 331
Iowa—Holloway v. Herryford, 9 Iowa 353—Hunt v. Collins, 4 Iowa 56

59. Longyear v. Minnesota Lumber Co, 66 N.W. 567, 108 Mich 645

60. Crable v. O'Connor, 133 P. 376, 21 Wyo 460.

61. Thielen v Schechinger, 230 N. W. 516, 210 Iowa 224.

The objection should be specific and should point out in what respect the affidavit is defective and a mere objection that no sufficient affidavit has been filed is too general.[62] Where the objection is required to be taken by a plea in abatement the plea must be properly drawn.[63]

Traverse of affidavit. A traverse of the allegations contained in an affidavit for attachment does not bring in issue either the knowledge or authority of affiant, which are not traversable facts.[64]

§ 142. Effect of Determination of Insufficiency

No further proceedings can be had on an affidavit which has been held insufficient.

When affidavits in attachment have been held insufficient, no subsequent proceedings based on them can be had.[65] Under a statute, however, providing that any creditor of defendant, on filing his affidavit and written undertaking, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against defendant, and under a further statutory provision that a dismissal of his action or proceedings in attachment by the first attaching creditor shall not operate as a dismissal of the action or proceeding of any subsequent attaching creditor, the rights of other creditors, who have come in under an attachment issued on a defective affidavit, whose proceedings are regular, are not lost by the quashing of the original attachment.[66]

§ 143. Amendments and Supplemental Affidavits

a. In general
b. Time for application for amendment
c. New verification
d. Effect of amendment
e. Supplemental affidavit or complaint

a. In General

(1) Rule stated
(2) Applications of rule

(1) Rule Stated

Ordinarily, under the statutes mere defects of form in an affidavit for attachment may be cured by amendment, but, in the absence of statutory permission, this right to amendment does not extend to defects of substance.

As a general rule, an affidavit or application for attachment which contains the substantial elements required by the statute,[67] and which contains clerical,[68] technical,[69] or formal[70] defects, is amendable, and may be corrected by amendment. On the other hand, in view of the fact that attachment is a statutory remedy and that the statutory procedure must be strictly followed, an application or affidavit containing material defects, or defects of substance, such as to deprive the court of jurisdiction over the res or property sought to be attached, is not amendable, and cannot be cured by amendment,[71] except where the right to amend has been extended

62. Gill v Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md 394

63. Newsom v. Fleming, (Va.) 181 S E 393

Plea not properly drawn

A plea in abatement which failed to show in what county or state defendant resided and where the cause of action arose, and which omitted a prayer for judgment, was insufficient, since the strict rule of pleading was inapplicable to plea in abatement in actions based on petition for attachment—Newsom v. Fleming, (Va.) 181 S E 393

64. Eureka Steam Heating Co v Sloteman, 38 N W 241, 67 Wis 113

65. Cleveland & Western Coal Co v J H Hillman & Sons Co., (D C Ohio) 245 F 200—6 C.J p 154 note 24.

66. Taylor v. Elliott, 51 Ind 375.

67. Rabbitt v. Frank C Weber & Co., 130 N E 787, 297 Ill 491

68. T. C May Co. v. Menzies Shoe Co., 119 S E 227, 186 N C. 144—6 C J p 154 note 33 [b].

69. Md—Gill v. Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md. 394.

Pa—Gerson v. Bernbaum Clothing Co., 11 Pa Dist & Co. 691.

6 C J. p 154 note 33 [c].

70. Cal—Anaheim Nat Bank v. Kraemer, 7 P (2d) 765, 120 Cal App 63

Md—Gill v. Physicians' and Surgeons' Bldg., 138 A 674, 153 Md 394—Booth v. Callahan, 55 A. 625, 97 Md 317

Mont—Patch v Stewart, 253 P 254, 78 Mont 192, followed in Bancroft v Leverty, 254 P. 1118, 78 Mont 559

Tenn—New York Casualty Co v. Lawson, 24 S W (2d) 881, 160 Tenn 329

Tex—Merritt v. Gray, (Civ App.) 262 S W 539, reversed on other grounds Gray v Merritt, (Com. App.) 276 S W 137

6 C J. p 150 note 80 [c], p 154 note 33.

Where writ quashed

Where a statute provides that an affidavit for an attachment may be amended if the attachment writ has been quashed, such statute must be followed and it is error to refuse an amendment after the writ is quashed—McSwain v. Cephus, 69 So. 178, 109 Miss 368.

In Pennsylvania

(1) The authorities in this state are not in accord. It seems to be the rule, however, that mere formal defects in a foreign attachment are amendable—Frankel v. Donehoo, 158 A 570, 306 Pa. 52—Stamm v Goldberg, 20 Pa Dist & Co 53—Modern Tool Co v. Automatic Press Feeder Co., 24 Pa Dist. 443.

(2) On the other hand, it has been held that plaintiff cannot amend an affidavit for attachment—Wolf v Zents, 5 Pa Dist. & Co. 276—Sperry v. Ollie, 15 Pa Dist 623, 32 Pa Co. 71.

71. Minn—Duxbury v Dahle, 81 N. W 198, 78 Minn 427, 79 Am S R 408

Mo—Farmers' State Bank of New Boston v. Gibson, (App.) 278 S W 737

Pa—Stamm v. Goldberg, 20 Pa Dist. & Co 53—Modern Tool Co. v Automatic Press Feeder Co., 24 Pa Dist. 443

Tenn—New York Casualty Co v. Lawson, 24 S.W.(2d) 881, 160 Tenn. 329

6 C.J. p 155 note 34.

by statute to matters of substance.[72] In other words, where under the statute amendments may be made as to matters of form, an amendment which would substitute a valid for a void affidavit is not allowable.[73]

Amendments for minor or formal defects in affidavits or applications for attachment have been permitted under the statutes applicable to amendments generally providing, in terms or effect, for amendment to any pleading, process, or proceeding in the discretion of the court and in the furtherance of justice, and requiring courts to disregard unsubstantial defects in any proceeding,[74] and it has been held that defects of substance can be cured by amendment under such statutes.[75] On the other hand it has been held that such a statute providing for amendments generally does not apply to amendments to attachment affidavits, at least where the defect sought to be cured thereby involves a jurisdictional allegation.[76] Also, notwithstanding the general statute granting the court power to permit amendment of any pleading or proceeding, a statute, providing that defendant may apply on motion, after reasonable notice, to have the writ of attachment discharged on the ground that it was improperly or irregularly issued, and providing that, if the motion is made on affidavits on the part of defendant, but not otherwise, plaintiff may oppose the same by affidavits or other evidence, has been held to limit and control the general statute, and where the application to discharge the attachment was not made on affidavits, plaintiff could not amend a defective affidavit for attachment.[77]

Where the writ was issued on a paper which as an affidavit was a nullity, and where an affidavit is essential to the issuance of a writ of attachment, the writ cannot be vitalized by the filing of an affidavit amending the purported affidavit which as an affidavit never existed.[78] Unless the affidavit is a nullity, however, it is amendable under a statute providing that an attachment shall not be discharged if at or before the hearing of an application for its discharge the affidavit on which it was based shall be amended and made to conform to the statute.[79]

Matter which is properly alleged in the original affidavit, in the absence of a statute to the contrary, need not be repeated in the amended affidavit.[80]

72. Cal.—Rosenberg v. Bullard, 15 P (2d) 870, 127 Cal App. 315
Ky.—Hart County Deposit Bank v Hatfield, 33 S.W.(2d) 660, 236 Ky 725
6 C J p 156 note 35

Same as complaint

An affidavit for attachment is amendable to the same extent as a complaint—Rosenberg v Bullard, 15 P (2d) 780, 127 Cal App 315

In Georgia, since the acts of 1887 and 1889, codified in Civ Code (1910) § 5706, authorizing amendments of affidavits which are the foundation of legal proceedings, an attachment affidavit is amendable both in form and substance, if there is enough to amend by, the same as other pleadings—Harmon v. Wiggins, (App.) 172 S E 847—A W. Busby & Son v Elliott, 95 S E. 1014, 22 Ga App. 391

73. New York Casualty Co v Lawson, 24 S W (2d) 881, 160 Tenn 329—6 C J. p 155 note 34 [a].

74. Pierce v. Mallard, 150 S E. 842, 197 N C. 679.

On motion to vacate

Under Code Civ Proc. § 768, providing that "whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights, be cured or supplied, it shall be the duty of the court to direct upon the hearing of such motion, that such defects . . . be cured or supplied nunc pro tunc," defects or insufficiencies in attachment papers may be remedied, even when the motion to vacate the attachment is based solely on those papers, since there is no reason why an attachment should be vacated because of the omission of some allegation or proof from the papers, when in fact the allegation can truthfully be made, or the truth is in existence or can be supplied on the motion to vacate—Sorensen v. S A Companhia General Commercial De Santos, Santos, Brasil, 180 N Y S 201.

75. Hetrick v. Renwald, 236 P 1089, 73 Mont 426—Jenkins v First Nat. Bank, 236 P. 1085, 73 Mont. 110—6 C.J p 156 note 36

76. Freer v. White, 51 N.W. 807, 91 Mich 74

77. Heaton v. Panhandle Smelting Co., 179 P. 510, 32 Idaho 146.

78. Cal.—Rosenberg v. Bullard, 15 P (2d) 870, 127 Cal App. 315.
Mo.—Farmers' State Bank of New Boston v Gibson, (App.) 278 S W. 737—First Nat Bank of Appleton City v Griffith, 182 S W. 805, 806, 192 Mo App 443
6 C J. p 155 note 34 [b].

"A thing which is nothing cannot be amended so as to be something If the writ of attachment levied upon the property and by which it was seized was issued upon an affidavit which sought to amend which had no existence, then the writ itself was a nullity, and the court obtained no jurisdiction over the res, the property attached Jurisdiction over the subject-matter of an attachment is obtained by the levy thereon of a writ properly issued . . . A valid writ cannot be issued unless the statutory affidavit has been filed Such an affidavit is an indispensable prerequisite to the issuance of a valid attachment writ. . If the affidavit filed is indeed an affidavit, but is merely insufficient in some one or more features thereof, the statute provides that it may be amended . . But, where a writ of attachment is issued and levied without an affidavit, or (which is the same thing) upon a paper purporting to be an affidavit, but which in fact is not, the writ is void, and cannot be galvanized into life by the filing of an affidavit amending an affidavit which never existed"—First Nat. Bank of Appleton City v. Griffith, supra.

79. Corum v Superior Court in and for Alameda County, 300 P. 837, 114 Cal.App 741—Nichols v. Davis, 137 P. 41, 23 Cal App. 67

80. Schultz v. Stiner, 157 P 365, 98 Kan. 45, denying rehearing 155 P.

Of course, to cure the defect, a sufficient amendment is necessary,[81] and the person seeking the amendment must conform to the rules and requirements respecting the filing of an amended affidavit.[82] Accordingly, where plaintiff, after an affidavit for attachment was held insufficient, filed an amended petition stating that the defect occurred by mistake, but repeated the same defect, the affidavit was insufficient.[83]

Where plaintiff has once filed an amended affidavit, and chosen to stand thereon, and where the rule to dissolve the attachment has been made absolute, it has been held that he will not be permitted again to file an amended affidavit.[84]

Construction of statutes. While it has been held that a general statute providing for liberality of construction in favor of amendments of ordinary pleadings does not apply to amendments of affidavits for attachment,[85] it is generally held, frequently by virtue of express statutory provision, that statutes relating to attachment affidavits, since they are remedial in character, should be liberally construed and applied.[86]

In collateral proceedings Of course the court in a collateral proceeding cannot permit an amendment of the affidavit for attachment.[87]

Intervening rights. Attachment proceedings may not be amended so as to create a lien affecting the rights of another attaching creditor, previously legally fixed on the same property.[88]

Under a statute providing for amendments where they can be made without prejudice to intervening rights, where the rights of third persons have intervened, defects in the attachment affidavit cannot be cured by amendment.[89]

Relating back Where attachment has issued, an averment in an amendment as to a ground for attachment, where such an amendment is permissible, should relate back to the time of asking the attachment in the petition originally filed.[90]

The federal courts, under general rules stated in the title Federal Courts § 130 [25 C.J. p 816 notes 90–95], may grant amendments in attachment proceedings in cases where the state practice does not allow them and the decisions of the state courts respecting amendments are not binding on them when sitting in the same jurisdiction, although generally, as seen in Federal Courts § 126 [25 C. J. p 813 note 30–p 814 note 54], the practice in attachment conforms to that of the state courts.[91]

(2) Applications of Rule

The rules stated in the previous subsection have been applied in a variety of situations.

The rules just announced in the previous subsection have been applied in many situations which will be discussed in detail hereinafter in this section.

Venue. A failure to state the venue in the affidavit does not render the affidavit void, and the defect may be cured under statutes permitting amendments as to formal matters,[92] even after a motion to dismiss on the ground of such omission has been filed.[93]

Entitling In view of the rule already discussed in § 119 that it is not necessary that the affidavit be entitled if the designation of the cause sufficiently appears elsewhere, a defect in the title of the cause is a mere formal matter, and may be remedied by amendment,[94] as may also a misnomer of the parties in entitling the affidavit.[95]

Parties and statements about parties. A proposed change in the affidavit, which would have the effect of introducing into the cause a new plaintiff for the ones who originally instituted the action and

1073, 97 Kan 555—6 C.J. p 155 note 33 [o].

Nonresidence

Where the original affidavit for attachment alleged the nonresidence of defendant, that allegation need not be repeated in the amended affidavit—Schultz v. Stiner, 157 P 265, 98 Kan. 45, denying rehearing 155 P 1073, 97 Kan 555

81. Bailey v Valley Nat. Bank, 19 N E 695, 127 Ill 332.

82. Robinson v. Burton, 5 Kan. 293

83. Champion v. Ferguson, 43 S W (2d) 719, 241 Ky 303.

84. Irvine v May Oil Burner Corporation, 17 Pa Dist. & Co. 711

85. Fargo v Cutshaw, 39 N E. 532, 12 Ind App 392.

86. Ga—Hensley v Minehan, 114 S. E 647, 29 Ga App 251.
Ill—Yannoulakis v. Sinopuolo, 210 Ill App 553
Kan—Schultz v Stiner, 155 P 1073, 97 Kan 555, rehearing denied 157 P 265, 98 Kan 45
Neb—Westover v Van Dorn Iron Works Co, 97 N W 598, 70 Neb. 415.
6 C J. p 155 note 33 [a]

87. Nix v. Citizens' Bank of Moultrie, 130 S E 597, 35 Ga App 546.

88. Harbour-Pitt Shoe Co v. Dixon, 60 S W. 186, 22 Ky L. 1169—6 C J. p 156 note 38.

89. Grassi v. La Sociedad Bancaria Del Chimborazo, 210 N Y S 705, 213 App Div 629—California Packing Corporation v Phoenix & Third Nat Bank of Lexington, Ky., 177 N Y S 37, 188 App Div. 475, reversed on other grounds California Packing Corporation v. Kelly Storage & Distributing Co., 126 N E. 269, 228 N.Y. 49.

90. Bundy v. McKee, 29 Iowa 253—Wadsworth v. Cheeny, 10 Iowa 257

91. Erstein v. Rothschild, (C.C. Mich.) 22 F. 61

92. Avery v. Good, 21 S W. 815, 114 Mo. 290

93. Struthers v. McDowell, 5 Neb. 491.

94. Union Bank & Trust Co v. Himmelbauer, 181 P 332, 56 Mont 82—6 C J. p 156 note 43

95. Ruthe v Green Bay, etc., R Co, 37 Wis. 344—6 C J. p 156 note 44.

proceeding, is of a material character, and, in the absence of statutory permission, is not allowable.[96] Where, however, such amendment is permissible under the statute, the affidavit for attachment may be amended so as to name an omitted party plaintiff,[97] or to insert the name of an additional party defendant.[98] Also, under statutes permitting the affidavit to be amended to cure any defect in form or substance, where no question of identity arises, an improper description of a party may be rectified by substituting his true name.[99]

An affidavit which gives the name of the firm of which plaintiffs are members, but which does not give the individual names of plaintiffs, has been held to be merely defective in form, and consequently subject to amendment.[1] On the other hand, under a statute permitting an affidavit for attachment to be amended to the same extent as ordinary declarations, it has been held that an amendment that the debt was due a partnership, instead of an individual as alleged in the affidavit, was improper.[2]

The naming of two or more persons as joint defendants, when in fact they are not jointly liable, has been held to be a defect of substance, and not curable by amendment.[3]

Capacity of party or affiant. An affidavit by an agent or attorney, which fails to disclose his relation to plaintiff, where necessary, is defective in form merely, and may be so amended as to show that fact.[4] Accordingly, where the original affidavit for attachment was not made by plaintiff and where it did not state that affiant made it for plaintiff, as required by statute, the defect is not jurisdictional, and the affidavit may be amended by incorporating such allegation.[5] Likewise, a receiver may amend by adding an allegation respecting his authority to sue.[6]

Under a statute authorizing an amendment if a proceeding taken by a party fails to conform to the statutory requirements, where an affidavit is made by an agent or attorney when plaintiff is in the county, and where under such circumstances the statute does not authorize an agent or attorney to make the affidavit an amended affidavit may be filed.[7]

Nature or cause of action. Where amendments to attachment affidavits are permissible under the statute as to formal matters only, an amendment which will effect a fundamental change in the cause of action as originally stated,[8] or which will substitute one cause of action for another,[9] is not proper. On the other hand, under a permissive statute, the affidavit may be amended by supplying

96. Fargo v Cutshaw, 39 N E 532, 12 Ind App 392

97. Shaw v Brown, 42 Miss 309—6 C J. p 156 note 46

98. B F Glover, etc, Comm. Co. v Abilene Milling Co, 116 S W. 1112, 136 Mo App 365—6 C J p 157 note 48.

99. Ex parte Nicrosi, 15 So 507, 103 Ala 104—6 C J. p 157 note 49.

Christian name

Where the affidavit in attachment proceedings gives only the initials of named defendant, the affidavit can be amended to show defendant's christian name—Southern Maryland Trust Co v Henry, 155 A. 599, 4 W. W Harr (Del) 496

Use of singular where plural required

Where, in an action against three defendants, the original attachment affidavit alleged that the action was not intended to hinder, delay, or defraud creditors of the said "defendant," and was thus in this respect insufficient, an amendment changing the singular, "defendant" to the plural, "defendants" was permissible—Peterson v. Beggs, 148 P. 541, 26 Cal App 760—6 C.J. p 154 note 33 [1].

1. Emerson v. Detroit Steel, etc., Co, 58 N W 659, 100 Mich 127—6 C J. p 156 note 47.

2. Holston Box & Lumber Co. v. Vonberg & Bates, 129 S E 562, 34 Ga App 298, conforming to answer to certified questions 129 S E 92, 160 Ga. 813—A W Busby & Son v Elliott, 95 S E 1014, 22 Ga App 391.

3. Blair v. Winston, 35 A 1101, 84 Md 356—Halley v Jackson, 48 Md 254—6 C J p 157 note 50

4. Northern Lake Ice Co v. Orr, 44 S W. 216, 102 Ky 586, 19 Ky L 1634—6 C J. p 157 note 54.

5. State ex rel Rabiste v Southern, 254 S W 166, 300 Mo 417

6. Md—Booth v. Callahan, 55 A 625, 97 Md 317
Mont—Muth v. Erwin, 36 P. 43, 14 Mont. 227

7. Harbour-Pitt Shoe Co v. Dixon, 60 S.W 186, 22 Ky L. 1169.

8. Pa—Porter v. Union Hay Co, 26 Pa Dist 712
Neb—Westover v Van Dorn Iron Works Co, 97 N W. 598, 70 Neb 415

Abandoning cause of action

Where a writ of attachment was based on an affidavit setting up four causes of action, and the amended complaint in the action set out only three causes of action, abandoning one, the writ of attachment was void.—Cable v. Olson, 15 P (2d) 737, 52 Idaho 389

Failure to allege relation of landlord and tenant

Where plaintiff in his affidavit for attachment alleged that defendant was indebted for rent and that defendant was disposing of a part of his crop without paying the landlord's lien, and failed to allege that the relationship of landlord and tenant existed and that the debt sued for was for "rent on, and advances made to assist or aid in the cultivation of, the land for the current year, as required," since such omission was one of substance, it was held that it could not be supplied by amendment. —Staggers v. Washington, 56 Ala. 225

Speed of automobile

An amendment during trial of an attachment levied on an automobile which collided with plaintiff's automobile to show that it was operated in excess of twenty miles per hour in willful violation of statute, went to the substance and not merely to the form, and was, therefore, unauthorized—Keller v Federal Bob Brannon Truck Co., 269 S W 914, 151 Tenn 427

9. Westover v. Van Dorn Iron Works Co., 97 N W 598, 70 Neb. 415—6 C J. p 157 note 57.

omitted statements as to the cause of action or the nature of the claim[10]

Where the original affidavit, although sufficient in form, was drawn on an incorrect theory of recovery, under a statute providing that no writ of attachment shall be quashed on account of any insufficiency of the affidavit, if plaintiff shall cause a legal and sufficient affidavit to be filed, an amendment stating the correct theory is permissible[11]

A failure to show in the affidavit the evidentiary facts by which plaintiff seeks to establish the cause of action alleged, as required by statute, has been held to be a formal defect which may be cured by amendment,[12] but, according to other authority, an affidavit which fails to make any statement of the material facts relied on to show the existence of the grounds for attachment, as required by statute, is void, and cannot thereafter be amended by the filing of another affidavit purporting to state the material facts[13]

Claim. In the absence of a statute to the contrary, an affidavit defective because not alleging an existing debt or demand due to plaintiff, which he is entitled to recover, is not the subject of amendment;[14] but an affidavit ambiguous because stating a present or a future indebtedness may be amended by striking out the allegation respecting the maturity of the debt in the future,[15] and such appropriate amendments may be made to an affidavit based on a debt actually due as will authorize an attachment to secure a debt not yet matured[16] or show that the debt is due in part only,[17] or that the indebtedness has become absolute pending the action.[18]

Under a permissive statute, when inadvertently omitted, the amount of the indebtedness claimed may be shown by a subsequent amendment or new affidavit,[19] or the affidavit may be amended where the allegations relative to the amount of the claim are uncertain and indefinite, or it contains erroneous statements in respect thereto, made through mistake or inadvertence.[20]

Under a statute providing that plaintiff must be permitted to amend any defect of form or substance in the affidavit for attachment, a plaintiff, who has sued out an attachment for a sum exceeding the court's jurisdiction, may amend by filing a new affidavit for a sum within the court's jurisdiction.[21]

Where the statute permits defects in attachment affidavits to be cured by amendments, a failure to state the amount affiant believes plaintiff out to recover may be cured by an amended affidavit.[22]

Under a statute providing generally for a cure of defects in attachment affidavits, a defective affidavit which fails to allege that the claim sued on is a just one, as required by statute, may be cured by an amended affidavit,[23] but under a statute allowing a supplemental affidavit to state additional facts to show the grounds of attachment, but which allows no other amendments, the omission in the affidavit of attachment that plaintiff is "justly" entitled to recover relates to plaintiff's right to recover, and cannot be cured by amendment.[24]

Security. A failure to state that the claim sued on is not secured,[25] or that, although secured, such

10. Haseltine v. Lyle, (Wash.) 27 P.(2d) 716—6 C.J. p 157 note 56

Existing facts

Under a statute providing that "no attachment shall be quashed or dismissed . . . if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued," an affidavit for attachment is amendable so as to state the existing facts.—Haseltine v. Lyle, (Wash.) 27 P.(2d) 716.

11. Tucson Nat. Bank v. Gomez, 234 P. 560, 27 Ariz. 510

12. Sorensen v. S. A. Companhia General Commercial De Santos, Santos, Brazil, 180 N.Y.S. 201.

13. Hatfield v. Blount, 103 S.E. 203, 86 W.Va. 411—Millar v. Whittington, (W.Va.) 87 S.E. 164.

14. Flexner & Lichten v. Dickerson, 65 Ala. 129—6 C.J. p 157 note 59.

15. Tommey v. Gamble, 66 Ala. 469

16. Iowa.—Wadsworth v. Cheeney, 13 Iowa 576

Kan.—Baker Wire Co. v. Kingman, 24 P. 476, 44 Kan. 270

17. Snodgrass v. Brownfield State Bank, (Tex.Civ.App.) 251 S.W. 567—6 C.J. p 157 note 62

18. Pride v. Wormwood, 27 Iowa 257.

19. Schultz v. Stiner, 155 P. 1073, 97 Kan. 555, rehearing denied 157 P. 265, 98 Kan. 45—6 C.J. p 157 note 64.

Amount already implicitly stated

An affidavit omitting a statement of the amount due, as required by statute, but reciting that plaintiff had begun his action on the notes and that the claim was just, due, and not paid, could be amended to state the amount of plaintiff's claim, where such matter could be inferred from what already had been expressly stated.—Schultz v. Stiner, 155 P. 1073, 97 Kan. 555, rehearing denied 157 P. 265, 98 Kan. 45

20. Kendrick v. Warren Bros. Co., 72 A. 461, 110 Md. 47—6 C.J. p 157 note 65

21. Webb v. McPherson, 38 So. 1009, 142 Ala. 540

22. Hart County Deposit Bank v. Hatfield, 33 S.W.(2d) 660, 236 Ky. 725

23. United Collieries v. Martin, 60 S.W.(2d) 125, 248 Ky. 808, 89 A.L.R. 971—6 C.J. p 153 note 66.

24. Sommers v. Allen, 28 S.E. 787, 44 W.Va. 120.

25. Jenkins v. First Nat. Bank, 236 P. 1085, 73 Mont. 110—American Surety Co. of New York v. Kartowitz, 195 P. 99, 59 Mont. 1.

Form defective

An affidavit for attachment, containing the statement "that the payment of the same [the debt] is not secured," instead of the statutory language "has not been secured," was

security has become valueless,[26] as required by statute, does not render the affidavit void, but defective in form merely, and subject to amendment.

Grounds Under some statutes, an affidavit which fails to assign any statutory ground for an attachment, is fatally defective in a matter of substance, and cannot be amended in that respect,[27] but under other statutes, which permit amendments as to matters of substance, such defects are amendable.[28]

Where permissible under the statute, an amendment which merely makes the cause of action alleged in the petition more specific is allowable to show the ground for the attachment,[29] as is also an amendment so as to allege fully matters prescribed in the disjunctive as a distinct ground of attachment, and only alleged in part in the original affidavit.[30] An amendment to an affidavit is likewise permissible for the purpose of stating a ground positively which was merely alleged on information and belief in the original affidavit.[31]

Under permissive statutes, an affidavit which is uncertain and ambiguous because stating separate grounds in the disjunctive is amendable.[32]

Under a statute providing that when an affidavit for attachment is adjudged insufficient, the attachment shall not be dissolved, if plaintiff files a good and sufficient affidavit, an affidavit charging a belief that defendant is about to remove his property may be amended by further charging a fraudulent intent,[33] or by supplying clerical omissions to state a fraudulent intention to dispose of the property and that the property belonged to the debtor.[34] Where the statute permitting amendments to pleadings generally applies to affidavits for attachment, an affidavit in the language of the statute, alleging fraudulent intent in disposing of property, may be amended by setting forth the facts relied on.[35]

An affidavit which does not substantially comply with the statutory provisions respecting the allegations as to the removal of defendant from the state or other prescribed place is defective in substance and cannot be amended, in the absence of a statute permitting amendments as to substantive matters;[36] but an allegation that the debtor is about to remove from the state may be amended by stating, in addition, a political division within the state.[37]

A failure to aver that plaintiff is in danger of losing his claim unless an attachment issue, or an allegation faulty in that respect is amendable, under a statute permitting amendments as to substantive matters.[38]

In the absence of a statute permitting amendments of attachment affidavits as to matters of substance, an amendment stating new or additional grounds proposes a matter of substance and should not be allowed.[39] Where, however, the statute per-

defective, but not void, being subject to amendment.—American Surety Co of New York v. Kartowitz, 195 P 99, 59 Mont 1.

26. Corum v Superior Court in and for Alameda County, 300 P. 837, 114 Cal App 741.

Pledge valueless

Where, on motion to dissolve an attachment on the ground that the debt was secured by a pledge of accounts, the trial court adopted plaintiff's theory that a transfer of the accounts did not constitute a pledge, and plaintiff, therefore, had no occasion to amend its affidavit to state that the uncollected accounts had become valueless, it should be given an opportunity to amend after reversal of the order denying the dissolution.—Savage Tire Sales Co. v. Stuart, 203 P 364, 61 Mont. 524.

Security already applied on debt

Where plaintiff in his original affidavit for attachment stated that his claim was not secured, he could later add by amendment that his claim had originally been secured, that such security had already been applied on the claim, that such security was hence valueless, and that the present action was brought to collect the remainder of the claim.—Hetrick v Renwald, 236 P 1089, 73 Mont. 426

27. Mentzer v. Ellison, 43 P. 464, 7 Colo App 315—6 C.J. p 158 note 69

28. **Order and judgment as amendment**

Where an affidavit on which a warrant of attachment was issued was insufficient because the grounds for plaintiff's assertion were not set out in the affidavit, but the court found from the evidence offered by the parties that there was reasonable ground for the assertions in the affidavit, it was held that the court's order and judgment was in effect an amendment of the affidavit.—Thornburg v. Burton, 148 S E 28, 197 N C. 193.

29. Iowa.—Gourley v. Carmody, 23 Iowa 212.
Miss.—Helton v. McLeod, 46 So. 534, 93 Miss. 516.

30. Helton v. McLeod, supra.

31. McDonald v. W W. Kimball Co., 86 S E 234, 144 Ga 105—Harmon v. Wiggins, (Ga App.) 172 S E 847—Hensley v Minehan, 114 S.E. 647, 29 Ga App 251.

32. Salmon v. Mills, (Ind.) 49 F. 333, 1 C C A. 278—6 C J p 153 note 73.

33. Musgrove v. Mott, 2 S W 214, 90 Mo 107.

34. Stewart v. Cabanne, 16 Mo App 517.

35. Josephi v Mady Clothing Co., 33 P 1, 13 Mont 195.

36. Ga.—Brown v. McCluskey, 26 Ga 577
Tenn.—Lillard v Carter, 7 Heisk 604

37. Brumby v. Rickoff, 21 N E 232, 94 Ga. 429.

38. Norton v. Flake, 26 Mo App 698

39. Mitchell v. Fahey, 240 P. 612, 112 Okl 251—6 C J. p 158 note 74
"An amendment of an affidavit for an attachment is proper where it will be in furtherance of justice, even on the hearing, but no new cause of attachment which existed at the beginning of the action can be assigned, as a party must state all his grounds therefor when the action is brought, and cannot bring new ones by amendment"—Brookmire v. Rosa, 51 N W. 840, 841, 34 Neb. 227.

New ground changing cause of action

Where plaintiff in his original affidavit averred that defendant left the

mits such amendments, amendments stating new or additional grounds are proper,[40] even after the attachment has been levied, or the trial has begun on a plea traversing the original affidavit[41] On the other hand, under such statutes, it has been held proper to refuse to allow such an amendment where the attachment was originally secured on grounds which had no existence in fact,[42] or where the motion to amend was not accompanied with an offer to file an additional bond conditioned for prosecuting with effect the additional causes proposed to be set forth[43]

Nonresidence of defendant, where relied on as a ground for attachment, according to some authority, is a jurisdictional matter, and an affidavit failing to allege such nonresidence cannot be remedied by an amendment supplying the omission, unless the statute permits amendments as to matters of substance.[44] According to other authority, nonresidence, although necessary to the jurisdiction of the court, is a formal averment not affecting plaintiff's cause of action, and, consequently, an affidavit for attachment, failing to allege defendant's nonresidence in a foreign attachment, can be amended.[45] Of course, where the statute permits amendments as to substantive matters, the statement that defendant is a nonresident, if necessary for an attachment, may be added by way of amendment, where such statement is omitted from the original affidavit.[46]

Where nonresidence of defendant must be positively sworn to, the fact that the averment of nonresidence is on information and belief does not render the affidavit void, but merely voidable, and as such it is amendable.[47]

Where a failure to ascertain and state in the affidavit the place of defendant's residence, as required by statute, merely renders the affidavit voidable, under a statute permitting amendments to attachment affidavits, the defect may be cured by amendment[48]

Negation of improper motive. Failure to state that the attachment is not sued out for the purpose of vexing or harassing defendant is a substantial defect which, in the absence of a statute extending the right of amendment to matters of substance, cannot be supplied by amendment[49]

Property of defendant. An affidavit for attachment may be amended so as to make the description of defendant's property more definite,[50] or remedy a clerical error in stating the possession by the debtor of goods exempt from execution[51]

Where plaintiff in his affidavit fails to aver that the property attached in a foreign attachment suit is owned by defendant, such omission may be supplied by amendment[52]

Date. Errors in the date in an attachment affidavit are usually considered as formal defects and may ordinarily be corrected,[53] or an affidavit newly dated may be substituted for one erroneously postdated[54]

Signature. If in accordance with the rules already discussed in § 132, an affidavit which is not signed is a nullity, if there is no signature to the

county to avoid service of, and that she concealed herself so that she could not be served with, a summons, and later by amendment sought to add, as a basis for an attachment, that the debt was due for rent and that defendant had removed a part of her property, it was held that the latter ground could not be added by amendment, the court saying: "It is well settled that a court should permit only such amendments as do not change a cause of action and which give to the plaintiff no rights which he did not have when the suit was instituted. Clearly the plaintiff sought by such amendment to add another ground for attachment different from the two originally laid, and there was no error of the court in refusing to consider said amendment"—Mitchell v. Fahey, 240 P. 612, 112 Okl. 251.

40. Cal.—Rosenberg v Bullard, 15 P.(2d) 870, 127 Cal.App. 315
Ky.—Sally v Brown, 295 S.W. 890, 229 Ky. 576
6 C.J. p. 158 note 75.

Amendment proper
An amendment, showing that defendants have entirely disposed of the property purchased from plaintiffs which had been purchased on fraudulent representations, and that it is out of the power of plaintiffs to recover by replevin, may properly be added to an original affidavit seeking an attachment on the ground that defendants are conveying their property with intent to defraud their creditors.—Jaffray v. Wolf, 47 P. 496, 4 Okl. 303.

41. Kilmer v. Parrish, 144 Ill.App. 270.—6 C.J. p. 158 note 77.

42. Carter v. James, 15 Ky.L. 127.

43. Page v. Dillon, 61 Ill.App. 282.

44. Freer v White, 51 N.W. 807, 91 Mich. 74.—6 C.J. p. 158 note 86.

45. Modern Tool Co. v. Automatic Press Feeder Co., 24 Pa.Dist. 443

On motion to quash, an amendment showing defendant's nonresidence should be allowed, particularly where defendant in a petition to quash averred that he resided in Virginia.—First Nat. Bank v. Kline, 24 Pa.Dist. 1112

46. Hamburger v. Halperin, 152 P. 61, 28 Cal.App. 317

47. Ill.—Booth v. Rees, 26 Ill. 45
Neb.—Clarke Banking Co. v. Wright, 55 N.W. 1060, 37 Neb. 382

48. Hogue v. Corbit, 41 N.E. 219, 156 Ill. 540, 47 Am.S.R. 232

49. Hall v. Brazleton, 46 Ala. 359.—Hall v. Brazleton, 40 Ala. 406.—Saunders v. Cavett, 38 Ala. 51.

50. Levin v. American Furniture Co., 66 S.E. 888, 133 Ga. 670.

51. Bunn v. Pritchard, 6 Iowa 56.

52. Mindlin v. Saxony Spinning Co., 104 A. 598, 261 Pa. 354.—Modern Tool Co. v. Automatic Press Feeder Co., 24 Pa.Dist. 443

53. Arkansas City Lumber Co. v. Scott, 47 P. 545, 5 Kan.App. 636.

54. Drew v. Dequindre, 2 Dougl. (Mich.) 93.

affidavit, there is nothing to amend, and, consequently, the defect cannot be cured by amendment.[55] If, on the other hand, affiant's failure to affix his signature is not a fatal defect, or if under the statute amendments may be made for defects of substance, the omission may be supplied by amendment,[56] as by adding his signature to the affidavit,[57] or by filing a new affidavit properly signed.[58]

Verification. A defect in the verification, being one of form and not of substance, may be amended,[59] and if the contents of the affidavit are duly sworn to, but the officer who administered the oath neglects to add his certificate or signature, he may generally be permitted to do so nunc pro tunc.[60] Where plaintiff has observed all the statutory requirements respecting the filing and verification of the petition for attachment, the failure of the clerk to sign the certificate does not invalidate the proceeding, and the clerk may be directed to sign.[61] An insufficient or defective authentication of the certificate of an officer acting without the jurisdiction may likewise be amended,[62] as may also an affidavit in which the jurat is mistakenly postdated,[63] or an affidavit improperly sworn to before the attorney of record, who, although otherwise authorized to take an oath to the affidavit, was disqualified in the particular case because of his relationship to the parties;[64] but an affidavit taken before a person having no authority to administer the oath is an absolute nullity and cannot be validated.[65] It has also been held that a certificate of a clerk, intended as an affidavit, which fails to state that plaintiff was sworn and which omits the jurat, cannot be cured by a subsequent order in which it appears that the clerk, having been sworn, states that plaintiff did in fact make oath to the matters stated in the certificate.[66]

Approval. It has been held that an indorsement of satisfaction could not be made nunc pro tunc.[67]

b. Time for Application for Amendment

The application for an amendment of a defective affidavit for attachment must be seasonably made.

It may be stated as a general rule that application for amendment of an attachment affidavit should be seasonably made, and that laches on plaintiff's part may deprive him of the right to amend.[68] Under permissive statutory provision an attachment affidavit may be amended at any time before judgment,[69] after a plea in abatement alleging formal defects therein has been filed,[70] after a motion to dissolve or quash the attachment has been made,[71] before the time of argument on a rule to dissolve,[72] and before the affidavit is adjudged defective.[73] On the other hand, while it has been held that the affidavit might be amended on appeal,[74] it has also been held that the affidavit is not amendable

55. Davis v. Sherrill, 113 S W 556, 52 Tex Civ App. 259—6 C J. p 159 note 2.

56. McCain v Street, 33 So 872, 136 Ala 625—6 C J. p 159 note 3.

In Missouri

(1) Under Rev St (1899) § 413 (St Annot [1906], p 501), permitting an attachment to be dissolved on motion before final judgment if the supporting affidavit is insufficient, but prohibiting its dissolution if plaintiff files a sufficient affidavit in such time and manner as the court directs, plaintiff could, pending the hearing of a motion to dissolve the attachment because the affidavit was not signed, amend by signing the affidavit, or by filing a sufficient affidavit. —Marshall v Brown, 122 S W. 790, 145 Mo.App. 426.

(2) It has been indicated, however, that an unsigned affidavit is a nullity which cannot be cured by amendment—First Nat Bank of Appleton City v. Griffith, 182 S W. 805, 192 Mo App 443

(3) Prior to the enactment of this statute, it was held in this jurisdiction that an affidavit, which is not signed by the alleged affiant, and in which the jurat is neither signed by the clerk nor attested by the seal of the court, is a nullity, and cannot be amended.—Sedalia Third Nat Bank v Garton, 40 Mo App 113

57. Savage v Atkins, 27 So 514, 134 Ala 378

58. McCain v. Street, 33 So. 872, 136 Ala 625

59. Ramsay Motor Co. v. Wilson, (Wyo) 30 P (2d) 482, 91 A L R. 908—6 C J p 150 note 80 [c], p 159 note 7.

Amendment to jurat

Notary public, taking an affidavit for attachment, may be allowed to amend his jurat to the affidavit by adding to his signature the words, "notary public"—Gray v Merritt, (Tex.Com App) 276 S W. 187, reversing Merritt v. Gray, (Civ.App) 262 S W. 539.

60. Fortenheim v. Claflin, 14 S W. 462, 47 Ark 49—6 C.J p 159 note 8.

61. Young v Wooden, 265 S W. 24, 204 Ky. 694.

62. Lawton v Kiel, 51 Barb.(N.Y) 30, 34 How Pr 465

63. Arkansas City Lumber Co v. Scott, 47 P 545, 5 Kan App 636.

64. Ramsay Motor Co. v. Wilson, (Wyo) 30 P (2d) 482, 91 A L R 908 —6 C J. p 159 note 10.

Duplicate affidavits

Where an affidavit for attachment is improperly verified before one of plaintiff's attorneys, plaintiff may repair it by filing duplicate affidavits properly verified—Heidelberger v. Heidelberger, 187 N Y S 864, 196 App Div. 626

65. Greenvault v. Farmers', etc, Bank, 2 Dougl (Mich) 498

66. Cosner v. Smith, 15 S E 977, 36 W Va 738

67. Slaughter v. Bevans, 1 Pinn (Wis) 348.

68. Irvine v. May Oil Burner Corporation, 17 Pa Dist & Co 711

69. Southern Maryland Trust Co v Henry, 155 A 599, 4 W W.Harr. (Del) 496—6 C J. p 159 note 17

70. Simpson v. East, 27 So. 436, 124 Ala 293.

71. Peterson v Beggs, 148 P 541, 26 Cal App 760—6 C J p 159 note 14

72. Modern Tool Co. v Automatic Press Feeder Co, 24 Pa Dist 443.

73. Peterson v. Beggs, 148 P 541, 26 Cal App 760—6 C J p 159 note 16.

74. Ala.—Sloan v. Hudson, 24 So 458, 119 Ala. 27
N C—Finch v. Gregg, 3b S E 251, 126 N C 176, 49 L.R.A. 679.
6 C J. p 159 note 18.

after judgment,[75] after a plea in abatement has been sustained,[76] or after defendant has appealed from an order of the court denying his motion to dissolve the attachment on the ground of the insufficiency of the affidavit.[77]

Where, on motion to dissolve an attachment for insufficiency of the affidavit, the court is required to give plaintiff an opportunity to remedy the defects, it may order the dissolution of the attachment unless a proper affidavit is filed within a designated time,[78] which should be reasonable.[79]

c. New Verification

An amended affidavit or petition must generally be verified anew.

Where an affidavit or petition is amended in a material respect, it should be verified[80] or sworn to[81] anew, or new affidavits should be filed;[82] but, if the amendment is no more than a new statement of the same cause of action, it has been held that the petition need not be resworn to.[83]

d. Effect of Amendment

(1) In general
(2) Relation back

(1) In General

An amendment is not necessarily the beginning of a new suit or prejudicial to rights existing.

The filing of an amended affidavit setting up additional grounds for attachment is not the commencement of a new suit.[84]

An unnecessary amendment is without prejudice where the original affidavit was sufficient.[85]

(2) Relation Back

Under a permissive statute, an amendment to an affidavit may, where it does not prejudice the parties or other persons, relate back to the time of the original affidavit.

Under a permissive statute, an amendment to an affidavit for attachment may relate back and be given effect as from the time of the original affidavit.[86] Accordingly, under such a statute, where the amendment does not change the cause of action or deprive defendant of any material right, it relates back to the time of the original affidavit.[87] On the other hand, in the absence of such a statute, it has been held that the levy of an attachment based on an insufficient affidavit is not cured by an amendment of the affidavit.[88]

An amended affidavit in attachment, the material averments of which are in the present tense, and do not relate back to the time of filing the original affidavit, does not cure defects in the original affidavit.[89]

As between the creditor and the debtor the amendment of the affidavit will not affect the lien obtained under the affidavit originally made and filed.[90]

As to subsequent attaching creditors or lienors, if the amendment is one of substance or prejudice will result, liens obtained by them intermediate the original levy and the amendment will be entitled to priority, and the amended attachment affidavit must be treated as though made and filed on the day of the amendment.[91] It has been held, however, where the defect cured by the amendment is not jurisdictional, that the amendment will relate

75. Garrison v. Seckendorff, 74 A. 311, 79 N.J.Law 203, affirmed 78 A. 1134, 80 N.J.Law 463

76. Sydnor v. Chambers, Dall. (Tex.) 601

77. Brandenstein v. Way, 49 P. 511, 17 Wash. 293

78. Kan.—Wells v. Danford, 28 Kan. 487
Mo.—Henderson v. Drace, 30 Mo. 358
—Claflin v. Hoover, 20 Mo.App. 314

79. Claflin v. Hoover, supra.

80. Huffman v. Martin, 10 S.W.(2d) 636, 226 Ky. 137

Clerk of superior court

Under the provisions of Civ.Code (1910) § 5056, while it is true that an attachment issued on an affidavit administered by a clerk of the superior court is absolutely void, and does not constitute a basis for rendering any valid judgment against defendant therein, such an officer may verify an amendment to defective grounds of attachment where the original affidavit has been verified and the writ issued before a proper officer.—Hensley v. Minehan, 114 S.E. 647, 29 Ga.App. 251.

81. Iowa.—Queen v. Griffith, 4 Greene 113.
N.C.—Atlantic Bank v. Frankford, 61 N.C. 199
6 C.J. p. 160 note 23

82. Ill.—Inman v. Allport, 65 Ill. 540
N.Y.—Davis v. Reflex Camera Co., 89 N.Y.S. 587, 97 App.Div. 73

83. Hamill v. Phenicie, 9 Iowa 525

84. Keith v. Ray, 33 N.E. 152, 231 Ill. 213, affirming 134 Ill.App. 119

85. Ask v. Armstrong, 68 N.W. 743, 9 S.D. 265—6 C.J. p. 160 note 33.

86. Thornburg v. Burton, 148 S.E. 23, 197 N.C. 193.

87. Robinson v. Bruce, 222 P. 518, 97 Okl. 3.

Defendant not prejudiced

Where it was provided by statute that a plaintiff was entitled to an attachment if he showed that he had an action for damages resulting from the commission of a felony or a misdemeanor, and plaintiff in his original affidavit alleged the commission of a felony by defendant in that he set fire to plaintiff's property, and the amended affidavit alleged facts showing that defendant set fire to plaintiff's property, under circumstances making the offense a misdemeanor, such variance did not deprive defendant of any substantial right and did not prevent the amended affidavit from relating back to the original affidavit.—Robinson v. Bruce, 222 P. 518, 97 Okl. 3.

88. Leavitt, etc., Co. v. Rosenberg, 93 N.E. 904, 83 Ohio St. 230

89. Robinson v. Burton, 5 Kan. 293

90. Robinson v. Bruce, 222 P. 518, 97 Okl. 3—6 C.J. p. 160 note 28.

91. Smith v. Dungey, 199 S.W. 777, 178 Ky. 702—6 C.J. p. 159 note 7 [c], p. 160 note 29.

back even as to subsequent attachment creditors.[92]

Sureties on the bond are not released by a merely formal amendment or one which merely enlarges the amount claimed by the original declaration.[93]

e. Supplemental Affidavit or Complaint

Under a permissive statute, plaintiff may file a supplemental affidavit or complaint to cure defects appearing in his original papers.

Under some statutes, where plaintiff's original affidavit is free from jurisdictional defects,[94] he is permitted to file a supplemental affidavit or complaint for the purpose of correcting errors or defects or supplying omissions in the original affidavit[95] or complaint,[96] even after a motion to vacate,[97] or for the purpose of bringing to the attention of the court additional facts in respect of his right to an attachment, which were not known to him at the time of the filing of the original affidavit.[98] Accordingly it has been held that plaintiff may by means of a supplemental affidavit amplify proof with respect to the damages for a breach of contract,[99] was properly allowed, since the original affidavit was free from jurisdictional defects,[1] or otherwise allege evidentiary facts,[2] or supply deficiencies and irregularities, such as the failure to show the grounds of affiant's information and belief.[3] Where the defect in the statement of his cause of action in the original affidavit is not such as to deprive the court of jurisdiction, plaintiff may supply such defects or irregularities by means of supplemental affidavits;[4] but, where the original affidavit is defective on its face in failing to state any cause of action, thus depriving the court of jurisdiction, the defect cannot be supplied by supplementary affidavits.[5]

Time of taking effect. The supplemental affidavit is ordinarily effective as of the time of its filing.[6]

§ 144. Application in Addition to Affidavit

In the absence of a statute to the contrary, an application in addition to the affidavit for attachment is unnecessary.

In accordance with the rule already discussed in section 105 that no pleadings need accompany the affidavit unless the statute so requires, in the absence of any statutory requirements as to a written request for an attachment in addition to the affidavit, it is sufficient that a proper affidavit entitling plaintiff to an attachment be in fact made and filed, the filing of the affidavit being a sufficient request to grant the writ, and confers upon the court jurisdiction to act.[7]

92. Tucson Nat Bank v Gomez, 234 P 560, 27 Ariz 510—6 C J p 160 note 30

93. Morton v. Shaw, 77 N E 633, 190 Mass 554.

94. Dexter & Carpenter v Lake & Export Coal Corporation, 188 N Y S 623, 196 App Div 766

95. Willits & Patterson v Abekobei & Co, 189 N Y S 525, 197 App Div. 528—6 C J. p 160 note 36

96. Fraser v. Copake Lake Pure Ice Corporation, 216 N.Y.S. 496, 127 Misc 310.

97. Cutler v. Allavena, 150 N Y S 790, 165 App Div. 422—6 C J p 160 note 37.

98. Sommers v Allen, 28 S E 787, 44 W Va 130—Goodman v Henry, 26 S E 528, 42 W Va 526, 35 L R A 847—Crim v Harmon, 18 S E 753, 38 W Va 596—6 C J p 161 note 38.

99. Dexter & Carpenter v. Lake & Export Coal Corporation, 188 N Y S 623, 196 App Div 766—Jones v Obcanska Zalozna V Karline, 212 N Y S 557, 126 Misc 306, affirmed 214 N Y S 860, 216 App Div. 704—6 C J. p 160 note 37 [a].

Facts showing damages

In an action for damages for breach of contract to deliver coal at a certain price, a supplemental affidavit, offered in connection with application for warrant of attachment, which showed the market price and value of the coal at the time and place of delivery in the precise amount for which recovery was sought, and which was in strict compliance with the requirement of the statute providing that the facts showing plaintiff's damages be stated, was properly allowed, since the original affidavit was free from jurisdictional defects—Dexter & Carpenter v Lake & Export Coal Corporation, 188 N Y S 623, 196 App Div 766

1. **Meaning of terms**

Supplemental affidavits may be used in support of an attachment, to amplify proof with respect to damages for breach of an obligation, by showing that the terms used have a special and technical significance in the trade—Jones v Obcanska Zaloznа V Karline, 212 N Y S 557, 126 Misc Rep 306, affirmed 214 N Y S 860, 216 App Div 704

2. U S—Siegel v Waynesboro Knitting Co, (D C N Y) 7 F Supp. 693. N Y—Dexter & Carpenter v Lake & Export Coal Corporation, 188 N Y. S 623, 196 App Div 766

3. Colcord v Banco de Tamaulipas, 180 N Y.S 852, 191 App Div 94

4. Willits & Patterson v Abekobei & Co, 189 N Y S 525, 197 App Div. 528

5. Wade v Gates Rubber Co, 199 N. Y S 16, 205 App Div. 17.

New cause of action

Where a warrant of attachment against a foreign corporation was based on a complaint and affidavits alleging that certain contracts were made between plaintiffs and defendant, which in fact were made between plaintiffs' assignor and defendant, the attachment failed, and could not be supported by an amended complaint and supplemental affidavit stating an entirely new cause of action—Wade v Gates Rubber Co, 199 N Y S 16, 205 App Div. 17.

6. United Collieries v. Martin, 60 S. W (2d) 125, 248 Ky 808, 89 A L R. 971

7. Winchell v. McKenzie, 53 N.W. 975, 35 Neb 813.

Indorsement of examination on application see supra § 134.

C. ATTACHMENT BOND OR OTHER SECURITY

§ 145. Necessity

A failure to give an attachment bond as required by statute is fatal.

Where a statute authorizing attachment requires, as a condition to the issuance of the writ, that a bond shall be given by plaintiff to indemnify defendant for any loss or injury resulting from the attachment in case it proves to be wrongful, a failure to give such bond is fatal,[8] and an attachment issued without the necessary bond is invalid.[9] Under some statutes, the giving of a bond is a jurisdictional requirement, which cannot be dispensed with, as jurisdiction does not attach until the bond is given.[10] Under other statutes, the bond is not a jurisdictional prerequisite, and the failure to give the attachment bond is a mere irregularity of which defendant alone can take advantage, the attachment being otherwise valid.[11] In the absence of statutory permission, where the statute requires a bond as a condition to the issuance of attachment, a court of equity has no general jurisdiction to order an attachment without bond.[12]

A statute providing that, where defendant in attachment makes an affidavit of substantial defense and, where plaintiff fails to give bond to prosecute the attachment with diligence, the attachment shall stand dismissed ipso facto is mandatory, and, on failure of plaintiff to give such bond, the attachment stands dismissed without any affirmative action of the court.[13]

In view of the fact that attachment is a statutory remedy, the court will not demand that plaintiff do more than the statute requires, and, where the statute does not require an attachment bond in the particular case, no bond need be given.[14] Accordingly, under the statutes in force at the time and in the place where the question arose, a bond has been held unnecessary in case of a branch writ to another county,[15] an attachment against a foreign corporation or a nonresident,[16] an attachment in favor of the United States,[17] a state, or a city or county[18] or an official thereof,[19] an attachment on a claim for liquidated damages;[20] where plaintiff takes a pauper oath in lieu of giving a bond,[21] or where the officer is not directed to take the property into his actual possession.[22] However, a statute authorizing a litigant to prosecute an action without payment of costs does not excuse the litigant from furnishing an attachment bond.[23]

Under some statutes, the addition by amendment of a new party defendant to an attachment proceeding necessitates the giving of a new bond.[24]

8. Ga.—Higgins v. Gosden, (App.) 185 S.E. 574.
Iowa.—Olds v. Olds, 261 N.W. 488, supplementing 260 N.W. 1.
Neb.—Vanburg v. Mauel, 269 N.W. 636.
Okl.—City Nat. Bank of Wellington, Tex. v. Bounds, 235 P. 188, 109 Okl. 254.
6 C.J. p. 161 note 41.

9. City Nat. Bank of Wellington, Tex. v. Bounds, supra.—6 C.J. p. 162 note 43.

10. Ala.—Earp v. Stephens, 55 So. 266, 1 Ala. App. 447.
Miss.—Ford v. Hurd, 12 Miss. 683.
6 C.J. p. 161 note 42.

11. Austin v. Goodbar Shoe Co., 80 S.W. 588, 60 Ark. 444.—6 C.J. p. 162 note 44.
Waiver by defendant of insufficiency of bond see infra § 160.

In Kentucky

(1) Under the statute of 1838–1839 (Sess.Acts 259), as well as the act of 1796 (1 Digest 159–160), directing the justice before granting an attachment to take bond and security from the attaching creditor, and declaring that "every attachment issued without such bond taken, or where no bond shall be returned," shall be illegal and void, and shall be dismissed," the word "void" has been held to be used incautiously and intended only to mean voidable.—Banta v. Reynolds, 3 B.Mon. 80.

(2) It has also been held in this jurisdiction that the want of a bond renders an attachment voidable, if not void.—Farmers Nat. Bank v. Lancaster Nat. Bank, 4 Ky.L. 451.

12. Olds v. Olds, (Iowa) 261 N.W. 488, supplementing 260 N.W. 1.

13. Maryland Casualty Co. v. Parrish, 143 S.E. 750, 150 Va. 473.

14. Wilkinson v. Bloch, (N.J.) 67 A. 117.—6 C.J. p. 162 note 47.

15. Simpson v. East, 27 So. 436, 124 Ala. 293.

16. Baker v. Morehead & Co., 7 Ohio N.P.(N.S.) 384.—6 C.J. p. 162 note 49.

Statute construed

A statute, providing that no undertaking in attachment shall be required where the "party or parties defendant" are all nonresidents of the state or a foreign corporation, is applicable where the party or parties against whom an order of attachment is issued are nonresidents, and does not require all of the parties defendant in the principal action to be nonresidents.—Broach v. Belch, 221 P. 77, 96 Okl. 148.—6 C.J. p. 162 note 49 [b].

17. U.S. v. Ottman, 8 D.C. 73.

18. Jenkins v. First Nat. Bank, 236 P. 1085, 73 Mont. 110.—6 C.J. p. 162 notes 51, 52.

19. Jenkins v. First Nat. Bank, supra.

20. Dirickson v. Showell, 28 A. 896, 79 Md. 49.

21. Wiley v. Bennett, 9 Baxt. (Tenn.) 581.—Barber v. Denning, 4 Sneed (Tenn.) 266.—6 C.J. p. 162 note 54.

22. Va.—Kenefick v. Caulfield, 13 S.E. 348, 88 Va. 122.
W.Va.—Bowlby v. De Witt, 34 S.E. 919, 47 W.Va. 323.
6 C.J. p. 162 note 55.

23. Orgeron v. Lytle, (La.) 157 So. 377.

Statute waiving security for costs

A city was not entitled, under a law providing that no security for costs should be required of any incorporated city or town, to issuance of a writ of attachment without filing an attachment bond.—City of Munday v. First State Bank of Munday, (Tex.Civ.App.) 66 S.W.(2d) 775.

24. Ill.—Baldwin v. Ferguson, 35 Ill. App. 393.
Pa.—Stein v. Bowers, 2 Wkly.N.C. 542.

Return and filing Where it is the legislative intent that the bond shall be returned and filed by the officer issuing the attachment at the return of the writ, since plaintiff is not charged with the custody of the bond, a failure of the officer to file the bond at the return of the writ is not fatal to the attachment, at least where no injury results to defendant because of such neglect.[25] Likewise, in view of a statute providing that the attachment law is to be construed "in the most liberal manner, for the advancement of justice and the benefit of creditors," although the statute requires the bond of the creditor to be taken and returned with the writ to the court, it does not embrace the case of the accidental destruction of such bond before its return, and the attachment will not, on proof of accidental destruction of the bond, be quashed for want of the bond taken and returned as required by the statute [26]

Use under another writ. If the original writ of attachment is lost and plaintiff, instead of procuring a duplicate, secures another writ and has the property seized again, a new bond is required, and the original bond cannot be used in the second proceeding [27] However, as discussed infra § 200, where the new writ is a substituted or an alias writ to cure a defect in the original writ or levy, it is not regarded as a new proceeding, and, therefore, no new bond is required.

Undertaking. Where the statute so permits, an undertaking instead of a bond may be filed [28] Where the statute requires a bond, however, an undertaking is not sufficient.[29]

§ 146. Time for Giving

The bond should be given within the time prescribed by statute, which frequently is before the issuance of the writ.

Since attachment is a statutory remedy, there must be a compliance with the statutory requirements as to the time of giving the attachment bond. Thus, where, under the statute, the giving of the bond is a condition precedent to the issuance of the writ,[30] until the giving of the bond jurisdiction does not attach, and the bond or undertaking must precede the issuance of the writ.[31] A marginal note upon the writ by the judge issuing it, that it shall not be levied until a sufficient bond is filed,[32] or a filing nunc pro tunc,[33] is insufficient to save the validity of the attachment under such statutes In the absence of a statute requiring the giving of bond before the issuance of attachment, however, it is not a prerequisite to its issuance [34] Also, under some statutes, the issuance of an attachment before a bond is given, if it is a defect, may be cured by the giving of a sufficient bond,[35] and, under a statute so providing, an attachment will not be dismissed if plaintiff, his agent, or attorney is willing to give bond, and does so within due time.[36]

Under a statute providing that, should defendant make an unqualified appearance in the cause, it is the duty of the clerk to issue notice to plaintiff of such fact and that, unless within five days after service of such notice plaintiff makes suitable bond, the levy shall be discharged, in the absence of the issuance and service of the prescribed notice, there is no basis for a contention that a failure to give bond, although plaintiff had knowledge of the unconditional appearance, ipso facto discharged the levy.[37]

Where the bond and the writ bear the same date it will be presumed, in the absence of evidence to the contrary, that the bond preceded the writ.[38] Also, a recital in the bond that plaintiffs "have this day sued out an attachment" has been held to be intended to identify the case in which the bond was given and not to indicate the order, in point of time, in the proceedings, and consequently not to render the attachment invalid as issued before bond was filed [39] Likewise, where the bond recited

25. Augusta Bank v. Conrey, 28 Miss. 667.

26. Wheeler v. Slavens, 21 Miss 628

27. Smith v. Wilson, 128 So 682, 13 La App 679, reversing on rehearing 125 So 302, 13 La App 437.

28. Schweigel v L. A. Shakman Co., 80 N W. 871, 81 N W. 539, 78 Minn 142

29. Blake v. Sherman, 12 Minn 420

30. Wentworth v. Moore, 117 P. 251, 64 Wash 451.

31. Iowa—Churchill v. Fulliam, 8 Iowa 45.

Pa—Wolf v Zentz, 5 Pa Dist. & Co 276

6 C.J. p 162 notes 57, 58.

32. Bailey v Clay, 7 S E 258, 79 Ga 600—6 C J p 162 note 58 [d]

33. Stevenson v Robbins, 5 Mo. 18—6 C J p 162 note 58 [b].

34. In Mississippi, there is no provision in the statute regulating attachments in chancery which requires complainant to give bond before the issuance of the attachment. —I B Rowell & Co v. Sandifer, 91 So 899, 129 Miss 167.

In Wisconsin, under Rev St. § 2732, the giving of the bond is not essential to the issuance of the writ, but is to its execution and to the maintenance of the proceedings—Hubbard v. Haley, 71 N W 1036, 96 Wis 578

35. Millbank v Broadway Bank, 3 Abb Pr N S (N Y) 223—6 C J. p 162 note 58 [c].

36. Engram v. Thoma, 101 So 834, 212 Ala 129.

37. Ex parte Copeland, 133 So 1, 222 Ala. 416.

38. Ind—Reed v. Kentucky Bank, 5 Blackf 227.

S.C—McKenzie v. Buchan, 10 S C L. 205

39. Wright v. Ragland, 18 Tex. 289.

that plaintiff "hath on this day sued out" a writ of attachment, the court could construe the writ and the bond together, and, where the date of the writ showed that it was issued after the bond was filed, the attachment was valid, notwithstanding the recital in the bond.[40] On the other hand, it has been held that an attachment was fatally defective where the attachment and bond were dated on the same day and the bond recited that on that day plaintiff had first issued or obtained the attachment.[41]

In the absence of a statute to the contrary, the fact that the undertaking was executed prior to the date on which the complaint was filed does not render the attachment void.[42]

§ 147. Form and Requisites

An attachment bond should conform, at least substantially, to statutory requirements as to its form and contents.

A statute requiring an attachment bond necessarily describes the kind of bond required in many of its particulars It should be consulted and closely followed,[43] and a failure to comply with its requirements is fatal to the attachment,[44] unless the omission or departure is only as to a requirement which is not jurisdictional or mandatory, and, therefore, constitutes a mere irregularity which may be cured or waived.[45]

A substantial compliance with the requirements of the statute is sufficient to uphold the bond, even though the exact words of the statute are not followed;[46] and mere clerical errors are not fatal, but may be disregarded or corrected where it is apparent that the purpose of the statute has been substantially fulfilled.[47]

The sufficiency of an attachment bond is not to be tested by whether the surety might eventually be held liable, but whether the precedent conditions prescribed by law, and without which the attachment cannot stand, have been fulfilled.[48]

The statutory form, where one is prescribed, should be followed, because it is always sufficient,[49] and it is sometimes regarded as not only correct but necessary to pursue the form given by the statute.[50] No recital which is not plainly required by the statute need be inserted,[51] although a recital beyond the statutory requirement may not render the bond or undertaking void.[52]

Aside from the statutory requirements no particular form of bond need be followed, but it is sufficient if the intention to become bound in the manner and to the extent required be adequately expressed.[53] Accordingly it has been held not a sufficient ground of objection that the bond contains interlineations and erasures,[54] that the condition

40. Summers v. Glancey, 3 Blackf (Ind.) 361.

41. Hucheson v. Rose, 2 A.K Marsh. (Ky.) 349

42. Booth v. Heberlie, 2 P (2d) 1108, 137 Or 354

43. Kimbrell v Heffner, 161 S E 175, 163 S C 35, 80 A L R 591—6 C J. p 163 note 62

Forms of attachment bonds in whole, in part, or in substance—Jansen v. Mundt, 30 N W 53, 20 Neb. 320—6 C J. p 163 note 61.

Statute not impliedly repealed

A statute providing the general requirements of attachment bonds is not repealed by a subsequent statute relating to fiduciaries therein described, which description is followed by an "in general" clause, under the familiar rule of construction that, where there is in the same statute a particular enactment, and also a general one which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.—Tri-State Motor Corporation v Standard Steel Car Co., 51 App D C 109, 276 F 631.

44. Freudenthal v Schulman, 17 Pa. Co 292—6 C.J p 163 note 63.

45. Gordon v Kerr, (Idaho) 21 P (2d) 930—6 C J p 163 note 64

46. Wolf v Zentz, 5 Pa Dist. & Co 276—6 C J. p 164 note 69.

Bond held sufficient

The expression in an attachment bond "conditioned that plaintiffs prosecute their said suit to effect" is the legal equivalent of the statutory expression "conditioned that plaintiffs will prosecute their suit to effect"—Laird v. Williams & Chastain, (Tex Civ App) 13 S W (2d) 944.

47. Laird v Williams & Chastain, supra—6 C J p 164 note 70.

Mistakes in grammar or misuse of words will not vitiate an attachment bond, where the intention and meaning are reasonably clear—Laird v Williams & Chastain, (Tex Civ App) 13 S W (2d) 944

48. Lehman v Broussard, 12 So. 504, 45 La Ann 346

Usual rule not applicable

"The principle that judicial bonds are to be construed by the law under which they are given, rejecting surplusage and supplying omissions, does not apply to such a case where the question is not as to the eventual liability of parties to such bonds after they have accomplished their purpose, but whether the conditions precedent prescribed by law and essential to the maintenance of the attachment have been strictly complied with Such compliance cannot be eked out by presumptions and implications or by collateral evidence"—Lehman v Broussard, 12 So. 504, 45 La Ann 346

49. Singleton v Wofford, 4 Ill. 570—6 C J p 164 note 65

50. Amos v. Allnutt, 10 Miss 215

51. Ala.—Harris v. Clapp, Minor 328

Ill.—Love v. Fairfield, 10 Ill 303

Miss.—Bosbyshell v. Emanuel, 20 Miss 62—Proskey v. West, 18 Miss. 711.

Tenn.—Lucky v. Miller, 8 Yerg 90.

52. Beardsley Land & Investment Co v Superior Court in and for Los Angeles County, 285 P 908, 104 Cal App 255—6 C J. p 164 note 68.

53. Conklin v. Dutcher, 5 How Pr (N.Y.) 336, Code Rep (N S) 49—6 C J. p 165 note 79.

54. Simon v. Johnson, 7 Kulp (Pa.) 166.

is written below the signatures of the obligors,[55] that matters of inducement are misrecited,[56] that the place of execution is omitted,[57] or that the name of a surety,[58] or of the principal,[59] or of one of them, is omitted from the body of the bond[60]

The bond is fatally defective if its terms are not such as to show an intention to become bound according to the statute and on account of the issue and levy of the particular attachment,[61] as where the description is of a court other than the one where the proceedings are had,[62] or of parties other than the parties to the suit pending in which the attachment is sought,[63] or where the bond is signed in blank.[64]

While an attachment bond should contain recitals which unmistakably identify it with the other proceedings in the suit,[65] in the absence of a statute making such a recital mandatory, it has been held that a failure to describe the proceedings[66] or the property to be attached[67] in the bond is not fatal

Where there are two or more plaintiffs, the plural form should be used in expressing the conditions of the bond,[68] and it has been held that a bond by joint plaintiffs conditioned that "he" will pay all such damages and costs as shall be adjudged against "him" if the attachment sued out by "him" shall prove wrongful will not support a joint attachment[69]

Under a practice of referring to the specific statute under which a bond is given, in view of the rule in respect of the operation and effect of amendments to statutes, as discussed in the title Statutes § 384 [59 C.J. p 1097 note 26], that the amendment becomes a part of the original statute as if it had always been contained therein, a reference to the general statute is sufficient without specific reference to existing amendments.[70] Where a bond recites that it is given under a certain statute, which statute relates to justices' courts, whereas the cause is pending in a district court and the bond is entitled as of such court and filed therein, the defect is not fatal, but the bond is subject to amendment[71]

Caption. A bond for an attachment need not state in the caption the county where executed,[72] nor is it fatally defective because it omits from the caption the name of one of several defendants.[73]

Date. Unless required by statute, a failure to date the bond will not be fatal to its sufficiency,[74] since the bond takes effect from the date of its filing[75]

Naming court. The bond should name the court in which the suit is brought;[76] but an omission in this respect has been held not to be a fatal defect.[77] Likewise, a misrecital as to the term of the court to which the attachment is returnable is not fatal to the attachment, particularly where it is provided that the statute is to be most liberally construed for the benefit of creditors.[78]

§ 148. —— Liability on Bond Not in Conformity to Statute

The sureties may be liable on an attachment bond as a common-law bond, even though it is not in conformity with the statute, if it is not so defective as to be void.

55. Melvin v. General Shields, 15 Ark 207.

56. Ala.—Adler v. Potter, 57 Ala 571
Miss.—Houston v. Belcher, 20 Miss 514.

57. Aultman v. Smyth, (Tex Civ App) 43 S.W. 932.

58. Ala.—McLean v Wright, 35 So 45, 137 Ala 644, 97 Am S R 67
N Y.—Williams v Barnaman, 19 Abb Pr. 69.
Ohio.—McLain v. Simington, 37 Ohio St 484

59. Walbridge v. Spalding, 1 Dougl (Mich) 451—6 C J p 165 note 87

60. Munzenheimer v Manhattan Cloak, etc., Co, 15 S W 389, 79 Tex 318

61. Hisler v. Carr, 34 Cal 641—6 C J. p 164 note 72

62. Bonner v. Brown, 10 La Ann 334.

63. Tex.—Schrimpf v. McArdle, 13 Tex 368.
Va.—Jones v Anderson, 7 Leigh (34 Va.) 308

64. Boyd v Boyd, 11 S C L 125—6 C J p 164 note 75
Blank unsigned bond is insufficient to support an attachment.—Higgins v Gosden, (Ga App) 185 S E 574

65. Hann v Ruse, 35 La Ann 725—6 C J p 165 note 93

66. Fla.—West v Woolfolk, 21 Fla 189
Ill.—Lawver v Langhans, 85 Ill 138
Miss.—Steamboat General Worth v Hopkins, 30 Miss 703
6 C J p 165 note 84

67. Ill.—Lawver v Langhans, 85 Ill 138
Mass.—Berry v Wasserman, 61 N E 228, 179 Mass 537
6 C J p 163 note 64 [b].

68. Laird v Williams & Chastain, (Tex Civ App) 13 S W (2d) 944

69. Solinskey v Young, (Tex App) 17 S W 1083—Winn v Sloan, 1 White & W Civ Cas Ct App. § 1103—6 C J p 164 note 76.

70. Bothwell v. Keefer, (Idaho) 27 P (2d) 65.

71. Gordon v. Kerr, (Idaho) 21 P. (2d) 930

72. Aultman, etc., Co v. Smyth, (Tex. Civ App) 43 S W 932.

73. Zenith Bathing Pavilion v Fair Oaks S S Corporation, 207 N.Y S 306, 211 App Div 492, reversed on other grounds 148 N E 532, 240 N. Y 307

74. Ky.—Plumpton v. Cook, 2 A K. Marsh 450—Conner v. Clarke, 10 Ky L 358
Mo.—Claflin v. Hoover, 20 Mo.App. 314

75. Claflin v Hoover, supra

76. Lawrence v Yeatman, 3 Ill 15—6 C J p 165 note 90

77. Ill.—Singleton v. Wofford, 4 Ill. 576
La.—Standard Cotton Seed Oil Co. v. Mathison, 17 So. 251, 47 La Ann. 710
Tex.—Huffman v. Hardeman, 1 S W. 575

78. Houston v. Belcher, 20 Miss. 514.

A bond to procure an attachment may be upheld as a voluntary common-law obligation, although the statute has not been complied with, and it will be enforced on condition broken according to its terms, if it is not contrary to an express statute or to public policy or morality, has not been exacted without authority of law, and is not otherwise of such a character or form as to be utterly void,[79] if it is not contrary to an express statute or to public policy or morality,[80] and is not otherwise of such a character or form as to be utterly void[81] This rule applies to afford security to the extent of the injury done, although the attachment has been discharged because of the defect in the bond[82]

§ 149. Amount

a. Amount fixed by statute
b. Stating amount in bond

a. Amount Fixed by Statute

The penalty of an attachment bond should be in the amount required by statute.

The amount of the bond is usually regulated by statute, and, where it is so fixed as, for example, with reference to the amount of the claim or the value of the property attached, an attachment cannot be supported by a bond in a less sum than that designated in the statute requiring it,[83] although a bond supported by an amount greater than that required by statute is unobjectionable.[84] It is frequently held under the statutes, however, that the court obtains jurisdiction of the cause notwithstanding the amount of the bond is insufficient,[85] and that the defect may be cured by amendment, as will be considered in section 159, or by the filing of new or additional security, as will be discussed in section 161. It has also been held that a judgment in an attachment suit is not rendered void where the penalty of the bond is insufficient[86]

Where the statute prescribes the amount in which the bond must be made, it is not within the discretion of the court to permit the filing of a bond for a smaller amount.[87] Where, however, the statute so provides, the amount of the bond lies within the discretion of the court,[88] or of the clerk of the court,[89] sometimes within certain fixed limits,[90] and, where the amount of the bond has been fixed by the clerk in his discretion, any insufficiency in amount will not be ground for discharging the attachment.[91]

79. Eckman v. Hammond, 43 N W 397, 27 Neb 611—6 C J. p 165 note 77.

80. Morgan v Mennes, 60 Cal 341—6 C J p 165 note 77 [b]

81. Perminter v McDaniel, 19 S C L 267, 26 Am.D 179—6 C.J p 165 note 77 [c].

82. Md —McLuckie v. Williams, 12 A 1, 68 Md 362
N Y —Corbit v. Nicoll, 12 N Y.Civ Proc. 235.

83. Corbyn v. Specification Motor Oil System of Oklahoma City, 32 P (2d) 726, 168 Okl 203—6 C J p 165 notes 94, 95, p 166 notes 96–1

When debt not due

(1) Where plaintiff, in an action to recover a debt not due, with an attachment on real estate, did not give an undertaking conditioned in three times the amount of the demand, defendants' motion to vacate the judgment for plaintiff and pending proceedings to enforce it was properly granted —I L. Lamm Co v. Peaks, 156 N W 194, 162 Wis. 289.

(2) An attachment creditor cannot claim that by disaffirming an express contract of sale of goods on sixty days' time, which had not elapsed, induced by the false representations of the buyer, the demand was converted into a claim ex delicto, and that he has waived the tort, and sues on an implied contract for money due, so as to evade a statute providing that, where the debt is not due, the attachment bond shall be conditioned at three times the amount demanded —Lederer v. Rosenthal, 74 N W 971, 99 Wis. 235.

84. Wigmore v Buell, 54 P 600, 122 Cal 144—6 C J p 166 note 2

85. La —Yates v Tessier, 5 La App 214—Citizens Bank v. Hudson, 5 La App 194.
S.D.—Charles Mix County Bank v. Calta, 189 N W. 527, 45 S D 564.

Case transferred to equity

In actions against a nonresident on judgments rendered in another state, in which attachments were issued against land within the state alleged to have been transferred to defendant's niece to defeat creditors, and in which the niece intervened and the causes were transferred to the chancery court, where they were tried as suits to recover a secret trust to defraud creditors, and lis pendens notices were filed, the fact that the attachment bonds were not conditioned as required by statute, did not defeat the jurisdiction of the court — Hurley v. Bryan, 254 S W. 694, 160 Ark 277.

86. Collins v. Southern Finance Corporation, (Ga App) 180 S E 744.

87. Fisher v. Snyder, (D C Tex) 27 F (2d) 538—6 C J p 167 note 7.

88. Prevost v. Post, 173 S E 628, 172 S C 228—6 C J. p 167 note 8.

Unliquidated claim

(1) Under the Texas statute the amount of the bond for attachment on an unliquidated demand is committed to the judge's discretion.—Fisher v Snyder, (D C Tex) 27 F. (2d) 538

(2) Where, however, the demand is liquidated, the court is not vested with a discretion in fixing the amount of the bond —Massman v Snyder, (C. C A Tex) 37 F (2d) 825, affirming (D. C) 27 F (2d) 542—Fisher v. Snyder, supra

89. Idaho —Gordon v. Kerr, 21 P. (2d) 930
Ky —Darnell v Johnston, 272 S W. 381, 209 Ky 95
6 C J p 167 note 9

90. Prevost v Post, 173 S E 628, 172 S C. 228—J W Copeland Co v. Brown, 37 S E 1002, 103 S.C. 177—6 C.J p 167 note 10.

In Idaho, "this court has held that the clerk has a large discretion in fixing the amount of the undertaking, and advises that the amount so fixed should not be less than the amount of the claim sued for."—Gordon v Kerr, 21 P (2d) 930, 931—6 C. J. p 167 note 10 [a] (2)

91. Gordon v. Kerr, supra.

Rule stated

"As long as the undertaking provides the conditions required by the statute, the mere fact that it does not provide a penalty equal to the claim sued for is not a ground for discharging the attachment. Had the Legislature intended that to authorize an attachment a bond should be given for a specific sum, it would have so provided."—Ross v. Gold Ridge Mining Co., 95 P. 821, 825, 14

Where the statute requires a bond sufficient to indemnify defendant for any loss sustained by wrongful attachment, it has been held that the mere fact that it is given for a sum certain will not invalidate the attachment where the penalty is apparently ample, and defendant advances no proof that the amount is insufficient,[92] but there is also authority to the effect that such attachment, and bond therefor, is absolutely void[93]

Under a statute providing that the order of attachment shall not issue until a bond has been executed to the effect that plaintiff pay to defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of plaintiff's claim, a bond for a sum less than double the amount claimed is sufficient, provided it is in a sum large enough to secure defendant from loss[94]

Under a statute providing that plaintiff must file a bond in a penalty at least double the value of the property sought to be attached, and where the statute also requires the sheriff to levy a writ of attachment on property fifty per cent greater in value than the amount stated in the petition under oath to be due, the amount for which the bond should be given is three times the sum alleged in the petition to be due.[95]

Costs, attorney's fees and interest. Where attorney's fees are included in the amount claimed, and are recoverable, they cannot be omitted in determining the amount of the bond, where the amount of the bond is fixed, under the statute, with reference to the amount claimed[96] Where, however, the petition prays for attorney's fees, which could not be lawfully included in the suit, a bond computed on the amount claimed, excluding such fees, is sufficient.[97]

It has also been held that defendant's attorney's fees in defending the action should be included in the bond given by plaintiff in attachment to secure defendant from loss in the event plaintiff fails to recover.[98]

In the absence of a statute to the contrary, costs of the suit which may accrue on plaintiff's claim during litigation are not to be considered in fixing the amount of a bond in an attachment proceeding before judgment[99]

Under statutes fixing the amount of the bond by reference to the amount claimed to be due, if a sum is stated to be due besides interest, leaving the amount due as interest to be ascertained in the future, bond need not be given for the amount which might be found to be due as interest.[1] If, however, interest is included in the sum claimed to be due, under such statutes, bond must be given for the amount claimed as interest as well as for the amount claimed as the principal sum.[2] Where the bond is insufficient to cover interest, it has been held that the attachment will be upheld only as to the principal[3] Interest to accrue in the future should not be considered in determining the amount of the bond or undertaking, as the amount of such interest cannot be definitely determined.[4] A miscalculation in the amount of interest due, so that the bond lacks a trifle of being in the amount required by the statute, has been held not to be fatal[5]

Minor deficiencies. While it has been held, since the issuance of the writ is an ex parte proceeding, that small deviations in the bond from the amount required by the statute are fatal,[6] and while the maxim, De minimis non curat lex, must be restricted to deficiencies too insignificant for consideration,[7] minor deficiencies in the amount of the

Idaho 687, quoted in Gordon v Kerr, (Idaho) 21 P.(2d) 930, 931

92. Ark.—Hurley v. Bryan, 254 S W 694, 160 Ark 277.
Ky.—Sutton v. Perkins, 11 Ky Op. 76.

93. Hisler v. Carr, 34 Cal. 641.

94. Darnell v. Johnston, 272 S W. 331, 209 Ky. 95.

95. Griffith v. Milwaukee Harvester Co., 61 N W. 243, 92 Iowa 634, 54 Am S R. 573—6 C J. p 166 note 99 [a].

96. Panhandle Nat. Bank v. Still, 19 S W. 479, 84 Tex 339.

97. Aultman, Miller & Co v. Smyth, (Tex.Civ App) 43 S.W. 932.

98. M. J Brandenstein & Co. v. Castano, (D C N.Y.) 283 F. 843.

99. Rhodes v Bowling Green White Stone Co. of Kentucky, 43 App.D.C 298

1. Ga.—Saulter v Butler, 10 Ga 510.
La.—Pope v Hunter, 18 La 306.
Va.—Smith v. Pearce, Gilm (21 Va.) 34—Smith v. Pearce, 6 Munf (20 Va.) 535

2. Red Cross Lumber Co v. Frank I Abbott Lumber Co, 71 So 191, 138 La 1082—Planters' Bank v. Byrne, 3 La Ann. 687—6 C J p 166 note 1 [d] (4)

3. Ky.—McDaniel v. Sappington, Hard 94
La.—Fellows v. Dickens, 5 La.Ann 131.

4. D C.—Rhodes v. Bowling Green White Stone Co. of Kentucky, 43 App D C. 298.

N.D.—Hemmi v Grover, 120 N W. 561, 18 N.D 573.

5. Driscoll v Kelly, 4 Ohio S. & C. P. 124, 5 Ohio N P. 243.

6. Marmine v Murphy, 8 Ind 272.

7. In Louisiana
(1) "If the maxim de minimis is applicable to an attachment bond, it must be restricted to a deficiency too insignificant for consideration"—Red Cross Lumber Co v. Frank I Abbott Lumber Co, 71 So. 191, 193, 138 La. 1082—Yale v. Cole, 31 La Ann. 687.

(2) A deficiency of seventeen dollars and ten cents in a bond for seven thousand, two hundred and sixty dollars and five cents is not insignificant, and the rule of de minimis will not cure such defect in the bond—

bond or undertaking, which are insignificant when compared with the amount for which it is given, may be disregarded under the maxim.[8] Even if the maxim, De minimis non curat lex, is not applicable to a slight deficiency in the bond, such a case falls within the purview of a statute providing that a substantial compliance shall be sufficient in applications for attachment.[9]

Partnership property. Where partnership property is attached for the debt of a partner, under a statute requiring the bond to be in double the value of the property attached, the penalty of the bond may be based on the value of defendant's interest rather than the value of the property.[10]

Showing as to amount claimed. The bond need not recite the amount claimed, so as to show that it is given in a sufficient amount with reference to the sum claimed according to the statute,[11] and a misrecital of the amount will not invalidate the bond, if the true amount, as alleged in the affidavit, shows the bond to be in the proper amount.[12]

Subsequent statutes. It is obvious that a bond, sufficient in amount when executed, will not be rendered insufficient by a subsequent statute increasing the amount required before an attachment will issue.[13]

Remittitur. An attachment bond insufficient in amount cannot be made good by a subsequent remittitur of a part of plaintiff's claim.[14]

b. Stating Amount in Bond

Ordinarily an attachment bond should state the amount of the penalty thereof.

Ordinarily the bond must state the amount of the penalty, and several courts have considered that a bond in which no amount is stated is fatally defective.[15] On the other hand, it has also been held that an attachment undertaking conditioned that plaintiff would pay all costs which might be awarded to defendant, and all damages which he might sustain by reason of such attachment, leaving the amount of the penalty blank, and containing all other conditions required by law, was sufficient to give the court jurisdiction, and sustain the attachment, since, by the failure to fix the maximum amount for which the sureties were to be liable in the undertaking, they bound themselves in an unlimited amount.[16]

§ 150. Conditions

An attachment bond should contain the statutory conditions.

The purpose of a statute requiring an attachment bond is to give security to the attachment debtor, on which recovery may be had in the event damages are sustained by reason of the attachment.[17] Since attachment is a statutory proceeding, the bond should contain the statutory conditions.[18] A condition, "to prosecute with effect," means to prosecute with diligence according to law.[19] A condition duly to prosecute the proceedings in attachment is simply a condition to prosecute the attachment proceedings to a final judgment. Such a condition is not the same as a condition to prosecute without delay or diligently to prosecute.[20]

The sureties' liability on the conditions in the bond will be hereinafter considered in section 163.

§ 151. Obligee

The bond should be payable to the person designated by statute.

The bond must run to the obligee designated by the statute.[21] Ordinarily the bond should be made payable to the person whose property is sought to

Red Cross Lumber Co v Frank L Abbott Lumber Co, supra.

(8) A deficiency of less than one dollar in the amount of an attachment bond will be cured by the rule de minimis—Bodet v. Nibourel, 25 La Ann 499.

9. Aldrich v Columbia R Co, 64 P. 455, 39 Or 263

9. Pharr v Estey Piano, etc., Co., 66 S E 618, 7 Ga App 262

10. Stewart v. Hunter, 1 Handy 22, 12 Ohio Dec (Reprint) 6

11. Strong v. Lake Weir Chautauqua, etc, Assoc, 6 So 882, 25 Fla. 765—6 C J p 166 note 97 [a]

12. Wigmore v. Buell, 54 P. 600, 122 Cal. 144—6 C.J. p 166 note 4.

13. Jones v. Johnson, 185 P. 1082, 77 Okl 14.

14. Red Cross Lumber Co. v. Frank I Abbott Lumber Co, 71 So 191, 138 La 1082.

15. Ala.—Copeland v. Cunningham, 63 Ala 394

Ind.—Louisville, etc, R Co v Lake, 32 N E 590, 5 Ind App 450.

La.—Lehman v. Broussard, 12 So. 504, 45 La Ann 346.

S C.—Boyd v. Boyd, 11 S C L. 125.

16. Bratton v. McReynolds, 266 P 31, 125 Kan. 665—6 C J. p 167 note 6

In Commenting on Louisville, etc, R Co v. Lake, 32 N E. 590, 5 Ind App 450, the court said "The court held the bond did not comply with the statute providing for a penalty in at least double the amount of plaintiff's claim, was no bond at all, and the court did not acquire jurisdiction of a nonresident defendant who did not appear and against whom judgment was taken by default. There are other authorities to the same effect They reveal the slavery of substance to the imperious old master, form, and are disapproved"—Bratton v McReynolds, 266 P. 31, 32, 125 Kan 665

17. Gordon v. Kerr, (Idaho) 21 P. (2d) 930

18. Hurley v. Bryan, 254 S.W. 694, 160 Ark. 277.

19. Kahn v. Herman, 3 Ga. 266.

20. Waring v. Fletcher, 52 N E 203, 152 Ind 620

21. Ala.—Hadley v. Bryars, 58 Ala. 139

La.—Scooler v. Alstrom, 38 La Ann. 907.

Tex.—Gray v. Steedman, 63 Tex 95—Archenhold v. B C Evans Co, 32 S W. 795, 11 Tex Civ App. 138.

be attached, that is, defendant,[22] and, where the statute requires that it must be made payable to defendant, a failure to name defendant[23] or describe him as defendant,[24] has been held to be fatal. On the other hand, under a statute requiring a bond payable to defendant, a designation of one defendant solely by the phrase "et al." was held to bind the obligor to such defendant in an action on the bond,[25] and a designation of defendant in the bond as "deft." was sufficient.[26]

Where there are several defendants, but the property of one only is attached, a bond to such defendant alone is proper and sufficient,[27] although it has also been held that, where all the defendants are jointly interested, the bond may be given to all, although the property of one only is attached.[28]

Where the attachment is against a partnership, the bond should be given to all the members of the firm and not merely to one,[29] but should not run to the firm in the firm name.[30]

Where the statute does not require the bond or undertaking to run to defendant, a bond given to the state instead of defendant is sufficient,[31] and, under a statute requiring a bond running to the state for the use of the owners of the property attached, if the state is made obligee, the owners need not be named or referred to in the bond.[32]

Where the bond is to be made payable to the clerk of the court, a bond made payable to the clerk, naming him, and his successors in office is sufficient, and the bond is not invalidated by the fact that the clerk named has ceased to be clerk and has been succeeded by another.[33]

§ 152. Obligor

The bond must be sufficiently definite to designate the obligor.

Although the obligor should properly be named in the bond, a designation of him as "plff," instead of inserting his name, has been held sufficient.[34]

§ 153. Sureties

a. In general
b. Competency
c. Sufficiency

a. In General

Statutory requirements in regard to the sureties on the bond must be met.

Where statutes require that an attachment bond be entered into with one or more sufficient sureties, on failure of the sureties to become parties to and sign the same the bond is rendered insufficient,[35] but the name of the surety need not appear in the body of the bond where he has signed it.[36]

Joint obligation. An attachment bond is sufficient, although the sureties signed as joint, and not as joint and several, obligors, where the statute does not specifically require that the obligation shall be several.[37]

Number. If the statute does not specify any number of sureties, a single surety, whose solvency and material possessions are satisfactory, is sufficient;[38] but, if the statute requires a specified number of sureties, less than that number will not support an attachment, no matter how responsible those executing the bond may be.[39]

22. La.—Hann v. Ruse, 35 La.Ann. 725
Tenn.—Renkert v. Elliott, 11 Lea 235
6 C.J. p. 168 note 19
23. Schrimpf v. McArdle, 13 Tex. 368
24. Rohrbough v. Leopold, 4 S.W. 460, 68 Tex. 254.
25. Renkert v. Elliott, 11 Lea (Tenn.) 235.
26. Finney v. Moore, 74 P. 866, 9 Idaho 284.
27. Bridges v. Center First Nat. Bank, 105 S.W. 1018, 47 Tex.Civ. App. 454—6 C.J. p. 168 notes 19 [c], 22.
28. Ala.—Hadley v. Bryars, 58 Ala. 139.
Ky.—Voorheis v. Ehting, 22 S.W. 80, 15 Ky.L. 161
Tex.—Sloo v. Powell, Dall. 467.
6 C.J. p. 168 note 23
29. DeCaussey v. Baily, 57 Tex. 665—6 C.J. p. 168 note 24.
30. Gray v. Steedman, 63 Tex. 95—6 C.J. p. 168 note 25.
31. Taaffe v. Rosenthal, 7 Cal. 514—6 C.J. p. 168 note 19 [h].
32. Wilson v. Shapiro, 12 Pa.Co. 466—6 C.J. p. 168 note 21 [a]
33. Scooler v. Alstrom, 38 La.Ann. 907
34. Finney v. Moore, 74 P. 866, 9 Idaho 284
35. Cal.—Alexander v. Superior Court in and for Los Angeles County, 266 P. 993, 91 Cal.App. 312
Neb.—Vanburg v. Mauel, 269 N.W. 626
N.D.—Golden Valley County v. Curtin, 203 N.W. 189, 52 N.D. 872.
6 C.J. p. 170 note 38.
36. McLain v. Simington, 37 Ohio St. 484.

Bond binding "the undersigned"

Where the names of all the sureties do not appear in the body of the attachment bond, but the bond binds "the undersigned," all the signers are included in the obligation assumed.—First Nat. Bank of Gallatin v. Wallace, (Tex.Civ.App.) 65 S.W. 392

Signing as "securities" where not named in bond

Where persons not named in the body of an attachment bond sign the instrument, describing themselves as "securities," their intent to bind themselves as sureties to the bond cannot be doubted.—First Nat. Bank of Gallatin v. Wallace, (Tex.Civ. App.) 65 S.W. 392

37. Baars v. Gordon, 21 Fla. 25—6 C.J. p. 170 note 39
38. Elliott v. Stevens, 10 Iowa 418—6 C.J. p. 171 note 46
39. Lehmann v. Steffey, 18 Pa.Dist. & Co. 574—McDougal v. McGee, 14 Pa.Dist. 500—6 C.J. p. 171 note 47.

b. Competency

Any person is competent as a surety who is legally able to enter into a binding contract of suretyship with the parties to the attachment bond.

Any person may be surety on an attachment bond who possesses the capacity to contract and who is not otherwise disqualified from becoming such surety by statute or rule of court[40] or by the fact that he is already bound as principal.[41] An officer of the corporation is a competent surety on the corporation's attachment bond,[42] but, where a partnership is principal on an attachment bond, a member of the partnership is incompetent as a surety thereon.[43] Under a statute requiring a written undertaking on the part of plaintiff with sufficient sureties, it is essential that some person or persons other than plaintiff shall join as surety or sureties, and an undertaking signed only by plaintiff is insufficient.[44]

Attorney as surety. In accordance with the general rules governing the disabilities of an attorney, as discussed in the title Attorney and Client § 45, in the absence of a statute to the contrary, an attorney at law may properly become a surety on his client's attachment bond.[45] It has also been held that an attachment bond, although signed by an attorney at law as security, when the statute prohibits an attorney from becoming a surety, is valid, at least where the clerk has approved it.[46]

Residence. Where personal sureties are accepted, the officer should require that they be residents of the state, so that the court may have jurisdiction over them,[47] and, where the statute requires "good and sufficient" sureties, nonresident sureties are not competent.[48] Where the statute expressly requires resident sureties, a failure to comply therewith invalidates the bond and the proceedings regardless of the property qualifications of the nonresident surety or sureties.[49]

In the absence of a statute so requiring, the sureties need not be residents of the county in which the attachment is granted.[50]

Attacking competency It has been held that an attack on the competency of a surety, as that he is a nonresident or an attorney, at least where such defect does not appear on the face of the bond, cannot be made by motion to quash, but must be raised by a plea in abatement.[51]

c. Sufficiency

The sureties must have assets of the amount and kind required by statute.

The sureties must be possessed of available assets of a sufficient amount to satisfy the court or officer designated by statute to pass on the sufficiency of the bond that they are financially able to meet the obligation which they have assumed.[52] The solvency of the sureties is primarily for the approving officer, and, in accepting the bond, he necessarily passes on the sufficiency of the security, and the person excepting to it must show that the security is insufficient.[53] According to some authority, where there is no testimony aliunde the bond, the sufficiency of the sureties will be presumed.[54]

In the absence of a statute to the contrary a surety need not own real estate if he is otherwise competent.[55]

Collective sufficiency. Unless otherwise provided by statute it is not necessary that each surety be worth the amount of the bond, but it is sufficient that they together have property sufficient to satisfy the maximum penalty of the bond.[56]

§ 154. Execution in General

a In general
b. By agent

a. In General

The bond must be executed in the statutory manner.

Since attachment is a statutory proceeding, if the

40. Ga.—Levin v American Furniture Co, 66 S E 888, 133 Ga. 670. Ind.—Abbott v Zeigler, 9 Ind 511. 6 C J. p 170 note 40.

41. Wanamaker v. Bowes, 36 Md. 42—6 C J. p 171 note 41

Bond held sufficient as executed by principal as principal and with sufficient sureties.—Gable v. Brooks, 48 Md. 108.

42. La.—Willer & Kern v. Webb, 4 La App 669
Tex.—Laning v. Iron City Nat Bank, (Civ.App.) 36 S.W 481.

43. H C Copeland & Co. v Monroe, 85 S E. 789, 16 Ga App 586—6 C.J p 171 note 41 [b].

44. Cal.—Alexander v. Superior Court in and for Los Angeles County, 266 P. 993, 91 Cal App 312
N D.—Golden Valley County v Curtin, 203 N W. 189, 52 N D 372

45. Simpson v Knight, 12 Fla 144—6 C J p 170 note 40 [b], [c].

46. Tessier v Crowley, 22 N W 422, 17 Neb 207—6 C.J. p 170 note 40 [a]

47. Prevost v. Post, 173 S E. 628, 172 S C. 228.

48. Caldwell v. Lamkin, 33 S W 316, 12 Tex Civ.App. 29.

49. Singer Mfg Co v. Mason, (C C Kan.) 22 F Cas No 12,903, 5 Dill. 488—6 C.J. p 171 notes 48, 49.

50. Prevost v. Post, 173 S E 628, 172 S C 228—6 C J. p 171 note 48 [a]

51. Lundy v. Little, (Tex.Civ.App.) 227 S W 538.

52. Lockett v De Neufville, 55 Ga 454—6 C J. p 171 note 51

53. Reid v Armour Packing Co., 21 S E 131, 93 Ga. 696—6 C.J. p 171 note 51 [b]

54. Lundy v. Little, (Tex.Civ App.) 227 S W. 538

55. Austin v. Latham, 19 La 88.

56. Wong Sar v. Uehara, 30 Hawaii 658—6 C.J. p 172 note 51 [d].

statute prescribes the manner in which the bond shall be executed, the statutory procedure must be followed. Unless required by statute it is not essential that the attachment plaintiff should himself execute the bond, it being sufficient if executed by proper sureties,[57] but, when the statute requires a bond executed by plaintiff, there must be such a bond, and execution by any other person will not suffice.[58] Where the statute requires a written undertaking on the part of plaintiff, with sufficient surety, it has been held that the undertaking must be signed by plaintiff;[59] but, under a similar statute, it has also been held that a bond executed by persons other than plaintiff is sufficient, since it is not necessary that there shall be in the bond a principal obligor to whom the other persons obligating themselves in favor of defendant shall stand in the relation of sureties.[60]

A partnership may make a bond by its several members to procure an attachment sued out by one member for the firm benefit.[61]

Filing. Where the statute so requires, an attachment bond should be duly filed in the proper office. Although a statute provides that no pleading shall be considered as filed until the clerk shall make a memorandum of the date of filing in the appearance docket, since an attachment bond is not a pleading, the failure of the clerk to make a memorandum of its filing will not invalidate the attachment.[62]

In office of clerk of court. Under a statute requiring an attachment bond to be executed in the office of the clerk of court, it is no objection that the bond was signed outside the office,[63] for the word "execute" means "to complete," and completion of a bond is giving it effect by delivery; and, therefore, a bond which is delivered in the proper office is "executed" in such office for the purposes of the statute.[64]

b. By Agent

(1) In general
(2) Form of appointment
(3) Attacking authority

(1) In General

Under a permissive statute the bond may be executed by an attorney or agent.

Under a statute providing that a justice, before granting an attachment, shall take bond and security of the party for whom it shall be issued, it has been held that a bond executed by an agent or attorney as obligor to pay costs and damages if judgment shall be awarded defendant is insufficient, and that the obligor should be the creditor or plaintiff in attachment.[65] Of course, under a statute authorizing a bond to be executed by the attaching creditor, his agent or attorney, a bond in which an agent or attorney is the obligor is sufficient.[66] It is, however, necessary that the person assuming to execute the bond shall have authority from plaintiff to act as his agent,[67] although plaintiff may accept and ratify the bond of an unauthorized agent or other person whenever such bond is not jurisdictional,[68] at least before the issuance of the writ.[69]

Where an agent may execute the bond for his principal, and where the attachment affidavit shows that affiant is plaintiff's agent, his signature of plaintiff's name on the bond "per" or "by" affiant, without any descriptive word as to agency, has been held to be a sufficient execution of the bond.[70]

It is the duty of a magistrate issuing a warrant of attachment to ascertain the authority of the agent executing a corporate attachment bond.[71] However,

57. McIntosh v. Hurst, 12 P 647 6 Mont 287—6 C J p 168 note 27.

58. Booker v. Smith, 16 S.E. 774, 38 S C 228—6 C J. p 168 note 26, p 169 note 28.

59. Summerton Live Stock Co v. Early, 96 S E. 518, 111 S C 154—Guckenheimer v. Dryfus, 21 S E 331, 43 S C 443—Booker v. Smith, 16 S E 774, 38 S C 228—Wagener v. Booker, 9 S E 1055, 31 S C. 375—National Exch. Bank v. Stelling, 9 S E 1028, 31 S C. 360.

60. Minn.—Howard v. Manderfield, 17 N W 946, 31 Minn 337.
Wis.—Shakman v. Koch, 67 N W. 925, 93 Wis. 595.

61. McCluny v. Jackson, 6 Gratt. (47 Va.) 96.

62. Farmers' & Merchants' Bank of Aurora v. Wells & Potter, 179 N.W. 838, 189 Iowa 1312.

63. Perko v Rock Springs Commercial Co, 259 P 520, 37 Wyo. 98.

64. Perko v Rock Springs Commercial Co, supra

65. Mantz v Hendley, 2 Hen. & M (12 Va.) 308
Competency of attorney to be surety on bond see supra § 153 c

66. Ga.—Greene v Lombard, 126 S. E 890, 33 Ga App. 518
Mich.—Walbridge v. Spalding, 1 Dougl 452
Pa.—Lehmann v. Steffey, 13 Pa Dist. & Co 574.
6 C.J. p 169 note 30.

Failure of person executing bond to describe himself as agent.—Where, under a statute requiring the execution of the bond by plaintiff himself or "by his agent by attorney," the party suing out the attachment described himself in the affidavit as agent of plaintiffs, but failed so to describe himself in executing the bond, which purported "to have been given by him in person," omitting any statement to the effect that he was the agent or attorney of plaintiffs, the bond was held fatally defective, because it did not appear that it was executed by plaintiffs, their agent, or attorney.—Powell v. Roderick, 1 Pa Dist 120—6 C J. p 169 note 30 [f]

67. Elliott v. Plukart, 6 Pa Co. 151—6 C J p 169 note 31.

68. Pollock v. Murray, 20 So. 815, 38 Fla 105—6 C.J p 170 note 32.

69. Kellogg v. Miller, 6 Ark. 468—6 C J. p 170 note 32 [c].

70. Harmon v. Wiggins, (Ga.App.) 172 S E. 847—Greene v. Lombard, 126 S E. 890, 33 Ga App 518.

71. J. W. Copeland Co v. Brown, 87 S E. 1002, 103 S.C. 177.

the agent need not file evidence of his authority to execute a bond,[72] unless the officer issuing the attachment requires proof of authority,[73] or until the bond is attacked by a proper plea or motion.[74]

(2) Form of Appointment

In the absence of a statute to the contrary, the authority of an agent to execute an attachment bond in the name of his principal must be under seal.

In accordance with the general rule discussed in the title Agency § 27 d (1), that, in order that an instrument under seal may be validly executed by an agent, the agent's authority must have been conferred on him by an instrument of equal dignity, in the absence of a statute to the contrary, a power of attorney under seal is required to authorize an agent to execute an attachment bond in the name of his principal.[75] However, a bond executed by an agent for the obligor, where the agent's authority is not shown to be under seal, although defective, has been held not to be a nullity,[76] and, where an undertaking in attachment need not be under seal, the name of attachment plaintiffs may be signed thereto by agents; and an undertaking so signed under authority of telegrams, which are attached thereto, is sufficient.[77] Under a statute requiring that the bond be executed by plaintiff or some one on his behalf, it has been held that the authority of the agent to execute it in the name of plaintiff need not be under seal, but may be made orally.[78]

Under a statute requiring an attachment bond executed by plaintiff or his agent, where the bond is not in plaintiff's name, but is the personal obligation of his agent, no power under seal authorizing its execution by the agent need be shown.[79]

Form of ratification. The ratification of the execution of an attachment bond by an agent should, in some jurisdictions, be under seal.[80]

(3) Attacking Authority

The authority of an agent to execute an attachment bond is presumed unless it is properly questioned.

The authority of an agent to execute an attachment bond will be presumed where it has not been denied or questioned by a proper plea.[81] Where defendant desires to attack the authority of the agent to execute such bond, he should file a plea in abatement,[82] but, where such authority is attacked for failure to file the evidence of his authority, this objection is overcome by filing his power of attorney.[83]

§ 155. Signing and Sealing

a. In general
b. Sealing

a. In General

The attachment bond must be signed by the obligor or by one qualified to act for him.

The signing of the attachment bond is one step in its execution,[84] and the parties who must execute the bond, as discussed in the previous section, must sign it,[85] although the fact that the surety by mistake signed his name to the justification instead of to the undertaking itself has been held to be immaterial.[86] It may be signed in the partnership name where it appears that the obligor is the partnership.[87] The signature of a corporation may be sufficient, although typewritten, and it is no objection that the corporate name alone appears without that of the executing agent.[88]

72. Miss.—Lindner v. Aaron, 6 Miss. 581.
S.C.—J. W. Copeland Co. v. Brown, 87 S.E. 1002, 103 S.C. 177—Grollman v. Lipsitz, 21 S.E. 272, 43 S.C. 329.

73. Grollman v. Lipsitz, supra.

74. Lindner v. Aaron, 6 Miss. 581.
Attacking authority see infra § 154 b (3).

75. Fla.—Pollock v. Murray, 20 So. 815, 33 Fla. 105—Forbes v. Porter, 6 So. 62, 25 Fla. 363.
Miss.—Lindner v. Aaron, 6 Miss. 581.

76. Wood v. Squires, 28 Mo. 528.

77. Ferst v. Powers, 36 S.E. 744, 58 S.C. 398.

78. Long v. Goodwin, 5 Pa.Dist. 335.

79. Walbridge v. Spalding, 1 Dougl. (Mich.) 451.

80. Pollock v. Murray, 20 So. 815, 33 Fla. 105.
Ratification of partnership bond.
Although, in Florida, a ratification of an attachment bond should be under seal, it seems that the bond of a partnership, executed by a member thereof, may be ratified by parol.—Jeffreys v. Coleman, 20 Fla. 536—Ross v. Steen, 20 Fla. 443.

81. Ala.—Jackson v. Stanley, 2 Ala. 326—Alford v. Johnson, 9 Port. 320.
Iowa.—Goddard v. Cunningham, 6 Iowa 400.
Miss.—Spear v. King, 14 Miss. 276—Lindner v. Aaron, 6 Miss. 581.
Tex.—Messner v. Lewis, 20 Tex. 221—Wright v. Smith, 19 Tex. 297—Messner v. Hutchins, 17 Tex. 597.
6 C.J. p. 170 note 31 [f].

82. Ala.—Alford v. Johnson, 9 Port. 320.
Tex.—Messner v. Hutchins, 17 Tex. 597.
W.Va.—Tingle v. Brison, 14 W.Va. 295.
6 C.J. p. 169 note 31 [k].

83. Miss.—Lindner v. Aaron, 6 Miss. 581.
Tex.—Drake v. Brander, 8 Tex. 351.

84. Perko v. Rock Springs Commercial Co., 259 P. 520, 37 Wyo. 98.

85. Ga.—Higgins v. Gosden, (App.) 185 S.E. 574.
S.C.—Summerton Live Stock Co. v. Early, 96 S.E. 518, 111 S.C. 154.

86. Boger v. Cedar Cove Lumber Co., 81 S.E. 784, 165 N.C. 557.

87. Iowa.—Churchill v. Fulliam, 8 Iowa 45.
S.C.—Grollman v. Lipsitz, 21 S.E. 272, 43 S.C. 329.

88. B. F. Bridges & Son v. First Nat. Bank of Center, 105 S.W. 1013, 47 Tex.Civ.App. 454.
Estoppel.
"The bond was signed simply, 'The First National Bank of Center, Texas,' without the addition of the name of the particular officer by whom it was signed. We think such signature sufficient. Certainly the plain-

b. Sealing

In the absence of a statute abolishing the distinction between sealed and unsealed instruments, a seal is necessary to the validity of an attachment bond.

In the absence of a statute to the contrary, the attachment bond should be under seal in order to be valid[89] However, the usual liberality respecting the character of the seal is applicable to attachment bonds, and a mere scroll has been held sufficient,[90] as has the word "[seal]" printed on the bond,[91] and the use of one seal or scrawl by two persons.[92]

Where the only way an attachment bond can legally show that it is executed by, or is the bond of, a corporation is by the corporate seal appearing on the bond, a private seal affixed by the agent is insufficient.[93]

The time of the sealing of the bond, if it is done before delivery, is immaterial, and the seal upon an attachment bond is none the less the seal of one who executes it whether he affixes it before or after his signature, or whether he adopts as his seal one which has been already affixed to the instrument by another, or is affixed to it at his request by another after the signature has been made.[94]

On the other hand, a statute providing that no scroll or private seal shall be necessary to the validity of any contract, bond, or conveyance has been held to be applicable to attachment bonds,[95] and, under a statute abolishing the distinction between sealed and unsealed instruments, the signature of the firm name of a partnership to an attachment bond, although followed by a private seal, is binding on the firm.[96]

Where the statute requires an attachment plaintiff to give an undertaking, since, as defined in section 1 of the title Undertakings [65 C.J. p 1212 note 1], an undertaking is a promise in writing not under seal, of course a seal is unnecessary.[97]

§ 156. Attestation and Acknowledgment

An attachment bond need not be attested unless this is required by statute.

An attachment bond need not be attested unless required by the statute,[98] and a rule of court requiring attestation, when the statute did not require it, has been held to be invalid as inconsistent with the statute[99] Although attestation by a magistrate be required by the statute, this need not be by the one issuing the writ.[1]

§ 157. Justification of Sureties

Where the sureties on an attachment bond are required to justify, they must do so, or the attachment will be vacated.

Where the sureties are required by statute to justify, a failure to comply will be a ground for avoidance of the attachment.[2] Where justification is required as an element of jurisdiction, a failure to comply cannot be cured;[3] but where the requirement is directory merely and not mandatory, a failure to comply is regarded as a mere irregularity which may subsequently be cured[4] or waived by failure to object in due time, as stated infra § 160.

In some jurisdictions, a defendant who desires to object to the sufficiency of sureties on an attachment bond must except to their sufficiency, after which they must justify[5]

Under a permissive statute, where the original sureties fail to justify, but other sureties are offered in due time, they must be accepted and permitted to justify.[6]

tiff, after causing the issuance of the writ of attachment and receiving the benefits thereof, would be estopped to deny that it had signed the bond"—B F Bridges & Son v. First Nat Bank of Center, 105 S W 1018, 1019, 47 Tex Civ App 454

89. Tiffany v. Lord, 65 N Y. 310—6 C.J p 172 note 54

90. State v. Eldridge, 65 Mo 584.

91. Underwood v. Dollins, 47 Mo. 259.

92. Baars v. Gordon, 21 Fla. 25.

93. Tanner, etc, Engine Co. v. Hall, 22 Fla 391.

94. George N Pierce Co v. Casler, 80 N E. 494, 194 Mass. 423

95. Gasquet v. Collins, 57 Tex 340—Bernhard v. De Forrest, 36 Tex. 518, overruling Hart v Kanady, 33 Tex 720, and Read v Levy, 30 Tex 738.

96. Brooks v. Hartman, 1 Heisk (Tenn) 36

97. Ohio—McLain v Simington, 37 Ohio St 484.
S C—Ferst v. Powers, 36 S E 744, 58 S C. 398—Grollman v. Lipsitz, 21 S E. 272, 43 S C 329.

98. Ky.—Conner v. Clarke, 10 Ky L 353
N C—O'Neal v. Owens, 2 N.C. 419.

99. Grollman v. Lipsitz, 21 S E. 272, 43 S C 329.

1. Dobbs v Justices Murray County Inferior Ct, 17 Ga 624—Brown v. Clayton, 12 Ga. 564.

2. Tibbet v. Sue, 54 P. 741, 122 Cal 206.
In Hawaii, the statutory provision that the affidavit of sureties on attachment bonds must contain a statement that the sureties are qualified was held to be repealed by implication—Wong Sar v. Uehara, 30 Hawaii 658.

3. Cal—Tibbett v. Sue, 54 P 741, 122 Cal 206—Taaffe v Rosenthal, 7 Cal 514
N Y—Bliss v Molter, 8 Abb N Cas 241, 58 How Pr 112.

4. Miller v Alaska-Canadian Oil & Coal Co, 4 Alaska 439—6 C J. p 172 note 65.

5. Cal—Poswa v. Brittain, (App) 41 P (2d) 345.
Idaho—Gordon v. Kerr, 21 P.(2d) 930.

6. Poswa v Brittain, (Cal App.) 41 P.(2d) 345.

§ 158. Approval

Where the statute requires the bond to be approved, approval is necessary, although, in the absence of a statute requiring the indorsement of approval on the bond, the receiving and filing of the bond by the official whose approval is necessary may imply his approval of it.

The officer issuing the writ is generally required first to approve and accept the bond,[7] and the writ may be avoided for failure so to approve.[8] The approving officer need not, however, in the absence of a statutory requirement to that effect, indorse on the bond his approval in writing,[9] as the existence of the fact is sufficient, and this is evinced by the mere receiving and filing of the bond and issuing the writ.[10]

Where the statute requires the clerk to indorse his approval on the bond, his failure to do so is at most an irregularity, and the indorsement of approval is only evidence of approval, but not the only evidence; and if the clerk receives the bond and issues the writ it amounts to an approval so far as defendant is concerned.[11] Under such circumstances the court may, on determining the fact, direct the indorsement to be made nunc pro tunc.[12]

§ 159. Amendment of Insufficient Bond

a. In general
b. Time for amendment
c. Mode of amendment
d. Effect of amendment

a. In General

In the absence of a statute permitting an attachment bond to be amended as to matters of substance, amendments may be made as to formal matters only.

Since attachment is a statutory proceeding, where the statute requires a sufficient bond or undertaking as a condition precedent to the issuance of the writ, the giving of a sufficient bond is jurisdictional and amendments as to matters of substance are not permissible in the absence of statutory permission.[13] Where, however, the statute grants the right of amendment, the attachment bond or undertaking may be amended;[14] and statutes granting the right to amend, being remedial in character, should receive a liberal construction.[15] A statute permitting amendments to "all papers in attachment proceedings," has been held to be sufficiently broad to permit amendments to attachment bonds.[16]

In the absence of a statute extending the right of amendment to matters of substance, amendments may be made as to formal matters only, and not as to jurisdictional defects which render the bond void.[17] On the other hand, where the statute permits amendments of any defects in the bond or undertaking, matters of substance, as well as matters of form, are amendable; and under such statutes such defects cease to be jurisdictional,[18] therefore, it is sometimes said that a void bond may be amended under authority of the statute,[19] although it has also been asserted that a void bond is no bond at all, and, wherever a bond is requisite to an amendment, a void bond cannot be amended.[20]

In accordance with these rules, where the statute permits amendments to the bond or undertaking, defects consisting of an omission of the name of de-

7. Ind—Blaney v. Findley, 2 Blackf 338.
Mass—George N. Pierce Co v Casler, 80 N E 494, 194 Mass. 423
Pa—Yost v Ginley, 2 Leg.Rec 351
6 C.J. p 172 note 66.

8. McMasters v Majewski, 5 Pa. Dist. & Co 279—6 C J p 173 note 67.

9. Mo—First Nat. Bank of Appleton City v. Griffith, 182 S W. 805, 192 Mo App 443.
Tex—Ford v Marsden, (Civ App) 54 S.W (2d) 833.
6 C.J. p 173 note 68.

10. Mo—First Nat Bank of Appleton City v. Griffith, 182 S W 805, 192 Mo App 443
Tex—Ford v Marsden, (Civ.App) 54 S W (2d) 833.
6 C.J. p 173 note 69

11. Baca v. Coury, 204 P 57, 27 N. M. 611.

12. Ark—Mandel v. Peet, 18 Ark. 236
Fla.—West v. Woolfolk, 21 Fla. 189.
W Va—Anderson v. Kanawha Coal Co, 12 W Va 526

13. Ga—H C Copeland & Co v Monroe, 85 S E 789, 16 Ga App 586
N.D—Golden Valley County v Curtin, 203 N W 139, 52 N D 372.
Pa—Wolf v Zentz, 5 Pa Dist. & Co. 276
6 C J. p 173 note 72

14. Ga—Collins v. Southern Finance Corporation, (App) 180 S E 744
Mich—Adams v. Kellogg, 29 N.W. 679, 63 Mich 105
N Y—Zenith Bathing Pavilion v Fair Oaks S. S Corporation, 207 N Y S 306, 211 App Div. 492, reversed on other grounds 143 N E 532, 240 N Y. 307
6 C J p 173 note 73
Filing additional or new security see infra § 161.

15. Yannoulakis v. Sinopuolo, 210 Ill App 553.

16. Gill v Physicians' and Surgeons' Bldg, 138 A. 674, 153 Md 394.

17. Gordon v Kerr, (Idaho) 21 P. (2d) 930—6 C J p 173 note 75.
Where surety incompetent
An attachment bond signed as surety by a member of the partnership which signed as principal cannot be amended—H C Copeland & Co v Monroe, 85 S E 789, 16 Ga App 586.

18. Gill v Physicians' and Surgeons' Bldg, 138 A 674, 153 Md 394—6 C J p 174 note 76

19. Ala—Jackson v. Stanley, 2 Ala. 326.
N Y—Finn v. Mehrbach, 65 N.Y S 250
Tenn—Lillard v. Carter, 7 Heisk 604

20. Cal—Alexander v. Superior Court in and for Los Angeles County, 266 P 993, 91 Cal App 312.
Ga—H C Copeland & Co. v Monroe, 85 S E 789, 16 Ga App. 586
Idaho—Gordon v. Kerr, 21 P.(2d) 930.
6 C J. p 174 note 78.

fendant in the caption,[21] a recitation that it was given under an improper statute,[22] an omission of the word "free" or "house" in the blank space before the word "holder" in the affidavit of justification of the sureties,[23] the insertion of the name of a stranger in the condition clause,[24] the inadvertent naming of the surety as obligee,[25] or a failure to secure timely approval,[26] have been held to be amendable.

Increasing amount of bond. Under permissive statutes, the court has jurisdiction and power to increase the amount of the undertaking on attachment,[27] and, where defendant complains of the lack of security, it has been held that his remedy is to move to increase the amount of the undertaking, and that a motion to dismiss the attachment therefor is improper.[28]

Supplying seal by amendment. It has been held that, where the bond is defective in being unsealed, the court should permit an amendment in that respect on motion.[29]

Necessity for motion. In jurisdictions where a plaintiff is permitted to amend a bond or file a new bond, he must make a timely motion therefor.[30]

b. Time for Amendment

Where amendment is permissible under the statute, a bond may be amended at any time before the attachment is dissolved.

Where permissible, amendments may be made before discharge of the attachment,[31] and an opportunity to amend should be allowed before discharging the attachment on account of an insufficient bond.[32] An undertaking in attachment may be amended in its formal parts at any time before judgment.[33]

A defective attachment bond cannot be amended in an appellate court;[34] but it has been held that, where a cause is reversed because of an insufficient attachment bond, it may be remanded with leave to amend.[35]

c. Mode of Amendment

A bond may be amended by striking or adding parts thereof, or by substituting a new bond.

The method of amendment may be either by correcting some formal irregularity, mistake, or omission,[36] or, as discussed in § 161, by the giving of an additional or substituted bond.

d. Effect of Amendment

The amendment of a bond takes effect ab initio.

Permitting the correction of an original bond or the substitution of a new one supposes the existence of a bond not defective in a jurisdictional respect or else dispenses with the jurisdictional element as a condition precedent. In any case, therefore, the effect of a duly authorized amendment is to validate the proceeding from its inception.[37]

§ 160. Waiver of Insufficient Bond

Defects in an attachment bond or undertaking which are not jurisdictional may be waived.

Since an attachment bond is required for the protection of defendant, the want of a sufficient bond may be waived by him,[38] unless the giving of a bond is an element of jurisdiction and the defect is such as to render the writ void.[39]

A waiver may be express, as by stipulation,[40] or may be implied from a failure to object.[41] It has, accordingly, been held that a defendant who fails

21. Zenith Bathing Pavilion v. Fair Oaks S S Corporation, 207 N Y S. 306, 211 App Div. 492, reversed on other grounds 148 N E 532, 240 N. Y. 307

22. Statute relating to justice courts An attachment bond substantially complying with a statute relating to attachment in a district court is merely irregular and subject to amendment, where it recited that it was given under a statute relating to undertakings on attachment in justice courts —Gordon v Kerr, (Ida-ho) 31 P (2d) 930

23. Bone v Trafton, 159 P. 819, 31 Cal App. 30

24. Yannoulakis v. Sinopuolo, 210 Ill App. 553.

25. Peyton v. Peyton, 120 S E. 689, 31 Ga App. 470.

26. State v. Second Judicial Dist. Court in and for Washoe County, 241 P 317, 49 Nev 145, 43 A L R 1331

27. Greene v Superior Court in and for City and County of San Francisco, 23 P (2d) 785, 133 Cal App 35—Francis v. Superior Court of Kern County, 209 P 80, 58 Cal App 618

28. Prevost v Post, 173 S E. 628, 172 S C 228—Copeland Company v Brown, 87 S E 1002, 103 S C 177.

29. Lea v Vail, 3 Ill. 473—6 C J. p 172 note 58

30. Corbyn v. Specification Motor Oil System of Oklahoma City, 32 P (2d) 726, 168 Okl 203

31. Maxwell v Flowers, 103 So. 413, 89 Fla 109—6 C J. p 174 note 79.

32. Bluegrass Canning Co v. Stewart, (Ky) 175 F 537, 99 C C A. 159 —6 C J p 174 note 80

33. Seattle First Nat. Bank v. Fish, 2 Alaska 344

34. Alabama Bank v. Fitzpatrick, 6 Humphr (Tenn) 311.

35. Hamble v. Owen, 20 Iowa 70.

36. Bone v Trafton, 159 P. 819, 31 Cal App. 30—6 C J. p 174 note 84.

37. Bone v. Trafton, supra—6 C J. p 174 note 87

38. Darnell v. Johnston, 272 S W. 381, 209 Ky. 95—6 C J. p 174 note 89.

39. Houston v Belcher, 20 Miss 514 —Tyson v. Hamer, 3 Miss 669.

40. Moynihan v Drobaz, 56 P. 1026, 124 Cal. 212, 71 Am S R 46.

41. Ga —Collins v Southern Finance Corporation, (App) 180 S E 744 Ky —Darnell v Johnston, 272 S.W. 381, 209 Ky. 95.

Failure to specify omission of names of defendants in the attachment bond waives such defect —Zenith Bathing Pavilion v Fair Oaks S S Corporation, 207 N.Y.S 306, 211

to assail the validity of an attachment, and who for a consideration agrees that money in possession of a garnishee be paid into court to abide the judgment, ratifies and confirms such attachment proceedings, notwithstanding that no sureties signed the bond on which the attachment was issued.[42] An entry of a general appearance,[43] or pleading to the merits,[44] without objection to the bond, may also operate as a waiver of defects in the bond or undertaking. After judgment it is too late to object to a defective bond,[45] and a fortiori such an objection cannot be raised for the first time in an appellate court.[46]

If defendant waives the insufficiency of the bond, a stranger to the proceeding cannot object.[47]

§ 161. Additional or New Security

Under a permissive statute, plaintiff may be required and permitted to file new or additional security.

In view of the fact that an attachment is a statutory proceeding in derogation of the common law, it has been held, where the statute governing attachment bonds is silent on curing the defects therein, that the court is without power to require or accept a new bond if the first proves insufficient,[48] although it has also been held that the general statutes giving the court power to permit an amendment of a proceeding to make it conform to the requirements of the statutes concerning such procedure apply to attachment proceedings, and that under such a statute the court may permit a new or additional bond or undertaking to be filed to correct a nonjurisdictional defect in the original bond or undertaking.[49] Of course, where the statute permits the filing of a new bond or additional security, where the defect in the original bond is not regarded as one of substance, it may be cured by the filing of a new or additional bond,[50] and in such case it is the duty of the court to permit the filing of such bond,[51] as of the date tendered.[52]

A statute permitting the filing of a new bond or additional security, where defendant's objection raises the question of the insufficiency of the security given, does not, in the absence of anything further, permit the filing of additional security where the original bond or undertaking is void,[53] nor does such a statute permit the filing of a bond for the first time on defendant's objection;[54] but, if the bond or undertaking is merely voidable, and not void, additional and sufficient security may be filed.[55]

Where the statute permits the filing of a new or amendment of all papers in attachment, plaintiff has a right to, and the court must permit, the amendment, by filing a new bond, of an error in the condition which, by transposition of parties, obligates defendant to prosecute the action.—Gill v. Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md. 394.

App.Div. 492, reversed on other grounds 148 N.E. 532, 240 N.Y. 307.

Where a statute limits the time within which defendant may object to the sufficiency of the sureties, a failure to object within such time constitutes a waiver of objections to their sufficiency.—Gordon v. Kerr, (Idaho) 21 P.(2d) 930.

42. Vanburg v. Mauel, (Neb.) 269 N.W. 626.

43. Cal.—Hammond v. Starr, 21 P. 971, 79 Cal. 556.
Ill.—Cruikshank v. Cogswell, 26 Ill. 366.
Ind.—Baltimore, etc., R. Co. v. Taylor, 81 Ind. 24.
6 C.J. p. 175 note 92.

44. Carter Grocery Co. v. Wilson, 153 S.E. 566, 156 S.C. 546, 72 A.L.R. 118.—6 C.J. p. 175 note 93.

By filing a plea in abatement to a writ of attachment, defendant waived any defect arising out of the court's failure to approve the bond.—First Nat. Bank of Appleton City v. Griffith, 182 S.W. 805, 192 Mo.App. 443.—6 C.J. p. 175 note 93 [a].

45. Carothers v. Click, Morr.(Iowa) 54.—6 C.J. p. 175 note 94.

46. Citizens Bank v. Hudson, 5 La. App. 194.—6 C.J. p. 175 note 95.

47. N.Y.—Reinmiller v. Skidmore, 7 Lans. 161.
S.C.—Camberford v. Hall, 14 S.C.L. 345.

Wash.T.—Baxter v. Smith, 4 P. 35, 2 Wash.T. 97.
6 C.J. p. 175 note 96.

48. Bradley v. Kroft, (C.C.Wis.) 19 F. 295.—6 C.J. p. 167 note 12.

49. Charles Mix County Bank v. Calta, 189 N.W. 527, 45 S.D. 564.

50. U.S.—M. J. Brandenstein & Co. v. Castono, (D.C.N.Y.) 283 F. 843.
Idaho.—Gordon v. Kerr, 21 P.(2d) 930.
Md.—Gill v. Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md. 394.
6 C.J. p. 167 note 11, p. 174 notes 85, 86.

Where surety incompetent
Where the surety on a bond was not a resident of the county where the proceedings were instituted, the attaching creditors' new bond, given within two days after the defect was pointed out in the answer, was authorized by statute.—Montgomery v. New Roads Oil Mill & Mfg. Co., 2 La.App. 530.

Defect in verification
A failure of the sureties to state in the verification in the bond that they are householders or freeholders may be cured by the filing, nunc pro tunc, of a new undertaking containing such recital.—Ingalls v. Nutter, 172 N.Y.S. 210.

51. Gordon v. Kerr, (Idaho) 21 P.(2d) 930.—6 C.J. p. 173 note 74.

Curing transposition of parties
Under a statute permitting the

52. Ga.—H. C. Copeland & Co. v. Monroe, 85 S.E. 789, 16 Ga.App. 586.
Pa.—McMasters v. Majewski, 5 Pa. Dist. & Co. 279.
Amendment of void bonds see supra § 159 a.

Absence of surety
A new undertaking by way of amendment cannot be filed, where the original undertaking was void because signed only by plaintiffs and not by surety.—Alexander v. Superior Court in and for Los Angeles County, 266 P. 993, 91 Cal.App. 312.

54. H. C. Copeland & Co. v. Monroe, 85 S.E. 789, 16 Ga.App. 586.

55. Benjamin v. Pardue, 162 S.E. 291, 44 Ga.App. 587.

Where infant was surety
Where plaintiff filed an attachment bond with an infant surety, it was held that, since the infant's contract was voidable but not void, the attachment bond was not void for want of surety; and, therefore, the attachment cannot be dismissed, although plaintiff may move for addi-

additional bond or undertaking, if the original one be insufficient in amount, defendant may require an additional bond or undertaking,[56] and plaintiff has the right so to cure such a defect.[57] Where, however, the penalty is fixed by statute, and a deficiency therein renders the bond void, such a defect cannot be cured by an additional bond.[58] A third party claimant of the attached property cannot demand an increase of the security under a statute giving defendant, or one who has acquired a lien or interest in his property after it has been attached, the right to apply therefor.[59]

Defendant cannot require additional security where plaintiff appeals from an order dismissing his complaint.[60]

Where a declaration in attachment is amended by increasing the amount of the claim, the court must require a new or additional undertaking to cover the increased claim.[61] The same rule applies where the cause of action is altered so as to discharge the sureties.[62] Where, however, the amendment reduces the amount sued for, the sureties are not discharged, and, therefore, no new bond is required.[63]

The fact that the clerk of the court is permitted under the statute to fix the amount of the bond before issuing the writ has been held not to divest the court of power to order an increase in the amount of the security necessary, since the clerk is but an arm of the court, and his requirement cannot be considered as a judicial finding on the amount necessary.[64] Where the clerk orders a new bond with increased penalty and both parties appeal, under some statutes the judge has power to order a still greater increase in the penalty.[65] Also, an order denying a motion to increase the amount of the undertaking has been held not to constitute res judicata as to the necessity for increased security and as to the subsequent renewal of the motion based on a change in the circumstances.[66]

A plaintiff who desires to file an additional affidavit setting forth additional grounds for an attachment should offer to file therewith a new bond conditioned for the prosecuting with effect, etc., the additional cause set forth,[67] and in order to render a surety competent to testify on behalf of plaintiff, a new bond with a different surety may be substituted therefor and the original canceled prior to the accrual of liability thereon.[68]

Necessity for motion. Plaintiff, desiring to tender a new or additional bond, should move for permission to do so,[69] and where the amount of the bond is fixed by the court and defendant desires to have the security increased, his motion therefor should show why the original security is inadequate.[70]

Effect of failure to give additional bond. When the court orders that an additional security be given, failure to give such additional security may result in dismissal of the warrant of attachment,[71] or the

tional security or a new bond—Benjamin v Pardue, 162 S E 291, 44 Ga App 587

56. U S—M J Brandenstein & Co v. Castano, (D C N Y) 283 F 843
Cal—Tiffany Productions of California v Superior Court in and for Los Angeles County, 22 P (2d) 275, 131 Cal App 729
Ky—Darnell v Johnston, 272 S W 381, 209 Ky 95
Mo—Coliseum Athletic Ass'n v Dillon, 223 S W 955, 204 Mo App 504
N Y—McCann v Schnitzler, 172 N E 143, 254 N Y 107, reversing 238 N Y S 177, 228 App Div 646, and 237 N Y S 872, 228 App Div 647—Zenith Bathing Pavilion v. Fair Oaks S S Corporation, 207 N Y S 306, 211 App Div 492, reversed on other grounds 148 N E 532, 240 N Y 307

57. Iowa—Carson, Pirie, Scott & Co v Long, 257 N W 815.
La—Yates v Tessier, 5 La App 214
S D.—Charles Mix County Bank v Calta, 189 N W 527, 45 S.D 564

58. Graham v. Burckhalter, 2 La. Ann 415.

59. T W. Warner Co v. Andrews, (D C N Y) 16 F Supp 238

60. Crowell Corporation v Baugh & Sons Co, 193 N E. 283, 265 N.Y. 487, affirming 268 N.Y S 931, 240 App Div 1026

Attachment annulled by dismissal

Entry of judgment for defendant so annulled an attachment that defendant could not thereafter move for order directing plaintiff to increase its security pending appeal—Crowell Corporation v Baugh & Sons Co, 193 N E 283, 265 N Y. 487, affirming 268 N Y S 931, 240 App Div 1026

61. Lanasa v Beggs, 151 A. 21, 159 Md 311

Reason for rule stated

"If this were not true, an attaching claimant in an action ex delicto or ex contractu could deprive the alleged debtor of the protection accorded by the statute by making his original claim less than ultimately intended, and then after furnishing a bond in the inadequate penalty fixed by the reduced claim, enlarge it by amendment to meet his utmost expectation. A court could not permit such an obvious maneuver to defeat the express and definite statutory prerequisite to its writ"—Lanasa v. Beggs, 151 A 21, 24, 159 Md 311.

62. Corum v Superior Court in and for Alameda County, 300 P. 837, 114 Cal App 741.

63. Corum v Superior Court in and for Alameda County, supra

64. Tiffany Productions of California v Superior Court in and for Los Angeles County, 22 P.(2d) 275, 131 Cal App 729—Francis v Superior Court of Kern County, 209 P 80, 58 Cal App 618

65. Luff v Levey, 166 S E. 922, 203 N C 783

66. Tiffany Productions of California v Superior Court in and for Los Angeles County, 22 P (2d) 275, 131 Cal App. 729

67. Page v Dillon, 61 Ill App. 282

68. La—Tyson v. Lansing, 10 La 444
N C—Garmon v. Barringer, 19 N C. 502
Tex—Shaw v. Trunsler, 30 Tex 390—Drake v. Brander, 8 Tex. 351.

69. Collins v. Southern Finance Corporation, (Ga App) 180 S E 744.

70. U S.—Griffith v. Alois Aufrichtig Copper & Sheet Iron Mfg Co, (D C N Y) 256 F 969
W Va—Flannigan v. Monongahela Tie & Lumber Co, 87 S E 165

71. Ga—Benjamin v Pardue, 162 S E 291, 44 Ga App 587
N Y—McCann v. Schnitzler, 172 N E 143, 254 N.Y. 107, reversing 238 N.

levy may be reduced so as to bring the amount attached fairly within the penalty of the bond.[72] Such security is not an undertaking for costs, and on failure to give the additional bond, the court is not authorized perpetually to stay the prosecution of the action;[73] neither may it dismiss the main action[74]

Time for giving. New or additional security should be timely given[75] Under some statutes, this may be done at any time before a motion to dismiss the proceedings on account of such defective bond is decided.[76]

§ 162. Deposit as Security

Under a permissive statute, a cash deposit with the designated official is proper in lieu of the statutory attachment bond.

Under some statutes, plaintiff may deposit money with the officer as security for the obligation assumed, instead of giving bond.[77] In such case, a check,[78] even when certified,[79] is not acceptable under a statute requiring a deposit of lawful money of the United States equal in amount to the undertaking otherwise required. This defect is not obviated where the magistrate, on objection to the security, cashes the check and deposits the money with the clerk[80]

Where an undertaking is required, the deposit of cash in an amount equal to the penalty of the required undertaking is not an acceptable substitute for such undertaking.[81]

§ 163. Liability on Bond

a. In general
b. Construction of bond

a. In General

Liability on the bond is contractual in nature, and is ordinarily restricted to the obligations expressly assumed therein.

Liability on an attachment bond is created by, and rests on, its stipulations.[82] The obligor has a right to stand on the very terms of his contract, and his liability will not be extended beyond the fair import of the words used,[83] his liability is one not to be extended by implication, and it will not be inferred that he has agreed to do more than that which is fairly expressed in the bond,[84] except that in some jurisdictions it is held that statutory conditions omitted from the bond may be read into it[85] It is a consequence of the rule stated that the sureties can be subjected to liability on the bond only in reference to the particular writ for obtaining which it was given.[86]

Y S 177, 228 App Div 646, and 238 N Y S 872, 228 App Div. 647.
6 C J p 167 note 13

72. Renkert v Elliott, 11 Lea (Tenn.) 235.

73. McCann v. Schnitzler, 172 N E 143, 254 N Y 107, reversing 238 N Y S 177, 228 App.Div 646, and 238 N Y.S 872, 228 App.Div. 647.

74. McCann v. Schnitzler, supra

75. Montgomery v. New Roads Oil Mill & Mfg. Co, 2 La App 580

76. Maxwell v. Flowers, 103 So. 413, 89 Fla. 109.

77. Mitchell v. Murphy, 60 So 674, 131 La 1033—6 C J. p 175 note 98

78. Cal—Rowe v. Stoddard, (App) 59 P (2d) 423
S C—McDaniel v. Patterson, 157 S E 72, 159 S C 378

79. Mitchell v. Murphy, 60 So. 674, 131 La. 1033.

80. McDaniel v Patterson, 157 S E 72, 159 S C. 378

Statute mandatory

"The language of section 303, enacted first in 1897, as to the character of the deposit, we regard as being mandatory. . . . The plaintiff in attachment now has one of two choices, either to give the required written undertaking, or to deposit the required sum of money He is not given the choice of depositing a check for money in lieu of the undertaking In this case, the check accepted by the magistrate turned out to be good, and it may be argued in support of the lower court's order that the defendant suffered no harm. This court, however, is bound by the statutory language, and must look not to one case alone, but to many cases that may arise in the future. Bank checks are not always collectible In the harsh remedy of attachment, used generally to assist a plaintiff in the collection of his alleged claim before the merit of his claim has been established, the courts must protect the rights of defendants as to the possession and control of their property The written undertaking or cash deposit, required by the law, is for the protection of defendants in attachment proceedings. The Legislature knew that bank checks might often be poor protection The courts should not attempt to substitute them in place of the protection the Legislature has thought necessary"—McDaniel v. Patterson, 157 S E 72, 74, 159 S.C. 378

81. Bate v. McDowell, 48 N.Y Super. 219.

82. Green v. Hoppe, (Tex Civ App.) 175 S W. 1117.

When an attachment is obtained by an administrator, and an attachment bond executed by the administrator and another, they are both individually liable on the bond, and the objection that the party is not declared against as an administrator is not available—Woodsmall v Keas, 7 Ky. Op. 275.

83. Ind.—Summerland v. Automobile Funding Co, 148 N E 202, 84 Ind. App 80
Mont—McGinley v Maryland Casualty Co of Baltimore, 277 P 414, 85 Mont. 1
N C—Martin v Rexford, 87 S E 352, 170 N C 540
6 C J. p 503 note 58

84. Furness v Read, 63 Md 1—6 C. J. p 503 note 59

85. Ill—Omaha Nat. Bank v. U. S. Fidelity & Guaranty Co, 244 Ill. App 204.
Ind—Waring v Fletcher, 52 N E. 203, 152 Ind 620

86. State ex rel. and to Use of Fenn v. Conran, (Mo) 212 S W. 869—6 C. J. p 503 note 60.

Wrongful execution

Where an action of slander was begun, and defendant's property attached, he appeared, and plaintiff secured general judgment, on which execution issued, in the absence of appeal bond, and where the attached property was sold, plaintiff and his surety on the attachment bond were not liable thereon for such wrongful execution where the judgment was reversed on appeal—State ex rel and to Use of Fenn v. Conran, (Mo) 212 S.W. 869.

The recovery against the sureties on the attachment bond cannot exceed the amount for which the principal is liable,[87] or the amount to which the liability of such sureties is limited by statute.[88]

A cause of action on an attachment bond differs greatly from an action at common law for malicious or wrongful attachment, the latter being governed by the law of torts (see infra § 503), while the former is governed by the language of the bond and of the statute under which it is given.[89] Consequently, the cause of action on the bond does not depend on a showing of malice,[90] and conversely, the fact that the principal may have been guilty of wanton or malicious acts, which would support an action of tort against him, does not in itself impose a liability on the sureties.[91] So, if a statutory ground of attachment existed, there is no liability on the attachment bond for wrongful attachment merely because plaintiff knew that defendant had no property except such as was exempt.[92]

Since the surety's liability arises under his contract, and is limited by its terms and conditions, the surety by signing an attachment bond, does not become a participant in the seizure or detention of the attached property by the sheriff or liable as a trespasser for such act.[93]

Where plaintiff in attachment has not signed the bond, he cannot be held liable in an action on the bond.[94]

The right of action by third persons against the surety on the attachment bond will be hereinafter considered in § 397 of this Title.

Particular bonds. Where the bond is conditioned, in terms or effect, to pay all damages that defendant may incur by reason of a wrongful suing out of the attachment, the condition is broken and liability on the bond arises where it appears that nothing was due plaintiff when he sued out the writ,[95] or where none of the statutory grounds for attachment exist.[96] In an action against a partnership, where the attachment was dissolved as to an absent partner, and where judgment was had against the other on a partnership debt, this is conclusive as to probable cause for obtaining the attachment; it was not wrongfully obtained, and the surety cannot be held liable to the partner as to whom the attachment was dismissed.[97]

Where the bond is conditioned that the obligees shall pay to defendant all such damages as he may sustain by the wrongful or vexatious suing out of the attachment, if any of the statutory grounds for attachment exist, irrespective of the grounds alleged in the affidavit, it has been held that the attachment

87. Waller v. Deranleau, 94 N.W. 1038, 4 Neb.(Unoff.) 497

88. Holmes v. Cooper, 27 Ark. 239

Sureties liable for appraised value

Under a statute providing that "no greater amount shall be recovered of the said securities, than the appraised value of the property seized by the officer," the court, on a verdict for a greater amount, should render judgment against the principal and sureties for the appraised value, and against the principal for the balance.—Holmes v. Cooper, 27 Ark. 239, 241.

89. Ga.—Levin v. American Furniture Co., 66 S.E. 888, 133 Ga. 670—Fourth Nat. Bank of Cincinnati v. Mayer, 24 S.E. 453, 96 Ga. 723
S.C.—Frick Co. v. Deiter, 167 S.E. 499, 168 S.C. 289
6 C.J. p. 500 note 21.

90. Ala.—Harris v. White, 101 So. 751, 212 Ala. 54
Ga.—Fourth Nat. Bank of Cincinnati v. Mayer, 24 S.E. 453, 96 Ga. 723.
S.C.—Frick Co. v. Deiter, 167 S.E. 499, 168 S.C. 289

Charge on wrongfulness

In an action on an attachment bond, a requested charge that, even if the attachment against plaintiff's crop was sued out vexatiously and maliciously, plaintiff could not recover unless the writ was wrongfully sued out, that is, without the existence of any facts authorizing a resort to attachment, was improperly refused.—Harris v. White, 101 So. 751, 212 Ala. 54

91. Martin v. Rexford, 87 S.E. 853, 170 N.C. 540—6 C.J. p. 504 note 62

Misappropriation of goods

Judgment cannot be had on attachment bond for loss or misappropriation of goods while held by defendant under contract to sell them.—Wise v. Vaughan, 295 P. 126, 160 Wash. 505

92. Troy v. Rogers, 20 So. 999, 113 Ala. 131

93. Ind.—Summerland v. Automobile Funding Co., 148 N.E. 202, 84 Ind. App. 30
Mont.—McGinley v. Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1
Wash.—Epley v. Hunter, 281 P. 327, 154 Wash. 163
Wash.T.—Dawson v. Baum, 19 P. 46, 3 Wash.T. 464.
6 C.J. p. 504 note 64.

94. Miss.—State v. Fortinberry, 54 Miss. 316
Neb.—Storz v. Finkelstein, 69 N.W. 856, 50 Neb. 177.

95. Burkhalter v. Matteson, 265 P. 1108, 125 Kan. 778

Attachment held not wrongfully sued out so as to impose liability on the bond.—Wise v. Vaughan, 295 P. 126, 160 Wash. 505.

Counterclaim justified

Under a bond conditioned that plaintiff will pay all damages which defendant may incur by reason of the wrongful suing out of the attachment, defendant's suit or counterclaim on an attachment bond is justified if it is made affirmatively to appear that there was nothing due plaintiff when attachment was sued out, and that he had no reasonable cause for believing anything was due.—Crom v. Henderson, 175 N.W. 983, 188 Iowa 227.

Wrongful and oppressive

Where the bond is conditioned that the surety will pay all damages which may be sustained by defendant if the proceedings of plaintiff shall be wrongful and oppressive, if defendant is not indebted, or if the statutory grounds for attachment do not exist, the attachment is wrongful and oppressive, giving rise to liability on the bond.—National Surety Co. v. Jean, (C.C.A.Tenn.) 36 F.(2d) 462, 68 A.L.R. 1326.

96. U.S.—National Surety Co. v. Jean, supra
Ala.—Blackman v. Gilmer, 130 So. 192—Bradford v. Lawrence, 90 So. 809, 18 Ala.App. 138
Wash.—McAllister v. Hogue, 234 P. 657, 133 Wash. 664.

97. Curl v. Trimble, 1 Ky.Op. 195.

is not wrongfully sued out, and that there is no breach of the bond in this respect.[98] On the other hand, where the bond is conditioned that plaintiff will pay all damages defendant may incur by reason of the wrongful suing out of the attachment, if it appears that plaintiff had no reasonable grounds to believe that anything was due him, it has been held that the attachment was wrongful, giving rise to a right of action on the bond, irrespective of the fact that a statutory ground for attachment existed.[99] Where the proceedings prove to be wrongful and oppressive only in part, it has been held that this imposes no liability on the obligors on a bond conditioned that the proceedings shall not be wrongful or oppressive.[1]

Where the bond is conditioned that if defendant recover judgment, or the attachment be set aside by order of court, plaintiff will pay all costs that may be awarded defendant, and all damages which he may sustain by reason of the attachment, defendant is entitled to assess damages under the bond under two conditions, where defendant recovers judgment, or where the attachment is set aside, dissolved, or vacated.[2] The entry of a voluntary nonsuit, even though it be without prejudice, has been held to be equivalent to the dissolution, vacation, and setting aside of the attachment, as the attachment necessarily falls on the termination of the action adverse to plaintiff.[3] Where neither party received affirmative judgment and each bore his own costs in the action, the sureties were held liable under a bond conditioned to pay all costs that may be awarded defendant and all damages sustained by reason of the attachment if defendant recover judgment in the action.[4] Likewise, under a bond conditioned to pay all damages that defendant may sustain in the event plaintiff shall fail to recover in the case, the only conditions necessary to a recovery on the bond are failure on the part of plaintiff to recover in the case, and the sustaining by defendant of damages in consequence of the suing out of the attachment.[5]

In a bond conditioned to make it operative if judgment be given for defendant, "judgment given" means that a judgment is given by the court determining that plaintiff had no cause of action when the attachment was procured. It may be a judgment after trial on the merits, or it may be a judgment of dismissal. A judgment of dismissal entered pursuant to a stipulation of the parties settling and adjusting all matters in dispute between them does not give rise to liability on a bond so conditioned.[6]

A condition in an attachment bond that plaintiff will prosecute his action or suit to or with effect means with success,[7] and his failure to do so constitutes a breach of the condition.[8] Where defendant in attachment filed a voluntary petition in bankruptcy, the adjudication in bankruptcy, under the Bankruptcy Act, terminated the lien of the attachment, rendering further prosecution of the action impractical, and plaintiff's filing of his claim in the bankruptcy court is not such an abandonment of the attachment proceedings as to establish liability on such a bond without regard to the actual indebtedness.[9]

Under a bond given to secure payment of compensatory damages only, no cause of action arises where an attachment has been granted but no levy has been made;[10] and where the bond is conditioned to pay any damages that might be sustained by reason of the attachment, if the warrant was vacated, where there was no property within the jurisdiction on which to levy the attachment, and where defendant was a nonresident, defendant has suffered no damage on which a recovery may be had against the sureties.[11] On the other hand, where the bond secures defendant his costs and damages if he recovers judgment, the sureties on the bond are liable to defendant on his recovery of a judgment,

98. Harris v. White, 101 So 751, 212 Ala 54—Painter v Munn, 23 So 83, 117 Ala 322, 67 Am S R 170

99. Crom v Henderson, 175 N.W. 933, 188 Iowa 227.

1. Waring v. Fletcher, 52 N E 203, 152 Ind 620—6 C J. p 500 note 22

2. Frick Co v Deiter, 167 S E. 499, 168 S C. 289.

3. Frick Co v Deiter, supra

4. Woodruff v Maryland Casualty Co, (Cal App) 35 P (2d) 628

5. Levin v American Furniture Co., 66 S E 888, 133 Ga. 670.

Dismissal

Under a bond conditioned to pay in case it should be finally determined that plaintiff was not entitled to an attachment, liability thereon arises on a dismissal of the action and a dissolution of the attachment—St John v United States Fidelity & Guaranty Co., 182 P. 128, 56 Mont 197

6. Downs v American Surety Co of New York, 156 N W 5, 132 Minn 201.

7. State ex rel Pinkley v. Young, 172 S W 431, 186 Mo App 258

8. Street v Browning, 87 So. 527, 205 Ala 110

The import of a failure to prosecute to effect is that there was no just cause of action—Street v. Browning, 87 So 527, 205 Ala. 110.

Rendering of personal judgment alone has been held to be the equivalent to a dismissal or discharge of the proceedings in attachment, and a failure to prosecute the proceedings according to the condition of the bond—Sannes v. Ross, 5 N E 699, 105 Ind 558

9. National Surety Co v. Jean, (C.C A Tenn) 36 F (2d) 468, 68 A L R 1326

10. Massachusetts Bonding & Insurance Co. v. U. S Conservation Co, 122 S E. 728, 31 Ga App. 716—6 C J. p 499 note 18.

11. Saltzman v. Indemnity Ins. Co. of North America, 274 N Y S 806

regardless of whether or not a levy has actually been made.[12]

Prior agreement of parties. An undertaking or bond in an attachment proceeding constitutes an original and absolute contract on the part of the sureties, and liability thereon is not dependent or contingent on any agreement entered into between plaintiff and defendant prior to the issuance of the writ, and not made a part of such bond or undertaking.[13]

Election of defendant as to which bond he will sue on. If several attachments in different actions levied on the same property are all discharged, the debtor may elect to bring an action for damages against the obligors on any particular bond.[14]

Where the cause of action is assigned after the execution of an attachment bond by plaintiff and his surety, the bond goes along with the action as continuing security and the surety continues liable for the substituted plaintiff.[15]

Termination of liability. The surety's liability on the bond is not terminated by dissolution of the attachment,[16] nor is this liability avoided merely because defendant may have the right to sue for abuse of process or malicious prosecution.[17]

b. Construction of Bond

While the language of an attachment bond should be construed strictly in favor of the obligors, the obligation of the sureties should be, if possible, construed as coincident with the obligations imposed by statute.

While it has been held that the language of an attachment bond is to be construed strictly in favor of the obligors,[18] it has also been held that the obligation of the surety under the bond must be construed as being coincident with the obligations imposed by the statute, unless such a construction does violence to the language of the bond.[19]

§ 164. Rights and Remedies of Sureties

Where the surety on one attachment bond has paid the entire damages awarded, he may demand contribution from sureties on other bonds if given for the same purpose.

Where there are several bonds executed for the identical subject matter, and the surety on one of them has paid the entire damages, he has a right to exact contribution from the sureties on the other bonds; but such surety has no right of subrogation or contribution as against the sureties on a bond in error, given to continue in force the original attachment pending the determination of the proceedings in error.[20]

§ 165. Discharge of Sureties

The sureties on an attachment bond are discharged where the terms of the bond are changed, where the cause of action is altered to their prejudice, or where the claim is settled or the principal released.

In accordance with the rules governing the termination and release of a surety's liability generally, as discussed in the title Principal and Surety § 116 et seq [50 C.J. p 93 note 29 et seq], the sureties on an attachment bond are discharged where the terms of the bond are changed,[21] where there has been a material alteration of the writ of attachment after its issuance,[22] where the original action has been settled and a stipulated judgment of dismissal has been entered,[23] or where an amendment is permitted in the action in which the bond was given, increasing the liability of the sureties or changing the character of the action.[24] However, the sureties are not discharged by an amendment which does not change the original cause of the action[25] or increase their liability,[26] even though they had no notice thereof.[27]

Although a surety is ordinarily discharged by the discharge of his principal,[28] this rule does not apply

12. Krall v. Howard, 76 N Y S 972, 37 Misc 832
13. Heine v Wright, 244 P 955, 76 Cal App 338
14. Viele v Edwards, 4 Ky L 903
15. Brown v Tidrick, 85 N W. 185, 14 S D 249, 86 Am S R 754.
16. Lanasa v. Beggs, 151 A 21, 159 Md 311.
17. Crom v Henderson, 175 N.W 983, 188 Iowa 227
18. U S —National Surety Co v Jean, (C C A Tenn) 36 F (2d) 468, 68 A.L.R. 1326.
Ind —Waring v Fletcher, 52 N E 203, 152 Ind 620
19. Downs v. American Surety Co of New York, 156 N W. 5, 132 Minn 201.
20. Bradford v Mooney, 2 Cinc Super (Ohio) 468
21. Quillen v Arnold, 12 Nev 234
22. Starr v Lyon, 5 Conn 538
23. Minn —Downs v American Surety Co of New York, 156 N.W. 5, 132 Minn 201.
Neb —Johnson v. Smith, Hultin, Anderson's Co , 246 N W. 230, 124 Neb 217.
24. Corum v. Superior Court in and for Alameda County, 300 P. 837, 114 Cal App 741—6 C.J. p 504 note 72.
25. Corum v. Superior Court in and for Alameda County, supra—6 C.J p 504 note 73.
26. Gregory v. U. S Fidelity & Guaranty Co , 185 P. 35, 105 Kan. 648, rehearing denied 185 P 1041, 105 Kan 648—6 C.J. p 504 note 74

Reducing amount

An amendment to the complaint which merely reduces the amount of the indebtedness sued on does not discharge the sureties.—Corum v. Superior Court in and for Alameda County, 300 P. 837, 114 Cal App 741.

27. Gregory v. U. S Fidelity & Guaranty Co., 185 P 35, 105 Kan 648, rehearing denied 185 P 1041, 105 Kan. 648—6 C J. p 504 note 75
28. Minn —Downs v American Surety of New York, 156 N W. 5, 132 Minn. 201.
Okl —Munson v. Beck, 214 P. 705, 89 Okl. 251.

where the discharge of the principal is by operation of law rather than by act of the parties.[29]

The mere fact that the attachment is subsequently discharged does not release the surety from liability under a bond conditioned to pay all damages which may be sustained by defendant if the proceedings of plaintiff shall be wrongful and oppressive.[30]

On consolidation of causes for trial, the liability of the surety will not be increased by the judgment that may be rendered, and, therefore, such consolidation will not release the surety from liability on the bond.[31]

An assignment of the cause of action and the substitution of the assignee as plaintiff has been held no defense to an action on the bond, which, it is considered, goes along with the action as continuing security.[32]

§ 166. Enforcement of Liability

As will be seen in the following sections, the liability on an attachment bond is, in the absence of a statutory provision to the contrary, enforceable though the medium of an ordinary civil action ex contractu.

§ 167. —— Nature and Form of Remedy

For breach of an attachment bond an action ex contractu arises thereon.

Where the statute requires plaintiff in attachment to give bond conditioned to pay all damages caused by the attachment, if it is wrongfully sued out, an action may, of course, be maintained on the bond for such damages as may be occasioned by a breach of the conditions of such bond.[33] Such a suit on an attachment bond is an action ex contractu in nature.[34]

In some jurisdictions, defendant in attachment proceedings may bring a separate action on the bond, or counterclaim on the bond in the original action;[35] but in other jurisdictions the statutes contemplate that there shall be a separate and independent action on the bond, rather than a counterclaim thereon in the original proceedings, and this rule applies to interpleaders as well as to defendants in attachment.[36] Where a counterclaim is permissible, the mere fact that the attachment defendant may have other remedies, such as an action for malicious prosecution, does not defeat his right to counterclaim on the bond in the original proceedings.[37]

A recovery cannot be had under the common counts for a breach of an attachment bond, where the only obligation assumed by defendant was a conditional one.[38]

§ 168. —— Right of Action

In the absence of a statute to the contrary, a right of action on an attachment bond, on breach thereof, arises only in favor of those named therein as obligees

An action on the bond will ordinarily lie only in favor of those named therein as obligees.[39]

An action on the bond cannot, it has been held, be maintained by the assignee of defendant in attachment,[40] but it has been held that the assignee may maintain an action on the bond against the principal where the assignment was made prior to the attachment.[41] Under a statute permitting suit in the name of the real party in interest, the assignee of an attachment bond may sue thereon in his own name,[42] but in such an action defendant may have the benefit of any set-off he would have had against the assignor.[43]

Officer levying attachment. Under the ordinary attachment bond conditioned for the payment of any damages which defendant in the attachment suit may suffer by reason of the attachment, if it proves to have been wrongful, it would seem clear that the officer levying the attachment can have no right of action on the bond; and a bond, conditioned to pay all damages "sustained by any person by reason of the suing out" of an attachment, has been held not to

29. Munson v. Beck, supra.

Failure to present claim in time

Where the principal on an attachment bond is discharged by failure to present a claim against such person as administratrix within the time limited by law, such discharge of principal by operation of law will not discharge the surety—Munson v. Beck, 214 P. 708, 89 Okl 251

30. National Surety Co v. Jean, (C C A Tenn) 36 F.(2d) 468, 68 A L R. 1326.

31. Gregory v. U. S. Fidelity & Guaranty Co, 185 P 35, 105 Kan 648, rehearing denied 185 P. 1041, 105 Kan. 648.

32. Brown v. Tidrick, 85 N W. 185, 14 S D 249, 86 Am S R 754

33. Md—L. J Appel Sons v State, to Use of Townsend, 175 A. 850. Ohio—Munro Hotel Co. v. Brough, 26 Ohio Cir Ct (N S) 185 Pa—Dyer v. Sharp, 2 Pa Co. 216. 6 C J p 507 note 6.

34. State ex rel. Myers v Mathieson, 232 S.W. 181, 207 Mo App. 676—6 C.J. p 507 note 6 [d].

35. Thielen v Schechinger, 230 N W. 516, 210 Iowa 224—Security Sav Bank v. Cumprich, 203 N W. 24, 199 Iowa 1061—Crom v Henderson, 175 N.W 983, 188 Iowa 227.

36. State ex rel Stevenson v. American Surety Co, (Mo App) 74 S W. (2d) 1094

37. Crom v Henderson, 175 N.W. 983, 188 Iowa 227

38. Gallup v Thomas B Jeffery Co., 85 A. 374, 86 Conn 308

39. L J. Appel Sons v State, to Use of Townsend, (Md) 175 A 850—6 C J p 504 note 61

40. Hopewell v McGrew, 70 N W. 397, 50 Neb. 789—6 C J, p 514 note 24.

41. Claypoole v. Pope, 9 Ohio Cir Ct. 309, 6 Ohio Cir Dec 142

42. State v. McHale, 16 Mo App 478.

43. State v. McHale, supra.

inure to the benefit of the officer who levied the attachment and took care of the property.[44] However, in a case where the attachment bond was conditioned for the payment of costs in case plaintiff fails to recover, it was held that the sheriff could recover thereon the expenses of keeping the attached property.[45] The right of third persons to bring action against the sureties on an attachment bond will be hereinafter considered in § 397.

Liability on the bond has already been considered in § 163.

§ 169. —— Conditions Precedent

Performance or compliance with conditions inserted in the bond is a condition precedent to bringing suit on the bond.

It is obvious that in order to impose liability on an attachment bond, there must be a compliance with, or performance of affirmative conditions inserted in the bond, in addition to the circumstances giving rise to liability on the bond, as already considered in § 163. Accordingly, under a bond conditioned that plaintiff will pay all costs and damages awarded defendant in case he recovers judgment, it has been held that a demand must be made on plaintiff for such payment before an action would lie against the sureties on the bond.[46] In the absence of a condition that plaintiff will pay on demand, or will pay any judgment that may be obtained against him, however, it is not necessary to make demand of the principal on an attachment bond before bringing action against the sureties on such bond.[47] Likewise, whether or not a judgment against plaintiff in attachment is a condition precedent to an action on the bond depends on the condition of the bond in question. If the bond is conditioned to pay such damages as may be sustained or caused by the wrongful attachment, it is not necessary that an independent action against attachment plaintiff should be first brought before suing on the bond,[48] but, if the bond is conditioned to pay such damages as may be awarded or recovered in any suit brought against attachment plaintiff, such suit is a condition precedent to any liability on the bond.[49]

Where the bond is conditioned to pay such damages as are awarded against plaintiff, a preliminary action against plaintiff in attachment has been considered necessary before an action can be brought on the bond.[50]

Where cause of action assigned after bond given. Where, after the giving of an undertaking by plaintiff in attachment, the cause of action is assigned, and the assignee substituted as plaintiff, it is not necessary that defendant, before proceeding against the surety on the undertaking for the costs, attempt to collect them from original plaintiff, the assignee having, by his substitution as plaintiff, become primarily liable therefor.[51]

Notice. It has been held that, in proceedings to collect on an attachment bond, whether by rule or by action, notice of the proceedings is necessary;[52] but service on plaintiff of a notice of the order vacating the attachment has been held not to be a condition precedent to the maintenance of a suit on the attachment bond.[53]

Assessment of damages in main action. Even though the statute authorizes the assessment of damages in the main action on the dissolution of the attachment, it is not a condition precedent to the right to bring suit on the bond that damages should be so assessed.[54]

Exhausting indemnity. An owner of property converted in attachment proceedings is not bound to exhaust his remedy by indemnification from third

44. Mitchell v. Chancellor, 14 W Va 22

45. Read v. Williams, 22 S E 213, 95 Ga 108

46. Cal—Morgan v. Mennes, 60 Cal 341.
Mont—Pinney v. Hershfield, 1 Mont. 367

47. Seattle Crockery Co. v. Haley, 33 P 650, 6 Wash 302, 36 Am S R 156—6 C J p 509 note 21

48. National Surety Co v Love, 182 N W 490, 105 Neb 855—6 C.J. p 509 note 27.

49. Sledge v Lee, 19 Ga. 411—6 C.J. p 509 note 28.

50. Offterdinger v. Ford, 24 S E 246, 92 Va. 636

Costs and damages
Where the bond is conditioned to pay all costs in the suit and such damages as shall be awarded against plaintiff "in any suit which may hereafter be brought for wrongfully suing out" the attachment, proceedings on the bond may be instituted for costs without a preliminary action against the attachment plaintiff, but no action can be brought on the bond for damages sustained by the wrongful attachment until there has been an award of damages against the attachment plaintiff—McLuckie v. Williams, 12 A. 1, 68 Md 262.

In Illinois
(1) Under a bond so conditioned it has been held that a preliminary action is not necessary.—Churchill v. Abraham, 22 Ill. 456—Packer v. Phillips, 33 Ill.App. 120.

(2) It has been held in the appellate court, however, that where plaintiff in attachment was not one of the obligors on the bond, a preliminary action against him was necessary before action would lie against the sureties—Wilson v. Isom, 3 Ill.App 246.

51. Brown v. Tidrick, 85 N W. 185, 14 S D 249, 86 Am S R 754

52. Thompson v Arnett, 64 S W. 735, 23 Ky L. 1082.

53. Epstein v. U. S Fidelity, etc, Co, 60 N Y S 527, 29 Misc 295, reversing 58 N Y.S. 1135, 28 Misc. 440.

54. Boatwright v. Stewart, 37 Ark. 614.

parties before suing on the bond given to indemnify him.[55]

Obtaining possession of bond. Where a right of action has accrued on an attachment bond, attachment defendant need not ask leave of the court to claim possession of the undertaking[56] or require the clerk with whom the undertaking is filed in accordance with the statute to deliver it to him[57] before he can commence an action thereon.

Payment of damages caused by attachment. It is usually held that, where the damages claimed are for amounts which defendant in attachment must pay out by reason of the attachment, it is not necessary that he should have actually paid out such amounts before bringing an action on the bond, but the fact that he has become liable therefor is sufficient.[58]

§ 170. —— Defenses

a. In general
b Res judicata
c. Acts or statements of defendant in attachment
d Ownership of property
e Good faith and probable cause
f. Defense limited to grounds of affidavit
g Return of property or proceeds of sale
h. Other levies

a. In General

Matters which render the bond invalid, or defeat liability thereon, constitute a defense to an action on the bond.

Of course, defects or omissions in the bond or in the execution of the bond which render it unenforcible or invalid, as discussed in sections 147–158, 163, are a defense to an action on the bond. Accordingly, it is a sufficient defense to an action on an attachment bond that the bond is void,[59] that action thereon is premature,[60] or that plaintiff in attachment recovered final judgment in the attachment proceedings as distinguished from the main action.[61]

On the other hand, it has been held not a defense that other persons than plaintiff procured the undertaking to be executed without his privity,[62] that the order vacating attachment was duly appealed from, and that the appeal still remains in full force and undetermined, it not being further alleged that a stay of proceedings had been ordered, or such other facts and circumstances in connection with it as legally accomplished that result,[63] or that there was a chattel mortgage on the property.[64] Also, it is not a defense to an action on the bond that plaintiff misrepresented the legal effect of the bond,[65] nor, in an action on an undertaking in attachment, is it a defense as to damages arising from proceedings in garnishment that there was personal property attached more than sufficient to pay the debt, interest, and costs.[66] The fact that the attachment was vacated because of the negligence of the attachment plaintiff's attorneys is no defense to a suit against the sureties on the bond.[67]

Where defendant in attachment was awarded judgment to the effect that the attachment had been wrongfully sued out, in an action on the bond for damages sustained thereby, it is immaterial whether or not a claim had been interposed by a third person in the attachment suit.[68]

Compliance with unconstitutional statute It is no defense to an action for wrongful attachment that the issue and execution of a void writ of attachment was in strict compliance with a statute where such statute was unconstitutional.[69]

In actions on bonds in two suits, the recovery of the full penalty of the bond in one action does not defeat the recovery of the full penalty of the bond in another action, although the items in the bills of particulars in each case are identical, where the recovery in each case is less than the total amount claimed.[70]

Illegality of claim sued on The illegality of the claim, in aid of which the attachment was sued out and a bond given, is no defense to an action on the bond.[71]

55. State v Dodd, 4 Mo App 598.
56. Bruce v. Coleman, 1 Handy 515, 12 Ohio Dec (Reprint) 265.
57. Freeman v Young, 26 N.Y Super. 666—6 C J p 509 note 33
58. Kan —Burkhalter v. Matteson, 246 P 673, 121 Kan. 231
N Y —Elsman v. Glen Falls Indemnity Co., 262 N.Y.S. 642, 146 Misc. 631
6 C.J. p 509 note 34.
59. Benedict v. Bray, 2 Cal. 251, 56 Am D 332
Bond not sealed
It has been held that the sureties on the attachment bond are not liable thereon when the bond is unsealed —State v. Thompson, 49 Mo 188.
60. Guthrie v. Fisher, 6 P. 111, 2 Idaho (Hasb) 111.
61. Waring v Fletcher, 52 N E 203, 152 Ind. 620—6 C J. p 510 note 46
62. Coleman v Bean, 14 Abb Pr (N Y.) 38, affirmed 1 Abb Dec 394, 3 Keyes 94, 32 How Pr. 370.
63. Ferber v Smith, 6 N Y S. 446, 3 Silv Sup 59—Powell v Bursky, 30 N Y S 480, 39 Misc 533
64. Hartmann v. Hoffman, 72 N.Y.S. 982, 65 App Div 443—6 C J. p 510 note 52
65. Lott v. Porter, 133 S W. 180, 97 Ark. 97.
66. Uhrig v. Sinex, 32 Ind 493
67. Powell v Bursky, 30 N Y S 480, 39 Misc 533
68. Penney v. Burns, (Ala.) 159 So 835.
69. Merritt v. St Paul, 11 Minn 223
70. State v. United States Fidelity & Guaranty Co, 95 S E. 783, 81 W Va 749.
71. State v. Fargo, 52 S.W. 199, 151 Mo. 280—6 C J. p 513 note 5.

Irregularities. Irregularities in attachment proceedings are not available as a defense in an action on the attachment bond[72] It has, accordingly, been held that it cannot be pleaded or proved as a defense that no writ of attachment had ever been sued out;[73] that no affidavit had been filed in the attachment proceeding,[74] that attachment plaintiff failed to file a new affidavit and undertaking on adding a new cause of action to the complaint;[75] that the affidavit on which the writ was issued disclosed no statutory ground for attachment;[76] that there was a misnomer of attachment defendant in process served on him;[77] that the levy was invalid,[78] or that the return thereon was invalid.[79]

It is not a defense to an action on a bond that it was not executed until after the issue of the writ, for which reason the writ was quashed,[80] that the penalty of the bond was for a slightly larger amount than required by statute,[81] or that the person executing the bond does not appear to have been the agent of attachment plaintiff.[82] It is no defense that plaintiff's first name was incorrectly stated in the condition of the bond, where it was correctly stated in the caption thereof.[83] In enforcing an attachment bond by rule, it is not necessary that the surety in response to the rule should urge that it was not a statutory bond where such fact is made to appear from the record.[84]

When the bond does not run to all persons who may be injured by the attachment, as required by statute, the surety has been held to be estopped to deny that the bond runs in favor of such persons, and to be liable to them in an action on the bond[85]

b. Res Judicata

If the attachment has previously been judicially declared wrongful, the propriety of the attachment cannot be set up as a defense to the bond; but, if a dissolution of the attachment is taken as only prima facie proof that it was wrongful, the propriety of the attachment may be raised as a defense.

Where the issue as to the rightfulness of an attachment has been decided in the main action adversely to plaintiff in attachment, he cannot, when made a defendant in an action on the attachment bond, set up as a defense that the matters stated in the affidavit were true, or that the proceedings in attachment were not wrongful;[86] but where an action on the bond is brought before the issue of the rightfulness of the attachment has been decided elsewhere, the defense may properly be based on a contention that grounds of attachment did actually exist[87] Where dissolution of the attachment is considered only as prima facie evidence that it was rightfully dissolved, dissolution of the attachment does not preclude an investigation of whether the attachment was wrongful in an action on the bond[88] The overruling of a motion to dissolve an attachment, made under a statute authorizing a motion to discharge for insufficiency of statement of cause or any other cause making it apparent of record that the attachment should not have been issued, or should not have been levied on a part or all of the property seized, is not such a judicial determination of the propriety of the attachment as to render the matter res judicata in a subsequent proceeding by the attachment defendant for damages caused by the wrongful attachment.[89]

c. Acts or Statements of Defendant in Attachment

Acts or statements of defendant which do not defeat liability on the bond are not a defense to an action thereon.

Of course, acts or conduct of defendant, which caused the injury complained of, are a defense to an action for damages caused by such injury.[90]

72. Mont.—Willard v Federal Surety Co, 8 P (2d) 633, 91 Mont 465 S D—Foster v Dischner, 212 N.W 506, 51 S D 102
6 C J p 512 note 76

The doctrine of estoppel prevents the obligors on an attachment bond from attacking collaterally, in an action on the bond, the regularity of the original proceedings.—Willard v Federal Surety Co, 8 P (2d) 633, 91 Mont 465—6 C J p 512 note 76 [a]

73. Love v Kidwell, 4 Blackf (Ind) 553

74. Trentman v. Wiley, 85 Ind 33.

75. Waring v. Fletcher, 52 N E. 203, 152 Ind 620.

76. McLean v. Wright, 25 So. 45, 137 Ala 644, 97 Am.S.R. 67.

77. Hedrick v. Osborne, 99 Ind 143

78. Willard v. Federal Surety Co, 8 P (2d) 633, 91 Mont 465—6 C J. p 512 note 82

Insufficient levy on profit a prendre

Where the attachment on a profit a prendre was levied in the manner provided by law for levies on interests in real property, an obligor on the attachment bond should not have been permitted to question whether the levy was legal, and whether it should have been made as on personal property.—Willard v. Federal Surety Co, 8 P (2d) 633, 91 Mont 465

79. State v Cowell, 102 S W 573, 125 Mo App 348—State v. Goodhue, 74 Mo App 162

80. Sumpter v Wilson, 1 Ind 144.

81. Hibbs v Blair, 14 Pa 413.

82. Massachusetts Bonding & Ins Co v U S Conservation Co., 114 S E 62, 29 Ga App 80—6 C J. p 512 note 85

83. State v. Yount, 172 S W 431, 186 Mo App 258.

84. Kerty v Miles, 6 Ky Op 609

85. Omaha Nat Bank v U S Fidelity & Guaranty Co, 244 Ill App. 204

86. Ind.—Waring v. Fletcher, 52 N. E 203, 152 Ind 620.
Mo.—Hayden v Sample, 10 Mo 215. 6 C J. p 511 note 59.

87. Stewart v. Cole, 46 Ala. 646.

88. Sloan v. Langent, 32 P 1015, 6 Wash 26

89. Cox v. Allen, 59 N W 335, 91 Iowa 462—6 C J p 510 note 53

90. **Purchase by himself**

Where defendant in an attachment claims damages for the illegal issuing of the writ, one item of which is

It is no defense to an action on an attachment bond that defendant neglected to bond the property,[91] or was insolvent or suffering pecuniary embarrassment.[92]

While a debtor's consent to an attachment may not create a ground therefor, it is a complete defense to an action by him for wrongful attachment.[93] The mere fact that defendant agreed to a sale of the attached property before final judgment,[94] or, being present at the sale under attachment, consented that the balance of the proceeds, after satisfaction of the judgment and costs, should be applied on a mortgage held by the attaching creditor,[95] does not constitute a defense to the bond. An agreement to a sale of the attached property, to constitute a defense to an action on the bond, must amount to consent by defendant in attachment to a judgment on attachment, and, therefore, to a waiver by him of any damages caused thereby. Accordingly, a defendant in attachment proceedings who fails to assail the validity of the attachment or the truthfulness of the affidavit on which it is based, and who voluntarily executes a bill of sale of the attached goods for the use and benefit of plaintiff, the attachment thereupon being dismissed, ratifies the attachment proceedings and cannot thereafter proceed against the attachment plaintiff or the surety on the bond for damages claimed to have been sustained by reason of wrongful attachment.[96] On the other hand, it has been held that, if an agreement to a sale of the attached property amounted to consent by defendant to a judgment on the attachment, and, therefore, to a waiver by him of damages, this effect should have been given to it in the attachment proceedings by a judgment for plaintiff in attachment. Under such circumstances, where the agreement did not result in a judgment for plaintiff in attachment, it was held that the agreement could not afterward be relied on as a defense to a suit on the attachment bond.[97]

d. Ownership of Property

Ordinarily, the fact that the defendant in attachment was not the owner of the property seized will be a defense to an action for wrongful attachment.

It may be shown in defense to an action on an attachment bond that defendant in attachment was not the owner of the property levied on,[98] but the fact that, prior to the levy of attachment, defendant conveyed the legal title, is no defense where defendant retained the equitable title and a right to reconveyance.[99]

e. Good Faith and Probable Cause

Plaintiff's good faith in suing out a wrongful attachment is no defense in an action on the bond for wrongful attachment, but, under a permissive statute, probable cause may be a defense thereto.

If an attachment was in fact wrongfully sued out, the fact that plaintiff in attachment acted in perfect good faith furnishes no defense as against a recovery of the actual damages resulting therefrom.[1] Where, under the statute, a lack of probable cause for suing out an attachment is necessary to authorize a recovery therefor, the fact that there was probable cause for suing out the writ is, of course, a complete defense;[2] but, where the statutes allow a recovery if the attachment was wrongful, although probable cause therefor existed, the existence of probable cause for suing out the writ is no defense against a recovery of actual damages,[3] although it may avail to prevent a recovery of exemplary or punitive damages.[4]

the alleged sacrifice of his goods seized and sold thereunder, and it appears that the low appraisement of the goods was procured by his own contrivance, and he was himself the purchaser of the goods at the sheriff's sale through a person interposed, and also concealed a part of the goods while under seizure, which in consequence were not included in the sale, he cannot recover—Yale v. Routh, 38 La Ann 894

91. McCarthy Co v Boothe, 88 P. 175, 2 Cal App 170—6 C J. p 511 note 66.

92. Lockhart v Woods, 38 Ala 631—6 C J. p 511 note 69

93. Baines v Ullman, 9 S W 543, 71 Tex 529—6 C J p 511 note 70.

94. Parker v. Nolan, 139 S E. 429, 37 Ga App 205

95. Walker v Fetzer, 34 S W. 536, 62 Ark. 135.

96. Mosher v. Beselin, (Neb.) 261 N W 126

97. Parker v Nolan, 139 S.E 429, 37 Ga App 205

98. Ala.—Watts v Rice, 75 Ala 289
Ga.—Massachusetts Bonding & Insurance Co v. U. S Conservation Co, 122 S E 728, 31 Ga App 716
Iowa—Mason v Rice, 19 N W. 897, 23 N W 384, 66 Iowa 174
Kan.—Bratton v. McReynolds, 266 P 31, 125 Kan 665
Mich.—Tomkovich v Mistevich, 192 N W 639, 222 Mich 425
Mo.—State v Lichtman, 168 S W 367, 184 Mo App 225.
N Y.—Hoffman v. Hand, 55 N Y S 955, 26 Misc 370
6 C J p 510 note 45, p 512 note 89

99. Gregory v U. S Fidelity & Guaranty Co, 185 P. 35, 105 Kan 648, rehearing denied 185 P. 1041, 105 Kan. 648.

1. U S.—Anvil Gold Mining Co v Hoxsie, (Alaska) 125 F 724, 60 C C A 492
Ala.—Birmingham Dry Goods Co v. Finley, 26 So. 138, 122 Ala 534
Wash.—Kimball v. Betts, 169 P. 849, 99 Wash 348.
6 C J p 512 note 91.

2. Iowa.—Vorse v Phillips, 37 Iowa 428.
Wash.—Seattle Crockery Co. v. Haley, 33 P 650, 6 Wash. 302, 36 Am. S R 156
6 C.J p 512 note 94
Wrongfulness of attachment in an action for wrongful attachment see infra § 517.

3. Ala.—Metcalf v. Young, 43 Ala. 643
N M.—Schofield v. Terr., 56 P 306, 9 M. 526
6 C J. p 512 note 96.

4. Metcalf v Young, 43 Ala. 643—6 C.J. p 513 note 97.

Advice of counsel. The fact that the writ was sued out on the advice of counsel is under no circumstances a defense to a claim for actual or compensatory damages,[5] and, although advice of counsel may constitute a defense in so far as punitive or exemplary damages are claimed, it can have this effect only where it was based on a full and fair statement of the facts of the case,[6] and was followed in good faith.[7]

f. Defense Limited to Grounds of Affidavit

Ordinarily, the defendant cannot justify the attachment except on the grounds stated in his affidavit for attachment.

The general rule is that in an action for wrongful attachment the inquiry is limited to the grounds of attachment alleged in the affidavit, and if these are found not to exist or not to be sufficient, the existence of other grounds which are sufficient furnishes no defense;[8] but in Alabama the courts take the view that if any sufficient ground for attachment existed, the attachment is not wrongful and no actionable injury results therefrom, and hence, the rule is that the existence of any ground of attachment is a complete defense, even though such ground is different from that alleged in the affidavit.[9]

g. Return of Property or Proceeds of Sale

An offer to return, to be a defense, must be made in good faith, and with present ability to perform, and a credit for the proceeds of a sale of the attached property is no defense where the attachment defendant does not consent thereto.

To be effective as a defense to an action on an attachment bond, an offer to return the attached property must be made in good faith, and with present ability to perform.[10]

Defendant in an action on the bond cannot be permitted to show as a defense that his judgment in the attachment action allowed defendant therein credit for the proceeds of the sale of property attached, where such credit does not appear from the record to have been made with the consent of the debtor.[11] This rule is grounded in the policy of the statutes, to the end that the restraints imposed by statute to prevent abuse of process be not rendered useless, and that the remedy provided by statute be not a means of oppression.[12]

h. Other Levies

The fact that there are other levies on the property is no defense to an action on a bond for wrongful attachment.

It is no defense to an action for a wrongful attachment that other attachments were levied on the property of attachment defendant at the time of the attachment complained of.[13] This is true even where the prior claim is for more than the value of the property seized.[14]

§ 171. —— Jurisdiction and Venue

Generally, the court in which the attachment proceedings were instituted has jurisdiction of an action on the bond given in such proceedings, and an action may be maintained on a bond issued in another state

Ordinarily, the court to which an attachment is returnable has jurisdiction of an action on the attachment bond.[15] It has been held that in an action for the wrongful and malicious attachment of goods, the owner was not compelled to elect to sue the plaintiffs in attachment for the wrongful act independent of the bond, or sue them and their surety on the bond, but he might sue the plaintiffs in attachment independent of the bond and join the surety, and, having done so and demanded exemplary damages of such plaintiffs to a sum within the jurisdiction of the court, the surety could not successfully plead to the jurisdiction because his liability on the bond was less than the minimum sum for which the court has jurisdiction.[16]

Venue. It has been held that an action may be maintained on the bond in one state for the wrongful suing out of an attachment in another state.[17]

5. Harris v. White, 101 So 751, 212 Ala 54—6 C J p 513 note 1.

6. Harris v. White, supra—6 C J. p 513 notes 2, 3.

7. Ala.—Baldwin v. Walker, 10 So. 391, 94 Ala 514.
Iowa.—Union Mill Co. v Prenzler, 69 N W. 876, 100 Iowa 540—Raver v Webster, 3 Iowa 502, 66 Am D. 96.

8. Ringen Stove Co. v. Bowers, 80 N W. 318, 109 Iowa 175—6 C.J. p 513 note 98
Liability on bond see supra § 163

9. Harris v. White, 101 So 751, 212 Ala. 54—6 C J p 513 note 99.

10. Ward v. Massachusetts Bonding & Insurance Co., 208 P 188, 57 Cal. App 623

11. Painter v. Munn, 23 So 83, 117 Ala 322, 67 Am S R 170—Bradford v Lawrence, 90 So 809, 18 Ala. App 138—6 C J p 510 note 50.

12. Bradford v. Lawrence, supra.

13. National Surety Co v. A C Fry Co, 149 P. 637, 86 Wash. 118—6 C. J. p 513 note 8.

14. National Surety Co. v. A. C. Fry Co, supra
Reason stated
"The fact, if it be a fact, that the Troughton claim was more than the value of the property, was immaterial. Troughton might have released his attachment or might have been unable to sustain his claim, in either of which events the Fry & Co. attachment, assuming that it was subsequent to the Troughton attachment, would still have held the property."—National Surety Co. v. A C. Fry Co., 149 P. 637, 639, 86 Wash. 118.

15. Continental Nat Bank v. Folsom, 3 S E 269, 78 Ga. 499—6 C.J. p 514 note 11.

16. Harkleroad v Leonard, 67 S.W. 127, 28 Tex.Civ App 133

17. Wiley v Trainwick, 14 Tex. 662—6 C.J. p 514 note 14.

§ 172. —— Time to Sue and Limitations

Ordinarily, an action on the bond may be brought after final judgment in the attachment proceedings and within the statute of limitations.

Although an action on attachment bond may not be maintained, in some jurisdictions, until final judgment is had in the original action,[18] yet, where defendant in the original action recovered judgment for costs, which were paid, and an appeal was taken, the action on the attachment bond, brought pending appeal, is not premature, because such satisfaction of judgment terminates the original action.[19]

Where an attachment has been vacated prior to the institution of an action for damages for a seizure of property thereunder, such action cannot be considered as having been prematurely brought because, after it was commenced, the order vacating the attachment is vacated, the latter order being in turn vacated by a subsequent order.[20]

Since the statute of limitations begins to run from the time when the cause of action accrues, where the cause of action on the bond is deemed to accrue at the time of the seizure of the property, the statute runs from that time,[21] while if the right to proceed either on, or independently of, the attachment bond does not accrue until the dissolution of the attachment, or until the final determination of the main action, the statute will not commence to run until the happening of such event.[22]

§ 173. —— Parties, Process, and Appearance

a. Plaintiffs in general
b. Joinder of plaintiffs
c. Defendants

a. Plaintiffs in General

Ordinarily the defendant in attachment is the proper party plaintiff in an action on the bond

In accordance with the rules pertaining to actions on bonds generally, as discussed in the title Bonds § 106 [9 C.J. p 85 note 54 et seq], in the absence of a statute to the contrary the attachment defendant is the proper party plaintiff to bring action for damages resulting from a wrongful attachment, where such action is based on a bond running to him as obligee;[23] and, indeed, it has been held that, where the bond is taken in the name of the state to the use of attachment defendant, an action thereon may be brought by the attachment defendant in his own name.[24]

It is proper for the obligees to bring suit on the bond in the form in which they were named in the bond.[25]

b. Joinder of Plaintiffs

As a general rule, where there are several obligees in an attachment bond who have sustained injury because of the attachment, they should all join in an action thereon.

Where all the obligees named in the bond have a common interest and have sustained a joint injury, it cannot be doubted that they may join in an action on the bond,[26] and furthermore it is difficult to escape the conclusion that in such case they must join.[27]

If each obligee has sustained an injury in his own right, all the obligees may join in an action on the bond,[28] and it has been held that they must join;[29] irrespective of the fact that each obligee has employed different counsel to represent his respective interests and incurred separate counsel fees.[30] It has also been laid down without qualifications that in an action by one of two joint obligees on a bond to recover the full amount of the bond the other is a necessary party to the action.[31]

It has been held that where more than one obligee is named in the attachment bond, but all of the obligees named do not suffer injury by reason of the wrongful attachment, an action on the bond may,[32] and in some states must,[33] be brought in the name of all the obligees for the benefit of the obligee or obligees who have actually been injured; but there is also authority for the view that in such case the obligee or obligees who have actually sustained in-

18. Maxwell v. Griffith, 54 P. 938, 20 Wash 106

Where appeal pending

Where there is an appeal pending from final judgment and the order dissolving the attachment, an action brought pending appeal is premature —Maxwell v. Griffith, 54 P. 938, 20 Wash. 106.

19. Morneault v. National Surety Co, 174 P. 81, 37 Cal App. 285.

20. Epstein v. U. S Fidelity, etc., Co, 60 N Y S 527, 29 Misc. 295, reversing 58 N.Y S. 1135, 28 Misc 440.

21. Jordan v Meyer, 39 S W 1081, 90 Tex 544—6 C J. p 510 note 40

22. Baker v. Skinner, 64 P 981, 63 Kan. 83.

23. Everglades Club Co. v. Volkoff, (Fla.) 150 So 232.

24. Taaffe v. Rosenthal, 7 Cal. 514—6 C.J p 514 note 19.

25. Everglades Club Co. v. Volkoff, (Fla.) 150 So 232

26. Alexander v. Jacoby, 23 Ohio St 358—6 C J p 515 note 28

27. Renkert v. Elliott, 11 Lea (Tenn.) 235.

28. Boyd v. Martin, 10 Ala 700.

29 Weedon v. Jones, 17 So. 454, 106 Ala 336.

30. Weedon v. Jones, supra.

31. King v Kehoe, 58 N W. 1071, 91 Iowa 91—6 C J p 515 note 33

32. Sloan v Langert, 32 P 1015, 6 Wash 26—6 C J. p 515 note 34.

33. Smith v Summers, 112 So. 344, 215 Ala 690—6 C.J. p 515 note 34 [a]

Permitting amendment to complaint by joining both obligees in attachment bond as plaintiffs for use

jury by reason of the attachment may sue on the bond without joining the obligee or obligees who have not been injured.[34]

Objection for defects of parties. If it appears from the complaint that all the obligees have not been joined as plaintiffs, the objection for this defect must be taken by demurrer, or it will be considered waived,[35] but if the complaint fails to show who are the obligees, and if the bond was in fact payable to others beside plaintiffs, objection may be taken to its introduction in evidence, or a variance may be claimed and proper charges requested.[36]

c. Defendants

Ordinarily the defendants in an action on the attachment bond are the obligors of such bond, the principal or surety, or both.

The parties to be sued on an attachment bond are, as in other cases, the obligors.[37] An action on an attachment bond may be brought against the principal alone,[38] or against the principal and sureties jointly.[39] There cannot, however, be two separate actions at the same time, one against the principal and another against the sureties; but one who attempts to prosecute such actions concurrently will be put to his election as to which one he will prosecute,[40] and it has also been held that an action cannot be prosecuted against the sureties alone to the exclusion of the principal if he desires to join therein.[41]

Where plaintiff in attachment did not execute the bond, he cannot, it has been held, be joined as a defendant in an action thereon, the mere fact that he is liable to the surety for any damage which the surety has suffered being insufficient to entitle him to be joined with the sureties,[42] but the view has also been asserted that the attachment plaintiff is a proper party to such an action notwithstanding he did not join in the bond sued on.[43]

Joinder of several attaching creditors. Where several creditors successively attach or otherwise impound the same fund of their debtor and give separate attachment bonds, they are not liable upon dismissal of their suits for a joint judgment for the damages resulting from the wrongful prosecution of their attachment suits. There is no joint tort by the several attaching creditors, no joint liability between the principals and sureties on the several bonds executed, and no connection between them at the time the attachments were sued out and the damage done.[44]

§ 174. —— Pleading

a. Plaintiff's pleading
b. Defendant's pleading
c. Issues, proof, and variance

a. Plaintiff's Pleading

(1) In general
(2) Particular allegations
(3) Joinder of causes of action
(4) Reply or replication

(1) In General

The plaintiff's pleadings must state clearly every material fact constituting a cause of action.

The declaration, petition, or complaint in an action for wrongful attachment is of course subject to the general rule that such a pleading must state, in clear and definite language, every material fact constituting part of the cause of action against defendant.[45]

(2) Particular Allegations

(a) As to attachment proceedings
(b) As to wrongfulness
(c) As to property affected
(d) As to bond
(e) As to want of probable cause
(f) As to malice
(g) As to termination of original proceedings
(h) As to damages

of plaintiff alone is both proper and necessary—Smith v Sumners, 112 So 344, 215 Ala 690.

34. Alexander v Jacoby, 23 Ohio St. 358—6 C J. p 515 note 35

35. Painter v Munn, 23 So. 33, 117 Ala 322, 67 Am S R 170.

36. Painter v Munn, supra

37. Neb—Eckman v. Hammond, 43 N W 397, 27 Neb 611—Young v Joseph, 99 N W 522, 5 Neb (Unoff.) 559
Tenn—Jennings v. Joiner, 1 Coldw. 645.
6 C J. p 515 note 39.

38. Ga.—Cincinnati Fourth Nat Bank v Mayer, 26 S E 33, 100 Ga 87
Nev—Jaksich v Guisti, 134 P. 452, 36 Nev. 104, 109
6 C J p 515 note 40.

39. Philippine—Alsua v. Johnson, 21 Philippine 308
Tenn—Jennings v. Joiner, 1 Coldw 644

40. Kendrick v Moss, 58 S W 127, 104 Tenn 376—6 C J p 515 note 42

41. Gerson v Hanson, 9 P 330, 34 Kan. 590—6 C J. p 515 note 44.

42. Ky.—Ault v. Everitt, 16 Ky L 93.

Neb—Storz v Finklestein, 66 N.W. 1020, 48 Neb. 27, 30 L R.A. 644.
6 C J p 515 note 45

43. Hoskins v. White, 32 P. 163, 13 Mont 70—6 C J p 516 note 46

44. N Y—Dyett v Hyman, 13 N.Y S. 895, affirmed 29 N.E 261, 129 N Y. 351, 26 Am S R 533.
Pa—Ceraline Mfg. Co v. Anthracite Beer Co., 25 Pa.Super. 94.
Tenn—Stringfield v Hirsch, 29 S W. 609, 94 Tenn. 425, 45 Am S.R. 733.
6 C J p 516 note 47

45. Waring v Fletcher, 52 N E. 203, 152 Ind. 620—6 C J. p 516 note 48.
Petition held sufficient.—Stults v. Northwestern Inv. Co., 200 N.W. 696, 198 Iowa 1056.

(a) As to Attachment Proceedings

In an independent action on the bond the plaintiff should allege the issue and levy of the writ of attachment.

Where an independent action is brought to recover for a wrongful attachment, the issue of the writ of attachment should be alleged;[46] but it has been held that where attachment defendant reconvenes on the attachment bond in the main action such allegation is unnecessary, since in pleading to a suit it is not necessary to aver the previous proceedings in the case, which appear to the court by the record.[47] Where an actual levy is necessary to a cause of action for wrongful attachment, such levy must of course be alleged,[48] but where a recovery may be had for the mere suing out of a wrongful attachment, even though there has been no levy thereunder, it is not necessary that a levy should be alleged.[49]

Beyond alleging the issue and levy of the writ in a proper case it is not necessary that the complaint in an action on an attachment bond should set out the proceedings in the attachment suit.[50]

(b) As to Wrongfulness

The petition should show that the attachment was wrongfully sued out.

Inasmuch as there can be no recovery for an attachment which is not wrongful, although the motive of the person suing it out may have been malicious, it must follow that the pleadings of attachment defendant must show that the attachment was wrongfully sued out.[51] It has been considered, however, that a general allegation that the attachment was "wrongfully" sued out is sufficient,[52] and it has also been held that a complaint alleging merely that the writ was "improperly" issued is insufficient.[53]

A dissolution of an attachment upon the merits being conclusive that it was wrongfully issued, it has been considered that, where the attachment was apparently dissolved on the merits, an averment in an action on the attachment bond that the suit was not prosecuted to effect and that judgment was rendered dismissing the attachment prevents any inquiry into the truth of the affidavit for attachment,[54] and the complaint in such an action should not deny the truth of the matters stated in the affidavit as grounds for the attachment.[55] However, since a dissolution of the attachment for irregularities or informalities does not establish that the writ was wrongfully issued, a mere statement that the attachment was dissolved does not show that it was wrongful.[56] An allegation that, on a trial on the merits, it was determined that nothing was due plaintiff amounts to an allegation that there was no ground for the attachment.[57]

(c) As to Property Affected

The declaration or complaint should describe the property seized under the writ of attachment.

The complaint in an action for wrongful attachment should describe the property levied on.[58]

(d) As to Bond

The plaintiff should set out the attachment bond, allege its due execution, and a breach of such bond

A complaint on an attachment bond should set out the bond,[59] and it must be alleged that the sureties joined in its execution,[60] and where plaintiff in attachment must join in the execution of the bond it would be insufficient to allege that he gave a bond to attachment defendant without alleging that he executed it.[61] It is not necessary, however, to allege that the undertaking was approved by the clerk who issued the writ,[62] and the authority of an agent

46. Hedrick v. Osborne, 99 Ind. 143—6 C.J. p 516 note 51.

47. Castro v. Whitlock, 15 Tex. 437

48. Hedrick v. Osborne, 99 Ind 143—6 C.J. p 516 note 54.

49. Dothard v. Sheid, 69 Ala. 135—6 C.J. p 516 note 56.

50. Ind—Uhrig v. Sinex, 32 Ind 493—Draper v Vanhorn, 12 Ind 352—Love v Kidwell, 4 Blackf 553.
S D—Brown v. Tidrick, 85 N W. 185, 14 S.D. 249, 86 Am S R. 754

51. Epley v. Hunter, 231 P. 327, 154 Wash. 162—6 C.J. p 517 note 58.

In Alabama

(1) It has been held that except where punitive damages are claimed, it is unnecessary to negative existence of any ground for attachment—Smith v. Summers, 112 So. 344, 215 Ala. 130.

(2) It has also been held that an allegation that an attachment was wrongfully sued out is insufficient where the petition fails to allege that no statutory ground existed for the issuance of the writ or that there was no debt due or to become due for which the attachment was sued out.—Irwin v. Cotney, 108 So. 235, 214 Ala. 415.

(3) However, an allegation that the attachment was wrongful in that no statutory ground therefor existed at the time of the issuance of the same has been held sufficient.—Irwin v. Cotney, supra.

(4) Other particulars of Alabama rule see 6 C.J. p 517 note 62 [a].

52. Irwin v Cotney, 108 So. 235, 214 Ala. 415—6 C.J. p 517 note 59.

53. Steen v. Ross, 22 Fla. 480.

54. Hayden v. Sample, 10 Mo 215—Bennett v. Mexico So Bank, 61 Mo. App 297.

55. Bennett v. Mexico So Bank, supra—6 C.J. p 517 note 67.

56. Eaton v. Bartscherer, 5 Neb. 469.

57. Stults v. Northwestern Inv. Co., 200 N.W. 696, 198 Iowa 1056.

58. Sanford v. Willetts, 29 Kan. 647—6 C.J. p 517 note 70.

59. Bunt v. Rheum, 3 N.W. 667, 52 Iowa 619.

60. Seattle Crockery Co. v. Haley, 33 P. 650, 6 Wash 302, 36 Am S.R. 156.

61. Church v. Campbell, 35 . 381, 7 Wash 547.

62. Ala.—Dothard v. Sheid, 69 Ala. 135.
Ind—Sannes v. Ross, 5 N.E 699, 105 Ind. 558.

to execute a bond need not be alleged.[63]

Conditions and breach of bond. If an action to recover for wrongful attachment is brought on the bond, the declaration, petition, or complaint must set out the provisions or conditions of such bond,[64] and aver a breach of the conditions in plain terms,[65] stating the facts which constitute such breach.[66]

Setting Out Statute under Which Bond Given. A bond given in attachment proceedings in another state, having been taken by a court having jurisdiction of the subject matter, is good as a common-law bond, and it is not necessary to set out any statute under which it was taken in order to maintain an action thereon.[67]

(e) As to Want of Probable Cause

Where statutes make want of probable cause an element of the cause of action on the attachment bond, such want of probable cause must be alleged

Whether a want of probable cause for suing out the writ must be alleged in an action for wrongful attachment depends upon the provisions of the statute under which the action is brought and the character of damages sought to be recovered. Where, under the statute, a want of probable cause for suing out the writ is an element of liability for wrongful attachment, it is of course necessary to allege want of probable cause, even though only actual damages are sought, or the form of the proceeding is such that only actual damages are recoverable.[68] Where, however, actual damages may be recovered for a wrongful attachment notwithstanding there was probable cause for suing out the writ, there is no necessity for alleging a want of probable cause where the recovery sought is of actual damages only, whatever may be the character of the proceeding in which such recovery is sought.[69]

If exemplary or punitive damages are sought to be recovered, a want of probable cause for suing out the writ must always be alleged.[70]

(f) As to Malice

The plaintiff need not allege malice to recover actual damages.

If only actual damages are sought to be recovered in an action on the attachment bond for a wrongful attachment, it is not necessary to aver malice on the part of the attachment plaintiff in suing out the writ.[71]

Where exemplary or punitive damages are sought it is necessary to allege malice in the suing out of the writ.[72]

(g) As to Termination of Original Proceedings

If no cause of action accrues until the attachment has been dissolved, or until the termination of the principal action, such facts should be shown by appropriate allegations.

If no cause of action for a wrongful attachment accrues until the attachment has been dissolved, the fact of dissolution should be alleged in a direct action to recover for wrongful attachment.[73] If a final determination of the suit in which the attachment was sued out in favor of attachment defendant is essential to a cause of action for wrongful attachment, it is necessary to show this fact by some appropriate form of averment.[74]

(h) As to Damages

The plaintiff should allege that he sustained damages; and, where special damages are sought, he should specifically point out the special damage suffered

63. Massachusetts Bonding & Insurance Co v. U S. Conservation Co, 114 S.E. 62, 29 Ga.App 80

Rule stated

"Where the attachment bond appears upon its face to have been executed by another in behalf of the principal, it is prima facie the obligation of the principal, and the suit is not subject to demurrer upon the ground that the authority of the agent to execute the attachment bond in behalf of the principal does not appear."—Massachusetts Bonding & Insurance Co. v U S Conservation Co., 114 S E. 62, 29 Ga App 80

64. Ind.—Dunn v. Crocker, 22 Ind 324.
Iowa.—Bunt v Rheum, 3 N.W. 667, 52 Iowa 619—Ryder v. Thomas, 32 Iowa 56
6 C J. p 518 note 79.

65. Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329—6 C.J. p 518 note 80.

66. Ala.—Schuessler v. Still, 53 So. 331, 169 Ala. 239.
Iowa.—Bunt v. Rheum, 3 N W 667, 52 Iowa 619—Horner v. Harrison, 37 Iowa 378—Ryder v. Thomas, 32 Iowa 56
Wash.—Church v. Campbell, 35 P. 381, 7 Wash 547.
6 C J p 518 note 81.

67. Cunningham v. Jacobs, 22 N E. 335, 120 Ind. 306.

68. Iowa.—Mahnke v. Damon & Co, 3 Iowa 107
N. Y.—Sprague v Parsons, 13 Daly 392, 6 N Y Civ Proc 26, 14 Abb N. Cas 320.
6 C J p 518 note 84.

69. Ala.—Painter v. Munn, 23 So. 83, 117 Ala 322, 67 Am S R 170
N Y.—Sprague v Parsons, 12 Daly, 392, 6 N Y Civ Proc. 26, 14 Abb N. Cas. 320
6 C J. p 518 note 86.

70. Painter v Munn, 23 So 83, 117 Ala 322, 67 Am S R. 170—Schloss v Rovelsky, 18 So. 71, 107 Ala. 596—6 C.J. p 518 note 87.

71. Ga.—Williams v Inman, 57 So 1009, 1 Ga App 321
N.Y.—Sprague v Parsons, 12 Daly, 392, 6 N Y Civ Proc 26, 14 Abb N Cas 320.
Ohio.—Bruce v Coleman, 1 Handy, 515, 12 Ohio Dec (Reprint) 265.

72. Ga.—McCormick v. Tribune-Herald Co, 78 S E 779, 13 Ga App 61.
Tenn.—Doll v. Cooper, 9 Lea. 576.
6 C J p 519 note 91

73. Ind.—Waring v Fletcher, 52 N. E. 203, 152 Ind 620
Ky.—Watts v. Hurst, 61 S.W. 261, 22 Ky L 1703.
6 C.J. p 519 note 94.

74. Crandall v Rickley, 25 Minn. 119—6 C J. p 519 note 96.

It is necessary to allege that damages have actually been sustained in consequence of the wrongful attachment,[75] and if a recovery of special damages is sought such damages must be specially pleaded.[76] Accordingly, it has been held that without specially pleading such items of damage defendant in attachment could not recover for a depreciation in the value of the property seized under the attachment,[77] for attorney's fees expended in relation to the attachment,[78] for loss of credit,[79] or for expenses incurred in traveling to the place of trial.[80]

The allegations as to damages should be made with certainty and definiteness,[81] but it has been held that a count averring the falsity of the alleged ground for attachment and want of probable cause to believe in its truth is sufficient to warrant the award of punitive damages.[82] However, where the petition alleges special damages with sufficient definiteness to apprise the adverse party fully of the evidence which will probably be introduced, this is good against a general demurrer.[83]

If special damages are claimed on more than one ground, and if any of the damages are recoverable, a demurrer to the entire complaint is properly overruled.[84]

Allegations of an evidentiary nature are properly stricken out.[85]

Demand for damages. Where a demand for damages provided for in an attachment bond is necessary to give a cause of action on the bond, such demand must be alleged.[86]

Nonpayment of damages. In proceedings based on an attachment bond for injuries caused by the wrongful suing out of an attachment, it is necessary to allege that the damages have not been paid.[87] Where plaintiff fails to allege nonpayment of damages, it is, in some jurisdictions, held that the pleading is fatally defective,[88] but in other jurisdictions the petition will be deemed sufficient after verdict.[89]

(3) Joinder of Causes of Action

The plaintiff may bring one suit on two or more bonds.

A plaintiff may proceed in one action for damages for breaches of two or more attachment bonds executed by the obligor in his favor,[90] and it has been held that the owner of goods wrongfully attached is not compelled to elect to sue plaintiff in attachment independently for the wrongful act of the bond, or to sue him and his surety on the bond, but may sue plaintiff independently of the bond and join the surety, counting on the bond.[91]

(4) Reply or Replication

The plaintiff may reply to new matter relied upon by defendant which is not put in issue by plaintiff.

In accordance with the rules governing replies or replications generally, as discussed in the title Pleading § 186 [49 C.J. p 326 note 25], new matter which calls for a reply must be something relied upon by defendant, but not put in issue by plaintiff. Accordingly, where the petition, in a suit on an attachment bond, averred generally that plaintiff in the attachment had failed to prosecute his action without delay and with effect, and, further, that a judgment had been rendered for defendant in the transaction on a plea in abatement, an allegation in the answer that the attachment suit was still pending on a mo-

75. Ala.—Flanagan v. Gilchrist, 8 Ala. 620.
Ind.—Love v. Kidwell, 4 Blackf. 553.
Va.—Dickinson v. McCraw, 4 Rand. (25 Va.) 158.

76. Munson v. Beck, 214 P. 708, 89 Okl. 251—6 C.J. p. 519 note 1.

Injury to credit

Plaintiff in an action on an attachment bond should not be allowed to recover, nor to prove, loss of credit as a result of wrongful attachment where he has not alleged in his pleadings, this item of special damage—Bradford v. Lawrence, 90 So. 809, 18 Ala. App. 138.

77. Wallace v. Finberg, 46 Tex. 35—Hamilton v. Kilpatrick, (Tex. Civ. App.) 29 S.W. 819—6 C.J. p. 519 note 2.

78. Ala.—Schuessler v. Still, 53 So. 531, 169 Ala. 239.
Cal.—Elder v. Kutner, 32 P. 563, 97 Cal. 490.
6 C.J. p. 519 note 3.

79. Bradford v. Lawrence, 90 So. 809, 18 Ala. App. 138—6 C.J. p. 519 note 5.

80. State v. Blackman, 51 Mo. 319.

81. Mo.—State v. Blackman, supra.
N.Y.—Rayner v. Clark, 7 Barb. 581.
Tex.—Hoover v. First Nat. Bank, (Civ. App.) 192 S.W. 1149.
6 C.J. p. 520 note 8.

82. Blackmon v. Gilmer, 130 So. 193, 221 Ala. 554.

83. Munson v. Beck, 214 P. 708, 89 Okl. 251.

84. Flournoy v. Lyon, 70 Ala. 308.

85. Tisdale v. Major, 75 N.W. 663, 106 Iowa 1, 68 Am.S.R. 263—6 C.J. p. 520 note 12.

86. Dunlop v. Farmer, 222 P. 640, 64 Cal.App. 691—Swain v. Los Angeles Morris Plan Co., 213 P. 703, 60 Cal.App. 667—6 C.J. p. 520 note 14.

87. Cal.—Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329—Swain v. Los Angeles Morris Plan Co., 213 P. 703, 60 Cal.App. 667.
Mo.—State ex rel. Stevenson v. American Surety, (App.) 74 S.W.(2d) 1094—State ex rel. and to Use of Kibble v. First Nat. Bank, (App.) 22 S.W.(2d) 185.
6 C.J. p. 520 note 15.

Foundation of suit against sureties is the failure of the principal to pay the damages which were sustained by a wrongful attachment.—Dunlop v. Farmer, 222 P. 640, 64 Cal.App. 691.

88. Morgan v. Menzies, 60 Cal. 341.

89. State ex rel. Stevenson v. American Surety Co., (Mo.App.) 74 S.W.(2d) 1094—State v. First Nat. Bank, (Mo.App.) 22 S.W.(2d) 185—State v. Reynolds, 117 S.W. 653, 137 Mo.App. 261—6 C.J. p. 520 note 16 [c].

90. Gabel v. Hammerwell, 44 Ala. 336.

91. Harkleroad v. Leonard, 67 S.W. 127, 28 Tex.Civ.App. 133—6 C.J. p. 521 note 18.

tion for a new trial and undisposed of set up no new matter requiring a replication [92] Where defendant in such an action sets up a judgment against the relator, a reply claiming that the judgment is exempt should not be stricken out [93]

b. Defendant's Pleading

General rules as to pleading govern the defendant's plea or answer in an action on an attachment bond.

In accordance with the rules governing pleas and answers generally, as discussed in the title Pleading § 106 et seq [49 C J. p 189 note 40 et seq], in an action on an attachment bond, defendant's plea or answer, to be sufficient, must with certainty allege all necessary facts to sustain the plea and must be responsive to the allegations of the declaration or complaint. Where the complaint alleges that plaintiff lost the use of the attached property for a stated time, allegations in the answer setting up the proceedings in the attachment suit, showing that plaintiff procured the release of the property shortly after it was seized, while not stating a complete defense, are relevant and material on the question of damages, and not subject to demurrer.[94] An answer in an action upon an undertaking given to procure an attachment which admits the making thereof, and, as to the other allegations, denies the same upon defendant's own knowledge, or his not having any knowledge or information sufficient to form a belief in respect to the same, is insufficient, because of the impossibility of distinguishing the allegations denied upon knowledge from those denied for a want of knowledge or information sufficient to form a belief.[95]

Where the bond declared on has apparently been regularly executed, any defect in its execution must be raised by special, and not general, demurrer [96]

In an action by a mortgagor for a wrongful attachment of the mortgaged property, an answer setting up that the mortgagee has recovered judgment against attachment plaintiff for the conversion of the identical property and that such judgment has been paid, is demurrable as not affecting the mortgagor's right of action.[97]

Non est factum. Non est factum is a proper plea in an action on an attachment bond for a wrongful attachment;[98] but it has been considered that, if an answer setting up such plea is not verified by affidavit, the execution of the bond will be adjudged confessed.[99]

Non damnificatus. Non damnificatus is a good plea to a suit on an attachment bond, where the condition is that plaintiff in the attachment "shall pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out said attachment."[1]

Payment Payment is a defense which must be alleged and proved in an action on an attachment bond [2]

c. Issues, Proof, and Variance

(1) Issues
(2) Proof
(3) Variance

(1) Issues

The issues are confined to those raised by the pleadings

In an action on an attachment bond, as in other actions, the issues are confined to those raised by the pleadings [3] The principal issue is usually whether the attachment was wrongfully obtained,[4] and the obligors on an attachment bond cannot question the sufficiency of the sheriff's return of levy.[5]

A plea of non est factum in an action on an attachment bond, in the absence of a plea traversing the breach of the bond alleged, puts in issue only the making of the bond described in the declaration or complaint [6]

(2) Proof

Every fact necessary to constitute a cause of action or a defense thereto must be proved, and otherwise proper evidence which tends to prove or disprove a fact in issue is admissible

In accordance with the rules governing proof in civil actions generally, as discussed in the title Pleading § 520 et seq [49 C.J. p 785 note 54 et seq] in an action on an attachment bond, every fact necessary

92. State v Williams, 48 Mo. 210.
93. State v Hudson, 86 Mo App 501
94. Anvil Gold Min Co v Hoxsie, (Alaska) 125 F 724, 60 C C A 492
95. Sheldon v. Sabin, 12 Daly (N Y.) 84
96. Massachusetts Bonding & Insurance Co v U S Conservation Co, 114 S E 62, 29 Ga App 80
97. Jencks v. Murphy, 89 N W 1121, 15 S D. 425—6 C.J. p 521 note 25.
98. Fitzsimmons v Hall, 84 Ill 538 —Oberne v Gaylord, 13 Ill App 30
99. State v Chamberlain, 54 Mo 338
1. Tex—Pinkard v Willis, 28 Tex Civ App. 198, 67 S W 135
W Va—Hoadley v Roush, 3 W.Va 280
6 C J p 521 note 29.
2. Waller v Deranleau, 94 N.W. 1038, 4 Neb (Unoff.) 497.
3. Complaint held to raise issue of the value of the property converted in an action on the attachment bond by a mortgagee—Allerton v. King, 274 P. 90, 96 Cal App 230
4. Miller v McCrory, 3 Ky L. 774, 11 Ky Op. 625
5. State v Goodhue, 74 Mo App 162
6. Fitzsimmons v. Hall, 84 Ill 538 —Oberne v. Gaylord, 13 Ill.App. 30 —6 C.J p 521 note 33.

to constitute a cause of action, or a defense, if in issue, must be proved by the party having the burden of proof thereof. For example, where depreciation is an element of damage sought to be recovered, plaintiff must show the market value of the property when taken and when returned.[7]

Also, otherwise proper evidence which directly proves or contradicts a fact in issue is admissible. Accordingly, under a plea of general issue or general denial it is proper to show a judgment on the merits in favor of attachment defendant in another action for the same cause,[8] that the proceeds of the sale of the attached property were credited to the attachment debtor in the original proceeding in order to reduce the amount of recovery to that extent;[9] or that attachment plaintiff stated the facts within his knowledge to his attorney before suing out the writ, and had been advised by him that the writ was authorized.[10]

Where the attachment defendant claims the value of the use of the attached property under his plea in reconvention for damages for wrongfully and maliciously suing out the writ, alleging that he was thereby deprived of its use, but the testimony tends to show that he was not so deprived thereof, plaintiff in attachment is entitled to the benefit of such proof without a special plea.[11]

Where the pleadings did not claim for time lost and expenses incurred in interviewing attorneys and the specified items of damage did not include such claim for damages, evidence of such damages was not admissible.[12] According to some authority, in an action on a bond conditioned to pay the attachment defendant all such damages as he may sustain by the wrongful or vexatious suing out of the attachment, defendant is not confined in his defense to proof of the existence of the particular ground of attachment averred in the affidavit, but may show the existence of any statutory ground.[13]

A general allegation of "injury to credit" is sufficient to authorize the introduction of evidence of a general loss of credit, but does not warrant evidence of special injury by loss of credit with particular persons.[14]

(3) Variance

The evidence adduced must conform to the allegations of the pleadings of the party by whom it is offered.

The evidence adduced in an action or proceeding for wrongful attachment must conform to the allegations in the pleadings of the party by whom it is offered,[15] although a slight variance may be disregarded as immaterial where the adverse party was not misled to his detriment.[16] Where the complaint in an action on an attachment bond fails to show who are the obligees, and the bond was in fact payable to others besides plaintiffs, objection may be taken to its introduction in evidence, or a variance may be claimed and proper charges requested.[17]

§ 175. —— Evidence

a Presumptions
b Burden of proof
c Admissibility
d. Weight and sufficiency

a. Presumptions

It will be presumed that the writ was regularly and properly issued.

In an action for wrongful attachment the presumption is that the writ was regularly and properly issued.[18] Accordingly, where the writ was issued, in an action on the bond it will be presumed that a proper affidavit was filed with the clerk, as he could not legally issue the warrant until an affidavit was filed, and the presumption is that every public officer has done his duty.[19]

7. Morneault v National Surety Co, 174 P 81, 37 Cal App 285.

8. Renkert v Elliott, 11 Lea (Tenn.) 235—6 C.J p 522 note 35

9. N Y—Van Dewater v Gear, 47 N Y S 503, 21 App Div 301
Tex—Mayer v. Duke, 10 S W 565, 72 Tex. 445.

10. Bowman v. Western Fur Mfg. Co., 64 N.W. 775, 96 Iowa 188

11. Dwyer v. Testard, 65 Tex. 432

12. Armentrout v. Baldwin, 144 N.W. 1003, 163 Iowa 410.

13. Painter v. Munn, 33 So 83, 117 Ala. 322, 67 Am.S R. 170.

14. Durr v. Jackson, 59 Ala 203—6 C J p 522 note 42

15. Ala—Pollock v Gantt, 69 Ala. 373, 44 Am S R 519
Mo—State v Allen, 128 S W. 809, 144 Mo App 234.
6 C J p 522 note 44.

16. Brown v Moore, 3 Or. 435—6 C. J p 522 note 45.

17. Painter v Munn, 23 So 83, 117 Ala 322, 67 Am S R 170

18. Elsman v. Glens Falls Indemnity Co, 262 N Y S 642, 146 Misc. 631—6 C J p 522 note 47.

Foreign attachment proceedings

(1) The regularity, validity, and freedom from defect of an attachment in a foreign state must be presumed in an action on an attachment bond—Elsman v Glens Falls Indemnity Co, 262 N.Y.S. 642, 146 Misc 631.

(2) In an action on an attachment bond given in another state, where it is shown that the court had jurisdiction of the subject matter, it will be presumed that the court had jurisdiction to issue the attachment, although no statute of that state authorizing attachment is pleaded.—Cunningham v. Jacobs, 22 N E. 335, 120 Ind 306.

19. Brown v Tidrick, 35 N W. 135, 14 S D. 249, 36 Am S.R 754.

b. Burden of Proof

The party suing on an attachment bond has the burden of proving every material element of his cause of action.

The party who seeks to recover damages by reason of an attachment against him has the burden of proving by a preponderance of the evidence that the attachment was wrongful[20] by showing such facts and circumstances as tend to establish the truth of what he asserts[21] It is also incumbent upon him, where such matters are necessary to his recovery, to show want of probable cause for suing out the writ,[22] that there has been an actual levy upon his property,[23] and that he has been injured thereby[24] and the extent of such injury.[25]

Where a defendant counterclaims on the attachment bond in the original proceedings, he, of course, has the burden of showing a wrongful attachment.[26]

c. Admissibility

(1) In general
(2) As to probable cause
(3) As to malice
(4) As to quantity and value of property seized
(5) As to damages

(1) In General

The record in the attachment proceedings, the bond, and other evidence material to the cause of action or defense against the same is admissible in an action on the bond.

In a suit on an attachment bond the record in the original suit is admissible in behalf of plaintiff,[27] although it was not filed with the complaint,[28] and when illegible may be elucidated by parol evidence[29] Where, however, the action was for an unlawful taking of property under a warrant of attachment which was subsequently vacated, and after such vacation a second and valid warrant had been secured and placed in the hands of the officer who held the property and the property sold thereunder, it was held that the judgment roll, execution, and return of the officer were not competent either in defense or in mitigation of damages.[30]

Where defendant in attachment brought an action against the attachment plaintiff for wrongful attachment, to which action the sureties were not parties, a judgment for plaintiff therein is admissible against the sureties in an action on the bond to prove the fact of its existence and what was there decided[31]

Evidence may be introduced to show the relations of the parties, where material,[32] but evidence of payment on account made after levy is not admissible to show the status of the parties as of the date of the levy[33]

The deposition of the officer levying the attachment has also been held admissible for the purpose of showing what he did.[34]

The holding of the goods under other writs after one had been dissolved may be shown.[35]

In an action on an attachment bond to recover damages for a wrongful attachment it is competent to identify plaintiff as the real defendant in the attachment proceedings, doing business under the name of the obligee named in such bond[36]

Secondary evidence of the contents of the bond may be admitted when a proper foundation therefor is laid.[37]

(2) As to Probable Cause

Evidence concerning probable cause to believe there are grounds for attachment is admissible in an action on the bond, where want of probable cause is an element of the cause of action

20. Jones v Van Donselaar, 204 N W. 416, 200 Iowa 176—Moore v Altmyer, 202 N W 214, 199 Iowa 368—6 C J. p 523 note 50

21. Burrows v. Lehndorff, 8 Iowa 96—6 C J. p 523 note 51

22. Moore v Altmyer, 202 N W 214, 199 Iowa 368—6 C J. p 523 note 53.

23. Colo—Graham v Reno, 38 P 835, 5 Colo App. 330
Ind—Barnett v Lucas, 61 N E. 633, 27 Ind App 441
6 C J. p 523 note 54.

24. Ala—Hale v. Helms, 81 So. 340, 17 Ala App. 62
Mo—State v. Endeavor Mining & Investment Co v. Webb City & Carterville Foundry & Machine Works, 132 S W. 18, 151 Mo App 31.
6 C J. p 523 note 55.

Elimination of issue of set-off

In a suit on an attachment bond for wrongful and malicious attachment, the elimination of the issues presented by defendant's plea of set-off does not relieve plaintiff of the burden of proof resting upon him to show that he was damaged by suing out of the attachment—Hale v. Helms, 81 So 340, 17 Ala App 62

25. Morneault v National Surety Co., 174 P 81, 37 Cal App 285—6 C J. p 523 note 56.

26. Crom v. Henderson, 175 N W 933, 188 Iowa 227

27. Hamilton v. Maxwell, 32 So. 13, 133 Ala. 233—6 C J. p 523 note 58.

28. Draper v. Vanhorn, 12 Ind. 352

29. Goldsmith v Picard, 27 Ala. 142.

30. Geller v Rosenfeld, 123 N Y S 628, 139 App Div 289.

31. Johnston v Sexton (Ill) 159 F 70, 86 C C.A 260 certiorari denied 29 S Ct. 685, 212 U S 576, 53 L Ed 657.

32. Harris v White, 101 So 751, 212 Ala 54

33. Harris v White, supra.

34. U. S Fidelity, etc, Co v. Howes, 109 S W 343, 33 Ky L 131—6 C J p 524 note 62

35. Engelke, etc, Milling Co v. Grunthal, 35 So. 17, 46 Fla 349.

36. Mich—Ermeling v Bargh, 79 N. W. 1094, 121 Mich 167
Neb—Waller v. Deranleau, 94 N.W. 1038, 4 Neb (Unoff) 497.
6 C.J. p 529 note 57.

37. Barnett v. Lucas, 61 N E. 633, 27 Ind App 441—6 C.J. p 524 note 64.

In proceedings to recover for injuries caused by wrongful attachment, facts and circumstances within the knowledge of attachment plaintiff, such as gave him reason to believe the truth of the facts stated in the affidavit, are competent evidence to show probable cause for suing out the writ;[38] but evidence of statements of third persons to attachment plaintiff as to defendant's conduct is not admissible, where there is no offer to prove that such statements were true or that plaintiff had reason to believe them to be so.[39] Evidence as to the conduct of attachment defendant's affairs and the good faith of his transactions is competent to prove want of reasonable cause.[40]

On an issue as to probable cause for suing out the writ, evidence as to the actual nonexistence of the grounds alleged is not competent.[41]

(3) As to Malice

Where malice is material to the cause of action, evidence tending to prove or disprove it is admissible.

It has been held competent for the purpose of proving malice to show that plaintiff in attachment procured two attachments in one week,[42] or to adduce evidence of attachment defendant's reputation for solvency and ability to pay his debts;[43] and where the debtors sued in attachment were a partnership it is competent to prove a wrongful levy of the attachment on the individual property of one of the partners, and attendant circumstances of aggravation, wantonness, or gross negligence, for the purpose of proving malice.[44] On the other hand, it is not permissible to show slanderous words or declarations of attachment plaintiff after the commencement of the action unless they relate directly to the act of suing out the attachment.[45]

Testimony to the effect the parties had "difficulty" on the day of the attachment and prior thereto is admissible on the question of bona fides or animus of the attaching creditor in procuring the attachment.[46]

Where exemplary or punitive damages are asked, attachment plaintiff should be permitted to show that he acted without malice,[47] and he may, for the purpose of showing absence of malice, introduce evidence of attachments against attachment defendant, levied prior to his own, provided he knew of them, but not otherwise,[48] that at the time of the suing out of the writ defendant in attachment was greatly involved in debt;[49] and that he acted on the advice of counsel, given on a full statement of the facts.[50]

(4) As to Quantity and Value of Property Seized

Evidence as to the quantity and value of property attached is admissible in an action on the bond.

It has been held that plaintiff may show that other goods than those designated in the sheriff's return were seized, whether the omission to inventory them was the result of fraud or mistake,[51] and that, although to determine the quantity of goods seized it is not competent to show the percentage of profits on goods sold, it is permissible to prove for this purpose the amount of goods on hand at any particular time, the quantity sold by way of diminution, and the stock with all additions made to it by accretions in the meantime.[52]

In determining the value of the property attached at the time of the attachment, it is competent to show what it brought at a sheriff's sale shortly after the seizure;[53] and an inventory of the stock of goods seized, made by defendant in attachment, is also admissible for this purpose.[54] Evidence on cross-examination of plaintiff's witness, who had been interested as purchaser of the goods subsequent to the attachment, tending to show that they were unsalable, is admissible on the question of damages, where it tends to show that the goods were of less value than claimed by attachment defendant.[55] A deputy

38. Ricker v. Davis, 139 N.W. 1110, 160 Iowa 87—Gaddis v. Lord, 10 Iowa 141—6 C.J. p. 526 note 92.

39. Schrimpf v. McArdle, 13 Tex. 368.

40. McAllister v. Hogue, 234 P. 657, 133 Wash. 664.

Ownership of land

In a suit on an attachment bond, debtor's testimony that he was the record title owner of land, some of it in the county, and that he had banking credit, was properly admitted in view of debtor's onerous burden under Remington Comp. St. § 654, of proving want of reasonable cause for levy.—McAllister v. Hogue, 234 P. 657, 133 Wash. 664—6 C.J. p. 526 note 95.

41. Peters v. Snavely-Ashton, 120 N.W. 1048, 122 N.W. 836, 144 Iowa 147—Charles City Plow, etc., Co. v. Jones, 32 N.W. 280, 71 Iowa 234—6 C.J. p. 524 note 68.

42. Ryall v. Marx, 50 Ala. 31.

43. Mayfield v. Cotton, 21 Tex. 1.

44. Watts v. Rice, 75 Ala. 289.

45. Burton v. Knapp, 14 Iowa 196, 81 Am. D. 465.

46. Harris v. White, 101 So. 751, 212 Ala. 54.

47. Sloan v. Langert, 32 P. 1015, 6 Wash. 26.

48. Lockhart v. Woods, 38 Ala. 631—6 C.J. p. 527 note 14.

49. Myers v. Wright, 44 Iowa 38—6 C.J. p. 527 note 17.

50. Sloan v. Langert, 32 P. 1015, 6 Wash. 26—6 C.J. p. 527 note 18.

51. Jefferson County Sav. Bank v. Eborn, 4 So. 336, 84 Ala. 520.

52. Jefferson County Sav. Bank v. Eborn, supra.

53. Marx v. Leinkauff, 9 So. 818, 93 Ala. 403—6 C.J. p. 527 note 26.

54. Carothers v. McIlhenny Co., 63 Tex. 138—6 C.J. p. 527 note 28.

55. Armstrong v. Ames, etc., Co., 43 S.W. 302, 17 Tex.Civ.App. 46.

sheriff who did not levy the attachment may testify as to the value of the goods, where a few days prior to the levy thereof he seized the same goods under a writ of detinue.[56]

Where cattle were attached, evidence as to what cattle are worth when located on and familiar with a range is admissible,[57] as is also evidence showing the condition and value of the cattle at times other than the day of their release.[58]

(5) As to Damages

Matters tending to show the amount of damage sustained by wrongful attachment are admissible in an action on an attachment bond.

Evidence of the amount of attachment defendant's business is admissible on the question of damages,[59] as is also evidence of loss of business.[60]

The judgment obtained against plaintiff in the attachment suit, if valid, is admissible on the question of damages.[61]

Where it is claimed that the seizure has caused injury because of the resulting inability to fulfill a contract of sale thereof, the contract may be proved by parol evidence on showing that it has been destroyed.[62] Plaintiff may not, however, testify as to the effect of an attachment on possible sales, not in the usual course of business.[63]

Injury to credit may be shown,[64] but attachment defendant cannot be permitted to testify that his credit was damaged in a designated amount, as extent of damage to credit is an inferential fact, which can be arrived at only by a weighing of all the facts and circumstances, and cannot be the subject of direct proof.[65]

It has been held that evidence that attachment defendant was a man of limited means is not admissible in his own behalf,[66] but it has also been held that proof of the financial inability of defendant in attachment to replevy the property seized is admissible in evidence to show his actual damage, and also his inability to minimize his damage.[67]

Where property has been wrongfully attached, it cannot be shown, in mitigation of damages, that the same goods were subsequently levied on and sold on execution in the satisfaction of a judgment outstanding against defendant in attachment.[68]

As to attorney's fees. In an action for wrongful attachment evidence is admissible to show the rendition of legal services in defeating the attachment suit[69] and the amount which defendant in attachment has paid or is bound to pay therefor, although not conclusive, is admissible.[70]

Minimizing damages. In an action for damages for detention of cars by attachment, defendant may show that plaintiff could, for a small sum, have secured a replevin bond, it being its duty to do what it reasonably could to lessen the injury,[71] but evidence of failure to mitigate damages is inadmissible where no duty to mitigate is shown.[72]

The deposition of the officer levying the attachment has been held admissible to show what he did and the nature of plaintiff's loss resulting from his store being closed under the attachment.[73]

56. Jefferson County Sav Bank v. Eborn, 4 So 336, 84 Ala 529

57. Schofield v. Territory, 56 P. 306, 9 N M. 526

58. Schofield v Territory, supra—6 C J. p 528 note 35

59. Ruthven v. Beckwith, 45 N W 1073, 84 Iowa 314, 51 N W. 153—6 C J. p 528 note 36

60. Birmingham Dry-Goods Co v Finley, 26 So. 138, 122 Ala. 534—6 C J p 528 note 38.

61. Pruitt v English, (Tex Civ App) 173 S W. 1172

62. Draper v. Vanhorn, 12 Ind 352

63. Thielen v Schechinger, 233 N.W 750, 211 Iowa 470.

Where there was prospective purchaser

"The proposed purchaser was not offered as a witness If it was proper at all to prove depreciation in this way (a point we need not decide), it is manifest that the purchaser himself could furnish the best evidence of the reasons which operated upon his mind in refusing to accede to the seller's price"—Armentrout v. Baldwin, 144 N W 1003, 1005, 163 Iowa 410

64. Brayton v Spooner, 5 Ky Op 63—6 C J p 528 note 43

65. Trammell v. Ramage, 11 So. 916, 97 Ala. 666

66. Jackson v Smith, 75 Ala 97

67. Parker v Nolan, 139 S E 429, 37 Ga App 205

68. Churchill v Abraham, 22 Ill 456

69. Balinsky v. Gross, 128 N Y S 1062, 72 Misc. 7

70. Ala.—Street v Browning, 98 So 203, 210 Ala 331
Okl.—Munson v. Beck, 214 P. 708, 89 Okl 251
6 C J p 529 note 55.

Necessity and reasonableness must be shown

"The measure of the recovery for expenses incurred by plaintiff by reason of defendant's wrongful act is a reasonable sum therefor, and not the amount actually paid out, nor a sum in excess thereof Hence, while evidence of the amount actually paid may be considered, the necessity of such payment and its reasonableness must be shown"—Munson v. Beck, 214 P. 708, 89 Okl. 251, 252

71. Pittsburg, etc, R. Co v Wakefield Hardware Co, 55 S E 422, 143 N C 54.

72. McAllister v. Hogue, 234 P. 657, 133 Wash 664.

Refusal to auction attached property

Where, prior to an advertised auction, an attachment was levied, and the debtor thereupon refused to proceed with the auction and place the proceeds in the hands of the sheriff as suggested by the creditor, such refusal is inadmissible in evidence, for "the respondent was under no obligation for the purpose of mitigating damages or any other reason to the benefit of the appellants to proceed with what had been advertised to be a voluntary sale of property now that it was under the cloud of an attachment"—McAllister v Hogue, 234 P. 657, 658, 133 Wash. 664.

73. U S Fidelity, etc, Co v Howes, 109 S.W. 342, 33 Ky.L. 131.

d. Weight and Sufficiency
- (1) In general
- (2) As to wrongfulness and probable cause
- (3) As to malice
- (4) As to property seized.
- (5) As to damages

(1) In General

The party having the affirmative of an essential issue must sustain it by a preponderance of the evidence.

Following the rules applicable in civil actions generally, a party having the affirmative of an issue in an action on an attachment bond must sustain it by a preponderance of the evidence, and a preponderance of the evidence is sufficient.[74]

Proof of the wrongful attachment is sufficient to warrant a recovery of actual damages, without evidence of malice or want of probable cause, although the petition alleges that the writ was maliciously issued without probable cause.[75] Where the record shows that a final judgment in personam alone has been taken, this sufficiently shows a dissolution or abandonment of the attachment.[76]

A judgment in an action, in which the sureties were not parties, in favor of the attachment defendant against the attachment plaintiff for wrongful attachment, in which damages were recovered for wrongs committed by the principal apart from the attachment, is not of itself sufficient to establish a cause of action against the sureties on the attachment bond.[77]

Execution of the attachment bond is sufficiently shown by introducing the record of the attachment suit,[78] and where defendants interpose a verified plea of non est factum, which is the only issue in the case, proof of the execution of the bond by defendants is sufficient to entitle plaintiffs to recover.[79]

(2) As to Wrongfulness and Probable Cause

While proof sufficient to lead a reasonable man to believe that he had grounds for attachment is sufficient to show probable cause, a final determination of the attachment proceedings on its merits for the defendant therein conclusively proves that the proceedings were wrongful.

A dissolution of the attachment or judgment for defendant when upon the merits, is ordinarily conclusive, in a subsequent action or proceeding to recover damages caused by the attachment, that the writ was wrongfully obtained;[80] but an attachment cannot be held to have been wrongful, within the meaning of statutes authorizing a recovery of damages resulting from wrongful attachments, merely because it has been dissolved on account of defects in the form of the proceedings, or for mere omissions, irregularities, or informalities in the issue of the writ.[81] Neither does the fact that the attachment is dissolved or quashed for the failure of the officer to perform his duty,[82] or dismissal of the attachment because of the existence of prior liens on the attached property necessarily establish that the attachment was wrongful.[83]

Failure to prosecute to effect imports, prima facie, the want of a just cause of action.[84]

If the attachment proceedings are sustained, this may be conclusive that they were rightful,[85] although where plaintiff recovers judgment on the merits in the main action, and defendant may still sue because none of the statutory grounds for attachment existed or because the claim or levy was excessive, such termination cannot be conclusive that the attachment was rightful.[86]

A levy on exempt property does not tend to establish that the attachment was sued out wrongfully.[87]

Probable cause. Proof of probable cause to be-

74. Waller v Deranleau, 94 N.W. 1038, 4 Neb (Unoff.) 497—6 C.J. p 529 note 59

75. Talbott v Great Western Plaster Co., 132 S.W. 15, 151 Mo App. 538

76. Sannes v. Ross, 5 N.E. 699, 105 Ind. 558.

77. Johnston v Sexton, (Ill.) 159 F. 70, 86 C.C.A. 260, certiorari denied 29 S.Ct. 685, 212 U.S. 576, 53 L.Ed. 657.

78. Adams v. Olive, 48 Ala. 551

79. Fitzsimmons v. Hall, 84 Ill. 538—6 C.J. p 529 note 64

80. Ala.—Smith v. Summers, 112 So. 344, 215 Ala. 690—Street v. Browning, 87 So. 527, 205 Ala. 110.
Okl.—Bash v. Howald, 157 P. 1154, 59 Okl. 116.
6 C.J. p 529 note 67

The judgment entry, showing a verdict and judgment for defendant in attachment suit on the merits of the claim sought to be enforced, established a breach of the attachment bond, and authorized a recovery thereon.—Street v. Browning, 87 So. 527, 205 Ala. 110

81. Ala.—Sharpe v. Hunter, 16 Ala. 765.
Ark.—Boatwright v. Stewart, 37 Ark. 614
6 C.J. p 529 note 68.

82. Offterdinger v. Ford, 24 S.E. 246, 92 Va. 636

83. Miller v. McCrory, 3 Ky.L. 774, 11 Ky.Op. 625

84. Smith v. Summers, 112 So. 344, 215 Ala. 690—Street v. Browning, 87 So. 527, 205 Ala. 110.

85. Waring v. Fletcher, 52 N.E. 203, 152 Ind. 620.

86. Ala.—Blackmon v. Gilmer, 130 So. 193, 221 Ala. 554—Bradford v. Lawrence, 90 So. 809, 18 Ala.App. 138.
Wash.—McAllister v. Hogue, 234 P. 657.

87. Faroux v. Cornwell, 90 S.W. 537, 40 Tex.Civ.App. 529.

lieve that grounds existed for suing out an attachment requires evidence showing, not merely what the creditor in fact believed, but also what a reasonable man, on proper investigation, would believe.[88] The fact that the trial court granted judgment which, if unreversed, would have sustained the attachment has been held to be insufficient of itself to show probable cause and the fact that the appellate court in reversing such judgment stated in its opinion that the question was a perplexing one is not controlling on the question of probable cause[89]

The fact that an attachment was levied on exempt property does not warrant an inference that it was sued out without probable cause,[90] nor is the fact that judgment was rendered for defendant in the suit in which the attachment was issued, sufficient to establish that the attachment was issued maliciously and without probable cause[91]

The fact that plaintiff in attachment acted under advice of counsel has been held to be sufficient to show probable cause in suing out the writ.[92]

(3) As to Malice

Want of probable cause is not conclusive on the question of malice.

The fact that probable cause did not exist, although not conclusive, may support an inference of malice sufficient to supply the place of direct proof thereof.[93] However, malice cannot be presumed, as against sureties on a bond to procure an attachment, who are strangers to the controversy and not interested in the result, from the mere fact that they signed without previously examining into the merits of the cause;[94] nor can malice in suing out the writ be inferred from an unsuccessful attempt to show the existence of probable cause therefor.[95]

Even if, in an action for wrongful attachment brought independently of the attachment undertaking, the judgment roll in the attachment action, showing judgment for the attachment defendant, is admissible as prima facie evidence of want of probable cause, it is no evidence of malice in procuring issuance of the attachment[96]

Advice of counsel. The absence of malice is conclusively proved by evidence that plaintiff acted under the advice of counsel, and that during the litigation two judgments were rendered in his favor, although subsequently reversed[97]

Participation by a principal in the malice of his agent in suing out an attachment cannot be inferred merely from the relation of principal and agent.[98]

(4) As to Property Seized

The return of the officer is conclusive as to the quantity of goods seized.

It has been held that the return of the officer making the levy is conclusive as to the quantity of goods seized.[99]

(5) As to Damages

The fact of damage must be sustained by a preponderance of the evidence.

The fact of damage, as other material facts, must be established by a preponderance of the evidence[1] The evidence as to damages must be definite and

88. McAllister v. Hogue, 234 P 657, 133 Wash. 664

Rule stated

"It does not depend upon the state of mind of anybody, but upon the true facts of the case It is for the plaintiff in any such case, if there has been no previous adjudication, to lay before the jury the facts concerning his affairs sufficiently to show that, as they were known, or might have been known, by reasonable inquiry there were no fraudulent transactions on his part, and none upon which the ordinary business man would naturally look with suspicion"—Seattle Crockery Co. v. Haley, 33 P. 650, 651, 6 Wash. 302, quoted in McAllister v. Hogue, 234 P. 657, 658, 133 Wash 664.

89. Taylor v. Wilbur, 16 P (2d) 457, 170 Wash. 265

90. Faroux v. Cornwell, 90 S W. 537, 40 Tex Civ App 529.

91. Hilfrich v Meyer, 39 P 455, 11 Wash 186—6 C J p 530 note 87

92. Taylor v. Wilbur, (Wash.) 31 P (2d) 1016.

93. Ala.—Alsop v Lidden, 80 So 401, 130 Ala 548
Iowa.—Welsh v. Haleen, 138 N.W 502, 157 Iowa 647
6 C J p 530 note 76.

94. Dawson v. Baum, 19 P 46, 3 Wash T. 464.

95. Flournoy v. Lyon, 70 Ala 308

96. Vesper v. Crane Co., 130 P. 876, 165 Cal. 36, L R A 1915A 541

97. Frank v Chaffe, 34 La Ann 1203—6 C J p 530 note 82.

98. Jackson v. Smith, 75 Ala. 97.

99. Matthews v Boydstun, (Tex Civ. App.) 31 S W. 814—6 C.J. p 530 note 88.

1. Morneault v National Surety Co., 174 P. 81, 37 Cal App 285. See Chase v. Bodge, 194 Ill.App 352.

Insufficient evidence of depreciation

An award of five hundred dollars for depreciation of an automobile is not supported by testimony of witnesses where one expert who saw the machine before levy testified that it was then worth eight hundred and fifty dollars, while another who did not see it stated it was worth eleven hundred and fifty dollars, and plaintiff, sole witness on the value at its return, testified that he sold it for four hundred and fifty dollars and a lot of land which he valued at two hundred dollars, notwithstanding evidence of experts as to the rate of depreciation of an automobile while in use, where the automobile was not in use while in custody—Morneault v. National Surety Co., 174 P. 81, 37 Cal App. 285.

certain and should not leave it to the jury to speculate as to the damages sustained, and where the evidence is not definite and certain, plaintiff cannot complain that the jury fail to award him anything where defendant is awarded a sum in set-off [2]

The contract price,[3] or the amount actually paid,[4] for the services of defendant's attorney in proceedings for the dissolution of the attachment is not conclusive as to what is a reasonable compensation therefor. The record in the attachment proceedings is not conclusive, in an action on the bond, as to the ownership of the property seized, and the true status of title may be shown.[5] As the mere seizure of a debtor's book of accounts under a writ of attachment creates no lien in favor of the attaching creditor on the accounts, proof of such seizure is not proof of damages entitling plaintiff to judgment in an action on the indemnifying bond given in the attachment suit.[6] Where plaintiff testified that he employed a certain attorney to defend the suit and agreed to pay him a certain fee, but there was no proof that he defended it, or that plaintiff had paid or was liable for the fee, there was no evidence of actual damages.[7]

§ 176. —— Trial

a. Questions of law and fact
b. Instructions
c. Verdict or findings

a. Questions of Law and Fact

Where the evidence on an issue is undisputed, or where there is no evidence, the determination of the issue is a question of law for the court; but where the evidence thereon is conflicting, the issue should be submitted to the jury.

Where the evidence is conflicting, it is for the jury to decide whether the attachment was sued out wrongfully,[8] maliciously,[9] or without probable cause [10] It is also for the jury to determine whether injury resulted from the attachment,[11] and to determine the amount of damages to be recovered [12] The question of what facts constitute probable cause is for the court.[13] The question of the ownership is one of law and not of fact.[14]

It is the province of the jury, in some jurisdictions, to determine whether punitive damages will be awarded, as well as the amount thereof.[15]

Issues upon which there is no evidence should not be submitted to the jury. Thus, where there is no evidence tending to show probable cause,[16]

2. State ex rel Myers v Mathieson, 232 S W 181, 207 Mo App 676

3. Ala —Street v Browning, 98 So 203, 210 Ala 331
N Y —Elsman v Glens Falls Indemnity Co, 262 N.Y S. 642, 146 Misc 631
6 C J p 531 note 95

4. Ala —Street v. Browning, 98 So. 203, 210 Ala 331
Okl.—Munson v. Beck, 214 P. 708, 89 Okl 251.

5. Massachusetts Bonding & Insurance Co v U S Conservation Co, 132 S E 728, 31 Ga App 716.

Reason for the rule stated

"The title to the property seized under an attachment is not, as between the plaintiff in attachment and the defendant in attachment, a matter of inquiry in the attachment case If the defendant's property is not levied upon, the defendant has nothing to complain of If the property levied on is not the property of the defendant in attachment, this fact, so far as respects the attachment suit, is of no concern to the plaintiff. He is concerned therein only so far as he may be answerable to another person for trespass in causing the levy The record in the attachment case therefore cannot, in a suit for damages on the bond by the defendant in attachment against the plaintiff in attachment, establish anything as to the true title to the property attached"—Massachusetts Bonding & Ins. Co. v. U. S Conservation Co., 132 S E. 728, 731, 31 Ga.App 716

6. McKinney v. Sweet, (Miss) 28 So 939.

7. State ex rel Myers v. Mathieson, 232 S W. 181, 207 Mo App 676—6 C J p 531 note 94

8. Hamilton v. Maxwell, 32 So. 13, 133 Ala. 233—Alsop v Lidden, 30 So 401, 130 Ala. 548—6 C J. p 531 note 96

9. Alsop v Lidden, supra—Hamilton v. Maxwell, 24 So. 769, 119 Ala 23—6 C J p 531 note 97

10. McAllister v. Hogue, 234 P. 657, 133 Wash 664—6 C J. p 531 note 98

11. Bell v Seals Piano & Organ Co, 78 So. 806, 201 Ala. 428—6 C J. p 531 note 1.

12. McFarland v. Ratcliffe, 9 P (2d) 1090, 167 Wash. 673—6 C J. p 531 note 2.

Attorney's fees

(1) The question as to the reasonableness of an attorney's fee for procuring dissolution of an attachment is one for the jury —McFarland v Ratcliffe, 9 P.(2d) 1090, 167 Wash. 673—6 C J. p 531 note 2 [b] (1).

(2) Where the attorney who defended the attachment suit testified as to the value of his services, and this evidence was not contradicted, it was the province of the jury to determine what constituted a reasonable fee.—St. John v. United States Fidelity & Guaranty Co, 182 P. 128, 56 Mont. 197.

(3) The attorney's fee to be awarded under a statute as costs of an action on a bond should be fixed by the court —McFarland v. Ratcliffe, supra

13. Mark v. Christian, 59 S.W. 1092, 22 Ky L 1102—6 C J. p 531 note 4.

14. Trentman v. Wiley, 85 Ind 32—6 C J p 531 note 6.

15. Blackmon v. Gilmer, 130 So. 192, 221 Ala 554—6 C J. p 531 note 2 [d], p 535 note 41 [b]

16. McAllister v Hogue, 234 P. 657, 133 Wash 664—6 C J. p 531 note 5.

Rule stated

"If the facts are not in dispute, the question is for the court Upon disputed facts the jury must be left to pass, but the court must determine on the facts found whether or not probable cause existed As to what facts are sufficient to show probable cause is a question of law for the court, and whether such facts are proved by the evidence is a question for the jury"—McAllister v Hogue, 234 P. 657, 658, 133 Wash 664.

Failure to investigate or obtain advice

Where there is neither pleading nor proof to the effect that the creditor sought advice of counsel or exercised diligence to ascertain facts on which reasonable cause might rest, although the debtor, who was his

or where there is no competent evidence of the value of an attorney's services,[17] such issues should not be submitted to the jury

Where the evidence leaves no doubt as to whether or not the attachment was wrongful, a verdict may be directed,[18] but where there is a judgment for defendant in the original action, and some evidence of actual damage, it is error to grant a nonsuit[19]

b. Instructions

The court should instruct the jury as to the law on all matters submitted to their consideration

The court should instruct the jury as to the law applicable to the matters presented for their consideration,[20] the elements and measure of damages,[21] and the manner in which the verdict should be returned,[22] being careful that the instructions shall not invade the province of the jury,[23] or be argumentative[24] or misleading[25]

c. Verdict or Findings

The verdict, if for plaintiff, should be in the amount of damages found to be sustained by plaintiff, not exceeding the amount of the bond

The rules governing verdicts in civil actions generally apply to actions on an attachment bond. Accordingly, the verdict, if for plaintiff on the bond, should be for the amount of damages found to be sustained by plaintiff, not exceeding the amount of the bond[26] A finding that nothing was due to plaintiff in attachment by reason of a counterclaim does not authorize an inference of malice in suing the writ such as will warrant an allowance of exemplary damages[27] A verdict contrary to the law and the evidence should be set aside and a new trial granted.[28]

§ 177. —— Judgment

The judgment in an action on an appeal bond must be in statutory form, and obtained in conformity with statutes

Where a statute requires that judgment be entered for the penalty of the bond, to be satisfied by the payment of the verdict and costs, a judgment for the payment of such verdict and costs rather than for the penalty, to be satisfied by the payment of such verdict and costs, will not be disturbed where a statute further requires that judgments shall not be reversed for mere technicalities not affecting the substantial rights of the parties[29]

tenant, said he was going to Oregon after leaving his place, as matter of law, there was no reasonable cause for attachment —McAllister v Hogue, 234 P. 657, 133 Wash 664

17. State ex rel First Nat Bank v Flarsheim, 119 S W 17, 137 Mo App 1

18. Elseley v Norfolk Nat Bank, 131 N W. 608, 89 Neb 382

19. Parker v Nolan, 139 S E 429, 37 Ga App. 205.

20. State ex rel and to Use of Kibble v. First Nat Bank, (Mo App) 22 S W.(2d) 185—6 C J. p 531 note 7.

21. Blackmon v Gilmer, 130 So 192, 221 Ala. 554—6 C.J p 532 note 8

Interest

In an action on an attachment bond, an instruction telling the jury that plaintiff was entitled to six per cent interest from the date the property was taken under a writ of attachment, was erroneous in not pointing out the effect of a return of part of the property on the right to recover interest —State ex rel and to Use of Kibble v First Nat. Bank, (Mo App) 22 S W (2d) 185

Loss of time and expenses

An instruction telling the jury that plaintiffs are entitled to recovery for the expenses and time that were necessary in the defense of the attachment suit, and which allows the jury to find for plaintiffs on this item, sufficiently informs the jury that the recovery could only be for loss of time, personal expenses, and printing bills that were necessary in the defense of the attachment Also, such instruction is not misleading because it omitted the word "reasonably" and used only the word "necessary"— State ex rel and to Use of Kibble v First Nat Bank, (Mo App) 22 S W (2d) 185

Property of defendant

The instructions should require the jury to find that the property taken under the writ of attachment belonged to plaintiff —State ex rel and to Use of Kibble v First Nat Bank, (Mo App) 22 S W (2d) 185

Punitive damages

"The jury should be given to understand by the trial court that the assessment of punitive damages as well as the amount, if so assessed, were matters resting in their sound discretion"—Blackmon v Gilmer, 130 So 192, 194, 221 Ala 554

Value of property

In an action on an attachment bond, an instruction permitting recovery for plaintiff, if the jury found that specific property had been taken under the writ, and restricting the amount of damages to the reasonable fair market value of such property not to exceed a certain sum, which was the value of the property as alleged in the petition, was not erroneous as allowing the jury to return a verdict for damages up to the full amount sued for rather than the amount shown by the evidence — State ex rel and to Use of Kibble v. First Nat Bank, (Mo App) 22 S W (2d) 185

22. Cross v Coffin-Fletcher Packing Co, 51 S E 704, 123 Ga 817

23. Vandiver v. Waller, 39 So 136, 143 Ala 411—6 C J p 532 note 11

24. Troy v Rogers, 20 So 999, 113 Ala 131—6 C J p 532 note 12

25. State ex rel and to Use of Kibble v First Nat Bank, (Mo App) 22 S W.(2d) 185—6 C J p 532 note 13.

Interest on value of property

An instruction that the jury might allow interest "on all property that was taken and not returned" is sufficient as limiting the jury to a calculation of the interest upon the property that was taken and not returned, and it was not misleading in failing to require the jury to calculate the interest upon the value of the property —State ex rel and to Use of Kibble v First Nat Bank, (Mo App) 22 S W (2d) 185

26. George N Pierce Co v Casler, 80 N E 494, 194 Mass 423

27. Ahrens v. Fenton, 115 N W. 233, 133 Iowa 559.

28. Oakes v Smith, 48 S E 942, 121 Ga. 817—6 C J p 533 note 16

29. State v Reynolds, 117 S W. 653, 137 Mo App. 261—6 C J. p 533 note 19.

Under a statute providing "that no greater amount shall be recovered of the said securities, than the appraised value of the property seized by the officer," the court, on a verdict for a greater amount in an action on the bond, should render judgment against the principal and sureties for the appraised value, and against the principal for the balance.[30]

Where it is alleged in the complaint in an action on an attachment bond that application was made for a warrant of attachment and that such warrant issued, it will be presumed, in support of a judgment for plaintiff, that a proper affidavit was filed with the clerk.[31]

A judgment may be rendered against the surety alone where service has not been obtained on the principal.[32]

§ 178. —— Appeal and Error

Appeals in actions on attachment bonds are controlled by rules applicable in other actions which have been discussed in the title Appeal and Error Cases of peculiar application to actions of this character, if any such may arise, will be treated in the Pocket Parts, under this section number.

§ 179. —— Damages

a. Actual or nominal damages
b Exemplary or punitive damages
c. Elements or items of damage
d Mitigation of damages
e. Amount of allowance
f. Set-Offs

a. Actual or Nominal Damages

A defendant in attachment who brings an action on the bond for wrongful attachment, upon proof that the attachment was wrongful, is entitled to recover his actual damages, and, in the absence of proof of actual damages, he is at least entitled to nominal damages.

In an action on a bond for the wrongful suing out of an attachment, if the attachment is shown to be wrongful and that plaintiff is entitled to recover, he is entitled to recover his actual damages,[33] by which is meant compensation[34] for those injuries and losses which are the direct and proximate result of the wrongful suing out of the writ and the seizure and detention of his property thereunder.[35]

Nominal damages. Where an attachment is wrongfully sued out but no actual damages have resulted, attachment defendant is nevertheless entitled to recover nominal damages.[36] Under these circumstances, however, he can recover nothing more.[37]

b. Exemplary or Punitive Damages

(1) Right to recover
(2) Under what circumstances allowable
(3) Actual damages as basis of recovery

(1) Right to Recover

In the absence of statutory permission, punitive damages are ordinarily not recoverable in an action on an attachment bond.

As a general rule the liability on the attachment bond is limited to the actual damages which defendant in attachment has sustained by reason of the wrongful suing out of the writ, and punitive or exemplary damages cannot be recovered there-

30. Holmes v Cooper, 27 Ark 239.

31. Brown v Tidrick, 85 N.W. 185, 14 S.D. 249, 86 Am.S.R. 754.

32. Watt v. Schlafly, 128 Ill.App. 303

33. Ga.—Parker v. Nolan, 139 S.E. 429, 37 Ga.App 205.
Ohio—Munro Hotel Co. v. Brough, 26 Ohio Cir.Ct (N.S.) 185.
Okl.—Van Sickle v Franklin, 162 P. 950, 62 Okl. 284.
Pa.—Dyer v. Sharp, 2 Pa.Co. 216.
Tenn.—Gordon v Kentucky Midland Coal Co., 278 S.W. 68, 152 Tenn. 267, 42 A.L.R. 1052.
6 C.J. p 534 note 35.

34. Okl.—Carter v. Walker, 267 P. 259, 130 Okl 284—Van Sickle v. Franklin, 162 P. 950, 62 Okl 284.
S.C.—Frick Co v. Deiter, 167 S.E. 499, 168 S.C. 289
6 C.J. p 534 note 36

35. U.S.—National Surety Co. v. Jean, (C.C.A.Tenn.) 36 F.(2d) 468, 68 A.L.R. 1326
Ga.—Parker v Nolan, 139 S.E. 429, 37 Ga.App 205
Mo.—State ex rel and to Use of Fenn v Conran, 212 S.W. 869
Okl.—Carter v Walker, 267 P. 259, 130 Okl 284—Van Sickle v Franklin, 162 P. 950, 62 Okl 284
S.C.—Frick Co v Deiter, 167 S.E. 499, 168 S.C. 289
6 C.J. p 534 note 37.

Amounts credited principal

Where attachment plaintiff recovered judgment against attachment defendant in the principal action, which judgment on appeal was reversed, the voluntary action of attachment defendant in setting off against the judgment three judgments held by himself against attachment plaintiff cannot be charged to the attachment bond in his suit thereon.—State ex rel and to Use of Fenn v. Conran, (Mo.) 212 S.W. 869.

Proximate cause

Where a prior attachment on a claim is many times less than the value of the attached property, and is not used to interfere with the business of the attachment debtor, and the subsequent attachment causes the damage which was incurred, the rule that a prior attachment is the proximate cause of the debtor's loss does not obtain.—Woodruff v. Maryland Casualty Co., (Cal.App.) 35 P.(2d) 623

36. Ala.—Schuessler v. Still, 53 So. 331, 169 Ala 239
N.Y.—Blynn v Smith, 4 N.Y.S. 306.
6 C.J. p 534 note 38.

37. Cal.—Heine v Wright, 244 P. 955, 76 Cal.App 338
Iowa.—Thielen v Schechinger, 233 N.W. 750, 211 Iowa 470—Schwartz v Davis, 57 N.W. 849, 90 Iowa 324
Neb.—Clare v. Sewell, 203 N.W. 557, 113 Neb. 441.
N.Y.—Blynn v. Smith, 4 N.Y.S. 306.
6 C.J. p 535 note 39.

on, whether the proceeding is by independent action on the bond or by an assessment of damages in the main action.[38] Where, however, the statute permits exemplary or punitive damages where the attachment was malicious as well as wrongful, such damages are proper,[39] and under some statutes recovery for punitive damages may be had against the principal on the attachment bond, but not against his surety.[40]

(2) Under What Circumstances Allowable

Where punitive damages are recoverable in an action on the bond, there must be proof of malice.

Under statutes permitting the recovery of exemplary or punitive damages such damages may be allowed for a wrongful attachment where the writ was sued out without probable cause and plaintiff in attachment acted maliciously in the premises.[41] In order to warrant such a recovery the element of malice[42] or, what imports the same, want of probable cause to believe that grounds for attachment existed, or wanton action,[43] must be present, and there can be no recovery beyond actual damages where the attachment was sued out in good faith and was merely wrongful.[44]

(3) Actual Damages as Basis of Recovery

Exemplary or punitive damages cannot be awarded unless actual damages are also awarded.

Where defendant in attachment fails to show that he is entitled to recover any actual damages because of the wrongful suing out of the writ, he cannot recover exemplary damages therefor, even though the writ was maliciously sued out;[45] and where plaintiff remits the actual damages the court has no power to render a judgment for exemplary damages.[46]

c. Elements or Items of Damage

(1) In general
(2) Loss, destruction, or conversion of property
(3) Injury to, or depreciation of, property
(4) Loss of use of property
(5) Injury to business
(6) Loss of profits
(7) Injury to credit
(8) Injury to reputation or feelings
(9) Loss of time
(10) Interest
(11) Costs
(12) Expenses of litigation

(1) In General

The items of damages recoverable in an action on a bond for wrongful attachment are those caused by the wrongful levy of attachment.

In accordance with the rule, that the recovery of actual damages is limited to compensation for injuries which are the direct and proximate result of the wrongful attachment, it has been held that no recovery can be had from inability to raise a crop,[47] for expenses incurred to prevent additional levies,[48] for damages arising from the taking of property before the attachment suit was begun,[49] or from seizure under a writ in detinue by attachment plaintiff, which suit was dismissed before suing out the attachment.[50] Neither are any damages recoverable against the sureties on the attachment bond for wrongs committed by the principal apart from the attachment.[51] Where a fund already in custodia legis is impounded by a wrongful attachment, the receiver's compensation for loaning the fund pending litigation, which was retained out

38. Ohio—Munro Hotel Co. v. Brough, 26 Ohio Cir Ct (N S) 185
Okl—Floyd v. Anderson, 128 P 249, 36 Okl 308, 43 L R A (N S) 788
Pa—Dyer v. Sharp, 2 Pa.Co. 216.
6 C J p 535 note 40.

In Texas
(1) It has been held in this jurisdiction that punitive damages may be recovered from the principal where the attachment was malicious and wrongful—Mayer v Duke, 10 S. W 565, 72 Tex 445—Tynburg v. Cohen, 2 S W. 734, 67 Tex. 220—Faroux v. Cornwell, 90 S W. 537, 40 Tex Civ. App 529—Emerson v. Skidmore, 25 S. W 671, 7 Tex Civ.App 641.

(2) It has been held, however, that no more than actual damages may be obtained from the sureties.—Faroux v. Cornwell, supra.

39. Blackmon v Gilmer, 130 So 192, 221 Ala. 554—6 C J. p 535 notes 41, 42

40. Cahill v Fidelity & Casualty Co., 175 N E 39, 37 Ohio App 444

41. U S—Tiblier v. Alford, (C.C La.) 12 F 262
Ala—Dothard v. Sheid, 69 Ala. 135.
6 C.J. p 535 note 45

42. Ky—Jackson v. Graves, 8 Ky Op 380
Tenn—Gordon v. Kentucky Midland Coal Co, 278 S W. 68, 152 Tenn. 267, 42 A L R 1052.
6 C J p 536 note 46.

43. Blackmon v Gilmer, 130 So. 192, 221 Ala. 554—Hamilton v. Maxwell, 24 So 769, 119 Ala. 22—McLane v. McTighe, 3 So. 70, 89 Ala. 411—Jackson v. Smith, 75 Ala 97—City Nat. Bank v. Jeffries, 73 Ala 183—McCullough v. Walton, 11 Ala. 492.

44. Gordon v Kentucky Midland Coal Co, 278 S W. 68, 152 Tenn 267, 42 A L R 1052—6 C J p 536 notes 47, 48.

45. Cahill v. Fidelity & Casualty Co, 175 N E 39, 37 Ohio App. 444—6 C. J. p 537 notes 49, 50

46. Smith v. Dye, (Tex Civ.App) 51 S W 358.

47. State v. Allen, 12 Mo App. 566.

48. Massachusetts Bonding & Insurance Co v. U. S Conservation Co., 122 S E 728, 31 Ga.App. 716.

49. Bradford v. Lawrence, 90 So. 809, 18 Ala App. 138.

50. Jefferson County Sav. Bank v. Eborn, 4 So. 886, 84 Ala. 529

51. Johnston v. Sexton, (Ill.) 159 F. 70, 86 C.C.A. 360.

of the growing interest, does not constitute an element of damage recoverable upon a breach of the attachment bond.[52] A levy of attachment on books of account is not a levy on the debts represented by the books, but only on the materials composing the books, and does not prevent the person to whom such debts are due from collecting them, so as to make such prevention an element of damage.[53]

Damages are not recoverable for a voluntary bankruptcy to which the attachment may have contributed,[54] although they are allowed for the period beginning with the wrongful attachment and ending with the filing of such voluntary petition in bankruptcy.[55] Where the bond is conditioned to pay all damages which may be adjudged against plaintiff in consequence of his failure to prosecute his suit to effect, where a receivership of the property was made necessary by the attachment, the amount of the receiver's compensation and expenses are recoverable under the bond on plaintiff's failure to prosecute the suit to effect.[56]

Plaintiff cannot recover for injuries resulting from the levy of executions by other creditors in consequence of the attachment,[57] nor can he recover expenses involved in preventing additional levies.[58]

Where property was wrongfully attached, the owner, who promptly sought release of the levy, can recover damages resulting from the levy between the date of the levy and the date of the release, regardless of whether the levy was valid, as the only remedy of the owner was to submit to the levy and to ask its release by the court.[59]

Necessary business expenses. It has been held that, where the stock in trade of a druggist was wrongfully attached, the rent of the building in which the business was carried on, for the time during which the goods were in custody, for which the druggist was liable, was recoverable from the attaching creditor.[60]

(2) Loss, Destruction, or Conversion of Property

The plaintiff in an action on the bond may recover for the loss, destruction, or conversion of his property occasioned by the wrongful attachment.

Where property wrongfully attached has been lost, destroyed, converted or sold, or for any reason cannot be returned to or recovered by defendant in attachment, he is entitled to recover, as actual damages, the value of the property at the time and place of the seizure,[61] with interest on such value from the time of the seizure[62] to the time of the trial[63] or of the rendition of the judgment.[64] Where, however, the conversion occurs while the property is in the custody of the attaching officer, the value of such property cannot be recovered in an action on the bond.[65]

On the other hand, plaintiff is entitled to recover his actual damages only, unless punitive damages are allowable and proper, and he cannot recover the fair market value of all the property taken when it is shown that some of the property was returned to him.[66] Likewise, where property is wrongfully seized and sold, and the proceeds were credited on the judgment obtained by plaintiff in attachment, defendant in that action, when suing on the bond, cannot receive credit for such amount paid on the judgment and then recover the full value of the property sold,[67] and a debtor, recovering property sold under attachment, cannot recov-

52. Stringfield v Hirsch, 29 S W 609, 94 Tenn. 425, 45 Am.S R 733

53. Goodbar v Lindsley, 11 S W. 577, 51 Ark 380, 14 Am S R 54.

54. National Surety Co v. Jean, (C. C A Tenn) 36 F (2d) 468, 68 A L R 1326.

Reason stated

"We cannot view the filing of a voluntary petition in bankruptcy as other than wholly independent of and disconnected from the wrongful attachment, whether dictated by motives of equality of treatment to all creditors or a determination to at least defeat payment in full to the attaching creditors There was nothing compulsory in this voluntary act on the part of appellee"—National Surety Co. v Jean, (C.C A Tenn) 36 F.(2d) 468, 471, 68 A L R 1326

55. National Surety Co. v. Jean, supra.

56. Brown v. Brown, 296 S W 356, 155 Tenn. 530

57. Marqueze v Sontheimer, 59 Miss 480.

58. Massachusetts Bonding & Insurance Co v U S Conservation Co, 122 S E 728, 31 Ga App 716.

59. Foster v. Dischner, 212 N.W 506, 51 S D 102.

60. Lord v. Wood, 94 N W. 842, 120 Iowa 302.

61. Brown & Root Co v Massachusetts Bonding & Ins Co, 174 N.Y. S. 129—6 C J p 537 note 64.

Fair market value

An instruction that plaintiff was entitled to the "fair market value" of the property taken under a writ of attachment, instead of the "reasonable market value," was not erroneous—State ex rel. and to Use of Kibble v First Nat Bank, (Mo App) 22 S W (2d) 185.

62. State ex rel and to Use of Kibble v First Nat Bank, supra—6 C J. p 538 note 65.

63. Ark—Norman v. Fife, 31 S W 740, 61 Ark 33.
Mo—State v Gage, 52 Mo App 464. 6 C J. p 538 note 66

64. Wallace v. Finberg, 46 Tex 35 —6 C J. p 538 note 67

65. Sigman v Zames, 200 N W. 438, 198 Iowa 895.

66. State ex rel and to Use of Kibble v. First Nat Bank, (Mo App) 22 S W (2d) 185.

67. Ala.—Bradford v Lawrence, 90 So. 809, 18 Ala App. 133
Ga.—Parker v Nolan, 139 S E. 429, 37 Ga App. 205.

er the value thereof in an action on the attachment bond.[68] Where the attachment is levied upon personal property of defendant, and such personalty is sold under a short-order sale as being perishable, or where defendant agrees with plaintiff to waive the necessity of obtaining an order for a short-order sale and the expense consequent thereto, and permits the property to be sold at the insistence of plaintiff as under a short-order sale, and therefore consents to the sale without prejudice to his rights, such forced premature sale of defendant's property, to his damage, furnishes a basis for a recovery by him under the attachment bond.[69] Where, however, plaintiff in attachment is not threatening or seeking to obtain a short-order sale, and where defendant, before final judgment, voluntarily agrees to the sale of the property, he cannot recover damage sustained by him as a result of such premature sale of the property.[70]

So far as recovery on an attachment bond depends on the amount of goods taken by virtue of the attachment, the marshal's inventory controls, in the absence of definite evidence to the contrary.[71]

(3) Injury to, or Depreciation of, Property

Injury to or depreciation in value of property is an element of damage recoverable in an action on the attachment bond.

Injury to or depreciation in value of personal property attached caused by the attachment is an element of actual damage, and may be recovered in an appropriate action or proceeding therefor,[72] and the rule in this respect has been held not to be affected by the fact that the injury or depreciation was the result of the negligence of the officer making the levy,[73] or that part of the depreciation was due to use and abuse of the property while in possession of the sheriff.[74]

Where plaintiff in attachment causes the goods seized to be sold in such large quantities that the price realized is unnecessarily depreciated, this may be an element of damages in an action for tort, but is not an element of damage in an action on an attachment bond.[75]

Under a statute providing that whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactorily to the court that the interest of the parties to the action will be subserved by a sale thereof, the court may order the property sold and the proceeds to be deposited in court, a loss caused by a decrease in the value of corporate stock while it was being held under a writ of attachment cannot be recovered from the sureties on the bond, at least where no application was made to the court for a sale of the stocks.[76] Also, where shares of stocks could be released by merely paying the poundage, an amount amply secured by the bond, recovery cannot be had for loss in value of the shares during the attachment.[77]

Real property. Where the owner of the premises attached is not deprived by the attachment of the possession or use thereof, nothing more than nominal damages can be recovered.[78]

(4) Loss of Use of Property

The plaintiff in an action on an attachment bond may recover the value of the use of property seized for the period during which he was deprived of its use.

68. Parsons v. McCollum, 299 S.W. 981, 221 Ky. 813

69. Parker v. Nolan, 139 S.E. 429, 37 Ga.App. 205

70. Parker v. Nolan, supra.

71. Brown & Root Co. v. Massachusetts Bonding & Ins. Co., 174 N.Y.S. 129

72. Neb.—Clare v. Sewell, 203 N.W. 557, 113 Neb. 441
Okl.—Carter v. Walker, 267 P. 259, 130 Okl. 284—Van Sickle v. Franklin, 162 P. 950, 62 Okl. 284
S.C.—Frick Co. v. Deiter, 167 S.E. 499, 168 S.C. 289
6 C.J. p. 538 note 68

Automobile kept for sale

Where attachment defendant kept an automobile for sale only, depreciation in value during the time it was held under an attachment would be a proper basis for damages, in a suit on the attachment bond, and the rental value should have been eliminated.—Morneault v. National Surety Co., 174 P. 81, 37 Cal.App. 285.

73. Ark.—Boatwright v. Stewart, 37 Ark. 614.
Iowa.—Ruthven v. Beckwith, 45 N.W. 1073, 51 N.W. 153, 84 Iowa 715
6 C.J. p. 539 note 69

74. McAllister v. Hogue, 234 P. 657, 133 Wash. 664

75. Jefferson County Sav. Bank v. Elborn, 4 So. 386, 84 Ala. 529

76. Elsman v. Glens Falls Indemnity Co., 262 N.Y.S. 642, 647, 146 Misc. 631.

77. T. W. Warner Co. v. Andrews, (C.C.A.N.Y.) 73 F.(2d) 287, certiorari denied 55 S.Ct. 515, 294 U.S. 717, 79 L.Ed. 1250

78. Cal.—Heine v. Wright, 244 P. 955, 76 Cal.App. 338
Iowa.—Thielen v. Schechinger, 233 N.W. 750, 211 Iowa 470.
6 C.J. p. 539 note 70

Rule stated

"Under such circumstances we regard it the settled rule of this state that wrong done by the mere issuance and levy of a writ of attachment upon real estate, without other evidence of actual injury, will not sustain a recovery of substantial damages . . . It is elementary, also, that if actual damages be not shown exemplary damages cannot be allowed."—New Sharon Creamery Co. v. Knowlton, 103 N.W. 770, 132 Iowa 672, quoted in Thielen v. Schechinger, 233 N.W. 750, 752, 211 Iowa 470.

Growing crops

In an action on an attachment bond for attachment of a growing crop of corn, which was not interfered with, and no portion of which was lost or destroyed, and seventy-five days later was returned to owner in same condition as when levied on, no recovery could be had for depreciation in value.—Clare v. Sewell, 203 N.W. 557, 113 Neb. 441.

Although property seized under a writ of attachment wrongfully sued out has been returned to or recovered by defendant in attachment, it is proper, in estimating his damages, to consider the injury which he has sustained by being deprived of the use of the property,[79] and to award him, as actual damages, the value of the use of the property for the period during which it was held under the writ[80]

The mere fact that the owner of attached property had plans for its disposal involving a speculative sale, or even a gratuitous loan, does not prevent a recovery of the reasonable market value of its use in an action on the attachment bond.[81]

The fact that attached personal property could not be used further in the county does not indicate that its adaptability and commercial requirements for use elsewhere would not give value to the right to possess and use it Accordingly, where equipment is useless in the locality where attached, but is in demand elsewhere, the damage recoverable is the rental value of the equipment where in demand, less the reasonable cost of removing it to the place of use.[82]

(5) Injury to Business

As a general rule, loss of, or injury to, business is not regarded as actual damage recoverable in an action on an attachment bond.

In some jurisdictions a defendant in attachment is allowed to recover compensation for injury to or loss of his business as part of the actual damages for a wrongful attachment,[83] but the more general view is that these matters are not such proximate or natural results of an attachment of property as to be proper for consideration in estimating damages in a case where an award of exemplary damages would not be proper.[84] Where, however, the elements of malice and lack of probable cause are present, the injury to or loss of business resulting from the wrongful act is quite proper for consideration in assessing damages.[85]

(6) Loss of Profits

The authorities are divided as to whether the loss of prospective profits may be allowed as actual damage; in any case the damage must be readily ascertainable.

While there are some decisions which hold that a recovery may be had for damages caused by the loss of probable or prospective profits, although the attachment was merely wrongful,[86] it is generally held that this is not an element of damage unless the attachment was malicious and without probable cause[87] At all events, recovery cannot be permitted for the loss of profits on a sale of property subject to attachment where the profits are contingent, doubtful, or highly speculative.[88]

(7) Injury to Credit

In some jurisdictions, damages are recoverable for loss of credit, especially where the institution of the attachment proceedings was malicious and without probable cause.

79. Munro Hotel Co. v Brough, 26 Ohio Cir.Ct (N S) 185—6 C J p 539 note 72.

80. Ariz.—American Surety Co. of New York v. Hatch, 206 P. 1075, 24 Ariz 66
Mo.—State ex rel and to Use of Kibble v First Nat Bank, (App) 22 S W (2d) 135.
Okl.—Van Sickle v. Franklin, 162 P. 950, 62 Okl 284.
6 C.J p 539 note 73.

Automobile kept for use

Where an automobile is owned for use rather than sale, the measure of damages is the rental value of the property while in custody, rather than the amount of depreciation in value, where no damages other than ordinary wear and tear are shown.—Mornesault v National Surety Co, 174 P 81, 37 Cal App. 285

81. Atlas Development Co v. National Surety Co, 212 P 196, 190 Cal 329

82. Atlas Development Co. v. National Surety Co., supra.

83. National Surety Co. v. Jean, (C C A Tenn) 36 F (2d) 468, 68 A L R 1326—6 C J. p 540 note 74

84. U S.—Fidelity & Deposit Co of Maryland v L Bucki & Son Lumber Co, (Fla) 23 S Ct 533, 189 U S 135, 47 L Ed 744, affirming 109 F 393, 48 C C A 436
Tex.—Tynberg v Cohen, (Civ App) 32 S W 157
6 C J p 540 note 75.

85. Ark.—Holliday v. Cohen, 34 Ark 707
Ky.—Reidhar v Berger, 8 B Mon 160
6 C J p 540 note 76

86. U S.—National Surety Co v Jean, (C C A Tenn) 36 F.(2d) 468, 68 A L.R. 1326.
Ga.—Parker v Nolan, 139 S E. 429, 37 Ga App 205.
6 C J p 540 note 77.

On forced premature sale of business property

Where plaintiff in attachment levied on cattle used in defendant's dairy business and forced a premature sale, defendant may bring an action on the bond and recover loss of profits in his business as dairyman.—Parker v Nolan, 139 S E. 429, 37 Ga App 205.

87. Sigman v Zames, 200 N.W. 435, 198 Iowa 805—6 C J p 540 note 78.

88. Cal.—Atlas Development Corporation v National Surety Co, 212 P 196, 190 Cal. 329
Ga.—Massachusetts Bonding & Insurance Co v U S Conservation Co, 114 S E 62, 29 Ga App. 80.

The loss of a possible sale is not an element of damage where it is not shown that there were negotiations with a prospect for a sale.—Thielen v Schechinger, 233 N W. 750, 211 Iowa 470

Where consideration was shares of stock in development corporation

Where oil-drilling machinery and equipment which were attached had been sold by the owner to a corporation organized for oil development, for fifty thousand shares of its stock, the damages from inability to carry out and realize on the contract were too remote, speculative, and uncertain, particularly when not within the contemplation of the surety on the attachment bond.—Atlas Development Co. v National Surety Co., 212 P. 196, 190 Cal. 329.

In some jurisdictions it is considered that injury to the credit of defendant in attachment is a natural and proximate result of a wrongful attachment, and is therefore proper to be considered in estimating the actual damages,[89] but other courts hold the view that such injury is too remote and speculative to be considered as an element of actual damages.[90]

Analogy to exemplary damages. A number of cases have treated a recovery for injury to credit as analogous to a recovery of exemplary damages, holding that a recovery may be had therefore where the suing out of the writ was malicious and without probable cause,[91] but not otherwise.[92]

(8) Injury to Reputation or Feelings

Damages for injury to reputation or feelings is not recoverable unless the attachment was sued out maliciously and without probable cause.

While it has been held that a recovery may be had for an injury to feelings where the attachment was sued out maliciously and without probable cause,[93] it is generally held that there can be no recovery for injuries resulting from humiliation or embarrassment, as such damages are too remote, accidental, and variable.[94] Likewise, damages for injuries to reputation are not considered actual damages, and hence are not recoverable unless the attachment was malicious as well as wrongful[95]

(9) Loss of Time

Ordinarily the attachment defendant may recover for loss of time caused by the wrongful attachment.

Where a debtor's stock in trade is wrongfully attached, he may, it seems, recover for the resulting loss of time in his business;[96] and, in some jurisdictions, he may recover for loss of time incident to defending the attachment suit,[97] but where such recovery is permitted, the damage must be the proximate result of the attachment, and its reasonableness must be shown.[98]

(10) Interest

As a general rule interest may be allowed on money, or on the value of property, wrongfully attached, in an action on the bond.

Although it has been held that interest on damages allowed for wrongful attachment cannot be recovered,[99] there is also considerable authority for the view that an allowance of interest on the money[1] or the value of the property[2] wrongfully detained is proper.

(11) Costs

Costs awarded to or incurred by defendant in attachment are recoverable as damages in an action on the bond.

The recovery in an action upon an attachment bond may include costs awarded to or incurred by defendant in attachment.[3] However, where plaintiff in attachment has paid such costs, they should not be allowed as damages in an action on the bond.[4]

89. U S—National Surety Co v. Jean, (C C A Tenn) 36 F (2d) 468, 68 A L R. 1326
Ala—Irwin v Cotney, 108 So 235, 214 Ala 415—Bell v Seals Piano & Organ Co, 78 So 806, 201 Ala 428
6 C.J. p 541 note 79

90. Elder v Kutner, 32 P 563, 97 Cal. 490—6 C J. p 541 note 80

91. Pettit v. Mercer, 8 B Mon (Ky) 51—6 C J p 541 note 82

92. U S—L Buckı & Sons Lumber Co v Fidelity & Deposit Co of Maryland, (Fla) 48 C C A. 436, 109 F. 393, affirmed 23 S Ct 582, 189 U. S 135, 47 L Ed. 744
Ark—Holliday v. Cohen, 34 Ark 707.
6 C J p 541 note 83

93. Munro Hotel Co. v. Brough, 26 Ohio Cir.Ct.(N.S) 185—6 C.J. p 541 note 84

94. Irwin v. Cotney, 108 So 235, 214 Ala. 415—6 C J. p 541 note 85

95. Munro Hotel Co v Brough, 26 Ohio Cir Ct (N S) 185—6 C J. p 541 note 86.

96. Lord v. Wood, 94 N W 842, 120 Iowa 303—6 C.J p 541 note 87

97. Idaho—Moseley v. Fidelity & Deposit Co of Maryland, 189 P 862 33 Idaho 37
Okl—Carter v Walker, 267 P. 259, 130 Okl 284.

98. Carter v. Walker, supra

99. Addison v Sujette, 38 S E 229, 60 S C 58—6 C J p 542 note 92

1. U S—Simpson v U S Fidelity & Guaranty Co, (D C Cal) 15 F (2d) 389
Wash—Taylor v Wilbur, 16 P (2d) 457, 170 Wash 265.
6 C J p 542 note 93

2. Mo—State v Seavey, 119 S.W 17, 137 Mo App 1—State v. Gold Spring Distilling Co., 72 Mo App. 573.
Utah—St Joseph Stock Yards Co v Love, 195 P 305, 57 Utah 450, 25 A L R 569
6 C J. p 542 note 94

3. U S—Simpson v. U S Fidelity & Guaranty Co, (D C Cal) 15 F. (2d) 389
Idaho—Randall v U S Fidelity & Guaranty Co, 23 P (2d) 319—Moseley v F.delity & Deposit Co of Maryland, 189 P 862, 33 Idaho 37, 25 A L R 564.
N Y—Brown & Root Co v Massachusetts Bonding & Ins Co, 174 N Y S 129
Okl—Carter v. Walker, 267 P 259, 130 Okl 284.
S C—Frick Co v Deiter, 167 S E. 499, 168 S C 289.
Wash—Taylor v Wilbur, 16 P.(2d) 457, 170 Wash 265
6 C J p 542 note 95

Fees of receiver to conserve property

Where a large quantity of green furs were attached and it became advisable to appoint a receiver to care for them, the expenses and fees of such receiver, taxed as costs, were recoverable as damages in an action against the surety on the attachment bond—Sklar v. Bernstein, 7 Tenn App. 593

4. Bradford v Lawrence, 90 So 809, 18 Ala App 138.

Where costs paid out of proceeds of sale

Where attached property has been sold, and the court costs have been paid from the proceeds, plaintiff in an action on the bond, recovering the full value of the property sold, cannot also receive the costs so paid as

(12) Expenses of Litigation

(a) Defending against attachment
(b) Defending principal suit
(c) Proceeding to recover damages

(a) Defending against Attachment

Expenses incurred in procuring a dissolution of the attachment are items of actual damage recoverable in an action on an attachment bond.

It is generally held that one against whom an attachment has been wrongfully sued out is entitled to recover, as a part of his damages for the wrong, the expenses which he incurred in defending against, and procuring dissolution of, such attachment [5] The recovery of such expenses depends upon whether the attachment produced or caused them.[6]

Counsel fees. While it is held in some jurisdictions that a defendant in attachment cannot be allowed any counsel fees whatever as part of his damages for the wrongful suing out of an attachment against him,[7] the more generally prevailing view is that one against whom an attachment has been wrongfully sued out is entitled to recover reasonable counsel fees incurred or expended in defending against such attachment.[8]

The actual rendition of services by the attorney in defending against the attachment is of course necessary in order to warrant a recovery for counsel fees,[9] and where no defense is interposed to an attachment, the expense of consultation with attorneys is not allowable [10]

Where services were not rendered until after judgment in the attachment suit there can be no recovery therefor.[11]

Necessity for actual payment. The right of defendant in attachment to recover attorney's fees is the same whether such fees have been actually paid or a mere liability therefor incurred,[12] but

damages—Bradford v. Lawrence, 90 So. 809, 18 Ala.App 133

5. Ga—Massachusetts Bonding & Insurance Co v U S Conservation Co, 132 S E 728, 31 Ga App 716
Idaho—Moseley v Fidelity & Deposit Co of Maryland, 189 P. 862, 33 Idaho 37, 25 A L R 564
N Y.—American Nat Bank v. Warren, 160 N Y.S 413, 96 Misc. 265
Okl—Carter v Walker, 267 P 259, 130 Okl 234—Munson v. Beck, 214 P. 708, 89 Okl 251.
6 C J. p 542 note 96.

Amount already paid

Where, in settlement of an action in attachment, involving a liability on the attachment bond, defendant's attorneys received a certain sum as attorney's fees, and thereafter such settlement was set aside, and a new trial granted, on which the court made an allowance to defendants for fees rendered, it was proper to require that such allowance be credited with the amount received by the attorneys under the settlement, which they retained—Kilmer v. Gallaher, 95 N W. 180, 120 Iowa 575

Cost of procuring depositions

Fees and other costs of eight hundred dollars paid for procuring depositions used in securing the release of an attachment are allowable as damages in an action on an attachment bond—Gregory v. U S Fidelity & Guaranty Co, 185 P 35, 105 Kan 648, rehearing denied 185 P. 1041, 105 Kan 648

Premium on replevy bond

Where defendant in attachment replevied the property attached, and there was a voluntary nonsuit without prejudice, such defendant may recover, as an element of damage, the premium on the replevy bond.—Irwin v. Cotney, 108 So. 235, 214 Ala. 415—St John v United States Fidelity & Guaranty Co, 182 P 128, 129, 56 Mont 197—Frick Co v Deiter, 167 S E 499, 168 S C 289—Gordon v Kentucky Midland Coal Co, 273 S W 68, 152 Tenn. 267, 42 A L.R 1052—6 C.J. p 542 note 96 [g].

Sheriff's allocation of poundage final

As respects the right to recover damages on attachment bonds for poundage due upon cash which had been attached by defendant, the sheriff's allocation of poundage as to the separate original actions was final—T W. Warner Co v Andrews, (C C A N Y.) 73 F (2d) 287, certiorari denied 55 S Ct. 515, 294 U S. 717, 79 L Ed 1250.

Sheriff's poundage and premium paid on bond given to discharge attachment are "damages" within the meaning of an attachment undertaking, and are recoverable in action thereon—General Outdoor Advertising Co v. R C Maxwell Co., 272 N. Y.S 366, 241 App Div. 444.

6. Idaho—Randall v U S Fidelity & Guaranty Co, 23 P (2d) 319
N.Y—Elsman v Glens Falls Indemnity Co., 262 N.Y S 642, 146 Misc 631.

7. U S—Simpson v U S Fidelity & Guaranty Co, (D C Cal) 15 F (2d) 389
Tenn—Gordon v Kentucky Midland Coal Co, 273 S W 68, 152 Tenn 267, 42 A L R 1052
6 C J. p 543 note 99.

8. Ala—Irwin v. Cotney, 108 So 235, 214 Ala 415—Street v Browning, 98 So 203, 210 Ala 331—Street v Browning, 87 So 527, 205 Ala 110
Cal.—Soule v. U. S. Fidelity & Guaranty Co, 255 P 886, 82 Cal App 572
Ga—Parker v Nolan, 139 S E 439, 37 Ga App 205
Iowa—Thielen v. Schechinger, 213 N W. 750, 211 Iowa 470
Kan—Burkhalter v Matteson, 246 P 673, 121 Kan 281—Gregory v U S Fidelity & Guaranty Co, 185 P 35, 105 Kan 648, rehearing denied 185 P 1041, 105 Kan 648
N Y—Brown & Root Co v. Massachusetts Bonding & Ins Co., 174 N Y S 139.
Ohio—Munro Hotel Co v. Brough, 26 Ohio Cir.Ct.(N S) 185
Okl—Carter v. Walker, 267 P. 259, 130 Okl 234—Munson v. Beck, 214 P 708, 89 Okl. 251.
S C—Frick Co. v. Deiter, 167 S E 499, 168 S C 289
Wash—Taylor v Wilbur, 16 P (2d) 457, 170 Wash 265—McFarland v. Ratcliffe, 9 P (2d) 1090, 167 Wash. 673
See Os-Ko-Mon v. New York Star Co, 211 Ill App 264—Chase v. Bodge, 194 Ill App 352
6 C J. p 543 note 1.

9. Schuessler v Still, 53 So 831, 169 Ala 239—6 C J p 544 note 2.

10. Thielen v Schechinger, 233 N W 750, 211 Iowa 470—6 C.J. p 544 note 2 [a]

11. Ala—Trammell v. Ramage, 11 So 916, 97 Ala 666
Iowa—Kilmer v. Gallaher, 95 N W. 180, 120 Iowa 575

12. Ala—Penney v. Burns, 159 So 835
Kan—Burkhalter v Matteson, 246 P. 673, 121 Kan 281.
N Y—Elsman v Glens Falls Indemnity Co, 262 N Y S. 642, 146 Misc. 631
6 C.J p 544 note 4.

either actual payment or a definite liability to pay must be shown in order to warrant a recovery.[13]

(b) Defending Principal Suit

As a general rule, the expenses of defending the principal suit on the merits are items of actual damage, especially where such defense is necessary to procure the dissolution of the attachment

Although there is authority to the contrary,[14] it is generally held that the expenses incurred in defending the principal suit on the merits are items of actual damage recoverable in an action on the bond,[15] especially where a defense on the merits is necessary to procure a dissolution of the attachment[16]

Counsel fees. It has been held that no allowance can be made for attorney's fees for services in defending the principal action,[17] in the absence of a stipulation therefor in the bond sued on[18] or a statutory provision for such an allowance;[19] and this has been held to be true, even though jurisdiction was obtained solely by attaching the property of a nonresident who subsequently appeared and defended the action.[20] However, according to other authority counsel fees for a defense on the merits may be allowed, at least where such defense was necessary to procure a dissolution of the attachment.[21] Under this rule, however, counsel fees in defending the principal action

Construction of bond

"Of course the distinction is familiar between a mere indemnity against damages and an indemnity against liability . . . But probably the cases in regard to indemnities, strictly so called, are hardly applicable The parties to the undertaking, by its terms, do not agree to indemnify but to pay such damages as the defendant may sustain Nor is the undertaking given to protect the defendant against the acts of some third person, or against some consequence of the defendant's own acts, as is often the case in bonds of indemnity The undertaking is to protect the defendant against acts of the plaintiff which may prove to have been unjustifiable There is every reason, therefore, for giving a construction to the undertaking which shall protect the defendant against damages incurred, if caused by the plaintiff's unjustifiable act The defendant should be made secure, and should not merely be indemnified This seems to us the just construction to be put upon this contract, considering its language and its purpose"—Crounse v Syracuse, C & N Y R Co, 32 Hun 497, 500, affirmed 97 N Y 631, quoted in Elsman v. Glens Falls Indemnity Co., 262 N Y S 642, 652, 146 Misc 631

13. Schuessler v Still, 53 So 831, 169 Ala. 239—6 C J p 544 note 5

14. Soule v U. S Fidelity & Guaranty Co, 255 P. 886, 82 Cal App 572—6 C J. p 543 note 97.

Transcript of testimony

The cost of procuring a transcript of testimony used in defending the suit on its merits is not allowable as damage in an action on an attachment bond.—Soule v U S Fidelity & Casualty Co, 255 P 886, 82 Cal App 572.

15. Minn—Greaves v. Newport, 42 N W 1059, 41 Minn 240
Or—Drake v Sworts, 33 P. 563, 24 Or. 198.
S D—Brown v Tidrick, 85 N W 185, 14 S D 249

16. Idaho—Moseley v Fidelity & Deposit Co of Maryland, 189 P 862, 33 Idaho 37, 25 A L R 564
Kan—Gregory v U S Fidelity & Guaranty Co, 185 P 35 105 Kan 648, rehearing denied 185 P 1041, 105 Kan 648—Parish v Brokerage Co, 140 P 835, 92 Kan 286
N Y—Holly v Rosenstein, 158 N Y S 226, 94 Misc 292—Straschitz v Ungar, 153 N Y S 118
6 C J p 543 note 97 [a]

In action against nonresident

The expenses of defense of the main action against a nonresident are recoverable, in an action on the bond, where the warrant is good on its face; and it is not necessary, in such case, to move to dissolve the attachment, because such motion would be futile under the circumstances—Thropp v Erb, 174 N E 67, 255 N Y 75, 71 A L R 1455, affirming 239 N Y S 836, 228 App Div 760—Straschitz v Ungar, 153 N Y S 118

Travel expenses, telephone, and telegrams

The expense of travel of counsel, witnesses, and the attachment defendant, and the cost of his telephone calls and telegrams incurred in defending the main suit, are elements of damage recoverable in an action on the bond, where such defense is necessary to procure a dissolution of the attachment—Elsman v Glens Falls Indemnity Co., 262 N Y S 642, 146 Misc 631

17. Cal—Miramonte & Louedestel Co v. National Surety Co, 266 P 576, 91 Cal App 64—Soule v. U S Fidelity & Guaranty Co, 255 P 886, 82 Cal App 572
S C—Frick Co v Deater, 167 S.E. 499, 168 S C 289.
6 C.J. p 544 note 6

Even where an attachment is regular on its face and can be discharged only by defeating the principal action by a trial on the merits, attorney's fees paid out for defending the principal action are not recoverable as damages in a suit on the attachment bond—Java Cocoanut Oil Co v Fidelity & Deposit Co of Maryland, (C C A Cal) 300 F 302

18. Gonzales v De Funiak Havana Tobacco Co, 26 So 1012, 41 Fla 471

19. Gonzales v De Funiak Havana Tobacco Co, supra

20. Fla—Gonzales v De Funiak Havana Tobacco Co., supra
Minn—Frost v Jordan, 36 N.W. 713, 37 Minn 544
6 C J p 545 note 9

21. U S—T W Warner Co v. Andrews, (C C A N Y) 73 F (2d) 287, certiorari denied 55 S Ct 515, 294 U S 717, 79 L Ed. 1250
Ga—Oakes v. Smith, 48 S E. 942, 121 Ga 317—Fourth Nat Bank of Cincinnati v Mayer, 24 S E 453, 96 Ga 723—Massachusetts Bonding & Insurance Co v U S Conservation Co, 122 S E 728, 31 Ga App. 716
Ind—Wilson v Root, 43 Ind 436
Iowa—Stults v Northwestern Inv. Co, 200 N W 696, 198 Iowa 1056—Crom v. Henderson, 175 N W. 983, 188 Iowa 227.
N M—Territory v. Rindscoff, 20 P 180, 5 N M 93
Wash—McFarland v. Ratcliffe, 9 P. (2d) 1090, 167 Wash 673
6 C J p 545 notes 10–12.

Attachment of nonresident's property

(1) Where jurisdiction is obtained by attachment in an action against a nonresident, and a defense on the merits is required and a motion to dissolve the attachment would not lie, attorney's fees may be awarded as damages although incurred in the defense of the main action—Moseley v Fidelity & Deposit Co of Maryland, 189 P 862, 33 Idaho 37, 25 A. L R 564—Thropp v. Erb, 174 N E. 67, 255 N Y. 75, 71 A L R 1455, affirming 239 N.Y S 836, 228 App Div. 760—Elsman v Glens Falls Indemnity Co, 262 N Y.S. 642, 146 Misc 631.

(2) Without motion to vacate an attachment on the property of a non-

cannot be recovered where such defense was not necessary to obtain a dissolution of the attachment, or to have the property released from the attachment.[22] Thus, where the attachment might have been vacated as a matter of law, and defendant in attachment fails to move to have it vacated,[23] or where no levy has been made,[24] counsel fees in defending the principal action are not recoverable in an action on the attachment bond.

(c) Proceeding to Recover Damages

The expenses of an action on the bond are generally not recoverable on the bond as damages for wrongful attachment

Expenses incurred by the trial of a counterclaim or an independent action on an attachment bond for damages for the wrongful suing out of an attachment are generally not recoverable in an action on the bond,[25] but it has been held that the costs of necessary steps taken for the purpose of assessing the damages may be recovered.[26]

Counsel fees. Counsel fees incurred in connection with an action on an attachment bond are not recoverable in such action,[27] except in jurisdictions where such fees are allowable, and taxed by the court, as costs [28]

d. Mitigation of Damages

(1) Duty to mitigate
(2) Matters in mitigation

(1) Duty to Mitigate

Ordinarily, the defendant in attachment must mitigate damages where practicable.

It is, of course, the duty of defendant in attachment to mitigate damages where practicable.[29]

(2) Matters in Mitigation

Defendant in an action on an attachment bond may show in mitigation such matters as reduce the actual damage sustained by plaintiff

Defendant in an action on an attachment bond has the right to show that he offered to return the property seized,[30] that part of the property at-

resident, the expense of defending the attachment suit on the merits cannot be recovered in an action on the attachment undertaking when the attachment is invalid on its face—Thropp v Erb, supra—Olsen v U S Fidelity & Guaranty Co, 128 N E 908, 230 N Y. 31, modifying 173 N Y S 916, 187 App Div 882.

Nonresident attorneys

The fees of nonresident attorneys are recoverable, even where resident attorneys are also employed, where the facts make such employment prudent, as where the nonresident attorneys are familiar with the case. —Elsman v. Glens Falls Indemnity Co, 262 N Y S 642, 146 Misc 631.

Where motion to dissolve attachment futile

In an action on several attachment bonds, counsel fees for defending the action wherein defendant attached plaintiff's property, upon its merits, were allowable, notwithstanding plaintiff made no effort to dismiss the attachment in advance of trial, where no motion had any chance of success except to dismiss complaint as insufficient in law on its face, and such motion plaintiff did make and thus disposed of the entire litigation. —T W. Warner Co. v Andrews, (C C. A N Y) 73 F (2d) 287, certiorari denied 55 S Ct. 515, 294 U.S. 717, 79 L. Ed. 1250.

Where motion to dissolve denied

In an action on a bond, where a motion to dissolve an attachment was denied because the proceedings were regular on their face, and a trial on the merits was had wherein judgment was rendered for defendant, a reasonable attorney's fee for defending the suit is recoverable as an element of damage—Van Sickle v Franklin, 162 P 950, 62 Okl 289—McFarland v Ratcliffe, 9 P (2d) 1090, 167 Wash. 673.

In Alabama

(1) In an action on a bond for wrongful attachment, the attorney's fee recoverable is properly extended to the entire defense in attachment suit where the only way to dissolve the attachment is to defend on the merits—Smith v. Summers, 112 So. 344, 215 Ala. 690.

(2) Where there is principal suit to which attachment is ancillary, counsel fees recoverable are limited to defense of ancillary writ—Smith v. Summers, supra.

22. St. Joseph Stock Yards Co v Love, 195 P. 305, 57 Utah 450, 25 A.L.R 569

23. Thropp v Erb, 174 N E 67, 255 N.Y 75, affirming 239 N Y S 836, 228 App.Div 760—Olsen v U S Fidelity & Guaranty Co, 128 N E 908, 230 N Y 31, modifying 173 N Y S 916, 187 App Div. 882.

24. Massachusetts Bonding & Insurance Co v U. S Conservation Co, 122 S E 728, 31 Ga App 716

25. Goodbar v Lindsley, 11 S W. 577, 51 Ark 330, 14 Am S R 54—6 C J p 543 note 98.

26. Olesen v. Fidelity & Deposit Co of Maryland, 262 N Y S 434, 147 Misc 38.

Construction of terms of bond for costs

"It is the opinion of this court that it was well within the contemplation of the parties that, if the warrant of attachment was vacated, necessary steps would have to be taken for the purpose of assessing the damages sustained because of the issuance of the warrant of attachment Such proceedings would result in the imposition of costs The provision, therefore, in the undertaking that 'the plaintiff would pay all costs which may be awarded and all damages that the defendant will sustain not exceeding the sum of $250' meant the damages sustained because of the issuance of the warrant of attachment plus the costs imposed in assessing such damages"—Olesen v. Fidelity & Deposit Co of Maryland, 262 N Y S 434, 436, 147 Misc 38

Costs of reference to assess damages

An attachment bond requiring payment of "all costs that may be awarded" defendant, and all damages which defendant may sustain "by reason of attachment," includes expenses of reference to which plaintiff resorted for assessment of damages in a suit on the bond—Olesen v Fidelity & Deposit Co of Maryland, 262 N Y S 434, 147 Misc 38

27. Van Sickle v Franklin, 162 P. 950, 62 Okl 284—6 C J p 545 note 13.

28. Mogler v Nelson, 234 N W 480, 211 Iowa 1288—Thielen v Schechinger, 233 N W 750, 211 Iowa 470—6 C J. p 545 note 14

29. U S—T. W Warner Co v. Andrews, (C C A N Y) 73 F (2d) 287, certiorari denied 55 S Ct. 515, 294 U S 717, 79 L Ed 1250
N Y—Elsman v. Glens Falls Indemnity Co., 262 N Y S 642, 146 Misc. 631.

30. Billingsley v Hewett, (Tex Civ. App.) 39 S.W. 953.

tached belonged to third persons;[31] or that defendant in attachment had replevied the property, sold it, and with the proceeds paid the debt to enforce which the attachment was sued out.[32] Any sum paid by plaintiff, in an attachment suit, for costs and damages awarded against him operates to reduce the liability specified in the undertaking given by the sureties.[33]

Damages cannot be reduced by showing that an execution was levied immediately after the discharge of the attachment;[34] or that plaintiff in attachment had a cause of action, where the petition in the action in which the attachment was issued was dismissed on the ground that there was no cause of action.[35] Where an attachment is dismissed because the affidavit therefor is defective, the fact that grounds for an attachment exist will not go in mitigation of damages if the damages sought are merely compensatory,[36] nor can it be shown in mitigation of actual damages that there was probable cause for suing out the attachment.[37] That attachment plaintiff subsequently caused a valid writ to be levied on the property for the owner's debt, may, however, be shown in mitigation of damages in an action on the bond.[38]

e. Amount of Allowance

(1) In general
(2) Limitation to penalty of bond

(1) In General

The amount of allowance, in an action on an attachment bond, is the sum of the items allowable under the facts of the particular case, and is not limited to the value of the property seized.

The amount of actual damages to be recovered for a wrongful attachment is of course the sum of those items which are proper to be allowed under the facts of the particular case and the law of the jurisdiction.[39] The recovery in such case is not limited to the value of the property attached, even where only actual damages were sustained. Thus, the rental value, or the value of the use, of attached property may be recovered, although the value of such use exceeds the sale value of the property.[40]

With respect to exemplary or punitive damages, it has been said that these should be in proportion to the actual damage sustained,[41] which does not, however, mean that one should be either in exact or approximate ratio to the other, but merely that the imposition of heavy exemplary damages, when the actual damage is small, is a circumstance which aids in determining whether passion instead of reason influenced the verdict.[42]

Limited to claim One counting on an attachment bond for wrongful attachment cannot recover more than his claim, even where he is otherwise entitled to an amount in excess thereof.[43]

(2) Limitation to Penalty of Bond

Ordinarily, the obligors of an attachment bond are not liable, in an action thereon, in a sum in excess of the penalty of such bond.

It would seem very clear, on principle, that the liability on an attachment bond cannot exceed the penal sum named therein, and, as a general rule, recovery will be limited thereto,[44] but there are,

31. Wieland v. Oberne, 20 Ill App 118.

32. Painter v. Munn, 23 So 83, 117 Ala 322, 336, 67 Am S R. 170—6 C J p 515 note 20

33. Baere v Armstrong, 26 Hun (N Y) 19, 62 How Pr. 515

34. Miller v Baker, 79 S W. 187, 25 Ky L 1353

35. Adam Roth Grocery Co. v Hopkins, 29 S W. 293, 16 Ky L. 673.

36. Lobenstein v Hymson, 18 S W 250, 90 Tenn. 606.

37. Schofield v. Terr, 56 P. 306, 9 N M. 526.

38. Earl v Spooner, 3 Den (N Y) 246—6 C J. p 514 note 9.

39. Hawaii—Waldo v. Pelly, 1 Hawaii 53
Ky—Jackson v. Graves, 8 Ky.Op 380.
6 C.J. p 545 note 29.

40. Ariz—American Surety Co. of New York v. Hatch, 206 P. 1075, 24 Ariz 66.
Tex—Munnerlyn v. Alexander, 33 Tex 125.

Verdict held not excessive
Where plaintiff's entire property, including household goods, was attached in a cause of action which did not come within the code provisions specifying grounds of attachment, a verdict of nineteen thousand four hundred twenty-six dollars and fifty-six cents for attachment of automobiles, automobile trucks, a boarding house outfit, mining supplies, and mining machinery valued at eighteen thousand dollars was not excessive—American Surety Co of New York v. Hatch, 206 P. 1075, 24 Ariz 66

41. Welsh v Haleen, 138 N W. 502, 157 Iowa 647—6 C J p 545 note 30.

42. Iowa—Ahrens v. Fenton, 115 N. W 233, 138 Iowa 559.
Tex—Tynberg v. Cohen, 13 S W 315, 76 Tex 409
6 C J p 545 note 31.

43. Charles City Plow, etc., Co. v. Jones, 32 N W 280, 71 Iowa 234—6 C J p 546 note 32

44. Ala—Hill v. Rushing, 4 Ala 213
Ariz—American Surety Co of New York v. Hatch, 206 P. 1075, 24 Ariz 66.
N.Y.—Olesen v. Fidelity & Deposit Co of Maryland, 262 N Y.S 434, 147 Misc 38
6 C J. p 546 note 33.

Where action is on attachment, supersedeas, and cost bonds
Where one surety signed the attachment, supersedeas, and cost bonds, and suit is brought on all three at the same time, it is no objection that the verdict exceeds the amount of any one bond, where it does not exceed the liability assumed under all of the bonds—American Surety Co of New York v. Hatch, 206 P. 1075, 24 Ariz 66.

Excess damages, over the penalty of the attachment bond, and sustained by the attachment rather than by loss of use of the property pending

nevertheless, other decisions in which it has been denied that the liability on the bond is so limited.[45]

f. Set-Offs

Judgments, claims, and unliquidated demands may be set off against a claim for damages in an action on an attachment bond.

In an action on an attachment bond defendants may set off a judgment recovered in the action in which the attachment issued against the damages sustained by the wrongful attachment.[46] One defendant may set off against plaintiff his claim for borrowed money owed by the party to whose use the action is brought,[47] and this right is not affected by the fact that the set-off is a personal right and is not enjoyed in common by the sureties joined as codefendants.[48] In fact, it has been held that even unliquidated demands may be used in set-off.[49]

V. WRIT OR WARRANT

§ 180. Nature and Necessity

A writ of attachment is a process issued in a suit and commanding an officer to attach defendant's property for satisfaction of plaintiff's demands. The writ is essential to the validity of the attachment, and may be either an ancillary process forming no part of the pleadings, or both a process and the plaintiff's initial pleading.

The writ of attachment is the process issued at the institution or during the progress of an action commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of defendant to satisfy the demands of plaintiff.[50]

The writ being the leading and essential process in the proceeding, it follows that there can be no attachment without issuance of the writ,[51] and that a seizure as on attachment without a writ is void.[52]

Where the suit is commenced by a writ of attachment it serves as both process and count of pleading and no declaration is necessary,[53] but the ancillary writ is not a pleading which permits of an answer, and it constitutes no part of, and is not embraced in, the pleadings in the action.[54]

§ 181. Time for Issuance

a. In general
b. At beginning of or during action
c. Interval allowed between filing affidavit and issue of writ

a. In General

The writ should be issued within the time, if any, prescribed by statute and not before the filing of a required affidavit and bond. If issuable only on court order, the writ should be issued as of the term at which awarded. Several writs should be issued in the order of demand.

Where the statute fixes a time within which the writ may issue, it must be issued within such prescribed time.[55]

A writ of attachment can never be issued before the filing of a required affidavit and bond.[56]

Where the attachment can be issued only on the order of the court, it should be issued as of the term at which it is awarded.[57]

Order of issue. Where several writs of attachment are sued out by different plaintiffs against the same defendant, they should be issued in the order in which the preliminary papers were received and the writs demanded.[58]

b. At Beginning of or during Action

(1) In general
(2) When action deemed commenced

(1) In General

Generally speaking, a writ of attachment must issue at the beginning, or during the pendency, of the action, and the writ will be void if issued either before the action began or after it ended.

appeal, cannot be charged to the supersedeas or cost bond—American Surety Co of New York v. Hatch, 206 P 1075, 24 Ariz 66

45. Marchand v. York, 10 Ky.L. 777—6 C J p 546 note 34

46. Ill—Weir v. Dustin, 32 Ill App 338.
Kan—Gerson v. Hanson, 9 P 230, 34 Kan 590.
Mo—State v U S Fidelity, etc, Co., 115 S W 1081, 135 Mo App 160.
Tex—Pruitt v English, (Civ App.) 173 S W. 1172
6 C J p 546 note 35

47. State ex rel Myers v. Mathieson, 232 S W. 181, 207 Mo App 676.

48. State ex rel Myers v. Mathieson, supra.

49. Field v. Maxwell, 68 N W 62, 44 Neb 900—Raymond v Green, 10 N W 709, 12 Neb 215, 41 Am S R 763—6 C.J p 546 note 35 [a]

50. Ornelas v. Silvan Newburger & Co, 72 So 372, 139 La. 332—6 C J p 175 note 1

51. Tahoma Finance Co v. Shannon, 244 P. 271, 138 Wash 90.

52. Miss—Sawyers v. Smith, 41 Miss 554.
Or—Macleay Estate Co v Churchill, 284 P 286, 287, 132 Or 68

"The issuance of a writ of attachment is just as essential to give validity to the attachment as the levy made under it . . . [and] to authorize the attachment of property in an action, a writ of attachment must first issue, and its issuance and delivery to the sheriff is the sole source of the officer's authority to act"—Macleay Estate Co. v. Churchill, supra.

53. Moore v. Hawkins, 6 Dana (Ky.) 289—6 C.J. p 175 note 3.

54. Kan—Boaston v. Wright, 3 Kan. 220.
Miss—Beck v. Irby, 36 Miss. 188, 6 C J p 175 note 4.

55. Webb v. Bowler, 50 N C. 362

56. Tanner v. Drake, (Tex Civ App.) 47 S W.(2d) 455—6 C J. p 176 note 10.

57. Barney v. Patterson, 6 Harr & J.(Md.) 182—6 C J. p 176 note 11.

58. Lick v. Madden, 25 Cal. 202—6 C.J. p 176 note 12.

In the case of ancillary attachment, the pendency of an action is a prerequisite to the right to the writ,[59] and a writ issued before an action is commenced is void and can give no lien;[60] but the writ may be issued contemporaneously with the commencement of the action,[61] or at any time thereafter before final judgment[62] and accrual of the right to execution.[63]

A writ of attachment must, however, be issued during the progress of the action[64] and cannot be issued after final judgment has been rendered,[65] nor after the suit has abated.[66]

(2) When Action Deemed Commenced

(a) On filing affidavit

(b) On filing complaint, declaration, or petition; or notice of motion

(c) On issuance or service of summons

(a) On Filing Affidavit

Under some practice the filing of the attachment affidavit is deemed to begin the suit.

Under some statutes the time of filing the affidavit for attachment is made, for all legal purposes, the date of the commencement of the suit, and a præcipe is not required.[67]

(b) On Filing Complaint, Declaration, or Petition; or Notice of Motion

The writ may issue, under some practice, on the filing of the complaint, or on such filing and issuance of a summons, or on service of a notice of motion for judgment.

Under some statutes the action is deemed to be commenced when the complaint, declaration, or petition is filed,[68] although some of the decisions hold that it is also necessary that a summons be issued thereon with a bona fide intent that it shall be served.[69]

The filing of a defective petition may institute the action within the contemplation of the rule, provided it is susceptible of amendment curing the defects.[70]

Where action is to be begun by notice of motion for judgment, an attachment may not issue, it has been held, after a mere filing of such notice without service thereof.[71]

(c) On Issuance or Service of Summons

aa. In general

bb. What constitutes issuance of summons

cc. Necessity of service of summons

aa. In General

In some jurisdictions the writ may issue at or after issuance of the summons, but not before.

In a number of states the action is deemed to be commenced when the summons is issued,[72] and will be deemed pending for the purposes of the issuance of the writ, if the summons and writ issue simultaneously;[73] but the summons must be issued at or before the issuance of the attachment,[74] and a writ of attachment issued before due issuance of the summons is null and void.[75]

59. Steele v. Harkness, 9 W Va 13—6 C J p 175 note 6

60. U S—Doherty v. Cremering, (C C A Ohio) 33 F (2d) 388.
Ky—Appleton v. Southern Trust Co, 51 S W (2d) 447, 244 Ky 453
W.Va—Citizens' Nat. Bank of Philippi v. Auvil, 156 S.E. 111, 109 W. Va. 753
6 C.J. p 175 note 7.

Statutes permitting the execution and filing of the affidavit before institution of suit do not justify issuance of the attachment before suit—Citizens' Nat Bank of Philippi v. Auvil, 156 S.E. 111, 109 W.Va. 753.

61. Appleton v. Southern Trust Co., 51 S.W.(2d) 447, 244 Ky. 453—6 C J. p 176 note 8.

62. Idaho—W. G. Jenkins & Co v. McKenzie, 226 P. 1069, 39 Idaho 291
Ind—Boyer v. Meeks, 164 N E 501, 88 Ind App 450
Ky—Pinson v Murphy, 295 S W. 442, 220 Ky 464
6 C J. p 176 note 9.

63. Cook v. Waco Auto Loan Co., (Tex Civ App) 299 S W. 514

64. Tanner v. Drake, (Tex Civ App) 47 S W (2d) 455

65. Ind—Boyer v Meeks, 164 N E 501, 88 Ind App 450
Mont—Harboldt v Hensen, 244 P. 488, 75 Mont 512.
N Y—Cotnareanu v Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y 294, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S. 1018, 246 App Div 573
Tex—Tanner v. Drake, (Civ.App) 47 S W.(2d) 455

66. Citizens' Nat Bank of Philippi v. Auvil, 156 S E. 111, 109 W Va. 753—Steele v. Harkness, 9 W.Va. 13.

67. Fla—Simpson v. Knight, 12 Fla. 144.
Ill.—Pullian v. Nelson, 28 Ill 112.
6 C.J. p 177 note 14.

68. Schwabacher v Abrahams Grocery Co, 44 P. 257, 14 Wash. 225—6 C J. p 177 note 15.

69. Darnell v. Mack, 65 N.W. 805, 46 Neb. 740—6 C J. p 177 note 16

70. Finley v Pew, 205 P. 810, 28 Wyo. 342, rehearing denied 206 P 148, 28 Wyo. 342.

71. Citizens' Nat. Bank of Philippi v. Auvil, 156 S.E. 111, 109 W Va. 753

72. N Y—Import Chemical Co v Forster & Gregory, 158 N Y S 409, 172 App Div. 406.
N D—Johnson v. Engelhard, 176 N W 134, 45 N D. 11
6 C J p 177 note 17.

73. Blackman v. Wheaton, 13 Minn. 326—6 C J p 177 note 18.

74. Minn—Borgen v Corty, 232 N W. 512, 181 Minn 349.
Or—Willamette Collection & Cred.t Service v. Henry, 7 P.(2d) 261, 138 Or. 460.

75. Cal—Rowe v. Stoddard, (App.) 59 P (2d) 423
Mont.—Duluth Brewing & Malting Co. v. Allen, 149 P. 494, 51 Mont. 89.
Or—Macleay Estate Co. v. Churchill, 284 P. 286, 132 Or 63—McMaster v. Ruby, 157 P. 782, 80 Or. 476.

bb. What Constitutes Issuance of Summons

Delivery to the officer charged with service of a summons is necessary and sufficient to constitute issuance of the summons warranting subsequent or contemporaneous issuance of the writ of attachment.

Summons will be deemed issued when it is made out and placed in the hands of an officer authorized to serve it with a bona fide intent to have it served,[76] and delivery to the officer charged with the duty of service has been held essential to issuance of a summons within the rule making issuance of the summons prerequisite to issuance of an attachment.[77]

cc. Necessity of Service of Summons

Generally speaking, service of the summons is not a condition precedent to issuance of a writ of attachment, but may be a condition subsequent.

While the granting of the warrant of attachment may be made either before or after the service of the summons,[78] and it is not necessary that the summons should be actually served by the officer or other person before the issuance of the writ of attachment,[79] nevertheless, to render the writ of attachment valid there must be either service of the summons or delivery to the officer with intent to have it served;[80] and it has been said that the jurisdiction acquired without service of the summons is subject to a condition subsequent that service of summons thereafter be made, and that in default of such subsequent service the action and attachment will fail.[81]

It has also been provided in some states, that a personal service of such summons shall be made, or publication thereof commenced, within a specified time after the issuance of the same, and if publication has been or is thereafter commenced, that the service must be made complete by the continuance thereof,[82] and the attachment fails if service is not so made or publication so commenced or continued,[83] or if the summons or the service thereof is set aside as irregular, and no stay is granted pending an appeal therefrom and no new service is made.[84]

c. Interval Allowed between Filing Affidavit and Issue of Writ

A reasonable time may properly elapse between the making and filing of the affidavit and the issuance of the writ or warrant of attachment.

The affidavit should be made contemporaneously with the issuing of the writ or warrant of attachment, or at a reasonable time prior thereto.[85] Reasonable time should be allowed within which to transmit the affidavit to the place where it is to be used,[86] but such a delay between the making of the affidavit and the issue of the writ as to cast a suspicion on the verity of the affidavit, or lead to the suspicion that the grounds stated in the affidavit for asking that the attachment issue had ceased to exist, will warrant the quashing of the attachment.[87]

§ 182. —— In Vacation

In the absence of a contrary statute, the writ may issue in vacation.

In the absence of statutory prohibition, the writ may issue in a pending action in vacation as well as during a term of court.[88]

Issuance of the writ of attachment on Sundays will be considered in § 42 of the title Sunday [60 C.J. p 1139 note 64–p 1140 notes 65–67; 6 C.J. p 179 notes 29–31], and issuance of the writ on holidays will be taken up in § 5 of the title Holidays [29 C.J. p 765 note 45; 6 C.J. p 179 notes 29–31].

§ 183. Issuance and Record

a. Issuance
b Record

a. Issuance

While issuance of the writ is, ordinarily, a judicial act, on compliance with statutory prequisites the writ issues as a matter of right. The writ is issued when delivered to the officer for execution. Lack of notice of issuance for protection of third persons cannot avail defendant.

While the issuance of a writ of attachment has been called a judicial act,[89] on compliance with

76. Macleay Estate Co v. Churchill, 284 P. 286, 132 Or. 62—6 C.J. p 178 note 19

77. Minn—Borgen v Corty, 232 N. W 512, 181 Minn 349.
Or—Macleay Estate Co. v. Churchill, 284 P. 286, 132 Or. 62

78. Rich v. St. John, 199 N Y S 149, 205 App Div. 24.

79. Maguire v. Bolen, 68 N W. 408, 94 Wis. 48.

80. Borgen v Corty, 232 N W. 512, 181 Minn 349.

81. Import Chemical Co. v. Forster & Gregory, 158 N Y.S. 409, 172 App. Div. 406.

82. Borgen v. Corty, 232 N W. 512, 181 Minn 349—6 C J p 178 note 21

83. Pectsch v. Sommers, 53 N Y S 438, 31 App Div. 255—6 C J. p 179 note 22.

84. Martin v. Smith, 75 N Y S 780, 37 Misc 435, affirmed 76 N.Y.S 1020, 71 App Div. 613.

85. Stricklin v. Hodgen, 172 S E. 770, 172 S.C. 37.

86. Kesler v Lapham, 33 S E 289, 46 W Va. 293—6 C J p 179 notes 25, 26 [b].

87. Stricklin v. Hodgen, 172 S.E 770, 172 S.C 37—6 C J. p 179 note 26.

88. Ill—Dutcher v. Crowell, 10 Ill. 445—Beecher v James, 3 Ill 462.
Tex—Byers v. Brannon, 19 S W. 1091

89. Haslett v. Rodgers, 33 S E 44, 107 Ga 239—6 C.J. p 179 note 32.

statutory requirements it will issue as a matter of right.[90]

A writ of attachment is not issued when sealed and signed by its author, the clerk,[91] but is issued when, and only when, delivered to the sheriff or similar officer for execution.[92]

The notice of issuance of a writ of attachment required to be given by the clerk is intended for the protection and benefit of other creditors of defendant, and a failure to give the notice is not available to defendant in attachment, and does not enable him to avoid the attachment or subsequent execution sale thereunder.[93]

b. Record

While provision is ordinarily made for recording attachments, the writ has been held not an "instrument" within the meaning of general recording acts.

Provision is, ordinarily, made for the recording of attachments, although it has been held that an attachment is not an "instrument" within the meaning of statutes affording prior rights to one acquiring title or lien by "instrument" first duly recorded.[94] Where an attachment is properly issued on the filing of a sufficient affidavit and bond, and property is taken thereunder, the lien of attachment is not lost by failure of the probate judge or a justice of the peace to make proper docket entries of the issuance of such order of attachment.[95]

§ 184. Form and Requisites

The form of the writ should comply with the requirements of applicable statutes or rules of court.

The writ should comply with the requirements of the statute in matters of form[96] and should show on its face by what officer it was issued.[97]

It has been held that an attachment writ was not insufficient in form because a blank form of a trustee writ was used, although the name of the trustee was not inserted,[98] and that a writ of "trustee process" may be sufficient as a valid attachment where no service is made on the trustee named therein.[99]

The summons and the order of attachment may be embodied in the same writ.[1]

Where the form of a warrant is controlled by rules of court, without mandatory statutory requirement, a harmless irregularity in form will not invalidate the warrant.[2]

§ 185. —— Style of Writ

The writ should run in the name of the state or people; defects in such respects are not amendable according to some authorities, although they may be amended according to other authorities.

The writ should run in the name of the state or people,[3] and, in some jurisdictions, a defect in this respect is held to be fatal, the writ being regarded as void ab initio;[4] but in other jurisdictions an amendment in this respect is allowed.[5]

90. Callanan v. Callanan, 248 N.W. 45, 188 Minn. 609.

91. McMaster v. Ruby, 157 P. 782, 80 Or. 476.

92. McMaster v. Ruby, supra.

93. Foore v. Simon Piano Co., 108 P. 1038, 18 Idaho 167.

94. Davis v. Perry, 8 P.(2d) 514, 120 Cal.App. 670.

Amendment of record

Where the clerk fails to embody in the record an affidavit on which a writ of attachment issued, the record will be amended so as to include the omitted affidavit.—Mitchell v. Hyster, 7 Ohio 257.

Copy of an attachment, with the sheriff's indorsement of a levy, on file in the office of the register of deeds, is not proof that an attachment has been issued, with the necessary affidavits and undertaking attached so as to authorize it to be executed.—Stanhilber v. Graves, 73 N.W. 48, 97 Wis. 515.

Right to entry of record not shown

Under Cir.Ct.Rules, rule 2, enacted pursuant to Rev.St. § 918 (U.S.Comp.St.[1901] p. 685), plaintiff, causing the issuance on October 14 of a writ of attachment made returnable December 6 following, while the court had two terms commencing on the last Tuesday of February and the third Tuesday of October, was not entitled, as a matter of right, to have his writ entered while the October term was in session, and, in the absence of an agreement of the parties or special order of the court, the clerk may refuse to enter it on the record and to enter judgment for plaintiff.—Kinney v. Plymouth Rock Squab Co., (Mass.) 214 F. 766, 131 C.C.A. 178, error dismissed 36 S.Ct. 723, 241 U.S. 653, 60 L.Ed. 1223.

95. Hennessey First Nat. Bank v. Heiser, 77 P. 36, 14 Okl. 115.

96. N.Y.—Place v. Riley, 98 N.Y. 1.—Worthington v. Dorsett, 6 N.Y.St. 861.
Wash.—Holman v. Cooper, 92 P. 731, 48 Wash. 24.
6 C.J. p. 180 notes 36–38.

97. McLorty v. Davis, Ky.Dec. 57.—6 C.J. p. 180 note 39.

98. Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am.D. 202.

99. Graves v. Severens, 37 Vt. 651.—6 C.J. p. 180 note 41.

1. Ark.—Rice v. Dale, 45 Ark. 34, citing Weil v. Kittay, 40 Ark. 528.
R.I.—Mellen v. Battey, 48 A. 141, 22 R.I. 395.
6 C.J. p. 180 note 42.

2. Cohn v. Children's Furniture Corporation, 231 N.Y.S. 35, 133 Misc. 151.

That attorney obtaining warrant of attachment failed to subscribe his name to the warrant and merely had his name and address appear on the paper attached and backed up to the warrant was a mere fact of form rather than of substance or jurisdiction, under Civ.Pract.Act § 909, making rules of court control, and Civ.Pract.Rules, rule 84, and did not invalidate the warrant, in the absence of a showing of prejudice.—Cohn v. Children's Furniture Corporation, 231 N.Y.S. 35, 133 Misc. 151.

3. Yeager v. Groves, 78 Ky. 278.—6 C.J. p. 180 note 43.

4. Harper v. Turner, 50 S.W. 755, 101 Tenn. 686.—6 C.J. p. 180 note 44.

5. Castriotis v. Guaranty Trust Co. of New York, 200 N.Y.S. 58, 205 App.Div. 602.—6 C.J. p. 180 note 45.

People of United States

Where a warrant of attachment against a trust company in aid of an attachment against a nonresident

§ 186. —— To Whom Directed

The writ should be addressed to a person, usually an officer, legally authorized to execute it. A writ addressed to no one is a nullity. Errors in respect of the officer designated may, however, be cured by amendment or by service by the proper officer.

As a rule, the writ should be directed to a particular officer or class of officers authorized by law to levy the same, and, according to the varying statutes of different jurisdictions, should be directed to the sheriff,[6] or a constable[7] of the county where defendant's property is located,[8] or to any sheriff[9] or constable[10] of the state.[11]

An error in this respect, however, has been held to be curable by amendment,[12] and it has also been held that an improper direction of the writ is immaterial if it was in fact executed by a proper officer.[13]

When the writ is directed to one specially authorized, the conditions and circumstances giving special jurisdiction and authority for such direction should affirmatively appear.[14]

A writ addressed to no one is void.[15]

§ 187. —— Description of Parties

The writ should contain the names of the parties, but need not state their ages or residences. Irregularities in respect of the names may be amended, or disregarded if slight, although, where neither party is named, the writ is fatally defective.

The writ should give the names of the parties to the suit,[16] but a slight variance in names may be disregarded under the rule of idem sonans,[17] a writ substantially indicating defendant is sufficient.[18] Also, amendments supplying the names of parties inadvertently omitted or correcting the names of parties have been liberally allowed by the courts, particularly where the substantial rights of the parties to the suit have not been thereby affected,[19] although, where the name of neither party is specified, the writ is fatally defective.[20]

Residence and majority. The writ need not state that plaintiff is a resident of the state[21] or that defendant is an adult.[22]

§ 188. —— Recitals in General

Minor defects in respect of recitals in the body of the writ will not invalidate it.

A writ running in the name of the state and

debtor, when issued, read "The People of the United States," instead of "The People of the State of New York," was properly signed by a judge of the state supreme court, and was afterward corrected by permission of that court, it was held that the writ needed no caption, in any event, but that if one had been required, the error was so palpable that the writ could be amended by a subsequent order of the court—Castriotis v. Guaranty Trust Co of New York, 200 N.Y.S 58, 205 App Div 602

6. Temple v. Eades Hay Co, 114 S E. 162, 184 N C. 239—6 C J p 150 note 48.

7. Archibald v. Thompson, 2 Colo 383—6 C J. p 180 note 49.

8. Edwards v. Case, 152 P. 880, 78 Or. 220—6 C.J. p 180 note 50.

Writ of no effect outside of sheriff's own county

Under L O.L § 298, providing that a writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and that several writs may be issued at the same time to the sheriffs of different counties, a writ of attachment, directed to a particular sheriff, is of no force or effect outside of his county—Edwards v. Case, 152 P. 880, 78 Or 220

9. Drewry v. Leinkauff, 10 So 352, 94 Ala. 486—6 C J. p 181 note 51

10. Rogers v. Moore, 40 Ga. 386.

11. Thomas v. Lavender, 15 Ga 267—6 C J. p 181 note 53

12. Herring v Kelly, 11 So 600, 96 Ala. 559—6 C J. p 181 note 54

13. Temple v. La Berge, 114 S E 166, 184 N.C. 252—Temple v Eades Hay Co, 114 S E. 162, 184 N C 239—6 C J. p 181 note 55

Addressed to "constable" but served by "sheriff"

A seizure of property is valid although done under a warrant of attachment improperly addressed to "any constable or other lawful officer," when same is in fact properly served by a sheriff, and later amended by leave of the court to read "To any sheriff or other lawful officer"—Temple v La Berge, 114 S E 166, 184 N C 252

14. Brooks v Farr, 51 Vt. 396—Dolbear v. Hancock, 19 Vt 388

15. Ky.—Settles v. Davis, 14 Ky.L 718

W Va—Sims v. Charleston Bank, 2 W.Va. 415.

16. Patrick v. Solinger, 9 Daly (N Y.) 149—6 C J. p 181 note 58

17. Norris v. Anderson, 64 N E 71, 181 Mass. 308, 92 Am S R. 420—6 C J p 181 note 59.

18. Me—Coombs v. Hogan, 95 A. 512, 114 Me 123

Mass—Bates v Nessen, 161 N E. 410, 263 Mass. 371.

Executor

Where, in an action on an account brought against the estate of decedent, the writ directed the officer to attach the goods and estate which were of decedent but in the possession of H, executor of the last will and estate of decedent, and to summon H as defendant in his capacity as executor, it was held that, as the executor was the only person who could be proceeded against, the writ must be construed as naming him as defendant—Coombs v. Hogan, 95 A. 512, 114 Me 123

Administrator; "chip" attachment

In an action on a contract with decedent, a writ of attachment which ran against goods of administrator was not defective where return showed chip attachment, it being evident that the action was against defendant as administrator—Coldwell v. New England Trust Co., 184 N E. 677, 282 Mass. 45.

19. Norris v. Anderson, 64 N E 71, 181 Mass 308, 92 Am S R 420—6 C J p 181 note 60

20. Iowa—Barber v Swan, 4 Greene 352, 61 Am D 121

Va—Clay v. Neilson, 5 Rand (26 Va.) 596

21. N Y—Maury v American Motor Co, 56 N Y.S 316, 25 Misc 657, affirmed 57 N Y S. 1142, 38 App Div. 623.

Tenn—Bloomfield v. Hancock, 1 Yerg. 100

22. Hall v Anderson, 40 N.Y S. 354, 17 Misc. 270.

signed by the clerk of a district court in a named county of such state is sufficient, although the body of the writ does not recite that such county was in such state.[23]

§ 189. —— Recitals as to Proceedings to Procure Attachment

It is, ordinarily, proper but not essential for the writ to recite the filing of the affidavit and bond and the order for issuance. Statutes requiring a writ issued without bond to recite such fact have been construed as merely directory.

In the absence of statutory requirement, it is not necessary to recite the filing of the affidavit required by law[24] or the execution or filing of a bond,[25] although it has been said to be good form to recite these matters;[26] neither is it necessary for the writ to recite the order for its issuance,[27] or to show on its face by what officer it was allowed.[28]

Statutory provisions to the effect that, if an attachment is issued without bond, such fact must be indorsed on the writ have been construed as merely directory, and not mandatory, in the sense that failure to do so will nullify the writ.[29]

§ 190. —— Recitals as to Action in Which Writ Issued

An ancillary writ of attachment should contain recitals which identify the suit in which it is issued and show that the suit is pending

An ancillary writ of attachment must refer to, describe, and identify the suit in aid of which it issues, so as to show unmistakably on its face that it forms an adjunct to that particular proceeding.[30] It should recite that an action has been commenced[31] and is pending[32] by plaintiff against defendant,[33] although the latter recital has been held unnecessary in some states,[34] the nature of the action,[35] the tribunal in which it is pending,[36] and, where required by statute, that the cause of action is just.[37]

§ 191. —— Recitals as to Amount of Claim

The writ should recite the amount of the claim. Irregularities as to such recital are amendable unless jurisdictional.

The writ should state the amount of the claim for which it is issued;[38] but where the amount claimed is omitted or erroneously stated, the writ is, ordinarily, amendable in that respect,[39] unless the amount recited is in excess of the jurisdiction of the court, in which event the writ is void and may not be amended.[40]

The purpose of stipulating the amount in the writ is to fix the liability of the sheriff, to designate the amount of property to be seized, and to protect the interests of innocent third parties.[41]

23. Bruyere v Liberty Nat Bank of Waco, (Tex Civ.App) 262 S W 844

Judicial notice taken that designated county is in state

A writ of attachment was sufficient, although not stating in the body that proceedings were to be had before a district court for the state of Texas, but that they were to be had before a district court in the county of McLennan, since the court takes judicial notice that McLennan County is in Texas, and the levying officers and parties would have the same knowledge, and the writ ran in the name of the state of Texas, and was signed by the clerk of a district court of Texas—Bruyere v Liberty Nat Bank of Waco, (Tex.Civ App) 262 S.W. 844.

24. Tessier v. Crowley, 20 N W 264, 16 Neb. 369—6 C J p 182 note 69

25. Tanner, etc., Engine Co. v. Hall, 22 Fla. 391—6 C J. p 182 note 70.

26. Tessier v. Crowley, 20 N W 264, 16 Neb. 369.

27. Armstrong v. Lynch, 45 N W. 274, 29 Neb. 87—6 C.J. p 182 note 72.

28. Shaubhut v Hilton, 7 Minn 506

29. Alabama Pine Co v. Merchants' & Farmers' Bank of Aliceville, 109 So 358, 215 Ala. 66.

30. Mass—Fairfield v Baldwin, 12 Pick 388
Tenn—Lewis v Woodfolk, 2 Baxt 25—Gibson v Carroll, 1 Heisk 23
6 C J p 182 note 74

31. Peak v Buck, 3 Baxt (Tenn) 71—6 C J p 182 note 75

32. Barber v Swan, 4 Greene (Iowa) 352, 61 Am D. 124—6 C J. p 182 note 76

33. Woodfolk v. Whitworth, 5 Coldw (Tenn) 561—6 C.J. p 182 note 77.

34. Westphal v. Sherwood, 28 N W 640, 69 Iowa 364—6 C.J. p 182 note 78 [a].

35. Thompson v. Carper, 11 Humphr (Tenn) 542—6 C J. p 182 note 78

Attachment of real estate

Realty attachment, based on a writ containing an account for groceries with totals for each month, was insufficient to create a lien, where the nature and amount of plaintiff's claim was not set forth in proper counts and no proper specification was attached to the writ—Crockett v. Borgerson, 152 A 407, 129 Me. 395—6 C J p 182 note 78 [b].

36. Peak v Buck, 3 Baxt.(Tenn.) 71—6 C J. p 183 note 79

37. Woodfolk v. Whitworth, 5 Coldw (Tenn.) 561—6 C.J. p 183 note 80.

38. Mont—State v. Pondera Valley State Bank, 248 P 207, 77 Mont 1.
N Y—In re People, by Beha, 175 N. E 113, 255 N Y 412, affirming 244 N Y S 902, 230 App.Div. 834.
6 C J p 183 note 82.

Interest

(1) In a warrant of attachment stating the amount of the demand, and commanding the attachment of sufficient property to satisfy the designated amount with interest, "interest" means the interest subsequently accruing.—In re People, by Beha, 175 N E 113, 255 N Y. 412, affirming 244 N.Y.S 902, 230 App.Div 834

(2) A warrant commanding the sheriff to attach so much property "as will satisfy $52,000 of plaintiff's demand of $119,116 49, and interest, together with the costs and expenses," authorized the sheriff to include interest on fifty-two thousand dollars—McCauley v Karline, 246 N Y. S. 607, 138 Misc 680, affirmed 249 N. Y.S. 903, 232 App Div 734

39. Emerson v. Thatcher, 51 P. 50, 6 Kan.App. 325—6 C J. p 184 note 83

40. McDaniel v Cage & Crow, (Tex. Civ.App.) 201 S W 1078.

41. Arena v. Bank of Italy, 251 P. 338, 80 Cal.App. 61.

§ 192. —— Recitals as to Grounds of Attachment

The writ should recite the grounds of attachment. Recital of two or more consistent grounds is proper, but grounds should not be stated in the alternative. Defective recitals in the writ may be aided by reference to the affidavit, and have been held amendable irregularities.

The writ should state one or more of the statutory grounds on which it is granted,[42] and is sufficient in this respect if the words employed are substantially synonymous with those of the statute,[43] but an insufficient recital has been held an irregularity only[44] In the absence of statutory inhibition, the court has inherent power to permit the amendment of an inadvertent error in the statement of the grounds,[45] and a defective statement in the writ may be aided by reference to the affidavit.[46]

Stating two or more grounds. There is no objection to stating two or more grounds, provided they are not inconsistent[47]

Alternative statements. The grounds of attachment should not be stated in the alternative,[48] except where the statement presents merely different phases of the same state of facts constituting, in effect, but a single ground;[49] but a writ containing such statements is voidable only and good until vacated,[50] and the court has power to correct an inadvertent error in stating in the alternative grounds which actually existed[51]

§ 193. —— Commands to Officer

a. As to attaching
b. As to summoning defendant
c. As to return

a. As to Attaching

The writ should direct the officer to attach the property of the defendant, designating the amount but not the particular property to be taken.

The writ should contain a command to the officer to attach the property or estate of defendant,[52] and, in accordance with the rule stated in § 191, should designate the amount or value of the property to be attached,[53] although it should not, ordinarily, designate the particular property to be taken.[54]

b. As to Summoning Defendant

Under some practice the writ should or must direct the officer to summon the defendant.

Where the statute so requires the writ should contain a direction to the officer to summon defendant,[55] and an omission of this direction has been held fatal[56]

c. As to Return

The writ should direct the officer as to its return, including the time and place thereof Defects in such respects may render the writ void or be curable by amendment, in accordance with local practice.

The writ should contain proper directions to the officer as to the return of the writ, and, where required should specify the return day[57] and the place of return.[58]

Statutes regulating the time at which a writ of attachment should be made returnable have been construed as mandatory, so that an error in respect of naming the return day has been held to render the writ void,[59] but, as a rule, it is considered

42. Fox v Mays, 61 N Y S 295, 46 App Div 1—6 C J. p 184 note 84

43. Jurgens v Tum Suden, 52 N Y S 662, 32 App Div. 1—6 C J. p 184 note 85

44. Ennis v Untermyer, 87 N Y S 695, 93 App Div. 375.

45. King v King, 74 N Y S 119, 68 App Div 189—6 C J p 184 note 87

46 Van Camp v Searle, 29 N Y S 757, 79 Hun 134, modified on other grounds 41 N E 427, 147 N Y 150, 2 N Y Ann Cas. 351—6 C J. p 184 note 88

47. Jurgens v Tum Suden, 52 N Y S 662, 32 App Div 1—6 C J p 185 notes 89, 90

48. Garson v. Brumberg, 26 N.Y S 1003, 75 Hun 336—6 C J. p 185 note 91.

49. Smith v Wilson, 28 N.Y S 212, 76 Hun 565—6 C.J. p 185 note 92.

50. Rogers v Ingersoll, 93 N Y S 140, 103 App Div 490, affirmed 78 N E 1111, 185 N Y 592—Stone v Pratt, 35 N Y S 519, 90 Hun 39.

51. Stone v Pratt, supra, distinguished in Cronin v Crooks, 38 N E 268, 143 N Y 352—Herzberg v Boiesen, 53 N Y S 256, 5 N Y. Ann Cas 35

52. Goudie v American Moore Peg Co, 123 A. 349, 81 N H 38—6 C J. p 185 note 95

53. Fairfield v Baldwin, 12 Pick (Mass) 388—6 C J. p 185 note 96.

54. Minn—Hines v. Chambers, 11 N W 129, 29 Minn 7
Tenn—Vance v. Cooper, 2 Coldw. 497
Va—Pulliam v. Aler, 15 Gratt. (56 Va) 54.
6 C J p 185 note 97.

55. State Bank v Matson, 26 Mo 243, 72 Am D 202—6 C J. p 186 notes 98, 99.

56. Whitney v. Brunette, 15 Wis. 61.

57. Will v Whitney, 15 Ind 194—6 C J. p 186 note 2
Writ held sufficient
Writ of attachment fully advised levying officer when, to whom, and where to return same, where it was made returnable on a day which was in fact the first day of the regular term of the seventy-fourth judicial district court of McLennan County, where suit was pending, without stating that it was the first day of that term of that court—Bruyere v Liberty Nat Bank of Waco, (Tex Civ App) 262 S W. 844.

58. Backalan v. Littlefield, 64 N C 233—6 C J p 186 note 3.
Writ held sufficient.—Bruyere v Liberty Nat Bank of Waco, (Tex Civ App) 262 S W 844

59. Freudenthal v. Schulman, 5 Pa. Dist 258—6 C.J. p 186 note 4.
Election
Under statutes requiring a writ to be returned on the first return day after the issuing thereof, and subse-

as rendering it only voidable,[60] so that an error in this respect,[61] or in respect of the court or officer to which, or the place where, the return is to be made,[62] may be cured by amendment, which subject of amendment will be further considered in § 198 infra.

Where the statutes do not require the writ to be made returnable to the next term of court, but permit it to be made returnable on any date specified prior thereto, such writ may be made returnable instanter.[63]

§ 194. —— Description of Property

In the absence of statutory requirement the writ need not describe the property to be attached. Where requisite, the description is sufficient which will enable the officer to find personalty, or would be sufficient to pass title to realty.

In the absence of any statutory requirement the writ need not describe the property which is to be attached,[64] and, where a description is required, it is sufficient, in the case of personalty, if it will enable the officer to find the property by the exercise of reasonable diligence,[65] or, in the case of land, if it would be sufficient to pass the land in a grant by the owner.[66]

One purpose of requiring a description is to notify all persons who are or may become interested in the property that the same is under attachment.[67]

§ 195. —— Date, Teste, Signature, and Seal

a. Date
b. Teste, or "attestation" of process
c. Signature
d. Seal

a. Date

The writ should show its date of issue, although defects in such respect are amendable.

The writ should show the date of its issuance,[68] but this need not appear in any particular place,[69] and an error[70] or an omission[71] in this respect will not render the writ void, but may be cured by amendment, which subject of amendment will be treated generally in § 198 infra.

b. Teste, or "Attestation" of Process

The writ should be tested as required by law, although irregularities in this respect are amendable.

The writ should be tested as required by law,[72] but, if not properly tested, may be amended.[73]

Attestation of the writ by the clerk as clerk of the district court of a particular county and state has been held sufficient, although there was more than one district court in such county, where there was only one clerk for such courts.[74]

c. Signature

(1) By issuing officer
(2) By plaintiff's attorney

quent statutes permitting return of all processes on the first Monday of the next term or on the second, third, or fourth Monday of any intermediate month, and rules of court made pursuant to statute, expressly giving the plaintiff an election in such respect, it has been held that the mandatory provision of the earlier act is no longer effective, but that plaintiff has an election as to the date on which the writ of attachment shall be made returnable—Slingluff v. Sisler, 17 Pa.Co. 136.

60. State Bank v Matson, 26 Mo 243, 72 Am.D. 208—6 C.J. p 186 note 5.

61. Robuck v Rasmussen, (Tex.Civ. App.) 251 S.W. 1115—6 C.J. p 187 note 6.

62. Ala.—Carter v. O'Bryan, 16 So 894, 105 Ala. 305—Mohr v. Chaffe, 75 Ala. 387
Ga.—Blake v. Camp, 45 Ga. 293.
Iowa—Rock Island Plow Co. v Breese, 49 N.W. 1026, 83 Iowa 553
6 C.J. p 187 note 7.

63. Cook v. Waco Auto Loan Co., (Tex.Civ.App.) 299 S.W. 514.

64. King v. Board, 7 W.Va. 701—6 C.J. p 187 note 11.

65. Hopkins v. Rays, 44 A. 102, 68 N.H. 164, 73 Am.S.R. 554—6 C.J. p 187 note 12

Description held sufficient

A description in the attachment and notice of levy of property as "compressed air machinery" and "three hoisting engines" is sufficient—Coast & Lakes Contracting Corp. v. Martin, 101 A. 502, 92 Conn. 11—6 C.J. p 187 note 12 [a].

66. Norris v Anderson, 64 N.H. 71, 181 Mass. 308, 92 Am.S.R. 420.

67. Coast & Lakes Contracting Corp. v. Martin, 101 A. 502, 92 Conn. 11

68. Me.—Millett v. Blake, 18 A. 293, 81 Me. 531, 10 Am.S.R. 275—Berry v Spear, 13 Me. 187.
Tenn.—Lyle v. Longley, 6 Baxt. 286.
Wis.—Shakman v Schwartz, 61 N.W. 309, 89 Wis. 72.

69. Swan v. Roberts, 2 Coldw. (Tenn.) 153—6 C.J. p 187 note 15

70. Md.—McCoy v. Boyle, 10 Md. 391
Mass.—Fay v. Hayden, 7 Gray 41—Parkman v. Crosby, 16 Pick. 297
Wis.—Shakman v Schwartz, 61 N.W. 309, 89 Wis. 72
6 C.J. p 187 note 16.

71. N.Y.—State v. Moran, 43 N.J. Law 49
Tex.—Brack v McMahan, 61 Tex. 1.
6 C.J. p 187 note 17.

72. Ill.—Norton v. Dow, 10 Ill. 459.
N.H.—Reynolds v. Damrell, 19 N.H. 394
Tenn.—Lyle v. Longley, 6 Baxt. 286.
6 C.J. p 188 note 19

73. Colo.—Skinner v. Beshoar, 2 Colo. 383.
Ill.—Norton v. Dow, 10 Ill. 459.
N.H.—Reynolds v. Damrell, 19 N.H. 394

74. Bruyere v Liberty Nat. Bank of Waco, (Tex.Civ.App.) 262 S.W. 844.

Judicial notice taken of facts

A writ of attachment was not required to be attested by the clerk as clerk of the seventy-fourth judicial district, McLennan County, in view of Rev.St. art. 240 Acts (1893) c. 46, and Acts (1915) c. 8 (Vernon Civ.St.Annot.Suppl.[1918] art. 30 subds. 19, 54, 74), since the court takes judicial notice that McLennan County has three district courts and but one clerk who performs all duties pertaining to clerkship of each of such courts—Bruyere v. Liberty Nat. Bank of Waco, (Tex.Civ.App.) 262 S.W. 844.

(1) By Issuing Officer

The writ should be signed by the issuing officer. An unsigned writ has been held void, although other authorities view defects of this character as subject to amendment or waiver.

The writ should be signed by the officer by whom it is issued,[75] whether this act is performed by a judge[76] or the clerk of court.[77] It has been held that a defect in respect of the signing does not render the writ void,[78] but such defect may be waived[79] or cured by amendment,[80] although other authority regards an unsigned writ as void and not properly the subject of amendment.[81]

(2) By Plaintiff's Attorney

A writ unsigned by plaintiff's attorney has been held void under regulatory statutes, although some authority views the defect as amendable.

It is sometimes required by statute that the writ should be signed by plaintiff's attorney.[82] This requirement has been construed as mandatory,[83] and the omission of his signature has been held to be a fatal defect;[84] although it has also been held that omission of the attorney's signature may be remedied by amendment,[85] and that the indorsement of the writ by plaintiff's attorney may be made after motion to quash.[86]

d. Seal

The authorities agree that the writ should bear the seal of the issuing court, or a private seal if none exists, but differ as to whether omission of the seal is a fatal defect or a mere irregularity.

The seal of the court from which the writ of attachment issues, or a private seal where no court seal exists, should be affixed to the writ,[87] and it has been held that the omission of the seal renders the writ void,[88] although there is also authority for the view that an omission of, or failure properly to affix, the seal is a mere irregularity[89] which may be waived[90] or cured by amendment.[91]

§ 196. —— Variance between Writ and Other Papers

a. In general

b As to amount of claim

a. In General

A material variance between the writ, affidavits, and pleadings may be fatal; but an immaterial variance will not invalidate the writ.

A material variance between the writ, affidavit, and pleadings, either as to grounds,[92] cause of action,[93] or description of parties,[94] is fatal, if the objection is properly raised; but an immaterial variance due to clerical oversight will not invalidate the writ.[95]

A writ of attachment may be sued out in the individual name of a plaintiff whose declaration in attachment was filed in his trade name.[96]

b. As to Amount of Claim

A writ for an amount exceeding plaintiff's claim is voidable, although a writ for a less amount is unobjectionable. The writ should conform to the complaint in respect of the amounts demanded from different defendants, but need not conform to amendments in the complaint made after issuance of the writ.

A variance as to the amount of the claim affords

75. U S—Wehrman v. Conklin, (Iowa) 15 S Ct 129, 155 U S 314, 39 L Ed 167—Wolf v Cook, (C C Wis) 40 F 432
Ill—Williams v. Vanmetre, 19 Ill 293.
Iowa—Foss v Isett, 4 Greene 76, 61 Am D. 117.

76. Fox v. Mays, 61 N Y S 295, 46 App Div. 1—6 C J p 188 note 23

77. Smith v Hackley, 44 Mo.App 614—6 C J. p 188 note 23.

78. Miller v Zeigler, 29 S E 981, 44 W Va 464, 67 Am S R. 777.

79. Lovell v. Sabin, 15 N H. 29—6 C J. p 188 note 25.

80. Miller v Zeigler, 29 S E 981, 44 W.Va. 464, 67 Am S R. 777—6 C J. p 188 note 26.

81. Calnet v Hare & Chase of Atlanta, 139 S E 115, 37 Ga.App 167

82. Fox v. Mays, 61 N Y S 295, 46 App Div 1—6 C J. p 188 note 27

83. MacDonald v. Kieferdorf, 18 N. Y.S. 763, 22 N.Y.Civ.Proc. 105.

84. Lassen v. Burt, 92 N.Y S. 796, 46 Misc 582.

85. Kissam v. Marshall, 10 Abb.Pr. (N Y) 424

86. Cicero v. Bates, 1 Mich N P. 25.

87. Wehrman v. Conklin, (Iowa) 15 S Ct 129, 155 U S. 314, 39 L Ed 167—6 C J p 188 note 29.

88. Starkey v Lunz, 110 P. 702, 57 Or 147, Ann Cas 1912D 782—6 C. J p 189 note 30

89. Winchell v. McKinzie, 53 N.W. 975, 35 Neb. 813—6 C J p 189 note 31.

90. New Haven Lumber Co v Raymond, 40 N W 820, 76 Iowa 225—6 C J. p 189 note 32.

91. Murdough v. McPherrin, 49 Iowa 479—6 C J p 189 note 33.

92. Ala.—Woodley v. Shirley, Minor 14.
Tex—Gregg v. York, Dall. 528.
6 C.J. p 189 note 38.

93. Ballard v. Great Western Min., etc, Co, 19 S E 510, 39 W.Va. 394 —6 C.J p 189 note 36.

94. Ligon v Bishop, 43 Miss. 527 —6 C J. p 189 note 37.

95. Brinkerhoff v Russ, 3 La App 723—6 C J p 189 note 39.

Failure to name writ
Where defendants urged that a sheriff's seizure of property as on attachment fell because the writ under which he levied was not designated a writ of attachment and did not direct him to attach, in denying the contention the court held that the alleged variance was not material because, if the sheriff was authorized to take possession of the property under the writ, it made no material difference what name, "attachment" or otherwise, was given to his act in seizing the property—Brinkerhoff v. Russ, 3 La App. 723

96. Dunn & McCarthy v. Pinkston, 170 S E 922, 47 Ga App. 514, reversed on other grounds 175 S E. 4, 179 Ga 31, conformed to 175 S. E. 663, 49 Ga App. 408.

no ground for setting aside the attachment where the amount stated in the writ is less than that demanded in the complaint or summons, for in such case defendant cannot be prejudiced,[97] and where the writ and complaint corresponded, although the amount named in the affidavit was smaller, it was held that a motion to quash the writ was properly denied where plaintiff amended his bond to correspond to the larger amount,[98] but a writ for an amount in excess of plaintiff's claim is improper[99] and voidable[1] as to the excess.[2] A slight discrepancy in either direction between the amount stated in the warrant and that contained in the complaint will not affect, in a collateral proceeding, the validity of a lien secured under the attachment.[3]

The writ need not conform to the complaint in respect of amendments as to amount made in the complaint after issuance of the writ.[4]

Where the complaint demands different amounts of different defendants, the writ should conform to the complaint in such respect[5]

§ 197. —— Defects, Objections, and Waiver

Minor or nonprejudicial defects will not invalidate the writ. Defendant's appearance may cure irregularities, but not jurisdictional defects.

As a general rule clerical errors or omissions readily supplied will not vitiate an otherwise valid writ,[6] nor will a writ otherwise proper be invalidated by irregularities of a nonprejudicial character.[7]

Appearance as waiver. Informalities will be waived by appearance and answer,[8] although the general appearance of defendant will not cure the improper issuance of a writ of attachment where the defect is of a jurisdictional character.[9]

Particular defects. After issue made and trial begun on the merits of a case, it is too late for an objection to the petition or attachment for want of verification.[10] Where a statute provided that an attachment might issue where defendant kept himself concealed with intent to avoid the service of a summons, and another statute directed that a summons should accompany a warrant of attachment, it was held that, where an attachment was issued on such ground, an objection that the summons was issued with the attachment, and that, therefore, it could not be truthfully said that defendant concealed himself with intent to avoid the service of such summons, was insufficient as affecting the validity of the attachment.[11]

The institution of an action before the claim is due, and the issuing and levying of an attachment without obtaining an order therefor, constitute a substantial defect of which junior attachment creditors may take advantage,[12] but where a mistake in a writ of attachment was cured by the statute of jeofails, and land was attached and extended on in said suit, it was held that the judgment could not be contested by a grantee of defendant, in an action brought to recover the land,

97. Tessier v Crowley, 20 N W 264, 16 Neb 369—6 C J. p 189 note 40

98. De Stafford v Gartley, 24 P 580, 15 Colo. 32

99. Reed v Kentucky Bank, 5 Blackf (Ind.) 227—6 C J p 190 note 42.

Interest

The fact that the complaint prayed six per cent interest, the warrant of attachment prayed interest, and the notice of levy did not mention interest, did not create a variance—Kelm v Lolland, 228 N.W 420, 59 N D 18—6 C J p 190 note 42 [b]

1. Ballard v Great Western Min, etc, Co, 19 S E 510, 39 W.Va. 394—6 C J p 190 note 43

2. La.—Williams v Louisiana Lumber Co, 29 So 491, 105 La. 99
Mont.—Wilson v. Barbour, 21 Mont 176
6 C J. p 190 note 44

3. Shaubhut v Hilton, 7 Minn 506

4. State v Pondera Valley State Bank, 248 P 207, 77 Mont. 1.

If the writ were valid when made, it is not rendered invalid by subsequent changes as to the amount.—State v. Pondera Valley State Bank, 248 P 207, 77 Mont. 1.

5. State v. Pondera Valley State Bank, supra—6 C J. p 183 note 82 [f]

6. Conn—Joseph v. Donovan, 157 A. 638, 114 Conn 79
Wyo—Wakefield & Co. v. Bell, 294 P 785, 42 Wyo 355
6 C J p 190 note 47.

Defect not misleading

Attachment writ, with blank space for amount of claim improperly filled in by defendant's name, but not misleading, was not subject to motion to quash—Wakefield & Co. v Bell, 294 P. 785, 42 Wyo 355.

Irregular statement as to court in which action is pending

Where anyone examining the certificate of attachment could readily have ascertained whether the action was pending in the superior court or the court of common pleas, a defect in not striking out of the printed form the words "common pleas court" did not make the attachment invalid—Joseph v. Donovan, 157 A 638, 114 Conn 79

7. Nimey v. Nimey, (Wash.) 45 P. (2d) 949.

Prejudice not shown

Where an affidavit of attachment recited an indebtedness of four thousand eight hundred sixty-eight dollars and thirty-seven cents, but the writ issued directed the sheriff to levy only to the extent of one thousand five hundred dollars, and a bond for three thousand dollars was given the levy made on real property was good to the extent of one thousand five hundred dollars, notwithstanding irregularities in the issuing of the writ, since the property owner was not prejudiced—Nimey v. Nimey, (Wash) 45 P.(2d) 949

8. Kirkman v. Patton, 19 Ala. 32—6 C J. p 190 note 48.

9. Borgen v. Corty, 232 N.W. 512, 181 Minn. 349.

Attachment issued without summons.—Borgen v Corty, 232 N W. 512, 181 Minn 349

10. Lynch v. Shepherd, 2 Ky.Op. 183.

11. Finn v. Mehrbach, 65 N Y S 250, 30 N Y.Civ.Proc. 242.

12. Deere v. Eagle Mfg. Co., 68 N. W. 504, 49 Neb. 385.

except by showing collusion between the parties[13]

Waiver of other particular defects has been heretofore considered, and section 184 and the sections following it should be consulted for cases, if any, on waiver of defects as to the matters specified in such sections.

§ 198. —— Amendments

A voidable writ is amendable; a void writ is not. Whether amendment may cut off intermediate rights of third parties is a matter as to which the authorities are not in entire accord.

In some states the statutes expressly provide for amendment of the writ, where legal grounds for the attachment existed at the time of its issue; and even in the absence of statutes expressly authorizing defects in form to be corrected the courts have been very liberal in granting applications to amend mere clerical errors and omissions,[14] although where the writ is absolutely void, it cannot be the subject of amendment.[15]

It has been held by a number of authorities that an amendment cannot be permitted to cut off intermediate rights acquired by third persons,[16] while other authorities hold that the same right to amend exists against creditors attaching after the issue of a defective writ as against the original debtor.[17]

The propriety of amendments to correct defects in respect of the particular matters of form and requisites of the writ there considered has been taken up in §§ 185–195 supra.

§ 199. Simultaneous Writs

Simultaneous writs against defendant may be issued to attach his property in different counties, and it has been held that this may be done without additional affidavits and undertakings

When defendant has property in several counties separate writs may be issued simultaneously to each county,[18] without additional affidavits and undertakings[19]

§ 200. Successive or Alias Writs

a. In general
b. Dissolution of first or succeeding writ

a. In General

Under some practice successive writs may issue where the prior writ was ineffectual, without a new affidavit or bond, although under other practice plaintiff's only remedy in such case is an alias writ issued on a new oath and bond; and still other authorities broadly deny the right to issue successive or alias writs. It has also been held that separate writs may issue in the same suit if based on different grounds, and that separate writs may issue against different property of the same defendant separately sued by different plaintiffs.

In some jurisdictions where the first writ fails through some defect, or where an insufficient amount of property is attached thereunder, successive writs may issue to the same or different counties[20] without filing a new affidavit or bond,

13. Parkman v. Crosbey, 16 Pick. (Mass.) 297.

14. Ga.—Fine v. Frankel Clothing Co., 95 S.E. 1017, 22 Ga.App. 404
Iowa.—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 815
Me.—Coombs v. Hogan, 95 A. 512, 114 Me. 128
Mass.—Eastern Tire Co. v. Witter, 188 N.E. 894, 281 Mass. 523
N.H.—Goudie v. American Moore Peg Co., 122 A. 349, 81 N.H. 88
N.Y.—N. V. Tonerde Maatschappij Voor Montaan-Chemie v. Great Lakes Coal & Coke Co., 276 N.Y.S. 895, 243 App.Div. 640—Castriotis v. Guaranty Trust Co. of New York, 200 N.Y.S. 58, 205 App.Div. 602—Ingalls v. Nutter, 172 N.Y.S. 210.
N.C.—Temple v. Eades Hay Co., 114 S.E. 162, 184 N.C. 239.
Tex.—Robuck v. Rasmussen, (Civ.App.) 251 S.W. 1115
Vt.—Kittredge v. Fairbanks Co., 99 A. 1016, 91 Vt. 174.
6 C.J. p. 190 note 54

Grounds of attachment

A warrant of attachment for unlawful removal of hay with intent to ship it out of the state without payment, being sufficient to show a conversion and attempted removal from the state, was amendable, under Code Civ.Proc. § 723, by addition of an allegation that the removal was with intent to defraud creditors, to make it comply with § 641, and § 636 subd. 2.—Ingalls v. Nutter, 172 N.Y.S. 210.

Misrecital of residence

A writ of attachment in an action against the estate of decedent which named the executor as a resident, when, in fact, he was a nonresident, may be corrected by amendment where it was served on the executor's resident agent.—Coombs v. Hogan, 95 A. 512, 114 Me. 128.

Case retained to permit amendment showing corporate character and perfecting of service

Where property was lawfully seized and held by copy pursuant to P.S. 1452, it was held, that the court could retain the case to permit amendment of the writ of attachment to show more definitely defendant's corporate character and to permit perfecting of service.—Kittredge v. Fairbanks Co., 99 A. 1016, 91 Vt. 174

15. Ga.—Calnet v. Hare & Chase of Atlanta, 139 S.E. 115, 37 Ga.App. 167.
Tex.—McDaniel v. Cage & Crow, (Civ.App.) 201 S.W. 1078.

16. Garvin v. Legery, 61 N.H. 153—6 C.J. p. 191 note 55

17. Conn.—Johnson v. Huntington, 13 Conn. 47.
Mass.—Dietrich v. Wolffsohn, 136 Mass. 335.
N.Y.—King v. King, 68 App.Div. 189, 74 N.Y.S. 119.
6 C.J. p. 191 note 56

18. Ark.—Read v. Kirkwood, 19 Ark. 332
Cal.—Martinovich v. Marsicano, 89 P. 333, 150 Cal. 597, 119 Am.S.R. 254.
Ill.—Morris v. School Trustees, 15 Ill. 266.
Mo.—Carter v. Arbuthnot, 62 Mo. 582—Huxley v. Harrold, 62 Mo. 516.
6 C.J. p. 191 note 57.

19. Martinovich v. Marsicano, 89 P. 333, 150 Cal. 597, 119 Am.S.R. 254.

20. Iowa.—Welch v. Welch, 238 N.W. 81, 212 Iowa 1245
Ky.—Savary v. Taylor, 10 B.Mon. 334.
La.—Bass v. Baskowitz, 139 So. 201, 170 La. 779.
Mass.—Solovicos v. MacLachlan, 128 N.E. 592, 236 Mass. 402
Mo.—First Nat. Bank v. Griffith, 182 S.W. 805, 192 Mo.App. 443
N.Y.—American Rattan & Reed Mfg. Co. v. Handel-Maatschappij Mo-

provided the affidavit and bond supporting the first writ are not defective;[21] although it has also been held that, where the original citation and writ of attachment after defective service are returned to the clerk's office and duly filed, they cannot again be issued and served, and that to correct the defect in service plaintiff's remedy is to apply to the court for an alias writ, which can issue only on making a new oath, securing a new order, and making a new bond;[22] and there are authorities which have denied the right to issue alias or successive writs[23]

Where there is nothing to show that the first writ of attachment was defective, or that it did not establish or fix the lien, issuance of a second writ of attachment in the same suit against the same property does not render the first writ void so as to permit intervening rights[24]

The existence of an attachment on certain property in a suit brought by a creditor of the defendant is no bar to the right of another creditor to institute an independent suit against the same defendant and have property attached under the writ issued therein which is not subject to the lien of the writ in the prior suit[25]

Separate writs based on different grounds. It has been held that there may be in the same suit more than one affidavit and attachment based on different grounds.[26]

Where, however, the original complaint or affidavit was against a number of defendants jointly, a separate attachment against one of the defendants on a separate affidavit for an attachment against such defendant, introducing a new and independent cause of action against such defendant alone, on the individual debt of such defendant, with which the other defendants were not concerned, cannot be sustained, since the separate affidavit cannot be considered as an amendment nor as an addition to the original.[27]

Lost writ. While the loss of an original writ of attachment does not require that plaintiff should begin new proceedings, where he elects to do so rather than to have duplicates of the lost papers issued, he must be held to have abandoned the original proceedings and a second writ issued under such circumstances is invalid in the absence of a new affidavit, order, or bond.[28]

b. Dissolution of First or Succeeding Writ

After dissolution of the original writ on the merits, a second writ will not issue on the same facts, although a second writ may be allowed on new grounds. A quashal of the original writ does not necessitate dissolution of an alias writ and, after dissolution of an attachment for insufficient bond, the filing of a new bond may warrant the issuance of an alias.

Where a writ of attachment has been dissolved by the court after a hearing on the merits of the application, an alias writ, based on substantially the same state of facts, whether applied for to the same or another court, will not be granted,[29] but

raux & Co, 185 N.Y.S. 480, 194 App Div 90
Va.—Kaylor v Davy Pocahontas Coal Co, 87 S E 551, 118 Va 369.
6 C J p 191 note 59

After levy on property beyond jurisdiction

Where the first attachment was void because the property levied on was beyond the court's jurisdiction, a second attachment could issue and hold the property when properly levied on and within the court's jurisdiction—Welch v. Welch, 238 N W. 81, 212 Iowa 1245

Prior attachment not entered in court

A preexisting attachment of land, made on a writ never entered in court, although undischarged on the record of the registry of deeds, was no bar to subsequent attachment and sale, through which the title of petitioner for registration of title to the land is derived—Solovicos v. MacLachlan, 128 N E. 592, 236 Mass. 402.

21. Triangle Radio Supply Co v De Forest Radio Telephone & Telegraph Co, 204 N Y S 72, 208 App Div 614, reargument granted 204 N.Y.S 954, 209 App Div. 819, and affirmed 205 N Y S. 470, 210 App Div 87—American Rattan & Reed Mfg Co v Handel-Maatschappij Moraux & Co, 185 N Y S 480, 194 App Div 90—6 C J. p 192 note 60

Different counties

A second and successive warrant of attachment against debtor's property in one county was properly granted on the same bond and complaint on which a previous warrant was granted against defendant's property in another county—Triangle Radio Supply Co v. De Forest Radio Telephone & Telegraph Co., 204 N Y.S. 72, 208 App Div 614, reargument granted 204 N Y S 954, 209 App Div 819, and affirmed 205 N Y S 470, 210 App Div 87.

New order requisite

After release of his attachment by his attorneys, plaintiff could take out a new attachment, and so use the affidavit a second time, but it would be under an independent order.—American Rattan & Reed Mfg Co. v. Handel-Maatschappij Moraux & Co, 185 N Y S 480, 194 App Div. 90.

Reviver after death of plaintiff

An alias, after the death of plaintiff and reviver in the name of his executor, does not require a new bond—Rheubottom v Sadler, 19 Ark. 491.

22. Pugh v. Flannery, 93 So. 699, 151 La. 1063—Erwin v Commercial & R. Bank, 12 Rob (La.) 227.

23. Pack v. American Trust, etc. Bank, 50 N E 326, 172 Ill 192—6 C.J. p 192 note 66

24. Holford v Patterson, (Civ App) 240 S W 341, affirmed 257 S W. 213, 113 Tex. 410

25. Altschuler v Porter, 146 A 303, 105 N J.Law 557, reversing 143 A 733, 6 N J Misc. 1049, which dismissed certiorari granted in Altschuler v Owen, 136 A. 924, 5 N J. Misc. 311, from 135 A. 823, 5 N J. Misc. 45.

26. Miller v. White, 32 S E 332, 46 W Va. 67, 76 Am S R. 791—6 C J p 192 note 65

27. Fair v Beal-Barrow Dry Goods Co, 230 S.W 23, 148 Ark 340

28. Smith v Wilson, 128 So 682, 13 La App 679, reversing 125 So 303, 13 La App 437.

29. N Y—Schlemmer v. Myerstein, 19 How.Pr. 412.

a second writ may issue on an amended affidavit showing new or different grounds for attachment.[30]

An alias writ will not be dissolved where the first writ was quashed for a mere irregularity, although the second was issued on the same affidavit and bond,[31] and, where an attachment is set aside for insufficiency of the bond, an alias writ may issue on the filing of a sufficient bond without the filing of a new petition or affidavit.[32]

VI. LEVY OF ATTACHMENT

§ 201. Necessity

There can be no attachment without a levy or its equivalent

A valid attachment requires an order thereof to be levied,[33] and where no property of defendant in attachment is seized by direct levy or by garnishment issued on the attachment, there is no attachment.[34]

§ 202. —— To Acquisition of Jurisdiction

In the absence of personal service, levy or its equivalent is essential to jurisdiction of the court in an attachment proceeding. A simulated levy on property not claimed by defendant is ineffectual.

In an attachment suit, where there is no personal service on defendant, a levy or its equivalent is essential to give the court jurisdiction to proceed to judgment,[35] and a simulated levy on property to which defendant has no claim of right will not have the effect of constructive notice to him so as to authorize the court to proceed to judgment.[36]

§ 203. —— To Creation of Lien

Levy is essential to acquisition of an attachment lien.

In order that a creditor may acquire a lien by virtue of his attachment, it is not alone sufficient that a writ of attachment has been regularly issued by a competent authority, or even placed in the hands of an officer, but there must be an actual and valid levy on the property of the debtor,[37] and, until such levy has been made, the attachment creditor has no rights in his debtor's property.[38]

§ 204. Who May Levy, and Basis and Duration of Authority

a. In general
b. Authority to levy

a. In General

The writ should be executed by a duly authorized officer, and service by an unauthorized officer is void. A private individual cannot levy an attachment.

The writ must be executed by the executive officer of the court, or of some court of similar jurisdiction in another county or district, to whom it is directed, and whose duty it is to obey the mandate contained in the process,[39] and service of the writ by an officer not legally authorized is void.[40]

A private individual cannot make a levy under a writ of attachment.[41]

b. Authority to Levy

The authority of the levying officer is based on the writ, which should be in his possession at the time of levy. His authority to levy begins with delivery of the writ and ends with its return, or arrival of the return day.

The authority of the levying officer is derived from, and dependent on, the execution and transmission to him of the writ of attachment,[42] and he must be prepared, if his right is challenged, to produce his authority. If he cannot do so, he is a trespasser and may be resisted as such.[43] It would seem, however, that the officer need not actually have the writ in his possession at the time of levy-

Pa.—Merritt v. Quigley, 1 Pa.Dist. 505—National Bank of Republic v. Tasker, 1 Pa.Co. 173.
6 C.J. p. 192 note 61

30. Bingham v. Keylor, 64 P. 942, 25 Wash. 156.

31. Ballard v. Great Western Min., etc., Co., 19 S.E. 510, 39 W.Va. 394—6 C.J. p. 192 note 63.

32. La.—Harrison v. Poole, 4 Rob. 193.
Tex.—Panhandle Nat. Bank v. Still, 19 S.W. 479, 84 Tex. 339

33. Bolling v. Pikeville Nat. Bank, 280 S.W. 1090, 213 Ky. 317.

34. Massachusetts Bonding & Insurance Co. v. U. S. Conservation Co., 122 S.E. 728, 31 Ga.App. 716.

35. Ga.—Nix v. Citizens' Bank of Moultrie, 130 S.E. 597, 34 Ga.App. 546—Clark Milling Co. v. St. Louis Southwestern Ry. Co., 127 S.E. 783, 33 Ga.App. 660
Ill.—Haller v. Rieth, 247 Ill.App. 541.
6 C.J. p. 213 note 41

36. Grier v. Campbell, 21 Ala. 327.

37. Ky.—Glass v. Alcorn, 70 S.W. (2d) 964, 254 Ky. 16—Bolling v. Pikeville Nat. Bank, 280 S.W. 1090, 213 Ky. 317.
N.D.—Zimmerman v. Boynton, 229 N.W. 3, 59 N.D. 112.
6 C.J. p. 213 note 43.

38. Bolling v. Pikeville Nat. Bank, 280 S.W. 1090, 213 Ky. 317—6 C.J. p. 213 note 44.

39. Pickett v. Richardson, 133 So. 274, 223 Ala. 683—6 C.J. p. 214 note 45
"Only a bonded executive officer as authorized by the statute has authority to discharge the extraordinary duty of levying an attachment"—Pickett v. Richardson, 133 So. 274, 275, 223 Ala. 683.

40. N.H.—Carroll County Bank v. Goodall, 41 N.H. 31
N.J.—Weingardt v. Billings, 20 A. 59, 51 N.J.Law 354

41. Marr v. Cook, 111 N.W. 116, 147 Mich. 425

42. Conn.—Wales v. Clark, 43 Conn. 183
N.Y.—Kelly v. Breusing, 33 Barb. 123
Tex.—Taylor v. Evans, (Civ.App.) 29 S.W. 172
6 C.J. p. 216 note 69.

43. Wales v. Clark, 43 Conn. 183—6 C.J. p. 216 note 70.

ing, but that it will be sufficient if he has it within his control.[44]

Duration of authority. The authority of the officer to whom the writ of attachment has been delivered to levy continues from his actual receipt of the writ[45] until the return day, or until he has actually returned it.[46]

§ 205. —— Particular Officers

a. Sheriffs and their deputies
b. Constables and their deputies
c. Coroners
d. Town or city marshals
e. Elisors
f. Indifferent persons specially deputed

a. Sheriffs and Their Deputies

The sheriff or his deputy may generally levy an attachment, although he may be restricted to property within his own county, and has been denied the right to levy a writ directed to a constable.

Attachments may usually be levied by the sheriff of a county,[47] and in certain cases, as where the attachment is for more than a certain amount or returnable to certain courts, only the sheriff or his deputy is authorized to levy.[48] The power of a sheriff to levy an attachment may also be exercised by a properly appointed and authorized deputy of such sheriff,[49] although it has been held that a sheriff cannot ratify the illegal act of one assuming to act as his deputy and making a levy in his name without his authority.[50]

A writ directed to a constable cannot lawfully be levied by the sheriff,[51] unless the statute authorized him to execute such process.[52]

Territorial restrictions. It has been held that a sheriff may not levy under an attachment on personal property outside of his own county,[53] although where a county is divided into different districts, a writ addressed to the sheriff of the county and sued out in one district may properly be executed in a different district of such county.[54]

b. Constables and Their Deputies

The right of constables to levy attachments is, ordinarily, restricted to those returnable to particular courts or involving claims of limited amounts. A special or deputy constable may or may not be authorized to levy in accordance with applicable statutory provisions.

Attachments may in certain cases be levied by a constable,[55] but, as a rule, their power in this respect is confined to attachments issuing from, and returnable to, certain courts,[56] and to attachments for sums not exceeding a certain amount fixed by statute,[57] and a levy by a constable in a case to which his power does not extend is void.[58]

A deputy constable may, it has been held, execute a domestic attachment, although it is directed to the constable,[59] although it has been held that code provisions authorizing an attachment in certain cases by a constable, refer only to a regular constable and not to a special or unbonded deputy constable.[60]

c. Coroners

The coroner may serve an attachment in an action wherein the sheriff is defendant.

In some jurisdictions it is expressly provided by statute that, in actions where the sheriff is defendant, the service of the attachment shall be made by a coroner, and service in such case by the sheriff's deputy is unauthorized and defective.[61]

44. Tex.—Taylor v. Evans, (Civ. App.) 29 S.W. 172
Vt.—Barney v. Rockwell, 15 A. 163, 60 Vt. 444
6 C.J. p. 216 note 71.

45. Wales v. Clark, 43 Conn. 183.

46. Ind.—Will v. Whitney, 15 Ind. 194
Iowa.—Westphal v. Sherwood, 28 N.W. 640, 69 Iowa 384—Courtney v. Carr, 6 Iowa 238
6 C.J. p. 216 note 73

47. Bain v. Mitchell, 2 So. 706, 83 Ala. 304—6 C.J. p. 214 note 48

48. Brinsfield v. Austin, 39 Ala. 227—6 C.J. p. 214 note 49

49. Miller v. McMillan, 4 Ala. 527—6 C.J. p. 214 note 50

50. Perkins v. Reed, 14 Ala. 536.

51. Porter v. Stapp, 6 Colo. 32—6 C.J. p. 214 note 52.

52. Bain v. Mitchell, 2 So. 706, 83 Ala. 304—6 C.J. p. 214 note 53.

53. Whitworth v. Wing, 118 S.E. 177, 125 S.C. 146—6 C.J. p. 214 note 48 [b]
Automobile
In an action for injuries from an automobile collision, under Code Civ. Proc. (1912) § 283, providing that the warrant shall be directed to a sheriff or constable of any county in which defendant's property may be, the sheriff to whom the writ was issued could not attach the automobile of defendant in a county other than his own.—Whitworth v. Wing, 118 S.E. 177, 125 S.C. 146

54. Pleak v. Marks & Shields, 152 N.W. 63, 171 Iowa 551

55. Lawrence v. Featherston, 18 Miss. 345—6 C.J. p. 214 note 54

56. Ala.—Langdon v. Raiford, 20 Ala. 532—Pearce v. Renfroe, 68 Ga. 194
N.C.—Carson v. Woodrow, 75 S.E. 996, 160 N.C. 143
6 C.J. p. 215 note 55.

57. Brinsfield v. Austin, 39 Ala. 227—Martin v. Dollar, 32 Ala. 422—6 C.J. p. 215 note 56

58. Tucker v. Quick, 94 So. 275, 18 Ala. App. 663, certiorari denied Ex parte Tucker, 94 So. 276, 208 Ala. 428—6 C.J. p. 215 note 57.

59. McCormick v. Miller, 2 Penr. & W. (Pa.) 230.

60. Pickett v. Richardson, 138 So. 274, 223 Ala. 683—Tucker v. Quick, 94 So. 275, 18 Ala. App. 663, certiorari denied Ex parte Tucker, 94 So. 276, 208 Ala. 428—6 C.J. p. 215 note 58 [a]

61. Ill.—Beach v. Schmultz, 20 Ill. 185.
Miss.—McLeod v. Harper, 43 Miss. 42
N.H.—Ingraham v. Olcock, 14 N.H. 243
6 C.J. p. 215 note 59.

d. Town or City Marshals

Under statute a town or city marshal may be authorized to levy an attachment on property within his own county; although he may not do so in the absence of statutory or special authority.

Under some statutes a town or city marshal is authorized to levy an attachment, although his right to levy on goods outside his own county has been denied.[62] Where, however, the statute does not confer power to levy an attachment upon that officer, a levy by him creates no lien, unless he is specially appointed for that purpose [63]

e. Elisors

An elisor or special officer appointed by the court may serve the writ where there is no sheriff nor coroner in the county, or where the attachment is against the sheriff himself.

In case there should be neither a sheriff nor a coroner in the county, a writ of attachment may be served by an elisor or elizor, or special officer appointed by the court,[64] and an elisor may be appointed to serve an attachment against the sheriff.[65]

f. Indifferent Persons Specially Deputed

Under some practice an indifferent person appointed by magistrate may levy an attachment. While having the powers of a sheriff in such respect, he should show his authority on demand.

In some states it is held that a magistrate may appoint an indifferent person to levy an attachment.[66] A person so appointed has all the powers of a sheriff in the premises, but must show his authority to act, if questioned.[67]

§ 206. —— Disqualification by Interest

Interest disqualifies an officer from levying an attachment.

Where an officer is interested in a case, he is disqualified from levying an attachment therein,[68] and this disqualification extends to a deputy sheriff, both in cases where his principal is interested and in cases where he is individually interested [69]

§ 207. Duty to Levy

An officer, or one becoming an officer pro hac vice, is under a duty to levy under a writ of attachment placed in his hands.

It is the duty of the officer, after the writ has been placed in his hands for execution, to proceed thereunder and complete its execution with all reasonable diligence and dispatch,[70] without inquiring into the regularity of the proceeding whereon the writ is grounded [71]

Officer pro hac vice. A private person duly authorized to serve an attachment, and who accepts the authorization and writ, becomes an officer pro hac vice under a duty to levy the attachment without further specific instruction to do so.[72]

§ 208. —— On Property Subsequently Acquired or Discovered

The officer is under a duty to levy on property of the defendant acquired or discovered subsequently to the issuance of the writ and before the return thereof.

Although defendant may have had no property at one time, yet if he has acquired property subsequently and before the return of the writ, or if further search develops property belonging to him, it is the duty of the officer to attach the same.[73]

§ 209. —— Where Bond Given to Prevent Levy

Where authorized by statute or otherwise, the officer may accept defendant's bond in lieu of levying the attachment.

In some states it is expressly provided by statute that the officer is not bound to levy the attachment where defendant gives a proper undertaking, but may instead take such undertaking,[74] and in others the practice of giving a release bond to prevent an actual levy exists, although not expressly authorized by statute.[75]

62. Tausend v Handlear, 68 N Y S 77, 33 Misc 587, 31 N Y Civ Proc 170—6 C J p 215 note 60

63. Citizens Sav Bank v Miller, 6 Ky L. 510—6 C J. p 215 notes 61, 62

64. McFarland v Tunnel, 51 Mo. 334 —6 C J p 215 note 63

65. Anonymous, 23 Wend (N Y) 103

Residence of elisor

"It is not necessary that the elisor should be a resident of the same county with the officer in default"—Anonymous, 23 Wend (N Y) 102

66. Conn—Carter v Clark, 23 Conn 512

Vt—Kelly v. Paris, 10 Vt. 261, 33 Am D. 199.

6 C.J. p 215 note 64.

67. N J—Morrel v Gardner, 20 N J. Law 673.

Vt—Burton v Wilkinson, 18 Vt 186, 46 Am D 145.

68. Miss—Dyson v Baker, 54 Miss 24—McLeod v. Harper, 43 Miss 42.

Vt—Evarts v Georgia, 18 Vt. 15.

6 C J. p 216 note 66

69. Miss—Dyson v. Baker, 54 Miss 24

Vt—Clark v Patterson, 5 A 564, 53 Vt. 676

6 C J p 216 note 67

70. Kennedy v Brent, (C C D C) 6 Cranch (U S) 187, 3 L Ed 194—6 C J p 216 note 75

71. Tenn—Stevenson v McLean, 5 Humphr. 332, 42 Am D. 434.

Tex—Rice v. Miller, 8 S W. 317, 70 Tex 613, 8 Am S R 630.

6 C J. p 216 note 76

72. Flinn v. St John, 51 Vt. 334

73. Iowa—Courtney v Carr, 6 Iowa 338.

Kan—Dolan v Wilkerson, 48 P. 23, 57 Kan 758

6 C J p 217 note 77.

74. Ayres v Burr, 64 P. 120, 132 Cal. 125—6 C J p 217 note 78

75. Ky—Cook v. Boyd, 16 B Mon. 556.

Mass—O Sheldon Co v Cooke, 59 N E 77, 177 Mass. 441.

Ohio—Hartwell v Smith, 15 Ohio St. 200.

6 C J. p 217 note 79.

§ 210. Time of Levy

a. In general
b. Seizure before issuance of writ or service of summons
c. When property pursued into another county

a. In General

An officer proceeding with due diligence may levy an attachment at any time within the period prescribed by law, although not after the return date nor after judgment.

In the absence of instructions for an immediate levy the officer has the right to make the same at any time within the period prescribed by law[76] He must, however, act with reasonable diligence in making the levy,[77] and it must be made before expiration of the time for the return of the writ,[78] and before judgment has been entered.[79]

b. Seizure before Issuance of Writ or Service of Summons

A levy is premature and void if made before issuance of the writ. Ordinarily the levy may precede service of the summons, although the contrary has been held where the defendant was a nonresident.

A levy may not be made under an attachment before the writ has been executed and issued.[80]

The seizure of property on an attachment writ may, it has been held, be made before the service of the summons,[81] the same being so far in the nature of a proceeding in rem as to be a basis of a subsequent service by publication upon a nonresident.[82] It has also been held, however, in the absence of a statute conferring jurisdiction upon the particular court to attach the property of a nonresident, that if defendant is a nonresident, and has not been served with a summons at the time of a levy upon the property, the court at that time has no jurisdiction either of the subject matter or of the person of defendant, the writ of attachment has no validity, and the levy under it is wholly void and unauthorized.[83]

c. When Property Pursued into Another County

An officer pursuing property into another county under statutory authorization must levy his attachment thereon within the period prescribed.

Where the officer is authorized by statute to pursue and attach property in an adjoining county within a certain time after its removal the levy must be made within the specified time therefor.[84]

§ 211. Order of Levy

The officer should serve or levy writs in the order of their delivery to him.

Where several writs against the same defendant are placed in an officer's hands, it is his duty to serve or levy them in the order in which they were delivered to him for that purpose,[85] and in the absence of any showing to the contrary it will be presumed that the sheriff levied first those attachments which came into his hands first[86]

§ 212. Rights and Powers of Levying Officer

a. To seize and hold property
b. To pursue property

a. To Seize and Hold Property

The levying officer may seize and hold the goods pending inventory and appraisal, but should do no more than safely keep them subject to judicial direction. The officer need not levy on personalty before seizing realty.

An officer having an attachment in his hands has the right to seize the goods of the debtor and hold them until an inventory and appraisal can be made according to law;[87] but beyond this he has no power to do any other act in relation to the goods seized than simply to keep them safely, subject to the direction of the judge granting the process.[88] The officer is not required to levy first on personal property before seizing realty.[89]

76. Tucker v. Bradley, 15 Conn 46—6 C J p 217 notes 80, 81.

77. Cal—Whitney v. Butterfield, 13 Cal 335, 73 Am D 54
Conn—Tucker v. Bradley, 15 Conn 46.
6 C.J. p 217 note 82

78. Ga—Family Finance Co. v. Downing (App) 181 S E 492—Hendricks v. Georgia Fertilizer Co., 149 S E. 711, 40 Ga App 427.
Tex—Rone v. Marti, (Civ App.) 244 S.W. 639.
6 C J. p 217 note 83.

Amendment to permit return at later term denied

Attachment not levied before return term cannot be amended and made returnable to another term, but must be dismissed, since court has no jurisdiction unless attachment is levied before return term—Family Finance Co v. Downing, (Ga App) 181 S E 492

79. McCarthy v. Culkin, 172 N.E. 524, 254 N Y. 328, reversing 239 N Y S 791, 228 App Div 690, dismissal of appeal denied 173 N E. 860, 254 N Y 547—6 C J p 217 note 84

80. Hardwick v. Page, 117 S E 204, 124 S C 111.

81. Bell v Olmsted, 18 Wis. 69—6 C J. p 217 note 87.

82. Maguire v. Bolen, 68 N W. 408, 94 Wis 48

83. Zerega v Benoist, 30 N Y Super. 199—Woodward v Stearns, 10 Abb. Pr N S (N Y) 395, following Gould v. Bryan, 16 N Y Super 626—6 C J. p 217 note 89

84. Budd v. Durall, 86 Iowa 315—6 C J. p 218 note 90.

85. Richards v Schreiber, etc, Co, 67 N W 569, 98 Iowa 422—6 C J. p 218 note 92.

86. Phelps v Ratcliffe, 3 Bush (Ky) 334

87. Bonnel v. Dunn, 29 N J Law 435.

88. Hergman v. Dettlebach, 11 How. Pr.(N Y.) 46.

89. U S—Samuels v. Revier, (Tex) 92 F 199, 34 C.C A. 294
Tex—Woldert v. Nedderhut Packing Provision Co, 46 S.W. 378, 18 Tex. Civ App 602.

b. To Pursue Property

Under statutory permission a levying officer may pursue personalty into another county and attach it there.

It is sometimes expressly provided by statute that an officer to whom a writ of attachment is directed may, if a defendant is in the act of removing any personal property, pursue and take the same in any county in the state and return it to the county from which the writ issued.[90]

§ 213. —— To What Property Levy Confined in General

a. Property of defendant generally
b Commingled goods
c. Goods in possession of third person

a. Property of Defendant Generally

Under a writ of attachment the levying officer may seize only the property of the defendant.

A writ of attachment gives no authority to the levying officer to seize or detain goods other than the goods of defendant.[91] Accordingly, the officer is not bound to levy upon property unless he has probable and reasonable cause to believe that the same belongs to defendant,[92] must determine at his peril what property is that of defendant,[93] and may, where he has any reason to doubt that the goods belong to the debtor, insist that the creditor point out property belonging to the debtor and indemnify him against liability.[94]

b. Commingled Goods

The levying officer should try to distinguish the defendant's goods from others with which they are commingled, but if unable to do so may retain the whole pending a third person's identification of goods owned by him.

Where the goods of defendant and those of a stranger are commingled it is the duty of the officer, if possible, to distinguish them before attaching,[95] and not attach the whole of them without making the inquiry.[96] If, however, the officer after making reasonable inquiry is unable to distinguish the goods, he may retain the whole until the owner identifies and points out the articles belonging to him.[97]

c. Goods in Possession of Third Person

An officer should investigate the ownership of property in possession of a third person before attaching it as that of the defendant.

Possession of personal property being presumptive evidence of title, the law makes no presumption in the officer's favor where he makes a levy upon property in the actual possession of a stranger to the suit under a writ running solely against defendant therein.[98] The officer is bound to take notice of the fact that the property is not in possession of the debtor, and to inquire of those in whose possession he finds the property for whom they hold it,[99] and both he and the creditor are affected by any knowledge that would be gained by such inquiry.[1]

§ 214. —— Effect of Specific Directions to Officer

a From creditor
b From debtor

a. From Creditor

An officer should follow the creditor's lawful directions respecting attachment, although such directions do not restrict his legal authority to attach sufficient property to secure the demand.

An officer receiving specific directions from the attaching creditor as to the attachment of property is bound to follow such directions if he can lawfully do so,[2] and a creditor, after suing out a writ of attachment, has the right to have the writ levied upon such property as he may specifically designate, and no other, although the writ may instruct the officer to seize and take into his possession all the property of defendant found in the officer's jurisdiction.[3] But, while special directions may justify the officer for not going beyond them,[4] it has been held that such directions do not deprive him of the legal authority to obey the general command to attach sufficient to secure the demand, if he has

90. House v Hamilton, 43 Ill. 185—6 C.J p 220 note 23

91. Overby v. McGee, 15 Ark 459, 63 Am D. 49—6 C J. p 218 note 98.

92. Iowa—Wadsworth v. Wallliker, 2 N W. 420, 51 Iowa 605
Me.—Bradford v. McLellan, 23 Me. 303.
Tex—Dewitt v Oppenheimer, 51 Tex. 103.
Vt—Hill v. Pratt, 29 Vt. 119.

93. State v. Koontz, 33 Mo. 323.

94. Bond v. Ward, 7 Mass. 123, 5 Am D 23—6 C J p 218 note 1.

95. Cal—Susskind v. Hall, 44 P. 328, 5 Cal Unrep Cas 304
Mass—Carlton v. Davis, 8 Allen 94
N H—Moore v Bowman, 47 N H 494—Wilson v. Lane, 33 N H 466

96. Carlton v. Davis, 8 Allen (Mass.) 94

97. Robinson v. Holt, 39 N H 557, 75 Am D. 223—Wilson v. Lane, 33 N. H. 466.

98. State v. Hope, 33 Mo. 430—6 C.J. p 219 note 6.

99. Ross v Draper, 55 Vt. 404, 45 Am.R 624—Whitcomb v. Woodworth, 54 Vt 544—Flanagan v. Wood, 33 Vt. 332.

1. Ross v. Draper, 55 Vt. 404, 45 Am. R 624.

2. Lovell v. Sabin, 15 N.H. 29—6 C J. p 219 note 10

3. Curry v Equitable Surety Co., 148 P. 914, 27 Colo App. 175.

4. Turner v. Austin, 16 Mass. 131—Goddard v. Austin, 15 Mass. 133.

opportunity so to do and chooses to avail himself thereof.[5]

b. From Debtor

According to some authorities the debtor has the personal right to select the property to be attached

In some jurisdictions the debtor may point out property to be seized under attachment, but this right is personal to him, and no complaint in that particular can be made by plaintiff.[6] Under the procedure in other states it is not necessary for the officer to call on defendant or his agent to point out the property to be levied on.[7]

§ 215. —— Use of Force Generally

The officer may use necessary force to levy an attachment.

In levying an attachment the officer has the right to use such force as may be necessary to the performance of his duty under the law.[8]

§ 216. —— Breaking or Entering Buildings and Opening Receptacles

a. Breaking or entering buildings
b Opening receptacles

a. Breaking or Entering Buildings

The officer may not break into a dwelling, or buildings physically connected therewith, to attach property therein, although he may enter peaceably for such purpose; and in the case of other structures a forcible entrance may be lawful. The officer may retain possession of premises long enough to inventory and remove attached goods.

As a rule an officer may not break the outer door of a dwelling house for the purpose of levying an attachment,[9] but, if the entry is made without force, peaceably, and permissively, he may proceed to levy upon goods within the house[10] Where, however, goods are within a store, warehouse, or any building other than a dwelling house, it would seem that the officer may, if necessary, make a forcible entrance in order to levy the writ after admission has been demanded and refused,[11] although a shed and barn attached to dwelling house have been held part thereof as bearing on the right of entering for attachment.[12]

Possession of premises. An officer levying upon personal property has the right to the temporary possession of the premises long enough for him, with reasonable diligence, to inventory and remove for storage the property levied upon,[13] and may, without liability to the debtor, have possession a reasonable time for packing and removing the goods.[14]

b. Opening Receptacles

Ordinarily an officer may break into a box or safe to attach the defendant's property, although he has been denied the right to open a safe deposit box rented jointly to the defendant and a third person, or to open packages of goods for inspection and appraisal.

As an incident of the officer's power and duty to take actual possession of tangible property, it has been held that he has the right to open boxes, safes. etc, containing property of defendant for the purpose of attaching such property,[15] or of making an inventory thereof.[16]

But an officer has been held to have no authority to open packages of goods for inspection and appraisal,[17] nor to break into a safe deposit box leased jointly to defendant and a third person.[18]

5. Conn —Welton v Scott, 4 Conn 527.
Mass —Turner v. Austin, 16 Mass 181
6 C J p 219 note 12

6. Hoy v. Eaton, 26 La Ann. 169.

7. U S —Samuels v Revier, (Tex) 92 F. 199, 34 C C A 294
Tex —Woldert v. Nedderhut Packing Provision Co, 46 S W. 378, 18 Tex Civ App 602
6 C.J p 219 note 14

8. Burton v Wilkinson, 18 Vt 186, 46 Am D. 145—6 C J p 219 note 15

9. Dupont v. Moore, 166 A 417, 86 N H 254—6 C J p 219 note 16

10. Himmelbauer v Union Bank & Trust Co, 220 P 84, 68 Mont. 34—6 C J p 219 note 17.

11. Clark v Wilson, 14 R I. 11—6 C J p 219 note 18

12. Frothingham v. Maxim, 141 A. 99, 127 Me. 58.

13. In re Bradley, (D C Ala) 225 F. 307

14. Ramsey v Burns, 69 P. 711, 27 Mont 154—6 C J p 219 note 19.

15. Carples v Cumberland Coal & Iron Co, 148 N E 185, 240 N.Y 187, affirming 207 N Y S 624, 212 App. Div 150—6 C J p 220 note 20

Safe deposit box

(1) A sheriff may be authorized, in aid of attachment, to open a safe deposit box rented to a debtor, by a safe deposit company, as the debtor cannot be allowed to defeat creditors by merely placing securities in a safe deposit box, the safe deposit box company being protected as against defendant by court order and levy of the sheriff thereon —Carples v Cumberland Coal & Iron Co, 148 N E 185, 240 N Y 187, affirming 207 N Y S. 624, 212 App Div 150

(2) But it has been held that the court has no authority, where a warrant of attachment has been issued, to direct a sheriff to break open a safe deposit box in national bank held in defendant's name, and take possession of the contents —Stehli Silks Corporation v Diamond, 204 N. Y S 542, 122 Misc 666

16. Tillinghast v Johnson, 82 A. 788, 34 R I 136, 41 L R A (N S) 764, Ann Cas 1914A 960

17. Gaskill v. Glass, 1 B Mon (Ky.) 252

18. Horace Holding Co. v Clements, 215 N.Y S. 169, 127 Misc 83

Not shown to contain property of defendant

In a case distinguishing Carples v. Cumberland Coal & Iron Co, 148 N. E 185, 240 N Y. 187, affirming 207 N Y S 624, 212 App Div 150, it has been held that a sheriff may not be ordered to break into a safe-deposit box leased jointly to defendant and another, in the absence of a showing that it contains defendant's property, on affirmative oath of colessee that

§ 217. Manner of Levy in General

The manner of levy should be such as to place the property beyond the control of the attachment debtor.

The essential requirement of a levy is that the acts of the attaching officer be such as to put the property out of the control of the attachment debtor.[19]

§ 218. —— Compliance with Statutory Requirements

The levying officer should comply with statutory requirements strictly, according to some authorities, or merely in substance according to others, stricter compliance being required where the rights of third persons are involved.

The proceeding by attachment being in derogation of the common-law, the officer must comply with the statutes in making the levy[20] It has been held that substantial compliance is sufficient,[21] although other authorities are to the effect that special statutory provisions respecting the manner in which attachment shall be levied must be strictly pursued, and that a departure therefrom will render the levy void[22]

Where the levy is asserted not against the rights of defendant in the writ, but against third persons, greater strictness is required than if the rights of defendant were alone concerned,[23] although a levy insufficient against other persons may be sufficient to vest the officer with a special property as against a mere trespasser[24]

In some jurisdictions it has been held that an attachment may be levied on the visible, tangible effects of a defendant in his actual or constructive possession, as an execution is levied,[25] and with like effect.[26]

Certificate of depository as to defendant's interest in attached property. Statutes to the effect that one holding property belonging to a defendant must on his demand furnish to an attaching officer a certificate of defendant's interest therein are for the protection of such officer, who may waive the requirement,[27] and such statutory directions are not mandatory in the sense that compliance therewith is essential to a valid levy.[28] In other words, the levy or attachment is complete when service is effected on the bank or other depository, and the validity of the attachment may not be successfully attacked because the depository did not return a certificate to the officer.[29]

it contains no such property.—Horace Holding Co v Clements, 215 N Y S. 169, 127 Misc 83.

19. Hart v. Oliver Farm Equipment Sales Co., 21 P.(2d) 96, 37 N M. 267, 87 A L R. 962

20. Ala —Berry v. Stewart, 92 So. 906, 207 Ala 318
Conn —Safford v. Morris Metal Products Co, 121 A. 885, 99 Conn 372 —Munger v. Doolan, 55 A 169, 75 Conn. 656.
Iowa —First Nat. Bank v Kindwall, 206 N W. 241, 201 Iowa 82
N H —Dupont v. Moore, 166 A 417, 86 N H 254
Ohio —L L. Le Veque Co. v. Ross, 31 Ohio N P (N S) 185.
Pa —Mehalick v. Tomshe, 28 Pa Dist. 874
Vt —Cuthbertson v. Ritchie, 130 A. 756, 99 Vt 50
6 C J. p 220 note 24.

Levy or attachment held valid

A proper entry in the encumbrance book in the office of the clerk of the county, pursuant to Code (1897) § 3899, relating to attachments on realty, construed in connection with § 3923, relating to instructions to the sheriff as to formal requisites of his return, is a good levy, notwithstanding the written return on the writ is not made until a subsequent date —First Nat Bank v. Kindwall, 206 N W. 241, 201 Iowa 82—6 C J. p 220 note 24 [b].

Levies held insufficient

Attachment by actual or constructive possession is essential, followed by serving a copy of the writ with a return of the attachment indorsed as the statute prescribes on the town or city clerk, and an attachment failing to comply with the foregoing statutory requirements is void —Dupont v Moore, 166 A 417, 86 N H 254 —6 C J p 220 note 24 [c]

Loss of writ

Loss of original writ of attachment does not absolve plaintiff from serving, entering, and docketing writ within the time required by statute, but he must proceed by copy under other statutory provisions, by entering and docketing copy, or taking steps towards such end, within the time for entering and docketing the original, failing in which action is not pending in court at the time of motion for filing of and proceedings on certified copy —Cuthbertson v Ritchie, 130 A. 756, 99 Vt 50

Statutory requirements enumerated

Under Gen St (1918) § 5862, the prerequisites of a valid attachment are First, a valid seizure of the property, second, due service on defendant of a copy of the process with a description of the property attached in the officer's certificate, third, a return of the process to the court with a like description of the property attached in the return as certified —Safford v. Morris Metal Products Co, 121 A. 885, 99 Conn. 372.

21. Cord v Newlin, 59 A 22, 71 N. J Law 438—6 C J p 221 note 25.

22. Neb —Ames v Parrott, 86 N W. 503, 61 Neb 847, 87 Am S R 536
N D —Ireland v Adair, 94 N W. 766, 12 N D 29, 102 Am S R 561

23. Russell v Major, 29 Mo App. 167—6 C J p 221 note 28.

24. Miller v. Fay, 40 Wis 633

25. Ohio —Gates v Pennsylvania Land, etc, Co, 9 Ohio Cir Ct. 378, 6 Ohio Cir Dec 163
Tex —Woldert v. Nedderhut Packing Provision Co, 46 S W 373, 18 Tex Civ App 602.
Va —Dorrier v. Masters, 2 S E. 927, 83 Va 459
6 C J. p 221 note 26

26. U S —Starr v. Taylor, (C C. Ind) 22 F Cas No 13,319, 3 McLean 542
Mich —Drs K & K U S Medical, etc, Assoc v Post, etc, Job Printing Co, 25 N W. 477, 58 Mich. 487
Ohio —Shorten v. Drake, 38 Ohio St. 76.
Tenn —Parker v. Freeman, 2 Tenn Ch 612

27. Prahl Const Corporation v Jeffs, 215 N Y S 96, 126 Misc. 802.

28. Prahl Const. Corporation v Jeffs, supra.

29. Korytkowski v. Greniewicki, 221 N Y S. 119, 220 App Div. 237—McCarthy v. Farley, 267 N.Y.S 733, 149 Misc 360.

Under statutory provisions for examination of a depository who fails to furnish the required certificate, or is shown to have furnished a certificate failing to set forth all the property of the attachment defendant in his hands, the examination is restricted to property within the jurisdiction subject to attachment and cannot be extended to property elsewhere [30]

§ 219. —— Necessity of Openness and Notoriety

The levy should be open and notorious in order to affect the rights of third persons.

In order that it may affect third persons the levy should be open and notorious,[31] and to this end it has sometimes been required that the officer should go to the place where defendant's property was to be found, and there, in the presence of one or more credible witnesses, declare that he attached such property at the suit of plaintiff.[32]

§ 220. —— Notice of Levy

a. Necessity
b. Form and sufficiency
c. To whom notice given
d. Time
e. Publication of notice

a. Necessity

The officer should give such notice as may be required by statute, and omission of statutory notice of levy may defeat the jurisdiction of the court.

It is sometimes required by statute that the officer making the levy shall give written notice thereof to defendant, to the person in possession of the property, or some other person or persons designated by the statute, and such provisions, when they exist, must be complied with.[33] A levy made in conformity to law may, however, be effective before service of notice,[34] which in the absence of a provision in the statute to the contrary is requisite to complete the levy rather than to create the attachment lien, which dates from the time of levy and not from that of notice, which can, as will be seen in subdivision d of this section, ordinarily be given within a reasonable period after levy [35]

Where a valid levy is the basis of jurisdiction, the failure to give the statutory notice defeats the jurisdiction of the court [36]

b. Form and Sufficiency

Notice of levy should be made in a form and manner complying with statutory requirements, and must ordinarily be written.

The notice should comply with statutory requirements as respects its form and sufficiency [37]

Written notice is usually required,[38] although it has been held that, where a tenant in possession has actual notice and receipts for the property, a written notice to him is not necessary.[39]

Where there has been no actual notice, and a constructive notice by seizure is relied on, there

30. Stine v. Greene, 72 N Y S. 729, 65 App Div 221, 32 N Y Civ Proc 222—Bluebird Undergarment Corporation v Gomez, 249 N Y S. 319, 139 Misc. 742

31. Poling v Flanagan, 23 S E. 685, 41 W Va 191—6 C J. p 221 note 30

32. Bryant v. Duffy, 30 S W. 317, 128 Mo 18—6 C J. p 221 note 31

33. Conn —Fosdick v Roberson, 100 A 1059, 91 Conn 571.
Ga —Lane v. Bradfield, 140 S.E. 417, 37 Ga App 395
6 C J p 221 note 32.

34. Edwards v Tracy, 212 N W. 317, 203 Iowa 1033

35. Schoonover v Osborne, 82 N W. 505, 111 Iowa 140, 82 Am S R 496 —6 C J p 222 note 33

36. Walter v Scofield, 67 S W. 276, 167 Mo. 537—6 C J. p 222 note 34.

37. Conn —Fosdick v Roberson, 100 A 1059, 91 Conn 571
Ga —Lane v Bradfield, 140 S E 417, 37 Ga App 395
S D —Woodbine Savings Bank v Yager, 234 N W 621, 57 S D. 645.
6 C J. p 221 note 32.

Notices held sufficient

(1) Under a statute providing in respect of levy on machinery, that if it cannot be moved without manifest injury, the levying officer shall not move it, but shall give notice of levy by posting a notice thereof on the outer door of the building in which such property is situated, failure to post notices on the outer door of a shed which was not completely inclosed did not invalidate the levy of an attachment on the machinery in the shed if the notices were conspicuously posted upon the shed —Coast & Lakes Contracting Corp. v. Martin, 101 A 502, 92 Conn 11.

(2) A description in the notice of levy of property as "compressed air machinery" and "three hoisting engines" is sufficient —Coast & Lakes Contracting Corp v. Martin, supra. 6 C J. p 221 note 32 [e].

Notice held insufficient

Under Pub Acts (1911) c 135, providing that if there be no person in charge or possession of the property attached the court before which such action is returnable may order such notice of the action as it may deem reasonable, notice of the action given according to an order of notice not prescribed by the court, but issued by the assistant clerk of the superior court, is insufficient, and renders the attachment judgment void —Fosdick v. Roberson, 100 A 1059, 91 Conn. 571—6 C J. p 221 note 32 [f].

Stating amount of claim

A notice of attachment which did not state the amount of plaintiff's claim, as required by statute, was void —Woodbine Sav Bank v. Yager, 234 N W. 621, 57 S D 645.

Entry as importing lawful notice

An entry of levy, made upon an attachment by a levying officer, reciting attachment had been levied upon described land as defendant's property imports lawful notice to defendant within code requirements —Scott v. Darien Motor Co., 163 S E. 246, 45 Ga App. 102.

38. Hamilton v. Hartinger, 64 N W. 592, 96 Iowa 7—6 C.J. p 222 notes 36, 32.

39. Foster v. Davenport, 80 N.W. 404, 109 Iowa 329.

must be a legal seizure,[40] and the seizure must be such as to affect the owner with notice of the levy.[41]

c. To Whom Notice Given

Notice should be given to the person or persons designated by statute.

Notice should be given to the person or persons designated by statute, as to the defendant or his agent,[42] or to the person in possession of the attached property,[43] although a notice in fact given to the proper persons will not be invalidated by a trifling error in designating them.[44]

d. Time

Generally notice should be given within a reasonable time after levy and before the return term.

Where the time for giving such notice is not absolutely fixed by the statute, it must be given within a reasonable time after the actual seizure of or levy on the property.[45]

It has been held that a levy on real estate would not be defeated by the fact that the notice was served on the owner the day preceding the levy.[46]

Notice must, when the statute so requires, be completed prior to the return term of the levy.[47]

e. Publication of Notice

Where the statute so provides, notice of levy should be published by posting a copy in a public place or printing it in a newspaper.

In some states the statute requires the officer to post copies of the notice for attachment in public places, and/or to publish the same in newspapers within the county.[48] One purpose of such statutes is to afford notice to other creditors of an attachment defendant, so that if they desire to prorate they may immediately commence and prosecute to final judgment their claims against the debtor.[49]

While the duty of giving notice by publication rests primarily upon the clerk, it is also the duty

40. United Provisions Corporation v Board of Missions, 124 S E 820, 33 Ga App. 9.

41. United Provisions Corporation v Board of Missions, supra.

Seizure held insufficient

Where, under attachment against nonresident, service was attempted by seizure of thirty-acre tract, and the only seizure relied on was by posting a notice on a building on separate four-acre tract and request by levying officer, that persons at work there notify defendant's absent agent, and there was no actual notice to defendant or agent, judgment for plaintiff on attachment was void, because the seizure designed to replace actual notice was insufficient—United Provisions Corporation v Board of Missions, 124 S.E 820, 33 Ga App. 9

42. Lane v. Bradfield, 140 S E 417, 37 Ga App. 395—6 C J. p 221 note 32 [b], [1].

Life tenant not agent

A life tenant in possession is not the agent of the remainderman to receive written notice of levy on the remainderman's interest—Lane v Bradfield, 140 S E. 417, 37 Ga App. 395.

Occupant not tenant in possession

Notice of levy given the occupant of realty is insufficient to justify judgment in attachment suit against the owner, where the owner had rented realty for a year to the occupant, who without the knowledge or consent of the owner, who lived in another state, had continued to occupy the land after refusal of the owner to continue tenancy—Morgan v Rupert, (Ga.) 186 S E 727

Registered letter addressed to defendant but receipted for by another

Where sheriff attempted to attach the interest of remainderman in realty in possession of a life tenant, a letter containing notice sent to remainderman by levy officer by registered mail, receipted for by third person purporting to act for remainderman, but whose authority to do so did not appear, was held insufficient to afford legal notice of attachment to remainderman—Lane v. Bradfield, (Ga.) 140 S E. 417.

43. Whitney v. Day, 168 P. 295, 86 Or. 268

Indorsee of note

On attachment of note not in possession of the debtor, notice should be served upon the indorsee having possession, as required by L O L § 300—Whitney v. Day, 168 P. 295, 86 Or. 268.

"Possession" of judgment attached

"Possession" of clerk of court of judgment is not such as requires service of notice of levy on him—Edwards v. Tracy, 212 N W. 317, 203 Iowa 1083.

44. Kilham v. Western Bank, etc., Co., 70 P. 409, 30 Colo. 365—6 C. J. p 223 note 35

45. Citizens' Nat Bank v. Converse, 70 N W. 200, 101 Iowa 307—6 C.J. p 223 note 39.

Two days after delivery of warrant

A statute providing that execution of attachment shall be made by leaving a certified copy of warrant of attachment with certain persons, with a notice showing property levied upon, but not saying that the two must be served together, does not require that "notice" shall be served at instant of delivery of warrant, but service of attachment and notice showing property levied on within two days thereafter was sufficient—Prevost v. Post, 173 S E. 628, 172 S C 228.

46. Kilham v. Western Bank, etc., Co., 70 P 409, 30 Colo 365.

47. Lane v. Bradfield, 140 S E. 417, 37 Ga App. 395.

48. Smith v. Runnells, 54 N W 375, 94 Mich. 617—6 C.J. p 221 note 32 [1]

Posting on court room door

(1) Under a code provision requiring that copies of the attachment be affixed to the door of the room where the court in which the suit is pending is held, posting on the front door of the courthouse has been held sufficient—Pertutta Bros v. Shields, 4 La App 24.

(2) Posting writ or mandate of attachment has been held essential under such code provision, so that posting merely of the petition and the order for the attachment was not sufficient—Parry v. Cox, 4 La App 238

"Three copies in three public places"

The statute requiring the officer to post three copies of the notice in three public places requires each notice to be posted in a separate public place—Reid, Murdock & Co. v. McGregor, 183 Ill App 300.

49. Quirk v. Diana Mines Co., 198 P. 672, 34 Idaho 30.

of the attachment plaintiff to inform himself as to whether or not the clerk has acted, and if not it is within plaintiff's power to compel the clerk to act,[50] and creditors otherwise commencing their actions in time will not be deprived of the right to prorate because of the clerk's failure to perform his statutory duty of publication, nor may an attachment plaintiff derive any benefit from neglect of his obligation to cause the clerk to do his duty in respect of publication.[51]

The right of another creditor of the attachment defendant to prorate does not depend upon whether such creditor is actually cognizant of the posting and publication of the notice, and if he begins his action after the posting and publication of notice and obtains judgment within the statutory period, he is entitled to prorate whether his bringing of suit was or was not prompted by a knowledge of the giving of notice of attachment.[52]

Time of posting or publication Statutes fixing the time of posting and publication are directory rather than mandatory so far as the rights of other creditors are concerned, and the attachment plaintiff is not entitled to the benefit of limitations on the time of prorating until after the actual giving of the notice by posting or publication.[53] Posting and publication after the time fixed by statute is not a nullity.[54]

§ 221. Levy on Personalty

Broadly speaking, to effect a levy on personalty the attaching officer should assume dominion over the property such as would render him a trespasser if not protected by the writ.

While the cases on the question of what will constitute a valid levy on personalty are not entirely harmonious,[55] it may be stated as a general rule that, in order to make a valid levy upon personalty, the officer executing the attachment must assume dominion over the property; he must not only have the property in view, but he must assert his dominion over it by such acts as would render him liable to an action for trespass but for the protection afforded him by process,[56] or, as stated in some decisions, the officer must assume such control and possession over the property that the real owner may bring replevin.[57]

§ 222. —— Service of Writ or Warrant

a. In general
b Time and place of service

a. In General

Service of the writ must be made as required by the applicable statutes

Where the statute requires a writ or warrant to be served on defendant, service must be made in the mode prescribed by statute.[58]

A substituted service is void if the officer's return does not show that diligent search was made for defendant during the whole time within which personal service might lawfully be made.[59]

A provision that the officer levying upon personal property capable of manual delivery shall deliver without delay to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted has been held to be merely directory.[60]

A defendant who absconds from the county and state thereby waives service of a copy of the writ.[61]

b. Time and Place of Service

Service should be made at the place and within the time prescribed by statute.

Where the law requires service a specified time before the return day, service made on the return day is insufficient.[62]

50. Quirk v. Diana Mines Co, supra
51. Quirk v. Diana Mines Co, supra.
52. Evans v. Power County, 1 P. (2d) 614, 50 Idaho 690—Quirk v Diana Mines Co, 198 P 672, 34 Idaho 30
53. Quirk v. Diana Mines Co, supra
54. Quirk v. Diana Mines Co, supra
55. Jones Lumber, etc, Co v Farris, 60 N.W 403, 6 S D 112, 55 Am S R 814—6 C J p 223 note 42
56. Ala —Fleming v. Moore, 105 So 679, 213 Ala 592
Fla —Ex parte Fuller, 128 So 483, 99 Fla 1165.
6 C J p 223 note 42.
57. Libby v Murray, 8 N.W 238, 51 Wis 371—Gallagher v. Bishop, 15 Wis 276.
58. Hayward v. Hartshorn, 3 N H 198—6 C J p 232 note 90.

Necessity of service

(1) In South Carolina it has been held that under Code Civ Proc (1912) § 234, in proceedings to secure jurisdiction of a defendant by attachment, followed by service of the summons, the writ of attachment need not be served except where the attachment is of realty—Stephens v. Ringling, 86 S E 683, 102 S C 333

(2) It has also been held that the warrant of attachment need not be served on the person in whose hands personal property of defendant may be found, but that it is sufficient to give such person notice of the attachment and demand surrender of the property—Sanders v. D. Landreth Seed Co., 74 S E 120, 91 S C 26.

Service on nonresidents

A writ of attachment is not a "judicial writ" within P S 1444, relating to the service of judicial writs on nonresidents—Kittredge v Fairbanks Co, 99 A 1016, 91 Vt. 174—6 C J p 232 note 90 [c]

59. Farr v. Kilgour, 75 N W 457, 117 Mich 227, following Brown v. Williams, 39 Mich 755.
60. U S—In re Schow, (D C Conn) 213 F 514.
N Y—Adams v. Speelman, 10 N Y S. 364, affirmed 27 N E. 854, 124 N Y. 666.
61. Thomas v. Richards, 35 N W. 42, 69 Wis 671—6 C J. p 232 note 93
62. Kobic v Reed, 219 N.W 673, 242 Mich. 594.

A substituted service made on the last day on which the principal defendant could have been served has been held good.[62]

Place of service. Service made in the county of the residence of defendant is sufficient.[64]

An attachment against a nonresident may, it has been held, be sued out in any county and served in another county by summons of garnishment issued and returnable in that county [65]

§ 223. —— Taking Possession and Removing Property in General

a. General rules
b Removal
c. Property capable of manual seizure in general
d Property incapable or difficult of manual seizure in general
e. Animals
g Debts and instruments for the payment of money
f. Crops

a. General Rules

The officer should take possession of personalty in order to effect a levy thereon, and his control over the property should be such as to preclude another from lawfully taking it without his knowledge. Possession may be actual or constructive in accordance with the nature of the personalty seized, and actual possession need not be taken immediately on service of the writ.

A levy upon personalty must be made by a seizure and taking of the attached property into custody by the officer,[66] either actually or constructively, according to the nature of the property;[67] and generally speaking the custody and control should be such as to enable the officer to retain and assert his power over the property, so that it cannot properly be withdrawn or taken by another without his knowing it.[68] It is not, how-

Judgment and execution rendered void

Where, after husband had transferred interest in stock of goods and fixtures to wife, the husband's creditor procured a writ of attachment which was not served on the wife until the return day, it was held that judgment and execution issued thereon were void, since the writ must be served at least six days before the return day, the court saying: "Whether the service is personal or substituted, the writ must be served at least six days before the return day."—Kobie v. Reed, 219 N W 678, 679, 242 Mich. 594.

63. Matthews v. Forslund, 71 N W. 854, 113 Mich. 416.

64. De Carie v. Marks, 137 N W. 94, 171 Mich. 167.

65. Gaston v. Jackson Nat Bank, 163 S E 265, 45 Ga App 106.

66. Conn—Gray v Bracken, 140 A. 354, 107 Conn 300
Fla.—Ex parte Fuller, 128 So. 483, 99 Fla. 1165.
Mich—McPartlin v. Clarkson, 215 N W. 338, 240 Mich 390, 54 A L R. 1535.
Nev—Green v. Hooper, 167 P. 23, 41 Nev. 12.
Pa.—Milton v. Meadville Spinning Co, 28 Pa Dist. 53.
Tex—Osborn v. Paul, (Civ App) 27 S W (2d) 572.
Wash—Tahoma Finance Co v. Shannon, 244 P 271, 138 Wash 90.
6 C.J. p 223 note 45

Acts constituting valid levy

(1) "An order of attachment is levied on personal property when that property has been taken by the officer charged with the enforcement of the writ"—Radford v Kachman, 160 N E 875, 877, 27 Ohio App 86

(2) A sufficient attachment of personal property is made by taking possession of the same, to be forthcoming on execution.—Bass v. Dumas, 95 A 286, 114 Me 50

(3) As respects personalty, the seizure, and not the official entry by sheriff or deputies, constitutes the "levy"—McBrien v. Harris, 145 S E 919, 39 Ga App 41.

(4) Where the city marshal of city of Buffalo delivered a certified copy of warrant of attachment issued in action for money due, to defendant's debtor, and gave notice that a portion of such indebtedness was thereby attached, and demanded certificate of amount due, it was held that, although the marshal did not obtain certificate required by Civ Pract Act § 918, nor make out proper inventory under § 921, the levy itself was complete—Korytkowski v. Grenie-wicki, 221 N.Y S. 119, 220 App Div. 237.
6 C J. p 223 note 45 [f].

Acts held not to constitute valid levy

Posting notice of attempted levy of attachment on combine and tractor has been held insufficient to constitute a legal levy of attachment where the sheriff did not take physical possession of the property—Osborn v. Paul, (Tex Civ App) 27 S W (2d) 572—6 C J p 223 note 45 [g].

67. Conn—Knox v. Binkoski, 122 A 400, 99 Conn 582
Fla—Ex parte Fuller, 128 So 483, 99 Fla. 1165
6 C.J. p 224 note 46.

Nature and condition of property as controlling

"From an extensive examination of the cases we are convinced of this, that the question of dominion over and manual possession is determined by the nature and condition of the property"—Ex parte Fuller, 128 So. 483, 484, 99 Fla 1165

68. Me—Bass v. Dumas, 95 A 286, 114 Me 50.
Nev—Beemer v Seaborn, 22 P (2d) 356, 54 Nev 459—Green v Hooper, 167 P 23, 41 Nev 12
Okl—Fiegel v First Nat Bank of Kingfisher, 214 P. 181, 184, 90 Okl 26
6 C J. p 225 note 47.

"In making a valid levy of an order of attachment, the weight of authority appears to support the rule that the officer executing the order must take only such possession of the property as he may be able to according to the nature of the property levied upon, but it is essential that the officer assumes control and dominion over it"—Fiegel v. First Nat. Bank of Kingfisher, supra

Independent of statute, to preserve and continue the attachment, the officer must retain possession, by having the actual physical custody, or such control as to have the power of taking immediate possession—Bass v Dumas, 95 A. 286, 114 Me 50.

Statutes obviating necessity of retaining possession

To relieve an attaching officer from the necessity of retaining actual possession of bulky articles, by filing the return specified under statutes regulating such matters, he must follow the statute—Bass v. Dumas, 95 A 286, 114 Me. 50.

ever, essential that the levying officer take actual possession of the property immediately upon service of the writ in order to effect a valid attachment against the defendant owner.[69]

A mere verbal declaration of a seizure or an intent to seize is not sufficient,[70] nor does service of a copy of the warrant on the person in charge of goods and informing him of the character of the papers, without taking any further steps, constitute a valid levy;[71] nor, it has been held, may a valid levy be shown merely by proof of an acceptance of service for garnishees by an insurance commissioner, without compliance with applicable statutes requiring the attaching officer to go to the persons in possession of the property and then and there declare in the presence of witnesses that he attaches such property.[72]

b. Removal

Ordinarily a levying officer should remove attached personalty and place it under his own control. But physical removal is unnecessary where other effective steps are taken to transfer control of the property from the debtor to the officer.

Where personal property has been attached by an officer, the latter may, and as a general rule should, remove the same and hold it in his individual control,[73] and such removal should be without unreasonable delay, or the officer will become a trespasser.[74] Removal, however, is not always indispensable;[75] and where an actual removal would occasion great and unnecessary expense, would be positively injurious to the parties, or, from the nature of the property, would be exceedingly inconvenient,[76] and other acts of notoriety, which may notify creditors that the goods are in the custody of the law, may be equivalent to a removal,[77] the goods may be left where they were before the seizure, provided they are actually put out of the control of the debtor.[78]

Where, for any of the reasons stated, the removal of the property is inadvisable, it is the usual practice for the officer to retain the goods in his custody in the place where levied on, through someone selected to take charge thereof for him,[79] and this will be sufficient, unless it is done colorably to give the appearance of an attachment where in truth none exists.[80] It has even been held that a valid attachment levy may exist although the levying officer fails to leave an agent in charge of unremoved property.[81]

c. Property Capable of Manual Seizure in General

Ordinarily an attaching officer should take actual possession or physical control of tangible personalty; and property must be such as to put it out of control of the debtor by assumption of control by the officer, and keep same in his charge or in charge of some one for him, the officer being authorized to deputize a third person to control and keep it for him as such officer.—Fleming v. Moore, 105 So 679, 213 Ala. 592.

69. McDonald v. Matoll Service & Transport Co, 179 A. 310, 115 N.J. Law 239.

70. Conn.—Hollister v. Goodale, 8 Conn 332, 21 Am D 674
Ga.—Jones v Howard, 27 S.E. 765, 99 Ga. 451, 59 Am S R 231.
Mo.—Shanklin v. Francis, 67 Mo App 457.
6 C.J. p 225 note 48.

71. Miles v. Brown, 38 N.Y Super. 400.

72. Milton v. Meadville Spinning Co, 28 Pa Dist 53

73. Pond v Skidmore, 40 Conn. 213—6 C.J. p 225 note 50.

74. Davis v Stone, 120 Mass. 228—6 C.J. p 225 note 51.

75. U.S.—In re Jones, (D.C.Tex.) 42 F.(2d) 269.
Ala.—Fleming v. Moore, 105 So. 679, 213 Ala. 592.
6 C.J. p 225 note 52.

Where rights of third persons not involved

Seizure of bankrupt's property under writ of attachment constituted an execution of such writ and created a lien without removing the property from the premises, where no question of innocent purchaser was involved.—In re Jones, (D.C.Tex.) 42 F.(2d) 269

76. Hart v. Oliver Farm Equipment Sales Co, 21 P.(2d) 96, 37 N.M. 267, 87 A.L.R. 962—6 C.J. p 225 note 53

77. Iowa.—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.
N.Y.—Florea v. Schultz, 217 N.Y.S. 764, 128 Misc 77.
6 C.J. p 226 note 54.

Locking up the property

Where a levying officer left attached property in defendant's store, but put it under lock, taking the keys and adding a lock of his own, and where he neglected to post a notice of levy on the door but did file a return affording constructive notice of levy, such officer's levy was effective as against a second attaching officer although the first officer had not actually removed the attached property. Placing the property under lock and filing the attachment return served to give the first officer control of the property and constituted a taking of "physical possession" thereof within applicable requirements of the civil practice act.—Florea v Schultz, 217 N.Y.S. 764, 128 Misc 77.

78. Fleming v. Moore, 105 So. 679, 213 Ala. 592—6 C.J. p 226 note 55.

Essential to put property out of debtor's control

The act of officer in levying on

79. Hamilton v. Hartinger, 64 N.W. 592, 96 Iowa 7—6 C.J. p 226 note 56

80. Mass.—Train v. Wellington, 12 Mass. 495.
Mich.—Patch v. Wessels, 9 N.W. 269, 46 Mich 249.
6 C.J. p 226 note 57.

81. Ex parte Fuller, 128 So 483, 99 Fla. 1165.

Notification to owner sufficient

"Where a deputy sheriff in the presence of the property delivers a writ of attachment to the owner, notifying him that he is levying on and taking possession of it and makes his return to the writ but leaves the property where he found it without an agent to represent him, all of which was known to persons making a judgment levy on a portion of the same property, such facts were sufficient to constitute an attachment levy and place the property constructively in the hands of the sheriff."—Ex parte Fuller, 128 So. 483, 99 Fla. 1165.

where he seeks to levy on part of a mass should first identify and separate the part to be attached.

In the case of tangible property susceptible of manual seizure and delivery and not in the possession of a third person, such property must be actually seized and taken into possession by the levying officer,[82] who must take and maintain actual custody and control of the property by such means as will exclude others from such custody,[83] but while the possession must be actual in the sense that it takes the property from the immediate control of defendant and gives the officer control over it,[84] so that he is able to touch or remove it,[85] the officer may take and maintain the actual custody and control of the property without actually touching or handling the same, by such means as will exclude all others from the custody, or will give timely and unequivocal notice of the custody of the attaching officer.[86]

It has also been held that seizure of part of a certain thing will bind the whole when it comes to hand;[87] and where a variety of articles are attached and it requires considerable time to complete the process, if the officer, after he has begun it, continues within a day without unnecessary delay until he has secured all the goods, the taking may be treated as one act.[88] It is, however, essential where an attachment is to be levied on part of a whole, that the part attached should be separated so that it may appear which portion was in fact attached.[89]

d. Property Incapable or Difficult of Manual Seizure in General

The levying officer may attach personalty incapable or difficult of manual seizure without taking actual possession, provided he performs a notorious and unequivocal act equivalent to actual seizure.

Where property is incapable or difficult of manual delivery, the officer may not be required to take actual possession thereof,[90] but some notorious

82. Conn.—Gray v. Bracken, 140 A. 354, 107 Conn 300—Knox v Binkoski, 122 A 400, 99 Conn 582
Idaho—American Fruit Growers v. Walmstad, 260 P. 168, 44 Idaho 786
Mich—McPartin v Clarkson, 215 N W 333, 240 Mich 390, 54 A.L.R 1535
Nev—Beemer v Seaborn, 22 P.(2d) 356, 54 Nev 459
N Y—Elias v. Steel Furniture Co., 229 N Y S 261, 131 Misc 941.
Pa—Somerset Coal Co v Diamond State Steel Co., 17 Pa Dist 536
Wash—State v. Nansen, 232 P 329, 132 Wash 563
6 C J p 226 note 58.

Levy on cash may not be made by attaching officer without taking the same into his manual custody, although defendant's right to receive cash may be otherwise levied on—Elias v. Steel Furniture Co., 229 N Y S 261, 131 Misc 941

Posting notice insufficient

The mere placing of notices on lion's cages did not constitute an attachment, it being necessary to take the property into possession, either actually or constructively by placing a keeper in charge, or by some act which unequivocally placed the property in the officer's possession—Knox v. Binkoski, 122 A. 400, 99 Conn 582.

83. Ala—Fleming v Moore, 105 So 679, 213 Ala 592
Idaho—American Fruit Growers v. Walmstad, 260 P. 168, 170, 44 Idaho 786.
6 C J. p 227 note 61.
"It is requisite, that the levying officer take actual manual possession of the property attached, and that he maintain the same either personally or through the agency of a keeper"—American Fruit Growers v. Walmstad, supra

84. Crisman v. Dorsey, 21 P. 920, 12 Colo 567, 4 L R A. 664—6 C J. p 227 note 59

85. Nichols v Patten, 18 Me 231, 35 Am D 713—6 C J p 227 note 60

86. Fleming v Moore, 105 So 679, 681, 213 Ala. 592—6 C J. p 227 note 61.
"An assertion by the officer that he levies or takes property by virtue of a writ in his possession, if the property is within his view and power to assert immediate dominion over it and, if necessary, take it into his custody, will be deemed an 'actual taking of it' under process"—Fleming v Moore, supra.

Inventory

Inventory of property seized, to sustain bona fides of levy and to identify property in case of controversy concerning it, is proper but not essential, nor is actual touching of property levied on essential to actual taking—Fleming v Moore, 105 So 679, 213 Ala. 592—6 C J. p 227 note 61 [b].

87. Pennsylvania R Co v Pennock, 51 Pa 244—6 C J. p 227 note 62

88. Bishop v. Warner, 19 Conn. 460—6 C J p 227 note 63.

89. Bisbee v Grant, 142 A. 775, 127 Me 243, followed in Savage v. Grant, 142 A 775, 127 Me. 547.

Pulpwood in boom

Purported attachment of thirty-five cords of pulpwood in boom containing over three hundred cords, without selecting or separating attached portion, was invalid.—Bisbee v. Grant, 142 A. 775, 127 Me 243, followed in Savage v. Grant, 142 A 775, 127 Me 547

90. U S—Quarles v Citizens' Nat. Bank of Salmon, Idaho, (C C A Idaho) 31 F (2d) 40
Cal—Irilarry v Byers, 257 P. 540, 84 Cal App 28.
Iowa—First Nat Bank v Schram, 211 N W 405, 202 Iowa 791
Ky—American Nat Bank v John Van Range Co, 278 S W 133, 211 Ky 849
N M—Hart v. Oliver Farm Equipment Sales Co, 21 P (2d) 96, 37 N M 267, 87 A L R 962
N Y—Prahl Const Corporation v. Jeffs, 215 N Y S 96, 126 Misc 802
6 C J p 228 note 70.

Fixtures

Where a sheriff levied attachment on restaurant fixtures, and put them in charge of the manager of the restaurant to hold for him under the attachment, the lien of attachment was not invalid because of the failure of the sheriff to take and retain possession—American Nat Bank v John Van Range Co, 278 S W 133, 211 Ky 849—6 C.J. p 228 note 70 [c] (2).

Heavy and unmanageable articles

(1) "There is no necessity for an actual handling of heavy and unmanageable articles. . . The mere service of a writ upon the defendant, as in the case of attachment of real estate, is sufficient"—Irilarry v Byers, 257 P 540, 541, 84 Cal App 28.

(2) Where machinery, tools, implements, and paraphernalia of contractor constructing dam were attached, and all of such property was under control of one keeper, it was presumably attached and held together—Irilarry v. Byers, supra.

act as nearly equivalent to actual seizure as practical must be substituted,[91] and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person must be required to place it in the hands of the court.[92]

Some statutes prescribe that a levy upon such personalty is to be made by delivering a copy of the writ or order, with a notice specifying the property attached, to the person holding the same or to his authorized agent,[93] while others provide that a certified copy of the writ and of the return may, within a certain time, be deposited in a specified office, and that such attachment shall then be as valid as if the articles had been retained by the officer,[94] or provide for both the service and the filing of notice of levy.[95]

e. Animals

The levying officer should take actual possession of animals where feasible, although constructive possession is sufficient to support an attachment of animals on the range or otherwise difficult of physical control.

It has been held that to levy an attachment upon a wild animal in captivity, actual possession or custody must be taken, so that mere notice of attachment is not sufficient to effect a valid levy.[96]

On the other hand, it has also been held that a constructive seizure is sufficient in the case of farm animals.[97]

Property of cumbersome character

Attaching officer need not lay hands on or remove property attached especially where the property is of such cumbersome nature that its manipulation would involve great expense or difficulty—Hart v Oliver Farm Equipment Sales Co, 21 P (2d) 96, 37 N M 267, 87 A L R. 962

Property subject to lien

A shipment of tobacco from a foreign country, refused by the consignee, and upon which an express company, to which bills of lading were sent, had a lien, so that the property was not capable of manual delivery, may be attached by leaving copy of the warrant of attachment with the express company and with the warehouseman in possession of the property itself—Dugundji v. Palco, 180 N Y S 381, 190 App Div 707.

Warehouse has been held "personal property not capable of manual delivery," within attachment statute permitting levy without taking such property into actual custody or possession—Quarles v. Citizens' Nat. Bank of Salmon, Idaho, (C C A Idaho) 31 F (2d) 40.

91. Landers v. Moore, 106 So 223, 21 Ala App 12, certiorari denied Ex parte Landers, 106 So 225, 214 Ala 20—6 C J p 228 note 71

Valid constructive seizure shown.—Hart v. Oliver Farm Equipment Sales Co, 21 P.(2d) 96, 37 N M. 267, 87 A. L R 962.

92. Davis v. Lewis, 16 Ohio Cir Ct. 138, 8 Ohio Cir Dec. 772

93. Cotnareanu v. Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y 294, modifying 283 N Y S 1018, 246 App Div. 572, and 283 N Y S 1018, 246 App Div 572—Dugundji v Palco, 180 N.Y S. 381, 190 App Div 707—Elias v Steel Furniture Co, 239 N Y.S 261, 131 Misc 941—Prahl Const Corporation v Jeffs, 215 N Y S 96, 126 Misc 802—6 C J p 229 note 73.

Purpose

In attachment of personal property incapable of manual delivery, the statute requires service on the person holding such property of both warrant and notice, and the holder of the property must look to notice to ascertain what property is attached and base his action thereon—Cotnareanu v. Chase Nat. Bank of City of New York, 2 N E (2d) 664, 271 N Y. 294, modifying 283 N Y S 1018, 246 App Div. 572, and 283 N Y S. 1018, 246 App Div 573

Notice held sufficient

In an action brought in aid of execution to compel delivery of stock certificates alleged to have been subject to levy of attachment, the defense that individual defendant had obtained a valid lien on the attachment debtor's interest in such stock certificates by attachment with notice of levy specifying in detail and by number the certificates belonging to the attachment debtor is sufficient in law on the face thereof—Cotnareanu v. National City Bank of New York, 3 N E (2d) 451, 271 N Y 619, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S 1019, 246 App Div. 572

Notice held insufficient

(1) An attachment levy is invalid where the notice of levy upon stock certificates served with warrant did not show that such certificates registered in names of nominees of attachment debtor belonged to him and were attached—Cotnareanu v. National City Bank of New York, 3 N E (2d) 451, 271 N Y. 619, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S 1019, 246 App Div 572, and following Cotnareanu v. Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y. 294

(2) Service on bank of certified copy of attachment warrant and notice that the sheriff attached all property debts, credits, and effects and all rights and shares of stock of defendant in attachment in possession of the bank does not effect levy, in the absence of circumstances tending to identify to bank the property in its possession in which the attachment debtor claimed to have an interest—Cotnareanu v. Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y 294, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S 1018, 246 App Div. 573

(3) Plaintiff in attachment suit acquired no lien against defendant's shares of stock in possession of a bank in the name of a third person by service of warrant and notice that the sheriff attached all the property, debts, credits, and effects and all rights and shares of stock of defendant in possession of the bank where the bank was apprised of asserted interest of attachment defendant in stock certificates after judgment against attachment defendant had been entered—Cotnareanu v. Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y. 294, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S 1018, 246 App Div 573.

94. Laughlin v. Reed, 36 A. 131, 89 Me 226—6 C J. p 229 note 74.

95. Kelly v. Stockgrowers Credit Corporation, (N D.) 263 N W 717.

96. Knox v Binkoski, 122 A. 400, 99 Conn 582

Caged lions have been held not property difficult to remove so as to excuse a levying officer from taking actual possession, and posting of a notice of attachment on the cage is not sufficient to constitute a levy—Knox v Binkoski, 122 A. 400, 99 Conn. 582.

97. First Nat Bank v. Schram, 211 N.W 405, 202 Iowa 791—Lee County Sav. Bank v Snodgrass Bros, 166 N W. 630, 182 Iowa 1387

Where sheriff did not take physical possession of horses, cattle, and hogs on a farm, nor cause them to

Animals on range. Owing to the difficulty in taking possession of range stock, provision is made in some of the states for levy upon such property by filing a copy of the writ with a designated officer, together with a notice thereto appended, containing the number and description of stock, that such property or a portion thereof is attached[98] In others the levy may be made, in the presence of certain credible witnesses, by designating by reasonable estimate the number of the animals, describing them by their marks and brands, or either, and giving notice thereof in writing to the owner, his herder, or agent, if residing within the county and known to the levying officer[99] Where so required there must be filed with the recorder a copy of the notice attached to the copy of the writ.[1]

f. Crops

An attaching officer may levy on growing crops without taking actual possession thereof, although actual possession is prerequisite to a levy on severed crops susceptible of manual custody.

To effect a levy of attachment upon growing crops it is ordinarily unnecessary to take actual possession,[2] although the levying officer should notify the person in possession of the fact of levy and should assume control of such crops[3]

The taking of actual possession or control has been held essential in the case of crops which are grown but unharvested,[4] and crops severed and capable of manual custody must be reduced to actual possession in order to effect a valid levy thereon.[5]

g. Debts and Instruments for the Payment of Money

An instrument for the payment of money is property subject to manual seizure and an attachment levy thereon should be made by taking actual possession of the instrument. On the other hand the debt represented by a contract or unissued instrument is not susceptible of manual seizure and may be levied upon by constructive seizure, as by serving a copy of the attachment writ upon the person charged with payment. Levy on a judgment must of necessity be symbolical.

An instrument for the payment of money is property capable of manual delivery within the meaning of the attachment law, and hence an actual taking into the custody of the attaching officer is necessary to constitute a valid levy upon written evidences of debt,[6] such as bonds,[7] promissory notes,[8] or checks,[9] and actual possession is essential to a valid attachment levy on other instruments which are unilateral contracts for the payment of money only,[10] acknowledge an absolute obligation to pay,[11] and constitute evidences of debt,

be segregated on the premises or removed therefrom, but did serve a notice of levy, take an invoice of the property, and leave the property in the custody of the farmer for the sheriff, taking the farmer's receipt, there was a valid levy.—First Nat. Bank v. Schram, 211 N.W. 405, 202 Iowa 791.

98. Mont.—Harmon v. Comstock Horse, etc., Co., 23 P. 470, 9 Mont. 213
N.M.—Schofield v. Territory, 56 P. 506, 9 N.M. 526
6 C.J. p. 230 note 75

99. Steinfeld v. Menager, 53 P. 495, 6 Ariz. 141—6 C.J. p. 230 note 76

1. Menager v. Farrell, 57 P. 607, 6 Ariz. 316—Steinfeld v. Menager, 53 P. 495, 6 Ariz. 141.

2. Grover v. Buck, 34 Mich. 519

Service and filing of notice sufficient
Filing of notice of levy in office of register of deeds where the crop was situated, and service on person having custody of the crop, is a sufficient levy of attachment on growing crop.—Kelly v. Stockgrowers Credit Corporation, (N.D.) 263 N.W. 717.

Crops as part of homestead realty
Unless the officer levying attachment commits trespass and takes possession of land to gather crops or sells ungathered crops, the levy is insufficient.—First Nat. Bank v. Cooper, (Tex.Civ.App.) 12 S.W.(2d) 371

3. Fiegel v. First Nat. Bank, 214 P. 181, 90 Okl. 26

Levy held sufficient
Where sheriff took invoice of the property, consisting of corn in field, hay, oats, horses, cattle, and hogs, and receipt from debtor, agreeing to hold the property and deliver it on demand, and returned that he made levy, it was held sufficient although the sheriff did not take physical possession, segregate the property, or remove it from the premises.—First Nat. Bank v. Schram, 211 N.W. 405, 202 Iowa 791.

4. Throop v. Maiden, 34 P. 801, 52 Kan. 253.

5. State v. Nansen, 232 P. 329, 132 Wash. 563

6. Cal.—Haulman v. Crumal, (App.) 57 P.(2d) 179.
La.—Woodworth v. Lemmerman, 9 La.Ann. 524

Treated as "corporeal movables"
"Written evidences of debt, like all corporeal movables, must be reduced to manual possession by the Sheriff, to constitute a valid seizure of them" for purposes of attachment.—Woodworth v. Lemmerman, 9 La.Ann. 524, 525.

7. Haulman v. Crumal, (Cal.App.) 57 P.(2d) 179—6 C.J. p. 227 note 64.

Locating bonds and serving person in possession
An attachment cannot be levied on negotiable mortgage coupon bonds, or a lien acquired thereon, by service of garnishment process on the corporation owing them, as they can only be attached by actually locating them and serving the attachment on the person having possession of them.—Husband v. Linehan, 181 S.W. 1089, 168 Ky. 301, Ann.Cas.1917D 951

8. Cal.—Haulman v. Crumal, (App.) 57 P.(2d) 179
N.Y.—Schmid v. Berkheimer, 224 N.Y.S. 736, 222 App.Div. 691—Chas. v. Steel Furniture Co., 229 N.Y.S. 261, 131 Misc. 941
6 C.J. p. 228 note 65

9. Des Brisay v. Morton, 218 N.Y.S. 17, 219 App.Div. 151—6 C.J. p. 228 note 66

Levy on demand against drawer of undelivered check
A purported levy on an undelivered check, which may not be made the subject of levy under a warrant of attachment, was not a sufficient levy on defendant's demand against the drawer of the check.—Steese v. Steese, 251 N.Y.S. 164, 140 Misc. 611.

10. Haulman v. Crumal, (Cal.App.) 57 P.(2d) 179—6 C.J. p. 228 note 67.

11. Haulman v. Crumal, *supra*—6 C.J. p. 228 note 68.

the title to which may pass by delivery merely.[12]

On the other hand, a debt not represented by a written instrument is incapable of manual delivery, and debts or contracts for the payment of money not in written form may be attached by constructive seizure, as by serving a certified copy of the writ or warrant of attachment on the person charged with payment.[13]

A levy upon a judgment must necessarily be symbolical, and is effective if made in accordance with applicable statutory provisions as to attaching judgments.[14]

§ 224. —— Shares of Corporate Stock

Under some statutes an officer may attach corporate stock by serving process on the corporation, although under others actual seizure of the stock certificate is essential.

Under statutes in some jurisdictions an attachment may be levied on shares of stock in a corporation, or options, rights, or interests therein, by constructive seizure, as by delivering to a designated officer of the corporation a copy of the writ or warrant and a notice specifying the property attached.[15]

A substantial compliance with the statute is sufficient,[16] although it is essential that service should be made upon the corporation in compliance with statutory requirements, which are mandatory in this respect.[17]

Service of the prescribed process upon the corporation completes the levy,[18] even though the stock, options, rights, or interests made subject to attachment do not appear on the corporate books,[19] and compliance by the corporation with statutory requirements that it deliver to the officer a certificate showing the property attached and identifying the shares or interests levied upon is not essential to the validity of the attachment.[20]

Seizure of the certificates has been held not essential to an effective attachment of shares of stock under statutes permitting levy by service of process on the corporation,[21] although there is authority requiring seizure as respects attachment of stock in a domestic corporation owned by a nonresident defendant who has the stock in his possession outside the state,[22] and under statutory

12. Haulman v Crumal, supra—6 C. J. p 228 note 69

13. Elias v Steel Furniture Co, 229 N.Y.S. 261, 131 Misc 941—Prahl Const. Corporation v. Jeffs, 215 N. Y.S 96, 126 Misc 802—Stagg v. British Controlled Oilfields, 192 N. Y.S. 596, 117 Misc 474.

The claim or right to receive money may be levied upon by an attaching officer by serving a certified copy of the warrant of attachment and notice showing the property attached upon the bank having custody of the funds—Elias v Steel Furniture Co., 229 N.Y S 261, 131 Misc 941.

Unsigned municipal warrant; levy on debt

Where a municipal warrant for payment of money had not yet reached the hands of the city treasurer, nor been signed by him, there was no available property capable of manual seizure by the attaching officer, and the latter could properly levy on the debt due from the city by serving the warrant of attachment on such treasurer—Prahl Const. Corporation v. Jeffs, 215 N.Y. S. 96, 126 Misc. 802.

Bank deposit of proceeds of sale

Where goods belonging to a nonresident debtor had been sold, and the proceeds deposited with a bank, such proceeds are not attachable by a creditor as property capable of manual delivery, but only as a demand owing by the bank to the debtor.—Riggi Bros. Co. v. Bank of Barcolona, 175 N Y S 531, 187 App Div. 213

14. Edwards v Tracy, 212 N W 317, 203 Iowa 1083

Levy was held sufficient where made in accordance with code provisions to the effect that a levy upon a judgment is made "by entering upon the judgment docket a memorandum of such fact, giving the name of the parties plaintiff and defendant, the court from which the execution issued, and the date and hour of such entry, which shall be signed by the officer serving the execution"—Edwards v. Tracy, 212 N W 317, 203 Iowa 1083.

15. Del—Woods v Spoturno, 183 A 319—Gibson v Gillespie, 138 A 600, 3 W W Harr 381.
Ga—Buxton v Fulcher, 90 S E. 105, 18 Ga App 517
6 C J. p 230 note 78

Nature of attachment

An attachment looking toward the sale of stock is in the nature of an ex parte proceeding, not a garnishment, and the company is not made a party to the suit, but merely gives a certificate showing the number of shares standing in the debtor's name.—State v New York-Mexican Oil Co, 122 A 55, 2 W.W Harr (Del.) 214

16. Scott v. Houpt, 83 S W. 1057, 73 Ark 78

17. Buxton v Fulcher, 90 S E. 105, 18 Ga App. 517.

18. Woods v Spoturno, (Del.) 183 A. 319—Gibson v. Gillespie, 138 A. 600, 3 W W Harr (Del.) 381.

19. Woods v. Spoturno, (Del.) 183 A 319

20. Gibson v. Gillespie, 138 A 600, 3 W W Harr (Del.) 381

21. In re Continental Transportation & Oil Co, (D C Del.) 17 F.(2d) 434—6 C.J p 230 note 78 [h]

22. American Surety Co of New York v Kasco Mills, 188 N E 75, 262 N Y. 585, affirming American Surety Co v Kasco Mills, 261 N Y. S 937, 237 App Div 880, affirming 266 N Y S 531, 149 Misc 10

Nonresident's stock; certificate within state

Under Code Civ Proc. § 647, providing for attachment of "the rights or shares which the defendant has in the stock of an association or corporation . . together with the interest and profits thereon," and in view of § 619 subd 3, specifying the manner in which intangible property must be attached, the corporate stock of nonresident defendant in a foreign corporation was properly attached by leaving a certified copy of the warrant and notice showing the property attached on the person within the state in possession of the certificates of the stock, although defendant had not given such person irrevocable powers of attorney enabling him to retransfer the stock, since it was the interest of defendant in the securities which the sheriff attached, and it was immaterial whether the securities were negotiable—General Motors Corporation v Ver Linden, 192 N.Y.S 28, 199 App Div. 375.

provisions, such as the Uniform Stock Transfer Act, which expressly make an actual seizure essential to the validity of an attachment of shares of stock, or contain general provisions making certificates of stock negotiable and investing the certificates with many of the incidents of tangible personal property, seizure has been held a condition precedent to attachment of corporate stock.[23]

Statutes relating to bulky tangibles and the like. Statutes providing that where an officer levies an attachment constructively upon any live stock or articles which by reason of their size, situation, or inflammable qualities are incapable of being conveniently taken into actual possession, the attachment shall not be defeated by his failure to take actual possession of the property, do not apply to stock certificates.[24]

§ 225. —— Having Property in View

An officer may attach personalty within his view and control without touching it. Ordinarily he should actually see the property attached, although this is not essential if circumstances show that he took actual control of unseen personalty.

Although an officer may make a valid levy on property within his view and power to control without actually touching it,[25] it is usually held necessary that he should have it in his view at the time of making the levy.[26] It has also been held, however, that a view of the property is not absolutely necessary where the officer assumes dominion over the property, having it, at the time, within his power and subject to immediate seizure.[27]

§ 226. —— Mortgaged or Pledged Property

a. Seizure upon payment or tender of amount due

b Levy subject to mortgage or pledge

a. Seizure upon Payment or Tender of Amount Due

Levy upon tangible personalty subject to mortgage or pledge may and should be made upon payment, tender, or deposit of the amount due in accordance with statutes governing such procedure Statutes requiring payment, tender, or deposit have, however, been construed as for the benefit of the mortgagee only and as inapplicable to property not subject to the mortgage or subject only to a foreign mortgage.

Under the law of some jurisdictions an attachment levy may be made upon mortgaged or pledged personalty on payment or tender of the amount due on the mortgage or pledge, or deposit of such amount with a specified public officer, such as the clerk of the court of the county from which the attachment issued, and the prescribed payment, tender, or deposit is essential to the validity of the attachment on the mortgaged or pledged property.[28]

If the officer levies an attachment upon the property by seizing the same and appoints a keeper without complying with the foregoing requirements, the attachment is unlawful as against the mortgagee,[29] and it has been held that he will be liable to the mortgagee as for a conversion, although he does not move or otherwise disturb the property.[30]

Such statutes, however, have been construed as strictly for the benefit of the mortgagee and not that of the mortgagor,[31] and they do not apply to

22. Ohio—L L LeVeque Co v Ross, 31 Ohio N.P (N S) 185
W Va—Kennedy v. Prunty, 174 S E 369.
Wis—Bloch-Daneman Co v. J Mandelker & Son, 238 N W. 831, 205 Wis 611—Hallbridge v American Nat Bank of Racine, 187 N W. 853, 177 Wis 206.

24. Dupont v. Moore, 166 A. 417, 86 N H 254.

25. Rogers v Maine Cent R Co, 94 A. 758, 113 Me 436, L R A 1915F 1184, Ann Cas 1916B 999.

Potatoes in railway car

Where a deputy sheriff, seeking to attach potatoes in a railway car, opened the door, looked in, and said, "I attach these potatoes," and closed the car, there was a levy attachment of such potatoes, as the officer was in view of the property, with power to control and take the same into his possession, even though he did not actually lay hands upon it—Rogers v. Maine Cent. R. Co, 94 A. 758, 113 Me. 436.

26. Ariz—Peevey v. Dickson, 224 P 808, 26 Ariz 212
Cal—Los Angeles Soap Co v. Bossen, 9 P (2d) 900, 901, 132 Cal App 237
6 C J p 231 note 80
"A levy of attachment made by an officer on personal property which he does not see or have in his possession is void"—Los Angeles Soap Co. v. Bossen, supra

27. Standard Bonded Warehouse Co v Cooper & Griffin, (D C N C.) 30 F (2d) 842—6 C J p 231 note 81.

28. Cal—Kuehn v. Don Carlos, (App) 41 P (2d) 585
Iowa—First Nat Bank v Nove, 235 N.W 561, 213 Iowa 344
Okl.—Central Sav. Bank & Trust Co. v. Liberty Nat Bank of Kansas City, Mo, 239 P 660, 112 Okl. 35
6 C J. p 199 note 10 [c], p 231 notes 82, 83.

Duty to pay principal and interest

Attaching creditor, under Comp.St. (1921) §§ 7660-7662, must pay or tender to mortgagee the amount of the mortgage debt and interest before the mortgaged property is taken, and on failure to do so cannot enforce attachment as to property covered by the mortgage—Central Sav Bank & Trust Co. v. Liberty Nat Bank of Kansas City, Mo., 239 P. 660, 112 Okl. 35

29. Cal—Sousa v Lucas, 105 P 111, 156 Cal. 460, affirming (App.) 100 P 115
Mass—Pomeroy v. Smith, 17 Pick 85
6 C.J. p 232 note 84.

30. Cal—Sousa v. Lucas, 105 P 111, 156 Cal 460, affirming (App.) 100 P 115—Irwin v. McDowell, 27 P 601, 91 Cal. 119.
Mont.—Rocheleau v. Boyle, 31 P. 533, 12 Mont. 590.

31. Iowa—First Nat Bank v. Nove, 235 N.W 561, 213 Iowa 344.
Okl—Broach v. Bolch, 231 P. 77, 96 Okl. 148.

any part of the attached property which is not subject to the mortgage,[32] nor, it has been held, to personalty within the state and subject to a foreign mortgage[33]

b. Levy Subject to Mortgage or Pledge

Levy of an attachment upon the mortgagor's or pledgor's equity of redemption should be made as on intangible property.

Mortgaged chattels may be also attached by levying on the right or equity of redemption, subject to the rights of the holder of the mortgage or pledge,[34] and such a levy may properly be made as on intangible property.[35]

It has been held that where the officer levies an attachment upon certain goods subject to a mortgage and takes possession of the same as against all persons except the mortgagee, and defendant in the attachment is wholly divested of his possession of the goods, such levy is sufficient as to defendant, whether or not it be sufficient as to some third person claiming some interest in the goods, and he may not be wholly and entirely divested of the possession.[36]

A levy on a pledged note has been held sufficient where notice was served on the pledgee and the note was permitted to remain in his hands[37]

§ 227. Levy on Realty

Realty may be attached by constructive seizure effected through overt act, notice, and recording of the attachment lien.

Broadly speaking, a levy of attachment upon realty, unlike personalty, is perfected by notice and recording without actual seizure and possession[38] To constitute a valid levy upon land, the officer must do some act which shows that he has seized the property and exercised dominion over it, and which is sufficient to put the owner or his tenant upon notice,[39] but owing to the difficulty of making a seizure of lands the law has invented the fiction of constructive seizure, which may be accomplished in various ways under the statutes of the different states.[40] The tenant is not thereby dispossessed,[41] and, in the absence of statute requiring it, it is not necessary that the officer in levying upon land should take possession of the same,[42] enter upon it,[43] or even, it has been held, have the same in his view.[44]

An attachment of all the right, title, and interest which the debtor has in lands is a good attachment of the land itself[45]

§ 228. —— Service of Writ and Description

a In general
b Service of writ on defendant
c. Service of writ and description on occupant

a. In General

Service of the writ in compliance with statutory requirements is sufficient.

It is sufficient if a writ of attachment on realty is served in compliance with regulatory statutory provisions[46]

32. Okl.—Central Sav. Bank & Trust Co. v. Liberty Nat. Bank of Kansas City, Mo., 239 P. 660, 112 Okl. 35

Utah.—Grover v. Cash, 253 P. 676, 69 Utah 194

Chattels covered only in part by mortgage

Where some of attached cattle were covered by mortgage and others were not, attachment without payment or tender of the amount due mortgagee was valid as to those not covered by the mortgage.—Central Sav. Bank & Trust Co. v. Liberty Nat. Bank of Kansas City, Mo., 239 P. 660, 112 Okl. 35

33. Hallom v. Nichols & Shepard Co., 166 P. 745, 64 Okl. 134.

Attachment in Oklahoma of property mortgaged in Kansas

Where property mortgaged in Kansas is attached in Oklahoma, it is not necessary for plaintiff to pay or tender to mortgagee the amount of the debt.—Hallom v. Nichols & Shepard Co., 166 P. 745, 64 Okl. 134

34. Hyde v. Shank, 43 N.W. 890, 77 Mich. 517—6 C.J. p. 232 note 86.

35. Clements v. Doblin, 204 N.Y.S. 113, 209 App. Div. 208, affirmed 147 N.E. 180, 239 N.Y. 526

Equity of redemption in goods consigned to factors

A levy on defendant's equity of redemption in goods consigned to factors, subject to a general lien for commissions and advances, was properly made as on intangible property.—Clements v. Doblin, 204 N.Y.S. 113, 209 App. Div. 208, affirmed 147 N.E. 180, 239 N.Y. 526

36. Myers v. Cole, 4 P. 169, 32 Kan. 138

37. Hardon v. Dixon, 86 N.Y.S. 346, 91 App. Div. 109—6 C.J. p. 232 note 88.

38. In re Maier Brewing Co., (C.C.A.Cal.) 65 F.(2d) 673, certiorari denied Wells v. Simons, 54 S.Ct. 131, 290 U.S. 695, 78 L.Ed. 593

39. Lane v. Bradfield, 140 S.E. 417, 37 Ga. App. 395—United Provisions Corporation v. Board of Missions, 121 S.E. 830, 33 Ga.App. 9—6 C.J. p. 232 note 95

Some overt act of constructive seizure is essential to the validity of an attachment on real estate.—Lane v. Bradfield, 140 S.E. 417, 37 Ga. App. 395

Levy on growing crops see supra § 223 f.

40. Smith v. Brown, 23 S.E. 849, 96 Ga. 274—6 C.J. p. 233 note 96.

41. Smith v. Collins, 2 N.W. 177, 41 Mich. 173—6 C.J. p. 233 note 97

42. Steam Stone-Cutter Co. v. Sears, (C.C.Vt.) 9 F. 8, 20 Blatchf. 23—6 C.J. p. 233 note 98

As basis for jurisdiction of nonresident see infra § 482

43. Perrin v. Leverett, 13 Mass. 128—6 C.J. p. 233 note 99

44. Robertson v. Hoge, 1 S.E. 667, 83 Va. 134—6 C.J. p. 233 note 1.

45. McDonnell v. Arno, 34 S.W.(2d) 212, 162 Tenn. 36—6 C.J. p. 233 note 2.

46. Mount v. Trammel, 175 P. 132, 73 Okl. 96

Statutory notice of levy of attachment on land need only describe property levied on.—Finch, Van

b. Service of Writ on Defendant

The writ must be served on defendant if statute so requires.

In some jurisdictions the statutes provide for service of a copy of the writ upon defendant in the action if he can be found in the county, and under such a statute it has been held that the attachment lien does not become valid until the writ is properly served by delivering a copy to defendant or the equivalent of such service [47]

c. Service of Writ and Description on Occupant

Compliance with statutory requirements, if existent, that a copy of the writ, usually accompanied by a description of the property and notice, be left with the occupant is essential to the validity of an attachment on realty.

Under some statutes a copy of the writ, usually accompanied by a description of the property attached and a notice that it is attached, should be left with the occupant of the property in making a levy upon real estate, and a failure to comply with such a requirement is fatal to the validity of the levy.[48]

The levy of an order of attachment on a tract of land owned by one party defendant by giving the occupant a copy and posting another does not create a lien upon a different tract of land a considerable distance away and owned by another defendant.[49]

§ 229. —— Declaration on Premises in Presence of Witnesses

Under some practice the officer may levy on realty by declaration of attachment made on the premises in the presence of witnesses.

In some states the levy may be made by the officer going to the house and lands of defendant, or to the person or house of the person in whose custody and possession defendant's property or estate may be, and then and there declaring in the presence of credible witnesses that he attaches the lands and tenements of such defendant at the suit of plaintiff [50]

§ 230. —— Indorsement on Writ

Under some statutes an officer may levy an attachment on realty by an indorsement of the levy on the writ or return.

In some jurisdictions a levy on real property may, by statute, be made by an indorsement of such levy on the writ, or, as it is worded in some reported cases, by an indorsement on the officer's return upon the process [51]

§ 231. —— Posting Copy of Writ or Order upon Property

A levy on realty may be invalidated by noncompliance with statutory regulations as to posting notice of attachment and the like. Distinct tracts should be separately posted, although in the case of adjoining lots it is unnecessary to post each separately.

It is a common provision in a number of the states that where there is no occupant of the property a copy of the writ, and description, and notice that the property is attached shall be posted in a conspicuous place on such property, and a failure to comply with such a requirement is fatal to the validity of the levy [52]

A levy upon a large number of adjoining town lots is not invalidated by a failure to place a copy of the writ on each separate lot,[53] but posting a copy on one tract will not be sufficient as a levy on another separate and distinct tract.[54]

§ 232. —— Filing and Recording

The authorities disagree as to the mandatory character of statutes calling for the filing and recording of the writ, certificate of attachment, and other papers.

In some jurisdictions in addition to some one of the foregoing steps, and in others in lieu thereof, it is provided that the levying officer shall file with some designated officer a copy of the writ, certificate of attachment, or the like, together with a description of the property attached and a notice that it is attached.[55] As a general rule compliance with these requirements is held to be necessary in order to constitute a valid levy on real property,[56] but there is also authority for the

Slyck & McConville v. Jackson, 220 N.W 130, 57 N D 17

47. Thompson v. White, 54 P. 718, 25 Colo 226—6 C J p 234 notes 7, 8.

48. Schwartz v. Cowell, 12 P 253, 71 Cal. 306—6 C.J. p 234 notes 9, 10.

49. Hatcher v. Wagner, 87 S W 778, 120 Ky. 603, 27 Ky L 1016.

50. Tomlinson v Stiles, 29 N.J.Law 426—6 C.J. p 233 note 4.

51. Me—Bryant v. Knapp, 68 A 640, 103 Me 139.

Vt—Pond v Baker, 55 Vt 400.

Va—Robertson v. Hoge, 1 S E 667, 83 Va 124

6 C J. p 233 note 5, p 234 note 6.

52. Williams v Olden, 61 P 517, 7 Idaho 116, 97 Am S R 250—6 C J. p 235 notes 12, 13.

53. Blake v. Rider, 14 P. 280, 36 Kan. 693.

54. Hall v. Stevenson, 23 P. 887, 19 Or 153, 20 Am S R 803—6 C.J. p 235 note 15.

55. Main v Tappener, 43 Cal. 206—6 C.J. p 235 note 16.

Location of land as bearing on necessity of filing

An officer serving an attachment writ in a county other than that in which it was issued is not required to have his return recorded with the clerk of the court of the county where the land that was attached is situated—Mount v. Trammel, 175 P 272, 73 Okl. 96—6 C.J. p 235 note 16 [c].

56. Idaho—Welch v. Morris, 291 P. 1048, 49 Idaho 781.

N.D.—Zimmerman v. Boynton, 229 N. W 3, 59 N.D. 112.

6 C.J. p 236 note 17.

view that such provisions are intended only to provide a method of giving notice of the attachment and a compliance therewith is no part of the levy,[57] and that noncompliance does not invalidate the attachment as against one having actual notice of the levy.[58]

§ 233. Levy on Interest in Land

Broadly speaking an interest in land may be attached by levy in the manner provided for attachment of land, although it is held that an equitable interest may be attached only by bill in equity. Seizure of realty in possession of a life tenant does not levy an attachment on the interest of the remainderman

Where an interest in land is subject to attachment, as explained in §§ 75–78, it has been held that such interest may and should be attached by a levy in the manner provided for the levy of the writ upon real property,[59] although there is also authority to the effect that an equitable interest in realty can be attached only by bill in equity.[60]

Interest of remainderman Seizure of realty in the possession of a life tenant is not a valid levy of attachment as against the interest of the remainderman.[61]

§ 234. Levy on Property Held Jointly

a. In general
b. Property of tenants in common

a. In General

Ordinarily the officer should levy an attachment on a defendant's interest in jointly owned property by constructive seizure, without taking actual possession of the physical property.

In the absence of a statute specially authorizing it, an officer levying under a writ of attachment against the property of a debtor owning property in common or jointly with another, incapable of being separately attached, may not lawfully seize the entire property,[62] and a levy on the undivided interest of an attachment debtor not entitled to possession may and should be made by constructive seizure without taking possession of the physical property.[63] It has been held that a statute providing that executions on judgments may be levied on joint property without taking the property into actual possession does not apply to attachments, although it was further held that such statute would not, if applicable, authorize a levy

There must be at least substantial compliance with statute requiring that, when realty standing in name of third person is attached, notice must be filed that defendant's interest is attached—Welch v Morris, 291 P. 1018, 49 Idaho 781.

Realty transferred from defendant at time of levy

Attachment against realty, which at time thereof had been conveyed by recorded deed from defendant's mother, was void, where statutory notice had not been filed—Welch v Morris, 291 P 1018, 49 Idaho 781.

57. Mass.—Coffin v. Ray, 1 Metc 212
Tex.—Woldert v. Neddenhut Packing Provision Co., 46 S W 378, 18 Tex Civ.App. 602
6 C J p 236 note 20.

58. Ellis v. Reed, (Alaska) 238 F 341, 151 C C.A. 357

Purchase of land before levy

The failure to record a certificate of attachment as required by Comp L (1913) § 974, does not invalidate the attachment as against a purchaser before the levy, who owed on his contract more than the amount for which the attachment was levied, and who had actual notice of the levy within a short time.—Ellis v Reed, (Alaska) 238 F. 341, 151 C.C A. 357

59. Epley v. Hunter, 281 P. 327, 154 Wash. 163—State ex rel. Oatey Orchard Co v. Superior Court for Chelan County, (Wash.) 280 P. 350—6 C.J. p 236 note 22.

Purchaser's interest under executory contract

(1) The purchaser's interest under an executory contract to purchase realty on deferred payments was subject to attachment only in the manner provided for attaching real property—Epley v. Hunter, 281 P 327, 154 Wash 163

(2) The right to attach the interest of a purchaser under a contract for the sale of land, as distinguished from the method of levying the attachment, will be considered in § 315 of the title Vendor and Purchaser [66 C J. p 1083 notes 97–14].

60. Lane v Marshall, 1 Heisk (Tenn) 30—6 C J. p 237 note 23.

61. Lane v. Bradfield, 140 S E 417, 37 Ga App 395

Does not constitute notice to remainderman

Where life tenant is in possession of realty, and possession, use, and enjoyment of the property by remainderman is postponed until the death of life tenant, no act of levy officer in seizing and taking possession of the property can amount to notice to remainderman, and entry of levy on attachment reciting such seizure and taking of possession is not a valid seizure as against remainderman—Lane v Bradfield, 140 S E. 417, 37 Ga App 395

62. Western Bond & Mortgage Co. v. Chester, 259 P 13, 145 Wash 81.

63. Taylor v. Benningfield, (Tex Civ App) 257 S.W. 938—Briggs v. Briggs, (Tex Civ App) 247 S W. 312.

Tenant's interest in cotton in landlord's possession

Although cotton in possession of the landlord and in which tenant has a three-fourths interest and his landlord a fourth interest can be levied on, as respects the tenant's undivided interest, by a creditor of the tenant, under Rev St. arts 254, 3743, 3744, yet it is subject only to a constructive levy of the attachment writ, that is, by giving the notice required by arts 255, 3740, and if the statutory course is not followed, and the officer levies the writ by taking possession of the property, there results an illegal ouster of rightful possession of the landlord which can be regained in the statutory proceeding of trial of right of property—Briggs v. Briggs, (Tex Civ App) 247 S W. 312

Interest of transferor of cotton tickets

Where by transfer of tickets or certificates by the debtor, before levy of attachment, to the owner of half interest in cotton, the transferee was entitled to possession, only constructive levy could be made on the debtor's half interest, since Rev St art 3740, provides that, where the debtor has an interest but is not entitled to possession, levy cannot be made by taking possession—Taylor v. Benningfield, (Tex.Civ App) 257 S W. 938.

by the sheriff simply indorsing "Levied" on the writ without going to see the property.[64]

b. Property of Tenants in Common

(1) Personalty
(2) Realty

(1) Personalty

In levying an attachment on the interest of a tenant in common in personalty the officer may be justified in taking possession of the property, but should not divide it to attach a specific part as property of the defendant.

An officer in levying upon an interest of a tenant in common in personal property may have the right to take possession of the property,[65] but he has no power to make a division, either with or without the consent of the cotenant, or to attach a specific parcel as the property of the debtor.[66]

(2) Realty

The officer should levy his attachment upon the debtor's undivided interest as tenant in common of realty.

An attachment upon real property of tenants in common should be levied upon the debtor's undivided share in whole or in part.[67]

§ 235. Amount of Property to be Attached and Excessive Levy

a. Amount of property to be attached
b. Excessive levy

a. Amount of Property to Be Attached

The levying officer should attach as much property as may be required to pay the total amount due.

In levying a writ of attachment the officer should take as much of defendant's property subject to attachment as will be sufficient to pay the debt demanded[68] with costs,[69] interest, and incidental expenses,[70] and it has been held that there should also be a proper allowance for the depreciation in value incident to the property seized and to the forced sale.[71] The officer must, however, decide for himself as to the extent and sufficiency of the seizure,[72] exercising a cautious and reasonable discretion such as should influence the conduct of prudent and discreet men in the management of their own affairs.[73]

The right of the attachment creditor, or debtor, to designate the property to be attached has been heretofore considered in § 214.

b. Excessive Levy

(1) In general
(2) Mode of obtaining relief

(1) In General

Excessiveness of levy may not invalidate the attachment, but is ground for discharge of a separable balance not required to pay the claim. Whether the levy is excessive is a question of fact.

Although a levying officer who makes an excessive levy may be liable to an action by the party injured, an attachment is not necessarily rendered void by the mere fact of being excessive,[74] and, where the officer levies upon a larger amount of property than is necessary, this will not authorize a release of the property on the ground of excessive levy, but in such case it is the officer's duty to retain sufficient to satisfy the claim and to discharge the balance.[75]

In the case of an indivisible article of personal property, the attaching officer may seize the same although greatly in excess of the attachment debt, where there is no other or sufficient property available.[76]

The question as to what constitutes an excessive levy is a question of fact and is properly left for the jury.[77]

(2) Mode of Obtaining Relief

The parties may raise the question of excessive levy by application for relief in the court wherein the action is pending. A court has power to protect both the attachment debtor and his other creditors by preventing or discharging an excessive attachment.

The question whether a levy is excessive is one

64. Berry v Stewart, 92 So. 906, 207 Ala. 318.

65. Gaar v Hurd, 92 Ill 315—6 C J. p 237 note 28.

66. Veach v Adams, 51 Cal. 609—6 C.J p 237 note 29.

67. Brown v. Bailey, 1 Metc.(Mass.) 251—6 C J. p 237 note 30.

68. Tucker v. Green, 27 Kan 355—6 C.J p 237 note 33

69. Pa.—Dreisbach v. Mechanics' Nat. Bank, 6 A. 147, 113 Pa. 551. Tenn.—Hughes v. Tennison, 3 Tenn. Ch 641
6 C J p 237 note 34.

70. Dewitt v Oppenheimer, 51 Tex. 103.

71. Dewitt v. Oppenheimer, supra.

72. Fitzgerald v. Blake, 42 Barb (N.Y.) 513.

73. Dewitt v. Opponheimer, 51 Tex 103

74. Kan.—Hodgen v. Roy, 169 P. 1143, 102 Kan. 197.
Ky.—Dade Park Jockey Club v. Commonwealth by Auditor of Public Accounts, 69 S.W (2d) 363, 253 Ky 314
6 C.J. p 238 note 40.

75. Wadsworth v. Walliker, 2 N.W. 420, 51 Iowa 605—6 C.J. p 238 note 41

76. Devereux Co v. Silsby, 114 A 460, 120 Me 362
Vessel.—Devereux Co. v. Silsby, 114 A 460, 120 Me 362.

77. Backus v Barber, 65 N.W 379, 107 Mich. 468—6 C.J. p 238 note 42.

to be presented to the court issuing the writ and in which the action is pending[78] by an application for relief by the debtor, or his successor in interest,[79] and can be raised, it has been held, only by the parties to the action.[80] But it has been said that a court has authority to protect a defendant, as well as other creditors, by preventing an excessive levy of attachment or the holding of more property than is sufficient to meet the debt with the necessary costs and expenses,[81] and the court may, after investigation as to the value of the property, discharge the attachment as to so much thereof as is in excess in value of the amount for which the levy should properly have been made.[82]

§ 236. Inventory and Appraisal

a. Necessity
b. Who may make
c. Time of making
d. Form and requisites
e. Service of inventory
f. Effect and conclusiveness of inventory and appraisal

a. Necessity

It is ordinarily proper, but as dependent upon the statutes may or may not be essential, for the levying officer to make and return an inventory and appraisal of the property attached.

As a general rule the levying officer should make and return an inventory and appraisal of the property attached.[83] But it has been held that an inventory, while proper, is not essential,[84] and that failure to make and file an inventory will not invalidate the levy,[85] although there is also authority to the effect that failure to file an inventory and return in compliance with statutory requirements renders the entire proceeding void.[86]

Where the scheduling and appraising of property taken on attachment are for the protection and benefit of defendant,[87] if such schedule and appraisal are omitted by order or consent of defendant, no rights of other creditors being involved, he will not be heard to object to such omission,[88] and where the provision requiring the inventory is considered as being for the benefit of a creditor it can be enforced only by him.[89] So also where a bond to dissolve an attachment provides for the payment of the amount recovered in the final judgment, and is executed without an appraisal of the attached land, as required by statute, the obligors waive the requirements for an ascertainment of the value of the land and substitute the amount of the final judgment for the appraised value.[90]

It has been held that where the officer in his return to a writ of attachment gives a specific description of the property attached a schedule reiterating the same facts is unnecessary.[91]

The omission of the officer to attach an inventory to his return, as required by statute, may be cured by amendment.[92]

Second appraisal On attachment against an absconding debtor, where there was an appraisal at the time the property was attached, a second appraisal after judgment and before sale is unnecessary.[93]

78. Idaho—Foore v Simon Piano Co., 108 P. 1038, 18 Idaho 167
Tenn.—Hughes v. Tennison, 3 Tenn Ch 641
Wash.—McConnell v. Kaufman, 32 P 782, 6 Wash 686
6 C J p 238 note 44.

79. Tenn.—Hughes v. Tennison, 3 Tenn Ch 641
Wash.—McConnell v Kaufman, 32 P 782, 3 Wash 686
6 C J p 238 note 45

80. Ala.—Brock v Young, 62 So 326, 7 Ala App 631, 633
Ga.—Fugazzi v Simpson, 70 S E. 642, 137 Ga 771
Neb Connelly v Edgerton, 34 N W 76, 22 Neb. 82
6 C J p 238 note 46.

81. Hodgen v. Roy, 169 P. 1143, 102 Kan. 197

82. Tucker v Green, 27 Kan. 355—6 C.J p 238 note 47.

Sale value

Failure to release any part of realty levied upon as exceeding amount of plaintiff's claim was not error, where under existing real estate values more than amount sufficient to satisfy plaintiff's claim could not be realized from the sale of realty, although the value of the realty might exceed amount of claim—Carson, Pirie, Scott & Co. v. Long, (Iowa) 257 N W 815

83. Ala.—Fleming v Moore, 105 So 679, 213 Ala 592
Conn.—Safford v. Morris Metal Products Co, 121 A 885, 99 Conn 372
N D.—Dickinson v First Nat Bank, 252 N W 54
S D.—Interstate Surety Co v. Bangasser, 311 N W 599, 60 S D. 618.
6 C J p 238 note 48

84. Fleming v. Moore, 105 So. 679, 213 Ala 592

85. U S.—Paragon Coal & Coke Co v. J. W Kirby & Sons Coal Co., (D C N Y.) 9 F (2d) 686.
N Y.—Prahl Const. Corporation v Jeffs, 315 N Y S 96, 126 Misc. 802.
6 C.J p 238 note 48 [c].

86. Dickinson v. First Nat Bank, (N D.) 252 N W. 54—6 C.J. p 238 note 48 [d].

87. Sheldon v. Sharpless, 2 Ohio Dec (Reprint) 1, 1 West L Month 12—Grussell v. Poll, 7 Ohio S. & C. P 428, 5 Ohio N P 439

88. Grussell v. Poll, supra.

89. McGinn v. Ross, 11 Abb Pr N S (N Y.) 20.

90. Barry v Wasserman, 61 N E 228, 179 Mass. 537.

91. Ark.—Pearce v. Baldridge, 7 Ark 413
Ind.—Dronillard v. Whistler, 29 Ind. 552
6 C J p 239 note 55.

92. U S.—Pacific Postal Tel Cable Co v. Fleischner, (Or.) 66 F 899, 14 C C A 166
N J.—Franklyn v. Taylor Hydraulic Air Compressing Co, 52 A. 714, 68 N.J.Law 113.

93. Donely v. McGrann, 1 Del. 453.

b. Who May Make

In accordance with the controlling statutes, the inventory and appraisal may be made by the levying officer with the assistance or in the presence of others, by the county clerk, or by disinterested freeholders.

The manner of making an inventory and appraisal is dependent upon statutes. In some jurisdictions the officer is required to make the inventory and appraisal with the assistance of a specified number of credible and disinterested householders[94] who must be first sworn by the officer.[95] In others the officer is required to make an inventory in the presence of a designated number of witnesses,[96] or the inventory and appraisal are required to be made by two disinterested freeholders.[97] The county clerk issuing a writ of attachment is not disqualified from acting as an appraiser.[98]

c. Time of Making

An inventory and appraisal should be made at the time, if any, limited by statute, or within a reasonable time.

As a rule it is not essential to the validity of a levy that the inventory and appraisal should be made forthwith,[99] but it will be sufficient if the same be made within a reasonable time.[1]

Statutes prescribing a period within which an inventory and return should be filed have been construed as mandatory.[2]

d. Form and Requisites

(1) In general
(2) Signature

(1) In General

Broadly speaking an inventory should be true and detailed as to the property seized, and the estimated value thereof should be set forth.

The inventory must be just, true, and minute as to all the property seized, and the estimated value of the several articles of personal property should be stated,[3] but a description of the property so full and true as to preclude any mistake as to what property was attached is sufficient,[4] and it has been held that inability or inadvertence to mention a debt due to attachment defendant as residuary legatee in the inventory filed by the sheriff will not defeat the lien of the attachment, where the attachment itself and the notice were broad enough to cover such indebtedness, since the court may authorize an amendment of the inventory.[5]

It has been held that if several parcels of land are levied on it is not necessary to make a separate appraisement of each lot, but the whole may be appraised by one estimate without specifying the separate value of each parcel.[6]

Such articles as are perishable must, it has been held, be enumerated.[7]

Where the appraisals of property seized under a writ of attachment are referred to in, and attached to, the sheriff's return, the latter must be considered in connection with them in determining whether the appraisal was properly made.[8]

(2) Signature

The inventory and appraisal should be signed by the makers.

Where so required by statute the inventory or appraisal should be signed by the officer before returning the same,[9] and the appraisement should be signed by the appraisers.[10]

e. Service of Inventory

Where the statute so requires, a copy of the inventory should be served on the defendant, but this requirement may be waived, and noncompliance therewith is unavailable to a third person.

94. Harding v Kansas City Guaranty L & T Co, 43 P. 835, 3 Kan App 519—6 C J p 239 note 56

Question for court

Question whether the property was appraised with the assistance of a disinterested and creditable householder, and generally whether it has been properly attached and appraised is for the court—Sprow v Wicker, 157 N E 460, 87 Ind App 253.

95. Connelly v Edgerton, 34 N W 76, 22 Neb 82—6 C J. p 239 note 57

96. Woodworth v. Lemmerman, 9 La Ann 524—6 C J. p 239 note 58

97. Wyckoff v Wyllis, 8 Mich 47—6 C J p 239 note 59

98. De Carie v. Marks, 137 N W. 94, 171 Mich 167

99. Kan—Dodson v. Wightman, 49 P. 790, 6 Kan App. 835.

N Y—Greenleaf v Mumford, 19 Abb. Pr 469, 30 How Pr 30, reversed on other grounds 4 Abb Pr (N S) 130. 6 C J p 240 note 61.

1. Ala—Toulmin v. Lesesne, 2 Ala. 359

Pa—Wilson v. Shapiro, 2 Pa Dist. 367, 12 Pa Co 466
6 C J. p 240 note 62.

2. N D—Dickinson v. First Nat. Bank of Cody, Wyo, 252 N W 54
S D—Interstate Surety Co v. Bangasser, 211 N.W. 599, 50 S D 618

Divestment of lien for noncompliance

A lien of attachment is subject to be divested by failure of the sheriff to file an inventory, warrant and return within twenty days—Interstate Surety Co. v Bangasser, 211 N W 599, 50 S D. 618.

3. Taacks v. Schmidt, 18 Abb Pr. (N Y) 307—6 C J p 240 note 63.

4. Stearns v Silsby, 52 A 115, 74 Vt 68—6 C J p 240 note 64.

5. Dunn v Arkenbrigh, 62 N Y S 861, 48 App Div 519, 31 N Y Civ. Proc 67, affirmed 59 N E 1122, 165 N Y 669.

6. Peabody v Minot, 24 Pick. (Mass) 329—Bond v Bond, 2 Pick. (Mass) 382—Barnard v. Fisher, 7 Mass 71.

7. Taacks v. Schmidt, 18 Abb Pr. (N Y) 307.

8. Horton v. Monroe, 57 N.W. 109, 98 Mich 195.

9. Harding v Kansas City Guaranty L & T Co, 43 P 835, 3 Kan App. 519—6 C J. p 240 note 69

10. Hopkins v Langton, 30 Wis. 379—6 C.J. p 240 note 70.

In some states the officer is required to serve on defendant a copy of the inventory at the same time he serves the latter with a copy of the writ.[11] It has been held, however, that the failure of the officer to serve a copy of the inventory on defendant can be taken advantage of by the latter only and is not available for a subsequent attaching creditor,[12] and that a defendant in attachment waived service of a copy of the writ and inventory by absconding from the county and state.[13]

f. Effect and Conclusiveness of Inventory and Appraisal

The inventory is conclusive as to whether specific property was attached, and the appraisal constitutes prima facie evidence of value.

Upon the question of whether any specific property, real or personal, has been attached, the inventory returned by the officer is conclusive,[14] and the appraised value of such property is prima facie evidence of its real value as against the officer.[15] Where, however, personal property seized by the officer is afterward sold by him at official sale, the value of the goods is not determined solely by the appraisal, but the amount received by the officer at such sale is competent evidence of value as is also the opinion of persons familiar with the goods and acquainted generally with the value of such goods.[16]

§ 237. Property Levied on under Other Process

a. Personalty
b. Realty

a. Personalty

(1) Who may levy
(2) Manner of levy

(1) Who May Levy

(a) In general
(b) Deputies

(a) In General

An officer holding personalty under a prior process may levy on the same personalty under a writ of attachment. Where property is held by one officer under process, some authorities deny the right of a different officer to levy an attachment thereon, although other authorities permit it to be subjected to further levies by either the same or a different officer.

An officer who has levied on personalty may subsequently make a levy on the same property under a writ of attachment;[17] but as a seizure and taking possession by the officer is essential in case of a levy upon personalty, as has been explained in § 223, it has been held in some jurisdictions that, where goods are held by an officer under other process, an attachment can be levied thereupon only by such officer, and another officer cannot make a levy thereon even though the officer holding the property assents to the subsequent so-called levy,[18] or although such officer or his keeper agrees to act also as the keeper of the second officer.[19] According to the decisions in other states, however, if personal property is levied upon under a writ, it may still be subjected to further levies either by the same or another officer, such levy being made subject to the prior levy or levies.[20]

(b) Deputies

Some authorities permit a deputy to attach property held under process by his principal, on the theory that the deputy and the principal are one officer, while others forbid such levy on the ground that they are different officers.

In some jurisdictions it is held that a deputy is so far a different officer from his principal as to come within the meaning of the rule forbidding levies on the same property by different officers, and that he is therefore unable to levy upon goods already attached by such principal.[21] In other jurisdictions, however, the acts of the deputy are regarded as the acts of the principal, and a deputy may levy an attachment upon property already attached by his principal through another deputy.[22]

(2) Manner of Levy

(a) By officer who made previous levy
(b) By officer other than one who made previous levy

(a) By Officer Who Made Previous Levy

An officer in possession of property under prior process may levy thereon without overt act and merely by noting the attachment on his return, although this rule is inapplicable where the officer lacks possession.

11. Safford v Morris Metal Products Co, 121 A 885, 99 Conn 372—6 C J p 240 note 71.
12. Duffee v Records, 2 Pennyp. (Pa) 343, 12 Wkly.N C 287—6 C J p 240 note 72
13. Thomas v. Richards, 35 N W. 42, 69 Wis 671.
14. Carson v. Golden, 14 P. 166, 36 Kan. 705.
15. Learned v. Vandenburgh, 7 How Pr (N Y) 379, affirmed 8 How Pr 77—6 C J. p 240 note 75.
16. Douglass v. Hill, 29 Kan. 527.
17. Hambley & Co v H. W White & Co, 133 S E 399, 192 N C. 31—6 C J p 240 note 77.
18. Fidelity & Casualty Co v. Thumm, 172 N E 681, 35 Ohio App. 499—6 C J. p 241 notes 79, 80.
19. Robinson v. Ensign, 6 Gray (Mass) 300—6 C J. p 241 note 81.
20. Patterson v Stephenson, 77 Mo. 329—6 C J p 241 note 82
21. Pierce v. Jackson, 18 A 319, 61 N.H. 121—6 C J. p 241 note 83.
22. Ark.—Claflin v. Furstenheim, 5 S W. 291, 49 Ark 302
Tex.—Heye v. Moody, 4 S.W. 243, 67 Tex 615.

Where an officer holds actual or constructive possession of property under a prior levy, but not otherwise,[23] no affirmative or overt act on his part is necessary in making a levy under a subsequent writ;[24] but he may simply treat the property as seized under the subsequent writ also and make his return accordingly.[25]

(b) By Officer Other than One Who Made Previous Levy

Levy of an attachment on property held under prior process by a different officer is effected by notifying the officer in possession. The return may describe the property as all that is in custody of such prior officer.

Where a subsequent levy is made by an officer other than the one who made the first levy, the possession of the first officer is not to be disturbed, but the levy is made by notifying the officer in possession of the making of it.[26] In such case the return need not specify the property, but it is sufficient to refer to the property as all which is in the custody of the officer in possession.[27]

b. Realty

Levy on land held under process by a different officer confers a valid, although subsequent, attachment lien.

Since in the case of levy upon realty, the officer levying acquires neither title, possession, nor special property, as shown in §§ 227, 240, there is no reason why an attachment creditor may not acquire a valid lien by the levy of a writ of attachment on land on which another officer has already levied an attachment or execution,[28] subject, of course, to the lien of the prior attachment or execution creditor.[29]

§ 238. Successive Levies under Same Writ

Successive levies under the writ are permissible in the absence of fraud. Further, an unofficial sale of attached property under agreement and delivery of the money proceeds to the attaching officer is in effect a release of the attachment on the property and a transfer thereof to the money.

A writ of attachment is not rendered functus officio by the first levy thereunder,[30] and in the absence of fraud there is no reason which will prevent a second levy upon personal property, under the outstanding writ, where such property has once been taken but afterward surrendered by mistake or otherwise, no other rights intervene, and the legal owner interposes no protest against such second levy.[31] Where an officer attaches property at different times on the same writ copies need not be left in each instance, the leaving of a single copy including a list of all the property attached before the time of service elapses being held, on a plea in abatement, to constitute good service.[32]

The practical effect of an executed agreement by plaintiff and defendant for sale of attached property under direction of the sheriff and the turning over of the proceeds to him, is to effect a release of the attachment on the tangible property and a levy of the attachment on the money proceeds.[33]

§ 239. Effect of Levy

a. In general
b As to check holder

23 In re Gilbert, (D C N.H) 13 F. Supp. 782—6 C J p 241 note 85.

Property not in officer's actual nor constructive possession

(1) An attachment of previously attached oil tanks and pumps was ineffective, where no new receiptor was given, and no new seizure or statutory return of attachment was made, and there was no showing that the receiptor was notified of second attachment and agreed to assume responsibility—In re Gilbert, (D C N. H) 13 F Supp 782

(2) Where oil tanks and pumps had been returned to the debtor's possession after attachment, no further attachment thereof could be made without new seizure and filing of statutory notice—In re Gilbert, supra.

24. Mont.—Chowning v. Madison Land & Irrigation Co, 276 P 946, 84 Mont 494
Or—Palmer-Haworth Logging Co v. Henderson, 174 P 531, 90 Or. 192.
6 C.J. p 241 note 86.

Property in charge of sheriff's deputy

(1) In levying a second attachment, no affirmative or overt act need be done to divest defendant of possession; the property being in the sheriff's possession by reason of a prior attachment not released, or, what is the same thing, having been placed by the sheriff in charge of a deputy who had receipted to him therefor—Palmer-Haworth Logging Co v. Henderson, 174 P. 531, 90 Or. 192.

(2) It is enough for a sheriff in levying an attachment on property of which he, through a deputy, had possession under a prior attachment, to forward the papers to his deputy and make a return that the property was attached, provided the return shows that he then held the possession—Palmer-Haworth Logging Co. v Henderson, supra.

25. Chowning v. Madison Land & Irrigation Co, 276 P 946, 84 Mont. 494—6 C J. p 242 note 87.

26. Ill—White v. Culter, 12 Ill App 38
Mo—Patterson v. Stephenson, 77 Mo. 329
N J—Woodward v Lishman, 78 A. 701. 80 N J Law 586.
6 C J. p 242 note 88.

27. State v Curran, 45 Mo App 142.

28. Ala—Johnson v. Burnett, 12 Ala 743
Mass—Watson v Todd, 5 Mass 271
6 C J. p 242 note 91.

29. Coffin v. Harris, 54 S E 437, 141 N C 707, 715, 6 L R A (N S) 624

30. MacDonald v Fitzgerald, 171 N. W. 879, 42 N D 133.

31. MacDonald v Fitzgerald, supra —6 C J p 242 note 93.

32. U. S. Bank v. Taylor, 7 Vt. 116.

33. Wycoff v. Farmers' & Merchants' Bank, 271 S W. 948, 168 Ark. 850.

a. In General

Levy of an attachment transfers the property from the debtor's custody to that of the law. In the absence of contrary statute, or special circumstances such as fraud, the attaching creditor secures only such rights in the property as his debtor had at the time of attachment

The effect of an attachment is to put the property into the custody of the law,[34] to secure it against alienation of the debtor and the judgments of other creditors and to hold it to be levied upon by execution when judgment shall have been obtained, a specific lien being created.[35] The rights of the attaching creditor are fixed at the time of levy,[36] the attachment is an encumbrance from that time and a subsequent judgment relates back to it.[37]

The attaching creditor "steps into the shoes" of his debtor and acquires whatever rights the latter may have in the property attached,[38] and the attachment operates only on such rights.[39] While an attaching creditor may in some circumstances occupy the position of an innocent purchaser for value,[40] it is ordinarily held that neither the attaching creditor[41] nor the levying officer,[42] is to be so regarded, and that the levy cannot give to the attachment creditor any other or higher rights than the debtor then has,[43] in the absence of fraud

34. Fla—Ex parte Fuller, 128 So 483, 99 Fla 1165
Tenn—Fischer Lime & Cement Co v Kaucher, 51 S W (2d) 492, 164 Tenn 657

35. Standard Oil Co of New York v. Stevens, 151 A 507, 103 Vt. 1—6 C J p 242 note 95

36. Sanders v Farrier, (Tex Civ. App) 271 S W 293

37. Shuck v. Quackenbush, 227 P 1041, 75 Colo 592, 38 A L R 259

38. Cal—Walters v Bank of America Nat Trust & Savings Ass'n, 52 P (2d) 232.
Conn—Collins v Lewis, 149 A. 668, 111 Conn 299
Ky—Day's Ex'x v Traders' Nat. Bank, 24 S W (2d) 576, 232 Ky 662

39. Nisbet v Federal Title & Trust Co, (Colo) 229 F 644, 144 C C A 54 certiorari denied 36 S Ct 553, 241 U S 669, 60 L Ed 1229—6 C J p 243 note 96

Equitable interests of third persons

Under the Attachment Act (1 Comp St [1910] pp 137, 138, §§ 7, 8), the previous equitable interests of third parties as well as their legal interests in the land attached are protected—Busath v. Prival, 95 A. 136, 84 N J Eq 599

40. Ryder v Brockton Sav. Bank, 127 N E 234, 235 Mass 476—Brewster v Weston, 126 N E 271, 235 Mass 14—Waltham Co-op Bank v Barry, 121 N E 71, 231 Mass 270

Statutes making attachment creditor bona fide purchaser

(1) Under statutes providing that from the date of an attachment the plaintiff shall be deemed a bona fide purchaser of the attached property as against third persons, subject to conditions as to recording in the case of real estate, an attachment creditor cannot claim to be a good-faith purchaser, where the premises were in possession of the debtor claiming a homestead exemption—Marvin & Co v. Piazza, 276 P 680, 129 Or. 128.

(2) Under such a statute the attaching creditor, before he can be deemed a purchaser in good faith of the attached property, must allege and prove facts establishing his position as attaching creditor—Wheeler Lumber, Bridge & Supply Co v Shelton, (Or) 29 P (2d) 1013, rehearing denied 31 P (2d) 163

Uniform Sales Act

(1) The provisions of the act governing the sale or pledge of goods by a person who, having sold goods, continues in possession, are inapplicable to the claim of attaching creditor of seller who retained possession of lumber after sale thereof, where there was no showing that sheriff or attaching creditor paid value for lumber or that attachment was based on valid debt—Wheeler Lumber, Bridge & Supply Co v. Shelton, (Or) 29 P (2d) 1013, rehearing denied 31 P (2d) 163.

(2) Where a sheriff, in possession of lumber under attachment, did not allege or prove that defendant in attachment was indebted to plaintiff in writ, nor that the sheriff or plaintiff in attachment was in the position of a purchaser in good faith for valuable consideration, the buyer of the lumber, in view of a completed sale thereof before levy of attachment, was entitled to possession as against the sheriff claiming under attachment—Wheeler Lumber, Bridge & Supply Co v Shelton, supra.

41. U S—Nisbet v. Federal Title & Trust Co, (Colo) 229 F. 644, 144 C C A. 54, certiorari denied 36 S Ct. 553, 241 U S 669, 60 L Ed 1229
Tex—Brinkman v Rick, (Civ App) 19 S W (2d) 808—Taylor v. Benningfield, (Civ App) 257 S.W 938.
Wash—Waddell v Roberts, 246 P 755, 139 Wash 273

42. American Fruit Growers of California v. Jackson, 265 P 926, 203 Cal 748
Sheriff seizing property under writ of attachment takes only such rights in the property as the person from whom it was seized had—American Fruit Growers of California v. Jackson, 265 P. 926, 203 Cal. 748.

43. Ariz—Ellery v Cumming, 14 P. (2d) 709, 40 Ariz 512, 83 A L R. 1081
Cal—Walker v Doak, 290 P 290, 210 Cal 30—Stockel v Elich, 297 P 595, 112 Cal App 588—Richman v. Bank of Perris, 282 P 801, 102 Cal. App 71
Conn—Travelers' Ins Co v. Mayo, 130 A 379, 103 Conn 341.
Ill—Brennan v Persselli, 187 N E. 820, 353 Ill 630, affirming 266 Ill. App 441
Iowa—Gibson v. Gibson, 217 N W. 852, 205 Iowa 1285—Midland Nat. Bank of Minneapolis, Minn, v. Douglas, 203 N W. 44, 199 Iowa 1190
Kan—Federal Trust Co v. Ireland, 296 P. 704, 132 Kan. 615
Ky—U S. Fidelity & Guaranty Co. v McHargue, 97 S W (2d) 831, 265 Ky 813—Amick v Goodykoontz, 43 S W (2d) 1000, 241 Ky 315—Stivers v Steele, 30 S W (2d) 717, 230 Ky. 700—Grooms v. National Bank of Kentucky, 292 S W 513, 213 Ky 846
La—Holmes & Barnes v Shawnee Milling Co, 4 La App 706
Me—Boyle v. Clukey, 139 A 461, 126 Me 443
Mass—O'Gasapian v. Danielson, 187 N E 107, 89 A L R 1159—Brewster v Weston, 126 N E 271, 235 Mass 14
Mo—Martz v. Big Horn Glass Co, (App) 269 S W 697
Mont—Dooley Implement Co. v. Citizens' State Bank of Dooley, 283 P 423, 86 Mont 339—First Nat Bank v Citizens' State Bank of Dooley, 283 P 420, 86 Mont. 331.
N H—Roaf v Champlin, 107 A 339, 79 N H 219
Ohio—Bell v Lertzman, 171 N E 613, 35 Ohio App 59
Or—Wheeler Lumber, Bridge & Supply Co. v. Shelton, 29 P.(2d) 1013, rehearing denied 31 P.(2d) 163—Hudelson v. Sanders-Swafford Co., 227 P 310, 111 Or 600
Tex—Stewart v. Rockdale State Bank, (Civ.App) 52 S W.(2d) 915, affirmed 79 S.W (2d) 116, 124 Tex 431—Brinkman v. Rick, (Civ App)

or collusion by which the attaching creditor's rights are impaired,[44] or unless he has been misled by the debtor's apparent ownership of the property attached and has given credit on the faith of such ownership,[45] or the rule is abrogated by statutes as to the effect of unrecorded conveyances or incumbrances as to creditors without notice.[46]

Estoppel of creditor to claim title. The levy of an attachment upon property may estop the attaching creditor to claim title thereto,[47] unless he was unaware that the levy was made upon property in which he had an interest.[48]

A levy upon property not subject to attachment, although it is properly quashed, does not affect the writ itself so as to warrant setting that aside also.[49]

Where a levy is not made in good faith nor for the purpose of its enforcement, but with the object merely to obtain some security or to prevent some other levy being previously made, or to hinder or delay other creditors of the debtor it must be adjudged fraudulent and void.[50]

b. As to Check Holder

A check presented after attachment of a bank deposit should not be paid.

Since, as has been seen in the title Assignments § 60, a check does not, either under the Negotiable Instruments Law or in accordance with many prior authorities, operate as an assignment pro tanto of the deposit against which it is drawn, the bank should not pay any check given previously to the attachment but presented subsequently,[51] although under the view that the giving of a check works an assignment of the deposit pro tanto, the amount thus transferred could not be attached by a creditor of the maker;[52] and consequently a check given before the attachment of such deposit, although not presented until afterward, should be paid to the holder.[53]

19 S W (2d) 808—Citizens' Nat Bank of Waco v Billingsley, (Civ App) 300 S W. 648

Wash—Tallyn v Cowden, 290 P 1005, 158 Wash 335—Waddell v Roberts, 246 P 755, 139 Wash 273

W Va—Howell v McCarty, 88 S E 181, 77 W Va 695

Wyo—Sorenson v Howell, 241 P 1068, 34 Wyo 119

6 C J p 243 note 97.

"The courts are generally united in the holding that an attaching creditor cannot seize or reach any interest in property greater than is actually owned by the debtor"—Federal Trust Co v Ireland, 296 P 704, 705, 132 Kan 615

Bank deposits

The text rule applies as to a bank deposit—Ellery v Cumming, 14 P. (2d) 709, 40 Ariz 512, 83 A L R 1081—Stradley v. Union Trust Co of San Francisco, 181 P. 823, 41 Cal App. 17—7 C J p 671 note 53.

Corporate stock

(1) "Where the stock has been transferred on the books of the corporation, an attachment creditor takes subject to any existing equities . . . if he desires to obtain the benefits of the stock as it actually is, he must also assume its burdens as actually existing"—Richman v Bank of Perris, 282 P 801, 809, 102 Cal App. 71

(2) A creditor of absconding bank president attaching president's stock who had constructive notice of defects and outstanding equities from defendants' possession of stock and from book entries showing stock was canceled and reissued to defendants took the stock subject to existing equities, and where his attachment debtor, president of the bank, had converted the bank's assets and absconded, the attachment creditor had no greater right than the president to set aside the sale of his stock without offering to reimburse the purchasers for moneys contributed to save the bank—Richman v. Bank of Perris, supra

Realty

(1) A judgment creditor's rights respecting attached land could rise no higher than the judgment debtor's—Gibson v Gibson, 217 N W. 852, 205 Iowa 1285

(2) A creditor attaching the debtor's interest in land acquires no greater interest than the debtor had—Roaf v Champlin, 107 A 339, 79 N H 219

(3) Where debtor was estopped to assert payment of notes secured by lien on land, creditor attaching land was likewise unable to assert that the notes had been paid, since an attaching creditor takes only the rights of the debtor at the time of levy.—Grooms v National Bank of Kentucky, 292 S W. 513, 218 Ky 846

Lease

Attaching creditor of lessees acquired no greater rights than lessees had at time of levy—Conolley v Power, 232 P 741, 70 Cal App 70.

Property obtained by fraud

(1) A creditor attaching property obtained by fraud acquires only the debtor's interest—Boyle v. Clukey, 139 A 461, 126 Me 443.

(2) Where a sale is procured by buyer's fraud or misrepresentation, the seller's right to retake the goods is superior to the claim of an attaching creditor, where the goods remain with the buyer, for the subsequent attaching creditor obtains no better right to the property than the fraudulent buyer—Blount-Decker Lumber Co v Farmers' Lumber Co, (Tex Civ App) 211 S W 247

44. Conn—Travelers' Ins. Co. v. Mayo, 130 A 379, 103 Conn 341.
Ill—Mattoon Grocery Co v. Stuckemeyer & Olson, 158 N E 422, 326 Ill 602
Or—Wheeler Lumber, Bridge & Supply Co v Shelton, 29 P (2d) 1013, rehearing denied 31 P (2d) 163—Hudelson v Sanders-Swafford Co, 227 P 310, 111 Or 600
Wyo—Sorenson v. Howell, 241 P. 1068, 34 Wyo. 119
6 C J. p 243 note 98

45. Conn—Travelers' Ins Co v. Mayo, 130 A 379, 103 Conn. 341
Wyo—Sorenson v. Howell, 241 P. 1068, 34 Wyo 119.

46. Johnson v. Darr, 272 S W. 1093, 114 Tex 516, affirming Darr v Johnson, (Civ App) 257 S W 682—Citizens' Nat Bank of Waco v Billingsley, (Tex Civ App) 300 S. W 648

47. Stein v. McAuley, 125 N W 336, 147 Iowa 630, 140 Am S R 332, 27 L R A (N S) 692 Contra Lewis v. Morse, 20 Conn. 211.

48. Steele v. Putney, 15 Me 327.

49. Gaar v Lyon, 37 S W. 73, 143, 99 Ky. 672, 18 Ky L 500

50. First Nat. Bank of Baltimore v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508

51. Kuhn v Warren Sav Bank, (Pa.) 11 A 440—7 C J. p 671 note 54.

52. Boswell v. Citizens' Sav. Bank, 96 S W 797, 123 Ky 435, 29 Ky.L. 983—7 C J. p 671 note 55

53. National Bank of America v Indiana Banking Co, 114 Ill 483—7 C.J. p 671 note 56.

§ 240. —— On Title to Property

The levy of an attachment merely impresses a lien on the property and does not change the title thereto.

The only purpose of levying an attachment is to impress a lien on the property,[54] and the levy does not change the title thereto,[55] even though, as in the case of personalty, it may be taken from the possession and control of defendant,[56] but only enables plaintiff to obtain security for an anticipated judgment.[57] The general property remains in defendant who may alienate such property subject to the lien of the attachment.[58]

The attaching creditor acquires no title to the property attached by means of his attachment,[59] and even, it has been held, no right of action against a third person who may take the property from the officer or destroy it.[60]

The attaching officer acquires at most only a special property in the articles attached,[61] and not an absolute interest.[62]

A levy on realty does not give to plaintiff a right to the possession of the estate nor to the rents, issues, and profits thereof,[63] nor does it confer upon the attaching officer the right to possession nor any special property therein,[64] nor is the interest or possession of the debtor divested by such levy.[65]

§ 241. —— As Satisfaction of Debt or Judgment

The authorities conflict as to whether levy of an attachment operates as a satisfaction of the debt or judgment.

A levy of attachment has been held to be a satisfaction of a debt, if the property is of a sufficient amount,[66] even though the property is wasted by the negligence of the officer, although if the loss occurs without fault on the officer's part the claim will not be extinguished.[67] But the better view is that the levy of an attachment is not a satisfaction of plaintiff's demand as the levy of an execution would be,[68] and it has been held that the seizure of property, even to the full value of the sum claimed under an order of attachment issued during the pendency of an action, is not necessarily a satisfaction of the judgment afterward obtained, and that it must be affirmatively shown that the property was applied to and satisfied the judgment.[69]

§ 242. —— Where Effected by Improper Means

A levy effected by improper means is invalid.

It may be stated as a general rule that where a levy is effected by any improper means, as for instance by the use of any fraudulent devices to obtain possession of the property, it will be invalid.[70]

§ 243. Defects, Objections and Waiver

a. Defects and objections
b. Waiver
c. Effect of entry of judgment

a. Defects and Objections

(1) In general
(2) Who may object
(3) Time to object

54. First Nat. Bank v. Kindwall, 206 N.W. 241, 201 Iowa 82

55. Ivey v. Kerce, 156 S.E. 239, 42 Ga.App. 336—6 C.J. p. 243 note 3

56. Starr v. Taylor, (C.C.Ind.) 22 F.Cas.No.13,319, 3 McLean 542—6 C.J. p. 244 note 4.

57. Larimer v. Kelley, 10 Kan. 298.

58. Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380, denying rehearing 126 So. 591, 13 La.App. 303—6 C.J. p. 244 note 6—11 C.J. p. 433 note 10—66 C.J. p. 512 note 91 [a] (3)

Property belongs to original owner

Property attached belongs to original owner until divested by the sale. —Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380, denying rehearing 126 So. 591, 13 La.App. 303

59. Kothman v. Markson, 9 P. 213, 34 Kan. 542—6 C.J. p. 244 note 7.

60. Ill.—Dobbins v. Hanchett, 20 Ill.App. 396.
N.D.—State v. Rose, 58 N.W. 514, 4 N.D. 319, 26 L.R.A. 593.

61. Hambley & Co. v. H. W. White & Co., 133 S.E. 399, 192 N.C. 31—6 C.J. p. 244 note 9

In attaching personal property, sheriff, on serving writ, takes possession of property and acquires special interest which he may enforce for all concerned.—Hambley & Co. v. H. W. White & Co., 133 S.E. 399, 192 N.C. 31.

62. Baugh & Sons Co. v. Crowell Corporation, 151 A. 718, 4 W.W. Harr. (Del.) 231.

Subsequent proceedings as not precluded

Levy under attachment statutes does not vest in the sheriff such absolute interest in the debt or chose in action as to preclude a subsequent proceeding thereon.—Baugh & Sons Co. v. Crowell Corporation, 151 A. 718, 4 W.W.Harr.(Del.) 231.

63. Kan.—Kothman v. Markson, 9 P. 213, 34 Kan. 542.
N.Y.—Columbia Bank v. Ingersoll, 1 N.Y.S. 54, 31 Abb.N.Cas. 241.
6 C.J. p. 244 note 10

64. Epley v. Hunter, 281 P. 327, 330, 154 Wash. 163—6 C.J. p. 244 note 11.

"A levy upon real estate does not permit the sheriff to take possession." —Epley v. Hunter, supra.

65. McInnes v. McKay, 141 A. 699, 127 Me. 110, affirmed McKay v. McInnes, 49 S.Ct. 344, 279 U.S. 820, 73 L.Ed. 975—6 C.J. p. 244 note 12.

66. Yourt v. Hopkins, 24 Ill. 326—6 C.J. p. 245 note 13

67. Starr v. Moore, (C.C.Ind.) 22 F.Cas.No.13,315, 3 McLean 354—Starr v. Taylor, (C.C.Ind.) 22 F.Cas.No. 13,319, 3 McLean 542.

68. Kanaman v. Hubbard, 222 S.W. 151, 110 Tex. 560, affirming (Civ.App.) 160 S.W. 304—6 C.J. p. 245 note 15

69. U.S.—Maxwell v. Stewart, (N.M.) 21 Wall. 71, 22 Wall. 77, 22 L.Ed. 564
Or.—Dickson v. Back, 51 P. 727, 32 Or. 217—Wright v. Young, 6 Or. 87.
6 C.J. p. 245 note 16.

70. Pomroy v. Parmlee, 9 Iowa 140, 74 Am.D. 328—6 C.J. p. 245 note 17.

(1) In General

A return good on its face entitles the levy to every reasonable presumption in its favor, and it is not open to collateral attack unless void. But a levy clearly bad may be vacated.

As a general rule where a return has been made which is sufficient on its face every reasonable presumption will be made in favor of the validity of the levy,[71] but where a levy is clearly bad and cannot be cured it will be vacated on motion.[72] Where the return is good on its face the levy cannot be attacked in a collateral proceeding unless it is void.[73]

(2) Who May Object

Defects and objections may be urged by those, and only by those, whose rights have been injuriously affected.

Where the levying officer fails to take into his possession such property as is capable of manual seizure, plaintiff may have reason to complain, but defendant is not injured thereby, and such levy will not be set aside on his motion.[74] Although it is indisputable that, where possession of property has been unlawfully obtained for the purpose of levying thereupon, such levy is wrongful and cannot be upheld as against anyone who is so situated that he can urge its invalidity, as has been shown in § 242, yet such objection is not available to a party whose right also springs solely from a seizure effected through the unlawful detention.[75]

Where, in order to render an attachment of realty valid against a subsequent purchaser or attaching creditor, the writ and officer's return, or a copy thereof, must be deposited in the clerk's office, omission to comply with this requirement can be taken advantage of only by parties subsequently purchasing or attaching such real estate.[76]

In an action in aid of an execution issued in an attachment suit, the fact that neither the attachment debtor in his lifetime nor his legal representative since his death questioned plaintiff's attachment does not affect the right of defendant to attack the sufficiency of the attachment, where such attack does not depend on any personal privilege and, more particularly, where it tenders an issue of due process.[77]

Where, in a suit to foreclose a mortgage, the mortgagee levies attachment, and the mortgagor interposes a counterclaim a subsequent owner of the mortgaged property, deriving title from the mortgagor, cannot set up, as against the mortgagee, the invalidity of the attachment levy.[78]

(3) Time to Object

Objections to the validity of the levy should be raised in apt time, and may be determined upon proceedings to enforce the levy.

Objection to the sufficiency of the levy of an attachment should be seasonably made,[79] and an objection to the manner of levying an attachment, which is not suggested by answer or upon the hearing below, cannot be taken for the first time on appeal.[80] But where a levy created no lien on account of an irregular return, it was held immaterial that there was no objection to its validity until after the submission of the case, since the court may disregard such levy at any stage of the proceedings.[81]

The question of whether a certain levy made by serving notice on the party claimed to be in possession is valid is properly determinable upon proceedings to enforce the same, and not upon a motion to set it aside and vacate it, since if as made it is invalid there was no valid levy to set aside or vacate.[82]

b. Waiver

(1) In general
(2) Waiver of notice

(1) In General

A levy otherwise insufficient may be made good by waiver or estoppel.

Where the interested parties have acknowledged the legality of a levy of attachment, such legality may not subsequently be questioned.[83] Thus the

71. Deware v. Wichita Valley Mill, etc, Co, 43 S W. 1047, 17 Tex Civ. App 394—6 C J. p 245 note 19.

72. Bridges v. Wade, 99 N Y S 126, 113 App Div. 350—6 C J. p 245 note 20.

73. Deware v Wichita Valley Mill, etc, Co, 43 S W 1047, 17 Tex Civ App. 394—Carothers v. Wilkerson, 2 Willson, Civ Cas Ct App § 353

74. Mechanics' Nat Bank v. Miners' Bank, 13 Wkly N C (Pa.) 515

75. Corning v. Dreyfus, (C.C.La.) 20 F. 426, reversed on other grounds 3 S Ct 379, 124 U.S 131, 31 L Ed 374.

76. Pomroy v. Stevens, 11 Metc (Mass.) 244—6 C J. p 245 note 22

77. Cotnareanu v. Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y 294, modifying 283 N Y S 1018, 246 App Div 572, and 283 N Y S. 1018, 246 App Div. 573

78. Mercantile Realty Company v Stetson, 94 N W. 859, 120 Iowa 324

79. Satterfield v. George, 244 S.W. 24, 155 Ark. 110.

After final judgment in the cause, it is too late to raise an objection as to the sufficiency of a levy of attachment.—Satterfield v. George, 244 S.W. 24, 155 Ark 110.

80. Willitts v. Waite, 25 N Y. 577.

81. Price v. Taylor, 57 S W. 255, 22 Ky L 249

82. Simpson v. Jersey City Contracting Co, 61 N Y.S 1033, 47 App Div 17, affirmed 58 N E. 896, 165 N Y. 193, 31 N.Y.Civ.Proc. 286, 55 L R A 796.

83. Ariz.—Southern Arizona Bank & Trust Co. v. Stigers, 53 P (2d) 422
Tex.—Wells v. Cloud, (Civ App.) 202 S.W. 331.

In action for conversion

The legality of the levy of an attachment cannot be questioned in an action for conversion where all the

conduct of defendant may make an otherwise invalid levy good by way of waiver,[84] estoppel, or agreement.[85]

It has been held that where defendant recognizes the validity of the attachment by giving an undertaking to have it discharged he cannot thereafter question its validity.[86] But in Alabama the execution of a forthcoming bond by a defendant in attachment to gain possession of his property taken under a void levy has been held to be ineffective to validate the levy, and not to deprive defendant of his right to a vacation of the levy on motion.[87]

(2) Waiver of Notice

Statutory notice of levy is subject to waiver.

An attachment defendant may so acquiesce in the levy as to waive a statutory requirement of written notice,[88] and a person in possession of attached property may waive notice so as not to be in a position to dispute the validity of the levy.[89]

c. Effect of Entry of Judgment

Entry of judgment will not cure defects in the levy so as to make what was no lien a valid attachment.

While the entry of judgment may cure some defects in the issue of a writ of attachment[90] such entry will not cure defects in the levy of the writ and make what was no lien a valid one.[91]

VII. RETURN

§ 244. Necessity

The return is ordinarily a necessary part of the proceedings, and its omission may constitute a jurisdictional defect.

The return is a necessary part of the proceeding, for by it alone the court is advised of the levy and its sufficiency, by which, as explained in § 202, in case there is no personal service of defendant, jurisdiction is acquired, and without which the court cannot proceed to the final adjudication of the cause.[92]

Due return and proper entry of the levy has been held essential to the jurisdiction of the court,[93] although under other statutes a contrary decision has been reached.[94]

There is also authority to the effect that the court may direct the officer to make the return,[95] or, in its discretionary power to allow amendments, may, when necessary, order it to be made nunc pro tunc.[96]

§ 245. By Whom Made

The return should ordinarily be made by the person authorized to levy and to whom the writ was directed. But as returning an attachment is an official and not a personal duty, the levying officer's deputy or successor may perform the act.

The return must be made by a person authorized by

parties acknowledge legality before and at the trial—Southern Arizona Bank & Trust Co. v. Stigers, (Ariz.) 53 P.(2d) 422

84. Ark.—Satterfield v George, 244 S.W. 24, 155 Ark. 110.
N.D.—Jongewaard v. Gesquire, 199 N. W. 585, 51 N.D. 173.
6 C.J. p. 246 note 30.

Failure to object

Plaintiff, in attachment consenting to the levy as made by the sheriff and reported in his return, and making no objection thereto till after final judgment against the attachment defendant, could not thereafter complain that the sheriff had made an insufficient attachment, as he did by insisting on another levy of the same writ for an additional quantity. —Satterfield v. George, 244 S.W. 24, 155 Ark. 110.

85. Jongewaard v. Gesquire, 199 N. W. 585, 51 N.D. 173—6 C.J. p. 246 note 31.

86. Lindsey v. Mexican Crude Rubber Co., (D.C.N.Y.) 197 F. 775.

Giving replevy bond and retaining possession

"It is very generally held that the giving of a replevy bond and retaining possession of the attached property [as was done in the instant case] . . . precludes the defendant in the writ from questioning the legality of the levy. Some of the authorities hold that he is estopped, others that he has waived any irregularities in making the levy."—Wells v. Cloud, (Tex.Civ.App.) 202 S. W. 331.

87. Jones v. Baxter, 41 So. 781, 146 Ala. 620, 119 Am.S.R. 54

88. Edwards v. Tracy, 212 N.W. 317, 203 Iowa 1033—6 C.J. p. 246 note 32

Waiver of statutory notice shown

Defendant in attachment proceeding, having actual notice of the attachment, was precluded from disputing its validity for want of notice where he acquiesced by failure to take prompt action after actual notice—Edwards v. Tracy, 212 N.W. 317, 203 Iowa 1033

89. Edwards v. Tracy, supra—6 C.J. p. 246 note 33.

90. Clark v. Tull, 84 N.W. 1030, 113 Iowa 142—6 C.J. p. 246 note 36.

91. Falk-Bloch Mercantile Co. v. Branstetter, 43 P. 571, 4 Idaho 661—6 C.J. p. 246 note 37.

92. Bolling v. Pikeville Nat. Bank, 280 S.W. 1090, 1092, 213 Ky. 317—6 C.J. p. 246 notes 39-42

"There must be a return of the attachment showing how and when executed and upon what property"—Bolling v. Pikeville Nat. Bank, supra.

93. Nix v. Citizens' Bank of Moultrie, 130 S.E. 597, 34 Ga.App. 546.

94. Paragon Coal & Coke Co. v. J. W. Kirby & Sons Coal Co., (D.C. N.Y.) 9 F.(2d) 686

Filing of return not jurisdictional

Under provisions of New York Civ. Pract. Act § 921 not in terms requiring the sheriff to file the attachment or a copy thereof, but merely requiring him to make and file in the county clerk's office an inventory of the property levied upon, it has been held that failure to file the inventory is not jurisdictional, and that the sheriff "is required to file a return to the county clerk's office only in case the attachment is vacated or annulled"—Paragon Coal & Coke Co. v. J. W. Kirby & Sons Coal Co., (D.C.N.Y.) 9 F.(2d) 686, 687.

95. Rock v. Singmaster, 17 N.W. 744, 62 Iowa 511—6 C.J. p. 247 note 43.

96. Bancroft v. Sinclair, 46 S.C.L. 617.

law, to levy the writ, and to whom it was directed,[97] but the duty of making it is official and not personal,[98] so that the return may be made by a deputy,[99] or by the levying sheriff's successor in office.[1] Where, however, the statute directs a constable, coroner, city marshal, or appointee who has served an attachment, to hand the return over to the sheriff who shall report to the court, a return by the constable directly to the court confers no jurisdiction.[2]

§ 246. To What Court Made

The writ should be returned to the proper court, which is ordinarily that in which it originated.

The court to which the return must be made is fixed either by the express directions of the writ, or, where the direction as to return is general, by statute, and failure to comply with statutory directions relative to the court to which the attachment papers must be returned may invalidate the proceedings.[3] Ordinarily the writ is returnable to the court or office from which it originated.[4]

Return to sheriff. Return of an attachment by the levying constable to the sheriff is not a return thereof to the court.[5]

§ 247. Time for Making

The return should be made in apt time, which is ordinarily the period fixed by statute, or in the absence of statutory specification, a reasonable time.

A return is properly made within the time, if any, fixed by statute.[6] In the absence of any statutory limitation the rule is that an attachment must be returned within a reasonable time;[7] but the mere fact that the return was not made until after the return day of the writ will not defeat the lien.[8] On the other hand, it has been held that if the return shows a substituted service upon defendant it must necessarily not be made before the return day of the writ.[9] The writ is not, in contemplation of law, to be considered as returned until the return day thereof, notwithstanding its actual return before that time,[10] and where the writ was made returnable to the third Tuesday in the month, instead of the first Tuesday when the term began, it was held that it would be presumed that the officer followed the mandate in his return.[11] It is not necessary in order to constitute a valid levy on land that the return should be written out and signed when the levy is made.[12]

The term of court to which an attachment should be returnable is determined by the date of the issuance of the writ, where issuance has been followed by a timely seizure, and in the absence of contrary statute there is no law requiring the execution and return of the writ to be made for any particular time before the return term specified in the writ.[13]

§ 248. Form and Requisites

a. Recitals
b. Description of property attached
c. Showing as to defendant's ownership
d. Showing as to value
e. Signature and verification

a. Recitals

(1) In general
(2) As to manner of levy
(3) As to person making levy
(4) As to time and place of levy
(5) As to personal service or notice
(6) As to leaving copy of writ for record
(7) Where levy made subject to prior levy

97. Olney v. Shepherd, 8 Blackf (Ind.) 146—6 C.J. p 247 notes 45, 46.

98. Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441—6 C.J. p 247 note 47.

99. Colver v. W. B. Scarborough Co., supra.

Unacquainted with facts

A deputy sheriff who signed return of writ of attachment in the sheriff's name was competent to make return, notwithstanding he was shown to have been personally unacquainted with the facts, in view of the rule that the duty of returning a writ is an official and not a personal, duty. —Colver v. W. B. Scarborough Co., 238 P. 1104, 73 Cal.App. 441

1. Carter v. O'Bryan, 16 So. 894, 105 Ala. 305

2. Barnett v. Ring, 55 Miss. 97

3. Moog v. Doe, 40 So. 890, 145 Ala. 568—6 C.J. p 247 note 50.

4. Green v. Lanier, 5 Heisk. (Tenn.) 662—6 C.J. p 247 note 51.

5. Southern Finance Corporation v. Collins, 168 S.E. 84, 46 Ga.App. 485

6. Westphal v. Sherwood, 28 N.W. 640, 69 Iowa 364—6 C.J. p 247 note 52.

7. Hibbard v. Pettibone, 8 Wis. 270—6 C.J. p 248 note 53

8. Horton v. Monroe, 57 N.W. 109, 98 Mich. 195—6 C.J. p 248 note 54

9. Reynolds v. Marquette Cir. Judge, 84 N.W. 628, 125 Mich. 445—Drew v. Claypool, 28 N.W. 73, 61 Mich. 283—Kraft v. Raths, 7 N.W. 232, 45 Mich. 20—6 C.J. p 248 note 55.

10. Scudder v. Wilcox, 1 Mich.N.P. 35—6 C.J. p 248 note 56.

11. Wason v. Martel, 39 A. 438, 68 N.H. 560.

12. Demint v. Ringo, 5 Ky.L. 320.

13. Bailey v. Kennett, 122 S.E. 804, 32 Ga.App. 255.

"May" term

Where an attachment was issued April 12, 1923, returnable to term of superior court convening May 21, and seizure was made and writ returned on May 2, the May term was the return term of the proceeding—Bailey v. Kennett, 122 S.E. 804, 32 Ga.App. 255

Return held in time

Where an attachment was returnable to October term, 1923, and was returned during that term, although after first day of term it was not subject to dismissal on the ground that it was returned too late—Greene v. Lombard, 126 S.E. 890, 33 Ga.App. 518.

(1) In General

The return should show the fact of levy, although it need not recite that levy was made to satisfy the claim.

The return to a writ of attachment must show that property has been seized thereunder,[14] either actually or constructively;[15] but it is not necessary that any particular words should be employed, and it is sufficient if the fact that the officer has attached property affirmatively appears from a fair construction of the whole return.[16] The return is not rendered insufficient by a failure to state that the levy was made to satisfy "any debt or damages and costs."[17]

(2) As to Manner of Levy

As a rule, the return should recite the acts done by the officer so as to show how the levy was made, although failure to set forth the details of service or levy has been held a mere irregularity and not a jurisdictional defect.

The return should show the manner of service or levy of the writ.[18] It is usually considered necessary that the return should state the facts, that is, set out the acts done by the officer and describe the manner in which the writ was executed, so that the court may judge for itself of the sufficiency of the levy,[19] and that a return which in effect merely states as a conclusion that a proper or sufficient levy was made, is defective.[20] On the other hand, however, the presumption that an officer did his duty, where nothing to the contrary appears, has been considered sufficient to support a levy, although the return did not specify the steps taken by the officer,[21] and it has also been held that the omission to set out the details of the service or levy of the writ is a mere irregularity and not a jurisdictional defect.[22]

Showing compliance with statute. It is usually held sufficient, at least so far as subsequent attaching creditors with notice are concerned,[23] if the return shows that there has been a substantial compliance with the statute,[24] but there is also authority for the view that strict and specific compliance with the statute must be shown by the return itself.[25]

Officer's opinion as to removal of property. Under statutes providing for constructive attachment of machinery, where in the opinion of the levying officer the machines cannot be removed without manifest injury, an attachment will not necessarily fail because the return omits to recite that in the officer's opinion such machines could not be removed without injury.[26]

(3) As to Person Making Levy

The return should show who made the levy.

The return to a writ of attachment should show by whom the levy was made.[27]

(4) As to Time and Place of Levy

The return should show the time of levy, but need not show that it was within the officer's bailiwick

In order to be sufficient, the return should show the date of the levy.[28]

It has been held not essential that the return should show that the levy was made in the county or bailiwick of the levying officer,[29] as it must be presumed, in the absence of anything to show the contrary,

14. McDougal v. McGee, 14 Pa Dist. 500—6 C J. p 248 note 60.

Manual possession

A return showing attempted attachment of property capable of manual seizure, but failing to show that the officer took it into his manual possession, was insufficient—McDougal v. McGee, 14 Pa Dist 500

15. La.—Poole v. Brooks, 12 Rob 484
Mo—Newton v. Strang, 48 Mo App 538.
6 C J. p 248 note 61.

16. Bryant v Knapp, 68 A 640, 103 Me 139—6 C J. p 248 note 62

17. Winningham v. Trueblood, 51 S. W. 399, 149 Mo 572.

18. Rudolph v. Saunders, 43 P. 619, 111 Cal 233—6 C.J. p 249 note 64.

19. Green v. Coit, 90 N E 794, 81 Ohio St 280, 135 Am S R. 784—6 C.J. p 249 note 65.

20. Sheldon v. Comstock, 3 R I. 84—6 C.J p 249 note 66.

21. Griffin v. American Gold Min Co, (Alaska) 136 F 69, 68 C.C.A. 637—6 C J. p 249 note 67

22. Ill—Pomeroy v Rand, 41 N E 636, 157 Ill. 176—Littlestone v Goldenberg, 66 Ill App 673
Minn—Schweigel v. L. A Shakman Co, 80 N W 871, 81 N.W. 529, 78 Minn 142
6 C J p 249 note 68.

23. Sabin v. Michell, 39 P. 635, 27 Or 66

24. Dodge v. Butler, 42 N J.Law 370—6 C J p 250 note 70.

25. Smith v. Wilson, 128 So 682, 13 La App 679, reversing 125 So. 302, 13 La App. 437—6 C J. p 250 note 71.

26. Coast & Lakes Contracting Corp. v. Martin, 101 A 502, 92 Conn 11.

Officer's opinion otherwise shown

Where the court found as a fact that the machines could not be removed without injury, and it was admitted that the levying officer was rightfully of the same opinion at the time of the attachment, the failure to state his opinion in the return did not invalidate the attachment in the case at bar, although the court said: "It is not necessary to rule that it would be so in every case"—Coast & Lakes Contracting Corp v. Martin, 101 A. 502, 503, 92 Conn. 11.

27. Ala—Carter v. O'Bryan, 16 So 894, 105 Ala 305
Ill—Clymore v. Williams, 77 Ill 618
Kan—Wilkins v. Tourtellott, 28 Kan. 825
Miss.—Tucker v. Byars, 46 Miss. 549.

28. Robertson v. Hoge, 1 S E. 667, 83 Va. 124—6 C J. p 250 note 73.

29. Ga—Connolly v Atlantic Contracting Co, 47 S E. 575, 120 Ga 213
Va—Guarantee Co. of North America v Lynchburg First Nat Bank, 28 S E 909, 95 Va. 480.
6 C J. p 250 note 74.

that the officer did his duty,[30] and executed the writ legally.[31]

(5) As to Personal Service or Notice

The return should show prescribed personal service of attachment notice, or facts excusing such service and compliance with requirements respecting substituted service; although irregularities in such recitals are not jurisdictional defects.

Under statutes requiring service of personal notice of the attachment on defendant, if he can be found, the return must affirmatively show that such service was properly made,[32] or that it could not have been made with reasonable effort.[33] Where the officer has been unable to find defendant, the return should show that he has complied with the statutory requirements that, in such case, he shall leave a copy of the writ at defendant's usual place of abode,[34] or with the tenant or person in possession of the property attached,[35] or mail a copy of the writ to defendant at his residence,[36] or post a copy of the writ or a notice of the levy in some designated or conspicuous place on such property,[37] although failure of a return to contain due recitals in such respects will not necessarily invalidate the proceedings,[38] and, where the statute does not require the return to recite such facts, omission thereof does not affect the validity of the return.[39]

(6) As to Leaving Copy of Writ for Record

The original return should show prescribed filing of copies of the writ and return.

It has been held that, inasmuch as the original return itself, and not the copy left with the clerk for record, is the evidence of the validity of the levy, it is necessary that the original return itself should state that a copy of the writ and a copy of the descriptive part of the return have been filed with the recording officer as required by statute.[40]

(7) Where Levy Made Subject to Prior Levy

Return of an attachment levied on property held by the officer under a prior process need state only that he has seized defendant's interest in such property; although an officer having two writs at the time of levy should return each as levied on the whole property. Return of an attachment levied on property held by a different officer should recite details of the subsequent levy.

Where an officer levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of defendant in the property at that time in his possession;[41] but it has been held that, where the officer has both writs in his possession when he comes on the property, he should return each writ as levied on the whole property found.[42]

Return of officer making prior levy. Where a levy is made by one officer subject to the levy of another officer who is in possession, the return of the latter must show what was done in respect of the subsequent levy.[43]

b. Description of Property Attached

(1) Necessity
(2) Sufficiency

(1) Necessity

The return must describe the property attached.

The return to a writ of attachment should describe the property on which the levy was made.[44] No lien is acquired as to any property other than that described in the return, and a total failure of the return to designate or describe the attached property will render the attachment inoperative.[45]

(2) Sufficiency

(a) In case of personalty
(b) In case of realty

(a) In Case of Personalty

The return should show the location of personalty, and describe it with certainty sufficient to permit identification.

30. Connolly v. Atlantic Contracting Co., 47 S.E. 575, 120 Ga. 213
31. Guarantee Co. of North America v. Lynchburg First Nat. Bank, 28 S.E. 909, 95 Va. 480
32. Crary v. Barber, 1 Colo. 172—6 C.J. p. 250 note 77.
33. Reynolds v. Marquette Cir. Judge, 84 N.W. 628, 125 Mich. 445—6 C.J. p. 250 note 78.
34. Adams v. Abram, 38 Mich. 302—6 C.J. p. 250 note 79.
35. Lehman v. Broussard, 12 So. 504, 45 La. Ann. 346—6 C.J. p. 251 note 80
36. Star Brewery v. Otto, 63 Ill. App. 40.
37. Colfax Bank v. Richardson, 54 P. 359, 34 Or. 518, 75 Am. St. R. 661—6 C.J. p. 251 note 82
38. Richardson v. Carr, 171 P. 476, 63 Okl. 46.
39. Weirick v. Mansfield Lumber Co., 117 N.E. 362, 96 Ohio St. 386
40. Me.—Carleton v. Ryerson, 59 Me. 438—Kendall v. Irving, 42 Me. 339
Vt.—Cox v. Johns, 12 Vt. 65.
6 C.J. p. 251 note 84.
41. Cal.—O'Connor v. Blake, 29 Cal. 312.
Iowa.—German Sav. Bank v. Capital City Oatmeal Co., 79 N.W. 270, 108 Iowa 380.
N.H.—Clement v. Little, 42 N.H. 563.
6 C.J. p. 251 note 85.
42. Violette v. Tyler, (D.C.) 28 F. Cas. No. 16,955, 2 Cranch C.C. 200
43. State v. Curran, 45 Mo. App. 142—6 C.J. p. 251 note 87
44. Harding v. Guaranty L. & T. Co., 43 P. 835, 3 Kan. App. 519—6 C.J. p. 251 note 88
45. Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47—6 C.J. p. 252 notes 89, 90

Failure to designate which of a number were attached

Where defendant had more in number of all the articles of personalty than were attached, and the officer's return did not show which were attached, no lien was created.—Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47.

It is difficult to lay down a precise or general rule as to what constitutes a sufficient description of personalty levied on under attachment,[46] but it is necessary that the property should be described with such reasonable certainty as to render it distinguishable.[47]

Location of the property should be shown by the return,[48] but a mere statement of the location, standing alone and without any statement of the quality or kind of property seized, is not a sufficient description.[49]

Reference to other papers in some other court or case for a description of the property levied on is not sufficient,[50] but the return may refer to an inventory or appraisement returned with the writ for the description.[51]

Excusable error of misdescription will not avoid the attachment, where from the appearance and use of the articles it is clear that the mistake was natural and in good faith,[52] or where the error was one of judgment as to quantity[53]

Return may be sufficient to confer jurisdiction where it shows that goods of defendant were attached under the writ in the state, although it is not definite as to the quantity or location of the goods.[54]

(b) In Case of Realty

The return should describe realty so that it may be easily identified. A description suitable to a deed is sufficient, but not always essential.

On an attachment of realty the return should describe the land with such precision that it may be readily identified[55] While there is respectable authority to the effect that the description should be as specific as that required in a deed,[56] and while such a description would unquestionably be sufficient in any case,[57] yet, inasmuch as the object of the attachment is merely to secure the jurisdiction of the court over the land until plaintiff establishes his claim, it would seem that the same certainty ought not to be required as when the title is divested.[58]

46. Baxter v. Rice, 21 Pick (Mass.) 197

47. N.H.—Dupont v. Moore, 166 A. 417, 86 N.H. 254
Vt.—Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47.
6 C.J. p. 252 note 92

"To give the officer constructive possession of the property attached, it was necessary that it be described in the return with reasonable certainty. And such certainty requires that the property be sufficiently pointed out to enable the debtor, and those with whom he may deal, to be informed that it is attached."—Humphrey v. Wheeler, supra.

Description held sufficient

A return disclosing that "forty car loads of staves" were attached and taken into possession by the sheriff is sufficient as respects the description of the property.—Daniels v. Taylor, 13 Ohio Cir.Ct.(N.S.) 116, 31 Ohio Cir.Ct. 611—6 C.J. p. 252 note 92 [a].

Description held insufficient

Return setting forth attachment of all shares, stocks, and bonds in a safety deposit box was insufficiently descriptive of property, the inconvenience of taking actual possession not dispensing with reasonable identification.—Dupont v. Moore, 166 A. 417, 86 N.H. 254—6 C.J. p. 252 note 92 [b].

48. Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47—6 C.J. p. 252 note 93

Location as in named town

The return, simply naming as attached "one spike tooth harrow," without giving its location more definitely than in a named town, was insufficient to create a lien.—Humphrey v. Wheeler, 101 A. 1018, 92 Vt. 47

49. Ahern v. Purnell, 25 A. 393, 62 Conn. 21

50. Harding v. Kansas City Guaranty L. & T. Co., 43 P. 835, 3 Kan. App. 519

51. Grebe v. Jones, 18 N.W. 81, 15 Neb. 312—6 C.J. p. 253 note 96

52. Briggs v. Mason, 31 Vt. 433—6 C.J. p. 253 note 97

53. Parker v. Williams, 1 A. 138, 77 Me. 418—6 C.J. p. 253 note 98.

54. Perry v. Griefen, 59 A. 601, 99 Me. 420

55. Hodgen v. Roy, 169 P. 1143, 102 Kan. 197—6 C.J. p. 253 note 1.

Descriptions held sufficient

(1) The return on an order of attachment describing land as northeast and northwest quarters of section 22 in township 7, range 38, was not void for indefiniteness or uncertainty.—Hodgen v. Roy, 169 P. 1143, 102 Kan. 197

(2) A return describing property attached as the undivided half interest of a named person in realty duly designated as to location and boundaries was sufficient.—Boone v. Evans, 31 S.W.(2d) 723, 235 Ky. 487

(3) Sheriff's return on an attachment writ, describing property as that of defendant at a specified city and in a designated county "16 acres out of T. & N. O. Ry. Survey 201 Abst. 696, property of defendant," did not insufficiently describe the property.—Lorenz v. Mingus State Bank, (Tex.Civ.App.) 60 S.W.(2d) 462.
6 C.J. p. 253 note 1 [b], [c], [g].

Description by metes and bounds

An attachment of realty by particular, instead of by general, description is not confined to parcels fraudulently conveyed, and the validity of an attachment was not impaired by the circumstance that the officer in his return described the realty by metes and bounds, and called it a "special attachment," although no third persons nor fraudulent conveyances were involved.—Cunningham v. Bright, 117 N.E. 909, 238 Mass. 385.

56. U.S.—Biggs v. Blue, (C.C.Ohio) 3 F.Cas.No.1,403, 5 McLean 148
Md.—Fitzhugh v. Hellen, 3 Harr. & J. 206
Mo.—Henry v. Mitchell, 32 Mo. 512.
6 C.J. p. 253 note 2.

57. Hays v. Bouthalier, 1 Mo. 346—6 C.J. p. 253 note 3.

58. Bradford Estate Co. v. Brown, 157 A. 874, 52 R.I. 103—6 C.J. p. 253 note 4.

"Weight of authority is to the effect that the description of the land in a writ of attachment need not be as specific as in a deed. As the object of the attachment is to secure control of the property until the suit is terminated, a description which affords means of identification is sufficient."—Bradford Estate Co. v. Brown, 157 A. 874, 875, 52 R.I. 103.

Return held sufficient

A sheriff's return on an attachment writ, describing attached lots as being on the northwesterly corner of certain streets, giving lot numbers on assessor's plats, was sufficient.—Bradford Estate Co. v. Brown, 157 A. 874, 52 R.I. 103—6 C.J. p. 253 note 4 [a].

Reference to other documents. The property may be described by reference to the inventory and appraisement,[59] the petition for attachment, where the land sought to be subjected is described therein,[60] or the public records of the county.[61]

c. Showing as to Defendant's Ownership

The return should show that the property seized was attached as that of defendant, although in some jurisdictions this is not essential to the validity of the levy or return.

It is unquestionably the better practice for the return to state that the property seized was attached as belonging to defendant,[62] and in some jurisdictions it is held necessary that the return should show, either by express statement or necessary intendment, that such was the case,[63] or that he had an interest or ownership therein,[64] although a failure of the return so to state may be remedied by amendment at the proper time.[65] In other jurisdictions, however, such a statement is held not essential to the validity of the levy or return.[66]

d. Showing as to Value

The better practice is to return the approximate value of the property attached

Although it has been held that the return need not, in the absence of any statutory requirement to that effect, contain a valuation of the property attached,[67] yet, inasmuch as it is the officer's duty to seize a sufficient amount to cover the claim sued on, it would seem not only to be proper but also the better practice that the return show the approximate value of the property taken.[68]

e. Signature and Verification

The return should be signed, but in the absence of statutory requirement it need not be verified.

The officer should, of course, sign the return;[69] but it has been held that an omission of the officer's signature[70] or a wrong signature[71] is a defect which may be corrected by amendment.

Unless required by statute the return need not be verified.[72]

§ 249. Defects, Objections, and Waiver

a. Defects and irregularities in general
b. Aider of defects

a. Defects and Irregularities in General

Mere irregularities will not invalidate the return, although defects warranting its quashal invalidate not only the return but the levy and attachment. Objections may not be raised in collateral proceedings where jurisdiction exists independently of attachment.

The return to an attachment will not be invalidated by a mere irregularity or defect in form which in no way affects the substance thereof.[73] Accordingly, a mere misstatement in a return,[74] or a failure to state all the facts connected with the levy,[75] will not of itself defeat the legal effect of the levy or affect the jurisdiction of the court. But it has been held that a return defective in omitting a special description of the estate attached, in connection with the usual requisites of a return, will be supplanted by subsequent attachments, the returns of which do comply with the statute.[76]

59. Schultz v. Stiner, 155 P 1073, 97 Kan 555, rehearing denied 157 P. 265, 98 Kan. 45—6 C.J p 254 note 5

60. Norfleet v. Hogan, 54 S W 713, 21 Ky.L 1200—6 C J p 254 note 6.

61. Duty v. Sprinkle, 60 S E. 882, 64 W Va. 39—6 C.J. p 254 note 7.

62. Hogue v. Corbit, 41 N E 219, 156 Ill 540, 47 Am S R. 232

63. McReynolds v Colclough, 92 S. E 206, 146 Ga. 696—Sharp v Hall, 88 S E 929, 145 Ga 171—Nix v. Citizens' Bank of Moultrie, 130 S. E 597, 34 Ga App 546—6 C J p 254 note 9.

Nonresident

"Where an attachment was sued out against a nonresident, and an entry of levy on realty was made by the sheriff, but he did not state in such entry that the property was levied on as that of the defendant, such levy was invalid and did not furnish a basis for a judgment against the property. . . . The fact that the sheriff included in his entry of levy the words, 'written notice given defendant,' was not sufficient to render the levy valid"—Sharp v Hall, 88 S E 929, 145 Ga 171—6 C J. p 254 note 9 [a]

64. Ga.—Tuells v. Torras, 39 S E 455, 113 Ga 691—Hiles Carver Co. v. King, 34 S E 353, 109 Ga 180
Mo.—Newton v. Strang, 48 Mo App 538
6 C J p 254 note 10

65. Ark.—Stout v. Brown, 40 S W 701, 64 Ark 96
Ky.—Mason v Anderson, 3 T B Mon 293
Mo.—Todd v Missouri Pac R Co, 33 Mo App 110

66. McLane v Kirby, 116 S W. 113, 54 Tex Civ App 113—6 C J. p 254 note 12

67. Childs v. Ham, 23 Me. 74

68. Barton v. Ferguson, 37 S W 49, 1 Ind T. 263—6 C J. p 255 note 14.

69. Ill.—Clymore v Williams, 77 Ill 618
Kan.—Wilkins v Tourtellott, 28 Kan. 825
6 C J p 255 note 15.

70. Ga.—Connolly v. Atlantic Contracting Co., 47 S E 575, 120 Ga. 213
Kan.—Wilkins v Tourtellott, 28 Kan. 825.
Mass.—Childs v. Barrows, 9 Metc 413

71. Kramer v Lilley, 118 S W 735, 55 Tex Civ App 339

72. Mechanics' Nat Bank v. Miners' Bank, 13 Wkly N C (Pa.) 515—6 C J p 255 note 19

73. Spangler v O'Shea, 3 So 378, 65 Miss 75—6 C J p 255 note 20

74. Buck-Reiner Co. v. McCoy, 52 N W 514, 85 Iowa 577—6 C J. p 255 note 21.

75. Stillman v. Hamer, 78 P 836, 70 Kan 469, 109 Am S R 465—6 C. J. p 255 note 22.

76. Owen v. Neveau, 128 Mass. 427—6 C J. p 255 note 23.

Where a return is unnecessary the rights of the attaching creditor cannot be affected by a failure to describe certain property which was actually seized [77]

The quashing of a return on account of defects contained therein is in effect a quashing of the levy and a release of the property taken thereunder.[78]

Where jurisdiction to render judgment is not dependent on attachment, one may not complain in a collateral proceeding of the insufficiency of the return [79]

b. Aider of Defects

(1) By extrinsic evidence
(2) By presumption
(3) By waiver
(4) By judgment

(1) By Extrinsic Evidence

Ordinarily, the return may be aided by parol where, and only where, it shows attachment of designated property

Where the return clearly shows that certain property was attached, the performance by the officer of certain acts in connection therewith may be shown by parol evidence,[80] or by facts appearing elsewhere in the proceeding,[81] and parol evidence may be admitted in aid of a return showing constructive levy.[82] Parol evidence, however, is not admissible to show what property was attached when the return does not in some manner designate the property.[83]

In an action on two replevin bonds given by the same parties for the recovery of the same attached property, it has been held competent for plaintiff to show, by extraneous evidence, to which writ each of the bonds applied, where such fact did not appear from the return on the writ.[84]

(2) By Presumption

A return irregular in some respects, but set forth in language sufficiently definite to justify an intendment of regularity, may be deemed sufficient to show compliance with statutory requirements on the basis of the presumption that the officer performed his duty; although such presumption is rebuttable and will not be indulged to aid a return obviously obscure or otherwise clearly insufficient.

Since, in the absence of a showing to the contrary, an officer is presumed to have done his duty, the courts in many instances will presume that the statute has been complied with, if the return, although informal in some respects, is set forth in language sufficiently definite to justify an intendment of regularity, and there is no affirmative evidence of an omission [85] Accordingly, it has been held that, where the return properly describes the property levied on, it will be presumed, although not expressly stated, that such property was attached as the property of defendant in attachment,[86] and an obscurity or irregularity in the date will be considered in connection with the date of the writ, and not understood as prior thereto [87] When, however, the obscurity of the return is such that its import cannot be ascertained with reasonable certainty, the court will not indulge in mere conjectural construction in order to make it effective;[88] and, where the statute requires a full return of all the officer's proceedings on or before the return day of the writ, it will not be presumed that he levied on any property other than that which he specified in the return.[89]

(3) By Waiver

Formal defects and irregularities in the return may be waived, but defects showing the levy to be void are not properly the subject of waiver.

Defendant in attachment waives any formal defects or irregularities in the return where he ap-

77. Central Trust Co of New York v. Worcester Cycle Mfg Co, (C C. Conn) 128 F. 482—6 C J. p 255 note 24.

78. Currens v. Ratcliffe, 9 Iowa 309.

79. Lorens v. Mingus State Bank, (Tex Civ App) 60 S W (2d) 462.

Suit to restrain sale on foreclosure of attachment

In a suit to restrain a sale of property on a foreclosure of an attachment lien, plaintiff was not entitled to complain of the officer's return of attachment where jurisdiction to render judgment was not dependent on the attachment—Lorens v Mingus State Bank, (Tex Civ.App.) 60 S W.(2d) 462.

80. Sinsheimer v. Whitley, 43 P. 1109, 111 Cal 378, 52 Am S R 192—6 C J p 256 note 26

81. Grebe v Jones, 18 N W. 81, 15 Neb 312—6 C J p 256 note 27.

82. Walters v. Bank of America Nat. Trust & Savings Ass'n, (Cal App) 44 P (2d) 601.

Service on bank

Where the sheriff's return showed that service of attachment was made on a bank by delivering a copy to the assistant cashier personally, parol evidence was admissible to show the duties of the assistant cashier, as a basis for showing that he was an officer, within code provisions permitting levy by leaving a copy of the written notice with "the manager or any other officer" of a banking corporation or association.—Walters v. Bank of America Nat. Trust & Savings Ass'n, (Cal App) 44 P.(2d) 601.

83. Sanford v Pond, 37 Conn 583—6 C.J p 256 note 29

84. McManus v. Donohue, 56 N E. 291, 175 Mass 308

85. Boyd v. King, 36 N J Law 134—6 C J p 256 note 31

86. Horton v. Monroe, 57 N W. 109, 98 Mich. 195—6 C J. p 257 note 32.

87. Millett v. Blake, 18 A. 293, 81 Me. 531, 10 Am S.R. 275

88. Me—Hathaway v. Larrabee, 27 Me. 449
Nev—Long v. Tighe, 133 P. 60, 36 Nev. 129.
6 C.J. p 257 note 34.

89. Phillips v. Harvey, 50 Miss. 439.

pears generally,[90] and admits the fact of levy in his answer[91] or by reading an amended return in support of his motion to vacate the attachment in the trial court.[92]

An intervener who consents to the property remaining in the custody of the attaching officer, and who joins in a delivery bond for it, waives the irregularities in a return affecting the validity of the levy.[93]

A vendee who sues for the recovery of property attached as the vendor's before the date at which the writ is returnable cannot subsequently avail himself of a defect in the return.[94]

Where the levy is void for failure of the return to show that the sheriff went on the land and there declared a levy, as required by the statute, such defect is not waived by defendant's failure to urge the objection, and a subsequent lienholder may raise it.[95]

(4) By Judgment

Defects in a return may be cured by recitals in the judgment.

Defects in the description of attached property contained in the return may, it has been held, be cured by a judgment which contains a full and proper description.[96]

§ 250. Amendment

a. In general
b. Time of amendment
c. Notice to adverse party
d. Effect of amendment

a. In General

The return may be amended to show the real facts; although the right to amendment is restricted to cases wherein the steps essential to a valid attachment have been taken but error in detailing them has supervened.

The return to a writ of attachment, as well as the inventory, may be amended so as to show the real facts[97]

The officer may amend without leave of court where he acts in time, as will be explained in subsection b of this section; or in a proper case amendment of the return may be made pursuant to leave of court Thus, it is within the power of the court to allow the officer to amend his return,[98] and leave to make an amendment may be granted on the application of either the officer or an interested party.[99] Such leave will be granted, however, only where the return as amended shows legal service,[1] and then only where there is sufficient on record to enable the court reasonably to infer that the amendment is in accord with the facts,[2] and merely affects the evidence, and not

90. Ill.—Leopold v. Steel, 41 Ill App 17.
Wis.—Williams v. Stewart, 3 Wis 773.
6 C J. p 257 note 36

91. Ky.—Buffington v Mosby, 34 S W 704, 17 Ky L 1307
Tenn.—Young v South Tredegar Iron Co, 2 S W. 202, 85 Tenn 189, 4 Am S R 752

92. Stewart v. Houston, 25 Ark 311.

93. J I. Case Threshing Mach Co v Merrill, 27 N W. 742, 68 Iowa 540

94. Judd v Langdon, 5 Vt 231.

95. People's Bank v West, 7 So 513, 67 Miss 739, 8 L R A 727

96. Richardson v. Carr, 171 P. 476, 68 Okl 46

97. Del.—Gibson v Gillespie, 138 A 600, 3 W W Harr 381
Ga.—McDonald v. W. W. Kimball Co., 86 S E 234, 144 Ga 105.
Kan.—Larimore v Parker, 168 P. 359, 101 Kan. 729.
Or.—Palmer-Haworth Logging Co v Henderson, 174 P 531, 90 Or 192
Pa.—Locey v Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa.Super 148
6 C J p 257 note 42.

Amendment "is a common-law right, and does not depend upon statutory authority."—Palmer-Haworth Logging Co v Henderson, 174 P. 531, 533, 90 Or 192

Clerical errors

In fraudulent debtor's attachment proceeding, a clerical error in the sheriff's return was amendable in accordance with the facts.—Locey v Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super. 148.—6 C J p 257 note 42 [e].

Description of property

(1) Where a sheriff's return to an order of attachment showed a levy, and a return to defendant on giving of forthcoming bond, but omitted to describe the property, an amendment should have been allowed for that purpose.—Larimore v. Parker, 168 P 359, 101 Kan 729.

(2) Where the resident agent of a corporation, at the time of the sheriff's attaching of the shares of stock of defendant in such corporation, gave a certificate showing that defendant owned seventy-six thousand six hundred ninety-three shares of stock, whereas transfer sheets received thereafter for use in making up a duplicate stock ledger showed that defendant at the time of the attachment owned only sixty-one thousand five hundred ninety-six shares of stock, it was held that the sheriff was entitled to leave to amend his return to show the true number of shares owned and the numbers of the certificates.—Gibson v Gillespie, 138 A. 600, 3 W W Harr. (Del.) 381

Failure to recite defendant's interest

(1) "If the entry of levy by the levying officer was defective on account of a failure to recite the interest of the defendant in the property seized by him, the entry was amendable."—McDonald v W W. Kimball Co, 86 S E 234, 235, 144 Ga. 105

(2) Where the court has acquired jurisdiction in an attachment proceeding against a nonresident, it is proper to permit amendment of the entry of levy and return, so as to show defendant's interest in the property levied on.—Hendricks v. Georgia Fertilizer Co., 149 S E. 711, 40 Ga App. 427.

98. Harding v. Riley, 63 N E 883, 181 Mass. 334.—6 C J. p 258 note 45.

99. Swift v. Hawkens, 69 A 620, 103 Me 371.—6 C J p 258 note 46.

1. Mich.—Reynolds v. Marquette Cir Judge, 84 N W 628, 125 Mich. 445.
Ohio.—Ford v. Wilson, Tapp 274
R I.—Sheldon v. Comstock, 3 R I 34.

2. Fairfield v. Paine, 23 Me 493, 41 Am D 357.—6 C J. p 258 note 48.

the fact, of service.[3] In other words, amendments in the return can be allowed only where all the steps to be pursued have been taken, but some error in detailing them has supervened,[4] and amendment will be denied where the steps essential to a valid attachment have not been taken so that the proposed amendment would not make the return accord with the actual facts.[5]

Statutes expressly permitting amendment. Statutes providing that in attachment cases the levying officer shall have the right to amend his return by supplying any omissions or errors, and that the court before which the attachment shall be returned shall have power to order amendment, are remedial in their nature and should be liberally construed.[6]

Amendment which would release the property attached and included within the original return should not be allowed.[7]

b. Time of Amendment

(1) In general
(2) After expiration of officer's term
(3) After intervention of rights of third persons

(1) In General

An amendment of a return should be made in apt time, and what is apt time will, ordinarily, rest in the sound discretion of the trial court as exercised under the circumstances of the particular case

Generally speaking, after the court has acquired jurisdiction in attachment, the return may be amended either at the return term or at the trial term and before judgment.[8]

While it has been held that an officer has an absolute right to amend his return, to conform to the facts, at any time before the cause is submitted to the jury,[9] the better rule seems to be that he can amend without leave of the court only before the return becomes a part of the record, and after that time leave of court must be obtained.[10] By leave of court the return may, it has been held, be amended after the return day,[11] after verdict,[12] before or after judgment, in the trial court's discretion,[13] or after an appeal has been taken.[14]

Thus, the mere fact that a considerable length of time has elapsed,[15] that the suit has been begun,[16] or that a judgment has been rendered[17] will not itself preclude an amendment of the return in attachment; but an officer should not be permitted to amend his return on a writ of attachment after the lapse of a considerable time, where he trusts merely to memory, and the amendment will add to his return a statement which, if untrue, cannot be disproved, and is, as to a fact, not likely to have impressed his memory.[18]

(2) After Expiration of Officer's Term

By leave of court an attaching officer may amend his return after expiration of his term of office.

The fact that the term of office of the officer who executed and returned a writ of attachment has expired will not as a rule prevent the court's exercising its discretion in allowing an amendment of the return.[19]

(3) After Intervention of Rights of Third Persons

Generally speaking, the return may not be amended after the rights of innocent third persons have intervened.

As a rule, an amendment of a return to a writ of attachment cannot be permitted where the rights

3. Kan—Wilkins v. Tourtellott, 28 Kan 825
Mass—Downs v Flanders, 22 N E 585, 150 Mass 92.
6 C J p 258 note 49

4. Safford v Morris Metal Products Co, 121 A 885, 99 Conn 372

5. Safford v. Morris Metal Products Co, supra.

Proper basis for amendment not shown

Where a deputy sheriff, with intent to attach the entire mechanical equipment of a company, placed a keeper over the plant until bond was given, but failed to make any inventory of the equipment except the contents of a particular storeroom, and did not serve any inventory on defendant, as required, or include any in his return except that of the storeroom, it was held that there had not been a valid attachment of the company's equipment, and that permission to amend his return so as to include therein the inventory of the entire plant was properly denied—Safford v Morris Metal Products Co, 121 A 885, 99 Conn 372

6. Hendricks v Georgia Fertilizer Co, 149 S E 711, 40 Ga App 427.

7. Mass—Williams v. Brackett, 8 Mass 240
Neb—Griffith v Short, 15 N W. 335, 14 Neb 259

8. Hendricks v Georgia Fertilizer Co, 149 S E 711, 40 Ga App 427

9. Md—O'Connell v Ackerman, 62 Md 337—Main v. Lynch, 54 Md. 658
N J—Cord v Newlin, 59 A. 22, 71 N J Law 438

10. Watson v Toms, 4 N W. 304, 42 Mich 561—6 C J p 258 note 44.

11. Mehalick v. Tomshe, 28 Pa Dist. 874.

12. Harding v Riley, 63 N E 883, 181 Mass 334

13. Chaffee v. Runkel, etc., Co., 77 N W 583, 11 S D 333

14. Tennent-Stribbling Shoe Co v. Hargardine-McKittrick Dry Goods Co, 58 Ill App. 368

15. Hutchins v. Brown, 4 Harr & M (Md) 498—6 C J p 259 note 52.

16. Cassidy Bros Commn Co. v. Estep, 63 Mo App 540

17. Ill—Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick Dry Goods Co, 58 Ill App. 368.
Ky—Mason v. Anderson, 3 T.B Mon. 293
6 C J p 259 note 54.

18. Gregor Grocer Co. v. Carlson, 67 Mo App. 179.

19. Larimore v Parker, 197 P. 1118, 109 Kan. 66—6 C J. p 259 note 51.

of innocent third persons, acquired previous thereto, would be injuriously affected thereby;[20] but the mere fact that defendant has made a voluntary assignment for the benefit of creditors will not preclude a subsequent amendment of the return, since the assignee takes subject to existing equities.[21]

c. Notice to Adverse Party

Notice of a proposed amendment should be given where jurisdiction would be affected or where extrinsic evidence forms the basis of amendment.

Notice of a proposed amendment of the return must be given to the parties who would be affected thereby where the amendment would affect the jurisdiction,[22] or where the record does not furnish the necessary data for the amendment and an extrinsic showing is required.[23]

d. Effect of Amendment

An amended return replaces the imperfect one, and relates back to the date of the original unless the rights of innocent third persons intervene. An unnecessary amendment is mere surplusage barren of effect.

The amended return takes the place of the imperfect one,[24] and, as a rule, the amendment relates back to the time of the original return,[25] although it will not do so to the injury of the intervening rights of an innocent third person.[26]

Amendments not necessary to the validity of the return are merely surplusage, and the time of such amendments does not affect the date as of which the attachment became a lien, which question is controlled by the date of the original and valid return and not that of the unnecessary amendment.[27]

§ 251. Recording

a. Necessity
b. Place of recording
c. Sufficiency of copy or record
d. Effect of filing or record

a. Necessity

Broadly speaking, an unrecorded attachment return is good as between the parties, but not as against subsequent innocent purchasers or creditors.

Where the statute so requires, a copy of the writ and descriptive part of the return must be recorded, in case of the attachment of realty or bulky personalty, as an essential to the creation and preservation of the attachment lien,[28] at least as against subsequent purchasers,[29] or subsequent attaching creditors.[30]

In any event, compliance with statutory requirements as to recording is necessary only to the creation of the lien,[31] an unrecorded attachment is valid between the parties, and as against all other persons except subsequent attaching creditors or subsequent purchasers in good faith and for value,[32] and an attachment is not invalidated as against defendant by failure to return a copy of the writ with the levy indorsed thereon to the county clerk for registration as required by the statute.[33] It has also been held that the officer is not bound to file the writ or a copy thereof with the clerk.[34]

b. Place of Recording

To be effective, the return should be recorded at the place designated by statute.

The return must be filed and recorded at the place prescribed by the statute,[35] and a recording

20. Pacific Postal Tel Cable Co v Fleischner, (Or) 66 F 899, 14 C C A. 166, affirming (C C) 55 F 733

21. Pond v Campbell, 56 Vt 674

22. Haynes v Knowles, 36 Mich. 407—6 C J p 259 note 58.

23. Cochrane v Johnson, 54 N W. 707, 95 Mich. 67.

24. Colo.—Bishop v Poundstone, 52 P 222, 11 Colo App 73.
Mo.—Buller v. Woods, 43 Mo App. 494.
6 C.J p 259 note 60.

25. Fleischner v. Pacific Postal Tel. Cable Co., (C C Or) 55 F. 733, modified on other grounds 66 F. 899, 14 C.C A. 166—6 C J. p 259 note 61.

26. Hendricks v. Shaw, 159 N E 620, 262 Mass. 284—6 C.J. p 259 note 61 [b]

Intervening attachment creditor

Motion to amend an attachment return will not relate back to the original attachment, so as to deprive the intervening attachment creditor of her rights—Hendricks v. Shaw, 159 N E 620, 262 Mass 284.

27. Weirick v Mansfield Lumber Co, 117 N E 362, 96 Ohio St 336

28. Blodgett v. Huiscamp, 21 N.W. 25, 64 Iowa 548—6 C J. p 259 note 63

29. Davis Sewing Mach Co v Whitney, 28 N W 674, 61 Mich 513—6 C.J. p 259 note 64.

30. In re Lyon Carpet Co, (D C. Mass.) 25 F.(2d) 509—6 C.J. p 259 note 64.

Subsequent creditor with knowledge

"A subsequent attaching creditor prevails over a prior unrecorded attachment, even though he has actual knowledge thereof"—In re Lyon Carpet Co., (D C Mass) 25 F (2d) 509, 512.

31. Evans v. Aldridge, 45 S E. 773, 133 N.C 378—6 C J. p 260 note 65.

32. In re Lyon Carpet Co., (D C. Mass) 25 F (2d) 509.

33. Woldert v. Nedderhut Packing Provision Co, 46 S W. 378, 18 Tex. Civ App 602.

34. Goodnow v Willard, 5 Metc. (Mass) 517—Cheshire v Briggs, 2 Metc (Mass) 436—6 C J. p 260 note 67.

35. Benjamin v Davis, 36 N.W 717, 73 Iowa 715—6 C J p 260 note 70.

Statute construed as permitting record in county other than that where suit is pending

Although not directly authorizing it, Vernon's Sayles Civ St Annot. (1914) art 6858, providing for record of attachment in the county where the land is located, impliedly authorizes the sheriff to certify a copy of the writ of attachment levied in a county other than that in which suit was pending—Farmers' Nat Bank v. Collis, (Tex Civ App.) 197 S W. 782, error refused.

at a place other than that specified is a nullity.[36]

Docket in which recorded. Statutes governing record of an attachment levy by the court clerk have been held in pari materia with statutes relating to lis pendens, so that such statutes should be construed together,[37] and under such a construction it has been held that an attachment recorded in the judgment docket and indexed is a lien on the property attached, although a lis pendens was never filed in a separate book labeled as such.[38]

c. Sufficiency of Copy or Record

The copy placed on the record should designate the parties, describe the property attached, show its ownership, correspond with the original in all material respects, and, generally, should comply with applicable statutory provisions.

The copy placed on the record should designate the parties,[39] and contain a description of the property sufficient to identify it[40] and show the ownership thereof.[41] Where the property attached is personalty, the record need not expressly state that it is too bulky to be removed,[42] at least where the description clearly shows that such is the case.[43] Where the copy varies from the original in an unimportant detail, the defect is not fatal,[44] but where it materially varies from the original,[45] or where the copy is such that the original, if like it, would be altogether void,[46] it will not constitute notice. Where the statute requires the officer to file a statement of the sum sued for, a mere statement of the ad damnum of the writ is insufficient,[47] although if the amount claimed exceeds the ad damnum, such a statement would, it seems, be sufficient.[48] Where the statute requires a statement of the "value of defendant's property," filing a statement of the "sum sued for" is insufficient.[49] The copy filed must be duly attested where so required by statute.[50]

d. Effect of Filing or Record

Recording is designed to afford notice of attachment to third persons.

The purpose of the recording is to give the public notice of the attachment,[51] and, where it is the duty of the clerk to make the proper entry, it has been held that the constructive notice is complete when the copy is entered in the proper book, although the entry is not indexed.[52] Where the statute merely requires the officer to leave a copy with the clerk, it would seem that constructive notice is complete when the copy is so left, although the clerk neglects to record it, or makes an insufficient record thereof.[53] It has been held that the rights of a subsequent lienor without notice of the attachment prevail over an attachment levied and filed for record before such lienor's rights arose but actually recorded by the clerk after such rights arose, the theory of the decision being that the lien of the attachment did not arise until actual recording was completed,[54] although other authority is to the effect that when the original attaching creditor has done all that the law

36. In re Lyon Carpet Co., (D C Mass.) 25 F (2d) 509—6 C J. p 260 note 71.

Realty

Where the statute requires an attachment of realty to be recorded in the district where the land lies, filing the attachment in a different district within the same county is ineffectual and does not constitute a recording in compliance with the statute—In re Lyon Carpet Co., (D C Mass.) 25 F (2d) 509.

37. Pierce v Mallard, 150 S E. 342, 197 N C 679.

38. Pierce v. Mallard, supra.

39. Me—Poor v. Chapin, 54 A. 753, 97 Me. 295.
Or—McDowell v. Parry, 76 P. 1081, 45 Or. 99.
6 C J. p 260 note 72.

Sufficiency of indexing

Under Vernon's Sayles Civ.St Annot (1914) art 6858, where the clerk duly indexed the names of several parties to suit wherein land was attached, it was held that the record was sufficient, although the heading of the writ when filed did not recite the names of some of the parties, the name of defendant whose land was attached being given—Farmers' Nat Bank v. Collis, (Tex Civ App.) 197 S. W. 782, error refused

40. Bryant v Osgood, 52 N H. 182—6 C J p 260 note 73

Description of realty held sufficient

The description of the land levied on, as noted in incumbrance book, reading "S E ¼ of section 8-91-38 in Buena Vista county, Iowa," was sufficient under Code (1897) § 3899, in view of § 3933, which expressly calls for liberality of construction, the figures referring to base line and meridian line fixed by law—First Nat Bank v. Kindwall, 206 N W. 241, 201 Iowa 82

41. Ga—Albright Pryor Co. v Pacific Selling Co., 55 S E 251, 126 Ga. 498, 115 Am S.R 108
Me—Shaw v O'Brion, 69 Me. 501.
6 C J p 261 note 74.

42. Brogan v McEachern, 68 A. 822, 103 Me. 198.

43. Davis v. Leary, 59 N E 191, 177 Mass. 526—6 C J. p 261 note 76.

44. Me—Lewiston Steam-Mill Co. v. Foss, 18 A. 288, 81 Me. 593.

Vt—Huntington v. Cobleigh, 5 Vt. 49.

Mistake in name of defendant.—Lewiston Steam-Mill Co. v. Foss, 18 A 288, 81 Me 593

45. Collier v. French, 21 N W. 90, 64 Iowa 577—6 C J. p 261 note 78

46. Herring v. Harmon, cited in Huntington v. Cobleigh, 5 Vt. 49, 56

47. Nash v. Whitney, 39 Me. 341

48. Lincoln v. Strickland, 51 Me. 321—6 C J. p 261 note 81.

49. Farrin v. Rowse, 52 Me. 409.

50. Farrin v. Rowse, supra

51. Me—Lincoln v. Strickland, 51 Me. 321.
Minn.—Arper v. Baze, 9 Minn. 108.
6 C.J. p 261 note 84.

52. Blodgett v. Huiscamp, 21 N W. 25, 64 Iowa 548.

53. Mass—Sykes v. Keating, 118 Mass 517.
Vt—Braley v. French, 28 Vt. 546.
6 C J p 261 note 87.

54. City Nat. Bank of Corpus Christi v. Craig, (Civ App.) 233 S W. 631, affirmed 257 S.W. 210, 113 Tex. 375.

requires of him, failure of the clerk to record the certificate will not invalidate an attachment of realty, even as against a subsequent purchaser for value and without notice.[55]

As bearing on possession or right to possession. Where an officer has attached personal property on a writ, and has filed an attested copy of his return with the town clerk under the statute, he does not deprive himself of the right to gain actual possession of the property attached and to remove it when necessary for its preservation, and as such filing is merely one mode of preserving an attachment already made, it does not follow therefrom that the officer has not taken possession of the property.[56]

Copy of attachment on file as evidence. In a collateral proceeding a party cannot prove the existence of his attachment lien by means of a copy of the attachment on file in the office of the register of deeds, but must offer the original attachment in evidence.[57]

§ 252. Operation and Effect of Return

a. As evidence generally
b. Persons and matters concluded
c. Construction of return

a. As Evidence Generally

The return is competent evidence and prima facie proof of the facts recited therein, although subject to impeachment.

The return to a writ of attachment is competent evidence to prove the fact and manner of the levy[58] and the nature of the property taken thereunder,[59] and is at least prima facie evidence of the facts recited therein,[60] although it is subject to impeachment.[61]

When levy made subject to other levies. The return of an officer, that he made the attachment subject to other attachments, is evidence of the order in which the writs were served,[62] but is by no means conclusive as to the validity of a former levy.[63]

b. Persons and Matters Concluded

(1) Persons
(2) Matters

(1) Persons

(a) Parties or privies
(b) Levying officer
(c) Strangers

(a) Parties or Privies

Subject to certain qualifications, it may be stated as a general rule that the return to a writ of attachment is conclusive on the parties and their privies.

As a general rule, the return of the officer to a writ of attachment is conclusive as to the parties to the proceeding and those claiming under them, and cannot be contradicted by them[64] in any collateral manner[65] for the purpose of invalidating the officer's proceedings,[66] defeating any rights acquired thereunder,[67] or avoiding a liability fixed on a party thereby.[68] This rule is not, however, universal; but the limits within which it is applicable are distinctly marked by the reason and object of it,[69] and there are many cases, to be found in

55. Butchers' Ice & Supply Co. v Bascom, 146 A 843, 109 Conn 433
56. Kelley v Tarbox, 66 A. 9, 102 Me. 119.
57. Stanhilber v. Graves, 73 N W 43, 97 Wis 515
58. Kelley v. Tarbox, 66 A 9, 102 Me. 119—6 C J p 261 note 91
59. Mass—Polley v. Lenox Iron Works, 4 Allen 329
W Va—Pocahontas Wholesale Grocery Co v. Gillespie, 60 S.E 597, 63 W Va 578.
6 C J p 262 note 92.
60. Conn—Manghue v. Reaney, 122 A 566, 99 Conn. 662
Tex—First Nat Bank of Littlefield v. Cooper, (Civ.App.) 12 S.W.(2d) 271
6 C.J. p 262 note 93.
61. American Fruit Growers v. Walmstad, 260 P. 168, 44 Idaho 786.
62. Thurston v. Huntington, 17 N. H. 438
63. National Wall-Paper Co. v. Fourth Nat. Bank, (Tenn Ch A) 51 S W. 1002—6 C J p 262 note 95
64. Ala—Landers v. Moore, 106 So 223, 21 Ala App 12, certiorari denied Ex parte Landers, 106 So 225, 214 Ala 20
Mass—Putnam v Handy, 142 N E 77, 247 Mass. 406
Tex—First Nat Bank v Cooper, (Civ App) 12 S W (2d) 271.
6 C J p 262 notes 96, 97.

Purchaser with notice
"A purchase of the property from the defendant subsequent to the levy, with notice, would constitute such purchaser a privy of the defendant, within the meaning of the rule that the sheriff's return is conclusive evidence of the seizure of the property by the sheriff under the writ"—Landers v. Moore, 106 So 223, 224, 21 Ala 12, certiorari denied Ex parte Landers, 106 So 225, 214 Ala. 20.

In the absence of fraud, an officer's return on an attachment as between the parties and their privies is conclusive as to all matters which are properly the subject of a return by him—Putnam v Handy, 142 N E 77, 247 Mass. 406—6 C J. p 262 note 96 [h]
65. Mich.—Hewitt v. Durant, 44 N. W 318, 78 Mich 186
Tex—Schneider v. Ferguson, 14 S W 154, 77 Tex 572
6 C J. p 264 note 98.
66. Ala—Governor v. Bancroft, 16 Ala 605
N H—Messer v. Bailey, 31 N.H. 9—Lewis v Blair, 1 N H. 68
67. U S—Cary Brick Co. v Tilton, (N H) 208 F 497, 125 C C A 499
Ala—Governor v. Bancroft, 16 Ala. 605.
N H—Wendell v. Mugridge, 19 N H 109—Lewis v Blair, 1 N H 68
68. Governor v. Bancroft, 16 Ala 605.
69. Ala—Governor v. Bancroft, supra.
N H—Lewis v Blair, 1 N.H 68.
6 C.J. p 264 notes 3, 4.

the books, where it has been held not to apply,[70] as in the case of matters not truly tending to impeach the return.[71]

(b) Levying Officer

Generally speaking, an officer's return to a writ of attachment is conclusive against him as to matters of fact recited therein but it is not conclusive in his favor.

The return is generally held conclusive against the officer by whom it was made,[72] and cannot be contradicted by him;[73] but this rule is not universal,[74] and does not apply to statements which are mere matters of opinion,[75] nor preclude the officer from proving facts dehors his return and not inconsistent therewith.[76] The return is not conclusive in favor of the attaching officer,[77] although an impeachment will not be allowed where the impeaching evidence would be immaterial.[78]

(c) Strangers

Against strangers the return constitutes only prima facie evidence.

As a general rule, the return of the levying officer is at most prima facie evidence only, and not conclusive as against strangers.[79]

(2) Matters

(a) Quantity of goods seized
(b) Ownership of property
(c) Value of property
(d) Matters not necessary to be returned

(a) Quantity of Goods Seized

Return recitals respecting quantities attached are not conclusive

A sheriff's return is not conclusive as to the quantity of goods seized under the attachment.[80]

(b) Ownership of Property

The return affords prima facie, but impeachable, proof of ownership.

The return of the attaching officer is not conclusive on anyone as to the ownership of the property attached,[81] and while as against the officer it furnishes prima facie proof of ownership,[82] the officer may show that the property levied on and returned as that of the debtor was not in fact the property of the debtor.[83]

(c) Value of Property

The return is merely prima facie evidence of value.

An officer's return is admissible as prima facie evidence of the value of the property attached, but is not conclusive on either the officer or the parties to the action and their privies, and is subject to be overcome by parol evidence of a different value.[84]

70. Ala.—Governor v. Bancroft, 16 Ala. 605
Kan.—Schwartzberg v. Central Ave State Bank, 115 P. 110, 84 Kan. 531.
N.H.—Lewis v. Blair, 1 N.H. 68.
6 C.J. p. 264 note 5

71. Ex parte Landers, 106 So. 225, 214 Ala. 20, denying certiorari Landers v. Moore, 106 So. 223, 21 Ala. App. 12

Abandonment of levy

The purchaser of property after levy of execution thereon, although in privy with defendant and concluded by sheriff's return, may show by parol that the levy was abandoned and the lien lost before he acquired the property, such testimony not tending to impeach the return.—Ex parte Landers, 106 So. 225, 214 Ala. 20, denying certiorari Landers v. Moore, 106 So. 223, 21 Ala. App. 12

72. State v. Penner, 6 N.W. 790, 27 Minn. 269.—6 C.J. p. 264 note 6.

73. Haynes v. Small, 22 Me. 14.—6 C.J. p. 264 note 7.

74. Manghue v. Reaney, 122 A. 566, 99 Conn. 662.—6 C.J. p. 265 note 8.

Conclusive only in absence of contrary evidence

Although a recital as to ownership is prima facie evidence of the fact and becomes conclusive in the absence of countervailing evidence, the officer may, in a suit against him, introduce evidence to controvert such prima facie proof.—Manghue v. Reaney, 122 A. 566, 99 Conn. 662.

75. Ala.—Governor v. Bancroft, 16 Ala. 605
Conn.—Williams v. Cheesebrough, 4 Conn. 356
N.H.—Kittredge v. Bellows, 4 N.H. 424
N.Y.—Denton v. Livingston, 9 Johns. 96, 6 Am.D. 264

76. Townsend v. Newell, 14 Pick. (Mass.) 332.—6 C.J. p. 265 note 10.

77. Conn.—Buckingham v. Osborne, 44 Conn. 133
Me.—Waterhouse v. Smith, 22 Me. 337.—Nichols v. Patten, 18 Me. 231, 35 Am.D. 713.
Mass.—Merrill v. Sawyer, 8 Pick. 397.
N.H.—Angier v. Ash, 26 N.H. 99.
6 C.J. p. 265 note 11.

78. Dickinson v. Lovell, 35 N.H. 9.—6 C.J. p. 265 note 12

79. Landers v. Moore, 106 So. 223, 21 Ala. App. 12, certiorari denied Ex parte Landers, 106 So. 225, 214 Ala. 20.—6 C.J. p. 266 note 13

80. La Follett v. Mitchell, 69 P. 916, 42 Or. 465, 95 Am.S.R. 780.—6 C.J. p. 266 note 14.

Enumeration of the articles attached in the sheriff's return to a writ of attachment is not conclusive against him in an action by the owner of the property to recover damages for the taking of such articles.—Baker v. Seavey, 40 N.E. 863, 163 Mass. 522, 47 Am.S.R. 475.

81. Haynes v. Small, 22 Me. 14.

82. Manghue v. Reaney, 122 A. 566, 99 Conn. 662.

Absence of controverting evidence

In an action to recover damages for the default of an officer in the service of mesne process, in which it was claimed that the officer attached certain described property as the property of defendant and took it into his possession and thereafter returned the writ of execution with indorsement that he was unable to get property to satisfy the writ, the recital in the officer's return as to defendant's ownership of the attached property was prima facie evidence of defendant's ownership, and became conclusive proof thereof in the absence of controverting evidence.—Manghue v. Reaney, 122 A. 566, 99 Conn. 662.

83. Governor v. Bancroft, 16 Ala. 605.—6 C.J. p. 266 note 16

84. Foster v. Wooley, 220 P. 933, 93 Okl. 53.—Correll v. Morgan, 174 P. 509, 70 Okl. 295.—6 C.J. p. 266 notes 17-21.

(d) Matters Not Necessary to Be Returned

The return is not conclusive as to recitals of unnecessary facts.

The return of any collateral fact not necessary to be returned in order to render the proceedings valid is not conclusive on the officer or the parties, but may be traversed,[85] and accordingly, an unnecessary recital of facts and circumstances attending the levy may be contradicted.[86]

c. Construction of Return

Returns have been held subject to a rule of strict construction.

It has been held that the return on an attachment should be strictly construed.[87]

§ 253. Effect of Failure to Make Return

Failure to make return excludes the property from legal custody and renders the attaching officer a trespasser; although such failure creates no presumption against service of the writ, and lack of proper return does not discharge the lien.

The officer becomes a trespasser ab initio when he fails to return the writ under which he levied on and seized property,[88] but the failure to return an attachment has been held to afford no presumption that it has not been served, so as to justify the court in issuing a second attachment.[89] Return of attachment being necessary to make it lawful ab initio, the property attached in the absence of return cannot be regarded as in custodia legis during the life of the writ.[90] It has been held, however, that the lien is not discharged by the failure to make a proper return.[91]

VIII. CREATION, NATURE, AND DURATION OF LIEN, AND PRIORITIES

§ 254. Creation and Existence of Lien

A valid attachment creates a lien on the property attached.

An attachment creates a lien or encumbrance on the property attached,[92] especially when levied on the property and certainly after it is carried into a decree,[93] which lien is perfected when the at-

Prima facie case of value shown

Where, in an action against a sheriff, plaintiff introduces the sheriff's return of the writ of attachment, reciting that he levied on certain property of the judgment debtor and swore two householders to appraise its value, and the value is so found and determined by the householders, a prima facie case of the value of the property at the time of the levy is presented.—Foster v. Wooley, 220 P 938, 93 Okl. 53.

Parol evidence overcoming return

An officer's return as to the value of the property attached may be overcome by parol evidence of a different value.—Correll v Morgan, 174 P 509, 70 Okl 295

85. Citizens' Nat. Bank v Loomis, 69 N.W. 443, 100 Iowa 266, 62 Am S.R. 571—6 C.J. p 266 note 22.

86. Pomroy v Parmlee, 9 Iowa 140, 74 Am.D 328.

87. Campbell v Tucker, 154 So. 825, 228 Ala 658, denying certiorari (App.) 154 So. 821.

Particular returns construed

(1) A sheriff's return showing summons on a garnishee to answer at a stated term was held a return to a writ of attachment.—State ex rel Rabiste v Southern, 254 S.W. 166, 300 Mo 417.

(2) A return stating that the premises where the property was were locked up and that the marshal was unable to obtain admission, overcomes the statement that he attached and took the property into his custody.—Davidoff v Chipornoi, 166 N.Y.S. 996, 101 Misc. 291.

88. Conn.—Williams v. Ives, 25 Conn 568
Mass.—Wiggin v. Atkins, 136 Mass 292

89. Baldwin v. Wright, 3 Gill (Md.) 241.

90. Mitchell v. Pierce, 86 A. 748, 86 Vt. 514

91. Cal.—Ritter v. Scannell, 11 Cal. 238, 70 Am.D. 775
Minn.—Cousins v. Alworth, 47 N.W. 169, 44 Minn 505, 10 L.R.A. 504

92. U.S.—Peck v. Jenness, (N.H.) 7 How. 612—The American, (D.C. Mass.) 40 F.(2d) 942—In re Blair, (D.C.Mass.) 108 F. 529.
Cal.—Bank of South San Francisco v Pike, 200 P. 752, 53 Cal.App. 524
Idaho.—Potlatch Lumber Co v Runkle, 101 P. 396, 16 Idaho 192, 23 L.R.A.(N.S.) 536, 18 Ann.Cas. 591
Ill.—Bigelow v. Andress, 31 Ill. 322
Me.—McInnes v McKay, 141 A. 699, 127 Me 110, affirmed McKay v McInnes, 49 S.Ct. 344, 279 U.S. 820, 73 L.Ed. 975
Md.—Union Trust Co v. Biggs, 137 A. 509, 153 Md. 50
Mass.—Davenport v. Tilton, 10 Metc. 320
Miss.—Cogburn v. Pollock, 54 Miss. 639.
Mont.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486—Short v Karnop, 275 P. 278, 84 Mont. 276—National Bank of Montana v. First Nat. Bank, 228 P. 80, 71 Mont 242
Neb.—Coulson v Galtsman, 96 N.W. 349, 1 Neb.(Unoff.) 502
N.H.—Stone v. Anderson, 26 N.H. 506.
Or.—Jones v. Beers, 246 P. 711, 118 Or. 317
R.I.—Smart v. Burgess, 85 A. 742, 35 R.I. 149
Tex.—Stewart v. Rockdale State Bank, (Civ.App.) 52 S.W.(2d) 915.
Wyo.—Platte County State Bank v Frantz, 239 P. 531, 33 Wyo. 326
6 C.J. p 266 note 29, p 269 note 36 [b].

Seizure creates lien

(1) It is the seizure of the property under attachment proceedings that creates the lien on the property.—Bigelow v Andress, 31 Ill. 322—Slattery v. P. L. Renoudet Lumber Co., 87 So. 888, 125 Miss. 229

(2) Where an officer takes possession of personal property by virtue of a writ of attachment, plaintiff thereby gains a lien on it.—Perry v. Griefen, 59 A. 601, 99 Me. 420.

Proceedings against nonresident

The only lien created in attachment against a nonresident, who is not served, is that arising by virtue of the seizure of the property levied on.—Owens v Atlanta Trust, etc., Co., 47 S.E. 215, 119 Ga. 924.

93. Hines v. Fulton, 140 S.E. 537, 104 W.Va. 561

In Louisiana provisional seizures (attachments) give no privilege to those who have made them until they have obtained a judgment and order of execution on the property provisionally seized, but it is not necessary that execution under the judgment actually issue.—In re Bryce Cash Store, 124 So. 544, 12 La. App. 365.

tachment suit ends in a judgment for plaintiff[94] and may be made available to the creditor.[95] This lien does not depend on possession;[96] it is created by operation of law,[97] and is solely a creature of statute and can be created only in the cases in which the legislature by statutory enactment has authorized its creation.[98] There must be a valid attachment to create a valid lien.[99] Substantial compliance with the procedural requirements established by statute is a prerequisite to the creation of a valid lien;[1] and, where compliance with a rule requiring the filing of a certificate, copy of the writ, or other paper is necessary in order to constitute a valid levy (see supra §§ 223-232), until the rule is complied with the attachment is not a lien on the property,[2] at least as against a subsequent purchaser or mortgagee without actual notice,[3] but constructive notice is complete with the performance thereof (see supra § 251), and the lien is not defeated by the failure of the officer properly to index the record.[4] Also any conditions prerequisite to the right to attach specified classes of property must be complied with or a lien will not be created by an attempted levy thereon,[5] but, where the procedural requirements are complied with, the validity of the lien is not affected by any question as to whether such attachment was wrongfully sued out or not.[6]

§ 255. —— Date of Origin

Generally the lien of an attachment dates from the time the writ is actually levied, although in some jurisdictions it dates from the time the writ is placed in the officer's hands for service, or, if filing is necessary, from the time the writ is filed.

In various states the lien attaches at different stages in the proceedings. The prevailing doctrine is that the lien dates from the time when the writ of attachment is levied, or, as the proposition is often stated, the title of the purchaser of attached property at an execution sale relates back to the time of levy,[7] irrespective of when the judg-

94. U.S.—Shear Co v. Currie, (C.C A.Tex) 295 F. 841.
Ala.—Federal Land Bank of New Orleans v. Strickland, 148 So. 799, 227 Ala. 116
Md.—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50
Mont.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486.

Compromise
Where a lien of attachment was ripened after defendant's death by compromise with the administrator under the judge's approval, it had priority over judgment docketed after attachment.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486.

95. McInnes v. McKay, 141 A. 699, 127 Me. 110, affirmed McKay v. McInnes, 49 S.Ct. 344, 279 U.S. 820, 73 L.Ed. 975.

96. Snyder v. Smith, 69 N.E. 1089, 185 Mass 58

97. Ark.—Harrison v. Trader, 29 Ark. 85.
Mass.—Snyder v Smith, 69 N.E. 1089, 185 Mass 58

Record of officer's doings
Sometimes a lien is created by a record of the doings of an officer, as in the case of attachments of real estate and of personal property that cannot easily be removed.—Snyder v. Smith, 69 N.E. 1089, 195 Mass 58

98. Brun v Evans, 241 P. 86, 197 Cal 439.

99. Ky.—Meyer v. Ruff, 16 S.W. 84, 13 Ky.L. 254
N.Y.—Van Camp v. Orleans County Nat. Bank, 41 N.E. 427, 147 N.Y. 150.

Mere institution of an action for a debt and the suing out of an attachment do not create a lien on property described in the petition, and on which the attachment is levied, if the attachment is invalid, because the affidavit required by the code was not made before it was issued. Such a proceeding does not create a lis pendens lien.—Meyer v. Ruff, 16 S.W. 84, 13 Ky.L. 254.

1. Ariz.—Menager v. Farrell, 57 P. 607, 6 Ariz. 316.
Va.—Fauquier Nat. Bank v. Hazelwood Savings & Trust Co., 182 S.E. 568.—Fauquier Nat Bank v Hazelwood Savings & Trust Co, 182 S.E. 566.
6 C.J. p 266 note 29 [h].

Jurisdiction over property
The court must acquire jurisdiction over property to be attached through prescribed statutory proceedings before a valid lien can exist on such property.—Fauquier Nat. Bank v Hazelwood Savings & Trust Co, (Va.) 182 S.E. 568.—Fauquier Nat. Bank v. Hazelwood Savings & Trust Co., (Va.) 182 S.E. 566.

2. Hall v. Gould, 79 Ill. 16.—Gaty v. Pittman, 11 Ill. 20.—Clayburg v. Ford, 3 Ill.App. 542.—6 C.J. p 286 note 18.

Clerical mistake of the clerk in recording the certificate in substituting the name of one county for another in the title of the cause will not defeat the lien.—Schlosser v. Beemer, 67 P. 299, 40 Or. 412.

3. Ind.—Peoria First Nat. Bank v. Farmers, etc., Nat. Bank, 86 N.E. 417, 171 Ind. 323, transferring (App.) 82 N.E. 1013.
Mich.—Davis Sewing-Mach Co. v. Whitney, 28 N.W. 674, 61 Mich 518.
6 C.J. p 286 note 18.

4. Bates v. Lundy, (Wash.) 33 P. (2d) 664.

5. Kuehn v. Don Carlos, (Cal.App.) 41 P.(2d) 585

Mortgaged personalty
The right to attach mortgaged personal property may be exercised only after compliance with the condition of payment, tender, or deposit of the amount of the mortgage debt, and, in the absence of such compliance, no lien is created by attempted levy.—Kuehn v Don Carlos, (Cal. App.) 41 P.(2d) 585.

6. Dwyer v. Testard, 65 Tex. 432.—Tseemelis v Sinton State Bank, (Tex.Civ.App.) 35 S.W.(2d) 451, affirmed (Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319.—Oscar v Sackville, (Tex.Civ.App.) 270 S.W. 397.

7. U.S.—Elkay Reflector Corporation v. Savory, Inc., (C.C.A.N.Y.) 57 F.(2d) 161.—In re Dukes, (D.C.Del.) 276 F. 724.
Ala.—Standard Sanitary Mfg. Co v. Benson Hardware Co., 154 So. 560, 228 Ala. 594.
Ill.—Bigelow v. Andress, 31 Ill. 322
La.—In re Bryce Cash Store, 124 So. 544, 12 La.App. 365
Miss.—Slattery v. P. L. Renoudet Lumber Co., 87 So. 333, 125 Miss. 229.
Mont.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486
N.C.—Hambley & Co. v. H. W. White & Co., 133 S.E. 399, 192 N.C. 31.
Tex.—Platte v. Securities Inv. Co., (Com.App.) 55 S.W.(2d) 551, affirming (Civ.App.) 34 S.W.(2d) 295.
6 C.J. p 269 note 43.

Date of filing bill immaterial
An attachment lien does not relate back to the date of the filing of bill,

ment is recovered,[8] but in some jurisdictions the lien is held to arise as soon as the writ is placed in the sheriff's hands for service.[9]

Filing or recording of attachment. Where the filing of a certificate, copy of the writ, or the like in a designated public office is necessary to complete a levy (see supra §§ 223, 232), the lien dates from the time when such certificate or copy of the writ is filed.[10]

Where affidavit is amended. The amendment of a merely irregular affidavit does not affect the time of the commencement of the lien.[11]

Where petition is amended. Where a merely defective petition in an attachment proceeding is amended, so as to perfect the action and not present a new cause of action, the amendment relates back to the filing of the petition, and the lien of the attachment is preserved from that time, even against the lien of subsequent attachers of the same property.[12] So, where an amendment enlarges plaintiff's claim, if there is no fraudulent intent and a new cause of action or claim is not included therein, it does not render the attachment invalid as against attachments levied before the amendment was made, except that, unless the difference between the sum claimed in the original complaint and that claimed in the amended complaint is the result of a mere clerical error, the lien of the attachment will extend only to the sum claimed in the original complaint.[13] However, in so far as the amendment sets up a new cause of action[14] or describes additional property not mentioned in the original petition,[15] it only takes effect from the time of filing it as to persons acquiring a lien or interest in the property by purchase or attachment; for, as to the new cause, such persons are not pendente lite purchasers.

Second attachment. A second attachment binds the debtor's interest from the time when it is levied,[16] and, after a first attachment is abandoned, a second attaching creditor cannot obtain priority over an intervening purchaser by tacking his lien to that of the previous attachment,[17] nor, where there is, in the same suit, more than one affidavit and attachment, based on different grounds, does the lien of the later attachments relate back to the first.[18] However, under a statute which allows a creditor who files his demand subsequent to the commencement of the attachment suit to become a party to the action and places all creditors of the attachment debtor, who file claims in the attachment suit, on an equal footing, the lien of the first attachment applies to all valid demands thereafter filed under that process.[19]

but dates from the seizure under the writ—Slattery v. P L Renoudet Lumber Co, 87 So 888, 125 Miss 229

8. Elkay Reflector Corporation v. Savory, Inc, (C C A N Y) 57 F. (2d) 161—Gatell v Millian, (C C. A Porto Rico) 2 F (2d) 865—In re Blair, (D C Mass) 108 F. 529—Yumet & Co v Delgado, (Porto Rico) 243 F 519, 156 C C A. 217.

Effect of judgment

A judgment for plaintiff does no more than establish the fact that the lien was rightly obtained—Yumet & Co v Delgado, (Porto Rico) 243 F. 519, 156 C C A. 217

9. Ark—Gray v. Bank of Hartford, 208 S W 302, 137 Ark. 232, certiorari denied 39 S Ct. 290, 249 U. S 608, 63 L Ed. 800.
Ind—Parker v Curll, 126 N E 858, 73 Ind App 178—Little v Mundell, 109 N E. 227, 59 Ind App 227
Ky—Peck v. Trail, 65 S W (2d) 83, 251 Ky 377—Daniels v. Runyons, 175 S W 338, 164 Ky 309
Pa—Underhill v. McManus, 16 Pa. Co 603.
6 C J p 270 note 44.

Delay in perfecting lien immaterial

The validity of an attachment lien as against the grantee of land is not affected by a delay in perfecting the lien occasioned by the delay in actually levying on the land—Daniels v Runyons, 175 S W. 338, 164 Ky 309

Directions not to levy

An order of attachment delivered to an officer with directions not to execute it creates no lien on the estate of defendant until the directions to stay its execution are removed—Hood v Pope, 26 S W (2d) 1043, 233 Ky. 749—6 C J. p 270 note 44 [d].

Foreign attachment

In a foreign attachment the goods of defendant are not bound until the writ is levied—Posey's Estate, 1 Chest Co. (Pa) 351

10. Ariz—Menager v. Farrell, 57 P 607, 6 Ariz 316
Conn—Butchers' Ice & Supply Co v Bascom, 146 A 843, 109 Conn 433
Fla—Lewis v. Stephens, 96 So. 396, 85 Fla 437
Or—Schlosser v. Beemer, 67 P. 299, 40 Or 412.
6 C J p 270 note 46

Recording unnecessary

An attachment on realty is made when the certificate is deposited in the town clerk's office and the time of its reception indorsed thereon, even though the town clerk fails to record it, and is sufficient against a subsequent bona fide purchaser—Butchers' Ice & Supply Co v. Bascom, 146 A. 843, 109 Conn. 433.

11. Goodman v Henry, 26 S E 528, 42 W Va 526, 35 L R A 847—6 C J p 270 note 47

12. Ky—Dengler v. Krell-French Piano Co, 119 S W. 757—Bamberger v Moayon, 16 S W. 276, 91 Ky 517, 13 Ky L 102
Okl—Symms Grocer Co v. Burnham, 52 P 918, 6 Okl 618

13. Suksdorff v. Bigham, 12 P. 818, 13 Or 369

14. Bamberger v Moayon, 16 S W 276, 91 Ky 517, 13 Ky L 102

15. Phelps v. Ratcliffe, 3 Bush (Ky) 334

16. Norton v. Babcock, 2 Metc (Mass) 510

17. Smith v. Whitfield, 2 S W. 822, 67 Tex. 124.

18. Miller v. White, 33 S E 332, 46 W Va 67, 76 Am S R 791

19. Shirk v. Wilson, 13 Ind 129.

Former rule

Under the attachment law of 1843 which did not allow a creditor who had filed his demand subsequent to the commencement of the attachment suit to become a party to the action, but under which each claim stood as an independent suit, the lien of subsequent claims commenced as early as they were filed.—Ziegenhager v. Doe, 1 Ind 296.

§ 256. Nature of Lien

An attachment lien, although inchoate in the sense that its enforcement depends on the creditor obtaining final judgment on his claim, is an actual and substantial security which confers vested rights on the holder thereof.

The lien created by a valid attachment is a statutory lien[20] It is not an interest in property,[21] nor is it of the same binding force as a judgment lien.[22] In a strict sense, it is not a fixed lien on property,[23] but is only a right to obtain payment out of the property attached in preference to others,[24] which right is inchoate or contingent[25] until the creditor has obtained final judgment in the attachment suit,[26] and, if, on final adjudication, no liability is adjudged against a defendant, there is no lien against his property.[27] However, the lien or security obtained by an attachment, even before judgment, is a fixed and positive security,[28] a specific lien,[29] and, although whether it will ever be made available to the creditor depends on contingencies,[30] its existence is in no way contingent, conditional, or inchoate[31] It is a vested interest,[32] an actual and substantial security,[33] affording specific security for satisfaction of the debt put in suit,[34] which constitutes a cloud on the legal title,[35] and is as specific as if created by virtue of a voluntary act of the debtor and stands upon as high equitable grounds as a mortgage lien.[36] It has also been held that the right acquired by an attachment of property is sufficient to justify the attaching creditor in filing a bill in equity to clear the property from adverse claims,[37] or to preserve the lien of the attachment when necessary papers have been lost and cannot be supplied,[38] or in applying for an injunction against the sale of the property under an execution issued on a subsequent judgment,[39] or, as appears in the title Fraudulent Conveyances § 331 b (4) [27 C.J. p. 733 note 10–p 744 note 14], in bringing an action to set aside a conveyance claimed to have been fraudulently made, without waiting until the indebtedness is reduced to judgment, although no decree setting aside such conveyance should be entered until the indebtedness is definitely established by judgment.

§ 257. Extent of Lien

The property and interest therein covered by the lien and the amount for which the property is bound are hereafter considered in sections 258, 259.

§ 258. —— Property or Interest Covered

a. Property covered
b. Interest covered

a. Property Covered

Subject to the rules as to the conversion of property from one form into another and of the right to the proceeds of the sale of property attached, an attachment lien covers only the actual property levied on.

As a general rule an attachment lien covers only the property which was levied on under the writ[40] Where one tract is attached the court cannot, even by rule, substitute a different tract;[41] nor will a description of property as land in an attachment include and bind a leasehold under an oil and gas lease[42] However, unless it affirmatively appears to the contrary, directly or by im-

20. Peck v Jenness, (N H) 7 How. (U S) 612—The American, (D C. Mass) 40 F (2d) 942
21. Conn—Lyon v. Sandford, 5 Conn 544
Iowa—Tetzloff v May, 131 N W. 647, 151 Iowa 441, Ann Cas.1913A 341.
6 C J p 269 note 34
22. Reeves v. Johnson, 12 N J Law 29
23. Tetzloff v May, 131 N W. 647, 151 Iowa 441, Ann Cas 1913A 341—6 C J. p 267 note 30
24. Beck v. Brady, 6 La Ann 447—Emerson v Fox, 3 La 178—6 C J p 267 note 31.
25. U S—Shear v. Currie, (C.C A Tex) 295 F 841.
Md—Union Trust Co. v Biggs, 137 A. 509, 153 Md 50
Mont—In re Stevenson's Estate, 289 P 566, 87 Mont 486
Utah—Hilton Bros Motor Co v District Court in and for Millard County, 25 P (2d) 595
Va—Deeds v Gilmer, 174 S E 37.
6 C J p 267 note 32.
26. Pratt v. Law, (D C) 9 Cranch (U S) 456, 3 L Ed 791—6 C J. p 267 note 33
27. Farmers' Nat Bank of Stephenville v Daggett, (Tex Com App) 2 S W (2d) 834, affirming Daggett v Farmers' Nat Bank, (Civ App) 259 S W 198
28. Kittredge v. Warren, 14 N H. 509.
29. In re Stevenson's Estate, 289 P. 566, 87 Mont 486
30. Kittredge v. Emerson, 15 N H 227—Kittredge v Warren, 14 N H 509
31. Kittredge v Emerson, 15 N H 227—Kittredge v Warren, 14 N H 509
32. McGaffey Canning Co v Bank of America, 294 P 45, 109 Cal App 415—6 C J p 267 note 33 [a].
33. Ark—Harrison v. Trader, 29 Ark. 85
Colo—Emery v. Yount, 1 P. 686, 7 Colo. 107.
Iowa—Byers v McEniry, 91 N W 797, 117 Iowa 499
6 C J p 269 note 36
34. McGaffey Canning Co v Bank of America, 294 P 45, 109 Cal.App. 415
35. Mullins v Aiken, 2 Heisk (Tenn) 535
36. Conn—Carter v Champion, 8 Conn 549, 21 Am D 695
Ind T—McFadden v Blocker, 48 S W 1043, 2 Ind T. 260.
6 C J. p 269 note 39.
37. Francis v Lawrence, 22 A 259, 48 N J Eq. 508—6 C J. p 269 note 40
38. Alley v. Carrol, 6 Heisk (Tenn) 221.
39. Schuster v. Rader, 22 P. 505, 13 Colo 329
40. Godefroy v Hupp, 160 P 1056, 93 Wash 371—6 C J p 273 note 71
41. Steinmetz v Nixon, 2 Yeates (Pa) 285
42. Andrews v. Manhattan Texas Petroleum Co, (Tex.Civ App) 252 S W. 378.

plication, a water right is attached equally with the land to which it is appurtenant, although the land alone is specified in the writ or return of attachment,[43] and an attachment lien on the personal property of a lessee of an oil and gas lease will cover oil and gas well drilling equipment which by the terms of the lease was the property of the lessee and removable by him at any time,[44] so, also, a levy on an oil lease will attach a lien to the oil in place as severed from the realty by the operation of the lease.[45] The levy of a purchase-money attachment subjects only the property described in the affidavit, or, in case it has been sold by the original purchaser, any purchase money thus due;[46] and an attachment of a residuary legatee's interest in the personal property of an estate will not cover cash obtained by the subsequent conversion of realty belonging to the estate into cash.[47] Service of attachment on a codefendant who is named in the attachment as a person indebted to, or in possession of property belonging to, the principal defendant gives plaintiff a lien on any debt then owed to the principal defendant by the codefendant and on any property of the principal defendant then in the possession of codefendant, but not on any indebtedness of codefendant to the principal defendant which accrues after service of the attachment or on any of the principal defendant's property which comes into the possession of codefendant after such service.[48]

Books of account. A levy of attachment on books of account is not equivalent to a levy on the debts charged therein, and creates no lien on such debts,[49] in the absence of statute.[50] In an action against a nonresident defendant insurance company under a statute which provides that an attachment shall bind the effects or indebtedness, an attachment of effects in the hands of resident agents having moneys, property, and effects of defendant includes and binds premiums due on policies written prior to the service of process but collected subsequent thereto, such books of account and evidences of debt constituting effects.[51]

Increase or income from property. An attachment lien extends to dividends declared on corporate stock[52] or dividends or interest declared on deposits in a savings bank,[53] after an attachment thereof, although, as to the latter, there is authority otherwise.[54] In regard to rents and profits, the authorities are not agreed, some holding the lien to extend to them,[55] and others, that they are not subject to the lien of the attachment.[56]

Where the attached property is sold under an order of court[57] in partition proceedings,[58] on foreclosure of a mortgage,[59] or by agreement between the owner and the attaching creditor,[60] the attachment lien will bind the proceeds of the sale, or the surplus proceeds in case the sale was under a lien prior to the attachment, and the attached property passes free from the lien which subsequently affects the proceeds only,[61] also, where land was sold under an escrow agreement under the terms of which title did not pass until a time subsequent to a levy of attachment on such real estate, the attachment created a lien on payments made subsequent thereto.[62]

43. Bothwell v. Keefer, (Idaho) 27 P.(2d) 65.

Irrigation company stock

Although shares of stock in an irrigation company may be personalty, the water right which controls is real property and included in attachment of real estate—Bothwell v. Keefer, (Idaho) 27 P.(2d) 65.

44. Young v Hill, 85 S W.(2d) 867, 260 Ky 397.

45. Humble Oil & Refining Co v. Andrews, (Tex Civ App.) 285 S W. 894

46. Gilham Electric Co v. Daniel, 160 S E. 106, 43 Ga.App 715

47. In re Troy's Estate, (Cal App) 37 P (2d) 471

48. Deeds v. Gilmer, (Va.) 174 S.E. 37.

49. Kreher v Mason, 33 Mo App 297—6 C.J. p 209 note 7.

50. Neb.—Sloan v. Thomas Mfg Co., 79 N W. 728, 58 Neb 713
Ohio.—New York Rubber Co. v. Gandy Belting Co, 11 Ohio Cir Ct. 618, 5 Ohio Cir Dec. 286.
6 C J p 208 note 6.

51. Ætna Ins Co v Robertson, 33 So 883, 126 Miss 337

52. U S—John T Porter Co. v Java Cocoanut Oil Co, (C C A Cal) 4 F (2d) 476, certiorari denied 45 S Ct 515, 268 U S 697, 69 L Ed 1163—Jacobus v Monongahela Nat Bank, (C C Pa) 35 F 395
Cal—Cates v. Consolidated Realty Co., 144 P 301, 25 Cal App 531—McCarthy Co v. Boothe, 33 P. 175, 2 Cal App 170.
Tenn—Moore v. Gennett, 2 Tenn Ch. 375
Tex—Stewart v. Howell Co., (Civ. App) 264 S W 208.

53. Loewe v Savings Bank of Danbury, (Conn) 236 F 444, 149 C C. A 496, L R A 1917B 933

54. Loewe v Union Savings Bank of Danbury, (D C Conn) 230 F. 303

55. La—Stockton v. Hyde, 5 La Ann 300
Tenn.—Young v. Hail, 6 Lea 179.

Authority of auditor to collect rents

In New Jersey an auditor in attachment appointed before appearance entered by defendant may be authorized by the court to collect rents of real estate attached accruing after the entry of such appearance—Chemical Nat. Bank v. Kellogg, 57 A 149, 70 N J Law 602

56. Columbia Bank v Ingersoll, 1 N Y S 54, 21 Abb N Cas 241—6 C.J. p 273 note 74.

57. Tallman v. Hollister, 9 How Pr. (N Y) 503—6 C J p 274 note 76.

58. Western Nat Bank v. National Union Bank, 46 A. 960, 91 Md. 613.

59. Harvey v. Foster, 30 P 849, 64 Cal 296—6 C J. p 274 note 78

60. Kendallville First Nat. Bank v. Stanley, 30 N E. 799, 4 Ind.App 213

61. Thurman v. Blankenship, etc., Co, 15 S W. 387, 79 Tex. 171.

62. Knapp v. Andrus, 180 P. 908, 56 Mont. 37.

Extent of levy as question of fact. Whether all or only part of the goods in a store are attached is a matter of fact, and in determining the effect to be given to what was done all the circumstances, including prior negotiations for a bond, may be considered [63]

b. Interest Covered

Subject to the rules laid down in certain of the registration acts, an attachment lien encumbers only the debtor's interest in the property levied on, existing at the time of the levy.

Except in so far as registration statutes make the attachment lien effective against outstanding unrecorded conveyances or encumbrances (see infra § 276), such lien covers only the actual interest of the debtor in the property levied on,[64] existing at the time of the levy,[65] and cannot extend to an interest subsequently acquired by him,[66] or an interest which, prior to the time of the levy, he lost or transferred [67] The lien will not attach to the mere legal title to land when the equitable estate is in another,[68] especially where the creditor has knowledge of the facts.[69] An attachment against property as belonging to a copartnership does not, where it in fact belongs to a partner in his individual capacity, establish a lien thereon prior to the lien of an attachment, levied thereon as the individual estate of the partner at a time subsequent to the levy against the property as copartnership property and prior to the time the action against the copartnership was changed by amendment to one against the partner individually.[70] A person possesses such an interest in property after it has been sold by the sheriff under judicial process but before acknowledgment of the deed that an attachment thereon will create a lien sufficient to hold any balance left in the sheriff's

63. Commonwealth v. Middleby, 73 N E 208, 187 Mass 342.

64. Cal—McGee v. Allen, 60 P (2d) 1026.
Kan—Federal Trust Co v Ireland, 296 P 704, 132 Kan 615—Saylor v. Crooker, 156 P. 737, 97 Kan 624
Ky—Day's Ex'x v. Traders' Nat Bank, 24 S W (2d) 576, 232 Ky. 662.
Minn—Scott v. Marquette Nat Bank, 217 N W. 136, 173 Minn 225
Okl—Farmers' State Bank of Ada v. Keen, 167 P 207, 66 Okl 62
Tex—Lem Smith & Co v. Sweatt, (Civ.App) 72 S W (2d) 313.
6 C J. p 274 note 81.

65. U S—Shear Co v. Currie, (C C A Tex.) 295 F 841—Loewe v Union Savings Bank of Danbury, (D C Conn) 230 F. 303
Cal.—Motor Acceptance Co v. Finn, 13 P (2d) 761, 124 Cal App 766—Ahern v Tulare Lake Canal Co , 1 P (2d) 490, 115 Cal App 93—Iknoian v. Winter, 270 P 999, 94 Cal App 223—Bank of South San Francisco v Pike, 200 P. 752, 53 Cal App 524.
Conn—Newman v Gaul, 129 A. 221, 102 Conn 425
Ill—Brennan v Persselli, 187 N E 820, 353 Ill 630, affirming 266 Ill App. 441—Wilson v. Kruse, 110 N E. 359, 270 Ill 298.
Iowa—Bain v. Ullerich, 177 N W 61, 189 Iowa 149
Ind—Frontier Nat Bank of Eastport, Me. v. Salinger, 126 N E 40, 72 Ind App. 479
Md.—Hohman v Orem, 182 A 587.
Minn—Scott v. Marquette Nat Bank, 217 N W 136, 173 Minn 225
Mont—Short v Karnop, 275 P. 278, 84 Mont. 276.
Pa—American International Shipbuilding Corp v Russel Wheel and Foundry Co., 30 Pa Dist. 265
Tex—Traders' Nat Bank v. Price, (Com App) 228 S W 160, reversing Price v Traders' Nat. Bank, (Civ App) 195 S W 934.
6 C.J p 274 note 82

Executor's commissions

Attachment on judgment against an executor laid in the hands of coexecutors could prevail against garnishees only to the extent of the judgment debtor's share of the coexecutors' commissions, and would be abortive, if the judgment debtor was not entitled to any part of the commissions—Hohman v. Orem, (Md.) 182 A 587

Nonexistent profits

Where the debtor's interest in an attached car of lumber was the excess value over the cost and labor of manufacture, and there was no excess, his creditor obtained nothing by attachment, notwithstanding the owner furnishing logs had not been paid before a prior car was shipped. —McRae v Hammond, 59 S W (2d) 497, 187 Ark 329

Prior equities not displaced

The lien of an attachment does not displace prior equities or rights, but is subject to all equities to which the property was liable in the debtor's hands—Wilson v. Kruse, 110 N E 359, 270 Ill 298

66. Sullivan v. Graham, 117 S W 171, 54 Tex Civ App 103—6 C J. p 274 note 83

67. **Trade acceptance**

Where, prior to levy of attachment of debt, evidence of the debt in the form of a trade acceptance was transferred to a third party, a holder in due course, the attachment was defective, and the fact that thereafter such trade acceptance came into defendant's hands does not cure the defect—Battle v Central Lumber Co, 211 N Y S 556, 125 Misc. 763.

Transfer of land

Where prior to levy of attachment judgment debtor surrendered his interest in land he held, under contract to purchase, to a third party in satisfaction of a loan, the attachment impressed no lien on such land—Graves v Arizona Cent. Bank, 272 P. 1063, 205 Cal 715.

If all title and interest has passed from the debtor to a third person at the time of the levy the attaching creditor gets nothing by the levy—Pacific Nat Bank v. Western Pac. R. Co, 108 P. 676, 157 Cal 573, 27 L R. A (N S) 987, 21 Ann Cas. 1391—Short v. Karnop, 275 P 278, 84 Mont. 276.

68. Kan—Federal Trust Co v Ireland, 296 P 704, 132 Kan. 615
Okl—Farmers' State Bank of Ada v. Keen, 167 P. 207, 66 Okl 62.

Express trust

Where a deed merely placed property in the grantee's name in trust for the grantor, the grantee's attaching creditor acquired no interest in the property superior to the grantee, as against the mortgagee of the grantor—Federal Trust Co v. Ireland, 296 P 704, 132 Kan 615.

Resulting trust

Latent equities against debtor, such as arise on resulting trust, may be asserted against attachment creditor who as to such equities does not have the status of a bona fide purchaser—McGee v. Allen, (Cal) 60 P. (2d) 1026

69. Scott v. Marquette Nat Bank, 217 N W 136, 173 Minn 225

70. Moody v. Lucier, 62 N H. 584.

hands after distribution of the moneys received under the sale.[71]

§ 259. —— Amount for Which Property Bound

The authorities differ as to whether the attachment lien is limited to the amount stated in the writ, the amount due at the time of the levy, or the amount for which judgment is finally obtained, and the costs.

While it has been held that the levy of an attachment binds the property, not merely for the amount which will discharge plaintiff's claim at the time of the levy, but for the amount of the judgment which he may thereafter obtain, and the costs, if any accrue, under the execution issued to enforce it,[72] there is also authority for the view that the lien of the attachment is restricted to the amount claimed in the writ or warrant, because sound policy requires that the extent of the lien shall be known as soon as it exists, in order to preserve the rights of third parties and prevent unnecessary restrictions on the sale of property.[73] The amount actually due on plaintiff's demand at the time of service of the attachment has been held to fix a limit beyond which the lien of an attachment cannot extend,[74] so that a judgment by collusion between the debtor and the attaching creditor for a larger amount than the original claim would not affect injuriously the rights of intervening purchasers,[75] and adding to the original demand and taking judgment for a larger sum than that claimed in the affidavit with knowledge of an intervening sale has been held to destroy the lien entirely,[76] but on the other hand, it has been held that, in the absence of intervening rights of third persons, a lien against property seized under attachment may be decreed for the judgment recovered against a defendant personally served, although it exceeds the sum for which the writ was issued.[77] The right of an officer to attach a single indivisible article of personal property, like a vessel, although of much greater value than the amount he is directed to attach on his precept, must be sustained of necessity where no other or sufficient property to satisfy his precept can be found, or is shown to him by the debtor, but such an attachment creates a lien only to the amount required to be attached under the precept, and can be released by a bond in the penal sum of the ad damnum of the writ.[78]

§ 260. Duration of Lien in General

Subject to express statutory enactments thereon, an attachment lien, unless terminated by dissolution or judgment for the defendant, continues until judgment and thereafter on personalty for a reasonable time to allow the issue and levy of execution, and on realty it merges in the judgment lien and continues for its duration.

An attachment lien ordinarily continues until the final determination of the case,[79] unless terminated by a dissolution of the attachment (see infra § 472), or judgment for defendant in the main action (see infra § 268), or unless the debtor appears and gives other and better security than the property affords as by furnishing a good and sufficient bond.[80] If the attachment lien is on real estate, it continues until judgment in the suit has been entered and docketed,[81] when, except in so far as is necessary to preserve the priority of lien acquired,[82] it, in a sense, merges in the judgment lien;[83] and, except as it is regulated by express

71. Wysocki v. Tomoski, 41 Pa Co. 471

72. Iowa.—Miller v. James, 53 N W 227, 86 Iowa 242
Me.—Searle v Preston, 33 Me 214.
Neb.—Rhodes v. Samuels, 93 N.W. 143, 67 Neb 1
6 C J p 274 note 84.

73. In re People, by Beha, 175 N E 113, 255 N Y 412, affirming 244 N Y S 902, 230 App Div 834—6 C J p 275 note 85

74. Syracuse City Bank v. Coville, 19 How Pr (N Y) 385.

75. Oconto Co. v. Esson, 87 N.W. 855, 112 Wis 89.

76. Tilton v. Cofield, 2 Colo. 392—6 C.J. p 275 note 88

77. Glendale Fruit Co. v. Hirst, 59 P 103, 6 Ariz. 428—6 C.J. p 275 note 89

78. Devereux Co v. Silsby, 114 A 460, 120 Me. 362.

79. Ala.—Standard Sanitary Mfg Co. v Benson Hardware Co., 154 So 560, 228 Ala 594.
Md.—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50.

80. Union Trust Co. v. Biggs, supra.

81. Conn.—Coit v. Sistare, 84 A. 119, 85 Conn 573, Ann Cas 1913C 243
Neb.—Lincoln Upholstering Co v. Baker, 118 N W. 321, 82 Neb 592
6 C J p 271 note 53.

82. Brun v. Evans, 241 P. 86, 197 Cal 439—Withrow v. National Surety Co., 10 P (2d) 83, 122 Cal App. 242—Balzano v. Traeger, 270 P. 249, 93 Cal App 640.

Attachment lien remains effectual to preserve a priority of lien, although it is only the judgment lien that can be enforced against the property attached.—Pease v. Frank, 105 N E 299, 263 Ill. 500, reversing 182 Ill App 331.

83. Cal.—Brun v. Evans, 241 P. 86, 197 Cal. 439—Withrow v. National Surety Co., 10 P.(2d) 83, 122 Cal. App 242—Balzano v. Traeger, 270 P. 249, 93 Cal App. 640—Water Supply Co. v. Sarnow, 92 P. 667, 6 Cal App 586.
Idaho.—Evans v. Power County, 1 P. (2d) 614, 50 Idaho 690.
Mont.—In re Stevenson's Estate, 289 P 566, 87 Mont. 486—Marlowe v Missoula Gas Co., 219 P. 1111, 68 Mont. 372.
6 C J. p 271 note 54.

Extent of merger

"The lien of the attachment on real property is not completely extinguished by the judgment, but such lien ceases in all respects, except to maintain the priority created and merges in the lien of the judgment, in the sense and to the extent that there are not then two separate and distinct and subsisting liens against the same property."—Balzano v. Traeger, 270 P. 249, 250, 93 Cal App 640.

statutory enactment, which in some states limits the lien to the same period as that provided for in the case of personal property,[84] and, in others, fixes a somewhat longer period,[85] its duration is the duration of the judgment itself,[86] the lien continuing until it is merged and the title obtained by a sale under the execution issued on the judgment obtained by plaintiff, or until the judgment is satisfied, or the attachment is discharged or vacated in some manner provided by law.[87] If the attachment lien is on personal property, in the absence of statute it will continue for a reasonable time after judgment to allow the issue and levy of an execution,[88] but by the entry of judgment and the issuance of the execution thereon the attachment is merged in the execution, the lien acquired by the attachment being preserved only to enable such lien to be enforced under execution.[89] In the New England states the duration of the attachment lien after final judgment is regulated by express statutory enactments which set a fixed time for its continuance[90] or require that execution must issue during the same term that final judgment in the attachment suit is recovered and must be levied on the attached property before the return day of the execution.[91] A failure to issue execution[92] or to levy on the attached property thereunder[93] within the time limited by statute results in the loss of the lien, even though the judgment is by default,[94] but, where execution is stayed, this will continue the attachment lien beyond the statutory period,[95] and it has been held that the statutory period does not run where a levy is prevented by the possession of a receiver under a stipulation.[96]

Where mortgaged property is attached and under a statutory provision the attaching creditor is ordered to pay the mortgagee the amount due on his mortgage, the attachment remains in force until the creditor's failure to pay the amount directed within the time fixed.[97]

Extension of lien. A statute providing for the extension of attachment liens has been construed to refer only to existing liens, and to have no application to attachment liens which have either expired by operation of law or have otherwise ceased to exist prior to the making of a motion for their extension.[98] Where the statute requires the motion for the extension of the attachment lien to be made in the court in which the action is pending, the trial court alone has jurisdiction to extend the lien and a motion therefor must be made before it, notwithstanding the pendency of an appeal, where the appeal does not embrace the question of the expiration of the attachment[99] and the issuance of a writ of supersedeas thereunder.[1]

§ 261. Release or Discharge

A release or discharge of an attachment lien involves a final relinquishment of claim.

84. Me.—Fletcher v. Tuttle, 54 A. 1110, 97 Me. 491.
Mass.—Moseley v. Moseley, 132 N.E. 417, 240 Mass. 1—Tolman v. Tolman, 113 N.E. 180, 224 Mass. 501.
6 C.J. p. 272 note 64.

Final judgment

The final judgment mentioned in a statute providing that no real estate shall be held by virtue of an attachment longer than thirty days, next after the day on which final judgment was rendered in the suit, in which the same was attached, to be taken in execution, probably means one from which no appeal is taken, such a judgment being final on the matters in controversy, if litigated, and also on default.—Leighton v. Reed, 28 Me. 87.

From expiration of right to appeal

Under Pub. St. (1882) c. 161 § 53, and Rev. L. c. 167 § 56, providing that in a suit in equity an attachment lien expires thirty days after the right of appeal from final decree expires, an attachment lien expires thirty days after entry of the decree if there is no right of appeal therefrom.—Tolman v. Tolman, 113 N.E. 180, 224 Mass. 501.

85. Shaffer v. Nosiglia, 220 P. 431, 64 Cal. App. 93—6 C.J. p. 272 note 65.

86. Stillman v. Hamer, 78 P. 836, 70 Kan. 469, 109 Am. St. R. 465.

87. Katz v. Obenchain, 85 P. 617, 48 Or. 352, 120 Am. St. R. 821—6 C.J. p. 271 note 58, p. 272 note 60.

88. Cal.—Balzano v. Traeger, 270 P. 249, 93 Cal. App. 640.
Ill.—Zimmer v. Lyon & Healy, 190 Ill. App. 642.
6 C.J. p. 271 note 55.

Time limit inapplicable in probate

A lien of attachment on the interest of an heir or legatee in the estate does not lapse on the expiration of three years from the date of the levy, since the attaching creditor has no power to control the proceedings in probate.—In re Troy's Estate, (Cal. App.) 27 P. (2d) 471.

89. Peetsch v. Sommers, 53 N.Y.S. 438, 31 App. Div. 255, 28 N.Y. Civ. Proc. 124.

90. U.S.—In re Gilbert, (D.C.N.H.) 13 F. Supp. 782.
Conn.—Allen v. Adams, 17 Conn. 67.
Me.—Fletcher v. Tuttle, 54 A. 1110, 97 Me. 491.
6 C.J. p. 272 notes 61–63.

91. Steere v. Stafford, 12 R.I. 131.

92. Mass.—Whittemore v. Swain, 84 N.E. 307, 198 Mass. 37.
Vt.—Nixon v. Phelps, 29 Vt. 198.
6 C.J. p. 272 note 66.

93. Bowley v. Bowley, 41 Me. 542.—Leighton v. Reed, 28 Me. 87.—Small v. Hutchins, 19 Me. 255.—Aiken v. Medex, 15 Me. 157.—6 C.J. p. 272 note 67.

94. Nihan v. Knight, 56 N.H. 167.—Haynes v. Thom, 28 N.H. 336.—6 C.J. p. 272 note 68.

95. R.I.—Steere v. Stafford, 12 R.I. 131.
Vt.—Rowan v. Union Arms Co., 36 Vt. 124.

96. Central Trust Co. v. Worcester Cycle Mfg. Co., (C.C. Conn.) 114 F. 659.

97. O'Neil v. Small, 167 N.E. 649, 268 Mass. 305.

98. Whitney v. Superior Court of California in and for Fresno County, 250 P. 666, 199 Cal. 569.

99. Palmer v. Fix, 271 P. 749, 205 Cal. 472, followed in 271 P. 750, 205 Cal. 787.

1. Palmer v. Fix, supra.

A release or discharge of an attachment or attachment lien involves the actual relinquishment of all future claim to the property concerned and the proceeds thereof.[2]

§ 262. —— By Act of Creditor or His Attorney

a. In general
b Waiver or abandonment
c Effect of abandonment

a. In General

The attachment creditor or his attorney may release the attachment without an order of court

Plaintiff in attachment or his attorney,[3] generally, has the right to release an attachment lien on property[4] without a court order,[5] and where the case involves an attachment on real estate they alone have the power to make such a release.[6] The mere destruction of the papers by plaintiff after an attachment is levied is not, however, a competent method of ending the proceedings and discharging the lien, but the papers should be sent to court and a disposal made thereof.[7] Where, however, the rights of third persons depend on the continuance of the attachment suit under statutes providing for pro rata distribution among attaching creditors, no release of the attachment can be made to the detriment of subsequent applying creditors.[8] Accordingly, the right of other attaching creditors cannot be affected by the action of one in filing his claim against an assignee,[9] accepting the position of assignee under a deed of trust,[10] or giving assent to a deed of trust for the benefit of all creditors.[11]

b. Waiver or Abandonment

An attachment lien may be lost by the attaching creditor's conduct in waiving or abandoning his rights therein, but such action will not be presumed and must be proved by the party asserting it

An attachment lien may be lost by delay or other conduct on the part of the attaching creditor which operates to waive or abandon his rights thereunder,[12] such as failing to enter the writ of attachment at the return time thereof,[13] failing to serve summons in the action on defendant,[14] failing to

2. Lathrop v. Lawson, 121 A. 438, 96 Vt. 513

3. Mont.—National Bank of Montana v First Nat Bank, 228 P. 80, 71 Mont 242
Okl.—Southwestern Broom & Warehouse Co v City Nat. Bank, 153 P 204, 52 Okl 422
6 C.J. p 275 note 90.

Statement of attorney not binding on judgment creditor

A statement by the judgment creditor's attorney that proceedings under a warrant of attachment were abandoned was held to be not binding on the judgment creditor, so as to make the warrant of no force.—Triangle Radio Supply Co v De Forest Radio Telephone & Telegraph Co, 204 N Y S. 72, 208 App Div 614, reargument granted 204 N Y S. 954, 209 App Div. 819, and affirmed 205 N.Y.S 470, 210 App Div. 87.

4. U S.—In re Continental Transportation & Oil Co, (D C Del.) 17 F (2d) 434
Mont.—National Bank of Montana v. First Nat. Bank, 228 P. 80, 71 Mont. 242
Okl.—Southwestern Broom & Warehouse Co v. City Nat. Bank, 153 P 204, 52 Okl. 422
6 C J. p 275 note 91.

Lien on property may be released by agreement.—J. H Mulrein Plumbing Supply Co v. Walsh, 222 P 1046, 26 Ariz 152—Fazzano v Martin, 108 A 512, 94 Conn. 91—6 C.J. p 275 note 91 [e].

Release of attachment involves ministerial duty only, and may be ordered by party causing levy.—National Bank of Montana v First Nat. Bank, 228 P 80, 71 Mont 242.

Attachment not affected by release of levy

Attachment is a distinct proceeding ancillary to the action in which it is employed, and is not affected by a release of the levy, the attachment proceeding remains intact and an alias writ is procurable without additional affidavit or undertaking.—National Bank of Montana v First Nat Bank, 228 P. 80, 71 Mont 242

5. Southwestern Broom & Warehouse Co. v. City Nat. Bank, 153 P 204, 52 Okl 422—6 C J p 275 note 92

6. Colo.—Barton v. Continental Oil Co, 38 P. 432, 5 Colo App 341.
Vt.—Braley v. French, 28 Vt 546.

7. Dean v Massey, 7 Ala. 601—6 C. J. p 275 note 95.

8. Rice v Baldwin, (C.C Ind.) 20 F Cas No 11,750a, 27 Int Rev Rec 130, 11 Reporter 627—6 C J p 275 note 96.

9. Neufelder v. German American Ins Co, 33 P 870, 6 Wash 336, 36 Am S R. 166, 22 L R A. 287.

10. Ryhiner v. Ruegger, 19 Ill App 156

11. Mass.—Marr v Washburn, etc, Mfg Co, 44 N.E 1062, 167 Mass 35.
N H.—Gathercole v Bedel, 18 A 319, 65 N H. 211.
N.C.—Rahity v. Stringfellow, 72 N.C 328

12. U.S.—In re Continental Transportation and Oil Co, (D C Del.) 17 F (2d) 434
Ga.—A W Watters & Co v O'Neill, 108 S E 257, 27 Ga App. 295, conforming to answers to certified questions 108 S E 35, 151 Ga. 680
La.—Smith v Wilson, 128 So. 632, 13 La App 679, reversing 125 So. 302, 13 La App. 437
Minn.—Union Inv Co v Abell, 181 N W. 353, 148 Minn 229.
6 C J p 276 note 1.

Bringing new process of attachment

Where a writ of attachment which had been levied was lost, plaintiff by beginning proceedings anew abandoned the original attachment and proceedings thereunder.—Smith v. Wilson, 128 So 632, 13 La App 679, reversing 125 So. 302, 13 La App 437.

Under statute providing for custody of attached property, abandonment by caretaker placed in charge discharges lien of attachment.—Keith v Ramage, 214 P. 326, 66 Mont 578.

Some affirmative act of the creditor, inconsistent with the continuance of the lien, must be shown before an attachment lien will be deemed abandoned.—Stillman v. Hamer, 78 P 836, 70 Kan. 469, 109 Am S R. 465

13. Munroe v St Germain, 42 A. 900, 69 N H 200—6 C J. p 276 note 2.

14. Union Inv Co. v. Abell, 181 N W. 353, 148 Minn 229—6 C.J. p 276 note 3.

Delay in service of summons

Where the action had already begun when the attachment therein was

prosecute the suit to judgment and execution with proper diligence,[15] failing or refusing to give to the sheriff indemnity rightfully demanded by him,[16] allowing the sheriff to return "no property found" on an execution issued in the attachment suit,[17] assenting to a subsequent assignment by the debtor for the benefit of creditors[18] or a conveyance of the property in trust,[19] purchasing the property at a sale under other process subsequently levied,[20] entering into general submission to arbitration of all demands between himself and defendant[21] or settling or adjusting the suit,[22] or proving the claim in aid of which the attachment was sued out in bankruptcy proceedings,[23] or proving the claim against the debtor's assignee for the benefit of creditors[24] or against the estate after his death.[25] If the creditor, after attaching mortgaged personal property, discontinues his proceeding against the trustee appearing or the trustee is discharged by the court, the attachment is dissolved.[26] On the return of an execution wholly unsatisfied, there is no execution in force and thus no lien on the property by virtue of either the attachment or the execution,[27] unless the failure to obtain satisfaction of the execution was caused by a fraudulent obstruction as a fraudulent conveyance or transfer of the property.[28]

Presumptions and burden of proof. The law does not favor the abandonment or forfeiture of an attachment,[29] but the presumption is that the lien continues.[30] Since the law does not favor or presume abandonments, it is incumbent on the party who asserts an abandonment of the attachment to establish the fact.[31]

No waiver or abandonment of the lien is shown by the conduct of the attaching creditor in taking out a general execution on his judgment in the attachment suit,[32] failing to proceed after deliver-

levied, neither the attachment nor the action was, as a matter of law, abandoned by the delay in the service of the summons—Wagner v Farmers' Co-op Exch Co of Good Thunder, 180 N.W. 231, 147 Minn 376, 14 A.L.R. 279.

Abandonment of first attachment held a waiver of lien thereunder

Where a creditor files a complaint and causes an attachment to be issued and levied on real estate of a nonresident, but fails to serve the summons or take any further steps in the action, and a year and nine months after commences a new action against the same nonresident on the same cause of action, and levies a new attachment on the same real estate and prosecutes such action to judgment, he is deemed to have abandoned his first action and to have waived any lien under his first attachment.—Union Inv Co v. Abell, 181 N.W. 353, 148 Minn 229

15. U.S.—Williams v Banana Distributing Co., (C.C.A.Mich.) 59 F. (2d) 645
Alaska—Belleview v. Wittenberg, 5 Alaska 515.
Ark.—Arkansas Bank & Trust Co. v State Bank, 266 S.W. 977, 166 Ark 533
6 C.J. p 276 note 4.

Creditor's duty

Where a creditor has attached mortgaged property, it is his duty to pursue the attachment proceeding until the validity of the mortgage is determined or abandon the attachment—O'Neil v. Small, 167 N.E. 649, 268 Mass. 305.

Amendment to include prior cause of action

An amendment of a declaration in a pending action, to include a cause of action on which an action had been previously brought and an attachment levied, operated as an abandonment of the prior suit and a dissolution of the attachment—Underwriters' Salvage Co. of New York v Gilman, (C.C.A.Mass.) 299 F. 388, reversing (D.C.) Gilman v. Underwriters' Salvage Co., 288 F. 1004

16. Cudahy v Rhinehart, 30 N.E. 1004, 138 N.Y. 248, 28 Abb.N.Cas. 327, affirming on this point 15 N.Y.S. 514, 60 Hun 414, 21 N.Y.Civ.Proc. 52—6 C.J. p 276 note 5

17. Butler v White, 25 Minn. 432—6 C.J. p 276 note 6

18. Gathercole v. Bedel, 18 A. 319, 65 N.H. 211—6 C.J. p 276 note 7

19. Ark.—Arkansas Bank & Trust Co. v State Bank of Poplar Bluff, 266 S.W. 977, 166 Ark. 533
Mass.—Marr v. Washburn, etc., Mfg Co., 44 N.E. 1062, 167 Mass. 35

20. McConnell v Hanley, 7 J.J. Marsh.(Ky.) 528—6 C.J. p 276 note 9

21. Me.—Clark v Foxcroft, 7 Me. 348—Mooney v. Kavanagh, 4 Me. 277.
Mass.—Hill v. Hunnewell, 1 Pick. 192.
6 C.J. p 277 note 10.

22. Felker v. Emerson, 17 Vt. 101.

23. Starks v. Curd, 10 S.W. 419, 88 Ky. 164, 10 Ky.L. 740

24. F. A. Drew Glass Co. v. Baldwin, 27 Mo.App. 44—6 C.J. p 277 note 12

25. Lafferty v. Lafferty, 102 N.W. 626, 139 Mich. 176—6 C.J. p 277 note 13.

26. O'Neil v. Small, 167 N.E. 649, 268 Mass. 305.

27. Peetsch v Sommers, 53 N.Y.S. 438, 31 App.Div. 255, 28 N.Y.Civ.Proc. 124.

28. Merchants' Nat. Bank v Greenhood, 41 P. 250, 851, 16 Mont. 395

29. Ala.—Ex parte Landers, 106 So. 225, 214 Ala. 20 denying certiorari Landers v. Moore, 106 So. 223, 21 Ala.App. 12
Kan.—Stillman v. Hamer, 78 P. 836, 70 Kan. 463.
N.M.—Hart v. Oliver Farm Equipment Sales Co., 21 P.(2d) 96, 37 N.M. 267, 87 A.L.R. 962.

30. Ex parte Landers, 106 So. 225, 214 Ala. 20, denying certiorari Landers v. Moore, 106 So. 223, 21 Ala.App. 12

31. Idaho.—Wright v. Westheimer, 28 P. 340, 3 Idaho (Hasb.) 232, 35 Am.S.R. 269
Okl.—Jordan v Brown Shoe Co., 4 P.(2d) 1020, 152 Okl. 288
6 C.J. p 277 note 14.

32. N.Y.—Barton v Albert Palmer Co., 83 N.Y.S. 1041, 87 App.Div. 35
Ohio.—Liebman v. Ashbacker, 36 Ohio St. 94
6 C.J. p 277 note 15.

Further levy precluded

Issuance of a general execution merges the warrant of attachment in the sense that no further levy can be made thereunder, but does not destroy the lien established by a prior levy.—Appleton v National Park Bank of New York, 202 N.Y.S. 516, 122 Misc. 248.

ing the attachment,[33] filing a claim bond,[34] staying execution on attached real estate,[35] agreeing to retain the attachment against a part of the land sufficient to cover the judgment,[36] substituting in place of plaintiff a partnership of which he is a member,[37] accepting payment on a contract assignment taken to perfect the attachment,[38] entering into an agreement for the sale of the property for the benefit of all concerned,[39] joining in a proceeding to have the debtor declared insolvent,[40] or having the debtor arrested or committed;[41] nor does levying a second writ of attachment against the same property as a precautionary measure show an abandonment of the first levy;[42] nor having a return of nulla bona on a first execution after judgment;[43] and it has been held that a creditor who had obtained a lien on real estate by an attachment in chancery did not waive the same by levying an execution thereupon under a judgment which he had subsequently obtained in an action at law.[44] Where a suit was brought against a nonresident by attachment, plaintiff's failure properly to enter his judgment when recovered in the judgment lien docket has been held not to operate as a waiver of his attachment lien,[45] and it has also been held that delay in the institution of proceedings to enforce an attachment lien, which could not have given rise to an inference of an abandonment of the lien, and which resulted in no advantage to the attaching creditor or injury to the opposing party, does not constitute such laches as will bar the right to enforce the lien.[46] Therefore, unless a presumption of laches is justified or defendant is prejudiced by such delay, a mere failure by plaintiff to assert his rights under an attachment is not sufficient to cause a loss of lien.[47] An attaching creditor will not be deemed to have abandoned his attachment lien by his refusal to continue paying a watchman, where he thought such a keeper unnecessary for the attached property because of its bulk, weight, and situation.[48] A temporary absence on the part of a caretaker placed in charge of property by the attaching officer does not constitute an abandonment,[49] and where an attaching creditor instructed the sheriff to leave the goods in the possession of the debtor following an attachment in good faith, there is no constructive abandonment of the levy.[50] An agreement by the attachment plaintiff with other creditors subsequently attaching the same property to prorate the proceeds thereof, which they could enforce under the statute if their liens were valid, did not constitute an abandonment of his lien on certain of the property, on which the latter attachments were held invalid in an action to which he was not a party.[51] Where the mortgagee of personal property of defendant is summoned as trustee of the mortgagor, and he appears and disclaims all interest as mortgagee, showing that there is no mortgage and no debt, his discharge by plaintiff will not dissolve the attachment.[52] An attachment lien is not waived by proceeding to judgment and execution sale of the attached goods pending appeal, with supersedeas, from an order dissolving the attachment.[53] An attachment levied against partnership property, in an action against one of the partners, is not deemed to be abandoned by the subsequent appointment, at the instance of plaintiff, of a receiver for the partnership.[54]

33. McCarthy v Farley, 267 N Y S 733, 149 Misc. 360.

Doctrine of dormancy does not apply to attachments The doctrine rests on constructive fraud or estoppel and does not arise from mere inactivity due to ignorance that the lien had been made effective or from inactivity not resulting from the creditor s instructions or other act staying further proceedings—McCarthy v Farley, 267 N.Y.S 733, 149 Misc. 360

34. Sanders v. Farrier, (Tex Civ. App) 271 S W. 293

35. Ensworth v King, 50 Mo 477.

36. Union Trust Co v. Biggs, 137 A 509, 153 Md 50

37. Nomska v Aten, 154 N.W. 445, 36 S D 222.

38. Fergus Motor Co v Schott, 26 P (2d) 365, 95 Mont 249.

39. Cressy v Kats-Nevins-Rees Mfg. Co., 59 N W. 63, 91 Iowa 444.

40. Berts v. Turner, 36 P 1014, 102 Cal 672

41. Mass—Watts v. Stevenson, 47 N E 447, 169 Mass 61—Twining v Foot, 5 Cush. 512, explaining Lyman v Lyman, 11 Mass 317

Or—Katz v Obenchain, 85 P. 617, 48 Or 352, 120 Am S R 821.

6 C J. p 277 note 19

42. Wright v. Westheimer, 28 P 430, 3 Idaho (Hasb) 232, 35 Am S R. 269—6 C J. p 277 note 20.

43. Lant v. Manley, (Mich) 75 F. 627, 21 C.C A 457.

44. Beall v. Barclay, 10 B Mon (Ky) 261

45. Katz v. Obenchain, 85 P. 617, 48 Or. 352, 120 Am S R 821

46. Hatcher v. Hendrie, etc, Mfg, etc, Co., (Colo) 133 F 267, 68 C C A 19

47. Title Ins & Trust Co. v. California Development Co., 152 P 542, 171 Cal. 173—6 C J. p 276 note 1 [e].

Attachment lien is not waived by lapse of time, although levied in 1903, where it had been continually attacked by action since six weeks after it was obtained—Mott v Holbrook, 148 N W 1061, 28 N D 251

48. Irilarry v. Byers, 257 P. 540, 84 Cal App. 28.

49. Hart v Oliver Farm Equipment Sales Co, 21 P (2d) 96, 37 N M 267, 87 A L.R. 962.

50. First Nat. Bank v. Corporation Commission of North Carolina, 157 A. 748, 161 Md. 508, 86 A L R. 1407

51. Hatcher v. Hendrie, etc, Mfg, etc, Co, (Colo.) 133 F 267, 68 C C A. 19

52. Simmons v. Woods, 11 N E. 659, 144 Mass 385

53. Ryan v. Maxey, 35 P. 515, 14 Mont 81.

54. Runner v. Scott, 50 N E 479, 156 Ind. 441.

c. Effect of Abandonment

An abandonment of an attachment leaves the attachment lien as an absolute nullity.

Where an attachment has been voluntarily abandoned, all effects of the lien are gone as completely as though the attachment had never been levied.[55] An attachment on a part of the property may be released, in the absence of fraud and collusion, without prejudice to the attachment on that part of the property not released,[56] and a release by a prior attaching creditor of a part of the goods attached will not cause a postponement of his lien on the balance to that of subsequent attaching creditors.[57]

§ 263. —— By Act of Debtor

The lien of attachment cannot be destroyed by an intermediate act of the debtor himself.

The lien of attachment cannot be destroyed or taken away by an intermediate act of the debtor himself[58] Accordingly, it is held that a debtor cannot defeat the lien by claiming a homestead accruing subsequently to an attachment by reason of his marriage, or because of his residence on the attached land,[59] mortgaging the attached land[60] or personal property which has been released on a receipt,[61] selling the property,[62] even though the sale is for valuable consideration,[63] disclaiming an absolute devise to him of the land attached,[64] or voluntarily surrendering a leasehold interest attached.[65]

General assignment for the benefit of creditors will not, in the absence of a statute giving it such effect, defeat a lien of a previous attachment,[66] but some of the statutes provide that an assignment shall have this effect.[67]

§ 264. —— By Act or Omission of Levying Officer

Where an attaching officer does not keep possession or control of personal property seized, the attachment lien is lost, unless an agreement to prevent the discharge is had beforehand

An attaching officer has no power to release an attachment of realty.[68]

If a lien is created by a writ of attachment, such lien is lost when returned by the sheriff without a levy.[69]

Levy on personalty Even though the levying officer has no right to release an attachment of personalty[70] unless by the authority or consent of attachment plaintiff,[71] he has the power to do so.[72] In the absence of special statutory provisions, if the attaching officer fails to keep possession or control of personal property seized, the attachment is regarded as abandoned and the lien is lost,[73] except as against attachment defendant,[74] unless the

55. Conn—Jester v Naples, 109 A 394, 94 Conn 567
Tenn—Groveland Banking Co v City Nat Bank, 234 S W 643, 144 Tenn 520
6 C J p 277 note 27.
Abandonment by caretaker is equivalent to a surrender of the property.—Keith v. Ramage, 214 P 326, 66 Mont. 578.

56. Security Nat Bank of Oklahoma City v Truscon Steel Co, 218 P 665, 92 Okl 81—6 C J. p 277 note 28.

57. Doggett v. Wimer, 54 Mo App 125

58. Union Trust Co v Biggs, 137 A 509, 153 Md 50—6 C J p 278 note 30

59. Avery v Stephens, 12 N W 211, 48 Mich 246—6 C J p 278 note 31.

60. Dickson v Back, 51 P 727, 32 Or 217—6 C J. p 278 note 32

61. Barnard v. Towne, 46 A. 687, 70 N H 154.

62. Bowlby v. De Wit, 84 S E 919, 47 W Va. 323—6 C J p 278 note 34

63. Shenandoah Valley R. Co. v Griffith, 76 Va. 913—6 C.J. p 278 note 35.

64. Daniel v. Frost, 62 Ga. 697

65. Hughes v Farmers' Nat Bank, 76 A. 33, 83 Vt. 386.

66. U S—Flash v Wilkerson, (C C Tenn.) 20 F 257, 22 F. 689
Ill—Plume, etc, Mfg Co v Caldwell, 26 N E 599, 136 Ill 163, 29 Am S R 305
6 C J p 278 note 39

67. Crane v Pacific Bank, 39 P 215, 106 Cal 64, 27 L R A. 562—6 C J p 278 note 40

68. Braley v French, 28 Vt 546—6 C J p 279 note 41

69. Lewis v Richards, 8 Ky Op 209

70. Gordon v Wilkins, 20 Me 134—6 C J p 279 note 43.

71. Smith v Robinson, 1 P 353, 64 Cal 387—6 C J p 279 note 44

72. Colo—Barton v Continental Oil Co, 38 P 432, 5 Colo App 341
Vt—Braley v French, 28 Vt 516
6 C J p 279 note 45

73. U S—In re Continental Transportation & Oil Co, (D C Del.) 17 F. (2d) 434
Conn—Knox v Binkoski, 122 A 400, 99 Conn 582.
Idaho—American Fruit Growers v Walmstad, 260 P 168, 44 Idaho 786
Me—Bass v Dumas, 95 A 286, 114 Me 50—Rogers v Maine Cent R Co, 94 A 758, 113 Me 436, L R A 1915F 1184, Ann Cas 1916B 999
Mont—Keith v Ramage, 214 P. 326, 66 Mont 578
Nev—Green v Hooper, 167 P. 23, 41 Nev. 13
6 C J p 310 note 6.
Rule in Maryland
Where chattels were seized by an officer under an attachment and the officer did not remove them from the premises but left them in the possession of the owner, it was held that if it should appear that the levy was not made in good faith, or for the purpose of its enforcement, as if the plaintiff's object was merely to obtain some security or to prevent some other levy being made in advance of his own, or to hinder or delay other creditors of the debtor, then the levy under the writ of attachment must be adjudged fraudulent and void However, it was apparent from the record in that case that no abuse of the writ was intended, and hence there was no constructive abandonment of the levy—First Nat Bank v. Corporation Commission of North Carolina, 157 A 748, 161 Md 508, 86 A L R 1407.
Physical possession necessary
The evidence must be sufficient to show that the attaching officer retained physical possession of the property attached—Bass v Dumas, 95 A 286, 114 Me 50

74. Ill—Conn v. Caldwell, 6 Ill 531
Vt.—Fifield v. Wooster, 21 Vt 215.

officer or his agent was deprived of possession by the wrongful act of another person, as will be discussed in § 265.

In order to maintain the lien, the continuous presence of an attaching officer, by himself or agent, with the property attached, is not necessary. It is sufficient if he exercise due diligence to prevent the property from going out of his control[75] A failure by an attaching officer to sign and file a return of attachment dissolves the attachment,[76] and, where an officer made numerous separate attachments on the same property, the fact that he made a sufficient return on one of the writs did not preserve the attachment as to the others[77] Where the attaching officer, or any person to whom he may deliver the goods for safe-keeping, permits them to return to the possession of the debtor, the attachment is, with respect to other creditors, ipso facto, dissolved;[78] but it has been held that, where an officer allowed the attached property to remain in the debtor's possession under an agreement between himself and the debtor that the attachment should still subsist, the attachment was not dissolved as against the debtor or anyone having notice of these facts.[79] Provided the debtor's use of the property will not result in injury to the property,[80] the fact that property attached is left in the hands of the debtor does not dissolve the attachment,[81] and attached property left in the hands of the debtor's wife is within the rule.[82] It has been held that in such a case there should be a keeper immediately representing the attaching officer who should be in possession and control of the property, and that the use thereof should be under the immediate supervision of such keeper[83] Where an agreement exists between the creditor and debtor that the property attached should continue to be delivered to a third party for use, the levying officer is not bound to either plaintiff or defendant and cannot require the third person to account, even though notice of seizure was served on it[84] If an officer mixes goods attached by him with other goods of the same kind attached by another officer, on a writ against the same defendant, so that the former goods cannot be identified, the lien of the last attachment is lost.[85] The act of an officer in merely permitting attached property to be sold and the proceeds substituted in lieu thereof did not constitute a release of the attachment.[86]

§ 265. —— By Act of Third Person

An attachment lien will not be released by a third person's acts.

An attachment lien will not be released or discharged because of the act of a third person.[87] Where an attaching officer or his agent is deprived of possession by the wrongful act of another person, the attachment is not regarded as abandoned, nor is the lien lost.[88]

§ 266. —— By Death

a. Of attaching creditor
b. Of attachment debtor

a. Of Attaching Creditor

Generally, the death of the plaintiff pending proceedings will not abate the attachment process.

Generally, an attachment proceeding will not abate due to plaintiff's death pending the proceedings,[89] although the contrary has been held.[90]

75. Conn.—Mills v Camp, 14 Conn. 219, 36 Am D 483
Mass.—Fettyplace v. Dutch, 13 Pick 388, 23 Am D 688
6 C J p 312 note 15.

76. Bass v. Dumas, 95 A. 286, 114 Me 50.

77. Bass v. Dumas, supra

78. Conn.—Gray v Bracken, 140 A. 354, 107 Conn. 300.
Mont.—Chowning v. Madison Land & Irrigation Co, 276 P. 946, 84 Mont 494
6 C J. p 312 note 22.

79. Mass.—Titcomb v. Bay State Grocery Co, 150 N E. 874, 254 Mass 599
Mont.—Chowning v Madison Land & Irrigation Co, 276 P. 946, 84 Mont 494
6 C.J. p 312 note 22.

Debtor or creditor may be keeper without loss of attachment

Where the attaching officer places attached property in the custody of the debtor as keeper, taking the keeper's receipt, and later placed the property in the custody of the creditor, taking a similar receipt, the attachment lien was not lost in either instance.—Myers v. Walker, 24 P. (2d) 97, 173 Wash. 592.

80. Train v. Wellington, 12 Mass 495.

81. Me.—Small v. Hutchins, 19 Me. 255
Mass.—Train v. Wellington, 12 Mass 495—Baldwin v. Jackson, 12 Mass 131.
N H.—Young v. Walker, 12 N H. 502
6 C J. p 312 note 17.

82. Farrington v. Edgerley, 13 Allen (Mass.) 453.

83. Jones Lumber, etc., Co. v. Faris, 60 N.W. 403, 6 S D 112, 55 Am S.R. 814—6 C J. p 312 note 18

84. H. R Hayes Lumber Co v. H. M. Jones Drilling Co, 148 So. 899, 177 La. 626.

85. Gordon v. Jenney, 16 Mass. 465.

86. Lathrop v. Lawson, 121 A. 438, 96 Vt. 513.

87. Harriman v. Gray, 103 Mass 229—Butterfield v Clemence, 10 Cush 269—6 C.J. p 279 note 46.

88. Woodward v. Lishman, 78 A. 701, 80 N J Law 586—6 C J. p 311 note 8.

89. Colo.—Thompson v. White, 54 P. 718, 25 Colo. 226
Mo.—Buller v. Woods, 43 Mo App. 494.
Tenn.—Boyd v. Roberts, 10 Heisk. 474.

90. In re Vargas, 19 Wend (N.Y.) 154.

b. Of Attachment Debtor

In the absence of a controlling statute, the attachment lien may continue after the death of the attachment debtor unless the principal action is abated by reason thereof.

Provisions are made in some statutes that attachments levied prior to the death of defendant shall not affect the disposition of his estate.[91] Where the statute so provides, the death of defendant before judgment dissolves the attachment,[92] but, in the absence of regulating statutes, there appears to be no reason why the attachment lien should not continue in operation after the death of defendant,[93] unless the principal action abates by reason thereof.[94] Definite statutory provisions in some jurisdictions stipulate that the attachment lien shall survive defendant's decease.[95]

Solvency as governing consideration. In some jurisdictions the rule is that the attachment remains in force if defendant is solvent at the time of his death, but that where he dies insolvent the attachment is dissolved.[96]

Death after final judgment. The death of the attachment defendant after final judgment against him does not have the effect of defeating the lien,[97] even though he may be insolvent at the time of his death.[98]

§ 267. —— By Judicial Proceedings Generally

Generally, an attachment lien cannot be destroyed by judicial proceedings to which the creditor is not a party, except where bankruptcy or insolvency adjudications are involved.

The destruction of an attachment lien cannot be had by judicial proceedings to which the creditor is not a party,[99] except an adjudication of bankruptcy, or, under the statutes in some jurisdictions, insolvency of the attachment debtor.

The appointment of a receiver to take charge of corporate assets does not, in the absence of a statute so providing, destroy the lien of an attachment previously levied on property of the corporation,[1] even though the attached property comes into the possession of the receiver.[2]

§ 268. —— By Proceedings in Main Action

a. In general
b. Discontinuance, dismissal, or nonsuit
c. Judgment for plaintiff
d. Judgment for defendant
e. Failure to issue, levy, or enforce execution
f. Appeal and supersedeas

a. In General

An attachment may be dissolved and the attachment lien lost by the effect of proceedings in the main action.

Service of summons on a nonresident in the county in which the same is issued does not abate an attachment, nor furnish grounds for demurrer to a bill in equity founded on the fact of such nonresidence,[3] nor is an attachment dissolved by the appearance of defendant in the action,[4] although, as

91. McCarthy v. Rogers, (Mass) 3 N E (2d) 787—6 C.J. p 279 note 50

Property alienated before decease

A debtor who transferred shares of stock to a receiver before his death pursuant to an interlocutory decree granted in a creditor's suit to reach and apply shares to the payment of a debt was held not to have "alienated" shares so as to preserve the creditor's attachment—McCarthy v Rogers, (Mass) 3 N E (2d) 787.

92. Huth v. Bachman, 28 Pa Dist 230

Statute not defeated by subsequent nunc pro tunc judgment

A statute, which provides that an attachment shall be dissolved on the death of the debtor before execution, even though the debtor had in good faith conveyed the land, is not defeated by a subsequent nunc pro tunc judgment—Taylor v. Badger, (Mass) 115 N E. 405.

93. Cal.—Everett v. Hayes, 270 P. 458, 94 Cal App 31.
Iowa—Tetzloff v. May, 154 N.W. 905, 172 Iowa 617
6 C J p 280 note 51.

94. Everett v. Hayes, 270 P 458, 94 Cal App 31—6 C J. p 280 note 52

95. Del—Woods v. Spoturno, (Super) 183 A 319
Iowa—Tetzloff v. May, 154 N W. 905, 172 Iowa 617
Ky—Brown's Adm'r v Gabhart, 23 S W (2d) 551, 232 Ky 442.
Mont—In re Stevenson's Estate, 289 P 566, 87 Mont 486.
6 C J p 280 note 53.

96. Day v Lamb, 6 Gray (Mass) 523—6 C J. p 281 note 54.

97. Waitt v. Thompson, 43 N H 161, 80 Am D 136—6 C J. p 281 note 55

98. Bowman v. Stark, 6 N H 459.

99. Conn—Lyon v. Sandford, 5 Conn 544
D C—Robinson v. Morrison, 2 App 129.
6 C J. p 281 note 63.

Reference of a case to arbitration will not discharge the lien of an attachment.—Seavey v. Beckler, 132 Mass. 203—6 C.J. p 281 note 63 [b]

Order for sale

Where a judgment, in actions consolidated for trial, foreclosed liens and ordered defendant's property sold, but a claim of a prior attachment lien was postponed for separate trial, and sufficient money was retained to pay the excepted claim if it should be established, it was held that sale of the property did not terminate the liens which were preserved, and the distribution of money preserved was merely postponed—Hendricks v Wall, (Tex Civ App) 277 S W. 207.

1. Neb—Arnold v. Weimer, 58 N.W. 709, 40 Neb 216.
N Y—National Park Bank v. Clark, 87 N Y S 185, 92 App Div. 262.
6 C J p 282 note 67.

2. N Y—Matter of Atlas Iron Constr Co., 46 N Y S. 467, 19 App Div 415
Ohio—Hughes v. Dale, 16 Ohio Cir Ct 645, 9 Ohio Cir Dec. 270

3. Hall v. Packard, 41 S E 142, 51 W Va 264.

4. Goldmark v. Magnolia Metal Co, 47 A 720, 65 N J Law 341—6 C J. p 282 note 70.

will be seen in § 408, formerly a different view may have been maintained. An amendment of the pleadings in the main action will not destroy an attachment,[5] at least where the object of the amendment is to cure a mere defect in form[6] or to make a more perfect statement of the original cause of action;[7] but it is otherwise as to an amendment which introduces a new demand or cause of action,[8] although in the absence of fraud this has been held to be untrue;[9] and it has also been held that an attachment is vacated by an amendment by which a corporation is substituted as plaintiff in place of the individual incorporators.[10] Where a new cause of action is pursued, including the cause on which an attachment was made, the attachment is not invalidated even though the new cause of action contained additional debt claims.[11] Where a complaint, when filed, contains sufficient averments to give the court jurisdiction, and an attachment of defendant's property is rightfully issued thereon, the fact that plaintiffs demurred to the answer, thereby admitting allegations of defense, is no ground for dissolving the attachment.[12] The lien of an attachment is not destroyed by the execution thereon.[13] It has been held that an attachment will be considered relinquished following the conversion of an action at law in which an attachment has been issued into a suit in equity,[14] but other holdings claim no general rule of law to be existent which requires a relinquishment of the attachment lien on such a transfer of the cause.[15]

Writ of error from the supreme court of the United States to reverse a judgment of a state court before execution ipso facto dissolves an attachment made at the commencement of the suit, because such a writ of error cannot be taken without giving security, which replaces the security of the attachment.[16]

Execution sale. Under a statute so providing, where the officer fails to complete the execution sale within five months after final judgment, the lien is lost and the execution purchaser takes subject to intervening rights.[17]

b. Discontinuance, Dismissal, or Nonsuit

A discontinuance, dismissal, or nonsuit in the main action will serve to dissolve the attachment and discharge the attachment lien.

Where the creditor in an attachment suit in which a levy has been made, and whose claim was sufficient to cover all the attached property, discontinued his suit on an agreement with the debtor to take all the property in satisfaction of his claim, it was held that, while his title might be good against the debtor, it would not be good against subsequent attaching creditors who perfected their lien by judgment and execution.[18] A discontinuance against a garnishee does not dissolve an attachment levied on land which the garnishee is alleged to have purchased by fraud.[19] An abatement of the main suit discharges the attachment.[20]

Dismissal of the original action in which an attachment was levied operates to release the attachment lien,[21] unless it is vacated and the action reinstated.[22]

Nonsuit of plaintiff will also serve to dissolve the attachment,[23] although where a nonsuit is set aside at the same term in which it is granted, the attachment lien is not destroyed.[24]

5. N D—MacDonald v. Fitzgerald, 171 N W 879, 42 N D 138
Tex.—Andrews v. Manhattan Texas Petroleum Co., (Civ App) 252 S W 878
6 C J. p 282 note 71.

Time granted to amend
The sustaining of a general demurrer to the complaint and the grant to the plaintiff of time to amend was held not to dissolve the attachment —American Surety Co of New York v Kartowitz, 166 P. 685, 54 Mont 92

6. Ill—Baldwin Co. v. Darnell, 213 Ill App. 589
Pa—Kamsler v. Parker Stores, Inc., 2 Pa Dist & Co. 317.
Tenn—Niehaus v. C. B Barker Const. Co., 186 S.W. 461, 135 Tenn 382.
6 C.J p 282 note 72.

7. Walden v. Locke, (Tex Civ App) 49 S W.(2d) 832.

8. Green v. Hoppe, (Tex Civ App) 175 S W. 1117—6 C J. p 282 note 73.

9. Underwriters' Salvage Co of New York v Gilman, (C C A Mass) 299 F 388, reversing (D C) Gilman v. Underwriters' Salvage Co, 288 F 1004

10. Fargo v. Cutshaw, 39 N E 532, 12 Ind App. 392

11. Meister v. Gale, 139 A. 700, 107 Conn 52

12. Hunter v. Wenatchee Land Co., 79 P 40, 36 Wash 541

13. People ex rel Hunter v. Seery, 200 N Y S 531, 206 App Div 19

14. Harwood v. U S Shipping Board Emergency Fleet Corporation, (D C Conn) 300 F 432.

15. Vaux v. Vaux, 172 A. 68, 115 N J Eq 586.

Lien of attachment enforceable in chancery although issued out of the circuit court—Vaux v. Vaux, 172 A 68, 115 N J Eq 586

16. Otis v. Warren, 16 Mass 53.

17. Reynolds v. Bean, 99 A. 1013, 91 Vt. 247.

18. Brandon Iron Co v. Gleason, 24 Vt 228

19. Hand v. Fritsch, etc., Co, 7 Ky L 439

20. Edwards v Tracy, 212 N W 317, 203 Iowa 1083

21. S C—Skalowski v. Joe Fisher, Inc, 149 S E. 340, 152 S C 108, 65 A L R 1427
Wis—Rathmann v. Schwanz, 175 N. W 812 170 Wis 459.
6 C J. p 284 note 86.

Dismissal of an attachment proceeding by original plaintiff is not a final adjustment, if other creditors have filed under the same—Ryan v. Burkam, 42 Ind 507.

22. Jaffray v. H B Claflin Co, 24 S W 761, 119 Mo 117—6 C J p 284 notes 87, 88.

23. Clark v Superior Court in and for Los Angeles County, 174 P 681, 37 Cal App 732—6 C J. p 283 note 78 [a], p 284 note 89.

24. Conn—Hubbell v. Kingman, 52 Conn. 17.

Entry of judgment for neither party by mistake, but stricken off at the same term of court, did not vacate the attachment, where no innocent party acquired an interest in the meantime.[25]

c. Judgment for Plaintiff

A judgment in favor of the plaintiff in an attachment suit does not destroy the attachment.

The rendition of a judgment in favor of plaintiff in the attachment suit does not, as a rule, destroy the attachment,[26] even though the judgment was obtained without any contest on the part of defendant,[27] but it has been held that the lien is lost where the attaching creditor consents to a judgment in his own favor before the return day of the writ,[28] and that, if plaintiff knowingly and willfully takes a judgment in excess of what he may legally claim, it will dissolve the attachment as to subsequent attaching creditors.[29] The improper inclusion, in a judgment for attachment plaintiff, of claims not in existence at the time of the attachment may render the attachment lien void as against persons purchasing part of the property attached after the commencement of the attachment suit.[30]

Payment in full of plaintiff's judgment necessarily annuls the attachment,[31] but where an attaching creditor secures a judgment for part of his claim and appeals therefrom, defendant is not entitled to have the attachment vacated on paying the amount of the judgment.[32] Where a plaintiff has recovered judgment in an attachment suit, the mere deposit by defendant with the clerk of the amount of the judgment is not such a payment thereof as will entitle him to have the attached property released.[33] Where the claim in litigation is settled between the parties, no further inquiry will be made to determine whether an attachment was properly sued out, but it will be considered as discharged.[34] Where an attachment exists against certain property, and such property is conveyed by the owner as part payment of the decree issued against him in the main action, an extinguishment of the attachment on the property will result.[35]

Execution issued against the property attached supersedes the attachment lien, and, on its return unsatisfied, no lien exists which can be enforced by action.[36]

d. Judgment for Defendant

A judgment for defendant on the merits of the suit terminates the attachment and destroys the lien.

A judgment for defendant on the merits of the suit terminates the attachment,[37] even though the clerk fails to perform the ministerial duty of certifying the judgment to the register of deeds,[38] or fails to note the discharge of the attachment,[39] and a judgment for defendant on a plea in abatement has been held to have the same effect.[40]

N H—Gunnison v. Abbott, 64 A. 23, 73 N H 590.
6 C J p 284 note 90.

25. Sawyer v Calais Nat. Bank, 133 A. 470, 126 Me 314

26. Ark—Weibel v Beakley, 119 S W 657, 90 Ark 454.
Ill—Yarnell v. Brown, 48 N E 909, 170 Ill 362, 62 Am S R 380
Ky—Garr v Lyons, 37 S W. 73, 148, 99 Ky. 672, 18 Ky L. 500.
6 C J p 284 note 92.

Judgment not annullment

A warrant of attachment and the liens acquired thereunder are not annulled by judgment rendered, but remain alive until dissolved by order of court or payment of judgment—Ackerman v. Tobin, (C C A Mo) 22 F (2d) 541, certiorari denied Tobin v Ackerman, 48 S Ct 321, 276 U S 628, 72 L Ed 739

27. State Nat Bank v Union Nat Bank, 48 N E 82, 168 Ill 519—6 C J. p 284 note 93.

28. Gilbert v. Gilbert, 33 Mo.App. 259

29. Page v. Jewett, 46 N H. 441—6 C.J. p 284 note 95.

30. Oconto Co v. Esson, 87 N.W. 855, 112 Wis 89

31. Maynard v. Damron, 36 S W.(2d) 638, 237 Ky. 793—6 C J. p 285 note 1.

Reason for rule

Attachment is an ancillary remedy to secure an alleged debt, and when the debt itself is paid, the attachment is annulled—Maynard v Damron, 36 S W (2d) 638, 237 Ky 793

Release following payment of indebtedness

Where a mortgagor sought to have released from attachment for the mortgage indebtedness land previously released from the mortgage lien, he must repay to the mortgagee the amount of taxes paid on the land sought to be released.—Stoops v. Bank of Brinkley, 225 S.W. 593, 146 Ark. 127

Order of attachment properly sustained

Where the purpose of an action has been accomplished when the judgment is paid and further investigation respecting ancillary remedies has become moot, the trial court acts properly in sustaining an order of attachment obtained in the main action—Maynard v. Damron, 36 S.W. (2d) 638, 237 Ky 793.

32. Wright v Rowland, 4 Abb Dec (N.Y) 649, 4 Keyes 165, 36 How Pr. 248, reversing 36 How.Pr. 115.

33. Sagely v. Livermore, 45 Cal 613.

34. Maynard v Damron, 36 S W (2d) 638, 237 Ky 793

35. Parkhurst v Maynard, (Mass) 188 N E 510.

36. Barton v Albert Palmer Co, 83 N Y S 1041, 87 App Div 35.

37. Ala—Morrison v Sanders, 80 So 135, 16 Ala App 561.
Colo—Vigil v. Pacheco, 36 P.(2d) 766—Gasche v. Lincoln Mines & Reduction Co., 265 P. 906, 83 Colo. 413
Idaho—Standlee v. Hawley, 295 P. 630, 50 Idaho 269—Washington County v Weiser Nat Bank, 253 P. 838, 43 Idaho 613
Mass.—Magaw v Beals, 172 N E 347, 272 Mass 334
Okl—Texas-Omar Gasoline & Oil Co. v. North American Car Co, 251 P. 1010, 123 Okl. 57.
6 C J. p 283 note 78.

Erroneous judgment for defendant, which is later vacated, does not destroy the lien—Gunnison v. Abbott, 64 A 23, 73 N.H 590.

38. Meloy v. Orton, (C C Wis.) 42 F. 513

39. Nichols v. Ingram, 146 P 988, 75 Or 439.

40. Ranscher v. McElhinney, 11 Mo. App. 434.

A reversal of the judgment for defendant revives the attachment.[41]

e. Failure to Issue, Levy, or Enforce Execution

Where it is so required, a failure to order execution will serve to release the attachment.

In some states a judgment for plaintiff in attachment is required to contain an order for special execution against, or sale of, the attached property, and a general judgment and execution releases the lien of the attachment;[42] but, in the absence of any express statutory requirement therefor, such an order, although customarily made, is not generally regarded as essential, and the lien of the attachment is not discharged by a general judgment and execution.[43] Where a judgment quasi in rem is rendered against attached property, directing it to be sold to satisfy the debt of the attaching creditor, the right which the latter has secured by the seizure under the writ of attachment becomes merged in the lien of the judgment.[44]

f. Appeal and Supersedeas

The pendency of an appeal by plaintiff may prevent dissolution of the attachment, but defendant's appeal bond may have that effect.

An appeal or writ of error sued out by defendant may release an attachment where defendant gives bond for the payment of the judgment, if it be affirmed.[45] The perfection of an appeal by plaintiff from a judgment in favor of defendant within the required statutory time will have the effect of preventing the dissolution of the attachment, which would otherwise be caused by a judgment in favor of defendant.[46]

§ 269. —— By Legislative Enactment

An attachment lien cannot be annulled by a subsequent act of the legislature.

The repeal, during the pendency of a suit, of a statute providing for attachments, without any reservation or other saving clause, has been held to dissolve an attachment taken thereunder;[47] but the weight of authority supports the view that the lien or security acquired by attachment is of such force and value that it cannot be annulled by a subsequent act of the legislature.[48]

§ 270. —— Other Matters Effecting Release or Discharge

An attachment will not be set aside and its lien discharged by mere irregularities or defects in the proceedings.

Where irregularities occur in the proceedings prior to the issue of the attachment, the lien will not for that reason be defeated.[49] Further, a writ of attachment, even though it might be set aside because of the existence of defects or irregularities, is not invalidated, and if it be properly issued, in due form of law, and not an absolute nullity, it is a sufficient justification for the officer in holding the property, unless the lien created by the levy has been released or discharged in some manner.[50] In attachment cas-

41. Friede v Weissenthanner, 58 N Y S 336, 27 Misc. 518, reversing 56 N Y S 399, 26 Misc. 857—6 C.J. p 284 note 83

42. U S.—First Nat Bank of Antioch v McKean, (C C A Or) 285 F. 557—Love v Pavlovich, (Alaska) 222 F 842, 138 C C A. 268.
Or —Liberman v. Low, 86 P (2d) 791 —Hill v Wilson, 261 P 422, 123 Or. 193—Smith v. Dwight, 156 P. 573, 80 Or. 1, Ann Cas 1918D 563
6 C J. p 285 note 97, p 486 note 95.

Attachment merely ancillary to suit
As an attachment is purely ancillary to a suit, if the court entered judgment for the amount of plaintiff's claim, and made no order as to the attached effects, the attachment would be considered as released — Kaylor v Davy Pocahontas Coal Co., 87 S E 551, 118 Va. 369.

Order for sale of part releases lien on remainder
A personal judgment for plaintiff, with an order for the sale of part of defendant's lands previously attached by plaintiff, releases the attachment lien on land not included in the order —Thomas v. Johnson, 36 N E 393, 137 Ind. 244.

Effect of taking out fieri facias
If plaintiff, instead of suing out a writ of venditioni exponas, takes out a fieri facias, he thereby waives the lien of the attachment.—Hurst v Luford, 11 Heisk (Tenn.) 622—6 C J. p 486 note 95 [c].

43. Ariz —Lount v Holladay, 234 P. 1084, 28 Ariz 16—Hunter v. Daze, 170 P. 783, 19 Ariz. 308
N M —First Nat. Bank of Elida v. George, 190 P. 1026, 26 N M 176
Tex —Baker v. Pitluk & Meyer, 205 S W 982, 109 Tex 237
Wyo —First Nat Bank v. Sorenson, 217 P 948, 30 Wyo. 136
6 C J. p 285 note 98, p 486 note 96.

44. Oliver v. Wright, 83 P. 870, 47 Or. 322.

45. Brun v. Evans, 241 P. 86, 197 Cal. 439—6 C J. p 285 note 5.

Personal property attachment
A statute applicable to attachment of realty has been held not intended to release a lien of attachment on personal property by undertaking on appeal from the judgment.—Balsano v. Traeger, 270 P. 249, 93 Cal.App 640

46. Munn v. Shannon, 53 N.W. 263, 86 Iowa 363—6 C.J. p 283 note 82.

47. Stephenson v. Wait, 8 Blackf (Ind) 508, 46 Am D 489.

48. Mulnix v. Spratlin, 50 P. 1078, 10 Colo App 390—6 C J. p 285 note 7

Vested interest
The lien of an attaching plaintiff is a vested right or interest, of which he cannot be divested without his voluntary act or without having his day in court.—McFadden v Blocker, 48 S W. 1043, 2 Ind T 260, 58 L R A. 878—6 C J p 285 note 7 [b].

49. Budd v. Long, 13 Fla. 288

50. Ela v. Shepard, 32 N H. 277.

Distinction between vacation and annulment
In New York, the court has drawn a distinction between the vacation and annulment of an attachment, saying "The entry of the order vacating the attachment did not annul the warrant of attachment. Such annulment occurs only in a case specified in section 3343, subdivision 12, of the Code of Civil Procedure." The provision referred to reads as follows: "A warrant of attachment against property is said to be 'annulled,' when the action, in which it

es the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued, and, no matter what, nor how great, errors or irregularities may subsequently occur, the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or appeal, or set aside in a direct and appropriate proceeding for that purpose.[51]

Change of jurisdictional boundaries. An attachment lien has been held not to be destroyed by the establishment of a new county line which places part of the attached property beyond the county where the writ was issued.[52]

Discharge of debtor on pauper's oath A discharge from commitment on execution by taking a poor debtor's oath will not of itself discharge the attachment made on the original writ, and thus release the receiptor of the property attached, on whom due demand was made.[53]

Expiration of attaching officer's term. An attachment does not abate on the expiration of the term of the officer by whom it was issued [54]

Substitution of security. Where a cash bond is substituted with the court's approval to stand in place of attached property, the attachment is not discharged.[55]

§ 271. Restoration of Lien

If an attachment lien is dissolved, terminated, or lost, it is ended and cannot be restored.

There is no way of reviving an attachment lien that is lost; a new attachment creating a new lien must be issued.[56] If the dissolution of an attachment is effected by the delivery of the property by the officer into the possession of the debtor, the attachment cannot be revived by a redelivery by the debtor to the officer;[57] and, even though the attaching officer does not, on dissolution of the lien, make a formal delivery of the property to the attached debtor, a second attachment will not, by virtue of such nondelivery, revive the lien created by the first attachment.[58] Where plaintiff attached defendant's land, and on his default entered judgment and took out execution, and at a subsequent term the execution was canceled, a new judgment rendered, and execution issued thereon, under which defendant's land was set off to plaintiff, his attachment lien having expired, his right to the land depended on his levy only, since the court's order vacating the former judgment did not revive the attachment.[59] An attachment of personalty dissolved by the officer taking the debtor's receipt was not restored by an order by the referee, in subsequent bankruptcy proceedings against the debtor, directing that the rights under the attachment be preserved for the benefit of the estate.[60] Where the first attachment of money is not made to enable the second to be made, and is abandoned simply because the right name of defendant is not given therein, and the second attachment is made on a writ issued to correct the mistake, and in all this the attachment plaintiffs and the officer serving the writs act without fraud and in good faith, the last attachment is valid, although the property is not returned to the owner before it is made.[61]

Act of the legislature cannot retrospectively restore an attachment which has been dissolved by the insolvency of the debtor.[62]

§ 272. Priorities between Attachments and Other Liens or Claims

a. General rule
b. Applications of rule

was granted, abates or is discontinued, or a final judgment, rendered therein, in favor of the plaintiff is fully paid; or a final judgment is rendered therein in favor of the defendant."—Norden v. Duke, 95 N.Y.S. 940, 47 Misc. 473, reversed on other grounds 94 N.Y.S. 878, 106 App.Div. 514.

51. Shea v. Shea, 55 S.W. 869, 154 Mo. 599, 77 Am.S.R. 779

Attachment unchallenged before judgment is not dissolved merely because the allegation on which the attachment was based was found against the attaching party—Essig v. Keating, 291 P. 323, 158 Wash. 443.

Failure to find record of entry of action

Where the attachment of realty had been properly made and the writ entered, a filing of the certificate of the clerk of court, stating that the clerk had found no record of entry of the action was held not to discharge the attachment, even had the writ not been entered, so as to invalidate the attachment as against subsequent purchasers relying on the record—Higgins v. Savoie, (Mass.) 193 N.E. 238.

52. Tyrell v. Rountree, (Tenn.) 7 Pet.(U.S.) 464, 8 L.Ed. 749, affirming (C.C.) 24 F.Cas.No.14,313, 1 McLean 95—6 C.J. p. 281 note 61.

53. Bailey v. Jewett, 14 Mass. 155—Lyman v. Lyman, 11 Mass. 317.

54. Davis v. Ainsworth, 14 How.Pr. (N.Y.) 346

55. Martin v. McBryde, 108 S.E. 739, 182 N.C. 175, 21 A.L.R. 12.

56. Cal.—Brun v. Evans, 241 P. 86, 197 Cal. 439.

Me.—Bass v. Dumas, 95 A. 286, 114 Me. 50.

Dissolution by supersedeas bond

An attachment lien, discharged by filing a supersedeas bond, on appeal from a judgment, cannot be revived under a statute allowing the extension of time of an attachment lien.—Brun v. Evans, 241 P. 86, 197 Cal. 439.

57. Gower v. Stevens, 19 Me. 92, 36 Am.D. 737—6 C.J. p. 313 note 24.

58. Anderson v. Land, 32 P. 107, 5 Wash. 493, 34 Am.S.R. 875.

59. Murphy v. Hill, 44 A. 703, 68 N.H. 544.

60. Gary v. Graham, 81 A. 666, 108 Me. 452.

61. Brady v. Royce, 62 N.E. 960, 180 Mass. 553.

62. Ridlon v. Cressey, 65 Me. 128.

a. General Rule

An attachment creditor is entitled under his lien only to the rights which the debtor had in the property at the time of the attachment, and is postponed to all prior liens or claims thereon except as special statutory provisions may affect such rights.

The rights of an attaching creditor with respect to the property attached must be determined by the state of the title at the time when the attachment was made.[63] Except in jurisdictions where he is so considered by force of statute,[64] he is not in the position of a bona fide purchaser for value,[65] but obtains only the rights which the debtor had in the property at that time, and is postponed to liens or claims of other persons upon or to the property, which became effective before the attachment,[66] except in so far as will be considered in §§ 274, 275, as he may avail himself of fraud in a transaction affecting the property, or, as will be seen in § 276, his position may be bettered by an omission on the part of others to comply with statutory requirements in respect to a transfer or encumbrance of the property. An attaching creditor may, however, succeed to the incidental rights to which the debtor was entitled by reason of his ownership of the property, as for example a right to redeem from a prior mortgage,[67] or a right to notice in regard to partition proceedings against the attached property,[68] or to the benefit of agreements in regard to such property,[69] but he is not entitled to rights and privileges in regard thereto which are personal to the debtor.[70]

All rights acquired in the attached property, from or against the attachment debtor, subsequent to the attachment, are subordinate thereto,[71] so that a title obtained under an attachment relates back to the time of the commencement of the lien, and the purchaser of the same acquires such title as the debtor had at that time, unaffected by any intermediate alienation or encumbrance.[72] So, where the attachment is lawful, title to the property obtained by a levy of an execution based upon the attachment is good as against encumbrances or notices of equities intervening between the attachment and the execution.[73]

63. State Banking, etc, Co v. Taylor, 127 N W 590, 25 S D 577, 29 L R A (N S) 523—6 C J p 286 note 16

Interest covered by attachment see supra § 258 b.

64. Hampden Nat Bank v. Hampden R. R. Corporation, 141 N E 107, 246 Mass 404—Hillside Co-op Bank v. Cavanaugh, 122 N E. 187, 232 Mass. 157—6 C J. p 286 note 17 [c].

65. Cal—Burns v Peters, 55 P (2d) 1182—Bank of San Francisco v. Pike, 200 P 752, 53 Cal App. 524.
Del—Royal Ins Co v. Simon, (Ch) 174 A 444.
Ill—Brennan v. Persselli, 266 Ill. App 441, affirmed 187 N E 820, 353 Ill 630.
Ind—Frontier Nat. Bank of Eastport, Me, v. Salinger, 126 N E. 40, 72 Ind App 479
Mont—Stauffacher v Great Falls Public Service Co, 43 P (2d) 647—Short v. Karnop, 275 P. 273, 84 Mont. 276
Ohio—Warren Guarantee Title & Mortgage Co v. Williams, 161 N E. 551, 27 Ohio App 505
Wis.—Karger v. Steele-Wedeles Co, 79 N.W. 216, 103 Wis 286.
6 C J. p 286 note 17.

66. Ill—Brennan v. Persselli, 266 Ill App. 441, affirmed 187 N.E. 820, 353 Ill 630
Ky—Veatch's Adm'r v. Loverett, 97 S.W (2d) 47, 265 Ky. 532.
Mont.—Short v Karnop, 275 P. 273, 84 Mont 276.
Ohio.—Warren Guarantee Title & Mortgage Co v. Williams, 161 N E 551, 27 Ohio App 505—Malkey v Ruggles, 24 Ohio N P (N S) 433
W Va—Howell v McCarty, 88 S E 181, 77 W Va 695
6 C.J p 286 note 18.

Claim of insane person

An attaching creditor of the grantee of an insane person obtains no greater rights than the judgment debtor or grantee had—Brewster v. Weston, 126 N E 271, 235 Mass. 14.

Coowner of attached property

Where a deed of trust was given by a married man joined by his second wife to secure a promissory note, and a creditor of the married man subsequently acquired by attachment at foreclosure all the interest of the married man, and there was an heir of the first marriage whose rights in the property had not been settled, the attaching creditor and such heirs were not tenants in common nor the owners of equal rights to such an extent that the superior lien of the deed of trust covering the entire tract should be foreclosed as against each equally, but the interest of the attaching creditor is first to be sold, and thereafter that of the heir—Shear Co v. Stuth, (Tex Civ App) 248 S W 158

Resulting trust

(1) An attaching creditor is not entitled to priority over the beneficiary of resulting trust in land—Stauffacher v Great Falls Public Service Co, (Mont.) 43 P (2d) 647.

(2) Where C took title to realty from R with full knowledge of a resulting trust in favor of R's copurchasers he took only such title as R had, and an attachment creditor acquired by his attachment only the rights which R had in the property—Fosdick v Roberson, 100 A. 1059, 91 Conn 571

67. Lyon v. Sandford, 5 Conn. 544

68. Munroe v. Luke, 19 Pick. (Mass) 39.

69. **Extension of time for performance**

Where an equity of redemption is attached, a subsequent agreement to extend the time of performance of conditions in the bond for conveyance inures to the benefit of the attaching creditor of the obligee—Whitmore v. Woodward, 28 Me. 392

70. La.—Slocomb v Arkansas Real Est Bank, 2 Rob 92
Mass—Kendall v. Lawrence, 23 Pick 540.
6 C J. p 287 note 21 [b], [c]

71. Malkey v Ruggles, 24 Ohio N P (N S.) 433—6 C.J. p 287 note 22

Attorney's lien

Liens of attaching creditors are superior to that of attorney for debtor for his services in obtaining increased price for the property by having the first sale set aside and a second valid sale made—Bradley v Bradley, 3 Ky Op. 68

72. Sanborn, McDuffee Co. v. Keefe, (N H) 187 A. 97—6 C J. p 288 note 24.

73. Sanborn, McDuffee Co. v. Keefe, supra.

The lien of an attachment on property is superior to the claims of general creditors of the debtor.[74]

Claims of United States. The United States does not have, in the absence of statute, such a general right of priority or privilege over private creditors for the satisfaction of debts due to it as will entitle it to a prior satisfaction by attachment and levy over prior attaching creditors of its debtor,[75] but where priority is given by statute to claims of the United States such priority will take precedence over the claims of prior attaching private creditors.[76] Further, where the claim of the United States to preference is based upon a statute giving it preference in case of an attachment of the debtor's property as an absent or absconding debtor for the benefit of all his creditors, it acquires no right to priority where an attachment is taken out but is withdrawn by agreement among the creditors and the debtor;[77] and a surety upon the bond of a government contractor acquires no priority by sequestration to the rights of the federal government as against an attaching creditor where the attachment does not operate as a sequestration of the contractor's property for distribution among his creditors.[78]

What law governs. The question of the priority of the lien of a chattel mortgage executed in a foreign state upon property which at the time was therein situated as against the lien of an attachment levied on the property in another state must be determined by the law of the latter state, it being not only the law of the forum but also of the place where the property was situated at the time of the levy.[79]

b. Applications of Rule

(1) In general
(2) Judgments
(3) Executions
(4) Garnishment
(5) Mechanic's lien
(6) Mortgages
(7) Receiverships
(8) Wages
(9) Widow's allowance

(1) In General

The lien of an attachment on property subject to a valid outstanding charge or lien is inferior whether such lien is based on contract or arises by operation of law, but the attachment lien is superior to any subsequent lien or encumbrance subsequently created on the property attached.

The rule which has just been stated that an attaching creditor acquires only the rights which the debtor himself had in the attached property applies where the debtor holds title to the property subject to a valid outstanding charge or lien,[80] whether such lien is based upon a contract or agreement between the debtor and the lienor,[81] as in the case of a pledge,[82] or delivery of negotiable notes indorsed in blank to the debtor as agent of the payees for collection,[83] or assignment by a contractor of money due or to grow due from the owner to the contractor,[84] or the lien arising in favor of attorneys who purchased land for a client at execution sale under an agreement that they will hold the title in trust for the client, subject to the payment of fees and expenses in making the conveyance;[85] or whether it arises by operation of law,[86] as in the case of an attorney's lien upon money collected or recovered for

74. Hyde Park Supply Co v. Peck-Williamson Heating & Ventilating Co., 197 S.W. 391, 176 Ky. 656, modifying 195 S.W. 1115, 176 Ky. 513

75. U.S. v. Canal Bank, (C.C.Me.) 25 F.Cas.No.14,715, 3 Story 79

76. Pa.—Willing v. Bleeker, 2 Serg. & R. 221
S.C.—U.S. v. Clason, 4 S.C.L. 118

77. McLean v. Rankin, 3 Johns. (N.Y.) 369.

78. People's Nat. Bank v. Corse, 182 S.W. 917, 133 Tenn. 720.

79. Hart v. Oliver Farm Equipment Sales Co., 21 P.(2d) 96, 37 N.M. 267, 87 A.L.R. 962.

80. Ky.—Cairns v. Louisville & N.R. Co., 58 S.W.(2d) 248, 248 Ky. 84.
W.Va.—Howell v. McCarty, 88 S.E. 181, 77 W.Va. 695
6 C.J. p. 288 note 28.

Mere right to a future lien does not give priority over an attachment levied before the lien actually comes into existence—Cohan v. Shibley, (Cal.App.) 289 P. 169—6 C.J. p. 288 note 28 [c]

Lien for alimony and attorney's fees
A lien obtained by attaching community property, by the holder of a note suing the husband, is superior to the wife's subsequent lien for alimony and attorneys' fees—Cohan v. Shibley, (Cal.App.) 289 P. 169.

81. Lipscomb v. Condon, 49 S.E. 393, 56 W.Va. 416, 426, 107 Am.S.R. 938, 67 L.R.A. 670—6 C.J. p. 288 note 29.
Mortgage see infra § 272 [b] (4).

82. Parkersburg First Nat. Bank v. Harkness, 24 S.E. 548, 42 W.Va. 156, 32 L.R.A. 408—6 C.J. p. 289 note 31—49 C.J. p. 926 note 30.

83. Howell v. McCarty, 88 S.E. 181, 77 W.Va. 695.

84. Harry Pinsky & Son Co. v. Wike, 136 A. 920, 101 N.J.Eq. 45, affirmed 141 A. 920, 103 N.J.Eq. 18.

85. Gibson v. Stoell, 108 A. 201, 93 Vt. 375.

86. Williamson v. Gayle, 7 Gratt. (48 Va.) 152—6 C.J. p. 289 note 32.

Money loaned to manufacturer
Money loaned for, and used in, the business of manufacturing becomes a lien on the plant on the filing of an attachment suspending the business of the plant, and takes priority to it, under some statutes—Goodnight v. Adsit, 11 Ky.Op. 157.

his client,[87] a bailee's lien,[88] a garage keeper's statutory lien,[89] an automobile repairman's lien,[90] a carrier's lien,[91] or of a lien for rent,[92] or customs duties,[93] or the lien created by the filing of a lis pendens.[94]

On the other hand the attachment takes priority over any lien or encumbrance on the property subsequently acquired or created,[95] even though it arises by virtue of a statute.[96] Where an attachment lien on realty is subject to an unrecorded charge thereon for the payment of a debt due by the owner of an equitable interest therein, the filing and recording of a notice of lis pendens in a suit for the debt prior to a sale of the property under the attachment proceedings is constructive notice to the purchaser at such sale of the prior equitable interest and his title is subject thereto.[97]

(2) Judgments

Whether the lien of a judgment is prior or subsequent to an attachment lien on the same property depends upon whether it attached prior or subsequent to the attachment.

Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor,[98] but where an attachment is levied before a judgment in favor of another person against the judgment debtor becomes a lien, the attaching creditor will ordinarily prevail without regard to the time when judgment is obtained in the attachment suit.[99] An attach-

87. Del—Royal Ins Co. v Simon, 174 A 444, 20 Del Ch 297.
Pa—Smith v. Keener, 113 A 912, 270 Pa 578—Hagemann's Estate, 5 Pa Co. 776

Charging lien

(1) On a bill of interpleader to determine the rights of conflicting claimants in a judgment recovered by plaintiff, the attorney who conducted the suit for plaintiff is entitled to the first claim on the fund as against plaintiff's attaching creditors, where he would have been entitled to enforce his claim for a lien as against his client, the plaintiff.—Royal Ins Co v. Simon, 174 A. 444, 20 Del Ch 297.

(2) Attorney for heir filing objections to administratrix' final account, who agreed to receive his compensation from the client's distributive share recovered, acquired a right in the client's distributive share by equitable assignment on entry of a decree settling the account, and had priority over administratrix who subsequently attached the client's share for the debt allegedly due to her individually from the client—In re McCormick's Estate, 182 A. 485, 14 N J Misc. 73.

88. Anheuser-Busch Brewing Assoc. v Daviess County Distilling Co., 49 S.W 541, 20 Ky L 1522—6 C J. p 288 note 29 [a], p 1139 note 4

89. Willis v. La Fayette-Phoenix Garage Co, 260 S W. 364, 203 Ky 554.

90. L O Umsted Auto Co v. Edwards, 251 S W 878, 159 Ark 327.

91. De Wolf v. Dearborn, 4 Pick (Mass) 466—10 C J p 460 note 28.

92. Ark—Sevier v. Shaw, 25 Ark 417.
Ill—Mead v Thompson, 78 Ill. 62—Thompson v. Mead, 67 Ill 395
Ky—Porter v. Rice, 128 S W. 70—Williams v. Wood, 2 Metc. 41—Kumbraugh v. Cuson, 1 Ky.Op. 363.

Proof of landlord's lien prerequisite

The lien of an attaching creditor has priority in the absence of proof of the ownership of the property, and a showing that the landlord's lien existed before the levy of attachment—Couts v. Spivey, 17 S W. 540, 66 Tex. 267.

93. Taacks v Schmidt, 18 Abb Pr. (N Y.) 307—6 C.J. p 289 note 36.

94. People's State Bank of Cherryvale v. Troutman, 208 P. 562, 111 Kan. 636—6 C J. p 289 note 40

Lien on partnership assets for expenses thereof

Where after action was begun alleging a mining partnership between plaintiff and defendant, and that plaintiff had advanced the exponses on the partnership account, and defendant owed plaintiff therefor, and plaintiff alleged and claimed a first lien on defendant's interest to satisfy its claim, a later attachment of defendant's interest in such property by another creditor is an attachment pendente lite, and when the first plaintiff's claim to the lien is perfected by judgment such lien has precedence over the attachment—People's State Bank of Cherryvale v. Troutman, 208 P. 562, 111 Kan. 636.

95. Electric Transmission Co of Virginia v. Pennington Gap Bank, 119 S E 99, 137 Va 94—6 C.J. p 289 note 41.

Surety completing construction contract

Where, on default of a contractor, his surety exercised its option of completing the work, and under such option took possession of all property of the contractor used on the work, the rights of the surety were inferior to the lien of an attachment levied by a creditor of the contractor before the surety took possession of the property—Electric Transmission Co of Virginia v. Pennington Gap Bank, 119 S E 99, 137 Va 94

96. Ala—Young v. Stoutz, 74 Ala. 574
N M—Bell v. Gaylord, 27 P. 494, 6 N M 227
6 C.J. p 289 note 42.

Homestead

An attachment on land when sustained, was a valid and subsisting lien on the property at the time of its award to the owner in his bankruptcy proceedings as an exempt homestead, so that the setting apart as a homestead did not affect the lien of the attachment—Gray v Bank of Hartford, 208 S W 302, 137 Ark 232, certiorari denied 39 S Ct. 290, 249 U S 608, 63 L Ed 800.

97. Hope v. Blair, 16 S.W. 595, 105 Mo 85, 24 Am.S.R 366

98. Harshberger v Harshberger, 26 Iowa 503—6 C J p 290 note 53
Time when judgment becomes a lien see Judgments §§ 466–470 [34 C J. p 582 note 53–p 585 note 4].

Judgment corrected nunc pro tunc

Where at subsequent term plaintiff moved for an order nunc pro tunc to correct judgment to conform to decision, and on the same day preexisting creditors, having knowledge that judgment was rendered against the owner of the premises, filed a petition in attachment against the owner; and attachments were levied subsequent to filing of motion for an order nunc pro tunc, preexisting creditors did not obtain priority against a judgment lien—Webb v Western Reserve Bond & Share Co, 153 N E 289, 115 Ohio St. 247, 48 A. L R. 1176

99. In re Stevenson's Estate, 289 P. 566, 87 Mont. 486—6 C J. p 291 note 54.

ment creditor of a corporation has a prior lien on the realty of the corporation as against a judgment creditor of a stockholder of the corporation who obtained his judgment prior to the levy of execution.[1] A judgment creditor who attached the personalty of his debtor is entitled to priority over a judgment creditor who did not attach such property.[2]

(3) Executions

An execution takes precedence over or is subsequent to the lien of an attachment according as the execution became effective prior or subsequent to the time of the attachment.

The levy of an execution upon personal property creates a lien superior to the lien of a subsequent attachment,[3] while on the other hand the lien of an attachment is superior to that of an execution which does not come to the hands of the officer until after a levy has been made under the attachment,[4] or in some jurisdictions until after the attachment writ has been delivered to the sheriff.[5] Where it is necessary that an execution be levied in order that it may constitute a lien upon defendant's property, an attachment which becomes a lien thereon at any time before the levy of the execution, although after it is issued, must be given priority,[6] but where an execution becomes a lien upon and binds the goods of defendant from the time it comes to the hands of the sheriff, it will prevail over an attachment levied after that time.[7]

The lien of an attachment of the proceeds of a sheriff's sale is subordinate to a claim under a deed relating back to the date of the sale.[8] It has been held that the lien of an execution levied on the debtor's realty subject to the lien debts of third parties who in the enforcement of a mortgage lien procured the issuance of a void attachment which was served on tenants owing rent on the debtor's realty is inferior to the lien of an attachment order against the same tenants owing rent.[9]

A sheriff's return on a fieri facias that the levy thereon was made subject to a former seizure of the same property under an attachment writ has been held conclusive on the execution creditor.[10]

The time at which an execution becomes a lien will be considered in the title Executions § 124 [23 C.J. p 490 note 52-page 493 note 73].

(4) Garnishment

Attachment and garnishment liens take precedence according to their priority in time.

The lien acquired by garnishment process is superior to that obtained by a subsequent attachment of the same property,[11] but is inferior to the lien obtained by a prior attachment thereof.[12]

Judgment docketed after attachment

A lien of attachment upon lands has priority over a lien of judgment obtained prior to but docketed after the levy of attachment—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486.

Alimony

A judgment awarding alimony without divorce and making it a lien against the spouse's property will not prevail against a lien of a valid attachment first levied in another court of concurrent or equal jurisdiction—Mitchell v. Talley, 109 S.E 882, 182 N C. 683

1. Tinnin v. Wilkirson, (Tex Com App) 58 S W (2d) 69, affirming (Civ App) 40 S W.(2d) 889.

One man corporation

A judgment creditor of stockholder who controlled corporation and owned practically all the stock thereof is not entitled, as against the corporation's attachment creditor, to a prior lien on realty which the stockholder conveyed to the corporation before judgment—Tinnin v. Wilkirson, (Tex Com App) 58 S W. (2d) 69, affirming (Civ App) 40 S W. (2d) 889.

2. Deeds v. Gilmer, (Va) 174 S E 37.

Individual and corporate debts

Where one of coowners of a corporation conducted as a partnership confessed judgments in favor of his individual creditors who had not instituted attachment proceedings and also in favor of other creditors who had instituted attachment proceedings against the owners, corporation, and corporation's debtor, the attachment creditors were held entitled to priority over other creditors to the amount, if any, to which the judgment debtor was entitled on settlement of accounts between the corporation and its debtor and between the owners of the corporation, as of the day on which the attachments were served—Deeds v. Gilmer, (Va) 174 S E 37.

3. Del—Stockley v. Wadman, 6 Del. 350
Ky—Fichtner v. Griffin, 9 Ky Op 462
6 C J p 291 note 56

4. Lowman & Hanford Co v Ervin, 290 P 221, 157 Wash 649—6 C J p 291 note 57.

Ratification of unauthorized execution

The ratification by a creditor of the issuance by the debtor's attorney who is a stranger to the creditor of execution on a judgment confessed by the debtor without such creditor's knowledge, does not render the lien prior to that of an attachment sued out by another creditor and levied after the execution, but prior to the ratification.—Galle v Tode, 42 N E 673, 148 N Y. 270, affirming 26 N Y S 633, 74 Hun 542

5. McCarthy v. Farley, 267 N Y S. 733, 149 Misc. 360

6. Metzner v Graham, 57 Mo. 404—6 C.J. p 292 note 53

7. Wells v Marshall, 4 Cow (N Y.) 411—6 C.J. p 292 note 59.

8. Gibson v. Stowell, 108 A. 201, 93 Vt. 375.

9. Appleman v. Lynch Nat Bank, 293 S W. 1097, 221 Ky. 415.

10. Prather, etc, Co v Chase, 3 Brewst (Pa) 206—6 C J. p 292 note 60.

11. International Finance Corporation v. Jawish, 63 App D C 262, 71 F.(2d) 985—6 C J. p 292 note 61

12. U S—Wooldridge v Mississippi Valley Bank, (C C Miss) 36 F 97.
Ala—Johnson v. Burnett, 12 Ala. 743
Ky.—Brownfield v. Howell, 4 Ky Op. 485
Md—Farmers' Bank v. Beaston, 7 Gill & J 421, 28 Am D 236
Ohio—McCombs v. Howard, 18 Ohio St. 422
Tenn—English v. King, 10 Heisk. 666.

(5) Mechanic's Lien

Ordinarily a mechanic's lien is prior or subsequent to an attachment lien according as to whether the mechanic's lien accrued prior or subsequent to the attachment.

An attachment is prior to a mechanic's lien subsequently accruing,[13] but an attachment subsequent to the accrual of a mechanic's lien is postponed thereto,[14] even though the lien is not perfected until after the attachment.[15] However, under some statutes laborers and materialmen serving stop notices as to a fund retained by the owner until a specified period after completion of the building are entitled to priority over an attachment of a prior date, preference, as between the laborers and materialmen, being given to the labor claims.[16] Where the priority in point of time of liens on a fund is first a mechanic's lien, then an attachment, followed by other mechanics' liens, the first mechanic's lien will not be shifted to money subsequently becoming due, in order to help the attaching creditor, where, to do so, would practically cut off the subsequent mechanics' liens.[17] A lien on money due from the owner to the contractor acquired by a person who has furnished work and materials to a subcontractor, although subsequent in point of time, is superior to an attachment, by a creditor of the subcontractor, of the amount owing from the contractor to the subcontractor.[18]

(6) Mortgages

Subject to the effect of recording acts, the charge of a mortgage and the lien of an attachment have priority according to the time of their creation.

Subject to the effect, as will be hereafter considered in § 276, of statutory requirements for the recording of mortgages, the charge of a prior mortgage on the property attached will prevail over the lien of a subsequent attachment,[19] provided the mort-

13. Salem First Nat Bank v Redman, 57 Me. 405—6 C J p 289 note 87—40 C J. p 286 note 70

14. Ala.—Young v. Stouts, 74 Ala. 574.
N.Y.—Herrmann v. New York, 120 N Y S 146, 136 App Div. 28
15. N C—Blue Pearl Granite Co v Merchants' Bank, 90 S E 312, 172 N C 354
Ohio—Lane v. Thomas, 25 Ohio Cir Ct 303
40 C J. p 286 note 72.

Relation back

Under some statutes the mechanic's lien, when perfected, relates back and takes effect from the time of the commencement of the labor or the furnishing of the materials so as to take precedence over any attachment lien created in the meantime—Finck & Schmidt Lumber Co. v Mehler, 43 S W. 403, 766, 102 Ky. 111, 19 Ky.L 1146

16. Harry Pinsky & Son Co v. Wike, 136 A 920, 101 N J Eq 45, affirmed 141 A 920, 103 N J Eq 18.
17. Herrmann v New York, 120 N. Y.S 146, 136 App Div. 28.
18. Southern California Electric Co v McDonald, 173 P. 760, 178 Cal 386.
19. Ala.—Singer v. Alexander City Bank, 138 So. 263, 223 Ala. 677—Herzfeld v. Hayne, 76 So. 973, 200 Ala. 615
Cal.—Burns v Peters, 55 P.(2d) 1182
Fla.—George Mackay & Co v Marion Hardware Co, 121 So 396, 100 Fla. 1532.
Ind.—Griffith State Bank v. Clark, (App) 199 N E 447.
Iowa—National Bank of Milton v. O'Brien, 195 N.W. 611, 196 Iowa 865
Kan.—Campbell v. Killion, 257 P 752, 124 Kan. 124—Daggett v. Four Hundred Oil & Gas Co, 241 P. 467, 119 Kan. 788.
Ky.—C. I. T Corporation v. Studebaker Sales of Kentucky, 65 S.W. (2d) 84, 251 Ky 349—Webster v Industrial Acceptance Corporation, 28 S W.(2d) 959, 234 Ky 613—Clark v. Ford, 201 S.W. 344, 179 Ky. 797.
Me.—Sawyer v. Calais Nat. Bank, 138 A. 470, 126 Me 314.
Mass.—Sandler v. Silk, 169 N E 431—Barry v. General Mortgage & Loan Corporation, 150 N E. 293, 254 Mass 232
Okl.—Evans v. McMillan, 239 P 449, 111 Okl. 253.
Or.—Bankers' Discount Corporation v. Noe, 242 P. 610, 116 Or 570
Tex.—Balcom v. Cain, (Civ App) 81 S W (2d) 827, error granted—Weaver v Hillman, (Civ App) 25 S W.(2d) 233, error dismissed
W Va.—Ashland Finance Co. v Dudley, 127 S E 33, 98 W Va 255
6 C J. p 289 note 43—41 C J. p 522 notes 62, 63, p 575 note 1.

Advances after attachment

Rights of creditors establishing liens subsequent to recording of mortgage are subject to those of the mortgagee as to advances made before and after attachment if the latter were required by binding obligation on the part of the mortgagee—Barry v General Mortgage & Loan Corporation, 150 N E 293, 254 Mass 232.

Equitable mortgage

(1) Equitable mortgages generally prevail over liens of subsequent attachments.—Reidy v Collins, 26 P (2d) 712, 134 Cal App 713—Motor Acceptance Co v Finn, 13 P (2d) 761, 124 Cal App 766—Osha v Higgins, 96 A 700, 90 Vt 130

(2) A trust deed which was given to secure indebtedness owing to a beneficiary created an equitable lien or mortgage as between the parties thereto, whether or not the trust deed was effective as a trust deed, and took precedence over a subsequent attachment by the settlor's creditor—Burns v. Peters, (Cal) 55 P.(2d) 1182.

Unrecorded mortgage

(1) The lien of an attachment is subject to a prior unrecorded mortgage—Bain v Ullerich, 177 N W 61, 189 Iowa 149—Karger v Steele Wedeles Co, 79 N W. 216, 103 Wis 286.

(2) The lien of a mortgage executed before, but not recorded until after, the levying of an attachment is the prior lien, although the attaching creditor had no notice of the mortgage—Northwestern Forwarding Co v. Mahaffey, 12 P. 705, 36 Kan 152.

Corporate property

(1) Mortgage liens have priority over attachments which are levied upon corporate property after the execution of the mortgage—Hatch v. Johnson L & T. Co., (C C Kan) 79 F 828.

(2) It is immaterial that the mortgage is given to secure an increased bonded indebtedness where the attachment is levied after the increase and after the execution of the mortgage—Ruesterer v. Horton Land, etc, Co, 61 S W. 238. 160 Mo. 141.

Fraudulent transaction involving valid mortgage

Where a second mortgage given before attachment was not a part of a scheme involving assignments of a second mortgage designed to defraud creditors or defeat subsequent attachment, the attachment is subject

gage is a valid instrument,[20] and the mortgagee has not so conducted himself as to be estopped to assert his priority,[21] as where the attachment creditor was induced to extend credit to the mortgagor by the fraudulent representation of the mortgagee,[22] and the rule applies in a case involving chattels, even though the attachment is for the purchase price of the goods so mortgaged and attached,[23] especially where the mortgagee has taken possession before the levy.[24]

On the other hand, a mortgage executed after an attachment is levied on the property is subject thereto.[25] However, where a mortgage subsequently issued is to secure an issue of bonds to take up an earlier bond issue secured by a mortgage executed before the levy of the attachment, and the second mortgage expressly preserves the lien of the first for the benefit of the holders of bonds so exchanged, the holders of the exchanged bonds, who have no notice of the intermediate attachments, will be entitled to the security of the first mortgage and to priority over the subsequent attachment creditors,[26] but where a new mortgage is made to secure a loan made to pay off an old mortgage on property on which an attachment was levied subsequent to the execution of the first mortgage, in the absence of an agreement for conventional subrogation, the lien of the attachment is superior to that of the new mortgage.[27] Inasmuch as the date of the mortgage determines the rights of bondholders secured thereby even though the entire transaction of advancing money to the corporation and taking bonds as security therefor takes place at a later time, where attachments are levied upon corporate property after the execution of the mortgage but before the money is advanced to the corporation and bonds issued therefor, bondholders claiming under the mortgage are entitled to priority over the attaching creditors.[28] Also a trust deed mortgage securing an issue of negotiable bonds is superior, to the extent of all bonds issued for value, as by purchase or pledge, to attachment liens arising after the effective date of the trust deed, although such attachment liens may have arisen prior to the sale or pledge of some of the bonds.[29] The rights of a mortgagee who fails to accept the mortgage until after writs of attachment are levied on chattels will be held inferior and subject to the attachment liens.[30] Where an attachment is levied on property subject to a mortgage, the failure of the attaching creditor to make a deposit to secure such mortgage as required by statute will not postpone the attachment to a subsequent mortgage.[31]

A statute providing that the lien of an attachment on the equity of redemption of real estate will, where such real estate is thereafter redeemed, cover the

to the mortgage—Sandler v. Silk, (Mass.) 169 N.E. 431.

Equity of redemption

A creditor, laying attachment on mortgaged land, acquired a lien on the mortgagor's equity of redemption—Union Trust Co. v. Biggs, 137 A. 509, 153 Md. 50.

20. Vervaris v. Egan, 226 Ill.App. 500—6 C.J. p. 290 note 46.

In Pennsylvania, lien upon chattels, except as permitted by statute, is invalid as against attaching creditors—Bucyrus-Erie Co. v. Casey, (C.C.A.Pa.) 61 F.(2d) 473.

21. Scrivener v. Dietz, 8 P. 609, 68 Cal. 1.

Improper conduct

Where property mortgaged in Kansas and brought to Oklahoma was seized under attachment, the mortgagee, who by replevin obtains possession and removes the property outside the state without foreclosure, as the Oklahoma statute requires, is guilty of conversion, and the attachment plaintiff is entitled to a return of the property or a satisfaction of his judgment.—Haltom v. Nichols & Shepard Co., 166 P. 745, 64 Okl. 184.

22. Chittendon v. Charles H. Sieg Mfg. Co., 66 P. 1077, 16 Colo.App. 549.

23. Finke v. Pike, 50 Mo.App. 564—Corning v. Rinehart Medicine Co., 46 Mo.App. 16.

24. Ill.—Chambers v. Newlin, 109 Ill.App. 138.

Wash.—Fenby v. Hunt, 101 P. 492, 53 Wash. 127.

25. First Nat. Bank v. Kindwall, 206 N.W. 241, 201 Iowa 82—6 C.J. p. 290 note 48—41 C.J. p. 522 note 67.

Entrance in encumbrance book sufficient levy

A mortgage executed after the sheriff noted levy of attachment in encumbrance book, pursuant to Code (1897) § 3899, but before the sheriff entered a return upon the writ, is subject to the lien created by the sheriff's levy—First Nat. Bank v. Kindwall, 206 N.W. 241, 201 Iowa 82.

Prior trust deed securing subsequent loan

An attachment creditor's lien is superior to lien of prior unrecorded trust deed delivered after levy of attachment and securing money borrowed after attachment issued and applied to obtain releases of prior trust deeds—Platte v. Securities Inv. Co., (Tex.Com.App.) 55 S.W.(2d) 551, affirming (Civ.App.) 34 S.W.(2d) 295.

Corporate property

Attachments levied on corporate property before the execution of a mortgage are entitled to priority over the mortgage lien—Griffin v. International Trust Co., (Alaska) 161 F. 48, 88 C.C.A. 212.

Erroneous entry of judgment

Title resting upon attachment antedating mortgage is good as against assignee of mortgage, although entry of "neither party" was erroneously made in attachment suit and later stricken—Sawyer v. Calais Nat. Bank, 138 A. 470, 126 Me. 314.

26. Griffin v. International Trust Co., (Alaska) 161 F. 48, 88 C.C.A. 212—14A C.J. p. 682 note 96.

27. Vaux v. Vaux, 172 A. 68, 115 N.J.Eq. 586.

28. In re Sunflower State Refining Co., (D.C.Kan.) 183 F. 834—14A C.J. p. 682 note 98.

29. Passaic Nat. Bank & Trust Co. v. Owens, 162 A. 879, 111 N.J.Eq. 486.

30. Sloan v. Thomas Mfg. Co., 79 N.W. 728, 58 Neb. 713—Rogers v. Heads Iron Fdy., 70 N.W. 527, 51 Neb. 39, 37 L.R.A. 429.

31. Tollerton, etc., Co. v. Skelton, 92 N.W. 651, 118 Iowa 543, 96 Am.S.R. 409—Generahofer v. Nupuf, 76 N.W. 745, 106 Iowa 374—Haydock v. Patton, 60 N.W. 533, 92 Iowa 247—6 C.J. p. 290 note 51.

premises discharged of the mortgage, does not apply to a discharge of a mortgage by mutual mistake of the parties.[32]

Attachment of rents. A creditor who attaches rents due on realty before the commencement proceedings to foreclose a mortgage of such realty acquires a lien on such rents superior to the lien of the mortgage.[33] So the claim of the attaching creditor is superior as to rents under a lease executed by the mortgagor after execution of the mortgage when the attachment is levied before the mortgagee has asserted his right to claim the rents.[34]

An attachment levied on crops by a landlord as an aid to the enforcement of his lien for rent, relates back, as enforcing the landlord's lien to the time when such lien accrued, so that where the landlord's lien is a charge upon the crop for the payment of the rent and accrues as soon as there is any crop upon which it may attach, such attachment is prior to a mortgage executed subsequently to the execution of the lease and before the attachment was levied.[35]

Abandoned attachment lien. An inchoate lien obtained by attachment not followed up and perfected by a judgment or decree in that action, but abandoned, is of no validity as against a subsequent mortgage.[36]

(7) Receiverships

The lien of an attachment is prior, as against a receiver subsequently appointed, to the extent of the property attached.

As has been heretofore stated (see supra § 267), the appointment of a receiver does not, in the absence of statute so providing, divest liens acquired by attachment, but a creditor attaching the debtor's property before the appointment of a receiver acquires a lien thereon, which when perfected by final judgment, entitles him to a preference over other less diligent creditors.[37] However, the fact that before the appointment of a receiver, one levies an attachment on certain property or funds does not give him a preference enforceable generally against the receiver,[38] but only a preference to the extent of the property or funds attached,[39] and an application therefore to have the judgment paid by the receiver should, in the absence of any showing that such funds were themselves sufficient for the purpose, be denied.[40]

Receivers' certificates of a private corporation are ordinarily inferior to the lien of a prior attachment.[41]

(8) Wages

An employee's lien for wages earned has priority over an attachment lien.

An employee's statutory lien for wages ordinarily is by the statute creating it given priority over an attachment,[42] even though levied prior to the commencement of the employee's suit.[43] However, under some statutes, the priority in such case is limited to the value of the work and labor performed prior to the levy of the attachment.[44]

A seaman's lien for wages on freight and cargo has been held superior to the title of attaching creditors.[45]

(9) Widow's Allowance

Ordinarily the widow's allowance is prior to a lien by attachment.

The widow's allowance usually takes precedence of

32. Williams v. Libby, 105 A. 855, 118 Me 80

Mistake as to title

Where land that had been attached was sold without knowledge of the attachment, and the purchaser discharged a mortgage thereon because of mistake of fact as to title, the attaching creditor could not thereafter levy on the attached premises and hold the proceeds of a forced sale as against the purchaser, to a greater extent than the value of the equity of redemption—Williams v. Libby, 105 A. 855, 118 Me. 80.

Valid excuse for mistake

Where real property was attached, but no service was made on the owner, who subsequently sold the property to a third person without knowledge of the attachment, such third person was not guilty of laches in failing to examine the records, it appearing that he was in poor physical and mental health—Williams v. Libby, 105 A. 855, 118 Me 80

33. People's Trust Co of Binghamton v Goodell, 236 N.Y.S. 549, 134 Misc. 692.

34. General Tire Company v. Tennis, 21 Pa.Dist. & Co 85

35. Adams v. Hobbs, 27 Ark. 1.

36. Arkansas Bank, etc, Co v. State Bank, 266 S.W. 977, 166 Ark. 538

37. In re Bryce Cash Store, 124 So. 544, 12 La.App. 365.

38. Iowa.—Smith v. Sioux City Nursery, etc, Co, 79 N.W. 457, 109 Iowa 51

N.Y.—Glines v. Supreme Sitting O. I. H, 21 N.Y.S. 736

39. Iowa.—Smith v Sioux City Nursery, etc., Co, 79 N.W. 457, 109 Iowa 51.

Mass.—Kittredge v. Osgood, 37 N.E. 369, 161 Mass 84.

N.Y.—Glines v Supreme Sitting O. I. H, 21 N.Y.S. 736

Ohio.—New York Rubber Co v Gandy Belting Co, 11 Ohio Cir.Ct. 618, 5 Ohio Cir.Dec 286.

53 C.J. p 251 note 44

40. Glines v Supreme Sitting O. I. H, 21 N.Y.S. 736

41. Cowden v Wild Goose Min, etc, Co, (Alaska) 199 F. 561, 118 C.C.A. 35—53 C.J. p 192 note 75.

42. Security Bank v National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380, denying rehearing 126 So. 591, 13 La.App. 303—6 C.J. p 289 note 34—39 C.J. p 221 note 59.

43. Ruston v. Perry Lumber Co, 58 S.W. 268, 104 Tenn. 538.

44. Kimball v Sundstrom, etc, Co, 92 S.E. 737, 80 W.Va. 522.

45. Poland v The Spartan, (D.C. Me.) 19 F.Cas.No.11,246, 1 Ware 130.

all liens by attachment.[46] This has been held to be true even with respect to property upon which a levy has been made,[47] but there is authority which holds that the attachment is entitled to priority with respect to property levied on.[48]

§ 273. —— Sale, Conveyances, and Assignments

Subject to the effect of registration statutes, a sale, conveyance, assignment, or other transfer is superior or inferior to the lien of an attachment according as to which was first executed or levied.

Since, as has been stated in § 71, only the interest of the attachment debtor is subject to attachment, and, as has been noted in § 272, the attaching creditor reaches only the interest which the debtor had at the time, it follows that a sale, conveyance, assignment, or other transfer by the debtor before the levy of the attachment takes priority over it,[49] although the assignment or other transfer be equitable,[50] if the transfer or assignment be in fact valid and operative.[51] On the other hand, the attachment takes priority over any subsequent sale, conveyance, or transfer by the debtor,[52] if the at-

46. Tetzloff v May, 154 N W 905, 172 Iowa 617—Tetzloff v May, 131 N W 647, 151 Iowa 441, Ann Cas 1913A 341.

47. Tetzloff v. May, 131 N W. 647, 151 Iowa 441, Ann Cas 1913A 341.

48. Blake v Durrell, 45 S W. 883, 103 Ky. 600, 20 Ky.L 270.

Reason for rule

"The attachment lien upon the husband's property can no more be disturbed by his death than it could be by his marriage and establishment as a housekeeper, had he been single at the date of the levy. The status of the lienholder cannot be changed by the death of the debtor' —Blake v. Durrell, 45 S W. 883, 103 Ky. 600, 20 Ky L. 270.

49. Ala —Singer v Alexander City Bank, 138 So. 263, 223 Ala 677
Ark —Farmerville State Bank v. Harmon, 75 S W (2d) 1010
Fla —Lewis v. Stephens, 96 So. 396, 85 Fla. 437.
Idaho —Gem State Lumber Co. v. Galion Irrigated Land Co, 41 P (2d) 620.
Iowa —Nelson v Lindsey, 162 N W 3, 179 Iowa 862.
Ky —Webster v Industrial Acceptance Corporation, 28 S W (2d) 959, 234 Ky. 613—Illinois Surety Co. v Mitchell, 197 S W. 844, 177 Ky. 367, L R A 1918A 931—Helm v. Sapp, 44 S.W 107, 19 Ky L 1614.
Md —Hohman v. Orem, 182 A 587—Pen Mar Co. v. Ashman, 136 A 640, 152 Md 273—McDowell, Pyle & Co v. Hopfield, 128 A 742, 148 Md 84
N.J —Becker v. Lehigh Valley R Co, 166 A. 338, 113 N J.Eq 135
N Y —Edison Electric Illuminating Co. of Brooklyn v. People's Nat Bank of Lebanon, 116 N E 369, 221 N Y. 1, L R.A 1917F 1123, reversing Edison Electric Illuminating Co. of Brooklyn v. Horace E Frick Co., 144 N.Y.S. 1114, 160 App Div 903
Ohio —Warren Guarantee Title & Mortgage Co. v. Williams, 161 N E. 551, 27 Ohio App. 505
Pa —Auto Building & Loan Ass'n v. Hall, 177 A. 581, 117 Pa Super. 104 —South Hills Trust Co. v. Baker, 83 Pa Super. 243.
Tenn —Moran v. Adkerson, 79 S W (2d) 44
5 C J p 972 note 79, p 973 note 81, p 974 note 87—6 C J. p 286 note 18 [o], p 292 note 65

Abandonment

Where a debtor who was purchasing realty under an installment contract abandoned it before his creditor attached, his creditor obtained no lien thereby —W. F Miller Co. v. Grussi, 98 A 90, 90 Conn. 555.

Partial assignment

(1) Debtor's partial assignment before laying of attachment has priority —Pen Mar Co. v. Ashman, 136 A. 640, 152 Md 273

(2) Although assignments were partial and not accepted, yet, in equity, the attaching creditors obtained priority over the assignee only to part of the fund not assigned —Davis v. Claxton, 268 P. 787, 82 Mont. 574.

(3) However, in jurisdictions where partial assignments without the consent of the debtor are declared void (see Assignments §§ 38–40), subsequent attaching creditors obtain priority over such assignees —Kiddoo v Ames, 73 Mo App 667—Missouri Pac R. Co. v. Wright, 38 Mo.App 141.

Right to question validity

In an action on a draft by the assignee thereof an attaching creditor of the assignor, whose assignment was made after assignment of the draft, has not the status entitling her, by interpleader in the action on the draft, to attack the assignment. —Vyne v Mosson, 156 N.Y S. 274, 92 Misc. 447.

50. Del —Wilmington Morris Plan Bank v Longacre, 180 A 642—Royal Ins Co v Simon, 174 A. 444
Ky —Illinois Surety Co v. Mitchell, 197 S W 844, 177 Ky. 367, L R A. 1918A 931
Md —Pen Mar Co v. Ashman, 136 A. 640, 152 Md 273
6 C J. p 292 note 65 [e], [j], [p].

51. Del.—Wilmington Morris Plan Bank v. Longacre, (Super.) 180 A. 642
Tenn —De Soto Hardwood Flooring Co v. Old Dominion Table & Cabinet Works, 43 S.W (2d) 1069, 163 Tenn 532
5 C J p 973 note 80.

52. Conn —Butchers' Ice & Supply Co v. Bascom, 146 A 843, 109 Conn 433.
Ky —Hurst v Hurst, 5 S W (2d) 1076, 234 Ky. 249
N H —Jacques v Manchester Coal & Ice Co, 95 A 952, 78 N H 33
Tex —Covert v. Calvert, (Civ App) 287 S.W. 117.
6 C J. p 293 note 66.

Abandonment

Where attachment precedes abandonment of realty by a debtor who was purchasing under installment contract, the creditor's rights, acquired under its attachment, can not be disposed of by the abandonment. —W. F. Miller Co v. Grussi, 98 A. 90, 90 Conn 555.

Deed to be delivered on compliance with terms

(1) Property conveyed by deed mailed to bank with directions to deliver it on payment of the purchase price is subject to the lien of an attachment delivered to the sheriff, after filing of lis pendens notice, before the bank's receipt and delivery of the deed.—Parker v. Curll, 126 N. E 858, 73 Ind App. 178.

(2) Where deed was not in escrow but was merely held by bank to be delivered on compliance with the vendor's terms, the lien of attachment writ duly levied and recorded before the deed was delivered by the bank is superior to any right acquired by the grantee —Covert v. Calvert, (Tex Civ.App) 287 S W. 117.

Right to contest validity

A subsequent lien claimant cannot take advantage of mere irregularities in a levy of an attachment not objected to by defendant and founded upon a bona fide claim, except where the attachment lien itself is assailed for actual fraud in its creation —Title Ins. & Trust Co v California Development Co, 152 P. 542, 171 Cal. 173

Transfer subject to attachment

(1) Grantee, who agreed in deed

tachment is valid[53] and has not been abandoned[54] the debtor, however, retaining, until a sale on execution, full power to dispose of the property attached subject to the attachment.[55]

Lien of unpaid seller. Unless the seller agrees that the purchaser may encumber the property,[56] or statutory provisions prevent, the lien of an unpaid seller of personalty,[57] or the implied lien of a vendor of realty[58] is superior to the lien of an attaching creditor of the purchaser; as is also the reserved lien of a vendor of realty, although an assignment of the lien was unrecorded and it had been erroneously released of record.[59] Moreover the right of a third person who advanced the purchase money for the purchase of personalty with the agreement that he should hold the title thereto until he was repaid,[60] and the lien of a third person advancing the purchase money for the purchase of realty,[61] is superior to that of an attachment creditor of the purchaser. The holder of a vendor's lien does not subordinate it to the lien of a subsequent attachment by subsequently to the levy of attachment taking a conveyance of the land.[62] Where, after an attachment has been levied on his interest, the vendee surrenders possession to the vendor on being released from the payment of the purchase money notes, the attaching creditor is seized of no greater estate than was owned by the vendee and by his purchase under the attachment with full notice of the vendor's rights acquires only the right to redeem against the vendor's lien on paying the agreed price.[63] A sale by a trustee under a deed of trust securing the purchase money will not be invalidated by an attachment made just before the sale and without any notice to the trustee.[64]

Conditional sale of personalty. Except as the rule is changed by statutes requiring contracts of conditional sale of personalty to be recorded (see infra § 276), an attaching creditor of a conditional vendee of personalty will be postponed to the rights of the vendor of the personalty attached,[65] although there is some contrary authority,[66] and after complete rescission of such a sale an attachment against the vendee is not effective against the vendor.[67] If at the time the attachment is made the conditional vendor has the right to retake the property because of a default by the vendee in the terms of the contract, the rights of the attaching creditor are subservient thereto,[68] but where the conditional vendee is not in default, a creditor of the vendee by attachment acquires a lien superior to the vendor's right to retake the property and which entitles him to succeed to the rights of the vendee in the property, subordinate, of course, to the vendor's claim.[69]

Contract to convey. It has been held that the

by which he took title to take subject to attachment, and to pay the judgment, may not assert as against the creditor that the attachment was invalid—Meister v. Gale, 139 A. 700, 107 Conn 52

(2) That deed expressly conveying subject to attachment, erroneously stated amount of attachment, did not affect the grantee's rights as against the attaching creditor, where the attachment referred to was obvious—Meister v. Gale, supra

53. Royal Ins Co. v. Simon, (Del Ch) 174 A. 444.

54. Allen v. Selman, (Tex Civ App) 10 S W (2d) 173

55. Ariz—J. H. Mulrein Plumbing Supply Co v. Walsh, 222 P. 1046, 26 Ariz 152.

Me—McInnes v McKay, 141 A 699, 127 Me. 110, affirmed McKay v. McInnes, 49 S Ct. 344, 279 U.S. 820, 73 L Ed. 975.

If attachment extinguished sale becomes absolute—J. H. Mulrein Plumbing Supply Co v. Walsh, 222 P 1046, 26 Ariz 152—6 C.J. p 293 note 66 [k].

56. Panhandle Tel, etc, Co v. Kellogg Switchboard, etc, Co, 132 S. W. 963, 62 Tex.Civ App. 402

57. Ky—Northern Bank v. Deckebach, 83 Ky 154.

N.Y.—Tuthill v. Skidmore, 26 N E 318, 124 N.Y. 148.

Vt—Ward v. Camp, 32 A. 236, 67 Vt. 461

58. Ark—Ponder v. Gibson-Homans Co, 266 S W. 682, 166 Ark 591

Ky—City Nat Bank of Cairo, Ill. v. Anderson, 225 S W. 361, 189 Ky 487.

66 C J p 1248 note 89.

59. Shear Co v. Currie, (C C A Tex) 295 F. 841.

60. Glass v. Cundiff & Longest, 181 S W. 638, 167 Ky. 760.

Prior creditors not bona fide purchasers

Prior creditors of defendant, attaching after his purchase of powder, the price of which was advanced by the intervener, who retained a lien therefor, were held not bona fide purchasers as to the intervener, so that his lien was prior to theirs—Glass v. Cundiff & Longest, 181 S.W. 638, 167 Ky. 760

61. Young v. Walsh, 3 N E. 512, 115 Ill 264.

62. Lorens v. Mingus State Bank, (Tex Civ App.) 60 S W (2d) 462.

Foreclosure of attachment lien

(1) Status as lienholder of holder of senior lien, taking conveyance of land subsequent to attachment, is not affected by foreclosure of the attachment lien—Lorens v. Mingus State Bank, (Tex Civ App) 60 S W (2d) 462

(2) Holder of senior lien unaffected by a foreclosure suit of the attachment lien, to which he was not a party, can not enjoin a foreclosure sale decreed in favor of the attachment lienholders, in the absence of allegations showing a right to some special equitable relief—Lorens v. Mingus State Bank, supra.

63. Hanna v. Davis, 20 S.W. 686, 112 Mo. 599

64. Prichard Bros v. Causey, 12 S. W (2d) 711, 158 Tenn 53.

Statute invalidating transfer or sale inapplicable

Code, invalidating transfers or sales of property mentioned in the attachment bill after filing of bill, is limited to sales or transfers by the debtor—Prichard Bros v. Causey, 12 S W (2d) 711, 158 Tenn 53.

65. Thornton v. Cook, 12 So 403, 97 Ala. 630—6 C J p 288 note 25

66. Sullivan Machinery Co. v. Griffith, 94 Pa Super. 207.

67. Steen v. Harris, 8 S.E. 206, 81 Ga 681.

68. Starr v. Govatos, 130 A. 392, 3 W.W Harr (Del) 66

69. Arter v. Jacobs, 234 N.Y.S. 357,

levy of an attachment on land subsequently to the execution of a contract to convey the same cannot defeat a bill for specific performance by the vendee,[70] but a deed executed pursuant to a verbal contract of sale under which the purchaser had not taken possession does not relate back to the verbal contract so as to defeat a lien created by an intermediate attachment.[71]

An unrecorded conveyance of real estate will prevail over a subsequent attachment thereof under process directed against the vendor,[72] unless, as will be seen in § 276, a different rule is established by a statute in reference to the recording of such instruments. However, this applies only to claims under the attachment as such, and the conveyance must, in order to protect the vendee, be recorded before the property is sold under execution on the judgment in the attachment suit,[73] failing in which a bona fide purchaser at the execution sale will acquire good title to the property,[74] provided his deed is recorded before the former deed.[75]

§ 274. —— Property Fraudulently Obtained by Debtor

The lien of an attaching creditor of a fraudulent grantee is subject to the rights of the defrauded grantor and those holding under him.

Where property has been purchased on fraudulent representations, a creditor of the purchaser attaching it acquires only the rights which the purchaser himself has, and the defrauded vendor can enforce his right to have the sale set aside against the attaching creditor as well as against the fraudulent vendee.[76] So also creditors of a grantee who attached real property conveyed to him in fraud of the grantor's creditors have been held to obtain no right in the same against subsequent mortgagees of the grantor to whom the property had been reconveyed.[77]

§ 275. —— Property Fraudulently Conveyed by Debtor

A fraudulent transfer or encumbrance of property will not defeat or postpone the lien of a subsequent attachment.

Where a debtor has sold, conveyed, transferred, or encumbered his property with a fraudulent intent, which the transferee or party to whom the encumbrance is given, shared or has been cognizant of, the transaction cannot defeat or postpone the lien of a subsequent attachment.[78] Accordingly, it is generally held that where a sale of personalty is not followed by a change of possession the lien of an attachment is superior to the claim of the vendee.[79]

§ 276. —— Effect of Statutory Requirements as to Recording of Transfers or Encumbrances

a. In respect of personal property
b. In respect of real property

a. In Respect of Personal Property

(1) In general
(2) Effect of notice

(1) In General

The lien of a subsequent attachment takes precedence over an unrecorded chattel mortgage or conditional sale of personalty where the validity of the latter as against third persons depends on their registration.

Where the statutes require that mortgages or conditional sales of personalty must be recorded in order to be valid against creditors and purchasers for value, an attaching creditor may, in default of such record, acquire a greater right in the property covered by such an instrument than his debtor had

226 App Div 343—6 C J p 288 note 25 [a].

70. Horton v Hubbard, 47 N.W. 115, 83 Mich. 123.

71. Voorheis v. Ehtng, 22 S W. 80, 15 Ky.L. 161.

72. Cal—Finnie v. Smith, 257 P 866, 83 Cal App. 707—Bank of South San Francisco v. Pike, 200 P. 752, 53 Cal App 524—Commercial Nat Bank of Los Angeles v. Roberts, 194 P. 751, 49 Cal.App 764
Ga—Smith v. Worley, 73 S E. 428, 10 Ga App 280
Minn—Greenleaf v. Edes, 2 Minn. 236
Mont—Short v. Karnop, 275 P. 278, 84 Mont. 276.
N J—Vail v Diamond, 122 A. 623, 95 N.J Eq 97
6 C J p 293 note 67

Deed procured by grantor's creditor

A deed executed and delivered, although not recorded, passes title against a subsequent attachment or judgment even when procured by a creditor of the grantor—Commercial Nat Bank of Los Angeles v. Roberts, 194 P 751, 49 Cal App 764.

73. Mo—Sappington v Oeschli, 49 Mo 244—Reed v. Ownby, 44 Mo. 204
Neb.—Harral v Gray, 4 N.W. 1040, 10 Neb 186.

74. Mich—Columbia Bank v Jacobs, 10 Mich 349, 81 Am.D. 792.
Mo—Chandler v. Bailey, 1 S W 745, 89 Mo 641—Adams v. Buchanan, 49 Mo. 64.

75. Mahoney v. Salsbury, 120 N.W. 144, 83 Neb 488, 131 Am.S R 649—Naudain v Fullenwider, 100 N. W. 296, 72 Neb 221.

76. Schweizer v Tracy, 76 Ill. 345—6 C.J p 294 note 73.

77. Westervelt v. Hagge, 85 N W. 853, 61 Neb. 647, 54 L R A. 333.

78. Cal—Bank of South San Francisco v. Pike, 200 P. 752, 53 Cal. App. 524.
Mont—Piersky v. Hocking, 292 P. 735, 88 Mont. 358
6 C J. p 294 note 75

79. Cohen v. Schneider, 40 A. 455, 70 Conn. 505—6 C.J. p 295 note 76.

and become entitled to priority over claims based on such instrument.[80] This is true, where the recording statute makes no exception in such case, although the mortgagee has exercised reasonable care in securing the record of his mortgage.[81] Furthermore, if the statute requires immediate delivery of possession or immediate recording of the mortgage, a noncompliance therewith will postpone the mortgage to an attachment for a debt contracted prior to the recordation thereof, even though the instrument is finally recorded before the attachment issues;[82] and an attachment levy on personalty, left in the unrestricted possession of the attachment debtor, gives the attaching creditor no protection as against a subsequent innocent purchaser.[83] However, a statute declaring that the failure to record a conditional sales contract renders such sale absolute except as between the vendor and vendee cannot be invoked to aid an attachment by a creditor of a party other than the conditional vendee.[84]

Insufficient notice. Where the instrument though recorded is by reason of its insufficient description of the property not constructive notice the attachment lien is superior.[85]

(2) Effect of Notice

The authorities are not in accord on whether an attaching creditor's knowledge of a prior chattel mortgage on, or conditional sale of, the attached property will deprive him of his priority.

Actual notice on the part of the attaching creditor of an unrecorded mortgage or conditional sale of personalty has been held insufficient to deprive him of the priority to which he was entitled by reason of the failure to record the instrument,[86] but there is also authority for the contrary view,[87] and where a chattel mortgage was wrongly indexed, a subsequent attachment creditor with actual notice has been held bound thereby.[88]

b. In Respect of Real Property

(1) In general
(2) Effect of notice

80. Ala.—Cornelius Lumber Co v Lawhorn-Smith & Co., 105 So 713, 21 Ala App 118, certiorari dismissed Ex parte Cornelius Lumber Co., 105 So 714, 213 Ala 553
Cal—Loosemore v. Baker, 166 P 26, 175 Cal 420—Fassett v Wise, 47 P 47, 1095, 115 Cal. 36, 36 L.R.A 505—Boamer v. Freeman, 24 P. 169, 84 Cal 554.
Conn—C I T Corporation v. Cohen, 167 A. 102, 117 Conn 159
Ga—W S. Bradley & Co v. Cochran, 108 S E 624, 27 Ga App 463.
La—Williams v. Miller, (App) 160 So. 165
Mo—Walker v. Hatfield, (App) 17 S W.(2d) 357.
6 C J p 295 note 77.

Assignment as security

Where the producer, having contract with the company financing crop of hops, assigned the contract while executory to the assignee as security for the loan, without recording the assignment, and the creditor of producer, although with knowledge of the assignment, while the contract was yet executory, levied on the hops, the rights of the attaching creditor were superior to those of the assignee—Lloyd L Hughes, Inc., v. Widders, (Wash.) 60 P.(2d) 243.

Purchase money lien

An unrecorded purchase-money lien on an automobile is invalid as against a subsequent creditor acquiring an attachment lien—Jewell v. Cecil, 198 S W. 199, 177 Ky. 822.

Liquidated claim

A person having a claim against the purchaser of an automobile for unliquidated damages is a creditor, within Ky St § 496, and his attachment lien acquired without notice is superior to an unrecorded purchase-money lien—Jewell v Cecil, 198 S W. 199, 177 Ky 822

Removal of property

Where chattels were moved to another county after the execution of a mortgage thereon and before such mortgage had been recorded and an attachment was levied thereon after the mortgage had been recorded in the original county but before it had been recorded in the county to which the chattels had been removed, the lien of the attachment was superior to the lien of the mortgage—Fassett v Wise, 47 P. 47, 1095, 115 Cal. 316, 36 L R A 505.

81. Kendall v Hastings, 125 A. 484, 81 N H 280.

82. Murray v. Zeller, (N J) 59 A. 261.

83. McPartin v. Clarkson, 215 N W. 338, 240 Mich 390.

84. C I T Corporation v. Cohen, 167 A. 102, 117 Conn. 159.

85. Young v. Hill, 85 S W (2d) 867, 260 Ky 397.

86. Hart County Deposit Bank v. Hatfield, 33 S W (2d) 660, 236 Ky 725—6 C J. p 297 note 79.

87. Lee County Savings Bank v. Snodgrass Bros, 166 N W. 680, 182 Iowa 1387—6 C J. p 297 note 80.

Defective mortgage known before attachment cured

Where recorded chattel mortgage did not impart constructive notice because of an insufficient description of the property covered thereby, an attaching creditor who obtained actual notice of such mortgage before filing an amended affidavit curing a fatal defect in the original affidavit was subordinate to the lien of the chattel mortgage—Hart County Deposit Bank v Hatfield, 33 S W. (2d) 660, 236 Ky 725

Duty to ascertain truth

Where the levying officer and creditor are told that there is a lien superior to the attachment levy to be made, it is the duty of the levying officer or creditor to make effort within reason to ascertain the truth.—Lee County Sav. Bank v Snodgrass Bros, 166 N W 680, 182 Iowa 1387—6 C J. p 297 note 80 [c].

Notice given in confidence

Where the attaching creditor has full knowledge of the rights of the mortgagee, but proceeds by stealth and at an unusual hour to get his attachment levied before the mortgage can be placed on the record, he will take no advantage from his act.—Temple v. Hooker, 6 Vt 240.

Reservation of title

In an action to determine priority of liens between a conditional sale vendor of personal property, under a contract reserving title in vendor until the property is paid for, and an attaching creditor who had actual notice of the vendor's reservation of title contract, prior to the levying of the attachment, the vendor is entitled to a first and prior lien on the property involved, and such lien may be established in an equitable proceeding—Security Nat Bank of Oklahoma City v. Truscon Steel Co., 218 P 665, 92 Okl 81.

88. Kern v. Wilson, 48 N W. 919, 82 Iowa 407.

(1) In General

Under the statutes in several jurisdictions an attaching creditor without notice of a prior unrecorded deed to, encumbrance on, or right in, the attached realty is entitled to priority; and a grantee or person holding an encumbrance or right in realty is likewise entitled to priority over an unrecorded attachment where their registration is required.

The phraseology of some statutes regarding the registration of titles to real estate places an attaching creditor on a par with a purchaser, and under such statutes a creditor levying his attachment without notice of a prior unrecorded deed is entitled to priority over the grantee under the unrecorded deed.[89] The same rule has been applied to an unrecorded lease,[90] mortgage,[91] outstanding equity,[92] partition,[93] or title bond.[94] On the other hand, the lien of a mortgage recorded prior to the time the attachment was made is superior to the lien of the attachment.[95] In some jurisdictions a deed recorded within a reasonable time after delivery prevails over the lien of an attachment made after the delivery of the deed, but prior to the recording of it,[96] and under some statutes if a deed[97] or mortgage,[98] executed before an attachment is made on the realty deeded or mortgaged, but not recorded until afterward, is recorded before judgment is obtained under the attachment, such deed or mortgage is good as against the attaching creditor or a purchaser at execution sale under the attachment. Also, it is held in some jurisdictions that instruments conveying equitable titles, although entitled to be recorded, need not be, in order to protect such title against attaching creditors.[99] An agreement con-

89. U S—Shear Co v Currie, (C C A Tex) 295 F 841.
Conn—Newtown Savings Bank v Lawrence, 41 A. 1054, 42 A. 225, 71 Conn 358.
Ky—Peck v Trail, 65 S W (2d) 83, 251 Ky 377
Me—U S Plywood Co. v. Verrill, 164 A 200, 131 Me 469
Mass—Hillside Co-op Bank v Cavanaugh, 122 N E 137, 232 Mass 157
N.H—Sanborn, McDuffee Co. v. Keefe, 187 A. 97
N D—Crosson v Kartowitz, 175 N. W. 868, 43 N D 466
Tex—Parks v. West, (Civ App) 274 S.W. 164
6 C J. p 297 note 82.

Notation for registration sufficient

The notation of a deed for registration as required by the Tennessee statute, in order to give such deed effect as against the creditors of the vendor from the date of such noting, is sufficient where the date of the receipt thereof is indicated in the register's note book by ditto marks referring to words and figures in the preceding line, so that where a deed, although noted for registration about sixteen months before an attachment was levied on the land as the property of the vendor, was not actually registered until eleven days after such levy, such notation was valid in the absence of proof that the deed was not in the register's office during the time from its notation until after it was registered.—Hughes v. Powers, 42 S W. 1, 99 Tenn. 480.

Reregistration

Where the registration of a deed is ineffectual because a judge of the court before whose clerk the acknowledgment was made did not certify to the official character of such clerk, as required by statute, a reregistration, with the omitted certificate, takes effect, as to the grantor's creditors, from the date the amended deed is noted for registration, and does not relate back to the noting and registration of the defective deed—Citizens' Bank v. McCarty, 42 S W. 4, 99 Tenn 469

In absence of recorded deed to debtor, the attaching creditor is not entitled to the benefits of the registration statute—Parks v West, (Tex Civ App) 274 S.W. 164—6 C.J. p 297 note 82 [n].

Defective deed

A purchaser of realty at a judicial sale under attachment proceedings, without notice of an unrecorded defective deed to the realty, executed prior to the attachment by the debtor, whose deed also was not of record, takes a good title as against the grantee of the debtor—Paine v. Mooreland, 15 Ohio 435, 45 Am D. 585.

Early rule

Under an early statute which required deeds to be recorded within a stated period from the time of their execution, an attachment made subsequent to the execution of a deed to the realty but prior to the time it was recorded has a preference over such deed where it was not recorded within the time prescribed by law—Parker v. Miller, 9 Ohio 108

90. Bank of Coushatta v. Williams, 121 So 646, 10 La App 571—6 C. J p 298 note 84

91. Wright v. Franklin Bank, 51 N E 876, 59 Ohio St 80—6 C J p 297 note 82 [h]—41 C J. p 575 note 2.

Attachment on equitable interest

An attachment levied upon an equitable interest in real estate has preference over an unrecorded mortgage on such interest—Wright v. Franklin Bank, 51 N.E. 876, 59 Ohio St. 80

Mortgage defectively recorded is inferior to a subsequent attachment regularly issued—Claflin v. South Carolina R Co, (C.C S C.) 8 F. 118, 4 Hughes 12.

Subrogation of purchaser paying mortgage debt

Where the purchaser of the equity of redemption paid the mortgage debt, but neglected to cause his deed from the mortgagor to be recorded until after a creditor of the mortgagor had attached the equity of redemption, he was held to have an equitable lien upon the premises for the amount of the mortgage—Slocum v. Catlin, 22 Vt. 137.

92. Tenn—Morrell v. Cawood, 8 Baxt 176.
W Va—Houston v. McCluney, 8 W. Va. 135

93. McMechan v. Griffing, 9 Pick (Mass) 537

94. Catlin v. Bennatt, 47 Tex. 165.

95. Cal—Beamer v Freeman, 24 P. 169, 84 Cal 554
Iowa—Tama City First Nat Bank v. Hayzlett 40 Iowa 659.
41 C J p 522 note 64

Deed intended as security

A sale of lands, absolute on its face, but intended as security for money advanced, when duly recorded, will rank subsequent attachments thereon to the extent of the balance due by the vendee to the vendor—Rice-Stix Dry Goods Co. v. Saunders, 54 So 479, 128 La. 82, following Davis v Kendall, 24 So 264, 50 La Ann. 1121

96. Apstein v. Sprow, 99 A. 1045, 91 Conn 421.

97. Commonwealth v. Gibson, 13 Ky. Op 44.

98. Campion v. Kille, 14 N J Eq 229.

99. Johnson v. Darr, 272 S.W. 1098, 114 Tex 516, affirming Darr v. Johnson, (Civ App) 257 S W. 682.

Declaration of trust.—Johnson v. Darr, 272 S W. 1098, 114 Tex. 516, affirming Darr v. Johnson, (Civ.App) 267 S W. 682.

stituting one an equitable mortgagee of land gives him a lien superior to that of a subsequent attaching creditor, although the mortgage is not made or recorded until after the attachment;[1] and where an equitable mortgage is not in legal form as a mortgage and so is not subject to the registration laws, it is not essential that it be recorded in order to have priority over a subsequent attachment.[2] An attachment against one whose title or interest in land is not of record is not preferred or benefited by the recording law,[3] so that if there is no deed on record to the debtor, the attaching creditor gets only such title as the debtor actually has in the property at the time of the levy.[4]

Notice or registration of attachment. The failure to file a lis pendens notice of attachment, when required, will render the lien of the attachment invalid as against a subsequent bona fide sale and transfer of the realty.[5] Under a statute which changes the rule, that the lien of an attachment in which the correct name of the defendant is not shown in the writ or on the records or index of the registry of deeds is good as against a purchaser of the realty attached for value in good faith and without notice[6] by providing that when the writ is seasonably amended to show the correct name of defendant, the attachment shall not be valid as against such bona fide purchasers except from the time a correspondingly amended copy is properly recorded, such statute applies only to cases where the owner of land sought to be attached is wrongly named in the writ, and the writ is afterward amended, and has no application where the writ is not amended to show the correct name of the owner of the realty.[7] Under the Torrens Law a properly registered attachment gives a lien superior to the rights of the holder of a prior unregistered conveyance of which the creditor had no actual notice.[8]

Provisional records; judicial mortgages. The recording of an attachment of realty made for securing the result of a suit does not change the character of the debt or give to the attaching creditor a preference over other existing creditors which he did not have before, the only preference obtained being limited to creditors whose claims are contracted subsequent to such recording.[9]

(2) Effect of Notice

Ordinarily knowledge or notice to an attaching creditor of a prior unrecorded deed or encumbrance will postpone his rights thereto.

Except in a few jurisdictions,[10] an attaching

1. Fitzgerald v Fitzgerald, 155 P. 791, 97 Kan 408
2. Williams-Echols Dry Goods Co. v. Bloyd, (Ark) 276 S.W 1.
3. Scott v Marquette Nat Bank, 217 N W. 136, 173 Minn 225
4. N D—Young v Salzer Lumber Co, 204 N W 8, 52 N D 685—Crosson v Kartowitz, 175 N W 868, 43 N D 466
Tex—Parks v. West, (Civ App) 274 S W 164.

Reconveyance

Creditors who attached the interest of their debtor in certain lands, in which the record showed he had only a vendor's lien, but which in fact had been reconveyed to him by an unrecorded deed, thereby secured a lien upon the title given him by the deed, but such lien was subject to the vendor's lien which he had assigned by unrecorded assignment to another—Traders' Nat. Bank v Price, (Tex. Com App) 228 S W 160, reversing Price v. Traders' Nat. Bank, (Civ. App) 195 S.W. 934.

5. Ind—Fountain Trust Co. of Covington v. Rinker, (App) 182 N E 709.
Tex—City Nat. Bank of Corpus Christi v. Craig, 257 S W. 210, 113 Tex 375, affirming (Civ.App.) 233 S W. 631.

Time notice dates from

Under act of 1889 (Rev.St. art 6858), constructive notice of an attachment levy on land under the doctrine of lis pendens does not date from the time of the filing of a copy of the writ of attachment and the sheriff's return in the county clerk's office, but from the actual making of the required record by the clerk, so that under act of 1905 (Rev St arts 6837–6840), a bona fide purchaser for value, after the filing of such copies, but before the record is made, acquires rights superior to the attachment lien—City Nat. Bank of Corpus Christi v. Craig, 257 S W 210, 113 Tex 375, affirming (Civ.App) 233 S.W 631.

Land for which notice required

(1) By the act of 1889 (Rev St. art 6858), for an attachment to constitute a prior lien as against a subsequent bona fide sale or encumbrance of the realty, notice of the attachment must be placed of record in the office of the county clerk where the attachment was on land outside the county where the attachment suit was pending, but as to land within the country the doctrine of lis pendens made the attachment lien a prior lien—City Nat Bank of Corpus Christi v Craig, 257 S W 210, 113 Tex 375, affirming (Civ App) 233 S W. 631.

(2) By the act of 1905 the requirement as to recording notice of attachment liens was extended so that for an attachment to constitute a prior lien as against a subsequent bona fide sale or encumbrance of the realty notice of the attachment must be placed of record in the office of the county clerk whether the attachment is made on land within or without the county where the attachment suit is pending—City Nat Bank of Corpus Christi v. Craig, supra.

Recorded attachment a prior lien

A purchaser of property after the levy of an attachment thereon and the due recording of a copy of the attachment and the sheriff's return has constructive notice of the levy such that she is not a bona fide purchaser under Rev St arts 6837–6840, entitled to take advantage of a failure to file notice of lis pendens—Holford v. Patterson, 257 S W. 213, 113 Tex 410, affirming (Civ App) 240 S.W 341.

6. Norris v. Anderson, 64 N E. 71, 181 Mass. 308, 92 Am S R. 420.
7. Bates v Nessen, 161 N.E. 410, 263 Mass. 371.
8. In re Juran, 226 N W. 201, 178 Minn. 55.
9. Martinez v. Holliday, 1 Philippine 194, 1 Off Gaz. 526.
10. Southern Bank, etc, Co v. Folsom, (Tenn) 75 F. 929, 21 C C A. 568.

creditor's actual knowledge of a prior unrecorded deed at the time when his attachment is levied will postpone his rights to those of the grantee under the unrecorded deed,[11] and upon the same principle an outstanding unrecorded equity cannot be defeated by the attachment of a creditor who has notice of such equity.[12]

What constitutes sufficient notice. An attaching creditor is chargeable with notice in the same manner as a subsequent purchaser.[13] Open, notorious possession of land is notice,[14] and except where land is registered under Torrens Law,[15] an open and notorious possession of land by the grantee[16] or by a tenant[17] is constructive notice of his title It is not, however, notice of an unrecorded deed that a subsequent deed of the same premises by the grantee,[18] a subsequent mortgage,[19] or an unacknowledged deed[20] has been recorded, or that a declaration of trust is filed by a cestui que trust when such a declaration is not a recordable instrument.[21]

A showing of facts sufficient to put the attaching creditor on inquiry has been held sufficient to charge him with notice [22]

Notice before levy of execution. It has been held that, although an attachment of real estate is made without notice that the debtor has conveyed it to a bona fide purchaser, the lien of the attaching creditor is defeated by actual notice of such conveyance, received before he levies his execution thereon, or has lawfully applied it to the satisfaction of his debt;[23] but there is also authority for the contrary view.[24]

§ 277. Priorities between Successive Attachments

a. General rule
b. Whether levy or delivery of writ governing consideration
c. Postponement of prior attachment

a. General Rule

In general, as between successive attachments, the lien of the first in point of time is the superior lien.

In the absence of statutes providing for a pro rata distribution among attaching creditors, which will be considered in § 335, or which give precedence over general attachments to attachments is-

11. Mass.—Flynt v Arnold, 2 Metc 619.
Or—Saling v First Nat Bank, 182 P 140, 93 Or 237.
Tex—Parks v West, (Civ App) 274 S W 164
6 C J p 298 notes 88, 89.

Sheriff's deed

Omission to record deed given to purchaser of an equity of redemption at a sheriff's sale does not render such deed invalid as against a subsequent attaching creditor who has actual knowledge of such unrecorded deed—Houghton v Batholomew, 10 Metc (Mass) 138, overruling anything to the contrary McGregor v. Brown, 5 Pick (Mass) 170.

12. Minn—Scott v Marquette Nat. Bank, 217 N W. 136, 173 Minn 225
N J—Busath v Prival, 95 A 136, 84 N J Eq 599
6 C J p 298 note 90.

Agreement to create lien; equitable mortgage

Under a statute providing that no deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record, an attaching creditor with notice has a lien superior to that reserved in a note given by the purchaser to a third party who advanced money for the purchase price of land—Schmidt v Carter's Adm'r, 28 S W 364, 95 Ky 1, 15 Ky L 402

13. Me—McLaughlin v Shepherd, 32 Me 143, 52 Am.D 646—Matthews v Demerritt, 22 Me. 312
N D—Ildvedsen v Bowbells First State Bank, 139 N W 105, 24 N. D 227
6 C J p 299 note 91.

14. Parks v West, (Tex Civ App) 274 S W 164

To be innocent purchaser for value, or obtain valid lien by attachment proceedings on property not in debtor's name on record, it is necessary to inquire of parties in possession by what right they are holding same; open notorious possession of land being "notice"—Parks v West, (Tex Civ App) 274 S W 164

15. In re Juran, 226 N W. 201, 178 Minn 55.

16. Ill—Slinger v Sterrett, 118 N E. 1003, 283 Ill 82—Wilson v. Kruse, 110 N E 359, 270 Ill 298.
Mass—Anonymous, Quincy 370.
6 C J. p 299 note 92

Land and crop

Title of grantee taking possession of land and wheat prior to service of attachment is good as against subsequently acquired attachment lien—Farmers' Bank of Smiths Grove v Kinslow, 299 S W. 549, 221 Ky 627.

17. Ill—Wilson v. Kruse, 110 N E 359, 270 Ill 298
Minn—Union Inv. Co. v. Abell, 181 N.W 353, 148 Minn 229.
Tex—J M. Radford Grocery Co v Matthews, (Civ App.) 78 S W.(2d) 989
6 C J p 299 note 92 [b], [c]

18. Roberts v Bourne, 23 Me 165, 39 Am D 614

19. Veazie v Parker, 23 Me 170.

20. Brown v Lunt, 37 Me 423.

21 Clark v Watson, 5 N E 293, 141 Mass 248

22. Saling v First Nat Bank, 182 P 140, 93 Or 237—6 C J. p 299 note 97.

Statement by grantor

Where purchaser informed the bank, from whom he had borrowed the money with which to make first payment, that he had given up the deal and turned the property back to the vendor, the bank, attaching the property two weeks after the vendor had retaken possession, was not in the position of an innocent purchaser without notice, having information sufficient to place it upon inquiry—Saling v First Nat Bank, 182 P. 140, 93 Or. 237

23. Iowa—Hoy v Allen, 27 Iowa 203
Mo—Hope v Blair, 16 S W 595, 107 Mo 85, 24 Am S R 366
Vt—Reynolds v Haskins, 35 A 249, 68 Vt 426—Hackett v. Callender, 32 Vt. 97.

24. Me—Emerson v Littlefield, 12 Me 148—Kent v. Plummer, 7 Me 464—Stanley v Perley, 5 Me 369.
Mass.—Coffin v. Ray, 1 Metc 212
N.H—Stowe v. Meserve, 13 N. H. 46.

sued in actions to enforce specific liens on the property regardless of which was prior in time,[25] or which give precedence to the attachment first recorded,[26] the general rule is that as between successive attachments of the same property the one which is earlier in point of time is entitled to priority,[27] irrespective of the time when judgments are recovered in the attachment suits,[28] and without regard to which of the two suits was first instituted,[29] but there is no priority where the first levy was made only on property other than that levied on under the subsequent writ.[30]

The rule is not affected by the circumstance that a subsequently attaching creditor shows superior diligence in getting a fraudulent conveyance of the property set aside,[31] or in defeating a previous fraudulent attachment;[32] that one of the attaching creditors is a nonresident[33] or had notice of a prior unrecorded attachment,[34] that entry of a personal judgment was erroneously made against a nonresident debtor on whom constructive service only was had;[35] that one of the attachments is under a statute specially giving a right to attach goods sold for unpaid purchase money;[36] that the attachment writs issued out of different courts and the property levied on was not the same,[37] that the earlier attachment was issued out of a court of limited jurisdiction;[38] that the property attached is a fund in the hands of the attaching creditor which belongs to the attachment debtor,[39] that the interest of the debtor was contingent at the time of the prior levy;[40] that the affidavit on which the first attachment was based was amended after the second attachment was levied;[41] or that the prior attaching creditor obtained his priority by the use of devices to delay or hinder the other creditor.[42] It has been held, however, that a creditor who has consented to a levy by another on a part of the lands he has attached may not afterward take the lands away, and, if he does, it is a fraud for which relief will be granted,[43] and in a case where several attachments issued on a ground not controverted, but the record showed no right to an attachment in any of the attaching creditors, a pro rata distribution was held proper.[44]

Where the property subject to more than one attachment is of sufficient value to pay all attachment liens on it, the question of priority does not arise.[45]

Ratification of prior unauthorized attachment. If the commencement of an action in which an attachment is issued was unauthorized, but is afterward ratified, the ratification cannot cut out or prejudice the rights of intervening attachments.[46]

25. Log Lien Act
The lien of an attachment under the Log Lien Act to recover the value of labor performed on certain logs, timber, or lumber is superior to the lien of a prior attachment on the same property under the general attachment law.—Halpin v Hall, 42 Wis 176.

26. Hendricks v. Shaw, 159 N E 620, 262 Mass. 284—6 C J. p 291 note 56 [d]

27. Ala.—Garrison v Webb, 18 So. 297, 107 Ala. 499.
Ark.—O'Donnell v. Magnolia Petroleum Co, 258 S W 981, 163 Ark 357.
Mass.—Bartlett v. Moore, 124 N E 275, 233 Mass 481
N.C.—Hambley & Co. v H W White & Co, 133 S E. 399, 192 N C 31
6 C J p 299 note 2.

28. Hambley & Co v H W. White & Co, supra—6 C J. p 300 note 3.

29. Altschuler v Porter, 146 A 308, 105 N J.Law 557, reversing 143 A 738, 6 N J Misc 1049.

30. Altschuler v. Porter, supra.

31. Cal.—Patrick v. Montader, 13 Cal 434
Miss.—Levy v. Marx, 18 So. 575
Mo.—State v Hickman, 51 S W. 630, 150 Mo 626
6 C.J. p 301 note 4.

32. Lilienthal v. A P. Hotaling Co, 15 P. 630, 15 Or. 371—6 C.J p 301 note 5

33. U S.—Bates v Days, (C C Mo) 17 F 167, 5 McCrary 342.
Idaho.—Barnett v. Kinney, 28 P 922, 24 P. 624, 2 Idaho (Hasb.) 740.
6 C.J p 301 note 6.

34. Kent v. Roberts, (C C Maine) 14 F Cas No 7,715, 2 Story 591

35. O'Donnell v Magnolia Petroleum Co, 258 S W 981, 163 Ark. 357.

36. Ark.—Arkadelphia Lumber Co v McNutt, 59 S W 761, 68 Ark 417, 82 Am S R 299—Fox v. Arkansas Industrial Co., 12 S W. 875, 52 Ark 450.
Mo.—Straus v. Rothan, 14 S W. 940, 102 Mo 261, affirming 41 Mo App. 602, and overruling Boyd v. J M. Ward Furniture, etc., Co, 38 Mo. App 210, and Bolckow Milling Co v. Turner, 23 Mo App. 103.

37. Altschuler v Owen, 135 A. 823, 5 N J Misc. 45, certiorari granted 136 A 924, 5 N J Misc 311.

38. Woodward v. Lishman, 78 A. 701, 80 N J Law 536
Probate court
Where realty was attached by the probate court, with judgment for the attaching creditor and abstract thereof filed with the clerk of the district court, the execution purchaser's interest was prior to a lien under an attachment issued out of the district court after the issuance of the first writ, but before the judgment and filing of the abstract.—Hanson v. Morrison, 165 P 531, 30 Idaho 422

39. Arledge v. White, 1 Head (Tenn.) 241.

40. Mechanics' Nat Bank v. Buckman, 56 Pa Super 285

41. Ga.—Cleckley v Ransom, 68 S. E 840, 8 Ga App 136
Okl.—Coyle Mercantile Co v. Nix, 54 P 469, 7 Okl 207
6 C J p 301 note 12

42. Dooley v. Hadden, (N Y) 21 S. Ct 259, 179 U S. 646, 45 L Ed. 357, reversing 92 F. 274, 34 C C A 338, 93 F 728, 35 C C A. 554—6 C J p 301 note 13.

43. Hills v Hubbard, 2 Root (Conn.) 397

44. Bright v. Blakemore, 9 Ky.L. 56

45. Goudie v American Moore Peg Co, 122 A 349, 31 N H 88

46. Caruth-Byrnes Hardware Co. v. Deere, 13 S.W. 517, 53 Ark. 140, 7 L R A. 405.

Necessity for diligence and compliance with statute. In order to preserve his priority, the first attaching creditor is held to strict compliance with the law, and must take all the steps necessary to subject the attached property to sale under execution in satisfaction of his claim.[47] Accordingly, if the action in which the senior attachment was issued is not prosecuted to judgment, but is settled out of court, and the suit is continued, it will have the effect of postponing the lien of such attachment to the junior attachment lien.[48]

Failure to give bond. It has been held that, where the debtor was constructively summoned, the fact that the creditor did not give a bond for the restoration of the property attached in case the judgment should be set aside until after the judgment had been obtained, although the statute required it before judgment, did not deprive him of his priority of lien over a subsequent attaching creditor;[49] but under a statute providing that, when an attachment is issued against a nonresident debtor and plaintiff has given no bond, the attachment shall be dissolved on defendant's entering his appearance, etc., where such nonresident defendant answers and prays dissolution of the attachment for failure of plaintiff to give bond, his property is so far freed as to let in a subsequent creditor, whose attachment is levied before the first creditor perfects his attachment by giving bond.[50]

Dissolution of senior attachment. In the case of several successive attachments of the same property, if the first attachment is set aside or dissolved, the second attachment will then be the first in the order of priority [51]

An attachment of firm property for a firm debt, although subsequent in point of time, takes priority of an attachment of firm property for a personal debt of one of the firm.[52]

b. Whether Levy or Delivery of Writ Governing Consideration

The time of the levy or of the delivery of the writ to the levying officer determines priority in accordance with the applicable rule as to the time fixing the date of origin of the lien.

As an attachment usually becomes a lien only from the time when a levy is made thereunder (see supra § 255), the general rule is that the priority between different writs of attachment is fixed according to the relative time when the respective levies are made thereunder;[53] and in this connection, although there is some authority to the contrary,[54] as a general rule, it is proper to regard fractions of a day.[55] It has been held, however, that, as it is the duty of an officer in whose hands several writs are placed to levy them in the order in which he received them (see supra § 211), his disregard of his duty in this respect will not be permitted to deprive the creditor whose writ was first delivered of the priority which a proper performance of the officer's duty would have given him.[56] In jurisdictions where the lien of an attachment dates from the time of the delivery of the writ to the officer (see supra § 255), the lien of the attachment which is first placed in the hands of the officer is necessarily prior to that of one subsequently delivered to him, even though the latter is first served [57]

c. Postponement of Prior Attachment

(1) Power of court
(2) Right to attack prior attachment
(3) Grounds for postponement

(1) Power of Court

The courts have power to postpone the lien of one attachment to that of another in a proper case.

Under a statute allowing the court to settle questions of priority and good faith of attachments sufficient chancery power can be exercised to post-

47. Cole v. Wooster, 2 Conn. 203—6 C.J. p 301 note 17.

48. Mass.—Taylor v. Mixter, 11 Pick 341.
Mo.—Burnham v. Blank, 49 Mo App 56—Adler v. Anderson, 42 Mo App 189
Vt.—Brandon Iron Co v. Gleason, 24 Vt. 228

49. O'Donnell v. Magnolia Petroleum Co., 258 S.W. 931, 163 Ark 357.

50. Pitman v. West, 199 S.W. 756, 198 Mo App. 92.

51. Flanagan v. Newman, 38 P 431, 5 Colo.App. 245—6 C.J. p 302 note 19.

52. Putnam v Loeb, 2 Ohio Cir Ct. 110, 1 Ohio Cir Dec. 391

53. Industrial Loan Corporation v Thomashunas, 17 Pa Dist. & Co 210—6 C.J. p 302 note 22

Prior warrant not levied before judgment

Attaching creditor of a bank account is entitled to proceeds collected by the sheriff on execution, notwithstanding the prior warrant of attachment had been issued in a different action, but not levied before judgment therein.—McCarthy v Culkin, 172 N.E. 524, 254 N.Y. 328, reversing 239 N.Y.S. 791, 228 App Div. 690, dismissal of appeal denied 173 N.E. 860, 254 N.Y. 547.

54. Industrial Loan Corporation v. Thomashunas, 17 Pa Dist & Co 210—6 C.J. p 302 note 23 [b]

Foreign attachments

In foreign attachments there is no priority between writs served on the same day.—Industrial Loan Corporation v Thomashunas, 17 Pa Dist & Co. 210.

55. Western Nat Bank v. Nat. Union Bank, 46 A. 960, 91 Md 613—6 C.J. p 302 note 23.

56. Atchison, etc., R. Co. v. Schwarzschild, etc., Co., 48 P 591, 58 Kan 90, 62 Am.S.R. 604—6 C.J. p 302 note 25.

57. Underhill v McManus, 34 A. 303, 175 Pa. 39—6 C.J. p 303 note 27.

pone one for another for any sound equitable reason.[58]

(2) Right to Attack Prior Attachment

A junior attaching creditor possessing a valid attachment on the property in issue is entitled to seek a postponement of the lien of a prior attachment to his own.

A junior attaching creditor is entitled,[59] in the discretion of the court,[60] to present objections to a prior attachment for the purpose of postponing it to his own; but in order to acquire any standing in court for this purpose he must show that his own attachment is valid[61] and that a binding levy was made thereunder on the same property that was seized under the prior writ.[62]

(3) Grounds for Postponement

(a) Jurisdictional defects generally
(b) Nonexistence of grounds of attachment
(c) Invalidity of claim
(d) Immaturity of claim
(e) Irregularities
(f) Alteration of writ
(g) Insolvency of defendant
(h) Consent to judgment
(i) Assignment of cause of action
(j) Fraud
(k) Directions to officer not to levy
(l) Change of venue

(a) Jurisdictional Defects Generally

The lien of a prior attachment may be postponed for jurisdictional defects in the attachment proceeding.

A prior attachment creditor may be postponed where his proceedings are tainted with a defect which takes away the jurisdiction of the court and renders the proceeding void,[63] as where the prior attachment was based on a claim for which the remedy by attachment was not available,[64] where the writ was issued contrary to statutory provisions, before the main action was commenced,[65] where the affidavit was fatally defective,[66] or where the attachment suit was brought without plaintiff's knowledge.[67] Omitting the name of defendant whose property is attached from an attachment bill has been held to be a defect which will postpone the lien of the attachment to that of another creditor whose levy was subsequently made,[68] and even a slight error in the name of defendant has been held sufficient to postpone a prior to a subsequent attachment.[69]

(b) Nonexistence of Grounds of Attachment

In the absence of fraud, nonexistence of the ground of attachment is not sufficient to postpone the attachment lien.

Nonexistence of the ground of attachment is not available to postpone a prior attachment,[70] except when such attachment is based on grounds known to be false.[71] The filing of an amended petition, which for the first time alleged that the creditor had a mortgage on the goods attached, a fact essential to the validity of a specific attachment, has been held not to relate back to the order of specific attachment issued when the original petition was

58. Pitman v. West, 199 S.W. 756, 198 Mo.App. 92—6 C.J. p. 304 note 30.

59. Parker v. Perkins, 53 N.H. 607—6 C.J. p. 304 note 31.

60. Espenhain v. Meyer, 43 N.W. 157, 74 Wis. 379

61. Hellwig v. Seeley, 178 N.Y.S. 313, 109 Misc. 183—6 C.J. p. 304 note 32.

Motion papers

Where a subsequent attachment creditor fails to present the papers on which his attachment was granted, and does not disclose the ground of such attachment in an affidavit on which a motion, under Code Civ. Proc. § 682, to vacate a prior warrant of attachment, is based, as required by §§ 636, 641, the motion will be denied.—Hellwig v. Seeley, 178 N.Y.S. 313, 109 Misc. 183.

62. Ladenburg v. Commercial Bank, 37 N.Y.S. 1085, 2 App. Div. 477—6 C.J. p. 304 note 33

63. Carney v. Taylor, 4 Kan. 178—6 C.J. p. 305 note 34.

Suit commenced in wrong county

Where the first attachment proceeding against a nonresident debtor was, in violation of the statute, begun in a county where he had neither property nor debts due him, nor was he to be found there himself, the second attachment creditor, who complied with the statute by beginning his attachment suit in a county where the debtor had property, obtained a prior lien, and the action of the first attachment creditor in thereafter procuring the debtor to come to the county where his suit was commenced and serving him with a summons there did not deprive the second attachment creditor of his priority of lien.—Carney v. Taylor, 4 Kan. 178.

64. Ark.—Rice v. Dorrian, 22 S.W. 213, 57 Ark. 541.
Ohio.—Ward v. Howard, 12 Ohio St. 158
Demands on which remedy by attachment lies see supra §§ 8–19

65. Seibert v. Switzer, 35 Ohio St. 661

66. Hart County Deposit Bank v. Hatfield, 33 S.W.(2d) 660, 236 Ky. 725—6 C.J. p. 305 note 37.

Cure by amendment

An attachment lien created by an amended affidavit cannot affect the right to a lien previously acquired on the same property by attachment or otherwise.—Hart County Deposit Bank v. Hatfield, 33 S.W.(2d) 660, 236 Ky. 725.

67. Caruth-Byrnes Hardware Co. v. Deere, 13 S.W. 517, 53 Ark. 140, 7 L.R.A. 405

68. Lillard v. Porter, 2 Head (Tenn.) 177

69. Lorie v. Abernathy, 63 Mo.App. 249—6 C.J. p. 305 note 40

70. Ala.—Putney v. Wolberg, 28 So. 741, 127 Ala. 124
Ark.—Glaser v. Ft. Smith First Nat. Bank, 34 S.W. 1061, 62 Ark. 171, 35 L.R.A. 765
Wis.—Rice v. Wolff, 26 N.W. 131, 65 Wis. 1
6 C.J. p. 305 note 41.

71. Kollette v. Seibel, 26 S.W. 863, 7 Tex. Civ.App. 260—6 C.J. p. 305 note 42.

filed, so as to affect the priority acquired in the meantime by other attaching creditors.[72]

(c) Invalidity of Claim

Invalidity of claim is a ground for postponement.

A subsequent attachment creditor may obtain priority over an earlier attachment by showing that the claim on which it was based is invalid,[73] even though the attachment defendant has consented to judgment thereon.[74]

(d) Immaturity of Claim

Immaturity of claim is a ground for postponement.

A junior attaching creditor may obtain preference by showing that the prior attachment was based on an immature claim.[75]

(e) Irregularities

Mere irregularities of which the debtor did not take advantage are not grounds for postponement.

An attachment will not be postponed to the claims of subsequent attaching creditors because of irregularities of which defendant in attachment has not taken advantage,[76] such as defects in the affidavit,[77] irregularities in the attachment bond,[78] in the summons[79] or the service thereof,[80] or a defective description in the return of the land levied on;[81] nor will the lien of an attachment be postponed because judgment was erroneously rendered for an amount in excess of that stated in the petition and affidavit where, with the consent of the debtor, a remittitur was entered of the excess.[82]

Where, however, plaintiff begins attachment proceedings against defendant under a wrong name and has to begin over again, his first action does not give him priority over those filing attachment proceedings after his first suit was begun.[83] If a writ of attachment securing a builder's lien is defective for failure to command the sheriff to attach the property, the attachment falls behind the attachment of other lienors, who have properly secured their liens, but is good against the debtor and any liens thereafter attaching.[84]

(f) Alteration of Writ

Alteration of the writ to the prejudice of subsequent attaching creditors is a ground for postponement.

It has been held that any alteration of a writ to the prejudice of the rights of subsequently attaching creditors will dissolve the attachment as against them.[85]

(g) Insolvency of Defendant

Insolvency of defendant is not a ground for postponement.

The notorious insolvency of defendant is not ground for postponing a prior attachment.[86]

(h) Consent to Judgment

Consent to judgment by the debtor is not a ground for postponement.

It is not ground for postponing a prior attachment that the debtor consented to judgment against him for a bona fide debt,[87] even though the creditor paid a money consideration for such consent.[88]

72. Ford v Witty, 245 S W 846, 197 Ky 86

73. Henderson v. J. B Brown Co., 28 So 79, 125 Ala 566—6 C J. p 305 note 43

Prima facie cause of action sufficient

When defendant challenges the sufficiency of the papers on which a warrant of attachment is granted, the court will closely scrutinize them, in order to see, not alone that the jurisdictional facts are stated, but that facts are stated which tend to establish a prima facie case entitling plaintiff to recover, but when the question arises as between two attaching creditors, if it appears presumptively that plaintiff has a cause of action, such as specified in Code Civ Proc. § 685, and that defendant is a foreign corporation, plaintiff, being prior in time, has the prior right, unless it appear that his preference has been secured by fraud or collusion with defendant—Colcord v Banco de Tamaulipas, 180 N.Y.S 852, 191 App Div 94.

74. Pierce v. Jackson, 6 Mass 242

75. Hinchman v. Town, 10 Mich 503—6 C J. p 305 note 45.

76. O'Donnell v Magnolia Petroleum Co, 258 S W 981, 163 Ark 357—6 C J p 306 note 46.

77. O'Donnell v. Magnolia Petroleum Co., supra—6 C J. p 306 note 47

Substantial conformity to statute sufficient

The paramount lien by reason of a prior attachment of property of nonresident defendant is not defeated by defects in the affidavit for attachment, where the same is substantially in the language of the statute and sufficient to form a basis for the issuance of the writ—O'Donnell v. Magnolia Petroleum Co., 258 S W. 981, 163 Ark 357.

78. Ark—Austin v. Goodbar Shoe Co, 30 S W 888, 60 Ark. 444
Cal—Fridenberg v. Pierson, 18 Cal 152, 79 Am D 162.
Mo—Van Arsdale v. Krum, 9 Mo. 397.

79. Johnson v Larson, 147 N W. 476, 96 Neb 193

80. Darby v. Shannon, 19 S C 526.

81. Riordan v Britton, 7 S W. 50, 69 Tex 198, 5 Am S R 87

82. Tustin v. Taylor, 239 Ill App. 501.

83. Boulware v. Louden, 8 Ky Op 93

84. Goudie v American Moore Peg Co 122 A 349, 81 N H 88

85. Laighton v. Lord, 29 N H. 237.

86. Harrison v. Harwood, 31 Tex 650

87. Cal—Shea v. Johnson, 35 P. 1023, 101 Cal 455
Mass—Eastman v. Eveleth, 4 Metc 137.
Tex—Goodbar v. Sulphur Springs City Nat Bank, 14 S W. 851, 78 Tex. 461
6 C J p 306 note 55.

88. Doggett v. Wimer, 54 Mo App. 125—Adler v. Anderson, 42 Mo App 189.

(i) Assignment of Cause of Action

Assignment of the cause of action is not a ground for postponement.

It is not sufficient ground for postponing a prior attachment that a colorable assignment of a just cause of action was made to enable the assignee to sue in a certain state.[89]

(j) Fraud

Fraud in the attachment is a ground for postponement

A subsequent attaching creditor may secure priority by showing that the earlier attachment was fraudulent.[90] However, the fact that a creditor, being in actual possession of goods of the debtor under a claim of title to them which was legally unfounded, placed them in the nominal possession of his attorney, in a place known only to himself, and was thus enabled to secure a levy on them prior in law to that of other attaching creditors, does not warrant a court of equity in postponing his lien to theirs.[91] A prior attachment which is only partly illegal will be wholly void as against subsequent legal attachments.[92]

(k) Directions to Officer Not to Levy

Directions by the creditor to the levying officer not to levy or to delay levying are grounds for postponement.

A creditor who directs the officer receiving the writ not to levy it,[93] or not to levy it unless another attachment issues,[94] may be postponed to a subsequent attaching creditor.

(l) Change of Venue

A change of venue in the attachment suit is not a ground for postponement.

A change of venue in an attachment suit will not postpone a prior attachment to a subsequent one.[95]

§ 278. Priorities between Simultaneous Attachments

The liens of simultaneous attachments have no priority, but are entitled to share equally.

Where there are several simultaneous attachments, that is, where the several writs are delivered to the officer, or the property is levied on at the same time, the rule is that there is no priority, but they are entitled to share equally.[96] If, however, the claim of some of the attachments is less than the portion of the proceeds which they are entitled to under this rule, the surplus will be bound by, and must be divided among, the remaining attachments.[97]

§ 279. Proceedings for Determination of Priorities

a. By petition or motion in first action
b. Resort to equity

a. By Petition or Motion in First Action

(1) Right to proceed in this manner
(2) Time for proceeding
(3) Jurisdiction
(4) Parties to intervention
(5) Notice
(6) Pleading
(7) Evidence
(8) Judgment
(9) Review
(10) Costs and interest

(1) Right to Proceed in This Manner

Subject to particular statutory provisions in force, a junior attaching creditor may attack a prior attachment by intervening in the original suit, or by motion to vacate the earlier attachment, or by appearing and defending against the prior attachment suit.

Although the details of the proceedings by which a junior attaching creditor may attack a previous attachment vary according to state statutes, the two modes in general use are for the second creditor to file a petition of intervention in the original suit,[98] or to move to vacate the earlier attachment.[99] It has also been held that the rights of attaching creditors may properly be determined on a motion for the distribution of a fund among them.[1] Also, although the rule is not univer-

89. Hadden v. Dooley, (N Y) 92 F 274, 34 C C A. 338, affirmed 93 F 728, 35 C C A. 554, reversing 84 F 80, and reversed on other grounds 21 S Ct. 259, 179 U.S. 646, 45 L Ed 357

90. Hale v. Chandler, 3 Mich. 531—6 C J. p 306 note 58

91. Dooley v Hadden, (N Y) 21 S Ct 259, 179 U S. 646, 45 L Ed 357, reversing 92 F 274, 34 C C A. 338, affirmed 93 F 728, 35 C C A. 554, reversing 84 F. 80

92. Ill —Culver v. Rumsey, 6 Ill App 597.

Mass —Robinson v. Ensign, 6 Gray 300.

Wis —Evans v. Virgin, 39 N W. 864, 72 Wis. 423, 7 Am S R 870.

6 C J p 307 note 60.

93. Moore v. Fitz, 15 Ind 43—6 C.J. p 307 notes 61, 62.

94. Florsheim Dry Goods Co. v. Taylor Commn. Co., 27 S W. 79, 59 Ark. 307—6 C J. p 307 notes 62, 63.

95. Laird v. Dickerson, 40 Iowa 665.

96. Hambley & Co v. H W. White & Co, 133 S E. 399, 192 N C. 31—Freeman v. Grist, 13 N C 217—6 C J p 309 note 93.

97. Ala —Jones v. Hutchinson, 43 Ala. 721.

Me —Blaisdell v. Pray, 68 Me 269.

Mass —Sigourney v. Eaton, 14 Pick. 414, 25 Am D 414.

N Y —Campbell v. Ruger, 1 Cow 215.

98. Pendleton v. Smith, 1 W.Va. 16—6 C J p 307 note 66.

99. Standard Impl Co. v. Lansing Wagon Works, 48 P. 638, 58 Kan. 125—6 C J. p 307 note 67.

1. Putnam, etc, Co. v. Loeb, 2 Ohio Cir Ct. 110, 1 Ohio Cir Dec 391.

sal,[2] it has been held that the junior attaching creditor may come in to the prior attachment suit and defend against the attachment,[3] but this has been held to be a matter resting in the discretion of the court rather than an absolute right.[4]

(2) Time for Proceeding

If an attaching creditor intervenes, he must do so while both attachment suits are pending, but on a motion to defeat a prior attachment the authorities are not agreed as to the necessity of making the motion before judgment.

In case of intervention the attaching creditor must file his petition in intervention while both attachment suits are pending.[5] It has been held that a motion of a junior attaching creditor to defeat a prior attachment must be made before judgment in the prior attachment suit;[6] but there is also authority for the view that such a motion may be made at any time before the proceeds are turned over to the prior attaching creditor.[7]

(3) Jurisdiction

Ordinarily, the court having jurisdiction of the first attachment writ determines questions of priority.

Ordinarily, the court which has jurisdiction over the earliest attachment writs decides questions of priority.[8]

(4) Parties to Intervention

All subsequent attaching creditors are necessary parties in an action by an attaching creditor to vacate a judgment in a prior attachment suit on the ground of fraud.

It has been held that, on intervention by an attaching creditor to vacate a judgment in a prior attachment suit on the ground of fraud, all subsequently attaching creditors are necessary parties.[9]

(5) Notice

Notice must be given to all interested parties.

Where the proceeding is by motion, notice of the motion must be given to all interested parties.[10]

(6) Pleading

The complaint of a subsequently attaching creditor must set forth the facts and state that his claim is a just one. The pleadings must be filed within the proper time.

A complaint by a subsequently attaching creditor must set out facts from which the nature of his alleged lien can be determined, and must state that his claim is a just one.[11] The time for pleading which is allowed to a subsequently attaching creditor who comes in and defends against a prior attachment is the same as that allowed to defendant himself.[12]

(7) Evidence

The general rules as to the burden of proof, and as to the admissibility and weight and sufficiency of the evidence, apply.

The burden of proof is on the party attacking the priority of the attachment lien to show facts sufficient to defeat the priority of such attachment lien,[13] except that in some jurisdictions, under a statute making an attaching creditor a purchaser in good faith from the date of attachment as against unrecorded instruments, such matter is an affirmative defense for which the creditor has the burden of proof.[14] The general rules as to the admissibility[15] and the weight and sufficiency[16] of evidence apply in such a contest.

2. Mich—Hale v. Chandler, 3 Mich 531
Ohio—Goble v. Howard, 12 Ohio St. 165—Ward v. Howard, 12 Ohio St. 158.

3. Mo—Jump v McClurg, 35 Mo 193, 86 Am D 146
Vt—Harding v Harding, 25 Vt 487
W Va—Miller v White, 33 S E. 332, 46 W.Va 67, 76 Am S R 791.
6 C.J p 308 note 72.

4. Mo—Jump v. McClurg, 35 Mo 193, 86 Am D 146.
N H—Reynolds v. Damrell, 19 N.H 394.

5. Smart v. Smart, 64 Me. 317.

6. Rudolf v. McDonald, 6 Neb. 163

7. Woodmansee v. Rogers, 82 N Y 38, 59 How Pr. 402, affirming 20 Hun 285, 58 How.Pr. 439—6 C J. p 308 note 71.

8. Mo—Sutton v. Stevens, 41 Mo App 42
Wis—Espenhain v. Meyer, 43 N.W. 157, 74 Wis 379—6 C J. p 308 note 74

9. Cook v Pollard, 8 S W. 512, 70 Tex 723

Intervention by officer

Intervention has been permitted to be effected through an officer who represented the junior attaching creditors—Willard v. Whitney, 49 Me 235

10. Cal—Dixey v Pollock, 8 Cal 570
Ill—Chandler v. Mullanphy, 7 Ill. 464

11. Shea v. Johnson, 35 P. 1023, 101 Cal. 455—6 C J p 308 note 77.

12. Jump v McClurg, 35 Mo. 193, 86 Am D 146

13. Holford v. Patterson, (Civ App) 240 S W. 341, affirmed 257 S W 213, 113 Tex 410—6 C J. p 308 note 80

Holder of unrecorded instrument

Under the registration law, a creditor is not required to show that he had no notice of a prior unrecorded deed or mortgage at the time of securing his lien on the land fixed by legal process, and the burden is on the holder of a prior unrecorded instrument to prove notice of his rights to the creditor at the time of the levy—Holford v. Patterson, (Civ App) 240 S W. 341, affirmed 257 S W. 213, 113 Tex. 410

14. Bailey v. Hickey, 195 P. 372, 99 Or 251.

15. Lee v. Lamprey, 43 N H. 13—6 C J p 308 note 81

16. Ruggles v. Helfrich, 123 P 369, 162 Cal 553—6 C J. p 292 note 65 [1], [w], p 306 note 58 [f], [g].

Knowledge of unrecorded deed

As respected whether a creditor at the time of attachment had knowledge of the unrecorded deed whereby the debtor conveyed the land, the evidence was held to support the inference that the debtor, in renting the

(8) Judgment

The judgment, in case the subsequent attaching creditor succeeds, should only postpone the first attachment to the subsequent one, and not set it aside entirely.

Where a subsequent attaching creditor succeeds in having his claim preferred to that of the earlier attachment, the judgment should not set aside the first attachment entirely, but should only postpone it to the subsequent one.[17]

(9) Review

Generally, an appeal lies from a decision determining priorities.

It has been held that an appeal will lie from the decision on a motion to determine the priority of attaching creditors;[18] but leave granted to a junior attaching creditor to defend the prior attachment suit has been held not to confer a right to review.[19]

(10) Costs and Interest

A junior attaching creditor who fails in his effort to establish the priority of his lien, ordinarily, is liable for the costs entailed by his proceeding, but not for costs or interest occasioned by other causes

In Massachusetts a junior attaching creditor who is let in to defend is liable for costs in case his defense fails,[20] unless a judgment for costs is entered against the original defendant,[21] but he is not liable for interest on the prior attaching creditor's claim during a delay which was caused by the attachment defendant.[22]

b. Resort to Equity

A subsequently attaching creditor who is denied relief at law may resort to equity to establish his lien as against a prior attaching creditor.

Where the subsequently attaching creditor is denied the right to intervene[23] or to move for discharge,[24] resort can be had to equity to enforce his rights against the prior attaching creditor; and where a judgment creditor fails to exercise his attachment lien and the judgment debtor conveys the property to others who mortgage it, questions as to the rights of such new parties in the attached property affecting the claimed priority of the judgment creditor's right therein under his attachment lien is within the exclusive jurisdiction of equity.[25] However, in a suit by subsequent attaching creditors to establish the priorities of their liens, the court cannot hold that prior attaching creditors, not parties to the suit, have lost their liens.[26]

IX. CUSTODY AND DISPOSITION OF PROPERTY

A. IN GENERAL

§ 280. Nature and Effect of Custody

Goods attached are in the custody of the law and an attaching creditor has no property in or right to possession of the attached property by reason of the levy.

Goods when properly attached are strictly in the custody of the law[27] and an attachment creditor has no interest or property in or right to possession of the attached goods, by reason of the levy,[28] and, usually at least, cannot maintain an action in his own name for violation of possession in the absence of statutory authorization, as explained below in § 292, his remedy, if any, being against the attaching officer.[29] An attaching creditor, by the mere levy of his attachment on land, does not become entitled to the possession of the land or to the rents and profits, and cannot exclude from possession the person rightfully entitled thereto.[30]

In general, where the court has custody of property, it will be retained to await the result of the action, and to satisfy any judgment that may be recovered,[31] and the property remains in the custody of the attaching officer or the officer in control of

property to tenants, rented it as the property of his grantee and not as his own—J M Radford Grocery Co v Matthews, (Tex Civ App) 78 S W (2d) 989.

17. Speyer v Ihmels, 21 Cal 280, 81 Am D. 157

18. Lane v White, 64 Mo App 191—6 C J. p 309 note 84.

19. Pike v. Pike, 24 N H. 384.

20. Whitwell v. Burnside, 1 Metc (Mass) 39.

21. Guild v. Guild, 2 Metc (Mass) 229.

22. Gill v. Gill, supra.

23. Ala—Cartwright v Bamberger, 8 So. 264, 90 Ala. 405.

La—Gasquet v. Johnson, 1 La 425

Minn—Lewis v. Harwood, 10 N W. 586, 28 Minn 428

N C—Fayetteville Bank v. Spurling, 52 N C 398

6 C J. p 309 notes 89, 91.

24. Iowa—Whipple v. Cass, 8 Iowa 126

S C—Ex p Perry Stove Co., 20 S.E 980, 42 S C 176

6 C J p 309 notes 90, 91.

25. C I T Corporation v House, 79 S W (2d) 392, 258 Ky 86

26. State v. Hickman, 51 S W. 680, 150 Mo 626.

27. Fair v Beal-Burrow Dry Goods Co, 230 S W. 23, 148 Ark. 340—6 C.J. p 309 note 95.

Acquisition of jurisdiction by court

Where the attaching officer takes possession of personal property by virtue of a writ of attachment, the court acquires jurisdiction over the property—Perry v. Griefen, 59 A. 601, 99 Me 420.

28. Ark—Atkins v. Swope, 38 Ark 528

Ind—Dufour v. Anderson, 95 Ind 302

6 C J. p 309 note 96.

29. Ladd v North, 2 Mass 514—6 C J p 309 note 96.

30. Heathman v Million, 31 S W 473, 17 Ky.L. 421

31. Morganton Mfg & Trading Co

the property until the suit is disposed of, unless bonded or the attachment is dissolved or the lien otherwise lost.[32] After the discontinuance of an attachment suit, the attaching officer holds the property until he has notice, or acquires knowledge, of the discontinuance.[33]

§ 281. Liabilities for Loss or Destruction of Property

An attaching plaintiff who does not direct the attaching officer as to the care of attached personal property or who does not otherwise participate in any wrongful act or negligence of such officer is not liable for a breach of duty on the part of such officer in respect of the care and custody of such property.

In the absence of any question as to the propriety of the levy of attachment, the attaching plaintiff is not liable for a breach of duty on the part of the attaching officer in failing safely to keep attached personal property, which results in an injury to such property, where such plaintiff did not direct the attaching officer as to the care and custody of the property or otherwise participate in the wrongful acts or negligence of such officer,[34] and in such case both the attaching plaintiff and the defendant must look to the attaching officer and his sureties for redress.[35] The reasons for this conclusion are that the official acts of the attaching officer in respect of the care and custody of attached property are not usually regarded as the acts of an agent of the attaching plaintiff,[36] and that the levy of the attachment does not of itself operate as a satisfaction of plaintiff's claim to the extent of the value of the attached property.[37] In this connection it has been pointed out that the attaching officer derives his power to seize and hold the attached property, neither from the attaching plaintiff nor from defendant, but from the statutes which declare the will of the state and that such officer is no more subject to control or direction from plaintiff than from defendant as to the manner in which he keeps the attached property.[38] It has been held that the attaching plaintiff is not liable for the destruction by fire of the attached goods while in the custody of the attaching officer unless such destruction was directly caused by plaintiff or by the wrongful act of the attaching officer to which plaintiff directly contributed.[39]

There is authority for the view that where a horse levied on died while in possession of the sheriff, owing to his negligence, the attaching creditor was not liable unless the attachment was wrongfully sued out.[40] Where the attachment debtor is under the duty to maintain attached cattle after due notice and they perish because of his neglect to comply with such duty, the loss is that of the attachment debtor,[41] and neither the attaching officer nor the plaintiff in attachment is liable for damages resulting from negligence in the care of cattle on a range, on which a levy of attachment has been made in compliance with statute, where, under the statute, the owner remains in control for the purpose of caring for the cattle and the negligence with respect thereto is chargeable to him.[42]

There is authority for the view that the attaching plaintiff is liable for the wrongful acts of the sheriff in making or permitting changes and alterations in a building in his possession under the levy of a writ of attachment where the sheriff acted under the directions of the attorney for the attaching plaintiff.[43] Where such alterations were made after defendant in the attachment proceedings had executed a lease of the premises, while the right to recover for the decreased rental value is in the lessee,[44] defendant in the attachment proceeding, as lessor, has the right to recover damages resulting from alterations of a permanent character.[45]

Where, in an action for breach of contract, a debt owing to defendant was attached and paid by the debtors to the officer, it was held that, on the default and absconding of the officer before judgment, the loss fell on the attaching plaintiff.[46]

Procedure. A debtor who seeks to charge the attaching creditor with liability for the destruction

v Foy-Seawall Lumber Co, 99 S E 104, 177 N C 404

32. Mich—Fletcher v Morrell, 44 N W 133, 78 Mich 176
Okl—Hennessey First Nat Bank v. Hesser, 77 P. 36, 14 Okl. 115
6 C J p 309 note 97, p 366 note 50

Possession until property disposed of
"Possession of attached property vests in the officer until the property is disposed of"—Keith v. Ramage, 214 P 326, 330, 66 Mont. 578.

33. Vanneter v Crossman, 39 Mich 610

34. N.D—Kukowski v. Emerson-Brantingham Implement Co, 175 N W 706, 43 N D 333
Tex—Kanaman v Hubbard, 222 S W 151, 110 Tex 560, affirming (Civ. App.) 160 S W. 304

35. Kanaman v. Hubbard, supra.

36. N D—Kukowski v Emerson-Brantingham Implement Co, 175 N W 706, 43 N.D. 333
Tex—Kanaman v Hubbard, 222 S. W. 151, 110 Tex 560, affirming (Civ.App.) 160 S W. 304.

37. Kanaman v. Hubbard, supra.

38. Kanaman v. Hubbard, supra.

39. Fair v Beal-Burrow Dry Goods Co, 230 S W 23, 148 Ark 340

40. McFaddin v Sims, 97 S W. 335, 43 Tex Civ App 598

41. Sewall v Mattoon, 9 Mass 535

42. Donald v. Carpenter, 27 S.W. 1053, 8 Tex Civ.App. 321

43. Epley v. Hunter, 281 P. 327, 154 Wash 163

44. Epley v. Hunter, supra.

45. Epley v. Hunter, supra

46. In re Dawson, 17 N E 668, 118 N Y 114, 6 Am S R 346, affirming 20 Abb N Cas 188, 13 N Y Civ Proc. 142—6 C J. p 373 note 24.

by fire of attached goods while in the hands of the officer has the burden to show that such destruction resulted from the negligence of the attaching creditor.[47]

A petition in an action against the officer and the attaching creditor based on the alleged fact that defendants had wrongfully permitted a third person to use the attached personalty is fatally defective where it fails to allege the history and outcome of the action in which the writ of attachment issued, facts showing damage or injury to the property resulting from its use by the third person, or the nature of such use.[48]

B. RIGHTS AND DUTIES OF ATTACHING OFFICER

§ 282. In General

The attaching officer has the right and duty to keep attached personal property in his possession or under his control.

In making an attachment of personal property it is the right and duty of the attaching officer to take possession of the property (supra § 223) and to keep the property in his possession or under his control,[49] for the benefit of the attaching plaintiff,[50] either personally, or through a keeper, servant, or agent (infra § 284), or bailee or receiptor (infra §§ 296-302).

The fact that it is the right and duty of the attaching officer safely to keep attached personal property does not confer on him the right to prevent the tenant of the premises on which the attached property is located from entering such premises,[51] even where such tenant is the attachment defendant[52] and where the lease is also attached,[53] except possibly for a short period necessary to safeguard the property pending removal.[54] The fact that defendant is allowed access to the building in which the attached property is located in the possession of the agent of the officer does not divest the latter of his custody.[55]

Usually at least the attaching officer has no authority or duty to deliver the attached property to plaintiff in attachment while the attachment suit is still pending,[56] or even, under certain circumstances, after judgment in favor of plaintiff in attachment and issuance of execution[57] So the attaching officer or the court having jurisdiction has no authority to permit plaintiff to use the attached personal property,[58] even on requiring the execution by plaintiff of an indemnity bond.[59] The sheriff has no authority to make or permit changes and alterations in a building while in his possession under a levy of writs of attachment.[60]

The right of plaintiff in attachment to follow the attached property into the hands of a third person who has acquired rights from the attachment defendant after the attachment depends on the reality of the sheriff's possession under the attachment,[61] and where plaintiff in attachment, who had had possession of the property as keeper for the sheriff, voluntarily permits the property to go out of his possession and has knowledge that defendant in attachment is negotiating for the sale of the property, plaintiff may not successfully question the title of the purchaser[62]

§ 283. Nature of Taking and Possession

a. General considerations
b. Property incapable of manual seizure

a. General Considerations

The question as to what is sufficient custody depends largely on the particular circumstances. Possession by the attaching officer may constitute constructive possession by the plaintiff in attachment.

What act, what species of possession, and what degree of vigilance will constitute legal custody is often a question of difficulty, depending upon a variety of circumstances, having respect to the nature and situation of the property and the purposes

47. Fair v. Beal-Burrow Dry Goods Co., 230 S W 23, 148 Ark 340

Evidence insufficient to show liability of attaching creditor

In attachment in which defendants sought to recover from plaintiff for destruction of goods by fire while in the possession of the sheriff under the writ, the evidence was insufficient to prove that plaintiff undertook to direct the sheriff as to what disposition he should make of the goods for their safe-keeping and preservation during the sheriff's possession under the attachment—Fair v. Beal-Burrow Dry Goods Co., 230 S.W. 23, 148 Ark. 340.

48. Jones v Robeline Garage, 135 So. 120, 16 La App 601

49. Walker v Foxcroft, 2 Me 270—6 C J p 310 note 1

50. Holm v Overholt, 6 P (2d) 76, 214 Cal 481

51. Treiber v. Mouriocourt, 258 N. Y S 206, 143 Misc. 741.

52. Trieber v Mouriocourt, supra—Grey v Sheridan Electric Light Co., 19 Abb N Cas (N Y.) 152—6 C J. p 310 note 1 [m] (1).

53. Grey v Sheridan Electric Light Co., supra.

54. Treiber v. Mouriocourt, 258 N Y S. 206, 143 Misc. 741.

55. Hamilton v. Hartinger, 64 N. W. 592, 96 Iowa 7

56. Vanneter v. Crossman, 39 Mich. 610

57. Blake v. Shaw, 7 Mass 505—6 C J p 310 note 5 [a]

58. Saliba v Mother M Agnes, 136 S E. 706, 173 N C 251.

59. Saliba v. Mother M. Agnes, supra.

60. Epley v. Hunter, 281 P. 327, 154 Wash. 163.

61. Whann v. Hufty, 12 La Ann. 280

62. Whann v. Hufty, supra.

for which custody and vigilance are required, and especially to the notice to other officers and persons having conflicting claims.[63]

While, as shown above in § 281, it has been held that the attaching officer is not the agent of the attaching party in respect of official acts of such officer in respect of the care and custody of the attached property so as to render such party liable for injuries to the property resulting from the acts or negligence of the attaching officer, it has been held in a case in which the question involved was as to the right of plaintiff in attachment to assert rights in respect of the violation of possession, that property which is in the custody of the attaching officer is constructively in the possession of such plaintiff through the officer as his agent.[64]

b. Property Incapable of Manual Seizure

In respect of property incapable of manual seizure, the attaching officer may have the right to actual possession for the purpose of preserving it. While it has been held that the attaching officer must use ordinary care for the preservation of such property, some statutes relieve him to some extent from strict liability.

Where an officer makes a constructive levy on property, which by reason of its bulk or for other cause cannot be immediately removed, as considered above in § 223, he does not deprive himself of the right to regain actual possession of the property whenever necessary for its preservation.[65] According to some cases, his liability to have such property forthcoming, that it may be taken on execution, is the same as if it had been taken into his actual possession, and the property is regarded as constructively in his possession, and he must use ordinary care and diligence for its preservation and safe-keeping.[66] Some statutes governing the attachment of property of the type considered in this section relieve the attaching officer, to some extent from the more stringent liabilities of the common law in relation to the attached property,[67] and it has even been said that, after a compliance with the statute, such officer has nothing further to do until execution, at least so long as the difficulty of removal remains.[68]

§ 284. —— Delivery to Keeper, Servant, or Agent

The attaching officer may deliver the attached property to a keeper or custodian and possession by such keeper or custodian constitutes possession by the attaching officer.

An attaching officer need not retain personal possession of the attached property, but may deliver it to a keeper, servant, or agent, whose possession will be regarded as the possession of the officer.[69] This rule has been applied or recognized where the attaching officer designates as keeper plaintiff in attachment,[70] or defendant in attachment.[71]

There is authority for the view that a keeper appointed by an attaching officer is not authorized to delegate his authority to another even though the written authorization given to him is directed to himself or bearer.[72]

§ 285. —— Allowing Debtor to Use Property

Questions as to the abandonment of the attachment by attaching officer's permitting the debtor to use attached property are considered above in § 264.

§ 286. —— Delivery of Property to Claimant

The attaching officer who delivers or releases attached goods to a third person who claims to own such goods acts at his peril.

63. Young v Walker, 12 N H 502—6 C J. p 311 note 9

Certain acts condemned

The unexplained conduct of attaching officers in keeping several custodians in charge of the home of defendant in attachment for eighteen days after her return thereto, where their presence in the kitchen and elsewhere was apparently wholly uncalled for, and in using an unreasonable time to inventory and remove the property, warranted severe condemnation—Himmelbauer v Union Bank & Trust Co, 220 P. 84, 68 Mont. 34

64. McGaffey Canning Co v Bank of America, 294 P. 45, 109 Cal App 415.

65. Wentworth v. Sawyer, 76 Me 434

66. Fay v. Munson, 40 Vt. 468—Smith v Church, 27 Vt 163—6 C J. p 311 notes 11, 12

67. Me—Wentworth v. Sawyer, 76 Me 434

Mass—Hubbell v. Root, 2 Allen 185 6 C J p 311 note 12

Existence of all responsibility not denied

"We do not mean to imply . . . that the attaching officer might not be responsible for any neglect or misconduct in relation to the property If there were any collusion with the debtor, wrongful omission to make the attachment known to him, or neglect of interfering to protect the property, when by a change of circumstances, its removal and reduction into the officer's possession became proper or necessary, the rule might be different"—Hubbell v. Root, 2 Allen (Mass) 185, 186.

68. Higgins v. Drennan, 32 N E 354, 157 Mass 334

69. Hart v Oliver Farm Equipment Sales Co, 21 P (2d) 96, 37 N M 267, 87 A.L R 962—6 C J p 312 note 14.

Bailee

Where a person having an executory contract to buy certain wheat, accepted the wheat from the sheriff, who had attached it as the property of another, and issued warehouse receipts to the sheriff, such person became the sheriff's bailee, and in a way attorned to him—Davidhizar v. Elgin Forwarding Co., 173 P. 893, 89 Or 89.

70. La—Whann v. Hufty, 12 La. Ann 230

Wash—Myers v. Walker, 24 P (2d) 97, 173 Wash 592.

71. Myers v. Walker, supra.

72. Conner v. Parker, 114 Mass. 331.

Where a third person claims to be the owner of attached goods, the officer may in his discretion release the same to him, but he does so at his peril, and the burden is upon him to establish that such property did not belong to attachment defendant.[73]

§ 287. —— Return of Property to Debtor

There is authority for the view that, where the attaching officers leave attached personal property in the possession of the defendant in attachment, such property is no longer in custodia legis.

While the view has been expressed that the attaching officer may designate defendant in attachment as keeper, as appears above in § 284, it has broadly been stated that when personal property on which a levy of attachment has been made is left by the attaching officer in the debtor's possession, it ceases to be in custodia legis, and may be taken by other creditors.[74]

Various questions as to the termination of the attachment by returning the attached property to the debtor are considered above in § 264, and as to the revival of the attachment by a redelivery by the debtor to such officer, above in § 271.

§ 288. Place of Custody

In general the officer may keep the attached property in whatever place he wishes. The removal of attached property by the attaching officer or his bailee from the state in which the attachment issued does not terminate such officer's special property therein.

In general where property is taken under attachment it is immaterial in what place it is kept by the officer.[75]

Attached personal property may be regarded as in the custody and possession of the attaching officer notwithstanding plaintiff in attachment is in control of the building in which such property is stored.[76]

Under some statutes, defendant in attachment, on making due request in writing, may, under certain circumstances, require the attaching officer to remove the attached property from such defendant's premises, or the keeper, within a reasonable time, notwithstanding a demand by mortgagees of the attached property for payment by the attachment creditor of the amount due the mortgagees where the request for removal was made within the time fixed by statute for payment or tender by the attachment creditor of the amount due the mortgagees in order to maintain the attachment.[77]

Removal from state. The removal by the attaching officer or his bailee of attached goods from the state in which the attachment issued will not discharge the attaching officer's special property therein.[78]

§ 289. Extent of Officer's Interest

a. In general
b. Property of tenants in common
c. Termination of official term

a. In General

The attaching officer has a special interest or property in attached personalty and the right to possession

The attaching officer on taking personal property under a writ of attachment acquires a special interest or property therein,[79] and the right to possession[80] against any one claiming the property under a title to which the lien of the attachment is superior.[81] The attaching officer may enforce his special interest in the property for the protection of all concerned,[82] and, as explained below in § 292, may maintain an appropriate action to protect or enforce his special property or interest in the attached property.

The special property of the attaching officer depends on his liability to answer for the attached personalty to the attaching creditor or the debtor,[83] and his special property ceases when his liability is discharged.[84]

73. Wadsworth v Walliker, 45 Iowa 393, 24 Am R 788

74. Green v. Hooper, 167 P. 23, 41 Nev 12

75. Carter v. Clark, 28 Conn 512—Lewis v Morse, 20 Conn. 211—6 C J. p 313 note 25.

76. Magaw v Beals, 172 N E 347, 272 Mass 334—Arthur McArthur Co v Beals, 137 N E 697, 243 Mass 449

77. Costa v. Goldenberg, (Mass) 154 N E 579

78. Mass —Brownell v. Manchester, 1 Pick. 232.
Vt—Utley v. Smith, 7 Vt 154, 29 Am D 153
6 C J p 313 note 26

79. Ark—Jetton v. Tobey, 34 S W. 531, 62 Ark 84
Me—Walker v. Foxcroft, 2 Me 270
Mass—Magaw v Beals, 172 N E 347, 272 Mass 334—Guttentag v Huntley, 139 N E 501, 245 Mass 212—Arthur McArthur Co v Beals, 137 N E 697, 243 Mass 449—Mills v Sullivan, 111 N E 605, 223 Mass 537—Farrington v. Edgerley, 13 Allen 453.
N H—Rochester Lumber Co. v Locke, 54 A. 705, 72 N H 22
N C—Saliba v. Mother M. Agnes, 186 S E 706, 193 N C 251.
Vt—Blodgett v. Adams, 24 Vt 23
6 C J p 313 note 28, p 314 note 36

80. Ark—Jetton v. Tobey, 34 S W. 531, 62 Ark 84
Mass—Arthur McArthur Co. v Beals, 137 N E 697, 243 Mass 449—Farrington v. Edgerley, 13 Allen. 453
N H—Rochester Lumber Co v. Locke, 54 A 705, 72 N H. 22.

81. Rochester Lumber Co v. Locke, supra

82. Saliba v Mother M. Agnes, 186 S E 706, 193 N C 251.

83. Holt v Burbank, 47 N H. 164.

84. Holt v. Burbank, supra.

The special title of the attaching officer in attached personalty cannot be defeated by trustee process in an action against the attachment debtor, in which the person in possession of the attached property is named as trustee.[85]

The attaching officer has only such special interest in attached property in his possession as the lien of the attachment creates.[86] The view has been expressed that the special interest or property is measured by the amount necessary to pay the debt for which the property has been attached,[87] or, under some circumstances, by the amount of the judgment in the attachment action.[88] Questions as to the extent of the lien of an attachment in general are considered above in §§ 257–259.

b. Property of Tenants in Common

The attaching officer may be entitled to the possession and control of the whole property owned by tenants in common, which is attached in an action against one of them

Where personal property owned by tenants in common is attached in a suit against one of them the officer is entitled to the possession and control of the whole under certain circumstances at least,[89] but his authority does not extend to making a division of the property so as to set apart the share of the tenant sued, as explained above in § 234

c. Termination of Official Term

The attaching officer has the duty to keep the attached property and have it forthcoming on demand even though not demanded until after the close of his official term.

It is the duty of the officer levying an attachment to keep the property and have it forthcoming on demand, even though not demanded until after the close of his official term.[90]

§ 290. Payment into Court

While the attaching officer may under some circumstances pay into court money which is subject to an attachment lien, he should not be required to do so in the absence of a statutory requirement to that effect.

In the absence of statutory directions to that effect, the attaching officer should not be ordered to pay into court money which he has attached or which is in his hands as the proceeds of attached property;[91] but he may do so, and in such case the money, when so paid into court, is still subject to the lien of attachment to the same extent and effect as if retained in the hands of the attaching officer.[92]

§ 291. Permitting Examination of Books and Papers

The right to examine attached books and papers has been recognized, and also denied.

While there are expressions to the effect that an attaching officer is not bound to permit parties whose books and papers are in his custody by virtue of a levy under a writ of attachment to examine them,[93] there is authority for the view that a plaintiff who has caused the sheriff to levy an attachment on property of the debtor, and on books and papers of the debtor relating to such property, has a right to examine the books and papers by leave of the court so far as is necessary to enable him to enforce the attachment.[94]

§ 292. Actions for Violation of Possession

a. Right of action
b. Form of action
c. Persons liable
d Conditions precedent
e. Defenses
f Jurisdiction
g. Evidence
h. Damages

a. Right of Action

The attaching officer, and usually only such officer, has, in the absence of statutory permission, the right to maintain an action for violation of possession of attached personal property

The attaching officer acquires a special property in, and the right to possession of, attached personal property, as explained above in §§ 282, 289, and his title or interest is sufficient to support an action for a violation of such possession.[95]

85. Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A 556, 86 N H. 293.

86. Kerr v. Drew, 2 S W. 136, 90 Mo 147.

87. Kerr v. Drew, supra.

88. Wheaton v Thompson, 20 Minn 196

89. Sharp v. Johnson, 63 P. 485, 38 Or 346

90. Cal—Sagely v. Livermore, 45 Cal 613
Conn—Baker v. Baldwin, 48 Conn 131.
Me—Smith v Bodfish, 33 Me. 136—Morton v. White, 16 Me 53.
6 C J p 313 note 29.

91. Dodge v Porter, 13 Abb Pr.(N. Y.) 253—6 C J p 313 note 32.

92. Ind—Kendallville First Nat. Bank v Stanley, 30 N E 799, 4 Ind. App 213
N C.—Lemly v. Ellis, 55 S E 629, 143 N C. 200
Pa—Shaffer v. Raymond, 1 Phila. 91.
6 C J p 313 note 33.

93. McCartan v Van Syckel, 17 N. Y.Super. 694—6 C J. p 313 note 34.

94. Brooke v. Foster, 20 Abb N Cas. (N Y) 200—6 C J. p 313 note 35

95. Mass—Guttentag v. Huntley, 139 N.E 501, 245 Mass 212
Mont—Keith v Ramage, 214 P. 326, 66 Mont 578
N H—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N H. 293
N Y—Florea v. Shults, 216 N.Y.S. 412, 127 Misc. 420.
6 C J. p 314 note 36

Action for conversion
The attaching officer may maintain

While there is authority for the view that the special interest which an attaching creditor has in attached personal property held by the officer as such creditor's agent is a sufficient foundation for an action for conversion,[96] and that the attaching plaintiff to whom the attached property had been delivered for the purpose of sale may maintain an action of trover against a person who wrongfully took the property from the attaching plaintiff,[97] in the absence of a statute to the contrary, in general the right of action for violation of possession lies exclusively with the attaching officer,[98] and the attaching creditor, as a rule, acquires no such interest in the attached property as to give him a right of action for a violation of the officer's possession[99]

While the view has been expressed that a statutory provision that where, after execution against property has been issued on a judgment for plaintiff in an action in which a warrant of attachment has been issued, the property has passed out of the hands of the sheriff without sale thereof or conversion into money, and the attachment has not been discharged, a person who willfully conceals or withholds such property from the sheriff is liable to double damages at the suit of the party aggrieved, authorizes an action by the attachment and judgment creditor if the case is otherwise within the provisions of the statute,[1] the right of action of such creditor must be confined to the cases provided for by the statute since the right of action exists solely by force of the statute,[2] and the action may be prosecuted solely for an injury occasioned by a willful withholding and concealment of property from the sheriff.[3] Such statute apparently contemplates only an injury to the person aggrieved by such an appropriation of the property as deprives such person altogether of the benefit thereof, and, in respect of an attachment and execution plaintiff, such an injury cannot be shown until by a return of the process it is demonstrated that the execution remains uncollected and that the property taken from the sheriff cannot be recovered by him and its proceeds applied on the judgment.[4] Such statute does not apply where there is not a levy on personal property capable of manual delivery.[5]

b. Form of Action

(1) In general
(2) Contempt proceedings

(1) In General

The attaching officer may maintain an action of replevin, trespass, or trover for a violation of his possession, according to the particular circumstances

The form of the action by an attaching officer for violation of his possession may, according to the particular circumstances, be either replevin,[6] trespass,[7] or trover.[8]

The officer may not maintain an action of trover where he did not acquire possession of the property under the writ of attachment involved.[9]

(2) Contempt Proceedings

Contempt proceedings will lie against a stranger to a suit who wrongfully interferes with property attached therein.

A stranger to a pending suit may be proceeded against as for contempt for interfering with property attached therein.[10]

an action based on the conversion of the attached property.—Guttentag v Huntley, 139 N.E 501, 245 Mass 212—Mills v. Sullivan, 111 N E 605, 222 Mass 587—Florea v Schultz, 216 N Y S 412, 127 Misc. 420—6 C J. p 314 note 36

96. McCaffey Canning Co. v Bank of America, 294 P. 45, 109 Cal App. 415.

Attachment debtor insolvent

Person converting property attached was liable in damages, to the attachment creditor where the attachment and judgment debtor was insolvent, and conversion was made with full knowledge of the creditor's claim—Humble Oil & Refining Co v Andrews, (Tex Civ App.) 285 S W. 894.

Removal of oil after attachment of oil lease

Persons removing oil after attachment of oil lease become liable to the attachment creditor as for waste and conversion for oil removed.—Humble Oil & Refining Co v. Andrews, (Tex Civ App) 285 S W. 894

97. Commonwealth Bank v. Shier, 38 S C L 233

Irregular delivery to plaintiff

Where a sheriff, by virtue of an attachment, seized goods and delivered them to plaintiff in attachment to be taken out of the district and sold, it was held that, although the delivery to plaintiff was irregular, yet he might maintain trover against a wrongdoer, who took the goods out of his possession.—Commonwealth Bank v. Shier, 38 S C L 233—6 C J p 314 note 37 [b].

98. Keith v Ramage, 214 P 326, 66 Mont. 578—6 C J. p 314 note 37.

99. Dufour v Anderson, 95 Ind 302—6 C J. p 309 note 96, p 314 notes 37, 38

1. Scott v. Morgan, 94 N Y 508.

2. Scott v Morgan, supra—Yokoyama v San Carlos Operating Co, 259 N.Y S. 471, 144 Misc. 733.

3. Scott v Morgan, 94 N Y. 508—Yokoyama v San Carlos Operating Co, 259 N Y S 471, 144 Misc. 733

4. Scott v Morgan, 94 N Y 508—Yokoyama v San Carlos Operating Co, 259 N Y S 471, 144 Misc 733

5. Korytkowski v Greniewicki, 221 N Y S 119, 220 App Div 207

6. Jetton v Tobey, 34 S.W. 531, 62 Ark 84—6 C J p 314 notes 36 [b], [g], 39.

7. Holy Trinity Polish National Catholic Church v O'Dowd, 107 A 556, 86 N H 298—6 C J p 314 notes 36 [c], 39

8. Holy Trinity Polish National Catholic Church v. O'Dowd, supra—6 C J. p 314 notes 36 [d], [f], 39.

9. Donnie v. Harris, 9 Pick (Mass) 364—6 C J. p 314 note 39 [c].

10. Ala.—Ex p. Stickney, 40 Ala. 160

N.Y.—Lowenthal v Hodge, 105 N.Y. S. 120, 120 App Div. 304.

c. Persons Liable

The attaching officer may enforce his special property or interest in, and his right to possession of, attached personal property both against a stranger to the action and also against the defendant in attachment, who wrongfully disturbs or interferes with such possession.

The attaching officer may enforce his special property or interest in, and right to possession of, attached personal property both against any stranger to the action who wrongfully disturbs or interferes with such possession,[11] and also against defendant in attachment under like circumstances.[12] So the attaching officer may proceed against one to whom such officer delivered the property for safe-keeping as a bailee for hire,[13] against the transferee of a custodian of the property who held it subject to the right of the attaching officer to take possession,[14] against a joint owner of personal property who has forcibly retaken the property after its taking under a writ of attachment against his coowner,[15] and against another officer who violates possession of the attaching officer,[16] as, for example, against another officer who wrongfully takes possession of the property under a writ of replevin,[17] or under another writ of attachment.[18]

d. Conditions Precedent

A demand for the return of attached property is not a condition precedent to the maintenance of an action for conversion where the defendant in such action has wrongfully destroyed such property.

A demand for the return of attached property is not necessary in an action for the conversion thereof where it has been destroyed by the wrongful act of defendant in such action.[19]

e. Defenses

Informality or irregularity in the attachment proceeding or a release of the levy may defeat an action based on an alleged violation of the attaching officer's possession.

While, in an action by an officer who had made a levy on certain property under a warrant of attachment against another officer who subsequently made a levy on the same property under another warrant of attachment, the right of defendant to attack the validity of the warrant under which plaintiff acted has seriously been questioned,[20] notwithstanding a recognition by the court of the right of a party not a party to the action in which a warrant of attachment is executed, under ordinary circumstances, collaterally to attack the validity of such warrant,[21] there is authority for the view that informality or irregularity in the attachment proceedings may be available as a defense in an action by the attaching officer for a violation of his possession.[22]

The fact that the attaching officer released the levy of attachment at the direction of the attachment creditor may defeat such officer's right to recover for an alleged conversion of the attached property.[23]

In an action against defendant in attachment for the conversion of personal property attached by destroying such property, defendant may not successfully contend that the attachment had been lost because no attempt had been made to levy an execution within a specified time after the rendition of the judgment, where the property was destroyed before the judgment was rendered.[24]

f. Jurisdiction

The attaching officer may maintain an action, based on his special title, in another state to which the property has been taken.

The special title which an attaching officer has in the property levied on is sufficient to permit him to assert his title by an action in another state to which the property has been taken.[25]

g. Evidence

In general, any relevant and competent evidence bearing on plaintiff's right to possession, on defendant's wrongful interference with such right, or on the amount of damages is admissible.

In trover by a sheriff for property attached parol evidence is admissible to show the delivery of the execution to him and the time of that delivery in order to hold the property subject to the attachment,[26] and proof of a fraudulent purchase by defendant of the goods in question from the attach-

11. Mass.—Arthur McArthur Co. v. Beals, 137 N.E. 697, 243 Mass. 449. Vt.—Blodgett v. Adams, 24 Vt. 23.

12. Mass.—Arthur McArthur Co. v. Beals, 137 N.E. 697, 243 Mass. 449. Vt.—Blodgett v. Adams, 24 Vt. 23.

13. Guttentag v. Huntley, 139 N.E. 501, 245 Mass. 212.

14. Jetton v. Tobey, 34 S.W. 531, 62 Ark. 34.

15. Whitney v. Ladd, 10 Vt. 165.

16. Mills v. Sullivan, 111 N.E. 605, 222 Mass. 587—6 C.J. p. 314 notes 36 [e], 39 [b].

17. Mills v. Sullivan, supra.

18. Florea v. Schultz, 217 N.Y.S. 764, 128 Misc. 77.

19. Davis v. Leary, 59 N.E. 191, 177 Mass. 526—6 C.J. p. 314 note 42.

20. Florea v. Schultz, 217 N.Y.S. 764, 128 Misc. 77.

21. Florea v. Schultz, supra.

22. Marshall v. Marshall, 7 Del. 125.

23. Dickey v. Bates, 35 N.Y.S. 525, 13 Misc. 439—6 C.J. p. 314 note 36 [i].

24. Davis v. Leary, 59 N.E. 191, 177 Mass. 526—6 C.J. p. 315 note 45.

25. Rhoads v. Woods, 41 Barb. (N.Y.) 471—6 C.J. p. 315 note 46.

26. Lowry v. Walker, 5 Vt. 181—6 C.J. p. 315 note 48.

ment debtor is admissible as explaining his acts in intermeddling therewith.[27]

Evidence that the property did not in fact belong to defendant in the attachment and that he had no attachable interest therein is admissible.[28]

Evidence as to the value of the goods in the ordinary course of trade is admissible,[29] and it has also been held that facts occurring after the commencement of the action might be shown as bearing on the quantum of damages.[30] It seems that, in trespass by an officer against a person other than the attachment debtor for taking property attached, defendant cannot show, in mitigation of damages, that part of the property was exempt from attachment.[31]

h. Damages

In general, the measure of damages is the value of the personal property involved in an action by the attaching officer for the violation of his possession where the return of the property is not involved.

In an action by an attaching officer for the violation of his possession, not involving a return of the property, the measure of damages is the value of the personal property involved,[32] at the time of the taking,[33] with interest[34] not exceeding the amount required to satisfy the writ.[35] Where, however, there has been no conversion by defendant to his own use, the measure of damages has been held to be the injury caused by the removal, not the value of the property.[36]

If the attaching creditor has failed to perfect his lien by taking out execution within the statutory period only nominal damages can be recovered by the officer.[37]

Double damages. In order to permit plaintiff in attachment to recover double damages, pursuant to a statute authorizing such recovery by the party aggrieved from a person who willfully conceals or withholds from the attaching officer attached personal property which has passed out of the hands of such officer under certain circumstances, the facts must be such as to bring the case within the provisions of such statute.[38]

§ 293. Charges for Care of Property

a. Right to reimbursement and compensation
b. Necessity and reasonableness of expenses
c. Persons liable
d. Allowance and enforcement

a. Right to Reimbursement and Compensation

In general, the attaching officer is entitled to reimbursement of necessary and reasonable expenses incurred by him in keeping the attached property.

As it is the duty of an officer, under a writ of attachment, to take and retain possession of the property levied on at his peril (supra § 282), he is entitled to reimbursement of actually necessary and reasonable expenses incurred by him in the performance of this duty,[39] such as the compensation of a keeper whom he has put in charge of the property,[40] or the expense of regaining possession of property which has wrongfully been taken out of his hands

A custodian appointed by the levying officer to care for live stock attached is entitled to reasonable compensation for the care, feed, and stabling of such stock from the time of his appointment until notified of the release of the attachment[42] A claimant of live stock, who remains in possession of live stock, notwithstanding an attachment, without giving the bond required by statute, is not, however, entitled, on vacation of the attachment, to recover from plaintiff in the attachment for taking care of such live stock[43]

Plaintiff in attachment who is successful in the

27. Lowry v Walker, supra

28. Hannon v Bramley, 32 A. 336, 65 Conn 193

29. Merchants' Nat Bank v McDonald, 88 N.W. 492, 89 N.W. 770, 63 Neb 363.

30. Lowry v. Walker, 5 Vt. 181.

31. Earl v. Camp, 16 Wend (N.Y.) 562—6 C J. p 314 note 44

32. Mills v. Sullivan, 111 N E. 605, 232 Mass. 587—6 C.J. p 315 notes 54, 55

Property taken by another officer

A deputy sheriff, who levied on property under a writ of attachment, which property was thereafter taken by a constable on a writ of replevin which was not entered, was presumptively entitled to recover, in an action for conversion, the full value of the goods —Mills v Sullivan, 111 N. E. 605, 222 Mass 587

33. Merchants' Nat Bank v. McDonald, 88 N W 92, 89 N W. 770, 63 Neb. 363—6 C J. p 315 note 56.

34. Merchants' Nat. Bank v. McDonald, supra.

35. Merchants' Nat Bank v. McDonald, supra.

36. Sinclair v. Tarbox, 2 N H 135.

37. Goodrich v Church, 20 Vt. 187.

38. Scott v. Morgan, 94 N Y. 508—Korytkowski v Greniewicki, 221 N. Y S 119, 220 App Div. 237.

Attachment of debt due attachment debtor

The statute is not applicable in a case in which a debt due to the attachment defendant has been attached —Korytkowski v Greniewicki, 221 N.Y S 119, 220 App Div 237

39. Colo.—Leadville City Bank v. Tucker, 3 P. 217, 7 Colo 220
La.—Olson v. American Guaranty Co, 90 So. 704, 150 La 470
6 C J p 370 note 90.

40. Nisbet v. Clio Min Co, 83 P. 1077, 2 Cal App 436—6 C J p 370 note 91

41. Rhoads v Woods, 41 Barb (N Y.) 471—6 C J. p 370 note 92.

42. Lawrenson v. McDonald, 69 N W. 586, 9 S D. 440—6 C J. p 370 note 93.

43. Samples v. Rogers, 119 S W. 199, 134 Ky. 93—6 C J p 370 note 94.

main action is entitled to compensation for the use of certain barges by the attaching officer for storage of property which was attached while on such barges.[44]

b. Necessity and Reasonableness of Expenses

In general, the charges must be reasonable and necessary.

The charges must be reasonable and necessary for the purposes for which they are incurred,[45] and in the proper exercise of the duty to take and retain possession.[46]

The mere fact that the attached property is more or less of a ponderous nature and physically annexed to the soil does not prevent the allowance of a keeper's fee, where such property might to a large extent have been dismantled and carried away.[47] It is not necessary, under all circumstances, to gather together in one place all the attached property, and the fact that the property is kept in different places does not necessarily show that maintaining keepers in such places was not a necessary expense.[48]

c. Persons Liable

(1) Debtor or defendant in attachment
(2) Creditor or plaintiff in attachment
(3) Persons other than attachment defendant or plaintiff
(4) Persons directly liable to custodian

(1) Debtor or Defendant in Attachment

In general, the expense of keeping and caring for the attached property falls ultimately on the attachment defendant where judgment in the action goes against him.

As the officer is entitled, in case he has paid the expenses of keeping and caring for the attached property and judgment in the action goes against defendant, to deduct such expenses from the proceeds of the attached property before turning them over to the attaching creditor in satisfaction of his debt, as explained below in subsection d (4) of this section, it is apparent that, under such circumstances, the cost of such care and custody falls eventually on defendant.[49] The expense of keeping the property of a third person cannot be imposed on an unsuccessful defendant.[50]

In general, where defendant in attachment prevails, either in the principal action or with respect to the propriety of the attachment, he cannot be held liable for the expense of keeping the property while the officer held it under the attachment,[51] and the officer has no lien on the property or its proceeds as against defendant.[52]

Where defendant contracts to pay the expenses of keeping attached property, he is liable on such contract, and the officer is not bound to credit the sum so received on his legal charges.[53] An agreement between the sheriff and a person with whom the sheriff stored attached property as to liability for storage charges has no binding effect on defendant in attachment or his administrator, where the writ of attachment has been dismissed.[54]

Where the possession of property is illegally acquired under color of an attachment, the officer cannot charge the attachment defendant for keeping the property.[55]

Maintenance of live stock. If live stock is attached and defendant does not have it released on bond, he is bound to care for it and is responsible for such expense if judgment is entered against him.[56]

(2) Creditor or Plaintiff in Attachment

In general, plaintiff in attachment becomes liable for the expense of keeping the attached property if the action is dismissed, the attachment is discharged, or defendant prevails on final determination of the cause.

If an attachment suit is dismissed, the attachment is discharged, or defendant prevails on the final determination of the cause, the expenses of keeping the property must, in general, be paid by plaintiff,[57] and the officer has no lien on the property or its proceeds as against defendant, as explained above in subsection c (1) of this section.

44. Lyons v. Empire Fuel Co., (C.C.A. Ohio) 270 F 930.

45. Idaho—McConnell v McCormick, 28 P. 421, 3 Idaho (Hasb.) 227.
N Y—Seeman v Tiedeman, 68 N Y S 401, 58 App Div 615
6 C J p 370 note 96

46. Cutter v Howe, 122 Mass 541—6 C J p 370 note 97.

47. Callahan v. Danziger, 158 P. 760, 172 Cal 738

48. Callahan v. Danziger, supra

49. Me.—Baldwin v. Hatch, 54 Me 167.
Mass—Tyler v Ulmer, 12 Mass 163.
Vt—Dean v. Bailey, 12 Vt 142
Wyo—Beeman, etc, Mercantile Co. v Sorenson, 89 P 745, 1135, 15 Wyo. 450
6 C J. p 370 note 99

50. Beeman, etc, Mercantile Co. v. Sorenson, supra

51. Beeman, etc, Mercantile Co., v. Sorenson, supra—6 C J. p 371 note 4.

52. Beeman, etc, Mercantile Co, v. Sorenson, supra—6 C J. p 371 note 4.

53. Brown v. Cooper, 65 How Pr (N. Y.) 126.

54. Roehl Storage Co. v Wilson, 256 N W 598, 268 Mich 691

55. Gardner v Hust, 31 S C L 601.

56. Ky—McCormick v Exchange Bank, 32 S W 932, 17 Ky L 847.
Mass—Phelps v Campbell, 1 Pick. 59
Vt—Dean v Bailey, 12 Vt 142.
6 C J p 371 note 3

57. Beeman, etc, Mercantile Co v. Sorenson, 89 P 745, 1135, 15 Wyo. 450—6 C J. p 371 note 4.

Under an agreement between plaintiff in attachment and claimants of the attached property who were not parties to the attachment suit, providing for the release of the levy by such plaintiff and an order by him on the attaching officer to return the attached property to such claimants, such plaintiff, on releasing the levy and making the order, is not liable for the expense of the care and disposal of the attached property, in the absence of any provision in the agreement imposing such liability on him.[58]

(3) Persons Other than Attachment Defendant or Plaintiff

Usually a person other than the attachment creditor or defendant, who owns or has an interest in the attached property, is not liable for expenses in connection with the attached property in the absence of an agreement imposing liability on him.

Where the attaching officer wrongfully seizes and sells property which is subsequently adjudged to belong to a third person, he cannot, as against such true owner, retain the costs of the seizure and sale.[59] So, in general, a mortgagee of the property attached cannot be held liable for the cost of keeping it.[60]

Where an officer seizes property which is not attachable because the interest of attachment defendant is that of mortgagee and the property remains in the hands of the mortgagor with the right of redemption, the officer or his bailee may not hold the property as against the mortgagor to compel reimbursement of money expended in discharge of a prior lien.[61]

The owner of attached property other than the attachment defendant may become liable for the expense of caring for and keeping such property under an implied contract.[62]

Under some statutes, the attaching officer is not liable to the attachment defendant for the amount of the necessary costs of the sale of the attached property, which such officer deducted from the proceeds and retained before paying over the proceeds of sale to defendant on the latter's giving bond to dissolve the attachment, notwithstanding defendant prevailed in the action.[63]

(4) Persons Directly Liable to Custodian

In general, a sheriff who employs a custodian is liable to such custodian for the latter's compensation. The custodian has no claim against the attaching plaintiff unless the services are rendered at the instance or request of such plaintiff.

While there is authority for the view that the sheriff by employing a keeper does not make himself personally responsible to such keeper unless he has done so expressly,[64] ordinarily, where the sheriff appoints a custodian to keep and care for the attached property, he is liable to such custodian either under his express contract or for a reasonable compensation.[65] So, a sheriff who employs a keeper without obtaining an order of court, in accordance with a statutory requirement, becomes personally liable for the keeper's compensation,[66] and the sheriff may not rely on his failure to obtain such order to relieve himself from such liability.[67] In such case the appointee is under no obligation to determine as to whether or not the order has been obtained.[68]

The custodian has no claim against the attaching plaintiff or creditor for his services,[69] except where

58. McPherson v. Harris, 59 Ala 630—6 C J p 371 note 4 [a] (2).

59. Haywood v Hardie, 76 N C 384.

60. Grover v Cash, 253 P 676, 69 Utah 194—6 C J p 371 note 6

61. Morton v Hodgdon, 32 Me 127.

62. Collins v Lewis, 149 A 668, 111 Conn 299

Cattle in possession of attachment defendant under conditional sales contract

(1) An attaching officer's possession of attached cattle which he had taken from the attachment defendant, who had possession of the cattle under a conditional sales contract, was that of an individual only, in respect of the liability of the seller for the expense of caring for and keeping such cattle, after the attachment defendant's abandonment of his interest in the cattle and the attaching officer's tender of the cattle to the seller—Collins v. Lewis, 149 A 668, 111 Conn 299.

(2) Such seller became liable to the attaching officer for the expense of the care and keeping of the cattle after the seller's refusal of the tender on the ground that he was not able to receive the cattle at the time of tender, where the attaching officer informed the seller that he was holding the cattle for the seller and would look to the latter for the expense of keeping the cattle and the seller subsequently sold the cattle and gave a receipt therefor to the attaching officer on relinquishment of possession by such officer—Collins v Lewis, supra

Care of animal with consent of owner

While, when a person's property is taken from his possession by the unlawful act of an officer, such person is not liable to pay for the keep of such property in the interim, one who furnished feed for an animal with the consent of the owner is entitled to recover compensation therefor from the owner—Summerton Live Stock Co. v Cleveland Mfg Co, 103 S E 516, 114 S C 186

63. Pollard v Baker, 101 Mass 259—6 C J p 371 note 2 [b]

64. Hawley v Dawson, 18 P. 592, 16 Or 344—6 C J p 371 note 7 [a].

65. Iowa—Hurd v Ladner, 81 N W. 470, 110 Iowa 263—Rowley v Painter, 29 N W 401, 60 Iowa 432 Nev—Allen v Ingalls, 111 P. 34, 114 P 758, 33 Nev 281, 285, Ann Cas 1913E 755
6 C J p 371 note 7.

66. Noel v Cowan, 260 P 116, 80 Mont 258

67. Daly v Kelley, 187 P. 1022, 57 Mont 306.

68. Daly v Kelley, supra.

69. Iowa—Hurd v. Ladner, 81 N W. 470, 110 Iowa 263
Nev—Allen v. Ingalls, 111 P. 34, 114 P 758, 33 Nev. 281, Ann Cas 1913E 755.

such services were rendered at the instance or request of such creditor or plaintiff.[70]

In an action against the officer for the compensation of the custodian, it is no defense that the officer has no claim against another for the performance of such services.[71] So, as between the officer and the custodian, the validity of the levy is not material.[72] The fact that a person was in the employ of the owner, trustee, or receiver of attached property during a part or all of the time that he was in charge of such property as keeper under appointment by a sheriff, does not prevent his recovering from the sheriff the reasonable value of his services as a keeper.[73]

d. Allowance and Enforcement

(1) In general
(2) Amount
(3) Taxation as costs
(4) Lien, deduction from proceeds, and retention of possession

(1) In General

The method, if any, prescribed by statute for determining compensation must be pursued.

Where a statute provides the method of determining the compensation, as by allowance of the court, such method must be pursued.[74]

While in some jurisdictions plaintiff in attachment, who cared for attached cattle under a contract with the sheriff, cannot recover under such contract by way of costs where the sheriff did not obtain an order of court to make the contract,[75] plaintiff is entitled to a reasonable compensation not to exceed that agreed on between himself and the sheriff.[76]

Where an attaching officer uses attached property and the use is sufficient to pay for the keeping, such officer may not maintain an action against the attachment plaintiff for the expense of such keeping.[77]

An issue between the keeper of attached property, appointed pursuant to an order of court, and the attachment debtor as to board furnished by such defendant to the keeper while the latter was in possession of the property cannot be adjudicated in the main action to which the keeper is not a party.[78]

The view has been expressed that, where plaintiff in attachment is entitled to an allowance for storage charges for the period during which the attached property was kept on barges owned by such plaintiff, the allowance may properly be made at any time before the distribution of the proceeds of the sale of the attached property and as an incident to such distribution, where the court by its order of sale reserved, and actually retained, control over the disposition of the proceeds.[79]

(2) Amount

A statutory provision fixing the amount to be allowed for the care and custody of the attached property controls. The amount of the just and reasonable expenses incurred should be allowed in the absence of a statutory provision fixing the amount.

If the amount to be allowed for the care and custody of attached property is fixed by statute, such limit cannot be exceeded.[80] If the amount is not, fixed by statute, the officer should be allowed the just and equitable expenses incurred in the proper care and keeping of the property while in his custody.[81]

Ordinarily, the amount is fixed by the officer who issued the writ,[82] or by the court,[83] whose discre-

Ohio.—Baker v. Campbell, 2 Ohio S & C P. 143, 3 Ohio N P. 297.

70. Nev.—Allen v Ingalls, 111 P. 34, 114 P 758, 33 Nev. 281, Ann Cas. 1913E 755.
Ohio.—Baker v. Campbell, 2 Ohio S. & C P. 143, 3 Ohio N P. 297.
Or.—Hawley v. Dawson, 18 P. 592, 16 Or. 344
6 C J. p 371 note 9.

71. Me.—Tyler v. Winslow, 46 Me. 348.
Mass.—Stowe v. Buttrick, 125 Mass. 449.
Nev.—Allen v. Ingalls, 111 P. 34, 114 P 758, 33 Nev. 281, 285, Ann Cas 1913E 755.
6 C J p 372 note 10.

72. Lawrenson v. McDonald, 69 N. W. 586, 9 S D. 440.

73. Daly v. Kelley, 187 P. 1022, 57 Mont. 306.

74. Colo.—Edinger v. Thomas, 47 P. 847, 9 Colo.App. 151.
N Y.—Treadwell v. John A. Meade Mfg Co, 78 N Y S. 283, 75 App Div. 478
6 C J. p 372 note 11.

75. Vaughan v. Hinkle, 225 S.W. 226, 146 Ark. 149.

76. Vaughan v. Hinkle, supra.

77. Dean v Bailey, 12 Vt. 142.

78. Chowning v Madison Land & Irrigation Co., 276 P. 946, 84 Mont. 494

79. Lyons v Empire Fuel Co., (C C. A Ohio) 270 F 930

80. Mathers v Ramsey, 2 Disn. (Ohio) 334—6 C J. p 372 note 13.
Fees for keepers
An allowance of four dollars per diem each for two keepers for keeping possession of and preserving property under attachment was in conflict with Comp St § 3704, which provides that no more than three dollars per diem be allowed to a keeper.—Cosner v United Mines Co, 198 P. 472, 33 Idaho 801.

81. Leadville City Bank v. Tucker, 3 P 217, 7 Colo 220

82. German American Bank v. Morris Run Coal Co, 68 N Y. 585—6 C J. p 372 note 16 [b].

83. In re Needham, 3 Dane Abr. (Mass.) 79—6 C J. p 372 note 16.
Compensation of custodians
An allowance of two dollars and fifty cents per day to each of two custodians of property attached cannot be said to be excessive where the property consisted of a number of properties widely scattered, and the responsibility of the custodians was great.—Colorado Vanadium Corporation v Western Colorado Power Co, 213 P. 122, 73 Colo. 24.
Property kept in excess of specified time
Determination as to fees to which

tion in regard to such allowance is sometimes controlled by statute.[84]

A person who had been appointed by the sheriff as keeper of attached property, without an order of court required by statute, is entitled to recover from the sheriff a reasonable compensation from the time of his appointment to the time when he surrendered or was required to surrender, possession of the attached property to some other person.[85]

(3) Taxation as Costs

While it has been considered that charges for keeping and preserving attached property are not taxable in the ordinary way as costs, in some jurisdictions such charges are taxable as costs.

While it has been considered that charges for keeping and preserving attached property are not taxable in the ordinary way as costs,[86] or as costs which abide the event of the suit,[87] the practice of taxing such charges as costs prevails in a number of jurisdictions.[88]

Intervention in an attachment proceeding by a person who submits a claim for rent of premises in which the attached goods were located, for the period during which such premises were retained by an officer until the goods were sold, may be treated as a motion to tax the costs, within the meaning of a statute for taxing as costs the necessary expense of keeping the attached property.[89]

(4) Lien, Deduction from Proceeds, and Retention of Possession

The charges of the officer sometimes constitute a lien on the attached property, to be satisfied before the proceeds are applied on the execution where plaintiff succeeds in the action.

Where plaintiff succeeds in the action the charges of the officer for keeping attached property have been held to constitute a lien on the same which must be satisfied before the proceeds of the sale of the property are applied on the execution,[90] and it is not necessary, in order to preserve this lien, that a charge should be taxed as costs and included in the execution.[91] Under some statutes garage charges for the safe-keeping of an attached automobile constitute a lien on the attached property.[92]

The right of the attaching officer or officer in charge of the attached property to retain possession of the property until certain expenses for the keeping of such property have been paid has been recognized under some statutes.[93]

The propriety of paying the expenses of preserv-

an attaching officer securing property himself on the keeper's discharge after ten days was entitled, under St (1913) c 611 § 1, was within the sound discretion of the court—Helliwell Garages v Feinberg, 126 N E 476, 235 Mass. 258.

84. McConnell v McCormick, 28 P. 421, 3 Idaho (Hasb.) 227—6 C J p 372 note 17

85. Daly v. Kelley, 187 P 1022, 57 Mont 306.

Recovery not excessive.—Daly v. Kelley, 187 P. 1022, 57 Mont. 306.

86. Genesee County Sav Bank v Ottawa Cir Judge, 20 N W. 53, 54 Mich 305—6 C J p 372 note 18.

87. Hanness v. Smith, 21 N J Law 495

88. Edinger v. Thomas, 47 P. 847, 9 Colo App. 151—6 C J. p 372 note 20.

Federal court

In a case which involved the right of plaintiff in attachment to an allowance for the use of barges owned by him for the storage of the attached property, the court said: "It seems to us the District Court has jurisdiction to entertain and act upon plaintiff's applications and tax the rental value as costs."—Lyons v. Empire Fuel Co, (C C.A Ohio) 270 F. 930, 932

Facts not showing want of due diligence

The facts under consideration did not show want of due diligence on the part of plaintiff in attachment, in prosecuting the action, and he was not, therefore, prevented from taxing as costs keeper's fees—Callahan v. Danziger, 158 P. 760, 172 Cal. 738

In Oregon

(1) The view has been expressed that, where a keeper is necessary, the expense is in the nature of a disbursement which plaintiff might lawfully make and which he might tax in the cause if he should prevail—Hawley v Dawson, 18 P 592, 16 Or. 344

(2) It seems, however, that expenditures of the officer for taking care of the property do not, like taxable costs, abide the event of the action but are a charge on the assets—Schneider v Sears, 8 P. 841, 13 Or 69

(3) Furthermore, the view has been expressed that the expense of keeping property held under attachment is neither a cost nor a disbursement under the statute, since the reasonableness of such charges is not and cannot be fixed by law, and that the clerk, who is a ministerial officer, cannot determine the amount due nor tax the same—Mitchell, etc, Co v. Downing, 32 P. 394, 23 Or 448

(4) The reasonableness of the charges of the officer for the care of the attached property should be determined by the court, on notice to plaintiff in attachment, and the amount as so determined should be entered as costs and disbursements against plaintiff and in favor of the officer, where the action has been settled and plaintiff agreed to pay the costs—Mitchell, etc, Co. v. Downing, supra

89. Wm R Moore Dry Goods Co v Lammers, 25 S W (2d) 754, 181 Ark. 334.

90. Me—Baldwin v. Hatch, 54 Me 167
Vt—McNeil v Bean, 32 Vt. 429
6 C J p 372 note 21.

91. Me—Baldwin v. Hatch, 54 Me 167
Vt—McNeil v Bean, 32 Vt 429.

92. Bentinck v Menotti, 275 P 850, 97 Cal App 412

93. Bentinck v. Menotti, supra—Newell v. McDonald, 212 P. 389, 60 Cal App. 202—6 C J. p 372 note 21 [d] (2).

Storage and garage charges

The above rule applies where the expenses involved are storage or garage charges for an attached automobile—Bentinck v Menotti, 275 P. 850, 97 Cal App 850—Newell v McDonald, 212 P. 389, 60 Cal App 202.

Payment by attachment defendant

It has been held that the owner of an attached automobile, who was the attachment defendant, must pay garage charges in order to obtain possession.—Bentinck v. Menotti, 275 P. 850, 97 Cal App. 412.

ing and selling the attached property out of the proceeds of such property has been recognized, where such property was delivered to an assignee for the benefit of creditors of the owner under an agreement between the assignor, the assignee, and the attachment creditor that the property should be converted into money and the proceeds held to await the event of the attachment suit and the suit was determined in favor of the attachment creditor.[94]

§ 294. Release of Property by Direction of Parties

In general, the attaching officer may properly release the attached property where he is directed to do so by the attaching creditor or such creditor's attorney, or by both parties to the attachment action.

The attaching officer is justified in releasing the attached property where the attaching creditor or such creditor's attorney directs such release,[95] and, a fortiori, the officer is justified in releasing the property where plaintiff and defendant in the attachment suit agree on terms of settlement and thereupon direct him to release the property.[96]

The right of plaintiff in attachment to recover for damages to attached property against a person to whom the attaching officer, with the permission of plaintiff, delivered the attached property, on receiving from such person an indemnity bond, has been recognized, where the evidence showed a specific agreement or understanding on the part of the person to whom the property was delivered that his use of the property would be at his own risk of injury thereto, and the injury to the property, as to which recovery is sought, occurred while the property was in such person's possession.[97] In such case the proper measure of damages is the extent to which the attachment lien was depreciated by the injury to the property;[98] but, if, after the injury, the market value of the property was sufficient to satisfy the attachment lien, plaintiff is not entitled to recover anything.[99]

§ 295. Release of Surplus Property or Proceeds

Questions concerning the amount of property to be attached and as to the effect of an excessive levy have been considered in § 235, and those concerning the release of an excessive levy and the disposition of any surplus on sale of the property will be discussed in § 335. Questions other than these, if any such may arise in future cases involving the release of surplus property or proceeds by the attaching officer, will be treated in the Pocket Parts under this section number.

C. DELIVERY TO RECEIPTOR OR BAILEE

§ 296. In General

The attaching officer may, in the absence of a statutory prohibition, place the attached property in the hands of a receiptor or bailee for safekeeping.

An officer who attaches personal property may, in the absence of a statutory provision to the contrary, deliver possession of it to a receiptor,[1] and the practice is said to be coeval with the practice of making such attachments.[2] It is in its nature a simple deposit, a delivery of the property to be kept by the depositary without compensation until called for by the attaching officer, and the relation of the receiptor and the officer is that of bailor and bailee,[3] this fact distinguishing the delivery of property to a receiptor from the situation which arises wherein, as has been considered in section 284, the officer places the attached property in the hands of a keeper, servant, or agent who becomes a mere custodian and servant of the attaching officer,[4] although the officer, it should be noted, may surrender the custody of the property to a bailee for hire, who is neither a keeper in this sense nor a receiptor.[5]

Under this practice property is sometimes receipted to be held by the receiptor, it is sometimes receipted to be left with or returned to defendant for his use, and is sometimes receipted to be used up or sold by defendant;[6] and any person sui juris, wheth-

94. McLain v. Simington, 37 Ohio St 660

95. Cal—Smith v. Robinson, 1 P. 353, 64 Cal 387
Neb—Cole v Edwards, 72 N W 1045, 52 Neb 711.

96. Melhop v. Seaton, 41 N.W 600, 77 Iowa 151—6 C J. p 326 note 6

97. Callihan v. Montrief, (Tex Civ. App) 71 S W.(2d) 564.

98. Callihan v Montrief, supra.

99. Callihan v. Montrief, supra.

1. Guttentag v. Huntley, 139 N.E. 501, 245 Mass. 212.

2. Phelps v. Gilchrist, 28 N H. 266.

3. McDermott v Jaquith, 92 A. 230, 88 Vt. 240—6 C J p 315 note 61.

4. Guttentag v. Huntley, 139 N.E. 501, 245 Mass 212—Robinson v. Bezarick, 30 N E. 553, 158 Mass. 141

5. Guttentag v Huntley, 139 N.E. 501, 245 Mass 212.

When garage owner not receiptor

A garage owner whose employee, to whom the attaching officer delivered an attached automobile, was authorized only to receive cars for safe-keeping and issue tags, or checks, and who issued only a check, was not a keeper or receiptor, in the absence of a special agreement by the owner to serve as such receiptor. —Guttentag v Huntley, 139 N E. 501, 245 Mass 212.

6. McDermott v. Jaquith, 92 A. 230, 88 Vt. 240.

er plaintiff[7] or defendant[8] in the attachment suit, claimant of the attached property,[9] or an indifferent person,[10] may be the receiptor.

The taking of a receipt by the officer is purely a voluntary act;[11] and the receipt is taken solely for the benefit and security of the officer.[12]

Where the attaching creditor, or his attorney, consents to the officer's taking a receipt for the attached property, and approves of the receiptor, the officer is generally held to be relieved from all liability for losses not occasioned by his neglect or misfeasance,[13] although a mere direction to the officer that he may take receiptors has been held not to release him from his official liability for the ultimate responsibility of the receiptors in case he allows the property to pass into their hands,[14] and the officer is liable for the tort or neglect of a receiptor to whom he intrusts the property without the agency of the creditor.[15]

§ 297. Form and Requisites of Receipt

There is no prescribed form for a receipt, and its effectiveness as such is determined by the law of contracts and bailments.

Where the officer delivers the attached property to a bailee for safekeeping no particular agreement is necessary,[16] and in the absence of a statutory provision therefor no writing is required,[17] although it would seem that the convenience and safety of the parties would render some writing showing the facts necessary in cases where the number of the articles attached is considerable.[18] However, a simple receipt admitting that the articles enumerated had been delivered by the officer to the receiptor for safekeeping and to be returned on request is sufficient.[19] On the other hand, since it is not necessarily a mere receipt and evidence of a deposit, the writing may contain stipulations with relation to various matters on the one side or the other, varying the obligations imposed by the law on the depositary,[20] and as it is nothing more than the written evidence of the contract of bailment entered into by the officer and receiptor, its form is a matter of voluntary agreement between them, and the rights and liabilities of the parties to it must be determined by its fair construction.[21]

Where the contrary does not appear, it will be assumed that the receipt was in common form.[22]

The delivery of goods under an attachment by an officer is a sufficient consideration for the contract of a receiptor making himself responsible thereby for the amount of debt and damages claimed in the writ.[23]

§ 298. Effect of Receipt

a. In general
b On attachment lien
c. Estoppel

a. In General

A receipt is treated as a contract of bailment.

A receipt for attached property is treated as a contract[24] between the receiptor and the attaching officer.[25]

The possession of a receiptor of property which has been taken by a lawful writ is, in law, that of the officer to whom he is accountable.[26]

The relation of creditor and debtor between a surety on an officer's receipt of attached property and the attachment creditor arises at the very time the suretyship begins.[27]

b. On Attachment Lien

Surrender of goods attached on receipt does not dissolve the attachment, except as to strangers to the action or to the receipt.

The acceptance by an officer of a receipt for at-

7. Myers v. Walker, 24 P (2d) 97, 173 Wash 592—6 C.J. p 316 note 65
8. Myers v. Walker, supra—6 C J. p 316 note 66
9. Kingsbury v. Sargent, 22 A 105, 83 Me 230—6 C J. p 316 note 67.
10. Wheeler v Nichols, 32 Me 233—6 C J. p 316 note 68
11. McDermott v Jaquith, 92 A 230, 88 Vt 240—6 C J p 316 note 62.
12. McDermott v. Jaquith, supra
13. Jewett v Dockray, 34 Me 45—6 C J. p 316 note 63
14. Austin v. Town of Burlington, 34 Vt 506—6 C J. p 316 note 64.
15. Gilbert v. Crandall, 34 Vt. 188—6 C.J. p 316 note 64.
16. Phelps v Gilchrist, 28 N H 266
17. Phelps v. Gilchrist, supra.
18. Phelps v. Gilchrist, supra—6 C. J p 317 note 70
19. Phelps v Gilchrist, supra—6 C J p 315 note 61
20. Phelps v Gilchrist, supra.
21. Me—Humphreys v Cobb, 22 Me 380
N H—Sanborn v. Buswell, 51 N H 573—Bruce v. Pettengill, 12 N H 341
6 C.J p 317 note 71.
Forms of receipts, in whole or in part—McNerney v. Downs, 101 A. 494, 92 Conn 139—Lester v Ladrigan, 98 A. 124, 90 Conn 570—Sweeney v Haggerty, (N.H) 177 A. 294—6 C J p 316 note 69 [a]
22. Finn v. Holden, (Vt) 175 A. 231.
23. Savage v. Robinson, 44 A 926, 93 Me 262—6 C J p 317 note 77, p 318 note 86 [d]
24. Brown v. Gleed, 33 Vt. 147—6 C J p 317 note 72.
25. Perley v. Brown, 18 N H 404—6 C J p 317 note 73
Parol evidence to contradict see infra § 302 f.
26. McDermott v. Jaquith, 92 A. 230, 88 Vt. 240—6 C.J p 317 note 76.
27. Goldberg v. Parker, 87 A. 555, 87 Conn 99, 46 L R A (N S.) 1097, Ann Cas 1914C 1059.

tached property does not, as a rule, affect the attachment lien, but the goods are regarded as still under the officer's control.[28] Moreover, the mere fact that the receiptor returns the property to the debtor does not affect the attachment[29] Where, however, the rights of innocent third parties are concerned, the attachment as to them must be regarded as dissolved;[30]

Where the receipt is in the alternative to pay a fixed sum or to redeliver the property, the receiptor has the right to elect which he will do, and the attachment is dissolved[31]

The failure of the officer to take a receipt in writing does not dissolve the attachment.[32]

c. Estoppel

(1) In general
(2) As to right of receiptor to assert interest in property
(3) As to valuation

(1) In General

A receiptor is estopped to deny the attachment, or consideration for the receipt.

A receipt for attached property is conclusive on the receiptor as to the attachment of the property described therein,[33] and the receiptor is concluded from setting up want of consideration for the execution of the receipt.[34]

A receipt providing that the receiptor is estopped to deny the attachment, ownership of defendant, and the stipulated value of the property seized is not against public policy[35]

(2) As to Right of Receiptor to Assert Interest in Property

A receiptor is not precluded from asserting his own title, or that of a claimant, except by his conduct or by an express provision of the receipt; an estoppel by contract terminates on redelivery.

It is generally held that, in an action on a simple accountable receipt, in which there is a mere promise to redeliver the property to the attaching officer with no direct admission of defendant's title, the receiptor may, in defense, assert his own title to, or lien on, the property, or that of another to whom he has returned it[36] However, a receiptor may estop himself to deny the debtor's title to the attached property in an action on the receipt, as where the receipt contains an express recital of an estoppel;[37] or where it contains an express admission of the debtor's title, with a promise to return the goods, or pay the judgment, not to exceed the stipulated valuation of the property;[38] or where the conduct of the receiptor who himself owns, or has a lien on, the goods has induced the officer to believe that they belong to the debtor,[39] or where the contract is a mere substitute

28. N H—Sweeney v. Haggerty, 177 A. 294
Vt—McDermott v. Jaquith, 92 A 230, 88 Vt 240
Wash—Myers v Walker, 24 P.(2d) 97, 173 Wash 592.
6 C J p 317 note 78

Receipt affects only custody

"The receipt merely affects the custody of the attached goods The attachment remains in force for the protection of the attaching officer and the attaching creditor"—Sweeney v. Haggerty, (N H) 177 A 294, 296.

29. N.H.—Sweeney v. Haggerty, supra.
Wash—Myers v. Walker, 24 P (2d) 97, 173 Wash 592

Right to possession not affected

"The claim, that when the oxen and the cow passed into the plaintiff's hands after they were receipted for the attachment was dissolved, cannot be sustained. The attachment was still in force for the security of the attaching creditors, and the officer, by virtue of it, could take the property from the debtor as well as from the receiptor. As between the debtor and the officer, the attachment was subsisting The special property acquired by the officer under his attachment remained, and he could assert it at any time, unless the rights of third parties had intervened"—Buzzell v Hardy, 58 N H 331, 332, quoted in Sweeney v. Haggerty, (N H) 177 A 294, 296.

30. Stewart v Stewart Drug Co, 102 A 823, 117 Me 84.

Bona fide purchasers and attaching creditors

Where property is attached and then given to a receiptor and the property is sold to a bona fide purchaser or attached by other creditors, the attachment, as to them, must be regarded as discharged by delivery to the receiptor.—Stewart v Stewart Drug Co, 102 A. 823, 117 Me 84.

Temporary receiver in bankruptcy

Where goods are attached and then released on receipt and surrendered to the debtor, the attachment lien is dissolved as to a temporary receiver in bankruptcy as a third person, without regard to the effect of the bankruptcy on attachment—In re Schow, (D C Conn) 213 F 514.

31. Gary v. Graham, 81 A. 666, 108 Me 452—6 C J. p 318 note 80.

32. Titcomb v Bay State Grocery Co, 150 N E 374, 254 Mass 599—Guttentag v Huntley, 139 N E. 501, 245 Mass 212

33. Brown v. Gleed, 33 Vt. 147—6 C.J. p 317 note 74, p 318 note 84

34. Stannard v. Tillotson, (Vt) 90 A. 950

35. McNerney v. Downs, 101 A. 494, 92 Conn 139

36. Whittredge v. Maxam, 44 A 491, 68 N H 323—6 C J p 318 note 82.

37. McNerney v. Downs, 101 A 494, 92 Conn. 139

Property surrendered to claimant

Where property attached was surrendered to a receiptor, and the receipt contained a clause stating, "it being understood that we are hereby estopped from denying that the property herein described has been attached by said officer, and that we have received the same from him, and is the property of said defendant, and of the value herein named," the receiptor is estopped to deny the title of defendant and the right of the officer to recover the judgment and costs in an action on the receipt, even though he had delivered the property to claimant—McNerney v. Downs, 101 A. 494, 495, 92 Conn 139

38. Drew v Livermore, 40 Me 266—6 C J p 318 note 86.

39. Me.—Sawyer v. Mason, 19 Me. 49
Mass—Dewey v. Field, 4 Metc. 381, 38 Am D 376.

for the security by attachment, and is, in effect, but an agreement to indemnify the officer for not making an attachment;[40] or where, although the property was not in fact attachable, the officer is still liable, either to plaintiff, defendant, or the true owner.[41]

The estoppel extends only for the duration of the receiptor's liability, and terminates when the goods have been redelivered to the sheriff.[42]

(3) As to Valuation

Where a valuation of the property attached is stipulated in the receipt, this is conclusive between the receiptor and the attaching officer.

The valuation fixed by the receiptor and officer is conclusive as between themselves, either in assumpsit or trover.[43] Where, however, the property is redelivered, but in a damaged condition, the recitals of the receipt are only prima facie evidence of the value.[44]

§ 299. Rights, Duties, and Liabilities of Receiptor

a. In general
b. Indemnity or reimbursement of receiptor
c Redelivery of property
d. Conversion

a. In General

The rights, duties, and liabilities of a receiptor are determined by the terms of his receipt and the law of bailments.

A receiptor's liability on his undertaking is dependent on its terms, and on the law of bailments;[45] but it may be stated generally that such liability is limited by that of the attaching officer, and when that is discharged the receiptor can no longer be held.[46] It is, therefore, obvious that a receiptor is not, by reason of a common receipt, a surety or guarantor of the debt on which the suit was brought,[47] nor is his liability for loss of goods absolute and unconditional.[48]

b. Indemnity or Reimbursement of Receiptor

Where a receiptor has received from the debtor an indemnity bond, he may sue on such bond for injuries sustained by the debtor's nonpayment of his debt.

A receiptor cannot claim reimbursement for money paid out by him on an execution against an attachment debtor, where the execution has been satisfied by an execution on the debtor's lands the receiptor taking a deed thereto as security for the amount paid the creditor;[49] but where he has received a bond to indemnify him for having given a receipt to an officer for attached goods, he is damnified by an attachment of his own property in a suit on his receipt to the officer, and may thereupon bring an action on such bond.[50]

c. Redelivery of Property

(1) Duty to redeliver on demand
(2) Right to redeliver
(3) Redelivery to debtor

Minn—Easton v. Goodwin, 22 Minn 426
N.H—Clement v. Little, 42 N H 563

40. Conn—Staples v. Fillmore, 43 Conn 510
Mass—Lewis v. Webber, 116 Mass 450—Thayer v. Hunt, 2 Allen 449
Minn—Mason v Aldrich, 30 N W 884, 36 Minn 283
6 C J. p 318 note 88

41. Conn—Clark v. Gaylord, 24 Conn 484
Me—Harris v Morse, 49 Me 432, 77 Am D 269
Mass—Smith v. Cudworth, 24 Pick 196

42. Lester v. Ladrigan, 98 A. 124, 90 Conn 570, L R A 1916F 939—6 C J. p 318 note 83, p 319 note 90

No consideration for continuing estoppel

"When, however, the contract has been completely performed, and the parties put back into the position which they occupied before the contract was entered into, there seems to be no consideration left on which to found an estoppel by contract"—Lester v. Ladrigan, 98 A 124, 126, 90 Conn 570, L.R A 1916F 939.

Receipt not a waiver of title

"The plaintiff [did not] waive his title to the property by receipting for it This was legally entirely consistent with an intention ultimately to assert title, should circumstances render it desirable for him so to do. The receipt was indeed a promise to deliver over the goods to the officer Having done this, he might then bring his action of replevin, trespass or trover to test his right"—Edmunds v. Hill, 133 Mass 445, 446

Where receiptor asserts title in replevin

Where property of the receiptor was attached as that of the debtor, the receiptor may, after redelivery, promptly replevy the property, notwithstanding the customary estoppel clauses in the receipt, for the estoppel operates only while the receipt is in force and the contract remains executory—Lester v Ladrigan, 98 A 124, 90 Conn 570, L.R A 1916F 939

43. Finn v. Holden, (Vt) 175 A 231—McDermott v. Jaquith, 92 A 230, 88 Vt. 240—6 C J p 318 note 81.

44. Bancroft v. Parker, 13 Pick (Mass) 192

45. Me—Waterman v. Treat, 49 Me 309, 77 Am D. 261
Minn—Mason v Aldrich, 30 N W. 884, 36 Minn 283.
6 C J p 319 note 91.

46. Me—Stewart v Stewart Drug Co, 102 A 823, 117 Me 81.
N H—Sweeney v. Haggerty, 177 A. 294.
6 C J p 519 note 92

Where attachment discharged by bankruptcy

Where the debtor has been adjudged a bankrupt and the trustee has elected to seize the property subject to attachment, the attachment thereupon being dissolved, the sheriff has no further right to the property and, therefore, cannot demand it of the receiptor—Sweeney v. Haggerty, (N H) 177 A 294.

47. Sweeney v. Haggerty, supra.

48. Ide v Fassett, 45 Vt. 68.

49. Woodward v. Munson, 126 Mass. 102

50. Otis v. Blake, 6 Mass. 336.

(1) Duty to Redeliver on Demand

The receiptor must redeliver the attached property to the sheriff on demand, provided the sheriff's right to possession has not terminated.

The attaching officer has a right, at any time, to reclaim the attached property,[51] either from his bailee or from defendant, if the bailee has allowed it to go back into the latter's possession,[52] and it is the duty of the bailee or receiptor, on demand, to redeliver to the officer the identical property which he received from him,[53] even though the lien of the attachment has expired.[54] Where, however, the officer's liability is discharged, the bailee need not redeliver to the sheriff, but will be held accountable to the debtor, or his assignee,[55] but the fact that the officer has been absolved from liability is a matter of affirmative defense which the receiptor must establish.[56]

Attaching condition to redelivery A receiptor may not attach a condition to redelivery, and, where he retains possession of the goods because the sheriff declines the conditions imposed, the receiptor is guilty of conversion.[57]

(2) Right to Redeliver

A receiptor has no right to require the sheriff to accept redelivery in the absence of a demand therefor by the sheriff.

One who signs a receipt for goods attached, agreeing to redeliver them to the attaching officer, or his order, on demand, cannot discharge himself by an offer to redeliver them before demand, unless expressly authorized so to do by the terms of his receipt;[58] but in case of a second attachment on the receipted property, he may return the property to the custody of the officer, if he is unwilling to incur any further responsibility by reason of such attachment.[59]

(3) Redelivery to Debtor

A redelivery of the property to the debtor, does not absolve the receiptor from liability to the officer.

When property attached and receipted for is redelivered to the debtor by the receiptor, the latter is liable therefor to the officer, whether by the receipt and redelivery he becomes a bailee and servant of the officer to keep the goods as in the custody of the law, or an original contractor, bound at his peril to have the goods forthcoming according to the terms of the receipt.[60]

d. Conversion.

A receiptor or bailee of attached property may be guilty of conversion of attached property, as where he refuses to redeliver the same on proper demand.

The receiptor or bailee of attached property is liable at any time to be called to account, if guilty of converting the property by any abuse, wrongful use, or refusal to deliver on demand,[61] or where he violates other terms of the bailment;[62] but mere negligence or nonfeasance of the receiptor in respect of the care of the property, whereby it becomes damaged, is not equivalent to a conversion.[63] A bailee has the right to remove the goods to a warehouse, and a removal beyond the jurisdiction of the attaching officer for that purpose does not dissolve the lien or constitute conversion by the bailee.[64]

Where there is a right to redelivery, the owner or his assignee must show a demand for the return of the goods, and a refusal to surrender the same, before the bailee can be held as a converter for nondelivery of the chattel.[65]

51. McDermott v Jaquith, 92 A 230, 88 Vt. 240—6 C J p 319 note 97

52. Sweeney v Haggerty, (N H) 177 A 294—6 C J p 320 note 98

53. Doolan v Wilson, 47 A 653, 73 Conn. 446—6 C J. p 320 note 99

54. Fitch v Chapman, 28 Conn 257 —6 C J p 320 note 1

55. N H—Sweeney v Haggerty, 177 A. 294.
Vt—Finn v. Holden, 175 A 231.

56. Finn v Holden, supra

57. Finn v Holden, supra
Requiring assumption of liens
A receiptor of property taken by the sheriff on attachment against another could not require the sheriff to assume liens which were on the property when the receipt was signed in order to entitle the sheriff to possession, although the sheriff would have been obliged to take the property subject to such liens—Finn v. Holden, (Vt) 175 A. 231.

58. Rowland v. Cooper, 16 Gray (Mass) 53

59. Whitney v Farwell, 10 N H 9

60. Thayer v Hunt, 2 Allen (Mass) 449—6 C J p 320 note 4

61. Finn v Holden, (Vt) 175 A 231 —6 C J p 319 note 93, p 320 note 99
Admission of demand
Receiptor's admission of demand by the attaching officer and of noncompliance with the demand was without effect on his liability on receipt, since the admission was no more than evidence of conversion—Largy v Morrison, (N H) 188 A 6

62. Guttentag v Huntley, 139 N.E 501, 245 Mass 212.
Where garage owner wrongfully delivers automobile
Where a garage owner, although not a receiptor, is bailee of an automobile for a constable, and issues the customary tag to the bailor, he is liable for conversion, even though he acted honestly, where he delivered the automobile to the true owner without the tag—Guttentag v. Huntley, 139 N E 501, 245 Mass 212.

63. Tinker v Morrill, 39 Vt. 477, 94 Am D. 345.

64. Titcomb v. Bay State Grocery Co, 150 N E. 874, 254 Mass 599
Removal from county
Where goods were attached in one county by a constable, and he requested an interested party to put them in his warehouse to save the expense of storage, the removal of the goods by such bailee to a warehouse in another county did not dissolve the attachment or constitute conversion—Titcomb v. Bay State Grocery Co, 150 N E 874, 254 Mass. 599

65. Titcomb v. Bay State Grocery Co, supra—6 C.J p 320 note 99
Necessity for designation of place of delivery
Where the debtor's goods were seized and placed in custody of a

§ 300. Release and Discharge of Receiptor

The attaching officer may release the receiptor, but the creditor cannot do so unless he releases his judgment against the debtor. Where the attaching officer is released, this operates to release the liability of the receiptor on his receipt.

As a general rule, anything which will relieve the attaching officer from liability will also release the receiptor from liability on the receipt [66] While the attaching officer may undoubtedly release the receiptor under proper circumstances, it has been held that he cannot do so after he has made an equitable assignment of the receipt to the attaching creditor,[67] and the sheriff cannot release a receiptor to his deputy.[68] The attaching creditor may release the receiptor from liability by releasing his judgment against the debtor; but it has been said that he cannot do so while he retains such judgment, and has taken the necessary steps to perfect his lien under his attachment.[69]

Loss of property without fault Where live stock which has been attached and receipted for dies without the receiptor's fault, before the time limited for its delivery,[70] and, in general, where property has perished without fault of the bailee,[71] he is released from liability.

Dissolution of attachment. The dissolution of the attachment relieves the receiptor of his liability, if the attached property has gone back into the hands of the owner,[72] but not otherwise [73] The mere fact that the prosecution of an attachment suit has been enjoined pending a proceeding in equity does not dissolve the attachment and discharge the sheriff, or defeat his cause of action against the receiptor.[74]

Where an attachment has been dissolved by the insolvency or bankruptcy of the debtor, a receiptor for the attached property is discharged from liability on his undertaking, if the property has gone back into the hands of the debtor, or if he delivers it to the assignee,[75] unless there is an order of court continuing the attachment for the benefit of the latter.[76]

Execution against body of debtor. The liability of a receiptor for goods attached which have not been delivered up by him on seasonable demand is not discharged by the subsequent commitment of the debtor on the execution;[77] but it has been held that if, after demand and before a reasonable time for delivery, the debtor is committed on the execution and no alias is taken out, the receiptor is excused from any delivery on that demand.[78]

Proceedings in main action. A receiptor of attached property is not discharged from liability on his receipt by any proceedings in the action in which the receipt is given, which do not increase his liability or modify, to his prejudice, his contract, as expressed in the receipt [79]

Redelivery of property The redelivery of the receipted property to the officer, on demand, discharges the receiptor from liability.[80]

Subsequent attachment. A receiptor may be discharged by the officer taking the property into his own hands on a second attachment,[81] or, it has been

bailee, and the alleged cause of action for conversion was assigned by the debtor, the demand by the assignee for delivery of the goods, without specifying the place of delivery, was too indefinite as a demand, and refusal of such demand could not be sufficiently definite to show a conversion of the goods by a refusal on the part of the bailee to deliver—Titcomb v. Bay State Grocery Co, 150 N E 374, 254 Mass 599
Demand as condition to action see infra § 302 c

66. Me—Stewart v Stewart Drug Co, 102 A 823, 117 Me 84
Vt—Finn v Holden, 175 A 231—McDermott v. Jaquith, 92 A 230, 88 Vt 240.

67. Jewett v. Dockray, 34 Me. 45

68. Pollard v. Graves, 23 Pick (Mass) 86—6 C J. p 320 note 7.

69. Torrey v. Otis, 67 Me. 573.

70. Me—Shaw v. Laughton, 20 Me 266
N H—Cross v. Brown, 41 N H. 283

71. Ide v Fassett, 45 Vt 68

72. Mass—Hayward v. George, 13 Allen 66.

N H—Berry v. Flanders, 45 A 591, 69 N H 626
6 C J p 321 note 12
Bankruptcy adjudication discharging lien of attachment see Bankruptcy § 245 [7 C J p 196 note 81]
Insolvency proceedings avoiding attachment lien see Insolvency § 11 [32 C J p 855 note 2]

73. Fitch v. Chapman, 28 Conn 257

74. McDermott v. Jaquith, 92 A. 230, 88 Vt 240

75. Largy v. Morrison, (N H) 188 A 6—Sweeney v Haggerty, (N H) 177 A 294—6 C J p 321 note 14
Estoppel
A receiptor of attached property, who signed a statement admitting the demand for the property by plaintiff and his noncompliance therewith, is not liable to the attaching officer on the ground of estoppel, where the debtor was adjudged bankrupt within four months after the attachment and bankruptcy trustee elected to treat the attachment as dissolved—Largy v. Morrison, (N. H) 188 A. 6
Fictitious description of property
A receiptor of attached property which was allowed to remain in the possession of the debtor was discharged from liability where the debtor was adjudged bankrupt within four months after the attachment was made, and the bankruptcy trustee elected to treat the attachment as dissolved by taking possession of the attached property, notwithstanding the fact that the receipt fictitiously recited the attachment of currency and did not describe the goods actually attached—Sweeney v. Haggerty, (N H) 177 A 294

76. Parker v. Warren, 2 Allen (Mass) 187.

77. Twining v Foot, 5 Cush (Mass) 512—6 C J p 321 note 16

78. Jameson v. Ware, 6 Vt 610

79. Stevens v Bailey, 58 N H 564—6 C J p 321 note 19

80. Lester v Ladrigan, 98 A 124, 90 Conn 570, L R A 1916F 939—6 C J. p 322 note 21.

81. N H—Young v. Walker, 12 N H 502—Webster v. Harper, 7 N.H. 594
Vt—Stannard v Tillotson, 90 A. 950—Rood v. Scott, 5 Vt. 268.

held, by the levy of a subsequent attachment and sale on execution, at the instance of plaintiff, or his attorney, after the first attachment.[82]

Act or agreement of parties An agreement between plaintiff and defendant in an action in which the property has been attached and receipted for to the officer by a third person, that plaintiff shall not enforce the receipt until after a specified time, and a forbearance to enforce it accordingly, will not discharge the receiptor from his liability to the officer, where the agreement is made without his consent or authority.[83] However, a sale of attached property by mutual consent of the officer, the attaching creditor, debtor, and receiptor, is an implied rescission of the contract evidenced by the receipt.[84]

Payment of judgment. The payment of the judgment obtained in the action discharges a receiptor from liability on his undertaking.[85]

§ 301. Actions to Protect Possession of Receiptor

As a general rule, a receiptor may sue for an unlawful interference with his possession of receipted goods.

Although it has been held otherwise,[86] the weight of authority is to the effect that a receiptor has such a special property in the goods receipted for by him that he may maintain an action against a person unlawfully interfering with his possession,[87] or that of his agent or servant.[88] Such action may also be brought by the attaching officer.[89]

§ 302. Actions on Receipts

a. Right of action
b. Form of action
c. Demand as condition precedent
d. Defenses
e. Pleading
f. Evidence
g. Damages

a. Right of Action

Generally a right of action on a receipt exists only in favor of the attaching officer, his successors, and assignees.

An action against a receiptor of attached property for failure to redeliver on demand or to pay the stipulated amount should ordinarily be brought by the officer to whom the receipt was given,[90] or in his name for the benefit of the creditor or owner.[91]

Where a receipt is taken by a deputy, he may himself sue,[92] or suit may be brought by his principal.[93] It seems also that a receipt given to a deputy sheriff may be enforced by the succeeding sheriff.[94]

The attaching creditor acquires no such interest in the property as to give him a right of action against the receiptor,[95] although he has been allowed to sue in the name of the attaching officer.[96]

b. Form of Action

Where a receiptor has converted property, the remedy may be in assumpsit on the contract, trover, case, or replevin; but, where the goods are merely injured, trover will not lie.

If the officer's liability for the goods continues, and the bailee refuses to deliver them on demand, or has converted them before demand, he is liable to the officer in assumpsit on his undertaking to keep the goods and deliver them on demand, or in trover for the conversion.[97] It has also been held that an action on the case will also lie against a receiptor for failure to redeliver the attached property,[98] and that an action of replevin can be maintained against a receiptor who becomes a bailee of an officer for attached goods, and who makes himself accountable by contract for the return of them.[99]

82. Beach v. Abbott, 4 Vt 605—6 C.J. p 322 note 24
83. Ives v. Hamlin, 5 Cush (Mass.) 534.
84. Kelly v Dexter, 15 Vt 310
85. N.H.—Prescott v. Perkins, 16 N.H. 305.
Vt.—Paddock v. Palmer, 19 Vt. 581
6 C.J. p 321 note 20
86. Warren v Leland, 9 Mass 265—Perley v Foster, 9 Mass 112—Ludden v. Leavitt, 9 Mass 104, 6 Am.D 45—6 C.J. p 322 note 25
87. Conn.—Peters v Stewart, 45 Conn. 103, 29 Am.R. 663
N.H.—Whitney v. Farwell, 10 N.H. 9—Poole v. Symonds, 1 N.H. 289, 8 Am.D. 71.
Vt.—Thayer v Hutchinson, 13 Vt. 504, 37 Am.D 607
6 C.J. p 322 note 26
88. Burrows v. Stoddard, 3 Conn. 160
89. Me.—Carr v. Farley, 12 Me 328
N.H.—Houston v Blake, 43 N.H. 115.
6 C.J. p 322 note 28
90. Me.—Smith v. Wadleigh, 18 Me. 95
Mass.—Parker v Warren, 3 Allen 187—Whittier v Smith, 11 Mass 211.
Vt.—Maxfield v Scott, 17 Vt. 634.
6 C.J. p 322 note 29.
91. Me.—Hapgood v. Fisher, 30 Me. 502
Mass.—Moore v. Fargo, 112 Mass. 254
92. Bradbury v. Taylor, 3 Me. 130
93. Me.—Smith v. Wadleigh, 18 Me 95
Mass.—Baker v Fuller, 21 Pick. 318.
Vt.—Sibley v. Story, 3 Vt 15—Spencer v Williams, 2 Vt. 209, 19 Am.D 711.
94. Finn v. Holden, (Vt.) 175 A. 231.
95. Meshew v. Gould, 30 La.Ann. 163.
96. Hapgood v. Fisher, 30 Me 502.
97. Holt v Burbank, 47 N.H 164—6 C.J. p 322 note 35.
98. Baker v. Fuller, 21 Pick (Mass.) 318.
99. Robinson v. Besarick, 30 N.E. 553, 156 Mass 141.

Where property is returned, but in a damaged condition, trover will not lie.[1]

c. Demand as Condition Precedent

Where a receipt stipulates for delivery on demand, a demand is a condition precedent to an action on the receipt; but, where the stipulation is in the alternative, to deliver within a specified time, no demand is necessary.

The necessity of a demand on the receiptor for the redelivery of attached property, in order to fix his liability to the officer, is dependent on the terms of the undertaking. Where the contract is simply to return the property on demand, a demand is a condition precedent to a right of action;[2] but, where the promise is in the alternative, to redeliver on demand, or, if no demand is made, to do so within a specified time, usually within the life of the execution that may issue, no demand is necessary after the expiration of such period.[3]

Where the receiptor has put it out of his power to return the property, a demand has been held unnecessary.[4]

On attaching officer. The liability of the receiptor being measured by that of the officer, a failure on the part of the officer holding the execution to make due demand on the attaching officer, whereby he is released from liability, will generally discharge the receiptor; and consequently no action can be maintained in the absence of such demand.[5]

By whom made. A demand on a receiptor for the redelivery of attached property is regularly made by the officer to whom the receipt was given, or by his duly authorized agent,[6] but it may be made by any officer holding the execution and receipt, on showing his authority,[7] and offering to return the receipt on the redelivery of the property.[8]

On whom made. A personal demand should be made on the receiptor himself,[9] or, if he be dead, on his personal representative,[10] although an unsuccessful demand made on the wife of a receiptor, at his dwelling house, during his absence from the state, has been held sufficient to charge him.[11]

In the case of joint receiptors a demand on one will be sufficient to charge all, in an action ex contractu,[12] but not in an action ex delicto.[13]

Time of making. A demand may be made on a receiptor for the return of attached property at any time within the life of the attachment lien. If not made within the statutory time within which execution must issue in order to preserve the lien, the officer has no further right to demand possession, and the receiptor is discharged on the return of the property into the hands of the owner.[14] Where the complaint, on an officer's receipt for attached property, alleged a demand made during the continuance of the attachment lien, it was held that whether the demand was made before or after rendition of judgment in the attachment suit was only material on the question of damages.[15]

Place of making. The demand need not of necessity be made at the place where the property must be received, and any facts which show a demand to be reasonable prove that it was made at a proper place.[16]

The receiptor's dwelling house has been held to be the proper place at which to make demand,[17] and, if it is made elsewhere, he is entitled to a reasonable time within which to make delivery.[18]

Sufficiency. The legal construction of a contract to deliver property on demand is that a reasonable demand is to be made.[19] A "legal demand" in this connection means a demand properly made as to form, time, and place, by a person lawfully authorized, and may be made before or after judgment in the suit in which the property has been attached.[20]

1. Tinker v Morrill, 39 Vt 477, 94 Am D 345.
2. Finn v Holden, (Vt) 175 A 231—McDermott v Jaquith, 92 A. 230, 88 Vt 240—6 C J p 322 note 38
3. Me—Hunter v Peaks, 74 Me 363—Low v Dunham, 61 Me 566
Mass—Parker v. Warren, 2 Allen 187—Hodskin v Cox, 7 Cush. 471
4. Mass—Parker v Warren, 2 Allen 187—Webster v Coffin, 14 Mass 196
N.H—Stevens v Eames, 22 N H 568
6 C J p 323 note 40.
5. Shepherd v Hall, 1 A 696, 77 Me 569—Hapgood v Hill, 20 Me. 372—6 C.J. p 323 note 42.
6. Foss v. Norris, 70 Me. 117.
7. Phelps v. Gilchrist, 28 N H 266—6 C J p 323 note 44
8. Me—Davis v Maloney, 8 A 350, 79 Me 110—Hinckley v. Bridgham, 46 Me 450—Bradbury v. Taylor, 8 Me 130
Mass—Moore v. Fargo, 112 Mass 254
N H—Phelps v Gilchrist, 28 N H 266—Stewart v Platts, 20 N H 476
Vt—Davis v Miller, 1 Vt 9—Walbridge v Smith, Brayt. 173
9. Sanborn v. Buswell, 51 N H 573—Phelps v. Gilchrist, 28 N H 266
10. Carpenter v Snell, 37 Vt 255.
11. Mason v. Briggs, 16 Mass. 453—6 C.J. p 323 note 48.
12. Griswold v Plumb, 13 Mass 298
13. White v Demary, 2 N H 546
14. Knap v Sprague, 9 Mass 258, 6 Am D 64—6 C J p 323 note 51.
15. Dejon v. Street, 65 A. 145, 79 Conn 333
16. Higgins v. Emmons, 5 Conn 76, 13 Am D. 41.
17. Me—Gilmore v. McNeil, 46 Me. 532
N H—Remick v. Atkinson, 11 N H. 256, 35 Am D 493.
6 C J. p 323 note 55
18. Gilmore v. McNeil, 46 Me 532.
19. Higgins v Emmons, 5 Conn 76, 13 Am D. 41—6 C J p 323 note 58.
20. Foss v. Norris, 70 Me. 117.

d. Defenses

In general, a defense to an action on the receipt must consist in matter which terminates the right of the sheriff to possession of the attached property.

As a general rule, a receiptor to an officer in attachment can avoid liability only by showing that the officer is free of all liability to the debtor or owner of the property, as well as to the attaching creditor.[21] The amendment of the writ on which property has been attached is not a defense in an action against the receiptor for such property, unless it has the effect of increasing his liability.[22] It is no defense that the receiptor was the attaching creditor, and that the goods have been applied to the debt.[23]

Death of debtor. Unless his estate has been represented insolvent in the probate court, the death of the debtor more than thirty days after judgment in the suit in which the attachment was made is no defense to an action brought by an attaching officer against a receiptor on his receipt for the attached property.[24]

Denial of attachment and receipt of goods The receiptor of attached property is estopped by his receipt to set up in defense to an action against him on his undertaking the insufficiency of the attachment,[25] irregularities in the attachment proceedings,[26] or to deny his receipt of all the goods set forth in the contract[27]

Error in names of parties. It is no defense to an action by an officer on a receipt given to him for property attached that the name of one of the parties was miscalled in the receipt, where it appears that the error was due to the carelessness of the receiptor.[28]

Excessive levy. It is no defense to an action by an officer on a receipt that he has attached property to an amount greater than the writ directed.[29]

Exemption of property. The fact that the property receipted for was exempt from attachment is no defense in an action on the receipt,[30] unless the debtor's possession has not been disturbed, or the property has been returned to his hands[31]

Failure to levy execution. Where the levy of an execution on attached property has been prevented by the refusal of the receiptor to deliver up the property, he is estopped to set up such omission as a defense to his liability on the receipt[32]

Fraud on receiptor. Actual fraud practiced on a receiptor of attached property is a good defense to an action on his receipt.[33]

Insufficiency of return. In an action against the receiptor for the value of goods attached on mesne process he cannot defend on the ground of the insufficiency of the officer's return as to the description of the property attached.[34]

Invalidity of judgment. The receiptors of property attached cannot, as a rule, impeach the judgment rendered in the suit against attachment defendant.[35]

Lack of qualification of officer. It is no defense to an action on a receipt to show that the attaching officer was not properly qualified, unless it appears that the suit is prosecuted solely for his benefit, and not for the benefit of the creditor in the suit on which the attachment was made.[36]

Set-off of debtor against creditor. It is no defense in an action on a receipt for attached goods that defendant in the attachment suit has recovered judgment against the attachment creditor sufficient to satisfy the claim on which the goods were attached.[37]

Tender. Where a specific valuation is affixed to each article attached, the tender of the agreed amount by the receiptor is a good defense to an action on his receipt[38]

e. Pleading

The pleadings should allege an existing attachment, a demand for delivery of receipted goods, and refusal to deliver the same.

A declaration or complaint on a receipt taken by an officer for property attached on mesne process

21. Finn v Holden, (Vt) 175 A 231—McDermott v Jaquith, 92 A 230, 88 Vt. 240—6 C J p 324 note 61.
22. Me—Hunter v Peaks, 74 Me 363
Mass—Miller v Clark, 8 Pick 412
6 C J p 324 note 62
23. Whittier v Smith, 11 Mass 211
24. Hapgood v Fisher, 30 Me 502
25. McNerney v Downs, 101 A 494, 92 Conn 139—6 C J p 324 note 65.
26. McNerney v. Downs, supra
27. Largy v Morrison, (N H) 188 A 6—6 C J p 324 note 66
28. Hunter v Peaks, 74 Me 363.
29. Hunter v Peaks, supra.
30. Smith v Cudworth, 24 Pick (Mass) 196
31. Mass—Thayer v Hunt, 2 Allen 449
N H—Stone v Sleeper, 59 N H 205
Wis—Main v Bell, 27 Wis 517.
32. Conn—Parks v Sheldon, 36 Conn 466, 4 Am R 95.
N H—Batchelder v Putnam, 54 N H. 84, 20 Am R 115.
33. Conn—Marion v. Faxon, 20 Conn 486
Me—Kingsbury v. Sargent, 22 A 105, 83 Me 230—Potter v Sewall, 54 Me 142.
34. Thompson v Smiley, 50 Me 67.
35. McNerney v Downs, 101 A 494, 92 Conn 139—6 C J. p 325 note 74
36. Taylor v Nichols, 29 Vt 104
37. Jenney v Rodman, 16 Mass 464
38. Bicknell v. Lewis, 49 Me 91.

should contain sufficient averments to show the attachment, the preservation of the attachment lien, and a sufficient demand on the receiptor, where such demand is necessary to fix his liability, together with his neglect or refusal to redeliver the property.[39] It is not necessary to allege that the officer who served the original writ was therein commanded to attach any certain amount,[40] or that judgment or execution had been obtained against attachment defendant,[41] neither is it necessary that the complaint should negative matters of defense.[42]

Where, in an action on an officer's receipt for property levied on, signed by defendant in his individual capacity, defendant pleaded that before he signed the receipt it was agreed between him and the officer that he should sign in his capacity as director of the corporation, and not otherwise, and that plaintiff would hold defendant liable only as a director, this was insufficient to raise the issue that defendant's signature to the receipt was obtained by fraud.[43]

f. Evidence

The plaintiff must prove the receipt and a violation of the terms thereof, subject to general rules as to the admissibility and sufficiency of evidence.

Plaintiff's right to recover must depend on the tenor of the receipt, and, therefore, where the receipt is lost, and its contents are not shown, judgment must be rendered for defendant.[44] Where live stock attached has died while in the custody of the receiptor, the burden is on plaintiff, in an action on the receipt, to show that this was due to some negligence or misfeasance on the part of the receiptor.[45]

Where the receiptor defends on the ground that the property did not belong to defendant in attachment, the burden is on him to show that such is the case.[46]

Admissibility. Defendant cannot, by parol evidence, alter or vary the terms of a written receipt,[47] but he may introduce evidence to show a release from liability.[48] The return of the officer on the execution issued on the judgment recovered in the suit in which the attachment was made is admissible in evidence to show the timely issue of the execution and an attempted levy on the property.[49]

The attachment debtor is a competent witness to show a sale by him to the receiptor previous to the attachment.[50]

Sufficiency. In an action by an officer against the bailees or receiptors of property attached by him, it is not necessary, in order to prove the attachment, to produce the original writ; but the fact may be proved by other evidence, and the receipt itself, if one has been taken, is the appropriate and proper evidence.[51]

The officer's return on the execution, that he seasonably made a demand on the receiptor, is not an act required in the course of his official duty, and, therefore, is not evidence of a demand,[52] but the written acknowledgment of a receiptor on the receipt, admitting a demand on a certain date, is sufficient evidence thereof,[53] although it does not establish the continuance of the lien on the property, or that the demand was made within the proper time after the rendition of the judgment.[54]

A prima facie case for plaintiff is made out by proof of the receiptor's refusal to deliver the property on demand.[55]

g. Damages

Damages for failure to redeliver are measured by the value of the goods receipted for, or the sum stipulated in the receipt, not exceeding the amount for which the officer is liable.

The measure of damages in an action on a receipt is the value of the goods receipted for, or the stipulated sum agreed to be paid in case of de-

39. Conn.—Jones v. Gilbert, 13 Conn. 507
Mass.—Baker v. Fuller, 21 Pick. 318
Vt.—Cooper v. Cree, 4 Vt. 289.
6 C.J. p. 325 note 78.

40. Jones v. Gilbert, 13 Conn. 507

41. Farnham v. Cram, 15 Me. 79—6 C.J. p. 325 note 80

42. Dejon v. Street, 65 A. 145, 79 Conn. 333

43. Dejon v. Street, supra

44. Taylor v. Rhodes, 26 Vt. 57

45. Cross v. Brown, 41 N.H. 283

46. Burt v. Perkins, 9 Gray (Mass.) 317.

47. McNerney v. Downs, 101 A. 494, 92 Conn. 139—6 C.J. p. 317 note 75, p. 325 note 85

Recitals as to ownership

In an action on an officer's receipt, executed to release attached property, which contained a waiver clause, providing that the obligor was estopped from denying ownership of attached property, testimony that defendant in the principal action was not the owner was inadmissible.—McNerney v. Downs, 101 A. 494, 92 Conn. 139

48. Pike v. Wiggin, 8 N.H. 356

49. Parker v. Warren, 2 Allen (Mass.) 137.

50. Fitch v. Chapman, 28 Conn. 257—6 C.J. p. 325 note 89

51. Me.—Potter v. Sewall, 54 Me. 142
Vt.—Stimson v. Ward, 47 Vt. 624—Lowry v. Cady, 4 Vt. 504, 24 Am.D. 628
6 C.J. p. 326 note 90.

52. Me.—Bicknell v. Hill, 33 Me. 297
Vt.—Davis v. Miller, 1 Vt. 9.
6 C.J. p. 326 note 91

53. Cargill v. Webb, 10 N.H. 199

54. Fowles v. Pindar, 19 Me. 420

55. Dejon v. Street, 65 A. 145, 79 Conn. 333.

fault,[56] not exceeding the amount for which the officer is liable to the attaching creditor.[57] The attaching officer may recover from the receiptor of the attached property only the value of the lien interest as damages, and, when it may be shown that the interest has no value, no loss has been sustained.[58]

When the receiptor allows the property attached to remain in the possession of the debtor, the ordinary rule of damages in an action by the officer is the amount of the judgment and interest, and his fees and poundage, if the value of the property exceeds that amount; but, if the value of the property stated in the receipt is less than the amount of the judgment, the costs, and fees, then the rule of damages is the value of the property as fixed in the receipt.[59] Where, however, the action is still pending against the debtor, on the refusal of the receiptor to deliver the property attached, the officer may recover of him the full value of the property with interest from the time of demand made.[60]

Where part of goods seized under superior title. In New Hampshire, where a part of the goods has been seized by one having a superior claim thereto, the measure of damages in an action against the receiptor for failure to return the balance of the attached goods is the difference between the value of those taken by him claiming the superior title and the value stated in the receipt, without regard to the actual value of the goods withheld by the receiptor;[61] but, where the goods retained by the receiptor, being the property of the debtor, are worth more than the sum stated in the receipt, and the debt secured by the attachment is greater than the same sum, that sum is the measure of damages for the receiptor's neglect to redeliver the debtor's property to the sheriff on demand.[62]

In Vermont, in such a case, damages are to be determined by assuming the value of the whole property receipted to be the same specified in the receipt, and ascertaining the just proportion, at that assumed value, which the property retained by the receiptor would bear to the property for which he is not liable.[63]

Interest is recoverable from the time of demand.[64]

Nominal damages. If there was a good cause of action against a receiptor at the time of the commencement of a suit on his receipt, but this is lost by a failure to preserve the attachment lien, by judgment for defendant and a return of the goods to him, or by reason of a seizure of the goods under a paramount title, nominal damages may nevertheless be recovered.[65]

D. RELEASE ON SECURITY

§ 303. Discretion of Officer Independent of Statute

In the absence of statute, the attaching officer may surrender attached property on such security as he deems sufficient.

Independently of statutory authority it is held that an attaching officer may, in his discretion, release attached property on such security as he may deem sufficient.[66]

§ 304. Special Bail

The discharge of the attachment by a forthcoming or dissolution bond has largely taken the place of the discharge by appearance and entry of special bail under the early practice by which attachment was resorted to to enforce appearance.

When the practice of requiring special bail was in vogue, defendant might discharge an attachment by appearing and entering special bail to the action,[67] the office of process of attachment being to enforce defendant's appearance, for which purpose defendant was required to surrender himself into custody or file special bail.[68] The modern statutes governing attachments do not, however, contemplate the mere enforcement of appearance, and special bail and imprisonment for debt are now generally abolished; but the release of attached

56. Finn v. Holden, (Vt) 175 A. 231—6 C J p 326 note 95

57. Wadleigh v. Fowles, 32 Me. 591

58. Largy v. Morrison, (N H) 188 A. 6.

59. Clement v. Little, 42 N H 563—Cross v Brown, 41 N H 283

60. Clement v. Little, 42 N.H 563

61. Healey v. Hutchinson, 20 A 332, 66 N H 316

62. Spear v. Hill, 52 N H 323.

63. Allen v Carty, 19 Vt 65

64. Mo—McDonald v Loewen, 130 S.W 52, 145 Mo App 49.

N H—Lamprey v. Leavitt, 20 N H 544

65. Me—Moulton v Chapin, 28 Me 505—Farnham v Cram, 15 Me 79—Norris v Bridgham, 14 Me 429 N H—Webb v Steele, 13 N H. 230.

66. Gassett v Sargeant, 26 Vt. 424—6 C J p 327 note 7.

Conditional release

Where the holder of a chattel mortgage paid money to a sheriff, representing defendant, to release an attachment, with the understanding that she could consult her attorney thereafter, and have the money returned to her, if she so desired, in which event the sheriff would retake possession of the goods under the writ of attachment, she is entitled to a return of the money on her prompt consultation with her attorneys and demand and notice to the sheriff to retake possession—Reed v National Grocery Co, 238 P 990, 136 Wash. 7.

67. Reid v Moore, 12 Ga 368—6 C. J. p 327 note 8.

68. Ferguson v Ryder, 2 Ohio St. 493—6 C J. p 327 note 9.

property, and the dissolution and discharge of the attachment, are effected by statutory bonds, substituted for special bail.[69]

§ 305. Forthcoming, Replevy, or Dissolution Bond

The defendant in an attachment suit may, under statutory provisions, ordinarily secure possession of his property by executing a forthcoming or a dissolution bond

Where, as has been seen in section 2 of this Title, the purpose of an attachment is to preserve the property in order that it may be applied in satisfaction of any judgment which plaintiff may recover, defendant may, where the statute so provides, secure its release or the release of the property by giving a bond or undertaking in accordance with the statutory requirements.[70] Such statutory bonds or undertakings are of two general classes, those the effect of which is to discharge the lien of the attachment and which, as will be seen in section 313, take the place of the attachment lien and are conditioned for and bind the obligor to the payment of the judgment which may be recovered against defendant in the action, and those which take the place of the property itself and are conditioned for the forthcoming of the property to respond to the judgment or for the payment of the penalty of the bond which is discharged by the satisfaction of such judgment or by the payment of the value of the property.[71] Bonds of the first class are variously termed bail bonds, replevy bonds, discharge bonds, or dissolution bonds, the latter being the designation which will be employed in this Title, while bonds of the second class are ordinarily termed forthcoming or delivery bonds. Such a bond or undertaking is, as will be seen in section 313 and subject to limitations and qualifications there stated, a substitute for the attachment, and is a condition precedent to the restitution of attached property,[72] unless the attachment is invalid or not properly sued out,[73] although it is not affected by all the contingencies which might discharge the attachment itself.[74]

Under statutes where defendant has a right to furnish a forthcoming or dissolution bond, it is the duty of the court or sheriff to accept a proper bond.[75]

A privilege of defendant. The right to give the bond provided for and thus release his property is a privilege conferred, and not a duty enjoined, on

69. Borden v. Surety Co., 13 Pa.Co. 627—6 C.J. p. 327 note 11.

70. Cal.—Thayer v. Braden, 150 P. 653, 27 Cal.App. 435
N.C.—Bissell v. Mitchell, 142 S.E. 706, 195 N.C. 484
Pa.—Commonwealth v. Tomashefsky, 93 Pa.Super. 104

Right not limited to nonresidents

The operation of the statute authorizing an attachment release bond is not restricted to nonresident defendants.—Colligan v. Benoit, 128 So. 688, 13 La.App. 612.

71. U.S.—Manufacturers' Finance Corporation v. Vye-Neill Co., (C.C.A.Mass.) 62 F.(2d) 625, affirming (D.C.) 46 F.(2d) 146, certiorari denied Kane v. Manufacturers' Finance Corporation, 53 S.Ct. 657, 289 U.S. 738, 72 L.Ed. 1486
Conn.—Republic Rubber Co. v. Foster, 111 A. 839, 95 Conn. 551
Ill.—U.S. Fidelity & Guaranty Co. v. Sabath, 8 N.E.(2d) 330, 286 Ill.App. 320—Cermak v. Schanf, 221 Ill.App. 351, affirmed 139 N.E. 39, 308 Ill. 61, 37 A.L.R. 1398
Kan.—Larimore v. Parker, 168 P. 859, 101 Kan. 729
Neb.—Burnham-Munger-Root Dry Goods Co. v. Strahl, 166 N.W. 266, 102 Neb. 142.
6 C.J. p. 327 note 12.

Bond to pay judgment not forthcoming bond

A bond given by defendant in attachment to pay any money judgment entered against defendant was not a forthcoming or redelivery bond, since a forthcoming bond would have served merely in lieu of the sheriff's physical custody of the property until the question of the propriety of the attachment could have been determined, whereas the bond to pay the judgment waived all questions as to the legality of the attachment, discharged it, and assumed a liability bearing no relation to the property attached.—Toelle v. Sells-Floto Shows Co., 207 P. 849, 111 Kan. 562.

Substitute and discharge bonds

A bond given before appearance of defendant in an action to foreclose a lien on property to secure release thereof after seizure is a "substitute bond," under Comp.L.(1913) § 7542, rather than a "discharge bond," under § 7556, both such statutes being applicable to proceedings to foreclose liens on personal property, under § 8142.—Minneapolis Threshing Mach. Co. v. Warner, 203 N.W. 197, 52 N.D. 432

72. Brenton v. Lewiston, 216 N.W. 6, 204 Iowa 892

73. Coharie Lumber Co. v. Buhmann, 75 S.E. 1008, 160 N.C. 385.

Where plaintiff failed to give attachment bond, defendant need not give a forthcoming bond to secure the return of his property.—Foster v. Pettus, 123 S.E. 529, 139 Va. 91.—Foster v. Wilson, 123 S.E. 527, 139 Va. 82.

Exclusiveness of remedy

Defendant could not have attachment in a civil action dissolved without giving bond with sufficient sureties approved in the manner provided by statute, except for irregularities or failure to serve summons, prior to enactment of statute providing for dissolution of attachment on giving bond, approved by plaintiff or certain officials, for payment of amount recovered or value of property released.—Lipsitt v. Walmsley, (Mass.) 193 N.E. 792

74. Baugh & Sons Co. v. U.S. Fidelity & Guaranty Co., 268 N.Y.S. 741, 239 App.Div. 731—6 C.J. p. 329 note 14

75. La.—Colligan v. Benoit, 128 So. 688, 13 La.App. 612
Or.—Credit Service Co. v. Payne, 244 P. 879, 117 Or. 547.

Statutory construction

In accordance with the general rule of statutory construction that a power conferred on an officer in terms permissive will be construed as mandatory, where the rights of the public or of third persons are involved, it seems that a statute providing that the proper officer "may" take a dissolution bond will be construed as mandatory, and the officer must accept a proper bond.—Capobinco v. Samorak, 128 A. 643, 102 Conn. 310—6 C.J. p. 339 note 95 [b].

defendant, for which reason plaintiff cannot complain that no bond has been given.[76]

For whole or part of property. It has been held that defendant may give a redelivery bond for either the whole or a part of the property attached,[77] and, where defendant tenders a proper additional bond after there has been a partial release on a former bond, the bond must be accepted and the remaining property released.[78]

Where there are two or more actions in which property has been attached, the proper course is to give a bond in each action rather than a single bond with reference to both actions,[79] but it has been held that, where attachments were levied and a single bond given to replevy the property, judgment could be rendered against defendant and his sureties for the amount of the judgment in each case.[80]

Substitution of bond for money. Where money has been deposited with the sheriff or in court under a stipulation, it cannot be released or withdrawn and a bond substituted therefor.[81]

Bond for real estate. A bond which contemplates restoration of possession cannot be taken to release an attachment on real estate, because defendant does not lose possession of real estate by an attachment,[82] although, of course, a dissolution bond, as distinguished from a restitution bond, is acceptable for this purpose.[83]

New or additional bond. Under statutory authorization, when the bond is or becomes insufficient for any reason, the court may order a new or additional bond on the application of plaintiff,[84] and, if defendant or replevinor fails to comply with such order, the court must render judgment for plaintiff by default.[85] The mere fact that the clerk failed to sign the order which was made by the court and assented to by counsel as to the form of the bond cannot affect the validity of such order.[86]

If a bond is canceled and the execution of another bond is ordered, the sureties on the latter are liable, without reference to the former.[87]

Construction of statutes. Where a statute providing for delivery bonds is specific and mandatory, it must be strictly construed.[88]

Cash deposit. Where property is released on a cash deposit in lieu of a bond, one who delivers cash to be used by the debtor for such purpose cannot, as against the seizing creditor, claim ownership of it and, where the property released is not produced, the seizing creditor may execute his judgment against the cash without regard to any such claim.[89]

§ 306. —— Consideration

The release of property, or of the attachment, is ordinarily the consideration of a bond to redeliver the property, or to pay the judgment.

The release of the attached property or of the attachment, as the case may be, has been held to constitute a sufficient consideration for an undertaking or bond executed to obtain such release;[90]

76. La.—Hughes v. Klingender, 14 La.Ann. 52—Watson v. Kennedy, 8 La.Ann. 280
Minn.—Kling v. Childs, 15 N.W. 673, 30 Minn. 366
R.I.—Clark v. Wilson, 14 R.I. 13

77. Keith v. Moore, 3 Ohio Cir.Ct. 432, 2 Ohio Cir.Dec. 245—6 C.J. p. 329 note 16

78. Petition of Bullock, 149 N.E. 604, 254 Mass. 14

79. N.J.—Hanness v. Smith, 22 N.J.Law 332
N.Y.—Walton v. Daly, 17 Hun 601.
6 C.J. p. 329 note 17

80. Irvin v. Howard, 37 Ga. 18—6 C.J. p. 329 note 18

81. Hill v. Hixon, 106 S.E. 551, 151 Ga. 333—6 C.J. p. 329 note 19

After agreed sale

Where it was agreed by the parties that the attached property be sold and the proceeds placed in the custody of the sheriff, he was under no duty to accept a replevy bond thereafter and release the fund notwithstanding the agreement.—Hill v. Hixon, 106 S.E. 551, 151 Ga. 333.

82. Fla.—Cowart v. Venable, 98 So. 219, 86 Fla. 367
Tex.—Toland v. Stroud, (Civ.App.) 36 S.W.(2d) 769
6 C.J. p. 329 note 20

83. American Agr. Chemical Co. v. Aetna Casualty & Surety Co., (Mass.) 193 N.E. 362

84. O'Connell v. Rogers, 237 P. 775, 72 Cal.App. 539.

Reason stated

"The right to the security of a good bond originally must certainly carry with it the right to have that security kept good."—Capobinco v. Samorak, 128 A. 648, 650, 102 Conn. 310

85. Capobinco v. Samorak, supra.

When "may" means "shall"

Under a statute providing that the court in action in which a bond has been given "may" on application of either party order a new bond substituted, and if such substitution be not complied with, "may" render judgment in plaintiff's favor by default, the court has no discretion on granting of plaintiff's application for substitution of new bond in the attachment suit, but must render judgment for plaintiff by default on failure of defendants to make a substitution required, in accordance with the general rule of statutory construction that a power conferred on the court for the benefit of third persons or the public must be construed as mandatory rather than permissive.—Capobinco v. Samorak, 128 A. 648, 102 Conn. 310.

86. Capobinco v. Samorak, supra.

87. McCloskey v. Wingfield, 32 La.Ann. 38—6 C.J. p. 348 note 95

88. Cox v. Southern Surety Co., 226 N.W. 114, 208 Iowa 1252

89. Locantro v. Keller, 121 So. 685, 9 La.App. 595.

90. Ariz.—Connor Live Stock Co. v. Fisher, 255 P. 996, 32 Ariz. 80, 57 A.L.R. 196
N.D.—Ravely v. Isensee, 221 N.W. 38, 57 N.D. 286.
Wis.—Rodenfels v. Stroemer, 248 N.W. 442, 211 Wis. 536.
6 C.J. p. 329 note 21

An additional obligation in the statutory form of a bond is unen-

but a bond given for the release of attached property will be regarded as invalid where there is no valid attachment pending, since in such case it must be regarded as being without consideration,[91] and further, where the attached property has been released on the giving of a bond to pay the judgment, a second bond for the same purpose is without consideration where the first is valid and not discharged.[92]

Where it is sought to give a bond effect as a common-law obligation, there must be a valid consideration therefor, and a consideration that the sheriff will release the lien where he has only authority to surrender the property is invalid.[93]

A seal will not import consideration where the bond was executed under a mistake of fact as to the existence of an attachment.[94]

Bond to prevent attachment. A sheriff's act in refraining from levying under an attachment writ is sufficient consideration for a bond to prevent the attachment.[95]

§ 307. —— Time for Giving

Ordinarily a redelivery or dissolution bond may be given at any time before judgment

Ordinarily the discharge of the property may be obtained by giving the bond at any time before judgment,[96] but after final judgment has been rendered in the action it is too late in the absence of express statutory authorization to obtain a release of the property in this manner.[97] After a sale of the property attached a release of the proceeds may be obtained by giving bond,[98] unless, as has been stated in section 305, the proceeds have been deposited under a stipulation of parties.

A statutory requirement for delivery of a bond within a certain time does not prevent its becoming effective on subsequent delivery as a common-law obligation.[99]

§ 308. —— By and to Whom Given in General

The bond should be given by the person authorized by statute, ordinarily the defendant or his agent or attorney, to the person prescribed by statute, ordinarily the attaching officer or the plaintiff.

The release of property may be secured by the giving of the statutory bond by the attachment defendant,[1] his agent or attorney,[2] or even, it has

forceable for lack of consideration — Herrera v. Neis, 18 Philippine 366

Bond for release and discharge

Release of attachment was the consideration for an undertaking given in consideration of both release and discharge of such attachment — Pue v. Wheeler, 255 P. 1043, 78 Mont 516, certiorari denied and writ of error dismissed Wheeler v. Pue, 48 S Ct 19, 275 U S 483, 72 L.Ed 385

91. American Agr Chemical Co v Aetna Casualty & Surety Co, (Mass) 193 N E 367—6 C J p 329 note 22.

Absence of attachable interest

When the judgment debtor had no attachable interest, the attachment was void ab initio, and the redelivery or forthcoming bond was without consideration—First Bank of Juntura v. Sitz, 1 P.(2d) 126, 138 Or 297, former opinion adhered to on reargument 6 P (2d) 242, 138 Or. 297

Want of jurisdiction

Where an attachment is set aside for want of jurisdiction, the undertaking as well as the attachment is void for want of consideration — Fried v. Continental Casualty Co, 279 N Y S 916, 155 Misc 487.

92. Detroit Fidelity & Surety Co v Gilliam, 34 S W (2d) 971, 237 Ky 425

93 Alaska—Belleview v. Wittenberg, 5 Alaska 515.
Cal—Kast v California Corporation, 197 P. 339, 185 Cal. 450.

Common-law bond

Where the consideration for the giving of a common-law bond to release an attachment was the immediate release of defendant's property from the valid attachments previously levied, and in return therefor the property was released by plaintiff and restored to the dominion and control of defendant, such consideration was fully executed, and there was no failure of consideration to release the surety on such bond or undertaking—Kast v California Corporation, 197 P 339, 185 Cal. 450

94. American Agr Chemical Co v. Aetna Casualty Surety Co, (Mass) 193 N E. 367

95. N Y—Cohen v Fidelity & Deposit Co of Maryland, 229 N Y S 296, 132 Misc 193
Wis—Automatic Screw Mach Products Co v Continental Casualty Co, 202 N W 681, 186 Wis 425.
6 C J p 329 note 24

96. Ind—Hammond Lumber Co. v Illges, (App) 185 N E 872
Iowa—Cox v Southern Surety Co, 226 N W. 114, 208 Iowa 1252
Ohio—Toledo Paper Box Co v. Lane, Inc, 32 Ohio N P (N S) 454.
6 C J p 329 note 25

97. Ga—Lafferty Lumber Co v Thomas, 139 S E. 587, 37 Ga App 226
Iowa—Cox v. Southern Surety Co, 226 N.W. 114, 208 Iowa 1252.
6 C J p 330 note 26

In connection with stay bond

Under Code Civ Proc § 688, as amended by L (1906) c 508, as to an undertaking to be given on application to discharge attachment (which application under section 687, as amended at the same time by chapter 507, may be made any time after defendant has appeared, whereas previously it could be made only before judgment), if application is after judgment for plaintiff, the same undertaking must be given as is required where application is before judgment, and in addition the security to perfect an appeal to the court of appeals and to stay execution, this in view of section 1311, providing that, where the security given on an appeal from final judgment is equal to that required to perfect an appeal to the court of appeals and to stay execution, the court may order discharge of a levy of execution, "but this section does not authorize the discharge of a levy . . . of attachment"—Hadjopoulos v. Manousso, 188 N Y.S 675, 197 App Div. 56

98. State v. Richardson, 37 La Ann 261

99. Waverly Lumber Co v Piantedosi, 160 N E 268, 262 Mass 377

1. Ala—Federal Land Bank of New Orleans v Strickland, 148 So. 799, 277 Ala 116
Cal—Thayer v Braden, 150 P. 653, 27 Cal App 435
6 C J p 330 note 29

2. Cummins v Gray, 4 Stew & P. (Ala) 397—6 C J. p 330 note 30.

been held, by a stranger to the attachment.[3] If, however, a person who is not authorized by law or by the court to do so undertakes to execute a delivery bond, it is invalid and will not be sustained either as a statutory or common-law obligation.[4]

Whether the officer levying an attachment or plaintiff in attachment should be named as the obligee in a bond to discharge the attachment, or to have the property forthcoming, depends entirely upon the statute. The bond must conform to the statutory requirement in this regard, else it will be bad as a statutory bond, notwithstanding if voluntarily entered into it may be good as a common-law undertaking.[5] A requirement of the statute that the bond shall run to the successors of the attaching officer must be observed.[6]

A bond running to a deceased person, or to him "and" his executors, administrators, and assigns is void ab initio for want of an obligee, but where the bond runs to such deceased person "or" his executors, administrators, and assigns, there is an existent obligee and the bond is valid.[7]

§ 309. —— Sureties

The surety must qualify according to statute.

The sureties must possess the qualifications required by the statute,[8] but it has been held that a judge might excuse compliance with a rule of court requiring a bond to be acknowledged by the sureties.[9] Where the statute requires the bond to be executed by such sureties as may be approved by the officer, a bond executed by one surety is sufficient.[10]

An undertaking signed by the surety alone has been held to be an act of defendant under the statute requiring defendant to give an undertaking for the discharge of the attachment.[11]

Justification. It is frequently required by statute that the sureties justify before the court, clerk, or sheriff,[12] but in some jurisdictions this requirement, being for the protection of plaintiff and not affecting the validity of the contract therein contained, may be waived.[13]

Objection as to number of sureties. As a provision of the statute requiring a certain number of sureties is for the benefit of plaintiff only, neither defendant nor the sureties will be heard to question the validity of the bond on the ground that it is executed by a less number of sureties than the law requires.[14]

Substitution or addition of sureties. It has been held that for the purpose of substitution courts of general jurisdiction have complete power to require a change of sureties in a delivery bond,[15] and the court may compel defendant to furnish further sureties upon a bond to discharge the attachment.[16]

Release. Statutory provisions for the release and indemnity of sureties on bonds executed in court have been held not applicable to bonds given to procure the release of attachments since the court would have no power to preserve the status quo in case the principal should refuse to give a new bond.[17]

3. Federal Land Bank of New Orleans v Strickland, 148 So 799, 227 Ala 116—6 C J. p 330 note 31, p 341 note 15.

In Kentucky the sheriff may deliver the property to the person in whose possession the property was found on execution by such person of a forthcoming bond—Monohan v Grayson County Supply Co, 54 S W (2d) 311, 245 Ky. 781.

Partners

(1) In some jurisdictions where the interest of one partner in firm property has been attached, the other partner may retain possession by giving a bond to have the property forthcoming—Hardy v Sprowle, 32 Me. 322—Stewart v. Hunter, 1 Handy (Ohio) 22, 12 Ohio Dec (Reprint) 6

(2) In Massachusetts the statute providing for the delivery of possession to a part owner of goods attached, upon his giving a bond, does not apply to an attachment of partnership property in an action against one partner.—Breck v. Blair, 129 Mass. 127.

4. Louisiana Central Lumber Co v. Bridger, 125 So. 502, 12 La App 266—6 C J. p 330 note 32

5. Campbell v. Tucker, 154 So 825, 228 Ala 658, denying certiorari (App) 154 So 821—6 C J p 331 note 40

6. Hughesville Mercantile Co. v McGruder, 111 S W. 1179, 132 Mo App 337.

7. Dunn v. Lerman, 135 N E. 604, 241 Mass 555

8. Western Lithograph Co v. Vanomar Producers, 263 P 850, 88 Cal App 549—6 C J p 330 note 33.

Substantial compliance

Where a statute requires the sureties to be holders of real estate, and they qualify in the affidavit as freeholders, the bond is sufficient, a freeholder being substantially what is required by statute.—Western Lithograph Co v. Vanomar Producers, 263 P. 850, 88 Cal.App 549

Surety company authorized by statute.—Schwarz v. District Court of Arecibo, 32 Porto Rico 9.

9. Gale v Seifert, 39 N W. 69, 39 Minn 171.

10. Ward v Whitney, 8 N Y 442.

11. Smith v. U S. Express Co, 25 N E 525, 135 Ill 279

12. Iowa—Brenton v Lewiston, 216 N.W. 6, 204 Iowa 892

Or—Credit Service Co. v. Payne, 244 P 879, 117 Or. 547.

Approval of bond see infra § 312

13. Credit Service Co v. Payne, 244 P 879, 117 Or. 547.

14. La.—Hughes v. Klingender, 14 La Ann 52—Watson v. Kennedy, 8 La Ann 280.

Minn—Kling v. Childs, 15 N W. 673, 30 Minn. 366

R I.—Clark v Wilson, 14 R I. 13

15. Ramsey v. Coolbaugh, 13 Iowa 164

16. La.—McCloskey v. Wingfield, 32 La Ann 38.

N Y.—Jewett v. Crane, 35 Barb. 208. 6 C J. p 331 note 39

New, additional, or amended bond see supra § 305.

17. Detroit Fidelity & Surety Co. v.

§ 310. —— Form and Sufficiency

The bond or undertaking should be in statutory form, but a substantial compliance with the statutes is sufficient, and a bond insufficient as a statutory bond, but sufficient as a common-law bond, may be enforced if it does not contravene public policy.

In order to be sufficient the bond must comply, at least substantially, with the requirements of the statute pursuant to the terms of which it is given,[18] failing in which it is ineffective for the purpose of releasing the property or discharging the attachment, and is incapable of enforcement as a statutory bond.[19]

A voluntary obligation for the release of attached property, however, is a valid common-law obligation,[20] and, although an undertaking may be defective as a statutory bond or for the purposes of the statutory remedy, yet if voluntarily entered into and supported by sufficient consideration it is good as a common-law obligation and may be enforced as such,[21] provided, of course, it does not

Gilliam, 34 S.W.(2d) 971, 227 Ky 425

18. American Agr Chemical Co. v Ætna Casualty & Surety Co, (Mass) 193 N.E. 367—6 C J p 331 notes 43, 44.

Bond held statutory

A bond to dissolve an attachment was given pursuant to statute where it recited an attachment on the property and the desire of defendant owner to have it dissolved, and that he would pay to plaintiffs within thirty days after final judgment the amount of the judgment up to a specified sum —American Agr Chemical Co v. Ætna Casualty & Surety Co, (Mass) 193 N E. 367.

Forms of bonds, in whole or in part, are found in the following cases.

Ariz —House v. Smith's Cashway, 300 P. 951, 38 Ariz 399
Ark —Hines v Martin, 1 S W.(2d) 86, 175 Ark. 1005.
Cal—Golden West Credit & Adjustment Co v Peardon, 19 P (2d) 817, 130 Cal App 186—Central California Creditors' Ass'n v Seeley, 267 P 138, 91 Cal App 327
Ill —Cermak v Schaaf, 224 Ill App. 351, affirmed 139 N.E. 39, 308 Ill 61, 37 A L R 1398.
Mass —Miller v London, 1 N E (2d) 198—Burns Bros. v Block, 198 N E 164
Or —Hall v. Cutler Bindery Co, 26 P (2d) 1109.
Tenn —Sadler v. Murphy, 77 S W (2d) 70
Utah —Huish v. Fenkell, 39 P.(2d) 330
6 C J p 331 note 42.

19. American Agr. Chemical Co v Ætna Casualty & Surety Co, (Mass) 193 N E 367—6 C J. p 331 note 45.

20. Cal —Kast v California Corporation, 197 P 339, 185 Cal 450
Conn —Fazzano v. Martin, 108 A. 513, 94 Conn 91—Robertson & Govanne Contracting Co v Ætna Accident & Liability Co., 99 A. 557, 91 Conn 129
6 C J. p 332 note 56.

Bond under agreement of parties

An undertaking given by agreement of parties reciting that it was given for the release of property attached in a former action and running directly to plaintiff in that action, its maker, defendant, agreeing that it would on demand pay to plaintiff the amount of whatever judgment might be recovered in that action, is not a statutory undertaking for the release of attached property, but is a direct undertaking to plaintiff to pay whatever judgment was obtained by him in the former action —Lane Mortgage Co v U. S Fidelity & Guaranty Co, 217 P. 765, 62 Cal App 636

Forms of undertaking, in whole or in part, held valid as voluntary bond —Robertson & Govanne Contracting Co v Ætna Accident & Liability Co, 99 A 557, 91 Conn 129—Nations v Beard, 267 S W. 19, 216 Mo App. 133 —6 C.J. p 332 note 55.

21. Ala —Braswell v. Watkins, 112 So. 343, 216 Ala 62—Donaldson v. Wilkerson, 68 So 812, 192 Ala 100
Cal —Central California Creditors' Ass'n v. Seeley, 267 P 138, 91 Cal. App. 327
Mo.—Nations v. Beard, 267 S.W. 19, 216 Mo App 33
Mont —Sloan v Young, 284 P 131, 86 Mont 414—Pue v Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v. Pue, 48 S Ct 19, 275 U S 483, 72 L Ed 385
N Y.—Cohen v. Fidelity & Deposit Co of Maryland, 229 N Y S 296, 132 Misc 193
Okl —National Surety Co. v. Morand, 217 P 870, 92 Okl 60
Or —Credit Service Co v. Payne, 244 P 879, 117 Or 547
Tenn —Wilson v. Bryant, 67 S W (2d) 133
Utah —Huish v. Fenkell, 39 P.(2d) 330
6 C J p 332 note 57.

Bond held not indefinite

The condition of a forthcoming bond for payment of any amount adjudged in plaintiff's favor "on or before the 17th day of December, 1921," was not so indefinite as to invalidate the bond, in view of circumstances indicating that the quoted words were inserted solely because the attachment suit was set for a hearing, and defendants had agreed to try case, on such day —Nations v Beard, 267 S W. 19, 216 Mo.App. 33

Bond without consideration

(1) A bond to dissolve an attachment was not enforceable as a common-law obligation, where no attachment was made of disputed real estate, since the obligor did not receive the benefit of a dissolution of the attachment thereon for which he bargained —American Agr Chemical Co v Ætna Casualty & Surety Co., (Mass) 193 N E 367

(2) Where a bond is on consideration of a release from the lien of attachment, and is given to the marshal, while only the court or clerk has power to release the lien, the consideration is void and the bond cannot be upheld as a common-law obligation —Belleview v. Wittenberg, 5 Alaska 515.

Conditions broader than required by the statute are valid and will be enforced —Automatic Screw Mach Products Co v. Continental Casualty Co, 202 N W. 681, 186 Wis. 435.

Conflicting conditions

A bond by which the obligors bound themselves to produce the property attached at such time and place as the court might require and, on the other hand, to perform the judgment of the court, constitutes a valid common-law bond —Foster v. Pettus, 123 S E 529, 139 Va 91—Foster v. Wilson, 123 S E. 527, 139 Va. 82

Defective execution

A surety on a forthcoming bond cannot complain that the bond was executed before the clerk of court instead of the sheriff, as required by law where the bond was executed pursuant to an order of the court, while the property was in the possession of the sheriff, thus releasing the attached property and rendering the bond a valid common-law obligation, if not a statutory bond —Fidelity & Casualty Co of New York v. Carson, 266 S W. 1063, 206 Ky 136

Deficiency in amount

Under a statute requiring a replevy bond in an amount either double the value of the property attached or double the amount of the claim, a bond "conditioned to pay the

contravene public policy or violate the law.[32]

A substantial requirement with the statute is all that is required of a statutory bond,[23] and an imperfect recital of preliminary facts, the suit being accurately described and the condition stated with substantial accuracy, or a mere clerical mistake, as by the transposition or substitution of the names of the parties, will not invalidate it;[24] neither will surplusage defeat the effect of the instrument as a statutory bond,[25] and, as discussed in section 317, a maker whose defective bond has been accepted will be estopped to deny its validity.

The bond must express the condition required by the statute;[26] but it has been held that no consideration need be inserted therein,[27] nor need matters admitted by the execution of the bond be recited.[28] The bond need not be under seal,[29] and in the absence of statute a revenue stamp is not required.[30]

The names of the signers should appear in the bond or some language should be used to indicate that the persons signing intend to become bound.[31]

In some jurisdictions it seems that a forthcoming bond should be executed in the presence of the sheriff, and, if executed before anyone else, it is not a statutory bond.[32]

Signature by agent. Where a bond was signed by an agent who could read and write, on behalf of, and in the presence of, the obligor, who could not read or write, the bond is binding without regard to the question whether the obligor understood the nature of the instrument.[33]

Delivery. The bond must be delivered as the statute may require to the sheriff or officer attaching the property,[34] or, if the writ has been returned to court, the bond must be delivered to the clerk,[35] otherwise it will not be effective. Where the bond was filed with the clerk or delivered to plaintiff instead of the sheriff and the sheriff released the property, the bond may be treated as properly delivered.[36]

debt, interest, and costs, or the value by the property attached, with interest, as the case may be, in the event he shall be cast in the suit" not to exceed two thousand dollars will be enforced as a replevy bond where the property has been released on such security—Wilson v Bryant, (Tenn) 67 S W (2d) 133

Omissions of the name of the obligee and the date for redelivery of the property from a replevy bond taken by the sheriff releasing property attached did not render bond void—Campbell v Tucker, 154 So 825, 228 Ala 658, denying certiorari (App) 154 So 821

22. National Surety Co v Morand, 217 P 870, 92 Okl 60—6 C J p 333 note 58

23. Cal—Passow & Sons v United States Fidelity & Guaranty Co, 170 P 1124, 177 Cal 31
Or—Credit Service Co v. Payne, 244 P 879, 117 Or. 547.
6 C J. p 332 note 52.

24. Mass—Massachusetts Bldg Finish Co v Brenner, 193 N E 355
Mich—Aman v Carpenter, 178 N W 33, 210 Mich 660
6 C J p 332 note 53

Omission of amount

Where a sheriff returned a writ of attachment with a forthcoming bond with the space for stating the amount of liability blank, an order permitting the amount to be inserted, on the ground of an oversight, resisted by the signers of the bond, did not entitle them to reversal for informality of proceedings—Larimore v. Parker, 168 P 859, 101 Kan 729.

25. Clayton v Stephenson, (Tex Civ App) 254 S W. 507—6 C J. p 332 note 54

Alternative conditions

A bond given to replevy attached property, and differing from the statutory form only in that it recited an appraisal of the property, and provided in addition to the statutory condition, and in the alternative, that, if defendant was condemned, the sureties should satisfy the judgment or pay the estimated value of property, was a statutory bond—Clayton v Stephenson, (Tex Civ App) 254 S W 507

26. Ark—Lowenstein v McCadden, 14 S W 1095, 54 Ark 18
Ga—Moody v Morgan, 25 Ga 331
Iowa—Allerton v Eldridge, 10 N.W 252, 56 Iowa 709
N Y—Morange v. Edwards, 1 E D Smith 414
6 C J p 331 note 46.

27. Bildersee v Aden, 62 Barb (N Y) 175—6 C J p 332 note 47.

28. Hoshaw v Gullett, 53 Mo 208—6 C J p 332 note 48.

29. Lynch v. Smyth, 54 P. 634, 25 Colo 103, reversing on other grounds 43 P 670, 7 Colo App 383

30. Mass—Sampson v. Barnard, 98 Mass 355
Nev—Bowers v Beck, 2 Nev 139

31. Strange v. McCall, 166 S E 33, 45 Ga App 718

Sureties

Where the named obligor and surety have signed a bond, and below their signatures appear the initials "N. P. & J P" without any indication in the bond that these persons intend to become sureties, it cannot be shown that they signed intending to become sureties—Strange v. McCall, 166 S E 33, 45 Ga App 718

32. Fidelity & Casualty Co of New York v Carson, 266 S W 1063, 206 Ky. 136—6 C J p 172 note 59 [b]

33. Reliable Finance Co v Baldrate, (Mass) 196 N E 849

34. Rodenfels v Stroemer, 248 N W. 442, 211 Wis 536

35. Santee River Co v. Webster, 23 R I 599

36. Commercial Nat. Bank of Kearney v Faser, 155 N W. 601, 99 Neb. 105

Not a common-law bond

The fact that a bond given to release an attachment was delivered to plaintiff instead of the sheriff, did not make it a common law, instead of a statutory, undertaking—Passow & Sons v United States Fidelity & Guaranty Co, 170 P. 1124, 177 Cal. 31

Delivery may depend on intention

Whether a bond given to plaintiff to release an attachment is delivered is a question of intention, which must be that the instrument shall be operative—Jones v. Leslie, 32 P (2d) 443, 138 Cal App 466.

Sufficient delivery

A statutory bond given to release an attachment, where properly executed, approved by the court, filed in the action, and acted upon by the sheriff, is substantially delivered and operative as a statutory bond, although not physically delivered to the sheriff—Jones v Leslie, 32 P. (2d) 443, 138 Cal App 466.

A surety who delivers a bond to the principal with his signature may be found to have authorized the principal to deliver the completed instrument.[37]

Filling blanks. Where a bond is signed by a surety with portions thereof not filled in, and the bond is given to an agent for the obvious purpose of delivery as a valid instrument, the surety is estopped, as to the obligee, to deny the authority of the agent to fill in and deliver the instrument.[38]

Time for objection. An objection to the sufficiency of a replevy bond, made for the first time on a motion for a new trial as to the right of property, comes too late.[39]

Amendment. A defective bond may, it has been held, be amended so that it will conform to the statute.[40]

§ 311. —— Amount

The penalty of the bond or undertaking is usually based on the value of the property or the amount of the claim.

The penalty of the bond usually under the statute must be proportioned to the value of the property,[41] or the amount of the claim sued on,[42] or the ad damnum of the writ.[43]

Where plaintiff sues several defendants, for one cause of action under a statute permitting such course of action where he is in doubt as to the person legally liable, a dissolution bond may be for amount of the claim, executed by all defendants, rather than several times the claim according to the number of defendants, and such bond will release the property of all the defendants levied on to secure the claim.[44]

§ 312. —— Approval of Bond and Order of Discharge

The bond must be approved by the court, clerk, or officer, and an order of discharge obtained as the statute may require.

A redelivery or dissolution bond should be approved by the sheriff, clerk, or judge where so required by statute.[45] If it is not so approved, it is not a statutory bond,[46] although the obligors may bind themselves by entering into a voluntary undertaking, without the procurement of a discharge by order of court,[47] and they may be bound as at common law in the absence of approval, as required by statute.[48]

37. Waverly Lumber Co v Piantedosi, 160 N E 268, 262 Mass 377

38. Palacios v Brasher, 34 P 251, 18 Colo 593, 36 Am S R 305

39. Willis v. Thompson, 20 S W. 155, 85 Tex 301.

40. Sherman v Morris, 87 S E. 709, 17 Ga App 446.

41. Campbell v. Tucker, 154 So 825, 228 Ala 658, denying certiorari (App) 154 So. 821—6 C J. p 333 note 59.

Amount fixed by sheriff

(1) A forthcoming bond must be in an amount double the value of the property released, which value is fixed by the sheriff—Campbell v. Tucker, 154 So. 825, 228 Ala 658, denying certiorari (App.) 154 So. 821.

(2) The attaching officer is not required to estimate the value of the attached property until defendants elect to have the replevy bond cover the value of the property rather than the amount of plaintiff's debt —Ford v Marsden, (Tex Civ.App) 54 S W.(2d) 833.

Presumption

Where the bond is not in double the amount of the claim, it will be presumed to be for double the value of the property seized, and that the officer fixed the value as he is authorized to do—Sadler v Murphy, (Tenn App) 77 S W.(2d) 70—Johnson v Phillips, 4 Tenn Civ App 662

42. Calvert v Bennett, (Tex Civ App) 286 S W. 303—6 C.J. p 333 note 60.

Defendant's option

Defendant has the option of giving a bond in an amount double the value of the property attached or double the amount of the claim—Wilson v. Bryant, (Tenn) 67 S W. (2d) 133—Foster v. Wilson, 123 S E 527, 139 Va. 82—6 C J. p 333 note 60 [a].

Presumption as to election

In Texas, in the absence of a showing that defendants in attachment elected to make a bond covering value of property replevied, the court will presume that the bond was for double the amount of the debt—Ford v Marsden, (Tex Civ.App) 54 S W (2d) 833—Calvert v Bennett, (Tex Civ App) 286 S W 303

43. Devereux Co v. Silsby, 114 A. 460, 120 Me 362

Attachment of indivisible property

The right of an officer to attach a single indivisible article of personal property, like a vessel, although of much greater value than the amount he is directed to attach on his precept, must be sustained of necessity where no other or sufficient property to satisfy his precept can be found, or is shown to him by the debtor, but such an attachment of course creates a lien only to the amount required to be attached under the precept, and can be released by a bond in the penal sum of the ad damnum of the writ—Devereux Co v. Silsby, 114 A. 460, 120 Me 362

44. Zenith Bathing Pavilion v. Fair Oaks S. S Corporation, 207 N Y S 306, 211 App Div 492, reversed on other grounds 148 N E 532, 240 N.Y 307.

45. Iowa—Brenton v. Lewiston, 216 N W 6
R I—Superior Glass Co v District Court of Sixth Judicial Dist, 135 A. 50
Va—Foster v. Wilson, 123 S E. 527, 139 Va 82
6 C J p 333 note 61, p 334 note 62.

Implied approval

"It is argued that the bond was not accepted and approved by the sheriff, and is therefore void. This was not formally done, but the facts that the plaintiff, who stood back of the sheriff and for whom the sheriff was acting, was satisfied with it, and the sheriff yielded possession of the property on account of its execution and delivery, are sufficient, we think, to establish an actual approval"—Commercial Nat Bank of Kearney v. Faser, 155 N W 601, 99 Neb 105.

46. Foster v. Wilson, 123 S E 527, 139 Va 82—6 C J. p 334 note 65.

47. N Y—Cockroft v. Claflin, 64 Barb 464, affirmed 53 N Y. 618
S C—Sullivan v Williams, 21 S E. 642, 43 S C 489
6 C J. p 334 note 66.

48. N Y—Cohen v Fidelity & Deposit Co of Maryland, 229 N Y.S 296, 132 Misc 191
Va—Foster v. Wilson, 123 S E. 527, 139 Va 82.
6 C J p 334 note 67.

Where the statute requires approval by the sheriff, the court cannot pass on its validity so as to bind the sheriff.[49]

Approval need not be indorsed on the bond, but the fact that the bond is accepted and spread on the docket without objection is sufficient proof of approval.[50]

Approval by officer having interest. Where a bond is accepted by the sheriff who is plaintiff in the suit, the bond is valid as against the contention that this is against the statute providing that he may not execute process in his own case.[51]

Waiver of approval. Where approval is regarded as a step for the protection of plaintiff, it may be waived, and the obligation remains a statutory bond.[52]

Order for discharge or release. The sheriff may release the attachment without a court order where he has not returned the writ to court.[53] Moreover, where the writ directs the officer to accept security, no order of discharge is required.[54] An order of dissolution should state whether it applies to the whole or only part of the property, and if to a part, what part.[55]

Presumptions. Where the consideration of a bond was the release or discharge of an attachment, and the property has been returned, it will be presumed that the necessary court orders to that end have been made.[56]

§ 313. —— Construction and Effect

a. Construction
b. Effect
c. Rights and remedies of sureties

a. Construction

The rules of construction applicable to bonds generally apply to forthcoming and dissolution bonds.

Recitals in a statutory undertaking, conditioned for the redelivery of attached property, have the same effect and ought to be construed in the same way as bonds containing similar recitals, and are to be given the same construction as other writings obligatory.[57] Although a bond is not strictly an undertaking such as is contemplated by the statute, in an action on the bond it will be construed in the same manner as a bond under the statute, and will be read in the light thereof and interpreted according to the meaning and intention of the parties.[58] It has been held that, where the bond does not follow the statute, and an action is brought thereon, the statutory terms will be read into the bond,[59] but similar provisions of a garnishment statute cannot be read into a bond for restitution of attached property.[60]

Where the bond has been prepared by defendant's counsel without notice to plaintiff or opportunity to suggest its form or object thereto, any doubt or ambiguity should be construed most strongly against defendant.[61]

Bond approved by wrong person

A bond to discharge an attachment duly executed and approved by a sheriff will be held good as a common-law bond, although it is not approved by the court, if it does not contravene public policy or violate the law —National Surety Co v. Morand, 217 P 870, 92 Okl. 60.

49. Superior Glass Co. v District Court of Sixth Judicial Dist, (R I.) 135 A 50

50. Cortelyou v Maben, 59 N W 94, 40 Neb 512

51. Forbes & Beck v. Navra, 63 Miss 1.

52. Iowa.—Brenton v. Lewiston, 216 N W 6, 204 Iowa 892
Or —Credit Service Co v. Payne, 244 P. 879, 117 Or 547
6 C.J p 333 note 61 [d].

53. Central California Creditors' Ass'n v Seeley, 267 P 138, 91 Cal App 327—Western Lithograph Co v. Vanomar Producers, 263 P. 850, 88 Cal App 549

Effect of misdating return

Where property was attached on May 7, and the return was promptly made but not filed, and on May 8 a bond to pay the judgment was given, which fact was noted on the return dated May 7, the property was properly released and the bond was effective without an order of the court where the writ and return were not filed with the clerk until May 9 — Western Lithograph Co v Vanomar Producers, 263 P 850, 88 Cal App. 549.

54. Bailey v Ætna Indemnity Co, 91 P 416, 5 Cal App 740

55. Ellsworth v Scott, 3 Abb N Cas (N Y) 9

56. Pue v Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U S. 483, 72 L Ed 385

57. Cal —Koehler v. Serr, 12 P.(2d) 673, 216 Cal 143, 89 A L R 262
Va.—Foster v. Wilson, 123 S E. 527, 139 Va 82
6 C J p 334 note 68

Intent of surety on a bond given to dissolve an attachment must be gathered from the language of the instrument which he signed—Eastern Tire Co v Witter, 183 N E 894, 281 Mass 523

Liberal construction

Conditions and obligations of a replevy bond are liberally construed, where possible, to give effect to the reasonable intention of the parties — Campbell v Tucker, 154 So 825, 228 Ala. 658, denying certiorari (App) 154 So 821

Object of bond considered

To ascertain liability of the surety on an attachment bond, the court must look beyond the form of the bond to the purpose sought to be accomplished when it was given — Neugent Garment Co. v U S Fidelity & Guaranty Co, 231 N W 600, 202 Wis. 93, denying rehearing 230 N W. 69, 202 Wis 93

58. Mo —Nations v. Beard, 267 S W. 19, 216 Mo App 33
Okl —Carter v. Walker, 267 P. 259, 130 Okl 284
6 C J p 335 note 69.

59. Kimbrell v Heffner, 161 S E 175, 163 S C 35, 80 A L R 591

60. Goldberg v Farber, 140 A. 787, 6 N J Misc 257, affirmed 143 A 917, 105 N J Law 239, and North Jersey Mortgage Co v Farber, 143 A 918, 105 N J Law 245.

61. Foster v Pettus, 123 S E 529, 139 Va 91—Foster v. Wilson, 123 S E 527, 139 Va. 82.

Where both real and personal property has been attached and a replevy bond has been given, it will be regarded as applying to the personal property only.[62]

b. Effect

(1) On lien of attachment
(2) On right to question or attack attachment
(3) On right to proceed to judgment
(4) On right to possession
(5) On right to deny ownership or liability to seizure
(6) On liability to subsequent levies

(1) On Lien of Attachment

(a) Forthcoming bond
(b) Dissolution bond

(a) Forthcoming Bond

The giving of a forthcoming bond does not dissolve the attachment.

A bond conditioned for the forthcoming or delivery of the property to satisfy any judgment that may be rendered does not affect or discharge the attachment,[63] or withdraw the property from the custody of the law so as to destroy the lien of the attachment, but the lien is preserved as if the property remained in the care of the officer[64] until the bond is forfeited.[65] Consequently, where property returned to defendant is subsequently attached, the second levy is subject to the prior levy, and the property may be applied in satisfaction of the judgment in the first action.[66]

The bond serves merely to insure the safe-keeping and faithful return of the property, and substitutes the responsibility of the obligors in this respect for that of the officer.[67] After the execution of such bond, the court cannot appoint a receiver to take charge of and sell the property.[68]

(b) Dissolution Bond

A dissolution bond dissolves the attachment lien.

A bond under the statute for the discharge of an attachment, not merely to have the property forthcoming, but conditioned to perform the judgment which may be rendered, dissolves the attachment and discharges the property from the custody of the law,[69] and after giving such bond the attach-

62. Miles v. Davis, 36 Tex 696.

63. Alaska—Belleview v. Wittenberg, 5 Alaska 515
Kan—Toelle v Sells-Floto Shows Co, 207 P 849, 111 Kan 562.
Ill—U. S Fidelity & Guaranty Co v. Sabath, 3 N E (2d) 330, 286 Ill App 320
Ohio—Conrad Baisch Kroehle Co. v Hoff, 176 N E. 487, 38 Ohio App. 394
Or—Nicolai-Neppach Co. v. Smith, 58 P (2d) 1016, adhered to 60 P. (2d) 979
Pa—Locey v Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super 143—Commonwealth v. Tomashefsky, 93 Pa Super. 104.
6 C J. p 335 note 71.

64. Ala—Federal Land Bank of New Orleans v Strickland, 148 So. 799, 227 Ala 116.
Alaska—Belleview v. Wittenberg, 5 Alaska 515
Colo—Curry v Equitable Surety Co, 148 P 914, 27 Colo App 175.
Conn—Republic Rubber Co. v. Foster, 111 A. 839, 95 Conn. 551
Kan—Toelle v Sells-Floto Shows Co, 207 P. 849, 111 Kan 562—Larimore v. Parker, 168 P. 859, 101 Kan 729.
Ky—Monohan v. Grayson County Supply Co, 54 S W (2d) 311, 245 Ky. 781, followed in Monohan v. Moorman, 54 S W (2d) 315, 245 Ky 789, Monohan v Decker, 54 S W (2d) 315, 245 Ky 790, and Monohan v. Whitely, 54 S W (2d) 315, 245 Ky. 790—Royal Collieries Co. v. Picklesimer, 42 S W (2d) 907, 240 Ky. 686—Hudson Engineering Co v Shaw, 179 S W. 1033, 167 Ky. 27
6 C J. p 335 note 72

Does not change nature of action

The filing of a bond to release chattels does not convert the proceeding into an action in personam —West v William E Wood Co, 118 A. 69, 140 Md 514

65. Federal Land Bank of New Orleans v. Strickland, 148 So 799, 227 Ala 116.

66. Curry v. Equitable Surety Co, 148 P. 914, 27 Colo.App 175

67. Wright v Manns, 12 N E 160, 111 Ind 422—6 C J p 335 note 73

68. Phillips-Buttorff Mfg Co. v. Williams, (Tenn) 63 S W. 185.

69. U S—Manufacturers' Finance Corporation v Vye-Neill Co, (C C A Mass) 62 F (2d) 625, affirming (D C) 46 F (2d) 146, certiorari denied Kane v Manufacturers' Finance Corporation, 53 S Ct 657, 289 U S 738, 72 L Ed 1486
Ariz—Servall Automotive Service v McDuffie, 38 P (2d) 655—House v Smith's Cashway, 300 P. 951, 38 Ariz. 399
Conn—Fazzano v. Martin, 108 A 512, 94 Conn 91.
Ga—Alvaton Mercantile Co v. Caldwell, 119 S E 25, 156 Ga 317, answers to certified questions conformed to Alvanton Mercantile Co v Caldwell, 120 S E 448, 31 Ga. App 195.
Ill—U. S. Fidelity & Guaranty Co. v. Sabath, 3 N E (2d) 330, 286 Ill App 320
Ind—Hammond Lumber Co. v. Illges, (App) 185 N E 873
Kan—Toelle v. Sells-Floto Shows Co, 207 P. 849, 111 Kan 562
Ky—Barrick-Kentucky Oil & Gas Co v Scrivner, 38 S W (2d) 960, 239 Ky. 127—Turner Elkhorn Coal Co v. Smith, 291 S W. 715, 218 Ky 503—Fidelity & Deposit Co of Maryland v. Cobb, 281 S W 478, 213 Ky 467—Hudson Engineering Co. v. Shaw, 179 S.W. 1033, 167 Ky 27.
Md—West v. Williams E Wood Co, 118 A 69, 140 Md 514
Neb—Durnham-Munger-Root Dry Goods Co. v Strahl, 166 N W. 266, 102 Neb 143
Ohio—Toledo Paper Box Co v. Lane, Inc, 32 Ohio N P (N S) 454
Or—Hill v. Wilson, 261 P. 422, 123 Or 193.
Pa—Borden v. Surety Co., 13 Pa Co 627.
Tenn—New York Casualty Co v Lawson, 24 S W.(2d) 881, 160 Tenn 329
Wash—Truax v. Title Guaranty & Surety Co, 162 P. 586, 94 Wash 472.
W.Va—Perkins v. Friedberg, 110 S E 618, 90 W Va. 185
6 C J. p 328 note 13, p 336 note 75.

Bond as standing for property

In the case of a bond given for the dissolution of the attachment, the bond takes the place of the attached property as security for the payment

ment defendant can sell or dispose of the property without violating any legal obligation assumed to the parties concerned in the cause.[70] It has been held, however, under some statutes, that the discharge of the lien of attachment by the giving of a bond to take its place does not vacate the writ of attachment[71]

The annulment of a dissolution bond will not reinstate an attachment lien.[72]

(2) On Right to Question or Attack Attachment

(a) Forthcoming bond
(b) Dissolution bond

(a) Forthcoming Bond

The giving of a forthcoming bond does not prevent the defendant from attacking the attachment, although the parties may not deny the existence of a valid levy.

The giving of a forthcoming bond as a rule does not bar a subsequent motion or other proceeding by defendant or surety to vacate the attachment,[73] although it should be noted that the giving of a forthcoming bond is an admission of the validity of the levy, which estops defendant from attacking the attachment or defending an action on the bond by a denial of such levy,[74] and, further, some authorities announce broadly that the obligors in the bond are estopped to deny the regularity or sufficiency of the attachment.[75]

Where the bond does not release the property without an order of discharge, the giving of the bond does not preclude defendant from moving to dismiss the attachment,[76] and a bond does not

of plaintiff's claim—Ravely v Isensee, 221 N W 38, 57 N D 286

Bond for real estate

Where a replevy bond has been given to secure the release of real estate, this will not affect the right to foreclose the attachment lien, because the bond cannot be accepted to release real estate—Toland v Stroud, (Tex Civ App) 36 S W.(2d) 769.

Change in nature of action

Principal and surety on an attachment bond are not liable to defendant in attachment, where there was no legal seizure of property of defendant in attachment, either by levy or by garnishment, and attachment was dissolved by filing of dissolution bond prior to answer of garnishee and of defendant in attachment, whereafter the case proceeded as an ordinary suit at law—Dunn & McCarthy v Pinkston, (Ga App) 187 S E 175

Time of dissolution

The lien acquired by an attachment was gone the moment a bond given to dissolve the attachment was delivered—Guaranty Sec Corporation v Oppenheimer, 137 N E 644, 243 Mass. 324

Money paid to secure the release of a portion of attached property must be regarded as a substitute for the attached property if not as partial payment of the debt—Everett v Cutler Mills, 160 A 924, 52 R.I 330

70. Miller v London, (Mass) 1 N E (2d) 198—6 C J p 337 note 76

Rule as to real estate

Statutes contemplating restitution of possession are inapplicable to real estate and the bond does not discharge the attachment lien, and, therefore, defendant cannot convey a free and clear title to such real estate, it remaining subject to levy on execution—Cowart v Venable, 90 So 219, 86 Fla 367

71. In re Federal Biscuit Co, (N Y) 214 F. 221, 130 C C A 635.

72. Hall v Cutler Bindery Co, (Or) 26 P (2d) 1109

73. Neb—Burnham - Munger - Root Dry Goods Co v Strahl, 166 N W 266, 102 Neb 142
N C—Bizzell v Mitchell, 142 S E 706, 195 N C 484
Tex—The Leader, Inc v Elder Mfg Co, (Com App) 39 S W (2d) 880, reversing Elder Mfg Co v The Leader, (Civ App) 25 S W (2d) 274.
6 C J p 337 notes 81, 82.

In New York

(1) The supreme court has held that defendant's giving of a forthcoming bond does not preclude a subsequent motion to vacate an attachment for insufficiency of plaintiff's affidavit—Shapiro v Loft, Inc, 254 N Y S 197, 142 Misc. 144.

(2) The city courts, however, have held that the condition of a release bond that defendant will deliver the property to satisfy the execution constitutes an admission that the warrant of attachment issued regularly, provided the summons was personally served, and that a motion to vacate the warrant, on the ground that the facts shown in the papers do not justify an attachment, will not lie—Erlich v Bristol, 262 N.Y. S 340, 341, 146 Misc. 831

(3) Discussing the effect of the statutory condition in a release bond given under the Justice's Court Act, it was stated, "in other words, the defendant says, in effect, 'You let me have my property, and if you recover judgment, I will pay the judgment up to the amount of the sum specified in the undertaking, if I don't return the property' . . . Because of the provisions of the Justice's Court Act relative to warrants of attachment and the view here expressed, it would seem that the motion to vacate the attachment becomes an academic question"—Erlich v Bristol, supra

74. U S—Ross-Higgins Co v. Protzman, (C C A Alaska) 278 F 699.
Fla—Moore v Holder, 116 So. 498, 95 Fla 504
Kan—Larimore v Parker, 168 P 859, 101 Kan 729
N Y—Einsenbud v Gellert, 55 N Y S 953, 26 Misc 867
S D—Brown v Tidrick, 85 N.W 185, 14 S D 249, 86 Am S R 754
Wis—Billingsly v Harris, 48 N W 108, 79 Wis 103
6 C J. p 337 note 83, p 352 note 44.

Bond to prevent attachment

Where a bond recites that it was given to dissolve an attachment whereas it was given to prevent an attachment, and its object was accomplished, the sureties are estopped to deny the levy of an attachment—Taborsak v Massachusetts Bonding & Insurance Co., (Mass) 193 N E 729

Property subject to mortgage

Where property subject to a mortgage was attached and released on a dissolution bond, the fact that the levy may have been void is no defense where the principal ignored other remedies and gave the dissolution bond—Truax v Title Guaranty & Surety Co., 162 P 586, 94 Wash 472.

75. Ross-Higgins Co v. Protzman, (C C A Alaska) 278 F. 699
Voidability of contract sued on cannot be urged—Ross-Higgins Co. v Protzman, (C.C.A Alaska) 278 F. 699

76. Love v Voorhies, 13 La.Ann. 549—6 C J p 338 note 85.

preclude defendant from traversing the truth of the grounds of attachment,[77] or from moving to dismiss the attachment.[78]

Mistake. It would seem that a mutual mistake of fact as to the actual levy may be shown, for in such case there is a failure of consideration.[79]

(b) Dissolution Bond

The giving of a dissolution bond ordinarily prevents the defendant from attacking the validity of the attachment, although it has been held by some authorities not to preclude the assertion of its wrongfulness, or a demand for additional security.

Where defendant gives a dissolution or discharge bond, or a bond conditioned to perform the judgment, which operates to discharge the attachment altogether, and makes the obligors unconditionally liable, this would seem to render immaterial the validity or even the existence of the grounds on which the attachment was based.[80] As to this, however, the authorities are not uniform, and while the decided weight of authority is in support of the view that the giving of such a bond operates as a waiver on the part of the attachment defendant to move for a dissolution of the attachment thereafter, and estops him to deny the truth or sufficiency of the grounds on which it was issued or the regularity of the proceedings,[81] the courts of a number of states adhere to the view that defendant may proceed to vacate the attachment notwithstanding the giving of such bond.[82] However, conceding that the attachment defendant is estopped to assert matters making the attachment merely voidable, the rule cannot be extended so as to estop defendant from showing that the proceedings are absolutely void, where to do that would confer jurisdiction upon a court having none.[83]

77. Ga.—Perryman v. Pope, 21 S.E. 715, 94 Ga. 673—Blumby v. Rickoff, 21 S.E. 232, 94 Ga. 429
Miss.—Montague v. Gaddis, 37 Miss. 453

78. Walter v. Kierstead, 74 Ga. 18

79. American Agr. Chemical Co. v. Ætna Casualty & Surety Co., (Mass.) 193 N.E. 367

Effect of plaintiff's forbearance to attach

Where no attachment of certain of defendant's real estate was made by the officer who attached other real estate, and plaintiffs' attorneys were not led to assume that the bond to dissolve attachment was furnished to avoid a threatened or impending attachment, plaintiffs' forbearance or failure to make a new attachment did not estop the surety to deny that an attachment was made on the theory that any mistake made was its mistake only or on the theory that the recitals in the bond induced the mistake on the part of plaintiffs.—American Agr. Chemical Co. v. Ætna Casualty & Surety Co., (Mass.) 193 N.E. 367

80. Ind.T.—Sanger v. Hibbard, 53 S.W. 330, 2 Ind.T. 547
Ky.—McCormack v. Henderson, 10 Ky.L. 541
Wash.—Brady v. Onffroy, 79 P. 1004, 37 Wash. 482
6 C.J. p. 338 note 90.

Dissolution bond is absolute undertaking

A bond given for the release of attached property, conditioned for payment of any judgment recovered against defendant, is not a substitute for the attached property, but is an original unconditional contract of the sureties, which renders it immaterial whether the attachment was valid.—First Nat. Bank v. McKean, (C.C.A.Or.) 285 F. 557—6 C.J. p. 338 note 91 [a]

81. U.S.—First Nat. Bank v. McKean, supra—Ross-Higgins Co. v. Proizman, (C.C.A.Alaska) 278 F. 699
Cal.—Koehler v. Sorr, 13 P.(2d) 673, 216 Cal. 143, 89 A.L.R. 262
Conn.—O'Keefe v. Elmer Automobile Co. of Winsted, 152 A. 280, 112 Conn. 370
Fla.—Moore v. Holder, 116 So. 498, 95 Fla. 504
Kan.—Toelle v. Sells-Floto Shows Co., 207 P. 849, 111 Kan. 562
Ky.—Turner Elkhorn Coal Co. v. Smith, 291 S.W. 715, 218 Ky. 503
Mont.—Sloan v. Young, 284 P. 131, 86 Mont. 414
Neb.—Burnham-Munger-Root Dry Goods Co. v. Strahl, 166 N.W. 266, 102 Neb. 142
N.D.—Ravely v. Isensee, 221 N.W. 33, 57 N.D. 286
Pa.—Bellah v. Poole, 11 Pa.Dist. 150
Tenn.—McWaters v. Hall, 15 Tenn. App. 46
Tex.—Turner v. Martin, (Civ.App.) 45 S.W.(2d) 236
W.Va.—Perkins v. Friedberg, 110 S.E. 618, 90 W.Va. 185
6 C.J. p. 338 note 91, p. 352 notes 43, 48, 49

General on prayer for specific attachment

Where a general attachment was issued, the obligor on a release bond to perform the judgment could not claim that a specific attachment was prayed for.—Fidelity & Deposit Co. of Maryland v. Helm, 289 S.W. 280, 217 Ky. 384

Misjoinder in original bill

A surety could not avoid liability on a bond to dissolve an attachment in an equity suit on the ground of misjoinder of parties plaintiff in such suit in equity.—Degnan v. Maryland Casualty Co., 171 N.E. 482, 271 Mass. 427

Questioning affidavit

Where an attachment bond unconditionally promised to pay a judgment on the merits, and effected release of the attached property, the parties thereto are estopped from questioning the regularity of the affidavit therefor.—Connor Live Stock Co. v. Fisher, 255 P. 906, 32 Ariz. 80, 57 A.L.R. 196—National Surety Co. v. Poates, 43 App.D.C. 334—6 C.J. p. 338 note 91 [g]

82. Thompson v. Royal Indemnity Co., 221 N.W. 415, 197 Wis. 43—6 C.J. p. 338 note 91½

Bond not a waiver of statutory ground

The giving of an attachment discharge bond does not waive the validity of the statutory ground on which the attachment was based.—Bissell v. Mitchell, 142 S.E. 706, 195 N.C. 484.

Necessity of judgment establishing ground

The statute requiring a bond to pay a judgment against attachment defendant contemplates a judgment establishing the validity of the ground of attachment, if traversed.—Bissell v. Mitchell, 142 S.E. 706, 195 N.C. 484

83. Cal.—Koehler v. Serr, 13 P.(2d) 673, 216 Cal. 143, 89 A.L.R. 262
Mont.—Sloan v. Young, 284 P. 131, 86 Mont. 414
Tenn.—New York Casualty Co. v. Lawson, 24 S.W.(2d) 881, 160 Tenn. 329.—McWaters v. Hall, 15 Tenn. App. 46
6 C.J. p. 353 note 55

Attachment prima facie valid

Where the affidavit recited that the action was one of contract, the question whether the action for

Some courts take the view that the giving of a dissolution bond will not estop defendant in attachment from maintaining an action on the attachment bond to recover his costs and the damages which he may have sustained by reason of the attachment, if it is finally determined that plaintiff had no cause of action,[84] but, as a general rule, the statutory condition being an unconditional promise to perform the final judgment of the court, the action proceeds as though no attachment had ever issued, and the election to dissolve the attachment estops defendant to claim that it was wrongful[85]

The execution of the statutory bond for the discharge of an attachment does not operate as a waiver of the right to demand additional or increased security from the attachment plaintiff[86]

(3) On Right to Proceed to Judgment

Ordinarily, the giving of a bond to release attached property has no effect on the plaintiff's right to proceed to judgment.

The giving of a bond does not preclude the rendition of a personal judgment against defendant on plaintiff's demand,[87] and, under ordinary circumstances, can have no effect whatever on the right of plaintiff to proceed to judgment in the main action, but under a statute permitting defendant in the attachment, brought for a debt not due, to give a bond conditioned for the payment of the debt at maturity, it has been held that the creditor cannot proceed to judgment after the bond is given[88]

An objection, by a surety on an undertaking given to secure the release of property attached at the commencement of an action, to a second trial of the action, on the grounds that a judgment against defendant, the principal obligor, remains of record and unreversed, and that there is no issue joined between plaintiff and surety, is properly overruled where the effect of vacating the original judgment as to the surety was to vacate it as to defendant.[89]

(4) On Right to Possession

Where the defendant executes a redelivery or dissolution bond, he thereupon becomes entitled to possession of the attached property.

Where defendant in attachment executes and delivers to the attaching officer a bond in conformity to the statute for the release of the property or the discharge of the attachment, he becomes entitled to the possession of the attached property,[90] and it becomes the duty of the attaching officer to deliver such property to him,[91] without prior demand[92]

Where the attachment is discharged by the giving of an undertaking, defendant may be required to pay the fees and charges of the levying officer as a condition of receiving back possession of the property.[93]

money received and conversion was based on contract or tort was not a matter of jurisdiction, but of evidence, as to which the complaint on which the attachment was based was not conclusive on rightfulness of attachment, and it was prima facie valid, and, consequently, the defect constituted no defense—Koehler v Serr, 13 P.(2d) 673, 216 Cal 143, 89 A.L.R 262

Where pleadings show attachment unauthorized

Where the grounds for attachment and other statements in the affidavit are contradicted by recitals in the complaint showing no right to an attachment, and the proceedings have been vacated on motion, such void proceedings may be shown in defense to an action on the undertaking to release the attachment—Kreider v American Surety Co of New York, (Cal.App.) 43 P (2d) 331.

84. Anvil Gold Min. Co v Hoxsie, (Alaska) 125 F 724, 60 C.C.A. 492—6 C.J. p 340 note 6.

85. Ky.—Fidelity & Deposit Co. of Maryland v. Cobb, 281 S.W 478, 213 Ky. 467
Wash.—Gutter v. Joiner, 105 P. 457, 56 Wash. 202.

Reasons for estoppel

"By the execution of the bond the defendant waived all objections to the attachment or what had been done under it He put it out of the power of the plaintiff to establish in that action that the attachment was properly obtained But for the giving of the bond the plaintiff might by amendment have asserted other grounds in addition to those he had alleged and might so in the end have sustained the attachment, though the grounds he had alleged, which had been controverted, were not sustained by the evidence . . The trial by the court with the witnesses before it could not be had after the bond was executed, and the right being expressly waived by the execution of the bond now sued on, the defendant cannot be heard to say that the right he then waived may be asserted in this action and is to be determined by the jury on the facts now shown"—Fidelity & Deposit Co of Maryland v Cobb, 281 S.W 478, 479, 213 Ky 467

86. Dusseldorf v. Redlich, 16 Hun (N.Y.) 624.

87. Ariz.—House v Smith's Cashway, 300 P 951, 38 Ariz 399
Ga.—Blakely Milling & Trading Co v Thompson, 128 S.E 688, 34 Ga App 129
Ind.—Eberhart v Eyre-Shoemaker, Inc., 134 N.E 237, 78 Ind.App 658
6 C.J. p 339 note 97.
Bond as appearance see Appearances § 12

88. Church v Henry, 17 La 70—6 C.J. p 339 note 92

89. U.S. Surety Co v. American Fruit Product Co., 40 App.D.C 239

90. Stevenson v Palmer, 24 P 5, 14 Colo 565, 20 Am.St.R. 295—6 C.J. p 339 note 94

91. Rodenfels v Stroemer, 248 N.W 442, 211 Wis 536—6 C.J. p 339 note 95.

On waiver of exceptions to sureties

Attachment plaintiff's attorney having expressly waived exception to the sureties on the redelivery bond, it was the sheriff's duty to return the attached automobile to defendant, even if the latter never demanded the return thereof—Rodenfels v. Stroemer, 248 N.W. 442, 211 Wis 536

92. Rodenfels v. Stroemer, supra.

93. Jones v Gould, 99 N.Y.S 789, 114 App.Div. 120—6 C.J. p 339 note 96.

(5) On Right to Deny Ownership or Liability to Seizure

The obligors on a bond to release attached property cannot, as a rule, deny the liability of the property to attachment or defendant's ownership.

Although there is authority to the contrary,[94] the obligors in a dissolution or redelivery bond cannot, as a rule, show that defendant is not the owner of the attached property,[95] or that it is not subject to levy.[96] However, it has also been held that a bond conditioned to release attached property, to pay any judgment that might be rendered, or to have the property ready to satisfy it was not a recognition of the title of defendants, and could have no force as a ratification of an unauthorized purchase by another.[97]

Assuming that the obligors may show want of ownership, proof of some interest in the property will be sufficient to render them liable on a redelivery bond.[98]

Showing encumbrances Where a bond is given under a statute requiring security conditioned to pay the value of the interest of defendant in the attached property, the obligors may show that defendant's interest was so small that merely nominal damages are recoverable,[99] but where the bond is conditioned to pay the judgment without reference to the value of the property, the existence of encumbrances is immaterial and cannot be shown.[1]

(6) On Liability to Subsequent Levies

The release of the property does not preclude its seizure on other levies, nor prevent the issuance of other attachments

It has been held that the giving of the statutory bond will not bar the issuance of another attachment where it appears that the surety is insolvent and the security insufficient,[2] nor does a bond to release certain property defeat the right to a second attachment in the same suit against other property, where defendant fails to give a bond for the release of his whole estate.[3] Where property has been released on bond, it may be levied on for execution of judgment,[4] and the giving of the bond does not prevent a creditor's motion to pursue the released property for satisfaction of execution in the hands of fraudulent holders of title.[5]

c. Rights and Remedies of Sureties

The surety may recover any amount paid from his principal, and, in some jurisdictions, may intervene to quash the bond or defend the main suit.

The surety has recourse against the principal

94. Ayres, etc., Co v Dorsey Produce Co, 70 N W. 111, 101 Iowa 141, 63 Am S R 376.

Statutory notice of ownership

In an action on a delivery bond, where the defense that the property belonged to a person other than defendant is raised, a statute relating to the notice to be given to the sheriff by claimant of attached property, designed for the protection of the sheriff, does not apply—Ayres, etc, Co v. Dorsey Produce Co, 70 N W 111, 101 Iowa 141, 63 Am S.R 376

95. Cal—Barrios & Co v. Indemnity Ins Co of North America, 282 P 386, 101 Cal App 675
Conn—Tolman v McLay, 157 A 647, 114 Conn 98.
S C—Bissell v. Mitchell, 142 S E 706, 195 S C 484
Tex—Calvert v Bennett, (Civ App) 286 S.W 303—Wells v. Cloud, (Civ. App) 202 S W 331
6 C J p 339 note 98, p 352 note 46

Undertaking constitutes original, independent, and absolute contract of sureties not dependent on the question of ownership—Barrios & Co v. Indemnity Ins Co of North America, 282 P 386, 101 Cal.App 675

Where a stranger to an attachment suit, in possession of the attached property, gives a redelivery undertaking under the statute, he cannot thereafter assert ownership and try the right of property under the statute—Commercial Nat Bank of Kearney v Faser, 155 N W 601, 99 Neb 105—6 C J p 340 note 99

Wife's claim of separate property

Judgment on a bond given by wife to release an automobile claimed by wife, attached in action against community of husband and wife, wherein the judgment was entered against the husband only, without the wife asserting ownership, was proper—Wingate v. Tolman, 243 P. 853, 137 Wash 634

96. Ark—Morrison v. Alphin, 23 Ark 136
Cal—Barrios & Co v Indemnity Ins Co. of North America, 282 P 386, 101 Cal App 576
Fla—Moore v. Holder, 116 So. 498, 95 Fla 504.
6 C J. p 352 note 45

97. Woods v. Robertson, 31 Mich 64

98. Huish v. Fenkell, (Utah) 39 P. (2d) 330

Record held to show some interest of defendant in attached property—Huish v. Fenkell, (Utah) 39 P (2d) 330

99. Tolman v. McLay, 157 A. 647, 114 Conn 98

Omission of statutory recitals

Where a debt has been attached, although not due, and a bond has been given to release the attachment, the fact that the bond omits the statutory condition to pay only the principal's interest in the attached property will render ineffective the defense that the debt was not due and that, therefore, the principal's attached interest was of no value—Robertson & Govanne Contracting Co v Ætna Accident & Liability Co, 99 A 557, 91 Conn 129

Evidence held insufficient.—Evans v Rappaport, 146 A. 611, 109 Conn 362

1. Dorr v. Clark, 7 Mich 310.

2. Stewart v Dobbs, 39 Ga 82—6 C J p 340 note 2

3. Kaylor v Davy Pocahontas Coal Co, 87 S E 551, 118 Va 369.

4. Miller v. London, (Mass) 1 N E (2d) 198.

Right to levy execution on property

"The effect of giving a bond under those sections is not to work a complete substitution of securities The effect is to permit a defendant, who has given bond in compliance therewith, to dispose of the property which was attached If after giving the bond he decides not to dispose of the property but to retain it, it is liable to seizure on execution"—Miller v. London, (Mass) 1 N.E (2d) 198, 200

5. Wilkinson v Macheca, 103 So 733, 158 La 183.

on an attachment bond for any amount he is obliged to pay thereunder, and the dismissal of the attachment suit as to one of the principals will not affect his liability to the surety.[6]

In some jurisdictions the sureties may protect their interests by moving to quash the attachment and bond,[7] and by defending the main action.[8] However, in other jurisdictions, they may not intervene and defend the main action,[9] and this is true where summary judgment may be entered against the surety and he is a party only for that purpose.[10] It has been held that a motion to quash a forthcoming bond is not proper or permissible in an action on such bond.[11]

Where an attachment is quashed, the surety may move to have the bond discharged.[12]

The surety's petition to be relieved of a forfeiture need not be brought in equity.[13]

§ 314. —— Effect of Appeal, Supersedeas, or Stay Bond

Ordinarily a bond on appeal cannot take the place of a forthcoming bond.

In the absence of statutory provision it is held that an appeal undertaking cannot be given the force of a forthcoming bond or be permitted otherwise to alter the status of the attached property,[14] the lien of the attachment, or the liability of the obligors on a delivery bond,[15] but, on the other hand, it has also been held that a supersedeas bond, which must be given to secure whatever judgment is rendered in a court of error, is a substitute for plaintiff's security by attachment or by bond given by defendant to dissolve an attachment.[16]

Where the same person is surety on both the delivery bond and the supersedeas bond, he is liable on both bonds,[17] although his total liability cannot exceed the amount for which the principal is in default upon the judgment rendered against him.[18]

§ 315. —— Liability of Obligors

a. Scope and extent
b. Conditions precedent

a. Scope and Extent

The liability of the obligors upon a bond or undertaking given to release attached property is measured by its terms and in case the attachment proceedings are not void may be either for the return of the attached property or the payment of its value or the satisfaction of the judgment against defendant.

The liability of the maker or sureties upon an undertaking or bond given to secure the release of the attached property is measured by the terms of the obligation which they have executed,[19] and where the sureties sign a bond freely and with full opportunity to understand the act, they are bound according to the terms of the bond and cannot show that they did not comprehend the con-

6. King v Malone, 99 A 691, 91 Conn 342.

7. Bizzell v Mitchell, 142 S E 706, 195 N C 484

8. N Y—Jewett v Crane, 35 Barb 208, 13 Abb Pr 97
Tex—The Leader, Inc v Elder Mfg Co, (Com App) 39 S W (2d) 880, reversing Elder Mfg Co v The Leader, (Civ App) 25 S W (2d) 274

9. Manufacturers' Finance Corporation v. Vye-Neill Co, (D C Mass) 46 F (2d) 146, affirmed (C C A) 62 F (2d) 625, certiorari denied Kane v Manufacturers' Finance Corporation, 53 S Ct. 657, 289 U S 738, 77 L Ed 1486.

10. Longshore v. Collier, 140 S E 636, 37 Ga App 450, followed in Reddy-Waldhauer-Maffett Co v Cranman, 153 S E 616, 41 Ga App 563

11. Craft v. Smith, 33 So 996, 45 Fla 222

12. The Leader, Inc, v Elder Mfg Co, (Tex Com App) 39 S W (2d) 880, reversing Elder Mfg Co v The Leader, (Civ App) 25 S W (2d) 274

13. Moody v. U S Fidelity & Guaranty Co, 137 So 308, 223 Ala 507

14. Collins v Burns, 26 P. 145, 16 Colo 7—6 C J p 340 note 7

15. U S—Ebner v Heid, (Alaska) 125 F 680, 60 C C A 370
Iowa—State v McGlothlin, 16 N.W 137, 61 Iowa 312—Williams v Robison, 21 Iowa 498
6 C J p 340 note 8

16. Ky.—Broughton v Saylor, 110 S W. 866, 129 Ky 180, 33 Ky L 611
Mass—Russia Cement Co v. Le Page Co, 55 N E. 70, 174 Mass 349
6 C J p 340 note 9

17. State v. McClothlin, 16 N W 137, 61 Iowa 312—6 C J p 345 note 46

18. State v McClothlin, supra

19. Mont—Sloan v. Young, 284 P 131, 86 Mont. 414
Or—McCargar v. Moore, 157 P. 1107, 88 Or. 682
6 C J p 340 note 10.

Express terms

The sureties may stand upon the express terms of their contract—Western Lithograph Co. v. Vanomar Producers, 263 P. 850, 88 Cal App 549

Errors or mistakes as to parties

(1) The surety on a bond to dissolve an attachment, signing under a mistaken belief as to the identity of the principal, is not liable on judgment against defendant other than such principal—Gordon & Dilworth v. Abbott, 154 N.E 523, 258 Mass 35

(2) Where the surety, as attorney for defendant in attachment, drew up the bond to secure the release of the property, which effected its purpose, he is not relieved from liability on the bond because the condition was therein stated to be the payment by defendant of all damages, costs, etc, recovered by defendant against plaintiff, which, in the most charitable view, was merely a clerical error and judgment was in fact recovered against defendant—Aman v Carpenter, 178 N.W 33, 210 Mich 660.

(3) Where a replevy bond was given by a stranger as authorized by statute, but was conditioned as though the stranger were defendant, a judgment for the true defendant shows no breach of the stranger's bond, and as a consequence no liability arises on the bond, either as a statutory or common-law obligation—Donaldson v. Wilkerson, 68 So. 812, 192 Ala. 100.

sequences.[20] So, where a common-law bond is taken, the scope and extent of the undertaking is to be gathered from the intent of the parties thereto as disclosed by a fair import of its language,[21] and the liability of the parties is measured by its terms and not by the terms of the statutory bond.[22]

The liability of the sureties cannot be extended to other actions than that in which the bond is given by a subsequent agreement of the principal[23] or by the action of the court.[24]

Necessity for valid attachment. Where an attachment is void for want of jurisdiction, the bond is also void, and no liability arises thereon,[25] but in a jurisdiction in which the truth of the matters set forth in the affidavit for attachment cannot be put in issue for the purpose of abating the writ, the sureties on a replevy bond cannot complain of a foreclosure of the attachment lien and a judgment against them on the bond on the ground that the facts stated in the affidavit are not true but are protected by the attachment bond.[26]

Bond for return of property. The only undertaking assumed upon a forthcoming bond in its ordinary form is that the property shall be forthcoming or the judgment in attachment shall be satisfied;[27] where the attachment is sustained, it is the duty of the obligors to return the property to the proper officer where a sale of the property is ordered[28] or, upon demand, to restore the property to the attaching officer so that execution can issue thereon,[29] and a cause of action accrues against the surety when, after such judgment, he refuses to deliver the property on demand and the execution is returned unsatisfied.[30] Under such a bond, the sureties are not liable for the payment of a personal judgment against defendant.[31]

Where the condition of the bond is merely that the property shall be forthcoming to answer the judgment, the party giving the bond does not become personally liable for the debt which formed the basis of the suit, but is bound only to produce the property in case judgment in the attachment proceeding is rendered for plaintiff.[32]

Where attached property is replevied with the intention of wasting and converting it, and the sureties on the bond had notice of such intention, they are jointly liable with their principal for the conversion.[33]

Bond for performance or payment of judgment. Where the obligor on the bond to discharge the attachment binds himself that defendant will perform the judgment of the court, he must perform such judgment in case defendant does not do so,[34] and upon judgment in favor of plaintiff the ob-

20. Waverly Lumber Co. v Pantedosi, 160 N E 268, 262 Mass 377

Mistake as to principal

A surety on a release bond is bound to ascertain his principal, and if by mistake he signs for one instead of for another he will not be allowed thus to defeat the levy and then set up his own act as a defense —Doane v. New Orleans, etc, Tel. Co, 11 La Ann 504.

21. Fazzano v. Martin, 108 A. 512, 94 Conn 91

22. Ala —Campbell v. Tucker, 154 So 825, 228 Ala 658, denying certiorari (App) 154 So 821

Pa —Commonwealth v. Tomashefsky, 93 Pa Super 104

23. McCargar v. Moore, 157 P 1107, 88 Or 682.

24. McCargar v. Moore, supra—6 C J. p 341 note 11.

25. Fried v. Continental Casualty Co, 279 N Y.S 916, 155 Misc 427.

26. Green v. Hoppe, (Tex Civ App) 175 S W. 1117

27. Royal Collieries Co v Picklesimer, 42 S.W (2d) 907, 240 Ky 686

Proceeds of insurance

The surety on a bond for the forthcoming of attached property is not liable for the amount of insurance paid the principal where the property has been destroyed by fire, the bond being silent on the question —Jones & Dubuisson v. Picard, 123 So. 416, 11 La App 239

Who bound to return

Where a bond conditioned for the return of property does not stipulate who shall make the return, it is the duty of the bondsman to see that defendant complies with the condition of the bond —Lastowski v Lawnicki, 179 A 266, 115 N J Law 230

Construction of bond see supra § 313.

28. Hines v Martin, 1 S.W.(2d) 86, 175 Ark 1005

Forthcoming at time and place of sale

A breach of a forthcoming bond is shown on establishment of the refusal of the principal on demand to deliver the property notwithstanding the bond recites that the property is to be forthcoming at the time and place of sale and the proof fails to show that the property had been advertised for sale or that defendant had failed to produce it at the time and place of sale —Reese v. Brinkley, 112 S E 289, 28 Ga App. 570

29. Barrios & Co v Indemnity Ins Co. of North America, 282 P. 386, 101 Cal App 675

30 Unit Const Co v Foss, 234 P 903, 71 Cal App 204.

31. Larimore v Parker, 168 P. 859, 101 Kan 729.

32. Cermak v Schaaf, 139 N E 39, 308 Ill 61, 37 A L R 1393, affirming 224 Ill App. 351

33. Powell v Thompson, 80 Ala 51.

34. Fidelity & Deposit Co of Maryland v Helm, 289 S W. 280, 217 Ky. 334—6 C J p 341 note 13

Bond by one of two defendants

A bond executed to obtain the release of an attachment in an action against two defendants covers only the liability of the defendant named as principal in the bond, and was applicable only to the satisfaction of judgment obtained against such defendant alone or jointly —Massachusetts Bldg Finish Co. v. Brenner, (Mass) 193 N E 355.

Identity of cause of action

The burden undertaken by the surety on an attachment bond, at the time of its execution, was to meet any judgment for the same cause of action relied on by plaintiff when the action was commenced —Massachusetts Bldg Finish Co. v. Brenner, (Mass) 193 N E 355.

Within thirty days

Where the condition is to pay within thirty days after final judgment, recovery may be had where plaintiff held execution without any

ligation of the obligor to pay the judgment on demand becomes absolute.[35]

b. Conditions Precedent

(1) In general
(2) Judgment
(3) Execution
(4) Demand

(1) In General

As a condition precedent to liability on the bond or undertaking, there must have been a breach of the condition and it must have effectuated a release of the property or a dissolution of the attachment.

In order that liability may arise against the principal and sureties, there must have been a breach of the conditions of the bond or undertaking.[36]

It has been held that a bond for the release of attached property or the discharge of an attachment does not become operative, and no liability arises thereon, unless or until the attached property is redelivered to the attachment defendant or his agent,[37] but there is also authority for the view that, where the practice under the statute requires an order discharging the attachment upon the execution of the proper bond, if the condition of the undertaking is for the release of the property from the attachment and not from the possession of the officer, the condition is complied with by an order discharging the attachment, and it is immaterial whether or not the property was redelivered to defendant.[38] It is also no objection that the sheriff surrendered the property to a third person, where defendant consented thereto.[39]

(2) Judgment

A final judgment in the attachment proceedings imposing a liability upon the defendant named in the bond either to pay it or to surrender the attached property for its satisfaction is ordinarily essential to liability on either a dissolution or a forthcoming bond.

There must ordinarily be a disposition of the cause requiring payment of judgment, some claim adjusted for the satisfaction of which the property is required, or some order of court under which the production of the property becomes a duty, before liability under a forthcoming or dissolution bond can arise,[40] but the conditions of the bond may be such that a failure to redeliver the property before judgment may subject the obligors to liability.[41] Further, the judgment must have been rendered in the attachment suit; a judgment in another suit upon the same cause of action by the same plaintiff against the same principal debtor is not sufficient.[42] On the other hand, a personal judgment against defendant is not a condition to liability upon a redelivery bond where such a judgment or order is made as requires a production of the property,[43] and further, the surety becomes liable when defendant's liability is established, although judgment has not been rendered against the surety.[44]

Finality. The judgment to secure the performance or satisfaction of which a bond is executed is ordinarily the final judgment under which plaintiff is entitled to be paid or defendant to be discharged.[45] A dissolution bond, conditioned for the payment of final judgment, may be enforced although the final judgment is rendered nunc pro tunc as of a previous term, notwithstanding payment must, under the statute, be made in a limited time after final judgment to avoid a breach since such time did not run until the

action against the principal or surety and made no effort to notify them of the execution or to collect it for one year and two months—Marcus v Rice, 172 N E 354, 272 Mass 290

35. Ravely v Isensee, 221 N W 38, 57 N D 286

36. Donaldson v. Wilkerson, 68 So 812, 192 Ala 100

37. Rodenfels v Stroemer, 248 N W. 442, 211 Wis 536—6 C J. p 341 note 16

Redelivery as consideration see supra § 306.

38. Gardner v Donnelly, 24 P. 1072, 86 Cal 367—McMillan v. Dana, 18 Cal 339—6 C J p 341 note 17

39. Huish v. Fenkell, (Utah) 39 P (2d) 330

40. Ga—Hosch v Saunders, 136 S E 103, 36 Ga App 219

Ky—Royal Collieries Co v Picklesimer, 42 S W (2d) 907, 240 Ky 686

6 C J p 341 note 18.

A prior judgment by default which falls upon dissolution by the bond may not be made the basis of liability—Borden v. Surety Co, 13 Pa Co 627

Where debtor bankrupt

A judgment against the principal debtor in attachment is necessary for a judgment against the surety on a dissolution bond, regardless of the debtor's bankruptcy—Hosch v Saunders, 136 S E 103, 36 Ga App 219

41. Foss v. Norris, 70 Me 117—6 C J. p 342 note 19

42. Hosch v. Saunders, 136 S.E. 103, 36 Ga App. 219.

Judgment not accruing on causes of action alleged nor entered in due course of proceedings is not within purview of a bond discharging attachment—Benjamin G Hitchings, Inc, v. Hartford Accident & Indemnity Co, 239 N Y.S 632, 228 App Div. 778, affirmed 175 N E 325, 255 N Y 589

43. Ark—Hines v. Martin, 1 S W. (2d) 36, 175 Ark. 1005

Tex—U S Fidelity & Guaranty Co v Mueller, (Civ.App) 13 S W (2d) 430

Wash—Spokane Merchants' Ass'n v. Mussellman, 234 P. 1033, 134 Wash 116

44. U S Fidelity & Guaranty Co v Mueller, (Tex Civ.App) 13 S W. (2d) 430

45. Cox v Southern Surety Co., 226 N W 114, 208 Iowa 1252—6 C J. p 342 note 22.

Before motion for new trial

A judgment entered before motion for new trial was a "final adjudication" as regards liability on delivery bonds requiring satisfaction of judgment within twenty days of its rendition—Cox v. Southern Surety Co., 226 N W. 114, 208 Iowa 1252.

date of entry nunc pro tunc.[46]

Where a bond is conditioned to pay a judgment against the principal, and a claimant has intervened, a final judgment on the merits will fix the surety's liability although the intervening claim has not been adjudicated.[47]

Against or in favor of whom rendered. It is, of course, necessary in order to fix the liability of the obligors in the bond that the judgment rendered in the action should be against the person named in the bond as the one for the satisfaction of a judgment against whom the bond is executed, and a judgment against any other person cannot have this effect.[48] However, it is not necessary that the judgment should in form be against the obligors, even though the bond is conditioned to pay such judgment as shall be rendered in favor of plaintiff against the obligors.[49]

The obligors are liable on a bond for the discharge of an attachment conditioned for the payment of the judgment which may be recovered, although judgment is recovered against less than all of the defendants,[50] and, where the bond is conditioned to pay a judgment entered against defendants individually or jointly, a judgment entered against two of several defendants will render the surety liable.[51]

Where the property of one of two defendants is seized, a dissolution bond, conditioned to pay the final judgment in the action, will render the obligors liable not only for a judgment against both defendants, but for judgment against defendant alone who was not the owner of the property.[52]

Where other creditors may apply under the statute and have their claims adjusted, a bond, although conditioned for the return of the goods should judgment be rendered for plaintiff, is for the benefit of all such creditors and will be construed to refer to any plaintiff who, as applying creditor, has filed a declaration and recovered judgment.[53]

Sustaining attachment. On a bond to pay the debt and costs if judgment should be rendered against defendants, a judgment upon a verdict sustaining allegations of fraud upon which the attachment was based is not an essential prerequisite to a recovery on the bond.[54] Where, however, defendant is given the right to controvert the grounds for attachment notwithstanding the execution of a dissolution bond, the surety cannot be held in the absence of a judgment sustaining the attachment.[55]

The judgment sustaining the attachment need not be made at the time of judgment in the main action, but may be entered at any proper time.[56]

Necessity for order of sale or of return of property. Whether the judgment must involve a decision as to the attached property in order to impose liability on the bond is a question which depends upon the character of the bond and the practice in the particular jurisdiction.[57] In the case of a forthcoming bond which is conditioned to have the property forthcoming or to pay its value to the extent of any judgment which may be rendered, where, under the particular statutes involved, the proper procedure is for the court, upon rendering judgment for plaintiff, to make an order for the delivery of the property to the officer for sale and to make an order for the sale thereof, there is no liability upon the forthcoming bond in the absence of such an order,[58]

46. Russia Cement Co v Le Page Co, 55 N E 70, 174 Mass 349.

47. Cermak v Schaaf, 224 Ill App 351, affirmed 139 N E 39, 308 Ill. 61, 37 A.L R 1398

48. Ala.—Donaldson v. Wilkerson, 68 So 812, 192 Ala 100.
Mass.—Gordon & Dilworth v. Abbott, 154 N E 523, 258 Mass. 35.
6 C J p 343 note 30

49. Hunter v McCraw, 32 Ala 518

50. Patch v. Robbins, 159 N E. 532, 261 Mass. 496—6 C.J. p 343 note 32

Common-law bond

A bond executed by defendants for release of an attachment conditioned on payment by defendants of "any judgments that may be recovered against them," will be construed as a common-law bond to protect plaintiff upon rendition of judgment against one of the defendants, notwithstanding nonsuit against the other, the condition not failing because of such nonsuit—Fazzano v. Martin, 108 A 512, 94 Conn 91

51. Burns Bros. v. Block, (Mass.) 198 N E 164

52. Cal.—McCormick v National Surety Co, 66 P 741, 134 Cal 510
Mass.—Way v Murphy, 47 N E 500, 168 Mass 472—Prior v. Pye, 41 N E 353, 164 Mass 316
6 C J p 343 note 34

53. Hanness v Smith, 22 N J Law 332

54. Com v Klein, 13 Pa Super. 528

55. Burgener v Spooner, 268 S W 6, 167 Ark 316

By implication from an act permitting defendant to controvert the ground of attachment notwithstanding the execution of a discharging bond, judgment cannot be rendered against the surety thereon unless the attachment is sustained—Burgener v. Spooner, 268 S W. 6, 167 Ark 316

56. Swift & Co v. Leon Cahn & Co., 92 So. 355, 151 La. 837.

Attachment sustained on appeal

Where a separate judgment was rendered dissolving the attachment, and an appeal taken, it was not true that there could be only one judgment in the case, and the judgment on such appeal maintaining the attachment was efficacious although rendered after judgment on the merits—Swift & Co. v Leon Cahn & Co., 92 So 355, 151 La 837

57. Jordan v. Brown Shoe Co, 4 P. (2d) 1020, 152 Okl 288—6 C J. p 342 note 24.

Failure to decree a privilege

A judgment on appeal is sufficient to support an action on a forthcoming bond although it fails to decree for plaintiff a privilege, or order that the property be seized or sold, these being consequences of the maintenance of the attachment—Swift & Co v. Leon Cahn & Co, 92 So. 355, 151 La 837

58. Jordan v. Brown Shoe Co, 4 P. (2d) 1020, 152 Okl. 288—6 C J. p 342 note 25.

particularly where the condition is specifically to return the property if so directed,[59] and a mere personal judgment is held insufficient upon which to predicate the breach.[60] It would seem, however, that the surety upon a forthcoming bond who has agreed that the attached property shall be forthcoming and rendered subject to the order of the court when the litigation reaches a stage for such action may be liable although there is no judgment subjecting the attached property or directing its delivery with which the judgment debtor has failed to comply where the property is outside of the judgment of the court and such an order is impossible of enforcement.[61]

In the case of a dissolution bond, on the other hand, where the bond discharges the attachment, releases the property from the custody of the law, and contains an unconditional obligation to pay whatever judgment may be rendered against defendant, the liability of the sureties is fixed by a simple judgment against defendant,[62] and there is no necessity for a recital that the attachment is affirmed,[63] or an order for a redelivery or sale of the attached property.[64]

Pendency of appeal. Neither a statutory provision requiring an undertaking nor a provision requiring the return of attached property to defendant upon his recovery of a judgment against plaintiff in the absence of the perfection of an appeal by plaintiff and the execution of an undertaking affects the liability of the sureties upon an undertaking or common-law bond given to secure the release of an attachment which is conditioned to pay to plaintiff the amount of any judgment which may be recovered by him in the action.[65] Where a bond given to dissolve an attachment is not sufficient as a statutory bond to preclude the necessity of a recognizance on appeal from a judgment for plaintiff, the surety cannot assert that there is no final judgment permitting a recovery against him on his bond notwithstanding defendant has claimed an appeal where he has failed to comply with an order of the court to furnish an appeal bond.[66]

(3) Execution

In some jurisdictions an action will not lie on a bond to release attached property unless an execution has been issued and returned unsatisfied.

Where plaintiff obtains judgment and execution is issued and returned unsatisfied, the condition of an undertaking to discharge the attachment,[67] or to have the property forthcoming to abide the final order of the court,[68] is broken and the liability of the sureties attaches.

In some jurisdictions under the statutes an execution must be regularly issued and regularly returned unsatisfied, in whole or in part, before liability will arise on a dissolution bond.[69] A premature return of an execution will not support the action unless it appears that there was no property on which execution might have been levied.[70] An execution is unnecessary, however, where it cannot be satisfied, as where defendant has been adjudicated a bankrupt,[71] but it has also been held that where a discharge in bankruptcy has not been obtained within one year after adjudication the issue and return unsatisfied of the execution is a condition precedent to enforcement of the liability.[72]

In the absence of statutory requirement, execution and return unsatisfied, made by an officer, is not es-

59. Brotherton v Thomson, 11 Mo 94—McDonald v Loewen, 130 S W 52, 145 Mo App 49—6 C J p 343 note 26

60. Jordan v Brown Shoe Co, 4 P (2d) 1020, 152 Okl 288—6 C J p 342 note 25

61. U S Fidelity & Guaranty Co v McHargue, 97 S W (2d) 331, 265 Ky 813—U. S. Fidelity & Guaranty Co. v. Albert, 58 S W.(2d) 644, 248 Ky. 375.

62. Ferguson v. Glidewell, 2 S W. 711, 48 Ark. 195—6 C J p 343 note 27

63. Truax v. Title Guaranty & Surety Co., 162 P 586, 94 Wash 472—6 C J. p 343 note 28.

64. Iowa—Garretson v. Reeder, 28 Iowa 21—Waynant v Dodson, 12 Iowa 22
La—Guay v Andrews, 8 La Ann 141

65. Kast v. California Corporation, 197 P. 339, 185 Cal 450

66. Fogel v Dussault, 7 N.E 17, 141 Mass 154.

67. Jewett v. Crane, 35 Barb (N.Y.) 208

68. Collins v. Mitchell, 3 Fla. 4—6 C.J. p 343 note 37.

69. Passow & Sons v U. S Fidelity & Guaranty Co, 170 P. 1124, 177 Cal 31—6 C J p 343 note 37 [b]

Levy on goods subject to liens

An execution creditor is not bound to require an officer to pay liens on goods sought to be levied on nor to equip him so to do in order to fulfill the requirement of execution returned unsatisfied, a condition precedent to suing a surety on a bond to release an attachment—Passow & Sons v. U. S Fidelity & Guaranty Co, 204 P. 545, 56 Cal App 72

Regular issuance and return.—Hutchinson v. U. S Fidelity & Guaranty Co, 209 P 249, 58 Cal App. 573.

Sufficiency of return

An execution need not be returned showing that no property existed, and a return stating that no property is found, wherefor the execution is returned unsatisfied, is sufficient The existence of property is not material, the only question being the demand by the officer before the action may be brought, in the absence of a showing of fraud or collusion participated in by the officer—Hutchinson v U S Fidelity & Guaranty Co, 209 P 249, 58 Cal App 573

70. Passow & Sons v U. S Fidelity & Guaranty Co, 170 P. 1124, 177 Cal 31

71. Cal—Barrios & Co v Indemnity Ins Co of North America, 282 P. 386, 101 Cal App 675
Mont—Pue v Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct 19, 275 U S 493, 72 L Ed. 385
6 C J. p 343 note 37 [b] (2).

72. Curtin v. Katchinski, 161 P. 764, 31 Cal App. 768.

sential to establish the liability of the sureties on a bond given to discharge the attachment,[73] but where special judgment against property released on a forthcoming bond is required, special execution demanding the sale of the property is necessary.[74]

Where the bond is conditioned to pay the judgment, the liability of the sureties attaches upon the rendition of the judgment against defendant and the issue of execution is not a condition to the right to resort to the bond.[75]

Common-law obligation. The issue and return unsatisfied of an execution is not a condition precedent to the enforcement of a common-law obligation unless the bond specifies such issue and return.[76]

(4) Demand

A demand must be made before an action can be brought on a bond where it so provides or where the statute so requires.

Where the condition of the bond or undertaking is expressed to be for a redelivery of the property upon demand, or where demand is prescribed by statute, such demand is ordinarily necessary to fix the liability of the obligors and give the obligee a right of action upon the bond,[77] but it has been held that no demand for the redelivery of property is necessary where it has been removed from the jurisdiction by an insolvent defendant in the action who has left the jurisdiction,[78] where defendant has been adjudicated a bankrupt,[79] where a bond given to discharge an attachment is conditioned to pay plaintiff the amount of final judgment within thirty days after entry,[80] where the bond makes it the sheriff's duty to make the demand, and plaintiff in attachment sues on the bond,[81] or in any case where a demand would be fruitless [82] Where the undertaking for the release of an attachment is for defendant's payment of the judgment upon demand, the sureties being liable immediately on default of their principal under the statute, without demand or notice, plaintiff may sue them without waiting for the expiration of the day on which payment is demanded of, and refused by, defendant [83]

The issuance of an execution and service by the officer is a sufficient demand.[84]

Where there is more than one surety, and the obligation is joint and several, a demand need be made only of the surety against whom suit is brought.[85]

§ 316. —— Discharge of Sureties

a. Performance or impossibility of performance
b Change in obligation
c. Fraud or collusion; release of indemnity
d. Dismissal of principal action or judgment for defendant; dissolution or discharge of attachment
e. Pursuit of or failure to pursue collateral remedies
f. Failure to take judgment against sureties
g. Subsequent levy on property

a. Performance or Impossibility of Performance

The sureties upon a bond or undertaking for the release of the attached property may be discharged by a performance of its conditions and in some, but not in all, instances by a subsequent impossibility of performance.

The sureties upon a bond of the character under consideration may be discharged by satisfaction of its conditions. So, where the bond is for a redelivery of the property, they are discharged by such redelivery,[86] and if it is in the alternative to perform the

73. Jennings v Wall, 104 N E 738, 217 Mass 278

74. Wright v Manns, 12 N E 160, 111 Ind 422—6 C J p 344 note 39

75. Endress v Ent, 18 Kan 236—6 C J. p 344 note 40.

76. Lane Mortgage Co v U S Fidelity & Guaranty Co, 217 P. 765, 62 Cal App 636—6 C J p 343 note 37 [b] (3)

77. Roadman v. Traeger, (Cal App) 43 P (2d) 564—6 C J. p 344 note 41

Purpose of demand

"The legitimate object of a demand is to enable a party to perform without a suit at law"—Roadman v Traeger, (Cal App) 43 P (2d) 564

78. Driggs v. Harrington, 2 Mont 30.

79. Pue v. Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U S 483, 72 L Ed 385

Where property sold by order of bankruptcy court.—Curtin v Katchinski, 161 P 764, 31 Cal App 768

80. Jennings v. Wall, 104 N E 738, 217 Mass 278

81. Pue v Wheeler, 255 P. 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U S. 483, 72 L Ed 385

82. Roadman v Traeger, (Cal App) 43 P (2d) 564

Effect of defense of exoneration

Sureties cannot complain of want of demand upon them for the payment of judgment, where they set up the defense of exoneration on a bond given to secure the release of an attached bank account, thus showing that such demand would have been refused had it been made—Roadman v. Traeger, (Cal.App) 43 P (2d) 564.

An express refusal to pay the judgment waives the necessity for a demand, for it would then be a useless act—Goldberg v. Rempp, 273 P 63, 95 Cal App. 452

83. Gardner v. Donnelly, 24 P. 1072, 86 Cal 367.

84. Goldberg v Rempp, 273 P. 63, 95 Cal App 452—6 C J. p 344 note 41 [1]

85. Goldberg v. Rempp, supra

86. Meffert v. House, 299 S W. 550, 221 Ky 630—6 C J. p 345 notes 49, 53.

Bond without statutory condition

Where a delivery bond given by defendant under a statute was not

judgment or to have the property or its value forthcoming it may be satisfied at their option by the performance of either condition.[87]

In the case of a bond given to discharge the attachment conditioned for the payment of the judgment, it may be discharged by such a payment or tender of the proper amount,[88] but it can be discharged only by such payment or tender,[89] and the obligors have no option to return the property in lieu thereof.[90]

Where it is proper to discharge the bond by a redelivery of the property, it must be redelivered in its entirety[91] and in the same condition as when it was surrendered to defendant,[92] free from liens which have been permitted to attach by its release.[93] However, where a forthcoming bond is given to prevent a levy, and part of the goods were then so affixed to the realty that they could not be severed, the surety is liable only for the return of that portion which was then severable.[94]

Partial payment of judgment by third persons. While it has been held that a surety is discharged from liability where an insurer makes a partial payment on the judgment which payment exceeds the penalty of the bond,[95] it has also been held that such partial payment will not discharge the surety, but he must pay the remainder up to the penalty of the bond.[96]

Illegality or impossibility of performance. It has been held that, where the condition of a forthcoming bond subsequently becomes illegal or impossible of performance, the sureties are discharged from liability.[97]

Where property perishes from natural causes or is destroyed by accident without fault of the surety, the general rule is that he is discharged from liability on his bond,[98] although there is authority to the con-

conditioned as required thereby, but recited that the sureties would be obligated if the property was not "forthcoming and subject to the orders of the court," it was held that, upon return of the property, and its sale under an order of the court, the sureties were discharged.—Rogers v Tri-State Motor Sales Co, 265 S W 80, 165 Ark 590

87. Ariz.—Doran v Oasis Printing House, 211 P 562, 24 Ariz. 475
Utah.—Huish v. Fenkell, 39 P.(2d) 330.
6 C J p 345 notes 50–52, p 346 note 56

Implied election

A motion to quash the attachment will be treated as defendant's election to have the property forthcoming pursuant to one of the two alternative conditions of the previously given forthcoming bond.—Home Distilling Co. v Himmel, 82 S E 1094, 74 W Va. 756

88. Curiac v. Packard, 29 Cal. 194—Hayes v Josephi, 26 Cal. 535—6 C J. p 346 notes 57, 58.

Keeping tender good

A tender of payment by the surety which is refused absolutely discharges the surety, and he need not keep his tender good.—Hayes v. Josephi, 26 Cal 535—6 C J. p 346 note 57 [a].

89. Perry v. Post, 45 Conn. 354—6 C J. p 346 note 59

90. Perry v. Post, supra

91. Cal.—Metrovich v. Jovovich, 58 Cal 341.
Ky.—Bland v. Creger, 13 B Mon 509
6 C J. p 345 note 54

92. Unit Const Co. v. Foss, 234 P. 903, 71 Cal App. 204—6 C J p 345 note 55

93. Unit Const. Co. v. Foss, supra

Mechanics' liens on realty

Where mechanics' liens were inchoate when the attachment on realty was dissolved, but were reduced to judgment pending judgment in the attachment suit, a late tender of such property subject to adjudicated liens furnishes no defense, as against the contention that the liens related to a date before the attachment was levied, for, as stated by the court "Had the property remained under attachment, it is undoubtedly true that such liens would have taken precedence over the lien of plaintiff's attachment. In that case, however, the plaintiff would have had the right to intervene in any action to enforce such preferred liens and to contest the validity or the amount thereof Plaintiff's attachment lien ceased upon the release of the property . . . He thereafter had no standing to appear in the actions wherein the preferred liens were prosecuted to judgment If he is bound to accept redelivery of the property encumbered with the liens of the judgments entered in such actions, then the security which he obtained by levy of the writ of attachment, and the undertaking for release thereof, has been impaired by suits to which he was not and could not have become a party. Such security is a property right."—Unit Const. Co. v. Foss, 234 P. 903, 904, 71 Cal.App 204

94. Starnes v Bender, 290 S.W. 357, 172 Ark 788.

Oil well casings

Where a forthcoming bond was given to prevent a levy on eight hundred and sixty feet of casing cemented in an oil well, only one hundred feet of which could be removed without total destruction, the surety need not redeliver the eight hundred and sixty feet, but only the one hundred feet which were readily severable.—Starnes v. Bender, 290 S.W. 357, 172 Ark. 788

95. O'Connor v. Hartford Accident & Indemnity Co, 115 A. 484, 97 Conn 8

Effect of condition that defendant will pay

"The effect of the words 'Zavaritis shall pay' should not be restricted by any technical meaning They do not mean that Zavaritis must do this act in person or with any specific property It is sufficient if he caused any money belonging to him, and either in his possession or his control, to be applied upon this judgment, or if any debtor or friend did such a thing for him In any case, the obligee in the bond, the plaintiff in this action, would have received all he was entitled to claim under the terms of the condition in the bond, in every respect he would be as well off as he would be if the attachment on the money in the savings bank had not been released upon the substitution of this bond"—O'Connor v. Hartford Accident & Indemnity Co, 115 A. 484, 488, 97 Conn. 9

96. Rice v. Rosenberg, 178 N E 724, 277 Mass. 334

97. Jones & Dubuisson v. Picard, 123 So 416, 11 La.App. 289—6 C. J p 346 note 61

98. Jones & Dubuisson v. Picard, supra.

Accidental fire

Where an automobile was destroyed by an accidental fire, the surety on a forthcoming bond was discharged from his duty to produce the same because of impossibility of per-

trary.[99]

The fact that the property has been taken under a paramount title may operate in discharge of the surety on a forthcoming bond,[1] so, where defendant has given a replevy bond and the goods are repossessed by the conditional seller, the bond is discharged.[2]

Where plaintiff by his own act prevents the obligors from delivering the property and is thus himself the cause of the forfeiture, he cannot take advantage of it and the obligors will be discharged to the extent that they are thus prevented from making delivery,[3] but it is no defense to an action upon a dissolution bond that plaintiff[4] or the sheriff,[5] failed to pay off a lien on attached property, with the result that the property was surrendered to the holder of a title retaining note on release of the property.

b. Change in Obligation

The sureties upon a forthcoming or dissolution bond are discharged by a material change or alteration in their obligation without their consent, as, for example, by an amendment of the pleadings changing the cause of action. They are not, however, discharged by matters which do not affect the extent of their obligation, such as amendments of the pleadings not changing the cause of action, or by the taking of additional security, or a delay in the issuance of execution, or by the death of a party where the action is not destroyed.

Under rules of general application, which are considered at length in the title Principal and Surety §§ 124–127 [50 C.J. p 116 note 35–p 128 note 11], any material change or alteration in the contract of the sureties without their knowledge or consent will release them from liability.[6] However, a mere spoliation or alteration of the bond by a stranger or unauthorized third person will not have this effect but the sureties will be liable according to the original tenor of the instrument.[7] Further, the subsequent acts or agreements of the parties must have the effect of modifying the contract of suretyship in order to work a discharge of the sureties.[8] Thus the mere failure to prosecute a motion for a new trial or the entry into a stipulation waiving an appeal will not discharge the surety in the absence of fraud or collusion,[9] nor will the termination of the receiver's control of an action discharge the surety on a bond of the receiver, his successors, and assigns,[10] nor will a reference to arbitration by consent of the parties discharge the surety on a dissolution bond[11] or a removal of a cause from a state to a federal court discharge a redelivery bond.[12] So an unsuccessful attempt of the attaching creditor to prevent the release of the attached property upon the ground that the bond is invalid is not such an interference with the rights and prejudice to the interests of the surety on the bond as to discharge him from liability,[13] and a subsequent agreement between plaintiff and defendant whereby defendant paid certain sums to secure the release of a subsequent attachment does not release the surety upon defendant's bond given to dissolve an attachment of other property of defendant where final judgment against defendant had been had and remained unpaid and the bond is conditioned for the payment of any final judgment rendered against defendant.[14] Plaintiff in attachment does not lose his recourse against a bond given for the release of attached property by accepting a dividend from the assignee for the benefit of the creditors of defendant in attachment.[15]

Agreement to accept installments. A stipulation filed in court whereby defendant agreed to pay in installments, or, on default, that judgment might be entered for the balance, has been held to discharge the surety, because it changed the nature of the claim,[16] but it has been held to the contrary that an agreement to pay in installments accompanied by delay in trial did not have this effect.[17]

Delay or extension of time. Although as a general rule any extension of time for the performance of an obligation will discharge a surety, the fact that a case was continued from term to term before trial is not such an extension as will release the surety.[18]

formance through no fault of the obligors—Jones & Dubuisson v Picard, 123 So. 416, 11 La App 289.

99. Doggett v. Black, (C C Ind.) 40 F. 439.

1. Moody v U S. Fidelity & Guaranty Co., 137 So 308, 223 Ala 507

2. Moody v. U S. Fidelity & Guaranty Co., supra

3. Dunlap v Clements, 18 Ala. 778—6 C J. p 346 note 62.

4. Huish v. Fenkell, (Utah) 39 P (2d) 330

5. Huish v. Fenkell, supra

6. Michelin Tire Co. v. Bentel, 193 P. 770, 184 Cal 315.

7. Iowa—Rowley v. Jewett, 9 N W 353, 56 Iowa 492
Mass—New England Grape Co v Fidelity & Deposit Co of Maryland, 167 N E 646, 268 Mass 298—Savage v. Walshe, 140 N E. 787, 246 Mass 170
Tex—Greenwade v Bradley, (Civ App.) 274 S W 190.
6 C J p 347 note 79

8. Meyer v Jones, 163 P. 67, 32 Cal App 378.

9. Meyer v. Jones, supra.

10. American Surety Co. v. Campbell, etc., Co., (Mass.) 138 F 531, 71 C C A. 55, affirming (C C.) 129 F. 491.

11. Seavey v. Beckler, 132 Mass 203

12. Ramsey v. Coolbaugh, 13 Iowa 164.

13. Jennings v Wall, 104 N E. 735, 217 Mass 378.

14. Andrews v. Abbott, 142 A. 227, 49 R.I 255.

15. Easton v Ormsby, 27 A. 216, 18 R I 309

16. Montgomery v. Ottoman, 264 P. 283, 88 Cal App 755.

17. Andrews v. Abbott, 142 A. 227, 49 R.I. 255.

18. Me—Leavitt v. Youngstown Pressed Steel Co., 166 A. 505, 132 Me. 76.

Requirement of additional security or execution of new bond. The refusal to approve a dissolution bond until strengthened by the addition of another surety will not, after it is so strengthened and approved, exonerate the sureties who signed it originally.[19] The acceptance by the clerk of a new bond will not discharge the sureties on the former bond where it was valid and the clerk had no authority to surrender the former and accept a substitute.[20] The sureties are not discharged where the court makes a void order for a new bond and such order is not complied with.[21]

Where, after the execution of a common-law bond, a second and statutory form of bond is executed, it may be inferred that the second bond is accepted in substitution for the first, which becomes no longer in force.[22]

Amendment of writ. If the parties without the consent of the surety alter the return time of the writ from a date when there was no term of court so as to make it returnable to a proper date, and the dissolution bond recited that the writ was returnable on the first date, the surety is discharged.[23]

Amendment of pleadings. The sureties upon an undertaking for the release of an attachment have, as has been noted, the right to stand on the very terms of their contract, and, if their obligation has been changed without their consent, they are released from liability. Accordingly, an amendment bringing in a new cause of action,[24] or merging causes of action,[25] will release the surety.

Sureties on a forthcoming bond, or a bond conditioned to pay the judgment, are not discharged by proper amendment of the attachment affidavit, or of the declaration or writ, the identity of the action not being changed.[26] Such bonds are not discharg-

Mass.—Dunn v. Lerman, 135 N.E. 604, 241 Mass. 555.

19. Sampson v. Barnard, 87 Mass. 359—6 C.J. p. 348 note 94.

20. Detroit Fidelity & Surety Co. v. Gilliam, 34 S.W.(2d) 971, 237 Ky. 425.

21. O'Connell v. Rogers, 237 P. 775, 72 Cal.App. 539.

22. Rosenberg v. Ganz, 114 A. 659, 96 Conn. 469.

23. Simeon v. Cramm, 121 Mass. 492.

24. Cal.—Michelin Tire Co. v. Bentel, 193 P. 770, 184 Cal. 315—Rio Grande Oil Co. v. Seaboard Surety Corporation of America, (App.) 33 P.(2d) 887.

Mont.—Gilna v. Fidelity & Deposit Co. of Maryland, 272 P. 540, 83 Mont. 231.

6 C.J. p. 347 note 80.

Stipulation held no consent

A stipulation signed by the attorney of a surety on undertaking to release an attachment, permitting plaintiff to prosecute a claim thereafter assigned to it in the original action without prejudice to any rights which defendants may have against plaintiff, etc., was not a consent that the sureties' agreement should be altered so as to cover the new debt set up in the amended complaint.—Michelin Tire Co. v. Bentel, 193 P. 770, 184 Cal. 315.

25. Benjamin G. Hitchings, Inc., v. Hartford Accident & Indemnity Co., 239 N.Y.S. 632, 228 App.Div. 778, affirmed 175 N.E. 325, 255 N.Y. 589.

26. U.S.—White v. Nemours Trading Corporation, (D.C.Mass.) 290 F. 250.

Cal.—Rio Grande Oil Co. v. Seaboard Surety Corporation of America, (App.) 33 P.(2d) 887—Western Lithograph Co. v. Vanomar Producers, 263 P. 850, 88 Cal.App. 549.

Hawaii.—Wong Tin Look v. Goo Wan Hoy, 22 Hawaii 540.

Kan.—Gregory v. U.S. Fidelity & Guaranty Co., 185 P. 35, 105 Kan. 648, rehearing denied 185 P. 1041, 105 Kan. 648.

Mass.—Aronow v. Gold, 174 N.E. 267, 274 Mass. 65, 74 A.L.R. 910—Moreland v. National Surety Co., 160 N.E. 830, 263 Mass. 331—Patch v. Robbins, 159 N.E. 532, 261 Mass. 496—Savage v. Walshe, 140 N.E. 787, 246 Mass. 170.

Mont.—Sloan v. Young, 284 P. 131, 86 Mont. 414.

6 C.J. p. 347 notes 73–75.

Amendment to correct clerical errors in a bond to dissolve an attachment does not relieve the surety from liability thereon.—Gordon & Dilworth v. Abbott, 154 N.E. 523, 258 Mass. 35.

Amendment waiving personal judgment

Where a cause of action is amended so that a personal judgment is not sought, but merely a judgment upholding the attachment, the essential liability is not altered and the surety remains liable on his bond.—Spokane Merchants' Ass'n v. Mussellman, 234 P. 1033, 134 Wash. 116.

Clarifying declaration

Where a declaration in an action against a maker and an indorser of a note set out the note without clearly pleading the nature of each defendant's liability, the allowance of a substitute declaration charging them as maker and indorser in separate counts, without notice to the sureties on the dissolution bond, after trial, before the auditor, did not introduce a new cause of action, nor injuriously affect their substantial rights, and hence did not discharge them.—Savage v. Walshe, 140 N.E. 787, 246 Mass. 170.

Cause of action not changed

Where one count of a complaint was amended by substituting for a claim on a canceled contract a claim on a new contract for a less amount, which agreement recognized, liquidated, and promised to pay the former claim, the amendment did not discharge the surety, the two claims being substantially for the same indebtedness.—Rio Grande Oil Co. v. Seaboard Surety Corporation of America, (Cal.App.) 33 P.(2d) 887.

Change in remedy

(1) Where a complaint alleging that plaintiff had security for a portion of the debt is amended by omitting reference to the security, there is no new cause of action, although the remedy sought may be changed, and the surety is not released by such amendment.—Sloan v. Young, 284 P. 131, 86 Mont. 414.

(2) Where the remedy sought was changed by an amendment releasing the security for the debt, but the property subject to the security was attached and sold to satisfy the judgment, the security cannot complain of the amendment, assuming that such amendment would otherwise be material.—Sloan v. Young, supra.

Where the evidence was the same at the first and second trials, there was no change of cause of action releasing the surety from liability on a dissolution bond, securing release of attached property.—Hill v. Wilson, 261 P. 422, 123 Or. 193.

An increase in the ad damnum, even beyond the penalty of the bond, will not discharge the surety where the cause of action is not changed.—Turner v. Fidelity & Deposit Co. of

ed necessarily and as a matter of law by an amendment as to the name of a party[27] by bringing in a new defendant,[28] or by substituting defendants, where the substitution is as to one not a party to the bond,[29] or by substituting for plaintiff in attachment his assignee, under an assignment for the benefit of creditors made after execution of the bond.[30]

An amendment changing the name of one of two copartners suing and adding a third partner so changes the nature of the action that a judgment cannot be entered against the obligee as stipulated in the bond.[31]

The amendment of a cause of action which brings into the case a party in lieu of a nonexistent corporation will, according to some authorities, so alter the liability as to discharge the surety on the dissolution bond,[32] while other authorities hold the contrary.[33]

Some courts take the view that where the amendment attempts to increase the amount of the claim, the surety is not discharged by such amendment, but he remains liable for the amount of the original claim,[34] while others hold that the surety is wholly discharged.[35]

It would seem that the sureties are not discharged by the amendment until judgment is entered; and consequently an amendment which has been waived will not discharge the surety, judgment being entered on the original cause of action.[36]

The failure of plaintiff to give the surety notice of a motion to amend the writ or pleadings will not necessarily discharge the sureties.[37] The only effect of a failure to so notify the surety is that he is not bound by the amendments but may attack their allowance in the action on the bond.[38] If the surety cannot show that the cause of action has been changed substantially, and that his burden has been increased, he is bound, notwithstanding want of notice of the motion to amend.[39]

Discontinuance as to part of defendants. Where an attachment suit is discontinued as against one principal on a bond, but the principal is not released thereby from liability on the bond, the obligation of the surety is not increased nor his remedies affected, and the surety is not discharged by such discontinuance.[40] The same rule applies to consent of plaintiff to an amended answer asserting that defendants are not partners,[41] but there is also authority for the view that the bond must be considered as referring to the suit in progress at the time of its execution,[42] and that a discontinuance as to one or more defendants is such a change in respect to the obligation of the sureties as will discharge them.[43]

Maryland, 200 P 959, 187 Cal 76—Eastern Tire Co v. Witter, 133 N E 894, 281 Mass 523—6 C J. p 347 note 75 [a].

27. Adams v Jacoway, 34 Ark 542

28. Salvin v Sidman, 119 N E 704, 230 Mass 278—6 C J p 347 note 77

29. Massachusetts Bldg Finish Co v Brenner, (Mass) 193 N E 355.

Condition to pay judgment against codefendant

The substitution by amendment of a writ and declaration of a new party defendant in place of the original codefendant of the principal in an attachment bond does not take a judgment later entered out of the terms of the attachment bond which applied only to a judgment obtained against defendant named as principal in the bond, alone or jointly, but not to judgment against other defendants—Massachusetts Bldg. Finish Co. v Brenner, (Mass) 193 N.E. 355

30. Slosson v. Ferguson, 18 N W. 231, 31 Minn 448.

31. Frank v. Millen, 115 N E 48, 226 Mass 71.

32. Hall v. Cutler Bindery Co, (Or.) 26 P (2d) 1109.

Effect of amendment on cause of action

Where there was no plaintiff in existence, there could be no cause of action and the surety would not be liable on the bond, but where, by amendment, a competent plaintiff is introduced, the cause may then become valid and the surety become liable on judgment This amendment increased the liability and discharged the surety—Hall v Cutler Bindery Co, (Or) 26 P (2d) 1109.

33. Bollwerk v Hirshon, 116 N E 528, 227 Mass. 375.

Change from corporation to partnership

Where a writ of "H Bowlwerk & Brother," a nonexistent corporation was amended to read "Henry Bollwerk and Joseph Bollwerk," doing business as "H Bollwerk & Brother," it was held that the sureties were not harmed thereby, the court saying: "There was no evidence to show that the defendants knew whether the plaintiffs were carrying on business as a partnership or a corporation; or that they were influenced by that consideration in executing the bond, or were in any way misled It is not to be assumed that they intended to make a contract with a party that did not exist."—Bollwerk v Hirshon, 116 N E 528, 529, 227 Mass 375

34. Ky—Hudson Engineering Co. v Shaw, 179 S W. 1033, 167 Ky. 27 S C—Lee v Angelos, 116 S.E 447, 123 S C 232

Wash—Petri v. Manny, 170 P 127, 99 Wash. 601, 1 A L R. 1595

35. Curnow v. Goodman, 133 N E. 379, 244 Mass. 265.

36. Aronow v Gold, 174 N E. 267, 274 Mass 65, 74 A L R 910

37. Massachusetts Bldg Finish Co. v. Brenner, (Mass) 193 N E 355

38. Massachusetts Bldg Finish Co. v. Brenner, supra—Curnow v. Goodman, 133 N E. 379, 244 Mass. 265

39. Massachusetts Bldg Finish Co. v. Brenner, (Mass) 193 N E 355—Rice v. Rosenberg, 178 N E 724, 277 Mass 334—Aronow v. Gold, 174 N E. 267, 274 Mass 65, 74 A L R. 910

40. Ark—Hines v. Martin, 1 S W. (2d) 86, 175 Ark 1005
Conn.—King v. Malone, 99 A. 691, 91 Conn. 342
Mass—Massachusetts Bldg Finish Co v. Brenner, 193 N E 355
6 C J p 349 note 2

41. Patch v. Robbins, 159 N E 532, 261 Mass. 496

42. Andre v. Fitzhugh, 18 Mich. 93.

43. Mich—Andre v. Fitzhugh, 18 Mich. 93.
Tenn—Harris v Taylor, 3 Sneed 536, 67 Am D 576
6 C J. p 349 note 4.

Transfer from law to equity. Where defendants, in order to secure the release of attached property, entered into an undertaking to pay any judgment which might be recovered against the attachment defendant, and plaintiff was compelled by an injunction to litigate the cause in equity, defendants were held liable under their undertaking for the payment of a decree which expressly covered the damages of plaintiff in his suit at law notwithstanding the decree included claims other than the one for which defendants' undertaking was given since defendants' obligation, being to pay not the claim but the judgment obtained upon it, the fact that the judgment was obtained in chancery rather than at law is immaterial although the action or cause of action to which their obligation related is merged in such decree.[44] The further fact that the decree adjusted the claims of others than plaintiff will not release defendants.[45]

Stay or delay in issuance of execution. The liability of the obligors on a forthcoming or dissolution bond being fixed by the rendition of a judgment against the attachment defendant, the sureties are not released by a delay in issuing execution on the judgment,[46] nor does a stay of execution by consent of the parties to the action have this effect.[47]

Assuming that a perpetual stay of execution might release the surety, the acceptance of an offer to stay must be made within a reasonable time, otherwise the surety will remain liable.[48]

Death of defendant. Where the cause of action survives, and the death of the attachment defendant does not operate as a dissolution of the attachment, judgment against his personal representative will perfect the liability of the sureties on a forthcoming or dissolution bond;[49] but, on the other hand, it is held that, where the death of defendant in attachment dissolves it, attachment plaintiff has no further claim on the property and cannot recover on the bond.[50]

c. Fraud or Collusion; Release of Indemnity

The surety may be discharged by fraud or collusion between the debtor and the creditor, as where it results in his failure to obtain or his release of indemnity; but he is not discharged by his loss of indemnity through his own fault.

The surety may be discharged from his liability by fraud or collusion between the debtor and creditor,[51] as where it results in a failure to defend a doubtful claim[52] or in a judgment for a larger amount than plaintiff is entitled to.[53]

Plaintiff owes no duty to the surety to disclose matters concerning the attachment suit, and the surety on a dissolution bond is not discharged by his failure to do so.[54] The promise of plaintiff's attorney to keep the surety informed, if made and not kept, will not relieve the surety from liability.[55]

Where the surety has been lulled into security by the acts and conduct of the creditor, and in consequence thereof fails to obtain indemnity or make an effort to do so, he is wholly discharged, but if he only surrenders certain property held by him as collateral security to the principal debtor, and has not been otherwise damaged, he is discharged only to the extent of the value of the property surrendered.[56] If, shortly after an order quashing an attachment

44. Perry v Jaquith, 86 A. 1003, 86 Vt 556.

45. Perry v. Jaquith, supra

46. Ill.—Duer v. Morrill, 20 Ill App 355
R.I.—Fales v. McDonald, 79 A 969, 32 R.I. 406.

47. Rio Grande Oil Co v Seaboard Surety Corporation of America, (Cal App) 33 P.(2d) 887—6 C.J. p 349 note 99.

Although as a general rule any extension of the time of payment of an indebtedness without the consent of the surety will release him from liability, this rule will not apply to a stay of execution by stipulation in an attachment suit, especially in view of the fact that such stipulation may aid the principal in paying his debt and in view of the further possibility that without such stay an appeal would suspend the execution far beyond the stipulated period —Rio Grande Oil Co v Seaboard Surety Corporation of America, (Cal App) 33 P (2d) 887—6 C.J. p 349 note 99 [a]

48. Pue v Wheeler, 255 P. 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S.Ct. 19, 275 U.S. 483, 72 L.Ed 385

Time held not reasonable.—Pue v Wheeler, 255 P 1043, 78 Mont. 516, certiorari denied and error dismissed Wheeler v Pue, 48 S.Ct 19, 275 U.S. 483, 72 L.Ed. 385.

49. Cal.—Turner v. Fidelity & Deposit Co of Maryland, 200 P. 959, 187 Cal 76
Mass.—Guaranty Security Corporation v. Oppenheimer, 137 N.E 644, 243 Mass 324.
Mich.—Aman v Carpenter, 178 N.W. 33, 210 Mich 660
Tex.—U. S Fidelity & Guarantee Co v. Mueller, (Civ App) 13 S.W.(2d) 430.
6 C.J. p 348 notes 83, 84.

50. Conn.—Green v. Barker, 14 Conn 431.
R.I.—Upham v. Dodge, 11 R.I. 621.

51. Passow & Sons v. U. S Fidelity & Guaranty Co., 170 P. 1124, 177 Cal 31.

52. Martiniello v. Robitaille, (Mass) 199 N.E 534.

53. Passow & Sons v United States Fidelity & Guaranty Co, 170 P. 1124, 177 Cal. 31.

54. Marcus v Rice, 172 N.E. 354, 272 Mass 290

Failure to inform of default
The failure of plaintiff to inform the surety, before signing a bond, that defendant had defaulted for failure to answer interrogatories, which default was removed where answer was made five days thereafter, did not release the surety from liability on his bond.—Marcus v. Rice, 172 N.E 354, 272 Mass. 290.

55. Marcus v. Rice, supra.

56. Rowley v Jewett, 9 N.W 353, 56 Iowa 492—6 C.J. p 348 note 93.

is made, it is set aside at the same term, but meanwhile the surety has surrendered property held by him as indemnity to the debtor, he is not discharged from the loss due to his haste and precipitancy.[57]

d. Dismissal of Principal Action or Judgment for Defendant; Dissolution or Discharge of Attachment

The sureties upon a dissolution or forthcoming bond are discharged by a judgment in favor of the defendant upon the principal demand or a dismissal of the action. Whether they are discharged by a failure of the plaintiff to sustain the attachment issue, is dependent upon the character of the bond which has been given.

Where the action in which the property was attached results in a judgment in favor of defendant, the obligors on the bond, whether it is for a discharge of the attachment or merely for a release of the property, are of course released from any liability on the bond.[58]

Where judgment is rendered against one defendant and in favor of another, and as to the latter no bond is given on appeal, the attachment has not been lost, and the surety remains liable on the forthcoming bond for the value of the property released where the judgment is reversed and rendered for plaintiff on appeal.[59]

Dismissal of action. Dismissal of the cause under a rule of court for want of prosecution discharges the sureties, and a reinstatement of the cause has no effect on the bond.[60] Where the attachment suit has been dismissed by stipulation and the redelivery bond exonerated, a creditor who claims an interest in the attachment proceeding and bond has, under statutory provision, a right to intervene in the attachment proceeding, but who has not done so, cannot recover upon the redelivery bond without an adjudication setting aside the order dismissing the attachment suit and exonerating the bond.[61]

Vacation of or failure to sustain attachment. As a general rule it is no defense that the attachment has been annulled where the action is on a dissolution bond,[62] unless the attachment is set aside for want of jurisdiction and there is a consequent failure of consideration.[63] Where, however, it is held that defendant in attachment may proceed to vacate the attachment notwithstanding he has given a dissolution or discharge bond, it would seem that such a bond also will fall with the attachment upon quashal or vacation.[64]

The obligors on a forthcoming, delivery, or replevy bond are released from liability thereon where the attachment is afterward quashed or vacated, or there is a failure to sustain the attachment issue,[65] as on failure to give an attachment bond,[66] or where the only ground for attachment was abandoned.[67] On dismissal of the attachment, no liability exists as to the obligors on a forthcoming bond, notwithstanding the action may have proceeded to a personal judgment against defendant.[68]

57. Hubbard v. Moss, 65 Mo 647

58. Cal—Hamilton v. Bell, 55 P 758, 128 Cal 93
Iowa—Barton v Thompson, 24 N.W 25, 66 Iowa 526
6 C J p 349 note 1.

Where property adjudged to intervener

(1) Where property attached was released to defendant on giving a forthcoming bond, and an intervener claimed the property and was adjudged the owner, this released the attachment and discharged the surety from liability on defendant's forthcoming bond—Rogers v. Reliable Feed Co., 275 S W 705, 169 Ark 391.

(2) It has been held that there was no liability on a forthcoming bond given by defendant in attachment, although judgment was rendered against him, where his wife, as interpleader, had subsequently recovered judgment for possession of the property, the conditions of the undertaking being complied with—Ourand v. Johnson, 98 S.W. 127, 6 Ind T. 361.

59. Golden West Credit & Adjustment Co v Peardon, 19 P (2d) 817, 130 Cal App 186.

60. Davis v. Cass, 142 A 377, 127 Me 167.

61. First Nat. Bank of Portland v Denbrae Sheep Co, 258 P. 365, 44 Idaho 447

62. Baugh & Sons Co v U S Fidelity & Guaranty Co, 268 N Y S 741, 239 App Div 731, affirmed 193 N E 283, 265 N Y. 486

Liability for premiums on bond

Annulment of attachment by entry of judgment of dismissal, no stay of proceedings on appeal having been obtained, did not discharge bond for discharge of attachment, so as to release defendant in attachment action from payment of premiums, where the attachment action was still pending on claimant's appeal and the obligor was bound by contract to pay any judgment "finally recovered"—Baugh & Sons Co v. U S Fidelity & Guaranty Co, 268 N Y S 741, 239 App Div 731, affirmed 193 N E. 283, 265 N Y. 486.

63. Fried v. Continental Casualty Co., 279 N Y.S 916, 155 Misc 487

64. Ark—Ford v. Wilson, 288 S W 712, 172 Ark 335—Burgener v Spooner, 268 S W 6, 167 Ark 316
N C—Bizzell v Mitchell, 142 S E 706, 195 N C 484.

Wis—Neugent Garment Co v. U. S. Fidelity & Guaranty Co, 230 N W 69, 202 Wis 93, rehearing denied 231 N W 600, 202 Wis 93—Thompson v Royal Indemnity Co, 221 N W 415, 197 Wis 43.
6 C.J p 347 note 68

65. Conn—Republic Rubber Co v. Foster, 111 A 839, 95 Conn 551
Ga—Burnette v. Johnson, 144 S E 36, 38 Ga App 396
Ill—Cermak v. Schaaf, 224 Ill App 351, affirmed 139 N E 39, 308 Ill. 61, 37 A L R 1398
N C—Bizzell v Mitchell, 142 S E. 706, 195 N C 484
Tex—Taylor v Whitehead, (Civ App) 65 S W (2d) 1110—Carney v. Stanley, (Civ App) 23 S W (2d) 770—Hayes v Davis, (Civ App) 18 S W.(2d) 704
6 C.J. p 346 note 66

66. Maryland Casualty Co v. Parrish, 143 S E. 750, 150 Va 473

67. Williamson v Williamson, 115 S E 805, 154 Ga 788

68. Lawrence v Lee's Department Store, (Ga App) 172 S E 471—Burnette v Johnson, 144 S E. 36, 38 Ga App 396.

Necessity of setting aside dismissal

Where the attachment has been

A replevy bond in attachment proceedings is discharged by a decree adjudging the property exempt;[69] and where foreclosure of the attachment lien was denied on the ground of such exemption, although judgment went against defendant for the debt, it could not be rendered against the sureties on the replevy bond for the exempt property.[70]

Where judgment of dissolution reversed on appeal. Where an attachment was dissolved and plaintiff appealed suspensively, thus annulling the judgment of the trial court, as discussed in Appeal and Error § 548, the attachment remaining in full force, the surety was not discharged from liability on the bond.[71]

e. Pursuit of or Failure to Pursue Collateral Remedies

Failure of the creditor to pursue collateral remedies which he may have will not ordinarily discharge a surety on a release bond.

Generally speaking, the surety is not discharged by the failure of the creditor to pursue collateral remedies to collect his judgment,[72] as by failure to prosecute the breach of a recognizance;[73] and, where a conditional vendor or a mortgagee waives his lien and sues for the debt, his failure to enforce his lien will not release the surety.[74]

Where an undertaking is given to pay any judgment which might be recovered in the attachment proceeding and, before such judgment is recovered, plaintiff is enjoined from proceeding in the suit at law and compelled to establish his claim in chancery, the liability upon the undertaking is not released by the fact that plaintiff might have secured a writ of sequestration in the chancery proceedings and so have secured protection equivalent to the benefit of defendant's obligation, and this is particularly true in view of the fact that executions upon the decree were returned nulla bona.[75]

Where a defendant in an attachment appeals unsuccessfully, plaintiff may sue the sureties on the bond given to release the attached property without resorting to his remedy against the sureties on the appeal bond, although the latter may be primarily liable.[76]

Where the judgment is not paid by an administrator because the claim is barred by failure to present it in due time, the surety is not thereby discharged.[77]

Arrest of debtor on execution The arrest of a debtor on execution in the principal action will not discharge the sureties upon a bond previously given for the dissolution of the attachment.[78]

f. Failure to Take Judgment against Sureties

A failure to take judgment against the sureties in the principal action as permitted by statute does not necessarily discharge them.

A statutory remedy afforded by a statute providing that where property has been released by virtue of a forthcoming bond the court upon giving judgment against defendant shall also give judgment in like manner and with like effect against the sureties is not, as will be seen in § 317b, exclusive; hence a failure to render such a judgment against the sureties at the time of giving judgment against defendant does not discharge them from liability and preclude the pursuit of other remedies upon the bond.[79] Where a judgment against defendant is appealed from and reversed, the surety on a dissolution bond is not discharged from liability to a judgment against him in the second trial of the action by the fact that judgment was not taken against him upon the first trial.[80]

g. Subsequent Levy on Property

A subsequent levy on released property will discharge sureties on a forthcoming bond, but not on a dissolution bond.

Where the property released on bond is subsequent-

dismissed and the bond exonerated, there can be no action on the bond until the order of dismissal and exoneration has been set aside—First Nat Bank v Denbrae Sheep Co, 258 P 365, 44 Idaho 447

69. Hall v Miller, 51 S W 36, 21 Tex Civ App 336

70. Hall v Miller, supra

71. Swift & Co v Leon Cahn & Co, 92 So 355, 151 La 837.

72. Chittenden v Royal Indemnity Co, 142 N E 54, 247 Mass. 265.

Rule stated

"It is plain a surety on a bond to dissolve an attachment has no legal or equitable right which can be impaired by the failure of the creditor of the debtor in the action or suit to make use or abandon the use of any collateral methods to collect his debt or judgment against such debtor The creditor may enforce the claim by any and every legal method until its satisfaction"—Chittenden v Royal Indemnity Co, 142 N E 54, 247 Mass 265

73. Chittenden v Royal Indemnity Co, supra

74. Cal—Passow & Sons v U S Fidelity & Guaranty Co, 204 P 545, 56 Cal App 72
Mont—Sloan v Young, 284 P. 131, 86 Mont 414.

Reason stated

"It must be presumed to have accepted the conditions then existing as the measure of its rights, and to have executed the undertaking with that understanding"—Passow & Sons v United States Fidelity & Guaranty Co, 170 P. 1124, 1127, 177 Cal 31

75. Perry v. Jaquith, 86 A 1003, 86 Vt 556.

76. Ark—Chrisman v. Jones, 34 Ark 73
N Y—Higgins v Healy, 47 N Y Super 207, affirmed 89 N Y 636

77. Munson v. Beck, 214 P 708, 89 Okl 251

78. Chittenden v Royal Indemnity Co, 142 N E 54, 247 Mass 265—6 C J p 347 note 72

79. First Nat. Bank v McKean, (C. C A Or) 285 F 557

80. Hill v. Wilson, 261 P. 422, 123 Or 193.

ly seized and sold on another attachment, the sureties on the release bond cannot be held liable for failure to deliver the property.[81] Ordinarily the subsequent levy will discharge the surety only where such levy renders redelivery impossible.[82] Accordingly, where the property has been promptly released to defendant on a second redelivery bond, and it is possible to perform the condition of the first bond, the surety is not discharged.[83] It has also been held that plaintiff may show he instructed the sheriff to attach other property not previously seized, and the violation of such instructions by the sheriff would not discharge the surety.[84]

A subsequent attachment by the same creditor must be levied on the identical property previously released to discharge the surety,[85] and where part only of the released property is subsequently attached, this does not exonerate the surety from his obligation to redeliver the balance.[86]

Where a bond removes the lien from the property and leaves it subject to future levies, the subsequent levies of attachments will not discharge the surety on the bond,[87] but if, after the execution of the bond, the officer levies another attachment before a delivery is necessary to discharge the condition thereof, such subsequent seizure will amount to a delivery and discharge the same.[88]

By levy of execution. It has been held that if execution is issued and levied on property sufficient to satisfy the judgment, the voluntary release of the attachment lien by plaintiff will discharge the surety on the bond.[89] However, a levy of execution on the goods released will discharge the sureties only to the extent of amount received on execution.[90]

§ 317. —— Enforcement of Liability

a. Right of action
b. Nature and form of remedy
c. Time to sue
d. Defenses and estoppel
e Parties
f Pleadings
g Evidence
h Trial
i. Judgment
j. Amount of recovery

a. Right of Action

A right of action arises upon the bond upon a breach of its conditions.

Upon a breach of the conditions of a bond given to secure the release of attached property, a right of action arises on the bond in favor of the obligee named therein,[91] and, under some statutes, the liability of the sureties on a replevy bond exists as a matter of law if the liability of attachment defendant is established in the suit.[92] While strangers to the proceedings do not have a right of action on the restitution bond,[93] the assignment of a judgment in an attachment suit without mention of the bond impliedly carries with it a right of action on the bond in favor of the assignee.[94]

b. Nature and Form of Remedy

The remedy on bonds of the character under consideration ordinarily may be by an independent action on the bond, or, under some statutes by the summary entry of judgment against the sureties on the bond upon entry of judgment against defendant.

Of course, the nature and form of the remedy upon a forthcoming, release, or replevy bond depends upon the statutes of the particular jurisdiction where relief is sought. Where the statute makes no provision for summary judgment on the bond or undertaking, a separate action must be brought on the bond, unless by consent the surety comes in the pro-

81. Cordaman v Malone, 63 Ala 556—6 C J p 340 note 4

82. Ala—Fleming v Moore, 105 So 679, 213 Ala 592
Colo—Curry v Equitable Surety Co, 148 P 914, 27 Colo App 175.

83. Curry v Equitable Surety Co, supra

84. Curry v Equitable Surety Co, supra

85. Pue v Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct 19, 275 U S 483, 72 L Ed 385

86. Pue v Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct 19, 275 U S 483, 72 L Ed 385

87. Pue v. Wheeler, 255 P. 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U S 483, 72 L Ed. 385—6 C J p 347 note 69

88. Ala—Scarborough v Malone, 67 Ala 570—Cordaman v Malone, 63 Ala 556
Colo—Schneider v Wallingford, 34 P 1109, 4 Colo App 150
Or—Duncan v. Thomas, 1 Or 314.
6 C J. p 347 note 70

89. Reid v Farmers', etc, Tobacco Warehouse, 44 S W 124, 19 Ky L 1939.

90. Miller v London, (Mass) 1 N E (2d) 198.

Such levy does not constitute bad faith.—Miller v. London, (Mass.) 1 N E (2d) 198.

91. Nelson v Century Indemnity Co, (C C A Cal) 65 F (2d) 765, certiorari denied Century Indemnity Co v Nelson, 54 S.Ct. 120, 290 U S 688, 78 L Ed 588

92. Turner v Martin, (Tex Civ App) 45 S W (2d) 236—U S. Fidelity & Guaranty Co v Mueller, (Tex Civ App) 13 S W (2d) 430

93. Hammond Lumber Co v. Illges, (Ind App) 185 N E 872

Proration. A creditor other than the original plaintiff is not entitled to proration in an action on a redelivery bond unless he has first intervened in the attachment suit and established a statutory right to such proration—First Nat Bank v Denbrae Sheep Co, 258 P. 365, 44 Idaho 447

94. Myer v Jones, 163 P. 67, 32 Cal. App 378.

ceedings,[95] and a statutory remedy providing for summary judgment against the sureties on an attachment, release, or forthcoming bond, in the absence of a further statutory provision to the contrary, is merely a cumulative remedy and not an exclusive one, and does not bar an independent action on the bond.[96] Under some statutes, the court may enter judgment summarily against the sureties on entering judgment against defendant, or enter judgment on motion or rule against the sureties,[97] particularly where the sureties by signing the bond become parties to the proceedings;[98] and summary judgment may also be entered against the sureties on the bond in a suit against the sheriff for failure to produce the goods, which suit is in effect a continuation of the attachment proceedings.[99] Likewise, under some statutes, upon failure to redeliver property after judgment against defendant, and a return by the officer of the bond forfeited on account of such failure, such return is given the force and effect of a judgment and authorizes the clerk to issue execution against all the obligors.[1] Under some statutes it has also been held that the remedy on the bond may be by scire facias as in other cases.[2]

Statutes authorizing summary remedies on forthcoming, delivery, or dissolution bonds are to be strictly construed, and one who seeks to enforce the liability of the obligors in this manner must comply, at least substantially, with the requirements of the statute in respect to all things which must be done in order to make the statutory remedy available.[3]

It seems that the statutory judgment of condemnation and of forfeiture of the bond cannot be entered summarily on a bond which is not in the statutory form,[4] although the defects do not prevent its enforcement as a common-law obligation.[5]

Election of remedy. Where a redelivery bond was conditioned in the alternative to redeliver the attached property or pay the appraised value thereof, and the obligors fail to do either, the obligee may then elect which alternative he will rely on.[6]

Notice. Under some statutes, the court has power to enter judgment against a surety without notice, where he has by his bond on record, conditioned as provided by statute for the performance and satisfaction by the principal of any judgment rendered against him in the action become, for this purpose, a party to the original suit or consented that judgment should be so entered.[7] It should be noted that this the right to enter summary judgment without notice is subject to the right of the surety to appear and defend, if, for any reason, he is discharged, exonerated, or has a valid defense.[8]

On the other hand, where the statute so requires, notice to the surety is essential, and if application is not made for summary judgment at the time specified in the notice it must be deemed abandoned.[9]

Remedy in equity. Where the statute provides that the bond shall be a lien on the obligor's real estate, but provides no procedure for the enforcement of the lien, resort may be had to equity to secure en-

95. Bizzell v Mitchell, 142 S E 706, 195 N C 484.

96. U S—First Nat Bank v. McKean, (C C A Or) 285 F 557.
Ky—Nunnelley v Nunnelley, 54 S W (2d) 931, 246 Ky 250
6 C J p 351 note 22

97. Ark—Hines v Martin, 1 S W (2d) 86, 175 Ark 1005—Dent v Farmers' & Merchants' Bank, 258 S W 322, 162 Ark 325
Ga—Blakely Milling & Trading Co v Thompson, 128 S E 688, 34 Ga App 129—Rutland v. Hill, 91 S E 922, 19 Ga App 528.
Ky—Nunnelley v Nunnelley, 54 S W (2d) 931, 246 Ky 250—Oppenheimer v Riley, 6 Bush 118
Tenn—Sadler v. Murphy, (App) 77 S W (2d) 70.
Tex—Davey v W G Hecht, Inc, (Civ App) 56 S W (2d) 275—Calvert v Bennett, (Civ App.) 286 S W. 303—Clayton v. Stephenson, (Civ App) 254 S W. 507—Rosser v. Hale, (Civ App) 235 S W 968
Wash—Adjustment Co. v. Heinrichs, 233 P. 24, 133 Wash. 692—Waller v. Heinrichs, 233 P 23, 133 Wash. 7.
6 C J. p 350 notes 16, 17.

Plaintiff had the same right to enter a judgment against the sureties on defendant's forthcoming bond that he had to enter one against defendant—McDonald v W W Kimball Co, 86 S E 234, 144 Ga 105

98. Hines v. Martin, 1 S W (2d) 86, 175 Ark 1005

Failure to return property

The sureties, by signing the forthcoming bond, become parties to the proceedings, and, upon a determination that the property is subject to plaintiff's claim, they are under a duty to return the property, and upon their failure to do so summary judgment may be entered against them—Hines v Martin, 1 S W (2d) 86, 175 Ark 1005.

99. Hines v. Martin, 1 S W (2d) 86, 175 Ark 1005

1. Woolfolk v Ingram, 53 Ala. 11—Cooper v. Peck, 22 Ala. 406

2. Sartin v Weir, 3 Stew. & P (Ala) 421—6 C J p 350 note 15

3. McCargar v. Moore, 157 P 1107, 88 Or 682—6 C J. p 350 notes 19, 21.

4. Ala—Braswell v. Watkins, 112 So 343, 216 Ala 62
Or—McCargar v. Moore, 157 P. 1107, 88 Or 682
Tex—Clayton v Stephenson, (Civ. App) 254 S W. 507.
6 C J p 350 note 20

5. Braswell v. Watkins, 112 So 343, 216 Ala 62

6. Hush v. Fenkell, (Utah) 39 P. (2d) 330

7. Ark—Dent v. Farmers' & Merchants' Bank, 258 S W. 322, 162 Ark 325.
Tex—Calvert v. Bennett, (Civ App) 286 S W. 303—Clayton v Stephenson, (Civ App) 254 S W 507
Wash—Adjustment Co. v Heinrichs, 233 P 24, 133 Wash 692—Waller v. Heinrichs, 233 P 23, 133 Wash. 7.
6 C J p 359 note 57.

8. Clayton v. Stephenson, (Tex.Civ. App) 254 S W 507.

9. Nunnelley v. Nunnelley, 54 S W. (2d) 931, 246 Ky. 250—Nunnelley v. Nunnelley, 6 S.W.(2d) 273, 224 Ky. 345.

forcement thereof, particularly where since the filing of the bond the obligor's property has become heavily encumbered thereby rendering an action at law on the bond inadequate Under such circumstances, where the statute does not expressly authorize the filing of a petition, the remedy should be sought by bill of complaint [10]

Simultaneous actions. Where defendant in attachment gave bond for the dissolution of the attachment, and, within thirty days after judgment for plaintiff in attachment, and before action was brought on the dissolution bond, defendant was arrested and gave a poor debtor's recognizance, it was held that plaintiff could maintain actions on the bond and on the recognizance at the same time.[11]

Reformation of bond. Where a bond is on its face erroneous, the court may reform the bond to conform to the obvious intention of the parties, and enforce the bond as reformed.[12]

c. Time to Sue

Action may be brought on the bond after liability has attached thereon.

The time for bringing action on a forthcoming, release, or replevin bond depends, of course upon the time liability attaches on the bond under the statutes of the particular jurisdiction and the conditions of the bond. Under a statute providing that plaintiff may prosecute on the bond or undertaking if execution against the attachment defendant be returned unsatisfied, action may be brought immediately on the return of the execution unsatisfied, and it is not necessary to postpone the bringing of the action until the time for appeal has passed [13] Also, where the execution has been returned unsatisfied, a bill to fix a lien on the surety's realty is not premature merely because brought before the return day of the execution [14]

d. Defenses and Estoppel

The invalidity or nonexistence of the bond, or a discharge from its obligations are ordinarily the only defenses available in an action thereon. The parties are ordinarily concluded by the recitals in the bond.

Generally, the only defenses available in an action on a bond given to secure a release of attached property are those raising the validity or existence of the bond,[15] or which show a discharge from its obligations [16] Accordingly, failure of consideration[17] or forgery[18] is available as a defense to an action on the bond.

As a general rule, if the principal is bound the sureties are also bound, and accordingly, in an action on or proceeding to enforce the bond, the sureties cannot set up any defenses which are not available to their principal [19] For example, if the judgment is valid as against attachment defendant it will not avail the obligors that it contains other provisions which, although void, do not affect defendant.[20]

Neither principal nor sureties can base an effective defense on the lack of an appraisement or inventory of the property,[21] a failure to enter the writ on the return day,[22] irregularities in the form[23] or execution[24] of the bond; the lack of approval of the

10. Andrews v Peacock, 146 A 771, 50 R I 260.

11. Watts v Stevenson, 47 N E 447, 169 Mass 61

12. Tolman v. McLay, 157 A. 647, 114 Conn 98

Where plaintiff described as owner

Where a bond recited that the interest of plaintiff was attached, and the circumstances clearly showed that defendant's interest was attached, the court could reform the bond according to the obvious intention and enforce it as reformed —Tolman v. McLay, 157 A 647, 114 Conn 98.

13. Hutchinson v U S. Fidelity & Guaranty Co, 209 P 249, 58 Cal App 578—6 C J p 351 note 27

14. Andrews v. Peacock, 146 A 771, 50 R I 260

15. Rodenfels v Stroemer, 248 N W 442, 211 Wis. 536—6 C J. p 351 note 28.

16. Atkinson v. Foxworth, 53 Miss. 733

Discharge of sureties see supra § 316.

17. Rodenfels v. Stroemer, 248 N.W 442, 211 Wis 536

Necessity for release of property to principal see supra § 315 b

Surety is not estopped by judgment to show that the principal never received the property attached on giving a release bond —McCalgar v Moore, 157 P 1107, 88 Or 682

18. Fla —Carroll v Orame, 139 So 593, 104 Fla 225

R I —Andrews v. Mollica, 167 A. 131, 53 R I. 427

19 La —Fusz v. Trager, 1 So 535, 39 La Ann 292—McCloskey v Wingfield, 32 La Ann 38

Tenn —Greenlaw v Logan, 2 Lea 185 6 C J p 351 note 30

20. Cheek v. Pugh, 19 Ark 574—6 C J p 353 note 52

21. Conn —O'Keefe v Elmer Automobile Co of Winsted, 152 A. 280, 112 Conn. 370.

N J —Goldberg v Farber, 140 A. 737, 6 N J Misc 257, affirmed 143 A 917, 105 N J Law 239, and North Jersey Mortgage Co v Farber, 143 A. 918, 105 N J Law 245.

6 C.J. p 351 note 31.

22. Lee v James, 23 N E 226, 150 Mass 475—6 C J. p 351 note 32

23. Sadler v Murphy, (Tenn App) 77 S W (2d) 70

An affidavit of illegality, consisting of exceptions to the sufficiency of an affidavit for attachment, the grounds constituting defenses to an action on a replevy bond, will be stricken where the defenses were not made before judgment on the replevy bond —Shapiro v Bank of Graymont, 121 S E 520, 31 Ga App 576

24. Andrews v. Bellilove, 143 A. 857, 49 R I 446—6 C J p 351 note 33.

Defect in signature

The surety on a bond to dissolve an attachment cannot take advantage of an abbreviation in the principal's signature —Andrews v. Bellilove, 143 A 857, 49 R I 446.

Late delivery

The surety cannot complain that a bond executed as a statutory obligation was delivered late and thus became a common-law obligation on the same terms —Waverly Lumber Co. v Piantedosi, 160 N E. 263, 262 Mass. 377.

bond,[25] a failure to deliver or file the bond,[26] or to record the release of attached property as required by statute,[27] or the fact that the creditor gained nothing by the attachment of the debtor's property, and lost nothing by its dissolution, because the goods at the time of the attachment were in the custody of the sheriff under a levy on a prior execution on which they were sold.[28] The solvency of the principals in the forthcoming bond is also immaterial,[29] unless they have been adjudicated bankrupt within four months of the levy of attachment, as discussed in Bankruptcy § 252 [7 C.J. p 199 note 2].

While fraud is not available to a surety on a release or forthcoming bond unless plaintiff was a party to the fraud,[30] fraud on the part of plaintiff or his attorney, such as misrepresenting the effect of the bond, is available as a defense thereto.[31]

Where the bond is conditioned to redeliver the property to the proper officer or pay plaintiff the full value thereof, not exceeding the amount of the judgment, an offer to return the property, to be a defense to an action on the bond, must be to return the entire property, and an offer not made in good faith, as where there is no present ability to perform, does not constitute a defense.[32]

The remedies of foreclosure of a mortgage lien and attachment for the debt due are not inconsistent, and the pursuance of both is no objection to an action on a replevy bond where the property attached is that subject to the mortgage.[33] That a judgment creditor sued the principal debtor on the judgment was no waiver of his right to sue the sureties on a bond given by the debtor to release an attachment.[34]

Defenses in summary proceedings. A statute providing a summary remedy against the obligors in a bond does not prohibit or impair the effect of any legal defense.[35]

Estoppel by recitals in bond Ordinarily the obligors in a forthcoming or discharge bond are concluded by the recitals made in the undertaking,[36] and this rule applies with equal force whether the undertaking is a statutory or a common-law bond.[37] However, it has been held that a recital in the bond that there was an attachment will not estop the obligor to show that there was no attachment where both parties acted under a mutual mistake of fact.[38]

e. Parties

(1) Plaintiffs
(2) Defendants

(1) Plaintiffs

Plaintiff is a proper party in an action on a bond given to him, and where the real party in interest can sue in his own name, he can sue thereon even though the bond runs to the sheriff. Where the bond runs to several jointly, all should join in suing thereon, and in case of the death of some of the obligees, the survivors may sue.

Place of execution
It is no defense that a bond was executed in the presence of the clerk rather than that of the sheriff.—Fidelity & Casualty Co of New York v Carson, 266 S W 1063, 206 Ky 136.

25. Bennett v Mulry, 26 N Y S 790, 6 Misc. 304—6 C J p 351 note 34

26. Cal—Passow & Sons v United States Fidelity & Guaranty Co, 170 P. 1124, 177 Cal 31
Neb—Commercial Nat Bank of Kearney v Faser, 155 N W 601, 99 Neb 105
6 C J. p 351 note 35

27. Ward v Massachusetts Bonding & Insurance Co, 228 P 363, 67 Cal App 792

28. Com v Litvits, 14 Pa Super 278

29. Broughton v Saylor, 110 S W 866, 129 Ky 180, 33 Ky L 611

30. Mass—Rice v Rosenberg, 178 N E 724, 277 Mass 334—Patch v Robbins, 159 N E 532, 261 Mass 496
R I—Andrews v Mollica, 167 A. 131, 53 R I 427.
6 C J p 353 note 54
Fraud discharging surety see § 316

Fraud as to amount of bond
Testimony by a surety as to the principal's false representation as to the amount of a release bond is inadmissible to impeach its validity as to attachment plaintiffs not parties to the fraud and without knowledge thereof—Andrews v Mollica, 167 A 131, 53 R I 427.

Misrepresentation by agent of obligee's attorney
The surety, in an action on a bond to dissolve an attachment, was not released by misrepresentations of the obligee's nephew while employed by the obligee's attorney where the misrepresentations were made without the obligee's authorization or knowledge—Rice v Rosenberg, 178 N E 724, 277 Mass 334

31. Fritts v Reidel, 165 P. 671, 101 Kan 68

Where surety illiterate
Where the nature and effect of a proposed redelivery bond in attachment were stated by the attorney for plaintiff to the surety, and the attorney wrote a bond, which was in fact a statutory forthcoming bond, differing materially from representations, and statements concerning the nature and effect thereof which were repeated before the surety, who was unable to read English script, in reliance on which he signed, such representations were equivalent to representations relating to contents of a written instrument and constituted a defense to an action on such bond—Fritts v Reidel, 233 P. 1015, 118 Kan 9.

32. Ward v. Massachusetts Bonding & Insurance Co, 208 P 188, 57 Cal App 623

33. Rosser v Hale, (Tex Civ App) 235 S W 908

34. Jennings v Wall, 104 N E 738, 217 Mass 278.

35. Fla.—Carroll v Orange, 139 So 593, 104 Fla 225.
Or—McCargar v Moore, 157 P. 1107, 88 Or 632
6 C J p 353 note 56.

36. Cal—Ward v. Massachusetts Bonding & Insurance Co, 228 P. 363, 67 Cal.App 792
Ill—Heilbrunn v. Ellsworth, 190 Ill. App 388
6 C J p 351 note 41.

37. Bailey v. Ætna Indemn. Co, 91 P. 416, 5 Cal App. 740.

38. American Agr Chemical Co v. Ætna Casualty & Surety Co, (Mass.) 193 N E 367.

Where the bond is given to plaintiff in the attachment suit, he is the proper party to sue on it;[39] but where the bond is given to the levying officer as obligee, proceedings for its enforcement are properly brought in his name.[40] In the case bond is given to the levying officer, plaintiff in attachment cannot, in some jurisdictions, maintain an action thereon in his own name,[41] unless the bond has been assigned to him,[42] or the statute authorizes an action thereon in his own name by the real party in interest.[43] In the absence of a statute allowing separate suits by different plaintiffs, if there are several plaintiffs, and the bond is given to them jointly, they must all unite in an action thereon,[44] although if some of the attaching plaintiffs are deceased, the survivors may sue on the bond.[45]

Where, in two distinct suits, the property was released on a single bond containing distinct obligations in favor of different obligees, it was held that each obligee had a distinct remedy on the bond for the satisfaction of any judgment in his suit.[46]

Where, on the execution of a forthcoming bond, all creditors who attach during the pendency of the first suit acquire an interest in the bond, they are properly joined as parties plaintiff and may sue to enforce liability on the bond.[47] Where, however, under the statute, the bond is held for the benefit of all creditors and may be prosecuted by them jointly or by any one of them separately in respect to his separate demand, an action on the statutory bond conditioned to pay each creditor the amount due him may be maintained by a single creditor in his own name.[48]

Assignment of bond. Where the bond given by attachment defendant is made to the officer as obligee, the latter may assign it to plaintiff in the attachment, who may then sue on it.[49] An attaching plaintiff to whom a release bond is executed may assign it,[50] and where plaintiff as the real party may sue on the bond made to the sheriff, his assignee may maintain an action on such bond.[51] It is unnecessary, however, to set forth the name of an assignee after verdict as plaintiff where the action is brought in the name of the assignor for the use of the assignee.[52]

(2) Defendants

An action on a joint and several redelivery or dissolution bond may be brought against any obligee therein, and a joinder of principal and surety is not required.

An action on a joint and several bond for the release of property seized under attachment may be brought against any one or more of the obligors and a joinder of all is unnecessary.[53] Thus, the surety may be sued separately and the principal is not a necessary party,[54] and where the undertaking sued on is, by its express terms, joint and several, a dismissal as to one surety does not affect plaintiff's right to judgment against the other.[55]

On the death of defendant, his heirs at law, although nonresidents, are proper, if not necessary, parties.[56]

f. Pleadings

(1) For plaintiff
(2) For defendant
(3) Judgment on pleadings
(4) Issues, proof, and variance

(1) For Plaintiff

Plaintiff's pleadings must state a cause of action, clearly alleging every fact material to his right to recover on the bond.

The declaration or complaint to be sufficient should state a cause of action and set forth every matter on which plaintiff relies for a recovery against defend-

39. Bowers v Beck, 2 Nev 139—6 C.J p 353 note 57

40. Andrews v. Paine, 163 A 182, 53 R I 20—6 C J. p 353 note 58

41. Ala —Agnew v Leath, 63 Ala 345
Mich —Forrest v O'Donnell, 4 N W 259, 42 Mich 556

42. Ala —Sartin v. Weir, 3 Stew. & P 421
Mich —Forrest v O'Donnell, 4 N W. 259, 42 Mich 556
Mo —McDowell v. Morgan, 33 Mo 555
6 C J. p 354 note 60.

43. Moorman v. Collier, 32 Iowa 138 —6 C.J p 354 note 63.

44. Pearce v. Hitchcock, 2 N.Y. 388

45. Degnan v. Maryland Casualty Co, 171 N E 483, 271 Mass. 427—6 C J p 354 note 69

46. Irish v. Wright, 12 Rob (La.) 563

47. Rutledge v. Corbin, 10 Ohio St 478—6 C J p 354 note 74

48. Pearce v Hitchcock, 2 N Y 388, disapproving Arnold v. Tallmadge, 19 Wend (N Y) 527.

49. Moorman v. Collier, 32 Iowa 138 —6 C J p 354 notes 63, 64.

50. George v. Tate, (Kan) 102 U S. 564, 26 L Ed. 232—6 C J. p 354 note 65.

51. Iowa —Rowley v. Jewett, 9 N W. 353, 56 Iowa 492.
Mo —State v. Pitman, 111 S W. 134, 131 Mo.App. 299.

52. De Santis v. Massachusetts Bonding & Insurance Co, (Mass) 194 N E 136

53. Andrews v. Mollica, 167 A. 131, 53 R L. 427—6 C J. p 355 note 76

54. Cal —Ward v. Massachusetts Bonding & Insurance Co, 208 P 188, 57 Cal App 623
R I —Andrews v. Bellove, 143 A. 857, 49 R I 446
Tex —American Surety Co. of New York v Stebbins, Lawson & Spraggins Co, 180 S W 101, 107 Tex 413, L R A 1916F 583, answer to certified questions conformed to (Civ.App) 181 S W. 567.

55. Fresno Home Packing Co v. Hannon, 116 P. 687, 16 Cal App. 284

56. U. S Fidelity & Guaranty Co v. Mueller, (Tex Civ.App.) 13 S.W. (2d) 430.

ant with such fullness, definiteness, and certainty that defendant will be able clearly to understand and intelligently to answer it [57]

It is, ordinarily, essential that plaintiff should allege that defendant executed and delivered the bond sued on,[58] but in jurisdictions where judgment may be summarily entered on the bond in the attachment suit, the bond need not be pleaded.[59]

In an action on an undertaking, by defendant in an attachment case, to secure the release of the attached property, it is necessary to aver that the attached property was restored to defendant.[60] It is also incumbent on plaintiff in such an action to set out in his declaration or complaint the condition of the bond.[61] and to allege facts which constitute a breach of such condition,[62] as that the attachment was released or discharged, where the consideration of the bond is such release or discharge,[63] the recovery of judgment in the attachment suit,[64] and that the attachment was not dissolved.[65]

The complaint on an undertaking to release attached property must show the regular issue and return unsatisfied of an execution,[66] and where a complaint shows a premature return of execution, it must also show that the debtor had no property or means, otherwise the complaint is fatally defective;[67] but a failure to allege an issue and return of execution is not fatal where the debtor is insolvent and where no objection is taken thereto by demurrer.[68] It is also necessary to allege an order in the attachment proceedings for the sale or return of the attached property,[69] or a demand for redelivery of the property, or for payment,[70] and a failure to comply therewith,[71] where the liability under the bond is con-

57. Ward v. Massachusetts Bonding & Insurance Co, 208 P 188, 57 Cal App. 623—6 C J p 355 note 79.

Alleging statutory ownership

Under a statute providing that, from the date of the attachment until it is discharged or the writ executed, plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, etc, an attaching creditor, in order to be deemed a purchaser in good faith as against the owner of an outstanding equity, must, in an action on a bond for redelivery of the property, allege and prove all the facts necessary to establish that character of his ownership, as against the equity. —Flegel v Koss, 33 P 847, 47 Or 366—6 C J. p 355 note 80.

Alleging value

(1) Where plaintiff seeks to recover the amount of his judgment under a bond conditioned to return the property or pay the value thereof not exceeding the amount of the judgment, or to pay the amount of the judgment and costs which plaintiff might recover, a complaint is not defective for failure to allege the value of the property seized, at least where it is alleged that defendant, after demand made, failed to comply with any of the alternatives — Huish v. Fenkell, (Utah) 39 P (2d) 330

(2) Where the obligation is to pay the value of the property released, not exceeding the amount of the judgment, and it is alleged that payment of the judgment was demanded and that the value of the property exceeds the judgment, it is not necessary to allege that the surety knew the value of the property, the practice being that defendant object to the amount demanded if the value of the property is less than the amount of the judgment.—Ward v. Massachusetts Bonding & Insurance Co. 208 P. 188, 57 Cal App 623.

Declarations or complaints held sufficient.—Ward v. Massachusetts Bonding & Insurance Co, 208 P 188, 57 Cal App 623—Pue v. Wheeler, 255 P 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct 19, 275 U S. 483, 72 L Ed 385—6 C J p 355 note 79 [a]

Forms of declaration or complaint, in whole or in part—Ward v. Massachusetts Bonding & Ins. Co, 208 P 188, 57 Cal App 623—6 C J p 355 note 78 [a]

58. Cal—San Francisco Sulphur Co v. Ætna Indemn Co, 93 P. 888, 7 Cal App 93
N Y—Clark v. Thorp, 15 N.Y Super 630
6 C J. p 355 note 81

59. Rosser v Hale, (Tex Civ App) 235 S W 968

In Maine, the bond or conditions need not be set forth verbatim, and only the penal part of the instrument need be declared on—Waterhouse v Tilenius, 107 A 337, 118 Me. 239

60. Toelle v National Surety Co, 223 P. 256, 115 Kan 425—6 C.J. p 355 note 82

Sufficient allegation of restoration

In an action on a bond to discharge an attachment, an allegation that the attached property was released to defendant on the giving of the bond is a sufficient averment of the restoration of the property to defendant—Toelle v. National Surety Co, 223 P 256, 115 Kan 425

61. Conn—Gallup v. Thomas B Jeffery Co, 85 A. 374, 86 Conn. 303.
Ill—Albin v Talbott, 46 Ill. 424.
6 C J p 355 note 83

62. Young v Joseph, 9° N W 522, 5 Neb (Unoff) 559—6 C J p 355 note 84.

63. Williamson v. Blattan, 9 Cal. 500—Palmer v Melvin, 6 Cal 651—6 C J p 355 note 85

64. Ark—Adams v. Jacoway, 34 Ark 542
Colo—Creswell v. Woodside, 46 P. 842, 8 Colo App 518
6 C J p 355 note 86.

65. Creswell v Woodside, supra.

66. Barrios & Co v Indemnity Ins. Co of North America, 282 P 386, 101 Cal App. 675—6 C J p 355 note 88

67. Passow & Sons v U S Fidelity & Guaranty Co, 170 P. 1124, 177 Cal 31.

Complaint held sufficient

In an action against a surety on a bond to release an attachment, an averment that defendant in the main action did not have any property subject to levy or means wherewith to satisfy the execution or judgment on the date on which the execution issued or at any time thereafter between the date of the issuance of the execution and the earliest date a return of the execution was permitted by law to be made or at any other time thereafter, when supported by proof, was sufficient—Passow & Sons v. U. S. Fidelity & Guaranty Co, 204 P. 545, 56 Cal App 72

68. Barrios & Co v Indemnity Ins. Co of North America, 282 P 386, 101 Cal App 675

69. Jordan v Brown Shoe Co, 4 P. (2d) 1020, 152 Okl. 288—6 C J p 356 note 89.

Demand is sufficiently alleged by reciting the issuance of an execution and its return unsatisfied.—Goldberg v. Rempp, 273 P. 63, 95 Cal. App 452

70. Goldberg v. Rempp, 273 P. 63, 95 Cal App 452—6 C J. p 356 note 90

71. Kanouse v Brand, 106 P. 120, 11 Cal App. 669.

ditioned on these things.

It has also been held that a declaration in covenant on the bond may be good without an averment that an order was made in the suit in chancery in which the attachment was issued remitting plaintiff to his remedy at law on the instrument.[72]

Action on bond to prevent levy. In an action on a bond to prevent attachment levy, an allegation that, on delivery of the bond to the sheriff, he refrained from levying the attachment and accepted the bond in lieu of levy sufficiently shows that the bond induced the sheriff to withhold levy, although another bond for the same purpose was previously given;[73] but a complaint which fails to aver that the sheriff did not complete the levy, or avers that the sheriff proceeded to levy, without showing that he went no further, is defective.[74]

With respect to the judgment in the main action, an averment that judgment was recovered, entered, and docketed is sufficient.[75]

Facts concluded by recitals of bond. In an action on an undertaking for the release of attached property, the complaint need not aver or set out facts which the obligor in the bond is estopped to deny by the recitals in the bond or by the execution of it.[76]

Action to recover for depreciation. In an action on a redelivery bond to recover for diminution in value of property returned by defendant, an allegation that the property was injured by usage and neglect sufficiently charges that defendant was in fault.[77]

Surplusage in the declaration or complaint may be disregarded as immaterial.[78]

(2) For Defendant

To be sufficient the plea or answer must put in issue the defense on which defendant relies.

In accordance with the general rules of pleadings, a plea or answer in an action on a bond given to secure the release of attached property to be sufficient must raise an issue to make available any defense on which defendant relies,[79] and clearly set forth matters of affirmative defense.[80]

In a debt on a bond given to discharge an attachment, the action is on the specialty and a plea of nil debet is not appropriate.[81] A statement filed under the general issue, equivalent to a plea of nil debet, is

72. Yocum v. Barnes, 8 B Mon (Ky) 496

73. Fresno Home Packing Co v Hannon, 116 P. 687, 16 Cal App 284

74. Coburn v Pearson, 57 Cal. 306.

75. McCutcheon v. Weston, 2 P. 727, 65 Cal 37

76. Bowers v Beck, 2 Nev. 139—6 C J p 356 note 94.

77. Creswell v Woodside, 46 P. 842, 8 Colo App 514

78. Ward v Massachusetts Bonding & Insurance Co , 208 P 188, 57 Cal App 623

79. **Failure to deny due entry of judgment**

Where defendant did not controvert the allegation of the complaint that, after the default of attachment defendant "was duly entered" by the clerk of the court, the clerk thereupon "duly entered judgment therein" against the debtors, a copy of which judgment was annexed as an exhibit, defendant thereby admitted that the judgment, including the order of sale, was duly entered as an order of the court, and not as a mere clerk's order—Johnston v Shaw, (Alaska) 190 F. 466, 111 C C A 298

Plea in bar held sufficient.—Hogan v. Shutler, 53 Ill. 437

80. **Attacking trial of main action**

A surety cannot avail himself of the defense that the judgment in the attachment suit was rendered without a fair trial without alleging the particular facts not presented at the trial—Bailey v. Ætna Indemn. Co , 91 P. 416, 5 Cal App 740.

Facts discharging surety

If it is contended that discontinuance as to one defendant released the surety, such defense must be raised by pleading—King v. Malone, 99 A 691, 91 Conn. 342.

Fraud

(1) If the surety claims that there was a collusive failure to introduce available evidence constituting a defense to the action, he must plead the details and his ability to supply on a new trial the evidence willfully suppressed—Bailey v Ætna Indemn. Co , 91 P. 416, 5 Cal App. 740

(2) An answer setting up that plaintiff misrepresented the legal effect of the bond, without averring facts showing why defendants had a right to rely on any superior knowledge of plaintiff, states no defense—Lott v. Porter, 133 S.W. 180, 97 Ark 97

Nonownership

(1) It has been held that, where the defense that the property levied on did not belong to defendant in attachment is available to the obligors on the bond given to discharge the property from the attachment, or for its redelivery, defendants must show by their pleading in whom the title was—Blatchley v. Adair, 5 Iowa 545.

(2) The act of the court, in an action on a bond given to obtain a release of property attached, in treating an averment of the answer of the surety that defendant had little interest in the property when it was attached as explanatory of the liability of the surety was not prejudicial to him, he thereby obtaining the right to show the actual value of defendant's interest—Mallory v. Hartman, 86 A 567, 86 Conn. 615.

Object of bond defeated

If defendants desire to defend on the ground that the object of the bond or undertaking was defeated after it was given, such fact must be set up in the answer—Bennett v. Mulry, 36 N.Y S 790, 6 Misc 304.

Void attachment

In order to raise the defense that the attachment issued without the necessary accompanying bond, the surety should distinctly and unequivocally aver in his plea that no attachment bond had been executed before the issue and levy of the attachment—English v. Reed, 25 S E. 325, 97 Ga 477.

Statute held or[illegible] limitation

A statute pr[illegible]ing an action on an attachment dissolution bond after six years from its date is a statute of limitations, which must be pleaded—Castaline v Swardlick, 163 N. E 62, 264 Mass 481.

Want of consideration

Since a bond imports consideration, want of consideration is an affirmative defense which defendant must plead—O'Byrne v. McCormick, (Mo App) 92 S W (2d) 1005

81. Blydenburgh v Carpenter, Lalor (N Y.) 169—6 C J. p 357 note 9.

inappropriate as a plea of the general issue.[82]

A plea of non est factum with notice of special matter that an appeal had been taken and allowed to the supreme court has been held not to show a defense, because there was no allegation that the appeal was still pending.[83]

(3) Judgment on Pleadings

Judgment may be entered on the pleadings where the defendant's plea or answer is or becomes insufficient.

An action on a dissolution bond conditioned to satisfy judgment comes within a statute authorizing plaintiff to take judgment at the first day of the term, on filing an affidavit stating the true amount of defendant's indebtedness and the writing or account by which defendant is indebted, unless defendant has filed a verified plea containing a good defense,[84] authorizing judgment on the pleadings if the facts in the complaint are insufficiently denied or substantially admitted,[85] or authorizing judgment in an action on an instrument for the payment of money only, for the sum claimed in the complaint, on striking out as frivolous a demurrer to the complaint.[86]

(4) Issues, Proof, and Variance

General rules of pleading control as to questions of issues, proof, and variance.

As in other civil actions, the issues are, in an action on a forthcoming or release bond, confined to those raised by the pleadings Ordinarily, the only question is whether there has been a breach of the bond,[87] and no issue can properly be raised as to the title to the property involved[88] A general denial in an action on a forthcoming, delivery, or discharge bond puts in issue only the material allegations of the complaint,[89] and a simple denial of the existence of the judgment in the attachment suit does not present the question of its invalidity so as to entitle the sureties to take advantage thereof.[90] A plea of non est factum puts in issue only the execution of the bond.[91]

Where an answer admits a waiver of demand by failure to deny an allegation thereof, the fact of demand cannot be put in issue.[92]

Proof. In accordance with the rules governing civil actions generally, in an action on a bond of the type under consideration, only such matters as are raised by the issues under the pleadings need be, or may be, proved. Accordingly, under a general denial, only the material allegations need be proved,[93] and, if the only plea is non est factum, plaintiff need not prove nonpayment of the judgment.[94] The attachment and replevin bond need not be introduced in evidence where they are part of the record in the case[95] Where defendant is deceased and his heirs have been substituted as parties but not served, it need not be shown that they received the property in order to render the surety liable for failure to redeliver the attached property.[96]

Likewise, under a plea of non est factum, it cannot be shown that the bond was not taken in accordance with the statutory requirements[97] The judgment against defendant and the unsatisfied execution thereon are admissible to show a breach of the bond,[98] and it cannot be shown that the judgment rendered in the original suit was invalid.[99] The sureties are also precluded from inquiring into the correctness of the judgment in the attachment suit.[1]

Variance. As in other civil actions, in actions of the character under consideration an immaterial variance between the pleadings and proof is not fatal. For example, where, by reason of a clerical error, the bond sued on does not express the true intention of

82. Waterhouse v. Tilenius, 107 A 337, 118 Me. 239

83. Poteet v Boyd, 10 Mo 160

84. McAllister v Eichengreen, 34 Md 54

85. Fitzgibbon v. Calvert, 39 Cal 261.

Answer held sufficient against a motion for judgment on the pleadings—Fritts v. Reidel, 165 P 671, 101 Kan. 68.

86. Coe v. Straus, 11 Wis. 72.

87. Reese v Brinkley, 112 S E 289, 28 Ga App 570—6 C J p 357 note 14.

88. Reese v. Brinkley, supra. Estoppel as to title see supra § 313 b (5)

89. Bennett v. Mulry, 26 N Y S 790, 6 Misc 304—6 C J p 357 note 15.

90. Fogel v Dussault, 7 N E 17, 141 Mass 154

91. Waterhouse v. Tilenius, 107 A 337, 118 Me 239.

92. Goldberg v Rempp, 273 P 68, 95 Cal App 452

93. Bennett v. Mulry, 26 N Y S. 790, 6 Misc 304

Proof of original claim

Under an early statute in New York, in an action on a bond given to discharge a foreign attachment, the condition of which bond was to pay the attaching creditor the amount justly due and owing by the debtor at the time the former became an attaching creditor, on account of any sum so claimed and sworn to by him, the creditor was required to establish his demand in the same manner as in an action against the debtor—Oakley v. Aspinwall, 4 N Y 513—Thompson v. Dickerson, 12 Barb (N Y) 108

94. Andrews v Bellilove, 143 A 857, 49 R I. 446.

95. Connor Live Stock Co v. Fisher, 255 P 996, 32 Ariz 80, 57 A L R 196

96. U S. Fidelity & Guaranty Co v Mueller, (Tex Civ App) 13 S W (2d) 430

97. Waterhouse v. Tilenius, 107 A. 337, 118 Me 239.

98. De Santis v Massachusetts Bonding & Insurance Co, (Mass) 194 N E 136.

99. Savage v. Walshe, 140 N E 787 246 Mass 170—6 C.J p 353 note 50

1. Savage v Walshe, supra—6 C.J. p 353 note 51.

the parties, but the error is not such as to invalidate the bond, as where plaintiff instead of defendant is named in the condition as the person in the event of whose payment of the judgment the bond shall be void, the fact that the declaration or complaint sets out the bond as it was intended to be written does not constitute such a material variance as to defeat a recovery,[2] and the fact that the complaint describes the bond sued on as an "undertaking pursuant to law," when it is in fact a common-law bond, is immaterial where the undertaking is set out in full in the complaint.[3] On the other hand, an action by the sheriff or constable suing for the use of one person is not sustainable by proof of a bond given another,[4] and where it is alleged that defendant in an attachment suit died before judgment, that his administrator was made defendant, and judgment was rendered against such administrator, a transcript showing judgment against defendant in his individual capacity will not sustain the declaration.[5]

g. Evidence

The evidence in actions on forthcoming or delivery bonds is subject to the rules of general application in civil actions.

As a general rule, matters which constitute plaintiff's cause of action on a redelivery or dissolution bond must be proved by plaintiff, while the obligors have the burden of proof of matters in defense, mitigation, or discharge. Thus plaintiff has the burden of showing the execution of the bond by defendants,[6] the immateriality of an alteration,[7] or the value of the property where the obligation of the bond is measured thereby,[8] and the burden is on defendant to show that the attachment defendant was not the owner of the attached property where he defends on that ground,[9] that the interest of the principal in the property attached was less than the amount of the attachment,[10] that the judgment was obtained by collusion or fraud,[11] that the property was lost without defendant's fault,[12] that the attaching creditor seized and sold the same property after its release,[13] that the property was taken under a claim paramount to the levy which could not be successfully resisted,[14] or that the judgment in the suit has been paid.[15] Plaintiff is not bound to show that there was property subject to levy where the action is on a bond given to prevent levy,[16] and where, as has been seen in § 310 b (2), the bond precluded the right to question or attack the attachment, plaintiff need not prove the grounds for attachment.[17]

Presumptions. Sureties freely signing a bond are presumed to know its contents.[18] Where a valid judgment against defendant in attachment is shown, it will be presumed that it remains unpaid.[19] Where there is no showing to the contrary, it may be presumed that the levying officer did his duty in respect of filing a forthcoming bond,[20] that the writ was returned, or that the clerk was authorized to take and approve the bond.[21] Where liability on the bond is confined to attachment defendant's interest in the property, it will be presumed that such interest was the amount ordered to be attached by the writ.[22] A presumption which may be recognized as between the parties to the main proceeding, that an original complaint and an amended complaint are for an identical cause of action, does not apply to a surety.[23]

Admissibility. In actions on forthcoming or dissolution bonds any evidence otherwise competent under the general rules of evidence and relevant to the issues may be admitted. For example, on the issue of the execution of the bond by defendant it may be shown that another had acted under an antecedent authority on his behalf or that he had subsequently ratified an unauthorized act.[24] On the question of ownership of the attached property the financial condition of the debtor at, and prior to, the

2. Hewes v. Cooper, 115 Mass 42—Leonard v. Speidel, 104 Mass 356
3. Dackich v Barich, 97 P. 931, 37 Mont 490
4. McConnell v Hulsey, 87 S E 156, 17 Ga App 387
5. Butler v Wilson, 10 Ark 313
6. Dackich v Barich, 97 P 931, 37 Mont 490—6 C J. p 357 note 24.
7. New England Grape Co v Fidelity & Deposit Co of Maryland, 167 N.E 646, 268 Mass. 298
8. Cal—Blume v Berry, 276 P 133, 98 Cal App. 30
Philippine—Crame Sy Panco v Gonzaga, 10 Philippine 646, 6 Off Gaz 951
9. Eisenbud v Gellert, 55 N Y.S 952, 36 Misc 367.
10. Evans v Rappaport, 146 A 611, 109 Conn 362—Safford v McNeil, 129 A 721, 102 Conn 684—6 C J. p 357 note 23
11. Martiniello v Robitaille, (Mass.) 199 N E. 534
12. Commercial Nat. Bank of Kearney v Faser, 155 N W. 601, 99 Neb 105.
13. Pue v Wheeler, 255 P. 1043, 78 Mont 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U S 483, 72 L Ed. 385.
14. Moody v. U. S Fidelity & Guaranty Co, 137 So 308, 223 Ala 507.
15. Winton v. Myers, 58 P. 634, 8 Okl 421.
16. Fresno Home Packing Co. v. Hannon, 116 P. 687, 16 Cal App. 284
17. Blakely Milling & Trading Co. v. Thompson, 128 S E 688, 34 Ga. App 129.
18. Waverly Lumber Co. v. Piantedosi, 160 N E 268, 262 Mass 377
19. Winton v. Myers, 58 P 634, 8 Okl 421.
20. New Haven Lumber Co v. Raymond, 40 N W 820, 76 Iowa 235.
21. Budd v Durall, 36 Iowa 315
22. Birdsall v. Wheeler, 20 A. 607, 58 Conn 429.
23. Savage v. Walshe, 140 N E. 787, 246 Mass 170.
24. Lynch v. Smyth, 54 P. 634, 25 Colo 103

time of its purchase may be shown.[25] So, on a question of value, the amount received by a trustee in bankruptcy on a note and trade acceptance is admissible,[26] but a finding of the value of property at the time of a prior conversion is not evidence of its value at the time of an attachment several months later.[27] Evidence of depreciation of value of the property since the giving of the bond is not admissible unless shown not to have been caused by the act or negligence of the principal.[28] On the issue of whether plaintiff is the real party in interest in an action on a bond given in attachment in an action on a note, evidence that a note was given to plaintiff's attorney and not to plaintiff is admissible.[29] The judgment and an admittedly unsatisfied execution are admissible.[30] It may be shown that the surety's obligation has been discharged by an accord and satisfaction and release of the judgment against the principal.[31] As against a release given by plaintiff it may be shown that it was after assignment of the verdict.[32] The record of a duly signed release is admissible as tending to show the fact of signing.[33] On a question of fraud, evidence that a master in chancery told the surety that the attachment was not for more than the amount of the bond is not admissible.[34] Evidence of the mailing of a demand to defendant in care of another is not admissible where it is not shown that defendant authorized such mailing or received the demand.[35] A disposition of his goods by the principal may be shown where made after issuance of execution but not where made before issuance of execution unless collusion is shown.[36]

The official return of the sheriff on the attachment is evidence of his official acts as against both principal and surety in a forthcoming or dissolution bond,[37] and it has been held that the proper and legal method of showing whether the judgment in the attachment suit has been satisfied is by the return on the officer on the execution.[38] A sheriff's return, stating that he delivered the property to a third person at the request of defendant, is admissible as evidence of such delivery,[39] and testimony in denial of such return by one who was not entitled to the property and who is not shown to have knowledge as to the orders of the owner to the sheriff is of no probative value.[40]

Parol evidence will not be admitted for the purpose of showing that a bond plainly coming under the provisions of one statute was designed to operate under the provisions of an entirely different one,[41] or to vary the terms of, or defeat the operation of, the bond,[42] although such evidence is admissible to explain a mistake in the recital of a bond.[43]

Where a bond has been properly filed and afterward lost, a copy preserved among plaintiff's papers may be admitted in evidence,[44] or an entry on the docket of the court in respect of the bond may be shown.[45]

Weight and sufficiency. The general rules as to evidence in civil actions have been applied in determining that the evidence in actions on forthcoming or dissolution bonds was sufficient to establish such matters as filing of an affidavit for attachment,[46] delivery of bond,[47] absence of alteration of bond,[48] release of attached property,[49] value of attached property,[50] insolvency of attachment defendant at time of levy,[51] or ownership of attachment judgment,[52] or that it was insufficient to establish such

25. Flegel v. Koss, 83 P. 847, 47 Or 366.
26. Trenton Trust Co v. Carlisle Tire Corporation, 147 A 366, 110 Conn. 125.
27. Trubee v. Wheeler, 2 A. 319, 53 Conn 458
28. Smith v. Packard, (Ill.) 98 F. 793, 39 C C A 294
29. Vaughn v Robbins, 149 N E 677, 254 Mass 35, 41 A L R 1488
30. De Santis v. Massachusetts Bonding & Insurance Co., (Mass.) 194 N E 136.
31. Giatas v. Demoulas, 170 N E 921, 271 Mass. 51.
32. De Santis v. Massachusetts Bonding & Insurance Co., (Mass.) 194 N.E. 136
33. Hesser v. Rowley, 73 P. 156, 139 Cal 410
34. Rice v Rosenberg, 178 N.E. 724, 277 Mass 334.
35. Blume v Berry, 276 P. 133, 98 Cal App 30
36. Passow & Sons v. United States Fidelity & Guaranty Co., 170 P. 1134, 177 Cal. 31.
37. Dodd v Butler, 7 Mo App 583
38. Huntress v. Burbank, 111 Mass 213
39. Hush v. Fenkell, (Utah) 39 P. (2d) 330.
40. Hush v. Fenkell, supra.
41. Smith v. Scott, 86 Ind 346.
42. Daniels v. Smith, 87 S E. 774, 144 Ga 561
43. Palmer v. Vance, 13 Cal. 553.
44. Wagner v. Romero, 3 P. 50, 3 N M. 131
45. Chapman v Seely, 8 Ohio Cir.Ct 179, 4 Ohio Cir Dec 395
46. Zurich General Accident & Liability Ins. Co v. Metropolitan Casualty Ins Co. of New York, 232 P. 418, 102 Cal App 107.
47. Reliable Finance Co. v. Baldrate, (Mass.) 196 N E 849
48. Knox v. Horne, (Tex Civ App.) 300 S W 259, dismissed for want of jurisdiction
49. Jones v Leslie, 32 P (2d) 443, 138 Cal App. 466
50. Ky.—U S. Fidelity & Guaranty Co v. McHargue, 97 S.W (2d) 831, 265 Ky 813
Mont.—Pue v Wheeler, 255 P. 1043, 78 Mont. 516, certiorari denied and error dismissed Wheeler v. Pue, 48 S Ct 19, 275 U S 483, 72 L Ed 385.
Tex.—Aviation Credit Corporation of New York v. University Aerial Service Corporation, (Civ App.) 59 S.W.(2d) 870
51. Nicolai-Neppach Co. v. Smith, (Or.) 58 P.(2d) 1016, adhered to 60 P.(2d) 979.
52. Pue v. Wheeler, 255 P. 1043, 78 Mont. 516, certiorari denied and error dismissed Wheeler v Pue, 48 S Ct. 19, 275 U.S. 483, 72 L Ed. 385.

matters as want of consideration,[53] or abandonment of the attachment[54]

An assessment of the value of the property in and by the judgment as required by statute is conclusive on the obligors on a forthcoming bond,[55] as is also an execution sale following the attachment,[56] and it has been held that, where the liability of the obligors is for the decrease in the value of goods between the date of their release and the date of their redelivery, the sum for which the property is sold at sheriff's sale is conclusive of its value.[57]

It is not necessary to introduce the writ of attachment itself in evidence in an action on a forthcoming or discharged bond which recites the attachment and the levy thereunder,[58] or to introduce the judgment in the attachment suit in evidence where the fieri facias issued thereon, with a nulla bona return, and showing the amount of the judgment, is introduced.[59]

The judgment in the attachment suit is conclusive unless assailed for fraud or mistake, against the sureties in the undertaking that defendant will perform the judgment of the court given to secure the restoration of the attached property to defendant.[60] Where, however, a judgment has been entered on an amended statement of claim in foreign attachment proceedings, the judgment is not conclusive on the surety's liability[61]

A recital in the bond sued on as to the value of the property is certainly prima facie evidence of its value,[62] and there is authority for the view that such a recital is conclusive on the question of value.[63]

The officer's return of failure to deliver property attached and released on delivery bond, indorsed on a special execution, has been held conclusive against the sureties in an action on the bond.[64]

h. Trial

Rules governing trials generally are applicable to actions on redelivery or dissolution bonds.

Jury issues under a plea in abatement should be submitted before the trial of the case on the merits.[65]

The general rule is that, where the facts are undisputed, the effect thereof is a question for the court,[66] and, where the evidence on any issue is insufficient to warrant submission thereof to the

53. O'Byrne v. McCormick, (Mo App.) 92 S.W.(2d) 1005

54. Jordan v Brown Shoe Co., 4 P. (2d) 1020, 152 Okl 288

55. Troy v Rogers, 22 So 486, 116 Ala 255, 67 Am S R 110

56. Jones v. Short, 101 P 209, 53 Or 525.

57. Creswell v Woodside, 63 P 330, 15 Colo App 468—6 C.J. p 358 note 42.

58. Ga.—Doyal v. Johns, 15 S.E. 776, 90 Ga 188
N.Y.—Christal v. Kelly, 88 N.Y. 285

59. Doyal v. Johns, 15 S.E 776, 90 Ga. 188

60. Martiniello v. Robitaille, (Mass.) 199 N.E 534—6 C.J. p 358 note 45

What constitutes fraud

(1) Sureties on a bond to dissolve an attachment must prove that the judgment was improper, either because the principals were not indebted to plaintiffs, or because the amount for which judgment was rendered was grossly exaggerated for the purpose of defrauding the sureties, in order to impeach the judgment rendered against the principals on the bond.—Martiniello v. Robitaille, (Mass.) 199 N.E 534

(2) Evidence of negotiations between obligees and principals on a bond to dissolve an attachment for entry of proper judgment, which did not culminate in an enforceable agreement, and that judgment was entered by default, did not show fraud relieving sureties from liability for nonpayment of alleged excessive judgment rendered against the principals.—Martiniello v. Robitaille, supra

(3) Evidence that one obligee and one principal on a bond to dissolve an attachment agreed on entry of judgment, but that judgment was entered by default, was insufficient showing of collusion between obligees and principals and did not relieve sureties from liability for nonpayment of judgment actually rendered.—Martiniello v. Robitaille, supra.

(4) In an action against sureties on a bond to dissolve an attachment, evidence of agreement between one of obligees of bond and one principal that obligee would not bring suit against sureties for two years if principal would give him judgment for four thousand dollars, and that obligees obtained judgment by default in a sum in excess of eight thousand dollars, was insufficient to impeach the judgment on the ground of fraud and collusion.—Martiniello v. Robitaille, supra.

61. Commonwealth v. A. B. Baxter & Co., 84 A. 136, 235 Pa. 179, 42 L.R.A.(N.S.) 484

62. U.S. Fidelity & Guaranty Co. v Mueller, (Tex.Civ.App.) 13 S.W. (2d) 430—6 C.J. p 359 note 46.

63. Klippel v. Oppenstein, 45 P. 224, 8 Colo.App. 187—6 C.J. p 359 note 47

64. Ark.—Chapline v. Robertson, 44 Ark. 202.
Mo.—State v. Cowell, 102 S.W. 573, 125 Mo.App. 348
6 C.J. p 359 note 48.

65. Price v. Bescher, 12 Heisk (Tenn.) 372

66. **Liability of surety**
Where the facts are undisputed, the liability of the surety is a question of law.—Burns Bros. v. Block, (Mass.) 198 N.E 164.

Reasonable time
(1) The question of a reasonable time in which to redeliver is a question for the court where the facts are undisputed.—Lastowski v Lawnicki, 179 A. 266, 115 N.J.Law 230.

(2) Whether a debtor accepted a perpetual stay of execution within a reasonable time is a question of law.—Pue v. Wheeler, 255 P. 1043, 78 Mont. 516, certiorari denied and error dismissed Wheeler v Pue, 48 S.Ct. 19, 275 U.S. 483, 72 L.Ed. 385.

Insolvency
As regards liability of sureties on a bond to release an attachment where proceedings in bankruptcy were filed against the attachment defendant within four months after levy, the fact that much of the evidence as to the value of attachment defendant's property at the time of levy was opinion evidence did not require submission of the question of insolvency to the jury, where other facts corroborated the opinion evidence.—Nicolai-Neppach Co. v Smith, (Or.) 58 P.(2d) 1016, adhered to 60 P.(2d) 979.

jury, or where the facts are admitted, the court may direct a verdict on that issue.[67]

If the evidence is conflicting, it is ordinarily the province of the jury to determine the issues, and the court should instruct the jury clearly on the law applicable where so requested.[68]

A finding that the principal is not discharged, where the issue is whether the surety is discharged, does not dispose of the issues.[69] Judgment cannot be entered on a bond in a jury case where defendant defaults unless the jury have found the value of the property attached,[70] although in a case tried without intervention of a jury it is sufficient that the court find the value of such property.[71] The court need not make a finding as to the value of replevied property where the attaching officer has estimated the value when the bond was given.[72]

i. Judgment

The judgment on a redelivery or dissolution bond should follow the statute and conform to the terms of the bond

In an action on a release or forthcoming bond, judgment should be entered in accordance with the terms of the bond.[73] A statutory judgment forfeiting the bond must strictly follow the substance of the statute. For the purposes of such judgment, the description of the parties as given in the bond is a matter of substance, identifying the bond with the writ and the judgment of condemnation.[74]

The court is authorized to render judgment for the penalty of such bond, but to be satisfied by the payment of the value of the property, with interest from the date of the bond, or by payment of plaintiff's demand, with interest or costs, or by the forthcoming of the property according to the tenor of the bond,[75] but a judgment on a dissolution bond is ordinarily for the amount of the judgment in the original action with interest, and a condition therein that it may be satisfied by a redelivery of the attached property, as though it were a judgment on a redelivery bond, is unnecessary.[76] Judgment against sureties on a replevy bond is properly for the value of the property as estimated by the sheriff when the bond was given, together with interest, in accordance with the direction of the statute.[77]

A statute requiring a judgment against principal and surety to recite the order of their liability, so that their property may be exhausted in such order by the officer having the execution, has been held not applicable to a judgment on a bond to discharge an attachment.[78]

67. A M Wilson & Co. v. Sims, 87 S E 890, 144 Ga 685

Facts admitted

Where the surety admits execution of the bond and the judgment is properly proved, the court may direct a verdict for the obligee where no competent evidence of any defense has been introduced.—Rice v Rosenberg, 178 N E 724, 277 Mass 334

The court must direct verdict on defense not supported by evidence.—O'Byrne v McCormick, (Mo App) 92 S W (2d) 1005

Submission to jury held not prejudicial.—Waverly Lumber Co. v Piantedosi, 160 N E 268, 262 Mass. 377

68. **Fraud**

The court should instruct the jury that the evidence to maintain a defense of fraud and misrepresentation should be clear and satisfactory, and the usual instruction that a preponderance of the evidence will defeat recovery is insufficient, where a more precise statement is requested.—Fritts v Reidel, 165 P. 671, 101 Kan 68

Condition of property

(1) Where goods retained by defendants under an attachment bond were returned to the sheriff and sold, and plaintiff brought an action on the redelivery bond for diminution in their value, an instruction that, if plaintiff inspected the property prior to its redelivery, and after such inspection made a demand for its return, without objecting to its quality or quantity, and the proper officer advertised it and sold it to plaintiff, and defendants were thereby misled and prevented from taking steps to protect themselves by electing to pay its value, plaintiff was estopped from asserting that the property was injured was erroneous.—Creswell v Woodside, 63 P 330, 15 Colo App 468

(2) It was proper to refuse a requested instruction that, if the goods, when redelivered, were not substantially in the same condition as when released, plaintiff was entitled to a verdict for a certain amount, where there was no evidence that the diminution in value of the goods between the time of release and of redelivery was such amount.—Creswell v Woodside, supra

69. **Issue of discharge by payment**

In an action on a bond substituted for an attachment in an action for personal injuries and conditioned for the payment of two thousand five hundred dollars on any judgment recovered, in which the surety pleaded a payment by an insurer against liability, and plaintiff filed a reply, alleging that the payment was pursuant to a policy of insurance in discharge of insurer's own liability, the court's conclusion thereon that the payment did not completely satisfy the judgment and did not discharge the principal in the bond was held not to dispose of the issue, which was whether the surety was released by the payment by the insurance company.—O'Connor v. Hartford Accident & Indemnity Co., 115 A. 484, 97 Conn 8.

70. Blanck v Roman, 134 So. 551, 101 Fla 398

71. Blanck v Roman, supra.

72. Wells v Cloud, (Tex Civ App) 202 S W. 331

73. Doran v Oasis Printing House, 211 P 563, 24 Ariz 475

74. Braswell v. Watkins, 112 So. 343, 216 Ala 62.

75. Massachusetts Bonding Co v. McLemore, 4 Tenn Civ App 633

In Maine, in an action on a bond given to obtain the release of an attachment, judgment may be entered for the penal sum of the bond, but the penalty may be chancered and execution issued for the amount remaining due on the judgment in the suit in which the bond was given including costs, etc.—Waterhouse v. Tilenius, 107 A. 337, 118 Me 239

76. National Surety Co v. Poates, 43 App D C 334

77. Wells v Cloud, (Tex Civ App) 202 S W 331

78. Andres v Schlueter, 118 N W 429, 140 Iowa 389.

Where agents, sued for broker's compensation, individually and as agents and trustees, executed a bond to secure the release of their principal's property from injunction and attachment writs, it was not necessary for the decree to show in what capacity they were held liable.[79]

On death of defendant, his heirs at law substituted as parties, although nonresidents, are bound by a judgment in rem holding the property subject to execution, although no personal judgment can be entered for want of appearance.[80]

A judgment on a bond in replevin of attached property reciting that, after replevy, defendant in attachment appropriated the property to his own use shows that there was no abandonment of the attachment proceedings.[81]

j. Amount of Recovery

The measure of the recovery on a forthcoming or dissolution bond is dependent on the terms of the bond and of the statute under which it is given.

The measure of recovery on a bond for the release of attached property depends on the terms and conditions of the instrument, or of the statute by which such liability is fixed.[82]

Under a bond conditioned to return the property in case judgment shall be rendered against defendant in the attachment suit, the liability of the obligors is for the value of the goods released and not for the amount of the money judgment against defendant.[83]

Where the bond is conditioned for the return of the property or the satisfaction of the judgment, the measure of the surety's liability is the amount of the judgment where not in excess of the value of the property released,[84] but, if such property is of less value than the amount of the judgment, the recovery is limited to its value.[85] Stated in other terms, the liability is for the value of the property not in excess of the amount of the judgment.[86]

Where the bond is conditioned for the return of the goods or the payment of a specific sum of money, a recovery may be had up to the amount of the penalty of the bond, although in excess of the actual value of the unreturned goods, if not in excess of the judgment obtained in the attachment proceedings,[87] but, if the undertaking is conditioned for the payment of the value of the property, not exceeding a certain sum, the liability is limited to the value of the property and cannot be extended to the sum named, or to include the liability of defendant in the suit.[88]

Where the bond is in a fixed penalty and is conditioned to have the property forthcoming to answer to the order or decree of the court, the obligors

79. Siler v Perkins, 149 S.W. 1060, 126 Tenn 380, 47 L.R.A.(N.S.) 232

80. U. S. Fidelity & Guaranty Co. v Mueller, (Tex.Civ.App.) 13 S.W.(2d) 430

81. Hart v Jopling, (Tex.Civ.App.) 146 S.W. 1075

82. Ala.—Campbell v Tucker, 154 So. 835, 228 Ala. 658, denying certiorari (App.) 154 So. 831.
Ga.—A. M. Wilson & Co. v. Sims, 87 S.E. 890, 144 Ga. 685
6 C.J. p. 359 notes 58, 59

83. N.J.—Niagara Realty Co. v. Consolidated Indemnity & Insurance Co., 166 A. 118, 11 N.J.Misc. 361
N.D.—Minneapolis Threshing Mach. Co. v. Warner, 203 N.W. 197, 52 N.D. 432.
Ohio—Edwards Co. v. Golstein, 23 Ohio Cir.Ct.(N.S.) 84
Philippine—Crame Sy Panco v. Gonzaga, 10 Philippine 646, 6 Off.Gaz. 951.

84. Calvert v. Bennett, (Tex.Civ.App.) 286 S.W. 303

85. Cal.—Ward v. Massachusetts Bonding & Insurance Co., 228 P. 363, 67 Cal.App. 792
N.D.—Minneapolis Threshing Mach. Co. v. Warner, 203 N.W. 197, 52 N.D. 432
6 C.J. p. 359 notes 61, 62.

86. U.S.—Nelson v. Century Indemnity Co., (C.C.A.Cal.) 65 F.(2d) 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588
Iowa.—Cox v. Southern Surety Co., 226 N.W. 114, 203 Iowa 1252

Actual value of debtor's interest in property

(1) The surety on an attachment redelivery bond, conditioned, as required by statute, on the payment of the judgment or of the value of defendant's interest in the attached property, is liable only to the extent of the actual value of defendant's interest in the property released by the bond.—Sunderlin v. Terry, 112 A. 642, 95 Conn. 713.—6 C.J. p. 360 notes 66 [b], 69.

(2) "Actual value," as used in a bond given pursuant to Gen.St.(1918) § 5888, to release attachment of personalty, and in which principal and surety agreed to pay actual value of interest of debtor in property attached, means the fair market value and not what the property would bring at execution sale.—Safford v. McNeil, 129 A. 721, 102 Conn. 684.

(3) Actual value of interest of debtor in attached property, which he and surety agree to pay by bond, means interest in the property actually taken by attachment undiminished by chattel mortgage, which is invalid as against attaching creditor.—Safford v. McNeil, supra.

Property subject to prior lien

(1) Where the surety in a forthcoming bond shows that the property attached is subject to a mortgage, he is liable, in the event of a recovery by plaintiff against defendant in the attachment suit, only for the value of defendant's equity in the property.—Halbert v. McCulloch, 3 Metc.(Ky.) 456, 79 Am.D. 556

(2) Where mortgage lien on property existed at time of attachment, judgment for value of the property at the time of attachment is error, since attachment was subject to mortgage lien and the proper measure of recovery was value at time of attachment, less amount of mortgage lien.—U. S. Fidelity & Guaranty Co. v. McHargue, 97 S.W.(2d) 831, 265 Ky. 813

87. Ga.—A. M. Wilson & Co. v. Sims, 87 S.E. 890, 144 Ga. 685
N.J.—Goldberg v. Farber, 140 A. 787, 6 N.J.Misc. 257, affirmed 143 A. 917, 105 N.J.Law 239, and North Jersey Mortgage Co. v. Farber, 143 A. 918, 105 N.J.Law 245
N.Y.—Erlich v. Bristol, 262 N.Y.S. 340, 146 Misc. 831.
6 C.J. p. 359 note 62.

88. Curtin v. Harvey, 52 P. 1077, 120 Cal. 620.—6 C.J. p. 360 note 67.

are liable to the extent of the penalty, and the obligee may recover the value of the property if not in excess of the balance due on the decree or the amount of the penalty of the bond.[89]

In the case of a bond conditioned to satisfy any judgment recovered against the attachment defendant, the judgment fixes the amount to be recovered under the bond, although exceeding the value of the property up to the amount of the penalty,[90] with interest.[91] In the case of a bond in a fixed amount conditioned to pay the judgment, the obligors cannot be held to a sum in excess of the amount of the judgment.[92]

In any event, the sureties are not liable in excess of the amount fixed in the bond.[93]

Where a surety on a bond to discharge an attachment was entitled to subrogation to the right of the principal debtor to deduction for collection on certain collateral, the judgment should be for the penal sum of the bond, but execution should issue only for the amount of the debt and costs, after deducting the amounts under the right of subrogation.[94]

Time as of which value to be computed When the value of the property is the measure of damages, the amount recoverable is the value at the time of the seizure under the attachment, or at the time at which the property should have been delivered under the condition of the bond.[95]

How value determined. The value is to be found by the court or jury trying the case[96]

Depreciation in value. Where the property when returned by defendant is of less value than when received by him, by reason of use or neglect on his part, plaintiff in the action may recover of the obligors the difference between the value at the time of the redelivery and at the time it was released from the attachment.[97] Where, however, the bond was conditioned that defendant should pay the debt, etc, or the value of the property, or should deliver the property when so ordered, and the court decreed a return and sale of the property pending the suit, because of its perishable nature, after the property had been used by defendant, it was held that the sureties were not liable for any difference between the amount realized at the sale and the valuation of the property fixed in the bond.[98]

Interest. A recovery on the bond may include interest from the time of a breach until the date of the judgment in the action on the bond.[99] Where the bond is to pay the amount of any judgment which may be recovered against the attachment defendant not exceeding a stated sum with interest and costs, the sureties are not bound to pay interest on plaintiff's claim but their liability is to interest on the judgment[1] A statute providing for judgment on a forthcoming bond in attachment for the value of the property, and, if that value exceeds the amount due on execution, for the amount due and twenty per cent damages, does not authorize judgment for interest on the value.[2]

Costs. On an unsuccessful appeal by the obligors, costs on both the attachment proceeding and on the delivery bond obligating them to pay the amount of the judgment and costs may be awarded against the surety.[3]

E. SALE AND DISPOSITION OF PROPERTY OR PROCEEDS

§ 318. Sale in General

Attached property cannot ordinarily be sold by the attaching officer before judgment unless statutes so provide; and in any case a greater interest than that of the debtor cannot be sold.

Ordinarily, in the absence of statute, an attachment is no justification to the officer in selling the property, unless sold under execution issued upon judgment.[4] In any case an attaching creditor can-

89. Bland v. Creager, 13 B Mon (Ky.) 509.

90. Kimbrell v. Heffner, 161 S E. 175, 163 S C. 35, 80 A L R. 591—6 C J. p 360 notes 64-66

91. Eastern Tire Co. v. Witter, 183 N E 894, 281 Mass. 523.

92. State v. McGlothlin, 16 N W. 137, 61 Iowa 312

93. Florence v. Swails, (Tex Civ App) 85 S.W (2d) 257

94. Jennings v Wall, 104 N E 738, 217 Mass 278.

95. Adler v Potter, 57 Ala. 571—6 C.J. p 360 note 70.

96. Ark —Fletcher v. Menken, 37 Ark 206
Mass —Hawkins v Farley, 77 N E 319, 191 Mass. 236
Miss —Young v. Pickens, 45 Miss 553
6 C J p 361 note 71.

97. Creswell v Woodside, 63 P. 330, 15 Colo App. 468.

98. Richards v. Craig, 8 Baxt (Tenn) 457.

99. Cal —Hammond v. Starr, 21 P 971, 79 Cal 556
Mass —Jennings v Wall, 104 N E 738, 217 Mass 278.
6 C J p 361 note 74

1. Bowlend v. U S Fidelity & Guaranty Co, 219 N Y.S 69, 218 App Div 656, affirmed 157 N E 857, 245 N.Y. 561.

2. McDonald v Loewen, 130 S W. 52, 145 Mo App 49

3. A M. Wilson & Co. v. Sims, 87 S E 890, 144 Ga 685.

4. Ill.—Culver v. Rumsey, 6 Ill App 598.
Mass —Crocker v. Baker, 18 Pick. 407—Rich v Bell, 16 Mass. 294.
Mich —Trowbridge v. Bullard, 45 N W. 1012, 81 Mich. 451.

not subject to sale in satisfaction of his claim a greater interest in property than that owned by his debtor.[5]

§ 319. —— Where Property Perishable, Liable to Depreciation, or Expensive to Keep

Attached property may, in some states, be sold before final judgment if it is perishable, liable to depreciation, or expensive to keep.

In some states, under statutes authorizing the proceedings, it is held that attached property may be sold before final judgment in the attachment suit either under an order of court obtained for that purpose or by the officer upon his own responsibility upon a showing made that the case is within the statute, where the property is of a perishable nature,[6] or when, by reason of its liability to great depreciation in value or of the expense incident to keeping it to await the determination of the action, the interests of the parties require that it shall be converted into cash;[7] and in the latter case the court should order a sale regardless of whether or not the property was perishable.[8] The action of the court in ordering a sale rests in its sound discretion, and such a sale will not be disturbed in the absence of a showing of abuse thereof,[9] but a sale should not be ordered where the creditor has attached ample property to satisfy his claim and where great loss may be sustained if a sale should take place.[10] The fact that defendants in attachment have no interest in the property does not affect the authority of the court to order a sale of whatever interest, if any, defendants have.[11]

§ 320. —— Nature and Effect of Sale

A sale before judgment does not alter the rights of the parties, but the proceeds are substituted for the property.

A sale under statutes providing for the sale of attached property in limine or before final judgment is an equitable remedy provided for the convenience of the parties and preservation of the property.[12] The object of the statutes is to confide a power to be used for the benefit of both parties,[13] and the rights of the parties are not intended to be altered thereby, but imperishable money requiring no expense to keep is substituted in the possession of the court or officer for perishable property or property expensive to keep.[14]

Where the officer sells on mesne process a part of attached property, realizing thereby a sufficient amount to satisfy the debt for the recovery of which the attachment was issued, plaintiff's lien on the remainder will not be thereby dissolved, although the sheriff may be liable for attaching too much.[15]

The proceeds take the place of the property and continue subject to the right of defendant to have it delivered to him on giving bond, unless he has waived the right by an agreement that the proceeds shall remain in hands of the sheriff subject to the rights of the attaching creditors, until the further order of the court.[16]

5. Federal Trust Co. v. Ireland, 296 P. 704, 132 Kan 615.

Attachment lien is foreclosed through sale which divests only such title as defendant had at the time of the attachment lien subject to execution—Stewart v. Rockdale State Bank, (Civ App) 52 S W (2d) 915, affirmed 79 S W (2d) 116, 124 Tex 431.

6. Ariz—J. H Mulrein Plumbing Supply Co v. Walsh, 222 P 1046, 26 Ariz 152.
Mich—Najdowski v Ransford, 227 N.W. 760, 248 Mich 465.
6 C J. p 361 notes 77, 79, 80, p 362 note 81

Sale without court order

Only where attached property, because of its nature and inherent qualities, is liable to material depreciation in value from decay or other causes pending the end of litigation, can it be sold without court order as "perishable property," under Code Civ Proc. § 547.—Callahan v. Danziger, 158 P. 760, 172 Cal 738.

7. Mont—State v District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546, 53 Mont 450
Vt—Goodrich v. Chappell, 98 A. 46, 90 Vt. 263
6 C J. p 361 notes 78–80, p 362 note 81.

Subserving parties' interests

A showing that attached property will depreciate in value is sufficient under a statute authorizing a sale "where it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale"—State v District Court of Fifteenth Judicial Dist in and for Musselshell County, 164 P. 546, 53 Mont. 450

8. Callahan v. Danziger, 158 P. 760, 172 Cal. 738

9. Moore v. Budlong, 143 A. 602, 49 R I 392

Presumption of propriety

Ordinarily the correctness of an order for the sale of attached property before judgment, or determining the propriety of such sale, will not be reviewed, nothing appearing affirmatively to impeach it, but the propriety thereof will be presumed —McCreery v. Berney Nat Bank, 22 So 577, 116 Ala 224, 67 Am S R. 105 —Runner v Scott, 50 N E 479, 150 Ind 441—Dunn v. Salter, 1 Duv (Ky) 342—6 C J. p 362 note 82

10. American Commercial Co v Randolph, 191 N W. 779, 49 N D 476

11. State v. District Court of Fifteenth Judicial Dist. in and for Musselshell County, 164 P. 546, 53 Mont 450.

12. Bradley v. General Motors Acceptance Corporation, (Ga App) 181 S E 188.

13. Mass—Pollard v. Baker, 101 Mass 259
Mo—Oeters v. Aehle, 31 Mo. 380
N H.—York v. Sanborn, 47 N.H. 403
6 C J. p 362 note 96.

14. State v. Hockaday, 33 S.W 812, 132 Mo 227—6 C J. p 362 note 83

15. Marshall v. Town, 28 Vt. 14.

16. State v Judge Twenty-first Judicial Dist., 37 La.Ann. 253—6 C J. p 362 note 85.

The sale does not defeat or displace a prior lien upon the property,[17] but the property is released from such lien which is transferred to the proceeds[18]

A sale of attached property is not vitiated by the fact that the officer illegally attaches the funds in his hands on a writ in favor of another creditor.[19]

§ 321. Sale after Replevy or Dissolution of Attachment

After replevy of attached property or dissolution of the attachment, there can be no sale.

Where the property attached has been replevied or the attachment discharged or dissolved, a sale of the property cannot thereafter be ordered or made because of its perishable nature, or liability to depreciation or the expense of keeping it.[20]

§ 322. Sale by Consent

A sale of the attached property may be made by the parties' consent which, in the absence of consideration, is revocable.

A sale of attached property may be made by the officer by consent of the parties interested,[21] and it is not necessary in such case that all the steps ordinarily required by statute be pursued.[22] So although a sale, proceeding under a statute, is void thereunder if the statutory requirements have not been complied with, where defendant was present and did not object thereto but made a bid on the property, the sale must be considered as valid, as having been made by consent.[23]

A sale by consent is the official act of the officer, and the proceeds are held under the attachment in the place of the property.[24]

If there is no consideration for the agreement of the owner of the attached property with the creditor or the levying officer that the property may be sold by them in such manner as they may choose, such license may be revoked at any time before a sale is made thereunder.[25]

§ 323. Duty of Officer to Sell

A regular order to sell imposes a duty on the officer.

Where the order for the sale of attached property is regularly issued, the officer must sell.[26]

§ 324. Proceedings

a In general
b Setting aside sale

a. In General

The proceedings on the sale must strictly comply with the governing statutes

The proceedings upon the sale of attached property should be in strict compliance with the statute governing the matter.[27] Where the statute requires that the question of whether the property is liable to perish or waste be determined by appraisers who must, after so determining, appraise the property, the officers cannot legally sell the property until after such determination.[28] Where a statute requires plaintiff obtaining a default decree without the appearance of an absent debtor to furnish a refunding bond before any proceedings to satisfy the decree be had, a sale made without such bond being given is void[29] A sale is not void, however, because of the failure of the order or attachment to run in the name of the state when the order of sale ran in the name of the state and defendants were regularly served or appeared and made no objection to the judgment sustaining the attachment.[30]

In determining whether an ordinary judgment only should be rendered for plaintiff or whether the attached property should be ordered sold, issues arising on denial of the facts alleged in the affidavit for attachment are for the jury, while the ques-

17. Taylor v Thurman, (Tex) 12 S W. 614—6 C J p 362 note 86

18. Bradley v. General Motors Acceptance Corporation, (Ga App) 181 S E. 188—6 C J. p 362 note 87

19. Wheeler v. Raymond, 130 Mass 247

20. Ky—Weathers v. Mudd, 12 B Mon 112
Or—Ah Lep v Gong Choy, 9 P 433, 13 Or 205
6 C J p 362 note 90.

21. Chadbourne v. Sumner, 16 N H 129, 41 Am.D. 720—6 C J p 362 note 91

22. J H Mulrein Plumbing Supply Co. v Walsh, 222 P. 1046, 26 Ariz 152.

23. Gibbs v Golden Live Stock Co, 151 S E 556, 40 Ga App 808.
Arranging to repurchase property
Where the judgment defendant in attachment was present at the sale, made no objection thereto, but arranged with plaintiff, who was a purchaser, to buy back the property, but failed to do so it was held that he was estopped, more than two years thereafter and after conveyance of the land to an innocent third person, to sue to have the sheriff's deed declared void.—Sharp v. Hall, 88 S E 929, 145 Ga. 171

24. Ind—Kendallville First Nat Bank v Stanley, 30 N.E 799, 4 Ind App 213
Mass—Kingsbury v Baker, 17 Pick 429
Vt—Lamb v Zundell, 62 A. 33, 78 Vt 232
6 C J p 363 note 92.

25. Wallis v. Truesdell, 6 Pick (Mass.) 455

26. Ind—State v. Manly, 15 Ind 8.
Tenn—State v. Manly, 11 Lea 636
6 C J p 363 notes 94, 96 [a].

27. Bean v. Colton, 130 A. 580, 99 Vt 45—6 C J. p 363 note 97.

28. Goodrich v. Chappell, 98 A. 46, 90 Vt 263.

29. Seay v Wofford, 106 So 751, 141 Miss 888, motion overruled 106 So. 927

30. First Nat Bank v Darrough, 19 P (2d) 551, 162 Okl 243.

tion as to whether the property was attached and the propriety of the attachment is for the court; and evidence as to whether the attached property should be sold is admissible, although offered after verdict and in the absence of the jury.[31] Under some statutes, the sale of attached lands under an order of the court is governed by the same restrictions and regulations as though the land had been levied on under execution.[32] Where the order of sale is made subsequent to the entry of a judgment for plaintiff, it is not necessary then to hear evidence as to the validity of the grounds of the attachment when that matter has been fully heard on a motion to dissolve.[33]

Property delivered under forthcoming bond. Under a statute providing that where property taken in attachment has been delivered to defendant under the provisions of a forthcoming bond the court may compel its delivery to the officer for sale, where a judgment has been rendered for plaintiff the proper procedure is for the court to make an order for the delivery of the property to the officer for sale and to make an order for the sale.[34]

Conveyance of property. A requirement that where a claim for purchase money has been reduced to judgment by the payee retaining title in the attached property he shall before sale convey the property to the debtor does not apply to a sale under short order; and in the latter case the sale is valid although no conveyance is made, such conveyance being necessary only in case of a regular sale under final process.[35]

Optional proceedings. Although a statute requires the sheriff to sell attached perishable property before judgment without a court order, a party desiring such a sale may proceed to obtain a court order therefor under a statute authorizing such an order where it appears that the interests of the parties will be subserved by a sale.[36]

Levy and appraisement. Where judgment is rendered for the attachment plaintiff, the original levy on the writ of attachment and the confirmation thereof by the court renders it wholly unnecessary to levy on the attached real property after the issue of the order of sale, and the sheriff proceeds as if the property had been levied on by execution. Accordingly, where appraisement is required by statute before sale, it is held that he may call an inquest at any time after the order of sale is delivered to him and before the sale.[37] A sale may be set aside even after confirmation, however, where it is void for want of further appraisal required by statute.[38]

b. Setting Aside Sale

In a proper case a sale of attached property may be set aside on motion or rule to show cause or in a separate equitable action instituted for the purpose.

Where proper grounds for setting aside the sale exists, as where there was a noncompliance with the requirements outlined in §§ 324–332 of this article, the court ordering a sale of attached property has the same power to set aside a sale made thereunder as it would have if the sale had been made by virtue of an execution issued on a judgment entered in an action at common law, the proper procedure being by rule to show cause[39] or motion,[40] and a sale of attached property after final judgment may be set aside in an equitable action based on the ground that the attachment and judgment were obtained on a false and fraudulent affidavit without notice to the attachment defendant.[41] Where more land is sold than was necessary to pay the amount the debtor owed, the sale should be set aside on equitable terms, giving the purchaser a lien on the land for all the money he has paid out therefor.[42]

§ 325. —— Order of Sale

A court order made in accordance with the requirements of the statute is necessary for the sale of attached property before judgment under statutes permitting sale by order.

Where the statute permits the sale of property before judgment by order of court, the levying officer has no right to sell without such order.[43] An order of sale of attached property may be made subsequent to the entry of judgment for the attaching creditor,[44] and it has been held timely if made at the

31. Sprow v. Wicker, 157 N E 460, 87 Ind App. 253
32. Helmer v. Rehm, 15 N W. 344, 14 Neb. 219
33. First Nat Bank v. Sorenson, 217 P. 948, 30 Wyo 136
34. Jordan v. Brown Shoe Co., 4 P. (2d) 1030, 152 Okl. 288.
35. Bradley v. General Motors Acceptance Corporation, (Ga App.) 181 S E 188
36. Henry Cowell Lime & Cement Co v. Figel, 148 P. 796, 27 Cal App 11.
37. Reeder v Mitchell, 244 P. 773, 117 Okl 21
38. Given v Owen, 175 P 345, 73 Okl 146.
39. Jackson v Halsted, 82 A 312, 82 N J Law 306—6 C J p 365 note 33 [a].
40. Kengreen Gas Utilities Corporation v Crozer, 51 S W.(2d) 262, 244 Ky. 440

Questions raised by motion

A motion to set aside a sale on attachment because the petition was insufficient to support the judgment raised the validity of an attachment based solely on a verified petition.—Kengreen Gas Utilities Corporation v Crozer, 51 S W (2d) 262, 244 Ky. 440.
41. Smith v Salmon, 101 S E 798, 149 Ga 699
42. Anderson v Lusk, 3 Ky Op 610.
43. Cal.—Witherspoon v. Cross, 67 P 13, 135 Cal. 96.
Idaho —Work v. Kinney, 51 P. 745, 5 Idaho 716
44. First Nat Bank v. Sorenson, 217 P. 948, 30 Wyo. 136.

next term thereafter.[45] Since an order of sale of attached property issued by the court clerk after judgment for the creditor must conform to the judgment or order of the court, the clerk is without jurisdiction to issue the order where there is no judgment or order of the court for the sale[46] Where a sale made under a default judgment was set aside after the judgment was vacated, on rendering a second wrongful default judgment a court is without power or authority to reinstate and approve the sale previously made.[47]

Where two attachments issue out of different courts, the court from which the last writ issued may, before judgment, in the interest of all the parties, order a sale of property levied on under both writs, but it has no power to interfere with the rights of the first attaching creditor in the proceeds[48]

It is sometimes required that an order for the sale of attached property before judgment must be predicated upon a sworn application by the levying officer showing the character of the property claimed to be perishable and the amount thereof[49] An attaching creditor who has applied for an order for a sale of property levied on may withdraw such application without thereby dissolving the attachment.[50]

Requisites and sufficiency. It is not necessary that the order should show the facts which authorize the sale of the property or the making of the order[51] However, a judicial sale of attached real estate sold by order of the judgment is void where no specific description of the property is included in the judgment.[52]

The order of sale must satisfy the statutory requirements as to advertising the sale, and should not improperly require prospective bidders to deposit a stated sum before the sale[53] Where the order of sale does not satisfy the statutory requirements or improperly requires prospective bidders to deposit a stated sum before the sale, the sale may be set aside on proper motion even though such requirement was ignored by the officer conducting the sale.[54]

Where superior lienholders are not seeking a sale, the court does not abuse its discretion by requiring an attaching creditor, who has been adjudged fourth lien on the property, to execute a bond for costs before ordering the property sold.[55]

An order issued by the court clerk after judgment for the creditor must conform to the judgment or order of the court.[56]

Nature and effect. An order of sale of attached property after judgment for the creditor is a species of execution.[57] An order for the sale before judgment of perishable property attached does not affect the legality of the original seizure.[58]

Attack on order If no jurisdiction was acquired over the subject matter of the levy, the order of sale may be set aside at any time and in any appropriate action, in which all the parties to the judgment should be made parties.[59] So where attached property has been sold under a judgment or order therefor which the court had no jurisdiction to render, the attachment defendant is not bound to appeal to save his rights, but may have the judgment set aside upon motion.[60]

The order directing attached property to be sold cannot, however, be collaterally attacked for the purpose of defeating the title of the purchaser at the sale,[61] or for mere irregularities curable by amendment[62]

§ 326. —— Notice of Appraisal and Sale

Notice of appraisal and sale should be given in accordance with the statutory requirements.

Since a resort to the proceeding of sale after appraisal is warranted only by specific statutory law, in order to be justified notice of appraisal and sale should be given as required by the statute, otherwise

45. Cosme v. Hatch, 24 N W 389, 17 Neb 694

46. Jordan v Brown Shoe Co, 4 P (2d) 1020, 152 Okl 288.

47. Haller v Rieth, 247 Ill App 541

48. Weaver v. Wood, 49 Cal 297

49. Work v. Kinney, 51 P. 745, 5 Idaho 716.

50. Smith v. Wens, 73 N E. 651, 187 Mass 421.

51. Moore v. Smith, 22 S E 297, 96 Ga 763—Wilson v. Garrick, 72 Ga. 660

52. Hackworth v. Thompson, 8 Ky. Op. 585.

53. Kengreen Gas Utilities Corporation v. Crozer, 51 S W (2d) 262, 244 Ky 440

54. Kengreen Gas Utilities Corporation v. Crozer, supra.

55. Citizens Nat Bank of Bowling Green v Phillips, (Ky) 95 S.W (2d) 601.

56. Jordan v. Brown Shoe Co., 4 P. (2d) 1020, 152 Okl. 288

57. N J—Jackson v Halsted, 82 A. 312, 82 N J Law 306.
Okl—Given v. Owen, 175 P. 345, 73 Okl. 146.
Special execution.—Jordan v. Brown Shoe Co., 4 P.(2d) 1020, 152 Okl 288.

58. Sterling v. Ripley, 3 Pinn (Wis) 155

59. Rone v Marti, (Tex Civ App.) 244 S W. 639

60. Osborn v. Cloud, 23 Iowa 104, 92 Am D 413

61. Ala.—McCreery v. Berney Nat Bank, 23 So 577, 116 Ala. 224, 67 Am S R 105
Mo—Buller v. Woods, 43 Mo App. 494

62. Williams v. Bennett, 88 S W. 600, 75 Ark. 313, 112 Am S.R. 57.

the sale will be illegal;[63] and it has been held that although the statute does not provide when notice of application for examination, appraisal, and sale of attached property shall be given, except that it shall be at least a stated time before sale, it must be given a reasonable time before the appraisers act, so that the parties may have an opportunity to be present, notwithstanding that the statute is silent as to any hearing by appraisers.[64]

Where the statute authorizes an order for immediate sale only after notice to the adverse party, the notice must be given to the defendant owning the property; and notice to a defendant having no interest therein is not sufficient.[65]

A notice of sale, which is defective for want of sufficient time, cannot be cured by a postponement of the sale on the day appointed therefor to a day remote enough to satisfy the statutory requirement as to notice.[66]

Where a judicial sale under attachment proceedings was advertised in a publication which was not a newspaper for that purpose, the irregularity is such an informality as is cured by prescription, precluding an attack on the sale more than two years thereafter.[67]

Where the property is subject to a mortgage, a sale should not, it has been held, be made without a previous warning order to the mortgagee.[68]

§ 327. —— Time of Sale

The sale should be made at the time prescribed by statute or order.

The sale of attached property should be made at the time prescribed by the statute[69] or ordered by the court.[70]

§ 328. —— Terms, and Mode and Conduct of Sale

The terms and conduct of the sale must conform to statutory requirements where such exist; in other respects they are largely discretionary.

In matters not regulated by statute or the order or decree, the sale is generally under the control of the officer conducting it, and he has considerable discretion in the actual conduct of the sale.[71] Where the statute requires the sale to be public, a private sale is unauthorized, and will, it has been held, have the effect of postponing the lien of the creditor effecting it to those subsequently attaching creditors.[72] It is not essential that the sale should be for cash;[73] but when the terms of sale of attached property do not conform to the statutory rules regarding the time for which credit may be given, the sale should be set aside.[74] When an officer sells goods he becomes liable from the time of the sale for the price at which they are sold, and cannot set up, in defense to an action for it, that he never received the money or its equivalent, when he has no right to sell for anything but money.[75]

Although the statute provided for the sale of attached property by the sheriff on judgment for plaintiff, defendant could not complain where a court treated an action for the breach of a warranty in a deed as one in equity and ordered a sale of the attached property by a commissioner, since, having the right to object if the property did not bring a fair price, he could not be harmed.[76]

Sale of original security first Where the debt on which the action is brought was secured, the owner of the attached property can, it has been held, require the officer to sell the original security before putting up the attached property.[77]

Opportunity to redeem. In decreeing a sale of real estate to satisfy the lien of an attachment thereon, it has been held that the debtor should be given a reasonable time to redeem by paying the amount decreed against him.[78]

§ 329. —— Sale of Part of Property

Only so much of the property as is required to pay the amount due or as is levied on should be sold.

It is the duty of the sheriff on the final process to sell no more of the property than may be required to pay the amount due, including the costs,[79] and

63. Bean v. Colton, 130 A. 580, 99 Vt. 45—6 C.J. p. 363 note 12.

64. Bean v. Colton, supra

Notice given after appraisal is insufficient, especially where defendant resided out of the state, and a sale after notice given after the appraisal was made constituted a conversion of the property by the officer making the sale.—Bean v. Colton, 130 A. 580, 99 Vt. 45

65. Melick v. Superior Court of California in and for Los Angeles County, 269 P. 746, 93 Cal.App. 189

66. Sawyer v. Wilson, 61 Me. 529

67. Jackson v. Brewster, (La.App.) 169 So. 166.

68. Simper v. Stein-Vogeler Drug Co., 37 S.W. 258, 18 Ky.L. 565—6 C.J. p. 364 note 14.

69. Knight v. Herrin, 48 Me. 533—6 C.J. p. 364 note 15.

70. Oeters v. Aehle, 31 Mo. 280—6 C.J. p. 364 note 16.

71. Appleman v. Lynch Nat. Bank, 298 S.W. 1097, 221 Ky. 415.

72. Culver v. Rumsey, 6 Ill.App. 598

73. Crocker v. Baker, 18 Pick. (Mass.) 407—6 C.J. p. 364 note 17.

74. Dunn v. Salter, 1 Duv.(Ky.) 342

75. Appleton v. Bancroft, 10 Metc. (Mass.) 231—6 C.J. p. 364 note 19.

76. Lemly v. Ellis, 55 S.E. 629, 143 N.C. 200

77. Stanley v. Hoffman, (Tex.Civ.App.) 57 S.W.(2d) 270.

78. Benedetto v. Di Bacco, 99 S.E. 170, 83 W.Va. 620

79. Dronillard v. Whistler, 29 Ind. 552—6 C.J. p. 364 note 23.

an order directing the sale of several lots of realty is improper in the absence of evidence showing that the lots should or must be sold together [80] Where the levy is upon a particular interest only, that interest alone should be sold,[81] but a sale after appraisal is not illegal by reason of the fact that more than enough to realize the amount called for by the precept is sold, where the last article sold was indivisible, and previous to its sale the necessary amount had not been realized.[82]

§ 330. —— Sale of Real Estate

Real estate should not be sold unless other property is insufficient to satisfy the debt, and in some jurisdictions cannot be sold without an action to enforce the lien.

A sale of real estate which has been attached cannot be ordered until all the personal property attached has been sold,[83] and where personalty has been sold for the full amount of plaintiff's debt, a subsequent sale of attached realty is void [84] So, where a defendant has deposited in court the amount of the debt, land attached should not be ordered sold for the payment of the debt. The fund in court should be first disposed of, and, if insufficient, a sale of the land may then be ordered.[85] Where the equitable interest of a debtor in land in which there is no defect of title is to be sold on credit, the land should be made subject to the payment of the purchase money.[86]

In West Virginia an action at law or in equity must be instituted to enforce the lien acquired in attachment proceedings [87]

§ 331. —— Indemnity Bond

The officer cannot refuse to execute a regular order of sale because plaintiff does not give an indemnity bond, but where such bond is required, a sale without one is invalid.

Where an order of sale is regularly issued, the officer is bound to sell, although title to the property is disputed, and he cannot refuse to proceed because plaintiff does not give an indemnity bond [88] Some statutes, however, require an indemnity bond before sale in cases against nonresidents, or where defendant has been constructively summoned and has not appeared, in order to secure him if he should appear and successfully defend within a certain time; and a sale without such bond having been executed is invalid and will be set aside.[89]

§ 332. —— Return and Confirmation

Where statutes require confirmation, a sale is incomplete until reported and, notwithstanding objections thereto, confirmed.

It is sometimes required by statute that a sale of attached property shall be returned or reported to the court and confirmed, in which case, until this is done, the sale remains incomplete,[90] passes no title to the purchaser,[91] cannot be enforced by either party,[92] and may be set aside.[93] The order of confirmation has been held a matter of right, however, and not of discretion, and its omission is immaterial after expiration of the time within which the attachment defendants are entitled to appear in order to set aside the sale.[94]

Exceptions or objections to the report of the sale may ordinarily be made and heard before confirmation;[95] but defendant who has procured a modification of the terms of sale with which the purchaser in good faith complied is estopped to object to its confirmation; nor will confirmation be denied on the ground of gross inadequacy of the purchase price on the testimony of a witness as to the value at a

80. Union Cotton Co v Bondurant, 222 S W 66, 188 Ky 319

81. Thompson v Baker, 74 Me 48

82. Wheeler v Raymond, 130 Mass 247

83. Ky—Davidson v Simmons, 11 Bush 330
W Va—Camden v Haymond, 9 W Va. 680
6 C J p 364 note 26

84. Howard v Howard, 39 S W (2d) 245, 239 Ky 160

85. Perry v Seitz, 2 Duv (Ky) 122

86. Hedrick v Peters, 7 Ky Op 565

87. Jackson v Parkersburg & O. V. Electric Ry Co, (D C W Va.) 233 F. 784

88. State v. Manly, 11 Lea (Tenn) 636

89. Ark—Bush v. Visant, 40 Ark 124.
Ky—Calk v Francis, 2 B Mon 42
W Va—Hall v Lowther, 22 W Va 570
6 C J p 365 notes 28, 29.

90. Freeman v Watkins, 13 S W 79, 52 Ark. 446—6 C J p 365 notes 30, 31

91. Kenaday v Gilkey, 98 S W 969, 81 Ark 147.

92. Henry Quellmalz Lumber & Mfg Co v Day, 201 S W 125, 132 Ark. 469—6 C J. p 365 note 32

93. Greer v. Powell, 3 Metc (Ky) 124

94. King v. Harrington, 14 Mich 532

95. Appleman v. Lynch Nat Bank, 298 S W. 1097, 221 Ky 415

Amended exceptions

A purchaser, excepting to the report of an attachment sale on the ground that the amount of a street improvement lien was not credited on his purchase price, is entitled to file amended exceptions setting up a sale of property to satisfy such lien, and to introduce proof on the question whether the master commissioner announced that he was selling the property subject to the lien, which was not referred to in the decree ordering the attachment sale; and his amended exceptions were offered in time when offered before the court acted on such liens where the original exception, alleging their existence, was filed before confirmation of the sale, although not within the time granted for exceptions, and the amendments presented no new exceptions, but merely made the motion definite—Appleman v. Lynch Nat. Bank, 298 S W. 1097, 221 Ky. 415.

subsequent time when conditions had changed.[96] After a sale has been reported to and confirmed by the chancellor, he has no power at a subsequent term to hear exceptions or to permit, without consent, the commissioner to amend his report.[97]

§ 333. —— Recovery of Purchase Money

Where a cause of action therefor exists, the selling officer can recover the purchase price by suit.

Ordinarily an officer selling property under an attachment may, if necessary, sue to recover the purchase price,[98] but where, under a sale by consent of all the parties, a creditor purchases a part of the property, in amount less than his debt, to satisfaction of which he is entitled under the agreement, the officer cannot maintain an action against him for the purchase price.[99]

§ 334. Title, Rights, and Liabilities of Purchaser

The purchaser at a valid sale of attached property acquires the title which defendant had therein at the time of the levy, and in the case of goods sold as perishable he takes good title even though defendant had none. He is liable for torts committed by him in connection with the sale but may recover from the creditor money paid for property he is required to surrender.

A sale of property under an attachment passes all of the attachment defendant's interest therein,[1] subject, in some jurisdictions, to the right of redemption,[2] and entitles the purchaser to possession.[3] The sale relates back to the levy and divests the debtor of the title which he had at the date of the levy and invests such title in the purchaser.[4]

Ordinarily, the purchaser acquires only defendant's interest in the property, however,[5] unless he can show himself entitled to the full protection afforded a bona fide purchaser for value without notice,[6] and where an attaching creditor has constructive notice of an encumbrance on property sold pursuant to a foreclosure of his attachment lien, the purchaser acquires only a qualified interest in the property, taking the legal title subject to the mortgage debt.[7] So, where there has been a sale of attached property under circumstances amounting to notice to the purchaser of the debtor's right to open the judgment, the purchaser will be held to purchase

96 Hilliard v Union Trust Co of New Jersey, 97 S E 335, 123 Va 734

Evidence held insufficient

Testimony of a witness, at a subsequent time when conditions had changed and land had advanced in price, that he would give ten thousand dollars for an interest in attached lands sold for seven thousand dollars, was insufficient to show that the property was sold for a grossly inadequate price particularly where the witness was an unsuccessful bidder at the sale.—Hilliard v Union Trust Co of New Jersey, 97 S E. 335, 123 Va. 724.

97. Lobrason v. Mullins, 10 Ky Op 194

98. Lamb v. Zundell, 62 A. 33, 78 Vt 232

99 Ball v. Divoll, 17 Pick (Mass) 143

1. Farmers' Nat Bank of Stephenville v. Daggett, (Tex Com App) 2 S W (2d) 834, affirming Daggett v Farmers' Nat Bank, (Civ App) 259 S W. 198—6 C J p 365 note 37

2. Hinton v. Elliott, 63 S W.(2d) 633, 187 Ark 907.

3. Williams v. Thompson, 7 Alaska 601.

4. Porto Rico—Parés v. Reynes, 2 Porto Rico Fed 402
Tex—Holford v Patterson, (Civ App) 240 S W 341, affirmed 257 S W. 213, 113 Tex 410
Wyo—Roberts v. Hudson, 173 P. 736, 25 Wyo. 505
6 C J. p 366 note 43.

Priority over subsequent sale

Where the steps marked out by the law for enforcing a judgment in an attachment proceeding have been followed, the purchaser at such sale acquires an interest superior to the rights of a purchaser at a receiver's sale subsequent to the attachment—Joaquin v. Avellano, 6 Philippine 551

Sale to innocent purchaser

A sale of land to an innocent purchaser after the payment of the purchase money and obtaining the title by deed will not, under some statutes dealing with the rights of such purchasers, be set aside even though a former judgment in the attachment proceedings has been reversed.—Beasley v. Mershon, 3 Ky Op 21.

5. State v District Court of Fifteenth Judicial Dist in and for Musselshell County, 164 P 546, 53 Mont 450—6 C J p 365 note 38.

If debtor has no title, none passes by sale on foreclosure of the attachment lien—Farmers' Nat Bank of Stephenville v Daggett, (Tex Com App) 2 S W (2d) 834, affirming Daggett v Farmers' Nat Bank, (Civ App) 259 S W. 198—Lem Smith & Co v. Sweatt, (Tex Civ App) 72 S W. (2d) 313.

Sale of pledged note

Where a note was pledged to a bank by the payee named therein, without indorsement, as collateral security for the payee's note, and the bank sold the pledged note in attachment proceedings, the purchaser became vested merely with the rights of the pledgor and of the pledgee—Citizens' Bank & Trust Co. v. Chase, 144 S E 464, 151 Va 65.

6. Chetham-Strode v Blake, (N M) 142 P 1130—Jones v. Springer, 103 P. 265, 15 N M. 98—6 C.J. p 366 note 39.

Facts showing no bona fide purchase

As a general rule, one who purchases the legal title with notice of an outstanding equitable title of heirs of the deceased member of the community, or notice of facts putting him on inquiry as to such title, does not take as a bona fide purchaser free from the equitable claims of the owners of the community. Accordingly, where a deed of trust was given by a married man joined by his second wife, creating a lien in favor of the beneficiary in the deed of trust as against both the interest of the married man and of an heir of the first marriage, and a creditor of the married man subsequently acquired by attachment his interest, the attaching creditor was not a bona fide purchaser, where at the time he acquired title under the attachment sale he was notified by public outcry of the interest of the heir, particularly where he had advanced no new consideration nor surrendered any security for the land. In such case the purchaser takes subject to the rights of the heir—Shear Co v Stuth, (Tex Civ App) 248 S W. 158

7. Fidelity & Deposit Co. of Maryland v First Nat. Bank, (Tex Civ. App) 33 S.W (2d) 605, error refused.

subject to that right [8]

Where an attachment or an attachment judgment is void, a sale thereunder is also void and the purchaser acquires no title [9]

A plaintiff who causes an attachment to issue and causes property to be sold not belonging to defendant, which property the purchaser is required to surrender, is liable to such purchaser for the money paid for such property.[10]

Sale of property as perishable. An order of sale of property as perishable and sale under such order will confer a good title on the purchaser[11] without regard to the title or interest of defendant in attachment and notwithstanding the property may have belonged to another or may have been burdened with other claims;[12] and persons claiming the property, or any interest therein adverse to the attachment defendant, must look to the proceeds of the sale in asserting their rights [13]

Liabilities. A mere purchaser who does nothing more than purchase, is not responsible in trespass for the wrongful act of the sheriff in levying on and selling the goods; but a purchaser who takes possession of the property is liable in trespass if the attachment defendant had no title, the wrong in such case being not the illegal seizure by the sheriff, but the subsequent act of the purchaser [14]

Where on the sale of attached property attaching plaintiff agreed with defendant to buy the property to satisfy his debt out of the proceeds thereof and to return the balance to the debtor, it was held that this constituted a secret trust in favor of the debtor, and that attaching plaintiff was liable to other creditors of defendant for the surplus of the proceeds over the amount necessary to satisfy his claim.[15]

If the purchaser at a sale of property under mesne process pays the price to the creditor whose recovery is sufficient to absorb the whole of such proceeds, the purchaser will be discharged unless the officer holds paramount claims on such proceeds.[16]

§ 335. Disposition of Proceeds or Property

a In general
b Before judgment
c. After judgment
d On dissolution, release, or payment
e Interest on proceeds

a. In General

The proceeds of property sold in attachment should be distributed to the parties entitled, all interested parties being given an opportunity to assert their claims and object to the order of distribution.

As shown in the following sections, the proceeds of the sale of attached property are to be distributed according to the outcome of the litigation to the parties entitled thereto. Defendant should have notice of the order of distribution,[17] and any person claiming an interest in the attached property should be given an opportunity to assert his claims before final distribution.[18] Accordingly, the alleged debtor whose property was sold may become a party to a money rule against the sheriff by an attaching creditor, and may plead that the creditor has no valid lien on the fund in the sheriff's hands,[19] but a creditor who has been paid in full has no right to complaint of the order of distribution,[20] and neither has a subsequent grantee of defendant in attachment, where the proceeds were insufficient to satisfy all creditors entitled to share therein.[21]

Order for assessment. A statute providing that the court shall direct the clerk to make an assessment of the amount to which each attaching creditor is entitled out of the property attached does not make an order necessary where the judge of the court is ex officio the clerk thereof.[22]

8. Coates v O'Connor, 168 N W 102, 102 Neb 602, rehearing denied 169 N W 239, 102 Neb 602

9. Sawyer v Burris, 121 S W. 321, 141 Mo App 108

Void attachment

Where an attachment was void for want of a proper affidavit, an order of sale and the sale thereunder were void, and the purchasers acquired no right to the property involved.—Kengreen Gas Utilities Corporation v Crozer, 51 S W (2d) 262, 244 Ky 440

Purchaser from purchaser

The purchaser of land from a vendor who acquired it at a sale under a void attachment acquires no better title than his vendor, notwithstanding he was an innocent purchaser without notice—Howard v Howard, 39 S.W (2d) 245, 239 Ky 160

10. Bruce v Carlisle, 8 Ky Op. 359

11. McConnell v. Kaufman, 32 P 782, 5 Wash 686—6 C J. p 366 note 40

12. Jones v. Springer, 103 P. 265, 15 N M 98, affirmed 33 S Ct 64, 226 U S 148, 57 L Ed. 161—6 C J. p 366 note 41.

13. Young v Kellar, 7 S.W. 293, 94 Mo 531, 4 Am S R 405

14. Talmadge v. Scudder, 38 Pa 517

15. Ries v Rowland, (C C Mo.) 11 F 657, 4 McCrary 85.

16. Barker v. Barker, 47 N H 341

17. Morrow v. Smith, 4 B Mon. (Ky.) 99—6 C J p 367 note 59.

18. Early v Meadow, 183 S W 229, 168 Ky 800

Wife of attachment defendant

Where the wife of an insolvent debtor owned one-half of the property involved in an attachment sale, she should be made a party and given an opportunity to assert her rights before final distribution among her husband's creditors—Early v. Meadow, 183 S W 229, 168 Ky. 800.

19. Wynne v. Millers, 61 Ga 343

20. Early v Meadow, 183 S W. 229, 168 Ky 800

21. Evans v Power County, 1 P. (2d) 614, 50 Idaho 690.

22. Rawles v People, 31 P. 941, 2 Colo App. 501.

b. Before Judgment

The proceeds of a sale before judgment are to be held until judgment and order for distribution.

The proceeds of a sale of attached property, when the sale thereof is made before judgment, are to be held, to be disposed of in like manner as the property would have been held and disposed of if it had remained unsold,[23] and should not be distributed before judgment and order for such distribution.[24] Furthermore, in case of dispute as to the ownership of attached property, the court should not order the proceeds of a sale of such property to be paid over to plaintiff in attachment until the question of ownership has been determined.[25] Where, by agreement of the parties, the proceeds were deposited with a third party who subsequently intervened in the action setting up an adverse claim, the court has power to require payment thereof to a commissioner appointed by the court.[26]

c. After Judgment

The proceeds of the sale of attached property should be distributed according to the priority of the claims thereto or prorated under statutes providing therefor.

Where the proceeds of the sale of attached property are claimed by several creditors, they will be distributed among the creditors in the order of their priority as determined by the court.[27] A creditor under whose writ property could not be seized because it was held by an officer of another jurisdiction, under another writ, may intervene in the suit in which the attachment was made and share in the distribution of the proceeds remaining after satisfying the first attachment,[28] and a mortgage lien perfected before the levy of a second attachment will be entitled to satisfaction out of the surplus proceeds of sale under a prior attachment.[29] Where a mortgagor assigns his equity of redemption after it is attached, and the officer afterward sells it on the attaching creditor's execution, which is satisfied by a part of the proceeds, and, having no notice of the assignment, applies the surplus in satisfaction of another attachment execution against the mortgagor, he is not answerable to the assignee for such surplus.[30]

In the absence of statutory provisions applicable to the particular case requiring another mode of distribution, as between several attachment creditors, the proceeds of the sale of attached property should be applied according to the priority of the attachment liens,[31] but it has been held that where an attachment is held void as to subsequently attaching creditors who have proved their claim and joined in a common suit for their mutual benefit, the court may distribute the fund among them pro rata instead of in the order of the liens of their respective attachments.[32]

23. Hartley v Hartley, 161 S E 358, 173 Ga 710—6 C J. p 367 note 53

Retention by clerk

The proceeds should be retained by the clerk of court until the attachment is disposed of—Pace v. Smith, 57 Tex 555.

24. McDonald v Loewen, 130 S W 52, 145 Mo App 49—6 C J. p 367 note 54.

Settlement of priorities

Third persons retaining attached property under a forthcoming bond could not legally pay the proceeds of the sale of the property over until settlement of the priorities of attaching creditors—McDonald v. Loewen, 130 S.W 52, 145 Mo App 49.

Deduction of "necessary charges"

Under a statute requiring the attaching officer to hold the proceeds of a sale before judgment subject to the attachment "after deducting the necessary charges," the "necessary charges" are the statutory fees to which the attaching officer and appraisers are entitled and the necessary expenses of keeper, labor, and advertising, of taking and preparing a schedule of the property to be sold, and a reasonable amount for services as auctioneer—In re Chebot, (D C.Mass) 288 F. 1006.

25. Simmons Clothing Co v. Davis, 58 S W 655, 3 Ind T 379—6 C J p 367 note 55

26. Morganton Mfg & Trading Co v Foy-Seawell Lumber Co., 101 S E 214, 178 N.C. 571.

27. **Claim for keeping**

In a proceeding by foreign attachment it has been held that the home defendant, having property of the absent defendant in his possession, for the keeping of which the absent defendant was indebted to him, was entitled to have his claim first satisfied out of the property, as against the attaching creditor—Williamson v. Gayle, 7 Gratt (48 Va) 152

Lien for labor

Where personal property of the debtor has been sold under an attachment lien of equal dignity with a mortgage lien under which real property has been sold, a labor lien prior to both the attachment and mortgage lien should be satisfied pro rata from the proceeds of the realty and personalty—N L Curry Grocery Co. v Chinn Mineral Co., 1 S W (2d) 536, 222 Ky. 437.

Previous buyer

Where certain staves were attached and sold, a previous buyer of staves from the attachment defendant who had paid the seller more than the value of staves delivered under the contract is entitled on intervention in the attachment proceedings to a preferred lien on the proceeds of the staves to the extent of the overpayment—Early v Meadow, 133 S W 229, 168 Ky 800

Intervention under claim of ownership

Where a third party on the day of the sale intervenes under a claim of ownership and seeks to obtain a suspension of the sale and the dissolution of the attachment on the ground that the judgment debtor was not the owner of the property, it is error to direct that the proceeds of the sale be first applied in part to payment of plaintiff in intervention as a preferred creditor and next to payment of the debt of plaintiff in attachment—Regalado v Luchsinger, 1 Philippine 619, 1 Off Gaz 513

28. Goodbar v. Brooks, 22 S W 96, 57 Ark 450—6 C J p 368 note 68.

29. Hurt v. Redd, 64 Ala. 85.

30. Bacon v. Leonard, 4 Pick. (Mass) 277—6 C J. p 368 note 70.

31. Woodward v. Lishman, 78 A 701, 80 N J Law 586—6 C J. p 367 note 62.

32. Craig v. California Vineyard Co., 46 P. 421, 30 Or. 43.

Provision is sometimes made by statute for a pro rata distribution of the proceeds of attached property among attaching or other creditors under certain circumstances, and where this is the case all attaching creditors who come within the terms of the statute fare equally, regardless of the order in which their attachments were issued, delivered to the officer, or levied.[33] Under such a statute an attaching creditor does not get an unqualified lien, but takes his lien subject to the provision that under the statutory conditions other creditors will be entitled to share in the proceeds of the attached property pro rata.[34]

Under a statute providing for pro rata sharing between the attaching creditor and creditors prosecuting their claims to final judgment within a stated time after notice of the attachment, it is not necessary for the creditor in the subsequent action to have an attachment issued or to intervene in the attachment suit in order to prorate in the proceeds of the property attached in the first action,[35] nor is he deprived of his right by the fact that he had a receiver appointed.[36] Where an attachment is obtained in two actions both of which were prosecuted to judgment for plaintiff, it is immaterial whether the property was sold under execution issued in the first or the last case, the fact that it was sold in the last case affects neither the validity of the sale nor the right to prorate in the proceeds.[37]

The sale of property as perishable does not affect the right of subsequently attaching creditors to participate in the proceeds.[38]

d. On Dissolution, Release, or Payment

The proceeds of a sale of attached property should be returned to defendant on dissolution or release of the attachment or payment of the debt.

The property held under an attachment or the proceeds thereof in case it has been sold should be returned to defendant where plaintiff voluntarily releases the attachment,[39] or where he succeeds in the action and defendant pays the judgment,[40] or where the attachment is dissolved,[41] or the lien thereof is lost.[42]

e. Interest on Proceeds

The party entitled to the proceeds is entitled to any interest produced thereby.

Where attached property becomes changed into money in the officer's hands and is invested by him so as to produce interest, such interest belongs to the party entitled to the money and not to the officer.[43]

F. PROCEEDINGS BY TRUSTEES OR AUDITORS

§ 336. In General

In some jurisdictions provision is made for trustees or auditors to administer an attachment debtor's estate.

Some of the attachment acts contemplate a proceeding somewhat analogous to proceedings in involuntary bankruptcy by the appointment of auditors or trustees to administer the debtor's estate and adjust the claims of all the creditors who come in under the attachment, and where this is the case the procedure thereunder is governed by the provisions of the act as interpreted by the courts.[44]

§ 337. Powers, Duties, and Liabilities

a. Powers and duties
b. Liabilities

a. Powers and Duties

The trustees and auditors are empowered and required to ascertain and adjust the demands of defendant's creditors who apply to them.

It is the duty of the trustees or auditors to ascertain and adjust the demands of all creditors of defendant who come in under the writ, and in so

33. Brady v Farwell, 5 P 803, 8 Colo 97—6 C J p 803 note 28, p 804 note 29

34. Greene v. Rice, 186 P 249, 32 Idaho 504.

35. Evans v Power County, 1 P. (2d) 614, 50 Idaho 690

36. National City Bank of Salt Lake City, Utah, v. Idaho Lumber Co, 229 P. 663, 39 Idaho 677.

37. Evans v Power County, 1 P (2d) 614, 50 Idaho 690

Action after statutory period

A creditor, obtaining judgment in an action not commenced within the statutory period after attachment levy in the first case in which an attachment was obtained, is not entitled to prorate in the proceeds of a sale under an execution issued in a subsequent case, but such creditor obtains an inferior lien—Evans v Power County, 1 P (2d) 614, 50 Idaho 690

38. Donk v Alexander, 7 N.E. 672, 117 Ill 330—6 C J. p 868 note 71.

39. Levy v. McDowell, 45 Tex 220

40. Neely v Munnich, 58 N.Y S 316, 27 Misc 507—6 C J p 868 note 65

41. In re Jones, 2 Kulp (Pa.) 126—6 C J p 868 note 66

42. Wright v Brown, 66 S E. 1034, 7 Ga.App. 389—6 C J p 868 note 67.

43. Richmond v. Collamer, 38 Vt 68—6 C J. p 868 note 72.

44. Altschuler v Owen, 135 A. 823, 5 N J.Misc. 45, certiorari granted 136 A. 924, 5 N J Misc 311, certiorari dismissed—Altschuler v. Porter, 143 A 733, 6 N J Misc. 1049, reversed on other grounds 146 A. 308, 105 N J Law 557—6 C.J p 868 notes 73, 74

Form of action

(1) An order for attachment and appointing auditor has been held justified in New Jersey in an action based on fraud in the execution or performance of a contract—Williams & Davis v. Davis, 147 A 337, 105 N. J.Law 542.

(2) In Pennsylvania, in an action by a wife for desertion trustees may not be appointed, the attachment provided for in that case not being in the nature of a foreign or domestic attachment, but being regarded as

doing, they exercise all the functions of a common-law auditor and are governed by the same rules that govern such officers[45] On their appointment all the estate of the debtor vests in them,[46] and they may sell so much thereof as is sufficient to pay defendant's debts,[47] restoring to the debtor the surplus left after such payment[48] They may sue on causes of action of the debtor in attachment[49] or to recover property fraudulently transferred by the debtor before the issuance of the writ,[50] and they may maintain an action against the sheriff for loss of the attached goods through negligence.[51]

b. Liabilities

Trustees acting in good faith are not responsible for errors of judgment or mistakes of law, but may be compelled to give an accounting, and in actions by creditors can avail themselves of defenses open to the debtor.

The powers of the trustees are not of a purely ministerial nature, and where they have acted in good faith they cannot be held responsible for an error of judgment or a mistake of law.[52] They can be compelled to account either by a creditor or by the debtor;[53] but no action by a creditor will lie against them until they have been called before the court which appointed them to settle their accounts[54] When trustees under an absconding debtor's act are sued by a creditor, they may avail themselves of the statute of limitations to the same extent that the debtor might in an action against him[55]

§ 338. Report and Action Thereon

The auditor's report is returned to the court for final judgment sustaining it or setting it aside.

The trustees or auditors must return their report to the court for final judgment within the time specified by the statute or a valid extension thereof.[56] The court may inquire into the merits of the matters involved and sustain the report,[57] or in a clear case set it aside and refer the matter back to the auditors,[58] or, if the evidence given before them be sent with the report, the court may supersede the finding of the auditors and itself render the proper judgment.[59] An applying creditor who has entered a rule for admission and presented his demand to the auditor cannot, however, attack the validity of the attachment on exception to the auditor's report.[60]

X. CLAIMS OF THIRD PERSONS

A. PRESENTATION AND DETERMINATION OF CLAIMS

1. In General

§ 339. Rights of Third Persons in General

Ordinarily a third person claiming ownership of, or an interest in, the attached property will be accorded the right to come into the attachment proceeding for the protection of such ownership or interest, but according to some authorities his right to do so must be expressly conferred by statute.

In the absence of a statute broad enough in its scope to permit such action, it has been held that a third person claiming a right to, or a lien upon, the property attached does not have a right to intervene in the attachment proceedings, and that a claimant of attached property, having no interest in the action or whose rights will be unaffected by its determination, is not entitled to become a party to it or to intervene therein for the purpose of asserting his title, but must resort to the common-law remedies or the statutory substitutes therefor.[61] The general tendency, under the statutes, however,

an original process—Longbotham v. Longbotham, 18 Pa Co 460.

45. Stewart v. Walters, 41 N.J.Law 430—6 C J p 369 note 76

46. N Y—Lee v. Hunter, 1 Paige 519.
Pa—McCormick v. Miller, 3 Penr & W. 238—Ankrim v. Woodward, 4 Rawle 345—Heinsler v. Friedman, 1 Phila 290
6 C J p 369 note 76.

47. Orr v. Post, Hopk.(N Y) 11—6 C J p 369 note 77

48. Matter of Randall, 1 Cai (N Y) 513—Lee v. Hunter, 1 Paige (N Y) 519.

49. McCready v Guardians of Poor, 9 Serg. & R (Pa) 94, 11 Am D. 667.

Suit by majority
All trustees required by statute must qualify, but if all qualify a majority may act Thus, where three trustees have qualified and one afterward dies, the other two may sue in the name of all—McCready v Guardians of Poor, 9 Serg & R (Pa) 94, 11 Am D 667.

50. Ankrim v. Woodward, 4 Rawle (Pa) 345—6 C J p 369 note 79.

51. Acker v Witherell, 4 Hill (N Y) 112

52. Bradley's App, 89 Pa 514—6 C. J p 369 notes 77 [c], 82

53. Matter of Cascaden, 2 Johns Cas (N Y) 107, Col Cas. 117, Col &C Cas 116.

54. N Y—Peck v. Randall, 1 Johns 165
Pa—Wilhelm v. Miley, 5 Serg & R 137

55. Peck v. Randall, 1 Johns.(N Y) 165

56. Taylor v. Woodward, 10 N.J Law 1—6 C J. p 369 note 86

When judgment may be rendered
Under the New Jersey statutes judgment cannot be rendered on the report until it has been on file for ten days and has been approved by the court or a judge—Plum v. Lugar, 9 A. 779, 49 N.J.Law 557.

57. Cox v. Pearce, 7 Johns.(N.Y.) 293.

58. N J—Stewart v. Walters, 38 N. J Law 274—Phoenix Iron Co. v. New York Wrought Iron R. Chair Co, 27 N.J.Law 484—Taylor v Woodward, 10 N.J Law 1—Berry v. Callet, 6 N J Law 179.
N Y—In re Negus, 7 Wend. 499.
6 C J. p 370 note 87

59. Stewart v. Walters, 41 N J Law 430

60. Westcott v. Sharp, 13 A. 243, 50 N.J Law 392

61. Me—Partridge v. Marston, 142 A 599, 127 Me. 330
Ohio—Boyer v. Maginnis, 10 Ohio Dec (Reprint) 378, 20 Cinc L Bul. 471.

is to afford claimant a more prompt redress for the invasion of his rights by allowing him to interplead, where his rights are directly involved and when necessary to preserve and protect such rights,[62] or to intervene in the action in which the attachment was sued out, or to resort to proceedings to try and determine the title to the property in dispute,[63] at least where the parties to the attachment suit fail to object to the intervention.[64] Indeed, it has been held, in the absence of a statute expressly conferring such right, that a person claiming some right in, or a lien on, the property attached may intervene in the proceeding, since such intervention prevents the abuse of process, circuity of action, and the delays and expenses arising therefrom.[65] In another jurisdiction, however, in the absence of statute, it has been held that intervention is allowed only when the rights of the intervener are directly involved, and only when necessary to preserve or protect such rights.[66]

Where a statute grants and limits the right to intervene in an attachment proceeding, the procedure is purely statutory, all parties interested being entitled to demand and have adherence thereto,[67] and the right will be restricted to the cases in which it is authorized by the statute.[68] Of course, where a claimant has voluntarily invoked the statute under which he elected to proceed, his rights must be asserted under the statute.[69]

The fact that the intervener has some other and adequate remedy for the protection of his property and rights is no bar to his right to intervene.[70] Conversely, the right of intervention is, unless otherwise provided by statute,[71] merely a cumulative, and not an exclusive, remedy, and does not preclude recourse by claimant to his other remedies.[72] On the other hand, where a claimant to attached property

RI—Massachusetts Loan & Trust Co v. Brown, 23 A 761, 17 R I 568
Tex—Whitman v Willis, 51 Tex 421—Dorroh v. Bailey, (Civ.App) 125 S W 620
6 C J p 373 note 26.

Sheriff's remedy

Where, under the statute, only the sheriff levying the writ may move for an interpleader to determine the ownership of attached property, a claimant is without standing to maintain a petition for an issue of interpleader—Gilroy v Boyle, 29 Pa. Dist. 760

62. Temple v Eados Hay Co, 114 S E. 162, 184 N C 239—6 C J p 373 note 27.

Domestic attachment

The act of May 26, 1897, permitting a sheriff, who has attached property which is claimed by another, to apply to the court to frame an issue to determine the ownership of the goods seized, does not apply to domestic attachments—McCullough v. Goodhart, 22 Pa Co 369.

63. U S—Nisbet v. Federal Title & Trust Co, (Colo) 229 F 644, 144 C C A 54, certiorari denied 36 S Ct. 553, 241 U S 669, 60 L Ed. 1229
D C.—Daniels v. Solomon, 11 App. D C 163.
Ill—Wilson v. Kuse, 110 N E 359, 270 Ill 298
Iowa—Thielen v. Schechinger, 230 N. W. 516, 210 Iowa 224.
N C—Hambley & Co v. H W White & Co, 133 S E 399, 192 N C. 31—Flowers v Spears, 130 S E. 710, 190 N C. 747.
Okl—Mundell v Colony Mercantile Co, 4 P (2d) 1059, 153 Okl. 79.
6 C J p 373 note 28.

Duty

It is the duty of a party claiming ownership of property attached to intervene and assert its claim—Patrick-Mosteller Co v James R Baker & Co, 105 S E 271, 180 N C 588

In Maryland

(1) It has been held that the right of a claimant of property to come in and assert and prove his or her right to it, when it is wrongfully seized under an attachment, existed prior to the passage of Acts (1876) c 285, subsequently amended by Acts (1888) c 507 § 3 and Acts (1892) c 507, now Code Pub Gen L. (1924) art 9 §§ 47 and 48—Haid v. Haid, 175 A. 338, 339

(2) "The right of a claimant of property to come in, and assert and prove his right to it, when it is wrongfully seized, rests upon the broad ground, that no man should be deprived of his property without a hearing, if he desires to be heard"—Haid v. Haid, supra—Kean v. Doerner, 62 Md 475, 476.

64. Steffy v. Teton Truck Line Co, 11 P (2d) 1082, 44 Wyo 345.
65. Del—Banker's Mortg Co v. Sohland, 138 A. 361, 3 W W Harr 331.
N C—Sims v Goettle, 82 N.C. 268—Toms v. Warson, 66 N C. 417.
66. Partridge v. Marston, 143 A. 599, 127 Me. 380.
67. U S—T W. Warner Co. v. Andrews, (D C N Y) 16 F Supp 238—T W. Warner Co v. Andrews, (D C N.Y.) 15 F Supp. 1055.
W.Va—Yellow Pine Lumber Co. v Mays, 94 S E 42, 81 W.Va. 46.
68. Gordon v McCurdy, 26 Mo 304.
69. Brokaw v. Collett, (Tex.Com. App) 1 S W.(2d) 1090, reversing Collett v. Brokaw, (Civ App) 296 S W 333.
70. U S—Nisbet v. Federal Title & Trust Co, (Colo) 229 F 644, 144 C C A 54, certiorari denied 36 S. Ct 553, 241 U S. 669, 60 L Ed 1229—Remington Paper Co v. Louisiana Printing & Publishing Co, (C. C La) 56 F 287.
Mont—Moreland v Monarch Min & Mill Co, 178 P 175, 55 Mont. 419
6 C J p 374 note 29
Election of remedies generally see infra § 350
71. Davis v. Warfield, 38 Ind 461—6 C J. p 374 note 30
72. U S—Nisbet v. Federal Title & Trust Co, (Colo) 229 F 644, 144 C C A 54, certiorari denied 36 S. Ct 553, 241 U.S 669, 60 L Ed 1229
Ariz—Montgomery v Kirksey, 233 P 588, 27 Ariz 356
N C—Flowers v. Spears, 130 S E. 710, 190 N.C 747
Okl—Mundell v. Colony Mercantile Co, 4 P.(2d) 1059, 153 Okl 79
Utah—Truitt v. Patten, 287 P. 175, 75 Utah 567
Wash—Sheffield Co v R. Hoe & Co, 23 P.(2d) 876, 173 Wash 489
6 C J p 374 note 31.

"May" permissive

Although an owner of wrongfully attached property under Civ Code (1913) par 1648, may claim it under paragraphs 1649–1651, or as permitted by paragraphs 1410, 1411, in view of paragraph 1407, giving an officer levying attachment authority to require indemnity, claimant is not required to pursue such remedies, but may sue the officer for the value of the property, "may" being permissive in meaning—Montgomery v. Kirksey, 233 P. 588, 27 Ariz. 356.

Statutory trial of right to property is not the exclusive remedy of

has the right to intervene in the proceedings, it has been held that he is not entitled to an injunction to restrain a sale under the attachment.[73]

An intervener cannot question the regularity of the proceedings in the principal case,[74] nor is a person who purchases property after it has been attached entitled to defend the principal suit on its merits, where the attachment defendant offers no defense thereto.[75] Although generally the validity of the attachment is not in issue, as will be discussed in § 357 c (1), a third person not a party to the proceedings may, in some jurisdictions, successfully attack the proceedings if they are void on their face.[76]

Where the intervener, after obtaining possession of property, disposed of some of it, but not in the statutory manner, it was held that he could not return the balance and pay for the part that was sold.[77]

Allowance discretionary. In the absence of a statute expressly granting the right of intervention in attachment proceedings, it has been held that whether the particular facts require the application of such right is to some extent, at least, in the discretion of the court to which the petition is presented.[78] On the other hand, where an interested party has the right as a matter of law to intervene, the allowance of intervention is not discretionary.[79]

Compelling appearance by claimant. Attachment being a legal proceeding, a court issuing the writ has no authority to compel a nonresident to appear and litigate his rights to the fund attached.[80]

Effect of destruction of property. As an interpleader in attachment proceedings involves primarily the right of possession, it cannot be maintained after the property has been destroyed in the hands of plaintiff in attachment.[81]

Failure of defendant to controvert. Where the property of a person other than defendant is seized under the attachment, the failure of defendant to controvert the alleged grounds of the attachment will not deprive the third person of his right to intervene and set up his claim to the property.[82]

Purchase of plaintiff's claim by one of several interveners. Where plaintiff brings attachment and levies on personalty and other parties intervene adversely to each other, the purchase of the claim of plaintiff by one interpleader does not dispose of the claim of the other interpleader, and the case should proceed as to him.[83]

§ 340. Who May Intervene

The right to intervene, or to have a trial of the right of property, where it exists, extends to any person claiming a general or special interest in the property, and with some exceptions is limited to such persons.

Where any intervention is permissible, any person not originally a party to the action who claims an interest, either general or special, in the property attached, may intervene or resort to the statutory method for the trial of the right of property in order to have his rights adjudicated by the court in which the attachment suit is pending,[84] provided he was in actual possession of the property, or enti-

a person whose property is attached as that of another. He has the option to sue for the recovery of the property itself, or in damages for its value—Carmichael v. Page, (Tex Civ App) 32 S W.(2d) 674—Taylor Bros Jewelry Co v Kelley, (Tex Civ App) 189 S W 340

73. W J. Callison Furniture Co v Kelemen, 36 S W.(2d) 637, 238 Ky 19

74. Loveman, Joseph & Loeb v. Foster, 150 So 170, 227 Ala. 385—6 C J. p 374 note 32

Rights acquired pendente lite

Where plaintiff in attachment first filed a declaration in tort, and afterward filed an amended declaration in assumpsit, an irregularity of this character, which plaintiff, upon leave granted, had the right to correct as against defendant, cannot be taken advantage of by an intervening creditor or an interpleader whose rights have been acquired pendente lite—May v. Disconto Gesellschaft, 71 N E 1001, 211 Ill. 310, affirming 113 Ill. App 415.

75. Pinion v. Henry, 104 S E. 427, 150 Ga 595, answers to certified questions conformed to 105 S E 634, 26 Ga App 115.

76. McDonald v. Stephens, 85 So. 746, 204 Ala 359—Jackson v Bain, 74 Ala. 338—Nordlinger v. Gordon, 72 Ala. 239

77. Bulluck v. Haley, 151 S E 731, 198 N C 355

78. Bankers' Mortg Co v Sohland, 138 A 361, 3 W.W Harr (Del) 331.

79. Farmers' Bank & Trust Co v Murphy, 127 S E 527, 189 N C. 479

80. State v. Blair, 142 S W. 326, 238 Mo. 132

81. Stadden Grocery Co. v. Lusk, 68 S W. 587, 95 Mo App. 261.

82. Saenger v. Standard Lumber Co, 50 S W.(2d) 589, 185 Ark. 990.

83. Miller v Campbell Commn. Co, 74 P. 507, 13 Okl. 75.

84. Cal—Bonfiglio v. Bonfiglio, 264 P. 747, 203 Cal 409.
Ill—Wilson v. Kruse, 110 N E 359, 270 Ill. 298
Ind—Sprow v Wicker, 157 N.E. 460, 87 Ind App 253.
Iowa—Citizens' State Bank of New Sharon v. Haworth, 222 N W. 428, 208 Iowa 1100
Kan—Wamego State Bank v. Sesler, 216 P 274, 113 Kan 656
Miss—Slattery v P L. Renoudet Lumber Co., 87 So. 888, 125 Miss. 239
N Y—Lee v. Pfeffer, 25 Hun 97.
N C—Francis v Mortgage Sec Corporation of America, 153 S E 317, 198 N C. 734—Farmers' Bank & Trust Co. v Murphy, 127 S E. 527, 189 N.C. 479
Pa—Royal Tailors v. McIntyre, 1 Pa Dist & Co 301.
6 C J p 375 note 39.

A claimant to real property which has been attached in an action between two other persons to recover upon an indebtedness, in which action the claimant of the property has no interest, has the right to intervene in defense of his property against the attachment—Bonfiglio v. Bonfiglio, 264 P. 747, 203 Cal. 409.

Conditional seller of truck

Where levy was made on a truck, which had been removed from the

tled to such possession, at the time of the levy thereon under the attachment,[85] or the institution of the proceedings[86]

According to some authority the general statute granting the right of intervention, providing in terms in effect that any person may, before trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest in both, extends the right of intervention to a person claiming the property attached or a lien thereon[87] Under this view an owner or claimant of property attached has such an interest against both parties to the proceeding as entitles him to intervene for the purpose of asserting his right and title to the attached property.[88] According to other authority, such a statute does not extend the right of intervention to an owner or claimant of the property attached. Under this view it is considered that ownership is not one of the essential questions to be determined in the litigation between plaintiff and defendant. Whether the property belongs to defendant or claimant, if determined, is considered as shedding no light upon the question in controversy, namely, that defendant is indebted to plaintiff[89] This rule, while followed, has been criticized as follows: "How it can be said that a person whose property has been attached, or who has a lien upon property which has been attached in an action against a third person, has no interest in the question as to whether the attachment shall be sustained and the property subjected to the payment of the judgment, we are unable to understand.

state where sold, before the expiration of ten days after the seller had notice that it had been removed, the truck was the property of the seller and it continued to be his as against the levy although he permitted the truck to remain out of the state over thirty days Since it was his property, he had a right to intervene in the attachment proceedings and set up his claim —Bradshaw v Kleiber Motor Truck Co, 211 P 305, 29 Ariz 293

Lis pendens notice

Where an attachment is sued out in the chancery court and property is seized which belongs to third persons and lis pendens notice is filed describing property not belonging to defendant but to such third persons, such persons may intervene to cancel the notices affecting such property or beclouding their title —Slattery v P L Renoudet Lumber Co, 87 So 888, 135 Miss 229

Purchaser at judicial sale

A person claiming an interest in property attached as a purchaser at a judicial sale could intervene in a pending attachment suit and assert his interest —W J Callison Furniture Co v Kelemen, 86 S W.(2d) 637, 238 Ky 19

A surety on a replevy bond who, before forfeiture and according to its terms, delivered the property to the sheriff notwithstanding any interest in the property which he may have had, might then assert any claim which he could have asserted before the bond was executed.— Brothers v. Russell & Duke, 71 So 450, 195 Ala 643

Transferee of a straight bill of lading covering a shipment of poultry, wherein the consignor was named consignee, who had paid a draft accompanying such bill of lading, was entitled to intervene in attachment proceedings brought by a creditor of the consignor and assert whatever claim he might have to such shipment —Tennessee Egg Co. v Monroe, 268 S W. 372, 151 Tenn 121, certiorari denied L J Schwaub & Sons v Tennessee Egg Co, 46 S Ct. 105, 269 U S 580, 70 L Ed 422.

85. Ohio —Modoc Soap Co. v. Brankamp, 5 Ohio N P (N S.) 252.
Tex —Bolin Tool Co. v. Jernigan, (Civ App) 50 S W (2d) 397.
6 C J p 375 note 40.

86. Stansel v Rountree, 25 So. 277, 40 Fla 428—6 C J. p 376 note 41.

87. Cal —Coghill v. Marks, 29 Cal. 673—Speyer v Ihmels, 21 Cal 281, 81 Am D 157—Carter v. Garetson, 204 P 1090, 56 Cal App 238
Idaho —First Nat Bank v. Denbrae Sheep Co, 258 P. 365, 44 Idaho 447—Potlatch Lumber Co. v Runkel, 101 P 396, 16 Idaho 192, 23 L R A (N S) 536, 18 Ann Cas 591
La —H B Claflin Co. v Feibelman Co, 44 La Ann 518—New Orleans Canal, etc, Co v Beard, 16 La. Ann 345, 79 Am D 582.
Mont —Moreland v Monarch Min & Mill Co, 178 P. 175, 55 Mont. 419
Utah —Houston Real Estate Inv. Co v. Hechler, 138 P. 1159, 44 Utah 64.
Wash —Happy v Prickett, 64 P. 528, 24 Wash 290
Wash T —Langert v Brown, 13 P 704, 3 Wash T 102

88. Potlatch Lumber Co v Runkel, 101 P 396, 16 Idaho 192, 23 L R A. (N S) 536, 18 Ann Cas. 591.

89. Minn —Lewis v Lewis, 10 N.W 586, 590, 28 Minn. 428
Neb —Geis v Geis, 250 N.W. 252, 125 Neb 394—Danker v. Jacobs, 112 N W 579, 79 Neb 485.
N M —Consolidated Liquor Co. v Scotello & Nizzi, 155 P 1089, 21 N M 485—C J L Meyer & Sons Co v Black, 16 P 620, 4 N M. 352.

"The subject-matter which the plaintiff presented to the court, by his complaint, for adjudication, was the indebtedness of the defendants to him upon the promissory notes. In a legal point of view the intervenors had no interest whatever in the question of the existence of such indebtedness. That was a matter wholly between the plaintiff and the defendants, with which no stranger had a right to interfere When the judgment was entered against the defendants the whole original subject-matter of the suit was disposed of; and the case presents the anomaly of a contention still going on, to eventuate in another and independent judgment, leaving the first judgment in full force. This is not an intervention to protect an interest in the matter in litigation, but the introduction of a new subject of litigation It is true, the new subject-matter grows out of the attachment, but a writ of attachment is a part of the remedy, and has nothing to do with the cause of action If the property is seized by virtue of the writ, to which another has a better right, the vindication of such involved a new and independent judicial inquiry"—Lewis v Lewis, supra.

Event of suit

A title to a statute "to provide for the intervention of third parties claiming an interest in the event of any suit pending or to be brought" has been held not to include an owner of attached property so that he may intervene in the proceedings — Geis v. Geis, 250 N.W. 252, 125 Neb 394

Ownership not determinable

The fact that a third party claims to be the owner of attached property does not give him the right to intervene in the attachment suit, and to have the question of his ownership determined in the attachment suit — Haines & Co. v Stewart, 91 N.W. 539, 3 Neb.(Unoff) 216.

Such an intervener has a direct interest that his property, or property upon which he has a lien, shall not be subjected to the payment of another's debt to his detriment."[90] Also, under a general statute granting the right to intervene but providing that the "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding," it has been held that a person claiming an interest in the litigation may be permitted to intervene for the purpose of asserting rights; but where he has no interest in the litigation, but only in the property attached, he is not permitted to intervene. Under this rule a person cannot intervene for the sole purpose of moving for a dissolution of the attachment.[91] Under a statute providing that grantees may appear and defend in suits against their grantors in which the real estate conveyed is attached, where a creditor attached real estate, which defendant had conveyed to claimant, on the ground that the conveyance was fraudulent, claimant's petition for leave to intervene and defend against the allegation of fraud and the attachment was denied, since claimant sought to defend against matters not in issue.[92]

Under a statute providing that any person "other than the defendant" may intervene, it has been held that the words "the defendant" refer to defendants who are sought to be subjected to the money judgment prayed for, and not to those collaterally interested.[93]

Persons having no title to the property attached, and not in actual possession thereof or entitled thereto, cannot claim or recover the property, because their interests cannot be affected by the controversy.[94]

Defendant in attachment cannot set up the right or claim of a third person to the property attached, but this can be done only by the claimant himself.[95]

§ 341. —— Particular Persons

The right of particular persons to intervene under statutory provisions must be determined by the proper construction of such provisions.

Under the rule that third persons have no right to intervene in attachment proceedings unless a statute permits them to do so, as already discussed in § 339, it necessarily follows that the right of a particular person to intervene in the proceeding depends upon the statute under which the right is asserted. The usual statutory provision is that persons interested may intervene, and hereinafter in this section will be discussed whether particular persons may intervene under such or similar statutory provisions.

Assignee of defendant. It has been held that a foreign assignor of a nonresident defendant may intervene in order to protect the latter's rights,[96] but an assignee who has not taken possession of the property or had the assignment recorded has been held not entitled to maintain his claim against a subsequently attaching creditor.[97]

Claimants subsequent to attachment. The mode of proceeding by intervention is usually not proper when the claim is based on a sale, transfer, or mortgage made subsequent to the attachment levy,[98] although the statutes sometimes permit claimants whose claims are subsequent in point of time to intervene for the purpose of attacking the attachment.[99]

A purchaser of attached property from persons retaining possession following the execution of a release bond has been held to have such an interest in the property as to authorize intervention to prevent a subsequent sale to satisfy the judgment, since the property levied on attachment is completely released on execution of bond, so as to entirely destroy jurisdiction of the rem and consequent jurisdiction of the court to sell it.[1]

A statute providing that "grantees may appear and defend in suits against their grantors in which the real estate is attached" has been held to be applicable only to grantees whose conveyances were subsequent to the attachment; otherwise their duly recorded deeds would take precedence of the attachment, and

90. Consolidated Liquor Co. v. Scotello & Nizzi, 155 P 1089, 21 N M 485

91. Chase v. Washtenaw Circuit Judge, 183 N.W. 63, 214 Mich 288 —Sidebottom v. Calhoun Circuit Judge, 167 N W 965, 202 Mich. 116 —Peterson v Swennington, 144 N. W. 550, 178 Mich. 294

92. Partridge v Marston, 143 A. 599, 127 Me 380.

93. Citizens' State Bank of New Sharon v. Haworth, 222 N W. 428, 208 Iowa 1100—Dimsdale v. Tolerton-Warfield Co., 131 N.W. 689, 151 Iowa 425.

94. Osborn v Koenigheim, 57 Tex 91—6 C J p 376 note 42

95. Dugundji v Paico, 180 N Y S 331, 190 App.Div. 707—6 C J p 376 note 43

96. D C—Matthai v. Conway, 2 App D C. 45.
N.Y—Lee v Pfeiffer, 24 Hun 660.
6 C J. p 377 note 56.

Assignee of bill of lading
The assignee of a bill of lading not indorsed by the consignee of goods could assert his claim in attachment proceedings against the consignor.—Neumann v Reiss, 245 N.Y S. 464, 138 Misc 576.

97. Yates v. Dodge, 23 Ill App 338, affirmed 13 N E 847, 123 Ill. 50

98. Bolin Tool Co v. Jernigan, (Tex Civ App) 50 S W (2d) 397—6 C J p 377 note 50.

99. California Packing Corporation v. Kelly Storage & Distributing Co, 126 N E 269, 228 N Y 49, reversing California Packing Corporation v Phoenix & Third Nat. Bank of Lexington, Ky., 177 N.Y S 37, 188 App Div. 475—6 C J. p 377 note 51.

1. Smith v. Jones, 11 S W (2d) 937, 226 Ky 785.

they would have no occasion to defend.[2]

General creditors. Although in some states there are statutory provisions by virtue of which any creditors of the attachment defendant may come in under the attachment and share in the distribution of the proceeds of the property,[3] general creditors of defendant in attachment cannot, as a rule, intervene.[4]

Statutes allowing creditors who come in after another creditor has attached defendant's property to share pro rata with the attaching creditor have been held to be valid.[5] The purpose of such a statute is to provide a fair and equitable distribution of the available and attached assets of the debtor, and its theory is that the first attaching creditor holds the property for the benefit of all creditors who reduce their claims to judgment within a specified time, thereby relieving them of the responsibility, and the debtor from the costs, of the suing out of additional attachment process.[6] Where the statute permits other creditors to file under the attachment, the lien of creditors who so file relates back to the delivery of the original writ to the sheriff, and such creditors have all the rights of the original plaintiff.[7] Under such circumstances, the claim of a creditor filing under an attachment keeps alive the original attachment and levy, although there has been a dismissal by the first attaching creditor.[8]

According to some authority, under a statute providing that any person who has an interest in the matter in litigation, in the success of either party, or an interest in both, may intervene, a judgment creditor of an insolvent defendant,[9] or a mortgage creditor,[10] has such an interest as to entitle him to intervene.

Junior attaching creditors. In the absence of a statute to the contrary, one whose claim is based upon a subsequent attachment has no right to intervene in the proceedings,[11] but, according to some authority, a general statute providing that persons having an interest in the matter in litigation, in the success of either party, or an interest in both, may intervene, a subsequent attaching creditor has such a direct interest in defeating the attachment as to entitle him to intervene.[12]

Under some statutes a junior attaching creditor may intervene in a prior attachment suit and there contest his rights with plaintiff in that suit, although he cannot be let in to defend the suit and dispute the grounds of the attachment in lieu of defendant, nor to defeat the attachment for mere errors or irregularities in the proceedings.[13] A junior attaching creditor cannot, however, intervene as a claimant of the property in his own right.[14]

Lienholders. The right to intervene in attachment proceedings is not confined to persons claiming title to, or ownership of, the property levied on, but is also available to one who claims a lien upon such property and a right to subject it to such lien in priority to the attachment.[15] Accordingly, the right to intervene has been held to extend to one holding a com-

2. Sprague v A. & W Sprague Mfg Co, 76 Me. 417.

3. Idaho—Greene v. Rice, 186 P 249, 32 Idaho 504
Ind—Little v Mundell, 109 N E 227, 59 Ind App 227
6 C J. p 377 note 55

Particular court immaterial

Under Comp St (1919) § 6781, all creditors who commence and prosecute their claims to final judgment within the prescribed sixty days are entitled to prorate with the attaching creditor without reference to whether such judgment had been procured in the district court or in the justice or probate court, or had been docketed in the district court within the sixty-day period, or at all—Greene v. Rice, 186 P 249, 32 Idaho 504.

4. Yellow Pine Lumber Co. v Mays, 94 S E 42, 81 W Va 46—6 C J. p 377 note 54

Any person interested

Under a statute providing that any person interested may file his petition to intervene, it has been held that only a person claiming the attached property or an interest in it or a lien thereon may intervene. A mere creditor at large of the debtor is not such a person—Yellow Pine Lumber Co v Mays, 94 S E 42, 81 W Va 46

5. Quirk v. Diana Mines Co, 198 P 672, 34 Idaho 30

6. Greene v Rice, 186 P. 249, 32 Idaho 504

7. **New levy unnecessary**

Attachment by other creditors need not be levied provided action is brought within thirty days after levy of the first attachment and diligently prosecuted to judgment—Linch v Perrine, 4 P (2d) 353, 51 Idaho 152, 81 A L R 355

8. Little v Mundell, 109 N E 227, 59 Ind App 227

9. New Orleans Canal, etc, Co v Beard, 16 La Ann 345, 79 Am D 582

10. Langert v. Brown, 13 P. 704, 3 Wash T. 102

11. Massachusetts Loan & Trust Co v. Brown, 23 A 761, 17 R I 568

12. Coghill v Marks, 29 Cal 673—Speyer v Ihmels, 21 Cal. 281, 81 Am D 157

13. Strawberry Growers' Selling Co v. Lewellyn, 103 So 823, 158 La 303, 39 A L R 1503—H B Claflin Co v. Feibelman Co, 44 La Ann 513—6 C.J p 377 note 52.

Applying creditor

A statute directing that "any creditor" of defendant may be admitted under attachment as an "applying creditor," includes any creditor whether his claim is liquidated or unliquidated, who states that the debt is owing and states the amount, since an "applying creditor" is in the nature of an intervener acting on the principle that the goods of defendant are in legal custody and are for the benefit of all creditors—Skratt v Carnera, 175 A. 366, 12 N. J Misc 826

14. McCluny v. Jackson, 6 Gratt (47 Va.) 96.

15. Henley v. Bradshaw Mercantile Co, 124 So 426, 220 Ala. 193—6 C J p 376 note 44.

Security

Where a lender advances money, taking stock as security, he may intervene to protect his security if the stock is attached in an action against the borrower—Banker's Mortg Co. v Sohland, 138 A. 361, 3 W W.Harr. (Del) 331.

mon-law lien for storage of the attached goods,[16] a mechanic's lien claimant,[17] a seller of goods who has exercised his right of stoppage in transitu,[18] and a landlord may intervene to assert against his insolvent debtor his right, as landlord, to unpaid rent.[19]

A mortgagee desirous of protecting his interest or of having the proceeds of the attached property applied first to the mortgage debt may intervene for that purpose,[20] provided, under some statutes, that the mortgagee has the right to present possession.[21]

Principal. Where there is evidence that property attached and sought to be subjected to payment of defendant's debt to plaintiff was held by defendant as agent of another, such alleged owner being a necessary party to a final and complete determination of ownership, should be permitted to intervene.[22]

Wife. Although under the statutes it is generally held that a wife claiming an interest in property attached in a suit against her husband may interplead,[23] it has been held that a wife, whose property was attached by her husband's creditors, on the ground that the conveyance from her husband was fraudulent, is not entitled to intervene, independently of statute, since her rights are not directly involved, and intervention is not necessary to protect them.[24]

§ 342. —— Estoppel to Assert Claim

While the claimant may be estopped by his conduct from asserting his claim, he will not ordinarily be estopped by the fact that he receipts for or gives a bond for the attached property, nor will he be precluded from setting up his claim in the attached property by the fact that he has pursued a remedy by way of replevin.

The owner of property levied on under an attachment against another may be estopped to assert his title in the attachment suit by reason of his own acts or declarations concerning the ownership,[25] but unless the elements of estoppel are present or the conduct of the owner amounts to fraud and deceit, he will not ordinarily be precluded from setting up his title.[26] Accordingly a claimant is not estopped to appear and assert his title in the attachment suit because of the fact that he has asserted the same claim in another suit,[27] or by reason of the service upon him of a summons requiring him to act as garnishee,[28] nor does any estoppel result from the fact that claimant fails to interplead after having obtained leave to do so,[29] or withdraws his claim from a sheriff's jury before a trial to test it is had.[30]

16. J. I Case Plow Works v. Union Iron Works, 56 Mo App 1.

17. Hurley v Epps, 69 Ga. 611—6 C J p 376 note 46

18. Letts-Spencer Grocer Co v Missouri Pac R Co, 123 S W 10, 138 Mo App 352—6 C J. p 377 note 49

19. Sullivan v. Cleveland, 62 Tex 677—6 C J p 376 note 47

20. Ala.—Brothers v Russell & Duke, 71 So. 450, 195 Ala. 643

S D.—Interstate Surety Co. v. Bangasser, 211 N W 599, 50 S D 618 6 C J p 376 note 48.

Trade name

An interplea in an attachment action was not invalidated by the fact that an individual interpleader claimed under a mortgage to a mercantile company, the company being the interpleader's trade name.—Boudreau v. Brown, (Mo App.) 89 S W. (2d) 455.

Trial of right to property

A mortgagee who has, under the mortgage, the right to take possession on default can prosecute an action for the trial of the right of property against one who attaches the mortgaged chattels.—State Exchange Bank v Shive & Keys Mill & Grain Co., (Tex Civ.App.) 170 S W. 1051

In Massachusetts, under Gen L. c 223 § 80, where mortgaged personal property is attached and on examination it appears that the mortgage is valid, the court, after finding the amount due on it, may direct the attaching creditor to pay it to the mortgagee, and if he does not pay or tender the amount within the time prescribed, the attachment is void No action is possible until the court has fixed the amount due and ordered payment. If the creditor allows the attachment to be dissolved, the dissolution is an act of law The remedies of the mortgagee if he has suffered loss must be obtained in other proceedings.—O'Neil v. Small, 167 N E 649, 268 Mass 305

21. Barney Cavanaugh Hardware Co. v. Lewis, 31 So. 270, 272, 48 Fla. 435.

"A person holding a bare mortgage upon personal property in this state, with no right to present possession of such property, cannot maintain a claim proceeding for such property, under the statutes of this state, as against attaching creditors of the mortgagor thereof."—Barney Cavanaugh Hardware Co. v. Lewis, supra

22. Farmers' Bank & Trust Co v Murphy, 127 S E 527, 189 N C 479

23. Md.—Haid v Haid, 175 A. 338—Brewer v. Bowersox, 48 A. 1060, 92 Md 569

Okl.—Ramsey v. Federal Surety Co, 249 P. 137, 121 Okl. 177.

Wife's separate property

Record title to property being in the wife and evidence that her money bought the property create a presumption that it is her separate property, allowing her to intervene when a creditor of her husband attaches the real estate, even though the wife is not interested in the action against her husband.—Bonfiglio v Bonfiglio, 264 P 747, 203 Cal 409

24. Partridge v. Marston, 143 A. 599, 127 Me 380

25. Drew v Kimball, 43 N H 282, 80 Am D 163—6 C J p 377 note 58

26. Nisbet v. Federal Title & Trust Co, (Colo.) 229 F 644, 144 C C A 54, certiorari denied 36 S Ct 553, 241 U S 669, 60 L Ed. 1229—6 C J. p 377 note 58 [c]–[i].

Sheriff's misdescription

Where, in a suit on a promissory note, plaintiff secured an attachment on certain property, and by interplea a bank claimed to be the mortgagee of such property under a prior chattel mortgage, the sheriff's misdescription in the attachment writ was not binding on the bank so as to preclude its showing that the attached property and the mortgaged property were the same.—Bruce v Kays, 1 S. W (2d) 214, 222 Mo App 77.

27. Hall v. Richardson, 16 Md 396, 77 Am.D. 303.

28. Murphy v. Cochran, 80 Ky. 239.

29. Wangler v. Franklin, 70 Mo. 659

30. Vulcan Iron Works v Edwards, 36 P. 22, 39 P. 403, 27 Or. 563.

Where the intervener claims under a mortgage, he is not estopped from asserting his rights in attached property because he failed to file a renewal of the instrument[31] or, where he claims the property on the ground that he was fraudulently induced to sell it, by his failure to record it in the first place,[32] nor is an intervener mortgagee estopped from asserting his rights by permitting the mortgagor to sell the mortgaged property if the proceeds are properly accounted for.[33]

An owner of personalty in possession of a third person is not estopped from asserting ownership as against an attaching creditor by declarations of title by the person in possession which are unknown to the owner.[34]

Effect of receipting for property. The owner of property does not, by receipting for it upon its being attached as the property of another, preclude himself from afterward asserting his title to the property.[35]

Effect of giving bond According to some authorities, where property in the possession of a third person is attached as that of defendant in attachment, and the person in possession procures a return of the property to him by giving a forthcoming bond for the redelivery of the property or of its appraised value, he becomes estopped, as between himself and the levying officer and plaintiff in attachment, from afterward asserting paramount title to such property in himself,[36] and it has also been held that a third person signing as surety on defendant's forthcoming bond cannot subsequently intervene in the proceedings, claiming the property himself.[37] On the other hand, it has been held in a number of cases that no estoppel arises from giving a forthcoming bond,[38] and the view has also been advanced that the question of estoppel depends on whether or not, at the time of giving the bond, the claimant notifies the officer of his claim of ownership.[39]

A purchaser of property has been held not precluded from asserting his ownership by reason of signing the bond given by defendant in an attachment suit to release the property,[40] nor does the execution of a bond to dissolve an attachment estop a surety who claims the property from asserting his title thereto as against a subsequent attachment by the obligee.[41]

Effect of suing out writ of replevin. While it has been held that one who has already replevied the attached property may not intervene,[42] it has also been held that the suing out of a writ of replevin by a mortgagee against an officer attaching the property on mesne process against the mortgagor, and the removal of the property out of the commonwealth, do not affect the statutory right of the mortgagee to demand and receive from the attaching creditor the amount for which the property is liable to him on the mortgage.[43]

Purchase at sale. Where, in a controversy as to the ownership and right of possession of attached property, the court, during the pendency of an action to recover it from the attaching officer ordered the sale of the property because it was of a perishable nature, and where at such sale plaintiff became a bidder and purchased the property, the bid and purchase does not estop plaintiff from further asserting title and right of possession to the property.[44]

Claim of attaching plaintiff As a levy on property under an attachment is an assertion on the part of plaintiff in attachment that such property belongs to defendant, it follows that plaintiff is estopped to

31. Lawrence v Beattie, 176 N.W 570, 209 Mich 128

32. Wray v Wrightsman, 124 S.W. 38, 139 Mo App 635

33. Bruce v Kays, 1 S W.(2d) 214, 222 Mo App 77

34. Wright v Tanner, 99 N W. 422, 92 Minn 94

35. Edmunds v Hill, 133 Mass 445 Effect of receipt generally see supra § 298

36. Allyn v Cole, 91 N W 505, 3 Neb (Unoff) 235—6 C J. p 340 note 99, p 378 note 65

37. Heilbrunn v. Ellsworth, 190 Ill. App. 388

38. Ala —Brothers v. Russell & Duke, 71 So 450, 195 Ala. 643. Mo.—Bradley Hubbard Mfg. Co. v. Bean, 20 Mo.App. 111. Okl —Ward v. Feldman, 253 P. 52, 122 Okl 175 6 C J p 379 note 66

In Kansas

(1) Where plaintiff was fully advised of the interpleader's claim, and was not induced by him to change his position to his injury, an estoppel does not arise on the intervener giving a forthcoming bond —Smith v Eby, 178 P 405, 104 Kan 178—Woods-Egon Live Stock Commission Co v Hicks, 142 P 276, 92 Kan 922

(2) Where, however, the giving of the bond results in injury to plaintiff if claimant is permitted to intervene, the giving of the bond estops claimant from intervening —Case v Steele, 8 P 242, 34 Kan. 90—Case v Shultz, 1 P. 269, 31 Kan 96—Wolf v Hahn, 28 Kan. 588—Haxtun v. Sizer, 28 Kan 310.

39. Robertson v. Andrus, 266 P 53, 125 Kan 730—6 C J. p 379 note 67.

40. Redwitz v. Waggaman, 33 La. Ann 26—6 C J. p 379 note 68

41. Rogers v. Bishop, 9 Gray (Mass) 225

42. York County Nat Bank of York, Pa., v. Deline & Elms, (Del Super.) 166 A. 670.

Effect of replevy

One who has already replevied the attached property may not intervene in attachment proceedings, since the rights of all the parties can be determined in the replevin action —York County Nat Bank of York, Pa, v. Deline & Elms, (Del Super.) 166 A. 670

43. Moore v Quirk, 105 Mass 49, 7 Am R 499

44. Hagar v. Haas, 71 P. 822, 66 Kan. 333.

assert title in himself upon an interplea or intervention.[45]

§ 343. Nature and Subject-Matter of Claim

The nature of a claim to entitle a person to intervene depends primarily on the statute under which intervention is sought.

Whether the claim of a person seeking to intervene in an attachment proceeding is of such a nature as to entitle him to do so depends primarily on the statutes of the particular jurisdiction. Where the statute permits any person claiming title or interest in the attached property to intervene, the right to intervene is not confined to a claim of entire ownership of the property.[46] Such a statute includes any claim where the seizure and detention of property would entitle claimant to recover damages for the wrong and injury done to him by reason of such seizure and detention.[47]

Under some statutes it has been held that, in order to authorize the proceeding by intervention in the attachment suit, the claim of the intervener must be a legal and not merely an equitable one.[48]

If the statute confines the right to determine the title in the principal action by intervention or interpleader, or in a special statutory proceeding, to personal property, a claimant of realty or an interest therein cannot have his rights considered in those modes,[49] but if the statute does not so confine the right such a proceeding is available to a claimant of realty.[50]

§ 344. Time for Intervening

Intervention must be within the time, if any, fixed by statute. Where no time is so fixed it may be permitted during the progress of the proceedings, according to some authorities even until the final disposition of the property or its proceeds.

If the property of a third person is attached, he is not, on learning of the attachment, charged with any duty of promptly reclaiming it, but he may stand on his legal rights and choose his own time to assert them,[51] particularly where the adverse party has suffered no prejudice thereby.[52]

Since attachment serves only the purpose of bringing the attached property into court for the purpose of subsequent disposition,[53] while claim of intervention should properly be imposed before trial between the attaching plaintiff and defendant,[54] any interested person may present his claim before an order is entered adjudging the disposition of the property,[55] or, under a permissive statute, before a sale of the property.[56] In some instances intervention has been allowed after the attaching plaintiff has received judgment and the proceeds of the sale have been ordered paid to him,[57] and, under some statutes, before the disposition of the proceeds of the sale.[58] Under some statutes intervention may be had at any time before the end of the term at which

45. Boettger v. Roehling, 74 Mo. App 357—6 C J. p 378 note 63.

46. Rice-Stix Dry Goods Co. v Albrecht, 113 N E 66, 273 Ill 447

47. Haid v. Haid, (Md) 175 A 338

48. Ill —Bostwick v Blake, 34 N.E 38, 145 Ill 85—Juilliard v May, 22 N E 477, 130 Ill 87—Providence City Ins Co v. Commercial Bank, 68 Ill. 348
N C —Simpson v. Harry, 18 N C 202.
6 C J p 379 note 73

49. Gordon v McCurdy, 26 Mo 304 —Henry Petring Grocer Co v. Eastwood, 79 Mo App 270—6 C J. p 379 note 71.

50. Bennett v Wolverton, 24 Kan 284—6 C J. p 379 note 72

51. Lester v Ladrigan, 98 A 124, 90 Conn 570, L.R A 1916F 939

Exemption from attachment

The exemption from attachment of materials furnished under a statute providing that whenever a person furnishes materials for the construction of any improvement, such materials shall not be subject to attachment to enforce any debt due by the purchaser of the materials, is absolute, and plaintiff is not required to make a timely claim thereof before sale to avail himself of the exemption —California Trojan Powder Co v. Wadhams & Co, 166 P. 759, 85 Or 307

52. Graves v Hall, 27 Tex 148.

53. Hunt v. Starks, 75 S W (2d) 787, 256 Ky. 120

54. Colo —Whalen v. McMahon, 26 P 533, 16 Colo 373—Latham v Gregory, 47 P 975, 9 Colo App 292
Ky —Taylor v. Taylor, 3 Bush 118
6 C J p 379 note 75

55. Ind —Sprow v Wicker, 157 N E 460, 87 Ind App 253—E I Dupont Powder Co v Pennsylvania & Indiana Coal Co, 121 N E. 680, 69 Ind App 320
Ky —Marcum v. Edwards, 205 S.W 798, 181 Ky 683
6 C J p 379 notes 76, 77.

After issues have been settled

A claimant may present his petition of intervention after the issues between plaintiff and defendant in attachment have been settled —Taylor v. Taylor, 3 Bush (Ky) 118.

Intervention after trial

An intervener, after trial, appeal and reversal of the attachment proceedings, may not come in to claim by supplemental petition the proceeds of property taken prior to the action —People's Sav Bank of Avoca v. McCarthy, 231 N.W. 482, 211 Iowa 40

56. Brunswick-Balke Collender Co v Starnes, 107 So. 743, 214 Ala. 263

57 Smith v. Jones, 11 S W (2d) 937, 226 Ky 785

After order of sale

An order of sale of attached property before judgment, the proceeds to be held subject to the ultimate decision of the cause, and a sale thereunder, do not prevent a claimant from appearing and asserting his claim —Petty v Hayden, 88 N W. 339, 115 Iowa 212—Hagar v. Haas, 71 P 822, 66 Kan 333—Hall v. Richardson, 16 Md 396, 77 Am D. 303—O'Brien v. Norris, 16 Md. 122, 77 Am. D 284—6 C J. p 380 note 81.

After proceeds have been paid on bond

The claimant may intervene after the proceeds of a sale of attached property have been paid to plaintiff in attachment upon his giving a bond of indemnity —Hall v Richardson, 16 Md 396, 77 Am D. 303

58. Murphy v Cochran, 80 Ky. 239.

Stranger to litigation

A stranger to the litigation may intervene to assert his rights to the

judgment is rendered against defendant.[59] It has also been held that under some circumstances intervention may be had on appeal[60]

If the statute prescribes the time within which a third person must assert his claim in order to obtain and preserve his rights, a compliance within the statutory time is essential, and a failure to do so is fatal[61] A failure of a lienholder to furnish the attaching officer an account of the amount due, after demand therefor, within the time fixed by statute, has been held to be fatal to his lien[62] Under a statute providing that two days after issuing the writ the clerk shall post notice of it, and that any creditor of defendant, who, within sixty days thereafter shall commence and secure final judgment against defendant shall share pro rata with plaintiff, it has been held that creditors who commence their actions within the time prescribed, had the clerk performed his statutory duty, are entitled to share in the proceeds of the judgment, as the failure of an officer to do his duty will not deprive litigants of valuable rights[63]

Mortgagee. The filing of an interplea, by a person holding a mortgage on the property attached, after the mortgage debt has become due has been held to be proper.[64]

Release bond. Where an attachment has been discharged on a release bond, it has been held that a third party cannot intervene and recover judgment against the obligors in the bond given solely for the protection of another.[65]

§ 345. Notice of Claim or Demand of Property

a. Necessity of notice
b. Time for giving
c. Form and sufficiency
d. Service or filing
e. Effect of filing claim

a. Necessity of Notice

Where required by statute, claimant must give notice of his claim.

Where it is required by statute that a claimant of property seized under attachment against another must, in order to protect his rights, give notice of his claim to, or make a demand for, the property, claimant's failure to assert his claim after knowledge of the seizure will bar his right of action for the trespass[66] Under other statutes, however, such a notice or demand is required only where the property is levied on while in the possession of defendant named in the writ of attachment, under such circumstances as to raise a presumption that he is the owner thereof.[67]

Where an attachment is wrongfully levied under the direction of plaintiff in attachment, the notice of claim required by statute to be given to the levying officer for his protection need not be given to plaintiff in order to render him liable to the claimant for damages in trespass or trover.[68]

Under some statutes, where mortgaged personalty is attached it becomes incumbent on the mortgagee, if he intends to assert his lien as against the attachment, to make a demand or give notice of the existence of his lien,[69] and his failure in this respect will preclude a dissolution of the attachment and retention of the mortgage lien or an action against the attaching officer[70] Under some statutes the notice of his lien should be given by the mortgagee,[71] or his attorney,[72] and directed to the attaching creditor, or to each of several attaching creditors, and served upon him or them or the attaching officer.[73]

property involved at any time before actual payment of the proceeds to the attaching plaintiff, even after the proceeds had been adjudged to the plaintiff and ordered paid—Smith v Jones, 11 S.W (2d) 937, 226 Ky 785

59. Springer v. Bigford, 43 N E 751, 160 Ill 495, affirming 55 Ill App 198—Juilliard v. May, 22 N E 477, 130 Ill. 87

60 Mo—Wolff v. Vette, 17 Mo App 36
Tenn—Jones v. Stewart, (Ch App) 61 S W 105.
6 C J. p 379 note 78.

61. Fife v. Ford, 41 A 1051, 67 N H 539.

62. Fife v. Ford, supra.

63. Quirk v. Diana Mines Co., 198 P. 672, 34 Idaho 30

64. Boudreau v. Brown, (Mo App) 39 S W (2d) 455.

65. Eberhart v Eyre-Shoemaker, Inc, 134 N E 227, 78 Ind App. 658

66. Cal.—Taylor v. Seymour, 6 Cal 512
Ky—Kinnimouth v Kimmel, 15 Ky L 125
Md—Trieber v. Blocher, 10 Md 14
6 C J p 380 note 87
Necessity of notice as a condition to liability of sheriff or constable see Sheriffs and Constables § 68 [57 C. J. p 831 notes 4-8].

67. Northern Rock Island Plow Co v Hackett-Gates-Hurty Co, 206 N W. 446, 165 Minn. 282—6 C J. p 380 note 88

68. Bradley v Miller, 69 N W 426, 100 Iowa 169

69. Me—Potter v. McKenney, 2 A 844, 78 Me 80
Mass—Codman v. Freeman, 3 Cush 306
6 C J p 381 note 91.

Nature of claim
Under a statute requiring the intervener to state the nature of the right by which he claims, failure to state that his claim was by virtue of a mortgage will prevent assertion of his claim as a mortgagee—Gulf Coast Lumber Co. v Miles, 90 So. 281, 206 Ala. 429.

70. Gross v Jordan, 22 A 250, 83 Me. 380—6 C J. p 381 note 92.

71. Campbell v. Eastman, 49 N E 914, 170 Mass. 523—6 C J. p 381 note 94.

72. Pettis v. Kellogg, 7 Cush. (Mass.) 456.

73. Macomber v. Baker, 3 Allen (Mass.) 241—Howe v Bartlett, 1 Allen (Mass) 29—Wheeler v Bacon, 4 Gray (Mass.) 550—6 C.J. p 381 note 96.

Where there is no valid subsisting attachment, there is no necessity for a mortgagee to state what is due him on his mortgage and demand payment of the amount,[74] and, if a demand is required only on an actual seizure of the property, the mortgagee may maintain replevin after attachment by trustee process against the mortgagor, without a demand.[75]

Waiver. The notice required by statute to be given by the mortgagee to a creditor attaching mortgaged personal property cannot be waived by the levying officer without the consent of the attaching creditor,[76] although when the attaching officer, for whose protection statutory provisions as to notice and claim are made, does not object to the sufficiency of the notice, but demands and obtains an indemnifying bond, questions as to the sufficiency of the notice are waived.[77] It seems that the attorney of the attaching creditor may waive the notice, or extend the time within which it should be given or filed.[78] Where plaintiff in attachment joins issue on a claim to the property attached, which has been filed, he waives the right to have the claim dismissed as improperly filed,[79] and the execution of an indemnity bond to the levying officer after notice of a claim to attached property has been given, for the purpose of having him retain the property, and the acceptance by the officer of such bond, amount to a waiver of defects in the notice.[80]

b. Time for Giving

The notice or demand must be given within the time prescribed by statute.

The required notice or demand must be filed or served within the time prescribed by statute,[81] or, if no time is prescribed by the statute, within a reasonable time after the attachment.[82] What is a reasonable time depends largely on the circumstances of the particular case,[83] and, where the attaching plaintiff or officer is fully aware that the attached property is already encumbered, the intervening mortgagee will be allowed more latitude in making demand and statement of his claim.[84]

A notice has been held sufficient when given after judgment in the principal action,[85] after judgment against another claimant for a return of the property replevied,[86] before a sale of the attached property,[87] or after such a sale,[88] and before payment over of the proceeds.[89]

Where an unusual time intervenes between the attachment and the notice the reason for the delay should appear in the notice.[90]

c. Form and Sufficiency

The notice or demand, if no form is prescribed by statute, must give such information as to enable the officer or plaintiff to understand the nature of the claim and the property which it includes.

Where no precise form is prescribed, a notice or demand by a claimant of attached property is sufficient if it gives to the levying officer or the attaching creditor notice of the existence of the claim and such information as to its nature and, in a proper case, its amount as will enable the officer or the creditor to act understandingly with reference to it,[91] and mere informalities, inaccuracies, or defects which have no tendency to mislead or prejudice the parties

74. Jordan v. Farnsworth, 15 Gray (Mass.) 517—6 C.J. p. 386 note 71

75. Putnam v. Cushing, 10 Gray (Mass.) 334

76. Campbell v. Eastman, 49 N.E. 914, 170 Mass. 523

77. Brinkley-Douglas Fruit Co. v. Silman, 166 P. 371, 33 Cal.App. 643

78. Green v. Kelley, 24 A. 133, 64 Vt. 309

79. Canty v. Wood, (Miss.) 38 So. 315.

80. Abner v. Twichell, 116 N.W. 95, 17 N.D. 229—6 C.J. p. 385 note 46

81. Brownell, etc., Car Co. v. Barnard, 22 S.W. 503, 116 Mo. 667—Tennent-Stribbling Shoe Co. v. Rudy, 53 Mo.App. 196—6 C.J. p. 381 note 97

On application

A creditor applying to the court to come in under the attachment has been held not to be bound to file his claim when he applies.—Hanness v. Smith, 21 N.J.Law 495.

82. Legate v. Potter, 1 Metc.(Mass.) 325—Housatonic Bank v. Martin, 1 Metc.(Mass.) 294—Johnson v. Sumner, 1 Metc.(Mass.) 172—6 C.J. p. 381 note 98.

Demand not timely

Where an automobile was attached on Dec. 4, 1924, and where a chattel mortgagee knew of service thereon, but made no demand until March 10, 1925, and no reason was shown for delay, and purchaser at execution sale had no knowledge of the mortgage until after December 27, demand by the mortgagee, under Gen.L. c. 223 §§ 74, 75, was not within a reasonable time.—Demers v. Winslow, 149 N.E. 110, 253 Mass. 472.

83. Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am.D. 374—6 C.J. p. 381 note 99

84. Congress Investment Co. v. Reid, 91 N.E. 896, 205 Mass. 576

85. Ark.—De Loach Mill Mfg. Co. v. Little Rock Mill, etc., Co., 47 S.W. 118, 65 Ark. 467, 67 Am.S.R. 942.

Ga.—Rogers v. Bates, 19 Ga. 545.

6 C.J. p. 381 note 1.

86. Housatonic Bank v. Martin, 1 Metc.(Mass.) 294.

87. Simmons v. Bennett, 20 Ga. 48

88. Me.—Holmes v. Balcom, 24 A. 821, 84 Me. 226

Mass.—Legate v. Potter, 1 Metc. 325. 6 C.J. p. 382 note 4.

89. Ark.—De Loach Mill Mfg. Co. v. Little Rock Mill, etc., Co., 47 S.W. 118, 65 Ark. 467, 67 Am.S.R. 942

Ky.—Morris v. Wilson, 7 Ky.L. 440

90. Brackett v. Bullard, 12 Metc. (Mass.) 308.

91. Luciano v. Caldarone, 151 N.E. 70, 255 Mass. 270—6 C.J. p. 382 notes 8, 9.

Affidavit of claim as condition precedent see infra § 352.

Notice held sufficient

(1) Under a statute requiring a claimant to property levied on who bases his claim on a mortgage or lien to state the nature of the right which he claims in his affidavit, it is sufficient if claimant simply states that he claims under a mortgage or under a lien, a further specification

will not vitiate the notice or demand,[92] if the true interest is determinable by the pleadings and proof in the action.[93]

The property claimed, or upon which a mortgage lien is asserted, should be particularly described,[94] but a notice stating ownership of all the property levied on, except a portion owned by another person named, has been held not to be invalidated by the exception.[95]

A mortgage under which the claim and demand is made must be designated with sufficient particularity to enable the attaching creditor to possess definite and valuable information concerning the claim,[96] and a reference to the town records, without giving the date of, or the names of the parties to, the mortgage, is insufficient.[97] A statement that the mortgage was given to secure a note is insufficient.[98] The specification of a demand under one mortgage will not avail in a claim under other mortgages,[99] but will be limited to the mortgage in the demand or notice described.[1]

Ordinarily, where goods claimed are intermingled with goods of the attachment debtor, if claimant fails to assert his ownership and to designate the particular goods claimed by him, the whole is liable to seizure and sale.[2] It has been held, however, that a demand of mortgaged goods need not specify what part of the attached property is included in the mortgage,[3] and is not defective because describing all the attached property as included in the mortgage.[4]

Demand. The notice should conclude with a demand, or its equivalent, for the amount claimed.[5]

Statement of indebtedness. Where claimant asserts merely a claim against, or a lien upon, the property and not the absolute ownership thereof, under some statutes the notice must, with reasonable certainty, describe or designate the indebtedness secured,[6] and state the amount thereof,[7] and a failure to comply with the requirements of the statute with respect to such statement or account will have the effect of depriving the claimant of any claim or lien against the property so far as the rights of the attaching creditor are concerned.[8] A mere statement of what the mortgage was given for is not a statement of the amount due.[9]

A statement of a balance due upon a single demand will suffice; but in case of several distinct demands the amount due upon each separate demand should appear.[10]

of the claim being unnecessary, since the rules of special pleading have no application to such proceeding—McDonald v. Stephens, 85 So. 746, 204 Ala. 359

(2) If the intervener contends that his claim is based on a mortgage from defendant in attachment, it is not a fatal defect if the attaching creditor neglects to mention that the mortgage was first executed to a third party, who transferred it to him—McDonald v Stephens, supra.

Notice held insufficient

Under a statute requiring a just and true account of the debt or demand, notice that claimant held a mortgage on property for three hundred dollars under which he had taken possession and incurred expense, with demand for payment, was insufficient—Fender v Blackmer, 138 N E 813, 244 Mass 447

Securing indemnity

Notice to the sheriff of a third party claim to the attached property is sufficient if it enables the sheriff to obtain a sufficient indemnifying bond from the attachment creditor—Capital Loan Co v. Keeling, (Iowa) 259 N W 194

92. Ala.—McDonald v. Stephens, 85 So 746, 204 Ala 359
Mass.—Magnifico v Nicholson, 163 N E 156, 264 Mass 519, 63 A L R 572—Bicknell v. Cleverly, 125 Mass 164
6 C J. p 382 note 10.

93. N Y.—Leinkauf Banking Co. v Grell, 70 N Y S 1083, 62 App.Div 275
Tex.—Hamburg v Wood, 18 S W 623, 66 Tex 168

94. Moriarty v Lovejoy, 23 Pick (Mass.) 321—6 C J. p 382 note 14

95. Susskind v. Hall, 44 P 328, 5 Cal Unrep Cas 304

96. Campbell v Eastman, 49 N E 914, 170 Mass 523—6 C J. p 384 note 32

97. Wilson v Crooker, 14 N E. 798, 145 Mass 571.

98. Hanson v. Herrick, 100 Mass. 328

99. Witham v Butterfield, 6 Cush (Mass.) 217

1. Simonds v. Parker, 3 Metc (Mass.) 144

2. Kelly-Goodfellow Shoe Co v. Sally, 89 S W 889, 114 Mo App 222—6 C J p 382 note 16
Intermingled goods as subject to attachment see supra § 74.

3. Folsom v Clemence, 111 Mass 273—Averill v. Irish, 1 Gray (Mass.) 254

4. Averill v Irish, supra—6 C J p 383 note 18

5. Brewster v. Bailey, 10 Gray (Mass.) 37.

6 Ashcroft v. Simmons, 24 N E 398, 151 Mass 497—6 C.J. p 383 note 21.

7. Luciano v Caldarone, 151 N E. 70, 255 Mass 270—6 C J p 383 note 22

Description of note without a statement of the amount due thereon will be insufficient—Sprague v. Branch, 3 Cush (Mass.) 575

Future advances

Where the mortgage is for future advances, the account need not contain a detailed statement of every item of a series of charges which are covered thereby, if the particular items are not requested—Hills v. Farrington, 6 Allen (Mass.) 80.

Notice held sufficient

Where a chattel mortgage was given for value and in good faith, a letter delivered to the attaching officer which contained a statement of the principal sum, date of mortgage, rate of interest, and recital that it was unpaid was sufficient notice of the amount due thereon, such statement being sufficient to enable a computation of the true amount due—Luciano v. Caldarone, 151 N E. 70, 255 Mass 270.

8. Magnifico v. Nicholson, 163 N.E 156, 264 Mass 519, 63 A L R 572—Fender v Blackmer, 138 N E 813, 244 Mass. 447—6 C J. p 384 note 36.

9. Sprague v. Branch, 3 Cush (Mass.) 575.

10. Housatonic Bank v. Martin, 1 Metc (Mass.) 294—Johnson v. Sumner, 1 Metc (Mass.) 172.

An innocent understatement of the amount due will not invalidate the demand[11] unless the amount actually due exceeds the value of the property;[12] neither will slight, innocent, and immaterial misstatements.[13] A statement of a greater sum than is due, if made in good faith, likewise will not defeat the claimant, if the value of the property attached is less than the sum actually due,[14] or the error was the result of accident or mistake,[15] unless the attaching creditor has been prejudiced thereby.[16] On the other hand, under such a statute, the test is not the value of the property, but the opportunity of the attaching creditor to reach a fair determination whether to pay off the encumbrance and hold the goods or to abandon his attachment and return them. He is not furnished such an opportunity where an account that is intentionally false and untrue is rendered. Accordingly, where a claimant knowingly furnishes an excessive demand, he thereby defeats his rights under the statute.[17]

Where a balance of the original indebtedness remains unpaid the account may state the sum actually due.[18]

Writing unnecessary. Unless required by statute, it is not essential that the notice of claim should be in writing.[19]

d. Service or Filing

Service of notice or claim must be in accordance with the statutory requirements.

Service on the attorney of the attaching creditor has been held sufficient under a statute requiring service on such creditor or the attaching officer.[20] Under a statute providing that any employee desiring to enforce his claim for wages at any time after seizure of the property under execution or writ of attachment, and before sale thereof is ordered, shall present to the officer levying on such property, or to the court having custody of such property, or from which such process issued, a statement under oath, etc., it has been held that, where a writ of attachment was issued against the crops of a tenant, a statement of claim by an employee for wages, filed with the clerk of the court from which the attachment issued, was a sufficient compliance with the law.[21]

e. Effect of Filing Claim

A person who files a claim to attached property becomes a party to the proceedings, but he obtains no lien thereby.

One who comes in under attachment proceedings and files a claim against the property and to share in its proceeds becomes a party to the proceedings,[22] but he does not thereby acquire any lien upon the property,[23] and he is estopped to assert a lien on the property prior to that of the first attaching creditor.[24]

§ 346. Account

Where the statute so requires, on proper demand claimant must file an account of his claim within a prescribed time or lose his right to the attached property.

Under a statute providing that a mortgagee, when the equity of redemption has been attached, shall render an account of the amount due him within a prescribed time, and that, if such account is not rendered within that time, his rights against the attached property are discharged, it has been held that the attaching creditor will be held to a strict compliance with all substantial requirements of the statute.[25] Accordingly, a demand for an account "forthwith,"[26] or one which fails to demand an ac-

Aggregate insufficient

Where several demands are secured a statement of the aggregate is not sufficient—Johnson v. Sumner, 1 Metc (Mass.) 172

Where one mortgage secures a gross sum to two persons, the account may set forth the gross sum due to each—Housatonic Bank v Martin, 1 Metc (Mass.) 294

11. In Johnson v Sumner, 1 Metc (Mass.) 172—6 C.J. p 383 note 26

12. Clark v. Dearborn, 103 Mass 335

13. Ashcroft v. Simmons, 24 N.E. 389, 151 Mass 497—Wilson v Crooker, 14 N.E. 798, 145 Mass 571—Bicknell v Cleverly, 125 Mass 164—6 C.J. p 383 note 28

14. Bigelow v Capen, 13 N.E. 896, 145 Mass 270—Clark v. Dearborn, 103 Mass 335—Rowley v. Rice, 10 Metc. (Mass.) 7.

15. Putman v. Osgood, 51 N.H. 192—6 C.J. p 383 note 30

16. Cousins v. O'Brien, 74 N.E. 289, 188 Mass 146—6 C.J. p 383 note 31, p 386 note 68

17. Magnifico v Nicholson, 163 N.E. 156, 264 Mass 519, 63 A.L.R. 572—6 C.J. p 383 note 25.

18. Johnson v. Sumner, 1 Metc (Mass.) 172

19. Huels v. Boettger, 40 Mo.App 310

20. Carter v. Green Mountain Gold Min. Co., 23 P. 317, 83 Cal. 222.

21. Stuart v Twining, 83 N.W. 891, 112 Iowa 154.

22. Colo.—Trinidad Nat. Bank v Jamieson House Furnishing Co., 155 P. 441, 60 Colo. 356
Md.—Gilpin v. Somerville, 161 A. 272, 163 Md. 40
6 C.J. p 384 note 40.

23. Winrod v Wolters, 74 P. 1037, 141 Cal. 399—6 C.J. p 384 note 41

24. Rouse v. Wallace, 50 P. 366, 10 Colo.App. 93—6 C.J. p 385 note 42

25. Farr v Dudley, 21 N.H. 372, 380. "The rights which a mortgagee has to the land mortgaged are oftentimes his only reliable security for the payment of his debt, the personal security may be entirely worthless. Our statutes require much formality in the execution and recording of mortgages of real estate, and if the rights of an individual thus acquired are to be taken away by the simple act of an attaching creditor's giving notice for an account of the claim, and a failure to comply with the requirements of that notice, we think the attaching creditor should also be held to comply strictly with all substantial requisitions of the statute"—Farr v. Dudley, supra

26. Green v. Kelley, 24 A. 133, 64 Vt. 309.

count for the amount due at the time of the demand,[27] has been held not to be in compliance with the statute, and not to require that an account be rendered within the prescribed time under the statutory penalty. A demand by a creditor must disclose his authority to make it by setting forth the fact of a levy under the attachment,[28] and a right to redeem from the mortgage;[29] but, where no more is required than a demand of an account of the mortgage debt, a demand by the officer in his own name and official capacity is sufficient without designating the creditor, the claim sued, the nature of the suit, or the court to which the writ is returnable.[30] Under such a statute the attorney of the attaching creditor has authority to waive the demand for an account, or to extend the time within which it may be filed.[31]

Where the attached property is discharged from the mortgage because no account is rendered, the officer need not again make a demand under a subsequent attachment.[32]

If, after proper demand, the account is not filed in accordance with the statute, the mortgagee loses his rights against the property,[33] and, if personalty has been attached, it is discharged from the mortgage.[34]

Under a statute providing that the officer levying the attachment may give claimant written notice of his attachment and, if claimant does not within ten days thereafter deliver to the officer a true account of the amount of his claim, he thereby waives the right to hold the property thereon, a claimant cannot excuse his failure to give notice of the true amount of his claim on the ground that the officer had already sold the property.[35] Also, under such a statute, the account must be delivered to the officer, a delivery to the creditor's attorney instead of the officer being insufficient.[36]

Where distinct demands are separately secured, separate accounts should be rendered stating the amount due on each and not the aggregate due on both.[37]

Sufficiency. Claimant in making his account under such statutes is not held as strictly to the requirements of the statute as is the creditor in making his demand. Accordingly, if the mortgaged premises are described correctly, it is immaterial that the description in the mortgage is not followed,[38] and the account is sufficient if it contains data from which such amount can be ascertained by computation.[39] Innocent inaccuracies or errors in the account rendered by a mortgagee of attached property to the attaching officer or creditor, resulting from accident or mistake, and which do not mislead or injuriously affect the attaching creditor, will not invalidate the demand of payment of his debt or defeat the mortgagee's right to enforce his lien,[40] although, if but part of the amount due is stated, a tender of that amount will discharge the mortgage.[41] If, however, claimant is required to file an account of his claim under oath, a mere unsworn letter stating the amount of the mortgage and claim, without showing the amount due, is insufficient.[42]

A reference to other persons for information concerning a part of the claim, the amount of which is not stated in the account, is insufficient as to that part.[43]

§ 347. Indemnity Bond

When a claimant to attached property asserts a valid claim thereto, under some statutes the attaching officer may require the plaintiff to give an indemnity bond.

In accordance with the general rules governing the giving of indemnity bonds to sheriffs and constables, as discussed in the title Sheriffs and Constables § 128 et seq., [57 C.J. p 918 note 87 et seq.], where the statute so requires, plaintiff must give an indemnity bond to the levying officer,[44] or claim-

27. Farr v. Dudley, 21 N.H. 372
28. Ricker v. Blanchard, 45 N.H. 39—6 C.J. p 385 note 50
29. Ricker v. Blanchard, supra—6 C.J. p 385 note 51
30. Kimball v. Morrison, 40 N.H. 117.
31. Green v. Kelly, 24 A. 133, 64 Vt. 309—Willard v. Goodrich, 31 Vt. 597
32. Kimball v. Morrison, 40 N.H. 117.
33. Kimball v. Morrison, supra.
34. Bryant v. Morrison, 44 N.H. 288—Kimball v. Morrison, 40 N.H. 117—Gilmore v. Gale, 33 N.H. 410—6 C.J. p 386 note 70.
35. Hill v. Wiles, 92 A. 996, 113 Me. 60.
36. Hill v. Wiles, supra.
37. Barton v. Chellis, 45 N.H. 135—6 C.J. p 385 note 63
38. Bryant v. Morrison, 44 N.H. 288
39. Sullivan Sav. Inst. v. Kelley, 59 N.H. 160
40. Gibbs v. Parsons, 6 A. 93, 64 N.H. 66—Putnam v. Osgood, 51 N.H. 192—Duncklee v. Gay, 39 N.H. 292—6 C.J. p 386 note 66.
41. Duncklee v. Gay, supra.
42. Gilmore v. Gale, 33 N.H. 410.
43. Duncklee v. Gay, 39 N.H. 292.
44. Ravely v. Isensee, 221 N.W. 33, 57 N.D. 286—6 C.J. p 386 note 72.

Liability on bond

(1) Where plaintiff attached mortgaged property, and, on mortgagee's appearance and claim to the property, gave the sheriff an indemnifying bond, whereupon a receiver was appointed and took charge of the property, the levy of attachment was not a conversion of the mortgaged property which would subject plaintiff to liability to the mortgagee on the indemnity bond, and the mortgagee must look to the mortgaged property for satisfaction of his claim—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.

(2) Other examples of liability on attachment indemnity bond.—6 C.J. p 386 note 73 [a].

ant,[45] for the purpose of imposing on the officer the duty and giving him the right to retain possession of the property, notwithstanding the adverse claim.

Under such statutes, a third party intervening to assert his claim may insist that the attaching plaintiff post a bond on presenting to the attaching officer a verified claim showing that such third party claimed the property attached, and setting out his right to possession,[46] if the intervener's claim is lawfully grounded and sufficient in form.[47]

While additional time may be allowed for the filing of the bond,[48] the failure of the attaching plaintiff to give a bond under such circumstances works a forfeiture of his attachment lien,[49] and authorizes the sheriff or attaching officer to release the attached property to the third party,[50] it being considered that his failure to give bond concedes the right of the intervener to the attached property.[51]

The fact that an indemnifying bond was executed to the sheriff before the levy of an attachment does not preclude claimants of the property from asserting their claims as provided by statute.[52]

§ 348. Operation and Effect of Determination

A finding of a sheriff's jury in favor of claimant is only prima facie evidence of ownership.

Where a sheriff's jury has been impaneled to try the validity of the claim, and found for claimant, as is customary in order that the sheriff may be protected by plaintiff's bond, the jury's determination is prima facie evidence of claimant's ownership, but is not decisive on the question of title.[53]

2. Actions or Proceedings to Establish Title or Recover Possession

§ 349. Form of Remedy

Under the practice in some jurisdictions a claimant may proceed by rule, by motion to discharge, or in summary proceedings.

In addition to the right of a third person claiming attached property to intervene in the attachment proceedings, as already considered in §§ 339–348, in some jurisdictions such a claimant may proceed by rule, if the rights of the parties will not be prejudiced thereby,[54] or he may have his rights determined on a motion to discharge the attachment,[55] or in summary proceedings provided for by statute.[56] Under some statutes, where an officer takes possession of property, under a writ of attachment, to possession of which the attachment debtor is not entitled, there results an illegal ouster of rightful possession which can be regained in a trial of the right to the property.[57]

Liability on indemnity bonds to sheriffs generally see Sheriffs and Constables §§ 137–142 [57 C.J. p 926 note 27–p 932 note 95]

45. McDermott v. Hayes, (D.C. Mass.) 194 F. 903, reversed on other grounds 197 F. 129, 116 C.C.A. 553—6 C.J. p 886 note 73

Measure of damages in an action on an indemnity bond, indemnifying a chattel mortgagee and constable against loss from the levying of the writ of attachment on mortgaged property, is the value of the property converted.—Allerton v. King, 274 P. 90, 96 Cal.App. 230

46. Arena v. Bank of Italy, 228 P. 441, 194 Cal. 195

Right to possession

Where a claim of a third party to attached goods omitted expressly to assert any right of possession, as required by Code Civ. Proc. § 689, it furnished no basis entitling the attaching officer to demand an indemnifying bond from plaintiff or justifying him in releasing the attached property when such bond was not given. Accordingly, a statement that the intervener is entitled to attached property because defendant in attachment gave him an assignment of such property does not set forth a right to possession entitling the attaching officer to insist on a bond.—Arena v. Bank of Italy, 228 P. 441, 194 Cal. 195.

47. McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415

Amendment of claim

Where a claim of a third party to attached property, under Code Civ. Proc. § 689, was so defective as to furnish no basis for the sheriff's demand for an indemnifying bond, and so ineffectual as to give him no right to release the property for failure to give such bond, an attempted amendment could not give validity to the sheriff's void act in making the demand.—Arena v. Bank of Italy, 228 P. 441, 194 Cal. 195.

Invalid claim

A statutory provision authorizing the sheriff to release property claimed by a third person, unless an indemnifying bond is given, does not protect the third person asserting an invalid claim.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

48. Chesterfield Grocery Co. v. Birch & Donner, (S.C.) 101 S.E. 645

49. McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

50. Kirk White & Co. v. Bieg-Hoffine Co., (Cal.App.) 44 P.(2d) 439

51. Ex parte Sales, 117 S.E. 350, 126 S.C. 155.

52. Gevedon v. Branham, 47 S.W. 589, 20 Ky.L. 791—6 C.J. p 374 note 35.

53. Anderson v. Fidelity & Deposit Co. of Maryland, 177 N.Y.S. 272, 188 App.Div. 626.

54. Remington Paper Co. v. Louisiana Printing, etc., Co., (C.C.La.) 56 F. 287.

55. U.S.—U. S. v. Neely, (C.C.N.Y.) 146 F. 764.
Kan.—Wichita Wholesale Grocery Co. v. Records, 19 P. 846, 40 Kan. 119—Symns Grocer Co. v. Lee, 58 P. 237, 9 Kan.App. 574.
6 C.J. p 886 note 76.

56. Platt, etc., v. McQuown, 20 Pa.Co. 401—6 C.J. p 886 note 77.

Summary process

(1) Summary process to determine ownership of attached property is allowable only in cases expressly authorized by law.—Adams v. Ross Amusement Co., 161 So. 601, 182 La. 252, affirming (App.) 158 So. 38.

(2) The attaching plaintiff's right to reconvene after intervention cannot be defeated because the intervener proceeded illegally in a summary manner, instead of regularly by petition and citation.—Adams v. Ross Amusement Co., supra.

57. Taylor v. Benningfield, (Tex.Civ.App.) 257 S.W. 933.

The character of the property at the time the attachment plaintiff is required to appear in court to contest claimant's rights may under the statute determine the procedure by which that right should be determined.[58]

Although, where a claimant to attached property has an adequate remedy at law, he, ordinarily, cannot resort to equity to obtain and preserve his rights,[59] it has also been held that a claimant may establish his prior lien on the property attached in an equitable proceeding, and, in the absence of a statute providing for intervention in the attachment proceedings by third persons claiming the property, it has been held that the question of ownership can be determined only in equity where all the facts can be ascertained and all the parties be brought in and their rights adequately protected.[60]

§ 350. —— Election

One claiming property seized under an attachment against another has an election as to the remedy by which he may assert his rights.

A person claiming property seized under an attachment against another has usually the option of instituting an independent action to protect or enforce his rights or of interpleading or intervening in the attachment suit for that purpose, as already discussed in § 339, and where resort to an independent action is had, claimant may usually maintain case, trespass, replevin, or trover.[61]

As the different remedies available to claimants are but different modes of determining the ownership of the property, it follows that if claimant elects to pursue one remedy he may be estopped to resort to another.[62] A mere failure on the part of claimant to avail himself of one statutory remedy does not, however, preclude him from resorting to another action,[63] nor does the fact that claimant is prosecuting another suit in the same court for the same cause prevent his appearing and asserting title to the property in the attachment suit.[64] It has also been held that the appearance and participation of a purchaser of property in an unsuccessful motion to discharge an attachment issued against his vendor on the ground that the conveyance was fraudulent does not preclude him from bringing subsequently an action to recover the property.[65]

Waiver of objection. An objection that a claim by a third person to property in the hands of the officer should be made, under the statute, by a petition in the attachment action, and not by a separate action in replevin, is waived where it is not raised before the trial of the replevin action.[66]

§ 351. Nature of Intervention Proceedings

An intervener's action to assert his interest in attached property is in effect in the nature of an action in replevin.

Although consequential and dependent on the levy of valid process on the property of claimant,[67] an intervention, or statutory trial to the right of property, is ordinarily a special proceeding created by statute, ancillary to a pending action and in aid of the remedy afforded by an attachment,[68] although it is, in many respects, an independent suit, performing, where the property is personalty, the same office in effect as replevin.[69]

58. Brokaw v. Collett, (Tex.Com App.) 1 S.W.(2d) 1090, reversing Collett v. Brokaw, (Civ.App.) 296 S.W. 333

59. Johnson v. Gillenwater, 87 S.W. 439, 75 Ark. 114

60. Byall v. Rigdon, 100 A. 835, 6 Boyce (Del.) 544.

Estoppel

Whether interveners seeking, by rule to show cause, to raise issue as to ownership of stock attached, were estopped from denying defendant's ownership against attachment creditor by their action in causing the stock to be transferred on their books was a question for determination of a court of equity.—Byall v. Rigdon, 100 A. 835, 6 Boyce (Del.) 544

61. Ariz.—Montgomery v. Kirksey, 233 P. 588, 27 Ariz. 356.
Colo.—Wilde v. Rawles, 22 P. 897, 13 Colo. 583
6 C.J. p. 387 note 78.

Replevin

(1) A person whose property has been attached as that of another may bring replevin therefor.—Gowan v. McAdoo, 173 N.W. 440, 143 Minn. 227.—Eaves v. Sales, 117 S.E. 350, 126 S.C. 155.

(2) Accordingly, one whose property is attached as that of another may intervene, or bring replevin or conversion against the officer, and the judgment will be binding on attachment plaintiff, who gave bond and directed the acts of the officer.—Nisbet v. Federal Title & Trust Co., (Colo.) 229 F. 644, 144 C.C.A. 54, certiorari denied 36 S.Ct. 553, 241 U.S. 669, 60 L.Ed. 1229

62. Richardson v. Watson, 23 Mo. 34—6 C.J. p. 387 note 80.

63. Montgomery v. Kirksey, 233 P. 588, 27 Ariz. 356—6 C.J. p. 387 note 81.

64. Hall v. Richardson, 16 Md. 396, 77 Am.D. 303, following Trieber v. Blocker, 10 Md. 14—6 C.J. p. 387 note 84

65. Thomas v. Baker, 21 P. 252, 41 Kan. 350.

66. Splain v. B. F. Goodrich Rubber Co., 53 App.D.C. 300, 290 F. 275

67. Jackson v. Bain, 74 Ala. 328

68. Misrach v. Liederman, (Cal.) 58 P.(2d) 746

69. Mo.—State ex rel. and to Use of Smith v. Boudreau, (App.) 82 S.W.(2d) 129—State ex rel. Stevenson v. American Surety Co., (App.) 74 S.W.(2d) 1094—Green v. Powell, (App.) 46 S.W.(2d) 915—Citizens' Trust Co. v. Elders, 259 S.W. 136, 213 Mo.App. 589—State v. Barker, 26 Mo.App. 487—Spooner v. Ross, 24 Mo.App. 599.
Okl.—Farmers State Bank of Newkirk v. Hess, 280 P. 305, 133 Okl. 190, 66 A.L.R. 894.
6 C.J. p. 387 note 87

"Interplea in attachment"

Where one who is not a party to an action files what he denominates an "interplea in attachment," which, without directly attacking the existence of any of the alleged grounds for attachment or any proceeding had therein prior to levy, merely de-

The interplea is an assertion by claimant of a title to the property attached superior to that of defendant in the attachment, and plaintiff in the attachment is thereby challenged to defend the title which he has asserted to be in defendant by attaching the property as his.[70] Accordingly, on the intervention, the intervener becomes plaintiff,[71] and plaintiff in attachment, defendant, and the action must be tried and determined separately from the attachment action,[72] on its own issues,[73] and the intervener must recover, if at all, on the strength of his own title.[74]

The assertion by an intervener of a judgment lien on the attached property does not convert an intervention in an attachment proceeding into a suit to enforce judgment liens.[75]

§ 352. Conditions Precedent

Where the statute so requires, the filing of an affidavit of claim and bond is a condition precedent to proceedings by the claimant to establish and enforce his rights.

It is sometimes required that claimant of property attached under process against another shall present an affidavit or make oath to his claim; and, where this is the case, compliance with such requirement is a condition precedent to proceedings by claimant to establish and enforce his title or rights in the attachment suit,[76] and one cannot effectively assert his title or claim to the property or an interest therein by a simple unsworn statement.[77] This affidavit of ownership should name claimant[78] and set out the nature of the claim.[79] Such an affidavit, however, is not a pleading and mere technical niceties should not overshadow claimant's rights.[80] Accordingly, an affidavit in substantial compliance with the statute is sufficient, especially where it is so treated by the parties.[81] Likewise, it will not be deemed material that the oath was defective, where it is acted on, an indemnity bond is given by plaintiff, and no prejudice has resulted.[82]

In the absence of a statute to the contrary it is not essential to the validity of the claim affidavit that it should be accompanied by a jurat with the name of the officer who administered the oath signed thereto.[83]

Bond. Where the statute requires claimant of attached property to give a bond, compliance with this requirement is a condition precedent to his right to assert his claim in the attachment suit;[84] and, unless the bond is given, the court has no jurisdiction to try the issue, even though the parties to the

nies that defendant in attachment or any other person than himself owns the personal property attached and claims for himself the title and in effect the right to the immediate possession of such property, he will be deemed an interpleader asserting a right in the nature of that of a petitioner in replevin, and as not moving for a discharge of the attachment.—Millus v. Lowrey Bros., 164 P. 663, 63 Okl. 261, L.R.A.1918B 336.

70. Boettger v. Roehling, 74 Mo. App. 257.

71. Saenger v. Standard Lumber Co., 50 S.W.(2d) 589, 185 Ark. 990.

72. Mo.—State ex rel. Smith v. Boudreau, (App.) 82 S.W.(2d) 129—Scott v. Levan, (App.) 286 S.W. 407—Citizens' Trust Co. v. Elders, 259 S.W. 136, 212 Mo.App. 589—Boettger v. Roehling, 74 Mo.App. 257.

Okl.—Farmers State Bank of Newkirk v. Hess, 280 P. 305, 133 Okl. 190, 66 A.L.R. 394.

6 C.J. p. 387 note 89.

Not part of cause of action

The interplea is in no sense part of the cause of action, but the assertion of an independent right, and must be tried and determined on what is virtually a separate record.—Boettger v. Roehling, 74 Mo.App. 257.

73. Monroe County Growers' Exch. v. Harper, 103 So. 600, 20 Ala.App. 532.

74. Ark.—Saenger v. Standard Lumber Co., 50 S.W.(2d) 589, 185 Ark. 990—Cate-La. Nieve Co. v. Plant, 287 S.W. 750, 172 Ark. 82.

Mo.—Scott v. Levan, (App.) 286 S.W. 407.

6 C.J. p. 387 note 90.

75. Yellow Pine Lumber Co. v. Mays, 94 S.E. 42, 81 W.Va. 46.

76. Stephenson & Bernard Realty Co. v. Sheehan, 144 So. 370, 25 Ala.App. 269—Key v. Haynes, 84 So. 563, 17 Ala.App. 229—6 C.J. p. 388 notes 92, 93.

77. Dorroh v. Bailey, 125 S.W. 620, 59 Tex.Civ.App. 282—6 C.J. p. 388 note 94.

Acknowledgment insufficient

Where a statute requires that a third party claim in attachment be verified by the party making it or his agent, an unverified demand by a person other than claimant as his agent is insufficient, even though an acknowledgment is made before a notary as to the truth of the facts stated therein.—Easterly v. Praul, 169 P. 396, 35 Cal.App. 39.

Adopting pleadings insufficient

The foreclosing of an attachment lien in favor of interveners is error, where interveners made no affidavit or bond to protect defendant, and their adoption of plaintiff's pleadings cannot be construed as an adoption of the attachment proceedings, so as to render them liable if the attachment had been sued out wrongfully.—Milliken v. Anderson, (Tex.Civ.App.) 294 S.W. 921.

78. Richardson v. Smith, 21 Fla. 336—6 C.J. p. 388 note 95.

79. Ala.—Witherington v. Gainer, 43 So. 117, 149 Ala. 655.

Minn.—Carpenter v. Bodkin, 30 N.W. 453, 36 Minn. 183.

Tex.—Wetzel v. Simon, 28 S.W. 274, 942, 87 Tex. 403—Sutton v. Gregory, (Civ.App.) 45 S.W. 932.

W.Va.—Ludington v. Hull, 4 W.Va. 130.

6 C.J. p. 388 note 96.

80. McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

81. Minn.—Carpenter v. Bodkin, 30 N.W. 453, 36 Minn. 183.

Mo.—Wray v. Wrightsman, 124 S.W. 38, 139 Mo.App. 635.

Affidavit sufficient

A third-party claim to attached property in the form of an affidavit setting out the facts and sworn to is a "claim verified by oath" within the statute.—McGaffey Canning Co. v. Bank of America, 294 P. 45, 109 Cal.App. 415.

82. Kellogg v. Burr, 58 P. 306, 126 Cal. 38.

83. York v. Lowry, 129 S.E. 793, 34 Ga.App. 389—6 C.J. p. 388 note 98.

84. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Stephenson & Bernard Realty Co. v. Sheehan, 144 So. 370, 25 Ala.App. 269—Monroe

action consent thereto.[85] However, a claimant who executes a bond, unauthorized by statute and insufficient, is not thereby estopped from securing a trial of the right of property by subsequently executing a statutory bond and complying with the other statutory requirements.[86]

§ 353. Defenses

Defenses available in replevin or ejectment are generally available in proceedings of this character.

Defenses which are good in an action for replevin, as discussed in the title Replevin §§ 77-83 [54 C.J. p 455 note 39-p 460 note 26], or in an action in ejectment, as discussed in the title Ejectment §§ 34-47 [19 C.J. p 1073 note 40-p 1089 note 60], are generally available against a person claiming property which has been attached in an action in which he is not a party. Accordingly, fraud on claimant's part,[87] or the fact that claimant does not have title to the property or the interest claimed,[88] or the invalidity of claimant's title, as that it was obtained under a conveyance made to hinder, delay, and defraud creditors[89] is available as a defense. It is not a defense, however, where mortgaged chattels are attached in the possession of the mortgagee, to say that he is the equitable, and not the legal, owner;[90] nor can an interpleader's right to attached property, claimed under a bill of sale, be defeated because the purchase money was furnished by a company in whose name he transacted business, where he owned all the stock except a few shares which were held in trust for him.[91] A settlement as to other claims by the debtor and interpleader in attachment, which did not affect the claim of the interpleader to the property attached, is no defense to the intervention.[92]

In order for the defense of res judicata to be available in a proceeding of this character, the right to the property or the validity of the claim must have been judicially determined on its merits. Accordingly, where claimant had filed a motion to dissolve the attachment on the grounds that he was the owner of the property attached, which was denied, it has been held that a plea of res judicata was not available as a defense to a petition to intervene on the same grounds, the overruling of the motion only determining that it was not apparent of record that the attachment should not have been issued.[93] The fact that a wife was made a party defendant in an action against her husband in order to divest her of any right of dower that she might have in the lands sought to be subjected has been held not to bar her from intervening in a sale of personalty attached by a judgment sustaining the attachment and ordering a sale of personalty, where she was without notice that such personalty would be attached.[94]

§ 354. Jurisdiction and Venue

A third person claiming property attached as that of another should bring his proceedings in a court having proper jurisdiction.

In order properly to adjudicate the rights of an intervener, his claim should be brought in the court having the proper jurisdiction,[95] including jurisdiction of the amount involved, which has been considered as the amount at which the attached property is valued.[96]

County Growers' Exch v. Harper, 103 So. 600, 20 Ala App 532.
Tex.—Dorroh v Bailey, 125 S.W. 620, 59 Tex Civ App 282
6 C J p 388 note 2
Claimant's bond or other security for possession or release of property see infra §§ 367-392.

85. Mobile L. Ins Co v. Teague, 72 Ala 147—6 C J p 388 note 3.

86. Reeves v. Wallace, 3 Tex A Civ. Cas § 178.

87. Saling v First Nat. Bank, 182 P 140, 93 Or. 237
Intent to defraud creditors
Where a father fraudulently, and acting in collusion with his son, conveyed property to his son, to enable him to obtain credit, and where the son secretly reconveyed such property to the father, but, with the father's knowledge, held himself out as owner, and the father, knowing that his son was unable to pay his debts, secretly, and with intent to defraud his son's creditors, filed a deed purporting to have been executed by the son, the father will not be given relief against the son's creditors, who attached the property subsequent to the reconveyance, in an equitable action to determine such adverse claim.—Saling v First Nat. Bank, 182 P. 140, 93 Or. 237.

88. **Answer** alleging that property claimed by an assignee as belonging to an individual member of a firm was partnership property, and that the assignment gave the interpleader no right to it, states a good defense.—Cox v Swofford Bros Dry-Goods Co, 47 S W 303, 2 Ind T 61—6 C J. p 388 note 7.

89. Ind T.—Cox v. Swofford Bros. Dry-Goods Co., 47 S.W. 303, 2 Ind. T 61
Mo.—Stewart v Outhwaite, 44 S W. 326, 141 Mo 562—Caruth-Byrnes Hardware Co v. Walter, 3 S W. 865, 91 Mo 484

90. Russell v. Painter, 7 S.W. 35, 50 Ark. 244.

91. Burke v. Sharp, 115 S.W 145, 88 Ark 433

92. A. J. Poor Grain Co. v. Franke Grain Co, 157 S W 840, 171 Mo App 354.

93. Citizens' State Bank of New Sharon v Haworth, 222 N W 428, 208 Iowa 1100.

94. Crook v. Blackburn, 71 S W (2d) 936, 254 Ky 405

95. Hambley & Co v H W. White & Co, 133 S E 399, 192 N C 31.
Court held to have jurisdiction
Under Code Civ.Proc § 689, the superior court has jurisdiction to determine title of property released by sheriff on stipulation between the attachment creditor and third party claimant.—Citrus Packing Co. v. Municipal Court of City of Los Angeles, (Cal App.) 30 P.(2d) 534.

96. Wetzel v. Simon, 28 S W. 274, 942, 87 Tex. 403—St. Louis Type Fdy. v. Taylor, 26 S.W. 226, 6 Tex Civ.App. 732—6 C.J. p 389 note 16.

Under various statutes it has been held that the trial of the right or title to property levied on under attachment and claimed by a third person must be had in the same court in which the attachment proceedings were instituted,[97] in a court which acquires jurisdiction of the persons of attachment plaintiff and claimant,[98] or, where the writ is issued in a county other than that in which the property is seized, in the county where seizure was made.[99] The jurisdiction of a designated court to try title to attached property is not affected by a statute authorizing the trial in another court of rights of property in general.[1]

A court having common-law jurisdiction may try the issue where claimant alleges the legal title to land and the attaching creditor asserts the title to be equitable by way of mortgage,[2] and a court of equity has jurisdiction of a bill, by one receiving a stock of goods in extinguishment of a preexisting debt, against a sheriff and attaching creditors to subject the proceeds of the sale of the goods at an attachment sale to the satisfaction of said debt and to enjoin the sheriff from paying the proceeds to the attaching creditors.[3]

Dependent on existence and service of writ. In an action begun by attachment the court has jurisdiction by reason of the writ and service thereof Consequently, if there is no writ in existence, or it has not been levied on or served, the court has no jurisdiction of the issue raised between the parties or by an interpleader.[4]

§ 355. Time to Sue and Limitations

The accrual of a cause of action and the commencement of actions is discussed in the title Actions §§ 124, 126–130. Limitations of actions is treated under the title of that name. The time for intervening is discussed in § 344 supra.

§ 356. Parties and Process

a In general
b Process

a. In General

Only persons directly or immediately interested are necessary or proper parties.

Generally, only persons directly and immediately interested in the subject matter of the suit need be made parties,[5] and one having no interest in, or claim to, the property is not a necessary party to a controversy respecting its ownership.[6] Accordingly, where a person other than attachment defendant asserts ownership of, or a lien on, the property attached,[7] or where subsequent attaching creditors intervene to have a previous attachment set aside as fraudulent, after the property has been sold and the fund is in court,[8] original defendant is not a necessary party to the proceedings. Also, attorneys for attaching creditors need not be made parties defendant to an intervening petition by claimant of the attached property.[9]

One claiming an undivided interest in the property attached is entitled to try the right of property without joining his coowner as a party.[10]

Where claimant dies pending proceedings to try right to the attached property, his heirs or legal representatives should be made parties.[11]

It has been held that where one claiming a preferred lien for services on attached property, which claim is disputed, sues, as required by statute, to establish his claim, neither the sheriff holding the attached property nor the attaching creditor is a nec-

97. Thompson v. Evans, 12 Ala 588

Vacating sale of attached property

Where, in an action to recover money, attachment has been levied on land, and the land sold after judgment, the district court has jurisdiction to entertain a motion by a stranger to the suit, holding title to such land, to release the land from the levy and set aside the sale—Knight v. Rhoades, 61 P. 869, 10 Kan App. 38.

98. Triest v Ensalen, 17 So. 356, 106 Ala. 180

99. Brown v. Woolwine, 191 P. 276, 107 Kan 258—6 C.J. p 389 note 13.

1. Springer v. Bigford, 43 N.E 751, 160 Ill. 495, affirming 55 Ill App. 198

2. Laclede Bank v. Keeler, 103 Ill 425.

3. Lowenstien v Abramsohn, 25 So 493, 76 Miss 890.

4. Ala.—Jackson v. Bain, 74 Ala 323.
Ark.—Splawn v. Martin, 17 Ark 146—Gibson v Wilson, 5 Ark. 422.
Ind T.—Swofford Bros Dry-Goods Co v. Smith-McCord Dry-Goods Co, 37 S W 103, 1 Ind T 314.

5. Whitman v. Willis, 51 Tex 421.

6. Bradshaw v Georgia, L & T Co, (Tenn Ch App) 59 S.W. 785—6 C J p 389 note 24

7. Boudreau v. Brown, (Mo App) 39 S W (2d) 455—6 C.J. p 389 note 23

Mortgagor

In a trial of the right to property between a mortgagee and attaching plaintiff, the mortgagor cannot question the description of the property in the mortgage as he is not a third party to the proceedings—Boudreau v. Brown, (Mo App) 39 S W (2d) 455

8. Joseph Peters Furniture Co. v. Dickey, 2 Tex Unrep Cas 237.

Defendant as party

Where notes are attached as defendant's property on the ground that a sale of them to a third person was actually to defendant, and an intervener asserts ownership because the sale was void, it is unnecessary for defendant to be before the court in any other capacity than defendant to the original bill—Bradshaw v Georgia L. & T. Co, (Tenn Ch A) 59 S W. 785.

9. Lyon v. Russell, 41 App D C 554.

10. Hamburg v. Wood, 18 S W. 623, 86 Tex. 168.

11. Muenster v. Tremont Nat. Bank, 49 S.W. 362, 92 Tex. 422.

essary or proper party.[12] The failure of claimant to obtain leave to become a party has been held to be waived where the attaching creditor without objection tries his right to the property.[13]

Proper parties Attaching creditors may be made parties to an action of replevin by claimant against the attaching officer for the purpose of defeating the claim,[14] but in a case where several attachments were levied by different persons on different articles of personalty which had been jointly purchased at one time by several purchasers from defendant in attachment, before the levy of the attachment, it was held that such purchasers could not require the attachment creditors, in a suit for the purpose, to contest with them whether the property is subject to attachment, without alleging that the attack on the validity of plaintiff's title involved a common question.[15]

Substitution of proper party by amendment. If an interplea is improperly interposed by the beneficiary of a trust, the trustee may be substituted in his stead by amendment.[16]

b. Process

A voluntary submission to the court's jurisdiction may operate as a waiver of proper process.

If the parties in the intervener's action voluntarily submit themselves to the jurisdiction of the court without process, the judgment of the court is as valid as if process had been issued.[17]

A statute, providing that any other creditor of defendant making and filing an affidavit and undertaking, as required of attachment plaintiff, together with his claim or demand, shall be made a party plaintiff and have like remedies against defendant to secure his claim or demand as the law gives to plaintiff, has been held not to be intended to permit such creditors to prosecute their claims to judgment under publication of notice and levy of a writ by the original attaching creditor, as the word "remedy" as so used is the means employed to enforce a right or redress an injury.[18]

§ 357. Pleading

a Claimant's petition or application
b. Plea or answer
c Issues, proof, and variance

a. Claimant's Petition or Application

(1) In general
(2) Amendments

(1) In General

Where the statute so requires, claimant should apply for relief by a proper petition or complaint, setting forth the nature of his claim and the facts upon which he relies.

Under some statutes, where a claimant to attached property files an affidavit of claim, the necessity for which has already been discussed in § 352, no pleadings are required.[19] Where, however, the statute so requires, third persons claiming property, or an interest therein, which has been attached as another's must come into the proceeding by petition.[20] The complaint, petition, or interplea should be in writing;[21] and, where the statute so requires, must be verified[22] by the party himself, his agent, or attorney.[23] It must, of course, set out matter sufficient to present an issue,[24] and to support a verdict and judgment;[25] but it has been held not

12. Shea v Regan, 74 P. 737, 29 Mont. 308—6 C J. p 389 note 29
13. McCray Refrigerator Sales Corporation v Logan, 172 N E 699, 36 Ohio App 201
14. Northern Timber Products Co v. Stone-Ordean-Wells Co, 173 N W. 439, 143 Minn. 200—6 C J p 389 note 30
15. Southern School Book Depository v. Ginn, 70 S E 569, 135 Ga 733.
16. Winklemaier v Weaver, 28 Mo 358
17. Snyder v Lyons, 119 S E. 286, 94 W Va 489
18. Trinidad Nat Bank v Jamieson House Furnishing Co, 153 P. 441 60 Colo 356
19. General Motors Acceptance Corporation v Judge of Circuit Court, Eleventh Judicial Circuit in and for Dade County, 136 So 621, 102 Fla 924
20. Yellow Pine Lumber Co v. Mays, 94 S E 42, 81 W.Va 46.

In Tennessee

(1) It has been held that a third person interested in the subject matter cannot of right present by petition his right to the property under attachment, but should proceed by original bill—Bradshaw v Georgia L & T. Co, (Tenn Ch.A.) 59 S.W 785

(2) The court, however, may determine the question on a petition if no objection is made thereto—Bradshaw v. Georgia L. & T Co, supra.

21. Neal v. Newland, 4 Ark. 459
22. Hurt v. Ohlman, 131 N E. 699, 349 Ill 163—6 C J. p 390 note 34
23. Standard Impl Co v Lansing Wagon Works, 48 P 638, 58 Kan 125—6 C J. p 390 note 35.
24. Doumas v Mormella, 251 Ill App 397—6 C J p 390 note 36.

Complaint or petition held sufficient

(1) A complaint alleging plaintiff's possession of timber, a writ of attachment in defendant's action against a third party and a wrongful withholding of possession, and a taking of possession from plaintiff's known agent to plaintiff's damage, and demanding its return, stated a good cause of action for replevin—Northern Timber Products Co v. Stone-Ordean-Wells Co, 173 N W. 439, 143 Minn. 200.

(2) A petition alleging the relation of suretyship between an intervener and defendant, in a judgment against both, his payment of the judgment under compulsion, and return of an execution showing no property of the principal found, and asserting right to the benefit of the lien of the judgment by subrogation, is sufficient on its face—Yellow Pine Lumber Co. v. Mays, 94 S E 42, 81 W Va 46

25. Neal v. Newland, 4 Ark. 459.

necessary to aver anything not indicated by the statute.[26]

In deciding as to the propriety of sustaining a demurrer to an interplea, only the averments of the interplea will be considered.[27]

Affidavit of merit unnecessary. A statute requiring in certain cases an affidavit of merits with a plea filed by the defendant named in the declaration stating that he has a defense upon the merits to the whole or a part of plaintiff's claim has been held to have no application to the petition of an intervener claiming property which has been attached as that of another, since he is not a person against whom plaintiff claims a recovery.[28]

Denial of claim. It has been held requisite for the claimant of the attached property to deny in his complaint, interplea, or petition, the claim of attachment plaintiff[29] On the other hand, a denial, by claimant, of the existence of the relation of debtor and creditor between himself and plaintiff has been held to be sufficient.[30]

Designation of property. The claimant should describe or designate the property attached and claimed by him,[31] and aver its value.[32]

Nature of claim. The intervener should set forth the nature of his claim to the property attached,[33] and show by his pleading whether such claim is absolute or conditional[34] While, in the absence of a statute to the contrary, it is not necessary to state from whom the property was acquired or the consideration paid therefor,[35] the petition should set forth the facts upon which the claim of ownership is based.[36] A simple allegation of ownership may be sufficient,[37] although it has been held that attachment plaintiff is entitled to demand the amendment of such a pleading of intervention, so as to give such information as will acquaint him precisely with the nature of the demand he has to meet.[38]

Under a statute requiring claimant to set forth the nature of his claim, where the intervention is based on a mortgage, it is not sufficient for claimant to state that he owns the paramount title, right, or interest in the attached property without making reference to the mortgage[39] It has also been held that one who claims as mortgagee must allege maturity of the debt and subsequent breach, or some other breach of condition such as entitles him to possession of the property.[40]

Showing right to relief. It has been held that, where title is not directly involved, such facts must be alleged as would authorize a court of equity to grant claimant a writ of injunction,[41] and under a statute extending equitable relief to a claimant whose property has been so withheld that it cannot be replevined, it must appear from the allegations of the bill that the goods sought to be delivered up were so controlled that an attempt to replevin them would be useless[42]

26. S Albert Grocer Co v. Goetz, 57 Mo App 3—6 C.J. p 390 note 38.

27. May v Disconto Gesellschaft, 113 Ill App 415, affirmed 71 N E 1001, 211 Ill 310.

28. Hurt v Ohlman, 181 N E 699, 349 Ill 163

29. Bamberger v. Halberg, 78 Ky. 376

30. Farmers' Nat Bank of Stephenville v. Daggett, (Tex Com App) 2 S W (2d) 834, affirming Daggett v. Farmers' Nat Bank, (Civ App) 259 S W 198

31. Grove v Foutch, 40 P 852, 6 Colo App. 357—6 C J p 391 note 50

32. Ashley v Millett, 8 Ky L. 536—6 C J. p 391 note 51.

33. Gulf Coast Lumber Co v Miles, 90 So. 281, 206 Ala. 429—6 C.J. p 390 note 44.

Allegation of special property

In an attachment suit against the husband, where the wife appears and denies the debt to the attaching creditor, she need not plead that the attached property was her separate estate, since the county court could not adjudicate such question—Farmers' Nat Bank of Stephenville v Daggett, (Tex Com App) 2 S W.(2d) 834, affirming Daggett v Farmers' Nat Bank, (Civ App) 259 S.W. 198

Mortgage

Where the intervener's affidavit of claim fails to state that he claims through a mortgage, he cannot recover as a mortgagee—Gulf Coast Lumber Co. v Miles, 90 So. 281, 206 Ala 429

Title or right to possession

The intervener's complaint should show title to, or right to possession of, the attached property—Anderson v Fidelity & Deposit Co of Maryland, 171 N.Y S. 272, 188 App Div 626

34. Maus v Bome, 24 N E 345, 123 Ind. 522—6 C J p 391 note 45

35. Coverdell v. Erickson, 168 N W 367, 39 N D 579

36. Patrick-Mosteller Co v. James R Baker & Co, 105 S E 271, 180 N C. 588

Fiduciary capacity

An intervener, claiming the property in a fiduciary capacity, should set out facts which authorize him to intervene—Sammis v Hitt, 84 N.W. 945, 112 Iowa 664—6 C J. p 390 note 42

37. Coverdell v. Erickson, 168 N W. 367, 39 N D 579—6 C J. p 391 note 46

Statement sufficient

(1) A third party claim sufficiently alleges ownership if stating that at all times, including the time of seizure, the property was that of claimant by reason of his purchase of and payment therefor.—Coverdell v Erickson, 168 N.W. 367, 39 N D. 579.

(2) An allegation that property seized was the property of the intervener and that he was entitled to immediate possession was sufficient—Pulsipher v. Chinn, 255 P. 439, 69 Utah 401.

38. Curtis v. Jordan, 34 So. 591, 110 La. 429

39. Vest v. First Joint Stock Land Bank, (Ala) 163 So. 654.

40. Wyeth Hardware Co v. Carthage Hardware Co, 75 Mo App 518.

41. Whitman v Willis, 51 Tex 421.

42. Luciano v. Caldarone, 151 N.E. 70, 255 Mass. 270.

(2) Amendments

Claimant's petition or application for relief may be amended upon timely application.

An intervener has the right to amend his pleadings to correct faults therein.[43] Accordingly it has been held that a claimant who files an affidavit and bond to try the right of property may thereafter amend his pleading and ask damages for the seizure.[44]

Where an order of amendment of a petition in intervention has been twice made by the trial judge, and each time the amendment offered has failed to meet the requirements of the order, the intervention may be properly dismissed.[45]

Of course, application for amendment must be timely made. Accordingly, it has been held that a claimant's motion to amend his petition must be made not later than at the close of his evidence,[46] and that an amendment cannot be made after final judgment in the attachment proceedings which settled all the rights of the parties thereto, including the claim of the intervener, and after the attached property has been sold.[47]

b. Plea or Answer

Where the statute so requires, the creditor should file a sufficient plea or answer to the interplea.

Where, under the statute, trial of the right to the attached property takes place upon the intervener's petition, an answer to the petition by the attaching creditor is neither necessary nor proper,[48] and it has been held that where one comes into suit in attachment for the sole purpose of asserting his claim to the property, a reply to his answer is not necessary.[49] Where, however, the statute so requires, a plea or answer to the interplea is necessary, which, where the statute requires all pleadings to be in writing, must be in writing.[50] This plea or answer should sufficiently tender an issue,[51] but, where the interplea admits the indebtedness of defendant in attachment, it is not necessary that the attaching plaintiff should allege such indebtedness in his answer.[52] Where an answer sets up a claim to the attached property, which with the accompanying exhibits clearly shows that at the time the attachment was levied defendant had no claim to such property, an exception to so much of the answer as attempts to set up such defense is properly sustained.[53]

A replication to an interplea in attachment which alleges a levy on property standing in the name of the attachment defendant, without notice of interpleader's alleged ownership of the property, is good against general demurrer, without the further setting up particular facts showing the legality of the levy.[54]

Counterclaim. Under some statutes a counterclaim may be filed in an interplea by a third person claiming the property, provided the counterclaim arises on the transaction set forth in the complaint or is connected with the subject of the action.[55]

Amendment. An answer to a petition in intervention has been held not to be amendable as to matters which plaintiff in attachment knew and could have included in his original answer and which he failed to include.[56] Under a stipulation filed in attachment suit by creditors against an assignor, in which the assignee intervenes "that the said attaching cred-

43. Luciano v. Caldarone, supra.

Amendment to show agency

Where the owner's property held by his agent is attached to enforce payment of the agent's debt, the agent's pleadings in the attachment may be amended to show the owner's rights in the property—Farmer's Bank & Trust Company v. Murphy, 127 S.E. 527, 189 N.C. 479

44. Breeden v. Pennington, (Tex.Civ.App.) 104 S.W. 908

45. Curtis v. Jordan, 34 So. 591, 110 La. 429.

46. Beaver Park Land & Water Co. v. Cowie, 189 P. 856, 68 Colo. 390

47. Bicklin v. Kendall, 34 N.W. 283, 72 Iowa 490

48. Yellow Pine Lumber Co. v. Mays, 94 S.E. 42, 81 W.Va. 46.

49. Spradlin v. Pieratt, 6 Ky.Op. 522.

50. Rosewater v. Schwab Clothing Co., 25 S.W. 72, 58 Ark. 446.

51. Emerson v. McGregor First Nat. Bank, (Tex.Civ.App.) 25 S.W. 433—6 C.J. p. 391 note 56

Answer held not demurrable.—Brinkman v. Rick, (Tex.Civ.App.) 285 S.W. 885.

Pleading by sheriff

In an action for possession of property held by a sheriff, to justify his seizure of the property the sheriff must plead and prove facts necessary to support the writ, and that the property belonged to defendant in the writ—Fulp v. Brashears, 241 P. 69, 116 Or. 538.

Fraudulent character of claimant's title

The answer may, by way of general denial or otherwise, show that the title of claimant is fraudulent as to creditors of attachment defendant.—Saling v. First Nat. Bank, 182 P. 140, 93 Or. 237—6 C.J. p. 391 note 56 [a].

Plea of fraud proper

Where an attaching creditor sues defendant and attaches his property, and intervener claims such property under a sale from defendant, the attaching creditor may plead that the sale was bogus, and for the purpose of concealing the fact that defendant was doing business in the state—Pring v. Pratt, (Tex.Civ.App.) 1 S.W.(2d) 441.

Sufficient answer

An averment that at the time of seizure of goods under attachment they were the property of defendant in attachment and subject to plaintiff's attachment is sufficient—Smokey v. Wack, 57 Miss. 832

52. Meyberg v. Jacobs, 40 Mo.App. 128

53. Chapman v. Pittsburg, etc., R. Co., 26 W.Va. 299.

54. Ray v. Keith, 75 N.E. 921, 218 Ill. 182.

55. State ex rel. and to Use of Smith v. Boudreau, (Mo.App.) 82 S.W.(2d) 129

56. Beaver Park Land & Water Co. v. Cowie, 189 P. 856, 68 Colo. 390.

itors will file no answer nor interpose no (any) defense to the claim of the intervener excepting as to matters of law arising upon the pleadings," the creditors cannot amend their answer to show distribution to them of the proceeds of the attached property subsequent to the interplea.[57]

c. Issues, Proof, and Variance

(1) Issue
(2) Proof
(3) Variance

(1) Issue

(a) In general
(b) Time for joining issue

(a) In General

The issue is confined to the claimant's right to the property.

The issues triable in a proceeding on an interplea are those raised by the pleadings,[58] which, since one claiming title to, or ownership of, attached property is generally concerned only with the establishment of that right, is ordinarily whether the property levied on is that of attachment defendant, or that of claimant, or whether the latter is entitled to its possession or has a lien thereon.[59] The intervener cannot litigate with defendant in attachment anything foreign to the attachment suit, and his action must be confined to proving his rights to the property attached.[60] The issue under the interpleader is not connected with the issues in the attachment suit,[61] and, in the absence of a statute to the contrary, an intervener cannot question mere irregularities in the attachment proceedings,[62] although there are decisions which recognize the right of claimant, under such circumstances, to contest the validity of

57. Robinson v. Belt, 51 S.W. 975, 2 Ind T 360

58. Scott v. Levan, (Mo App) 286 S W. 407.

59. Ala.—Gulf Coast Lumber Co v Miles, 90 So 231, 206 Ala. 429—McDonald v Stephens, 85 So. 746, 204 Ala. 359—King v Central Hardware Co, 75 So 987, 200 Ala 209—Monroe County Growers' Exch. v. Harper, 103 So. 600, 20 Ala App 532.
Ga.—Foremost Dairies v. Kelley, (App) 181 S E 204—Bank of Manchester v Universal Credit Co., 164 S.E 95, 45 Ga App 233
Iowa.—Thielen v. Schechinger, 230 N W 516, 210 Iowa 224.
Mo—State ex rel Smith v Boudreau, (App) 82 S W (2d) 129
N C—Bulluck v. Haley, 151 S E. 731, 198 N C 355—Mitchell v. Talley, 109 S E 882, 182 N.C. 682.
6 C J p 391 note 62.

Issue

(1) The issue is whether the attached property is subject to the writ.—Loveman, Joseph & Loeb v Foster, 150 So 170, 227 Ala 385.

(2) Title involved is the paramount issue between an intervener and the attaching plaintiff.—Saenger v Standard Lumber Co, 50 S W (2d) 589, 185 Ark 990—Bank of Manchester v. Universal Credit Co., 164 S E 95, 45 Ga.App 233.

(3) The issue is whether or not the property attached belongs to the intervener.—Roseman Feed Co. v. Nashville Grain & Feed Co, 109 S E 881, 182 N C 690.

Petition to from issue granted

Where plaintiff issued an attachment against A and the sheriff attached property as that of A, and where claimant's petition alleging his ownership of the property and praying for a dissolution of the attachment on his giving security was granted, it was held that although the practice was irregular, claimant's further petition for an issue to determine the ownership of the goods should be granted.—Burleigh v. White, 8 Pa Dist. & Co. 113.

In Texas

(1) Since it is held that a writ of attachment cannot be abated on the ground that defendant is not the owner of the property attached, a person, with whom the debtor and creditor relationship does not exist with plaintiff, is not required to plead and prove that the attached property does not belong to defendant but belonged to him, since to inject such an issue in the case would be to require the court to take cognizance of an issue when presented by an answer, when it could not acquire jurisdiction by a plea in abatement.—Farmers' Nat. Bank of Stephenville v. Daggett, (Com App) 2 S W.(2d) 834, affirming Daggett v. Farmers' Nat. Bank, (Civ App.) 259 S.W. 198.

(2) On the other hand, in a trial of right to personal property, since it is merely a possessory action, the issue to be tried is whether the attaching creditor or claimant is entitled to possession at the time of the levy of attachment.—Sanders v. Farrier, (Civ App.) 271 S W 293.

(3) The requisites of issue in trial of right of property are the authority and right by which plaintiff seeks to subject property levied on to his execution and nature of claim of defendant thereto.—Sanders v. Farrier, supra.

(4) The lien of an attaching creditor is fixed at the time of levy of attachment, and he is entitled, or not entitled, to immediate possession through the officer at that time, and if claimant is entitled to possession at such time, then he and not the creditor is entitled to judgment in his favor at date of trial of issues.—Sanders v Farrier, supra.

60. Farmers' & Merchants' State Bank of Wakefield v. Goe, 202 P. 835, 110 Kan. 65.

Waiver

The right of a plaintiff to object to a litigation by an interpleader on a controversy unconnected with the attached property and wholly foreign to the litigation presented by plaintiff is not waived by answering that part of an interplea which sets up interpleader's claim to the attached property, nor by appearing and cross-examining at the taking of depositions on behalf of interpleader, where the cross-examination concerns only the right to the possession of the property.—Farmers' & Merchants' State Bank of Wakefield v. Goe, 202 P. 835, 110 Kan. 65.

61. Cermak v. Schaaf, 224 Ill App. 351, affirmed 139 N E. 39, 303 Ill. 61, 37 A.L.R. 1393.

62. Ala.—Vest v. First Joint Stock Land Bank, 163 So. 654—Loveman, Joseph & Loeb v. Foster, 150 So. 170, 227 Ala. 385—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Monroe County Growers' Exch. v. Harper, 103 So. 600, 20 Ala App. 532.
Iowa.—Thielen v. Schechinger, 230 N.W 516, 210 Iowa 224.
Kan.—Amis v. Valerius, 235 P. 333, 118 Kan 455, modified on other grounds 236 P. 669, 118 Kan. 650.
Mo.—Scott v. Levan, (App) 286 S W. 407.
N.Y.—Colcord v. Banco de Tamaulipas, 180 N.Y.S. 852, 191 App.Div. 94.
N C.—Bulluck v. Haley, 151 S E 731, 198 N C. 355—Mitchell v Talley, 109 S E 882, 182 N C. 682—Roseman Feed Co. v. Nashville Grain

the proceedings on the ground of jurisdictional defects,[63] or where the process is void on its face.[64] Accordingly it is held that the claimant cannot urge a defense personal to attachment defendant,[65] such as the insufficiency of the affidavit on which the attachment issued,[66] or the insufficiency of the bond,[67] or dispute the existence, validity, or amount of plaintiff's claim,[68] the grounds of attachment, where judgment against defendant has been rendered,[69] the making of a levy on the property,[70] or the validity of the levy.[71]

Claim of priority as creditor. An intervener claiming the property under an assignment from defendant in attachment is in no position to claim priority as a creditor.[72]

Estoppel of creditor. Where the attaching creditor admitted in its answer to a petition in intervention that the debtor and his wife were the owners and in possession of the goods at the time they executed a bill of sale thereof to the intervener, it could not contend at the trial that a prior bill of sale executed by the debtor alone defeated the bill of sale to the intervener.[73]

Immaterial issues raised by the pleading will not be tried.[74] Issues not raised by the pleadings are also immaterial.[75]

The question of value or damages for detention cannot, as a general rule, be considered in the intervention proceedings,[76] unless the issue is not restricted to the establishment of claimant's title or right of possession.[77]

(b) Time for Joining Issue

The issues must be joined within the statutory time.

Where a statute prescribes the time within which issue must be joined, there must be a compliance therewith. Under some statutes the issue is to be made up by the attachment creditor at the term of court to which the attachment is returnable, failing in which the levy is to be discharged and the claimant released from his bond;[78] but the claimant or intervener is not required to join issue until final

& Feed Co, 109 S E 881, 182 N C 690
Tex —Bateman v Ramsey, 74 Tex 589
W Va —Yellow Pine Lumber Co v Mays, 94 S E 42, 81 W Va 46
6 C J p 392 note 63.

Amendments

(1) A third party claimant in an attachment suit is not a party to the proceedings and cannot question the sufficiency of plaintiff's complaint in that suit, and hence has no right to object to amendment of complaint in attachment proceedings —Vest v First Joint Stock Land Bank, (Ala.) 163 So 654

(2) That the right of action was transferred pending an attachment suit, and that complaint was amended to show that thereafter suit would be prosecuted for the benefit of the transferee, was of no concern to an intervener claiming a prior lien —King v. Central Hardware Co, 75 So 967, 200 Ala 209

63. Ala —Vest v First Joint Stock Land Bank, 163 So 654—Loveman, Joseph & Loeb v Foster, 150 So 170, 227 Ala 385
Ga —Bank of Manchester v. Universal Credit Co, 164 S E. 95, 45 Ga App 233
6 C J p 392 note 64

64. Hill v Rentz, 78 So 881, 201 Ala 527—Monroe County Growers' Exch. v Harper, 103 So 600, 20 Ala App 532—6 C J. p 392 note 65.

65. Devant v Pecou, 128 So 700, 13 La App. 594—6 C J. p 392 note 66

66. Scott v. Levan, (Mo App) 286 S W. 407—6 C J. p 393 note 67.

Grounds of knowledge in affidavit

Failure of the affidavit for attachment to show grounds of affiant's information and belief is not a jurisdictional defect, which can be taken advantage of by a subsequent attachment creditor, being merely an irregularity, of which defendant alone may complain —Colcord v. Banco de Tamaulipas, 180 N Y S 852, 191 App Div 94

67. Lee v. Bradlee, 8 Mart.(La) 20

68. Scott v Levan, (Mo App.) 286 S W 407—6 C.J p 393 note 69.

69. Thielen v Schechinger, 230 N W 516, 210 Iowa 224—6 C J. p 393 note 70

Traversing grounds of attachment

Only the defendant in attachment may traverse the grounds on which the attachment was made —Bank of Manchester v Universal Credit Co, 164 S E 95, 45 Ga App 233.

70. Fla —H B Claflin Co v. Harrison, 31 So 818, 44 Fla 218
N C —Springfield First Nat Bank v Asheville Furniture, etc, Co, 26 S E 927, 120 N C 475.
6 C J p 393 note 71

71. Yeatman v Estill, 3 La Ann. 222 —Emerson v. Fox, 3 La. 178—6 C J p 393 note 72.

72. May v Disconto Gesellschaft, 71 N E 1001, 211 Ill 310, affirming 113 Ill App 415—6 C J. p 393 note 73.

73. Mesa County Nat Bank v Berry, 135 P 129, 24 Colo App 487.

74. **Fraudulent nature of conveyance**

Where a husband, under a power of attorney from his wife, conveyed to himself real property which she had before the power conveyed by trust deeds to secure a certain creditor and, by a subsequent conveyance, conveyed it directly to the creditor in satisfaction of his wife's obligation, it was held that, in a subsequent action against the wife aided by attachment of this property, an allegation in the reply to the creditor claiming under his deed, and intervening against plaintiff that the conveyance from the husband to himself was without consideration and made to hinder creditors, raised an immaterial issue, owing to the husband's subsequent deed making the invalidity of the deed to himself of no consequence —Tennis v Barnes, 52 P 1038, 11 Colo App 196

75. **Sex**

In claim proceedings it is immaterial whether defendant in attachment was a man or a woman where no question of coverture is involved — Weinstein v Yielding, 52 So. 591, 167 Ala 347.

76. U.S —Swift v. Russell, (Ind T) 97 F 443, 38 C.C A 259
N C —McLean v. Douglass, 28 N C 233
6 C J p 393 note 77.

77. Turner v Lytle, 59 Md 199.

78. Miller v. Tennant-Stribling Shoe Co, (Miss) 119 F 865, 56 C C A. 337, followed in Tennent-Stribling Shoe Co v Roper, 128 F. 40, 62 C. C A. 548—6 C J. p 393 note 80.

Not a default

Failure of plaintiff in an attachment proceeding to move at the return term to make up issue to try right of claimant to funds in the hands of the garnishee does not con

judgment in the attachment case.[79] Also, under some statutes, it has been held that failure to join issue in a claim case, within five minutes after an announcement of "ready" by both parties, is sufficient reason for dismissing the levy.[80]

Under a statute providing in trial of the right of property cases that if plaintiff appears and defendant fails to appear, or neglects or refuses to join issue "under the direction of the court" within the time prescribed for pleading, plaintiff shall have judgment by default, where a claimant stated on appearance day that he was ready to join issues when the court should reach the case on the docket and direct issues to be made, and no objection was made to this, it has been held not to be an abuse of discretion to refuse to give plaintiff a default judgment four weeks later, or to permit issues to be thereafter joined.[81]

(2) Proof

An intervener must prove his right to the attached property, and proof need not and cannot be made of matters not within the issues.

An intervener must prove his essential allegations in his petition for intervention, and, to have any standing in court, he must first establish his title, lien on, or interest in the property attached,[82] and he must recover on the strength of his own title or claim and not on the weakness of his adversary's.[83] To do so it is incumbent upon him to show that he acquired his title or right prior to the interposition of his claim.[84] If the intervener claims as administrator, he must offer proof tending to show his authority as such,[85] while if he claims as a trustee for the benefit of creditors, he must show that there are other creditors than attachment plaintiff.[86]

Proof need not be made of matters not in issue. Accordingly, where on a trial of a claimant's right to attached property the creditor's good faith is not questioned, proof need not be made that he is a creditor in good faith.[87] Where, under the statute, an interpleader by filing his interplea concedes that an attachment suit is pending and that a writ of attachment has been obtained and levied on the property, on a hearing on the interplea it is not necessary that plaintiff offer in evidence the record in the attachment suit to show his lien upon the property attached.[88]

Likewise, proof cannot be made of matters not in issue. Thus, in an action of attachment where an interpleader claims the property, a compromise between defendant and interpleader cannot be considered in favor of plaintiff unless specially pleaded.[89] Likewise, a defense that claimants' title was obtained for the purpose of defrauding plaintiff cannot be interposed and proved where it is not alleged.[90] Since an interpleader must recover on the strength of his own title, he cannot show that the attached property belonged to some person other than attachment defendant or himself.[91] Where one holding a bill of sale to certain goods accepted from the sheriff an appointment as custodian thereof after their attachment by a creditor of the former owner, the attaching creditor cannot contend that he was thereby estopped to intervene and claim the goods, if no estoppel was pleaded in the answer to the petition in intervention.[92]

(3) Variance

An immaterial variance between the pleadings and proof is not fatal.

Immaterial variances between the allegations and proof are not fatal. Thus a third party claim to attached property cannot be defeated merely because it states the value of the property is greater than

statute default, under Code (1906) §§ 4992, 4993 (Hemingway Code §§ 3266, 3267) as such sections apply only to the claim of a third person to property levied on by execution.—Piqua Sav Bank v Copiah Hardware Co., 111 So 836, 146 Miss 581.

79. Mahaffey Co. v Russell, (Miss.) 54 So 807, 945—6 C J p 393 note 81.

80. Hopper v. Wilson, 58 S E 359, 128 Ga 776

81. Scott v. DeWitt, 93 S W. 215, 42 Tex Civ.App. 69

82. Iowa.—Thielen v. Schechinger, 230 N W. 516, 210 Iowa 224.
W Va.—Yellow Pine Lumber Co. v. Mays, 94 S E 42, 81 W Va. 46.
In Alabama, according to an early case on the trial of the right to property between attaching creditors and claimant, the creditors must prove that the property in controversy belonged to defendant in attachment at the time of the levy, and, for this purpose, they may trace the title from the original owner to defendant, and may show the character of the actual possession to disprove the authority of one actually in possession to convey or assign the property to claimant, and, in such a case, any evidence as to the authority of the person in actual possession to convey the property, or as to the consideration of the conveyance, and its amount, is admissible.—Elliott v. Stocks, 67 Ala 290.

83. Connersville Buggy Co v. Lowry, 77 S W. 771, 104 Mo App 186.

84. Seisel v. Folmar, 15 So. 850, 103 Ala 491.—Foster v. Goodwin, 2 So. 895, 82 Ala 384.

85. Sammis v Hitt, 84 N W. 945, 112 Iowa 664.

86. Reynolds v. Collins, 78 Ala 94.—6 C J. p 400 note 60

87. Peterson v. Woolery, 37 P 416, 9 Wash 390

88. Swofford Bros Dry-Goods Co v Smith-McCord Dry-Goods Co., (Ind T.) 35 F. 417, 29 C C A 239

89. A. J. Poor Grain Co v Franke Grain Co., 157 S W. 840, 171 Mo App 354

90. Thiering v. Gage, 284 P. 832, 132 Or 92

91. Connersville Buggy Co v. Lowry, 77 S W. 771, 104 Mo App 186

92. Mesa County Nat Bank v Berry, 135 P. 129, 24 Colo App. 487.

the proof shows it to be[93] On the other hand, it has been held that one who claims attached property as owner cannot support his claim by evidence of either a mortgage or a lien.[94]

§ 358. Evidence

Reference should be made to the title Evidence for the general rules of evidence which are applicable to proceedings of this nature Questions involving presumptions and burden of proof, admissibility, and the weight and sufficiency of evidence arising in this type of proceeding will be treated in the sections immediately following.

§ 359. —— Presumptions and Burden of Proof

a. Presumptions
b Burden of proof

a. Presumptions

The usual presumptions arising in civil actions prevail, including those growing out of claimant's possession of the attached property.

The usual presumptions arising in civil actions apply in a proceeding by a third person claiming property attached as that of another. Accordingly, if the writ of attachment is regular on its face, it will be presumed to have been properly issued.[95] Where a claim of intervention is filed in a corporation's name by its treasurer, and its president and treasurer, being two of three directors, appear to prosecute the claim, a presumption exists that the filing of the claim was the authorized act of the corporation.[96] The fact that the intervening claimant was in possession of the property attached at the time of the levy thereon raises a presumption that he was the owner at such time;[97] and where the record title to property is in the wife, and there is evidence that her money bought this property, a presumption is created that it is her separate property, allowing her to intervene when such property is attached by a creditor of her husband[98] Also, where an intervener holds a draft with a bill of lading attached, made payable to his order, a presumption arises that he is a holder in due course.[99]

b. Burden of Proof

Generally, where the attached property was in defendant's possession, claimant has the burden of proving his right to the property; but, where claimant had possession, the burden is on plaintiff to disprove claimant's right to the property.

Although there is authority to the contrary,[1] where a party interpleads, or institutes an independent action, claiming a right in the property superior to that of the attaching creditor, the burden is, as a rule upon him to establish the validity of his claim,[2] at

93. Coverdell v Erickson, 168 N W 367, 39 N D 579

94. Bank of Mobile v. Lewis, 80 So 179, 16 Ala App 605

95. Harris v Daugherty, 11 S W 921, 74 Tex. 1, 15 Am S R. 812

96. G O K Enterprises v Moos, 172 A 745, 116 N J Eq 175, reversing 168 A. 596, 114 N J Eq. 189

97. Colo —Doane v. Glenn, 1 Colo 495

Mo —Fairbanks-Morse Co v Coulson Food Co, 131 S W. 894, 151 Mo App 260.

Possession by intervener

Evidence that cattle were waybilled as belonging to the intervener and that he accompanied them to their destination, where they were attached for the debt of the shipper while still on the cars, shows such actual possession of the intervener as to warrant the presumption of his ownership —Wear v. Sanger, 2 S W. 307, 91 Mo. 348

98. Bonfiglio v Bonfiglio, 264 P. 747, 203 Cal 409.

99. Mangum v. Mutual Grain Co, Inc, 114 S E 2, 184 N.C. 181—6 C J. p 394 note 87.

1. Gilpin v. Somerville, 161 A. 272, 163 Md. 40

In Mississippi, under Code (1906) §§ 163, 2352, 4994, plaintiff in attachment has the burden of proof on the trial of claimant's issue —Third Nat Bank v Reeves Grocery Co, 73 So 836, 113 Miss 35

2. Ark —Saenger v Standard Lumber Co, 50 S W (2d) 589, 185 Ark 990—Webber v. Rogers, 193 S.W 87, 128 Ark 25

Fla —General Motors Acceptance Corporation v. Judge of Circuit Court, Eleventh Judicial Circuit in and for Dade County, 136 So. 621, 102 Fla 924

Ky —Daugherty v. Bell Nat. Bank, 194 S W 545, 175 Ky. 513—Brown v. Johnson & Johnson, 116 S.W 273, 132 Ky 70

Mo —Cochrane v. First State Bank of Pickton, Tex, 201 S.W 572, 198 Mo App 619—Miles v. Haney, 176 S W 429, 190 Mo App 220—Torreyson v. Turnbaugh, 79 S W. 1002, 105 Mo App 439

N C —Fochtman v. Greer, 140 S E. 442, 194 N C. 674—Economy Electric Co v. Automatic Electric Power & Light Plant, 118 S.E. 3, 185 N C 534—Mangum v Mutual Grain Co, 114 S E. 2, 184 N C 181—Moon-Taylor Co v Gray-Smith Milling Co, 97 S E 213, 176 N C 407.

Tex —Sanders v. Farrier, (Civ.App) 271 S W 293

6 C J. p 394 note 90.

Bank

(1) In an action against a consignor of goods under a bill of lading with draft attached, in which a writ of attachment was levied on the proceeds of the goods, a bank claiming to be the bona fide purchaser of the draft for value and in due course had the burden of proving its title —Sterling Mills v. Saginaw Milling Co., 114 S E 756, 184 N C 461.

(2) The burden was on the intervener bank, claiming the proceeds of a draft attached by plaintiff, to show its title —Moon-Taylor Co. v. Gray-Smith Milling Co., 97 S E 213, 176 N C. 407

(3) Where the buyer, in an action against the seller, attached funds paid on a draft and the seller's bank filed an interplea, claiming ownership thereof, the court rightly instructed that it devolved on the interpleader to prove that the funds, at the time they were attached, belonged to it —Townsend Wholesale Grocery Co. v. Chamberlain Canning Co., (Mo App) 277 S.W. 958

Holder of chattel mortgages

The burden was on the intervener to prove that the property attached was covered by its chattel mortgages —Grover v. Cash, 253 P. 676, 69 Utah 194.

least where the property attached was in the possession of defendant in attachment,[3] or under some statutes, in the possession of a person other than claimant.[4]

Where, however, claimant was in possession of the property at the time of the levy thereon, this fact may throw upon the attaching plaintiff the burden of proving that the property was subject to attachment under his writ.[5] Under such circumstances, claimant has the burden of showing that he was in possession.[6]

The statutes sometimes impose upon the attaching creditor, in all claim cases, the duty of first establishing a prima facie case of ownership in the attachment defendant and liability of the property to attachment, whereupon the burden is shifted to the claimant who must then proceed to show his title to or lien upon the property.[7]

Where claimant has shown that he acquired title to the property attached as that of the debtor the burden is cast upon the attaching creditor to show facts and circumstances from which a transfer by claimant can be inferred.[8]

According to some authority, in a controversy between an attaching creditor and the claimant of the property, the creditor has the burden to show that attachment defendant owed the debt or some part thereof.[9]

Attack on attachment proceedings. It has been considered that where the interplea is a denial of attaching plaintiff's right to hold the property by reason of some vice or defect in the attachment proceedings, the burden is upon attaching plaintiff to show the levy of a valid writ and prima facie ownership in attachment defendant before it is necessary for the intervener to introduce any evidence.[10]

Fraud or collusion. If a transfer of the property to the intervener is admitted, but fraud is alleged and relied on to avoid such conveyance, the burden of proof rests upon the party who sets up fraud.[11]

Corporation

In an action against the president and controlling stockholder of a corporation as an individual, the burden was on the intervening corporation to prove that it owned movable property attached as that of the individual—Modisette & Adams v Lorenze, 112 So 397, 163 La. 505.

Members of syndicate

Where defendant as a member of a syndicate sold stock to plaintiff in violation of law, and plaintiff sued and attached money in defendant's name in a bank, and members of the syndicate intervened, claiming a right to the money, such interveners had the burden of proof to show their title and right to possession of the money—Landwehr v. Lingenfelder, (Mo App) 249 S W. 729.

Money

An interpleader claiming title to money attached by plaintiff in the case had the burden of proving title or right to the money—Rathbone v Rathbun, (Mo App) 35 S W (2d) 38

Purchaser before attachment

The burden of proof is generally on the purchaser who bought of defendant before levy, and who intervenes to claim the property—Wells v Guaranty State Bank, 156 P. 896, 56 Okl. 688

Son as intervener

In an action by a son to cancel a writ of attachment issued against his father, on the ground that the son was the owner of the real estate in question, the burden of proof was on the son—Newman v Northern Montana Ass'n of Credit Men, 208 P 914, 63 Mont 545

Transferee of bill of lading

A mere transferee of a bill of lading from the consignor has the burden of proving ownership on a motion to vacate the attachment—Neumann v Reiss, 245 N Y S. 464, 138 Misc. 576.

3. Ala—Vest v. First Joint Stock Land Bank, 163 So 654—Henley v Bradshaw Mercantile Co, 124 So 426, 220 Ala. 193

Tex—Sigmond Rothchild Co. v Moore, (Com App) 37 S W.(2d) 121, reversing (Civ.App) 22 S W. (2d) 533—Sanders v. Farrier, (Civ App) 271 S W. 293.

Buyer of truck

Where the buyer of a truck from plaintiff sells it to defendant and defendant resells it to the buyer but keeps possession, the buyer may intervene in an attachment action between plaintiff and defendant, although the fact that defendant had the truck when it was attached puts the burden on the buyer of showing that he had title or right to possession—Henley v. Bradshaw Mercantile Co., 124 So. 426, 220 Ala 193

Shifts burden

Plaintiff's proof of defendant's possession and control claiming to own, and exercising customary acts of ownership over, property when attached, sufficed to shift to the parties, interposing claim, the burden of establishing their right—Dusenberry v Black, 99 So. 910, 211 Ala 153

4. Bolin Tool Co v Jernigan, (Tex Civ App.) 50 S.W.(2d) 397.

5. Allen v. Dickey, (Ga App) 188 S E 273—Foremost Dairies v Kelley, (Ga App) 181 S E 204—Blount v Dunlap, 130 S E 693, 34 Ga App 666—6 C J p 395 note 92

Presumption of title where claimant in possession see subdivision a of this section.

Proof of possession

Where the sheriff's return does not state who was in possession, it is incumbent upon the attaching party to prove by competent evidence who was in possession—Boaz v. Schneider, 6 S W 402, 69 Tex 128

6. Briggs v Briggs, (Tex Civ App.) 227 S W 511.

7. Loveman, Joseph & Loeb v. Foster, 150 So. 170, 227 Ala 385—McDonald v. Stephens, 85 So 746, 204 Ala 359—Barnes v Montgomery, (Ala App) 153 So. 661—6 C J p 395 note 93.

8. Lipschitz v. Halperin, 103 N Y S. 202, 53 Misc 280

9. Dickman v. Williams, 50 Miss. 500

10. Swofford Bros Dry-Goods Co. v Smith-McCord Dry-Goods Co., 37 S W. 103, 1 Ind T 314—6 C J. p 395 note 97

Issue as to validity of attachment see supra § 357 c (1).

11. Mo—Gate City Nat Bank v. Boyer, 142 S W 487, 161 Mo App 143.

Okl—Wells v Guaranty State Bank, 156 P 896, 56 Okl 688.

6 C J p 395 note 94.

Bad faith

Under statute exempting from attachment materials furnished for use in construction of a building, as long as such materials were to be applied in good faith to construction or repair of the building, the burden was on an attachment creditor to show bad faith in the purpose for which the materials were on the ground.—

Where interveners charge collusion between plaintiff and defendants in attachment for the purpose of allowing plaintiff to obtain unlawful preference over the interveners and other creditors of defendants, the burden is on the interveners to prove such charge.[12]

Making up of issue by court. Under a statute providing that where a third person interposes a claim to the attached property an issue shall be made up under the direction of the court, the court has in its discretion authority to make plaintiffs take the position of actors, thus placing upon them the burden of proof[13]

§ 360. —— Admissibility

Competent evidence which is relevant to the issues is admissible.

Subject to the general rules of evidence, the claimant or intervener is entitled to introduce any proper evidence relevant to the issues and tending to establish his title to or claim upon the property,[14] while the attaching plaintiff may show any facts legitimately tending to dispose of or avoid such title or claim,[15] under the denial contained in the general replication.[16] Plaintiff in attachment cannot, however, show that other persons have an interest in conjunction with the interpleader, or that the interest of the interpleader is subject to the claims of a stranger,[17] and, in general, any evidence which does not legitimately tend to throw light on the issues in the intervention should be excluded.[18]

Where there has been a levy on certain barrels and half barrels, "each about half full," but with no

California Trojan Powder Co v Wadhams & Co, 166 P. 759, 85 Or 307.

12. Daniels v. Solomon, 11 App D C 163

13. Pelzer Mfg Co. v. Pitts, 57 S E 29, 76 S C. 349, 11 Ann Cas 665

14. Loveman, Joseph & Loeb v Foster, 150 So 170, 227 Ala. 385—6 C J p 395 note 1.

Claimant under chattel mortgage

Where the vendor of land claimed a lien on cotton raised thereon and sought an attachment, claimant of the cotton under a chattel mortgage from the vendee of the land could introduce evidence tending to show nonexistence of the relation of landlord and tenant between the vendor and the mortgagor—Herzfeld v. Hayne, 76 So 973, 200 Ala. 615.

Contract to which plaintiff is not a party

Evidence of a contract between defendant in attachment and claimant, to which plaintiff was not a party, is not binding on plaintiff and is inadmissible in a claim suit—Monroe County Growers' Exch. v Harper, 103 So 600, 20 Ala.App. 532.

Evidence of original sales contract

An intervener may not prove his title to attached property by offering in evidence the original sales contract providing that he retains title until payment, along with oral evidence of purchase under the contract, but must further prove that the purchaser under the contract had not perfected his title by payment—General Motors Acceptance Corporation v. Judge of Circuit Court, Eleventh Judicial Circuit in and for Dade County, 136 So. 621, 102 Fla 924.

Evidence under general issue

In a statutory trial of the right of property where the only proper issue is affirmation by plaintiff that the property levied on is subject to the attachment, and a denial of that fact by the intervener, such issue is sufficient to authorize plaintiff to introduce evidence of every fact showing the property liable to the levy, and to authorize the intervener to give evidence of every fact showing that he has a superior right to the property—Millitello v B F Roden Grocery Co., 67 So. 420, 190 Ala 675

Jury entitled to know all the facts

Where a buyer of tomatoes, in an action against the seller, attached funds paid on draft, and the seller's bank filed an interplea claiming ownership of the funds, evidence as to the condition of the tomatoes on delivery was properly admitted, since the jury were entitled to all facts of the controversy—Townsend Wholesale Grocery Co. v. Chamberlain Canning Co., (Mo App) 277 S W. 958.

To prove sale

Testimony relating to a transaction between plaintiff and attachment defendant is competent and admissible to prove a sale of the property to the intervener—Frank v. Levi, 81 N.W. 459, 110 Iowa 267.

Use of automobile

In an action against a husband in which his wife intervened, claiming ownership of an attached automobile, evidence that the husband used the automobile in his employment was inadmissible, not tending to prove whether he owned, borrowed, or leased the automobile—Beaver Park Land & Water Co. v. Cowie, 189 P. 856, 68 Colo. 390.

15. Ramsey v. Federal Surety Co., 249 P. 137, 121 Okl. 177—6 C J. p 396 note 2.

Abandonment of claim

A contract apparently showing an abandonment by the intervener of his claim is admissible—Henderson v. Baker, 47 S W. 211, 20 Ky.L. 580

Draft and bill of lading

In an action by the drawee of a draft with bill of lading attached to recover damages for the drawer's breach of contract of sale with intervention by the bank at which it was payable claiming ownership of funds attached, where there was no controversy as to identity or form of the draft which plaintiff had paid, the draft was admissible—S Sternberg & Co v. Crohon & Roden Co., 90 S E 935, 172 N C. 731.

Priority

Where an intervener claims title to attached property by virtue of a mortgage prior to the levy of attachment, the attaching plaintiff may show by instrument that his lien is antecedent in date to intervener's mortgage—Boswell v. Carlisle, 55 Ala 554.

16. Ill—Hutchinson Nat. Bank v. Crow, 56 Ill App. 558.
Kan—Tennent v. Battey, 18 Kan. 324.
6 C J. p 396 note 3.

17. Levy v. Levy, 31 Mo 403.

18. Ala—Monroe County Growers' Exch. v Harper, 103 So. 600, 20 Ala App. 532.
Mo—Highfield v. United Magazine Press, (App.) 190 S.W. 926.
6 C J. p 396 note 5.

Failure to plead a mortgage

(1) Where the intervener's affidavit of claim fails to state that the nature of his claim is through a mortgage, he may not recover as a mortgagee, and evidence tending to establish a mortgage is inadmissible. —Gulf Coast Lumber Co. v. Miles, 90 So. 281, 206 Ala. 429.

statement as to the actual contents, the levy is a levy on the barrel and contents; and, on trial of a claim case under such levy, it is not error to admit evidence as to the contents of each barrel.[19]

Although the intervener may show a bona fide sale and delivery of property by defendant in attachment to himself before plaintiff's lien attached by levy of attachment,[20] and the fact that the conveyance was recorded subsequent to the attachment will not necessarily render it inadmissible in evidence,[21] as a rule, evidence of matters occurring after the attachment of the property,[22] including bills of sale[23] and receipted bills dated after the levy,[24] is not admissible in a proceeding to try the right of a claimant thereto, at least where such matters have not been specially pleaded[25]

Acts, admissions, or declarations of parties. The acts or declarations of attachment defendant while in possession, tending to indicate or explain the character of his possession, are admissible,[26] if made in the presence of claimant,[27] but declarations of defendant after he has parted with his possession,[28] or subsequent to the levy and interposition of intervener's claim,[29] are inadmissible.

Declarations of a claimant tending to prove the validity of his title to property in controversy are not admissible in his favor,[30] but his oral[31] and written[32] admissions or declarations derogatory to his claim or title are admissible in evidence against him.

The testimony of a witness that he held possession of the goods for claimant but not for attachment defendant is admissible when the title of the latter is not well established.[33]

Affidavit and bond of claimant The affidavit[34] and bond given by claimant for the redelivery of the property[35] are admissible for plaintiff in attachment to prove the levy.

Proceedings in attachment. In a statutory trial of the right of property the writ of attachment is admissible in evidence against claimant,[36] and, if it is lost, its existence and contents may be proved by secondary evidence[37]

An inventory or appraisal attached by the levying officer to the return of a levy under an attachment and made a part thereof is competent evidence in a claim suit instituted to determine the rights of the parties to the property levied on,[38] as tending to prove the value of the property.[39]

Inasmuch as the question of the validity or invalidity of attachment plaintiff's claim against defendant does not arise on the trial of the right of property, it has been held that a judgment in an attachment suit would be inadmissible as evidence against claimant in a trial of the right of property.[40]

(2) Intervener's evidence that defendant in attachment had tendered produce in payment of rent for which the attachment was brought, that claimant furnished defendant merchandise to aid in making crop, that claimant's mortgage had not been paid, and that claimant had not been paid for ginning cotton which had been attached, was held inadmissible where the intervener's claim affidavit did not refer to the mortgage under which his claim was made, or the nature of the right claimed—Vest v First Joint Stock Land Bank, (Ala.) 163 So. 654

19. Parham v Potts-Thompson Liquor Co., 56 S.E. 460, 127 Ga. 303

20. Henley v Bradshaw Mercantile Co., 134 So. 426, 220 Ala. 193

Conveyance prior to levy

In a suit in which a growing crop was attached, one intervening and claiming title by purchase from the debtor's wife was entitled to show that the crop had passed by a conveyance from the debtor to the wife before the levy, and, so far as he had notice at the time of the purchase by him, in good faith—Botna Valley State Bank v. Greig, 180 N.W. 301, 190 Iowa 155.

21. Utah-Idaho Sugar Co. v. Lewis, 127 P. 590, 95 Or. 224.

22. Murnan v Isbell, 271 P. 649, 133 Okl. 160—6 C.J. p. 397 note 23.

Depositions

Depositions of officers of bank, not made in the course of business, and after the transaction in controversy, are inadmissible—S. Sternberg & Co. v. Crohon & Roden Co., 90 S.E. 935, 172 N.C. 731.

Evidence of ownership

Evidence of claimant's exercise of ownership and control of the property from the time of the alleged purchase to attachment, but not later, is competent—Murnan v. Isbell, 271 P. 649, 133 Okl. 160

23. Fontaine v. Beers, 19 Ala. 722.

24. Arnold v. Cofer, 33 So. 539, 135 Ala. 364

25. Plano Mfg. Co. v. Cunningham, 73 Mo.App. 376—6 C.J. p. 397 note 24

26. Arnold v. Cofer, 33 So. 539, 135 Ala. 364—6 C.J. p. 396 notes 7, 8.

27. Vermillion v. Parsons, 94 S.W. 239, 118 Mo.App. 260

28. Smith v. Haire, 58 Ga. 446.

Hearsay evidence

Statements by defendant in attachment to the attaching creditor as to his own financial condition are hearsay, not pertinent, and highly prejudicial to the interpleader, and therefore inadmissible.—Torreyson v. Turnbaugh, 79 S.W. 1002, 105 Mo.App. 439

29. Fontaine v Beers, 19 Ala. 722—6 C.J. p. 396 note 11.

30. Barber v. Kinard, (Miss.) 4 So. 120—6 C.J. p. 397 note 12

31. Cal.—Bleven v. Freer, 10 Cal. 172
Minn.—Wright v. Tanner, 99 N.W. 422, 92 Minn. 94
6 C.J. p. 397 note 13

32. Sawyer Paper Co. v. Mangan, 68 Mo.App. 1.

33. Max v Watkins, 30 Ga. 682

34. Guy v. Lee, 2 So. 273, 81 Ala. 163.

35. Guy v Lee, 2 So. 273, 81 Ala. 163—Mayer v Clark, 40 Ala. 259—Henderson v. Montgomery Bank, 11 Ala. 855

36. Ala.—Guy v Lee, 2 So. 273, 81 Ala. 163
Ill.—Sheldon v Reihle, 2 Ill. 519.
6 C.J. p. 397 note 17

37. Derett v. Alexander, 25 Ala. 265

38. Schloss v. Inman, 30 So. 667, 129 Ala. 424.

39. Hunt v. Strew, 33 Mich. 85—Walrath v Campbell, 28 Mich. 111—6 C.J. p. 397 note 20

40. King v. Central Hardware Co., 85 So. 822, 204 Ala. 336, reversing

Relationship of claimant and debtor. Evidence of the relationship between the intervener and one of defendants in attachment has been held inadmissible against the intervener,[41] but there is also authority for a contrary view.[42]

To contradict officer's return. The levying officer's return of the attachment is not conclusive against an intervening claimant of the property levied on, and evidence contradicting such return may be introduced on behalf of such claimant.[43]

To show fraud. The claimant may, on framing the proper issue, show that the judgment obtained by the attaching creditor against the debtor was obtained by collusion and fraud.[44]

Evidence tending to show that the title of the interpleader was fraudulently acquired is admissible,[45] although in some jurisdictions attaching plaintiff must prove defendant's indebtedness to him before he can attack the bona fides of the transfer.[46] The fraud must be proved by evidence other than the affidavit for attachment, which in some jurisdictions is held inadmissible for that purpose;[47] and, on the other hand, claimant cannot in rebuttal introduce his petition filed in an action against his debtor in a suit to which attaching creditor was not a party showing the consideration paid for the property.[48]

If claimant alleges that attachment defendant obtained the goods from him through fraud, collections made and disposition of assets by defendant prior to the levy are competent and admissible,[49] and claimant may likewise testify to statements made by defendant to obtain such credit from him.[50]

To show indebtedness to claimant. The account books of defendant in attachment have been held admissible to show the existence and amount of his indebtedness to the intervening claimant.[51]

To show title in third person. As an intervening claimant of property must recover on the strength of his own title, any evidence tending to show title in a third person not connected with the suit is inadmissible on his behalf,[52] unless in some proper way he connects himself with such outstanding title,[53] although the intervener may show that, before the attachment issued, defendant had sold the property to persons from whom the intervener purchased it, his purpose in such instance not being to claim the property as that of a third person.[54]

To show value of property. Evidence of the value of the property attached is relevant and admissible in a suit or proceeding between the attaching creditor and a claimant of the property,[55] and may be offered by either party.[56]

§ 361. —— Weight and Sufficiency

The party having the burden of an issue must establish it by a preponderance of the evidence, and such proof is sufficient.

As in other civil actions, the party in the proceeding having the affirmative of an issue must prove it by a preponderance of the evidence, and such proof is sufficient.[57] This evidence should be of a positive

85 So 821, 17 Ala App. 347—6 C J. p 397 note 22

41. Baum v. Sanger, (Tex Civ App) 49 S.W 650

42. La —Porterfield v. Greenwood, 10 La Ann 51.
Minn —Wright v. Tanner, 99 N W 422, 92 Minn 94
6 C J. p 397 note 27.

43. Bruce v. Kays, 1 S W (2d) 214, 222 Mo App. 77—6 C J. p 397 note 28.

Misdescription
A misdescription by the sheriff under the writ of attachment would not bind the intervener to preclude him from showing that morigaged property and the attached property were the same —Bruce v Kays, 1 S W (2d) 214, 222 Mo App 77.

44. Still v. Focke, 2 S.W. 59, 66 Tex 715.

45. Mankato First Nat. Bank v. Kansas City Lime Co., 43 Mo App. 561—6 C J. p 398 note 32.

Fraudulent claim of intervener
Where an attachment was levied on a motor truck and intervener claimed ownership of the truck, where plaintiff contended that the intervener's claim was fraudulent, testimony concerning goods found in intervener's home after a fire at defendant's store is inadmissible as that would not tend to prove the issue involved in the case —Paragould Wholesale Grocery Co v Middleton, 235 S W. 469, 208 Mo App. 592.

46. Campbell, etc, Co v. Ross, 58 N E. 596, 187 Ill. 553, affirming 86 Ill App 356—Springer v Bigford, 43 N E 751, 160 Ill 495, affirming 55 Ill App 198—Commercial Nat Bank v Canniff, 51 Ill App 579, affirmed 37 N E 398, 151 Ill. 329—6 C J. p 398 note 33.

47. Ala —Dollins v. Pollock, 7 So 904, 89 Ala 351
Mo —Albert v. Besel, 88 Mo. 150.

48. Howard v. Parks, 21 S W. 269, 1 Tex Civ App 603

49. Wollner v Lehman, 4 So. 643, 85 Ala 274—6 C J. p 398 note 30.

50. D'Arrigo v. Texas Produce Co, 44 S W 531, 18 Tex Civ App. 41.

51. Broach v. Wortheimer-Swarts Shoe Co., (Miss) 21 So 800.

52. Seisel v. Folmar, 15 So 850, 103 Ala. 491—6 C J. p 398 note 38.

53. Wollner v. Lehman, 4 So 643, 85 Ala 274—Jackson v. Bain, 74 Ala. 328.

54. Shields v. Perry, 16 La 463

55. Ala —Wollner v Lehman, 4 So 643, 85 Ala 274—Roswald v. Hobbie, 4 So 177, 85 Ala 73, 7 Am S R 23
Iowa —Ohde v. Hoffman, 90 N.W 750
6 C J p 398 note 41.

56. Roswald v Hobbie, 4 So 177, 85 Ala. 73, 7 Am S R 23

57. **Assignment negatived**
On an application by a third party to vacate an attachment of money due defendant, a cablegram from defendant set out in the affidavit, authorizing the moving party to collect "all money owing to me or which may become due to me," negatived an assignment of such money to the moving party —Pedro y Seltzer, Inc, v. Brivio, 180 N Y.S. 706, 191 App Div. 110.

Evidence held sufficient
(1) To authorize finding for plaintiff in attachment.
Cal —Meislisch v San Francisco Wool Sorting & Scouring Co., 8 P.

character, and evidence of a general nature founded largely upon supposition is insufficient.[58]

The general rule is that where a third party interposes a claim to attached property, evidence that

(2d) 310, 213 Cal. 668—Miller v Ambassador Park Syndicate, 9 P. (2d) 267, 121 Cal.App 92
Ga.—Blount v Dunlap, 130 S.E. 693, 34 Ga.App 666
La.—Toledo Bridge & Crane Co. v D. K. Jeffris & Co., 74 So. 893, 141 La. 168.
Mont.—Newman v. Northern Montana Ass'n of Credit Men, 208 P. 914, 63 Mont. 545
N.D.—Grewer v. Kinnischtzke, 237 N.W. 305, 61 N.D. 116.
Okl.—Millus v. Lowrey Bros., 164 P. 663, 63 Okl. 261, L.R.A.1918B 336.
S.D.—Lowe v. Helmer, 210 N.W. 737, 50 S.D. 516
Wash.—Livingston v. Gamble-Robinson Commission Co., 131 P. 818, 73 Wash. 268.
6 C.J. p. 398 note 45 [a].

(2) To establish immediate delivery of property to claimant after purchase thereof—Murnan v. Isbell, 271 P. 649, 133 Okl. 160.

(3) To establish right to trucks attached, as assignee of attachment defendant's interests—Tenner v Indiana Parts Depots, 142 A. 421, 6 N.J.Misc. 573.

(4) To make a prima facie case for plaintiff—Vest v. First Joint Stock Land Bank, (Ala.) 163 So. 654

(5) To show that at the time of and prior to levy of attachment, claimant, who replevined the property, was in actual possession and control by the attachment defendant as his agent—Clopton v. Jolley & Terry, (Tex.Civ.App.) 203 S.W. 799

(6) To show that defendant owned the attached property.—Massari v. Forest Lumber Co., (U.S.D.C.Fla.) 290 F. 470—Larimore v. Parker, 197 P. 1118, 109 Kan. 66—Carman v. Anderson, 15 La. 135.

(7) To show title or right to the property to be in the intervener
Ala.—Flaherty v. People's Bank of Mobile, 113 So. 910, 216 Ala. 542—Home Guano Co. v. Akin, 92 So. 404, 207 Ala. 367.
Ark.—Saenger v. Standard Lumber Co., 50 S.W.(2d) 539, 185 Ark. 990—Collin County Nat. Bank v Harris & Jaggers, 119 S.W. 662, 90 Ark. 439
Cal.—American Fruit Growers of California v. Jackson, 265 P. 926, 203 Cal. 748.
Kan.—Robertson v Andrus, 266 P. 53, 125 Kan. 730—Smith v. Eby, 178 P. 405, 104 Kan. 178
La.—Public Indemnity Co. v. Smith, 153 So. 693, 179 La. 304.
Miss.—Brewer v. Gates, 31 So. 205.
Pa.—Rogers v. Schadt, 67 A. 919, 218 Pa. 617.
Tex.—Hargadine v. Davis, (Civ.App.) 34 S.W. 342.
Wash.—Mielke v. Hans, 233 P. 5, 133 Wash. 59
W.Va.—Armour Fertilizer Works v Finnell, 164 S.E. 253, 112 W.Va. 325
6 C.J. p. 399 note 52 [a].

(8) To show a delivery of a bill of sale to the intervener in accordance with the intention of the grantor—Aber v. Twichell, 116 N.W. 95, 17 N.D. 229.

(9) To show as matter of law that a foreign bank owned the drafts, requiring dissolution of attachment against the proceeds as property of the seller—P. Pastene & Co. v. Irving Nat. Bank, 164 N.E. 49, 249 N.Y. 272, reversing 229 N.Y.S. 905, 224 App.Div. 719, reargument denied 166 N.E. 316, 250 N.Y. 538.

(10) To support a finding that instructions to issue a certificate in the pledgee's name were the result of a mistake—Brinkman v. Rick, (Tex.Civ.App.) 19 S.W.(2d) 808.

(11) To support a finding that the purchaser's agent issued instructions to issue certificate in the purchaser's name—Brinkman v Rick, (Tex.Civ.App.) 19 S.W.(2d) 808.

(12) To support a finding that plaintiff did not release, waive, or abandon his attachment—Jongewaard v. Gesquire, 199 N.W. 585, 51 N.D. 173.

(13) To sustain verdict that bill of sale to claimant, who held a mortgage on the property, was not intended to convey the property, and that claimant was not the owner—Clopton v Jolley & Terry, (Tex.Civ.App.) 203 S.W. 799.

Evidence held insufficient

(1) To overcome claimant's proof of title to property involved—Jamison v. Wilson, 119 So. 800, 152 Miss. 382.

(2) To require or support verdict for claimant—Newman v. Northern Montana Ass'n of Credit Men, 208 P. 914, 63 Mont. 545—Magnolia Milling Co. v Rommel, 297 P. 191, 161 Wash. 398—Armour Fertilizer Works v Finnell, 158 S.E. 510, 110 W.Va. 416—6 C.J. p. 399 note 52 [b].

(3) To require or support verdict for plaintiff in attachment—Flaherty v People's Bank of Mobile, 113 So. 910, 216 Ala. 542—Foremost Dairies v. Kelley, (Ga.App.) 181 S.E. 204—Arpas v. Mishawaka Rubber & Woolen Co., (Ind.App.) 199 N.E. 167—Palmer v. Leavy, (Mo.App.) 205 S.W. 244.

(4) To show delivery of property to claimant—Rivard v. Loudon, (Wash.) 50 P.(2d) 914, rehearing denied and modified on other grounds 50 P.(2d) 1151

(5) To show that claimant made any statement to the bank to encourage the making of the loan from which the note sued on as a basis for attachment resulted, or was responsible in any way therefor to make good the charge of fraud against claimant or of collusion between him and the borrower from the bank—Saling v. First Nat. Bank, 197 P. 257, 100 Or. 221.

(6) To show that a conveyance to defendant by trustee was prior to the attachment levy.—Horan v. Varian, 268 P. 637, 204 Cal. 391, recalled 276 P. 1002, 207 Cal. 7.

(7) Other examples of evidence held insufficient—6 C.J. p. 398 note 45 [b], p. 400 note 68 [a], [b].

Identity of property

The property covered by a mortgage conveying "all the dry goods, groceries, etc., kept in stock at the storehouses and warerooms" of the mortgagor, at a certain place, was sufficiently identified in an interplea by the mortgagee in attachment against the mortgagor by a showing that there was but one store at such place and that the sheriff attached all the goods therein—Rice v. Sally, 75 S.W. 398, 176 Mo. 107.

Property held not to be debtor's

The facts that the purchaser of chattels at an execution sale was a brother-in-law of the execution debtor, that the debtor's father-in-law's name was on the door where the goods were kept by the purchaser, that the latter was not engaged in a business to which the chattels would be suited, that the debtor had them in his possession and was selling them at the time plaintiffs attached them as the debtor's property, and that the debtor's brothers secured the purchaser's bond to retain the property, have been held not to be evidence of a transfer of the property from the purchaser to the debtor after the execution sale so as to warrant an attachment of it as the property of the debtor—Lipschitz v Halperin, 103 N.Y.S. 202, 53 Misc. 280.

58. Perkins v. Lyons, 82 N.W. 486, 111 Iowa 192.

Fraud

Where claimant alleges fraud on the part of the attachment debtor, evidence of a general nature founded largely upon supposition will be insufficient on his part—Perkins v. Lyons, 82 N.W. 486, 111 Iowa 192.

Slight circumstances

Where the debtor's title to property attached is shown only by slight circumstances and opinions of witnesses, and the unimpeached evidence of the claimant is unequivocal

the property was in defendant's possession at the time of attachment,[59] or that defendant in attachment had previously represented himself as the owner,[60] is sufficient to make out a prima facie case for the attaching plaintiff.

A mere showing of admissions of defendant in favor of claimant's title and a surrender of possession to claimant a few hours before the levy does not overcome the prima facie case which the possession by attachment defendant on the date of the levy and for some time previous, and the use of the property apparently as his own, makes against claimant.[61] An admission by claimant that the property attached is that of defendant in attachment also operates to make a prima facie case against claimant on the question of ownership.[62] Where the return of the levy under the attachment does not recite that the property was found in the possession of defendant in attachment, the attaching creditor successfully carries the burden of proof by showing affirmatively that defendant in attachment was vested with the title to such property at or before the time of the levy.[63]

A judgment condemning the property levied on to be sold is prima facie evidence in a suit between the attaching creditor and a claimant that the title to the property was in defendant in attachment,[64] but is not conclusive[65]

On the other hand, a claimant to attached property may establish a prima facie case by showing that the property was in his possession at the time it was attached.[66]

Since a claimant of attached property must recover on the strength of his own title, it is sufficient if the attaching creditor shows that the property does not belong to claimant.[67] Claimant, however, is not required to prove his title beyond a reasonable doubt,[68] and, although his evidence is such that a demurrer might be sustained thereto; yet, if the creditor's evidence shows for claimant a prima facie case of ownership, the judgment must be in his favor.[69]

Where a claimant interposes a claim to certain goods under each of two different attachments, a payment of the assessed value of the goods under one claim does not of itself sustain his claim under the second attachment[70]

Where, in an attachment suit on the ground of fraud in disposing of property, defendant makes default, he admits the fraud, and it is only necessary to connect the interpleader with it by showing knowledge in himself or his agent, or both;[71] but the judgment against attachment defendant is not prima facie evidence that the sale to claimant was fraudulent.[72]

The value of attached property as assessed under direction of statute by the officer levying the writ is to be taken as correct, in the absence of other evi-

both as to her possession and title, a verdict finding the property subject is contrary to law—Smith v McCranie, 82 S E 807, 14 Ga App 721—6 C J p 400 note 68.

59. Loveman, Joseph & Loeb v. Foster, 150 So 170, 227 Ala 385—Henley v. Bradshaw Mercantile Co, 124 So 426, 220 Ala 193—British Mortgage Co v Cody, 33 So 832, 135 Ala 622—Barnes v Montgomery, (Ala App) 153 So 661—6 C J. p 398 note 47.

Burden not sustained

Claimant to property seized under attachment was held not to have sustained the burden of proof required of a third party claiming property taken from the possession of one other than claimant—Concrete Machinery & Supply Co v. Waara, (Ariz) 27 P (2d) 682.

Possession at time of levy

(1) Where the sheriff swears that he attached property while it was on the place cultivated by defendant, and that it was part of the crop raised by defendant that year, a prima facie case is raised for the attaching plaintiff—British Mortgage Co v. Cody, 33 So 832, 135 Ala 622

(2) Even though, shortly prior to the levy, defendant in attachment gave a bill of sale to the intervener who made part payment therefor, the fact that defendant's bailee held possession of the goods at the time they were attached creates a prima facie case for the attaching plaintiff—Floege v Wiedner, 14 S.W. 132, 77 Tex. 311.

Possession of husband

Evidence that household property was stored when the husband and his family moved, and that the husband returned such property for taxation makes out a prima facie case of title in the husband, authorizing a finding for the plaintiff in attachment—Blount v. Dunlap, 130 S E 693, 34 Ga App 666.

60. Kan—Amis v. Valerius, 235 P 833, 118 Kan 455
S C—Ex parte Yorke, 75 S E 211, 94 S C 40

Implication of ownership

Where defendant is silent when circumstances would seem to indicate that he should assert his ownership, if it existed, he will be considered to have represented himself as owner—Taylor v Butler, (Tex Civ App) 168 S W 1004

61. Harvey v. Jewell, 10 S E 631, 84 Ga 234.

62. Bleven v. Freer, 10 Cal. 172.

63. American Nat Bank v. Lee, 53 S.E 268, 124 Ga 863

64. State v. Spikes, 33 Ark 801.

65. State v Spikes, supra.

66. **Draft with bill of lading**

Intervener could establish a prima facie case by evidence that a draft with bill of lading attached had been duly executed and was in its possession, payable to its order, and that it was a holder and purchaser of the draft for value without notice of any defenses or equities—Mangum v. Mutual Grain Co, 114 S E 2, 184 N C. 181.

67. Slocomb v Breedlove, 8 La 143, 28 Am.D. 135

68. Ala—Wollner v. Lehman, 4 So. 643, 85 Ala 274.
N Y—Westervelt v. Phelps, 63 N.E. 962, 171 N Y 212
6 C J. p 399 note 54.

69. Baer v. Groves, 46 Mo App 245—6 C J p 399 note 55

70. Derrett v. Alexander, 25 Ala. 265

71. Graham Paper Co. v. St. Joseph Times Printing, etc, Co, 79 Mo. App 504

72. Ott v Smith, 10 So 70, 68 Miss. 773—6 C J p 400 note 73.

dence thereon.[73]

Indebtedness. Although it has been held that the attachment proceedings are sufficient proof of the attachment defendant's indebtedness to the creditor,[74] at least where attachment defendant was in possession of the property at the time of the levy,[75] according to other authority the mere bringing of a suit upon an alleged debt is no evidence of an indebtedness as against a third person claiming property attached in the action;[76] nor are the affidavit, bond, and other papers in attachment evidence of any indebtedness due plaintiff.[77]

Validity of writ. The writ of attachment itself is sufficient evidence of its own validity where it is not attacked by special plea.[78]

§ 362. Trial

a. In general
b. Questions of law and fact
c. Instructions
d. Verdict or findings

a. In General

Where a person other than defendant claims property attached as that of defendant, the trial of the right to such property should be in accordance with the statutes of the jurisdiction.

Where a person not a party to the proceedings claims property which has been seized under the writ, the trial of the right to the property should be in accordance with the statutes of the particular jurisdiction.[79] Under some statutes issues made by the interpleader should be tried and determined as like issues between plaintiff and defendant;[80] and where there are several claiming liens against attached property, the issues raised between interpleaders should be tried and determined, and the property awarded to the rightful claimant.[81]

Where there is no conflicting claim as to title, an adjudication of title before the hearing on the attachment issues is not necessary.[82] In the absence of a statute prescribing the procedure, while it may be the better practice to have the matter of the interpleader settled first and then render judgment on the attachment suit,[83] it is not necessary to do so, as the court has ample power to protect the true owner from sale of the property under the attachment in case the issues as to ownership are found for him on his interpleader, even though judgment in the original suit is entered before determination of the issues raised by the interpleader.[84] It has also been held that in attachment, wherein an intervener claiming title to the property attached is interested only in the issue of title, it rests in the discretion of the court whether or not such intervener be given a separate trial.[85] Of course, if a statute prescribes the order in which the interpleader and the principal action shall be tried, the statutory procedure should be followed. Accordingly, where the statute so provides, the right to the attached property must be tried prior to the determination of the rights of the parties to the original action;[86] while under others it may not be tried until the attachment suit has been prosecuted to judgment.[87]

73. Hunter v. Daze, 170 P. 788, 19 Ariz. 310

74. Moore v. Penn, 10 So 343, 95 Ala 200—Pulliam v Newberry, 41 Ala. 168—Butler v. O'Brien, 5 Ala. 316—6 C J p 400 note 75

75. Sexey v Adkinson, 34 Cal. 346, 91 Am D. 698—6 C.J. p 400 note 76.

76. Dickenson v. Cowley, 15 Kan. 269

77. Ill—Yost Mfg. Co v. Alton, 48 N E. 175, 168 Ill. 564
Ind.—Shaffer v Alden, 2 Ind. 42.
6 C.J p 400 note 78.

78. Yarborough v. Weaver, (Tex. Civ App) 22 S W. 771.

Proof of validity of attachment

Claimant of property seized under attachment is not entitled to a general charge, on the theory that the execution in favor of plaintiff was insufficient to make out a prima facie case, because there was no proof of the validity of the attachment writ—Mooneyham v. Herring, 35 So 390, 204 Ala 332

79. U S—T. W. Warner Co. v. Andrews, (D C.N.Y.) 15 F.Supp 1055
Tex.—Pring v. Pratt, (Civ App.) 1 S W.(2d) 441.

In New Jersey

In trying the right of property taken by a sheriff by virtue of a writ of attachment, that officer may determine the admissibility of evidence, but has no power to direct a verdict, but only to conduct the inquisition as prescribed by statute, and there is a statutory distinction between such proceeding and one where the sheriff's taking is by virtue of an execution to enforce a judgment, in the latter proceeding the inquisition is to be tried by a judge of the common pleas court as any other case of trial by jury—Brown v. Christian, 117 A. 294, 97 N J Law 56.

80. Ramsey v. Federal Surety Co., 249 P. 137, 121 Okl. 177—6 C J. p 400 note 80.

Return of writ, affidavit and bond

In an attachment proceeding, it is only where the writ, affidavit, and bond have been returned into court that the court has authority, under Code (1907) § 6040, to make up an issue between plaintiff and claimant.—Key v. Haynes, 34 So. 563, 17 Ala. App. 229.

81. Miller v. Campbell Commn. Co., 74 P 507, 13 Okl 75.

82. Hawk v. Bruce, (Mo App.) 195 S.W. 569.

83. Hurt v. Ohlman, 131 N E. 699, 249 Ill 163—Cermak v Schaaf, 139 N E. 39, 308 Ill 61, 27 A L R. 1398, affirming 224 Ill App 351

84. Cermak v. Schanf, supra.

85. Alpine Cotton Mills v. Weil, 40 S E 218, 129 N C. 452.

86. Mo—Hawk v. Bruce, (App) 195 S W. 569.
Tex—Pring v. Pratt, (Civ App) 1 S W.(2d) 441.
6 C J. p 401 note 84.

Retention of property on bond

An act authorizing the attaching creditor, in cases of intervention, to retain the property attached upon giving bond to produce it, does not require trial at that time of the issue of ownership—Kupperman v. Moore, (La.App) 166 So 519

87. Mahaffey Co. v. Russell & But-

In a proper case an attachment may be dissolved on an interpleader's motion to dissolve rather than on the issues raised by the interpleader's answer, particularly where there is no request that the controverted facts should be submitted to a jury.[88] Where, however, the showing upon the motion discloses a substantial question as to ownership between defendant and interpleader, a motion to dissolve should be overruled, as that question should be determined upon a fuller hearing than is possible upon an ex parte hearing upon affidavits.[89]

Consolidation. Where two interventions in an attachment proceeding are so closely related that they could be treated as a joint intervention, it is not error to consolidate them for trial together,[90] and where different parties levy attachments on the same property the causes for a trial of the right of property may be consolidated, although claimant has given separate bonds to the creditors,[91] but a failure so to consolidate cannot be availed of as error, where no injury has resulted therefrom.[92]

Right to jury trial. Where, under the constitution of the state, a jury trial is not a matter of right in a special proceeding unless a jury trial therein was a matter of right at common law, in the absence of a statute providing for a jury trial in a proceeding to establish title or recover possession of attached property, a jury trial therein is not a matter of right.[93] Where, however, a statute requires the court upon the filing of an interplea to impanel a jury to try the right of property, a jury trial on that issue may be had as a matter of right, and any party to the proceeding may insist upon a jury trial, unless the right of a jury trial so given is waived,[94] or unless the pleadings present only a question of law.[95] Although there is authority to the contrary,[96] the claimant of the attached property having, as a rule, the affirmative of the issue and the burden of proof, has generally the right to open and close;[97] but where the state of the case is such that the affirmative of the issue and the burden of proof has devolved upon the attaching plaintiff, this carries with it the right to open and close.[98]

Opening statement. Plaintiff, in his opening statement in a proceeding for attachment in which a party claiming the property interpleaded, may read his petition filed against defendant in the action.[99]

b. Questions of Law and Fact

Questions of law are for the determination of the court, while questions of fact are for the jury in the case of a jury trial.

In accordance with the rules governing civil actions generally, questions of law are for the court, while questions of fact are for the jury to determine. Where the facts are clear and undisputed, a question of law is presented,[1] and under such circumstances the court may properly direct a verdict.[2] Where the title or lien of claimant rests upon documentary evidence,[3] and where the court finds, as a

ler, 54 So 807, 945, 100 Miss. 122—6 C.J. p 401 note 85

88. Fairbanks, Morse & Co. v. Inglitt, 188 P. 248, 106 Kan. 488.

89. Western Grocer Co v. Alleman, 106 P. 997, 81 Kan 900.

90. V. G. Bloede Co v Mae Veneer Products Co, 290 S.W. 603, 172 Ark 821.

91. Davis v. Dallas Nat. Bank, 25 S.W. 222, 7 Tex.Civ.App 41.

92. Davis v. Dallas Nat. Bank, supra.

93. Misrach v. Liederman, (Cal App.) 58 P.(2d) 746.

94. Yellow Pine Lumber Co v. Mays, 94 S.E. 42, 81 W.Va. 46—6 C.J. p 401 note 88.

Entry of record

Consent to waiver of jury trial must be entered of record, and a recital in the record that neither party requested a jury and that the court was substituted in lieu thereof is sufficient—Yellow Pine Lumber Co v. Mays, 94 S.E. 42, 81 W.Va. 46.

95. Ray v. Keith, 75 N.E. 921, 213 Ill 182

96. Marmiche v. Commagere, 6 Mart N.S.(La.) 657—64 C.J. p 81 note 96.

97. Webber v. Rogers, 193 S.W. 87, 128 Ark. 25—6 C.J. p 401 note 91—64 C.J. p 81 note 97.

Property in defendant's possession

Claimant has the right to open and close where he admits the property was in defendant's possession at the time of the levy—Atkinson v. J. B. Colt Co, 145 S.E. 455, 167 Ga. 287—64 C.J. p 81 note 1.

98. Cassell v Vincennes First Nat. Bank, 48 N.E. 701, 169 Ill 380—6 C.J. p 401 note 92—64 C.J. p 81 note 98.

Property in claimant's possession

Where the property was in claimant's possession at the time of the levy, the burden of proof shifts to plaintiff who then has the right to open and close—Bones v. Printup Bros & Co, 64 Ga. 753—Hancock v. Geen-Miller Co, 132 S.E. 136, 35 Ga. App. 81.

99. Ramsey v. Federal Surety Co, 249 P. 137, 121 Okl. 177.

1. Mass.—Demers v. Winslow, 149 N.E. 110, 253 Mass 472.
Tex.—Verhalen v. Eby, (Civ.App.) 285 S.W. 922.
Wyo.—Steffy v. Teton Truck Line Co, 11 P.(2d) 1082, 44 Wyo 345.

2. N.J.—Levinson v. Godfrey, 74 A. 278, 79 N.J.Law 212.
Tex.—Smith v Frost, (Com.App.) 254 S.W. 926, reversing Frost v. Smith, (Civ.App.) 207 S.W. 392.
6 C.J. p 402 note 3.

Direction of verdict proper

Where the evidence showed that claimant held title to attached property under a conditional sale and that he had not been paid therefor, and where the evidence showed that plaintiff did not possess such a right as to entitle him to take advantage of claimant's failure to register his conditional sale, the direction of verdict for claimant was proper—Levinson v. Godfrey, 74 A. 278, 79 N.J. Law 212.

Direction held improper

Where there is evidence that claimant acquired his title fraudulently, it is error for the court to direct a verdict in his favor—Meridian Fertilizer Factory v. Bush, 27 So 645, 77 Miss. 697—Burns v. Woolery, 45 P. 894, 15 Wash. 134

3. Yellow Pine Lumber Co. v. Mays, 94 S.E. 42, 81 W.Va. 46.

matter of law, that the deed upon which intervener bases his claim is void,[4] there is nothing for the jury to decide. Whether the facts justify intervention at all is a question of law for the court.[5]

On the other hand, issues upon which the evidence is conflicting are for the determination of the jury, or the trial court in the absence of a jury,[6] and where there is substantial conflicting evidence the verdict should not be directed.[7] Accordingly, upon conflicting evidence, claimant's ownership,[8] and the bona fides of his claim,[9] the amount due claimant,[10] whether claimant was induced by fraud to make a sale to defendant in attachment which he claims the right to rescind[11] or participated in the debtor's fraud in transferring property to him,[12] whether an intervening bank held a draft as a purchaser for value or merely for collection,[13] whether there was such a depreciation in the value of the attached property as authorized a mortgagee thereof to take possession under a provision in the mortgage authorizing him to do so in case of an unreasonable depreciation in value,[14] whether a mortgage was executed on certain property and secured a certain note, and whether the mortgaged and attached chattels were identical,[15] whether a note sued on was still due and unpaid[16] and, if unpaid, the amount due thereon,[17] whether the mortgaged property was the same as that sold under attachment,[18] and the attaching creditor's knowledge that a third person owned the property levied on,[19] are questions for the jury, and their finding thereon either way should not be disturbed.[20] The credibility of witnesses and the weight to be given evidence are also facts to be determined by the jury.[21]

c. Instructions

Instructions should be given on the law applicable to the issues and the evidence, and should not be confusing or misleading, or invade the province of the jury.

In general, instructions should be drawn so that the jurors, as laymen, can understand them, leaving nothing to their interpretation as to the meaning of the court or the duties of the jury.[22] The instructions should define to the jury the issues which

4. American Exch Bank v. Inloes, 7 Md. 380

5. Banker's Mortg Co v. Sohland, 188 A. 361, 3 W.W.Harr.(Del.) 331
Ga.—Blount v. Dunlap, 130 S.E. 693, 34 Ga.App. 666
Mo.—Townsend Wholesale Grocery Co. v. Chamberlain Canning Co., (App.) 277 S.W. 958
N.J.—Pass v. Merchants' Trade Securities Corporation, 155 A. 772, 9 N.J.Misc. 709.
Tex.—Sigmond Rothchild Co. v. Moore, (Com.App.) 37 S.W.(2d) 121, reversing (Civ.App.) 22 S.W.(2d) 533
W.Va.—Yellow Pine Lumber Co. v. Mays, 94 S.E. 42, 81 W.Va. 46.
6 C.J. p. 401 note 94.

7. Fla.—H. E. Alley Co. v. Ball, 136 So. 704, 102 Fla. 1034
Ga.—Muscogee Motor Co. v. Brown, 184 S.E. 317, 181 Ga. 797.
S.C.—Davis v. W. H. Crozier & Co., 113 S.E. 377, 121 S.C. 99

8. Ga.—Blount v. Dunlap, 130 S.E. 693, 34 Ga.App. 666
Ky.—Keith v. J. F. Arnold & Co., 254 Ky.App. 115.
Kan.—Amis v. Valerius, 235 P. 833, 118 Kan. 455, modified on other grounds 236 P. 669, 118 Kan. 650
Md.—Haid v. Haid, 175 A. 338.
Mo.—Townsend Wholesale Grocery Co. v. Chamberlain Canning Co., (App.) 277 S.W. 958
Okl.—Whitfield v. Jones, 237 P. 440, 110 Okl. 237.
Or.—Thiering v. Gage, 284 P. 832, 132 Or. 92
Tex.—Verhalen v. Eby, (Civ.App.) 285 S.W. 922
6 C.J. p. 401 note 95.

Dispute as to ownership

(1) Where the intervener claims property attached as that of defendant in attachment, evidence that defendant declared over the telephone that the property was his raised a question of fact to be determined by the jury.—Davis v. W. H. Crozier & Co., 113 S.E. 377, 121 S.C. 99.

(2) Where defendant held title to an automobile which was registered in her name by her husband without her knowledge or her paying anything for it, and transferred title to her son, receiving no consideration therefor, the son intervening in an action against defendant, the question of the ownership of the automobile is for the jury.—Moore v. Wilson, 18 S.W.(2d) 373, 230 Ky. 49.

9. Baum v. Sanger, (Tex.Civ.App.) 49 S.W. 650.—6 C.J. p. 401 note 96

10. Citizens' Trust Co. v. Elders, 259 S.W. 136, 212 Mo.App. 589

11. Union Mfg., etc., Co. v. East Alabama Nat. Bank, 29 So. 781, 129 Ala. 292.—6 C.J. p. 402 note 97.

12. Maryville Mercantile Co. v. Hedgecock, (Mo.App.) 186 S.W. 55.—6 C.J. p. 402 note 98.

13. Markham-Stephens Co. v. Richmond Co., 99 S.E. 17, 177 N.C. 364.—Moon-Taylor Co. v. Gray-Smith Milling Co., 97 S.E. 213, 176 N.C. 407.—Worth Co. v. International Sugar Feed No. 2 Co., 90 S.E. 295, 172 N.C. 385.

14. Henton v. Spearman, 62 Mo.App. 307.

15. Bruce v. Kays, 1 S.W.(2d) 214, 222 Mo.App. 77.

16. Bruce v. Kays, supra.

17. Citizens' Trust Co. v. Elders, 259 S.W. 136, 212 Mo.App. 589

18. Bruce v. Kays, 1 S.W.(2d) 214, 222 Mo.App. 77.

19. Campbell v. Denver First Nat. Bank, 43 P. 1007, 22 Colo. 177.

Wages

Whether probable cause existed for the attachment of the wrong party's wages is a question for the jury to decide.—L. & N. Clothing Co. v. Conder, 58 S.W.(2d) 221, 248 Ky. 28.

20. Mich.—Heaton v. Nelson, 41 N.W. 895, 74 Mich. 199.
Mo.—John Deere Plow Co. v. Sullivan, 59 S.W. 1005, 158 Mo. 440.—Hagardine-McKittric Dry Goods Co. v. Carnahan, 83 Mo.App. 318.

21. Mo.—Cochrane v. First State Bank of Pickton, Tex., 201 S.W. 572, 193 Mo.App. 619
N.C.—Moon-Taylor Co. v. Gray-Smith Milling Co., 97 S.E. 213, 176 N.C. 407
Tex.—Sigmond Rothchild Co. v. Moore, (Com.App.) 37 S.W.(2d) 121, reversing (Civ.App.) 22 S.W.(2d) 533.—Briggs v. Briggs, (Civ.App.) 227 S.W. 511.

22. Mansur-Tebbetts Implement Co. v. Ritchie, 45 S.W. 634, 143 Mo. 537.

Not objectionable as lecture

Full and complete instructions are not objectionable as being a lecture to the jury, as, in a sense, every instruction is a lecture to the jury as to the law of the case.—Gate City Nat. Bank v. Boyer, 142 S.W. 487, 161 Mo.App. 143.

are for their consideration,[23] should be so framed as to confine their attention to the issue made by the pleadings[24] and the evidence adduced in the case,[25] and should correctly state the law with reference to the various matters presented,[26] and may state the effect of certain evidence, if believed by the jury,[27] that certain allegations are admitted,[28] and what the verdict should be upon a particular state of facts.[29] The instructions given by the court should not in any manner invade the province of the jury by withdrawing from its consideration any question of fact,[30] nor should they be conflicting,[31] confusing,[32] misleading,[33] or argumentative,[34] or in any way prejudicial to either party.[35]

d. Verdict or Findings

The verdict should be free from uncertainty, responsive to the issues and evidence, and dispose of all the issues.

The verdict should be that of the jury,[36] and should be free from uncertainty,[37] ambiguity,[38] and responsive to the issue or issues,[39] the evidence,[40] and the charge of the court,[41] and must dispose of the whole issue submitted to the jury.[42]

In case of special ownership or partial interest in the property or its proceeds where there is a privity of title between claimant and attachment defendant, the jury should make a finding as to the extent of claimant's interest therein if they have found that the attached property belongs to him;[43] but unless a special interest is claimed the amount of claimant's interest in the property need not be stated.[44]

Where, on an issue as to whether the claimant of attached property was the owner, a verdict was returned that the jury found for plaintiff in the exact amount of plaintiff's debt, it was held that such sum should be treated as surplusage, and the verdict sustained as an adverse finding on the issue of claimant's title.[45]

Where several claim suits are pending in the same tribunal, each presenting precisely the same issues on the record, and the determination of these issues depends on precisely the same evidence in each case, an agreement of all parties that a verdict in one case actually submitted to the jury shall be the verdict in all of the cases has the effect of making the finding in the case that is actually tried regular and valid in all of them.[46]

Where the verdict is neither responsive to the issues nor supported by the evidence, it will be set aside;[47] but the fact that a verdict is insufficient does not entitle an interpleader to file a second interplea, nor after such a verdict and a judgment

23. V. G Bloede Co v. Mae Veneer Products Co, 290 S W 603, 172 Ark 321—6 C J p 402 note 4

24. Mo—Springfield Engine, etc., Co. v. Glazier, 55 Mo App 95—Rindskoff v. Rogers, 34 Mo App 126.
N C—McLean v. Douglass, 28 N C 233
6 C J p 402 note 5.

25. V G Bloede Co v. Mae Veneer Products Co, 290 S W 603, 172 Ark 321—6 C J p 402 note 6.

26. Martin v. Davis, 40 N.W. 712, 76 Iowa 762—6 C J p 402 note 7.

27. Alpine Cotton Mills v Weil, 40 S E 218, 129 N C 452—6 C J. p 403 note 8.

28. Snell v. Crowe, 5 P. 522, 3 Utah 26

29. Sargent v Cameron, 53 P. 394, 11 Colo App 200—6 C J. p 403 note 10

30. Lafferty v. Hilliker, 81 S W 910, 109 Mo App 56—6 C.J. p 403 note 11

31. Mansur-Tebbetts Impl Co. v. Ritchie, 45 S W 634, 143 Mo. 537—6 C J p 403 note 12.

32. Goldberg v. Bussey, (Tex Civ App.) 47 S W. 49—6 C J. p 403 note 13

33. Mo—Keet-Rountree Dry Goods Co v. Hodges, 161 S W. 862, 175 Mo App. 434.
Tex—Mayer v. Walker, 17 S W. 505, 82 Tex 222
6 C J. p 403 note 14.

34. Arnold v Cofer, 33 So 539, 135 Ala 364—6 C J. p 403 note 15.

35. What Cheer v Hines, 53 N W 126, 86 Iowa 231—6 C J p 403 note 16

36. Montagnino v. Minolfi, 160 N Y S 103
Verdict not finding of jury
Where, in a trial of the right to property before a sheriff's jury, the only evidence was the intervener's affidavit, and the jury were handed a written form, holding for intervener, to sign, and signed it at the sheriff's direction after objection, such verdict was not the finding of the jury and will be set aside.—Montagnino v. Minolfi, 160 N.Y.S 103

37. Heidenheimer v. Johnson, 13 S W 46, 76 Tex 200—Pitkins v. Johnson, (Tex.) 2 S.W. 459—6 C J. p 403 note 17.

38. General Motors Acceptance Corporation v Judge of the Circuit Court, 11th Judicial District in and for Dade County, (Fla.) 136 So 621.
Unambiguous verdict
A verdict "We, the jury, find the right of property to be in the plaintiff," is equivalent to a simple verdict in favor of plaintiff and is not ambiguous—General Motors Acceptance Corporation v. Judge of the Circuit Court, 11th District in and for Dade County, (Fla.) 136 So 621.

39. Citizens' Trust Co v Elders, 259 S W. 136, 212 Mo App 589—6 C J. p 404 note 18

40. Brinkman v. Rick, (Tex Civ. App.) 19 S W.(2d) 808—6 C J. p 404 note 19

41. Heidenheimer v Johnson, 13 S W. 46, 76 Tex. 200—6 C J. p 404 note 20.

42. Mo—Citizens' Trust Co. v. Elders, 259 S W. 136, 212 Mo App 589.
Tex—Clopton v. Jolly & Terry, (Civ. App.) 181 S W 562.
6 C J p 404 note 21.

43. Nelson Distilling Co. v. Hubbard, 53 Mo App 23.

44. Beck v. Wisely, 63 Mo App. 239.

45. Faulkner v. Cook, 103 S W. 384, 83 Ark. 205.

46. Jaffray v. Smith, 17 So. 218, 106 Ala. 112.

47. N J.—Columbia Bank v. Spring, 26 A. 711, 55 N J Law 545.
Okl—Ranney-Alton Mercantile Co. v. Hanes, 60 P. 284, 9 Okl. 471.
Motion for new trial held properly overruled—Townsend Wholesale Grocery Co v. Chamberlain Canning Co., (Mo App.) 277 S W. 958.

thereon in his favor, can his name be struck from the docket without his consent.[48] The determination by a sheriff's jury as to the validity of the claim made by a third person to property levied upon under an attachment is not such a judicial determination as entitles either party to review it by a motion to set aside the verdict.[49]

It is not necessary to assess the value of the property claimed,[50] unless the statute so requires,[51] and a finding as to the value of the property may be disregarded as surplusage.[52]

Where the verdict as returned by the jury is responsive to the issue which has been tried, and the intent of the jury is clear, the court may, and should, correct it in matters of form and detail, but it must not amend it in such a manner as to change its meaning or effect,[53] and, where an amendment to the verdict is permissible, it may be made after the jury has been discharged.[54]

§ 363. Judgment and Enforcement Thereof

a. In general
b. Where claimant is successful
c. Where claimant is unsuccessful
d. Amendment or reformation
e. Effect of judgment
f. Execution

a. In General

There must be a judgment in accordance with the statute, conforming to the verdict, and in accordance with the pleadings and evidence adduced at the trial.

In a proceeding to try the right to property attached and claimed by a third person, where the court has proper jurisdiction,[55] there must be a judgment[56] founded on a regular and valid verdict, to which the judgment must conform.[57] The judgment should, furthermore, be in accordance with any statutory provisions on the subject,[58] although it has been held that a judgment not following the statute strictly will not be reversed for that reason, where no injury has resulted to claimant.[59]

The judgment must not allow relief not asked for or covered in the pleadings,[60] and it must be in accord with the evidence adduced at the trial.[61]

In the absence of a statute to the contrary, judgment may be, and usually is, rendered on the interpleader or intervention independently of the attachment suit.[62]

Surplusage in the findings of the jury should be ignored in writing the judgment.[63]

Where sureties have intervened and defended claimant's rights, judgment may be rendered in their behalf, although it inures to the benefit of claimant.[64]

48. State Bank v. Byrd, 8 Ark. 152

49. Cohen v. Climax Cycle Co., 46 N.Y.S. 4, 19 App.Div. 158

Where there are no answering affidavits, the facts must be taken as stated in the moving papers upon a motion to set aside the finding of a sheriff's jury—Montagnino v. Minolfi, 160 N.Y.S. 103.

50. Citizens' Trust Co. v. Elders, 259 S.W. 136, 212 Mo.App. 589—Wrather v. Lawson, (Mo.App.) 247 S.W. 473—6 C.J. p. 404 note 26.

51. Copeland Bros. Realty Co. v. Jones, 108 So. 591, 214 Ala. 615—Home Guano Co. v. Akin, 92 So. 404, 207 Ala. 367—Jordan v. Collins, 18 So. 137, 107 Ala. 572—6 C.J. p. 404 note 27

Sufficiency of assessment

Where property is levied on under a writ of attachment, and the court finds that only one bale of cotton levied on is liable to the satisfaction of the writ and assesses its value, there is a full compliance with Code (1907) § 6041, where a third party claimant has possession of the balance of the property under his bond—Home Guano Co. v. Akin, 92 So. 404, 207 Ala. 367.

52. Wrather v. Lawson, (Mo.App.) 247 S.W. 473.

53. Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., 85 F. 417, 29 C.C.A. 239, affirming 87 S.W. 103, 1 Ind.T. 314—6 C.J. p. 404 note 28.

54. Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 85 F. 417, 29 C.C.A. 239, affirming 87 S.W. 103, 1 Ind.T. 314

55. Mobile Life Ins. Co. v. Teague, 73 Ala. 147.

56. State v. Silverstein, 77 Mo.App. 304—6 C.J. p. 405 note 32.

57. Mills v. Thomson, 61 Mo. 415—6 C.J. p. 405 note 33.

58. Martin v. Harnett, 25 S.W. 1115, 26 S.W. 945, 86 Tex. 517, 674—Pitkins v. Johnson, (Tex.) 2 S.W. 459—6 C.J. p. 405 note 34.

59. Cobb v. Campbell, 33 S.W. 246, 14 Tex.Civ.App. 433.

60. Ky.—Fulks v. Isaacs, 5 S.W.(2d) 1039, 224 Ky. 181.
La.—Consolidated Cos. v. Laws, 124 So. 775, 11 La.App. 676.

Judgment beyond prayer of petition

Where prayer of petition of party intervening in the sale of attached property did not mention the intervener's mortgage, the relief allowed under the mortgage would be beyond prayer of petition—Consolidated Cos. v. Laws, 124 So. 775, 11 La.App. 676.

61. Barnes v. Montgomery, (Ala.App.) 153 So. 661.

Facts not in evidence

In action for possession of an automobile attached as property of a third person, a judgment denying possession to plaintiff and giving it to a third person, based on a purported assignment by liens filed after the case was submitted was erroneous—Bunnell v. Thomas, 165 P. 1047, 33 Cal.App. 634.

Judgment against weight of evidence

Judgment for an intervener who offers no evidence in the trial is clearly erroneous, where plaintiff in attachment proves the property levied on was in defendant's possession at the time of the levy.—Barnes v. Montgomery, (Ala.App.) 153 So. 661.

62. Cermak v. Schaaf, 224 Ill.App. 351, affirmed 139 N.E. 39, 308 Ill. 61, 27 A.L.R. 1398.

63. Wrather v. Lawson, (Mo.App.) 247 S.W. 473.

64. Boehm v. Calusch, (Tex.) 3 S.W. 293.

Assessment of value of property. Where the value of the property is immaterial, it may be ignored in writing the judgment,[65] although, where the statute so requires, an assessment of the value of the property may be necessary.[66] Where the statute provides that the value of the property in controversy shall be assessed as of the time of the interposition of the claim, an assessment of value as of any other time is improper.[67]

Where the property has been sold, it is proper that the amount realized by the sale should be ascertained by the court.[68]

b. Where Claimant Is Successful

Ordinarily, under the statutes, where claimant is successful, the judgment should be that the attachment be vacated or the proceeds of the property, if it has been sold, be turned over to claimant.

Of course, where claimant is successful in establishing his claim or interest in the attached property, the judgment entered should be in accordance with the controlling statute. Ordinarily, under the statutes, where claimant or intervener succeeds in establishing his title to the property attached, the judgment should be that the attachment be vacated[69] as to both the intervener and defendant in attachment,[70] and the property returned to the true owner,[71] and the court should make such orders as are necessary to protect the rights of claimant.[72] In the absence of a statute enabling the court to award further relief,[73] where the property attached has been sold and the proceeds of the sale are in the hands of the proper officer, judgment should be that claimant have and recover the proceeds arising from the sale of the goods by such officer, who should be ordered to pay the proceeds to claimant;[74] and it is erroneous to enter judgment for value of the property against plaintiff in attachment.[75] Where claimant establishes a prior right to the proceeds of the attached property, or a prior lien thereon, judgment should not be entered against attaching plaintiff therefor, since if claimant is entitled to personal relief, he must obtain it against attachment defendant,[76] and he should not receive judgment for a greater portion of the proceeds than is necessary to compensate him.[77]

In an equitable proceeding by interveners to establish the priority of their claims, judgment may, if asked for by claimant, be rendered against the debtor for a claim admitted by him.[78]

Where claimant has established his title as a trustee in a valid trust deed, the attachment creditor is not entitled to a judgment against claimant and the sureties on his delivery bond for the value of the property after deducting the amount of the valid debts secured by the trust deed, because there is a surplus after making such deduction.[79]

On a finding that the property is subject to a valid mortgage, a judgment in favor of claimant should not discharge the attachment lien, but should direct that the mortgagee retain possession until the mortgage has been discharged and that the attaching creditor may sell subject to the mortgage, in the manner provided by statute.[80]

65. Wrather v. Lawson, (Mo App) 247 S W 473—6 C J p 405 note 37

66. Martin v Harnett, 25 S W 1115, 26 S W 945, 86 Tex. 517, 674—6 C.J p 405 note 38.

67. King v. Central Hardware Co, 75 So. 967, 200 Ala 209.

68. St. Louis Brewing Assoc. v. Drulinger, 62 Mo App. 485.

69. Ohio—Modoc Soap Co v Brankamp, 5 Ohio N P (N S) 252
S C—Eaves v. Sales, 117 S E. 350, 126 S C 155.
6 C J p 405 note 40.

70. Ford v. Calhoun, 30 S E 820, 53 S C. 106.

71. Eaves v. Sales, 117 S E 350, 126 S C 155—6 C J. p 405 note 41.

No election

Under Rev St (1919) § 1776, providing that any person claiming property may interplead, the interpleader must prove title to, or right to the immediate possession of, the property, and if he succeeds he must take the property or the proceeds thereof, if it has been sold by the order of the court, and he cannot take a money judgment against the attaching creditors, there being no right of election to take either the property or its value as in replevin cases—Citizens' Trust Co v. Elders, 259 S W. 136, 212 Mo App. 589.

72. Eaves v Sales, 117 S E 350, 126 S C. 155—6 C.J. p 405 note 42.

Reserving right to sue

Judgment in attachment suit, in favor of interveners claiming ownership of attached property, not reserving to interveners right to sue plaintiff for wrongful seizure of property, was erroneous—Public Indemnity Co. v. Smith, 153 So. 693, 179 La 204

Statement of amount of mortgage and lien

Where property levied on under a writ of attachment was found to have passed by purchase to one claiming under a mortgage or lien, except as to one item of the property, no necessity existed to, and the court properly did not ascertain and state in the judgment the former amount of the mortgage and lien debts on the property, the property not being liable to the satisfaction of the writ—Home Guano Co. v. Akin, 92 So 404, 207 Ala 367.

73. Farmers' State Bank of Newkirk v. Hess, 230 P. 305, 138 Okl. 190, 66 A L R 894.
Recovery of damages see infra § 366

74. Citizens' Trust Co. v Elders, 259 S W. 136, 212 Mo App 589—6 C. J p 405 note 43

75. Citizens' Trust Co. v Elders, supra—6 C J. p 405 note 44.

76. Chapman v Bullock, (Tex Civ. App) 254 S W. 232.

77. E V. Webb & Co v. Friedberg, 126 S E. 508, 189 N.C 166

78. Clinton Lumber Co v Mitchell, 16 N W. 52, 61 Iowa 132.

79. Pittman v. Rotan Grocery Co, 39 S W. 1108, 15 Tex Civ App 676—Linz v Atchison, 38 S.W. 640, 47 S W. 542, 14 Tex Civ App. 647—6 C.J p 406 note 45.

80. Lapowski v Taylor, 35 S W. 934, 13 Tex Civ App 624.

c. Where Claimant Is Unsuccessful

Under some statutes, where claimant is unsuccessful, the judgment should condemn the property to the satisfaction of any judgment obtained in the attachment proceedings, although under other statutes judgment may be rendered against claimant and the sureties on his bond on breach of its conditions.

Where the issue is found against claimant, the judgment should, under some statutes, condemn the property to the satisfaction of the judgment which has been, or may be, obtained in the attachment suit;[81] and it is not proper to render a money judgment against claimant,[82] or to direct that he and his sureties on the claim bond pay plaintiff in attachment the value of the property as assessed by the jury and the costs of suit.[83] Under other statutes, however, judgment may be rendered against claimant and his sureties on the bond, in the event of its forfeiture or breach of condition.[84] Where the statute permits the rendering of a personal judgment against claimant, judgment may be rendered for plaintiff in attachment for the amount of his debt, instead of the value of the property, where the debt is less than such value.[85] Where the statute so provides, the rendering of a money judgment against an intervener replevying the attached property, on judgment going against him, is proper, without providing in the alternative for a return of the property.[86]

Under some statutes, in a trial of the right to attached property, an "order of dismissal" is in effect an adjudication of the failure on claimant's part to establish his right to the property as against the attaching creditor, and places the duty on claimant to make return of the property.[87]

A judgment in favor of several attaching plaintiffs should not be joint, but should establish their rights and priorities.[88]

Where claimant received a portion of his claim on a sale of the property, in accordance with an agreement under which he permitted a sale thereof, a judgment based on a finding that his claim was invalid should contain a provision establishing his right to the money he has received from the sale, as against the other parties, where an advantage has been secured to them by reason of the sale.[89]

Where claimant fails to appear and join the issue, judgment by default may be had against him like any other defendant,[90] although where the intervener files his bond and oath, enters his appearance, and requests an order directing issues, no default judgment can be rendered against him until he refuses to join issues under direction of the court.[91]

A sheriff who successfully defends a replevin action brought for property seized by him on an order of attachment, where the property has been taken away from him under the order of delivery, is entitled to an alternative money judgment for the amount of the lien, in case it is less than the full value of the property; otherwise for the actual value.[92]

d. Amendment or Reformation

In a proper case the judgment may be amended or reformed.

In the event of a clerical misprision, the judgment may be amended on motion,[93] or, where necessary, it may be reformed.[94]

e. Effect of Judgment

The judgment is conclusive between the parties.

The judgment on the trial of the right to property levied on and claimed by a third person is conclusive, as between attaching plaintiff and claimant, on the question as to whether or not claimant owns or has an interest in the property,[95] and is also held to bind the sureties on claimant's bond in the event that the property in controversy is not forthcoming, or the value thereof is not paid by claimant.[96]

81. Cooper v Owen, 161 So 93, 230 Ala 316—6 C J p 406 note 48.

Judgment condemning property

A judgment that "property belongs to the defendant in the writ of attachment issued in this cause and is subject to and liable to the satisfaction of said writ of attachment" complies with a statute directing that property be condemned to the satisfaction of defendant's debt—Vest v. First Joint Stock Land Bank, (Ala.) 168 So 654.

82. Ala.—Arnold v. Cofer, 33 So 539, 135 Ala 364
Iowa—Clarinda Valley Bank v Wolf, 69 N W. 1131, 101 Iowa 51

83. Arnold v. Cofer, 33 So 539, 135 Ala 364—6 C J. p 406 note 50

84. Osgood Co. v. Emblem Oil Co, 168 A. 515, 111 Pa Super. 38—6 C J. p 406 note 51

85. Warren v. Atlas Const Co, (Tex Civ App) 197 S W 320—Cobb v Campbell, 38 S W 246, 14 Tex Civ App 433

86. People's Nat Bank v Corse, 182 S W. 917, 133 Tenn. 720.

87. Sanders v. Farrier, (Tex Civ. App) 271 S W 293.

88. Fort Worth Pub Co v. Hitson, 14 S W. 843, 16 S W. 551, 80 Tex 216

89. Bryant v. Fink, 39 N W. 820, 75 Iowa 516

90. Cobb v Campbell, 38 S W. 246, 14 Tex Civ App. 433—6 C J. p 406 note 54.

91. Warren v. Atlas Const. Co, (Tex.Civ App) 197 S W. 320.

92. Amis v. Valerius, 235 P 833, 118 Kan 455, modified on other grounds 236 P. 669, 118 Kan 650

93. Seisel v. Folmar, 15 So 850, 103 Ala. 491—Gray v. Raiborn, 53 Ala. 40.

94. Burlacher v. Watson, 38 Tex 62.

95. Ark.—Hershy v. Clarksville Inst, 15 Ark. 128.
Ga.—Parham v. Potts-Thompson Liquor Co, 56 S E 460, 127 Ga 303
Ill.—Weber v. Mick, 23 N E. 646, 131 Ill. 520.
Mo.—Tipton Bank v. Cochel, 27 Mo. App 529
6 C J p 407 note 57.

96. Trieste v Enslen, 17 So 356, 105 Ala 180, citing Charles v Haskins, 14 Iowa 471, 83 Am D. 378.

An intervener who replevies the property on a forthcoming bond and who is sued on the bond after a judgment against his interests is estopped to set up any contention raised by him in the claim case,[97] and a judgment in favor of the intervener estops plaintiff in attachment from ignoring or denying the possession of the intervener,[98] and gives notice of the intervener's rights to purchasers of the property, who must be governed thereby.[99]

Since the action in which judgment in the intervention suit is rendered is independent of the main suit, with separate and distinct issues, the judgment does not affect the attachment suit,[1] nor does it affect the title to the property as between attachment defendant and the intervener.[2]

Where the value of improvements is awarded to an intervener, he is not entitled to retain possession of the land until the improvements have been paid for, as against an attaching creditor.[3]

Judgment for claimant in an action against the attaching officer is not binding on the attaching creditor unless he has had notice of the action.[4]

f. Execution

Where the statute so permits, plaintiff may have execution issue on the judgment.

Where attached property is claimed by a third person who gives the required claim bond, and thereafter the attaching creditor prevails on a trial of the right of property between himself and claimant, it is error to direct the issuance of an execution before the return of the claim bond forfeited,[5] but, where the statute permits judgment to be entered in the proceeding to try the right of property against claimant and the sureties on his bond, plaintiff may have execution issue on such judgment.[6]

§ 364. Appeal and Error

Generally, third persons claiming property attached as that of another may appeal, and the appeal will be governed by the rules applicable to other civil appeals.

Generally, the parties to a proceeding to establish or determine a third person's claim to attached property have the same right of appeal as in actions commenced in an ordinary way,[7] even though the right to appeal is not expressly given by the statute authorizing claimant to intervene or interplead in the attachment suit.[8] In the absence of a statute providing for review of the action of a sheriff's jury, however, it has been held that no appeal will lie therefrom.[9]

In accordance with the general rules governing appeals in civil actions, parties to an appeal are bound by the positions which they held at the trial,[10] and when a proceeding by intervention in attachment is treated by the trial court as not necessarily equitable, it will be regarded in the same light in the appellate court.[11] Also, if attachment plaintiff fails to recover judgment, the exclusion of evidence of the value of attached property would not be an error for which he could complain,[12] although, if the validity of the conveyance to claimant of attached property is assailed, the exclusion of evidence showing the value of the property would not be harmless but would be reversible error.[13]

To what court appeal lies. The appeal must, of course, be taken to a court having proper jurisdiction; thus, where a question involving the title to land is in issue, appeal must be taken to that court alone which has jurisdiction as to such question;[14] and the same principle applies where the jurisdiction of the appellate court is dependent on the amount in controversy, which, for the purpose of defining the jurisdiction of the courts, has been interpreted as

97. Thompson v. O'Connor, 41 S.E. 242, 115 Ga. 120

98. Smith v. Pool, (La.) Mann Unrep Cas. 446.

99. Lobdell v. Union Bank, 8 La. Ann. 117.

1. Nichols v. Koshinick, 19 Ohio Cir. Ct. (N.S.) 148—6 C.J. p. 407 note 59.

Judgment on merits
The attaching plaintiff's right to a personal judgment on the merits against defendant is not affected by an adjudication of the right to property attached in favor of the intervener.—Brownell Car Co. v. Barnard, 40 S.W. 762, 139 Mo. 142

2. Ark.—Hershy v. Clarksville Inst., 15 Ark. 128
Ill.—Weber v. Mick, 23 N.E. 646, 131 Ill. 520—Needham v. Clary, 62 Ill. 344
Iowa.—Petty v. Hayden, 88 N.W. 339, 115 Iowa 212
6 C.J. p. 407 note 60.

3. Coleman v. Teddlie, 30 So. 99, 106 La. 192

4. Peaslee v. Stamford, Brayt. (Vt.) 140

5. Rogers v. Bailey, 25 So. 909, 121 Ala. 314.

6. Rhodes v. Smith, 66 Ala. 174—6 C.J. p. 407 note 65.

7. Ark.—Mitchell v. Woods, 11 Ark. 180
Ill.—Seass v. Manion, 92 Ill. App. 471
N.C.—McLean v. McDaniel, 44 N.C. 203
Vt.—Chaffee v. Malarkee, 26 Vt. 242
6 C.J. p. 407 note 66.

8. Mitchell v. Woods, 11 Ark. 180

9. Cohen v. Climax Cycle Co., 46 N.Y.S. 4, 19 App.Div. 158—Montagnino v. Minolfi, 160 N.Y.S. 103—6 C.J. p. 407 note 66

10. Edwards v. Stewart, 44 S.W. 326, 141 Mo. 562.

Burden of proof
One accepting the burden of proof on the trial must retain it on appeal.—Edwards v. Stewart, 44 S.W. 326, 141 Mo. 562.

11. Clinton Nat. Bank v. Studemann, 37 N.W. 112, 74 Iowa 104.

12. Roswald v. Hobbie, 4 So. 177, 85 Ala. 73, 7 Am.S.R. 23.

13. Roswald v. Hobbie, supra.

14. Ducker v. Wear, etc., Dry Goods Co., 34 N.E. 562, 145 Ill. 653—6 C.J. p. 408 note 68.

the value of the property attached, and not the amount of the claim sued on.[15]

Parties. Where there is judgment against the intervener and defendant in attachment, the intervener must himself appeal, and an appeal by attachment defendant is not sufficient to bring up the question of ownership.[16]

Time for appeal. The appeal must be taken and perfected or the writ of error sued out within the time prescribed therefor by statute.[17]

Supersedeas or stay of proceedings. Where a bond is given by claimant, the pendency of the appeal operates as a supersedeas, and the attaching officer is not liable for failure to levy an execution issued against the property interpleaded.[18]

Record. The record on appeal in proceedings to try the right to property attached must be kept distinct from the record of the proceedings in attachment,[19] and must show that an issue has been made up between claimant and attaching creditor.[20] Where a claim is interposed by one partner in the name of his firm, subsequent proceedings are properly conducted against the partnership as claimant, notwithstanding the bond is given by each partner individually and recites that he "has filed a claim," and, accordingly, a recital in the judgment entry that the one interposing the claim is a member of the partnership is sufficient, on error, to sustain a default against the partnership as claimant.[21]

Scope and extent of review. Where the question at issue on trial was the right to the attached property, the appellate court can pass on that question only [22]

Since only where there is a flagrant abuse of its authority by the trial court will the appellate court review matters involving the trial court's discretion, the appellate court will not interfere with the discretion of the trial court in refusing permission to interplead after the time for interpleading has passed,[23] with the trial court's decision allowing a judgment creditor to join issue on a third party claim after the term to which the garnishment is returnable,[24] or with the trial court's decision to dismiss an interplea in attachment for want of notice of filing [25]

The appellate court will not consider questions of fact which have been determined by the jury,[26] or consider objections not raised in the trial court;[27] neither will it look into the attachment for the purpose of finding error in the claim suit, unless the record of the former is introduced in some legitimate way into the latter.[28]

Where it appears from a recital in a verdict not assessing each item of property, in a trial of the right to property, that there was an agreement of the parties by which the jury was to be governed in their findings, it will be presumed on appeal, in the absence of a contrary showing, that the agreement dispensed with the necessity of assessing each separate item of the property.[29]

§ 365. Costs

The costs of an intervention proceeding must generally be assessed to the losing party.

Costs and disbursements in a proceeding to try the right to property levied on under attachment and claimed by a third person have no connection with the main action,[30] and must, as a rule, be borne by the party to such proceeding who is unsuccessful,[31] although it has been held that all the costs may be imposed on claimant who is partly successful.[32]

One who claims as trustee under a deed of trust which is satisfied pending trial is entitled to costs accruing prior to such satisfaction.[33]

15. Martin v. Duncan, 41 N E 43, 156 Ill. 274, reversing 47 Ill App 84—6 C J p 408 note 69

16. Hardie v Colvin, 9 So. 745, 43 La Ann 851

17. Ryan v. Heenan, 41 N W 367, 76 Iowa 589—6 C J p 408 note 71.

18. State v. Ranson, 86 Mo 327—6 C J. p 408 note 72

19. Scott v. Levan, (Mo App) 236 S W 407—6 C J. p 408 note 73

20. Tupper v. Cassell, 45 Miss. 352

Recital to clerk

A recital of the clerk that "the jury came to try the issue" is not sufficient record that the issues have been made up for the purposes of appeal.—Tupper v. Cassell, 45 Miss 352.

21. Pace v Lee, 49 Ala. 571.

22. Clarinda Valley Bank v. Wolf, 69 N W 1131, 101 Iowa 51—6 C J p 408 note 76.

23. Funkhouser v. How, 13 Mo 47.

24. Wineman v. Clover Farms Dairy, 151 So 749, 168 Miss 583

25. Brownell, etc, Car Co v. Barnard, 22 S W 503, 116 Mo 667

26. Knight v Rhoades, 61 P 869, 10 Kan App 38—6 C J. p 408 note 78

27. U. S Fidelity & Guaranty Co. v Albert, 59 S W (2d) 644, 248 Ky 375—6 C J p 408 note 79

28. Gray v. Raiborn, 53 Ala. 40.

29. Massillon Engine, etc, Co v. Arnold, 32 So. 594, 133 Ala. 368—6 C.J. p 408 note 81.

30. Schneider v. Sears, 8 P 841, 13 Or 69.

31. Ky.—Whitaker v Blain Mooreman & Co, 2 Ky Op 238
Tex.—Laird v Williams & Chastain, (Civ App) 13 S W (2d) 944.
6 C J. p 408 note 83.

Claimant successful

In an attachment suit where claimant is successful in sustaining his claim to part of the property, it is error to adjudge the costs of the suit against him, although the attachment be sustained in all other particulars.—Whitaker v Blain Mooreman & Co., 2 Ky.Op. 238

32. Stewart v. Outhwaite, 44 S W. 326, 141 Mo 562

33. Helm v. Gray, 59 Miss. 54.

Expenses of custody or sale. An attaching creditor of an insolvent corporation, who refuses on demand to deliver the property attached to a receiver subsequently appointed for the corporation, and who resists the receiver's action to recover it in an attempt to enforce his preference, will not, on recovery by the receiver, be allowed the costs of the attachment and care of the property.[34] Where the property is sold by agreement of the parties, the attaching officer may retain the expenses of sale and the custody of the property, until sold, from the date of the agreement, and claimant, if successful, must look to plaintiff in attachment for his reimbursement.[35]

Under a statute providing that, in cases of attachment, any person having a claim against defendant for labor done may give notice thereof, and that, unless the claim is disputed, it must be paid out of the proceeds of the sale, and, if disputed, an action must be begun within ten days for the recovery thereof, where the court subsequently to the filing of claims makes an order allowing compensation to the sheriff for caring for the attached property, the compensation is properly allowed as part of the costs in the judgment, since the rights acquired by filing claims are purely statutory, and there can, therefore, be no trust fund created in the hands of the sheriff which can not be subjected to any lawful order of the court with reference to fees.[36]

Attorney's fees. Where an intervener has to go into court to prove his title and has to employ counsel in doing so, he will be entitled to reasonable attorney's fees.[37]

Likewise, where a chattel mortgagee interposes a claim in attachment proceedings and the mortgage provides for a reasonable attorney's fee, the allowance of an amount which plaintiff's attorney has admitted at the trial to be reasonable is not error.[38]

Security for costs. Under some statutes it is within the discretion of the court when claimant's issue is made in attachment proceedings to require claimant to file security for costs incurred by reason of his claim.[39]

§ 366. Damages

In the absence of a statute to the contrary, as a general rule, damages cannot be recovered in a proceeding to try the right to attached property, although, where the statute so permits, damages are recoverable in such a proceeding.

The general rule, in the absence of statute, is that claimant cannot recover damages for the invasion of his rights by the seizure and detention of the property, except by an independent action brought for this purpose.[40] Under a permissive statute, however, an intervener who has established his right to property attached as that of another may recover the damages he has suffered by reason of the attachment,[41] and under such circumstances the measure of damages has been held to be the value of the attached property with interest from the date of attachment.[42] Where the attached property has been sold on plaintiff's application without the consent of the interpleader, it has also been held that his recovery should be the value of the property attached and damages for taking and withholding it.[43] Attorney's fees are generally not allowable as an element of damages,[44] although it has been held that attorney's fees incurred in suing out an injunction to prevent the sale of property wrongfully seized are recoverable as an element of damage.[45] That an attachment injured the intervener's credit and caused him to keep

34. Compton v. Schwabacher, 46 P 338, 15 Wash 306

35. Graham v. Swayne, 1 Rob.(La.) 186.

36. Legg, etc, Co. v. Worthington, 108 P. 284, 157 Cal. 488—6 C.J. p 409 note 88.

37. Campti Motor Co v Box, 136 So 179, 17 La.App. 399

38. Fenby v. Hunt, 101 P. 492, 53 Wash 127.

39. Third Nat Bank v Reeves Grocery Co., 73 So. 866, 113 Miss. 35

Nonresident

A motion by plaintiff to require a nonresident interpleader to give security for costs should be sustained —Blasland-Parcels-Jordan Shoe Co v Hilig, 70 Mo App 301.

40. State ex rel Stevenson v American Surety Co., (Mo App.) 74 S W (2d) 1094—Citizens' Trust Co v Elders, 259 S W 136, 212 Mo App 589—6 C J p 410 note 92.

Recovery of damages for dispossession see infra §§ 393–405.

41. Farmers' State Bank of Newkirk v. Hess, 280 P. 305, 138 Okl 190, 66 A L R 894—6 C.J. p 409 note 91

Amount of damages

(1) An award of three thousand three hundred seventy-five dollars, including one thousand six hundred dollars for eight months detention of a drag line machine costing twelve thousand dollars, with a rental value of from one hundred fifty dollars to two hundred dollars per month, is not excessive—State ex rel. Stevenson v American Surety Co, (Mo App.) 74 S W.(2d) 1094.

(2) An award of two thousand five hundred dollars for the unlawful taking under attachment of an automobile purchased seven months before for three thousand five hundred fifteen dollars was held not excessive.—Pass v. Merchants' Trade Securities Corporation, 155 A. 772, 9 N J Misc 709.

42. Cornfroth v. Maguire, 21 P 191, 12 Colo. 432—Brasher v. Holtz, 20 P. 616, 12 Colo. 201.

43. Farmers' State Bank of Newkirk v. Hess, 280 P. 305, 138 Okl 190, 66 A L R 894.

44. Colo.—Joslin v McGee, 39 P 349, 5 Colo App 531.
Ky.—Bogard v. Tyler, 78 S W. 138, 25 Ky.L. 1416.

Allowance of attorney's fees is not discretionary with the court; it must be under a statute or by virtue of a contract—Joslin v. McGee, 39 P. 349, 5 Colo App. 531.

45. Willis v. Eisernack, 135 So. 117, 16 La.App 607.

idle an employee under pay are items too remote to be considered in assessing damages.[46]

Where, under the statutes, damages may be recovered by the intervener, it does not necessarily follow from the fact that the sheriff cannot be held for the damages that the attaching creditor cannot be held liable, particularly when he persists in the seizure, after being apprised of claimant's rights, and provides an indemnity bond to the sheriff to prevent a release of the property from seizure.[47]

Under some statutes damages may be recovered, in a proceeding to try the right to attached property, against an unsuccessful claimant,[48] but in such a proceeding the statutory damages alone may be recovered.[49]

In an independent action brought by attachment plaintiff, an intervener in the attachment proceedings will be held liable for whatever damages plaintiff sustained from the conversion of the property accomplished by the procuring of the unlawful release of the property from the lien of the attachment.[50]

B. CLAIMANT'S BOND OR OTHER SECURITY FOR POSSESSION OR RELEASE OF PROPERTY

1. In General

§ 367. Right to Obtain Release of Property on Giving Bond

Where the statute permits, a claimant of attached property may secure its release by giving bond.

The statutes sometimes allow a claimant of property attached under process against another to obtain a release of the property and possession thereof by giving bond to return the same, or its value, in case he shall fail to establish his title or interest,[51] and under such a statute the giving of a sufficient bond is jurisdictional.[52] In the absence of such statutory permission, however, a claimant cannot obtain the release of property in this manner,[53] and, according to some authority, an instrument given by an intervener for that purpose is not a judicial bond and cannot be recovered on as such,[54] although according to other authority the fact that the statute does not provide for the release of the property by such procedure does not prevent liability on such a bond, which was voluntarily given and the property released thereon, as such a bond is not void as one exacted by an officer without authority of law.[55]

In the absence of a statute so requiring, a person seeking to intervene in attachment proceedings need not give bond,[56] and even where a release of the attached property may be secured on giving bond, if a release is not sought, bond is unnecessary.[57]

Where one claiming to be the owner of personalty attached as the property of another gives a forthcoming bond, this does not entitle him to retain the property as against a subsequent attachment creditor while such bond is in force, unless he gives another forthcoming bond.[58]

A deposit in court in lieu of a claimant's bond cannot be made in some jurisdictions,[59] although the practice seems to be permissible in other states.[60]

§ 368. Form and Requisites of Bond

The intervener's bond should comply substantially with the form required by statute.

A bond which complies substantially with statutory requirements is sufficient,[61] and a bond which is insufficient under the statute may be construed

46. Northern Timber Products Co v Stone-Ordean-Wells Co., 173 N W 439, 143 Minn. 200.

47. Willis v. Ezernack, 135 So 117, 16 La App 607.

48. Wetsel v Simon, (Tex Civ App) 25 S W 792—6 C J. p 409 note 90

49. Floege v Wiedner, 14 S.W. 132, 77 Tex 311.

50. Arena v. Bank of Italy, 228 P 441, 194 Cal 195.

Conversion

A claimant securing the release of attached property under a third-party claim, unless in fact legally justified in claiming as trustee, was liable in conversion for nullification of the attachment lien.—McGaffey Canning Co v Bank of America, 294 P. 45, 109 Cal.App. 415.

51. Stewart v Howell Co., (Tex Civ App) 264 S W 208—6 C J p 410 note 94

52. Ala.—McDonald v. Stephens, 83 So 746, 204 Ala. 359—House v West, 19 So 913, 108 Ala. 355—Mobile Life Ins Co v. Teague, 78 Ala 147—Walker v Ivey, 74 Ala 475—Stephenson & Bernard Realty Co v. Sheehan, 144 So 370, 25 Ala App 269—Key v Haynes, 84 So 563, 17 Ala App 229

Tex.—Stewart v. Howell, (Civ App) 264 S W. 208

53. Meyer v. Johnson, 28 La Ann 241—Dawson v. Morton, 22 La Ann 535—Hughes v. Klingender, 14 La. Ann 52

54. Meyer v. Johnson, 28 La Ann 244—Dawson v. Morton, 22 La Ann 535.

55. Lowe v Southern Surety Co, 237 N W 78, 55 S D 633

56. Cermak v. Schaaf, 224 Ill App 351, affirmed 139 N E 89, 308 Ill 61, 37 A L R 1398.

57. Temple v Eades Hay Co, 114 S. E 162, 184 N C 239.

58. Harris v. Stewart, 47 S W. 634, 65 Ark 566

59. Otis v. Nelson, 140 P. 211, 15 Ariz. 486.

60. Larsen v. Richards, 134 P. 583, 43 Utah 196.

61. Holloway v. Burroughs & Taylor Co., 58 So. 953, 4 Ala.App. 630.

Bond held sufficient

A bond signed by three persons binding themselves to the obligor for the payment of two hundred ninety-four dollars "to the effect

and enforced as a common-law obligation [62]

As a general rule the bond is conditioned that claimant will have the property forthcoming to answer the judgment in the attachment suit if found liable therefor, and also for the payment of costs and damages occasioned by the institution of his claim [63] The fact that a bond states that it is intended as a delivery bond will not, if the prescribed statutory conditions of such a bond are omitted, entitle a claimant to possession of the property;[64] but a failure of the bond to comply strictly with the statute cannot be taken advantage of by the obligors after having obtained possession [65]

Amount. The amount of the bond, while dependent wholly upon statute, is usually double the appraised value of the property,[66] and it has been considered that a bond for a less amount is insufficient, although it is for more than double the amount of the debt for which the attachment was issued [67]

Obligee. Whether the bond should be made payable to plaintiff in attachment or to the attaching officer is a matter as to which the statute governs,[68] and, under a statute requiring the bond to be filed with the attaching officer, it is sufficient if the bond is made payable to the party for whose security it was executed.[69]

Where the statutes provide for a bond payable to plaintiff and the property is seized under several attachments, the bond may be payable to all plaintiffs jointly and severally,[70] or to all jointly instead of jointly and severally.[71] After possession of the property has been delivered on the faith of the bond and it has been sold, it is too late to raise an objection that no bond was executed to one who owned the property jointly with the debtor [72]

Execution. The signature of a partnership or firm name as surety on a claimant's bond has been held valid, although the names of the individual partners were not signed.[73]

§ 369. —— Amendment

An improperly framed bond may be amended on leave.

If the bond has been improperly framed the court may give leave to amend it before entering upon the trial.[74]

§ 370. —— Waiver of Defects

Defects in the intervener's bond may be waived by the party for whose benefit it was intended.

Since the bond is intended for the security and benefit of the attaching plaintiff, he may waive defects therein by his actions in failing to object to alleged defects at the proper stage of the proceedings,[75] and formal defects in the claimant's bond are waived if it is accepted and treated as valid.[76] Failure of claimant to have the bond approved may be waived by plaintiff.[77]

§ 371. Filing of Bond

An officer's failure to perform his duty and file a bond given him does not affect claimant's rights.

Where the officer is as much the agent of attachment plaintiff as of claimant, his failure to file the bond until some months after its delivery to him does not affect claimant's right to the property.[78]

that we will pay all damages sustained by reason of the detention or sale of such property" was upheld, although not a model bond —Nokes v. Switzer, 10 N W 536, 12 Neb. 156

Compliance with statute

A bond conditioned that the obligor shall have the property forthcoming for the satisfaction of the judgment if it be found liable therefor, and shall pay all costs and damages that may be recovered, is a sufficient compliance with the statute —Holloway v. Burroughs & Taylor Co, 58 So 953, 4 Ala App 630

Forms of claimants' bonds.—Cermak v. Schaaf, 139 N E 39, 308 Ill 61—Eichoff v. Tidball, 61 Tex 421—6 C J. p 410 note 99 [a].

62. Ala —Rhodes & Broadfoot v. Smith, 66 Ala 174
N Y —Ehrlich v. Sklamberg, 119 N Y S 337, 65 Misc 5.
6 C J p 410 note 4

63. Ala —Holloway v. Burroughs & Taylor Co., 58 So. 953, 4 Ala App 630.
Ill —Cermak v. Schaaf, 139 N E. 39, 308 Ill 61
6 C J p 410 note 1.

64. Jennings v Warnock, 87 Iowa 278—6 C J p 410 note 2.

65. Mercantile Acceptance Corporation v Hedgepeth, 112 So. 873, 147 Miss 717—6 C J p 410 note 3

66. Turner v Lytle, 59 Md. 199—6 C.J p 410 note 5

67. Kamena v Wanner, 6 Abb Pr (N Y) 193, reversing 15 How Pr 5, and affirming 24 How Pr. 509—6 C J p 410 note 6

68. Benton v. Benson, 32 Ga. 354—6 C J. p 411 note 7 [a]

69. Eichoff v Tidball, 61 Tex 421.

70. P J Peters Saddlery, etc, Co v Schoelkopf, 9 S W 336, 71 Tex. 418 —Elser v. Graber, 6 S W. 560, 69 Tex 222

71. Jacobs v. Shannon, 21 S W. 386, 1 Tex Civ App. 395

72. Frankfort Deposit Bank v. Thomason, 66 S W. 604, 23 Ky.L 1957

73. Jacobs v Shannon, 21 S W. 386, 1 Tex Civ.App 395.

74. Martin v. Mayer, 20 So. 963, 112 Ala. 620

75. Rhodes v. Smith, 66 Ala. 174.

Waiver by failure to object

Where for eight years the plaintiff treated the bond as one for the trial of the right to attached cotton, and, after the intervener had parted with the cotton, repudiated it as a claim bond, insisting that it was a replevin bond, his failure to make timely objection waived the defects in the bond —Rhodes & Broadfoot v. Smith, 66 Ala. 174.

76. Clarinda Valley Bank v. Wolf, 69 N W 1131, 101 Iowa 51—6 C.J. p 411 note 13.

77. Ehrlich v. Sklamberg, 116 N.Y. S 602, affirmed 119 N.Y S. 337, 65 Misc. 5.

78. Mayer v. Woolery, 39 P. 135, 16 Wash 354.

The filing of the bond by claimant may be waived by plaintiff.[79] In the absence of a statute to the contrary, a failure to indorse the fact and time of filing on the bond is immaterial.[80]

§ 372. Operation and Effect of Bond

The giving of bond by claimant for the release of the property gives the court jurisdiction to hear and determine the intervention, it admits the validity of the attachment, and does not operate to discharge the attachment lien.

The giving of the bond operates to give the court jurisdiction to hear and determine the action of intervention.[81]

In accordance with the rule that the regularity of the attachment is not in issue in the trial of the right to the property, as already discussed in § 357c (1), it has been held that claimant by filing his bond admits the fact and validity of the levy.[82]

The effect of the giving of a claimant's bond is to substitute the undertaking for the attached property, and the action may proceed to determination, although the title to the attached property has not been determined.[83] The execution of a delivery bond by a claimant of attached property does not as a rule discharge the lien created by the levy,[84] and, under some statutes, claimant must make himself a party to the attachment action or be concluded by the judgment therein.[85] However, it has been held that the execution of a bond to perform the judgment of the court discharges the attachment,[86] and, where a claimant procures a release of attached property by depositing a sum of money to secure plaintiff's recovery, it has also been held that the attachment is thereby discharged.[87]

Where the statute so provides, the property, after the bond is given and in the hands of the claimant, is in custodia legis in the sense that the intervener's possession is protected against levies from any source, excepting subsequent writs against the original defendant in attachment,[88] until the statutory claim suit is determined.[89]

Effect on subsequent claims. The execution of a bond by an intervener does not bar the interposition of other claims,[90] and, if claimant would retain the property against a subsequently attaching creditor, under some statutes he must give another forthcoming bond to the latter,[91] although under other statutes an additional bond is not necessary.[92]

Presumption as to nature of custody of claimant. Where one claiming attached property executed a delivery bond and receipted for the property to the officer, the presumption is that he retained it under his bond and not as custodian or receiptor at common law.[93]

§ 373. Release of Security

Security which has been given for the release of attached property will not be returned or released merely on the filing of a motion therefor.

Where property alleged to belong to defendant was released from attachment on a claimant's depositing a sum of money to secure plaintiff's recovery and the property was thereupon returned to the claimant, the court in which the attachment was pending had no jurisdiction, in the absence of fraud, on motion, to enter an order discharging the same or releasing the deposit on affidavits of the claimant that the property attached and the deposit made in lieu thereof belonged to him and not to attachment defendant.[94]

79. Ehrlich v Sklamberg, 116 N.Y.S 602, affirmed 119 N.Y.S 337, 65 Misc. 5.

Judgment proper

A judgment against the principal in an attachment suit and claimants of property in an amount exceeding the original demand, including damages awarded against claimants and sureties, was proper as in effect establishing a fund from which the principal judgment could be collected.—Concrete Machinery & Supply Co. v. Waara, (Ariz.) 27 P.(2d) 682

80. Bolin Tool Co v Jernigan, (Tex Civ.App.) 50 S.W.(2d) 397.

81. Stewart v. Howell Co., (Tex.Civ App.) 264 S.W. 208.

Effect of execution of forthcoming, replevy, or dissolution bond by attachment defendant see supra § 313.

Jurisdiction to render decree

Claimant of property levied on under foreign attachment in proceedings against a nonresident defendant and surety on a forthcoming bond by executing the bond became parties to the cause and submitted themselves to the authority of the court to render a proper decree against them, provided jurisdiction was acquired by proper publication of notice on the nonresident defendant.—Mercantile Acceptance Corporation v Hedgepeth, 112 So. 872, 147 Miss. 717.

82. McDonald v. Stephens, 85 So. 746, 204 Ala. 359

83. Finn v. Mehrbach, 65 N.Y.S. 250, 30 N.Y.Civ.Proc 242

84. Sanders v. Farrier, (Tex.Civ App.) 271 S.W. 293—6 C.J. p. 411 note 22.

85. Frankfort Deposit Bank v. Thomason, 66 S.W. 604, 23 Ky.L. 1957—Miller v. Desha, 3 Bush (Ky.) 212.

86. Graham v. Sheets, 9 Ky.Op. 701.

87. Larsen v Richards, 134 P. 583, 43 Utah 196

88. U.S. Carriage Co v Bay City Buggy Works, 33 S.W. 381, 12 Tex. Civ.App. 52

89. Ex parte McFry, 117 So. 464, 218 Ala. 21.

90. La.—White v. Hawkins, 16 La. Ann. 25

Miss.—Dreyfus v. Mayer, 12 So. 267, 69 Miss. 282

91. Harris v. Stewart, 47 S.W. 634, 65 Ark. 566.

92. Phillips v. Davis, (Tex.Civ.App.) 49 S.W. 144—U.S. Carriage Co v. Bay City Buggy Works, 33 S.W. 381, 12 Tex.Civ.App. 52.

93. Clarinda Valley Bank v. Shenandoah Nat. Bank, 79 N.W. 391, 109 Iowa 43.

94. Larsen v Richards, 134 P. 583, 43 Utah 196.

2. Liabilities on Bonds

§ 374. Liability of Claimant

Claimant's liability on his bond arises upon a breach of its conditions.

The liability of a claimant on his bond is analogous to that of an attachment defendant on a forthcoming bond, and it arises upon a breach of the conditions of the bond. This liability accrues and is fixed by a final judgment against defendant in the attachment suit,[95] but the bond is not forfeited until execution has been issued on the judgment and claimant has failed to surrender the property to the sheriff according to the condition of the bond,[96] and, where the obligation of the bond is construed to be that defendant will perform the judgment, or the obligors will have the property or its value forthcoming to answer the judgment of the court, until there has been a judgment subjecting the property, and the judgment debtor has failed to satisfy it, there is not a breach.[97]

Even though claimant establishes his title to most of the property and fails as to only a small portion, his liability to deliver that which does not belong to him continues, and the bond should not be quashed.[98]

A condition that claimant will prosecute the action to effect means that he will prosecute it successfully,[99] and a failure to prosecute the action constitutes a breach of the bond.[1] Conditions of the bond that claimant will prosecute his action to effect and that plaintiff shall return the property, if return be adjudged, and in default thereof pay the assessed value are separate conditions, independent covenants, and a failure to perform either constitutes a breach of the bond.[2]

A sale of the property by claimant placing it beyond his power to return it constitutes a breach of a bond conditioned to deliver it on a finding against his claim.[3]

Bankruptcy of defendant. That defendant in attachment was adjudicated a bankrupt and that his receiver claimed the property, or that the receiver subsequently transferred what title he had in the property to claimant, would not affect the liability of the obligors on the claimant's bond, it being conditioned that the claimant would, in an action thereon, prove that he was the general owner of the property at the time of seizure, or pay plaintiff the value thereof.[4]

Destruction of property. Under a bond conditioned to deliver up the property on demand or pay the value of the property, an intervener who secures possession of attached property by giving a bond for its later delivery, if so decreed, is the legal custodian of the property, and has the duty of safely keeping it, and in case the property is destroyed, even though such destruction was not claimant's fault, the injured party may be indemnified from his bond.[5] Under this

95. Ga.—Bowden v. Scott, 99 S.E. 140, 23 Ga.App. 636.
Tex.—Sanders v. Farrier, (Civ.App.) 271 S.W. 293.
6 C.J. p. 411 note 29.

Fieri facias

The contention of plaintiff, in a suit on a forthcoming bond given by claimant in attachment, that there was a breach because property was not produced on demand and was dissipated, was unsound, in view of Civ.Code (1910) § 5122, as plaintiff could not make a legal demand or complain of dissipation of property until he was legally in a position to sell it and could not be in such position until he had a fieri facias.—Bowden v. Scott, 99 S.E. 140, 23 Ga.App. 636.

96. Labat v. Dugan Piano Co., 198 S.W. 125, 130 Ark. 572.—6 C.J. p. 411 note 30.

Surrender not bona fide

Liability arises on claimant's forthcoming bond where the surrender of the property to the sheriff is not made in good faith and did not constitute a legal surrender.—Farmers' & Merchants' Bank v. Cochran, 141 S.E. 919, 37 Ga.App. 794.

97. Deposit Bank of Frankfort v. Thomas, 66 S.W. 604, 23 Ky.L. 1957

98. Bowling v. Davis, 44 S.W. 643, 45 S.W. 77, 103 Ky. 187, 19 Ky.L. 1859

Extent of discharge of bond

Where the intervener's right to property attached is upheld in part and denied in part, his bond should be discharged only to the extent of the property adjudged to belong to him.—Bowling v. Davis, 44 S.W. 643, 103 Ky. 187.

99. Spickard v. Continental Casualty Co., (Mo.App.) 64 S.W.(2d) 734.

1. Sparkman v. Miller-Cahoon Co., 282 P. 273, 48 Idaho 254.

2. Spickard v. Continental Casualty Co., (Mo.App.) 64 S.W.(2d) 734

3. Lassiter v. Byrd & Coker, 55 Ga. 606.

Advertising for sale

Generally, where execution is issued after dismissal of the claim of intervention, the property should be advertised for sale, but where the intervener disposed of the attached property and was therefore, unable to deliver it, advertising is dispensed with.—Lassiter v. Byrd & Coker, 55 Ga. 606.

4. Ehrlich v. Sklamberg, 119 N.Y.S. 337, 65 Misc. 5, affirming 116 N.Y.S. 602.

5. U.S.—Doggett, Bassett & Hills Co. v. Black, (C.C.Ind.) 40 F. 439
Ala.—Kamburis v. Stearns, 145 So. 449, 226 Ala. 171.
Liability of surety in case of destruction of property see infra § 375.

Claimant wrongdoer

"The claimant in this case has been adjudged to be a wrongdoer—in other words, the court has adjudged his claim to be unfounded, and his litigation to be false. Shall he now be heard to say, 'True, I have detained this horse wrongfully two years, but now he is dead I can't return him, therefore I ask to be exonerated from my covenant to do so, or to pay the judgment rendered'? The terms of the covenant are unconditionally to return the horse or pay his value, or abide the judgment of the court. Shall the law incorporate other terms for the benefit of the wrongdoer? The rules have not been so far extended either at law or in equity; we see no reason to do so; neither justice nor public policy demands this."—Dear v. Brannon, 4 Bush (Ky.) 471, 477.

rule the only excuse for a failure to have the property forthcoming is an act of God, the law, or the conduct of the other party.[6]

Illegal levy. Since an attachment lien does not exist where the levy is illegal and void, where there has been an illegal levy, the attachment plaintiff, having no lien on the property, cannot recover on a claimant's bond for claimant's failure to redeliver the property.[7]

Liability of claimant to sureties. A surety against whom, together with claimant, judgment for damages and costs had been rendered, and who had paid a fieri facias issued thereon, was entitled, under early statutes of Georgia, to control the fieri facias for the purpose of reimbursing himself out of the effects of claimant.[8]

§ 375. Liability of Sureties

The sureties are liable on the bond after liability has accrued against the principal because of a breach of its conditions.

The liability of the sureties on a claimant's bond does not become fixed or enforceable until a liability on the part of his principal has accrued.[9] A liability on the part of the sureties is, however, created, and a proceeding against them authorized, on a failure of claimant to deliver the property in accordance with a condition of the bond,[10] or the dismissal of the claim because of a failure to comply with the statutory procedure.[11]

Such an undertaking fixes an unconditional obligation on the surety to pay the judgment, regardless of any defects or irregularities in the issuance or levying of the attachment,[12] and regardless of the failure to observe the formalities of statutory provisions relating to bonds or undertakings furnished;[13] but such is not the case where the attachment proceedings were void for want of jurisdiction, since under such circumstances the bond is not supported by a consideration.[14]

Destruction of property. In accordance with the rules discussed in the previous section with regard

Intervener distinguished from officer

An intervener securing attached property upon giving bond is not in the same position as a levying officer who holds attached property for a particular purpose. If the property is lost or damaged in the possession of the latter while he is exercising reasonable care, no liability attaches to him, such is not the case of the intervener who is not a mere bailee of his alleged own property.—Doggett, Bassett & Hills Co. v Black, (C.C Ind) 40 F. 489.

6. Kamburis v. Sterns, 145 So. 449, 226 Ala. 171

7. Briggs v Briggs, (Tex Civ App) 247 S.W. 312

Sale by claimant

Where, in an action by a tenant's creditor, the officer levying plaintiff's writ of attachment on cotton in possession of the landlord and in which the tenant had a three-fourths interest and the landlord a fourth interest for rent, actually seized and levied upon the cotton and threatened to take the cotton from the warehouse and required the landlord to file a claimant's affidavit and bond, the landlord's possession was illegally ousted and disturbed, and, the levy of attachment being contrary to Rev St. arts 255, 3740, the attachment lien was lost, so that plaintiff could not recover judgment on the landlord's claim bond for the value of the three-fourths interest of the tenant in the cotton on the ground that the landlord sold the entire cotton after the claim bond was filed—Briggs v Briggs, (Tex Civ App) 247 S W. 312

8. Keith v. Whelchel, 9 Ga. 179.

9. Fraser v. Thorpe, 11 La Ann 47—Goodman v Allen, 8 La Ann 381.

No judgment against principal

Where an intervening claimant took possession of the attached property on executing a bond therefor, and the parties in the attachment suits recovered judgment against defendant, but did not ask nor recover judgment against the intervening claimant, the surety on claimant's bond is not liable to the plaintiffs in an independent action, even though the bond was filed in the court of a magistrate, where technical errors and defects not affecting the merits should be disregarded—Troy v. Ætna Accident & Liability Co, 115 S E 325, 122 S C. 210.

10. Wills Point Bank v. Bates, 13 S W. 309, 76 Tex 329—6 C J. p 412 note 36

Agreement of surety

The surety in a forthcoming bond agrees that the attached property shall be forthcoming and rendered subject to the orders of the court when the litigation reaches the stage of such action, or, if it is not produced after the requisite notice and legal steps therefor, that defendant will perform the judgment of the court, at least to the value of the attached property.—U S Fidelity & Guaranty Co v. Albert, 58 S W.(2d) 644, 248 Ky. 375.

11. Higdon v. Vaughn, 58 Miss. 572—6 C J. p 412 note 37

12. Fla—Moore v. Holder, 116 So. 498, 95 Fla 504.
Kan—Peterson v Woolen, 30 P. 123, 48 Kan 770—Case v. Steele, 8 P 242, 34 Kan. 90
Mont—Sloan v. Young, 284 P. 131, 86 Mont 414.
Neb—Cooper v Davis Mill Co, 67 N W 178, 48 Neb 420
N D—Revely v. Isensee, 221 N.W. 38, 57 N D 286.

After removal from state

An objection in a proceeding on a forthcoming bond that the attachment on partnership property was issued against one partner alone was not available after the property had been delivered on faith of a bond and had been removed from the state—U S. Fidelity & Guaranty Co. v Albert, 58 S W (2d) 644, 248 Ky. 375.

13. Pacific Finance Corporation v. Fidelity & Deposit Co of Maryland, 272 N.Y.S. 513, 151 Misc. 798.

Common-law liability

Although a bond given to regain possession of personalty taken under warrant of seizure fails to comply with statutory requirements, the surety may be held bound as on a common-law obligation to the covenant to which he subscribed—Pacific Finance Corporation v. Fidelity & Deposit Co of Maryland, 272 N Y. S. 513, 151 Misc. 798.

Failure to endorse writ

The surety on a replevin bond could not escape liability thereunder because the replevin writ was not indorsed where plaintiff in replevin who was the principal under bond took possession of the property—Spickard v Continental Casualty Co, (Mo App) 64 S.W (2d) 734

14. Sloan v. Young, 284 P. 131, 86 Mont. 414.

to claimant's liability on the bond, according to some authority the surety is liable on the bond in case of the destruction of the property as it cannot be delivered on demand even though claimant was not the cause of such destruction or otherwise at fault, the only excuses available to the surety being acts of God, the law, or the conduct of the other party,[15] according to other authority, however, the sureties on claimant's release bond are entitled to show that it is impossible to return the property because of its destruction by death or otherwise, if such destruction was without the fault or negligence of claimant, since it is the duty of the sureties to redeliver the property, and, if that is impossible, it operates as a discharge from the obligation[16]

§ 376. Discharge of Sureties

The surety on the bond is, as a rule, discharged only by the extinguishment of the obligation of the principal or a performance of the conditions of the bond.

While the general rule, as discussed in the title Principal and Surety § 116 [50 C J. p 93 note 29], is that the liability of a surety ends with the extinguishment of the obligation of the principal, and while this rule undoubtedly applies to the discharge of sureties on a claimant's bond given in an attachment proceeding, it has been held that the sureties on a claimant's bond will not be discharged by the neglect of the claimant to take advantage of the failure of attachment plaintiff to make up the issue to try the right of property;[17] the destruction of the bond either before or after claimant obtained possession of the property,[18] an adjudication of bankruptcy against defendant in attachment,[19] the fact that claimant's possession of the property was hindered or delayed by the assertion of some right therein by the debtor's receiver in bankruptcy, which was thereafter waived,[20] an agreement between attachment plaintiff and several claimants whereby suits are tried together;[21] an agreement that the verdict and judgment in one of several suits to be actually tried shall be the verdict and judgment in all,[22] or an agreement between attachment plaintiff and claimant that the value of the property at the time of the trial shall be assessed at the sum shown by an inventory taken some time before;[23] nor will a payment by the sureties on one of claimant's bonds of a judgment for a greater amount than the value of the property release them from their obligation on a bond given to a subsequently attaching creditor of the same property,[24] nor can the sureties be released from liability on application therefor by representing that claimant is about to leave the country and permit an issue framed to go by default.[25] Since the operation of the intervener's bond may be distinguished from the operation of a supersedeas bond, the execution of a supersedeas bond does not operate to release the surety from liability on the bond to release the attached property.[26] Where a claimant's bond is quashed and another substituted, the sureties on the latter cannot escape liability because the bond was executed after delivery of the property,[27] nor is a surety released by an amendment to the complaint unless such amendment states a cause of action different from that on which the bond was given.[28]

§ 377. Enforcement of Liability

Under the various provisions of the statutes, liability on the bond may be enforced by rule or motion or action on the bond.

The enforcement of liability on the bond depends on the procedure provided by statute. Under various statutes, the liability on the claimant's bond may be enforced by rule or motion,[29] by entering judgment against claimant and his sureties in the proceeding to try the right of property, where claimant is unsuccessful therein, as already pointed out in § 363c, or by an action on the bond.[30] Under some statutes a sheriff or constable can summarily declare a statutory bond forfeited upon breach of its conditions, but where the bond is not so conditioned as to constitute a statutory bond, such summary procedure cannot be had, and the obligation of the bond can be enforced only by the common-law remedies.[31]

15. Kamburis v Stearns, 145 So 449, 226 Ala 171
Destruction of bond see infra § 376
16. Atchinson v Foxworth, 53 Miss 741
17. Atkinson v Foxworth, 53 Miss 741
18. Ehrlich v Sklamberg, 116 N Y S 602, affirmed 119 N Y S 337, 65 Misc 5
Destruction of property see supra § 375
19. Ehrlich v Sklamberg, 119 N Y S 337, 65 Misc 5, affirming 116 N Y S 602
20. Ehrlich v Sklamberg, 116 N.Y S 602, affirmed 119 N Y S 337, 65 Misc 5—6 C J p 412 note 42
21. Triest v. Enslen, 17 So 356, 106 Ala 180
22. Jaffray v. Smith, 17 So 218, 106 Ala 112
23. Jaffray v. Smith, supra.
24. Conway v Backus, 3 Tex.A Civ Cas. § 266
25. Armour v Tabor, 7 Pa.Dist. 462, 21 Pa Co 425—6 C J. p 412 note 47
26. Lowe v. Southern Surety Co., 227 N W. 78, 55 S D 623.
27. Bull v Jones, (Tex.Civ App) 47 S W. 474.
28. Ky.—U S Fidelity & Guaranty Co v Albert, 58 S W.(2d) 644, 248 Ky 375
Mont—Sloan v. Young, 284 P. 131.
Amendment
An amendment to the complaint which merely changes the remedy sought does not release the surety from his obligation on the bond—Sloan v. Young, (Mont.) 284 P. 131
29. Ky—Martin v. Donaldson, 5 Ky L 253
La—Wright v. Oakey, 16 La Ann 125
30. Wright v Oakey, supra
31. Gaut v. Beatty, 77 So 28, 200

§ 378. —— Nature and Form of Remedy

In the absence of a statute to the contrary the nature and form of the remedy is the same as that of actions on bonds generally, as discussed in the title Bonds § 105 [9 C.J. p 82 note 1–p 84 note 28]. For future cases, if any, on this point peculiar to actions of this nature, consult Pocket Parts under this section number.

§ 379. —— Right of Action

The right of action on the bond given by a claimant of attached property is the same as that on other bonds, as discussed in the title Bonds § 99 [9 C.J. p 78 note 43–p 82 note 99].

§ 380. —— Conditions Precedent

The only conditions precedent to a suit on the bond are that the attachment be sustained and that there be a breach of a condition of the bond.

Ordinarily the only conditions precedent to liability on the bond are that the attachment is sustained and that a breach of a condition of the bond occurs.[32] In the absence of a statute to the contrary an order of sale of the attached property need not be entered, particularly where such an order would be futile in view of a removal of the property out of the court's jurisdiction[33] Where the principal has departed from the jurisdiction, notice to him of a motion to require the obligors on the bond to produce the property is not a prerequisite to liability of sureties who have been properly served with such notice.[34] In so far as liability on claimant's bond is concerned, a failure of the sheriff to levy execution on property, which is already subject to an attachment lien in his hands, is immaterial.[35]

§ 381. —— Defenses

Payment of the judgment or a lack of consideration for the bond is an effective defense to an action on the bond.

Payment to the attaching plaintiff of the indebtedness due him is a sufficient defense to an action on the claim bond,[36] and it has also been held that defendants may avail themselves of the fact that the officer accepting the bond had no authority to do so[37] Want of consideration is also a good defense to an action on the bond[38]

On the other hand, it cannot be set up as a defense that claimant is the real owner of the property attached,[39] that the property was not liable to attachment,[40] that claimant did not actually obtain possession of the property,[41] that the bond was executed after delivery of the property[42] or by mistake,[43] or that claimant did not sign the bond;[44] nor can defendants assign errors in the attachment proceedings between the creditor and his debtor,[45] or set up that the officer bringing the action, to whom the bond was given, has no interest in the property,[46] or any irregularity in the bond, after delivery had been made thereunder.[47]

§ 382. —— Jurisdiction and Venue

In the absence of a statute to the contrary, jurisdiction is governed by the general rules of jurisdiction in civil actions as discussed in the title Courts § 15 et seq [15 C J. p 723 note 78 et seq], and the

Ala 654—Cobb v. Thompson, 6 So 373, 87 Ala 331.

Redelivery in sixty days

Under Code (1907) § 2955, requiring a bond for the replevy of attached goods to be conditioned for a return of specific property within thirty days after judgment, a bond requiring delivery sixty days after its issuance is not good as a statutory bond, and cannot be forfeited summarily by the sheriff—Gaut v. Beatty, 77 So 28, 200 Ala 654

32. U S Fidelity & Guaranty Co v. Albert, 58 S W.(2d) 644, 248 Ky 375

33. U. S Fidelity & Guaranty Co. v Albert, supra.

34. U S. Fidelity & Guaranty Co. v. Albert, supra

Service on attorneys

Notice of motion to require the obligors on a forthcoming bond to produce the attached property, served on the principal's attorney, was sufficient without service on the principal individually—U S Fidelity & Guaranty Co v. Albert, 58 S W (2d) 644, 248 Ky. 375

35. Sparkman v. Miller-Cahoon Co, 282 P 373, 48 Idaho 254

36. Sparkman v Miller-Cahoon Co, supra—6 C J p 413 note 54

37. Thixton v Goff, 5 Ky L. 764—6 C J. p 413 note 55

38. Blue Ridge Coal Corporation v Lewis, 205 N Y S 452, 210 App Div 275, affirmed 148 N E 743, 240 N Y 649

Lack of consideration

Where the intervener is entitled to the attached property without being required to file a bond, there is no consideration for the bond given—Blue Ridge Coal Corporation v Lewis, 205 N Y S 452, 210 App Div 475, affirmed 148 N E 743, 240 N Y 649

39. Ormsbee v. Davis, 16 Conn 567—6 C J p 413 note 56.

40. Higdon v. Vaughn, 58 Miss 572

41. Ehrlich v Runzler, 119 N Y S. 344, 65 Misc 15—Ehrlich v Sklamberg, 119 N Y S 337, 65 Misc. 5, affirming 116 N Y S 602

42. Bull v Jones, (Tex Civ App) 47 S.W 474.

43. Leet v Green, 152 S.W. 772, 151 Ky 632

44. Davis v. Warden, 3 Phila (Pa) 322

45. U. S Fidelity & Guaranty Co v. Albert, 58 S W (2d) 644, 248 Ky. 375—6 C J p 413 note 62.

Effect of affirmance

The court of appeal's affirmance of a judgment sustaining an attachment was an adjudication binding on the principal in a forthcoming bond and all other defendants, regardless of errors committed in the case—U S Fidelity & Guaranty Co v Albert, 58 S W (2d) 644, 248 Ky. 375.

46. Morgan v. Furst, 4 Mart.N S (La) 116, 16 Am D. 166.

47. Mercantile Acceptance Corporation v Hedgepeth, 112 So 872, 147 Miss 717—Spears v Robinson, 15 So 111, 71 Miss. 774.

venue is governed by the rules discussed in the title Venue For future cases, if any such may arise, not falling within such general rules, consult Pocket Parts under this title and section number.

§ 383. —— Time to Sue and Limitations

The conditions in the bond determine the time at which a right of action thereon accrues.

The time at which a right of action on a claimant's bond accrues depends upon the nature and condition of the bond. If it is conditioned for the delivery of the property, or its value, to satisfy any judgment obtained against defendant in attachment within a certain time thereafter, an action on the bond lies at the expiration of such time, although the intervention has not been disposed of, and the judgment against defendant did not order condemnation of the attached property.[48] If, however, the bond is conditioned to satisfy only such judgment as may be rendered against claimant himself, no action lies until after rendition of such a judgment.[49] Under a statute authorizing a claimant to the property attached to give a bond conditioned that, in an action thereon to be commenced within three months, the claimant will establish that he was the general owner of the property at the time of the seizure, or, if he fails so to do, that he will pay to plaintiff the value thereof, an action on a claimant's bond must be brought by plaintiff in the attachment within the time specified[50]

§ 384. —— Parties, Process, and Appearance

Either the plaintiff in attachment or the attaching officer who is obligee of the bond is a proper party plaintiff, and the surety may be sued alone.

Where the bond is payable to plaintiff, his right to maintain an action thereon is clear.[51] Where the bond is payable to the attaching officer, he is a proper party plaintiff,[52] and, under some statutes, it is held that, inasmuch as plaintiff is the real party in interest, an action on the bond may be maintained in his name, although it is payable to the attaching officer.[53]

The surety may be sued alone,[54] particularly where claimant did not sign the bond.[55]

§ 385. —— Pleading

a. In general
b. Issues and proof

a. In General

To be sufficient, a pleading must state a cause of action or raise a defense thereto, as the case may be.

In an action on a claimant's bond, as in other civil actions, plaintiff's pleadings must state a cause of action. If plaintiff proceeds by a common-law action on the bond, it is only necessary to set out the execution of the bond,[56] and a breach of its conditions,[57] and, inasmuch as the parties are bound to notice the determination of the claim suit, no averment of notice to them of determination is necessary[58] Where the application for leave to bring action on claimant's bond must be made to the court before the warrant of attachment is vacated or annulled, in an action on the bond it is not necessary for plaintiff to allege that the order giving him leave to sue was properly issued[59] A complaint alleging the death of the person giving the bond and the naming of attachment defendant as executor, which allegation was not denied by the answer, has been held sufficient to warrant a judgment against defendant as executor, where the court found that he, and not claimant, was the owner of the property.[60]

A motion for judgment on a claimant's bond, under some statutes, may, it has been held, be heard and determined either upon or without written pleadings.[61]

Where a claim to the attached property is interposed, a reply by plaintiff in attachment consisting of only a general denial of the claim of ownership made by claimant is insufficient to bring plaintiff within a statute which provides that plaintiff in attachment shall, as against third persons, be deemed a purchaser in good faith and for value.[62]

b. Issues and Proof

The only issue is whether there has been a breach of the conditions in the bond, and proof may be made of anything within the issues.

Ordinarily the only issue is whether there has

48. Clarinda Valley Bank v Shenandoah Nat. Bank, 79 N.W. 391, 109 Iowa 43.

49. Yale v. Hoopes, 16 La.Ann 311 —6 C.J. p 413 note 52

50. Berner v Walker, 116 N.Y.S 615, 63 Misc 262

51. Kohn v. Hunshaw, 20 P. 629, 17 Or 308

52. Sparkman v Miller-Cahoon Co., 282 P. 273, 48 Idaho 254.

53. Lomme v. Sweeney, 1 Mont. 584 —6 C.J. p 413 note 65.

54. Idaho.—Sparkman v. Miller-Cahoon Co., 282 P. 273, 48 Idaho 254 Ky.—U. S. Fidelity & Guaranty Co v Albert, 58 S.W.(2d) 644, 243 Ky 375.

55. Vella v. U. S Fidelity & Guaranty Co., 281 N.Y.S. 17, 245 App. Div 339.

56. Gilmer v Allen, 9 Ga. 203—6 C.J. p 413 note 67

57. Garnett v. Roper, 10 Ala. 842— 6 C.J. p 413 note 68

58. Garnett v. Roper, supra.

59. Maldonado & Co. v United States Fidelity & Guaranty Co., 167 N.Y.S. 197, 179 App.Div. 817

60. Reiss v. Pfeiffer, 103 N.Y.S. 473, 117 App Div 880.

61. Martin v. Donaldson, 5 Ky.L. 253 —6 C.J. p 413 note 72.

62. Flegel v. Koss, 33 P. 847, 47 Or. 366.

been a breach of the conditions in the bond.[63] For example, in an action on a claimant's bond conditioned that in an action thereon, to be commenced within a certain time, he will establish that he is the owner of the property, or, failing therein, will pay to plaintiff the value thereof, the sole issue is as to the ownership of such property.[64]

In accordance with the general rules of proof in civil cases, proof may be made of any matter within the issues. Accordingly, where the issue is whether claimant shall be liable on his bond for the entire value of the property or to the extent of the creditor's claim, he may prove that he has a right to the property seized as between himself and the owner, so as to limit his liability to the amount of the attaching creditor's claim.[65]

§ 386. —— Evidence in General

In actions of this character the party having the affirmative of an issue has the burden of proving it.

As in other civil actions, in an action on a claimant's bond the burden of proof rests on the party having the affirmative of an issue. Accordingly, in an action on a bond conditioned that claimant will establish that he is the owner of the property or will pay the value thereof, the burden of proof as to ownership is on defendant.[66]

Where the complaint alleged that defendant gave plaintiff a bond conditioned "to pay the value of the property . . . to wit," a certain sum, and the allegation was not denied, it was not necessary for plaintiff to offer any proof on the subject.[67]

§ 387. —— Admissibility of Evidence

The principles determining the admissibility of evidence in actions on bonds given by third persons claiming attached property have been those applicable to civil actions generally and have been discussed in the title Evidence. For future cases, if any, arising under the statutes presenting rules not falling within the general rules, consult Pocket Parts under this section number.

§ 388. —— Weight and Sufficiency of Evidence

The party having the burden of proving an issue must sustain it by a preponderance of evidence.

The party having the burden of proving an issue in an action on a claimant's bond must prove it by a preponderance of the evidence, and if the proof on the issue is evenly balanced, he is not entitled to recover thereon.[68] The judgment recovered in the main action is no evidence of the value of the property in an action on the claimant's bond, and such value must be established independently of the judgment.[69] A recital in a forthcoming bond that the principal obligor claims the property is not evidence that a claim has actually been made, but only that the obligor intended to make it.[70] Where a claim was dismissed for failure to file the required affidavit, mere proof by plaintiff, in an action on the claimant's bond, that the property was not forthcoming is insufficient to show a breach of the condition, it being necessary to show that claimant was not entitled to the property.[71] Evidence showing refusal of claimant to deliver the property after the failure of his claim is sufficient to fix his liability,[72] and a return of nulla bona on an execution against attachment defendant is sufficient to render sureties on the bond liable.[73] Where under the statute the sheriff must evaluate the property, a valuation by him that it was more than plaintiff's claim presumptively entitled plaintiff to judgment without other proof of value.[74]

§ 389. —— Trial

Questions of fact should, where there is a jury trial, be submitted to the jury under proper instructions from the court.

In keeping with the general rules governing civil actions, in an action on claimant's bond, questions of law are for the court to decide, while questions of fact are for the jury. Accordingly, where the evidence is conflicting, the court should not direct the verdict, but should submit the issue to the jury under proper instructions.[75] Where all the testimony in an action on a replevin bond by one claiming the

63. Ga.—O'Neil Mfg. Co. v. Harris, 56 S.E. 739, 127 Ga. 641—Rowland v. Page, 61 S.E. 148, 4 Ga.App. 269 N.H.—King v. Brown, 101 A. 627, 78 N.H. 470.

64. Bramble v. Kellogg, 195 N.W. 665, 225 Mich. 80—6 C.J. p. 413 note 73.

65. Loosemore v. Baker, 166 P. 26, 175 Cal. 420

66. Bramble v. Kellogg, 195 N.W. 665, 225 Mich. 80—6 C.J. p. 414 note 74.

67. Goldstein v. Goldman, 77 N.Y.S. 699, 74 App.Div. 356

68. Bramble v. Kellogg, 195 N.W. 665, 225 Mich. 80
Evidence held to indicate fraud.—Bramble v. Kellogg, 195 N.W. 665, 225 Mich. 80
Return of executions unsatisfied made a prima facie case against a surety sued for breach of a replevin bond.—Sparkman v. Miller-Cahoon Co., 282 P. 273, 48 Idaho 254

69. Bruck v. Feiner, 56 N.Y.S. 1025, 26 Misc. 724.

70. McFarland v. Lee, 73 S.E. 1091, 10 Ga.App. 698.

71. Holloway v. Burroughs, etc., Co., 53 So. 952, 4 Ala.App. 630.

72. Stinson v. Hall, 54 Ga. 676—6 C.J. p. 414 note 79.

73. Emanuel v. Mann, 14 La.Ann. 53

74. Bolin Tool Co. v. Jernigan, (Tex.Civ.App.) 50 S.W.(2d) 397.

75. Bramble v. Kellogg, 195 N.W. 665, 225 Mich. 80.

property under attachment related to the question of title to the property at the time when the attachment was levied, an instruction that the burden of proof was on defendants to show title to the property replevied, etc., was not objectionable on the ground that it should have limited the inquiry as to defendants' title to the time when the attachment was levied.[76]

§ 390. —— Judgment

Judgment may be entered for the amount of the debt where it is less than the value of the property.

Although, as will be discussed in § 392, the damages recoverable in an action on claimant's bond are limited to the value of the property, it has been held to be immaterial that the judgment was for the amount of the debt instead of for the value of the property, where the debt was less than such value.[77] Where under the bond claimant has the right to return the property to the sheriff to abide the decree of the court or become liable for its value, the rendering of a decree on the bond for its penalty without a finding as to the value of the property is error.[78]

The judgment for plaintiff, in a suit on defendant's replevy bond, should provide for its satisfaction by a return of the property attached, unless it is manifest from the wording of the bond that the intention was to substitute personal liability of the sureties; and a surety on the bond may insist on the right to return the property if the principal joins in the demand. A tender of the property replevied from an attachment levied by the sheriff must be made to the sheriff, a tender to plaintiff in attachment not being sufficient.[79]

§ 391. —— Appeal and Error

General rules as to appeals and proceedings in error apply.

Ordinarily, appeals in actions of this character are governed by the usual rules as to appeal and proceedings in error in civil cases generally, as discussed in the title Appeal and Error. Accordingly, the appellate court will interpret the evidence in the most favorable light, in support of the judgment rendered by the trial court and the findings of fact either made by it or necessarily implied to support the judgment.[80] Likewise, the amount of recovery will not be reviewed where the motion for new trial did not assign that the judgment was excessive.[81]

§ 392. —— Damages

The liability on a claimant's bond is limited by the terms of the bond and the value of the attached property released thereunder.

Liability on the bond must, of course, be measured by the terms of the bond,[82] and the recovery thereon cannot exceed the amount named therein,[83] and is also, as a rule, limited to the value of the property delivered to claimant, with interest[84] and costs.[85] Likewise, where the value of the property taken exceeds the amount of the creditor's claim, the damages should be limited to the amount of the claim,[86] except where the sheriff had taken the property from the owner and is responsible over to the owner for the excess in value of the property above the amount due the creditor, in which case recovery for the full value of the property is proper.[87] The foregoing is true regardless of the amount of the judgment recovered in the attachment suit,[88] or of the fact that there are several attaching creditors.[89]

In regard to the items for which recovery may be had, it has been held that plaintiff may recover damages for the loss of the use of such property during the time it was in the intervener's possession,[90] and for deterioration in the value of the property while in claimant's possession.[91] Where personal property and money were attached and where the property was released to claimant on his giving bond, but

76. Fabian v. Traeger, 74 N.E. 131, 215 Ill. 220, affirming 117 Ill.App. 176

77. Cobb v. Campbell, 38 S.W. 246, 14 Tex.Civ.App. 433

78. Mercantile Acceptance Corporation v. Hedgepeth, 112 So. 872, 147 Miss. 717.

79. Massachusetts Bonding Co. v. McLemore, 4 Tenn.Civ.App. 633

80. Concrete Machinery & Supply Co. v. Waara, (Ariz.) 27 P.(2d) 682

81. Spickard v. Continental Casualty Co., (Mo.App.) 64 S.W.(2d) 734

82. Sloan v. Young, 284 P. 131, 86 Mont. 414.

83. Ehrlich v. Rinzler, 119 N.Y.S. 344, 65 Misc. 15—6 C.J. p. 414 note 87.

84. Ariz.—Concrete Machinery & Supply Co. v. Waara, 27 P.(2d) 682
Idaho—Sparkman v. Miller-Cahoon Co., 282 P. 273, 48 Idaho 254.
6 C.J. p. 414 note 88.

Value of whole

Where attached property has been released under a replevin bond, plaintiff in attachment is entitled to have all the property taken under the replevin bond returned, or if it cannot be returned then to have a judgment for the value of the whole, and is not bound to accept part, but, if he does so, its value must be deducted.—Riverside Portland Cement Co. v. Taft, 221 P. 357, 192 Cal. 643.

85. Robertson v. Patterson, 17 Ala. 407—6 C.J. p. 415 note 89

86. Ala.—Maas v. Long, 70 Ala. 237
Tex.—Wallace v. Terry, (App.) 15 S.W. 35.

87. Loosemore v. Baker, 166 P. 26, 175 Cal. 420

88. Ala.—Jaffray v. Smith, 17 So. 218, 106 Ala. 112
N.Y.—Bruck v. Feiner, 56 N.Y.S. 1025, 26 Misc. 724

89. Blankenship v. Thurman, 5 S.W. 836, 68 Tex. 671—6 C.J. p. 415 note 91.

90. Botts v. Nichols, 7 La.Ann. 263

91. Frost v. Gibson, 59 Ga. 600
In Tennessee, the judgment should allow return of property in as good

where the money was not discharged from the attachment, in an action against the sureties on claimant's bond, the sureties are entitled to have the amount of money so attached applied in reduction of damages against them.[92] Where attachment plaintiff intermeddled with the property released on claimant's bond so as to divert a portion of it from the control of the sureties, the sureties, in an action against them, are entitled to credit on the bond for the amount diverted.[93] A sum which claimant has paid to the attachment debtor in lieu of the latter's exemption cannot be considered in fixing the amount of the liability on his bond.[94]

Nominal damages. Where there has been a breach of the conditions of the bond, plaintiff is entitled to recover nominal damages, although no actual damages are proved.[95]

C. RECOVERY OF DAMAGES FOR DISPOSSESSION

§ 393. Right to Recover

One who owns, or who is entitled to possession of, property which is attached in an action against another may recover damages sustained by his dispossession.

Since, as already pointed out in § 339, the right to intervene is merely a cumulative and not an exclusive remedy, where an attachment is levied on property of which a person other than defendant in attachment is the owner or entitled to possession, such person has a right of action for the damages which he has sustained by reason of the resulting dispossession,[96] whether or not he had previously intervened in the action.[97] This right is not affected by the fact that the property was in the possession of defendant in attachment at the time of the seizure,[98] that the owner of the property came into possession under a fraudulent sale, such sale not being connected with the grounds of attachment,[99] that the owner of the goods which were mixed with those of defendant in attachment refused to designate his share;[1] that the property was sold subsequent to the wrongful seizure thereof;[2] that plaintiff accepted the proceeds of the property when sold,[3] that there has been a rendition of judgment in the attachment suit,[4] that the owner intervened as claimant in the attachment suit and recovered judgment in the intervention,[5] that there was a rendition of judgment in the claim suit adverse to claimant;[6] or that attachment plaintiff, by amendment of his petition, has brought the owner into the attachment suit as a party.[7]

A lessee whose rights were not disturbed by the attachment,[8] or the holder of a laborer's lien on the property,[9] has been held to have no right to damages

condition as when replevied, less ordinary depreciation, and the bondsmen are liable for any other deterioration—Massachusetts Bonding Co. v McLemore, 4 Tenn Civ A. 633.

92. Riverside Portland Cement Co v. Taft, 221 P 357, 192 Cal 643

93. Riverside Portland Cement Co v. Taft, supra

94. Jaffray v. Smith, 17 So 218, 106 Ala 112

95. Spickard v Continental Casualty Co, (Mo App) 64 S W (2d) 734

96. Ala—Bell v. Seals Piano & Organ Co, 78 So 806, 201 Ala 423
Colo—Poundstone v. Holt, 37 P. 35, 5 Colo App 66
Ky—Crawford v. Staples, 212 S W. 113, 187 Ky 477—Fite v. Briedenback, 105 S W. 1182, 127 Ky 504, 32 Ky L 1283.
N.C—Tatham v De Hart, 112 S E 430, 183 N C. 657
Okl—Keystone Pipe & Supply Co v. Crabtree, 50 P (2d) 1086
Tenn—So Knoxville Contracting & Const Co v Brakebill & Hamilton, 10 Tenn App 325
Tex.—Sereno v Triggo, (Com App) 1 S W (2d) 607, affirming Stevens v Triggo, (Civ App) 296 S.W. 979
6 C J p 415 notes 95, 96

Proximate cause of injury

Where plaintiff, under the statute, had the right to a lien for materials furnished, and the exclusive right of attachment, defendant's attachment suit which deprived plaintiff of both his rights, leaving his debt unpaid, was the proximate cause of his injury—California Trojan Powder Co v. Wadhams & Co, 166 P. 759, 85 Or 307.

97. Mont—O'Brien v. Quinn, 90 P 166, 35 Mont. 441
N C—Flowers v Spears, 130 S E 710, 190 N C. 747—Tatham v. De Hart, 112 S E 430, 183 N C 657
Pa—Siegel v Netherlands Co, 59 Pa Super 132.

98. Hillman v. Griffin, 59 P 194, 696, 6 Cal Unrep Cas 354

99. Moore v. Pope, 27 La Ann. 254

1. Barnes v Darby, 44 S W 1029, 18 Tex Civ App. 468

2. Ala—Ellis v. Allen, 2 So. 676, 80 Ala 515.
Mass—Holly v Huggeford, 8 Pick 73, 19 Am D 303.
6 C J p 416 note 1.

3. Mo.—Franke v. Eby, 50 Mo App 579
S C—First Nat Bank v. H L. & L F McSwain, 75 S E. 1106, 93 S C 30.

Theory

Where attached property is ordered sold as perishable and the intervener accepts the proceeds of the sale, he had no privilege to elect his remedy, not having full freedom of choice, and he may sue for damages sustained by the attachment.—Franke v Eby, 50 Mo App 579

4. Juilliard v. May, 22 N E 477, 130 Ill 87—Samuel v. Agnew, 80 Ill 553

5. Clark v Brott, 71 Mo 473, following Perrin v Claflin, 11 Mo. 13—6 C J p 416 note 3

6. Louisville, etc, R Co v. Brinkerhoff, 24 So 892, 119 Ala. 606.

Reversed on appeal

The owner of property which was unlawfully seized under an order of attachment and levy thereon in an action against a third person was entitled to recover from plaintiff in attachment causing such seizure, notwithstanding that plaintiff in attachment obtained judgment in the trial court validating the attachment which was reversed on appeal—Eureka Dry Cleaners v. Stone Brothers & Shrout, 86 S W.(2d) 1032, 261 Ky. 15

7. Dimsdale v. Tolerton-Warfield Co, 131 N W. 689, 151 Iowa 425—6 C J p 416 note 5

8. Schulte v Republic Supply Co, (Tex Civ App) 297 S W 667.

9. Higginbotham-Bailey-Logan Co.

for wrongful seizure and conversion. On the other hand, it has been held that a mortgagee having possession of specific mortgaged property, which was taken under an attachment against another, had a right of action for interference with his possession [10]

Malice and want of probable cause in issuing and levying the writ are not necessary elements in an action of this character, at least where the owner is in possession of the property and there was nothing about it which indicated ownership in attachment defendant.[11]

Notice of contemplated sale. A person whose property has been attached as that of another is under no legal duty to inform attachment plaintiff that he had contracted for the sale of the attached property, particularly where plaintiff knew that he had sold, or was preparing to sell, the property.[12]

§ 394. Persons Liable

Any person responsible for an attachment invading the rights of a third person is liable in damages therefor.

In general, one who is injured by a wrongful attachment may claim entire compensation from any one of several tort-feasors participating in the wrongful act, and one who is injured by reason of a wrongful attachment has the election to pursue jointly or severally all who aided in, or advised or procured, or accepted benefits resulting from, the trespass,[13] including anyone who was present and assisted in the illegal act.[14]

§ 395. —— Levying Officer

The levying officer is always liable for his own wrongful act in seizing, under any process, the property of a person other than the one against whom the process is directed. This general liability, which is the same in the case of attachment as in the case of any other process, is discussed in the title Sheriffs and Constables § 68 [57 C.J. p 827 note 67–p 833 note 42].

§ 396. —— Attaching Creditor

An attaching creditor is generally not liable for the seizure of another's than the debtor's property, unless he directed or consented thereto, or, with knowledge of the wrong, ratified it.

While an attaching creditor may be held liable, jointly with the levying officer[15] and independently of any bond,[16] for a wrongful seizure, under the

v Bellah, (Tex Civ App) 79 S W (2d) 907.

Suit not timely

Under a statute providing that a laborer holding a lien on property shall have six months within which to bring suit to foreclose the lien, a holder of a laborer's lien cannot maintain conversion against an attachment creditor on the theory that, on conversion caused by the attachment, the six months' limitation did not apply but that the general two-year period was applicable, at least where the alleged conversion did not take place until more than six months after the filing of the laborer's lien—Higginbotham-Bailey-Logan Co v. Bellah, (Tex Civ App) 79 S W (2d) 907.

10. Poundstone v. Maben, 37 P. 37, 5 Colo App 70—Poundstone v. Holt, 37 P. 35, 5 Colo App 66.

Second mortgagees of personal property may sue one who wrongfully attaches the property and interferes with their security and diminishes the value thereof—Taylor v Hines, 31 Mo App 622

11. Ill—First State Bank of Pond Creek, Okl. v. Clark, 202 Ill App 283.
N M—Marron v. Barton, 285 P. 502, 34 N M 516.
Pa—Siegel v. Netherlands Co., 59 Pa Super 132.

"We feel that the question of malice and probable cause are wholly foreign to this case and they can only be considered when, through the very nature of the proceedings, it is necessary to inquire into the motives of persons who cause a writ to be issued or a proceeding to be instituted Where one is in possession and enjoyment of his property and another intermeddles with it, why should it be necessary for him to show that the intermeddler was actuated by malice and had no reason to thus intermeddle with his goods? Why should the facts in this case be treated any differently than an ordinary trespass case where a person willfully enters the land of another and commits a depredation thereon? Malice and probable cause need not be shown to support a recovery in an action of trespass. It must be remembered, that the articles in question were not in the possession of the defendant in the attachment, they were not intermingled with his goods, there was nothing about them which indicated any apparent ownership in him, and where goods are so situated a different question would arise. When property is in ownership and possession of a third person, this condition gives notice to the sheriff and to those dealing with him that in seizing the goods as the property of another they act at their peril The owner has done everything that he could to label the goods with the badge of ownership The sheriff and those acting with him cannot protect themselves under a writ which gives them no authority to act in the premises"—Siegel v Netherlands Co, 59 Pa Super 132, 138.

12. Rosenberg v. Stone, 168 S.E. 486, 160 Va. 381.

13. Vandiver v. Pollak, 19 So. 180, 107 Ala 547, 54 Am.S R. 118.

Option

The wrongful seizure of the property of one person under legal process directed against another amounts to a conversion, for which action may be maintained against the officer who makes the seizure, or against the person who directed the officer to act—Western Bond & Mortgage Co v Chester, Sheriff, 259 P 13, 145 Wash. 81.

Joint trespassers

Where a creditor sues out a writ of attachment and others become sureties on a bond to indemnify the sheriff, if he seizes property not subject to attachment, the creditor, sureties, and sheriff become joint trespassers—Sparkman v. Swift, 8 So 160, 81 Ala 231—Screws v. Watson, 48 Ala. 628

14. Cheek v. Odom, 100 So. 782, 20 Ala App. 31.

15. Minn—Northern Rock Island Plow Co v. Hackett-Gates-Hurty Co., 206 N W 446, 165 Minn 282.
N C—Core v W T McCoy & Co, 167 S E 385, 204 N C 118
Wash—Western Bond & Mortgage Co. v. Chester, 259 P. 13, 145 Wash. 81
6 C J. p 416 note 7.

16. N M—Murry v. Belmore, 154 P. 705, 21 N M 313.
N.C—Core v. W T McCoy & Co., 167 S E 385, 204 N.C. 118.
6 C J. p 416 note 8.

attachment, of property of a person other than defendant in attachment,[17] such liability is confined to cases in which he counseled, directed, or consented to the illegal act of the levying officer,[18] or actively participated therein,[19] or, knowing that the acts of the officer were wrongful or irregular, adopted, ratified, or confirmed them,[20] and for a wrongful seizure with which the attaching creditor was not so connected he cannot be held liable,[21] but the injured person must seek his redress solely against the levying officer and the sureties on his bond. In accordance with this rule, it has been held that one who would avoid responsibility for a levy on property of a third person, when knowledge of the wrongful act is brought to his attention, should make known his disapprobation thereof; otherwise he will be held to have ratified it.[22] The mere appropriation of the proceeds of the sale of the property by plaintiff in attachment, when turned over to him by the officer levying the writ, in the absence of evidence showing a knowledge on his part of the tortious character of the seizure and sale of the property by such officer, is not sufficient to show ratification of the officer's wrongful act,[23] although, if plaintiff, with knowledge of the true ownership of the goods, receives the proceeds of the sale, he thereby ratifies the wrongful levy.[24]

§ 397. —— Sureties on Attachment Bond

Sureties on an attachment bond conditioned to pay all damages sustained by defendant are not liable to third persons whose property has been seized under the writ, but, under a bond conditioned in terms broad enough to include such persons, they may be liable to third persons in actions of this character.

Since the liability of sureties on an attachment bond is created by, and rests solely on, the stipulations of the bond,[25] the sureties on an attachment bond, conditioned to pay all damages which may be sustained by defendant, cannot ordinarily be held liable for a trespass committed to the property of a third person,[26] even though their principal ratified

17. Core v. W. T McCoy & Co, supra—6 C J p 416 note 9.

Acts constituting seizure

Where a sheriff in levying an attachment enters defendant's store, demands his key, tells him to take his cash and get out, follows him out and locks the door, such act constitutes a seizure, rendering attaching plaintiff liable for anything unlawfully taken—Schwartzberg v Central Ave State Bank, 115 P. 110, 84 Kan 581.

18. Ala—Screws v. Watson, 48 Ala. 628
Ark—Webb v. Van Vleet-Mansfield Drug Co., 179 S W. 357, 120 Ark. 236
Ind—Butler v. Borders, 6 Blackf 160
Kan.—Bratton v. McReynolds, 266 P 31, 125 Kan 665.
Md—Corner v. Mackintosh, 48 Md 374.
Mich—Tomkovich v. Mistevich, 192 N W. 639, 222 Mich 425.
Miss—Jamison v. Wilson, 119 So 800, 152 Miss. 382
Mo—Klie v Wellman, 175 S W 267, 189 Mo App 601—Kreher v Mason, 25 Mo App. 291
N M.—Murry v. Belmore, 154 P. 705, 21 N M 313.
N Y—Wehle v. Butler, 61 N Y 245
N C—Core v. W. T McCoy & Co, 167 S.E 385, 204 N C 118
Okl—Frick-Reid Supply Co v. Hunter, 148 P 83, 47 Okl. 151—Stump v. Porter, 120 P 639, 31 Okl 157.
Wash—Western Bond & Mortgage Co. v. Chester, 259 P. 13, 145 Wash 31.
6 C J. p 417 note 10.

Client has been held not to be liable for the act of his attorney in directing the levy of an attachment on the property of a third person—Guilfoyle v. Seeman, 58 N Y S 668, 41 App Div. 516—6 C J. p 417 note 10 [a]

19. Frick-Reid Supply Co v. Hunter, 148 P 83, 47 Okl 151—Stump v. Porter, 120 P. 639, 31 Okl 157.

Act of participation

Where attaching plaintiff purchased at a sale a part of the property wrongfully levied on, there was such a participation as to render him liable as a trespasser.—Deal v. Bogue, 20 Pa. 228, 57 Am D 702.

20. U S—Lovejoy v. Murray, (Iowa) 3 Wall 1.
Colo—Riethmann v. Godsman, 46 P 684, 23 Colo 202
Neb—Walker v Wonderlick, 50 N W 445, 39 Neb 504
N M—Murry v. Belmore, 154 P. 705, 21 N M 313
N C—Core v. W T McCoy & Co, 167 S E 385, 204 N C. 118.
Okl—Stump v. Porter, 120 P. 639, 31 Okl 157.
6 C J p 417 note 11.

Act of ratification

(1) Where property is wrongfully attached, and plaintiff, being aware of the wrongful attachment, refuses to release it on demand, he ratifies the wrongful levy—Cole v. Edwards, 72 N W 1045, 53 Neb. 711.

(2) When the attaching creditor for whose benefit the seizure was made not only refuses to surrender it, but, by answer to the suit to recover the property asserts it to be the property of the debtor, the ratification of the levy is complete—Herrman v. Gilbert, 8 Hun (N.Y.) 253.

Defending unlawful act

Where plaintiff in attachment, after an unlawful levy on a third person's property with knowledge of the facts, defends the wrongful act, he is liable as an original wrongdoer—Frick-Reid Supply Co. v. Hunter, 148 P. 83, 47 Okl 151.

21. Core v W T McCoy & Co, 167 S E 385, 204 N C. 118—6 C J. p 417 note 12

22. Frick-Reid Supply Co v. Hunter, 148 P 83, 47 Okl 151

23. Walker v. Norris, 63 So. 935, 10 Ala App 515.

24. Omaha Nat Bank v Robinson, 77 N.W 73, 56 Neb. 590—6 C.J. p 417 note 11 [d].

25. McGinley v. Maryland Casualty Co of Baltimore, 277 P. 414, 85 Mont. 1.

28. Ark—Maloney v. Jones-Wise Commission Co, 174 S W. 239, 117 Ark 130
Ind—Summerland v. Automobile Funding Co, 148 N E 202, 84 Ind App 30
Iowa—Thielen v. Schechinger, 230 N W 516, 210 Iowa 234
Mich—Tomkovich v. Mistevich, 192 N W 639, 222 Mich. 425
Miss—Jamison v Wilson, 119 So 800, 152 Miss 382
Mont—McGinley v Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1
6 C J p 417 note 14, p 504 note 61

Levy on partnership's goods for debt of individual

Where an attachment in an action against an individual is levied on the property of a partnership of which he is a member, there is no liability on the bond for such wrongful at-

the tort of the attaching officer.[27] Although it has been held that the sureties are not liable to a third person, whose property has been wrongfully attached, under a bond conditioned to pay all damages sustained by any person by reason of the suing out of the attachment,[28] it has also been held that the sureties are liable to such third persons under a bond so conditioned,[29] and where the statute requires a bond running in favor of others who may be injured by the attachment, this provision, although omitted, will be read into the bond, so that a stranger thereto, injured by the attachment, may maintain an action thereon.[30] In support of the rule permitting recovery against the sureties on such a bond, it has been said that to construe the words "suing out of said attachment" to relate only to the initial proceedings, the filing, docketing, and issue of the papers, so that only those then interested could have recourse against the bond, would give no meaning to the words "other persons interested in these proceedings," as there is no one except plaintiff interested in an attachment until there has been a levy or seizure of property under it.[31]

The liability of the obligors on an indemnity bond, given to secure the sheriff against loss arising from the claims of third persons, is discussed in the title Sheriffs and Constables §§ 137–143 [57 C J. p 926 note 27–p 932 note 95].

§ 398. Actions

A demand is not in all cases a condition precedent to an action.

Where plaintiff in attachment caused a writ of attachment to issue and be put in the hands of the sheriff, who seized property not in the possession of defendant in attachment and sold it on execution, and where plaintiff in attachment bid in the property at the sale and retained it, a conversion of the property took place, and a demand for a return of the property is unnecessary.[32]

§ 399. —— Nature and Form of Remedy

In the absence of a statute to the contrary, the common-law remedies may be availed of.

A person whose property has been attached in a suit to which he is not a party may resort to the common-law remedies for the damages inflicted by the seizure,[33] and, in the absence of a statute to the contrary, such a person may disregard the attachment bond and sue in tort.[34] Accordingly, trespass[35] or trover,[36] if there has been a taking of actual possession,[37] is a proper form of action to recover damages for the wrongful seizure of one's property under a writ of attachment directed against another.

Actions of this character are not actions for distraining a chattel.[38]

tachment—Tomkovich v. Mistevich, 192 N W 639, 222 Mich 425

Obligor's undertaking

The undertaking of the obligor on the bond is that the attachment is properly sued out, and that the claim of attaching plaintiff is well founded, but not that the attaching officer will commit no trespass—Davis v Commonwealth, 13 Gratt (54 Va) 139.

27. J H Walker & Co v. Norris, 63 So 935, 10 Ala App. 515

28. Davis v. Commonwealth, 13 Gratt (54 Va) 139

29. Ill—McKinstry v. Bras, 180 Ill App 648
Md—L J Appel Sons v State, to Use of Townsend, 175 A. 850
6 C J. p 417 note 15

Garnishees

(1) Where a bond is conditioned to pay all damages that may accrue to defendant or any garnishee, defendant may maintain an action thereon to the use of any garnishee who has been damaged—Barnes v Webster, 16 Mo 258, 87 Am D 232—6 C J. p 502 note 44

(2) The rule is otherwise where attachment defendant is the only obligee named in the bond—Rothermel v Marr, 98 Pa 285

Under a condition to "pay all damages and costs that may accrue to any defendant, garnishee or interpleader by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon," a surety on the bond was liable in an independent action to a successful interpleader who claimed the property—State v American Surety Co, (Mo App) 74 S W (2d) 1094—State v East Joplin Lumber Co, 70 Mo App 663

30. Omaha Nat Bank v U S Fidelity & Guaranty Co., 244 Ill App 204

31. L J Appel Sons v. State, (Md) 175 A. 850

32. Northern Rock Island Plow Co v Hackett-Gates-Hurty Co, 206 N W 446, 165 Minn 282

33. Bassham v. Evans, (Tex Civ App) 216 S.W 446

34. Ill—First State Bank of Pond Creek, Okl, v Clark, 202 Ill App 283
Ky—Crawford v Staples, 212 S W 119, 184 Ky 477
N M—Marron v. Barton, 285 P. 502, 34 N M 516.

35. Ill—First State Bank of Pond Creek, Okl. v. Clark, 202 Ill App 283
Pa—Siegel v Netherlands Co., 59 Pa Super 132.
6 C J p 417 note 16.

Knowledge of claim

An action for trespass vi et armis may be maintained by one whose property has been wrongfully seized in an attachment suit pending between other parties, where plaintiff in the attachment suit knows that the property is owned or claimed by plaintiff, or where he directs the officer to seize the property, or executes an indemnity bond—Bruce v. Crysler, (Mo App) 217 S W. 563

36. Worthington v Hanna, 23 Mich 530—6 C J. p 417 note 17.

37. Schulte v Republic Supply Co, (Tex Civ App) 297 S W. 667.

Disturbance of operation

Levy under an attachment writ on drilling equipment did not constitute conversion against the owner's lessee, where operation was not disturbed—Schulte v. Republic Supply Co, (Tex Civ App) 297 S.W 667

38. P. F. Scheidelman & Sons v. Webster Basket Co, 257 N Y S 552, 143 Misc 836, affirmed 259 N Y S 963, 236 App Div. 774.

§ 400. —— Defenses

Matters which defeat plaintiff's right to recover constitute a defense in actions of this character.

As in other civil actions, any fact or state of facts that may be set up to defeat the cause of action constitutes a defense. Accordingly, the absence of injury may be set up as a defense.[39] It also is a defense to an attaching creditor that plaintiff's claim is invalid and rests on a fraudulent transfer of the property by the debtor,[40] unless the vacating of the attachment has precluded defendant from justifying under it,[41] or attachment defendant pleads in recoupment and recovers therefor, in which case attachment plaintiff cannot, in an action by a third person for wrongful attachment, plead in justification that a sale to plaintiff was in fraud of creditors.[42] On the other hand, the fact that defendant had reason to believe that the property belonged to his debtor instead of to plaintiff is not a defense to an action to recover the value of the property,[43] nor is it a defense that plaintiff might have given a claim bond and have had a trial of the right of property in the goods attached, since plaintiff had a right to allow the property to be carried away, and, if the levy were wrongful, to bring an action for damages.[44] Also, it is not a defense that the petition of intervention was not filed until after the final judgment in the attachment suit.[45] In trover for levying an attachment against a husband on property of the wife, it is no defense that the husband authorized the levy.[46] Where several creditors seized property by attachment, one of such creditors may be sued for the attachment, and he cannot defend by setting up that the other creditors were also liable for the trespass.[47]

Where punitive damages are sought, defendant may set up in defense that a judgment finding for plaintiff in a claim case arising from the attachment was erroneous, such judgment being conclusive in so far as title is concerned but not on the question of malice or lack of probable cause.[48]

§ 401. —— Parties

Plaintiff may sue one or all persons jointly and severally liable to him.

The attaching creditor and the levying officer being both jointly and severally liable for the wrongful seizure, it is not necessary to join the officer as a party defendant in an action against the creditor.[49] So, also, where there were several attaching creditors, the owner of the property seized may sue one without joining the others,[50] or he may sue all.[51]

§ 402. —— Pleading

a. Complaint, declaration, or petition
b Plea or answer
c. Issues, proof, and variance

a. Complaint, Declaration, or Petition

It is usually sufficient for plaintiff to state in his initial pleadings that the property attached as that of another was his, that the attachment was wrongful, and that damage resulted to him therefrom.

As in other civil actions, plaintiff's complaint, declaration, or petition to be sufficient must contain facts upon which he relies sufficient to state a cause of action. To do this he usually need allege only that the property seized was his, that the attachment was wrongful, and that damage resulted to him therefrom. In general, the complaint, declaration, or petition in an action for the seizure of property under an attachment against another person need allege only that the attachment was wrongful, and the resulting damage.[52]

38. Riggle v. Jackson, 296 P. 889, 112 Cal App. 428.

Plaintiff already compensated

Where parties furnishing personalty for plaintiff's use had compensated plaintiff for damages sustained by delay caused by attachments, as they were required to do under contract, plaintiff could not recover for alleged wrongful attachments.—Riggle v Jackson, 296 P. 889, 112 Cal App. 428

Redelivery of goods

In an action by an administrator to recover the value of goods belonging to the estate, which were levied on by defendants as the property of another, an answer that, on the demand and bond of the special administrator, the goods were delivered to him, that the estate received the goods uninjured, that they were sold under orders of the probate court, and that the estate got the benefit of the proceeds, states a good defense.—Pinkard v. Willis, 67 S.W. 135, 28 Tex Civ App 198

40. Hess v. Hess, 22 N E 956, 117 N Y 306—Rinchey v Stryker, 28 N Y 45, 84 Am D 324, 31 N Y 140, 26 How Pr. 75—6 C J. p 417 note 18.

41. Hess v. Hess, 22 N E 956, 117 N Y 306

42. Grisham v. Bodman, 20 So 514, 111 Ala. 194—6 C J. p 417 note 20.

43. Angell v. Hopkins, 21 P. 729, 79 Cal. 181.

44. Smith v. Kaufman, 10 So. 229, 94 Ala. 364—6 C J p 418 note 22.

45. Patton v. Madison Nat Bank, 104 S W. 264, 126 Ky 469

46. Mattingly v. Houston, 52 So 78, 167 Ala. 167.

47. Dyett v. Hyman, 29 N E 261, 129 N Y 351, 26 Am S R 533

48. Maxwell v. Speth, 72 S E 292, 9 Ga App 745.

49. Dyett v Hyman, 29 N E 261, 129 N Y. 351, 26 Am S R 533, affirming 13 N Y S. 895—6 C J. p 418 note 27.

50. Dyett v. Hyman, supra.—Wehle v. Butler, 61 N Y. 245

51. Wehle v. Butler, supra.

52. Gustafson v. Byers, 288 P 111, 105 Cal.App 584—6 C.J. p 418 note 30.

Petitions held sufficient.—Gustaf-

It is sufficient to state that the seizure was wrongful,[53] without specifying the manner in which it was made[54] or stating the time of the levy,[55] or the value of the property.[56]

It is not necessary to allege that the attachment was malicious and without probable cause, nor need malice in the seizure of plaintiff's property be alleged if only actual damages are sought to be recovered.[57]

Special damages must be pleaded in order to be recoverable.[58]

b. Plea or Answer

The plea or answer to be sufficient must raise the defense relied upon by defendant

In accordance with the rules governing civil actions generally, the plea or answer to be sufficient must be sufficient to raise an issue as to any defense available. Accordingly, where such a defense is relied upon defendant must aver the existence of a debt due to him from defendant in attachment[59] and that the property was, at the time of the seizure, that of defendant in attachment,[60] and deny that such property was that of plaintiff,[61] and that defendant had notice of plaintiff's claim of ownership.[62] A defendant who was plaintiff in attachment need not, when justifying, aver the ground on which the attachment was issued, or set out the return of the writ.[63]

A general denial is usually sufficient to admit any evidence that plaintiff never had a cause of action either as to all of the property involved, or as to any part thereof; but it is not sufficient to raise a special defense.[64]

c. Issues, Proof, and Variance

The issues are confined to those raised by the pleadings, and the proof is confined to matters arising under the issues.

As in other civil actions, the issues in an action of this character are confined to those raised by the pleadings, which are the existence of the cause of action and defenses thereto. Other matters are not in issue. Accordingly, the existence or nonexistence of grounds for the issuance of a writ of attachment,[65] or probable cause for suing out the writ,[66] or of malice in connection therewith,[67] is entirely foreign to the question of liability for seizure and conversion, under the guise of an attachment, of property of a person other than the attachment defendant. So also a judgment sustaining the attachment has no bearing on the question whether the levy was wrongful as to a third person.[68]

Plaintiff may ordinarily show that defendant knew of his claim to the property,[69] and, where the good faith of such claim is attacked, that the claim was bona fide.[70] Plaintiff may also introduce evidence showing the damages sustained by him because of the wrongful levy on his property,[71] and the cost price of the property, while

son v. Byers, 288 P. 111, 105 Cal.App. 584—First State Bank of Pond Creek, Okl. v. Clark, 202 Ill.App. 283—Wade v. Winstanley, 230 S.W. 353, 207 Mo.App. 129—National Bond & Investment Co. v. McCoy, (Tex.Civ.App.) 263 S.W. 1089.

Sheriff's jury finding insufficient

In an action on a bond given to cover a fund held by a sheriff, but claimed in attachment suit by plaintiff, allegations in the complaint that the sheriff's jury found that the deposit belonged to claimant were insufficient to present the fact that plaintiff was owner of and entitled to the possession of the fund.—Anderson v. Fidelity & Deposit Co. of Maryland, 177 N.Y.S. 272, 188 App.Div. 626.

53. Richardson v. Hall, 21 Md. 399.

54. Richardson v. Hall, supra.

55. Richardson v. Hall, supra.

56. Richardson v. Hall, supra.

57. First State Bank of Pond Creek, Okl. v. Clark, 202 Ill.App. 283—6 C.J. p. 418 notes 35, 36.

58. Okl.—First Nat. Bank of Mounds v. Cox, 198 P. 579, 82 Okl. 129.

Utah.—Adair v. James M. Peterson Bank, 211 P. 683, 61 Utah 159.

6 C.J. p. 418 note 37.

Attorney's fees

Attorney's fees are special damages which must be pleaded.—Adair v. James M. Peterson Bank, 211 P. 683, 61 Utah 159.

59. Deitsch v. Wiggins, 1 Colo. 299.—6 C.J. p. 418 note 39.

60. Md.—Richardson v. Hall, 21 Md. 399.

Wis.—Adler v. Cole, 12 Wis. 188.

61. Richardson v. Hall, 21 Md. 399.

62. Mattingly v. Houston, 52 So. 78, 167 Ala. 167.

63. Berry v. Hart, 1 Colo. 246.

64. State ex rel. and to Use of Kibble v. First Nat. Bank, (Mo.App.) 22 S.W.(2d) 185.

65. Central Coffee, etc., Co. v. Welborn, 134 S.W. 2, 153 Mo.App. 647.

66. Speth v. Maxwell, 65 S.E. 580, 6 Ga.App. 630.

67. Ga.—Speth v. Maxwell, 65 S.E. 580, 6 Ga.App. 630.

Tex.—Epps v. Hazlewood, 89 S.W. 809, 40 Tex.Civ.App. 325.

68. Fairbanks v. Kent, 63 P. 707, 16 Colo.App. 35.

69. New Morgan County Building & Loan Ass'n v. Plemmons, 97 So. 46, 210 Ala. 16.—6 C.J. p. 419 note 49.

Evidence held relevant

In a suit for wrongfully taking plaintiff's property under attachment against her husband, the affidavit, plaintiff's claim bond, an order quashing it on defendant's motion, and the latter's indemnifying bond were relevant to show that defendant knew that plaintiff claimed some of the property, and induced the sheriff to levy the writ on it.—New Morgan County Building & Loan Ass'n v. Plemmons, 97 So. 46, 210 Ala. 16.

70. Simis v. Hodge, 24 N.E. 1094, 121 N.Y. 671, affirming 3 N.Y.S. 228, 50 Hun 410.—6 C.J. p. 419 note 50.

71. Bess v. Reed, 278 S.W. 569, 212 Ky. 243.

Attorney's fees and use of property

Refusal to allow evidence as to attorney's fees and loss of use of property by wrongful attachment was erroneous.—Bess v. Reed, 278 S.W. 569, 212 Ky. 243.

Evidence of contract price

In action for wrongful attachment

not conclusive as to its value at the time of the seizure, may be shown to aid in arriving at the value at such time.[72] On the other hand, where special damages are not pleaded, the admission of evidence to establish special damages is error.[73]

Under the general issue defendant may show that the goods did not belong to plaintiff but belonged to attachment defendant,[74] and, under proper allegations, he may show fraud affecting himself,[75] if such fraud involves plaintiff,[76] or that it was not his intention to make an excessive levy,[77] or that no damage was sustained by plaintiff by virtue of the levy;[78] but no evidence relating to the merits of the attachment suit,[79] or as to the regularity of the proceedings therein,[80] is admissible.

In mitigation of damages defendant may show that the property wrongfully attached has been returned, or has been applied for the benefit or advantage of plaintiff with his consent, express or implied, or through legal proceedings instituted by third persons,[81] or that the owner of the attached property recovered it for less than its value.[82]

§ 403. —— Evidence

a. In general
b. Admissibility
c. Weight and sufficiency

a. In General

A party having the affirmative of an issue has the burden of proving it.

As in other civil actions, the party having the affirmative of an issue has the burden of proving it.[83] In the absence of a judicial determination of plaintiff's ownership in the attachment proceedings,[84] ordinarily plaintiff has the burden of establishing his ownership,[85] particularly where the attachment defendant was in possession of the property at the time of the levy,[86] although the placing on defendant of the burden of showing that the attachment defendant had some interest in the property has been held not to be error.[87] Likewise, plaintiff has the burden of proving injury to himself as a result of the wrongful levy on his property.[88]

In proceedings against an attaching creditor who justifies under the writ he must prove a debt from the attachment defendant to him,[89] and where he attempts to justify his action on the ground that a transfer of the property from the attachment defendant to plaintiff was fraudulent, he has the burden of proving fraud.[90]

Presumption from failure to call debtor. The failure of the attaching creditor, after having testified to the bona fides of his claim and the consideration paid therefor, to introduce the debtors who are present in court as witnesses is not a suspicious circumstance against the validity of the transaction, and does not authorize any presumption against him.[91]

on merchandise sold to another evidence regarding sale price under original contract and price received under subsequent contract was admissible to show damages sustained —Rosenberg v. Stone, 168 S E 436, 160 Va 381.

72. Bunting v Salz, 22 P. 1132, 3 Cal Unrep Cas 193

73. First Nat Bank of Mounds v Cox, 198 P. 579, 82 Okl. 129.

74. Smith v. Kaufman, 10 So 229, 94 Ala 364—6 C J. p 419 note 59

75. Cook v. Hopper, 23 Mich. 510—6 C J p 419 note 60.

Evidence of fraud

An averment that the attached property belonged to defendant in attachment at the time of seizure allows evidence showing that a sale under which plaintiff claims was fraudulent as to an attaching creditor—Adler v. Cole, 12 Wis 188

76. State v. Mattlage, 86 Mo App 382

77. Pollak v. Searcy, 4 So 137, 84 Ala 259. See Treece v Reinhart-Smith Grocer Co, 197 Ill App 40.

78. Riggle v. Jackson, 296 P. 889, 112 Cal App. 428

An affidavit made by plaintiff in replevin as to the value of the property replevied is not admissible against him in a subsequent action by him for wrongful attachment for the purpose of showing that he was not damaged because part of the goods were converted—Walker v Collins, (Kan) 59 F 70, 8 C C A 1, reversed on other grounds 17 S Ct 738, 167 U.S 57, 42 L Ed 76.

Evidence of lack of damage

In an action for alleged wrongful attachment of personalty furnished by others for plaintiff's use in drilling oil well, evidence of a contract whereby others agreed to pay plaintiff damages in case of delay is competent on the theory that there can be no recovery for a wrongful attachment where no damages have been sustained thereby—Riggle v Jackson, 296 P 889, 112 Cal App. 428

79. Edinger v. Henchler, 8 Iowa 513—6 C J. p 419 note 62

80. Cevada v. Miera, 61 P 125, 10 N M 62—6 C J. p 419 note 63

81. Grisham v. Bodman, 20 So. 514, 111 Ala 194—6 C J p 419 note 65

82. Scott v. Childers, 60 S W. 775, 24 Tex Civ.App 349.

83. New Morgan County Building & Loan Ass'n v. Plemmons, 97 So 46, 210 Ala. 16.

84. Crawford v Staples, 212 S W. 119, 184 Ky 477.

85. Sereno v. Triggo, (Tex Com. App) 1 S W (2d) 607, affirming Stevens v. Triggo, (Civ App) 296 S W. 979—6 C J. p 413 note 47

86. Sigmond Rothchild Co v Moore, (Tex Com App) 37 S.W (2d) 121, reversing (Civ.App.) 22 S W.(2d) 533

87. Sereno v. Triggo, (Tex Com App) 1 S W (2d) 607, affirming Stevens v. Triggo, (Civ App) 296 S W. 979.

88. Auto Salvage Co. v. Meriwether, 126 So 687, 169 La 1145

89. Deitsch v. Wiggins, 1 Colo 299

90. Buckeye Nat Bank of Findlay, Ohio v. Huff & Cook, 75 S E 769, 114 Va. 1.

91. Pollak v. Harmon, 10 So. 156, 94 Ala 420.

b. Admissibility

The general rules as to the admissibility of evidence apply.

The general rules as to the admissibility of evidence in civil cases apply to actions brought for the recovery of damages for dispossession of property attached as that of another.[92] Hearsay and irrelevant evidence will be excluded.[93] Testimony of a person familiar with the type of property seized under the writ is admissible to show the decline in value of the property while it was wrongfully withheld from plaintiff.[94] The finding of the jury in the claim suit cannot be given in evidence for the purpose of increasing the damages.[95]

c. Weight and Sufficiency

The party having the affirmative of an issue must prove it by a preponderance of the evidence

The party having the burden of proving an issue must establish it by a preponderance of the evidence, and a preponderance is sufficient.[96] Where the property taken is claimed by an assignee of defendant in attachment, and his allegation in the pleadings as to the value of the property is not controverted, the sheriff's return showing the value is sufficient proof of the same.[97] Proof that defendant gave the levying officer an indemnifying bond at the time of the attachment presumptively establishes his liability for the wrongful seizure by the officer.[98] On the question of the value of the property, the price which the goods brought at a forced sale is not conclusive.[99]

Where property is seized in an attachment suit pending between other parties, and a demand is made for the property and it is refused, there is prima facie evidence of a conversion,[1] and undisputed evidence of possession at the time of attachment makes a prima facie case of ownership.[2]

While a sheriff's return is prima facie evidence of the facts stated therein,[3] his return to the attachment is not conclusive as to the identity of the property attached, and plaintiff may show aliunde that the property attached was the same as that described in a mortgage on which his claim is based.[4]

Where punitive or exemplary damages are sought, under some statutes the existence of malice must be established by evidence direct or circumstantial.[5] The absence of malice is conclusively proved by evidence that plaintiff acted under

92. Taylor Bros Jewelry Co v Kelley, (Tex Civ App) 189 S W. 340—6 C J p 418 note 48–p 419 note 53

93. Taylor Bros Jewelry Co. v Kelley, supra

Clerk's record of transfers

In vendee's suit for conversion of rhubarb roots seized by defendant under attachment against plaintiff's grantor, the admission of evidence showing that a search of township clerk's records did not disclose transfer of personal property to plaintiff was error—Kovich v Church & Church, 255 N W 421, 267 Mich 640

Evidence held not admissible

In an action for wrongfully taking plaintiff's property under a writ of attachment against her husband, admission of plaintiff's testimony that she was in a very weak condition when she left home on the morning of the levy, that it was "right cold" on that day, that her children were living with her at her home, and that she had been married twelve years was reversible error—New Morgan County Building & Loan Ass'n v Plemmons, 97 So 46, 210 Ala 16

94. Rosenberg v. Stone, 168 S E 436, 160 Va. 381.

95. Batchellor v. Schuyler, 3 Hill (N Y.) 386

96. Taylor Bros. Jewelry Co. v. Kelley, (Tex Civ App) 189 S.W. 340

Evidence held sufficient

(1) To support a finding that the property was transferred to plaintiff before the attachment—Morehouse v Spokane Sec. Finance Corporation, (Wash) 27 P.(2d) 697

(2) To sustain finding that plaintiff did not notify attaching officers of her ownership of the property attached—Sorenson v. Howell, 241 P 1068, 34 Wyo. 119

(3) To show that mixing of secondhand automobile parts seized under provisional writ did not destroy their value—Auto Salvage Co v. Meriwether, 126 So. 687, 169 La 1145.

(4) To sustain finding as to value of raisins seized by sheriff under a writ of attachment—Sun-Maid Raisin Growers of California v Jones, 274 P 557, 96 Cal App 650

(5) To show value of property—Sigmond Rothschild Co. v. Moore, (Tex Civ App) 22 S W (2d) 533, reversed on other grounds (Com App) 37 S W (2d) 121.

(6) To show rental value of car attached—National Bond & Investment Co v McCoy, (Tex Civ App) 263 S W. 1089

Evidence held insufficient

(1) To sustain a finding as to the rental value of the car while it was wrongfully attached.—Taylor Bros Jewelry Co v Kelley, (Tex Civ.App) 189 S W 340.

(2) To show that attachment plaintiff merely held property under pledge—McCall v. First Nat. Bank, 277 P 562, 47 Idaho 519

Original contract for sale of merchandise wrongfully levied on was sufficient, under evidence, to establish value thereof at time of attachment—Rosenberg v. Stone, 168 S E 436, 160 Va. 381.

97. Hayden Saddlery Hardware Co v. Ramsay, 36 S W. 565, 14 Tex Civ App. 185

98. Dyett v. Hyman, 29 N E 261, 129 N Y 351, 26 Am S R 533, affirming 13 N Y S 395

99. Carey v. Dyer, 73 N W. 29, 97 Wis 554

1. Bruce v. Crysler, (Mo App.) 217 S W. 563.

2. State v. Moos, 83 Mo App 2.

3. McCall v First Nat. Bank, 277 P 562, 47 Idaho 519.

Evidence of sheriff's return

Where the sheriff makes a return to the effect that he attached property by taking it into his custody and appointing a keeper for it, such evidence does not sustain a contention that the sheriff did not take possession of the attached property—McCall v. First Nat Bank, 277 P. 562, 47 Idaho 519.

4. Crawford v. Nolan, 34 N W. 754, 72 Iowa 673

5. Wray v Great Falls Paper Co, 234 P. 486, 72 Mont. 461.

the advice of counsel, and that during the litigation two judgments were rendered in his favor, although subsequently reversed [6]

§ 404. —— Trial

General rules apply to trials in actions of this character.

In accordance with the rules governing the trial of civil actions generally, the instructions must correctly advise the jury as to the law applicable to the questions before them,[7] and be consistent with the evidence[8] and pleadings,[9] and so phrased as not to be conflicting[10] or tend to mislead the jury.[11]

As in other civil actions, questions of fact,[12] including the weight to be given to particular testimony,[13] are for the determination of the jury, or by the court, sitting as a jury,[14] but where the evidence is uncontradicted, there is nothing for the jury to decide [15]

The verdict must be in accord with the weight of evidence,[16] and must not be excessive [17]

Place of trial. Under a statute providing that an action must be tried in the county where the cause of action arose if it is to recover a chattel distrained, or damages for distraining, an action for damages for dispossession of chattels attached as property of another is not an action for distraining a chattel, and need not be tried in the county where the cause of action arose.[18]

§ 405. —— Damages

Where plaintiff is entitled to recover, his damages should be for the amount of injury actually resulting to him, unless the case is such that an award of punitive damages is proper.

Where plaintiff does not ask for exemplary or punitive damages, upon a proper showing he is entitled to recover all actual damages resulting from the wrongful seizure,[19] but under such cir-

Evidence of malice

Evidence that the attaching officer appeared at plaintiff's restaurant, with a writ directed against the property of another, on June 20, but failed to levy the writ until a week later, when just before noon he told plaintiff he was going to close his restaurant and excluded customers who were entering for the noon meal, that plaintiff asked the officer to inspect the restaurant license which was in her name, which he refused to do, and that plaintiff made claim of ownership to defendant who refused to release the attachment, will justify recovery of damages based on malice—Wray v Great Falls Paper Co, 234 P. 486, 72 Mont. 461.

6. Frank v. Chaffe, 34 La Ann. 1203

7. Mont.—Brennan v Mayo, 50 P (2d) 245
Va—Rosenberg v. Stone, 168 S E 436, 160 Va 381.
6 C.J p 419 note 67

Correct statement of law

In wife's action for wrongful attachment of her separate property under execution directed against her husband, instruction that the law presumes that what a person possesses is owned by him and that if the jury found from the evidence that the wife was in possession of the store and merchandise at the time of levy thereon, the law presumes that she was the owner of the property, was proper—Brennan v Mayo, (Mont.) 50 P (2d) 245

Malice

In an action for wrongful attachment, where the court charged in the language of Rev.Codes (1921) § 8666, an instruction explaining the meaning of "actual" and "presumed" malice as employed in such section, although abstract and without an attempt to apply them to the facts, was not objectionable as authorizing an award of exemplary damages for malice in law as well as malice in fact, which the evidence did not authorize—Wray v Great Falls Paper Co, 234 P. 486, 72 Mont 461

8. Lathers v Wyman, 45 N W. 669, 76 Wis 616—6 C J. p 419 note 68

Assumption proper

Evidence that purchaser under contract for conditional sale of automobile surrendered his interest and the seller treated the contract as forfeited, showed a forfeiture authorizing instruction assuming that the seller's interest in the automobile was entire—Western Bond & Mortgage Co. v. Chester, 259 P. 13, 145 Wash 81.

9. New Morgan County Building & Loan Ass'n v Plemmons, 97 So. 46, 210 Ala 16.

10. Wray v. Great Falls Paper Co, (Mont) 234 P 486

11. Ind T—Simmons Clothing Co v. Davis, 58 S W 655, 3 Ind T 379
Mo.—Klie v Wellman, 175 S W. 267, 189 Mo App 601.
6 C J. p 419 note 69

12. Ala—Bell v Seals Piano & Organ Co, 78 So 806, 201 Ala. 428
Ky.—S L. Crook Corporation v Blackburn, 59 S W.(2d) 1, 248 Ky 543
Mo—Citizens' State Bank of Atlanta, Kan, v Ferson, (App) 208 S. W 136—Wade v Winstanley, (App) 200 S.W 435
Tenn—So Knoxville Contracting & Const. Co v. Brakebill & Hamilton, 10 Tenn App 325.
Vt—Lathrop v. Lawson, 121 A 438, 96 Vt 513

Evidence held insufficient to raise an issue as to value—Chillicothe First Nat Bank v McSwain, 75 S E 1106, 93 S C. 30, Ann Cas 1914D 809.

13. S L Crook Corporation v Blackburn, 59 S W (2d) 1, 248 Ky. 543

14. Citizen's State Bank of Atlanta, Kan, v. Ferson, (Mo App) 208 S. W. 136

Questions for court without jury

Whether levy of attachment writ or financial condition of oil syndicate caused shut down of drilling operations was a question for the court sitting without a jury—Schulte v Republic Supply Co, (Tex Civ App) 297 S W 667.

15. Ala—New Morgan County Building & Loan Ass'n v Plemmons, 97 So 46, 210 Ala 16
Tex—Sigmond Rothschild Co. v. Moore, (Tex Civ App) 22 S W (2d) 533, reversed on other grounds (Com App) 37 S W (2d) 121

16. S L Crook Corporation v. Blackburn, 59 S W (2d) 1, 248 Ky. 543

17. **Verdict held not excessive.**—Brakebill & Hamilton et al v South Knoxville Contracting & Constr. Co., 14 Tenn App 531

18. P F. Scheidelman & Sons v. Webster Basket Co, 257 N Y S 552, 143 Misc 836, affirmed 259 N Y.S. 963, 236 App Div 774

19. Kyd v Cook, 76 N W 534, 56 Neb 71, 71 Am S R 661—6 C J. p 420 note 70.

Gains prevented are losses, and there are damages recoverable—Kyd v Cook, 76 N.W. 524, 56 Neb 71, 71 Am S R. 661.

cumstances he is entitled to recover only his actual damages[20] He is not entitled to recover for expenses which he otherwise would have incurred if his property had not been seized,[21] or for damages which are not the proximate result of the attachment.[22]

While no fixed rule of damages can be declared which will apply in every instance, as the measure of damages must of necessity vary in different cases according to the facts,[23] as a general rule where plaintiff was totally deprived of his property the measure of damages is the market[24] value of the property taken[25] at the time of seizure,[26] with interest,[27] or, if interest would not be a just standard, the value of the use of the property,[28] from the date of the levy up to the time of trial. Where there is a rise in the value of the property seized after the levy, it has also been held that plaintiff is entitled to recover for a conversion the highest intermediate value between the time of the levy and the time of the trial.[29] Where the property was only detained for a time, the measure of damages is the value of the use during such time,[30]

Payment under duress

Where officers who attached plaintiff's saloon fixtures and stock of goods as the property of another person were proceeding to eject plaintiff and close the saloon, having placed a sign on the door that it was in the hands of the officers, when plaintiff paid the claim against the attachment debtor, the payment was under duress and not voluntary, and could be recovered as actual damages, in an action for the wrongful attachment—Klie v Wellman, 175 S W 267 189 Mo App 601.

General damages

In an action for damages in trespass for wrongful levy of an attachment, only general damages may be recovered if the petition fails to plead special damages—First Nat Bank of Mounds v. Cox, 198 P. 579, 82 Okl 129.

20. No disturbance of possession

The mere wrongful levy of an attachment writ on oil drilling equipment does not give rise to damages in conversion, in the absence of a disturbance of the possession and actual loss proximately resulting therefrom—Schulte v. Republic Supply Co, (Tex Civ App) 297 S W 667

Real property

In the absence of a pending sale, the mere levy of a writ of attachment upon real property, which does not disturb the possession or use of the property by the owner, affords no grounds for recovery of other than nominal damages—Keystone Pipe & Supply Co v. Crabtree, (Okl) 50 P (2d) 1086.

21. Crawford v. Staples, 212 S W 119, 187 Ky 477.

Cost of feeding stock

In an action for damages for the wrongful attachment of personal property, where plaintiff owner of the property was not deprived of its use and possession, he having given a bond for its retention, he only bore the cost of maintenance of the live stock attached as he would have done had there been no attachment, and, consequently, he is not entitled to recover the cost of feeding them while holding them under his retention bond—Crawford v. Staples, 212 S W 119, 187 Ky 477.

Cost of harvesting

Where, in an action by the owner of attached wheat for damages from the sale thereof pending the litigation, the evidence showed that plaintiff acquiesced in such sale and payment of expenses, and there was no evidence of any unreasonable expense connected therewith, defendants were liable only for the net amount received for the wheat and costs of suit, and plaintiff could not recover the costs of harvesting—Tuttle v Bell, 142 P 940, 92 Kan 725, rehearing denied 144 P. 217, 93 Kan 234

22. Ky—Crawford v. Staples, 212 S W 119, 184 Ky. 477
Va—Rosenberg v. Stone, 168 S E. 436, 160 Va 381

Death of live stock

Plaintiff suffered no loss of profit from failure to consummate a sale upon a purchase offer made while the attachment was pending, which loss was the proximate result of the attachment, where he still retained property equivalent in value to the price offered, and his only loss was to horses from disease and mules from increased age, both of which were natural causes not resulting from the attachment—Crawford v Staples, 212 S W. 119, 184 Ky 477.

Inability to accept offer of sale

In an action for wrongful attachment of plaintiff's live stock, a claimed loss from being prevented by the attachment from accepting an offer of sale was held to be too remote, improbable, and speculative to justify damages, at least until notice of the possibility of the sale was brought to the parties securing the attachment—Crawford v Staples, 212 S.W. 119, 184 Ky. 477.

Loss due to decline in market value

A loss due to the decline in the market value of goods held under a wrongful attachment was held to be a natural and proximate cause of the wrongful attachment—Rosenberg v Stone, 168 S E. 436, 160 Va. 381.

23. Taylor Bros Jewelry Co. v. Kelley, (Tex Civ App) 189 S W 340

24. National Cotton Oil Co v Ray, (Tex Civ App) 91 S W 322—Weaver v Goodman, (Tex Civ App) 51 S W 860

25. Ky—Stewart v Cincinnati Cadillac Co, 275 S W. 25, 210 Ky 104—Knox v Shannon, 11 Ky Op 452
Tex—Taylor Bros Jewelry Co v Kelley, (Civ App) 189 S W 340.
6 C J p 420 note 79

Damages not excessive

Two thousand five hundred dollars for unlawful taking under attachment, of automobile purchased seven months before for three thousand five hundred fifteen dollars, was held not to be excessive.—Pass v Merchants' Trade Securities Corporation, 155 A. 772, 9 N J Misc 709.

26. Lancaster v Corsicana Nat. Bank, (Tex Com App) 240 S W 307, reversing (Tex Civ App) 229 S W 580—6 C.J p 421 note 80

Sale price during trial not determinative

The amount at which attached goods were sold under agreement of counsel pending trial does not necessarily determine the value of the goods at the date of seizure under a writ of attachment for the purpose of ascertaining damages suffered by defendant by reason of an excessive seizure, since the value should be determined as of the date of seizure, instead of at a subsequent date—Lancaster v. Corsicana Nat. Bank, (Tex Com App.) 240 S.W 307, reversing (Civ.App.) 229 S W 580

27. Taylor Bros Jewelry Co. v. Kelley, (Tex Civ.App.) 189 S W 340—6 C J p 421 note 81.

28. Taylor Bros. Jewelry Co. v. Kelley, supra

29. Plymouth Rubber Co v Knott, 187 N Y S 914, 114 Misc 695.

30. Ill—First State Bank of Pond Creek, Okl, v. Clark, 202 Ill App. 283.
Ky—Eureka Dry Cleaners v Stone Brothers & Shrout, 86 S W (2d) 1032, 261 Ky 15—Bess v. Reed, 278 S W. 569, 212 Ky 243

or the difference between the value of the property at the time of seizure and its value when released from the levy.[31]

Recovery may also be had, in a proper case, for expenses incident to the wrongful levy,[32] including necessary expenses incurred in a suit to recover possession,[33] such as counsel fees,[34] stenographic expenses,[35] and traveling expenses;[36] but injury to credit,[37] and a decrease in business,[38] have been held to be too remote to be recovered in an action of this character.

Where plaintiff had only a partial interest in the property the damages recoverable must be measured by the extent of his interest,[39] and if the attachment is wrongful in part, plaintiff can recover damages for the seizure of property in excess of that which the real debt justified[40]

Duty to minimize damages. As in other civil actions, a person, whose property has been attached under a writ issued against another person, is under a duty to take reasonable steps to reduce his loss caused thereby and to minimize his damages,[41] but in view of the rule governing damages generally that the efforts which the injured party must make to avoid the consequences of the wrongful act or omission need only be reasonable under the circumstances of the particular case, as discussed in the title Damages § 32 [17

La.—Willis v. Ezernack, 135 So. 117, 16 La. App. 607
Mo.—State ex rel. Stevenson v. American Surety Co., (App.) 74 S.W.(2d) 1094.
Okl.—First Nat. Bank v. Cox, 198 P. 579, 82 Okl. 129.
Tex.—Taylor Bros. Jewelry Co. v. Kelley, (Civ.App.) 189 S.W. 340.
6 C.J. p. 421 note 82.

Attached automobile

In a suit for an automobile wrongfully attached and sold as property of another, or for its value, plaintiff might recover it, together with the reasonable value of its use on a basis of rental value.—Taylor Bros. Jewelry Co. v. Kelley, (Tex. Civ. App.) 189 S.W. 340.

Damages held not excessive.—State ex rel. Stevenson v. American Surety Co., (Mo. App.) 74 S.W.(2d) 1094.

Possibility of failure to rent

In estimating damages in a successful interpleader's action on an attachment bond, a possibility that a drag line machine could not have been rented during eight months' detention because of weather conditions could not be considered.—State ex rel. Stevenson v. American Surety Co., (Mo. App.) 74 S.W.(2d) 1094.

31. Ky.—Bess v. Reed, 278 S.W. 569, 212 Ky. 243.—Crawford v. Staples, 213 S.W. 119, 184 Ky. 477.
Okl.—Keystone Pipe & Supply Co. v. Crabtree, 50 P.(2d) 1086.
Tenn.—Brakebill & Hamilton v. South Knoxville Contracting and Constr. Co., 14 Tenn.App. 531.
Va.—Rosenberg v. Stone, 168 S.E. 436, 160 Va. 881.
6 C.J. p. 420 note 71.

Salable value

In an action for damages for wrongful attachment of live stock, the criterion of damages for the loss of the use of property owned and held for use is the value of such use, and for property owned and held for sale the value is estimated on the basis of the deterioration or depreciation in salable value caused by the attachment.—Crawford v. Staples, 213 S.W. 119, 184 Ky. 477.

32. Auto Salvage Co. v. Meriwether, 126 So. 687, 169 La. 1145.—Willis v. Ezernack, 135 So. 117, 16 La. Ann. 607.

Reassortment of automobile parts

In the owner's suit for commingling secondhand automobile parts when seized under provisional writ, the cost of reassortment was the proper measure of damages.—Auto Salvage Co. v. Meriwether, 126 So. 687, 169 La. 1145.

33. Ga.—Jones v. Lamon, 18 S.E. 423, 93 Ga. 529.
La.—Willis v. Ezernack, 135 So. 117, 16 La. App. 607.
Okl.—Keystone Pipe & Supply Co. v. Crabtree, 50 P.(2d) 1086.
Pa.—Hyde v. Kiehl, 183 Pa. 414.—Siegel v. Netherlands Co., 59 Pa. Super. 132.
6 C.J. p. 420 note 72.

Cost of recovery

The measure of damages for wrongfully suing out an attachment on a stock of goods sold is the expenses and loss the plaintiff has been put to in getting his property back, including any loss incurred by its seizure and detention.—Siegel v. Netherlands Co., 59 Pa. Super. 132.

Value of time

The value of the time devoted to procuring a release of a wrongful attachment is recoverable by the person against whom the attachment has been sued out.—Adair v. James M. Peterson Bank, 211 P. 683, 61 Utah 159.

34. Ill.—First State Bank of Pond Creek, Okl. v. Clark, 202 Ill. App. 283.
La.—Willis v. Ezernack, 135 So. 117, 16 La. App. 607.
Okl.—Reliable Mutual Hail Ins. Co. v. Rogers, 160 P. 914, 61 Okl. 226, L.R.A. 1917B 350.
Utah.—Adair v. James M. Peterson Bank, 211 P. 683, 61 Utah 159.
6 C.J. p. 420 note 72 [a].

In Kentucky

(1) It has been held in this jurisdiction that there could be no recovery for attorney's fees incurred in establishing ownership of the property.—Eureka Dry Cleaners v. Stone Brothers & Shrout, 86 S.W.(2d) 1032, 261 Ky. 15.

(2) On the other hand it has been indicated, although not decided, that such attorney's fees are recoverable.—Bess v. Reed, 278 S.W. 569, 212 Ky. 243.

35. First State Bank of Pond Creek, Okl., v. Clark, 202 Ill. App. 283.

36. Adair v. James M. Peterson Bank, 211 P. 683, 61 Utah 159.

37. Cunningham v. Sugar, 49 P. 910, 9 N.M. 105.

38. Bess v. Reed, 278 S.W. 569, 212 Ky. 243.

39. Becker v. Dunham, 6 N.W. 406, 27 Minn. 32.—6 C.J. p. 421 note 83.

40. Lancaster v. Corsicana Nat. Bank, (Tex. Com. App.) 210 S.W. 307, reversing (Civ.App.) 229 S.W. 580.

41. Ky.—Crawford v. Staples, 213 S.W. 119, 184 Ky. 477.
Tex.—Taylor Bros. Jewelry Co. v. Kelley, (Civ.App.) 189 S.W. 340.
6 C.J. p. 420 note 77.

To take property back

Where a tortious levy of attachment is made upon the property of one not a party to the process, and he files statutory claim to the property, and the levying officer holds the property in his possession awaiting the decision of the court, the claimant, upon recovering a judgment finding the property not subject, cannot refuse to take it back from the officer and hold the person causing the levy to be made liable for its full market value.—Maxwell v. Speth, 72 S.E. 292, 9 Ga. App. 745.

C.J. p 769 notes 25, 26], a person whose property has been wrongfully attached as that of another need use only ordinary efforts and make only a reasonable expenditure to minimize the damages.[42] Accordingly, it has been held that he is under no duty to minimize his damages by giving bond to secure a release of the property, or to make application to the court to have the property released from the levy,[43] although, where plaintiff seeks to recover profits lost because of the wrongful seizure, it has been held that an attempt to replevy the property or to secure other property to take its place was necessary.[44]

Nominal damages. Where there is no evidence of actual damages caused by the wrongful levy on plaintiff's property, he is entitled to recover only nominal damages.[45]

Punitive, exemplary, or vindictive damages. Under permissive statutes, where the attachment was malicious or willful, punitive or exemplary damages may be recovered,[46] if specially pleaded.[47] To justify a recovery of punitive damages, however, requisites imposed by statute such as malice, lack of probable cause, or a willful and wanton trespass, must be present, and, under this requirement, where it appears that defendant acted in good faith in suing out the attachment, compensatory damages alone are recoverable.[48]

XI. DISSOLUTION, QUASHAL, OR VACATION

A. IN GENERAL

§ 406. General Statement

To avoid the effect of an attachment, the writ should be dissolved in the manner prescribed by statute.

In order to avoid entirely the effect of an attachment, it is necessary that the writ be dissolved, vacated, or quashed by proper proceedings,[49] and until such action is taken the attachment remains valid.[50] However, attachment is a statutory remedy and may be destroyed only in the manner prescribed by statute.[51]

One seeking to arrest the operation of an attachment statute by reason of an assignment for creditors in a foreign state must establish the validity or legal effect of the assignment under the laws of the state where it was made, and no presumption of validity or legal effect of the assignment will be indulged.[52]

§ 407. Matters Operating as Dissolution or Discharge

Matters which operate as an automatic dissolution or discharge of an attachment, since they also serve to destroy the attachment lien, have been discussed under the sections relating to the release or discharge of the lien (§§ 261–270).

§ 408. —— Appearance

A mere appearance and pleading to an action is not sufficient to discharge an attachment under modern statutes.

Since the early theory of foreign attachment had for its purpose the enforcement of an appearance and the obsolete practice of requiring bail to complete the appearance, some weight has been given to the argument that an appearance dissolves an attachment;[53] but where the attachment

42. Rosenberg v. Stone, 168 S.E. 436, 160 Va. 381

Duty not arbitrary

The duty to minimize damages is not an arbitrary one, and must be exercised only when it is a reasonable duty which can be performed at trifling expense and with reasonable exertion.—Rosenberg v. Stone, 168 S.E. 436, 160 Va. 381.

43. Tenn.—So. Knoxville Contracting & Const. Co. v. Brakebill & Hamilton, 10 Tenn. App. 325
Va.—Rosenberg v. Stone, 168 S.E. 436, 160 Va. 381.

44. Taylor Bros. Jewelry Co. v. Kelley, (Tex. Civ. App.) 189 S.W. 340—6 C.J. p. 420 note 78.

45. Crawford v. Staples, 212 S.W. 119, 184 Ky. 477—6 C.J. p. 420 note 74.

46. Klie v. Wellman, 175 S.W. 267, 189 Mo. App. 601—6 C.J. p. 421 note 84

47. Ala.—Bell v. Seals Piano & Organ Co., 78 So. 806, 201 Ala. 428.
Okl.—Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914, 61 Okl. 226, L.R.A. 1917B 350
6 C.J. p. 421 note 85.

48. Cal.—Riggle v. Jackson, 296 P. 889, 112 Cal. App. 428
Colo.—Painesville Nat. Bank of Painesville, Ohio, v. Hannan, 171 P. 364, 64 Colo. 301.
6 C.J. p. 421 note 86.

49. Ind.—McLain v. Draper, 8 N.E. 910, 109 Ind. 556
Kan.—Oberlander v. Confrey, 17 P. 88, 38 Kan. 462
N.J.—Cummins v. Blair, 18 N.J.Law 151.
6 C.J. p. 421 note 90

Attachment will not fall of its own weight where there is a failure to include an order of sale of the attached property in a personal judgment.—Lount v. Holladay, 234 P. 1084, 28 Ariz. 16

50. Magaw v. Beals, 172 N.E. 347, 272 Mass. 334

51. N.Y.—McCarthy v. Farley, 267 N.Y.S. 733, 149 Misc. 360.
R.I.—Seiler Coal Co. v. Superior Court, 129 A. 311, 47 R.I. 76.

52. Judd v. J. W. Forsinger Co., (N.J. Sup.) 186 A. 525

53. Miss.—Garrett v. Tinnen, 8 Miss. 465
Va.—Tiernans v. Schley, 2 Leigh (29 Va.) 25

In Missouri the statute provides that, when an attachment is issued against a nonresident and plaintiff gives no bond, the attachment shall be dissolved as of course, on defendant's appearing and answering to the merits.—Bambrick Bros. Const. Co.

seeks more than a mere appearance, under modern statutes which require the giving of a particular bond in order to effect the dissolution of an attachment or the release of the property, an appearance and pleading to the action will not discharge the attachment,[54] and this has been held to be so even though defendant may appear and confess judgment.[55]

§ 409. —— Causes Subsequent to Attachment in General

Those matters occurring subsequent to the time of attachment which may sometimes operate to dissolve or discharge an attachment lien or, as it is otherwise stated, to discharge the attachment, have been discussed in §§ 262–263.

§ 410. —— Proceedings in Action

The attachment and the lien obtained thereunder may be discharged by certain proceedings in the main action, as shown in § 268 a.

§ 411. —— Termination of Action without Judgment

The loss of the attachment lien or the dissolution of the attachment due to a discontinuance, dismissal, or nonsuit in the main proceedings is reviewed in § 268 b.

§ 412. —— Judgment for Plaintiff

The effect of a judgment for plaintiff in the main proceeding upon the attachment, or, more properly, the attachment lien, has been considered in § 268 c.

§ 413. —— Judgment for Defendant

The effect of a judgment for defendant upon an attachment taken by plaintiff has been discussed in § 268 d.

§ 414. —— Failure to Issue, Levy, or Enforce Execution

A failure to order execution following judgment may cause the loss of an attachment as has been shown in § 268 e

§ 415. —— Death of Party

Since the death of a party to an attachment operates on the attachment lien as well as on the attachment itself, all such cases have been discussed in § 266.

§ 416. Grounds for Dissolution or Discharge

Since an attachment may be obtained only by special proceedings and on particular grounds, any departure from such requirements may serve as a ground for quashing, dissolving, or vacating it.

Since special proceedings and particular grounds are necessary to authorize an attachment of property, a defendant may raise issues regarding the validity of the attachment without touching on the merits of the claim involved in the action in which the writ issued,[56] while, on the other hand, objections which go to the action itself are not necessarily available as grounds for dissolving the attachment.[57] The fact that plaintiff obtains and levies a second attachment is no ground for dissolution of the second one,[58] and the fact that a prior attachment in another court has been dissolved is not ground for quashing a second attachment.[59] Service of summons on a nonresident in the county in which the summons is issued does not abate an attachment.[60] An improperly issued attachment should be discharged.[61] A foreign attachment may be quashed upon the proof of facts not disclosed in the record.[62] The failure of a

v Semple Place Realty Co, 193 S W 543, 270 Mo 450—Donovan v. Gibbs, 187 S W. 46, 268 Mo. 279

54. Donovan v. Gibbs, 187 S W 46, 268 Mo 279—6 C J p 431 note 89

Where no bond is given, an attachment against a nonresident is not automatically dissolved by a filed answer but requires a motion and action thereon—Donovan v. Gibbs, 187 S.W 46, 268 Mo 279.

55. Wigfall v Byne, 30 S C L. 412

56. Ala.—Mann Lumber Co. v Bailey Iron Works Co, 47 So. 325, 156 Ala 593

Pa.—Heller v. Goldsmith, 14 Pa Dist & Co. 746

Ruling on motion to quash service is not governing

The same facts and circumstances which were submitted to invoke a ruling on a motion to quash the service of summons on a nonresident by publication do not necessarily compel a similar ruling on a motion to dissolve the attachment levied on property of such nonresident—Zander v. Bright, 52 P (2d) 868, 142 Kan 833

Existence of a chattel mortgage on attached property covering defendant's indebtedness to plaintiff is not ground for dissolution of the attachment where plaintiff alleged in the affidavit for attachment that the mortgage had become valueless without his fault—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal. 492.

Failure of plaintiff's attachment to comply strictly with the terms of statute necessitates quashing his attachment releasing the attached property—Hayes v Davis, (Tex.Civ App) 18 S.W (2d) 704.

57. N H—Burleigh v. Wong Sung Leon, 139 A. 184, 83 N.H. 115.

Va.—Henry Myers & Co. v. Lewis, 92 S E 988, 121 Va 50.

6 C J. p 421 note 94

58. Johnson v. Larson, 147 N.W. 476, 96 Neb. 193.

59. Hedrick v. Markham, 103 A. 98, 132 Md. 160.

60. Hall v. Packard, 41 S E. 142, 51 W Va. 264.

61. Butler v Peters, 205 P. 247, 62 Mont. 381, 26 A L R 560.

62. American International Shipbuilding Corporation v Russel Wheel & Foundry Co., 30 Pa.Dist 265.

plaintiff to register an assumed name under which he was doing business cannot be taken advantage of by a motion to quash.[63]

Vacation without grounds. Where no grounds for a vacation of attachment exist, the court is without authority to set it aside.[64]

Two or more grounds for dissolution may be relied on in the same proceeding.[65]

Laches of plaintiff in failing to prosecute the case vigorously is ground for dissolution.[66]

§ 417. —— Failure of Plaintiff to Show Cause of Action

The failure of plaintiff's pleadings in the attachment suit to show a cause of action is a sufficient ground for a motion to dissolve the attachment.

It is sufficient ground for a motion to dissolve an attachment that plaintiff's pleadings in an attachment suit fail to show a cause of action,[67] notwithstanding the affidavit is sufficient to warrant the issuance of the writ.[68] However, a mere defective statement of a cause of action is not a sufficient ground for the discharge of an attachment.[69] A failure to set out in the complaint a demand for liquidated damages will not serve to quash the attachment obtained in the action,[70] nor will an uncertainty in the petition as to the amount recoverable warrant a quashal of the attachment.[71] A failure on the part of defendant to prove the insufficiency of the cause of action will result in a refusal to quash the attachment issued.[72]

§ 418. —— Insufficiency of Cause of Action to Support Attachment

It is sufficient ground for quashal of an attachment that the cause of action will not support the attachment.

The fact that the cause of action set up by the attaching plaintiff is not such as will support an attachment is a sufficient ground for a motion for the quashal of an attachment;[73] and this has been held to be true, although the affidavit for attachment does state such a cause of action.[74]

§ 419. —— Errors or Variance as to Amount of Claim and Excessive Claim

The fact that the writ issued for an amount larger than the actual amount due is not a sufficient ground to quash the attachment.

Even though ordinarily an affidavit to procure an attachment is required to state the amount of the attaching plaintiff's claim, it is not a sufficient ground for the vacation of an attachment that the writ was issued for an amount larger than the actual amount due the attaching creditor,[75] although it has been held that, where a writ of attachment issues for the whole amount claimed in several causes of action included in the same pe-

63. Pasquinelli v Southern Macaroni Mfg Co, 30 Pa Dist 704

64. Noziska v. Aten, 154 N.W. 445, 36 S D 222

65. Meinhard v. Youngblood, 19 S E 675, 41 S C. 312—6 C J. p 422 note 97.

66. Rouss v. Gilliam, 70 Pa Super. 594.

67. Alaska—Loussac v. Jacobsen, 7 Alaska 593.
Ga.—Thomas v Chattanooga Ry & Light Co, 94 S E 50, 21 Ga.App. 172.
Mo—Pisculic v. Pletka, 2 S W.(2d) 187, 221 Mo App 250
N Y—Wulfsohn v Russian Socialist Federated Soviet Republic, 138 N. E. 24, 234 N Y. 372, reversing 195 N Y.S. 472, 202 App Div. 421, reargument denied 139 N E 742, 235 N.Y. 579, and error dismissed 45 S. Ct. 39, 266 U S 580, 69 L Ed 451—Severnoe Securities Corporation v. Westminster Bank, 210 N Y S 629, 214 App Div. 14.
Ohio—Adkins v. Newcomer, 9 Ohio N P (N S) 305.
Okl—Alwood v. Harrison, 171 P. 325, 66 Okl. 203
6 C J p 423 note 10

On sustaining a demurrer to the complaint, it is proper to discharge the attachment—Caldwell & Co's Ancillary Receiver v. Landrum, 83 S W (2d) 876, 260 Ky. 77—6 C J. p 423 note 10 [c]

68. Kyle v. Chester, 113 P. 749, 42 Mont. 522, 37 L R A (N S) 230—6 C J p 423 note 11.

69. Savage Tire Sales Co v Stuart, 203 P. 364, 61 Mont 524—Union Bank & Trust Co v. Himmelbauer, 181 P. 332, 56 Mont 82—Cope v. U. M. M. & P Co, 1 Mont. 53.

70. Whittinghill v. Oliver, (Tex Civ App) 38 S W (2d) 896—6 C J. p 423 note 10 [c]

71. Hall v. Parry, 113 S W 561, 55 Tex Civ App 40

72. C. G. Blake Co. v. W. R. Smith & Son, 133 S E 685, 147 Va 960.

73. La—Holcomb & Hoke Mfg. Co v. Theodora, 1 La.App 445.
Mont.—Butler v. Peters, 205 P. 247, 62 Mont 381, 26 A L R. 569.
6 C J p 423 note 14.

74 Kyle v. Chester, 113 P. 749, 42 Mont 522, 37 L R A (N S.) 230—6 C J p 423 note 15

75. Ky.—Dade Park Jockey Club v Commonwealth, by Auditor of Public Accounts, 69 S.W.(2d) 363, 253 Ky. 314
Mont—Cilna v. Barker, 254 P. 169, 78 Mont 343
Tex—Nail v. Compton, (Com App) 55 S W (2d) 1028, affirming Butler v. Nail, (Civ App) 36 S W (2d) 307—Garvey v Guaranty Bank & Trust Co, (Civ App) 298 S W. 303
Wash—Haseltine v. Lyle, 27 P (2d) 716
W Va—Leatherman v. Pancake, 152 S E 325, 108 W.Va. 648, 68 A.L R. 851
Wyo—Finley v Pew, 205 P. 310, 28 Wyo. 342, rehearing denied 206 P. 148, 28 Wyo 342.
6 C J. p 429 note 71.

Order of reduction or partial release
When an attachment on real estate is properly made, the court has no authority to annul it, but where the damages alleged are excessive the court may order a reduction of the ad damnum or a partial release of the attachment—Everett v. Cutler Mills, 160 A. 924, 52 R I. 330.

Certain damages without proof
It is not ground for vacating an attachment that the attachment papers make no proof of certain items of damage, if there exists proof of substantial damage outside of those items—Crook v. Lupton, 170 N.Y S. 345, 182 App Div. 353.

tition, and later, before trial, some of such causes are dismissed by plaintiff, a motion to dissolve the attachment should be granted.[76] The test that courts seem to have applied in cases of this kind is good or bad faith in making the claim.[77] While a variance between the affidavit for attachment and the writ issued thereon as to the amount claimed has been held to be a fatal defect,[78] it is not a ground for quashing an attachment that the petition claimed a greater amount than that for which the writ of attachment is issued,[79] for plaintiff is not bound to attach for the full amount of his claim.[80]

§ 420. —— Nonexistence of Grounds of Attachment

The nonexistence of grounds of attachment as alleged in the affidavit is adequate to cause the dissolution of the attachment.

The dissolution of an attachment may be sought on the ground that the statements of the affidavit for the attachment are false in that the grounds of attachment alleged therein do not, or did not at the time when the affidavit was made, exist.[81] Accordingly, an attachment sued out on the ground of nonresidence of defendant must be dissolved where it is shown that he does in fact reside within the state[82] or was present within the county when the writ was issued.[83] A writ based on an allegation that defendant is an absconding debtor must fall where it is shown that he has not in fact absconded;[84] and proof of the absence of any fraudulent intent on the part of defendant requires the vacation of an attachment based on the ground of a fraudulent transfer or concealment of property.[85] In some cases a different view has been asserted which holds that the truth of the affidavit cannot be put in issue on the trial of the attachment suit, and defendant, if he claims that the affidavit is false, must have recourse to his remedy for wrongful attachment.[86]

76. Greenwood First Nat Bank v Van Doren, 93 N W 1017, 68 Neb 142

77. Finley v. Pew, 205 P 310, 28 Wyo, 342, rehearing denied 206 P 148, 28 Wyo 342.

78. Cal—Rosenberg v. Bullard, 15 P (2d) 870, 127 Cal App 315.
Tex.—Butler v Nail, (Civ App) 36 S W.(2d) 307, affirmed Nail v Compton, (Com App.) 55 S.W (2d) 1028
6 C J p 429 note 73

79. Evans v. Lawson, 64 Tex. 199—6 C J p 430 note 74

80. Dwyer v Testard, 65 Tex 432

81. Idaho—W G Jenkins & Co, Bankers, v. McKenzie, 238 P 294, 41 Idaho 76—Hill v. Bennett, 215 P 471, 37 Idaho 161.
La—Typhoon Fan Co v Pilsbury, 118 So 70, 166 La. 883, followed in 118 So 73, 166 La 891—Middleton v. Howell, (App) 6 La.App 865
Minn—Sheehan v. First Nat Bank, 204 N W 38, 163 Minn 294
N D—Page v. Steinke, 236 N W. 261, 60 N D. 685
Okl.—Smith v. Stricker Radio & Music Shoppe, 251 P 1015, 123 Okl 95—Mott v Zimmerman, 229 P 237, 100 Okl. 299—Millus v Lowrey Bros, 164 P 663, 63 Okl 261, L R.A 1918B 336
Pa—Locey v Sterling Motor Truck Co. of Pittsburgh, 156 A. 730, 102 Pa Super 148—Bereal Hotel Co v Riggs Merchandising Service, Inc, 17 Pa Dist. & Co 95—Kauffman v. Musin, 9 Pa Co 414
R I—Silva v. Superior Court, 128 A 212, 46 R I. 342
6 C J p 424 note 19.

The false statement in an affidavit that a claim is unsecured will furnish a ground for vacating the attachment—Kreider v American Surety Co of New York, (Cal App) 43 P (2d) 831—Hill v. Bennett, 215 P 471, 37 Idaho 161—6 C J. p 424 note 19 [e]

Under a statute of limited application, the question as to fraud may not be considered on a motion to dissolve the attachment.—Hotchkiss v Pinney, 25 Pa Co 65.

General or specific writ

Under a statute providing that the attachment provisions shall be given a liberal construction, where the petition stated a good ground for attachment and the property attached was not exempt the court properly refused to release the property held under a specific writ of attachment, although no good ground for a specific writ was alleged—Donnelly v. Dripps, (Iowa) 167 N W. 102

82. Kan—Wamego State Bank v. Sesler, 216 P 274, 113 Kan 656
Okl—Black, Sivalls & Bryson v Farrell, 268 P 276, 131 Okl 249
Pa—Graybill v Hoover, 28 Pa Dist 389—Bloom v Littman, 24 Pa Dist 1105—Lopez v. Donohue, 32 Pa.Co. 532
6 C J p 424 note 20

Writ issued while defendant was in the county will be vacated—Wright v. Hovey, 35 Pa Co. 647.

Partial failure of grounds

(1) It has been held that an attachment issued on the ground of nonresidence of defendants must be discharged in toto where it is shown that some of defendants are residents of the state—National Brewing Co v. Bomgardner, 5 Pa Dist 865—6 C J p 424 note 20 [e] (1).

(2) But other authorities have asserted the view that where one defendant in an attachment against several parties denied the alleged nonresidence of his codefendant, such denial afforded no cause for quashing the writ—Warren v. Winterstein, 72 N W 600, 114 Mich. 647—6 C J. p 424 note 20 [e] (2)

83. Milton v Meadville Spinning Co, 28 Pa Dist. 52—6 C J. p 424 note 20 [b].

84. Hale v Hamilton, 7 La App 409—6 C J p 425 note 21.

85 La—Montgomery v New Roads Oil Mill Mfg Co, 2 La App 580
Minn—Chalmers Motor Car Co v Midland Motors Co, 190 N W 348, 153 Minn 304—Sweeney v. McMahon, 177 N W 361, 145 Minn 334
6 C J. p 425 note 22

An offer to return property, the concealment of which was the ground for attachment, is not a sufficient cause for dissolving the attachment—Jackson v. White, 15 Phila (Pa) 294

86. Iowa—Security Sav. Bank v Cimprich, 208 N.W 24, 199 Iowa 1061
Tex—Ford v. Johnston, (Civ.App) 184 S W 303
6 C J. p 425 note 23.

Question of whether defendant was a resident of the state, temporarily absent, or was a nonresident, cannot be raised in an attachment suit by special appearance or otherwise—Security Sav. Bank v Cimprich, 208 N W. 24, 199 Iowa 1061.

Suit on attachment bond, wherein the grounds of attachment may be attacked, is the attachment defendant's sole remedy for a wrongful issuing of attachment.—Security Sav.

Where an allegation of two or more grounds of attachment is made in the affidavit, the nonexistence of one of them is not a sufficient reason for a dissolution of the writ, if one sufficient ground is established [87]

Reasonable cause for believing existence of grounds The fact that an attaching creditor had reasonable cause for believing that the alleged grounds of attachment existed will not, according to the weight of authority, prevent the vacation of the writ where it is made to appear that such alleged grounds did not in fact exist.[88]

Rights of third person. A third person claiming an interest in the property levied on cannot intervene to question the grounds for the issuance of the writ,[89] in the absence of fraud or collusion between the attaching creditor and the debtor.[90]

§ 421. —— Want of Jurisdiction

A lack of jurisdiction is a sufficient ground for dismissing the entire attachment proceeding.

A sufficient ground for dismissing an entire attachment proceeding exists where jurisdiction is lacking.[91] Mere nonresidence of the creditor is not ground for quashing an attachment[92] and the fact that both of the parties to a suit were nonresidents when the cause of action accrued and when the suit was brought is no ground for abating the attachment where there was no fraud on the jurisdiction of the court.[93] Where a nonresident defendant received a directed verdict determining that he had no interest in the property attached, the trial court should dissolve the attachment of its own motion.[94]

§ 422. —— Improper Levy

The fact that property was improperly levied on is not sufficient ground for setting aside a writ of attachment.

It is not a sufficient ground for setting aside a writ of attachment that property was improperly levied upon, although it may be ground for setting aside the levy.[95] Where there is an excessive levy, the error should be corrected by procuring a release of the property in excess of what is sufficient to satisfy the writ and not by discharging the attachment altogether.[96]

§ 423. —— Defects in Proceedings to Obtain Attachment

A mere defect or irregularity in the proceedings will not cause a dissolution, quashal, or vacation of the attachment, but an error therein must be material to cause such action.

Notwithstanding the fact that the proceedings by which the writ was obtained are defective is always a sufficient ground for demanding the dissolution, quashal, or vacation of an attachment,[97] the writ will not be quashed for every defect or slight irregularity in the proceedings, but the error must be material in order to warrant such action by the court.[98] Although the irregularities which

Bank v. Cimprich, 208 N W. 24, 199 Iowa 1061.

87. Remington v Fragulius, 208 P. 65, 120 Wash 563—6 C J p 425 note 24

88. Mundil v. Hutson, 268 P. 566, 33 N M 388, 59 A L R. 522—6 C J p 425 note 25

89. Danker v. Jacobs, 112 N W 579, 79 Neb. 435—6 C J p 425 note 26.

90. Mallette v Ft Worth Pharmacy Co, 51 S W. 859, 21 Tex Civ App 267

91. Atoka Milling Co v. Groomer, 268 P 208, 131 Okl 58—Emert v. Groomer, 268 P 204, 131 Okl. 174—6 C J p 422 note 99

Where junior attaching creditor is movant, the question presented in the absence of fraud or collusion is, are there present jurisdictional defects such as to render the prior attachment proceeding a nullity—American Merchant Marine Ins Co v. Forsikrings Aktieselskabet Norden, 188 N Y S. 593, 197 App Div. 63.

Consolidated actions

Where actions pending between the same parties in the city and supreme courts were consolidated in the supreme court at defendant's instance, it was held to be error to vacate an attachment obtained by plaintiff in the city court, although he had also obtained security in the supreme court case—Goepel v Robinson Mach Co, 103 N Y S. 5, 118 App Div 160.

92. Grant v. Booker, 249 P. 1013, 31 N M 639

93. Givens v Merchants' Nat Bank, 85 Ill 442—Mitchell v. Shook, 72 Ill 492

94. Campbell v. Hill, 155 S.E 273, 158 S C. 151.

95. Gallun v. Weil, 92 N.W. 1091, 116 Wis. 236—6 C J. p 430 note 79

Owner of property attached under an invalid levy should submit thereto and ask the court to release him—Foster v. Dischner, 212 N W. 506, 51 S.D. 102.

96. Moses v. Arnold, 43 Iowa 137, 22 Am R 239—6 C J. p 367 note 60.

97. Fla—Caldwell v People's Bank of Sanford, 75 So. 848, 73 Fla 1165

N Y—Bob v. Claude Neon Lights, 240 N.Y.S. 417, 136 Misc 727

Pa—Locey v. Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super 148—Steadle v. Schneider, 16 Pa Dist. & Co. 665.

6 C J. p 425 note 29.

98. N J.—Black v Emack, 166 A. 513, 11 N J Misc 863.

Tenn—Smyth v Moffett, 6 Tenn App 331.

6 C J. p 425 note 30.

Effect of statute as to amendments

Comp L (1913) § 7561, dealing expressly with the discharge of attachments irregularly issued, is not controlled or affected by §§ 7482, 7483, giving the trial court discretionary power to allow amendments to any pleading, process, or proceeding—Golden Valley County v. Curtin, 203 N.W. 189, 52 N D 372.

Failure to serve garnishee is not ground for dissolution—Benoski v Adams Co, 18 Ohio Cir.Ct.(N S.) 473.

warrant a dissolution of the writ will usually appear on the face of the affidavit or undertaking to procure attachment, or by comparison with the summons and complaint,[99] it is not essential that this should be the case; but defects or irregularities which are not so apparent may be shown[1] The fact that a defect in the proceedings has been cured before a hearing on a rule or motion to dissolve the attachment because of such defect has been held sufficient to preclude a dissolution for that reason[2] A motion to discharge the attachment on the pleadings and attachment papers must be based on the pleadings and papers as amended at the time of the motion.[3]

Junior attaching creditors, although entitled to intervene, cannot defeat a prior attachment by showing mere irregularities which were waived by the debtor himself,[4] and can only set up fraud or collusion by which they have been prejudiced,[5] or such imperfections as render the proceedings void.[6]

Defects or irregularities sufficient to warrant vacation of writ. It has been held to be sufficient ground for the dissolution, quashal, or vacation of an attachment that the writ was issued without a lawful affidavit[7] or bond,[8] or an order directing the issuance thereof;[9] that the affidavit,[10] bond,[11] or writ[12] is defective in matter of substance; that the writ was issued prior to the issuance of any summons or defendant's appearance,[13] that no service of summons has been made on defendant, either personally or by publication, as required by statute,[14] that the service was defective,[15] that no compliance was had with the provisions requiring posting of the citation and writ,[16] that the sum claimed in an action aided by attachment for the contract price of the goods sold is merely averred in the affidavit and not established by proof,[17] that the certified copy of the writ was not entered within the time allowed by statute,[18] that the officer failed to file an inventory of the property attached,[19] that the marshal attached property outside of his jurisdiction, which he had no right to do;[20] or that there was no actual seizure of the property by the officer.[21]

Defects or irregularities not sufficient to warrant vacation of writ. It has been held to be not a sufficient ground for the dissolution, quashal, or vacation of an attachment that there are trivial de-

Variance between affidavit and contract is a material defect warranting the dissolution of the attachment—Leighton v. Nohlechek, 188 P 130, 21 Ariz 305.

99. Kohler v. Agassiz, 33 P. 741, 99 Cal. 9—6 C.J. p 429 note 64

1. Hirsh v Thurber, 54 Md. 210—6 C J p 429 note 65

2. Hallowell v. Tenney Canning Co., 16 Pa.Super. 60—6 C J. p 429 note 66

3. Republic Truck Sales Corporation v. Peak, 239 P. 331, 194 Cal. 492.

4. Colcord v Banco de Tamaulipas, 180 N Y S 852, 191 App.Div. 94—6 C J p 429 note 67.

5. Colcord v. Banco de Tamaulipas, supra—6 C J. p 429 note 68

6. Wichita Nat. Bank v. Wichita Produce Co., 54 P 11, 3 Kan App 40—6 C J. p 429 note 69

7. S C.—J. H Witherspoon Co. v. Bell, 128 S E 503, 132 S C. 303
W.Va.—Eplin v Blessing, 80 S E. 458, 73 W Va. 283
6 C J p 426 note 31.

Provisional seizure is dissolved where the petition does not pay for a writ of attachment—Holcomb & Hoke Mfg. Co v Theodora, 1 La App 445

8. Freudenthal v. Schulman, 5 Pa. Dist. 258—6 C.J. p 426 note 32.

9. Ga.—Blackwell v Compton, 33 S E 672, 107 Ga. 764
La.—Erwin v Commercial, etc., Bank, 3 La Ann 186, 48 Am D 447

10. Cal.—Rosenberg v. Bullard, 15 P.(2d) 870, 127 Cal App 315
Tex.—Nail v Compton, (Com App) 55 S W (2d) 1033, affirming Butler v. Nail, (Civ App) 36 S W (2d) 807—Midland Nat Bank v Goldsmith, (Civ.App) 31 S W (2d) 120, 6 C.J p 426 note 34.

Attachment issued on affidavit certified by member of partnership should be quashed on motion—O'Brien v. Pope, 114 S E. 239, 91 W. Va 590

Failure of the affidavit to state any ground for attachment is sufficient reason for a dissolution.—Caldwell v People's Bank of Sanford, 75 So 848, 73 Fla. 1165—6 C J p 426 note 34 [d] (1)

11. Golden Valley County v. Curtin, 203 N W. 189, 52 N D. 372—6 C.J p 426 note 35

Failure to give additional security as ordered after the attachment issued will cause loss of attachment—McCann v. Schnitzler, 172 N E 143, 254 N Y. 107, reversing 238 N Y S 177, 228 App Div 646, and 238 N Y S 872, 228 App Div 647.

12. Smith v. Hackley, 44 Mo App 614—6 C.J. p 426 note 36.

Failure to comply with statute
Statutes regulating the time at which a writ of attachment should be made returnable have been held mandatory, so that an error in this respect is ground for quashing the writ—Freudenthal v Schulman, 5 Pa. Dist 258

13. Ridenbaugh v Sandlin, 94 P. 827, 14 Idaho 472, 125 Am S R 175.

14. Finch v. Slater, 67 S E 264, 152 N C. 155

15. Coughlin v Angell, 44 A 525, 68 N H 352—6 C J p 427 note 39.

16. Pugh v. Flannery, 92 So 699, 151 La 1063

17. Golden Gate Co v. Jackson, 14 Abb N Cas (N Y) 323

18. Cuthbertson v. Ritchie, 130 A. 756, 99 Vt. 50.

19. Interstate Surety Co. v. Bangasser, 211 N W. 599, 50 S D 618.

20. Benet v. Hernandez, 22 Porto Rico 323.

21. American Surety Co. of New York v Kasco Mills, 266 N.Y S. 531, 149 Misc. 10, affirmed American Surety Co v Kasco, 261 N Y S 987, 237 App Div 880, affirmed 188 N E 75, 262 N.Y. 585.

fects or irregularities in the affidavit,[22] bond,[23] or writ,[24] or in the complaint in the action;[25] that a person was improperly joined as a defendant in the attachment,[26] that defendant was sued by the initials of his christian and middle names,[27] that an affidavit for publication was not filed separately from the affidavit for attachment,[28] that service by registered mail on a nonresident was invalid. where time still existed to effect service by publication;[29] that the summons in the action was irregular and defective,[30] that there was a slight inconsistency between the date of the summons and the date of the sheriff's return,[31] that plaintiff in good faith had a summons issue instead of a warning order made;[32] that the attachment affidavit and bond were not filed on the day shown by the record,[33] that the notice required to be subjoined to the summons to be personally served without the state failed to designate the day on which the order for substituted service was made, and is not subscribed by plaintiff's attorney;[34] that defendant was not served with a copy of the writ in the manner directed by statute,[35] that the affidavit was not affixed to the writ at the time when the writ was served;[36] that copies of the complaint and affidavit served on the person from whose possession the property was taken, as required by statute, did not contain the name of the officer before whom they were verified;[37] that the affidavit falsely stated the cause for attachment where plaintiff was entitled to judgment;[38] that there was an abortive attempt to serve process on a nonresident defendant;[39] that plaintiff served only the principal defendant;[40] that the clerk neglected to advertise until the second term after the writ issued,[41] that the writ was prematurely returned not personally served;[42] that the original bond executed in compliance with the fiat of the judge authorizing the issue of the writs had disappeared with the original in the case;[43] that the

22. Mo—Pisciiic v Pletka, 2 S W (2d) 187, 221 Mo. 250.
Neb—Pitelka v Pitelka, 171 N W 894, 103 Neb 388
Pa—Hessler v. Balser, 2 Pa.Dist & Co 443
Tex—Tsesmelis v. Sinton State Bank, (Civ App) 35 S W (2d) 451, affirmed (Com App) 53 S W.(2d) 461, 85 A L R 319—Snodgrass v. Brownfield State Bank, (Civ App) 251 S W 567.
6 C J. p 427 note 41.

Correction of attachment papers

Defects in attachment papers may be remedied, even when the motion to vacate the attachment is based solely on those papers, and no reason exists why an attachment should be vacated because of the omission of some allegation or proof from the papers, when in fact the allegation can truthfully be made, or the proof is in existence, and can be supplied on the motion to vacate—Sorensen v. S A. Companhia General Commercial De Santos, Santos, Brazil, 180 N Y S. 201.

Disjunctive allegations in the affidavit will not cause the quashal of the attachment—Piedmont Grocery Co. v. Hawkins, 98 S E. 152, 83 W Va 180, 4 A L R 828.

Affidavit taken by plaintiff's attorney

It is not ground for quashing a writ of attachment that the affidavit was made before a notary public, who was also attorney for plaintiff—Snodgrass v. Brownfield State Bank, (Tex Civ App) 251 S.W. 567.

Failure to attach affidavit to writ

Where the property is seized under a writ of attachment without there being attached thereto an affidavit as required by statute, the seizure may be discharged on motion, but the writ cannot be set aside on the ground that it was improvidently granted—Gallun v. Weil, 92 N W 1091, 116 Wis 236

23. Ga.—Benjamin v Pardue, 162 S E 291, 44 Ga App 537
Idaho—Gordon v Kerr, 21 P (2d) 930
S C—J. W. Copeland Co. v. Brown, 87 S E 1002, 103 S C. 177.
6 C J p 427 note 42

Insufficient undertaking which is subsequently cured does not make an attachment void—Charles Mix County Bank v. Calta, 189 N.W. 527, 45 S D. 564

Failure to give increased bond

On appeal from the clerk's order increasing the attachment bond, the judge on ordering a further increase was without power to provide that on plaintiff's failure to give bond within the specified time the attachment should stand vacated without further action—Luff v Levey, 166 S E 922, 203 N C. 783

False swearing or fraud of surety is not ground for vacating attachment—Poswa v. Brittain, (Cal App.) 41 P.(2d) 345.

24. Fox v Mays, 61 N.Y.S 295, 46 App Div. 1—6 C J. p 428 note 43.

25. McQuay v McQuay, 284 P. 532, 86 Mont 535—6 C.J p 428 note 44.

Failure of complaint to allege amount due will not cause quashal of the attachment on motion therefor—Kohlor Flour Mills Co. v. Reeves Grocery Co, 73 So 866, 113 Miss 30.

Matter alleged in affidavit

Omissions in complaint are not grounds for discharge of attachment where the affidavit of attachment affirmatively alleged such facts—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal 492

26. Albers v Bedell, 87 Mo 133

27. Daniels v Taylor, 31 Ohio Cir. Ct 611.

28. Raymond v. Nix, 49 P. 1110, 5 Okl. 656

29. Clarke v Carlisle Foundry Co, 270 N Y S. 351, 150 Misc 710.

30. Ridenbaugh v. Sandlin, 94 P. 827, 14 Idaho 472, 125 Am S R. 175—6 C J p 428 note 48

31. Cureton v. Dargan, 12 S C. 122.

32. Appleton v Southern Trust Co, 51 S W.(2d) 447, 244 Ky. 453

33. Sheip v. Price, 3 Pa Super. 1.

34. Orvis v. Lambeau, McCarty Civ. Proc (N Y.) 250

35. Capital Sav Bank & Trust Co v. Hammett, 113 A 360, 95 Vt. 47—6 C J. p 428 note 52

36. Simpson v. Oldham, 2 Pinn (Wis) 461, 2 Chandl 129.

37. Mazurette v Richard Carle Amusement Co, 99 N Y S. 1109, 49 Misc. 604.

38. Paxton v. Trabue, (Tex Civ App.) 216 S W. 399

39. Kennard v. Hollenbeck, 22 N W. 771, 17 Neb 362

40. Friede v. Azovsko Donskoi Kommercheske Bank, (D C N.Y) 266 F. 131.

41. Cory v. Lewis, 5 N J Law 994

42. Paddock v. Smith, 1 Mich N P. 114

43. Gribble v. Ford, (Tenn Ch A.) 52 S W. 1007.

sheriff failed to take the attached goods into his possession;[44] that the certificate of the affidavit and of the acknowledgment and approval of the bond was made in the name of the clerk by his deputy,[45] or that no bill of particulars was annexed to the original papers.[46] Where a part of the debt sued for is due and a part not due, and the affidavit required by statute where attachment is sought for a debt not due is not filed, the writ may stand as to the part due and be dismissed as to the part not due, but it cannot be quashed on motion.[47] Where plaintiff in his affidavit for attachment unites several causes of action, some of which are stated with sufficient precision to sustain the attachment and some of which are not so stated, a motion to vacate the attachment in toto is properly denied,[48] but defendant may move to reduce the amount to be secured by the attachment to that involved in the causes of action which are sufficiently stated.[49] When the defect is one that may be cured by amendment, defendant is not entitled to have the writ dismissed as against a subsequent motion for leave to amend.[50]

§ 424. —— Fraud

The use of fraudulent means to obtain an attachment or attachment levy is a sufficient ground for vacating it.

Fraudulent method employed by the attaching creditor will serve as a sufficient ground for the quashal or vacation of his attachment,[51] but on the failure to prove such deceit, the attachment will be affirmed and approved.[52] The use of fraud in procuring a levy on the attached property has been held sufficient to justify an application to have the attachment dissolved.[53]

§ 425. —— Pendency of Another Action

The pendency of a second action will not of itself serve to dissolve an attachment obtained in a prior action on the same cause.

Where another action is pending for the same cause of action as that on which an attachment was sued out, the pendency of the second action has been considered not of itself sufficient to warrant a dissolution of the writ.[54] Although it has been held that, where an attachment was issued in the earlier action, another attachment issued in the later action should be dissolved,[55] at least where both attachments were sued out in the same county.[56] An attachment of property in one state will not bar the right to issue a writ of the same nature in another state, even when the assets bound by the first writ might be sufficient to pay the demand.[57]

§ 426. —— Lack of Interest in Attached Property

The fact that the defendant has no interest in the property attached is not a ground for a motion by him to dissolve the attachment, although it may afford a ground to a third person claimant.

Courts have, as a rule, considered as insufficient to warrant a vacation of an attachment the fact that defendant in attachment has no interest in the property levied on, since, ordinarily, defendant will not be injured by seizure of property which he does not own,[58] but where the attachment was

44. Hotchkiss v. Pinney, 25 Pa Co 65.

45. Anderson v. Kanawha Coal Co, 12 W Va 536

46. Pharr v Estey Piano, etc, Co, 66 S E 618, 7 Ga App 262

47. Hubbard v Haley, 71 N.W. 1036, 96 Wis 573

48. McQuay v McQuay, 284 P 532, 86 Mont. 535—6 C.J. p 428 note 62

49. Netter v Trenton Whisk Broom Works, 125 N Y S. 141, 140 App. Div. 287.

50. Kittredge v. Fairbanks Co., 99 A 1016, 91 Vt. 174

51. Minn —Svendsgaard v. Svendsgaard, 190 N W 894, 153 Minn. 478
Okl —Atoka Milling Co. v. Groomer, 268 P. 208, 131 Okl 58—Emert v Groomer, 268 P. 204, 131 Okl. 174
6 C J p 422 note 8.

52. Condon Wrapping Mach Co. v Dearborn, 168 N Y.S 718, 181 App Div 311

53. Paul Delaney Co. v. Joseph Freedman Co, 108 A 435, 93 N J Law 456—6 C J p 422 note 9.

54. Pa —McBride Paper Co v. Beistle, 16 Pa Dist 78—Swartz v. Lawrence, 12 Phila 181.
S D —Charles Mix County Bank v Calta, 189 N W 527, 45 S.D 564
6 C J p 422 note 4.

Attachment without declaration filed does not void attachment subsequently filed

The pendency of an attachment in which no declaration was filed at the first term will not abate a second attachment between the same parties under which the same property was seized and in which a declaration was duly filed —Drake v. Lewis, (Ga. App) 79 S E 167.

Appeal from order vacating prior attachment

Where attachments in one court have been vacated for irregularity, and the suits dismissed, and the costs paid, the pendency of an appeal from the judgments vacating the attachments and dismissing the suits does not preclude the issuing of attachments for the same cause in subsequent suits by the same plaintiff against the same defendant in another court —Haviland v Wehle, 11 Abb Pr N.S. (N Y.) 447, affirmed 4 Daly 549.

55. Flickner v. One Chevrolet Truck and Trailer, (S C) 182 S E 104—6 C J p 422 note 5

56. Miss —James v Dowell, 15 Miss 333.
N J —Harris v. Linnard, 9 N J Law 58.

57. Parson v Columbia Ins Co, 2 Phila (Pa) 21—1 C J p 86 note 7

58. Ga —Smith v. Fourth National Bank, 89 S E 762, 145 Ga 741
Idaho —First Nat Bank v Collins, 9 P (2d) 802, 51 Idaho 689
La —Carney v Security Credit Corporation, 135 So 915, 172 La 911
Miss —Weaver Grocery Co. v. Cain Milling Co, 78 So. 769, 117 Miss 781.
Mo —Hodiamont Bank v. Franklin, (App) 215 S W. 503.

resorted to in order to obtain jurisdiction, a nonresident defendant has been allowed to show his lack of interest in the property attached for the purpose of ousting the court of jurisdiction.[59]

On a claim of an intervener the attachment may be dissolved where it appears that a portion of the property belongs to the intervener and a portion to defendant and the amount belonging to each is not evident,[60] or where it appears that attachment defendant was not the owner of the property or of any interest therein.[61] On the other hand, where the intervener fails to establish any title to the property, an order dissolving the attachment should be set aside.[62]

§ 427. —— Property Not Subject to Attachment

The fact that property attached was not legally subject to seizure is usually an insufficient ground for dissolution

It is usually not a sufficient ground for dissolving a writ of attachment that the property levied on thereunder was not legally subject to seizure under the writ.[63]

§ 428. —— Miscellaneous Grounds

An attachment may be vacated or dissolved on miscellaneous grounds other than those hereinbefore specifically mentioned.

It has been held that where an attachment is issued on an alleged indebtedness, and the evidence shows that the indebtedness was not joint, the proceeding must be quashed.[64] It has been held that where a fund, on deposit in a bank and attached in an action in a federal court as property of defendant therein, was claimed by others, not parties, and an action was instituted in a state court against the bank for the recovery of the fund, it was the duty of plaintiff in the federal court to appear in such action and submit his rights to adjudication therein for the protection of the bank, and that unless he did so the attachment would be vacated.[65] A colorable transfer of a just cause of action against a foreign corporation by a nonresident to a resident of a particular state, for the purpose of enabling the assignee to maintain an action by attachment in the courts of that state for the real benefit of the assignor, does not render an attachment obtained by the assignee void or subject to be attacked by junior attaching creditors of the common debtor.[66]

A statute authorizing a junior attaching creditor to dispute a prior attachment on the ground that the sum demanded in the first suit was not justly due, or was not payable when the suit was commenced, and authorizing him to file a petition of intervention in the same suit, does not authorize such intervention on the ground that the debt of the senior creditor has been paid subsequently to the commencement of the suit[67]

A tender by defendant before suit was brought of the amount of the decree, except the interest, is no ground for discharging the attachment and declaring the bond released, where no money has been paid into court.[68]

N J.—Brombacher v Journeymen Barbers' International Union of America, 143 A. 804, 6 N J Misc. 1069

N D—Gilmore v Olson, 210 N W 341, 54 N D 633

Ohio—Cartmell v The Rudolph Wurlitzer Co, 5 Ohio N P (N S) 604

Okl—First Nat Bank of Cleveland v Coates, 161 P 1095, 62 Okl 142

Pa—Williamson v Bokropis, 7 Pa Co 270

Tex—Wells v. Cloud, (Civ App) 202 S W 331

6 C J p 430 note 85

Determination of ownership

A claim by defendant that the property attached belongs to another cannot be determined on a motion to discharge the attachment—Crosby v Gas, etc, Co, 24 Ohio Cir Ct (N S) 247

Ownership by others

A claim that others than defendants are the owners of the property attached is not available as a defense against the foreclosure of the attachment.—Hodiamont Bank v. Franklin, (Mo.App.) 215 S.W. 503.

59. U S—La Varre v International Paper Co, (D C S C) 37 F (2d) 141

Ga—Smith v Fourth National Bank, 39 S E 762, 145 Ga 741

La—Ribundo v Kemp, 126 So 577, 12 La App 512

6 C J p 431 note 86

60. Di Marco v. Priola, (La App.) 141 So 469.

61. Olson v Johnson, 194 P. 1105, 69 Colo 453

62. Detroit & Security Trust Co v Gitre, 235 N W 884, 254 Mich 66

63. Minn—Rossing v Larson, 202 N W 711, 162 Minn 176—Beigler v Chamberlin, 176 N W 49, 145 Minn 104

Mont—Davis v Bryant, 205 P. 209, 62 Mont 352

Porto Rico—Successors of Lamadrid & Co v. Martorell, 27 Porto Rico 551

6 C J p 431 note 87

Homestead

The exemption of land attached under homestead laws affords no ground for vacating the attachment. —Rossing v. Larson, 202 N W. 711, 162 Minn 176—6 C J. p 431 note 87 [c].

Release of exempt property

The court has jurisdiction to release exempt property from attachment without bond, even though no statutory provision is had concerning a complete remedy with respect to exempt property wrongfully attached—Ray v. Cox, (Utah) 30 P (2d) 1062.

64. Ga—Cox v Henry, 38 S E 856, 113 Ga 259.

Md—Boyd v. Wolff, 41 A. 897, 88 Md. 341.

65. U S. v. Neeley, (C C N Y.) 146 F 764

66. Hadden v Dooley, (N Y) 92 F. 274, 34 C C A 338, affirmed 98 F. 728, 35 C C A 544, reversing 84 F. 80, and reversed on other grounds 21 S Ct 259, 179 U S 646, 45 L.Ed. 357

67. Moore v Ladenburg, 59 N E. 676, 178 Mass 272.

68. Dudley v Chicago, etc, R. Co, 52 S E 718, 58 W Va 604, 112 Am. S R. 1027, 3 L R A.(N.S.) 1135.

Further or collateral security. An attachment issued because defendant made a mortgage on land with intent to defraud his creditors will not be vacated because defendant offers to give the attaching creditor a further mortgage on the land.[69] but under some statutes, an attachment may be dissolved on a filing of the proper bond.[70] An attachment will not be dissolved due to a pledge of accounts as security when it is shown that the accounts have become valueless without any act of the creditor.[71] It is not sufficient ground for dissolving an attachment that a proceeding is pending to foreclose a chattel mortgage securing the claim sued on,[72] or that plaintiff seeks, in the same proceeding, to foreclose a lien on property held as security for the claim, where the security is insufficient.[73] A discharge of an attachment may be obtained on the ground that the debt is secured, and the fact that the creditor's security was located in another state does not prevent such action.[74] A release of an attachment on certain realty is not justified by the fact that a bond was given to release the personalty attached at the same time.[75]

B. JURISDICTION AND FORM OF REMEDY

§ 429. Jurisdiction to Quash, Vacate, or Dissolve

An application to quash, vacate, or dissolve an attachment should be made to the court before which the action in connection with which the writ issued is brought.

Attachment, especially when a suit is pending, is a process of the court over which such court has the inherent power of control,[76] and as a general rule an application to vacate or set aside an attachment should be made to the court before which the action involving the issued writ was brought, or before a judge of such court.[77] However, in some jurisdictions it is expressly provided that the application for relief from an attachment may be made to a designated officer of the court, such as a court commissioner[78] or the clerk.[79]

Although attachment is released by the direction of plaintiff, the court may properly grant a motion to discharge.[80]

Where an attachment has been discharged by giving bond for that purpose, as discussed in § 313, the court has no jurisdiction subsequently to discharge the attachment for the reason that there is no longer any attachment to be discharged.[81]

§ 430. Form of Remedy in General

The party securing the writ cannot discharge it of his own motion, but the procedure prescribed by statute or local rule must be pursued.

The determination that a writ of attachment should not have been issued or that it shall be discharged is a judicial function which the party securing the writ cannot perform for himself, nor can he procure it to be performed by officers who act merely ministerially.[82] The procedure shall be in accordance with that, if any, which is prescribed by applicable statutes.[83] As will be seen in the following sections, an attachment may be dissolved or vacated by the court of its own motion or on a motion or rule to show cause or by a plea in abatement. Although in some jurisdictions the right of a plaintiff to attachment may be determined on exception,[84] objections cannot or-

69. Taylor v. Kuhuke, 26 Kan 132
70. Petition of Bullock, 119 N E 604, 254 Mass 14
71. Savage Tire Sales Co v. Stuart, 203 P. 364, 61 Mont 524
72. Pech Mfg Co v. Groves, 62 N W. 109, 6 S D 504
73. Shedd v McConnell, 18 Kan 594
74. Mason v Jansen, 263 P. 484, 45 Idaho 354
75. Seiler Coal Co v Superior Court, 139 A. 811, 47 R I 76.
76. Morgan v Avery, 7 Barb (N Y) 656, 2 Code Rep 91—6 C J p 437 note 29
77. Cal—Clayton v Superior Court in and for City and County of San Francisco, 21 P.(2d) 1017, 131 Cal App 619
N J—Paul Delaney Co v. Joseph Freedman Co, 108 A 435, 93 N J Law 456
Pa—Slingluff v. Sisler, 23 Pa Co 540
S C—Moody v Dudley Lumber Co, 137 S E 141, 138 S C 478.
6 C J. p 437 note 30

Application to court or judge

In New York an application made to the court to vacate an attachment need not be made before the judge who granted the writ, but it is otherwise when made to the judge, the statute providing for both cases, and distinguishing between applications to the court and to the judge On application to the court the moving party becomes subject to the usual rules in regard to notice, time, and place of hearing, but an application to the judge may be made out of court, and is subject to his direction whether it shall be heard ex parte or on notice—Ingalls v Nutter, 172 N.Y S 210—6 C J. p 437 note 30 [d]

Judge in vacation held authorized to discharge attachment.—Caldwell & Co's Ancillary Receiver v. Landrum, 83 S W (2d) 876, 260 Ky 77

Such an application is addressed to the discretion of the court—Rouss v Gilliam, 70 Pa Super 594—6 C J p 437 note 30 [f]

78. Schall v Bly, 5 N W. 651, 43 Mich 401—6 C J p 437 note 31.
79. Palmer v. Bosher, 71 N C 291
80. National Bank of Montana v. First Nat Bank, 228 P. 80, 71 Mont. 242.
81. Leusch v Nickel, 113 P 595, 16 N M. 28—6 C J p 438 note 34
82. National Bank of Montana v. First Nat. Bank, 228 P. 80, 71 Mont. 242.
83. Collings v. Gibson, (Iowa) 220 N W 338
84. Bauman v. Cline, 123 So 514, 11 La App. 438—6 C.J. p 438 note 36 [a].

dinarily be raised by a demurrer[85] or on appeal,[86] where the objection was not raised in the trial court.[87]

§ 431. Action by Court ex Mero Motu

The court may ex mero motu quash, dissolve, or vacate an attachment irregularly issued.

Where an attachment has been irregularly issued, it is within the power of the court to quash or dismiss the same ex mero motu and without any application for such action by defendant or any other person.[88]

§ 432. Motion to Modify Attachment

In the case of an excessive or unreasonable attachment, a defendant may have a remedy by motion to modify.

The court may on proper showing reduce the amount of the attachment or dissolve it entirely, if justice requires.[89] So, where an attachment is issued on an indebtedness, only part of which is in reality due, a motion for a modification of the writ on that ground is proper.[90]

§ 433. Motion or Rule to Show Cause

Under the practice in some jurisdictions the proper procedure to discharge or dissolve an attachment is by motion or rule to show cause.

While, as will be seen in the following section, a plea in abatement may properly be resorted to where defects relied on to defeat an attachment are not apparent on the face of the proceedings, in a number of states the statutes permit application to dissolve the attachment because of matters outside the record to be made by a motion or rule to show cause why the writ should not be dissolved,[91] the application in such case being supported by affidavits[92] or other evidence[93] in the form of depositions,[94] or oral testimony,[95] or by the compelling of production of books and papers,[96] as the statutes may provide. Where matters apparent on the face of the record are relied on to defeat the attachment, they may be taken advantage of ordinarily by a motion to quash the writ or to dissolve the attachment,[97] which raises issues of law[98] and is treated substantially as a demurrer to a pleading,[99] although there is authority to the effect that a motion to discharge cannot be made to perform the office of a demurrer to the complaint.[1] Further facts alleged in the motion cannot for its purposes be made a part of the petition or record by its mere filing.[2]

A motion to quash or dissolve an attachment is in the nature of a plea in abatement, and, if successful, has the same effect.[3]

§ 434. Plea in Abatement

A proper method of seeking the dissolution of an attachment on grounds not apparent of record is by a plea in abatement or a plea in the nature thereof.

Where the defects are not apparent on the face

85. Hunt v Collins, 4 Iowa 56—6 C J. p 438 note 38

86. Morgan v Avery, 7 Barb (N Y) 656

87. Iroquois Furnace Co v Wilkin Mfg Co, 54 N E 987, 181 Ill 582—6 C.J. p 438 note 40

88. Trinidad Asphalt Mfg Co v. Standard Oil Co, 258 S W 64, 214 Mo App. 115—6 C J. p 438 note 42

89. Marsh v. Moore, 161 A. 227, 52 R.I 458

Breach of employment contract

In an action in attachment for breach of a contract of employment for the balance of salary due or about to become due, if plaintiff was likely to secure employment or had secured employment, thus lessening the amount of damages he might recover, defendant's remedy was not to move to vacate the attachment, but to present such facts on motion to reduce the amount of the attachment—Meinhart v. Contresta, 194 N.Y.S. 593.

Special attachment of realty as standing fraudulently in the name of another than the owner is attachment "made on mesne process" within Rev.L c 167 § 110, giving the right to petition for reduction or discharge of excessive or unreasonable attachments—Shea v Peters, 119 N E 746, 230 Mass 197.

90. Hubbard v Haley, 71 N W 1036, 96 Wis 578

91. U S—Dicks-David Co. v Edward Maurer Co, (D C N J) 279 F 281

Pa—Wolf v Zentz, 5 Pa Dist & Co 276—Graybill v Hoover, 28 Pa Dist. 889

R I—Silva v. Superior Court, 128 A 212, 46 R I 342

6 C J p 438 note 36 [a], p 439 note 48

Falsity of the affidavit for attachment, by reason of the nonexistence of the grounds of attachment alleged therein, may be set up by motion or rule to show cause—Silva v Superior Court, 128 A 212, 46 R I. 342—6 C J. p 439 note 48 [b].

92. Bell v Courteen Seed Co. of Milwaukee, Wis, 196 N W 1006, 197 Iowa 120—6 C J p 439 note 49

93. Carnahan v Gustine, 37 P 594, 2 Okl 399—6 C J p 439 note 50.

94. Hanna v. Barrett, 18 P. 497, 39 Kan 446—6 C J p 439 note 50 [a]

95. Holliday v. Cohen, 34 Ark 707—6 C J p 439 note 50 [b], [c].

96. Schwartz v. Atkin, 12 Pa.Co. 373.

97. Ariz—Lount v. Holladay, 234 P. 1084, 28 Ariz. 16

Mo—Trinidad Asphalt Mfg Co v. Standard Oil Co, 258 S W 64, 214 Mo App 115

Pa—Wolf v Zentz, 5 Pa.Dist. & Co. 276

Tenn—Gilbert v. Smith, 14 Tenn. App. 500

6 C J p 438 note 43.

98. Richardson v Woodruff & Sons, 100 S E 173, 178 N C. 46—6 C J. p 439 note 44.

99. Tollerton v Woods, (Mo App) 89 S W (2d) 567—6 C.J p 439 note 45

1. Cal—Lathrop v. Francis, 180 P. 1, 180 Cal 182

Mont—Union Bank & Trust Co v. Himmelbauer, 181 P. 332, 56 Mont. 82.

2. Tollerton v. Woods, (Mo App) 89 S W (2d) 567.

3. Mont—Vaughn v. Dawes, 17 P. 114, 7 Mont. 360.

W Va—Simmons v. Simmons, 48 S E 833, 56 W.Va. 65, 107 Am S R. 890, 3 Ann Cas. 184.

of the proceeding, a plea in abatement or a plea in the nature of such a plea is the usual,[4] and, in some jurisdictions, the only available[5] method of presenting the objection. So, it is proper to raise the untruth of plaintiff's allegations as to the grounds for attachment by such a plea.[6]

A plea traversing the allegations of the affidavit for attachment is permitted in a number of jurisdictions,[7] and amounts to practically the same thing as a plea in abatement, as it merely goes to defeat the attachment, leaving the merits of the case untouched.[8]

C. PERSONS ENTITLED TO MOVE OR PLEAD

§ 435. Defendant in Attachment

The defendant in attachment is entitled to move or plead for a dissolution, quashal, or vacation thereon if grounds therefor exist.

Since defendant in attachment is, under ordinary circumstances, the person most affected, if not the only person affected, by issuance and levy of the writ, it naturally follows that he is entitled to move or plead for a dissolution, quashal, or vacation thereon in case any of the grounds therefor exist,[9] and it has been held that no other person has this right,[10] unless, as is very generally the case, the statutes or local practice rules authorize other persons who might have a remedy against the attachment in a court of equity to resort to the more convenient and expeditious method of determining the controversy in the original suit.[11]

§ 436. —— Ownership of Property as Bearing on Right

A motion to dissolve an attachment based on other grounds cannot be defeated by showing that the defendant had no interest in the property at the time of the levy thereon.

Even though a defendant cannot ordinarily proceed for a dissolution of an attachment on the ground that he has no interest in the property levied on, as shown in § 426, a motion or plea based on other grounds cannot, as a rule, be defeated by showing that defendant had no interest in the property at the time of the levy thereon,[12] although there is authority to the contrary,[13] for

4. Ala.—Melvin v. Scowley, 104 So. 817, 213 Ala. 414.
Mo.—Trinidad Asphalt Mfg. Co. v. Standard Oil Co., 258 S.W. 64, 214 Mo.App. 115.
Tenn.—Mason v. Burgess, 8 Tenn. Civ.A. 133.
Tex.—Taesmelis v. Sinton State Bank, (Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ.App.) 35 S.W.(2d) 451.
6 C.J. p. 458 note 12.

5. De Jarnette v. Dreyfus, 51 So. 932, 166 Ala. 138—6 C.J. p. 439 note 47.

Cause of action not authorizing attachment.
Where an attachment is sued out for a cause of action on which the statutes do not authorize its issue, the irregularity cannot be reached by a plea in abatement or by a motion to quash it. The proper method of reaching the objection, where the writ will not lie for the enforcement of the action, is a rule on plaintiff to show cause against the dissolution of the writ and its levy, and the motion must precede a plea to the merits.—Cooper v. Owen, 161 So. 98, 230 Ala. 316—Federal Land Bank of New Orleans v. Strickland, 148 So. 799, 227 Ala. 116—6 C.J. p. 439 note 47 [b].

6. Melvin v. Scowley, 104 So. 817, 213 Ala. 414—Hall v. Pearce, 96 So. 608, 209 Ala. 397.

7. Colo.—Colorado Vanadium Corporation v. Western Colorado Power Co., 213 P. 122, 73 Colo. 24.
Ga.—Lawrence v. Lee's Department Store, (App.) 172 S.E. 471.
6 C.J. p. 459 note 14.

In Texas it is held that the affidavit for attachment is not traversable for the purpose of abating the writ and vacating the lien.—Hart v. Jopling, (Civ.App.) 146 S.W. 1075—6 C.J. p. 459 note 14 [b].

Verified answer.
The allegations of an affidavit for attachment may be denied in a verified answer.—Ford v. Wilson, 288 S.W. 712, 172 Ark. 335.

Affidavit setting up a defense cannot take the place of an answer in abatement.—Kellogg v. Sutherland, 38 Ind. 154.

8. Gallun v. Weil, 92 N.W. 1091, 116 Wis. 236—6 C.J. p. 459 note 15.

9. Ga.—Smith v. Fourth Nat. Bank, 89 S.E. 762, 145 Ga. 741.
N.Y.—Rosenberg v. Occidental Trading Co., 178 N.Y.S. 477, 189 App.Div. 330—L. Arbetter, Inc. v. Isabel, 263 N.Y.S. 176, 147 Misc. 54—Thomas v. Blizzard, 170 N.Y.S. 11.
6 C.J. p. 431 note 90.

Each defendant can move to discharge an attachment irregularly or improperly issued as to him.—Willett & Burr v. Alpert, 185 P. 976, 181 Cal. 652.

Individual and representative capacity.
Where defendants hold some of attached land as trustees, they are not deprived of their right to move on one or more statutory grounds to quash the writ.—Golden Valley County v. Curtin, 203 N.W. 189, 52 N.D. 372.

Joint motion.
Where each defendant elects to challenge the sufficiency of the writ in toto, the writ is held good if sufficient as to any one defendant.—Jenkins v. First Nat. Bank, 236 P. 1085, 73 Mont. 110.

10. Thielen v. Schechinger, 230 N.W. 516, 210 Iowa 224—6 C.J. p. 432 note 91.

Debtor alone may assail attachment on ground that allegations on which the writ issued are untrue.—Thielen v. Schechinger, 230 N.W. 516, 210 Iowa 224.

11. King v. Patterson, 164 S.W. 1191, 129 Tenn. 1—6 C.J. p. 432 note 92.

12. La.—Middleton v. Howell, 6 La.App. 865.
Mich.—F. W. Stock & Sons v. Capitol Cooperage Co., 197 N.W. 529, 226 Mich. 405.
N.Y.—Thomas v. Blizzard, 170 N.Y.S. 11.
N.C.—Luff v. Levey, 166 S.E. 922, 203 N.C. 783.
6 C.J. p. 432 note 94.

13. Gore v. Ray, 41 N.W. 329, 73 Mich. 335—6 C.J. p. 432 note 94 [d].

the reason that plaintiff in attachment, having by the levy asserted that the property is that of defendant, is estopped to assert the contrary.[14] However, as such action on the part of the attaching plaintiff cannot of course estop him to assert that defendant has subsequently parted with his interest in the property, it is held by some authorities that a transfer by defendant of all his interest in the attached property, subsequent to the seizure, precludes him from moving to dissolve the attachment.[15]

§ 437. —— Waiver or Estoppel

A defendant may by his own acts waive or be estopped from claiming his right to seek a dissolution of the attachment.

Where defendant consents to an attachment,[16] by his conduct waives his right to assert defects in the attachment,[17] delays in objecting thereto,[18] appears generally in the action,[19] or agrees, after seizure of the attached property, that the sheriff shall sell summarily and retain the proceeds until final judgment,[20] he may preclude himself from insisting on a dissolution of the writ, and where a defense to the main action has been waived defendant cannot set up such defense to defeat the attachment proceedings.[21] However, a mere request by defendant for a suspension of legal proceedings has been held not to estop him from moving to vacate for plaintiff's failure to publish within the time prescribed by statute;[22] nor is a motion to vacate an attachment waived by the subsequent filing of affidavits denying the truth of the matters alleged in the affidavit for attachment.[23] The execution of a replevy bond in an attachment does not have the effect of precluding defendant from quashing the writ of attachment for defects in the affidavit therefor.[24] A failure of defendant to plead to the merits of the action will not debar him from filing a plea in abatement denying the existence of the grounds for attachment;[25] nor is defendant precluded from insisting on a non-jurisdictional reason for dissolution because of the fact that in his petition to quash he also set up a reason going to the jurisdiction.[26]

§ 438. Assignee or Grantee of Defendant

An assignee or vendee of a defendant in attachment may be allowed to move for the dissolution of the writ.

Although the right in some instances has been denied,[27] it is generally accepted that an assignee of defendant in attachment may move or plead for the dissolution of the writ,[28] unless he has waived this right,[29] or unless a similar motion made by defendant, his assignor, has been denied.[30] A grantee or vendee of defendant subsequent to the

14. Ga.—Holmes v. Langston, 27 S E 155, 99 Ga 555
Neb.—Kountze v Scott, 72 N W. 585, 53 Neb 460—McCord, etc, Co v Bowen, 70 N W. 950, 51 Neb 247—Dayton Spice-Mills Co v Sloan, 68 N W 1040, 49 Neb. 622—Standard Stamping Co v. Hetzel, 62 N W 247, 44 Neb 105.

15. Conrad Baking Co. v. Kunkel, 160 N Y S 841—6 C J. p 433 note 96

Assignment for benefit of creditors

(1) An assignor's interest in the surplus after making a general assignment for the benefit of creditors is sufficient to entitle him to move for the dissolution of an attachment on the property assigned.—Winona First Nat Bank v Randall, 37 N W. 799, 38 Minn. 382—6 C J. p 433 note 96 [b] (1).

(2) But defendant's right has been limited in some instances to moving for the discharge of his residuary interest.—Kountze v. Scott, 68 N W 479, 49 Neb 258—6 C J. p 433 note 96 [b] (2).

16. Thames v. Schloss, 24 So 835, 120 Ala 470

17. Maynard v Damron, 36 S W (2d) 638, 237 Ky 793

18. Walden v Locke, (Tex Civ App) 33 S W.(2d) 475—6 C J p 433 note 99.

19. N C.—Richardson v Woodruff & Sons, 100 S E 173, 178 N C 46
Pa.—Franklin Trust Co. v Hegh, 6 Pa Dist & Co 231.
6 C J p 433 note 1

No estoppel as to subsequent complaint

Defendant, by a general appearance in an action for damages instituted by an affidavit averring the existence of a debt for which attachment would lie, was not estopped, on a subsequent filing of a complaint stating a cause of action for which an attachment would not lie, to move to strike such complaint and to quash the writ.—Noah MacDowell & Co v Edward & John Burke, Limited, 130 A. 199, 3 N J Misc 740.

In New York, defendant's right to move for the vacation of an attachment is held to be not waived by a general appearance.—Shapiro v. Loft, Inc, 254 N.Y S 197, 142 Misc. 144—6 C J p 433 note 1 [d].

Dissolution of attachment proceedings under the statute is not barred by an appearance and plea.—Leib v Bostwick, 239 N.W 405, 256 Mich. 277—Hyde v Nelson, 11 Mich 353

20. Dungan v Jesko, 246 P 1094, 118 Okl 217—6 C J. p 433 note 2

21. Pennsylvania R Co. v. Peoples, 31 Ohio St. 537.

22. Mojarrieta v. Saenz, 80 N.Y. 547

23. Salmon v Mills, (Ind) 49 F. 333, 1 C C A 278

24. Mueller v Gollober, (Tex Civ. App) 252 S W 1076.

25. Miller v Fewsmith Lumber Co, 26 S E 175, 42 W Va 323.

26. Turner v Larkin, 12 Pa.Super. 284, dismissing appeal 7 Del Co. 543

27. Rowe v Kellogg, 19 N.W. 957, 54 Mich. 206—6 C J. p 434 note 8 [f]

28. Wichita Wholesale Grocery Co v. Records, 19 P 346, 40 Kan. 119

29. Marx v. Chancimino, 69 N Y S 672, 59 App Div. 570—6 C.J p 434 note 9

30. Strauss v. Vogt, 24 N Y S. 433, 23 N Y Civ.Proc. 251—6 C J. p 434 note 10.

Effect of overruling motion by assignee on right of successor to move

Where the statutory assignee of defendant has moved to dissolve the attachment, and such motion has been overruled, a similar motion by his successor without leave of court may properly be stricken from the files.—Hillyer v Biglow, 28 P. 150, 47 Kan 473.

attachment of the property conveyed is sometimes allowed to assail the attachment.[31] A person in whose hands real property is specially attached as belonging to another, but is standing fraudulently in his name, may move to dissolve the special attachment under a statute permitting defendant or the person whose property has been attached on mesne process to move to reduce or discharge the attachment.[32]

§ 439. Receiver, Trustee in Insolvency, or Personal Representative, of Defendant

The right of a receiver, trustee in bankruptcy or insolvency, or personal representative of attachment defendant to move for a dissolution, quashal, or vacation of the attachment writ is discussed in the titles Bankruptcy § 212 [7 C.J. p 146 note 51]; Executors and Administrators § 750 [6 C.J. p 435 note 14]; Insolvency § 11 [6 C.J. p 435 note 13]; and Receivers § 342 [6 C.J. p 434 note 12].

§ 440. Creditors of Defendant

Defendant's creditors other than the one attaching may be permitted to contest attachment and to move for dissolution.

Other creditors of defendant than the one who sued out an attachment are sometimes permitted to contest the attachment,[33] and, accordingly, a judgment creditor of defendant in attachment has been held entitled to move or plead for a dissolution of the attachment.[34] On a motion to vacate an attachment by a junior attaching creditor, the court will not scrutinize the complaint and affidavits as closely as when the motion is made by defendant whose property was attached.[35]

§ 441. Holder of Lien on Property Attached

A lienholder on property levied on under an attachment may defend against the attachment.

A person having a lien on the property levied on under an attachment is usually permitted to defend against the attachment,[36] provided his objections are substantial and not based on mere irregularities in the proceedings which have been waived by defendant himself.[37]

§ 442. Claimant of Attached Property

A claimant of the property attached may under some circumstances move for quashal of the attachment.

A person who claims ownership in the property attached has been held to have a right to be heard on his intervening by a motion to discharge the attachment,[38] but it has also been held that such person's remedy is by a claim of the property and an interpleader to determine the title, rather than by intervention in the attachment proceedings.[39] An intervener may, according to some authorities, move to quash the attachment on grounds other than such ownership,[40] but not on the ground of such ownership.[41]

§ 443. Sureties on Replevy Bond

Sureties on bond to replevy attached property may intervene and move to dissolve.

Sureties on a bond given to replevy attached property have been allowed to intervene and set up a defect in the affidavit.[42]

§ 444. Garnishee

The right of a garnishee to plead or object against an attachment taken on the property of the creditor of the garnishor is discussed in section 199 of the title Garnishment [6 C.J. p 437 notes 22, 23].

§ 445. Plaintiff in Attachment

A motion to dissolve the writ cannot be made by the plaintiff in attachment.

Plaintiff in attachment cannot move for a dissolution of the writ.[43]

31. Long v. George, (Mass) 195 N E 377—6 C.J. p 434 note 11.

32. Shea v Peters, 119 N.E 746, 230 Mass 197.

33. Elkins Nat Bank v. Simmons, 49 S E 893, 57 W.Va. 1—6 C J. p 436 note 20

34. Williams v. East Wareham, etc., R Co, 50 N.E 646, 171 Mass 61

35. American Merchant Marine Ins Co v. Forsikrings-Aktieselskabet Norden, 188 N.Y S 593, 197 App Div. 63

Second attaching creditor may contest the validity of the first attachment—Tucson Nat. Bank v Gomez, 234 P 560, 27 Ariz 510—6 C J p 436 note 20 [e]

36. McElldowney v. Madden, 56 P 783, 124 Cal 108—6 C J p 435 note 15.

37. Baker v Ayers, 25 S W. 834, 58 Ark 524—6 C J p 435 note 16.

38. Modoc Soap Co v Brankamp, 5 Ohio N.P (N S) 252.

39. Burleigh v. White, 8 Pa Dist & Co 113

40. Hines v. Kimball, 47 Ga. 587—6 C J 435 note 17

Claimant may move to dismiss levy under void attachment, but only defendant in attachment can traverse the grounds of attachment—Bank of Manchester v Universal Credit Co, 164 S E 95, 45 Ga App. 233.

41. Tollon v. Hand & Johnson Tug Co, 29 Pa Dist. 298—Claflin Co v. Weiss, 16 Pa Co. 247.

42. Burch v. Watts, 37 Tex. 135—6 C J p 436 note 18

43. Mense v. Osbern, 5 Mo. 544.

§ 446. Other Persons

Although having an interest in the property seized, one cannot, as amicus curiæ, move or plead for the dissolution of an attachment, as is discussed in section 3 of the title Amicus Curiæ. Also, as will be shown in section 1930 of the title Corporations, a domestic corporation cannot move to vacate an attachment against a similar, named corporation on the ground that its property has been taken under the attachment. For subsequent cases which may arise consult Pocket Parts.

D. PROCEEDINGS

§ 447. Proceedings on Motion

The proceedings on a motion to quash or dissolve an attachment or to show cause why it should not be quashed or dissolved will be considered in detail in the subsequent sections.

§ 448. —— Necessity for General Appearance in Action

A general appearance is required in some jurisdictions when moving for the vacation of an attachment, but in others it is held unnecessary.

In some jurisdictions a defendant may move to vacate an attachment without appearing generally in the action,[44] while in others such a motion cannot be made without a general appearance to the action.[45]

§ 449. —— Time for Motion

A motion to vacate or discharge an attachment must be made within the time, if any, fixed by applicable statutes and rules of court unless the court in its discretion permits the making of the motion out of time.

While a statute requiring objections of a particular character to be made within a specified time must be followed, it has no application to cases not within its provisions.[46] In general a defendant may make a motion to quash or vacate an attachment as soon as he comes before the court[47] but the time within which he must move is dependent on the applicable statutes and rules of court. Thus by some of such provisions defendant is required to move at the very outset of the proceedings, either at the return term of the writ or as soon thereafter as possible,[48] or within the time prescribed for pleading in abatement,[49] or within the time for answer,[50] or within a reasonable time after appearance,[51] and cannot be allowed to present such a motion after he has pleaded to the merits or in bar to the main action,[52] or has filed a plea in abatement of the attachment;[53] but in other jurisdictions a more lenient rule prevails, and defendant can make his motion to quash at any time before trial[54] or final judgment.[55]

After judgment. While defendant may, in some states, move to quash the writ even after judgment,[56] if the proceeds of the attached property have not been applied in satisfaction of the judgment,[57] the general rule is that no motion to vacate or quash can be made after final judgment.[58]

Effect of delay. It is within the sound discretion of the trial court to strike out defendant's motion to quash the levy of attachment and his

44. Willett & Burr v. Alpert, 185 P. 976, 181 Cal 652—6 C.J. p 440 note 52.

45. U.S.—Feurer v. Stewart, (C.C. Wash.) 82 F. 294.
Pa.—Singerly v. Dewees, 19 Pa.Co. 80
6 C.J. p 440 note 53.

46. Golden Valley County v. Curtin, 203 N.W. 189, 52 N.D. 372.

Objections to surety
A statute providing that a defendant may except to the sufficiency of the surety upon an undertaking for attachment within a certain time or else that he will be held to have waived all objections to the surety does not limit defendant's right to ask that attachment proceedings be vacated where plaintiff has executed an undertaking for an attachment but without sureties—Golden Valley County v. Curtin, 203 N.W. 189, 52 N.D. 372.

47. Md.—H. L. Neuman Co. v. Duhadaway, 141 A. 342, 154 Md. 595
Va.—C. G. Blake Co. v. W. R. Smith & Son, 133 S.E. 685, 147 Va. 960
6 C.J. p 440 note 54

After giving replevin bond
A vacation of an unwarranted attachment is not error even though no motion to vacate was made before the replevy bond was given—Bizzell v. Mitchell, 142 S.E. 706, 195 N.C. 484—6 C.J. p 440 note 55 [c].

48. Brewster v. James, 3 Ill. 464—6 C.J. p 440 note 55.

49. De Bardeleben v. Crosby, 53 Ala. 362—6 C.J. p 440 note 55 [c] (1).

50. Merritt v. St. Paul, 11 Minn. 223—6 C.J. p 440 note 55 [c] (2)-(4).

51. Walden v. Locke, (Tex.Civ.App.) 33 S.W.(2d) 475.

52. Watson v. Noblett, 47 A. 433, 65 N.J.Law 506—6 C.J. p 441 note 56.

53. Rice v. Hauptman, 31 P. 862, 2 Colo.App. 565—6 C.J. p 441 note 57.

54. Clark v. Tull, 84 N.W. 1030, 113 Iowa 143—6 C.J. p 441 note 58

Time for filing discretionary with the trial court and not mandatory—Hall v. Pearce, 96 So. 608, 209 Ala. 397.

55. William Edwards Co. v. Goldstein, 88 N.E. 877, 80 Ohio St. 303—6 C.J. p 441 note 59.

56. Rowles v. Hoare, 61 Barb (N.Y.) 266—6 C.J. p 442 note 60.

57. R. Baff & Son v. F. M. Heggie Co., 176 N.Y.S. 736—6 C.J. p 442 note 61.

58. D.C.—Cross v. Union Storage & Transfer Co., 48 App.D.C. 606
Ga.—Askew v. Melvin, 87 S.E. 278, 144 Ga. 348—Philip Carey Co. v. Sheppard, 91 S.E. 444, 19 Ga.App. 368
S.D.—Citizens' Nat. Bank of Sisseton v. Miller, 199 N.W. 965, 47 S.D. 548.
Wash.—Godefroy v. Hupp, 160 P. 1056, 93 Wash. 371.
6 C.J. p 442 note 62.

plea in abatement of the attachment where they were made out of time and without the leave of court.[59]

§ 450. —— Notice of Motion

Notice of the motion is ordinarily a statutory prerequisite.

Notice to plaintiff of a motion to dissolve or vacate is usually held to be essential,[60] but it has been held that such notice is unnecessary where the motion is founded on plaintiff's application and proofs.[61]

It is required generally that such notice shall specify the grounds on which is based the motion to quash or dissolve.[62] Where the motion is based on irregularity in the proceedings, the notice must point out the irregularity on which the moving party intends to rely,[63] but this is not considered necessary where the defect is more than a mere irregularity.[64]

Time for giving notice. The statutes sometimes require notice within a specified time before the return day,[65] while other statutes require merely a reasonable notice of the motion.[66] In the latter case the reasonableness of the notice will be determined by the circumstances and conditions existing at the time the matter was to be presented.[67]

Service. The notice must be served on plaintiff in attachment if he resides in, or is to be found within, the county,[68] or otherwise upon his agent or attorney,[69] and service is sometimes required to be made by reading the notice to the person served.[70]

§ 451. —— Requisites of Motion

The motion must be sufficiently definite to present the ground relied on.

A motion to quash or vacate an attachment must in general be specific as to the ground relied on,[71] which must be one which shows the invalidity of the proceedings,[72] although unless the requirement is imposed by statute the motion need not contain all of the elements of a traversing plea,[73] and where the statute provides generally that the motion may be on the ground that the attachment was improperly or irregularly issued it is unnecessary that a motion based on affidavits be more precise than the statutory language, but the affidavits must be specific and precise.[74] However, where an attachment is attacked for jurisdictional defects, the attachment may be vacated although no specific irregularities in the attachment papers are pointed out[75] or although erro-

59. Hodiamont Bank v. Franklin, (Mo.App.) 215 S.W. 503.

60. R.I.—Everett v. Cutler Mills, 160 A. 924, 52 R.I. 330
Utah.—Hilton Bros. Motor Co. v. District Court in and for Millard County, 25 P.(2d) 595.
6 C.J. p. 443 note 63

61. Thalheimer v. Hays, 42 Hun 93, affirmed 14 N.E. 609, 107 N.Y. 673

62. Powers v. Freeland, 299 P. 736, 114 Cal.App. 146—6 C.J. p. 443 note 65

Accompanying affidavit

A notice of motion to discharge an attachment, defective because not stating the grounds of motion, is cured by the accompanying affidavit disclosing the claimed grounds.—Giandeini v. Ramirez, (Cal.App.) 54 P.(2d) 91—6 C.J. p. 443 note 65 [a].

63. Willett & Burr v. Alpert, 185 P. 976, 181 Cal. 652—6 C.J. p. 443 note 66

64. Weil v. Gallun, 78 N.Y.S. 300, 75 App.Div. 439—6 C.J. p. 443 note 67.

65. Cleland v. Clark, 69 N.W. 652, 111 Mich. 336—6 C.J. p. 443 note 68.

66. Kan.—Guest v. Ramsey, 33 P. 17, 50 Kan. 709—Quinlan v. Danford, 28 Kan. 507.
Neb.—Sterling Mfg. Co. v. Hough, 68 N.W. 1019, 49 Neb. 613.

67. Sterling Mfg. Co. v. Hough, supra—6 C.J. p. 443 note 70.

68. Cleland v. Clark, 69 N.W. 652, 111 Mich. 336

69. Finch v. McVean, 91 P. 1019, 6 Cal.App. 272—6 C.J. p. 444 note 72.

70. Cleland v. Clark, 69 N.W. 652, 111 Mich. 336—6 C.J. p. 444 note 73.

71. Ga.—Wiggins v. L. Jonas & Co., 106 S.E. 927, 26 Ga.App. 706
N.Y.—Hiller v. Russo-Asiatic Bank, 273 N.Y.S. 594, 242 App.Div. 688.
6 C.J. p. 444 note 77.

Defects in affidavit

(1) Specifications, in mere general terms, that an affidavit for attachment does not conform with provisions of Code Civ.Proc. § 538, and that the attachment was improperly and irregularly issued, are not sufficiently specific to sustain a motion or order for discharge of the writ.—Republic Truck Sales Corporation v. Peak, 229 P. 331, 194 Cal. 492.

(2) An objection that there was "no sufficient affidavit filed" is too general to be the basis of an adjudication.—Gill v. Physicians' and Surgeons' Bldg., 138 A. 674, 153 Md. 394.

Defects in the bond must be specifically pointed out.—Wiggins v. L. Jonas & Co., 106 S.E. 927, 26 Ga.App. 706.

Forms of motion to dissolve attachments.—West v. Woolfolk, 21 Fla. 189—Kilpatrick v. O'Connell, 62 Md. 403

Amendment

Where defendant's original motion to discharge an attachment was sufficient, the allowance of an amendment to the motion was not error.—Fawkner, Currie & Co. v. Sanitary Fish Co., 177 P. 708, 105 Wash. 88.

72. Patrick-Mosteller Co. v. James R. Baker & Co., 105 S.E. 271, 180 N.C. 588.

73. Fawkner, Currie & Co. v. Sanitary Fish Co., 177 P. 708, 105 Wash. 88.

74. Fawkner, Currie & Co. v. Sanitary Fish Co., supra.

Irregular or improvident

A motion to dissolve an attachment will not be held too indefinite where it is based on the grounds that the attachment was irregularly issued and that it was improvidently granted, although it did not specify any irregularities and did not specify any particulars wherein the warrant had been issued improvidently, but merely referred to the affidavit accompanying the motion.—Brekke v. Waite, 153 N.W. 901, 36 S.D. 26

75. Weehawken Wharf Co. v. Knickerbocker Coal Co., 53 N.Y.S. 982, 24 Misc. 683, reversing 49 N.Y.S. 1001, 1150, 22 Misc. 559, 768—Thomas v. Blizzard, 170 N.Y.S. 11—6 C.J. p. 444 note 78.

neous reasons are assigned[76] In general an application is sufficient where it puts in issue the material allegations of plaintiff's petition as to the grounds on which the issuance of the attachment is based[77] A petition in support of an application for the dissolution of an attachment based upon the falsity of the grounds upon which such attachment was issued must deny the existence of the facts alleged in the affidavit;[78] and where the facts stated in the affidavit upon which the attachment was granted are prima facie sufficient to justify the issue thereof, and defendant fails to make any explanation of the same in his motion to vacate, the attachment will not be disturbed.[79] A specification in an affidavit traversing the truth of the affidavit for attachment is insufficient where it constitutes an effort to put in issue the merits of the case rather than the ground for attachment,[80] as where it denies that defendants were indebted to plaintiff in the specific sum alleged.[81]

The motion should, where it is deemed essential to the movant's right to proceed, show that it was defendant's property that was attached[82] and a description of the property should be given[83]

Request for restoration. Upon application to dissolve an attachment levied on realty, it is unnecessary that the petitioner should ask for restoration of the property.[84]

Entitling. Even though a motion to quash or vacate an attachment should ordinarily be entitled in the original cause,[85] this has been held not necessary where the proceedings were before a circuit court commissioner.[86]

Verification. It has been considered that a motion for the dissolution of an attachment should be verified,[87] and also, to the contrary, that such verification is not necessary.[88]

§ 452. —— Supporting Affidavits

Where an application is based on facts outside the record, it must usually be supported by affidavits showing the facts relied on and controverting the grounds supporting the attachment

Where an application to vacate or quash an attachment is based on evidence dehors the record, it is usually supported by affidavits.[89] The supporting affidavits should set out the facts on which the motion to quash or vacate is based,[90] and should contain enough to put in issue the allegations of the affidavit for attachment,[91] although they should not go to the merits of the cause of the action or defense.[92] Where an attachment was issued in a suit by a corporation, an allegation by defendant in an affidavit to quash, made on information and belief without giving the sources of his information or the grounds of his belief that the action had been commenced without authority of the board of directors, was held insufficient to raise an issue[93]

A verified answer may be used as an affidavit so far as its contents are pertinent,[94] as may also

76. Bruce v. Cook, 6 Gill & J (Md) 345

77. Sutton v. Cook, 126 S E. 473, 159 Ga 505

78. Stock v. Reynolds, 80 N W 289, 121 Mich 356—6 C J p 444 note 80

79. Wickham v. Stern, 9 N Y S 803, 18 N Y Civ Proc 63—Marietta First Nat. Bank v. Bushwick Chemical Works, 5 N Y S 824, affirmed 6 N Y S 313, 3 Silv Sup 61, 17 N Y Civ Proc 329—Pach v. Orr, 1 N Y S 760, 15 N Y Civ Proc 176.

80. Republic Truck Sales Corporation v. Peak, 239 P 331, 194 Cal 492

81. Cal—Republic Truck Sales Corporation v Peak, supra
Wash—Market Operating Corporation v Crull, 5 P (2d) 340, 165 Wash 306

82. Osborne v. Robbins, 10 Mich 277—6 C J p 445 note 82.

Nonownership of property
Where a defendant moves to dissolve an attachment on several grounds, including nonownership of property supported by an affidavit, such ground cannot be disregarded as surplusage but should be given its legal effect, which is to preclude him from relief under such motion upon any ground stated therein—Gilmore v. Olson, 210 N W. 341, 54 N D 638

83. Macumber v Beam, 22 Mich 395—6 C J. p 445 note 83.

84. Smith v. Collins, 2 N W. 177, 41 Mich 173

85. Waltz v. Nichols, 32 Hun 276, 19 N.Y Wkly Dig 165—6 C J p 444 note 75

86. Heyn v. Farrar, 36 Mich 258.

87. Osborne v. Robbins, 10 Mich. 277

88. Wm W Kendall Boot, etc, Co v August, 32 P 635, 51 Kan 53.

89. W G Jenkins & Co, Bankers, v. McKenzie, 238 P 294, 41 Idaho 76—6 C J p 445 note 87.

Affidavit of merits
Where a defendant, in support of his motion to dissolve an attachment as to him, filed an affidavit in which he set forth that he was a resident of the state, and that the money attached belonged to him, there was a sufficient affidavit of merits, since, in view of Code Civ Proc § 557, the motion might have been made without any affidavit—Willett & Burr v Alpert, 185 P 976, 181 Cal. 652.

90. Omaha Hardware Co. v Duncan, 47 N W 816, 31 Neb 217—6 C.J p 445 note 89

91. Mich—Lefaivre v Kess-Line Motors, 193 N W. 794, 233 Mich 42
S D—Merchants' Bank of Redfield v Gillespie, 194 N W 836, 46 S D 513
6 C J. p 445 note 90

92. First Nat. Bank v. Collins, 9 P (2d) 802, 51 Idaho 689—6 C J p 446 note 91

Denial of debt
Where plaintiff obtained a writ of attachment, under Attachment Act § 1 subd 2, an ex parte affidavit of defendant's agent, denying existence of the debt, is not sufficient to support a motion to quash writ—Robinson v. Mellon, 126 A. 863, 2 N J Misc. 1184

93. Carolina Agency Co v Garlington, 67 S E 225, 85 S C 114

94. Nelson v. Munch, 23 Minn. 228

the verified pleading of plaintiff.[95]

Showing right to move Where the motion is made by a person other than defendant in attachment, his supporting affidavits should show the facts which give him the right to move.[96] Where it was plainly stated in affidavits filed in support of a motion to discharge an attachment that affiants were the defendants, their true names being slightly changed in the attachment proceedings, it was held that, the affidavits not being denied, the court would treat the affiants as defendants and not as strangers or intruders.[97] A junior attaching creditor must present, as part of his motion papers, the papers upon which his own attachment is founded.[98]

Showing present condition of action. It is sometimes required that the supporting affidavits shall state the present condition of the action, and, if it has not been tried, the time appointed for holding the next term, where the action is triable.[99]

Traversing, explaining, or avoiding plaintiff's evidence. After plaintiff has filed his affidavit or other evidence to sustain the averment made by him to obtain the issue of the attachment writ, defendant may in some jurisdictions file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by plaintiff's evidence.[1]

§ 453. —— Opposing Affidavits

Where an attachment has been challenged by a motion to vacate supported by affidavit, the plaintiff may file affidavits in opposition of such motion and in support of the attachment.

Where an application to discharge or vacate an attachment is made upon a motion supported by affidavit, plaintiff is allowed to file affidavits in opposition to such motion and in support of his attachment,[2] but such a course is not permissible where the motion to vacate is made upon the original papers.[3] On a motion to dissolve an attachment, plaintiff's verified pleading stands as an affidavit.[4]

Scope. The new proof which plaintiff is allowed to use in opposition to a motion to vacate is, as a rule, limited to affidavits tending to sustain the grounds of attachment originally relied on,[5] or to contradict, answer, or explain the affidavits read in support of the motion;[6] and affidavits tending merely to remedy defects in, or to qualify, the papers on which the attachment was originally granted should not be heard,[7] unless, of course, the statute permits new or additional proof on the hearing of such a motion.[8]

Order for filing of affidavits. It has been held that where the grounds for the issuance of an attachment are alleged in the language of the statute, the defendant denies by affidavit the truth of the averments made to obtain such attachment, and moves to dissolve the same, the court before which the proceeding is pending should by an order require plaintiff in attachment, within a reasonable, fixed time, to file such affidavits or other evidence as he desires or relies on to sustain the averments made by him to obtain the issuance of the writ, and defendant, within a reasonable, fixed time thereafter, to file such affidavits or other evidence as he desires or relies on to traverse, explain, or avoid the case made by plaintiff's evidence, and

95. San Francisco Iron & Metal Co v Abraham, 396 P 82, 211 Cal 552—Rosenberg v Bullard, 15 P.(2d) 870, 127 Cal App 315

96. Belmont v Signa Iron Co, 42 N.Y S 123, 12 App Div 441—6 C J p 446 note 93.

97. Sparks v. Bell, 70 P. 281, 137 Cal 415

98. American Merchant Marine Ins. Co v Forsikrings-Aktieselskabet Norden, 188 N.Y S 593, 197 App Div 63

99. Sanger v Connor, 88 N.Y S 1054, 95 App Div. 521—Cole v. Smith, 82 N Y S. 982, 84 App Div 500—Austrian Bentwood Furniture Co v Wright, 88 N Y S 142, 43 Misc. 616

1. Milton v. Meadville Spinning Co, 28 Pa Dist 53—6 C.J p 446 note 96.

2. Equitable Trust Co of New York v Sala, 169 N Y S 930, 103 Misc 429—Fidelity & Deposit Co. of Maryland v. Hickler, 198 N.Y S 499—6 C J p 447 note 98

Issuance of rule not prevented

Where the affidavits in support of a rule to show cause why an attachment should not be quashed, and why testimony should not be taken in support thereof, tend to show that the claim was unliquidated, opposing affidavits will not avail to defeat the issuing of the rule—Dicks-David Co v. Edward Maurer Co, (D C N J) 279 F. 281

For form see Robinson v. Morrison, 2 App D C 105

3. Mont—Continental Oil Co. v Jameson, 164 P 727, 53 Mont 466 N Y—Trow's Printing, etc, Co v Hart, 85 N Y 500, affirming 9 Daly 413, 60 How Pr. 190.
6 C J. p 447 note 99

4. San Francisco Iron & Metal Co v Abraham, 296 P 82, 211 Cal 552

5. Chambers, etc, Glass Co. v Roberts, 38 N Y S 301, 4 App Div. 20—6 C.J p 447 note 1

Affidavit must set forth supporting evidence

As regards the issuance of a warrant of attachment against a foreign corporation to which two shovel cranes had been shipped, in a suit for the conversion of the cranes, affidavits in opposition to a motion to vacate the warrant of attachment were defective in failing to set forth any evidence supporting the allegations of the complaint charging the foreign corporation with conversion of the cranes—Miller Bros Const. Co v. Thew Shovel Co, 288 N Y.S. 944

6. Yates v North, 44 N.Y 271—6 C. J. p 448 note 2

7. Yates v. North, supra—6 C J. p 448 note 3

8. Herman v Bailey, 45 N Y S 88, 20 Misc 94, affirming 43 N.Y.S 1155, 19 Misc. 709.

plaintiff, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as is applicable in rebuttal[9] In some jurisdictions where defendant files an affidavit denying some material allegation of the attachment affidavit,[10] plaintiff may be compelled by rule to file an affidavit showing his cause of action,[11] failing in which the attachment will be dissolved[12] Such an affidavit should be explicit and should state with due particularity the facts constituting the ground of action.[13]

Amending or filing supplemental affidavit. According to some decisions, where plaintiff is ruled to show his cause of action and his affidavit is insufficient to sustain the attachment, he cannot amend[14] or file supplementary affidavits;[15] but other cases hold that it is within the discretion of the court to allow an amendment[16] or the filing of a supplementary affidavit.[17]

§ 454. —— Issues

The issue to be determined on a motion to dissolve is whether or not the writ should have been issued.

The sole issue before the court on a motion for the dissolution, quashal, or vacation of an attachment is whether or not the writ should have been issued,[18] and it is not proper for the court to enter upon any consideration of the merits of the action in connection with which the attachment was sued out[19] save in exceptional cases,[20] such as where the moving papers are hopelessly bad,[21] where it is certain that the complaint is so defective that plaintiff cannot recover,[22] or where the facts are undisputed and a legal conclusion is certain[23] Defendant may, however, advance pertinent facts to explain how the transactions out of which the suit originated arose,[24] and the fact that an inquiry into the existence of the grounds of attachment alleged incidentally involves some of the allegations in the petition in the principal action does not require the court to refuse to con-

9. Jordan v. Dewey, 59 N W 88, 40 Neb 639.

10. Netter v Hosch, 1 Pa Co 452

11. Shadduck v. Marsh, 21 N J Law 434—6 C J. p 448 note 7

12. Hartman v. Wallach, 17 Pa Co 88.

13. McCulley v Chisholm, 19 Phila (Pa.) 337—6 C J p 448 note 9

14. Shumway v. Webster, 24 Wkly. N C (Pa.) 336

15. Teutonia Loan, etc, Co v. Turrell, 49 N E 852, 19 Ind App 469, 65 Am S R 419—6 C J. p 448 note 11.

16. Geigy Aniline & Extract Co v Fries-Harley Co, 17 Pa Dist 239—6 C J. p 448 note 12

17. Yamada v. Hall, 260 P 243, 145 Wash 365—6 C J p 448 note 13

Court is bound to consider second affidavit.—Geigy Aniline & Extract Co v Fries-Harley Co, 17 Pa Dist 239—6 C.J. p 448 note 13 [a]

18. Cal.—Hamilton v. Baker-Hansen Mfg Co., 169 P 238, 176 Cal 569—Anaheim Nat Bank v. Kraemer, 7 P (2d) 765, 120 Cal App 63
Mont.—Jenkins v. First Nat. Bank, 236 P 1085, 73 Mont. 110.
N J.—Schmidt v. Kyle, 135 A 89, 4 N J Misc. 970.
Ohio.—Ascherenka v Lonsdale Mfg Co, 153 N E 150, 20 Ohio App. 123 6 C.J p 449 note 14.

Title to property

(1) On a motion to vacate or dissolve an attachment the title to property will not be adjudicated.—First Nat. Bank v. Collins, 9 P.(2d) 802, 51 Idaho 689—Molina v. Comision Reguladora del Mercado de Henequen, 103 A. 397, 91 N.J Law 382—Premier Malt Sales Corporation v Tullock, 197 N Y S 579, 119 Misc 509—6 C J p 449 note 14 [h]

(2) On a motion to vacate a levy in an action against nonresident defendants, where there is a sharp question of fact as to the ownership of the attached property, defendants are entitled to have the court determine this question of title, in order to be informed whether the court has jurisdiction to which they must submit.—Premier Malt Sales Corporation v. Tullock, supra

(3) On motion to vacate an attachment against a nonresident defendant and another levy thereon on a judgment rendered in favor of defendant, the validity of an assignment of the judgment by defendant to another nonresident cannot be decided.—Rogers v. Logan, 188 N Y S 337

19. Cal.—Republic Truck Sales Corporation v. Peak, 229 P 331, 194 Cal 492—Corum v Superior Court in and for Alameda County, 300 P 837, 114 Cal App. 741.
N J.—Schmidt v Kyle, 135 A. 89, 4 N J Misc 970.
N Y.—Premier Malt Sales Corporation v Tullock, 197 N.Y S. 579, 119 Misc. 509—Gaynor v. Yier, 162 N Y S 463, 97 Misc 662.
Ohio.—Crosby v. Sandusky Gas & Electric Co, 24 Ohio Cir.Ct.(N S.) 247.

Objections to complaint

(1) The only questions considered on motion to discharge directed to the complaint are whether the action is on an express or implied contract for direct payment of money, whether the complaint states facts sufficient to constitute a cause of action, and if not, whether it can be amended so as to state one.—Gilna v. Barker, 254 P 169, 78 Mont 343—Union Bank & Trust Co v. Himmelbauer, 181 P. 332, 56 Mont. 82.

(2) Only an amended complaint before the court at the time of dissolving the attachment, issued on the original complaint, could be considered.—First Nat Bank v. Collins, 9 P (2d) 802, 51 Idaho 689

(3) A motion to discharge cannot be used as a demurrer to the complaint.—Hamilton v. Baker-Hansen Mfg Co, 169 P 238, 176 Cal 569—Union Bank & Trust Co. v. Himmelbauer, 181 P 332, 56 Mont. 82—6 C J. p 449 note 15 [d].

Exception to verification cannot be considered on motion to dissolve an attachment.—Willer & Kern v. Webb, 4 La App 669

On a motion for the reduction of an attachment the court acts in excess of its power in dissolving the attachment on the ground that an examination of the allegations of the complaint shows that plaintiff could not have judgment for any amount against defendant.—Sachs v. Nussenbaum, 104 A. 393, 92 Conn. 682.

20. Poris v. American-National Co, 197 N Y S 853

21. Story v. Arthur, 71 N Y S 776, 35 Misc 244.

22. Goodyear v. Commercial F. Ins. Co., 68 N Y S. 756, 58 App Div. 611—6 C J. p 450 note 16.

23. Lowenstein v. Salinger, 17 N.Y. S. 70.

24. Hamilton v. Johnson, 49 N.W. 703, 32 Neb. 730—6 C.J. p 450 note 17.

sider the motion[25] or to suspend decision thereon until the final trial of the cause.[26] On a motion to quash, based on the original papers, the essential statements in an affidavit for attachment are not traversable but must, for the purposes of the motion, be taken as true.[27]

Upon a motion to vacate or discharge, no pleading controverting the motion is ordinarily required or allowed,[28] all the grounds of the motion standing as denied without any pleading in behalf of plaintiff.[29]

Where a motion has been made to quash an attachment, but no jurisdictional defect appears on the face of the proceedings, plaintiff is entitled to frame an issue and contest questions raised outside of the record.[30]

A motion to vacate an attachment "upon the grounds" that it was improvidently issued "and is without warrant of law" raises the issue that the attachment was irregularly as well as improvidently issued.[31]

§ 455. —— Evidence

a. Presumptions
b. Burden of proof
c. Admissibility
d Weight and sufficiency

a. Presumptions

Where a motion to vacate or dissolve is based on the original papers, it will be presumed that the averments in such papers are true.

Where a motion to dissolve or quash an attachment is based upon the original papers on which the attachment was granted, the averments contained in such papers are to be deemed true,[32] and all legitimate deductions and inferences from what appears in such papers must be made and construed in favor of plaintiff,[33] and if such papers show a prima facie case for the attachment this is sufficient.[34]

b. Burden of Proof

While in general the burden of sustaining the attachment is on plaintiff, the moving party may have the burden of proof as to particular matters.

As has been seen in section 69, where the existence of the grounds of attachment have been properly placed in issue, the burden of establishing them is on plaintiff, although there are some authorities which hold that there must be some evidence adduced by defendant that the facts stated in the affidavit are untrue in order to throw the burden of proving their truth on plaintiff.[35] Broadly, however, it may be stated that the burden is on plaintiff to establish the facts necessary to sustain the attachment,[36] although where defendant, without denying the ground on which the writ issued, sets up as an affirmative reason for dissolution some fact which renders the process of attachment unavailable, he has the burden of proof as to such matter.[37] So, where the return of the officer to the writ is regular in form, defendant must show that the writ was not in fact served as stated therein.[38] By some authorities a distinction is pointed out between jurisdictional and nonjurisdictional grounds, the rule announced being that in the case of a jurisdictional ground which goes to the right of the court to hear and try the facts upon which the attachment is based the burden is on defendant, but upon a nonjurisdictional ground the burden is on plaintiff.[39]

Where a person other than defendant moves

25. Kan.—Bundrem v. Denn, 25 Kan. 430
Okl.—Carnahan v. Gustine, 37 P. 594, 2 Okl. 399.

26. Bundrem v. Denn, 25 Kan. 430, 435

27. Norwell-Shapleigh Hardware Co. v. Hall Novelty, etc., Co., (Tex. Civ. App.) 91 S.W. 1092

28. Bell v. Courteen Seed Co. of Milwaukee, Wis., 196 N.W. 1006, 197 Iowa 120—6 C.J. p. 438 note 41.

29. Campbell v. Mitchell, 4 Ky. Op. 629

30. Krepps v. First Nat. Bank, 225 P. 711, 99 Okl. 83—6 C.J. p. 450 note 21.

31. Addison v. Sujette, 27 S.E. 631, 50 S.C. 192

32. Iowa.—Ross v. Long, 258 N.W. 94.
N.Y.—U. S. v. Brown, 160 N.E. 13, 247 N.Y. 211, reversing and answering certified question 222 N.Y.S. 391, 220 App. Div. 692
Pa.—Malis v. Homer Building & Loan Ass'n, 171 A. 570, 314 Pa. 321
Wash.—Fawkner, Currie & Co. v. Sanitary Fish Co., 177 P. 708, 105 Wash. 88
6 C.J. p. 451 note 23.

Facts well pleaded stand admitted
A defendant moving to quash an attachment admitted averments of the declaration and affidavits as were well pleaded.—Suter v. Lockwood Dental Co., 45 App. D.C. 92

33. Commonwealth Mortgage Co. v. Le Roy Sargent & Co., 172 N.Y.S. 594, 104 Misc. 558—6 C.J. p. 451 note 24.

34. Crook v. Lipton, 170 N.Y.S. 345, 182 App. Div. 858—6 C.J. p. 451 note 25.

35. Swift & Co. v. Bonvillain, 71 So. 849, 139 La. 558—6 C.J. p. 451 note 27

36. N.J.—Henry v. Freeman, 145 A. 107, 7 N.J. Misc. 263
Okl.—Jordan v. Brown Shoe Co., 4 P. (2d) 1020, 152 Okl. 288
Pa.—Stamford Rolling Mills Co. v. Erie R. Co., 101 A. 823, 257 Pa. 507

37. Iowa.—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 815
S.C.—Faulkner v. Strickland, 125 S.E. 637, 130 S.C. 304.
6 C.J. p. 452 note 32.

38. Lewis v. Rasp, 76 P. 142, 14 Okl. 69

39. Jordan v. Brown Shoe Co., 4 P. (2d) 1020, 152 Okl. 288.—Krepps v. First Nat. Bank, 225 P. 711, 99 Okl. 83.

to dissolve the attachment because of his ownership of the property or interest therein, without denying the truth of the grounds of the attachment or alleging irregularities in the proceedings therefor, the burden of proof is upon the moving party to establish the matters on which he relies[40] Where judgment creditors of defendant seek the quashal of an attachment upon the ground of collusion between plaintiff and defendant, the burden of proving such collusion rests upon them[41] However, it has been held that where an attachment of an insolvent debtor's goods is attacked by existing creditors as having been sued out through collusion between the debtor and an attaching creditor upon a simulated indebtedness for the purpose of giving the attaching creditor preference, and of hindering, delaying, and defrauding the other creditors of the debtor, the burden is on the attaching creditor to prove clearly and fully that defendant in attachment was indebted to him in the amount claimed in the attachment suit.[42]

c. Admissibility

(1) Motion on original papers
(2) Motion on evidence dehors record

(1) Motion on Original Papers

Where dissolution is sought of an attachment for defects apparent in the proceedings, the court is limited to a consideration of the papers of record in the case.

Upon an application for the dissolution of an attachment for defects apparent in the proceedings, the court is limited to the consideration of the papers of record in the case;[43] and in the absence of error on the face of the record the courts should refuse to vacate or quash the attachment,[44] since defendant by moving on the original papers is deemed to have conceded all the averments of fact contained in the affidavit, and the fair inferences to be drawn therefrom, to be true for the purposes of the motion.[45] In determining whether an attachment was properly issued in the first instance, only the facts existing and before the officer at the time of its issuance may be considered, and not new facts or new grounds for the first time stated at the hearing of the motion to discharge.[46] Hence, where an affidavit is fatally defective in failing to show any one or more of the conditions necessary to the allowance of the attachment, the defect cannot be supplied by affidavit submitted at the hearing of a motion to vacate.[47]

(2) Motion on Evidence Dehors Record

Both parties are entitled to present all the facts which might assist the court where a motion to dissolve the attachment is based upon other than the original papers.

On the hearing of a motion to dissolve or vacate an attachment based upon other than the original papers, both parties are entitled to present all the facts to enable the court to decide whether the ground upon which the warrant was issued in fact existed[48] Accordingly, plaintiff may introduce any proper evidence tending to support his contention that the grounds of attachment relied on by him did exist at the time when the writ was sued out, as shown in section 69, while defendant may introduce any proper evidence legitimately tending to show that the issuance of the writ was improper.[49] However, evidence which is immaterial or irrelevant cannot be admitted.[50]

d. Weight and Sufficiency

A motion seeking the vacation or quashal of an attachment must be supported by evidence sufficient to warrant such an order

In general, in order to entitle the debtor to have an attachment discharged on motion, he must

40. Standard Impl. Co v. Parlin, etc., Co., 38 P 363, 51 Kan 566—6 C J. p 452 note 34

41. Daniels v. Solomon, 11 App D C 163.

42. Henderson v. Brown, 28 So 79, 125 Ala 566.

43. Fernau v Butcher, 6 A 67, 113 Pa 292—6 C J. p 453 note 37.

Bill of particulars

A bill of particulars will be considered on the question whether plaintiff has pleaded a cause of action—Poris v. American-National Co, 197 N Y S. 853

44. Crook v. Lipton, 170 N.Y S. 345, 182 App Div 858—6 C.J p 453 note 38

45. Coakley v Rickard, 121 N.Y.S. 280, 136 App Div 489—6 C J. p 453 note 39

46. Addison v Sujette, 27 S.E 631, 50 S C 192—6 C J p 455 note 60

Where the motion is based on a variance between the petition and the affidavit for attachment, the variance cannot be corrected by evidence—Sanger v Texas Gin, etc, Co, (Tex Civ App) 47 S W. 740—6 C J. p 455 note 60 [b].

47. Addison v. Sujette, 27 S E 631, 50 S C 192.

48. Adam Hat Stores v Lang, 280 N Y.S 100, 155 Misc 587—6 C J. p 453 note 40.

Presentation of new proof

Where it is moved by defendants to vacate a warrant of attachment, not on the original papers, but on affidavits containing allegations to contradict plaintiff's contention, plaintiff was entitled to present new proof to support the attachment—Adam Hat Stores v Lang, 280 N Y. S 100, 155 Misc 587.

Abandonment

In determining whether an attachment has been abandoned, the fact that a judgment is merely for amount of the debt, without reference to the attachment, may be considered with other facts—Jordan v Brown Shoe Co, 4 P (2d) 1020, 152 Okl 288.

49. Brown v. Blanchard, 39 Mich. 790—6 C J. p 453 note 41

50. Cooley v Abbey, 86 S E 786, 111 Ga. 439—6 C J. p 454 note 43.

make a clear and entirely satisfactory showing,[51] but where such showing is made the motion is improperly denied.[52]

Plaintiff's pleadings, where they are evidence before the court on motion to dissolve, are no more conclusive than any other item of evidence before the court.[53]

A mere recital in the moving papers is no evidence of the truth of the allegations on which the motion is based,[54] but an admission in defendant's affidavit in support of the motion may cure a defect in plaintiff's proof.[55]

Where there is counter testimony on a motion to dissolve an attachment, in the absence of evidence upon the part of the attaching party in addition to the affidavit for attachment, the attachment will fall since the assertion of facts in the affidavit is for the purpose of securing the attachment and not of creating evidence as to any issue of fact which may arise thereon in the absence of additional testimony.[56] It has been held that as the affidavit of defendant in support of his motion to vacate the attachment is the evidence of an interested party, the court may refuse to credit it, although the allegations therein are denied in general terms only, and not specifically by the opposing affidavit of plaintiff.[57] An affidavit that plaintiff, on certain representations made to him by defendant's treasurer, subsequently ascertained to be untrue, had been induced to part with a certain sum of money is sufficient to sustain an attachment against an unsupported motion to vacate such writ.[58]

The levy of an attachment in fraud of creditors of the debtor cannot be established by evidence of a general nature and founded largely upon supposition.[59] The mere fact that the officer made a substituted service of summons in an attachment action several days after the writ was issued does not conclusively disprove the allegation of an affidavit as to defendant having left the state and that his residence was unknown to plaintiff.[60] An attachment issued in an action on a note and mortgage on an affidavit setting forth sufficient grounds therefor which are shown to be true should be sustained on a motion to discharge the attachment, where it is shown on the hearing thereof that the mortgaged property is not a sufficient security for the debt, and no sufficient ground for discharging the attachment is shown.[61] Where the whole evidence contained in the affidavits on both sides shows that plaintiff could not have

51. Blakeslee v Paul, 238 N.W 447, 212 Iowa 1385.

Lack of jurisdiction

Where lack of jurisdiction in the court depends on the existence of facts alleged in the motion and there is no evidence of any character in support of the motion or otherwise, it is improper to sustain the motion and dissolve the attachment—Tollerton v Woods, (Mo App) 89 S W (2d) 567.

Merely controverting the material allegations of the procuring affidavit does not entitle defendant to a discharge of the attachment—State Bank of Goldendale v. Beeks, 204 P. 771, 119 Wash 42.

Ex parte affidavit

Where the affidavit on which the writ is issued complies with the statute, the writ will not be quashed on ex parte affidavits showing that the claim is unliquidated, although a rule to show cause may be obtained on such affidavits under which testimony may be taken to determine in advance of the trial the character of the cause of action—Dicks-David Co. v Edward Maurer Co., (D C N J) 279 F 281

Evidence held insufficient to sustain attachment.—Bell v Courteen Seed Co of Milwaukee, Wis., 196 N W 1006, 197 Iowa 120—Van Donselaar v. Jones, 192 N W 23, 195 Iowa 1081—Franke v. Kelsheimer, 163 N. W 239, 180 Iowa 251—Miller v Jones, 9 Philippine 648, 6 Off Gaz 267

Evidence held sufficient to sustain attachment

U S—Shepard & Gluck v. Snodgrass, (D C La) 264 F. 256

Iowa—Carson, Pirie, Scott & Co v. Long, 257 N W 815

Kan—Milberger v Veselsky, 155 P 957, 97 Kan 433

Minn—Clarke & Simmons v Rule, 185 N W 947, 151 Minn 30.

N.J—Laura v Puncerelli, 102 A 433, 91 N J Law 38, affirmed 105 A. 894, 92 N J Law 513

N Y—Equitable Trust Co of New York v. Sala, 169 N.Y S. 930, 102 Misc 429

Tex—Ellerd v. Alexander & Oliver, (Civ App) 282 S W 871

Wyo—Finley v Pew, 205 P 310, 28 Wyo 342, rehearing denied 206 P 148, 28 Wyo 342

6 C J. p 454 note 44 [a].

Conflicting evidence

(1) Where the evidence, in the form of affidavits, in a proceeding to dissolve an attachment, was conflicting as to the grounds of such attachment, an order of dissolution was sustained—Lawson v. Brokmann, 218 P. 1008, 114 Kan. 469.

(2) Applications to dissolve attachments are addressed to the trial court alone and the court on appeal will not undertake to weigh the evidence presented when there is testimony reasonably supporting the finding of the trial court—State v. Carson, 269 P 292, 131 Okl 289.

52. Birken v Hickey, 176 N W. 137, 42 S D 472.

Where plaintiff has not met the burden cast upon him by an absolute denial contained in defendant's affidavit to dissolve an attachment, an order setting aside an order dissolving the attachment is not justified by alleged falsehood in the supporting affidavit—Van Dam v Baker, 204 N. W. 633, 164 Minn 130.

53. San Francisco Iron & Metal Co v. Abraham, 296 P 82, 211 Cal. 552

54. Investment Registry of America v Moore, 218 P 595, 63 Cal App. 327—6 C J p 454 note 46

55. Vogelman v Lewit, 96 N Y.S 207, 48 Misc. 625

56. McCray Refrigerator Sales Corporation v Logan, 172 N E. 699, 36 Ohio App. 201

57. Dietlin v Egan, 19 N Y S 392, 22 N Y Civ Proc 398—6 C J. p 454 note 48.

58. Simon v. Kugler Syndicate, 68 N Y S 1128, 34 Misc 806

59. Perkins v. Lyons, 82 N.W. 486, 111 Iowa 192.

60. Barth v Burnham, 81 N.W. 809, 105 Wis 548

61. Shedd v. McConnell, 18 Kan 594.

known the facts to which he swore positively in the affidavit for attachment, the attachment should be dissolved [62]

Character of proceeding. Where the issue is as to whether plaintiff's cause of action is in contract or in tort, the fact that the complaint contains a count for money had and received is not conclusive.[63] Likewise, where the statement in the affidavit for attachment is sufficient as to the character of plaintiff's claim, its truth or falsity cannot be established by a reference to plaintiff's petition [64]

§ 456. —— Hearing, Reference and Determination

a. In general
b. Continuances
c. Reference

a. In General

General rules are, except as they may be altered by specific statutes or rules of court, applicable to hearings or motions to dissolve or vacate attachments

A hearing and trial of the questions of fact involved must be had on an application for a dissolution of an attachment,[65] and such proceedings should be governed by the rules of law controlling the determination of issues on ordinary trials [66] The court or officer to whom a motion to vacate or dissolve an attachment is made usually will hear such motion without a jury, whether it be based on the original papers or on defects not apparent in those papers,[67] and in some jurisdictions such a trial is, it seems, the only proper method.[68] The court may, however, for its better information and satisfaction, frame and submit proper issues to a jury,[69] and in certain cases this ought to be done.[70] Where parties agree that the question as to whether the attachment should be sustained shall be submitted to the court and parol evidence heard on the motion to dissolve, if it was irregular for the court to hear that branch of the case, the irregularity was waived by the agreement.[71] There is no merit in an objection that the court should have denied a motion to dissolve the attachment because another motion for the same purpose was pending and undetermined, where the earlier motion had been denied before or at the time when the later one was granted.[72] Where on motion to discharge defendant or his property the only question involved is one of law, which has been settled adversely to plaintiff, the court may quash the attachment.[73]

The manner of taking the evidence at the hearing of a motion to dissolve, based on a denial of the truth of the matters alleged in the affidavit for attachment, is within the discretion of the court.[74]

The court must take notice of the complaint and affidavit on which the writ issued, even though they are not formally introduced in evidence, as they constitute a part of the record.[75] The court will not be influenced by a communication not addressed to it but to another and called to its attention, nor by that party but by the counsel for defendant.[76]

Bill of particulars. On a rule to show cause why an attachment should not be quashed on the ground that the claim was unliquidated, and why testimony should not be taken, and a bill of par-

62. O'Reilly v. Freel, 37 How Pr (N.Y.) 272.

63. San Francisco Iron & Metal Co v. Abraham, 296 P 82, 211 Cal. 552.

64. Price Hill Colliery Co v Old Ben Coal Corporation, 175 N E 755, 38 Ohio App 151

65. N C —Patrick-Mosteller Co. v. James R Baker & Co, 105 S E 271, 180 N C 588
Okl —Krepps v First Nat Bank, 225 P. 711, 99 Okl 83—Hart-Parr Co v Duncan, 184 P. 108, 74 Okl. 312 —Millus v. Lowrey Bros, 164 P. 663, 63 Okl. 261, L R A 1918B 336 6 C J p 455 note 54

Failure to try nonjurisdictional facts after a ruling in favor of jurisdiction is reversible error —Krepps v. First Nat. Bank, 225 P. 711, 99 Okl. 83.

Time
The validity of the ground of attachment may be tried, if demanded, before the trial on the merits or with the main issue —Bizzell v. Mitchell, 142 S E 706, 195 N C 484

66. Hart-Parr Co. v. Duncan, 184 P 108, 74 Okl 312

67. Millus v. Lowrey Bros, 164 P 663, 63 Okl 261, L R A 1918B 336— 6 C J p 455 note 55.

Ex parte attachment
A judge is vested with wide discretion in passing on an application to remove an attachment granted ex parte —Friedman v. First Nat Bank, 122 S E 81, 31 Ga App 742

68. Millus v. Lowrey Bros, 164 P. 663, 63 Okl 261, L R A 1918B 336— 6 C J p 455 note 56

69. Millus v Lowrey Bros., supra— 6 C J. p 455 note 57.

70. Pasour v. Linneberger, 90 N C. 159—6 C J. p 455 note 58

71. Leet v. Robertson, 8 Ky Op 638

72. Goldfield-Mohawk Min Co. v. Francis-Mohawk Min, etc, Co, 102 P. 963, 31 Nev 348.

73. Woods v. Southern Life, etc, Co., 93 A 579, 87 N J Law 202

74. La Varre v. International Paper Co, (D C S C.) 37 F.(2d) 141—6 C. J. p 455 note 64.

Order of proof rests in the discretion of the court, providing no prejudice results —Morelli v Thombs, 172 N E 331, 35 Ohio App 233.

Order of court necessary
On a motion to dissolve an attachment, an order of court is necessary for the taking of testimony as to the truth of plaintiff's affidavits, either orally or before a judge or in writing before a commissioner, examiner, or master in chancery.—Molina v Comision Reguladora del Mercado de Henequen, 103 A. 397, 91 N J.Law 332.

75. Goldman v. Floter, 76 P. 58, 142 Cal 388

76. Molina v. Comision Reguladora del Mercado de Henequen, 103 A. 397, 91 N J Law 332.

ticulars required to be used on the hearing, defendant may be granted a bill of particulars according full information as to the nature of the alleged cause of action.[77]

Right to open and close. Since plaintiff in attachment, as shown in section 455, has the affirmative of the issue and the burden of proof where the grounds of the attachment are attacked, it is usually held that such party also is entitled to open and close on the hearing of a motion to dissolve the attachment.[78]

Questions of law and fact. It is a question of fact whether or not there were sufficient grounds for the attachment.[79]

Findings. It has been held that a statute providing for the separation, by the judge, of his conclusions of law and fact does not apply to the trial of an attachment.[80] A motion to dissolve must, of course, be denied where the court finds as a fact the matter relied on as ground for the attachment.[81] A finding that a breach of contract, while sufficient to entitle plaintiff to recover therefor, was not fraudulent conduct sufficient to sustain an attachment is not erroneous as a matter of law.[82] A finding, on an application to dissolve an attachment granted on the ground of fraud by a party to a contract, that there has been no breach and that defendant is right is a finding that defendant designed no wrong, and negatives fraud; and, if there is no evidence to show the specific fraud on which the affidavit of attachment was based, there is no finding that can be reviewed so as to disturb a conclusion dissolving the attachment.[83] Where the jury, instructed by the court, find against defendant, and also on certain immaterial issues raised by superfluous pleadings and redundant evidence which should have been submitted to the court, the irregularity is not such as to warrant the setting aside of the order dismissing the motion to dissolve.[84] Where the same alleged fraud is relied on as ground of recovery in the petition as is set forth in the affidavit for attachment, the finding of a court or judge thereof, on motion to discharge, that there is sufficient proof to sustain the attachment in no way affects the issue made by the pleadings, as that issue is still for the court or jury on the trial, and must be determined on the evidence then produced.[85]

Special findings after dissolution on the merits. After an attachment has been dissolved on a full hearing on the merits, there is no necessity that on request, sustained by affidavits, additional special findings should be made, and it is not error to strike such affidavits from the files on motion.[86]

b. Continuances

It is within the discretion of the judge or court to grant or refuse an application for a continuance of a hearing on application for the dissolution of an attachment.

The grant or refusal of an application for a continuance of the hearing on request for the vacation or quashal of an attachment is within the discretion of the court or judge hearing such application.[87]

c. Reference

On a hearing of an application to dissolve an attachment, a reference may be ordered by the court to determine the facts in some cases.

It is within the discretion of the court to order a reference to determine the facts in some cases, as where defendant in an attachment on the ground of nonresidence moves for a discharge on the ground of being a resident;[88] where the question of the validity of an assignment is involved;[89] or where the depositions taken under a rule to show cause are voluminous.[90] However, a provi-

77. Dicks-David Co v Edward Maurer Co., (D C N J.) 279 F 281

78. Jordan v. Dewey, 59 N W 88, 40 Neb 639—6 C J. p 456 note 72

79. Williams v. Farmers' Gin, etc, Co, 73 P. 269, 13 Okl. 5—6 C J. p 456 note 74.

Matters considered

In an attachment proceeding in C county, with an affidavit of illegality on the ground of nonresidence, if there was any evidence that defendants had registered and voted in C county, it would be a circumstance for the jury in determining the domicile of defendants.—Melvin v. Askew, 100 S E. 49, 24 Ga App. 164.

80. Crouch v. Meguiar-Harris Co, 42 S W. 91, 19 Ky.L. 819.

81. Hughes v Crooker, 56 S E 510, 144 N C 764

Conclusion justified

Findings of fact that defendant sold plaintiff a certain quantity of wheat, that one car of it was not up to the required grade, and was rejected after plaintiff had paid the draft which accompanied it, that defendant took back the wheat and repaid the price to plaintiff, that plaintiff demanded that defendant ship him another car of wheat and that the price of wheat had advanced and defendant refused have been held sufficient to justify the conclusion that defendant denied all liability for breach of the contract—Stock v Reynolds, 80 N.W. 289, 121 Mich 356.

82. Godstein v Frantz McRay Iron Works Co., 92 P 703, 41 Colo. 261

83. Powers v O'Brien, 6 N W 679, 44 Mich 317.

84. Harmon v. Jenks, 4 So 260, 84 Ala 74

85. Shawnee Commercial, etc, Bank v. Miller, 24 Ohio Cir Ct. 198

86. Standard Stamping Co v Hetzel, 62 N W 247, 44 Neb. 105.

87. Elkhart State Bank, of Elkhart, Kan, v. Bristol Broom Co, 129 S E 371, 143 Va. 1—6 C J p 456 note 66

88. Killian v. Washington, 2 Code Rep.(N.Y.) 78.

89. Carter v Barton, 48 S.W. 1017, 2 Ind T. 99

90. Netter v. Hosch, 1 Pa Co. 452

sion for a reference in an order overruling a motion to vacate is improper [91]

§ 457. —— Order Granting or Denying Motion

a. In general
b. Scope and extent of relief
c. Operation and effect

a. In General

The order may dissolve or sustain the attachment in whole or in part, and may impose terms. General rules apply as to its form and sufficiency.

In a case calling for such action, the court may vacate an attachment in part and sustain it in part,[92] deny the motion without prejudice to a renewal,[93] or impose terms on the granting of an order vacating the attachment,[94] but a vacation cannot be made conditional on the giving of a bond or the making of a deposit.[95] The papers on which the motion was made should be recited in the order,[96] but it is not ordinarily necessary to set forth the findings of fact on which the order is based,[97] and it is proper to refuse to recite, in an order of dissolution, that there was reasonable ground for suing out the writ.[98] A rendition of a judgment for plaintiff and an order foreclosing the attachment lien, without mentioning the motion to quash the writ, is equivalent to an order denying the motion.[99]

Filing and entry When an order of the district judge at chambers, sustaining or dissolving an attachment, is made, it, together with the motion on which it is made, is filed with the clerk of the court and becomes a part of the record.[1] Where a journal entry on a motion to dissolve an attachment is to the effect that, after hearing the allegations of the pleading, the attachment is dissolved, the contention of defendant in attachment that the court heard evidence and did not discharge the property because of insufficiency of the petition cannot be maintained.[2] On a collateral attack, the final order discharging the attachment will be presumed to have been entered before the filing of a motion for change of venue.[3]

Setting aside order of dismissal. A complaint by a creditor in an action on redelivery bonds, which alleges the dismissal of the attachment lien by stipulation, without alleging that plaintiff appeared in the attachment proceedings or gave notice of a claimed right to prorate, is held insufficient to authorize the setting aside of the order dismissing the attachment.[4]

Directions as to restitution or redelivery. While it is proper, on dissolving an attachment, to direct restitution or redelivery of the property attached,[5] it is unnecessary to insert directions as to the manner of redelivery, unless such directions are called for by special circumstances [6]

Granting time to file attachment bond. Where the statute provides that an attachment issued without bond against a nonresident may be dissolved on entry of appearance by defendant unless plaintiff shall file an attachment bond, the court has no discretion to dissolve such an attachment without fixing a time within which plaintiff may file a bond in order to keep his attachment alive.[7]

b. Scope and Extent of Relief

The relief granted must be in conformity with the issues presented by the motion.

While it has been held that an order quashing the writ should further provide that defendant go hence without day and recover his costs of plaintiff and have execution therefor,[8] since, as has been seen in section 454, the merits of the action are not in issue, it is proper to refuse to strike the complaint in the main action on quashing an ancillary attachment,[9] and plaintiff has a right to have the case retained on the docket for new process and

91. Woodward v Musgrave, 43 N Y S 330, 14 App Div 291

92. Iowa—Moses v Arnold, 43 Iowa 187, 22 Am R 239
Pa—O'Neill v Brown, 17 Pa Dist 1062
6 C J p 456 note 84

93. Griffith v Alois Aufrichtig Copper & Sheet Iron Mfg Co, (D C N Y) 256 F 969

94. Union Distilling Co v Union Pharmaceutical Co, 6 N Y S 539, 56 N Y Super 417—6 C J p 457 note 85

95. Harnick v Saperstein, 178 N Y S 136

96. American Audit Co. v. Industrial Federation of America, 84 N Y S 369, 87 App Div 275—6 C J. p 457 note 86

Forms of orders dissolving an attachment—West v. Woolfolk, 21 Fla 189—Ellsworth v Scott, 3 Abb N Cas (N Y) 9—Hendelman v. Kahan, 93 P 1074, 48 Wash 549

97. Coharie Lumber Co v Buhmann, 75 S E 1008, 160 N C 385—6 C J p 457 note 87

98. Hendelman v Kahan, 93 P 1074, 48 Wash 549

99. Rice v Sanger Bros, 239 P 397, 27 Ariz 15

1. Gillespie v Lovell, 7 Kan 419.

2. Brown v. Cairns, 65 P. 231, 63 Kan 882

3. Whitney v. Superior Court of California in and for Fresno County, 250 P. 666, 199 Cal. 569

4. First Nat. Bank v Denbrae Sheep Co, 258 P. 365, 44 Idaho 447

5. Jones v Hamlin First State Bank, (Tex Civ App) 140 S W 116—6 C J p 457 note 95.

6. Ellsworth v Scott, 3 Abb N Cas (N Y) 9

7. Mesendieck Grain Co v Folz, 50 S W (2d) 159, 227 Mo App 24

8. Draper v Hoops, 135 Ill App 388

9. Danser v Mallonee, 86 S E 895, 77 W.Va. 26—6 C J. p 457 note 92.

new order of attachment if so desired.[10] Where, on the hearing, it appears that there is sufficient ground for an attachment, the court may permit the warrant of attachment to be amended to conform to new proof adduced at the hearing.[11] Where defendant moved to vacate an attachment, an order deciding that the order of publication of summons was improperly issued because of insufficiency of the affidavit is erroneous as not based on the motion.[12] Where the motion is to discharge the attachment only, a further order of the judge that an undertaking given to discharge the attachment be canceled is not binding on the parties, that question not being submitted to the judge, unless the necessary and legal effect of discharging the attachment must be to cancel and avoid the undertaking.[13]

c. Operation and Effect

The vacating order is not res adjudicata to any fact in the main action or subsequent proceedings.

The dissolution of an attachment on motion is not a final adjudication of any fact in the action, even though it depends on a provisional inquiry into the merits and involves consideration of matters which would afterward arise on the trial,[14] and a vacating order is not res adjudicata as to a subsequent warrant issued on an affidavit stating additional facts.[15] An order dissolving the attachment on extrinsic evidence which cannot be put in the record must be accepted as conclusive in all collateral proceedings.[16] Where two writs of attachment issued in the same action are levied on the same property, an order of dissolution will be held to have dissolved both attachments, in the absence of proof that it was intended to be limited to one writ only.[17]

A refusal to dissolve a fraudulent debtor's attachment settles the question of fraud and retains for plaintiff his lien or right of action on the bond.[18]

Where an attachment was illegally issued, defendant may have the right reserved to sue plaintiff for wrongful issuance thereof.[19]

§ 458. —— Rehearing

The judge who discharges an attachment may grant a rehearing on such motion at his discretion

After an order for the discharge of an attachment the judge making the same may, on proper application by plaintiff and a showing that such order was obtained by perjury and fraud, grant a rehearing on such motion to ascertain whether the former ruling was induced by such unlawful means, and if he shall so determine he may rescind his order dissolving the attachment and overrule the motion therefor,[20] but a reargument will not be granted merely on the ground that certain subsequent acts of defendant tend to show alleged fraud.[21] It has been held to be error to reopen a case for the purpose of considering a motion to quash, where such motion has been adversely ruled on before judgment,[22] and also a rehearing which seeks a retrial of the question before the court on the first motion to discharge is improperly granted where the first motion was fully litigated and denied with a right of appeal.[23] An adjudication by one justice of the peace overruling a motion to dissolve an attachment cannot be reversed by another justice before whom the action is pending in consequence of a change of venue.[24]

§ 459. —— Renewal of Motion

After a motion to dissolve an attachment has been denied or withdrawn, it is within the discretion of the court to entertain a second motion therefor.

While an order overruling or denying a motion to quash or vacate an attachment does not necessarily preclude a renewal of the motion,[25] it is,

10. Snyder v Breitinger, 180 S E 96, 100 W.Va. 93

11. Adam Hat Stores v Lang, 280 N Y S 100, 155 Misc 537

12. Watson v. Paschall, 53 S E 646, 73 S C 413.

13. Wyman v. Hallock, 57 N W. 197, 4 S D. 469.

14. Lowe v. Swinehart, Tire, etc., Co., (D C N Y) 211 F 165.

15. Munn v. Munn, 143 S E 879, 146 S C 290

16. Whitney v. Superior Court of California in and for Fresno County, 250 P 666, 199 Cal. 569—6 C J p 457 note 1

Effect on bond

Order discharging an attachment is conclusive on an undertaking given to secure its release—Michelin Tire Co v Bentel, 193 P. 770, 184 Cal 315.

17. Pennsylvania Mortg Inv Co v. Gilbert, 52 P 246, 18 Wash. 667—6 C J p 457 note 2

18. Locey v Sterling Motor Truck Co of Pittsburgh, 156 A. 730, 102 Pa Super 148

19. Sholars v Guaranty Bank & Trust Co, 97 So 593, 154 La 414—Hale v Hamilton, 7 La App. 409

20. Guernsey v. Cherryvale First Nat. Bank, 65 P. 250, 62 Kan. 203—6 C J p 458 note 4.

21. Webb v. Groom, 29 N Y Super 532.

22. Rogers v East Line Lumber Co, 33 S W. 312, 11 Tex Civ App 108.

23. First Nat. Bank & Trust Co of Vermillion v Kirby, (S D) 253 N W 616.

24. Nixon v. Johnson, 52 P. 702, 7 Kan App 239.

25. Simmons v. Simmons, 48 S E. 833, 56 W Va. 65, 107 Am S R. 890, 3 Ann Cas. 134—6 C.J. p 458 note 8.

Order is not res judicata

An order denying a petition to dissolve an attachment was not res judicata, so as to preclude a subsequent application to dissolve the same attachment, because the doc-

as a general rule, a matter resting in the discretion of the court whether or not a second motion to dissolve will be entertained after the first has been denied[26] or withdrawn[27] Where no appeal is taken from an order of dissolution within the required time, the order is considered final[28] It has been held in certain jurisdictions, however, that a motion may be made, without leave of court, to dismiss an attachment on affidavits, although a motion to vacate the attachment founded on the original papers has been made and denied[29]

§ 460. Proceedings on Plea in Abatement

The time for filing a plea in abatement, the formal and substantial requisites of such a plea, and the procedure thereon will be considered in detail in the following sections.

§ 461. —— Time for Filing

In the absence of statutory provision, the usual rules as to the filing of dilatory pleas will control the time for filing a plea in abatement.

With regard to the time of filing a plea in abatement or traverse seeking the dissolution of an attachment, it may be stated generally that in the absence of express statutory provision the usual rule as to the filing of dilatory pleas applies,[30] and such a plea or traverse should be filed within a reasonable time, usually at the return or first succeeding term,[31] and prior to an answer or plea to the merits.[32] However, it has been held that pleading in bar before a plea in abatement is disposed of does not waive the plea in abatement,[33] although a pleading to the merits of the cause, without first interposing plea in abatement, waives the matter in abatement[34] In some jurisdictions in attachment cases the rules that matter in abatement cannot be joined with matter in bar in the same plea or answer nor can pleas in abatement and pleas in bar be pleaded at the same time, since either proceeding will cause a waiver of the matter in abatement, are not applied to the full extent,[35] and the joinder of pleas has been provided for by certain statutory enactments.[36]

§ 462. —— Requisites and Sufficiency of Plea

a In general
b. Verification

a. In General

The plea must be certain and specific and pray that the attachment be vacated or quashed.

Accuracy and precision should be employed in framing a plea in abatement of an attachment and such plea should be certain to every intent.[37] It should put in issue all the material allegations of the affidavit[38] and specify the defects of which complaint is made.[39] Such a plea should also pray that the attachment be quashed,[40] and may properly conclude to the country.[41]

trine of res judicata is inapplicable —Leib v. Bostwick, 239 N W. 405, 256 Mich 277—Campbell v. Hill, 155 S E 273, 158 S C 151

26. Adams v Lockwood, 2 P 626, 30 Kan 373—6 C J p 458 note 9

27. Hoobler v. Howland, 43 S W 486, 19 Ky L 1473.

28. Keystone Pipe & Supply Co v Crabtree, (Okl) 50 P (2d) 1086

29. Hawkins v. Pakas, 60 N Y S 1108, 44 App Div 395—6 C.J p 458 note 11.

30. Banks v. Hunt, 70 Ga. 741—6 C J. p 459 note 17

Time for plea in abatement generally see Abatement and Revival § 193.

31. Fla.—Caldwell v. People's Bank of Sanford, 75 So 848, 73 Fla 1165 Ga.—Banks v. Hunt, 70 Ga. 741. 6 C.J. p 459 note 18.

Plea not voided as tardy

Where an original attachment was quashed on motion, but the order was later revised on appeal by the plaintiff, and a plea in abatement was filed at the first term after the remand, it was held that such plea was in time even though a declaration was filed at the term at which the attachment was quashed —Decatur Bank v Berry, 3 Humphr (Tenn) 590.

32. Gardner v James, 5 R I 235—6 C J p 459 note 19.

33. Coombs Commn. Co v. Block, 82 S W 1139, 180 Mo 668—6 C J p 460 note 20.

34. Bates v. Bank of Moulton, 148 So 150, 226 Ala 679—Ex parte Tucker, 94 So 276, 208 Ala 428, denying certiorari Tucker v. Quick, 94 So 275, 18 Ala App 663.

35. Hawkins v Albright, 70 Ill. 87—1 C J p 269 note 84

36. Coombs, etc, Comn Co v. Block, 82 S W 1139, 180 Mo 668—1 C.J p 270 note 85 [b].

37. Colorado Vanadium Corp v. Western Colorado Power Co, 213 P 122, 73 Colo 24—6 C.J p 460 note 21 See Lloyd v. Lincoln Stars, 209 Ill App 421.

38. Colorado Vanadium Corporation v Western Colorado Power Co, 213 P 122, 73 Colo. 24—6 C J. p 460 note 22

Pleading held insufficient

Traverse relating to falsity of the affidavit in the present instead of the past is insufficient —Mitchell v Northwestern Lumber & Shingle Co, 1 P (2d) 97, 89 Colo 215—Colorado Vanadium Corporation v Western Colorado Power Co, 213 P 122, 73 Colo 24—6 C J. p 460 note 22 [k].

39. Mohr v Chaffe, 75 Ala 387—6 C J p 461 note 23.

Plea properly raising question of variance

A plea which stated that the writ should be abated because the summons was not in due form of law, in this, that by said writ defendant was required to answer to plaintiff in the court to be held on the third Tuesday of October, and in the summons defendant was required to answer to plaintiff at the court to be held on the third Tuesday of August, was a good plea and properly raised the question of variance between the writ and summons —Kenaston v. Chesley, 52 N H. 564.

40. Mantz v Hendley, 2 Hen. & M (12 Va) 308—6 C J. p 461 note 24.

41. Ill —Ridgway v. Smith, 17 Ill. 33
Tenn —Boon v. Rahl, 1 Heisk. 12.

b. Verification

Where it is so required, the plea in abatement to an attachment must be verified by oath.

In some jurisdictions a plea or answer denying the grounds of attachment as set forth in the affidavit must be verified by a proper oath,[42] while in other jurisdictions it is held to be unnecessary that the traverse to the truth of the affidavit which is the foundation of the attachment be sworn to.[43]

A verifying affidavit of a plea in abatement must be positive as to the truth of the facts contained in the plea, and should leave nothing to be concluded by inference or intendment.[44]

The verification may be made by defendant's attorney.[45]

§ 463. —— Amendment, Withdrawal, or Abandonment of Plea

A plea in abatement may be amended in a matter of form after filing.

After the filing of a plea in abatement to an attachment, it may be amended in a matter of form.[46] However, it has been held that an amendment should not be permitted after a demurrer to such plea has been sustained.[47]

Where a plea in abatement entered to an action commenced by attachment is withdrawn after return of process duly served, the lien of the attachment remains in full force.[48] It is usually considered that a plea in abatement is not waived or abandoned by pleading to the merits before a disposal of the plea is made.[49] Where defendant seasonably interposes a plea in abatement and it is overruled by the trial court and an exception is reserved by the defendant, he does not, by subsequently pleading to the merits, waive the objection so as to make it unavailable on appeal.[50]

§ 464. —— Similiter or Replication to Plea

The plaintiff may accept the issue tendered by a similiter or a replication to the plea.

If the ground of the attachment is denied by a negative plea, plaintiff has the right, although it may not be his duty, to signify his acceptance of the issue tendered by the plea, and this acceptance may be signified at law by a similiter and in equity by a replication in the nature of a similiter.[51]

§ 465. —— Issues

The sole issue upon a plea in abatement to an attachment is the question of the existence of the grounds of attachment denied by the defendant.

Upon a plea in abatement or traversing the grounds of the attachment, the sole issue to be decided is as to the existence of the facts asserted by plaintiff's affidavit as grounds of attachment and denied by defendant,[52] and the merits of plaintiff's case are not a proper subject of inquiry.[53] Where it is so provided by statute the moving party may apply to the court to have the issues joined in the main action at once and the issues of the main suit and those raised by the traverse are then submitted together.[54]

§ 466. —— Evidence

a. Burden of proof
b Admissibility
c. Weight and sufficiency

a. Burden of Proof

The burden of proving the facts alleged in the attachment affidavit rests on the plaintiff where challenged by a plea in abatement of the attachment.

Where the facts set out in the attachment affidavit are properly put in issue the burden of proof rests upon plaintiff to prove the existence of the facts as alleged[55] by a preponderance of evidence.[56]

42. Irwin v Evans, 4 S W 693, 92 Mo 472—6 C J. p 461 note 26

43 Ga.—Ousts v Seabrook, 47 Ga 359
N M —Ripley v Astec Min Co, 28 P. 773, 6 N M. 415

44. Wrompelmeir v. Moses, 3 Baxt (Tenn) 467—6 C J p 461 note 28.

45. Irwin v. Evans, 4 S W. 693, 92 Mo. 472.

46. Trabue v. Higden, 4 Coldw (Tenn) 620—6 C.J. p 461 note 30

Discretion of court

(1) Leave to amend the traverse of an attachment affidavit is discretionary, and, where the grounds of the court's refusal do not appear, error cannot be declared —Midland Fuel Co. v Schuessler, 71 P. 894, 18 Colo App 386.

(2) Discretion not abused in refusing amendment after judgment —Colorado Vanadium Corporation v. Western Colorado Power Co, 213 P. 122, 73 Colo. 24.

47. Livengood v. Shaw, 10 Mo. 273—6 C J p 461 note 31

48. Claflin v Sylvester, 12 S W 503, 99 Mo 276

49. Chattanooga Third Nat. Bank v. Foster, 18 S W 267, 90 Tenn 735—1 C J. p 272 note 6 [b]—6 C J p 461 note 33

50. Norvell v. Porter, 62 Mo. 309—Ellis v. Lamme, 42 Mo 153.

51. Cheatham v. Pearce, 15 S.W 1080, 89 Tenn. 668—6 C J. p 461 note 34.

52. Teweles v. Luns, 74 N W 122, 98 Wis. 453—6 C J. p 461 note 35

53. Chouteau v Boughton, 13 S W. 877, 100 Mo 406—6 C J. p 462 note 36

Merits of suit not involved

A denial by a plea in abatement of the grounds of attachment is not a denial of the indebtedness so as to make that an issue on the trial of the right to attach—Anderson v Dever, 68 So 166, 109 Miss 235

54. Caldwell v. People's Bank of Sanford, 75 So 848, 73 Fla 1165.

55. Mo—R C. Stone Milling Co v. McWilliams, 98 S W. 828, 121 Mo App 319.
Wis—St Louis Clay Products Co v Christopher, 140 N.W 351, 152 Wis 603
6 C J p 462 note 37.

56. Waring v. Fletcher, 52 N E 203, 152 Ind 620.

b. Admissibility

Only such evidence as tends to sustain the defendant's plea or the plaintiff's affidavit is admissible.

Upon the trial of the issue formed by a plea in abatement or traverse of the grounds of the attachment, the evidence admissible is confined on the part of defendant to matters tending to sustain the allegations of his plea or traverse, and on the part of plaintiff to matters tending to sustain the grounds originally alleged in his affidavit for the issue of such attachment [57]

c. Weight and Sufficiency

The rights of the parties are to be determined according to the preponderance of the evidence.

The rights of the parties are to be determined according to the preponderance of the evidence,[58] and it is not necessary that the existence of the ground of attachment set up in the affidavit should be proved to the satisfaction of the jury [59] However, a proof of facts from which the existence of the alleged grounds of attachment might be reasonably inferred is not sufficient to sustain the attachment in the absence of proof that such grounds actually existed [60]

§ 467. —— Time and Place of Hearing

The plea or traverse must be heard at the time and place fixed by the rules of practice of the particular jurisdiction.

The practice as to the time of hearing the issues formed upon a plea in abatement or answer traversing the attachment affidavit is not uniform. In some jurisdictions such issue should be disposed of before the trial of the main action,[61] in other jurisdictions the issue may be tried before a trial on the merits,[62] or may be tried either before or with the main case,[63] while in still other jurisdictions the practice is to try the issue as to the propriety of the attachment together with the issues in the principal action.[64] Where a motion to dissolve on account of the insufficiency of the attachment bond and issues raised by a traverse of the grounds of affidavit for attachment are pending at the same time, it is discretionary with the court which shall be tried first.[65]

Place of hearing. The trial of the issues of fact raised upon the traverse of the affidavit must be had in the county where the suit is pending.[66]

§ 468. —— Hearing and Determination

a. Trial by jury
b. Questions of law and fact
c. Instructions
d Verdict and findings

a. Trial by Jury

Unless waived, the issue on a plea in abatement should generally be tried by a jury.

Although generally the issue on a plea in abatement or traverse of the grounds of the attachment should be tried by a jury, unless such trial is waived by the parties,[67] it is a proper practice for the court to determine this question instead of submitting it to a jury.[68]

b. Questions of Law and Fact

Questions of fact are for the jury where the trial is to a jury.

57. North America Nat Bank v Thomas, 74 A 1092, 30 R.I. 294—6 C J p 462 note 39.

58. Waring v Fletcher, 52 N E 203, 152 Ind 620—6 C J p 462 note 41

Evidence sufficient to sustain

Where the plea in abatement contended that the writ should be dissolved because issued before the suit was duly instituted, the petition in the original suit was held sufficient evidence to defeat such claim—Laird v. Williams & Chastain, (Tex Civ App) 13 S W (2d) 944—6 C J p 462 note 40

Evidence insufficient

The discharge of an attachment, due to a finding that the issuance of a summons for attachment instead of a warning order was not in good faith, will be reversed where it is not supported by the facts—Appleton v. Southern Trust Co., 51 S W.(2d) 447, 244 Ky 453.

59. Bowles Live Stock Commn Co v Hunter, 91 Mo App 333—6 C J p 463 note 42

60. Brandenburg v. Malcolm, 102 Ill App 302

61. National Tube Works Co. v Ring Refrigerating, etc, Mach Co, 98 S W 620, 201 Mo. 30—6 C J p 463 note 44

Defendant need not plead to merits

until disposition of plea in abatement—B F. Coombs, etc, Commn Co v. Block, 32 S.W. 1139, 130 Mo 668.

62. Price v. Beecher, 12 Heisk. (Tenn) 372—Robb v. Parker, 4 Heisk (Tenn) 58.

63. Alvaton Mercantile Co. v Caldwell, 128 S E 781, 34 Ga App 151—Blakely Milling & Trading Co v Thompson, 128 S.E 688, 34 Ga App 129—6 C J. p 463 note 46.

Statute construed

Where a statute provides that no traverse of the attachment proceedings shall delay judgment, it means that nothing that works a continuance of the traverse only shall postpone the main case—Parker v Brady, 56 Ga 372—Alvaton Mercantile Co v. Caldwell, 128 S.E. 781, 34 Ga App 151

64. Weston v. Jones, 25 So 888, 41 Fla. 188—6 C.J p 463 note 47

65. Forbes v. Porter, 6 So. 62, 25 Fla 363.

66. Canova v. Colby, 16 Fla. 167.

67. Fla—Nelson v. Hall, 63 So. 156, 66 Fla 35
Okl—Millus v Lowrey Bros, 164 P. 663, 63 Okl. 261, L.R.A.1918B 336
6 C J. p 463 note 50.

68. Metcalf v Jelks, 8 S W.(2d) 462, 177 Ark. 1023

Question of discharge for court

The question of discharging or sustaining an attachment is for the court to decide, though the liability of the defendant for the debt sued on is for the jury—Ford v Wilson, 288 S.W. 712, 172 Ark. 335.

Questions of fact are for the jury.[69] In case of conflicting evidence, the truth of the affidavit of attachment and the existence of the grounds of attachment set up therein are questions of fact.[70] Testimony of an ability to pay the debt owing does not entitle defendant to a peremptory instruction.[71] The question of residence is a mixed one of law and fact.[72]

c. Instructions

The jury should be properly instructed on both the law and facts involved in the case.

The jury should be properly instructed as to the issues of fact submitted for their consideration[73] and the principles of law applicable thereto.[74]

d. Verdict and Findings

A formal verdict should be had on a trial of an issue raised by a plea in abatement of an attachment.

Upon trial of an issue of the propriety of an attachment resulting in favor of defendant the jury should render a formal verdict for defendant before the court quashes the attachment,[75] although a failure to do so is not a cause for reversal.[76] Where a plea traversing the allegation of the attachment affidavit is not sustained, the jury should, it has been held, assess plaintiff's damages.[77] It is the better practice for the jury to make separate findings as to each ground of attachment, instead of a general finding in the plea in abatement,[78] but the failure to do so is at most an irregularity.[79]

§ 469. —— Judgment

The court should render a judgment in conformity with the verdict or finding.

Where the verdict or finding on the plea in abatement of the attachment is for plaintiff, the court should render judgment sustaining the attachment,[80] while if the decision on the plea is in favor of defendant the judgment should be that the attachment, and with it the principal action where jurisdiction rests solely upon the attachment, be abated with costs against plaintiff.[81]

E. EFFECT OF DISSOLUTION OR REFUSAL TO DISSOLVE, AND REVIEW THEREOF

§ 470. Effect of Dissolution in General

In the absence of an appeal, a dissolution of an attachment is a final adjudication of all questions arising therein and, as regards the property attached, the parties are put in the same position as if no attachment had issued.

A dissolution of an attachment is a final adjudication of all questions arising in the attachment proceedings unless an appeal therefrom is taken in due time,[82] and, as regards the property attached, the parties are put in the same position as if no attachment had issued.[83] The dissolution of a wrongful attachment cannot affect the lien of an execution in favor of a third person on the same property.[84]

69. First Nat Bank v Kibble, 273 S W 148, 221 Mo App 311, certiorari quashed State ex rel First Nat. Bank v Trimble, 287 S W 432, 315 Mo 966—Englehart-Davidson Mercantile Co. v. Burrell, 66 Mo App 117—6 C.J. p 463 note 51.

No presumption raised

Where no presumption of fraud was raised in an attachment suit, the question of fraudulent intent in giving the chattel mortgage was held to be properly submitted to the jury. —State ex rel First Nat Bank v Trimble, 287 S W. 432, 315 Mo 966, quashing certiorari, First Nat Bank of Milan v Kibble, 273 S.W. 148, 221 Mo App 311.

70. Walkeen Lewis Millinery Co. v. Johnstone, 111 S.W 639, 131 Mo App. 693—6 C J. p 463 note 52

71. Anderson v. Dever, 68 So. 166, 109 Miss. 235.

72. Jarrell v. Leeper, 9 S.W.(2d) 778, 178 Ark 6

73. First Nat. Bank v Kibble, 273 S W. 148 221 Mo App 311, certiorari quashed State ex rel. First Nat. Bank v Trimble, 287 S.W. 432, 315 Mo. 966—6 C J. p 463 note 53.

"Any" synonymous with "either"

In instruction in attachment suit, that "if plaintiff has failed to so prove any said grounds," it is the duty of the jury to find for defendant, the word "any" is synonymous with "either."—Carr-Lowry Lumber Co v. Martin, 109 So. 849, 144 Miss 106.

"Any" as meaning "either" generally see Any 3 C J S p 1398

74. Bowles Live Stock Commn. Co v. Hunter, 91 Mo App 333—6 C.J p 463 note 54

75. Towle v. Lamphere, 8 Ill App 399.

76. Towle v. Lamphere, supra

77. Boggs v. Bindskoff, 28 Ill. 66

78. Rothschild v. Lynch, 76 Mo App 339

79. Rothschild v. Lynch, supra

80. Hill v Bell, 19 S W 959, 111 Mo 35—6 C J. p 464 note 59

81. Hill v Bell, supra—6 C J p 464 note 60

82. Danforth v Rupert, 11 Iowa 547 —6 C J p 464 note 61

83. N H —Fairfield v Day, 55 A. 219, 72 N H 160
S D —Piper v Hagen, 146 N W. 692, 33 S D 491.
Tex —Eikel v. Hanscom, 3 Willson, Civ Cas Ct App § 473
6 C J p 464 note 62

Similarity to nonsuit

The legal effect of quashing a writ of attachment is that plaintiff takes nothing by his writ and the defendant goes without day, which is the like result of a judgment of nonsuit. —Jaudel v. Schoelzke, 112 A. 328, 95 N.J Law 171.

Dissolution for insufficiency of affidavit

Where a motion to vacate an attachment was made upon the original papers and was granted because affidavits were totally insufficient, the court had no jurisdiction to grant the warrant of attachment—Fried v Continental Casualty Co., 279 N. Y S 916, 155 Misc 487.

84. Drs. K & K U S. Medical, etc., Assoc v Post, etc., Job Printing Co., 25 N W. 477, 58 Mich. 487.

§ 471. On Main Action

a. Where attachment basis of jurisdiction
b. Where jurisdiction of person acquired otherwise than by attachment
c Where writ quashed by agreement

a. Where Attachment Basis of Jurisdiction

Where the attachment is essential to the jurisdiction of the court, dissolution of the attachment will terminate the main suit.

Where a suit is commenced by attachment, and the attachment is essential to the jurisdiction of the court, the dissolution of the attachment will carry with it the main suit,[85] unless there is a statutory provision to the contrary.[86] Where an attachment sued out for a debt not yet due is dissolved, this will ordinarily operate as a termination of the whole proceeding,[87] although it has been held that, if the attachment is dissolved merely for a technical defect, the court should exercise a sound discretion as to whether or not the action should be dismissed,[88] and that, when a suit is brought with an attachment upon a debt not due, and upon maturity thereof an amendment is filed showing the facts and that the debt is overdue, the main suit should not be dismissed merely because the attachment has been quashed.[89]

b. Where Jurisdiction of Person Acquired Otherwise than by Attachment

Where jurisdiction is not dependent on an attachment, a dissolution thereof does not terminate the main action.

Where an attachment is merely ancillary, the dissolution thereof does not terminate the main action which may proceed to judgment, notwithstanding the dissolution, provided the court has jurisdiction of the subject matter and of the person of defendant.[90] Likewise, although a suit is commenced by attachment, where defendant makes a general appearance in the action,[91] or where summons is duly served on him,[92] the dismissal of the attachment will not carry the main cause with it, particularly under a statute expressly so providing.[93]

c. Where Writ Quashed by Agreement

Although a suit is brought by attachment, a quashal of the writ by agreement that the case shall be tried upon its merits does not effect a dismissal of the suit.

Where suit is brought by attachment, and the writ is quashed by agreement that the cause shall be tried upon its merits, the effect of the quashal is not a dismissal of the suit[94] In an action commenced by attachment under a statute for the benefit of all creditors, the settlement of an attachment by those creditors instituting the action

85. La.—First Nat Bank v Pierson, 146 So 749, 176 La 792
Tenn.—Purnell v Morton Live Stock Co., 1 S W (2d) 1013, 156 Tenn 383
W Va.—Deming Nat Bank v Baker, 98 S E 438, 83 W Va 429—Millar v. Whittington, 87 S E. 164, 77 W Va 142
6 C J p 465 note 67.

Rule recognized.—Snyder v. Breitinger, 130 S E 96, 100 W Va 93

86. McCormick v. Hawks, 95 So. 241, 131 Miss. 111.

87. McCartney v McCartney, (Neb.) 260 N.W 184—6 C J p 465 note 68

Rule recognized.—Snyder v Breitinger, 130 S E 96, 100 W Va 93

88. Kan.—Pierce v. Myers, 28 Kan 364
Ohio.—Ramsay v Overaker, 1 Disn 569, 12 Ohio Dec (Reprint) 801.
6 C.J. p 465 note 69.

89. Panhandle Nat. Bank v. Still, 19 S W. 479, 84 Tex 339—Arnold v Willis, 4 S W 485, 68 Tex 268

90. Iowa.—Edwards v Tracy, 212 N W 317, 203 Iowa 1033
Ohio.—Ritz v May, 3 N E (2d) 816, 52 Ohio App 399
Pa.—Linahan v Lawson, 24 Pa.Dist 628—Kriebel v. High, 1 Pa Dist 385
6 C J. p 464 note 66.

91. U S.—Lucas v Vulcan Iron Works, (D C Pa.) 233 F 823
Ga.—Lancaster v Neal, 154 S E 386, 41 Ga App 721—Williams v Flanders, 134 S E 183, 35 Ga App 644—Evans v Smith, 111 S E 76, 28 Ga App 813—A W. Watters & Co v O'Neill, 108 S E 257, 27 Ga App 295, conforming to answers to certified questions 108 S E. 35, 151 Ga 680—Duke v. Automobile Supply Co, 94 S E. 915, 21 Ga App 603—Falligant v. Blitch, 91 S E 1057, 19 Ga App 675—Philip Carey Co v Sheppard, 91 S E 444, 19 Ga App 863
Mo.—Hawk v. Bruce, (App.) 195 S W 569
6 C J. p 465 note 71.

92. Nashville v Wilson, 12 S W 1032, 88 Tenn 407—6 C J p 465 note 72

Right to issue new attachment

In an action to recover a debt with attachment and service of process by publication against a nonresident defendant, his motion, after the court on his special appearance for the purpose has quashed the attachment and order of publication against him, to dismiss the case from the docket, is properly overruled, and after such action plaintiff has the right to retain the case on the docket for a new order of attachment if so advised.—Norman v. Willis, 106 S E. 252, 83 W Va. 76—Danser v. Mallonee, (W Va.) 86 S E 895

93. Staab v. Hersch, 8 P 243, 3 N.M. 153—6 C J. p 466 note 75

Personal service of notice before final judgment

A personal judgment may be rendered against defendant in attachment, notwithstanding the dismissal thereof, if service is had or notice given, in accordance with the provisions of a statute which authorizes the trial of the main action, notwithstanding the dismissal of the attachment, when notice of the attachment is served personally on defendant at least ten days before final judgment.—Hodnett v. Stone, 20 S E 43, 93 Ga. 645—6 C.J. p 466 note 74.

Residence in county

The dissolution or quashing of the attachment will not carry with it the main action where a statute providing that, in case defendant or one of the parties resides in the county, the court shall proceed in the case as if there had been a summons regularly served, notwithstanding the dismissal of the attachment, is applicable.—Brackett v. Brackett, 61 Mo 221—Peery v Harper, 42 Mo 131—Sharpless v Ziegler, 92 Pa 467.

94. Ross v. Allen, 67 Ill. 317.

does not discontinue the case as to creditors not assenting thereto.[95]

§ 472. In Respect to Attached Property

a. Vacation of lien
b. Return of property

a. Vacation of Lien

The lien on property seized under an attachment is vacated when the attachment is dissolved.

Where an attachment is dissolved the lien on the property seized thereunder is vacated,[96] and the right to hold the attached property ceases.[97] If by judicial sale a fund has been substituted in place of the property the lien on the fund is thereby discharged.[98]

b. Return of Property

(1) In general
(2) Time and manner of making return
(3) Necessity for payment of fees and charges of officer
(4) Liability for detention by officer
(5) Effect of second attachment where property not returned

(1) In General

Generally, on the dissolution of an attachment, all property seized thereunder should be returned, notwithstanding an appeal has been taken, although in some jurisdictions an exception is made in the case of nonresidents.

Ordinarily on the dissolution of an attachment all property attached should be returned to defendant, whether the dissolution is by operation of a final judgment in defendant's favor or by special proceedings for the purpose of obtaining an order of dissolution had in advance of a trial on the merits,[99] while if the property has been sold defendant is entitled to the proceeds arising from the sale.[1] In the absence of any statutory provision to the contrary, it is the duty of the officer to return the property or proceeds to attachment defendant, notwithstanding an appeal is taken or other proceedings in error instituted.[2] In some jurisdictions the property of a nonresident will remain in the custody of the court to await the determination of the main action.[3]

(2) Time and Manner of Making Return

The property should be returned promptly. A notice of relinquishment is not sufficient if the property has been removed from the custody of attachment defendant.

Where an attachment has been dissolved, the officer holding the property should return the same promptly.[4] If property attached belongs to two cotenants, the return to either will be sufficient.[5] A mere notice of the relinquishment of the attachment is not ordinarily a sufficient return of property which has been seized,[6] unless the property has not been removed from the custody of attachment defendant.[7]

Under a statute providing that the attachment

95. Smith v. Warden, 35 N.J Law 346.

96. Mo.—McClellan v. Dougherty, (App.) 204 S.W. 201
Pa.—Locey v. Sterling Motor Truck Co. of Pittsburgh, 156 A. 730, 102 Pa. Super. 148.
6 C.J. p. 466 note 77.

Prior mortgage becomes effective
Where an attachment of personal property was dissolved by the court's order and was delivered to the debtor upon his receipt, a chattel mortgage previously filed covering the property so released became immediately effective.—Green v. Hooper, 167 P. 23, 41 Nev. 12.

97. Roehl Storage Co. v. Wilson, 256 N.W. 598, 268 Mich. 691.

Absence of order of dissolution
The effect of the dissolution of an attachment is to release the attached property, although no order of dissolution is entered in the court where the action is pending.—In re Federal Biscuit Co., (N.Y.) 214 F. 221, 130 C.C.A. 635.

98. Goldstein v. Sondheim, 3 Kulp (Pa.) 212

99. Ariz.—J. H. Mulrein Plumbing Supply Co. v. Walsh, 222 P. 1046, 26 Ariz. 152
Ill.—Zola v. Zacher, 220 Ill. App. 123
Ky.—Holbrook v. Sanders, 287 S.W. 944, 216 Ky. 421
N.Y.—Harnick v. Saperstein, 178 N.Y.S. 136
6 C.J. p. 466 note 80.

1. N.H.—York v. Sanborn, 47 N.H. 403
N.Y.—Day v. Bach, 87 N.Y. 56
N.C.—Mahoney v. Tyler, 48 S.E. 549, 136 N.C. 40.—Devries v. Summot, 86 N.C. 126.
Vt.—Adams v. Lane, 38 Vt. 640.
6 C.J. p. 467 note 82.

2. Loveland v. Alvord Cons. Quartz Min. Co., 18 P. 682, 76 Cal. 562.—6 C.J. p. 467 note 83.

3. Page v. McDonald, 74 S.E. 642, 159 N.C. 38.

Restitution not granted where summons defective
Although the motion of defendant in attachment to set aside the judgment for failure to prove mailing of summons is granted, restitution will not be ordered, defendant having been proved indebted to plaintiff, not appearing in the action, having no property in the state, and not doing business therein, and defendant's motion being delayed for nearly a year, and plaintiff's only remedy, were motion granted, being to institute proceedings in California.—B. Berman, Inc., v. American Fruit Distributing Co. of California, 186 N.Y.S. 376, 114 Misc. 345

4. Titcomb v. Bay State Grocery Co., 150 N.E. 874, 254 Mass. 599.—6 C.J. p. 467 note 85

5. Gassett v. Sargeant, 26 Vt. 424.—6 C.J. p. 467 note 86

6. Becker v. Bailies, 44 Conn. 167.—6 C.J. p. 467 note 87.

7. Dishneau v. Newton, 71 N.W. 807, 96 Wis. 531.

Attachment of horses in livery stable
Where the sheriff attached some horses at a livery stable, but did not remove them therefrom, and after the dissolution of the attachment notified the keeper of the stable of that fact, a delivery of the horses by the latter to third parties who held a contract of purchase from the owner was held to be a legal return of the property.—Dishneau v. Newton, 71 N.W. 807, 96 Wis. 531.

shall be dissolved after the filing of an undertaking if sureties justify within a specified time, a constable is not required to release the property after the undertaking is filed before the sureties have justified [8]

(3) Necessity for Payment of Fees and Charges of Officer

The attachment defendant is not required to pay fees or costs connected with the seizure and custody of the property where the attachment is set aside or vacated.

Where an attachment is set aside or vacated, defendant cannot be required to pay the fees of the levying officer or the costs, charges, and expenses incurred by him in connection with the seizure and custody of the property as a condition of receiving back his property,[9] and where the property has been sold defendant is entitled to receive the entire proceeds without deduction for such fees or charges.[10]

(4) Liability for Detention by Officer

The attaching plaintiff is not liable for unlawful detention of the property by the officer after the attachment has been dissolved.

The attaching plaintiff cannot be held liable for the misconduct of the levying officer in refusing or neglecting to return the property to defendant upon a vacation of the attachment.[11]

(5) Effect of Second Attachment Where Property Not Returned

A second attachment will not revive the lien created by the first attachment if there has not been a redelivery of the property unless, it has been held, the second attachment is made for the purpose of correcting a mere irregularity in the first.

If on the dissolution of an attachment there is not a formal delivery of the property to the attachment debtor, a second attachment will not revive the lien created by the first attachment,[12] but there is other authority which holds that where the second attachment is made for the purpose of correcting a misnomer of defendant in the first and plaintiff and officer have acted in good faith, the second attachment is effective even though the property has not been returned to the owner.[13]

§ 473. On Rights of Other Attaching Creditors or Execution Creditors

Rights of creditors who, in accordance with the statute, file claims under an attachment are unaffected by a dismissal of the attachment for mere irregularities or discontinuance by an agreement between the attaching creditor and the debtor.

Under statutes so providing, the attachment is for the benefit of all creditors who file claims thereunder, and who thus acquire liens relating back to the reception of the writ by the officer,[14] and their rights will be unaffected by the dismissal of the original attachment because of defects in the papers,[15] or by a discontinuance by agreement out of court by the attaching creditor and the debtor.[16] The dismissal of an attachment does not affect the lien of an execution in favor of a third person upon the same property.[17]

§ 474. On Rights of Intervening Claimant

The dismissal of an attachment releases property claimed by an intervener.

The dismissal of an attachment suit operates as a release of the property claimed by an intervener, and if he wishes to be quieted in his title he must have recourse to a direct action.[18]

§ 475. Liability on Release or Forthcoming Bond

Unless otherwise provided by statute, the quashal of an attachment dissolves a bond or releases a deposit given to secure the release of the property.

Where an attachment is vacated or quashed, a forthcoming, delivery, or replevy bond given to secure the release of the property falls with it,[19] un-

8. Doe v. Cramer, 178 P. 850, 179 Cal 722

Waiver by constable

A constable, under a statute relating to discharge of an attachment on filing of an undertaking, could not waive the time provided by law for requirement for justification of the sureties, and hence a demand for his fees as a condition of releasing property could not operate as a waiver of objection that redelivery of property to defendant was not yet due—Doe v. Cramer, 178 P. 850, 179 Cal 722.

9. West Side Nat. Bank of Chicago v. Warsaw Discount Bank, 197 N Y S. 144, 204 App Div. 4—6 C.J p 468 note 88.

10. Littlefield v Davis, 62 N H 492—York v Sanborn, 47 N H 403.

11. Mich.—Blanchard v Brown, 3 N W. 246, 42 Mich 46

N C.—Mahoney v. Tyler, 48 S E. 549, 136 N C 40

12. Anderson v. Land, 32 P 107, 5 Wash 493, 34 Am S R 875

13. Brady v Royce, 62 N E 960, 180 Mass 553.

14. Trentman v Wiley, 85 Ind 32—Ryan v Burkam, 42 Ind 507—Shirk v Wilson, 13 Ind. 129—6 C J p 468 note 92

15. Fee v Moore, 74 Ind. 319.

Writ of foreign attachment

Where a writ of attachment on land in another county was dismissed as to plaintiff, the suit was at an end, and no judgment could be given in favor of other creditors not plaintiffs—Olney v. Shepherd, 8 Blackf (Ind.) 146

16. Smith v Warden, 35 N J Law 346—Cummins v Blair, 13 N J. Law 151

17. Drs K & K U S Medical, etc., Assoc v Post, etc., Job Printing Co., 25 N W 477, 58 Mich 487—6 C J p 468 note 95

18. La.—Meyers v Birotte, 6 So 607, 41 La.Ann 745

Me.—Saco v. Hopkinton, 29 Me 268. 6 C J p 468 note 96

19. N.Y.—Fried v. Continental Casualty Co., 279 N.Y S 916, 155 Misc 487.

less a statute provides otherwise.[20] Likewise, the dissolution of an attachment releases a deposit of money payable to the depositor on demand.[21]

§ 476. On Right to Attach Property in Other Proceedings

The vacation of an attachment does not preclude another attachment of the same property by the same creditor.

The vacation of an attachment does not preclude another attachment of the same property by the same creditor if grounds therefor exist,[22] although where the dissolution is on the ground of insufficiency of the attachment affidavits, there can, of course, be no subsequent attachment proceedings on the same affidavits.[23]

§ 477. Effect of Refusal to Dissolve

Refusal to dissolve the attachment conclusively establishes the truth of the allegations supporting the issuance of the attachment, the existence of grounds therefor, and the validity of the writ.

The refusal of a motion to vacate an attachment conclusively establishes the truth of the allegations on which the attachment issued[24] and the fact that the writ is valid and properly issued.[25] The question whether there was ground for issuing the attachment is settled and cannot be reviewed by a jury, either on the trial of the issue to determine whether the debt is due or in a separate proceeding,[26] nor can the court again enter upon the question of its dissolution after making an order denying the motion to dissolve the attachment.[27] However, as the only issue involved is as to the truth of the matters alleged as ground for the attachment, (see supra §§ 454, 465), a refusal to dissolve does not determine whether or not the property was exempt from attachment.[28]

§ 478. Review of Action on Motion

An appeal from an order dissolving or refusing to dissolve an attachment is governed by the rules applicable to an appeal generally, and hence the various phases of this subject are treated in the title Appeal and Error.

§ 479. Damages and Costs on Dissolution

Subject to exceptions, the general rule is that the plaintiff is liable for costs and, in some instances, damages, on dissolution of the attachment.

On dismissal of plaintiff's cause of action in attachment, ordinary costs should be taxed against plaintiff as in other cases,[29] and in some jurisdictions it is held proper, on dissolving an attachment, to assess defendant's damages by reason of the issuance of the writ.[30] Under a statute providing that a writ of attachment to secure jurisdiction of a nonresident shall be dissolved when he makes a general appearance, the costs of the attachment should not be included in the judgment where defendant enters his personal appearance.[31] Where defendants in an attachment proceeding made a general assignment, and the assignees moved to dissolve the attachment, and a similar motion was made by one of the defendants who had an interest in the property, and an order of dissolution, made at chambers, was brought up for review on certiorari and sustained as to defendant, it was held that the writ of certiorari was not of right under the circumstances, and that, although the assignees had no statutory right to move for dissolution, yet the equities were in their favor and no costs would be allowed for or against them.[32] Costs may be taxed against defendant on an ill-founded petition to dissolve although the

Pa.—Locey v. Sterling Motor Truck Co. of Pittsburgh, 156 A. 730, 103 Pa.Super. 143.

6 C.J. p. 468 note 97

20. Calvert v. Bennett, (Tex.Civ. App.) 286 S.W. 303.

21. Ryan v. Lyon, 99 N.E. 169, 212 Mass. 416.

22. Brinkman Co. Bank v. Gustine, 66 P. 990, 63 Kan. 758—6 C.J. p. 468 note 99

23. Ind.—Teutonia Loan, etc., Co. v. Turiell, 49 N.E. 852, 19 Ind.App. 469, 65 Am.S.R. 419.

Pa.—National Bank of the Republic v. Tasker, 1 Pa.Co. 173

24. Kan.—Western Grocer Co. v. Alleman, 106 P. 460, 81 Kan. 543, 135 Am.S.R. 398, 27 L.R.A.(N.S.) 630

Pa.—Commonwealth v. Sisler, 46 A. 420, 196 Pa. 147

S.C.—George Norris Co. v. Levin, 61 S.E. 1103, 81 S.C. 36.

Wash.—Sheppard v. Guisler, 88 P. 759, 10 Wash. 41

6 C.J. p. 469 note 2

25. Nagle v. Omaha First Nat. Bank, 77 N.W. 1074, 57 Neb. 552—6 C.J. p. 469 note 3

26. Slingluff v. Sisler, 46 A. 419, 196 Pa. 121—6 C.J. p. 469 note 4.

27. Pa.—Lett v. Wyland Co., 18 Pa.Co. 525

Wash.—Sheppard v. Guisler, 88 P. 759, 10 Wash. 41

28. Johnson v. Bartek, 76 N.W. 878, 56 Neb. 432—6 C.J. p. 469 note 7.

29. Veale v. Bourne, 30 S.W.(2d) 793, 224 Mo.App. 614.

Premium paid on bond

The premium paid on a bond to release an attachment is taxable as costs where the complaint is dismissed on the merits.—Williams v. Sawyer Bros., (C.C.A.N.Y.) 51 F.(2d) 1004, 81 A.L.R. 1527.

30. Ark.—Rodgers v. Cades, 146 S.W. 507, 103 Ark. 187.

Ind.T.—Barton v. Ferguson, 37 S.W. 49, 1 Ind.T. 263

La.—Mitchell v. Murphy, 60 So. 677, 131 La. 1040.

6 C.J. p. 470 note 17.

Diminution in value of stock

Under a statute so permitting, the chancellor may order that, in the event a suit against a nonresident is dismissed or discontinued, shares of stock seized to confer jurisdiction shall be restored to the owner without diminution in value or complainants shall pay the difference.—Cantor v. Sachs, 162 A. 73, 18 Del.Ch. 359.

31. Bambrick Bros. Const. Co. v. Semple Place Realty Co., 193 S.W. 543, 270 Mo. 450.

32. Rowe v. Kellogg, 19 N.W. 957, 54 Mich. 206.

writ of attachment is later quashed on the ground of defective service.[33]

Where the attachment is dissolved by appearance of the nonresident defendant, no attorney's fees will be taxed as costs against plaintiff, in the absence of a statute making provision therefor.[34] Attorney's fees will not be awarded defendant where the attachment is dissolved because of a mere irregularity in the signature of the affidavit and not because plaintiff was not entitled to an attachment.[35]

Damages and costs accruing from wrongful attachment are considered in §§ 520, 555–565 infra.

§ 480. Reinstatement

If the order discharging an attachment has not been made at the time judgment is rendered, the court may reinstate the attachment when convinced that the discharge was error, on a timely motion for reinstatement.

It has been held proper for a court, when convinced of its error in quashing an attachment, to set aside its order doing so, and thereby to reinstate the same at the same term at which it was rendered,[36] or even when final judgment has been rendered,[37] but an order discharging an attachment made at the time judgment is rendered is final, and the attachment cannot be reinstated.[38] Affidavits filed on a motion to reinstate an attachment, but which it was improper for the court to consider, cannot be considered on an appeal from an order restoring the attachment lien.[39]

Under a statute authorizing a judge of the court of appeals to reinstate an attachment, vacated by the circuit judge, on inspection of the copy of the record, including the evidence, if the evidence considered on the motion to discharge was oral, it should be certified by the circuit court as are bills of exception in ordinary appeal,[40] and, if the evidence consists of depositions, a transcript of such evidence with a certificate of the judge should be prepared as in equitable actions on appeal.[41] It is not a compliance with the statute to offer a copy of the order of the circuit court discharging the attachment, together with the original papers in the action, where there is no showing as to what evidence was considered on the motion to discharge.[42] Where an attachment has been discharged by the circuit judge and reinstated by a judge of the court of appeals, it will be assumed that the discharge and reinstatement were made on the merits of the case, and such presumption is entitled to a controlling influence.[43] The discharge of an attachment, pendente lite, is an interlocutory order, from which no appeal lies; it can be reinstated only by application to and before a judge of the appellate court.[44]

To be effective, the motion for reinstatement must be made within the statutory period of limitation prescribed therefor.[45]

Where an attachment after dissolution is reinstated, the lien thereof is of the same force and effect as if there had been no order of dissolution,[46] unless the property has been sold in the meantime and the proceeds distributed.[47]

33. Stock v. Reynolds, 80 N W 289, 121 Mich. 356, 6 Detroit Leg N 489.

Waiver of objection to jurisdiction

Where a defendant in attachment proceedings, after appearing specially, and moving to quash a writ of attachment on the ground of defective service of the writ, and pending the determination of the application, petitions for a dissolution of the writ, which petition is ill-founded, he cannot, after granting of the motion to quash, object that the court had no jurisdiction of the petition to dissolve, so as to escape liability for costs therein—Stock v Reynolds, 80 N W. 289, 121 Mich. 356, 6 Detroit Leg.N. 489.

34. Veale v. Bourne, 80 S W.(2d) 793, 224 Mo.App 614.

Remedy for recovery of fees

The remedy of defendant in attachment for the recovery of attorney fees on dissolution of attachment is by separate suit or suit on bond for special damages—Veale v. Bourne, 80 S.W.(2d) 793, 224 Mo App 614.

35. Bass v. Baskowitz, 129 So. 201, 170 La. 779

36. Miss—Adams v. Evans, 19 So. 834

Tex—Woldert v Nedderhut Packing Provision Co, 46 S W. 378, 18 Tex Civ App 602

6 C.J. p 470 note 20.

Mistake of plaintiff

Plaintiff, who through mistake directed the officer to abandon attachment, was entitled on a petition therefor to an entry of the suit as of the term at which it would have been entered but for the mistake, and attachment would be thereby reinstated—Langdell v. Eastern Basket & Veneer Co, 99 A. 90, 78 N.H 243.

37. Woldert v. Nedderhut Packing Provision Co, 46 S W. 378, 18 Tex Civ.App 602—6 C J. p 470 note 21.

38. Davidson v. Allan, 5 Ky L. 683.

Reinstatement at subsequent term

After dismissal for want of service, a case may not be restored to the docket at a subsequent term to enable plaintiff to take judgment against the surety on attachment bond—Davis v. Cass, 142 A. 377, 127 Me 167.

39. Pach v. Orr, 1 N Y.S. 760, 15 N Y.Civ Proc. 176, affirmed 20 N E 415, 112 N.Y. 670—6 C J. p 470 note 23.

40. Buck v. Watson, 170 S.W. 509, 161 Ky. 169

41. Buck v. Watson, supra.

42. Buck v. Watson, supra

43. Shercliff v. Cooper, 5 Ky Op 772

44. Winchester v. Darnaby, 4 Ky Op 326.

45. Cal.—O'Connell v. Rogers, 237 P 775, 72 Cal App. 539—Clark v Superior Court in and for Los Angeles County, 174 P. 631, 37 Cal. App 732

Ky—Holbrook v Sanders, 237 S W. 944, 216 Ky. 421

46. Gillig v George C. Treadwell Co, 42 N E. 590, 148 N Y. 177—6 C J. p 471 note 29.

47. Haebler v. Myers, 30 N.E 963, 132 N Y 363, 28 Am S R 589, 15 L.R A. 583—6 C.J. p 471 note 30.

XII. PROCEEDINGS IN MAIN ACTION

§ 481. Prosecution of Action in General

The proceedings in the main action, except as concern the attachment, are, in the absence of contrary statute, controlled by the ordinary rules as to civil procedure.

In general, as will be seen from the following sections, proceedings in the action which is begun by attachment or to which attachment is ancillary are controlled, except as to matters arising out of the issuance or levy of the writ of attachment, by the rules governing other civil actions. Where the action is one in which the remedy by attachment is not authorized by statute, the issuance and levy of the attachment will confer no jurisdiction;[48] but, on the other hand, where the court has acquired jurisdiction otherwise than by attachment, a defect therein or a failure thereof, as where the goods attached were not the property of defendant, will not constitute a defense to plaintiff's demand.[49] Under an original attachment proceeding instituted to obtain a judgment in rem against a nonresident, plaintiff must prove both the debt and the attachment lien.[50]

Where the effectiveness of an attachment lien is dependent on the establishment of the creditor's claim at law, any action in the attachment case before a trial and judgment in the main suit is premature,[51] but, where there has been a service of summons and complaint, an order of condemnation as to the attached property is appropriate although a claim suit independent of the main suit has not been tried.[52]

Unless the statutes provide otherwise, the procedure in an action on a purchase-money attachment is the same as in ordinary attachments.[53]

§ 482. Process or Notice

Process or notice in proceedings in the main action where an attachment has issued must, as will be seen in the following sections, comply with statutory and constitutional requirements as to its necessity, nature, and sufficiency.

§ 483. —— Necessity for

Notice or service of process in accordance with the statute is essential to jurisdiction.

Under the constitutional requirement of due process of law, which will be considered in the title Constitutional Law § 568 [12 C.J. p 1193 note 76], as well as under principles of natural justice, it is necessary that one have notice of some sort before his property shall be bound by a judicial sentence, and it is essential to the jurisdiction of the court in attachment proceedings that defendant shall be served with notice or process either personally or by some other mode provided by law in lieu of personal service.[54] Where the statute makes no provision for actual notice to defendant, the seizure of property under the writ stands in place of personal service and authorizes a judgment against the property,[55] but, where the statute provides for notice to defendant, a failure to give such notice is a ground for abating the writ,[56] dismissing the suit,[57] or reversing[58] or setting aside, in direct proceedings,[59] the judgment rendered therein. As to whether a judgment rendered without the required notice to defendant, where there has been a valid seizure of property, is void or merely voidable, the cases are in conflict. In some jurisdictions it has been held that the court

48. Mudge v. Steinhart, 20 P 147, 78 Cal 34, 12 Am S R. 17—6 C J p 74 note 52

49. Dugundji v Palco, 180 N Y S 881, 190 App Div 707.

50. Arnold v Pike, (Tex Civ App) 191 S.W 207

51. Union Trust Co. v. Biggs, 127 A. 509, 153 Md. 50.

52. Cooper v. Owen, 161 So 98, 230 Ala. 316.

53. Nixon v L A Russell Piano Co, (Ga App.) 180 S E 742

54. Ark.—Bank of Pangburn v. Tate, 227 S W. 389, 147 Ark 292.
La.—Pugh v. Flannery, 92 So 699, 151 La. 1063—Collins v. McCook, 136 So 304, 17 La App 415—Tatum v. McWilliams, 7 La App 91.
Okl.—Davies v. Thompson, 160 P. 75, 61 Okl. 21, L R A.1917B 395.
Pa.—Spettigue v. Hutton, 9 Pa Co 156.
S C.—Stephens v. Ringling, 86 S E 683, 102 S C. 333.
6 C J p 471 note 32.

Statute prescribing limit for service of summons

The last sentence of Mason St. (1927) § 9342, which provides that the main action must be begun as provided in § 9199 not later than sixty days after the issuance of the writ of attachment, does not modify the requirement that the summons be issued, but only sets a limit on the time when the service of the summons shall be completed and the action begun by acquiring jurisdiction in the main action.—Borgen v Corty, 232 N W. 512, 181 Minn 349

55. Ga.—Coral Gables Corporation v Hamilton, 147 S E 494, 168 Ga. 132.—Hendricks v Georgia Fertilizer Co, 149 S E 711, 40 Ga App 427
Or.—Okanogan State Bank of Riverside, Wash v Thompson, 211 P 933, 106 Or 447
Tex.—Pantaze v. Fox-Head Spring Beverage Co, (Civ App) 23 S W (2d) 514, affirmed 37 S W.(2d) 724, 120 Tex 270—Cook v Waco Auto Loan Co, (Civ App) 299 S W. 514
6 C J. p 472 note 40.

56. N H.—Nelson v. Swett, 4 N H 256
N.Y.—Martin v Smith, 75 N Y S 780, 37 Misc 425, affirmed 76 N Y S 1020, 71 App Div 618
N C.—Burwell v. Lafferty, 76 N C 383

57. Bland v. Schott, 5 Mo. 213

58. Rumbough v. White, 11 Heisk (Tenn) 260—6 C J p 471 note 36

59. Drysdale v. Biloxi Canning Co, 7 So. 541, 67 Miss. 534.

acquires jurisdiction over the property by a valid levy thereon, and its judgment in regard thereto is binding until reversed on appeal or set aside in some direct proceeding for that purpose,[60] but the weight of authority appears to be that the jurisdiction acquired by the seizure of the property is not to pass absolutely on the rights of the parties but only to pass on such rights after defendant has been given an opportunity to appear and defend; and, where this view is maintained, a judgment rendered without the notice prescribed by law against a defendant who has not appeared is deemed absolutely void and open to collateral attack.[61] In any event, to support a judgment there must be either personal service or a valid levy.[62]

§ 484. —— Requisites and Sufficiency

The process or summons must conform to statutory requirements.

The process or summons in attachment must conform to the statutory requisites,[63] although an irregularity may be disregarded where defendant has been served with process giving him all the notice to which he is entitled.[64] Where process has been regularly issued but irregularly served in the first instance, an alias summons may be directed and served if there has been no discontinuance of the action.[65]

Where other creditors come in under an attachment, if defendant was duly served with process in the attachment suit first commenced, this is sufficient as to the other claims filed thereunder.[66]

§ 485. —— Inclusion of Summons Clause in Writ

When permitted by statute the issuance of a writ of attachment containing a summons clause is sufficient issuance of a summons.

The issuance of a writ of attachment containing a summons clause is sufficient issuance of a summons within a statute providing that a civil action is commenced by filing a complaint and causing a summons to issue thereon.[67]

§ 486. —— Time for Service

Service or publication of summons must be made within the time specified by statute.

Jurisdiction in attachment may only be acquired by service or publication of summons within the period of time specified by statute.[68] It is not necessary that notice to defendant in attachment be served at or before the issuance of the writ,[69] nor is it improper if the summons is placed with the sheriff before the complaint is filed.[70]

§ 487. —— Personal Service and Proof Thereof

In general personal service made and proved in accordance with the statute is essential to support a judgment in personam as distinguished from a judgment in rem.

If defendant in attachment resides or can be found in the state, he may be brought before the court by personal or other service of summons.[71] Where the proceeding is in rem and no personal judgment is sought, personal service on defendant is unnecessary,[72] but to authorize a judgment bind-

60. Shea v Shea, 55 S W. 869, 154 Mo 599, 77 Am S R 779—6 C J p 472 note 38

61. Bank of Pangburn v. Tate, 227 S W. 389, 147 Ark 292—6 C.J p 472 note 39

Acts equivalent to seizure

Under a statute, dispensing with the performance of acts equivalent to seizure of property on attachment, and providing for the filing and recording of the prescribed certificate made by the sheriff to afford notice to intended purchasers that real property affected thereby has been subjected to a lien for the payment of such a sum of money as may be recovered in an action therefor, the court acquires jurisdiction and control over the property attached to the same extent as resulted under the former procedure—Okanogan State Bank of Riverside Wash v Thompson, 211 P 933, 106 Or 447.

62. Lewis v Martin, (La App) 169 So. 269—6 C J p 472 note 42

63. Ala.—Guy v Pridgen & Holman, 118 So 229, 22 Ala App 595.
La.—Inter City Express Lines v. Guarisco, (App) 165 So 727
Mont.—Duluth Brewing & Malting Co v. Allen, 149 P 494, 51 Mont 89
N Y.—Brandow v. Murray & Tregurtha Corporation, 196 N Y S 293, 203 App Div 47—Fair v Kenny, 171 N Y S 694, 103 Misc. 412
S C.—Stephens v. Ringling, 86 S E 683, 102 S C 383.
Tenn.—Rosenbaum v. Herron, 5 Tenn Civ App 630.
6 C J p 473 note 47

64. Md.—Tonn v. Collins, 81 A. 219, 116 Md 52
Mo.—Winningham v. Trueblood, 51 S W. 399, 149 Mo 572.

Process not showing attachment

A judgment foreclosing an attachment against a nonresident is not bad because neither the notice served nor the copy of the petition delivered to the nonresident showed the attachment—Findlay v. Lumsden, (Tex Civ App.) 171 S W. 813

65. Water Front Coal Co v. Smithfield Marl, etc., Co., 76 S E 937, 114 Va 482

66. Woods v. Brown, 93 Ind. 164, 474 Am D. 369

67. Handley v. Anderson, 82 S W 716, 5 Ind T 186—6 C J. p 474 note 55.

68. Mont.—Duluth Brewing & Malting Co v. Allen, 149 P 494, 51 Mont 89
N.Y.—Friedman v. Prescetti, 192 N. Y S 55, 199 App Div 835—Fair v Kenny, 171 N.Y.S 694, 103 Misc 412
6 C J p 473 note 53, p 474 note 54.

69. Runner v Scott, 50 N E 479, 150 Ind. 441—6 C J. p 473 note 52

70. Booth v. Heberlie, 2 P (2d) 1103, 137 Or 354.

71. Magrew v. Foster, 54 Mo 258.

72. Ga.—Coral Gables Corporation v Hamilton, 147 S E. 494, 168 Ga. 182
Iowa.—Security Sav. Bank v. Cumprich, 203 N W. 24, 199 Iowa 1061.
Mo.—State ex rel Rabiste v Southern, 254 S W. 166, 300 Mo. 417.

ing on defendant's person, where he has not appeared, it is essential that he shall have been served with process, either personally or by some mode equivalent to personal service.[73] In the federal courts personal service on defendant is indispensable and no issue and levy of attachment in an action begun in a federal court is permitted if personal service has not been or cannot be made.[74]

In accordance with statutory provisions regulatory thereof, personal service is made in the usual manner, by delivering to defendant in person a copy of the summons or notice at some place within the state where the action is brought or pending,[75] and an acceptance by defendant of personal service outside of the state is sufficient to give the court jurisdiction to render judgment on an attachment against land.[76] The proof of service must specifically show that the statutory requirements have been complied with and so a mere recital in the record that the action was commenced by attachment on defendant's property, with notice, is not conclusive that there was personal service on defendant.[77] An incomplete return of an officer will not be impeached after judgment if it is not so incomplete as to negative a performance of the essential requirements of service.[78]

§ 488. —— Substituted Service

Substituted service, when permitted, must be made in conformity with statutory requirements.

Substituted service is sufficient when permitted by statute,[79] but in making such service the statutory requirements must be complied with.[80] Where attachment is necessary in order that substituted service may be resorted to, the nominal attachment of a chip has been held a sufficient compliance with the statute.[81]

Where notice by mail is permitted, a copy of the notice must be mailed to each defendant, and consequently two defendants cannot be served with notice by mailing a single copy to them, although they are husband and wife, such service being prima facie void as to both.[82]

In jurisdictions where posting is a method of service, the proper averments therefor must be made,[83] the notice must be posted at the specified place,[84] and must consist of all the required documents.[85] The legality of the service must be determined solely from the sheriff's return, and

W.Va.—Byrd v Rector, 163 S E 845, 112 W.Va. 192, 81 A.L.R. 1213.

Necessity of attempt

When an affidavit for attachment is on the ground of nonresidence of defendant, the officer executing the attachment writ is not required to make an effort to summon defendant —Walton v Gregory Funeral Home, (Miss.) 154 So. 717.

73. Exchange Nat. Bank v. Clement, 19 So 814, 109 Ala. 270—6 C.J. p 473 note 48

74. Cleveland & Western Coal Co. v J. H. Hillman & Sons Co., (D.C. Ohio) 245 F 200—6 C.J. p 473 note 50.

75. Stowell v. Hooper, 116 A. 256, 121 Me 152—6 C.J. p 474 notes 57, 58

Reading

(1) A writ of capias or attachment, whereon an attachment has been made, should be served by summons under Rev St. c 86 § 17, and not by reading or copy like a writ of original summons —Stowell v. Hooper, 116 A 256, 121 Me. 152.

(2) Service by reading the writ to defendant is insufficient under Pub. St. c 219 § 3, providing that, "when the goods or estate of a person are attached, a summons in the form prescribed shall be delivered to the defendant, or left at his abode"—Blake v. Smith, 38 A. 16, 67 N.H. 182.

76. Clark v. Tull, 84 N.W. 1030, 113 Iowa 143.

77. Godfrey v. Downer, 47 Vt. 653

78. Richardson v. Carr, 171 P. 476, 68 Okl. 46.

79. Stowell v. Hooper, 116 A. 256, 121 Me 152—6 C.J. p 474 note 61

Citation through curator ad hoc

Service on a nonresident by citation through a curator ad hoc as provided by statute is sufficient if defendant has actual notice—Inter City Express Lines v Guarisco, (La. App.) 165 So. 727—National Safe & Lock Co. v. Davis, 6 La.App. 210.

80. Bloom v Kahl, 255 Ill.App. 456 —6 C.J. p 474 note 62.

81. Jordan v. McKay, 165 A. 902, 132 Me 55.

82. Rabbitt v Frank C. Weber & Co., 130 N.E. 787, 297 Ill. 491

83. Bloom v. Kahl, 255 Ill.App 456

84. Collins v. McCook, 136 So 204, 17 La.App 415—Wright v Melder, 125 So. 765, 12 La.App. 222.

Court room door

In a suit against a nonresident defendant, failure to affix a writ of attachment on the court room door or on a bulletin board near the entrance to the court room was held fatal—Wright v Melder, 125 So 765, 12 La App 222.

Service on attorney as validating seizure

Where the attachment was not posted as required by statute, a citation served on an attorney appointed cannot validate seizure under attachment or give jurisdiction—Parry v. Cox, 4 La.App 238.

85. Pugh v. Flannery, 92 So. 699, 151 La. 1063.

Copy of writ

Where a certified copy of the original writ of attachment was not posted as required by statute, with respect to nonresident defendants, service of the writ on the garnishee was illegal and of no effect, and no jurisdiction was acquired by the illegal seizure—Pugh v. Flannery, 92 So 699, 151 La. 1063

Statute complied with

In proceedings in rem by attachment against an absent or nonresident defendant, Code Pract. arts 254, 255, providing for service of attachment and citation on an absent or nonresident defendant by posting at the courthouse door, and requiring the sheriff to keep a copy of the petition for delivery to defendant or advocate appointed to defend him, were sufficiently complied with by posting a copy of the petition, as well as attachment and citation—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31

parol evidence is not admissible to show a proper posting of the required notice.[86]

§ 489. —— Service by Publication and Proof Thereof

a. In general
b. Conditions precedent
c Application for order
d Order for publication
e Sufficiency of publication
f. Mailing of notice
g. Proof of service by publication
h. Personal service outside state in lieu of publication
i. Defects and objections

a. In General

Service by publication is authorized under certain circumstances, but the statutory provisions must be complied with.

In accordance with statutory provisions, service by publication is authorized where defendant is a nonresident, or has left the state, or where his residence is unknown,[87] but such statutes must be strictly complied with.[88] A statute pertaining to notice by publication in actions generally will not be held to amend a statute relating to attachment, when it appears that such was not the intention of the legislature.[89]

b. Conditions Precedent

Conditions precedent must be complied with before service by publication may be effected.

Before service by publication may be resorted to, an order for publication must be procured when such is a statutory requirement.[90] Dependent on the particular provisions of the statute pertaining thereto, it has been held that the order for service by publication may be made before the warrant is issued or before there is any actual levy of the attachment,[91] while in other cases, decided under dissimilar statutes, it has been held that the attachment must be issued and levied before the order for publication is made.[92] As the issuance of a summons is the commencement of the action, it has been held that an order for publication of summons and notice of attachment and the actual publication thereof do not give jurisdiction, where the summons had been merely filled out and not issued, and issuance had not been waived.[93]

c. Application for Order

The application for an order of publication must show the existence of facts warranting service in this manner.

86. Collins v. McCook, 136 So. 204, 17 La.App. 415

87. Security Sav. Bank v. Cimprich, 203 N.W. 24, 199 Iowa 1061—6 C.J. p. 474 notes 63–65.

88. Flint v. Coffin, (N.C.) 176 F. 872, 100 C.C.A. 342

Service in foreign country as basis for publication

Service in a foreign country in the first instance in attachment proceedings cannot, it has been held, be made the basis for proceeding by publication.—Stearns v. Taylor, 27 Mich. 88.

Void attachment

Under Ohio law, service by publication on nonresident defendant which was based on void attachment is invalid.—Doherty v. Cremering, (C.C.A. Ohio) 83 F.(2d) 388

89. Marshall Field & Co. v. Thompson, 238 Ill.App. 145.

90. Sonnak v. Walker, 180 N.Y.S. 848, 191 App.Div. 157.

Statutory period computed from order

Attachment, provided for by Code Civ.Proc. § 636, where a resident has been absent from the state for more than six months past and has not designated the person on whom to serve a summons in his behalf, cannot be issued, where the order of publication has not been granted, for until the grant of order of publication the statutory period cannot be computed, and to meet the required conditions an order for publication must precede or be granted concurrently with the attachment.—Sonnak v. Walker, 180 N.Y.S. 848, 191 App.Div. 157.

Vacation of order for publication

That an attachment against the property of nonresident defendant issued prior to procuring of an order for publication was vacated, and that the attached property was sold and conveyed to a stranger, did not warrant a vacation of the order for publication of notice against a nonresident defendant, since the vacated attachment may be reinstated on appeal or another attachment may be procured.—Sexton v. Bernheimer, 171 N.Y.S. 696, 104 Misc. 1.

91. S.D.—Iowa State Sav. Bank v. Jacobson, 66 N.W. 453, 8 S.D. 292
Tex.—Pantase v. Fox Head Spring Beverage Co., 37 S.W.(2d) 724, 120 Tex. 270, affirming (Civ.App.) 23 S.W.(2d) 514.
Wis.—Gallun v. Weil, 92 N.W. 1091, 116 Wis. 236

92. Little v. Christie, 48 S.E. 89, 69 S.C. 57—6 C.J. p. 475 note 72.

Attachment prior to affidavit for publication

A motion to discharge an attachment, on the grounds that the attachment order was issued and levied on the land before the affidavit for publication was filed, is properly overruled.—Button v. Maker, 200 P. 777, 83 Okl. 75

In New York

(1) Under Civ.Pract.Act §§ 232, 493, which amended and consolidated earlier statutes on the subject, no order for service by publication in an action to recover a sum of money only against a nonresident may be made, except on proof that property has been seized by attachment.—Dimmerling v. Andrews, 139 N.E. 774, 236 N.Y. 510, reversing 198 N.Y.S. 325, 119 Misc. 829, affirmed 198 N.Y.S. 909, 205 App.Div. 855.

(2) Prior to the above decision the cases seem not to have been in accord, due to some extent to alterations in the statute. Thus, in some cases a prior levy of the attachment has been held necessary.—Guffey v. Grand Trunk R. Co., 122 N.Y.S. 947, 67 Misc. 553—Wilson v. Lange, 83 N.Y.S. 180, 40 Misc. 676.

(3) In other cases it has been held unnecessary.—Parke v. Gay, 59 N.Y.S. 890, 28 Misc. 329—Whitman v. Vullo, 197 N.Y.S. 577—Merkle v. Sable, 197 N.Y.S. 576.

93. McClure v. Fellows, 48 S.E. 951, 131 N.C. 509.

The application for an order of publication should be on affidavit showing the existence of the facts warranting service in this manner,[94] such as that defendant has property within the state[95] subject to attachment,[96] and, where so required by statute, that an attachment has been issued.[97] If required by statute, a description of the property must also be included.[98] Where the necessary facts sufficiently appear from the affidavit for attachment, the application may be based thereon, and an additional affidavit is not necessary.[99]

d. Order for Publication

The order of publication must sufficiently designate defendant, although defects may be cured by an alias order.

An order for publication designating nonresident defendant merely by his initials is insufficient,[1] but an alias order of publication may cure defects in a previous publication.[2] The issuance of an order of publication raises the presumption that the petition and other papers had been filed theretofore without any indorsement thereon of the date and filing.[3]

e. Sufficiency of Publication

The publication must substantially comply with the statutory requisites as to its manner, period, time, and contents.

The publication must be in the mode,[4] for the period,[5] and within the time[6] required by the statute, and all the matters which the statute requires to be set forth must be contained therein.[7] Generally, where only personal property is attached no description is required,[8] but where real property is the subject of the attachment it must be described with certainty.[9] However, a defect in the published notice is not fatal if the property is adequately described in the affidavit for service by publication.[10] It is also necessary that the publication should be to defendant,[11] but the mere fact that a resident defendant is described in the published notice as a nonresident will not invalidate the notice, where it is otherwise as prescribed.[12]

94. N Y—Friedman v Prescetti, 193 N.Y.S 55, 199 App Div 385
Okl—City Nat Bank v. Sparks, 151 P 225, 50 Okl. 648.
6 C J p 475 notes 73, 74.

95. N D—Kelm v. Lolland, 228 N W 420, 59 N D 18
Or—Leslie v McNeil, 154 P. 884, 79 Or. 364
6 C J p 475 note 75.

Affidavit that sheriff attached property

An affidavit that certain property of defendant has been attached by the sheriff is sufficient to comply with a statute requiring that the allegation be made that defendant has property within the state—Kelm v Lolland, 228 N W. 420, 59 N.D 18

96. Pennsylvania Mortg Trust Co. v Norris, 54 P. 288, 8 Kan App 699

97. Wilson v Lange, 83 N Y S 180, 40 Misc 676—6 C J. p 475 note 77.

98. City Nat Bank v. Sparks, 151 P. 225, 50 Okl 648

99. Burnett v McCluey, 4 S W. 694, 92 Mo 230—6 C J p 475 note 79

1. Missouri, etc, R Co v. Morris, 134 S.W 1027, 153 Mo App. 667.

2. Best v. British, etc, Mortg. Co., 38 S E. 923, 128 N C. 351

Absence of notice of warrant of attachment

Where a publication of summons in an attachment proceeding begun July 17, 1900 was defective in not containing notice also of the warrant of attachment, as required by Code § 352, an alias order of publication, which was made in due time, and complied with the section, prior to the November term, cured the defect—Best v British, etc, Mortg Co, 38 S E 923, 128 N C 351

3. Johnson v. Gage, 57 Mo 160.

4. Doheny v Worden, 78 N Y S 959, 75 App Div. 47

Publications once a week

Under a statute providing for service on nonresidents by newspaper publication once a week for six successive weeks, there must be one publication in each of the six weeks, and a series of publications of which two are made in a single week and none in the week following does not constitute a valid service—Doheny v. Worden, 78 N Y S. 959, 75 App Div 47.

5. Horton v Monroe, 57 N W. 109, 98 Mich 195, following Colton v. Rupert, 27 N W 520, 60 Mich. 318—6 C J p 475 note 85.

Discretion of court

Under Comp St § 802, providing that in attachment suits, where plaintiff relies on service by publication, publication must be commenced within thirty days after granting the attachment, and § 806, providing that publication must be for four successive weeks, the court may in its discretion permit the publication to continue, on an affidavit filed nearly a year after the institution of the action, and after defendant has appeared specially and moved to dismiss for want of publication—Jenette v Hovey & Co, 103 S E 301, 182 N C. 30

Notice published for sufficient period.—Lorthioir v. McLeod, 135 So 143, 102 Fla. 12.

6. N Y.—Bakalas v. Moscahlades, 196 N Y.S 682, 203 App Div. 554—Rome Trust Co v Cummings, 206 N Y.S 728, 123 Misc 884
Okl—State v. Bruce, 261 P 361, 128 Okl 85
Tex—Mitchell v. Reitz, (Civ.App) 269 S W. 279, error dismissed (Com App) 281 S W. 1044

Notice sufficient.—Mills v. Housel, 85 S E 17, 168 N C. 651

7. City Nat. Bank v. Sparks, 151 P. 325, 50 Okl. 648—6 C J p 475 note 86

8. Beckwith v. Douglas, 25 Kan 159—6 C J. p 475 note 86 [a]

9. Kan—Cackley v Smith, 38 Kan. 450—Cohen v. Trowbridge, 6 Kan 385
Okl.—City Nat Bank v Sparks, 151 P. 225, 50 Okl. 648.

Minor defect

Although there is a minor defect in the description of the land in the published notice, if the notice substantially complies with the statute and states the county in which the land is located it is sufficient—Pitelka v Pitelka, 171 N W. 894, 103 Neb 358—Grebe v. Jones, 18 N W. 81, 15 Neb. 312, overruling Westcott v. Archer, 11 N.W. 491, 12 Neb 345

10. Pitelka v. Pitelka, 171 N W 894, 103 Neb 358.

11. Yarbrough v. Pugh, 114 P 918, 63 Wash 140, 33 L R A (N S) 351—6 C J p 476 note 87

12. H O & C A Thompson v J B Camors & Co., 89 So. 619, 126 Miss 772.

Plaintiff is entitled to a reasonable time to perfect his suit by order of publication, and the suit does not abate immediately on the return of the process not served and failure to take such order.[13]

f. Mailing of Notice

When mailing of a copy of the published notice is required the time and manner of mailing prescribed by statute must be complied with.

Where the statute provides that, in case of service by publication in attachment suits, the clerk within ten days after the first publication shall mail to defendant, a copy of the published notice. A failure of the clerk to do so within the prescribed time is fatal,[14] but, if a notice is mailed to defendant as required, it is sufficient, although it requires him to appear on a day which has already passed when he receives it,[15] and, unless the statute so requires, where notice is properly mailed it need not be further shown that it was received.[16] No notice by mailing need be given in an action of a nature different from that for which such notice is prescribed,[17] and, similarly, when the statutory requirement pertains only to a suit against a nonresident, it is not necessary for the clerk to mail a copy of the notice to an absent resident.[18] An affidavit by the clerk that the statutory requirements have been complied with is prima facie sufficient to give the court jurisdiction.[19]

g. Proof of Service by Publication

Proof of service must show compliance with statutory requirements

Proof of service by publication must show that the statutory requirements have been complied with.[20]

h. Personal Service Outside State in Lieu of Publication

Personal service outside the state is the equivalent of publication when so provided by statute.

When so permitted by statute, personal service on defendant outside of the state is the equivalent of publication and mailing of the summons or notice.[21] To render such service effectual there must be property of defendant which may be attached within the state,[22] but no order for publication is necessary if not prescribed by statute.[23] Merely

13. McClung v Sieg, 46 S E 210, 54 W Va 467, 66 L R A 884—6 C J p 474 note 68

Second publication

Where plaintiff, filing an action to recover money, on the same day filed an affidavit for service by publication which was made on the day following, and the court, more than sixty days after the filing of the petition, quashed the affidavit and pretended service, and within thirty days thereafter plaintiff filed a second affidavit for service by publication, and made the first publication on the day following the second affidavit, such publication related back to the date of filing of the action, which will be deemed to have commenced at the time of the filing of the first affidavit and publication, thus rendering the overruling motion to dissolve the attachment and dismiss the action not error—Keisel v Reynolds, 244 P. 1104, 125 Okl 295

14. Haller v Rieth, 247 Ill App 541

Failure of record to show mailing

A default judgment in a suit against a nonresident begun by attachment may be valid, although the record does not affirmatively show that a copy of the advertisement was mailed to defendant—Herrick v Herrick, 65 So 146, 186 Ala 439

15. Kirk v Elmer H Dearth Agency, 49 N E 413, 171 Ill 207, affirming 68 Ill App. 468.

16. Walton v. Gregory Funeral Home, (Miss.) 154 So. 717.

17. Glasgow v. Peyton, 159 P. 670, 22 N.M 97

18. H O & C A. Thompson v. J B Camors & Co., 89 So 649, 126 Miss 772

19 Guy v Pridgen & Holman, 118 So 229, 22 Ala App 595

20. Doheny v Worden, 77 N Y S 959, 75 App Div 47

Affidavit before full expiration of time

An affidavit of publication of the notice of attachment for six successive weeks, as required by statute, together with the declaration of plaintiff in the suit, filed after the last publication, but before the expiration of the sixth week is not prematurely filed, within a statute providing that plaintiff, on filing an affidavit of the publication may file his declaration and proceed as if a copy of the attachment had been personally served, although the time to plead to the declaration did not begin to run until the service was completed by the expiration of the six weeks from the date of the first publication—Kurtz v Gartner, 104 N W 596, 141 Mich. 262

21. First Nat Bank v Proffitt, (Mo. App) 293 S W. 521—Payne v. Brooke, (Mo App) 217 S.W 595—6 C J. p 476 note 91.

Notification that foreclosure is sought

An attachment lien on land of a nonresident defendant, duly served personally by notice as provided by statute, can be foreclosed, although defendant was not informed by the nonresident notice served on him that foreclosure was sought.—Lane v First Nat Bank, (Tex Civ App) 216 S W 490, error refused

Unnecessary information

The fact that summons on a nonresident contains more information than necessary will not invalidate it —First Nat Bank v. Proffitt, (Mo. App) 293 S W 524.

Summons to answer "petition"

A summons for defendant to answer the "petition" is not invalid in that it does not comply with the statute requiring defendant to answer the "action," where defendant has received all the necessary information—First Nat Bank v Proffitt, (Mo App) 293 S W 524.

22. N.Y.—American Bank v Goss, 142 N E. 156, 236 N Y 488, reversing on other grounds 198 N Y S 857, 204 App Div 759.
Wash—Morris & Co. v. Belkin, 166 P. 1142, 97 Wash 457

23. American Bank v. Goss, 142 N. E. 156, 236 N Y 488, reversing 198 N.Y S 857, 204 App Div 759

Sheriff's certificate sufficient

The sheriff's certificate that a warrant of attachment was levied on defendant's property within the state is ordinarily equivalent to the affidavit required by Code Civ Proc § 438 subd 5, where summons is served outside the state.—American Bank v. Goss, 142 N E. 156, 236 N.Y. 488,

leaving a copy of the summons at defendant's residence outside of the state is not sufficient under a statute specifying personal service.[24]

i. Defects and Objections

Immaterial mistakes do not vitiate the attachment and if the court has acquired jurisdiction defects may be cured by amendment or by a new publication.

An immaterial mistake in a notice by publication does not vitiate an attachment properly issued and levied,[25] and if the court has acquired jurisdiction a defect may be cured by amendment or by a new publication.[26] However, where the statute provides that, if a copy of the attachment shall not have been served on any of defendants, and none of them shall appear, plaintiff, on filing an affidavit of publication of notice, may file his declaration and proceed as if service had been made, a judgment in a suit begun by attachment against a nonresident who was not served, and who did not appear, is void where the declaration was filed several months before the affidavit of publication.[27] Where a motion to set aside an order for publication is made on the grounds that defendant has no leviable property in the state, plaintiff may introduce proof that defendant has such property.[28] A notice of a motion to set aside an order of publication need not specify a jurisdictional defect on which it is based,[29] but an objection that the court has not obtained jurisdiction of the person of defendant does not present the question of the sufficiency of an affidavit for publication of summons in attachment.[30]

If the statute does not require a summons, where service is by attachment and publication, it is immaterial that one which has been issued is defective.[31]

§ 490. —— Effect of Service

Jurisdiction is acquired on completion of proper service of notice.

Where constructive service of summons has been had by publication against a nonresident defendant and property within the state has been attached under a writ of attachment regularly issued in conformity with the requirements of the statute, the jurisdiction of the court attaches in rem to the extent of the property attached, and a judgment entered under the constructive service of summons is valid and binding to the extent of the rest.[32] Personal service of a citation on defendant does not cure a defective service of the writ of attachment under which his property was seized,[33] nor does the fact that defendant was personally served with summons establish that he was a resident of the state.[34] Where, after an attachment is issued, a subpœna to answer is issued and served on defendant, the service of such subpœna does not make it the leading writ.[35] In a suit by attachment, where defendant is personally served, the jurisdiction does not depend on the regularity of the attachment.[36]

§ 491. Appearance

a. In general
b. Effect of appearance

a. In General

Defendant must file bail before he may plead if such is required by statute but not otherwise

Where the practice of requiring bail no longer exists, or the attachment is not regarded as the leading process, defendant may appear and defend the action without giving bond or other security to discharge the attachment.[37] Where special bail was required and attachment was regarded as original process to enforce appearance, defendant in attachment could not plead until he had filed such bail,[38] and where the statute required the replevy of property taken under an attachment to enforce appearance, the execution of the replevy bond was a condition to the right to plead.[39]

In some jurisdictions a defendant in attachment has the same time for appearance after the attachment as he would have after personal service

reversing 198 N.Y.S. 857, 204 App Div 759

24. Armstrong v. Brant, 21 S.E. 634, 44 S.C. 177—6 C.J. p 476 note 92

25. Putnam v. Loeb, 2 Ohio Cir.Ct. 110, 1 Ohio Cir.Dec. 391—6 C.J. p 476 note 93

26. Mills v. Housel, 85 S.E. 17, 168 N.C. 651.

27. Nugent v. Nugent, 37 N.W. 706, 70 Mich. 52.

28. Marrone v. Tesoriere, 156 N.Y.S. 280, 92 Misc. 602.

29. Wilson v. Lange, 83 N.Y.S. 180, 40 Misc. 676—6 C.J. p 476 note 95

30. Barnes v. Boston Inv. Co., 94 N.W. 101, 4 Neb. (Unoff.) 349.

31. Mills v. Housel, 85 S.E. 17, 168 N.C. 651.

32. Iowa—Security Sav. Bank v. Cumprich, 203 N.W. 24, 199 Iowa 1061

N.C.—Jenette v. Hovey & Co., 108 S.E. 301, 182 N.C. 30

6 C.J. p 471 note 33

33. Elder v. Ludeling, 23 So. 929, 50 La.Ann. 1077.

34. Hall v. Packard, 41 S.E. 142, 51 W.Va. 264

35. Grubbs v. Colter, 7 Baxt. (Tenn.) 432.

36. Maurer v. Phillips, 168 S.W. 669, 182 Mo.App. 440

37. Heckscher v. Trotter, 5 A. 581, 48 N.J.Law 419—6 C.J. p 477 note 4

38. Williams v. Haselden, 44 S.C.L. 55—6 C.J. p 477 note 2.

39. Alexander v. Taylor, 62 N.C. 36—Barry v. Sinclair, 61 N.C. 7—Britt v. Patterson, 31 N.C. 197.

in the action,[40] while in other jurisdictions he may appear and defend at any time before final judgment is rendered against him.[41]

The same acts will ordinarily constitute an appearance in actions begun or aided by attachment as in other suits and therefore this phase is treated in the title Appearances § 12 m.

b. Effect of Appearance

A general appearance enables the court to render a judgment in personam if it has jurisdiction of the suit.

The fact that an action is begun or aided by attachment does not vary the rule that a general appearance by defendant gives the court jurisdiction to render a personal judgment against him and places him in the same position with regard to his defense against the action as though he had personally been served.[42] Such an appearance waives defects in process or other prior irregularities which go to the jurisdiction of the person,[43] but it will not cure defects which deprive the court of jurisdiction of the suit.[44] Where a defendant brought into court on attachment process files a general appearance and answers, a motion to dismiss the attachment on the ground that it would not lie under the statute is properly refused.[45] It has been held that an alias writ cannot issue after a general appearance to an attachment issued on the ground of fraud.[46]

§ 492. Parties

The owner of property must be a party before he is concluded by the attachment proceedings or before a lien attaches to the property.

The owner of property is not concluded by proceedings to attach the property, to which proceedings he is not a party,[47] and if defendant has no interest in the property, no lien thereon attaches.[48] When a creditor attaches the property of a nonresident debtor, he must, in some states, where the legal title is in the mortgagee, make the mortgagee a party defendant,[49] although it has also been held that where, in an action for the recovery of money, attachment is sued out and levied on the debtor's real estate, the mortgagee of such property is not a proper party defendant.[50] It has been held that, where an equitable attachment was sued out by a surety against the principal debtor before payment of the claim secured, the creditor might intervene and prosecute the suit to a decree in his own favor.[51]

40. Gray v. Smith, 17 Tex 389—6 C.J. p 477 note 5

41. Harrison v Wilson Lumber Co., 45 S.E. 730, 119 Ga. 6—6 C.J. p 477 note 6.

42. Ga.—Cincinnati, N. O. & T. P. Ry. Co. v. Pless & Slade, 60 S.E. 8, 3 Ga.App. 400
Mo.—Winningham v. Trueblood, 51 S.W. 899, 149 Mo. 572
6 C.J. p 478 notes 12, 13.

Right to move to discharge attachment
Under a statute providing that defendant may at any time before or after the release of attached property, or before any attachment shall have been actually levied, apply for the discharge of the attachment on the ground that it was improperly or irregularly issued, defendant's general appearance in an action, though it operated as a waiver of defects in the summons so far as the action itself was concerned, had no effect upon the ancillary attachment proceeding, and did not defeat the right to move thereafter to discharge the attachment.—Duluth Brewing & Malting Co. v. Allen, 149 P. 494, 51 Mont. 89.

43. Ark.—U. S. Fidelity & Guaranty Co. v. Walker, 76 S.W.(2d) 949
Ga.—Lancaster v. Neal, 154 S.E. 386, 41 Ga.App. 721.
Kan.—Schultz v. Stiner, 157 P. 205, 98 Kan. 45, denying rehearing 155 P. 1073, 97 Kan. 555
N.C.—Martin v. McBryde, 108 S.E. 739, 182 N.C. 175, 21 A.L.R. 12.
Pa.—Borough v. Jones, 18 Pa.Co. 261—SS Co., Ltd. v. Fruit Co., 2 Pa. Co. 123
6 C.J. p 478 note 14.

Regularity of attachment
(1) In a suit by attachment, where defendant enters his appearance, the jurisdiction does not depend on the regularity of the attachment.—Maurer v. Phillips, 168 S.W. 669, 182 Mo. App. 440

(2) Where the action is not one in which the remedy is authorized by statute, the issue and levy of an attachment will give the court no jurisdiction, but it has been held that defendant may waive this objection by pleading to the merits.—Hoopes v. Pusey, 2 Chest.Co. (Pa.) 306.

44. Mo.—First Nat. Bank v. Griffith, 182 S.W. 805, 192 Mo.App. 443.
Pa.—Wanamaker v. Stevens, 1 Pa. Co. 317

Appearance after failure of attachment
Where the statute provides that unless service is made within a specified time the attachment shall fail, a failure to make service within such period is not waived by appearance.—Blossom v. Estes, 84 N.Y. 614—Rhode Island Hospital Trust Co. v. Keeney, 48 N.W. 341, 1 N.D. 411.

45. Rocky Mount Mills v. Wilmington, etc., R. Co., 25 S.E. 854, 119 N.C. 693, 56 Am.S.R. 682.

46. Watson v. Noblett, 47 A. 488, 65 N.J.Law 506.

47. Groveland Banking Co. v. City Nat. Bank, 234 S.W. 643, 144 Tenn. 520.

48. Ga.—Coker v. Taylor, 150 S.E. 820, 169 Ga. 555
Tex.—Farmers' Nat. Bank of Stephenville v. Daggett, (Com.App.) 2 S.W.(2d) 834, affirming Daggett v. Farmers' Nat. Bank, (Civ.App.) 259 S.W. 198

Not subject of inquiry
That judgment debtor is not owner of property attached cannot be subject of inquiry, either by defendant or intervener, since attachment cannot extend beyond defendant's interest.—Farmers' Nat. Bank of Stephenville v. Daggett, (Tex.Com.App.) 2 S.W.(2d) 834, affirming Daggett v. Farmers' Nat. Bank, (Civ.App.) 259 S.W. 198.

49. King v. Patterson, 164 S.W. 1191, 129 Tenn. 1.

50. Endel v. Leibrock, 33 Ohio St. 254.

51. Peevey v. Cabaniss, 70 Ala. 253.

§ 493. Pleading

a. Complaint, declaration, or petition
b. Plea, answer, or affidavit of defense
c. Issues

a. Complaint, Declaration, or Petition

(1) Necessity for
(2) Time for filing
(3) Sufficiency
(4) Verification
(5) Amendment

(1) Necessity for

As a general rule a complaint is necessary in attachment proceedings unless dispensed with by statute.

As a general rule the filing of a declaration, bill, or complaint is necessary in an attachment case to give the court jurisdiction of the cause,[52] at least where the attachment involves an amount in excess of a sum specified by statute.[53] However, under some statutes the filing with the clerk of a short note setting forth the cause of action is a substitute for the declaration in attachment proceedings.[54]

(2) Time for Filing

A mandatory statutory provision specifying the time within which the complaint must be filed must be complied with.

The time within which the complaint, declaration, or petition in an attachment suit must be filed is a matter regulated by the statutes and rules of practice of the various jurisdictions, which, when mandatory, must be complied with;[55] where the statute is directory only and not mandatory the court may properly overrule a motion to strike the complaint on the ground that it was filed too late.[56] Where defendant is a nonresident and does not appear, the filing of the declaration prior to the filing of the proof of publication will render the judgment taken in the action void.[57]

(3) Sufficiency

The complaint must state facts sufficient to constitute a cause of action, to authorize an attachment, and to sustain a recovery.

The complaint, declaration, or petition must state facts sufficient to constitute a cause of action and to authorize an attachment of the property,[58] and,

52. Ala.—Rhodes v. Sewell, 109 So. 179, 21 Ala. App. 441.
Ga.—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182.
6 C.J. p. 479 note 24.

Requirement of copy of declaration

(1) Statute requiring plaintiff attaching property to furnish copy of declaration within three days after written demand is valid and enforceable.—Ferguson & Co. v. Melillo, 165 N.E. 18, 266 Mass. 197.

(2) Copy of declaration, untrue in essential particulars, does not satisfy requirement of attachment statute that plaintiff furnish copy on demand.—Ferguson & Co. v. Melillo, supra.

53. Smith v. Dungey, 199 S.W. 777, 178 Ky. 702.

Over fifty dollars

Attachment involving over fifty dollars cannot be issued until action has been instituted by filing petition, as required by Code Civ. Pract. § 39.—Smith v. Dungey, 199 S.W. 777, 178 Ky. 702.

54. Spear v. Griffin, 28 Md. 418.—Thrasher v. Everhart, 3 Gill & J. (Md.) 234.—6 C.J. p. 479 note 25.

55. Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182.—Nixon v. L. A. Russell Piano Co., (Ga. App.) 180 S.E. 743.—West v. Gainesville Nat. Bank, 124 S.E. 733, 32 Ga. App. 703, conforming to answer to certified questions 123 S.E. 870, 158 Ga. 640.—6 C.J. p. 479 notes 26, 27.

Term of court

(1) Plaintiff in attachment suit has under the state law of Georgia until the last day of the term to file a declaration in attachment.—S. A. Lynch Enterprise Finance Corporation v. Dulion, (C.C.A. Ga.) 45 F.(2d) 6.

(2) Declaration in attachment in Georgia may be filed either at or before first term of court to which attachment is returnable the word "at," as used in Civ. Code (1910) § 5102 being equivalent to the words "not later than."—Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga. App. 679.

(3) Declaration in attachment filed on October 1st was held timely, where attachment was returnable to May term of Bacon county superior court, in view of rule that declaration may be filed at any time during term to which attachment is returnable.—Tanner v. Patterson, (Ga. App.) 134 S.E. 405.

56. Cooper v. Owen, 161 So. 93, 230 Ala. 316.

57. Nugent v. Nugent, 37 N.W. 706, 70 Mich. 52.

58. Ga.—Readdick v. Forsythe, (App.) 182 S.E. 407.—Ubico Milling Co. v. Poythress, 113 S.E. 815, 29 Ga. App. 134.
Ky.—Ford v. Witty, 245 S.W. 846, 197 Ky. 86.
6 C.J. p. 480 note 31.

Authority of agent

A declaration alleging a contract with defendant's "regularly authorized traveling agent," but not alleging any authority in the agent to execute the alleged contract, was subject to special demurrer.—Ubico Milling Co. v. Poythress, 113 S.E. 815, 29 Ga. App. 134.

Specific attachment

Failure of a creditor and mortgagee of stock of goods to allege his mortgage rendered the issuance of a specific attachment of no effect, under a statute which permits a specific attachment to enforce a mortgage.—Ford v. Witty, 245 S.W. 846, 197 Ky. 86.

Election of claims

That court required plaintiff to elect whether it would prosecute action on one or both notes did not render defective grounds of attachment alleged in petition, where a single claim was sufficient to sustain the attachment.—Walker v. Grayson County State Bank, 35 S.W.(2d) 850, 237 Ky. 449.

Complaint sufficient

(1) A writ of attachment was held properly issued on complaint stating cause of action against husband on note jointly executed by him and wife after filing of proper affidavit and undertaking.—First Nat. Bank v. Collins, 9 P.(2d) 802, 51 Idaho 689.

(2) Complaint and affidavit which showed existence of cause of action on contract and liquidated damages was held sufficient to give jurisdiction to grant a warrant of attachment.—California Packing Corporation v. Kelly Storage & Distributing Co., 126 N.E. 269, 228 N.Y. 49, reversing California Packing Corporation v. Phoenix & Third Nat. Bank of

where the suit is begun by attachment, the declaration must set forth the cause of action specified in the affidavit on which the proceeding is based.[59] The allegations must be statements of fact and not of mere legal conclusions.[60]

All matters essential to recovery, whether required by statute or rule of practice, must be stated. Hence, the declaration or complaint must show the jurisdiction of the court,[61] that defendant is the debtor,[62] and where a judgment in rem is sought, the property or fund upon which the judgment is to operate.[63] When specifically prescribed, the complaint must allege the particulars of the claim, the amount due, and a demand or refusal to satisfy the debt or damage done.[64] In the case of an attachment against a nonresident, the complaint must allege that defendant owns the property, or a sale of the same will be void.[65] Where the action is commenced by attachment, it is necessary, in some jurisdictions, that the complaint shall allege the issuance of the writ,[66] but in other jurisdictions it is held unnecessary for plaintiff to plead the attachment proceedings if in fact the court has jurisdiction.[67] When the complaint is prematurely filed, it must show the reason for the premature filing.[68] An action cannot be maintained to collect rent not due, without an allegation of fraud upon which attachment can be based.[69]

Allegations which are not prescribed by statute or rule of practice need not be made.[70] Thus, the petition in proceedings begun by attachment on the property of a nonresident need not show that defendant was personally served with notice,[71] and a bill for attachment against a nonresident is not insufficient because it does not pray for a personal judgment for any deficiency, where it contains a prayer for general relief.[72] Where personal service has been had the complaint need not state the intention of plaintiff to attach property of defendant.[73]

Construing declaration with affidavit. It has been held that the declaration must be construed with the allegations in the affidavit,[74] and where reference is made to the attachment papers the complaint will be construed in connection with them,[75] but it has also been held that neither the

Lexington, Ky., 177 N.Y.S. 37, 188 App.Div. 475

(3) Amended declaration in attachment, wherein claim was made for an amount allegedly due for commissions, alleging that plaintiff sold one car of hay for defendant, for which defendant agreed to pay plaintiff a commission and that commissions amounted to twenty dollars sixty-nine cents states cause of action—Southern Flour & Grain Co. v. Frow, (Ga.App.) 187 S.E. 230

59. Groetzinger v. Kratt, 18 Pa.Co. 241—6 C.J. p. 480 note 32

60. Cal.—Giandeini v. Ramirez, (App.) 54 P.(2d) 91
Ga.—Harmon v. Wiggins, (App.) 172 S.E. 847.
N.Y.—Georgis v. Giocalas, 233 N.Y.S. 16, 225 App.Div. 577—Barbrick v. Carrero, 171 N.Y.S. 447, 184 App.Div. 160

Value of services

In attachment, based upon a claim for services, a complaint alleging them to be worth a stated amount was insufficient, where the character of the services or their value were not set out by evidentiary facts—Georgis v. Giocalas, 233 N.Y.S. 16, 225 App.Div. 577—Barbrick v. Carrero, 171 N.Y.S. 447, 184 App.Div. 160

61. Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga.App. 679

Personal jurisdiction of defendant

Failure of the declaration to show jurisdiction of the person of defendant may be taken advantage of by a motion at the trial term—Drake v. Lewis, 79 S.E. 167, 13 Ga.App. 276

62. Coker v. Taylor, 150 S.E. 820, 169 Ga. 555

Legal responsibility for debt

Prefix "Mrs." to name of defendant in attachment has been held not necessarily to indicate legal status and to show that defendant is a married woman who would not be liable for community debts—Willer & Kern v. Webb, 4 La.App. 669

63. Smith v. Jacksonville Oil Mill Co., 94 S.E. 900, 21 Ga.App. 679.

64. Spaulding v. Harvey, 7 Ind. 429.

Amount of debt

A sum claimed in the petition, based on the assumption that the value of the tract of land from which plaintiff was evicted was proportionately equal to the value of the entire tract was held to sufficiently fix the amount of the debt—Brinkerhoff v. Russ, 3 La.App. 723.

65. Johnson v. North Star Lumber Co., (Or.) 206 F. 624, 125 C.C.A. 118, affirmed (D.C.) 196 F. 56

66. Ga.—Wilson v. Stricker, 66 Ga. 575—Kolb v. Cheney, 63 Ga. 688—Mehring v. Charles, 58 Ga. 377
Or.—Page v. Smith, 10 P. 833, 13 Or. 410
6 C.J. p. 480 note 36.

67. Mo.—Kansas City Stained Glass Works, etc., Co. v. Robertson, 73 Mo.App. 154
Tex.—Cook v. Waco Auto Loan Co., (Civ.App.) 299 S.W. 514—Covert v. Calvert, (Civ.App.) 287 S.W. 117—Newsom v. Couch, (Civ.App.) 262 S.W. 155—Awalt v. Schooler, (Civ.App.) 128 S.W. 453.
6 C.J. p. 480 note 36 [a]

Jurisdiction to foreclose lien

Allegations of service on nonresident defendant taken in connection with the attachment proceedings of which the court must take judicial notice have been held to show that the court acquired jurisdiction and in proceeding in rem could foreclose attachment lien—Covert v. Calvert, (Tex.Civ.App.) 287 S.W. 117.

68. Johnson v. Muenz, 187 P. 126, 76 Wash. 526.

69. Hall's Safe, etc., Co. v. Meade, 6 Ky.Op. 219.

70. Ga.—Harper v. Allen, 154 S.E. 651, 41 Ga.App. 736
N.D.—Hemmi v. Grover, 120 N.W. 561, 18 N.D. 578

Ownership of property in state

The complaint need not show that defendant owned property in the state subject to an attachment when such is not a statutory requirement—Hemmi v. Grover, 120 N.W. 561, 18 N.D. 578.

71. Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 132

72. Butterfield v. Miller, (Tenn.) 195 F. 200, 115 C.C.A. 152.

73. Okanogan State Bank of Riverside, Wash. v. Thompson, 211 P. 933, 106 Or. 447

74. Merchants' Grocery Co. v. Albany Hardware & Mill Supply Co., 160 S.E. 658, 44 Ga.App. 112.

75. King v. Thompson, 59 Ga. 380.

affidavit for nor order of attachment is any part of the pleadings in the action,[76] and that where the affidavit and complaint are separate papers, the complaint cannot be aided by the affidavit.[77] Where the action is on a debt not due, the complaint must contain, in addition to the allegations of fraud necessary to be made in the affidavit for attachment, a statement of the facts constituting the fraud.[78] It is usually not necessary to transcribe in the complaint all the matters recited in the affidavit or bond.[79]

(4) Verification

The necessity for a verification may in some cases be obviated by the attachment affidavit.

It has been held that the petition in an attachment suit need not be verified where the affidavit on which the attachment issued contains the substantive traversable matter of the petition.[80] A verification which is insufficient as to matters not necessary to be stated to show a cause of action, but going only to the right to attachment, will not render the complaint insufficient.[81]

(5) Amendment

An amendment is usually permissible in the discretion of the court where it does not change the cause of action.

Plaintiff in attachment will usually be allowed to amend his pleadings, as in other actions, without affecting the attachment, provided such amendment will not change the cause of action,[82] but the right of plaintiff to amend is ordinarily within the discretion of the court,[83] and he may not amend without leave of court.[84] Amendments have been allowed adding new counts for the same cause of action,[85] correcting a defective statement of the cause of action;[86] correcting a misstatement as to the amount claimed;[87] correcting a mistake as to the venue of the cause,[88] striking out parties improperly joined,[89] adding new parties;[90] and substituting parties plaintiff where the action was brought in the name of the wrong person or there has been a change in relation to the ownership of the cause of action.[91] An amendment changing the character in which plaintiff sues has been permitted,[92] but there is other authority holding that such an amendment dissolves the attachment.[93]

76. Rhodes v Sewell, 109 So. 179, 21 Ala App 441

77. Jordan v Frank, 46 N W 171, 1 N D 206

78. H B. Claflin Co. v Simon, 55 P 376, 18 Utah 153—6 C J p 480 note 35

79. Ala—Reynolds v. Bell, 3 Ala 57.
Neb—Cox v. Peoria Mfg Co., 60 N W. 933, 42 Neb 660
S C—Carolina Agency Co. v. Garlington, 67 S E 225, 85 S.C. 114—6 C J p 480 note 34

Recitals not connected with action
Recitals contained in the bond and affidavit, when the suit is commenced by attachment, need not be carried into the declaration since they have no connection with the cause of action—Reynolds v. Bell, 3 Ala. 57.

80. Seawell v Lowery, 16 Tex. 47—Holden v. Meyer, 1 White & W Civ. Cas Ct App § 829—Fechheimer v. Ball, 1 Tex A.Civ Cas § 766

81. Carolina Agency Co. v. Garlington, 67 S E 225, 85 S.C. 114

82. U S.—Underwriters' Salvage Co of New York v. Gilman, (C C A Mass.) 299 F 388, reversing (D C) Gilman v. Underwriters' Salvage Co., 288 F. 1004
Cal—Hoffman v Pacific Coast Const Co, 173 P 776, 37 Cal App. 125
Ky.—Smith v Dungey, 199 S.W. 777, 178 Ky 702.
Md—Lanasa v. Beggs, 151 A. 21, 159 Md 311.
Mont—Wall v. Brookman, 282 P. 774, 72 Mont 228—Union Bank & Trust Co v Himmelbauer, 181 P. 332, 56 Mont 82
Wash—Spokane Merchants' Ass'n v Mussellman, 234 P 1033, 134 Wash 116
6 C J p 481 note 47.

83. Lanasa v. Beggs, 151 A 21, 159 Md 311.

Exercise of discretionary power
Discretionary power of amendment of declaration in attachment proceedings will not be permitted to nullify provisions of statute nor afford either party undue advantage.—Lanasa v Beggs, 151 A 21, 159 Md 311.

84. Ferguson & Co. v. Melillo, 165 N.E 18, 266 Mass. 197.

Amendment similar to original
That one of four counts in declaration furnished original defendants after attachment was substantially the same as single count of declaration subsequently filed without leave of court did not prevent dismissal of action—Ferguson & Co v. Melillo, 165 N E 18, 266 Mass 197.

85. Mass—Miller v. Clark, 8 Pick 412
Nev—Mendes v. Freiters, 16 Nev 388
6 C J p 482 note 48

86. U S—Nevada Co v Farnsworth, (C C Utah) 89 F 164
Ky—Dengler v Krell-French Piano Co., 119 S W. 757
Tex—Boyd v. Beville, 44 S W. 287, 91 Tex 439—Tarkinton v. Broussard, 51 Tex 550

87. Anderson v. Dever, 68 So 166, 109 Miss 235—6 C J. p 482 note 50

88. Perry v. Mulligan, 58 Ga. 479.

89. Spokane Merchants' Ass'n v. Mussellman, 234 P 1033, 134 Wash. 116—6 C J p 482 note 52.

90. Conn—Hamilton v. Lamphear, 7 A. 19, 54 Conn. 237
Ky—Walters v Smith, 55 S.W. 904, 21 Ky L 1635
6 C J p 482 note 53.

91. U S—Campbell, etc, Co v. American Surety Co, 129 F. 491, affirmed 138 F. 531, 71 C C A. 55
Mass—Campbell, etc, Co v Barr Pumping Engine Co, 65 N E 396, 182 Mass 304
6 C.J p 482 note 54.

92. Epstin v. Levenson, 4 S E 328, 79 Ga 718

Suit for use of another
An amendment to the declaration, filed after levy, alleging that plaintiff sues for the use of another, who has purchased the claims since the levy, does not dissolve the attachment—Epstin v. Levenson, 4 S E 328, 79 Ga. 718.

93. Hagerty v. Hughes, 4 Baxt (Tenn.) 222

Amendment to sue as administrator
An attachment issued in aid of an action by a husband, as such, for malpractice to his wife, was held abandoned by amending the declaration so that the action stood as one by him as administrator for the use of his children—Hagerty v. Hughes, 4 Baxt (Tenn.) 222.

It is not permissible to amend so as to set up a new cause of action, and an amendment of this nature, if allowed, will usually operate as a discharge of the attachment.[94]

b. Plea, Answer, or Affidavit of Defense

The general rules governing the plea or answer in civil cases generally apply as a rule in attachment proceedings.

The rules governing the plea or answer to the action, as distinguished from the attachment proceeding, are for the most part the same as those applicable to other actions.[95] Defendant may plead any available defense,[96] but his plea or answer must be timely filed.[97] Where the plea or answer is insufficient, the attachment as against defendant is properly sustained.[98]

c. Issues

The issues which may be considered are controlled by the pleadings, parties, and evidence

Plaintiff in attachment cannot raise the question of fraud on the part of defendant unless there is evidence of an indebtedness.[99] Where a special attachment is directed and made of realty of which defendant once had the legal title, but which is alleged to have been conveyed by him prior to the attachment in fraud of plaintiff, and where defendant more than four months after the attachment has filed his petition in bankruptcy, been adjudged a bankrupt, and received his discharge, the court in the original action cannot determine whether or not there was an attachment in fact, or inquire into the alleged fraudulent conveyance, since such questions must be subsequently determined in proper proceedings, when all the persons legally interested are before the court as parties.[1]

§ 494. Evidence

All matters essential to recovery or the establishment of his claim must be established by attachment plaintiff

One must establish his claim and that his adversary is indebted to him before he can successfully fasten an attachment lien on real estate or sustain a judgment in attachment;[2] it is the duty of an attaching creditor to show that the property attached was that of his debtor,[3] and, where de-

94. Minn.—Heidel v Benedict, 63 N. W. 490, 61 Minn 170, 52 Am S R 592, 31 L R.A. 422.
Pa.—Milton v. Spinning Co, 12 Pa Dist 53
6 C J. p 482 note 56.

95. Musical Leader Pub Co v White, 184 Ill App 453.

Personal jurisdiction of defendant
Where personal service of writ is made on defendant in a fraudulent debtor's attachment proceeding, or he enters a general appearance, the action proceeds as any other personal action in assumpsit, and defendant must file an affidavit of defense as provided by statute.—Locey v Sterling Motor Truck Co. of Pittsburgh, 156 A. 730, 102 Pa Super. 148.

96. Lanasa v. Beggs, 151 A. 21, 159 Md. 311

97. Thompson v. Hockworth, 7 Ky Op. 171.

Answer filed five months after petition
An answer by defendant in attachment more than five months after the filing of the petition of attachment, in which defendant "denies that he is about to sell or otherwise dispose of his property with intent to cheat," etc, is not responsive to the petition because of the time which elapsed between the filing of the petition and the answer.—Thompson v. Hockworth, 7 Ky Op. 171.

After levy of attachment
Where summons is served by publication on a nonresident, and later an attachment is levied on his property, jurisdiction is not acquired, and the defendant is not under obligation to submit to the court's jurisdiction until levy of attachment, and hence his time to answer does not expire until the statutory period after the levy.—Cahill v. Broadwell Productions, 190 N Y S 235.

Demand not yet due
(1) Under statute in Missouri it has been held that in an attachment suit upon a demand not yet due the plea to the merits may be filed at any time before the demand matures.—Hamilton v. McClelland, 33 Mo 315

(2) However, defendant is not bound to plead to the merits until after the claim matures.—Kritzer v Smith, 21 Mo. 296.

98. Daugherty v Bell Nat. Bank, 194 S W. 545, 175 Ky. 513.

Failure to deny grounds for attachment
Where defendant did not deny allegation in affidavit that she and her codefendants did not have property in the state to satisfy the judgment, or that collection would be endangered by delay and return of no property found, the court properly sustained attachment as against defendant.—Daugherty v. Bell Nat. Bank, 194 S.W 545, 175 Ky. 513.

Whether debt is due
In an action on an account begun by attachment, the question whether the debt was due cannot be adjudicated, where not set up by the plea in abatement.—Lee v McConnell, 69 So. 706, 109 Miss 339.

Admission of debt
An affidavit of defense which admits the debt sued on, but denies the fraud upon the ground of which the attachment was issued, is not sufficient to prevent judgment.—Commonwealth v. Klein, 13 Pa.Super. 528.

99. Yost Mfg Co. v. Alton, 48 N E 175, 168 Ill. 564.

1. Stickney, etc., Coal Co. v. Goodwin, 49 A. 1039, 95 Me. 246, 85 Am. S R 408

2. Employers' Liability Assur. Corporation v. Taylor, (Va.) 178 S E. 772.—6 C J. p 483 note 64.

Notes admissible to show debtor status
Where plaintiff company took defendant's notes payable to its officers for convenience in negotiation, in a sale of its business, they were admissible to support in attachment suit by the company to show relationship of debtor and creditor, although not payable to the company.—Maryville Mercantile Co. v. Hedgecock, (Mo App.) 186 S.W. 55

3. Smith v. McWilliams, 3 Ky Op. 246

Ownership doubtful
In an action for damages for wrongfully keeping hull of vessel on plaintiff's land, wherein several nonresident defendants were made parties, because of a doubt as to which was liable, the evidence of ownership was held insufficient to sustain a warrant of attachment except as to one defendant.—Zenith Bathing Pavilion v. Fair Oaks S. S. Corporation,

fendant does not appear, that he has been served with the requisite process.[4] The right to recover must be proved, even though defendant has failed to set up a defense.[5]

The affidavit on which the attachment was issued and the writ of attachment are not admissible as evidence, although they may be competent to go before the jury as pleadings.[6]

The phase of this subject relating to evidence and proof of intent to conceal property or defraud creditors as grounds for attachment is treated in section 69 supra.

§ 495. Trial

a. In general
b. Questions of fact
c. Instructions
d. Verdict or findings

a. In General

The court may advance the hearing of an attachment issue, but it may not, without the consent of the parties, try an issue before the term to which the attachment is returnable.

It is within the power of the court to advance the hearing of an attachment issue.[7] It has been held that where defendant appears in a short note case in which an attachment has issued, the proper procedure is to try the short note case before the validity of the attachment,[8] and the action proceeds as in assumpsit at common law.[9] A court has no jurisdiction, without the consent of both parties, to try an issue in an action in assumpsit commenced by attachment before the term to which the writ of attachment is returnable.[10]

The pendency of rule to dissolve attachment constitutes no obstacle to the trial of the case on its merits against a resident duly served, or to entry and confirmation of judgment by default.[11]

b. Questions of Fact

Questions of fact are to be determined in the trial court.

Questions of fact are to be determined in the trial court[12] by the jury.[13]

A verdict should be directed for plaintiff if the defense is without merit,[14] and conversely, where the evidence fails to support any one of the grounds for attachment, a peremptory instruction should be given for defendant.[15]

c. Instructions

Instructions to the jury should be correct and applicable.

Instructions predicated on the pleadings and evidence[16] and which fairly present the theories of both parties[17] are properly given. It is error for the court to refuse to give an appropriate instruction where no other instruction on that subject is given,[18] but it is proper for it to refuse to give an inapplicable instruction.[19] In attachment, based

148 N.E. 532, 240 N.Y. 307, reversing 207 N.Y.S. 306, 211 App.Div. 492

4. Employers' Liability Assur. Corporation v. Taylor, (Va.) 178 S.E. 772

5. Vandergrift v. Summerall, 164 S.E. 718, 158 Va. 725.

Foreign attachment
The burden is on plaintiff to show that defendant is a nonresident or outside the commonwealth in a foreign attachment proceeding—Tredway v. Eldridge, 7 Pa.Dist. & Co. 585

6. Dale v. Christian, 79 S.E. 1127, 140 Ga. 790

7. Dickinson v. Morgenstern, 111 Ill.App. 543

8. Philbin v. Thurn, 63 A. 571, 103 Md. 342.

9. Weiss v. Northern Dredge & Dock Co., 142 A. 253, 155 Md. 351.

10. Hecht v. Feldman, 39 N.E. 121, 158 Ill. 390, reversing 54 Ill.App. 144

11. State Nat. Bank v. Winn, 64 So. 495, 134 La. 639.

12. Apstein v. Sprow, 99 A. 1045, 91 Conn. 421.

Reasonable time to record deed
What is a reasonable time in which to record a deed after delivery to give it priority over an attachment issued before its execution is a question of fact for the trial court in each case—Apstein v. Sprow, 99 A. 1045, 91 Conn. 421

13. West v. William E. Wood Co., 118 A. 69, 140 Md. 514. See Weber Chimney Co. v. Johnson, 205 Ill. 348.

Ownership of property
In an attachment proceeding, whether the property attached was owned by defendant or by a partnership was for the jury—West v. William E. Wood Co., 118 A. 69, 140 Md. 514

Intent of debtor
With regards to the right to attachment, the intent with which the debtor acts or contemplates acting is a question of fact dependent on the circumstances—Fulwider v. Benda, (S.D.) 253 N.W. 154

Deposits in assumed name
In attachment, evidence of bank deposits in an assumed name was held sufficient for submission to the jury of the question of whether defendant had property which he had concealed and unjustly refused to apply to the payment of his debts—Gray v. Valley, 101 So. 855, 136 Miss. 886.

14. Ga.—Gibbs v. Golden Live Stock Co., 151 S.E. 556, 40 Ga.App. 808
Iowa—Carritt v. Penny, 196 N.W. 285, 197 Iowa 1157
Or.—Johnson v. Curl, 34 P.(2d) 975, denying rehearing 33 P.(2d) 237.

15. Pinola Lumber Co. v. Husbands, 79 So. 69, 118 Miss. 229.

16. Ark.—J. C. Engleman, Inc. v. Briscoe, 291 S.W. 795, 172 Ark. 1088
Ill.—Bacon v. Reichelt, 199 Ill.App. 331.

Following language of statute
An instruction, in an attachment action on the alleged fraudulent purpose of defendant to hinder and delay his creditors, etc., which follows the language of the statute, is sufficient.—East Side Packing Co. v. Meritz, (Mo.App.) 218 S.W. 436

17. Martin v. Barrett, (Mo.App.) 204 S.W. 410.

18. First Nat. Bank v. Poor, (Colo.) 29 P.(2d) 713.

19. McCormick v. Hawks, 95 So. 241, 131 Miss. 111.

on defendant's having secretly left the state with intent to defraud his creditors and made conveyances for the same purpose, an instruction that the conveyance of property to creditors by a debtor in failing circumstances is not of itself sufficient evidence of fraud to authorize an attachment is not erroneous, as taking from the jury the question of fraud.[20]

d. Verdict of Findings

A verdict must be authorized by the evidence and is to be construed in the light of the pleadings and issues.

A verdict which is not authorized by the evidence is erroneous,[21] it must be construed in the light of the pleadings and issues, and it will not be set aside for uncertainty if, when so construed, it is not indefinite.[22]

Findings on matters not presented by the issues are unnecessary.[23] Where nonresident defendants are jointly and severally liable, and service is had by publication, a finding that "defendants, or one of them, has property within the jurisdiction of the court" is sufficient to sustain the judgment against them.[24]

§ 496. Reference

References in proceedings aided by attachment are subject to general rules of procedure.

Where a referee has been appointed to take answers of a witness concerning the property of defendant in attachment and has discharged his duties, the court has no power to issue an order controlling the referee and compelling the witness to produce books and papers which the referee had not directed to be produced.[25] A statute which pertains to actions of account and provides for a reference to an auditor has been held not to apply to an attachment issue arising in an action of account, and there is no practice which would justify a reference to an auditor.[26] Where an attachment suit is referred to commissioners to ascertain the real estate of the attachment debtor and the liens against it, without first making the known lien creditors and the trustee holding the legal title parties, and the court consolidates the suit with another pending suit in which there has been no reference, it is error to render final decree on the commissioner's report as to both causes.[27]

§ 497. Judgment

a. In general
b. Form and sufficiency generally
c. Directions as to sale of property and application of proceeds
d. Time of entry
e. Setting aside default
f. Validity
g. Effect

a. In General

Judgment against the attached property may be rendered on a valid seizure thereof and a compliance with all the statutory requirements pertaining thereto.

Question not in issue

Where an attachment was issued on an affidavit that defendant was about to dispose of its property for the purpose of defrauding its creditors, it was not error to refuse an instruction on the question of hindering and delaying creditors, since such question was not in issue—Michigan Stove Co v Waco Hardware Co, 54 S W. 357, 22 Tex Civ App 293

Plaintiff's belief that grounds for attachment existed

Where in attachment the issue is whether defendant was a nonresident of the state, or had converted, or was about to convert, his property into money, with intent to place it beyond reach of his creditors, unless the evidence is sufficient to raise the question of defendant's estoppel to deny the grounds of the attachment, it is proper to refuse an instruction that, if defendant led plaintiff to believe that he was a nonresident of the state, or that he was about to convert his property with fraudulent intent, the jury should find for plaintiff—McCormick v Hawks, 95 So 241, 131 Miss 111.

20. Island Coal Co v Rehling, 53 N E. 777, 22 Ind App 305.

21. Wesley v Battle Bros., 88 S E 415, 17 Ga App 755.

22. Merchants' Grocery Co v. Albany Hardware & Mill Supply Co., 160 S E 658, 44 Ga App 112.

Specific description of property

In an action in personam, in which property has been attached, a verdict for plaintiff in a certain sum, and that he is entitled to have the property sold, without specifically describing it, is not so uncertain that judgment cannot be pronounced on it—Hartford L Ins Co. v. Bryan, 58 N.E. 262, 25 Ind App. 406.

Variance in affidavit and declaration

Where there was a variance in the designation of plaintiff in an affidavit for an attachment and a declaration, but the declaration also referred to the company designated in the affidavit, the verdict in plaintiff's favor was a verdict for the company designated in the affidavit—Merchants' Grocery Co v. Albany Hardware & Mill Supply Co, 160 S E 658, 44 Ga App 112

Sum certain

In an attachment on a judgment by which the amount of defendant's indebtedness was established and the only question before the jury was the title to the property attached, a verdict is not void because it is not for a sum certain—West v. William E Wood Co, 118 A 69, 140 Md 514

23. Dronillard v. Whistler, 29 Ind 552

Residence in county

In a proceeding by attachment against a nonresident, it is not necessary, that the court should find whether the family of defendant remains settled in the county, where such is a matter of defense which was not presented—Dronillard v. Whistler, 29 Ind 552

24. Coughran v Germain, 97 N W. 743, 17 S D 529, affirming 87 N W. 527, 15 S D 77

25. Guinan v Allan, 57 N Y.S 614, 40 App Div 137, 29 N Y Civ Proc. 277

26. Dickinson v. Morgenstern, 111 Ill App 543

27. Wilson v. Carrico, 33 S.E 237, 46 W Va. 466.

Where no personal jurisdiction of defendant is acquired, the judgment is in the nature of a judgment in rem and not a judgment in personam [28] By a valid seizure of defendant's property and the giving of such notice as is required by law the court acquires jurisdiction to render judgment against the attached property,[29] but to authorize a judgment, where there is no jurisdiction of defendant's person, it is necessary that it shall be made to appear that all the requisite preliminary proceedings have been taken in accordance with law and established facts,[30] and that plaintiff shall establish his demand by proof.[31] Under statutes so providing, before a judgment will be given for the sale of the attached property, plaintiff must give security conditioned to make restitution in case defendant shall thereafter appear and prevail in the action [32]

Although several writs of attachment may issue out of the same court against the same defendant at the suit of different plaintiffs, only one such suit should be permitted to go to judgment.[33]

b. Form and Sufficiency Generally

Minor irregularities do not invalidate a judgment.

A judgment which is in such form as to be readily understandable is not rendered insufficient by the occurrence of abbreviations therein,[34] and similarly an immaterial variance between the judgment on the attachment writ and the affidavit therefor will not invalidate the judgment [35]

As a rule the attachment judgment need not declare the existence of a statutory lien [36]

c. Directions as to Sale of Property and Application of Proceeds

(1) Propriety and necessity
(2) Form and sufficiency

(1) Propriety and Necessity

Whether or not the judgment shall contain directions as to the sale of the property is dependent on the requirements of the statute pertaining thereto.

While it has been considered proper for the court, on rendering judgment for plaintiff in an attachment suit, to include in its judgment a direction that the property attached be sold and the proceeds applied to the payment of the judgment,[37] this is not the rule when the statute provides otherwise.[38] Where authorized by statute, an order foreclosing the attachment lien is proper.[39]

28. Del—Woods v. Spoturno, (Super) 183 A 319
Iowa—Security Sav Bank v Cumprich, 203 N.W 24, 199 Iowa 1061
Mont—State v. Carey, 238 P. 597, 74 Mont. 39.

29. De Jarnette v. Dreyfus, 51 So 932, 166 Ala. 138—6 C J. p 483 note 83

30. Ala—Southern Timber & Investment Co. v. Creagh, 45 So 666, 154 Ala. 283
S C—Stephens v. Ringling, 86 S.E 683, 102 S.C. 333
6 C J p 484 note 84.

Assessment of damages by prothonotary

Under the Pennsylvania act of April 9, 1870, authorizing the prothonotary to assess the damages on evidence produced to him or on the affidavit of plaintiff or some other person cognisant of the transaction, a judgment by default, rendered without the production of the required evidence, is erroneous—Oliver v. Becker, 15 Pa.Dist. 599—6 C J. p 484 note 84 [f].

Recital of levy of attachment in judgment

Where the existence of an attachment lien was not an issue of fact for the jury, on the establishment of plaintiff's debt by the verdict, it was the court's duty to recite in its judgment the issuance and levy of the attachment as the method prescribed by law for the preservation of the lien fixed by the levy until enforced by execution—Johnson v. W H Goolsby Lumber Co, (Tex Civ App) 121 S W. 883

31. Brown v Crescent Stave Co, 269 S W 739, 207 Ky. 470—6 C J. p 484 note 85.

32. Ky—Harris v. Adams, 2 Duv. 141—Allen v Brown, 4 Metc. 342
Md—Mears v Adreon, 31 Md 229
Va—Brien v Pittman, 12 Leigh (39 Va) 379—Watts v. Robertson, 4 Hen & M (14 Va) 442.
6 C.J. p 484 note 86

33. Altschuler v. Owen, 135 A. 823, 5 N J Misc 45, certiorari granted 136 A 924, 5 N J Misc 311.

34. See Benjamin Moore & Co. v Clark, 204 Ill App 191

35. Brown v Williams-Brooke Co, 63 So 351, 106 Miss 187.

Application of property to payment of debts

A judgment on an attachment writ, reciting that defendant unjustly refused to apply his property to the payment of his debts, is not invalid because of a variance between it and the affidavit which alleged that defendant had property which he concealed and unjustly refused to apply to the payment of his debts—Brown v Williams-Brooke Co., 63 So 351, 106 Miss 187.

36. Cooper v. Owen, 161 So 98, 230 Ala 316.

37. Johnson v Curl, (Or) 34 P.(2d) 975, denying rehearing 33 P.(2d) 237—6 C J p 485 note 93.

38. Payne v O'Shea, 84 Mo. 129—6 C J. p 485 note 94 [a].

Sale of real estate

When so provided by statute, the court will not render judgment for the sale of real estate under attachment unless, or until, it has been made to appear by affidavit that defendant has not sufficient personal property in the state to satisfy the judgment—Webber v Tanner, 65 S. W. 848, 23 Ky L 1694, allowing rehearing 64 S W 741, 23 Ky L 1107—Davidson v Simmons, 11 Bush (Ky) 330—Jackson v McElroy, 2 Bush (Ky) 132—6 C J. p 487 note 2.

39. Olivares v Garcia, (Tex Com. App) 91 S W (2d) 1059, affirming (Civ App) 56 S W (2d) 243—Toland v Stroud, (Tex Civ App) 36 S W (2d) 769—Cook v Waco Auto Loan Co, (Tex Civ App) 299 S W. 514—Oscar v Sackville, (Tex Civ. App) 270 S W. 897—6 C J. p 485 note 94 [c], [d].

Rendition of judgment on replevin bond

In an action for debt, in which plaintiff sued out a writ of attachment, the court had authority to foreclose the attachment lien regardless of whether judgment was rendered on the replevin bond given—Galloway v. Morris & Co, (Tex Civ. App) 249 S W 284—Coopwood v. Wofford, (Tex Civ App) 219 S W. 504.

Under some statutes, in order to subject the attached property to judgment, a personal judgment against defendant must contain an express order for the sale of the property,[40] although the writ of attachment will not be quashed unless there is a motion to quash by defendant.[41] In the absence of a statutory provision therefor, the judgment need not order a sale of the attached property.[42] A statute requiring the court to order the property "remaining in the hands of the officer" to be sold does not apply where the property has been taken from the officer before he has made his return.[43]

(2) Form and Sufficiency

Generally the order of sale should describe the property and direct the sale of as much thereof as will be necessary to satisfy the judgment.

The order for sale should describe the attached property clearly and definitely,[44] and direct the sale of as much thereof as will be necessary to satisfy the judgment.[45] Where realty is involved it has been held that a report to, and confirmation by, the court should be required before conveyance to the purchaser and payment of the purchase money to the creditor.[46] If a person, not a party to the action, has rights in the attached property, the court, although not having equity jurisdiction, may mold its judgment so as to protect such rights.[47]

d. Time of Entry

Judgment by default cannot be rendered before the time specified by statute. Generally, judgment on an attachment issued on an unmatured demand cannot be rendered until the demand has matured.

Usually it is not permissible to enter a final judgment by default against a defendant in attachment who has not been personally served until the lapse of a specified time after the execution of the writ,[48] but it seems that a judgment rendered before such time has elapsed is only erroneous and not void.[49] A judgment against an attachment defendant is valid against him, although it includes the sureties on his replevin bond, when by the express provisions of the code a judgment is not to be rendered against the sureties until the expiration of thirty days after the judgment against defendant.[50]

It has been held not necessary to wait until a determination upon a traverse to the attachment affidavit before entering judgment by default in the main action,[51] but there is other authority to the effect that, where defendant in attachment pleads in abatement and joins in plaintiff's demurrer thereto, it is error to render final judgment against defendant as on default without disposing of the demurrer.[52] A plea to a subsequent declaration will not prevent a default in attachment to which defendant has not pleaded.[53]

If parties to an attachment suit agree to a judgment fixing the amount due, such judgment may be entered at once without abatement of pending claim suits by other parties.[54]

Attachment on immatured demand. Where the attachment was issued upon an immatured demand, judgment cannot be rendered in the action, without defendant's consent or without express statutory authority, until the demand has matured.[55]

40. Lount v. Holladay, 234 P 1084, 28 Ariz. 16—6 C.J. p 486 note 95

41. Lount v Holladay, 234 P 1084, 28 Ariz 16—Hunter v. Daze, 170 P. 788, 19 Ariz 310

42. Nonaka v. Aten, 154 N.W 445, 36 S.D 223—6 C.J. p 486 note 96

43. Hawk v. Bruce, (Mo.App.) 195 S.W. 569.

44. Ky.—Beall v Barclay, 10 B.Mon 261.
Tenn.—Hillman v. Werner, 9 Heisk 586—Staunton v. Harris, 9 Heisk 579
6 C.J. p 486 note 97.

Reference to abstract or map
(1) A description, in a judgment, of land upon which process of attachment had been levied and upon which the court gave a foreclosure, was held sufficient where, although not complete in itself, it referred to the abstract wherein an adequate description of the property could be obtained—Newsom v. Couch, (Tex.Civ.App.) 262 S.W. 155.
(2) An officer, to determine metes and bounds of a tract of land upon which foreclosure is ordered, may go to any record, map, and document referred to in the judgment for further description, and may rely on the surveyor to determine boundary lines, if necessary—Newsom v Couch, supra.

45. Harlow v. Becktle, 1 Blackf (Ind.) 237—6 C.J. p 486 note 98.

46. Brien v. Pittman, 12 Leigh (39 Va.) 379.

47. Tenn.—Blue Grass Canning Co. v. Wardman, 52 S.W 137, 103 Tenn 179.
Tex.—Walker v. Houston, (Civ.App.) 29 S.W. 1139
6 C.J. p 487 note 1.

48. Letondal v. Huguenin, 26 Ala. 552—6 C.J. p 487 note 3

49. Conn.—Morey v. Hoyt, 26 A. 127, 62 Conn. 542, 19 L.R.A. 611.

Miss.—Calhoun v. Ware, 34 Miss. 146.
Tenn.—Porter v. Partee, 7 Humphr. 168

50. Stephens v. Davis, (Ala.) 39 So. 331.

51. Ripley v. Astec Min Co, 28 P. 773, 6 N.M. 415.

52. Rowley v. Cummings, 9 Miss. 340.

Motion to dissolve
Where a defendant appears by motion to dissolve an attachment, a judgment by default upon denial of the motion should not be allowed until time has been given him to plead—Whiting v. Budd, 5 Mo. 443.

53. Baldwin Co. v. Darnell, 213 Ill. App 589.

54. Monroe County Growers' Exch. v. Harper, 103 So 600, 20 Ala.App. 532.

55. Crain v. Bode, 39 P 747, 5 Wyo. 255—6 C.J. p 487 note 8.

e. Setting Aside Default

A default judgment may be set aside on compliance with a statute which so provides.

A default judgment may be set aside where defendant complies with a statute providing therefor and makes application within the specified time.[56] It has been held that a judgment in a foreign attachment suit will not be opened merely because defendant was unable to furnish special bail required and therefore could not contest the suit on its merits where defendant had knowledge of the attachment from the time that it was made.[57]

f. Validity

The validity of the judgment depends on the validity of the attachment where personal jurisdiction has not been acquired, but a judgment against defendant personally is not invalidated by defects in the attachment.

Where personal jurisdiction of defendant has not been acquired, the validity of the judgment depends on the validity of the attachment,[58] but where personal jurisdiction has been acquired a general verdict and judgment against defendant personally is not affected by defects in the attachment,[59] nor is it invalid because of a failure to adjudicate the issue presented by the attachment.[60] Although a portion of a judgment is void because it is in personam without proper personal service having been had, another portion of the judgment may be upheld where it is in rem on the attached property.[61] Where a judgment in attachment against two defendants is an entirety, if void as to one defendant it is void as to both.[62]

A judgment of foreclosure of an attachment based on a petition which was insufficient to authorize a judgment for the debt in that it did not state a cause of action is invalid,[63] but a judgment foreclosing a lien is properly rendered although allegations in the pleading that the debt was due plaintiff is not supported by the evidence, if no motion to quash on that ground is made by defendant.[64]

g. Effect

(1) In general
(2) As dependent on personal jurisdiction

(1) In General

A judgment is conclusive as to matters properly adjudicated therein and cannot be collaterally attacked. However, persons who were not parties to the suit are not precluded thereby.

Where the court has jurisdiction, a judgment in an attachment suit cannot be collaterally attacked for errors or irregularities in the proceedings,[65] and so, where the court has acquired jurisdiction of the property, its judgment is conclusive with respect thereto until reversed or set aside in a direct proceeding, and cannot be collaterally attacked on the ground of irregularities in the proceedings.[66] The judgment determines the truth of the attachment affidavit and the propriety of the attachment even though it is obtained by default.[67] A judgment in favor of defendant is conclusive that the attachment was without sufficient cause.[68]

Where the judgment is for the recovery of so much money and the costs of the action and the sale of the attached property, the judgment for costs is a lien on the attached property and may be enforced by an order of sale.[69]

Where the court does not have jurisdiction, the judgment is void and no title can be acquired under the sale.[70]

56. Smith v. Foster, 3 Coldw (Tenn) 139—6 C.J. p 487 note 10

57. Morgan v. Ownbey, 100 A. 411, 6 Boyce (Del) 379.

58. Del—Woods v. Spoturno, (Super) 183 A. 319
La.—Collins v. McCook, 136 So. 204, 17 La App 415.
N Y—Cohn v. Enterprise Distributing Corporation, 212 N.Y.S. 39, 214 App Div 238

Property not attachable

A judgment founded on an attachment of nonattachable property is void—Cohn v Enterprise Distributing Corporation, 212 N Y S 39, 214 App Div 238

59. Philip Carey Co. v. Sheppard, 91 S E. 444, 19 Ga App 368.

Amendment of judgment

Where plaintiff, by amendment, struck verdict and judgment as against property levied on and the surety on replevin bond, defects in the levy because of insufficient description of the property or failure to allege ownership in defendant in attachment were amendable and could not affect a general verdict and judgment against defendant alone—Philip Carey Co. v Sheppard, 91 S E 444, 19 Ga App 368.

60. Slusser v. Romine, (Ind App.) 200 N E 731.

61. Collins v Southern Finance Corporation, (Ga App.) 180 S E 744

62. Britton v. Gregg, 95 Ill App. 29

Judgment in aid of assumpsit

A judgment in attachment in aid of a suit in assumpsit is an entirety, and, if void, as to one of two defendants, it is void as to both—Britton v. Gregg, 95 Ill App. 29

63. Baker v. Hahn, (Tex Civ App.) 161 S W. 443

64. Milliken v. Anderson, (Tex.Civ App.) 294 S W. 921

65. Colo—Van Wagenen v Carpenter, 61 P. 698, 27 Colo 444
Mich—Gill v. Backus, 66 N.W. 347, 108 Mich 417.
N Y—Ledoux v. East River Silk Co, 44 N.Y.S 489, 19 Misc 440.
N C—Harrison v Pender, 44 N.C 78, 57 Am D 573
6 C J. p 488 note 15.

66. L O Umsted Auto Co v Edwards, 251 S W 878, 159 Ark 327—6 C J p 489 note 26

67. Gooden v. Lewis, 167 P. 1133, 101 Kan. 482.

68. Anvil Gold Min Co v Hoxsie, (Alaska) 125 F 724, 60 C C A 492

69. Merwin v. Hawkes, 1 P 640, 31 Kan. 222

70. Duxbury v Dahle, 81 N.W. 198, 78 Minn 427, 79 Am S R. 408—6. C J p 488 note 16.

As against third parties. A judgment rendered in an attachment suit operates only against defendants named in the affidavit and it does not prejudice the rights of claimants to the property who were not parties to the proceedings,[71] and, as against third party claimants, it does not establish that the attachment was lawfully issued.[72] A claim that a judgment adversely affects the rights of third parties is ill-founded where the judgment specifically protects their rights.[73]

Where, in a suit to foreclose an attachment lien, the court rendered judgment against claimants who were improperly allowed to intervene in the action, the court may, before the expiration of the term at which the original judgment was entered and without notice of its intention so to do, amend the judgment by striking out so much thereof as was a judgment against the intervener, and dismiss the plea of intervention without prejudice.[74]

Attachment lien. The effect of the judgment on the attachment lien is treated in § 260 supra.

(2) As Dependent on Personal Jurisdiction

A general judgment in personam is binding on all defendant's property, but where only jurisdiction of the property is acquired, a judgment can bind only the property levied upon.

Where jurisdiction of defendant's person is obtained, a general judgment rendered against him is binding on all his property.[75] Where the court has acquired jurisdiction of the property, but not of the person, the judgment can bind nothing except the property levied upon, and is not operative in any manner in personam.[76] If the property attached proves insufficient to satisfy plaintiff's claim, no other property can be taken,[77] and plaintiff must sue on the original indebtedness to recover the balance.[78] Such judgment will have no effect in another state as a personal judgment against the debtor,[79] and is not an evidence of indebtedness on which an action can be maintained.[80]

§ 498. Amount of Recovery and Writ of Inquiry

Generally, where personal jurisdiction is acquired the amount recoverable is not confined to the sum claimed in the affidavit for attachment, but as to a judgment in rem it is so limited.

Where the court has obtained jurisdiction over the person of defendant, a recovery may be had of such amount as plaintiff shows to be due him, regardless of the amount claimed in the affidavit for attachment,[81] but the attached property shall not be subject to a lien of a greater amount than stated in the affidavit if the rights of third parties who

71. Cooper v. Owen, 161 So 98, 230 Ala 316

Order of condemnation

Where a claim suit in attachment proceeding results in a holding that the property does not belong to claimant, it will be so ordered, and rights determined are subject to a condemnation made in the main suit, but the condemnation is operative only on claimant's rights in the property after determination of the claim proceeding—Cooper v. Owen, 161 So 98, 230 Ala 316

72. Metropolitan Investment & Improvement Co v Schouweiler, 163 P 599, 83 Or 695, affirmed 164 P 370, 83 Or 695.

Proper affidavit

Judgment against defendant in a suit wherein attachment was levied on his land does not establish, as against a party holding a deed from him, that there was a proper affidavit for attachment—Metropolitan Investment & Improvement Co v Schouweiler, 163 P 599, 83 Or 695, affirmed 164 P. 370, 83 Or 695

73. Boone v Evans, 31 S W.(2d) 723, 235 Ky. 487

74. Carothers v Lange, (Tex Civ App) 55 S W 580

75. Brownwell, etc, Car Co v Barnard, 40 S W 762, 139 Mo 142—6 C J p 488 note 17.

76. Ga.—Collins v. Southern Finance Corporation, (App) 180 S E 744
Mont.—State v Carey, 238 P. 597, 74 Mont 39
N J.—Blessing v Blackburn Varnish Co, 107 A. 599, 93 N J.Law 321
N Y.—Davidoff v Chipornoi, 166 N.Y. S 996, 101 Misc 291.
6 C J p 488 note 20, p 489 note 21.

Docketing

(1) Under 2 Comp St (1910) pp 1978, 1979 §§ 73–76, judgment in attachment proceedings in a district court, where there has been no appearance by defendant, should not be docketed in the court of common pleas, such judgment not being a "final judgment" within 2 Comp Sts pp 2003, 2005 §§ 168, 172, providing that "final judgment" of a district court may be docketed in the court of common pleas—Blessing v Blackburn Varnish Co, 107 A 599, 93 N J Law 321

(2) The act of docketing a judgment in a district court attachment, proceeding in the court of common pleas and the supreme court cannot affect defendant's land, since land cannot be attached in a district court proceeding, and the act of docketing the judgment cannot enlarge the scope of the judgment—Blessing v Blackburn Varnish Co, supra.

(3) Under 2 Comp St (1910) pp 2957, 2958 §§ 6, 11, providing that a judgment docketed in the supreme court shall operate as a judgment obtained therein, a district court judgment in attachment proceedings against a nonappearing defendant cannot be docketed in the court of common pleas and then in the supreme court, for to so do would transfer judgment operative only against attached property to one enforceable against any property in the state, without affording defendant an opportunity of a day in court as to such other property—Blessing v Blackburn Varnish Co, supra.

77. Oil Well Supply Co v Koen, 60 N E. 603, 64 Ohio St 422—6 C J. p 489 note 22

78. Bliss v Heasty, 61 Ill 338—6 C J p 489 note 23

79. Tenn.—Earthman v. Jones, 2 Yerg 483
Va.—Fisher v. March, 26 Gratt (67 Va.) 765

80. Eastman v Wadleigh, 65 Me 251, 20 Am R 695—6 C J. p 489 note 25.

81. Colo.—Creighton v Kerr, 1 Colo. 509.
Mich.—Pew v Yoare, 12 Mich 16
See Wottowa v. Ridgly, 202 Ill App 384.

have acquired an interest in the property pending the suit will be adversely affected thereby.[82] Where no personal jurisdiction is obtained judgment should not be rendered for an amount greater than that claimed in the affidavit[83] or the published notice,[84] with interest[85] and costs.[86] The recovery of a less amount than that claimed in the affidavit will not invalidate the attachment.[87]

Where, after an attachment levy, plaintiff filed an amended complaint adding a second cause of action for increased damages but abandoned it at the hearing, the court had jurisdiction to render judgment on the first cause of action, payable out of the property levied on.[88]

Debt not due. Where the attachment was for a debt not due, the recovery may include a portion of the demand which was not due at the time of the commencement of the action but has become due before the trial,[89] if the rights of other creditors are not adversely affected thereby.[90]

§ 499. Execution

Execution for the balance may be issued if the property attached is not sufficient to pay the judgment where personal jurisdiction has been obtained, but not otherwise.

Where personal jurisdiction is obtained, and the property attached is not sufficient to pay the judgment, execution may issue for the balance;[91] but it is improper to award a general execution where there was no personal service upon or appearance by defendant.[92]

XIII. PROCEEDINGS IN AID OF AND EQUITABLE RELIEF AGAINST ATTACHMENT

§ 500. Proceedings in Aid of Attachment

When permitted by statute, proceedings to aid and supplement the remedy by attachment may be instituted by the sheriff or attachment plaintiff.

Provision is commonly made by statute for proceedings to aid and supplement the remedy by attachment. Thus, under applicable statutes, the court has power to compel defendant to make disclosure as to property which the sheriff has been unable to seize, and to order it delivered to the sheriff;[93] the attaching officer is authorized to sue for and collect promissory notes and other evidences of indebtedness attached by him,[94] plaintiff may, by leave of court, bring in the name of the sheriff and himself jointly any action which might be brought by the sheriff to recover a demand attached;[95] where property subject to attachment has been transferred in order to defeat or delay plaintiff, the sheriff alone or with plaintiff may bring an action to determine that fact;[96] and, where property of attachment defendant is in the possession of third persons who refuse to deliver it to the sheriff after levy thereon, attachment plain-

82. Tilton v. Cofield, 2 Colo. 392

Fraud on creditor

A judgment in excess of the amount stated in the affidavit was held not a fraud affecting rights of a subsequent creditor where a remittitur was later filed—Tustin v. Taylor, 239 Ill App 501

Excessive judgment voidable

Judgment for a sum exceeding the amount stated is voidable, but not void ab initio, in the absence of fraud—Tustin v. Taylor, 239 Ill App 501

83. Palmer v. Riddle, 54 N E 227, 180 Ill 461—6 C J. p 489 note 28

84. Alpine Cotton Mills v. Weil, 40 S E 218, 129 N C 452.

85. Ill—Empire Car-Roofing Co. v. Macey, 3 N E 417, 115 Ill 390
Ind—Henrie v Sweasey, 5 Blackf 273.
Mich.—Rose v. Palmer, 41 N W. 1080, 74 Mich 332
Tex—Briggs v. Lane, 1 Tex A Civ Cas § 961.
6 C J p 489 note 30

86. Piggott v. Schram, 64 Tex. 447—6 C J p 489 note 31

Costs and notary fees

In a suit wherein attachment is properly levied, the sheriff's costs in serving the writs and the notary fees in the matter of the affidavit and bond for the attachment are properly taxable as costs against defendant.—Kinkade v Champion Horseshoe Co., 163 P. 228, 32 Cal App 435

87. Colo—De Stafford v. Gartley, 24 P 580, 15 Colo 32
La—Williams v Louisiana Lumber Co, 29 So 491, 105 La 99
Md—Dirickson v. Showell, 28 A. 896, 79 Md 49
6 C J p 490 note 32

88. Roznik v. Becker, 122 P 593, 68 Wash. 63

89. N J—Devlan v. Wells, 47 A. 467, 65 N J Law 213
Wis—Rollins v. Kahn, 29 N W. 640, 66 Wis 658.
6 C J. p 490 note 34

90. Tustin v. Taylor, 239 Ill App 501.

91. Walker v. Cottrell, 6 Baxt (Tenn.) 257.

Evidence of execution

An instrument designated to be a "half sheet," which was apparently the clerk's memoranda or the judge's minutes in an attachment proceeding, and which did not purport to be the record of attachment judgment, or the language of the judgment, was held not to constitute evidence that no special execution was issued on the attachment judgment—Zimmer v Lyon & Healy, 190 Ill.App 642

92. Davidoff v Chipornoi, 166 N Y S 996, 101 Misc 291—6 C J. p 490 note 36

Execution against earnings

Where judgment is on constructive service of summons, and attachment of personalty, execution against the wages and earnings of defendants is unauthorized, since the judgment is enforceable only against property actually and lawfully levied upon—Davidoff v Chipornoi, 166 N Y.S 996, 101 Misc. 291.

93. Senter v. Mitchell, (C C Ark.) 16 F 206, 5 McCrary, 147, reversed on other grounds Emerson v. Senter, 6 S Ct 981, 118 U S 3, 30 L Ed. 49—6 C J. p 490 note 38.

94. Rohrer v Turrill, 4 Minn. 407—6 C J. p 490 note 39.

95. Rogers v. Ingersoll, 93 N Y S 140, 103 App Div 490, affirmed 78 N.E. 1111, 185 N.Y. 592—6 C.J. p 491 note 40.

96. Heidelberger v. Heidelberger, 187 N.Y S. 864, 196 App.Div. 626.

tiff may, in his own name maintain an action to recover possession.[97] Where a debt owed by a third person to the judgment debtor has been attached, the judgment creditor may recover the amount thereof from such person although, after the levy, the latter has paid the sum owed to the judgment debtor.[98] When so provided in the code of procedure, where a debt is attached, judgment cannot be issued against the debtor attached in the original action as in the case of garnishment, but a new action must be brought against the person attached to enforce the attachment lien.[99] Proceedings cannot be instituted to compel a third person to appear and testify as to any property in his possession belonging to the judgment debtor, where the moving papers do not allege, either positively or on information and belief, that the person has or had property in his possession belonging to the debtor.[1]

The maintenance of an action in aid of attachment must be predicated upon a proper levy under the attachment.[2] The sheriff may bring the action before judgment is entered,[3] although judgment may be entered in attachment prior to the bringing of an action by the sheriff against the garnishee.[4]

A statute authorizing the sheriff to maintain certain actions in aid of attachment does not affect a statute which permits him to collect and receive debts where the former is intended merely to furnish additional modes of relief.[5] Similarly, a statute concerning set-off which relates solely to claims under an assignment for the benefit of creditors has no application to an action in aid of attachment by a judgment creditor.[6] An action to satisfy a judgment out of the proceeds of a life insurance policy issued to defendant is not an action in aid of the attachment.[7]

The complaint must make allegations as to all material facts essential to state a cause of action;[8] one which contains all material allegations required by statute is sufficient.[9] A complaint in aid of attachment which seeks to levy on the cancellation value of a life insurance policy is demurrable where it fails to show that the insurance has a cancellation value payable solely to the debtor.[10]

It is not necessary to allege that an action by a sheriff against a person having in his possession property belonging to defendant in attachment was brought by the direction of the court or judge.[11]

§ 501. —— Equitable Relief

Generally, equitable relief will be given where special circumstances justifying it are shown to exist.

While it is not usually the duty of a court of equity to aid an attaching creditor until all his legal remedies are exhausted,[12] yet equity will in-

97. Skinner v. Stuart, 39 Barb (N Y) 206.

98. Korytkowski v Gremiewicki, 221 N Y S. 119, 220 App Div 237

99. Helvetia Swiss F. Ins Co v Brandenstein, (N Y) 168 F. 1020, 92 C C A 614, affirming (C C) Brandenstein v. Helvetia Swiss F Ins Co, 159 F 589, error dismissed 30 S Ct 405, 215 U.S. 588, 54 L Ed 339, certiorari denied 30 S Ct. 575, 216 U S 621, 54 L Ed 641.

1. Farmers' State Bank of Brantford v Berglund, 198 N W 123, 50 N D 839.

2. Cotnareanu v Chase Nat Bank of City of New York, 2 N E (2d) 664, 271 N Y 294, modifying 283 N Y S 1013, 246 App Div. 572, and 283 N Y S 1013, 246 App Div. 573—New Amsterdam Casualty Co. v National Union Fire Ins. Co. of Pittsburgh, Pa, 260 N.Y.S. 71, 236 App. Div. 494.

3. Monsanto v. Hubshman, 223 N.Y. S. 267, 129 Misc 888

4. Ackerman v. Tobin, (C C A Mo) 22 F (2d) 541, certiorari denied Tobin v. Ackerman, 48 S Ct. 321, 276 U S. 628, 72 L.Ed. 739.

5. Monsanto v. Hubshman, 223 N. Y.S 267, 129 Misc 888.

6. Appleton v. National Park Bank of New York, 202 N Y S. 516, 122 Misc 248

7. Marks v. Equitable L. Assur Soc, 96 N Y S. 551, 109 App Div. 675

Reason for rule

The attachment is merged in the judgment for plaintiff and superseded by the execution issued thereon.—Marks v Equitable L Assur Soc, 96 N Y S 551, 109 App Div. 675.

8. New Amsterdam Casualty Co v National Union Fire Ins Co. of Pittsburgh, Pa, 260 N Y S 71, 236 App Div 494.

Service of certified copy of warrant

Complaint in an action in aid of attachment was held insufficient where it merely alleged that a copy of the warrant was served on defendant, and not that a certified copy was thus served, and failed to allege service of notice showing the property attached.—New Amsterdam Casualty Co v National Union Fire Ins Co of Pittsburgh, Pa., 260 N.Y. S 71, 236 App Div 494.

9. Monsanto v. Hubshman, 223 N. Y S 267, 129 Misc 888.

Negotiability of warehouse receipt

Under Code Civ Proc § 655 subd 1 § 708 subd 4, and § 649 subd 2, a sheriff can sue to enforce an attachment debtor's right to compel accounting for interest in a warehouse receipt worth substantially more than defendant's lien, even after judgment and execution against attachment debtor, without alleging that the receipt was negotiable and hence free from attachment under Gen Bus L § 110, for the negotiable provision is for the benefit of the warehouseman only.—Castriotis v. Guaranty Trust Co of New York, 127 N E 900, 229 N Y 74, reversing 179 N.Y S 913, 190 App Div. 938.

10. Chelsea Exch. Bank v. Travelers' Ins. Co, 160 N.Y S. 225, 173 App Div. 829

11. Kelly v. Breusing, 32 Barb (N Y.) 601, affirmed 33 Barb. 123—6 C.J. p 815 note 47.

12. Ala.—Pearce v. Jennings, 10 So 511, 94 Ala 524.
Ohio—Secor v. Witter, 39 Ohio St. 218—Endel v. Leibrock, 33 Ohio St. 254.
6 C J. p 491 note 43.

Transfer of stock on books of corporation

A party is not entitled to an injunction against a corporation restraining it from transferring stock certificates on its books, for if it holds possession for the debtor the attachment is effective, and if it

tervene where it is clear that plaintiff's only remedy is equitable or where special circumstances justifying such action are shown to exist.[13] When specifically so provided by statute, equitable relief will be granted if it is more expedient although plaintiff has an adequate remedy at law.[14]

Where proper grounds for its interference are shown, a court of equity will afford the attaching creditor relief against fraudulent conveyances and assignments[15] and will require notes in the hands of one who is not a bona fide holder for value to be surrendered to the attaching creditor of the maker.[16] So also, in a proper case, such a court will entertain a bill for an accounting[17] or to remove clouds from a title,[18] or grant an injunction to prevent the debtor from committing waste upon attached land,[19] or, in some cases, to prevent the sale of the attached property under a void judgment.[20] A statute relating to remedies of creditors who desire to reach negotiable instruments does not apply where the instrument is non-negotiable.[21] A suit in equity cannot be maintained in aid of an attachment at law where it has been decided in a prior suit to which complainant was a party, that his attachment was ineffectual to give him any lien.[22]

Where property is in the possession of a third person, that person must be made a party to the proceeding and given an opportunity to be heard.[23]

Equitable relief before judgment. When so provided by statute, equitable relief will not be granted until judgment in the attachment suit or until defendant has made default unless special circumstances warranting the interposition of the court are alleged.[24] Where a creditor seeks in equity to enforce the collection of a debt, he must allege that he has recovered a judgment in person against defendant whose property he seeks to attach, that the judgment is unpaid, that he has caused execution to issue on his judgment directed to the county where the judgment was rendered, or to that in which defendant resides, that the execution was placed in the hands of the proper officer while in force, and that it had been returned by the officer, indorsed in substance, "no property found."[25]

§ 502. Equitable Relief against Attachment

In a proper case, a court of equity is available for relief against an attachment.

A court of equity may afford relief against an attachment[26] at the instance of another creditor of defendant,[27] of an assignee in insolvency,[28] or of

holds possession for a third party, then the title has passed from the debtor—Bloch-Daneman Co v. J Mandelker & Son, 238 N.W. 831, 205 Wis 641.

13. Cal—Everett v. Hayes, 270 P 458, 94 Cal App 31
N.Y.—Goldstein v Societa Veneziana Per L'Industria Delle Conterie, 183 N.Y.S. 460, 193 App Div. 168.
6 C J p 491 note 44

Injunction pendente lite

If it should appear that injunctive relief pendente lite is necessary to secure plaintiff's rights to the final relief, such injunction may be issued—Goldstein v Societa Veneziana Per L'Industria Delle Conterie, 183 N.Y S 460, 193 App Div 168.

14. Coral Gables Corporation v. Hamilton, 147 S E. 494, 168 Ga. 182.

Relief against misrepresentation

(1) A petition in attachment to obtain judgment in rem against property within the court's jurisdiction, based on fraudulent misrepresentation in the sale of property in another state, could seek equitable relief ancillary to attachment—Coral Gables Corporation v Hamilton, 147 S E 494, 168 Ga. 182

(2) A petition in attachment, seeking rescission of a contract for the purchase of land for fraudulent representations, is not demurrable as showing that plaintiffs had an adequate remedy at law—Coral Gables Corporation v. Hamilton, supra

15. N.Y.—Deichmiller v Grindle, 225 N Y S 171, 130 Misc 752
Wash T—E C Meacham Arms Co v. Swarts, 7 P 859, 2 Wash T. 412.
6 C J p 492 note 45.

Assignment of judgment by debtor

A complaint alleging that an insolvent nonresident defendant assigned judgment to defeat plaintiff's attachment states a cause for injunctive relief—Deichmiller v. Grindle, 225 N Y S 171, 130 Misc 752.

16. Lambert v. Allard, 136 A. 121, 126 Me 49.

17. Rowan v. Union Arms Co, 36 Vt. 124.

18. Voss v. Murray, 32 N E. 1112, 50 Ohio St 19

19. Conn—Camp v. Bates, 11 Conn. 51, 27 Am D 707.
N H—Moulton v. Stowell, 16 N.H 221.

20. N.Y—People v Van Buren, 32 N E 775, 136 N Y. 252, 20 L R A. 446—Tannenbaum v Rosswog, 6 N Y S. 578, 22 Abb N Cas. 346
Ohio—Wood v. Stanberry, 21 Ohio St. 142
Tex—Blum v. Schram, 58 Tex. 524

21. Goldstein v Societa Veneziana Per L'Industria Delle Conterie, 183 N.Y.S. 460, 193 App Div. 168.

22. Montgomery v McDermott, (C C N Y) 99 F 502, affirmed 103 F 801, 43 C C A. 348

23. Goldstein v. Societa Veneziana Per L'Industria Delle Conterie, 183 N.Y.S. 460, 193 App Div. 168

24. Riggi Bros Co. v Bank of Barcelona, 175 N Y S 531, 187 App Div 213

Enjoining payment to nonresident debtor

A suit by an attachment creditor, brought before default of defendant in the attachment suit, to restrain a bank, not alleged to be insolvent, from paying certain proceeds from the sale of goods, alleged to be the property of the nonresident debtor, to a foreign bank, also claiming such proceeds, will be dismissed, where complainant fails to allege any special circumstances warranting the interposition of equity—Riggi Bros Co v Bank of Barcelona, 175 N.Y.S 531, 187 App Div 213.

25. Adkins v. Meadows, 9 Ky Op 124.

26. Norton v. Hickok, 25 Conn 356—6 C J. p 493 note 51.

27. Ala.—Rice v. Less, 16 So 719, 105 Ala 293.
Conn—Norton v. Hickok, 25 Conn 356

28. Emerson v. Detroit Steel, etc, Co, 58 N.W. 659, 100 Mich 127—Gott v Hoschna, 24 N.W. 123, 57 Mich. 413.

a vendor of land attached,[29] where the proceedings are brought within the time prescribed for seeking equitable relief,[30] and a proper case for its interference is shown,[31] and where the applicant for relief has no adequate remedy at law.[32]

XIV. WRONGFUL ATTACHMENT

A. UNDER IRREGULAR OR VOID PROCESS

§ 503. Liability in General

A party suing out the attachment may be liable in damages where the process is irregular, unauthorized, or void.

Where the process of attachment is irregular, unauthorized, or void, a levy made by the officer renders the party suing out the attachment a trespasser, since under such circumstances the officer becomes the agent of such party.[33] It has been held that, where summons was not served on the attachment defendant within the time required by statute, the court lost jurisdiction and the attachment was rendered unauthorized and void from the beginning, and the attachment plaintiff might be held liable for the wrongful levy under it.[34]

§ 504. Necessity for Setting Aside of Process

Where an attachment is voidable it will protect the attachment plaintiff until it is set aside, but where it is void the attachment plaintiff is liable for damages immediately, without a setting aside of the attachment.

Where an attachment is irregular or merely voidable, it will nevertheless protect the attachment plaintiff, or other parties acting under it, until it is set aside,[35] but after it has been set aside it affords no protection to the party at whose instance it was issued, and he becomes a trespasser ab initio by relation.[36]

Where an attachment is for any reason void, attachment plaintiff will be a trespasser ab initio and liable to attachment defendant for any damages resulting therefrom,[37] and there is no necessity for setting the writ aside before bringing an action for acts done under it.[38]

§ 505. Actions

Trespass de bonis asportatis and case may be appropriate common-law remedies

An action for damages against one causing property to be taken under a void attachment has been held to be in substance an action for trespass de bonis asportatis.[39] It has been held, however, that where the writ is merely irregular or voidable, an action on the case is the proper and the only remedy.[40]

§ 506. —— Conditions Precedent

A demand for a return of the property is not a condition precedent, dissolution of the attachment may be.

A demand for the return of property wrongfully seized under a void attachment is not a prerequisite to the bringing of an action for damages for conversion thereof.[41] As has been noted in § 504, a setting aside of the attachment may or may not be a condition precedent.

§ 507. —— Matters of Defense and in Mitigation

Matters which constitute a bar to the action or circumstances in mitigation of the liability of the wrongdoer may be shown.

Where property is seized under a void attachment, it has been held that a subsequent seizure thereof by attachment plaintiff under valid process, whether a second writ of attachment or an execution, and application of the property so seized to the payment of the owner's debt without his consent, cannot be shown either in defense or in mitigation of damages for the wrongful attachment,[42] and this rule is not altered by the fact that an

29. Ramash v Scheuer, 51 N W 330, 81 Wis 269

30. Zeman v Steinberg, 54 S W 178, 21 Ky L 1152

31. Norton v Kickok, 25 Conn 356—6 C J p 493 note 56

32. Turner v Hatch, 58 N W. 605, 100 Mich 65

33. Ala.—Stetson v. Goldsmith, 30 Ala 602
Kan.—Duff, etc, Furniture, Co v Read, 88 P 263, 74 Kan 730
N Y.—Hall v Waterbury, 5 Abb N Cas 374, 57 How Pr. 131.
6 C J. p 493 note 58.

34. Ruser v. Union Distilling Co., 27 N Y.S. 920, 7 Misc 396

35. Hawaii.—Wiley v. Nicholson, 1 Hawaii 44
N Y.—Day v Bach, 87 N Y. 56

36. N J.—McFadden v. Whitney, 18 A 62, 51 N J Law 391
N Y.—Day v Bach, 87 N.Y. 56—Kerr v. Mount, 28 N Y. 659—Lyon v Yates, 52 Barb. 237.

37. Merritt v. St Paul, 11 Minn. 223—6 C J. p 494 notes 62, 63.

38. Day v. Bach, 87 N Y. 56.

39. N Y.—Kerr v. Mount, 28 N.Y 659
Tenn.—Stewart v. Roberts, 1 Yerg 336

40. Ark.—Bach v. Cook, 21 Ark 571
Ky.—Owens v. Starr, 2 Litt 230.
6 C J p 494 note 66

41. Flaxman v Capitol City Press, 185 A 417, 121 Conn 423

42. Tiffany v Lord, 65 N Y. 310—Wehle v Butler, 61 N Y. 245—Lyon v Yates, 52 Barb (N Y) 237—Otis v Jones, 21 Wend (N.Y) 394—Hanmer v. Wilsey, 17 Wend (N.Y.) 91.

offer was made to return the property on discovering that the first attachment was invalid,[43] although, under other authority, the rule is not so stringent and the fact that plaintiff caused a subsequent valid writ to be levied may be shown in mitigation of damages.[44] Where property is taken by the wrongful act of one person, its subsequent seizure on process issued in favor of another against the owner, by which it is appropriated to the payment of his debt, is a circumstance which may be received in mitigation of the liability of the wrongdoer.[45] If the property has been returned and retained by the owner, this may be shown in mitigation of damages,[46] but not in bar of the action for the wrong.[47]

§ 508. —— Jurisdiction and Venue

Actions of the character under consideration are controlled by rules applicable to civil actions generally as to questions of jurisdiction and venue. The jurisdiction of particular courts will be considered in the title Courts §§ 249-297 [15 C.J. page 985 note 24-page 1007 note 10]. Questions as to venue will be considered in the title Venue.

§ 509. —— Time to Sue and Limitations

General rules apply as to the bar of the action by general statutes of limitation and will be considered in the title Limitations of Actions.

§ 510. —— Parties

Where several persons have void writs levied against the property of the debtor at the same time, they may be sued either jointly or severally.

Where several persons place void writs in the hands of an officer and have them levied at the same time, they may be sued either jointly[48] or severally.[49]

§ 511. —— Pleadings

The declaration or complaint must allege facts, not conclusions, constituting a cause of action.

If the action is based on the ground that the attachment was void, it is incumbent on plaintiff to plead facts showing this to be the case, and a mere allegation that the attachment was illegal, unauthorized, and void, being a conclusion of law, is insufficient.[50] If the basis of the action is that the attachment was void or irregularly sued out, it will not be sufficient to allege merely that it was vacated, but it should be further shown that it was vacated for irregularity or because unauthorized.[51] There is no necessity of alleging malice or want of probable cause,[52] nor is it necessary to allege the place of levy.[53]

§ 512. —— Evidence

The rules in respect to the burden of proof, admissibility of evidence, and the weight and sufficiency of the evidence in this action correspond to the rules in any other action on the case or of trespass de bonis asportatis and, therefore, the subject is treated generally elsewhere in this work (see Case, Action on § 10 [11 C.J. p. 19 notes 59-62]; Trespass §§ 86-96 [63 C.J. p. 1002 note 46-p. 1026 note 96]).

§ 513. —— Trial

The rules of law pertaining to the trial of this action correspond to the rules in any other action on the case or of trespass de bonis asportatis and, therefore, the subject is treated generally elsewhere in this work (See Case, Action on § 11 [11 C.J. p. 19 note 63-p. 20 note 71]; Trespass §§ 98-101 [63 C.J. p. 1029 note 58-p. 1034 note 35]).

§ 514. —— Judgment and Review

The rules applicable to any other action on the case or of trespass de bonis asportatis, as the case may be, apply in this action, and, therefore, the subject is treated generally elsewhere in this work. (See Case, Action on § 11); Trespass §§ 102, 103 [63 C.J. p. 1034 note 36-p. 1035 note 60, p. 1094 note 94-p. 1095 note 11]).

43. Hanmer v. Wilsey, supra.
"By procuring a sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort or take away the right to full compensation."—Otis v. Jones, 21 Wend. (N.Y.) 394, 396.

44. Morrison v. Crawford, 7 Or. 472.

45. Wehle v. Butler, 61 N.Y. 245—Wehle v. Spelman, 25 Hunt (N.Y.) 99—6 C.J. p. 494 note 69.

46. N.J.—McFadden v. Whitney, 18 A. 62, 51 N.J. Law 391.
N.Y.—Lyon v. Yates, 52 Barb. 237.

47. Kerr v. Mount, 28 N.Y. 659—6 C.J. p. 495 note 71.

48. Wehle v. Butler, 61 N.Y. 245—Vose v. Woods, 26 Hun (N.Y.) 486.

49. Wehle v. Butler, 61 N.Y. 245.

50. Sprague v. Parsons, 13 Daly 553, 11 N.Y. Civ. Proc. 17—Sprague v. Parsons, 12 Daly 392, 6 N.Y. Civ. Proc. 26, 14 Abb. N. Cas. 320.

51. Sprague v. Parsons, 13 Daly (N.Y.) 553—6 C.J. p. 495 note 75.

52. Sprague v. Parsons, 12 Daly 392, 6 N.Y. Civ. Proc. 26, 14 Abb. N. Cas. 320.

Suit by third party owner.
A third party, owner of goods attached, may maintain trespass against the plaintiff in attachment without alleging malice and want of probable cause.—McCormick v. Tribune-Herald Co., 78 S.E. 779, 13 Ga. App. 61.

53. Vose v. Woods, 26 Hun (N.Y.) 486.
However, such an allegation will not vitiate the complaint.—Vose v. Woods, supra.

§ 515. —— Damages

An owner retaining possession and use of the property may recover only nominal damages, but where he has been deprived of its use he may recover the value of the use.

Where the owner of property attached under void process remains in actual possession, he may recover, if at all, only nominal damages, under an allegation of the value of the property as an item of damages,[54] but where he refrains from using the property under the instructions of the officer making the levy and is thereby deprived of its earning capacity, he is entitled to recover the value of its use up to the time when he was informed that the levy was released.[55] Where goods first seized under a void writ are afterward levied on under a valid writ in favor of the same creditor and sold by due process of law and the proceeds applied to the debt of the owner, this application may be shown in mitigation of damages for the wrongful seizure (see § 507 supra).

B. UNDER REGULAR PROCESS

1. Liability

§ 516. Nature and Grounds

Authorities are divided whether, if not provided for by statute, an action independent of the bond lies for wrongful attachment, in the absence of malice and want of probable cause in the issuance of the writ.

It is well settled that an action may be maintained against the attaching plaintiff for a wrongful and malicious attachment,[56] this being in the nature of a malicious prosecution or malicious abuse of process and governed by essentially the same rules.[57] Similarly, one who without probable cause sues out an attachment and levies it on the property of another is liable for the damages sustained.[58] In the absence of statutory authorization therefor, it has been held that an action will not lie independent of the bond for the wrongful suing out of an attachment, if there was probable cause and an absence of malice,[59] but on the other hand, there is considerable authority for the view that the mere fact that an attachment is wrongful gives the attachment defendant a cause of action independent of any statutory authority.[60] In a number of states statutes have been enacted under which at least actual damages are recoverable for injuries sustained by an attachment which is merely wrongful, and the procedure by which damages are to be recovered is prescribed either expressly or by implication, and under such statutes neither malice on the part of attachment plaintiff, nor the want of probable cause for believing that the alleged grounds of attachment existed, is necessary to warrant a recovery of actual damages;[61] nor

54. Low v Ne Smith, (Tex Civ App) 77 S W 32.

55. Low v. Ne Smith, supra.

56. Mass—Reardon v Sadd, 159 N E 751, 262 Mass. 345—Malone v Belcher, 103 N.E 637, 216 Mass 209, 49 L R.A (N S) 753, Ann Cas 1915A 830
Ohio—Munro Hotel Co. v Brough, 26 Ohio Cir Ct (N S.) 185.
6 C J. p 495 note 82.

57. Mass—Malone v. Belcher, 103 N E 637, 216 Mass 209, 49 L R A (N S) 753, Ann Cas 1915A 830
Ohio—Munro Hotel Co v. Brough, 26 Ohio Cir Ct (N S) 185.

Counterclaim based on malicious attachment

In a broker's action to recover a balance due on trades in cotton futures, a counterclaim, based on the facts that plaintiff had wrongfully brought suit in another state for the same cause of action and had maliciously sued out an attachment to injure defendant and to force him to pay a debt which he did not owe, and which was uncollectible in law or in equity, that defendant had no property or effects in such state subject to attachment, as was known to plaintiff, and that the court there had no jurisdiction of the action, and there was no service of process therein, and seeking to have such action enjoined, was not in form an action for an abuse of process, but merely for malicious prosecution and wrongful attachment—Carpenter, etc, Co v. Hanes, 83 S E. 577, 167 N C 551.

58. N C—Tyler v. Mahoney, 82 S E 870, 166 N C 509
Tenn—Gordon v Kentucky Midland Coal Co, 278 S W. 68, 152 Tenn 267, 42 A L R. 1052

59. Slaughter v. Nolan, 169 N W. 232, 41 S D 134—6 C J. p 495 note 84, p 496 note 85.

What constitutes probable cause

"Probable cause," as used in an action for the wrongful and malicious suing out of an attachment, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting consciously, impartially, reasonably, and without prejudice, to believe that some one of the grounds for suing out the writ of attachment existed, and in deciding on the existence of probable cause the person's belief in the existence of the ground for the attachment cannot be considered, nor the existence of such facts as might have influenced his judgment, but the test is the effect they might have on the judgment of an ordinarily prudent and reasonable man—Alsop v. Lidden, 30 So. 401, 130 Ala 548

60. U S—Miller v. Smith, (C.C A. Mo) 1 F (2d) 292
Okl—Overton v Sigmon Furniture Mfg Co, 151 P. 215, 50 Okl 531.
6 C J p 496 note 87

61. Ala—Liversage v. Gibson, 133 So 715, 222 Ala 672.
Ill—Strobot v. Cordes, 207 Ill App 412
N M—Marron v. Barton, 285 P. 502, 34 N M 516.
Okl—Oklahoma State Bank of Ada v. Reed, 288 P. 281, 143 Okl 131, 85 A L.R. 635—Scott v Waples-Painter Co, 176 P. 754, 74 Okl 52—Stonemets v. Gallagher, 158 P. 385, 60 Okl 230
6 C J p 496 notes 88, 89.

What law governs

The right to recover damages for detention of a ship under a wrongful attachment is determined by the law prevailing at the time within the territorial limits in which the wrong complained of was done—Taylor v. Insurance Co. of North America, (D C N Y.) 9 F.Supp 574

has good faith, or the absence of it, on the part of attachment plaintiff any bearing on the question of his liability[62] However, in some jurisdictions the statutes are not so broad, and to authorize a recovery, while malice is not necessary, it is essential that the attachment should have been sued out without probable cause, as well as wrongfully.[63]

§ 517. —— Wrongfulness of Attachment

The attachment must be wrongful or no cause of action arises.

In order that a cause of action may arise from the suing out of an attachment, it is essential that the suing out of the writ shall have been wrongful,[64] and if the element of wrongfulness is absent the attachment plaintiff cannot be subjected to any liability on the ground that the process was sued out maliciously or vexatiously.[65]

An attachment may be said to be sued out wrongfully, where it is issued against a person who is not indebted to plaintiff in attachment and against whom plaintiff in attachment has no valid claim,[66] where the action is brought in the name of a person who has not authorized or sanctioned it,[67] where no grounds for attachment exist;[68] where the statute forbids the issuance of an attachment for the enforcement of a claim for less than a specified amount, and the claim sued on is for less than that amount;[69] or where attachment plaintiff's debt is amply secured,[70] or he refuses to accept reasonable security.[71] However, an attachment is not shown to be wrongful by the mere fact that it is sued out for a greater amount than is actually due,[72] although it has been said that, where the disparity between the debt actually due and the amount for which the attachment is sued out is so great as to manifest an intention to abuse the remedy afforded by the extraordinary process of attachment, an action for both vexatious and wrongful use of the writ might possibly lie.[73] It has been held that the fact that defendant, at the time the attachment was sued out, had no property liable to attachment does not make the attachment wrongful, but evidence thereof might be admissible as tending to show matters of vexation on the part of plaintiff suing it out.[74]

Sustaining or dissolution. If the attachment proceedings are sustained, this is conclusive that they were rightful, and there can be no cause of action for damages.[75] Conversely, a dissolution of the attachment on the merits is conclusive that the writ was wrongfully obtained,[76] but an attachment is

62. General Motors Acceptance Corporation v Sneed, 119 So. 417, 167 La. 432, modifying 121 So 254, 9 La App. 471—6 C J p 496 note 90

63. Iowa—McCormick Harvesting Mach. Co v. Colliver, 39 N W 892, 75 Iowa 559—Nordhaus v Peterson, 6 N W 77, 54 Iowa 68.
Wash—McGill v Fuller, 88 P. 1038, 45 Wash 615—Levy v. Fleischner, 40 P 884, 12 Wash. 15.
6 C J p 496 note 91

64. Davis v Berbells, 9 P (2d) 787, 167 Wash. 468—6 C.J. p 498 note 99.

Attachment in compliance with statute

Where an affidavit for attachment was issued in compliance with a statute, the debtor actually indebted could not recover for wrongful attachment.—Davis v. Berbells, 9 P (2d) 787, 167 Wash 468.

Existence of any ground for attachment

If any of the grounds on which plaintiff predicates his right to attachment is true, the attachment is not wrongfully sued out—Palo Sav Bank v. Cameron, 168 N W. 769, 184 Iowa 183

65. Ala.—Calhoun v Hannan, 6 So 291, 87 Ala. 277—Jackson v. Smith, 75 Ala. 97—City Nat Bank v Jeffries, 73 Ala. 183.
Tex—Knowles v. Gary, etc., Co, (Civ App) 141 S W. 189.
6 C J p 498 note 1.

66. Ala—Irwin v. Cotney, 108 So 235, 214 Ala 415.
Philippine—Guillermo v Matienzo, 8 Philippine 368, 5 Off Gaz 544
Wyo—Allith-Prouty Co v. Wallace, 233 P 144, 32 Wyo 392, 39 A L R 513, rehearing denied 234 P 504, 32 Wyo 392, 39 A.L.R 513.
6 C J p 498 note 4.

Wager

An attachment is wrongfully issued if based on an affidavit stating, untruthfully, that defendant is justly indebted to plaintiff, when, in fact, the indebtedness is on a wager—Comer v Powell, (Tex Civ App) 189 S W 88

67. Bauer v Mitchell, 13 N W. 986, 80 Neb 187

68. Ala—Irwin v. Cotney, 108 So 235, 214 Ala 415
Tex—Hoover v First Nat. Bank, (Civ App) 192 S W. 1149.
6 C J p 498 note 6

Existence of past-due debt

An attachment may be wrongful if the grounds on which it is based are untrue, although defendant landowner owes a past-due debt—Hoover v First Nat Bank, (Tex.Civ App) 192 S W 1149

Removal of property

Attachment on the untrue ground that defendant was about to remove property with intent to defraud creditors is wrongful, unless plaintiff was informed as to defendant's intention and believed such information, and unless it was true—Chism v C W. Hall Motor Co, (Tex Civ. App) 278 S W. 350

69. Gaddis v Lord, 10 Iowa 141—6 C J p 499 note 7

70. Drummond v. Stewart, 8 Iowa 341.

71. Clements v McCain, (Tex Civ App) 49 S W. 132—6 C J. p 499 note 9.

72. Ala—Marx v. Leinkauff, 9 So 818, 93 Ala 453
Ind—Waring v Fletcher, 52 N.E 203, 152 Ind 620.

73. Marx v. Leinkauff, 9 So 818, 93 Ala 453

74. Ala—Troy v. Rogers, 20 So 999, 113 Ala 131
Tex—Faroux v Cornwell, 90 S W. 537, 40 Tex Civ App 529

75. La—Gusman v De Poret, 33 La. Ann 333—Bell v. Leathers, Louque Dig 63
Tenn—Boyce v Early-Stratton Co, 10 Tenn App 545.

76. La—Barrimore v. McFeely, 32 La Ann 1179
Mont—Willard v. Federal Surety Co, 8 P (2d) 633, 91 Mont 465
Kan—Hoge v. Norton, 22 Kan. 374

not wrongful within the meaning of statutes authorizing a recovery of damages resulting from wrongful attachment merely because it was dissolved for defects in the form of proceedings, or for mere omissions, irregularities, or informalities in issuing the writ.[77]

A voluntary abandonment or dismissal of an attachment is held, in some jurisdictions, to render the attaching creditor and his surety responsible for damages for the wrongful suing out of the writ;[78] but in other jurisdictions it is held that no inference that the attachment was wrongfully sued out arises from the voluntary dismissal of the suit.[79]

That attachment plaintiff took a personal judgment for the debt does not impliedly negative either the dismissal, dissolution, or abandonment of a wrongful attachment.[80]

§ 518. —— Wrongful or Excessive Levy

The attachment plaintiff is not liable for wrongful acts of the levying officer which he neither counseled, directed, consented to, ratified, nor confirmed.

While an attachment plaintiff may be held liable for the wrongful acts of the officer levying the attachment in connection with such levy,[81] such liability is limited to cases where plaintiff counseled or directed[82] or at least consented to[83] the very act which constitutes the illegality or wrong, or, knowing that the acts of the officer were wrongful or irregular, ratifies and confirms them by receiving benefits derived therefrom,[84] and in the absence of such circumstances, the attachment plaintiff is subject to no liability by reason of the officer's wrongful acts.[85]

§ 519. —— Actual Levy

In the absence of an actual levy, no cause of action for wrongful attachment arises.

The fact that the attachment was applied for and issued creates no cause of action, unless the same was actually levied, although the issue may have been wrongful.[86] Thus, where a levy is invalid for failure to notify attachment defendant thereof, the mere fact that the supposed levy was entered in the incumbrance book gives attachment defendant no claim for damages.[87] However, even though the supposed levy is invalid, if the officer has assumed control under it, attachment defendant may recover his damages.[88]

§ 520. —— Damage from Levy

No liability for either actual or exemplary damages exists where none has been sustained by reason of the wrongful levy.

There can be no recovery of either actual or exemplary damages for a levy from which no damage resulted, even though the attachment, and hence the subsequent levy, was wrongful.[89]

N Y —Freeman v. Young, 26 N Y Super 666
Wash —Gutter v Joiner, 105 P 457, 56 Wash 202—McGill v Fuller, 88 P 1038, 45 Wash 615
6 C J p 529 note 67 [a]-[e]

Res judicata

(1) Judgment dissolving attachment as wrongfully issued is res judicata on right to damages —General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La 432, modifying 121 So 254, 9 La App 471

(2) Where no appeal was taken from an order discharging attachment, the order was res judicata, in an action for damages, that property was exempt —Findel v. Chester, 13 P (2d) 442, 169 Wash 151.

77. Taylor v Fluharty, 208 P. 866, 35 Idaho 705—6 C J. p 529 note 68 [a]

Clerical errors

Clerical errors or irregularities committed in the preparation of attachment papers do not render plaintiff in attachment proceedings liable in damages for wrongful attachment —Taylor v. Fluharty, 208 P 866, 35 Idaho 705.

78. Ind —Sannes v Ross, 5 N E 699, 105 Ind 558—Vurpillat v Zehner, 28 N E 556, 2 Ind App 397.

La —Steinhardt v. Leman, 6 So 665, 41 La Ann 835—Cox v Robinson, 2 Rob 313
Miss —Dean v. Stephenson, 61 Miss 175
6 C J p 499 note 13

79. Iowa —Nockles v Eggspieler, 47 Iowa 400
Ohio —Collins v Bingham, 22 Ohio Cir Ct 538, 12 Ohio Cir Dec 825
Tex —Frank v Tatum, (Civ App) 26 S W. 900
6 C J p 499 note 14

80. Overton v. Sigmon Furniture Mfg Co, 151 P 215, 50 Okl 531

Equivalent to dismissal

Taking a personal judgment alone is equivalent to a dismissal of the attachment proceedings —Sannes v. Ross, 5 N E 699, 105 Ind. 558

81. Faroux v Cornwell, 90 S W. 537, 40 Tex Civ.App 529—6 C J p 497 note 92

82. Cole v Edwards, 72 N W. 1045, 52 Neb 711—6 C J p 497 note 93

83. N J —Carey v D Wolff, 63 A 270, 72 N J Law 510.
Vt —Evarts v Hyde, 51 Vt 183
Wis —Adams v. Savery House Hotel Co, 82 N W 703, 107 Wis 109
6 C J p 497 note 94.

84. Adams v Savery House Hotel Co, supra—6 C J p 497 note 95.

85. Snyder v Stokes, (Tex Civ App) 34 S W (2d) 918, affirmed (Com App) 55 S W (2d) 557—6 C.J p 497 note 97

86. Peters v. Snavely-Ashton, 134 N W. 592, 157 Iowa 270—6 C J. p 499 note 18

87. Sioux Valley State Bank v Kellogg, 46 N W. 859, 81 Iowa 124—6 C J p 500 note 19.

88. Foster v Dischner, 212 N W 506, 51 S D 102

89. Iowa —Braland v. Christenson, 171 N W. 22.
Tex —Tsesmelis v. Sinton State Bank, (Com App) 53 S W (2d) 461, 85 A L R 319, affirming (Civ App.) 35 S W.(2d) 451—Olivares v Garcia, (Civ App) 56 S W.(2d) 243—Tsesmelis v Sinton State Bank, (Civ App) 35 S.W (2d) 451, affirmed (Com.App) 53 S W (2d) 461, 85 A L R 319—Oscar v. Sackville, (Civ App) 270 S W. 397—Hoover v. First Nat. Bank, (Civ App) 192 S W. 1149
6 C J p 500 note 20.

Belief that levy prevented gathering crop

Owner of land and crops, not gathering crops, believing that the attachment levied prevented him from doing so, where, in fact, he was not

§ 521. —— In Action on Bond

The nature and grounds of liability in an action on an attachment bond are discussed in section 163 supra.

§ 522. Accrual of Right of Action

The cause of action may accrue prior to the determination of an appeal on the merits of the main proceeding.

Where the dissolution of an attachment is final, no appeal having been perfected, and plaintiff's damages for wrongful attachment have accrued, his action to recover such damages, begun pending an appeal on the merits in the attachment suit by plaintiffs therein, is not premature.[90]

§ 523. —— Prior to Dissolution of Attachment

Whether the attachment must be dissolved before recovery may be had is dependent on the statute or rule of practice in the particular jurisdiction

In a number of states the rule is that, before any right of action can arise from the wrongful suing out of an attachment, the attachment must be dissolved,[91] but this rule does not prevail in those jurisdictions where damages caused by wrongful attachment are considered proper matter to be set up in the main action by way of counterclaim, set-off, or reconvention in cases where a recovery is sought by this procedure,[92] or in jurisdictions where there is a controlling statute to the contrary.[93]

§ 524. —— On Dissolution of Attachment

When the statute so provides, the right of action may be asserted immediately following the dissolution of the attachment.

Under some statutes the mere dissolution of the attachment gives a right of action,[94] and it is not necessary to wait until the determination of the main action before instituting proceedings for redress.

§ 525. —— On Termination of Main Action in Defendant's Favor

On termination of the main action in defendant's favor, a cause of action in favor of defendant arises.

Where a final judgment has been rendered in the main action in defendant's favor, he has a cause of action for injuries caused by the attachment in all jurisdictions where actions for wrongful attachment, either on, or independently of, the attachment bond, may be maintained,[95] and this has been held to be true, notwithstanding defendant did not controvert the grounds of attachment by plea in abatement or otherwise.[96] The statutes have been so construed in a number of jurisdictions as to require a final judgment in defendant's favor in the main action as a condition precedent to his right to recover damages for a wrongful attachment, so that the mere dissolution of an attachment without more would give attachment defendant no right of action,[97] but in other jurisdictions defendant may proceed for a recovery of damages for a wrongful attachment notwithstanding the pendency of the main action[98]

§ 526. Persons Entitled to Recover

The various persons who may have been entitled to recover are considered in detail in the following sections.

§ 527. —— Attachment Defendant in General

The attachment defendant may recover for a wrongful attachment if he has an interest in the property attached.

If an attachment levied on the property of a defendant in attachment proves to have been wrongful, he is entitled to recover for the resulting damages,[99] but he has no right of action where the attachment, although wrongful, was levied on property of all interest in which he has divested himself before the levy, and a fortiori the attachment defendant can have no right of action for the

so prevented, could not recover for loss occasioned by his mistaken idea —First Nat Bank v. Cooper, (Tex Civ App) 12 S W.(2d) 271

Valid and invalid writs issued simultaneously

Where writs of attachment and sequestration were simultaneously issued and executed on the same property which was released on seizure under both writs at the same time, there can be no recovery based on the wrongfulness of the attachment, if the writ of sequestration was valid —Watkins Banking Co. v Louisiana Lumber Co, 17 So 143, 47 La Ann. 581.

90. McClelland v. Dougherty, (Mo App) 204 S W. 201

91. Nolle v Thompson, 3 Metc (Ky) 121—6 C J p 500 note 24

92. Tynberg v Cohen, 13 S W. 315, 76 Tex 409—6 C J p 500 note 25

93. Campbell v. Chamberlain, 10 Iowa 337

94. Waring v Fletcher, 52 N E 203, 152 Ind. 620—Harper v Keys, 43 Ind. 220—6 C.J p 500 note 27

95. Atlas Development Co. v National Surety Co, 212 P. 196, 190 Cal 329—6 C J. p 500 note 29.

96. State v Beldsmeier, 56 Mo 226 —6 C J. p 501 note 30

97. Hahn v. Seifert, 31 N W 564, 64 Mich 647—6 C J. p 501 note 31.

98. Ala —Alsop v Lidden, 30 So 401, 130 Ala 548—Anniston First Nat Bank v. Cheney, 23 So. 733, 120 Ala. 117.
Iowa —Campbell v. Chamberlain, 10 Iowa 337
Kan —Kerr v. Reece, 27 Kan 469
Mass —Reardon v Sadd, 159 N E. 751, 262 Mass. 345

99. Row v. Morris, (Okl) 49 P.(2d) 1103—6 C J. p 501 note 35.

seizure of property of a stranger, to which he never had any title[1] Where the persons suing out the attachment mistakenly assumed that plaintiff was their debtor, but plaintiff was the one whose wages they intended to attach, he can sue for wrongful attachment.[2]

§ 528. —— Waiver or Estoppel

An attachment defendant may by his conduct waive or become estopped to assert his claim for damages.

An attachment defendant may, by his conduct, waive, or become estopped to assert, his claim for damages for a wrongful attachment;[3] but, as he is entitled to bring an action for the wrongful attachment at any time within the statutory period of limitation, he cannot lose his right merely by failing to notify the surety of his intentions in that regard[4] Attachment defendant is not precluded from recovering damages by giving a redelivery bond or depositing a sum of money to secure the release of the attachment and repossession of the property.[5]

§ 529. —— Assignee in Bankruptcy of Attachment Defendant

An assignee in bankruptcy of attachment defendant may recover the actual damages sustained, but the right to recover punitive damages remains with the bankrupt.

It has been held that a bankrupt's right of action on an attachment bond for the wrongful suing out of an attachment passes to the assignee in bankruptcy in so far as the action seeks compensation for injuring, detaining, or converting the property attached, but remains with the bankrupt in so far as the action seeks to recover compensation for injury to the bankrupt's business, reputation, and credit, and vindictive damages for a malicious suing out, or abusive use, of the attachment.[6]

§ 530. —— Owner of Property Attached

The remedy of the owner of the property who is not a party to the attachment proceedings is by an action for wrongful seizure and dispossession, and not by an action for wrongful attachment.

As a general rule, as stated in § 517 above, the basis of an action for a wrongful attachment is the wrongful suing out of the writ; but, in case a writ of attachment is levied on the property of a person other than defendant in the attachment proceedings, the existence of the grounds for an attachment against such defendant is immaterial, and the remedy of the owner of the property is by an action for wrongful seizure and dispossession and not by an action for wrongful attachment.[7]

Claims of third persons have been considered in §§ 339–405.

§ 531. —— Garnishees

The right of a garnishee to sue on the attachment bond has been treated in § 163. Examine Pocket Parts for cases, if any such may arise, as to the right of a garnishee to recover other than on a bond.

§ 532. —— Officer Levying Attachment

The right of the officer levying the attachment to sue on the attachment bond has been treated in § 163. Examine Pocket Parts for cases, if any such may arise, as to the right of the officer to recover other than on a bond.

§ 533. Persons Liable

Ordinarily it is the attachment plaintiff who is liable, although an officer issuing a writ without proper authority may be.

Attachment plaintiff is liable for the damages resulting from the wrongful suing out of the writ, or, under certain circumstances, for a wrongful levy under a writ properly sued out.[8] Several succes-

1. Miss—Collins v. Wheeless, 157 So 82
Okl—Row v. Morris, 49 P (2d) 1103
6 C J p 501 note 36

Tenant

Entire maintainable claim of tenant, owning no personalty on leased premises, and subtenant corporation, to which entire present leasehold interest belonged, for damages by wrongful attachment of such personalty, went out with subtenant's dismissal as party plaintiff on its motion—Collins v. Wheeless, (Miss) 157 So 82

2. L & N. Clothing Co v. Conder, 58 S W (2d) 221, 248 Ky 28

3. Ill—Strobot v. Cordes, 207 Ill. App 442
Neb—Mosher v. Beselin, 261 N W. 126
6 C J p 501 note 38.

4. Kerr v Reece, 27 Kan 469.

5. Cal—Heine v Wright, 244 P. 955, 76 Cal App 338
Utah—St Joseph Stock Yards Co. v. Love, 195 P. 305, 57 Utah 450, 25 A L R 569

Benefit inuring to attachment plaintiff

Attachment defendants, substituting security for attached property, were held not estopped to enforce liability for damages resulting from attachment, in the absence of claim of fraud or deceit or misrepresentation, for the attachment plaintiffs were not harmed but rather received a more efficacious security—Heine v Wright, 244 P. 955, 76 Cal App. 338

6. Doll v. Cooper, 9 Lea (Tenn) 576.

Limit of aggregate recovery

While the bankrupt and his assignee may maintain separate actions and recover, the assignee for the injury to the property, and the bankrupt for the personal tort, yet the aggregate recoveries cannot exceed the amount of the penalty where the action is on the bond—Doll v. Cooper, 9 Lea (Tenn) 576.

7. Central Coffee, etc., Co. v. Welborn, 134 S.W 2, 153 Mo.App 647—6 C.J. p 502 note 43

8. Kan—Schwartzberg v. Central Avenue State Bank, 115 P. 110, 84 Kan. 581.

sive wrongful attachments partly covering the same time are concurrent and not joint, and the injured party may recover from any wrongdoer the entire damages, although he can have only one satisfaction for the same injury.[9]

A corporation as well as a natural person may become liable for wrongful attachment and for exemplary, as well as actual, damages.[10]

A county cannot, it has been held, become liable in damages for a wrongful attachment.[11]

A clerk of court issuing an attachment, in the absence of any affidavit authorizing its issuance, has been held to be liable therefor to a third person injured thereby.[12]

The liability of sureties on the attachment bond is treated in § 375 supra. The liability of the levying officer is discussed generally in the title Sheriffs and Constables § 122 [57 C.J. p 902 note 98–p 904 note 4].

§ 534. —— Liability of Principal for Act of Agent or Attorney

A principal is liable for the wrongful issuance of an attachment by his agent where the latter is acting within the scope of the agency.

One who authorizes or directs his agent or attorney to sue out a writ of attachment, or ratifies the act of the latter in so doing, is liable for actual damages resulting therefrom in case the attachment proves to be wrongful,[13] or the agent is guilty of misconduct while acting within the scope of the agency.[14] So, also, where an agent or attorney, acting maliciously and without probable cause therefor, sues out an attachment in the name of his principal, the latter may be held liable for exemplary damages if he caused or participated in such evil motive or ratified what was done with full knowledge of the existence thereof;[15] but in the absence of such participation or ratification exemplary damages cannot be assessed against the principal.[16]

A general authority to commence suit will warrant an attorney in attaching property and will render the client responsible for any damages occasioned thereby.[17]

2. Actions

§ 535. Methods of Enforcing Liability

Owing to the great variety of statutes on the subject, the methods of enforcing liability for injuries caused by wrongful attachments are very numerous, and in most jurisdictions several modes of obtaining redress for such injuries are open to the attachment defendant, which are discussed in detail in §§ 536–538 following.

§ 536. —— Proceedings in Main Action

a. In general
b. Set-off and counterclaim
c. Reconvention

a. In General

Dependent on the governing statute in the particular jurisdiction, damages may be recovered in the action in which the attachment was issued, after dissolution thereof, or in other proceedings.

There is a variance in the statutes and rules of practice on this subject in the several jurisdictions, and so in a number of jurisdictions damages resulting from a wrongful attachment need not be separately sued for, but may be recovered in the action in which the attachment was issued,[18] while in others damages for the wrongful suing out of an attachment cannot be awarded in the attachment suit, but can be recovered only by proceedings sub-

N Y —Hirshorn v. A. L. Tuska, Son & Co., 281 N.Y.S. 41, 156 Misc. 453
N D —Kelly v Stockgrowers Credit Corporation, 263 N.W. 717—Stringer v Elsaas, 163 N.W. 558, 37 N.D. 20
Wash —Epley v. Hunter, 281 P. 327, 154 Wash. 163.
Tenn.—Davis v. Sloan Oil Co., 13 Tenn. App. 405
Tex —Baker v. Black, (Civ.App.) 83 S.W.(2d) 811, error granted.
6 C.J. p 502 note 52

9. State v. United States Fidelity & Guaranty Co., 95 S.E. 783, 81 W. Va. 749.

10. Ala.—Jefferson County Sav. Bank v. Eborn, 4 So. 336, 84 Ala. 529.

Kan.—Western News Co. v. Wilmarth, 6 P. 786, 33 Kan. 510
Tex.—Emerson v. Skidmore, 25 S.W. 671, 7 Tex. Civ. App. 641.

11. Reed v. Howell County, 28 S.W. 177, 125 Mo. 58, 46 Am.S.R. 466—6 C.J. p. 503 note 55

12. Faulkner v. Brigel, 101 Ind. 329

13. Feury v. McCormick Harvesting Mach. Co., 61 N.W. 162, 6 S.D. 396—6 C.J. p. 504 note 77

Liability not on officer's bond

Where property is wrongfully attached, defendant's proper remedy, on constable's refusal to release property from attachment, is a suit on the attachment bond, and not on the constable's official bond, for the damage has arisen from plaintiff's wrongful attachment.—State ex rel. Barrett v. Bridges, (Mo.App.) 206 S.W. 598.

14. Jones v. Parker, 62 S.E. 261, 81 S.C. 214.

15. Vandiver v. Waller, 39 So. 136, 143 Ala. 411—6 C.J. p. 505 note 78.

16. Jackson v. Smith, 75 Ala. 97

17. Ark.—Foster v. Pitts, 38 S.W. 1114, 63 Ark. 387.
Me.—Fairbanks v. Stanley, 18 Me. 296
Mich.—Brown v. Spiegel, 120 N.W. 579, 156 Mich. 138

18. Selsor v. Arnbrecht, 157 P. 908, 57 Okl. 732—6 C.J. p. 505 note 83.

Law prior to statute

In Oklahoma, prior to Rev. L. (1910)

sequent to the main action (see § 537 infra). The recovery of damages in the same proceedings is an optional rather than an exclusive remedy where the statute is permissive in character,[19] but there is no other remedy available for the recovery of compensatory damages arising from the loss of or injury to the property where the statute is mandatory.[20] In some jurisdictions, on the dissolution or dismissal of the attachment in proper proceedings for that purpose, the damages sustained by a wrongful attachment may be assessed and a judgment therefor rendered against attachment plaintiff and the sureties on his attachment bond,[21] and it has been held that, where it is determined that attachment defendant was not indebted to attachment plaintiff, damages as for the wrongful attachment of defendant's property may thereupon be assessed,[22] even though the grounds on which the attachment was issued were not contested.[23]

In the absence of statutory directions the better practice in attachment suits is to try the main issue first, and then, in the event of defendant succeeding, to take up the trial of the claim for damages.[24]

b. Set-Off and Counterclaim

Dependent on the governing statutory provision, a set-off or counterclaim for the damages sustained may or may not be asserted in the main action.

In regard to the right to counterclaim damages caused by a wrongful attachment in the main suit the decisions are not harmonious, due, in a measure, to variations in the statutes in the several jurisdictions. According to some authorities such a counterclaim is proper,[25] at least where the affidavit and bond for attachment are filed with the petition in the action and the writ is immediately sued out,[26] the reasons given being that such a counterclaim is connected with the subject of the action,[27] arises out of the suit instituted by plaintiff in attachment,[28] or is a claim held by defendant at the commencement of the action.[29] On the other hand, it is held in a number of cases that damages arising from a wrongful attachment are not a proper subject of counterclaim in the main action,[30] for the reasons that the claim therefor does not arise out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim,[31] is not connected with the subject of the action,[32] or is not one on which, at the time of the commencement of the action, defendant could have maintained an action on his part against plaintiff.[33] A counterclaim alleging that the proceedings were maliciously instituted will be dismissed since a determination of the attachment proceedings is a prerequisite to the cause of action and the counterclaim would raise improper issues.[34]

§ 4855, becoming effective, May 16, 1913, a cross action by defendant for wrongful attachment could not be maintained in the same proceedings—Selsor v Arnbrecht, 157 P 908, 57 Okl 732

19. Oklahoma State Bank of Ada v. Reed, 288 P 281, 143 Okl 131, 85 A L R 635.

20. Sonsee v Jones & Green, 248 S W 289, 157 Ark 131—Davidson v Mayhue, 179 S W. 371, 120 Ark. 344

Damages from malicious prosecution

Although the statute requires compensatory damages to be recovered, if at all, in the same proceedings, damages arising from malicious prosecution of an attachment or on account of injury to credit or loss of prospective profits are not recoverable in the attachment suit on the dissolution of the attachment, but must be recovered, if at all, in a separate action—Sonsee v Jones & Green, 248 S.W 289, 157 Ark 131

21. Adkins v Lacy, 56 S W 876, 68 Ark 170—6 C J p 505 note 86

22. McLin v Worden, 55 So 353, 99 Miss 547—6 C J. p 505 note 87.

23. McLin v. Worden, 55 So. 353, 99 Miss 547

24. Union Nat Bank v Cross, 75 N W 992, 100 Wis. 174.

25. Crooke v Deas & Duke, 111 So 293, 146 Miss. 260—6 C.J. p 506 note 89

Denying matters stated in application

In a counterclaim not based on the bond, it was held necessary to negative the truth of the matters stated in the application for the attachment.—Swan v Smith, 26 Iowa 87

26 Iowa City Branch State Bank v. Morris, 13 Iowa 136—Stadler v. Parmlee, 10 Iowa 23—Reed v. Chubb, 9 Iowa 178—6 C J p 506 note 90

Necessity for leave of court

In Kansas, under the definition of a set-off in Code Civ.Proc § 100 (Gen St [1915] § 6992), as a cause of action for the recovery of money, a claim for damages on account of a wrongful attachment may be used as a cross demand in the action in which the attachment order was issued, but only where it is set out in a supplemental answer filed by leave of court, inasmuch as it is only by such permission that matters occurring since the beginning of the action can be effectively pleaded in view of Code Civ Proc. § 145 (Gen. St [1915] § 7037)—Deerfield State Bank v. Coerber, 215 P 285, 113 Kan 498.

27. Waugenheim v Graham, 39 Cal. 169—6 C J p 506 note 91

28. Michigan Stove Co v Waco Hardware Co., 54 S W 357, 23 Tex Civ App 293

29. Iowa City Branch State Bank v. Morris, 13 Iowa 136—Stadler v Parmlee, 10 Iowa 23—Reed v Chubb, 9 Iowa 178—6 C.J p 506 note 93.

30. Tacoma Mill Co v Perry, 73 P 801, 32 Wash 650—6 C J p 506 note 94.

31. Hoeven v Morley, 155 N W 191, 36 S D 421—6 C J. p 506 note 95.

Attachment in action on open account

Damages, through a wrongful attachment of defendant's automobile in plaintiff's action on open accounts, could not be pleaded by defendant in the action as a counterclaim, a wrongful attachment being a tort—Hoeven v Morley, 155 N W 191, 36 S D 421

32. Colo—Esbensen v Hover, 33 P 1008, 3 Colo App 467
Kan—Carver v Shelly, 17 Kan 472
N M—Leyser v Rindskopf, 5 P 540, 3 N M 233
6 C J p 506 note 96

33. Tessier v Englehart, 24 N.W. 734, 18 Neb 167

34. Kassel Poultry Co. v. Sheldon

It has been held that in an action aided by attachment damages on the ground that the attachment was wrongful are not a proper subject of set-off, because not in existence at the commencement of the suit,[35] and that, where a suit is commenced by attachment, damages alleged to be sustained by the issue thereof cannot be set off in such action pending a rule to dissolve the attachment.[36] Nevertheless, in a case where a nonresident plaintiff, after attaching defendant's property, took charge thereof, and without defendant's consent wrongfully sold it and converted the proceeds to his own use, it was held that plaintiff was liable to defendant for the value of the property converted above the debt with interest and costs, which defendant was entitled to set off in the attachment suit.[37]

c. Reconvention

In some jurisdictions a plea in reconvention for damages sustained is proper.

In Texas it is well settled that damages caused by a wrongful attachment may be pleaded in reconvention in the action in which the attachment was sued out, and in so pleading defendant may declare either independently of or on the attachment bond.[38]

In Louisiana it has been held that, where defendant in an action instituted by attachment resides in the same parish as plaintiff, he cannot institute a demand in reconvention for damages growing out of the attachment; but it appears that such a plea is permissible where the parties do not reside in the same parish.[39]

§ 537. —— Proceedings Subsequent to Main Action

In some jurisdictions proceedings for damages can only be had subsequent to the main action. The right to set off the damages in a subsequent action does not exist in the absence of statute.

Dependent on statute or rule of practice in some jurisdictions damages for the wrongful suing out of an attachment can be recovered at law only by proceedings subsequent to the main action.[40] It has been held, however, that defendant in attachment suit at equity may at his discretion, where the attachment has been dismissed, proceed to recover damages by motion before the court that passed upon the original cause.[41] The provisions of the code must be complied with before the court will permit an attachment plaintiff to resort to the harsh and summary method of enforcing the bond by rule.[42]

Ordinarily the right to set up such damages by way of a counterclaim or set-off in a subsequent action does not exist, especially when the damages are incapable of liquidation,[43] but under a statute requiring a bond conditioned that plaintiff shall pay damages if he fails to prosecute his action with effect and recover judgment against defendant, it has been held that, where an attachment has been dissolved, the damages, if capable of liquidation, may be set off in a subsequent action by plaintiff against defendant on the same cause of action.[44]

§ 538. —— Election of Remedies and Effect Thereof

The attachment defendant cannot choose inconsistent remedies.

An action of replevin will lie to recover property wrongfully attached,[45] but if the owner replevies the property he may not proceed under a statute authorizing him to sue for double its

Produce Co, 129 A. 424, 3 N J Misc. 277

Introduction of prejudicial evidence

Counterclaim in attachment proceeding, alleging malicious institution of that proceeding, would raise improper issues, and necessitate introduction of evidence which might be prejudicial to the determination of the main action, and, therefore, motion to strike would be allowed.—Kassel Poultry Co v Sheldon Produce Co, 129 A. 424, 3 N J Misc. 277

35. Donnegan v Armour, 3 Ohio Cir Ct 423, 2 Ohio Cir Dec. 245—6 C J. p 507 note 98.

36. Gunnis v. Cluff, 4 A. 920, 111 Pa 513—Shaw v Folkers, 12 Wkly N C (Pa) 518—6 C J p 507 note 99

37. Abernathy v. Meyer-Bridges Coffee, etc, Co, 99 S.W 942, 30 Ky L 844, rehearing denied 103 S W. 342, 31 Ky L 807.

However, where the attachment was pending when the set-off was filed, and it was thereafter sustained, there could be no recovery on the set-off for the suing out of the attachment, or the levy on defendant's stock of goods, for the locking up of defendant's store, the seizure or holding of the goods under the attachment, or for any injury to defendant's trade or credit—Abernathy v. Meyer-Bridges Coffee, etc., Co, supra

38. Lee v Wilkins, 1 Tex.Unrep Cas 287—6 C J p 507 notes 2, 3.

39. See also Bloch v His Creditors, 16 So 267, 46 La Ann 1334—Coco v Guyral, 36 La Ann 293—Davis v Binion, 5 La Ann. 248—Boyd v Warfield, 6 Mart N S.(La) 671—6 C J p 507 notes 4, 5

40. Lawing v. Schauffu, 34 S W.(2d) 1055, 162 Tenn 79, 85 A.L R. 633—6 C.J. p 505 note 85.

Not permitted by statute

A statute regarding assessment of damages at law on motion, which refers to summary judgments against delinquent officials, does not apply to damages for wrongful attachment against plaintiff in attachment suit at law—Lawing v Schauffu, 34 S.W (2d) 1055, 162 Tenn. 79, 85 A.L R. 633.

41. Macheca v. Panesi, 4 Lea (Tenn) 544—6 C J p 508 note 9.

42. Kerty v. Miles, 6 Ky Op 609

43. Colo—Drake v. Avanzini, 36 P 846, 20 Colo. 104
Wis—Ashland County v. Stahl, 4 N W. 752, 48 Wis 593
6 C J. p 508 note 12.

44. Plunkett v. Sauer, 12 Wkly.N C (Pa) 362

45. Ill—McKinty v. Butts, 217 Ill. App 234
Iowa—Upp v Neuhring, 104 N.W. 350, 127 Iowa 713.

value.[46] Similarly, where plaintiff has the attachment dissolved and the property returned to him he cannot treat the attachment as a conversion and sue for the full value of the property.[47] Case, and not trespass is the proper form of action for maliciously suing out an attachment and causing it to be levied on the property of another.[48]

In some states, on failure of an attachment, defendant may sue either on the attachment undertaking or for malicious attachment.[49] Where a party prosecutes concurrently an action at law on the attachment bond against the principal obligor alone and motions in equity against the principal obligor and his sureties, the court will, on its own motion, require him to elect whether he will proceed at law or in equity.[50] If defendant in attachment counterclaims damages on the bond, a recovery thereon is a bar to a recovery in a subsequent suit of any further damages for the same cause;[51] but where judgment is rendered for attachment defendant on a counterclaim for damages, and the judgment orders, in addition to the payment of damages, the return of the property or the payment of its value in a designated sum, and the damages are paid, but the property is not returned, a suit will lie on the attachment bond for its value as fixed by the judgment.[52] Where two attachments are levied on the same property, and defendant reconvenes in respect to the second and recovers damages, this does not operate as a bar to an action by him against the prior attaching creditor for wrongful attachment.[53]

§ 539. Conditions Precedent

In the absence of statutory requirement, a demand for the payment of damages is not a condition precedent to the institution of suit.

In the absence of any statutory requirement therefor, a demand for the payment of the damages suffered is not necessary as a condition precedent to the commencement of an action for wrongful attachment.[54]

§ 540. Defenses

a. In general
b. Acts or statements of attachment defendant
c. Good faith; justness of claim
d Probable cause, insolvency of debtor
e. Advice of counsel
f. Subsequent levy; return of property

a. In General

In some jurisdictions grounds not asserted in the affidavit are not available as a defense to wrongful attachment, but there is authority to the contrary. Matters which have been adversely decided in the main action cannot be asserted as a defense.

Generally, in an action for wrongful attachment the inquiry is limited to the grounds of attachment alleged in the affidavit, and if these are found not to exist or not to be sufficient, the existence of other grounds which were sufficient furnishes no defense,[55] but there is authority which holds that the existence of any ground of attachment is a complete defense even though such ground is not alleged in the affidavit.[56] The failure of the attaching creditor to file an affidavit for attachment is no defense if there has been an actual levy.[57] Where the action is based upon a conversion of attached property wrongfully sold, it is no defense that the sheriff is also liable for suffering the conversion.[58] Where the issue as to the rightfulness of an attachment has been decided in the main action adversely to the attachment plaintiff, he cannot, in an action for wrongful attachment, set up as a defense that the matters set up in the affidavit were true, or that the attachment proceedings were not wrongful.[59]

b. Acts or Statements of Attachment Defendant

(1) In general
(2) Consent

(1) In General

Acts or statements of attachment defendant which

46. McKinty v. Butts, 217 Ill App 234.
47. Wade v. Ray, 168 P. 447, 67 Okl. 39, L R A 1918B 796.
48. Shaver v. White, 6 Munf (20 Va.) 110, 8 Am D. 730
49. Vesper v. Crane Co, 180 P. 876, 165 Cal. 86, L R A 1915A 541.
50. Kendrick v. Moss, 58 S W. 127, 104 Tenn 376—6 C J. p 508 note 15
51. Davis v. Milburn, 4 Iowa 246.
52. Morrison v Springfield Engine, etc., Co, 51 N.W. 183, 84 Iowa 637.
53. Torrey v Schneider, 11 S W 1068, 74 Tex. 116.
54. Cox v. Robinson, 2 Rob.(La.) 313.

Demand necessary after consent

To recover damages for the hire of slaves seized by attachment it was held not necessary to put the attaching party in default, but where an attachment was levied on slaves, and with the debtor's consent they remained in the hands of attachment plaintiff, in order to enable the former to recover their value, it was held that the latter must be put in default otherwise than by the institution of suit—Cox v. Robinson, 2 Rob (La.) 313.

55. Blum v. Strong, 6 S W. 167, 71 Tex 321, 326—Woods v. Huffman, 64 Tex. 98—6 C J. p 513 note 98
56. Baxley v. Segrest, 4 So. 865, 85 Ala 183—Gabel v. Hammerwell, 44 Ala 336—Lockhart v. Woods, 38 Ala 631—6 C J. p 513 note 99.
57. Miller v. Smith, (C.C A Mo) 1 F (2d) 292.
58. Abernathy v. Meyer-Bridges, etc, Co., 103 S W. 342, 31 Ky.L. 807.
59. Kennedy v. Meacham, (C C. Tenn) 18 F. 313.

do not constitute estoppel or grounds for the attachment cannot be utilized as a defense.

It is no defense to a claim for damages for wrongful attachment that defendant in attachment replevied the goods from the officer and obtained judgment therefor,[60] failed to object to the sale of the goods under the attachment and assisted in making a better sale,[61] did not question the validity of the levy,[62] neglected to bond the property,[63] fraudulently assigned his property shortly after the attachment, unless the fraudulent intent on the part of defendant existed at the time the attachment issued,[64] settled the main action by payment of his indebtedness;[65] made a settlement of an attachment wrongfully brought by giving notes for the alleged debt and payment of costs in order to obtain a release of his property,[66] or released a claim for damages for a subsequent attachment in consideration of its relinquishment.[67] It is a good defense that the affidavit for attachment was founded on statements of matters sufficient to authorize an attachment made by defendant in attachment to plaintiff,[68] or to third persons and communicated to plaintiff,[69] but statements to third persons and not communicated to attachment plaintiff are not effective for this purpose.[70]

Where two separate attachment suits are brought and levies are made thereunder, a settlement by attachment defendant with one of the attaching plaintiffs will not extinguish any cause of action which he may have against the other for a wrongful attachment.[71]

Giving bond. It has been held that, where a defendant in attachment procures the discharge of the attachment and release of the property by giving the bond provided by statute, he cannot thereafter maintain an action for wrongful attachment;[72] but there is also authority for the view that the execution by defendant in attachment of the redelivery bond provided for by statute cannot be regarded as an admission of record that the order of attachment was rightfully obtained or set up as a bar to his right of action on the attachment bond.[73]

(2) Consent

Consent to an attachment is a defense if the attachment has been sued out in reliance thereon but not otherwise.

Consent to an attachment is no defense where the writ was not sued out because of the consent but because the party believed he had grounds for an attachment.[74]

Where the attachment is against a partnership, the consent of one partner bars his right to recover for injuries sustained thereby.[75] Where not collusive the consent of one partner has been held binding on the firm,[76] but there is other authority to the contrary.[77]

c. Good Faith; Justness of Claim

Good faith or justness of claim is no defense.

The good faith of the attachment plaintiff is no defense as against a recovery of actual damages,[78] but the good faith of the attaching plaintiff is available as a defense to the extent of preventing a recovery of exemplary or punitive damages.[79] Similarly the justness of the claim is no defense to a suit for actual damages if the attachment is actually wrongful.[80]

d. Probable Cause; Insolvency of Debtor

Probable cause is a defense against punitive but not against actual damages. Insolvency of the debtor is no defense.

In the absence of a statute so providing, the existence of probable cause for suing out the writ

60. Vincent v McNamara, 39 A. 444, 70 Conn 332—6 C.J. p 511 note 62

61. Decatur First Nat. Bank v Houts, 19 S.W. 1080, 85 Tex 69—6 C.J. p 511 note 63

62. Foster v Dischner, 212 N.W. 506, 51 S.D. 102

63. Watson v. Kennedy, 8 La.Ann 280.

64. Donnell v. Jones, 17 Ala. 689, 52 Am.D. 194.

65. Farmers' & Merchants' State Bank of Hecla v Michael, 153 N.W. 1008, 36 S.D. 172.

66. Hunter v. Penland, (Tex.Civ. App.) 32 S.W. 421.

67. Weston v. Dorr, 25 Me. 176, 43 Am.D. 259.

68. U.S.—Tiblier v. Alford, (C.C.La.) 12 F. 262
Miss.—Cocke v. Kuykendall, 41 Miss 65.

69. Tiblier v. Alford, (C.C.La.) 12 F. 262.

70. Tiblier v. Alford, supra.

71. Carson v. Smith, 34 S.W. 855, 133 Mo. 606.

72. Ind.—Bick v. Lang, 44 N.E. 555, 15 Ind.App. 503.
Minn.—Rachelman v Skinner, 48 N.W. 776, 46 Minn. 196.
6 C.J. p 499 note 16.

73. Alexander v. Jacoby, 23 Ohio St. 358—6 C.J. p 499 note 17

74. Dunlap v. Fox, (Miss.) 2 So. 169.
Consent to attachment of wife's property
A husband who is in possession of his wife's property has no authority to consent to an attachment thereof —Mattingly v. Houston, 52 So. 78, 167 Ala. 167.

75. Barker v. Abbott, 21 S.W. 72, 2 Tex.Civ.App. 147—6 C.J. p 511 note 71.

76. Barker v. Abbott, supra.

77. Thames v. Schloss, 24 So. 835, 120 Ala. 470.

78. Strobot v. Cordes, 207 Ill.App 442—6 C.J. p 512 note 91.

79. Strobot v. Cordes, supra—6 C.J. p 512 note 92.

80. Bartley v. J. M. Radford Grocery Co., (Tex.Civ.App.) 15 S.W. (2d) 46.

is no defense against recovery of actual damages,[81] although it may avail to prevent recovery of exemplary or punitive damages.[82] The fact that there was probable cause for suing out the writ is a complete defense, where, by statute, lack of probable cause is necessary to authorize recovery.[83]

It is no defense to an action for wrongful attachment that defendant was insolvent or suffering pecuniary embarrassment.[84]

e. Advice of Counsel

That the writ was sued out on advice of counsel is no defense to a claim for actual damages, but it may be a defense against exemplary or punitive damages.

That the writ was sued out on advice of counsel is, in the absence of statute, no defense to a claim for actual damages,[85] although such advice may be a defense so far as exemplary damages are claimed,[86] providing that it was based on a full and fair statement of the facts of the case and was followed in good faith.[87] Similarly the attachment plaintiff cannot be held immune from actual damages under a statute which would free him from liability if probable cause existed where, although he has acted on the advice of counsel, he failed to submit all the facts within his knowledge to the attorney.[88]

f. Subsequent Levy; Return of Property

A subsequent levy or the return of the property does not constitute a defense.

In a suit to recover damages for wrongful attachment it cannot be shown that other attachments than defendant's were subsequently levied on the property.[89]

The return of property taken under a wrongful attachment does not furnish a complete defense.[90]

§ 541. Jurisdiction and Venue

The action may be brought in the county where the attachment took place where such is permitted by statute.

Under a statute providing that an action for a trespass may be prosecuted in the county in which the cause of action arose, it has been held that an action for the wrongful seizure of property under a writ of attachment, whether upon the attachment bond or otherwise, may be brought in the county, where the seizure took place, even though none of the defendants are residents of such county.[91]

§ 542. Time to Sue and Limitations

The action must be brought within the time allowed by the statute of limitations.

An action for wrongful attachment must, of course, be brought within the time allowed by the statute of limitations.[92]

§ 543. Parties

The action must in general be by and against the real parties in interest.

Where an assignment for the benefit of creditors has been accepted by some of the beneficiaries and the assignee has taken possession of the property, he is the proper party to maintain an action, independent of the attachment bond for the injury resulting from a wrongful attachment under process against the assignor,[93] whether the seizure was before the assignment[94] or after he had taken possession of the property,[95] and the assignor cannot bring such an action.[96]

Where a personal judgment could be rendered against a sheriff who wrongfully attached exempt property, the sheriff is not a mere nominal party to a suit for wrongful attachment.[97]

§ 544. Pleading

Questions as to the pleadings in actions for wrongful attachment will be considered in the following sections, first, as they relate to the pleadings of the attachment defendant and, second, as they relate to the pleadings of the attachment plaintiff.

81. Strobot v. Cordes, 207 Ill App 442—6 C J p 512 note 96.

82. Ala.—Bradford v. Lawrence, 94 So 103, 208 Ala 248
Ill—Strobot v. Cordes, 207 Ill App 442
6 C J. p 513 note 97 [a].

83. Carey v Gunnison, 1 N.W. 510, 51 Iowa 202

84. Kaufman v Armstrong, 11 S.W 1043, 74 Tex 65

85. Grimestad v. Lofgren, 117 N W. 515, 105 Minn 286, 127 Am.S R 566, 17 L R A (N S) 990—6 C J. p 513 note 1

86. Bradford v Lawrence, 94 So. 103, 208 Ala. 248—6 C.J. p 513 note 2

87. Union Mill Co. v. Prenzler, 69 N W. 876, 100 Iowa 540—6 C J. p 513 note 3.

88. Mills v. Vollmer-Clearwater Co., 217 P. 3, 126 Wash. 73

89. Blum v. Stein, 5 S W. 454, 68 Tex. 608—6 C J. p 514 note 10.

90. Kerr v Mount, 28 N.Y. 659—6 C. J. p 513 note 7.

91. Perry v Stephens, 13 S.W. 984, 77 Tex 246—Cahn v. Bonnett, 62 Tex 674—6 C J. p 514 note 15.

92. Woods v. Huffman, 64 Tex. 98.

93. Rock Island Plow Co v Hill, (Tex Civ.App) 32 S.W. 242—6 C.J. p 514 note 20.

94. Martin-Brown Co v. Henderson, 28 S W 695, 9 Tex.Civ.App 130—6 C J p 514 note 21.

95. Roby v. Meyer, 19 S.W. 557, 84 Tex 336.

96. Ky—Cleveland Coal Co v. Sloan, 14 S W. 279, 90 Ky. 308, 12 Ky.L. 223.
Tex—Roby v. Meyer, 19 S.W. 557, 84 Tex 336—Fechheimer v. Ball, 1 Tex App Civ.Cas. § 766.

97. Russell v Dilley, 159 N.W. 189, 177 Iowa 522.

§ 545. —— On Behalf of Defendant in Attachment

a. In general
b. As to damages

a. In General

The declaration or complaint must allege the facts essential to the plaintiff's cause of action.

The declaration or complaint in an action for wrongful attachment must show that the attachment has been wrongfully sued out and it must state every material fact constituting the cause of action.[98] The fact of dissolution of the attachment should be alleged in jurisdictions in which no cause of action for wrongful attachment arises until dissolution,[99] but where attachment defendant may proceed for a recovery of damages for a wrongful attachment notwithstanding the pendency of the main action, it is unnecessary to allege a final determination of the action.[1] The complaint should describe the property levied on or state facts showing an excuse for failure to do so.[2] Where a recovery may be had for the mere suing out of a wrongful attachment, even though there has been no levy thereunder, it is not necessary that a levy should be alleged.[3] An allegation that plaintiff was the owner of the attached property on a certain day, which was the day of the levy, is sufficient, since the law ordinarily takes no notice of fractions of a day.[4]

Probable cause; malice. Where malice or want of probable cause is, under the statute, an element of wrongful attachment, it is necessary to make the allegation, even though only actual damages are sought or the form of the proceeding is such that only actual damages are recoverable,[5] but the rule is otherwise where actual damages are recoverable, notwithstanding there was probable cause where the recovery sought is for actual damages only.[6] If exemplary damages are sought, malice or want of probable cause must be alleged.[7] Where a wrongful attachment without malice is actionable it has been held that it is not necessary to sue on one count for the wrongful and on another for the malicious attachment of property, the reason being that if an action on the case will lie for wrongful attachment malice merely goes in aggravation of damages.[8]

Reconvention. A general allegation that the attachment was wrongfully sued out is sufficient in a plea in reconvention.[9]

b. As to Damages

Allegations as to special damages must be clear and definite.

Allegations as to damages should be certain and definite,[10] but, although ambiguous or alleging only

98. McDonald v. Louthen, 208 S.W. 423, 137 Ark. 167—6 C.J. p 516 note 48, p 517 note 58.

Knowledge of falsity of pleadings
Allegations that the attaching creditors' statement that the debtor was about to dispose of his property with intent to defraud, etc., was false and known to be false are sufficient, although the pleadings established the property was to be disposed of without cash return—Hoover v. First Nat Bank, (Tex Civ.App.) 192 S.W. 1149.

Homestead
A complaint to recover for the wrongful attachment of a homestead exempt from levy, which sets forth all the statements required by the statute for a declaration of a homestead and that the property had not been abandoned as such, is sufficient—McNabb v. Byrnes, 268 P. 428, 92 Cal App. 331.

99. McDonald v. Louthen, 208 S.W. 423, 137 Ark. 167—6 C.J. p 519 note 94.

Allegation held sufficient
An allegation that the attachment was abandoned and waived, and that the cause was fully disposed of, sufficiently shows dissolution of the attachment to warrant an action for damages—Overton v. Sigmon Furniture Mfg. Co., 151 P. 215, 50 Okl 531

1. McLaughlin v. Davis, 14 Kan 168.

2. Schneider v. Ferguson, 14 S.W. 154, 77 Tex 572—6 C.J. p 517 note 70 [a].

Complaint held sufficient.—Overton v. Sigmon Furniture Mfg. Co., 151 P. 215, 50 Okl. 531.

3. O'Brien v. Quinn, 90 P. 166, 35 Mont. 441.

4. O'Brien v. Quinn, supra.

5. Cal.—Vesper v. Crane Co., 180 P. 876, 165 Cal. 36, L.R.A.1915A 541
Iowa.—Bunt v. Rheum, 8 N.W. 667, 52 Iowa 619—Burton v. Knapp, 14 Iowa 196, 81 Am.D. 465
6 C.J. p 518 note 84 [a], [b]

Rebuttal of grounds of attachment
Facts which show the existence of malice and which rebut the grounds of the attachment are properly alleged—Brady-Neely Grocer Co. v. De Foe, (Tex.Civ.App.) 169 S.W. 1135

6. Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914, 61 Okl. 226, L.R.A.1917B 350—6 C.J. p 518 note 86

7. Ala.—Hamilton v. Maxwell, 24 So. 769, 119 Ala. 23
Tex.—Faroux v. Cornwell, 90 S.W. 537, 40 Tex.Civ.App. 529—Elser v. Pierce, 2 Tex.A.Civ.Cas. § 737.
6 C.J. p 518 note 87.

8. Fry v. Estes, 52 Mo.App. 1—6 C.J. p 521 note 19.

9. Black v. Drury, 24 Tex. 289—6 C.J. p 517 note 60

Denial of ground for attachment
One reconvening for wrongful attachment must deny the existence of the ground on which the writ issued, but a plea alleging generally that the writ was wrongfully sued out is sufficient to admit evidence of that fact, in absence of special exception—Richburg v. McIlwaine, (Tex.Civ.App.) 181 S.W. 1166.

10. Colo.—Peterson v. Spears, 209 P. 509, 72 Colo. 40.
Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
6 C.J. p 520 note 8.

Portion of damages caused by attachment
Where a complaint for making a wrongful ancillary attachment did not show what part of the alleged damages was caused by the attachment and what part was incurred in defending the main suit, a demurrer on the ground of ambiguity should be sustained—Peterson v. Spears, 209 P. 509, 72 Colo. 40.

general damages, a complaint will be sustained as stating a cause of action if some damages, even though nominal, are recoverable.[11] The better practice is to itemize the damages,[12] although it is permissible to claim a gross sum embracing all the items.[13] Where special damages are sought, they must be specially pleaded.[14] Thus, unless specially pleaded, attachment defendant cannot recover for attorney's fees expended in relation to the attachment,[15] or for special injuries to business[16] or resulting from loss of credit[17] or reputation.[18] Failure to allege and prove that damages sustained were not paid will not preclude recovery, where no objection to the complaint specified that there was no allegation of nonpayment of damages, and the case was tried on the theory that the damages were not paid.[19]

Reconvention. Where actual and vindictive damages are sought in a plea of reconvention, each should be set out in the pleadings as a separate cause of action.[20]

§ 546. —— On Behalf of Plaintiff in Attachment

Pleadings on the part of the attachment plaintiff are controlled by the rules applicable to pleadings of defendants generally.

A plea to the jurisdiction cannot be interposed by plaintiff in attachment after he has pleaded to the merits.[21] If the answer admits the seizure of the property, attachment plaintiff cannot allege, on the trial, that the property had been previously seized by another creditor.[22]

§ 547. —— Issues, Proof, and Variance

The evidence must conform to the issues presented by the pleadings.

The evidence must conform to the pleadings of the party by whom it is offered.[23] Where defendant's right to counterclaim for damages resulting from the wrongful levy of an attachment in the action was agreed on, so that the only question was the amount of such damages, evidence as to whether the attachment was properly sued out on reasonable cause was immaterial.[24] Under a plea of general issue or general denial it is proper to show a judgment on the merits in favor of attachment defendant in another action for the same cause,[25] and it may be shown that other attachments were issued at about the same time as plaintiff's and levied on the same goods, and that after the dissolution of plaintiff's writ the goods of attachment defendant, which were of a perishable nature, were held by the sheriff under such other writs, and sold on the petition of the parties to such other writs.[26] Under an allegation that the levying of the attachment injured plaintiff's business and credit, evidence that the news of the attachment was published by a mercantile agency is admissible without being more specifically pleaded.[27] In a proceed-

Loss through foreclosure sale

Allegations that plaintiffs had arranged a sale to parties able to pay for the land, and that the actual market value was much less when sold at a foreclosure sale sufficiently alleged actionable damages against a general demurrer—Hoover v. First Nat. Bank, (Tex Civ.App.) 192 S.W. 1149.

Recovery for conversion and exemplary damages

Pleadings alleging conversion by virtue of wrongful attachment and alleging value of property and damages in the same amount, and also praying for exemplary damages and general and special relief, are sufficient to warrant recovery of damages, and should not be limited to recovery for conversion only—Baker v. Black, (Tex Civ App) 83 S.W (2d) 311, error granted.

11. Colo.—Peterson v. Spears, 209 P. 509, 72 Colo. 40.
Tex.—Anderson v. Byrum, (Civ.App.) 73 S.W (2d) 571.

12. Bickham v. Hutchinson, 23 So 902, 50 La.Ann. 765

13. Bickham v. Hutchinson, supra

14. Harper v Cox, 264 P 1075, 125 Kan 563—6 C.J. p 519 note 1.

Loss of sale

(1) Damages through the loss of sale of property because of the wrongful attachment are sufficiently grounded by a showing of the prospective purchaser's willingness and ability to perform and attachment defendant's compliance with the terms of the contract—Hoover v First Nat Bank, (Tex Civ App) 192 S.W. 1149.

(2) Allegations that the prospective purchaser was to give notes which he was able to pay, and that a mortgagee had agreed to extend his debt until such notes were due, allege damages with sufficient certainty—Hoover v. First Nat Bank, supra.

(3) Allegations that the extension of a mortgage on plaintiffs' property depended on closing a prospective sale sufficiently negatived the contention that the mortgage, and not the attachment, caused the sale's failure.—Hoover v. First Nat. Bank, supra.

(4) Allegations that plaintiffs' proposed sale of real estate was broken up by the attachment levy are sufficient, despite the improbability of a trade for some one hundred thirty-seven thousand dollars, being interrupted by attachment for some four thousand dollars with large partial payments already made—Hoover v. First Nat. Bank, supra.

15. Iowa—Vorse v. Phillips, 37 Iowa 428.
Mo—State v. Blackman, 51 Mo 319.

16. Donnell v. Jones, 13 Ala. 490, 48 Am.D. 59.

17. Harper v Cox, 264 P. 1075, 125 Kan. 563—6 C.J. p 519 note 5.

18. Donnell v. Jones, 13 Ala. 490, 48 Am D 59.

19. Kelly v. Stockgrowers Credit Corporation, (N.D.) 263 N.W. 717

20. Fechheimer v. Ball, 1 Tex A Civ Cas. § 766.

21. Thompson v Rosenstein, (Tex Civ App) 67 S.W. 439

22. Kuhn v. Weil, 73 Mo. 213.

23. Miles v. Butler, (Tex App) 16 S.W. 103.

24. Brown v. Spiegel, 133 N.W. 618, 167 Mich 645

25. Warwick v Underwood, 3 Head (Tenn) 238, 75 Am D. 767.

26. Engelke, etc., Milling Co. v. Grunthal, 35 So 17, 46 Fla 349.

27. Hayes v. Union Mercantile Co., 70 P. 975, 27 Mont. 264.

ing to assess damages on the dissolution of an attachment, the issue to be tried and determined by the jury is whether the said attachment was wrongfully sued out, and not whether the statements in the affidavit are actually true or false.[28] Malice or want of probable cause for the attachment need not be proved, as a rule, to recover actual damages only.[29]

§ 548. Evidence

Matters relating to the burden of proof and presumptions, and to the admissibility and sufficiency of evidence, in actions of the character under consideration will be discussed in the following sections.

§ 549. —— Presumptions and Burden of Proof

a Presumptions
b. Burden of proof

a. Presumptions

The presumptions are in favor of the rightfulness and regularity of the attachment.

In an action for wrongful attachment, the presumption is that the writ was properly and lawfully issued,[30] and was sufficient to justify a levy on the property of defendant named therein;[31] the mere fact that the attachment writ was quashed or that the attachment suit was abandoned or dismissed affords no basis for a presumption that the attachment was wrongful.[32]

b. Burden of Proof

Attachment defendant has the burden of proving the matters essential to his recovery.

Attachment defendant has the burden of proving that the attachment was wrongful.[33] Thus, where such matters are essential to his recovery, he must show want of probable cause for suing out the writ,[34] and that there has been an actual levy on his property.[35] The burden is on him to show that he has been injured[36] and the extent of such injury.[37] To prove damages to personalty in possession of the sheriff under the wrongful attachment, there must be sufficient evidence from which the monetary loss can be determined.[38] Where plaintiff alleges that his property has been converted by the refusal of defendant's attorney to deliver it to plaintiff on the latter's written demand, he must show such attorney's authority to receive or act on such demand.[39]

§ 550. —— Admissibility

a. In general
b As to malice
c. As to value of property attached
d. As to damages

a. In General

Otherwise competent and material evidence, which is relevant to the issues, is properly admitted.

As in civil cases generally, in an action for wrongful attachment, evidence which is competent and material to the issues is properly admitted,[40] and incompetent and immaterial evidence is properly excluded.[41] Expert testimony by one who has no spe-

28. Cocke v. Kuykendall, 41 Miss 65.

29. Mo—Talbott v. Great Western Plaster Co, 132 S.W. 15, 151 Mo App 538.
Okl—Reliable Mut. Hail Ins. Co. v. Rogers, 160 P. 914, 61 Okl. 226, L R A 1917B 350.

30. Ingalls v. Christopherson, 114 N.W. 704, 21 S.D. 574—6 C.J. p 522 note 47

31. Ingalls v. Christopherson, supra

32. Hall v. Carroll, (Tex Civ.App.) 67 S.W.(2d) 1068.

33. Richburg v. McIlwaine, (Tex Civ.App.) 131 S.W. 1166—6 C.J. p 523 note 50.

34. Iowa—Dent v. Smith, 5 N.W. 143, 53 Iowa 262—Raver v. Webster, 8 Iowa 502, 66 Am D 96.
Neb—Jones v. Fruin, 42 N.W. 283, 26 Neb 76—Parmer v. Keith, 20 N.W. 103, 16 Neb 91
Tex.—Sanger v. Thomasson, (Civ. App.) 44 S.W. 408.
6 C.J. p 523 note 53.

35. Mazuroff v. Commercial Bank, 97 N.W. 763, 135 Mich. 390.

36. Neb—Jones v. Fruin, 42 N.W. 283, 26 Neb 76—Parmer v. Keith, 20 N.W. 103, 16 Neb 91
Tenn—Ranning v. Reeves, 2 Tenn. Ch. 263
6 C.J. p 523 note 55.

37. Tynberg v. Cohen, (Tex Civ App.) 24 S.W. 314—6 C.J. p 523 note 55 [b], [c].

38. Epley v. Hunter, 281 P. 327, 154 Wash. 163

39. Ward v. United Grocery Co, (Utah) 36 P.(2d) 99

40. Walker v. Jean Lafitte Hotel Corporation, (Tex Civ App.) 94 S.W.(2d) 504—Brady-Neely Grocer Co. v. De Foe, (Tex Civ App.) 169 S.W. 1135. See Troece v. Reinhart-Smith Grocer Co, 197 Ill App. 40.

Release suggesting duress

Where, in an action for wrongful attachment, defendant, plaintiff in attachment, pleaded that, when the claim was settled and the attachment vacated, plaintiff, defendant in attachment, released him from all liability, evidence of such release was admissible, although the complaint showed that the attachment was greatly in excess of the amount due, so as to suggest duress—Hayes v Union Mercantile Co, 70 P. 975, 27 Mont. 264.

41. Iowa—Massena Sav. Bank v. Gamside, 130 N.W. 918, 151 Iowa 168
Md—Sterling v. Marine Bank, 87 A. 697, 120 Md. 396, Ann Cas 1915A 1219.

Illegal sale of liquor on attached premises

Where plaintiff owed defendant rent on a building occupied as a hotel and defendant sued him therefor, brought attachment, took possession of the personalty, and ejected plaintiff, and the attachment was dissolved, in an action for damages evidence that plaintiff was illegally selling liquor, of which defendant knew before he demanded rent, but of which he made no complaint, was properly excluded—Wellington v. Spencer, 132 P. 675, 37 Okl. 461, 46 L R A (N S) 469.

Intent of attachment defendant

Defendant in attachment cannot testify respecting his intent in disposing of his property, the issue be-

cial knowledge of the subject is inadmissible.[42]

Facts and circumstances within the knowledge of attachment plaintiff, giving him reason to believe the truth of the facts stated in the affidavit, are competent to show probable cause for suing out the writ;[43] but matters which were not known to attachment plaintiff at the time of suing out the writ cannot, of course, be shown on the issue of probable cause therefor.[44] In a suit where an attachment has been issued for which defendant claims damages by the plea of reconvention, it is proper to refuse to allow him to be asked whether or not he was willing for the attachment to issue.[45] If the general reputation of attachment defendant is put in issue by the evidence, he may offer evidence to sustain it.[46] In support of a counterclaim for damages caused by a wrongful attachment of a stock of goods, attachment defendant's inventory of the stock is admissible in connection with other evidence on the question of the identity of the property sold.[47] Evidence that the proceeds of the attached property were applied to the satisfaction of the judgment obtained by plaintiff in the attachment suit has been held admissible to show good faith on the part of plaintiff.[48]

b. As to Malice

Where malice is a material factor, otherwise competent evidence, relevant thereto is properly admitted either to prove or disprove its existence

The attachment plaintiff, for the purpose of showing absence of malice, may prove that the debt on which the attachment issued was actually due,[49] that prior to the suing out of the writ attachment defendant had admitted the facts on which the affidavit for attachment was based;[50] that, at the time of suing out the writ, the attachment defendant was greatly involved in debt,[51] or that the money realized by a sale of the attached property was applied to the satisfaction of the judgment obtained by plaintiff in the attachment suit.[52] Evidence that attachment plaintiff acted without malice is not admissible where only actual damages are sought.[53] On the issue of malice, it is incompetent to show that plaintiff in attachment was angry with defendant in attachment after the time of the levy,[54] the sending of notices of the attachment to the commercial papers if plaintiff is not first connected with the sending of such notices,[55] or the value of the property seized where it is not proposed to show that the levy was made on more property than the writ authorized or that plaintiff in attachment gave directions as to the property on which it should be levied,[56] neither is it permissible to introduce affidavits for continuance made by the sheriff, attachment plaintiffs' attorneys, and others in the case in support of the theory that the attaching creditors and the sheriff knew that the debtor's transfer of his goods was an honest one, and that the attachments were levied for vexatious purposes and to compel the grantee to pay the grantor's debts.[57] The intention of the officer levying the attachment is immaterial in the action.[58]

c. As to Value of Property Attached

Matters pertinent to the value of the property attached may be shown.

In determining the value of the property attached at the time of the attachment, it is competent to show what it cost,[59] and an inventory of the goods seized, made by defendant in attachment, is also admissible for this purpose.[60] Plaintiff in attachment may testify as to the value of the attached property where he has shown himself qualified to do so.[61] Written bids for the property, made after advertisement by the receiver appointed therein, are admissible in evidence as tending to show whether the goods sold for a fair price, even if not sufficient of themselves to prove the value.[62] It is not competent to show the amount of insurance that attachment defendant had on the property seized,[63]

ing whether plaintiff in attachment had reasonable grounds to believe that his intent was fraudulent—Sels v Belden, 48 Iowa 451.

42. Zinn v Rice, 37 N.H. 747, 161 Mass 571

43 Iowa—Deere v. Bagley, 45 N W 557, 80 Iowa 197.
Tex—Rainey v. Kemp, 118 S W. 630, 54 Tex Civ.App. 486—Cline v. Hackbarth, 71 S.W. 48, 30 Tex Civ App 591.
6 C J p 526 note 92

44. Raver v. Webster, 3 Iowa 502, 66 Am D 96—6 C J. p 526 note 93

45. Luster v. Campbell, (Tex.Civ. App) 46 S.W. 876.

46. Goldsmith v Picard, 27 Ala 142

47. Michigan Stove Co. v. Waco Hardware Co, 58 S W 734, 24 Tex Civ.App 301

48. Cline v Hackbarth, 71 S W 48, 30 Tex Civ App 591

49. Marshall v Betner, 17 Ala 832

50. Raver v. Webster, 3 Iowa 502, 66 Am D 96

51. Mitchell v Harcourt, 17 N W. 581, 62 Iowa 349

52. Cline v Hackbarth, 71 S W. 48, 30 Tex Civ App 591.

53. Williams v Kane, (Tex Civ. App) 55 S W 974

54. Yarborough v. Weaver, 25 S W. 468, 6 Tex Civ App. 215.

55. Jamison v. Weaver, 46 N.W 996, 81 Iowa 212.

56. Deere v Bagley, 45 N.W. 557, 80 Iowa 197.

57. Buckingham v. Tyler, 41 N W. 868, 74 Mich 101.

58. Rainey v Kemp, 118 S W. 630, 54 Tex Civ App 486

59. Angell v. Hopkins, 21 P 729, 79 Cal 181—6 C J. p 527 note 25

60. Michigan Stove Co v. Waco Hardware Co, 58 S W. 734, 24 Tex. Civ App 301—6 C J. p 527 note 28 [b]

61. Cline v. Hackbarth, 71 S.W. 48, 30 Tex Civ App 591.

62. Citizens' Nat Bank v. Converse, 75 N W. 506, 105 Iowa 669.

63. Blum v. Stein, 5 S.W. 454, 68 Tex. 603.

and evidence as to the value of the goods a considerable time after the attachment is properly refused.[64]

d. As to Damages

Evidence as to damages should be confined to items for which recovery may be had.

Evidence of the amount of attachment defendant's business and profits[65] is admissible on the question of damages, as is also evidence of loss of business.[66] Evidence that defendant in attachment stated that he did not want the property back because he could do better in a suit for damages is not admissible where only actual damages are sought.[67] Where realty and personalty are both attached, and attachment defendant is not deprived of the use of the realty, the value thereof is immaterial on the question of damages for the seizure of the personalty.[68] In an action for wrongful attachment on the ground that the debtor was about to dispose of his property with intent to defraud his creditors, evidence that he stated, prior to the attachment, that if sued he would not pay at all is admissible on the issue of his right to recover exemplary damages.[69]

Injury to credit. Evidence of the amount of attachment defendant's credit and the effect of the attachment on it is admissible.[70] Evidence, for attachment plaintiff, that attachment defendant was reputed insolvent at the time of the attachment is competent on the question whether the latter has sustained any, and what, injury to his credit.[71]

§ 551. —— Weight and Sufficiency

General rules are applicable in determining the weight and sufficiency of the evidence.

As in other civil actions, the verdict or findings are sufficiently sustained by a preponderance of the evidence.[72] That plaintiff in attachment did not act with malice or without probable cause may be shown by the circumstances which existed at the time.[73] While the fact that a writ of attachment was sued out without probable cause does not necessarily establish malice on the part of the attaching plaintiff,[74] it may support an inference of malice sufficient to supply the place of direct proof,[75] the jury being at liberty to draw the inference or not, according to the facts and circumstances of the case.[76] The fact that an attachment was maliciously sued out does not warrant an inference that it was sued out without probable cause,[77] nor is the mere fact that the attachment was discharged,[78] or that judgment was rendered for defendant in the main action,[79] sufficient to establish that the attachment was issued maliciously and without probable cause.

Where the answer in an action for wrongful attachment admits the attachment proceedings, the issue of the attachment, and an adverse decision on appeal, these facts will be deemed sufficiently proved without the introduction of the record of the attachment suit.[80] Payment into court and tender of a sum of money by defendants in attachment amount to a conclusive admission that such money was due when the attachment issued.[81]

64. Williams v Kane, (Tex Civ App) 55 S W 974

65. Hayes v Union Mercantile Co, 70 P. 975, 27 Mont 264—6 C J p 528 note 37

66. Schwartzberg v Central Ave State Bank, 115 P. 110, 84 Kan 581—6 C.J. p 528 note 38

67. Williams v Kane, (Tex Civ. App) 55 S.W 974

68. Imperial Roller Milling Co v Cleburne First Nat Bank, 27 S W 49, 5 Tex.Civ App 686.

69. Pate v. Vardeman, (Tex Civ App) 158 S W. 1183.

70. Hayes v Union Mercantile Co, 70 P 975, 27 Mont. 264

Publication of attachment proceedings

To prove injury to credit, it is competent to introduce evidence that an account of the attachment proceedings was published and to show the extent of the circulation of the publication—Brand v Hinchman, 36 N W. 664, 62 Mich. 590, 13 Am S R. 362—6 C.J. p 528 note 44.

71. Mayfield v. Cotton, 21 Tex 1.

72. Walker v. Jean Lafitte Hotel Corporation, (Tex Civ App) 94 S W.(2d) 504

Testimony of one partner

In an action for wrongfully attaching a stock of goods owned by a firm, evidence that the managing partner was not trying to defraud creditors by holding a discount sale may support a verdict for plaintiffs, although the other partner did not testify as to his intention, since if the attachment was wrongful as to one partner the verdict would be proper—Brady-Neely Grocer Co v. De Foe, (Tex Civ App.) 169 S W 1135.

73. Kaufman v. Wicks, 62 Tex 234—Dwyer v. Testard, 1 Tex A Civ Cas § 1228—6 C J. p 530 notes 74, 83.

Departure from state by insolvent defendant

Evidence that, at the time of the attachment, defendant in attachment was clearly insolvent and had left the state, and that plaintiff in attachment acted in good faith on the advice of counsel, tends to establish that the attachment was not maliciously sued out without probable cause—Strobot v Cordes, 207 Ill. App 442

74. Talbott v Great Western Plaster Co, 86 Mo App 558

75. Willis v McNeill, 57 Tex. 465—6 C J p 530 note 76

76. Ark—Foster v Pitts, 38 S.W. 1114, 63 Ark 387
Neb—Jones v Fruin, 42 N W. 233, 26 Neb 76.
Tex—Willis v McNeill, 57 Tex 465 6 C J p 530 note 77

77. Ark—Foster v Pitts, 38 S W. 1114, 63 Ark 387
Tex—Biering v Galveston First Nat. Bank, 7 S W 90, 69 Tex 599

78. Mitchell v. Mattingly, 1 Meto. (Ky) 237.

79. McGill v. Fuller, 38 P. 1038, 45 Wash. 615.

80. Byford v. Girton, 57 N.W. 588, 90 Iowa 661

81. Mitchell v Harcourt, 17 N.W. 581, 62 Iowa 349.

The return of the levying officer has been held conclusive as to the quantity of goods seized,[82] although a sworn appraisal made under a sheriff's levy is not conclusive as to their value.[83]

§ 552. Trial

a. Questions of law and fact
b. Instructions
c. Verdict or findings

a. Questions of Law and Fact

The rules applicable in other civil cases as to the determination of questions of law and questions of fact control in an action for wrongful attachment.

As in civil cases generally, questions of fact are for the determination of the jury.[84] Where the evidence is conflicting, it is for the jury to determine whether the attachment was sued out wrongfully,[85] maliciously,[86] or without probable cause,[87] and whether a writ of attachment was returned in an action not entered.[88] Similarly, it is for the jury to determine whether injury resulted from the attachment,[89] the value of the goods attached,[90] and the amount of damages to be allowed;[91] but costs definitely fixed by law are to be taxed by the court, and there is no occasion to submit the amount to be allowed to the jury.[92] Issues on which no evidence has been introduced,[93] or on which the evidence is uncontroverted,[94] should not be submitted to the jury. Where no question of fact is involved, the court should determine the issue as to the existence of grounds for the attachment,[95] and the question of damages must not be submitted before the court has made this determination.[96]

b. Instructions

General rules apply as to the instructions.

The court should instruct as to the law applicable to the issues,[97] and the elements and measure of damages.[98] Instructions must not proceed on an assumption not warranted by the facts,[99] invade the province of the jury,[1] or be misleading.[2] Instructions containing correct statements of law predicated on uncontradicted evidence are properly given,[3] and where

82. Schneider v. Ferguson, 14 S.W. 154, 77 Tex. 572

83. Blum v. Stein, 5 S.W. 451, 68 Tex. 608

84. Iowa—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 133
Tex.—Lancaster v. Corsicana Nat. Bank, (Civ.App.) 229 S.W. 580, reversed on other grounds (Com.App.) 240 S.W. 307

Placing property beyond creditors
On counterclaim for wrongful attachment, whether defendant was about to convert the property into money for the purpose of placing it beyond the reach of creditors, or whether plaintiff had reasonable cause to believe so, was a question of fact for the jury.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 133.

85. Mich.—Brand v. Hinchman, 36 N.W. 664, 68 Mich. 590, 13 Am.S.R. 362
Wash.—Epley v. Hunter, 281 P. 327, 154 Wash. 163.

Issue as to excessive levy is properly submitted to jury.—Brady-Neely Grocer Co. v. De Foe, (Tex.Civ.App.) 169 S.W. 1135.

86. Brand v. Hinchman, 36 N.W. 664, 68 Mich. 590, 13 Am.S.R. 362

87. Ky.—L. & N. Clothing Co. v. Conder, 58 S.W.(2d) 221, 248 Ky. 28
Mich.—Brand v. Hinchman, 36 N.W. 664, 68 Mich. 590, 13 Am.S.R. 362

88. Parks v. Hall, 2 Pick.(Mass.) 206

89. Seal v. Holcomb, 107 S.W. 916, 48 Tex.Civ.App. 330—6 C.J. p. 531 note 1.

90. Hirshorn v. A. L. Tuska, Son & Co., 281 N.Y.S. 41, 156 Misc. 452.

91. Ark.—Bank of Wynne & Trust Co. v. Stafford, 195 S.W. 397, 129 Ark. 172
Tex.—Anderson v. Byrum, (Civ.App.) 73 S.W.(2d) 571
Wash.—Epley v. Hunter, 281 P. 327, 154 Wash. 163
6 C.J. p. 531 note 2

92. Ringen Stove Co. v. Bowers, 80 N.W. 318, 109 Iowa 175

93. Epley v. Hunter, 281 P. 327, 154 Wash. 163

Monetary loss
Where no evidence as to monetary loss has been submitted, there is nothing that can be submitted to the jury on this issue.—Epley v. Hunter, 281 P. 327, 154 Wash. 163

Probable cause
Where there is no evidence tending to show probable cause, the question should not be submitted to the jury.—Kompass v. Light, 80 N.W. 1003, 122 Mich. 86

94. Miss.—Turner v. Crane, 75 So. 945, 115 Miss. 134
Tex.—Miller v. L. Wolff Mfg. Co. of Texas, (Civ.App.) 225 S.W. 212
6 C.J. p. 531 note 96 [a].

95. Bank of Wynne & Trust Co. v. Stafford, 195 S.W. 397, 129 Ark. 172

96. Crescent Stave Co. v. Brown, 205 S.W. 937, 181 Ky. 787.

97. Bell v. Fox, 84 S.W. 384, 37 Tex.Civ.App. 522—6 C.J. p. 531 note 7 [a], [b].

Instruction sufficient
An instruction, that one seeking to seize property on an alleged claim is not permitted under attachment or garnishment proceedings to seize more than will secure his alleged claim, and if he does so it is at his peril, and he is liable to the person whose property he has so seized in damages, in an amount sufficient to compensate the person injured for the injury inflicted, was held sufficient to cover the issues in a claim for damages on account of illegal garnishment and attachment.—Beggs Oil Co. v. Deardorf, 222 P. 535, 97 Okl. 33.

98. Cole v. Noerdlinger, 60 P. 57, 22 Wash. 51—6 C.J. p. 532 note 8 [b]–[f]

99. Hanger v. Ives, 62 S.W. 63, 69 Ark. 52

1. Cromwell v. McGoon, 76 N.W. 672, 106 Iowa 266

2. Chism v. C. W. Hall Motor Co., (Tex.Civ.App.) 278 S.W. 350—6 C.J. p. 532 note 13

Instructions not misleading
Instructions in an action for wrongful attachment, where the evidence did not warrant a verdict for profits, authorizing the consideration of profits and use of property and fixing damages accordingly, and correctly stating the law as far as they went, were not erroneous.—State v. U.S. Fidelity & Guaranty Co., 95 S.E. 783, 81 W.Va. 749.

3. Himmelbauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34.

Right to enter premises and seize property
In an action against an attaching creditor and a sheriff for conversion of personalty and for forcible and

the uncontroverted evidence shows that the attachment was wrongfully sued out, a peremptory instruction to this effect may be given.[4] Instructions pertaining to issues which are not necessarily involved are properly refused.[5]

c. Verdict or Findings

A verdict contrary to the law or to the evidence cannot be sustained.

A verdict contrary to the law or unsupported by the evidence should be set aside.[6]

§ 553. Judgment

The judgment must be supported by the pleadings and proof.

Where one of the attaching creditors files no answer to a suit for wrongful attachment, and plaintiff fails to show liability as to any of such creditors, it is not error to deny judgment by default against a creditor thus failing to file an answer.[7] Where the jury found specially that defendant in attachment was entitled to damages for the wrongful suing out of the writ, and that the claim on which it was sued out was not yet due, it was held proper to render a judgment for the amount of the damages found, not diminished by the amount of attachment plaintiff's claim.[8]

§ 554. Appeal and Error

Matters of appeal and error pertinent to this topic conform to the general rules in civil cases discussed in the title Appeal and Error.

§ 555. Damages

The measure of damages does not depend on the particular remedy pursued.

Damages for wrongful attachment are no different whether the action to recover them be upon the bond, a common-law action for wrongful attachment, or by way of counterclaim.[9]

§ 556. —— Actual or Compensatory Damages

Compensation for injuries and losses which are the direct and proximate result of the wrong is recoverable as actual damages.

Where the suing out of the writ was wrongful, the attachment defendant is entitled to recover his actual damages,[10] that is, compensation for injuries and losses which are the direct and proximate result of the wrongful suing out of the writ and the seizure and detention of his property thereunder.[11] Actual loss or injury must have been sustained or no compensatory damages are recoverable.[12]

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wrongful entry of plaintiff's home and occupancy after entry, an instruction that defendants had the right to enter the premises and to seize the property under the writ of attachment was held not erroneous on the uncontradicted evidence that the sheriff procured the key from the constable in apparent possession and made entry peaceably and without force—Himmelbauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34

4. Turner v. Crane, 75 So. 945, 115 Miss 134.

5. Cheek v. Odom, 100 So. 782, 20 Ala App 31.

6. Ga—Gorham v. Felker, 28 S E 1002, 102 Ga 260.
Tex—Kaufman v. Armstrong, 11 S W. 1048, 74 Tex. 65—Miller v L. Wolff Mfg. Co of Texas, (Civ App.) 225 S W. 212.

Finding on issue improperly submitted

Defendant, having without controversy discharged his burden to prove that plaintiff's attachment was wrongful, was entitled to a finding on the question of how much, if any, damage he had sustained, a right precluded by an unsupported finding of the jury that there was no falsity in the affidavit for attachment, rendered on an issue which under the proofs should not have been submitted—Miller v L Wolff Mfg. Co. of Texas, (Tex Civ App.) 225 S W. 212

Finding sufficient

A verdict for plaintiffs in a certain amount "as actual damages over and above the principal and interest of the judgment" in the main action was held sufficient to warrant the cancellation of the judgment recovered by defendant in the attachment action—Brady-Neely Grocer Co. v. De Foe, (Tex Civ App.) 169 S. W. 1135, 1137.

7. Munns v. Loveland, 49 P. 743, 15 Utah 250.

8. Wetherell v. Sprigley, 43 Iowa 41.

9. Allith-Prouty Co v Wallace, 233 P. 144, 32 Wyo 392, 39 A.L.R 513, rehearing denied 234 P. 504, 32 Wyo 392, 39 A.L.R. 513.

10. D C—Palmer v U S, 41 App D C 341
La.—General Motors Acceptance Corporation v Sneed, 121 So. 254, 9 La App 471, modified on other grounds 119 So 417, 167 La. 432—T. E Newsom & Co v. Smith, 120 So. 248, 9 La App. 693.
Tenn.—Russellville Bank & Trust Co. v. McGhee, 65 S.W.(2d) 202, 16 Tenn App 460
6 C J p 534 note 35

Nonprofitable manufacturing plant

Inability of a manufacturing company or firm to operate its plant at a profit does not preclude its right to other damages as compensation for deprivation of the use of property during the period of wrongful seizure and possession by attachment—State v U S Fidelity & Guaranty Co., 95 S E 783, 81 W Va. 749.

11. Ky—Crawford v. Staples, 212 S W. 119, 184 Ky 477.
Okl—James McCord Co. v. Johnson Grocery Co., 172 P. 438, 69 Okl 276
Tex—Taylor v. Smith, (Civ.App.) 27 S W (2d) 825—Spillman v Weston, (Civ App.) 200 S.W. 557.
6 C J. p 534 notes 36, 37.

12. Rains v. Jones, (La App.) 152 So. 356—Ceramı v Daigle, 6 La App 556—Holcomb & Hoke Mfg Co. v. Theodora, 1 La App. 445.

Attachment of realty

The wrongful attachment of realty affords the owner thereof no ground for recovery of actual damages where he has sustained no loss—Taylor v. Smith, (Tex.Civ.App.) 27 S W.(2d) 825—Spillman v. Weston, (Tex Civ App.) 200 S.W. 557.

§ 557. —— Nominal Damages

Nominal damages may be recovered where no actual damage has resulted.

Where a writ of attachment is wrongfully sued out and levied on property, but no actual damage results, nominal damages may be recovered,[13] but nothing more is recoverable[14]

§ 558. —— Exemplary or Punitive Damages

Exemplary or punitive damages are recoverable where actual damage has been sustained and the writ was sued out maliciously and without probable cause.

Exemplary or punitive damages may be allowed where the writ was sued out maliciously and without probable cause,[15] but there can be no recovery beyond actual damages where the attachment was sued out in good faith and based on probable cause[16] In a number of jurisdictions it has been held that the elements of malice and want of probable cause must both be present[17] Where the attachment defendant fails to show any actual damages he cannot recover exemplary damages[18] even though the writ was maliciously sued out[19]

§ 559. —— Elements or Items of Damages in General

Items of damages which are directly and proximately the result of the wrongful attachment are, as a general rule, recoverable.

In accordance with the rule stated in § 556 above, that the recovery of actual damages is limited to compensation for injuries which are the direct and proximate result of the wrongful attachment, the items of damage recoverable are limited to those which flow naturally and reasonably therefrom.[20]

Damages accruing subsequent to the abandonment of the levy are recoverable where the abandonment is unknown to the owner of the property and no actual notice is given to him.[21]

Loss, destruction, or conversion of property.[22] Where property wrongfully attached has been lost, destroyed, converted, or sold, or for any reason cannot be recovered by the attachment defendant, he may recover, as actual damages, the value of the property at the time and place of the seizure,[23] with interest on such value[24] from the time of the seizure

13. Bartley v J M Radford Grocery Co, (Tex Civ App) 15 S.W. (2d) 46—Comer v Powell, (Tex Civ App) 189 S.W. 88—6 C.J. p 534 note 38.

However, a counterclaim for damages asserted in the main action was held correctly withdrawn from the consideration of the jury on the ground that no actual damages were shown—Britson v Tjernagel, 57 N.W. 872, 90 Iowa 356

14. Olivares v Garcia, (Tex Civ App) 56 S.W.(2d) 243—Tsesmelis v Sinton State Bank, (Tex Com App) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ App) 35 S.W. (2d) 451—6 C.J. p 535 note 39.

15. Munro Hotel Co v Brough, 26 Ohio Cir.Ct.(N.S.) 185—6 C.J. p 535 notes 44, 45

16. Ala.—Bradford v Lawrence, 94 So. 103, 208 Ala. 248
Iowa—Carritt v Penny, 196 N.W. 285, 197 Iowa 1157
La.—T. E. Newsom & Co. v. Smith, 120 So. 248, 9 La.App. 693—General Motors Acceptance Corporation v Sneed, 121 So. 254, 9 La.App. 471, modified on other grounds 119 So. 417, 167 La. 432
Tenn.—Gordon v. Kentucky Midland Coal Co., 278 S.W. 68, 152 Tenn. 267, 42 A.L.R. 1052.
6 C.J. p 536 notes 47, 48.

17. Crymble v Mulvaney, 40 P. 499, 21 Colo. 203—6 C.J. p 536 note 46

18. Tsesmelis v Sinton State Bank, (Tex Com App) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ App) 35 S.W.(2d) 451—Olivares v. Garcia, (Tex Civ App) 56 S.W.(2d) 243—Taylor v Smith, (Tex Civ App) 27 S.W.(2d) 825—6 C.J. p 537 note 49

19. Hilfrich v Meyer, 39 P. 455, 11 Wash. 186

20. Bowen v Harris, 59 S.E. 1044, 146 N.C. 385

Matters held not basis of recovery

(1) Injuries from inability to gather a crop because of the seizure of the attachment defendant's working stock—Lang v Fritz, (Tex Civ App) 38 S.W. 233

(2) Loss from an enforced sale under an assignment by the debtor—Donnell v Jones, 13 Ala. 490, 48 Am. D. 59

(3) Loss from being prevented from selling the property during the time the sheriff had it in his possession under the attachment levy—Rambaut v Irving Nat. Bank, 58 N.Y.S. 1056, 42 App.Div. 143.

(4) Loss incurred in surrendering life insurance policies for their cash value in order to pay other debtors—Olivares v Garcia, (Tex Com App) 91 S.W.(2d) 1059, affirming (Civ App) 56 S.W.(2d) 243

(5) Loss of logs, alleged to be due to a seizure of attachment defendant's teams—Bowen v. Harris, 59 S.E. 1044, 146 N.C. 385

(6) Money expended in telegrams to prevent injury to attachment defendant's credit—Johnson v King, 64 Tex. 226

Matters held recoverable

Where a manufacturing plant was seized under a wrongful attachment, it was held that wages or salaries of employees essential to the conduct of business, who were retained on the probability of a resumption of operations after dissolution of the attachment, could be recovered as actual damages—State v U.S. Fidelity & Guaranty Co., 95 S.E. 783, 81 W.Va. 749

21. Kelly v. Stockgrowers Credit Corporation, (N.D.) 263 N.W. 717.

Filing notice with register of deeds

Filing with the register of deeds of a notice of abandonment of a levy of attachment on a growing crop did not relieve the attaching creditor from damages subsequently accruing to the crop, where no actual notice was given to the owner—Kelly v Stockgrowers Credit Corporation, (N.D.) 263 N.W. 717

22. Shields' Adm'rs v Chesser, 180 S.W. 968, 167 Ky. 532.

23. Baker v. Black, (Tex.Civ.App.) 83 S.W.(2d) 811, error granted—Vincent v. Bell, (Tex.Civ.App.) 22 S.W.(2d) 753—6 C.J. p 537 note 64.

Attachment of tobacco crop

Where a decedent wrongfully attached plaintiffs' tobacco crop before it was stripped, packed, and put in hogsheads, plaintiffs' damage, recoverable against the personal representatives, was the reasonable market value of the tobacco at the time of the levy, with interest from such time—Shields' Adm'rs v. Chesser, 180 S.W. 968, 167 Ky. 532.

24. Porter v Knight, 19 N.W. 282, 63 Iowa 365—6 C.J. p 538 note 65.

to the time of the trial[25] or of the rendition of the judgment.[26]

Injury to, or depreciation in value of, property; loss of sale. Injury to, or depreciation in value of, personal property wrongfully attached is an element of actual damages,[27] even though such injury or depreciation was due to the negligence of the levying officer.[28]

While, ordinarily, depreciation in the value of real property, which occurs while the levy remains in force, there being no change of possession or loss of the use thereof, is not the immediate result of the attachment and no recovery beyond nominal damages can be had therefor,[29] where a pending sale is broken up by the levy itself, unaided by the act or delinquency of attachment defendant, and depreciation and loss follow, there is ample foundation for the recovery of actual damages.[30] The loss of a sale alone does not warrant damages if the property has not depreciated in value.[31]

Loss of use of property. Although the property wrongfully attached has been returned to, or recovered by, the attachment defendant, it is proper, in estimating his damages to consider the injury which he has sustained by being deprived of the property and to award him the value of the use of the property during the time it was held under the writ.[32] Where his possession is in no way interfered with, the attachment defendant cannot recover for the loss of the use of his property.[33]

Loss of, or injury to, business. In some jurisdictions, defendant in attachment is permitted to recover compensation for injury to, or loss of, his business as an element of damages for a wrongful attachment,[34] but in other jurisdictions the injury is not viewed as such proximate or natural result of the attachment as to constitute an element of damages if an award of exemplary damages would not be proper,[35] at least where recovery is sought, not for the detention of the property or

25. Simmons Clothing Co. v. Davis, 58 S.W. 655, 3 Ind.T. 379—6 C.J. p. 538 note 66.

26. Willis v. Lowry, 2 S.W. 449, 66 Tex. 540—Schoolher v. Hutchins, 1 S.W. 266, 66 Tex. 324.

27. Ark.—Nothwang v. Harrison, 191 S.W. 2, 126 Ark. 548
N.D.—Kelly v. Stockgrowers Credit Corporation, 263 N.W. 717
Okl.—Leasure v. Hughes, 178 P. 696, 72 Okl. 75.
S.D.—Foster v. Dischner, 212 N.W. 506, 51 S.D. 102.
Tex.—Taylor v. Smith, (Civ.App.) 27 S.W.(2d) 825—Vincent v. Bell, (Civ.App.) 22 S.W.(2d) 753
W.Va.—State v. U. S. Fidelity & Guaranty Co., 95 S.E. 783, 81 W.Va. 749.
6 C.J. p. 538 note 68.

Injury to crop

An attaching creditor which abandoned and canceled an attachment on a growing crop was liable for damages to the crop which accrued because of weather conditions and marauding animals during the time the crop was held by attachment, when at the time of attachment the crop was ready for harvesting and the owner was prepared for and was beginning harvesting operations.—Kelly v. Stockgrowers Credit Corporation, (N.D.) 263 N.W. 717.

Later sale at same price

Where plaintiff attached defendant's personal property, defendant could not, in an action for wrongful attachment, recover damages for the loss of an advantageous sale, having later made a sale at the same price.—Dawson v. Falfurrias State Bank, (Tex.Civ.App.) 181 S.W. 553.

28. Iowa.—Blaul v. Tharp, 49 N.W. 1044, 83 Iowa 665.
Wis.—Chicago Union Nat. Bank v. Cross, 75 N.W. 992, 100 Wis. 174

29. Cal.—Heath v. Lent, 1 Cal. 410
Iowa.—Tisdale v. Major, 75 N.W. 663, 106 Iowa 1, 68 Am.S.R. 263
La.—Brandon v. Allen, 28 La.Ann. 60
Tex.—Trawick v. Martin Brown Co., 14 S.W. 564, 79 Tex. 469
6 C.J. p. 539 note 70

30. Ark.—Arkansas Nat. Bank v. Stuckey, 181 S.W. 913, 121 Ark. 302
Tex.—Tsesmelis v. Sinton State Bank, (Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ.App.) 35 S.W.(2d) 451—Hoover v. First Nat. Bank, (Civ.App.) 192 S.W. 1149
6 C.J. p. 539 note 71.

Measure of damages

Where a wrongful attachment prevented real estate owners from consummating a sale, the measure of damages is the difference between the contract price and the property's market value when sold on mortgage foreclosure while the attachment was still in force.—Hoover v. First Nat. Bank, (Tex.Civ.App.) 192 S.W. 1149

Inquiries as to price

Where an attachment was wrongfully sued out against a lot, defendant's statement that he had some inquiries as to the price of the lot and had conversed with another person about building a house thereon, but, owing to the attachment, nothing had ensued, was of too remote and speculative damages upon which to base a recovery.—Turner v. Crane, 75 So. 945, 115 Miss. 134

31. Tsesmelis v. Sinton State Bank, (Tex.Com.App.) 53 S.W.(2d) 461, 85 A.L.R. 319, affirming (Civ.App.) 35 S.W.(2d) 451

32. Cal.—Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329—Dunlop v. Farmer, 222 P. 640, 64 Cal.App. 691
Mo.—State ex rel. and to Use of Kibble v. First Nat. Bank, (App.) 22 S.W.(2d) 185
Tex.—Taylor v. Smith, (Civ.App.) 27 S.W.(2d) 825
Wash.—Melcher v. Clark, 258 P. 1032, 145 Wash. 95, 54 A.L.R. 448
6 C.J. p. 539 notes 72, 73

33. Ark.—Arkansas Nat. Bank v. Stuckey, 181 S.W. 913, 121 Ark. 302
Tex.—Osborn v. Paul, (Civ.App.) 27 S.W.(2d) 572.

Pasturage rents and profits from cultivation

Although an attachment was wrongfully sued out, the defendant could not recover for loss of pasturage rents, or profits from cultivation of the land, where his possession was in no way interfered with and he had at all times control of the land.—Arkansas Nat. Bank v. Stuckey, 181 S.W. 913, 121 Ark. 302

Use of machinery

The owner of a combine and tractor could not recover damages for loss of the use of the machinery, where physical possession of property was not taken.—Osborn v. Paul, (Tex.Civ.App.) 27 S.W.(2d) 572

34. Ala.—Marx v. Leinkauff, 9 So. 813, 93 Ala. 453
Neb.—Meyer v. Fagan, 51 N.W. 753, 34 Neb. 184
La.—General Motors Acceptance Corporation v. Sneed, 119 So. 417, 167 La. 432, modifying 121 So. 254, 9 La.App. 471.
6 C.J. p. 540 note 74.

35. O'Brien v. Quinn, 90 P. 166, 35 Mont. 441—6 C.J. p. 540 note 75.

interruption of its use but for the value of the property taken.[36] However, where malice and want of probable cause exist, injury to, or loss of, business may be considered in estimating damages.[37]

Loss of probable or prospective profits. In some jurisdictions loss of probable or prospective profits is recoverable even though the attachment was merely wrongful,[38] but in others this is not an element of damage unless the attachment was sued out maliciously and without probable cause,[39] at least where recovery is sought for the value of the property taken and not for its detention or interruption of its use.[40]

Injury to credit. In the absence of malice and want of probable cause the general view is that damages for loss of credit cannot be recovered, being too remote and speculative to be considered in determining actual damages,[41] but there is authority which holds it to be recoverable as an element of actual damage.[42] A recovery for loss of credit has been sustained where the suing out of the writ was malicious and without probable cause,[43] but there is some authority to the effect that it is not an element of damage even though the attachment was maliciously sued out[44]

Injury to feelings. The authorities are not in accord as to whether injury to feelings constitutes an element of damage for wrongful attachment. In some jurisdictions recovery may be had for injury to feelings if the attachment was sued out maliciously and without probable cause,[45] but there is other authority holding that it is not recoverable notwithstanding the maliciousness of the attachment.[46] In the absence of malice or want of probable cause, recovery for such injury has been refused,[47] but there is also authority that a recovery for humiliation and mortification may be had.[48]

Injury to reputation. Damages for injury to reputation have been held not recoverable unless the attachment was malicious as well as wrongful,[49] but there is other authority to the effect that this constitutes an element of damage even in the absence of malice.[50]

Loss of time. Loss of time incident to defending against the attachment has been held not an element of damages.[51] However, it has been held that damages for the time spent in securing a release of the levy may be recovered,[52] and where attachment defendant's stock of goods is wrongfully attached he may recover for the resulting loss of time in his business.[53]

36. Hamlett v. Coates, (Tex Civ App) 182 S.W. 1144.

37. Ala.—Goldsmith v. Picard, 27 Ala. 142.
Kan.—Schwartzberg v. Central Ave State Bank, 115 P. 110, 84 Kan 581.
Mo.—State v. Thomas, 19 Mo 613, 61 Am D. 580.

38. Ga.—Parker v. Nolan, 139 S E 429, 37 Ga.App 205.
Okl.—Leasure v. Hughes, 178 P. 696, 72 Okl 75.
6 C J. p 540 note 77.

39. Long v. Burley State Bank, 165 P. 1119, 30 Idaho 392—6 C J. p 540 note 78.

40. Hamlett v. Coates, (Tex Civ. App) 182 S W 1144.

Rule stated

The general rule that one injured by a wrongful attachment cannot recover for loss of future profits applies only where the measure of damages is the value of property taken, and not where the recovery is for detention of property or interruption of its use.—Hamlett v. Coates, (Tex Civ App) 182 S W. 1144

41. First Nat Bank v. Cooper, (Tex Civ App) 12 S W (2d) 271—6 C J p 541 notes 80, 82

42. Ala.—Bell v. Seals Piano & Organ Co, 78 So. 806, 201 Ala. 428
La.—General Motors Acceptance Corporation v. Sneed, 119 So. 417, 167 La 432, modifying 121 S W. 254, 9 La App 471
6 C J p 541 note 79.

Difficulty of ascertainment

The difficulty of ascertaining damages to defendant's business and credit from wrongful attachment does not defeat his right thereto.—General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La 432, modifying 121 So. 254, 9 La App 471

43. La.—Offutt v. Edwards, 9 Rob 90
Mich.—Grimes v Bowerman, 52 N.W. 751, 92 Mich 258.
Tex.—Lewis v Taylor, (Civ App) 24 S W 92
6 C J p 541 note 82.

44. Melcher v. Clark, 258 P. 1032, 145 Wash 95, 54 A L R 448

45. N H.—Friel v. Plumer, 43 A. 618, 69 N H. 493, 76 Am S R. 190
Tex.—Trawick v. Martin Brown Co, 14 S W. 564, 79 Tex. 460.

46. Tisdale v. Major, 75 N W. 663, 106 Iowa 1, 68 Am.S R 263

47. Neb.—Henderson v. Weidman, 130 N W. 579, 88 Neb. 813
Wash.—McGill v. Fuller, 88 P. 1038, 45 Wash 615.
6 C J p 541 note 85.

48. Arisman v. Nagle, 148 So. 885, 177 La 583—General Motors Acceptance Corporation v Sneed, 119 So 417, 167 La 432, modifying 121 So. 254, 9 La App. 471.

Mortification, annoyance, and vexation

Damages are recoverable for mortification, annoyance, and vexation caused by the illegal issuance of a writ of attachment.—Hathaway v. Winn, 4 La App 588.

49. Chicago Union Nat. Bank v. Cross, 75 N W 992, 100 Wis. 174—6 C J p 541 note 86

50. Doll v Cooper, 9 Lea (Tenn.) 576—Powers-Taylor Drug Co v. Wafford, (Tenn Ch App) 53 S.W. 243

Injury to social standing

Although the wrongful attachment was not malicious, damages therefor may include something for injury to social standing.—General Motors Acceptance Corporation v. Sneed, 119 So 417, 167 La 432, modifying 121 So 254, 9 La App 471

51. Idaho.—Taylor v. Fluharty, 208 P. 866, 35 Idaho 705.
La.—Lewis v. Martin, (App) 169 So. 269.
Tex.—Craddock v. Goodwin, 54 Tex. 573—Taylor v. Smith, (Civ App) 27 S.W (2d) 825—Lang v. Fritz, (Civ.App) 38 S W. 233.

52. Foster v. Dischner, 212 N.W. 506, 51 S D. 103.

53. Lord v. Wood, 94 N W. 842, 120 Iowa 303.

Measure of damages for loss of time

Where a creditor wrongfully attaches his debtor's stock, the

Subsequent levies. An attachment defendant cannot recover, as an item of actual damage for wrongful attachment, injuries resulting from the levy of attachments by other creditors in consequence of the attachment.[54]

Interest. Although it has been held that interest on money attached[55] or on the damages allowed for wrongful attachment[56] is not recoverable, there is authority for the view that an allowance of interest on the money[57] or the value of personal property,[58] but not real property,[59] wrongfully detained is proper.

§ 560. —— Expenses of Litigation

a. General expenses
b. Counsel fees

a. General Expenses

Reasonable and necessary expenses incurred in defending the attachment proceedings are recoverable, but the expenses incurred in the main suit may not be recovered.

As a rule, reasonable and necessary expenses incurred by the attachment defendant in defending against the wrongful attachment are recoverable as part of the damages.[60] However, expenses incurred in defending the main action are not generally recoverable,[61] and expenses of litigation to procure redress for the trespass cannot be allowed in the absence of aggravation for which punitive damages are recoverable.[62]

b. Counsel Fees

(1) Defending against attachment
(2) Defending principal action

(1) Defending against Attachment

Generally, counsel fees incurred in defending against the attachment may be recovered, but there is authority to the contrary.

In some jurisdictions it is held that the attachment defendant cannot recover any counsel fees as part of his actual damages,[63] but the more generally prevailing view is that reasonable counsel fees incurred or expended in defending against the wrongful attachment are recoverable.[64] The right to recover counsel fees is the same whether such fees have actually been paid or merely incurred,[65] but either actual payment or a definite

measure of the debtor's damages for loss of time is what his time would have been worth in his particular business, and not his reasonable wages, or what he would have been able to earn in other employment—Lord v. Wood, 94 N.W. 842, 120 Iowa 303.

54. Blum v. Davis, 56 Tex. 422.

55. Taylor v Fluharty, 208 P 866, 35 Idaho 705

56. Preston v Slocomb, 1 La.Ann. 382—6 C J p 542 note 92

57. U S—Jacobus v Monongahela Nat. Bank, (C C Pa.) 35 F. 395.

Ga.—Green Fruit Co. v Pate, 24 S E. 455, 99 Ga. 60—Cincinnati Fourth Nat Bank v. Mayer, 24 So. 453, 96 Ga 728

Mo—State v. McHale, 16 Mo App 478.

6 C.J. p 542 note 93.

58. Kauffman v. Babcock, 2 S W 878, 67 Tex. 241—6 C J. p 542 note 94.

59 Tilton v. J. L Gates Land Co, 121 N.W. 331, 140 Wis 197

60. Leasure v. Hughes, 178 P 696, 72 Okl. 75—6 C J. p 542 note 96.

As exemplary damages

Expenses in attending court might be recovered as exemplary damages but not as actual damages—Craddock v Goodwin, 54 Tex. 573—First Nat. Bank v. Cooper, (Tex. Civ App) 12 S W.(2d) 271.

Premium for replevy bond

Premiums paid for replevy bond to secure release of the property are recoverable, where attachment was wrongfully sued out—Gordon v Kentucky Midland Coal Co, 278 S W 68, 152 Tenn 267, 42 A L R 1052—6 C J p 542 note 96 [e], [g].

61. Peterson v. Speare, 209 P. 509, 72 Colo. 40—6 C J p 543 note 97

62. Cottrell v. Russell, 21 Mo App. 1

63. Ark.—Arkansas Nat Bank v. Stuckey, 181 S W 913, 121 Ark 302
Tenn—Gordon v. Kentucky Midland Coal Co, 278 S W. 68, 152 Tenn 267, 42 A L.R. 1052
Tex—Taylor v Smith, (Civ.App) 27 S W.(2d) 825
6 C J p 543 note 99

Not direct consequences of attachment

Attorney's fees are not actually and naturally the direct consequences of an attachment, so that the attachment defendant, on showing that the attachment was wrongfully sued out, could not recover them as damages—Arkansas Nat Bank v Stuckey, 181 S W. 913, 121 Ark 302

Properly exemplary damages

Attorneys' fees, incurred in attempting to vacate attachment, are elements of exemplary, rather than actual, damages in an action for wrongful attachment—First Nat Bank v. Cooper, (Tex Civ.App.) 12 S W (2d) 271.

Attachments in chancery

Damages by way of attorney's fees may not be allowed in attachments in chancery in the absence of a statute providing therefor—D. Rosenbaum's Sons v. Davis & Andrews Co, 71 So 388, 111 Miss. 278—Bonds v. Garvey, 39 So 492, 87 Miss. 335

64. Cal—Soule v. United States Fidelity & Guaranty Co, 255 P. 886, overruling Heath v. Lent, 1 Cal 410.

La—Price v. Foster, 161 So. 161, 182 La. 79—Anisman v. Nagle, 148 So. 885, 177 La. 533—Cupples Co. Manufacturers, v. Bascowitz, 134 So. 83, 172 La. 254—General Motors Acceptance Corporation v Sneed, 119 So. 417, 167 La. 432, modifying on other grounds 121 So. 254, 9 La.App 471—Hathaway v. Winn, 4 La.App 588—Donohoe Oil & Gas Co. v. Mack-Jourden Co, (App) 144 So. 169, set aside on rehearing 142 So 713.

Miss—Wigginton v. Moore, 113 So. 326, 147 Miss 169—Turner v. Crane, 75 So 945, 115 Miss. 134

Okl—Leasure v. Hughes, 178 P. 696, 72 Okl 75.

S D—Foster v Dischner, 212 N W. 506, 51 S D. 102

Wyo.—Allith-Prouty Co. v. Wallace, 233 P. 144, 32 Wyo. 392, 39 A L R 513, rehearing denied 234 P. 504, 32 Wyo 392, 39 A L R. 513.

6 C J. p 543 note 1.

Fee fixed by court

An award for services rendered under the eye of the court by an attorney whose fee is not disclosed may be fixed by the court—Jackson v Patton, (La.App.) 152 So. 597

65. Neb.—Raymond v. Green, 10 N. W. 709, 12 Neb. 215, 41 Am R 763.
Okl.—Bash v. Howald, 112 P. 1125, 27 Okl. 462.
6 C J. p 544 note 4.

liability to pay must be shown.[66] Where it is impossible to differentiate between the attorney's services for dissolving the attachment and those for defending the main suit, attorney's fees cannot form an element of damages for the wrongful issuance of the writ.[67]

(2) Defending Principal Action

Counsel fees incurred in defending the principal action cannot be recovered unless a trial of the main action is indispensable to the attachment proceedings.

As a general rule, allowance of counsel fees must be limited to those incurred for services in connection with the attachment itself, and cannot be allowed for services in defending the principal action.[68] However, recovery of counsel fees may be permitted where the entire defense to the attachment action merely tends to show the wrongful issuance of the attachment,[69] or where a trial of the principal action is necessary in order to dispose of the attachment.[70]

§ 561. —— Matters in Mitigation

Matters in mitigation of damages may properly be shown.

Matters which affect the amount of damages actually suffered by attachment defendant may be shown in mitigation thereof.[71] It is matter in mitigation or reduction of damages that there has been a return and acceptance of the property seized under the attachment;[72] that the proceeds derived from the sale on execution were applied on the judgment against the attachment defendant;[73] that the attachment defendant had recovered back the property for less than its value;[74] that after seizure the attaching creditor bought the property at a sale under foreclosure of a lien placed thereon by the attachment defendant in favor of another creditor,[75] or that the party suing out the attachment was security on a bond of the attachment defendant, and that the latter at the time the writ was sued out was about to remove his property from the state.[76]

Justness of the claim in the principal suit is no circumstance in mitigation of damages in an action for wrongful attachment;[77] nor can damages be reduced by showing that at the time of the seizure the debtor contemplated selling his goods in bulk at a sacrifice,[78] or that the attachment defendant was insolvent.[79]

§ 562. —— Amount of Allowance in General

The amount of actual damages recoverable is such as will compensate the attachment defendant for his loss proximately caused by the wrong. Exemplary damages should be in proportion to the actual damages.

The amount of actual damages recoverable is such as will compensate the attachment defendant for his loss proximately caused by the act of wrongful attachment and deprivation of possession,[80]

66. La.—Morgan City v. John Dalton Co., 7 La.App. 60—Holmes & Barnes v. Shawnee Milling Co., 4 La.App. 706
Wash.—McGill v. Fuller, 88 P. 1038, 45 Wash. 615

67. Farris v. Swift, 99 So. 893, 156 La. 12—Rains v. Jones, (La.App.) 152 So. 356—Dupuis v. Davis, 139 So. 662, 19 La.App. 160—Green v. Norsworthy, 135 So. 713, 17 La.App. 548—Hathaway v. Winn, 4 La.App. 588—Minges v. Bonnette, 4 La.App. 351

68. Farris v. Swift, 99 So. 893, 156 La. 12—Lewis v. Martin, (La.App.) 169 So. 269—Rains v. Jones, (La.App.) 152 So. 356—Dupuis v. Davis, 139 So. 662, 19 La.App. 160—Green v. Norsworthy, 135 So. 713, 17 La.App. 548—Hathaway v. Winn, 4 La.App. 588—Minges v. Bonnette, 4 La.App. 351—6 C.J. p. 544 note 6

69. Whitney v. Brownewell, 32 N.W. 285, 71 Iowa 251

70. Alith-Prouty Co. v. Wallace, 233 P. 144, 32 Wyo. 392, 39 A.L.R. 513, rehearing denied 234 P. 504, 32 Wyo. 392, 39 A.L.R. 513—6 C.J. p. 545 note 12

Jurisdiction gained by attachment

Where jurisdiction in the cause is gained by attachment on the ground of nonresidence, and it is necessary to defend the case on its merits to determine whether attachment was wrongful, attorney's fees for procuring dissolution of wrongful attachment include those for contesting the merits.—Alith-Prouty Co. v. Wallace, 233 P. 144, 32 Wyo. 392, 39 A.L.R. 513, rehearing denied 234 P. 504, 32 Wyo. 392, 39 A.L.R. 513.

71. Wade v. Ray, 168 P. 447, 67 Okl. 39, L.R.A.1918B 796.

72. McFadden v. Whitney, 18 A. 62, 51 N.J.Law 391—Kerr v. Mount, 28 N.Y. 659—Lyon v. Yates, 52 Barb. (N.Y.) 237—Hanmer v. Wilsey, 17 Wend. (N.Y.) 91.

Refusal to accept redelivery

Where plaintiff, whose stock had been seized on attachment against him, refused a tender of the goods back under circumstances indicating an intent to create a situation from which he might profit, and subsequently brought suit against the sheriff and the attaching creditor and her agent for malicious use of the writ, defendants were liable for the damages naturally resulting from an oppressive execution of the process, and, although plaintiff's refusal to accept redelivery should be considered in assessing damages, it did not destroy the cause of action unless the tender was made at a time when no damages could have resulted.—Black v. Spears, 176 N.W. 469, 209 Mich. 1, modified on other grounds 180 N.W. 593, 213 Mich. 29

73. Ark.—Scanlan v. Guiling, 39 S.W. 713, 63 Ark. 540
Okl.—Wade v. Ray, 168 P. 447, 67 Okl. 39, L.R.A.1918B 796

74. Scott v. Childers, 60 S.W. 775, 24 Tex.Civ.App. 349.

75. Koyer v. White, 25 S.W. 46, 6 Tex.Civ.App. 381

76. Forrest v. Collier, 20 Ala. 175, 56 Am.D. 190

77. Bartley v. J. M. Radford Grocery Co., (Tex.Civ.App.) 15 S.W.(2d) 46.

78. Estes v. Chesney, 16 S.W. 267, 54 Ark. 463.

79. Kaufman v. Armstrong, 11 S.W. 1048, 74 Tex. 65

80. Ark.—Nothwang v. Harrison, 191 S.W. 2, 126 Ark. 548.
Mo.—State ex rel. and to Use of Kibble v. First Nat. Bank, (App.) 22 S.W.(2d) 185.
N.D.—Kelly v. Stockgrowers Credit Corporation, 263 N.W. 717.

with a full consideration of all the elements of damage for which recovery is permitted[81] A fortiori, actual damages are limited to that amount.[82]

Exemplary or punitive damages should be in proportion to the actual damage sustained,[83] the imposition of disproportionate damages indicates that the verdict of the jury was reached through prejudice or passion, or failure to consider the evidence.[84]

Double damages. Under a statute which permits double damages for wrongful seizure of the property, and double its value if sold, double the value of the property may not be recovered if it is not sold, even though the actual damage sustained consists of nothing save the value of the property.[85]

§ 563. —— Limitation to Amount Claimed in Pleading

The amount of damages is limited to that claimed in the pleading.

The damages recoverable by an attachment defendant for a wrongful attachment cannot of course exceed the amount which he has claimed therefor in his pleading.[86]

§ 564. —— Set-Offs

The judgment recovered by attachment plaintiff in the main suit and money realized from the sale of the property which has been paid the attachment defendant may be utilized to offset damages in the action for wrongful attachment.

In an action for wrongful attachment, the judgment recovered for the purchase price of the goods attached by the attachment plaintiff in the main suit may be asserted as a credit against the claim.

81. McClelland v. Dougherty, (Mo App.) 204 S.W. 201.

Attorney's fees

(1) Four hundred dollars attorney's fee for procuring dissolution of attachment of property valued at twenty-five thousand dollars, and involving two days' trial and examination of numerous witnesses, was held reasonable.—General Motors Acceptance Corporation v. Sneed, 119 So. 417, 167 La. 432, modifying 121 So. 254, 9 La.App. 471.

(2) A fee of two hundred fifty dollars, fixed by a district judge for an attorney's services, appraised by several practicing attorneys as worth at least three hundred dollars, in releasing nonresident defendants' wrongfully attached property, worth over twenty-five thousand dollars, was held neither excessive nor inadequate.—Price v. Foster, 161 So. 161, 182 La. 79.

Humiliation, worry, and attorney's fees

Where seven hundred fifty dollars, the sum due from a third party to defendant wife, was garnisheed under a writ of attachment, an award of one hundred dollars to each of defendant spouses for humiliation and worry caused by wrongful attachment, plus one hundred dollars to the wife and fifty dollars to the husband for attorney's fees, was held not inadequate.—Aniaman v. Nagle, 148 So. 885, 177 La. 583.

82. Iowa.—First Nat. Bank v. Schram, 211 N.W. 405, 202 Iowa 791.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.
Okl.—Mannford State Bank v. Arnold, 221 P. 76, 105 Okl. 131.

Actual value of goods converted

Where plaintiff wrongfully attached defendant's stock of merchandise, preventing intended sale and converting goods to its own use, defendant could recover as damages no more than the actual value of the goods.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183

Costs and expenses

In an action to recover damages for unlawful attachment of household goods, where the evidence showed that the goods were attached after plaintiff had left the town in which they were, and that the goods were held for about five or six weeks, when they were released, a judgment for eight hundred and eight dollars and twelve cents was erroneous, the costs and expenses which seemed to be the proper elements of damage sustained by the plaintiff amounting to about one hundred dollars.—Henderson v. Weidman, 130 N.W. 579, 88 Neb. 813

Loss of use exceeding value of property

In an action for damages caused by wrongful levy of a writ of attachment, a six hundred dollar verdict for loss of the use of a team of horses and a wagon of the probable value of about two hundred dollars for about nine months was held excessive.—Mannford State Bank v. Arnold, 221 P. 76, 105 Okl. 131

Loss of reputation and humiliation

In an action for wrongful attachment, where it appeared that defendant had levied on and sold a horse belonging to plaintiff valued at one hundred dollars, it was held that an allowance of five hundred dollars for loss of reputation and humiliation from the levy of the attachment was excessive.—Jensen v. Hallam, 70 N.W. 1121, 51 Neb. 492.

83. Iowa.—Soesbe v. Lines, 164 N.W. 129, 180 Iowa 943
Okl.—Mannford State Bank v. Arnold, 221 P. 76, 105 Okl. 131
6 C.J. p. 545 note 30.

Exemplary damages held excessive

Allowance of one hundred twenty-five dollars exemplary damages for attachment, only five dollars actual damages being allowed, and no brutal or harsh treatment being shown, is excessive.—Soesbe v. Lines, 164 N.W. 129, 180 Iowa 943

Exemplary damages held not excessive

(1) Where the attachment proceeding was unwarranted and resorted to more as a means of oppression or extortion than to preserve legal rights, a verdict of two hundred dollars as exemplary damages is not excessive, although the actual damages are assessed at only sixty dollars.—Byford v. Girton, 57 N.W. 588, 90 Iowa 661

(2) An allowance of five hundred dollars exemplary damages, where the actual damages allowed were ninety dollars, is not so disproportionate as to authorize the setting aside of the verdict.—Harkleroad v. Leonard, 67 S.W. 127, 28 Tex.Civ.App. 133

(3) A verdict for thirty-five dollars for the value of a bale of cotton wrongfully attached, and for fifty dollars for exemplary damages, is not excessive.—Lister v. Campbell, (Tex.Civ.App.) 46 S.W. 876.

84. Mannford State Bank v. Arnold, 221 P. 76, 105 Okl. 131

85. Shields' Adm'rs v. Chesser, 180 S.W. 968, 167 Ky. 532

86. Handel v. Kramer, 1 Tex.A.Civ.Cas. § 826.—6 C.J. p. 546 note 32

although not the proper subject for a plea of counterclaim or set-off,[87] but, where one wrongfully levies an attachment on exempt property, converting it to his own use, it has been held that he cannot offset his debt against his liability for the value of the property attached.[88] Where the attachment plaintiff has levied several wrongful attachments and has satisfied the debt by a sale under one of the levies, the payment to the attachment defendant of the surplus realized from the sale can be utilized to offset damages only as to the particular attachment through which it was realized and not as against the other claims.[89] Where defendant in attachment reconvenes for damages, the attachment plaintiff cannot set up as an offset against such claim that, when the property was sold under the levy, he bought it in and settled mortgages on it which were in existence before the attachment, and ask to be subrogated to the rights of the mortgagees.[90]

§ 565. Costs

Costs in actions for wrongful attachment being in the absence of specific statutes controlled by the rules applicable to civil actions generally, the questions relating thereto are considered in the title Costs. Cases, if any may arise, which are not within such rules will be found in the Pocket Parts.

ATTACK. In common understanding, the word has been held to mean to fall upon with force or to assault, as with force of arms;[1] and, in a particular connection, to impeach.[2]

Phrases: "Actual attack,"[3] "attack on the credibility of a witness by way of impeachment,"[4] "preparation for such attack,"[5] and "undertake an attack."[6]

ATTAIN. To arrive at or to reach or come to by progression or motion; hence to achieve or accomplish, that is, to reach by effort; to compass; to gain;[7] also, to acquire or to gain or obtain possession of.[8]

Phrase: "Attaining the age of twenty-one years."[9]

ATTAINDER. It has been said that the word "attainder" is derived from the words "attincta" and "attinctura," and that it is defined to be the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death;[10] that extinction of civil rights and capacities which takes place wherever a person who has committed treason or felony receives sentence of death for his crime;[11] a mark of infamy by means of which the offender becomes "attinctus" or "blackened."[12]

Bills of attainder. The phrase, as it is used in constitutions, federal and state, is defined and distinguished from other terms, and the subject matter fully treated in the title Constitutional Law §§ 452–455 [12 C.J. p 1108 notes 35–47]. It has been said that bills of attainder, or acts of attainder, as they

87. Brady-Neely Grocer Co v. De Foe, (Tex.Civ.App.) 169 S.W. 1135

88. Stephens v. Cox, (Tex.Civ.App.) 255 S.W. 241, rehearing denied 256 S.W. 643.

89. Pate v. Vardeman, (Tex.Civ.App.) 141 S.W. 317.

90. Smith v. Morgan, (Tex.Civ.App.) 56 S.W. 950.

Reason for rule

This would be setting up a contract claim against a claim for tort —Smith v. Morgan, (Tex.Civ.App.) 56 S.W. 950.

1. Webster D., quoted in Phipps v. State, 31 S.W. 397, 400, 34 Tex.Cr. 560—6 C.J. p. 546 note 2.

2. Hector v. State, 48 S.E. 315, 316, 120 Ga. 543—6 C.J. p. 546 note 3.

3. Phipps v. State, 31 S.W. 397, 400, 34 Tex.Cr. 560.

4. Sheppard v. State, 145 S.E. 654, 659, 167 Ga. 326.

5. Phipps v. State, 31 S.W. 397, 400, 34 Tex.Cr. 560

6. Phipps v. State, supra.

7. In re Central Union Trust Co. of New York, 183 N.Y.S. 671, 673, 193 App.Div. 292.

"Attempt" distinguished and sometimes equivalent.—O'Brien v. U. S., (C.C.A.Ill.) 51 F.(2d) 193, 197.

8. Century D., quoted in Jones v. State, (Tex.Cr.) 72 S.W.(2d) 260, 263

9. **Technical use**

"Attaining" has a technical meaning when so used "And if a contingent legacy be left to anyone, as when he attains, or if he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy." —In re Central Union Trust Co. of New York, 183 N.Y.S. 671, 673, 193 App.Div. 292, quoting 2 Blackstone Comm. p 513

10. Ex p. Garland, 4 Wall. (U.S.) 333, 337, 18 L.Ed. 366, quoting Tomlins L. D.—6 C.J. p. 546 note 5.

"Conviction" distinguished.—Jacob L. D., quoted in Ex p. Brown, 8 P. 829, 830, 68 Cal. 176—6 C.J. p. 547 note 7 [a].

11. Caldwell v. Hill, 176 S.E. 331, 336, 179 Ga. 417—6 C.J. p. 547 notes 6, 7.

Outlawry in treason

It has been said that an outlawry in treason amounts to an attainder —Cozens v. Long, 3 N.J.Law 331, 340, citing 4 Blackstone Comm. p. 314

"Sentence of disqualification to hold office" compared

"While technical attainder, working a corruption of the blood, does not exist in the United States, yet a sentence of disqualification to hold or enjoy any office of honor, profit, or trust which is provided by the constitution in case of conviction by impeachment is within the primary definition of the term."—State v. Hastings, 55 N.W. 774, 781, 37 Neb. 96.

12. State v. Hastings, supra.

were called after they were passed into statutes, were laws which declared certain persons attainted, and their blood corrupted so that it had lost all heritable quality.[13]

Other phrases: "Attainder of treason,"[14] and "no bill of attainder . . . shall be passed."[15]

ATTAINMENT. Act of attaining; also, that which is attained.[16]

ATTAINT. Attainted, stained, or blackened;[17] convicted of a crime.[18]

In old English practice, a writ which lay to inquire whether a jury of twelve men gave a false verdict.[19]

Phrase: "Attainted of waste."[20]

ATTAINT D'UNE CAUSE. In French law, the gain of a suit.[21]

ATTEINDRE. Law French, to reach to; to overtake or come to.[22]

ATTEMPT.

As Noun

The term, as used in the criminal law, is defined and the subject matter to which it relates fully treated in the title Criminal Law §§ 73–78 [16 C.J. p 111 note 91–p 119 note 79]. It has been said that "attempt" is an indefinite term,[23] but one well understood both in law and by people generally.[24] As commonly used, the word implies an act or effort,[25] an actual deed done in pursuance and in furtherance of a design,[26] an exercise of physical force directed to some definite end,[27] or a physical act of causation,[28] an exertion,[29] an intent formed,[30] a purpose[31] or expression of opinion,[32] something more than a mere declaration,[33] a remote effort or indirect measure taken with intent to effect an object,[34] and the possibility of the act attempted.[35] It has been said that it signifies both the act and the intent with which the act is done,[36] and carries within itself the idea of an uncompleted act[37] The term generally means an act, effort, an endeavor or exertion tending toward the accomplishment of a purpose which exceeds a mere intent but falls short of an execution of it;[38]

13. Ex parte Garland, 4 Wall (U S) 333, 387, 18 L Ed 366

14. Ex parte Garland, supra.

15. Caldwell v Hill, 176 S.E 381, 386, 179 Ga 417

16. Webster New Int. D.

"Attempt" distinguished and sometimes equivalent.—O'Brien v U. S, (C C A Ill.) 51 F (2d) 193, 197.

17. Black L. D—Cozens v. Long, 3 N J Law 331, 340.

18. Browne v. Blick, 7 N C. 511, 518

19. Black L. D., citing 3 Blackstone Comm. p 402.

Historical note

(1) "Prior to the practice of granting new trials, the writ of attaint against the jury was the most common means of reversing an unwarranted verdict, and the hardships attending the writ of attaint seem to have led the courts first to modify verdicts and then to grant new trials"—Warner v. Goding, 107 So. 406, 408, 91 Fla. 260.

(2) The writ was abolished by 4 Geo. IV c 50 §§ 60, 61.—Wharton L. Lex.

Procedure under the writ

"This inquiry was made by a grand assize or jury of twenty-four persons, usually knights, and, if they found the verdict a false one, the judgment was that the jurors should become infamous, should forfeit their goods and the profits of their lands, should themselves be imprisoned, and their wives and children thrust out of doors, should have their houses razed, their trees extirpated, and their meadows plowed up, and that the plaintiff should be restored to all that he lost by reason of the unjust verdict."—Black L D, citing 3 Blackstone Comm. p 404—Coke Litt 294b

20. Browne v Blick, 7 N C. 511, 518

21. Black L. D.

22. Adams Gloss.

23. Turner v State, 130 So. 617, 619, 100 Fla. 1078.

24. Ariz—State v. Crawford, 190 P 422, 21 Ariz. 501.
N H—Follett v Standard Fire Ins Co., 92 A. 956, 957, 77 N.H. 457.

25. Groves v State, 42 S E 755, 757, 116 Ga. 516, 59 L R A 593.

26. Radebaugh v Scanlan, 82 N E 544, 547, 41 Ind App. 109.

27. Ala.—Allen v. State, 112 So. 177, 178, 22 Ala App. 74
Ind—Hollister v State, 59 N E 847, 848, 156 Ind. 255

28. McDade v. People, 29 Mich 50, 55—6 C J. p 548 note 18

29. Lewis v. State, 35 Ala 380, 387

30. U S—U. S v. Sugarman, (D C Minn.) 245 F. 604, 606
Ariz—State v. Crawford, 190 P. 422, 21 Ariz 501
6 C.J. p 549 note 55.

31. Cal—In re Bergland's Estate, 182 P 277, 280, 180 Cal 629, 5 A L R. 1363.
Tex—Cirul v. State, 200 S W. 1088, 1089, 83 Tex Cr 8

32. Stow v Converse, 4 Conn 17, 27

33. State v McCarty, 36 P 338, 340, 54 Kan 52.

34. Ala—Allen v State, 112 So. 177, 178, 22 Ala App. 74
N Y—People v. Lawton, 56 Barb. 136, 135

35. Stokes v. State, 46 So. 627, 629, 92 Miss. 415, 21 L R A (N S) 898

36. State v Evans, 73 P 1047, 1048, 27 Utah 12—6 C J p 549 note 57

A concomitant act.—Fox v. State, 34 Ohio St. 377, 379

37. Morton v. State, 72 So 187, 72 Fla 265.

38. U S—Columbian Ins Co of Indiana v. Modern Laundry, (C C A Minn.) 277 F 355, 359, 20 A L R 1159
Ala—Jackson v State, 8 So. 773, 91 Ala 55, 56, 24 Am S R 860—Tharpe v. State, 122 So 698, 23 Ala App 193—Allen v State, 112 So 177, 178, 22 Ala App 74.
Ark—Turnage v State, 30 S.W.(2d) 865, 867, 182 Ark 74
Cal—People v. Mason, 45 P. 182, 183, 113 Cal 76.
N H—Follett v. Standard Fire Ins Co, 92 A. 956, 957, 77 N H 457
Or—Lahey v Lahey, 219 P. 807, 809, 109 Or. 146
Pa—Commonwealth v. Johnson, 167 A 344, 346, 312 Pa 140, 89 A L R 333—Commonwealth v. Crow, 154 A. 283, 285, 303 Pa. 91
6 C J. p 547 note 13–p 549 note 39.

Negative act constituting "attempt"

Suffering an attachment with fraudulent intent constitutes an attempt to transfer fraudulently—Cartright v. Bamberger, 8 So. 264, 265, 90 Ala 405.

an ineffectual act.[39]

The term may be employed also as meaning an attack;[40] an experiment;[41] an offer;[42] a trial;[43] a trial or physical effort to do a particular thing.[44]

Other terms compared and distinguished. "Attempt" is frequently used in statutes as synonymous with "intent."[45] It is, however, more comprehensive than the word "intent;"[46] the distinction between an "intent" and an "attempt" to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution.[47] The word has also been distinguished from "preparation," it being said that there is a clear line of distinction between mere acts of preparation and acts which rise to the dignity of attempts,[48] but that, in a certain connection, statutes have defined "attempt" in terms of specific acts, the purpose being to formulate a comprehensive definition broad enough to include acts in the nature of preparation superseding the narrower conception of the meaning of the word "attempt."[49] It has also been compared with and distinguished from "design," "execution,"[50] "purpose,"[51] and "solicitation."[52]

Phrases: "Attempt at an attempt,"[53] "attempt at fraud,"[54] "attempt of the trustees . . . to add $500,000 to the permanent endowment fund,"[55] "attempt to cause insubordination,"[56] "attempt to commence an action,"[57] "attempt to contest,"[58] "attempt to defeat the provisions of this will,"[59] "attempt to defraud,"[60] "attempt to induce violation of lawful duty,"[61] "attempt to influence the decision of a court,"[62] " 'attempt' to marry,"[63] "attempt to monopolize,"[64] "attempt to sell the stock,"[65] "guilty of attempt;"[66] also, "attempts, and but too successful,"[67] and "attempts to commit felonies."[68]

As Verb

As a verb, the word has been defined variously as meaning to attack; to endeavor; to make an effort; to make an effort to effect; to make an effort upon; to make an endeavor; to make a trial or experiment; to perform an act toward accomplishing a purpose;

39. Lahey v. Lahey, 219 P. 807, 809, 109 Or 146—6 C J. p 547 note 15

40. Jackson v. State, 8 So. 773, 91 Ala. 55, 56, 24 Am S.R. 860—6 C J p 548 note 20.

41. People v. Moran, 25 N E 412, 413, 123 N Y 254, 20 Am S R 732, 10 L R A 109—6 C J p 549 note 30

42. Mo —State v. Fielder, 109 S W. 580, 583, 210 Mo. 188
Pa —Commonwealth v. Harris, 1 Leg Gaz 455, 457
"Offer" sometimes interchangeable.—State v. Woodward, 81 S W 857, 862, 182 Mo. 391, 103 Am S R 646.

43. Com v. Dougherty, 37 Pa. 62, 64—6 C J. p 549 note 38.

44. Lewis v State, 35 Ala. 380, 387 —6 C J. p 549 note 39.

45. State v. Hurley, 64 A 78, 79, 79 Vt. 28, 113 Am S.R 934, 6 L R A (N S.) 804—6 C J p 549 note 56.

46. Cirul v State, 200 S W. 1088, 1089, 83 Tex Cr 8—6 C J. p 549 note 55 [c], p 550 note 58.

47. Or —Lahey v Lahey, 219 P. 807, 809, 109 Or. 146
Tex —Cirul v State, 200 S.W. 1088, 1089, 83 Tex Cr 8.
Va —Merritt v. Commonwealth, 180 S E 395, 397.
6 C J p 550 note 59.

48. Cal —People v. George, 241 P. 97, 101, 74 Cal App 440.
Ga —Groves v. State, 42 S E 755, 756, 116 Ga 516, 59 L R A 598.
Miss —Wiggington v State, 101 So 856, 857, 136 Miss 825.
6 C J p 548 note 27 [a].

49. Commonwealth v Mehales, 188 N E 261, 263, 284 Mass 412.

50. Lahey v Lahey, 219 P 807, 809, 109 Or. 146

51. Gist of the distinction
"Attempt is expressive rather of a moving towards doing the thing than of the purpose itself"—State v Martin, 14 N.C 329, 330—6 C J. p 548, note 25 [a].

52. State v. Bowers, 14 S E 488, 490, 35 S C 262, 28 Am S R 847, 15 L R.A. 199—6 C J. p 548 note 17 [b]

53. State v. Noland, 168 S E. 412, 414, 204 N C. 329.

54. Shaw v. Scottish Commercial Ins. Co, (C C Me) 1 F 761, 763.

55. De Pauw University v Ankeny, 166 P 1148, 97 Wash. 451

Contemplating present and future effort
" 'Attempt' . . . does not necessarily refer to something that had gone before, but is capable of being interpreted as referring to the attempt then being, and thereafter to be, made, to add $500,000 to the permanent fund of the university "—De Pauw University v. Ankeny, 166 P. 1148, 1149, 97 Wash 451

56. U S v. Sugarman, (D C Minn.) 245 F 604, 606

57. N Y.—Sloman v. Bennet, 248 N. Y S. 509, 510, 139 Misc 508.
Ohio—Mulcahy v. Mutach, 1 N E (2d) 651, 652, 51 Ohio App 407
Wyo —In re Big Laramie River, 153 P. 890, 891, 23 Wyo 450.

58. In re Hill's Estate, 169 P. 371, 372, 176 Cal 619

59. In re Bergland's Estate, 182 P. 277, 280, 180 Cal. 629, 5 A L R 1363.

60. Minn —Bahr v. Union Fire Ins. Co, 209 N.W. 490, 491, 167 Minn. 479.
N H —Follett v. Standard Fire Ins. Co, 92 A 956, 957, 77 N.H. 457.
"Fraud" distinguished.—Columbian Ins Co of Indiana v. Modern Laundry, (C C A Minn) 277 F. 355, 359, 20 A.L R 1159.

61. Sabbatino v. U. S, (C C A N Y.) 298 F. 409.

62. In re Stolen, 216 N.W. 127, 129, 193 Wis 602
"Right of petition" compared.—In re Stolen, 216 N W 127, 129, 193 Wis. 602.

63. Lahey v. Lahey, 219 P. 807, 809, 109 Or 146.

64. U S —International Visible Systems Corporation v. Remington-Rand, Inc, (C C A.Ohio) 65 F (2d) 540, 542
Wis.—State v Lewis & Leidersdorf Co, 230 N W. 692, 695, 201 Wis. 543.

65. Andrews v. Chase, (Utah) 49 P. (2d) 938, 941

66. State v. Noland, 168 N E 412, 414, 204 N C. 329
"Attempt to commit crime" distinguished.—State v. Noland, 168 S.E. 412, 414, 204 N C 329

67. Stow v Converse, 4 Conn 17, 36, 37.

68. Stauber v Larkin, 271 N.Y S. 305, 306, 241 App Div. 797.

to try with some effect; to use exertion for any purpose.[69] The verb has sometimes been held equivalent to, and sometimes distinguished from, "attain" (see Attain ante note 7), "intend,"[70] and "try."[71]

Phrases: "Attempt to collect;"[72] also "attempted murder,"[73] "attempted to be fraudulently transferred or conveyed,"[74] and "attempted to prove,"[75] and also "attempting . . . to . . . anticipate a fund,"[76] and "attempting to flee."[77]

ATTEND. To be present at, for purposes of duty, business, curiosity, pleasure, etc., and as an intransitive verb, to give attention; pay regard or heed.[78] It has been said that the word denotes animation and not to be referable to an inanimate object.[79]

Phrases: "Attend to and build the house,"[80] "authority 'to attend to the business of the principal, generally,'"[81] and "to attend the conveyance,"[82] also "'attended' at the taking of the deposition,"[83] "'attended' by a physician,"[84] "by what physician . . . attended,"[85] and "unless such conveyance is attended;"[86] and also, as a participial adjective, "attending physician."[87]

ATTENDANCE. The act of attending or attending on.[88]

Phrases: "Each day's attendance,"[89] "in attendance upon said sessions,"[90] "in attendance . . . upon the conveyance,"[91] "'in attendance' upon the court,"[92] "medical attendance,"[93] and "stated attendance on divine worship."[94]

ATTENDANT. One who is present and takes part in the proceedings;[95] one who owes a duty or service to another, or in some sort depends upon him; one who follows and waits upon another.[96] As an adjective, accompanying, or connected with.[97]

Attendant terms. In English law, terms, usually mortgages, for a long period of years, which are created or kept outstanding for the purpose of attending or waiting upon and protecting the inheritance.[98]

Other phrases: "A stated attendant on divine worship,"[99] "attendant interest,"[1] "attendant or a person accompanying or serving with the armies,"[2] "dis-

69. Ala.—Jackson v. State, 8 So 773, 91 Ala 55, 56, 24 Am S R 860
Ariz.—Downing v. U. S., 68 P. 555, 8 Ariz 31, 32, quoting Webster D
Ill.—Forsyth v Chicago Union Tract Co., 134 Ill App. 123, 125, quoting Century D
N Y.—People v. Moran, 25 N E 412, 413, 123 N.Y. 254, 20 Am S R. 732, 10 L R A 109
6 C J. p 549 notes 40–54.

70. Groves v State, 42 S E 755, 757, 116 Ga. 516, 59 L.R A. 598

71. Berdeaux v. Davis, 58 Ala. 611, 612.

72. Northern Pac Ry. Co v. Snohomish County, 172 P. 878, 881, 101 Wash. 686

73. U S v. Lim San, 17 Philippine 272, 276

"Frustrated murder" distinguished.—U S. v Lim San, 17 Philippine 273, 276 See also Homicide §§ 68, 69 [30 C J. p 12 note 2–p 14 note 26]

74. Cartright v. Bamberger, 8 So 264, 265, 90 Ala 405.

75. Hogan v. Northfield, 56 Vt. 721, 722

76. Graham v. Lee, 23 Beav. 388, 53 Reprint 152.

77. Ex parte Austin, 93 So. 869, 129 Miss 869.

78. Century D.

79. Atterbury v. National Union Fire Ins Co, 31 P.(2d) 489, 490, 94 Colo 518.

80. McPhee v. Young, 21 P. 1014, 1016, 13 Colo 80

81. Coquillard v French, 19 Ind 274, 287.

82. William Kinscherf Co. v. St Paul Fire & Marine Ins Co, 254 N Y S 382, 384, 234 App Div. 385

83. Miller v. McDonald, 13 Wis 673, 675.

84. Mich.—Plumb v Penn Mut. L Ins Co, 65 N W. 611, 613, 103 Mich 94.
Okl.—Sovereign Camp, W. O W. v. Brown, 221 P 1017, 1020, 94 Okl 277
Pa.—McBride v Sun Life Ins. Co of America, 90 Pa Super 35, 41.

85. White v. Provident Sav L. Assur. Soc., 39 N E 771, 773, 163 Mass. 108, 27 L R A. 398.

86. William Kinscherf Co. v. St. Paul Fire & Marine Ins. Co., 254 N Y S 382, 383, 234 App Div. 385

87. Gibson v. American Mutual Life Insurance Co., 37 N.Y. 580, 582

88. Century D.

89. Ala.—Ex parte Pickett, 24 Ala 91, 95
Wis.—State v. Hastings, 16 Wis 337, 339

90. State v. Briggs, 63 N.W. 206, 207, 5 N.D 69

91. William Kinscherf Co. v St. Paul Fire & Marine Ins. Co., 254 N Y.S. 382, 384, 234 App Div. 385.

92. Cal.—Mason v Culbert, 41 P. 464, 108 Cal 247, 249.
R I.—Ellis v Degarmo, 24 A. 579, 580, 17 R I 715, 19 L R A 560.

93. Iowa.—Knapp v. Sioux City, etc., R Co, 32 N W. 18, 20, 71 Iowa 41, 45.
N Y.—People v Pierson, 68 N E. 243, 244, 176 N Y 201, 98 Am S R 666, 63 L R A. 187.
Ohio.—Gilligan v Supreme Council of Royal Arcanum, 26 Ohio Cir Ct 42, 43
6 C J p 550 note 64 [d].

94. People v. Tuthill, 31 N Y. 550, 560

95. Webster New Int. D.

96. Black L. D.

97. Fletcher v. Winnfield Bottling Works, 107 So 103, 104, 160 La 261

98. Black L. D., citing 1 Stephen Comm p 351
In conveyancing
A phrase used in conveyancing to denote estates which are kept alive, after the objects for which they were originally created have ceased, so that they might be deemed merged or satisfied, for the purpose of protecting or strengthening the title of the owner.—Black L D.

99. People v. Tuthill, 31 N.Y. 550, 560

1. Fletcher v. Winnfield Bottling Works, 107 So. 103, 104, 160 La. 261

2. Ex parte Jochen, (D.C.Tex.) 257 F. 200, 205.

honesty of any attendant or attendants,"[3] and "usual medical attendant."[4]

ATTENTAT. Latin, he attempts. In the civil and canon law, anything wrongfully innovated or "attempted" in a suit by an inferior judge, or judge a quo, pending an appeal.[5]

ATTENTION. Consideration; exclusive or especial consideration; notice; observant care; the act or state of attending or heeding.[6] It has been said that the word implies animation and hence is not referable to an inanimate object.[7]

Phrases: "The same shall have prompt attention,"[8] and "your bill . . . shall have attention."[9]

ATTENUATE. To make thin; to make slender or fine; reduce in density; dilute;[10] to make thin or slender as by mechanical or chemical action; to make thin or slender or less consistent; to render less viscid or dense; to rarefy.[11]

Phrase: "Attenuated discharge passages."[12]

ATTERMINARE. In old English law, to put off to a succeeding term; to prolong the time of payment of a debt.[13]

ATTERMOIEMENT. In canon law, a making terms, a composition, as with creditors.[14]

ATTEST. The term comes from the two Latin words "ad" and "testari," which mean literally to witness to or to bear witness; and it has been said that the notion associated with the word, both in its technical and nontechnical use, is that of observation and subscription;[15] and that, although sometimes characterized as not having a sufficiently definite signification,[16] yet it naturally takes some of its force from context and purpose, although "attest" inherently betokens a solemn personal act of authentication of genuineness.[17] In the present tense, the word has been defined as meaning to act as a witness to, to bear witness to a fact, to certify to the verity of a copy of a public document formally by signature, to make a solemn declaration in words or writing to support a fact, or to signify by subscription of his name that the signer has witnessed the execution of the particular instrument;[18] to affirm to be true or genuine;[19] to bear witness to;[20] to certify,[21] to subscribe;[22] to testify;[23] to vouch for;[24] to witness;[25] to witness the execution of a written instrument, at the request of him who makes it, and subscribing the same as a witness.[26] It has been said that the word is appropriately used for the affirmation of persons in their official capacity to test the truth of a writing,[27] and that it is the technical word by which, in the practice of many states, a certifying officer gives assurance to the verity of a copy.[28]

3. Atterbury v. National Union Fire Insurance Co., 31 P (2d) 489, 491, 94 Colo 518.

4. Cushman v. U. S Life Ins Co, 70 N.Y. 72, 78

5. Black L. D, citing Addams Eccl Reports p 22.

6. Ala.—Manier v. Appling, 20 So. 978, 980, 112 Ala 663
Kan.—Bauman v McManus, 89 P. 15, 17, 75 Kan 106, 10 L R A (N S) 1138, quoting Webster D and Century D.

7. Atterbury v. National Union Fire Ins Co, 31 P (2d) 489, 490, 94 Colo. 518.

8. Ala.—Manier v Appling, 20 So 978, 980, 112 Ala 663, 669, quoting Century D.
Kan.—Bauman v McManus, 89 P 15, 17, 75 Kan. 106, 10 L R A (N S.) 1138

9. Atchison First Nat Bank v. Commercial Sav. Bank, 87 P. 746, 747, 74 Kan 606, 118 Am.S.R 340, 8 L R A (N S) 1148, 11 Ann Cas 281—6 C.J. p 551 note 65 [b].

10. New Century D, quoted in Stearns-Roger Mfg Co v Greenawalt, (C C A Colo.) 62 F.(2d) 1033, 1038

11. Webster D., quoted in Stearns-Roger Mfg Co v Greenawalt, supra.

12. Stearns-Roger Mfg. Co. v Greenawalt, supra.

13. Black L D

14. Black L D

15. International Trust Co v. Anthony, 101 P 781, 782, 45 Colo 474, 22 L R A (N S) 1002, 16 Ann Cas 1037

16. U S v. Potter, (C C Mass) 56 F 83, 92.

17. Smith v. Curran, 255 N W. 276, 277, 267 Mich 413, 94 A L R 766
"Authenticate" compared.—U S v. Potter, (C C Mass) 56 F. 83, 92.

18. Lindsey v Realty Trust Co, (Tex Civ App) 75 S W (2d) 322, 324—6 C J p 551 notes 69, 71, p 552 notes 73–76.
Similar definition
"To certify as accurate, genuine, or true"—New Standard D, quoted in Morse v Kroger, 285 P. 185, 188, 87 Mont. 54.

19. Mont.—Morse v Kroger, supra —Ex parte Lockhart, 232 P. 183, 186, 72 Mont. 136.
Neb.—State v McCartney, 236 N W. 339, 340, 121 Neb 153
Tex.—Lindsey v Realty Trust Co, (Civ App) 75 S W.(2d) 322, 324
6 C J p 551 note 70

20. Mont.—Ex parte Lockhart, 232 P. 183, 186, 72 Mont. 136.
Neb.—State v McCartney, 236 N W 339, 340, 121 Neb 153.
Tex.—Lindsey v. Realty Trust Co, (Civ App) 75 S W.(2d) 322, 324
6 C J p 551 note 68

21. Mont.—Morse v Kroger, 285 P. 185, 188, 87 Mont 54—Ex parte Lockhart, 232 P 183, 186, 72 Mont. 136
Pa.—Lipewitz v. Siglin, 17 Pa Dist. 655, 656, quoting Century D
Tex.—Lindsey v. Realty Trust Co, (Civ App) 75 S W (2d) 322, 324
6 C J. p 551 note 72

22. California Canneries Co. v. Scatena, 49 P 462, 463, 117 Cal 447—In re Walker, 42 P 815, 816, 110 Cal 387, 52 Am S R. 104, 30 L R. A. 460

23. Oxford D, quoted in In re Paxon, 70 A. 280, 285, 221 Pa. 93

24. State v. McCartney, 236 N.W. 339, 340, 121 Neb 153.

25. International Trust Co v. Anthony, 101 P 781, 782, 45 Colo. 474, 22 L.R A (N S.) 1002, 16 Ann Cas. 1037.

26. Black L. D.

27. McGuire v. Church, 49 Conn. 248, 249

28. Ex parte Lockhart, 232 P. 183,

Phrases: "Attest: A. R. McDonald, City Clerk,"[29] and "attest by writing;"[30] also "attests a protest;"[31] and also, used participially, "attesting witness."[32]

Attested

In the past tense, the word has been held to mean authenticated;[33] certified;[34] signed in the presence of;[35] verified;[36] witnessed;[37] and, when used with reference to judicial writings or copies thereof, the word seems to have a legal meaning, which is an authentication by the clerk of the court so as to make them receivable in evidence.[38] "Attested" has been distinguished from "executed"[39] and "proved."[40]

Phrases: "A true and attested copy,"[41] "'attested' account,"[42] "attested and subscribed,"[43] "attested by at least two witnesses,"[44] "attested by the signature of a legal voter,"[45] "'attested copy' of the citation,"[46] "attested in his presence,"[47] "attested note,"[48] "attested order,"[49] "by deed or will attested,"[50] "entries were attested,"[51] "reports . . . attested by the signatures . . . of the directors,"[52] and "such bonds . . . attested by the City Clerk."[53]

ATTESTATIO. Law Latin, an attesting, attestation, testimony.[54]

ATTESTATION. "Attestation," as the term applies to a deed, is defined in the title Deeds § 35 [18 C.J. p 193 note 71–p 195 note 5]; and as it applies to the execution of a will, in the title Wills §§ 182–197 [68 C.J. p 671 note 8–p 713 note 88]. In its more general applications, the word has been defined as meaning an act by which one certifies the truth of a fact;[55] an act of authentication;[56] a signature;[57] a solemn or official declaration in support of a fact;[58] a subscription;[59] a verification;[60] the act of witnessing an instrument of writing, at the request of the party making the same, and subscribing it as a witness;[61] the act of witnessing the actual execution of a paper, and subscribing one's name as a witness to that fact;[62] the act of witnessing the

186, 72 Mont. 136—6 C.J. p 552 note 82

29. Morse v Kroger, 285 P. 185, 188, 87 Mont. 54.

30. California Canneries Co. v. Scatena, 49 P. 462, 463, 117 Cal 447

"Subscribe" equivalent.—California Canneries Co. v Scatena, 49 P. 462, 463, 117 Cal. 447.

31. Hudson v. Parker, 1 Rob Eccl 14, 26.

32. In re Reid's Estate, 153 N.W 324, 325, 130 Minn. 256.

Defined as meaning

(1) A person who signs his name to an instrument to prove it, and for the purpose of identifying the maker or makers—Century D., quoted in International Trust Co. v. Anthony, 101 P. 781, 783, 45 Colo 474, 22 L.R.A (N S) 1003, 16 Ann Cas. 1087.

(2) One who sees a writing executed or hears it acknowledged, and, at the request of the party, thereupon signs his name as a witness—Luper v. Werts, 23 P. 850, 855, 19 Or. 122.

(3) One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification.—Bouvier L D., quoted in Hannah v. Brereton, 23 Que Super 98, 105

(4) A subscribing witness—In re Reid's Estate, 153 N.W. 324, 325, 130 Minn. 256—6 C.J. p 555 note 16.

Under the common law a subscribing or attesting witness was an outside party called in to stand as a witness between the parties thereto. Some of the authorities have likened him to an arbitrator if there is ever any dispute about the execution and delivery, or the identity of the instrument For this reason a party to the instrument cannot attest the signature of the other party—Gibson v Penn, 24 Pa Co 244, 246

33. Goss, etc, Co v. People, 4 Ill App 510, 515.

34. Lipewits v. Siglin, 34 Pa Co 584, 586

35. Den v. Matlack, 17 N J Law 86, 104.

36. Donaldson v. Wood, 22 Wend. (N Y) 395, 400

37. International Trust Co. v. Anthony, 101 P. 781, 784, 45 Colo 474, 482, 22 L R A.(N S.) 1003, 16 Ann.Cas. 1087.

38. Vance v. Reardon, 11 S.C L. 299, 303—6 C J. p 553 note 87.

39. Lewis v. Lewis, 13 Barb. 17, 23, affirmed 11 N.Y. 220

40. In re Paxon, 70 A. 280, 285, 221 Pa. 98

41. Century D, quoted in Lipewits v. Siglin, 17 Pa Dist 655, 656.

"A certified copy" equivalent.—Century D, quoted in Lipewits v. Siglin, 17 Pa Dist 655, 656.

42. Donaldson v. Wood, 22 Wend (N. Y.) 395, 400

43. Lord v Lord, 58 N.H. 7, 9, 42 Am R. 565

44. Logwood v. Hussey, 60 Ala 417, 424.

45. State v. McCartney, 236 N.W. 339, 340, 121 Neb 153

46. Beaupre v Schlosberg, 163 A 653, 654, 131 Me 407

47. Den v. Matlack, 17 N J.Law 86, 104

48. Walker v. Warfield, 6 Metc (Mass) 466, 470—Gray v. Bowden, 23 Pick (Mass) 282, 283.

49. Mineola Tribe No. 114, I. O. R M v Lizer, 33 A. 149, 150, 117 Md. 136, 42 L R A.(N S) 1170.

50. In re Paxon, 70 A. 280, 285, 221 Pa. 98.

51. U S. v. Potter, (C C Mass) 56 F 83, 94.

52. Mont—Ex parte Lockhart, 233 P 183, 185, 72 Mont 136
Neb—Gerner v. Mosher, 73 N W. 384, 387, 58 Neb. 135, 46 L R A 244.

53. Smith v Curran, 255 N W. 276, 267 Mich. 413, 94 A L R. 766.

54. Adams Gloss.

55. Hannah v. Brereton, 23 Que.Super 98, 105

56. Ill—Goss, etc., Mfg. Co. v. People, 4 Ill App 510, 515.
Okl—First Nat. Bank v. Devore, 234 P. 734, 735, 110 Okl 283

57. Calkins v. Calkins, 75 N E. 183, 183, 216 Ill 458, 108 Am S R 233, 1 L R A.(N S.) 393—6 C.J. p 554 note 1.

58. Iowa—Sawyer v. Lorenzen, 127 N W. 1091, 1093, 149 Iowa 87, 92, Ann Cas 1912C 940, quoting Webster D.
Okl—First Nat. Bank v. Devore, 234 P. 734, 735, 110 Okl. 283

59. International Trust Co v. Anthony, 101 P 781, 782, 45 Colo 474, 479, 22 L R A (N.S) 1003, 16 Ann Cas 1087—6 C.J. p 554 note 2

60. Wait v. Demeritt, 119 Mass 158

61. In re Jones' Estate, 172 P. 206, 207, 101 Wash. 128—6 C.J. p 553 note 91

62. U S—In re Virgin, (D C Ga) 224 F. 128, 130.
Ga—White v. Magarahan, 13 S E 509, 510, 87 Ga. 217.

signature of an instrument and subscribing the name of the witness in testimony of such fact;[63] the authentication of an instrument by the requisite number of witnesses;[64] the subscription by a person of his name to a written instrument to signify that the same was executed in his presence, or that it is correct.[65] It has been said that the word implies the presence of some person who stands by but is not a party to the transaction.[66]

In its secondary or technical sense, it has been held to mean the certification by the keeper of a record of the verity of the copy,[67] being the act of the officer, as disclosed by his certificate, and not the act of the maker of the instrument;[68] and in this sense it has been said that the word implies that everything essential to the completeness and validity of the instrument so attested has been done;[69] and that it includes the word "copy," although not expressly used.[70]

"Attestation" has been distinguished from "acknowledgment" (see Acknowledgments § 1, 1 C J S p 778 note 6), "execution,"[71] "proof,"[72] and "subscription."[73]

Attestation clause That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.[74] The attestation clause may consist of a simple word such as "witness," "attest," or "test," or there may be no words of attestation at all, save the signature of the witness.[75]

ATTESTOR. One who attests or vouches for.[76]

Attestor of a cautioner. In Scotch practice, a person who attests the sufficiency of a cautioner, and agrees to become "subsidiarie" liable for the debt.[77]

ATTIC. All the rooms immediately below the roof.[78]

Phrase: "Attic story."[79]

ATTILAMENTUM. In old English law, tackling or "tackel;" rigging, furniture, equipment.[80]

ATTILE. In old English law, the rigging or furniture of a ship[81]

ATTINCTA. Law Latin, an attaint, stain, or blackening; a conviction or finding of guilty of some offense.[82]

ATTINCTUS. Literally, stained or blackened.[83]

ATTITUDE. Any condition of things or the relation of persons viewed as the expression of, or as affecting feeling, opinion, intentions, etc.;[84] position as indicating action, feeling, or mood.[85]

Phrases: "Attitude of claiming an adverse interest,"[86] "attitude of mind,"[87] and "the jury will not consider anything . . . but the attitude."[88]

Minn —In re Drusch's Estate, 164 N W 1023, 1024, 188 Minn 322
Okl —First Nat Bank v Devore, 234 P 734, 735, 110 Okl. 283

63. U.S —In re Smith, (D C Ga) 281 F 574, 575—In re Virgin, (D C Ga) 224 F 128, 130
Okl —First Nat Bank v Devore, 234 P. 734, 735, 110 Okl. 283
6 C J. p 553 note 89

64. Lewis v. Lewis, 6 Serg & R (Pa) 489, 490—Beswick's Est, 30 Pa Co 419, 421

65. Colo —International Trust Co v Anthony, 101 P 781, 783, 45 Colo 474, 22 L R A (N S) 1002, 16 Ann Cas 1087.
Wis —Skinner v American Bible Soc, 65 N.W. 1037, 1039, 92 Wis 209

66. Donovan v. St Anthony, etc, El Co, 80 N W 772, 774, 8 N D 585, 73 Am S R 779, 46 L R A 721

67. Wickersham v Johnston, 38 P 89, 90, 104 Cal 407, 43 Am S.R 113

68. First Nat Bank v Devore, 234 P. 734, 735, 110 Okl. 283

69. Beswick's Estate, 30 Pa Co. 419, 421

70. Wickersham v. Johnston, 38 P 89, 90, 104 Cal 407, 43 Am S R 113.

71. As distinct formalities
"Execution" and "attestation" are clearly distinct formalities, the former being the act of the party, the latter of the witnesses only —Black L D.

72. In re Paxon, 70 A. 280, 282, 221 Pa 98

73. Gist of distinction
It has been said that subscription differs from attestation, in that the former is the mere manual or mechanical act of signing—the act of the hand, whereas the latter signifies the mental act of bearing witness to—the act of the senses
Ga —Moore v. Walton, 123 S E 812, 814, 158 Ga 408
Ky —Swift v. Wiley, 1 B Mon. 114, 117
Minn —In re Ludwig's Estate, 81 N W 758, 761, 79 Minn 101
Miss —Maxwell v Lake, 88 So. 326, 329, 127 Miss 107
N H —Tilton v Daniels, 109 A. 145, 79 N H 368, 8 A L R. 1073
Ohio —Tims v. Tims, 32 Ohio Cir Ct 506, 513.
Okl.—In re Klufa's Estate, 188 P. 329, 330, 78 Okl 13—Hill v. Davis, 167 P 465, 466, 64 Okl 253, L R A 1918B 687
Wash —In re Chafey's Estate, 8 P. (2d) 959, 960, 167 Wash. 185.

74. Black L. D. See Moore v. Walton, 123 S E 812, 814, 158 Ga. 408 —Calkins v Calkins, 75 N E 182, 183, 216 Ill 458, 108 Am S R. 233, 1 L R A (N S) 393.

75. Calkins v Calkins, supra.

76. Black L. D

77. Black L. D.

78. Webster New Int. D.

79. Madden v Zoning Board of Review of City of Providence, 136 A 493, 494, 48 R I. 175.

80. Adams Gloss.

81. Black L D

82. Adams Gloss

83. State v Hastings, 55 N.W. 774, 782, 37 Neb 96, 119, citing Rapalje & L L. D

84. Century D.

85. Webster Int. D., quoted in Garman v Commonwealth, 209 S W. 528, 532, 183 Ky 455.

86. Miles v Strong, 36 A. 55, 59, 68 Conn 273.

87. Snavely v. Booth, (Del Super.) 176 A 649, 653.
"Mental approach" equivalent.—Snavely v. Booth, (Del.Super) 176 A 649, 653.

88. Garman v. Commonwealth, 209 S W. 528, 532, 183 Ky. 455.

ATTORN. "Attorn," as the word is used in the law of landlord and tenant, will be defined in the title Landlord and Tenant §§ 277–279 [35 C.J. p 1247 note 97–p 1249 note 40]. It has been said that the verb "attorn," among other meanings, may mean to transfer or turn over to another;[89] to turn over; to transfer to another money or goods; to assign to some particular use or service;[90] to consent to a transfer.[91]

Phrases: "Claims to have 'attorned,'"[92] and "plaintiff had 'attorned.'"[93]

ATTORNAMENTUM. Law Latin, attornment.[94]

ATTORNARE or ATTURNARE. Law Latin, to turn; to exchange; to give one thing in place of another. In feudal law, to attorn; to transfer or turn over.[95] In old English practice, to attorn; to put in one's place; to appoint a substitute or attorney.[96]

ATTORNATIO. Law Latin, an attornment.[97]

ATTORNATO FACIENDO VEL RECIPIENDO. An obsolete writ, which commanded a sheriff or steward of a county court or hundred court to receive and admit an attorney to appear for the person who owed suit of court.[98]

ATTORNATUS. One who is attorned, or put in the place of another; a substitute; hence an attorney.[99]

ATTORNATUS FERE IN OMNIBUS PERSONAM DOMINI REPRESENTAT.[1]

ATTORNE. Law French, in old English law, an attorney.[2]

ATTORNEY. The word, both in its broadest sense as signifying one appointed to act for another, and in the narrow sense signifying one employed to manage a cause in litigation, has been defined and, in the latter sense, the subject-matter fully treated in Attorney and Client post.

Phrases: "'Acting as' attorney,"[3] "agent, attorney, or proxy,"[4] "an attorney employed in the case,"[5] "any attorney . . . specially appointed by the Attorney General,"[6] "a party 'or his attorney,'"[7] "appears of record as the attorney,"[8] "attorney at law" (see Attorney and Client § 1), "attorney for himself as petitioning creditor,"[9] "attorney general" (see Attorney General § 1), "attorney in fact" (see Agency § 4), "attorney is answerable,"[10] "attorney of record" (see Attorney and Client § 3), "attorney or counselor,"[11] "by any attorney of any court of record,"[12] "city attorney,"[13] "embezzlement by agent, attorney, clerk, or servant,"[14] "his agent or attorney at law,"[15] "holds himself out to be an attorney,"[16]

89. Eichelberger v. Sifford, 27 Md. 330, 330.

90. Bouvier L D, quoted in Hemminger v Klaprath, 189 A. 363, 364, 15 N J.Misc. 163.

In feudal law

Where a lord alienod his seigniory, he might, with the consent of the tenant, and in some cases without, attorn or transfer the homage and service of the latter to the alienee or new lord—Black L D.

91. Burrill L D

92. Wilson v. Lyons, 94 N W 636, 637, 4 Neb (Unoff) 406

93. Obermeier v. Mattison, 193 P 915, 93 Or 195.

94. Adams Gloss.

95. Adams Gloss

Attornare rem—to turn or attorn over a thing, as money and goods, that is, to assign or appropriate them to some particular use and service.—Adams Gloss

96. Adams Gloss, citing Reg Orig p 172

97. Adams Gloss, citing Bracton fol 79b

98. Black L D, citing Fitzherbert Nat Brev pp 156, 349

99. Adams Gloss

Attornati et apprentici—attorneys and apprentices—Adams Gloss

Attornatus generalis—a general attorney, one who is authorized to appear in all suits and causes, and in all courts; or in all suits at a particular circuit, or for a specified time—Adams Gloss., citing Reg Orig. pp 20–22.

Attornatus regis or reginæ—the attorney of the king or queen; the attorney general—Adams Gloss, citing 3 Blackstone Comm. p 27.

Attornatus vel procurator—an attorney or procurator (proctor)—Adams Gloss., citing Reg Orig. pp 25b, 281

1. A maxim meaning, "An attorney represents the person of his master in almost all respects"—Adams Gloss, citing Bracton fol 342.

2. Black L D.

3. In re Morse, 126 A. 550, 551, 98 Vt 85, 36 A L R 527.

4. In re West's Estate, 249 N.Y.S 738, 740, 139 Misc 516

5. State v Standard Oil Co. of Louisiana, 113 So. 867, 872, 164 La 334.

6. U S. v Rubin, (D.C Conn) 218 F 245, 250

7. Dezino v William S. Drozda Realty Co, (Mo App) 13 S W (2d) 659, 661.

8. Du Bois v Woodward, 151 A. 366, 367, 8 N.J Misc. 645

9. Unger v. Noxon Chemical Products Co, (C C A Pa) 82 F.(2d) 312, 313

10. Buisson v Potts, 156 So. 408, 410, 180 La. 330.

11. U. S. v Philadelphia & R Ry. Co, (D C Pa.) 221 F 683, 685.

12. Nardi v Poinsatte, (D C.Ind) 46 F (2d) 347, 348.

13. Baxter v. City of Venice, 111 N. E. 111, 112, 271 Ill 233.

14. Chanock v. U. S., 50 App D C. 54, 267 F 612, 613, 11 A L.R 799.

15. Harmon v. Wiggins, 172 S E. 347, 348, 48 Ga App. 469.

16. People v Taylor, 138 P. 762, 763 56 Colo. 441.

"Advertising himself as a lawyer" equivalent.—People v. Taylor, 138 P. 762, 763, 56 Colo 441.

"in case such attorney is one of the subscribing witnesses thereto,"[17] "official assistant district attorney, regularly employed,"[18] "payable to the order of 'C. R. Wattenscheidt, Attorney,'"[19] "powers of the state's attorney,"[20] "relationship between attorney and client,"[21] and "services of an 'attorney;'"[22] also "attorney's costs" (see Attorney and Client § 163), "attorney's fees" (see Attorney and Client §§ 160–163), and "attorney's lien" (see Attorney and Client §§ 207–238).

17. In re Putnam's Will, 238 N Y S 112, 115, 135 Misc. 311
18. People v. Fuller, 282 N.Y.S. 28, 62, 156 Misc 404
19. All v McComas, 161 A. 187, 162 Md 690
20. People v Newcomer, 120 N E 244, 247, 284 Ill 315.

"Powers of the Attorney General" contrasted.—People v Newcomer, 120 N.E. 244, 247, 284 Ill. 315.

21. Ex parte Schneider, (Mo App) 294 S W 736, 738
22. Eagle Indemnity Co v. Industrial Accident Commission of California, 18 P.(2d) 341, 343, 217 Cal. 244.

ATTORNEY AND CLIENT

This Title includes the practice of law in any rank or branch of the profession; admission to practice, and privileges, disabilities, and liabilities incident to the office conferred; licenses and license fees and privilege and occupation taxes; regulation of professional conduct; and the relation between attorney and client, and their mutual rights, duties, and liabilities.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. DEFINITIONS, §§ 1-3

II. THE OFFICE OF ATTORNEY, §§ 4-60
- A. Admission to Practice, §§ 4-16
- B. Suspension and Disbarment, §§ 17-41
- C. Privileges, Disabilities, and Liabilities of Attorneys, §§ 42-60

III. RETAINER AND AUTHORITY, §§ 61-124
- A. Retainer, §§ 61-65
- B. General Incidents of Relation, §§ 66-71
- C. Proof of Authority, §§ 72-78
- D. Scope of Authority, §§ 79-107
- E. Termination of Relation, §§ 108-118
- F. Change and Substitution of Attorneys, §§ 119-124

IV. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT, §§ 125-159

V. COMPENSATION OF ATTORNEY, §§ 160-206

VI. LIEN OF ATTORNEY, §§ 207-238

Sub-Analysis

I. DEFINITIONS—p 702
- § 1. Attorney and attorney at law—p 702
- 2. Client—p 702
- 3. Other terms—p 702

II. THE OFFICE OF ATTORNEY—p 706

A. Admission to Practice—p 706
- § 4. In general—p 706
- 5. Constitutional and statutory provisions and rules of court—p 709
- 6. Jurisdiction to admit—p 711
- 7. Capacity and qualifications—p 712
- 8. —— Preliminary study and clerkship—p 714
- 9. Application for admission—p 715
- 10. Examination—p 716
- 11. Determination of right to admission and review thereof—p 716
- 12. Oath—p 719
- 13. Registration—p 720
- 14. Certificate or license—p 720

II. THE OFFICE OF ATTORNEY—Continued

A. Admission to Practice—Continued

§ 15. Admission of attorney from other jurisdiction—p 720
16 Practicing without admission—p 724

B. Suspension and Disbarment—p 727

§ 17. Tenure of office in general—p 727
18 Power to suspend or disbar—p 728
19. Grounds for suspension or disbarment—p 733
20. —— Want or loss of moral character—p 735
21. —— Criminal offenses and conviction thereof—p 735
22. —— Fraud in procuring admission—p 740
23. —— Professional misconduct—p 741
24. —— Nonprofessional misconduct—p 762
25. Defenses—p 764
26. Proceedings—p 767
27. —— Notice and preliminary proceedings—p 768
28. —— Nature and form—p 770
29 —— Conditions precedent—p 774
30 —— Persons entitled to prosecute—p 774
31. —— Charges—p 775
32. —— Demurrer, answer, and subsequent pleadings—p 779
33. —— Evidence—p 780
34 —— Trial or hearing—p 791
35. —— New trial and rehearing—p 796
36 —— Judgment or order—p 797
37. —— Review—p 799
38 —— Punishment—p 806
39 —— Costs—p 812
40 Operation and effect—p 813
41. Reinstatement—p 814

C. Privileges, Disabilities, and Liabilities of Attorneys—p 820

§ 42. In general—p 820
43. Privilege as party to suit—p 821
44. Privilege from arrest or service of process—p 821
45 Acting as bail or surety—p 822
46 Purchasing demands for suit—p 823
47 Representing adverse interests—p 823
48 —— After relation terminated—p 827
49 Acting in different capacities—p 830
50 Liability for costs—p 830
51. Liability for officers' fees—p 832
52 Liability to adverse party and to third persons—p 833
53. Liability of third persons to attorney—p 836
54 Assignment as counsel by court—p 837
55. License fees and taxes—p 837
56. Partnership of attorneys—p 838
57. Attorneys' clerks and agents—p 842
58. Regulation of professional conduct—p 842
59. Offenses in exercise of professional functions—p 844
60. Bar associations—p 844

III. RETAINER AND AUTHORITY—p 845

A. RETAINER—p 845

§ 61. Definition and nature—p 845
62. Necessity of retainer—p 845
63. —— Right of litigant to act in person or by attorney—p 846
64 —— Effect of unauthorized action—p 847
65. What constitutes retainer—p 848

B. GENERAL INCIDENTS OF RELATION—p 850

§ 66. In general—p 850
67 Rules of agency applied—p 850
68 Liability of client for attorney's acts—p 852
69 Notice to attorney—p 853
70 Notice to client—p 867
71 Ratification by client of attorney's acts—p 867

C. PROOF OF AUTHORITY—p 874

§ 72. In general—p 874
73. Presumption of authority—p 875
74 Objections to authority and demand of proof—p 881
75 Disclosure of client's name, residence, and address—p 885
76 Evidence of authority—p 886
77. Written authority—p 893
78 Determination and order or rule—p 894

D. SCOPE OF AUTHORITY—p 896

§ 79. In general—p 896
80. Conduct and control of litigation in general—p 898
81. Proceedings before judgment—p 902
82. —— Appearance—p 903
83. —— Process, notices, and service—p 905
84 Interlocutory proceedings in general—p 907
85 —— Change of venue—p 907
86 —— Confession of or consent to judgment—p 907
87. —— Dismissal, discontinuance or nonsuit—p 908
88. —— Attachment—p 910
89. —— Affidavits—p 910
90 —— Reviving suit—p 910
91. —— Arbitration—p 910
92. —— Submission of controversy without action—p 911
93. Judgment and proceedings thereafter in general—p 911
94. Opening and vacating judgment—p 912
95. Appeal or other proceeding for review—p 912
96. Proceedings for collection—p 914
97. —— Execution and sale—p 914
98. —— Judicial sale—p 915
99. Payment or satisfaction of judgment—p 915
100. Admissions, stipulations and waivers—p 917
101. Matters not immediately connected with litigation—p 923
102. —— Acknowledging client's indebtedness—p 924
103. —— Binding client by contract—p 924

III. RETAINER AND AUTHORITY—Continued

D. Scope of Authority—Continued

§ 104. —— Disposition of client's money or other property—p 927
105. —— Settlement, compromise and release—p 928
106. —— Receiving and making payments—p 934
107. Delegation of authority and employment of assistants—p 938

E. Termination of Relation—p 940

§ 108. In general—p 940
109. Act of parties—p 940
110. —— Withdrawal of attorney—p 943
111. Disbarment of attorney—p 945
112. Death of attorney—p 945
113. Death of client—p 945
114. Dissolution of partnership—p 947
115 Insanity—p 947
116. Termination of controversy—p 947
117 Termination for other reasons—p 949
118. Notice to appoint another attorney—p 949

F. Change and Substitution of Attorneys—p 950

§ 119 Right to change attorney—p 950
120 Consent of attorney and client—p 951
121. Application and order of court—p 951
122. Terms, compensation and lien—p 953
123. Notice to adverse party—p 956
124. Effect of substitution—p 957

IV. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT—p 957

§ 125. General rules stated—p 957
126. Acquiring interest adverse to client—p 960
127. Dealings between attorney and client—p 963
128. —— Conveyances, mortgages, and assignments—p 969
129. —— Gifts—p 971
130. —— Security for fees and costs—p 972
131. —— Special contracts—p 972
132. —— Effect of termination of relationship—p 972
133. Accounting and payment—p 973
134. —— Individual interest of attorney—p 974
135. —— Acts and defaults of partner or associate—p 974
136 —— Interest—p 974
137. —— Persons entitled—p 975
138. Fraud—p 975
139. Money collected and not paid over—p 976
140. Negligence in general—p 977
141. —— Care and skill required—p 979
142. —— Ignorance of law—p 979
143. —— Giving improper or erroneous advice—p 980
144. —— Making collections—p 981
145. —— Preparing and recording contracts or conveyances—p 982
146. —— Conduct of litigation—p 982

IV. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT—Continued

§ 147. Unauthorized acts in general—p 985
148. —— Violation of instructions—p 985
149. Acts of associates or substitutes—p 986
150. Acts of partners and clerks—p 986
151. Acting for party adversely interested—p 986
152. Actions for money collected and for accounting—p 987
153. —— Defenses—p 987
154. —— Proceedings and relief—p 988
155. Actions for negligence or wrongful act—p 994
156. —— Defenses—p 996
157. —— Proceedings and relief—p 997
158. Summary remedies of client—p 1005
159. —— To compel payment over of money—p 1007

V. COMPENSATION OF ATTORNEY—p 1017

§ 160. Right to compensation in general—p 1017
161. Statutory regulations—p 1018
162. Retaining fee—p 1019
163. Statutory fees and taxed costs—p 1020
164. Circumstances affecting right—p 1021
165. —— Acting without license—p 1022
166. —— Absence of benefit to client—p 1023
167. —— Conduct of attorney—p 1024
168. Premature termination of employment—p 1027
169. —— By act of parties—p 1027
170. —— By operation of law—p 1032
171. —— By death or disability—p 1032
172. Services under assignment as counsel by court—p 1033
173. Persons entitled in general—p 1037
174. Division of fees and apportionment—p 1038
175. Necessity of contract of employment—p 1041
176. Nature and extent of liability—p 1043
177. —— Attorney employed by agent—p 1044
178. —— Attorney employed by one joint defendant—p 1045
179. —— Attorney employed by trustees, personal representatives, and beneficiaries—p 1045
180. —— Reimbursement for expenses—p 1046
181. Express agreements in general—p 1047
182. —— Construction and operation—p 1054
183 —— Performance—p 1059
184. —— Contract with partnership—p 1062
185 —— Employment of additional counsel—p 1062
186 Contingent fee contracts—p 1062
187. —— Construction and operation—p 1067
188. —— Performance—p 1071
189. —— Effect of premature termination or settlement of action—p 1075
190. Implied agreements—p 1077
191. Value of services and amount of compensation—p 1078
192. Payment and recovery back by client—p 1094
193. Funds subject to payment of compensation—p 1095
194. Summary remedies to compel payment—p 1100
195. Actions for compensation—p 1102

V. COMPENSATION OF ATTORNEY—Continued

§ 196. —— Defenses—p 1102
197. —— Form of action—p 1103
198. —— Conditions precedent—p 1105
199. —— Time to sue and limitations—p 1105
200. —— Jurisdiction and venue—p 1106
201. —— Process and appearance—p 1106
202. —— Parties—p 1106
203. —— Pleading—p 1107
204. —— Evidence—p 1113
205. —— Trial—p 1128
206. —— Judgment, enforcement thereof and review—p 1136

VI. LIEN OF ATTORNEY—p 1137

§ 207. Nature of and right to lien—p 1137
208. Statutory provisions—p 1139
209. Person entitled—p 1140
210. Retaining lien—p 1141
211. Charging lien—p 1142
212. Assignment of lien—p 1148
213 Services and fees covered—p 1149
214. Proceedings to perfect—p 155
215. —— Notice—p 1155
216. Time when lien attaches—p 1160
217. Duration and termination of lien in general—p 1161
218. Waiver, loss, or discharge in general—p 1162
219. Discharge of attorney—p 1164
220. Withdrawal by attorney—p 1164
221. Satisfaction and release of judgment—p 1165
222. Taking security—p 1165
223. Suit for compensation—p 1166
224. Relinquishment of possession—p 1166
225. Subject matter of retaining lien—p 1166
226. —— Property delivered for special purpose—p 1169
227. —— Property delivered in representative capacity—p 1169
228. Subject matter of charging lien—p 1169
229. Priorities—p 1176
230. Protection against assignment by client—p 1178
231. Protection against settlement between parties—p 1180
232. Protection against set-off between parties—p 1197
233. Enforcement of retaining lien—p 1199
234. Enforcement of charging lien—p 1200
235. —— Summary proceedings—p 1202
236. —— Independent action—p 1203
237. —— Action on judgment—p 1204
238. —— Proceedings for enforcement—p 1204

I. DEFINITIONS

§ 1. Attorney and Attorney at Law

Attorney, in its broad sense signifies an agent, but in general use is construed as meaning attorney at law.

The word "attorney" signifies, in its broadest sense, a substitute or agent,[1] one who is appointed or authorized to act in the place of or for another.[2] It is not necessarily limited to an attorney in fact;[3] on the contrary, when not coupled with any qualifying expression, the word is usually construed as meaning attorney at law.[4] The term will be used in this sense in this Title.

An attorney at law is an officer in a court of justice who is employed by a party in a cause to manage the same for him.[5]

§ 2. Client

A client is one who seeks advice of an attorney or retains him to prosecute or defend a suit.

A client is one who applies to a lawyer or counselor for advice and direction in a question of law, or commits his cause to his management in prosecuting a claim or defending against a suit in a court of justice,[6] one who retains the attorney, is responsible to him for his fees, and to whom the attorney is responsible for the management of the suit,[7] one who communicates facts to an attorney expecting professional advice.[8]

§ 3. Other Terms

a. Advocate
b. Barrister
c. Counsel or counselor
d. Lawyer
e. Proctor
f. Solicitor
g. Practice of law

a. Advocate

An advocate is a person learned in law and duly admitted to practice.

An advocate is a person learned in the law and duly admitted to practice who assists his client with advice and pleads for him in open court.[9] In the civil and ecclesiastical law an advocate is an officer of the court learned in the law who is engaged by a suitor to maintain or defend his cause.[10]

In admiralty practice, counsel eo nomine were not known, the functions of counsel in courts of common law and equity being performed in civil and maritime courts by advocates.[11]

b. Barrister

A barrister is a person entitled to practice as an advocate or counsel in superior courts in England.

In England and her colonies a barrister is a person entitled to practice as an advocate or counsel in the superior courts.[12]

c. Counsel or Counselor

Counsel means an advocate, counselor, or pleader, a member of the legal profession.

The word "counsel" means an advocate, counselor, or pleader; one who assists his client with advice and pleads for him in open court.[13] A counselor is an advocate or barrister; a member of the legal profession whose special function is to give counsel or advice as to the legal aspects of judicial controversies or their preparation and management, and to appear in court for the conduct of trials, or the argument of causes or presentation of motions, or any other legal business that takes him into the presence of the court.[14]

1. Ricker's Pet, 29 A 559, 66 N H 207, 208, 24 L R A 740—6 C J p 566 note 3
Word "agent" as including attorneys see Agency § 1
2. Kaufman v. Jurczak, (N J Ch) 139 A. 716—6 C.J. p 566 note 4
3. La.—Clark v. Morse, 16 La. 575
Md.—Enchelberger v. Sifford, 27 Md 320, 329
4. In re Morse, 126 A. 550, 98 Vt. 35, 36 A.L.R 527—6 C.J. p 566 note 6.
Term applied
While in England it may be otherwise, in the United States the general designation of attorney is applied to all who follow the profession of law, although different terms are used in some jurisdictions.—In re Paschal, (Tex) 10 Wall (U S.) 483, 19 L Ed 992—Weed Sewing Mach. Co v. Boutelle, 56 Vt. 570, 48 Am R 821—6 C J p 566 note 8, p 567 note 9
Distinction between attorney and counselor
In some jurisdictions an attorney is a person authorized to appear and represent a party in the written proceedings in any action, suit, or proceeding, in any stage thereof, and an attorney, other than one who represents the party in the written proceedings, may also appear for and represent a party in court, or before a judicial officer, in which case he is known, in the particular action, suit, or proceeding, as counselor only.—Caples v. Ditchburn, 169 P. 510, 87 Or 264—6 C J p 567 note 15½ [a]—15 C J. p 352 note 18.
5. Glade Springs Bank v McEwen, 76 S E 222, 160 N.C. 414, 421—6 C.J. p 566 note 8.
6. McCreary v. Hoopes, 25 Miss 428, 429
7. McFarland v. Crary, 6 Wend.(N. Y.) 297, 312
8. Cross v. Riggins, 50 Mo. 335, 337.
9. Burrill L. D.
10. Black L. D.
11. Sturgis v. The Joseph Johnson, (D C N.Y.) 23 F Cas No 13,576a
"Advocate" another denomination of proctor.—Sturgis v. The Joseph Johnson, (D.C N.Y.) 23 F Cas No.13,576a.
12. Sweet L. D.—6 C J. p 567 note 11.
13. Black L. D, quoted in Harkins v. Murphy, 112 S W. 136, 51 Tex. Civ App. 568, 570
14. Black L D.—15 C J p 351 notes 14, 15, p 352 notes 16–18.

d. Lawyer

A lawyer is one skilled in the law; "lawyer" is the synonym of "attorney."

A lawyer is defined as one skilled in the law.[15] The term is synonymous with "attorney."[16]

e. Proctor

A proctor is an attorney in the admiralty and ecclesiastical courts.

A proctor is an attorney in the admiralty and ecclesiastical courts.[17]

f. Solicitor

A solicitor is a person prosecuting or defending suits in courts of chancery.

A solicitor is a person whose business it is to be employed in the care and management of suits depending in courts of chancery.[18] In the great majority of the states of the Union, where law and equity are both administered by the same court, it has naturally come about that the two offices of attorney at law and solicitor in chancery have practically been consolidated, although in the federal equity practice the term "solicitor" is in general use; but in some states the office of solicitor in chancery is a distinct and separate office from that of attorney at law.[19]

g. Practice of Law

Practice of law is not confined to performing services in a proceeding in the court, but also includes preparation of legal instruments, etc.

While a statute, which declares that the performance of certain acts shall be included within the meaning of practicing law, may not be invalid,[20] a statute enumerating and penalizing certain acts when performed by a person not licensed to practice law has been held not to define for all purposes "practice of law" and to take the matter out of the control and supervision of the court.[21] The general meaning of the term, "practice law" or "practice of law," is of common knowledge, although the boundaries of its definition may be indefinite as to some transactions.[22] As generally understood, it is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure;[23] but it is not confined to performing services in an action or proceeding pending in courts of justice,[24] and, in a larger sense, it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.[25] To "practice law" is to

15. Bouvier L. D., quoted in Danforth v. Egan, 119 N.W. 1021, 28 S. D. 43, 51, 139 Am.S.R. 1030, 20 Ann. Cas. 413

16. People v. Taylor, 138 P. 762, 56 Colo. 441.

17. Anderson L. D.—Jacob L. D., cited in Thorne v. Victoria, (D.C. N.Y.) 23 F.Cas.No.13,988

18. Bouvier L. D.—In re Rausch, 83 N.J.Eq. 82, 87.

Solicitor of the municipality

An attorney employed by a municipality, under Gen.Code § 6212—37, to secure the enforcement of prohibition laws is not a "solicitor of the municipality" within the meaning of § 13,764, authorized to bring and prosecute an error proceeding in the court of appeals on behalf of the state of Ohio to reverse a judgment of the court of common pleas reversing a judgment of a mayor's court finding a person guilty of the unlawful possession of intoxicating liquor in violation of a state statute.—State v. Blox, 155 N.E. 412, 413, 23 Ohio App. 307.

19. Del.—In re Hoffecker, (Ch.) 60 A. 981
N.J.—In re Rausch, 90 A. 12, 83 N.J. Eq. 82.

20. Kendrick v. State, 120 So. 140, 23 Ala.App. 5, reversed 120 So. 142, 218 Ala. 277.

21. Rhode Island Bar Ass'n v. Automobile Service Ass'n, (R.I.) 179 A. 139

22. State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899

23. Cal.—Smallberg v. State Bar of California, 297 P. 916, 212 Cal. 113—Cohn v. Thompson, 16 P.(2d) 864, 128 Cal.App. 783—Schroeder v. Wheeler, 14 P.(2d) 903, 126 Cal. App. 367.
Idaho.—In re Matthews, 62 P.(2d) 578.
Kan.—Depew v. Wichita Ass'n of Credit Men, 49 P.(2d) 1041, 142 Kan. 403—State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899.
Ohio.—Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 129 Ohio St. 23
49 C.J. p. 1313 note 29.

Person engaged in "practice of law" is one who, by reason of attainments previously acquired through education and study, has been recognized by the courts as possessing profound knowledge of legal science entitling him to advise, counsel with, protect, prosecute, or defend the rights, claims, or liabilities of his clients, in respect of the construction, interpretation, and operation and effect of law.—Meunier v. Bernich, (La.App.) 170 So. 567.

24. Kan.—Depew v. Wichita Ass'n of Credit Men, 49 P.(2d) 1041, 142 Kan. 403
N.Y.—In re Pace, 156 N.Y.S. 641, 170 App.Div. 813.
N.C.—Seawell v. Carolina Motor Club, 184 S.E. 540, 209 N.C. 624.
49 C.J. p. 1314 note 62.

25. Cal.—Smallberg v. State Bar of California, 297 P. 916, 212 Cal. 113—Cohn v. Thompson, 16 P.(2d) 864, 128 Cal.App. 783—Schroeder v. Wheeler, 14 P.(2d) 903, 126 Cal. App. 367.
Colo.—People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Banks Performing Trust Functions, 59 P.(2d) 468.
Ga.—Boykin v. Hopkins, 162 S.E. 796, 174 Ga. 511.
Idaho.—In re Matthews, 62 P.(2d) 578.
Ill.—People ex rel. Courtney v. Association of Real Estate Taxpayers of Illinois, 187 N.E. 823, 354 Ill. 102—People v. People's Stock Yards State Bank, 176 N.E. 901, 344 Ill. 462.
Kan.—Depew v. Wichita Ass'n of Credit Men, 49 P.(2d) 1041, 142 Kan. 403—State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899.
Neb.—State ex rel. Wright v. Barlow, 268 N.W. 95
N.Y.—In re Pace, 156 N.Y.S. 641, 170 App.Div. 813.

carry on the business of an attorney at law;[26] to do or practice that which an attorney or counselor at law is authorized to do and practice;[27] to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, or at least for gain,[28] to make it one's business to act for, and by the warrant of, others in legal formalities, negotiations, or proceedings.[29] Applying the rules above stated, many cases may be found in the notes below which have held the doing of certain things to be practicing law.[30] Fur-

N C—Seawell v. Carolina Motor Club, 184 S E 540, 209 N C. 624.

N D.—Cain v. Merchants Nat Bank & Trust Co. of Fargo, 268 N W 719.

Ohio—Land Title Abstract & Trust Co. v. Dworken, 193 N E 650, 129 Ohio St 23.

R.I—Rhode Island Bar Ass'n v Automobile Service Ass'n, 179 A 139.

49 C J. p 1313 note 30, p 1315 note 63

"Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These customary functions of an attorney or counselor at law . . . bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as concerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys"—In re Opinion of the Justices, (Mass.) 194 N.E 313, 317, quoted in Rhode Island Bar Ass'n v. Automobile Service Ass'n, (R I.) 179 A. 139, 144. To same effect Eley v. Miller, 34 N E 336, 7 Ind App. 529

26. People v. People's Trust Co., 167 N.Y.S. 767, 180 App Div 494.

27. N Y—People v. Alfani, 125 N.E 671, 227 N.Y. 334, reversing 174 N. Y.S. 527, 186 App.Div. 468, 37 N.Y. Cr 395

Wash—Ferris v. Snively, 19 P.(2d) 942, 172 Wash. 167, 90 A L.R. 278—State v. Chamberlain, 233 P 337, 133 Wash 520

49 C J p 1314 note 59

28. Kendrick v State, 120 So 142, 218 Ala 277

29. In re Bailey, 146 P. 1101, 50 Mont 365, Ann Cas 1917B 1198

30. Acts or services held to constitute practice of law

(1) Person participating in trial and advertising himself as a lawyer has been held to be "practicing law"—People v Castleman, 294 P 535, 88 Colo 229

(2) One who advertised himself as a lawyer and appeared in the district court with the court's permission as an attorney in two cases, was practicing law within L (1917) c 90 § 1, defining "practicing law"—In re White, 171 P 759, 54 Mont. 476

(3) An attorney, not admitted, perfecting appeals from justices' courts to the district court and appearing therein and conducting legal correspondence, using letterheads describing himself as a lawyer and professional cards so advertising himself, is practicing law.—In re Phillips, 210 P. 89, 64 Mont 492

(4) One who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court, is engaged in the "practice of law."—Depew v Wichita Ass'n of Credit Men, 49 P (2d) 1041, 142 Kan. 403

(5) Anyone holding himself ready, able, and willing to represent, out of court, another in the adjustment and collection of claims, and turning cases over to his attorney when necessary in order to collect is practicing law—Berk v. State, 142 So. 832, 225 Ala 324, 84 A L R 740

(6) One giving legal advice to those for whom he draws instruments does "work of legal nature," when such instruments set forth, limit, terminate, claim, or grant legal rights—Paul v. Stanley, 12 P. (2d) 401, 168 Wash 371.

(7) Preparing documents and rendering other services involving the use of legal knowledge and skill, and charging for such services, are within the term "practice of law"—People v. People's Stock Yards State Bank, 176 N E 901, 344 Ill. 462

(8) Preparation for a money consideration of legal instruments to be shaped from a mass of facts and conditions involving the application of intricate principles of law, which requires a mind trained in existing laws to insure the specific result and to guard against other undesirable results, constitutes "practice of law," for which one must qualify in a prescribed manner—Crawford v. McConnell, (Okl.) 49 P (2d) 551.

(9) Giving advice for compensation regarding the legal status and rights of another and conduct with respect thereto constitutes "practice of law"—Fitchette v Taylor, 254 N. W. 910, 191 Minn 582, 94 A L R. 356.

(10) Law clerk's services in handling uncontested probate cases, examining abstracts of title, and preparing wills, leases, etc, were held to be "practice of law" within a statute prohibiting such practice by one not admitted thereto—Ferris v. Snively, 19 P.(2d) 942, 172 Wash. 167, 90 A L R. 278.

(11) Former probate judge who, for compensation, without being admitted to practice law and without paying license fees, advised persons in probate matters and prepared and filed papers in connection therewith, and who prepared articles of incorporation for corporate organizers, which work was necessary to clear titles in loan transactions, is engaged in the "practice of law," although he did not sign the papers and pleadings as an attorney, and he did not accept legal employment except from persons who had already enlisted his services in business matters connected with loans—In re Brainard, 39 P. (2d) 769, 55 Idaho 153.

(12) City attorney, consulted at his office regarding legal matters by persons whom he told he was a lawyer with authority to represent them before state courts, and appearing before a justice of the peace as attorney at law representing clients for hire, is guilty of holding himself out as an attorney—People v. Hubbard, 145 N.E. 93, 313 Ill. 346.

(13) Advertising one's self as engaged in the business of drawing legal papers is practicing law—People v. Alfani, 125 N E 671, 227 N Y. 334, reversing 174 N Y S. 527, 186 App Div. 468, 37 N Y Cr. 395

(14) One who holds himself out as entitled to practice law or who is engaged in the preparation of legal instruments requiring specialized technical training is practicing law—Childs v. Smeltzer, 18 Pa Dist. & Co 39

(15) One accepting retainers to

ther, applying the rules above stated, many cases may be found in the notes below which have held the doing of certain things not to be practicing law.[81]

obtain divorces without having a license to practice law is guilty of acting as a solicitor—People v. Hubbard, 245 Ill App 197

(16) Layman engaged in the business of soliciting foreign beneficiaries of decedents' estates and obtaining, through foreign agents, power of attorney and agreements to represent beneficiaries for a percentage of such beneficiaries' shares, which was divided with the foreign agents and with the attorneys employed by such layman, was held to be engaged in the "practice of law"—In re Lynch's Estate, 276 N Y S 939, 154 Misc 260

(17) An agreement between property owners and one not an attorney that the latter should endeavor to secure a reduction of an assessment and that he should retain lawyers and experts and pay them, is in contravention of public policy—People ex rel Holzman v Purdy, 162 N Y S 65

(18) Resident who, being admitted to the bar elsewhere, represented he had authority to conduct a cause, has been held to be practicing law—People v. Thomas, 290 P 283, 87 Colo 547

(19) Stenographer making the practice of drafting legal instruments for hire was held engaged in "practicing law"—Childs v. Smeltzer, 171 A 883, 315 Pa 9.

(20) Laymen, employed for salary to solicit and drum up accident business for an attorney, are guilty of practicing law—In re Levine, 205 N Y S 589, 210 App Div 8

(21) Conducting proceedings in the matter of estates and guardianships in the probate court constitutes "practice of law"—In re Otterness, 232 N W 918, 181 Minn 254, 73 A L R 1319

(22) Foreclosure of mortgages by advertisement, where an attorney's fee is included in the costs, constitutes "practice of law"—In re Otterness, supra

(23) An industrial commission would be prohibited from entertaining the appearance of practice before it on rehearing proceedings of any person other than an attorney at law duly admitted to practice, since one appearing before the commission in a representative capacity after claimant first receives notice of the disallowance of his claim is engaged in "practice of law"—Goodman v Beall, 200 N E 470, 130 Ohio St. 427

(24) Claim adjuster who contracted to enforce, secure, settle, adjust, or compromise a claim arising out of the death of a child through a railroad's dynamite torch, and who was required to examine the facts and to advise the parents regarding the liability of the railroad, and who, in adjusting claims, advised clients respecting their rights and liabilities as a matter of law, was engaged in unauthorized "practice of law"—Meunier v Bernich, (La.App) 170 So 567.

(25) Claim adjuster's contract to enforce, secure, settle, adjust, or compromise parents' claim for death of their child, under which contract the adjuster was required to examine the facts and to advise the parents regarding the liability of the railroad whose dynamite caused the death, was held to be illegal and against public policy, on the ground that the adjuster attempted to perform services which only an attorney was entitled to render thus illegally practicing law, and hence the adjuster could not recover for services rendered—Meunier v Bernich, supra

(26) One who renders an opinion as to the proper interpretation of a statute, or gives information as to what judicial or quasi judicial tribunals are deciding, and receives pay for it, is, to that extent, "practicing law"—Mandelbaum v Gilbert & Barker Mfg. Co, 290 N Y S 462, 160 Misc 656

(27) "Practice of law" includes the drawing for others of complicated legal instruments requiring more legal knowledge than is possessed by the average layman, even though such instruments may to some extent be incident to business such as that usually conducted by trust companies—Cain v. Merchants Nat. Bank & Trust Co of Fargo, (N D) 268 N W. 719.

31. Acts or services held not to constitute practice of law

(1) Business conducted by an attorney under the name of an association, whereby the association supplied to subscribers emergency road, garage, and medical service, provided maps and touring information, furnished accident insurance, and paid for legal advice and for defending members when charged with the violation of automobile laws and regulations and for defending suits for property damage, and furnished a magazine containing a list of attorneys which members could engage, but also permitted members to employ any unlisted attorney, was held not to be engaged in the "practice of law"—In re Thibodeau, (Mass.) 3 N E (2d) 749, 106 A.L.R. 542

(2) Occasional drafting of simple deeds and other legal instruments when not conducted as an occupation or yielding a substantial income, gratuitous furnishing of legal aid to poor and unfortunate without means in pursuit of any civil remedy, as a matter of charity, search of records of realty to ascertain what may be disclosed without giving opinion or advice as to the legal effect of what is found, work of an accountant dissociated from legal service, and other kindred pursuits, do not constitute the "practice of law."—In re Opinion of the Justices, (Mass) 194 N E 313

(3) Preparation by a trust company, acting through an officer not authorized to practice law, of single will naming the trust company as executor has been held not to violate the statute prohibiting unauthorized practice of law—In re Umble's Estate, 177 A. 340, 117 Pa Super 15

(4) The drafting of simple legal papers, such as deeds, mortgages, etc., by filling out printed blanks, by one not holding himself out as a member of the bar is not practicing law.—Childs v. Smeltzer, 18 Pa Dist & Co. 39.

(5) Statute prohibiting the practice of law by laymen does not preclude realty brokers from drafting deeds, mortgages, or other contracts growing out of their business transactions as the practice of law by the drafting legal instruments is prohibited only when the drafting thereof is not connected with the immediate business of the person preparing them who, although not a member of the bar, holds himself out as specially qualified—Childs v. Smeltzer, 171 A. 883, 315 Pa. 9.

(6) Collection agent who was not an attorney was held not to be engaged in the "practice of law," where a claim was assigned to him under an agreement that, if he could not collect the claim without suit, he was to hire an attorney at his expense and sue in his own name, and, if the collection was made, he was to remit the balance to the assignor, after deducting costs and a percentage for his services—Cohn v. Thompson, 16 P.(2d) 364, 128 Cal. App. 783

(7) Statute prohibiting commencement, conduct, or defense of an action by a person not the party concerned, unless admitted to practice law under state supreme court rules, is inapplicable to a layman, merely agreeing to employ counsel to collect a debt due to another by litigation—Clifford v. Wilcox, 27 P.(2d) 722, 175 Wash 513

(8) Agreement, whereby a client

II. THE OFFICE OF ATTORNEY

A. ADMISSION TO PRACTICE

§ 4. In General

a. Nature of office

b. Nature of right to practice

a. Nature of Office

An attorney is an officer of the court with an obligation to the public as well as to his clients

An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term,[32] but is an officer of the court.[33] He is, however, in a sense an officer of the state, with an obligation to the courts and to the public no less

authorized a third person to make arrangements with a named attorney relative to court proceedings and agreed to pay such third person from moneys received for services as adviser, was held not on its face violative of a statute prohibiting persons not attorneys from soliciting employment as, or furnishing, attorneys, or holding themselves out as attorneys.—Cagliardi v Hoffman, 284 N.Y.S. 81, 246 App Div. 753.

(9) Advertisements concerning services furnished by a trust company in connection with trusts in wills, not offering legal advice, have been held not to advise the public that the trust company maintained a place for the practice of law, in violation of the statute.—In re Umble's Estate, 177 A. 340, 117 Pa Super 15

(10) Suggestions by accountants as to how a corporation could reduce its franchise tax has been held not to be practice of law.—Elfenbein v. Luckenbach Terminals, 166 A. 91, 111 N J Law 67.

(11) Assisting workman or his dependents in submitting a compensation claim is not "practice of law" —Goodman v. Beall, 200 N E 470, 130 Ohio St. 427.

(12) Patent attorney's contract, to protect a client's interest by employing counsel when necessary and prosecuting an infringement suit, was not illegal as an agreement to "practice law," although the patent attorney was not an attorney at law —Schroeder v. Wheeler, 14 P (2d) 903, 126 Cal App. 367.

(13) The act of an attorney in fact or an agent in merely signing a notice of appeal on behalf of his principal is not a violation of the statutes regulating the practice of law —Tomondong v. Ikezaki, 32 Hawaii 12.

(14) Practice of a notary and bank employee, acting in effect as a lawyer in connection with the execution of a will, is strongly condemned — In re Flynn's Estate, 253 N.Y.S. 638, 42 Misc 7.

(15) Act of an agent of a bonding company in preparing and executing the bond for his principal, where he merely performs the duties of agent, does not constitute "practice of law." —State ex rel Wright v Barlow, (Neb) 268 N.W. 95.

(16) One who acts merely as an amanuensis in preparing an assignment of a judgment is not engaged in the "practice of law"—State ex rel. Wright v. Barlow, supra

(17) Person who is not a member of the bar is entitled to prepare instruments, such as simple deeds, mortgages, promissory notes, and bills of sale, when such instruments are incident to transactions in which such person is interested, provided no charge is made therefor.—Cain v Merchants Nat Bank & Trust Co. of Fargo, (N D) 268 N W 719

"Investigation" of a case does not necessitate the "practice of law," "investigation" being synonymous with "detection," since it is not part of a lawyer's function to ferret out evidence which may be helpful to his client in prosecution of such client's claim.—Meunier v. Bernich, (La App.) 170 So 567.

32. Cal.—Ex parte Galusha, 195 P. 406, 184 Cal 697—In re Cate, (App) 273 P. 617, supplementing opinions 270 P 968, and 271 P 356
Fla.—In re Clifton, 155 So 324, 115 Fla 168.
Kan.—In re Hanson, 5 P (2d) 1088, 134 Kan 165.
Minn.—In re Greathouse, 248 N.W 735, 189 Minn 51
Mo.—In re H——— S———, (App) 69 S.W.(2d) 325
Neb.—State ex rel. Sorensen v. Goldman, 255 N.W. 32, 127 Neb. 340.
6 C J. p 568 note 21.

Public officer

In some jurisdictions by virtue of statutes, an attorney at law is a public officer.—State v. Goldstein, 220 P. 565, 109 Or 497.

33. U.S.—U S v. Frank, (D C N J.) 53 F (2d) 128, reversed on other grounds (C C A) Loughlin v U. S, 57 F (2d) 1080, and reversed on other grounds in part Pearse v U. S., 59 F (2d) 518—Bowles v U S, (C C A.Md) 50 F (2d) 848, certiorari denied 52 S Ct 29, 284 U S 648, 76 L Ed. 550—Bartos v U. S Dist. Court for Dist of Nebraska, (C C A.Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138—Hertz v. U. S., (C C A.Minn) 18 F (2d) 52—In re Evans, (D C N C) 116 F. 909, 8 Am Bankr. 730
Ala.—Wise v. Miller, 111 So 913, 215 Ala 660
Ariz.—State v. Superior Court of Maricopa County, 5 P (2d) 192, 39 Ariz 242.
Cal.—Ex parte Galusha, 195 P 406, 184 Cal 697—Daily v Superior Court in and for Monterey County, 40 P (2d) 936, 4 Cal App (2d) 127—People v. Frank, 22 P (2d) 792, 132 Cal App 360—In re Cate, (App) 273 P. 617, supplementing opinions 270 P 968 and 271 P 356—Falloon v Superior Court of Los Angeles County, 248 P 1057, 79 Cal App 149—Furlong v White, 196 P. 903, 51 Cal App 265—Platnauer v Superior Court in and for Sacramento County, 163 P 237, 32 Cal App 463.
Fla.—Baruch v Giblin, 164 So. 831—In re Clifton, 155 So 324, 115 Fla. 168—Gould v State, 127 So. 309, 99 Fla 662, 69 A L R 699
Ill.—People ex rel. Chicago Bar Ass'n v Templeman, 1 N E (2d) 850, 363 Ill 152—In re Casey, 195 N E 39, 359 Ill 496—In re Zahn, 190 N E 419, 356 Ill 283—People ex rel Chicago Bar Ass'n v. Green, 187 N E 811, 353 Ill 638—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E 332, 351 Ill 206—People v Gorman, 178 N E 880, 340 Ill 432—People v People's Stock Yards State Bank, 176 N E 901, 344 Ill. 462—People v Johnson, 176 N. E 278, 344 Ill 132—People v Czarnecki, 109 N E 14, 268 Ill 278
Ind.—Neff v City of Indianapolis, 198 N E 328—In re McDonald, 164 N E 261, 200 Ind 424.
Iowa.—In re Cloud, 250 N W. 160, 217 Iowa 3
Kan.—State ex rel Boynton v. Perkins, 28 P (2d) 765, 138 Kan 899—In re Hanson, 5 P (2d) 1088, 134 Kan 165
Ky.—Commonwealth ex rel. Ward v. Harrington, 98 S W (2d) 53, 266 Ky 41—Sparks v. Commonwealth, 8 S W.(2d) 397, 225 Ky 334—Dunn v Bradley, 6 Ky Op 241.
Mass.—Berman v Coakley, 137 N E. 667, 243 Mass 348—In re Carver, 112 N E. 877, 224 Mass. 169.
Minn.—In re Greathouse, 248 N W. 735, 189 Minn 51
Miss.—Ex parte Redmond, 82 So. 513, 120 Miss 536.

significant than his obligation to his clients[34] The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court[35] An attorney has a duty to aid the court in seeing that actions and proceedings in which he is engaged as counsel are conducted in a dignified and orderly manner, free from passion and personal animosities, and that all causes brought to an issue are tried and decided on their

Mo—In re H——— S———, (App) 69 S W (2d) 325
Mont—State v. District Court of First Judicial Dist in and for Lewis and Clark County, 191 P 772, 58 Mont. 276.
Neb—State ex rel Sorensen v Goldman, 255 N W 32, 127 Neb 340
N J.—Raimondi v. Bianchi, 134 A. 866, 100 N J Eq 238
N.Y.—People ex rel Karlin v Culkin, 162 N E 487, 248 N Y. 465, 60 A L R 851, affirming 228 N Y.S 873, 223 App Div 822—In re Brooklyn Bar Ass'n, 227 N Y S. 666, 223 App Div 149—Meegan v. Tracy, 223 N Y S 355, 220 App Div. 600—In re Strandburg's Estate, 247 N Y.S 194, 138 Misc 732, modified on other grounds 248 N.Y.S. 164, 138 Misc. 859—Weinblatt v. Parkway-St Johns Place Corporation, 241 N Y S 721, 136 Misc 743, affirmed 243 N.Y S 810, 229 App Div 865
N C—In re Dillingham, 124 S E 130, 188 N C 162—Chatham Lumber Co v Parsons Lumber Co, 90 S E 241, 172 N C 329
N D—Simon v Chicago, Milwaukee & St P Ry. Co, 177 N W. 107, 45 N D 251.
Okl—In re Shoemake, 31 P (2d) 928, 168 Okl 77.
Or—In re Crum, 204 P. 948, 103 Or 296—State v Edmunson, 204 P. 619, 103 Or 243
Pa—Childs v Smeltser, 171 A. 883, 315 Pa. 9—Miller v. Knabb, 5 Pa Co 636
R.I—Rhode Island Bar Ass'n v Automobile Service Ass'n, 179 A 139
Wis—Petition of Board of Law Examiners, Examination of 1926, 210 N W. 710, 191 Wis 359—Langen v Borkowski, 206 N W 181, 188 Wis 277, 43 A.L.R 622—In re Maresh's Will, 187 N W 1009, 177 Wis 194—Hanson v. Temple, 185 N W 225, 175 Wis 349—Armstrong v Morrow, 163 N W 179, 166 Wis. 1, Ann Cas 1918E 1156
6 C J. p 568 note 22.

34. Fla—In re Clifton, 155 So 324, 115 Fla 168
Ill—People ex rel Chicago Bar Ass'n v. Green, 187 N E 811, 353 Ill 638—People v. Johnson, 176 N E 278, 344 Ill. 132.
Kan—In re Hanson, 5 P (2d) 1083, 134 Kan 165
Mass—In re Opinion of the Justices, 194 N E 313.
Mo—In re H——— S———, (App) 69 S.W.(2d) 325
N Y—People ex rel. Dawson v. Knox, 247 N Y S 731, 231 App Div. 490, affirmed 196 N E. 582, 267 N Y. 565—In re Strandburg's Estate, 247 N Y S. 194, 138 Misc 732, modified on other grounds 248 N.Y.S. 164, 138 Misc 859
Wis—In re Jaeger's Will, 259 N.W. 842, 218 Wis 1, 99 A.L.R 738—Petition of Board of Law Examiners, Examination of 1926, 210 N.W 710, 191 Wis 359—Langen v Borkowski, 206 N W 181, 188 Wis. 277, 43 A L R 622—Hanson v Temple, 185 N W 225, 175 Wis 349.
6 C J. p 568 note 23, p 596 note 6 [a].

First duty not to clients

"Counsel must remember that they, too, are officers of the courts, administrators of justice, oath-bound servants of society, that their first duty is not to their clients, as many suppose, but is to the administration of justice, that to this their clients' success is wholly subordinate, that their conduct ought to and must be scrupulously observant of law and ethics; and to the extent that they fail therein, they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice"—U S. v. Frank, (D C. N J) 53 F (2d) 128, 129, reversed on other grounds (C C A) Loughlin v. U S, 57 F (2d) 1030, and reversed on other grounds in part Pearse v. U S, 59 F (2d) 513—In re Kelly, (D C Mont) 243 F. 696, 705

Public has a deep and vital interest in his integrity—Berman v Coakley, 187 N E 667, 243 Mass. 348.

Conflict of duties

(1) In case of conflict between attorney's duty to client and that to court, his duty to court must prevail.—State v. Barto, 232 N.W. 553, 202 Wis. 329

(2) Where duties to court and profession conflict with those an attorney deems due a client from friendship, he should abandon the relation of attorney—State v Woodville, 108 So 309, 161 La. 125

Accepting employment entails duty to courts and faithful performance of services, and it is a dereliction of duty for an attorney to abandon a cause on appeal and fail to favor the court with a brief—Lammer v. Smith, 19 P (2d) 825, 130 Cal App. 98

Oath shows first duty is to public

Oath of an attorney to support constitutions and obey laws shows intent to charge him with public function, which is superior to private interests of client—Petition of Board of Law Examiners, Examination of 1926, 210 N W. 710, 191 Wis. 359.

Duty to know reports and documents are true and correct

(1) Attorneys have a duty to know that the contents of reports and documents are true and correct, and a presentation is a representation that this duty has been performed—U S v Ford, (D C Mont) 9 F (2d) 990—Sparks v. Commonwealth, 8 S. W (2d) 397, 225 Ky. 334

(2) Conduct of attorneys in permitting their names to be signed to a brief which they did not read has been held highly improper—In re Glauberman, 152 A. 650, 107 N J Eq. 334.

Suits in forma pauperis

(1) It is the duty of attorneys concerned in applications to sue in forma pauperis to ascertain so far as they are able by investigation that applicant is entitled to the favorable consideration of the court, and that all the facts calling for the exercise of the court's discretion in behalf of applicant exist—Osiel v. Osiel, (N J Ch) 62 A. 549.

(2) Attorneys, requiring a county to bear the expense of an appeal of an impecunious person, owe a duty to the court to appear and point out by brief or oral argument wherein their client has not had a fair trial—Flores v State, 4 P.(2d) 334, 39 Ariz 106—Fogal v. State, 3 P.(2d) 1053, 39 Ariz. 55 (first case), followed in 3 P.(2d) 1053, 39 Ariz. 57 (second case), and Johnson v. State, 3 P.(2d) 1054, 39 Ariz. 57.

Client having governmental powers

Attorney's official status on behalf of client with governmental powers does not make him a "public official" within a statute relating to holding over of the office—People ex rel Dawson v Knox, 247 N Y S 731, 231 App Div. 490, affirmed 196 N.E 582, 267 N Y 565

State may attach conditions to right to practice

Since the right to practice law is created by statute, and an attorney practices under a license from the state, the state may attach such conditions to the license as it believes necessary for the protection of the public—Yeiser v Dysart, 45 S.Ct. 399, 267 U S 540, 69 L Ed 775, affirming In re Yeiser, 192 N W. 953, 110 Neb 65.

35. In re Maresh's Will, 187 N.W. 1009, 177 Wis. 194—6 C J. p 569 note 25.

merits only,[36] to aid any effort under the court's direction to root out corruption and fraud,[37] and also to devote his ability, skill, and diligence along ethical and professional lines to the interests of his client,[38] and to refrain from entering into any alliance or incurring any obligation connected with the litigation in which he is engaged as counsel that would place him in a position where his personal interests would be adverse to those of his client.[39]

b. Nature of Right to Practice

Right to practice law is not a natural or constitutional right, but is in the nature of a privilege or franchise.

The right to practice law is not a natural or constitutional right,[40] nor an absolute right[41] or a right de jure,[42] but is a privilege or franchise.[43]

36. U S—U. S. v. Frank, (D C N.J.) 53 F.(2d) 128, reversed on other grounds (C C A.) Loughlin v U S., 57 F.(2d) 1080, and reversed on other grounds in part Pearse v. U S., 59 F (2d) 518—Heriz v. U. S., (C C A Minn.) 18 F (2d) 52
Cal—Daily v. Superior Court in and for Monterey County, 40 P (2d) 936, 4 Cal App (2d) 127—In re Cate, (App.) 278 P. 617, supplementing opinions 270 P. 968 and 271 P 356—Falloon v. Superior Court of Los Angeles County, 248 P. 1057, 79 Cal App 149—Furlong v. White, 196 P. 903, 51 Cal App 265.
Ill.—People v. Gorman, 178 N E 880, 340 Ill. 432—People v. Burr, 147 N E 47, 316 Ill. 166, affirming People v McCaffrey, 232 Ill App. 462—People v. Czarnecki, 109 N.E 14, 268 Ill. 278—Watson v. Trinz, 274 Ill App. 379.
Ind—In re McDonald, 164 N E. 261, 200 Ind 424
Me.—Ellis v Emerson, 147 A. 761, 128 Me 379
Mont—State v. District Court of First Judicial Dist in and for Lewis and Clark County, 191 P. 772, 58 Mont. 276—In re O'Keefe, 175 P. 593, 55 Mont 200.
N.J—Raimondi v. Bianchi, 134 A 866, 100 N J Eq 238
N.Y.—People ex rel. Karlin v. Culkin, 162 N E 487, 248 N.Y. 465, 160 A L R 851, affirming 228 N Y S 873, 223 App Div. 822
Okl—In re Kelley, 28 P (2d) 564, 167 Okl. 142.
Utah—Van Cott v. Wall, 178 P. 42, 53 Utah 283
Wis—Petition of Board of Law Examiners, Examination of 1926, 210 N.W 710, 191 Wis. 359—Langen v Borkowski, 206 N W. 181, 188 Wis 277, 43 A L R. 622.
6 C J. p 569 note 26.

Same duty in civil and criminal cases
Under Judiciary L. § 88 subd 2, as amended by L (1912) c 253, as to disbarment of attorneys guilty of professional misconduct, there is no difference in the duty of the attorney to the court in criminal and civil cases—In re Palmieri, 162 N.Y S 799, 176 App Div. 58, reversed on other grounds 117 N.E. 1078

Although possessing a personal dislike for the presiding judge, attorneys are under an obligation to uphold the dignity of the court—Platnauer v. Superior Court in and for Sacramento County, 163 P. 237, 32 Cal App 463

Profession includes much more than the mere management of the prosecution and the defense of litigated cases—Commonwealth v Wheeler, 73 Pa Super 164

Default judgment should not be taken unless intentional
Attorney should not take default judgment, unless after communicating with opponent he is satisfied default was intentional—Marcus v Simotone & Combined Sound & Color Films, 237 N.Y S 509, 135 Misc 228

Informing court of infancy of litigant
Intentional neglect to inform the court of the infancy of the litigant is a breach of attorney's duty to the court—Keenan v. Flanagan, 147 A. 617, 50 R I. 321.

37. In re Becker, 241 N Y S 369, 229 App Div. 62, appeal dismissed In re Levy, 174 N E. 461, 255 N Y 223.

38. Cal—Falloon v Superior Court of Los Angeles County, 248 P 1057, 79 Cal App. 149—Furlong v White, 196 P. 903, 51 Cal App 265—Platnauer v. Superior Court in and for Sacramento County, 163 P 237, 32 Cal App. 463
Ill—People v. Johnson, 176 N E. 278, 344 Ill. 132—People v. Charone, 123 N E. 291, 288 Ill. 220
Okl—In re Kelley, 28 P.(2d) 564, 167 Okl. 142
Wis—Langen v Borkowski, 206 N W. 181, 188 Wis. 277, 43 A.L R 622
6 C J. p 569 note 27.

Within ethical limits, an attorney owes his entire devotion to his client's interest—Mutter v. Burgess, 290 P. 269, 87 Colo 580.

Duty of attorney
(1) Duty of an attorney to his client demands nothing more than an honest effort to secure justice for such client, and does not permit or excuse a resort to deception to procure for a client even that to which the attorney honestly believes his client entitled—In re Wilmarth, 172 N W. 931, 42 S.D. 76.

(2) It is the attorney's duty, without flattery or scurrility, to present his view of the law, irrespective of an adverse ruling of the court—Phipps v. City of Medford, 158 P 666, 81 Or. 119, denying rehearing 156 P. 787, 81 Or. 119.

Persistent in presenting points
Although a lawyer in discharging his duty to a client be persistent in presenting his points, he is within his rights, so long as his language is not indecorous, whether he be right or wrong—Platnauer v. Superior Court in and for Sacramento County, 163 P. 237, 32 Cal.App 463.

39. McWhirter v. Donaldson, 104 P. 731, 36 Utah 293
Acquiring interests adverse to client see infra § 126
Representing adverse interests see infra §§ 47, 48.

40. Ariz—In re Gibbs, 278 P 371, 35 Ariz. 346—In re Miller, 244 P. 376, 29 Ariz 532.
Ind—In re McDonald, 164 N E 261, 200 Ind. 424
Iowa—In re Cloud, 250 N W 160, 217 Iowa 3.
Kan—In re Casebier, 284 P. 611, 129 Kan 853
La.—State v. Rosborough, 94 So. 858, 152 La. 945
N Y—In re Peters, 166 N E 337, 250 N Y 595, affirming 225 N Y S 144, 221 App Div 607, and answering certified question 228 N Y S. 876, 228 App Div. 865, reargument denied 170 N E. 148, 252 N Y. 572
N C—Seawell v. Carolina Motor Club, 184 S E 540, 209 N C 624.
Or—In re Weinstein, 42 P (2d) 744, 150 Or. 1.
Vt—In re Haddad, 173 A. 103, 106 Vt 322
6 C J p 569 note 29

41. Cal—In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P (2d) 329, 1 Cal (2d) 61, followed in Ballf v. Bar Examiners, 33 P (2d) 333, 1 Cal (2d) 789
Ill—People v. Baker, 142 N E 554, 311 Ill 66, 31 A.L R 737.
Iowa—In re Cloud, 250 N W. 160, 217 Iowa 3
S D—In re Hosford, 252 N W. 843, 62 S D 374—In re Egan, 218 N.W. 1, 52 S D. 394.

42. In re Ellis, 203 P 957, 118 Wash. 484.

43. Ariz—In re Miller, 244 P. 376, 29 Ariz 532.
Cal—Townsend v. State Bar of California, 291 P. 837, 210 Cal. 362.

The right to practice law is not "property,"[44] nor in any sense a "contract,"[45] nor a "privilege or immunity,"[46] within the constitutional meaning of those terms. It cannot be assigned or inherited, but must be earned by hard study and good conduct.[47]

§ 5. Constitutional and Statutory Provisions and Rules of Court

a. As to admission of attorneys
b. Miscellaneous provisions

a. As to Admission of Attorneys

Generally, the legislature may prescribe reasonable rules and regulations for admission to the bar, but cannot deprive courts of the right to make other, or additional, rules pertaining thereto.

Notwithstanding the jurisdiction and power to admit applicants to practice law is judicial and vested solely in the courts as hereafter shown (see infra § 6), it has been generally conceded that the legislature may, subject to constitutional limitations, prescribe reasonable rules and regulations for admissions to the bar which will be followed by the courts,[48] and this power to prescribe qualifica-

Idaho—In re Edwards, 266 P. 665, 45 Idaho 676
Ind—In re McDonald, 164 N E 261, 200 Ind 424.
Iowa—In re Cloud, 250 N W. 160, 217 Iowa 8.
Kan.—State ex rel Boynton v. Perkins, 28 P (2d) 765, 138 Kan 899—In re Casebier, 284 P. 611, 129 Kan 853
La—State v Rosborough, 94 So 858, 152 La 945—Meunier v. Bernich, (App) 170 So. 567.
Mass—In re Carver, 112 N E 877, 224 Mass. 169
Nev—In re Scott, 292 P 291, 53 Nev. 24, rehearing denied 296 P. 1113
N Y—People ex rel Karlin v Culkin, 162 N E 487, 248 N Y 465, 160 A L R 851, affirming 223 N Y S 873, 223 App Div. 822—In re Goldstein, 220 N Y S. 473, 220 App Div 107, modifying 218 N Y S. 944, 218 App Div. 799
Ohio—Land Title Abstract & Trust Co v Dworken, 193 N E 650, 129 Ohio St. 23—Dworken v Cleveland Automobile Club, 29 Ohio N P (N S) 607—United Mercantile Agency v. Lybarger, 28 Ohio N P (N S) 319—Goodman v Western Bank & Trust Co, 28 Ohio N P (N S) 272—Dworken v. Department House Owners Association of Cleveland, 28 Ohio N P (N S) 115
Or—In re Weinstein, 42 P (2d) 744, 150 Or 1—In re Crum, 204 P. 948, 103 Or. 296
S D—In re Brown, 264 N W 521—In re Hosford, 252 N W 843, 62 S D 374—In re Egan, 218 N W. 1, 52 S D 394
Vt—In re Morse, 126 A. 550, 98 Vt 85, 36 A L R 527
W Va—In re Adkins, 98 S E. 888, 83 W Va 673
6 C J p 569 note 30.

Of nature of public trust

Right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also exercise of special privilege, highly personal and partaking of the nature of a public trust—In re Levine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324

44. Idaho—In re Edwards, 266 P 665, 45 Idaho 676.
Kan—In re Casebier, 284 P 611, 129 Kan 853
6 C J p 569 note 33.

Property right

(1) The right to practice law has been held not to be a property right—In re Hosford, 252 N W 843, 62 S D 374.

(2) However, it has also been held that it is a property right, existing by virtue of letters patent—Unger v. Landlords' Management Corporation, 168 A 229, 114 N J Eq 68.

45. In re Casebier, 284 P 611, 129 Kan 853—6 C J p 569 note 34

46. U S—Bradwell v Illinois, (Ill) 16 Wall 130, 21 L Ed. 442
La—Meunier v. Bernich, (App) 170 So 567.
Md—In re Taylor, 48 Md 28, 30 Am R 451
Wash—State v. Rossman, 101 P 857, 53 Wash 1, 21 L R A (N S) 821, 17 Ann Cas 625
As a privilege or immunity within meaning of constitution see Constitutional Law § 458 [12 C J p 1110 note 85]

47. Fla—In re Clifton, 155 So. 324, 115 Fla 168
Kan—In re Casebier, 284 P. 611, 129 Kan 853
Ohio—United Mercantile Agency v Lybarger, 29 Ohio N P (N S) 319
Vt—In re Morse, 126 A. 550, 98 Vt 85, 36 A L R 527.
6 C J. p 569 note 36.

48. U S—Keeley v. Evans, (D C Or) 271 F 520, appeal dismissed 42 S Ct 184, 257 U S 667, 66 L Ed 426
Ariz—In re Bailey, 248 P 29, 30 Ariz. 407—In re Miller, 244 P. 376, 29 Ariz. 582
Cal—In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal.(2d) 324—Agg Large v State Bar of California, 23 P (2d) 288, 218 Cal 334—Brydonjack v. State Bar of California, 281 P. 1018, 208 Cal. 439, 66 A L R. 1507—In re Weymann, 268 P. 971, 92 Cal App 646—In re Chapelle, 234 P 906, 71 Cal App 129.
Kan—Depew v Wichita Ass'n of Credit Men, 49 P (2d) 1041, 142 Kan 403—In re Casebier, 284 P. 611, 129 Kan 853.
La—State v Rosborough, 94 So 858, 152 La. 945
Mass—In re Opinion of the Justices, 194 N E 313
Mich—In re Bonam, 237 N W. 45, 255 Mich 59
Nev—In re Scott, 292 P 291, 53 Nev. 24, rehearing denied 296 P 1113
N C—Seawell v. Carolina Motor Club, 184 S E 540, 209 N C. 624
Ohio—In re Thatcher, 12 Ohio N P. (N S.) 273
Or—In re Crum, 204 P. 948, 103 Or. 296.
Tenn—Gregory v. City of Memphis, 6 S W.(2d) 332, 157 Tenn 68
Tex—Burns v State, (Civ App) 76 S W (2d) 172, error granted.
Va—Bryce v Gillespie, 168 S E 653, 160 Va 137
Wis—State v. Cannon, 240 N W 441, 206 Wis 374
6 C J p 569 note 31, p 572 note 68.

Declaratory of inherent power of court

Statute declaring that the supreme court shall, by general or special rules, regulate admission of attorneys to practice in state courts is declaratory of power inherent in the supreme court to control and supervise the practice of law generally.—Rhode Island Bar Ass'n v Automobile Service Ass'n, (R I) 179 A 139.

Legal services not connected with administration of law in court proceedings

(1) Legislature may establish whatever qualifications it chooses for those permitted to render any type of legal service which has nothing to do with the administration of the law in court proceedings—State v. Cannon, 240 N.W. 441, 206 Wis 374.

(2) Legislature in punishing practice of law except by licensed attorneys is empowered to authorize licensed realty brokers to draw deeds, bonds, mortgages, leases, releases, agreements and assignments.—Mor-

tions cannot be irrevocably surrendered.[49] However, the legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice,[50] nor take from the courts the right and duty of actually making orders admitting applicants,[51] and the admitted power of congress to prescribe qualifications for attorneys in the federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such persons.[52] The authority of the legislature is denied by some courts on the ground that courts have the sole right to prescribe for themselves the qualifications of their ministers of justice, and the rules and regulations for their admission, without interference by a coördinate branch of the government.[53] It has been held, however, that a mere declaration of the effect to be given to a purely judicial act of the supreme court in directing the admission of an attorney at law to practice before it is not a legislative interference with judicial power.[54]

Courts may make reasonable rules and regulations for admission to the bar,[55] and may prescribe qualifications in addition to those provided by statute.[56] However, a court rule requiring the employment of local counsel by counsel of record, not maintaining an office in the county, has been held invalid,[57] as the privilege conferred on a person admitted to practice as attorney is state wide and cannot be abridged by local court rule.[58]

b. Miscellaneous Provisions

The validity of certain other statutory provisions has been before the courts for adjudication.

A statute authorizing the court of appeals to adopt rules regulating practice of law and providing for procedure for disciplining attorneys was held not unconstitutional.[59] A clause excepting, from a statute defining practice of law, laymen's activities without resort to court proceedings, in

ris v Muller, 172 A. 61, 113 N J Law 46, reversing 168 A. 772, 11 N J Misc 866.

Qualifications necessary to protect public

Legislature has power to exact of those desiring to practice law such qualifications as, in the legislature's judgment, are necessary to protect citizens from becoming unconscious victims of dishonesty or incompetence—State v. Cannon, 240 N.W. 441, 206 Wis 374

Legislation forbidding practice of law relating to the performance of functions of attorney before a court by individuals other than members of the bar would be within competency of the legislature, and crimes might be established as well as civil remedies for infraction of such prohibitions—In re Opinion of the Justices, (Mass) 194 N E 313.

Statute relating to board of examiners held valid.—In re Chapelle, 234 P 906, 71 Cal App 129.

Compulsory membership of attorneys

State Bar Act was held not void because of a provision therein for compulsory membership of attorneys. —In re Scott, 292 P 291, 53 Nev. 24, rehearing denied 296 P 1113.

State statutes regulating the practice of law are inapplicable to federal courts.—Ex parte McCue, 293 P. 47, 211 Cal 57.

49. Ex parte Steckler, 154 So 41, 179 La. 410, appeal dismissed 54 S Ct. 781, 292 U.S 610, 78 L Ed 1470

50. Cal—In re Chapelle, 234 P 906, 71 Cal App 129.
La—Ex parte Steckler, 154 So 41, 179 La 410, appeal dismissed 54 S Ct 781, 292 U S. 610, 78 L Ed 1470
Mass—In the Opinion of the Justices, 194 N E 313
Minn—In re Grantham, 227 N W 180, 178 Minn. 335—In re Humphrey, 227 N W. 179, 178 Minn 331
N C—Seawell v. Carolina Motor Club, 184 S E 540, 209 N C. 624
6 C J p 572 note 64.

Powers not possessed

(1) Permission to practice law cannot be given by the legislature, except subject to requirements for admission to the bar established by judicial department—In re Opinion of the Justices, (Mass) 194 N E 313 —In re Thatcher, 12 Ohio N P (N.S) 273.

(2) Legislature has no power to enact legislation designed to permit practice of law relating to performance of functions of attorney before court by individuals other than by members of the bar, since permission to practice law is within exclusive cognizance of the judicial department.—In re Opinion of the Justices, supra

(3) Legislature may make exceptions to prohibitory provisions with regard to practice of law, but permission cannot thereby be conferred to practice law, except subject to the judicial department—In re Opinion of the Justices, supra.

(4) A joint legislative resolution requiring the court to grant a license to certain individuals to practice law cannot avoid the requirements of a general statute, Code (1913) c 119 § 1 (§ 4699), and rules of court made pursuant thereto, regulating the granting of license and prescribing study and degree of preparation in order to entitle applicant to a license —In re Adkins, 98 S E. 888, 83 W. Va 673

51. In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324—In re Chapelle, 234 P. 906, 71 Cal App. 129

52. Ex p Garland, 71 U.S 333, 18 L Ed. 366, 375

53. Ill—In re Day, 54 N E 646, 181 Ill 73, 50 L R A. 519.
N J—In re Branch, 57 A. 431, 70 N J Law 537
Pa.—Splane's Pet, 16 A. 481, 123 Pa. 527
Utah—In re Platz, 132 P. 390, 42 Utah 439.
6 C J p 572 note 65.

54. Hoopes v. Bradshaw, 80 A 1098, 231 Pa 485, distinguishing Splane's Pet, 16 A 481, 123 Pa. 527.

55. Cal—In re Cate, (App) 273 P. 617, supplementing opinions 270 P. 968 and 271 P 356
Ind—In re McDonald, 164 N.E 261, 200 Ind 424.

56. Ariz—In re Bailey, 248 P 29, 30 Ariz 407—In re Miller, 244 P. 376, 29 Ariz 532
Cal—In re Lavine, 41 P (2d) 161, 2 Cal.(2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal.(2d) 324
Wis—State v. Cannon, 240 N W. 441, 206 Wis. 374.

57. Meyer v. Brinsky, 195 N E. 702, 129 Ohio St. 371.

58. Meyer v Brinsky, supra

59. Commonwealth ex rel. Ward v. Harrington, 98 S W.(2d) 53, 266 Ky. 41.

enforcing, securing, settling, adjusting, or compromising defaulted, controverted, or disputed accounts or claims, was held unconstitutional, but the remainder of statute was valid legislation in aid of the supreme court's inherent power.[60]

§ 6. Jurisdiction to Admit

a. In general
b. Particular courts or boards

a. In General

Power to admit applicants to practice law is judicial and vested solely in the courts Power is not an arbitrary or despotic one.

Attorneys being officers of the court (see supra § 4 a), the power to admit applicants to practice law is judicial and not legislative, and is vested in the courts only.[61] However, this power to admit attorneys is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion.[62]

b. Particular Courts or Boards

Power to admit to practice is sometimes vested in the supreme court or courts of appeal and sometimes in courts of general jurisdiction.

In many jurisdictions the power to admit to practice is exercised by courts of record of general jurisdiction,[63] but exclusive power to admit applicants to the bar is sometimes vested by the legislature in the supreme court[64] or other court of appeal[65]

60. Meunier v. Bernich, (La App) 170 So. 567.

61. Cal—In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P.(2d) 311, 2 Cal (2d) 324—Howe v State Bar of California, 298 P 25, 212 Cal 222—Townsend v State Bar of California, 291 P 837, 210 Cal. 362—Brydonjack v State Bar of California, 281 P 1018, 208 Cal 439, 66 A L R 1507—In re Cate, (App) 273 P 617, supplementing opinions 270 P 968 and 271 P. 356—In re Chapelle, 234 P 906, 71 Cal App 129
Conn—Rosenthal v State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R 991.
Idaho—In re Edwards, 266 P 665, 45 Idaho 676
Ill—People v. People's Stock Yards State Bank, 176 N E 901, 344 Ill 462.
Kan—State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan 899
La—Meunier v. Bernich, (App) 170 So 567.
Mass—In re Opinion of the Justices, 194 N E 313—In re Opinion of the Justices, 180 N E 725, 279 Mass 607, 81 A L R 1059
Neb—State ex rel. Wright v. Barlow, 268 N.W. 95.
Ohio—In re Thatcher, 12 Ohio N P (N S) 273
Or—In re Crum, 204 P. 948, 103 Or 296
Pa.—In re Olmsted, 140 A 634, 292 Pa. 96—Wildermuth's Admission, 7 Pa Dist. 6.
S D—In re Hosford, 252 N W 843, 62 S D. 374
Tex—Burns v State, (Civ App) 76 S W.(2d) 172, error granted.
W Va—In re Adkins, 93 S E 888, 83 W Va. 673.
Wis—State v. Cannon, 221 N.W. 603, 196 Wis. 534
6 C J. p 571 note 61.

Judicial department should control the appointment of its officers, including its attorneys—In re Cate, (Cal App) 273 P 617, supplementing opinions 270 P 968 and 271 P 356

One function of supreme court is to admit only properly qualified persons to practice of law, and to prevent practice of law by unauthorized persons—State ex rel Boynton v Perkins, 28 P (2d) 765, 138 Kan 899

In New Jersey, attorneys at law are not admitted to practice by the court They are invested with that privilege by letters patent issued by the governor of the state when he is assured that such licensees are possessed of the proper qualifications by a recommendation to that effect from the supreme court—In re Branch, 57 A 431, 70 N J Law 537, 576—In re Raisch, 90 A. 12, 83 N J Eq 82

62. Or—In re Crum, 204 P. 948, 103 Or 296
S D—In re Hosford, 252 N.W. 843, 62 S D 374.
6 C J p 572 note 62.

63. In re McDonald, 164 N E 261, 200 Ind 424

Court of county in which applicant resides
Under Const art 7 § 21, and Burns St Annot (1914) § 997, an applicant for admission to the bar must apply to the circuit court of the county in which he resides—In re Holt, 108 N E. 860, 183 Ind. 248

64. Idaho—Anderson v Coolin, 149 P. 286, 27 Idaho 334
Philippine—In re Guarina, 24 Philippine 37
R I—Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139.
Wash—In re Bruen, 172 P. 1152, 102 Wash 472
6 C J. p 572 note 71.

In California
(1) Under the State Bar Act passed in 1927, the power and jurisdiction to admit attorneys to practice is vested in the supreme court—In re Weymann, 268 P. 971, 92 Cal App. 646

(2) Prior thereto, such jurisdiction and power was vested in the district courts of appeal under the then existing legislation—In re Wells, 163 P 657, 174 Cal 467—Danford v Superior Court of California in and for City and County of San Francisco, 193 P. 272, 49 Cal App 303—In re Mash, 179 P. 897, 39 Cal App 548—6 C J. p 572 note 72

Acting on certificate of state board of examiners
A statute conferring on the supreme court power to determine the right of an applicant to be admitted to the practice of law will be construed to require the court to act only on the certificate of the state board of law examiners.—In re Bowers, 192 S W. 919, 137 Tenn 193, rehearing denied 194 S W. 1092, 137 Tenn 189.

Admission to practice in supreme court carries with it, by virtue of statutory provisions in some jurisdictions, the right to practice in the lower courts on a showing of an honest disposition and good moral character.—Martin v Ins Co., 25 Pa. Dist. 455

In New York, admission to practice by the appellate division admits the applicant to practice in all courts, including the court of appeals—Matter of Backus, 136 N.Y S 484, 151 App.Div. 813

65. In re Klein, 169 N E 397, 252 N. Y 316, reversing 233 N Y S 801, 226 App Div 659—Matter of Backus, 136 N Y S 484, 151 App Div. 813—6 C.J. p 572 note 72.

Commissioner of patents. By act of congress, the commissioner of patents, subject to the approval of the secretary of the interior, may prescribe rules and regulations governing the right and qualifications of a person to act as a patent agent or attorney before his office.[66]

The United States Board of Tax Appeals has power to adopt rules as to the persons who may practice before it as attorneys, notwithstanding the absence of an express statute providing for a list of enrolled attorneys.[67]

§ 7. Capacity and Qualifications

a. In general
b. Good moral character
c Citizenship and residence
d. Women and minors

a. In General

Compliance with local statutory provisions and rules of court is prerequisite to the practice of law.

The right to admission to practice is governed in every jurisdiction by the local statutory and constitutional provisions and rules of court and compliance with these requirements is prerequisite to the practice of law.[68] The ultimate purpose of all regulations of the admission of attorneys is to assure the courts the assistance of advocates of ability, learning, and sound character and to protect the public from incompetent and dishonest practitioners.[69]

In the federal courts, the qualifications for admission are prescribed by court rules, and, generally, a member of the bar of a state is admissible on motion on a proper showing of compliance with the rules.

b. Good Moral Character

Possession of a good moral character is universally required as a condition to the right to admission to practice.

The possession of a good moral character is universally required as a condition precedent to the right to admission to practice.[70] This includes at

66. U S Rev St § 487, as amended by Act Febr 18, 1922 § 3 [42 St at L. p 390 c 58], U S Code tit 35 § 11.

67. Goldsmith v. U S. v Board of Tax Appeals, 46 S Ct 215, 270 U.S 117, 70 L Ed 494, affirming 55 App. D C 229, 4 F (2d) 422

68. Ill—People ex rel. Courtney v. Association of Real Estate Taxpayers of Illinois, 187 N E 823, 354 Ill 102

Ohio—Land Title Abstract & Trust Co v. Dworken, 193 N.E. 650, 129 Ohio St. 23.

Right to practice law is limited to persons of good moral character with special qualifications ascertained and certified as prescribed by law. —In re Clifton, 155 So. 324, 115 Fla 168—In re Casebier, 284 P. 611, 129 Kan 853—In re Opinion of the Justices, (Mass.) 194 N E 313—In re Weinstein, 42 P (2d) 744, 150 Or. 1 —6 C J p 569 note 32.

69. Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn 409, 87 A L R. 991.

Other statement of rule

A license to practice law is a guaranty that, as far as the court is advised, the licensee is fit and proper to assume the responsibilities of an attorney, to enjoy and safe-keep confidences of others, and to aid and assist in the care and management of their legal business and affairs.—People v Czarnecki, 109 N E 14, 268 Ill. 278

Right to appear before the board of tax appeals of the United States is subject to such limitations and conditions as are necessary for the protection of the department and the public.—Goldsmith v U S Board of Tax Appeals, 55 App D C 229, 4 F (2d) 422, affirmed 46 S Ct 215, 270 U S 117, 70 L Ed 494

Capacity of register of deeds to practice law see Registers of Deeds § 9 [53 C J p 1072 note 52]

70. Ala—Ex parte Thompson, 152 So. 239, 228 Ala 113, followed in Ex parte Walker, 152 So 246, 228 Ala 130, and In re Countryman, 152 So. 257, 228 Ala 21

Cal—Vaughan v. State Bar of California, 284 P 909, 208 Cal 740—In re Mash, 179 P. 897, 39 Cal App 548

Fla—In re Clifton, 155 So 324, 115 Fla 168.

Hawaii—In re Roberts, 30 Hawaii 588

N Y—In re Rouss, 116 N E. 782, 221 N Y 81, affirming 155 N Y S. 557, 169 App Div 629, reargument denied and amendment of remittitur granted 117 N E 1083, 221 N.Y 667

N C—In re Farmer, 131 S E 661, 191 N C. 235

Or—In re Crum, 204 P. 948, 103 Or. 296.

6 C J. p 573 note 83.

Good character, not reputation, required

Applicant for license to practice law is required to show good moral "character," or what he really is, as distinguished from good "reputation," or the opinion generally entertained of him—In re Weinstein, 42 P (2d) 744, 150 Or. 1.

Lack of proper conception of ethics

A man of mature years and of good general reputation, who, as found by board of law examiners, has failed to conceive the nature of the duties of attorney, and has no proper conception of the ethics of the profession, having solicited business for a member of the bar, etc, should not be admitted to practice law—In re Bowers, 200 S W 821, 138 Tenn. 662

Facts held to negative good moral character

(1) Facts disclosing applicant had been disbarred in another state, convicted of forgery, and adjudged in contempt for practicing law without a license—In re Garland, 28 P (2d) 354, 219 Cal. 661.

(2) Concealing former application for admission and withdrawal thereof because of objections to his moral character—In re Wells, 163 P. 657, 174 Cal 467.

(3) Convictions of assault and carrying concealed weapons; and denial of custody of child in divorce proceedings as not a fit and suitable person to have such custody—In re Farmer, 131 S.E 661, 191 N C 235.

(4) Indictment for felony—State v Podell, 207 N W. 709, 189 Wis 457.

(5) Making false statements in affidavits accompanying application —Spears v. State Bar of California, 294 P. 697, 211 Cal. 133, 72 A L R 923.

(6) Obtaining a loan by concealing material facts, and assisting another attorney before admission by advising witnesses to evade giving honest answers—In re Wells, 163 P. 657, 174 Cal. 467.

(7) Obtaining goods by false pre-

least common honesty.[71] The standard of personal and professional integrity which should be applied to persons admitted to practice law is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law,[72] and an applicant may be rejected for want of good moral character although guilty only of acts which would not be cause for disbarment or suspension.[73]

Certificate as to good character of applicant should be given by practicing attorneys only from personal knowledge or after painstaking inquiry into the matter.[74]

c. Citizenship and Residence

A necessary qualification for admission to practice, generally, is that the applicant be a citizen of the United States. Residence in the state is sometimes required.

A necessary qualification for admission to practice, generally, is that the applicant must be a citizen of the United States,[75] as an alien cannot well take the oath required of attorneys and counselors.[76] In some states, however, one who has declared his intention to become a citizen of the United States and who possesses the other necessary qualifications may be admitted by virtue of statutory provisions,[77] but an attorney, admitted under such conditions, is not admissible to the bar of a district court of the United States where, after such admission to the bar of the state court, his petition for admission to citizenship was denied.[78]

Residence. Although it has been held that an applicant, although not a resident, may be admitted if he possesses all the other qualifications,[79] bona fide residence in the state is an essential condition for original admission to the bar in some jurisdictions, with actual domicile and an established place of business.[80] The question of what shall be the required connection between residence and the practice of law is primarily for the state where the practice is sought to be conducted,[81] and residence within the meaning of a statute requiring residence for a certain period prior to admission means the abode where one actually lives, and not a mere naked legal residence.[82]

d. Women and Minors

There is a conflict as to the right of women to be admitted to the practice of law. Generally, a minor is not eligible for admission to the bar.

A woman has no right at common law, or under the constitution of the United States, or under statutes in some jurisdictions, to practice law, and, except in those jurisdictions where special statutory provisions have been made, rendering her eligible, it has been held that she cannot be admitted to the bar as an attorney,[83] although there

tense, larceny, or conspiracy to commit it, forgery, and extortion—In re Dillingham, 124 S.E. 130, 188 N.C. 162

71. People v. Macauley, 82 N.E. 612, 230 Ill. 208, 120 Am.S.R. 287—6 C.J. p. 574 note 84

72. People v. Macauley, supra.

73. Cal.—In re Wells, 163 P. 657, 174 Cal. 467
Or.—In re Weinstein, 42 P.(2d) 744, 150 Or. 1.

74. In re Dillingham, 124 S.E. 130, 188 N.C. 162

75. Agg Large v. State Bar of California, 23 P.(2d) 288, 218 Cal. 334—6 C.J. p. 573 note 74.

Philippine Islands

(1) Under the treaty of Paris providing that all Spanish subjects remaining in the islands and not preserving their allegiance to Spain by certain acts shall be held to have renounced it and to have adopted the nationality of the territory, one who left the islands, although for temporary purposes, has been held to have lost his right to claim citizenship and with it the right to practice law in the Archipelago—Bosque v. U.S., 28 S.Ct. 501, 209 U.S. 91, 52 L.Ed. 698, affirming 1 Philippine 88

(2) A child under parental authority whose father made no declaration of intention to retain Spanish citizenship under such treaty is a citizen and qualified to enroll for the bar examination—Matter of Arnaiz, 9 Philippine 705, 6 Off.Gaz. 549

(3) The son of a Spaniard born in Cuba, but who was of age on April 11, 1899, and made no declaration of intention to claim Spanish citizenship is, likewise, a citizen of the Philippine Islands and entitled to enroll for the bar examination—Matter of Villapol, 9 Philippine 706, 6 Off.Gaz. 550
6 C.J. p. 573 note 74 [d].

76. In re Admission to Bar, 84 N.W. 611, 61 Neb. 58

77. Telegdi v. State Bar of California, 283 P. 821, 208 Cal. 793—Howden v. State Bar of California, 283 P. 820, 208 Cal. 604—6 C.J. p. 573 note 76

Court cannot make exceptions to statute

An alien applicant for admission to the bar, who had filed his application and taken his examination before the amendment of Code Civ. Proc. § 275, by St.(1921) p. 538, permitting citizens to be admitted to the bar and providing that aliens previously admitted to practice must complete their naturalization within one year, or have their certificates revoked, became effective on July 29, 1921, is not entitled to have an order entered admitting him as of a day prior to the effective date of the amendment, since the statute covers his case, and the court cannot write exceptions therein—Petition of Harrison, 211 P. 26, 59 Cal.App. 539

Statute not modified by general statute

Statute permitting one declaring his intention to become a citizen to be admitted has been held not modified by a later statute generally prescribing regulations as to admission to practice law—Telegdi v. State Bar of California, 283 P. 821, 208 Cal. 793—Howden v. State Bar of California, 283 P. 820, 208 Cal. 604

78. In re O'Sullivan, (D.C.Mont.) 267 F. 230

79. In re Tryon, 96 A. 235, 114 Me. 549.

80. Ind.—In re De Benedetto, 143 N.E. 413
Wis.—In re Pierce, 207 N.W. 966, 189 Wis. 441.

81. In re Pierce, supra.

82. In re McGrath, 278 N.Y.S. 135, 243 App.Div. 803

83. Ex parte Hale, 89 S.E. 216, 145 Ga. 350—6 C.J. p. 574 notes 88, 89

is authority to the contrary.[84] Objections to the admission of women to the bar, aside from the fact that it has no warrant under the common law, lay in the fact that an attorney is a quasi-officer of the court and an admission of women to that office would mean that they were eligible to all other offices,[85] and there has been raised a further and stronger objection to the admission of married women on the ground of their disabilities arising from coverture.[86]

In statutes authorizing the admission of attorneys generally and which provide that any "person" or "citizen" having certain prescribed qualifications may be admitted on application, the words "person" and "citizen" have been held not to include women, even though there may be a general provision in the statute law that words importing the masculine gender shall be construed to include the feminine.[87]

Nevertheless, the legislature has abundant power to provide for the admission of women to the bar of the state, and by specific statutory provisions women are now entitled to practice in the supreme court of the United States and in the highest courts of many of the states.[88]

Minors The general rule is that a minor is not eligible to admission to the bar; most of the statutes provide that the applicant shall be twenty-one years of age, and it seems that this is a necessary requisite even where there is no special provision,[89] although a male person over eighteen years of age, whose disabilities have been removed by court pursuant to statute, has been held entitled to be examined as to his qualifications to practice law.[90]

§ 8. —— Preliminary Study and Clerkship

Compliance with statutory provisions and court rules with respect to the course and length of study is essential for admission to practice law

In nearly all the states the legislature has committed the course and length of study to be prescribed by the courts. As a rule the applicant must have studied law for a certain period either in a law school or while serving a clerkship in the office of a practicing attorney,[91] and in some jurisdictions courts have promulgated rules relating to general educational requirements.[92] The applicant, during his period of clerkship, must have been actually engaged in assisting the attorney whom he serves, in his business and under his control,[93]

84. Colo.—In re Thomas, 27 P. 707, 16 Colo. 441, 13 L R A 538
Conn.—In re Hall, 50 Conn 131, 47 Am R 625
Ind.—In re Leach, 34 N E. 641, 134 Ind 665, 21 L R A 701
N.H.—Ricker's Pet., 29 A. 559, 66 N H 207, 24 L R A 740.
Pa.—In re Kilgore, 17 Wkly N C. 475
6 C.J p 575 note 93

85. Matter of Bradwell, 55 Ill 535

86. U S.—Bradwell v. Illinois, (Ill.) 16 Wall 130, 21 L Ed 442—In re Lockwood, 9 Ct Cl. 346
Ill.—Matter of Bradwell, 55 Ill. 535
N H.—Ricker's Pet., 29 A 559, 66 N H 207, 24 L R A 740.

87. Md.—In re Maddox, 50 A. 487, 93 Md. 727, 55 L R A 298
Mass.—Robinson's Case, 131 Mass. 376, 41 Am R. 239
Tenn.—State v. Davidson, 22 S W 203, 92 Tenn. 531, 20 L R A. 311
Wis.—Matter of Goodell, 39 Wis. 232, 20 Am R. 42.
6 C J p 574 note 90

88. Colo.—In re Thomas, 27 P 707, 16 Colo. 441, 13 L R A 538
N Y.—In re Stoneman, 53 Am R. 325.
Wis.—In re Goodell, 31 N W. 551, 48 Wis. 693

89. Ark.—Ex p Coleman, 15 S W. 470, 54 Ark 235.
Neb.—In re Admission to Bar, 84 N. W 611, 61 Neb. 58.

90. State v. Baker, 6 So 445, 25 Fla. 598.

91. In re Moskovitz, 155 N.Y S 485, 169 App Div 527—6 C J p 577 note 19

Approved law school

Where a bar examining committee permitted applicant to take an examination not knowing his studies were limited to the evening classes of a law school which were not approved, the committee did not waive the requirement of study in an approved law school.—Rosenthal v State Bar Examining Committee, 165 A 211, 116 Conn 409, 87 A L R. 991

Waiver of service of clerkship

Neither L (1913) c 105 § 2, nor the rules for admission to the bar prescribed by the court of appeals, confer any power on the appellate division of the supreme court to waive the requirement of such rules requiring clerkship as a condition precedent to admission to the bar.—In re McGinniss, 173 N.Y S 209, 186 App Div. 938

Service in office of counselor necessary

Where there was a general overhauling of rules concerning admission to the bar fifteen months before a student began service under an attorney who was not a counselor, with whom he served for about six months before he became aware that rule 4–C, as amended, required service under a counselor, his application to be permitted to take an examination as though he had served under a counselor for such six months will be denied.—In re Schalick, 130 A. 520, 3 N J Misc 936.

Full-time law school

Proposal of a bar association to extend the period of training for part-time law schools and to leave the period of training for full-time law schools the same was denied under a definition of "full-time law school," as one where hours of attendance are so arranged that at least two thirds of the weekly classroom time is scheduled after 9 A. M. and before 4 P M, and "part-time law school" as any other.—Petition of Association of Bar of City of New York, 177 N E 423, 257 N Y 211

92. In re K., 93 A. 668, 88 N J Law 157.

Bar examiners may not relax rule

Applicant for admission to an examination to the bar is not entitled to be relieved from paragraph (d) of rule 4 that, at least three years before taking a bar examination, applicant should have graduated from an approved high school or have passed an examination equivalent to that of graduation in a public high school, and bar examiners have no authority to relax such rule.—In re K., 93 A 668, 88 N J Law 157.

93. N Y.—In re Moskovitz, 155 N Y. S 485, 169 App Div. 527
Pa.—Dunn's Application, 9 Pa.Dist. 107.
6 C J. p 577 note 20.

and must have studied under the personal direction of the attorney[94] in an office within the jurisdiction.[95]

On failure in examination. In some jurisdictions, court rules require an applicant for an examination to serve a clerkship in the office of a counselor where he has failed in a previous examination, and this requirement has been held not satisfied by taking a course at law school during the prescribed period.[96] While such a rule has been held to apply to attorneys of other jurisdictions recently admitted,[97] it has also been held not to apply to attorneys of other jurisdictions with a long record of service.[98]

Reduction of term. The statutes quite generally provide for a reduction of the term of the clerkship on proof of the applicant having pursued classical studies to a certain extent.[99]

§ 9. Application for Admission

Applicants for admission to the bar or to bar examinations must comply with rules relating to application therefor, as filing of required certificates, etc

An application for admission to the bar filed before the effective date of an amending statute is not controlled by such amending statute.[1] Applicant should make a full disclosure of any criminal charges preferred against him,[2] notwithstanding such charges were subsequently dismissed.[3] After dismissal of a petition for admission to practice law, applicant may make a new application for admission.[4]

Admission to examinations. In some jurisdictions, court rules require a person intending to take bar examinations to post notices thereof and to file applications and certificates relative to his right to be admitted to such examinations, and such persons must fully comply with these rules and regulations.[5] In some states, an application for admission to bar examinations must be made by a counselor in open court on an affidavit or verified petition on the opening day of the term, as the court cannot consider informal oral applications by students at all sorts of times and places;[6] and a certificate as to preliminary education may not ordinarily be filed nunc pro tunc.[7] While it has been held that a certificate of commencement of clerkship filed in vacation will not be reckoned as relating to the previous term of court,[8] the filing of such certificate nunc pro tunc has sometimes been allowed.[9]

Clerkship must be regular daily employment

Under Court of Appeals Rules, rules 4, 5 (48 N E vi), applicant is not entitled to admission to the bar on a showing of perfunctory, nominal, or occasional attendance at a law office; but the rules require that his clerkship shall be his regular daily employment—In re Moskovits, 155 N Y S 485, 169 App Div. 527—6 C.J. p 577 note 20 [a].

Vacation period

Character committee could not refuse to certify applicant for admission to the bar because he worked in hotel during vacation applicable on the year of required clerkship—In re Klein, 169 N E 397, 252 N Y 316, reversing 233 N.Y S. 801, 226 App.Div. 659.

94. Baker v Judges Ulster C. Pl., 4 Johns.(N Y) 191

95. In re Staub, 123 A 541, 99 N J Law 373—In re Meigs, 153 A. 102, 9 N.J.Misc. 234.

96. In re G., 130 A. 534, 3 N J.Misc 941.

97. In re Meigs, 153 A. 102, 9 N J Misc. 234.

98. In re Natelson, 129 A. 183, 3 N J. Misc. 549.

99. Order for allowance to attorney's clerks for classical studies must be obtained from a judge at the commencement of the clerkship, the question of such allowance will not be considered on application for admission.—Anonymous, 3 Wend.(N Y) 456

Relaxation of rule on petition of the bar

The rule of court prescribing the period of study may be, it has been said, relaxed in a particular instance on a petition of a majority of the members of the bar.—In re Reynolds, 29 Pa Co 187

1. Brydonjack v. State Bar of California, 281 P 1018, 208 Cal. 439, 66 A L R 1507.

2. Spears v. State Bar of California, 294 P 697, 211 Cal 183, 72 A L R 923

3. In re Garland, 28 P.(2d) 354, 219 Cal 661

4. Rosencrans v. Tidrington, 155 N. E 705, 199 Ind 140

5. N Y—In re Moore, 15 N E 369, 108 N Y. 280.
Pa.—Moore's Application, 9 Pa Dist. 109
6 C.J. p 576 notes 4 [a], 6.

Date when qualifications first existed

One is not entitled to take a bar examination where certificate of academic qualifications does not give the date when such qualifications first existed, and fails to show that at least three years will have expired when the bar examination is held—In re Cole, 169 A 634, 12 N J Misc 131.

Registration preliminary to beginning legal studies see infra § 13.

6. In re Caplin, 130 A. 526, 3 N J. Misc 940

7. In re K., 98 A 668, 88 N J Law 157—In re Sachs, 169 A. 634, 12 N J Misc 142

Regents' certificate

A court rule requiring proof that applicant had, within three months after commencing his clerkship, passed the regents' examination has been held mandatory, and an application for exemption from its requirements will be denied.—In re Moore, 15 N E. 369, 108 N Y 280—Moore's Application, 9 Pa.Dist. 109.

8. Ex p. Sayre, 7 Cow.(N Y) 368.

9. In re Trusdell, 130 A. 522, 3 N J. Misc. 940.

By whom application made

Application for leave to file a certificate of commencement of clerkship nunc pro tunc should be made by a counselor at law, and be based on a proper affidavit stating the facts fully—In re Genzler, 130 A. 535, 3 N J Misc 939.

Change of court rule

Applicant to be admitted to a bar examination, who began his period of service of clerkship before the change of rule relating to filing, has been held entitled to permission to file a certificate nunc pro tunc—In re Trusdell, 130 A. 522, 3 N.J.Misc. 940.

Failure to post notices of intention to take bar examinations is not excused by inadvertence or unforeseen circumstances preventing such action immediately before the expiration of the time for filing such notices.[10]

Declaration of intention to open office. A court rule requiring applicant for admission to a county bar to file a written declaration of an intention to open his principal office in the county has been held not invalid.[11]

§ 10. Examination

Applicants for admission to the bar must submit to an examination to test their legal knowledge unless excepted therefrom by statute or rule of court.

An applicant for admission to the practice of law must possess the requisite ability and legal learning, to test which he must submit himself to an examination either by the court itself or by duly appointed examiners.[12] The law gives a large discretion to the examiners as to the regulations governing examinations, the exercise of which will not be reviewed unless there is a clear abuse thereof,[13] and there must be a compliance with the rules and regulations concerning the examination.[14]

Exceptions to rule. While it is sometimes provided by statute or rule of court that graduates of certain institutions of learning may be admitted without examination,[15] it has been held that the word "may" will not be construed to mean "must" or "shall" and the examiners may require such graduates to take an examination,[16] and such a statute has been held invalid as applied to persons graduating before the enactment thereof.[17]

Where the legislature, in prescribing the requirements for admission to practice has failed to make any provision for the rights of a person previously admitted to the lower courts, it has been held that it could not have been the intention of the legislature to have required of them a submission to the examination prescribed.[18]

Admission of attorneys from other jurisdictions is discussed infra § 15.

§ 11. Determination of Right to Admission and Review Thereof

a. In general
b Issues
c Evidence
d. Hearing
e. Review of order in general
f. Setting aside order
g. Collateral attack

a. In General

Although proceedings for admission are judicial, courts may employ members of the bar to ascertain qualifications of applicant. Motion to the court to admit is the proper procedure on denial of recommendation by bar committee

Proceedings for admission of attorneys at law are judicial;[19] and while a petition for admission to the bar has been held a proceeding at law, and

Application denied

(1) Under rule 4—E, one beginning his period of clerkship on June 16, 1924, but failing to file certificate of commencement of clerkship until June 30, has been held not entitled to permission to file the certificate nunc pro tunc—In re Molloy, 130 A. 525, 3 N J Misc. 937.

(2) Where the clerkship of a law student was actually commenced in September, the fact that he delayed filing his certificate of commencement of clerkship until November because at that time examinations for attorney's license were held in November, and that, after his clerkship commenced, the time for such examinations was changed from November to October, constitutes no reason for granting his application to file a certificate nunc pro tunc, so as to enable him to take advantage of the time served prior to the filing of the certificate, in view of Sup Ct Rules, rule 4, as amended in 1923—In re McLaughlin, 135 A 565, 100 N J.Law 15

10. In re Keely, 171 A. 387, 12 N.J Misc. 38A.

11. In re Olmsted, 140 A. 634, 292 Pa. 96

12. In re Ellis, 203 P 957, 113 Wash 484—6 C J. p 575 note 3, p 576 note 4.

Candidate improperly admitted to examination

The court rule providing for the admission as attorneys by the superior court of all successful candidates at the examination applies only to the candidates who have been properly admitted to the examination and have passed—Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A L R 991.

13. Colo.—People v. Carr, 48 P 128, 21 Colo 525

Mich—Mitchell v. State Bd of Law Examiners, 119 N W 537, 155 Mich. 452.

6 C J p 576 note 5.

14. In re Grout, 108 N E 83, 214 N. Y 39—6 C J. p 576 note 7.

15. In re Admission of Certain Persons to Bar, 247 N W 877, 211 Wis. 337—6 C J p 576 note 8

16. In re Ellis, 203 P. 957, 113 Wash 484.

17. In re Admission of Certain Persons to Bar, 247 N W. 877, 211 Wis. 337

Persons graduating before enactment of such a statute will not be admitted to the bar until after inquiry showing their qualifications at the time of applying for admission, the act makes a diploma, when it was issued, prima facie evidence of the holder's qualifications and fitness, but does not attempt to cover the period intervening between the granting of the diploma and the application.—In re Admission of Certain Persons to Bar, 247 N.W. 877, 211 Wis. 337.

18. In re Applications for Admission to Practice, 85 N W. 992, 14 S D 429.

19. In re Crum, 204 P. 948, 103 Or. 396.

Supreme court possesses the power, irrespective of legislature, to determine the qualifications of those who apply for admission to practice law—Meunier v. Bernich, (La App.) 170 So. 567.

not one in equity,[20] it has also been held that the proceeding for admission is not an action at law, but is in the nature of an investigation by the court or its representatives to determine whether a particular candidate is qualified to become one of its officers.[21]

The usage by courts of employing members of the bar to ascertain the qualifications and character of applicants for membership is reasonable and valid,[22] and the question as to whether certificates of admission to the bar shall be granted hereafter to candidates denied certificates for cheating at examinations rests largely in the sound discretion of the board of law examiners.[23]

Procedure on denial of admission by examiners. Where a board of governors recommended admission, but the committee of bar examiners denied the application after due investigation, a motion to the court to be admitted to practice has been held the proper procedure.[24]

United States Board of Tax Appeals, on an application for permission to practice before it, may properly consider the record of hearing on a similar application before the treasury department,[25] and denial of such application because of alleged violation of duty by applicant has been held not an abuse of discretion,[26] although applicant should not be rejected on a charge of unfitness without an opportunity by notice for a hearing and answer.[27]

b. Issues

Moral fitness of applicant is in issue in proceeding for admission, and on review of action refusing application to take the examination, issue is as to fairness of committee's action.

An applicant seeking admission to the bar puts in issue his moral fitness,[28] and the question as to moral character raised by protest is directly presented when a creditable examination paper is tendered showing a competent knowledge of the law.[29] The fundamental issue on review of the action of a bar committee refusing to approve an application to take a bar examination is whether the committee acted fairly,[30] and evidence of the qualifications of applicant is properly excluded on such review.[31]

c. Evidence

Burden of establishing good moral character, or the erroneous decision of bar examiners, is on the applicant.

While applicant for admission to the bar is entitled to the presumption that he is morally fitted and but little evidence is required in support thereof,[32] nevertheless, he has the burden of establishing his good moral character.[33] When, however, he has made a prima facie showing and has paid his fee and taken the examination, one making objections to his admission has the burden of proceeding to offer evidence in support of the objections to overcome the prima facie showing,[34] and if the allegations of the objector are supported by

20. In re De Propper, 128 N.E. 785, 236 Mass. 500.

21. Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R. 991.

22. Conn.—Rosenthal v. State Bar Examining Committee, supra.
Tenn.—In re Bowers, 194 S.W. 1093, 137 Tenn. 189, denying rehearing 192 S.W. 919, 137 Tenn. 193.

Arm of court
The state board of law examiners is an arm of the supreme court created to aid in determining questions incident to the admission and disciplining of attorneys, and it is on the record of proceedings had before such board and the recommendation thereof, made in conformity to law, that the supreme court acts.—In re Ellis, 203 P. 957, 118 Wash. 484.

Decisions are not judicial
Decisions made in carrying out the procedure established for admitting attorneys to practice are not judicial and may properly be vested in a committee, including the determination of which law schools shall be approved.—Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R. 991.

Powers not exceeded
Bar examining committee did not exceed its powers or act unreasonably in approving the same schools approved by the Council of American Bar Association.—Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R. 991.

Character committee not called on to examine as to education
A committee on character and fitness of applicant for admission to the bar, on certification of the board of law examiners that he passed the required examination, is not called on to examine into his academic or legal learning.—Application of Brennan, 243 N.Y.S. 705, 230 App. Div. 218.

23. Petition of Board of Law Examiners, Examination of 1926, 210 N.W. 710, 191 Wis. 359.

24. Ex parte McCue, 293 P. 47, 211 Cal. 57.—Brydonjack v. State Bar of California, 281 P. 1013, 208 Cal. 439, 66 A.L.R. 1507.

25. Goldsmith v. U.S. Board of Tax Appeals, 55 App. D.C. 229, 4 F.(2d) 422, affirmed 46 S.Ct. 215, 270 U.S. 117, 70 L.Ed. 494.

26. Goldsmith v. U.S. Board of Tax Appeals, supra.

27. Goldsmith v. U.S. Board of Tax Appeals, 46 S.Ct. 215, 270 U.S. 117, 70 L.Ed. 494, affirming 55 App. D.C. 229, 4 F.(2d) 422.

28. Rosencrans v. Tidrington, 141 N.E. 58, 193 Ind. 472, 28 A.L.R. 1136.

29. In re Farmer, 131 S.E. 661, 191 N.C. 235.

30. Higgins v. Hartford County Bar, 149 A. 415, 111 Conn. 47.

31. Higgins v. Hartford County Bar, supra.

32. Petition of Morrison, 186 N.W. 556, 45 S.D. 128.

33. Cal.—In re Garland, 23 P.(2d) 354, 219 Cal. 661.—Spears v. State Bar of California, 294 P. 697, 211 Cal. 133, 72 A.L.R. 923.
Ind.—Rosencrans v. Tidrington, 141 N.E. 58, 193 Ind. 472, 28 A.L.R. 1136.
Or.—State ex rel. Board of Bar Examiners v. Poyntz, 52 P.(2d) 1141, rehearing denied 54 P.(2d) 1212.—In re Weinstein, 42 P.(2d) 744, 150 Or. 1.

34. State ex rel. Board of Bar Examiners v. Poyntz, (Or.) 52 P.(2d)

sufficient evidence, the prima facie showing fails[35] No presumption of guilt arises from mere accusations made against applicant.[36]

On review of the decision of the bar examiners, the burden is on the complainant to show wherein it is erroneous or unlawful.[37]

Sufficiency. Cases treating of the sufficiency or the insufficiency of the evidence to show whether applicant is entitled to admission to practice law are set out in the note.[38]

d. Hearing

Inquiry as to moral character is broader in scope than in a disbarment proceeding Court will not act in contravention of examiners in absence of showing of fraud, unfairness, etc

Where formal applications are filed, the court will examine the entire record of the particular proceeding of the bar examiners complained of, such examination not being limited to the scope of a writ of certiorari,[39] and an inquiry as to the good moral character of applicant for admission is broader in its scope than that in a disbarment proceeding and may extend to his general character as well as to particular acts.[40] In their inquiry as to the moral character of an applicant for admission to the bar, the courts are not limited to the certificate presented by him, but will look behind it, and are bound to do so in cases attended with suspicious circumstances,[41] although there are cases holding such certificate conclusive[42] While the court may admit a petitioner to practice as an attorney without favorable action by the committee of bar examiners,[43] it will not exercise its power in contravention of the recommendation of the committee of bar examiners, except on a convincing showing that the adverse recommendation is not based on sound premises and valid reasoning,[44] and it will not inquire into applicant's inability to pass a bar examination unless he can show that he was prevented from passing through fraud, imposition, or coercion, or that he

1141, rehearing denied 54 P (2d) 1212.

35. In re Crum, 204 P. 948, 103 Or 296.

36. In re Crum, supra.

37. In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P (2d) 829, 1 Cal (2d) 61, followed in Ballf v. Bar Examiners, 33 P.(2d) 833, 1 Cal (2d) 789—Salot v. State Bar of California, (Cal) 45 P (2d) 203

38. **Evidence held sufficient**
(1) Good character—Ex parte McCue, 293 P 47, 211 Cal 57

(2) Lack of good character.—Spears v. State Bar of California, 294 P. 697, 211 Cal 183, 72 A.L.R 923—In re Stover, 224 P 771, 65 Cal App 622—In re Farmer, 131 S E 661, 191 N C 235—In re Weinstein, 42 P. (2d) 744, 150 Or. 1.

Evidence held insufficient
(1) To overcome prima facie showing of good character—State ex rel. Board of Bar Examiners v. Poynts, (Or) 52 P (2d) 1141, rehearing denied 54 P.(2d) 1212

(2) To show affidavit contained matter knowingly false—In re Crum, 204 P. 948, 103 Or 296

(3) To show change of records of city of which applicant was recorder—In re Crum, supra

(4) To show conduct warranting denial of admission—Ex parte McCue, 293 P. 47, 211 Cal 57

(5) To show unfairness, arbitrariness, fraud, and dishonesty in marking and grading examination papers of complainant—Salot v State Bar of California, (Cal) 45 P (2d) 203.

(6) To show unlawful conduct—In re Crum, supra

Failure to perform duty imposed
On an application for admission to the bar, where objection was made that applicant, who was city recorder, failed to notify the city attorney to appear in a case involving the city, it was held that no such duty was imposed on the city recorder, and hence such failure could not constitute a ground for refusal of the application—In re Crum, 204 P. 948, 103 Or. 296

Membership at bar of supreme court has been held sufficient to show good character, but other lower courts in the jurisdiction may refuse a permit to practice on being duly informed that the person no longer possessed a good moral character—In re Olmsted, 140 A. 634, 293 Pa. 96

39. In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P (2d) 829, 1 Cal (2d) 61, followed in Ballf v Bar Examiners, 33 P (2d) 833, 1 Cal (2d) 789

Bar examiners report confirmed
The report of the committee of bar examiners of the State Bar on the August, 1933, examinations was affirmed as against complaints of unsuccessful applicants seeking a determination that, notwithstanding the report of the bar examiners, the petitioners were qualified to practice law within the state—In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P (2d) 829, 1 Cal (2d) 61, followed in Ballf v. Bar Examiners, 33 P (2d) 833, 1 Cal (2d) 789

40. Cal—Spears v. State Bar of California, 294 P. 697, 211 Cal 183, 72 A.L.R 923.
Or—In re Weinstein, 42 P.(2d) 744, 150 Or 1

Question for jury
It has been held that whether the specific acts of applicant for admission to the bar show him not to be of good moral character would be a question for the jury—Rosencrans v Tidrington, 141 N E 58, 193 Ind. 472, 28 A.L.R 1136

41. In re Peters, 225 N.Y.S. 144, 221 App Div. 607, affirmed 166 N.E 337, 250 N.Y. 595, which answered certified question 228 N.Y.S 876, 223 App Div 865, and in which reargument denied 170 N E 148, 252 N.Y. 572—6 C.J. p 574 note 86.

42. In re Bowers, 194 S.W. 1093, 137 Tenn. 189, denying rehearing 192 S W 919, 137 Tenn. 193—6 C J. p 574 note 87.

43. Ex parte McCue, 293 P. 47, 211 Cal 57—Brydonjack v. State Bar of California, 281 P. 1013, 208 Cal. 439, 66 A.L.R 1507.

44. Cal—Salot v State Bar of California, 45 P (2d) 203—Spears v. State Bar of California, 294 P. 697, 211 Cal. 183, 72 A.L.R 923
Ill—In re Frank, 127 N.E. 640, 293 Ill 263.
Tenn—In re Bowers, 200 S.W. 821, 138 Tenn. 662

Refusal to vacate order of admission is proper where there was no charge of irregularity, misconduct, abuse of discretion, accident, surprise, fraud, or error of law that could serve as a basis for vacating the order—Rosencrans v Tidrington, 155 N E 705, 199 Ind. 140.

has been treated unfairly or unjustly,[45] as the general qualifications of applicant are not to be substituted for the requisite knowledge of law which he must possess in order to be admitted into the legal profession.[46]

An order declaring a bar examination void because of fraud and the impossibility of determining which applicants had benefited directly or indirectly therefrom cannot be set aside as to applicants showing that they had not participated in the fraud, nor benefited therefrom either directly or indirectly, since public policy demands absolute purity of bar examinations and a prompt disclosure of fraud of others by any applicant.[47]

Confronting witnesses. Applicant is entitled to confront the witnesses and to subject them to cross-examination and to invoke the protection of the rules of evidence.[48]

e. Review of Order in General

Appeal from court decision as to admission is not allowed in absence of statute or court rule conferring the right.

While it has been held that the court to which the application is made has the right to pass on the qualifications of applicant, and its decision is not subject to review by a higher court,[49] the right to appeal is sometimes expressly conferred.[50] However, one not a party to the ex parte proceeding for admission to the bar cannot appeal from the judgment therein.[51] In any case the exercise of discretionary power in passing on the qualifications of the applicant will not be reviewed unless there is a clear abuse of discretion.[52]

f. Setting Aside Order

The court may vacate the order of admission at the same term when granted; a person not a party to the admission proceeding may not move to vacate the order.

While the court has power on its own motion, at the same term at which it has granted one a license to practice law, to set aside such order,[53] as where it was obtained by fraudulent artifices or concealment of material facts,[54] a person opposed to the admission of applicant, not being a party to the proceeding to admit him, cannot move to vacate the judgment of admission.[55] Also, the court may correct the order at a later date to make it conform to the situation then existing.[56]

After a license to practice law has been granted, however, a motion will not lie at the relation of any person to vacate the order on the ground that the order granting the license has been obtained by fraud and false representations, proceedings for disbarment being the proper remedy.[57]

g. Collateral Attack

Granting of a license to practice is not subject to collateral attack.

The granting of a license to practice law being the exercise of a judicial function, as heretofore shown (see supra § 6), it is not the subject of collateral attack[58] and can only be impeached collaterally by what affirmatively appears on the face of the record.[59]

§ 12. Oath

Generally, an applicant must, on admission to the bar, take the oath of office.

45. In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P.(2d) 829, 1 Cal.(2d) 61, followed in Ballf v. Bar Examiners, 33 P.(2d) 833, 1 Cal.(2d) 789—Salot v. State Bar of California, (Cal.) 45 P.(2d) 203.

46. In re Investigation of Conduct of Examination for Admission to Practice Law, 33 P.(2d) 829, 1 Cal.(2d) 61, followed in Ballf v. Bar Examiners, 33 P.(2d) 833, 1 Cal.(2d) 789—Salot v. State Bar of California, (Cal.) 45 P.(2d) 203.

Applicant's argument of case with commendable clarity and conciseness before the court has been held not a basis for admission to the bar, since such performance could not be accepted as sufficient evidence of his general knowledge of the law—Salot v. State Bar of California, (Cal.) 45 P.(2d) 203.

47. Petition of Castleman, 78 S.W.(2d) 311, 257 Ky. 434.

48. In re Crum, 204 P. 948, 103 Or. 296.

49. State v. Johnston, 2 Harr. & M.(Md.) 160.

50. Conn.—In re O'Brien, 63 A. 777, 79 Conn. 46.
Md.—State v. Johnston, 2 Harr. & M. 160.

51. Rosencranz v. Tidrington, 155 N.E. 705, 199 Ind. 140.

52. In re Mash, 179 P. 897, 39 Cal. App. 543—6 C.J. p. 579 note 47.

Presumption in favor of lower court's action.—Rosencranz v. Tidrington, 155 N.E. 705, 199 Ind. 140.

53. Killian v. State, 78 S.W. 766, 72 Ark. 137.

54. Lowenthal's Case, 61 Cal. 122—6 C.J. p. 579 note 42.

55. Rosencranz v. Tidrington, 155 N.E. 705, 199 Ind. 140.

56. **Removing doubts as to citizenship.**
A circuit court, which had jurisdiction to admit an attorney to practice, had authority, several years thereafter, after the attorney had applied for, and been admitted to, citizenship, to remove all doubts as to his citizenship, to correct the order to conform to the situation then existing.—Brownell v. Widdis, 188 N.W. 544, 219 Mich. 167.

Effect of vacation of first order.
The vacation of an order admitting an attorney to practice on the ground that at the time the order was entered he was not a citizen does not affect a subsequent order entered by the same court, amending the prior order and admitting the attorney to practice after he had properly been admitted to citizenship.—Brownell v. Widdis, 188 N.W. 544, 219 Mich. 167.

57. Neff v. Kohler Mfg. Co., 90 Mo. App. 296.

58. Mo.—Fish v. St. Louis County Printing, etc., Co., 74 S.W. 641, 102 Mo.App. 6.
Pa.—Holshue v. Morgan, 32 A. 623, 170 Pa. 217—Hooven Mercantile Co. v. Morgan, 4 Pa.Dist. 48, 15 Pa.Co. 567.

59. Fish v. St. Louis County Printing, etc., Co., 74 S.W. 641, 102 Mo. App. 6.

On admission to the bar applicant must take the oath of office by which he swears to support the constitution of his state and of the United States, and to discharge the duties of his office with honesty and faithfulness,[60] and the oath is simply declaratory of the obligations which rest on every individual coming to the bar, whether he has taken the oath or not.[61]

Where a court of appeals has no original jurisdiction, it has been held that no relief can be granted on an application for an order to permit an attorney, previously admitted, to file in the clerk's office an oath nunc pro tunc.[62]

Other oaths. In some jurisdictions, it is also required that applicant take additional oaths,[63] such as that he has not been and will not be in any way concerned in a duel, either as principal or second, and where such a requirement exists, it must of course be complied with before applicant can be admitted,[64] unless it is contrary to some provision of the state constitution.[65]

§ 13. Registration

Attorneys must comply with the court rules or statutes requiring registration. Some jurisdictions require registration of applicants prior to the beginning of the study of the law.

In the absence of a statute or rule of court requiring something further, the order of court admitting an attorney to practice is a sufficient registration; but it is usually required that attorneys sign the roll or file a certificate with the clerk of court that they have been duly admitted to practice, and, in absence of compliance therewith, it is unlawful for a person to practice law.[66] Where an attorney fails to have his name entered on the roll of attorneys at the date of his license, he cannot have it enrolled afterward nunc pro tunc.[67]

Registration preliminary to legal study. In some jurisdictions, registration prior to the beginning of applicant's term of study of the law is required, and such registration will not be allowed nunc pro tunc except in case of special circumstances.[68]

§ 14. Certificate or License

Securing of certificate of admission is generally necessary.

In order to constitute "admission to the bar" within the legal definition of that term, applicant must, in addition to the other requirements, secure a certificate of admission or license,[69] and a court will not grant a certificate of admission to practice as an attorney as of a prior date, when applicant was not then registered and enrolled as provided by statute.[70]

A person holding a permit from the supreme court to practice until the next bar examination is not irregularly admitted to practice.[71]

§ 15. Admission of Attorney from Other Jurisdiction

a. To general practice
b For trial of particular case
c Joining resident attorney

60. Corti v. Cooney, 211 N.W. 274, 191 Wis 464—6 C.J. p 578 note 29

61. Corti v. Cooney, supra

62. In re Caruthers, 52 N.E. 742, 158 N.Y. 131.

63. Cal.—Cohen v. Wright, 22 Cal 293, followed in Ex p. Yale, 24 Cal. 241, 85 Am.D. 62.
Mo.—State v. Garesche, 36 Mo. 256
W.Va.—Ex p. Hunter, 2 W.Va. 122.
6 C.J. p 578 note 27.

Aid of rebellion

Immediately after the close of the Civil War congress and some of the state legislatures passed acts requiring every attorney to take a test oath that he had not aided or abetted the late rebellion. Many of the acts were held void as being practically a punishment for past conduct and, therefore, ex post facto laws, and also as being in conflict with the general pardon granted by the president.—In re Garland, 4 Wall. (U.S.) 333, 18 L.Ed. 366—Cummings v. Missouri, 4 Wall. (U.S.) 277, 18 L.Ed. 356—Ex p. Law, 15 F.Cas.No.8,126, 35 Ga. 285—Champion v. State, 2 Coldw. (Tenn.) 111—Ex p. Quarrier, 2 W.Va. 569, 4 W.Va. 210.

Ku Klux law

A statute requiring courts to have their officers sworn to disclose knowledge of persons who have been guilty of the offenses against the statute commonly known as the Ku Klux law has been held not applicable to attorneys.—Ingersoll v. Howard, 1 Heisk. (Tenn.) 247

64. Seymour v. Ellison, 2 Cow. (N.Y.) 13—6 C.J. p 578 note 24

65. Matter of Dorsey, 7 Port. (Ala.) 293

66. Thompson v. Stiles, 39 N.Y.S. 876, 44 Misc. 334.

67. In re Fellows, 3 Ill. 369.

68. Bradley's Pet., 15 Pa.Dist. 674.

69. Fla.—In re Clifton, 155 So. 324, 115 Fla. 168
Tenn.—In re Bowers, 192 S.W. 919, 137 Tenn. 193, rehearing denied 194 S.W. 1093, 137 Tenn. 189.
6 C.J. p 579 note 33.

New state created

An attorney licensed to practice in the state of Virginia before the formation of the state of West Virginia, and resident in the latter state at the time of its organization, is not required to obtain a new license.—Ex p. Quarrier, 2 W.Va. 569—Ex p. Faulkner, 1 W.Va. 369

Withholding license pending investigation

Where the supreme court has assumed to take jurisdiction of a petition resisting the admission of applicant to practice law and thereby has misled the petitioners, the court will not sign a license, although the certificate of the examiners was regular, until the questions raised by the petition can be investigated by the examiners.—In re Bowers, 192 S.W. 919, 137 Tenn. 193, rehearing denied 194 S.W. 1093, 137 Tenn. 189.

Statute requiring license held valid.—Berk v. State, 142 So. 832, 225 Ala. 324, 84 A.L.R. 740.
Certificates as to preliminary education and clerkship see supra § 9

70. In re Bonam, 237 N.W. 45, 255 Mich. 59.

71. Moore v. Wesley, 262 P. 1035, 125 Kan. 22.

a. To General Practice

(1) In general

(2) Revocation

(3) Costs of investigation

(1) In General

While an attorney has no right to admission on motion to the courts of another jurisdiction, such right is generally granted on compliance with prescribed conditions.

The admission to practice of attorneys admitted in another jurisdiction is generally authorized and regulated by statutes and rules of court in most jurisdictions, and compliance therewith is essential.[72] While an attorney admitted to practice in one state has no absolute or constitutional right to be admitted on motion as an attorney in other states,[73] the courts of most jurisdictions have followed the practice of admitting attorneys, without examination, on certificate of admission to the highest courts of other jurisdictions[74] and proof of practice therein for a prescribed time.[75] Although it has been stated that in many instances

72. Gibson v Lee, (Ga App) 181 S E 192—6 C J p 577 note 13

Strict construction

Rules relating to admission to practice law on motion should be strictly construed—In re Rotolo, 285 N Y S 274

Statute is applicable only to such persons as are entitled to admission under the laws of the state—In re Maddox, 50 A 487, 93 Md 737, 55 L R A 298—In re Takuji Yamashita, 70 P 482, 30 Wash 234, 59 L R A. 671, 94 Am S R 860

To whom petition addressed

Petition by an attorney from another state for admission to practice must be addressed to the superior court of applicant's residence, actual or intended—Gibson v Lee, (Ga App) 181 S E 192

Utmost good faith

An attorney from one state applying for admission to the bar of another state owes the duty of exercising the utmost good faith—Gibson v Lee, (Ga App) 181 S E 192

Federal circuit court of appeals, while hearing counsel not admitted in the court, has pointed out that practitioners who desire to act as attorneys of record in the court must comply with the court rule as to taking the oath and subscribing the roll—In re Miltones, Inc, (C C A N Y) 286 F. 806

73. N D—Youmans v. Hanna, 160 N W 705, 35 N D 479, Ann Cas 1917E 263, motion denied 161 N W 797, 35 N D 479, Ann Cas 1917E 263, second rehearing denied 171 N. W 835, 43 N D 536

Okl—Dickerson v Worten, 251 P 52, 122 Okl. 76

Pa—In re Brown, 9 Pa Dist 103.

Wis—In re Pierce, 207 N W 966, 189 Wis. 441

6 C J p 573 note 77.

74. Cockerill v State Bar of California, 298 P 807, 212 Cal 439, amended on other grounds 3 P (2d) 1022—Harrington v State Bar of California, 292 P 456, 210 Cal 514—6 C J p 577 notes 12, 13 [c]

Compliance with statute prior to amendment

A certificate from a circuit court or district court of another state will not entitle applicant to admission, where the law as amended requires such certificate from the clerk and chief judge of the highest court of such other state—Gibson v Lee, (Ga.App) 181 S E 192.

Territory admitted to statehood

(1) An attorney admitted to practice in the Indian Territory United States court is eligible to be admitted to practice in the highest court of such state on its admission to statehood—Martindale v. Shaha, 151 P 1019, 51 Okl. 670

(2) However, where the allegations of a petition for mandamus fail to show that plaintiff was admitted to the bar, the supreme court will not compel the district judge to recognize him as an attorney—Dickerson v Worten, 251 P. 52, 122 Okl 76

Circumstances under which examination held necessary

Applicant was not entitled to admission to the bar without examination although he had been admitted to the Bar of Indiana in 1918, on recommendation of a law committee, without examination as to fitness, and had practiced law in that state until December, 1928, where he had subsequently made four applications for admission to the New Jersey Bar, but each time failed to pass the examination—In re De Vita, 291 N Y S 78, 249 App Div 63.

75. Cal—Rhodes v. State Bar of California, 62 P.(2d) 141

N.Y—In re Carpel, 165 N Y S. 102, 178 App Div. 146—In re Dodds, 285 N Y S 24

Wis—In re Pierce, 207 N W. 966, 189 Wis 441

Actual practice

(1) That an attorney in a sister state had practiced for one year and ten months, and then removed to California, whence he claimed to have continued his practice by correspondence, has been held not a sufficient showing of actual practice for three out of seven years preceding his application for admission to the bar, required by Code Civ Proc § 279, to entitle him to admission—In re Scott, 234 P 128, 70 Cal App 716

(2) The fact that an attorney of another state was an actual resident and officeholder of Wisconsin has been held not to, of itself, interfere with his being engaged in actual practice in such other state—In re Pierce, 207 N.W. 966, 189 Wis 441

(3) An attorney who, during the required time of actual practice in another jurisdiction, was a resident of the state in which the motion is made for his admission, has been held not entitled to be admitted on such motion—In re Rosenbloom, 285 N Y S. 275—In re Rotolo, 285 N.Y.S. 274

Tacking practice in several states

Time of practicing in different states may be added, in passing on an application for admission to the bar of an attorney of another state—In re Pierce, 207 N W. 966, 189 Wis. 441.

Determination and proof

(1) Function of the supreme court to determine what is satisfactory proof of practice of an attorney in a sister state before admission to practice in Wisconsin cannot be delegated—In re Pierce, 207 N W. 966, 189 Wis 441

(2) Certificate of a judge of a sister state is not conclusive proof of practice in another state—In re Pierce, supra.

Admission denied where former practice highly specialized

Application for admission to the bar without examination was denied in view of the highly specialized and peculiar character of petitioner's prior practice—Henderson v State Bar of California, 28 P (2d) 915, 219 Cal 696

Certificate of permanent admission inadvertently omitted

Under Code Civ Proc § 279, one practicing law continuously in Washington for ten years, of which three were within seven years immediately preceding his application for admission to the California bar, is entitled to admission on motion, although the Washington supreme court, through inadvertence, granted him no certifi-

courts have admitted attorneys from other jurisdictions without proof of good moral character,[76] it is now well settled that applicant must be possessed of a good moral character,[77] must be in good standing in the courts of the sister state,[78] and must be prepared to produce evidence of such standing,[79] as by certificate from the proper court.[80]

The principle of comity held inapplicable. There is no rule of comity between states requiring the courts of one state to admit a citizen thereof to the general practice of the law because he previously had been admitted to practice in another state.[81]

Recommendation of board of examiners In some jurisdictions, recommendation of the board of examiners is required, whether or not there be objections to the permanent admission to practice,[82] and while admission is ultimately and finally for the court and is a matter of broad discretion, the court could disregard or suspend the rule providing for recommendation, but it would have to be a plain case for it to feel justified in doing so.[83]

Temporary license. In some jurisdictions, an attorney applying for admission on motion may be granted a temporary license pending investigation concerning him, and, on a permanent admission being refused, the court may extend such temporary license to enable him to wind up any business begun.[84]

Attorney from foreign country. Some states admit without examination persons who have practiced a certain length of time in a foreign country provided the common law of England constitutes the basis of jurisprudence.[85]

cate of permanent admission, at the end of the year for which he was originally admitted—In re Ryzek, 232 P. 473, 70 Cal App 23

76. In re Leonard, 6 P. 426, 12 Or 93, 53 Am R 323

77. In re Carpel, 165 N Y S 102, 178 App Div. 146

Misconduct in youth

Admission to practice of an attorney of another state should not be refused for an act in the nature of an impropriety and under palliating circumstances, rather than a vicious wrong, more in the nature of a slip, which any young attorney might make and still intend to be honorable and upright, than of a deliberate intention to violate the ethics of the profession, nor for social immorality occurring a number of years ago when he was quite young, there being no evidence that his conduct in that regard has not since been good—Ex parte Keeley, (Or) 189 P 885

Turbulent and intemperate nature

Permanent admission to practice of an attorney of another state will be refused because of his general disposition, as where it is evident that he is of a turbulent and intemperate nature and always in trouble—Ex parte Keeley, (Or) 189 P 885

Inquiry into character; burden of proof

(1) The requirement that an attorney, applying for admission on certificate from another state, shall produce "satisfactory evidence of good moral character," places the burden on him of proving this—In re Wells, 163 P. 657, 174 Cal 467

(2) On an attorney's application to practice on a certificate from another state, his general character as well as particular acts may be inquired into—In re Wells, supra

(3) The court may refuse admission on proofs that might not establish his guilt of any of the acts declared to be causes for disbarment—In re Wells, supra

(4) Transcript of testimony in disbarment proceeding filed with committee of bar examiners, and certified to the supreme court on review of order denying application for admission to practice, is before the supreme court for all purposes—Ex parte McCue, 293 P 47, 211 Cal 57

(5) On petition for admission, the record of the supreme judicial court on an earlier petition by the same party for admission, showing he was not of good moral character, and the record of disbarment in another state, were competent—In re De Propper, 128 N E 785, 236 Mass 500

Appearance before officer taking deposition

The appearance of an attorney not licensed to practice within the state, but licensed in the federal courts and courts of a foreign state, before an officer taking a deposition at the request of the attorney of the record, while improper practice, does not involve his moral character, nor is it sufficient to deprive him of his right to a license to practice law—Ex parte McCue, 293 P. 47, 211 Cal 57.

Practice before the federal court, although applicant for admission to the state bar was not previously licensed in the state, has been held not to warrant refusal of admission to practice—Ex parte McCue, 293 P. 47, 211 Cal 57.

78. Cal—Warbasse v. State Bar of California, 28 P (2d) 19, 219 Cal 566
N.Y—In re Peters, 225 N Y S 144, 221 App Div 607, affirmed 166 N E 337, 250 N.Y 595, which answered certified question, 228 N Y S 876, 233 App Div 865, and in which reargument denied 170 N E. 148, 252 N Y 572
6 C.J. p 577 note 15.

Going behind action of foreign court reinstating applicant

Where applicant for admission to the bar had been suspended and reinstated in another state, the California court may go behind the action of the court in the other state, and determine for itself from the record whether applicant is eligible to admission to the practice of law in California—Warbasse v State Bar of California, 28 P (2d) 19, 219 Cal 566

Fact that attorney had paid penalty in another state by two years' suspension from practice did not necessarily require that he be admitted to practice in California on mere formal proof of moral fitness—Warbasse v State Bar of California, 28 P (2d) 19, 219 Cal. 566.

79. In re Application for Admission to Bar, 14 Wkly N C.(Pa.) 88, 31 Pittsb Leg J N S 273

80. In re Rodgers, 46 A 668, 194 Pa 161—Splane's Pet, 16 A. 481, 123 Pa 527.

81. State ex rel Boynton v. Perkins, 28 P (2d) 765, 138 Kan 899—6 C J p 573 note 80.

Circuitous route to admission

A resident of a state who is admitted to practice in another jurisdiction will not be admitted on motion to the courts of the state of his residence, where it appears that applicant undertook by a circuitous and indirect route to do that which he was not qualified, or was unwilling to try, to do directly.—In re Himmelstein, 285 N Y S 265—In re Lefkowits, 285 N Y S 249.

82. Ex parte Keeley, (Or) 189 P. 885.

83. Ex parte Keeley, supra.

84. Ex parte Keeley, supra.

85. Matter of Wray, 142 N Y S 186, 157 App Div. 905—Matter of Mag-

(2) Revocation

An order admitting an attorney may be revoked for cause, either in term time or in vacation.

An order admitting an attorney from another jurisdiction may be taken, modified, vacated, or revoked either in term time or in vacation,[86] and an intentional concealment of a fact which would affect the passage of an order of admission, or the making of a recommendation by another attorney, is such fraud as will authorize the revocation of the order of admission.[87] An order of admission, obtained by fraud or other improper means, may be corrected without proceedings for disbarment, and a proceeding by the solicitor-general to set aside the order because of fraud is a proper proceeding and can be brought in vacation,[88] and since the investigation relating to an attorney's fraud in procuring admission to practice on a certificate of a court in another jurisdiction is not a disbarment proceeding, the inquiry is not limited to acts occurring since the passage of a statute relating to disbarment.[89]

(3) Costs of Investigation

Statute making county liable for cost of investigation of charges of misconduct of attorney is applicable to investigation concerning admission of attorney from another jurisdiction

A statute providing for the liability of a county, on approval of the court, for expenses incurred by the board of examiners in investigating charges of misconduct, has been held applicable to the investigation of objections to the granting of a permanent license to an attorney from another state, practicing under a temporary license,[90] and the court is required to allow items of a cost bill that are correct, proper, and justly incurred,[91] the exercise of discretion being limited to the allowance or disallowance of particular items as it may appear that they are reasonable or otherwise, or that the services were actually rendered as claimed.[92]

b. For Trial of Particular Case

By universal usage and comity, an attorney is usually given the right to try a particular case in another jurisdiction.

While, as shown above, a citizen of one state, although possessed of all the requisite qualifications, has no absolute right to be admitted to practice in the courts of another state, one who is a regularly licensed attorney in one state is generally given, by universal usage and comity, the privilege to practice in the courts of other states in particular cases without going through the formality of an admission and license,[93] and the power of the legislature to provide the manner, terms, and conditions of the admission of attorneys to practice, does not deprive the courts of their inherent power, as a matter of comity, to permit an attorney from a sister state to appear and present argument in a particular case.[94] However, this right is not absolute; it is restricted to the trial of particular causes and does not authorize a general license to practice,[95] and usage and comity do not permit a resident of a state, although an attorney of another state, to accept employment

gia, 51 N.Y.S. 1055, 27 App.Div. 129

86. Gibson v. Lee, (Ga.App.) 181 S.E. 192.

87. Cal.—In re Wells, 172 P. 93, 36 Cal.App. 785.
Ga.—Gibson v. Lee, (App.) 181 S.E. 192

Attorney must be fair and open with the court, and act so as to command the confidence of the community.—In re Price, 235 N.Y.S. 601, 226 App.Div. 460

Particular grounds

It is a ground for the revocation of an order of admission: (1) That an attorney withheld the fact of his conviction of a crime—State Bar of California v. Hull, 284 P. 492, 103 Cal.App. 302—In re Holland, 274 P. 559, 96 Cal.App. 655—In re Mash, 153 P. 961, 28 Cal.App. 692

(2) That disbarment proceedings were pending against him—In re Jacobsen, 287 P. 131, 105 Cal.App. 236—In re Leasley, 214 P. 284, 61 Cal.App. 59.

(3) That he had been disbarred—State Bar of California v. Rollinson, 1 P.(2d) 428, 213 Cal. 36, reversing (App.) 291 P. 431—In re Mash, 153 P. 961, 28 Cal.App. 692—In re McDonald, 164 N.E. 261, 200 Ind. 424

(4) That the certificate of admission in another jurisdiction was not from the clerk and chief judge of the highest court of such jurisdiction—Gibson v. Lee, (Ga.App.) 181 S.E. 192.

88. Gibson v. Lee, supra.

Fraud in procuring admission as ground for suspension or disbarment see infra § 22

89. In re Wells, 163 P. 657, 174 Cal. 467.

90. State v. Superior Court in and for San Juan County, 200 P. 562, 117 Wash. 3

Costs in suspension or disbarment proceedings see infra § 39

91. State v. Superior Court in and for San Juan County, supra.

92. State v. Superior Court in and for San Juan County, supra.

93. Idaho—Mason v. Pelkes, 59 P.(2d) 1087—Freeling v. Tucker, 289 P. 85, 49 Idaho 475.
Kan.—State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899.
Wis.—In re Pierce, 207 N.W. 966, 189 Wis. 441
6 C.J. p. 573 note 78.

Courtesy not a right.—Mason v. Pelkes, (Idaho) 59 P.(2d) 1087.

Appearance for removal of case to federal court

An attorney licensed to practice in the federal courts and in courts of a foreign state has been held privileged to appear in the local state courts to secure the removal of an action pending there to the proper federal court, notwithstanding he is not licensed to practice in the local courts.—Ex parte McCue, 293 P. 47, 211 Cal. 57.

Participation allowed only after permission

Usage and comity do not permit an attorney of another state to conduct a cause in Colorado, but only to participate with the court's permission.—People v. Thomas, 290 P. 283, 87 Colo. 547

94. Freeling v. Tucker, 289 P. 85, 49 Idaho 475.

95. State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899—6 C.J. p. 573 note 79.

as an attorney or to act as such in the state of residence while unlicensed by the court.[96]

A statute providing that members of the bar of another state employed in a case pending in the state may be admitted for all purposes of the case in which they are so employed has been held to provide for admission ex gratia for the occasion, and not as members of the bar of the state.[97]

c. Joining Resident Attorney

In some jurisdictions, nonresident attorneys must associate themselves in good faith with a resident attorney for the trial of cases.

In some jurisdictions, nonresident attorneys must associate themselves in good faith with a resident attorney for the trial of cases[98] or must file a written appointment of a resident attorney on whom service may be had,[99] and such a requirement has been held not unreasonable or improper.[1] Where such requirements exist, a member of a foreign bar, not associated with a member of the bar of the jurisdiction trying the case, is not entitled to be introduced pro hac vice and has no audience before the court,[2] although where a nonresident attorney has been admitted pro hac vice on motion without joining a resident attorney as required, a subsequent order may be made nunc pro tunc of the appearance of a resident attorney.[3]

However, such a rule or statute has been held not to apply to a foreign attorney suing in his own behalf as plaintiff,[4] nor where resident and foreign attorneys are employed on the case by the client.[5]

§ 16. Practicing without Admission

a. In general
b. Effect on proceedings
c. As an offense

a. In General

Subject to certain exceptions, a person not admitted as an attorney cannot practice law.

In the absence of constitutional or statutory authority, a person who has not been admitted as an attorney cannot practice law, as by representing a client, in a court of record, either as an attorney[6]

96. People v. Thomas, 290 P 283, 87 Colo 547.

97. North Laramie Land Co v Hoffman, 184 P. 226, 26 Wyo 327, rehearing granted 195 P. 933, 27 Wyo. 271.

No right to subscribe pleadings

Comp St.(1910) § 966, providing that nonresident attorneys employed as counsel "in any case pending before any of the courts of this state may be admitted for all the purposes of the case," does not authorize a nonresident attorney to sign a petition in error, since the proceedings in error are not "pending" until the petition is filed.—North Laramie Land Co v. Hoffman, 184 P. 226, 26 Wyo 327, rehearing granted 195 P. 933, 27 Wyo 271

98. Idaho—Anderson v. Coolin, 149 P. 286, 27 Idaho 334.
Pa.—In re Bryne, 17 Pa Dist. 427.

99. Arthaud v Griffin, 210 N.W. 540, 202 Iowa 462

1. Arthaud v. Griffin, supra.

2. In re New Jersey Refrigerating Co, 126 A 174, 96 N J Eq 431.

3. In re Bryne, 17 Pa Dist. 427

4. Iowa—Arthaud v Griffin, 210 N W. 540, 202 Iowa 462

5. Arthaud v. Griffin, supra.

6. Colo—Bennie v Triangle Ranch Co, 216 P 713, 73 Colo 536.
Ill—People v. Munson, 150 N.E. 280, 319 Ill 596
Mass—In re Opinion of the Justices, 194 N.E. 313.
Minn.—Fitchette v Taylor, 254 N W 910, 191 Minn. 582, 94 A.L.R. 356.
N J—Black & White Operating Co v Grosbart, 151 A 630, 107 N J Law 63, affirming 145 A 105, 7 N J Misc 233—Unger v Landlords' Management Corporation, 168 A 229, 114 N J Eq 68—New Jersey Photo Engraving Co v Carl Schonert & Sons, 122 A 307, 95 N J Eq 13—Gadek v Kugler, 141 A. 561, 6 N J Misc. 471
Pa.—Bronson v. Brown, 8 Pa Dist. 365.
6 C J. p 569 notes 38, 39.

The rule arises out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional duty—Heiskell v. Mosie, (App D C) 82 F (2d) 861.

Court may inquire of its own motion

Power of the court in which action is brought to inquire whether an attorney appearing before it is one of its officers, entitled to appear and present issues, may be exercised on the court's own motion, however it may have been informed—Post v. Louis, 172 N.Y.S 561, 184 App Div. 533.

Association with attorney

Prohibition of practice of law by one not licensed is to be observed in fact as well as in theory, and that there may be associated in the trial of the case other persons actually licensed to practice law in nowise validates the participation of one not so authorized—People v. Munson, 150 N.E 280, 319 Ill 596.

In Louisiana

(1) There is no conflict between Rev St § 122, giving the right to appear and plead in person or by attorney at law or in fact, and Act (1908) No 66, imposing a penalty for practicing without license, and the last-mentioned act contemplates no interference with the exercise by any litigant of the right to appear and plead in any court of the state either in person or by his attorney at law duly qualified or his attorney in fact duly authorized, and there being no repealing clause, the later statute must be construed with the then existing legislation as to give effect to each, bearing in mind that the later statute governs in the event of an irreconcilable conflict—Howell v. Mundy, 82 So. 274, 145 La. 291.

(2) The right of any party to a lawsuit to be represented by his attorney in fact is not affected by the collateral question whether the attorney in fact is guilty of having practiced law without a license—Brown v. Guillot, 83 So. 373, 146 La 46.

(3) A litigant who has appeared and pleaded through an attorney in fact in a pending suit has an interest entitling him to intervene, through an attorney in fact, in a proceeding instituted by members of the bar against the attorney in fact through whom such pleadings were filed, to strike the same from the record and punish such attorney in fact for contempt upon the ground that

or as the agent of his client.[7] A person who has no right to practice law directly cannot do so indirectly by employing licensed attorneys to practice for him.[8]

Exceptions to rule. Ordinarily, however, there is an exception to the general rule above stated, as to practice in courts not of record,[9] or not strictly of record.[10] An officer of a corporation who wrote an alleged debtor stating that his account had been placed in his hands for collection and that he would file suit in a justice court, using stationery on which was printed his name followed by words "attorney at law," notwithstanding he had no license to practice, was held within exception of the statute prohibiting practice of law by which any person may attend to its own claims out of court.[11] Services not essentially professional, and which do not involve appearance in any court, may be performed by an unlicensed person.[12]

Client representing himself in court. Except when public welfare demands otherwise,[13] the general rule above stated does not prevent any one from appearing in any cause in his own behalf,[14] or as guardian or next friend of an infant.[15]

Waiver of objection. The recognition of a person as attorney in the cause, after his actual admission to the bar, waives the objection that he was not admitted at the time of his first appearance in the cause.[16]

b. Effect on Proceedings

Proceedings in a suit by a person not licensed to practice are a nullity.

Proceedings in a suit by a person not entitled to practice are a nullity,[17] and the suit may be dismissed.[18] If the cause has proceeded to judgment, the judgment is void and will be reversed.[19] Briefs presented on appeal by persons not licensed

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he was assuming to practice law without having obtained a license as an attorney at law—Howell v Mundy, 82 So 274

Corporation not entitled to practice law see Corporations § 956 [14A C J p 296 note 63]

Right to practice as property right entitling injunction to prevent intrusion into professional field see Injunctions § 149

What acts or services do or do not constitute practice of law see supra § 3

7. Cobb v. Judge Grand Rapids Super Ct., 5 N W 309, 43 Mich 289—6 C J p 570 note 40.

8. Cain v Merchants Nat Bank & Trust Co of Fargo, (N D) 268 N W. 719

9. Colo—United Securities Corporation v. Pantex Pressing Mach., 53 P (2d) 653

Md—Rehm v Cumberland Coal Co of Baltimore City, 181 A 724, 169 Md 365

Tenn—Gregory v City of Memphis, 6 S W (2d) 332, 157 Tenn 68

6 C J p 570 note 42

In New York

(1) By statute, it is provided that no one not admitted to practice law shall practice in any court or before any magistrate and it has been held that a justice of the peace is a magistrate within the meaning of the statute—People v Black, 252 N Y S 197, 156 Misc 516

(2) However, prior to the amendment of 1933, a person not admitted to practice law could practice before justice's courts except in certain cities—People v Alfani, 125 N E 671, 227 N.Y 334, reversing 174 N Y S 527, 186 App Div 468, 37 N.Y Cr 395

6 C J. p 570 note 42 [b].

10. Porter v. Bronson, 19 Abb.Pr.(N Y) 236, 29 How Pr 292

Accountants may practice before quasi judicial tribunals by permission, but may not practice law, without being admitted to the bar—Mandelbaum v Gilbert & Barker Mfg Co., 290 N.Y S 462, 160 Misc. 656.

11. Dietzel v State, (Tex Cr) 98 S W.(2d) 183

12. Atlanta Title & Trust Co. v Boykin, 157 S E 455, 172 Ga. 487—6 C J p 570 note 45

13. In re Opinion of the Justices, (Mass) 194 N E 313.

14. Ala—Copeland v. Dabbs, 129 So 88, 88 Ala 489

Mass—In re Opinion of the Justices, 194 N E 313

N J—Black & White Operating Co v Grosbart, 151 A 630, 107 N J Law 63, affirming 145 A 105, 7 N J Misc 233—New Jersey Photo Engraving Co v Carl Schonert & Sons, 122 A 307, 95 N.J Eq. 12

6 C.J. p 570 note 44

15. Black & White Operating Co v. Grosbart, 151 A 630, 107 N J Law 63, affirming 145 A 105, 7 N J Misc 233—New Jersey Photo Engraving Co v. Carl Schonert & Sons, 122 A 307, 95 N J Eq 12.

16. Parow v. Cary, 1 How Pr (N Y) 66

17. Colo—Bennie v. Triangle Ranch Co., 216 P. 718, 73 Colo 586

N Y—Colton v Oshrin, 278 N.Y S 146

Pa—Goldstein v Marriott, 14 Pa Dist & Co. 635

S D—Stevens v. Jas A Smith Lumber Co., 222 N W. 665, 54 S D 170

6 C J. p 570 note 47.

Striking name from papers

On motion the supreme court may strike from original files and briefs the name of a nonresident attorney not regularly admitted to practice in Idaho—Anderson v. Coolin, 149 P. 286, 27 Idaho 334

Who may object

Subsequent lien creditors may not object to a writ of execution on the ground that it was issued on the praecipe of an attorney not admitted to practice in the particular county. —Mercantile Co. v. Morgan, 15 Pa. Co 567

18. Crawford v. McConnell, (Okl) 49 P (2d) 551—6 C.J. p 570 note 48.

Prejudice conclusively presumed

Participation in trial as an attorney by a person unauthorized to practice law has been held ground for mistrial, notwithstanding actual prejudice to the parties to the action was not shown, since the proceeding was void and prejudice is conclusively presumed—Colton v. Oshrin, 278 N Y S. 146.

Where parties are trustees

Where an attorney in certiorari proceedings had no legal status to act for the property owners, who had employed the attorney's employer, not an attorney, to obtain a reduction of assessment for them, the attorney's appearance would justify refusal to retain jurisdiction; but the owners being trustees, the proceedings will be permitted to be continued, on condition that the illegal agreement be annulled, and that the trustees themselves retain counsel—People ex rel Holzman v. Purdy, 162 N Y S 65

19. Bennie v. Triangle Ranch Co., 216 P 718, 73 Colo. 586—6 C J. p 570 note 49.

to practice[20] in the appellate courts[21] will not be considered.

c. As an Offense

(1) Contempt
(2) Misdemeanor

(1) Contempt

Practicing law without being admitted constitutes a contempt of the court

The act of holding oneself out as an attorney without having a license constitutes contempt of court,[22] which the court has inherent power to punish,[23] and an express grant of authority to determine who shall practice as attorneys before the courts of the state has been held to carry with it the implied power to punish for contempt those pretending to the office,[24] and the supreme court may hold such persons in contempt notwithstanding the unauthorized acts took place in a lower court,[25] or outside of court.[26] A contempt proceeding has been held warranted notwithstanding the existence of a statute penalizing such acts,[27] although ordinarily the court will not resort to or exercise this drastic and extraordinary power unless necessary.[28]

Nature of proceeding. The contempt proceeding has been held to be criminal in its nature[29] regardless of the fact that the result of the pro-

20. North Laramie Land Co v. Hoffman, 184 P 226, 26 Wyo 327, rehearing granted 195 P 988, 27 Wyo. 271—3 C.J. p 1436 note 59—6 C.J. p 570 note 50

In New Jersey

(1) The supreme court and the court of errors and appeals will not receive a brief presented by a member of the bar who has not as yet been licensed to practice as counselor-at-law, or who is not counsel of another state admitted pro hac vice—Hazard v Phoenix Woodworking Co, 80 A 456, 78 N.J.Eq 568—Hirsch v. De Puy, 166 A 720, 11 N.J. Misc 500—3 C.J. p 1436 note 56

(2) Where such a brief has been presented the cause will stand as if, notwithstanding the stipulation to submit it upon briefs under the rule, plaintiff in error had entirely failed to comply with that stipulation—Duysters v Crawford, 54 A. 823, 69 N.J.Law 229

21. Brice v Chapman, 22 S.E. 525, 95 Ga. 799—Clifton v. Carson Naval Stores Co, 122 S.E. 639, 32 Ga. App 51—6 C.J. p 570 note 51.

22. U.S.—Heiskell v Mosne, (App. D.C.) 82 F (2d) 861
Colo.—People v Castleman, 294 P. 535, 88 Colo 229—People v. Thomas, 290 P 288, 87 Colo. 547
Idaho.—In re Brainard, 89 P (2d) 769, 55 Idaho 153
Mont.—In re White, 171 P 759, 54 Mont 476
N.J.—New Jersey Photo Engraving Co v Carl Schonert & Sons, 122 A 307, 95 N.J.Eq 12.
R.I.—Rhode Island Bar Ass'n v Automobile Service Ass'n, 179 A. 139
6 C.J. p 570 note 52—13 C.J. p 12 note 85.

Construction of statute

A person who allegedly represented that he was learned in the law, particularly in matters connected with conveyancing and in preparation of probate papers in probate matters and who prepared deeds for heirs of an estate, was held engaged in "practice of law" within the statute making illegal practice of law contempt of court, as against the contention that preparation of deeds and mortgages did not constitute practice of law—In re Matthews, (Idaho) 62 P (2d) 578

Licensed attorney connected with association also liable

A licensed attorney associated with the proprietors of an automobile service association engaged in unauthorized practice of law has been held guilty of contempt for illegal practice—Rhode Island Bar Ass'n v Automobile Service Ass'n, (R.I.) 179 A 139

23. People v. Securities Discount Corporation, 198 N.E. 681, 361 Ill 551, affirming 279 Ill.App 70—People ex rel Courtney v Association of Real Estate Taxpayers of Illinois, 187 N.E. 823, 354 Ill. 102—People v People's Stock Yards State Bank, 176 N.E. 901, 344 Ill 462

Supreme court

(1) Supreme court possesses inherent power to punish for contempt any person assuming to practice law within a state without having been duly licensed so to do—State ex rel Wright v. Barlow, (Neb.) 268 N.W 95.

(2) Supreme court, which has jurisdiction in matter of admission and disciplining of attorneys, has power to punish as for contempt any one who, without authority, practices law or holds himself out as entitled to do so—In re McCallum, 57 P. (2d) 1259, 186 Wash 312

Who may institute proceedings

Committee of State Bar Association was held authorized to institute contempt proceedings against a person allegedly engaged in unauthorized practice of law—In re McCallum, 57 P (2d) 1259, 186 Wash 312

24. R.I.—Rhode Island Bar Ass'n v Automobile Service Ass'n, 179 A 139
Vt.—In re Morse, 126 A. 550, 98 Vt. 85, 36 A.L.R 527.

25. Ill.—People v People's Stock Yards State Bank, 176 N.E 901, 344 Ill 462
Vt.—In re Morse, 126 A 550, 98 Vt 85, 36 A.L.R 527

26. People v. People's Stock Yards State Bank, 176 N.E 901, 344 Ill. 462.

27. Neb.—State ex rel Wright v. Barlow, 268 N.W 95
R.I.—Rhode Island Bar Ass'n v Automobile Service Ass'n, 179 A. 139.

28. In re Frederick Bugasch, Inc., 175 A 110, 12 N.J Misc 788

Only where evident need for summary action

(1) Where other remedies are available and efficient to right the wrong of practicing without a license they should be first invoked, unless there is an evident need for summary action to protect the public and the jurisdiction of the court—Rhode Island Bar Ass'n v Automobile Service Ass'n, (R.I.) 179 A. 139.

(2) Where defendant who had allegedly practiced law without a license in preparing deeds, mortgages, and contracts for others for compensation had never been notified that such business amounted to the practice of law, the supreme court refused to punish through extraordinary process of contempt proceeding, and dismissed the case without prejudice to proceedings by any other remedy provided by law—In re Estes, 57 P.(2d) 1262, 186 Wash 690.

(3) Where defendant in such a case desisted from such practice after second notice from the State Bar Association, the supreme court refused to punish through extraordinary process of contempt proceedings, especially since defendant, if guilty of practicing law without a license, was punishable under criminal laws—In re McCallum, 57 P. (2d) 1259, 186 Wash 312

29. N.J.—In re Frederick Bugasch, Inc, 175 A. 110, 12 N.J Misc 788.
Vt.—In re Morse, 126 A 550, 98 Vt. 85, 36 A.L.R. 527.

ceeding inures to the individual benefit of properly licensed lawyers.[30]

Defenses. That a justice of peace and some others with whom one, making pretensions of being an attorney, did business, knew that he was not an attorney, does not affect the question of contempt,[31] and the granting of permission by a judge to appear in cases for a short time pending admission to the bar, although in palliation of the offense, is no excuse.[32] That no fee for the services was received is no defense.[33]

Punishment. The amount of fees received by such practice does not furnish the only basis for determining the punishment,[34] and in dealing with such a case the court may consider the lack of candor of the offender during the contempt proceeding.[35]

(2) Misdemeanor

Practicing law without being admitted constitutes a misdemeanor in some jurisdictions

In some jurisdictions, any person not duly licensed to practice law who holds himself out as an attorney and counselor at law, or who attempts to practice such profession, while liable for contempt, is also guilty of a misdemeanor,[36] and in the enactment of statutes making it an offense to practice law without a license, the legislature will be held to have intended only to protect the general public from exploitation, and not to protect the legal profession, especially since any such attempt of the latter kind would be invalid.[37] While an indictment or information containing allegations substantially in the language of the statute has been held sufficient,[38] an indictment not alleging that accused practiced law for a fee or reward has been held demurrable, although the offense is charged in the language of the statute.[39]

While there is no presumption that accused had been admitted to practice law and it is incumbent on him to show such right,[40] the state must prove that he practiced law for a fee or reward,[41] and a receipt for money is admissible with testimony that the witness paid accused for legal services.[42] Proof that accused performed only one act outside the court, such as preparing a bill of sale and chattel mortgage, has been held insufficient to sustain a conviction.[43]

B. SUSPENSION AND DISBARMENT

§ 17. Tenure of Office in General

Admission of a person to the bar is for life unless such right is revoked upon good cause shown. Change of residence to another jurisdiction may forfeit right to practice. Right to surrender license may be refused.

The right to practice law is not an absolute right, but a privilege only, as heretofore seen (supra § 4), which may be revoked whenever the holder's misconduct makes him unfit to exercise the duties of his office.[44] Since an admission to the

30. In re Frederick Bugasch, Inc., 175 A 110, 12 N J Misc 788

31. In re Morse, 126 A. 550, 98 Vt 85, 36 A L R 527

32. In re White, 171 P 759, 54 Mont 476

33. State ex rel. Wright v Barlow, (Neb.) 268 N.W. 95

34. People v. People's Stock Yards State Bank, 176 N E 901, 344 Ill 462

35. People v People's Stock Yards State Bank, supra.

36. La.—State v. Rosborough, 94 So 858, 152 La. 945
N J—New Jersey Photo Engraving Co. v Carl Schonert & Sons, 122 A 307, 95 N J Eq 12.
6 C J. p 570 note 53.

Statutes not repugnant

The act of May 16, 1905 (L [1905] p 190), declaring one holding himself out as attorney at law without being licensed to practice guilty of misdemeanor, is not so repugnant to act revising law concerning attorneys and counselors, as amended in 1917 (L [1917] p 205), as to render either void, the latter prohibiting practice of law without a license, by giving legal advice or representing client in court of record or before justice of peace.—People v. Hubbard, 145 N E 93, 313 Ill 346

Words construed as generally understood

The words "to practice as an attorney at law" in a statute prohibiting such practice by unlicensed persons, will be construed as persons generally would understand them, such words not being technical or scientific.—People v Alfani, 135 N E 671, 227 N Y 334, reversing 174 N Y. S 527, 186 App Div 468, 37 N Y Cr. 395

37. People v. Black, 282 N.Y.S. 197, 156 Misc. 516.

38. Midkiff v. State, (Ariz.) 30 P. (2d) 1057.

Indictment held sufficient

Indictment charging that defendant made it a business to practice as attorney in a justice's court when not regularly admitted to practice as attorney, and that defendant received compensation for so appearing, was held sufficient to charge offense.—People v. Stoddard, 281 N Y S 730, 157 Misc. 153

39. State v Adair, 157 A. 358, 4 W W Harr (Del.) 585.

40. Commonwealth v. Branthoover, 24 Pa Co. 353.

41. State v. Adair 156 A 358, 4 W W Harr (Del.) 585

42. People v. Hubbard, 245 Ill App 197

43. People v Weil, 260 N.Y S 658, 237 App Div 718

44. Fla.—In re Clifton, 155 So 324, 115 Fla. 168.
Hawaii—In re Roberts, 30 Hawaii 588
Ill.—People v. Baker, 142 N E 554, 311 Ill 66 31 A L R 737
Iowa—In re Cloud, 250 N.W. 160, 217 Iowa 3
Ky.—Commonwealth v. Harrington, 98 S W (2d) 53, 266 Ky 41
S D.—In re Brown, 264 N W 521
Vt.—In re Haddad, 173 A. 103, 106 Vt. 322
6 C J p 580 note 52

Not like ordinary public offices

The office of an attorney is not, like ordinary public offices, subject

bar is for life unless the attorney is removed,[45] an attorney is liable to the summary jurisdiction of the court for misconduct and subject to disbarment, although at the time of an application against him he has ceased to practice as an attorney, and has gone into another business.[46]

Change of residence or absence from state. While absence of an attorney from a state does not of itself forfeit or abandon his right to practice law,[47] it has been held that a member of the bar of a state loses his right to practice there by changing his residence to another jurisdiction,[48] although he does not cease to represent his client in actions previously commenced until his client has substituted another attorney in his place.[49]

Surrender of certificate or resignation. An attorney may, with the consent of the court, resign his office and relinquish its rights and privileges.[50] A petition for leave to surrender his certificate for cancellation should allege that there are no outstanding matters to be disposed of by him, nor any proceedings pending for his disbarment, or that he has no reasonable apprehension of such proceedings being taken,[51] and an attorney's resignation should not be permitted where another has moved to strike his name from the roll of attorneys, or where he apprehends that some one may do so.[52]

Patent attorneys. Under a rule of the patent office, the powers of a patent attorney may be revoked at any stage in the proceedings upon application to, and approval by, the commissioner; and when so revoked, the office will communicate directly with applicant or such other attorney as he may appoint, and the attorney whose powers are revoked will be promptly notified thereof. The spirit of this rule requires that notice of such revocation should be given to the legal representatives of a deceased applicant.[53]

§ 18. Power to Suspend or Disbar

a. In general
b Particular courts
c. Bar committee or association
d. Commissioner of patents

a. In General

While courts have inherent power to suspend or disbar an attorney, statutes may regulate the exercise of such power.

The right or power to discipline attorneys by suspension or disbarment is inherent in the courts[54]

to the will of the body creating it and burdened with whatever conditions that body may impose, but is held during good behavior, and is one of which he can be divested only upon good cause shown and after proper judicial proceedings—In re Clifton, 155 So. 324, 115 Fla. 168—People v. Baker, 142 N.E 554, 311 Ill 66, 31 A L R 737—In re Buckley, 4 Ohio N P (N S) 129—6 C J. p 568 note 24

Duty to seek other employment

The right to practice law is not a vested right, and, if conformity with professional ethics is unprofitable, an attorney should seek some other vocation—In re Meck, 200 N E 478, 51 Ohio App. 237.

45 In re Pierce, 207 N W 966, 189 Wis 441—6 C J. p 580 note 54.

Temporary abandonment of the legal profession as an immediate means of livelihood, and a failure for a time to exercise the rights and privileges granted, is not a destruction of the right or privilege to a subsequently renewed practice—In re Pierce, 207 N W 966, 189 Wis 441

46. In re Dellenbaugh, 17 Ohio Cir Ct. 106, 9 Ohio Cir.Dec 325

47. In re Pierce, 207 N.W. 966, 189 Wis 441

48. Matter of Mosness, 39 Wis 509, 20 Am R 55.

49. Faughnan v. Elizabeth, 33 A 212, 58 N J Law 309.

50. In re Haddad, 173 A. 103, 106 Vt 322.

51. In re Clifton, 155 So 324, 115 Fla 168

52. Fla—In re Clifton, supra
Vt—In re Haddad, 173 A. 103, 106 Vt 322.
6 C J. p 581 note 56 [b].

53. In re Mattullath, 38 App D.C 497.

54. U S—Conley v. U. S, (C C A Minn) 59 F (2d) 929—Hertz v. U S, (C C A Minn) 18 F (2d) 52
Colo—People v. Irwin, 152 P. 905, 60 Colo 177.
Conn—Grievance Committee of Hartford County Bar v Broder, 152 A 292, 112 Conn 263, 269
Fla.—Petition of Jacksonville Bar Ass'n, 169 So. 674—Gould v State, 127 So 309, 99 Fla. 662, 69 A L R 699
Ga—De Krasner v. Boykin, (App) 186 S E 701
Ill—In re Needham, 4 N E (2d) 19, 364 Ill. 65—People v. Harris, 112 N E 978, 273 Ill 413.
Kan—In re Hanson, 5 P.(2d) 1083, 134 Kan 165
Ky.—Chreste v Commonwealth, 186 S W. 919, 171 Ky. 77, Ann Cas 1918E 122
La—State v Woodville, 108 So 309, 161 La. 125—State v. Flynn, 107 So 314, 160 La 483
Mass—In re Opinion of the Justices, 194 N E 313—In re Keenan, 192 N E. 65, 287 Mass. 577, 96 A.L.R. 679—In re Ulmer, 167 N E 749, 268 Mass 373
Mo—In re Sparrow, 90 S W (2d) 401
N C—Brummitt v. Winburn, 175 S E. 498, 206 N C 923
N D—In re Eaton, 235 N.W 587, 60 N D 580
Or—State v. Woerndle, 220 P. 744, 109 Or 461—State v. Woerndle, 209 P 604, 109 Or 461.
Pa—In re Wolfe's Disbarment, 135 A 732, 288 Pa 331, 50 A L R 380
S C—State v Jennings, 159 S E. 627, 161 S C 263
S D—In re Hosford, 252 N W. 343, 62 S D 374
Utah—In re Barclay, 24 P (2d) 302, 82 Utah 288
Vt—In re Haddad, 173 A. 103, 106 Vt 322
Va—Norfolk & Portsmouth Bar Ass'n v Drewry, 172 S E 332, 161 Va 333
Wis—State v. Cannon, 221 N W 603, 196 Wis 534—In re Stolen, 214 N W 379, 193 Wis 602, affirmed 216 N W. 127, 193 Wis. 602, 55 A L R. 1355.
6 C J p 580 note 55.

Preservation of dignity

The court has power as matter of preservation of judicial dignity and integrity to guard portals against intrusion by those who are unfit—Gould v. State, 127 So. 309, 99 Fla 662, 69 A L R 699

Summary jurisdiction

(1) The court by reason of the

and has been exercised from the earliest times,[55] and whenever a proper case is made out it is its duty to exercise it.[56] The power to disbar or suspend an attorney is judicial in its nature[57] and can be exercised only by the courts,[58] and cannot be defeated by the legislative or executive departments,[59] although statutes may regulate its exercise.[60] The suspension or cancellation of an attorney's license by a court exercising its inherent or statutory authority does not contravene either the federal or state constitutions.[61]

Power not an arbitrary one. The power is not an arbitrary and despotic one to be exercised at the pleasure of the court or because of passion, prejudice, or personal hostility;[62] it is rather one to be used with moderation and caution, in the exercise of a sound judicial discretion,[63] and only

necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its own dignity has a summary jurisdiction to deal with the alleged misconduct of an attorney—In re Clifton, 155 So 324, 115 Fla 168

(2) A statute providing a summary method of securing payment of moneys withheld by attorneys from clients and of inflicting punishment on attorney where bad faith is shown, did not deprive the court of its inherent power to disbar members for wrongful retention of client's money, nor stay disbarment proceedings until the summary method should be pursued—In re Kraus, 185 A 737, 322 Pa 362

55. Colo—People v Irwin, 152 P 905, 60 Colo 177
Mo—In re Sparrow, 90 S W (2d) 401

56. U S—Hertz v U. S., (C C A Minn) 18 F (2d) 52
Hawaii—In re Roberts, 30 Hawaii 588
Ill—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 332, 351 Ill 206—People v Hansen, 147 N E 431, 316 Ill 502
Mont—In re Hansen, 54 P (2d) 882
Ohio—In re Meek, 200 N E 478, 51 Ohio App. 237.
Okl—In re Rice, 29 P.(2d) 599, 167 Okl 330—State v. Ledbetter, 260 P 454, 127 Okl 85
Pa—In re Disbarment Proceedings, 184 A 59, 321 Pa 81—In re Wolfe's Disbarment, 185 A 732, 288 Pa 331, 50 A L R. 380—In re Oliensis, 26 Pa Dist 853—In re Thornton, 16 Pa Dist. 422.
S D—In re Brown, 264 N W 521
6 C J p 581 note 56

No hesitation where disbarment necessary

Although the power to order disbarment of an attorney is always to be exercised with great caution, as shown infra this section, there should be no hesitation in directing disbarment where necessary for the protection of the court and the public—In re Alexander, 184 A 77, 321 Pa 125—In re Lemisch, 184 A. 72, 321 Pa 110—In re Barach, 123 A. 727, 279 Pa. 89.

Court not relieved of duty by extraneous facts

That bar association may entertain trivial or malicious charges or show undue favoritism does not relieve court of duty to investigate charges or disbar guilty offender—People v Johnson, 176 N E 278, 344 Ill 132

Exercise of power as necessity requires

In the absence of restrictive legislation, the power to disbar may be exercised as necessity requires—State v Flynn, 107 So 314, 160 La 433

57. Fla—Petition of Jacksonville Bar Ass'n, 169 So 674
Ill—People v Gorindar, 182 N E. 732, 350 Ill. 256—People v. Gilmore, 177 N.E 710, 345 Ill. 28
Nev—State ex rel McCloskey v. Greathouse, 36 P (2d) 357, 55 Nev 409
N M—In re Royall, 268 P 570, 33 N M 386
Okl—State v Ledbetter, 260 P. 454, 127 Okl 85
S D—In re Brown, 264 N W 521.
Va—Norfolk & Portsmouth Bar Ass'n v Drewry, 172 S E 282, 161 Va 833
6 C J p 581 note 61

58. State ex rel McCloskey v Greathouse, 36 P (2d) 357, 55 Nev 409

Judge at chambers

A judge in chambers has no power to suspend or disbar an attorney—State v Nathans, 27 S E 52, 49 S C 199

59. Cal—In re Cate, (App) 273 P. 617, supplementing opinions 270 P 968 and 271 P 356
Colo—People v Irwin, 152 P 905, 60 Colo 177
Kan—In re Gorsuch, 214 P 794, 113 Kan 380
N M—State v. Raynolds, 158 P 413, 22 N M 1
Okl—In re Evans, 179 P. 922, 72 Okl 215.
Tenn.—In re Hickey, 258 S W. 417, 149 Tenn 344
6 C J p 581 note 57.

60. Kan—In re Gorsuch, 214 P. 794, 113 Kan. 380
La—Meunier v. Bernich, (App) 170 So. 567
Okl—In re Shoemake, 31 P (2d) 928, 168 Okl 77—In re Evans, 179 P. 922, 72 Okl 215.
Tenn—In re Hickey, 258 S.W. 417, 149 Tenn 344
Utah—Foster v. Burton, 232 P 917, 64 Utah 550—Higgins v. Burton, 232 P 914, 64 Utah 562.
6 C J p 581 note 58

Statutes not exclusive

Statutes relating to suspension, discipline, or disbarment of attorney are not exclusive in their provisions.—De Krasner v. Boykin, (Ga App) 186 S E 701.

Right to disbar not restricted

Revisal (1905) §§ 939–945, though prohibiting disbarment as punishment for contempt, does not restrict right to disbar when disbarment is not imposed under power to punish for contempt, but for misconduct of attorneys in matters affecting their fitness to be members of the bar—State v. Johnson, 93 S.E. 847, 174 N. C. 345, L R A 1918A 1189.

Common-law power abridged

Revisal (1905) § 211, held not to deprive the courts of their common-law power to disbar unfit attorneys, save in case of conviction of crimes not affecting their professional standing—State v Johnson, 93 S E 437, 171 N C. 799.

In New York

Judiciary L. §§ 88, 476, 477, provide for the suspension or removal of an attorney from practice—In re Newell, 160 N Y S 275, 174 App Div 91

Penal nature of statutes providing for disbarment see Statutes § 339 [59 C J. p 1111 note 9 [b] (31)]

61. In re Cloud, 250 N W. 160, 217 Iowa 3.

62. Ill—People v Gorindar, 182 N E 732, 350 Ill. 256—People v Gilmore, 177 N E 710, 345 Ill 28—People v. McCallum, 173 N E 827, 341 Ill 578.
Okl—State v Ledbetter, 260 P 454, 127 Okl 85
Pa—In re Lemisch, 184 A 72, 321 Pa 110—In re Oliensis, 26 Pa Dist 853
6 C J. p 581 note 63.

63. U S—Hertz v. U. S., (C.C A Minn) 18 F (2d) 52
Ark.—McGehee v State, 32 S W.(2d) 308, 182 Ark. 603.
Ill—People v. Hansen, 147 N E 431, 316 Ill. 502.
Mo—In re Sizer, 267 S W. 922, 306 Mo. 356
Okl—State v. Ledbetter, 260 P. 454

in a clear case,[64] for the most weighty reasons,[65] and upon clear legal proof as hereafter shown infra § 33.

Distinct from right or power to punish for contempt. The right or power of suspension or disbarment is different and distinct from the power to punish for contempt.[66]

Place where misconduct committed. A court has jurisdiction to disbar an attorney for acts done in or out of court,[67] outside of the state[68] or in another court of the state[69] or while practicing before the federal courts,[70] or before the United States land office.[71]

Suspension pending disciplinary proceedings. It is not proper for courts ordinarily to deprive the accused of his rights as an attorney pending the investigation and trial of an application for disbarment;[72] nor will misconduct on the part of an attorney, although amounting to a contempt and furnishing cause for his removal or suspension, justify a court in excluding him from practicing at its bar when no judgment of removal or suspension has been rendered against him.[73] However, under statutes in some jurisdictions, where an attorney is convicted of a felony involving moral turpitude, he may be suspended by the court pending final action on the judgment of conviction.[74]

b. Particular Courts

Courts authorized to admit attorneys have inherent power to suspend or disbar them. Legislature may confer, on certain courts, exclusive jurisdiction to disbar attorneys

It is well settled that any court authorized to admit an attorney has inherent jurisdiction to suspend or disbar him for sufficient cause, and that such jurisdiction does not necessarily depend on any express constitutional provision or statutory enactment,[75] and conversely a court that has no jurisdiction to admit attorneys to practice has no jurisdiction to disbar them,[76] the jurisdiction to admit and disbar being deemed correlative.[77] Generally, all courts of record have power in a proper case to suspend or annul the license of an attorney practicing in the particular court pronouncing sentence,[78] but the power to go further and make the

127 Okl 85—State v Breckenridge, 258 P. 744, 126 Okl 86, 53 A L R 1239

Pa—In re Alexander, 184 A 77, 321 Pa 125—In re Lemisch, 184 A 72, 321 Pa 110—In re Disbarment Proceedings, 184 A. 59, 321 Pa 81—In re Barach, 123 A 727, 279 Pa 89—Wilhelm's Case, 112 A. 560, 269 Pa 416.

S D—In re Hosford, 252 N W. 843, 62 S D 374.

6 C J. p 581 note 64

64. Wilhelm's Case, 112 A. 560, 269 Pa 416

65. State v Ledbetter, 260 P 454, 127 Okl 85—6 C.J p 582 note 65

66. U S—Duke v. Committee on Grievances of the Supreme Court of the District of Columbia, (App D C.) 82 F (2d) 890, certiorari denied 56 S Ct 751

Utah—Higgins v. Burton, 232 P. 914, 64 Utah 562—Foster v Burton, 232 P 917, 64 Utah 550

6 C.J p 580 note 55 [b].

Contempt and disbarment proceedings as distinct proceedings see infra § 28

67. Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A L R. 666.

68. Matter of Lamb, 94 N.Y.S. 331, 105 App Div. 462.

69. In re Hurst, 176 A. 427, 317 Pa 217—6 C J p 583 note 79.

70. In re Sherwood, 103 A. 42, 259 Pa 254, L R A 1918D 447—6 C J p 583 note 80

71. People v Patterson, 138 P. 80, 56 Colo. 296.

72. State v Goode, 44 P 640, 4 Idaho 730

73. Withers v. State, 36 Ala 252

74. Shafer v State Bar of California, 12 P (2d) 957, 215 Cal 706

75. U S—Hertz v U. S, (C C A. Minn.) 18 F (2d) 52

Ala—McCord v State, 126 So. 373, 220 Ala 466

Cal—In re Cate, (App) 273 P 617, supplementing opinions 270 P 968 and 271 P 356

Ga—Wood v State, 165 S E. 908, 45 Ga App 783

Iowa—In re De Caro, 262 N.W. 132, 220 Iowa 176

Kan—In re Gorsuch, 214 P. 794, 113 Kan. 380

Mass—In re Opinion of the Justices, 180 N E 725, 279 Mass 607, 81 A L R 1059

Mo—In re Richards, 63 S W (2d) 672, 333 Mo. 907.

Neb—State ex rel Sorensen v. Goldman, 255 N W. 32, 127 Neb 340

N D—In re Eaton, 235 N W. 587, 60 N D. 580.

Ohio—In re Thatcher, 12 Ohio N P (N S) 497.

Okl—State v Ledbetter, 260 P. 454, 127 Okl. 85

Or—State v. Edmunson, 204 P. 619, 103 Or. 243.

R.I—Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139

S D—In re Brown, 264 N W. 521

Utah—In re Burton, 246 P 188, 67 Utah 118—In re Hilton, 158 P 691, 48 Utah 172, Ann Cas 1918A 271

Wash—In re Bruen, 172 P. 1152, 102 Wash 472

Wis—State v. Cannon, 226 N W. 385, 199 Wis 401

6 C J. p 580 note 55.

In New Jersey

(1) A court of chancery has been held to have no jurisdiction to disbar a solicitor from practice—In re Hahn, 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830, denying motion 94 A 953, 84 N J Eq. 523.

(2) And an order of the court of chancery debarring a counselor is not sustainable under the Practice Act requiring the solicitor to act under the direction of the court—In re Hahn, supra

(3) Nor is such an order, entered in proceedings not purporting to be proceedings to punish for contempt, sustainable as punishment for contempt—In re Hahn, supra

76. In re Wilson, 100 P 75, 79 Kan. 450.

77. In re Wilson, supra.

78. Neb—In re Yeiser, 192 N W. 953, 110 Neb 65, affirmed Yeiser v. Dysart, 45 S Ct. 399, 267 U S. 540, 69 L Ed 775.

Va—Legal Club of Lynchburg v. Light, 119 S E 55, 137 Va 249

W.Va—In re Daugherty, 136 S.E. 402, 103 W Va. 7.

6 C J. p 582 note 70.

Circuit court

The circuit court had jurisdiction to investigate charges of ambulance chasing made in petition of members of the local bar—State v. Circuit Court of Milwaukee County, Branch No. 1, 214 N W. 396, 198 Wis. 132.

suspension or revocation effective in all other courts of the state must be conferred by statute[79] As there is no necessary connection between the power to admit to practice and the power to disbar for subsequent misconduct, the legislature may confer on any court the power to suspend or disbar,[80] but, where the statute vests the power to disbar or suspend in certain courts, a court not specified therein has no jurisdiction to act in such matters,[81] and, of course, such power can be exercised only by the courts of the jurisdiction where such attorney is a member of the bar.[82] A municipal court has been held to have no power to disbar or suspend attorneys for general misconduct or violation of the canons of ethics,[83] and a statute conferring power of disbarment upon any court of record does not include courts of limited jurisdiction only,[84] such as certain criminal courts.[85]

An appellate court generally possesses the power by an original proceeding to suspend or disbar an attorney for unprofessional conduct,[86] and the

Court of general jurisdiction

In the absence of constitutional or statutory restrictions, a court of general jurisdiction has authority to suspend or disbar an attorney—In re Clifton, 155 So. 324, 115 Fla 168

Court of common pleas has jurisdiction in a disbarment proceeding over a respondent who had been duly served and entered an appearance—In re Hurst, 176 A 427, 317 Pa 217

In New Mexico

The district court may suspend an attorney for fraud and deceit practiced on the court, until the supreme court, on hearing had, either disbars him or restores him to practice—State v Raynolds, 158 P 413, 22 N M 1

79. Legal Club of Lynchburg v Light, 119 S E 55, 137 Va 249—6 C J p 582 note 71

80. Cal—Danford v Superior Court of California in and for City and County of San Francisco, 193 P 272, 49 Cal App 303
Iowa—In re Hunt, 205 N.W. 321, 201 Iowa 181.
6 C J p 582 note 72

Exclusive jurisdiction

It has been held competent for the legislature to confer on certain courts exclusive jurisdiction to disbar attorneys—Ex parte Marshall, 147 So 791, 165 Miss 523

Superior court

(1) Under Code Civ Proc. § 287, the superior court has jurisdiction to enter an order of disbarment—Danford v Superior Court of California in and for City and County of San Francisco, 193 P 272, 49 Cal App 303

(2) Such statute is not invalid—Danford v. Superior Court of California in and for City and County of San Francisco, supra.

Trial court

Where, in disbarment proceeding, alleged misconduct of attorney was properly brought to the attention of the trial court by filing of a report of the committee of the bar association and the court entered an order appointing a committee and directing it to investigate and file charges, the proceedings were in accordance with the statute, and gave the court jurisdiction to hear and determine the question—In re Hunt, 205 N.W. 321, 201 Iowa 181.

In Ohio

(1) Gen Code, § 1707, conferring jurisdiction on common pleas to suspend or remove an attorney at law from office, is not invalid—In re Quimby, 18 Ohio App. 142

(2) Disbarment proceedings should be instituted in a court of common pleas which is a court of general jurisdiction—In re Meck, 200 N E 478, 51 Ohio App 237.

(3) Disbarment proceedings under Gen Code, § 1707, in a court of common pleas, though a special statutory proceeding, may be heard by such court constituted as in other cases—State v Darby, 144 N E 611, 109 Ohio St 632—State v Le Blond, 140 N E 510, 108 Ohio St 136, certiorari denied and error dismissed 44 S Ct 134, 263 U S 679, 714, 68 L Ed 503

81. State v Laughlin, 73 Mo 443, reversing 10 Mo App 1

82. La—In re Craven, 151 So. 625, 173 La 372, 90 A L R 973.
Mass—In re Ulmer, 167 N E. 749, 268 Mass 373.

Federal district court

Federal court for district of Massachusetts had jurisdiction of proceedings to disbar an attorney admitted to practice in federal circuit court for the district of Maine prior to the abolition thereof by statute—In re Ulmer, 167 N E 749, 268 Mass 373

83. Bloomingdale Bros v. Hudson, 264 N Y S 639, 147 Misc. 759

84. Garrigus v State, 93 Ind. 239—Mattler v Schaffner, 53 Ind 245—6 C J. p 582 note 73

85. Iowa—State v. Mosher, 103 N W. 105, 128 Iowa 82, 5 Ann Cas. 984—State v. Clarke, 46 Iowa 155.
Mo—State v Laughlin, 73 Mo. 443
6 C J p 582 note 74.

86. In re Sparrow, (Mo) 90 S W. (2d) 401—6 C J p 582 note 75

Revocation effective in all courts

Code (1919) §§ 3423, 3424, relating to revocation or suspension of attorneys from practice, and extending the power of the supreme court of appeals, so that any revocation or suspension by it is effective in all courts of the state, are reasonable and valid—Legal Club of Lynchburg v. Light, 119 S.E 55, 137 Va 249.

In Kentucky

(1) The court of appeals was held to have power to entertain by original proceeding inquiry into charges against attorney, notwithstanding a constitutional provision conferring appellate jurisdiction only, since the inquiry did not involve judicial power and authority as contemplated in the constitution—Commonwealth ex rel. Ward v. Harrington, 98 S W.(2d) 58, 266 Ky. 41.

(2) The court of appeals was not precluded in original proceeding from disciplining attorney as respects his right to practice in inferior courts, in view of a statute conferring on the court of appeals exclusive power to grant licenses to practice law in any court—Commonwealth ex rel. Ward v Harrington, supra

In New York

(1) The appellate division of the supreme court has inherent as well as statutory power to direct an investigation into the unprofessional practices of attorneys to ascertain if its integrity is assailed or honor violated—In re Brooklyn Bar Ass'n, 227 N Y S 666, 223 App Div 149—In re Association of Bar of City of New York, 227 N Y S 1, 222 App Div 761—In re Cushman, 158 N.Y S 7, 171 App Div. 787.

(2) And may compel an attorney to testify as to his professional acts—People ex rel Karlin v Culkin, 162 N E 487, 248 N.Y 465, 60 A L R 851, affirming 228 N Y S. 873, 223 App Div. 822—Application of City Club of New York, 253 N.Y.S. 100, 233 App Div. 351.

(3) The power may be exercised sua sponte, whether the misconduct be that of a single attorney or of a particular class notwithstanding no specific charges are made and no individual is accused—In re Brooklyn Bar Ass'n, supra—In re Association of Bar of City of New York, supra

(4) A petition setting forth the existence of systematic "ambulance chasing" has been held to disclose a condition requiring the court to

power of the supreme court in such cases has been held to be inherent and independent of statute,[87] constitutional or statutory authority being held to be merely declaratory of the existing power.[88] The exercise of original jurisdiction by appellate courts is, however, disapproved in some cases.[89] Of course, the court in which an attorney commits unprofessional acts has jurisdiction, notwithstanding the attorney lives in another jurisdiction.[90]

c. Bar Committee or Association

Statutes conferring power on bar committees or associations to make final orders as to suspension or disbarment are invalid; but statutes conferring power to make investigations and recommendations are not invalid.

The board of commissioners of a state bar has no authority to suspend or disbar an attorney,[91] and a statute giving commissioners of the state bar authority to suspend or disbar attorneys is void,[92] but a statute providing for the investigation of charges against attorneys by such organization, subject to review by the supreme court, is not invalid.[93] A state bar commission has jurisdiction

entertain the petition.—In re Association of Bar of City of New York, supra.

(5) This power to inquire will not be denied, as putting a lawyer's reputation at the mercy of the tongue of ignorance or malice, as the remedy is to make the inquisition secret in its preliminary stages.—People ex rel. Karlin v. Culkin, supra.—In re Brooklyn Bar Ass'n, supra.

(6) However, the court will assume authority where a member of the bar is charged with corrupt and unethical conduct, and the facts are shown or the conduct is notorious.—Application of City Club of New York, supra.

(7) Without facts presented charging any lawyer with misconduct, the court is not inclined to initiate a general crusade in relation to the political activities of lawyers.—Application of City Club of New York, supra.

87. Ariz.—In re Myrland, 45 P.(2d) 953.—In re Bailey, 248 P. 29, 30 Ariz. 407
Cal.—Johnson v. State Bar of California, 52 P.(2d) 928.
Idaho.—In re Edwards, 266 P. 665, 45 Idaho 676.
Ill.—People v. People's Stock Yards State Bank, 176 N.E. 901, 344 Ill. 462.—People v. Berezniak, 127 N.E. 36, 292 Ill. 305.—People v. Harris, 112 N.E. 978, 273 Ill. 413.—People v. Czarnecki, 109 N.E. 14, 268 Ill. 273.
Iowa.—In re De Caro, 262 N.W. 132, 220 Iowa 176
Kan.—State ex rel. Boynton v. Perkins, 28 P.(2d) 765, 138 Kan. 899.—In re Gorsuch, 214 P. 794, 118 Kan. 380
Mass.—In re Cohen, 159 N.E. 495, 261 Mass. 484, 55 A.L.R. 1309
Miss.—In re Steen, 134 So. 67, 160 Miss. 874
Mo.—In re Richards, 63 S.W.(2d) 672, 333 Mo. 907.—In re Sizer, 254 S.W. 82, 300 Mo. 369
Mont.—In re Hansen, 54 P.(2d) 882
N.J.—In re Investigation by Bar Ass'n of Hudson County, 160 A. 809, 109 N.J. Law 275
N.M.—In re Royall, 286 P. 156, 34 N.M. 554.
Ohio.—In re Thatcher, 89 N.E. 39, 80 Ohio St. 492.
Okl.—State v. Ledbetter, 260 P. 454, 127 Okl. 85.
S.D.—In re Gibbs, 214 N.W. 850, 51 S.D. 464
Utah.—In re Barclay, 24 P.(2d) 302, 82 Utah 288.—In re Burton, 246 P. 188, 67 Utah 118
Wash.—In re Bruen, 172 P. 1153, 102 Wash. 472
Wis.—State v. Cannon, 221 N.W. 603, 196 Wis. 534.
6 C.J. p. 583 note 76.

"Its [power to disbar] existence is necessary and incidental to the court for its own protection, to secure the proper administration of justice, to maintain the prestige of the profession for integrity, to conserve the public good, and to protect clients from malpractice attended with fraud and corruption."—In re Shoemake, 31 P.(2d) 928, 929, 168 Okl. 77.

88. La.—State v. Flynn, 107 So. 314, 160 La. 483
N.D.—In re Eaton, 235 N.W. 587, 60 N.D. 530

89. Ala.—Ex p. Peters, 70 So. 648, 195 Ala. 67.
Ohio.—In re Meck, 200 N.E. 478, 51 Ohio App. 237
6 C.J. p. 583 note 77.

In California an original application for disbarment of an attorney will not be entertained by the supreme court, unless instituted or supported by a bar association, or the misconduct is alleged to have direct connection with matters pending in the supreme court.—In re Forster, 176 P. 38.—6 C.J. p. 583 note 77 [a].

In Ohio

(1) The court of appeals has no plenary power to discipline persons not members of the bar on account of reprehensible practices in respect of personal injury cases.—In re Meck, 200 N.E. 478, 51 Ohio App. 237

(2) In disbarment proceedings, such court can only reprimand, suspend, or disbar respondent from practice before such court.—In re Meck, supra.

In Virginia

While Const. (1902) § 88, limiting the original jurisdiction of the supreme court of appeals to cases of habeas corpus, mandamus, and prohibition, does not abridge the power of such court to suspend or disbar attorneys, where the circuit court has jurisdiction of proceedings for the expulsion or suspension of an attorney, the supreme court of appeals has jurisdiction only to deal with the case on appeal, and cannot take original cognisance thereof, in view of Code § 3196, the matter complained of not occurring in that court.—Legal Club of Lynchburg v. Light, 119 S.E. 55, 137 Va. 249.

90. In re Carrao, 156 N.Y.S. 379, 170 App. Div. 545.

91. In re Royall, 268 P. 570, 33 N.M. 386

92. In re Edwards, 266 P. 665, 45 Idaho 676

In Washington

L.(1917) p. 421, providing for proceedings for disbarment of attorneys before the state board of law examiners, is constitutional in all respects except as to the provision for a final order or judgment of disbarment by the board.—In re Ward, 179 P. 76, 106 Wash. 147.—In re Bruen, 172 P. 1153, 102 Wash. 472.

Statute construed

Under a state bar act providing for suspension of a member for nonpayment of dues, it has been held to have been the legislative intent that the suspension should be made by the court and not by the board of governors of the state bar.—Carpenter v. State Bar of California, 295 P. 33, 211 Cal. 358

93. Ala.—Ex parte Thompson, 152 So. 239, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala. 130, and In re Countryman, 152 So. 257, 228 Ala. 21.
Cal.—Johnson v. State Bar of California, 52 P.(2d) 928.
Idaho.—In re Edwards, 266 P. 665, 45 Idaho 676.
Nev.—In re Scott, 292 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113

Committee of state bar and supreme court have jurisdiction to hear

to hear a disbarment proceeding notwithstanding the state bar commission did not exist at the time the attorney allegedly committed the acts of misconduct, as a new method of procedure may be employed in an inquiry into acts of misconduct occurring prior to the creation of such procedure,[94] and the mere appointment of a new committee by the court cannot and does not affect its jurisdiction in disbarment proceedings.[95]

d. Commissioner of Patents

The commissioner of patents has power to suspend or disbar attorneys from practicing before that department.

The commissioner of patents may, after notice and opportunity for a hearing, suspend or exclude from further practice an agent or attorney who has violated or refused to comply with such regulations. The commissioner's hearing and determination of charges against a patent agent or attorney and the secretary's approval of the commissioner's findings are judicial functions;[96] but as congress has the right to vest the commissioner and the secretary with such judicial functions, it also has the power to authorize them to delegate such functions to an assistant, and therefore the act of congress which provides that the assistant secretary of the interior shall perform such duties in the department as shall be prescribed by the secretary is not limited to merely administrative duties, but authorizes the secretary to delegate to the assistant the judicial duty of approving the findings of the commissioner of patents in proceedings for the disbarment of a patent solicitor.[97]

§ 19. Grounds for Suspension or Disbarment

Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment.

Attorneys, in performance of the obligations and duties assumed, must conform to certain standards in relation to their clients, to the court, to the profession, and to the public,[98] and an attorney can be deprived of his rights as an attorney by the judgment of the court for moral or professional delinquency.[99] While a license to engage in the practice of law will not be revoked for trivial causes, impropriety, or breaches of good taste,[1] discipline for misconduct is not limited to cases where the attorney's acts are infamous or of a gross or serious nature,[2] and the courts will ordinarily discipline lawyers for offenses involving moral turpitude.[3] Also, in order that acts or conduct should be ground for striking the name of an attorney from the rolls it is not essential that they be such as would subject him to indictment or to any civil liability.[4] Conversely, the fact that misconduct charged against an attorney may also render him liable to punishment under the criminal laws does not necessarily deprive the court of power to hear disbarment proceedings against him.[5] Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which

and determine charges against a member of the bar in disciplinary proceedings—Dalzell v State Bar of California, (Cal.) 57 P.(2d) 1300

94. In re Barclay, 24 P.(2d) 303, 82 Utah 288

95. In re Mundy, 161 So. 184, 182 La. 148

96. Robertson v. U. S., 52 App.D.C. 177, 285 F. 911

97. Robertson v. U. S., supra
Power of federal department heads, including that of secretary of interior and secretary of treasury, to disbar attorneys from practicing before the department see United States § 33 [65 C.J. p. 1273 notes 11-13].

98. Neb.—State ex rel. Sorensen v. Ireland, 251 N.W. 119, 125 Neb. 570—State v. Priest, 242 N.W. 433, 123 Neb. 241.
Wis.—State v. Barto, 232 N.W. 553, 202 Wis. 329.

99. Bartos v. U. S. Dist. Court for Dist. of Nebraska, (C.C.A.Neb.) 19 F.(2d) 722, reversing (D.C.) In re Bartos, 13 F.(2d) 133.

Relation of court and its attorneys to people is one of high responsibility, involving complete trust and confidence and absolute fidelity and integrity—In re Casey, 195 N.E. 39, 359 Ill. 496.

1. Ill.—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N.E. 424, 353 Ill. 399.
Okl.—State v. Cutlip, 202 P. 782, 83 Okl. 183—In re Reily, 183 P. 728, 75 Okl. 192, 7 A.L.R. 89
Pa.—Maginnis' Case, 112 A. 555, 269 Pa. 186
S.D.—Petition of Morrison, 186 N.W. 556, 45 S.D. 123
Wis.—State v. Stetson, 234 N.W. 704, 203 Wis. 657.

2. Lewis v. Board of Governance of Pennsylvania Bar, 173 A. 652, 316 Pa. 193.

3. In re Hahn, 94 A. 953, 84 N.J.Eq. 523, motion denied 96 A. 589, 85 N.J.Eq. 510, Ann.Cas.1918B 330.

4. U.S.—Hertz v. U. S., (C.C.A. Minn.) 18 F.(2d) 52
Conn.—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 113 Conn. 263, 269
Ill.—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206—People v. Gorman, 178 N.E. 880, 346 Ill. 432—People v. Gilmore, 177 N.E. 710, 345 Ill. 28—People v. Olson, 153 N.E. 348, 322 Ill. 210—People v. Beresniak, 127 N.E. 36, 292 Ill. 305—People v. Meyerovitz, 116 N.E. 189, 278 Ill. 356
Ky.—Chreste v. Commonwealth, 198 S.W. 929, 178 Ky. 311
N.Y.—In re Schneidkraut, 246 N.Y.S. 505, 231 App.Div. 109—In re Newell, 160 N.Y.S. 275, 174 App. Div. 94.
Pa.—In re Rosenbaum, 150 A. 748, 300 Pa. 465—In re Wolfe's Disbarment, 135 A. 732, 288 Pa. 331, 50 A.L.R. 380—In re Margolis, 112 A. 478, 269 Pa. 206, 12 A.L.R. 1186
6 C.J. p. 583 note 85, p. 587 note 31.

5. La.—State v. Cary, 65 So. 748, 135 La. 579.
Mo.—In re Richards, 62 S.W.(2d) 672, 333 Mo. 907
6 C.J. p. 583 note 86.

attend the relation of attorney and client and the practice of law before the courts, or showing such a lack of personal honesty or of good moral character as to render him unworthy of public confidence, constitutes a ground for his disbarment.[6]

Any conduct which would preclude the admission of an applicant to the bar will justify his disbarment, after he is admitted;[7] among other things, a want of good moral character (infra § 20), insanity,[8] or ignorance of the law.[9] However, misconduct occurring previous to the admission of an attorney to practice, while it may be ground for refusing him a license, is generally not ground for disbarment,[10] although the evidence of such misconduct is material and relevant and may, under certain circumstances, and in connection with acts shown to have been done after admission, be sufficient to require disbarment.[11]

Legislative limitation of power. Although it is well settled that the legislature may provide that certain acts or conduct shall require a disbarment,[12] the accepted doctrine is that statutes and rules merely regulate the power to disbar instead of creating it,[13] and that such statutes do not restrict the general powers of the court over attorneys, who are its officers, and that they may be removed for other than statutory grounds.[14] In a few jurisdictions, however, the view obtains, that an enumeration of the grounds of disbarment by statute deprives the court of the power to disbar for causes other than those so specified.[15]

Intent. The rule laid down in some cases is that

6. Conn.—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 112 Conn 263, 269
Ill.—People v Berezniak, 127 N.E 36, 292 Ill 305.
Ky.—Chreste v Commonwealth, 198 S.W. 929, 178 Ky 311
Mass.—In re Ulmer, 167 N.E 749, 268 Mass. 373.
Mo.—In re H——— S———, (App.) 69 S.W.(2d) 325.
Okl.—In re Sitton, 177 P. 555, 72 Okl 13
S.D.—In re Brown, 264 N.W 521
Utah.—In re Barclay, 24 P.(2d) 302, 82 Utah 288.
6 C.J. p 533 note 87.

Granting of license is on implied understanding that the licensee shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.—State v Scoville, 243 N.W 269, 123 Neb. 457, followed in State ex rel Good v. Black, 251 N.W 109, 125 Neb. 383

Promoting ends of justice

An attorney is admitted as a member of the bar to promote the ends of justice, and that implies something more than private gain.—In re Bond, 31 P.(2d) 921, 168 Okl. 161

7. U.S.—Heitz v. U. S., (C.C.A. Minn.) 18 F.(2d) 52
Conn.—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 112 Conn 263, 269
Fla.—Gould v State, 127 So 309, 99 Fla. 662, 69 A.L.R. 699.
6 C.J. p 584 note 88.

8. Smith v. State, 1 Yerg.(Tenn.) 228

9. Ky.—Commonwealth ex rel. Ward v Harrington, 98 S.W.(2d) 53, 266 Ky. 41
Tenn.—Smith v State, 1 Yerg 228.
6 C.J. p 584 note 91

10. State v. Gebhardt, 87 Mo.App. 542.

11. In re Platz, 132 P. 390, 42 Utah 439.

12. Cal.—In re Collins, 206 P. 990, 188 Cal 701, 32 A.L.R 1062
Idaho.—In re Kerl, 188 P. 40, 32 Idaho 737, 8 A.L.R 1259
Ohio.—In re Bickley, 4 Ohio N.P.(N.S.) 129
6 C.J. p 584 note 94

Misbehavior, as used in a statute relating to disbarment, must be restricted in meaning to the accomplishment of the purpose for which the statute was intended and refers only to misbehavior demonstrating the attorney's unfitness to continue the practice of the law.—Ex parte Redmond, 135 So 833, 156 Miss. 439

Statute broad enough to cover all grounds

Pub.Acts (1913) c 42, § 1, prescribing the grounds of disbarment from practice in state courts and prescribing penalties and procedure in disbarment cases, is sufficiently broad to embrace any cases demanding suspension or disbarment, and under subs 5 power was conferred to punish defendants guilty of unprofessional conduct, dishonesty, malpractice, or any conduct which renders them unfit to be members of the bar commensurate with their offenses by either suspension or disbarment.—In re Hickey, 258 S.W. 417, 149 Tenn 344.

Reenacted statute previously construed

Where a statute giving grounds for disbarment of an attorney was construed by the court of final jurisdiction and was thereafter reenacted without material change, to give the statute a new construction disbarring an attorney on a new ground would be in effect disbarring the attorney by a law not previously prescribing the offense.—Lotto v. State, (Tex.Civ.App.) 208 S.W 563

State Bar Act is not a nullity and an attorney may be disbarred or suspended for violating the provisions thereof.—Howe v. State Bar of California, 298 P 25, 212 Cal 222

13. McCord v. State, 126 So 873, 220 Ala 466.—6 C.J. p 584 note 95.

14. Ala.—McCord v. State, 126 So. 873, 220 Ala 466
Ariz.—In re Bailey, 248 P 29, 30 Ariz 407
Ga.—Wood v State, 165 S.E. 908, 45 Ga.App. 783
Ill.—In re Needham, 4 N.E.(2d) 19, 364 Ill 65.
Ky.—Chreste v. Commonwealth, 198 S.W 929, 178 Ky 311.—Lenihan v Commonwealth, 176 S.W 948, 165 Ky 93, L.R.A.1917B 1132.
Mo.—In re Richards, 63 S.W.(2d) 672, 333 Mo 907
N.Y.—In re Zirinsky, 255 N.Y.S. 492, 234 App.Div. 470.—In re Newell, 160 N.Y.S 275, 174 App.Div. 94.
Utah.—In re Barclay, 24 P.(2d) 302, 82 Utah 288.
6 C.J. p 584 note 96.

Scope of power residing in judiciary with respect to disciplining or disbarring attorneys embraces the right to define by court's rules or by adjudication the acts constituting the practice of law.—Meunier v. Bernich, (La.App.) 170 So. 567.

In California

(1) It has been held that a violation of the rules of professional conduct may warrant suspension or disbarment although the offenses were not enumerated in the statute relating to disbarment proceedings.—Fish v State Bar of California, 4 P.(2d) 937, 214 Cal 215

(2) In earlier cases it was stated that the court could not disbar or suspend for acts of misconduct not included within the statute.—In re Collins, 81 P 220, 147 Cal. 8.—In re Morganstern, 215 P. 721, 61 Cal.App 702

15. Ind.—Ex p. Trippe, 66 Ind. 531.—Reilly v. Cavanaugh, 32 Ind. 214

the wrongdoing must have been intentional in order to constitute cause for the disbarment of an attorney; that not only must the act itself be proved to have been committed, but the bad or fraudulent motive for the commission thereof must also be established, either from the act itself or from proof of other circumstances, and that unless this is done disbarment is not authorized,[16] but this is not true in all jurisdictions.[17]

§ 20. —— Want or Loss of Moral Character

When an attorney's character is bad in such respects as to show him unfit to be trusted with the powers of an attorney, he may be disbarred.

The relation of the court and its attorneys to the people is one of high responsibility, involving complete trust and confidence and absolute fidelity and integrity.[18] As good character is an essential qualification for the admission of an attorney to practice, he may be removed whenever he ceases to possess such a character.[19] To warrant the removal, however, the attorney's character must be bad in such respects as to show that he is unsafe and unfit to be trusted with the powers of an attorney,[20] as conduct which is merely discreditable to the attorney, but not dishonorable or criminal conduct, may not be ground for suspension or disbarment.[21]

Immoral conduct is that conduct which is willful, flagrant, or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community.[22]

§ 21. —— Criminal Offenses and Conviction Thereof

a. In general
b Necessity of previous conviction
c. Effect of appeal and reversal
d. Effect of acquittal, pardon, service of sentence, etc.

—Redman v. State, 28 Ind 205—Ex p Smith, 28 Ind 47.
N C—Kane v Haywood, 66 N C. 1—Ex p Schenck, 65 N C 353.

16. Fla.—Gould v State, 127 So 309, 99 Fla 663, 69 A L R 699
Ill.—In re Lasecki, 192 N E 655, 358 Ill. 69—People ex rel. Chicago Bar Ass'n v. Hammond, 191 N E 215, 356 Ill. 581—In re Pels, 190 N E 250, 356 Ill. 200—People ex rel Chicago Bar Ass'n v Lotterman, 187 N E 424, 353 Ill 399—People v Gorindar, 182 N E. 732, 350 Ill 256—People v Hansen, 147 N E 431, 316 Ill. 502—People v. Pio, 139 N E. 45, 303 Ill. 128—People v. Harris, 112 N E 978, 273 Ill 413.
N Y.—In re Zanger, 194 N E 72, 266 N.Y 165, reversing 267 N Y S 193, 239 App Div. 129, reargument denied 270 N Y.S. 657, 241 App Div 60.
Okl—Haunstein v. State Bar of Oklahoma, 46 P.(2d) 558—In re Rice, 29 P (2d) 599, 167 Okl 330—In re Hadwiger, 27 P (2d) 604, 167 Okl 307
6 C.J p 584 note 98.

Knowingly done
An attorney's act in connection with an attempted blackmailing must have been knowingly done in order to justify his disbarment—In re Mills, 176 P. 556, 104 Wash 278.

17. In re Hobbs, 73 A. 303, 75 N.H 285.

18. People ex rel Chicago Bar Ass'n v. Templeman, 1 N E.(2d) 850, 363 Ill 152.

Attorney must conduct his activities so that he will not be repeatedly open to assaults upon his honor, and repeated failure to do so raises suspicion of unfitness and tends to discredit the profession—People ex rel Chicago Bar Ass'n v Sherwin, 4 N E (2d) 477, 364 Ill. 350

19. Cal—Bar Association of San Francisco v. Cantrell, 193 P 598, 49 Cal App 468
Hawaii—In re Roberts, 30 Hawaii 538.
Idaho—In re Dampier, 267 P. 452, 46 Idaho 195
Ill—People v. Gilmore, 177 N E 710, 345 Ill 28—People v Meyerovitz, 116 N E. 189, 278 Ill. 356—People v. Czarnecki, 109 N E 14, 268 Ill 278
Ky—Commonwealth ex rel Ward v Harrington, 98 S W (2d) 53, 266 Ky 41—Rosenberg v Commonwealth ex rel Otte, 74 S.W.(2d) 478, 255 Ky 413
Mass—In re Ulmer, 167 N E 749, 268 Mass 373.
Mont—In re Hansen, 54 P (2d) 882
Neb—State ex rel Sorensen v. Goldman, 255 N.W. 32, 127 Neb 340—State v Scoville, 243 N W. 269, 123 Neb 457, followed in State ex rel. Good v Black, 251 N.W. 109, 125 Neb 382
N Y—In re Rouss, 116 N.E. 782, 221 N Y. 81, affirming 155 N.Y.S. 557, 169 App Div. 629, reargument denied and amendment of remittitur granted 117 N E 1083, 221 N.Y 667—In re Gluck, 243 N.Y S. 334, 229 App Div. 490—In re Popper, 184 N Y S 406, 193 App Div. 505, 39 N Y.Cr 5.
Okl—In re Bond, 31 P (2d) 921, 168 Okl 161.
Or—State v. Estes, 209 P. 486, 105 Or 222
S C—State v Jennings, 159 S.E. 627, 161 S C 263.
Utah—In re Hilton, 158 P. 691, 48 Utah 172, Ann.Cas 1918A 271.
Wis—In re Stolen, 214 N W. 379, 193 Wis 602, 55 A L R 1355, affirmed 216 N W. 127, 193 Wis 603, 55 A L R 1355—In re Richter, 204 N W. 492, 187 Wis. 490, 41 A L R. 485
6 C J p 584 note 1.

Common honesty is essential for every lawyer to retain his standing as a member of the bar.—People v. Gilmore, 177 N E 710, 345 Ill 28—Duffin v Commonwealth, 271 S W. 555, 203 Ky 452—In re Ulmer, 167 N E 749, 268 Mass. 373—Bar Ass'n of City of Boston v. Sleeper, 146 N. E. 269, 251 Mass. 6.

20. Idaho—In re Dampier, 267 P. 452, 46 Idaho 195
Okl—In re Hadwiger, 27 P (2d) 604, 167 Okl 307
Utah—In re Hilton, 158 P. 691, 48 Utah 172, Ann Cas.1918A 271.
6 C J. p 584 note 1.

Rule held reasonable
Rules adopted by the state bar and approved by the supreme court making immoral conduct of attorney ground for disbarment, were held reasonable—In re Hicks, 20 P (2d) 896, 163 Okl 29.

21. In re Hadwiger, 27 P.(2d) 604, 167 Okl. 307.

22. In re Hicks, 20 P.(2d) 896, 163 Okl. 29

Disbarment justified
Where an unmarried dwarf possessing intellect of a child became pregnant by reason of intimacy with a married attorney who was the father of six children, disbarment of the attorney on the ground of immoral conduct was held justified—In re Hicks, 20 P.(2d) 896, 163 Okl. 29.

a. In General

An attorney may be disbarred where guilty of conduct amounting to a crime involving moral turpitude.

Although conviction of a crime not involving moral turpitude may not warrant disbarment,[23] the commission or conviction of an attorney of a felony or other crime involving moral turpitude is generally made a ground for suspension or disbarment by statute, and even in the absence of a statutory provision such conduct is a sufficient cause for disbarment,[24] although the offense was not committed in his professional capacity.[25] While

23. U S—Bartos v. U S District Court for District of Nebraska, (C C A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F.(2d) 138.
Ill.—People v. Smith, 124 N E. 807, 290 Ill 241, 9 A.L.R 183.
Minn—In re Conley, 248 N.W. 41, 188 Minn. 575.

Unfitness to practice necessary

Proof of attorney's conviction for assault with intent to murder was held not alone sufficient to warrant disbarment in the absence of evidence as to whether the crime was committed by the respondent under such circumstances as show him unfit for the trusts and confidence reposed in him as an attorney, or as showing any unprofessional acts which unfit him for association with the fair and honorable members of the profession—Branch v. State, 128 So. 487, 99 Fla. 444.

24. U S—Bartos v. U. S Dist Court for Dist of Nebraska, (C C A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F.(2d) 138
Cal—In re Herron, 19 P (2d) 4, 217 Cal 400—In re Collins, 206 P. 990, 188 Cal 701, 32 A.L.R 1062
Ill.—In re Needham, 4 N.E (2d) 19, 364 Ill 65
Ky—Commonwealth v. Porter, 46 S W.(2d) 1096, 242 Ky. 561.
Minn—In re Sachs, 246 N.W 662, 188 Minn. 94.
Mont—In re Peters, 235 P 772, 73 Mont. 284
Neb—State v. Scoville, 243 N W 269, 123 Neb. 457, followed in State ex rel. Good v Black, 251 N W 109, 125 Neb 332
N J.—In re Breidt, 94 A. 214, 84 N J Eq. 222.
N Y—In re Dolowich, 285 N Y S 433, 246 App Div 209—In re Kehoe, 226 N Y S 248, 222 App Div 272—In re Gunner, 167 N Y S 526, 180 App Div. 923—In re Summers, 159 N Y S 86, 173 App Div 961—In re Taylor, 285 N Y S 1036—In re Reeves, 165 N Y.S 634—In re Kuntz, 164 N Y S 900.
Okl—In re Threadgill, 27 P (2d) 601, 166 Okl 301—In re Eyler, 277 P 930, 136 Okl. 268—In re Chitwood, 253 P 104, 122 Okl. 182—In re Elliott, 253 P. 103, 122 Okl 180—In re Williams, 167 P 1149, 64 Okl 316—In re Horine, 167 P. 1148, 64 Okl 315
Wis—State v. O'Leary, 241 N.W 621, 207 Wis 297, 81 A.L.R. 1193.
6 C J. p 585 note 2.

Either felony or misdemeanor

(1) Under Code Civ Proc. § 287, providing that an attorney may be suspended on the ground that he has been convicted "of a felony or misdemeanor involving moral turpitude," it is immaterial whether the crime is a felony or misdemeanor as defined by Pen Code § 17—In re Thompson, 174 P. 86, 37 Cal App 344.

(2) Felony comprehends, as basis for disbarring attorney from practice of law, an offense punishable by imprisonment in the penitentiary—State v Scoville, 243 N W 269, 123 Neb. 457, followed in State ex rel. Good v. Black, 251 N.W. 109, 125 Neb 332.

Failure to certify copy of conviction

Noncompliance with Rev Codes § 4003, relating to the transmission of a certified copy of record of an attorney's conviction, does not deprive the court of power, or relieve it of the duty to proceed, upon its own motion, in disbarment cases, when the facts justifying such action are brought to its attention—In re Hofstede, 173 P 1037, 31 Idaho 448.

Moral turpitude

(1) It has been stated that a concept of moral turpitude, as respects disbarment of an attorney, depends on the state of public morals, and may vary according to the community and the times—In re Bartos, (D C Neb) 13 F (2d) 138, reversed on other grounds (C C A) Bartos v. U S District Court for District of Nebraska, 19 F.(2d) 722

(2) This is doubtless so when viewed solely as a question of morals and long periods of time are taken into consideration, but when private rights are being adjudicated they are determined by rules of the civil law, not the moral, and so the civil law fixes a definite meaning to the phrase—Bartos v. U. S District Court for District of Nebraska, (C C.A Neb) 19 F.(2d) 722, reversing (D C) In re Bartos, 13 F.(2d) 138.

(3) Moral turpitude has been defined as anything done contrary to justice, honesty, principle, or good morals
U.S—In re Bartos, (D C Neb) 13 F. (2d) 138, reversed Bartos v U. S District Court for District of Nebraska, (C.C A) 19 F (2d) 722
Cal—In re O'Connell, 194 P. 1010, 184 Cal 584
Ill—In re Needham, 4 N E (2d) 19, 364 Ill 65.
Mont—In re Peters, 235 P. 772, 73 Mont 284
Okl—In re Williams, 167 P. 1149, 64 Okl 316.
Or—State v. Edmunson, 204 P. 619, 103 Or 243.
Wash—In re Comyns, 232 P. 269, 132 Wash. 391.
6 C J. p 585 note 2 [a].

(4) It has also been defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general—Bartos v U S District Court for District of Nebraska, (C C A Neb) 19 F (2d) 722, reversing (D C.) In re Bartos, 13 F. (2d) 138—In re O'Connell, 194 P 1010, 184 Cal 584—In re Hofstede, 173 P 1037, 31 Idaho 448—In re Williams, 167 P. 1149, 64 Okl 316.

(5) It implies something immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude—Bartos v. U. S. District Court for District of Nebraska, (C C A Neb.) 19 F.(2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138.

Statutes held not impliedly repealed

(1) The statute regulating admission to practice of law did not impliedly repeal the statute prohibiting persons convicted of felony from practicing law—Commonwealth v. Porter, 46 S W (2d) 1096, 242 Ky. 561

(2) Revisal (1905) § 211, providing for the disbarment where attorneys had been convicted of crime rendering them unfit to practice law, was held not repealed by Acts (1907) c 941, providing for disbarment on conviction of felony—State v. Johnson, 88 S E 487, 171 N C. 799.

25. State v Scoville, 243 N W. 269, 123 Neb 457, followed in State ex rel Good v Black, 251 N.W. 109, 125 Neb 332

State bar commission

Where a statute authorizes a commission to investigate and pass on all complaints that may be made concerning their unprofessional conduct, it has been held that the commission cannot disbar an attorney for his conviction of a crime unconnected with his practice of the law—In re Dampier, 267 P. 452, 46 Idaho 195

Disbarment or suspension for nonprofessional misconduct see infra § 24.

it has been held that a judgment of conviction must have been rendered by a court of record[26] on prosecution by the state in its own name for a violation of state laws as distinguished from a prosecution by a city for the violation of an ordinance,[27] a conviction in the court of another state[28] or in a federal court[29] has been held sufficient to authorize disbarment, although it has been held that the offense must involve moral turpitude within the meaning thereof in the jurisdiction where disbarment is sought.[30] The record of conviction is sometimes made conclusive evidence of the attorney's unfitness, as shown infra § 33, and sometimes operates per se as a disbarment,[31] but in order to have this effect the crime must come within the statute.[32]

Particular crimes. The rules stated above have been applied in cases where an attorney has been guilty of adultery,[33] arson,[34] attempting to evade federal income tax,[35] barratry,[36] bigamy,[37] blackmail,[38] bribery,[39] or attempted bribery,[40] concealment and disposition of assets with criminal in-

26. In re Sanford, 232 P 1053, 117 Kan 750—In re Anderson, 168 P 868, 101 Kan 759.

27. In re Sanford, 232 P. 1053, 117 Kan 750

28. Barnes v District Court of Appeal, Second Appellate Dist, 173 P 1100, 178 Cal 500—6 C J p 585 note 2 [c].

29. Ala.—State v. Riddle, 105 So 259, 213 Ala. 430
Cal.—In re Shepard, 170 P 442, 35 Cal App 492
Kan.—In re Minner, 3 P (2d) 473, 133 Kan 789, 79 A L R 35
Ky.—Commonwealth v Porter, 46 S. W (2d) 1096, 242 Ky 561
Minn.—In re Beach, 231 N W 241, 180 Minn 557—In re O'Neill, 163 N W 504, 137 Minn 477
Mont.—In re Peters, 235 P. 772, 73 Mont 284.
Okl.—In re Green, 16 P (2d) 582, 161 Okl 1
6 C J p 585 note 2 [c]

30. In re Dampier, 267 P. 452, 46 Idaho 195—6 C J p 585 note 2 [c] (4).

Moral turpitude determined from record

Whether the offense of which attorney was convicted in the federal court involves moral turpitude requiring disbarment is for the supreme court to determine, looking only to the record.—In re Dampier, 267 P. 452, 46 Idaho 195.

31. In New York

(1) Section 88 subd 3 and § 477, of the Judiciary Law requiring an attorney, convicted of a felony, to be stricken from the rolls, are mandatory.—In re Spielberg, 279 N Y S. 562, 244 App Div 539—In re Shapiro, 279 N.Y S. 551, 244 App Div 538—In re Griffin, 279 N Y S 550, 244 App Div 537—In re Kresel, 270 N.Y S 879, 241 App.Div 18—In re Singer, 254 N Y.S 371, 233 App Div 467—In re Ackerson, 218 N Y S. 654, 218 App Div 388—In re Epstein, 218 N Y.S. 56, 218 App Div. 141—In re Felder, 209 N Y S 716, 214 App Div. 57—Matter of Patrick, 120 N.Y S 1006, 136 App Div 456, 24 N.Y.Cr 231—6 C.J. p 586 note 26 [a]

(2) Immediately on conviction for a felony, an attorney ceases to be an attorney, unaffected by his subsequent mental condition.—In re Wilcox, 227 N Y S. 230, 233 App Div 735

(3) Regularity of the conviction cannot be inquired into in a proceeding under the statute.—In re Ackerson, supra—In re Stein, 191 N Y S 419, 199 App Div 673—In re Hughes, 177 N Y S 234, 188 App Div 520

(4) The statute applies to convictions in another state.—In re Sullivan, 286 N Y S 318, 246 App.Div 393—In re Roth, 206 N Y S 232, 210 App Div 487—In re Innes, 162 N Y S 721, 176 App Div. 902.

(5) The statute applies also to convictions in the federal courts.—In re Goldstein, 276 N Y S 234, 242 App Div 577—In re Goldsmith, 276 N Y S 83, 242 App Div 576—In re Reynolds, 243 N Y S 809, 229 App. Div 663—In re Shalleck, 242 N Y S 641, 229 App Div 691—In re Langfur, 241 N Y S 846, 229 App Div 198—In re Mantell, 232 N Y S 336, 225 App Div 5—In re Kaye, 226 N Y S 391, 222 App Div 829—In re Felder, 209 N Y S. 716, 214 App Div 57—In re Dubin, 208 N Y S 125, 211 App Div 614—In re Kaufmann, 187 N.Y S 213, 195 App Div 830—In re Lindheim, 187 N Y S 211, 195 App Div 827, 39 N Y Cr 115—In re Hodgskin, 183 N Y S 401, 193 App Div 217—In re Boetzel, 180 N Y S 412, 191 App. Div 881—In re Fried, 284 N Y S 490.

(6) An attorney convicted of a felony under the laws of the United States will be disbarred although the crime would not be a felony if trial had been had under the laws of New York, but a misdemeanor.—In re Ackerson, 218 N Y S. 654, 218 App Div. 388

(7) However, while disbarment automatically follows conviction of a felony, this is not so with respect to a misdemeanor in which case the character of the offense will be considered with respect to the punishment warranted.—In re Ackerson, supra—In re Smith, 213 N Y S. 751, 216 App Div 173—In re Hughes, 177 N.Y S 234, 188 App.Div. 520—6 C J p 586 note 27 [a]

(8) But disbarment will be ordered where the character of the offense shows him no longer fit to be allowed to practice.—In re Smith, supra—In re Katzman, 198 N Y S 4, 204 App Div 234—In re Stein, 191 N Y S 419, 199 App Div. 673—In re Hughes, supra

Effect of reversal on appeal see infra § 21 c.

32. Ex p Biggs, 97 P 713, 52 Or. 433—6 C.J p 586 note 27

33. Grievance Committee of Hartford County Bar v Broder, 152 A 292, 112 Conn 263, 269

34. In re Heckheimer, 280 N.Y S 911, 245 App Div 179

35. In re Diesen, 217 N W. 356, 173 Minn 297.

36. State v Rossman, 101 P 357, 53 Wash 1, 21 L R A (N S.) 821, 17 Ann Cas 65

37. In re Kelly, 262 N Y S. 677, 237 App Div 673

38. Miss.—In re Marshall, 133 So. 293, 162 Miss 364
Wash.—In re Mills, 176 P. 556, 104 Wash 278
6 C J p 586 note 12

Blackmail within purpose of disbarment proceeding

An attorney is guilty of "blackmail," if, availing of fears of opponent, he willfully collects from the opponent a sum beyond which the law would allow an attorney to collect, even if everything claimed against the victim as facts were established as absolutely true, and the attorney need not resort to threats to be guilty of blackmail.—In re Marshall, 133 So. 293, 162 Miss. 364.

39. Hawaii.—In re Pedro, 32 Hawaii 751
Ky.—Commonwealth v Stump, 57 S W (2d) 524, 247 Ky 539
Minn.—In re Beach, 231 N W. 241, 180 Minn 557—In re Erickson, 221 N W. 724, 175 Minn. 626
N Y.—In re Stephens, 203 N.Y S 506, 208 App Div 229.
N D.—In re Crum, 215 N W. 682, 55 N D. 876, 55 A.L R 220
6 C J p 586 note 11.

40. State v. Kern, 233 N.W. 629, 203 Wis. 178

tent,[41] felonious conspiracy, such as racketeering,[42] conspiring with a bankrupt to conceal his property,[43] criminal conspiracy[44] to smuggle opium,[45] to violate the Espionage Act,[46] or the federal prohibition act,[47] dueling,[48] embezzlement,[49] extortion[50] or attempted extortion,[51] falsifying bank reports,[52] forgery,[53] forgery in the second degree,[54] fornication;[55] fraud in procuring organization of corporations,[56] illegal manufacture,[57] possession,[58] or sale of intoxicating liquor,[59] knowingly receiving stolen property with intent to convert,[60] larceny,[61] grand larceny,[62] or attempted grand larceny,[63] libel,[64] making fraudulent proof of loss on insurance contract,[65] murder,[66] mutilation and destruction of public records and fabrication of evidence,[67] obtaining money under false pretenses,[68] offense against pension laws,[69] perjury[70] or subornation of perjury,[71] seduction under promise

41. In re Egan, 218 N.W. 1, 52 S D 394.

42. Minn —In re Moses, 243 N.W 336, 186 Minn 357
Pa —In re Green, 22 Pa Dist. & Co 620—In re Werblun, 22 Pa Dist. & Co 617—In re Herbert W Salus, 22 Pa Dist. & Co. 565.

43. In re O'Neill, 163 N.W. 504, 137 Minn. 477.

44. In re Chitwood, 253 P 104, 122 Okl 182—In re Elliott, 253 P. 103, 122 Okl. 180—In re Williams, 167 P 1149, 64 Okl 316

45. In re Shepard, 170 P. 442, 35 Cal. App. 492.

46. Cal —In re O'Connell, 194 P 1010, 184 Cal. 584.
Wash —In re Wells, 208 P. 25, 121 Wash. 68

47. In re Finch, 287 P. 677, 156 Wash 609.

48. Smith v. State, 1 Yerg.(Tenn.) 228

49. Colo —People ex rel. Atty Gen v Bentall, 51 P.(2d) 352—People v. Kaufman, 5 P.(2d) 1114, 90 Colo. 8
La —In re Edwards, 119 So. 868, 167 La. 546.
Minn —In re Fitz Gibbons, 234 N.W. 637, 182 Minn. 373.
N.Y.—In re Livers, 158 N Y S 723, 172 App Div. 609
Okl —In re Roach, 284 P. 33, 141 Okl 78
Utah —In re Foxley, 217 P. 248, 61 Utah 575
6 C.J. p 586 note 7.

50. N Y —In re Jacobs, 291 N Y S. 306, 249 App Div. 99.
S D —In re Sherin, 130 N W. 761, 27 S.D 232, 40 L R A.(N S) 801, Ann Cas 1913D 446

51. Barton v. State Bar of California, 40 P (2d) 502, 2 Cal (2d) 294 -6 C.J. p 586 note 14.

52. In re Peters, 235 P. 772, 73 Mont 284.

53. Cal —In re Shinn, 186 P. 772
Colo —People v Warren, 12 P (2d) 348, 91 Colo 99.
Minn —In re Disbarment of Olson, 267 N W. 361—In re MacLean, 263 N W 906.
N Y —In re Woodworth, 280 N Y S 949, 245 App Div. 813—In re Landman, 272 N Y S 647, 242 App Div. 662—In re Shenfeld, 200 N.Y S 108, 205 App Div. 634
Pa —McEvoy's Case, 12 Pa Dist. & Co. 741—In re Thornton, 16 Pa. Dist 422
Wash —In re Sellers, 253 P. 1119, 142 Wash 562.
6 C J p 585 note 4.

54. Minn —In re Bell, 246 N W. 467, 188 Minn 31.
N Y —In re Bernikow, 226 N Y S 158, 222 App Div 269—In re Sugarman, 213 N Y S. 913, 216 App Div. 175.

55. In re Isserman, 140 A 253, 6 N J Misc 146.

56. In re Spielberg, 279 N.Y S. 562, 244 App Div. 539—In re Shapiro, 279 N Y.S. 551, 244 App Div 538

57. U S —Bartos v U S District Court for District of Nebraska, (C. C A Neb) 19 F.(2d) 722, reversing (D C.) In re Bartos, 13 F (2d) 133.
Colo —People v. Cowen, 298 P. 957, 88 Colo 571.

58. State v Bieber, 247 P. 875, 121 Kan 536, 48 A L R 252.

59. N.C —State v. Johnson, 93 S E. 847, 174 N C 345, L R A 1918A 1139.
Or —State v. Edmunson, 204 P. 619, 103 Or. 243
6 C J p 586 note 23.

60. Cal.—In re Thompson, 174 P. 86, 37 Cal App 344.
N Y —In re Storey, 183 N Y S. 303, 193 App Div. 91.
Okl —In re Morgan, 33 P.(2d) 770, 168 Okl 461
6 C.J p 586 note 10.

61. In re Rosenfeld, 170 N Y S. 756, 184 App Div 882—6 C J. p 586 note 8.

62. Minn —In re Nelson, 235 N W. 675, 183 Minn 140
Mont —In re Thresher, 170 P. 1163, 54 Mont 474
N Y —In re Rudin, 281 N Y S 331, 245 App Div. 259—In re Woodworth, 280 N Y S 949, 245 App Div. 813—In re Bruno, 279 N.Y.S 28, 244 App. Div 741—In re Ury, 274 N Y S. 210, 242 App.Div 734—In re Warren, 272 N Y S 303, 242 App Div. 649—In re Whynman, 266 N Y S. 225, 238 App Div 571—In re Hirsch, 266 N Y S 155, 238 App Div. 570—In re Sugarman, 260 N Y S 824, 237 App. Div 346—In re Seinfeld, 257 N Y S. 1035, 236 App Div. 57—In re Bluestone, 254 N Y S 327, 232 App Div. 865—In re Krevoruck, 248 N Y S. 878, 232 App Div. 37—In re Ruda, 247 N Y S 943, 231 App Div 547—In re Rella, 231 N Y S 187, 225 App Div 653—In re Kirschner, 230 N Y S 73, 224 App Div 222—In re Booth, 227 N Y S. 745, 223 App Div 233—In re Isquith, 213 N Y S 827, 216 App Div 167—In re McCreery, 192 N.Y S 275, 199 App Div 899—In re Egan, 263 N Y S 465—In re Winder, 210 N Y S 469
Wash —In re Liliopoulos, 27 P.(2d) 691, 175 Wash 338

63. Minn —In re Ginsberg, 257 N W 337, 192 Minn 547
N Y —In re Stein, 279 N Y.S 632, 244 App Div 540—In re Perry, 257 N Y S 1035, 236 App Div. 54—In re Wolf, 162 N Y S 179, 175 App Div. 969—In re Griffin, 279 N Y S 550.

64. Ex p Mason, 43 P 651, 29 Or. 18, 54 Am S R. 772

65. In re Egan, 218 N W. 1, 52 S D 394.

66. Matter of Patrick, 120 N.Y S 1006, 136 App Div. 450.

67. State v. Harwood, 173 S E. 24, 206 N C. 87.

68. Ill —In re Needham, 4 N.E (2d) 19, 364 Ill. 65
N Y —In re Lambert, 280 N.Y S 320, 245 App Div. 816—In re Riley, 290 N Y S. 381
6 C J p 586 note 9.

69. In re Hopkins, 103 P. 805, 54 Wash 569

70. N.Y.—In re Silver, 252 N.Y S. 749, 233 App Div. 303.
Or —State v. Woerndle, 220 P. 744, 109 Or 461—State v Woerndle, 209 P 604, 109 Or 461.
Pa —In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa. 555.
Wis —State v. Stetson, 234 N.W. 704, 203 Wis 657
6 C J p 585 note 5.

71. Colo —People v. McCann, 249 P. 1093, 80 Colo 230
Pa —Klensin v. Board of Governance of Pennsylvania Bar, 168 A. 474, 312 Pa 564.
S.D —In re Hosford, 245 N.W. 822, 60 S D. 625.
Wis —State v. Stetson, 234 N W. 704, 203 Wis. 657.
6 C.J. p 585 note 6.

Acts held not to constitute crime

Where defendant, in personal injury action, introduced record show-

of marriage,[72] violation of Blue Sky Law,[73] violation of Draft Act,[74] willful publication of false and scandalous matter,[75] willfully secreting public records,[76] and using the mails to defraud.[77]

b. Necessity of Previous Conviction

While pendency of criminal proceedings is not a bar to disbarment proceedings, ordinarily the court will not entertain such proceedings pending the outcome of the criminal action, where the attorney has violated the law in a matter distinct from his professional conduct.

While the pendency of criminal proceedings is generally not a bar to disbarment proceedings,[78] ordinarily when an attorney has violated the laws of the state in a matter distinct from his professional conduct, that is, when the act or offense is committed in his private capacity and not by virtue of his office as an attorney, courts will not entertain any proceedings for his disbarment until after he has been convicted of the offense charged,[79] or at least until sufficient time has elapsed to afford the proper authorities opportunity to prosecute the accused.[80] Yet the rule is not an inflexible one; there may be cases in which it is proper for the court to proceed without such previous conviction, and such power has frequently been exercised.[81]

Where the conduct charged as the ground for removal falls within the sphere of official duty, it is of no moment that it also amounts to an offense against the criminal laws as heretofore shown supra § 19, and the power of the court to disbar in such case will not be withheld until after conviction,[82] although the court may in its discretion withhold the exercise of this power as the facts of any particular case may suggest would be appropriate.[83]

c. Effect of Appeal and Reversal

Ordinarily conviction of a crime involving moral turpitude is a ground for disbarment, notwithstanding an appeal has been taken, but on reversal an application for vacation of the order of disbarment may be made.

ing plaintiff had pleaded guilty to petit larceny, but in fact he had not pleaded guilty and had not been arrested, and plea had been entered without his knowledge by attorney, plaintiff's attorney, by eliciting plaintiff's testimony that he had not pleaded guilty and had never been arrested, with knowledge that record showed entry of plea of guilty, was not guilty of subornation of perjury, alleged as ground for disbarment.—In re Sizer, 267 S.W. 922, 306 Mo. 356.

72. In re Wallace, 19 S.W.(2d) 625, 323 Mo. 203.

73. In re Meek, 36 P.(2d) 267, 169 Okl. 89.

74. Idaho—In re Kerl, 188 P. 40, 32 Idaho 737, 8 A.L.R. 1259—In re Hofstede, 173 P. 1087, 31 Idaho 448.
Pa.—In re Margolis, 112 A. 478, 269 Pa. 206, 12 A.L.R. 1136.

75. State v. Edmunson, 204 P. 619, 103 Or. 243.

76. In re Bloor, 52 P. 779, 21 Mont. 49.

77. Ala.—State v. Riddle, 105 So. 259, 213 Ala. 430.
Cal.—In re Crane, 189 P. 1072.
Wash.—In re Comyns, 232 P. 269, 132 Wash. 391.

78. Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A.L.R. 666.

79. Idaho—In re Baum, 186 P. 927, 32 Idaho 676.
Mo.—Jones v. Sanderson, 229 S.W. 1087, 287 Mo. 176.
N.Y.—In re An Attorney, 161 N.Y.S. 504, 175 App.Div. 653.
Ohio.—In re Bickley, 4 Ohio N.P.(N.S.) 129.
Pa.—Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A.L.R. 666—In re Rule on A. for Disbarment, 11 Pa.Dist. 268.
6 C.J. p. 584 note 94 [b], p. 586 note 28.

Final judgment or order before conviction

A disbarment proceeding tried before L. (1919) p. 151, went into effect, was under Rev.St.(1909) § 960, under which no final judgment suspending for a definite time could be made for an indictable offense in the absence of indictment and conviction, and a disbarment or suspension for twelve months is such a final judgment, since it does not suspend until indictment might be secured and trial had thereon, but finally disposes of the case charging costs to the party disbarred.—Jones v. Sanderson, 229 S.W. 1087, 287 Mo. 176.

Final order held error

Making final order in disbarment proceeding for circulation of cartoons regarding judge during pendency of criminal charges for same offense was held error.—Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A.L.R. 666.

80. In re Tipton, 42 P. 504, 4 Idaho 513—6 C.J. p. 587 note 29.

81. Ill.—People v. Smith, 124 N.E. 807, 290 Ill. 241, 9 A.L.R. 183.
Iowa.—State v. Metcalfe, 214 N.W. 874, 204 Iowa 123.
Mont.—In re Young, 250 P. 957, 77 Mont. 332.
N.Y.—In re Kammerlohr, 157 N.Y.S. 933, 171 App.Div. 781.
Okl.—In re Grant, 46 P.(2d) 317.
Or.—State v. Mannix, 288 P. 507, 133 Or. 329, rehearing denied 290 P. 745, 133 Or. 329.—State v. Woerndel, 209 P. 604, 109 Or. 461.
Pa.—In re Margolis, 112 A. 478, 269 Pa. 206, 12 A.L.R. 1136.
S.D.—In re Brown, 264 N.W. 521.
Vt.—In re O'Brien, 113 A. 527, 95 Vt. 167, 14 A.L.R. 859.
6 C.J. p. 587 note 30.

Exercise of discretion not jurisdictional question

Court has a discretion to exercise its power prior to conviction and its action in exercising that discretion does not present a jurisdictional question.—In re Young, 250 P. 957, 77 Mont. 332.

82. Idaho.—In re Burns, 40 P.(2d) 105, 55 Idaho 190—In re Edwards, 266 P. 665, 45 Idaho 676.
Ill.—People v. Meyerovitz, 116 N.E. 189, 278 Ill. 356.
La.—In re Kenner, 152 So. 520, 178 La. 774.
Mass.—Bar Ass'n of City of Boston v. Sleeper, 146 N.E. 269, 251 Mass. 6.
Neb.—State v. Fisher, 174 N.W. 320, 103 Neb. 736.
Pa.—Stone v. Board of Governance of Pennsylvania Bar, 168 A. 473, 312 Pa. 576, 90 A.L.R. 1109—In re Rule on D. for Disbarment, 12 Pa. Dist. 276.
S.D.—In re Sherin, 210 N.W. 507, 50 S.D. 428.
6 C.J. p. 587 note 32.

Extortion

Letter by one attorney to another was held a threat to institute disbarment proceedings unless property was surrendered, and comes within extortion statutes.—In re Sherin, 210 N.W. 507, 50 S.D. 428.

83. Ex p. Tyler, 40 P. 32, 107 Cal. 78.

It is held in some cases that an appeal so suspends the judgment in a criminal case that the attorney is not liable to be disbarred as for a conviction of a crime pending the determination of such appeal;[84] but the better rule seems to be that when an attorney has been convicted of a crime it is sufficient cause for his disbarment or suspension as an attorney, notwithstanding an appeal has been taken and is pending from the conviction.[85]

Reversal of an attorney's conviction because the statute under which the prosecution was laid was void for uncertainty does not preclude a disbarment proceeding for acts which constituted the basis of the criminal prosecution.[86] Where disbarment automatically follows on conviction of a felony as heretofore shown supra § 21 a, if the conviction is reversed on appeal a proper application for vacation of the order of disbarment may then be made.[87]

d. Effect of Acquittal, Pardon, Service of Sentence, Etc.

An acquittal, pardon, suspension of sentence, etc., is no bar or defense to a disbarment proceeding.

In a proceeding to disbar an attorney on the ground that he has been convicted of a crime, the fact that he may have been restored to his rights of citizenship by pardon,[88] by serving out his term of imprisonment,[89] or by the payment of a fine[90] or the suspension of sentence,[91] is not, in most jurisdictions, a defense to proceedings for disbarment; but there are decisions to the contrary.[92] And in any case it is usual for the court to examine the proofs of alleged innocence in determining whether or not the order of disbarment should be vacated.[93] Even an acquittal upon a criminal charge does not prevent the disbarment of an attorney, where it clearly appears that the misconduct under investigation rendered him unfit to be intrusted with the powers and duties of his profession,[94] but the contrary has also been held.[95] Also, the entry of a nolle prosequi in a prosecution begun will not terminate a proceeding to disbar, nor prevent disbarment of, an attorney where the conduct under investigation may show him unfit to be intrusted with the powers and duties of his profession.[96]

§ 22. —— Fraud in Procuring Admission

Fraud in the procuring of admission to the bar is a ground for disbarment.

Statutes sometimes expressly confer power on the courts to remove from office an attorney or counselor who has been guilty of any fraud or deceit in the proceedings by which he was admitted to practice, and even in the absence of such a statute the fraudulent procurement of admission to practice is good ground for disbarment, such conduct making the attorney unfit to be a member of the legal profession and being an imposition on the court.[97]

84. In re O'Connell, 189 P. 700, 182 Cal 786—In re Riccardi, 189 P 694, 182 Cal 675—6 C J p 587 note 34

85. In re Minner, 2 P.(2d) 473, 133 Kan. 789, 79 A L R 35—In re Casebier, 284 P 611, 129 Kan. 853—6 C J. p 587 note 35

86. In re Burns, 40 P (2d) 105, 55 Idaho 190

87. In re Kaufmann, 187 N Y S 213, 195 App Div 830—In re Lindheim, 187 N Y S. 211, 195 App Div. 527, 89 N Y Cr 115

88. D.C—Bowles v. Laws, 59 App. D C 399, 45 F (2d) 669, certiorari denied 51 S Ct 488, 283 U S 841, 75 L Ed. 1452.
Pa—Snyder's Case, 152 A 33, 301 Pa. 276, 76 A L R 666—In re Wolfe's Disbarment, 135 A 732, 288 Pa. 331, 50 A L R 380.
6 C J p 587 note 36.

89. People v. Monroe, 57 P. 696, 26 Colo 232.

90. People v. Weeber, 57 P. 1079, 26 Colo 229.

91. In re Lilliopoulos, 27 P.(2d) 691, 175 Wash. 338.

92. In re Herron, 19 P (2d) 4, 217 Cal 400—In re Emmons, 154 P 619, 29 Cal App. 121—6 C J p 588 note 39.
Record of conviction, while in force may be used as the foundation for a disbarment proceeding, but it is no longer possible, after a pardon, to disbar an attorney by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character—In re Emmons, 154 P. 619, 29 Cal App 121

93. Matter of E———, 65 How Pr (N Y) 171.

94. Cal—In re Lincoln, 283 P. 965, 102 Cal App 733
Mo—In re Richards, 63 S W.(2d) 672, 333 Mo. 907
Neb—State v. Fisher, 174 N W. 320, 103 Neb. 736
N Y—In re Schneidkraut, 246 N.Y. S 505, 231 App Div. 109
Pa—Snyder's Case, 152 A. 33, 301 Pa 276, 76 A L R 666—In re Wolfe's Disbarment, 135 A. 732, 288 Pa. 331, 50 A L R. 380—In re Barach, 123 A 727, 279 Pa 89—In re Kauffman, 14 Pa Dist & Co 506
Vt—In re O'Brien, 113 A. 527, 95 Vt 167, 14 A L R. 859.
6 C J p 588 note 41
Misdemeanor in professional capacity
A statute making it a ground for disbarment where an attorney has committed a misdemeanor in his professional capacity has been construed as not using the word misdemeanor in the technical sense of offenses punishable by fine and imprisonment, but as the equivalent of professional misbehavior—In re Richards, 63 S W (2d) 672, 333 Mo 907.

95. People v. John, 72 N E 789, 212 Ill. 615.

96. Pa—In re Wolfe's Disbarment, 135 A. 732, 288 Pa 331, 50 A L R. 380
Vt—In re O'Brien, 113 A. 527, 95 Vt. 167, 14 A L R 859

97. Minn—In re Bauer, 209 N.W. 21, 167 Minn 350
N Y—In re Schecht, 275 N.Y S. 712, 242 App Div. 495—In re Klein, 275 N.Y.S 703, 242 App Div. 494—In re

Thus one who secures admission to practice by willfully misrepresenting the facts as to his qualifications for admission,[98] or by fraudulently suppressing the fact of his indictment or conviction of crime,[99] the institution of disbarment proceedings,[1] or previous disbarment[2] in another jurisdiction, is guilty of such fraud and deceit as to require his disbarment.

§ 23. —— Professional Misconduct

a. In general
b. In relation to client
c. In relation to other attorneys
d. In relation to court
e. Deception of court and obstruction of justice
f. Misuse, falsification, or alteration of records and papers
g Misconduct as judge, prosecuting attorney, etc.
h. Miscellaneous grounds

a. In General

Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.

Conduct of an attorney in the performance of his duties as such is especially subject to the supervision of the courts in which he exercises that profession, and professional misconduct renders him subject to suspension or disbarment by the court, according to the degree of moral turpitude evinced by such misconduct.[3] This professional misconduct may consist in betraying the confidence of a client, as shown infra § 23 b, in attempting by

Price, 235 N Y S 601, 226 App Div 460
6 C J p 588 notes 43, 44

Fraudulent admission in another jurisdiction

Admission to the bar of another jurisdiction by falsely representing membership in the local bar is tainted by fraud and such fraud will contaminate the license to practice, granted on motion thereafter in the local jurisdiction on faith of such admission in the other jurisdiction —In re Price, 235 N.Y.S. 601, 226 App Div 460.

Proceeding to set aside order of admission of attorney from another jurisdiction as not a disbarment proceeding see supra § 15 a (2).

98. N Y.—In re Price, 235 N Y S 601, 226 App Div 460—In re Carpel, 165 N Y S. 102, 178 App Div. 146—In re Moskovits, 155 N.Y.S 485, 169 App Div 527.
N C—Attorney General v Gorson, 183 S E 392, 209 N C. 320, certiorari denied Gorson v. State of North Carolina ex rel Attorney General of North Carolina, 56 S Ct 752
6 C J p 588 note 45

99. N Y—In re Carpel, 165 N Y S 102, 178 App Div 146—In re Osgoodby, 155 N Y S 485, 169 App Div 626
Wis—State v. Podell, 207 N.W. 709, 189 Wis 457
6 C J p 588 note 46.

1. N Y—In re Price, 235 N Y S 601, 226 App Div 460
Wis—In re State Board of Law Examiners, 184 N W. 379, 175 Wis 66

2. Nev—State Bar v. Riccardi, 294 P 537, 53 Nev 128.
N Y—In re Hughes, 177 N.Y.S 234, 188 App Div. 520.
N C—Attorney General v Gorson, 183 S E 392, 209 N C 320, certiorari denied Gorson v State of North Carolina ex rel. Attorney General of North Carolina, 56 S Ct 752
6 C J p 588 note 47.

3. U S—Selling v Radford, (Mich.) 37 S Ct 377, 243 U S. 46, 61 L Ed 585—Duke v Committee on Grievances of Supreme Court of District of Columbia, (App D C.) 82 F (2d) 890, certiorari denied 56 S Ct 751—In re Ades, (D C Md.) 6 F.Supp 467
Cal—Ewell v State Bar of California, 40 P (2d) 264, 2 Cal (2d) 209—Mauer v State Bar of California, 26 P (2d) 14, 219 Cal. 271.
Colo—People ex rel Colorado Bar Ass'n v ———, Attorney at Law, 295 P 917, 88 Colo 325
Ill—In re Needham, 4 N E (2d) 19, 364 Ill. 65—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N.E 332, 351 Ill 206—People v Gorman, 178 N E 880, 346 Ill 432—People v. A'Brunswick, 146 N E 483, 315 Ill. 442—People v. Harris, 112 N E 978, 273 Ill. 413.
Iowa—In re Hunt, 205 N W. 321, 201 Iowa 181
Mass—In re Cohen, 159 N E 495, 261 Mass. 484, 55 A L R 1309
Mich—Attorney General v. Nelson, 249 N W. 439, 263 Mich. 686
N Y—In re Gordon, 241 N.Y.S 263, 229 App Div 88—In re Casey, 203 N Y S 61, 208 App Div. 24—In re Pouker, 197 N Y S 190, 203 App Div 520—In re Thayer, 190 N Y S 392, 198 App Div. 311—In re Earley, 177 N Y S. 347, 188 App.Div 532—In re Brown, 165 N Y S 736, 178 App Div 558—In re Brandmarket, 164 N Y S 369, 177 App Div 656—In re Smith, 160 N Y S 88, 173 App Div 601—In re Burnstine, 155 N Y S 500, 169 App.Div 540—In re Napolis, 155 N Y S 416, 169 App Div 469—In re Wilson, 170 N Y S. 725.
Ohio—In re Bickley, 4 Ohio N P.(N. S) 129
Okl—Ferguson v City of Hooker, 36 P (2d) 18, 169 Okl 34—In re Morgan, 33 P.(2d) 770, 168 Okl. 461
Pa—Stone v Board of Governance of Pennsylvania Bar, 163 A. 473, 312 Pa 576, 90 A L R 1109—In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa 555—In re Rosenbaum, 150 A 748, 300 Pa. 465—In re Lemisch, 22 Pa Dist & Co 645—In re Gartner, 22 Pa Dist & Co 643—In re Brodsky, 22 Pa Dist. & Co. 641—In re Samuel W. Salus, 22 Pa.Dist. & Co. 573.
S D—In re Waggoner, 206 N.W 427, 49 S.D. 78—In re Swihart, 177 N W. 364, 42 S D 628—In re Hanson, 161 N.W. 353, 38 S D. 350
Wash—In re Smith, 233 P. 288, 133 Wash. 145, 43 A.L.R. 102—In re Harvey, 216 P. 7, 125 Wash 698—In re Arctander, 188 P. 330, 110 Wash 296
Wis—Hepp v. Petrie, 200 N.W. 357, 185 Wis 350.
6 C J. p 588 note 48.

Abuse of special appearances

Attempted abuse of special appearances should be dealt with, when necessary, by disciplinary action against the offending attorney—U. S v. Collins, (C C A N Y) 55 F.(2d) 70.

Appropriating property deposited as bail

An attorney at law who attempted to appropriate to his own use property which he knew did not belong to his client, but which had been intrusted by the owners thereof to be deposited in lieu of bail to secure the

any means to practice a fraud or impose on or deceive the court, as shown infra § 23 d, or the adverse party or his counsel, as shown infra § 23 c; and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favorable opinion which the public should entertain concerning it.[4]

Misdemeanor within the meaning of a disbarment statute is equivalent to professional misbehavior and is not used in any technical sense of an offense punishable by fine or imprisonment.[5]

Moral turpitude comprises everything done contrary to justice, honesty, or good morals,[6] and misconduct in reference to one's duties and obligations as an attorney—conduct contrary to justice, honesty, modesty, or good morals—constitutes moral turpitude;[7] but, whether or not a violation of the rules of professional conduct involves any or all of these elements or is merely characterized as unethical, such violation may be penalized.[8] However, moral turpitude cannot be predicated on errors of judgment as to the law, or on action had and taken in good faith.[9]

Professional ethics. While it has been held that there is no difference between personal and professional ethics,[10] conduct usual or permissible in a commercial business may not be permissible to a lawyer.[11] Although the canons of ethics of the American and state bar associations are not enforced by the courts as a binding obligation,[12] the codes of legal ethics are commonly recognized as establishing wholesome standards of professional

release of his client from custody pending trial, which property he knew was to be returned to the owners, was held guilty of such unprofessional conduct as to warrant disbarment—In re Condon, 195 N W 492, 157 Minn. 24.

Attempting to force settlement by threats

Evidence showing that an attorney attempted to force a cash settlement of a slander action by a representation that a proposed book of attorney's client contained scandalous statements concerning the person from whom the settlement was sought, and that the book would be published if the action were not settled, required the attorney's disbarment—In re Pollack, 285 N.Y.S. 344, 246 App Div. 211.

Ignorant, negligent, or willful malpractice

While disciplinary proceedings cannot be taken against a solicitor for ignorant malpractice, he may be censured, and in gross cases disciplined for negligent malpractice, and may be disbarred for willful malpractice—In re Rosenkrans, 94 A. 42, 84 N J Eq. 232

Paying money to a "fixer" to procure a suspended or light sentence for a client has been held ground for disbarment.—In re Grudberg, 283 N Y.S. 353.

Proper venue and removal from calendar

Attorneys should see that actions are brought in the proper venue and are promptly removed from the calendar when they have been settled or discontinued—In re Glucksman, 243 N Y.S 1, 230 App Div 185

Actions held not to constitute misconduct

(1) That an attorney procured service of an unfiled complaint for alimony has been held not conduct meriting infliction of punishment, under evidence that opposing counsel were apprised of the fact that complaint was not filed nor summons issued—Bruns v. State Bar of California, 1 P.(2d) 989, 213 Cal 151.

(2) Bankers refused to underwrite railroad bonds, unless the president of the railroad would underwrite part of the issue, the president to have an interest in the bankers' option to purchase the bonds at a stated price and this arrangement was approved by the directors of the railroad and carried out. Where, after the president's interest in the option had expired, his personal attorney, who was also attorney for the railroad, induced the bankers to restore the president to his original interest in the option and subsequent financiering required the railroad to purchase its outstanding bonds, the bankers and the president exercised their option, and then sold bonds at a large profit, it has been held that the attorney was not guilty of misconduct—In re Chadbourne, 198 N.Y. S 422, 204 App Div. 459.

4. In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 332, 351 Ill. 206—6 C J. p 589 note 52

Malpractice by an attorney comprises any conduct which shows such intentional fraud on the court or client as involves moral turpitude—In re Smith, 94 A. 39, 84 N J Eq 252—6 C J. p 589 note 52 [a].

Professional malpractice is of three kinds,—ignorant, negligent, and willful—In re Rosenkrans, 94 A. 42, 84 N J Eq. 232

Willful professional misconduct

That the conduct of an attorney in engaging in business ventures and extending his credit further than his resources justified was subject to criticism, in that he placed himself in a position where his integrity as a lawyer could be questioned, was held not alone sufficient to constitute willful professional misconduct. —People v. Hansen, 147 N E. 431, 316 Ill. 502

5. In re H——— S———, (Mo App) 69 S W (2d) 325

6. Jacobs v. State Bar of California, 25 P.(2d) 401, 219 Cal. 59.

7. Dudney v. State Bar of California, 4 P (2d) 770, 214 Cal 238—Marsh v. State Bar of California, 291 P 583, 210 Cal 303—In re Humphrey, 168 P. 60, 174 Cal 290.

8. Dudney v State Bar of California, 4 P (2d) 770, 214 Cal. 238.

9. In re Kling, 186 P. 152, 44 Cal. App 267.

10. In re Williams, (Okl) 50 P. (2d) 729

Professional ethics is not a distinct system of morality, but it is the application of the accepted standards of right and wrong to the conduct of professional men in the business relations peculiar to their professional employment—In re Williams, (Okl) 50 P (2d) 729.

Standards of common honesty and fair dealing determine whether an attorney is subject to a disciplinary proceeding—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E. 332, 351 Ill. 206

11. In re Tracy, (Minn.) 266 N.W. 88.

12. People v McCallum, 173 N.E. 827, 341 Ill 578—Hunter v. Troup, 146 N.E. 321, 315 Ill. 293.

action,[13] and an attorney may be disciplined for not observing them.[14]

b. In Relation to Client

(1) In general
(2) Representing conflicting interests
(3) Misappropriation and failure to account

(1) In General

Unfaithful or fraudulent conduct of an attorney toward his client constitutes ground for suspension or disbarment.

The law is well settled that unfaithful or fraudulent conduct of an attorney toward his client, showing the unfitness of the attorney to handle the affairs of others, is good ground for suspension or disbarment.[15] It is also ground for suspension or disbarment that an attorney used means inconsistent with truth or professional ethics to aid his client's cause.[16] Betraying the confidence of his client,[17] defrauding him,[18] or obtaining money

13. Ill.—Hunter v. Troup, supra
Mass.—In re Cohen, 159 N.E. 495, 261 Mass. 484, 55 A.L.R. 1309

Must not offend against reasonable rules of propriety

Whatever may be the constitutional rights of an attorney at law, he must not offend against reasonable rules of propriety, and the courts must see that the public interests are conserved by the observance by lawyers of the proprieties, even though profit may be thereby restrained—In re Cohen, 159 N.E. 495, 261 Mass. 484, 55 A.L.R. 1309.

14. Hunter v. Troup, 146 N.E. 321, 315 Ill. 293.

Unprofessional conduct in an attorney is that which violates the rules or ethical code of his profession or which is unbecoming a member of that profession—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206—People v. Gorman, 178 N.E. 880, 346 Ill. 432

15. Ark.—Maloney v. State, 32 S.W. (2d) 423, 182 Ark. 510
Cal.—Myers v. State Bar of California, 50 P.(2d) 795—Lantz v. State Bar of California, 298 P. 497, 212 Cal. 213—Bar Association of San Francisco v. Cantrell, 193 P. 598, 49 Cal.App. 468.
D.C.—Fletcher v. Laws, 62 App.D.C. 40, 64 F.(2d) 163.
Fla.—In re Clifton, 155 So. 324, 115 Fla. 168.
Idaho—In re Wourms, 170 P. 919, 31 Idaho 291.
Ill.—People ex rel. Chicago Bar Ass'n v. Byrne, 188 N.E. 849, 354 Ill. 607—People v. Olson, 153 N.E. 348, 322 Ill. 210.
Ky.—Lenihan v. Commonwealth, 176 S.W. 948, 165 Ky. 93, L.R.A.1917B 1132.
Minn.—In re Tracy, 266 N.W. 88—In re Garrett, 188 N.W. 322, 152 Minn. 300—In re Ginsberg, 169 N.W. 787, 141 Minn. 271.
Mont.—In re Waddell, 172 P. 1036, 54 Mont. 597.
N.J.—In re McDermut, 114 A. 144, 96 N.J.Law 17
N.Y.—In re Marshall, 213 N.Y.S. 611, 216 App.Div. 168—In re Lynch, 205 N.Y.S. 518, 210 App.Div. 191—In re Marcus, 203 N.Y.S. 417, 208 App.Div. 300—In re Gilbert, 202 N.Y.S. 885, 207 App.Div. 687—In re Ball, 171 N.Y.S. 489, 184 App.Div. 18—In re Rahm, 161 N.Y.S. 1038, 175 App.Div. 330, reargument denied 163 N.Y.S. 1128—In re Mulligan, 161 N.Y.S. 1033, 175 App.Div. 322—In re O'Neill, 161 N.Y.S. 899, 175 App.Div. 973
Okl.—In re Tillman, 11 P.(2d) 511, 157 Okl. 166
Or.—State v. Goldstein, 220 P. 565, 109 Or. 497—State v. Farrin, 160 P. 124, 81 Or. 489.
Pa.—In re Alexander, 134 A. 77, 321 Pa. 125—Maginnis' Case, 112 A. 555, 269 Pa. 186—In re Goldberg, 22 Pa.Dist. & Co. 582—Gorson's Case, 11 Pa.Dist. & Co. 563.
S.D.—In re Wilmarth, 172 N.W. 921, 42 S.D. 76
Tenn.—State v. Rogers, 191 S.W. 125, 136 Tenn. 578.
Wash.—In re Martin, 181 P. 880, 107 Wash. 372.
Wis.—State v. Bradford, 259 N.W. 109, 217 Wis. 389.
6 C.J. p. 589 note 52.

Phrase "maintain inviolate the confidence," as contained in Code Civ. Proc. § 282, is not confined merely to noncommunication of facts learned in the course of professional employment—In re Soale, 159 P. 1065, 31 Cal.App. 144.

Transactions adverse to client

(1) An attorney who, as trustee of a decedent's estate, purchased from himself individually a third mortgage was guilty of misconduct warranting suspension from practice—In re Ball, 171 N.Y.S. 489, 184 App.Div. 18

(2) An attorney who, as trustee of a decedent's estate, made a personal profit, by receiving a bonus for a loan of trust money on inadequate security without his client's knowledge, was guilty of misconduct warranting suspension.—In re Ball, supra.

(3) Under an alleged contract whereby an attorney was to receive one fourth of the amount to be recovered for his client's ward, the attorney's retention, out of cash received, of one fourth of the amount of a note payable eleven months hence, given to the client, was so unethical as to call for exercise by the Supreme Court of its disciplinary power—In re Barth, (Ariz.) 50 P.(2d) 564

Concealing amount offered in settlement

Evidence disclosing that an attorney solicited a case and then concealed from his client the amount offered in settlement authorized disbarment.—In re Purdy, 25 P.(2d) 1096, 166 Okl. 31.

Failure to give advice where client is experienced person

Where an attorney negotiated a sale of stock, part of which belonged to a trust estate, and the entire purchase price, including a commission paid to the attorney by the buyer, was turned over to the attorney's client who then paid the attorney for his services, the attorney was not guilty of professional misconduct in failing to tell his client that he must account to the trust estate for this commission, and to prepare the necessary papers to protect both himself and client, in view of the fact that the client was an experienced financier, the attorney was not employed by the trust estate, and the fact that, after the attorney's attention had been called to the client's failure to account for the commission, the attorney advised the client to do so, and the client followed this advice—In re Chadbourne, 198 N.Y.S. 422, 204 App.Div. 459.

16. Cal.—Galbraith v. State Bar of California, 23 P.(2d) 291, 218 Cal. 329.
Minn.—In re Glover, 223 N.W. 931, 176 Minn. 519
N.Y.—In re Yardum, 218 N.Y.S. 6, 218 App.Div. 134.

Confession of adultery

A solicitor has been held guilty of unprofessional conduct in procuring from a client's wife in her husband's presence a sworn confession of adultery—In re Hahn, 94 A. 953, 84 N.J.Eq. 523, motion denied 96 A. 539, 85 N.J.Eq. 510, Ann.Cas.1918B 880

17. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206—6 C.J. p. 589 note 49.

18. Ark.—Maloney v. State, 32 S.W. (2d) 423, 182 Ark. 510.

or property from him by extortion[19] or by false representations relative to matters intrusted to him as an attorney,[20] warrants suspension or disbarment. The same is true of defrauding a client by means of false and misleading statements,[21] by knowingly giving false advice,[22] by inducing or making a settlement to the disadvantage of a client,[23] or by trading a number of releases for a lump sum to be distributed to clients as the attorney thinks best.[24] So also, the abandonment of his client's interests after receipt of a fee,[25] as by failure to protect the rights of the client on writ of error or appeal[26] or by withdrawing a motion for a new trial without the knowledge or authority of his client,[27] has been held ground for disciplinary action.

The refusal of an attorney to deliver the client's letters and papers on demand is ground for suspension where the attorney did not claim any lien on them.[28]

Negligence or mistake. While, as shown infra § 125, an attorney has a duty to execute the business intrusted to him with a reasonable degree of care, skill, and dispatch, mere negligence or mistake in the performance of an attorney's duty is generally insufficient to warrant disbarment,[29] but it has been held ground for disciplinary action that

Ill—People v. Gilmore, 177 N.E. 710, 345 Ill. 28

Taking assignment

An attorney has been held guilty of overreaching himself and of defrauding his client in procuring an assignment from the client to a cause of action filed in her name—People v. Gilmore, 177 N.E. 710, 345 Ill. 28

19. N.Y.—In re Aydelotte, 200 N.Y.S. 637, 206 App.Div. 93
Wyo.—State Board of Law Examiners v. Sheldon, 7 P.(2d) 226, 43 Wyo. 523
6 C.J. p. 590 note 54.

20. Ill.—People ex rel. Chicago Bar Ass'n v. Kwasigroch, 192 N.E. 221, 357 Ill. 302
N.J.—In re Rosenkrans, 94 A. 42, 84 N.J.Eq. 232—In re Eaton, 94 A. 31, 84 N.J.Eq. 379—In re Colyer, 94 A. 29, 84 N.J.Eq. 449
N.Y.—In re Gavrin, 286 N.Y.S. 208, 246 App.Div. 397—In re Gladstone, 173 N.Y.S. 89, 185 App.Div. 471.
N.D.—In re Bryans, 204 N.W. 9, 52 N.D. 673
Okl.—In re Johnson, 33 P.(2d) 189, 168 Okl. 366
6 C.J. p. 590 note 55.

Violation of a promissory obligation, followed by a false assertion, often repeated, that the promise was being performed, constitutes malpractice—In re Rosenkrans, 94 A. 42, 84 N.J.Eq. 232.

21. Cal.—Marsh v. State Bar of California, 291 P. 583, 210 Cal. 303—In re Hittson, 185 P. 308, 43 Cal.App. 462
Idaho—In re Henry, 269 P. 416, 46 Idaho 573
Minn.—In re Chisholm, 241 N.W. 53, 185 Minn. 326.
N.M.—In re Barth, 189 P. 499, 26 N.M. 93.
N.J.—In re Trimble, 95 A. 863, 85 N.J.Eq. 348.
N.Y.—In re Jaffe, 280 N.Y.S. 927, 245 App.Div. 831—In re Hyman, 174 N.Y.S. 306, 186 App.Div. 263—In re Gridley, 167 N.Y.S. 107, 179 App.Div. 621—In re Coleman, 156 N.Y.S. 487, 170 App.Div. 537.
Or.—State ex rel. Seton v. McMonamin, 29 P.(2d) 520, 146 Or. 60
S.D.—In re Morrison, 178 N.W. 732, 43 S.D. 185
Wash.—In re Cavers, 4 P.(2d) 1106, 165 Wash. 261.
Wyo.—State Board of Law Examiners v. Sheldon, 7 P.(2d) 226, 43 Wyo. 522
6 C.J. p. 590 note 57.

Acquisition of client's money by representations that it was needed in the prosecution of a foreclosure action for the client, and subsequent conversion thereof by the attorney, has been held misconduct requiring suspension of the attorney—In re Williams, 289 N.Y.S. 103, 248 App.Div. 203.

22. In re Alexander, 184 A. 77, 321 Pa. 125—6 C.J. p. 590 note 58.

Honest mistake

That an attorney honestly advised his client that he could procure a divorce in Virginia after the client obtained constructive domicile there was held not to establish professional misconduct—In re Baltimore, 252 N.Y.S. 771, 233 App.Div. 320.

23. Ill.—People v. Sullivan, 117 N.E. 134, 279 Ill. 634, L.R.A.1918A 1136
N.Y.—In re Richardson, 226 N.Y.S. 250, 222 App.Div. 282.
6 C.J. p. 590 note 59.

Attorney has been held justified in refusing offer of settlement which required full performance by his client in advance of trial, and gave the other party three days thereafter to file a surety bond or deposit fifty thousand dollars cash—In re Farrell, 262 N.Y.S. 766, 237 App.Div. 673

24. In re Glucksman, 243 N.Y.S. 1, 230 App.Div. 185.

25. N.Y.—In re Steierman, 262 N.Y.S. 121, 237 App.Div. 584—In re Marcus, 203 N.Y.S. 417, 208 App.Div. 300.
N.D.—In re Maloney, 153 N.W. 385, 35 N.D. 1.
S.D.—In re Morrison, 178 N.W. 732, 43 S.D. 185.

26. Ariz.—Tovar v. State, 8 P.(2d) 247, 39 Ariz. 528
N.J.—In re McDermut, 114 A. 144, 96 N.J.Law 17
Okl.—In re Tillman, 11 P.(2d) 511, 157 Okl. 166.

Excuse

An attorney could not excuse himself from protecting the rights of his client, under death sentence, on writ of error, by insisting that there was no money to pay the necessary expense of a transcript, in view of a statute permitting a transcript to be printed at public expense on the judge's order—In re McDermut, 114 A. 144, 96 N.J.Law 17.

27. State Bd. of Law Examiners v. De la Motte, 142 N.W. 929, 123 Minn. 54.

28. In re Youngentob, 168 N.Y.S. 961, 181 App.Div. 490

29. Ill.—People v. Charone, 123 N.E. 291, 283 Ill. 220
Nev.—In re Miller, 38 P.(2d) 972, 55 Nev. 444
N.Y.—In re Farrell, 262 N.Y.S. 766, 237 App.Div. 673—In re Downes, 167 N.Y.S. 583, 180 App.Div. 282.

Accepting employment when busy

Acceptance of employment by an attorney when the press of other matters prevents immediate action is not ground for disbarment—People v. Wing, 120 N.E. 451, 284 Ill. 647

Institution of a second and different action on dismissal of the first and denial of amendment has been held not to constitute professional misconduct—In re Farrell, 262 N.Y.S. 766, 237 App.Div. 673.

Laziness or inattention to business does not warrant disbarment as an attorney without evidence of dishonorable or corrupt motives—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699.

Mistake in drafting a petition in a suit prosecuted for his client, resulting from oversight, or, at most, from negligence, does not justify disbarment—In re Smith, 94 A. 39, 84 N.J.Eq. 252.

an attorney was culpably or grossly careless and negligent as to his client's interests [30]

Loans to or from clients. Making a loan to a destitute client where it is not consideration for the employment[31] or the borrowing of money from a client[32] is not, of itself, ground for suspension or disbarment. but, where the attorney is guilty of false representations respecting the security for the loan, he is subject to disciplinary action.[33]

Excessive fees An exact standard for fixing attorney's fees does not exist, and the charging of an excessive fee is not ground for suspension or disbarment if the attorney is not guilty of willfully overreaching, or of fraud and deception toward, the client,[34] notwithstanding later developments prove the fee to be unreasonably large, or the services unnecessary,[35] but, where the fee is clearly excessive,[36] or the attorney fails to render any adequate service therefor,[37] an attorney is subject to disciplinary action.

Mentally incompetent client. An attorney's acceptance of a retainer from a client to investigate

30. Cal—Ring v State Bar of California, 47 P (2d) 704—Marsh v State Bar of California, 39 P (2d) 403, 2 Cal (2d) 75—Marsh v State Bar of California, 291 P 583, 210 Cal 303
N J—In re Trimble, 95 A 863, 85 N J Eq 348
N Y—In re Radetsky, 284 N Y S 89, 245 App Div 662—In re Gerety, 270 N Y S 653, 240 App Div 496
Okl—In re Connell, 192 P 564, 79 Okl 212
Wash—In re Boland, 248 P 399, 140 Wash 148
Wis—State v Sodenberg, 255 N W 906, 215 Wis 571

Unexplained delay by a solicitor in prosecution of a suit for his client constitutes malpractice—In re Smith, 94 A 39, 84 N J Eq 252—In re Rosenkrans, 94 A 42, 84 N J Eq 232

31. In re Sizer, 267 S W 922, 306 Mo 356

32. Attorney General v Lane, 243 N W 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct 115, 287 U S 654, 77 L Ed 565

33. In re Walder, 247 N Y S 14, 231 App Div 206.

34. Cal—Myers v State Bar of California, 50 P.(2d) 795—Herrscher v State Bar of California, 49 P (2d) 832
Ill—People ex rel. Chicago Bar Ass'n v Green, 187 N E 811, 353 Ill 638
Mont—In re Maury, 34 P (2d) 380, 97 Mont 316
N M—In re Marron, 160 P 391, 22 N M 252, L R A 1917B 378, motion granted In re Marron & Wood, 165 P 216, 22 N M 501
Ohio—In re McCray, 1 Ohio App 421
Okl—Haunstein v State Bar of Oklahoma, 46 P (2d) 558
6 C J p 599 note 69

Retaining more than contracted amount

The action of an attorney in charging or retaining fifty per cent commission on a claim taken for collection, although his agreement was to charge merely twenty-five per cent, has been held to merit disciplinary action—In re Choate, (Okl) 50 P (2d) 706.

35. N Y—In re Roth, 169 N Y S 151, 181 App Div 618
Ohio—In re McCray, 1 Ohio App 421

36. Cal—Herrscher v State Bar of California, 49 P (2d) 832—In re Goldstone, 6 P (2d) 513, 214 Cal 490, 80 A L R 701
Ill—People v Pio, 139 N E 45, 308 Ill 128
N J—In re Hahn, 94 A 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830
N Y—In re Gavrin, 275 N Y S 789, 242 App Div 490—In re Karp, Alter, Busch Rusgo, Aronstein, Butler, Mayer, Kahan, Fitzsimmons, Goldstein, McAuliffe, Hirsch, Frankel, Weber, and Kurtz, 270 N Y S 113, 240 App Div 388, affirmed In re Karp, 195 N E 160, 266 N Y 473—In re Annabel, 229 N Y S 385, 228 App Div 539—In re Fisch, 177 N Y S 338, 188 App Div 525—In re Cohen, 155 N Y S 517, 169 App. Div 544
S D—In re Egan, 157 N W 310, 37 S D 159, motion denied 161 N W 1003, 38 S D 458
Wash—In re Wiltse, 186 P. 848, 109 Wash 261
Wis—State v Barto, 232 N W 553, 202 Wis 329

Contract in advance of services

An attorney, who contracts in advance for an unreasonable fee, is as guilty as one who extorts it after rendering his services, and in neither case does a settlement with his client free him from liability—In re Cohen, 155 N Y S. 517, 169 App Div. 544.

Deducting for disbursements

An attorney's practice of accepting retainors and deducting for payments due physicians, and thereby paying clients less than the percentage due under retainers, is condemned—In re Cashman, 242 N Y S 566, 229 App Div 471—In re Fieldsteel, 240 N Y S 481, 228 App Div 470

One half of alimony

An attorney making an agreement to receive one half of all alimony collected prior to judgment together with counsel fees awarded has been held guilty of misconduct warranting suspension—In re Dangler, 182 N. Y S 471, 192 App Div 237

37. Cal—Farrar v State Bar of California, 34 P (2d) 1024, 1 Cal (2d) 359—Barbee v State Bar of California, 2 P (2d) 353, 213 Cal 296
Ill—People ex rel Chicago Bar Ass'n v Green, 187 N E 811, 353 Ill 638—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 332, 351 Ill 206—People v. Anderson, 112 N E 273, 273 Ill 37
Mich—Attorney General v Lane, 243 N W. 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct 115, 287 U S 654, 77 L Ed. 565.
N J—In re Hahn, 94 A. 953, 84 N J Eq 523, motion denied 96 A. 589, 85 N J Eq 510, Ann Cas 1918B 830
N Y.—In re Higgins, 291 N Y S. 63, 249 App Div 64—In re Sussman, 290 N Y S 727, 248 App Div 494—In re Pollane, 244 N Y S 201, 230 App Div 318—In re Dangler, 199 N.Y S. 306, 205 App Div 94—In re Levinson, 188 N Y S 730, 197 App Div 46, reargument denied 191 N Y S 935, 199 App Div 966
Pa—In re Morris, 14 Pa Dist. & Co 164—Graft's Disbarment, 13 Pa Dist. & Co. 313—McCoach's Case, 10 Pa.Dist & Co. 25.
R I—Grinsell v Wilcox, 98 A. 977.
6 C J p 590 note 56

Belief action was begun

While an attorney is bound by the date in a process server's affidavit of service, as respects the date of commencement of an action on the issue of the amount of a fee, an attorney has been held not to have overreached himself in retaining the amount agreed if action was necessary to collect the money, where the facts justified the belief that the summons had been actually served—In re Flanagan, 247 N Y S. 724, 231 App Div 548

Ignorance of client

Where a fee contracted for is clearly extortionate, the client cannot have had in view the real effect of the contract—In re Hahn, 94 A 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830.

his rights is not improper, although the attorney knows him to be a lunatic, or later discovers that fact, for to hold otherwise would deprive an insane person of the aid and assistance of counsel in protecting his rights;[38] but, where an attorney procures conveyances from a mentally incompetent client of practically all his property, it is ground for disbarment.[39]

(2) Representing Conflicting Interests

An attorney's conduct in representing conflicting claims of two or more clients may be such as to warrant his disbarment.

Attempting to act for one party to a litigation or business dealings after having been engaged to represent the adverse party, and seeking to use the knowledge and secrets acquired from the first for the benefit of the second and the injury of the first, is such culpable conduct as will always justify suspension or disbarment unless satisfactory explanation can be made;[40] and it makes no difference in this respect whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues.[41] As shown infra § 47, an attorney may represent his client's adversary with perfect propriety whenever their interests are not hostile to each other, and consequently the mere fact that he apparently occupied that position does not necessarily imply that in doing so he has been guilty of such unprofessional conduct as warrants disbarment.[42] In order to entail that consequence it should appear that there were antagonistic interests in fact which he assumed to represent on both sides,[43] and that in assuming this relation to both sides of a controversy he was acting from a corrupt motive or with an evil intent, and that by reason of such conduct some injury or wrong was sustained by parties interested directly or indirectly in the litigation.[44]

(3) Misappropriation and Failure to Account

(a) In general

(b) By one partner

(a) In General

Misappropriation of the funds of a client by an attorney with a fraudulent purpose is ground for suspension or disbarment

Although in some jurisdictions, a demand by the client is held necessary,[45] whether so provided by statute or not, it is always a ground for the suspension or disbarment of an attorney that he has misappropriated the funds of his client, either by failing to pay over money collected by him for his client or by appropriating to his own use funds intrusted to his care, as by mingling them with his own funds,[46] provided the circumstances attend-

38. People v. Adams, 94 N E 950, 249 Ill. 524.

39. In re Egan, 157 N.W. 310, 37 S D. 159, motion denied 161 N W 1003, 38 S D. 458—6 C J. p 590 note 62.

40. Cal—Galbraith v. State Bar of California, 23 P.(2d) 291, 218 Cal 329.
Mich—Murphy v. Riggs, 213 N W 110, 238 Mich 151
Mont—In re Grorud, 275 P. 1098, 84 Mont 221.
N Y—In re Moses, 195 N Y S 358, 202 App Div 83—In re Young, 177 N Y S. 259, 188 App Div 538.
Okl—In re Gowdy, 36 P (2d) 902, 169 Okl 370—Ferguson v City of Hooker, 36 P (2d) 18, 169 Okl 34—In re Dick, 26 P (2d) 413, 166 Okl. 114—In re Jeter, 20 P (2d) 886, 163 Okl 27—State v. Jefferson, 193 P 44, 79 Okl 288
Pa—In re Goldberg, 184 A 74, 321 Pa. 109—Lewis v Board of Governance of Pennsylvania Bar, 173 A. 652, 316 Pa 193.
S D—In re Morrison, 178 N W. 732, 43 S.D. 185
6 C J. p 590 note 63, p 621 note 54 [a].

Personal interest in case

Partners acting as solicitors for both parties and withholding the fact of personal interest have been held guilty of contemptuous conduct warranting suspension—Ertag v Cavallo Const. Co., 145 A 627, 104 N J. Eq 331.

41. Cal—Galbraith v State Bar of California, 23 P.(2d) 291, 218 Cal. 329
N M—In re Marron, 160 P. 391, 22 N M 252, L R A.1917B 378, motion granted In re Marron & Wood, 165 P. 216, 22 N M. 501.
S D—In re Wilmarth, 172 N.W. 921, 42 S D 76.
6 C J. p 591 note 64.

42. In re Collins, 81 P. 220, 147 Cal 8

43. In re Collins, supra—6 C.J p 591 note 67

44. In re Baum, 186 P 927, 32 Idaho 676—6 C J p 591 note 68.

45. Ill—People v Harris, 112 N E 978, 273 Ill 413
Ky—Denny v Commonwealth, 194 S W 330, 175 Ky 357
N Y—In re Baltimore, 252 N Y S 771, 233 App Div 320
Pa—In re Griffith, 184 A 76, 321 Pa 64—In re Forman, 184 A. 75, 321 Pa 47—In re Gery, 180 A 307, 284 Pa 121—Dixon v. Minogue, 124 A. 334, 280 Pa. 138—Wilhelm's Case, 112 A. 560, 269 Pa 416—In re Rule on A for Disbursement, 11 Pa Dist. 268.
Vt—In re Aldrich, 95 A. 927, 89 Vt. 518

46. Ariz—In re Myrland, 29 P (2d) 483—In re Langworthy, 8 P (2d) 245, 39 Ariz 523—In re Manatt, 264 P. 473, 33 Ariz 299—In re Bailey, 254 P 481, 31 Ariz 407, certiorari denied Bailey v. State of Arizona, 48 S Ct 31, 275 U S 575, 72 L Ed 434—In re Bailey, 248 P 29, 30 Ariz 407
Cal—Wilcox v State Bar of California, 42 P.(2d) 631, 2 Cal (2d) 614—Oster v. State Bar of California, 42 P (2d) 627, 2 Cal (2d) 625, rehearing denied and modified on other grounds 43 P (2d) 535—Brown v. State Bar of California, 42 P.(2d) 306, 2 Cal (2d) 533—Smuckler v. State Bar of California, 38 P.(2d) 777, 2 Cal (2d) 80—Branch v. State Bar of California, 56 P (2d) 945—Roark v. State Bar of California, 55 P (2d) 339—Tatlow v State Bar of California, 55 P (2d) 214—Seavey v State Bar of California, 47 P (2d) 281—Nolan v State Bar of California, 13 P.(2d) 512, 216 Cal 58—McArthur v. State Bar of California, 12 P (2d) 453, 215 Cal. 652—D'Elia v. State Bar of Cali-

fornia, 300 P 826, 212 Cal 770—Schaffer v. State Bar of California, 298 P 994, 212 Cal 367—In re Herron, 298 P. 474, 212 Cal 196—Green v. State Bar of California, 292 P 638, 210 Cal 603—In re Petersen, 280 P 124, 208 Cal 42—Bar Association of San Francisco v. Cantrell, 193 P. 598, 49 Cal App 468

Colo—People v. Warren, 12 P (2d) 348, 91 Colo 99—People v Marshall, 297 P 998, 88 Colo 394—People v Winograd, 287 P 864, 87 Colo 384—People v Cary, 251 P 597, 80 Colo 443—People v Furman, 212 P 825, 72 Colo 549—People v Humbert, 194 P. 612, 69 Colo 188—People v. Kohn, 149 P 249, 59 Colo 353

D C—Thomas v. Ogilby, 59 App D C. 382, 44 F (2d) 890

Idaho—In re Burns, 40 P (2d) 105, 55 Idaho 190

Ill—In re Mack, 196 N E. 197, 360 Ill 343—In re Casey, 195 N E 39, 359 Ill 496—People ex rel Chicago Bar Ass'n v. Chancellor, 192 N E 641, 358 Ill. 112—In re Borchardt, 192 N E 383, 357 Ill 458—In re Zahn, 190 N E 419, 356 Ill 283—People ex rel Chicago Bar Ass'n v Pace, 188 N E 169, 354 Ill 111—People v. Hansen, 185 N E. 225, 352 Ill 144—People v. Hachtman, 183 N E 222, 350 Ill 326—People v Ladouceur, 179 N E 890, 347 Ill 454—People v Simmons, 173 N E 398, 341 Ill. 340—People v Olson, 153 N E 348, 322 Ill 210—People v Grusd, 148 N E 860, 318 Ill 44—People v. Kwasigroch, 130 N E 344, 296 Ill. 542—People v Loeff, 126 N E 577, 292 Ill 55—People v. Smith, 124 N E 807, 290 Ill. 241, 9 A L R 183—People v Moseley, 116 N E 123, 278 Ill. 377—People v Pfuhl, 114 N E 10, 275 Ill 243—People v Czarnecki, 109 N E 14, 268 Ill 278

Iowa—In re Cloud, 250 N W 160, 217 Iowa 3—State v Kaufmann, 209 N W 417, 202 Iowa 157

Kan—In re Stanley, 33 P (2d) 163, 139 Kan 656—In re Learnard, 249 P. 606, 121 Kan 596

Ky—Commonwealth for and on behalf of Pike County Bar Ass'n v Hinton, 72 S W (2d) 481, 254 Ky 798—Duffin v. Commonwealth, 271 S W 555, 208 Ky. 452

La—In re Fourchy, 143 So 714, 175 La. 628, appeal dismissed and certiorari denied Fourchy v Fletchinger, 53 S Ct 387, 288 U.S. 589, 77 L Ed. 968—In re Heard, 141 So 60, 174 La 563—In re Wolff, 115 So 809, 165 La 641.

Mass—In re Carver, 112 N E 877, 224 Mass 169

Minn—In re McGrath, 265 N W. 23—In re Ostensoe, 264 N W 569—In re Rasmussen, 262 N W 258—In re Strand, 260 N.W. 499—In re Nelson, 256 N W. 186, 192 Minn. 313—In re Waters, 256 N.W 139, 192 Minn. 262—In re Ebert, 255 N.W. 89, 191 Minn. 589—In re Dahlberg, 252 N W. 417, 190 Minn. 496—In re Stauning, 252 N W. 84, 190 Minn 405—In re Bodin, 249 N.W. 569, 189 Minn. 396—In re Severson, 248 N W. 293, 189 Minn. 20—In re Breding, 247 N W. 694, 188 Minn 367—In re Larson, 245 N W. 626, 187 Minn 427—In re Manahan, 242 N W. 548, 186 Minn. 98—In re Moerke, 238 N.W 690, 184 Minn. 314—In re Smith, 237 N W 877, 184 Minn 87—In re Friedman, 236 N W. 703, 183 Minn. 350—In re Smith, 236 N.W. 324, 183 Minn. 220—In re Scott, 232 N. W 108, 181 Minn 230—In re Kanter, 231 N W. 396, 181 Minn 65—In re Kahner, 231 N W. 233, 180 Minn 556—In re Comfort, 230 N W 582, 180 Minn 148—In re Heath, 227 N W 892, 178 Minn 547—In re Redding, 225 N W 274, 177 Minn 352—In re Young, 225 N W 97, 177 Minn 203—In re Halvorson, 221 N W 907, 175 Minn 520—In re George, 215 N W. 425, 172 Minn 347—In re Spencer, 215 N W 191, 172 Minn 158—In re Hage, 214 N W 663, 171 Minn 434—In re Buck, 214 N W. 662, 171 Minn 352—In re Ericson, 213 N W 556, 171 Minn 111—In re Yakey, 212 N.W 13, 170 Minn 21—In re Larson, 210 N W 865, 169 Minn 194—In re Bauer, 209 N W 31, 167 Minn. 350—In re Cherry, 208 N W 197, 166 Minn 448, 45 A L R 1103—In re Eberhart, 205 N W 266, 164 Minn 408—In re Dahl, 199 N W 429, 159 Minn 481, 43 A L R 52

Mont—In re Stevens, 16 P (2d) 410, 92 Mont 549—State v. Hughes, 10 P (2d) 584, 92 Mont 53—In re McCue, 261 P. 341, 80 Mont 537—In re McCue, 248 P 187, 77 Mont 47—In re Niles, 224 P 861, 70 Mont. 249—In re Jewell, 201 P 266, 60 Mont 602—In re Lunke, 182 P 126, 56 Mont 226—In re Gullickson, 181 P 983, 56 Mont 144—Ex parte Burke, 176 P 421, 55 Mont 303—In re Waddell, 172 P 1036, 54 Mont 597.

Neb—State ex rel Sorensen v Goldman, 255 N W. 32, 127 Neb 340—State ex rel Sorensen v Kennedy, 248 N W. 314, 124 Neb 789—State v Priest, 242 N W 433, 123 Neb 241—State v Priest, 223 N W 635, 113 Neb 47

Nev—In re Pilkington, 49 P (2d) 965—In re French, 225 P 396, 47 Nev. 469

N J—In re Hahn, 94 A 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830—In re Cosey, 94 A 54, 84 N J Eq 343, motion denied 96 A. 595, 85 N J Eq 599—In re Lowenkopf, 183 A. 716, 14 N.J Misc 203—In re Wittstein, 136 A. 183, 5 N J Misc. 239.

N M—In re Royall, 286 P. 156, 34 N M 554—In re Fleming, 259 P. 613, 32 N M. 442—In re Barth, 189 P. 499, 26 N.M. 93.

N Y—In re Wallach, 285 N Y.S. 363, 246 App Div. 213—In re Braun, 285 N Y.S 360, 246 App Div. 206—In re Newman, 284 N.Y S. 294, 245 App. Div. 660—In re Whaley, 284 N Y S 85, 245 App Div. 664—In re Clowe, 283 N Y S 808, 245 App Div. 596—In re Delman, 283 N.Y S. 801, 245 App Div. 593—In re Ostergren, 283 N Y S 615, 246 App Div 725—In re Warrick, 278 N Y S 132, 244 App Div. 48—In re Jackson, 272 N Y S 913, 242 App Div. 240, motion granted 195 N E 149, 266 N Y. 450—In re Williams, 272 N Y S 893, 243 App Div 151—In re Purcell, 272 N Y S 328, 241 App Div. 843—In re Porcella, 272 N Y S 285, 241 App Div. 844—In re Rosenblatt, 271 N.Y S 581, 241 App Div 215—In re Ivone, 270 N Y S. 697, 241 App Div 5—In re Husin, 268 N Y S 106, 239 App Div 551—In re Krissoff, 267 N Y S. 887, 239 App Div. 436—In re Needleman, 267 N.Y S. 785, 240 App Div 971—In re Williams, 267 N Y S 354, 239 App Div. 131—In re Cunningham, 267 N Y S. 346, 239 App Div 114—In re Kahan, 267 N Y S 289, 239 App Div 123—In re Lehman, 267 N.Y.S 287, 239 App. Div. 126, motion granted 191 N E 515, 264 N Y. 462—In re Horkimer, 267 N Y S 245, 239 App Div. 118—In re Siegel, 265 N Y S 497, 238 App Div 744—In re Gappelberg, 264 N Y S 267, 238 App Div. 238—In re Mahan, 262 N Y S 702, 237 App Div. 664—In re Smith, 262 N Y S. 684, 237 App Div 662—In re Scuderi, 262 N Y S 91, 237 App Div 589—In re Sullivan, 261 N Y. S 664, 237 App Div. 551, motion denied 264 N Y S 914—In re Treadwell, 260 N.Y S. 264, 236 App Div 562—In re Janover, 260 N Y S 134, 236 App Div. 436—In re Brown, 260 N Y.S 111, 236 App Div. 423—In re Salmon, 260 N.Y.S 86, 236 App Div. 441—In re Campbell, 260 N Y S. 80, 236 App Div 429—In re Yochelson, 258 N Y S 724, 236 App Div 307—In re Blakesberg, 258 N.Y S 583, 236 App Div. 227—In re Vogelstein, 258 N Y S. 574, 236 App.Div 252—In re Moran, 258 N Y S 565, 236 App Div 243—In re Schneider, 258 N Y S 558, 236 App Div. 243—In re Crames, 258 N Y.S. 551, 236 App. Div. 229—In re Powers, 257 N Y S. 113, 235 App Div. 382—In re Mulry, 255 N Y S. 249, 234 App Div 404—In re Rebarber, 254 N Y S 126, 234 App Div 27—In re Schwind, 253 N. Y S 762, 233 App Div. 468—In re Robson, 253 N.Y.S. 713, 233 App. Div. 471—In re Halpern, 253 N.Y. S. 613, 233 App Div. 480—In re Malcolm, 253 N.Y S 602, 233 App. Div. 476—In re Cumming, 252 N.Y. S. 762, 233 App Div. 313—In re Radtke, 252 N.Y.S. 760, 233 App. Div. 309—In re Cohen, 252 N.Y S. 757, 233 App.Div 317—In re Silver, 252 N Y S 749, 233 App.Div. 303—In re Carroll, 248 N.Y.S. 363,

231 App.Div. 623—In re Cusack, 247 N.Y.S. 39, 231 App Div. 186—In re Walder, 247 N Y S 14, 231 App Div 206—In re Brinn, 246 N. Y S. 515, 231 App Div 179—In re Schneidkraut, 246 N Y S 505, 231 App.Div 109—In re Pollane, 244 N.Y.S 201, 230 App Div 318—In re Babcock, 243 N Y S 489, 230 App Div. 323—In re Rosenbaum, 242 N Y.S 15, 229 App Div 199—In re Greenwald 241 N Y S 703, 229 App Div. 139—In re Gordon, 241 N Y S. 276, 229 App Div 142—In re Ziff, 239 N Y S 388, 228 App Div 209—In re Langfur, 238 N Y S 498, 227 App Div 468—In re O'Connor, 236 N.Y S 25, 226 App Div 600—In re Polan, 235 N Y S 667, 226 App Div 467—In re Raileanu, 232 N.Y.S 175, 225 App Div 90—In re Elliott, 230 N Y S 1, 224 App Div. 207—In re Cusack, 227 N Y S 187, 222 App Div. 624—In re Richardson, 226 N Y.S 250, 222 App Div. 282—In re Krimsky, 226 N Y S. 188, 222 App Div 275—In re Gertler, 226 N Y. S. 65, 222 App Div. 270—In re Oberstein, 222 N Y S 656, 221 App Div 60—In re Kopf, 222 N Y S 636, 221 App Div 51—In re McWilliams, 221 N Y S 708, 220 App Div. 523—In re Stark, 221 N Y S. 248, 220 App Div 133—In re Walsh, 217 N Y S 253, 217 App Div 437—In re Lordan, 217 N Y S 237, 217 App Div. 441—In re Greenberg, 213 N Y S. 728, 216 App Div 164—In re Menzel, 213 N Y S 707, 216 App Div 176—In re Auerbach, 213 N Y S 664, 216 App.Div 159—In re Marshall, 213 N Y S 611, 216 App Div. 168—In re Zahm, 211 N Y.S. 144, 213 App Div 551—In re Vermilya, 211 N Y S 36, 213 App Div 546—In re Newman, 208 N Y S 140, 211 App Div 654, reargument denied 155 N E 874, 244 N Y 507—In re McKenna, 208 N Y S 127, 211 App Div. 646, affirmed 148 N E 766, 240 N Y 703—In re McGee, 208 N Y S. 104, 211 App Div. 650, affirmed 152 N E 436, 242 N Y 581—In re Simons, 208 N Y S 51, 211 App Div 659—In re Enklewitz, 207 N Y S 596, 211 App Div 268—In re Tryon, 205 N Y S 423, 209 App Div 793—In re Ackerson, 205 N Y S 407, 209 App Div. 735—In re Goette, 205 N Y S 388, 210 App Div 189—In re Galland, 203 N Y S 42, 208 App Div. 48—In re Makay, 203 N. Y S 15, 208 App Div 44—In re Brown, 200 N Y S 661, 206 App. Div. 111—In re Steinfeld, 198 N Y S. 124, 204 App Div. 508—In re Menzel, 196 N.Y S 834, 203 App Div. 515—In re McEveety, 195 N Y. S 345, 202 App Div 79—In re Farrington, 193 N.Y S 334, 200 App Div. 735—In re Rose, 189 N Y S 543, 197 App Div. 865—In re McKee, 188 N Y S. 753, 197 App Div. 192—In re O'Brian, 188 N Y S 506, 197 App Div. 50—In re Steinberg, 184 N Y.S. 450, 193 App Div. 502—In re MacWilliams, 184 N Y S 343, 193 App Div. 499—In re Smithwick, 183 N Y S 301, 193 App Div 459—In re Boughton, 182 N Y S 440, 192 App Div 235—In re Earley, 177 N.Y.S. 347, 188 App Div 532—In re Tinney, 176 N Y S 103, 187 App Div 569—In re Hyman, 174 N Y S. 306, 186 App Div 263—In re Roth, 169 N Y S 151, 181 App Div 618—In re Flowerman, 168 N. Y S 860, 181 App Div 488—In re Rini, 168 N.Y S 859, 181 App Div 496—In re Wilkenfeld, 167 N Y S 598, 180 App Div 286—In re Coleman, 165 N.Y S 685, 178 App Div. 580—In re Pollock, 165 N Y S 631, 178 App Div. 577—In re Walsh, 164 N.Y S 553, 177 App Div 659—In re Haire, 162 N Y S 510, 175 App Div 847—In re Herrman, 161 N Y S 977, 175 App Div 310—In re Little, 161 N Y S 570, 175 App Div 280—In re Dobbs, 160 N Y S 173, 173 App Div. 605—In re Eisenberg, 160 N Y S 148, 173 App Div 598—In re O'Brien, 158 N Y S 1059, 172 App Div 621—In re Dressler, 158 N Y S. 191, 173 App Div 929—In re Goldfarb, 157 N Y S 1076, 173 App Div 882—In re Kammerlohr, 157 N.Y S 933, 171 App Div 781—In re Simpkins, 155 N Y S 531, 169 App Div 632—In re Evans, 155 N Y S 491, 169 App Div 502—In re Adler, 155 N Y S 489, 169 App Div 494—In re Lichtenberg, 155 N Y S 483, 169 App Div 505—In re Vanderpool, 155 N Y S 467, 169 App Div 499—In re Osgoodby, 155 N Y S 465, 169 App Div 626—In re Cohen, 155 N Y S 459, 169 App Div 492—In re Hayes, 155 N Y S 457, 169 App Div 516—In re Harris, 155 N Y S 450, 169 App Div 525—In re Weill, 155 N Y S 449, 171 App Div 895—In re Levor, 155 N Y S 426, 169 App Div 642—In re Gray, 155 N Y S 407, 171 App Div 894—In re Dinkelspiel, 283 N Y S 395—In re Fontinelli, 283 N Y S. 268—In re Kushner, 283 N Y S 167—In re Reiburn, 283 N Y S 136—In re Ropiecki, 282 N Y S 947—In re Brody, 276 N Y S 368—In re White, 204 N Y.S 618.

N D —In re Garrity, 235 N W. 343, 60 N D. 454—In re Torson, 183 N W. 1016, 46 N D 200

Ohio —In re Mengert, 8 Ohio N P (N S) 355—In re Morehouse, 8 Ohio N P (N S) 179

Okl.—In re Myres, 43 P.(2d) 773, 173 Okl 123—In re Lester, 36 P (2d) 478, 169 Okl 162—In re Shoemake, 31 P (2d) 928, 168 Okl 77—In re Burns, 215 P 193, 90 Okl 1—State v. Breslin, 169 P. 897, 67 Okl 135—In re Warren, 151 P 619, 49 Okl 87

Or —State v Tarpley, 259 P 733, 122 Or. 479—State v Parker, 252 P. 711, 120 Or 465—State v. Estes, 209 P. 486, 105 Or 222

Pa —In re Kraus, 185 A. 737, 322 Pa 362—In re Bonner, 176 A. 220, 317 Pa 185—In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa. 555—In re Ryan, 20 Pa Dist & Co. 636—In re Marcus, 20 Pa Dist. & Co 616—In re Bonner, 20 Pa Dist & Co 593—In re Kauffman, 14 Pa Dist & Co 506—In re Stiles, 14 Pa Dist & Co 296—McEvoy's Case, 12 Pa Dist & Co 741—Ferry's Case, 12 Pa Dist & Co 716—Melnick's Case, 11 Pa Dist & Co 566—Garlic's Case, 11 Pa Dist & Co. 453—In re Rule on D for Disbarment, 12 Pa. Dist. 276—Ashton Disbarment, 4 Pa Dist. 425—In re Allen, 41 Pa Co 562

R I —Heitmanck v. Turano, 158 A 878—Hale v. McGauley, 147 A. 889

S D —In re Fitzpatrick, 266 N W 150—In re Foy, 250 N W 671, 63 S D. 33—In re Teesdale, 183 N W 131, 44 S D 204—In re Van Ruschen, 160 N W. 1006, 38 S D 254

Utah —In re Steffensen, 39 P (2d) 723, 85 Utah 380—In re Matthews, 217 P 250, 61 Utah 581.

Wash —In re Disbarment of McCann, 43 P (2d) 437, 181 Wash. 183—In re Hutchinson, 33 P (2d) 1119, 178 Wash 112—In re Sampley, 294 P 1118, 160 Wash 92—In re Martin, 132 P 579, 107 Wash 461—In re Gowan, 176 P 7, 101 Wash 166

Wis —State v Kuenzli, 249 N W 511, 212 Wis 296—State v Andrews, 240 N W 147, 206 Wis 615

Wyo —State Board of Law Examiners v Brown, 290 P. 1013, 42 Wyo 108

6 C J p 591 note 69

No circumstances warrant appropriation to own use

(1) No circumstance in which an attorney may be placed will warrant him in appropriating to his personal use the funds of his client, or justify him in falsely stating that such funds are not in his hands—San Francisco Bar Association v McClellan, 181 P 231, 40 Cal App 630—In re Barth, 189 P 499, 26 N M 93—In re Reich, 287 N Y S. 861, 247 App Div. 459

(2) An attorney's claim regarding services for a corporation in which the client was interested could not justify retention of the client's money—Hale v. McGauley, (R.I) 147 A 889

(3) Retention by an attorney of an entire fund collected for his client has been held not justified because the fees had not been settled—In re Wittstein, 136 A 183, 5 N J.Misc 239

(4) Nor can an attorney retain an entire sum collected because of a disagreement between him and his client as to costs and the amount of his fee—Denny v. Commonwealth, 194 S W. 330, 175 Ky. 357.

(5) A claim for fees to which he is not entitled will not justify an attorney's use of a client's money.—

ing the transaction are such as to satisfy the court that the attorney is acting in bad faith or with a fraudulent purpose.[47] Mere nonpayment of mon-

People v. Loeff, 126 N E 577, 292 Ill 55

(6) In a disbarment proceeding, fraudulent withholding of a client's money by an attorney has been held not excusable by an alleged lien not claimed until shortly before trial — State Board of Law Examiners v Brown, 290 P 1013, 42 Wyo 108

(7) It is no excuse for failure promptly to pay over funds to the use specified by the client that the attorney intended later to repay the money, or that the client could suffer no loss — In re Coleman, 165 N Y S 685, 178 App Div 580

(8) Financial misfortune affords no justification for an attorney's conversion of funds placed in his hands for a specific purpose — In re Borchardt, 192 N E 583, 357 Ill. 458 — In re Zahn, 190 N E 419, 356 Ill 283 — People v Grusd, 148 N E 860, 318 Ill 41 — In re Freda, 267 N Y S 292, 239 App Div 116

(9) Failure of a bank in which an attorney was a depositor did not justify misapplication of money he received from a client two months later to pay the master in chancery in a foreclosure suit, since the attorney's dire financial necessity could not exonerate misapplication of funds — In re Zahn, supra

(10) Where an attorney obtains money from an insurance society to be paid into court in an interpleader case, and retains it, it is no excuse that the society was not legally incorporated and authorized to do business, and that he ultimately paid the money to the person entitled before a dismissal of the bill of interpleader — People v Czarnecki, 109 N E 14, 268 Ill. 278

(11) It is no defense to an attorney's misappropriation of money paid him by officers of a benefit society that an officer authorized him to retain it as payment of fees, where he knew it was a trust fund, and that the officer had no authority to authorize such retention — People v Czarnecki, supra

(12) It is no excuse that the attorney is unable to pay the client through lack of means — People v Kwasigroch, 130 N.E 344, 296 Ill 542

(13) An attorney's conduct in converting a client's securities has been held not excused by the client's subsequent ratification of the attorney's use of securities, although such ratification mitigated the attorney's act — In re Kohler, 270 N.Y.S 634, 240 App Div 501.

(14) Where an attorney was given a check to pay costs of a referee, his failure to do so was not excused by his doubting the soundness of the referee's conclusions and by pending disciplinary proceedings, which disrupted his business and left him in a highly agitated state of mind — In re Coleman, 165 N Y S 685, 178 App Div 580

(15) An attorney who borrowed money from a client knowing the client's expectation that the money was to be expended in paying off liens against certain property had the duty to be frank with the client, where he intended to use the money for other purposes, and could not escape censure by the plea that the money was a loan, not constituting a trust fund, and could, therefore, be used by the attorney as he saw fit — In re Ropiecki, 282 N Y S. 947

(16) A contract of employment as attorney to take the necessary legal steps to collect clients' interests in decedent's estate for a fee of twenty-five per cent of the "amount recovered" has been held to warrant the attorney's retention of only such percentage of the amount actually collected for the clients, so as to require his disbarment because of retention of, and failure to account to clients for, a larger sum collected, as against the contention that his additional charges were proper for services performed in an effort to realize on judgment obtained by him for clients — Dalzell v State Bar of California, (Cal.) 57 P (2d) 1300

Duty to keep books to prove honesty

An attorney should keep proper books and records to be prepared to prove his honesty and fair dealing if his actions are questioned in disciplinary proceedings — In re O'Neill, 240 N Y S 188, 228 App Div. 518.

Final judgment in a suit for accounting is conclusive in a disbarment proceeding as to the rights of an attorney and his client to the fund in question — State v. Priest, 223 N W 635, 118 Neb. 47.

Acts of conversion

(1) An attorney's payment of witness' fees out of a client's funds after the client's demand for return of the money constituted conversion. — In re Annabel, 229 N Y.S 385, 223 App Div 539.

(2) However, an attorney authorized to apply an amount collected for his client on a certain claim against his charges, which were not fixed, has been held not guilty of conversion in retaining the entire amount collected on another claim as part of the charge for his services without informing the client of collection thereof until the latter complained to the bar association — In re Sachs, 238 N Y S 1001, 248 App Div. 201.

Commingling moneys

(1) Commingling of other persons' moneys with his own by an attorney is condemned as a dangerous practice, but an attorney is not subject to censure for commingling moneys belonging to different clients. — Gordon v Harrison, 161 A 608, 105 Pa Super. 513

(2) An attorney's belated segregation of a client's money in a separate account did not excuse previous mingling thereof with own funds — In re Powers, 257 N.Y S 113, 235 App Div 382

Deceit and willful misconduct

Under Code (1907) § 2992, an attorney, who collected notes for his client and thereafter advised the client that the money had not been collected, is guilty of deceit and of willful misconduct, justifying a disbarment — Peters v. State, 69 So 576, 193 Ala 593.

Withholding amount of settlement

Where an attorney compromised with the paramour of his client's wife for twenty-five thousand dollars, concealing the amount thereof from his client, and paying him only two thousand dollars and detectives nine thousand dollars, which payments were subsequently slightly increased on discovery of the facts, it was held that his conduct was unconscionable, oppressive, and fraudulent, and required his disbarment — In re Hahn, 94 A. 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830.

"Good moral character," which is a condition precedent to the right to practice law, includes honesty and frankness toward a client, and is inconsistent with an endeavor wrongfully to obtain the client's property — People ex rel Chicago Bar Ass'n v Pace, 183 N.E. 169, 354 Ill 111.

47. Ill — People ex rel. Chicago Bar Ass'n v. Hammond, 191 N.E. 215, 356 Ill 581.
Ky — Duffin v. Commonwealth, 271 S W 555, 203 Ky. 452 — Bonner v Goodloe, 266 S.W 62, 205 Ky 555
N Y — In re Marvin, 168 N Y S 555, 180 App Div 778 — In re Picker, 153 N Y S 456, 171 App Div. 895 — In re Levitan, 284 N Y S 850
S D — In re Nelson, 214 N W 808, 51 S D. 451.
6 C J p 592 note 70.

Liability depends on intent

An attorney's liability to discipline has been held dependent on acts done and his intent, and not controlled by the technical question whether he adopted the proper remedy for settlement of disputes, or whether his acts constituted a technical conversion — In re Marvin, 168 N.Y S. 555, 180 App Div. 778.

ey, not accompanied with any fraud or dishonesty,[48] or delay for only a reasonable time in transferring the money to the client,[49] is not a sufficient ground for suspension or disbarment; but an attorney is subject to censure for failure to keep the funds of clients in such a manner that they may be paid over on demand when due.[50] The amount misappropriated[51] and the purpose of the informant or relator[52] are, however, immaterial. The excuse of youth and inexperience will not be received except perhaps in mitigation of the penalty.[53]

Failure to pay due solely to insolvency. In cases where there has been no fraud or willful wrong, and the attorney's failure to pay over was due solely to his insolvency, the court has sometimes regarded the proceeding as a mere remedy for the client, and made the judgment of disbarment conditional to take effect within a certain time unless the attorney shall, before that time, pay over to the client all sums due by him with interest and costs.[54]

Disobedience to order requiring payment to client. The court may disbar an attorney who disobeys its order requiring him to pay over to his client money collected.[55]

Necessity that money be received in professional capacity. It has been held that it must appear that the money or other funds withheld by the attorney came into his hands, and is held by him, in his capacity as attorney, and that he cannot be disbarred for retaining money acquired and held by him in pursuance of an ordinary contract of trade not involving the relation of attorney and client.[56] However, under the rule, stated supra § 19, that misconduct justifying disbarment is not limited to acts committed strictly in a professional character, but extends to all such misconduct as would have prevented an admission to the bar, it has been held immaterial whether the money came into the attorney's hands in a professional or nonprofessional capacity.[57]

(b) By One Partner

Misappropriation of a client's money by one partner

Money paid under a contract for services

(1) An attorney cannot be suspended for refusing to repay money paid him by a client under a contract for services—Evans v Wade, 278 S W. 604, 212 Ky. 238

(2) "Money of a client," as used in a statute with respect to conversion thereof by an attorney collecting it, refers to money collected from third persons for the use and benefit of the client and not money paid by a client to the attorney under a contract of employment of the attorney. —Evans v. Wade, supra.

Real dispute and offer of amount claimed due

Where there was a real dispute between an attorney and client as to the terms of retainer, and the attorney several times offered to pay the client the amount which he admitted to be due the client from the proceeds of settlement of claim for injuries, there was no basis for disciplinary proceedings—In re Dobroczynski, 207 N.Y.S. 795, 211 App Div. 642

Keeping first payment as fee

Under contingent retainer of fifty per cent, an attorney could keep all of one thousand dollars received as first payment on a four thousand dollar settlement with a railroad in receivership, if further payments were to be made—In re Jackson, 267 N Y S 601, 239 App Div. 122.

48. Ky.—Duffin v. Commonwealth, 271 S W. 555, 208 Ky. 452—Bonner v. Goodloe, 266 S.W. 62, 205 Ky 555.

Mont—In re McCue, 261 P 341, 80 Mont 537

S D.—In re Nelson, 214 N W. 803, 51 S D 451

6 C.J. p 592 note 71.

Retention of part as fee

Under St. § 104, an attorney's refusal to pay over money collected for a client to be grounds for disbarment must be wrongful, and not in good faith, and an attorney who, under §§ 331i1–331k5, had collected money from a parent for the support of children, and in good faith retained a portion of it as a fee, was not liable to disbarment, although such moneys were not chargeable with his fee—Bonner v. Goodloe, 266 S W. 62, 205 Ky. 555.

Failure to notify as to collection

The conduct of accused in failing to notify his client of collection of money due the client until two months after receipt of the money, while blameworthy, has been held not to require disbarment—San Francisco Bar Ass'n v. McClellan, 131 P 231, 40 Cal App. 630.

Defalcation by clerk

Where an attorney's employee collected an account in September, of which the attorney did not learn until March or April, and after the agent's defalcation and destruction of the records, delaying determination of amounts owed, and he made good to his client in June, his delay was not unreasonable—In re Hirsch, 171 N.Y S. 534, 184 App.Div. 147.

49. Ky—Denny v. Commonwealth, 194 S W. 330, 175 Ky. 357.

Okl—State v. Cutlip, 202 P. 782, 83 Okl 183

Three months after demand

Retention of money belonging to a client for ten months after its collection and for three months after formal demand therefor was made on an attorney in the county of his residence was an unreasonable delay—Denny v Commonwealth, 194 S. W. 330, 175 Ky. 357.

50. In re Solem, 248 N W. 212, 188 Minn. 572—6 C J p 592 note 72.

51. Matter of Sayer, 131 N Y.S. 331, 146 App Div. 928

52. Matter of Z———, 89 Mo.App. 426

53. Matter of Karliner, 147 N Y S 563, 163 App Div 881—Matter of Herbst, 143 N Y S 890, 158 App. Div. 601—Matter of Buchler, 140 N Y S 324, 155 App Div. 246.

54. Colo—Matter of Browne, 2 Colo. 553

Tenn—Davis v. State, 23 S W. 59, 92 Tenn. 634—Jones v Miller, 1 Swan 151.

55. Minn—In re Severson, 248 N.W. 293, 189 Minn 20.

N Y—In re Kinney, 280 N Y S 822, 245 App Div. 314—In re Carter, 164 N Y.S. 862, 177 App.Div. 677.

6 C J. p 592 note 77.

56. People v. Appleton, 105 Ill. 474, 44 Am R. 812—6 C J. p 592 note 78.

57. Kan—In re Wilson, 100 P. 635, 79 Kan. 674, 21 L R.A (N S.) 517, 17 Ann Cas 690.

Wis—In re O———, 42 N.W. 221, 73 Wis. 602.

without knowledge on the part of the other partners may not constitute a ground for suspension or disbarment of the others.

Where two or more attorneys are practicing in partnership, and one of them receives and improperly appropriates the money of a client without the knowledge of his partners, and fails on demand to pay it over, all the members of the firm are civilly liable for the amount so misappropriated, as shown infra § 150, but only the member who is personally culpable can be suspended from practice or disbarred therefor.[58] Where, however, the money is in contemplation of law in the hands of the firm and all the members thereof have knowledge of the misappropriation, all are liable to disbarment, although only one had the full benefit of the money.[59]

c. In Relation to Other Attorneys

Unfair dealing with other attorneys, intermeddling with their clients, making false and scandalous remarks concerning them, etc., constitutes ground for disciplinary proceedings.

An attorney has been held liable to disciplinary action for attempting to make an opposing attorney drunk in order to obtain the advantage of him in the trial of a case,[60] intermeddling between a brother attorney and his client,[61] disregarding an attorney in settling with his client,[62] making false and scandalous statements concerning a fellow attorney,[63] and for instituting disbarment proceedings against a brother attorney with improper motives and without just grounds.[64] So, also, deceiving or attempting to deceive the opposing party or his counsel,[65] lack of good faith in his dealings with an opposing attorney,[66] failure to pay, as agreed, a contingent interest to an attorney whom he superseded in the trial of a case,[67] or who was associated with him in the case,[68] has been held ground for suspension or disbarment. Also, it is ground for disbarment that an attorney fraudulently attempted to prevent his former partner from collecting his share of the profits of the partnership in an action for an accounting.[69]

d. In Relation to Court

(1) In general
(2) Offensive conduct toward judges

(1) In General

Misconduct toward a court or judge in or out of court may warrant suspension or disbarment, including conduct which may also constitute a contempt of court.

Professional misconduct authorizing suspension or disbarment is not confined to misconduct in the attorney's relation to his client, but includes as well misconduct toward the court or a judge in or out of court.[70] Thus, deliberate disobedience of a mandate or order of court,[71] as by a willful vio-

58. State v Breslin, 169 P 897, 67 Okl 125—6 C J p 593 note 82

59. People v. Betts, 58 P. 1091, 26 Colo. 521

60. Dickens' Case, 67 Pa. 169, 5 Am R 420.

61. Cal—Ewell v. State Bar of California, 40 P.(2d) 264, 2 Cal.(2d) 209
N Y.—In re Glasberg, 155 N.Y.S. 437, 169 App Div 496
6 C J p 593 note 85.

62. In re O'Neil, 239 N Y S 297, 228 App Div. 129
Attorney also officer of corporation
An attorney was bound to observe legal ethics whether he was the officer of an indemnity company or its general counsel—In re O'Neil, 239 N. Y S 297, 228 App.Div. 129.

63. D.C—In re Reid, 45 App D C. 240, L R A 1916F 394.
Kan—In re Macy, 196 P. 1095, 109 Kan 1, 14 A L R 848.
Wis—State v Rubin, 229 N.W. 36, 201 Wis. 30.
6 C J. p 593 note 86.
Where also contempt of court
Where attorney's misconduct consisted of alleging in a petition unnecessary and scandalous matter as to the moral character of another attorney, an application for disbarment predicated thereon will not be entertained since there is an adequate remedy by contempt proceedings—People v. Berry, 29 P. 904, 17 Colo 322
Trial court refusing to take action
A bitter controversy between an attorney and a deputy prosecuting attorney and state's witnesses has been held not to warrant disciplinary action, where the trial judge refused to take action at the time—In re Dore, 4 P (2d) 1107, 165 Wash 225
Criticism as to amount for which action was brought
In an attorney's action for services in bringing an action for criminal conversation with defendant's wife and for alienation of affections, defendant's counsel's criticism in his argument to the jury of plaintiff for bringing the action for so large an amount of damages has been held not ground for disbarment of defendant's counsel.—State v. Ridgway, 208 P. 587, 104 Or 634.
While counsel is not liable to a civil action or to criminal proceedings for anything he may have said in the course of a trial or investigation, provided it was relevant or pertinent to the subject matter of the controversy, a member of the bar is always responsible to the court for his professional conduct—In re Schwartz, 195 N.Y.S. 513, 202 App. Div 88.

64. Matter of Kelly, 62 N Y. 198

65. Ariz—In re Myrland, 45 P.(2d) 953
N Y—In re Yardum, 218 N Y S. 6, 218 App Div. 134—In re Kaluaky, 155 N Y S 550, 169 App Div 531
Wash—In re Bolin, 232 P. 370, 132 Wash 453.
6 C J p 589 note 51.
Sharp practice by an attorney warrants disciplinary measures by the supreme court—In re Boland, 248 P. 399, 140 Wash. 148.

66. Minn—In re Gurley, 239 N.W. 149, 184 Minn. 450
N.Y—In re Steinberg, 184 N.Y.S 450, 193 App Div. 502.
6 C J p 594 note 88.

67. In re Lambert, 280 N.Y S. 820, 245 App Div. 316.

68. In re Youngentob, 168 N Y S 961, 181 App.Div. 490.

69. In re Berkeley, 160 N Y S 1093, 174 App Div. 305, affirmed 154 N.E. 621, 243 N.Y. 597.

70. U S—In re Ades, (D.C.Md) 6 F. Supp. 467.
Ala—In re Mitchell, 71 So. 467, 196 Ala 430.
6 C J p 594 note 89.

71. In re Gluck, 243 N.Y.S. 334, 229

lation of an order suspending the attorney from practice,[72] constitutes ground for suspension or disbarment.

Contempt of court. While a contempt of court may constitute a ground for disbarment, ordinarily disbarment will not be ordered for a contempt of court unless the contempt is of so gross a nature as to render the attorney unworthy of his office[73] In all such cases of disbarment proceedings for contempt amounting to misbehavior in office the statutory procedure must be observed.[74]

(2) Offensive Conduct toward Judges

Any conduct reflecting unjustly on the character or integrity of a judge will justify suspension or disbarment.

The obligation which attorneys assume, when admitted to the bar, to maintain at all times the respect due to the courts of justice and judicial officers, is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining both in and out of court from insulting language and offensive conduct toward the judges personally for their judicial acts, and a violation thereof constitutes a ground for suspension or disbarment[75] Thus, a threat of personal chastisement made by an attorney to a judge out of court for his conduct during the trial of a pending cause is a breach of this obligation and constitutes sufficient ground for striking the attorney from the rolls[76] So, also, using written or spoken language reflecting unjustly on the character or integrity of the judge of the court is conduct unbecoming an attorney, and an indignity on the court, and will justify the summary disbarment of the attorney guilty of it.[77] Some cases hold that, if the offense is committed out of court, the offensive language or conduct complained of must have had reference to the official acts of the judge[78] While attorneys have the widest latitude in differing with, and criticizing the opinions of, the courts, yet when they resort to misrepresentation and unwarranted assaults on the courts whose officers they are, they violate their duty and obligation and are subject to suspension or disbarment[79] Such cases have arisen in which

App Div. 490—In re Reinhardt, 162 N Y S. 524, 175 App Div. 843.

Where order a nullity

Where, on an attorney's objection to dismissal of his client's suit until his fees were paid, the court heard the testimony, and fixed fees over the attorney's objection, he was not subject to disbarment for refusal to abide by court order fixing his fee, the judge being without jurisdiction, and the order as to fees a nullity—People v A'Brunswick, 146 N E 433, 315 Ill 442—6 C J. p 595 note 2 [b].

72. N Y—In re Dangler, 199 N.Y.S. 306, 205 App.Div. 94.
S D—In re Hosford, 252 N W. 843, 62 S D. 374

73. In re Minnis, (Cal.) 56 S Ct 504—6 C J. p 595 note 2.
Contempt and disbarment proceedings as distinct proceedings see infra § 28

74. State v. Root, 67 N W 590, 5 N D 487, 57 Am S.R. 568—6 C J. p 596 note 4.

75. U S—In re Ades, (D C Md) 6 F. Supp. 467.
Colo—People v. Ginsberg, 285 P. 758, 87 Colo 115.
Kan—In re Hanson, 160 P. 1141, 99 Kan. 23.
Mont—In re Huppe, 11 P (2d) 793, 92 Mont 211.
N Y.—In re Bevans, 233 N.Y.S 439, 225 App Div. 427.
Okl—State v. Breckenridge, 258 P. 744, 126 Okl. 86, 53 A L R 1239
R I—In re Troy, 111 A. 723, 43 R I 279.
S D.—State v. Kirby, 154 N.W. 234, 36 S.D. 138.
Utah.—In re Hilton, 158 P 691, 48 Utah 172, Ann Cas 1918A 271.
6 C J. p 594 notes 90, 91

Letter not intended for circulation

An attorney's reference to a judge as an "arrogant jackass" in a letter to a state representative did not warrant suspension from practice, absent evidence that the attorney intended the matter to be circulated—In re Huppe, 11 P (2d) 793, 92 Mont 211.

76. U S—Bradley v. Fisher, (D C.) 13 Wall 335, 20 L Ed 646
Ark—Beene v State, 22 Ark. 149
N D—State v. Root, 67 N W. 590, 5 N D 487, 57 Am.S R 568
Or.—Ex p. Ditchburn, 52 P. 694, 32 Or. 538
6 C J. p 594 note 90

77. Cal—Peters v. State Bar of California, 26 P (2d) 19, 219 Cal 218—In re McCowan, 170 P 1100, 175 Cal 51, 177 Cal 93—In re Humphrey, 163 P 60, 174 Cal 290
Mich—Attorney General v Nelson, 249 N W. 439, 263 Mich 686
Pa—In re Gross, 177 A 767, 318 Pa 143, certiorari denied 56 S Ct 248, 296 U S 645, 80 L Ed 458—In re Gray, 16 Pa Dist 967.
R I—In re Troy, 111 A. 723, 43 R I 279.
Utah—In re Hilton, 158 P 691, 48 Utah 172, Ann Cas 1918A 271
Wash—State v. Willis, 103 P. 737, 95 Wash 251.
6 C J p 594 note 91.

Objectionable printed matter not shown to, or approved by, attorneys

That attorneys were shown and approved before publication the body of an article is insufficient to show improper conduct where the comments and heading of the article which constituted the objectionable portion misrepresenting the action of a court were not shown to, or approved by the attorneys—In re Marron, 160 P. 391, 23 N M 252, L R. A 1917B 378, motion granted In re Marron & Wood, 165 P. 216, 22 N M. 501.

78. U S—Bradley v. Fisher, (D C) 13 Wall 335, 20 L Ed 646
Fla—State v. Kirke, 12 Fla. 278, 95 Am D. 314
Tex—Jackson v State, 21 Tex. 668.
6 C J p 594 note 92

79 U S—In re Ades, (D C Md.) 6 F. Supp 467
Cal—In re Humphrey, 163 P 60, 174 Cal 290—In re Graves, 231 P. 411, 64 Cal App 176—Bar Ass'n of San Francisco v Philbrook, 170 P. 440, 35 Cal App. 460
Ill—People v Standidge, 164 N E. 844, 333 Ill 361—People v Metzen, 125 N E 734, 291 Ill 55
Mont—In re Huppe, 11 P (2d) 793, 92 Mont 211
N Y—In re Bevans, 233 N.Y S 439, 225 App Div. 427
Okl—State v Breckenridge, 258 P. 744, 126 Okl 86, 53 A L R 1239
R I—In re Troy, 111 A 723, 43 R I. 279
Utah—In re Hilton, 158 P. 691, 48 Utah 172, Ann Cas 1918A 271.
6 C J p 594 note 93.

Offense against individual and court

Publication of a false and malicious attack on a judicial officer is

the libelous or scandalous matter concerning one or more judges, constituting the basis of the charge, was made a part of a brief,[80] a pleading,[81] a petition for a rehearing,[82] or an affidavit in a cause;[83] and it has been held that the writing of a personal letter to a judge complaining of his conduct and reflecting on his integrity constitutes professional misconduct for which the attorney may be disciplined.[84]

Attorney not privileged. While, in actions for libel and slander, counsel are exempt from liability for defamatory language in the pleadings, or published or uttered in the course of judicial proceedings, provided such language is pertinent and material to the case, as stated in the title Libel and Slander § 104 [36 C J. p 1250 note 92-p 1261 note 88], this rule does not apply, and cannot be pleaded as a defense, in proceedings to disbar an attorney for maliciously slandering the judge before whom he has conducted litigation, in such a case defendant can only protect himself by showing the truth of the charges alleged,[85] although, where the statement was made in good faith in the course of a judicial proceeding and relevant to the subject or cause of inquiry, it is not a ground for suspension or disbarment.[86]

e. Deception of Court and Obstruction of Justice

Conduct on the part of an attorney tending to subvert or obstruct justice is a ground for suspension or disbarment

There is no recognized rule of law or ethics which justifies the conduct of counsel in any case, civil or criminal, in endeavoring by dishonest means to mislead the court or jury, even if to do so might work to the advantage of his client, and such conduct will constitute a ground for suspension or disbarment.[87] A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.[88] An attorney may be suspended or disbarred for perverting, or attempting to pervert, a decision of a cause on the merits, by deceiving or misleading the court,[89] by bribing or tampering with wit-

both an offense against him individually and against the courts—In re Bevans, 233 N Y S 439, 225 App Div 427.

Repetition no defense

In disbarment proceedings, an attorney cannot avoid responsibility for statements that seats on the supreme court were purchased by the claim that he merely repeated the sentiments of another person, whose name he gave when making the statements—In re Troy, 111 A 723, 43 R I 279.

Criticism within constitutional rights

(1) An attorney at law who acts within his constitutional rights in criticising the court would not be guilty of conduct such as to render him unfit to practice his profession—In re Hickey, 258 S W 417, 149 Tenn 344

(2) But criticisms should always strictly observe the principles of truth, honesty, and fairness—In re Humphrey, 163 P 60, 174 Cal 290

Criticisms of candidate for judge

Criticisms of a candidate for judge of court are privileged so far as made on reasonable ground and in good faith, as regards a disbarment proceeding—Snyder's Case, 152 A. 32, 301 Pa 276, 76 A L R 666—6 C. J p 594 note 93 [c].

Private conversation

Statements of an attorney at law in private conversation, referring to the judge of the circuit court and his cousin as being "some combination" and that, when the cousin moved his finger west, the judge moved west, have been held insufficient to warrant disbarment—In re Hickey, 258 S W 417, 149 Tenn 344

Statements held not ground for suspension

Notwithstanding facts did not justify publication of a newspaper article by defendant charging that the circuit judge was wholly unfit and incapacitated to hold court and as a result the court had broken down and ceased to function, such publication did not render defendant unfit to be a member of the bar.—In re Hickey, 258 S W 417, 149 Tenn 344

80. U S—In re Minnis, (Cal) 56 S Ct 504
Kan—In re Hanson, 160 P. 1141, 99 Kan 23
6 C J. p 595 note 94

81. In re Bevans, 233 N Y S 439, 225 App Div 427—6 C J p 595 note 95

82. Ky—In re Woolley, 11 Bush 95
La—De Armas' Case, 10 Mart 123
Wash—In re Robinson, 92 P 929, 48 Wash 153, 15 L R A (N S) 525, 15 Ann Cas 415

83. Mich—In re Mains, 80 N W 714, 121 Mich 603
N Y—Matter of Rockmore, 111 N Y S 879, 127 App Div 499—Matter of Murray, 11 N Y S 336

84. Ill—People v Metsen, 125 N E 734, 291 Ill 55
N M—In re Rogers, 212 P 1034, 28 N M 375
N Y—In re Carrao, 156 N.Y S. 379, 170 App Div 545
6 C.J p 595 note 98

85. Cal—In re Graves, 221 P. 411, 64 Cal App 176
Mont—In re Huppe, 11 P.(2d) 783, 93 Mont 211
N Y—In re Bevans, 233 N Y S 439, 225 App Div 427
6 C.J p 595 note 1.

86. In re Sherwood, 103 A 42, 259 Pa. 254, L R A 1918D 447

87. Hawaii—In re Metzger, 31 Hawaii 929.
N Y—In re Palmieri, 162 N Y S 799, 176 App Div 58, reversed on other grounds 117 N E 1073
S D—In re Wilmarth, 172 N W. 921, 42 S D 76.

88. People ex rel Chicago Bar Ass'n v Sherwin, 4 N.E (2d) 477, 364 Ill. 350

89. Cal—Roark v State Bar of California, 55 P (2d) 839—Wright v State Bar of California, 17 P (2d) 101, 217 Cal 59—In re Graves, 280 P 115, 208 Cal 57—Bar Ass'n of San Francisco v. Devall, 210 P 279, 59 Cal App 230.
D C—Thomas v Ogilby, 59 App D C 382, 44 F (2d) 890
Hawaii—In re French, 28 Hawaii 47
Ill—People v. Johnson, 176 N E 278, 344 Ill 132
Kan—In re Macy, 196 P 1095, 109 Kan 1, 14 A L R 848
Ky—Davis v Commonwealth, 2 S W. (2d) 1038, 233 Ky 90
Mass—In re Ulmer, 167 N E. 749, 268 Mass. 373
Minn—In re Glover, 223 N W 921, 176 Minn 519—In re McGinley, 209 N W 870, 168 Minn 224

nesses[90] or jurors,[91] by stifling or suppressing evidence,[92] by introducing evidence or allowing evidence to be given which he knows to be false or forged,[93] by knowingly making false or forged

Mont.—In re O'Keefe, 175 P. 593, 55 Mont 200.
Neb.—State v. Fisher, 174 N.W. 320, 103 Neb 736
Nev.—Washoe County Bar Ass'n v. Scoular, 190 P 899, 44 Nev 208.
N.M.—In re Marron, 160 P 391, 22 N.M. 252, L.R.A.1917B 378, motion granted In re Marron & Wood, 165 P. 216, 22 N.M. 501.
N.Y.—In re Zanger, 194 N.E. 72, 266 N.Y. 165, reversing 267 N.Y.S. 193, 239 App.Div. 129, reargument denied 270 N.Y.S. 657, 241 App.Div 60—In re Heimsoth, 175 N.E. 112, 255 N.Y. 409, affirming 243 N.Y.S. 149, 229 App.Div. 194—In re Feinstein, 280 N.Y.S. 267, 245 App.Div. 740—In re Isaacs, 270 N.Y.S. 708, 240 App.Div. 498—In re Katz, 243 N.Y.S. 96, 230 App.Div. 172—In re Schlacht, 239 N.Y.S. 454, 228 App.Div. 226—In re Weinstein, 239 N.Y.S. 404, 228 App.Div. 210—In re Rosenberg, 238 N.Y.S. 514, 227 App.Div. 527—In re Maisel, 238 N.Y.S. 622, 227 App.Div. 522—In re Gilchrist, 208 N.Y.S. 720, 208 App.Div. 497—In re Moses, 195 N.Y.S. 358, 202 App.Div. 83—In re Farrington, 193 N.Y.S. 334, 200 App.Div. 735—In re Dangler, 182 N.Y.S. 471, 192 App.Div. 237—In re Ginsburg, 177 N.Y.S. 293, 188 App.Div. 517—In re Gladstone, 173 N.Y.S. 89, 185 App.Div. 471—In re Sachs, 155 N.Y.S. 461, 169 App.Div. 622—In re Lichtenberg, 155 N.Y.S. 482, 169 App.Div. 605
N.D.—In re Bryans, 204 N.W. 9, 52 N.D. 673.
Okl.—In re Huggins, 31 P.(2d) 944, 168 Okl. 91.
Or.—State v. Mannix, 288 P. 507, 133 Or. 32, rehearing denied 290 P. 745, 133 Or. 329—State v. Goldstein, 220 P. 565, 109 Or. 497
Pa.—In re Oliensis, 26 Pa.Dist. 853—In re Serber, 14 Pa.Dist. & Co. 481
S.D.—In re Egan, 218 N.W. 1, 52 S.D. 394—In re Morrison, 178 N.W. 732, 43 S.D. 185
Utah—In re Jones, 249 P. 803, 68 Utah 213
Vt.—In re O'Brien, 107 A. 487, 93 Vt. 194
Wash.—In re Bolin, 232 P. 370, 132 Wash. 453
6 C.J. p. 589 note 50, p. 596 note 6.

Conspiracy by clients

(1) Where client and others, conspiring to obstruct justice and accomplish an unlawful purpose, continually consult their attorney, and he criticises their plans and purposes only on the ground of impracticability, and tacitly approves of obtaining the desired results by the means employed, he will, in a disbarment proceeding, be considered as one of the conspirators—State v. Fisher, 174 N.W. 320, 103 Neb. 736.

(2) A member of the bar, knowing of a conspiracy of his client and others to obstruct justice and accomplish an unlawful purpose in a litigation in which he is employed as an attorney, should prevent such practices, if possible, and, if not, should either expose such conspiracy, in view of Rev.St. (1913) § 269, or withdraw from the employment.—State v. Fisher, supra

Deceiving clerk of court

It is unethical and unprofessional for an attorney to hand a clerk, from whom he obtained a genuine exhibit, a spurious duplicate bearing a forged signature of the clerk, in order to secure the clerk's unwilling aid in misrepresenting to a witness that the spurious writing was the genuine exhibit.—In re Metzger, 31 Hawaii 929

False addresses of plaintiffs

Attorney cannot escape responsibility for deception in giving false addresses on pleadings by feigning ignorance of systematic office practice.—In re Katz, 243 N.Y.S. 96, 230 App.Div. 172.

Interposition of false answer

That an answer does not state the legal defense to an action against an attorney is not in itself sufficient to subject the attorney to censure for interposition of a false answer.—In re Rolph, 264 N.Y.S. 171, 238 App.Div. 235

Misrepresentation to discredit witness

It is unethical and unprofessional for an attorney, even though defending a man on trial for his life, to resort to falsehood and misrepresentation in order to show supposed lack of credibility of handwriting expert.—In re Metzger, 31 Hawaii 929.

Paper forged by another

The lawyer who knowingly uses the forgery of another to impose on a court cannot justify or lessen his violation of duty as a member of the bar by showing that he did not himself commit the forgery.—State v. Fisher, 174 N.W. 320, 103 Neb. 736

90. Ky.—Taylor v. Commonwealth, 233 S.W. 895, 192 Ky. 410.
N.Y.—In re Rouss, 155 N.Y.S. 557, 169 App.Div. 629, affirmed 116 N.E. 782, 221 N.Y. 81, certiorari denied 38 S.Ct. 332, 246 U.S. 661, 62 L.Ed. 927
Okl.—In re Williams, 46 P.(2d) 507
Pa.—In re Blumenthal and Verlin, 10 Pa.Dist. & Co. 781.
S.D.—In re Hooper, 189 N.W. 309, 45 S.D. 525
6 C.J. p. 596 note 7

91. Colo.—People v. Powell, 287 P. 858, 87 Colo. 387
Ohio.—In re Neff, 23 Ohio Cir.Ct. (N.S.) 318.
Wash.—In re Bruener, 294 P. 254, 159 Wash. 504.
6 C.J. p. 597 note 8.

92. U.S.—Harkin v. Brundage, (C.C.A.Ill.) 13 F.(2d) 617, certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838, and reversed on other grounds 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457.
Colo.—People ex rel. Colorado Bar Ass'n v. ———, Attorney at Law, 295 P. 917, 88 Colo. 325.
6 C.J. p. 597 note 9.

93. Ariz.—In re Hoover, 46 P.(2d) 647.
Ark.—McGehee v. State, 32 S.W.(2d) 308, 182 Ark. 603
Cal.—Roark v. State Bar of California, 55 P.(2d) 889—Green v. State Bar of California, 2 P.(2d) 340, 213 Cal. 403—Bruns v. State Bar of California, 1 P.(2d) 939, 213 Cal. 151—State Bar of California v. Jones, 280 P. 964, 208 Cal. 240
Hawaii.—In re French, 28 Hawaii 47
Kan.—In re Gorsuch, 214 P. 794, 113 Kan. 380.
N.M.—In re Marron, 160 P. 391, 22 N.M. 252, L.R.A.1917B 378, motion granted In re Marron & Wood, 165 P. 216, 22 N.M. 501
N.Y.—In re Gladstone, 173 N.Y.S. 89, 185 App.Div. 471—In re Abuza, 166 N.Y.S. 105, 178 App.Div. 757—In re Palmieri, 162 N.Y.S. 799, 176 App.Div. 58, reversed on other grounds 117 N.E. 1078.
Ohio.—In re Abrams, 173 N.E. 312, 36 Ohio App. 384
Pa.—In re Barach, 123 A. 737, 279 Pa. 89.
Vt.—In re O'Brien, 113 A. 527, 95 Vt. 167, 14 A.L.R. 859—In re O'Brien, 107 A. 487, 93 Vt. 194.
6 C.J. p. 597 note 10

Permitting client to testify falsely

Lawyer owes client the duty to see that the latter's rights are fully protected under forms of law, but is never justified in imposing on the court or knowingly permitting client to do so by testifying falsely.—In re Hoover, (Ariz.) 46 P.(2d) 647.

Summing up false testimony to jury

Where an attorney obviously aids a witness to lie and deliberately and emphatically in his summing up to the jury of what he personally knows to be false testimony adopts it, such conduct is the equivalent of false swearing by himself and equally worthy of discipline.—In re Palmieri, 162 N.Y.S. 799, 176 App.Div. 58, reversed on other grounds 117 N.E. 1078.

affidavits, or having them made, for the purpose of deceiving the court,[94] or by incorporating misstatements in the pleadings or in the papers in a case before the court.[95] Other acts of misconduct resulting in obstructing or perverting the administration of justice which have been held grounds for disbarment are: Conspiring to obtain a divorce on false grounds,[96] inducing litigants to assume a fictitious residence,[97] filing suit before legal residence necessary therefor is fully established;[98] filing suit or taking proceeding in the wrong jurisdiction with corrupt motive or fraudulent design to subvert justice;[99] filing a sham answer[1] or affidavit[2] for the purpose of delay; abetting witness to conceal identity or to impersonate another;[3] deliberately and knowingly procuring a false and fraudulent judgment or order;[4] submitting a fictitious case;[5] submitting only a partial statement of material facts known to him,[6] continuing a suit based on perjured testimony;[7] prosecuting a claim known by him to be unjust and without merit,[8] advising a client to forfeit bail[9] or to disobey an order of court;[10] applying for continuance because of the absence of material witnesses who

Emergency no excuse

Emergency does not excuse an experienced attorney's adoption of testimony known to him to be false—In re Palmieri, 162 N.Y.S. 799, 176 App.Div. 58, reversed on other grounds 117 N.E. 1078

94. D.C.—Curtis v. Whiteford, 59 App.D.C. 330, 41 F.(2d) 302
Minn.—In re Bresky, 214 N.W. 666, 171 Minn. 490
Nev.—In re Bailey, 161 P. 512, 40 Nev. 139
N.J.—In re Rosenkrans, 94 A. 42, 84 N.J.Eq. 232
N.Y.—In re Finkel, 288 N.Y.S. 409, 248 App.Div. 369—In re Diamond, 262 N.Y.S. 665, 237 App.Div. 657—In re Powers, 257 N.Y.S. 113, 235 App.Div. 382—In re Batt, 246 N.Y.S. 77, 230 App.Div. 656—In re Brown, 165 N.Y.S. 736, 178 App.Div. 558—In re Hawes, 156 N.Y.S. 283, 169 App.Div. 644, affirmed 111 N.E. 211, 217 N.Y. 602—In re Cebulsky, 155 N.Y.S. 463, 169 App.Div. 636—In re O'Brien, 155 N.Y.S. 552, 169 App.Div. 519.
N.D.—In re Bryans, 204 N.W. 9, 52 N.D. 673
Pa.—In re Olliensis, 26 Pa.Dist. 853—In re Shoemaker, 18 Pa.Co. 36.
S.D.—In re Egan, 157 N.W. 310, 37 S.D. 159, motion denied 161 N.W. 1003, 38 S.D. 458
6 C.J. p. 597 note 11.

False affidavit to dismiss appeal

Attorney for defendants, to whom a copy of stenographer's minutes and of case on appeal were delivered, who, after turning them over to a third party who lost them, obtained dismissal of the appeal on default by an affidavit stating that plaintiff had done nothing to bring the case on for argument, although a return of the minutes for bringing of the appeal had been sought, was guilty of improper conduct, justifying suspension.—In re Finkel, 288 N.Y.S. 409, 248 App.Div. 369.

Positive affidavit instead of one on information and belief

Conduct of attorney in permitting an affidavit positive in form, when it should have been on information and belief, to stand without correction was deserving of censure, but not necessarily corrupt or dishonest.—In re Egan, 157 N.W. 310, 37 S.D. 159, motion denied 161 N.W. 1003, 38 S.D. 458.

Acting in professional capacity

Attorney assisting another attorney in preparing pleadings in an action for his own services acted in a professional capacity within the code providing for disbarment for professional misconduct.—Curtis v. Whiteford, 59 App.D.C. 330, 41 F.(2d) 302

95. In re Wilson, 170 N.Y.S. 725

Misstatement immaterial to case

A misstatement in a brief that bonds devised to testator's wife had matured and been paid, when she had sold them before maturity, which was inadvertently copied in other briefs, but not material to the case, does not amount to professional misconduct.—In re Wilson, 170 N.Y.S. 725

96. In re Forrester, 155 N.Y.S. 420, 169 App.Div. 619—6 C.J. p. 597 note 13

97. In re O'Neill, 171 N.Y.S. 514, 184 App.Div. 75—In re Mathot, 166 N.Y.S. 217, 178 App.Div. 759, dismissal of appeal granted 117 N.E. 948, 222 N.Y. 8.

98. In re Hoover, (Ariz.) 46 P.(2d) 647.

Zealousness no excuse

The fact that counsel for plaintiff in a divorce suit became persuaded, in his anxiety to serve his client, that the latter's residence was that of her parents in the county of venue would not justify his action in commencing and prosecuting suit before she established a legal residence in such county for the statutory period.—In re Hoover, (Ariz.) 46 P.(2d) 647.

99. La.—In re Mundy, 158 So. 563, 180 La. 1079.
Ohio.—In re Abrams, 173 N.E. 312, 36 Ohio App. 384.

1. In re Tinney, 176 N.Y.S. 102, 187 App.Div. 569—In re Schreiber, 156 N.Y.S. 398, 170 App.Div. 543.

2. People v. Martin, 124 N.E. 340, 288 Ill. 615.

3. In re Zanger, 194 N.E. 72, 266 N.Y. 165, reversing 267 N.Y.S. 193, 239 App.Div. 129, reargument denied 270 N.Y.S. 657, 241 App.Div. 60

Good faith

Where a person was known and dealt with in relation to certain business under an assumed name, an attorney, who thoughtlessly, but in good faith, permitted such person to testify under the assumed name and made affidavits referring to him by the assumed name, was held not guilty of professional misconduct justifying disbarment.—In re Zanger, 194 N.E. 72, 266 N.Y. 165, reversing 267 N.Y.S. 193, 239 App.Div. 129, reargument denied 270 N.Y.S. 657, 241 App.Div. 60

4. Ill.—People v. Brillow, 140 N.E. 829, 309 Ill. 173
N.Y.—In re Wilson, 170 N.Y.S. 725

5. Kan.—In re Macy, 196 P. 1095, 109 Kan. 1, 14 A.L.R. 848
N.Y.—In re Cohen, 258 N.Y.S. 615, 236 App.Div. 263—In re Hawes, 156 N.Y.S. 283, 169 App.Div. 644, affirmed 111 N.E. 211, 217 N.Y. 602.
6 C.J. p. 597 note 15.

6. Matter of V———, 42 N.Y.S. 268, 10 App.Div. 491—6 C.J. p. 597 note 16

7. Matter of Hardenbrook, 135 App.Div. 634, 121 N.Y.S. 250, affirmed 92 N.E. 1036, 199 N.Y. 539.

8. N.Y.—In re Brooklyn Bar Ass'n, 227 N.Y.S. 666, 223 App.Div. 149.
Okl.—In re Pruett, 46 P.(2d) 919.
6 C.J. p. 597 note 18.

9. Matter of Pascal, 131 N.Y.S. 823, 146 App.Div. 836.

10. In re Apfel, 195 N.Y.S. 325, 202 App.Div. 76—6 C.J. p. 597 note 20.

Good faith

Attorney's conduct in informing a client that a restraining order preventing disposition of stock pending a divorce trial was void, without a showing of bad faith, did not merit disciplinary action.—In re Dore, 4 P.(2d) 1107, 165 Wash. 225.

are actually present;[11] citing a case as controlling without informing the court of unreported decisions known to him which discredited it,[12] filing false or sham pleadings,[13] or worthless appeal bonds;[14] supporting a claim by a false and fraudulent appraisement;[15] offering depositions directly contradictory to those made in a former proceeding by the same deponent;[16] and submitting a proposition to change an opinion of a court for a money consideration.[17]

Conduct tending to prejudice consideration of pending litigation, on the part of an attorney, has been held to constitute a ground for suspension or disbarment.[18]

f. Misuse, Falsification, or Alteration of Records and Papers

Misuse or falsification of court records or papers is a ground for suspension or disbarment.

An attorney may be suspended or disbarred for improperly falsifying, altering, or abstracting court records or papers.[19] Thus, knowingly antedating a writ[20] or the jurat to an official oath taken before him and the acknowledgment of an official bond made before him as notary public,[21] or an acknowledgment,[22] or inducing a clerk of court to antedate the filing of a paper so as to secure a lost right[23] or to change the return date of a subpœna,[24] or executing a paper purporting to be a judgment of the court,[25] or simulating a court order to obtain possession of property[26] is sufficient ground for suspension or disbarment. That the alteration was made without fraudulent intent palliates, but does not justify, the act.[27] Also, it is ground for suspension or disbarment for an attorney to misuse court orders, papers, or processes,[28] as by drafting an indecent and scandalous complaint to coerce payment or settlement,[29] or by alleging untrue, infamous matter in pleadings.[30] However, an attorney was held not deserving of punishment for alleged alterations in a transcript on an appeal, where such alterations were made with an honest motive, were freely admitted by the attorney, and were due to his inexperience.[31]

g. Misconduct as Judge, Prosecuting Attorney, Etc.

Misconduct of an attorney acting in an official capacity, such as judge, prosecuting attorney, or the like, has been held to constitute a ground for his suspension or disbarment.

Although the official conduct of public officers has been held not subject to review in disbarment pro-

11. In re Champion, 103 P. 600, 24 Okl. 154

12. Matter of V———, 42 N.Y.S. 268, 10 App.Div. 491.

13. In re Tinney, 176 N.Y.S. 102, 187 App.Div. 569—6 C.J. p. 597 note 24

14. People v. Pickler, 57 N.E. 893, 186 Ill. 64.

15. State v. Fisher, 117 N.W. 882, 82 Neb. 361, affirmed 119 N.W. 249, 82 Neb. 367.

16. Matter of Schleimer, 135 N.Y.S. 406, 150 App.Div. 507.

17. People v. Reaugh, 79 N.E. 936, 234 Ill. 541

18. N.M.—In re Hanna, 227 P. 983, 30 N.M. 96

Pa.—In re Gross, 177 A. 767, 313 Pa. 143, certiorari denied 56 S.Ct. 248, 296 U.S. 645, 80 L.Ed. 453—Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A.L.R. 666—Wilhelm's Case, 112 A. 560, 269 Pa. 416.

19. Ariz.—In re Spriggs, 284 P. 521, 36 Ariz. 262

Kan.—In re Macy, 196 P. 1095, 109 Kan. 1, 14 A.L.R. 848.

N.Y.—In re Rubenstein, 197 N.Y.S. 75, 203 App.Div. 517—In re Farrington, 193 N.Y.S. 334, 200 App.Div. 735

Okl.—In re Huggins, 31 P.(2d) 944, 168 Okl. 91.

Wis.—State v. Sullivan, 249 N.W. 519, 213 Wis. 314

Wyo.—State Board of Law Examiners v. Strahan, 8 P.(2d) 1090, 44 Wyo. 156, rehearing denied 13 P.(2d) 1083, 44 Wyo. 487

6 C.J. p. 598 note 29

Negligence in nondiscovery of changes

Counsel's failure to investigate changes in transcript was held to be inexcusable neglect meriting reprimand by the court.—Sparks v. Commonwealth, 8 S.W.(2d) 397, 225 Ky. 334.

Suggesting change by client

The language used by an attorney, charged with counseling falsification of documents, is immaterial, if it suggests fraudulent conduct.—In re Bullowa, 229 N.Y.S. 145, 223 App.Div. 593

20. Ex p. Brown, 1 How.(Miss.) 303

21. In re Arctander, 1 N.W. 43, 26 Minn. 25

22. In re Orlean, 271 N.Y.S. 331, 241 App.Div. 101.

23. Howard v. Gulf, etc., R. Co., (Tex.Civ.App.) 135 S.W. 707

24. Thompson v. Denman, 50 S.W.(2d) 222, 164 Tenn. 428

25. In re Bunt, 182 N.Y.S. 434, 192 App.Div. 226.

26. In re Myrland, (Ariz.) 45 P.(2d) 953

27. In re Dore, 4 P.(2d) 1107, 165 Wash. 225—6 C.J. p. 598 note 33

28. Minn.—In re Dows, 209 N.W. 627, 168 Minn. 6, 47 A.L.R. 265

Mont.—In re Frederick, 227 P. 999, 71 Mont. 205.

N.J.—In re Hahn, 94 A. 953, 84 N.J.Eq. 523, motion denied 96 A. 589, 85 N.J.Eq. 510, Ann.Cas.1918B 830

Pa.—In re Blumenthal & Verlin, 10 Pa.Dist. & Co. 731.

R.I.—Grievance Committee of Rhode Island Bar Ass'n v. Clifford, 97 A. 975.

S.D.—In re Swihart, 177 N.W. 364, 42 S.D. 628.

Publication of defamatory affidavit

Preparing a defamatory affidavit, withholding the same from filing after it was ordered sealed, and communicating the contents to a newspaper, was held to warrant suspension.—In re Sadicoff, 282 P. 953, 208 Cal. 555.

29. In re Hansen, 169 N.Y.S. 881, 182 App.Div. 568.

30. N.Y.—In re Burger, 271 N.Y.S. 676, 241 App.Div. 218—In re Rapport, 283 N.Y.S. 210.

Wis.—In re Richter, 204 N.W. 492, 187 Wis. 490, 41 A.L.R. 485

Suggesting shameful exposures

It was improper for an attorney, by references in his bill as to the nature of the investigations made by him, to suggest the possibility of shameful exposures which would follow litigation, especially where the most disgraceful charges were based only on assertions of third parties.—In re Bunker, 199 N.Y.S. 435, 205 App.Div. 237.

31. People ex rel. Chicago Bar Ass'n v. Sherwin, 4 N.E.(2d) 477, 364 Ill. 350.

ceedings,[32] it has also been held that the court may suspend or disbar an attorney for misconduct relating to his duties as a justice of the peace,[33] magistrate,[34] sheriff,[35] district or prosecuting attorney,[36] village attorney,[37] attorney general,[38] or as a fiduciary under a court appointment.[39]

Misconduct as judge. A constitutional provision relating to the removal of judges of the supreme or circuit courts has been held inapplicable in determining the power of the court to disbar a member of the bar who is also a judge of the superior court,[40] and in some jurisdictions it has been held that the courts

32. In re Borie, 118 So 45, 166 La 855.

33. In re Hobbs, 73 A 303, 75 N H 285—6 C J p 600 note 81

34. Matter of Davis, 15 Hawaii 377

35. In re Roberts, 30 Hawaii 583

36. N D—In re Crum, 215 N W. 682, 55 N D. 876, 55 A L R 220
Okl—In re Simpson, 192 P. 1097, 79 Okl 305
Pa—Maginnis' Case, 112 A. 555, 269 Pa 186
6 C J p 600 note 83

Conduct held to warrant disciplinary action

(1) Acceptance of a bribe by a county attorney, for which he agrees not to prosecute one for a crime—In re Simpson, 192 P 1097, 79 Okl 305

(2) Acceptance by two attorneys of employment to prosecute a suit for civil damages on the same facts against accused—In re Truder, 17 P (2d) 951, 37 N M 69

(3) Acceptance of money by an attorney when acting as prosecuting officer, knowing it was intended to influence him—In re Crum, 215 N W. 682, 55 N D 876, 55 A L R. 220

(4) Accepting a reward for recovering and returning stolen property and assisting the deputy sheriff, who, under Rev Code (1919) § 3691, is prohibited from receiving a reward for doing any official act, in also securing a reward for similar services—In re Waggoner, 206 N W. 427, 49 S D. 78—In re Waggoner, 199 N. W. 244, 47 S D 401

(5) Appearing in other counties and defending respondents charged with committing crimes therein, and appearing in proceedings in which the state was an opposing party or had adverse interests—In re Wakefield, 177 A 319, 107 Vt 180

(6) Attaching tags to exhibits admitted in evidence with notations thereon for the purpose of prejudicing the jury—State v. Harris, 213 P 215, 66 Mont 34.

(7) Collecting money from the county on fictitious claims and enforcing civil liability by threats of criminal prosecution—People ex rel. Colorado Bar Ass'n v ———, Attorney at Law, 9 P (2d) 611, 90 Colo 440.

(8) Collecting of money on forfeited bonds, etc, by a county attorney, and instead of turning it over, after deducting commission, withholding it on a claim of the county's indebtedness to himself—In re Sitton, 177 P 555, 72 Okl 13

(9) Converting funds of the state paid to a prosecutor by check by virtue of his office—State v Garland, 150 P 289, 77 Or. 92.

(10) Hampering the administration of criminal law by endeavoring to secure provision for prosecutrix and child rather than to convict one charged with rape—In re McCowan, 170 P. 1100, 175 Cal 51, 177 Cal 93.

(11) Neglect of duty—People v. Anglim, 78 P 687, 33 Colo 40—In re Voss, 90 N W 15, 11 N D 540—In re Simpson, 83 N W 541, 9 N D 379—6 C J p 591 note 63 [a], p 621 note 54 [a]

(12) Raising amounts on several receipts attached to verified bills, on which an attorney received reimbursement from the county for alleged expenditures incident to his official duties—In re Forbes, 257 N W 329, 192 Minn 544.

(13) Requiring written stipulation for release including liability for instituting criminal prosecution on dismissal of criminal case—In re Truder, 17 P (2d) 951, 37 N M 69

(14) Urging defendant to plead guilty when he protests his innocence—People v. Phipps, 104 N.E 144, 261 Ill. 576

(15) Using office as an instrument to aid civil business, issuing warrants and complaints for criminal prosecutions to compel the persons accused to make settlements—In re Joyce, 234 N.W 9, 182 Minn 156—In re Bunston, 155 P 1109, 52 Mont. 82

It is not misconduct for a state's attorney, believing that perjury has been committed, to bring the matter to the attention of the grand jury, although interested therein, if he acts in good faith and is free from prejudice While an information for disbarment of a state's attorney is pending in the supreme court, he is not justified in having the matter of perjury in swearing thereto laid before the grand jury, and in doing so is not guilty of unprofessional conduct or breach of duty, if there is no personal spite or prejudice on his part, and he in good faith exercises no control, influence, or assistance in such presentation.—People v. Hickman, 128 N E 484, 294 Ill 471.

Mere dereliction of county attorney by failure to prosecute case, where the evidence showed the commission of the offenses charged, has been held not enough to warrant disbarment.—In re Burton, 246 P. 188, 67 Utah, 118.

Grounds for removal or suspension from office as district or prosecuting attorney see District and Prosecuting Attorneys § 7 [18 C J. p 1302 note 32—p 1303 note 53].

37. In re Baum, 186 P. 927, 32 Idaho 676

Division of fees

Division with the mayor of the city of the fees earned by respondent as city attorney and as commissioner in a special assessment proceeding was ground for disbarring respondent—People v. Jadrich, 151 N E 241, 320 Ill 344

38. In re Becker, 208 N Y S 437, 208 App Div 224—6 C.J. p 600 note 83 [b]

It is a very dangerous practice for any attorney, who has been connected with the attorney general's or district attorney's office in the prosecution of persons charged with criminal offenses, to appear thereafter for such defendants in subsequent proceedings of a criminal nature—In re Becker, 208 N.Y S. 437, 208 App Div 224

Conduct requiring disciplinary action

(1) A false statement by a deputy attorney general to the court that papers he had requested from the district attorney did not relate to the case which he was defending, made without knowledge as to whether such statement was true or false, was unjustified, and required punishment—In re Becker, 208 N Y S 437. 208 App Div. 224.

(2) A deputy attorney general, who by virtue of his office and his official demand obtained evidence from the district attorney on which a person had been indicted, was thereby disqualified from defending such person, and his conduct in appearing for such defendant was improper.—In re Becker supra.

39. Ill—People v. Tilton, 120 N E. 252, 284 Ill 385
N Y—In re Fridiger, 188 N Y S. 39, 196 App Div. 413, 39 N Y Cr 214—In re Lichtenberg, 155 N Y S 482, 169 App.Div 505
Ohio—In re Woodworth, 31 Ohio N. P (N S) 107

40. In re Stolen, 214 N W. 379, 193 Wis. 602, 55 A L R 1355, affirmed 216 N.W 127, 193 Wis. 602, 55 A.L R 1355.

have no jurisdiction in disbarment proceedings against an attorney for misconduct committed in his capacity as a judge of a court of record on the ground that the remedy by impeachment is exclusive;[41] but in other jurisdictions, it has been held that the court has authority to revoke or suspend the license to practice law, even though the attorney at the time of misconduct holds a judicial or other official position,[42] although the exercise of such power deals only with the status or relation of the attorney as such.[43] Of course, where the judge of a particular court is not required to be a qualified attorney and disbarment will not affect his official status, he may be disbarred for misconduct in office.[44]

A board of governors of the state bar was held to have jurisdiction to entertain complaints filed against a member of the state bar touching on his present fitness to practice law and based on the acts of the attorney occurring during a prior incumbency of the office of county judge.[45]

h. Miscellaneous Grounds

Under the rule that professional misconduct renders an attorney subject to disciplinary action, various acts of misconduct have been held sufficient or insufficient to authorize suspension or disbarment.

Under the rule that professional misconduct renders an attorney subject to disciplinary action, various acts of misconduct have been held to authorize suspension or disbarment such as: Permitting use of name by unqualified persons,[46] or by another attorney,[47] transacting business under another's name;[48] using name of another attorney in an action without his authority,[49] soliciting business in an unprofessional manner,[50] as by employing paid "detective agency"

For a firm of attorneys to advertise as a mercantile collection agency under the fictitious name of a "detective agency" was unethical.—In re Swihart, 177 N.W. 364, 42 S.D. 628

49. In re Grosso, 194 N.E. 514, 359 Ill. 243—6 C.J. p. 598 note 36.

50. U.S.—In re Ades, (D.C.Md.) 6 F. Supp. 467.

Cal.—Johnson v. State Bar of California, 52 P.(2d) 928—McCue v. State Bar of California, 47 P.(2d) 268—Recht v. State Bar of California, 23 P.(2d) 273, 218 Cal. 352—Townsend v. State Bar of California, 291 P. 837, 210 Cal. 362—Barton v. State Bar of California, 289 P. 818, 209 Cal. 677

Colo.—People v. Ginsberg, 285 P. 758, 87 Colo. 115.

Ill.—People v. Ashton, 180 N.E. 440, 347 Ill. 570—People v. McCallum, 173 N.E. 827, 341 Ill. 578.

Iowa.—State v. Kaufmann, 209 N.W. 417, 202 Iowa 157

Minn.—In re Greathouse, 248 N.W. 735, 189 Minn. 51

Mo.—In re Gallant, (App.) 95 S.W. (2d) 1249

N.Y.—In re Schwarz, 132 N.E. 921, 231 N.Y. 642, affirming 186 N.Y.S. 535, 195 App.Div. 194, and reargument denied 134 N.E. 554, 232 N.Y. 520—In re Schwartz, 267 N.Y.S. 243, 239 App.Div. 127—In re Axtell, 242 N.Y.S. 18, 229 App.Div. 323, affirmed 177 N.E. 423, 257 N.Y. 210, and modified on other grounds 257 N.Y.S. 470, 235 App.Div. 350—In re Helfant, 240 N.Y.S. 242, 228 App.Div. 479—In re Schacht, 239 N.Y.S. 516, 228 App.Div. 232—In re Bovard, 239 N.Y.S. 465, 228 App.Div. 263—In re Vail, 239 N.Y.S. 414, 228 App.Div. 217—In re Klein, 239 N.Y.S. 382, 228 App.Div. 246—In re Schleider, 239 N.Y.S. 311, 228 App.Div. 221—In re Burke, 237 N.Y.S. 53, 227 App.Div. 746—In re Brooklyn Bar Ass'n, 227

41. In re Strahl, 195 N.Y.S. 385, 201 App.Div. 729—6 C.J. p. 601 note 84.

42. Ariz.—In re Spriggs, 284 P. 521, 36 Ariz. 262.

S.D.—In re Rempfer, 216 N.W. 355, 51 S.D. 393, 55 A.L.R. 1346

Utah.—In re Burton, 246 P. 188, 67 Utah 118.

Wis.—In re Stolen, 214 N.W. 879, 193 Wis. 602, 55 A.L.R. 1355, affirmed 216 N.W. 127, 193 Wis. 602, 55 A.L.R. 1355

Proceeding in reality seeking removal dismissed

Where an application for disbarment of an attorney in reality sought his removal from the office of municipal judge, and extraordinary or unusual circumstances were lacking, it was held that the proceeding should be dismissed.—In re Gibbs, 214 N.W. 350, 51 S.D. 464.

Conduct aggravated

Unworthy conduct of an attorney at law is aggravated, where he is a judge of a district court.—In re Burton, 246 P. 188, 67 Utah 118

Grounds for suspension or disbarment

(1) The action of a district judge in writing a letter addressed to himself, purported to have been written by a party to a litigation in his court, and which the judge attempted to have signed by such party, was held unjustifiable conduct incompatible with a judge's duties.—In re Burton, 246 P. 188, 67 Utah 118

(2) An attorney, inducing those appearing before him, while acting as a county judge, to pay exorbitant retainer fees to another attorney, and advising in a matter which might and did come before him as judge, was guilty of conduct requiring disbarment.—In re Rempfer, 216 N.W. 355, 51 S.D. 393, 55 A.L.R. 1346.

(3) An attorney, who, while judge, willfully caused the records of his court to be falsified, so as to benefit a former client, must be disbarred.—In re Spriggs, 284 P. 521, 36 Ariz. 262

(4) Giving legal advice, in violation of statute.—People v. Lindsey, 283 P. 539, 86 Colo. 458

Conduct held not ground for suspension or disbarment

(1) Proceedings, merely erroneous, whereby a district judge arbitrarily suspended attorneys from practice, furnish no basis for disbarment of such district judge.—In re Burton, 246 P. 188, 67 Utah 118

(2) It is not ground for disbarment of an attorney that, while judge of the district court and while representing a party to an election contest before the legislature, he directed the grand jury's attention to reports that the other party to the contest had spent money largely in excess of the amount to which he made affidavit, where the instruction would have been proper except for the fact that he represented a party to such contest, and the instruction had no direct bearing on the contest.—People v. Class, 201 P. 883, 70 Colo. 381

43. In re Burton, 246 P. 188, 67 Utah 118

44. State v. Peck, 91 A. 274, 88 Conn. 447, L.R.A.1915A. 663—6 C.J. p. 601 note 85.

45. Weston v. Board of Governors of State Bar, (Okl.) 61 P.(2d) 229

46. Cal.—Smallberg v. State Bar of California, 297 P. 916, 212 Cal. 113.

N.Y.—In re Durst, 263 N.Y.S. 575, 237 App.Div. 685

6 C.J. p. 598 note 34.

47. In re Wintrob, 26 Pa.Dist. 864.

48. Minn.—In re Hertz, 166 N.W. 397, 139 Minn. 504

Nev.—In re Scott, 292 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113.

6 C.J. p. 598 note 35

agents to solicit retainers,[51] by giving or offering a valuable consideration therefor in violation of statute,[52] rewarding, directly or indirectly, those bringing cases to his office,[53] or by advertising as a divorce lawyer through the public press and otherwise[54] in violation of statute,[55] ambulance chasing;[56] soliciting employment by threats;[57] com-

N Y S 666, 223 App Div. 149—In re Levine, 205 N Y S 589, 210 App. Div 8—In re Gray, 172 N Y S. 648, 184 App Div. 822—In re Schwarz, 161 N Y S 1079, 175 App Div 835
Ohio—In re Rule 28 of Cleveland Bar Ass'n, 29 Ohio N P (N S) 291
Wash—In re Winthrop, 237 P 3, 135 Wash 135—In re Wiltse, 186 P. 848, 109 Wash 261—In re Gill, 176 P 11, 104 Wash 160.
6 C J p 598 note 37.

Dishonorable or disreputable

An attorney's solicitation of employment will not, under all circumstances, justify his disbarment or suspension, but to justify that the solicitation must be in a dishonorable or disreputable manner, and where it consists of a mere effort to honorably procure employment for legitimate purpose, it is no ground for suspension or disbarment—State v. Smith, 99 S E 332, 84 W.Va 59

Advice free

Advertisement consisting of name and address of attorney and words "advice free" violated the rule against advertisement, requiring reprimand of attorney—Barton v. State Bar of California, 289 P. 818, 209 Cal 677.

Under another name

Advertisement by attorney-at-law under a name not his own is conduct justifying discipline—In re Cohen, 159 N E 495, 261 Mass. 484, 55 A L R 1309

Officer of insurer

Attorney-superintendent of claims for employers' liability insurer was held subject to censure for activity in securing retention of attorney to represent claimants having third party claims—In re Cherry, 240 N Y. S 282, 228 App Div. 458.

Attorney not chargeable with notice as matter of law

That attorney over five-year period obtained six cases by solicitation did not make him chargeable, as matter of law, with notice of solicitation by employees—In re Seidman, 240 N Y. S. 592, 228 App Div. 515.

51. U S—In re Ades, (D C.Md.) 6 F. Supp. 467.
Cal—Sawyer v. State Bar of California, 32 P.(2d) 369, 220 Cal 702—Fish v State Bar of California, 4 P (2d) 937, 214 Cal. 215
Hawaii—In re Trask, 30 Hawaii 736.
Ill—People v. Beresniak, 127 N E 36, 292 Ill. 305
Kan—In re Gorsuch, 214 P. 794, 113 Kan. 380.
Ky—Chreste v. Commonwealth, 198 S.W. 929, 178 Ky. 311—Chreste v. Commonwealth, 186 S W. 919, 171 Ky. 77, Ann Cas 1918E 122.
Mass—In re Thibodeau, 3 N E (2d) 749, 106 A L R 542.
N Y—In re Kreindler, 240 N Y.S. 604, 228 App Div 492—In re Fieldsteel, 240 N Y S 481, 228 App Div. 470—In re Mahan, 239 N Y S. 892, 228 App.Div 241—In re Levy, 239 N Y S 377, 228 App Div. 249—In re Schleider, 238 N Y S. 601, 227 App Div. 532—In re Levine, 205 N.Y.S. 589, 210 App Div. 8.
Ohio.—In re Meck, 200 N E 478, 51 Ohio App 237.
Pa—In re Salus, 184 A 69, 321 Pa. 103—In re Disbarment Proceedings, 184 A 59, 321 Pa 31.
6 C J p 598 note 38.

52. In re Newman, 158 N.Y S. 375, 172 App Div. 173—6 C J p 599 note 39

53. Cal—Dahl v State Bar of California, 1 P.(2d) 977, 213 Cal 160—Irving v. State Bar of California, 1 P.(2d) 2, 213 Cal 81—Shaw v State Bar of California, 297 P. 532, 212 Cal 52.
Ill—People v. Jadrich, 151 N.E 241, 320 Ill. 344.
Kan—In re Staton, 210 P. 615, 113 Kan 226
N Y—In re Littick, 232 N.Y.S. 571, 225 App Div 246, affirmed 171 N.E 805, 253 N Y 613
Wis—State v Kiefer, 222 N W. 795, 197 Wis 524.

"Unlicensed person" with whom attorney is prohibited from sharing compensation incidental to professional employment refers to a person not licensed to practice law—Howe v State Bar of California, 298 P 25, 212 Cal 222.

Alliance between doctors and lawyers

Alliance whereby doctors act as "feeders" for lawyers and lawyers act as collectors for recommending physicians is disapproved—In re Robinson, 241 N Y S 296, 229 App Div. 119—In re Fieldsteel, 240 N Y S. 481, 228 App.Div. 470.

54. Cal—Mayer v. State Bar of California, 39 P.(2d) 206, 2 Cal (2d) 71
Mass—In re Cohen, 159 N E 495, 261 Mass 484, 55 A L R 1309
N Y—In re Neuman, 155 N Y.S. 428, 169 App Div 638
Pa—In re Olienasa, 26 Pa Dist 853.
S D—In re Donovan, 178 N.W. 143, 43 S D. 93, 9 A L R. 1497.
6 C J. p 599 note 40.

Violation of ethics

An attorney may properly accept a retainer for the prosecution or defense of an action for divorce when convinced that his client has a good cause, but the ethics of the profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares—In re Donovan, 178 N.W. 143, 43 S. D 93, 9 A L R 1497.

55. In re Biaggi, 172 P. 1130, 36 Cal. App 650

56. U S—In re Ades, (D.C Md.) 6 F Supp. 467.
Cal—Remington v. State Bar of California, 28 P.(2d) 510, 218 Cal 446—Smith v. State Bar of California, 294 P. 1057, 211 Cal. 249, 73 A L R. 393
Neb—State ex rel Sorensen v. Goldman, 255 N W 32, 127 Neb. 340
N Y—In re Becker, 241 N.Y.S 369, 229 App Div. 62, appeals dismissed In re Levy, 174 N E 461, 255 N Y. 223—In re Feuerman, 238 N.Y S. 656, 227 App Div. 506—In re Reichman, 238 N Y.S. 647, 227 App.Div. 512—In re Seligsohn, 238 N Y.S 637, 227 App Div 480—In re Orange, 237 N Y S 49, 227 App Div. 748—In re Dollins, 237 N.Y S. 46, 227 App Div. 747—In re Gondelman, 233 N Y S. 343, 225 App Div 462—In re Marlow, 232 N Y S. 573, 225 App Div. 252—In re Katska, 232 N Y S 575, 225 App Div 250, modified on other grounds 237 N Y S. 803, 227 App.Div 821—In re Newell, 160 N.Y S. 275, 174 App. Div. 94
Wis—State v Cannon, 226 N W. 385, 199 Wis 401.

Not justifiable

"Ambulance chasing" by attorneys is not justified, because poor persons might be deprived of rights by overreaching representatives of persons about to be sued—In re Rothbard, 232 N Y.S. 582, 225 App Div. 266

Failure to keep usual books

Attorney's failure to keep records, or destruction of or failure to produce records kept, although not included in ambulance chasing charges against him, indicated he violated the law and an intent to hide conditions—In re Marlow, 232 N Y S 573, 225 App Div. 252.

Arrangement for notification of accidents

Attorney, who had an arrangement with an employee of a railroad whereby the latter disclosed telegraphic communications received by the road containing particulars of accidents, so that the attorney might have his "ambulance chaser" at the spot at the earliest possible moment, was guilty of unprofessional conduct—In re Newell, 160 N.Y S 275, 174 App Div. 94.

57. Matter of Hamilton, 24 Philippine 100.

mencing actions without proper retainers;[58] publishing articles laudatory of himself and derogatory of other attorneys;[59] sending communications to persons against whom he has claims to collect in such a form as to indicate that an action has been commenced or that legal proceedings are pending to collect the claim, where such is not the fact,[60] using criminal procedure[61] or threatening criminal proceedings[62] to enforce a civil claim; purchasing litigious rights[63] in a suit in which he is interested as attorney,[64] blackmailing,[65] or aiding a client in carrying through a scheme in the nature of blackmail;[66] defrauding insurance companies by means of fictitious claims,[67] accepting a challenge to fight a duel, or fighting a duel in another state and killing his adversary;[68] obtaining incriminating letters by threats,[69] collusively obtaining a divorce,[70] commencing suit for divorce without authority,[71] moving one's admission against adverse report of examiners;[72] acquiescence in placing of excessive number of lawyers on payroll of sanitary district,[73] stating the law incorrectly to stir up a riot,[74] taking an unfair advantage of a party in the absence of his legal adviser;[75] altering and using before another court an undertaking unsuccessfully used,[76] conniving at a violation of the bankruptcy law,[77] disposing of the property of a bankrupt so as to put it out of the power of the trustee in bankruptcy to recover the property applicable to the claims of creditors,[78] filing a sham petition in order to obtain the taking of a deposition, that the testimony might be published in a newspaper;[79] directing the sheriff to take from defendant on a writ of replevin a large quantity of goods not described in the writ;[80] advising a breach of trust with the design to benefit himself, or assisting a client in a scheme which he knows to be dishonest and fraudulent;[81] conversing before jurors as to the merits of a case in which he is employed,[82] advising client to forfeit bail,[83] securing release of prisoner by imposition,[84] offering to sell evidence to adverse attorney,[85] offering to disclose material testimony on employment as associate counsel,[86] taking money from accused criminal to procure release from custody,[87] nonpayment

58. In re Glucksman, 248 N Y S 1, 230 App Div 135—In re Cohen, 240 N.Y S 350, 228 App Div 465

59. Ill.—People v. Berezniak, 127 N E. 36, 292 Ill 305
S D—In re Morrison, 178 N W. 732, 43 S D 185

60. Pa.—In re Weiss, 176 A 924, 317 Pa. 415.
S D—In re Swihart, 177 N W. 364, 42 S D 628
6 C J p 599 note 42.

Mailing summonses
For a firm of attorneys operating a mercantile collection agency to mail summonses in the hope debtors would take their receipt as the equivalent of personal service, was unlawful—In re Swihart, 177 N.W 364, 42 S D 628

61. Pa—In re Weiss, 176 A 924, 317 Pa 415.
S D—In re Waggoner, 206 N.W. 427, 49 S D 78
6 C J. p 599 note 47.

Instituting prosecution without foundation
It was dishonorable and unprofessional for an attorney to cause prosecution to be instituted without foundation or probable cause to bring about a settlement of a civil action, even though the attorney did not therein represent that he was the county attorney.—In re Waggoner, 199 N W. 244, 47 S D 401.

62. N Y.—In re Feinstein, 253 N Y S 455, 233 App Div. 541—In re Gelman, 245 N Y S 416, 230 App Div. 521—In re Hyman, 235 N Y S 622, 226 App Div. 468—In re Bookman, 188 N Y S 271, 196 App Div 765—In re Beachboard, 263 N Y S 492
S D—In re Bartlett, 197 N W. 285, 47 S D 208

63. In re Zirinsky, 255 N.Y S 493, 234 App Div. 470—6 C J. p 599 note 43

64. People v Gilmore, 177 N E 710, 345 Ill 28

65. People v Blakemore, 141 N E 138, 309 Ill 311—6 C J p 599 note 44.

66. In re Meighen, 214 N W 848, 51 S D 459—6 C J. p 599 note 45.

67. In re Durst, 239 N Y S. 316, 228 App Div. 256.

68. Smith v. State, 1 Yerg (Tenn) 228

69. Matter of Chadsey, 126 N Y S 456, 141 App Div 458, affirmed 95 N E 1124, 201 N.Y 572

70. In re Neary, (Okl) 50 P (2d) 1119—6 C J. p 599 note 49

71. Dillon v State, 6 Tex 55.

72. Matter of Deringer, 12 Phila (Pa) 217

73. In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 333, 351 Ill 206

74. Jones' Case, 12 Pa Co 229.

75. Cal—Carpenter v State Bar of California, 292 P 450, 210 Cal 530
N Y—In re Yardum, 218 N.Y.S. 6, 218 App Div 134.
6 C.J. p 599 note 52.

Concealing attorneyship
It is unethical for a lawyer to conceal his attorneyship, especially when dealing with layman—In re Yardum, 218 N Y S 6, 218 App Div. 134

76. Matter of Goldberg, 29 N Y S. 972

77. In re Naphtaly, (Cal) 14 Cent. L J 96

78. Matter of Joseph, 120 N Y S 793, 135 App Div 589

79. Ex p. Krieger, 7 Mo App 367.

80. In re Goldberg, 63 N Y S 392, 49 App Div 357

81. People v Keegan, 32 P 421, 18 Colo 237, 36 Am S R 274—6 C.J. p 599 note 59

82. Pa—Matter of Carter, 1 Phila 507.
Tenn—Turner v. St. John, 3 Coldw 376.

83. Matter of Pascal, 131 N Y S 823, 146 App Div 836

84. In re Waggoner, 199 N.W 244, 47 S D 401—6 C J p 599 note 63.

Unethical defense
Attorney in disbarment proceedings is guilty of unethical and unprofessional conduct in interposing a defense that a prisoner who had escaped while being transported to another state by the attorney at his request was not legally held by the sheriff because legal commitment had not been issued—In re Waggoner, 206 N W 427, 49 S D 78.

85. In re Enright, 31 A 786, 67 Vt. 351.

86. Chreste v. Commonwealth, 186 S W 919, 171 Ky 77, Ann Cas 1918E 122

87. In re Kelly, 188 N.Y.S. 502, 197 App Div. 41.

of annual license fee,[88] appearing in court to participate in a case in a drunk and intoxicated condition;[89] suspension or disbarment by sister state;[90] giving false testimony before investigating board;[91] failure to appear and answer charges before disciplinary committee,[92] assisting a corporation or another to practice law;[93] passing bad checks,[94] fomenting litigation or instigating lawsuits,[95] bringing actions to extort money,[96] bringing actions on groundless claims,[97] advising prosecution of actions without having been consulted by plaintiff,[98] bringing actions in supreme court instead of municipal court because of greater likelihood of settlement by insurance companies,[99] agreeing to defend persons in advance of commission of criminal offense,[1] advising or aiding person to obtain property other than by orderly processes of law,[2] fraudulently procuring money on false drafts and procuring estate funds from executor without security,[3] obtaining claims against person for purpose of filing petition in bankruptcy;[4] signing client's name to affidavit of inability to pay costs,[5] obstructing the Draft Act,[6] obtaining information from grand jurors concerning their official action;[7] having claims assigned to resident of a town adjoining a city so that suit could be filed before town justice in violation of statute;[8] violation of escrow agreement;[9] intentional violation of the law or constitution.[10]

Insufficient grounds. The following acts, by reason of the circumstances of the particular case, have been held insufficient to warrant suspension or disbarment: Making motion on ground not supported by facts;[11] bringing a suit which the attorney knows cannot be maintained for want of jurisdiction,[12] charging term fees according to a rule of the county bar,[13] submitting an illegal and excessive bill of costs;[14] conspiring to sell to a newspaper a confession of one accused of murder;[15] taking a false acknowledgment as notary public;[16] specializing in personal injury cases;[17] soliciting claims in aid of client's interest[18] without misrepresentation;[19] making contingent fee contracts,[20] failure to have client correct false testimony before leaving witness stand;[21] employment of investigators;[22] irregular

88. In re Gibson, 4 P (2d) 643, 35 N M 550

Penalty of suspension from practice for nonpayment of annual license fee provided by 1927 amendment to State Bar Act will not be imposed for delinquency occurring under original act (L [1927] c 113 § 2, amending L [1925] c 100 § 10)—In re Gibson, 4 P (2d) 643, 35 N M 550.

89. In re Macy, 196 P 1095, 109 Kan 1, 14 A L R 848

90. Minn—In re Leverson, 261 N.W 480.
S D—In re Brown, 264 N W 521.

91. In re Kohler, 270 N Y S 634, 240 App Div 501—In re Branch, 165 N Y.S 688, 178 App Div 585

92. In re Morris, 14 Pa Dist. & Co 164

93. Cal.—Smallberg v State Bar of California, 297 P 916, 212 Cal 113
Minn—In re Otternes, 232 N W. 318, 181 Minn 254, 73 A L R 1319
N Y.—In re Pace, 156 N Y S 641, 170 App Div 818.

94. Minn—In re Karatz, 202 N.W 74, 162 Minn 80
N J—In re P, 169 A 25, 111 N J Law 509
N Y—In re Schiel, 253 N Y S 753, 233 App Div 306

95. In re Cohen, 159 N E 495, 261 Mass 484, 55 A L R 1309

"Interest," within a statute prohibiting attorney from encouraging litigations from motive of interest, means something more than an impersonal desire to assert or vindicate a right.—In re Eaton, 235 N.W. 587, 60 N.D 580.

"Passion," within a statute prohibiting attorney from encouraging litigation from motive of passion, denotes malice, antipathy, hatred, or revenge—In re Eaton, 235 N W. 587, 60 N D 580

96. In re Macy, 196 P. 1095, 109 Kan 1, 14 A L R 848

97. In re Macy, supra

98. Smallberg v State Bar of California, 297 P 916, 212 Cal 113

99. In re Schneidkraut, 246 N Y S 505, 231 App Div. 109.

1. In re Lemisch, 184 A 72, 321 Pa 110—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81

2. Colo—People ex rel. Colorado Bar Ass'n v ———, Attorney at Law, 295 P 917, 83 Colo 325—People v Kelley, 285 P. 767, 87 Colo 88
N M—In re Hittson, 150 P 733, 20 N M 319, L R A 1916A 1171

3. In re Rogers, 235 N.Y S 718, 226 App Div 470

4. People v. Ginsberg, 285 P. 758, 87 Colo 115

5. People v Johnson, 176 N E. 278, 344 Ill 132

6. In re Margolis, 112 A. 473, 269 Pa 206, 12 A L R 1186

7. In re Hittson, 150 P 733, 20 N M 319, L R A 1916A 1171.

8. In re An Attorney, 154 N Y S. 703, 170 App Div 922

9. In re Tanz, 260 N Y S 219, 236 App Div 559—In re Furstenburg, 243 N.Y S 9, 230 App Div. 166

10. U S—Bartos v U S District Court for District of Nebraska, (C. C A Neb) 19 F (2d) 723, reversing (D C) In re Bartos, 13 F (2d) 138. N M—In re Margolis, 29 Pa Dist. 1134

11. Fletcher v. Daingerfield, 20 Cal. 427

12. Hinckley v. Krug, 34 P. 118, 4 Cal Unrep Cas 208

13. In re Aldrich, 86 A. 801, 86 Vt. 531

14. Matter of Zirinsky, 148 N.Y S 517, 163 App Div 960

15. In re Haymond, 53 P. 899, 121 Cal 385

16. Matter of Barnard, 136 N.Y S 185, 151 App Div. 580

17. In re Sizer, 267 S W. 922, 306 Mo 356

18. People v. Edelson, 145 N E. 246, 313 Ill 601.

For petition in bankruptcy

Attorneys who solicited claims for purpose of having creditors sufficient to authorize a petition in bankruptcy, and represented the petitioners in bankruptcy under a mistaken belief that they had authority, were held not guilty of unprofessional conduct, warranting suspension—People v. Edelson, 145 N E 246, 313 Ill 601.

19. People v. Ashton, 180 N E. 440, 347 Ill. 570

20. In re Sizer, 267 S.W. 922, 306 Mo. 356

21. In re Hoover, (Ariz.) 46 P (2d) 647.

22. In re Sizer, 267 S.W. 922, 306 Mo. 356.

conduct by attorney employed by accused prior to his own admission to the bar;[23] advancing living expenses to needy client;[24] belligerent and headstrong attitude, temper and disposition;[25] securing release of aliens from military service;[26] settling infants' cases without a court order[27] especially where the court failed or refused to fix a fee,[28] refusal to answer questions in ambulance-chasing investigation on ground of privilege, but no such claim made in disciplinary proceedings;[29] tendering bill for services to decedent, corroborated by executor, and then withdrawing claim after stubborn contest in court;[30] volunteering services to needy litigants,[31] turning over to another attorney work which accused did not have time to perform, or in preparing papers for such attorney and indorsing such other attorney's name thereon;[32] bringing contempt proceedings to collect judgment from trustee after delay and various proceedings,[33] participation in friendly suit to secure authorization of settlement of claims for personal injuries to infants;[34] solicitation of few isolated cases in attorney's behalf for which he paid no commission[35]

§ 24. —— Nonprofessional Misconduct

Generally, conduct of an attorney outside his professional capacity which shows him to be unfit to manage the affairs of others is ground for his suspension or disbarment.

Commonly, an attorney is free to engage in commercial pursuits of an honorable character and to advertise and to extend his purely mercantile business honestly and fairly by ordinary commercial methods.[36] While it has been held that the court has no jurisdiction to disbar an attorney for misconduct committed in his individual capacity and not in a professional capacity,[37] as a general rule an attorney may be suspended or disbarred for such misconduct unconnected with his professional duties as shows him to be an unfit and unsafe person to manage the legal business of others,[38] although it

23. In re Kling, 186 P. 152, 44 Cal App 267

24. Ill.—People v. McCallum, 173 N. E. 827, 341 Ill. 578
N.Y.—In re Cherry, 240 N.Y.S. 282, 228 App.Div 458.

25. People v A'Brunswick, 146 N.E. 433, 315 Ill 442

26. In re Arctander, 188 P. 380, 110 Wash. 296.

27. In re Schlaimer, 247 N.Y.S. 9, 231 App Div 202—In re Linden, 240 N.Y.S. 274, 228 App Div. 497.

28. In re Fink, 241 N.Y.S. 886, 229 App Div. 338—In re Jeromer, 239 N.Y.S. 304, 228 App Div. 123—In re Goldberg, 238 N.Y.S. 273, 227 App Div. 502.

29. In re Schneidkraut, 246 N.Y.S. 505, 231 App Div. 109.

30. In re Campbell, 1 Ohio App. 413

31. In re Ades, (D.C.Md.) 6 F.Supp 467.

In many cases

Where no proceedings were taken in any court to punish attorney for volunteering, at request of certain organization, services in defense of a colored man accused of murder in hostile community, tender of services in subsequent cases under similar circumstances should not be made the subject of punitive action —In re Ades, (D.C.Md.) 6 F.Supp 467

Notifying court

Attorney volunteering services in defense of accused should notify and consult with court whose duty it is, at least in capital cases, to provide counsel.—In re Ades, (D.C.Md.) 6 F.Supp 467

32. In re Wilmarth, 172 N.W. 921, 42 S.D. 76.

33. In re Wilson, 170 N.Y.S. 725.

34. In re Wilbur, 239 N.Y.S. 483, 228 App Div 197.

35. In re Seidman, 240 N.Y.S. 592, 228 App Div. 515.

36. In re Thibodeau, (Mass.) 3 N.E. (2d) 749.

Where attorney conducting association, furnishing legal service to members, sent to members a list of attorneys which the members could select but permitted them to engage unlisted attorneys, the fact that a partner of such attorney and the son of a partner were named in the list was held not to show impropriety, where the attorney's law firm did not derive any direct advantage therefrom, but such listed attorneys were permitted to retain moneys received for services rendered to the members —In re Thibodeau, (Mass.) 3 N.E. (2d) 749, 106 A.L.R. 542

37. Ark.—Maloney v. State ex rel Cypert, 32 S.W.(2d) 423
La.—State v. Weber, 75 So. 111, 141 La. 448—State v. Fourchy, 31 So. 325, 106 La. 742
Tex.—Lotto v. State, (Civ.App.) 208 S.W. 563

38. U.S.—Bartos v. U.S. Dist. Court for Dist. of Nebraska, (C.C.A.Neb.) 19 F.(2d) 722, reversing (D.C.) In re Bartos, 13 F.(2d) 138
Cal.—In re Shattuck, 279 P. 998, 208 Cal. 6
Colo.—People v. Allen, 295 P. 1107, 88 Colo. 283.
Conn.—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 112 Conn. 262, 269
Fla.—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699
Hawaii.—In re Mills, 17 Hawaii 564.
Idaho.—In re Baum, 186 P. 927, 32 Idaho 676
Ill.—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 333, 351 Ill. 206—People v. Meyerovitz, 116 N.E. 139, 273 Ill. 356
Kan.—In re Wilson, 230 P. 748, 123 Kan. 657
Mass.—In re Carver, 112 N.E. 877, 224 Mass. 169
Minn.—In re Waleen, 250 N.W. 798, 190 Minn. 13—In re Moerke, 238 N.W. 690, 184 Minn. 314—In re Westphal, 237 N.W. 593, 184 Minn. 28—In re Skinner, 214 N.W. 652, 171 Minn. 437—In re Cary, 177 N.W. 801, 146 Minn. 80, 9 A.L.R. 1272.
Mont.—In re Young, 250 P. 957, 77 Mont. 332—In re McCue, 248 P. 187, 77 Mont. 47—In re Callicotte, 187 P. 1019, 57 Mont. 297
Neb.—State v. Scoville, 243 N.W. 269, 123 Neb. 457, followed in State ex rel. Good v. Black, 251 N.W. 109, 125 Neb. 382
N.Y.—In re Dolphin, 147 N.E. 538, 240 N.Y. 89, dismissing appeal 203 N.Y.S. 472, 208 App Div. 223—In re Wilcox, 276 N.Y.S. 463, 243 App. Div. 103—In re Leder, 272 N.Y.S. 154, 242 App Div. 641—In re Fischel, 247 N.Y.S. 168, 231 App Div. 193—In re Goldstein, 220 N.Y.S. 473, 220 App Div. 107, modifying 218 N.Y.S. 944, 218 App Div. 799—In re Somerville, 170 N.Y.S. 879, 183 App Div. 445—In re Isaacs, 158 N.Y.S. 403, 172 App Div. 181.
Okl.—In re Osmond, 54 P.(2d) 319, 174 Okl. 561—In re Hills, 40 P.(2d) 1031, 170 Okl. 427—Warkentin v. Kleinwachter, 27 P.(2d) 160, 166 Okl. 218—State v. Jefferson, 193 P. 44, 79 Okl. 288.
Or.—State v. Mannix, 288 P. 507, 133 Or. 329, rehearing denied 290 P.

745, 133 Or 329—State v. Estes, 209 P. 486, 105 Or 222
Pa—In re Wolfe's Disbarment, 135 A 732, 288 Pa 331, 50 A.L.R 330
S D—In re Morrison, 178 N.W 732, 43 S D 185
Utah—In re Burton, 246 P. 188, 67 Utah 118.
Va—Norfolk & Portsmouth Bar Ass'n v Drewry, 172 S E 282, 161 Va 833
Wash—In re Snelling, 224 P. 600, 129 Wash 56—In re Ward, 179 P. 76, 106 Wash 147—In re Turner, 176 P 332, 104 Wash 276
Wis—State v Ingram, 248 N.W. 915, 212 Wis 142—In re Richter, 204 N.W 492, 187 Wis 490, 41 A.L.R 485.
6 C J p 600 note 78

Immorality or dishonesty

Unprofessional misconduct which would justify disbarment must have an element of immorality or dishonesty, or be of such character as to be in violation of private interests or the public good—People v. Baker, 142 N.E. 554, 311 Ill. 66, 31 A.L.R 737—In re Burton, 246 P. 188, 67 Utah 118.

Statute authorizing suspension of attorney's license for any "unlawful or dishonest or unworthy or corrupt or unprofessional conduct" has been held to authorize discipline or disbarment for conduct committed out of court or disconnected with discharge of any professional duty—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S E 282, 161 Va. 833

Perjury as a witness

(1) It has been held that an attorney who perjures himself while a witness in a proceeding may be disbarred—In re Ulmer, 167 N E 749, 268 Mass. 373—In re Herts, 211 N.W 678, 169 Minn 431—In re O'Keefe, 175 P. 593, 55 Mont. 200—In re Popper, 184 N.Y S 406, 193 App Div 505, 39 N.Y Cr 5.

(2) Technical perjury is not necessary—In re Popper, supra

(3) Nor is it any excuse or defense that the court was not deceived—In re O'Keefe, supra.

(4) To the contrary it has been held that an attorney who gives false testimony or makes a false affidavit in a judicial proceeding in which he was not acting as attorney has been held not liable to suspension or disbarment, since in such a case he is privileged to the same extent as any other witness from any punishment except a criminal prosecution—Beckner v. Commonwealth, 103 S W. 378, 126 Ky. 318, 31 Ky L. 703, 128 Am S R 287.

Particular misconduct held to authorize disciplinary action

(1) Conviction of attorney for conversion of his employer's money while acting as officer of a trust company, notwithstanding that he had not been actually engaged in the practice of law—In re Arrow, 290 N. Y S 677, 248 App Div. 490.

(2) Delivering public addresses under auspices of I. W. W., whose literature, teaching sabotage and criminal syndicalism and advocating serious crimes, was circulated among his listeners with his knowledge.—In re Smith, 233 P. 288, 133 Wash. 145, 43 A.L.R 102.

(3) Habitual drunkenness—Wood v. State, 165 S E 908, 45 Ga App 783—In re Maley, 1 N E (2d) 495, 363 Ill 149

(4) Obtaining money by false promise of marriage—In re Raileanu, 232 N Y S 175, 225 App Div. 90.

(5) Owning monetary interest in social club in which card games for money stakes were played required his suspension—In re Fischer, 247 N Y.S. 168, 231 App Div. 193.

(6) Passing bad checks—In re McCue, 248 P. 187, 77 Mont. 47—State ex rel Sorensen v. Ireland, 251 N W 119, 125 Neb. 570—In re Kammerlohr, 157 N Y S. 933, 171 App Div. 781—State v Mannix, 288 P. 507, 133 Or. 329, rehearing denied 290 P. 745, 133 Or. 329.

(7) Testifying as character witness for known criminal—In re Schachne, (D C N.Y.) 5 F.Supp. 630.

(8) Use by attorney of a petition addressed to Chicago Bar Association charging high federal government official with unprofessional conduct in handling of an estate, and of a petition to probate court involving same matter, in attempt by threat of a public scandal involving the federal administration, to secure a governmental appointment for himself—In re Malmin, 4 N E (2d) 111, 364 Ill. 164.

(9) Vouching for validity of supersedeas bond of underworld character without investigating validity of the obligation—In re Maben, 27 P (2d) 601, 167 Okl 111.

(10) Where attorney, in response to question in verified application for third marriage license whether he was divorced, a widower, or single, had answered, "Single," when, in fact, his first marriage had been annulled and he had been divorced from second wife by unexpired California interlocutory decree, such conduct was held not excusable even if the attorney misconstrued the law and deemed himself free to remarry in another state—In re Schecht, 275 N. Y.S. 712, 242 App Div. 495.

Particular acts held not ground for suspension or disbarment

(1) Contract to obtain appointment of another to public office—Ex parte Redmond, 125 So. 333, 156 Miss 439.

(2) Acts committed and opinions expressed by an attorney of the supreme court during the war, which were not in accord with the standard of patriotism set by the bar association and observed by the average citizen and member of the profession, but which nevertheless did not amount to treason, nor to a violation of the espionage law then in force (U S Comp St [1918] U S Comp.St Annot Suppl [1919] §§ 10212a-10212h), or of any federal or state statute, nor to a violation of the oath and duties of an attorney, as prescribed by the statutes and the decisions and rules of this court—In re Clifton, 196 P. 670, 33 Idaho 614, 19 A.L.R. 931.

(3) Conduct of an assistant corporation counsel assigned to the police department in erroneously ordering the arrest of a witness at a hearing before the chief police inspector—In re Dolphin, 203 N Y S. 472, 208 App Div 223, appeal dismissed 147 N E 538, 240 N.Y. 89.

(4) Instructing and preparing applicants for admission to the bar for taking the examination before the board of law examiners, for which he conducted quiz classes for compensation, although accused must not advertise or represent that he can or will furnish his students with a question or questions which are to be used by the board of law examiners in the examination of the applicants—People v Baker, 142 N E. 554, 311 Ill 66, 31 A.L R. 737.

(5) Shooting and injury of two persons under claimed right of defense of self or property, even if not justified.—State v Metcalfe, 214 N. W. 874, 204 Iowa 123

(6) Stopping payment of check, issued to enable borrower to obtain release of property from attachment, after borrower had informed attorney that borrower could not repay loan.—Warkentin v. Kleinwachter, 27 P (2d) 160, 166 Okl. 213.

(7) Where attorney, to obtain delivery of cleaned and repaired fur coat for wife, delivered a check for small amount, but told the furrier that the check was postdated and not good at the time, and that the attorney expected to make it good by depositing an expected fee and requested the furrier to hold the check until the following Tuesday, but the expected fee did not materialize it was held not to warrant disciplinary action against the attorney, although his checking account had been closed for some time when the check was delivered—In re Hyman, 275 N Y.S. 708, 242 App Div. 492.

Conviction of crime not committed in professional capacity as ground for disbarment see supra § 21.

has been held in some cases that an attorney will not be disbarred for misconduct not in his professional capacity unless such misconduct is infamous or very gross.[39] While it has been held that an attorney acting in ordinary business transactions must exercise a higher degree of care than is required of a layman in the conduct of his private affairs,[40] it has also been held that when an attorney steps aside from his duties as a member of the profession, and engages in business affairs of any character with persons who repose no special confidence in him and to whom he owes no personal obligations, no rule of law compels him to be more careful than the ordinary business man.[41]

Attorney occupying judicial position. The court may disbar an attorney betraying a lack of moral qualifications although acting as a judge, notwithstanding the misconduct bore no relation to his duties and responsibilities in his professional capacity.[42]

§ 25. Defenses

a. In general
b. Limitations and laches
c. Settlement with client

a. In General

Technical defenses are unavailable to an attorney where he knows his conduct was ethically wrong. Failure to interpose a defense is a waiver thereof.

An attorney charged with delinquencies should admit them and make such truthful explanations as he may, and should not rely on technical defenses or employ sophistry in argument in an attempt to establish a superficial justification.[43] Thus, the youth and inexperience[44] motive for the act,[45] honest belief of the attorney,[46] physical disabilities of the attorney,[47] or his financial needs,[48] voluntary intoxication,[49] habitual drunkenness,[50] or previous good character[51] of the accused attorney is no defense to a disbarment proceeding. Nor is the motive for preferring the charges[52] such as for the purpose of collecting money previously converted by the attorney,[53] or for personal spite and revenge,[54] a defense, if the charges are true. Also, it is no defense that the attorney has escaped criminal responsibility,[55] or has testified to his connection with the crime charged.[56] Nor is it any defense that others in the community have been guilty of the same offense,[57] that the at-

39. U S —Bartos v. U. S. District Court for District of Nebraska, (C. C.A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138
Ill —People v Hoering, 148 N E 299, 317 Ill 390.
Utah.—In re Jones, 249 P. 803, 68 Utah 213
6 C J. p 600 note 80.

Changing name of grantee in deed

Attorney's change of name of grantee after execution of deed was held under the circumstances, not a sufficiently serious matter to justify disbarment or suspension —In re Jones, 249 P 803, 68 Utah 213.

40. Minn —In re Waleen, 250 N W. 798, 190 Minn 13
N Y —Feiber v Copeland, 250 N.Y S 429, 232 App.Div 504.

Same standards

That attorney who had collected, and appropriated to his own use, money which he received in payment for stock which he had sold for a client, may have been acting in the matter as agent instead of attorney for the client, was held not to bar consideration of such conduct in discipline proceeding, since attorneys are held to the same standard of fair dealing in their private as in their professional character —In re Hansen, (Mont) 54 P (2d) 882.

41. Cal —In re Soale, 159 P. 1065, 31 Cal App 144
Okl —Warkentin v Kleinwachter, 27 P.(2d) 160, 166 Okl. 213.
S D —In re Case, 182 N W. 638, 44 S D 120
6 C J p 600 note 79.

A mere business transaction by which somebody purchased from a lawyer property, with which she became dissatisfied, cannot afford ground for disbarment, where the lawyer did not act as her attorney nor in a confidential relation, and kept within the law —Buhler v. Trick, 144 N E. 840, 195 Ind. 190

42. In re Stolen, 214 N W. 379, 193 Wis 602, 55 A L R 1355, affirmed 216 N W. 127, 193 Wis. 602, 55 A L R 1355

Borrowing money from criminal

The action of a superior court judge in borrowing money from notorious bootleggers was held to require his disbarment —In re Stolen, 214 N W 379, 193 Wis 602, 55 A L R 1355, affirmed 216 N W. 127, 193 Wis 602, 55 A L R. 1355

43. In re Feinstein, 253 N.Y.S. 455, 233 App Div 541.

Technical legal defenses are not available to an attorney in a disciplinary proceeding where he knows his conduct was ethically and morally without support.—In re Information to Discipline Certain Attorneys of Chicago, 184 N E. 332, 351 Ill 206.

44. In re Breidt, 94 A. 214, 84 N J Eq 222—6 C.J. p 602 note 96

45. State v. Woerndle, 220 P. 744, 109 Or 461.

46. In re Coleman, 156 N Y S. 487, 170 App Div. 537.

47. In re Warrick, 278 N Y S 132, 244 App Div. 48—In re Hyman, 174 N.Y S 306, 186 App Div. 263.

48 Ill —People v. Grusd, 148 N E 860, 318 Ill 44
N Y —In re Warrick, 278 N Y S 132, 244 App Div 48—In re Cunningham, 267 N Y S 846, 239 App Div. 114—In re Campbell, 260 N Y S 80, 236 App Div 439—In re Pollino, 244 N Y S 201, 230 App Div 718—In re McEvcety, 195 N [illegible] 345, 202 App Div 79—In re Earley, 177 N Y S 347, 188 App Div 532—In re Hyman, 174 N Y S 306, 186 App. Div. 263

49. State v. Ledbetter, 260 P. 454, 127 Okl 85

50. People v Tracey, 145 N.E. 665, 314 Ill 434.

51. People v Johnson, 176 N.E. 278, 344 Ill 132—6 C J p 602 note 97.

52. In re Sizer, 267 S W. 922, 306 Mo 356.

53. In re Heath, 227 N.W. 892, 178 Minn. 547.

54. Ill —People v. Holt, 116 N E. 612, 279 Ill 107—People v. Harris, 112 N E 978, 273 Ill. 413.
Mont —In re Hansen, 54 P (2d) 882.
Okl —In re Kelley, 28 P.(2d) 564, 167 Okl. 142
6 C J p 602 note 99.

55. U S —U S. v. Parks, (C.C Colo) 93 F 414
N.Y —Matter of Robinson, 136 N.Y S. 548, 151 App Div 589, affirmed 103 N E 160, 209 N Y 354

56. Matter of Rouss, 147 N Y.S. 713, 162 App Div. 496

57. Ill —In re Information to Discipline Certain Attorneys of Sani-

torney has reformed,[58] that attorney representing party in civil action had no duty to take part in prosecution of case as state's attorney after change of venue was granted,[59] that the misconduct has created a civil liability,[60] that the attorney was ignorant of the law violated,[61] that he was acting for himself and not for another,[62] that legal advice, while holding office of juvenile judge, was given in a foreign jurisdiction,[63] that a partnership existed between an attorney and another whom he defrauded by acts involving moral turpitude,[64] that disbarment would disqualify the attorney from holding office as commonwealth's attorney,[65] that a civil action to collect the money was dismissed by the plaintiff,[66] or terminated in verdict and judgment for respondent,[67] that only a breach of contract occurred,[68] that attorney's opportunity for commission of reprehensible actions was created in part by the client,[69] or that his client has not complained and may not have been injured.[70] Long and intimate friendship with client,[71] failure of client to object because plaintiff's attorney represented him in a former related action arising out of the same matter,[72] threat of mandamus or criminal prosecution,[73] or acquiescence to misuse of fund by one not entitled thereto,[74] constitutes no defense. Also, an unauthorized investment of a client's funds is no defense for failure to pay the money to the client,[75] and an attorney of record, who actually keeps in touch with the matters, may not escape responsibility on the plea that the counsel he retained is to blame,[76] and an attorney who had ordered his card printed as an advertisement in a foreign paper, cannot avoid responsibility for the insertion of the name and address of a disbarred attorney having offices in the same suite by a claim that he had only seen the advertisement once and merely noticed his name, the advertisement being in a language not understood.[77] The failure of the client to make a demand for the payment of money may be of some weight in considering the excuse of forgetfulness.[78]

An attorney is not justified in wrongfully deviating from a strict performance of his duty to the court because of a bona fide belief that his adversary is attempting to take an unfair advantage,[79] nor is an attorney relieved of this duty because he engages in gratuitous employment for a client,[80] and a contention that an investigation, under authority of a statute not in effect at the time the acts were committed, is ex post facto is without merit.[81] Also, the principle that ratification is equivalent to antecedent authority is inapplicable in a proceeding to discipline an attorney for conversion of his client's funds so as to constitute a defense thereto.[82] The capacity of a sanitary district to contract for services of attorneys is no defense to a charge that the attorneys participated in a wrongful use of public funds where they reasonably knew they could not, in good conscience, remain parties to such contract,[83] nor is it a defense that the attorneys waited for work without realizing the injustice of taking public funds without a return therefor.[84]

tary Dist of Chicago, 184 N E 332, 351 Ill 206—People v Jackson, 153 N E 621, 333 Ill 618.
Ohio—In re Meck, 200 N E. 478, 51 Ohio App 237.
6 C J p 602 note 6.

58. Ga—Wood v State, 165 S E 908, 45 Ga App 783
Pa—In re Rosenbaum, 150 A. 748, 300 Pa 465
S D—In re Webb, 159 N.W. 107, 37 S D 509.
Attorney's claim of rehabilitation in disciplinary proceedings should be evidenced by an honest intent to make whatever amends are necessary to clear record of past conduct and by his attitude of cooperation with the persons whose legal duty is to investigate his conduct and make proper recommendations to the supreme court—Wood v State Bar of California, (Cal) 58 P.(2d) 1280.

59. People v Hickman, 128 N E. 484, 294 Ill 471.

60. Maggart v. State Bar of California, (Cal) 61 P (2d) 451—Jacobs v State Bar of California, 25 P. (2d) 401, 219 Cal 59

61. N Y—Matter of Robinson, 125 N.Y S 193, 140 App Div. 329.
S D—In re Schull, 127 N W. 541, 25 S D 602

62. Matter of Bauder, 112 N.Y S 761, 128 App Div 346.

63. People v Lindsey, 283 P. 539, 86 Colo. 458.

64. In re Cruickshank, 190 P. 1038, 47 Cal App 496

65. Commonwealth v Stump, 57 S. W (2d) 524, 247 Ky 589.

66. In re Maloney, 153 N.W 385, 35 N D 1

67. In re Egan, 154 N W 521, 36 S D 228

68. In re Levinson, 188 N Y S 730, 197 App Div 46, reargument denied 191 N.Y S. 935, 199 App Div. 966.

69. In re Casey, 195 N E. 39, 359 Ill 496.

70. In re Hendrick, 241 N Y S 50, 229 App Div. 100—In re Steinberg, 184 N Y S. 450, 193 App Div. 502—In re Ball, 171 N.Y S 489, 184 App Div 18—6 C J. p 602 note 9.

71. State v. Woodville, 108 So. 309, 161 La 125.

72. Michel v. McKenna, 227 N.W 396, 199 Wis 603

73. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E. 332, 351 Ill. 206

74. In re McKee, 188 N Y S. 753, 197 App Div 192

75. In re Gery, 130 A. 307, 284 Pa. 121.

76. In re Heimsoth, 243 N Y S. 149, 229 App Div 194, affirmed 175 N.E. 112, 255 N.Y 409

77. In re Treadwell, 162 N.Y S. 554, 175 App Div. 833

78. In re McCue, 261 P. 341, 80 Mont 537

79. In re Hittson, 150 P 733, 20 N. M 319, L R A 1916A 1171.

80. In re Moore, 150 P. 736, 20 N.M. 312.

81. In re Winne, 280 P. 113, 208 Cal. 35.

82. People v Hillyer, 297 P. 1004, 88 Colo 428.

83. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E 332, 351 Ill. 206

84. In re Information to Discipline

The fact that evidence of misconduct was heard at a former disciplinary proceeding is no defense to a subsequent proceeding where no formal charge based on such misconduct had been made in the first proceeding,[85] and where an attorney, against whom a rule for disbarment was pending, made statements reflecting on the judge, but later apologized, a statement by the judge that the matter is ended has been held to relate to the contempt and not to the rule for disbarment which had not been considered by the court at that time.[86]

It is a good defense that the misconduct was committed by a partner or clerk without authority or knowledge of the accused[87] or that the attorney honestly considered he was not the attorney or agent of the party and acted accordingly.[88]

Failure to interpose a defense constitutes a waiver thereof.[89]

Acquittal of a criminal charge, pardon, etc., as a defense is treated supra § 21.

b. Limitations and Laches

General statutes of limitations are not applicable to disciplinary proceedings, although staleness of a charge may prevent its being considered. Special statutes, if valid, will bar the prosecution of such a proceeding

The general statute of limitations is no defense to a proceeding for the disbarment or suspension of an attorney,[90] nor will the courts establish a limitation as to the time in which such proceedings may be instituted by analogy to the statute of limitations unless, from the nature or circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences.[91]

Staleness in a charge against an attorney may prevent its being considered, because an unreasonable delay in the presentation of a charge of misconduct may make it impossible for an attorney to procure the witnesses or the testimony which would have been available at an earlier time to meet such charge.[92] However, the court will not refuse to hear charges of unprofessional conduct against an attorney because of expiration of long period of time unless it would be unjust to compel him to answer such charges.[93]

Statute specially applicable. It has been held that a proceeding to discipline an attorney is barred where brought after the time prescribed by a statute of limitations specially applicable to such proceedings,[94] and that the repeal of such a statute will not operate to revive the cause of action for disbarring the attorney.[95] However, it has also been held that

Certain Attorneys of Sanitary Dist of Chicago, supra.

85. In re Huppe, 11 P.(2d) 793, 92 Mont. 211.

Expressio unius est exclusio alterius not applicable to judgment

Where an attorney had been reprimanded for misconduct made the basis of a complaint, but no formal charge based on certain other conduct had been made although the referee had made no findings but had submitted the evidence thereof, such conduct may properly be investigated in a subsequent proceeding notwithstanding the court had held another matter, not the basis of a formal charge, in abeyance, the rule expressio unius est exclusio alterius not being applicable—In re Huppe, 11 P (2d) 793, 92 Mont. 211.

86. Wilhelm's Case, 112 A. 560, 269 Pa. 416

87. In re Wilson, 170 N Y S 725.

88. In re Hughes, 242 N W. 711, 186 Minn. 204

89. In re Ulmer, 167 N E. 749, 268 Mass 373

90. Ariz—In re Bailey, 248 P. 29, 30 Ariz 407
Ga.—Wood v State, 165 S.E. 908, 45 Ga App 783.
La.—State v Walker, 75 So. 207, 141 La. 464
Neb.—State v Fisher, 174 N.W. 320, 103 Neb 736.
N.Y.—In re Gavrin, 286 N Y S 208, 246 App Div 397—In re Simpkins, 155 N Y S 521, 169 App.Div 632.
Or.—State v. Mannix, 288 P. 507, 133 Or. 329, rehearing denied 290 P. 745, 133 Or 329—State v Tarpley, 259 P 732, 122 Or. 479—State v. Parker, 252 P 711, 120 Or 465—State v. Woerndle, 220 P. 744, 109 Or. 461
Pa.—Wilhelm's Case, 112 A. 560, 269 Pa 416—In re Stockwell, 21 Pa Co 105
S C.—State v Jennings, 159 S E 627, 161 S C. 263
S D.—In re Egan, 154 N.W. 521, 36 S D 228.
6 C J p 601 note 86.

Disbarment proceedings are civil proceedings and therefore the rule of prescription governing civil actions would more properly be applicable than the rule governing prescription of criminal proceedings.—In re Kenner, 152 So. 520, 173 La. 774.

91. Wood v. State, 165 S E. 908, 45 Ga App. 783—6 C J. p 601 note 87.

92. Ga.—Wood v State, 165 S E. 908, 45 Ga App 783
Minn.—In re Tracy, 266 N.W. 88.
6 C J p 585 note 3, p 601 note 88.

Delay insufficient to constitute a defense

(1) Complaint in disbarment proceeding based on attorney's alleged misconduct terminating several months previously is not stale—Wood v. State, 165 S.E. 908, 45 Ga. App. 783.

(2) Delay of three years in presenting petition to discipline attorney after disbarment in federal court is no defense—In re Ulmer, 167 N E. 749, 268 Mass. 373.

(3) Disbarment is not prevented by a delay of five years in the hearing on the rule, which is not so great as to warrant, a dismissal on the ground of laches, especially as it inured to respondent's benefit—Wilhelm's Case, 112 A. 560, 269 Pa. 416.

Lapse of ten years

That state's attorney nearly ten years before disbarment proceeding represented two complaining witnesses in civil actions based upon the same facts as pending criminal actions prosecuted by him in violation of Pol Code, § 938, but in ignorance of such statute and with no improper motives, gives but little support to a charge of present unfitness to practice—In re Wilmarth, 172 N W. 921, 42 S.D. 76.

93. People ex rel. Chicago Bar Ass'n v Sherwin, 4 N.E (2d) 477, 364 Ill 350.

94. In re Evans, 179 P. 922, 72 Okl 215

95. In re Evans, supra.

a statute providing limitations for the bringing of disciplinary proceedings was invalid.[96]

c. Settlement with Client

Settlement with a client, especially where made after disciplinary proceedings are begun or threatened, is no defense.

Settlement with clients on a basis satisfactory to them, or repayment of the amount due or of part thereof, does not preclude inquiry into the moral and professional quality of an attorney's acts prior to and in connection therewith, and hence is no defense to a proceeding to disbar him, based thereon,[97] especially where made under compulsion.[98] The court will not permit matters affecting the character of its officers to be settled by private arrangement.[99]

Payment after proceedings begun or threatened

Payment or application of the amount due or withheld, when made by the attorney after the proceedings for disbarment have been commenced, or are about to be instituted, does not operate to relieve him from the liability already incurred, and the court may still proceed to disbar him.[1] A fortiori, a mere intent,[2] or offer to make restitution,[3] or a tender of the money withheld,[4] constitutes no defense.

§ 26. Proceedings

The authorities are conflicting as to the venue and entitling of disciplinary proceedings and the joinder thereof with other proceedings.

A requirement that the proceeding be heard in the county of the attorney's residence is not jurisdictional[5] and may be waived,[6] and the question being one of fact, cannot be considered on a motion to dismiss, which deals solely with questions of law.[7]

96. In Minnesota
(1) A statute providing a two year limitation for the bringing of disciplinary proceedings against an attorney has been held invalid—In re Tracy, (Minn.) 266 N.W. 88

(2) Prior thereto it was held that misconduct of an attorney occurring more than the statutory period before the institution of the proceedings was not ground for discipline, unless such conduct was of a continuing nature—In re Waters, 256 N.W. 139, 192 Minn 262—In re Gerlich, 244 N.W. 414, 187 Minn 88—In re Moerke, 238 N.W. 690, 184 Minn 314—In re Buck, 214 N.W. 662, 171 Minn 352—In re Cherry, 208 N.W. 197, 166 Minn 448, 45 A.L.R 1108

97. Colo—People v. Hillyer, 297 P. 1004, 88 Colo 428.
Idaho—In re Burns, 40 P.(2d) 105, 55 Idaho 190
Ill—People ex rel Chicago Bar Ass'n v. Hammond, 191 N.E. 215, 356 Ill 581.
Ky.—Denny v. Commonwealth, 194 S.W. 330, 175 Ky 357
Mont.—In re Hansen, 54 P.(3d) 882
Neb—State v. Priest, 242 N.W. 433, 123 Neb. 241.
N.Y.—In re Yochelson, 258 N.Y.S. 724, 236 App Div 307—In re Pollane, 244 N.Y.S 201, 230 App Div 318—In re O'Connor, 236 N.Y.S. 25, 226 App Div. 600—In re Little, 161 N.Y.S. 570, 175 App Div 280
Pa—In re Kraus, 185 A. 737, 322 Pa. 362.
S.D—In re Nelson, 214 N.W. 808, 51 S.D. 451.
Wash—In re Gowan, 176 P. 7, 104 Wash. 166.
6 C.J. p 601 note 89.

Claim by attorney to part of sum in hand does not excuse his failure to pay over promptly to his client the part as to which there is no claim—In re Kraus, 185 A. 737, 322 Pa. 362.

98. Cal—Maggart v. State Bar of California, 61 P.(2d) 451—Ring v State Bar of California, 24 P.(2d) 821, 218 Cal 747.
Mont.—In re Hansen, 54 P.(2d) 882
N.Y—In re Westcott, 156 N.Y.S. 504, 170 App Div 541.

99. State v. Priest, 242 N.W. 433, 123 Neb 241.

1. Ill—People ex rel. Chicago Bar Ass'n v. Chancellor, 192 N.E. 641, 358 Ill. 112—In re Borchardt, 192 N.E. 383, 357 Ill 458—People ex rel. Chicago Bar Ass'n v. Kwasigroch, 192 N.E. 221, 357 Ill 302—In re Zahn, 190 N.E. 419, 356 Ill. 283—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N.E. 424, 353 Ill 399—People v. Hansen, 185 N.E. 225, 352 Ill. 144—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N.E. 332, 351 Ill 206—People v. Grusd, 148 N.E. 860, 318 Ill 44.
Iowa—In re Cloud, 250 N.W. 160, 217 Iowa 3.
Mont—In re McCue, 261 P. 341, 80 Mont 537
N.Y—In re Porcella, 272 N.Y.S 235, 241 App Div. 344—In re Babcock, 243 N.Y.S 489, 230 App Div 323—In re Doody, 222 N.Y.S 551, 221 App Div 15—In re Walsh, 217 N.Y.S 253, 217 App Div. 437—In re Galland, 203 N.Y.S 42, 208 App. Div 48—In re Makay, 203 N.Y.S. 15, 208 App Div. 44—In re McElveety, 195 N.Y.S. 345, 202 App Div. 79—In re Kelly, 188 N.Y.S. 502, 197 App Div. 41—In re MacWilliams, 184 N.Y.S 343, 193 App. Div. 499—In re Earley, 177 N.Y.S 347, 188 App Div. 532—In re Hyman, 174 N.Y.S 306, 186 App Div. 263—In re Flowerman, 168 N.Y.S. 860, 181 App Div. 488
Pa—Breslin v. Board of Governance of Pennsylvania Bar, 175 A 378, 316 Pa. 392—Wilhelm's Case, 112 A. 560, 269 Pa 416—In re Goldbacher, 20 Pa Dist & Co 597—In re Bonner, 20 Pa Dist. & Co 593
6 C.J. p 601 note 91.
In Kentucky
(1) It has been held that an attorney is entitled to an opportunity to repay the client before disciplinary action is begun.—Evans v. Wade, 278 S.W. 604, 212 Ky. 238.

(2) But a failure to pay over the money to clients has been held not excused by efforts to settle with them or by payment of some of them after the institution of disbarment proceedings—Commonwealth, for and on behalf of Pike County Bar Ass'n, v. Hinton, 72 S.W (2d) 481, 254 Ky. 798.

2. Mich—In re Coburn, 174 N.W. 134, 207 Mich 350.
N.Y—In re Cunningham, 267 N.Y.S. 346, 239 App Div. 114.
S.D—In re Kaas, 162 N.W. 370, 39 S.D 4
6 C.J. p 602 note 93.

3. Matter of Z———, 39 Mo App 426

4. Clegg v. Baumberger, 9 N.E 700, 110 Ind 536.

5. Peters v State Bar of California, 26 P.(2d) 19, 219 Cal 218.

6. Peters v. State Bar of California, supra.
Hearing without objection
Attorney submitting, without objection, to hearing in disciplinary proceeding, held in county other than required by statute, could not raise the objection on petition to annual recommendation of the board of governors of the state bar for suspension from practice—Peters v. State Bar of California, 26 P.(2d) 19, 219 Cal 218.

7. In re Ulmer, 167 N.E 749, 268 Mass 373.

How entitled. The proceeding is sometimes entitled in the name of the state at the relation of the prosecuting attorney, attorney-general, or other public officer who institutes it,[8] and sometimes in the name of a client[9] or the bar association.[10] Since a proceeding to disbar an attorney is not a criminal proceeding, it need not run in the name of the state,[11] and the practice quite generally prevails of entitling it either Ex parte, In re, or In the Matter of, followed by the name of the accused, and such title seems preferable as indicating more accurately the real nature of the proceeding.[12]

A mere clerical error in the entitling of the petition will not vitiate it.[13]

That the information on which the proceeding is based does not proceed in the name of the aggrieved client and does not comply with strict rules of pleading with reference to the caption is immaterial, its only purpose being to bring to the attention of the court and the attorney for the state the facts, so that they may determine whether the case is one calling for further action.[14]

Joinder of proceedings. While there is authority to the effect that contempt and disbarment proceedings may be joined,[15] it has also been held that contempt and disbarment proceedings are distinct proceedings and should not be combined.[16]

While it has been held that a court cannot require the matter of a substituted attorney's disbarment to be tried with a proceeding for the former attorney's discharge,[17] it has also been held that the court has power to consider charges of misconduct against an attorney on the appeal of his client's case where sufficient cause is shown for the institution of disbarment proceedings.[18]

Proper party. In a proceeding to discipline an attorney for failure to pay over funds, the client, a collection company, being interested in the proceeds was a proper party to the proceeding as relator.[19]

Public hearing. An attorney who failed to demand a public trial in the proceedings for his suspension could not claim that he was deprived of a public hearing.[20]

§ 27. —— Notice and Preliminary Proceedings

a. Notice
b. Preliminary proceedings

a. Notice

Subject to some exceptions, an attorney is entitled to notice, which may be constructive or by publication where the attorney cannot be found.

The general rule is that before an attorney may be removed from his office by a court, whether under a statute or in the exercise of its inherent powers, he is entitled to notice and opportunity to be heard in defense,[21] and a statute providing that an attor-

8. Denny v. Commonwealth, 194 S W. 330, 175 Ky. 357—6 C.J. p 604 note 34.

Requiring election in whose name to prosecute has been held properly refused—Denny v. Commonwealth, 194 S W. 330, 175 Ky. 357.

9. Wilson v. Popham, 15 S.W. 859, 91 Ky 337, 13 Ky L 904.

10 Boston Bar Assoc v Casey, 97 N E 751, 211 Mass. 187, 39 L R A. (N S) 116, Ann.Cas 1913A 1226.

11 Ky.—In re McDonald, 162 S W. 566, 157 Ky 92.
Mo—In re Bowman, 7 Mo App. 569.
N D—In re Crum, 75 N W. 257, 7 N. D 316

12. Schwartz v State, 18 Ohio App. 373—6 C J p 604 note 33.

13. State v. Greenfield, 162 P. 858, 93 Or. 407.

14. Denny v. Commonwealth, 194 S W 330, 175 Ky. 357.

15. Kan—In re Hanson, 5 P.(2d) 1088, 134 Kan. 165
Ohio.—State v. Albin, 161 N E. 792, 118 Ohio St. 527.

16. State v Fisher, 174 N.W. 320, 103 Neb. 736—6 C.J. p 596 note 5.

17. U S. v. Hicks, (C C A Cal) 37 F (2d) 289

18. Vivian Collieries Co. v Cahall, 110 N.E 672, 184 Ind. 473

19. Denny v. Commonwealth, 194 S W. 330, 175 Ky 357

20. State Bar of California v Jones, 280 P 964, 208 Cal 240

21. U S—Conley v. U S, (C C A Minn) 59 F (2d) 929—U S v. Hicks, (C C.A Cal) 37 F (2d) 289—Bartos v U S Dist Court for Dist. of Nebraska, (C.C A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138.
Ariz—In re Bailey, 248 P. 29, 30 Ariz 407
Ark—Dickerson v. State, 179 S W 324, 120 Ark. 9.
Cal—In re Reid, 187 P. 7, 182 Cal 33.
Mass—In re Keenan, 192 N E 65, 287 Mass 577, 96 A L R 679—In re Ulmer, 167 N.E 749, 268 Mass 373—Bar Ass'n of City of Boston v. Sleeper, 146 N E 269, 251 Mass 6.
Minn—In re Diesen, 215 N W. 427, 173 Minn 297
N M—State v. Raynolds, 158 P. 413, 22 N M 1.
S.D—In re Hosford, 252 N.W. 843, 62 S D. 374.
Utah—Foster v. Burton, 232 P. 917, 64 Utah 550—Higgins v. Burton, 232 P 914, 64 Utah 562
Vt—In re Haddad, 173 A. 103, 106 Vt 322
6 C J p 604 note 39.

Thirty days' notice is reasonable, is due process, and a determination of the issue by the judge in disbarment proceedings is the exercise of judicial power and is not a denial of the right of trial by jury.—Ex parte Cashin, 90 So 850, 128 Miss 224.

Notice of facts constituting misconduct

(1) An attorney in disciplinary proceedings against him is entitled to notice setting forth the facts constituting such misconduct—In re Ulmer, 167 N.E 749, 268 Mass 373—State v. Smith, 99 S E. 332, 84 W.Va 59

(2) Omission of a copy of findings of federal court disbarring attorney from papers ordered to be served on attorney in disciplinary proceedings is not a fatal defect, on motion to dismiss, the attorney being familiar with such findings—In re Ulmer, supra.

Citation signed by judge in vacation

A citation to appear, signed by a

ney shall be suspended after a complaint is filed in disbarment proceedings until the question in disbarment is finally determined has been held invalid.[22] Such notice need not be in the form of technical process,[23] and does not require the seal of the court,[24] the teste of a judge,[25] or authentication by the clerk.[26] While it has been held that the notice or citation must be served on the attorney and returned,[27] and that leaving a copy at the attorney's residence or most notorious place of abode is insufficient,[28] it has also been held that, although the proceeding is in the nature of a civil action as shown infra § 28, it is not a civil action in the strict sense that service of summons as required in civil actions is necessary to give the court jurisdiction, and the court may adopt any method of notice which gives the attorney the privilege of making his defense,[29] and service by mail[30] or by publication,[31] or substituted or constructive service,[32] has been held sufficient where the attorney is absent from the state and cannot, after due diligence, be found, provided there is a statute or rule of court authorizing such service.[33]

An attorney failing to answer an accusation after notice to appear and answer is not entitled to a notice of the meeting of a local administrative committee where the rules of procedure of the state bar provide that on failure to answer the accusation the committee might proceed to a determination without further notice to the attorney.[34]

Exceptions to rule requiring notice. Where an offense by an attorney is committed in the presence of the court,[35] or where he has been convicted of a felony or a misdemeanor involving moral turpitude, and where the record of his conviction has been duly certified to the court,[36] no notice is necessary. Nor is it necessary in proceedings of this kind that the accused attorney be given notice and an opportunity to be heard before the board of law examiners or the officer thereof who conducts the preliminary investigation.[37]

Waiver. Where an attorney appears in answer to each rule in disbarment proceedings, the question of formal notice drops out of the case.[38]

b. Preliminary Proceedings

Where the facts before the court are indefinite, it may order inquisition into conduct of attorneys.

Where the information is so indefinite as to make

judge in vacation, and giving the attorney thirty days to prepare his defense, has been held sufficient—Ex parte Cashin, 90 So. 850, 128 Miss 224

Refusal to issue rule on original information for disbarment has been held not to bar issuance of rule on subsequent information—Commonwealth v. Stump, 57 S W (2d) 524, 247 Ky 589

Ordinary writ of summons not proper

A disbarment proceeding cannot be instituted or maintained by an ordinary writ of summons and attachment—Philbrick v. Creed, 117 N E 637, 228 Mass 382.

Before United States supreme court

On proceedings to disbar a member of the supreme court of the United States on the ground of disbarment by state court, opportunity should be given to point out any ground which would prevent the supreme court from giving effect to finding of state court establishing want of fair private and professional character—Selling v. Radford, (Mich) 37 S Ct 377, 243 U S 46, 61 L Ed 585, Ann Cas 1917D, 569.

22. McMurchie v Superior Court of Yavapai County, 221 P. 549, 26 Ariz 52

23. In re Ulmer, 167 N E 749, 268 Mass. 373—6 C J p 604, note 40.

24. Mass—In re Allin, 112 N E 494, 224 Mass 9
Or—State v. Hall, 190 P. 304

25. In re Allin, 112 N E 494, 224 Mass. 9.

26. State v Hall, (Or) 190 P 304

27. Strickland v Willingham, 175 S E 605, 49 Ga App 355—6 C J. p 604 note 41

28. Strickland v Willingham, supra

29. Miss—Ex parte Cashin, 90 So 850, 128 Miss. 224
Wash—State v Willis, 163 P. 737, 95 Wash 251

30. In re Allen, 41 Pa Co. 562—6 C J. p 605 note 42.

31. In re Holland, 274 P 559, 96 Cal App 655

32. In re Craven, 151 So 625, 178 La 372, 90 A L R 973—In re Heard, 125 So 593, 169 La. 559—In re Craven, 125 So 591, 169 La 555

Service on attorney's counsel of record

Service of notice of complaint in disbarment proceedings on counsel of respondent attorney instead of on respondent attorney was held not to deprive the committee on grievances of Chicago Bar Association as commissioners of supreme court of jurisdiction where the counsel on whom notice was served represented respondent attorney in other complaints filed in the same proceedings and was of record in instant proceedings in supreme court—In re Mack, 196 N E 197, 360 Ill 343

33. In re Heard, 125 So 593, 169 La 559—In re Craven, 125 So 591, 169 La 555

34. In re Pilkington, (Nev) 49 P 2d 965.

35. Mass—Bar Ass'n of City of Boston v. Sleeper, 146 N E 269, 251 Mass 6
Utah—Higgins v Burton, 232 P. 914, 64 Utah 562—Foster v. Burton, 232 P. 917, 64 Utah 550
6 C J. p 605 note 43

36. Cal—In re Thompson, 174 P. 86, 37 Cal App 344—In re Shepard, 170 P 442, 35 Cal App 492.
Mont—In re Peters, 235 P. 772, 73 Mont 234
N C—State v Harwood, 173 S E 24, 206 N C 807.
6 C J p 605 note 44.

Circumstances dispensing with notice

Superior court was held authorized to suspend attorney against whom disbarment proceedings were pending for refusal to present evidence in disbarment proceedings which he had commenced against another attorney and because of the court's knowledge that he had been convicted of a crime involving moral turpitude, notwithstanding that the attorney was given no notice of intended action, except recital of facts to the attorney on which the court would pass an order suspending him—De Krasner v. Boykin, (Ga App.) 186 S E 701.

37. La—State v. Fourchy, 31 So. 325, 106 La. 743.
Minn—State Bd of Law Examiners v Byrnes, 105 N W. 965, 97 Minn. 534.

38. Wilhelm's Case, 112 A. 560, 269 Pa. 416.

charges impossible or improper without further inquisition, the court may order such inquisition[39] and may appoint a committee to furnish it with specific information as to the conduct of attorneys,[40] and the requirements of the law as to the formulation of a charge are inapplicable thereto in advance of the preferment of the charge.[41] A statute authorizing the commissioners of the state bar to appoint committees to investigate charges against members of the bar and to report their findings has been held not invalid.[42]

The written accusation of a grievance committee of a bar association necessary to institute disbarment proceedings by calling the court's attention to the misconduct must be properly signed, duly attested, and accompanied by a sufficient affidavit,[43] which affidavit is in the nature of a bill of particulars attached to the accusation of the grievance committee.[44]

The attorney is not entitled to a transcript of the testimony given before a committee investigating his conduct[45] nor to cross-examine the witnesses appearing before such committee.[46]

Factual basis necessary. In order to move a court to action to discipline attorneys with respect to their general conduct, it is essential that a factual basis for such action be presented to it.[47]

§ 28. —— Nature and Form

Strictly speaking, disbarment proceedings are neither civil nor criminal, but special proceedings to preserve the courts and the public from ministrations of unfit persons. Courts may prescribe a method of procedure where none is provided.

Proceedings for the disbarment or suspension of attorneys are judicial proceedings,[48] and while it has been held that they are not criminal proceedings,[49] there is authority to the effect that they partake of the nature of criminal prosecutions or are quasi criminal,[50] although generally, they are held to be of a civil, rather than of a criminal,

39. Del.—Pyle v. Yarowsky, 146 A. 296, 16 Del.Ch. 280.
N.Y.—People ex rel. Karlin v. Culkin, 162 N.E. 487, 248 N.Y. 465, 60 A.L.R. 851, affirming 228 N.Y.S. 873, 228 App.Div. 822.
Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

Need not be public

A preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right, is not a sitting of a court within the fair intendment of a statute whereby sittings of a court are required to be public.—People ex rel. Karlin v. Culkin, 162 N.E. 487, 248 N.Y. 465, 60 A.L.R. 851, affirming 228 N.Y.S. 873, 228 App.Div. 822.

Compulsory process

Court's power to inquire into attorneys' professional conduct imports power to employ appropriate and adequate methods, including compulsory process.—People ex rel. Karlin v. Culkin, 162 N.E. 487, 248 N.Y. 465, 60 A.L.R. 851, affirming 228 N.Y.S. 873, 228 App.Div. 822.

Subpoena duces tecum regularly issued on an order of the supreme court has been held effective to require attorneys to appear to testify before a bar association or committee.—In re Investigation by Bar Ass'n of Hudson County, 160 A. 809, 109 N.J.Law 275.

40. In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

Report as to other additional misconduct

(1) Where the court appointed a committee not only to ascertain whether members of the bar had connection with organized crime, but for the purpose of investigating charges against the professional conduct of members of the bar, the committee was authorized to make a report with recommendation as to other unprofessional matters revealed by the investigation, because when the rule was issued covering matters reported, a case against the offenders had legal life from that moment only.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

(2) Committee appointed by judge to institute disbarment proceedings could investigate charges of unprofessional misconduct, even though not submitted by the judge.—In re Abrams, 173 N.E. 312, 36 Ohio App. 384.

41. People ex rel. Karlin v. Culkin, 162 N.E. 487, 248 N.Y. 465, 60 A.L.R. 851, affirming 228 N.Y.S. 873, 228 App.Div. 822.

42. In re Edwards, 266 P. 665, 45 Idaho 676.

43. Committee on Grievances of State Bar Ass'n v. Strickland, 158 S.E. 110, 200 N.C. 630.

44. Committee on Grievances of State Bar Ass'n v. Strickland, supra.

45. Idaho.—In re Edwards, 255 P. 906, 44 Idaho 163.
Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

46. In re Disbarment Proceedings, supra.

47. Application of City Club of New York, 253 N.Y.S. 100, 233 App.Div. 351.—In re Rochester Bar Ass'n's Resolutions, 236 N.Y.S. 76, 226 App.Div. 233.

Affidavits insufficient

Affidavits filed incidental to an appeal of a law case have been held insufficient to justify an investigation into the professional misconduct of an attorney.—Vivian Collieries Co. v. Cahall, 110 N.E. 672, 184 Ind. 473.

48. In re Crum, 204 P. 948, 103 Or. 296.

49. Cal.—In re Winne, 280 P. 113, 208 Cal. 35.—San Francisco Bar Ass'n v. Sullivan, 198 P. 7, 185 Cal. 621.
Fla.—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699.
La.—In re Craven, 151 So. 625, 178 La. 372, 90 A.L.R. 973.
N.Y.—In re Lynch, 238 N.Y.S. 482, 227 App.Div. 477.—In re Spencer, 201 N.Y.S. 315, 206 App.Div. 806.—In re Popper, 184 N.Y.S. 406, 193 App.Div. 505, 39 N.Y.Cr. 5.—In re O'Neill, 171 N.Y.S. 514, 184 App.Div. 75.—In re Herrman, 161 N.Y.S. 977, 175 App.Div. 310.—In re Ropiecki, 282 N.Y.S. 947.
Okl.—In re Sitton, 177 P. 555, 72 Okl. 13.
Or.—State ex rel. Seton v. Arnold, 28 P.(2d) 846, 145 Or. 634.
Va.—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S.E. 282, 161 Va. 833.

Disciplinary proceedings are not criminal, and their privilege is not to punish but to inquire into the conduct of an officer of the court, and hence purely criminal aspect of attorney's conduct in giving false financial statement or false testimony was not involved in disciplinary proceedings.—In re Kunstler, 289 N.Y.S. 107, 248 App.Div. 393.

50. Ga.—Strickland v. Willingham, 175 S.E. 605, 49 Ga.App. 355.
Ky.—Lenihan v. Commonwealth, 176 S.W. 948, 165 Ky. 93, L.R.A.1917B 1132.

nature,[51] and, consequently do not fall within that class of cases that entitles the attorney to a jury trial, see the title Juries § 66 [35 C.J. p 186 notes 84, 85]. However, strictly speaking, such proceedings are neither civil actions nor criminal prosecutions,[52] but are special proceedings,[53] peculiar to themselves,[54] sui generis,[55] disciplinary in nature,[56] and of a summary character, resulting from the inherent power of the courts over their officers,[57] and they usually relate to conduct unbecoming to an attorney after his admission to practice.[58] Such a proceeding is not a lawsuit between parties litigant,[59] but is rather in the nature of an inquest or inquiry as to the conduct of the respondent.[60]

Although the word punishment is frequently used[61] and it cannot be questioned that disbarment is punishment,[62] it is almost universally held that the proceeding is not for the purpose of punishment of the attorney,[63] but to determine the fitness of an

N D—In re Eaton, 235 N.W. 537, 60 N.D. 530.
6 C J p 602 note 11.

51. Ark—Maloney v State, 32 S.W. (2d) 423, 182 Ark. 510
Idaho—In re Baum, 186 P. 927, 32 Idaho 676
Ky—Lenihan v Commonwealth, 176 S W. 948, 165 Ky. 93, L R A 1917B 1132
La—In re Kenner, 152 So. 530, 178 La. 774—State v. Flynn, 107 So 314, 160 La 483.
Mich—Attorney General v. Lane, 243 N W. 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct. 115, 287 U S 654, 77 L Ed 565
N J—In re Breidt, 94 A. 214, 84 N J Eq. 232.
Okl—In re Connell, 192 P. 564, 79 Okl 212—State Bar Comm v Sullivan, 131 P 703, 35 Okl. 745, L R. A 1915D 1218
S D—In re Morrison, 178 N.W 732, 43 S D 185—State v. Kirby, 154 N. W 284, 36 S D. 188.
Tex—Houtchens v State, (Com App) 63 S.W (2d) 1011, reversing (Civ App) 47 S W (2d) 679, and motion granted (Com App) 74 S W. (2d) 976—Houtchens v. Mercer, (Com App) 29 S W (2d) 1031, 69 A L R. 1103
Va.—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S E 282, 161 Va. 833.
Wash—State v. Rossman, 101 P 357, 53 Wash 1, 21 L R A (N S.) 821, 17 Ann Cas. 625.
W.Va.—Hall v. Eary, 170 S.E. 904, 114 W Va. 82
6 C J. p 602 note 15.

"This distinction must be borne in mind: The law punishes one for what he does, not for what he is, while an attorney is disbarred because of what he is as proven, as of course it only could be proven, by what he has done It is this that fundamentally differentiates a disbarment proceeding from a criminal prosecution, and proves the correctness of the holding that a disbarment proceeding is purely civil in its nature."—In re Egan, 154 N. W. 521, 36 S D. 228.

As respects procedural matters

As respects pleading, jurisdiction, supersedeas, and other procedural matters, a disbarment suit is a "civil suit"—Burns v State, (Tex.Civ. App) 76 S W (2d) 172, error granted

Criminal procedure rules not applicable

A disciplinary proceeding is not governed by the procedural rules appertaining to the trial of one accused of a criminal offense—Johnson v State Bar of California, (Cal) 52 P (2d) 928—In re Needham, 4 N. E (2d) 19, 364 Ill. 65.

52. Ala—Ex parte Thompson, 152 So. 239, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala. 130, and In re Countryman, 152 So 257, 228 Ala. 21—McCord v. State, 126 So 873, 220 Ala. 466.
La—In re Mundy, 158 So. 563, 180 La. 1079.
Miss—Ex parte Redmond, 125 So 833, 156 Miss. 439
Mo.—In re Sparrow, 90 S W (2d) 401—In re Richards, 63 S W.(2d) 672, 333 Mo 907.
Nev—Washoe County Bar Ass'n v Scoular, 190 P. 899, 44 Nev 208.
Ohio—Schwartz v. State, 18 Ohio App 373.
Or.—State v. Greenfield, 162 P. 358, 93 Or 407.
6 C J. p 602 note 12.

53. Cal—In re Winne, 280 P 113, 208 Cal 35—In re Morganstern, 215 P 721.
N M—In re Zinn, 34 P (2d) 1097, 38 N M. 449.
N Y—In re Mathot, 117 N E 948, 222 N Y 8, granting dismissal of appeal 166 N.Y S. 217, 178 App Div 759
Ohio—Schwartz v. State, 18 Ohio App. 373
6 C J p 602 note 13.

54. Cal—Marsh v. State Bar of California, 39 P (2d) 403, 2 Cal.(2d) 75—In re Vaughan, 209 P. 353, 189 Cal 491, 24 A L R 858
Nev—Washoe County Bar Ass'n v. Scoular, 190 P. 899, 44 Nev 208.

55. Ala—Ex parte Thompson, 152 So. 239, 228 Ala. 113, followed in Ex parte Walker, 152 So 246, 228 Ala 130, and In re Countryman, 152 So. 257, 228 Ala 21
Mo—In re Sparrow, 90 S W.(2d) 401—In re Richards, 63 S W.(2d) 672, 333 Mo 907—In re Noell, (App) 96 S.W (2d) 212—In re H——— S———, (App.) 69 S.W. (2d) 325.
Or—State ex rel Seton v. Arnold, 28 P.(2d) 346, 145 Or. 634.

56. In re Popper, 184 N Y S. 406, 193 App Div. 505, 39 N.Y.Cr. 5.

57. Ala.—McCord v. State, 126 So. 873, 220 Ala. 466.
Iowa—State v Kaufmann, 209 N.W. 417, 202 Iowa 157.
La.—In re Mundy, 158 So. 563, 180 La. 1079
6 C.J. p 602 note 13.

58. Gibson v. Lee, (Ga.App) 181 S. E. 192

59. Idaho—In re Baum, 186 P. 927, 32 Idaho 676.
W Va—State v. Smith, 99 S E. 332, 84 W Va. 59.
6 C J p 602 note 12 [a].

Not adversary proceeding

A proceeding to vacate an order of admission to the bar is not adversary in the sense that the attorneys filing the information are adverse parties without standing as plaintiffs because not parties to the ex parte proceeding for admission—In re McDonald, 164 N E 261, 200 Ind 424.

60. Idaho—In re Baum, 186 P. 927, 32 Idaho 676
Mo—In re Richards, 63 S W.(2d) 672, 333 Mo. 907.
N M—In re Zinn, 34 P.(2d) 1097, 38 N M 449.
W.Va—State v. Smith, 99 S.E. 332, 84 W Va. 59

61. Cal—Marsh v. State Bar of California, 39 P (2d) 403, 2 Cal. (2d) 75
N J—In re Breidt, 94 A. 214, 218, 84 N.J Eq 222
"And yet, after all, I know of no better term in which to characterize the plight of a disciplined solicitor, one disbarred or suspended, than as 'punishment.' That is the term used by our Supreme Court . . . and it amounts to punishment by whatever name called."—In re Breidt, supra.

62. Lenihan v. Commonwealth, 176 S W 948, 165 Ky. 93, L.R.A.1917B 1132.

63. U.S—Ex p. Wall, (Fla.) 2 S Ct. 569, 107 U.S. 265, 27 L Ed. 552—Duke v. Committee on Grievances of the Supreme Court of the Dis-

officer of the court to continue in that capacity[64] and to preserve and protect the courts of justice and the public from the official ministration of persons unfit to practice.[65]

In some jurisdictions there are two methods by which an attorney may be disbarred: (1) By the exercise of the inherent power of the courts in the orderly administration of public justice; (2)

trict of Columbia, (App D C) 82 F (2d) 890, certiorari denied 56 S Ct 751—Hertz v. U. S, (C C A Minn) 18 F (2d) 52
Ark—Maloney v. State, 32 S W.(2d) 423, 182 Ark. 510
Cal—Hill v. State Bar of California, 42 P (2d) 629, 2 Cal (2d) 622—Marsh v. State Bar of California, 39 P.(2d) 403, 2 Cal (2d) 75—McIntosh v. State Bar of California, 294 P. 1067, 211 Cal 261—In re Vaughan, 209 P 353, 189 Cal 491, 24 A L R. 858—In re Cate, 212 P. 694, 60 Cal App 279—In re Shepard, 170 P. 442, 35 Cal App 492
Colo—People v. Irwin, 152 P. 905, 60 Colo. 177
Conn—In re Kone, 97 A. 807, 90 Conn 440.
Idaho—In re Burns, 40 P (2d) 105, 55 Idaho 190—In re Kerl, 188 P. 40, 32 Idaho 737, 8 A L R. 1259—In re Wourms, 170 P. 919, 31 Idaho 291.
Ill—In re Borchardt, 192 N E 383, 357 Ill. 458
Kan—In re Gorsuch, 214 P. 794, 113 Kan. 380.
Ky.—Commonwealth v. Porter, 46 S W (2d) 1096, 242 Ky. 561—Chreste v Commonwealth, 198 S W 929, 178 Ky 311.
La—In re Mundy, 158 So 563, 180 La 1079—State v. Gowland, 140 So 500, 174 La 351
Mo.—In re Sparrow, 90 S W (2d) 401—In re Richards, 63 S W (2d) 672, 333 Mo 907—In re H——— S———, (App) 69 S W (2d) 325
Neb—State ex rel Sorensen v Goldman, 255 N W 32, 127 Neb 340—State ex rel Sorensen v Ireland, 251 N W. 119, 125 Neb 570—State v. Priest, 242 N W. 433, 123 Neb. 241.
N J—In re Breidt, 94 A. 214, 84 N. J Eq 222
N Y—In re Rouss, 116 N E. 782, 221 N Y 81, affirming 155 N Y S 557, 169 App Div. 629, reargument denied and amendment of remittitur granted 117 N E 1083, 221 N Y 667—In re Mahan, 262 N Y S 702, 237 App Div 664—In re Heitrick, 197 N Y S 6, 203 App Div 512—In re Ropiecki, 232 N Y S 947
Ohio—Schwartz v. State, 18 Ohio App 373
Okl—In re Lane, 54 P.(2d) 339—In re Green, 49 P (2d) 197—In re Bond, 31 P.(2d) 921, 168 Okl 161—State v Ledbetter, 260 P. 454, 127 Okl 85
Or—State ex rel. Seton v. Arnold, 28 P (2d) 846, 145 Or. 634
Pa—In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa 555—In re Oliensis, 26 Pa Dist. 853.
S C—State v Jennings, 159 S E 627, 161 S C 263
S D—In re Brown, 264 N W 521—In re Byrne, 262 N W. 236—In re Hosford, 252 N W 843, 62 S D. 374—In re Egan, 218 N W. 1, 52 S D 394—In re Nelson, 214 N W. 803, 51 S D 451—In re Egan, 154 N W 521, 36 S D 228
Tex—Burns v. State, (Civ App) 76 S.W (2d) 172, error granted.
Va—Norfolk & Portsmouth Bar Ass'n v Drewry, 172 S E 282, 161 Va 333
Wis—State v Kern, 233 N W 629, 203 Wis 178—State v. Barto, 232 N W 553, 202 Wis 329
6 C.J p 581 note 59

Although penalty for repeated offense may be much greater than would have been imposed were it first offense, such increased penalty is not meting out of further punishment for prior acts, but is adjudication of attorney's fitness to continue in practice—Marsh v State Bar of California, 39 P (2d) 403, 2 Cal (2d) 75

64. Cal—Hill v. State Bar of California, 42 P (2d) 629, 2 Cal (2d) 622—Marsh v State Bar of California, 39 P (2d) 403, 2 Cal (2d) 75—In re Vaughan, 209 P 353, 189 Cal 491, 24 A L R 858
Fla—Branch v. State, 163 So. 48
Neb—State ex rel Sorensen v Ireland, 251 N W. 119, 125 Neb. 570
N Y—In re Ropiecki, 232 N Y S 947.
S D—In re Byrne, 262 N W 236

65. U S—Ex p Wall, (Fla) 2 S Ct 569, 107 U S 265, 27 L Ed 552—Duke v Committee on Grievances of the Supreme Court of the District of Columbia, (App D.C) 82 F.(2d) 890, certiorari denied 56 S Ct. 751—Hertz v. U. S, (C C A Minn) 18 F (2d) 52
Ark—Maloney v. State, 32 S W.(2d) 423, 182 Ark 510
Cal—McIntosh v. State Bar of California, 294 P. 1067, 211 Cal 261—In re Vaughan, 209 P 353, 189 Cal. 491, 24 A L R 858—In re Cate, 212 P. 694, 60 Cal App 279—In re Shepard, 170 P 442, 35 Cal App 492.
Colo—People v. Irwin, 152 P. 905, 60 Colo 177.
Conn—In re Kone, 97 A. 807, 90 Conn 440.
Fla—Gould v. State, 127 So 309, 99 Fla 662, 69 A L R 699.
Idaho—In re Burns, 40 P.(2d) 105, 55 Idaho 190—In re Kerl, 188 P. 40, 32 Idaho 737, 8 A.L R 1259—In re Wourms, 170 P 919, 31 Idaho 291.
Ill—In re Borchardt, 192 N.E 383, 357 Ill 458—People v. Meyerovitz, 116 N E 189, 273 Ill 356
Kan—In re Gorsuch, 214 P. 794, 113 Kan 380.
Ky—Commonwealth v. Porter, 46 S W (2d) 1096, 242 Ky 561—Chreste v Commonwealth, 198 S W 929, 178 Ky 311
La—In re Mundy, 158 So. 563, 180 La. 1079—In re Craven, 151 So 625, 178 La 372, 90 A L R 973—State v. Gowland, 140 So. 500, 174 La 351.
Mass—In re Keenan, 192 N E 65, 287 Mass 577, 96 A L R 679.
Mich—Attorney General v. Lane, 243 N W 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S.Ct. 115, 287 U S 654, 77 L Ed 565
Mo—In re Sparrow, 90 S W (2d) 401—In re Richards, 63 S W (2d) 672, 333 Mo 907—In re H——— S———, (App) 69 S W (2d) 325
Neb—State ex rel Sorensen v. Goldman, 255 N W. 32, 127 Neb 340—State v. Priest, 242 N W. 433, 123 Neb 241.
N J—In re Breidt, 94 A. 214, 84 N J Eq 222
N Y—In re Heitrick, 197 N Y S 6, 203 App Div 512—In re Popper, 184 N Y S 406, 193 App Div. 505, 39 N Y Cr 5
Ohio—Schwartz v. State, 18 Ohio App 373
Okl—In re Green, 49 P (2d) 197—In re Bond, 31 P (2d) 921, 168 Okl. 161—State v. Ledbetter, 260 P. 454, 127 Okl 85
Or—State ex rel Seton v Arnold, 28 P (2d) 846, 145 Or 634
Pa—In re Law Ass'n of Philadelphia, 167 A 579, 312 Pa 555—In re Oliensis, 26 Pa Dist 853
S C—State v. Jennings, 159 S.E 627, 161 S C 263
S D—In re Brown, 264 N.W 521—In re Hosford, 252 N W. 843, 62 S D 374—In re Egan, 218 N W. 1, 52 S D 394—In re Nelson, 214 N. W. 803, 51 S D 451
Tenn—State v. Davis, 23 S W. 59, 92 Tenn. 634
Tex—Burns v State, (Civ App) 76 S W (2d) 172, error granted—Houtchens v Mercer, (Civ App) 80 S W (2d) 545.
Va—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S E. 282, 161 Va 333
Wis—State v. Barto, 232 N W. 553, 202 Wis 329
6 C J p 581 note 60.

No private interest

Disbarment proceeding is undertaken and carried forward solely for the public welfare, and involves no private interest except that of the

by the statutory method,[66] and where special statutes regulating the proceedings have been enacted, they should be observed as far as the steps to be taken have been prescribed.[67] However, while it has been held that the proceedings are governed exclusively by statutes specifically covering them,[68] it has also been held that the proceeding need not follow any particular form, statutory or otherwise,[69] and that it is immaterial whether rules of procedure adopted by the state bar were followed,[70] so long as respondent had notice and an opportunity to be heard. Where no form of procedure is prescribed, the court may adopt a method of procedure[71] and the form is not controlling so long as the essentials of fair notice and opportunity to be heard are present,[72] but such method adopted does not restrict the general power of the courts, and the courts may disregard such rules and adopt the methods most suitable to the occasion,[73] although it has been stated that as far as applicable the proceeding should be conducted in general harmony with the practice of the courts in civil matters.[74] However, an attorney cannot be disbarred for conduct subsequent to his admission in a proceeding by a committee on character and fitness to cancel their certificate of general fitness and strike his name from the roll,[75] and the summary method of procedure for disbarment of an attorney convicted of a crime has been held not applicable to a case where an attorney was removed from public office, the procedure being limited to prosecutions for a criminal offense in which the judgment finally determines for all purposes the question of guilt or innocence of the particular crime.[76] A newly created method of procedure may be employed in an inquiry into acts of alleged misconduct which occurred prior to the creation of such new procedure,[77] and disbarment proceedings, when properly instituted, are not invalid.[78]

Before bar committees, boards, and the like.

attorney—In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679

66. Ky.—Duffin v. Commonwealth, 271 S.W. 555, 208 Ky. 452.
N.C.—Committee on Grievances of State Bar Ass'n v. Strickland, 158 S.E. 110, 200 N.C. 630

67. Committee on Grievances of State Bar Ass'n v. Strickland, supra—6 C.J. p. 608 note 97

68. Cal.—Marsh v. State Bar of California, 39 P.(2d) 403, 2 Cal.(2d) 75—In re Vaughan, 209 P. 353, 189 Cal. 491, 24 A.L.R. 858
Fla.—Petition of Jacksonville Bar Ass'n, 169 So. 674.

Matters occurring prior to statute

Disbarment cannot be had in a proceeding instituted by a state bar under the statutory method where all matters complained of took place prior to the enactment of such statute authorizing such procedure, and which repealed all prior subsisting statutes on the subject.—In re Parker, 184 S.E. 532, 209 N.C. 693

69. Ariz.—In re Myrland, 45 P.(2d) 953—In re Bailey, 248 P. 29, 30 Ariz. 407
Mass.—In re Mayberry, 3 N.E.(2d) 248, 105 A.L.R. 976

Disbarment proceedings held to conform to statute.—In re Manatt, 264 P. 473, 33 Ariz. 299

70. In re Myrland, (Ariz.) 45 P.(2d) 953

Formal and definite rules

"While it is an excellent practice to have formal and definite rules covering procedure before the State Bar in matters of this kind, the only requirement going to the jurisdiction of this court is that the respondent has ample opportunity to present his side of the matter."—In re Myrland, (Ariz.) 45 P.(2d) 953, 954.

71. Cal.—In re Morganstern, 215 P. 721, 61 Cal.App. 702
Miss.—Ex parte Cashin, 90 So. 850, 128 Miss. 224
Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.
6 C.J. p. 609 note 98

Power of supreme court to prescribe rules of conduct for disciplining of attorneys includes power by general rules to set up, or provide for setting up, judicial agencies in the nature of special judicial commissions for the purpose of vesting in them the right to take such proceedings as may be necessary to inquire into the charges of alleged professional misconduct on the part of attorneys.—Petition of Jacksonville Bar Ass'n, (Fla.) 169 So. 674

Retroactive operation

(1) The rule that rules of court must be held to operate prospectively only does not apply to a disbarment proceeding.—In re Noell, (Mo. App.) 96 S.W.(2d) 213.

(2) A disbarment proceeding does not test a right of property, as regards the retroactive operation of court rules.—In re Noell, supra.

Statutory procedure not provided

A disbarment for the violation of Code Civ. Proc. § 287 subd. 5, is not precluded, because at the time of such misconduct the procedure in cases of violation of that act had not been provided for, since under § 187 suitable process or mode of proceeding might be adopted, and particularly where the acts committed were also a violation of § 287 subd. 2, which imposes no limitation on the power of the court to entertain a motion for removal or suspension.—In re Morganstern, 215 P. 721, 61 Cal.App. 702.

72. Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81
Va.—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S.E. 282, 161 Va. 833
6 C.J. p. 608 note 19.

Proceeding to review unauthorized judgment of bar commission as proceeding to disbar

Proceeding to review state bar commission's unauthorized disbarment of attorney for conviction of crime will be treated as a disbarment proceeding on the certificate of conviction.—In re Dampier, 267 P. 452, 46 Idaho 195

Proceeding by client to compel payment of funds

Under a statute making it the court's duty to disbar an attorney retaining a client's money after demand, it has been held that the court may enter an order of disbarment in a proceeding by the client to compel the attorney to pay over the money.—Dixon v. Minogue, 124 A. 334, 280 Pa. 128
Disbarment proceeding as form of summary proceeding by client to compel payment over of money see infra § 159

73. In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

74. State v. Flynn, 107 So. 314, 160 La. 483—6 C.J. p. 609 note 99.

75. In re Ransom, 192 N.E. 912, 353 Ill. 227.

76. In re Reid, 187 P. 7, 182 Cal. 88

77. In re Barclay, 24 P.(2d) 302, 82 Utah 283

78. U.S.—Ex p. Wall, (Fla.) 2 S.Ct. 569, 107 U.S. 265, 27 L.Ed. 552—McVicar v. State Board of Law Examiners, (D.C.Wash.) 6 F.(2d) 33.

Proceedings under a rule of court, either before the court or before bar commissioners, are of like force and effect, and either proceeding is proper,[79] and, while it has been said that in disbarment proceedings before a board of governance the proceedings before the hearing masters should conform as nearly as may be to equity practice, there is no absolute requirement that they shall be conducted as in equity.[80] A bar committee's investigations and hearings had in order to determine their subsequent course in the matter are summary in character, and not adversary in any proper sense.[81] The board of governors of a state bar, in performance of their statutory powers relating to disbarment, acts merely as an intermediary agency for the taking of testimony and reporting thereon to the court,[82] and the disciplinary investigation is ancillary to the judicial review by the court of the decisions of the board,[83] but nevertheless an inquiry by a committee of a bar association instituted on advice by supreme court and upon subpœnas regularly issued under a court order is a court inquiry.[84]

§ 29. —— Conditions Precedent

A preliminary examination of the charges by a district attorney or bar association may be a condition precedent to disbarment proceedings in some jurisdictions, but it is not necessary that there be a prior civil action looking to the redressing of the injured person's wrongs.

In some jurisdictions, proceedings will not be entertained against attorneys for misconduct unless a preliminary examination of the charges has been had by a district attorney or by the appropriate committee of the bar association,[85] and a state bar act has been held to contemplate an investigation and a finding or conclusion as to whether or not it is advisable to institute proceedings against a member and cause a hearing to be held.[86]

A prior civil action, looking to the redressing of the injured person's wrongs, is not a condition precedent to the maintenance of a disbarment proceeding.[87]

Necessity for prior conviction by a court of criminal jurisdiction where the acts constituting the ground for disbarment amount to a crime see § 21 supra.

§ 30. —— Persons Entitled to Prosecute

The right to institute and prosecute the proceeding is not confined to clients, but the court may proceed of its own motion. Also, a bar association or attorneys may prosecute such proceedings.

The right to institute a disbarment proceeding is not confined to clients,[88] nor is it necessary that the person complaining should have a financial interest in the matter, or an interest of such nature as characterizes one as a party in interest in ordinary litigation.[89] It is not necessary that proceedings against attorneys for malpractice or unprofessional conduct should be founded on formal allegations against them,[90] as the court, learning of professional misconduct of attorneys, may institute disbarment proceedings, of its own motion, without waiting for a specific complaint,[91] and may direct some attorney to draw up the accusation and

Mass.—In re Ulmer, 167 N.E. 749, 268 Mass. 373.
As not a denial of equal protection of the law, see Constitutional Law § 562 [12 C.J. p. 1184 note 63 (d)].
Summary proceeding as constituting due process of law, see Constitutional Law § 612 [12 C.J. p. 1224 note 25].

79. In re Casey, 195 N.E. 39, 359 Ill. 496.

80. Klensin v. Board of Governance of Pennsylvania Bar, 168 A. 474, 312 Pa. 564.

81. In re Sparrow, (Mo.) 90 S.W. (2d) 401.

82. Cal.—Johnson v. State Bar of California, 52 P.(2d) 928.
Idaho.—In re Edwards, 266 P. 665, 45 Idaho 676.
Nev.—In re Scott, 293 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113.
Arm of supreme court.
The board of bar commissioners is, in effect, the arm of the supreme court, commissioned to find facts, declare opinion, and recommend course of action, but may do nothing final.—In re Edwards, 294 P. 847, 50 Idaho 238.
Committee on discipline is no more a judicial body than the board of bar commissioners.—In re Edwards, 294 P. 847, 50 Idaho 238.

83. In re Richardson, 288 P. 669, 209 Cal. 492.

84. In re Investigation by Bar Ass'n of Hudson County, 160 A. 809, 109 N.J.Law 275.

85. In re Tuck, 167 N.Y.S. 534, 180 App.Div. 924.
Evidence held insufficient to prevent dismissal of application for disbarment.—In re Babcock, 210 N.W. 196, 50 S.D. 413.

86. In re Herron, 298 P. 474, 212 Cal. 196.

87. Idaho.—In re Burns, 40 P.(2d) 105, 55 Idaho 190.
Wash.—State v. Snook, 139 P. 764, 78 Wash. 671.

88. State v. Hunter, 276 S.W. 639, 152 Tenn. 233.—6 C.J. p. 604 note 28.

89. State v. Hunter, supra.—6 C.J. p. 604 note 29.

90. In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.—6 C.J. p. 603 note 21.
Information developed in progress of cause.
Such proceedings are often instituted on information developed in the progress of a cause or from what the court learns of the conduct of the attorney from its own observation.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.—6 C.J. p. 603 note 23.

91. Ky.—Lenihan v. Commonwealth, 176 S.W. 948, 165 Ky. 93, L.R.A. 1917B 1132.
N.Y.—People ex rel. Karlin v. Culkin, 162 N.E. 487, 248 N.Y. 465, 60 A.L.R. 851, affirming 228 N.Y.S. 873, 223 App.Div. 822.—In re Wendel's Estate, 267 N.Y.S. 33, 148 Misc. 884.
Ohio.—Preusser v. Faulhaber, 15 Ohio Cir.Ct.(N.S.) 110.
Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.—Snyder's Case, 152 A. 33, 301 Pa. 276, 76 A.

prosecute the case.[92] The proceedings are frequently instituted and prosecuted by bar associations.[93] The proceedings are often instituted and conducted by the prosecuting officer of the state,[94] attorneys,[95] and sometimes by third parties on affidavit.[96]

Waiver of irregularity. Although, by statute, a prosecution against an attorney for misconduct may be instituted by information or motion of two or more practicing attorneys, accused by appearing and answering to a motion of one attorney waives objection to the form of proceeding that it was commenced by only one.[97]

§ 31. —— Charges

a. In general
b. Verification and signature
c. Amendment

L R 666—Magginnis' Case, 112 A 555, 269 Pa 186.
S D—In re Hosford, 252 N W 843, 62 S D 374
Wis—Rubin v State, 216 N W. 513, 194 Wis. 207
6 C J p 603 note 24.

92. Ind—In re Saric, 149 N E 434, 197 Ind 1.
Iowa—In re Cloud, 250 N.W. 160, 217 Iowa 3
6 C.J. p 604 notes 26, 33.

"Order of court"
District judges' preliminary order, appointing an attorney to investigate the conduct of, and file accusations against, another attorney, became an "order of court," contemplated by the disbarment statute, when filed by the presiding judge in the office of the clerk in the proper county during court session, although prepared and signed by judges outside such county.—In re Cloud, 250 N W. 160, 217 Iowa 3.

Presumption as to termination of authority
Under Burns St Annot (1914) § 1011 (Rev St [1881] § 976), providing for appointment by the court of attorneys to prosecute proceedings to remove an attorney, there is no presumption that their authority ended, in the absence of a showing of removal, resignation, or death, until judgment of the court is made effectual by being properly recorded.—In re Saric, 149 N E 434, 197 Ind 1

Substitution of attorneys
Under Code § 325 et seq, the court may appoint attorneys other than those appointed to draw up accusations to prosecute charges—State v. Kimball, (Iowa) 158 N W 579, rehearing denied 160 N.W. 836.

93. Cal—Golden v. State Bar of California, 2 P.(2d) 325, 213 Cal. 237.
Ind—In re McNames, 200 N E 703.
La—In re Mundy, 158 So. 563, 180 La. 1079
Nev—State Bar v. Riccardi, 294 P. 537, 53 Nev 128.
6 C J. p 604 note 30.
But it has been stated that bar associations as such cannot be complainants in disbarment proceedings—In re Sizer, 267 S W. 922, 306 Mo 356.

"Aggrieved" applicable to bar association
Under Acts (1919) c 42 § 3, providing that proceedings for disbarment may be instituted by the court on its own motion or by a bar association or committee, or an individual aggrieved by the conduct of an attorney, the requirement that the petition shall be presented by petitioners "aggrieved" applies alike to a bar association, a committee, or an individual—State v. Hunter, 276 S. W. 639, 152 Tenn 233

Fact that a bar association is incorporated does not place it outside the terms of Code Civ Proc. § 291, as amended by St (1921) p 100 § 3, providing that the accusation in disbarment proceeding may be presented by a legally organized bar association—In re Morganstern, 215 P. 721, 61 Cal App 702

Member of bar appointed by association
An order authorizing the board of managers and the committee on grievances of the Chicago Bar Association, acting as commissioners of the supreme court, to investigate complaints against members of the bar, did not require that the original complainant follow the proceeding into the supreme court, but permitted a member of the bar designated by the board of managers to present the matter to the supreme court—In re Malmin, 4 N.E (2d) 111, 364 Ill. 164

More than one attorney
Under a statute providing that a proceeding for the disbarment of an attorney may be instituted by the complaint of a judge of any court, a practicing attorney, etc, it has been held that the complaint may be made by several attorneys acting as the duly appointed committee or commission of the bar association, and that an objection thereto on the ground that it was not permissible and was an act prejudicial to accused in the trial before the jury is without merit—Houtchens v. State, (Tex Civ.App) 47 S W.(2d) 679, reversed on other grounds (Com App) 63 S W (2d) 1011, motion granted 74 S W.(2d) 976.

Substitution of board of governors of state bar for supreme court committee
Where the supreme court committee on professional ethics and grievances instituted a disbarment proceeding and subsequently the supreme court substituted a board of governors of the state bar to carry out the same duties previously intrusted to the committee, the board of governors had the right to proceed with further prosecution of the suit for disbarment—In re Mundy, 161 So 184, 182 La. 148

94. People v. Harris, 112 N E 978, 273 Ill. 413—6 C J p 604 note 32.

Solicitor for judicial district
(1) May institute proceedings when authorized by statute—State v. Riddle, 105 So. 259, 213 Ala. 480.

(2) May not do so when not so authorized—Committee on Grievances of State Bar Ass'n v Strickland, 158 S E 110, 200 N C. 630.

State's attorney other than one where respondent resides
Under Sup Ct.Rules, rule 40 (85 N. E xii), the fact that a state's attorney, other than the state's attorney where respondent in disbarment proceedings resided, was a relator, the petition being verified by two other relators, both aggrieved parties, has been held immaterial—People v. Harris, 112 N E. 978, 273 Ill. 413.

95. Colo—People v. Class, 201 P. 883, 70 Colo 381.
Ohio—In re Meck, 200 N E. 478, 51 Ohio App 237.
6 C J. p 604 note 31.

Personal aggrievance unnecessary
In a petition for disbarment, made by an individual member of the bar, a claim that the petitioner must have been personally aggrieved in the sense of suffering injury to person or property by the conduct of defendant is too narrow a construction of Acts (1919) c 42 § 3, since every member of the bar is "aggrieved" by professional misconduct of any other member—State v. Hunter, 276 S W. 639, 152 Tenn. 233.

96. Neb.—State v. Fisher, 174 N W. 320, 103 Neb 736
Tenn—State v Hunter, 276 S W. 639, 152 Tenn 233
6 C J. p 603 note 25.

97. Jackson v. State, 21 Tex. 668.

a. In General

While no accusation may be necessary where the ground for disbarment is conviction of crime, ordinarily the court may not suspend an attorney without some charge being made and filed against him. Technical pleading is not essential, but the charge must be sufficiently specific so as to inform accused of the nature of his alleged misconduct.

While, under some statutes, where the ground for disbarment is conviction of crime, no accusation in writing is necessary,[98] this is not true in all jurisdictions,[99] and, ordinarily, the court may not suspend an attorney, other than for contempt, without some charge being made and filed against him [1]

Although it has been held that the petition for disbarment is governed by the rules of practice at common law so far as applicable,[2] it has also been held that disbarment proceedings, being special proceedings, as shown supra § 28, are not controlled by the rules or principles of criminal or common-law pleading,[3] or by statutory provisions in regard to complaints in civil actions or indictments in criminal proceedings,[4] the usual practice being for the court to issue a rule or order on the attorney, reciting the substance of the information or charges against him and requiring him to show cause why he should not be suspended or disbarred.[5] However, while formal and technical pleading is not essential to this proceeding,[6] it is important that the charges against an attorney shall be so specific as fairly to inform him of the nature of the misconduct of which he is accused.[7] It is

98. Cal.—Barnes v. District Court of Appeal, Second Appellate Dist., 173 P. 1100, 178 Cal. 500.
Mont.—In re Peters, 235 P. 772, 73 Mont. 284.

99. State v. Prendergast, 164 P. 1173, 84 Or. 307.

Complaint held demurrable

A complaint in disbarment proceedings under Lord L. § 1092 subd. 1, was held demurrable where it charged merely that accused was convicted in the federal court of using the mails to defraud in violation of U.S. Pen.Code § 215.—State v. Prendergast, 164 P. 1173, 84 Or. 307.

1. Cal.—In re Reid, 187 P. 7, 183 Cal. 88.
Utah.—Foster v. Burton, 232 P. 917, 64 Utah 550.—Higgins v. Burton, 232 P. 914, 64 Utah 562.

Charges not bearing title of original action

In a proceeding against an attorney for misconduct in misquoting the record in his brief, so far as in disbarment, separate charges, not bearing the title of the original action, should have been filed, and a failure so to file requires a dismissal without prejudice.—Dolley v. Ragon, 228 P. 664, 67 Cal.App. 731.

2. Bar Ass'n of City of Boston v. Casey, 116 N.E. 541, 227 Mass. 46.

3. Ill.—In re Information to Discipline Certain Attorneys of Sanitary District of Chicago, 184 N.E. 332, 351 Ill. 206.
La.—In re Mundy, 158 So. 563, 180 La. 1079.
N.M.—In re Zinn, 34 P.(2d) 1097, 38 N.M. 449.
6 C.J. p. 605 note 47 [a].

Information or indictment unnecessary

(1) Since disciplinary proceedings are not intended for punishment (supra § 28), they do not fall within that class of cases that require the charges to be preferred by information or indictment.—State v. McRae, 38 So. 605, 49 Fla. 389, 6 Ann.Cas. 980.—Hess v. Conway, 144 P. 205, 93 Kan. 246.

(2) Proceedings instituted against certain attorneys by a board of managers and a committee on grievances of the Chicago Bar Association acting as commissioners of the supreme court, pursuant to an order authorizing them to investigate complaints against members of the bar, were held sufficient to confer jurisdiction upon the supreme court of the disbarment proceeding against such attorneys, notwithstanding the proceeding was not instituted by the filing of an information.—In re Malmin, 4 N.E.(2d) 111, 364 Ill. 164.

4. Or.—State v. Greenfield, 162 P. 858, 93 Or. 407.
Wash.—In re Sherrill, 198 P. 725, 116 Wash. 143.

5. Cal.—Irving v. State Bar of California, 1 P.(2d) 2, 213 Cal. 31.
Mass.—In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679.
6 C.J. p. 603 note 22.

Passing on sufficiency of charge

Sufficiency of a charge against an attorney sought to be disbarred is passed on when an application is made for leave to file the information to disbar.—People v. Jackson, 153 N.E. 621, 322 Ill. 618.

6. Ala.—In re Fite, 152 So. 246, 228 Ala. 4.—Ex parte Thompson, 152 So. 229, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala. 130, and In re Countryman, 152 So. 257, 228 Ala. 21.—McCord v. State, 126 So. 873, 220 Ala. 466.
La.—In re Mundy, 158 So. 563, 180 La. 1079.
Mass.—In re Keenan, 192 N.E. 65, 287 Mass. 577, 94 A.L.R. 679.
Ohio.—In re Bickley, 4 Ohio N.P.(N.S.) 129.
Or.—State v. Woerndle, 209 P. 604, 109 Or. 461.—State v. Greenfield, 162 P. 858, 93 Or. 407.
W.Va.—State v. Smith, 99 S.E. 332, 84 W.Va. 59.

Court will look to substance

In a disbarment proceeding, the court on demurrer will look to the substance of the charge rather than to the technical accuracy with which it is presented.—State v. Woerndle, 209 P. 604, 109 Or. 461.—State v. Greenfield, 162 P. 858, 93 Or. 407.

Proceeding to vacate order of admission

In a proceeding to set aside and vacate the order of admission, where fraud is claimed in the application for admission to practice, the form of the pleadings is not material, and any relevant facts may be inquired into.—In re Wells, 163 P. 657, 174 Cal. 467.

Professional capacity

An information for the disbarment of an attorney under the statutes in some jurisdictions must allege that respondent is an attorney.—State v. Quarles, 48 So. 499, 153 Ala. 54.

7. Ala.—In re Fite, 152 So. 246, 228 Ala. 4.
Cal.—In re Lincoln, 233 P. 965, 102 Cal.App. 733.
Fla.—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699.—Hogan v. State, 104 So. 598, 89 Fla. 388.
Idaho.—In re Baum, 186 P. 927, 32 Idaho 676.
Ill.—People v. Briggs, 161 N.E. 736, 330 Ill. 339, certiorari denied Schmuts v. People of State of Illinois ex rel. Chicago Bar Ass'n, 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545.
La.—In re Mundy, 158 So. 563, 180 La. 1079.
Mass.—In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679.
N.D.—In re Eaton, 235 N.W. 587, 60 N.D. 580.
Or.—State v. Hall, 190 P. 304.
S.D.—In re Gibbs, 214 N.W. 850, 51 S.D. 464.
W.Va.—State v. Smith, 99 S.E. 332, 84 W.Va. 59.
6 C.J. p. 605 note 48.

Complaints held sufficient

Ala.—Ex parte Thompson, 152 So.

not necessary for the complaint to set out facts tending to establish the course, regularity, and results of proceedings leading up to the authorization and participation of the bar association, as a presumption of regularity attaches,[8] and the fact that an affidavit contains a statement that affiants had investigated the conduct of respondent does not invalidate the complaint to which it is attached, but such surplus matter should be stricken therefrom.[9]

It has been held not material that the charges and specifications are not proved exactly as alleged,[10] but an attorney is not called on to defend against matters not contained in the charge,[11] and, ordinarily, trial can be had only on the charges contained in the information or rule, and other charges in the affidavits filed with it, or brought out by the evidence, will not be considered[12] unless such affidavits are made a part thereof.[13] However, while it has been held that proof of acts not charged will not justify disbarment,[14] where the matter was fully covered by testimony and the attorney had every opportunity to and did present his evidence, he cannot complain.[15] Also, an attorney cannot complain of a variance between the pleadings.

229, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala. 130, and In re Countryman, 152 So. 257, 228 Ala. 21—McCord v. State, 126 So. 873, 220 Ala. 466.

Cal.—In re Masuran, 263 P. 339, 88 Cal.App. 272—People v. California Protective Corporation, 214 P. 1089, 76 Cal.App. 354.

Idaho.—In re Edwards, 294 P. 847, 50 Idaho 238.

La.—In re Mundy, 153 So. 563, 180 La. 1079—In re Kenner, 152 So. 520, 178 La. 774.

Mass.—In re Ulmer, 167 N.E. 749, 268 Mass. 373.

Complaint held insufficient

A charge in a rule that an attorney solicited employment, without showing that it was by dishonorable or disreputable means, is not sufficient.—State v. Smith, 99 S.E. 332, 84 W.Va. 59.

General charge considered with specific charges

While a general charge that respondent's reputation for truth and veracity and fair dealing is bad as not being specific, yet it may be considered with the specific charges filed.—People v. Martin, 124 N.E. 340, 288 Ill. 615.

Petition alleging disbarment elsewhere

(1) Petition to disbar an attorney, alleging merely the facts on which a foreign judgment of disbarment was based, without independently charging the existence of those facts, did not state the cause of action.—State v. Flynn, 107 So. 314, 160 La. 483.

(2) Petition alleging that an attorney had been disbarred in United States district court for professional misconduct amounting to moral wrong, a copy of the findings by the judge in the federal court being annexed, is sufficient.—In re Ulmer, 167 N.E. 749, 268 Mass. 373.

Portion of complaint held too vague.—In re Gibbs, 214 N.W. 850, 51 S.D. 464.

Statement in one or more paragraphs

If the facts of the charged misconduct are clearly brought to accused's attention, the form in which they are stated, as whether they are stated in one or two paragraphs, is not of great importance.—In re Smith, 85 P. 584, 73 Kan. 743.

8. State Bar v. Riccardi, 294 P. 537, 53 Nev. 128.

9. Houtchens v. State, (Tex.Com.App.) 63 S.W.(2d) 1011, reversing (Civ.App.) 47 S.W.(2d) 679, and motion granted (Com.App.) 74 S.W.(2d) 976.

10. In re Barclay, 24 P.(2d) 302, 82 Utah 288.—6 C.J. p. 605 note 50.

Evidence admissible

Under a disbarment petition, alleging fraudulent withholding by attorney of moneys collected for client, but not enumerating items, evidence of items was admissible.—State Board of Law Examiners v. Brown, 290 P. 1013, 42 Wyo. 108.

Immaterial variance

In a disbarment proceeding, a variance between the charge that accused had appropriated corporation manager's money and proof that the money belonged to the corporation was immaterial.—In re Barclay, 24 P.(2d) 302, 82 Utah 288.

11. In re Baum, 186 P. 927, 32 Idaho 676.

12. Cal.—Townsend v. State Bar of California, 291 P. 837, 210 Cal. 362.—San Francisco Bar Ass'n v. Sullivan, 198 P. 7, 185 Cal. 621.

Idaho.—In re Edwards, 266 P. 665, 45 Idaho 676.

Ill.—People v. McCaskrin, 156 N.E. 328, 325 Ill. 149.

Mass.—Bar Ass'n of City of Boston v. Sleeper, 146 N.E. 269, 251 Mass. 6.

Mont.—In re McCue, 261 P. 341, 80 Mont. 537.

N.D.—In re Elton, 235 N.W. 587, 60 N.D. 580.

Pa.—Maginnis' Case, 112 A. 555, 269 Pa. 186.

W.Va.—State v. Smith, 99 S.E. 332, 84 W.Va. 59.

6 C.J. p. 605 note 52.

Charges not set forth in affidavit, but included in accusation by solicitor

In disbarment proceedings against an attorney, including in the written accusation drawn up by the solicitor charges not set forth in the affidavit accompanying the accusation was error.—Committee on Grievances of State Bar Ass'n v. Strickland, 158 S.E. 110, 200 N.C. 630.

Answer alleging general good behavior

In view of the fact that the rule in disbarment proceedings does not require respondent to answer, an allegation in an answer filed by him of general good behavior does not authorize consideration of charges against respondent not included in the formal charges presented.—Maginnis' Case, 112 A. 555, 269 Pa. 186.

Petition broad enough to cover findings

Under the petition the referee was not limited to a finding on the charge of conspiracy to defraud an insurance company which involved but one phase of the attorney's conduct.—In re Durst, 239 N.Y.S. 316, 228 App.Div. 256.

Guilt of crime not in issue

In a disbarment proceeding, the attorney's guilt or innocence of a crime, for which he has been convicted, is not in issue.—In re Kerl, 188 P. 40, 32 Idaho 737, 8 A.L.R. 1259.

13. State v. Shumate, 87 S.E. 613, 48 W.Va. 359.

14. In re Baum, 186 P. 927, 32 Idaho 676.—6 C.J. p. 605 note 51.

15. Idaho.—In re Burns, 40 P.(2d) 105, 55 Idaho 190.

Ill.—In re Mack, 196 N.E. 197, 360 Ill. 343.

N.Y.—In re Kohler, 270 N.Y.S. 634, 240 App.Div. 501.—In re Horovitz, 240 N.Y.S. 343, 228 App.Div. 484.

Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

Obviating amendment

The admission of testimony as to acts not charged has been held to obviate the necessity for a motion to amend the petition.—In re Horovitz, 240 N.Y.S. 343, 228 App.Div. 484.

ings and the proof, where it relates only to issues injected voluntarily by his own testimony.[16]

Waiver. An attorney appearing and offering evidence without objection waives any defect in the charge, as that it was not specific enough to inform him of the misconduct with which he is charged.[17]

b. Verification and Signature

Verification of the charges, although not jurisdictional, is generally required It may, in some jurisdictions, be on information and belief. Where so required, the information must be signed by the proper persons for court to have jurisdiction.

While, where the proceeding is initiated by a bar association or commission, verification may be dispensed with,[18] and in a disbarment proceeding before a committee on grievances of a bar association, a verified complaint is not required,[19] ordinarily the formal charges should be verified by the affidavit of some person to the effect that the charges therein contained are true.[20] Such verification is not jurisdictional,[21] although the attorney had no notice of the preinvestigation of the conduct prior to the show-cause order,[22] and may be waived by respondent.[23] Although it has been held that the court will merely require such verification as assures good faith,[24] in some jurisdictions it is necessary that the charges shall be made or verified by one having actual knowledge thereof,[25] unless the verification is made by a bar association;[26] but in other jurisdictions verification on information and belief is sufficient,[27] provided the sources of such information and the grounds for such belief are definitely set forth in the affidavit[28] in accordance with the general rule governing affidavits on information and belief, as shown in the title Affidavits § 26. However, the verification is not affected by the nonproduction of affidavits and documents on which the information and belief were partially derived.[29]

The sufficiency of the verification must be determined by an inspection of it, and the evidence of affiant cannot be taken for the purpose of showing

16. Wood v State, 165 S E 908, 45 Ga App 783
Prior proceeding by informer as not ground for abating subsequent disbarment proceeding for same misconduct see Abatement and Revival § 32 note 16.

17. Barton v. State Bar of California, 289 P. 818, 209 Cal. 677.

18. People ex rel Chicago Bar Ass'n v Templeman, 1 N E (2d) 850, 362 Ill 152—People v Briggs, 161 N E 736, 330 Ill. 339, certiorari denied Schmuts v People of State of Illinois ex rel. Chicago Bar Ass'n, 49 S Ct. 27, 278 U.S 625, 73 L Ed. 545—6 C J p 606 note 60.

19. In re Casey, 195 N.E. 39, 359 Ill. 496

20. Cal—In re Herrick, 176 P. 165
Fla—Hogan v. State, 104 So. 598, 89 Fla. 383
Ill—In re Ransom, 192 N E 912, 358 Ill 227.
6 C J p 606 note 57.

Where proceedings are moved by third parties on affidavit, the accusation must be drawn up and sworn to by the person making it—In re Cloud, 250 N.W 160, 217 Iowa 2—6 C J. p 604 note 27.

21. Ala—Ex parte Messer, 152 So 244, 228 Ala. 16.
Cal—Golden v. State Bar of California, 2 P (2d) 325, 213 Cal 237—Bruns v State Bar of California, 1 P (2d) 989, 213 Cal 151—Irving v State Bar of California, 1 P (2d) 2, 213 Cal. 81—In re Herron, 298 P 474, 212 Cal. 196.
Tex—Houtchens v State, (Civ App) 47 S W (2d) 679, reversed on other grounds (Com.App.) 63 S W.(2d) 1011, motion granted 74 S W.(2d) 976
6 C J p 606 note 58

22. Fish v. State Bar of California, 4 P (2d) 937, 214 Cal 215

23. Ex parte Messer, 152 So 244, 228 Ala. 16—6 C J. p 606 note 59.

24. State v Greenfield, 162 P. 858, 93 Or 407

By attorney, one of petitioners
Verification of a petition made on affidavits of an attorney, who deposed that he was the attorney for petitioners and was one of the petitioners himself and a member of the bar association, is technically sufficient—State v. Greenfield, 162 P. 858, 93 Or 407.

By officer of bar association
A complaint is not insufficiently verified because the verification was made by an officer of complainant bar association—Ring v State Bar of California, 24 P (2d) 821, 218 Cal 747.

25. In re Masuran, 263 P 339, 88 Cal App 272—6 C J. p 606 note 61

Statutory verification sufficient
Where charges of accusation against attorney were made positively, statutory verification was positive affirmance of allegations therein, notwithstanding verification contained words "except as to matters therein stated on information and belief".—Lantz v State Bar of California, 298 P. 497, 212 Cal 213.

26. Ring v. State Bar of California, 24 P (2d) 821, 218 Cal 747—In re Morganstern, 215 P. 721, 61 Cal App 702

Verification by president sufficient
Under Code Civ Proc §§ 290, 291, as amended by St (1921) p 100 § 3, requiring the accusation in disbarment proceedings to be in writing, and relating to the verification thereof, it was held that such an accusation filed by an incorporated bar association was sufficiently signed and verified when signed by the president and assistant secretary of the association, and verified by the president in his individual capacity—In re Morganstern, 215 P. 721, 61 Cal. App 702

Allegations based on knowledge
A complaint may be verified on information and belief, although the allegations thereof were based on complainant's knowledge—Ring v. State Bar of California, 24 P.(2d) 821, 218 Cal. 747.

Statute not invalid
A statute authorizing a verification on information and belief where made by a bar association has been held not invalid—In re Morganstern, 215 P 721, 61 Cal App 702.

27. La—In re Borie, 118 So 45, 166 La. 855.
Or—State v. Hall, 190 P 304.
Tex—Houtchens v. State, (Com. App) 63 S W.(2d) 1011, reversing (Civ App) 47 S.W (2d) 679, and motion granted (Com App.) 74 S W. (2d) 976—Rowland v State, (Civ. App) 55 S W.(2d) 133.
6 C J p 606 note 62.

28. In re Veeder, 65 P. 180, 10 N M. 669.

29. Houtchens v. State, (Tex.Civ. App) 47 S W (2d) 679, reversed on other grounds (Com App) 63 S W. (2d) 1011, motion granted 74 S.W. (2d) 976.

that he had no personal knowledge as to the charges.[30]

Signature. While the court is without jurisdiction where the information is not signed either by the attorney general, a state's attorney, or the president and secretary of a bar association, where so required,[31] a complaint in a disbarment proceeding will not be quashed because signed by more than one attorney, notwithstanding the statute provides that it shall be signed by "a practicing attorney."[32]

c. Amendment

Court should be liberal in allowing amendments, but should also give respondent an opportunity of meeting any new matter therein alleged.

The power of the court to allow an amendment is as broad as in any other special proceeding,[33] and the court should be most liberal in allowing amendments provided respondent is given an opportunity of meeting any new matter therein alleged.[34] Leave to file an amendment to the petition must be obtained from the court, and cannot be granted by a commissioner taking the evidence.[35] It is not error to allow an amendment to the petition after sustaining a demurrer thereto,[36] and an amendment may be made after the hearing has been entered on, where accused is given time to prepare his defense to new charges contained therein;[37] but an amendment of the petition has been refused after complainants have announced that they are through taking evidence in chief, and respondents have proceeded with their evidence on the strength of such announcement.[38] However, it has been held that an accusation in disbarment proceedings may be amended to conform to the proof after the case has been tried and coincident with the entry of judgment.[39] While a referee does not abuse his discretion in refusing an amendment until the attorney general can investigate the charge contained therein,[40] the new charge ought not to be disregarded and the court may treat the amendment as a new petition.[41]

§ 32. —— Demurrer, Answer, and Subsequent Pleadings

a. Demurrer
b. Answer
c. Subsequent pleadings

a. Demurrer

Respondent may demur to accusation, which will then be taken as true, and on overruling of demurrer, the court will enter proper judgment.

Although not expressly provided by statutes relating to disbarment proceedings, it has been held that an attorney has a right to demur to the petition.[42] Where a demurrer is filed, the allegations of the complaint are to be taken as true,[43] and if the demurrer is overruled, the court will enter final judgment in accordance with the gravity of the offenses charged.[44] Where a demurrer is filed to the whole accusation, and any one of the charges or specifications contains sufficient cause for the motion to disbar, the demurrer should be overruled.[45]

30. In re Morganstern, 215 P. 721, 61 Cal App 702—6 C J. p 606 note 65.

31. In re Ransom, 192 N E 912, 358 Ill. 227.

32. Houtchens v. State, (Tex Com App) 63 S.W (2d) 1011, reversing (Civ App) 47 S W.(2d) 679, and motion granted (Com.App) 74 S W (2d) 976—Rowland v State, (Tex Civ.App.) 55 S.W (2d) 133.

33. State v. Kimball, (Iowa) 158 N W 579, rehearing denied 160 N W. 836.

34. In re Egan, 154 N W. 521, 36 S. D. 228

Amendment not prejudicial

Introduction at the time of hearing before the board of law examiners, in a disbarment proceeding, of the new cause of complaint has been held within the board's discretion, and not error or prejudicial, where respondent attorney did not request, either before the board, or the supreme court, additional time conformably to Remington Comp St. § 139—18—In re Winthrop, 237 P. 3, 135 Wash 135.

35. People v. Smith, 124 N E 807, 290 Ill. 241, 9 A L R 183.

36. Hogan v. State, 104 So. 598, 89 Fla 338

37. In re Winthrop, 237 P. 3, 135 Wash 135—In re Sherrill, 198 P. 725, 116 Wash. 143.

38. In re Sizer, 267 S W. 922, 306 Mo. 356.

39. In re Morganstern, 215 P. 721, 61 Cal App. 702

40. In re Polley, 159 N.W. 42, 37 S. D. 523.

41. In re Polley, supra.

42. In re Bickley, 4 Ohio N.P (N S.) 129.

43. Ill—People v. Briggs, 161 N E 736, 330 Ill. 339, certiorari denied Schmutz v. People of State of Illinois ex rel Chicago Bar Ass'n, 49 S Ct 27, 273 U S 625, 73 L Ed. 545 Ky.—Lenihan v. Commonwealth, 176 S W 948, 165 Ky 93, L R A 1917B 1132

S D—In re Waggoner, 199 N W. 244, 47 S.D 401.

44. People v Briggs, 161 N E 736, 330 Ill 339, certiorari denied Schmutz v People of State of Illinois ex rel. Chicago Bar Ass'n, 49 S Ct 27, 273 U S. 625, 73 L.Ed. 545.

45. Rosenberg v Commonwealth ex rel Otte, 74 S W.(2d) 473, 255 Ky. 413—6 C.J. p 606 note 66.

Demurrer held not to challenge sufficiency of complaint

Where a complaint for disbarment consisted of a single paragraph specifying six different series of alleged acts of misconduct, and no motion was made to separate it into paragraphs, a demurrer to "each paragraph" of the complaint did not challenge the sufficiency of any one of the alleged series of acts taken separately.—Buhler v. Trick, 144 N. E 840, 195 Ind. 190.

b. Answer

Respondent should seasonably enter his plea or answer, and should explain and set out the bona fides of the alleged misconduct.

When a petition and accusation in a disciplinary proceeding has been duly served on an attorney, he must seasonably plead or interpose an answer to the accusation,[46] and the refusal of the court to permit the filing of a plea on the day set for trial is within the court's discretion.[47] Where so required by statute the court must pass on the sufficiency of the charges before the attorney is required to answer.[48] In the absence of a controlling statutory provision, respondent is not entitled to the time allowed to answer an ordinary summons, but may be cited to appear within any time that gives him a reasonable opportunity to prepare his defense.[49]

The answer should raise an issue[50] and particularity should be observed, not merely to deny the charges, but to explain and set out the bona fides of the transactions to which they relate.[51] An answer, failing to deny specific charges of misconduct, constitutes an admission thereof,[52] and an attorney is bound by his admission in his answer that in certain matters he acted in his professional capacity.[53] Where the answer is uncertain[54] or seems to be evasive,[55] respondent may be given an opportunity to amend or file a more specific answer; and the same is true where the answer contains scandalous and impertinent matter.[56]

Verification. Ordinarily, the answer should be verified,[57] but the circumstances may be such as to dispense with this requirement.[58]

c. Subsequent Pleadings

No pleadings are had beyond the answer.

There are no further pleadings beyond the answer to the rule to show cause; the replication is not used in this form of proceeding.[59] On filing the answer the accuser may move to make the rule absolute, and respondent may move to discharge the rule.[60]

§ 33. —— Evidence

a. In general
b. Failure to testify or call witness
c. Accomplice testimony

a. In General

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

The authorities are in conflict as to whether an accused attorney is entitled to the presumption of innocence. The burden of proof rests on those in charge of a disbarment proceeding.

On the basis that disbarment proceedings are not criminal in nature (see supra § 28), it has been stated that an accused attorney is not entitled to a presumption of innocence,[61] but a license to

46. Ill.—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N.E. 332, 351 Ill. 206.
Minn.—In re Ahlstrom, 268 N.W. 638.—In re Eberhart, 205 N.W. 266, 164 Minn. 408.

Motion for disbarment properly denied

Denial of a motion of relator in a disbarment proceeding to disbar an attorney by default because of failure to file an answer on or before the date fixed by rule nisi, which required an attorney to appear and answer on such date, or when thereafter reached on call as by law directed, was held not error, where the attorney appeared and filed the answer in accordance with the order of the judge to whom the motion was referred in rule nisi.—De Krasner v. Boykin, (Ga.App.) 186 S.E. 749

Defense of laches was held not available to respondent in a disbarment proceeding in the absence of a pleading or evidence showing that respondent, because of lapse of time, had been prevented from producing in evidence facts which, if produced, would have been a defense to the charges.—In re Noell, (Mo.App.) 96 S.W.(2d) 213

47. Thomas v. Ogilby, 59 App.D.C. 382, 44 F.(2d) 890

48. State v. Mosher, 103 N.W. 105, 128 Iowa 82, 5 Ann.Cas. 984

49. Cal.—In re Lowenthal, 21 P. 7, 78 Cal. 427.
Okl.—In re Brown, 39 P. 469, 2 Okl. 590.
6 C.J. p. 606 note 67.

50. In re Richter, 204 N.W. 492, 187 Wis. 490, 41 A.L.R. 485

Answer held insufficient to raise an issue of fact.—In re Richter, 204 N.W. 492, 187 Wis. 490, 41 A.L.R. 485

51. Rosenberg v. Commonwealth ex rel. Otte, 74 S.W.(2d) 478, 255 Ky. 413.—6 C.J. p. 606 notes 69, 70

52. Colo.—People v. Cowen, 298 P. 957, 88 Colo. 571.—People v. Powell, 287 P. 858, 87 Colo. 337.
N.Y.—In re Goldberg, 238 N.Y.S. 273, 227 App.Div. 502.

53. In re Richards, 63 S.W.(2d) 672, 333 Mo. 907.

54. In re Zinn, 34 P.(2d) 1097, 38 N.M. 449

On failure to amend an answer that is uncertain, the answer will be deemed to raise no effective denial of the allegations.—In re Zinn, 34 P.(2d) 1097, 38 N.M. 449

55. Colo.—People v. Webster, 64 P. 207, 28 Colo. 223.
Minn.—In re Nunn, 76 N.W. 38, 73 Minn. 292

56. People v. Payson, 71 N.E. 692, 210 Ill. 82.

57. State v. Winton, 5 P. 337, 11 Or. 456, 50 Am.R. 486

58. State v. Winton, supra.

59. Colo.—People v. Selig, 55 P. 732, 25 Colo. 505, 506
Fla.—State v. Maxwell, 19 Fla. 31.

60. State v. Maxwell, supra.

61. Ring v. State Bar of California, 24 P.(2d) 821, 218 Cal. 747.—6 C.J. p. 607 note 79.

In Massachusetts, in a disbarment proceeding heard by a single justice, ruling that there was no presumption of innocence other than that in contemplation of law re-

practice law being a certificate of good moral character and a representation by the court, as of the date of the license, that the licensee is a trustworthy person who reasonably may be expected to act fairly and honestly in the practice of his profession, it has been held that the original representation exists as a continuing presumption in the absence of proof to the contrary,[62] and in some jurisdictions it has been held that an attorney is presumed to be innocent of the charges preferred and to have performed his duty, in accordance with his oath,[63] and to have acted from proper motives.[64] However, the presumption prevails only until a prima facie case of guilt is made out.[65] It will be presumed that the attorney knows the court rules,[66] and intended the natural result of his acts,[67] that an examining board and the court admitting him to practice had no knowledge concerning his conviction in a foreign state;[68] and, where the attorney has defaulted in the disbarment proceeding, that he is guilty.[69] It will not be presumed that the attorney in the particular case in question deviated from his usual course of procedure in his business matters.[70]

Burden of proof. The burden of proof rests on those in charge of a disbarment proceeding to prove the alleged acts of misconduct[71] and the moral turpitude thereof,[72] but where a prima facie case has been made out, the burden of overcoming such prima facie case by evidence rests on the attorney.[73]

Under a rule to show cause why he should not be disbarred, the burden is on the attorney to justify his conduct;[74] and where the attorney admits the conduct charged, the burden is on him to justify it.[75]

(2) Admissibility

The rules and principles of evidence applicable to civil proceedings are applicable to disbarment proceedings, and to be admissible the evidence must be relevant, competent, and material

The rules and principles of the law of evidence applicable to civil proceedings are also applicable to disbarment proceedings,[76] and the evidence on either side must be such as is legally competent to maintain the issue.[77] The court may acquire,

spondent began trial as an innocent man and would remain such unless charges were proved was held proper—In re Mayberry, 3 N.E.(2d) 248, 105 A.L.R. 976.

In New York

(1) In a later case it was held that no presumption of innocence is applicable—In re Ropiecki, 282 N.Y.S. 947.

(2) But in an earlier case it was held that the attorney would be presumed innocent, where the information charged him with the commission of a criminal act—In re An Attorney, 161 N.Y.S. 504, 175 App.Div. 653.

62. Roark v. State Bar of California, (Cal.) 55 P.(2d) 339.

63. State v. Cutlip, 202 P. 782, 83 Okl. 183—State v. Vernor, 191 P. 729, 79 Okl. 124—In re McNabb, 185 P. 441, 76 Okl. 253—In re Reilly, 183 P. 738, 75 Okl. 192, 7 A.L.R. 8[illegible]—6 C.J. p. 607 note 78.

64. Maginnis' Case, 112 A. 555, 269 Pa. 186.

65. Roark v. State Bar of California, (Cal.) 55 P.(2d) 339—6 C.J. p. 607 note 80.

As to receipts taken by attorney

In a disbarment proceeding based on misappropriation of estate funds by an attorney for executor, the court could not presume that the attorney, who produced no receipts in support of his assertion of payment to executor, had not taken receipts—People ex rel. Chicago Bar Ass'n v. Templeman, 1 N.E.(2d) 850, 363 Ill. 152.

66. People v. Johnson, 176 N.E. 278, 344 Ill. 132.

67. In re Sherin, 210 N.W. 507, 50 S.D. 428.

68. State Bar of California v. Hull, 284 P. 492, 103 Cal.App. 302.

69. In re Stauning, 352 N.W. 84, 190 Minn. 405.

70. People ex rel. Chicago Bar Ass'n v. Pace, 188 N.E. 169, 354 Ill. 111.

Failure to take receipts

In disbarment proceedings based on misappropriation of clients' money, an attorney's failure to take receipts for payments could not be presumed where in other matters the attorney took and gave receipts as a matter of course—People ex rel. Chicago Bar Ass'n v. Pace, 188 N.E. 169, 354 Ill. 111.

71. Cal.—In re Soale, 159 P. 1065, 31 Cal.App. 144.

N.Y.—In re Spencer, 201 N.Y.S. 315, 206 App.Div. 806.

Pa.—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81.

Establishing all facts

To sustain an accusation in a disbarment proceeding for the alleged violation of a client's confidence, it is not necessary to establish all the facts as to the ultimate loss on the client's part which might be necessary in an action for damages for deceit—In re Soale, 159 P. 1065, 31 Cal.App. 144.

Where fraud charged

Burden of proof where fraud is charged is on the party bringing the charge, since all men are presumed to act from honest motives until the contrary is shown—People ex rel. Chicago Bar Ass'n v. Hammond, 191 N.E. 215, 356 Ill. 581.

72. In re Wells, 168 P. 657, 174 Cal. 467.

73. Cal.—In re Graves, 221 P. 411, 64 Cal.App. 176.

N.Y.—In re Horowitz, 240 N.Y.S. 343, 228 App.Div. 484—In re Fieldsteel, 240 N.Y.S. 481, 228 App.Div. 470.

Pa.—In re Salus, 184 A. 70, 321 Pa. 106—In re Gery, 130 A. 307, 284 Pa. 121.

6 C.J. p. 607 note 81.

Explanation of bank deposits

Evidence of large bank deposits many times greater than the salary earned by a public official requires explanation by such official, and such rule is applicable in disciplinary proceedings against an attorney who is an ex-official—In re Kunstler, 289 N.Y.S. 107, 248 App.Div. 393.

74. People v. Lindsey, 283 P. 539, 86 Colo. 458.

75. Attorney General v. Lane, 243 N.W. 6, 259 Mich. 283, certiorari denied Lane v. Voorhies, 53 S.Ct. 115, 287 U.S. 654, 77 L.Ed. 565—6 C.J. p. 607 note 82.

76. Ala.—Ex parte Messer, 152 So. 244, 228 Ala. 16.

Ill.—In re Needham, 4 N.E.(2d) 19, 364 Ill. 65.

Mass.—In re Ulmer, 167 N.E. 749, 268 Mass. 373.

N.Y.—In re Lynch, 238 N.Y.S. 482, 227 App.Div. 477.

6 C.J. p. 607 note 83.

77. Cal.—In re Richardson, 288 P. 669, 209 Cal. 492.

Neb—State v. Fisher, 174 N.W. 320, 103 Neb 736.
6 C.J. p 607 note 33.

Evidence held admissible

(1) Attorney's answer to the original charges to show his admission of the facts, where the amended charges were practically identical with the original charges—Thomas v. Ogilby, 59 App D.C. 382, 44 F.(2d) 890

(2) Attorney's insistence on the removal of a murder prosecution against a colored man from a hostile community and to trial by jury from which colored persons, as a class, were not excluded, which the counsel appointed by the court deemed unnecessary, was relevant to the charge that the attorney improperly injected himself into the case not to protect accused's constitutional rights but to exploit the views of a certain organization.—In re Ades, (D. C.Md.) 6 F.Supp. 467.

(3) Conveyances corroborating the evidence of witness as to reparation from an attorney on the theory that fraud was practiced on a client, in support of the specific charge in a disbarment proceeding—McCord v. State, 126 So. 873, 220 Ala. 466

(4) Copies of the pleadings and findings of fact in federal disbarment proceedings—In re Ulmer, 167 N.E. 749, 268 Mass. 373

(5) Copy of an affidavit prepared by an attorney to deceive the court was sufficiently identified for introduction in disbarment proceedings, although never part of the record—Hertz v. U. S., (C.C.A.Minn.) 13 F.(2d) 52.

(6) Evidence of disbarments in other states, and of fraud in securing admission to practice, was admissible on the question of fitness to hold a license—In re Bailey, 254 P. 481, 31 Ariz. 407, certiorari denied Bailey v. State of Arizona, 48 S.Ct. 31, 275 U.S. 575, 72 L.Ed. 434

(7) Evidence on charges which were found an insufficient cause for discipline may be considered as tending to characterize the attorney's conduct and intent in matters found to constitute misconduct—In re Moerke, 238 N.W. 690, 184 Minn. 314

(8) Findings and an order of the district court, in a summary proceeding brought against an attorney by clients to recover moneys—In re Gerlich, 244 N.W. 414, 187 Minn. 88

(9) A judgment suspending an attorney from practice was admissible in subsequent proceedings charging the attorney with practicing during the suspension period, although an appeal from the judgment was undetermined—Lincoln v. Superior Court of California, 271 P. 1107, 95 Cal. App. 35.

(10) Letters written by an attorney, which he did not deny, were held not prejudicial, notwithstanding the claim that the letters were improperly obtained.—In re Scott, 292 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113.

(11) Statement by an attorney to a witness, from which misconduct charged could reasonably be inferred—McCord v. State, 126 So. 873, 220 Ala. 466.

(12) Testimony as to an attorney's statement about the source of title and a subsequent attempt to secure the return of the property.—McCord v. State, supra.

(13) Although a specific charge of an attorney's misconduct may not be supported by sufficient evidence to require a disbarment, yet, if it shows a disposition to unprofessional conduct, it should be considered in connection with facts established on other charges in the same complaint for disbarment—State v. Fisher, 174 N.W. 320, 103 Neb 736.

(14) In a disbarment proceeding for soliciting claims and suits through paid agents, evidence of the solicitation of claims by an alleged agent of the attorneys was admissible, although there was no showing what disposition was made of the claims—In re Gallant, (Mo.App.) 95 S.W.(2d) 1249.

(15) In a proceeding to disbar an attorney on the ground of conveyances in fraud of his former partner, a judgment creditor, the record in the former partner's action against respondent was competent proof as to his conduct therein—In re Berkeley, 160 N.Y.S. 1093, 174 App.Div. 205, affirmed 154 N.E. 621, 243 N.Y. 597.

(16) In proceedings to disbar an attorney who attempted to procure settlement of a slander action by the threat that such attorney's client would publish a libelous book against the party from whom settlement was sought, a letter written by the client after the threat by the attorney, on which letter the client was convicted of blackmail, was properly admitted to show the character of the manuscript and the purpose for which it was typed—In re Pollack, 285 N.Y.S. 244, 246 App.Div. 211.

(17) Statement, made by an attorney's counsel on an appeal to the board of tax appeals on the matter of deducting business expenses from gross income, that the attorney secured business through information received from employees of companies and paid employees for such information, although not conclusive on the attorney, was admissible in a disbarment proceeding as made in the attorney's presence and as corroborating the charge that the attorney spent money to obtain law business—In re Noell, (Mo.App.) 96 S.W.(2d) 213.

Antecedent disciplinary proceedings

State bar committee, hearing charges against an attorney, did not err in permitting an inquiry into possible antecedent disciplinary proceedings against him—Dalzell v. State Bar of California, (Cal.) 57 P.(2d) 1300.

Opinion evidence

Judge's testimony that he would not have permitted the withdrawal of the deposit had the attorney informed him of the oral decision disposing of the deposit was held not objectionable as being the opinion of a witness—In re Lincoln, 283 P. 965, 103 Cal.App. 733.

Parol evidence

Oral testimony concerning fee-splitting did not violate the parol evidence rule, although documents were introduced, the purpose being not to vary the terms but to impeach the written representations—Ring v. State Bar of California, 24 P.(2d) 821, 218 Cal. 747

Testimony at former hearing of person, since deceased

(1) Testimony of a deceased person, taken on a preliminary examination before the official committee, after notice and an opportunity to cross-examine, is admissible at the final hearing before the commissioner in disbarment proceedings.—In re Heard, 141 So. 60, 174 La. 563.

(2) But, where the adverse party had no opportunity or right to cross-examine such witness, such testimony has been held inadmissible—In re Lynch, 238 N.Y.S. 482, 227 App. Div. 477.

On cross-examination

(1) Prosecuting attorneys had the right to cross-examine thoroughly defendant as witness in his own behalf in a disbarment proceeding—McCord v. State, 126 So. 873, 220 Ala. 466

(2) Cross-examination of defendant in a disbarment proceeding relative to the discussion of an incident in which he had contributed to the moral delinquency of a girl did not require reversal—McCord v. State, supra.

(3) The fact that a conviction for subornation of perjury was pending on an appeal did not preclude the question, on cross-examination in disbarment proceedings, as to whether the attorney had been convicted therefor—In re Abrams, 173 N.E. 312, 36 Ohio App. 384.

In rebuttal

In disbarment proceedings, it was competent to show in rebuttal that, contrary to counsel's assertion, defendant attorney made the statement alleged—In re Abrams, 173 N.E. 312, 36 Ohio App. 384.

Evidence held inadmissible

(1) Evidence offered to control the findings of fact made by the federal

through all legitimate channels open to it, information available as to the present moral fitness of the attorney to practice law,[78] but irrelevant and immaterial testimony is not admissible.[79] The person charged should be permitted to avail himself of all the recognized competent evidence that would tend to disprove such charge and vindicate his character,[80] and, where respondent sets up a defense, it is proper to admit testimony to disprove it.[81] Where the charges are denied, the affidavits and papers on which the proceedings were instituted are not evidence on the issues, but are simply pleadings or statements of the charges relied on,[82] but where the attorney agrees that the case should be submitted on the record, affidavits on which the information is based and which are a part of the record may properly be considered.[83]

An exception to the general rule which excludes evidence of transactions other than those involved in the charge, as discussed in the title Evidence § 579 [22 C.J. p 745 note 43], is that evidence of similar derelictions is admissible to show scienter, where proof of criminal or fraudulent intent is essential to sustain the charge[84] or to prove intent and a common plan.[85]

Statute relaxing rules of evidence. A disbarment proceeding has been held to belong to that

court in disbarment proceedings.—In re Ulmer, 167 N E 749, 268 Mass 373.

(2) Testimony as to the reasonable value of land, in proceedings based on the attorney's misconduct in procuring client to sign the deed —McCord v. State, 126 So. 873, 220 Ala 466.

(3) Identity of respondent in disbarment proceedings with respondent in the previous case, or the fact that the previous information was filed.—People v. Johnson, 176 N E 278, 344 Ill 132.

(4) Where disbarment proceedings were resubmitted to the commissioner for the further cross-examination of a witness, who disappeared, testimony that she subsequently made statements conflicting with the original testimony was incompetent.—People v. Johnson, supra

78. In re Hosford, 252 N.W. 843, 62 S D 374

Character affidavits

In a proceeding to revoke an attorney's license for making a false affidavit when applying for admission to the bar, character affidavits were relevant.—State Bar of California v. Rollinson, 1 P (2d) 428, 213 Cal. 36, reversing (App.) 291 P. 431

79. Cal.—Shaw v State Bar of California, 297 P. 532, 212 Cal. 52—In re Richardson, 288 P 669, 209 Cal 492.
N.Y.—In re Goldstein, 258 N.Y S 548, 236 App Div 233.

Evidence held inadmissible

(1) Testimony as to defendant's presence at a political meeting the preceding year, in order to show motive for preferring charges.—McCord v. State, 126 So. 873, 220 Ala. 466.

(2) Where an attorney was charged with having confederated with another to commit perjury as to the genuineness of a document, the acquittal of the confederate on trial of the indictment against him is not competent evidence for the attorney in disbarment proceedings, for the reason, among others, that the parties to the proceedings were not the same—In re O'Brien, 113 A. 527, 95 Vt 167, 14 A L R 859

Evidence held immaterial

(1) Client's ratification of attorney's use for his own purposes of money sent him to redeem mining properties from tax sales—People v. Hillyer, 297 P 1004, 88 Colo 428

(2) Evidence of the presence of members of the bar signing the information at a meeting of the bar which resolved to prefer the charges resulting in the disbarment of the attorney—McCord v. State, 126 So. 873, 220 Ala. 466

Evidence held immaterial and hearsay

In a disbarment proceeding, testimony that attorneys filing the complaint had investigated the conduct of defendant before filing the complaint, and that they were actuated by proper motives, was incompetent as hearsay and immaterial—Houtchens v State, (Tex Com App) 63 S.W. (2d) 1011, reversing (Civ App) 47 S W (2d) 679, and motion granted (Com App) 74 S W.(2d) 976.

Evidence held irrelevant

Attorney's conspiracy action is unjustified, unless based on reasonable grounds, and only relevant evidence is admissible in disbarment proceedings instituted because of the bringing of such action, and acts, omissions, and statements are not admissible unless connected with defendants—In re Bevans, 225 N.Y.S. 273, 222 App Div. 701.

80. Allen v. State Bar of California, 21 P (2d) 107, 218 Cal. 19—6 C J. p 607 note 84.

Previous good character

(1) The attorney's character being directly in issue, evidence thereof is admissible—State Bar of California v. Rollinson, 1 P (2d) 428, 213 Cal 36, reversing (App) 291 P 431—People v. Johnson, 176 N E 278, 344 Ill. 132—People v Johnson, 163 N E 326, 332 Ill. 84—Buhler v. Trick, 144 N E. 840, 195 Ind. 190—Lenihan v. Commonwealth, 176 S W. 948, 165 Ky 93, L R A 1917B 1132—6 C J. p 607 note 84 [a].

(2) However, such evidence must be produced in a manner sanctioned by the rules of evidence—Allen v. State Bar of California, 21 P.(2d) 107, 218 Cal 19.

81. Propper v. Owens, 72 S E 242, 136 Ga. 787.

82. Houtchens v State, (Tex Com. App) 63 S W.(2d) 1011, reversing (Civ App.) 47 S W.(2d) 679, and motion granted (Com App) 74 S W. (2d) 976—6 C.J p 607 note 86.

Reading affidavit to jury

(1) Reading an affidavit, attached to the complaint, to the jury has been held prejudicial error, where investigation of defendant by affiants as officers of the bar association was alleged—Houtchens v State, (Tex Com App.) 63 S W.(2d) 1011, reversing (Civ App.) 47 S W.(2d) 679, and motion granted (Com App.) 74 S W. (2d) 976.

(2) This is so, also, where the finding against the attorney was based entirely on the affidavit, without other evidence to support it—Lenihan v. Commonwealth, 176 S W 948, 165 Ky 93, L R A 1917B 1132

83. Denny v. Commonwealth, 194 S W. 330, 175 Ky. 357.

84. Ex parte Powell, (Ala) 166 So 614—In re Fite, 152 So 246, 228 Ala. 4—Ex parte Messer, 152 So. 244, 228 Ala. 16.

Employment of paid solicitors

In disbarment proceedings of attorneys for employing paid agents to solicit claims and suits and for solicitation through paid agents, evidence of similar transactions to those charged in the information was admissible, since it tended to show concerted plan or manner of conducting law business—In re Gallant, (Mo App.) 95 S W.(2d) 1249.

85. In re Kohler, 270 N.Y.S. 634, 240 App Div. 501.

class of cases to which a statute, designed to relax the rules of evidence thought to be too strict and narrow for ordinary litigation, would ordinarily be applicable.[86]

(3) Weight and Sufficiency

The authorities are conflicting as to the amount of proof necessary to sustain the charges in a disbarment proceeding. Conviction of a crime is sometimes made conclusive evidence of an attorney's unfitness to continue in the profession.

The authorities in disbarment proceedings are not uniform as to whether such a suit is civil or criminal (see supra § 28), or as to the amount of proof necessary to sustain the charges. By some courts it is held that, being criminal or quasi-criminal, or where the acts charged are criminal in their nature, the charge should be proved beyond a reasonable doubt.[87] Other courts hold that the rule in criminal prosecutions that the guilt of the accused must be proved beyond a reasonable doubt does not apply to proceedings for disbarment,[88] and that it is sufficient if the charge is established by a preponderance of evidence, as in any civil case.[89] However, it has been held that a mere preponderance of the evidence may not be sufficient,[90] and frequently, in describing the amount of proof required, the courts use such phrases as "clear and convincing evidence,"[91] "clearly established,"[92] "satisfy the court to a reasonable certainty,"[93] "clear preponderance of evidence," "clear and sat-

86. In re Keenan, 192 N E 65, 287 Mass 577, 96 A L R 679

Declarations of deceased person before commencement of action

(1) A statute, providing that a declaration of deceased person should not be inadmissible in evidence as hearsay, if the court found that it was made in good faith before the commencement of the "action," and on personal knowledge of declarant, was applicable to a disbarment proceeding—In re Keenan, 192 N E 65, 287 Mass. 577, 96 A.L.R 679.

(2) In a disbarment proceeding, the fact that deceased juryman, who had made statements concerning the misconduct of respondent in influencing jurymen, was the self-confessed taker of a bribe and was promised immunity from prosecution for his revelations, and that such declarations were not subject to cross-examination, did not affect their admissibility as evidence under the statute—In re Keenan, supra.

(3) Declarations of a deceased juryman concerning the misconduct of an attorney, although made prior to the actual institution of a disbarment proceeding but after the commissioner began taking the evidence touching on the conduct of respondent, were admissible under a statute removing the inadmissibility of such declarations because of their hearsay nature, provided they were made prior to the commencement of the action, since the commissioner's inquiry was merely preliminary in nature, was not designed to establish any rights or to end in any judgment or decree, and could not be considered the commencement of a disbarment proceeding—In re Keenan, supra.

87. People v. Bither, 165 N.E 793, 334 Ill 264—People v. Kerker, 146 N.E. 439, 315 Ill 572—6 C J. p 607 note 87.

88. Ala.—McCord v. State, 126 So. 873, 220 Ala 466
Ariz.—In re Myrland, 29 P.(2d) 483
Cal.—Fischer v State Bar of California, 58 P (2d) 1277, rehearing denied 59 P (2d) 805—San Francisco Bar Ass'n v Sullivan, 198 P 7, 185 Cal 621—In re Cruickshank, 190 P. 1038, 47 Cal.App 496
Ill.—In re Malmin, 4 N E (2d) 111, 364 Ill 164.
Mass.—In re Mayberry, 2 N E (2d) 248, 105 A L R 976
N Y.—In re Lynch, 238 N Y S 482, 227 App Div 477—In re Herrman, 161 N Y S 977, 175 App Div 310—In re Ropiecki, 282 N Y S. 947
Va.—Norfolk & Portsmouth Bar Ass'n v. Drewry, 172 S E 282, 161 Va 833
6 C J p 607 note 88

Failure to keep, or destruction of, books, vouchers, and checks, although not alone the basis for charges in disciplinary proceedings, is a suspicious circumstance—In re O'Neill, 240 N Y S 183, 228 App Div. 518.

Proof of payments to solicitors not necessary

Charge of solicitation made against an attorney in disciplinary proceedings may be established without proof of the payment by the attorney for the solicitor's services—In re Schacht, 239 N Y S. 516, 228 App Div 232

89. Ark.—Maloney v State, 32 S W (2d) 423, 182 Ark 510
N Y.—In re Farrell, 262 N Y S. 766, 237 App Div. 678—In re Spencer, 201 N Y S 315, 206 App Div 806—In re Herrman, 161 N Y S 977, 175 App Div. 310
Pa.—In re Lemisch, 184 A. 72, 321 Pa. 110
Tex.—Houtchens v. State, (Com App.) 63 S W (2d) 1011, reversing (Civ App.) 47 S W (2d) 679, and motion granted (Com App.) 74 S W (2d) 976
6 C J. p 607 note 89

90. Okl.—In re Maben, 27 P.(2d) 601, 167 Okl 111—In re Simpson, 192 P 1097, 79 Okl 305—In re Connell, 192 P. 564, 79 Okl 212.
Or.—State v. Estes, 209 P. 486, 105 Or 222

91. Ariz.—In re Myrland, 29 P (2d) 483
Ill.—People ex rel Chicago Bar Ass'n v Hammond, 191 N E 215, 356 Ill 581—In re Pelz, 190 N E 250, 356 Ill 200—People ex rel Chicago Bar Ass'n v Lotterman, 187 N E 424, 353 Ill 399—People v Kerker, 146 N E 439, 315 Ill. 572
Minn.—In re Otterness, 232 N W. 318, 181 Minn 254, 73 A.L.R 1319
Miss.—Ex parte Redmond, 125 So. 833, 156 Miss 439
N Y.—In re An Attorney, 161 N Y. S 504, 175 App Div 653
Okl.—Haunstein v State Bar of Oklahoma, 46 P (2d) 558—In re Rice, 29 P.(2d) 599, 167 Okl 330—In re Hadwiger, 27 P.(2d) 604, 167 Okl. 307
Or.—State v. Mannix, 288 P 507, 132 Or 329, rehearing denied 290 P. 745, 133 Or 329
Pa.—In re Lemisch, 184 A 72, 321 Pa 110—In re Disbarment Proceedings, 184 A 59, 321 Pa. 81.
6 C.J. p 607 note 90

92. Cal.—San Francisco Bar Ass'n v. Sullivan, 198 P 7, 185 Cal. 621
Ill.—People v. Jackson, 153 N E. 621, 322 Ill 613
Okl.—In re Maben, 27 P (2d) 601, 167 Okl. 111—State v. Ledbetter, 260 P 454, 127 Okl 85—State v Cutlip, 202 P 782, 83 Okl 183—In re Simpson, 192 P. 1097, 79 Okl 305—In re Connell, 192 P. 564, 79 Okl. 212.
Or.—State v Estes, 209 P 486, 105 Or 222—State v. Garland, 150 P. 289, 77 Or. 92.

93. Cal.—Golden v. State Bar of California, 2 P (2d) 825, 213 Cal 237—Bar Ass'n of San Francisco v. Goldman, 199 P. 836, 53 Cal.App 42.
Okl.—State v. Cutlip, 202 P. 782, 83 Okl. 183—State v. Vernor, 191 P 729, 79 Okl 124—In re McNabb, 185 P 431, 76 Okl 253—In re Reily, 183 P. 728, 75 Okl 192, 7 A.L.R. 89.

isfactory legal proof," and the like,[94] not only with regard to the acts charged, but also with regard to fraudulent or dishonest motives.[95] This rule has been said to be preëminently appropriate where the offense charged is cognizable by the criminal law,[96] but, even where the charges of professional misconduct on which an attorney is disbarred are not of a criminal nature, it has been held that they should be established by a preponderance of "satisfactory evidence."[97]

All proper intendments are in favor of the attorney,[98] and reasonable doubts[99] or conflicts in the evidence[1] should be resolved in his favor; but where the charges remain unexplained by the attorney, they must be taken as true.[2] The testimony of the attorney must be accepted as true unless outweighed by other facts and circumstances presented by the evidence,[3] and evidence bearing the earmarks of private spite should be accepted with extreme caution and scrutinized most carefully.[4]

In many cases the evidence has been held sufficient to support a finding that the attorney was guilty of the conduct charged,[5] while in a large

94. Idaho—In re Baum, 186 P. 927, 32 Idaho 676
Ill—In re Lasecki, 192 N.E. 655, 358 Ill 69—People v Johnson, 163 N.E. 326, 332 Ill 84—People v McCaskrin, 156 N.E. 328, 325 Ill 149—People v Hansen, 147 N.E. 431, 316 Ill 502—People v A'Brunswick, 146 N.E. 483, 315 Ill 442—People v. Baker, 142 N.E. 554, 311 Ill 66, 31 A.L.R. 737
Iowa—In re De Caro, 262 N.W. 132, 220 Iowa 176
Minn—In re Hertz, 166 N.W. 397, 139 Minn 504
N.Y.—In re Steinfeld, 198 N.Y.S. 124, 204 App.Div. 508
S.C.—State v. Jennings, 159 S.E. 627, 161 S.C. 263
Utah—In re Hanson, 158 P. 778, 48 Utah 163
Va.—Norfolk & Portsmouth Bar Ass'n v Drewry, 172 S.E. 282, 161 Va. 833
W.Va.—State v. Smith, 99 S.E. 332, 84 W.Va. 59
6 C.J. p. 607 note 90.

To justify disbarment, the case must at least be clear and free from doubt—People ex rel. Chicago Bar Ass'n v Hammond, 191 N.E. 215, 356 Ill. 581—People v Gorindar, 182 N.E. 732, 350 Ill. 256—People v Pio, 139 N.E. 45, 308 Ill. 128—In re Haddad, 173 A. 103, 106 Vt. 322

Evidence held to authorize inference of guilt.—In re Salus, 184 A. 70, 321 Pa. 106—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81

95. Ill.—In re Lasecki, 192 N.E. 655, 358 Ill. 69—People ex rel. Chicago Bar Ass'n v Lotterman, 187 N.E. 424, 353 Ill. 399—People v Gorindar, 182 N.E. 732, 350 Ill. 256—People v McCaskrin, 156 N.E. 328, 325 Ill. 149—People v Hansen, 147 N.E. 431, 316 Ill. 502—People v A'Brunswick, 146 N.E. 483, 315 Ill. 442
Fla.—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699.
Okl.—Haurstein v State Bar of Oklahoma, 46 P.(2d) 558—In re Rice, 29 P.(2d) 599, 167 Okl. 330—In re Hadwiger, 27 P.(2d) 604, 167 Okl. 307

96. In re An Attorney, 161 N.Y.S. 504, 175 App.Div. 653—6 C.J. p. 608 note 91

97. Cal.—In re Houghton, 8 P. 52, 67 Cal. 511.
Mich.—Matter of Baluss, 28 Mich. 507
Wis.—In re O———, 42 N.W. 221, 73 Wis. 602

98. In re Petersen, 280 P. 124, 208 Cal. 42—In re Alameda County Bar Ass'n, 170 P. 432, 35 Cal.App. 534

Good reputation strongly tends to prove innocence

(1) Where an attorney by his conduct has built up a reputation for honesty and fair dealing, when his integrity as a lawyer is assailed, such reputation is a circumstance strongly tending to prove his innocence—People v McCallum, 173 N.E. 827, 341 Ill. 578

(2) However, testimonials regarding an attorney's good character do not serve to outweigh inferences, where the evidence shows intentional wrongdoing—In re Durst, 239 N.Y.S. 316, 228 App.Div. 256

Inferences from return of fee claimed to be exorbitant

In a disbarment proceeding for charging exorbitant fees, no adverse or favorable inferences could be indulged as a result of the attorney's restitution of the moneys received, where the restitution was made solely in the interests of expediency in relation to another case and under pressure—Herrscher v State Bar of California, (Cal.) 49 P.(2d) 832

Testimony of self-confessed perjurer

In a disciplinary proceeding against an attorney, finding could not be based on uncorroborated testimony of self-confessed perjurer and unmitigated liar—In re O'Neill, 171 N.Y.S. 514, 184 App.Div. 75.

99. Laney v State Bar of California, (Cal.) 60 P.(2d) 845—Golden v State Bar of California, 2 P.(2d) 325, 213 Cal. 237—In re Alameda County Bar Ass'n, 170 P. 432, 35 Cal.App. 534

1. San Francisco Bar Ass'n v McClellan, 181 P. 231, 40 Cal.App. 630—6 C.J. p. 607 note 90 [a] (2).

2. People v. Lindsey, 283 P. 539, 86 Colo. 458

3. In re Stolen, 214 N.W. 379, 193 Wis. 602, 55 A.L.R. 1355, affirmed 216 N.W. 127, 193 Wis. 602, 55 A.L.R. 1355

Disbelief of attorney's testimony not based on surmise or conjecture

In a disbarment proceeding, the state bar governors could not disbelieve the attorney's testimony that he paid fifty thousand one hundred seventeen dollars and fifty-four cents obligation merely because the petitioner testified that the payment was in currency, but the disbelief must be based on evidence sufficient to support a finding against accused—Golden v State Bar of California, 2 P.(2d) 325, 213 Cal. 237

Evidence held sufficient to establish the fact that respondent charged with borrowing money from bootleggers knew the character of such persons—In re Stolen, 214 N.W. 379, 193 Wis. 602, 55 A.L.R. 1355, affirmed 216 N.W. 127, 193 Wis. 602, 55 A.L.R. 1355

4. Herrscher v. State Bar of California, (Cal.) 49 P.(2d) 832—Peck v State Bar of California, 17 P.(2d) 112, 217 Cal. 47.

5. U.S.—Hertz v. U. S., (C.C.A. Minn.) 18 F.(2d) 52—In re O'Neill, (D.C.N.Y.) 5 F.Supp. 465—In re Rowe, (D.C.N.Y.) 4 F.Supp. 35.
Ariz.—In re Lohrke, 2 P.(2d) 1039, 38 Ariz. 520
Ark.—State v Huddleston, 293 S.W. 353, 173 Ark. 686.
Cal.—Wilcox v State Bar of California, 42 P.(2d) 631, 2 Cal.(2d) 614—Brown v State Bar of California, 42 P.(2d) 306, 2 Cal.(2d) 533—Barton v State Bar of California, 40 P.(2d) 502, 2 Cal.(2d) 294—Maggart v State Bar of California, 61 P.(2d) 451—Jurich v State Bar of California, 60 P.(2d) 282—Fischer v State Bar of California, 58 P.(2d) 1277, rehearing denied 59 P.(2d) 805—Padgham v. State Bar of California, 58 P.(2d) 633—Branch v State Bar of California, 56 P.(2d) 945—Roark v. State Bar of California, 55 P.(2d) 839—Seavey

v. State Bar of California, 47 P (2d) 281—Sawyer v State Bar of California, 32 P (2d) 369, 220 Cal. 702—Nolan v State Bar of California, 28 P (2d) 1050, 219 Cal 759—Stafford v State Bar of California, 26 P (2d) 833, 219 Cal. 415—Mauer v. State Bar of California, 26 P (2d) 14, 219 Cal. 271—Ring v State Bar of California, 24 P.(2d) 821, 218 Cal 747—Galbraith v State Bar of California, 23 P (2d) 291, 218 Cal 339—Recht v State Bar of California, 23 P (2d) 278, 218 Cal. 352—Allen v State Bar of California, 21 P (2d) 107, 218 Cal 19—Wright v State Bar of California, 17 P. (2d) 101, 217 Cal 59—Fish v State Bar of California, 4 P (2d) 937, 214 Cal 215—Irving v. State Bar of California, 1 P.(2d) 2, 213 Cal 81—D'Elia v. State Bar of California, 300 P. 826, 212 Cal 770—Lantz v. State Bar of California, 298 P 497, 212 Cal 213—Smallberg v State Bar of California, 297 P 916, 212 Cal. 119—McIntosh v State Bar of California, 294 P. 1067, 211 Cal 261—Smith v. State Bar of California, 294 P. 1057, 211 Cal 249, 73 A.L.R. 393—Marsh v State Bar of California, 291 P 588, 210 Cal 303—Aydelotte v. State Bar of California, 290 P 41, 209 Cal 737—In re Richardson, 288 P 669, 209 Cal 492—Bailey v State Bar of California, 288 P 433, 209 Cal 476—In re Stafford, 284 P. 670, 208 Cal 738—State Bar of California v Jones, 280 P 964, 208 Cal. 240—In re Vaughan, 209 P 353, 189 Cal 491, 24 A.L.R 858—In re Lincoln, 283 P. 965, 102 Cal App 733—In re Masuran, 263 P. 339, 88 Cal.App 372—In re Hittson, 185 P. 308, 43 Cal App 462—In re Soale, 159 P 1065, 31 Cal App 144.

Colo—People v Boutcher, 4 P (2d) 910, 89 Colo 497—People v Hillyer, 297 P 1004, 88 Colo 428—People v. Irwin, 152 P. 905, 60 Colo. 177

Hawaii—In re Lyman, 30 Hawaii 405

Idaho—In re Burns, 40 P (2d) 105, 55 Idaho 190

Ill—People ex rel Chicago Bar Ass'n v. Templeman, 1 N E (2d) 850, 363 Ill 152—In re Casey, 195 N E 39, 359 Ill 496—People ex rel Chicago Bar Ass'n v Byrne, 188 N E 849, 354 Ill. 607—People ex rel Chicago Bar Ass'n v Pace, 188 N E 169, 354 Ill. 111—People ex rel Chicago Bar Ass'n v Green, 187 N E 811, 353 Ill 638—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N.E. 832, 351 Ill 206—People v. Hachtman, 183 N E 222, 350 Ill 326—People v Ladouceur, 179 N.E. 890, 347 Ill. 454—People v Gilmore, 177 N E 710, 345 Ill. 28—People v. Johnson, 176 N E 278, 344 Ill. 132—People v. Simmons, 173 N E 898, 341 Ill 340—People v. Jackson, 153 N E 621, 322 Ill. 618—People v. Hoering, 148 N E 299, 317 Ill. 390—People v Fish, 143 N E 49, 311 Ill 497—People v Donovan, 123 N E. 513, 288 Ill 555—People v Holt, 116 N E 612, 279 Ill 107—People v. Moseley, 116 N. E 123, 278 Ill. 377—People v. Pfuhl, 114 N E 10, 275 Ill 243—People v Keeley, 112 N E 362, 273 Ill 95—People v. Stonecipher, 111 N E 496, 271 Ill 506—People v. Czarnecki, 109 N E. 14, 268 Ill. 278

Iowa—In re De Caro, 262 N W 132, 220 Iowa 176—In re Cloud, 250 N W 160, 217 Iowa 3—State v Kaufmann, 209 N W 417, 202 Iowa 157

Kan—In re Stanley, 33 P (2d) 163, 139 Kan 656—In re Evans, 29 P (2d) 1111, 139 Kan 63—In re Wilson, 280 P. 748, 128 Kan 657—In re Learnard, 249 P. 606, 121 Kan 596—In re Gilbert, 216 P 1039, 114 Kan 57—In re Staton, 210 P 615, 112 Kan 226

Ky—Commonwealth ex rel Ward v Harrington, 98 S W (2d) 53, 266 Ky 41—Taylor v Commonwealth, 233 S W. 895, 192 Ky. 410

La—In re Kenner, 152 So 520, 178 La 774—In re Fourchy, 143 So 714, 175 La 628, appeal dismissed and certiorari denied Fourchy v Fletchinger, 53 S Ct 387, 288 U S 589, 77 L Ed 968—In re Heard, 141 So 60, 174 La 562—State v Woodville, 108 So 309, 161 La 135

Mass—In re Mayberry, 3 N E (2d) 248, 105 A.L.R. 976—In re Allin, 112 N E 494, 224 Mass. 9—In re O Connell, 53 N E 1001, 54 N E 553, 174 Mass. 253

Mich—Crowley v Burns, 267 N W. 631, 276 Mich 351—Attorney General v. Nelson, 249 N.W. 439, 263 Mich 686

Minn—In re Waleen, 264 N W 802—In re Larson, 245 N.W 626, 187 Minn 427—In re Gerlich, 244 N W 414, 187 Minn 88—In re Moerke, 238 N W 690, 184 Minn 314—In re Hage, 214 N W 663, 171 Minn 434—In re Yakey, 212 N W 13, 170 Minn 21—In re Hertz, 211 N W 678, 169 Minn 431—In re Eberhart, 205 N W 266, 164 Minn 408—In re Cary, 177 N W. 801, 146 Minn. 80, 9 A L R 1272

Miss—In re Latham, 139 So 457, 162 Miss 233—In re Marshall, 138 So 293, 162 Miss 364

Mo—In re H——— S———, (App) 69 S W (2d) 325

Mont—In re Hansen, 54 P (2d) 882—In re Young, 250 P 957, 77 Mont 332—In re Niles, 224 P. 861, 70 Mont. 249—In re O'Keefe, 175 P. 593, 55 Mont 200—In re Waddell, 172 P 1036, 54 Mont 597

Nev—In re Miller, 59 P (2d) 9—In re Bailey, 161 P 512, 40 Nev. 139

N J—In re Cosey, 94 A. 54, 84 N J. Eq 343, motion denied 96 A. 595, 85 N J Eq 599—In re Smith, 94 A 30, 84 N J Eq. 252

N Y—In re Kunstler, 289 N Y S 107, 248 App Div 393—In re Aronstein, 289 N Y S 62, 248 App Div 349—In re Sachs, 288 N Y S 1001, 248 App Div. 201—In re Dorfman, 287 N.Y S 399, 247 App Div 271—In re Campbell, 286 N Y S 187, 246 App Div 394—In re Braun, 285 N Y S 360, 246 App Div 206—In re Lazarus, 284 N Y S 340, 245 App Div 657—In re Schecht, 275 N Y. S 712, 242 App Div 495—In re Abel, 276 N Y S 443, 242 App Div. 490—In re Karp, Alter, Busch, Rusgo, Aronstein, Butler, Mayer, Kahan, Fitzsimmons, Goldstein, McAuliffe, Hirsch, Frankel, Weber, and Kurtz, 270 N Y S 113, 240 App Div 388, affirmed In re Karp, 195 N E 160, 266 N Y 473—In re Greenfogel, 267 N Y S 892, 239 App Div 432, motion denied 191 N E 515, 264 N Y 463—In re Friedland, 264 N Y S 151, 238 App Div. 215—In re Treadwell, 260 N Y S 264, 236 App Div 562—In re Goldstein, 258 N Y S 548, 236 App Div 233—In re Powers, 257 N Y S 113, 235 App Div 382—In re Albert, 252 N Y S 774, 233 App Div. 822—In re Silver, 252 N Y S 749, 233 App Div 303—In re Flanagan, 247 N Y S 724, 231 App Div 548—In re Cusack, 247 N Y S 39, 231 App Div 186—In re Brinn, 246 N.Y.S 515, 231 App Div 179—In re Babcock, 243 N Y S 489, 230 App Div. 332—In re Schmidt, 243 N Y S 295, 229 App Div 604—In re Sprung, 242 N Y S 660, 229 App Div 501—In re Gluck, 243 N Y S 334, 229 App. Div. 490—In re Cohen, 243 N Y S 75, 229 App Div. 478—In re Axtell, 242 N Y S 18, 229 App Div 323, affirmed 177 N E 428, 257 N.Y. 210, and modifying on other grounds 257 N Y S 470, 235 App Div 350—In re Kopleton, 241 N Y S 171, 229 App Div 111—In re Katz, 241 N Y. S 317, 229 App Div. 103—In re Gordon, 241 N Y S 263, 229 App Div 88—In re Eichner, 241 N Y S 113, 229 App Div. 77—In re Becker, 241 N Y S 369, 229 App Div 62, appeal dismissed In re Levy, 174 N E. 461, 255 N Y 233—In re Seidman, 240 N Y S 592, 228 App Div 515—In re Linden, 240 N Y.S 271, 228 App Div 497—In re Horovitz, 240 N.Y S 343, 228 App Div. 484—In re Schacht, 239 N Y S 516, 228 App Div. 232—In re Schlacht, 239 N Y S 454, 228 App Div 226—In re Feuerman, 238 N Y S 656, 227 App. Div. 506—In re Seligsohn, 238 N. Y S 627, 227 App Div. 480—In re Rogers, 235 N Y S. 718, 226 App. Div 470—In re Rothbard, 232 N.Y S. 582, 225 App Div. 266—In re Littick, 232 N Y S 571, 225 App Div 246, affirmed 171 N E 805, 253 N.Y 613—In re Elliott, 230 N Y S 1, 224 App Div 207—In re Bullowa, 229 N.Y.S. 145, 223 App Div. 593—

In re Crary, 228 N Y S 340, 223 App Div 277—In re Krumsky, 226 N Y S 188, 222 App Div. 275—In re Stark, 221 N Y S 243, 220 App Div 133—In re Lordan, 217 N Y S 237, 217 App Div 441—In re Walsh, 217 N Y S 253, 217 App Div 437—In re Marshall, 213 N Y S 611, 216 App Div 168—In re Greenberg, 213 N Y S 728, 216 App Div 164—In re Auerbach, 213 N Y S 664, 216 App Div. 159—In re Simons, 208 N Y S 51, 211 App Div 659—In re Newman, 208 N Y S 140, 211 App Div 654—In re McGee, 208 N Y S. 104, 211 App Div 650, affirmed 152 N.E 436, 242 N Y 581, reargument denied 155 N E 874, 244 N Y. 507—In re McKenna, 208 N Y S 127, 211 App Div. 646, affirmed 148 N E 766, 208 N Y 703—In re Enklewitz, 207 N Y S 596, 211 App Div 268—In re Goette, 205 N Y S 388, 210 App Div. 189—In re Ackerson, 205 N Y S. 407, 209 App.Div 735—In re Marcus, 203 N Y S. 417, 208 App Div 300—In re Makay, 203 N Y S 15, 208 App Div 44—In re Flynn, 203 N Y. 29, 208 App Div. 40—In re Gilbert, 202 N Y S 885, 207 App Div 687—In re Spencer, 201 N.Y S 315, 206 App Div 806—In re O'Brian, 188 N Y S. 506, 197 App Div 50—In re Steinberg, 184 N Y. S 450, 193 App Div 503—In re Bunt, 182 N Y S 434, 192 App Div 226—In re Hunter, 179 N Y S 199, 189 App Div 805—In re Earley, 177 N Y S. 347, 188 App Div 532—In re Pollock, 165 N Y S 631, 178 App Div. 577—In re Hoyt, 165 N Y S 722, 178 App Div 570—In re Brown, 165 N Y S 736, 178 App Div. 558—In re Walsh, 164 N Y S 553, 177 App Div. 659—In re Haire, 162 N Y. S 510, 175 App Div 847—In re Herrman, 161 N Y S 977, 175 App Div. 310—In re Kammerlohr, 157 N Y S 933, 171 App Div 781—In re Hawes, 156 N Y S 283, 169 App Div. 644, affirmed 111 N E 211, 217 N.Y. 602—In re Cebulsky, 155 N Y S. 463, 169 App Div 636—In re Cohen, 155 N Y S 517, 169 App Div 544—In re Lenney, 155 N Y S. 473, 169 App Div. 509, appeal dismissed 115 N E 1043—In re Vanderpool, 155 N Y S 467, 169 App Div 499—In re Reiburn, 283 N.Y S 136—In re Ropiecki, 282 N.Y.S 947.

N C—Brummitt v. Winburn, 175 S E 498, 206 N C. 923

N D—In re Eaton, 235 N.W. 587, 60 N D. 530—In re Garrity, 235 N W 343, 60 N D. 454—In re Torson, 183 N W 1016, 46 N D 200.

Okl.—In re Murray, 61 P (2d) 1051—In re Lane, 54 P.(2d) 339—In re Neary, 50 P (2d) 1119—In re Roff, 50 P.(2d) 355—Charlton v. State Bar of Oklahoma, 42 P (2d) 233, 171 Okl. 128—In re Hills, 40 P (2d) 1031, 170 Okl. 427—In re Gowdy, 36 P.(2d) 902, 169 Okl 370—In re Lester, 36 P (2d) 478, 169 Okl. 162—In re Sides, 12 P.(2d) 232, 158 Okl. 110—Bar Commission of Oklahoma v. Dill, 229 P. 801, 107 Okl 61—In re Simpson, 192 P. 1097, 79 Okl 305—State v Vernor, 191 P. 729, 79 Okl 124—State v. Curd, 181 P. 484, 75 Okl 15—In re Horne, 167 P. 1148, 64 Okl 315.

Or—Ex parte Johnston, 61 P (2d) 296—State ex rel Seton v Arnold, 28 P (2d) 846, 145 Or 634—State v Mannix, 288 P 507, 133 Or 329, rehearing denied 290 P 745, 133 Or. 339—State v. Estes, 209 P. 486, 105 Or 222

Pa—In re Kraus, 185 A 737, 322 Pa 362—In re Griffith, 184 A. 76, 321 Pa 64—In re Forman, 184 A. 75, 321 Pa. 47—In re Lemisch, 184 A 72, 321 Pa 110—In re Salus, 184 A 69, 321 Pa 103—In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa 555—In re Barach, 123 A. 737, 279 Pa 89

R I—In re Troy, 111 A. 723, 43 R I. 279

S D—In re Brown, 264 N W 521

Tex—Rowland v State, (Civ.App) 55 S W (2d) 133

Utah—In re Barclay, 24 P.(2d) 302, 82 Utah 288

Wash—In re Gwynn, 37 P (2d) 1114, 179 Wash 389—In re Mills, 176 P 556, 104 Wash 278

Wis—State v Ingram, 248 N W 915, 212 Wis 142—State v Stetson, 234 N W 704, 203 Wis 657—State v Barto, 232 N W 553, 202 Wis. 329

6 C J p 607 note 90 [c]

Evidence held sufficient to prove

(1) Attorney's failure to comply with the law governing compromise of infants' claims, in disciplinary proceedings—In re Fieldsteel, 240 N. Y.S 481, 228 App Div 470.

(2) Attorney's practice to disregard court orders fixing compensation in infants' cases—In re Gordon, 241 N Y S. 263, 229 App Div 88

(3) Bad faith—In re Gerlich, 244 N.W. 414, 187 Minn 88.

(4) That accused acted inadvertently under a misapprehension of the real facts and intended no wrong—In re Staton, 210 P. 615, 112 Kan 226

(5) That an attorney did not improperly volunteer to defend a colored man accused of murder, over his objection, knowing that accused had confessed, in order to exploit the views of a certain organization, rather than to protect accused's constitutional rights—In re Ades, (D C. Md) 6 F.Supp 467.

(6) That an attorney for executor induced executor to loan him estate funds without giving security, which were not repaid—In re Rogers, 235 N Y.S. 718, 226 App Div 470.

(7) That an attorney volunteering, at the request of a certain organization, to defend a colored man accused of murder did not neglect the constitutional rights of accused—In re Ades, supra.

(8) That an attorney did not falsely represent to the court that he had been engaged to represent accused—In re Ades, supra

(9) That an attorney published false statements criticizing certain state judges and officials.—In re Ades, supra.

(10) That an attorney was guilty of misconduct in obtaining a loan by false representations that he owned an interest in a certain building, and that a certain corporation was indebted to him in the sum of twenty-five thousand dollars—State v. Estes, 209 P. 486, 105 Or 222

(11) That an attorney fraudulently obtained from a client money which he pretended to loan to a fictitious person—People v Ladouceur, 179 N E 890, 347 Ill 454

(12) That an attorney did not intentionally misrepresent to a client that judgment for costs had been entered—In re Rolph, 264 N Y S 171, 238 App Div. 235.

(13) That an attorney did not interpose a false answer in an action against him—In re Rolph, supra.

(14) That an attorney deserved censure for reposing undue trust and confidence in an employee, suffering him to conduct the collection branch of his business without due supervision, resulting in the employee's embezzlement of client's moneys and loss of records, thus delaying restitution—In re Hirsch, 171 N Y S. 534, 184 App Div 147.

(15) That an attorney was guilty of misrepresenting to the state and federal courts the status as party plaintiff of a corporation, amounting to deceit and requiring disbarment.—State v Mannix, 288 P. 507, 133 Or. 329, rehearing denied 290 P. 745, 133 Or. 329.

(16) That an attorney's misconduct in delaying payment of money received for a client was without improper motive, and that he had no intention or idea of defrauding his client.—In re Hirsch, supra

(17) That an attorney's fee of forty per cent of the legacies collected was grossly excessive—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N.E 424, 353 Ill. 399.

(18) That respondent grossly neglected his duty as attorney for plaintiff in an action against a railroad company for personal injuries—People v. Hillyer, 297 P. 1004, 88 Colo. 428.

(19) That respondent made a false affidavit of defense for client, that he filed false affidavits to enjoin a sale of property ordered in proceedings for the forfeiture of criminal bonds, and that he failed to protect client's rights on the foreclosure of a first deed of trust—People v. Martin, 124 N E. 340, 288 Ill. 615.

number of other cases it has been held insufficient.[6]

(20) That respondent misappropriated money collected for client.—People v. Hillyer, supra.

(21) That client did not consent to the retention by an attorney of money given him to deposit in court.—In re Pollock, 165 N.Y.S. 631, 178 App. Div. 577.

(22) To support the finding of a committee.—In re Barclay, 34 P.(2d) 302, 82 Utah 288.

(23) Unprofessional solicitation of business, as through paid agents or runners

Cal.—Johnson v. State Bar of California, 52 P.(2d) 928

Ill.—People v. McCallum, 173 N.E. 827, 341 Ill. 578

Mo.—In re Noell, (App.) 96 S.W.(2d) 213—In re Gallant, (App.) 95 S.W.(2d) 1249.

N.Y.—In re Fieldsteel, 240 N.Y.S. 481, 228 App. Div. 470

Pa.—In re Salus, 184 A. 70, 321 Pa. 106

(24) Violation of the confidence of a client so as to subject an attorney to disbarment.—In re Soale, 159 P. 1065, 31 Cal.App. 144

6. U.S.—U.S. v. Hicks, (C.C.A.Cal.) 27 F.(2d) 289—In re Ades, (D.C.Md.) 6 F.Supp. 467.

Cal.—Herrscher v. State Bar of California, 49 P.(2d) 832—Ewell v. State Bar of California, 40 P.(2d) 264, 2 Cal.(2d) 209—Kilpatrick v. State Bar of California, 32 P.(2d) 248, 220 Cal. 689—Burke v. State Bar of California, 21 P.(2d) 577, 218 Cal. 143—Peck v. State Bar of California, 17 P.(2d) 112, 217 Cal. 47—Clark v. State Bar of California, 4 P.(2d) 944, 214 Cal. 281—Golden v. State Bar of California, 2 P.(2d) 325, 213 Cal. 237—In re Petersen, 280 P. 124, 208 Cal. 42—San Francisco Bar Ass'n v. Oppenheim, 198 P. 1069, 186 Cal. 75—San Francisco Bar Ass'n v. Sullivan, 198 P. 7, 185 Cal. 621—In re Peaslis, 252 P. 745, 80 Cal.App. 672—Bar Ass'n of San Francisco v. Devall, 210 P. 279, 59 Cal.App. 230—Bar Ass'n of San Francisco v. Goldman, 199 P. 836, 53 Cal.App. 42—In re Kling, 186 P. 152, 44 Cal.App. 267—In re Alameda County Bar Ass'n, 170 P. 432, 35 Cal.App. 534.

Ill.—In re Kolb, 199 N.E. 92, 362 Ill. 190—In re Horwitz, 196 N.E. 208, 360 Ill. 313—People ex rel. Chicago Bar Ass'n v. Hammond, 191 N.E. 215, 356 Ill. 581—In re Pels, 190 N.E. 250, 356 Ill. 200—People ex rel. Chicago Bar Ass'n v. Mall, 188 N.E. 449, 354 Ill. 323—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N.E. 421, 353 Ill. 399—People v. Golondar, 182 N.E. 732, 350 Ill. 256—People v. Bither, 165 N.E. 798, 334 Ill. 264—People v. Johnson, 163 N.E. 326, 332 Ill. 84—People v. McCaskrin, 156 N.E. 328, 325 Ill. 149—People v. Hansen, 147 N.E. 431, 316 Ill. 502—People v. A'Brunswick, 146 N.E. 483, 315 Ill. 442—People v. Mohan, 138 N.E. 279, 307 Ill. 158—People v. Lasley, 135 N.E. 50, 302 Ill. 595—People v. Meyer, 132 N.E. 420, 299 Ill. 355—People v. Hickman, 128 N.E. 434, 294 Ill. 471—People v. Charone, 123 N.E. 291, 288 Ill. 220—People v. Wing, 120 N.E. 451, 284 Ill. 647.

Ind.—Vivian Collieries Co. v. Cahall, 110 N.E. 672, 184 Ind. 473

Ky.—Commonwealth ex rel. Wilson v. Steele, 67 S.W.(2d) 508, 252 Ky. 420—Duffin v. Commonwealth, 271 S.W. 555, 208 Ky. 452

La.—In re Craven, 151 So. 625, 178 La. 372, 90 A.L.R. 973—In re Borie, 118 So. 45, 166 La. 855

Minn.—In re Jelle, 244 N.W. 518, 187 Minn. 140—In re Otterness, 232 N.W. 318, 181 Minn. 254, 73 A.L.R. 1319—In re Morgan, 216 N.W. 319, 172 Minn. 532—In re Scott, 215 N.W. 175, 172 Minn. 248—In re Mohn, 184 N.W. 14, 149 Minn. 377—In re Hertz, 166 N.W. 397, 139 Minn. 504

Miss.—Ex parte Redmond, 125 So. 833, 156 Miss. 439

Mo.—State ex rel. Barrett v. Farris, 264 S.W. 363

Mont.—In re Huppe, 11 P.(2d) 793, 92 Mont. 211

Nev.—In re Clarke, 212 P. 1037, 46 Nev. 304—Washoe County Bar Ass'n v. Scoular, 190 P. 899, 44 Nev. 208—In re Winters, 163 P. 244, 40 Nev. 335

N.M.—In re Marron, 160 P. 391, 22 N.M. 252, L.R.A.1917B 373, motion granted In re Marron & Wood, 165 P. 216, 22 N.M. 501

N.Y.—In re Cook, 273 N.Y.S. 13, 242 App.Div. 224—In re Halprin, 271 N.Y.S. 679, 241 App.Div. 220—In re Lauria, 271 N.Y.S. 678, 241 App.Div. 216—In re Siegel, 271 N.Y.S. 671, 241 App.Div. 102—In re Cohalan, 271 N.Y.S. 76, 241 App.Div. 17—In re DeMillo, 270 N.Y.S. 645, 241 App.Div. 8—In re Karp, Alter, Busch, Rusgo, Aronstein, Butler, Mayer, Kahan, Fitzsimmons, Goldstein, McAuliffe, Hirsch, Frankel, Weber, and Kurtz, 270 N.Y.S. 113, 240 App.Div. 388, affirmed In re Karp, 195 N.E. 160, 266 N.Y. 473—In re Farrell, 262 N.Y.S. 766, 237 App.Div. 678—In re Vogelstein, 258 N.Y.S. 574, 236 App.Div. 252—In re Hussey, 258 N.Y.S. 634, 236 App.Div. 236—In re Fischer, 247 N.Y.S. 168, 231 App.Div. 192—In re Fisch, 246 N.Y.S. 760, 231 App.Div. 192—In re Schneidkraut, 246 N.Y.S. 505, 231 App.Div. 109—In re Glucksman, 243 N.Y.S. 1, 230 App.Div. 185—In re Cashman, 242 N.Y.S. 566, 229 App.Div. 471—In re Greenwald, 241 N.Y.S. 703, 229 App.Div. 189—In re Robinson, 241 N.Y.S. 296, 229 App.Div. 119—In re O'Neill, 240 N.Y.S. 183, 228 App.Div. 518—In re Linden, 240 N.Y.S. 274, 228 App.Div. 497—In re Horovitz, 240 N.Y.S. 343, 228 App.Div. 484—In re Fieldsteel, 240 N.Y.S. 481, 228 App.Div. 470—In re Cohen, 240 N.Y.S. 350, 228 App.Div. 465—In re Cherry, 240 N.Y.S. 232, 228 App.Div. 458—In re Bovard, 239 N.Y.S. 465, 228 App.Div. 263—In re Schlacht, 239 N.Y.S. 454, 228 App.Div. 226—In re Schleider, 239 N.Y.S. 311, 228 App.Div. 221—In re O'Neil, 239 N.Y.S. 297, 228 App.Div. 129—In re Baker, 238 N.Y.S. 409, 227 App.Div. 540—In re Langfur, 238 N.Y.S. 498, 227 App.Div. 468—In re Spigelgass, 233 N.Y.S. 33, 225 App.Div. 297—In re Woodburn, 208 N.Y.S. 331, 212 App.Div. 43—In re Levine, 205 N.Y.S. 589, 210 App.Div. 8—In re O'Neill, 171 N.Y.S. 514, 184 App.Div. 75—In re Somerville, 170 N.Y.S. 879, 183 App.Div. 415—In re Treadwell, 162 N.Y.S. 554, 175 App.Div. 833—In re An Attorney, 161 N.Y.S. 504, 175 App.Div. 653—In re Metcalfe, 236 N.Y.S. 591—In re Keesing, 233 N.Y.S. 319—In re Ifshin, 233 N.Y.S. 308—In re Janover, 165 N.Y.S. 645

N.D.—In re Doherty, 164 N.W. 948, 38 N.D. 260.

Ohio.—In re Campbell, 17 Ohio Cir.Ct.(N.S.) 223, 1 Ohio App. 413—In re McCray, 17 Ohio Cir.Ct.(N.S.) 213, 1 Ohio App. 421

Okl.—Haunstein v. State Bar of Oklahoma, 46 P.(2d) 558—In re Rice, 29 P.(2d) 599, 167 Okl. 330—In re Fleming, 29 P.(2d) 592, 167 Okl. 335—In re McNabb, 185 P. 431, 76 Okl. 253—In re Reily, 183 P. 728, 75 Okl. 192, 7 A.L.R. 89—In re Huddleston, 181 P. 711, 75 Okl. 48.

Or.—State v. Ridgway, 208 P. 587, 104 Or. 624

S.D.—In re Wilmarth, 172 N.W. 921, 42 S.D. 76

Utah.—In re Jones, 249 P. 803, 68 Utah 213.

Wash.—In re Bond, 60 P.(2d) 54—In re Dunham, 214 P. 628, 124 Wash. 418

6 C.J. p. 607 note 90 [d].

Evidence held insufficient to prove

(1) Acceptance of bribe.—San Francisco Bar Ass'n v. Oppenheim, 198 P. 1069, 186 Cal. 75.

(2) Acceptance of salaries without rendering adequate services therefor.—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206

(3) Alleged misconduct of an attorney in appearing as attorney for defendant in a divorce action with-

Conviction of crime as conclusive evidence. In some jurisdictions, usually by virtue of express

statutory provisions, the conviction of an attorney of a crime involving moral turpitude is conclusive evidence of his unfitness to remain a member of the bar,[7] and in some states this rule has been ap-

out authority—In re Rice, 29 P.(2d) 599, 167 Okl 330.

(4) Alleged misconduct of an attorney in that he, by misrepresentations and bad faith, obtained delivery of a truck held under execution by constable—In re Rice, supra

(5) Attorney's contention that one thousand dollars of two thousand dollars, which client allegedly had paid to the attorney to be applied as a down payment on the purchase of certain realty, had been paid merely as compensation for past services—In re Ropiecki, 282 N Y S 947

(6) Attorney's contention that a transaction, whereby client gave an attorney two thousand five hundred dollars, receiving in return an insurance policy, was a sale of the policy to the client and not, as claimed by the client, a loan secured by the policy for the express purpose of paying outstanding liens against particular property—In re Ropiecki, supra

(7) Attorney's contention that he had kept the unpaid balance of clients' money in cash in a safe in his office, properly earmarked, and had not commingled it with his private property—In re Ropiecki, supra

(8) That an attorney's payments to doctors, were compensation for the doctors' recommending him in personal injury cases or that the attorney withheld excessive amounts from clients—In re Fieldsteel, 240 N.Y.S 481, 228 App Div 470

(9) Attorney's solicitation as to cases in which he obtained retainers through recommendations of third parties—In re Seidman, 240 N Y S 592, 228 App Div 515

(10) Attorney's solicitation of litigation, client's testimony being contradicted—In re Seidman, supra

(11) Bad faith or fraudulent purpose, necessary to justify disbarment—In re Lasecki, 192 N E 655, 358 Ill 69

(12) Breach of trust in capacity as an attorney—In re Parker, 184 S E 533, 209 N C 693

(13) Bringing an action in the name of a woman on a policy issued to her father without her knowledge or consent, and of alleging therein that her father had died, although he was still living, and of receiving and appropriating proceeds of settlement—In re Hertz, 166 N W 397, 139 Minn 504

(14) Charge that an attorney obtained and converted bank account without client's knowledge—In re DeMillo, 270 N Y S 645, 241 App.Div. 8

(15) Charge that respondent had collected money from various insurance societies, and failed to account for it to his clients—In re Hertz, supra

(16) Dividing fees with persons not lawyers—In re Gallant, (Mo App) 95 S W (2d) 1249

(17) Fraudulent intent—Barbee v State Bar of California, 2 P (2d) 353, 213 Cal. 296

(18) Innocence of intentional wrongdoing recommending him to leniency—Howe v State Bar of California, 298 P 25, 213 Cal 222

(19) That a small loan by lawyers to a destitute client, by whom they had been employed to bring a personal injury action, was a consideration for employment and that respondents proposed to the client to put up a certified check for a certain amount if the client would permit them to bring action to set aside the settlement made by the client with defendant in the proposed action—In re Sizer, 267 S W. 922, 306 Mo. 356

(20) That an allegation in a petition for mandamus that the petitioner was the sole attorney for accused, to whom the warden had denied the petitioner access, was made with the intention to deceive the court which knew that other counsel had been appointed for accused—In re Ades, (D C Md) 6 F Supp 467.

(21) That an attorney procured habeas corpus without having been engaged to represent accused and without informing the court of the fact—In re Ades, supra.

(22) That an attorney attempted to intimidate state's witness and get her to change her testimony.—In re Ades, supra

(23) That an attorney had falsely represented at hearing of writ for habeas corpus that permission to consult with accused had been refused—In re Ades, supra

(24) That an attorney falsely swore that he had no funds in his possession as trustee belonging to trustor, where trustor had theretofore assigned interest in trust funds—Golden v. State Bar of California, 2 P (2d) 335, 213 Cal 237.

(25) That an attorney fraudulently wrote an assignment on the back of stock certificates which were given as collateral security for a loan—State v. Estes, 209 P 486, 105 Or. 322

(26) That an attorney converted to his own use money which was given him to institute bankruptcy proceedings or permitted taxes for which a client had given him money, with the request to pay them, to become delinquent—State v. Estes, supra.

(27) That attorneys extorted an additional fee from a client by threats of criminal proceedings—In re Marron, 160 P 391, 22 N M 253, L R A 1917B 378, motion granted In re Marron & Wood, 165 P 216, 22 N M 501.

(28) That an attorney was guilty of knowingly prosecuting fraudulent claim for personal injuries—People v McCallum, 173 N E 827, 341 Ill 578

(29) That an attorney filed false and fraudulent affidavits to induce the court to advance an action for personal injuries knowing affidavits to be fraudulent.—People v McCallum, supra

(30) That an attorney attempted to induce a third person to buy realty and to refuse to pay the unrecorded mortgage thereon—In re Spencer, 201 N.Y S 315, 206 App Div. 806

(31) That by undue influence, fraud, and deceit an attorney induced a client, while she was incompetent, to make her will, leaving a legacy to his daughter and appointing him executor, and procured the assignment to his wife of real estate mortgages.—In re Spencer, supra.

(32) That respondents had agreed, in violation of Rev St (1919) § 668, to divide fees with unlicensed representatives employed by them as investigators and claim agents—In re Sizer, 267 S W 922, 306 Mo 356

(33) That respondents, in order to get personal injury cases, promised to give clients money to live on pending the action, and offered to place a certain amount to such persons' credit in bank—In re Sizer, supra

(34) That, while acting as agent to collect rents, pay for taxes and repairs, and to find a purchaser for a business block, attorney deceived his principal as to the value of her equity therein, to enable himself to purchase it at a lower price through a third party without her knowledge—In re Spencer, supra

7. Cal—In re Collins, 206 P 990, 188 Cal 701, 32 A L R 1062—In re O'Connell, 194 P 1010, 184 Cal 584
Idaho—In re Kerl, 188 P 40, 32 Idaho 737, 8 A L R 1259
Ill—In re Needham, 4 N E (2d) 19 364 Ill 65—People v Meyerovitz, 116 N E 189, 278 Ill 356
Iowa—State v Metcalfe, 214 N.W 874, 204 Iowa 123
Ky—Commonwealth v Porter, 46 S. W (2d) 1096, 242 Ky 561—Underwood v Commonwealth, 105 S.W. 151, 32 Ky L. 32.

plied where the conviction was secured in a federal court,[8] but wholly denied[9] or qualified, at least to some extent,[10] in other states.

In other jurisdictions, it has been held that, in the absence of statute, a conviction of a crime involving moral turpitude is not conclusive, in a disbarment proceeding against an attorney on any ground of res judicata,[11] although it has been held to establish prima facie the attorney's unfitness to practice.[12]

b. Failure to Testify or Call Witness

Failure of an attorney to testify in his own defense or to call witnesses may be considered in weighing the evidence adduced in a disbarment proceeding.

The rule in criminal cases that the failure of accused to testify in his own behalf shall not be considered against him does not apply to proceedings for disbarment of an attorney, and such failure may be considered in weighing the evidence offered against him.[13] Also, where the testimony of witnesses, if true, shows the attorney to be guilty of the alleged offenses, any inference to be drawn from his failure to produce other witnesses must be resolved against him.[14]

c. Accomplice Testimony

Ordinarily, an accomplice may testify against the attorney, but the authorities are conflicting as to the necessity of corroboration.

One who entered into a corrupt scheme with an attorney may, in proceedings to disbar the attorney, testify to the details of the scheme,[15] and the rule of the criminal law that defendant cannot be convicted on the uncorroborated evidence of an accomplice has been held not to apply in disbarment proceedings.[16] However, where required, the extent to which corroboration is necessary in such a proceeding is for the determination of the court in each case.[17]

Mont—In re Callicotte, 187 P. 1019, 57 Mont. 297

Neb—State v Scoville, 243 N.W. 269, 128 Neb 457, followed in State ex rel Good v Black, 251 N.W. 109, 125 Neb 382

Pa—In re Gottesfeld, 91 A. 494, 245 Pa. 314.

S.D—In re Kirby, 73 N.W. 92, 10 S.D. 322, 39 L.R.A. 856.

6 C.J. p 608 note 91 [a].

Conviction of contempt

Where an order of the probate court holding an attorney guilty of contempt for converting to his own use property of an estate had been affirmed by the appellate court and a further review of the record was denied by the supreme court, the order was "final" and immune from collateral attack in a proceeding to disbar such attorney—People ex rel Chicago Bar Ass'n v. Templeman, 1 N.E.(2d) 850, 363 Ill. 152

Guilt may be proved without record

Although the record of the conviction is conclusive evidence of the guilt of the accused, guilt may be established without such record—People v. Meyerovitz, 116 N.E. 189, 278 Ill. 356

Injunction not equivalent to conviction

Injunction against an attorney's maintaining a place where liquors were kept for sale and sold was held not a conviction of felony within the statute making conviction conclusive—State v. Metcalfe, 214 N.W. 874, 204 Iowa 123.

Prosecution abandoned on appeal

Prosecution of an attorney in a district court on an appeal, where the case was triable anew, after a conviction in a police court, was held abandoned, and the conviction of little, if any, probative force in disbarment proceedings—State v Metcalfe, 214 N.W. 874, 204 Iowa 123

Conviction of crime involving moral turpitude as ipso facto causing disbarment see supra § 21

Conviction of crime involving moral turpitude as making it mandatory on court to disbar attorney see infra § 38

8. In re Needham, 4 N.E.(2d) 19, 364 Ill. 65

Conviction of illegal use of mails

Judgment of the federal circuit court of appeals affirming a judgment of the federal district court convicting an attorney of using the United States mails to obtain money and property of others by fraud and false pretenses was held conclusive evidence of such attorney's guilt—In re Needham, 4 N.E.(2d) 19, 364 Ill. 65

9. **Not conclusive of either guilt or moral turpitude**

Conviction of an attorney of a felony in the federal court is not conclusive evidence of such guilt or of moral turpitude in disbarment proceedings, so as to preclude this court from looking into the record for the purpose of determining both the guilt and the moral turpitude of such attorney, but is conclusive only of the fact of conviction—In re Green, 16 P.(2d) 582, 161 Okl. 1.

10. **Not conclusive of moral turpitude**

While conclusive effect will be given the record of conviction in a federal court, it is not conclusive that the crime involved moral turpitude; that is a question of law for this court—In re Downs, 268 P. 17, 46 Idaho 464—In re Dampier, 267 P. 452, 46 Idaho 195

11. N.Y.—In re Kaufmann, 157 N.E. 730, 245 N.Y. 423, reversing 211 N.Y.S. 256, 213 App.Div. 555—In re Lindheim, 211 N.Y.S. 261, 213 App. Div. 560

Wis.—State v. O'Leary, 241 N.W. 621, 207 Wis. 297, 81 A.L.R. 1193

Judgment on plea of nolo contendere

Mere introduction of a certified copy of an indictment and judgment thereon, based on a plea of nolo contendere, was held not to show "conviction or confession" of felony, warranting an attorney's disbarment—In re Stiers, 167 S.E. 382, 204 N.C. 48

12. State v. O'Leary, 241 N.W. 621, 207 Wis. 297, 81 A.L.R. 1193

13. Cal.—Fish v. State Bar of California, 4 P.(2d) 937, 214 Cal. 215—In re Graves, 221 P. 411, 64 Cal. App. 176

N.Y.—In re Lynch, 238 N.Y.S. 482, 227 App.Div. 477—In re O'Neill, 171 N.Y.S. 514, 184 App.Div. 75.

6 C.J. p 608 note 93

Right of attorney to decline to testify in disbarment proceeding see Witnesses § 441 [70 C.J. p 735 notes 41–43]

14. In re Herrman, 161 N.Y.S. 977, 175 App.Div. 310.

15. State v. Cadwell, 40 P. 176, 16 Mont. 119—6 C.J. p 608 note 91

16. In re Morton, 177 P. 453, 179 Cal. 510—6 C.J. p 608 note 95.

Client held not accomplice

Client is held not to be an attorney's accomplice, so as to require corroboration of his testimony in a disbarment proceeding, because of the execution of a note and mortgage on the attorney's advice to defraud creditors—In re Masuran, 263 P. 339, 88 Cal.App. 272.

17. Matter of Hardenbrook, 121 N.Y.S. 250, 135 App.Div. 634, affirmed 92 N.E. 1086, 199 N.Y. 539.

§ 34. —— Trial or Hearing

a. In general
b Reference

a. In General

The trial or hearing in a disbarment proceeding should be conducted in accordance with general legal principles, including those applicable to continuances, instructions, reopening a case, confronting witnesses, and verdicts.

Where not prescribed by statute, the court may prescribe the form and manner of proceeding (supra § 28) and is vested with a large discretion[18] which is not to be exercised in an arbitrary manner,[19] but most cautiously and with a scrupulous protection of the rights of accused,[20] and in accordance with the legal rules and principles for determining his guilt.[21] All matters touching upon the integrity of the bar should receive the fullest consideration without regard to technicalities,[23] and the attorney cannot control the investigation of the court or the consideration of any facts or circumstances that will assist the court in accurately determining his then fitness to practice law,[23] but, subject to the constitutional limitation as to self-incrimination, he must answer, disclose and testify.[24]

Joint or separate trial. Where two or more attorneys jointly commit acts which, if proven, justify the disbarment of each, they may be jointly charged as together doing the acts, and it is not error to refuse a separate trial to each in the absence of a statute giving such right.[25] Upon such joint trial one or more may be acquitted and the others convicted, or all may be acquitted or convicted, according to the evidence.[26]

Continuance. The granting of a continuance is within the discretion of the trial court[27] and the refusal thereof is not cause for reversal where ample opportunity was afforded for a full investigation,[28] and the attorney suffered no prejudice thereby;[29] but it is error to refuse respondent a

18. U S—Bartos v U S District Court for District of Nebraska, (C C A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138.
D C—Thomas v Ogilby, 59 App D C 382, 44 F (2d) 890
Ill—People ex rel Chicago Bar Ass'n v Lotterman, 187 N E 424, 353 Ill 399
Okl—In re Rice, 29 P (2d) 599, 167 Okl 330—In re Hadwiger, 27 P.(2d) 604, 167 Okl. 307
S D—In re Hosford, 252 N.W. 843, 62 S D 374
Vt—In re Haddad, 173 A. 103, 106 Vt 322

The order of proof is within the sound discretion of the trial court and an order of the court that the charges should be disposed of separately as respects the proof is reasonable—Thomas v Ogilby, 59 App D C. 382, 44 F (2d) 890.

19. U S—Bartos v. U. S District Court for District of Nebraska (C C.A Neb) 19 F.(2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138
Ill—In re Lasecki, 192 N E 655, 358 Ill 69—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N E 424, 353 Ill 399—People v. Bither, 165 N E 798, 334 Ill 264
Okl—In re Rice, 29 P (2d) 599, 167 Okl 330—In re Hadwiger, 27 P. (2d) 604, 167 Okl. 307.

20. In re Hosford, 252 N.W. 843, 62 S D 374.

21. Ill—In re Lasecki, 192 N E 655, 358 Ill 69—People ex rel. Chicago Bar Ass'n v. Lotterman, 187 N E. 424, 353 Ill. 399—People v. Gorindar, 182 N.E 732, 350 Ill. 256—People v. Gilmore, 177 N E 710, 345 Ill 38—People v. Bither, 165 N.E 798, 334 Ill. 264.
Okl—In re Rice, 29 P (2d) 599, 167 Okl 330—In re Hadwiger, 27 P (2d) 604, 167 Okl 307.
Vt—In re Haddad, 173 A. 103, 106 Vt 322
6 C J p 609 notes 98, 99.

Decision as to merits of plea

Where an attorney interposed exceptions by way of a preliminary defense, he is entitled to a decision from the court on the merit of his pleas—State v. Flynn, 107 So 314, 160 La 483.

Interrogation of witnesses by judge

It has been held not improper for the judge to interrogate witnesses—Wilhelm's Case, 112 A. 560, 269 Pa 416.

22. In re Huppe, 11 P.(2d) 793, 92 Mont 211.

23. In re Hosford, 252 N W 843, 62 S D 374.

Intention not to practice in future

An attorney's intention not to practice law in the future is no reason why the court should decline to proceed to a final determination of the disbarment proceeding.—People v. Powell, 287 P. 858, 87 Colo. 387.

24. Cal.—Fish v. State Bar of California, 4 P (2d) 937, 214 Cal 215
Minn—In re Halvorson, 221 N.W 907, 175 Minn 520
N M—In re Zinn, 34 P.(2d) 1097, 38 N.M 449.

Attorney may not assume an attitude purely defensive, but must explain transactions wrongful on their face and demonstrate their innocence or good faith—In re Zinn, 34 P.(2d) 1097, 38 N M 449.

25. In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 332, 351 Ill. 206—6 C J p 609 note 11.

26. In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, supra—6 C J. p 609 note 12.

27. Iowa—State v. Kimball, 158 N. W. 579, rehearing denied 160 N.W 836.
Pa—Wilhelm's Case, 112 A. 560, 269 Pa 416

28. Wilhelm's Case, supra.

29. Green v State Bar of California, 292 P 638, 210 Cal 603

Refusal held not prejudicial or erroneous

(1) Refusal to continue disbarment proceeding on the ground that attorney had tendered an answer only at the time of trial was held not error, where all the parties had announced ready, and the answer was in effect a denial of the charges of the petition, and did not allege new matter which would cause the relator surprise—De Krasner v. Boykin, (Ga App) 186 S.E 749.

(2) The refusal of a continuance which resulted in a hearing where the attorney was without benefit of counsel has been held not prejudicial where the matter involved a single issue without complications and the facts found rested almost entirely on admissions made by the attorney in his answer and oral testimony and letters written by him, and where he subsequently appeared before the board of commissioners and the supreme court without counsel—In re Steffensen, 39 P.(2d) 722, 85 Utah 380.

(3) Refusal of a continuance has been held not prejudicial where the

continuance on a proper showing being made by him.[30]

Right to confront witnesses. A disbarment proceeding not being criminal in nature (supra § 28), it has been held that the accused attorney is not entitled to be confronted face to face with the witnesses against him,[31] but that the depositions of absent or nonresident witnesses, if competent otherwise, are competent and admissible evidence in such cases.[32] On the other hand some courts hold that disbarment or suspension can be had only on evidence good at common law, given in the presence of respondent, by witnesses subject to cross-examination.[33] This right may, however, be waived by the appearance of respondent and his failure to enter objection thereto at any time.[34]

Reopening case. The judges hearing a disbarment proceeding have authority to entertain a motion to reopen the case.[35] Such motion is addressed to their sound discretion[36] and a reopening of the case may be based upon such reasonable terms as they see fit.[37] Where the motion to reopen the proceedings for newly discovered evidence is granted, the lower court should consider such evidence and then transmit it to the appellate court together with a report as to whether any change in the recommendation is to be made.[38]

Dismissal or direction of verdict. While the court will dismiss the proceeding where the charges are not supported by the evidence,[39] a motion to dismiss will be denied where a prima facie case has been presented,[40] or where the evidence introduced by the attorney constitutes no defense thereto.[41] Also, there being no exceptions thereto, the pro-

attorney filed no answer to the complaint, signed a stipulation of readiness on the day before the hearing, and appeared at a later hearing without counsel—Green v State Bar of California, 292 P 638, 210 Cal 603

(4) Where accused was given ample time to prepare depositions and notice of the day on which they would be required, and though the time was extended they were not received within the extended time, the court did not err in refusing to wait longer for them, especially where the only matter thereby shown not already in evidence was immaterial—In re Vaughan, 209 P. 353, 189 Cal. 491, 24 A.L.R 858.

(5) Refusing continuance to defendant to prepare defense to amendment charging him with causing disappearance of a witness, where defendant did not appear and testify, was held within the discretion of the trial court, the accusation being as to a matter of his personal conduct—State v Kimball, (Iowa) 158 N W 579, rehearing denied 160 N.W. 836

(6) The denial by commissioners to hear disbarment proceedings, of a continuance because witnesses for the attorney were under indictment and would claim their privilege of refusing to give testimony, is not shown to be erroneous, where the commissioners reserved their ruling upon the effect of the claim of privilege by the witnesses until such claim should be made, and the witnesses were not subpœnaed by the attorney to appear at the hearing before the commissioners—In re O'Brien, 113 A. 527, 95 Vt. 167, 14 A L R 859

(7) It was not error for the commissioners to hear disbarment charges to deny a continuance because of the physical inability of the attorney to attend the hearing until proof of such inability be made by some showing beyond the mere statement of his counsel—In re O'Brien, supra

(8) The court properly refused continuance of disbarment proceedings until determination on appeal of criminal action for subornation of perjury, disbarment involving charges other than perjury—In re Abrams, 173 N E 312, 36 Ohio App 384

30. In re Vaughan, 209 P 353, 189 Cal 491, 24 A L R 858—6 C J. p 609 note 13.

Continuance held proper

Proceedings against an attorney for violating a judgment of suspension are properly continued until after the determination of an appeal from such judgment of suspension—Lincoln v Superior Court of California, 271 P 1107, 95 Cal App 35

31. Ala—Ex parte Messer, 152 So 244, 228 Ala. 16

Cal—Bar Ass'n of San Diego v. Superior Court of San Diego County, 222 P 135, 64 Cal App 590—In re Morganstern, 215 P. 721, 61 Cal. App 702

6 C J. p 608 note 18, p 609 note 5

Failure to call person verifying accusation

Accused in disbarment proceedings was held not denied constitutional right to be confronted with witnesses because the person verifying the accusation was not called as a witness—In re Mazuran, 263 P 339, 88 Cal App 272

32. People v. Stonecipher, 111 N E 496, 271 Ill. 506—6 C J. p 609 note 6.

33. In re Sizer, 267 S W 922, 306 Mo 356—6 C J. p 609 note 7

Right to cross-examine witnesses testifying at preliminary investigation into attorney's conduct see supra § 27.

34. In re ———, 86 N Y. 563—6 C J p 609 note 8.

35. State Board of Law Examiners v Strahan, 3 P (2d) 79, 43 Wyo. 223

36. State Board of Law Examiners v Strahan, supra.

Newly discovered evidence

On a motion to reopen the case for the purpose of taking newly discovered evidence, the court should consider whether the evidence could with reasonable diligence have been discovered and produced at the trial, whether it would be merely cumulative, and whether it would probably cause a change, favorable to respondent, in the recommendation theretofore made—State Board of Law Examiners v Strahan, 3 P (2d) 79, 43 Wyo 223

37. State Board of Law Examiners v Strahan, supra

38. State Board of Law Examiners v Strahan, supra.

Recommendation based on all the evidence

The supreme court in disbarment proceedings against an attorney should have the benefit of the recommendation of trial judges based on all the evidence—State Board of Law Examiners v. Strahan, 3 P (2d) 79, 43 Wyo 223

39 Colo—People ex rel Colorado Bar Ass'n v Kelley, 18 P.(2d) 1118, 93 Colo 212

Mont—In re O'Sullivan, 251 P. 143, 77 Mont. 444

6 C J p 610 note 16

40. In re Ulmer, 167 N E 749, 268 Mass 373

Some evidence, although conflicting

A request for a ruling that there is no evidence to show deceit, malpractice, or other gross conduct will be denied where there is evidence, although conflicting, of such conduct.—Bar Ass'n of City of Boston v. Sleeper, 146 N.E 269, 251 Mass 6.

41. Thomas v Ogilby, 59 App D C. 382, 44 F.(2d) 890.

ceedings will be dismissed for want of prosecution,[42] as where the principal witness for the prosecution has died since the institution of the proceeding and it is impossible to obtain sufficient evidence to justify the submission of the case,[43] or where the alleged conduct occurred a long time previous to the petition and the matter was before the courts and examined by the bar association, which failed to find sufficient ground to present charges.[44] However, a motion to dismiss the proceedings as violative of the attorney's constitutional rights will be denied where the affidavit submitted in support of the motion is devoid of fact or argument indicating the most remote invasion of such rights.[45]

A proceeding for disbarment or suspension cannot be dismissed, over objection, on the motion of the accuser,[46] defendant is entitled to have the evidence examined by the court so as to receive an authoritative determination of the falsity of the charges.[47]

In disbarment proceedings, as in all civil actions, the court may direct a verdict, where the evidence is uncontroverted.[48]

Arguments of counsel. An argument of counsel referring to the reputation and high standing of the lawyers who signed the complaint, and their motives and beliefs in so doing, is error,[49] but an argument calling attention to the evil consequences of the practice charged in a specification other than that on which the attorney was disbarred was held not ground for reversal.[50]

Instructions. Upon a submission of questions to a jury, the instructions given to the jury must not be general,[51] or misleading,[52] and must not be contradictory, ambiguous, or argumentative.[53] While instructions on the weight of the evidence should not be given,[54] it is not error to give an instruction assuming the truth of facts which the attorney has admitted,[55] and the court may instruct the jury as to the amount of proof required.[56] Each question submitted to the jury need not cover all the issues in the case[57] and where a petition was drawn in the form of a single count alleging several grounds for disbarment, it is not necessary for the court to instruct the jury to specify the particular ground or grounds on which they predicate their verdict.[58] It is not error to refuse to submit interrogatories referring the legal interpretation of the specifications to the jury;[59] and the failure to charge or submit a particular interrogatory is not error in the absence of a specific request therefor.[60]

Questions of law and fact Where the answer is insufficient or where no answer is filed, so that the essential facts stand admitted, it is not error to refuse to submit the issues of fact to the jury.[61] Whether the withholding of money was with a fraudulent intent is a question for determination of the trier of facts,[62] but the question whether a felony of which an attorney was convicted shows that he is unfit to be trusted with the duties of his profession, is not a fact to be found, but a conclusion of law to be deduced from facts revealed to the court.[63]

In a proceeding before the court, it is the court's duty to determine the competency as well as the weight of the evidence,[64] and also the credibility of the witnesses.[65]

Matters considered. In disbarment proceedings,

42. In re Townsend, 168 P. 218, 67 Okl 25.

43. State v. Johnson, 188 P 1053, 78 Okl 58

44. In re Tuck, 167 N.Y.S. 534, 180 App Div 924

45. In re Carter, 164 N.Y.S. 862, 177 App Div 677.

46. Cal.—In re Knott, 12 P. 780, 71 Cal 584
Pa.—In re Davies, 93 Pa. 116, 39 Am. R 729
6 C.J. p 609 note 14.

47. In re Chandler, 63 N.W. 69, 105 Mich 235.

48. Wood v State, 165 S.E. 908, 45 Ga App 783—6 C.J. p 610 note 17.

49. Houtchens v State, (Tex Com. App.) 63 S.W.(2d) 1011, reversing (Civ.App.) 47 S.W.(2d) 679, and motion granted (Com App.) 74 S.W.(2d) 976.

50. McCord v. State, 126 So. 873, 220 Ala. 466.

51. Houtchens v State, (Tex Com. App.) 63 S.W.(2d) 1011, reversing (Civ App.) 47 S.W.(2d) 679, and motion granted (Com App.) 74 S.W.(2d) 976

52. McCord v. State, 126 So 873, 220 Ala. 466

Instruction held misleading

An instruction reciting parts of a pleading which had been previously stricken out by the court has been held misleading and erroneous—Buhler v. Trick, 144 N.E. 340, 195 Ind 190

53. Houtchens v. State, (Tex Com App.) 63 S.W.(2d) 1011, reversing (Civ App.) 47 S.W.(2d) 679, and motion granted (Com App.) 74 S.W.(2d) 976.

Instruction held contradictory and argumentative.—Houtchens v State, (Tex Com App.) 63 S.W.(2d) 1011, reversing (Civ App.) 47 S.W.(2d) 679, and motion granted (Com App.) 74 S.W.(2d) 976.

54. Houtchens v. State, supra.

55. Chreste v Commonwealth, 198 S.W. 929, 178 Ky 311

56. McCord v State, 126 So 873, 220 Ala 466

57. McCord v State, supra.

58. Wood v. State, 165 S.E. 908, 45 Ga App 783.

59. McCord v. State, 126 So. 873, 220 Ala 466

60. McCord v State, supra.

61. Rosenberg v. Commonwealth ex rel Otte, 74 S.W.(2d) 478, 255 Ky. 413.

62. In re McCue, 261 P 341, 80 Mont. 537.

63. State v. Harwood, 173 S.E. 24, 206 N.C. 87

64. Miller v Commonwealth, 57 S.W.(2d) 476, 247 Ky. 479

65. Mass.—Bar Ass'n of City of Boston v Sleeper, 146 N.E. 269, 251 Mass. 6.

the public interest is the primary question[66] and the real question for determination in such proceedings is whether or not the attorney is a fit person to be longer allowed the privileges of being an attorney.[67] The court will examine all the facts and circumstances[68] and must view the alleged misconduct from the standpoint of facts appearing at the time[69]

Verdict or findings. Where a petition, drawn in the form of a single count, alleges several grounds as causes for disbarment, the verdict need not specify the grounds on which it is predicated, a general verdict being sufficient,[70] and under a statute providing for suspension or disbarment of an attorney found guilty of fraudulent or dishonest conduct, it has been held a verdict finding the attorney guilty as charged is sufficient and that it is not necessary that the verdict specifically find the attorney guilty of fraudulent or dishonest conduct.[71]

While written findings are not required in a disbarment proceeding unless so provided by statute,[72] they are not prohibited[73] and the practice of making no findings is not to be commended.[74]

Pa.—In re Salus, 184 A. 69, 321 Pa. 103.
Wis.—State v. Bradford, 259 N.W. 109, 217 Wis. 389.

66. State v. Schnorenberg, 243 N.W. 486, 208 Wis. 595.

67. Cal.—McIntosh v. State Bar of California, 294 P. 1067, 211 Cal. 261
Idaho—In re Wourms, 170 P. 919, 31 Idaho 291.
Ill.—People v. Jackson, 153 N.E. 621, 322 Ill. 618.
Iowa.—State v. Kaufmann, 209 N.W. 417, 202 Iowa 157.
Kan.—In re Gorsuch, 214 P. 794, 113 Kan. 380.
N.Y.—In re Kelly, 188 N.Y.S. 502, 197 App. Div. 41
Okl.—State v. Ledbetter, 260 P. 454, 127 Okl. 85—In re Sitton, 177 P. 555, 72 Okl. 13.
Pa.—In re Olienais, 26 Pa. Dist. 853, 863.
S.D.—In re Brown, 264 N.W. 521—In re Hosford, 252 N.W. 843, 62 S.D. 374—In re Van Ruschen, 160 N.W. 1006, 38 S.D. 254—In re Egan, 154 N.W. 521, 36 S.D. 228
Wis.—State v. O'Leary, 241 N.W. 621, 207 Wis. 297, 81 A.L.R. 1193—State v. Kern, 233 N.W. 629, 208 Wis. 178
6 C.J. p. 581 note 62.

68. U.S.—In re Ades, (D.C.Md.) 6 F. Supp. 467.
Ill.—People v. Gorindar, 182 N.E. 732, 350 Ill. 256—People v. Gilmore, 177 N.E. 710, 345 Ill. 28
Okl.—In re Green, 16 P.(2d) 582, 161 Okl. 1.

Matters considered in determining an attorney's fitness

(1) In a disciplinary proceeding the local administrative committee and board of governors of state bar as well as the supreme court are required to consider accused attorney's past record as to proceedings wherein disciplinary measures have actually been prescribed—In re Miller, (Nev.) 59 P.(2d) 9

(2) In determining the guilt of the attorneys, their reputation is to be taken into consideration, as well as the practice observed by the profession generally in the matter involved—People v. Edelson, 145 N.E. 246, 313 Ill. 601.

(3) In determining an attorney's moral fitness, the court should consider the constitutional and statutory privileges as an elector that were lost through his conviction of a crime—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 112 Conn. 263, 269.

(4) The court can hear such facts of a case originating in a municipal court as is pertinent to the charge of misconduct—In re Disbarment Proceedings, 184 A. 59, 321 Pa. 81

(5) The fact that an attorney was convicted of a crime should always be considered in determining his fitness to continue practice—In re Van Ruschen, 160 N.W. 1006, 38 S.D. 254

(6) The levy of a fine because of visits to disorderly houses may be considered in determining whether an attorney is a proper person to hold a license—People v. Smith, 124 N.E. 807, 290 Ill. 241, 9 A.L.R. 188.

(7) A judgment in a civil action against the attorney is not res adjudicata in a disbarment proceeding, and the court may examine the facts anew—In re Tanz, 252 N.Y.S. 769, 233 App. Div. 300

Matters not considered in determining attorney's fitness

(1) Where the acts charged show that the attorney is unfit to continue practicing, the supreme court, having inherent power to disbar him, need not consider the validity of a statute setting up grounds for disbarment regardless of whether the petition attempts to set up statutory grounds—In re Spriggs, 284 P. 521, 36 Ariz. 263.

(2) Matters attempted to be set out in a bill of exceptions on a writ of error from a conviction of a crime, but which was held not a bill of exceptions because not presented in time, cannot be considered in the disbarment proceedings—In re O'Connell, 194 P. 1010, 184 Cal. 584

(3) A trial judge hearing disciplinary proceedings against an attorney previously disbarred in a federal court is not required to review what took place in the federal court—In re Ulmer, 167 N.E. 749, 268 Mass. 373.

Motive not decisive

The motive actuating an attorney in the commission of a felony of which he was convicted is not decisive of whether he is fit to be trusted with the duties of his profession—State v. Harwood, 173 S.E. 24, 206 N.C. 87

69. Colo.—People v. Hillyer, 297 P. 1004, 88 Colo. 428
Wis.—State v. Rubin, 229 N.W. 36, 201 Wis. 30

70. Wood v. State, 165 S.E. 908, 45 Ga. App. 783

71. Newsom v. State, (Tex. Civ. App.) 236 S.W. 228

72. Cal.—In re Biaggi, 172 P. 1130, 36 Cal. App. 650
Nev.—Washoe County Bar Ass'n v. Scoular, 190 P. 899, 44 Nev. 308
6 C.J. p. 609 note 1.

73. In re Biaggi, 172 P. 1130, 36 Cal. App. 650

Conformity of findings to charges

(1) A finding that an attorney violated a certain rule and statute cannot be sustained where the complaint charges no violation thereof, and no amendments were made to the complaint although leave to amend was given—Irving v. State Bar of California, 1 P.(2d) 2, 213 Cal. 81.

(2) A finding that respondent knowingly failed to tell the truth and was guilty of perjury in the disbarment proceeding has been held not error notwithstanding there was no charge of perjury in the complaint, where the issue narrowed down to the question whether respondent was telling the truth or committing perjury—Bar Ass'n of City of Boston v. Sleeper, 146 N.E. 269, 251 Mass. 6.

74. In re Kling, 186 P. 152, 44 Cal. App. 267.

Conclusions held findings of fact

In disbarment proceeding, conclusions of single justice that declarations of deceased person were made in good faith upon personal knowledge and before commencement of proceeding, as required by statute

On a petition for reargument the decision may be modified so as to omit a sentence which the judge who took testimony on motion deleted from his findings.[75]

Preservation of evidence. A statutory provision requiring the evidence to be reduced to writing, filed, and preserved contemplates such preservation for the purpose of appeal only,[76] and if the accused is acquitted there is no occasion for completing the record.[77] Such a requirement is complied with if the oral testimony is taken down in shorthand, duly certified, and filed at the time judgment is entered.[78]

b. Reference

Where a reference is permissible, the referee, if not disqualified, is an officer of the court vested with its authority and dignity in the special instance to conduct the proceedings and report thereon to the court.

There is a conflict of authority as to the right to a reference in a disbarment proceeding. In some jurisdictions, the usual practice is to refer the proceedings to a referee or a committee of the bar association to take the testimony and report thereon together with findings and recommendations,[79] but in a number of states it is ruled that not only should the judge make the findings of fact and law, but also that the witnesses should be examined in the presence of the court.[80]

Where a disbarment proceeding is referred to a referee, it has been held that the referee is an officer of the court[81] vested with the dignity and authority of the court in the special instance,[82] and with all the powers and attributes of such officers in the discharge of the duties which devolve upon them[83]

Disqualification to act. While the members of a bar association's grievance committee or executive committee have been held disqualified to act as referees in disciplinary proceedings instituted by the bar association,[84] it has also been held that in a proceeding before the state bar governors, any members present may act as prosecutors without being disqualified to participate in the recommendation,[85] and a person is not disqualified to act as referee therein because he had, while president of the bar association, appointed the members of the grievance committee conducting the hearings,[86] and a commissioner appointed to take testimony is not disqualified because of his membership in the bar association preferring the charges.[87] As the findings of the referee or committee are not binding on the court (see infra § 37), bias or prejudice of the referee or committee will not disqualify them,[88] and where statutory grounds of disqualification are specified, no member of a committee will be held to be disqualified in the absence of a showing of a statutory ground therefor.[89]

Proceedings. A court order appointing a committee on grievances as commissioners of the court in disciplinary matters effects a change in procedure alone and therefore there is no merit in a contention that such commissioners were without jurisdiction because the complaints were not verified;[90] and an attorney cannot object to the proceedings on the ground that after demurrers were interposed to the charges, the committee on discipline was discharged and the bar commission thereafter took charge of the proceedings and made the findings and recommendations, where a rule providing therefor was adopted by the bar and approved by the court.[91] A motion to amend the complaint raises no issue of

removing inadmissibility in evidence of such declarations because of hearsay nature, were findings of fact and supported by the evidence—In re Keenan, 192 N E 65, 287 Mass 577, 96 A L R. 679.

75. In re Tracy, (Minn.) 267 N.W. 142, modifying 266 N W. 88.

76. State v. Tomlinson, 109 N W. 120, 131 Iowa 617.

77. State v. Tomlinson, supra.

78. State v Tomlinson, supra—State v. Mosher, 103 N W. 105, 128 Iowa 82, 5 Ann Cas 984

79. La.—In re Mundy, 161 So 184, 182 La 148
Mont.—In re McCue, 261 P. 341, 80 Mont. 537
6 C J. p 609 note 9.

80. State v. Finley, 11 So. 674, 30 Fla 325, 18 L R A. 401—6 C.J. p 609 note 10

81. State v. Vernor, 191 P. 729, 79 Okl 124—In re McNabb, 185 P 431, 76 Okl 253—In re Reily, 183 P. 728, 75 Okl 192, 7 A L R 89.

82. In re McCue, 261 P. 341, 80 Mont. 537.

83. Klonsin v. Board of Governance of Pennsylvania Bar, 168 A. 474, 312 Pa. 564

84. In re Metcalfe, 286 N.Y.S. 591—6 C J. p 609 note 9 [b].

85. Golden v State Bar of California, 2 P (2d) 325, 213 Cal. 227.
Statute authorizing committee to prefer and to sit for consideration of charges
A state bar act is not void because of a provision authorizing a local administrative committee or the board of governors to prefer charges against an attorney and then to sit for consideration of the charges so preferred "The powers conferred . . relate to matters of great public concern, in which the members of the board and committee have no personal interest They have no greater interest in the result of this proceeding than has any other member of the profession or any other member of the community entitled to protection against unscrupulous lawyers."—In re Scott, 292 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113.

86. In re Metcalfe, 286 N Y.S 591

87. In re Richards, 63 S.W (2d) 672, 333 Mo 907.

88. Fish v State Bar of California, 4 P (2d) 937, 214 Cal 215.

89. Fish v. State Bar of California, supra—Aydelotte v. State Bar of California, 290 P. 41, 209 Cal. 737

90. In re Mack, 196 N E 197, 360 Ill 343.

91. In re Burns, 40 P.(2d) 105, 55 Idaho 190

fact so as to require the presence of the attorney at the time in order to protect his rights[92] The referee or committee has been held justified in investigating the general professional conduct of the attorney;[93] and it is not error to refuse a request for a ruling that a petition for disbarment is not a proper method to obtain information as to the attorney's relations with a client where the sole issue is as to whether respondent's professional conduct has been so reprehensible as to require his disbarment.[94]

Findings, conclusions, and recommendations. In some jurisdictions, a referee or commissioner may only take and report the testimony,[95] and cannot dismiss the charges, but can merely make recommendations,[96] while in other jurisdictions, the state bar board of governors has power only to dismiss the charges or to make a minute entry that it deems the evidence sufficient to merit further action,[97] and a recommendation as to the punishment to be imposed is beyond and outside its powers[98] A statute empowering a board of governors of the state bar to make findings in disbarment proceedings and report them to the supreme court has been held not invalid,[99] and the attorney is not entitled to be served with a copy of the findings prior to the filing thereof with the clerk of court[1] However, where a statute makes no such requirement, a referee or committee need not state findings of fact and conclusions of law,[2] but where conclusions of law are made by the referee, they must stand on their soundness in law and the sufficiency of the findings and evidence to uphold them.[3]

A commissioner's report that the evidence is insufficient to sustain the charges is sufficient as against a contention that it should have specifically found the respondent not guilty,[4] and the fact that the commissioner, who found the attorney guilty of the acts charged, did not recommend disbarment is no ground for rejecting his report[5] A recommendation for suspension or disbarment by a board of governors implies a finding that the acts committed by an attorney involved moral turpitude, dishonesty, or corruption,[6] and there is no merit in a contention, because ten months elapsed between the submission of the charges and the recommendation of the committee, that the decision is contrary to law.[7]

A concurrence of a majority of the board of governors is sufficient to sustain their recommendation[8]

Neither the board of governors of the bar nor the court should attempt to evaluate an attorney's services in a disbarment proceeding, there having been no failure to disclose to the client the true facts and no overreaching or fraud on the part of the attorney.[9]

§ 35. —— New Trial and Rehearing

A new trial or rehearing is within the discretion of the trial court or tribunal and will ordinarily be granted on a proper showing being made

A new trial may be granted in a disbarment proceeding where a proper showing is made[10] and it is within the discretion of the judge to grant a new trial after a verdict of not guilty.[11] However, where an attorney has been disbarred by the supreme court in an original proceeding, it has

92. In re Egan, 154 N.W. 521, 36 S D 228.

93. Klensin v. Board of Governance of Pennsylvania Bar, 168 A. 474, 312 Pa 564

94. Bar Ass'n of City of Boston v. Sleeper, 146 N E 269, 251 Mass 6.

95. In re Richards, 63 S W (2d) 672, 333 Mo 907

96. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E 332, 351 Ill 206

97. In re Hoover, (Ariz) 46 P.(2d) 647.

98. In re Hoover, supra.

99. State Bar of Oklahoma v McGhee, 298 P. 580, 148 Okl 219

1. Shaeffer v State Bar of California, 32 P (2d) 140, 220 Cal 681.

2. In re Richards, 63 S W.(2d) 672, 333 Mo 907

3. In re McCue, 261 P. 341, 80 Mont 537.

4. People v Kerker, 146 N E 439, 315 Ill. 572

5. In re Heard, 141 So 60, 174 La. 563.

6. Marsh v State Bar of California, 291 P. 583, 210 Cal 303.

7. Mauer v State Bar of California, 26 P.(2d) 14, 219 Cal. 271

8. Ala.—Ex parte Thompson, 152 So 229, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala 130, and In re Countryman, 152 So 257, 228 Ala. 21—In re Fite, 152 So 246, 228 Ala. 4
Cal.—Golden v. State Bar of California, 2 P (2d) 325, 213 Cal. 237
Ill.—In re Needham, 4 N.E (2d) 19, 364 Ill 65

9. Herrscher v. State Bar of California, (Cal) 49 P.(2d) 332.

10. Ind.—Ex p. Walls, 64 Ind 461
Ky.—Chreste v. Commonwealth, 186 S.W 919, 171 Ky. 771, Ann Cas. 1918E 122.
Response submitted under a misunderstanding
Where an attorney submitted his response in disbarment proceedings under unusual circumstances, at a time when he was in such a mental state as not to fully appreciate its effect and under a misunderstanding as to the punishment to be inflicted, it was held that he was entitled to a new trial.—Chreste v Commonwealth, 186 S W 919, 171 Ky. 771, Ann Cas 1918E 122

No facts showing new evidence
An order disbarring an attorney cannot be reversed for refusal of new trial on affidavits showing merely that certain things were omitted to be done at the trial in securing evidence to exonerate respondent, conceding that counsel were inefficient. —In re Cruickshank, 190 P. 1038, 47 Cal App. 496.

11. State Board of Law Examiners v Phelan, 5 P (2d) 263, 43 Wyo. 481, 78 A L R 1317.

been held that a motion for a new trial will not be entertained.[12]

While the granting or denial of a rehearing is a matter within the discretion of the trial court,[13] generally an attorney will be granted a rehearing in a proper case,[14] provided the petition for rehearing is filed within the prescribed time.[15] On a rehearing, counsel must convince the court that on the record before it the petitioner was prejudiced by an error of law or a misconception of the evidence.[16]

§ 36. —— Judgment or Order

While the rules governing judgments or orders and the entry thereof need not be strictly followed, the rules as to vacation, modification, and collateral attack have generally been applied.

The orders of the court are the only orders which work disbarment or suspension;[17] the decision of the referee or committee in disbarment proceedings does not amount to a judgment of disbarment or suspension.[18] Common-law rules governing the entries of judgments are not applicable to judgments or orders in disciplinary proceedings,[19] and after the finding of facts, the order of disbarment or suspension may be entered without any further notice to the attorney.[20] A judgment disbarring an attorney is not invalid because entered by two of the judges appointed to try the case, the third judge dissenting.[21]

A judgment of disbarment has been held one in rem and can be based on substituted process[22] and, where the proceedings are properly begun and the attorney pleads guilty or fails to answer, the court will proceed to render such judgment as the case requires,[23] and, a fortiori, where the attorney has consented to the entry of an order for his disbarment, an order striking his name from the roll will be made.[24] Where the attorney has failed to appear and answer, a motion for judgment by default[25] or pro confesso[26] will be granted. However, an unsworn information in a disbarment proceeding against an attorney cannot be taken pro confesso,[27] but the charges must be proved, notwithstanding respondent's default of answer.[28]

A judgment disbarring an attorney implies that he is unfit to be trusted in the duties of his profession,[29] and that the court rendering the judgment considered such attorney a member of its

12. Matter of Tyler, 12 P. 289, 13 P 169, 71 Cal 353

13. In re Allin, 112 N.E. 494, 224 Mass 9

In absence of any injustice

Attorney charged with professional misconduct was held not entitled as matter of right to have the matter reheard before a local administrative committee merely because the attorney had made no appearance before it, in the absence of any injustice suffered by the attorney.—Maggart v State Bar of California, (Cal.) 61 P (2d) 451.

14. In re Allin, 112 N.E. 494, 224 Mass 9—6 C.J. p 610 note 19

Recommendation of board of governors

The board of governors of the state bar was held justified in concluding that full justice could be accorded an attorney charged with professional misconduct and recommended to be disbarred by the local administrative committee by taking additional evidence at a hearing before the board without remanding the matter to the local committee for a hearing de novo.—Maggart v State Bar of California, (Cal.) 61 P.(2d) 451.

Rehearing properly granted

Defendant was held to have a right to hearing on motion for rehearing in disbarment proceedings although the term of office of one of three judges sitting in the proceedings had expired, since the court trying the proceedings had not ceased to exist.—Attorney General v. Shaw, 269 N.W. 138, 277 Mich 187.

Second petition for a rehearing will not be considered, the decision on the first petition being a final disposition of the case.—State Board of Law Examiners v. Strahan, 13 P (2d) 1083, 44 Wyo 487, denying rehearing 8 P (2d) 1090, 44 Wyo 156.

15. Ill.—In re Casey, 195 N.E. 39, 359 Ill. 496

Wyo.—State Board of Law Examiners v Strahan, 13 P.(2d) 1083, 44 Wyo. 487, denying rehearing 8 P. (2d) 1090, 44 Wyo 156

Presented after period of suspension expired

Notwithstanding that, had evidence produced on rehearing been available and produced at the original hearing, the court's decision would have sustained contention of the suspended attorney, where period of suspension had expired, application for rehearing will not be granted.—In re Feinberg, (N.J.) 126 A. 667.

16. In re Feinberg, supra.

17. Cal.—In re Shattuck, 279 P. 998, 208 Cal. 6.

Nev.—State ex rel. McCloskey v Greathouse, 36 P.(2d) 367, 55 Nev 409

18. State ex rel McCloskey v. Greathouse, supra

19. In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 134 N.E. 332, 351 Ill 206.

20. In re Allin, 112 N.E. 494, 224 Mass. 9.

21. In re Cloud, 250 N.W. 160, 217 Iowa 3.

22. In re Craven, 151 So 625, 178 La 372, 90 A.L.R. 973

23. Bar Commission of Oklahoma v. Dill, 229 P 801, 107 Okl 61.

24. In re McNamara, 272 N.Y.S. 127, 242 App Div. 631

25. Colo.—People ex rel. Atty. Gen. v. Bentall, 51 P (2d) 352.

Nev.—State Bar of Nevada v. Riccardi, 296 P 1013, 53 Nev 128.

Motion for judgment on the pleadings on an attorney's failure to answer, while improper, may be sustained as a motion for a default judgment.—People v. Kaufman, 5 P. (2d) 1114, 90 Colo 8.

26. In re Simons, 214 N.Y.S. 50, 216 App Div 162

Assumption of guilt

When personal service has been made upon accused in disbarment proceedings and he defaults, an order of discipline will be entered upon the assumption that the attorney is guilty as charged.—In re Bodin, 249 N.W. 569, 189 Minn. 396.

27. Ex parte Latham, 136 So. 625, 161 Miss 243

28. Ex parte Latham, supra.

29. State v Harwood, 173 S.E. 24, 206 N.C. 37.

bar,[30] and such judgments need not contain a statement of the grounds of disbarment or suspension,[31] nor specify the particular charge or accusation upon which the attorney was disbarred or suspended[32] and should be no broader than a rule to show cause.[33] Where the accusation in a disbarment proceeding merely charges certain facts and prays that accused be found guilty and be disbarred, the final order of the court that the application of plaintiff shall be granted is a sufficient finding of his guilt,[34] and an order of disbarment entered on a finding of misconduct alleged in the petition is not erroneous although the findings also include other specifications of misconduct not alleged in the petition.[35] A judgment or order suspending an attorney for an indefinite period is not void,[36] nor is a judgment disbarring an attorney for a definite period and "until the further order of this court" invalidated by the quoted clause,[37] for, even if such clause is void, it may be considered as mere surplusage.[38] The judgment may order the proceedings to be held in abeyance for a definite period and to be dismissed at the end of such period on a showing that the attorney has not been again guilty of the conduct charged,[39] but while part of a court's order of suspension requiring the attorney's disbarment at the end of a certain period at another hearing, before another judge, most probably, and on other evidence of additional misconduct is invalid,[40] where the decree is certain and meets all the requirements of a final judgment, such invalid portion may be disregarded as surplusage.[41]

In such proceedings no fine, imprisonment, or other punitive sentence can be imposed;[42] but under some statutes it seems that an attorney may be suspended for withholding or embezzling his client's moneys, and a money judgment rendered against him for the amount of the money so withheld or embezzled, in the same decree.[43] If defendant is not found guilty the only judgment that can be rendered is a dismissal of the charges;[44] and, where relator refuses to proceed with the trial after denial of motion for continuance, the proceedings may be dismissed.[45]

While a judgment or order suspending or disbarring an attorney is self-executing,[46] it has been held that such judgment will be stayed to the extent of permitting the attorney to obtain substitutions for his clients.[47] Except with respect to an attorney's right to future reinstatement (infra § 41), the judgment or order in disbarment proceedings is final and conclusive unless reversed or modified on appeal,[48] and all the statutes and rules touching that subject are applicable.[49]

Vacation or modification. An order of disbarment, rendered upon an accusation which is fatally

30. In re Ulmer, 167 N.E. 749, 268 Mass. 373

31. Danford v. Superior Court of California in and for City and County of San Francisco, 193 P. 272, 49 Cal.App. 303—6 C.J. p. 610 note 20.

32. Iowa—Perry v. State, 3 Greene 550
Kan.—In re Wilcox, 133 P. 547, 90 Kan. 95.
Mo.—State v. Watkins, 3 Mo. 480.

33. Moutray v. People, 44 N.E. 496, 163 Ill. 194—Winkelman v. People, 50 Ill. 449

34. In re Biaggi, 172 P. 1130, 36 Cal.App. 650—6 C.J. p. 610 note 23

35. In re Allin, 112 N.E. 494, 224 Mass. 9.

36. Conn.—In re Kone, 97 A. 307, 90 Conn. 440
Kan.—In re Hanson, 5 P.(2d) 1088, 134 Kan. 165.
Ohio—State v. Darby, 144 N.E. 611, 109 Ohio St. 632—State v. Le Blond, 140 N.E. 510, 108 Ohio St. 126, certiorari denied and error dismissed 44 S.Ct. 134, 263 U.S. 679, 714, 68 L.Ed. 503.

Suspension until repayment of client's claim.

(1) The court will not order an attorney to pay a debt to his client as a condition for permission to resume practice after suspension—State v. Hughes, 10 P.(2d) 584, 92 Mont. 53.

(2) Where attorney was alleged to have defrauded a client by indirect sale of alleged worthless bonds, under evidence tending to show that they had some value, the court in a judgment of temporary disbarment, should not make the period of suspension depend on payment of accuser's claim, that being too indefinite—In re Soale, 159 P. 1065, 31 Cal.App. 144.

37. In re Tyler, 20 P. 674, 78 Cal. 307, 12 Am.S.R. 55—6 C.J. p. 610 note 24.

38. Philbrook v. Newman, (C.C.Cal.) 85 F. 139

39. State v. Soderberg, 255 N.W. 906, 215 Wis. 571.

40. In re Biaggi, 172 P. 1130, 36 Cal.App. 650

41. In re Biaggi, supra.

42. State v. McRae, 38 So. 605, 49 Fla. 389, 6 Ann.Cas. 580—6 C.J. p. 610 note 26.

43. Reilly v. Cavanaugh, 32 Ind. 214.
Punishment generally see infra § 38.

44. State v. Tracy, 87 N.W. 727, 115 Iowa 71—6 C.J. p. 610 note 28.

45. De Krasner v. Boykin, (Ga.App.) 186 S.E. 749.

46. Lincoln v. Superior Court of California, 271 P. 1107, 95 Cal.App. 35—In re Graves, 216 P. 386, 62 Cal.App. 168.

47. In re Axtell, 257 N.Y.S. 470, 235 App.Div. 350, modifying 242 N.Y.S. 18, 229 App.Div. 823, affirmed 177 N.E. 423, 257 N.Y. 210

48. Ala.—Ex parte Peters, 70 So. 648, 195 Ala. 67
Mass.—In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679.
Miss.—Ex parte Marshall, 147 So. 791, 165 Miss. 523.

Further order of suspension after provisional order

Where an attorney, convicted of a felony involving moral turpitude, has been suspended by the court pending final action on the judgment of conviction, disciplinary proceedings, based on the facts giving rise to the criminal action, may be brought against him and a further order of suspension rendered, the first order of suspension being provisional and temporary.—Shafer v. State Bar of California, 12 P.(2d) 957, 215 Cal. 706.

49. In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679.

defective,[50] or which is not supported by any evidence,[51] or where proper service was not had on the attorney,[52] will be set aside on application which should be made to the court in which the original proceedings were had, notwithstanding the judgment has been affirmed on appeal.[53]

The court may also, in a proper case, modify its judgment from one of disbarment to one of suspension,[54] and the judgment in a disciplinary proceeding is not res judicata, if thereafter, upon proper hearing, with all the rights of the attorney safeguarded, the court shall determine otherwise as to the then fitness of such accused to practice, or as to the propriety of the order previously entered,[55] and it obviously follows that an act by a suspended or disciplined attorney might give rise to modification of the judgment, on complaint or on the court's own motion.[56] Likewise, the conduct of accused or the development of additional facts might give rise to modification of a suspension order, either favorably or unfavorably to accused.[57] Where judgment has been rendered against defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.[58]

Where an original decree of disbarment had been canceled by a second decree, except in so far as it affected his practice within the state, it has been held that a court acted illegally and beyond its authority in canceling the second decree on a motion by the attorney seeking a modification of such original decree.[59]

Collateral attack. A judgment disbarring or suspending an attorney cannot be collaterally attacked as by way of defense to a proceeding in the nature of an information for attempting to practice law without a license.[60]

§ 37. —— Review

a. Of court order or judgment
b. Of proceedings before committee or referee

a. Of Court Order or Judgment

(1) In general
(2) Effect of appeal; supersedeas

(1) In General

General rules apply with respect to review of a judgment or order in a disbarment proceeding.

In some early cases it was held that an appeal or writ of error will not lie to review an order suspending or disbarring an attorney;[61] but under the statutes in most jurisdictions the rule is now otherwise,[62] notwithstanding the proceeding is not a proceeding according to the course of the com-

50. U. S. v. Clark, (D.C Alaska) 76 F 560.

51. Kan.—In re Burnette, 78 P 440, 70 Kan. 229
Utah.—In re Evans, 130 P. 217, 42 Utah 282

52. Strickland v Willingham, 175 S. E. 605, 49 Ga.App. 355.

53. Matter of Wharton, 62 P. 741, 130 Cal. 486.

54. In re Burke, 21 Ohio Cir.Ct. 34, 11 Ohio Cir Dec 397.

55. In re Hosford, 252 N.W. 843, 62 S D 374.
Judgment as not res judicata on application for reinstatement see infra § 41.

56. In re Hosford, 252 N.W. 843, 62 S D. 374.

57. In re Hosford, supra
Reinstatement see infra § 41.

58. People v. Hill, 55 N.E. 542, 182 Ill. 425.

59. Maxey v. Polk County District Court, 165 N.W. 1005, 182 Iowa 366

60. U S.—Philbrook v. Newman, (C. C Cal.) 85 F. 139.
Tex.—Smith v. State, 5 Tex. 578.

61. Ex p. Robinson, (D C Ark.) 19 Wall (U S.) 513, 22 L.Ed. 205—6 C J. p 610 note 36.

62. Del.—Adair v. Pennewill, 153 A. 859, 4 W W Harr 390
Pa.—In re Gery, 5 Pa Dist & Co. 580
W.Va.—State v Smith, 99 S.E. 332, 84 W Va. 59
6 C J. p 611 note 37.

Writ of error
A writ of error is proper to review disbarment proceeding because not in accordance with law, sufficiency of evidence, improper admission of incompetent evidence, or of an alleged abuse of discretion.—Adair v. Pennewill, 153 A. 859, 4 W W Harr (Del.) 390.

Certiorari
(1) A writ of certiorari has been held a proper remedy to correct or revise disbarment proceedings where it is a substitute for a writ of error.—Ex p. Biggs, 64 N C. 202—6 C.J. p 611 note 45

(2) But there is authority to the contrary.—Randall, Petitioner, 11 Allen (Mass.) 473.

(3) A district court has been held to have power to issue a writ of certiorari to the board of commissioners of the state bar and to inquire into its jurisdiction to suspend an attorney from practice.—State v. Kiker, 261 P. 816, 33 N.M. 6.
Certiorari to review proceedings of particular tribunals or officers generally see Certiorari § 46 [11 C.J. p 134 notes 80–97].

Filing exceptions not proper remedy
The remedy of an attorney is by appeal if error has been committed by the court in its findings of fact and law in a disbarment proceeding, and the filing of exceptions is improper.—In re Gery, 5 Pa Dist. & Co. 580

"Persons aggrieved"
One deprived by order of the court of chancery of his office of solicitor and of the right of exercising to the full extent, the office of counselor is aggrieved thereby within 1 Comp St. (1910) p 450 § 111, authorizing persons aggrieved by any order of the court of chancery to appeal from the same.—In re Hahn, 96 A 589, 85 N. J Eq 510, Ann Cas 1918B 830, denying motion 94 A. 958, 84 N J Eq 523.

Necessity of leave to appeal
(1) No appeal may be taken from a unanimous decision of the appellate division in a disbarment proceeding without leave of the appellate division or of the court of appeals unless a constitutional question is involved.—In re Mathot, 117 N E 948, 222 N.Y. 8, granting dismissal 166 N.Y.S. 217, 178 App.Div. 759.

(2) An order of disbarment for a contumacious assertion of spurious

mon law,[63] and it has been held that an attorney has an absolute right to appeal from a judgment in a disbarment proceeding.[64] In some jurisdictions no appeal will lie by the relator or accuser from the action of the court in refusing disbarment,[65] especially where the proceeding is brought under a statute providing for the disbarment of an attorney on conviction of a crime,[66] but in other jurisdictions the prosecutor may appeal.[67]

Jurisdiction. The appellate jurisdiction of a court on a writ of error or appeal from a judgment of disbarment or suspension is derived from and dependent on constitutional and statutory provisions.[68]

Presentation of grounds and record. The presentation of grounds for review[69] and the record on appeal[70] are governed by the statutes and rules of practice of the particular jurisdiction.

Hearing and determination. In some states disbarment proceedings are tried de novo on appeal,[71]

privileges has been held not to directly involve a constitutional question within the meaning of this rule —In re Levy, 174 N.E. 461, 255 N.Y. 223, dismissing appeal In re Becker, 241 N.Y.S. 369, 229 App.Div. 62

(3) Under a statute providing for a review of a disbarment proceeding by a "motion of appeal," it has been held that the phrase means an application for and allowance of an appeal —Attorney General v. Lane, 243 N.W. 6, 259 Mich. 283, certiorari denied Lane v. Voorhies, 53 S.Ct. 115, 287 U.S. 654, 77 L.Ed. 565

Mandamus to secure or compel acknowledgment of right to practice law see Mandamus § 113 [38 C.J. p. 648 note 32–649 note 47 p. 651 notes 1–10].

63. Adair v. Pennewill, 153 A. 859, 4 W.W.Harr. (Del.) 390

64. Houtchens v. Mercer, 27 S.W. (2d) 795, 119 Tex. 244—Houtchens v. Mercer, (Tex.Com.App.) 29 S.W.(2d) 1031, 69 A.L.R. 1103

Collectors of an estate of a deceased attorney cannot maintain an appeal from an order of disbarment because of the fact that such order lessens the respect in which the memory of such attorney would otherwise be held where the statute defining their powers does not give them the right to have such an action revived —Metzger v. O'Donoghue, 53 App.D.C. 107, 288 F. 461.

65. N.Y.—In re Dolphin, 147 N.E. 538, 240 N.Y. 89, dismissing appeal 203 N.Y.S. 472, 208 App.Div. 223

Pa.—Critchfield v. Levy, 109 A. 155, 265 Pa. 388.

6 C.J. p. 611 note 39.

66. In re Stiers, 167 S.E. 382, 204 N.C. 48.

67. Ark.—State v. Huddleston, 293 S.W. 353, 173 Ark. 686.

Conn.—Grievance Committee of Hartford County Bar v. Broder, 152 A. 292, 112 Conn. 263, 269

Iowa.—State v. Kaufmann, 209 N.W. 417, 202 Iowa 157.

6 C.J. p. 611 note 40.

County bar association held "party aggrieved" was entitled to appeal from a judgment merely suspending attorney for one year—State v. Huddleston, 293 S.W. 353, 173 Ark. 686.

An order dismissing a disbarment proceeding has been held appealable as an order determining the action and as an order affecting or determining substantial rights—State v. Snook, 139 P. 764, 78 Wash. 671.

Where no substantial right affected

An order overruling a motion for the appointment of an attorney to conduct proceedings for disbarment does not affect any substantial right, and is therefore not appealable— Byington v. Moore, 30 N.W. 485, 70 Iowa 206

68. In West Virginia, the supreme court of appeals has jurisdiction of a writ of error to a judgment of a circuit court disbarring or suspending an attorney—State v. Smith, 99 S.E. 332, 84 W.Va. 59—State v. Shumate, 87 S.E. 618, 48 W.Va. 359.

Construction of contravening provisions

(1) Under a provision of the code that if the provisions of different chapters or articles of the code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article, an act defining the court of appeals' jurisdiction prevails over an apparently contradictory statutory provision for appeal to supreme court by suspended attorney.—Memphis and Shelby County Bar Ass'n v. Himmelstein, 53 S.W.(2d) 378, 165 Tenn. 102

(2) Where a code embodies two acts without material change, relating to appellate jurisdiction of the courts, it must be held that the code embodies them as previously construed—Memphis and Shelby County Bar Ass'n v. Himmelstein, supra.

69. In Georgia

Refusal of trial court in disbarment proceedings to certify a bill of exceptions until plaintiff in error had certified as material to complete understanding of errors complained of certain exhibits was held not error —De Krasner v. Boykin, (App.) 186 S.E. 701.

70. In California

(1) The reasons stated by the lower court for disbarring an attorney are no part of the judgment and have no place in the record on appeal.— In re Cruickshank, 190 P. 1033, 47 Cal.App. 496.

(2) On appeal under an alternative method provided by statute, an appellate court has held that it could not order that exhibits need not be copied into the reporter's transcripts, but that the clerk of court be required to produce and file the original exhibits to be used at the hearing on appeal —In re Millsap, 268 P. 970, 92 Cal.App. 653

In Iowa

(1) The attorney may select grounds of appeal and prepare his abstract to that end, and unless he desires to submit for review questions of fact upon the evidence, he need not include the evidence in his abstract —State v. Kimball, 158 N.W. 579, rehearing denied 160 N.W. 836

(2) In disbarment proceedings, where statute provides that transcript be transferred to appellate court on appeal, accused cannot limit right of state to present entire record by his appeal from part of record only as state may appeal also —State v. Kaufmann, 209 N.W. 417, 202 Iowa 157.

In Wyoming

Where a motion to reopen the case for newly discovered evidence is denied, parts of the additional record necessary for the information of the appellate court should be sent up — State Board of Law Examiners v. Strahan, 3 P.(2d) 79, 43 Wyo. 223

71. In re Law Ass'n of Philadelphia, 167 A. 579, 312 Pa. 555—6 C.J. p. 611 note 42.

In Iowa

(1) Under statutory provisions relating thereto, it has been held that a disbarment proceeding is triable de novo on appeal to the supreme court, notwithstanding the statute provides for a special court of three judges to try and determine disbarment cases —In re De Caro, 262 N.W. 132, 220 Iowa 176—In re Cloud, 250 N.W. 160, 217 Iowa 2.

(2) Prior to the enactment of such statutory provisions, the sole question for the appellate court was whether the evidence sustained the findings and judgment —State v. Kaufmann, 209 N.W. 417, 202 Iowa 157.

while in others the appellate court has no jurisdiction to try the case de novo, but its jurisdiction is appellate only.[72] Some presumptions must be indulged in favor of the fair intent of the trial court and its rulings,[73] and it will be presumed that the judgment of the lower court was predicated only on competent evidence, unless the contrary affirmatively appears,[74] but the appellate court cannot presume that error is shown in the judgment of the lower court.[75]

On appeal the test is whether the trial court exercised a reasonable discretion,[76] and the lower court's exercise of discretion will not be interfered with except in case of abuse.[77]

The verdict of a jury is conclusive on the appellate court where there is sufficient evidence to justify it[78] and, unless error clearly appears, the conclusions and findings of fact by the trial court will not be reversed[79] especially where based on conflicting evidence.[80]

Questions not raised in the trial court will not be considered on appeal,[81] and the court will not

72. Ala.—Peters v State, 69 So 576, 193 Ala. 598
Mich.—Attorney General v Lane, 243 N.W 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct 115, 287 U S 654, 77 L Ed 565
6 C J p 611 note 43

The appeal is in the nature of certiorari and the appellate court does not weigh the testimony.—Attorney General v. Nelson, 249 N W. 439, 263 Mich 686

In New York

(1) The court of appeals' power of review of the determination of the appellate division is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it.—In re Goldstein, 220 N Y S 473, 220 App Div 107, modifying 218 N.Y S 944, 218 App Div. 799.—6 C J p 611 note 38 [a].

(2) The court has no jurisdiction over questions relating to the comparative weight of the evidence or of the fairness of the sentence.—In re Hawes, 111 N E 211, 217 N.Y. 602, affirming 156 N Y S 283, 169 App Div 944

(3) The court of appeals has no power to revise the determination of the appellate division as to the punishment to be inflicted.—In re Axtell, 177 N E 423, 257 N Y. 210, affirming 242 N Y S 18, 229 App Div. 323, modified 257 N Y S 470, 235 App Div. 350.

(4) The appellate division has exclusive jurisdiction to mitigate the rigor of its judgments in disbarment proceedings.—In re Axtell, supra.

(5) Where the evidentiary facts are undisputed, and the only possible inferences from those facts point to innocence of the attorney, the court of appeals has jurisdiction to review the order of disbarment.—In re Zanger, 194 N E 72, 266 N.Y. 165, reversing 267 N Y S 193, 239 App.Div 129, reargument denied 270 N.Y S. 657, 241 App Div 60

(6) Where the facts are stipulated, the question for the court to determine is whether from the agreed facts an inference may be drawn that the attorney was guilty of such conduct as constituted a cause for disbarment.—In re Zanger, supra

73. McCord v State, 126 So 873, 220 Ala. 466

Conclusions of trial court hearing disbarment proceeding are very persuasive on the supreme court, since the trial court better knows the lawyer, his standing, character, credibility, and fidelity to trust.—In re Kraus, 185 A 737, 322 Pa 362

74. Miller v Commonwealth, 57 S W (2d) 476, 247 Ky. 479

75. Houtchens v. Mercer, (Tex Civ App.) 30 S W (2d) 545

Misapplication of evidence by single justice in disbarment proceeding would not be presumed.—In re Mayberry, (Mass.) 3 N E (2d) 248, 105 A L R 976

76. Grievance Committee of Hartford County Bar v Broder, 152 A. 292, 112 Conn 263, 269

77. Ark.—Maloney v State, 32 S W. (2d) 423, 182 Ark 510.—McGehee v State, 32 S W (2d) 308, 182 Ark. 603.—State v Huddleston, 293 S W. 353, 173 Ark 686
D C.—Thomas v Ogilby, 59 App D C. 332, 44 F (2d) 890
Pa.—Wilhelm's Case, 112 A. 560, 269 Pa. 416

Refusal of continuance

That matter of a continuance in disbarment proceedings was for the discretion of the trial court, and its refusal is not a cause for reversal, especially where ample opportunity was afforded for full investigation.—Wilhelm's Case, 112 A. 560, 269 Pa. 416

Rule not applicable to intermediate appellate court

The rule that the lower court's exercise of discretion will not be interfered with except in case of abuse has been held to relate to the exercise of discretion of the trial court rather than to that of an intermediate appellate court, and the supreme court will reverse the decree of a court of appeals which had reversed the decree of the trial court, the trial court not having abused its discretion.—Thompson v Denman, 50 S.W. (2d) 222, 164 Tenn 428.

78. Rowland v State, (Tex Civ App.) 55 S W.(2d) 133

Of same effect as in civil action

Verdict of jury in disbarment proceedings has the same effect in settling issues of fact as the verdict in a civil action at law.—State Board of Law Examiners v Phelan, 5 P. (2d) 262, 43 Wyo. 481, 78 A.L R 1317

79. Cal.—In re Morton, 177 P 453, 179 Cal 510.—In re Hittson, 185 P. 303, 43 Cal App 462
Fla.—Gould v State, 127 So. 309, 99 Fla 662, 69 A L R 699
Ky.—Heck v Battistee, 189 S W 25, 172 Ky 234.
Mass.—Bar Ass'n of City of Boston v. Sleeper, 146 N E 269, 251 Mass 6
Pa.—In re Law Ass'n of Philadelphia, 167 A. 579, 313 Pa 555.—In re Gery, 130 A. 307, 284 Pa. 121.—In re Barach, 123 A 727, 279 Pa. 89.—Wilhelm's Case, 112 A 560, 269 Pa 416.—In re Margolis, 112 A. 478, 269 Pa 206, 12 A L R. 1186
Wyo.—State Board of Law Examiners v Strahan, 8 P.(2d) 1090, 44 Wyo 156, rehearing denied 13 P (2d) 1083, 44 Wyo 487
6 C J p 611 note 38 [b].

Findings have effect of verdict in civil action

Findings of trial judges in disciplinary proceedings against attorney should be given effect, in settling issues of fact, of verdict in a civil action.—State Board of Law Examiners v Strahan, 8 P (2d) 1090, 44 Wyo. 156, rehearing denied 13 P (2d) 1083, 44 Wyo 487

80. In re Morganstern, 215 P 721, 61 Cal App 702.—In re Cruickshank, 190 P. 1038, 47 Cal App. 496.

Court will not retry proceeding

The court will not retry the proceeding and determine the credibility of witnesses and the weight of the evidence as a matter of original jurisdiction, and disregard the judgment of the lower court.—In re Masuran, 268 P. 339, 88 Cal App 272.

81. Ala.—Peters v. State, 69 So. 576, 193 Ala. 598.
Iowa.—State v. Kimball, 153 N W. 579, rehearing denied 160 N W. 336.
Wyo.—State Board of Law Examin-

reverse the judgment or order for errors occurring in the trial where they were not prejudicial to the attorney.[82] Also the court will not render any decision on appeal where the question has become moot,[83] and the court, having passed on the constitutionality of a statute in a habeas corpus proceeding by the attorney, will not again review the question in a disbarment proceeding.[84] Where no evidence is presented in the abstract only points of law are reviewable,[85] and neither the denial of a rehearing, nor the question whether suspension or absolute removal was required, present questions of law for review,[86] and the question whether the evidence was clear and convincing is not properly reviewable as a matter of law on certiorari.[87] Where the attorney filed a claim of exceptions to the findings, rulings, and order of the court, it has been held that the only question presented was whether the rulings of law affecting the attorney were correct.[88] Findings of a trial court are properly a part of the record which the appellate court may review,[89] and the reversal of a judgment of conviction of crime on which disbarment proceedings were predicated, although not made part of the record on appeal, has been held proper to be considered on appeal from a judgment of disbarment.[90]

If the proceedings were properly instituted, no substantial rights denied the respondent, no prejudicial errors committed, and there is competent evidence to sustain the judgment, it must be affirmed,[91] but where the order made is improper, the court on a review of the record will vacate such order.[92]

ers v. Brown, 290 P. 1013, 42 Wyo 108.

Insufficient objection

In disbarment proceedings under Code § 325 et seq, the objection that amended charges were not sworn to as required by statute is not so presented to the trial court as to be reviewable, by a plea that they were not drawn up in legal form and were insufficient to put defendant on his defense—State v Kimball, (Iowa) 158 N.W. 579, rehearing denied 160 N.W. 836

Invited error

An attorney cannot complain on appeal that an affidavit was not sufficient, where he agreed that it might be read as testimony of an absent witness, thereby avoiding the granting of a continuance—Chreste v Commonwealth, 193 S.W. 929, 178 Ky. 311.

Res judicata

Where the court entered an order dismissing disbarment proceeding, even if the order was final judgment, the court had jurisdiction to commence a new proceeding to hear new testimony, and the order could be at most an affirmative defense of res judicata which attorney could not assert for the first time on appeal from judgment of disbarment entered in later proceeding—In re Mayberry, (Mass.) 3 N.E.(2d) 248, 105 A.L.R. 976.

82. Ala.—McCord v. State, 126 So. 873, 220 Ala. 466.
Iowa—State v. Kimball, 158 N.W. 579, rehearing denied 160 N.W. 836
Ky.—Denny v. Commonwealth, 194 S.W. 330, 175 Ky 357
Tex.—Rowland v. State, (App.Div.) 55 S.W.(2d) 133.

No evidence showing prejudice

(1) That seven attorneys signed complaint in disbarment proceeding was held not to require reversal of judgment of suspension for the reason that the jury gave the signatures evidentiary weight where no fact suggests such influence—Rowland v State, (Tex.Civ.App.) 55 S.W.(2d) 133.

(2) Respondent in disbarment proceeding for bribing or attempting to bribe jurors was held not prejudiced by single justice's findings, based on evidence, relative to the presence on juries of a considerable number of jurors of a low grade of intelligence and character—In re Mayborry, (Mass.) 3 N.E.(2d) 248, 105 A.L.R. 976.

(3) Where respondent in disbarment proceeding before single justice had been fully heard on all matters involved, with knowledge of charges, variances in details between statements in special commissioner's preliminary reports and justice's findings were immaterial—In re Mayberry, supra.

Error held prejudicial

In disbarment proceeding, reading of affidavits to jury on which information was based was held prejudicial error where one of their findings was based entirely on such affidavits.—Lenihan v Commonwealth, 176 S.W. 948, 165 Ky. 93, L.R.A.1917B 1132.

83. Bowles v Lawa, 59 App.D.C. 399, 45 F.(2d) 669, certiorari denied 51 S.Ct. 488, 283 U.S. 841, 75 L.Ed. 1452—Whitaker v. Grievance Committee of Supreme Court of District of Columbia, 56 App.D.C. 148, 10 F.(2d) 1013.

Not moot because of expiration of suspension period

Questions presented by appeal from judgment suspending attorney did not become moot because of expiration of period of suspension.—In re Luncoln, 283 P. 965, 102 Cal.App. 733.

84. In re Meek, 36 P.(2d) 267, 169 Okl. 89.

85. State v. Kimball, (Iowa) 158 N.W. 579, rehearing denied 160 N.W. 836

Whether findings of fact warrant conclusion

Where the evidence is not brought up, the only question for the court is whether the findings of fact warrant the conclusion—People v. Tilton, 120 N.E. 252, 284 Ill. 385

86. In re Allin, 112 N.E. 494, 224 Mass 9

87. In re Coburn, 174 N.W. 134, 207 Mich. 350.

88. In re Keenan, 192 N.E. 65, 287 Mass 577, 96 A.L.R. 679

Credibility of witnesses

In disbarment proceeding heard by single justice where there was no direct evidence of respondent's participation in unlawful practices, credibility of witnesses and determination of probabilities was held for the justice—In re Mayberry, (Mass.) 3 N.E.(2d) 248, 105 A.L.R. 976

89. In re Biaggi, 172 P. 1130, 36 Cal. App 650

In Massachusetts

On appeal in disbarment proceeding, which is a proceeding at common law, the supreme judicial court must decide whether general or special findings are warranted by direct testimony or as inferences from all the evidence or whether findings can be sustained on any reasonable view of the case as presented to the trial court—In re Mayberry, 3 N.E.(2d) 248, 105 A.L.R. 976

90. State v. Metcalfe, 214 N.W. 874, 204 Iowa 123.

91. Mich.—Attorney General v Nelson, 249 N.W. 439, 263 Mich 686
Pa.—In re Kraus, 185 A. 737, 322 Pa. 362.

92. In re Schulte, 17 P.(2d) 687, 161 Okl. 206.

(2) Effect of Appeal; Supersedeas

Since a judgment or order of suspension or disbarment is self-executing, its operation is not affected by an appeal or a writ of error.

Since a judgment of disbarment or suspension is self-executing (see supra § 36), its operation is not affected by an appeal[93] or writ of error,[94] except as to costs;[95] and a writ of supersedeas will not issue as there is no further action to be taken by the court below upon which the writ could act,[96] but there is authority to the contrary.[97]

b. Of Proceedings before Committee or Referee

General rules have been applied to a review of a report of a referee or committee in a disbarment proceeding.

Proceedings before a referee or committee for the discipline, suspension, or disbarment of an attorney are subject to review by the court,[98] and sometimes by a board of governors of the state bar,[99] and review, as used in a statute relating to a petition to the court to review the decision of the board of bar governors, means a reexamination of the entire case,[1] a judicial reexamination, as of the proceedings of a lower court by a higher court.[2]

Application and record. The transmission of the record of disbarment proceedings had before a referee or committee has been held to confer jurisdiction on the court to consider and determine charges not dismissed, notwithstanding the disciplinary body did not comply with a statute in that it entered no order dismissing the charges and made no minute entry of the sufficiency of the evidence to merit further action,[3] and notwithstanding a statute gives the right as a matter of course only to the person whose license has been revoked to object and have a review of proceedings of the state board of examiners, the court may, of its own motion, examine into the charges against an attorney even though revocation of his license has not been recommended by the board.[4] While the finding of the board of governance may be brought up for review by the court by the filing of exceptions,[5] it has been held necessary that a party bring to the court such part of the record as is necessary to be considered on the exceptions,[6] and where it is desired to review the findings of fact of a commissioner to whom a disbarment case was referred, respondent must file exceptions, an abstract of the record, brief and argument.[7] The abstract of the record must be a complete abstract or abridgment of the record and not a mere index to the testimony in the record[8] and must set forth all the evidence upon the contested findings.[9] Where the attorney's abstract of the transcript of the proceedings does not contain all the evidence

93. Lincoln v. Superior Court of California, 271 P 1107, 95 Cal App 35—In re Graves, 216 P 386, 62 Cal App 168—6 C J. p 612 note 46.

94. Tyler v. Presley, 13 P. 856, 72 Cal. 290.

95. Walls v Palmer, 64 Ind. 493.

96. In re Graves, 216 P. 386, 62 Cal App 168.

97. Houtchens v. Mercer, (Tex Com. App.) 29 S.W.(2d) 1031, 69 A.L.R. 1103.

Supersedeas bond can be made payable to the state—Houtchens v Mercer, (Tex Com App.) 29 S W.(2d) 1031, 69 A.L R. 1103

98. In re Hadwiger, 27 P.(2d) 604, 167 Okl. 307

99. In re Williams, (Okl.) 46 P.(2d) 507.

Power of board of governors

(1) A board of governors of the state bar is authorized to sit as an appellate court and review the findings and conclusions of the administrative committee, and may adopt the report in toto; adopt it in part and reject it in part; may take additional evidence, or it may disregard all the proceedings had and hear the whole case itself—In re Williams, (Okl.) 46 P.(2d) 507

(2) Bar commissioners are authorized, without another hearing, to reverse ruling of committee on discipline, which sustained demurrer to disciplinary complaint against attorney—In re Edwards, 294 P. 847, 50 Idaho 238.

1. In re Shattuck, 279 P. 998, 203 Cal 6

2. In re McCue, 261 P. 341, 80 Mont 537.

3. In re Hoover, (Ariz.) 46 P.(2d) 647.

4. In re Olson, 198 P. 742, 116 Wash 186

5. In re Rosenbaum, 150 A. 748, 300 Pa 465.

Waiver of service of summons in error will not give the appellate court jurisdiction to review a disbarment proceeding where such waiver is by a person not concerned with the preparation or prosecution of the proceeding—Schwartz v. State, 18 Ohio App. 373.

6. People v Johnson, 176 N.E. 278, 344 Ill. 132

Private communication by a reviewing governor to other members of the board of governors as to the state of the record of the proceedings before the local administrative committee is no part of the record on review.—Shaeffer v. State Bar of California, 32 P.(2d) 140, 220 Cal. 631.

7. People v. Czarnecki, 109 N.E. 14, 268 Ill. 278

Impertinent matter stricken from brief

Exhibits consisting of laudatory letters concerning the attorney will be stricken from his brief on the ground of impertinence.—People v. A'Brunswick, 146 N.E. 433, 315 Ill. 442

8. People v. Czarnecki, 109 N.E. 14, 268 Ill. 278.

9. People v. Johnson, 176 N.E. 278, 344 Ill 132

Clerk's transcript

A bar association is not entitled to a dismissal of an appeal because no reporter's transcript was filed, where the attorney did file a duly certified clerk's transcript, as defendant may rely on errors shown by the clerk's transcript.—In re Millsap, 268 P. 970, 92 Cal App. 653.

Motion to confirm after submission to court

A motion to confirm the report because of the failure to abstract all the necessary evidence will not be considered where interposed after the submission of the cause to the court—People v. Johnson, 176 N.E. 278, 344 Ill. 132.

and record to enable the court to pass upon his exceptions, amicus curiæ may file an additional abstract, but no burden rests upon him to do so,[10] and if the evidence is not fairly abstracted, the opposite party's remedy is to file an additional abstract.[11] However, although an attorney, petitioning for review, fails to file a brief, the court may examine and determine the case on its merits,[12] and a commissioner's erroneous conclusions of law based on correct findings of fact can be attacked although no objections or exceptions thereto were taken.[13]

A petition to review an order of a board of governors will not be considered where not filed within the required time.[14]

Hearing. On review, the court has full authority to confirm, modify, or set aside the report and findings of a referee or committee,[15] and must examine the entire record anew,[16] review and weigh the evidence,[17] and consider all the circumstances revealed by the record,[18] uninfluenced in whole or in part by the action taken by the referee or committee.[19]

The burden is on the party attacking the findings to prove them to be incorrect[20] notwithstanding the fact that the court weighs the evidence,[21] and no presumption of unfairness or partiality in a proceeding before the board of law examiners for the disbarment of an attorney arises from the fact that the complaint was verified by a member of the board to the effect that he believed it to be true, as the power of instituting proceedings is expressly conferred on the board.[22]

While in the absence of a settled case,[23] or where neither side has brought up the evidence,[24] or where a part only of the evidence taken is brought up,[25] the findings of fact of a referee or committee may be considered conclusive. Ordinarily, although based on substantial evidence,[26] the findings, conclusions, and report of the referee or committee are advisory or recommendatory in character, but not of binding effect on the court,[27] and will be freely set aside if found to be incorrect.[28]

10. In re Larsen, 192 N.E. 643, 358 Ill. 103

11. People v Johnson, 176 N.E. 278, 344 Ill. 132

12. In re Cargill, 23 P.(2d) 693, 164 Okl 265

13. People v Keeley, 112 N.E. 362, 273 Ill. 95.

14. Bordner v. State Bar of California, 24 P.(2d) 459, 218 Cal. 580

15. Ala.—Ex parte Thompson, 152 So. 229, 228 Ala. 113, followed in Ex parte Walker, 152 So. 246, 228 Ala. 130, and In re Countryman, 152 So. 257, 228 Ala. 21

N.Y.—In re Weidmann, 285 N.Y.S. 43.

Okl.—State v. Vernor, 191 P. 729, 79 Okl. 124—In re McNabb, 185 P. 431, 76 Okl. 253—In re Reily, 183 P. 738, 75 Okl. 192, 7 A.L.R. 89.

Utah.—In re Hanson, 158 P. 778, 48 Utah 163

16. Cal.—In re Stafford, 284 P. 670, 208 Cal. 738

Nev.—State Bar of Nevada v. Miller, 24 P.(2d) 317, 55 Nev. 38—In re Scott, 293 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113.

That attorney may not be misled to his prejudice

Where the attorney was advised by the chairman of the local administrative committee that the proceeding would be postponed or reopened, the reviewing court should see that he was not misled to his prejudice thereby, regardless of whether his application to reopen the case was made in strict compliance with the statute.—Ewell v. State Bar of California, 40 P.(2d) 264, 2 Cal.(2d) 209.

17. Cal.—Bentson v. State Bar of California, 13 P.(2d) 512, 216 Cal. 58—Clark v. State Bar of California, 4 P.(2d) 944, 214 Cal. 281

Okl.—In re Murray, 61 P.(2d) 1051—In re Neary, 50 P.(2d) 1113—In re Pruett, 46 P.(2d) 919—Charlton v. State Bar of Oklahoma, 42 P.(2d) 233—In re Hills, 40 P.(2d) 1031, 170 Okl. 427—In re Purdy, 25 P.(2d) 1096, 166 Okl. 31—In re Tillman, 11 P.(2d) 511, 157 Okl. 166.

18. In re Lane, (Okl.) 54 P.(2d) 339—In re Choate, (Okl.) 50 P.(2d) 706—In re Threadgill, 27 P.(2d) 601, 166 Okl. 301—In re Dick, 26 P.(2d) 412, 166 Okl. 114

19. In re Scott, 293 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113

20. Cal.—Aydelotte v. State Bar of California, 290 P. 41, 209 Cal. 737

Okl.—State v. Cutlip, 202 P. 782, 83 Okl. 183—State v. Vernor, 191 P. 729, 79 Okl. 124—In re McNabb, 185 P. 431, 76 Okl. 253—In re Reily, 183 P. 738, 75 Okl. 192, 7 A.L.R. 89

Burden not sustained.—Jacobs v. State Bar of California, 25 P.(2d) 401, 219 Cal. 59—Aydelotte v. State Bar of California, 290 P. 41, 209 Cal. 737.

21. Ring v. State Bar of California, 24 P.(2d) 821, 218 Cal. 747—In re Petersen, 280 P. 124, 208 Cal. 42

22. In re Sherrill, 198 P. 725, 116 Wash. 143

23. In re Waters, 256 N.W. 139, 192 Minn. 262.

24. People v. Edelson, 145 N.E. 246, 313 Ill. 601—People v. Pio, 139 N.E. 45, 308 Ill. 128

25. In re Larsen, 192 N.E. 643, 358 Ill. 103—People v. Tilton, 120 N.E. 252, 284 Ill. 385.

26. Herrscher v. State Bar of California, (Cal.) 49 P.(2d) 832

27. Cal.—In re Stafford, 284 P. 670, 208 Cal. 738—In re Petersen, 280 P. 124, 208 Cal. 42—In re Shattuck, 279 P. 998, 208 Cal. 6.

Nev.—State ex rel. McCloskey v. Greathouse, 36 P.(2d) 357, 55 Nev. 409—In re Scott, 293 P. 291, 53 Nev. 24, rehearing denied 296 P. 1113

N.M.—In re Gibson, 4 P.(2d) 643, 35 N.M. 550

Okl.—In re Lane, 54 P.(2d) 339—In re Choate, 50 P.(2d) 706—Haunstein v. State Bar of Oklahoma, 46 P.(2d) 558—In re Threadgill, 27 P.(2d) 601, 166 Okl. 301—In re Dick, 26 P.(2d) 412, 166 Okl. 114—State v. Vernor, 191 P. 729, 79 Okl. 124—In re McNabb, 185 P. 431, 76 Okl. 253—In re Reily, 183 P. 738, 75 Okl. 192, 7 A.L.R. 89

Utah.—In re Hanson, 158 P. 778, 48 Utah 163

Wash.—In re Boland, 248 P. 399, 140 Wash. 148.

Reprimand

Recommendation by local administrative committee of state bar of discipline of attorney in the form of a reprimand was held advisory only as regards action by the board of governors of the state bar.—Wood v. State Bar of California, (Cal.) 53 P.(2d) 1280.

28. Okl.—State v. Cutlip, 202 P. 782, 83 Okl. 183—State v. Vernor, 191 P. 729, 79 Okl. 124—In re McNabb, 185 P. 431, 76 Okl. 253—In re

However, the report and recommendations of a referee or committee, after an investigation, carry weighty presumptions of justice and propriety,[29] and while the findings of a referee are not conclusive, they will be given the same dignity as a special verdict by a jury, or the findings of a trial court,[30] and will be adopted where amply sustained by the evidence,[31] or where they are not against the clear weight of the evidence,[32] or where the evidence consisted of sharply conflicting testimony.[33]

Questions not raised before the referee or committee will not be considered on a review of the report and findings,[34] and evidence not introduced before the disciplinary body taking testimony will not be considered by the appellate court.[35] Similarly, a charge not pursued nor found upon by the referee or committee cannot be considered on a review of their recommendation,[36] and a special plea in bar to the jurisdiction must be regarded as abandoned where not argued in respondent's brief.[37] Errors occurring in the disbarment proceeding are not grounds for rejecting the recommendation of a referee or committee where they are not prejudicial.[38]

On a motion to dismiss an appeal, the question of whether an order of the court of chancery disbarring a solicitor from practicing in that court is sustainable as an order suspending him until the supreme court has acted is not presented and can only be dealt with on the appeal itself.[39]

Decision After reviewing the action of a board of governors, the court will make such order as is warranted by the facts and deemed proper under the circumstances of the case,[40] and the court has power to reverse the ruling of the referee on the question of allowing an amendment to the complaint and to again refer the case to the ref-

Reily, 183 P 728, 75 Okl. 192, 7 A L R 89

Wash.—In re Ryzek, 187 P 364, 109 Wash 700

Inconsistency with judgment adjudicating same questions

Where the findings are found to be inconsistent with a valid judgment of a court of competent jurisdiction of this state adjudicating the same questions of law or fact, they will be disregarded in so far as they are inconsistent therewith.—Haunstein v State Bar of Oklahoma, (Okl.) 46 P (2d) 558

29. Okl.—In re Lane, 54 P (2d) 839—Haunstein v State Bar of Oklahoma, 46 P (2d) 558—In re Meek, 36 P (2d) 267, 169 Okl 89—In re Threadgill, 27 P (2d) 601, 166 Okl 301—In re Dick, 26 P (2d) 412, 166 Okl. 114—State v Cutlip, 202 P. 782, 83 Okl 183—State v Vernor, 191 P 729, 79 Okl 124—In re McNabb, 185 P 431, 76 Okl 253—In re Reily, 183 P 728, 75 Okl 192, 7 A L R 89

Or.—State v Goldstein, 220 P. 565, 109 Or 497

Pa.—In re Alexander, 184 A 77, 321 Pa 125—Klensin v Board of Governance of Pennsylvania Bar, 168 A 474, 312 Pa 564—In re Rosenbaum, 150 A 748, 300 Pa 465

Presumed just

In a proceeding to discipline attorney, advisory recommendations of board of governors of state bar will be presumed, in first instance, to be just, but may be approved by the supreme court in such modified form as is deemed proper.—In re Myres, 43 P.(2d) 773, 172 Okl 123

Consideration of recommendation beyond power of committee

While a recommendation as to the punishment to be made is beyond the power of the committee or board of bar governors in some jurisdictions and not binding on the court, nevertheless the court may consider such recommendation.—In re Hoover, (Ariz.) 46 P (2d) 647

30. In re Grorud, 275 P. 1098, 84 Mont 221—In re McCue, 261 P 341, 80 Mont 537—In re Sullivan, 189 P 770, 57 Mont 592

Same presumptions indulged

Presumptions indulged in favor of trial court's or jury's action is indulged in support of findings and conclusions of committee on grievances of bar association.—People ex rel Colorado Bar Ass'n v. ———, Attorney at Law, 9 P (2d) 611, 90 Colo 440

31. Minn.—In re Nelson, 209 N.W 316, 167 Minn 467

Mont.—In re Grorud, 275 P. 1098, 84 Mont 221—In re McCue, 261 P 341, 80 Mont 537—In re Griggs, 240 P 820, 74 Mont 373—In re Sullivan, 189 P 770, 57 Mont 592

N Y.—In re Batt, 246 N Y S 77, 230 App Div 656—In re Karlin, 242 N Y S 653, 229 App Div 500

N D.—In re Nevin, 222 N W 266, 57 N D 367

Okl.—In re Schulte, 243 P. 933, 114 Okl 115.

32. In re Neary, (Okl.) 50 P (2d) 1119—In re Roff, (Okl.) 50 P (2d) 355—In re Pruett, (Okl.) 46 P (2d) 919—In re Grant, (Okl.) 46 P (2d) 317—Charlton v State Bar of Oklahoma, 42 P (2d) 233, 171 Okl 128—In re Hills, 40 P (2d) 1031, 170 Okl 427—In re Purdy, 25 P (2d) 1096, 166 Okl 31—In re Tillman, 11 P (2d) 511, 157 Okl 166

33. N Y.—In re McGauley, 270 N Y S 772, 241 App Div. 19—In re Wilson, 251 N Y.S. 954, 232 App Div 808

Pa.—Klensin v Board of Governance of Pennsylvania Bar, 168 A. 474, 312 Pa 564

Credibility of witnesses is for referee.—State v Bradford, 259 N W. 109, 217 Wis 389

34. Cal.—Howe v State Bar of California, 298 P 25, 212 Cal 222

N Y.—In re Popper, 184 N Y.S 406, 193 App Div 505, 39 N Y Cr. 5.

35. Johnson v State Bar of California, (Cal.) 52 P (2d) 928

36. Cal.—Golden v State Bar of California, 2 P (2d) 325, 213 Cal 237.

N Y.—In re Cohen, 243 N Y S. 75, 229 App Div. 478

37. In re Richards, 63 S.W (2d) 672, 333 Mo 907

38. Roark v. State Bar of California, (Cal.) 55 P.(2d) 839.

Errors held not prejudicial

(1) Misconduct of one of examiners in disbarment proceeding in intimidating witness and resorting excessively to leading questions and conducting improper and prejudicial cross-examination was held not prejudicial where the evidence conclusively established attorney's misconduct.—Roark v State Bar of California, (Cal.) 55 P (2d) 839

(2) Petitioner for review of recommendation of disbarment, given complete hearing in the supreme court, was held not prejudiced because not served with copy of the commissioners' findings.—In re Henry, 269 P 416, 46 Idaho 578

39. In re Hahn, 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830, denying motion 94 A 953, 84 N.J Eq 523

40. In re Williams, (Okl.) 58 P.(2d) 145—In re Jeter, 20 P (2d) 886, 163 Okl 27

eree to hear evidence on and report upon any issue arising from such amendment,[41] and where several attorneys are involved in a transaction and only one was subjected to investigation and disbarment recommended, the court will remand the proceeding with directions to bring in such attorneys for investigation and to take such further steps as may seem meet and proper.[42] Where the circumstances justify a rereference, as where respondent wished to produce newly discovered evidence bearing directly on the issue, it will be again referred to the referee to take additional testimony,[43] and where, coincident with a motion made on the report of the referee, recanting affidavits were filed which are met by answering affidavits, the reference should be opened and the matter remitted to hear evidence on the affidavits.[44] However, the proceedings will not be remanded for the taking of evidence which the attorney failed or neglected to produce during the investigation of his conduct[45] or where such evidence is not creditable,[46] or where it relates to a side issue[47]

Rehearing. That a petition for a rehearing was not filed within the required time after the entry by the court of an order of suspension has been held not to deprive the court of its power to grant a rehearing, since the court could vacate such order of its own volition and thereby retain jurisdiction of the proceedings for further consideration, regardless of whether or not any petition for a rehearing was filed.[48]

Review of action of board of governors. An attorney charged with professional misconduct was held not entitled to complain of the refusal of the board of governors to remand matter to the local administrative committee where the board elected to take additional evidence with consent of attorney and his counsel, and it was not contended that he was not fully heard, nor that a more favorable showing would have been made on hearing de novo.[49] On proceedings to review an order of the board of governors of state bar recommending suspension from practice for one year, where all other attorneys involved in the transaction had been exonerated, the order of the board as to such attorney was annulled and proceeding based thereon ordered dismissed[50]

§ 38. —— Punishment

The court has discretion as to what punishment shall be imposed Generally, disbarment will not be decreed unless the conduct of the attorney shows that he is morally unfit to continue in the profession.

In arriving at the punishment to be imposed, precedents are of little aid,[51] and each case must be largely governed by its particular facts, and the matter rests in the sound discretion of the court.[52] The question is not what punishment may the offense warrant, but what does it require as a penalty to the offender, as a deterrent to others, and as an indication to laymen that the courts will maintain the ethics of the profession[53] Disbarment will be decreed only when the court is convinced of its neces-

41. In re Egan, 154 N.W. 521, 36 S D 228

42. Gray v State Bar of California, 33 P.(2d) 1016, 1 Cal (2d) 226

43. In re Jackson, 267 N.Y.S. 601, 239 App Div 122

44. In re O'Neill, 165 N.Y S 569

45. Cal.—Shaeffer v State Bar of California, 32 P (2d) 140, 220 Cal 681
La.—In re Heard, 141 So 60, 174 La 563

46. State v. Mannix, 288 P 507, 133 Or 329, rehearing denied 290 P 745, 133 Or 329

47. In re Goldstein, 253 N.Y S 548, 236 App Div. 233

48. Mayer v State Bar of California, (Cal) 39 P (2d) 206

49. Maggart v State Bar of California, (Cal) 61 P (2d) 451

50. Gray v State Bar of California, (Cal) 59 P (2d) 1033.

51. In re Powers, 257 N.Y.S. 113, 235 App Div 382

52. Ark.—Maloney v. State, 32 S.W. (2d) 423, 182 Ark 510—McGehee v State, 32 S W (2d) 308, 182 Ark. 603—State v. Huddleston, 293 S W. 353, 173 Ark 686.
Conn.—Grievance Committee of Hartford County Bar v Broder, 152 A 292, 112 Conn 263, 269
Iowa.—In re DeCaro, 262 N.W. 132, 220 Iowa 176
Ky.—Lenihan v. Commonwealth, 176 S W 948, 165 Ky. 93, L R A 1917D 1132
Or.—State v Tarpley, 259 P 783, 122 Or 479
S C.—State v Jennings, 159 S E 627, 161 S C 263
6 C J p 612 note 49

According to law and conscience

The jurisdiction exercised by the court over an attorney is one exercised according to law and conscience, and not according to technical rules.—Gould v. State, 127 So 309, 99 Fla 662, 69 A L R 699

Commonwealth's attorney who was found guilty of misconduct in connection with an indictment and in retaining excessive fees from money collected for clients would not be suspended from the practice of law, since he would thereby be prevented from performing his official duties, but the penalty of censure was imposed.—Commonwealth ex rel Ward v Harrington, 98 S W (2d) 53, 266 Ky 41

Effective judicial disapproval

Under circumstances calling for disciplinary measures against an attorney, although not disbarment, such measures should be coextensive with effective judicial disapproval of misconduct.—State v. Kern, 233 N. W. 639, 203 Wis 178

Discipline not retroactive

If an attorney's conduct subjects him to discipline, such discipline is not retroactive merely because no similar acts have previously passed under judicial scrutiny.—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E 332, 351 Ill 206.

53. Iowa.—In re De Caro, 262 N W. 132, 220 Iowa 176
Or.—State v. Tarpley, 259 P. 783, 122 Or 479
Utah.—In re Hanson, 158 P. 778, 48 Utah 168
6 C J p 612 note 50.

Influencing considerations

First, the effect that the punishment may have on others with a view

sity for the protection of the profession, the courts, and the public,[54] and a removal from the bar should not be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired.[55] It follows that the court may, instead of striking an attorney's name from the rolls, merely suspend him from practice for a specified length of time,[56] or until the perform-

of stamping out the evil; second, the probability of reform or regeneration of the offending attorney; and, third, punishment—State v Kiefer, 222 N W. 795, 197 Wis. 524.

Motive considered

In proceedings for the disbarment or suspension of attorneys, the motive as well as the charge should be considered in determining the punishment—In re Ward, 179 P. 76, 176 Wash 147.

54. Mont—In re Peters, 235 P. 772, 73 Mont 284.
N D—In re Bryans, 204 N W. 9, 52 N D 673
Okl—In re Sitton, 177 P. 555, 72 Okl 13
S D—In re Wilmarth, 172 N W. 921, 42 S D 76.
Wis—State v. Rubin, 229 N W 36, 201 Wis. 30—In re Richter, 204 N W. 492, 187 Wis 490, 41 A L R. 485

To warrant disbarment, an attorney's conduct must be so gross as to show want of integrity, moral turpitude, depravity of character, or dishonesty—State v. Jennings, 159 S E 627, 161 S C 263.

Statement of standard of conduct warranting disbarment repudiated

(1) It has been stated that disbarment should be resorted to only where the evidence and circumstances are such as to show that respondent is so lacking in ability or character as to be wholly unfit to be intrusted with the interests of others—In re Bartlett, 197 N.W. 285, 47 S D. 208.

(2) In a later case the court held that it had inadvertently set too low a standard of conduct and that such sentence should be stricken from the opinion—In re Waggoner, 199 N W 244, 47 S D 401.

55. Cal—Barbee v State Bar of California, 2 P (2d) 353, 213 Cal. 296
Iowa—In re DeCaro, 262 N.W 132, 220 Iowa 176
Ky—Lenihan v Commonwealth, 176 S W 948, 165 Ky. 93, L R A 1917B 1132
Mont—In re Jewell, 201 P. 266, 60 Mont 602.
N J—In re Breidt, 94 A 214, 84 N J Eq 222
N Y—In re Axtell, 257 N Y S. 470, 235 App Div 350, modifying 242 N. Y S 18, 229 App Div. 333, affirmed 177 N E 423, 257 N Y. 210.
Okl—In re Green, 49 P.(2d) 197
Or—State v Tarpley, 259 P 783, 122 Or 479—State v. Woerndle, 220 P. 744, 109 Or. 461.
Pa—Maginnis' Case, 112 A. 555, 269 Pa 186.
Wis—State v. Rubin, 229 N.W. 36, 201 Wis 30
6 C J p 613 note 51.

56. Cal—Barbee v. State Bar of California, 2 P (2d) 353, 213 Cal. 296
Mo—In re Tall, 93 S W (2d) 922
N Y—In re Swanick, 291 N Y S 193, 249 App Div 100—In re Sachs, 288 N Y S 1001, 248 App Div 301
Or—State v. Tarpley, 259 P 783, 122 Or 479
S C—State v. Jennings, 159 S E 627, 161 S C. 263
6 C J. p 612 notes 52.

Thirty days.—In re Frederick, 227 P 999, 71 Mont 205—In re Tillman, 11 P (2d) 511, 157 Okl 166—State v Breckenridge, 258 P. 744, 126 Okl. 86, 53 A L R 1239

Sixty days.—In re Hoover, (Ariz) 46 P (2d) 647—In re Hanson, 158 P. 778, 48 Utah 163—6 C J. p 612 note 52 [a]

Ninety days.—In re Jewell, 201 P. 266, 60 Mont. 602—Ex parte Burke, 176 P 431, 55 Mont 303—In re Williams, (Okl) 58 P (2d) 145—In re Choate, (Okl) 50 P (2d) 706—In re Johnson, 33 P (2d) 189, 168 Okl 366—In re Bond, 31 P (2d) 921, 168 Okl 161—In re Boland, 248 P. 399, 140 Wash 148

Two months.—In re Nelson, 214 N. W 808, 51 S D 451.

Three months

Cal—Ewell v. State Bar of California, 40 P (2d) 264, 2 Cal (2d) 209—Sawyer v State Bar of California, 32 P.(2d) 369, 220 Cal. 702—Peters v State Bar of California, 26 P. (2d) 19, 219 Cal 218—Galbraith v. State Bar of California, 23 P (2d) 291, 218 Cal 329—Recht v State Bar of California, 23 P (2d) 273, 218 Cal 352—Rehart v State Bar of California, 16 P (2d) 993, 217 Cal 57—In re Goldstone, 6 P (2d) 513, 214 Cal 490, 80 A L R 701—Fish v State Bar of California, 4 P (2d) 937, 214 Cal 215—Barbee v State Bar of California, 2 P (2d) 353, 213 Cal. 296—Bruns v State Bar of California, 1 P (2d) 989, 213 Cal 151—Bar Ass'n of San Francisco v Devall, 210 P. 279, 59 Cal App 230
Mont—State v Hughes, 10 P.(2d) 584, 92 Mont 53
N Y—In re Wilson, 289 N Y S 213, 248 App Div 388—In re Cantor, 289 N Y S 193, 248 App Div 390—In re Purcell, 272 N Y S 338, 241 App 343—In re Yochelson, 258 N Y S. 724, 236 App Div 807—In re Halpern, 253 N.Y.S 618, 233 App Div. 480—In re Galland, 203 N.Y.S 42, 203 App Div. 43.
Utah—In re Steffensen, 39 P (2d) 722, 85 Utah 330—In re Barclay, 24 P (2d) 302, 82 Utah 283.
Vt—In re Wakefield, 177 A. 319, 107 Vt. 130
Wash—In re Snelling, 224 P. 600, 129 Wash 56.
Wis—State v Kiefer, 222 N.W. 795, 197 Wis. 524
6 C J p 612 note 52 [b].

Four months.—McCue v. State Bar of California, (Cal) 47 P.(2d) 268

Six months

U.S—In re Gilbert, 48 S Ct 309, 276 U S 294, 72 L Ed 580.
Ariz—In re Myrland, 45 P (2d) 953.
Cal—Oster v State Bar of California, 42 P (2d) 627, 2 Cal (2d) 625, rehearing denied and modified on other grounds 43 P (2d) 535—Wood v. State Bar of California, 58 P (2d) 1280—Townsend v. State Bar of California, 51 P.(2d) 379—Barton v. State Bar of California, 2 P (2d) 149, 213 Cal 186—Dahl v. State Bar of California, 1 P (2d) 977, 213 Cal 160—Schaffer v. State Bar of California, 298 P. 994, 212 Cal 367—In re Sadicoff, 282 P. 952, 208 Cal 555
Ill—In re Maley, 1 N E (2d) 495, 363 Ill 149
Ky—Commonwealth for and on behalf of Pike County Bar Ass'n v. Hinton, 72 S W.(2d) 481, 254 Ky. 798
La—State v. Woodville, 108 So. 309, 161 La 125
Minn—In re Ostensoe, 264 N.W. 569—In re Joyce, 234 N W. 9, 182 Minn 156—In re Dows, 209 N W. 627, 168 Minn 6, 47 A L R 265.
Nev—In re Miller, 38 P (2d) 972, 55 Nev 444—Washoe County Bar Ass'n v. Scoular, 190 P. 899, 44 Nev 208
N J—In re Isserman, 140 A. 253, 6 N J Misc 146
N.Y—In re Sale, 289 N Y S 66, 248 App Div. 402—In re Reich, 287 N Y S 861, 247 App.Div 459—In re Gavrin, 286 N Y S 203, 246 App Div 397—In re Newman, 284 N.Y S 294, 245 App Div 660—In re Radetsky, 284 N Y.S 89, 245 App. Div. 662—In re Delman, 283 N Y S 801, 245 App.Div 598—In re Goldman, 272 N.Y S. 293, 241 App Div. 349—In re Rosenblatt, 271 N Y S 581, 241 App Div 215—In re Gerety, 270 N Y.S 653, 240 App Div 496—In re Cunningham, 267 N Y S. 346, 239 App Div. 114—In re Freda, 267 N Y S 292, 239 App Div 116—In re Davidson, 252 N Y S 767, 233 App.Div. 311—In re Vail, 239 N Y.S. 414, 228 App Div. 217—

In re Mahan, 239 N Y S 392, 228 App.Div. 241—In re Brown, 200 N Y S 661, 206 App Div 111—In re Menzel, 196 N Y S 334, 203 App Div 515—In re Schwartz, 195 N Y.S 513, 202 App Div 88—In re Rose, 189 N Y S 543, 197 App Div 865—In re MacWilliams, 184 N Y S 343, 193 App Div 499—In re Jakubowsky, 283 N Y S. 347

N D—In re Crum, 215 N.W. 682, 55 N D 876, 55 A L R 220

Okl—In re Neary, 50 P (2d) 1119—In re Hills, 40 P (2d) 1031, 170 Okl 427—In re Shoemake, 31 P (2d) 938, 168 Okl 77—In re Hadwiger, 27 P (2d) 604, 167 Okl 307—State v Jefferson, 193 P 44, 79 Okl 288

Or—State v Woerndle, 220 P. 744, 109 Or 461

S D—In re Meighen, 214 N W 848, 51 S D 459—In re Hooper, 189 N W 309, 45 S D 525—In re Donovan, 178 N W 143, 43 S D 98, 9 A L R 1497—In re Swihart, 177 N W 364, 42 S.D. 628

6 C J p 612 note 52 [c].

Eight months.—In re Sullivan, 189 P 770, 57 Mont 592—In re Miller, (Nev) 59 P (2d) 9

Eighteen months.—McArthur v State Bar of California, 12 P (2d) 453, 215 Cal 652—Costigan v Adkins, 57 App D C 153, 18 F (2d) 803, certiorari denied Adkins v Costigan, 47 S Ct. 769, 274 U.S 760, 71 L Ed 1338

One year

U S—U S v. Kegley, (D C Cal.) 8 F Supp. 327

Ark.—Maloney v State, 32 S W (2d) 428, 182 Ark 510—McGehee v. State, 32 S W (2d) 808, 182 Ark 603—State v Huddleston, 293 S W. 353, 173 Ark 686

Cal—Farrar v State Bar of California, 34 P (2d) 1034, 1 Cal (2d) 359—Johnson v. State Bar of California, 52 P.(2d) 928—Ring v State Bar of California, 47 P (2d) 704—Peck v State Bar of California, 17 P.(2d) 112, 217 Cal 47—Bentson v State Bar of California, 13 P (2d) 513, 216 Cal 58—Green v State Bar of California, 2 P (2d) 840, 213 Cal 402—Irving v. State Bar of California, 1 P.(2d) 2, 213 Cal 81—D'Ellia v State Bar of California, 300 P 826, 212 Cal. 770—Lantz v State Bar of California, 298 P 497, 212 Cal 213—In re Herron, 298 P 474, 212 Cal 196—Smallberg v. State Bar of California, 297 P. 916, 212 Cal 113—Shaw v. State, Bar of California, 297 P. 532, 212 Cal. 52—Mills v State Bar of California, 296 P 280, 211 Cal 579, rehearing denied 297 P 19, 211 Cal 579—Townsend v. State Bar of California, 291 P. 837, 210 Cal 362—Marsh v. State Bar of California, 291 P 583, 210 Cal. 303—State Bar of California v. Jones, 280 P. 964, 208 Cal 240—In re Petersen, 280 P 124, 208 Cal. 42—Bar Association of San Francisco v. Cantrell, 193 P. 593, 49 Cal App 468.

Colo—People v Ginsberg, 285 P. 753, 87 Colo 115

Idaho—In re Burns, 40 P (2d) 105, 55 Idaho 190.

Ill—In re Information to Discipline Certain Attorneys of Sanitary Dist of Chicago, 184 N E 332, 351 Ill 206—People v Ashton, 180 N E 449, 347 Ill 570

Iowa—In re De Caro, 262 N W 132, 220 Iowa 176

Mich—Attorney-General v. Nelson, 249 N W 439, 263 Mich. 686

Minn—In re Smith, 237 N W 877, 184 Minn 87—In re Halvorson, 221 N W 907, 175 Minn. 520—In re Buck, 214 N W 662, 171 Minn. 352—In re Ginsberg, 169 N W 737, 141 Minn 271

Mo—In re Gallant, (App) 95 S W (2d) 1249

Nev—In re Pilkington, 49 P (2d) 965—In re Scott, 292 P 291, 53 Nev 24, rehearing denied 296 P 1113

N J—In re Feinberg, 136 A. 667—In re Glauberman, 152 A 650, 107 N J Eq 384

N Y—In re Zipkin, 291 N Y S 272, 249 App Div 100—In re Braun, 285 N Y S 360, 246 App Div 206—In re Lazarus, 284 N Y S 340, 245 App Div 657—In re Whaley, 284 N Y S. 85, 245 App Div 664—In re Engler, 283 N.Y S 180—In re Warrick, 278 N Y S 132, 244 App Div 48—In re Gavrin, 275 N Y S 789, 242 App Div 490—In re Jackson, 272 N Y S 918, 242 App Div. 240, motion granted 195 N E 149, 266 N Y 450—In re Miller, 272 N Y S 706, 241 App Div 414—In re Burger, 271 N Y S 676, 241 App Div 213—In re Isaacs, 270 N Y S 708, 240 App Div 498—In re Ludden, 268 N Y S 123, 239 App Div 548—In re Husin, 268 N Y S 106, 239 App Div 551—In re Williams, 267 N Y S 354, 239 App Div 131—In re Chaikin, 264 N Y S 221, 238 App Div 211—In re Treadwell, 260 N Y S 264, 236 App Div 562—In re Blakesberg, 258 N. Y S 583, 236 App Div 227—In re Feinstein, 253 N Y S 455, 233 App Div. 541—In re Schiel, 252 N Y S 753, 233 App Div. 806—In re Wyte (formerly Weissberger), 248 N Y S 26, 231 App Div 539—In re Flanagan, 247 N Y S 724, 231 App Div. 548—In re Fischer, 247 N Y S 168, 231 App Div 193—In re Gordon, 241 N Y.S. 276, 229 App Div 142—In re Reynolds, 241 N Y S 146, 229 App Div. 117—In re Hendrick, 241 N Y S 50, 229 App Div. 100—In re Schleider, 239 N Y S 311, 228 App Div 221—In re Schleider, 238 N Y. S 601, 227 App Div 532—In re Springer, 238 N Y S 591, 237 App Div 490—In re Rosenberg, 238 N Y S 514, 227 App Div 527—In re Goldberg, 238 N Y S 273, 227 App Div 502—In re Bevans, 233 N Y S 439, 225 App Div 427—In re Annabel, 229 N.Y.S 385, 223 App Div 539—In re Stark, 221 N.Y.S 243, 220 App Div 132—In re Goldstein, 220 N Y S 473, 220 App Div 107, modifying 218 N Y S 944, 218 App Div. 799—In re Lynch, 205 N Y.S. 518, 210 App Div 191—In re Tryon, 205 N Y S 423, 209 App Div. 793—In re Aydelotte, 200 N.Y S 637, 206 App Div. 93—In re Pouker, 197 N. Y S 190, 203 App Div 520—In re Kelly, 188 N Y S 502, 197 App Div. 41—In re Dangler, 182 N Y S 471, 192 App Div. 237—In re Eisenberg, 160 N Y S 143, 173 App Div. 598—In re Goldfarb, 157 N Y S 1076, 173 App Div. 882—In re Neuman, 155 N Y S 428, 169 App Div 638—In re Dinkelspiel, 283 N Y S 395

N D—In re Bryans, 204 N W. 9, 52 N D. 673.

Ohio—In re Meck, 200 N E 478, 51 Ohio App 237

Okl—In re Pruiett, 46 P (2d) 919—In re Myres, 43 P.(2d) 773, 172 Okl 123—In re Dick, 26 P (2d) 412, 166 Okl 114

Or—Ex parte Eastman, 62 P (2d) 27—State v. Parker, 252 P. 711, 120 Or 465

Pa—Breslin v. Board of Governance of Pennsylvania Bar, 175 A. 378, 316 Pa 392—Lewis v Board of Governance of Pennsylvania Bar, 173 A 652, 316 Pa 193

S D—In re Hosford, 245 N W. 822, 60 S D 625

Wash—In re Disbarment of McCann, 42 P (2d) 437, 181 Wash. 183—In re Hutchinson, 33 P (2d) 1119, 178 Wash 112—In re Cavers, 4 P (2d) 1106, 165 Wash 261—In re Sampley, 294 P 1113, 160 Wash 92—In re Kienstra, 282 P. 221, 154 Wash 153, modifying 276 P 294, 151 Wash 424—In re Ward, 179 P 76, 176 Wash 147—In re Turner, 176 P. 332, 104 Wash 276

Wis—State v Kuensli, 249 N W. 511, 212 Wis 296

6 C J p 612 note 52 [e].

Two years

U S—In re Fertig, (C C A) 68 F (2d) 307.

Cal—Johnson v. State Bar of California, 52 P (2d) 928—Wright v State Bar of California, 17 P (2d) 101, 217 Cal. 59—Green v. State Bar of California, 292 P. 638, 210 Cal 603

Ill—In re Grosso, 194 N E 514, 359 Ill. 243—People ex rel Chicago Bar Ass'n v Chancellor, 192 N.E. 641, 353 Ill. 112—In re Zahn, 190 N.E 419, 356 Ill. 283

Minn—In re Yakey, 212 N.W. 13, 170 Minn. 21.

N J—In re P., 169 A. 25, 111 N J. Law 569—In re Broidt, 94 A. 214, 84 N J Eq 222—In re Rosenkrans, 94 A. 42, 84 N J Eq 232

N Y—In re Sugarman, 288 N.Y.S. 592, 248 App Div 724—In re Porcella, 272 N Y S 235, 241 App.Div. 344—In re Siegel, 265 N Y.S. 497, 238 App Div 744—In re Mahan, 262 N Y S. 702, 237 App Div. 664—

ance of prescribed conditions,[57] and this course is the usual one where the conduct complained of is a mere failure to turn over to his client money collected for him, no deliberate fraud, imposition, or attempt at oppression being shown.[58]

Mitigating circumstances may be considered in determining the punishment to be imposed in disciplinary proceedings, such as the motives and purposes which actuated accused, his previous good record, his characteristics and nature, testimonials as to his good character and reputation, his youth and inexperience and the fact that he was not guilty of intentional wrongdoing, or restitution of the client's money,[59] and, where mitigating circumstances are shown, the

In re Tans, 260 N Y S 219, 236 App Div 559—In re Brown, 260 N Y S 111, 236 App Div 423—In re Campbell, 260 N Y S 80, 236 App Div 429—In re Gottlieb, 260 N Y S 45, 236 App Div 432—In re Moran, 258 N Y S 565, 236 App Div 243—In re Crames, 258 N Y S 551, 236 App Div 229—In re Powers, 257 N Y S 113, 235 App Div 382—In re Babcock, 243 N Y S 489, 230 App Div 323—In re Fieldsteel, 240 N Y S 481, 228 App Div 470—In re Cherry, 240 N Y S 282, 228 App Div 458—In re Linden, 240 N Y S 274, 228 App Div 497—In re Weinstein, 239 N Y S 404, 228 App Div 210—In re Levy, 239 N Y S 377, 228 App Div 249—In re Feuerman, 238 N Y S 656, 227 App Div 506—In re Reichman, 238 N Y S 647, 227 App Div 512—In re Langfur, 238 N Y S 498, 227 App Div 468—In re Burke, 237 N Y S 53, 227 App Div 746—In re Cusack, 227 N Y S 187, 222 App Div 621—In re Menzel, 213 N Y S 707, 216 App Div 176—In re Marshall, 213 N Y S 611, 216 App Div. 168—In re McElveety, 195 N Y S 345 202 App Div 79—In re McKee, 188 N Y S 753, 197 App Div 192—In re Evans, 155 N Y S 491, 169 App Div 502—In re Adams, 291 N Y S 2.

R I—In re Troy, 111 A 723, 43 R I 279

Wis—State v Bradford, 259 N W 109, 217 Wis 389—State v Ingram, 248 N W. 915, 212 Wis 142—State v. Cannon, 226 N W 385, 199 Wis 401.

Wyo—State Board of Law Examiners v Strahan, 8 P (2d) 1090, 44 Wyo. 156, rehearing denied 13 P (2d) 1083, 44 Wyo 487

6 C J. p 612 note 52 [f]

Two years and six months.—Smukler v State Bar of California, 38 P (2d) 777, 2 Cal (2d) 80

Three years

Cal—Hill v State Bar of California, 42 P (2d) 629, 2 Cal (2d) 622—Marsh v State Bar of California, 39 P.(2d) 403, 2 Cal.(2d) 75—Tatlow v State Bar of California, 55 P (2d) 214—Johnson v State Bar of California, 52 P (2d) 928—Shaeffer v State Bar of California, 32 P (2d) 140, 220 Cal 681—Mauer v State Bar of California, 26 P.(2d) 14, 219 Cal 271

Iowa—State v Kaufmann, 209 N W 417, 202 Iowa 157

Mich—Attorney General v. Lane, 243 N W. 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct 115, 287 U S 654, 77 L Ed 565

Minn—In re Waleen, 250 N W. 793, 190 Minn 13

N J—In re Breidt, 94 A 214, 84 N J Eq 222

N Y—In re Rubenstein, 197 N Y S 75, 203 App Div 517—In re Hettrick, 197 N Y S 6, 203 App Div 512—In re Moller, 290 N Y S 257

Wyo—State Board of Law Examiners v Brown, 290 P 1013, 42 Wyo 108

6 C J p 612 note 52 [g].

Five years.—In re Schachne, (D C N Y) 5 F Supp 680—In re Dolins, 237 N Y S 46, 227 App Div 747—In re Bolin, 232 P 370, 132 Wash 453

Indefinitely or until further order of the court

Colo—Melville v. Wettengel, 57 P (2d) 699, 98 Colo 529—People v Winograd, 287 P 864, 87 Colo 384—People v Kelley, 285 P. 767, 87 Colo 88

Ill—People v Harris, 112 N E 978, 273 Ill 413—People v Anderson, 112 N E 273, 273 Ill 37

Mont—In re Gullickson, 181 P. 983, 56 Mont 144

N J—In re Lowenkopf, 183 A 716, 14 N J Misc 203

R I—Heitmanek v Turano, 158 A 878—Grinsell v Wilcox, 98 A 977

Wis—State v Kern, 233 N W 629, 203 Wis 178—In re Stolen, 214 N. W 379, 193 Wis 602, 55 A L R 1355, affirmed 216 N W. 127, 193 Wis 602, 55 A L.R 1355.

57. Ill—In re Borchardt, 192 N E 383, 357 Ill 458

Or—State v Tarpley, 259 P. 783, 122 Or 479

S C—State v Jennings, 159 S E 627, 161 S C. 263

6 C J p 612 note 53.

Judgment of disbarment suspended on condition that the attorney pay to the ward, whose estate was devastated by his conduct, a sum of money on the first of every month until further order of the court—State v Jennings, 159 S E 627, 161 S C. 263

58. In re Borchardt, 192 N E. 383, 357 Ill 458—6 C J p 613 note 54.

Municipal judge was censured for taking two hundred dollars from a colored woman in connection with his efforts to obtain a pardon for her, notwithstanding the judge believed that he had committed an injustice in sentencing her to prison—In re Harriss, 4 N E (2d) 387, 364 Ill 290.

Effect of restitution

(1) In a disbarment proceeding for unlawful retention of clients' money, restitution is not evidence of innocence, although such restitution may appear as a mitigating circumstance in the punishment—In re Kraus, 185 A. 737, 322 Pa. 362

(2) The weight to be given restitution by an attorney of a client's property is to be determined by the facts in each case.—People ex rel Chicago Bar Ass'n v Lotterman, 187 N E 424, 353 Ill 399—People v Grusd, 148 N E 860, 318 Ill. 44.

59. Cal—Marsh v State Bar of California, 39 P (2d) 403, 2 Cal (2d) 75

N Y—In re Westchester County Bar Ass'n, 276 N Y S 654, 243 App Div 621—In re Yochelson, 258 N.Y.S 724, 236 App Div 807.

S D—In re Meighen, 214 N.W. 848, 51 S D 459

Utah—In re Burton, 246 P. 188, 67 Utah 118

6 C J p 601 note 92.

Delay in instituting proceedings

Delay in instituting disbarment proceedings may be considered in mitigation of punishment—State v. Tarpley, 259 P 783, 122 Or. 479—State v. Parker, 252 P. 711, 120 Or 465

Frankness in disciplinary proceedings

An attorney's frankness in answering a charge in disciplinary proceedings bears on the extent of punishment to be imposed for professional misconduct—In re Porcella, 272 N. Y S 235, 241 App.Div 344—In re Blakesberg, 258 N Y S. 583, 236 App Div 227—In re Mulry, 255 N.Y.S 249, 234 App Div. 404.

Expression of regret

In a disbarment proceeding, an attorney's expression of regret that the petition filed by him charged that a certain court order was the result of hatred and vindictiveness of the judge could be considered in mitigation of offense—People ex rel Chicago Bar Ass'n v. Sherwin, 4 N.E (2d) 477, 364 Ill 350

Illness and straitened financial circumstances held insufficient to justify granting application of attorney disbarred for permitting an insurance adjuster to use his name as attorney for plaintiffs in fictitious

court will often suspend, rather than disbar, the attorney, or will reduce the term of suspension.[60] If the misconduct is not sufficiently flagrant to justify disbarment or suspension, or mitigating circumstances are shown, a reprimand may be administered;[61] but, where there are no extenuating circumstances and the conduct shows that the attorney is morally unfit to continue in the profession, he will be disbarred.[62]

On the other hand, incriminating circumstances

cases for suspension for a fixed term —In re Durst, 263 N.Y.S. 575, 237 App Div. 685

Previous good character not controlling

While previous good character may be considered in disbarment proceedings, where a gross breach of law and of the ethics of the profession is shown, it should not control the decision of the court as to whether the attorney should be disbarred or merely suspended—People ex rel. Chicago Bar Ass'n v. Chancellor, 192 N E 641, 358 Ill 112—People v. Donovan, 123 N E 513, 288 Ill 555.

60. U S—In re Paris, (D C.N Y) 4 F.Supp 878
Cal—Smukler v State Bar of California, 38 P.(2d) 777, 2 Cal (2d) 80—Recht v State Bar of California, 28 P.(2d) 273, 218 Cal 352—Bentson v State Bar of California, 13 P (2d) 512, 216 Cal. 58—Lantz v State Bar of California, 293 P 497, 212 Cal 213.
Colo—People v Ginsberg, 285 P 758, 87 Colo 115
Ill—People v Lally, 144 N E 329, 313 Ill 21
Iowa—In re De Caro, 262 N W 132, 220 Iowa 176
Minn—In re Smith, 237 N W 877, 184 Minn 87
Mont—Ex parte Burke, 176 P 421, 55 Mont. 303
N Y—In re Warrick, 278 N Y S 132, 244 App Div 48—In re Freda, 267 N Y S 292, 239 App Div 116—In re Siegel, 265 N Y S 497, 238 App Div 744—In re Treadwell, 260 N Y.S. 364, 236 App Div 562—In re Yochelson, 258 N Y S 724, 236 App Div. 807—In re Cramer, 258 N Y S 551, 236 App Div. 229—In re Halpern, 253 N Y S 618, 233 App Div 480—In re Katzka, 232 N Y S. 575, 225 App Div 250, modified on other ground 237 N Y S 808, 227 App Div 831—In re Eisenberg, 160 N Y S 143, 173 App Div 598—In re Newman, 158 N Y S 375, 172 App Div 172—In re Fallick, 286 N Y.S. 581
S D.—In re Kirby, 170 N W. 635, 41 S D 405.
Wis—State v Kern, 233 N W. 629, 208 Wis. 178.
Wyo.—State Board of Law Examiners v Strahan, 8 P (2d) 1090, 44 Wyo 156, rehearing denied 13 P (2d) 1083, 44 Wyo 487.
6 C J p 613 note 55

61. U S.—In re Baker, 56 S Ct. 377, 297 U.S 601, 80 L Ed 1413—Bartos v U S. Dist Court for Dist of Nebraska, (C C A Neb) 19 F (2d) 722, reversing (D C) In re Bartos, 13 F (2d) 138—In re Ades, (D C Md) 6 F Supp 467
Ariz—In re Myrland, 29 P (2d) 433
Cal—Remington v State Bar of California, 28 P (2d) 510, 218 Cal 446—Lupton v State Bar of California, 16 P (2d) 995, 217 Cal 56—Dudney v State Bar of California, 4 P (2d) 770, 214 Cal 238—D'Elia v. State Bar of California, 300 P 826, 212 Cal 770
Colo—People ex rel Colorado Bar Ass'n v ———, Attorney at Law, 9 P (2d) 611, 90 Colo 440—People v White, 1 P (2d) 577, 89 Colo 306—People v. Marshall, 297 P 998, 88 Colo 394—In re Nikkel, 279 P 565, 86 Colo 189
Ill—People ex rel Chicago Bar Ass'n v Sherwin, 4 N E (2d) 477, 361 Ill 350—People v McCallum, 173 N E 827, 341 Ill 578—People v Hickman, 138 N E 484, 294 Ill 471—People v Berezniak, 127 N E 36, 292 Ill 305
Minn—In re Otterness, 232 N W 318, 181 Minn 254, 73 A L R 1319—In re Dunn, 217 N W. 142, 173 Minn 274—In re McVeety, 211 N W 653, 170 Minn. 170
Mont—In re Hansen, 54 P (2d) 882
N M—In re Zinn, 42 P (2d) 776, 39 N M 161
N Y—In re Grill, 290 N Y S 729, 248 App Div 491—In re Phillips, 289 N Y S 56, 248 App Div 768—In re Berger, 286 N Y S 177, 246 App Div 892—In re Clowe, 283 N Y S 803, 245 App Div 596—In re Moller, 279 N Y S 779, 241 App Div 819—In re Wilcox, 276 N Y S 463, 243 App Div 103—In re McDougald, 276 N Y S 21, 242 App Div 578—In re Engel, 272 N Y S 696, 241 App Div 100—In re Britt, 267 N Y S 824, 239 App Div 430—In re Rolph, 264 N Y S. 171, 238 App Div 235—In re Mulry, 255 N Y S 249, 234 App Div 404—In re Burns, 254 N Y S. 131, 234 App Div 31—In re Steinberg, 252 N.Y S 755, 233 App Div 301—In re Carroll, 248 N Y S 363, 231 App Div 623—In re Batt, 246 N Y S 77, 230 App Div 656—In re Heimsoth, 243 N Y S 149, 229 App. Div 194, affirmed 175 N.E 112, 255 N Y. 409—In re Glucksman, 243 N Y S 1, 230 App Div. 135—In re Greenwald, 241 N Y S 703, 229 App Div 189—In re Kreindler, 240 N. Y S 604, 228 App Div 493—In re Cohen, 240 N Y S 350, 228 App Div. 465—In re Kreisvogel, 240 N Y.S. 314, 228 App Div 490—In re Flatow, 239 N Y.S 526, 228 App Div. 253—In re Bovard, 239 N Y S. 465, 228 App Div 263—In re Ziff, 239 N. Y.S. 388, 228 App Div 209—In re Klein, 239 N Y S 382, 228 App Div. 246—In re Uran, 238 N Y S 596, 227 App Div 496—In re Hyman, 235 N Y S 622, 226 App Div 468—In re Spigelgass, 233 N Y S 33, 225 App Div 297—In re Bullowa, 229 N Y S 145, 223 App Div 593—In re Oberstein, 222 N Y S 656, 221 App Div 60—In re Yardum, 218 N Y.S. 6, 218 App Div. 134—In re Zahm, 211 N Y S 144, 213 App Div 551—In re Bunker, 199 N Y S 435, 205 App Div 237—In re Tunnicliff, 195 N Y S 449, 202 App Div 69—In re Apfel, 195 N Y S 325, 202 App. Div 76—In re Thayer, 190 N Y S 392, 198 App Div 311—In re Bookman, 188 N Y S 271, 196 App Div 765—In re Penn, 188 N Y.S 193, 196 App Div 764—In re Becker, 187 N Y S 400, 196 App Div 914—In re Markewich, 182 N Y S 653, 192 App. Div. 242—In re Fisch, 177 N Y S. 338, 188 App Div 535—In re O'Reilly, 176 N Y S 781, 188 App Div 970—In re Hirsch, 171 N Y.S 534, 184 App Div. 147—In re Barondess, 162 N Y S 114, 176 App Div. 206—In re Schwarz, 161 N Y S 1079, 175 App Div 335—In re O'Neill, 161 N Y S. 899, 175 App Div. 973—In re Galland, 158 N.Y.S. 695, 172 App Div 611—In re Newman, 158 N Y S 375, 172 App Div 173—In re Pace, 156 N Y S. 641, 170 App Div 818—In re Carrao, 156 N. Y S 379, 170 App Div. 545—In re Lauterbach, 155 N Y S 478, 169 App Div 534—In re Napolis, 155 N. Y S. 416, 169 App Div. 469—In re Gray, 155 N Y S 407, 171 App Div. 894—In re Tepper, 154 N Y S 413, 170 App Div 889—In re Keesing, 283 N Y S. 319—In re Beachboard, 263 N Y S 492
Okl—In re Williams, 50 P (2d) 739—In re Green, 49 P (2d) 197—In re Hadwiger, 27 P (2d) 604, 167 Okl 307—In re Jeter, 20 P.(2d) 886, 163 Okl. 27—State v. Cutlip, 202 P. 782, 83 Okl. 183—In re Connell, 192 P. 564, 79 Okl 212
S D—In re Byrne, 262 N W 236—In re Bartlett, 197 N W 285, 47 S D 208—In re Wilmarth, 172 N.W 921, 42 S D 76.
Utah—In re Burton, 246 P. 188, 67 Utah 118
Vt—In re Wakefield, 177 A. 319, 107 Vt 180.
Wash—In re Disbarment of McCann, 42 P (2d) 437, 181 Wash 183.
Wis—State v Schnorenberg, 243 N. W 486, 208 Wis 595
6 C J. p 613 note 56

62. Ariz—In re Barth, 50 P (2d) 564—In re Langworthy, 8 P.(2d) 245, 39 Ariz 523.

such as the previous poor record of an accused, his years of practice, knowledge of wrongdoing, repeated misconduct, etc, may be considered in determining whether or not a more severe penalty should be imposed.[63]

Disbarment mandatory. Under statutes in some jurisdictions which have been held not invalid,[64] the court has no election, but must disbar an attorney convicted of a criminal offense involving moral turpitude where the conviction has become final and has not been set aside.[65]

Statutory punishment not exclusive. Where an attorney is guilty of professional misconduct, a proceeding under a statute limiting punishment for such misconduct to suspension from practice for twelve months is not exclusive, but such attorney may be disbarred in a common-law proceeding.[66]

Cal—Barton v State Bar of California, 40 P (2d) 502, 2 Cal (2d) 294—Mayer v State Bar of California, 39 P (2d) 206, 2 Cal (2d) 71—Laney v State Bar of California, 60 P (2d) 845—Mills v State Bar of California, 58 P (2d) 1273—Roark v. State Bar of California, 55 P. (2d) 839—McIntosh v State Bar of California, 294 P 1067, 211 Cal 261

Colo—People v. Hillyer, 297 P. 1004, 88 Colo 428.

Conn—Grievance Committee of Hartford County Bar v. Broder, 152 A 292, 112 Conn 263, 269

Ill—People v. Hansen, 185 N.E. 225, 352 Ill. 144—People v Gilmore, 177 N.E 710, 345 Ill 28—People v. Johnson, 176 N.E 278, 344 Ill 132

Ky—Rosenberg v Commonwealth ex rel Otte, 74 S.W (2d) 478, 255 Ky. 413.

La—In re Wolff, 115 So 809, 165 La 641.

Minn—In re Strand, 260 N.W. 499—In re Waters, 256 N.W 139, 192 Minn 262—In re Gerlich, 244 N.W 414, 187 Minn 88—In re Smith, 236 N.W. 324, 183 Minn 220—In re Fitz Gibbons, 234 N.W. 637, 182 Minn. 373

Mo.—In re Richards, 63 S.W.(2d) 672, 333 Mo 907.

Neb—State ex rel Sorensen v. Ireland, 251 N.W. 119, 125 Neb 570

N.M—In re Eaton, 281 P. 24, 34 N. M. 329.

N.Y—In re Kunstler, 289 N.Y.S 107, 248 App Div. 393—In re Mitnick, 288 N.Y.S. 913, 248 App Div 198—In re Ostergren, 283 N.Y.S 615, 246 App Div. 725—In re Feinstein, 280 N.Y.S. 267, 245 App Div 740—In re Klein, 275 N.Y.S. 703, 242 App Div 494—In re Williams, 272 N.Y.S 898, 242 App Div 151—In re Krissoff, 267 N.Y.S 887, 239 App. Div. 436—In re Needleman, 267 N.Y.S 785, 240 App Div 971—In re Schwartz, 267 N.Y.S. 343, 239 App Div. 127—In re Goldstein, 258 N.Y.S 548, 236 App.Div 233—In re Schwind, 253 N.Y.S 762, 233 App. Div. 468—In re Robson, 253 N.Y.S 713, 233 App Div 471—In re Malcolm, 253 N.Y.S. 602, 233 App Div 476—In re Cohen, 252 N.Y.S. 757, 233 App Div. 817—In re Silver, 252 N.Y.S. 749, 233 App Div. 803—In re Rosenbaum, 242 N.Y.S. 15, 229 App Div 199—In re Helfant, 210 N.Y.S 242, 228 App Div. 479—In re Durst, 239 N.Y.S 316, 228 App Div. 256—In re Flynn, 203 N.Y.S 29, 208 App. Div. 40—In re Makay, 203 N.Y.S. 15, 208 App Div 44—In re Montegriffo, 156 N.Y.S 512, 171 App Div. 933, rehearing denied 161 N.Y.S 1135—In re Riordan, 290 N.Y.S. 267—In re Dawson, 290 N.Y.S 262—In re Kushner, 283 N.Y.S 167—In re Reiburn, 283 N.Y.S 136—In re Ropiecki, 282 N.Y.S 947.

Okl—In re Osmond, 54 P (2d) 319, 174 Okl. 561—In re Kelley, 28 P (2d) 564, 167 Okl 142—State v Breckenridge, 258 P. 744, 126 Okl 86, 53 A.L.R 1239—In re Warren, 151 P 619, 49 Okl. 87.

Or—State ex rel. Seton v. McMenamin, 29 P.(2d) 520, 146 Or 60—State v. Mannix, 288 P 507, 133 Or 339, rehearing denied 290 P. 745, 133 Or 329—State v Tarpley, 259 P. 783, 122 Or 479

Pa—In re Goldberg, 184 A. 74, 321 Pa 109—In re Salus, 184 A. 70, 321 Pa. 106—In re Salus, 184 A. 69, 321 Pa 103—Klensin v. Board of Governance of Pennsylvania Bar, 168 A 474, 312 Pa 564—In re Law Ass'n of Philadelphia, 167 A 579, 312 Pa 555—In re Gangewer, 19 Pa Dist & Co 698.

S.D—In re Brown, 264 N.W. 521—In re Kaas, 162 N.W. 370, 39 S.D. 4

Utah—In re Hilton, 158 P 691, 48 Utah 172, Ann Cas.1918A 271.

Wash—In re Madigan, 300 P. 1119, 163 Wash 151—In re Mills, 176 P 556, 104 Wash 278.

Wis—State v. Sullivan, 249 N.W. 519, 212 Wis 314—State v. Andrews, 240 N.W 147, 206 Wis 615.

63. Cal—Marsh v State Bar of California, 39 P (2d) 403, 2 Cal (2d) 75—McCue v. State Bar of California, 47 P (2d) 268.

Colo—People v. Hillyer, 297 P. 1004, 88 Colo. 428.

Previous record

In considering the punishment to be imposed on an attorney for breach of trust in connection with the handling of his clients' funds, the previous record of the attorney who had been suspended from the practice of law for one year on another occasion could be considered—Mills v. State Bar of California, (Cal) 58 P.(2d) 1273.

Second offense

Previous suspension of an attorney for a similar offense justifies severer punishment than for a first offense—In re Sherin, 210 N.W. 507, 50 S.D 428.

64. In re Casebier, 284 P. 611, 129 Kan. 353

65. Cal—In re Herron, 19 P (2d) 4, 217 Cal. 400—In re O'Connell, 194 P 1010, 184 Cal 584—In re O'Connell, 189 P. 700, 182 Cal 786—In re Riccardi, 189 P 694, 182 Cal. 675—In re Beggs, 176 P. 165

Kan—In re Casebier, 284 P 611, 129 Kan 353—State v. Bieber, 247 P. 875, 121 Kan 536, 48 A.L.R 252

Mo—In re Wallace, 19 S.W.(2d) 625, 323 Mo 203

Wash—In re Lilopoulos, 27 P (2d) 691, 175 Wash 338—In re Finch, 287 P. 677, 156 Wash. 609.

"May" construed as mandatory

"May," as used in a statute relating to disbarment of an attorney convicted of any criminal offense involving moral turpitude, is mandatory—In re Wallace, 19 S.W.(2d) 625, 323 Mo. 203

Record of conviction conclusive

Under a statute providing that a lawyer "may" be disbarred for conviction involving moral turpitude and that the record shall be conclusive evidence, the supreme court must accept the record as conclusive, and must disbar—In re Finch, 287 P. 677, 156 Wash. 609.

Suspension pending further action in criminal case

An attorney, convicted of a felony involving moral turpitude, but placed on probation without the imposition of sentence, should be suspended pending further action in a criminal case—In re Jacobsen, 260 P. 294, 202 Cal. 289.

In Oklahoma it has been held that there is nothing in the statute which requires disbarment on conviction in the federal courts of a crime involving moral turpitude.—In re Green, 16 P (2d) 582, 161 Okl 1.

Conviction of felony operating ipso facto to disbar attorney see supra § 21

66. Duffin v. Commonwealth, 271 S. W. 555, 203 Ky. 452.

§ 39. —— Costs

Generally, in the absence of statutes providing therefor, costs cannot be recovered by either party.

While, under statutes in some jurisdictions, the court may adjudge, in its discretion, that the accused pay a part or all of the costs involved in the proceeding,[67] and although in some cases the courts have adjudged that accused should pay the costs or a part thereof, seemingly as a part of his punishment,[68] generally, in the absence of a statute giving costs in such cases, the rule is that none can be recovered by either party,[69] except perhaps where the court finds that the proceedings have been instituted in bad faith, when it may adjudge costs against the petitioner.[70]

Liability of state or county. Under statutes providing that a disbarment proceeding must be conducted in the name of the state and that, in all civil actions prosecuted in the name of the state by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties, it has been held that the state, rather than the county, is liable for the costs of a disbarment proceeding.[71]

On appeal costs have been held to be governed by the appeal rules and statutes.[72]

67. S D—In re Wilmarth, 172 N W 921, 42 S D 76
Wis—State v Sodorberg, 255 N.W. 906, 215 Wis 571.
6 C J p 613 note 60.

Particular items

(1) Under a statute providing that the costs of a reference shall be paid by the county, etc, and that the court in its discretion may tax the costs for necessary disbursements against accused, it has been held that the fees of the referees, the per diem and mileage of the stenographer reporting and transcribing the testimony, and the charges of such stenographer for a transcript of the evidence are not chargeable against accused—In re Bartlett, 198 N W. 125, 47 S D 270—In re Egan, 160 N W 814, 38 S D 224, modifying 159 N.W. 393, 37 S D. 642—6 C J p 613 note 60 [c] (1).

(2) Carbon copies of the transcript of testimony to be furnished in disbarment proceedings are not necessary and not properly taxable against accused.—In re Egan, 159 N W. 393, 37 S D. 642, modified on other grounds 160 N W. 814, 38 S D 224

(3) Expenses of an insanity expert in disbarment proceedings when brought from without the state are properly chargeable against accused only to the amount of witness' fee and mileage from the state line—In re Egan, 159 N W. 393, 37 S D. 642, modified on other grounds 160 N.W. 814, 38 S D. 224

Effect of unnecessary payment by county

(1) The fact that the disbursements in such proceeding have been paid by the county has been held not to affect the right to tax them against accused, the county being clearly entitled to reimbursement—In re Egan, 160 N W 814, 38 S D. 224, modifying 159 N W. 393, 37 S D. 642.

(2) It is no objection that the judgment will be in favor of the state, as it will of necessity be for the benefit of the county—In re Egan, 159 N W. 393, 37 S D. 642, modified on other grounds 160 N.W. 814, 38 S D 224

Notice and opportunity to urge objections

An objection that it is sought to tax the costs against accused without notice to him and without giving him any opportunity to file and urge objections is without merit where such opportunity is given before the costs are taxed against him—In re Egan, 159 N W. 393, 37 S D 642, modified on other grounds 160 N W 814, 38 S D 224

In the Philippine Islands, in accordance with the statute, the accused attorney will be adjudged to pay whatever costs have been incurred by him in a disbarment proceeding—In re Adriatico, 7 Philippine 172, 5 Off Gaz 52

68. Mont—In re Hansen, 54 P (2d) 882
N M—In re Zinn, 42 P (2d) 776, 39 N M 161.
Okl—In re Connell, 192 P 564, 79 Okl. 212.
Utah—In re Hanson, 158 P. 778, 48 Utah 163.

Referee's and stenographer's fees and other court costs have been held chargeable against accused—In re Hanson, 158 P 778, 48 Utah 163

69. In re Marron & Wood, 165 P 216, 22 N M 501, granting motion In re Marron, 160 P 391, 22 N M 252, L R A 1917B 378—6 C J p 613 note 61

Applicability of general statute

(1) In at least one jurisdiction it has been held that a statute governing costs in all civil actions or proceedings is not applicable to disbarment proceedings—In re Marron & Wood, 165 P 216, 22 N M 501, granting motion In re Marron, 160 P. 391, 22 N M 252, L R A 1917B 378.

(2) In another jurisdiction it has been held that costs are taxable under a general statute authorizing courts to award and apportion costs in their discretion—In re Wilcox, 135 P 995, 90 Kan 646.
6 C J. p 614 note 64

Statute prohibiting costs not invalid

A statute which provides that in disbarment proceedings commenced of the court's own motion the court must direct some attorney to draw up the accusation, and that in such case no allowance of costs shall be made for the payment of attorney's fees, is not unconstitutional—Brown v Warren County, 135 N.W 4, 137 N W 474, 156 Iowa 20, 42 L R A. (N S) 527, Ann Cas 1915B 185

70. In re Wilmarth, 172 N W. 921, 42 S D 76—In re Polley, 159 N W. 42, 37 S D 523—6 C J. p 613 note 61 [b], p 614 note 62

Where there is no finding of improper motive of the accuser in preferring the charges, accused cannot be awarded judgment for his necessary expenditures under a statute relating to the taxing of costs in such cases when it is determined that the charges were unfounded and that the accusation was made without probable cause and influenced by improper motives—In re Polley, 159 N.W. 42, 37 S D 523.

71. Committee on Grievances of North Carolina Bar Ass'n v Strickland, 161 S E 76, 201 N C 619
Liability of county for costs of investigating objections to admission of attorney from another jurisdiction see supra § 15

72. Houtchens v State, (Tex Com. App) 74 S W (2d) 976, granting motion 63 S W (2d) 1011, reversing (Civ App) 47 S W.(2d) 679—6 C J p 614 note 65.

Attorneys signing complaint not liable

(1) Attorneys signing a complaint in disbarment proceeding did not make themselves parties to litigation or liable for costs on appeal on reversal of disbarment judgments by the commission of appeals.—Houtchens v State, (Tex Com App) 74 S W (2d) 976, granting motion 63 S W. (2d) 1011, reversing (Civ App.) 47 S. W (2d) 679.

(2) The minutes of the commission of appeals may be corrected after reversal of judgments disbarring an at-

§ 40. Operation and Effect

The effect of disbarment or suspension is governed by the law in force at the time, and generally the attorney loses every privilege to which his license entitled him while the order of disbarment or suspension is operative, and violation of such order constitutes contempt.

The law in force at the time of the judgment or order in disbarment proceedings governs the consequences thereof.[73] Generally, as regards the effect of disbarment the authorities are uniform that it deprives the party disbarred of every privilege to which his license had entitled him,[74] but suspension operates simply to deprive an attorney temporarily of the right to practice his profession and does not oust him from his office[75]

While, in some jurisdictions, an order of suspension or disbarment deprives the attorney not only of his privileges in the court making the order of suspension or disbarment, but also his privileges in all courts of the state,[76] it has been held in other jurisdictions that a disbarred attorney has the right to practice in inferior courts where admission to the bar is not required in order to practice therein,[77] and it has also been held that disbarment in one court will not affect the right to appear before an independent tribunal.[78] Thus disbarment in a state court does not ipso facto deprive an attorney of his right to appear in the federal courts,[79] although it seems that, where the highest court of a state has revoked an attorney's license to practice, his license to practice in the federal courts of that state should be revoked as a matter of course,[80] and the courts of other states, if aware of his disbarment, will generally refuse him permission to appear before them[81]

Appearing propria persona. An order of suspension or disbarment generally prevents an attorney's appearance in court only as an attorney for another,[82] and does not extend to prevent an appearance for himself on a cause of action in his own favor or on a cause that has been transferred to him in good faith[83]

torney to show taxation of costs against the state, as the commission intended, instead of attorneys signing the complaint in a disbarment proceeding—Houtchens v State, supra

73. Attorney General v Lane, 243 N W 6, 259 Mich 283, certiorari denied Lane v Voorhies, 53 S Ct 115, 287 U S 654, 77 L Ed 565

74. People v Humbert, 282 P 263, 86 Colo 426—6 C J p 614 note 66.

Power of attorney

While under the disability of such a decree the attorney cannot, as such, act under a power of attorney—Paul v Purcell, 1 Browne (Pa) 348

Disbarment as terminating relationship between attorney and client, or as terminating the contract of employment see infra § 111

75. Mo—State ex rel McAllister v. Sanderson, 217 S W. 60, 280 Mo 258

Tex—McBrayer v Cravens, Dargan & Roberts, (Com App) 265 S W. 694, reversing Cravens, Dargan & Roberts v McBrayer, (Civ App.) 255 S W 994

6 C J p 614 note 74

Not required to obtain new license

The effect of a judgment suspending an attorney for twelve months was to take away from him the benefit of his license during the period of his suspension, not to extinguish it, and at the expiration of the twelve months he is entitled to practice without procuring a new license.—State ex rel McAllister v. Sanderson, 217 S W. 60, 280 Mo. 258.

76. N M—State v Marron, 167 P 9, 22 N.M. 632, L R A.1918B 217.

Ohio—State v Brough, 15 Ohio Cir Ct (N S) 97

6 C J p 614 note 67.

Inferior courts not requiring admission

Under a statute defining the effect of suspension or disbarment to be to deprive the attorney of the right to appear in any of the courts of the state, it has been held that a suspended or disbarred attorney is precluded from practicing even in those courts where no order of admission to the practice of law is required—State v Marron, 167 P. 9, 22 N M 632, L R A 1918B 217.

77. Ex parte Hittson, 178 P. 149, 39 Cal App 91

78. Bradley v Fisher, (D C) 13 Wall (U S) 335, 20 L Ed 646—6 C J p 614 note 69

79. In re Thatcher, (C C & D C Ohio) 190 F 969, affirmed 212 F 801, 129 C C A 255—6 C J. p 614 note 70

80. In re Barton, (D C Cal) 54 F. (2d) 810—6 C J p 614 note 71.

Federal court will recognize judgment of state court, subject to exceptions

The federal courts will recognize the condition created by a judgment of disbarment or suspension of a state court, unless the attorney shows good cause to the contrary, as by showing that the state procedure was wanting in due process because of lack of notice or opportunity to be heard, or that there was such want of proof as to the facts found as to give rise to a clear conviction that the decision should not be followed, or that there existed some grave reason which convinces the court that it would be a violation of its duty to disbar or suspend on the basis of the state court's order—Selling v Radford, (Wash.) 37 S Ct 377, 243 U S 46, 61 L Ed 585, Ann Cas 1917D 569—In re Barton, (D C Cal) 54 F (2d) 810.

81. Danforth v Egan, 119 N W. 1021, 23 S D 43, 139 Am S R 1030, 20 Ann Cas 413—6 C J. p 614 note 68

82. Philbrook v San Francisco Super Ct, 43 P 402, 111 Cal. 31

83. Leonard v Toledo, St. L. & W R Co, (D C Or) 232 F. 281—6 C J. p 615 note 76

Assignment after entry of order of disbarment or suspension

(1) A statute prohibiting a disbarred attorney from prosecuting an action in propria persona where the subject of such action has been assigned to him subsequent to the entry of the judgment of disbarment has been held invalid where there was an outright assignment of the chose in action—O'Connell v. Judnich, 235 P. 664, 71 Cal App. 386

(2) But, where the assignment was for the purposes of collection only, such statute has been held not invalid—Koepple v. Morrison, 257 P. 590, 84 Cal App 137

Appearing for corporation where owning all capital stock

The right of a disbarred attorney as a party to a suit in court to appear in person therein does not entitle him to appear for a corporation, even if he owns all its capital stock—Cary & Co v. F. E. Satterlee & Co., 208 N W. 408, 166 Minn. 507

Contingent fee contract does not give the attorney such an interest in the case as to entitle him to appear therein after its removal to a

Rights of citizenship are not affected by disbarment.[84]

Offenses. An attorney who attempts to practice law, while an order of suspension or disbarment is in effect, is guilty of contempt,[85] and the common-law rule that a person cited for contempt may acquit himself by an oath denying the charge has been held not applicable to a charge of practicing law by a disbarred attorney, especially where the acts charged and established are not ambiguous.[86] A pardon granted to an attorney convicted of crime does not affect the court's authority in contempt proceedings for practicing law after disbarment, where such pardon was granted after the occurrence of the acts constituting the contempt.[87]

Conduct of a disbarred attorney in holding himself out as competent to draw all legal papers is a violation of a law forbidding persons, not members of the bar, from holding themselves out to the public as being entitled to practice law.[88]

§ 41. Reinstatement

a. In general
b. Procedure

a. In General

An order or judgment of disbarment is not final and conclusive in that a disbarred attorney may not be reinstated to the practice of the law under proper circumstances

While an order or judgment of disbarment is not necessarily final or conclusive for all time, and an attorney who has been disbarred may be reinstated, on motion or application, for reasons satisfactory to the court,[89] nevertheless on a petition for reinstatement, the court will not consider alleged errors in the disbarment proceeding,[90] nor will it consider

federal court which had disbarred him—Leonard v Toledo, St L & W. R Co, (D C.Or) 232 F 281

84. U.S—Philbrook v Newman, (C C Cal.) 85 F 139
Ohio—In re Thatcher, 93 N E 895, 83 Ohio St. 246, Ann Cas 1912A 810

85. U S—Bowles v. U S, (C C A Md) 50 F (2d) 848, certiorari denied 52 S Ct 29, 284 U S 648, 76 L Ed 550
Colo—People v Humbert, 282 P 268, 86 Colo 426
N Y.—In re Koffler, 258 N Y S. 611, 236 App Div 240
S D—In re Sullivan, 265 N W 601
13 C J p 12 note 86

Conduct held to constitute contempt

(1) Holding himself out as an attorney by keeping open an office and displaying a sign indicating that it was a law office and by using stationery indicating that he was an attorney—State v Marron, 167 P. 9, 22 N M 632, L.R A 1918B 217—6 C J. p 614 note 74 [b]

(2) Remaining silent with knowledge that his name was appearing in directories as an attorney—People v. Humbert, 282 P 268, 86 Colo 426—People v. Norton, 104 P 605, 44 Colo 253.

(3) The drawing of pleadings and the preparing of a case for trial in the district court is practicing the legal profession therein, whether the attorney signs his own name or the name of some other attorney, and is a violation of duty by the attorney who had been suspended from practicing in the district court—State v. Fisher, 174 N W 320, 103 Neb 736.

Contempt of disbarring court

One holding himself out as a practicing attorney after disbarment is guilty of contempt of the disbarring court—Bowles v. U. S., (C C A.Md) 50 F (2d) 848, certiorari denied 52 S Ct 29, 284 U S 648, 76 L Ed. 550

Additional testimony unnecessary

In a contempt proceeding, there was no necessity for taking additional testimony, where respondent, in open court, represented himself to the judge as a practicing attorney, and the falsity of the representations was established by answer under oath, respondent being given an opportunity to produce evidence in explanation of the charges, if he so desired—Bowles v U S, (C C A Md) 50 F (2d) 848, certiorari denied 52 S Ct. 29, 284 U S 648, 76 L Ed 550

86. Bowles v Laws, 59 App D C 399, 45 F.(2d) 669, certiorari denied 51 S Ct 488, 283 U S 841, 75 L Ed 1452

87. Bowles v Laws, supra

88. Childs v Smeltzer, 18 Pa Dist & Co 39

89. Ala—Ex parte Peters, 70 So 648, 195 Ala. 67
Cal—In re Cate, 212 P 694, 60 Cal App 279—Bar Ass'n of San Francisco v Cantrell, 200 P 968, 53 Cal App 758.
Miss—Ex parte Marshall, 147 So 791, 165 Miss. 523—Ex parte Redmond, 82 So 513, 120 Miss 536
N J—In re Harris, 95 A 761, 88 N J Law 18
Ohio—In re Sparks, 13 Ohio Cir Ct (N S.) 360
Okl—In re Snodgrass, 26 P.(2d) 756, 166 Okl 156
Pa—In re McKenna, 22 Pa Dist. & Co 485
Tex—Burns v State, (Civ App) 76 S W (2d) 172, error granted
Wash—In re Bruener, 34 P (2d) 437, 178 Wash. 165
6 C J p 615 note 79

It is not the policy of the law that an attorney who has been disbarred for misconduct shall never be readmitted to practice—In re Nisbet, 246 P 120, 77 Cal App 260

Particular statute construed

Code (1906) § 323 (Hemingway Code § 200), providing that a disbarred attorney shall never afterward be permitted to act as attorney or counselor in any court of the state, does not preclude the circuit court from acting on the merits of a petition by a disbarred attorney for reinstatement, and it may restore such attorney to his privileges—Ex parte Redmond, 82 So 513, 120 Miss 536

Not a modification or vacation of judgment of disbarment

The reinstatement of a disbarred attorney is not a modification or vacation of the judgment of disbarment within the rule that judgments pass beyond the court's power and control after the lapse of the term at which they were rendered—Ex parte Peters, 70 So 648, 195 Ala 67—In re Fleming, 8 P (2d) 1063, 36 N. M 93

Judgment disbarring an attorney is not res judicata on an application for reinstatement—Burns v State, (Tex Civ App) 76 S W (2d) 172, error granted—In re Bruener, 34 P (2d) 437, 178 Wash. 165.
Suspension judgment as not res judicata where court determines otherwise as to propriety of such order see supra § 36

Order denying reinstatement not res judicata

An order denying reinstatement to a disbarred attorney has been held not res judicata so as to preclude a consideration on the merits of a later application for reinstatement. —In re Bruener, 34 P (2d) 437, 178 Wash 165.

90. In re Kaufmann, 157 N E 730, 245 N Y. 422, reversing 211 N.Y.S.

the question whether disbarment was warranted[91] The effect of a judgment of disbarment will not be lightly set aside,[92] and a mere sentimental belief that the erring lawyer has been punished enough does not justify his reinstatement,[93] as the court, on a petition for reinstatement, has a solemn duty to the legal profession and to the public which must be performed without regard to feelings of sympathy.[94] Evidence of reformation is required before applicant is entitled to reinstatement,[95] notwithstanding the attorney has received a pardon following his conviction,[96] and the requirements for reinstatement have been held to be the same as for original admission to the bar,[97] except that the court may require a greater degree of proof than in an original admission (infra § 41 b).

An attorney who is no longer a bona fide resident of the state is not eligible for reinstatement,[98] nor is an attorney, voluntarily withdrawing his name from the roll and stipulating that he would not apply for reinstatement if the information for disbarment was dismissed, eligible for reinstatement,[99] and an attorney who refused to participate in proceedings for his disbarment has been held not entitled to seek reinstatement on the ground of newly discovered evidence.[1] Where an order admitting the petitioner to the bar was set aside for fraud, in legal effect the petitioner was never an attorney and cannot be reinstated,[2] and an intention not to enter the practice in the state if reinstated has been held not persuasive on consideration of a petition for reinstatement.[3] An application for reinstatement will be denied where applicant has practiced law, directly or indirectly,[4] and an application for reinstatement, the attorney having been suspended indefinitely, has been held to present a moot question where, pending such application, the court admitting him had revoked his license to practice.[5]

Effect of pardon. Ordinarily a pardon does not extend to disbarment proceedings or require a court to reinstate an attorney,[6] but does no more than open the door to an inquiry that would otherwise be barred,[7] although, in at least one jurisdiction, a full pardon has been held to absolve the attorney from all the consequences of an order of disbarment made under a statute providing that, on conviction of a felony, the court in which the attorney shall have

256, 213 App Div 555—In re Lindheim, 211 N Y S 261, 213 App Div. 560

91. Vaughan v. State Bar of California, 284 P 909, 208 Cal 740.

Petition based on alleged errors in disbarment proceeding

Where an attorney, having been disbarred, applied for reinstatement for alleged errors in the order for disbarment, the sole question was whether the order of disbarment was right in substance, and the objection that no hearing was granted was of no avail, where on the application for reinstatement there was a hearing, and the order was sustained—In re Shepard, 170 P. 442, 35 Cal App 492.

92. In re Cate, 212 P 694, 60 Cal. App. 279

Reinstatement should be difficult, rather than easy, to obtain—In re Morton, 243 P 32, 75 Cal App 497.

93. In re Morton, supra—In re O'Connell, 222 P. 625, 64 Cal.App 673—In re Cate, 212 P. 694, 60 Cal App. 279

94. In re O'Keefe, 205 P. 667, 62 Mont. 534.

Affidavits as to illness immaterial

Physicians' affidavits as to the illness of applicant for reinstatement as an attorney have been held immaterial—In re Egan, 218 N.W 1, 52 S D. 394

95. State v. Priest, 242 N.W. 433, 123 Neb. 241.

96. Cal—In re Lavine, 41 P.(2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 511, 2 Cal (2d) 324
Fla—Branch v. State, 163 So. 48.

97. Ex parte Marshall, 147 So 791, 165 Miss 523

98. Mich—In re Salsbury, 186 N W. 404, 217 Mich 260
N M—In re Fleming, 8 P (2d) 1063, 36 N M. 93

Vacation of order of disbarment

Where a disbarred attorney, since his disbarment, has by a life of rectitude demonstrated that he is possessed of moral character sufficient again to be a member of the bar, but he has become a nonresident, he cannot be reinstated, residence being a necessary qualification, but the order of disbarment will be vacated—In re Salsbury, 186 N.W. 404, 217 Mich 260.

99. People v. Reed, 173 N E. 772, 341 Ill 573.

1. In re O'Brien, 113 A 527, 95 Vt 167, 14 A L R 859.

2. Cal—In re Lasley, 254 P 913, 81 Cal App 719.
Ky—Commonwealth v. Defever, 45 S.W.(2d) 439, 241 Ky. 834.

3. Iowa—State v. Maxey, 186 N.W 40.
S D—In re Egan, 161 N W. 1003, 38 S D 453, denying motion 157 N W. 310, 37 S D. 159.

4. Cal—In re McKelvey, 255 P. 834, 82 Cal App. 426

Wash—In re Gowan, 251 P. 773, 141 Wash 523.

Acts held not violation of disbarment order

Employment of a disbarred attorney as a law office clerk at a small salary, and giving advice to the employer's clients on small matters has been held not to prevent reinstatement—In re McKelvey, 255 P 834, 82 Cal App 426

5. In re Jacobsen, 289 P. 159, 209 Cal 539

6. Fla—Branch v. State, 163 So 48
Ga—Payne v. State, (App) 133 S E 633
6 C.J. p 615 note 79 [b].

Reason for rule

Where an attorney was guilty of misconduct for which he was both disbarred and criminally prosecuted and convicted, he did not forfeit his right to practice law because of the conviction of the crime, but because of the adjudication that he had been guilty of conduct which showed him to be a person unfit to engage in practicing law, and a pardon wiping out such conviction will not reinstate him as a practicing attorney—Branch v. State, (Fla.) 163 So. 48.

7. La—State v. Gowland, 140 So. 500, 174 La. 351
N Y—In re Kaufmann, 157 N E 730, 245 N Y. 423, reversing 211 N Y.S 256, 213 App Div. 555—In re Lindheim, 211 N.Y.S 261, 213 App Div. 560.

been convicted shall enter an order disbarring such convict.[8]

Statutes effecting reinstatement. A special statute purporting to reinstate a disbarred attorney is invalid,[9] and a pardon statute, in so far as purporting to reinstate or direct reinstatement of a disbarred attorney without a showing of moral rehabilitation, has been held invalid.[10]

The decisive questions on an application for reinstatement are whether applicant is of "good moral character" in the sense in which that phrase is used when applied to attorneys at law and is a fit and proper person to be intrusted with the privileges of the office of an attorney,[11] and whether his mental qualifications are such as to enable him to discharge efficiently his duty to the public,[12] and the moral attributes of the petitioner are to be regarded as separate and distinct from his mental qualifications.[13] However, the time between disbarment and reinstatement of an attorney is not necessarily an essence in an action to restore a disbarred attorney to the practice of the law.[14]

b. Procedure

(1) In general

(2) Reference

8. Ex parte Crisler, 132 So. 103, 159 Miss 247

9. Ohio—State v. Brough, 33 Ohio Cir.Ct 257.
Wis—State v. Cannon, 240 N.W. 441, 206 Wis. 374.

10. In re Lavine, 41 P.(2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324

11. Cal.—Kepler v State Bar of California, 13 P (2d) 509, 216 Cal 52—Vaughan v. State Bar of California, 284 P 909, 208 Cal. 740—Petition of Morganstern, 259 P. 90, 85 Cal App. 113—In re La Motte, 247 P 524, 77 Cal App. 733—In re Cate, 247 P 231, 77 Cal App 495—In re Morton, 243 P. 32, 75 Cal App 497—In re O'Connell, 223 P 625, 64 Cal App 673—In re Cate, 212 P. 694, 60 Cal App 279—In re Mash, 179 P 897, 39 Cal App. 548
Conn—In re Kone, 97 A. 307, 90 Conn 440
Fla—Branch v State, 163 So 48.
Miss—Ex parte Marshall, 147 So 791, 165 Miss. 523.
Neb—State v. Priest, 242 N.W. 433, 123 Neb 241
S D—In re Egan, 218 N W. 1, 52 S D 394
Wash—In re Bruener, 34 P (2d) 437, 178 Wash 165.
W Va—In re Daugherty, 136 S E 402, 103 W Va. 7.
6 C J. p 615 note 81.

Court must use every legitimate channel open in seeking information as to the moral fitness of a disbarred attorney for reinstatement—In re Egan, 218 N.W. 1, 52 S D 394—Petition of Morrison, 186 N.W. 556, 45 S D. 122.

Conviction for a felony has been held not to prevent the court's inquiring into the attorney's fitness to practice on a petition for reinstatement after a reversal of the conviction or the granting of a pardon, and, after the granting of a pardon, the court is required to consider the fitness of applicant to practice when he petitions for reinstatement—In re Kaufmann, 157 N E 730, 245 N.Y 423, reversing 211 N Y S 256, 213 App Div 555—In re Kaufmann, 228 N Y S 349, 223 App Div 299—In re Lindheim, 211 N.Y.S. 261, 213 App Div. 560

Matters considered in determining moral fitness

(1) All circumstances bearing on question whether attorney was fit, notwithstanding judgment suspending him was indefinite and conditioned on his showing the court that he would not be guilty of such conduct as that involved in the disbarment proceedings—State v Cannon, 240 N W 441, 206 Wis. 374

(2) Applicant's character and standing in community in which he resided prior to disbarment, ethical standards which he observed in practice of law, character of charge for which he was disbarred, his conduct subsequent to disbarment, and time that has elapsed between disbarment and application for reinstatement—In re Bruener, 34 P.(2d) 437, 178 Wash 165.

(3) Conduct of applicant prior to disbarment—Ex parte Marshall, 147 So 791, 165 Miss 523

(4) Events occurring before the disbarment of the petitioner and not then called to the court's attention—In re Riccardi, 251 P. 650, 80 Cal App 66

(5) Former record of disbarred attorney, admitting misconduct and asserting reformation on application for reinstatement, must be considered with conduct after disbarment—In re Egan, 218 N W. 1, 52 S D 394

(6) Where an attorney was disbarred because of his conviction in the federal court, the district court of appeal on application for reinstatement, opposed by the bar association on the ground that the record made on the trial shows him to be devoid of that fundamental moral perception and personal integrity required of attorneys, will examine the evidence adduced during his trial in the federal court—In re Stevens, 210 P 442, 59 Cal App 251.

(7) A suspended attorney could not be refused reinstatement merely because of publicly criticising courts during political campaign, although without foundation, and court will not inquire into his motive—State v. Cannon, 240 N W 441, 206 Wis 374

(8) Attorney's attitude in his campaigns for judicial office could be considered only in so far as reflecting his character, apart from his disposition to criticize courts—State v. Cannon, supra.

12. In re La Motte, 247 P 524, 77 Cal.App 733—In re Cate, 247 P 231, 77 Cal App 495.

Procedure to be followed

(1) All applicants for readmission after disbarment are not required to submit to reexamination as to their mental qualifications, as required of original applicants by Code Civ Proc. §§ 276, 277, but the question of reexamination by the board of bar examiners should be left to the sound discretion of the court—In re Cate, 241 P 95, 197 Cal. 796—In re Stevens, 241 P 88, 197 Cal. 408

(2) Examination as to mental attributes of applicant for reinstatement as attorney may be of special character, depending upon exigencies of each particular case—In re Cate, 247 P 231, 77 Cal App. 495

(3) Where examination as to mental attributes of applicant for reinstatement as attorney is found necessary, nature thereof will, in its entirety, be left for final determination of appellate court—In re Cate, 247 P 231, 77 Cal App. 495

13. Petition of Morganstern, 259 P 90, 85 Cal App 113

14. In re Snodgrass, 26 P.(2d) 756, 166 Okl 156.

Insufficient time to prove reformation

Eleven months' residence in the state after disbarment has been held not sufficient time to prove reformation of gambling habits which caused improper acts resulting in disbarment—Petition of Morganstern, 259 P. 90, 85 Cal App 113.

(1) In General

The method of procedure to obtain reinstatement varies in the different jurisdictions, but the proof must be sufficient to overcome the court's former adverse judgment.

The application or petition for reinstatement is addressed to the sound discretion of the court[15] which will determine the matter on the particular facts of each case[16]

Court to which application made The court to which an application for reinstatement must be made is frequently dependent on constitutional and statutory provisions.[17] In some jurisdictions, the court disbarring an attorney has power to reinstate him,[18] and it has been held that, after an attorney has been disbarred, the judgment remaining unreversed, he cannot apply, as in the first instance, for readmission or to another court, but must apply to the court in which he was disbarred to be reinstated.[19] In other jurisdictions, however, it has been held that an application for reinstatement of an attorney disbarred by a judgment of a court of competent jurisdiction must be treated as an application for admission to practice, and not as an application to vacate the order of disbarment,[20] and must be addressed to the court having jurisdiction to admit an attorney to practice[21]

Nature of form of application. The general procedure provided by the code for a new trial or rehearing of causes does not apply,[22] nor is the application otherwise to be restricted to a procedure in the nature of a bill of review, or governed by other equity or common-law rules,[23] and a petition to review the evidence in the disbarment proceeding is not the proper procedure to be followed in applying for reinstatement[24] While it has been held that the application may be made orally by motion,[25] general-

15. Cal—In re Nisbet, 246 P. 120, 77 Cal App 260.
Conn—In re Kone, 97 A. 307, 90 Conn. 440
Ga—Payne v. State, (App.) 182 S.E. 638
Me—Crawford v. Kegan, 134 A. 564, 125 Me 521.
Okl—State v. Ledbetter, 18 P.(2d) 1085, 162 Okl. 20.
Pa—Wilhelm's Case, 112 A. 560, 269 Pa 416
W Va—In re Daugherty, 136 S E 402, 103 W Va. 7

Not disturbed on appeal in absence of abuse

Application by a suspended attorney for reinstatement is addressed to the sound discretion of the court, whose determination thereon will not be disturbed unless applicant was deprived of an opportunity to be heard, a fair hearing and investigation, and a reasonable exercise of judicial discretion—In re Kone, 97 A 307, 90 Conn 440

16 In re Snodgrass, 26 P (2d) 756, 166 Okl 156

17. **Supreme court** has inherent power to reinstate an attorney—In re Wolff, 136 So 583, 173 La 257.

District court of appeals has inherent power to reinstate a disbarred attorney—In re Cate, (Cal App) 270 P 968, rehearing denied 271 P 356, and supplemented 273 P 617

Circuit courts and the supreme court each have jurisdiction and power to make a decree reinstating a disbarred attorney—Branch v State, (Fla) 163 So 48

Law court without jurisdiction

Report on an attorney's petition for reinstatement cannot be considered by a law court, it not being included in the enumeration of cases within the statute conferring jurisdiction—Crawford v. Kegan, 134 A. 564, 125 Me. 521.

18. Ala—Ex parte Peters, 70 So 648, 195 Ala 67.
Mich—In re Salsbury, 186 N W. 404, 217 Mich 260
Miss—Ex parte Redmond, 82 So. 513, 120 Miss. 536

19. Ala—Ex parte Peters, 70 So 648, 195 Ala 67
Mich—In re Salsbury, 186 N W 404, 217 Mich 260
Pa—In re Margolis, 124 A. 439, 280 Pa 296
6 C J p 615 note 85

Board of examiners without jurisdiction

The state board of law examiners, created by L (1916) c 107, has no jurisdiction as to the reinstatement of a disbarred attorney.—Ex parte Redmond, 82 So 513, 120 Miss 536

20. Cal—In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324—In re Cate, (App) 270 P 968, rehearing denied 271 P. 356, and supplemented 273 P 617—In re Cate, 212 P. 694, 60 Cal App 279—Danford v Superior Court of California in and for City and County of San Francisco, 193 P 272, 49 Cal App 203—In re Mash, 179 P 897, 39 Cal. App 548
N M—In re Fleming, 8 P (2d) 1063, 36 N M 93

Application without benefit of presumptions

Application for reinstatement by a disbarred attorney, admitting misconduct and asserting reformation, is really an application for admission to the bar without benefit of presumptions as to character—In re Egan, 218 N W 1, 52 S D 394

21. Cal—In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324—Danford v Superior Court of California in and for City and County of San Francisco, 193 P 272, 49 Cal App. 203—In re Mash, 179 P. 897, 39 Cal. App 548
Tex—Burns v. State, (Civ App.) 76 S W (2d) 172, error granted

Supreme court or district court of appeal

Notwithstanding Code Civ Proc § 276, the supreme court, as well as the district courts of appeal, has original jurisdiction over applications for restoration to practice after disbarment, but the superior court is without such jurisdiction—In re Cate, 241 P 95, 197 Cal 796—In re Stevens, 241 P. 88, 197 Cal 408

Supreme court

(1) A statute providing that no license to practice law shall be issued by any court or authority except by the supreme court has been held not invalid as applied to a disbarred attorney who sought restoration of his license in the district court which disbarred him—Burns v State, (Tex Civ App) 76 S W (2d) 172, error granted.

(2) The word "revoke" within a statute providing that judgment on disbarment may revoke a license entirely has been held to mean "annul by taking back," and hence a license could be restored to a disbarred attorney only by the supreme court which issued the license originally.—Burns v. State, supra.

22. In re Evans, 130 P 217, 42 Utah 232

23. In re Evans, supra.

24. In re Meyer, 127 A 698, 3 N J Misc 168

25. Ex p. Walls, 73 Ind 95.

ly, the application is in the form of a petition and should be verified,[26] and should set forth not only the facts touching the proceedings in disbarment, with reasons why the petitioner should be reinstated,[27] but should also in all respects comply with the rules applicable to the admission of candidates to practice law in the first instance.[28]

Opposition to application. Any person may oppose the reinstatement of an attorney,[29] but adversary pleadings are not required.[30]

Evidence The burden is on applicant to show his qualifications for reinstatement[31] by positive proof,[32] although no resistance is made to his application.[33] While it has been held that the proper method of establishing character and trustworthiness is by recommendations and statements of those in a position to know and judge the petitioner,[34] and that the opinion of the public, when settled and deliberate, is the highest evidence of good moral character,[35] the mere formal proof of good character required on an original application is not enough,[36] and a petition by attorneys and others, stating that in their opinion applicant has been sufficiently punished and is of good moral character, has been held insufficient.[37] Although under some circumstances, it has been held that the attorney should not be subjected to the rigid character test applicable to original applicants,[38] the court may require a greater degree of proof than in an original admission,[39] and it has been held that the proof must be sufficient to overcome the court's former adverse judgment of applicant's character,[40] and mere present apparent good moral character of a petitioner is not sufficient for

Reinstatement on court's own motion

In a disbarment proceeding, the supreme court, on its own motion, ordered respondent reinstated as a member of the bar—People ex rel Colorado Bar Ass'n v Lindsey, 52 P.(2d) 663, 97 Colo 599

26. In re Newton, 70 P 510, 982, 27 Mont 182

27. Bar Association of San Francisco v. Cantrell, 200 P 968, 53 Cal App 758—6 C J p 615 note 89

28. In re Newton, 70 P 510, 982, 27 Mont 182

Reexamination as to moral and mental qualifications see supra § 41 a

29. Ex p Walls, 73 Ind. 95.

30. Ex p Walls, supra

31. Cal—In re Lavine, 41 P (2d) 161, 2 Cal (2d) 324, modified on other grounds and rehearing denied 42 P (2d) 311, 2 Cal (2d) 324—Kepler v. State Bar of California, 13 P (2d) 509, 216 Cal 52—In re La Motte, 247 P 524, 77 Cal App 733—In re Cate, 247 P 231, 77 Cal. App 495.

Fla—Branch v. State, 163 So 48.

Ga—Payne v State, (App) 183 S E 633.

Neb—State v. Priest, 242 N.W. 433, 123 Neb 241

N Y—In re Kaufmann, 157 N E 730, 245 N Y 423, reversing 211 N Y S 256, 213 App Div 555—In re Landheim, 211 N Y S 261, 213 App Div 560.

S D—In re Egan, 218 N W 1, 52 S D 394—Petition of Morrison, 186 N W 556, 45 S D 123

W Va—In re Daugherty, 136 S E 402, 103 W Va 7.

6 C J p 616 note 94

32. Kepler v State Bar of California, 13 P (2d) 509, 216 Cal. 52.

33. Ex p Walls, 73 Ind 95.

34. In re Snodgrass, 26 P.(2d) 756, 166 Okl. 156.

35. Ex parte Marshall, 147 So. 791, 165 Miss. 523.

Estimate of witnesses intimately acquainted with the attorney is admissible on the question of good moral character—Ex parte Marshall, 147 So. 791, 165 Miss 523

36. State v Priest, 242 N W. 433, 123 Neb 241—6 C J p 615 note 82

37. Cal—In re Cate, 212 P 694, 60 Cal App 279—In re Thompson, 174 P 86, 37 Cal App 344

N J—In re Harris, 95 A 761, 88 N J Law 18.

S D.—In re Egan, 218 N W. 1, 52 S D 394

6 C J p 615 note 83.

Far from being cogent evidence

"Personally solicited letters or mere signatures obtained to a petition, while plenary evidence of the unwillingness of such signers to deny a personal favor, is very far from being cogent evidence of any particular state of facts, especially if it relates to the moral character of the person who obtains the letters or circulates the petition"—In re Harris, 95 A 761, 763, 88 N J Law 18.

Duty of members of bar to court

Members of the supreme court bar are court officers owing a special duty thereto in petitioning for the reinstatement of a disbarred attorney—In re Egan, 218 N W 1, 52 S. D 394

Letters of same evidentiary value as unverified petition

Attorney's letter to the supreme court is of as much evidentiary value as his signature to an unverified petition for the reinstatement of a disbarred attorney—In re Egan, 218 N W 1, 52 S D. 394.

Reinstatement not warranted

(1) An attorneys' petition, signed by some to avoid embarrassment or because of misrepresentations, and by others with little knowledge of the details of the disbarred attorney's conduct, was held not to warrant his reinstatement—In re Egan, 218 N W 1, 52 S D. 394

(2) Unverified business men's petition, reciting that it was based on their personal knowledge of the disbarred attorney's character, etc, for twenty years, was held not to warrant reinstatement, in view of his history during such period—In re Egan, supra

38. State v Cannon, 240 N W. 441, 206 Wis 374

39. Ex parte Marshall, 147 So. 791, 165 Miss. 523

Stronger proof required than that on initial admission

It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question—Kepler v State Bar of California, 13 P (2d) 509, 216 Cal 52

40. Cal—Kepler v State Bar of California, supra—In re Cate, 212 P 694, 60 Cal App. 279

Neb—State v. Priest, 242 N.W. 433, 123 Neb 241

S D—In re Egan, 161 N W 1003, 38 S D 458, denying motion 157 N W 310, 37 S D 159

6 C J. p 615 note 84.

Evidence held to justify reinstatement

Cal—Application of Cruickshank, 259 P. 67, 85 Cal App 209—In re Stevens, 257 P 218, 83 Cal.App. 745—In re McKelvey, 255 P. 834, 82 Cal App 426—In re Rheinschild, 254 P 931, 82 Cal App 16—In re La Motte, 247 P 524, 77 Cal App 733—In re Nisbet, 246 P 130, 77 Cal App 260—In re Morton, 243 P 32, 75 Cal App 497—In re Hahn, 206 P. 473, 56 Cal App. 702.

reinstatement where his attitude is unchanged as to the conduct for which he was disbarred[41]

Operation and effect. To reinstate a disbarred attorney means to invest him again with the right to practice,[42] but reinstatement of a disbarred attorney is not a surrender of the court's power to discipline such attorney on becoming false to his duties,[43] and it is not a revocation of the order of disbarment, nor does it relate back in point of time to the disbarment.[44] Moreover, the restoration may be provisional where the attorney's conduct after his dismissal has not been wholly free from blame,[45] and an attorney has been partially reinstated under some circumstances.[46]

Appeal. An amicus curiæ is not a party to a proceeding for reinstatement and has no right to

Miss—Ex parte Marshall, 147 So 791, 165 Miss 523.
Mont—In re Doepker, 271 P 694, 83 Mont. 315
N.Y—In re Newell, 203 N.Y.S. 677, 208 App Div 496.
Okl—In re Snodgrass, 26 P (2d) 756, 166 Okl 156—State v Ledbetter, 18 P.(2d) 1085, 162 Okl 20
R I—In re Troy, 118 A. 869
Utah—In re Hilton, 218 P. 273, 62 Utah 216
Wash—In re Bruener, 34 P (2d) 437, 178 Wash 165
Wis—State v Cannon, 240 N.W. 441, 206 Wis 374
6 C.J. p 615 note 84 [d].

Evidence held to warrant denial of reinstatement

U.S—In re Chopak, 20 Cust & Pat App 124.
Cal—Kepler v State Bar of California, 13 P (2d) 509, 216 Cal 52—In re Kepler, 250 P. 701, 79 Cal App 639—In re Riccardi, 222 P 625, 64 Cal App 791—In re O'Connell, 222 P. 625, 64 Cal App 673—In re Stevens, 219 P 1014, 63 Cal App 682—In re Cate, 212 P 694, 60 Cal App 279—In re Stevens, 210 P 442, 59 Cal App 251—In re Cate, 201 P 964, 54 Cal App. 401—In re Shopard, 170 P. 442, 35 Cal App 492.
Colo—People ex rel Colorado Bar Ass'n v Lundsey, 23 P (2d) 118, 93 Colo 41.
Iowa—State v Maxey, 186 N.W 40
La—State v Gowland, 140 So. 500, 174 La 351.
Neb—State v. Priest, 242 N.W. 433, 123 Neb 241
N.Y.—In re Durst, 263 N.Y.S. 575, 237 App Div 685
S.D—In re Hosford, 265 N.W 593—Petition of Morrison, 186 N.W 556, 45 S.D. 123—In re Egan, 161 N.W 1003, 38 S.D 458, denying motion 157 N.W 310, 37 S.D. 159

False allegations or testimony

(1) False allegation in a petition for readmission as attorney at law after a judgment of disbarment has been held sufficient of itself to preclude reinstatement.—In re Kepler, 250 P. 701, 79 Cal App. 639.

(2) Where an attorney on a prior application for reinstatement testified falsely to a definite fact within his knowledge, he should not be reinstated.—In re Kone, 97 A. 307, 90 Conn. 440.

Recommendation of bar association

An attorney's application for reinstatement after disbarment will be granted, where recommended by the bar association and supported by evidence of good character—In re Harris, 95 A. 761, 88 N.J Law 18—In re Wendel, 128 A 243, 3 N.J.Misc 312—Petition of Romano, (R.I) 152 A 254—6 C.J p 615 note 84 [b].

Reinstatement denied where no error committed or injustice done

The court is not disposed to exercise its inherent power to reinstate a disbarred attorney, no matter how sympathetic the members of the court might be, unless, perhaps, it is convinced that an error was committed, or an injustice done, in rendering the decree of disbarment—In re Wolff, 136 So 583, 173 La 257

Restitution of money to clients

(1) The return of money to clients will not be given very much weight, as it might depend more on the attorney's financial ability or other favoring circumstances than on repentance or reformation—State v. Priest, 242 N.W 433, 123 Neb 241—In re Harris, 95 A. 761, 88 N.J Law 18—6 C.J p 615 note 84 [c]

(2) A disbarred attorney's failure to pay the balance due on a judgment against him has been held to justify the board of bar governors' denial of his petition for reinstatement—Kepler v State Bar of California, 13 P (2d) 509, 216 Cal. 52

Where disbarment was for acts involving high degree of moral turpitude, the attorney should be reinstated only on the most clear and convincing or overwhelming proof of reform—Petition of Morganstern, 259 P 90, 85 Cal App 113—In re Stevens, 210 P 442, 59 Cal App 251.

Withdrawal of charge of fraud in client's suit

An attorney disbarred for fraudulently appropriating a client's money was held not entitled to reinstatement, because, in the client's suit against the attorney to recover the money allegedly misappropriated, all the allegations in the complaint appertaining to fraud were stricken by consent of counsel, since the willingness of the immediate parties to withdraw the charge of wrongdoing, supported by the evidence in the disbarment proceedings, does not affect the discipline of the attorney.—In re Tansey, 180 A. 618, 13 N.J. Misc. 731.

Second reinstatement denied

(1) A disbarred attorney's apologies, regrets, and pledges, similar to those relied on in reinstating him after a former disbarment, were held not to warrant a second reinstatement—In re Egan, 218 N.W. 1, 52 S.D 394

(2) An attorney, who had pleaded guilty in a federal court, on an indictment, was sentenced to fifteen months in a federal prison, was pardoned after eight months' imprisonment, and who based a first application for reinstatement as attorney on an original guilt and subsequent expiation, was not entitled to reinstatement or to leave to appeal to the court of appeals, notwithstanding his present claim of innocence and that he had pleaded guilty on the understanding that the indictment against another would be dismissed—In re Nitsberg, 289 N.Y.S 334, 248 App Div. 232, denying reargument 288 N.Y.S. 1077.

41. In re O'Connell, 250 P. 390, 199 Cal 538, 48 A.L.R 1232.

Refusal to go into disbarment matter

The fact that a disbarred attorney, seeking reinstatement, refused to go into the matter involved in the disbarment trial has been held not an indication of insufficient repentance, where to do so would require an admission that he committed a criminal offense—Ex parte Marshall, 147 So 791, 165 Miss 523.

42. Cal—In re Cate, 270 P. 968, rehearing denied 271 P 356, and supplemented 273 P 617
Mich—In re Salsbury, 186 N.W 404, 217 Mich. 260

43. Ex parte Marshall, 147 So. 791, 165 Miss 523

44. In re Salsbury, 186 N.W. 404, 217 Mich 260

45. In re Davies, 16 Phila (Pa.) 65.

46. McGehee v State, 33 S.W.(2d) 368, 182 Ark. 1024.

Reinstatement to allow performance of duties of public office

An attorney suspended from practice for one year was reinstated so far as the suspension affected his duties as prosecuting attorney, to which office he was elected.—McGehee v State, 33 S.W.(2d) 368, 182 Ark. 1024.

appeal from a judgment adverse to his contentions.[47] On appeal from a judgment on a petition for reinstatement, trial is not de novo, but the review is on the record, with the right to require additional evidence if necessary,[48] but the court may review the findings of fact of the chancellor and is not bound by such findings on conflicting evidence.[49] The appellate court will not try the question of the petitioner's guilt of crime on an appeal from an order denying reinstatement made after the granting of a pardon,[50] the lower court having supervisory powers with respect to the conduct of attorneys and the right to summon witnesses to determine such attorney's right to reinstatement.[51]

(2) Reference

Under some statutes applications for reinstatement may be referred to designated boards for their consideration, hearing, and report.

While, as shown above, the court has inherent power with regard to hearing and deciding petitions for reinstatement, where statutes have been enacted providing a procedure before the board of governors of the state bar, applicant will be remitted to the procedure provided.[52] The power conferred upon the board of governors must be exercised in accordance with the provisions governing admissions,[53] and with orders of the court defining their powers and prescribing their duties.[54] The petitioner should be given the fullest opportunity to meet all derogatory evidence,[55] and the findings of fact should be made on all the evidence.[56] After hearing the evidence, the board reports the evidence together with its findings on the petitioner's moral qualifications, on whether an examination is necessary, and, if so, the character and extent of the examination to which applicant should be subjected.[57] Either applicant or respondent may take exceptions to any or all the findings of the board,[58] and the finding as to the mental qualifications of a disbarred attorney must be tested by determining where the preponderance of evidence lies.[59] Where the reference is special, with leave to except to the findings, the court will ascertain where lies the preponderance of the evidence and decide accordingly,[60] and where only one of three referees heard the testimony, the court will disregard the rule that he who hears and observes the witness is the best judge of the weight of the testimony,[61] but where the findings of the board are supported by the evidence, they should be affirmed.[62]

C. PRIVILEGES, DISABILITIES, AND LIABILITIES OF ATTORNEYS

§ 42. In General

An attorney is entitled to many privileges and exemptions which are allowed for the protection of his clients and the dignity of the court.

In his capacity as an officer of the court in which he practices, an attorney is entitled to many privileges and exemptions not enjoyed by private persons, these are allowed not so much for the benefit of the attorney himself as for the protection of his client's interests and of the dignity of the court.[63]

47. Jones v Cashin, 98 So. 98, 133 Miss. 585.

48. Ex parte Marshall, 147 So 791, 165 Miss 533

49. Ex parte Marshall, supra

50. In re Kaufmann, 157 N E 730, 245 N Y 423, reversing 211 N Y S 256, 213 App Div 555—In re Lindheim, 211 N Y S 261, 213 App Div. 560

51. In re Kaufmann, 157 N E 730, 245 N Y 423, reversing 211 N Y S 256, 213 App Div 555—In re Lindheim, 211 N Y S 261, 213 App Div. 560

52. In re Cate, (Cal App) 270 P 968, rehearing denied 271 P 356, and supplemented 273 P 617

Statute not invalid

(1) A statute giving the board of governors of a state bar the power to pass on petitions for reinstatement as attorneys did not divest the court of jurisdiction to determine a pending application—In re Cate, 279 P. 131, 207 Cal 443.

(2) Such statute applies only to proceedings thereafter initiated before the board—In re Cate, supra.

Board of examiners preferred

On an application for reinstatement as an attorney, where it is decided that examination of mental and moral attributes is necessary, such examination will be referred preferably to a board of bar examiners, in view of Code Civ Proc § 279—In re Cate, 247 P 231, 77 Cal App. 495.

53. In re Cate, (Cal App) 270 P 968, rehearing denied 271 P 356, and supplemented 273 P 617.

54. In re Stevens, 257 P. 218, 83 Cal. App 745

Limitation as to findings

Specific designation of the issues on reference, in proceedings for readmission to the bar, limited the powers of the referees to make findings—In re Stevens, 257 P. 218, 83 Cal App 745

55. In re Cate, 247 P. 231, 77 Cal. App. 495

56. In re Cate, supra.

57. In re Cate, supra.

Proposed findings not in response to any issue formed by the pleadings

will be denied—In re Riccardi, 251 P. 650, 80 Cal App 66.

58. In re Cate, 247 P. 231, 77 Cal App. 495.

Not supported by evidence

A petitioner for reinstatement can avail himself of the alleged error in that the findings of the referees are not supported by the evidence, but only by a motion for a new trial—In re Riccardi, 251 P. 650, 80 Cal App. 66

59. Application of Cruickshank, 259 P 67, 85 Cal App. 209

60. In re Stevens, 257 P. 218, 83 Cal. App. 745

61. In re Stevens, supra.

62. In re Cate, 279 P. 131, 207 Cal 443

63. Lamb v. Schmitt, (Miss.) 52 S Ct 317, 285 U S 222, 76 L Ed 720, affirming (C C A) Schmitt v Lamb, 48 F.(2d) 533, reversing (D C) 43 F.(2d) 770, and certiorari granted Lamb v Schmitt, 52 S Ct 43, 284 U S 609, 76 L Ed 521—6 C.J. p 616 note 95.

As shown in the title Juries § 153 [35 C.J. p 255 note 90], an attorney is exempt from service as a juror. He also may be exempted from duty as a road overseer and in similar small offices,[64] but not from service in the militia unless specially made so by statute.[65]

A court has inherent authority to protect the rights of attorneys practicing before it.[66]

§ 43. Privilege as Party to Suit

Under modern practice, attorneys sue and are sued the same as other parties, but the practice was different at common law.

While under modern practice attorneys sue and are sued the same as other parties, at common law, an attorney had the right to bring suits in which he was plaintiff in the court of which he was an attorney and to be proceeded against as defendant by bill in the court in which he practiced,[67] the bill against him and all notices had to be served personally on the attorney or his agent;[68] he could not plead his privilege when he was sued jointly,[69] and his privilege ceased when he had not practiced for a year.[70]

§ 44. Privilege from Arrest or Service of Process

a. From arrest
b. From service of process not in arrest

a. From Arrest

An attorney is privileged from arrest while in attendance on court.

At common law, attorneys, as officers of the court whose duty it is to attend the court in their official capacity, are privileged from arrest on mesne process.[71] This privilege exists while on the way to court, while in attendance on court,[72] and while returning from court.[73] However, an attorney is not privileged from arrest while at home,[74] while attending a master, examiner, or judge out of court,[75] or when sued jointly with another,[76] nor does the privilege extend to an attorney who has ceased to practice for a year and has betaken himself to another business or profession.[77] The privilege has been restricted by statute in some states to cases where an attorney is in actual attendance in court,[78] and the ancient common-law rule has been declared not fully applicable to present-day conditions in this country.[79]

Waiver of privilege. It seems that the privilege of an attorney from arrest may be waived.[80]

b. From Service of Process Not in Arrest

The jurisdictions are not uniform as to the existence of the privilege of exemption from service of process not in arrest.

While in some states the exemption does not exist at all,[81] in a few states the courts have held that attorneys at law, while in attendance on court, are exempt from the service of summons or other process not in arrest.[82] Also, in some jurisdictions, the privilege of exemption from service of process of nonresident witnesses and suitors has been held to be applicable to nonresident attorneys.[83] However,

64. Respublica v Fisher, 1 Yeates (Pa.) 350

65. N.Y.—In re Bliss, 9 Johns. 347
Pa.—Respublica v Fisher, 1 Yeates 350
Disability of attorney of a party to instrument to receive such instrument in escrow see Escrows § 7 [21 C.J. p. 877 notes 26, 27]

66. In re Post's Estate, 279 N.Y.S. 408, 155 Misc. 389

67. Scott v Van Alstyne, 9 Johns. (N.Y.) 216—Emmet's Case, 2 Cai. (N.Y.) 386—6 C.J. p. 616 note 1.

68. Lawrence v Warner, 1 Cow. (N.Y.) 193—6 C.J. p. 616 note 2

69. Chenango Bank v. Root, 4 Cow. (N.Y.) 126—6 C.J. p. 616 note 4

70. Brooks v Patterson, 2 Johns. Cas. (N.Y.) 102.

71. Ogden v Hughes, 5 N.J.Law 840—6 C.J. p. 616 note 6.

72. Secor v Bell, 18 Johns. (N.Y.) 52.

73. Bennett v Ahrens, (C.C.A.Ill.) 57 F.(2d) 948.

74. Corey v. Russell, 4 Wend. (N.Y.) 204.

75. Cole v McClellan, 4 Hill (N.Y.) 59

76. Gay v. Rogers, 3 Cow. (N.Y.) 368

77. Brooks v Patterson, 2 Johns. Cas. (N.Y.) 102, Col. & C. Cas. 133.

Acting either as attorney or counselor

Where an attorney and counselor continues to act in either capacity, it is sufficient to retain the privilege of freedom from arrest.—Ogden v. Hughes, 5 N.J.Law 840.

78. Gibbs v. Loomis, 10 Johns. (N.Y.) 462—6 C.J. p. 616 note 16

79. Elam v Lewis, 19 Ga. 608—6 C.J. p. 616 note 17.

80. Bennett v. Ahrens, (C.C.A.Ill.) 57 F.(2d) 948—6 C.J. p. 617 note 18

81. Ark.—Paul v Stuckey, 189 S.W. 676, 126 Ark. 389, L.R.A.1917B 883
N.Y.—Kutner v Hodnett, 109 N.Y.S. 1068, 59 Misc. 21
6 C.J. p. 617 note 23.

82. Schmitt v Lamb, (D.C.Miss.) 43 F.(2d) 770, reversed on other grounds (C.C.A.) 48 F.(2d) 533, certiorari granted Lamb v. Schmitt, 52 S.Ct. 43, 284 U.S. 609, 76 L.Ed. 521, affirmed Lamb v Schmitt, 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720—6 C.J. p. 617 note 19.

83. U.S.—Durst v Tautges, Wilder & McDonald, (C.C.A.Wis.) 44 F.(2d) 507, 71 A.L.R. 1394—Schmitt v. Lamb, (D.C.Miss.) 43 F.(2d) 770, reversed on other grounds (C.C.A.) 48 F.(2d) 533, certiorari granted Lamb v Schmitt, 52 S.Ct. 43, 284 U.S. 609, 76 L.Ed. 521, affirmed Lamb v Schmitt, 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720
Kan.—Kansas Wheat Growers' Ass'n v Moffatt, 283 P. 634, 139 Kan. 537.
Pa.—Holmes v Nelson, 1 Phila. 217.
6 C.J. p. 617 note 22.

Acting as attorney, party, and witness

Nonresident attorney, while present to take depositions and acting as party, witness, and attorney in three local suits to prevent taking of depositions, is exempt from service of process.—Durst v Tautges, Wilder & McDonald, (C.C.A.Wis.) 44 F.(2d) 507, 71 A.L.R. 1394.

this exemption does not apply to a nonresident attorney who is not an attorney of record,[84] nor to a nonresident attorney coming into the state to take depositions to be used in the trial of an action in another state,[85] and a nonresident attorney is not privileged from service of process in a second suit brought in aid of the first, on which the attorney was in attendance when served.[86] The exemption exists, however, only while the attorney is in actual attendance on the court.[87]

Waiver. The privilege of exemption from service or process or summons may be waived.[88]

§ 45. Acting as Bail or Surety

Under statutes and rules of court in most jurisdictions, an attorney is disqualified from acting as bail or surety in judicial proceedings.

In the absence of a statute or rule of court, an attorney may be surety for his client on any bond or obligation which the proceedings in a case may render necessary.[89] There is no question, however, as to the power of the courts or of the legislature to make a rule or statute that attorneys shall not be taken as sureties on bonds of their clients or others in judicial proceedings,[90] and it is now generally prohibited in most jurisdictions, either by statute,[91] or by rule of court.[92] The rule disqualifying attorneys from becoming bail has been applied in a jurisdiction where it seems that there was neither a statute nor a rule of court to that effect, and an attorney of the court proposed as bail was rejected,[93] and under a statute which expressly prescribed the qualifications of bail without referring to what have always been held by the common law as disqualifications of persons who are proposed for bail, it was held that the common-law disqualification of practicing attorneys still obtained.[94] While in some jurisdictions this disqualification does not extend to cases where the attorney was not employed as counsel,[95] in others it extends to all cases pending in the courts,[96] as well justices' courts as courts of record.[97]

Effect of violation of prohibition. Unless the statute or rule of court is mandatory in terms and declares that a bond signed by an attorney as bail or security is absolutely void,[98] the regulation is clearly directory and for the government of attorneys as officers of court, and its violation does not

84. Tadge v. Byrnes, 176 P. 439, 179 Cal 275.

85. Minn—Nelson v McNulty, 160 N.W. 795, 135 Minn 317, L.R.A. 1917C 431.
Neb—Chicago, B & Q R Co v Davis, 197 N.W. 599, 111 Neb 737

86. Lamb v. Schmitt, (Miss.) 52 S Ct 317, 285 U.S. 222, 76 L.Ed. 720, affirming (C.C.A.) Schmitt v Lamb, 48 F.(2d) 533, reversing (D.C.) 43 F.(2d) 770, and certiorari granted Lamb v Schmitt, 52 S.Ct. 43, 284 U.S. 609, 76 L.Ed. 521.

87. Tyrone Bank v. Doty, 2 Pa.Dist. 558, 13 Pa.Co. 287—6 C.J. p. 617 note 20.

88. Simon v Solomon, 164 N.W. 820, 166 Wis. 177—Simon v De Gersdorff, 164 N.W. 818, 166 Wis. 170

Seeking relief from examination before trial
Nonresident attorney served with process in state while trying a case waives his privilege by seeking relief from an order for examination before trial.—Simon v Solomon, 164 N.W. 820, 166 Wis. 177—Simon v De Gersdorff, 164 N.W. 818, 166 Wis. 170

89. Ind—Abbott v. Zeigler, 9 Ind. 511
N.Y.—Walker v. Holmes, 22 Wend. 614
6 C.J. p. 617 note 24.

Rule disapproved
Attorneys should not be allowed to act as sureties or indemnitors for clients in legal proceedings—U.S. Fidelity & Guaranty Co v Sabath, 2 N.E.(2d) 330, 286 Ill.App. 320.

90. Ind.—Ohio, etc., R. Co v. Hardy, 64 Ind. 454—Abbott v. Zeigler, 9 Ind. 511
Ky.—Johnson v. Com., 2 Duv. 410

91. Okl.—Goodwin v State ex rel. Crandall, 31 P.(2d) 841, 168 Okl. 4
S.C.—Safran v Safran, 93 S.E. 140, 107 S.C. 452
6 C.J. p. 617 note 30.

Attorney for nonresident plaintiff
Attorneys of a nonresident plaintiff, required by Kirby's Dig. §§ 959–964 to give a bond for costs, may become sureties, the attorneys being liable for costs before the bond was given.—Kansas City Southern Ry. Co v Miller, 175 S.W. 1164, 117 Ark. 396

Civil or criminal action
(1) A bond given by a guardian is not given in a "civil action," within the provisions of a statute of the state in which the guardian was appointed forbidding an attorney to sign a bond in any civil or criminal action in which he is employed as counselor, since a "civil action" implies adversary parties and an issue, and is designed for the recovery or vindication of a civil right or the redress of some civil wrong.—Bopst v Williams, 229 S.W. 796, 287 Mo. 317

(2) Rev.L.(1910) § 256, prohibiting an attorney from signing a bond as surety in any civil or criminal action in which he is employed as counselor, have been held inapplicable to a common-law agreement or indemnity given to discharge a mechanic's lien.—Carr v Wewoka Oil & Gas Co. of Wewoka, 229 P. 434, 103 Okl. 139.

Signing as principal
Although defendant's attorney as signer of a bond was described as principal, he was, in fact, no more than surety for defendant, and as such was precluded by statute from executing the supersedeas bond.—Craig v Wilder, (Fla.) 169 So. 847.

92. Safran v Safran, 93 S.E. 140, 107 S.C. 452—6 C.J. p. 618 note 31

93. Scott v. Craig, 1 Wend. (N.Y.) 35—Coster v Watson, 15 Johns. (N.Y.) 535.

94. Miles v. Clarke, 15 N.Y.Super. 709, affirmed 17 N.Y.Super. 632—Wheeler v. Wilcox, 7 Abb.Pr. (N.Y.) 73

95. Goodwin v State ex rel. Crandall, 31 P.(2d) 841, 168 Okl. 4

96. S.D.—Towle v Bradley, 50 N.W. 1057, 2 S.D. 472
Wis.—Gilbank v Stephenson, 30 Wis. 155.
6 C.J. p. 618 note 34

97. Hudson v Smith, 82 N.W. 943, 111 Iowa 411—Valley Nat. Bank v. Garretson, 74 N.W. 11, 104 Iowa 655—6 C.J. p. 618 note 35

98. Goodwin v State ex rel. Crandall, 31 P.(2d) 841, 168 Okl. 4—6 C.J. p. 618 note 36.

Estoppel by misrepresentation as to employment as counsel
Attorney, who signs a criminal appearance bond as surety and represents that he is not and will not be employed as counsel in a case, which representation, although false, is properly relied on by an official who is thereby induced to approve the

relieve the attorney from his liability as surety; he cannot thus take advantage of his own wrong when sued on his undertaking.[99] The obligation of the bond being binding on the attorney, notwithstanding the prohibition, the courts will not ordinarily dismiss the suit for want of a sufficient bond,[1] unless the rule or statute requires or authorizes a dismissal,[2] but will merely subject the attorney to punishment as for contempt.[3]

§ 46. Purchasing Demands for Suit

In the absence of a prohibitory statute, attorneys are not prohibited from buying demands for the purpose of bringing suit thereon, except as it might be a violation of the law against champerty and maintenance.

A statute expressly prohibiting attorneys from buying notes, demands, or other choses in action for the purpose of bringing suit on them is not invalid,[4] but, being penal, must be strictly construed.[5] In the absence of such a statute, there is no prohibition against the purchase by attorneys of notes or other choses in action for the purposes of suit, except in so far as such purchases may be a violation of the general law against champerty or maintenance.[6]

§ 47. Representing Adverse Interests

An attorney is by virtue of his office disqualified from representing interests which are adverse in the sense that they are hostile, antagonistic, or in conflict with each other.

The office of attorney incapacitates him from representing different interests which are adverse in the sense that they are hostile, antagonistic, or in conflict with each other,[7] and this disqualification pre-

bond, may be estopped to deny the truth of the representation in an action to recover the penalty provided in the bond—Goodwin v. State ex rel Crandall, 31 P.(2d) 841, 168 Okl. 4

99. Mont—State v District Court of Lewis and Clark County, 19 P (2d) 326, 92 Mont 587
Tex—Lundy v. Little, (Civ App.) 227 S W 538
6 C J p 618 note 37.

1. De Jarnatt v Marquez, 60 P 45, 127 Cal 558, 78 Am S R 90—6 C J p 618 note 38

2. Fla—Love v Sheffelin, 7 Fla 40
Kan—Cook v Caraway, 29 Kan 41.
Wis—Gilbank v Stephenson, 30 Wis 155.

3. State v District Court of Lewis and Clark County, 19 P (2d) 326, 92 Mont 587—6 C J p 619 note 40.

4. People v. Walbridge, 6 Cow (N Y.) 512

Who is attorney within statute

One who never filed his certificate with the clerk of the court of appeals, and who only practiced for about a year after admission, is not an attorney within the statutory prohibition, and, on the purchase of a note for the purpose of bringing suit thereon he can recover in an action brought for him by another attorney—Thompson v. Stiles, 89 N.Y S 876, 44 Misc 334.

Agreement to conduct suit and pay plaintiff share of proceeds

An agreement by an attorney to commence and conduct and pay all the expenses of a suit, and give plaintiff a certain share of the proceeds, was held not invalid under the New York statute (2 Rev St. § 71), prohibiting an attorney from buying a chose in action for the purpose of bringing a suit thereon—Fogerty v. Jordan, 25 N Y.Super. 319.

Purchase of a senior judgment by a junior judgment creditor who is an attorney, made for the mere purpose of securing the younger debt, is not within the prohibition of the statute—Van Rensselaer v. Sheriff Onondaga County, 1 Cow (N Y) 443

Purchase of stock of a corporation is not within the prohibition of the statute—Ramsey v. Gould, 57 Barb (N Y) 398.

5. Ramsey v Gould, 57 Barb.(N Y) 398—6 C J. p 619 note 43.

6. Griffith v Anderson, 125 P. 218, 22 Idaho 323
Purchase by attorney of claim with intent to sue thereon as champertous see Champerty and Maintenance § 10 [11 C J. p 239 note 73—p 240 note 97].

7. Cal—Anderson v Eaton, 293 P 788, 211 Cal 113—Elberta Oil Co v Superior Court in and for Kings County, 291 P. 668, 108 Cal App 344
Hawaii—Christian v Waialua Agricultural Co, 30 Hawaii 533
Illinois—People v Hanson, 135 N E 268, 290 Ill 370—Olson v North, 276 Ill App 457 See Lindem v Sauerland, 206 Ill App 15
Ky.—Owsley v Cook, 1 Ky Op 518
Md—Derlin v. Derlin, 121 A 27, 142 Md 352
Neb—Federal Trust Co v Damron, 247 N W 589, 124 Neb 655
N.J—Sun Building & Loan Ass'n of Newark v Rashkes, 183 A. 274, 119 N J Eq 443
N.Y—Loew v. Gillespie, 153 N Y S 830, 90 Misc. 616, affirmed 157 N.Y. S 1133
Okl—Steeley v. State, 187 P. 821, 17 Okl Cr 252
Pa—Pile v. Thompson, 62 Pa Super. 400.
S D—Tabor Realty Co v. Gannon, 207 N W 94, 49 S D 268.
Tex—Bryant v Lewis, (Civ App.) 27 S W (2d) 604—Payne v. Livingston, (Civ App) 253 S W 701
Utah—Gillette v. Newhouse Realty Co, 282 P. 776, 75 Utah 13.
Wash—Pacific Coast Cement Co v Metropolitan Casualty Ins Co of New York, 23 P.(2d) 890, 173 Wash 534.
Wis—Harvey v. Harvey, 231 N W 580, 202 Wis 552—Michel v McKenna, 237 N W 396, 199 Wis 603
6 C J. p 619 note 45

Reasons for, and other statements of, rule

(1) "No man can serve two masters, for either he will hate one, and love the other, or he will cling to one, and slight the other Ye cannot serve God and mammon"—Sun Building & Loan Ass'n of Newark v Rashkes, 183 A. 274, 277, 119 N J Eq 443

(2) "The unamendable mandate of both law and morals forbids an attorney, in the homely phrase of the field, 'to run with the rabbits and hark with the dogs'"—Gilliam v Saunders, 167 S E 799, 800, 204 N.C 206

(3) "A man should not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those he has deluded to their disadvantage, and founding that claim on the very matters of the delusion"—Broom Leg Max (9th ed) p 116, quoted in Federal Trust Co v Damron, (Neb) 247 N W. 589, 593

(4) "Justice and ethics both require that no attorney be permitted to receive fees from adversaries in any cause."—Logan v Logan, 180 N E 32, 34, 97 Ind App 209.

(5) The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce, to their full extent, the rights of the interest which he should alone represent.

cludes him from undertaking employment whereby his own interests are brought into conflict with those of his client.[8] Moreover that an attorney undertakes to represent interests which are adverse may

Cal—Anderson v. Eaton, 293 P 788, 211 Cal 113
Md—Derlin v. Derlin, 121 A 27, 142 Md 352
Nev—Boyd v Second Judicial Dist. Court in and for Washoe County, 274 P 7, 51 Nev 264
Tex—Bryant v Lewis, (Civ App.) 27 S W (2d) 604.
Utah.—Gillette v Newhouse Realty Co, 282 P. 776, 75 Utah 13
Wis—Michel v. McKenna, 227 N W. 396, 199 Wis 608
6 C J. p 619 note 45 [a].

(6) It is a violation of an attorney's duty to be faithful to, and to protect his client in every possible way, for such attorney to assume a position adverse or antagonistic to his client without his free and intelligent consent given after full knowledge of all the facts and circumstances—Anderson v. Eaton, 293 P. 788, 211 Cal 113.

Honesty of motives and intentions

When he is once retained and has received the confidence of his client, he cannot enter the service of those whose interests are adverse to those of his client, no matter how honest his motives and intentions—Anderson v. Eaton, 293 P. 788, 211 Cal 113—People v. Hanson, 125 N E. 268, 290 Ill 370

Prejudice to one client for benefit to another

"An attorney . . . cannot prejudice one client for the benefit of another"—Sun Building & Loan Ass'n of Newark v Rashkes, 183 A. 274, 277, 119 N J.Eq. 443.

Disability from time retainer fee agreed on

If retainer fee is definitely agreed on as to amount, an attorney must hold himself in readiness to represent his client according to scope of employment, even though no litigation is pending, and cannot take fee on the other side—Bright v. Turner, 265 S W. 627, 205 Ky. 188.

Uncontested matters

In uncontested matters, the conduct of an attorney who acts for opposing parties is open to most careful scrutiny—Sun Building & Loan Ass'n of Newark v Rashkos, 183 A 274, 119 N J Eq. 443.

Public officer

An attorney who holds public office is prohibited, within the rule stated in the text, to represent an interest on behalf of a private individual which his duty as public officer requires that he oppose.—Stark County v. Mischel, 173 N W. 817, 42 N D 232, 6 A L R 174—In re Wakefield, 177 A 319, 107 Vt. 180.

Representations or interests adverse within rule

(1) Attorney for payee intervening in suit against maker and seeking recovery on a note could not at the same time represent the maker whose interests were adverse—Southwestern Flooring & Sales Co v White, (Tex Civ App.) 296 S W 916

(2) For an attorney who is in the general employ of a corporation to represent an individual client has been held to fall within the condemnation of the rule stated in the text—People v People's Trust Co, 167 N Y S 767, 180 App Div. 494, 36 N.Y Cr. 203

(3) Attorneys who appear in workmen's compensation proceedings on behalf of both the employer and his insurance carrier but undertake to cast liability if any on the employer, represent conflicting interests within the rule disqualifying an attorney from representing adverse interests—Szabo v Standard Commercial Body Corporation, 225 N Y S 332, 221 App Div 722—Hammele v McMahon, 221 N Y S 76, 220 App Div. 60

(4) For an attorney who was instructed by his client, a mortgagee to foreclose a mortgage, to enter into a contract with the mortgagor to postpone foreclosure was held to be an improper representation of conflicting interests—Pile v. Thompson, 62 Pa Super. 400

(5) Attorney representing two guilty corporate directors could not represent innocent stockholders in receivership proceedings because of conflicting interests—Rochester v. Gonterman, (Mo.) 49 S W (2d) 71

(6) Attorney appearing for an informant against an alleged incompetent in the first insanity proceeding was held to be disqualified from appearing for the alleged incompetent or waiving any of his rights in another like proceeding in the same court—State ex rel. Terry v. Holtkamp, 51 S W.(2d) 13, 330 Mo 608—State ex rel Townsend v. Mueller, 51 S W (2d) 8, 330 Mo 641.

(7) Attorney acting as legal adviser in school district organization and consolidation proceedings, to persons later becoming members of the board of education, cannot file information in quo warranto as state's attorney or otherwise against such members on the ground that organization of district was illegal—People v Hanson, 125 N.E 268, 290 Ill 370

(8) Where an attorney counseled with an aged woman of his own nationality who could talk but little English advising a sale, and his partner secured as purchaser of her property his friend, who relied upon such attorney's judgment as to advisability of purchase, the attorneys represented hostile interests.—Wachsmut v Miller, (Iowa) 168 N.W. 344.

(9) Attorneys representing a bank, which was primarily interested in an appeal from a receiver's report, were not proper attorneys to represent the receiver—Tabor Realty Co. v. Gannon, 207 N W. 94, 49 S D 268

(10) Contract by attorney of employer's compensation insurance carrier to represent deceased employee's mother in pressing a claim against a third party causing injuries, was held to be void as against public policy—Anderson v. Eaton, 293 P. 788, 211 Cal. 113.

(11) Attorney could not represent two heirs asserting interests in estate of intestate where recovery for one would reduce the other's recovery and increase the attorney's compensation, and the matter was unexplained to client adversely affected—Bryant v Lewis, (Tex Civ App.) 27 S W (2d) 604

8. N J—Morris v Glaser, 151 A 760, 106 N J Eq 570
Utah—Gillette v Newhouse Realty Co, 282 P 776, 75 Utah 13.
6 C J p 619 note 45.

Motive immaterial

"The practice . . . is emphatically disapproved irrespective of its motive or whether or not it was the result of design, ignorance, or negligence"—Morris v Glaser, 151 A. 760, 765, 106 N J Eq 570.

Duty of disclosure

"It is undoubtedly the duty of an attorney to disclose to his prospective client every adverse retainer and every prior retainer which may affect the discretion of the latter."—Hunter v Troup, 146 N E. 321, 324, 315 Ill 293

Right to presume absence of adverse interest

"When a client employs an attorney, he has a right to presume if the latter be silent on the point, that he has no engagements which interfere in any degree with his exclusive devotion to the cause confided to him, and that he has no interest which may betray his judgment or endangor his fidelity"—Hunter v. Troup, 146 N E 321, 315 Ill 293.

Based on public policy

'The rule that an attorney may not by his contract of employment place himself in a position where his own interests or the interests of another whom he represents conflict with the interests of his client is founded on principles of public policy"—Gillette v Newhouse Realty Co., 282 P. 776, 779, 75 Utah 13.

More cogent reasons

"An attorney cannot represent conflicting interests. For more cogent.

constitute ground for disbarment (supra § 23), or may render the attorney liable to one of the clients represented for loss resulting to him during the course of such representation (infra § 151).

However, it is not inconsistent with the status or office of attorney that he represent different interests which are not actually adverse in the sense that they conflict or are hostile.[9] Mere possibility that

reasons an attorney may not, by a contract of employment with his client place himself in a position where his own interests are in conflict with those of his client."—Gillette v Newhouse Realty Co, 282 P 776, 779, 75 Utah 13

Acquiring interest adverse to client see infra § 126

9. Ill—Painter v. Merchants & Manufacturers Bank of Milwaukee, 277 Ill App 208 See Levy v Payne, 208 Ill App 141
Iowa—Trulin v Plested, 159 N W 633, 178 Iowa 220
N Y—Eisemann v. Hazard, 112 N E 722, 218 N Y 155, reversing 146 N Y S 685, 161 App Div. 703.
S C—Outlaw v National Council, Junior Order United American Mechanics, 92 S E 469, 107 S C. 225
Tex—Laybourne v Bray & Shifflett, (Civ App) 190 S W. 1159
6 C J p 621 note 52

Danger of conflicting duties

"Adverse interests, if they are to be adjusted, may be represented by the same counsel, though the cases in which this can be done are exceptional, and never entirely free from danger of conflicting duties"—Eisemann v Hazard, 112 N E 722, 218 N Y. 155, reversing 146 N.Y S 685, 161 App Div 703.

Interests varying only in degree

(1) Solicitor may represent two clients who desire same result, although their interests vary in degree—Busey v. Perkins, 176 A. 474, 168 Md 19

(2) For example, where two sisters were indebted to creditors in different degrees with one able to meet obligations but the other not, so that the creditors would have to resort for payment to property owned by the more deeply indebted sister as tenant in common with the other, the interests of the sisters in settlement of the debt was not so conflicting as to prevent one solicitor representing both sisters in working out a plan for the solution of their debt problems—Busey v Perkins, supra

Representations or interests not adverse within rule

(1) Where claims against a railroad, which plaintiff claimed were assigned to him to sue, were assigned to another who sued the railroad, which, with knowledge of plaintiff's claim, settled with the subsequent assignee, taking an indemnity bond holding it harmless against plaintiff's demands, the attorney for the subsequent assignee could appear for the railroad in the action against it by plaintiff where the trial chiefly involved the issue of whether plaintiff or such assignee had the better title—Broadbent v Denver & R G Ry Co, 160 P. 1185, 48 Utah 598.

(2) That an attorney representing an estate in administration proceedings also instituted suit for another against the estate to partition certain land included in such estate was held to be insufficient to show that the attorney was guilty of fraud or engaged in a conspiracy against the heir—Le Fors v Le Fors, (Tex Civ. App) 41 S W 2d 517.

(3) Representation of administratrix having no equity in certain property and of owner of worthless mortgage by same attorney, was held not improper, as involving conflict of interest—Hopkins v. National Bank of Norman, 242 P. 532, 115 Okl. 196

(4) Attorney for automobile owner in casualty company's suit to restrain action by such owner as insured on a policy may also appear for an injured person in a suit against the owner, though at the time the attorney was appearing, as such, for such owner in other litigation—Maryland Casualty Co v. Jackson, 119 N E 682, 230 Mass. 334.

(5) The interests of an infant daughter of testatrix, who would take more under the will than in case of intestacy, did not conflict with the interests of another beneficiary under the will so that it was not improper for counsel for the infant to enter their appearance also as counsel for the other beneficiary in probate proceedings—Morris v Foster, 51 App D C. 238, 278 F. 321, certiorari denied 42 S Ct 586, 259 U.S 582, 66 L Ed 1074

(6) The record in a particular case was held to show no conflict of interests to preclude an attorney who represented petitioner for a receiver from also acting as attorney for the receiver—J. C. Turner Lumber Co v Toomer, (C C A. Ga.) 275 F. 678.

(7) An attorney who was retained to adjust the affairs of a firm and was also employed to secure control for his client by involuntary proceeding in bankruptcy, was not guilty of improper conduct—Eisemann v Hazard, 112 N E 722, 218 N.Y. 155, reversing 146 N Y S 685, 161 App. Div 703

(8) An agreement by attorneys to represent a vendor in a suit to recover the land for fraud does not preclude them from representing a grantee of the purchaser, who claims to be an innocent purchaser, against the vendor—Trulin v Plested, 159 N W 633, 178 Iowa 220.

(9) In an action to set aside special assessments by property owners against contractors and a city, in which it was claimed that the assessments were void and that a reassessment was necessary under St (1921) § 75 56, because not made before the contract was entered into, as required by § 62 18 (9), but in which there was no issue as to the validity of the contract, it was held that there was no conflict between the interests of the city and the interests of the contractors, precluding the contractors' attorney from acting in a similar capacity for the city—Macleod v City of Washburn, 190 N W. 124, 178 Wis. 379.

(10) Where a stockholder of a dissolved corporation without creditors brings a bill to supplant the corporation directors acting as statutory trustees in winding it up, by a receiver, there was no impropriety in the solicitor for complainant also acting as counsel for the receiver—Cahall v. Lofland, 107 A. 769, 12 Del. Ch 125

(11) That an attorney rendering services to a bank prior to its insolvency was an officer of another corporation which was interested as a stockholder in the bank did not deprive him of right to accept employment by the bank as special counsel.—Penrose v. Page, 125 A. 549, 145 Md 1.

(12) That an attorney rendering services to a bank prior to its insolvency was guarantor of a mortgage loan by the bank did not warrant inference that in serving the bank as counsel, he was serving his own interest, for his obligation under the guaranty could not have been affected by the success or failure of the bank—Penrose v Page, supra

(13) Railway was not entitled to complain because plaintiff suing railway and automobile driver for decedent's death employed the same attorney as the driver employed in an action against railway—Masterson v Berlin St Ry, 139 A. 753, 83 N H 190

(14) An attorney for the executrix of a deceased partner was not guilty of improper conduct merely because his firm also organized a corporation to which the partnership assets were transferred.—Malden Trust Co. v. Brooks, (Mass.) 197 N E 100

(15) Court, in will contest, could permit counsel representing surviv-

different interests represented by an attorney might develop a conflict is not sufficient to disqualify him.[10] Nor is an attorney to be disqualified merely by reason of conduct with respect to a party not amounting to an impropriety under the circumstances of the particular case,[11] or where different parties represented by an attorney were actually benefited rather than adversely affected by the attorney's conduct.[12]

Criminal and civil proceedings arising out of same matter. Not only is an attorney who represents an individual in a civil matter disqualified from appearing as district or prosecuting attorney against the same individual on substantially the same facts, as stated in the title District and Prosecuting Attorneys § 12 [18 C.J. p 1313 notes 8-10], but conversely a prosecuting attorney who appears against accused in a criminal proceeding is disqualified from appearing in a civil case against the same individual.[13] This is so regardless of any question whether such attorney makes use of information gained in the criminal action to force a settlement in the civil action.[14]

Attorney and client relation; act as umpire. The objection that an attorney is disqualified by reason of his representing adverse interests is available only to those as to whom the attorney in question sustains, or has sustained, the relation of attorney and client.[15] Nor does the rule prohibit his acting for both parties in a transaction where his duty is merely that of an umpire and not that of counsel.[16]

Authority or consent by parties. An attorney may properly represent adverse interests where the persons represented expressly authorize him to do so,[17]

ing husband, as contestant, to represent husband as guardian ad litem for minor daughter—In re Novotny's Estate, 271 P. 923, 94 Cal App 782, rehearing denied 273 P. 58, 94 Cal App. 782.

10. Lessing v. Gibbons, (Cal App.) 45 P.(2d) 258.

Absence of actual or contemplated litigation

Attorney is not precluded from accepting employment by two persons merely because of possible conflict of their interests, in the absence of actual or contemplated litigation—Lessing v. Gibbons, (Cal.App.) 45 P (2d) 258.

When wife's interest does not disqualify

That an attorney represented a widow and aided her in the distribution of estate of her deceased husband was not ground for objection merely because such attorney's wife was an interested party as heir, so long as there was no conflict between the widow's interest and those of the attorney's wife and others similarly situated—Derlin v. Derlin, 121 A 27, 142 Md 352.

11. **Talking over litigation**

It is not unprofessional conduct for attorneys in the rural parts of the state, where local attorneys are usually well known, to talk over the litigation with defendants when acting as counsel for plaintiffs—Sullivan v Fidelity & Casualty Co of New York, 175 N W 397, 208 Mich 63, affirmed 178 N W. 39, 210 Mich 625.

12. Sugarman v Jayne, 198 N.W 903, 227 Mich 535

Holder of legal and of equitable title benefited

Where the holder of equitable title brought an action to remove a cloud from title against the holder of legal title after a decree had been obtained in other action against the holder of legal title to foreclose a land contract, the equitable owner's interests were not so adverse to those of the legal owner as to preclude the equitable owner's attorney from making a motion on behalf of the legal owner to set aside the decree in the foreclosure case, since both the equitable owner and the legal owner would be benefited by defeat or delay of the foreclosure proceedings—Sugarman v Jayne, 198 N W. 903, 227 Mich 535.

13. In re Wilmarth, 172 N W. 921, 42 S D 76. See Cottam v National Mutual Church Ins Co, 209 Ill App. 404

14. In re Wilmarth, 172 N W. 921, 42 S D. 76.

15. Ala.—Lester v. Gay, 117 So 211, 217 Ala 585, 59 A L R 1561

Cal.—Hicks v. Drew, 49 P. 189, 117 Cal 305—Gaver v Early, 209 P. 390, 58 Cal App 725

Iowa—Van Veen v Van Veen, 236 N W 1, 213 Iowa 323, supplemented 238 N W 718, 213 Iowa 323—In re Champions Estate, 180 N W. 174, 190 Iowa 451

Wis.—Harvey v. Harvey, 231 N W 580, 202 Wis. 553—Michel v. McKenna, 227 N W. 396, 199 Wis 608 6 C J p 620 note 49.

No disqualification under particular circumstances

(1) The mere fact an attorney has had a conversation with the adverse party prior to litigation and solely for the purpose of fixing fees in connection with his offer to conduct the case for such party but his offer was rejected does not disqualify him from appearing under a subsequent retainer notwithstanding information as to the facts of the case which came to him in the conversation referred to—Hicks v Drew, 49 P. 189, 117 Cal 305

(2) A conference between an attorney and attorneys for will contestants, in which the contestants themselves did not participate, relative to the employment of such attorney to represent contestants on trial of contest, resulting in the rejection by contestants of the terms upon which the law firm of which such attorney was a member, were willing to accept employment, did not disqualify other member of such firm from appearing for the proponent of the will.—In re Champion's Estate, 180 N W 174, 190 Iowa 451

(3) That attorney, before his employment by defendant, had spoken with plaintiff's husband respecting the action, was held not to render his employment by defendant improper.—Lester v Gay, 117 So 211, 217 Ala. 585, 59 A L R 1561

(4) Plaintiff's attorney was not disqualified to act as such because shortly before bringing the action he was a clerk in the office of one defendant who was then an attorney for the other defendant—Gaver v. Early, 209 P 390, 58 Cal App 725

(5) That attorneys for a store had offered to sue a third person in name of store for purchases charged to the customer's account and had received payment from the customer to defray expenses was held not to prevent the attorneys from acting for the store in an action against the customer—Bloomingdale Bros v Hudson, 264 N. Y S 629, 147 Misc 759

16. Ill.—Strong v. International Bldg, Loan, etc, Union, 82 Ill App 426, affirmed 55 N E 675, 183 Ill 97, 47 L R A 793

Ohio—Sipes v Whitney, 30 Ohio St. 69, 76

6 C J. p 620 note 50

17. Hopkins v National Bank of Norman, 242 P 532, 115 Okl 196—6 C J p 620 note 46.

or where the parties consent to the representation,[18] or where notwithstanding the existence of conflicting interests the parties concerned on full disclosure of the facts by the attorney direct him to continue.[19]

Right to object and presentation thereof; waiver. Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation.[20] Moreover the objection that an attorney has represented adverse interests must be presented in the trial court particularly where it appears that no injury resulted from such representation.[21] The right to object that an attorney represents conflicting interests may be waived by the person entitled to assert such right.[22]

Prevention of, or relief from representation. Where the fact that an attorney is acting for the adversaries in a case is properly brought to the attention of the court before which the cause is pending the court is required to prevent the attorney from continuing to so act.[23] Moreover on a proper case made one of the parties represented may be granted appropriate equitable relief from the effects of an attorney's undertaking to represent conflicting interests.[24] At any rate an attorney may be prohibited by court order from proceeding as attorney for conflicting interests.[25]

§ 48. —— After Relation Terminated

The rule which disqualifies an attorney from representing adverse interests is applicable to a case wherein the relation of attorney and client as to one of such interests has terminated.

The incapacity of an attorney to represent adverse interests (supra § 47) also disqualifies him from representing interests which are in conflict with the interests of his former client, for the obligation of fidelity and loyalty still continues.[26] However, the interests of the former client must have been ad-

18. Hoidale v Cooley, 174 N W. 413, 143 Minn. 430—6 C J p 620 note 46 [a]

No substantial controversy

There is no impropriety in an attorney representing different parties between whom there is no substantial controversy so long as they are content—Hoidale v. Cooley, 174 N W 413, 143 Minn 430

19. **Patent applications on common subject matter**

In a suit for an injunction against patent infringement, that the same firm of attorneys prosecuted patent applications for plaintiff and defendant, containing a common subject matter, was held not to require dismissal of bill for want of equity, where the evidence established full disclosures of facts by attorneys and on their offer to withdraw as attorneys for both parties they declined to accept such offer but directed the attorneys to prosecute both applications—Cold Metal Process Co v United Engineering & Foundry Co, (D C Pa) 3 F Supp 130, appeal dismissed (C C A) United Engineering & Foundry Co v Cold Metal Process Co, 68 F (2d) 561, certiorari denied 54 S Ct. 530, 291 U S 675, 78 L Ed 1064

20. Van Veen v Van Veen, 236 N W. 1, 213 Iowa 323, supplemented 238 N W 718, 213 Iowa 323

One of two defendants in partition

Where attorneys appeared for one of defendants in a partition action and for plaintiff in a mortgage foreclosure action consolidated therewith, only such defendant could object—Van Veen v Van Veen, 236 N W. 1, 213 Iowa 323, supplemented 238 N W 718, 213 Iowa 323.

Hold-over tenant

Hold-over tenant appealing from judgment against it for lessor corporation and association contracting with lessor for use of leased warehouse was held not entitled to complain of representation of both association and lessor by same attorneys where conflicting interests were only apparent—Curtiss Aeroplane & Motor Corporation v. Haymakers Warehousing Corporation, (Tex Civ App) 264 S W 326.

21. **Attorney for receiver and for creditors**

A receivership proceeding could not be invalidated on the ground that attorney for receiver was also attorney for some creditors and thus was representing antagonistic interests, where such matter was not brought to the attention of the trial court, and it was difficult to choose a disinterested attorney, and there was nothing in the record to indicate that the attorney for receiver neglected his duty as such to advantage of other parties represented by him—Home Mortg Co v Sitka Spruce Pulp & Paper Co, 36 P (2d) 1038, 143 Or 502.

22. Harvey v. Harvey, 231 N W 580, 202 Wis 553—Michel v McKenna, 227 N W. 396, 199 Wis 608

23. Logan v Logan, 180 N E 32, 97 Ind App 209.

Imperative duty

"Courts not only have the power to prevent such action when properly brought to their attention, and to bar, under such circumstances, an attorney from acting as such in a pending cause, but have an imperative duty to do so"—Logan v. Logan, 180 N E 32, 34, 97 Ind.App. 209

Depending on facts in each case

(1) "Whether or not an attorney has violated his professional duty and should be prohibited from acting in a particular case depends upon the facts in such case"—Logan v. Logan, 180 N E 32, 34, 97 Ind App. 209.

(2) Accordingly in a damage action by an heir in an administratrix' name, against a widow, as an individual, and coheirs, refusing to bar the administratrix' attorneys from acting for defendants in such cause could not be said to be a violation of the court's duty—Logan v. Logan, supra.

24. **Avoidance of contract**

Where an attorney by fraud induces a client to enter into a contract purporting to be a loan and mortgage as security for another contract, and the same attorney acted for the other contracting party, and the mortgagor obtained no part of certain money pretended to be loaned to him, it was held that the contract should be avoided except to operate as security as contemplated by the mortgagor—Naef v. Verges, 72 So 935, 140 La. 196

25. **Order removing attorney not improper**

In a minority stockholders' action against a corporation and others, an order removing an attorney representing both the corporation and a cross complainant was held not to be improper—Elberta Oil Co v Superior Court in and for Kings County, 291 P. 668, 108 Cal App. 344.

26. Cal—Wutchumna Water Co v Bailey, 15 P (2d) 505, 216 Cal 564.
D C—Brown v. Miller, 52 App D C 330, 286 F 994.
Ga.—Johnson v Morris, 108 S E 810, 27 Ga App 468
Iowa—Kluht v. Mitchell, 199 N W 294, 199 Iowa 1163.

verse in the sense that they are in conflict with, or hostile to, the interests subsequently represented.[27] Moreover an attorney may properly represent an interest which is actually adverse to a former client, but is based on matters arising subsequent to the termination of the prior relation and not connected therewith.[28] Further previous representation of a party in matters unrelated to pending litigation may not disqualify an attorney from representing the adversary of such party.[29]

Test. The test of inconsistency in cases of the character under consideration is not whether the attorney has ever appeared for the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection.[30] Nor does the rule imposing disability on the attorney mean that he, having once been employed by a client, shall never thereafter appear in any matter against him but merely forbids the attorney's appearance or acting against the client where the at-

Neb—Baker v. Farnsworth, 221 N W. 17, 117 Neb 504
Okl—In re Jeter, 20 P.(2d) 886, 163 Okl 27
Wis—Harvey v Harvey, 231 N W 580, 202 Wis. 553—Michel v McKenna, 237 N W. 896, 199 Wis 608
6 C J p 620 note 47.

Public policy forbids attorney's representing party, over objection, where subjects are same or inseparably related, against adversary whom he previously served—Baker v Farnsworth, 221 N W. 17, 117 Neb 504—6 C J. p 621 note 55.

Two things forbidden

"An attorney is forbidden to do either of two things after severing his relationship with a former client He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship"—Wutchumna Water Co. v Bailey, 15 P (2d) 505, 509, 216 Cal 564

Nondisclosure of confidential nature

"The principle which forbids an attorney who has been engaged to represent a client from thereafter appearing on behalf of the client's opponent applies equally even though during the continuance of the employment nothing of a confidential nature was revealed to the attorney by the client"—Christian v. Waialua Agricultural Co, 30 Hawaii 533.

Public officers

(1) Lawyer having once held public office or having been in the public employ should not, after his retirement, accept employment in connection with any matter that he has investigated or passed upon in office or employ—In re Williams, (Okl) 50 P (2d) 729

(2) Accordingly officers of the federal government employing attorneys are entitled to avail themselves of the rule stated in the text when attorneys employed by such officers, after termination of the relation, attempt to represent interests in conflict with such officers—Gesellschaft Fur Drahtlose Telegraphie M B H v Brown, 64 App D C 357, 78 F (2d) 410, certiorari denied Brown v Gesellschaft Fur Drahtlose Telegraphie M. B H, 56 S Ct 139, 296 U S 618, 80 L Ed 439, rehearing denied 56 S Ct. 169, 296 U S 663, 80 L Ed 472—Brown v. Miller, 52 App D C. 330, 286 F 994

Claim adjuster

Attorney employed as claim adjuster is disqualified after severing relations with employer to bring action against it on behalf of a person whose claim he investigated—Hovel v Minneapolis & St L Ry Co, 206 N W 710, 165 Minn 449

Suing former client

Conduct of attorney for plaintiff in commencing an action against former clients concerning matters in which he appeared as their attorney and confidential adviser, was unprofessional—Harvey v. Harvey, 231 N W 580, 202 Wis 553

Associate not party to misconduct

Counsel retained after commencement of an action to assist in the trial did not make himself a party to misconduct of associate in bringing action against former client—Harvey v Harvey, 231 N W. 580, 202 Wis. 553.

Duty to raise question of misconduct

(1) Attorneys and court are under a duty to raise the point of an attorney's unprofessional conduct by bringing an action against a former client involving the use of confidential relation—Harvey v Harvey, 231 N.W. 580, 202 Wis. 553

(2) Nevertheless counsel was under no greater duty to raise the question of associate's misconduct than were attorneys for opposite parties or the court itself—Harvey v. Harvey, supra.

Relations held to disqualify attorney

Attorney drawing contract for plaintiff, and whom plaintiff consulted regarding matter being tried, was properly disqualified as attorney for defendant—Wingilia v. Ashman, 217 N W 909, 241 Mich 531.

Subsequent client not entitled to benefits

Litigant may not secure fruits of decree, obtained by attorney whom he knows previously represented his adversary, over the latter's objection, in the same subject-matter—Baker v Farnsworth, 221 N W. 17, 117 Neb 504

27. Mich—Gillett v Gillett, 257 N. W 719, 269 Mich 364
N.Y—In re Wilson, 170 N Y S 725

Representation held not improper

Where an owner contracted for erection of building, and gave mortgages to secure money, there was no impropriety in her attorney's acting as attorney for building contractors against a bank which advanced money for construction, after his relations with the owner, as her attorney, had ceased—All ance Trust Co v Hubbard, 171 P. 650, 87 Or 669

28. Murphy v. Riggs, 213 N W. 110, 238 Mich. 151.

Divorce

Solicitor who filed pleading for wife defending a divorce suit which was heard and dismissed properly appeared in her subsequent divorce suit, wherein he filed a pleading for defendant husband, where any confidential information imparted by wife to him would not be available in latter suit because facts of former suit were res judicata, and where facts in latter suit arose since termination of the solicitor's relation as solicitor for the wife—Wilber v. Wilber, 105 A. 664, 90 N J Eq 7.

29. **Where no general employment**

Attorney was not disqualified to represent plaintiff because he had represented defendants in previous unrelated matters, where attorney had no general employment with defendants—National Finance Co v. Abernathy, (Tex Civ App) 66 S W. (2d) 358, error dismissed

30. Wutchumna Water Co v. Bailey, 15 P (2d) 505, 216 Cal 564—6 C J. p 591 note 65, p 620 note 51.

torney can use, to the detriment of such client, the information and confidences acquired during the existence of their relation as attorney and client.[31]

Right to object; waiver. Only one who has been a client of the attorney may, however, complain of his conduct.[32] A former client's right to object, however, may be waived.[33]

Prevention of representation. An attorney may in a proper case be enjoined from representing an interest which is in conflict with that of a former client.[34] Moreover an attorney may on proper application be prohibited by court order from representing an interest in conflict with one to which he previously sustained the relation of attorney and client,[35] or other confidential relation.[36]

On the other hand in the absence of a showing that the supposed adverse interests are actually in conflict or hostile, an attorney may not be prevented from continuing to represent his client.[37] Nor does the

31. Cal.—Wutchumna Water Co. v. Bailey, 15 P.(2d) 505, 216 Cal. 564
N.J.—Wilber v. Wilber, 105 A. 664, 90 N.J.Eq. 7—6 C.J. p. 620 note 48

32. Mich.—Michel v. Michel, 227 N.W. 396, 199 Wis. 608

Party defendant who was not client

One of two defendants could not complain because plaintiff's attorney represented the other defendant in a previous action arising out of the same automobile collision.—Michel v. McKenna, 227 N.W. 396, 199 Wis. 608

33. Harvey v. Harvey, 231 N.W. 580, 202 Wis. 553

Waiver by defendant

Defendant who failed to object to appearance of attorney for plaintiff on the ground that attorney formerly represented defendant waived attorney's professional misconduct.—Harvey v. Harvey, 231 N.W. 580, 202 Wis. 553—Michel v. McKenna, 227 N.W. 396, 199 Wis. 608

34. Wutchumna Water Co. v. Bailey, 15 P.(2d) 505, 216 Cal. 564.

35. Brown v. Miller, 52 App.D.C. 330, 286 F. 994

Motion not too late

Where several months before trial one of defendant's counsel was informed that a motion would be made to require him to withdraw on the ground that he had previously represented plaintiff, such a motion made at the trial was held not too late.—Kluht v. Mitchell, 199 N.W. 294, 199 Iowa 1163

Discretion

(1) Excluding, on motion, an attorney from appearing against a former client in a suit arising from that in which he was its attorney was held to be in the court's sound discretion.—Boyd v. Second Judicial Dist. Court in and for Washoe County, 274 P. 7, 51 Nev. 264

(2) In an action for alienating affections of plaintiff's wife, denial of motion to require one of defendant's counsel to withdraw his appearance, based on affidavits that he had acted as plaintiff's counsel in a divorce suit and also in the present action, was held to be a prejudicial abuse of discretion.—Kluht v. Mitchell, 199 N.W. 294, 199 Iowa 1163.

Knowledge acquired in prior relation

(1) Where it appeared that an attorney, representing one party in litigation, had formerly represented the adverse party with respect to the same matter involved in the litigation, the court need not inquire as to how much knowledge the attorney acquired from his former client during that relationship, before refusing to permit the attorney to represent the adverse party.—Brown v. Miller, 52 App.D.C. 330, 286 F. 994.

(2) Accordingly an attorney employed by the alien property custodian was properly prohibited from continuing to represent a corporation which had been taken over by the custodian in a suit against him based on information acquired by the attorney while employed as such by the custodian.—Brown v. Miller, supra

Rules and statutes relating to disbarment

The rules of the court and the statutes relating to disbarment proceedings against an attorney do not deprive the court of its authority without such proceedings to order an attorney not to appear in a case against a client relating to matters which the attorney had handled for the client.—Brown v. Miller, 52 App.D.C. 330, 286 F. 994.

Inherent power

Court, to prevent injustice, has inherent power to prevent an attorney from appearing in a particular case against a former client.—Boyd v. Second Judicial Dist. Court in and for Washoe County, 274 P. 7, 51 Nev. 264

Court's power to prevent or strike appearance

A court can order an attorney to refrain from appearing for a party, or strike his appearance from the docket, where the attorney had previously represented the adverse party with respect to matters involved in the action.—Brown v. Miller, 52 App.D.C. 330, 286 F. 994.

Detailed ascertainment of certain facts

In order that a court may prevent an attorney from appearing against a former client it is unnecessary that the court ascertain in detail the extent to which the former client's affairs might have a bearing on the matters involved in the subsequent litigation nor the attorney's knowledge thereof.—Boyd v. Second Judicial Dist. Court in and for Washoe County, 274 P. 7, 51 Nev. 264.

Evidence warranting attorney's exclusion

Evidence warranted the court in excluding attorney from appearing against a former client in a case arising out of one in which he was its attorney.—Boyd v. Second Judicial Dist. Court in and for Washoe County, 274 P. 7, 51 Nev. 264.

36. Stay

Where by reason of one's employment as claim adjuster he gained information in the investigation of a particular case and after termination of employment undertook to represent his former employer's adversary in the prosecution of a claim involved in such case, it was held that the court on proper application might stay further prosecution of the action until plaintiff was represented by another attorney.—Havel v. Minneapolis & St. L. Ry. Co., 206 N.W. 710, 165 Minn. 449

37. Restraining acceptance of retainer

(1) "Where an attorney has, in the course of other business, or in conducting other suits, obtained a knowledge of matters connected with the suit in question, the courts will not, in general, simply on the fact of such knowledge, restrain an attorney from acting against the party through whose business he obtained such knowledge, especially where such party does not desire his services."—Price v. Grand Rapids, etc., R. Co., 18 Ind. 137, 141—6 C.J. p. 620 note 48 [a]

(2) Attorneys who have withdrawn from a case believing in good faith that the litigation is ended, will not, in case of its continuance, be enjoined from accepting a retainer from parties having an adverse interest to their former client, or from disclosing information acquired in their professional capacity from such client, for the court, in the absence of any showing to the contrary, will assume that such attorneys will observe all the obligations of honorable members of the bar.—Lalance,

fact that an attorney undertakes to represent an interest hostile to a former client but based on matters arising subsequent to the prior relation present a case for equitable interference on behalf of the former client [38]

Moreover a defendant who complains that the attorney for plaintiff was formerly employed by defendant must raise the point by motion rather than by answer.[39]

§ 49. Acting in Different Capacities

An attorney may not act in any capacity or assume any duty inconsistent with his office of attorney.

The relation of attorney and client is of such an important nature that the courts will not allow an attorney to act in any capacity or assume any duty inconsistent with his office of attorney or his duty to his client; public policy also demands that an attorney shall not act in any other capacity where his duty would be incompatible with his duty as an attorney,[40] but where such duty is not incompatible with his duties as an attorney, he may act in both capacities.[41]

An attorney for a tax collector at the time tax proceedings are begun, but who was not attorney for such collector at the time of the tax sale, could become a purchaser.[42]

Statutes sometimes forbid the constable who serves process in an action from appearing as attorney at the trial,[43] and where the constable has appeared for plaintiff and proved his cause of action, a judgment in his favor cannot be allowed to stand, although there was no appearance by defendant or any one in his behalf.[44]

The competency of an attorney to be a witness see the title Witnesses § 71 [70 C.J. p 175 note 46–p 178 note 86], or to act as a trustee in bankruptcy see the title Bankruptcy § 157 [7 C.J. p 109 notes 85–87], or to act as an arbitrator see the title Arbitration and Award § 46.

§ 50. Liability for Costs

In the absence of misconduct or of a statute or rule of court providing otherwise, an attorney is not liable for the costs of a suit unless he has engaged to become liable.

In the absence of misconduct or of a statute or rule of court providing otherwise, an attorney is not liable for the costs of suit unless he has engaged to become liable.[45] Of course where the attorney is

etc., Mfg Co. v Haberman, Mfg Co., (C.C.N.Y.) 93 F 197

Motion to disqualify properly denied

In a husband's divorce suit, where each party had been previously married but had obtained a divorce from former spouse, denial of wife's motion to disqualify husband's counsel because such counsel and his firm had represented wife in her previous divorce suit against former husband over eleven years before filing of present bill was held not to be error, since the suits were not related and there was no showing that husband's counsel could or did betray any confidence—Gillett v Gillett, 257 N.W. 719, 269 Mich. 364

38. Murphy v Riggs, 213 N.W. 110, 238 Mich 151.

Slander

Client was held not entitled to enjoin a former attorney from representing third party, suing client for slander on transactions arising after the professional relation ceased, notwithstanding threatened divulgence of knowledge obtained in professional capacity—Murphy v Riggs, 213 N.W. 110, 238 Mich 151

Disclosure as inducement to employment

Attorney offering as inducement to employment that he would divulge knowledge, acquired during employment by former client whom prospective client desired to sue, was held not subject to equitable interference —Murphy v. Riggs, 213 N.W. 110, 238 Mich 151

39. **Reason for rule**

"It must be raised by motion for it is plain that the improper conduct of plaintiff's attorney cannot be made the basis of a defense on the merits or a plea in abatement"—Havel v Minneapolis & St L Ry. Co, 206 N.W 710, 711, 165 Minn 419.

40. Ill—Harris v. Young, 215 Ill App 489.

Okl—Steeley v State, 187 P. 821, 17 Okl Cr 252.

6 C.J. p 621 note 55.

Special master subsequently appearing as solicitor

The special master in chancery, to whom a suit for an accounting is referred for the purpose of his taking the evidence and reporting the same together with his conclusions of fact, should not subsequently appear in the suit as a solicitor for one of the parties, such a course of practice is harmful and tends to bring courts into disrepute.—Harris v. Young, 215 Ill App 489.

Withdrawing from case so as to be witness

Attorney withdrawing from case before trial, when it appeared he might be a witness, is not subject to criticism—Allen v. Ross, 225 N.W. 831, 199 Wis 162, 64 A.L.R 180

Acting as detective

It is highly improper for an attorney to act as a private detective, and to testify as to facts so learned, in a case in which he is retained and has a pecuniary interest, and the court is required to weigh his testimony against that of other persons—Doremus v. Doremus, 102 A 659, 88 N.J.Eq 256—6 C.J. p 621 note 55 [c] (4).

Special surrogate as attorney for proponent of will

A special county judge and surrogate, having no power to act unless the regular surrogate is disqualified or there is a vacancy in the office, has been held not disqualified to act as an attorney for the proponent of a will in a proceeding before the surrogate—In re Locker's Estate, 279 N.Y.S 114, 154 Misc 685.

41. Hall v Brackett, 60 N.H 215—6 C.J. p 622 note 56.

Capacity of lawyer to become another's agent for purposes other than practice of law see Agency § 14

42. Walker v Mills, 109 S.W. 44, 210 Mo. 634

43. Wilkinson v. Vorce, 41 Barb (N.Y.) 370—6 C.J. p 622 note 57.

44. Ford v. Smith, 11 Wend (N.Y.) 73

45. U.S—U. S. v. Call, (C.C.A Fla.) 287 F 520

N.J—Caldwell Builders' Supply Co v. Goldblatt, 172 A. 901, 12 N.J Misc 457

6 C.J. p 622 note 59—15 C.J. p 97 note 64 [a] (2).

the real party interested he may be required to pay costs as in the case of any other litigant,[46] but a beneficial interest in a cause of action does not render an attorney liable for costs where such beneficial interest consists of a right to a portion of the sum or property recovered as compensation for his services in the action.[47]

Statutory provisions. In some jurisdictions, by virtue of statutory provisions, attorneys are liable for costs in appellate courts save where a pauper affidavit is filed in the clerk's office of the court below and a certified copy thereof transmitted to the appellate court with and as a part of the transcript of the record or bill of exceptions, and the attorneys will not be relieved from the payment of costs where the affidavit was not transmitted to the appellate court until some days after the transcript and bill of exceptions,[48] nor will the attorneys be relieved from the payment of costs because appointed by the court to represent an accused, the affidavit filed being insufficient,[49] and counsel appointed to defend an accused, not being under any duty to prosecute the case in the appellate court after accused became a fugitive from justice, cannot be relieved from their liability for costs.[50]

An attorney has sometimes, by statute, been held liable for costs on the indorsement of the writ, where plaintiff was unable to pay or was a nonresident.[51] However, the liability of an attorney for costs where plaintiff is a nonresident is purely statutory,[52] and is not discretionary with the court[53] and the attorney may relieve himself thereof by filing and procuring the allowance of an undertaking.[54] His liability will be enforced only where plaintiff is required to give security,[55] and if the right to such security is waived as to plaintiff the waiver inures to the benefit of the attorney.[56] Also, the attorney may be liable only where he has instituted a suit for a sole plaintiff who is a nonresident or for two or more plaintiffs all of whom are nonresidents,[57] and moreover, plaintiff must have been a nonresident at the commencement of the suit.[58]

Misconduct or negligence. The court has inherent power in the exercise of its discretion to impose costs on an attorney in order to punish him,[59] and where an attorney has been guilty of unauthorized or negligent acts or of general professional misconduct, he is often held liable for costs by the court as a punishment for such acts or misconduct.[60]

Liability must be pointed out with certainty

A client undertaking to place liability for costs on his attorney must show with certainty wherein the attorney has thus bound himself or point out clearly some law which so binds him.—Lazarus, Michel & Lazarus v. Veazey, 92 So 338, 151 La. 790.

Liability for excess costs collected

Where an attorney exacts a larger amount of costs than he is legally entitled to, the excess may be recovered back in an action against him.—One Hundred & Thirty-Fourth St Co. v. Wells, 140 N.Y.S. 1051, 80 Misc 215—Britton v Frank, How App Cas 4, 3 How Pr.(N.Y.) 101, 4 How Pr 144.

Criminal cross bill of exceptions

It has been held that, where there is no law by which the state can maintain a cross bill of exceptions in a criminal case, and no provision for taxing costs against the state, the costs will be taxed against the solicitor bringing the cross bill.—Mill v. State, 58 S.E. 673, 2 Ga.App. 398.

In Hawaii

The rule of the supreme court providing that attorneys shall be liable for costs incurred by their respective clients was held to be made for the protection of the court, and gives rise to no obligation in favor of a public litigant as against the attorney for the opposite party.—Holstein v. Benedict, 22 Hawaii 749.

—6 C.J. p. 622 note 61 [a]—15 C.J. p. 97 note 64 [d]

46. Kelly v New York City R. Co., 106 N.Y.S. 894, 122 App.Div. 467.

47. La.—Lazarus, Michel & Lazarus v. Veazey, 92 So. 338, 151 La. 790.
N.Y.—Hampton v Rosenheim, 155 N.Y.S. 361, 92 Misc. 207—Spence v Bode, 108 N.Y.S. 593, 57 Misc. 611.
Tenn.—Campbell v. Lee, 12 Tenn.App. 293.
6 C.J. p. 622 note 62.

Attorney alone authorized to compromise

Where an attorney brings an action under a contingent fee contract and informs the defendant that he is an assignee of the demand and alone authorized to compromise or settle the demand, it has been held that the attorney is liable for costs.—Voorhees v. McCartney, 51 N.Y. 387—Bliss v Otis, 1 Den.(N.Y.) 656.

48. Burke v Seaboard Air Line Ry. Co., 168 S.E. 90, 46 Ga.App. 488.

49. Summerour v. State, 158 S.E. 327, 172 Ga. 560.

50. James v. State, 132 S.E. 417, 162 Ga. 42, followed in 132 S.E. 418, 162 Ga. 44.

51. Mass.—Bird v Johnston, 119 N.E. 354, 230 Mass. 28.
N.H.—Miner v Smith, 6 N.H. 219.
6 C.J. p. 622 note 64.

52. Allen v. Fink, 207 N.Y.S. 428, 211 App.Div. 411, modified on other grounds 208 N.Y.S. 827, 213 App.Div. 845—6 C.J. p. 622 note 65.

53. Allen v. Fink, supra.

54. Allen v. Fink, supra.

55. Reed v. Benzine-ated Soap Co., 65 A. 1008, 72 N.J.Eq. 622.

56. Reed v. Benzine-ated Soap Co., supra.

57. Berrie v. Atkinson, 40 S.E. 708, 114 Ga. 708.

58. Long v. Hall, 5 N.Y.Super. 729.—6 C.J. p. 633 note 69.

59. Allen v Fink, 207 N.Y.S. 428, 211 App.Div. 411, modified on other grounds 208 N.Y.S. 827, 213 App.Div. 845.

Excessive zeal to circumvent adversary

Where actions were apparently meritorious, the fact that the plaintiff's attorney attempted with excessive zeal to circumvent his adversary and avoid immediate compliance with burdensome orders for security for costs has been held not a sufficient ground for punishing him by imposing costs.—Allen v. Fink, 207 N.Y.S. 428, 211 App.Div. 411, modified on other grounds 208 N.Y.S. 827, 213 App.Div. 845—6 C.J. p. 623 note 70 [g].

60. U. S. Savings Bank v. Pittman, 86 So. 567, 80 Fla. 433—6 C.J. p. 623 note 70—15 C.J. p. 98 note 68.

Attorney having interest adverse to client

If an attorney, after he has an interest adverse to his client, proceeds and obtains decrees adverse to the

An attorney who inserts in the pleadings impertinent or scandalous matter may be made personally liable to the adverse party for the costs of expunging such matter.[61]

Under the new federal equity rules costs may be imposed upon solicitors as well as parties for infraction of the rules designed to secure reduction of the record on appeal, and if any attorney in a federal court appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he will be required by order of the court to satisfy any excess of costs so increased.[62]

Enforcement of liability. The liability of an attorney for costs may be enforced by an application for an order requiring the attorney to pay costs.[63] While an attorney, not ordered to pay the costs, cannot be held in contempt because of his client's failure to pay them,[64] statutes in some jurisdictions authorize an attachment for contempt for nonpayment of costs by an attorney under some circumstances, as for example, in the case of misconduct of an attorney.[65]

In some jurisdictions, where the costs of a reference were allowed as an incident to a final judgment, an attorney cannot be held in contempt for the nonpayment of costs,[66] and their payment can be enforced only by those methods which the law designates for the enforcement of the decree or judgment itself.[67]

A writ of scire facias will sometimes issue against an attorney for the payment of costs.[68]

§ 51. Liability for Officers' Fees

Generally, an attorney is not liable for the fees of officers of the court in the absence of an express agreement to pay them.

At common law the attorney of record cannot be held personally responsible to clerks, sheriffs, or other officers for their fees for services rendered in behalf of his client in the progress of the cause unless there is proof of his express promise to pay them, or of some practice or course of dealing from which such personal promise can be implied,[69] on the principle that an attorney's negotiation for work to be done in a law suit is the act of an agent for a known principal, and for the expense of that service the attorney does not become personally responsible.[70]

Liability by statutes or rules of practice. In some jurisdictions, however, by reason of either statutory provisions or rules of practice, an attorney is held liable for all costs incurred on behalf of his client for the fees of officers or witnesses[71]

client, and there is an appeal to the supreme court and other costs, in consequence of such action, a court of equity will tax such costs, including a reasonable attorney's fee, against such attorney—U S Savings Bank v. Pittman, 36 So. 567, 30 Fla 423.

Attorney appearing for himself

Where an attorney in the prosecution of an action conducted by him for himself and in his own behalf is guilty of such misconduct as would subject him to the payment of costs and to imprisonment for nonpayment in case the suit was being conducted by him for a third person, he is not exempt from the liability for such costs merely because he himself is the party litigant, but is held to the same degree of responsibility in the one case as in the other. —In re Kelly, 62 N.Y. 198.

61. Ill—McConnel v. Holobush, 11 Ill. 61
N.Y—Allen v. Fink, 207 N.Y.S. 428, 211 App.Div 411, modified on other grounds 208 N.Y.S. 827, 213 App Div. 845.
6 C.J. p 623 note 71.

62. Toledo Metal Wheel Co v Foyer Bros & Co, (Ohio) 223 F. 350, 138 C.C.A. 612—6 C.J. p 623 note 72

63. U.S.—Bogart v. Electrical Supply Co, (C.C.A.N.Y.) 27 F. 722, 23 Blatchf. 552.
N.Y—Struffman v Muller, 74 N.Y. 594
6 C.J. p 623 note 75

64. Rubber & Celluloid Products Co v. Sobel, 155 A. 134, 9 N.J.Misc 648

65. In re Kelly, 62 N.Y. 198—15 C.J. p 299 note 8.

66. Rubber & Celluloid Products Co v. Sobel, 155 A. 134, 9 N.J. Misc 648

67. Rubber & Celluloid Products Co v. Sobel, supra.

68. Bird v. Johnston, 119 N.E. 354, 230 Mass 28.

Record conclusive

A writ of scire facias is based on the record in the original suit, which is conclusive against the attorney in the scire facias proceedings, so that it is not open to him to show that the plaintiff in the original suit, described as a nonresident, was a resident—Bird v Johnston, 119 N.E. 354, 230 Mass. 28.

Evidence

(1) An officer's return on execution that he made diligent search for the goods, chattels, or lands of the judgment debtor, but could not find any within his precinct, is some evidence of the avoidance of costs, or of the inability to pay them, within the meaning of the statute making the indorser of the bill liable for costs as surety in such case—Bird v. Johnston, 119 N.E. 351, 230 Mass 28

(2) In an action of scire facias against the indorser of a bill in equity, where a witness testified that he had called at the home of the plaintiff in the original suit and had seen another woman, he is properly allowed to testify that such woman told him that plaintiff was not there and that she did not know where she was, to contradict such woman's testimony that at that time the plaintiff boarded at her house—Bird v. Johnston, supra.

(3) The liability of the indorser of the bill in equity for costs is established by a special finding of the jury, in an action of scire facias against him, that the judgment debtor was unable to pay the costs—Bird v. Johnston, supra.

69. Cowan v. Hulse & Allen, (Tex Civ App) 273 S.W. 663—6 C.J. p 623 note 76, p 624 note 79.

70. Cowan v Hulse & Allen, supra —6 C.J. p 623 note 76 [a], p 625 note 84.

71. N.J—Rubber & Celluloid Products Co. v. Sobel, 155 A. 134, 9 N.J.Misc 648.
N.Y—Myers v. Grove, 272 N.Y.S. 162, 242 App.Div. 637—Ruhloff v. Catts, 174 N.Y.S. 153.
6 C.J. p 624 note 80.

The attorney is liable, not on his own account, but for his client, his liability is that of a guarantor,[72] the liability sometimes arising from his indorsement of the original writ or from the promise implied upon his giving direction to the officer to perform certain acts in the course of the cause.[73] However, this rule being in opposition to the elementary principles of agency, it has been held that it should be strictly limited in its application and not extended to analogous cases, unless it appears that the reasons which originally led to its adoption apply,[74] and consequently it has been held that an attorney is not liable, in the absence of an express promise, for the fees of a referee[75]

§ 52. Liability to Adverse Party and to Third Persons

a. In contract in general
b In tort in general
c. To pay over or refund money collected

a. In Contract in General

In the absence of assumption of personal liability, an attorney is generally not liable for work done by third persons in connection with a law suit.

Generally, although there is authority to the contrary,[76] an attorney's negotiation for work to be done in a law suit is the act of an agent for a known principal, and the attorney is not personally liable,[77] as, for example, for the fees of witnesses,[78] stenographers,[79] or for the expenses of printing briefs, etc[80] In other words, an attorney cannot be held personally liable on such contracts, unless on an express promise to that effect, proof of circumstances from which such promise may be justly inferred, or notice to the third party of lack of authority in the attorney.[81] However, where an attorney fails to disclose that he was acting for clients he is personally liable,[82] and the mere fact that the third person knew the attorney was acting as attorney for his clients is not conclusive,[83] so that an attorney, ordering work to be done or services to be performed in connection with a case, is liable where he contracts on his personal responsibility or promises to pay therefor[84] Also, where the attorney is directly and personally interested jointly with others in the

Anomalous rule

"The rule is an anomalous one, when it is remembered that an attorney in issuing an execution is acting only as an agent for a disclosed principal, namely, his client The client, in my opinion, and not the attorney, should be held responsible to the sheriff However sound this criticism may be on principle, it is not the law"—Ruhloff v Catts, 174 N.Y S 139

Not enforceable by summary proceeding

An attorney's liability for officer's fees cannot be enforced by a summary proceeding under a statute providing that the court may make an order requiring the party at whose instance the attachment is issued to pay the same to the sheriff, the word party not including the attorney for the party—Myers v. Grove, 272 N. Y S 162, 242 App Div 637

72. Tarbell v Dickinson, 2 Cush. (Mass) 345.

73. Strout v Bradbury, 5 Me 312—6 C J p 624 note 82

74. Judson v Gray, 11 N Y 408.

75. Rubber & Celluloid Products Co v Sobel, 155 A 134, 9 N J Misc. 648—6 C J p 625 note 85

76. Judd & Detweiler v Gittings, 43 App D C 304

Rules of court as to filing and distribution of briefs

In an action by printers against attorneys to recover the price of printing briefs in two cases in which the defendants were counsel, the rules of court have little, if any, bearing upon the question of whether the plaintiffs had legal notice as to the filing and distribution of briefs in pending cases, especially where one set of the briefs in question was for use in a court in another jurisdiction—Judd & Detweiler v Gittings, 43 App D C 304

77. Colo—Elder v Eastwood, 216 P 542, 73 Colo 489
Mo—Inland Printing & Binding Co v Elam, (App) 240 S W 823
N Y.—Potter v Austin, 190 N Y S. 712—Willett v William J Burns International Detective Agency, 176 N Y S 722—Research Laboratories v Harrison, 166 N Y.S 706—Royal Indemnity Co. v. Corn, 162 N Y S 659

78. Potter v Austin, 190 N.Y S. 712—6 C J p 624 note 77.

79. Rubber & Celluloid Products Co v Sobel, 155 A 134, 9 N J.Misc 648—6 C J p 624 note 78.

80. Colo—Elder v. Eastwood, 216 P 542, 73 Colo 489
Mo—Inland Printing & Binding Co v Elam, (App) 240 S.W. 823.
6 C J p 625 note 86

81. Mo—Inland Printing & Binding Co v Elam, (App) 240 S W 823—Mendenhall v Sherman, 187 S W 271, 193 Mo App 684
Pa—Messenger Publishing Co v Walkinshaw, 157 A 18, 102 Pa.Super. 445—I F Huntzinger Co. v. Devlin, 83 Pa Super 63.
6 C J. p 658 note 9

The rule is well established that, when a person contracts as the agent of another and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible, this rule applies to the relationship of attorney and client.—Bonynge v. Field, 81 N Y 159, 160

Notice of attorney's responsibility

It is within the scope of the authority of an attorney to bind his client for the printing of paper books in appeal, but where, in an action by a printer against a client for the cost of printing such books, there is evidence that the printer had notice that the attorney was taking appeal on his own responsibility, and was liable for the costs of printing, the case is for the jury, and verdict for defendant will be sustained—I F Huntzinger Co v Devlin, 83 Pa Super 63

82. American Appraisal Co. v Pio, 246 Ill App 467.

Rebutting prima facie liability

The prima facie personal liability of an attorney to a third person on an agreement from the manner of execution in the attorney's name is rebuttable by proof negativing personal liability—Falsten Realty Co v Kirksey, 137 So. 267, 103 Fla 225

83. Right Printing Co. v. Stevens, 179 A. 209, 107 Vt 359.

84. Colo—Elder v Eastwood, 216 P. 542, 73 Colo. 489.
Kan—Martin v. Bell, 203 P. 691, 110 Kan 192.
N.J.—Car & General Ins. Corporation

proceedings and it was not solely for his clients, the contract may be express or implied from the conduct of the parties, and the attorney, if he wishes to escape personal liability, must expressly contract to that effect,[85] and where not authorized to appeal, an attorney ordering a transcript of the evidence is liable for the expense thereof.[86]

Contract to settle case. An attorney contracting to settle a case for a certain sum is liable for the breach of such contract.[87]

b. In Tort in General

An attorney is personally liable to a third person sustaining injury in consequence of his wrongful acts or improper exercise of authority where he has been guilty of fraud or collusion, or of a malicious or tortious act.

While an attorney is not liable to a third person for acts performed in good faith,[88] and mere negligence on the part of an attorney is insufficient to give a right of action to a third party injured thereby,[89] an attorney is personally liable to a third party who sustains an injury in consequence of his wrongful act or improper exercise of authority where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act,[90] and these rules, it seems, would apply where a licensed attorney gives free advice to a person

v. Davimos, 173 A 150, 12 N J Misc. 569, affirmed 176 A. 320, 114 N J Law 192

N Y—Riley v. Tull, 174 N.Y S 862, 186 App Div. 805, reversing 167 N Y S 918—Batavia Times Pub Co v. Hall, 221 N Y S 89, 129 Misc 197—Daniels v Hand, 161 N Y S 213, 97 Misc. 418—Title Guaranty & Trust Co v Maloney, 165 N Y S 280—Title Guarantee & Trust Co v. Rudershausen, 164 N Y S 15

Pa—Messenger Pub. Co v Walkinshaw, 157 A 18, 102 Pa Super 445

Vt—Right Printing Co v Stevens, 179 A 209, 107 Vt. 359

Wash.—J. D O'Malley & Co v Lewis, 28 P (2d) 283, 176 Wash 194

6 C J p 625 note 86 [a]

Evidence

(1) In an action by a physician against attorneys for services consisting of giving of testimony on a trial, the evidence was held not to show that the testimony of plaintiff was requested by defendant under an agreement to pay for the services—Potter v. Austin, 190 N Y S 712.

(2) Evidence was held to warrant the jury finding that attorney assumed liability for services rendered by detective in procuring evidence to be used in a divorce suit—Riley v. Tull, 174 N Y S 862, 186 App Div. 805, reversing 167 N.Y S 918.

Parol evidence not considered

Conversation between attorney ordering printing and printer long after work was delivered, will not be considered, where the original contract was clear—Batavia Times Pub Co v. Hall, 221 N Y S. 89, 129 Misc 197.

Question for jury

Affidavit of defense, in an action for cost of printing paper book used on appeal to supreme court, alleging that contract was made by defendant as attorney for client, made a case for the jury—Messenger Pub Co v. Walkinshaw, 157 A. 18, 102 Pa Super. 445.

Findings

(1) In an action for services rendered in procuring a signer to a bail bond at the request of an attorney on behalf of his client, a special finding that nothing was to be paid for furnishing the bond at the time was held not inconsistent with the general verdict for plaintiff—Martin v. Bell, 203 P. 691, 110 Kan 192

(2) In a printer's action to recover for printing of briefs in a case in which defendant was attorney, the trial court's refusal to find that defendant was attorney for a certain person and his wife and that the printer knew that defendant was the agent for such clients when order for printing briefs was given was held error, notwithstanding no reference was made in brief to the person's wife, where uncontradicted evidence showed that the printer knew that defendant was acting as attorney for husband and wife—Right Printing Co v. Stevens, 179 A. 209, 107 Vt 359

(3) A printer was held not entitled to recover from attorney for printing of briefs in a case in which attorney represented the clients, where the trial court, sitting without a jury, found that the printer understood that the attorney was personally liable for printing bill, but the court did not find that attorney understood that he was personally liable or that in the circumstances he knew or ought to have known that the printer understood that the attorney was personally liable—Right Printing Co. v Stevens, supra

85. Elder v Eastwood, 216 P. 542, 73 Colo 489

86. Morgan v. Krook, 283 P. 287, 36 Ariz 133

87. Car & General Ins Corporation v Davimos, 173 A 150, 12 N J Misc 569, affirmed 176 A 320, 114 N J Law 192

Breach not justifiable

Attorney, agreeing to settle case for less than amount of judgment, recovered by his client as administrator ad prosequendum in a death action, was not justified in declining to provide a release by decedent's general administrator, unless attorney for defendant's liability insurer paid the cost of administrator's bond—Car & General Ins Corporation v Davimos, 173 A 150, 12 N J Misc 569, affirmed 176 A 320, 114 N J Law 192

Evidence

Testimony of attorney for plaintiff in a death action that he acted only for himself in agreeing with attorney for defendant's insurer to settle the case for less than the amount of judgment against defendant was held sufficient, with remaining testimony, to support the trial court's finding in insurer's action against former attorney for breach of contract that he acted as principal—Car & General Ins Corporation v Davimos, 173 A 150, 12 N J Misc 569, affirmed 176 A 320, 114 N J Law 192

88. La—Hemenway Furniture Co v Juneau, (App) 142 So 333

Okl—Thomas Fruit Co v. Levergood, 274 P 471, 135 Okl. 105—Waugh v. Dibbens, 160 P. 589, 61 Okl 221, L R A 1917B 360

89 U S—District of Columbia Nat. Sav Bank v Ward, (D C.) 100 U. S. 195, 25 L Ed 621

N.Y.—In re Cushman, 160 N Y S 661, 95 Misc 9

6 C J p 625 note 88

90. Conn—First Nat Bank v. Broder, 141 A 861, 107 Conn 574

La—U. S Fidelity & Guaranty Co v Roberson, (App) 142 So 321

Mass—Anderson v. Rubin, 190 N E 544

N Y—In re Cushman, 160 N.Y S. 661, 95 Misc 9

Okl—Thomas Fruit Co v. Levergood, 274 P 471, 135 Okl 105

Pa—Haggerty v. Moyerman, 184 A. 654

6 C J p 625 note 89

See Treece v Reinhart-Smith Grocer Co, 197 Ill App 40.

Measure of damages

(1) The measure of administratrix' lawyer's liability for deceiving administratrix' surety was held the amount surety was forced to pay.—

not his client.[91] He is also liable where he institutes proceedings without authority from his client, where he and his client fraudulently conspire to do an illegal act, or where he acts dishonestly with some sinister view or for some improper purpose of his own which the law considers malicious.[92] In the case of a trespass or other active tort committed by an attorney as agent of his client both the attorney and the client are liable.[93] An attorney is not liable, however, where, in the institution or conduct of any suit or judicial proceeding, or in procuring the issuance of process, he acts merely as an attorney at the instance of his client and under his instructions.[94] The rule applies equally whether the process is an execution or attachment against the property or the person of the debtor.[95]

Causing illegal execution to issue. An attorney who causes an execution to issue illegally, knowing, or having reason to know, of its illegality, is liable for the damages resulting,[96] but he is not liable for damages resulting from the issuance or levy of process at the instance of his client unless he is shown to have acted dishonestly and with an improper purpose.[97]

Attorney appearing without authority. Any party who sustains an injury in consequence of an attorney's assuming to appear and act for him when he had no authority to do so may hold such attorney liable for the injury suffered.[98]

Acts of client. An attorney is not liable for the wrongful acts of his client[99] in accepting payment in settlement of a judgment lien after having assigned such lien[1]

c. To Pay Over or Refund Money Collected

While liable for funds received for the benefit of a third person, an attorney paying over to his client money received for him is not liable to the party paying such money to him although such party is entitled to have part or all of the money refunded.

An attorney receiving funds with knowledge that they belong to a third person has been held responsible for their payment to such person, even though there is no contractual relation between him and the person entitled thereto,[2] and the court has inherent power to order an attorney to pay over money, deposited with him for a specific purpose, to a third person entitled thereto.[3] However, the summary remedies provided for the recovery of money by a client which his attorney wrongfully withholds (infra § 159) are not available to third persons.[4]

U. S Fidelity & Guaranty Co v. Roberson, (La App) 142 So 321

(2) Damages of lessee of a pool hall for misrepresentation of lessor's attorney concerning title to personalty which attorney removed after lessee entered upon the lease, whereupon lessee gave up the lease which was later extinguished by foreclosure of a mortgage on the realty was held not to include lessee's prospective profits in the leased premises except so far as profitable uses to which the leasehold might be put were reflected in its value—Anderson v. Rubin, (Mass) 190 N E 544

(3) Damages of lessee of a pool hall for misrepresentation of lessor's attorney concerning title to personalty which attorney removed after lessee entered upon the lease, whereupon lessee gave up the lease which was later extinguished by foreclosure of a mortgage on the realty was held not to include amount expended by lessee for repairs under requirement of the lease.—Anderson v. Rubin, supra.

91. Within the territorial limits of his license, an attorney owes to a person not his client the duty of giving him honest and unselfish advice, if advice be given, though he is not required to give free advice.—Grudberg v. Midvale Realty Co, 196 N. Y S. 760, 119 Misc. 558

92. Okl—Thomas Fruit Co. v. Levergood, 274 P. 471, 135 Okl. 105.
Pa—Haggerty v Moyerman, 184 A 654
6 C J. p 625 note 90.

93. Williams v. Inman, 57 S E 1009, 1 Ga App 321.

94. Neb—Lee v Brown, 157 N W 633, 99 Neb 661.
N Y—Ford v. Williams, 13 N Y. 577, 67 Am D 83.
Tex—Citizens' Nat Bank of Cameron v. Morrison, (Civ.App) 50 S W (2d) 346
6 C.J. p 626 note 92.

95. U S—Campbell v Brown, (C C. Tex) 4 F Cas No.2,355, 2 Woods 349.
Ga—Hunt v. Printup, 28 Ga. 297
Iowa—Dawson v. Buford, 30 N W 35, 70 Iowa 127.
Minn—Farmer v. Crosby, 45 N W. 866, 43 Minn. 459.
6 C.J p 626 note 93.

96. Mass—Sullivan v. Jones, 2 Gray 570
N.Y—Allen v Froome, 38 N.E. 645, 195 N Y 404, reversing 124 App. Div 936, 109 N Y S. 1123.
Pa—Haggerty v. Moyerman, 184 A 654
6 C.J. p 626 note 94.

97. Neb.—Lee v. Brown, 157 N.W. 633, 99 Neb 661.
Tex—Citizens' Nat. Bank of Cameron v. Morrison, (Civ App) 50 S.W. (2d) 346
6 C.J. p 626 note 95.

98. U S—Field v Gibbs, (C C.N J) 9 F Cas No 4,766, 1 Pet C C 155
Md—Munnikuyson v. Dorsett, 2 Harr & G 374
Mass—Smith v. Bowditch, 7 Pick 137
N Y—People v Bradt, 7 Johns. 539
Vt—Coit v Sheldon, 1 Tyler 300

99. Abramson v. Ryall, 159 N Y S 772

1. Abramson v. Ryall, supra

2. Ashton v Skeen, 39 P (2d) 1073, 85 Utah 489, rehearing denied 44 P (2d) 688, 85 Utah 503

Paying to wife, money awarded husband

An attorney who has been lawfully employed by a wife to represent her husband in a partition suit against both of them could lawfully pay the money awarded to the husband to the wife, and is not liable to the husband therefor.—Buckhouse v Parsons, 198 P. 444, 60 Mont. 156.

3. Sherman v. Yankee Products Corporation, 194 N.Y S. 705, 201 App Div. 647.

4. Breen v. Phillips, 149 S E. 565, 169 Ga. 13.

Not liable for expense in bringing such proceedings

An attorney, sought to be compelled by rule to pay the balance of an amount due a receiver, has been held not liable for the payment of services rendered by the receiver's attorney in bringing such rule.—

While it has been held that where a master commissioner overpaid attorneys on a settlement of an estate before a judgment of distribution and although the attorneys had paid the amount over to their client, the court had jurisdiction to proceed against the attorneys by rule or otherwise to compel them to repay the overpayment as against an objection that it was the mistake of the commissioner,[5] in accordance with the general rule that the principal alone is liable for money paid to his agent, which the payer has a right to recall, but which he fails to recall until after it has been paid by the agent to his principal (Agency § 217), where an attorney, acting as such, without fraud collects money and pays it over to his client, although the party paying such money is entitled to have part or all of it refunded to him, the attorney is not personally liable for it; but in order to exonerate himself he must prove that he has paid it over to his client,[6] because in the absence of such proof it will be presumed that the excess remained in the attorney's hands, and he will be liable therefor.[7]

Receiving payment outside agency and through his own wrong. The rule is otherwise where the attorney receives the money outside of his agency and through his own wrong; in such a case the attorney himself is liable for the amount so received, even though he may have paid it over to his client.[8]

Payment dependent on contingency. An attorney receiving money for his client, subject to a ratification of a settlement, is liable to account to the third person making such payment on a failure to consummate the settlement.[9]

§ 53. Liability of Third Persons to Attorney

Third persons unlawfully interfering with the relationship of an attorney and his client or using an attorney's name without authority are liable for the damages thereby caused.

Third persons unlawfully interfering with the relationship of an attorney and his client,[10] or

Breen v. Phillips, 149 S E 565, 169 Ga. 13.

5. Oliver v Braswell, 235 S W. 724, 193 Ky 297.

6. Cal—Brown v Howard, 261 P. 732, 86 Cal App 532
Mass.—Bromfield v. Gould, 193 N E 796, 289 Mass. 80.
6 C.J. p 626 note 98

Payment to client not wrongful

Where jury could have found on evidence that money received by attorney for trustee in bankruptcy from plaintiff, against whom and two others the estate had a claim, was to be paid to the trustee to be applied on account if the balance of the proposed settlement was not paid, mere bringing of an action by attorney for the trustee against plaintiff and others did not make payment thereafter to trustee of the sum received by attorney from plaintiff wrongful—Bromfield v. Gould, 193 N. E. 796, 289 Mass. 80

Money obtained from court's registry

(1) An attorney is not personally liable to restore to the court's registry money obtained therefrom for his client's benefit under an erroneous order of the court and delivered to the client—Whitehurst v. Owens, 148 So 583, 110 Fla. 113—Holland v McGill, 145 So. 210, 107 Fla. 444, 87 A L R. 171.

(2) And this rule is applicable even though such error was induced by the attorney, provided no fraud or bad faith on his part is shown to have been practiced in connection therewith.—Holland v. McGill, supra.

Evidence insufficient as matter of law

(1) In an action to recover part payments made to attorney for trustee in bankruptcy under an agreed settlement of a claim held by bankruptcy estate, refusal to rule as matter of law that plaintiff was entitled to recover payments under an agreement binding attorney personally to repay to plaintiff money received from him if the balance of settlement was not paid was held not error, where the evidence was susceptible of a contrary finding as to the agreement—Bromfield v Gould, 193 N.E 796, 289 Mass. 80

(2) Where there was evidence that attorney for trustee in bankruptcy in an action brought against plaintiff and two others against whom bankruptcy estate had a claim had given plaintiff proper credit for payments made to attorney, refusal to rule as a matter of law that attorney was liable to plaintiff for the sum received by him because he had failed to give plaintiff proper credit in the action was held not error.—Bromfield v. Gould, supra

Liability of attorney to make restitution on reversal of judgment see Appeal and Error § 1982

7. Keithley v. Foster, 132 Ill App 299—6 C J. p 626 note 99

8. Fowler v. Shearer, 7 Mass. 14—6 C J. p 626 note 1.

9. Ambrose v. Graziani, 247 S W 953, 197 Ky 679.

Return of fee

An attorney who made a settlement on behalf of the next friend of an infant which he knew, or should have known, was not binding, and received the agreed amount, is not entitled, as against the person paying the settlement, to retain his fee for making the settlement after the infant repudiated it, as he had a right to do—Ambrose v. Graziani, 247 S.W. 953, 197 Ky 679

10. Lurie v New Amsterdam Casualty Co, 1 N E (2d) 472, 270 N Y 379, affirming 281 N Y S 988, 245 App Div 710—Gordon v Mankoff, 261 N Y S. 888, 146 Misc. 258

Contract not broken

Where a claim for personal injury has been assigned to an attorney under a contract for a division of the amount recovered, with a stipulation that any money received by the injured person in settlement of such claim should be held as agent for the attorney, an action for maliciously persuading such person to break the contract cannot be maintained against a personal injury adjuster who caused a settlement to be made, where it does not appear that he induced, or persuaded, or attempted to persuade, such person not to hold the money as agent for the attorney—Cameron v. Barancik, 173 Ill App 23

Mistake in rule of damages immaterial

Attorney suing insurance company whose agents wrongfully induced his client to breach contract of retainer has been held not precluded from recovering damages because attorney mistook the rule of damages and asked for an amount equal to the sum received by client by way of settlement, where attorney alleged and

using an attorney's name without authority[11] are liable to the attorney for the damages caused thereby.

§ 54. Assignment as Counsel by Court

Attorney assigned to represent an indigent or absent person has a duty to act and to diligently protect all the rights of such person

Where an indigent or absent person is a party to a suit, the court will ordinarily assign counsel to represent him, and it is the duty of the attorney so assigned to act,[12] and to protect all the rights of the client as fully and to the same extent as if he were employed by the client,[13] generally even without compensation (infra § 172).

§ 55. License Fees and Taxes

A license fee or tax may be imposed on attorneys either as a regulatory measure or as a method of raising revenue.

The requirement of a license fee may be a regulatory measure where its purpose is to fix a standard of learning and character for those desiring to engage in the practice, and to raise funds for carrying out such purpose, with the idea of protecting the public against the consequences of a want of professional qualifications,[14] or it may be merely a method of raising revenue,[15] and all the members of a firm of lawyers must pay the tax.[16] While under some statutes, where an attorney fails to register and pay the fee within the

proved damages, and the measure of damages need not be stated in the complaint when facts are alleged from which the damages can properly be inferred—Lurie v New Amsterdam Casualty Co, 1 N E (2d) 472, 270 N Y. 379, affirming 281 N Y S. 985, 245 App Div. 710.

11. Crane v Heine, 170 P. 433, 35 Cal App 466.

Nominal damages recoverable

Where defendant, without permission, used attorney's name and standing in endeavoring to effect collections by typewriting attorney's signature to collection letters and sending them to the debtors, there was an invasion of the attorney's rights from which the law will presume nominal damages at least, recoverable under Civ Code § 3360—Crane v Heine, 170 P. 433, 35 Cal App. 466

12. U S—Powell v. State of Alabama, 53 S Ct 55, 287 U.S 45, 77 L Ed 158, 84 A L R 527, reversing Powell v State, 141 So 201, 224 Ala 540, certiorari granted Powell v State of Alabama, 52 S Ct 648, 286 U S 540, 76 L Ed 1278, Patterson v State of Alabama, 53 S Ct 55, 287 U S. 45, 77 L Ed 158, 84 A L R 527, reversing Patterson v State, 141 So 195, 224 Ala 531, certiorari granted 52 S Ct. 648, 286 U.S. 540, 76 L Ed 1278, Weems v State of Alabama, 53 S Ct. 55, 287 U S 45, 77 L Ed 158, 84 A.L R 527, reversing Weems v State, 141 So 215, 224 Ala 524, certiorari granted 52 S Ct. 648, 286 U.S. 540. 76 L Ed 1278.

Ga.—Weatherby v Pittman, 101 S E 131, 24 Ga App 452.

6 C J p 627 note 4—16 C J. p 822 note 37.

Appointment of counsel to defend indigent person charged with crime see Criminal Law § 982 [16 C.J p 822 note 35]

13. U S.—Downer v Dunaway, (C C.A.Ga.) 53 F.(2d) 536, conformed (D C) 1 F Supp 1001

Okl.—Noel v. State, 188 P. 688, 17 Okl.Cr. 308.

R I—State v Hudson, 179 A. 130.

Tex—Madero v Calzado, (Civ App) 281 S W 328 (second case)—Lopez v Calzado, (Civ App) 281 S W. 324.

Attorney for indigent is a quasi public official, since he is acting under court appointment, is charged with dual responsibility of faithful discharge of his duties to individual and to state, and he cannot indulge indigent's wishes or pervert a law intended for protection of indigent to his own personal advantage—State v Hudson, (R I) 179 A. 130

Continuance, change of venue, etc.

It is duty of counsel, appointed to represent accused too poor to employ counsel, to make necessary motions for continuance, change of venue, and new trial—Downer v. Dunaway, (C C.A Ga) 53 F (2d) 536, conformed (D C.) 1 F Supp. 1001.

General and special demurrers

Attorney representing an absent party has the duty to test the pleadings by general demurrer and special exceptions—Lopez v. Calzado, (Tex Civ App) 281 S W. 324

Appeal

The right of appeal being a constitutional right, the counsel appointed by the court to defend an indigent defendant fails in his duty when he neglects to take an appeal from a judgment and sentence of death in a homicide case, in view of Rev L (1910) §§ 5968, 6969—Noel v State, 188 P. 688, 17 Okl.Cr 308.

Court directing action

Where attorney appointed to represent an absent party, who had been served by publication, fails to test the pleadings by demurrer and exception, the court should direct his action—Lopez v Calzado, (Tex Civ. App) 281 S W 324

14. Cal—Carpenter v State Bar of California, 295 P. 23, 211 Cal 358
N M.—In re Gibson, 4 P (2d) 643, 35 N.M. 550
N D—Goer v Taylor, 200 N.W. 898, 51 N D. 792
Okl—Kelley v. State Bar of Oklahoma, 298 P 623, 148 Okl 282.
Or—Abraham v. Roseburg, 105 P. 401, 55 Or 359
6 C J p 571 note 57.

Liability as member of bar

State Bar Act has operative effect against practicing attorney as licensed member of bar, rather than as member of any bar association—In re Gibson, 4 P.(2d) 643, 35 N M 550

Statute not invalid as conferring unregulated discretion

State Bar Act is not subject to criticism as conferring unregulated discretion respecting fees and penalties on executive body—Carpenter v. State Bar of California, 295 P. 23, 211 Cal. 358

15. Cal—Ex parte Johnson, 190 P. 852, 47 Cal App. 465.
Nev—Ex parte Dixon, 183 P. 642, 43 Nev 196
Or—Abraham v. Roseburg, 105 P. 401, 55 Or 359
Wash—State v Holmes, 234 P. 275, 133 Wash 543
6 C.J p 571 note 58.

Minimum fee where not engaged in practice

Under an ordinance making it unlawful for any person to engage in any of certain businesses, including the practice of law, without first paying a license fee based on his gross annual income, every attorney must pay at least the minimum fee, although he did not practice during the previous year—Anderson v. City of Birmingham, 33 So. 900, 205 Ala. 604.

Nonresident attorney

Mere incidental practice of a nonresident attorney, in a city which imposed a tax on attorneys, has been held not to render such attorney subject to the tax—City of Texarkana v Taylor, 51 S W (2d) 856, 185 Ark. 1145

16. Blanchard v. State, 11 So 785, 30 Fla 223—6 C J. p 571 note 54 [a].

prescribed time, he loses his right to practice,[17] under other statutes the payment of such a tax is not a condition precedent to the right to practice law.[18]

§ 56. Partnership of Attorneys

a. In general
b. Compensation and division of profits

a. In General

A valid contract of partnership may be made between two or more duly qualified attorneys, and the general principles of the law of partnership are applicable thereto

A valid contract of partnership may be made between two or more duly qualified attorneys,[19] but not between an attorney and a person not admitted to practice.[20] A firm of law practitioners, as such, are regarded as a single entity[21] and the general principles of the law of partnership apply to lawyers with the same force that they do to partnerships engaged in other occupations or professions.[22]

In the absence of a special agreement, each member of the firm assumes the duty of giving to its business all of his time, skill, and ability, as far as reasonably necessary to the success of the common enterprise,[23] and, consequently, in the absence of an express agreement to the contrary any professional services rendered by a member of a firm of lawyers will be presumed to be for the benefit of the firm.[24] Nevertheless a member of a law firm has a right to attend to his individual interests which have no connection with the practice of his profession, and, unless such action so abstracts his attention or absorbs his time as to materially interfere with his professional duties, his partner cannot complain,[25] and fees received by a partner in his individual capacity, and not as an attorney, are not partnership property.[26] However, fees earned by one member under a firm contract belong to the firm,[27] and an award of counsel fees must be considered as being made to the firm.[28]

In an action for damages for the breach of a partnership contract, where the evidence is conflicting, the question as to whether a provision of the contract was breached is for the jury.[29]

The acts and admissions of one member of a firm, made in relation to and in the course of the regular business of the firm, are binding on the firm.[30] However, although there is authority to

17. Ga.—Williams v. Ivey, 169 S.E. 366, 177 Ga. 77
Wash.—Smith v. Kneisley, 49 P.(2d) 916, followed in 49 P.(2d) 918

18. Ft. Worth, etc., R. Co. v. Carlock, 75 S.W. 931, 33 Tex.Civ.App. 202.

19. Amey v. Vermont Products Co., 177 A. 197, 107 Vt. 178.

Absence of provision for sharing losses
An agreement between lawyers handling matters upon an equal division of profits constitutes a partnership notwithstanding the absence of a provision for sharing losses, such provision being implied in the absence of an intent to the contrary —Copeland v. King, 139 So. 221, 224 Ala. 160.

Special partnership
The relationship of attorneys engaged in a common enterprise for mutual benefit amounts to a special partnership.—Dingman v. Henry, 51 App.D.C. 339, 279 F. 795.

No partnership
Where one attorney associates another attorney with him and pays him a salary, pays all the office expenses, etc., it has been held that they were not partners, notwithstanding the letterheads and billheads and the sign on the door indicated that the business was that of a partnership.—Amey v. Vermont Products Co., 177 A. 197, 107 Vt. 178

20. Johnson v. Davidson, 202 P. 159, 54 Cal.App. 251—6 C.J. p. 627 note 8.

Employment of clerk on percentage basis
It is lawful for an attorney to employ a layman to take charge of the management of the work to be done in his office, to the extent of drawing pleadings and other papers, and to agree to pay such person for such services a fixed percentage of the receipts of the attorney from his clients; such an agreement not being one to become partners in the practice of law.—Johnson v. Davidson, 202 P. 159, 54 Cal.App. 251.

21. Henn v. Clifford J. Heath, Inc., 139 A. 406, 101 N.J.Eq. 347, affirmed 141 A. 769, 102 N.J.Eq. 596

22. Dennis v. Seattle First Nat. Bank, 73 P. 1125, 33 Wash. 161.

23. Gratwick v. Smith, 195 N.Y.S. 568, 202 App.Div. 600—6 C.J. p. 627 note 9.

24. Ky.—Charles v. Whitt, 218 S.W. 994, 187 Ky. 77.
N.Y.—Gratwick v. Smith, 195 N.Y.S. 568, 202 App.Div. 600
6 C.J. p. 627 note 10.

25. Rothrock v. Hamlin, 253 P. 1057, 81 Colo. 100—6 C.J. p. 627 note 11.

Burden of proof
(1) The burden of proving the inclusion of fees for nonlegal work by one partner as assets of the firm is on the one so claiming.—Rothrock v. Hamlin, 253 P. 1057, 81 Colo. 100

(2) The burden of proof to show that services were of a professional character and therefore on firm account rests upon the party asserting it.—Brown v. Cragg, 32 N.E. 569, 230 Ill. 299, reversing 129 Ill.App. 597.

26. Dempsey v. McGinnis, 219 S.W. 148, 203 Mo.App. 494.

Acting as receiver on appointment prior to partnership
An attorney who received compensation for services performed as a receiver, received in his individual capacity as a receiver, and not as a lawyer, was not required to divide the fee received with his partner, who became such subsequent to the appointment as receiver.—Dempsey v. McGinnis, 219 S.W. 148, 203 Mo.App. 494

27. Kleinschmidt v. White, 15 P.(2d) 127, 159 Okl. 234.

28. Henn v. Clifford J. Heath, Inc., 139 A. 406, 101 N.J.Eq. 347, affirmed 141 A. 769, 102 N.J.Eq. 596

29. McElroy v. Elledge, (Tex.Civ.App.) 69 S.W.(2d) 109

30. N.Y.—Title Guaranty & Trust Co. v. Maloney, 165 N.Y.S. 280.
Tex.—Robertson v. National Spiritualists' Ass'n of United States of America, (Civ.App.) 25 S.W.(2d) 389.
6 C.J. p. 627 note 13.

the contrary,[31] to work without compensation is not part of the partnership business and one member of the firm cannot bind the firm to do work without compensation.[32] Also, as such a partnership is not one in trade or commerce, one partner has no implied authority to become a party to, or a guarantor of, a negotiable instrument and bind the firm thereby.[33] Indorsees, a firm of attorneys, could not assert claim to a note after conducting suit thereon as attorneys for prior indorsee on the theory that he was the owner.[34]

Notice to one member is notice to all where it relates to the firm business.[35]

Dissolution. A law partnership is dissolved where one of the partners assumed the office of a judge, since thereafter he could not engage in the practice of law,[36] and in accordance with the general rule stated in the title Partnership § 271 [47 C.J. p. 1041 note 96], on the death of a partner the surviving partners become vested with the legal title to the assets of the partnership.[37] The relation of law partners continues, after dissolution of the partnership, as to cases pending at the dissolution.[38]

A payment by one attorney to another to induce the formation of a partnership, such payment to be returned if dissolution of the partnership occurred before a certain date, is recoverable by the first attorney on a termination of the partnership by mutual consent on the formation of a new partnership including another attorney.[39]

b. Compensation and Division of Profits

After payment of the debts of the partnership, each member is entitled to share in the profits; but after dissolution a member has no right to share in fees subsequently earned.

In accordance with the general rule applicable in all cases of partnership, stated in the title Partnership § 94 [47 C.J. p. 786 note 92], there is no implied obligation that, for performing the duty of devoting himself to the firm's business, a partner shall be paid more than his proportionate share of the gains,[40] and, conversely, as long as the firm continues there is usually no deduction because one partner has not been as active as the other.[41] After the payment of debts, for which each partner is liable for his share[42] a partner has the right to share in the profits of the partnership[43] in accordance with the partnership agreement.[44] How-

Acceptance of fee in full

Acceptance of fee by one attorney as compensation in full for attorneys jointly obligated to client was binding upon his associates—Robertson v. National Spiritualists' Ass'n of United States of America, (Tex.Civ.App.) 25 S.W.(2d) 889.

Representation by individual, not by firm

The law partner of attorney of record, who individually represented defendants in error, was not authorized to acknowledge the service of a bill of exceptions, and his acknowledgment did not satisfy the requirement for service upon defendants in error or their counsel of record—Davis v. Gillespie, 181 S.E. 167, 180 Ga. 850.

31. Stone v. Hart, 66 S.W. 191, 23 Ky.L. 1777.

32. Swanson v. Duffy, 269 P. 865, 126 Or. 309.

33. Swanson v. Duffy, supra—6 C.J. 6 p. 628 note 14.

34. First Trust & Savings Bank of Blanchard v. Johnson, 211 N.W. 373, 202 Iowa 799.

35. Wittenbrock v. Parker, 36 P. 374, 102 Cal. 93, 41 Am.S.R. 172, 24 L.R.A. 197—6 C.J. p. 628 note 15.

36. Stuart v. Murray, 202 P. 179, 70 Colo. 449.

37. Dingman v. Henry, 51 App.D.C. 339, 279 F. 795.

38. Creason v. Deatherage, 80 S.W.(2d) 1, 335 Mo. 661.

39. Cole v. Holton, 172 N.E. 858, 272 Mass. 565.

Interest from date of demand

Where partner, under terminated partnership agreement to practice law, was entitled to refund of three thousand dollars, interest was due from the date of demand, being a liquidated sum—Cole v. Holton, 172 N.E. 858, 272 Mass. 565.

Right not waived

That nothing was said, on formation of new partnership to practice law, concerning partner's right to return of sum provided for under previous agreement, did not show waiver thereof—Cole v. Holton, 172 N.E. 858, 272 Mass. 565.

40. U.S.—Consaul v. Cummings, (D.C.) 32 S.Ct. 82, 222 U.S. 262, 56 L.Ed. 192.
Iowa—Roth v. Boies, 115 N.W. 930, 139 Iowa 253.

41. Bettinger v. Goebel, 4 Ohio App. 362—6 C.J. p. 628 note 18.

Equalizing agreement

Where a law partnership was interrupted by the election of a partner to congress, and at the end of a year it was agreed that his absence should be equalized by charging him on the books with one-half of his salary for the year, but there was nothing said as to a continuance of the partnership, and thereafter it was terminated, the charge against him on the books was in settlement of partnership affairs up to that time, and he was not entitled to recover back this amount—Bettinger v. Goebel, 4 Ohio App. 362.

42. White v. Stratton, 3 La.App. 342.

43. Cole v. Holton, 172 N.E. 858, 272 Mass. 565.

Fee allowed copartner as offset for damages

A partner is entitled to his share of a fee allowed a copartner as an offset for damages in a suit in which the copartner was the defendant, notwithstanding such fee was never collected by the firm.—Ganoe v. Ohmart, 246 P. 348, 118 Or. 135.

44. D.C.—Williams v. Foster, 62 App.D.C. 14, 63 F.(2d) 893, certiorari denied 53 S.Ct. 692, 289 U.S. 749, 77 L.Ed. 1494.
La.—Quintero v. Caffery, 108 So. 87, 160 La. 1054.
W.Va.—Cunningham v. Madden, 175 S.E. 446.

Percentage of net fees

(1) Under an agreement giving the partners certain percentages of the receipts after the deduction of current expenses, such expenses should be deducted from the gross income and then the net income apportioned and such expenses should not be divided on the same percentages as the net income.—Cunningham v. Madden, (W.Va.) 175 S.E. 446.

(2) An attorney dividing a fee received for services, including the refinancing of a loan, with a lending association's officer who guaranteed repayment of the new loan, has been held accountable to his partner only

ever, a partner who declares he has no faith in a client's claim and refuses to take part in the prosecution of the suit or to become liable for any expenses in connection therewith, waives and abandons his right to share in any fees recovered therein,[45] and is estopped to assert any interest in lands subsequently acquired by his copartner in payment of such fees,[46] and a partner, who testified against his firm's right to recover for legal services, has been held estopped to claim a share of the fees recovered.[47]

After dissolution of firm. While the general rule is that upon the dissolution of a firm each member is obliged to perform what work may be necessary for closing out the business without other compensation than his share of the profits,[48] even where the firm is dissolved by the death of a member,[49] there are, nevertheless, exceptions to this rule;[50] and, where the circumstances are such as to render it equitable, extra compensation in the nature of salary, or an increased apportionment of profits, may be awarded to one partner.[51] Thus where a law firm is dissolved with cases yet untried the active partner who undertakes to finish the work is entitled to extra compensation for his labor.[52]

Where one member of a law firm has withdrawn, a contract of employment of such firm is of a divisible nature, under which a recovery may be had for services of which the client has already had the benefit,[53] but, although there is authority to the contrary,[54] such withdrawing partner can have no interest in fees for services rendered by the remaining member of the firm after the dissolution in cases commenced either before[55] or

for the portion of the fee actually retained by him—Clanton v Perry, 33 S W (2d) 364, 182 Ark 1184

Pooling arrangement of a partner with an outside attorney, associated with the firm in a particular case, for the division of fees of a particular case between them is not invalid as to the copartners having full knowledge thereof—Quintero v Caffery, 108 So 87, 160 La. 1054

Fee provision in agreement compromising case

Law partners, accepting compromise agreement and claiming interest in contingent fee, are bound to accept provision therein for special fee to member of firm and are not entitled to any interest therein—Quintero v. Caffery, 108 So. 87, 160 La. 1054.

45. Gillett v Hudspeth, (Tex Civ App.) 233 S W. 850, error refused

46. Gillett v. Hudspeth, supra.

Evidence of copartner's expenditures

In an action by an attorney against a former partner to recover an interest in lands acquired under a contract with a client for the payment of attorney's fees from moneys, goods, and other property recovered in a suit, evidence of expenditures incurred by defendant in prosecuting such suit was admissible; they being proper credits in case it was held the contract conveyed an interest in lands and that plaintiff was not estopped to assert his claim.—Gillett v. Hudspeth, (Tex Civ App) 233 S.W 850, error refused.

Authority to manage suit is question for jury

In an action by an attorney to recover from a former partner an interest in land acquired as fees under a contract with a client, the court did not err in submitting to the jury questions as to whether plaintiff authorized defendant to manage the litigation; they being material on the question of whether defendant's expenditures were properly chargeable against the partnership—Gillett v Hudspeth, (Tex Civ App) 233 S W 850, error refused

47. Houghton v Thomas, 221 N Y S 630, 220 App Div. 415, motion denied 159 N E 641, 246 N Y. 535, affirmed 162 N E 509, 248 N Y 523, motion denied 162 N E. 537, 248 N Y 591.

48. Cunningham v. Madden, (W.Va) 175 S E 446—6 C J p 628 note 19

49. Consaul v. Cummings, (D C) 32 S Ct 83, 222 U.S 262, 56 L Ed. 192—6 C J. p 628 note 20

50. Stuart v. Murray, 202 P 179, 70 Colo. 449—6 C J. p 628 note 21

Distinction as to professional partnerships

The reasons upon which is based the rule that the surviving partner must close the business of the firm without charge therefor cannot apply in a case where a member of a professional partnership voluntarily quits the firm. When he leaves the firm he withdraws from it all that he had therein, except as to accounts for past business of the firm This exception to the general rule is founded on reason, and is supported by the authorities—Stuart v. Murray, 202 P 179, 70 Colo. 449—6 C J. p 628 note 21 [a].

51. S C—Carrere v. Whaley, 17 S C. 595.
W Va—Cunningham v. Madden, 175 S E 446
6 C J. p 628 note 22.

52. Cunningham v Madden, supra—6 C J. p 628 note 23.

Reasonable worth

The partner who performs material personal services, not in mere winding up, but in carrying on the unfinished business of the firm, is entitled to receive the reasonable worth of those services—Cunningham v. Madden, (W Va) 175 S.E. 446.

53. Schulder v Ellis, 286 P 620, 75 Utah 432—Schulder v Dickson, 243 P 377, 66 Utah 418—6 C J. p 628 note 24.

Where fee contingent

While a partner's liability to a dissolved partnership, contingent on pending litigation, cannot be treated as a distributable asset, a decree in an action for an accounting should not prejudice the copartner's right therein—Cole v Holton, 172 N E 858, 272 Mass 565

54. Cunningham v Madden, (W.Va) 175 S E 446—47 C J. p 1165 note 55.

Fee, less value of services, as firm asset

While the partner who performs material personal services in carrying on the unfinished business of the firm is entitled to receive the reasonable worth of those services, the balance of the fee that the services yield are to be treated as partnership assets—Cunningham v. Madden, (W Va) 175 S.E 446.

55. Colo—Rothrock v. Hamlin, 253 P. 1057, 81 Colo 100.
Wis—Puffer v. Merton, 170 N.W. 368, 168 Wis. 366, 5 A.L.R. 1238.
6 C J. p 629 note 25.

Value to client, not to firm

Law partner, completing services begun before voluntary dissolution, may collect and retain their value to client, not merely their value to the firm.—Rothrock v. Hamlin, 253 P. 1057, 81 Colo. 100.

No recovery on basis not pleaded

Lawyer, praying recovery from former partner on the basis of pro-

after such dissolution,[56] in the absence of an agreement to the contrary.[57] Nor is the retiring partner chargeable, after the dissolution, with any of the expenses of the firm in prosecuting cases commenced before the partnership was dissolved,[58] and money afterward collected by him or paid to him by his former partner as his share of the fees earned after the dissolution of the partnership in cases commenced before the dissolution cannot be recovered by the partner in an action for an accounting.[59] While advances made to clients, plus fees collected, prior to the dissolution of the partnership, are partnership assets to which each partner is entitled proportionately,[60] and the obligation of a partner to a dissolved partnership for services rendered by the firm to him should be treated as an asset for which he should account,[61] a partner has no ascertainable interest in a partnership asset until there has been an accounting.[62] Although an attorney is entitled to share in fees received by his partner in connection with pending business, especially where the claimant continued to render services in such case,[63] a continuing partner, purchasing a claim pending on a contingent fee, need account to the retiring partner only for the agreed compensation on such claim and not for the profits thereon.[64] However, an attorney is not entitled to share in fees received by his former partner for services rendered under a new and distinct employment,[65] and the estate of a deceased partner is not entitled to share in the increased fee of the continuing partner obtained by him through an assignment by an associate counsel retiring from the case, the assignment not being made to the firm.[66]

Under an agreement providing that in case of dissolution of the firm, certain partners are to have no interest in the outstanding accounts, it has been held that the provision refers to a voluntary dissolution and not to one occurring by reason of the death of one of the partners.[67]

Agreement on dissolution. If a fair and reasonable agreement settling the rights of the partners has been made the courts will recognize and enforce it,[68] and one suing to set aside a settlement

portion of services before and after dissolution, cannot recover a share of the profits exceeding the value of his services to the firm—Rothrock v Hamlin, 253 P 1057, 81 Colo 100

56. Isenhart v. Hazen, (Kan App) 63 P 451

57. Williams v Danson, 262 P 930, 146 Wash 358—Gray v Stern, 149 P 26, 85 Wash 645.

Accounting required

A continuing law partner cannot avoid accounting, under the dissolution contract, for fees in a case which the retiring partner was to conduct, on the theory that the brief written before dissolution by the retiring partner became the continuing partner's property—Gray v Stern, 149 P 26, 85 Wash. 645.

Not entitled to greater share of fees

Where an agreement of dissolution provided that the fees on unfinished business should be divided on the former ratio, the retiring partner is not entitled to a greater share of such fees because under the original partnership he was entitled to a certain allowance at stated intervals before any division of the earnings was made between the partners, his rights being dependent on the dissolution agreement which made no provision therefor—Williams v Danson, 262 P 930, 146 Wash 358

58. Isenhart v. Hazen, (Kan App) 63 P. 451.

59. Isenhart v Hazen, supra.

60. Levinson v Vanderveer, 13 P (2d) 448, 169 Wash. 254.

61. Cole v Holton, 172 N E 858, 272 Mass 565

62. In re Durant's Estate, 215 N W. 584, 194 Wis 275

Action to establish trust not maintainable

An attorney's petition to establish an equitable trust in the assets of his deceased former partner's estate will be dismissed where brought before an accounting of the partnership has been had—In re Durant's Estate, 215 N W. 584, 194 Wis. 275

63. Creason v. Deatherage, 30 S W. (2d) 1, 325 Mo 661

Fees increased after dissolution by agreement of client with other partner

Where law firm agreed to conduct cases on contingent fee, a partner who continued to work thereon was entitled to share in increased fees, although the agreement allowing increased fee was entered into solely with the other partner after dissolution—Creason v Deatherage, 30 S W (2d) 1, 325 Mo. 661.

Judgments collected after partner's death

Member of law firm conducting cases on a contingent fee had an equitable claim to his share of fees realized on judgments collected after partner's death—Creason v. Deatherage, 30 S W.(2d) 1, 325 Mo 661

64. Gray v Stern, 149 P. 26, 85 Wash 645.

65. Cal—Heer v Moran, 277 P 149, 93 Cal App 430
Utah—Schulder v Ellis, 243 P. 391, 66 Utah 453—Schulder v. Dickson, 243 P 377, 66 Utah 418.
W Va—Cunningham v. Madden, 175 S E 446.

Evidence of subsequent profits excluded

In a suit for an accounting under a partnership agreement to practice law, evidence of partner's profits subsequent to the termination of the partnership was held properly excluded—Cole v Holton, 172 N E 858, 272 Mass 565.

As commissioner in chancery

Fees earned by law partner as commissioner in chancery after dissolution of the partnership were held not partnership assets in an accounting proceeding—Cunningham v Madden, (W Va.) 175 S E 446.

Statement by one member not binding

A statement by one retiring partner to another that the latter would share in the fees paid for litigation then pending is not binding on the other members of the partnership—Schulder v. Dickson, 243 P. 377, 66 Utah 418.

66. Macpherson v. Bacon's Ex'r, 203 S W. 744, 180 Ky. 773.

67. Puffer v. Merton, 170 N.W. 368, 168 Wis 366, 5 A.L R 1288

68. Cal—Heer v Moran, 277 P. 149, 93 Cal App 430
Wash—Gray v. Stern, 149 P. 26, 85 Wash 645
6 C J p 629 note 29.

Failure of consideration

(1) In attorney's action against another attorney on a contract pro-

has the burden to establish his right to an accounting,[69] and in a suit for discovery and accounting of fees under a legal partnership, the burden of proof is on the plaintiff.[70]

Illegal contracts. Equity will not decree an accounting between the partners of a law firm of fees realized on a contingent fee basis from cases obtained through the efforts of a layman employed by the firm to solicit personal injury cases, since the method by which the cases were obtained is contrary to legal ethics and public policy,[71] and a member of a firm, who became such by reason of helping to obtain the retainer of one of the members of the firm by a county and was promised a share of the profits, has been held not entitled to recover a share of the profits received by the firm after he severed his connection therewith, the securing of such contract not being a legal consideration for the promise to give him a share of the profits.[72]

§ 57. Attorneys' Clerks and Agents

An affidavit of the clerk of an attorney is insufficient as the foundation of a motion, no excuse being offered for its not being made by the attorney. A law clerk, suing for compensation, has the burden of establishing his right thereto.

It has been held that an affidavit of the clerk of an attorney is insufficient as the foundation of a motion, where no excuse is offered for its not being made by the attorney.[73]

Compensation. In an action to recover compensation for services as a law clerk, plaintiff must establish a contract, the performance of the services contemplated thereby, and nonpayment therefor;[74] and where some of the services were of a clerical nature and others constituted a practice of the law, the burden is on the clerk to segregate them.[75] While in accordance with the general rule (infra § 165), a law clerk is not entitled to recover additional salary for work done in connection with the deceased attorney's estate at the request of his representative where it constituted practice of the law,[76] the defense that the clerk was disqualified to perform some of the services rendered to the attorney's clients because not admitted to practice law is not available to the representative of the deceased attorney in an action by the clerk to recover extra compensation in accordance with his contract of employment.[77]

§ 58. Regulation of Professional Conduct

Attorneys are subject to the supervision and control of the courts, and it is within the power of the legislature to enact reasonable measures for the regulation of their professional activities.

An attorney is bound to conduct himself with integrity and professional decorum,[78] and as the practice of the law is affected with a public interest, it is the right and duty of the state to regulate and control it so that the public welfare will be served and promoted,[79] and the legislature

viding that, if plaintiff did not return to China, defendant would pay to plaintiff six-tenths of profits accruing after certain date until certain sum should be paid and that entire law practice should then be defendant's, defendant could not claim lack of consideration where defendant admitted that plaintiff did not return to China and that defendant practiced under the firm name after such date and made profits.—Chalaire v Franklin, (C C A China) 81 F (2d) 105.

(2) In attorney's action against another attorney on a contract whereby defendant agreed to pay to plaintiff six-tenths of profits accruing from law practice after certain date until certain sum should be paid and that thereafter entire law practice should be defendant's, plaintiff's alleged failure to keep his promise to secure in the United States legal business and send it to defendant in China constituted only a partial failure of consideration, which was not a defense.—Chalaire v Franklin, supra.

69. Heer v Moran, 277 P. 149, 98 Cal App 430

Evidence

(1) Evidence sustained finding that settlement between law partners was entered into voluntarily and without fraud.—Heer v Moran, 277 P. 149, 98 Cal App 430.

(2) Finding that partners on dissolution of law partnership agreed to wind up the business and divide the fees in accordance with a partnership agreement, was sustained by the evidence.—Schulder v. Dickson, 243 P. 377, 66 Utah 418.

(3) Evidence was held not to establish a charge of fraud against the withdrawing law partner in concealing collection of large sums for legal services.—Houghton v. Thomas, 221 N.Y.S. 630, 220 App Div 415, motion denied 159 N.E. 641, 246 N.Y 535, affirmed 162 N.E. 509, 248 N.Y 523, motion denied 162 N.E. 537, 248 N.Y 591

(4) Evidence was held sufficient to support findings that there had been a full and complete accounting and settlement between the partners on all matters in which they were jointly interested.—Diesen v. Cox, 238 N W 785, 184 Minn 400.

70. Matson v. Rusch, 61 App.D C 184, 59 F (2d) 360

71. Thatcher v Meck, 195 N.E 254, 49 Ohio App 92.

72. Jamieson v. Iles, 219 Ill App 432

73. Chase v Edwards, 2 Wend (N Y) 283.—Jackson v Woodworth, 3 Cai (N Y) 136.—6 C J. p 629 note 39

74. Ferris v. Snively, 19 P (2d) 942, 172 Wash. 167, 90 A L R 278.

Construction of contract

Attorney's agreement to pay a law clerk part of probate fees collected in excess of a stated sum at the end of each year was held to contemplate payment thereof when computations, no matter when made, disclosed the fees received exceeding such sum in any year.—Ferris v. Snively, 19 P (2d) 942, 172 Wash. 167, 90 A L R. 278.

75. Ferris v. Snively, supra.

76. Ferris v. Snively, supra.

77. Ferris v. Snively, supra.

78. Youngentob v. Luongo, 249 N Y S 415, 139 Misc. 840.

79. Rhode Island Bar Ass'n v. Au-

may enact reasonable measures for the regulation of the activities of the members of the legal profession.[80]

Also, attorneys are subject to the supervision and control of the courts[81] and the power of the court to make reasonable rules and regulations regarding the conduct of attorneys is not open to question.[82] It is the duty of the courts to see to it that attorneys live up to their high obligations,[83] and to see that the profession is confined to professional service, by professional means, and to lend no sanction to unprofessional service,[84] and it has been held the inherent duty of all courts to support the ethical standing of the bar by impressing upon its members the duty of holding sacred that confidence which should and must ever exist between attorney and client.[85]

The canons of ethics adopted by a bar association, while they do not have the effect of statutes,[86] are binding on attorneys.[87] The authority of the canons of ethics is derived, not from the fact that they are approved by the bar associations, but because they are statements of principles and rules accepted and acknowledged by reputable attorneys and are recognized and applied by the courts in proper cases.[88]

Particular conduct unethical. Various acts and conduct on the part of attorneys have been held to be unethical or improper.[89]

tomobile Service Ass'n, (R.I.) 179 A. 139.

80. N.M.—In re Gibson, 4 P.(2d) 643, 35 N.M. 550.
Wis.—In re Maresh's Will, 187 N.W. 1009, 177 Wis. 194.
Statute held not invalid.—State Bar of California v. Jones, 280 P. 964, 208 Cal. 240.

81. U.S.—The Penn Fuel, (D.C.N.Y.) 36 F.(2d) 272.
Fla.—Gould v. State, 127 So. 309, 99 Fla. 662, 69 A.L.R. 699.
Ill.—People v. People's Stock Yards State Bank, 176 N.E. 901, 344 Ill. 462.
Iowa.—In re Cloud, 250 N.W. 160, 217 Iowa 3.
N.Y.—In re Brooklyn Bar Ass'n, 227 N.Y.S. 666, 233 App.Div. 149.—In re Wellington's Estate, 289 N.Y.S. 1005, 160 Misc. 383, denying modification 276 N.Y.S. 946, 154 Misc. 271.
Okl.—In re Shoemake, 31 P.(2d) 928, 168 Okl. 77.
Pa.—Childs v. Smeltzer, 171 A. 883, 315 Pa. 9.
Wis.—In re Maresh's Will, 187 N.W. 1009, 177 Wis. 194.
Attorneys, by becoming members of the bar, submit themselves to the control of the court in so far as their professional activities are concerned.—The Penn Fuel, (D.C.N.Y.) 36 F.(2d) 272.
Advertising easy divorces.
Statute prohibiting lawyers from advertising facilities for procuring divorces, unless lawyers are licensed and sign full name to the advertisement, does not require such advertising, but recognizes the courts' power to regulate the professional conduct of the bar members and seeks to protect the courts and members.—Givens v. Tampa Bar Ass'n, (Fla.) 169 So. 744.

82. Barton v. State Bar of California, 289 P. 818, 209 Cal. 677.
Rules of conduct formulated by the board of governors of the state bar on approval of the supreme court thereby become the rules of that court.—Barton v. State Bar of California, 289 P. 818, 209 Cal. 677.

83. In re Strandburg's Estate, 247 N.Y.S. 194, 138 Misc. 733, modified on other grounds 248 N.Y.S. 164, 138 Misc. 859.
Sharp practices not tolerated.
Sharp practices whereby one attorney obtains an unfair advantage over another attorney should not be tolerated in the courts.—Corson v. Corson, 169 S.E. 567, 160 Va. 552.
Power of appellate court.
Appellate court has no way of punishing lawyers who do not properly take care of the interests of their clients, and who may fail to present proper bills of exception or to have statements of fact filed in time.—Taylor v. State, 31 S.W.(2d) 1072, 116 Tex.Cr. 641.

84. Rodenfels v. Stroemer, 248 N.W. 442, 211 Wis. 536.

85. In re Sirelow's Estate, 220 N.W. 251, 117 Neb. 168.

86. People v. Gilmore, 177 N.E. 710, 345 Ill. 28.

87. In re Opinion of the Justices, (Mass.) 194 N.E. 313.

88. Hepp v. Petrie, 200 N.W. 857, 185 Wis. 350.

89. **Particular acts held unethical or improper.**
(1) Accepting retainers through a legal aid department of a labor union.—In re Rule 28 of Cleveland Bar Ass'n, 29 Ohio N.P.(N.S.) 291.

(2) Ambulance chasing.—Weinard v. Chicago, M. & St. P. Ry. Co., (D.C. Minn.) 298 F. 977.—Chunes v. Duluth, W. & P. Ry. Co., (D.C.Minn.) 298 F. 964.

(3) Asking prejudicial questions in expectation of an unfavorable answer.—Busch v. Louisville & N.R. Co., 17 S.W.(2d) 337, 322 Mo. 469, certiorari denied Louisville & N.R. Co. v. Busch, 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

(4) Assailing integrity of adverse party's attorney in a brief without justification.—Youngentob v. Luongo, 249 N.Y.S. 415, 139 Misc. 840.

(5) Champerty, maintenance, ambulance chasing, and solicitation of business by attorneys.—In re ———, 290 N.Y.S. 277.

(6) Commencing several actions on the same cause of action in different places.—Savarin v. Union Pac. R. Co., (D.C.Minn.) 292 F. 157.

(7) Conducting a collection agency in different states where he is not authorized to practice law and using a letter head calculated to create the impression that he maintains offices as an attorney in the places mentioned.—Application of J. W. Rowe Co., 181 N.Y.S. 87, 191 App.Div. 179.

(8) Extravagant statements by attorney to parties to action, whereby he secured retainer in a case already in the hands of reputable attorney, who was properly conducting the case, show indifference to established professional standards prescribed by the oath of attorney.—Hepp v. Petrie, 200 N.W. 857, 185 Wis. 350.

(9) Representing adverse interests is unethical.—Lubell v. Barend, 134 A. 358, 99 N.J.Eq. 631, reversed on other grounds Weanthal v. Barend, 141 A. 750, 102 N.J.Eq. 591.

(10) Stirring up litigation in which he has no interest except the possibility of fees.—Ellis v. Frawley, 161 N.W. 364, 165 Wis. 381.

(11) Attorneys seeking the revocation of a judge's admission to practice because of alleged fraud violate their duty of respect to the courts by failing to dismiss such petition on receipt of information indicating the right of such judge to practice.—In re Pearis, 252 P. 745, 80 Cal.App. 672.

(12) It is improper for an attorney for the defendant in an action for specific performance of a sale contract to take a conveyance of the realty before trial and after the lis pendens was filed.—Goldberg v. Levy,

§ 59. Offenses in Exercise of Professional Functions

While an attorney is not criminally responsible for honestly giving mistaken advice on doubtful questions, misconduct of an attorney is sometimes made a criminal offense by statute.

While an attorney is not criminally responsible for honestly giving mistaken advice on doubtful questions of law,[90] in some jurisdictions, by virtue of statutes, it is made a criminal offense for an attorney to advertise for divorce business, and such a statute is not invalid,[91] and may be violated without a direct offer to procure divorces or to act as attorney in a divorce suit.[92] Also, it has been made a criminal offense for an attorney to refuse to pay over money collected by him,[93] to agree to pay a witness a sum of money for his testimony provided the attorney wins his case,[94] or to be guilty of any deceit or collusion with intent to deceive the court or any party.[95] An attorney may also be guilty of blackmail in sending a threatening or abusive letter, and the fact that the letter is sent in an effort to collect an account does not make it privileged,[96] and an attorney who conspires with his client to commit a violation of the law, or advises and directs his client in such an act, is equally guilty with him.[97] The question as to an attorney being guilty of contempt because of continuing to practice after suspension or disbarment (supra § 40) or for acting as bail (supra § 45) is treated elsewhere in this title. Attorneys at law must maintain a high standard of honesty, but they are entitled to a fair trial when accused and cannot be convicted except according to the established rules of procedure and the law in such cases made and provided.[98] The principle that an attorney at law has the right to speak and act on information furnished by his client, and may claim immunity in the exercise of such right, applied in the title Libel and Slander § 104 [36 C.J. p 1256 notes 4-7, p 1257 notes 8-16], cannot be used as a shield against crime.[99] An attorney charged with a criminal offense must be proven guilty beyond reasonable doubt, regardless of the right of court to discipline him.[1]

§ 60. Bar Associations

A statute creating a state bar association is not invalid.

A statute creating a state bar has been held not invalid,[2] and to leave membership in the bar association optional with the individual attorney.[3] Statutory provisions relative to qualifications for membership in a state bar board of governors must be complied with.[4]

Judges of a court of record, during their continuance in office, have been held not subject to the jurisdiction, control, and processes conferred on a state bar association.[5]

134 A. 853, 99 N.J.Eq. 634, affirmed 137 A. 917, 101 N.J.Eq. 293.

(13) It is unethical for an attorney holding a license to practice in a lower court to give advice on matters that cannot arise in such court without disclosing his professional limitations.—In re Trask, 30 Hawaii 736.

(14) Where adverse interest exists between accounting party and rights of infant, attempt of attorney for the accounting party to accelerate the nomination of a special guardian is unethical and in derogation of the infant's rights, and the conduct of an attorney, who accepts the recommendation of the accounting or other adverse party, or his attorney, and seeks to obtain the appointment as special guardian, is unethical.—In re Wechsler's Estate, 273 N.Y.S. 968, 152 Misc. 564.

Improper division of fees

(1) It is unethical for an attorney licensed to practice in all courts to divide with a lower court practitioner fees from clients brought by the latter.—In re Trask, 30 Hawaii 736.

(2) It is unethical for the lower court practitioner to accept such a division of fees.—In re Trask, supra.

Whether counsel may or should furnish security for costs in a pending action is a matter of ethics and not of law.—In re Cleveland Discount Co., (D.C.Ohio) 9 F.(2d) 97.

90. People v. Kresel, 277 N.Y.S. 168, 243 App.Div. 127.

91. State v. Giantvalley, 143 N.W. 730, 123 Minn. 227.

92. State v. Giantvalley, supra.—6 C.J. p. 629 note 44.

93. Hall v. Eary, 170 S.E. 904, 114 W.Va. 82.—6 C.J. p. 629 note 45.

94. State v. Clopton, 15 Mo.App. 539.

95. People v. Oishei, 45 N.Y.S. 49, 20 Misc. 163, 12 N.Y.Cr. 362.

96. Ala.—Peters v. State, 51 So. 953, 166 Ala. 35.
N.Y.—People v. Wickes, 93 N.Y.S. 163, 112 App.Div. 39, 20 N.Y.Cr. 9.

97. Goodenough v. Spencer, 2 Thomps. & C. (N.Y.) 503, 15 Abb.Pr. (N.S.) 243, 46 How.Pr. 347.

98. People v. Ehle, 112 N.E. 970, 273 Ill. 424.

99. People v. Donahoe, 198 Ill.App. 1, affirmed 117 N.E. 105, 279 Ill. 411.

1. Abrams v. State, 170 N.E. 188, 34 Ohio App. 13.

2. State Bar of California v. Jones, 280 P. 964, 208 Cal. 240.

3. In re Gibson, 4 P.(2d) 643, 35 N.M. 550.

4. Solon v. State Bar of California, 24 P.(2d) 770, 218 Cal. 752.

Place where office maintained

Statute was held to require that newly elected member of the state bar board of governors maintain a law office outside the city in which a holdover member, representing the same district, maintained an office.—Solon v. State Bar of California, 24 P.(2d) 770, 218 Cal. 752.

5. State Bar of California v. Superior Court in and for Los Angeles County, 278 P. 432, 207 Cal. 323.

III. RETAINER AND AUTHORITY

A. RETAINER

§ 61. Definition and Nature

"Retainer" is the act of a client by which he employs an attorney to manage for him a cause to which he is a party, or otherwise to advise him as counsel

"Retainer" has been defined as the act of a client by which he engages an attorney to manage for him a cause in which he is a party, or otherwise generally to advise him as counsel,[6] and as the securing of an attorney at law to perform professional services in the business of another, in such manner that he cannot engage himself to, or perform any service in the employment in the interest of, the opposing party, or in any manner do anything in the business prejudicial to the party employing him.[7] The word is also used to denote the fee which the client pays his attorney when he retains him,[8] that is, the retaining fee.[9]

General retainers have for their object the securing beforehand of the services of a particular attorney or counselor for any emergency that may afterward arise, they have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable; counsel thus retained is not at liberty to accept employment or render service adversary to the interest of the client retaining him.[10]

A special retainer has reference to a particular case, or to a particular service; it, however, imposes obligations, pro hac vice, equally binding with those enjoined by a general retainer; it forbids the acceptance of adversary employment, or the performance of adversary services.[11]

§ 62. Necessity of Retainer

a. In general
b. Community of interest and joint parties

a. In General

In general, an attorney may not appear for a person until he is in fact employed by, or retained for, such person.

Every attorney regularly licensed and duly admitted to practice possesses a general license to appear in court for any suitors who may retain him, but his license is not of itself an authority to appear for any particular person[12] until he is in fact employed by, or retained for, such person.[13] In other words, the relation of attorney and client commences from the date of the employment of the attorney; that is, from the time when the agreement or contract by which the attorney is retained is consummated.[14]

b. Community of Interest and Joint Parties

While the fact that a community of interest exists does not of itself authorize an attorney to act for a person who is not his client, yet where there are joint parties, an attorney who appears for one is sometimes regarded as acting for all.

While an attorney has no right to act as attorney for a person who is not his client, even though there may be a community of interest,[15] where there are several joint defendants, and an attorney appears in the case, he is usually supposed to act for all,[16] except when one of the joint defendants has not been served with process.[17] Furthermore, where plaintiff in a cause has authority to join

6. Saulsbury v American Vulcanized Fibre Co, 91 A 536, 541, 5 Boyce (Del) 182

Similar definitions
Ala.—Agnew v Walden, 4 So. 672, 673, 84 Ala 502
Cal.—Knight v Russ, 19 P 698, 699, 77 Cal 410
Ga.—Pickens Co v Thomas, 111 S.E 27, 152 Ga 648, 21 A.L.R 1438, answers to certified questions conformed to 111 S E 739, 28 Ga.App 434
Kan.—Blackman v. Webb, 17 P. 464, 38 Kan 668
Ky.—Bright v Turner, 265 S W 627, 205 Ky. 188
Mass.—Blair v. Columbian Fireproofing Co, 77 N E 762, 763, 191 Mass 333.
6 C J p 630 note 50.

7. Kelley v Richardson, 37 N.W. 514, 528, 69 Mich. 430.

8. Ga.—Pickens Co v Thomas, 111 S E 27, 152 Ga 648, 21 A L R 1438, answers to certified questions conformed to 111 S E 739, 28 Ga App 434.
Ill.—Union Safety, etc, Co v. Tenney, 65 N E 688, 690, 200 Ill. 349.

9. Bouvier L D.
Considered as compensation see infra § 162.

10. Agnew v. Walden, 4 So 672, 673, 84 Ala. 502.

11. Agnew v. Walden, supra.

12. Batesville Bank v Maxey, 88 S. W. 968, 76 Ark. 472—6 C J. p 630 note 53

13. U S.—Starrett Corporation v. Fifth Ave. & Twenty-Ninth St. Corporation, (D C N Y) 1 F.Supp. 868.
Ill.—Scharlau v. Lombard State Bank, 278 Ill App 504.
Miss.—Hirsch Bros & Co v. R E. Kennington Co, 124 So 344, 155 Miss 242, 88 A.L.R. 1
6 C.J. p 630 note 54.

14. Dentzel v City, etc, R Co, 45 A 201, 90 Md. 434—6 C J. p 630 note 55.

15. Silverman v. Greaser, 27 W Va. 550—6 C J. p 630 note 56

Life tenant and tenant in common
In a proceeding for the condemnation of land, the attorney for the life tenant had no authority to bind the owner of the "fee-simple estate"—Arnold v. Fort Worth & D S. P. Ry. Co, (Tex Civ.App) 8 S W.(2d) 298.

16. Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am D. 56—6 C.J. p 630 note 57.

17. Tex.—Miller v. Alexander, 8 Tex. 36.
Vt.—Whitney v. Silver, 22 Vt. 634.

another person as coplaintiff, no authority to counsel to represent such person need be shown [18]

§ 63. —— Right of Litigant to Act in Person or by Attorney

A party to an action is entitled either to act as his own attorney or to have as his representative an attorney of his own choice or selection.

A party to an action may appear either in person or by an attorney, as explained in § 2 of the title Appearances, and he may act as his own attorney,[19] that is, he may manage, prosecute, or defend in person a suit to which he is a party,[20] even though, as explained above in § 16, he has not been admitted to practice law. Where a statute permits a party to appear either by himself or by attorney, it is not permissible to deny such party the right to prosecute an action in person and to compel him to employ counsel.[21]

The rule that a person who is a party to a suit may act as his own attorney does not authorize a person who owns all the capital stock of a corporation to act as attorney for such corporation in a suit to which it is a party, since the corporation is a distinct legal entity.[22] Furthermore, there is authority for the view that an executor, administrator, or guardian, as such, has no right to conduct proceedings in a probate court, except as to matters personal to himself as representative [23]

In general, a litigant is entitled to be represented by an attorney[24] of his own choice or selection.[25] The denial of the right of an attorney selected by a party to appear generally and to represent such party, on the ground that such right had been lost by undertaking to appear specially and to remove the cause to the federal court, has been regarded as a denial of such party's right to be heard through counsel of his own choice,[26] and in such case the court has no authority to appoint counsel not of such party's own choice to represent such party, under a statute authorizing the appointment of attorneys for nonresidents and others who are unrepresented.[27] The right of a so-called warning order attorney, appointed for a nonresident defendant on an original petition, pursuant to statute, to represent such defendant in connection with a cross-petition against such defendant by a codefendant has been denied in the absence of such attorney's appointment as attorney on the cross-petition [28] The right of a party who has appeared in propria persona subsequently to associate with himself an attorney in the conduct of the case has been recognized [29]

Questions as to the representation of accused by counsel, and as to the assignment of counsel, in a criminal case are considered in §§ 978–982 of the title Criminal Law [16 C.J. p 820 note 11–p 823 note 48].

A contract whereby one not licensed to practice law undertakes for a pecuniary consideration to perform services which, properly and legally, may be performed by a licensed attorney is illegal and

18. Union Naval Stores Co. v. Pugh, 47 So. 48, 156 Ala. 369.

19. Cal.—Culley v. Cochran, 290 P. 484, 107 Cal.App. 525
N.Y.—People v. James, 269 N.Y.S. 626, 150 Misc. 390.
N.C.—Abernethy v. Burns, 173 S.E. 899, 206 N.C. 370.
Wash.—Americus v. McGinnis, 221 P. 987, 128 Wash. 28.

Intervening party

A person who had been notified by defendant in an action of the bringing of the action, had been authorized by defendant to conduct the defense, had been authorized by an order of court to intervene, and would be bound by any judgment in the action, was the real party in interest and was entitled to conduct the defense in person where he had filed a pleading in intervention.—Culley v. Cochran, 290 P. 484, 107 Cal.App. 525.

Status of party acting as own attorney

A layman with resources who insists on exercising his privilege of representing himself must expect and receive the same treatment as if he were represented by an attorney.—Ackerman v. Southern Arizona Bank & Trust Co., 7 P.(2d) 944, 39 Ariz. 484

20. Cal.—Philbrook v. Superior Court of City and County of San Francisco, 43 P. 402, 111 Cal. 31
Iowa.—Arthaud v. Griffin, 210 N.W. 540, 202 Iowa 462
Mass.—In re Opinion of the Justices, 194 N.E. 313.

Right of client to act in person after attorney has been employed see infra § 80.

21. Abernethy v. Burns, 173 S.E. 899, 206 N.C. 370.

22. Cary & Co. v. F. E. Satterlee & Co., 208 N.W. 408, 166 Minn. 507

Person no longer attorney at law

In reaching the above conclusion the court pointed out that the person who sought to act as attorney for the corporation was no longer an attorney at law.—Cary & Co. v. F. E. Satterlee & Co., 208 N.W. 408, 166 Minn. 507.

23. In re Otterness, 232 N.W. 313, 181 Minn. 254, 73 A.L.R. 1319.

24. Wheatland v. Maloney, 294 P. 499, 110 Cal.App. 288.

Not bound to appear and prosecute case

Plaintiff is not legally bound to appear and prosecute his case, but has the right to prosecute it by attorney, and to produce such witnesses as are deemed necessary to establish his cause of action.—Baldauf v. Nathan Russell, Inc., 96 A. 96, 88 N.J.Law 303, Ann.Cas.1917D 1191

Particular persons who may employ attorneys see Descriptive-Word Index.

25. Cal.—Warden v. Lamb, 277 P. 867, 93 Cal.App. 738
N.J.—Marshall v. Romano, 153 A. 751, 10 N.J.Misc. 113.
Tex.—Swartz v. Swartz, (Civ.App.) 76 S.W.(2d) 1071.—Arnold v. Fort Worth & D. S. R. Ry. Co., (Civ. App.) 8 S.W.(2d) 293.

26. Roberts v. Anderson, (C.C.A. Okl.) 66 F.(2d) 874

27. Roberts v. Anderson, supra.

28. Carter v. Capshaw, 60 S.W.(2d) 959, 249 Ky. 483.

29. Warden v. Lamb, 277 P. 867, 93 Cal.App. 738.

void where a statute forbids the practice of law by one not duly admitted or licensed.[30] A contract by the terms of which an attorney, in consideration of the payment to him of a fixed amount per week, agrees to assist in the collection and prosecution of claims of clients and customers of the other party to the contract, who is not a lawyer, and to pay over to such other all fees for services is illegal and void.[31]

It has been stated broadly that congress has the power to prescribe conditions on which attorneys will be allowed to represent litigants before any of the courts of the government, within certain reasonable limitations, if done by general laws applicable to all alike, and in advance of services rendered in such courts.[32]

Constitutional provisions. The right to be heard by counsel, given by some constitutional provisions, is restricted to criminal prosecutions.[33] A provision of a workmen's compensation act which makes fees of attorneys and physicians subject to the approval of the industrial accident board is not violative of a constitutional provision that any suitor in any court in the state shall have the right to prosecute or defend a suit either in his own proper person or by an attorney or agent of his choice.[34] The appointment by a judge of an attorney for defendant, charged with contempt, who did not object to services rendered by the attorney, was not erroneous as a denial of his constitutional right to present his own case.[35]

Attorney of record. While a party litigant may have a number of counsel to advise him and actually to participate in a trial as his representatives,[36] in some jurisdictions at least, he may have only one attorney or solicitor of record.[37] The attorney or solicitor of record may be an individual practitioner,[38] or, under some statutes, a firm of practitioners, who, as such, are regarded as a single entity.[39]

§ 64. —— Effect of Unauthorized Action

The bringing of an action by an attorney without authority from plaintiff is not binding on the latter.

Where suits are brought by an attorney without authority from plaintiff, the rule seems established that the bringing of suit does not bind the involuntary plaintiff,[40] unless plaintiff ratifies the act of the attorney (infra § 71), and there is authority for the view that in such case the proceedings are void.[41]

The propriety of a motion to dismiss the action when the attorney's lack of authority to institute the action is established has been recognized, as shown in section 57 of the title Dismissal and Nonsuit [18 C.J. p 1182 note 69]. Furthermore, where it clearly appears that the attorney has no authority to institute the action, it may be proper

30. Crawford v McConnell, (Okl.) 49 P.(2d) 551 See also supra § 16.

31. Jenkins v. Ross, 17 Pa.Dist & Co 406.

Reason for rule

"The effect of the verbal agreement between Freeston and the defendant [attorney] was to permit Freeston to practice law through the medium of the defendant Such an agreement is utterly void under the statute law and common law of our Commonwealth The Act of April 17, 1913, P. L. 80, makes it unlawful for any person to practice law or hold himself out as a lawyer, or maintain a law office of any kind for the practice of law, without having first been duly and regularly admitted to practice law in a court of record of any county in the state That the agreement in this case violates both the letter and spirit of this act is too plain to require discussion If any individual or corporation can hire a lawyer to represent their clients in court, while they direct the litigation, fix and collect the fees, then the Act of 1913 is not worth the paper it is written on. Quite aside from the statute, the agreement is illegal and void at common law as against public policy"—Jenkins, Trustee v. Ross, 17 Pa.Dist. & Co. 406, 407.

32. Moyers v City of Memphis, 186 S.W. 105, 135 Tenn. 263.

33. Rosen v Seidenberg, 170 A. 351, 111 Pa.Super 534

34. May v. Charles Hoertz & Son, 170 N.W. 305, 204 Mich 432—Mackin v Detroit-Timkin Axle Co., 153 N.W. 49, 187 Mich. 8.

Reason for rule

"The Industrial Accident Board is not, in contemplation of law, a court, and a claimant before it for damages resulting from personal injuries is not strictly a 'suitor in any court,' but the right of a claimant to select and employ an attorney or agent to represent him in the matter is recognised by the provision referred to These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional."—Mackin v. Detroit-Timkin Axle Co., 153 N.W. 49, 55, 187 Mich 8.

35. Knapp v. Knapp, 272 P. 512, 73 Utah 268.

36. In re Stewart, 95 A. 739, 85 N.J.Eq. 3.

37. In re Stewart, supra.

Reason for rule

"No party litigant can have two solicitors or attorneys of record. The reason is that the adverse party shall not be put to an election upon which of the two to serve notices, or with whom, of the two, to treat concerning the litigation. He certainly cannot be required to serve duplicate notices, or seek an interview with another after having consulted one. Further, how is the clerk of the court to tell to which one of the solicitors' accounts he is to charge the papers that are to be filed? He certainly has no right to make an election, nor has he any right to divide the charges between them. If a party could have two solicitors of record, why not three, four, five, or six, or any other number And what an embarrassment to the adverse party this would make"—In re Stewart, 95 A. 739, 85 N.J.Eq. 3.

38. In re Stewart, supra.

39. In re Stewart, supra.

40. Ga.—Anderson v Crawford, 94 S.E. 574, 147 Ga. 455, L.R.A.1918B 894.

Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.

6 C.J. p 631 note 72.

41. McDowell v. Gregory, 14 N.W. 899, 14 Neb. 33.

to stay the proceeding and arrest its further prosecution.[42]

§ 65. What Constitutes Retainer

a. In general
b. Payment of fees
c. Subject matter of employment

a. In General

In general, the relation of attorney and client is a matter of contract, and general rules as to the making of a contract govern in determining whether or not the relation has been created.

Generally speaking, the relation of attorney and client is a matter of contract,[43] but such contract has certain special and unique features.[44] The relation is created by the employment by a client, capable of entering into contractual relations, of an attorney possessing authority to practice his profession,[45] and, where the necessary elements of a contract exist, the creation of the relation is not prevented merely by the fact that a blood relationship exists between the attorney and client.[46] Such relation cannot be created by the attorney alone[47] or by the attorney and a third person who has no authority to act.[48]

A valid offer and acceptance will constitute the relation of attorney and client.[49] Thus, the contract of employment, in general, consists of an offer or request by the client and an acceptance or assent by the attorney,[50] or of an offer by the attorney and acceptance of the offer by the client.[51]

Formality is not an essential element of the employment of an attorney.[52] The contract may be express[53] or implied,[54] and it is sufficient that the advice and assistance of the attorney is sought and received, in matters pertinent to his profession.[55] An acceptance of the relation is implied on the part of the attorney from his acting in be-

42. Rosenthal v. Forman, 115 N.Y.S. 282—Hudson River West Shore R Co. v. Kay, (N.Y.) 14 Abb.Pr (N. S.) 191.

43. Cal.—Wheatland v. Hart, 294 P. 501, 110 Cal.App. 762—Wheatland v. Baker, 294 P. 501, 110 Cal.App. 761—Wheatland v Maloney, 294 P. 499, 110 Cal.App. 288.
Iowa.—Healy v Gray, 168 N.W. 222, 184 Iowa 111.
Mo.—Ex parte Schneider, (App.) 294 S.W. 736.
N.Y.—Kellogg v. Kellogg, 166 N.Y. S. 417, affirmed 171 N.Y.S. 39, 183 App.Div. 236.
Tex.—Houston Land & Trust Co. v. Sheldon, (Civ.App.) 69 S.W.(2d) 796, error dismissed.
Va.—Dunlop v McGehee's Ex'r, 124 S.E. 199, 139 Va. 643.

Substitution of name of attorney for that of another attorney on printed form of such other

A contract for which a printed form of one attorney was used was not a contract with such attorney but was a contract with another attorney, where the name of the first-mentioned attorney was eliminated in the preparation of the contract and the name of such other attorney was substituted in writing, notwithstanding the attorney whose name was eliminated was interested in the contract and performed part of the services in connection with the matter involved.—Berkos v. Ætna Life Ins. Co., 279 Ill.App. 243.

Circumstances sufficient to show employment or existence of relationship.—Magee v. Brenneman, 206 P. 37, 188 Cal. 562—In re Tyler, 12 P. 289, 13 P. 169, 71 Cal. 358—Pilant v. Davis, 2 Ky.Op. 40—Kennedy v Morris, 1 Ky.Op. 421—6 C.J. p 630 note 60 [c].

Circumstances insufficient to show employment or relation.—Bailey, Oot & Ryan v. Butcher, Tanner & Foster, 148 N.E. 587, 240 N.Y. 328, reversing 205 N.Y.S. 910, 210 App.Div. 812—Ewing v. Haas, 111 S.E. 255, 132 Va. 215—6 C.J. p 630 note 60 [d].

44. Martin v Camp, 114 N.E. 46, 219 N.Y. 170—Kellogg v. Kellogg, 166 N.Y.S. 417, affirmed 171 N.Y.S. 39, 183 App.Div. 236.

45. Ex parte Schneider, (Mo.App.) 294 S.W. 736.

46. Ex parte Schneider, supra.

47. Scharlan v. Lombard State Bank, 278 Ill.App. 504.

48. Scharlan v. Lombard State Bank, supra.

49. State of Ohio, ex rel. Shroder & Darby, v. Shay, 3 Ohio N.P.(N. S.) 657.

50. Hirsch Bros. & Co v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 68 A.L.R. 1—6 C.J. p 630 note 60.

51. Everett, Clarke & Benedict v. Alpha Portland Cement Co., (N.Y.) 225 F. 931, 141 C.C.A. 55

52. U.S.—Rodgers v Bromberg, (C.C.A.Tex.) 53 F.(2d) 723, certiorari denied 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934.
Iowa.—Anderson v. Lundt, 206 N.W. 657, 200 Iowa 1265—Healy v. Gray, 168 N.W. 222, 184 Iowa 111.

53. Dunlop v McGhees, Ex'r, 124 S.E. 199, 139 Va. 643.

Exact amount of compensation not stated

That the exact amount of compensation to be paid an attorney for services was not stated did not prevent the contract from being express, client's obligation being to pay a reasonable fee.—Moore v Stanfill, 31 S.W.(2d) 610, 235 Ky. 372.

54. Iowa.—Healy v. Gray, 168 N.W. 222, 184 Iowa 111
Va.—Dunlop v. McGhee's Ex'r, 124 S.E. 199, 139 Va. 643
W.Va.—Keenan v Scott, 61 S.E. 806, 64 W.Va. 137.

Implied from conduct

The contract may be implied from the conduct of the parties.—Healy v Gray, 168 N.W. 222, 184 Iowa 111

Attorney not formally attorney of record

Where an attorney who was not plaintiffs' attorney of record joined in a stipulation on behalf of plaintiffs, tried the case for plaintiffs in the presence of and without objection from them, appeared for plaintiffs in opposition to a motion for a new trial without objection, acted for plaintiffs in every subsequent step taken in their behalf, and had been specifically described by plaintiffs in writing as their attorney, the court and defendants were entitled to assume that such attorney was attorney for plaintiffs and authorized to act in their behalf at the hearing on the motion for a new trial.—Anderson v City Ry. Co., 48 P.(2d) 969, 9 Cal.App.(2d) 205.

55. Anderson v. Lundt, 206 N.W. 657, 200 Iowa 1265.

Relation held to exist

The relation of attorney and client existed between the assignee and maker of a note executed on the former's advice when consulted by the latter, whom he represented as an attorney in several cases, concerning the payee's account, even though the assignee was also in the business of discounting notes, and there was no litigation concerning the account nor any dispute as to the amount or justness thereof.—Addison v. Cope, 243 S.W. 212, 210 Mo.App. 569.

half of his client in pursuance of a request by the latter.[56]

While it has been said that the relation of attorney or client must be created by contract or by law,[57] in general there must be a contract, express or implied.[58] The mere fact that one has acted as attorney for another does not, alone and of itself, create the relation,[59] although it may afford a presumption of its creation or existence, as shown infra § 73.

Correspondence between attorneys for different clients which is evidently conducted solely for the purpose of cooperation between such attorneys, who have a common interest in certain litigation, does not constitute the employment of one of such attorneys by the other.[60]

Where one who is retained as an attorney, or who undertakes to perform an act which requires an attorney, himself engages an attorney to perform the act, the latter is but a subagent, and the relation of attorney and client does not subsist between him and the original employer.[61]

A retainer of one member of a firm of attorneys is a retainer of the firm, in the absence of an agreement to the contrary.[62] Any member may attend to the business intrusted to a firm of attorneys, for the act of each is the act of all, and such a general contract does not give the client the right to demand that any particular member of the firm shall render the services or conduct the litigation.[63] A party may, however, personally contract with one member of the firm for his legal services, and where such contract is proved it will be sustained.[64]

b. Payment of Fees

The payment of fees is not a necessary element of the relation of attorney and client.

The relation of attorney and client is not dependent on the payment of fees.[65] The relation may exist even though a third person pays or is to pay for the attorney's services,[66] or even though such services are rendered by the attorney gratuitously.[67]

c. Subject Matter of Employment

In order to render the relation that of attorney and client, the matter involved must be of a legal nature.

In general, in order to constitute the relation a professional one and not merely one of principal and agent, the attorney must be employed either to give advice on a legal question, to prosecute or defend an action in a court of justice, or to prepare and draft, in legal form, such papers as deeds, wills, contracts, and the like.[68]

The question as to what services are contemplated by the contract of employment depends on the terms of the contract duly construed.[69] A contract for employment with respect to matters other than for which the attorney was expressly employed may be implied from the circumstances.[70]

56. Hirsch Bros & Co. v. R. E Kennington Co., 124 So 344, 155 Miss. 242, 88 A.L.R 1

57. Hirsch Bros & Co. v. R. E. Kennington Co., supra.

58. Ewing v Haas, 111 S E. 255, 132 Va 215—6 C J. p 631 note 62

59. Hirsch Bros & Co. v. R E. Kennington Co., 124 So 344, 155 Miss. 242, 88 A L.R. 1—6 C J. p 631 note 62

60. Bailey, Oot & Ryan v. Butcher, Tanner & Foster, 148 N E. 537, 240 N Y. 323, reversing Bailey v Butcher, 205 N Y S 910, 210 App. Div 812.

61. Ackley v Prime, 278 P 932, 99 Cal.App. 534—6 C.J. p 631 note 66

62. Cal.—Williams v. More, 63 Cal 50.
Okl.—Kleinschmidt v. White, 15 P. (2d) 127, 159 Okl 234
W Va —Garden v. Riley, 133 S E. 46.
6 C J. p 629 note 31.

63. La —Simon v. Brashear, 9 Rob. 59, 41 Am.D. 321.
Miss.—Clifton v. Clark, 36 So. 251, 83 Miss 446, 102 Am S R 458, 66 L R A 821, 1 Ann Cas 396
Wash —Dennis v Seattle First Nat Bank, 73 P. 1125, 33 Wash. 161.
W Va —Tomlinson v. Polsley, 5 S.E. 457, 31 W.Va 108

64. Ostrander v Capitol Inv., etc., Assoc, 89 N W 964, 130 Mich. 312

65. Iowa —Healy v Gray, 168 N.W. 222, 184 Iowa 111.
Mo —Ex parte Schneider, (App) 294 S W. 736
Okl —Pyeatt v Estus, 179 P. 42, 72 Okl. 160, 4 A L R 1570
Tex —Anderson v. State, 266 S.W. 159, 98 Tex Cr. 449.
6 C J. p 631, note 67, 68

66. U S —Everett, Clarke & Benedict v Alpha Portland Cement Co., (N. Y) 225 F 931, 141 C C.A. 55.
Cal —Wittenbrock v. Parker, 36 P. 374, 102 Cal 93, 41 Am S R. 172, 24 L R A 197
N Y —Arnold v. Robertson, 3 Daly 298.
W Va —Keenan v. Scott, 61 S E 806, 64 W Va 137, 142.

Purchaser intrusting examination of title to attorney for loan company

Where the purchaser of land from purchasers at a guardian's sale intrusted the examination and approval of the title to an attorney for the loan company, who examined the title for the purpose of making a loan to the purchaser and who performed such services for the purchaser without additional charge, the relation of attorney and client existed between such attorney and the purchaser —Pyeatt v. Estus, 179 P. 42, 72 Okl 160, 4 A L R 1570.

67. Packard v. Delfel, 38 P. 208, 9 Wash 562.

68. Hirsch Bros & Co. v R E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A L R 1—6 C J. p 631 notes 69, 70

69. Macpherson v Bacon's Ex'r, 203 S W 744, 180 Ky 773

Defense of suits then pending or thereafter instituted

A contract between a county and attorneys, whereby the attorneys were employed to defend the county in certain enumerated suits on county bonds and any other suits that might be brought against the county on account of bonds issued, was sufficiently broad to embrace any suit on bonds, whether then pending or thereafter to be instituted —Macpherson v Bacon's Ex'r, 203 S.W. 744, 180 Ky 773.

70. Healy v. Gray, 168 N W. 222, 184 Iowa 111.

B. GENERAL INCIDENTS OF RELATION

§ 66. In General

There is authority for the view that the relation of attorney and client is that of servant and master in a limited sense. An attorney is not a party to an action in which he has been retained.

As explained above in section 65, the relation of attorney and client is a matter of contract. The relation is one of agency (infra § 67), is fiduciary, and one of special trust and confidence (infra § 125 et seq.). There is also authority for the view that the relation is that of master and servant in a limited and dignified sense.[71]

An attorney in a law court or a solicitor in chancery is not a party to the action or suit in which he has been retained.[72] An attorney representing one of the litigants is not a party to the suit, nor does he have any title or interest therein, so as to permit the rights of the client to be adjudicated by proceedings against the attorney in the latter's name.[73]

An attorney of record may not deny that the relation of attorney and client exists between himself and one for whom he appears and conducts litigation.[74]

§ 67. Rules of Agency Applied

The relation of attorney and client is one of agency, and the general rules of law that apply to agencies apply.

The relation of attorney and client is one of agency,[75] that is, the attorney is the agent of the client,[76] and, while the view has been expressed that the authority of an attorney to act for his principal is different from that of a general agent, and, in many respects, more extensive[77] and exactive,[78] usually the general rules of law which apply to agencies apply to the relation of attorney and client.[79] Thus, the client is bound, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority.[80]

71. Fla.—In re Clifton, 155 So 324, 115 Fla 168
N.Y.—In re Co-operative Law Co., 92 N E 15, 198 N Y. 479.
N.C—Chatham Lumber Co. v. Parsons, Lumber Co, 90 S E. 241, 172 N C. 320.

72. Mass.—Conley v. Fenelon, 165 N E 382, 266 Mass 340.
N J.—Kaufman v. Jurczak, 139 A. 716, 102 N J Eq 66.

73. G. A. Wiegand & Co v Villemeur, 136 So 105, 17 La App. 457

74. In re Newman, 153 N.Y S. 375, 172 App.Div. 173.

75. Iowa—Farnsworth v. Hazelett, 199 N W 410, 197 Iowa 1367, 38 A. L R 814
Mo.—Henderson v Cape Trading Co, 289 S W 332, 316 Mo 384.
Mont—Caterpillar Tractor Co v. Johnson, 43 P (2d) 670, 99 Mont. 269
Or—Lehman v. Knott, 187 P 1109, 100 Or 240
Tex.—Reynolds v. Volunteer State Life Ins Co., (Civ App) 80 S.W. (2d) 1037, error refused.
6 C J p 637 note 50.

76. Ala.—Nyhoff v. Palmer, 116 So. 520, 217 Ala. 432.
Cal—atkinson v. Foote, 186 P. 831, 44 Cal.App. 149.
Ky—Douthitt v Guardian Life Ins. Co. of America, 31 S W.(2d) 377, 235 Ky. 328—Lisanby v. Illinois Cent R Co, 272 S W. 753, 209 Ky. 325.
Mont—Hansen v. Johnson, 4 P.(2d) 1033, 90 Mont 597—Bury v. Bury, 223 P. 502, 69 Mont 570.
R I—McLyman v Miller, 161 A. 111, 52 R I. 374.
6 C J p 637 note 50.

Agent or representative

An attorney in a law court or a solicitor in chancery is the mere agent or representative of a party.—Kaufman v Jurczak, 139 A. 716, 102 N J Eq 66.

Agent to manage case

An attorney is an agent employed by a party to a case to manage it for him—McLyman v. Miller, 161 A. 111, 52 R.I. 374.

Preparation and trial of case

In the preparation and trial of a lawsuit, the attorney acts as agent of his client—Lisanby v. Illinois Cent. R. Co., 272 S W. 753, 209 Ky 325.

Attorney of prospective purchaser

Attorney employed by prospective purchaser of land to examine and pass on title, cause survey and map to be made, work out other details of transaction for absent client, and prepare or approve deeds and other documents to close transaction, becomes agent as well as attorney for client—Nyhoff v. Palmer, 116 So. 520, 217 Ala 432.

Capacity of lawyer to become another's agent for purposes other than the practice of his profession see Agency § 14.

77. W. P. Hamblin, Inc., v. Newark Fire Ins. Co, 139 A. 212, 48 R.I. 473.

78. Herfurth v. Horine, 93 S.W.(2d) 21, 266 Ky. 19.

Essentials stated

To constitute the relation a professional one and not merely one of principal and agent, the attorney must be employed either to give advice on a legal point, to prosecute or defend an action in a court of justice, or to prepare and draft, in legal form, such papers as deeds, wills, contracts, and the like—Spier v. Thomas, (Neb) 269 N W 61.

Special agent

An attorney at law is a special agent limited in duty and authority to the vigilant prosecution or defense of the rights of his client.—State v. Goldstein, 220 P. 565, 109 Or. 497.

79. Ark.—White & Black Rivers Bridge Co. v. Vaughan, 36 S W (2d) 672, 183 Ark. 450
Mich—Detroit v. Whittemore, 27 Mich 281.
Mo—Henderson v Cape Trading Co, 289 S W. 332, 316 Mo. 384.
Mont—Caterpillar Tractor Co v. Johnson, 43 P (2d) 670, 99 Mont 269—Bury v. Bury, 223 P. 502, 69 Mont. 570
6 C J. p 637 note 50.

80. Fla.—Griffith v. Investment Co., 110 So. 271, 92 Fla. 781.
Iowa—State v Dangelo, 166 N.W. 587, 182 Iowa 1253
Ky—Dewberry v. Commonwealth, 44 S W (2d) 1076, 241 Ky. 726—Trevillian v. Boswell, 43 S.W.(2d) 715, 241 Ky. 237—Sayre v. Commonwealth, 233 S.W. 737, 194 Ky 338, 24 A L R 1017—Hughes v. Commonwealth, 80 S.W. 197, 25 Ky.L. 2153.

In general, whatever is done in the progess of the cause by such attorney is considered as done by the party, and is binding on him,[81] even, in respect of certain matters, where the attorney is employed only to conduct the trial.[82]

The attorney's authority does not necessarily commence with the institution of a suit; where he is employed in anticipation of a suit, he has as much power to bind his client before the suit is begun as he has afterward.[83]

In general, the omissions, as well as commissions, of an attorney are to be regarded as the acts of the client whom he represents, and his neglect is equivalent to the neglect of the client himself.[84]

Mass.—Stevens v Thissell, 134 N.E 398, 240 Mass 541.
Mont—Bury v. Bury, 223 P. 502, 69 Mont 570.
N Y—Daley v. Dennis, 242 N Y S 408, 133 Misc. 1.
N.D—State v Keller, 223 N W. 698, 57 N D 645, 64 A L R 434
R I—McLyman v. Miller, 161 A. 111, 52 R I. 374.
6 C J p 637 note 50.

Client's lack of knowledge of attorney's act does not prevent the application of the rule—Daley v. Dennis, 242 N.Y S 408, 137 Misc. 1.

Representations

(1) The representations of counsel retained by a corporation and its treasurer, and through whose efforts a mortgage claimed to have been obtained by duress was procured, were binding on the company and the treasurer—Stevens v. Thissell, 134 N E. 398, 240 Mass. 541.

(2) Action of a judgment debtor's attorney in informing those present at an execution sale that the sale was illegal because the debtor had no title to the property was binding on the debtor, notwithstanding the attorney's testimony that he had no direct authority from the debtor to make the statement, where he apparently acted in her interest—Taylor v. Bailey, 185 A. 699, 323 Pa 278.

Solution of difficulties

Where sisters left the solution of their difficulties with creditors to solicitor, the solicitor's solution of the problem was their solution, without reference to whether it was provident or wise, provided he acted with an adequate degree of competency in the exercise of his best judgment and with the highest degree of fidelity to his clients' interests—Busey v. Perkins, 176 A. 474, 168 Md 12.

81. Ariz.—Avery v. Calumet & Jerome Copper Co., 284 P. 159, 36 Ariz 239.
Fla—Small v. Colonial Inv Co., 109 So. 433, 92 Fla. 503.
Kan—Overlander v. Overlander, 284 P 614, 129 Kan 709.
Ky—Lusanby v. Illinois Cent. R. Co., 272 S W 753, 209 Ky. 325
Neb.—Georgen v. Department of Public Works of Nebraska, 243 N. W. 886, 128 Neb 648.
6 C J. p 638 note 51.

Service of writ

Plaintiff is bound by directions as to the service of the writ given by plaintiff's attorney to the officer to whom the writ is delivered for service—Morgan v. Joyce, 27 A. 225, 66 N.H. 538

Approval of decree and acceptance of benefits

Approval of a decree and acceptance of benefits under such decree by counsel for both defendants estopped defendant on whom a summons had not been served from attacking the decree, in the absence of any claim of fraudulent conduct on the part of the attorney who had assumed to act for such defendant—Burk v. Amos, 247 N.W. 197, 262 Mich 332.

82. Devlin v New York, 15 Abb Pr N.S (N Y) 31—6 C J p 638 note 52

83. State v Froah, 263 N.W. 525, 220 Iowa 840—6 C J. p 638 note 53.

84. Ariz—Avery v. Calumet & Jerome Copper Co, 284 P 159, 36 Ariz 239—Irvin v. Dwight B. Heard Inv Co, 281 P. 213, 35 Ariz. 528
Ark.—Merchants' & Planters' Bank & Trust Co v Ussery, 38 S.W.(2d) 1087, 183 Ark. 838—Blackstad Mercantile Co v. Bond, 148 S.W. 262, 104 Ark 45.
Fla—Abney v Hurner, 121 So. 883, 97 Fla 240, denying rehearing 120 So. 825, 97 Fla 240—Griffith v. Investment Co, 110 So 271, 92 Fla. 781—Small v. Colonial Inv. Co., 109 So 433, 92 Fla. 503.
Ill.—Hillenbrand v Hillenbrand, 211 Ill App 624.
Iowa.—State v. Froah, 263 N.W. 525, 220 Iowa 840
Ky—Douthitt v Guardian Life Ins. Co. of America, 31 S.W.(2d) 277, 235 Ky 328—Davidson v. Richardson, 245 S W 1, 196 Ky 553—Sayre v Commonwealth, 238 S W. 737, 194 Ky. 338, 24 A L R 1017
Me—Leviston v. Standard Historical Soc, 173 A. 810, 133 Me. 77—Harmon v Fagan, 154 A 267, 130 Me. 171—Ellis v Emerson, 147 A. 761, 128 Me 378—Beale v. Swasey, 75 A 134, 106 Me. 35, 20 Ann.Cas. 396.
Mass.—Linehan v. Linehan, 111 N E 901, 223 Mass. 297.
Mo—Welch v Mastin, 71 S W. 1090, 98 Mo App. 273
Okl.—Vincent v. Kelly, 249 P. 942, 121 Okl 302—Wagner v. Lucas, 193 P. 421, 79 Okl. 231.
S D—Bran v Bruner, 244 N W. 537, 60 S.D. 397—Smith v. Wordeman, 240 N W. 325, 59 S D 368—Sayer v. Lee, 166 N W. 635, 40 S D 170.
Tex—Reynolds v. Volunteer State Life Ins. Co, (Civ App) 80 S W (2d) 1087, error refused
Vt.—Barrows v Wilson, 121 A. 440, 97 Vt 26—Babcock v. Brown, 25 Vt. 550, 60 Am Dec. 290.
Va.—Carpenter v Ingram, 146 S E 193, 152 Va 27.
Wyo—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509
6 C J p 638 note 54, p 672 note 51.

Delay in segregating tax liens

Where a real estate transaction was held up due to the delay of an attorney in segregating tax liens, such delay is imputable to the attorney's principal—Beckett v. Kornegay, 143 S E 296, 150 Va. 636.

Failure to reveal facts on application for title insurance

The failure of the attorney for an applicant for a policy of title insurance to reveal to the title company certain facts known to the attorney which rendered the title defective, as well as the personal failure of the applicant to reveal such facts, relieved the company from liability in respect of such defects, under a condition of the policy—Vernon v. Title Guarantee & Trust Co, (Cal App) 46 P.(2d) 191.

Negligence of attorney

(1) It is the clear weight of authority that the negligence of an attorney is imputable to his client, and that the client cannot be relieved from a judgment taken against him because of the neglect of his attorney unless he shows that the neglect of the attorney was excusable or, in the alternative, assumes the burden of clear affirmative proof that he himself (the client) was in no manner negligent—Armstrong v. Hartford Fire Ins. Co., 195 P. 301, 33 Idaho 303—Smith v. Wordeman, 240 N W. 325, 59 S D 368—Kelly v. Hidam, 231 P. 678, 32 Wyo 271.

(2) When a party employs an attorney at law to defend his suit in the courts of the country, he presents him to the court as his accredited agent, and, as such, he must be concluded by any acts or omissions where no fraud or unfairness is made to appear—Merchants & Planters Bank & Trust Co v Ussery, 38 S.W. (2d) 1087, 183 Ark 838.

Negligence, mistake, or misconduct of counsel as ground for vacating judgment see Judgments § 280 [34

There is authority for the view, however, that this rule does not apply where the attorney acts in bad faith or intentionally neglects his client's business;[85] it has been held that the rule is subject to the peculiar circumstances of each case.[86] Furthermore, the matter in respect of which an attorney fails to act must be one which is within the scope of the attorney's employment in order that the failure to act may be imputed to the client.[87]

The general rule that a client is bound by the acts of his attorney does not hold good when the acts of the attorney were done in pursuance of a fraudulent confederation of the attorney with the party who seeks to maintain such acts of the attorney.[88]

Unauthorised acts. A client is not bound by an act of his attorney, where such act is entirely unauthorized and outside the scope and course of his employment.[89] Of course, a person is not bound by the acts of an attorney whom such person has not employed and has not authorized to act for him.[90]

§ 68. Liability of Client for Attorney's Acts

In general, a client is liable for an injury to a third person resulting from an act of the attorney which is within the scope of the attorney's authority.

A client is liable to a third person injured by an act of the attorney done in the execution of matters within his authority.[91] When the attorney conducts the case in such a way as to be liable himself in an action for trespass, his client is also liable.[92] The client is not liable, however, for acts of the attorney which are outside the scope of the attorney's authority.[93] Thus, a client is not responsible for any illegal action taken or directed by his attorney which the client did not advise, consent to, or participate in, and which was not justified by any authority that he had given.[94]

Fraudulent or dishonest acts of attorney. The

C.J. p 307 note 80–p 312 note 10, p 313 notes 13–21].

85. Sayer v. Lee, 166 N.W. 635, 40 S.D. 170.

86. City of Auburndale v. State, 137 So. 286, 103 Fla. 393.

Granting relief after attorney's negligence

Where, because of the negligence of his attorney, a client has been deprived of an opportunity to be heard on the merits, and makes prompt application for redress, it would not be an abuse of discretion for the trial judge to grant the relief if it could be done without prejudice to the rights of the other party.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.

Where defendant is public corporation

Where defendant is a public corporation, the general rule that counsel's negligence in the matter of filing a pleading is equivalent to the neglect of the client does not apply with equal force.—City of Auburndale v. State, 137 So. 286, 103 Fla. 393.

87. Texas Employers' Ins. Ass'n v. Clark, (Tex.Civ.App.) 23 S.W.(2d) 405.

Failure to give notice and file claim under Workmen's Compensation Act

Where the wife of an injured employee employed attorneys to bring an action for damages for injuries to such employee on the theory that the employer did not carry compensation insurance, the failure of such attorneys to give notice and file a claim under the Workmen's Compensation Act was not imputable to the employee, especially in view of the fact that the employee had been incapacitated and, therefore, relieved of the duty to give notice and file a claim.—Texas Employers' Ins. Ass'n v. Clark, (Tex.Civ.App.) 23 S.W.(2d) 405.

88. Roller v. McGraw, 60 S.E. 410, 63 W.Va. 462.

89. U.S.—Horseshoe Mining Co. v. Miners' Ore Sampling Co., (Colo.) 147 F. 517, 77 C.C.A. 213.
Ark.—Foster v. Pitts, 38 S.W. 1114, 63 Ark. 337.
Or.—Kelsay v. Taylor, 107 P. 609, 56 Or. 13.

Fraud of attorney

A client was not bound by the act of its attorney in assisting in perpetrating a fraud on a third person, because in so acting the attorney was acting outside the scope of his employment.—J. M. Robinson & Co. v. Bank of Pikeville, 142 S.W. 1065, 146 Ky. 538.

90. Brewer v. New England Mortg. Sec. Co., 87 S.E. 657, 144 Ga. 548.

91. N.Y.—Penna. v. Atlantic Macaroni, Co., 161 N.Y.S. 191, 174 App. Div. 436.
Pa.—Steehler v. Volk, 167 A. 424, 109 Pa.Super. 190.
6 C.J. p 671 note 42
See Treece v. Reinhart-Smith Grocer Co., 197 Ill.App. 40.

Wrongful entry of judgment

Where the attorney for plaintiff, on payment of the amount due, promised defendant that no judgment would be entered against him, but nevertheless took judgment, his client would be liable for any damages occasioned thereby.—Penna. v. Atlantic Macaroni Co., 161 N.Y.S. 191, 174 App. Div. 436.

Liability of client:
For defamatory communication made by his attorney see Libel and Slander § 150 [37 C.J. p 14 notes 4–7].
For illegal arrest caused by the attorney see False Imprisonment § 40 [6 C.J. p 672 notes 49, 50, 25 C.J. p 511 note 94–p 512 note 2].
For malicious prosecution for malicious acts of his counsel see Malicious Prosecution § 66 [38 C.J. p 456 note 41]
For wrongful execution directed by his attorney see Executions § 456 [23 C.J. p 974 notes 65–68]
For wrongful seizure of property of third person in attachment proceeding under direction of his attorney see Attachment § 396
Liability of attorney to client for negligent acts see infra §§ 140–146

92. N.Y.—Poucher v. Blanchard, 86 N.Y. 256
Pa.—Gillingham v. Clark, 1 Phila. 51.
6 C.J. p 671 note 45
Joint liability of attorney and client for trespass committed by an attorney as agent of his client see supra § 52.

93. B. F. Goodrich Rubber Co. v. Holland, 131 So. 882, 159 Miss. 346.
See Treece v. Reinhart-Smith Grocer Co., 197 Ill.App. 40.

94. Ill.—Golden v. Cervenka, 216 Ill. App. 397
N.Y.—Rossi v. City of Schenectady, 233 N.Y.S. 512, 133 Misc. 792.
6 C.J. p 671 note 46.

client may be chargeable with a fraud perpetrated by his attorney,[95] and, since an attorney who has obtained judgment for his client continues to be his agent in the collection of the money, fraud in the management of the business affects the client as if it were his own act.[96] The rule is otherwise, however, as to a fraud practiced outside the scope of the attorney's employment,[97] and in a case in which it was held that the client was not liable for a loss sustained by third persons through the theft of property by the attorney, the view was expressed that a client has the right to assume that his business will be transacted honestly and efficiently by the attorney.[98]

Damages. A client is liable for actual damages only, unless, with full knowledge, he ratifies the attorney's act.[99]

§ 69. Notice to Attorney

a. In general
b. Knowledge or notice affecting real property
c. Knowledge or notice affecting personal property
d. Matters involved in legal or administrative proceedings

a. In General

Subject to certain limitations and qualifications notice to, or knowledge of, an attorney is notice to, or knowledge of, his client.

In view of the rule that an attorney is an agent of his client and that general rules as to agencies apply to the relation of attorney and client (supra § 67), and in accordance with the general rule stated in § 262 of the title Agency, and subject to qualifications and limitations stated below, notice to an attorney is notice to the client who employs him,[1] and knowledge of an attorney is knowledge of, or is imputed to, his client.[2] This is true whether the notice of the attorney is actual or

95. Ky—Commonwealth v Smith, 46 S W (2d) 474, 213 Ky 365
N J—Clawans v Ordway Building & Loan Ass'n, 164 A. 267, 112 N J. Eq 280

Fraud in negotiating loan and giving mortgage

Imprudence of a mortgagee in employing an attorney who, according to the mortgagee's information, was the equitable owner, could be considered in determining whether fraud perpetrated by the attorney should be visited on the mortgagee or on the actual equitable owner who later became the record owner of the property involved—Clawans v Ordway Building & Loan Ass'n, 164 A. 267, 112 N J Eq 280.

96. McDonald v Todd, 1 Grant (Pa.) 17.

97. Fidelity Trust Co v. Baker, 47 A 6, 60 N J Eq 170

98. In re Smith's Estate, 266 N Y S 666, 148 Misc 585, affirmed 282 N Y S 845, 246 App Div 563

99. Foster v Pitts, 38 S W 1114, 63 Ark. 337

1. U S—U S v. Gower, (C C A Okl) 71 F (2d) 366—The Tompkins, (C C A N Y) 13 F (2d) 552—In re Locust Bldg Co, (C.C A N Y) 299 F 756, certiorari denied Keighley v American Trust Co, 44 S Ct 635, 265 U S 590, 68 L Ed 1195
Ala—John Silvey & Co. v. Cook, 68 So 37, 191 Ala 228
Cal—Watson v Sutro, 24 P 172, 25 P 64, 86 Cal 500—Gaver v Early, 209 P 390, 58 Cal App 725—Fletcher v Allen, 197 P 952, 51 Cal App 774—Atkinson v Foote, 186 P. 831, 44 Cal App 149
Ga.—Citizens' Bank of Vidalia v. Citizens' & Southern Bank, 127 S E 219, 160 Ga 109—Fluellen v. Campbell Coal Co, (App) 188 S E 54
Ill—Hollan v Kepner, 130 N E 699, 297 Ill 332.
Iowa—Perpetual Savings & Loan Ass'n v. Van Atten, 233 N W 746, 211 Iowa 435—Stevens v. People's Sav Bank, 171 N W 130, 185 Iowa 619.
Ky—Barnes v Commonwealth, 201 S W 318, 179 Ky. 725
Mass—Goldston v Randolph, 199 N. E 896.
Mich—Security Trust Co v. Tuller, 220 N W. 795, 243 Mich. 570
Mont—Caterpillar Tractor Co v. Johnson, 43 P (2d) 670, 99 Mont 269—Hansen v Johnson, 4 P.(2d) 1088, 90 Mont. 597—Davenport v. Davenport, 222 P. 422, 69 Mont. 405
N Y.—Howell v Mills, 53 N.Y. 322—Polhamus v Hines, 218 N Y.S. 401, 128 Misc. 299—U S v. Sumner, 217 N Y S 645, 127 Misc 907
Ohio—American Export & Inland Coal Corporation v Matthew Addy Co, 147 N E 89, 112 Ohio St. 186.
Okl—Pyeatt v Estus, 179 P 42, 72 Okl 160, 4 A L R 1570—Lambert v Smith, 157 P. 909, 53 Okl. 606, 18 A L R. L
Tex—Dixon v U S Fidelity & Guaranty Co, (Civ App.) 293 S.W. 291.
6 C J. p 638 note 58

2. U S.—Weicker v. Bromfield, (C.C A Colo) 34 F (2d) 277.
Ala—John Silvey & Co. v. Cook, 68 So 37, 191 Ala 228.
Cal—Rogart v. George K. Porter Co, 223 P. 959, 193 Cal. 197, 31 A L R. 1045—Rauer v. Hertwick, 165 P 946, 175 Cal 278—Otis v. Zeiss, 165 P. 524, 175 Cal 192—Laukkare v. Abramson, 50 P (2d) 478, 9 Cal. App (2d) 447.
Colo—Herrick v Woodrow-Shindler Co, 226 P 137, 75 Colo 362.
Del—Chadwick v. Parkhill Corporation, 141 A. 823, 16 Del Ch 105.
Ga—Bean v Barron, 168 S E. 259, 176 Ga 285—Citizens' Bank of Vidalia v Citizens' & Southern Bank, 127 S E 219, 160 Ga. 109.
Ill—Hodes v. Foster, 155 N E 762, 324 Ill 615—Cessna v Hulce, 153 N E. 679, 322 Ill 589—Hollan v. Kepner, 130 N E 699, 297 Ill 332.
Ind—Campion v State, 154 N E 802, 199 Ind. 129.
Iowa—Farnsworth v Hazelett, 199 N W 410, 197 Iowa 1367, 38 A L R 814.
Kan—Overlander v Overlander, 284 P 614, 129 Kan 709
Ky—Lusanby v Illinois Cent R Co, 272 S W. 752, 209 Ky. 325—Barnes v Commonwealth, 201 S.W 318, 179 Ky 725
La—Allen v Frank Janes Co., 78 So 115, 142 La 1056
Md—Miller v Mitnick, 161 A. 157, 163 Md 113
Mont—Caterpillar Tractor Co. v. Johnson, 43 P (2d) 670, 99 Mont 269.
Neb—Marshall v. Rowe, 254 N W. 480, 126 Neb. 817—Goergen v Department of Public Works of Nebraska, 243 N W. 886, 123 Neb 643
N.Y—Howell v. Mills, 53 N Y. 322—U. S. v Sumner, 217 N.Y.S 645, 127 Misc. 907
N.C—Bryant Mfg Co v. Hester, 98 S E 721, 177 N.C 609
Okl—Pyeatt v Estus, 179 P. 42, 72 Okl 160, 4 A.L R 1570.
Or—Bailey v. Hickey, 195 P. 372, 99 Or. 251.
Tenn—Goodbar v Union & Planters' Bank & Trust Co, 67 S.W.(2d) 562,

constructive.[3] The rule applies in a criminal as well as in a civil case.[4]

The fact that the attorney has not actually communicated his knowledge to the client is immaterial,[5] the facts constituting knowledge, or want of it, on the part of an attorney, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but, when ascertained, the constructive notice thereof to the client is conclusive, and cannot be rebutted by showing that the attorney did not in fact impart the information so acquired.[6]

The rule that the client is affected by notice to, or knowledge of, his attorney is sometimes considered from the standpoint of presumptions; thus, the view has been expressed that notice to an attorney in respect of matters as to which he is employed is presumed to be notice to the client,[7] that there is a presumption that the attorney has performed his duty to communicate to his client whatever information the attorney acquires in relation to the subject matter involved in the transaction.[8]

The rule that notice to the attorney is notice to the client applies when an attorney or counsel is acting for another in a particular matter or generally in the affairs of such other,[9] and generally speaking, knowledge of, or notice to, the attorney is the equivalent of knowledge of, or notice to, the client where the knowledge or notice is obtained by, or given to, the attorney while he is acting for, or is engaged in the business of, his client.[10]

There are statements or holdings in many cases which tend to confine to rather narrow limits the application of the rule that notice to, or knowledge of, an attorney is imputed to his client; thus, it has been held or recognized that usually, at least, in order to render the rule applicable, notice or knowledge must be received or obtained by the attorney while he is acting for his client,[11] that

17 Tenn.App 355—Bank of Blount Co. v. Dunn et al., 10 Tenn.App. 95.

Tex.—Fort Worth & D. C. Ry. Co. v. Greathouse, (Civ.App.) 41 S.W. (2d) 413, reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., (Com.App.) 65 S.W.(2d) 762—Dixon v. U. S. Fidelity & Guaranty Co., (Civ.App.) 293 S.W. 291—Bradford v. Malone, 130 S.W. 1013, 49 Tex.Civ.App. 440

Wash.—In re Waters of Doan Creek in Walla Walla County, 299 P. 383, 162 Wash. 695.

6 C.J. p. 639 note 59.

Knowledge of attorney for creditor of bankrupt concerning preference see Bankruptcy § 215 [7 C.J. p. 154 note 94]

3. Shartzer v. Mountain Lake Park Assoc., 37 A. 786, 86 Md. 335.

4. Barnes v. Commonwealth, 201 S.W. 318, 179 Ky. 725

5. Cal.—Watson v. Sutro, 24 P. 172, 25 P. 64, 86 Cal. 500

Iowa.—Farnsworth v. Hazelett, 199 N.W. 410, 197 Iowa 1367, 38 A.L.R. 814.

6. Cal.—Wittenbrock v. Parker, 36 P. 874, 103 Cal. 93, 41 Am.S.R. 172, 24 L.R.A. 197.

Ky.—Lisanby v. Illinois Cent. R. Co., 272 S.W. 753, 209 Ky. 325

7. Smith v. Thomsen, 48 P.(2d) 102, 8 Cal.App.(2d) 603.

8. Bailey v. Hickey, 195 P. 372, 99 Or. 251.

Conclusive presumption

(1) It is conclusively presumed that an attorney performed the duty to communicate to his client whatever information the attorney acquired in relation to the subject matter of his employment—U. S. v. Sumner, 217 N.Y.S. 645, 127 Misc. 907.

(2) However, it has been said that the general rule that knowledge of the attorney is chargeable to the client is sometimes spoken of as a conclusive presumption of law, but this is a mere matter of terminology. A conclusive presumption is a substantive rule of law, and when the basic facts are before a court the rule, like any other legal principle, finds application.—Farnsworth v. Hazelett, 199 N.W. 410, 197 Iowa 1367.

9. Atkinson v. Foote, 186 P. 831, 44 Cal.App. 149

10. Ala.—John Silvey, & Co. v. Cook, 68 So. 27, 191 Ala. 228.

Colo.—Bunnell v. Holmes, 171 P. 365, 64 Colo. 345.

Ga.—Citizens' Bank of Vidalia v. Citizens' & Southern Bank, 127 S.E. 219, 160 Ga. 109.

Ill.—Cessna v. Hulce, 153 N.E. 679, 322 Ill. 589

Iowa.—Perpetual Savings & Loan Ass'n v. Van Atten, 233 N.W. 746, 211 Iowa 435—Shoemaker v. Smith, 45 N.W. 744, 80 Iowa 655

Ky.—Combs v. Roberts, 35 S.W.(2d) 293, 237 Ky. 299

Neb.—Marshall v. Rowe, 254 N.W. 480, 136 Neb. 817

N.Y.—U. S. v. Sumner, 217 N.Y.S. 645, 127 Misc. 907.

Okl.—Lambert v. Smith, 157 P. 909, 53 Okl. 606, 18 A.L.R. 1

Pa.—Bell v. Scranton Trust Co., 128 A. 494, 282 Pa. 562

Tex.—Hexter v. Pratt, (Com.App.) 10 S.W.(2d) 692, affirming (Civ.App.) 283 S.W. 653

6 C.J. p. 638 note 58, p. 639 note 59.

Affecting admission of evidence

Relative to the admission in evidence, in an action against a guardian and her attorney for receipts which they retained and omitted from their account, of a passbook which had been in the attorney's possession, showing the receipt by them of a stock dividend from a bank, it is immaterial that the guardian had never known of it, she being charged with notice of whatever her attorney, who was her agent, had notice of, and ought, in good faith and in the exercise of ordinary care and diligence, to have communicated to her.—Gaver v. Early, 209 P. 390, 58 Cal.App. 725.

Application of insurance moneys to redemption of bonds

Holders of bonds issued under a second trust mortgage were charged with knowledge, acquired by their attorneys in a proceeding for the foreclosure of such mortgage, of the trustee's application of the proceeds of money received under an insurance policy for the mortgaged property, which was destroyed by fire, to the redemption of outstanding first mortgage bonds and part of second mortgage bonds.—Bell v. Scranton Trust Co., 128 A. 494, 282 Pa. 562.

11. Iowa.—Perpetual Savings & Loan Ass'n v. Van Atten, 233 N.W. 746, 211 Iowa 435—Andrew v. Rivers, 223 N.W. 102, 207 Iowa 343

N.J.—Centreville Building and Loan Ass'n v. Gollin, 176 A. 356, 117 N.J.Eq. 412.

N.Y.—Vital v. Jandorf, 212 N.Y.S. 548, 126 Misc. 124.

Pa.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

the notice must be in respect of matters as to which the relation of attorney and client exists,[12] and that to charge the client with notice it is necessary that the knowledge of the attorney shall be gained in the course of the particular transaction in which he is employed by his client,[13] and during the existence of the relation.[14] There is also authority for the view that the transaction in which the knowledge of the attorney is obtained must be one within the scope of his employment,[15] and that the knowledge or notice must refer to a matter within the scope of the attorney's employment, authority, or agency.[16] Where the attorney acts contrary to his authority, the knowledge of the attorney of his own act in that regard is not imputed to the client.[17] Furthermore, it has been held or recognized that a client is not affected with notice because of knowledge obtained by his attorney from outside sources, and not in the course of his employment,[18] as, for example, where the knowledge is acquired by the attorney in the performance of professional services for another,[19] and that the client is not affected by knowledge acquired, or notice received, by his attorney before the commencement of the relation[20] and while acting for other persons.[21] In some jurisdictions, including jurisdictions in which the immediately foregoing statements are regarded as expressions of limitations ordinarily applicable, a broader application of the rule as to notice and knowledge has been recognized under certain circumstances; thus, there is authority for the view that a client is affected by, or chargeable with, notice or knowledge of matters of which his attorney acquired knowledge previously to, and independently of, his employment, where such knowledge is in the mind of the attorney while acting pursuant to his employment.[22] So, also, it has been held or recognized that the client is so affected or chargeable in respect of knowledge acquired by the attorney in a prior transaction, where such knowledge is so precise and definite,[23] or was acquired so shortly before the relation between such attorney and client arose,[24] that it is or must be present to the mind and memory of the attorney during a later transaction within the scope of the attorney's employment, even though his knowledge was acquired before the relation of attorney and client arose,[25] or was acquired in the course of employment by a different client.[26] In other words, knowledge acquired

Tex.—Ives v. Culton, (Civ App.) 197 S.W. 619, affirmed (Com App.) 229 S.W. 331.

12. Florence v De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565—6 C.J. p. 640 note 64.

13. Cal.—Otis v. Zeiss, 165 P. 524, 175 Cal. 192.
Ga.—Lang v. Aldred, 179 S.E. 567, 51 Ga. App. 91.
Ky.—Drury v. Franke, 57 S.W.(2d) 969, 247 Ky. 758, 88 A.L.R. 917.
N.J.—Centreville Building & Loan Ass'n v. Gollin, 176 A. 356, 117 N.J. Eq. 412.
6 C.J. p. 639 note 63.

14. Wittenbrock v. Parker, 36 P. 374, 102 Cal. 93, 41 Am.S.R. 172, 24 L.R.A. 197—6 C.J. p. 640 note 65.

15. American Export & Inland Coal Corporation v. Matthew Addy Co., 147 N.E. 89, 112 Ohio St. 186.

16. Ga.—Lang v. Aldred, 179 S.E. 567, 51 Ga. App. 91.
Iowa.—Andrew v. Rivers, 223 N.W. 102, 207 Iowa 342.
Minn.—Larson v. Johnson, 221 N.W. 871, 175 Minn. 502.
N.Y.—Vital v. Jandorf, 212 N.Y.S. 548, 126 Misc. 124.
Wash.—Florence v. De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565.

Matters within authority of special agent

(1) An attorney, employed for the special purpose of bringing suit, is not bound to disclose to his client knowledge of facts beyond the scope of such employment and known to be within the authority of independent agents.—Foorman v. Meyers, 37 P.(2d) 469, 1 Cal. App. 719.

(2) Notice of unsanitary conditions on leased premises to lessor's attorney by counsel for tenants, who knew that certain real estate agents were lessor's agents in all other matters relating to the leasing of the premises and that the attorney notified was lessor's agent only for the purpose of suing for rent, was not notice to the lessor as to the unsanitary conditions.—Foorman v. Myers, supra.

Knowledge gained in drawing contract

Knowledge obtained by an attorney in drawing a contract was not chargeable to the client where the knowledge was not gained in the exercise of the attorney's employment by such client, had no reference thereto, and was not within the scope of his employment.—Andrew v. Rivers, 223 N.W. 102, 207 Iowa 342.

17. Burns v. McCain, 290 P. 622, 107 Cal.App. 291.

18. Neilson v. Weber, 64 S.W. 20, 107 Tenn. 161.

19. Ill.—Cessna v. Hulce, 152 N.E. 679, 322 Ill. 589.
Ky.—Drury v. Franke, 57 S.W.(2d) 969, 247 Ky. 758, 88 A.L.R. 917.
Minn.—Larson v. Johnson, 221 N.W. 871, 175 Minn. 502.
Mo.—Ford v. French, 72 Mo. 250.
Mont.—Hansen v. Johnson, 4 P.(2d) 1088, 90 Mont. 597.
Pa.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

20. Ala.—Marshall v. Lister, 71 So. 411, 195 Ala. 591.
Ky.—Drury v. Franke, 57 S.W.(2d) 969, 247 Ky. 758, 88 A.L.R. 917.
Mont.—Hansen v. Johnson, 4 P.(2d) 1088, 90 Mont. 597.
Tex.—Ives v. Culton, (Com App.) 229 S.W. 331, affirming (Civ App.) 197 S.W. 619.
6 C.J. p. 640 notes 65, 67.

21. Cal.—Otis v. Zeiss, 165 P. 524, 175 Cal. 192.
Ga.—Lang v. Aldred, 179 S.E. 567, 51 Ga. App. 91.
6 C.J. p. 640 note 63.

22. Ga.—Bean v. Barron, 168 S.E. 259, 176 Ga. 285.
Or.—Bailey v. Hickey, 195 P. 372, 99 Or. 251.

23. Deering v. Holcomb, 67 P. 240, 561, 26 Wash. 533—6 C.J. p. 640 note 69.

24. Melms v. Pabst, 64 N.W. 518, 93 Wis. 153, 57 Am.S.R. 899—6 C.J. p. 640 note 69.

25. Bogart v. George K. Porter Co., 223 P. 959, 193 Cal. 197, 31 A.L.R. 1045—6 C.J. p. 640 note 69.

26. Hess v. Conway, 142 P. 253, 93 Kan. 787, rehearing denied 144 P. 205, 93 Kan. 246—6 C.J. p. 640 note 69.

by an attorney prior to the existence of the relation of attorney and client ordinarily will be chargeable to the client where such knowledge was acquired so recently, or under such circumstances, that it will be presumed to have been in the mind of the attorney at the time of the transaction in question.[27] There is authority for the view, however, that the burden is on the person who relies on the existence of such knowledge to show that it was present in the mind of the attorney when he acted for his client,[28] and that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the attorney when acting for his client is necessary in order to charge the client by constructive notice of the prior information to the attorney.[29]

Since the whole doctrine of imputed notice to a client rests on the ground that the attorney has knowledge of something material to the particular transaction which it is his duty to communicate to his principal,[30] notice will not be imputed to a client where it would be a breach of professional confidence to make the communication.[31] Furthermore, the client is not affected with notice where the circumstances are such as to render it certain or probable that the attorney will not perform his duty to communicate material facts to his client,[32] where his interest in, or relation to, a previous transaction was such as would induce him to withhold the information,[33] or where the attorney engages in a transaction in his own interest under circumstances which will induce him not to communicate his knowledge to his client,[34] as, for example, where the attorney has a personal interest adverse to the interest of his client.[35] So, in general, the client will not be chargeable with the knowledge of the attorney where the latter was acting fraudulently,[36] and will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal.[37]

Knowledge of, and notice to, the attorney for one party to a transaction do not charge the other party with like knowledge and notice where the attorney does not act for such other party.[38] There is authority for the view that, even where an attorney acts for both parties to a transaction, the circumstances surrounding the dual relationship may be such as to prevent his knowledge acquired while acting for one client in the matter involved from affecting the other client.[39] Notice to an attorney who undertakes to act for a party to an action, without authority, is not notice to such party.[40]

In order to render applicable the rule that notice to, or knowledge of, the attorney is chargeable to the client, it must appear that the attorney actually had, or could have had, notice or knowledge of the fact in question.[41]

Where an attorney acts in his own behalf, he is chargeable with knowledge even though he acquired his information while acting in his professional capacity in behalf of a client.[42]

Attorney acting for collection agency. Where an attorney is employed by a firm of collecting agents who have received the claim to be collected from its

27. Bailey v. Hickey, 195 P. 372, 99 Or. 251.

28. Mathews v. Damainville, 91 N.Y.S. 524, 100 App.Div. 311, 15 N.Y.Ann.Cas. 436, reversing 89 N.Y.S. 493, 43 Misc. 546.

29. Cal.—Otis v. Zeiss, 165 P. 524, 175 Cal. 192—Wittenbrock v. Parker, 86 P. 374, 102 Cal. 93, 103, 41 Am.S.R. 172, 24 L.R.A. 197.
N.Y.—Slattery v. Schwannecke, 23 N.E. 922, 118 N.Y. 543—Constant v. Rochester University, 19 N.E. 631, 111 N.Y. 604, 7 Am.S.R. 769, 2 L.R.A. 734.

30. U.S.—In re Locust Bldg. Co., (C.C.A.N.Y.) 299 F. 756, certiorari denied Keighley v. American Trust Co., 44 S.Ct. 635, 265 U.S. 590, 68 L.Ed. 1195.
Wis.—Melms v. Pabst Brewing Co., 66 N.W. 244, 93 Wis. 140

31. U.S.—In re Locust Bldg. Co., (C.C.A.N.Y.) 299 F. 756, certiorari denied Keighley v. American Trust Co., 44 S.Ct. 635, 265 U.S. 590, 68 L.Ed. 1195.
Iowa.—Farnsworth v. Hazelett, 199 N.E. 410, 197 Iowa 1367, 38 A.L.R. 814.
6 C.J. p. 640 note 73.

32. Pa.—Lovell v. Renwel, 13 Pa.Co. 608.
Tex.—Fordtran v. Cunningham, (Civ.App.) 177 S.W. 212
Wash.—Florence v. De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565.

33. Scotch Lumber Co. v. Sage, 32 So. 607, 132 Ala. 593, 90 Am.S.R. 932—6 C.J. p. 640 note 74.

34. American Export & Inland Coal Corporation v. Matthew, Addy Co., 147 N.E. 89, 112 Ohio St. 186.

35. Iowa.—Farnsworth v. Hazelett, 194 N.W. 410, 197 Iowa 1367, 38 A.L.R. 814.
Mich.—Valley Jitney Jungle Co. v. Hamady, 249 N.W. 888, 264 Mich. 354

36. Farnsworth v. Hazelett, 199 N.W. 410, 197 Iowa 1367, 38 A.L.R. 814.

37. Tex.—Rogers v. Driscoll, (Civ.App.) 125 S.W. 599.
Wash.—Florence v. De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565
Wis.—Melms v. Pabst Brewing Co., 66 N.W. 244, 93 Wis. 140

38. Mich.—Minto v. Davie, 215 N.W. 360, 240 Mich. 406
S.C.—Caughman v. Smith, 5 S.E. 362, 28 S.C. 605
Tex.—Schlottmann v. Wiese, (Civ.App.) 86 S.W.(2d) 44.

39. Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

40. Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141, reversing 249 Ill.App. 479.

41. U.S.—In re Locust Bldg. Co., (C.C.A.N.Y.) 299 F. 756, certiorari denied Keighley v. American Trust Co., 44 S.Ct. 635, 265 U.S. 590, 68 L.Ed. 1195
Ill.—Haines v. Doss, 259 Ill.App. 179.
Pa.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405

42. Singfield v. Vogler, 192 S.W. 906, 127 Ark. 618—6 C.J. p. 641 note 76.

owners, his knowledge is not that of the owners of the claim but only that of the collecting agency.[43]

Knowledge of attorney as notice to his firm. Knowledge acquired by one member of a law firm is constructive notice to the firm as to such knowledge.[44]

After termination of relation. The presumption of law being that the relation between an attorney and his client ceases with the termination of the litigation for which the attorney was retained (infra § 108), ordinarily, no notice to him after final judgment is binding on his client.[45] The fact that there has been a change of attorneys pending the completion of the matter for which the first attorney was employed does not, however, prevent the imputation to the client of knowledge acquired by such attorney prior to the change of attorneys, where the change was made solely because of the illness of the first attorney.[46]

b. Knowledge or Notice Affecting Real Property

(1) In general

(2) Claims and rights of third persons

(1) In General

A person who has dealings which involve real property, including a purchaser, is usually chargeable with knowledge of, or notice to, his attorney concerning matters affecting title to, or rights or interests in, such property, acquired or obtained in the course of the attorney's employment in connection with such property.

In accordance with general rules and subject to applicable qualifications and limitations (supra § 69 a), a client is affected with notice of matters affecting title to, or interests in, real property, where knowledge of such matters is acquired by his attorney in connection with the client's business respecting such property.[47] Thus, usually a purchaser of real property is chargeable with notice to, or knowledge of, his attorney, in respect of matters affecting title, received or obtained by the attorney while acting for the purchaser in connection with the acquisition of the property.[48] A like rule applies to knowledge of the attorney for the purchaser in respect of the dimensions of the property involved.[49] There is even authority for the view that a purchaser is chargeable with knowledge of matters affecting the title which was acquired by the attorney in a trans-

43. Hoover v Wise, 91 U S 308, 23 L Ed. 392, affirming 61 N.Y. 305—6 C J. p 641 note 78

44. Wittenbrock v Parker, 36 P. 374, 102 Cal 93, 41 Am S R 172, 24 L R. A. 197

45. Ill.—Cummer v. Cummer, 283 Ill App 220
Tex.—Hamilton v. Hamilton, (Civ. App.) 225 S.W. 69.
6 C.J. p 640 note 70.

46. Farnsworth v Hazelett, 199 N W. 410, 197 Iowa 1367, 38 A.L.R. 314.

47. Md.—Miller v. Mitnick, 161 A. 157, 163 Md 113.
Tenn.—Goodbar v. Union & Planters' Bank & Trust Co, 67 S.W.(2d) 562, 17 Tenn App. 355

Examination for title insurance

As affecting the liability of a bank and trust company in respect of the application and investment of the proceeds of the sale of certain real property which came into its possession, such bank and trust company was chargeable with the knowledge of an attorney in its title department, of limitations contained in deeds in the chain of title where such knowledge was acquired by the attorney in the examination of title, made for the purpose of determining whether or not the bank and trust company would issue a title guaranty policy.—Goodbar v Union & Planters' Bank & Trust Co., 67 S W (2d) 562, 17 Tenn App. 355.

Mortgage given under duress

Knowledge of an attorney who procured the execution of a mortgage that the mortgagor acted under duress in giving the mortgage is binding on a corporation for whose benefit the mortgage was taken and also on a purchaser on foreclosure of the mortgage, where the attorney acted in the various transactions as attorney for the corporation and for the purchaser.—Stevens v. Thissell, 134 N E 393, 240 Mass. 541.

Redeemable or irredeemable ground rents

Attorney for the purchaser at a foreclosure sale of certain leasehold lots must be charged with knowledge of what the record disclosed as to whether ground rents were redeemable or irredeemable, which knowledge was attributable to the purchaser.—Miller v. Mitnick, 161 A. 157, 163 Md. 113.

Validity of waiver, release, and disclaimer

Knowledge of the attorney for certain heirs of the fraudulent character of a sale by the administratrix of certain real property was imputed to such heirs in determining the validity of an instrument of waiver, release, and disclaimer, which was executed by such heirs and which was held to apply to a claim under statute for liquidated damages for the fraudulent sale.—Nelson v. Nelson, 20 P (2d) 995, 131 Cal App. 126

48. Ill.—Pearson v. Johnson, 130 N E. 742, 297 Ill. 417
Wash.—Stubbe v. Stangler, 283 P. 916, 157 Wash. 283.

Existence of restrictive covenants

The rule applies to the attorneys knowledge of the existence of restrictive covenants.—Isaacs v Schmuck, 213 N.Y S 563, 218 App Div. 516, answering certified questions 219 N Y.S. 337, 219 App Div. 734, and reversed on other grounds 156 N.E. 621, 245 N.Y. 77, 51 A L R 1454.

Property conveyed through attorney

Where the purchaser's attorney was merely interposed for the purchaser in making the purchase, the purchaser was charged with knowledge of defects in title, in view of the fact that the act of sale to the attorney by an agent for the vendor showed limitations on such agent's authority which were disregarded by him in making the sale.—Aucoin v. Engeron, 115 So. 576, 165 La. 319.

Sole ownership by married woman

(1) The rule applied where the negotiations for the sale of the property were carried on between the purchaser and the husband of the person who, as an examination of the title disclosed, was the sole owner.—Pearson v. Johnson, 130 N E. 742, 297 Ill. 417.

(2) A creditor of the husband, who was to obtain a benefit from the sale, was also chargeable with notice that the wife was the sole owner, where such notice was acquired by the attorney who acted both for the purchaser and for the creditor.—Pearson v Johnson, supra.

49. Donigan v. Policek, (Tex.Civ. App.) 34 S.W.(2d) 375.

action in which the attorney was acting for another client, where such transaction was closely connected with the subsequent purchase.[50]

The assignee of a mortgagee may be charged with knowledge of facts constituting a defense to a suit to foreclose such mortgage where the attorney of the assignee possessed such knowledge.[51]

A purchaser is not chargeable with his attorney's knowledge of matters affecting title and involving a fraudulent misrepresentation by the vendor, where the circumstances are such as to induce the attorney not to communicate his knowledge to the purchaser.[52] A mortgagee is not affected with his attorney's knowledge of the latter's intention to apply money received under the mortgage to a wrongful purpose, where the mortgage is executed by the attorney himself on real property which he has transferred as executor to himself as an individual.[53]

A purchaser may not be charged with the alleged knowledge of an attorney, in order to prevent cancellation or rescission of the contract of purchase on the ground of mistake as to the identity of the property involved, in the absence of any showing that the attorney had knowledge of the preliminary negotiations between the parties or that the property described in the abstract which the attorney examined was property other than that which the purchaser believed that he purchased.[54]

Representative character of attorney. In general, an attorney employed by a prospective purchaser of real property to represent such purchaser in the transaction is such a representative of the purchaser that the latter is affected with notice to, or knowledge of, the attorney,[55] as, for example, knowledge obtained by the attorney in examining or passing on title pursuant to the attorney's employment.[56] Likewise, the attorney for a mortgagee or grantee in a deed given as security is the representative of the mortgagee or grantee in respect of knowledge acquired by the attorney on an examination of title as a preliminary to the execution of the mortgage or deed.[57] There is authority for the view, however, that an attorney employed only to draw the deed does not become a representative of the prospective purchaser to the extent that the latter is bound by the attorney's knowledge of facts not disclosed to the purchaser.[58] Knowledge of, and notice to, the attorney for the vendor do not charge the purchaser with like knowledge and notice where the attorney does not act for the purchaser,[59] and a like rule applies so as to prevent charging a mortgagee or beneficiary of a deed given as security with knowledge of, or notice to, the attorney for the mortgagor or grantor, where the attorney does not act for the mortgagee or beneficiary.[60] Similarly, the vendor is not chargeable with knowledge acquired by the at-

Map and dimensions

Knowledge acquired by the attorney for a purchaser in passing on title, concerning a map referred to in the deed and the dimensions of the lots involved, became the knowledge of the purchaser—Donigan v. Pollcek, (Tex Civ.App.) 34 S.W.(2d) 375

50. Vernon v. Title Guarantee & Trust Co, (Cal.App.) 46 P.(2d) 191.

Defects in procedure preceding sale under execution

Where an attorney, acting on behalf of a client, brought an action against an incompetent without having a guardian ad litem appointed, and without having the summons and complaint served on the general guardian of the incompetent, who was appointed after the action was commenced, and the attorney entered a default judgment before the expiration of the time to answer, which was granted by such attorney to the attorney for defendant incompetent, and real property of the incompetent was sold under execution to a person for whom the attorney for plaintiff in the first action was acting at the time of the sale, the attorney's knowledge of the defects affecting title was chargeable to the purchaser, in respect of a concealment of such defects by the attorney when he applied to a title company, on behalf of the purchaser, for a title policy, so that, under the terms of the policy, the title company was relieved from liability in respect of such defects—Vernon v. Title Guarantee & Trust Co., (Cal.App.) 46 P.(2d) 191.

51. Woodrow v. Frederick, 131 S.E. 598, 133 S.C. 431.

Mortgage assigned by mortgagee who was assignee's attorney

The assignee, by constituting the mortgagee and assignor, who was an attorney, and such mortgagee's law firm, the assignee's agent for the collection of the interest, and by accepting the interest from the mortgagee without payment by the mortgagor, was affected by knowledge obtained by the mortgagee and his firm that there was nothing due on the bond and mortgage—Woodrow v. Frederick, 131 S.E. 598, 133 S.C. 431.

52. Fordtran v. Cunningham, (Tex Civ.App.) 177 S.W. 212.

Promise to vendor not to reveal flaw in title

That the purchaser's attorney knew of a flaw in the title, and agreed with the vendor not to reveal it, did not make his act binding on the purchaser.—Fordtran v. Cunningham, (Tex. Civ.App.) 177 S.W. 212.

53. Goodell v. Taylor, (N.J.Ch.) 97 A. 569

54. Nelson v. Pedersen, 137 N.E. 486, 305 Ill. 606

55. Ill.—Hodes v. Foster, 155 N.E. 762, 324 Ill. 615
Mass.—Lincoln v. Sauer, 137 N.E. 642, 243 Mass. 201

56. Ill.—Pearson v. Johnson, 130 N.E. 742, 297 Ill. 417.
Mass.—Ratshesky v. Piscopo, 131 N.E. 449, 239 Mass. 180
Okl.—Pyeatt v. Estus, 179 P. 42, 72 Okl. 160, 4 A.L.R. 1570
Wash.—Stubbs v. Stangler, 233 P. 916, 137 Wash. 233

57. Ga.—Citizens' Bank of Vidalia v. Citizens' & Southern Bank, 127 S.E. 219, 160 Ga. 109.
Ky.—Drinkard v. George, 36 S.W. (2d) 56, 237 Ky. 560
Tex.—Hexter v. Pratt. (Com.App.) 10 S.W.(2d) 693, affirming (Civ. App.) 283 S.W. 653

58. Webb-Crawford Co. v. Boseman, 173 S.E. 144, 178 Ga. 328

59. Minto v. Davis, 215 N.W. 360, 240 Mich. 406.

60. S.C.—Caughman v. Smith, 5 S.E. 362, 28 S.C. 605
Tex.—Scholottmann v. Wiese, (Civ. App.) 36 S.W.(2d) 44
6 C.J. p. 640 note 64 [a] (3).

torney for the purchaser while the attorney was acting on behalf of the purchaser.[61]

(2) Claims and Rights of Third Persons

(a) In general

(b) Person claiming under mortgage

(a) In General

In general, notice to, or knowledge of, an attorney, who acts for the purchaser of real property in connection with the purchase, of outstanding rights or claims of third persons is imputed to the purchaser.

In general, notice to, or knowledge of, an attorney, who acts in connection with the purchase of real property as attorney for the purchaser, of outstanding rights or claims of third persons is equivalent to notice to, or knowledge of, the purchaser.[62] This rule applies in determining whether or not the purchaser is a bona fide purchaser without notice of the outstanding rights or claims,[63] and in determining questions as to priority between the rights of the purchaser and those of the third persons.[64]

There is authority for the view that the purchaser may be chargeable with knowledge of outstanding rights or claims, acquired by his attorney prior to the existence between them of the relation of attorney and client, where such knowledge was acquired by the attorney under circumstances which raise a presumption that the knowledge is in the mind of the attorney when he is acting for the purchaser.[65] According to some cases, however, in order that knowledge of, or notice to, the attorney of a person who claims to have acquired an interest

61. Magnus Beck Brewing Co v. Setel, 225 N Y S 41, 130 Misc. 705

Extension of mortgage

Where the attorney for the vendor, after the execution of the contract and in the course of closing the sale, acted on behalf of the purchaser and without authorization from the vendor, in obtaining an extension of a mortgage on the property involved, the knowledge of the attorney in that regard was not imputable to the vendor, so as to prevent his successfully claiming that he had been released from personal liability on the bond and mortgage because of the extension agreement.—Magnus Beck Brewing Co v Setel, 225 N.Y.S. 41, 130 Misc. 705.

Limited employment of vendor's attorney by purchaser

Knowledge of an attorney, who was only acting for plaintiff in passing on the sufficiency of title to several properties, that a purchaser of land from plaintiff through defendant, a broker, had made a certain offer for the land, and that some of the properties received by plaintiff in part payment for her land actually belonged to defendant, did not charge plaintiff with constructive knowledge, where such attorney in every other detail was attorney for the purchaser.—Puffer v. Badley, 181 P. 1, 92 Or. 360, 4 A.L.R. 1561.

62. Allen v. Frank Janes Co., 73 So. 115, 142 La. 1056.

Outstanding lease

Where a purchaser's counsel was furnished a copy of vendor's lease to a third person and information as to subletting by such third person and had examined the title, the counsel's knowledge of the lease and subletting was the purchaser's knowledge. —Lincoln v. Sauer, 127 N.E. 642, 243 Mass. 201.

63. Cal.—Watson v Sutro, 24 P. 172, 25 P. 64, 86 Cal. 500.

Ill—Hodes v. Foster, 155 N.E. 762, 324 Ill 615

Mass.—Ratshesky v. Piscopo, 131 N E 449, 239 Mass 180.

N J—Goldberg v. Levy, 134 A. 353, 99 N J Eq 634, affirmed 137 A. 917, 101 N.J Eq 293.

N Y—Polhamus v. Hines, 218 N.Y.S 401, 128 Misc 299

Okl—Pyeatt v Estus, 179 P. 42, 72 Okl 160, 4 A.L.R 1570.

66 C J p 1181 note 93.

Outstanding contract of sale

(1) The above rule applies where the outstanding right or claim is based on a prior contract of sale—Hodes v Foster, 155 N E 762, 324 Ill. 615—Goldberg v. Levy, 134 A. 353, 99 N J Eq 634, affirmed 137 A. 917, 101 N J.Eq 293.

(2) Purchasers of land were bound by knowledge of their counsel, who has been informed of a prior contract by the vendor to sell to a third person and of the vendor's attempt to register the title in order to perform such prior contract, but who made no inquiries of the prior purchaser or of his counsel—Ratshesky v. Piscopo, 131 N.E. 449, 239 Mass. 180.

Notice acquired in examining and passing on title

Where the purchaser of land from persons who had purchased such land at a guardian's sale elected to rely on the investigation and opinion of the attorney for a loan company, who examined the title for the purpose of making a loan to the purchaser, the purchaser was bound by such notice or knowledge of outstanding equities as was received or acquired by such attorney in examining and passing on the title—Pyeatt v Estus, 179 P. 42, 72 Okl. 160, 4 A.L.R. 1570.

Character of notice to attorney

Where the question involved was as to whether or not the lessee of certain oil lands, to whom the transferee of the lessor had transferred the right, title, and interest of such transferee, was chargeable with knowledge of the rights of a third person which arose prior to such transfer by the transferee, while the view was expressed that knowledge by notice to an attorney or counsel, acquired during the negotiations for a purchase, is notice to the principal, it was recognized that the notice must be of a character which would put a prudent man on such inquiry that, if prosecuted with reasonable diligence, it would lead to actual knowledge of the true facts with reference to the subject of the transaction—Fletcher v. Allen, 197 P. 953, 51 Cal App 774.

64. Iowa—Shoemaker v Smith, 45 N W 744, 80 Iowa 655

Me—Bunker v. Gordon, 16 A. 341, 81 Me 66.

Or—Bailey v. Hickey, 195 P. 372, 99 Or. 251.

Purchaser at sale under execution

Where certain papers, which were withdrawn from the files of the court by plaintiff's attorney with the consent of the court, disclosed the existence of a vendor's lien, such attorney presumably acquired actual notice of the existence of such lien, which must be imputed to plaintiff who purchased the real property on a sale under execution, and the vendor's lien was superior to the rights of plaintiff.—John Silvey & Co. v. Cook, 68 So. 37, 191 Ala. 228.

65. Bailey v. Hickey, 195 P. 372, 99 Or 251.

Attachment and sale on execution

The rule was applied where the attorney for plaintiff, in an action in which real property was attached and plaintiff subsequently purchased the property at a sale under execution, had acquired knowledge, prior to the attachment, that defendant in such action had sold the property to another—Bailey v. Hickey, 195 P. 372, 99 Or. 251.

in, or title to, real property may constitute notice to such person, the knowledge must have been acquired by the attorney after the commencement of the relation of attorney and client,[66] and notice must have been received by the attorney while he was acting in the line of his duty and while he was engaged in a service for his client to which the notice relates.[67] Thus, it has been held or recognized that a purchaser is not chargeable with knowledge or notice of outstanding rights or claims where knowledge of such rights or claims was acquired by the attorney while the latter was acting for another client and not for the purchaser.[68] So, knowledge of the outstanding claim of a third person, acquired by the attorney for a grantee, is not notice to the grantee, where such knowledge was acquired by the attorney when he was previously acting as attorney for the grantor in a different transaction, since the interest of the grantor and the interest of the grantee are antagonistic.[69] In any event, the purchaser is not chargeable with notice of outstanding rights of third persons, on the ground that his attorney in the transaction for the purchase had knowledge of the facts, where the knowledge of the attorney, if any, was acquired before the relation of attorney and client arose, and there is no evidence that such knowledge was present in the mind and memory of the attorney while acting pursuant to such relation.[70] A like rule applies in respect of knowledge of a prior unrecorded conveyance, acquired by the attorney for a judgment creditor of the grantor before the creation of the relation of attorney and client, where such knowledge was not present in the mind of the attorney while transacting the business of the judgment creditor.[71]

Under the rules here considered, a purchaser is affected with notice of outstanding rights and claims only to the extent that such matters are fairly within the knowledge of his attorney, and the purchaser is not affected with knowledge unless the attorney has, or could have had in the performance of his duty, the knowledge with which it is sought to charge the purchaser.[72]

Knowledge of, and notice to, the vendor's attorney, of outstanding claims or rights of third persons do not charge the purchaser with like knowledge or notice where the attorney does not act for the purchaser.[73] Knowledge of the purchaser's attorney of outstanding rights of a third person, which arose after the making of the contract of sale but

66. Marshall v. Lister, 71 So. 411, 195 Ala. 591.

Attorney for execution creditor

The above rule was applied where it was claimed that a judgment and execution debtor had informed the attorney for the judgment and execution creditor, before the entry of the judgment, that the wife of the judgment debtor owned the property in question, but it did not appear that the information was given after the relation of attorney and client had commenced.—Marshall v. Lister, 71 So. 411, 195 Ala. 591.

Fraud

The purchaser of real property was not chargeable with knowledge of frauds which were attempted or committed by his attorney, or which were within the attorney's knowledge, prior to the commencement of the relation of attorney and client.—Goerz v. Barstow, (Ga.) 148 F. 562, 78 C.C.A. 248, reversing (C.C.) 122 F. 140.

67. Wiggins v. Stewart, 109 So. 101, 215 Ala. 9.

Not employed for particular transaction

(1) Knowledge of an attorney, who is employed generally by a purchaser, of outstanding or adverse interests, is not imputed to the purchaser, where such attorney did not act for the purchaser when the purchase was made.—Wheat v. Baer & Thayer Hardwood Co., 131 So. 307, 15 La. App. 306.

(2) This rule was recognized in holding that the knowledge of the attorney should not be imputed to the purchaser for the purpose of showing that possession of the purchaser was in bad faith as affecting its claim of title by prescription.—Wheat v. Baer & Thayer Hardwood Co., supra.

Unrecorded deed

The above rule was laid down in a case in which the question involved was as to whether a person who claimed under judgment, execution, levy, sale, and a sheriff's deed in due form had notice of a prior unrecorded deed to a third person.—Wiggins v. Stewart Bros., 109 So. 101, 215 Ala. 9.

68. Ala.—Mundine v. Pitts' Adm'r, 14 Ala. 84.
Mo.—Ford v. French, 72 Mo. 250.
Pa.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

Loan and mortgage

Where a purchaser in possession under an unrecorded contract of sale and purchaser, who had not paid the full purchase price, employed an attorney to obtain a loan for the purchaser on the security of a mortgage on the property, the attorney's knowledge of the existence of mortgages given by the vendor and holder of the legal title, after the contract of sale and purchase was executed, was not chargeable to the purchaser in so far as subsequent payments on the purchase price were concerned, where such knowledge, if acquired by the attorney, was acquired by him in examining the title, because, in examining the title, the attorney was, under the circumstances, acting for the person who contemplated making the loan to the purchaser, and not for the purchaser.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

69. Morris v. Curtin, 152 N.E. 210, 321 Ill. 462.

70. Otis v. Zeiss, 165 P. 524, 175 Cal. 192.

71. Ives v. Culton, (Tex.Civ.App.) 197 S.W. 619, affirmed (Com.App.) 229 S.W. 321.

72. Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

Subsequent payments by purchaser

The above rule was applied in holding that a purchaser could not be charged with notice of mortgages given by the vendor and holder of legal title after the contract of sale was made, in so far as subsequent payments on the purchase price were concerned.—Kinch v. Fluke, 166 A. 905, 311 Pa. 405.

73. Minto v. Davis, 215 N.W. 360, 240 Mich. 406.

Prior contract of sale

The rule applied where the question involved was as to a prior contract by the vendor for the sale of the property to third persons.—Minto v. Davis, 215 N.W. 360, 240 Mich. 406.

before its consummation, may not be imputed to the vendor, where such knowledge was acquired by the attorney while he was acting as the attorney for the purchaser in a matter independent of his employment by the vendor.[74] There is authority for the view that knowledge of an attorney, who is consulted by a prospective purchaser or grantee with regard to the title, is not imputable to such purchaser or grantee, where the attorney was not employed to negotiate the purchase or to acquire title.[75]

The mere fact that an attorney, under his contract of employment, has an equitable interest in a fund, resulting from a recovery by his client, does not constitute notice to the attorney of a prior unrecorded conveyance of real property, which becomes subject to the lien of the judgment in favor of the client as judgment creditor of the grantor, notice to the client.[76]

A person to whom real property is conveyed as trustee, under a recorded declaration of trust by him in favor of a named beneficiary, is chargeable with knowledge of an attorney who is the real purchaser, acquired in the examination of the title, of a prior recorded mortgage given by the grantor.[77]

Fraudulent conveyance or transfer. The grantee of real property is bound by knowledge acquired by his attorney in the course of the transaction leading to the conveyance, tending to show that the conveyance is intended to defeat the claims of third persons.[78] A party to a transaction which involved the fraudulent conveyance by a beneficiary of a trust of real property of such beneficiary's interest, for the purpose of defeating the claim of a judgment creditor of such beneficiary, is chargeable with knowledge of such party's attorney as to the purpose of the conveyance.[79]

There is authority for the view that knowledge of an attorney, employed only to draw the deed, of facts indicating a fraudulent purpose on the part of the vendor is not chargeable to the prospective purchaser,[80] and that knowledge of the attorney for a purchaser, who was employed merely to examine and report on the title and not to negotiate the purchase, of the purpose of the vendor to defraud his creditors is not imputable to the purchaser.[81]

Attorney as bona fide purchaser. An attorney may not successfully claim to be a bona fide purchaser, where he has purchased from his client and has acquired knowledge of the rights of others while acting for his client in the prior purchase of the property by such client.[82] An attorney who purchases real property from his client pending an action in which the attorney represents such client and in which title to, or rights in, such property are at issue, may not successfully claim the status of a bona fide purchaser where he purchased with full knowledge of the existence of a mortgage on the property.[83] So, also, an attorney who purchases real property at a judicial sale in a suit in which his client is a party, and who has obtained a decree awarding him an interest in such property, is affected with knowledge of defects in service of process in such suit on a party who has an interest in the property.[84] An attorney who acted for a mortgagee in connection with the execution of the mortgage, and who is the purchaser at the foreclosure sale under the mortgage, purchases subject to outstanding equities, where the attorney has knowledge of such equities when he acts in connection with the execution of the mortgage.[85]

(b) Person Claiming under Mortgage

Knowledge of, or notice to, the attorney for a mortgagee, or grantee or beneficiary of a deed given as security, of outstanding rights or claims of third persons is, in general, imputable to the mortgagee, beneficiary, or grantee.

Knowledge of, or notice to, the attorney for a mortgagee, or grantee or beneficiary of a deed given as security, of outstanding rights or claims of third persons is, in general, equivalent to knowledge of, or notice to, the mortgagee, beneficiary, or grantee.[86]

74. Larson v. Johnson, 221 N.W. 871, 175 Minn. 502.

Assignment of contract by purchaser as security

The above rule was applied where, after the making of the contract, the purchaser assigned such contract to a third person as security, the attorney drew the assignment, and the vendor had no actual knowledge of the assignment until after he obtained from the purchaser a quitclaim terminating such purchaser's interest in the contract and premises—Larson v Johnson, 221 N.W. 871, 175 Minn. 502

75. Arrington v. Arrington, 19 S.E. 851, 114 N.C. 151—6 C.J. p. 640 note 64 [a] (4)

76. Ives v. Culton, (Tex.Civ.App.) 197 S.W. 619, affirmed (Com.App.) 229 S.W. 321

77. Kaufman v. Federal Nat. Bank, 191 N.E. 422, 287 Mass. 97.

78. Combs v. Roberts, 35 S.W.(2d) 293, 227 Ky. 299.

79. Schaefer v. Fisher, 242 N.Y.S. 308, 137 Misc. 420.

80. Webb-Crawford Co. v. Boseman, 173 S.E. 144, 178 Ga. 328.

81. Weil v. Reiss, 66 S.W. 946, 167 Mo. 125.

82. Singfield v. Vogler, 192 S.W. 906, 127 Ark. 618.

83. Gay v. Parpart, (Ill.) 1 S.Ct. 456, 106 U.S. 679, 27 L.Ed. 256.

84. Galpin v. Page, (D.C.) 18 Wall. (U.S.) 350, 21 L.Ed. 959.

85. Howell v. Mills, 53 N.Y. 322.

86. Ky.—Drinkard v. George, 36 S.W.(2d) 56, 227 Ky. 560.
N.Y.—Howell v. Mills, 53 N.Y. 322.
Tex.—Hexter v. Pratt, (Com.App.) 10 S.W.(2d) 692, affirming (Civ.App.) 283 S.W. 653.

Deed as security

Where an attorney, employed by a bank to examine the title of devisees

The rule applies in determining whether or not the mortgagee, grantee, or beneficiary is an innocent purchaser without notice,[87] and in determining priority between the mortgage and a prior conveyance of, or encumbrance on, the property.[88] Likewise, knowledge of the attorney for the purchaser of a deed of trust given as security, of the prior rights of a third person, is notice to such purchaser.[89] There is authority for the view that knowledge of the mortgagee's attorney is not imputable to the mortgagee, where the knowledge of the attorney is not obtained in the course of his employment in connection with the mortgage,[90] and that knowledge acquired by an attorney before he became the attorney for the grantee of a trust deed given as security is not chargeable to such grantee.[91] In any event, in order that knowledge of, or notice to, the attorney for the mortgagee of the existence of a prior conveyance or encumbrance may be chargeable to the mortgagee, where such knowledge or notice was acquired in a prior transaction in which the attorney was not acting for the mortgagee, there must be clear proof that such knowledge or notice was present in the attorney's mind when he was acting for the mortgagee in connection with the execution of the mortgage.[92]

Knowledge of the attorney for the mortgagor of outstanding rights or claims is not chargeable to the mortgagee where the attorney does not act for the mortgagee.[93] Similarly, knowledge of the attorney for the grantor, in a trust deed given as security, that other like deeds of the same land were executed simultaneously with such trust deed is not imputed to the beneficiary of such deed.[94] Knowledge of an

under a will, for the purpose of making to such devisees a loan to be secured by a deed of the property, such devisees being the executors of the will, was notified by a creditor of the testator that such executors had administered to themselves the property devised to them under the will, without paying the debt of the testator to such creditor, such notice to the attorney was notice to the bank, and the title of the bank to such property given to secure such loan must yield to the lien of a judgment de bonis testatoris obtained on such debt of the testator in a suit commenced after such administration of such property and after the bank had so acquired title thereto as security.—Citizens' Bank of Vidalia v. Citizens' & Southern Bank, 127 S.E. 219, 160 Ga. 109.

Knowledge acquired in the examination of title

(1) The rule applies where the knowledge is acquired in the examination of title as a preliminary to taking a mortgage or deed as security.—Citizens' Bank of Vidalia v. Citizens' & Southern Bank, 127 S.E. 219, 160 Ga. 109.—Drinkard v. George, 36 S.W.(2d) 56, 237 Ky. 560.

(2) The grantee in a deed of trust given as security is chargeable with notice of the claim of title of a third person, where the attorney of the grantee in examining abstracts of title discovered the existence of facts which, if investigated, would have led to a discovery of the claim of the third person, whether or not the investigation was made.—Hexter v. Pratt, (Tex.Civ.App.) 283 S.W. 653, affirmed (Com.App.) 10 S.W.(2d) 692.

Mortgage of timber

Knowledge and opportunity of an attorney for a prospective mortgagee of timber to know of a prior mortgage on the same timber was imputable to such prospective mortgagee.—Bryant Mfg. Co. v. Hester, 98 S.E. 721, 177 N.C. 609.

87. Hexter v. Pratt, (Tex.Com.App.) 10 S.W.(2d) 692, affirming (Civ. App.) 283 S.W. 653.

88. Westervelt v. Haff, 2 Sandf.Ch. (N.Y.) 98.

89. Atkinson v. Foote, 186 P. 831, 44 Cal.App. 149.

Evidence as to attorney's recollection of facts

On an examination of the circumstances prior to, and connected with, the purchase of the trust deed, the conclusion was reached that the attorney retained knowledge of the prior rights of third persons, and had such knowledge present in his mind, when the purchase was made.—Atkinson v. Foote, 186 P. 831, 44 Cal. App. 149.

Effect of knowledge

While the knowledge of the attorney of the purchaser of the trust deed was regarded as only constructive notice to the purchaser in a general sense, it was held that it was sufficient to prevent such purchaser from claiming priority as to advances made under the trust deed after such knowledge was obtained by the attorney and after the purchase, notwithstanding the rule in the jurisdiction in which the question arose that actual notice was required in order to prevent a prior mortgagee from claiming protection as to subsequent advances made by him.—Atkinson v. Foote, 186 P. 831, 44 Cal. App. 149.

90. In New Jersey

(1) The above view was taken in the court of errors and appeals.—Centreville Building & Loan Ass'n v. Gollin, 176 A. 356, 117 N.J.Eq. 412.

(2) In an earlier case in the court of chancery, after a review of the cases as to the effect of knowledge of, or notice to, an agent, including cases in the court of errors and appeals, the court adopted and applied the rule that knowledge of an agent is chargeable to his principal, even though not obtained while he was concerned for the principal or in the course of the same transaction, provided the principal, if acting for himself or through another agent, would have acquired the same knowledge, and held that the knowledge of the attorney for a mortgagee of the existence of a prior unrecorded mortgage on the premises in question was chargeable to the second mortgagee, so as to give the prior unrecorded mortgage priority, notwithstanding such knowledge was acquired by the attorney prior to, and independently of, his employment by such second mortgagee.—Reiners v. Hawthorne, 156 A. 370, 109 N.J.Eq. 60.

91. Dowdy v. Furtner, (Tex.Civ. App.) 198 S.W. 647.

92. Slattery v. Schwannecke, 23 N.E. 922, 118 N.Y. 543.—Constant v. Rochester University, 19 N.E. 631, 111 N.Y. 604, 7 Am.St.R. 769, 2 L.R.A. 734.

93. N.Y.—Flanders v. Rosoff, 97 N.Y.S. 514, 111 App.Div. 1, affirmed 81 N.E. 1164, 188 N.Y. 616.
S.C.—Caughman v. Smith, 5 S.E. 362, 28 S.C. 605.

Prior unrecorded mortgage

Knowledge of the attorney for the mortgagor of a prior unrecorded mortgage is not imputed to a subsequent mortgagee, where the attorney does not act for the mortgagee.—Caughman v. Smith, 5 S.E. 362, 28 S.C. 605.

94. Schlottmann v. Wiese, (Tex.Civ. App.) 36 S.W.(2d) 44, error dismissed.

attorney for a prior mortgagee, whose duties are confined to an examination of the abstract of title and to writing opinions as to the condition of the title, of provisions of a subordinate mortgage, executed simultaneously with the prior mortgage, is not imputed to the prior mortgagee.[95]

Fraudulent foreclosure sale. Knowledge of the fraudulent character of a foreclosure sale under a deed of trust given as security, as to the grantor and the beneficiaries, acquired by the attorney for the trustee, who conducted the sale, is not imputable to a beneficiary of a subsequent deed of trust of the same property, given as security, so as to defeat such beneficiary's status as a bona fide purchaser, notwithstanding such attorney acted for the beneficiary of the subsequent deed of trust when such deed was given.[96]

c. Knowledge or Notice Affecting Personal Property

(1) In general

(2) Bills and notes

(1) In General

In general, knowledge of, or notice to, an attorney in respect of matters affecting or involving transfers of personal property is imputed to his client.

The general rule that notice to, or knowledge of, an attorney is imputable to his client (supra § 69 a) applies to knowledge of matters affecting or involving the transfer of personal property.[97] In general, however, a mortgagee under a chattel mortgage is not chargeable with knowledge of facts acquired by his attorney which if known to the mortgagee would invalidate the mortgage, where knowledge of the attorney is in respect of matters which are not within the scope of the attorney's employment or authority,[98] or where the circumstances are such as to prevent the operation of the presumption that the attorney will communicate to his client matters material to the client's protection and interest.[99]

Outstanding claims or rights of third persons. Knowledge of, or notice to, the attorney for the purchaser of, or other person who claims the ac-

95. Perpetual Savings & Loan Ass'n v Van Atten, 233 N.W. 746, 211 Iowa 435

96. Wood v. North Carolina Trust Co, 156 S.E. 523, 200 N.C. 105.

Nonpayment of bid and failure to pay bonds secured by deed of trust

The fraud alleged in respect of the prior foreclosure sale was the failure of the purchaser to pay the amount of his bid to the trustee named in the deed of trust and the failure of the trustee to apply the amount of such bid to the payment of the bonds secured by such deed — Wood v. North Carolina Trust Co., 156 S.E. 523, 200 N.C. 105.

97. **Assignment of interest in payments due or to become due**

(1) Knowledge of an attorney for a person who has funds in his possession which he is obligated to pay to another, of the assignment by such other of the latter's interest in payments from such funds, due or to become due, is binding on the person so obligated to make payments — Manfredi v. O'Brien, 185 N.E. 365, 282 Mass. 458.

(2) The rule was applied in a suit by a person, who had contracted with the owner of land to furnish labor for the construction of a building, to compel a corporation, which was the mortgagee in a construction mortgage executed by the owner, to apply moneys due under the mortgage in satisfaction of a debt due plaintiff from the owner, based on work and labor furnished by plaintiff pursuant to his contract with the owner; and it was held that, where the mortgagor had assigned his interest in payments due, and to become due, under the construction mortgage, the assignee in turn had assigned such interest, and defendant mortgagee had made payments to the mortgagor in violation of a stipulation made by the mortgagee, the trial court properly disregarded a suggestion by the mortgagee, made at the time of entry of a final decree in favor of plaintiff, that the last assignee should be made a party defendant for the benefit of the mortgagee, in view of the facts that the attorney for the mortgagee had knowledge of the assignments at the time they were made and that plaintiff did not learn of such assignments until the hearings before a master were in progress.—Manfredi v. O'Brien, supra.

Bill of sale to secure a debt

A corporation is chargeable with knowledge of a bill of sale to secure a debt executed in the name of the corporation by its president, without the authority required by its by-laws, where the same is witnessed by the attorney of the corporation, who represented it in the litigation to compromise and settle which the bill of sale was executed — People's Credit Clothing Co. v. Old Colony Ins. Co. of Boston, 171 S.E. 587, 47 Ga.App. 819.

Purpose of transfer of bank deposit

(1) Notice to an attorney of the purpose of a transfer of a bank deposit by the owner may be notice to the attorney's client — Goldston v. Randolph, (Mass.) 199 N.E. 896

(2) Notice to the attorneys for the executors of donor's estate that the transfer of donee's interest in a bank account to the estate was made because the donee thought it necessary on the advice of the executors' attorneys constituted notice to the executors of the reason for such transfer.—Goldston v. Randolph, supra.

98. Florence v. De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565.

Limited employment of attorney

Where an attorney was the agent of a prospective mortgagee of personal property merely for the purpose of advising the mortgagee as to the existence and value of the property, knowledge of the attorney that the property had been transferred to the prospective mortgagor for the purpose of defrauding the creditors of the transferor was not imputable to the prospective mortgagee, notwithstanding the attorney prepared the chattel mortgage, where the mortgagee paid no fee to the attorney and the latter was in fact the attorney for the original transferor and for the mortgagor — Florence v. De Beaumont, 172 P. 340, 101 Wash. 356, 4 A.L.R. 1565

99. Florence v. De Beaumont, supra.

Scheme to defraud creditors

The knowledge of an attorney that property covered by a chattel mortgage had been transferred to the mortgagor for the purpose of defrauding the creditors of the transferor was not imputable to the mortgagee, where such knowledge had willfully been concealed by the attorney who, while acting in certain respects for the mortgagee, was ac-

quisition of an interest in, personal property, of outstanding claims to, or rights in, such property of third persons ordinarily is equivalent to knowledge of, or notice to, the client, where such knowledge or notice was acquired or received in the course of the attorney's employment.[1] This rule applies to notice to the attorney of the existence of a chattel mortgage on the property,[2] notwithstanding the mortgagee is in default at the time of the purchase for failure to file the renewal affidavit in connection with such mortgage.[3]

The knowledge of the attorney for an attachment creditor of the existence of a prior mortgage on the property involved is not imputable to such creditor, so as to prevent the attachment creditor from claiming the rights of an encumbrancer in good faith, where the knowledge of the attorney was acquired prior to the creation of the relation of attorney and client and while the attorney was acting for another client.[4] In order to charge a person with notice of a claim of title to personal property in the possession of one other than the owner because of the alleged knowledge of the attorney of such person, it must appear that the attorney had actually acquired such knowledge.[5]

(2) Bills and Notes

Knowledge concerning defects, defenses, and the like, which affect a note, acquired by the attorney for the transferee or holder while the attorney is acting in the course of his employment, is in general chargeable to the transferee or holder.

Knowledge of an attorney, who represents the indorsee of a promissory note in the transaction in which the transfer is made, of an infirmity in the note is imputed to the indorsee.[6] Likewise, the transferee of a note is chargeable with knowledge of his attorney of the conditions attached to the giving of the note,[7] and of an offer by the transferee of the property of the maker of the note to assume the liabilities of the maker, in determining whether or not the transferee of the note had accepted such offer within a reasonable time.[8]

Knowledge of the attorney for the holder of a note of facts constituting a defense is not necessarily imputable to such holder, where such knowledge was acquired by the attorney in transactions with other persons which occurred before the transaction in which the note was given.[9] Likewise, knowledge of the attorney of the transferee of the payee of a note is not imputable to the transferee, so as to

tually the agent and attorney for the original transferor and for the mortgagor—Florence v. De Beaumont, 172 P. 840, 101 Wash. 356, 4 A.L.R. 1565.

1. Iowa—Frick v. Fritz, 88 N.W 961, 115 Iowa 438, 91 Am S R 165 Mich—Security Trust Co. v. Tuller, 220 N.W. 795, 243 Mich. 570.

Purchase of vessel

Knowledge of the attorney of the purchaser of a vessel of the existence of a prior unrecorded conveyance of the vessel to a third person was notice to the purchaser, within the meaning of the federal statute providing that no bill of sale, conveyance, or the like, of a vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs or devisees, and any person having actual notice, until such bill of sale, conveyance, or the like, is recorded as provided in the statute—The Tompkins, (C.C.A. N.Y.) 13 F.(2d) 552

2. Security Trust Co. v. Tuller, 220 N W. 795, 243 Mich. 570—11 C.J. p 523 note 69

Mortgage covering real and personal property

Notice to the attorney for the purchaser, resulting from an examination of an abstract of title, that a certain prior trust mortgage covered both real and personal property was notice to the purchaser—Security Trust Co v. Tuller, 220 N.W. 795, 243 Mich. 570.

3. Security Trust Co v. Tuller, supra.

4. Hansen v. Johnson, 4 P (2d) 1088, 90 Mont. 597.

5. Haines v. Doss, 269 Ill App. 179.

Erroneous information

The fact that the attorney for a judgment creditor was erroneously informed, prior to the levy of execution on an automobile in the hands of the judgment debtor, that a third person had a mortgage on the automobile was not notice to the judgment creditor that such third person claimed the automobile by virtue of a conditional sales contract—Haines v. Doss, 269 Ill.App 179.

6. Lambert v. Smith, 157 P. 909, 53 Okl. 606, 13 A.L.R 1.

7. Weicker v. Bromfield, (C C.A. Colo.) 34 F.(2d) 377.

Notes given pursuant to agreement for merger of banks

The knowledge of the attorney for a bank that notes, executed and transferred to the bank by the directors and stockholders of another bank, were given pursuant to an agreement which contemplated a merger of the banks and which contained a provision for the receipt, by the makers of the notes, of certain securities of the bank of which such makers were stockholders and directors, which had been criticized by a bank examiner, was the knowledge of the bank for which the attorney acted—Weicker v Bromfield, (C C A Colo) 34 F (2d) 377

Attorney for a bank was held the special agent of the bank in obtaining a note and security deed from a wife so as to impute to the bank attorney's knowledge the fact that the note was to secure the husband's debts—Carlton v. Moultrie Banking Co, 152 S E 215, 170 Ga 185

8. Bogart v. George K. Porter Co, 223 P. 959, 193 Cal. 197, 31 A.L.R. 1045.

Assumption of debts by corporate transferee of property

Knowledge of the attorney for the assignee of the payee of a note that a corporation, to which the maker had transferred his assets after giving the note, had assumed the payment of the outstanding indebtedness of the maker was chargeable to the assignee, precluding such assignee from bringing an action against the corporation's trustees after dissolution, and eleven years after the corporation's assumption agreement, even though the assumption agreement should be regarded as a mere offer to assume the indebtedness and the attorney had in the meantime been an officer of the corporation—Bogart v. George K Porter Co, 223 P. 959, 193 Cal. 197, 31 A.L.R. 1045.

9. Lang v. Aldred, 179 S E. 567, 51 Ga.App. 91.

Note secured by deed

The above rule was applied where

prevent the transferee, from being a holder in due course, where the interest of the attorney is adverse to that of the transferee,[10] or, it seems, where the attorney of the transferee in other matters had acquired the knowledge in question while acting as the attorney for the payee in the transaction in which the note was given.[11]

Where the provisions of an indenture of trust, executed in connection with the creation of a so-called Massachusetts realty trust, in terms exempt the trustee from personal liability for any obligation or liability incurred in response to his trust, knowledge of the attorney for the vendor of real property of such provisions is chargeable to the vendor, so as to relieve the trustee of personal liability to the vendor on notes executed by the trustee as maker and given for the purchase price of such real property.[12] A like rule applies in respect of a promissory note given by trustees to a mortgagee, where such note is secured by a mortgage on the trust property, and the attorney for the mortgagee, in examining the title, acquired knowledge of the provisions of the declaration of trust exempting the trustees from personal liability.[13]

d. Matters Involved in Legal or Administrative Proceedings

Knowledge of, or notice to, an attorney for a litigant or party to an action, concerning matters involved in the litigation or action, is in general imputable to such litigant or party.

Knowledge of, or notice to, the attorney for a litigant or party to a legal proceeding, of matters arising in the course of the litigation or proceeding, is ordinarily imputable to such litigant or party.[14] The rule applies in a criminal as well as in a civil proceeding.[15] This rule has been applied or recognized where the attorney had knowledge or notice as to the pendency of an action,[16] orders of the court relating to the trial of the cause,[17] the assignment or setting of a cause for trial,[18] the method of selecting a special judge in a criminal prosecution,[19] the separation of jurors in a criminal case,[20] the existence of a cross action,[21] the claim, in a former action, of a codefendant of a party,[22] the

a deed was given to secure the note on which the action was brought, in which action the maker set up the defense that the debt represented by the note was the debt of her husband, and the attorney who had been employed by plaintiff to examine the title to the property conveyed as security may have acquired knowledge that the debt represented by the note was the debt of defendant's husband in previous transactions with other persons—Lang v. Aldred, 179 S.E. 567, 51 Ga.App. 91.

10. Valley Jitney Jungle Co. v. Hamady, 249 N.W. 888, 264 Mich. 354.

Attorney who is officer of payee

The rule stated in the text was applied where the attorney was an officer of the payee corporation—Valley Jitney Jungle Co. v. Hamady, 249 N.W. 888, 264 Mich. 354—Lovell v. Renwel, 13 Pa.Co. 608.

11. Lynch v. Holbrook, 193 P. 505, 49 Cal.App. 380.

12. Brown v. Smith, (C.C.A.Conn.) 73 F.(2d) 524.

Evidence

In an action against the trustee on notes covering the purchase price of realty conveyed to trust, the notes being executed by the trustee as such, evidence showing that plaintiff vendor had no knowledge of the provisions of the declaration of trust absolving the trustee and shareholders from personal liability was inadmissible as not tending to contradict proof that the vendor, through his attorney, who drew up the declaration of trust, had knowledge of its provisions—Brown v. Smith, (C.C.A. Conn.) 73 F.(2d) 524.

13. Baker v. James, 181 N.E. 861, 280 Mass. 43.

14. Kan.—Overlander v. Overlander, 284 P. 614, 129 Kan. 709.
Neb.—Goergen v. Department of Public Works of Nebraska, 243 N.W. 886, 123 Neb. 648.
Ohio—Roma v. Industrial Commission of Ohio, 119 N.E. 461, 97 Ohio St. 247.

Attorney of record

In pending judicial proceedings ordinarily, notice to an attorney of record is notice to his client—Roma v. Industrial Commission of Ohio, 119 N.E. 461, 97 Ohio St. 247.

15. Barnes v. Commonwealth, 201 S.W. 318, 179 Ky. 725.

16. Bunnell v. Holmes, 171 P. 365, 64 Colo. 345.

Motion to set aside default judgment

Knowledge of the attorney of defendant of the pendency of the action against the latter is imputed to defendant, so as to warrant the denial of a motion to set aside a default judgment, made on the ground that defendant did not have knowledge or notice of the pendency of the action—Bunnell v. Holmes, 171 P. 365, 64 Colo. 345.

Notice to surety of action against principal

A surety had notice of an action against the principal, where the attorneys who appeared for the principal were acting on behalf of the surety—Keating v. Equitable Surety Co. of New York, 235 N.Y.S. 231, 134 Misc. 491.

17. Dillon v. Hawkins, 227 S.W. 753, 147 Ark. 1.

Failure of attorney to communicate information does not, of course, prevent the application of the above rule—Dillon v. Hawkins, 227 S.W. 753, 147 Ark. 1.

18. Mont.—Davenport v. Davenport, 222 P. 422, 69 Mont. 405.
Okl.—Bigsby v. Eppstein, 135 P. 934, 39 Okl. 466.

19. Campion v. State, 154 N.E. 802, 199 Ind. 129.

Knowledge of attorney for accused.—Campion v. State, 154 N.E. 802, 199 Ind. 129.

20. Barnes v. Commonwealth, 201 S.W. 318, 179 Ky. 725.

21. Davis v. Cox, (Tex.Civ.App.) 4 S.W.(2d) 1008.

Notice to plaintiffs' attorneys

Notice of cross action, given to plaintiffs' attorneys of record, who were still representing them, so far as the trial court and defendants knew, when such attorneys stated that they declined to prosecute the action further and took a bill of exceptions to the court's action in trying the case after refusing a motion for a nonsuit, must be taken as notice to plaintiffs.—Davis v. Cox, (Tex.Civ.App.) 4 S.W.(2d) 1008.

22. Herrick v. Woodrow-Shindler Co., 226 P. 137, 75 Colo. 363.

Same property involved in both actions

Plaintiff herein, defendant in a former action in which the same property was involved, was charged with knowledge which his attorney

steps taken in respect of attached property,[23] the rendition or entry of a judgment against the client,[24] the existence of a judgment dismissing an action on application of plaintiff's attorney,[25] the provisions of a judgment,[26] and the continuance in force of an injunction.[27]

The question as to the effect of knowledge of, or notice to, the attorney for a party has arisen in determining whether or not there has been a waiver of objections in respect of matters arising in the course of the proceedings, and it has been held or recognized that there was an imputation of knowledge, sufficient as a basis for a waiver, where the attorney had knowledge of facts which disqualify a juror for the trial of a cause,[28] of the concealment of facts by a juror on his voir dire examination,[29] and of the fact that an order for the appointment of a receiver did not require a bond.[30] In this connection, while the view has been taken that usually at least knowledge of an attorney, acquired prior to the creation of the relation of attorney and client with a party to an action and while the attorney was acting in a different matter, is not imputed to such party in respect of concealment of facts by a juror on his voir dire examination,[31] there is authority for the view that an attorney's knowledge of facts which disqualify a juror is imputed to such attorney's client, notwithstanding such knowledge was acquired prior to, and independently of, the employment, provided such knowledge was present in the mind of the attorney at the time of the trial or before the verdict was rendered.[32]

Where, under the applicable statute, the running of a statute of limitations is suspended for the period between the presentation of the claim and the denial of such claim, even if the suspension continues until claimant is notified of the denial of the claim, notice of such denial to the attorney for claimant is notice to claimant.[33]

In order that a notice to an attorney in the course of a legal proceeding may be regarded as notice to a party to the proceeding, it must appear that such attorney is authorized to represent such party.[34]

Effect of termination of relation. Ordinarily, notice to an attorney in respect of proceedings, given after termination of the relation of attorney and client, is not notice to the client.[35] Thus, in the absence of a showing that the attorney has authority to represent the client after judgment, or of a statutory provision giving such authority, notice to the attorney is not notice to the client, in respect of a motion to amend or modify a final decree,[36] or of a

had concerning the claims of his co-defendant in the former action—Herrick v Woodrow-Shindler Co, 226 P 137, 75 Colo. 363.

23. Putnam v. Handy, 142 N.E. 77, 247 Mass. 406.

24. Cal.—Rauer v. Hertweck, 165 P 946, 175 Cal 278
Okl.—Bigsby v Eppstein, 135 P. 934, 39 Okl 466
Tex.—Bradford v. Malone, 130 S.W. 1013, 49 Tex.Civ.App 440.

Motion for new trial
The rule was applied in upholding the denial of a motion by defendant for a new trial, made on the ground of surprise and irregularities in the procurement of the judgment—Bigsby v. Eppstein, 135 P. 934, 39 Okl 466.

25. Braa v Bruner, 244 N.W. 537, 60 S.D. 397

26. In re Waters of Doan Creek in Walla Walla County, 299 P. 383, 162 Wash. 695.

27. U. S v. Sumner, 217 N.Y.S. 645, 127 Misc. 907.

28. Bean v. Barron, 168 S.E. 259, 176 Ga. 285—35 C.J. p 865 note 2

29. Gackstetter v Market St. Ry. Co, (Cal.App.) 52 P.(2d) 998.

30. Williams v. New York Zinc Co., (C.C.A.N.Y.) 29 F.(2d) 167.

Objection to receiver's sale because of want of bond
The rule applied in a case in which the party at whose instance a receiver was appointed objected to a sale by the receiver on the ground that the receiver had not filed a bond—Williams v New York, Zinc Co., (C.C.A.N.Y.) 29 F.(2d) 167.

31. Drury v. Franke, 57 S.W.(2d) 969, 247 Ky 758, 88 A.L.R. 917

32. Bean v. Barron, 168 S.E. 259, 176 Ga 285

Motion for new trial
In determining the propriety of the denial of a motion by defendant for a new trial, based on the claim that jurors who participated in rendering a verdict for plaintiff were disqualified because they were related to plaintiff's attorney, it was held that the evidence was sufficient to support a finding that knowledge of the existence of such relationship, acquired by defendant's attorney previously to, and independently of, such attorney's employment by defendant, was present in the mind of defendant's attorney at the time of the trial and, therefore, was imputable to defendant at the time of selecting the jury or before the verdict was rendered, so as to warrant the conclusion that there was a waiver of the disqualification—Bean v. Barron, 168 S.E. 259, 176 Ga. 285.

33. U. S. v. Gower, (C.C.A.Okl.) 71 F.(2d) 366.

Government war risk insurance
Notification received by insured's attorney, that a claim under a yearly renewable term war risk policy was disallowed, was notification to insured, with respect to the question when the one-year limitation period for filing suit after July 3, 1930, suspended during the pendency of the claim in the veterans' bureau by the act of July 3, 1930 (38 U.S.C.A. § 445), began to run again—U. S. v. Gower, (C.C.A.Okl.) 71 F.(2d) 366.

34. Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141, reversing 249 Ill. App. 479.

Motion to vacate order striking case from docket and to reinstate cause
A notice to an attorney of a motion by plaintiff to vacate an order striking the cause from the docket and to reinstate the cause was not notice to defendant, where such attorney was not authorized to represent defendant—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 144, reversing 249 Ill. App. 479.

35. Ill.—Cummer v. Cummer, 283 Ill.App 220
Tex.—Hamilton v. Hamilton, (Civ. App.) 225 S.W 69

36. Swift v. Allen, 55 Ill. 302—Cummer v. Cummer, 283 Ill.App. 220.

Divorce
The rule applies in respect of a motion to modify a final decree of divorce—Cummer v. Cummer, 283 Ill. App. 220.

motion to enter judgment nunc pro tunc correcting the judgment already entered.[37]

Patent cases. Under the provision of the federal statute [Rev.St. § 4894; 35 U.S.C.A. § 37] that, on failure of applicant for a patent to prosecute his application within one year after any action therein, of which notice shall have been given to applicant, the application shall be regarded as abandoned unless it is shown that the delay was unavoidable, the requirement as to notice to applicant is satisfied by notice to his attorney.[38] There is, however, authority for the view that, under such statute, notice to the attorney for applicant, is not notice to the personal representative of applicant where such attorney never became the attorney of such representative.[39]

Proceedings under Workmen's Compensation Act. Notice to the attorney, who has been duly designated by applicant for compensation under a Workmen's Compensation Act as the person on whom notices of proceedings are to be served, of the rejection of the claim is sufficient under some acts, in the absence of a notice to the industrial commission of a change by applicant of the person who is to receive notices.[40] So, also, under some acts, notice to the attorney for insurer of the making of an award is notice to insurer, notwithstanding the adjuster or paying officer of insurer did not receive notice mailed by the industrial accident board.[41] It has been held, however, that notice to the attorney of record for claimant of the rejection of the claim is not notice to claimant, where the attorney did not communicate to claimant the fact of rejection, and, at or about the time the claim was rejected, the attorney withdrew from the case.[42]

§ 70. Notice to Client

Knowledge acquired by a party to a suit, affecting the interests of the parties, may be regarded as the knowledge of such party's attorney.

While notice is not imputable to an attorney in all his personal, professional, and official connections from the fact that one of his clients has notice,[43] a party's knowledge of matters affecting the interests of the parties to a suit is the knowledge of such party's attorney.[44]

§ 71. Ratification by Client of Attorney's Acts

a. In general
b. What constitutes ratification
c. Procedural questions in determining ratification

a. In General

In general, a client may ratify an unauthorized act of his attorney, and a person for whom an attorney has appeared or commenced an action without authority may ratify the act of the attorney in that regard.

In general, a client may ratify unauthorized acts of his attorney,[45] and, a subsequent ratification of

37. Hamilton v. Hamilton, (Tex.Civ.App.) 225 S.W. 69, dismissed for want of jurisdiction.

38. Rosenberg v. Carr Fastener Co., (C.C.A.N.Y.) 51 F.(2d) 1014, certiorari denied 52 S.Ct. 32, 284 U.S. 652, 76 L.Ed. 553.

39. In re Mattullath, 38 App.D.C. 497.

40. Strebing v. Industrial Commission, 184 N.E. 886, 351 Ill. 627.

Facts not constituting notice of change

The fact that an attorney other than the one originally designated to receive notices examined applicant's witnesses before the industrial commission did not charge the commission with notice of a change.—Strebing v. Industrial Commission, 184 N.E. 886, 351 Ill. 627.

41. Dixon v. U. S. Fidelity & Guaranty Co., (Tex.Civ.App.) 293 S.W. 291.

42. Roma v. Industrial Commission of Ohio, 119 N.E. 461, 97 Ohio St. 247.

43. Wardlaw v. Troy Oil Mill, 54 S.E. 658, 74 S.C. 368, 114 Am.S.R. 1004.

Attorney for corporation who was also president of bank

A bank which made a loan to a corporation to which personal property had been furnished under a contract, in the nature of a chattel mortgage, providing that title should remain in the seller until the purchase price was paid, which contract was not recorded when the loan was made, was not chargeable with notice of the existence of such contract merely because the president of the bank was the attorney for the corporation to which the loan was made, where the attorney had no knowledge of the contract under which the property was purchased.—Wardlaw v. Troy Oil Mill, 54 S.E. 658, 74 S.C. 368, 114 Am.S.R. 1004.

44. Ill.—McNemar v. McNemar, 143 Ill.App. 134.
Mich.—Faber v. Eastman, Dillon & Co., 259 N.W. 880, 271 Mich. 142.

45. Iowa.—Story County Trust & Savings Bank v. Youts's Estate, 200 N.W. 700, 199 Iowa 444.
Okl.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P.(2d) 335, 162 Okl. 192.
Utah.—Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 53 Utah 601.
6 C.J. p. 669 note 33.

Acceptance of service of claim against decedent's estate

An administratrix who ratified by her acts and conduct her attorney's unauthorized acceptance of service of notice, under Code § 3338, of filing and hearing of claims against the estate, was bound thereby.—Story County Trust & Savings Bank v. Youts's Estate, 200 N.W. 700, 199 Iowa 444.

Arbitration

If the act of an attorney in submitting his client's cause to arbitration is ratified and adopted by his client, the award, if otherwise valid, may be enforced.—Jenkins v. Weeks, 2 Ky.Op. 118.

Assignment of judgment

A client may ratify the assignment by his attorney of a judgment recovered for the client by the attorney, notwithstanding want of authority of the attorney to make such assignment.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P.(2d) 335, 162 Okl. 192.

Compromise and settlement

(1) In view of the rule generally

the acts of an attorney is equivalent to a special authority previously granted to do those acts.[46]

Ratification is based on knowledge,[47] and ratification is not effected and the client is not bound unless he acted with full knowledge of all the facts and circumstances,[48] or, at least, with knowledge of all the material facts or circumstances.[49] Furthermore, there is authority for the view that, in order

recognized that a compromise of the client's cause of action is not within the scope of an attorney's general authority (infra § 105), the binding effect of a compromise entered into by an attorney without express authority depends on the client's ratification—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40—Dawson v. Hotchkiss, 169 S.E. 564, 160 Va. 577.

(2) A client may ratify the act of his attorney in negotiating or attempting a compromise and settlement—Johnson v. Star Piano Co., 108 S.E. 811, 27 Ga.App. 425—Combs' Adm'r v. Virginia Iron, Coal & Coke Co., 32 S.W.(2d) 649, 236 Ky. 524—Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 53 Utah 601—6 C.J. p. 669 note 33 [b].

(3) Defendant, who has ratified acts of its attorney in compromising an action, will not be heard to complain—McGinley v. Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1.

Matters involved in organization of corporation

"Where the attorney charged with the organization of a corporation had the stock actually paid for in cash, and had bonds issued to the stockholders in an amount equal to their stock, as a bonus, the stockholders, all of whom had full knowledge of the purpose and the means taken to effectuate it, were bound by his acts, [even] though the purpose would better have been accomplished by paying for the bonds and having the stock issued as a bonus"—Williamson v. Collins, (Ohio) 243 F. 835, 836, 156 C.C.A. 347.

Receiving notes and securities

(1) The act of an attorney in receiving notes or securities from the judgment debtor, to be collected and applied to the judgment, may be ratified by his client where the attorney assumes to act for his client—Wilkinson v. Holloway, 7 Leigh (34 Va.) 277, 294.

(2) Such an agreement by an attorney in his own name, however, has been held incapable of ratification—Black v. Drake, 2 Colo. 330.

Rescission of contract

The acts of an attorney for vendors of real property under an installment contract containing no time essence or other provision for forfeiture, nor any provision making all payments due on default in one or more payments, in demanding possession after the purchaser filed a suit to rescind the contract, and in accepting an instrument authorizing him to take possession in compliance with such demand, and "to effectuate the cancellation of the contract," did not amount, together with the purchaser's acts, to a rescission of the contract, in the absence of evidence that vendors, who were not present when such acts took place, authorized or ratified their attorney's conduct.—Barton v. Tombari, 207 P. 239, 120 Wash. 331.

Effect of ratification

(1) A statement or admission made by an attorney in one case is binding on his client in another, when the client has ratified it after it has been made—Berry v. Littlefield, Alvord & Co., 54 App.D.C. 195, 296 F. 285.

(2) A mortgagee who ratified collections by his attorney of installments of principal of the mortgage could not, under the circumstances, deny the authority of the attorney subsequently to collect other installments of principal which were not paid over to the mortgagee by the attorney—Williams v. Cook, 137 A. 232, 289 Pa. 207.

Ratification of illegal arrest see False Imprisonment § 40 [25 C.J. p. 512 note 3].

46. La.—Zibilich v. Rittenberg, 139 So. 309, 18 La.App. 628.
N.C.—Gallup & Co. v. Rozier, 90 S.E. 209, 172 N.C. 283.
Okl.—St. Louis & S. F. R. Co. v. Leger Mill Co., 155 P. 599, 53 Okl. 127.
6 C.J. p. 669 note 33, p. 670 note 33 [d].

Relation back of ratification

An administratrix's ratification of her attorney's unauthorized acceptance of service of notice of a claim against the estate was effective and bound the administratrix as of date of such acceptance—Story County Trust & Savings Bank v. Youtz's Estate, 200 N.W. 700, 199 Iowa 444.

47. Cal.—Central California Creditors' Ass'n v. Seeley, 267 P. 138, 91 Cal.App. 327—Cormac v. Murphy, 208 P. 360, 58 Cal.App. 366.
Mass.—See v. Norris, 125 N.E. 619, 234 Mass. 345.
Pa.—McLaughlin v. Monaghan, 138 A. 79, 290 Pa. 74.

Knowledge of unauthorized act

(1) The client must have knowledge of the unauthorized act of his attorney in order that there may be a ratification—See v. Norris, 125 N.E. 619, 234 Mass. 345—Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141—McLaughlin v. Monaghan, 138 A. 79, 290 Pa. 74.

(2) The client must also know that the act in question was that of his attorney—Central California Creditors' Ass'n v. Seeley, 267 P. 138, 91 Cal.App. 327.

Assignment of judgment

(1) Ratification of attorney's unauthorized assignment of judgment by nonresident client, to whom the transaction was reported as a collection merely, could not be inferred or presumed—McFry v. Stewart, 121 So. 517, 219 Ala. 216.

(2) Where a client has no occasion to further concern himself about a judgment, and nothing to put him on inquiry, knowledge of the assignment as a basis of ratification cannot well be imputed to him.—McFry v. Stewart, supra.

Facts not constituting notice

The mere fact that a client had knowledge that a third person was furnishing information to such client's attorneys would not be notice that plaintiff was doing it with expectation that he would be paid by defendants—Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.

48. Cal.—Broecker v. Moxley, 28 P.(2d) 409, 136 Cal.App. 248.
Iowa.—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 43.
Mich.—People's State Bank for Savings v. Bloch, 237 N.W. 773, 249 Mich. 99.
N.Y.—Babcock v. Warner Bros. Theatres, 270 N.Y.S. 765, 240 App.Div. 466—Hallow v. Hallow, 193 N.Y.S. 460, 200 App.Div. 642.
6 C.J. p. 669 note 35.

Settlement

The rule applies in respect of an alleged settlement by the attorney—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 43.

Knowledge by one party plaintiff that the attorney has compromised the suit is notice to all parties plaintiff—Loughridge v. Burkhart, 144 S.W. 65, 147 Ky. 457.

Fraud on court and client

An attempt to satisfy a judgment in respect of certain defendants, in advance of the rendition of judgment, was a fraud on the court and on plaintiff, and constituted an additional reason why plaintiff could not be regarded as having ratified an attempted settlement by his attorney, especially until such time as plaintiff acquired knowledge of all the facts.—Broecker v. Moxley, 28 P.(2d) 409, 136 Cal.App. 248.

49. Idaho.—Storey v. United States

to effect ratification and to bind the client, it is necessary that the client have knowledge of his legal or equitable rights,[50] and of possible defects in the act to be ratified.[51]

The act which it is sought to ratify must have been done by the attorney as attorney for the client,[52] and it must be ratified as a whole; it cannot be ratified in part and repudiated in part.[53]

While there is apparently authority for the view that a person who represents a party to litigation in all transactions in connection therewith may ratify, on behalf of such party, unauthorized acts of the attorney for such party,[54] it has been held or recognized that the ratification must be that of the client himself and not that of his agent,[55] and a person who is a stranger to a transaction between an attorney and another may not ratify the action and conduct of the attorney.[56] Of course, the acts of the attorney himself cannot be relied on to establish a ratification on the part of the client where the action of the attorney in the first instance was unauthorized.[57]

A contract entered into by an attorney cannot be ratified by the client if the execution and performance of the contract accomplishes a crime.[58]

Questions as to ratification by the client of his attorney's employment of assisting counsel are considered below in § 107.

Unauthorized appearance and bringing action. An unauthorized appearance by an attorney may be cured by ratification by the party for whom the attorney appeared.[59]

A person in whose name an action or proceedings is brought without authority from him may ratify the unauthorized act of the attorney in this regard.[60]

Defendant in an action may ratify the act of an attorney in making application to open a default judgment against defendant, even though the attorney was not originally authorized to represent defendant.[61]

Appeal. A party may ratify the unauthorized act of his attorney in taking an appeal[62] and in executing an appeal bond.[63]

Fidelity & Guaranty Co of Baltimore, Md, 183 P 990, 32 Idaho 383
Md.—Forest Hill Permanent Bldg Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md 666

Compromise and settlement

The rule applies in respect of an unauthorized compromise and settlement—Storey v. United States Fidelity & Guaranty Co of Baltimore, Md, 183 P. 990, 32 Idaho 383

50. Babcock v. Warner Bros. Theatres, 270 N Y S. 765, 240 App Div 466.

Understanding of effect of act on rights

In order to bind the client, it is necessary that he shall have a proper understanding of the effect of the act, which, it is claimed has been ratified, on the client's rights—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 43.

51. Babcock v. Warner Bros. Theatres, 270 N Y S. 765, 240 App Div 466

52. Black v. Drake, 2 Colo. 330

53. Ala.—McFry v. Stewart, 121 So 517, 219 Ala. 216.
Pa.—Netter v Logan, 169 A. 245, 111 Pa Super. 143.
Vt.—Nason v. Addison County Trust Co, 157 A 821, 104 Vt. 183
6 C J. p 669 note 37.

Assignment of judgment

Judgment creditor cannot ratify in part attorney's unauthorized assignment of judgment, so as to hold both judgment and money received.—McFry v Stewart, 121 So 517, 219 Ala 216

54. Rotberg v Hebron, 157 N Y.S. 738, 94 Misc 225

55. Glade Spring Bank v. McElwen, 76 S E 222, 160 N C 414, Ann Cas 1914C 542—Moye v Cogdell, 69 N. C 93

56. Watkins v. Clemmer, 19 P.(2d) 303, 129 Cal App 567.

Creation of account stated

Where a divorced wife's lawyer had a telephone conversation with her former husband, in which the husband promised to pay their son's doctor bill, the doctor could not ratify the lawyer's act so that there would be an account stated between the doctor and the husband—Watkins v. Clemmer, 19 P.(2d) 303, 129 Cal App. 567

57. McCaffrey v. Mitchell, (Colo.) 56 P (2d) 926

58. Babcock v. Warner Bros. Theatres, 270 N Y.S. 765, 240 App Div. 466

Provision for payments to attorney

A secret contract between the prospective lessee of premises and the lessor's attorney, providing for annual payments to the attorney during the period of the lease, if illegal as corruptly influencing attorney, could not be ratified by the lessor.—Babcock v Warner Bros Theatres, 270 N Y S 765, 240 App Div. 466

59. U S.—Rodgers v Bromberg, (C. C.A Tex.) 53 F (2d) 723, certiorari denied 52 S Ct. 314, 285 U S. 542, 76 L Ed. 934.

Mich.—August v. Collins, 251 N W 565, 265 Mich 389
Or.—Louth v Woodard, 236 P. 480, 114 Or 603
6 C J p 670 note 33 [c]

60. U S.—Rodgers v. Bromberg, (C. C.A Tex.) 53 F.(2d) 723, certiorari denied 52 S Ct. 314, 285 U S. 542, 76 L Ed 934
Colo.—Thomas v Mahin, 230 P. 793, 76 Colo 200
Ga.—Anderson v. Crawford, 94 S E 574, 147 Ga. 455, L R A 1918B 894.
Ky.—Botto v Botto, 13 Ky Op 315
Minn.—Northern Pac Ry Co v. Pioneer Fuel Co, 181 N.W. 341, 148 Minn 214.
6 C J. p 669 note 33 [a].

61. Young v. Martin, 153 P. 542, 96 Kan. 748

Presence of defendant

Where, on the hearing on the application to open the default judgment, defendant was present in the court room, presumably advising with his counsel, he ratified all his counsel had already done in his behalf, regardless of whether such counsel had been authorized prior thereto to represent him—Young v. Martin, 153 P. 542, 96 Kan. 748

62. Mich.—August v. Collins, 251 N W 565, 265 Mich. 389.
N C.—Gallup & Co. v. Rosner, 90 S. E 209, 172 N C. 283.

63. Ga.—Nisbet v. Lawson, 1 Ga. 275.
Mich.—August v. Collins, 251 N W. 565, 265 Mich. 389.

b. What Constitutes Ratification

Ratification may be express or implied and may consist of a failure to disaffirm, acceptance of benefits, or the performance of affirmative acts.

Ratification may be express, or it may be implied from circumstances;[64] whether or not the circumstances warrant the implication of ratification must, of course, depend on the facts of each particular case.[65]

Silence and inaction on the part of the client after acquiring knowledge of the facts may constitute ratification as a matter of law,[66] and, as a general rule, any failure on the part of a client to object to, or disaffirm, an unauthorized act promptly or within a reasonable time after he becomes aware of such act, will be regarded as a ratification,[67] as will also the acceptance by the client of benefits resulting from an attorney's acts.[68] A client may by acquiescence in, and adoption of an unauthorized act of his attorney ratify such act.[69] So, a ratification may be

64. Ky.—Combs' Adm'r v. Virginia Iron, Coal & Coke Co., 33 S.W (2d) 649, 236 Ky 524
S C—Foxworth v Murchison Nat Bank, 134 S.E 428, 136 S C. 458.
6 C J p 670 note 38

65. Wood v Bangs, 48 A. 189, 13 Del. 435—6 C J. p 670 note 38.

66. McFry v. Stewart, 121 So. 517, 219 Ala. 216.

67. Ala.—Etheridge v. Caffey, 90 So 286, 206 Ala. 474
Idaho—Evans v Power County, 1 P (2d) 614, 50 Idaho 690.
Iowa—Story County Trust & Savings Bank v. Youts's Estate, 200 N.W 700, 199 Iowa 444
Ky—Combs' Adm'r v Virginia Iron, Coal and Coke Co., 33 S W (2d) 649, 236 Ky 524.
Okl—Cook v Fisher, 204 P. 927, 85 Okl 109
S C—Foxworth v. Murchison Nat. Bank 134 S.E. 428, 136 S C 458.
Utah.—Bivans v. Utah Lake Land, Water & Power Co, 174 P. 1126, 53 Utah 601.
6 C.J. p 670 note 39.

Failure to disavow promptly

(1) The rule that, without previous special authority, or subsequent ratification, an attorney cannot compromise a judgment and satisfy the same on payment of a part thereof, does not apply where plaintiff took no step to set aside the satisfaction until ten years after the satisfaction was entered, and seven years after the death of the attorney, that he made no claim against the estate of the attorney at any time, and that the judgment still remained unsatisfied as to four of the original codefendants.—Summerville v. Galey, 45 Pa.Super. 62.

(2) A stipulation between attorneys is presumed to have been authorized by a client where he recognizes its validity by acting under it or acquiescing in an action under it for nearly four years.—Clemens v. Gregg, 167 P. 294, 34 Cal.App 245

(3) Where the act of an attorney in submitting a controversy to arbitration is not promptly repudiated by his client, it is very generally held that the act of the attorney, even if not valid at the outset, is made valid by the acquiescence of his client—Bivans v Utah Lake Land, Water & Power Co, 174 P 1126, 53 Utah 601

Promise of attorney not repudiated

Where a promise relied on by plaintiff was shown to have been made by the attorney for defendant, the attorney's authority was not repudiated by defendant, where defendant admitted owing part of the debt covered thereby, and pleaded a tender to that extent—Battle v Daniel, 89 S E. 196, 145 Ga. 331

68. U S—Maryland Casualty Co v. Beebe, (C C A Utah) 54 F (2d) 743
Cal—Faulkner v Brooks, (App) 13 P (2d) 748
Ga—Johnson v. Star Piano Co., 108 S E 811, 27 Ga App. 425.
La—Simon v. Barnett, 125 So 743, 169 La 612.
N Y—Rotberg v Hebron, 157 N Y S 788, 94 Misc 225
Pa—Commonwealth v Stephens, 173 A 869, 114 Pa Super. 126, appeal dismissed Stephens v. Commonwealth of Pennsylvania, 55 S Ct. 353, 294 U S 691, 79 L Ed 1231
S C—Foxworth v Murchison Nat. Bank, 134 S E 428, 136 S C 458.
Tex—Kreis v Kreis, (Civ App) 57 S.W (2d) 1107
Vt—Nason v Addison County Trust Co., 157 A 821, 104 Vt. 183
6 C J. p 670 note 40.
See Smith v. McBowe, 206 Ill App. 632.

Denial of authority not permitted

A party will not be permitted to deny the authority of an attorney to act for him, and at the same time take advantage of the benefits secured by the unauthorized acts of such attorney—Bush v Missouri State Life Ins. Co., 224 P. 331, 98 Okl 110

Acceptance of deed in payment of debt

A grantee, by accepting a deed of real property in payment of a debt due from the grantor, ratified the acts of an attorney for a collection agency with which the grantee had placed its claim for collection, notwithstanding such attorney had exceeded his authority and the grantee was not advised of a fraud which had been perpetrated on him, where the grantee was advised of all the facts known to such attorney and of all of such attorney's acts respecting the matter—Anglo-American Mill Co v Kentucky Bank & Trust Co, 47 S W (2d) 951, 243 Ky. 124.

Acceptance of personal property

Persons who received chattels with knowledge of a mortgage thereon and of a bill of sale thereof to their attorney for the amount of the unpaid mortgage debt could not retain the property without paying such amount—Speer v Campbell, 9 P.(2d) 1100, 167 Wash 544.

Receipt of payments out of proceeds of insurance policy, under claim against insured's estate

Where, at the insistance of the insurance company, insured had changed the beneficiary of an accident policy from a named beneficiary to the estate of insured, the beneficiary originally named, by accepting the net proceeds of the policy under a claim made by such beneficiary against the estate of insured, ratified the acts of the attorney of such beneficiary in collecting the policy in the name of the administrator of the estate of insured, who had been appointed in a proceeding conducted by the attorney, and the beneficiary could not retain such benefits and also bring an action against the insurance company on the policy.—Maryland Casualty Co v. Beebe, (C. C.A.Utah) 54 F.(2d) 743.

69. State ex inf. Talbott ex rel. Waples v. Mississippi & Fox River Drainage Dist., 238 S W. 446, 292 Mo 696

Signing amended articles of association in proceeding to establish drainage district

Even if there was a question as to the authority of attorneys for petitioning landowners in a proceeding to establish a drainage district to sign the amended articles of association for such landowners, their signatures were ratified and confirmed by the acquiescence and adoption thereof by all parties except those as to whom the proceedings were subsequently dismissed—State ex inf Talbott ex rel. Waples v Mississippi & Fox River Drainage Dist, 238 S.W. 446, 292 Mo. 696.

effected by the client's taking affirmative action in accordance with an agreement made by the attorney which was not authorized when the agreement was made.[70]

The fact that a client does not expressly disavow an act of his attorney is not, under all circumstances, conclusive of ratification.[71]

In view of the rule that knowledge of the facts is a necessary element of ratification, in the absence of knowledge on the part of the client, of the unauthorized act of his attorney, there is no duty of disaffirmance,[72] and, in general, there is not a ratification or implied assent on the part of the client where, on obtaining knowledge of the unauthorized act of the attorney, the client promptly repudiates such act.[73] Affirmative acts on the part of the client may not be given the effect of ratification, where at the time of such acts the client did not know of the unauthorized act of the attorney,[74] and the fact that the client has by his conduct apparently approved or acquiesced in the act of another does not constitute a ratification, where at the time the client gave such apparent approval he did not know that the act in question was that of his attorney, which was unauthorized.[75]

The view has been expressed that, to amount to

70. Ky.—Roberts v. Combs, 10 S.W. (2d) 608, 226 Ky. 97.
La.—Zibilich v. Rittenberg, 139 So. 309, 18 La.App. 628.
Utah—Bivans v. Utah Lake Land, Water, and Power Co., 174 P. 1126, 53 Utah 601.

Dismissal of suit

The above rule was recognized where the client dismissed a suit in accordance with a compromise agreement made by his attorney.—Zibilich v. Rittenberg, 139 So. 309, 18 La.App. 628.

Submission to arbitration

Where parties whose attorneys had signed an agreement for submission to arbitration appeared before the arbitrators accompanied by the attorneys and testified under oath as witnesses, the facts were sufficient to show ratification.—Blakely v. Graham, 111 Mass. 8—6 C.J. p. 670 note 38 [d].

Consent decree

When counsel employed to try a case agrees with the opposite counsel to the entry of a consent decree, which is taken and is partially performed by the client, in the absence of fraud, accident, or mistake, the decree is binding.—Wilbanks v. Wilbanks, 125 S.E. 202, 159 Ga. 196.

Compromise

The facts that a deed was prepared by an attorney, that it was executed and acknowledged by the client, and that it was delivered, accepted, and put on record constituted ratification by such client of the agreement pursuant to which the deed was given.—Roberts v. Combs, 10 S.W. (2d) 608, 226 Ky. 97.

71. Ark.—Young v. Fowler, 200 S.W. 813, 132 Ark. 145.
Ind.—Hammond v. Evans, 55 N.E. 784, 23 Ind.App. 501.
6 C.J. p. 670 note 39 [b].

Failure formally to repudiate settlement

Defendant's failure formally to notify plaintiff of defendant's repudiation of a settlement does not constitute ratification, where it is evident to plaintiff immediately after the settlement that defendant does not intend to comply therewith and, therefore, plaintiff is not prejudiced.—Sherman & Sons Co. v. Princess Shirt Waist Mfg. Co., 210 N.Y.S. 100, 213 App.Div. 140.

72. See v. Norris, 125 N.E. 619, 234 Mass. 345.

Client not prevented from asserting attorney's lack of authority

Where the attorney for defendant in a suit to enjoin foreclosure of a mortgage on real property entered into a stipulation that defendant would bid at the foreclosure sale an amount equal to the amount due under the mortgage plus an amount equal to the amount of plaintiff's claim under a mechanic's lien, the facts that an ad interim injunction was dissolved in accordance with the stipulation and that plaintiff could not be restored to his rights under the injunction did not prevent defendant from asserting lack of authority of his attorney to make an agreement to pay the claim of plaintiff when the latter's lien was established, in view of the fact that defendant had no knowledge of his attorney's agreement for the payment of plaintiff's claim before an action to enforce the mechanic's lien was commenced by plaintiff.—See v. Norris, 125 N.E. 619, 234 Mass. 345.

73. Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

Compromise and settlement

The rule was applied where the attorney, who was authorized to compromise his client's case, entered into a stipulation for a compromise which violated express limitations on the attorney's authority in that regard, imposed by the client.—Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

Partial satisfaction of judgment

Client who promptly discharged an attorney after knowing all the facts as to the attorney's acts in signing a partial satisfaction of judgment did not ratify the attorney's acts because of not making an earlier protest to the court, where the client had not been shown the paper in question and even the court and counsel could not understand what had been done without a hearing.—Broecker v. Moxley, 28 P.(2d) 409, 136 Cal.App. 248.

74. Hallow v. Hallow, 193 N.Y.S. 460, 200 App.Div. 642.

Acceptance of benefits

The mere fact that a client accepted money recovered by his attorney would not amount to ratification of a void contract made by the attorney with another for obtaining evidence, in the absence of a showing that the client knew that the attorney had assumed to act for the client in employing such other.—Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.

Alimony

The acceptance by a client of payments of alimony in less amounts than was provided for in an order of court entered on a stipulation did not constitute a ratification by the client of a later unauthorized stipulation entered into by her attorney, which provided for the payment of less amounts than those fixed in the original stipulation, where the payments were received by the client without knowledge of the existence of the second stipulation.—Hallow v. Hallow, 193 N.Y.S. 460, 200 App.Div. 642.

75. Central California Creditors' Ass'n v. Seeley, 267 P. 138, 91 Cal.App. 327.

Motion to amend complaint

A motion by plaintiff in attachment, made in an action by him on a bond to discharge the attachment, to amend the complaint to conform to the proof by striking from the description, in the complaint, of the obligation of the bond a promise to redeliver the attached property, which motion was granted but apparently no amendment was actually made, did not constitute a ratification of the act of plaintiff's attorney in mutilating the bond by scratching through with a lead pencil the provi-

an implied ratification, the act of the client must be inconsistent with any reasonable hypothesis other than that of approval of the acts of the attorney.[76]

Ratification of appearance or bringing action. In general, failure of a party, for whom an attorney has appeared promptly, to disavow and disaffirm the act of the attorney in that regard, on receiving knowledge of such act, constitutes a ratification of the appearance.[77] So, an unauthorized appearance may be ratified by affirmative acts of the party for whom the appearance was made, in approval or recognition of such appearance.[78]

There is authority for the view that where a person has been joined as a party plaintiff in an action without authority from him, silence on his part, or a total failure to disclaim the authority of an attorney to bring the action on such person's behalf, after the latter has received notice of the action, constitutes a ratification.[79] Such person's failure to appear and move to have his name stricken does not, however, in all circumstances, as a matter of law, amount to a ratification;[80] a prompt disclaimer of any interest in, or connection with, the action, communicated to defendant may be sufficient to prevent charging such person on the theory of ratification.[81] A person in whose name an action or proceeding is commenced by an attorney may ratify the act of the attorney in this regard by taking steps in support or recognition of the action or proceeding.[82]

Appeal. Subsequent participation by a party who is in court on service of process and who is represented by an authorized attorney, in proceedings after appeal, constitutes ratification by such party of the unauthorized act of the attorney in taking an appeal and executing an appeal bond.[83]

Other illustrations of ratification by failure to disaffirm or acceptance of benefits. Other acts of an attorney which may be ratified by his client's failure to object to, or disaffirm, the act of the attorney promptly or within a reasonable time, are a compromise and settlement,[84] the submission of a claim

sion as to redelivery, where the fact that it was the attorney who had so mutilated the bond was not known to plaintiff when the motion to amend was made and such knowledge was acquired by the client only when the attorney testified in the action after such motion was made —Central California Creditors' Ass'n v. Seeley, 267 P. 138, 91 Cal App 227.

76. Batesville Bank v. Maxey, 88 S. W. 968, 76 Ark. 472—6 C.J. p 671 note 41.

Making claim against deceased attorney's estate

The fact that a mortgagee filed a claim against the estate of his deceased attorney for the amount of the principal of the mortgage, which such attorney had collected without authority and had not paid over to the mortgagee, did not prevent the mortgagee from asserting the mortgagor's continued liability for the principal—Workman v Eyler, 121 A. 515, 94 N J Eq 526—Steadman v. Foster, 92 A. 353, 83 N J Eq 641.

Acceptance of payments which are due

There is authority for the view that the receipt of payments from another, which such other admits to be due, does not constitute ratification, by the person receiving payment, of an agreement of his attorney to forbear bringing suit against such other.—Bank of Franklin v. Trotter, 177 S E. 325, 207 N.C. 442

77. Mich.—August v. Collins, 251 N. W. 565, 265 Mich 389.
Or—Louth v. Woodard, 236 P. 480, 114 Or. 603.

Appearance for defendant not served with process

Where one of several defendants had apparent authority to authorize an attorney to appear for all defendants and conduct the case and an attorney did appear for all, failure of defendant who had not been served with process promptly to disavow the authority of the attorney to appear after acquiring knowledge of such appearance was a ratification of the appearance—Louth v. Woodard, 236 P 480, 114 Or. 603.

Permitting action to go to judgment

Where defendant, with knowledge of the pendency of an action against him in which he has not been served with process, permits the action to go to judgment against him, he thereby ratifies an attorney's appearance for him in the action.—Louth v. Woodard, 236 P 480, 114 Or. 603.

78. Robb v Vos, (Ohio) 15 S Ct. 4, 155 U S. 13, 39 L Ed. 52—6 C.J. p 670 note 38 [c].

79. Anderson v. Crawford, 94 S.E. 574, 147 Ga. 455, L R.A.1918B 894

80. Anderson v. Crawford, supra.

81. Anderson v. Crawford, supra.

82. **Settlement with attorney**

A plaintiff, in whose name an action was begun by an attorney without plaintiff's authorization, ratified the act of the attorney in this regard by making a settlement with the attorney and conveying his interest in the subject matter involved to a third person pursuant to the settlement.—Thomas v. Mahin, 230 P. 793, 76 Colo 200.

Taking possession of property involved

A railroad company, by taking possession of land acquired as a result of condemnation proceedings, after the bond for taking possession was filed and the tracks were laid, ratified the act of attorneys in filing the petition for condemnation—Northern Pac Ry. Co v. Pioneer Fuel Co., 181 N.W. 341, 148 Minn. 214.

Petition for appointment of substituted trustee

A person interested in a trust estate, by signing an agreement approving a trust account filed by executors of the trustee and requesting that the balance should be paid to a named corporation as substituted trustee, ratified the action of counsel in signing as her attorney a petition for the appointment of such corporation as substituted trustee—In re Large's Estate, 181 A. 859, 120 Pa Super 45.

83. August v. Collins, 251 N.W. 565, 265 Mich. 389.

Liability on bond

The rule was applied in holding appellant liable on the appeal bond—August v. Collins, 251 N.W. 565, 265 Mich 389.

84. Ga.—Patterson v. Southern Ry. Co, 151 S E 818, 41 Ga App. 94.
Iowa—Fernac v. Italian Importing Co, 179 N.W. 823.
Ky—Combs' Adm'r v. Virginia Iron, Coal & Coke Co, 33 S.W.(2d) 649, 236 Ky. 524—Mason v. Cook, 218 S W. 740, 187 Ky. 260.
Mont.—McGinley v. Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1.

to arbitration,[85] the act of the attorney for a judgment debtor in giving directions in respect of a sale under execution,[86] a motion for a directed verdict,[87] the assignment of judgment,[88] and bidding at a foreclosure sale.[89]

Other acts of an attorney which may be ratified by his client's acceptance of benefits with knowledge of the facts, are the compromise or settlement of the client's claim,[90] an agreement for the extension of time for payment of mortgage notes,[91] attorney's indorsing check in the name of his client and cashing such check,[92] an assignment of life insurance,[93] waiver of a trial by jury,[94] and a stipulation by the attorney for the entry of judgment against his client.[95]

c. Procedural Questions in Determining Ratification

In general, the burden of proving ratification is on the party who relies on ratification as part of his case. General rules as to admissibility, weight, and sufficiency of evidence apply in determining questions as to ratification.

The burden of proof rests on the person who relies on ratification by the client,[96] including the burden of showing that plaintiff had full knowledge of all material circumstances.[97] Where a transaction which involves the assignment of a judgment by the attorney for plaintiff in the judgment is wholly in the interest of the latter, equity often presumes acceptance on the part of such plaintiff.[98]

In the determination of a question as to ratification, general rules as to the relevancy, materiality, and competency of evidence apply,[99] as do also the

NC—Chavis v. Brown, 93 S.E. 471, 174 N.C. 122
Okl—Walker v. Gulf Pipe Line Co., 226 P. 1046, 102 Okl. 7—Cook v. Fisher, 204 P. 927, 85 Okl. 109
Utah—Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 53 Utah 601
6 C.J. p. 661 notes 48, 49.

Claim for goods sold
The seller of personal property was not entitled to recover on instruments evidencing the purchase price, where the attorney for the seller had made a settlement with the buyer and the seller collected the amount of the check given pursuant to the compromise and made no objection to the settlement for several years.—Brenard Mfg. Co. v. Ferguson, 118 So. 444, 151 Miss. 602.

Executory agreement for compromise
If the only thing involved is an executory agreement to compromise or settle, which has not been acted on or completed, the client's acquiescence therein does not constitute a ratification.—Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

85. Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 53 Utah 601.

86. Evans v. Power County, 1 P.(2d) 614, 50 Idaho 690

87. Katzenberg v. Sats, 221 N.Y.S. 105, 129 Misc. 218.

Party present when motion made
Where a motion for a directed verdict was made by the attorney for a party in the presence and hearing of such party and such party did not dissent or disapprove, it was presumed that he consented to such motion and that he authorized in fact what his attorney did, and he could not subsequently disaffirm the act of his attorney.—Katzenberg v. Sats, 221 N.Y.S. 105, 129 Misc. 218.

88. McFry v. Stewart, 121 So. 517, 219 Ala. 216.

89. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458.

90. Ga.—Patterson v. Southern Ry. Co., 151 S.E. 318, 41 Ga.App. 94—Johnson v. Star Piano Co., 108 S.E. 811, 27 Ga.App. 425.
Ky.—Roberts v. Combs, 10 S.W.(2d) 603, 226 Ky. 97.
Okl.—Bush v. Missouri State Life Ins. Co., 224 P. 331, 98 Okl. 110
Tex.—Kreis v. Kreis, (Civ.App.) 57 S.W.(2d) 1107.

Accepting deed and claiming ownership
The facts that a deed was accepted by the grantee and put on record and that the grantee was claiming ownership of the property covered by the deed constituted ratification by the grantee of the agreement of his attorney pursuant to which the deed was given.—Roberts v. Combs, 10 S.W.(2d) 603, 226 Ky. 97.

Immediate return of proceeds
If the client returns the proceeds of the settlement immediately upon his receipt thereof he is in no way estopped from asserting the attorney's lack of authority.—Phillips-Jones Corporation v. Caskey, 128 So. 553, 14 La.App. 26, denying rehearing 127 So. 46, 13 La.App. 675

91. Simon v. Barnett, 125 So. 743, 169 La. 642.

Acceptance of better security
The holder of mortgage notes who made no objection to an agreement by his attorney for the extension of the time for payment of such notes and who accepted the benefit of better security authorized and approved the agreement, even though the making of the agreement was not originally authorized.—Simon v. Barnett, 125 So. 743, 169 La. 642.

92. Nason v. Addison County Trust Co., 157 A. 821, 104 Vt. 183.

Acceptance of attorney's personal check for part of sum
Client's retention of the proceeds of an attorney's personal check, with the knowledge that the attorney had indorsed the client's signature on a larger check payable to the client and cashed such check, constituted ratification, and the client could not recover from the trust company which cashed the check the difference between the amount of the check cashed and the amount received by the client from his attorney.—Nason v. Addison County Trust Co., 157 A. 821, 104 Vt. 183.

93. Bush v. Missouri State Life Ins. Co., 224 P. 331, 98 Okl. 110.

94. Crysup v. Crockett Automobile Co., (Tex.Civ.App.) 18 S.W.(2d) 715.

95. Faulkner v. Brooks, 13 P.(2d) 743, 125 Cal.App. 137.

96. Rickert v. Craddock, 157 P. 401, 98 Kan. 143.

Compromise or settlement
(1) The burden of proof rests on a party who seeks to establish the fact that a client ratified an attempted compromise or settlement of the client's claim by his attorney for less than the amount due.—Rickert v. Craddock, 157 P. 401, 98 Kan. 143.

(2) This rule has apparently been recognized in another case.—High v. Hollis, 132 S.E. 260, 35 Ga.App. 195

97. Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666.

98. McFry v. Stewart, 121 So. 517, 219 Ala. 216.

99. **Evidence held admissible**
On an issue as to whether a landowner ratified an agreement between his attorney and the commonwealth to pay rent to the commonwealth for land taken by condemnation until the owner moved from the land, evidence

general rules as to the weight and sufficiency of evidence.[1] Slight evidence of acquiescence on a client's part will be deemed a ratification of the acts of his attorney in making a compromise.[2]

Where the evidence as to ratification is conflicting, the question is one of fact for the jury.[3] In the absence both of proof of authority of plaintiff's attorney to release plaintiff's claim against defendant and of proof of ratification of an alleged release by his attorney, a request for a binding instruction for defendant, based on such alleged release, is necessarily refused.[4]

Pleading. Where in an action to recover on a claim as originally presented to defendant, plaintiff places no reliance on defendant's payment, without plaintiff's indorsement, of a voucher check given to plaintiff's attorney in settlement of the claim, defendant in pleading settlement need not plead plaintiff's ratification of the settlement which was made by plaintiff's attorney.[5]

C. PROOF OF AUTHORITY

§ 72. In General

In general an attorney is not required in the ordinary case to show his authority, in the absence of demand therefor by the court or party entitled to make demand or of a statutory requirement of written evidence of authority.

Although it is necessary that an attorney be specially authorized to act for a client as explained above in section 62, in general, in view of the presumption that an attorney is authorized to represent, or appear for, a party whom such attorney professes to represent or appear for, as shown below in section 73, the attorney's position as an officer of the court makes it unnecessary for him, in the ordinary case, to show his authority in any way,[6] unless the

as to the rental value of the land was admissible to show that the agreement was reasonable and advantageous to the landowner—Commonwealth v. Stephens, 173 A. 869, 114 Pa.Super 126, appeal dismissed Stephens v Commonwealth of Pennsylvania, 55 S.Ct. 353, 294 U.S. 691, 79 L.Ed 1231

1. Evidence held sufficient

(1) To show ratification—Faulkner v Brooks, (Cal.App.) 13 P.(2d) 748—Story County Trust & Savings Bank v Youts's Estate, 200 N.W. 700, 199 Iowa 444—Hamilton v Coster, 144 N.E. 226, 249 Mass. 391—Blakely v Graham, 111 Mass. 8—6 C.J. p. 670 note 38 [a].

(2) To authorize submission to jury of question as to ratification—Darden v Baker, 137 S.E. 146, 193 N.C. 386

(3) To authorize finding that the client had ratified a settlement by his attorney for less than the full amount of the client's claim—Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94

(4) To show ratification by plaintiff, in a suit to foreclose a mortgage, of a stipulation entered into by his attorney, which was actually a contract, providing for payment from the proceeds of the sale of a specified amount to a defendant in the suit, for fixtures sold by such defendant under a conditional sales contract—Rotberg v. Hebron, 157 N.Y.S. 788, 94 Misc. 225.

(5) To warrant a finding that a landowner ratified an agreement between his attorney and the commonwealth to pay rent to the commonwealth until the owner moved from his condemned land and to remit future interest on the condemnation award—Commonwealth v Stephens, 173 A. 869, 114 Pa.Super 126, appeal dismissed Stephens v. Commonwealth of Pennsylvania, 55 S.Ct. 353, 294 U.S. 691, 79 L.Ed 1231.

(6) To show the ratification of the act of an attorney in filing a petition for condemnation.—Northern Pac Ry Co. v Pioneer Fuel Co., 181 N.W. 341, 148 Minn. 214

(7) To support a finding, in a proceeding to vacate a judgment and to quash execution, that appearance by filing an answer in the original action was ratified—West v Muse Mercantile Co., 277 S.W. 21, 169 Ark 1212

Evidence held insufficient

(1) To show ratification—Rickert v Craddock, 157 P. 401, 98 Kan 143—6 C.J. p. 670 note 38 [b].

(2) To show, as a matter of law, that an attorney was authorized to act for a certain person, by subsequent ratification—Ryder v. Ellis, 134 N.E. 692, 241 Mass 50.

(3) To show ratification of an attempted settlement by the attorney.—Rickert v. Craddock, supra.

(4) To show that the client acted with full knowledge of all the material circumstances—Forest Hill Permanent Bldg Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666.

(5) To show that a client was aware that his attorney had assumed to employ, or contract with, another, on the client's account, to obtain evidence to enable the client to establish a claim, so as to authorize such other to recover from the client for services in obtaining evidence—Davis v Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.

(6) Testimony of a client that he was satisfied with what the attorney did in the case did not warrant a finding of ratification by the client of the act of attorney in drawing release of cause of action—De Santis v Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass 315

2. McGinley v Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1

3. Waters v. Blackmon, 153 So. 739, 228 Ala. 462.

4. McLaughlin v. Monaghan, 138 A. 79, 290 Pa. 74.

5. Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94.

6. Iowa.—Carson, Pirie, Scott & Co v Long, 257 N.W. 815, 219 Iowa 444.

Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1

Mo.—Stiles v. Cooter Gin Co., (App.) 74 S.W.(2d) 1092.

6 C.J. p. 631 note 76.

Charter provision

An attorney who appeared for defendant in an action in the city court of the city of Auburn was not required to prove his authority, under Auburn City Charter § 140—Daly v. Dennis, 242 N.Y.S. 408, 137 Misc. 1.

Proof of authority held not necessary

(1) In a partition action by the administrator and children of an intestate who owned an undivided half in realty, a motion of defendant who owned the other undivided half requiring proof of the attorneys' authority to appear for the intestate's son, was properly overruled, where the only evidence of want of authority was that of affidavit of defendant and her attorney, who did not

attorney is duly called on to show his authority by the court or a party entitled to demand such showing (infra § 74) or there is a statutory requirement that the authority of the attorney shall be evidenced by writing (infra § 77). This rule applies to an attorney who appears for a corporation.[7]

There is authority for the view that it should be made to appear by the record that an attorney has authority to continue to represent his client on an application by the adverse party to enter a judgment nunc pro tunc where a judgment dismissing the action was entered several years before and such attorney's client has removed from the state.[8]

It has broadly been stated that only the attorney of record is entitled to recognition by the court.[9]

Under a statute providing that a party in any proceeding may appear, plead, prosecute, or defend, in his proper person, or by any citizen of good character, if the authority of a person other than an attorney at law is questioned, he must produce it and file it with the court,[10] and, even if not questioned, the court will ordinarily compel him to file his authority before he will be permitted to appear.[11]

§ 73. Presumption of Authority

a. In general
b. Scope of authority in general
c. Continuance of relation or authority; acts after judgment
d. Appeal

a. In General

There is a presumption that an attorney at law as an officer of the court is, in general, duly authorized to act for a client whom he professes to represent.

There is a well recognized presumption in favor of an attorney's authority, as an officer of the court, to act for any client whom he professes to represent[12] unless there has been fraud or imposi-

claim that the attorneys for the son did not have authority but only that defendant and her attorney did not know where the son was—Bleakley v. Long, (Iowa) 268 N.W. 152

(2) An order to counsel for plaintiffs to file a warrant of attorney for each plaintiff, which stayed all proceedings meanwhile, did not prevent counsel for plaintiffs from taking action on plaintiffs' behalf, without establishing authority to act for plaintiffs, in proceedings on the rule to strike the name of one of the plaintiffs as a party because he was joined without his consent—Gliwa v. U. S Steel Corporation, 185 A 584, 322 Pa. 225, certiorari denied 57 S Ct. 117.

7. Manchester Bank v. Fellows, 28 N H. 302—6 C J. p 631 note 76, p 633 note 88.

8. Hamilton v. Hamilton, (Tex Civ App.) 225 S W. 69

9. Drummond v. West, 300 P. 323, 212 Cal. 766.

Attorney without standing before court

Where an action was commenced by stockholders and trustees of a corporation in the corporation itself in which it was sought to compel defendants to deliver to plaintiffs property of the corporation, and the prosecuting officer, apparently acting under Remington Rev St. § 1044, filed a petition, entitled in the pending action, for the appointment of successors in trust to take charge of the corporate property, an attorney who acted with the prosecuting attorney in filing the above petition and who was referred to in the preface of such petition as appearing for a number of stockholders of the corporation, had no standing before the court where no one represented by such attorney appeared in the action and none of the stockholders represented by him was named—State ex rel. Gardner v Superior Court for King County, (Wash.) 56 P (2d) 1315.

The mischief that might follow from holding that the acts of an unauthorized attorney are conclusive upon the person for whom he appears would induce the court to hesitate long before establishing such a rule, it would, in some degree, subject the property of every individual in the community to the mistake or malice of a particular class of men—Critchfield v Porter, 3 Ohio 519.

10. Stevens v. Fuller, 55 N.H 443.

11. Stevens v. Fuller, supra.

12. U S—In re Illinois Fireworks Co, (D C Ill.) 4 F.Suppl 200.
Ala.—Kemp v. Donovan, 94 So. 168, 208 Ala 289
Ariz—Gila Valley Electric, Gas & Water Co v. Arizona Trust & Savings Bank, 215 P. 159, 25 Ariz 177
Cal—Voinich v Rolleri, 264 P. 240, 203 Cal. 379—Miller v. Murphy, 248 P. 934, 78 Cal.App. 751.
Ga.—Edwards v. Wall, 113 S E 190, 153 Ga. 776, answers to certified questions conformed to 114 S E. 63, 29 Ga.App. 107.
Ill—De St. Aubin v. King, 209 Ill App 419—Keithley v. Clark County, 206 Ill App 500—Brown v. Saathoff, 205 Ill App. 194.
Iowa—Carson, Pirie, Scott & Co. v. Long, 257 N W. 815, 219 Iowa 444.
Ky.—Botto v. Botto, 13 Ky Op 315—Boyd v Wilson, 11 Ky Op 547
Me—Inhabitants of York Harbor Village Corporation v. Libby, 140 A 382, 126 Me 537
Mich—August v. Collins, 251 N W. 565, 265 Mich 389
Miss.—Great Atlantic & Pacific Tea Co v. Majure, 168 So 468—Gulf Coast Motor Express Co. v. Lott, 157 So 469, 171 Miss 221—Hirsch Bros. & Co. v. R E Kennington Co., 124 So. 344, 155 Miss 242, 88 A.L.R. 1.
Mo—Cooper v. Armour & Co, 15 S. W (2d) 946, 222 Mo App. 1176—McPike Drug Co. v. Wilson, (App.) 237 S W. 1044.
Mont—In re Miller's Estate, 229 P 851, 71 Mont 330—Davenport v. Davenport, 223 P 422, 69 Mont 405—Missoula Belt Line Ry Co v. Smith, 193 P 529, 58 Mont. 432
N Y—Carpenter v. New York Trust Co, 161 N.Y S 267, 174 App.Div 378, affirmed 117 N.E. 1063, 221 N. Y. 614
N C—People's Bank of Burnsville v Penland, 173 S.E. 345, 206 N C 328
Okl—Phelan v Stockyards Bank, 32 P (2d) 270, 168 Okl. 232
Pa.—Daron v Prudential Insurance Co. of America, 26 Pa Dist 691
Tex—Hildalgo County Drainage Dist No 1 v. Magnolia Petroleum Co, (Civ.App.) 47 S.W.(2d) 875.
6 C J. p 631 note 76.

Acts binding client

When an attorney makes an appearance in a case in his client's behalf, the authority of the attorney to so act for his client is presumed, and his acts bind his client, unless it is clearly shown that such acts of the attorney were unauthorized—Overlander v Overlander, 284 P. 614, 129 Kan 709.

Appearing and filing pleading

Where an attorney appears in a

tion,[13] or unless the party has objected to the use of his name.[14] Thus there is a presumption that an attorney who appears for a party in an action or litigation has authority to do so unless the contrary is shown,[15] and that an attorney who brings an action has authority to do so unless the contrary is

cause and files an answer or other pleading, being an officer of the court, it is presumed that he has authority, and that what he does with relation thereto has been done with authority duly conferred.—Lawrence v. Montgomery Gas Co, 106 S E 890, 88 W. Va. 352.

Motion to vacate default judgment

On a motion to vacate a default judgment made by attorneys, the presumption is that they represented the judgment debtor—Gila Valley Electric, Gas & Water Co v Arizona Trust & Savings Bank, 215 P 159, 25 Ariz 177.

Representation before industrial commission

Where an attorney has executed and filed an application with the industrial commission for a rehearing, within thirty days after denial of a claim for compensation by the commission, the attorney signing claimant's name thereto by himself as attorney, the signing and filing of such application furnish presumptive evidence of the attorney's authority to so act in claimant's behalf—State ex rel Juergens v Industrial Commission of Ohio, 189 N E. 445, 127 Ohio St. 524.

Representation of substituted party

(1) It is presumed that an attorney who appeared in court and defended an action as representing the administratrix of the original defendant, after the administratrix had been substituted as party defendant on revival, had authority to represent the administratrix.—Nelson v. Ziegler, 220 N W. 194, 196 Wis 426

(2) In an action against a railroad company for injuries sustained during the period of federal control, where the railroad company's answer denied negligence on the part of the director general, his agents or employees, and, after substitution of the director general, the counsel filing the answer assisted in impaneling the jury and stated the substituted defendant's case to the jury, and on behalf of such defendant objected to introduction of any evidence, the court was warranted in presuming that such counsel represented the director general, especially where there was no claim to the contrary—Hines v. Smith, (C C.A Ohio) 270 F 132, certiorari denied Payne v Smith, 41 S Ct. 448, 255 U S. 576, 65 L Ed 794.

Signing answer authorizing appointment of receiver

Where receivers were appointed on a bill by a simple contract debtor and an answer, signed by an attorney, admitting that plaintiff was entitled to the relief prayed, it was presumed that the attorney was authorized to sign, the sufficiency of the answer not having been questioned during the three years it was on file—Merchants' Bank & Trust Co v. Pflug, (C.C.A.Wis) 6 F (2d) 385, certiorari denied 46 S Ct. 101, 269 U.S 572, 70 L Ed 413.

Mere lapse of time intervening after an appearance and acceptance of service by an attorney raises a presumption of authority so to act, or at least of the knowledge and acquiescence of the party therein.—Lytle v. Forest, 4 Pa Dist 292.

13. Hirsch Bros. & Co v R E Kennington Co, 124 So. 344, 155 Miss. 242, 88 A.L.R. 1—6 C.J. p 632 note 77

14. Md—Kelso v. Stigar, 24 A. 18, 75 Md 376
Miss—Hirsch Bros & Co v. R E. Kennington Co, 124 So 344, 155 Miss 242, 88 A L R 1.

15. U S—Feldman Inv. Co v. Connecticut General Life Ins Co, (C C A Okl) 78 F (2d) 838—Drew v Burley, (D C Or) 287 F. 916—Cooper v. Jewett, (S D) 233 F 618, 147 C C A. 426—In re Illinois Fireworks & Display Co, (D C Ill) 4 F Suppl 200.
Ala—Pallilla v. Galilee Baptist Church, 112 So 134, 215 Ala 667.
Cal—Voinich v Rolleri, 264 P 240, 203 Cal 379—Tornquist v Johnson, 13 P.(2d) 405, 124 Cal App 634—Associated Oil Co v Mullin, 294 P 421, 110 Cal App. 385—Jones v Baxter, 197 P 361, 51 Cal App 589—Walberg v. Underwood, 180 P. 55, 39 Cal App 748—Thomas v Furman, 178 P 870, 39 Cal.App. 278
D C—Pueblo of Santa Rosa v. Fall, 56 App D C. 259, 12 F (2d) 332, certiorari granted 47 S Ct. 106, 273 U S 678, 71 L Ed 836, and reversed on other grounds 47 S Ct. 361, 273 U S. 315, 71 L Ed 658.
Ga—Edwards v. Wall, 113 S E 190, 153 Ga. 776, answers to certified questions conformed to 114 S E 63, 29 Ga App 107.
Iowa—Sloan v. Jepson, 252 N W. 535, 217 Iowa 1082—Fuehr v. Ehwert & Richter Express & Storage Co, 163 N.W 347, 180 Iowa 518.
Ky—King Const Co v. Mary Helen Coal Corporation, 239 S W. 799, 194 Ky. 435
Miss—Hirsch Bros & Co. v R. E Kennington Co, 124 So. 344, 155 Miss. 242, 88 A L R 1.
Mo—Stiles v. Coster Gin Co., (App) 74 S W (2d) 1092
Mont—Union Bank & Trust Co of Helena v. Penwell, 42 P (2d) 457, 99 Mont. 255—Missoula Belt Line Ry Co v. Smith, 193 P. 529, 58 Mont 432.
Neb—Jordan v. Evans, 157 N W. 620, 99 Neb. 666
Okl.—Phelan v. Stockyards Bank, 32 P (2d) 270, 168 Okl 232
Pa—Taylor v. Siers, 63 Pa.Super. 564—Shure v Goodinate Co, Inc., 14 Pa Dist & Co 209—Daron v. Prudential Ins. Co. of America, 26 Pa Dist 691
Tex—Hidalgo County Drainage Dist. No 1 v Magnolia Petroleum Co, (Civ App) 47 S W (2d) 875.
W Va—Lawrence v. Montgomery Gas Co, 106 S E 890, 88 W Va 352
Wis—Reinkey v Wilkins, 179 N.W 751, 172 Wis 515
Wyo—Heyer v. Hines, 252 P. 1038, 36 Wyo 53
6 C J p 631 note 76

Authority not in writing

The court may assume that an attorney entering appearance for a party is authorized to do so, although his authority is not in writing—Jacobson v Ashkinaze, 168 N E 647, 337 Ill 141, reversing 249 Ill App 479

Collateral proceedings

(1) It has been held or recognized that the above rule applies where there is a collateral attack on a judgment or decree—Louth v Woodard, 236 P 480, 114 Or. 603—34 C J. p 541 note 85

(2) Thus the rule applies where the collateral attack is made by the party against whom the decree was entered, on the ground that the attorney who appeared for such party was not authorized to appear—Louth v. Woodard, supra—34 C J p 541 note 85

(3) So, where a regular attorney at law has appeared in the case, and such appearance amounts to a submission to the court's jurisdiction, although process has not been served, it will be presumed in a collateral proceeding that such appearance was with authority from the client—Johnson v. Baumhoff, 18 S W (2d) 13, 322 Mo 1017—State ex rel Compagnie Générale Transatlantique v. Falkenhainer, 274 S W. 758, 309 Mo 224—State v. Muench, 130 S W 282, 230 Mo. 236.

One defendant appearing in action in proper person

Even though one defendant appeared in the action in proper person, where, on the hearing on demurrer, an attorney appeared for both defendants, it must be presumed, in the absence of any showing to the contrary, that his appearance was authorized, as every intendment is to be indulged in support of the judg-

shown.[16] The possession by an attorney of the instrument on which the action is brought creates a presumption of such attorney's right to bring the action.[17]

The presumption in favor of the authority of the attorney is not conclusive and may be rebutted,[18] and, in general, the party for whom the attorney appeared may thereafter show that the attorney appeared without authority.[19] In general, however, in the absence of countervailing evidence, the presumption becomes conclusive.[20] As sometimes stated, the presumption that an attorney who appears for a party is duly authorized prevails until it is conclusively shown that the attorney was not authorized so to appear.[21] In other words, the authority assumed by an attorney at law to act for a party in court is valid until disproved; not void until proved.[22]

The presumption that an attorney, as an officer of court, has authority to act for a person whom he professes to represent does not arise where an attorney professes to represent a person in a transaction in which any person might act as agent.[23]

Appearance of, and action by, corporation. The general rule that there is a presumption in favor of the authority of an attorney applies as well to the appearance of a corporation by attorney as to that of a natural person.[24] Thus there is a presumption that an attorney who brings an action in the name of a corporation has authority to do so.[25]

ment and an attorney is an officer of the court and occupies a position of trust and confidence respecting the administration of justice, and it must be presumed that he will not violate his obligation by making an unauthorized appearance.—Jones v Baxter, 197 P 361, 51 Cal App 589

Recital in judgment record

Where a judgment record recites that an attorney appeared for a party, it is presumed that such appearance was authorized by such party. —Fuehr v Ewert & Richter Express & Storage Co, 163 N.W. 347, 180 Iowa 518

16. Ark.—Jones v Bank of Commerce of Fort Smith, 199 S.W. 103, 131 Ark 362—Voss v Arthurs, 195 S.W. 680, 139 Ark. 143.
Iowa.—Carson, Pirie, Scott & Co v. Long, 257 N.W. 815, 219 Iowa 444.
Mo.—Stiles v Cooter Gin Co, (App.) 74 S.W.(2d) 1092
Tex.—Rychener v McGuire, (Civ App.) 66 S.W.(2d) 413
W.Va.—Lawrence v Montgomery Gas Co, 106 S.E. 890, 88 W.Va. 352 —County Court of Tyler County v. Duty, 87 S.E. 256, 77 W.Va. 17
Wis.—[illegible] v Wilkins, 179 N.W. 751, 172 Wis. 515.

Bringing and continuing action

A regularly practicing attorney, as an officer of the court, is presumed to have full authority to bring and continue an action prosecuted by the party represented by him unless the contrary is shown.—Carson, Pirie, Scott & Co v Long, 257 N.W. 815, 219 Iowa 444

Action to recover taxes

Authority of an attorney under Acts (1921) p 676, reenacting Rev. St.(1919) § 12944, to bring an action to collect taxes on personal property, will be presumed after judgment, where it was not appropriately challenged previously, since the superior court will presume that the trial court knew that such attorney was a duly licensed attorney.—State ex rel Hawkin v. Edwards, 286 S.W. 25, 315 Mo. 209

Contest of will

Complaint of an attorney contesting a will as attorney for certain heirs, under Rev.Codes (1921) § 10029, need not allege that he is their attorney, this being presumed, without allegation or proof.—In re Miller's Estate, 229 P. 851, 71 Mont. 330.

Replevin

An attorney who enters a replevin writ is presumed to have authority to do so.—Edgecomb v. Lawlis, 140 A. 182, 126 Me. 550.

17. Reed v. Curry, 35 Ill. 536.—6 C.J. p 631 note 76 [c].

18. Cal.—Sullivan v. Dunne, 244 P. 343, 198 Cal 183
Ga.—Edwards v. Wall, 113 S.E. 190, 153 Ga. 776, answers to certified questions conformed to 114 S.E. 63, 29 Ga.App. 107.
Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537
Miss.—Hirsch Bros. & Co. v. R. E. Kennington Co., 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
Mont.—Union Bank & Trust Co. of Helena v Penwell, 42 P.(2d) 457, 99 Mont 255
Neb.—Kaufmann v. Drexel, 76 N.W. 559, 56 Neb. 229
6 C.J. p 633 note 80.

19. Cal.—People v Western Meat Co, 110 P. 338, 13 Cal.App. 539.
Miss.—Hirsch Bros. & Co v. R. E. Kennington Co, 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.

20. U.S.—In re Illinois Fireworks & Display Co., (D.C.Ill.) 4 F.Supp. 200.
Miss.—Hirsch Bros. & Co v. R. E. Kennington Co, 124 So. 344, 155 Miss. 242, 88 A.L.R. 1.
6 C.J. p 633 note 79.

Collateral attack

On a collateral attack on a separation decree the authority of an attorney to appear for the person whom he assumes to represent as recited in the decree is conclusively presumed in some jurisdictions.—Barber v. Barber, 222 P. 284, 47 Nev. 377, 39 A.L.R. 706.

21. Hidalgo County Drainage Dist. No. 1 v Magnolia Petroleum Co, (Tex.Civ.App.) 47 S.W.(2d) 875

22. U.S.—Brown v Arnold, (Mo.) 131 F. 723, 67 C.C.A. 125.
Or.—Louth v Woodard, 236 P. 480, 114 Or. 603.
6 C.J. p 633 notes 83–86

23. Doeller v Mortgage Guarantee Co, 171 A. 356, 166 Md. 500

24. U.S.—Kynerd v. McCarthy, (C.C.A.Tex.) 3 F.(2d) 32.—Drew v. Burley, (D.C.Or.) 287 F. 916
Mich.—Norberg v. Heineman, 26 N.W. 481, 59 Mich. 210.
N.Y.—Attorney General v Guardian Mut. L. Ins. Co, 77 N.Y. 272.
W.Va.—Lawrence v. Montgomery Gas Co, 106 S.E. 890, 88 W.Va. 352
Wis.—Shroudenbeck v. The Phoenix Fire Ins. Co, 15 Wis. 632.
6 C.J. p 633 note 88.

Appearance for taking depositions outside state

In an action for personal injuries against a foreign corporation, appearance by regular attorney at law of a state other than the state of the forum for the purpose of taking depositions outside the state of the forum, constituting a submission to jurisdiction of the court, would be presumed to be by authority of the corporation in prohibition proceedings to prevent the court from proceeding further in the cause, on the ground of lack of jurisdiction.—State ex rel Compagnie Générale Transatlantique v. Falkenhainer, 274 S.W. 758, 309 Mo. 224.

25. Ala.—Gaines v. Tombeckbee Bank, Minor 51.
Ark.—Jones v Bank of Commerce of Fort Smith, 199 S.W. 103, 131 Ark. 362.
Iowa.—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 815, 219 Iowa 444.

Such a presumption may, however, be rebutted.[26]

Appearance of, and action by, public or political entity. The rule that there is a presumption that an attorney who appears for a party is duly authorized applies where an attorney appears for a county[27] or a drainage district.[28] So, in the case of an action brought in the name of a county, municipality, or like entity as plaintiff, the presumption has been indulged that an attorney was authorized to represent the named plaintiff or to institute the action where such attorney has signed the pleadings[29] or has instituted the action,[30] but the presumption is rebuttable.[31] In the case of an action brought in the name of the state as plaintiff, there is no presumption that the attorney, other than the attorney general or his representative, who appears as attorney for the state has authority to institute the action, to appear, and to conduct the trial of the case, where, under the governing statute, only the attorney general has authority to institute the action in question.[32]

b. Scope of Authority in General

In general there is a presumption that an attorney is authorized to act for his client in all matters involved in the action, at least in so far as his acts affect the remedy.

The authority of the leading counsel in a case to control and direct the proceedings therein is presumed,[33] and broadly speaking, there is a presumption that an attorney is authorized to do all such acts as are within the apparent scope of his authority, for his client in the institution and conduct of an action,[34] and, in the absence of a pleading questioning the attorney's acts on the ground of fraud or otherwise, such presumption is conclusive.[35] As sometimes stated, in the absence of a showing to the contrary, an attorney is presumed to have authority to perform, on behalf of his client, all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, which affect the remedy only.[36] So it has been held or recognized that there is a presumption that an attorney or counsel employed in connection with certain litigation has authority to acknowledge service of summons or to waive it[37] or to enter the appearance of his client to any pleading or proceeding in the case,[38] to give notice to a public officer to release

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

Wis.—Shroudenbeck v. The Phoenix Fire Insurance Co., 15 Wis. 700.

6 C.J. p. 633 note 88

Attorney also officer and stockholder

An attorney who verified pleadings for plaintiff corporation and who was the secretary and a stockholder of such corporation and its attorney for general purposes was presumed to have authority to maintain the suit in question.—Inter City Auto Stage Co. v. Bothell Bus Co., 247 P. 1040, 139 Wash. 674.

Bringing, filing, and signing bill

The rule that where a bill in equity is brought, signed, and filed by solicitors, the authority of the solicitors to represent plaintiff is prima facie presumed applies where a corporation is plaintiff.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

28. Gidwitz v. Cohn, 238 Ill.App. 227

Plaintiff corporation

(1) The presumption that an attorney who enters an appearance for a plaintiff corporation was retained by the corporation may be rebutted. —Gidwitz v. Cohn, 238 Ill.App. 227.

(2) A like rule applies to the presumption that an attorney who brings an action on behalf of a corporation was authorized to represent the corporation.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

27. Hidalgo County Drainage Dist. No. 1 v. Magnolia Petroleum Co., (Tex.Civ.App.) 47 S.W.(2d) 875

28. Hidalgo County Drainage Dist. No. 1 v. Magnolia Petroleum Co., supra

29. Me.—Inhabitants of York Harbor Village v. Libby, 140 A. 382, 126 Me. 537

Tex.—Brite v. Atascosa County, (Civ. App.) 247 S.W. 878.

Bill in equity brought, signed, and filed by solicitors

In the case of a suit in equity brought in the name of a municipal corporation as plaintiff, where the bill was brought, signed, and filed by solicitors who are officers of the court, authority to represent plaintiff was prima facie presumed.—Inhabitants of York Harbor Village v. Libby, 140 A. 382, 126 Me. 537.

Presumption as to authority of city attorney to bring an action for, or defend an action against, city see Municipal Corporations § 2206 [44 C.J. p. 1477 notes 88–91].

30. County Court of Tyler County v. Duty, 87 S.E. 256, 77 W.Va. 17.

31. Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537

32. State v. Gattavara, (Wash.) 47 P.(2d) 18.

Action to recover premiums and penalties for benefit of compensation fund

In an action by the state on behalf of the department of labor and industries to collect premiums and penalties for the compensation fund, instituted by attorneys employed by the department, a presumption that the attorney appearing in the case had authority to do so was not available, since only the attorney general could institute such action. —State v. Gattavara, (Wash.) 47 P.(2d) 18.

33. Stoker v. Stoker, (Tex.Civ.App.) 260 S.W. 1076, construing opinion 254 S.W. 398

34. National Bond & Investment Co. v. McCoy, (Tex.Civ.App.) 263 S.W. 1089

35. National Bond & Investment Co. v. McCoy, supra.

36. Mass.—James v. James, 156 N.E. 745, 260 Mass. 19.

Miss.—Great Atlantic & Pacific Tea Co. v. Majure, 168 So. 468

Making client party to proceeding

In a proceeding in the probate court for the appointment of a trustee, a corporation became a party to the proceeding where its name was subscribed to the petition, by its attorney, as a party interested, in the absence of a showing of lack of authority of the attorney.—James v. James, 156 N.E. 745, 260 Mass. 19.

37. McPike Drug Co. v. Wilson, (Mo.App.) 237 S.W. 1044—6 C.J. p. 645 note 18.

38. King Const. Co. v. Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky. 435.

property attached at the instance of the client,[39] and to enter into stipulations incidental to the litigation in connection with which the attorney is employed.[40]

While ordinarily the power of an attorney to act for his client in an action is to be considered sufficient until disproved, not void or insufficient until proved,[41] the assumption by an attorney at law, even if generally retained, of authority to act for his principal outside the due and orderly prosecution, defense, or conduct of litigation or proceedings in courts does not create any presumption of actual authority so to act,[42] and where an attorney assumes so to act, his acts must be shown to be within the scope of his authority in order to bind his client.[43]

Any presumption in favor of the authority of an attorney to bind his client ceases if the court and the other parties are notified of a lack of authority before the matter is consummated.[44]

Pleading. While the pleading of formal allegations by an attorney may be presumed to be done without special instructions from his client,[45] in respect of setting out a specific cause of action or defense the attorney is presumed to act under special authorization of his client.[46]

Appointment of other counsel. There is a presumption that the nonresident attorney of a person named as a party to a proceeding has authority to appoint a resident attorney to accept service of notice of the proceedings involved.[47]

Compromise, settlement, and release. While there is authority for the view that, even where an attorney is not authorized, by virtue of his employment merely, to make a compromise, it is not necessarily to be presumed that, if he assumes the right to exercise such power, and does exercise it, he acted without lawful authority,[48] there is, in general, no presumption that an attorney who agrees to the settlement, for less than the amount due of a claim which was placed in his hands for collection, has authority to make such settlement.[49] Where, however, a compromise made by attorneys who represent the respective parties has formally been embodied in a judgment, it is presumed that the judgment was rightfully entered until the contrary is made to appear.[50]

There is authority for the view that there is a presumption that attorneys of record have authority to enter into a stipulation which amounts to an agree-

39. Bronough v. Jones, (Okl) 49 P (2d) 715

Justification for release

Notice from plaintiff's attorney of record to a public officer to release property attached at the instance of plaintiff is presumed to be given with plaintiff's authority and is as effective to justify the officer in releasing the property as though given by plaintiff himself—Bronough v. Jones, (Okl) 49 P (2d) 715.

40. Armstrong v. Brown, (Cal App) 54 P (2d) 1118.

Presumption in supplementary proceeding constituting collateral attack on judgment of authority of attorney to stipulate for change of venue see Judgments § 425 [34 C.J. p 541 note 87].

41. In re Jones' Estate, 195 N.W. 930, 111 Neb 166.

Claims or prospective claims against estate

It was said, after a statement of the above rule, that this applies to the power of an attorney in dealing with claims or prospective claims against an estate which he is actually engaged in settling—In re Jones' Estate, 195 N.W. 930, 111 Neb. 166.

42. U.S.—Horseshoe Mining Co v. Miners' Ore Sampling Co, (C.C.A. Colo) 147 F. 517

Miss—B F. Goodrich Rubber Co v. Holland, 131 So. 882, 159 Miss 346.

43. U S—Horseshoe Mining Co. v. Miners' Ore Sampling Co, (C C A. Colo) 147 F 517

Miss—B F Goodrich Rubber Co. v Holland, 131 So 882, 159 Miss 346

44. Broecker v. Morley, 28 P.(2d) 409, 136 Cal App 248.

45. Clarke v Taylor, 168 N E. 806, 269 Mass 335

46. Clarke v. Taylor, supra.

Presumption of preparation under plaintiff's instruction

Declaration drawn by attorney might be presumed to have been prepared under instructions—Peck v New England Telephone & Telegraph Co., 114 N E. 674, 225 Mass. 464.

47. Rivkin v. Niles, (Minn) 263 N. W. 920

Proceedings to extend time to redeem from foreclosure sale

The rule was applied where an attorney who acted as attorney for the mortgagee in foreclosing a mortgage subsequently became a nonresident and thereafter appointed a resident attorney to accept service of papers in a proceeding by the mortgagor to extend the time to redeem from the foreclosure sale.—Rivkin v. Niles, (Minn) 263 N.W. 920.

48. Okl—St Louis & S F R. Co. v. Leger Mill Co, 155 P. 599, 53 Okl. 127.

Tex—East Line & R R R. Co. v. Scott, 10 S W. 99, 72 Tex. 70, 13 Am.S.R. 753.

49. Cal—Jones v. Noble, 39 P (2d) 436, 3 Cal App (2d) 316

Ga—Evans v Atlanta Nat. Bank of Jacksonville, Fla., 95 S E 219, 147 Ga. 621.

Ill—Brooks v. Kearns, 86 Ill. 547

Mich—People's State Bank for Savings v Bloch, 227 N W. 778, 249 Mich 99.

Okl—Hamberger v. White, 154 P. 576, 54 Okl. 736—Scott v. Moore, 152 P. 823, 52 Okl. 200.

Acceptance of payments

Even if an attorney accepted the principal, interest, and costs on a fieri facias based on a judgment on a note, and agreed with the maker not to collect attorney's fees provided for therein, such agreement would raise no presumption that the attorney was authorized by his client to make such settlement—Evans v Atlantic Nat. Bank of Jacksonville, Fla., 95 S.E 219, 147 Ga. 621

50. Cal.—Nielsen v. Emerson, 6 P. (2d) 281, 119 Cal App 214

N C—Chavis v. Brown, 93 S E. 471, 174 N.C. 122.

Tenn—Memphis Cotton Press & Storage Co. v. Hanson, 4 Tenn.App. 293.

Tex—Dunlap v. Villareal, (Civ App.) 91 S.W.(2d) 1124.

Presumption as against collateral attack of judgment of authority of attorney to compromise suit see Judgments § 425 [34 C.J. p 541 note 86].

ment for the final disposition of the case;[51] and it has even been held that an attorney who has appeared and entered into a stipulation for a party will be presumed to have authority to do so although he is not the attorney who instituted the action for the party.[52]

Where an attorney represents several fire insurance companies in connection with the settlement of a loss resulting from the same fire and such companies do not have identical interests, there is no inference that everything done by such attorney was done by him for each of the companies.[53]

There is no presumption that an attorney has authority to enter into a stipulation by which the amount of alimony payable under a court order to his client as plaintiff in a separation action is reduced.[54]

Consent to, confession of, or offer of, judgment. There is a presumption that an attorney of record has authority to make an offer to the adverse party to take judgment against such attorney's client,[55] and that an attorney who consents to a judgment against his client is authorized to give such consent.[56] The rule applies on a motion by the party against whom the judgment was entered with his attorney's consent, to set aside such judgment.[57]

On a motion by defendant to set aside a judgment by confession against him entered after proceedings in open court, there is a presumption that the attorney who confessed judgment on behalf of defendant, was an attorney of some court of record.[58]

c. Continuance of Relation or Authority; Acts after Judgment

Subject to certain limitations, there is a presumption of the continuance of the relation of attorney and client and of the authority of such attorney where such relation is shown once to have existed.

Where the relation of attorney and client is shown to have existed in a particular case or litigation, there is a presumption of the continuation of such relation, in the absence of a showing that the relation has been terminated or discontinued.[59] While, according to some cases, there is a presumption that the retainer does not extend to proceedings taken after the entry of the decree, for its enforcement,[60] under some conditions at least the rule that there is a presumption of the continuance of the relation and of the authority of the attorney has been applied or recognized in respect of continuance after judgment.[61] In any event, there is not a presumption in every case that the relation of attorney and client ceases after entry of judgment.[62]

There is authority for the view that the fact that an attorney appeared for a party and obtained the vacation of an order for the examination of such

51. State v. Superior Court in and for Clallam County, 276 P. 98, 151 Wash. 413.

Stipulation as to settlement and dismissal

(1) There is a presumption that an attorney had the consent of his client in signing a stipulation which agreed to a dismissal of the action and which recited that the subject matter had been adjusted and settled by the parties—Hill v. Wilson, 250 P. 340, 119 Or. 636.

(2) Such presumption is disputable and may be overcome by proof in a direct proceeding to set aside the unauthorized act, brought promptly on the discovery of such act.—Hill v. Wilson, supra.

52. Nielsen v. Emerson, 6 P.(2d) 281, 119 Cal.App. 214

53. Kitch v. Northwestern Nat. Ins Co., 207 N.W. 716, 189 Wis 378.

54. Hallow v. Hallow, 193 N.Y.S. 460, 200 App.Div. 642.

55. Parr v. Chicago, B & Q. R Co., 184 S.W. 1169, 194 Mo.App. 416.

Presumption of attorney's authority to confess judgment in a justice of the peace court see Justices of the Peace § 106 [6 C.J. p 646 note 33].

56. Miss—Hurst v. Gulf States Creosoting Co, 141 So. 346, 163 Miss. 512—Cocke v. Wilson, 134 So 686, 161 Miss 1.

Mo—Parr v. Chicago B & Q R Co, 184 S.W. 1169, 194 Mo App 416

N C—Southern Chemical Co v. Bass, 95 S E 766, 175 N C 426—Gardner v. May, 89 S.E. 955, 172 N C 192.

Tex.—Dyer v. Johnson, (Civ.App.) 19 S.W.(2d) 421.

6 C.J. p 646 note 32.

Judgment against plaintiff

The rule applies where a judgment is entered against plaintiff with the consent of plaintiff's attorney—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512.

Judgment against defendant

The rule applies where a judgment is entered against defendant with the consent of his attorney—Southern Chemical Co v. Bass, 95 S.E. 766, 175 N.C. 426—Gardner v. May, 89 S.E. 955, 172 N.C. 192

Presumption as to good faith

The attorney is presumed to have acted in good faith and not to have betrayed the confidence, or sacrificed the rights, of his client—Gardner v. May, 89 S.E. 955, 172 N.C. 192.

Entry of judgment on consent of attorneys for municipal corporation

The presumption in favor of the authority of the attorney has been indulged in upholding the validity of a judgment entered on consent of attorneys who appeared for a municipal corporation in the absence of a showing of fraud or want of authority—Strand Imp Co. v. City of Long Beach, 161 P. 975, 173 Cal. 765.

57. Miss—Hurst v. Gulf States Creosoting Co, 141 So. 346, 163 Miss 512

N C—Southern Chemical Co. v Bass, 95 S E 766, 175 N C 426—Gardner v. May, 89 S.E. 955, 172 N.C. 192

58. Bowman v. Powell, 127 Ill.App. 114.

59. Cal—Dodd v. Tibbetts, 244 P. 1081, 198 Cal 333

Md—Harris v. Harris, 152 A. 359, 159 Md 624

Mo—Southard v. Nelson, 43 Mo App 210

Va—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.

60. Ransom v. Sutherland, 9 N.W. 530, 46 Mich. 489—6 C.J. p 672 note 60

61. Cal—Dodd v. Tebbetts, 244 P. 1081, 198 Cal. 333.

Md—Harris v. Harris, 152 A. 359, 159 Md. 624.

62. People ex rel. Lax v. Ehler, 187 N.E. 630, 353 Ill. 595.

party in supplementary proceedings does not necessarily warrant a presumption that the attorney is representing such party several months later.[63]

Release and satisfaction of judgment. Under certain circumstances at least, there is a presumption that an attorney who entered satisfaction of a judgment, on receipt of the full amount of the judgment, acted by authority.[64] It has been held, however, that there is no presumption that plaintiff's attorney has authority to release and satisfy a judgment against defendant by consenting to the release and discharge of defendant from custody under a writ of capias ad satisfaciendum.[65]

Reopening or vacating judgment. There is authority for the view that the court may assume the authority of an attorney to act for his client in consenting to the reopening of a judgment, in the absence of any objection on the part of the client,[66] and that there is not necessarily a presumption that the relation of attorney and client had ceased on entry of judgment so as to render improper service on the attorney of notice of a petition to vacate the judgment.[67]

d. Appeal

Various presumptions in favor of the authority of an attorney who acts in connection with an appeal have been indulged.

There is authority for the view that there is a presumption that an attorney of record for a party in the lower court has authority to take an appeal,[68] and this presumption will prevail in the absence of a sufficient showing that such authority is lacking.[69] So also certain presumptions have been indulged in favor of the authority of the attorney to do certain acts in perfecting an appeal.[70]

The right of an attorney to sign a waiver of service of a writ of error may be presumed in the absence of a showing to the contrary.[71]

It may be presumed that an attorney who briefed an appeal for appellee had authority to do so, in the absence of a showing to the contrary.[72]

In considering the authority of an attorney to move to dismiss an appeal, the court gave effect to the presumption that an attorney is presumed to have authority in the absence of a showing to the contrary.[73]

§ 74. Objections to Authority and Demand of Proof

a. In general

b. Method of raising objection

63. McBrien v. Miller, 166 N Y S 445

64. Miller v Preston, 25 A. 1041, 154 Pa 63—Netter v Logan, 111 Pa Super 143—Summerville v. Galey, 45 Pa Super. 62—Trostle v. Harbaugh, 16 Pa.Dist & Co 13—6 C.J. p 655 notes 66, 67.

65. Seitovits v. London, 229 N.W 590, 249 Mich. 567

66. Hookey v. Greenstein, 104 N Y S. 621, 119 App Div. 209

67. People ex rel Lax v. Ehler, 187 N E 630, 353 Ill. 595.

68. Cal.—United States of Mexico v Rask, 293 P 108, 109 Cal App 497 Wyo.—Heyer v Hines, 252 P. 1028, 36 Wyo 53.

Appeal by one of several defendants

Where two defendants appeared by the same attorney, the court assumed that, in respect of acts done by the attorney in connection with an appeal by one defendant from a judgment against both, the attorney continued as the attorney of record of both defendants, including the defendant who did not appeal, and held that the acts of the attorney were binding on both defendants.—Dodd v. Tebbetts, 244 P. 1081, 198 Cal. 333

69. Cal.—United States of Mexico v Rask, 293 P. 108, 109 Cal App 497. Wyo.—Heyer v. Hines, 252 P. 1028, 36 Wyo 53.

Presumption cannot be overthrown by a mere absence of evidence as to the attorney's actual authority in the premises.—Heyer v. Hines, 252 P 1028, 36 Wyo 53.

70. Huntsinger v. Devlin, 80 Pa Super 187

Notice of appeal

(1) Some cases hold that, where a notice of appeal is signed by an attorney, the presumption is that he had authority to take such action.—Title Ins. & Trust Co. v. California Development Co, 143 P 728, 168 Cal 397—United States of Mexico v Rask, 293 P 108, 109 Cal App 497—Union Bank & Trust Co of Helena v Penwell, 42 P.(2d) 457, 99 Mont 255—Ruhle v Caffrey, 174 A 204, 113 N J Law 240, reversed on other grounds 180 A 834, 115 N J Law 517—Heyer v Hines, 252 P. 1028, 36 Wyo 53—6 C J p 653 note 46

(2) Such presumption can be overcome only by clear proof.—United States of Mexico v. Rask, supra.—Union Bank & Trust Co. of Helena v. Penwell, supra.—Heyer v. Hines, supra.—6 C J. p 653 note 47.

(3) And especially is this true if supported by the affidavit of the attorney himself.—Ring v Chas. Vogel Paint, etc, Co, 46 Mo App. 374.

Printing of paper books

When an attorney has been acting for defendant up to judgment, and defendant acts with the attorney in the taking of an appeal, and the attorney orders the printing of the paper books required by the rules of the appellate court, there is a presumption that the attorney is acting under authority of his client.—Huntsinger v. Devlin, 80 Pa Super. 187

Signing bond for sureties

As against objection to the sufficiency of a bond, given in connection with an appeal from an award of commissioners in condemnation proceedings, attorneys by whom names of sureties were signed thereto are presumed to be authorized to do so.—Dysart v. Wichita Falls, R & Ft W. Ry. Co., (Tex Civ.App.) 220 S.W. 277.

Stipulation for deposit of certificate of deposit in lieu of undertaking

There was a presumption that the attorney for appellant had authority to enter into a stipulation for the deposit of a certificate of deposit in lieu of a stay bond.—Armstrong v. Brown, (Cal App.) 54 P (2d) 1118.

71. Brann v. Pool, 272 S.W 691, 303 Mo 309

72. Alsmeier v. Adams, 109 N E 58, 62 Ind App 219, denying rehearing 105 N E 1033, 62 Ind App 219.

73. Interdiction of Erichson, 90 So. 235, 149 La. 895.

Attorney who withdrew from case in lower court

The above rule was applied notwithstanding the attorney who made the motion to dismiss on behalf of appellants had withdrawn from the

a. In General

On due and timely objection made in the proper court as to want of authority and demand for proof, a showing of an attorney's authority may be required.

In general, an attorney will not be required to show his authority unless it is properly called in question by a party to the proceeding or by the court,[74] and it has been said that an attorney who appears in a court of record as representative of a party litigant may not, in general, be required to prove his authority, except at the instance of the court and his client.[75] A mere request to show authority is not ordinarily sufficient for this purpose, attorneys not being bound to gratify the opposite party with a sight of their authority on slight or frivolous grounds,[76] and a rule on an attorney to show his authority will not be granted on a mere suggestion[77]

Notwithstanding the presumption in favor of an attorney's authority (supra § 73), it is necessary that the authority of the attorney shall be shown when it is properly questioned,[78] and there is a well recognized discretion in the court to call for proof of such authority when it sees fit.[79] So, in general, either party to a suit may question an attorney's right to represent his alleged client.[80] Thus, defendant may question the authority of the attorney for plaintiff to institute or prosecute the action.[81] The party for whom the attorney professes to act may, of course, question the authority of the attorney and require a determination as to such authority.[82]

While under certain circumstances a stranger to the record cannot make such an objection,[83] there is authority for the view that the court has inherent authority to call for proof of an attorney's authority, even though the information which raises the question as to such authority comes from a stranger.[84]

Persons who deal with an attorney in a transaction in which the attorney represents that he acts for another may demand evidence of the attorney's authority, where the transaction is one in which any person might act as agent.[85]

Scope of authority. The right of a third person to assert the lack of authority of an attorney in respect of certain acts by him connected with the affairs of his client has been denied,[86] especially where the client has ratified the act of his attorney.[87]

Appeal The appellate court may in a proper case permit the questioning of the authority of an attorney to take an appeal,[88] and in general the respondent or appellee may question such authority.[89]

case in the lower court, as attorney for one of the appellants—Interdiction of Erichson, 90 So. 235, 149 La. 895.

74. Miller v Continental Assur. Co., 134 S.W. 1003, 233 Mo 91, Ann Cas 1912C 102—6 C J p 633 note 83

75. Stiles v Cooter Gin Co., (Mo. App.) 74 S W (2d) 1092.

76. Danville, etc, R Co v Rhodes, 36 A. 648, 180 Pa 157—6 C J. p 633 note 84.

77. Williams v Uncompahgre Canal Co., 22 P 806, 13 Colo 469

78. Gulf Coast Motor Express Co v. Lott, 157 So 469, 171 Miss 221

An attorney may be required to show his authority when it is properly challenged—Gulf Coast Motor Express Co. v Lott, 157 So. 469, 171 Miss. 221

Showing express authority

When an attorney's authority to represent a client is properly questioned, express authority must be shown for such right of representation—McPike Drug Co. v. Wilson, (Mo App.) 237 S W. 1044.

Proof indicating lack of authority

Where the proof indicates that an attorney may not be authorized to represent a party, the court should require evidence of authorization or strike his appearance and papers served by him—O. G. Orr & Co v Firemen's Fund Ins Co, 253 N Y S 2, 141 Misc 330, reversed on other grounds 256 N.Y.S. 79, 235 App Div 1.

79. McPike Drug Co. v Wilson, (Mo App.) 237 S W. 1044—6 C J. p 634 note 96

Authority questioned by adverse party or stranger

Where the court obtains information, either from an adverse party or from a stranger, which raises a doubt as to the authority of an attorney to act for a party, the view has been expressed that it is largely a matter of discretion with the court as to making any inquiry—McPike Drug Co v Wilson, (Mo.App.) 237 S.W 1044—Munhall v. Mitchell, 163 S.W. 912, 178 Mo App 494.

Proof in record

The requirement that an attorney file proof of his authority becomes academic, where such proof is contained in the record—First Nat Bank v. Plumpton, 203 N.Y S 102

80. U S—In re Retail Chemists Corporation, (C C A.Conn.) 66 F (2d) 605.

Mont.—Union Bank & Trust Co of Helena v Penwell, 42 P (2d) 457, 99 Mont 255

Wis—Peplinsky v Billings, 252 N. W 342, 213 Wis 651.

6 C J. p 634 note 7.

81. Ky—Commonwealth v. Roberts Coal Co., 216 S W. 584, 186 Ky 394.

Wis.—Peplinsky v. Billings, 252 N. W 342, 213 Wis 651.

6 C J. p 634 note 96.

82. McPike Drug Co v. Wilson, (Mo App.) 237 S.W 1044—Munhall v Mitchell, 163 S W. 912, 178 Mo App 494

83. Bryans v. Taylor, Wright, 245—6 C J p 635 note 8.

84. McPike Drug Co v. Wilson, (Mo. App.) 237 S W 1044—Munhall v. Mitchell, 163 S W. 912, 178 Mo App 494.

85. Doeller v. Mortgage Guarantee Co, 171 A. 856, 166 Md 500.

Reliance on attorney's representations

In such case persons dealing with the attorney are not entitled to rely on his representations as to his authority—Doeller v Mortgage Guarantee Co, 171 A 856, 166 Md. 500.

86. Ala.—Pond v. Lockwood, 8 Ala 669

Ga.—Hirsch v. Fleming, 31 S.E 9, 77 Ga 594.

Assignment of judgment

The assignment of a judgment by an attorney was valid as to the judgment debtors and their terre-tenants, the assignor being the only one who could object—Hay v. Hillegass, 119 A. 588, 275 Pa 497, certiorari denied Hillegass v Rohm, 43 S Ct. 705, 262 U.S. 758, 67 L.Ed 1218.

87. Pond v. Lockwood, 8 Ala 669

88. In re Foust's Guardianship, (Minn.) 262 N.W. 875.

89. United States of Mexico v. Rask, 293 P. 108, 109 Cal App. 497.

The right of respondent to deny the authority of an attorney to take an appeal for the adverse party has been denied, where respondent asserts the authority of the attorney to file the action below, in order to support the judgment appealed from, in favor of respondent who was defendant below, in the absence of a showing of change of authority after the entry of judgment.[90] The right of certain appellants to assert the lack of authority of an attorney to represent another named appellant has been denied, where such appellants have no personal interest in the appeal in view of the fact that no judgment was rendered against such appellants in the lower court, from which an appeal would lie.[91]

Prosecuting claim under Workmen's Compensation Act. The view has been taken that an industrial board may properly require an attorney to make proof of his authority to prosecute a claim for compensation under a workmen's compensation act, where the application for compensation is made on behalf of a person who is not a resident of the United States and who is not present when the application is filed or at the hearing.[92]

Loss of right to object. The circumstances may be such as to prevent a party's taking the position that the attorney who entered his appearance for such party had no authority to represent him and that such attorney was not the attorney of record.[93] The fact that the attorney for defendant enters into a stipulation with the attorney who appears for plaintiff relating to the preparation of, and the practice in, the action may constitute a waiver by defendant of the objection as to the authority of plaintiff's attorney to bring and maintain the action.[94]

Time of making objection or demand. Ordinarily, an objection based on want of authority of an attorney should be made promptly[95] or at the earliest opportunity,[96] preferably at the term at which appearance is first made;[97] otherwise, according to some authorities, the adverse party waives the want of authority and consents to the appearance of the attorney.[98] Furthermore, a party may lose his right to question the appearance for him of an attorney by failure to dissent and to raise the objection with due diligence.[99] In respect of the power of the court to require a showing of authority, however, the view has been taken that the trial court, or the appellate court has power, at any stage of the case, to require an attorney to show his authority to appear.[1]

The application for plaintiff's attorney to show authority should, ordinarily be made before a plea has been filed.[2] Defendant's attorney may, however, be required to show his authority, even after he has filed a plea at plaintiff's demand.[3]

The authority of an attorney to represent his alleged client cannot ordinarily be questioned at the

90. United States of Mexico v. Rask, supra.

91. Miller v. Continental Assur. Co. of America, 134 S.W. 1003, 233 Mo. 91, Ann.Cas.1912C 102—6 C.J. p. 635 note 3 [a].

92. Kuratnik v. Illinois Steel Co., 159 N.E. 693, 87 Ind.App. 357.

93. Madden v. Madden, 192 N.W. 665, 222 Mich. 404.

Secret agreement between party and attorney

A litigant having no way of knowing who represents the adverse party except by the record, any secret or private agreement between such adverse party and his attorney would not be binding on such litigant, and, in the absence of any stipulation or order of substitution, such adverse party should not be permitted to say that his attorney of record does not have authority to represent him.—Madden v. Madden, 192 N.W. 665, 222 Mich. 404.

94. Arrington v. Sizemore, 43 S.W. (2d) 699, 241 Ky. 171.

95. Colo.—Williams v. Uncompahgre Canal Co., 22 P. 806, 13 Colo. 469. Pa.—Kissick v. Hunter, 39 A. 83, 184 Pa. 174.
6 C.J. p. 635 note 11.

96. In re Miller's Estate, 229 P. 851, 71 Mont. 330—Missoula Belt Line Ry. Co. v. Smith, 193 P. 529, 58 Mont. 432.

97. Mitchell v. Church of Christ at Mt. Olive, 122 So. 341, 219 Ala. 322—6 C.J. p. 635 note 12.

98. In re Miller's Estate, 229 P. 851, 71 Mont. 330—Missoula Belt Line Ry. Co. v. Smith, 193 P. 529, 58 Mont. 432—6 C.J. p. 635 note 13.

Raising question collaterally after three years

Where receivers were appointed on a bill by a simple contract creditor and defendant's answer admitting that plaintiff was entitled to the relief prayed, one not a party to the bill could not avoid the effect of the answer, in giving the court jurisdiction to appoint a receiver, by claiming for the first time and collaterally, three years after the answer was filed, that it was not verified, and was signed by the attorney.—Merchants' Bank & Trust Co. v. Pflug, (C.C.A. Wis.) 6 F.(2d) 385, certiorari denied 46 S.Ct. 101, 269 U.S. 572, 70 L.Ed. 413.

99. Bogardus v. Livingston, 2 Hilt. (N.Y.) 236.

1. Pueblo of Santa Rosa v. Fall, 47 S.Ct. 361, 273 U.S. 315, 71 L.Ed. 658, reversing 56 App.D.C. 259, 12 F.(2d) 332, certiorari granted 47 S.Ct. 106, 273 U.S. 673, 71 L.Ed. 836.

Authority of plaintiff's counsel

(1) It has been said that the general rule seems to be that at any stage of the proceedings, when it is properly suggested to the court that a party plaintiff is represented by unauthorized counsel, the court may call on such counsel to show his authority.—Walker v. Sutherland, 299 P. 335, 136 Or. 355, certiorari denied 52 S.Ct. 30, 284 U.S. 649, 76 L.Ed. 551.

(2) The authority of an attorney appearing for the alien property custodian to maintain suit may be questioned at any stage of the case and the attorney required to show his authority.—Sutherland v. International Ins. Co. of New York, (C.C.A.N.Y.) 43 F.(2d) 969, certiorari denied 51 S.Ct. 103, 282 U.S. 890, 75 L.Ed. 785.—Sutherland v. International Ins. Co. of New York, (C.C.A.N.Y.) 43 F.(2d) 972, certiorari denied 51 S.Ct. 103, 282 U.S. 890, 75 L.Ed. 785.

2. Doe v. Abbott, 44 So. 637, 152 Ala. 243, 126 Am.S.R. 30—6 C.J. p. 635 note 14.

3. Westbrook v. Blood, 15 N.W. 544, 50 Mich. 443.

trial.[4] It has been held, however, that it is within the discretion of the trial court to postpone a decision as to the authority of an attorney to bring an action as attorney for the named plaintiff until final hearing on the merits.[5]

After final judgment, only the party who was not properly represented can take advantage of an unauthorized appearance by an attorney;[6] the judgment debtor who has properly been represented cannot object to the judgment on the ground that the judgment creditor was not represented by an attorney who was authorized to represent such creditor.[7]

Taking, or representation on, appeal. An objection to an attorney's authority to take an appeal must be made by respondent at the earliest possible moment; otherwise the objection is waived.[8] Since, however, respondent is entitled to rely on the presumption that the taking of the appeal was authorized (supra § 73) until advised to the contrary,[9] an objection is timely and there is no waiver where such objection is made promptly after respondent acquires knowledge of the want of authority.[10]

An appellant, on whose behalf an appeal has been taken by an attorney, must urge the attorney's lack of authority promptly on learning that the appeal has been taken, and, if he does not, he is estopped from objecting to the attorney's lack of authority after judgment has gone against him in the appellate court.[11]

Jurisdiction to determine. The court where the wrongful appearance was entered or the unauthorized suit brought is the proper tribunal to pass on the question of authority.[12]

Where an attorney acknowledges service on a bill of exceptions for a party without being employed by such party, the appellate court does not have jurisdiction to try the issue as to whether or not such acknowledgment was authorized.[13]

b. Method of Raising Objection

In general, the proper method to raise an objection based on want of authority of an attorney to appear is by a proper motion or petition directly raising the question.

In general, the rule seems to be that the authority for an attorney to appear may not be called into question except by a motion or petition made directly for that purpose.[14] In any event, a proper method of raising the question as to the authority of the attorney is a motion,[15] as, for example, a motion to

4. Doe v. Abbott, 44 So. 637, 152 Ala. 243, 126 Am S R 30.

Reason for rule

It is the proper practice to raise the question as to an attorney's authority to bring an action by motion (infra b herein) and not at the trial, because the question is one of practice and is not an issue in the action—O G Orr & Co v Fireman's Fund Ins Co, 253 N Y S. 2, 141 Misc 330, reversed on other grounds 256 N.Y.S 79, 235 App Div. 1.

5. Pueblo of Santa Rosa v Fall, 47 S Ct. 361, 273 U S. 315, 71 L Ed 658, reversing 56 App D C. 259, 12 F (2d) 332, certiorari granted 47 S Ct 106, 273 U S 678, 71 L Ed 836

6. Walker v. Sutherland, 299 P 335, 136 Or 355, certiorari denied 52 S Ct 30, 284 U S 649, 76 L Ed 551.

7. Walker v Sutherland, supra

8. Union Bank & Trust Co of Helena v. Penwell, 42 P (2d) 457, 99 Mont. 255

9. Union Bank & Trust Co. of Helena v. Penwell, supra.

10. Union Bank & Trust Co. of Helena v. Penwell, supra

11. Great Atlantic & Pacific Tea Co v. Majure, (Miss.) 168 So. 468.

12. Iowa—Krause v. Hampton, 11 Iowa 457.
Mich—Dehn v Dehn, 136 N W. 453, 170 Mich 407
Mo—Miller v Continental Assur Co, 134 S.W. 1003, 233 Mo. 91, 98, Ann. Cas 1912C 102—Clark v. Holliday, 9 Mo. 711.

Trial court

Determination of the actual existence of the presumed authority of an attorney attempting to act for an insane client rests with the trial court—Sullivan v. Dunne, 244 P. 343, 198 Cal 133

13. Edwards v. Wall, 113 S E 190, 153 Ga. 776, answers to certified questions conformed to 114 S.E. 63, 29 Ga App. 107.

Remedies available

The right of the party aggrieved is an action in damages against the attorney for any loss or injury sustained by reason of such attorney's unauthorized appearance, or by a petition in equity in the superior court to set aside any judgment against such party in the higher court in consequence of such unauthorized acknowledgment of service—Edwards v. Wall, 113 S E 190, 153 Ga. 776, answers to certified questions conformed to 114 S E. 63, 29 Ga.App 107.

14. N.Y.—Institute of Educational Travel v. Binkerd, 153 N Y.S 427, 90 Misc. 325
Pa—Daron v. Prudential Ins. Co. of America, 26 Pa Dist. 691.
6 C J. p 635 note 18.

Reason for rule

It is the proper practice to raise the question as to an attorney's authority to bring an action by motion, because the question is one of practice and is not an issue in the action—O. G. Orr & Co v. Fireman's Fund Ins Co, 253 N Y S 2, 141 Misc 330, reversed on other grounds 256 N.Y S 79, 235 App Div. 1.

Authority to commence action

(1) The proper procedure for defendant to question the authority of counsel representing plaintiff to institute or prosecute the action is by a motion supported by affidavit—Chesapeake & O Ry Co v Commonwealth, 225 S W. 145, 189 Ky 465.

(2) The authority of an attorney, appearing for a corporation in an action brought in the name of the corporation as plaintiff must be questioned by motion—Institute of Educational Travel v Binkerd, 153 N Y.S 427, 90 Misc 325.

Statutory provisions

Where an attorney signed the pleadings on behalf of a county in a suit brought in the name of a county as plaintiff, no attack could be made on such attorney's authority to represent the county, in the absence of a motion under Vernon's Sayles' Civ St Annot (1914) art 335, in writing under oath stating that defendant believed that such suit was instituted against defendant without authority on the part of plaintiff's attorney—Brite v. Atascosa County, (Tex Civ App) 247 S W. 878.

15. Mitchell v. Church of Christ at Mt. Olive, 122 So. 341, 219 Ala. 322—6 C J. p 635 note 18.

vacate the appearance[16] or to dismiss the action,[17] or for an order requiring that authority be shown.[18]

The question as to an attorney's authority to represent an alleged client may not, as a general rule, be raised by demurrer[19] or by motion to strike the pleading filed by such attorney.[20] While there is authority for the view that the question as to an attorney's authority to bring an action for another may, under certain circumstances, be raised by plea,[21] usually the question as to an attorney's authority may not be raised by plea or answer.[22]

Questions as to the right to open or vacate a judgment on the ground of invalidity because of the unauthorized appearance of an attorney are considered in section 267 of the title Judgments [34 C.J. p 272 note 72–p 274 note 78], questions as to the right to assert, on a collateral attack on a judgment, the want of authority of an attorney to appear for, or to represent, an alleged client in the action in which the judgment was rendered are considered in section 424 of the title Judgments [34 C.J. p 537 notes 68–70].

Affidavits. There is authority for the view that a motion or petition to require a showing of the authority of an attorney to appear should be supported by an affidavit[23] showing, in the first instance, prima facie a want of authority (infra § 76 c). In some jurisdictions, however, the view has been expressed that the showing of reasonable cause in support of the motion must be by affidavit or otherwise,[24] and, therefore, it has been held that an affidavit is not absolutely essential; something short of an affidavit may constitute a sufficient showing to justify the granting of an order requiring an attorney to produce and prove his authority.[25]

The affidavits should state facts showing why the motion should be granted,[26] and it is not enough to allege generally, on information and belief, that the attorney acts without authority.[27]

Notice. There should be notice of the motion, and an ex parte request for a rule for an attorney to show his authority has been held bad.[28]

§ 75. Disclosure of Client's Name, Residence, and Address

The court may compel an attorney to disclose the name and residence of his client, in a pending action or proceeding.

The court has a right to compel an attorney to disclose the name and residence of his alleged client,[29] where such disclosure is necessary in the

Authority of plaintiff's attorney

Defendant in any action has the right to question by motion, supported by affidavit, the authority of counsel representing plaintiff to institute or prosecute the action.—Commonwealth v Roberts Coal Co, 216 S. W 584, 186 Ky 394

16. Connifield v Thorp, (Alaska) 71 F 924, appeal dismissed 83 F 1022, 27 C C A 686.

17. Bonnifield v Thorp, supra.

Motion to dismiss as proper method to question authority of attorney to bring suit see Dismissal and Nonsuit § 57 [18 C J p 1182 note 69].

18. U S—Bonnifield v Thorp, supra.

Mont—Union Bank & Trust Co. of Helena v Penwell, 42 P.(2d) 457, 99 Mont. 255.

19. Ark.—State v. Baxter, 38 Ark 462.

Miss—Gulf Coast Motor Express Co v Lott, 157 So 469, 171 Miss 221—Gibson v State, 59 Miss. 341.

Authority to bring suit

(1) The power of counsel to bring a suit may not be questioned by demurrer.—People ex rel. Courtney v. Ashton, 192 N.E 320, 358 Ill. 146.

(2) The view has been taken that a bill is not subject to demurrer for failure to state that plaintiff religious society authorized the legal procedure.—Mitchell v. Church of Christ at Mt Olive, 122 So. 341, 219 Ala. 322.

(3) Authorization of a village to solicitors to bring suit to enjoin the violation of an ordinance may not be raised by demurrer, at least, not by general demurrer—Inhabitants of York Harbor Village Corporation v. Libby, 140 A 382, 126 Me 537.

20. Gulf Coast Motor Express Co. v. Lott, 157 So. 469, 171 Miss 221.

21. Mitchell v Church of Christ at Mt Olive, 122 So 341, 219 Ala 322

22. Institute of Educational Travel, 153 N Y S 427, 90 Misc 325—6 C J p 636 note 25

Action in name of corporation

The authority of an attorney who appeared for a corporation in an action brought in the name of the corporation as plaintiff could not be questioned by answer—Institute of Educational Travel v. Binkerd, 153 N Y S. 427, 90 Misc. 325

23. U S.—Bonnifield v Thorp, (Alaska) 71 F. 924, appeal dismissed 83 F 1022, 27 C C A. 686

Ky—Chesapeake & O Ry. Co. v Commonwealth, 225 S.W. 145, 189 Ky 465.

6 C.J. p 635 note 18.

24. Missoula Belt Line Ry. Co. v. Smith, 193 P 529, 58 Mont 432.

25. Union Bank & Trust Co of Helena v Penwell, 42 P.(2d) 457, 99 Mont. 255.

Statements in letters

Statements in letters of statutory trustees for liquidation of a defunct corporation that they never authorized their cotrustee, who was an attorney, to prosecute an appeal from an order appointing a receiver were sufficient to justify an order requiring the cotrustee to produce and prove his authority to appear for the other trustees on appeal—Union Bank & Trust Co. of Helena v Penwell, 42 P (2d) 457, 99 Mont 255

26. Daron v. Prudential Ins Co. of America, 26 Pa.Dist 691—6 C J p 636 note 26.

27. People v. Mariposa Co, 39 Cal. 683—6 C J p 636 note 26

28. Minn—Farrington v. Wright, 1 Minn 241.

N.H—Beckley v. Newcomb, 24 N H 359

Pa—Com v. Serfass, 5 Pa Co. 133, 3 Del Co 418.

29. McBrien v. Miller, 166 N Y S. 445—Ninety-Nine Plaintiffs v. Vanderbilt, 11 N Y Super 632, 1 Abb. Pr 193, 10 How Pr. 324—6 C J. p 634 note 98.

Duty to disclose name of client

An attorney at law who filed an answer, appearing for Richard Roe, owed the duty to the trial court to disclose the real name of his client, whether it was himself or some other person—Geary v. Stafford, 275 P. 865, 98 Cal App. 84.

interest of justice, in order to protect the rights of the adverse party to the action.[30] This power to compel disclosure, however, is confined to the action or proceeding in which the attorney purports to represent his client,[31] and it must be exercised during the pendency of the action and while the relation of attorney and client actually exists.[32] In an action gone to judgment an attorney cannot be compelled to disclose his former client's residence, so that he may be pursued in subsequent litigations.[33] Furthermore, there is authority for the view that whether or not the court will compel an attorney to disclose the names of persons whom such attorney represents in a particular proceeding is within the discretion of the court.[34]

The penalty of refusing the information is visited on the client by staying his action, or, if a defendant, by striking out his plea.[35] No punishment is, however, inflicted on the attorney who is the mere confidential agent of his client and is supposed to be acting by his command,[36] unless he has been guilty of deceit,[37] in which case he may be charged with the costs of a reference to determine the client's residence.[38]

§ 76. Evidence of Authority

a. Burden of proof
b. Admissibility
c. Weight and sufficiency

a. Burden of Proof

(1) In general
(2) Scope of authority

(1) In General

In general, the burden is on the party who denies the authority of an attorney to represent, or appear for, another to prove want of authority.

While it has been broadly stated that, where the authority of an attorney to appear on behalf of defendant is questioned, the burden is cast on the party asserting the authority to prove the same, since such party is in possession of the facts,[39] in view of the presumption in favor of the authority of an attorney who professes to represent, or who appears for, a client or party (supra § 73), in general the burden of proof is on the side denying an attorney's authority.[40] Thus, a party who questions the authority of an attorney to appear for the opposite party has the burden of proving want of authority.[41]

30. Matter of Trainor, 130 N Y S 682, 146 App.Div. 117—6 C J. p 634 note 99.

31. Hyman v Corgil Realty Co., 149 N.Y.S. 493, 164 App Div. 140—Matter of Malcom, 113 N.Y.S 666, 129 App Div. 226

Attorney representing party in different action

An attorney who does not appear for any party to an action should not be required to disclose the addresses of certain persons who are named as parties, in order that process may be served on such persons, notwithstanding the attorney has acted as attorney for such persons in another action—Brooklyn Sav. Bank v Park Slope Realty Corporation, 260 N.Y.S. 503, 146 Misc. 4

Motion to require attorney to reveal address of administrator

(1) Where there was no proceeding in the surrogate's court as to an estate, and it did not appear that an attorney was the attorney for the administrator in any proceeding therein pending, such attorney could not, on petition by claimant, be required to reveal the administrator's address—In re Schroeder's Estate, 157 N Y S 142, 93 Misc 404, 16 Mills Surr. 188.

(2) The facts that the moving papers on an application for an order directing an attorney at law to disclose the address of the administrator of a decedent's estate were served on such attorney and that, immediately under his signature acknowledging such service, there appear the words "Attorney for" the administrator, in the handwriting of a person other than such attorney, do not constitute an acknowledgment by the attorney that he is attorney for the administrator on the application to compel disclosure of the administrator's address—In re Schroeder's Estate, 157 N.Y S 142, 93 Misc 404, 16 Mills Surr. 188

32. Matter of Trainor, 130 N Y S 682, 146 App.Div. 117—Matter of Malcom, 113 N Y S 666, 129 App Div 226

After relation of attorney and client has ceased, the attorney cannot be compelled to disclose the residence of the client—McBrien v Miller, 166 N.Y S. 445

33. Hyman v. Corgil Realty Co., 149 N.Y.S 493, 164 App Div. 140—6 C. J. p 634 note 3.

34. State v American University of Sanipractic, 250 P. 52, 140 Wash 625

Private counsel associated with attorney general

Denial of a motion to require counsel, associated with the attorney general in quo warranto proceeding against a corporation conducting a school for drugless healing, to disclose the names of persons whom such counsel represented was within the discretion of the trial court—State v. American University of Sanipractic, 250 P. 52, 140 Wash. 625

35. McBrien v. Miller, 166 N.Y.S. 445—6 C J. p 634 note 4.

36. McBrien v Miller, supra—Walton v Fairchild, 4 N Y S. 552

37. McBrien v. Miller, 166 N Y S. 445.

38. Baur v. Betz, 1 How Pr (N S) 344, affirmed 99 N Y. 672.

39. Gaston & Co v All Russian Zemsky Union, 224 N Y S 522, 221 App.Div. 732.

40. U S.—Feldman Inv Co. v. Connecticut General Life Ins. Co., (C. C A Okl.) 78 F (2d) 838.
Ala.—Pallilla v Galilee Baptist Church, 113 So 134, 215 Ala. 667
Neb.—Jordan v Evans, 157 N W 620, 99 Neb 666
6 C J p 636 note 29.

Motion to dissolve attachment

In an action wherein defendant sought dissolution and dismissal of an attachment on the ground that attorneys had no authority to represent plaintiff, the burden was on defendant to prove lack of attorneys' authority.—Carson, Pirie, Scott & Co. v Long, 257 N W 815, 219 Iowa 444

41. Iowa.—Carson, Pirie, Scott & Co. v. Long, supra.
Mo.—Stiles v Cooter Gin Co., (App.) 74 S W.(2d) 1092
Mont.—Union Bank & Trust Co of Helena v Penwell, 42 P.(2d) 457, 99 Mont. 255
Pa.—Daron v Prudential Ins Co. of America, 26 Pa Dist 691
Wis.—Peplinsky v. Billings, 252 N. W 342, 213 Wis 651—Reinkey v. Wilkins, 179 N.W. 751, 172 Wis. 515.

There is authority for the view that the burden is on a person who claims that an appearance for him by an attorney was not authorized, to show want of authority of the attorney,[42] but according to some cases, after the party whom an attorney professes to represent has denied his authority, the burden of showing authority is on the attorney.[43]

Where the attorney shows his authority, it devolves on the party who challenges such authority to show that it is invalid and insufficient.[44]

There is authority for the view that, where an attorney at law denies that he represented a certain person in a particular transaction, the burden is on the party who relies on the alleged fact that the attorney did represent such person, as a basis for such party's right to recover, to prove such alleged representation.[45]

Attack on judgment. In general, where want of authority to appear for a party, against whom judgment has been rendered, is alleged, to invalidate the judgment, the burden of proving such want of authority is on the party who asserts such want.[46] Thus, defendant in an action must show want of authority of an attorney, where defendant seeks to have a decree against him, which was entered on the consent of an attorney, set aside on the ground that the appearance of such attorney for defendant was not authorized and, therefore, that the court did not have jurisdiction to enter the judgment.[47]

(2) Scope of Authority

A party who relies on the act of an attorney for the other party to avoid liability may, under certain circumstances, have the burden to establish that the act was within the scope of the authority of such attorney. In respect of certain acts of an attorney performed in the course of litigation, the burden to show want of authority is on the party who asserts such want of authority.

Where defendant relies on an act of plaintiff's attorney as a defense to the action it has been held or recognized that defendant has the burden of proving that the act was within the authority of the agent,[48] at least where the act relied on is not one which is ordinarily within the scope of an attorney's employment, as for example, a compromise or settlement for less than the amount due, entered into by plaintiff's attorney,[49] or the alleged release by plaintiff's attorney of defendant's liability.[50] So, according to some cases, where a mortgagor relies on the alleged agency of an attorney at law to receive payments of principal for the mortgagee, the burden of proving such agency rests on the mortgagor.[51] Where, however, a compromise made by the attorneys for the respective parties as formally embodied in a judgment, the view has been taken that the party who assails such judgment has the burden to show

Wyo.—Heyer v. Hines, 252 P. 1028, 36 Wyo. 53.
6 C.J. p. 636 note 29.

42. U.S.—Cooper v. Jewett, (S.D.) 233 F. 618, 147 C.C.A. 426.
Pa.—Taylor v. Siers, 68 Pa. Super. 564.

After an appearance in a trial on the merits, plaintiff ought not to be deprived of the result on the theory that defendant was not regularly in court, without some evidence from the latter that the attorney assuming to represent him was not authorized so to do.—Taylor v. Siers, 63 Pa. Super. 564.

43. Riley v. O'Kelly, 157 S.W. 566, 250 Mo. 647.—6 C.J. p. 636 note 30.

44. Gulf Coast Motor Express Co. v. Lott, 157 So. 469, 171 Miss. 221.

45. Planters' Mfg. Co. v. Greenwood Agency Co., 152 So. 476, 168 Miss. 892.

46. Connell v. Gallagher, 55 N.W. 229, 36 Neb. 749.

Suit to set aside judgment

A party who filed a petition in equity to set aside a judgment, and who admitted that an attorney had appeared for him, had the burden to establish that such appearance was not authorized.—Bond v. Epley, 48 Iowa 600.

Collateral attack

In the case of a collateral attack on a decree by the party against whom the decree was entered, on the ground that the attorney who appeared for such party had no authority to appear, such party has the burden to prove want of authority of the attorney.—Louth v. Woodard, 236 P. 480, 114 Or. 602.

47. Feldman Inv. Co. v. Connecticut General Life Ins. Co., (C.C.A. Okl.) 78 F.(2d) 838.

48. Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666.

Endorsement of check

Where a building association delivered a check for a loan to the borrower's attorney, and directed the bank to pay it on the attorney's indorsement, and was sued by the borrower, the burden rested on such association to prove the attorney's authority to indorse the check.—Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666.

49. Ga.—High v. Hollis, 132 S.E. 260, 35 Ga. App. 195.

Kan.—Rickert v. Craddock, 157 P. 401, 98 Kan. 143.

Defendant assuming burden of proof

Where defendant contended that he settled plaintiff's claim by paying plaintiff's attorney less than the full amount thereof, the burden was on defendant to show affirmatively the attorney's special authority to make settlement, especially where defendant admitted a prima facie case for plaintiff and assumed the burden of proof.—High v. Hollis, 132 S.E. 260, 35 Ga. App. 195.

50. J. D. Halstead Lumber Co. v. Hartford Accident & Indemnity Co., 298 P. 925, 38 Ariz. 228.

Release of indemnitor

In an action by an indemnitee against an indemnitor, who had given a bond of indemnity to enforce the liability of the indemnitor, the latter has the burden to prove that the indemnitee's attorney had authority to execute a release of the liability of the indemnitor, which the latter set up as a defense.—J. D. Halstead Lumber Co. v. Hartford Accident & Indemnity Co., 298 P. 925, 38 Ariz. 228.

51. Brientnall v. Peters, 176 A. 240, 317 Pa. 356.—Judith v. Di Cola, 176 A. 238, 317 Pa. 353.—Burkhart v. Falco, 176 A. 844, 116 Pa. Super. 262.

want of authority of his attorney to make such compromise.[52]

A party who relies on a statement which, it is alleged, was made by an attorney at law, as a basis for recovery by such party, has the burden to prove that the making of such alleged statement was within the scope of such attorney's alleged agency for another.[53]

In respect of certain matters arising in the course of litigation, the view has been taken that the burden of showing want of authority of the attorney is on the party who relies on, or asserts, such want of authority; thus, there is authority for the view that the burden of showing want of authority is on a party who seeks to be relieved from a stipulation entered into by the attorneys of record, which amounts to an agreement for a final disposition of the case.[54] So, where a client denies the authority of an attorney whom such client has employed in particular litigation, to enter an appearance for the client to any pleading or proceeding in the case, the client has the burden of proving want of authority.[55]

Consent judgment and offer of judgment. On a motion by defendant to set aside a judgment against him entered by consent of his attorney, defendant has the burden of proving that he did not consent, and that his attorney did not have authority to consent, to the judgment.[56] So, in a suit to set aside a judgment entered pursuant to an agreement between the attorneys, on the ground that the attorneys who signed the agreement acted without authority, plaintiff has the burden of proving the facts on which they rely.[57]

There is authority for the view that the burden of showing want of authority of an attorney of record to make an offer to the adverse party to take judgment against such attorney's client is on the party who questions such authority, unless such authority is denied by the attorney's client.[58]

Appeal. The burden is on the party who denies the authority of an attorney, who represented a party in the lower court, to appeal, to establish want of authority;[59] but on a prima facie showing by respondent that the attorney who took an appeal had no authority from appellant to do so, it devolves on the attorney to show that he was authorized to prosecute the appeal.[60]

b. Admissibility

In general, any competent and relevant evidence is admissible to show the authority of an attorney to act for another and, also, the scope of his authority.

Proof of retainer and authority may be made in the same way that any other fact is proved. Thus, a written recognition of an attorney's authority is always admissible,[61] as is proof of conduct constituting an estoppel[62] or other circumstance constituting legal evidence.[63] The appearance of an attorney for a party is received as evidence of his authority to represent such party.[64]

There is authority for the view that where, on an application to reopen a default judgment against defendant, no issue is squarely raised as to the right of an attorney to appear for defendant, it is not error to exclude evidence to show want of authority of the attorney.[65]

52. Chavis v. Brown, 93 S.E. 471, 174 N.C. 122.

53. Miss.—Planters' Mfg. Co. v. Greenwood Agency Co., 152 So. 476, 168 Miss. 892.
Okl.—Calloway v. State, 246 P. 873, 117 Okl. 43.

54. State v. Superior Court in and for Clallam County, 276 P. 98, 151 Wash. 413.

55. King Const. Co. v. Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky. 435.

56. People's Bank of Burnsville v. Penland, 173 S.E. 345, 206 N.C. 323.—Southern Chemical Co. v. Bass, 95 S.E. 766, 175 N.C. 426.—Gardner v. May, 89 S.E. 955, 172 N.C. 192.

57. Pierce v. Foreign Mission Board of Southern Baptist Convention, (Tex.Civ.App.) 218 S.W. 140, reversed on other grounds (Com.App.) 235 S.W. 552.

58. Parr v. Chicago, B. & Q. Co., 184 S.W. 1169, 194 Mo.App. 416.

59. Heyer v. Hines, 252 P. 1028, 36 Wyo. 53.

60. Union Bank & Trust Co. of Helena v. Penwell, 42 P.(2d) 457, 99 Mont. 255.

61. Stream v. Lloyd, 21 N.E. 533, 128 Ill. 492.—6 C.J. p. 636 note 31

62. Cal.—Kelly v. Ning Yung Benev. Assoc., 84 P. 321, 2 Cal.App. 460
W.Va.—Teter v. Irwin, 71 S.E. 115, 69 W.Va. 200, Ann.Cas.1913A. 707.

63. Ga.—Glover v. Summerour, 141 S.E. 211, 165 Ga. 513.
Mass.—Massachusetts Northeastern St. Ry. Co. v. Plum Island Beach Co., 151 N.E. 84, 255 Mass. 104.
6 C.J. p. 636 note 33.

Preparation of instrument in name of others

Where, in an action by a husband and wife to recover a statutory penalty for failure of defendant, after demand, to satisfy a mortgage of record, which plaintiffs had given, it appeared that the demand was prepared by plaintiffs' attorney and signed in the names of plaintiffs, evidence of the husband as to conversations with his wife in respect of employing an attorney and making request to satisfy the mortgage of record was admissible.—Bank of Odenville v. Hannah, 101 So. 589, 211 Ala. 648.

Representation after termination of original suit

Notwithstanding a solicitor's disavowal of authority to represent client in proceedings following the termination of the original suit, the solicitor's conduct in pleading and continuing to appear could be considered.—Harris v. Harris, 152 A. 359, 159 Md. 624.

64. U.S.—Osborn v. U. S. Bank, (Ohio) 9 Wheat. 738, 6 L.Ed. 204.
Ind.—State Bank of Indiana v. Bell, 5 Blackf. 127.
Me.—Penobscot Boom Corp. v. Lamson, 16 Me. 224, 14 Am.D. 656.
Vt.—Addison v. Bishop, 2 Vt. 231.

65. Young v. Martin, 153 P. 542, 96 Kan. 748.

Competent and relevant evidence to show the limits of the attorney's authority is admissible.[66] As against the client or alleged client, the declarations of an attorney are not, as a rule, admissible to show the existence of the relation of attorney and client[67] or the scope of the attorney's employment.[68] Where, however, there is evidence other than the attorney's declarations, which is sufficient prima facie to show the attorney's authority, the declarations of the attorney are admissible in corroboration, if they were part of the res gestæ and were made at the time of the transaction in question.[69]

As bearing on the claim that the relation of attorney and client does not exist between a certain attorney and plaintiff in an action, notwithstanding the name of such attorney appears on plaintiff's petition, it is proper to receive testimony to the effect that the name of such attorney appeared on the petition through mistake and that he has no connection with the case, both from the person who is plaintiff's attorney[70] and also from the attorney whose relation to plaintiff is in question.[71]

c. Weight and Sufficiency

(1) In general

(2) Scope of authority

(1) In General

In general, want of authority of an attorney who appears for, or professes to represent, another must be established by clear and satisfactory evidence.

A rule on an attorney to show his authority will not be granted on a mere suggestion (supra § 74); in the case of a rule or motion, there must, in the first instance, be a prima facie showing of a want of authority,[72] and, on hearing, such want must be established by clear and positive proofs.[73]

The evidence of authority produced in favor of an attorney must be satisfactory;[74] yet that may be regarded as satisfactory evidence which would be insufficient evidence of such authority if it was a fact in issue in the suit.[75] A rule of court, providing that in all cases of divorce the attorneys appearing for a defendant who has not been personally served shall by affidavit show their authority to act for such defendant, requires such showing where the summons was served on defendant by registered mail, as service by registered mail is not personal service.[76]

In favor of the alleged client and against a third person, the appearance of an attorney for such client is sufficient to show that such attorney was authorized to represent such client, in the absence of evidence to the contrary.[77] Even against the alleged client, the appearance of an attorney for him in a suit or action is prima facie evidence of the attorney's authority,[78] and clear and satisfactory proof is necessary to overcome the presumption, considered above in § 73, that an attorney is authorized to appear for the client whom the attorney professes to represent.[79] So, the appearance of an attorney at

66. **To show authority to put contract in acceptable form, not to make contract**
Evidence that an attorney to whom a broker was directed to submit a proposed contract for the sale of real property represented the owner only for putting the contract in acceptable form, not as an agent empowered to make a contract, was properly admitted—Webb v. Watson, 130 So. 211, 221 Ala. 595

67. McFarland's Adm'r v McFarland, 30 S.W.(2d) 958, 235 Ky. 283

68. West v A. F. Messick Grocery Co., 50 S.E. 565, 138 N.C. 166.
Compromise or release
Authority of an attorney to compromise or release a claim cannot be established by the declarations of the attorney—J. D. Halstead Lumber Co. v Hartford Accident & Indemnity Co., 298 P. 925, 38 Ariz. 228.

69. Ferguson v Lewis, (Tex.Civ. App.) 290 S.W. 858.

70. Johnson v. Morris, 108 S.E. 810, 27 Ga.App. 463

71. Johnson v. Morris, supra.

72. Williams v. Uncompahgre Canal Co., 22 P. 806, 13 Colo. 469—6 C.J. p. 637 note 37.

73. Bonnifield v Thorp, (D.C.Alaska) 71 F. 924, appeal dismissed 33 F. 1022, 27 C.C.A. 686—6 C.J. p. 637 note 38

74. Low v. Settle, 22 W.Va. 387—6 C.J. p. 637 note 39
Representation before industrial board in compensation case
Alien claimant's power of attorney to a foreign consul as attorney in fact and the consul's certificate of employment of an attorney at law constituted sufficient proof of the authority of the attorney at law to represent claimant in a compensation proceeding before the industrial board—Kuratnik v Illinois Steel Co., 159 N.E. 693, 87 Ind.App. 357.

75. Low v. Settle, 22 W.Va. 387.

76. Cubbison v Cubbison, (Ariz.) 40 P.(2d) 86.

77. Ala.—Kemp v Donovan, 94 So. 168, 208 Ala. 289.
Or.—State ex rel. Estes, 51 P. 77, 34 Or. 196.
See De St. Aubin v. King, 209 Ill. App. 419.
Evidence held insufficient to justify dissolution of attachment on the ground that the attorney for plaintiff had no authority to prosecute and continue the litigation—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 815, 219 Iowa 444.

78. U.S.—In re Illinois Fireworks & Display Co., (D.C.Ill.) 4 F.Supp. 200
Ind.—Neff v City of Indianapolis, 198 N.E. 828.
Or.—Louth v Woodard, 236 P. 480, 114 Or. 603
Record showing an appearance by an attorney for a party is only prima facie evidence of authority of the attorney, as against such party—Simonson v. Typer, (C.C.A.Wyo.) 235 F. 240—Blyth v. Swenson, 49 P. 1037, 15 Utah 345.

79. Iowa.—Walsh v. Doran, 123 N.W. 999, 145 Iowa 110.
Neb.—Jordan v. Evans, 157 N.W. 620, 99 Neb. 666
Pa.—Lyttle v Forest, 4 Pa.Dist. 292.
Suit to set aside or cancel judgment
The above rule has been recognized in a suit in equity to cancel or set aside a judgment, where plaintiff in such suit alleged that the attorney who appeared for him in the action in which the judgment was rendered was not authorized to appear.—Sloan v Jepson, 252 N.W. 535, 217 Iowa 1082—Walsh v. Doran, 123 N.W. 999, 145 Iowa 110—Turner v. Turner, 74 P. 55, 33 Wash. 118.

law for a corporation is, in the first instance, at least, sufficient evidence of his authority.[80] There is even authority for the view that a declaration by an attorney that he is employed by, or authorized to represent, a party is sufficient evidence of his authority in the case of an individual or corporate party.[81]

An affidavit by a named plaintiff to the effect that the action is being prosecuted without his knowledge or consent and that he has no claim against the named defendant is prima facie sufficient to show want of authority of the attorney to prosecute the action.[82]

The fact that an attorney possesses authority to represent a client in one case is not evidence of the attorney's authority to represent such client in another and distinct proceeding,[83] and employment of an attorney to conduct a suit does not of itself tend to show his employment to conduct other suits, even though the same transaction or occurrence may be the occasion for all of them.[84]

Where the attorney shows his authority, the party who challenges such authority must show by positive proof that it is invalid and insufficient.[85]

In the notes are cited cases in which the sufficiency of evidence has been considered in determining whether or not an attorney was employed by, or was authorized to represent, a particular client, or whether or not the relation of attorney and client between them was created.[86]

Lack of authority, knowledge, and acquiescence

Where defendant sought to open a judgment on the ground that the attorney who accepted service and appeared did so without authority, the clear proof on defendant's part must extend not only to lack of authority but also, under some circumstances at least, to lack of knowledge and acquiescence—Lyttle v. Forest, 4 Pa. Dist 292

Evidence held sufficient

(1) To overcome the presumption of the authority of an attorney to act for the party whom the attorney professed to represent—Cooper v Armour, 15 S.W.(2d) 946, 222 Mo App. 1176

(2) To support a finding that an attorney had no authority to appear for a particular defendant—Simonson v. Typer, (C C A.Wyo.) 285 F. 240—Park, Grant & Morris v Shannon & Mott Co., 167 N.W. 285, 140 Minn. 60—People's Bank of Burnsville v. Penland, 178 S E 345, 206 N C. 823—6 C J. p 637 note 38 [a].

(3) To show that attorney had authority to represent party for whom he appeared—August v. Collins, 251 N.W. 565, 265 Mich 389.

(4) To show that an attorney had authority to enter his appearance as solicitor for defendant in an action for divorce rather than merely to assist another attorney.—Madden v. Madden, 192 N W 665, 232 Mich. 404.

Evidence held insufficient to overcome the presumption of authority—Sloan v. Jepson, 252 N.W. 535, 217 Iowa 1082—Walsh v. Doran, 123 N W. 999, 145 Iowa 110—6 C J. p 637 note 38 [c].

80. U S—Osborn v. U. S Bank, (Ohio) 9 Wheat. 738, 6 L Ed 204. Me—Penobscot Boom Corp. v. Lamson, 16 Me 224, 14 Am.D. 656.

81. Me—Bridgton v. Bennett, 23 Me. 420—Penobscot Boom Corp v Lamson, 16 Me 224, 14 Am.D 658. N H—Manchester Bank v. Fellows, 28 N H 302

82. Bell v Farwell, 89 Ill App 638, affirmed 59 N E. 955, 189 Ill 414

83. Sullivan v. Dunne, 244 P. 348, 198 Cal. 183.

84. Gibbs v. Lumbermen's Mut Casualty Co, 173 A. 372, 87 N H 19.

85. Gulf Coast Motor Express Co. v Lott, 157 So. 469, 171 Miss 221.

86. **Evidence held sufficient**

(1) To show employment—Anderson v Lundt, 206 N W 657, 200 Iowa 1265. See Benko v. Lenard, 191 Ill App 600—Burns v. Illinois Cent R Co, 190 Ill App. 191.

(2) To permit an inference of the existence of the relation of attorney and client.—Waters v. Blackmon, 153 So 739, 228 Ala. 462.

(3) To support a finding that an attorney was authorized to act for another in a certain matter—Etheridge v Caffey, 90 So. 286, 206 Ala 474—Myers v Kirk, 135 S E. 788, 192 N.C. 700

(4) To support a finding that an attorney was the attorney for a party to a transaction, notwithstanding such party's denial—Texas Bridge Co v. Brown-Crummer Inv. Co, 231 P. 1042, 117 Kan 359.

(5) To support a finding that an attorney was authorized to appear or act for a certain corporation.—Feldman Inv. Co. v. Connecticut General Life Ins. Co., (C C.A.Okl.) 78 F (2d) 888.

(6) To support a finding that defendant corporation had employed a certain attorney with authority to enter its appearance in an action—Heinemann Dry Goods Co v Schiff, 268 S W. 596, 167 Ark. 422.

(7) To show that an attorney was employed by a creditor to collect a debt—Austin v. Bullitt, 3 Ky.Op. 47.

(8) To support a trial court's finding that an attorney negotiating a loan for a client and overseeing the application of its proceeds was the client's agent—Haedge v. Gaver, 217 N W 109, 173 Minn 207.

(9) To show in a proceeding by certiorari to review assessment of relator's realty, that the attorney who sued out the writ was employed by a corporation, which relator had employed to secure a reduction of assessment.—People ex rel Trojan Realty Co v. Purdy, 162 N.Y S. 56, 174 App Div. 702.

(10) To show that the attorney for the guarantor of a note had no authority to represent the holder of the note in making a joint bid at a foreclosure sale, on behalf of the guarantor and the holder—J D Halstead Lumber Co v Security Title Insurance & Guarantee Co, 3 P (2d) 52, 116 Cal App 679.

(11) To show that the relation of attorney and client had never existed between plaintiff in the action at bar and a certain attorney, so as to render inapplicable the rule that an attorney who acquires knowledge of the affairs of another pending the relationship of attorney and client between them cannot use such knowledge afterward to the detriment of his former client—Johnson v Morris, 108 S E. 810, 27 Ga App 463.

(12) To show, in a suit to prevent the enforcement of a judgment, that an attorney who appeared for the party against whom the judgment was given was not authorized to appear—Handley v Jackson, 50 P. 915, 31 Or. 552, 65 Am S R. 839.

Evidence held insufficient

(1) To show that the relation of attorney and client existed—McFarland's Adm'r v. McFarland, 30 S W. (2d) 958, 235 Ky. 282.

(2) To show that an attorney was the agent of, or represented, another, in the particular matter involved.—

(2) Scope of Authority

The authority of an attorney to perform certain acts for his client may be inferred from circumstances. Proof to overcome a presumption in favor of an attorney's authority must be clear. Clear and satisfactory evidence showing that the attorney of record in the lower court is without authority to take an appeal is necessary in order to overcome a presumption of his authority to take an appeal.

The authority of an attorney to perform certain acts on behalf of his client may be inferred from circumstances.[87] Where there is a presumption of the authority of an attorney for a party to litigation to perform a certain act, the proof to establish lack of authority should be clear.[88]

In an action on a compromise agreement, entered into by defendant's attorney, for breach of performance, there must be evidence showing the giving of authority to the attorney to compromise, or showing consent to, or ratification of, the agreement, where such authority is challenged and want of authority is put in issue,[89] but the view has been expressed that slight evidence may be sufficient to authorize the belief that an attorney was clothed with the authority to compromise, which he undertook to exercise,[90] or to take the case to the jury on the issue as to such authority.[91]

In the notes will be found illustrations of cases in which the sufficiency of evidence as to the scope of an attorney's authority was involved, as, for example, as to his authority to sign a written instrument on behalf of his client,[92] to enter into a contract,[93] to complete negotiations as to the amendment of a lease, or as to the waiver of its terms,[94] to give a license for the use of a patent,[95] to make a com-

Purnell v Union Trust Co. of Maryland, 173 A. 1, 167 Md 85—Planters' Mfg. Co. v. Greenwood Agency Co, 152 So 476, 168 Miss 892

(3) To show as a matter of law that an attorney was acting for a specified person in the transaction involved—Ryder v. Ellis, 134 N E 692, 241 Mass. 50

(4) To show that attorneys had authority to institute actions—Chunes v. Duluth, W. & P. Ry. Co, (D C Minn) 298 F. 964.

Preparation of mortgage

The mere fact that an attorney draws notes and mortgages is not sufficient to show that he acted as attorney for the mortgagee, inasmuch as an attorney often performs such services for the mortgagor—McFarland's Adm'r v McFarland, 80 S W. (2d) 958, 235 Ky 283

Inquiry as to whether attorney available

A letter in substance asking an attorney whether he is in a position to handle an action is insufficient to show authority to appear generally.—American Sardine Co. v. Olsen, 102 A. 797, 117 Me 26.

Action in name of dissolved corporation

Affirmative acts of one director of a dissolved corporation in authorizing an attorney to bring an action, and the silent acquiescence by the other surviving directors with knowledge thereof, were sufficient authority for bringing the action—O G. Orr & Co v. Fireman's Fund Ins Co, 256 N Y.S. 79, 235 App Div. 1, reversing 253 N.Y S 2, 141 Misc. 330

Authority to make motion to vacate default judgment

Striking a motion to vacate a default judgment because of counsel's want of authority to represent defendant was error in the absence of anything on the face of the record showing want of authority, where the motion was filed by attorneys admitted to practice and purported to be on behalf of defendant corporation only, and was verified by one of the attorneys filing it, who under oath stated that he was the attorney for defendant and had full authority to represent it—Gulf Coast Motor Express Co v. Lott, 157 So. 469, 171 Miss. 221.

Service of summons signed by attorney

Plaintiff showing service of summons, properly signed by attorneys, on defendants in personal injury suit, established prima facie such attorneys' authority to appear for plaintiff—Peplinsky v Billings, 252 N W. 342, 213 Wis. 651.

87. Ala—McFry v. Stewart, 121 So 517, 219 Ala 216
Mass—Barnes v Boardman, 21 N E 308, 149 Mass 106, 3 L R A 785
S C—Foxworth v Murchison Nat. Bank, 134 S E 428, 136 S C 458.
6 C J. p 653 note 43.

88. Hill v. Wilson, 250 P 840, 119 Or 636.

Stipulation

The rule applies where there is a presumption that an attorney has authority to enter into a stipulation—Hill v. Wilson, 250 P. 840, 119 Or. 636.

89. Jones v Noble, 39 P.(2d) 486, 3 Cal App (2d) 316.

90. East Line & R R R. Co v. Scott, 10 S W. 99, 72 Tex. 70, 13 Am S R. 758

91. St Louis & S F. R Co v. Leger Mill Co, 155 P. 599, 53 Okl. 127.

92. **Evidence held sufficient**

(1) To show that the attorney for the purchaser of real property had authority to sign the contract of purchase—Hamilton v. Coster, 144 N E. 226, 249 Mass 391.

(2) To warrant a finding by the jury that a client authorized his signature to a demand for satisfaction of a mortgage of record, or that he ratified such signature before delivery to the mortgagee—Bank of Odenville v. Hannah, 101 So. 589, 211 Ala. 643

93. **Evidence held sufficient**

(1) To show that a mortgagee either authorized or ratified the making of a stipulation which amounted to a contract providing for the payment, out of the proceeds of the sale of the mortgaged premises, of a certain amount to persons who had installed certain property on the premises under a conditional sales contract—Rotberg v Hebron, 157 N.Y. S 783, 94 Misc 225

(2) To support a finding that an attorney to whom a claim had been turned over for collection by a credit and collection corporation was an agent of such corporation and authorized to enter into a contract for towing, storing, and repairing an automobile, the assignment of which had been directed as a result of supplementary proceedings in connection with the enforcement of the claim—Hill v. Creditors' Nat Clearing House, 194 N E 138, 289 Mass. 437.

(3) To show that a judgment debtor and judgment creditor were responsible for acts of their attorneys during negotiations preceding a sheriff's sale.—Stockwell v McAlvay, (Cal App) 57 P (2d) 957.

94. **Evidence held insufficient** to show that the attorney for lessors had authority to complete negotiations as to amendment or waiver or to draw a deed of trust involved—Lake Shore Country Club v. Brand, 171 N E. 494, 339 Ill. 504

95. **Evidence held sufficient** to show

promise or settlement,[96] to enter into an agreement to release an adverse party from liability,[97] to collect a debt,[98] to pay a debt or obligation,[99] to assign a mortgage,[1] to obtain possession of certain property for the purpose of sale or delivery to a third person,[2] to receive notice from insured under a liability policy of claim against insured and to conduct the defense,[3] to dismiss a cross complaint and

that the equitable owner of a patent did not authorize an attorney to bind it in negotiations for licensing defendant—Hilditch v. American Bumper Corporation, (D C N.Y.) 15 F (2d) 451.

96. **Evidence held sufficient**

(1) To sustain a finding that the client authorized his attorney to make a settlement—Sette v. Sette, 295 P. 1096, 132 Kan. 375.

(2) To establish that an attorney was employed by defendant and directed to negotiate for the settlement of a claim against defendant which resulted in the stating of the account on which suit was brought—Fleschler v. Strauss, (Cal App.) 60 P. (2d) 193.

(3) To sustain a finding that a party had knowledge of, and approved, a settlement—La Marche v Schoenrock, 247 N.W. 852, 211 Wis 300.

(4) To sustain a finding that the settlement made was the one authorized by the client and that such settlement was not inequitable—Sette v. Sette, 295 P. 1096, 132 Kan 375.

(5) To show that counsel was authorized to make settlement of a copyright infringement suit on the terms named in the agreement—Baldwin Law Pub Co. v. Mog, (C C A. Ohio) 10 F (2d) 269.

(6) To support a finding that the attorney for certain heirs in a suit to partition decedent's property had no authority to make a final settlement agreement—Dawson v. Hotchkiss, 169 S E. 564, 160 Va 577.

Evidence held insufficient to show, on a motion of plaintiff to set aside a judgment entered pursuant to a compromise, that plaintiff's attorney did not have authority to make the compromise—Chavis v. Brown, 93 S E 471, 174 N C 122

97. **Evidence held sufficient** to raise the issue as to attorney's authority to enter into an agreement to release adverse party from liability—Ferguson v. Lewis, (Tex Civ.App.) 290 S W. 858.

Authority not shown

Evidence that an attorney represented an indemnitee in regard to fidelity and surety claims was insufficient to establish attorney's authority to release indemnitor from liability.—J D Halstead Lumber Co, v. Hartford Accident & Indemnity Co, 293 P. 925, 38 Ariz 228.

98. **Evidence held sufficient** to show the authority of the attorney for a mortgagee to collect the amount of a mortgage and to deliver the mortgage to the mortgagor—Downing v Coffey, 166 So 414, 231 Ala. 678.

Evidence held insufficient

(1) To show that the attorney for a mortgagee had authority to receive payments of the principal—Brientnall v. Peters, 176 A 240, 317 Pa 356—Judith v. Di Cola, 176 A. 238, 317 Pa 353—Burkhart v. Falco, 176 A. 844, 116 Pa Super. 263.

(2) To show that an attorney for a mortgagee had authority to receive payment of the principal of the mortgage and to cancel the mortgage—Workman v. Eyler, 121 A. 515, 94 N J.Eq 526.

(3) To show that a mortgagee held out his attorney as an agent authorized to receive payments of the mortgage principal—Zimmer to Use of Hammer v. Zsigmond, 167 A. 405, 109 Pa Super. 322.

Acquiescence in similar acts

(1) Evidence that "in some cases" the attorney for a mortgagee had collected, and the mortgagee had accepted, payments of principal on mortgage loans which the attorney had made to certain mortgagors on behalf of the mortgagee did not establish authority of the attorney to collect the principal of another mortgage, for the same mortgagee, where the placing of mortgages and the collection of interest by the attorney extended over a period of twelve years—Brientnall v. Peters, 176 A. 240, 317 Pa 356.

(2) Evidence that, "in some instances," an attorney had collected payments of the principal on mortgage loans made to mortgagors, on the mortgagee's behalf, eleven years and more before the mortgage under consideration, running to the same mortgagee, was executed did not establish the attorney's authority, on the theory of the principal's acquiescence in a series of similar acts by his agent, to collect the principal on the mortgage under consideration—Burkhart v. Falco, 176 A. 844, 116 Pa Super. 263.

(3) Evidence that in two instances the mortgagee received payment of the principal on mortgages through an attorney is not of itself sufficient to permit an inference that the attorney was authorized to collect the principal for such mortgagee in other cases—Borland v. Wible, 94 Pa Super. 41.

99. **Evidence held sufficient**

(1) To show that an attorney was authorized to use part of a loan to his client to satisfy an existing mortgage—Etheridge v. Caffey, 90 So. 286, 206 Ala. 474.

(2) To show that an attorney, employed by a mortgagor to procure a loan and also acting for the mortgagee in obtaining the mortgage, became the mortgagor's agent when the mortgagor left checks she indorsed to tax collectors in the attorney's possession for the payment of taxes, thus requiring the mortgagor to bear the loss due to the attorney's failure to pay the taxes—Steehler v Volk, 167 A. 424, 109 Pa. Super. 190.

1. **Evidence held insufficient** to show any agency on the part of an attorney to assign a bond and mortgage, which he obtained from the mortgagee by fraudulent representations, or to show an estoppel of the mortgagee to assert a claim of ownership as against one to whom the attorney had transferred the mortgage as security for a loan—Noland v. Law, 170 S E. 439, 170 S C 345.

2. **Evidence held sufficient** to show that the attorney for the administrator of an estate was not authorized to obtain possession of certain negotiable instruments, which were part of the estate, for the purpose of sale or delivery to a third person—Wilkinson v. Zumwalt, 297 P. 94, 112 Cal. App 416.

3. **Evidence held insufficient** to permit a finding, in assumpsit on a policy insuring plaintiff's automobile liability, of attorneys' actual or implied authority from insurer to receive notice, and conduct defense, of the action against insured—Gibbs v. Lumbermen's Mut Casualty Co., 173 A. 372, 87 N.H 19.

Apparent authority

An automobile liability insurer's direction that one claiming damages from insured refer any claim to insurer's claim agent and the employment of attorneys to defend previous suits arising out of the same accident did not authorize a finding of such attorneys' apparent authority to receive notice of and defend later suit by claimant—Gibbs v. Lumbermen's Mut. Casualty Co., 173 A. 372, 87 N.H. 19.

to withdraw an answer,[4] to sign a consent judgment,[5] to enter a satisfaction of judgment,[6] and to subscribe for corporate stock.[7]

Authority with respect to appeals. Where the authority of an attorney of record, in the lower court, of the named appellant to take an appeal is questioned by respondent, the presumption, recognized in some jurisdictions at least, that such attorney has authority to take the appeal (supra § 73) will prevail, in the absence of clear and satisfactory evidence showing that such authority is lacking.[8] The presumption that an attorney for a party in the lower court has authority to take an appeal is not overcome by a mere absence of evidence of such attorney's actual authority.[9] Where, however, there is a sufficient showing to put the attorney on his proof of authority to prosecute the appeal, evidence that the attorney had authority to represent the named appellant on prior occasions and in the lower court in the present case is not sufficient to show his authority to prosecute the appeal.[10]

The presumption of an attorney's right to sign as attorney of record a waiver of service of a writ of error is overcome, where the record fails to show that the attorney was the attorney of record of a particular appellee for whom the attorney signed the waiver.[11]

The fact that an attorney had withdrawn in the lower court as attorney for one of two appellants is no evidence that he does not represent the other appellant, so as to have authority to move to dismiss the appeal.[12]

§ 77. Written Authority

Usually a warrant of attorney is not required under the present practice.

In early practice a warrant of attorney to sue or defend was a special warrant from the crown, authorizing a party to appoint an attorney to sue or defend for him.[13] Later, when the parties themselves had the right to authorize their attorneys, it was defined as a special authority, given by a party to his attorney, to commence a suit, or to appear and defend a suit, in his behalf.[14]

While some statutes provide for the exhibition of written authorization under certain conditions,[15]

4. **Evidence showing want of authority**

The presentation by plaintiff, who had consented to the entry of judgment on a cross complaint filed by one of the defendants, of a communication from such defendant to plaintiff to the effect that no one was authorized to withdraw the cross complaint and answer of such defendant, was sufficient to support the denial of a motion by the attorney of record of such defendant to dismiss the cross complaint and to withdraw the answer—Red Bud Realty Co v. South, 241 S.W. 21, 153 Ark 330

5. **Evidence held sufficient**

(1) To support a finding, on plaintiff's motion to set aside a judgment entered by consent, that plaintiff's attorney had authority to sign the consent judgment.—Alston v Southern Ry Co, 176 S.E 292, 207 N C 114.

(2) To support a finding, on defendant's motion to set aside a judgment by consent, that the attorney who signed the consent judgment had not been authorized—People's Bank of Burnsville v Penland, 178 S E 345, 206 N C 323

6. **Evidence held sufficient** to sustain a finding that a party had knowledge of, and approved, a satisfaction of judgment—La Marche v. Schoenrock, 247 N.W 852, 211 Wis 300.

Evidence held insufficient to overcome the presumption that an attorney was authorized to enter a satisfaction of judgment—Trostle v. Harbaugh, 16 Pa Dist & Co 18.

7. **Evidence held sufficient** to show that an attorney was authorized to subscribe for stock on behalf of defendants sued for unpaid subscription—Teiser v. Swirsky, 2 P (2d) 920, 137 Or 595, rehearing denied 4 P (2d) 322, 137 Or. 595.

8. United States of Mexico v. Rask, 293 P 108, 109 Cal.App 497

Change of authority

Respondent, who relies on the existence of the authority of the attorney for the opposite party to commence the action, in order to support the judgment appealed from, which is in favor of respondent as defendant in the lower court, may not successfully deny the authority of such attorney to take an appeal, in the absence of a clear and satisfactory showing that a change in authority occurred after the entry of judgment.—United States of Mexico v. Rask, 293 P 108, 109 Cal App 497.

Evidence held insufficient to overcome the presumption that an attorney of record in the lower court had authority to take an appeal—United States of Mexico v. Rask, 293 P 108, 109 Cal App 497

9. Heyer v. Hines, 252 P. 1023, 36 Wyo 53.

10. Union Bank & Trust Co. of Helena v. Penwell, 42 P.(2d) 457, 99 Mont. 255.

11. Brann v. Pool, 272 S.W. 691, 308 Mo 309.

12. Interdiction of Erichson, 90 So 235, 149 La. 895.

13. Cyclopedic L D., quoted in First Nat Bank of Kansas City v. White, 120 S W 36, 39, 220 Mo. 717, 132 Am S R 612, 16 Ann Cas. 889.

Early common law

"At common law the plaintiff and defendant must, in general, have appeared in person and could not have appeared by attorney, without the king's special warrant, by writ or letters patent"—1 Tidd Pr., quoted in First Nat Bank of Kansas City v. White, 120 S W 36, 39, 220 Mo. 717, 132 Am S R 612, 16 Ann Cas. 889.

14. Cyclopedic L D, quoted in First Nat Bank of Kansas City v. White, 120 S W 36, 220 Mo 717, 132 Am. S R 612, 16 Ann Cas 889

"Even when the parties began appointing attorneys, it was done by parol in open court, but later by writing denominated 'warrants of attorney.'"—1 Tidd Pr., quoted in First Nat. Bank of Kansas City v. White, 120 S W 36, 39, 220 Mo 717, 132 Am. S R 612, 16 Ann Cas 889

These warrants are now in disuse, although formal entries of them on the record were long retained in practice—Cyclopedic L D, quoted in First Nat Bank Kansas City v. White, 120 S W 36, 39, 220 Mo 717, 132 Am.S.R 612, 16 Ann Cas. 889.

15. In Montana an heir who, as the records of an estate in the course of administration showed, was a non-resident of the United States, whose rights must be determined un-

as a general rule, it is no longer necessary, in the case either of an individual or of a corporation, for an attorney to have a warrant of attorney,[16] authority by parol being sufficient.[17] There is, however, no objection to a written warrant, and in case one is given an attorney is bound to produce it when properly called on to do so.[18]

On an application in a surrogate's court, brought in the name of a nonresident to compel the judicial settlement of an account, the court has denied the right to file the petition until the attorney for the named applicant should present an authorization from such applicant empowering the attorney to appear, initiate, and prosecute the proceeding.[19]

§ 78. Determination and Order or Rule

a. In general
b. Order or rule

a. In General

When the issue as to an attorney's authority is duly submitted to the court, it may in general determine the matter in a summary way. Where the question as to an

der Rev Codes § 7673, as amended by L (1913) c 54, prior to distribution, was not required, on appearing in advance of a decree of distribution, to file written evidence of her attorney's authority, as in proceedings to determine heirship—State v. District Court of Thirteenth Judicial Dist. in and for Yellowstone County, 203 P. 360, 62 Mont. 60.

In New York

(1) By virtue of statute [now embodied in Civ Pract Rules, rule 55], written evidence of the authority of the attorney for plaintiff to commence an action of ejectment might be required—Stewart v Butler, 59 N Y S 573, 27 Misc. 708—Stewart v. Hilton, 58 N.Y.S. 415, 27 Misc 239—6 C J. p 633 note 92 [a]

(2) A verification of the complaint by plaintiff was sufficient evidence of authority under this statute—Graham v Andrews, 32 N.Y S 795, 11 Misc 649, 24 N Y Civ Proc. 263.

In North Carolina

(1) In a suit by a wife, pursuant to L (1919) c 24, to have allotted and paid a reasonable subsistence from the estate of her husband, who was a nonresident and a fugitive from justice, the trial court should have required counsel for the husband to file written authority, as required by Revisal (1905) § 213, to appear specially for such husband to move to dismiss the wife's attachment of his land.—Walton v. Walton, 100 S E. 176, 178 N C. 73

(2) The propriety of an order requiring all counsel appearing in the case to file written powers of attorney has been recognized—Irwin v. City of Charlotte, 136 S E. 368, 193 N C. 109

In Pennsylvania

(1) Under the act of April 14, 1834, P L p 354 (17 Pub St § 1632), providing that the attorney for plaintiff in every action, shall, if required, file his warrant of attorney in the office of the prothonotary or clerk of the court in which such action shall be depending, it has long been settled that the court has the undoubted right to require the attorney to present his warrant of attorney where it has reason to question his right to appear—Gliwa v. U S Steel Corporation, 185 A 584, 322 Pa. 225, certiorari denied 57 S Ct 117—Moore v Steinman Hardware Company, 21 Pa Dist. & Co 441—Daron v Prudential Insurance Co of America, 26 Pa Dist. 691—6 C J p 633 note 92 [b], 93 [b]

(2) Although it has been said that the order to compel the attorney to file his warrant of attorney is customarily granted on cause shown by affidavit and on motion of opposing counsel, such affidavit is not essential and the court may act on any proper request or showing—Gliwa v. U. S Steel Corporation, supra

(3) A sworn statement by plaintiff in a petition for a rule to strike his name as party plaintiff, on the ground that the attorney had no authority to represent him, is sufficient to authorize the court to require the attorney to file a warrant of attorney—Gliwa v. U. S. Steel Corporation, supra.

(4) The statutory requirement is not met by proof that the action was originally brought with the consent of plaintiff The act requires a specific form of proof to be filed in order that the right may be clearly and indisputably shown, and this requirement cannot be dispensed with—Fisler v Reach, 51 A 599, 202 Pa. 74—6 C J. p 633 note 92 [b]

(5) There was a sufficient compliance with the statute where, in an action brought in the name of two executors, a warrant of attorney executed by one executor was filed—Moore v Steinman Hardware Company, 21 Pa Dist & Co 441.

(6) The act was intended to prevent fraud and imposition and to shield suitors from the unauthorized conduct of unscrupulous attorneys, but not to prevent the bringing of an action on behalf of one who, by reason of the injuries sought to be redressed, was rendered incapable of acting for himself—Qualey v. Scott, 28 Pa Dist 605.

(7) Where a person, in whose name an action was brought, died as the result of the injuries for which the action was brought, without having been able to execute a warrant of attorney, a warrant executed by such person's administratrix, who had been substituted as plaintiff was sufficient, where the petition to require the attorneys for plaintiff to file their warrant of attorney was not presented until after the death of the original plaintiff, and the warrant, executed by the administratrix ratified and confirmed the bringing of the action, spoke, in so far as the right of the administratrix to maintain the action was concerned, as of the date at which plaintiff's attorneys were first required, under the statute, to show their authority, and the warrant was otherwise sufficient—Qualey v. Scott, supra.

Warrant of attorney to confess judgment see Judgments §§ 152–157 [34 C.J. p 104 note 82–p 114 note 58]

16. U S—Rodgers v. Bromberg, (C. C.A Tex) 53 F (2d) 723, certiorari denied 52 S Ct. 314, 285 U S. 542, 76 L Ed 934
Ga.—Edwards v. Wall, 113 S E 190, 153 Ga 776
Mich—Hempel v. Bay Circuit Judge, 193 N W 281, 222 Mich. 553
6 C J. p 633 note 93.

Trial or appellate court

No warrant of attorney is required to entitle an attorney to appear for a litigant either in the trial or appellate court.—Edwards v. Wall, 113 S E 190, 153 Ga 776, answers to certified questions conformed to 114 S E. 63, 29 Ga.App. 107.

Corporation

Attorney at law need not have a formal warrant of attorney, even from a corporation, in order to file a legal proceeding.—Rodgers v. Bromberg, (C C A Tex.) 53 F (2d) 723, certiorari denied 52 S.Ct. 314, 285 U S. 542, 76 L Ed 934.

17. Wessel v. Bishop, 107 N.W. 220, 76 Neb 74—6 C.J. p 634 note 94.

18. State v Tilghman, 6 Iowa 496.

19. In re Ford's Estate, 163 N Y S. 960, 93 Misc 100.

Mere verification of the petition was not sufficient evidence of authority in such case—In re Ford's Estate, 163 N.Y.S. 960, 93 Misc. 100.

attorney's employment and authority is a material and contested issue in a case tried before a jury, the question is usually one of fact for the jury.

The rule to show his authority having been granted, the attorney is at liberty to show cause against the same by answer and evidence as the court shall direct; and, on such showing and evidence pro and con, the court may determine the controversy in a summary way.[20] The issue on such question takes precedence of other proceedings and should be determined before a trial either on the issues of law or of fact.[21] Ordinarily, it is a question to be decided by the court.[22] Where, however, the question as to whether an attorney was authorized to appear for, or was employed by, another becomes a material and contested question of fact on the trial of an action before a jury, the question is in general one for the jury.[23]

An instruction to the jury in a case in which the authority of an attorney is involved, substantially to the effect that a person may be bound by acts of an attorney whom such person has not employed and has not authorized to act for him, is erroneous.[24]

Continued representation. Where, in proceedings after the original suit, a solicitor denies that he continued to represent the party for whom he appeared in such suit, the question as to such solicitor's authority is a question of fact, which is to be determined by the court.[25]

Scope of authority. Where a question as to the scope or extent of the authority of an attorney for a particular person becomes a material and contested issue of fact on the trial of an action before a jury, the question is in general one for the jury.[26] A request for a binding instruction for defendant, based on an alleged release of defendant executed by plaintiff's attorney, is properly refused where there is no proof of authority of the attorney to execute such release, or of ratification of his act.[27]

Continuance of relation. Under certain circumstances the question as to whether the relation of attorney and client continues after entry of judgment in the action in which the attorney was employed is one of fact.[28]

Relief. If it is shown that an attorney whose authority to represent a party has duly been questioned has no authority to represent such party, the attorney will not be permitted to act further for such party.[29] It is only in extreme cases and to prevent injustice, as where it is shown to the court that the attorney appearing for plaintiff or for defendant is not doing so in good faith and in the interest of such party, that the court will strike out the pleading on the ground that the attorney appearing for such party has no right or authority to do so.[30]

b. Order or Rule

The court may issue an order or rule requiring an attorney to show his authority, where the question is duly presented. An order or rule to produce authority should be specific.

20. Williams v. Uncompahgre Canal Co, 22 P 806, 13 Colo 469.

21. Williams v. Uncompahgre Canal Co, supra

22. Ark.—Beardon v St Louis, etc, R. Co, 146 S W 861, 103 Ark 341
Iowa.—Savery v. Savery, 3 Iowa 271
Pa.—Newhart v. Wolfe, 2 Pennyp 395

Issue to be determined

On issue of estoppel, whether or not an attorney represented the holder of a tax certificate during negotiations with a delinquent taxpayer was for the court trying issues.—Quilling v. Waggoner, 246 N.W. 564, 210 Wis. 507

23. Ala.—Hoover v. Miller, 73 So. 817, 198 Ala. 499
N J.—Black & White Operating Co v. Grosbart, 145 A. 105, 7 N J.Misc 233
N Y.—Howard v. Smith, 28 N Y.Super 124—Kahn v. Lesser, 16 N.Y.S 154, 28 Abb N Cas. 77.

Attorney as agent for lender

In a proceeding involving an issue as to whether an attorney was the agent of a lender who made a loan on certain security, the question as to such agency was for the jury.—Glover v. Summerour, 141 S E. 211, 165 Ga 513.

24. Brewer v New England Mortg. Sec Co, 87 S E. 657, 144 Ga. 548.

25. Harris v. Harris, 152 A. 359, 159 Md 624.

26. Ala.—Waters v Blackmon, 153 So 739, 228 Ala 462
Ark.—Laird v. Byrd, 9 S W (2d) 571, 177 Ark. 1114
Md.—Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, 118 A 164, 140 Md 666

Authority to extend time for payment

Whether or not an attorney, whose testimony and letter to a defaulting debtor indicated authority to collect the balance of the purchase price of personalty or to institute suit for the property itself, had authority to extend the time of payment for a short period in order to collect the balance, was for the jury, such action not depriving his client of any material right, but relating merely to the attorney's control of the remedy.—Laird v Byrd, 9 S.W.(2d) 571, 177 Ark 1114

27. McLaughlin v. Monaghan, 138 A. 79, 290 Pa. 74

28. People ex rel Lax v. Ehler, 187 N E 630, 353 Ill 595

Service of notice to vacate judgment

Under the circumstances of the case under consideration, the question as to whether the relation of attorney and client continued after judgment in respect of the propriety of serving on the attorney a notice of a petition to vacate the judgment was one of fact.—People ex rel Lax v Ehler, 187 N E. 630, 353 Ill. 595.

29. Union Bank & Trust Co. of Helena v Penwell, 42 P.(2d) 457, 99 Mont. 255

30. Lambert v. Lambert, (Mo.) 208 S W 118.

Answer erroneously stricken

It seems that it was error to strike out defendant's answer in an attachment proceeding merely because in his absence the attorneys filing the answer did so at the instance of defendant's adopted child, in possession of the property attached and charged with its care and maintenance.—Lambert v. Lambert, (Mo.App.) 208 S W. 118.

The court may, where the matter is properly presented, issue a rule against an attorney who has brought an action to show by what authority, if any, such attorney has acted.[31] An order or rule on an attorney to produce his authority should be specific.[32] A defective order is void and may be disregarded.[33]

A rule to file a warrant of attorney acts as a stay of proceedings;[34] but it has been held that an order staying "all proceedings" until an attorney proves his authority is bad; it should stay all proceedings by that attorney.[35] Also, it has been held that, if an attorney in response to a rule, or on a motion, requiring him to show authority, fails to show sufficient authority for instituting the action, the court may dismiss the action.[36]

D. SCOPE OF AUTHORITY

§ 79. In General

An attorney has express authority to do all those acts which he has been expressly authorized to do by the client; and, in addition, he has, by virtue of the retainer or employment alone, the general implied authority to do on behalf of the client, in or out of court, all acts necessary or incidental to the prosecution or management of the suit, or the accomplishment of the purpose, for which he was retained, and apparent authority to exercise those powers which the client has held him out to third persons as possessing.

Although an attorney has no authority to bind a person as his client until he has been retained or employed by him (supra § 62), thereafter the attorney acts as the agent of the client and, under the general rules of agency, the client is bound by all acts or omissions of the attorney within the scope of the latter's authority, express implied, or apparent (supra §§ 67–68).

Notwithstanding a statutory enumeration of attorneys' power, which is not regarded as exclusive,[37] an attorney generally has express authority to bind his client by all acts which are expressly authorized by the contract of employment;[38] and, in addition, he has, merely by virtue of the retainer or employment alone, the general implied authority to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution or management of the suit or defense (see infra § 80), or the accomplishment of the purpose for which he was retained.[39] Moreover, in so far as the attorney's dealings with courts and third persons are concerned, if the client places the attorney in a position where he appears with reasonable certainty to be acting for the client, or without interference suffers the attorney to assume such a position and thereby justifies those dealing with the attorney in believing that he is acting within his authority, the attorney thereby acquires apparent authority to bind the client by all acts and omissions coming within the scope of the powers which the client has caused or permitted the attorney to seem to possess.[40] The apparent au-

31. Commonwealth v. Roberts Coal Co, 216 S.W. 584, 186 Ky 394

32. Turner v. Davis, 2 Den (N.Y.) 187, 2 How Pr. 86—6 C.J. p 637 note 45

33. Farrington v. Wright, 1 Minn 241.

34. Pa.—Meyer v Littell, 2 Pa. 177—Dunn v. Stone Co, 11 Wkly N C 95—Reese v. Church of Messiah, 1 Wkly N C. 416

35. Farrington v. Wright, 1 Minn. 241

36. Chunes v Duluth, W & P. Ry. Co., (D C Minn) 293 F. 964.
Without prejudice
The court may, on failure of the attorney to make a sufficient showing of his authority to bring the action, dismiss without prejudice.—Commonwealth v Roberts Coal Co, 216 S W 584, 186 Ky 394.

37. State v. Froah, 263 N.W. 525, 220 Iowa 840.

38. Ledwith v. Rosalsky, 155 N E. 688, 244 N Y 406, reversing 216 N Y S 411, 217 App Div. 749, motion denied 157 N.E 858, 245 N.Y. 563—Wertheimer v. New York Rys. Co, 164 N Y.S. 260, 177 App Div. 443.

39. Cal.—Coonan v Loewenthal, 61 P. 940, 129 Cal 197—Johnson v. Johnson, 3 P.(2d) 587, 117 Cal App 145

Ga.—Rooke v. Day, 167 S E. 762, 46 Ga App. 379.

Hawaii.—Anderson v. Rawley Co, 27 Hawaii 60.

Idaho—Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md, 183 P. 990, 32 Idaho 388

Ind.—Evansville Improvement Co. of Vanderburgh County v Gardner, 128 N E 471, 75 Ind App. 401.

Iowa.—Shores Co v. Iowa Chemical Co, 263 N W. 581—State v Froah, 263 N.W. 525, 220 Iowa 840—Healy v. Gray, 168 N.W 222, 184 Iowa 111.

Ky.—Herfurth v. Horine, 93 S.W. (2d) 21, 266 Ky. 19—Anglo-American Mill Co v. Phillips, 32 S W (2d) 994, 236 Ky 245—Kammerer v. Brown, 27 S.W.(2d) 959, 224 Ky. 199.

Mich.—Hightower v. Detroit Edison Co, 247 N.W. 97, 262 Mich. 1, 86 A. L R 509.

Mo.—Hemphill Lumber Co v Arcadia Timber Co., (App) 52 S W.(2d) 750—Krug v. Roberts Cone Mfg Co., 250 S W. 621, 213 Mo App. 628

Mont.—State v. Turlok, 248 P. 169, 76 Mont 549.

N.Y.—Humphries v Shapiro, 175 N.Y S 426, 187 App Div. 96—People v. People's Trust Co., 167 N Y S 767, 180 App Div. 494, 36 N Y Cr 203—Clinton v. N Y C & N. H R R Co, 131 N Y Supp 881, 147 App Div 470—Katzenberg v. Sais, 221 N Y S 105, 129 Misc. 218—In re Callahan, 174 N Y.S. 268, 106 Misc 202

Pa.—Cole v. National Casket Co, 101 Pa Super. 207.

Porto Rico—Bank of San Juan v District Court of San Juan, 32 Porto Rico 774.

Tex.—McMillan v. McMillan, (Civ App) 72 S W.(2d) 611.

Vt.—Brammall v. La Rose, 165 A. 916, 105 Vt 345, followed in 165 A 918, 105 Vt. 352

6 C.J. p 641 note 84, p 643 note 4

40. Ariz.—Irvin v. Dwight B Heard Inv. Co., 281 P. 213, 35 Ariz 528.

Fla.—Griffith v. Investment Co., 110 So. 271, 92 Fla. 781.

Ill.—Caesna v. Lietuva Loan & Savings Ass'n, 252 Ill App 612.

Ky.—Herfurth v. Horine, 93 S W (2d) 21, 266 Ky. 19—Johnson v. Holt's

thority of an attorney is an absolute one in that it may exist wholly irrespective of the client's consent in fact;[41] and after such authority has been exercised the client cannot avoid or repudiate it by asserting the absence of an intention to confer any power of the character exercised,[42] nor by showing that the attorney's authority was limited by uncommunicated or secret instructions or limitations which are not binding on persons dealing with the attorney in good faith.[43] It has been said, however, that an attorney is such a special agent that the rule which requires the principal to give notice of any limitation of his general agent, or any agent who has apparent authority, does not apply;[44] and, as to matters not coming within an attorney's apparent authority, it may merely be presumed that the attorney is acting in accordance with the client's instructions, so that while the attorney's acts are prima facie authorized they may, nevertheless, be disaffirmed by the client within a reasonable time.[45]

Nevertheless, the authority of an attorney generally extends only to those acts of commission or omission for which the client has given express, implied, or apparent authority.[46]

An employment or retainer for one purpose gives the attorney no authority with respect to wholly independent and collateral matters having no relation to the employment or the accomplishment of its objective,[47] nor does an attorney have authority to represent or act for a person or persons other than the one or ones by or for whom he was employed.[48] In other words, as an attorney is a special agent when his employment is in connection with a particular matter or transaction, his powers are confined to such as are necessary for the accomplishment of the specific purpose for which he was employed.[49]

The implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up any substantial right of the client,[50] or the imposition of new liabilities upon him;[51] and usually the retainer gives no implied authority for the attorney to do illegal or

Adm'r, 31 S W (2d) 895, 235 Ky. 518—Sayre v Commonwealth, 238 S.W. 737, 194 Ky. 338, 24 A.L R 1017
N.J —Fuld v Adams, 156 A. 333, 108 N J Law 373.
Tex —Callihan v Montrief, (Civ App) 71 S.W (2d) 564.
Va.—Singer Sewing Mach Co v Ferrell, 132 S E 312, 144 Va 395.
Wash —Wood v. Miller, 265 P. 727, 147 Wash. 251
6 C J. p 638 note 56.

41. Ky —Johnson v Holt's Adm'r, 31 S W (2d) 895, 235 Ky 518.
Mont —State v. Turlok, 248 P. 169, 76 Mont 549
6 C J. p 641 note 80.

42. Irvin v. Dwight B. Heard Inv. Co , 281 P. 213, 35 Ariz 528.

43. Ky.—Herfurth v. Horine, 98 S. W (2d) 21, 266 Ky 19—Johnson v. Holt's Adm'r, 31 S W.(2d) 895, 235 Ky. 518
Va —Singer Sewing Mach. Co. v. Ferrell, 132 S E. 312, 144 Va. 395.
6 C J p 638 note 56.

44. Bourland v Huffhines, (Tex Civ. App) 269 S W 184, affirmed Huffhines v Bourland, (Com App.) 280 S W. 561.

45. Krug v. Roberts Cone Mfg. Co , 250 S W. 621, 213 Mo App. 628—6 C J. p 641 note 81.

46. Conn —Gagner v. Petrauskas, 152 A. 145, 112 Conn. 307.
Mo —Krug v Roberts Cone Mfg. Co., 250 S W. 621, 213 Mo.App 628.
Mont —State v. Dow, 229 P. 402, 71 Mont. 291.
N M —Dacus v Maryland Casualty Co., 55 P (2d) 663
Okl —Freeman v. State, 203 P 1052, 20 Okl Cr 443
Pa —In re Quest's Estate, 188 A. 137, 324 Pa 230

47. Ill —Lanski v Chicago Title & Trust Co , 155 N E 296, 324 Ill 367.
Md —Forest Hill Permanent Bldg Ass'n of Harford County v Fisher, 118 A 164, 140 Md 666
Miss —B F Goodrich Rubber Co v Holland, 131 So 832, 159 Miss 346
Mo —National Union Fire Ins Co v Vermillion, (App) 19 S W.(2d) 776
Porto Rico —Bank of San Juan v. District Court of San Juan, 32 Porto Rico 774.
Tex —Donoho v Lewis, (Com.App) 12 S W (2d) 983, affirming (Civ. App) 1 S W.(2d) 481.
Wash —Barton v. Tombari, 207 P. 239, 120 Wash 331.
6 C J. p 642 notes 1, 2.

48. La.—Powell v. Larence, 155 So 13, 179 La 751.
Mass —Hanzes v. Flavio, 125 N E 612, 234 Mass. 320.
N.C —Town of Greenville v. Munford, 131 S.E 740, 191 N C. 373
Okl —Griffin v Galbraith, 247 P. 339, 114 Okl 208.
6 C J. p 642 note 3 [a].

Partnership attorney has no authority to act for members who have previously retired from the partnership —Hanzes v. Flavio, 125 N E 612, 234 Mass 320

49. N M —Dacus v. Maryland Casualty Co , 55 P.(2d) 663.
Pa.—Pore v. Duke, 154 A. 797, 303 Pa. 528.
Tex —Bourland v. Huffhines, (Civ App) 269 S W 184, affirmed Huffhines v Bourland, (Com App) 280 S.W. 561.

50. U S —Glover v. Bradley, (S C.) 233 F 721, 147 C C A. 487, Ann Cas 1917A 921.
Ill —Village of Dolton v. S. Ellen Dolton Estate, 162 N E 214, 331 Ill. 88.
Ky —Lawson v. Wright, 3 Ky Op. 352
Mo —Krug v. Roberts Cone Mfg. Co , 250 S W 621, 213 Mo.App. 628
N J —Phillips v. Pullen, 14 A 222, 50 N J Law 439—In re Koehler's Estate, 140 A. 15, 102 N J Eq. 132—Trenton Street Ry Co. v. Lawlor, 74 A. 668, 71 A. 234, 74 N J Eq. 828.
N C —Deitz v. Boloh, 133 S E 284, 209 N C 202—Bissell v Auto & Tire Equipment Co., 108 S E 439, 182 N C. 98—Bank of Glade Spring v McElwen, 76 S E 222, 160 N C 414, Ann.Cas 1914C 542
Pa —In re Quest's Estate, 188 A. 137, 324 Pa 230—In re Berberich's Estate, 101 A. 461, 257 Pa 181
Tenn —Holt v. State, 24 S.W.(2d) 886, 160 Tenn 366
Tex.—Butler v. Fechner, (Civ App.) 200 S W. 1126—Jacobs v. State, 213 S.W. 628, 85 Tex.Cr 505
Wash —Barton v. Tombari, 207 P. 239, 120 Wash. 331.
6 C J p 642 note 94, p 647 note 57
Rights which may be waived by attorney see infra § 100

51. U S —Robert R Sizer & Co. v. Chiarello Bros , (D C N Y.) 32 F. (2d) 333.
Iowa —Bibler v. Bibler, 216 N.W. 99, 205 Iowa 639
6 C J p 642 note 95.

unlawful acts,[52] or to act as to matters in which he has interests antagonistic to those of the client.[53]

A determination of what powers come within an attorney's apparent authority is generally dependent upon what powers persons of reasonable prudence might reasonably believe the attorney to possess on the basis of the client's conduct.[54] An attorney ordinarily has apparent authority to exercise those powers which are commonly exercised by attorneys at law in like cases or circumstances and which third persons have no notice that the attorney does not in fact possess.[55] On the other hand, the apparent authority of an attorney cannot comprehend powers which, to the knowledge of the person asserting such authority, have not in fact been conferred by the client;[56] nor powers which the ordinary attorney and client relationship, for the purposes for which it is known to exist, would not induce a third person to believe that the attorney had the authority to exercise,[57] for all persons dealing with an attorney, as such, are charged with notice of his usual and ordinary powers, and they cannot set up ignorance to avoid the consequences of their conduct.[58] Moreover, the basis of the rule as to apparent authority is an estoppel,[59] and hence it may be held inapplicable whenever the circumstances are such as to preclude the raising of an estoppel against the client.[60] A client who does not hold out an attorney as having authority beyond that in fact given is not required to protect himself by giving notice of the limits of the authority.[61]

An attorney for a court official representing an estate, who can act only by and with the consent and approval of the court, has no power, unless it has been expressly granted, to bind the client or the estate he represents.[62]

Joint attorneys. Where several attorneys are employed under a joint contract, each has authority to bind the other attorney or attorneys by his acts, as well as the client.[63]

§ 80. Conduct and Control of Litigation in General

a. In general
b. Exclusion of control by client

a. In General

The employment or retainer of an attorney for the purpose of prosecuting or defending litigation gives him implied power to take all steps necessary or incidental to the prosecution or management of the case or defense, and apparent authority as to the courts and opposing parties or their counsel to take all steps and exercise all powers that are ordinarily taken by, or conferred upon, attorneys in similar causes, in so far as they relate to or affect procedural or remedial matters but not the subject matter of the litigation.

The general employment of an attorney to prosecute or defend a cause or proceeding ordinarily vests in a plaintiff's attorney the implied authority to take all steps or do all acts necessary or incidental to the regular and orderly prosecution or management of the suit,[64] and in a defendant's attorney the power to take such steps as he deems necessary to defend

52. Freeman v. State, 203 P. 1052, 20 Okl.Cr. 443—6 C.J. p 642 note 96.

53. U.S.—Barnett v. Kunkel, (Okl.) 259 F. 394, 170 C.C.A. 370
Ky.—Montgomery Coal Corporation v. Allais, 3 S.W.(2d) 180, 223 Ky. 107—King Const. Co. v. Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky. 435
6 C.J. p 642 note 97

54. Ky.—Johnson v. Holt's Adm'r, 31 S.W.(2d) 895, 235 Ky. 518
Md.—Milkton v. French, 150 A. 28, 159 Md. 126.

55. Herfurth v. Horine, 98 S.W.(2d) 21, 266 Ky. 19

56. Md.—Milkton v. French, 150 A. 28, 159 Md. 126
Tex.—Bourland v. Huffhines, (Civ. App.) 269 S.W. 184, affirmed Huffhines v. Bourland, (Com.App.) 280 S.W. 561.

57. Iowa.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258.
Md.—Milkton v. French, 150 A. 28, 159 Md. 126.
Mass.—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305.

58. Mass.—Precious v. O'Rourke, supra
N.J.—Strauss v. Rabe, 130 A. 920, 98 N.J.Eq. 700, affirming 127 A. 188, 97 N.J.Eq. 208
Or.—Union Central Life Ins. Co. v. Toliver, 52 P.(2d) 1129.
6 C.J. p 638 note 55.

59. Czesna v. Lietuva Loan & Savings Ass'n, 252 Ill.App. 612

60. Czesna v. Lietuva Loan & Savings Ass'n, supra.

61. Gibbs v. Lumbermen's Mut. Casualty Co., 178 A. 372, 87 N.H. 19

62. Iowa.—In re Carpenter's Estate, 231 N.W. 376, 210 Iowa 553.
Pa.—In re Berberich's Estate, 101 A. 461, 257 Pa. 181
Tex.—Butler v. Fechner, (Civ.App.) 200 S.W. 1126

63. Lake v. Wilson, 38 S.W.(2d) 25, 183 Ark. 180—Lake v. Wilson, 35 S.W.(2d) 597, 183 Ark. 180.

64. Fla.—Griffith v. Investment Co., 110 So. 271, 92 Fla. 781—Small v. Colonial Inv. Co., 109 So. 433, 92 Fla. 503
Idaho.—Evans v. Power County, 1 P.(2d) 614, 50 Idaho 690.
Ky.—Anglo-American Mill Co. v. Phillips, 32 S.W.(2d) 994, 236 Ky. 245
Mass.—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305—Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592—Hahn v. Loker, 118 N.E. 661, 229 Mass. 363, L.R.A.1918D 807.
Mich.—Hightower v. Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509
Miss.—B. F. Goodrich Rubber Co. v. Holland, 131 So. 882, 159 Miss. 346
Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549
N.Y.—Katzenberg v. Satz, 221 N.Y.S. 105, 129 Misc. 218
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
Okl.—Neil v. Union Nat. Bank of Chandler, 178 P. 659, 72 Okl. 116.
Pa.—Swartz v. Morgan & Co., 29 A. 974, 163 Pa. 195
Vt.—Brammall v. La Rose, 165 A. 916, 105 Vt. 345.
6 C.J. p 641 note 84.

Acts pertaining to remedy

The attorney "is, by his general employment, authorized to do all acts necessary or incidental to the prosecution or defense which pertain

the suit and protect the interests of defendant,[65] in so far as they affect only the remedy. By virtue of such employment the attorney also acquires, as to the courts and other parties or their counsel, the apparent authority to bind the client by taking all steps or exercising all powers that are ordinarily taken by, or conferred upon, attorneys in similar actions or causes.[66] In proceedings before a court of record this apparent authority of an attorney is so broad, so far as the court and opposing parties are concerned, as to have been characterized as plenary in nature;[67] and, in the absence of fraud or collusion, almost any act or omission in litigation which affects only the remedy or procedure will be treated as coming within his authority to bind his client,[68] for the courts must deal with the parties as though they were actually present and acting in the persons of their attorneys.[69] Otherwise stated, the authority of an attorney extends to the management of the case in all the exigencies which arise during its progress,[70] and his broad authority in this connection cannot be questioned by the client because of the want of specific authority to do the act done or consented to,[71] or because the attorney has in fact exceeded or violated instructions or limitations not communicated to the court or opposing parties or their counsel.[72]

The broad implied or apparent powers of an attorney with respect to the conduct or control of litigation are, however, limited to matters which relate only to the procedure or remedy.[73] The employment of itself confers upon the attorney no

to the remedy pursued The choice of proceedings, the manner of trial, and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action"—Ohlquest v. Farwell, 32 N W 277, 279, 71 Iowa 231

65. Hawaii—Anderson v. Rawley Co, 27 Hawaii 60.
Iowa—Shores Co v. Iowa Chemical Co, 268 N.W 581—State v Froah, 263 N W 525, 220 Iowa 840.
Ky—Johnson v. Holt's Adm'r, 31 S W (2d) 895, 235 Ky. 518—Sayre v. Commonwealth, 238 S W 737, 194 Ky. 338, 24 A L R 1017
N C—Chatham Lumber Co v. Parsons Lumber Co, 90 S E. 241, 172 N C 320
R I—McLyman v. Miller, 161 A. 111, 52 R I 374
Tex—McMillan v McMillan, (Civ App) 72 S W.(2d) 611
Vt—Barrows v Wilson, 121 A. 440, 97 Vt 26
6 C J p 642 note 93

Defense attorney in a criminal case is generally held to have such powers to bind his client.
Ga—Abney v State, 169 S E. 539, 47 Ga App 40
Iowa—State v Froah, 263 N W. 525, 220 Iowa 840—State v Dangelo, 166 N.W. 587, 182 Iowa 1253
Ky—Dewberry v. Commonwealth, 44 S W (2d) 1076, 241 Ky 726—James v Commonwealth, 247 S W 945, 197 Ky. 577—Sayre v. Commonwealth, 238 S W. 737, 194 Ky. 338, 24 A L R 1017—Bonar v Commonwealth, 202 S W. 676, 180 Ky. 338.
Mont—State v. Turlock, 248 P. 169, 76 Mont. 549
N D—State v. Keller, 223 N.W. 698, 57 N D. 645, 64 A.L R. 434.
Okl.—Freeman v. State, 203 P. 1052, 20 Okl Cr 443.
Tex—Ex parte Wood, (Cr.) 37 S.W. (2d) 487—Ex parte Maple, 33 S.W. (2d) 734, 116 Tex.Cr. 382—Jacobs v State, 213 S.W. 628, 85 Tex.Cr. 505.

66. U S—In re Level Club, (D C N. Y.) 46 F (2d) 1002
Ky.—Herfurth v Horine, 98 S W (2d) 21, 266 Ky 19—Johnson v. Holt's Adm'r, 31 S W (2d) 895, 235 Ky. 518
N M—Dacus v. Maryland Casualty Co, 55 P (2d) 663, 40 N M 110.

67. In re Level Club, (D C N Y) 46 F (2d) 1002, 1003
"The apparent authority of attorneys in any proceeding before the court is plenary so far as the court and the opposing parties are concerned, for necessarily it must be adequate to all the exigencies of litigation. To be agents with such authority is one of the reasons for the existence of the Bar."—In re Level Club, supra

68. U S—In re Level Club, supra.
Ariz—Irvin v Dwight B Heard Inv. Co, 281 P. 213, 35 Ariz 528
Fla—Henderson v State, 113 So. 689, 94 Fla 318
Ill—Village of Dolton v. Dolton Estate, 162 N E 214, 331 Ill. 88
Iowa—Shores Co v. Iowa Chemical Co, 268 N W 581
Ky—Herfurth v Horine, 98 S W.(2d) 21, 266 Ky. 19
Mass.—Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592.
Mont.—Davenport v. Davenport, 222 P 422, 69 Mont 405
N.J—Kaufman v. Jurczak, 139 A 716, 102 N J Eq 66
N Y—In re Callahan, 174 N Y.S. 268, 106 Misc 202, affirmed 175 N.Y S 896, 188 App Div 944
Okl—Neil v Union Nat Bank of Chandler, 178 P. 659, 72 Okl 116
Tex.—Richardson v McCloskey, (Civ. App.) 228 S.W. 323, dismissed for want of jurisdiction
6 C.J. p 641 notes 82, 89.

Reasons for rule
(1) "Having voluntarily reposed confidence in such counsel and held him out to the court and opposing counsel as his representative, he cannot repudiate his action or inaction in the conduct of the suit, so far as such repudiation might affect the action of the court, past or prospective, or the rights of his opponent, except perhaps when a denial of such right would be in effect perpetrate a fraud against him"—Irvin v. Dwight B. Heard Inv Co, 281 P. 213, 214, 35 Ariz 528.

(2) "It is manifest that no tribunal, where parties appear by attorney at law, could proceed safely or conveniently under any practice which permitted the party to disavow what had been done in his behalf in open court The attorney may be liable to his client if he has acted to his prejudice without authority, but the orders of the court and the rights of the other parties cannot be affected"—Hale v Wheeler, 163 N E. 178, 179, 264 Mass 592

69. Chadwick v Parkhill Corporation, 141 A 823, 16 Del Ch. 105

70. In re Callahan, 174 N Y.S 268, 106 Misc. 202, affirmed 175 N Y S. 896, 188 App Div 944

71. U S—In re Level Club, (D.C.N. Y) 46 F.(2d) 1002
Iowa—Shores Co v. Iowa Chemical Co, 268 N W 581
N Y—In re Callahan, 174 N Y S 268, 106 Misc. 202, affirmed 175 N Y S 896, 188 App Div 944.

72. Ga—Rooke v Day, 167 S E. 762, 46 Ga App 379.
Ky—Herfurth v Horine, 98 S W (2d) 21, 266 Ky 19—Johnson v Holt's Adm'r, 31 S.W.(2d) 895, 235 Ky. 518.
N Y—Tatum v. Maloney, 234 N Y S. 614, 226 App.Div 62
N C—Hendricks v. Town of Cherryville, 153 S E. 113, 198 N.C. 659.

73. Mass—De Santis v. Massachusetts Bonding & Insurance Co., 194 N E 136, 289 Mass 315.
N.D—Hauser v. Security Credit Co., 266 N.W. 104.

implied or apparent power or authority over the subject matter of the cause of action or defense;[74] and, unless the attorney has expressly been granted authority with respect thereto, the power to deal with or surrender these matters is regarded as remaining exclusively in the client.[75]

If the client has not held the attorney out as possessing greater powers, the apparent authority of the attorney does not comprehend other or greater powers than an attorney authorized to take charge of litigation commonly has;[76] and an attorney has no implied authority to take steps which are not necessary to the due and orderly prosecution of the case, but are collateral thereto.[77]

Moreover, a retainer or employment for a particular cause or proceeding does not of itself give the attorney authority to act for the party in a different cause or proceeding not essentially a part of the cause for which the attorney was employed, although the other proceeding may involve the same matters concerned in the original litigation;[78] and a general retainer does not authorize the attorney to act in any particular suit or proceeding,[79] but an attorney employed with respect to one issue has authority to act with respect to another issue inseparably connected with it,[80] and an employment for a particular cause gives the attorney authority to act in all proceedings which are but a part or continuation of the original employment and required to be prosecuted or defended in order to accomplish the purpose for which the attorney was retained.[81]

Similarly, an attorney has no authority to represent or act for a party or parties to litigation other than the one or ones by whom he has been employed or whom he has been legally appointed to represent.[82]

An employment of an attorney to conduct a proceeding before an administrative board or body, not a court of record, has been held not to vest the attorney with the broad implied or apparent powers ordinarily resulting from the client's allowing an attorney to appear upon the records of a court of record as his attorney,[83] but there is other authority to the contrary,[84] and the general rules with reference to implied powers have been ap-

74. U S—U. S. v. Beebe, (Ala.) 21 S.Ct. 371, 180 U.S. 343, 45 L.Ed. 563
Ala.—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40—Indemnity Co. of America v. Bollas, 135 So. 174, 223 Ala. 239—Craft v. Standard Accident Ins. Co., 123 So. 271, 220 Ala. 6—Blackwood v. Maryland Casualty Co., 137 So. 467, 24 Ala. App. 527.
Ark.—Laird v. Byrd, 9 S.W.(2d) 571, 177 Ark. 1114.
Idaho—Evans v. Power County, 1 P. (2d) 614, 50 Idaho 69—Storey v. U. S. Fidelity, etc., Co., 183 P. 990, 32 Idaho 388.
Ill.—Village of Dolton v. Dolton Estate, 162 N.E. 214, 331 Ill. 88.
Ky.—Lawson v. Wright, 3 Ky. Op. 352
Me.—Pomeroy v. Prescott, 76 A. 898, 106 Me. 401, 138 Am.S.R. 347, 21 Ann.Cas. 574.
Mass.—De Santis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass. 315—Friedberg v. Jablon, 192 N.E. 49, 287 Mass. 510—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305—Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592—Hahn v. Loker, 118 N.E. 661, 229 Mass. 363
Mont.—State v. Turlock, 248 P. 169, 76 Mont. 549.
N.Y.—In re Rahm, 161 N.Y.S. 1038, 175 App.Div. 330, reargument denied 163 N.Y.S. 1128—In re Zweig's Will, 261 N.Y.S. 400, 145 Misc. 839
N.C.—Deitz v. Bolch, 183 S.E. 384, 209 N.C. 202—Bissell v. Auto & Tire Equipment Co., 108 S.E. 439, 182 N.C. 98—Bank of Glade Spring v. McEwen, 76 S.E. 222, 160 N.C. 414, Ann.Cas.1914C 542
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
Okl.—Neil v. Union Nat. Bank of Chandler, 178 P. 659, 72 Okl. 116
Tex.—McMillan v. McMillan, (Civ.App.) 72 S.W.(2d) 611—Lane v. Mitchell, (Civ.App.) 289 S.W. 195
Vt.—Brammall v. LaRose, 165 A. 916, 105 Vt. 345, followed in 165 A. 918, 105 Vt. 352—Granger v. Batchelder, 54 Vt. 248, 41 Am.R. 846.
6 C.J. p. 641 note 85, p. 643 note 5.

"It is settled law that while an attorney, by virtue of his employment, has broad powers with reference to the prosecution and management of actions and suits, these powers do not extend to matters affecting the cause of action"—De Santis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 139, 289 Mass. 315

75. Cal.—Woerner v. Woerner, 152 P. 919, 171 Cal. 298
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
Wash.—Barton v. Tombari, 207 P. 239, 120 Wash. 331.
6 C.J. p. 643 note 5
Admissions, stipulations, or waivers which affect cause of action or defense see infra § 100.
Power of attorney to make settlement, compromise, or release see infra § 105.

76. Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305

77. Goodrich Rubber Co. v. Holland, 131 So. 882, 159 Miss. 346

78. Ill.—Hollan v. Kepner, 130 N.E. 699, 297 Ill. 332—Caesna v. Lietuva Loan & Savings Ass'n, 252 Ill.App. 612
Mo.—National Union Fire Ins. Co. v. Vermillion, (App.) 19 S.W.(2d) 776
6 C.J. p. 642 note 2

79. King Const. Co. v. Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky. 435.

80. Davidson v. Richmond, 245 S.W. 1, 196 Ky. 553.

81. Anderson v. W. G. Rawley Co., 27 Hawaii 60.

82. U S—Harkin v. Brundage, (C.C.A.Ill.) 13 F.(2d) 617, certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 833, and reversed on other grounds 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457
La.—Powell v. Larance, 155 So. 13, 179 La. 751
Okl.—Griffin v. Galbraith, 247 P. 339, 114 Okl. 208
Tex.—Underwood v. Pigman, (Com.App.) 32 S.W.(2d) 1102, reversing (Civ.App.) 21 S.W.(2d) 703, judgment modified on other grounds (Com.App.) 36 S.W.(2d) 1114

Retired members of partnership client
Where a partnership has been dissolved, an attorney employed by the partnership has no authority to act in a suit against them for partners who have retired from the partnership—Hanzes v. Flavio, 125 N.E. 612, 234 Mass. 320.

83. Dacus v. Maryland Casualty Co., (N.M.) 55 P.(2d) 663.

84. Ill.—Heinze v. Industrial Commission, 123 N.E. 598, 288 Ill. 342.

plied to an attorney employed to obtain a building permit from a building inspector.[85]

As an attorney acting purely in a professional capacity is not a party himself, but is merely an agent or representative of the party by whom he is employed or retained (supra §§ 66 and 67); he has power to act in litigation and assert the rights of a party only in the latter's name.[86]

b. Exclusion of Control by Client

The right of a client, who is represented by an undischarged attorney of record, to conduct or control the litigation personally, without acting through his attorney or without regard to the latter's knowledge or consent, or to control the attorney in his handling of procedural matters, has been both affirmed and denied.

In view of the broad powers with which he is vested with respect to litigation, his training and position as an officer of the court, and the necessity for an orderly conduct of causes in court, it has frequently been said that an attorney of record in a cause has the exclusive power and control over the litigation for which he was employed with respect to procedural and remedial matters;[87] and that the courts, in cases where the parties are represented by counsel, deal only with the counsel and not with the litigants.[88] Accordingly, although the client might, in the first instance, have elected to appear or act in person (supra §§ 16 and 63), after an attorney has been employed or retained, it has been held that the only way the client can control the proceedings is by exercizing his power to discharge or change his attorney (infra §§ 109 and 119), and that, as long as the attorney has not been discharged, the client cannot control him in the due and orderly conduct of the suit.[89] Also, it has been held, particularly where there is a statute providing that a party who has appeared by attorney cannot act in person except by order of the court,[90] that, if a party has appeared in a court proceeding by attorney, and has an attorney of record, the court cannot recognize any other as having management or control of the action, and the party can act only through his attorney.[91] Under these holdings, an attempt by the client to stipulate or act with reference to the conduct or disposal of the proceedings will not be recognized or entertained by the court unless the same is signed or assented to by the attorney of record,[92] although the client himself may not be permitted to repudiate his own acts in this connection to the injury of the adverse party.[93]

Other cases, however, by stressing the fact that an attorney is but a mere agent or representative whose authority is revocable at the pleasure of the party by whom he is employed, have concluded that the conduct of the suit belongs to the party,[94] who is the dominus litis;[95] and that the attorney has no right to take proceedings or act against the orders or will of his client.[96] Moreover, many cases

Mo—Cully v. Kelley-Dempsey Co., 57 S W (2d) 784, 227 Mo App 775.

85. Anderson v W. G. Rawley Co., 27 Hawaii 60

86. Mass—Conley v Fenelon, 165 N E 382, 266 Mass 340
N J—Kaufman v Jurcsak, 139 A. 716, 102 N J Eq 66

87. Cal—Electric Utilities Co v. Smallpage, 31 P.(2d) 412, 137 Cal. App 640
Iowa—Shores Co v. Iowa Chemical Co, 268 N W 581.
Mich—Hightower v Detroit Edison Co, 247 N W 97, 262 Mich 1
Miss—De Armond v. Fine, 72 So. 145, 111 Miss 737.
N C—Deitz v. Bolch, 133 S E. 384, 209 N C 202.
6 C J. p 643 note 6—60 C J. p 47 note 23

Reasons for rule

"When one hires an attorney to represent him in litigation, that attorney has full charge of the case as far as procedure and remedy are concerned He is trained and skilled in the law. A client has no knowledge of procedure and intrusts this to the attorney he employs"—Shores Co v Iowa Chemical Co., (Iowa) 268 N.W. 581, 582.

88. Irvin v Dwight B Heard Inv. Co, 281 P 213, 35 Ariz 528

89. Nightingale v Oregon Cent Ry Co, (C C Or.) 18 F Cas No.10,264, 2 Sawy 338.

90. Johnson v Antonopoulos, 210 N Y.S 589, 213 App Div. 324

91. Sieck v Hall, 34 P (2d) 844, 139 Cal App 279—Electric Utilities Co v Smallpage, 31 P.(2d) 412, 137 Cal App 640—Anglo California Trust Co. v Kelly, 272 P 1080, 95 Cal App 390—McMunn v Lehrke, 155 P 473, 29 Cal App 298—Carter v Holt, 154 P 37, 28 Cal App. 796—6 C J p 643 note 7.

Client cannot assume control

"While a party to an action may appear in his own proper person or by attorney, he cannot do both If he appears through an attorney, such attorney has the management and control of the action If the party becomes dissatisfied with his attorney he may make a change. Until this has been done, the client cannot assume control of the case . . . This rule is indispensable to the orderly conduct of the case"—Anglo California Trust Co v Kelly, 272 P 1080, 1081, 95 Cal App 390.

92. Cal—Anglo California Trust Co. v Kelly, supra
N Y—Johnson v. Antonopoulos, 210 N Y S 589, 213 App Div 324
6 C J p 643 notes 7–11.

93. McBratney v. Rome, etc., R Co, 87 N Y 467—6 C J. p 643 note 12.

94. Kaufman v. Jurcsak, 139 A. 716, 102 N J.Eq 66.

95. Erickson v Foote, 153 A 853, 112 Conn. 662.

96. Conn—Erickson v. Foote, supra
Minn—Nelson v Nelson, 126 N W. 731, 111 Minn 183, 31 L R.A (N S) 523, 137 Am S R 549

"An attorney has no exclusive control over litigation committed to his charge. Absolute control thereof rests with his client. Of course, an attorney may do many things in the course of the action without consulting, and which bind, his client; but the latter's directions and orders, when given, are supreme. Any other rule would elevate the agent above the principal, and in fact reverse the relation between them, the agent becoming the principal, and the principal the agent"—Nelson v. Nelson, 126 N W 731, 735, 111 Minn 183, 31 L R A.(N S) 523, 137 Am S.R. 549.

have recognized the right of the client, by appearing or acting in person, to have the cause terminated or disposed of as he sees fit without regard to the consent or wishes of his attorney of record who has not been discharged;[97] and it has been said that, as the law favors the settlement or termination of litigation, any agreement which deprives a litigant of the right to control his case, before it is finally determined, is void as against public policy.[98] Partially because of these views, and the fact that the subject matter of the litigation is generally regarded as remaining within the exclusive control of the client, it is widely held, as will be seen later, that a client may dismiss or discontinue an action (infra § 87), or settle or compromise his litigation or claims (infra § 105), over his attorney's objections or without his knowledge or consent, notwithstanding the existence of an agreement or contract which attempts to deprive the client of this right.

§ 81. Proceedings before Judgment

All steps or proceedings ordinarily taken in order to defend or enforce the remedy or bring the claim or cause of action to hearing, trial, determination, and judgment are within the general authority and control of an attorney who has been employed for purposes of litigation.

Under the general rules stated in the preceding section, practically all procedural matters or proceedings or steps in court necessary to defend or to enforce the remedy or to bring the claim, demand, cause of action, or subject matter of the suit to hearing, trial, determination, and judgment are within the general authority and control of an attorney who has been employed for purposes of litigation.[99]

Accordingly, although the attorney cannot bring or commence a suit or proceeding which the client expressly directs him not to bring,[1] or has not authorized,[2] nor file a pleading or amendment which the client openly repudiates,[3] in the absence of some such specific limitations or restrictions, the general implied or apparent authority of an attorney who has been employed for purposes of litigation or suit extends to the determination or selection of the forum,[4] and the type or form of the proceedings or remedy,[5] the drawing and filing of pleadings and papers;[6] the preparation of the case for trial by searching for evidence or interviewing, handling, or obtaining witnesses;[7] the

97. Colo.—Gooding v. Lyon, 166 P. 564, 63 Colo. 328
Miss.—Zerkowsky v. Zerkowsky, 131 So. 647, 160 Miss. 278
N.J.—Sternberg v. Vineland Trust Co., 152 A. 370, 107 N.J.Eq. 255—Du Bois v. Woodward, 151 A. 366, 367, 8 N.J.Misc. 645.
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
Tex.—Ex parte Wood, (Cr.) 87 S.W. (2d) 437
6 C.J. p. 643 note 13.

"We are thus confronted with a rather unusual development. The effort of a party to discontinue a proceeding that he has initiated is combated by his attorney in that proceeding . . . We fail to grasp the theory upon which the attitude of relator's attorney may be justified. The very word 'attorney' implies the function of acting for another—in the present case, the relator. The relator having clearly manifested his desire to terminate the proceedings, there is no moving party."—Du Bois v. Woodward, supra.

98. Nichols v. Orr, 166 P. 561, 63 Colo. 333, 2 A.L.R. 449—6 C.J. p. 739 note 44
Validity of contracts depriving client of right to dismiss or settle case see infra § 105.

99. Cal.—Boca, etc., R. R. Co. v. Superior Court, 88 P. 718, 150 Cal. 153—Electric Utilities Co. v. Smallpage, 31 P.(2d) 412, 137 Cal.App. 640—Anglo California Trust Co. v. Kelly, 272 P. 1080, 95 Cal.App. 390.
D.C.—Olney v. Butte Creek Consol. Dredging Co., 51 App.D.C. 8, 273 F. 736
Hawaii.—Anderson v. Rawley Co., 27 Hawaii 60
Iowa.—Shores Co. v. Iowa Chemical Co., 268 N.W. 581—State v. Froah, 263 N.W. 525, 220 Iowa 840—Rhutasel v. Rule, 65 N.W. 1013, 97 Iowa 20
Mass.—De Santis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass. 315—Friedberg v. Jablon, 192 N.E. 49, 287 Mass. 510.
Mich.—Hightower v. Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509.
N.Y.—Clinton v. N. Y. C. & N. H. R. R. Co., 131 N.Y.S. 881, 147 App.Div. 470—Katzenberg v. Satz, 221 N.Y.S. 105, 129 Misc. 213
N.C.—Deitz v. Bolch, 183 S.E. 384, 209 N.C. 202—Southern Chemical Co. v. Bass, 95 S.E. 766, 175 N.C. 426
N.D.—Hauser v. Security Credit Co., 266 N.W. 104
Pa.—Cole v. National Casket Co., 101 Pa.Super. 207.
Vt.—Brammall v. LaRose, 165 A. 916, 105 Vt. 345.
6 C.J. p. 641 note 89—p. 643 note 6.

1. N.J.—Sternberg v. Vineland Trust Co., 152 A. 370, 107 N.J.Eq. 255.
N.Y.—In re Rahm, 161 N.Y.S. 1023, 175 App.Div. 330.

2. Peplinsky v. Billings, 252 N.W. 342, 213 Wis. 651.

3. Strahan v. Haynes, 262 P. 995, 33 Ariz. 128

4. McGeorge v. Bigstone Gap Impr. Co., (C.C.Va.) 88 F. 599—6 C.J. p. 641 note 87.

5. Iowa.—State v. Froah, 263 N.W. 525, 220 Iowa 840—Rhutasel v. Rule, 65 N.W. 1013, 97 Iowa 20—Ohlquest v. Farwell & Co., 82 N.W. 277, 71 Iowa 231.
Ky.—Johnson v. Holt's Adm'r, 31 S.W.(2d) 895, 235 Ky. 513
Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549
6 C.J. p. 641 note 86.

6. Levy v. Nelson, 279 S.W. 620, 212 Ky. 444.
Must be in client's name
All pleadings and papers must be filed in the name of the party rather than in the name of the attorney himself.—Conley v. Fenelon, 165 N.E. 382, 266 Mass. 340—Kaufman v. Jurczak, 139 A. 716, 102 N.J.Eq. 66.
Authority of attorney to verify petition in involuntary bankruptcy proceeding see Bankruptcy § 116 [7 C.J. p. 78 notes 47, 48].

7. N.Y.—Wertheimer v. New York Rys. Co., 164 N.Y.S. 260, 177 App.Div. 443.
Wash.—Wood v. Miller, 265 P. 727, 147 Wash. 251.
Attempts to bribe or corrupt witnesses
(1) Even the dishonest and fraud-

determination and fixing of the manner[8] and time[9] of trial, and the conduct and management thereof,[10] including the examination or cross-examination of witnesses,[11] the making of arguments to the court or jury,[12] and the making or failure to make requests for instructions[13] or objections to instructions given,[14] and the making of a motion for a directed verdict,[15] or the verdict or findings themselves[16]

Moreover, where an attorney's management and control of proceedings in court is regarded as exclusive (supra § 80 b), the client himself cannot seek to conduct or manage the trial of the case,[17] as by having the cause set for trial,[18] demanding a jury trial,[19] or cross-examining witnesses.[20] Also, all legal proceedings in the cause must be signed or inaugurated by the attorney of record alone[21]

Where several attorneys are engaged in the trial of a cause on behalf of the client one of the attorneys has the authority to bind the others by his action in court if they do not openly dissent thereto.[22]

The apparent authority of an attorney extends, however, only to the use of ordinary court procedure,[23] and an attorney's attempt to induce others to join with his client in a proposed pending litigation, by means other than the ordinary court process for obtaining a joinder of parties, is collateral to, but not a part of, the procedure in the case and is not within the scope of the attorney's apparent authority.[24]

§ 82. —— Appearance

Although an attorney cannot appear for a party who has not employed or authorized him to act in the cause, an attorney has authority to appear where he has been expressly authorized to do so, and his employment or retainer for the purposes of particular litigation gives him general implied or apparent authority to appear in that cause.

Although an attorney purporting to appear or act for a party or person in a cause is presumed to

ulent acts of an attorney in seeking to corrupt witnesses and influence their testimony has been held within the scope of his authority to interview witnesses and search for evidence—Wertheimer v New York Rys. Co., 164 N.Y.S. 260, 177 App Div. 448.

(2) Also, where the client refused to have anything to do with the matter but told the attorney to use his own judgment, it was held that the client could not object that the attorney's attempts to bribe a witness were without authority—Wood v. Miller, 265 P. 727, 147 Wash 251.

(3) On the other hand, an attorney representing defendant in a criminal prosecution has been held to have no implied power to suppress evidence or to seek to induce witnesses to absent themselves—Freeman v State, 203 P. 1052, 1054, 20 Okl.Cr 443

(4) The reasons given for this latter holding were that "there can be no implied power given to an attorney by his client to violate the penal laws of the state Section 2258, R.L. 1910, makes the suppressing of evidence a misdemeanor"—Freeman v State, supra.

8. Fla.—Henderson v. State, 113 So 689, 94 Fla 318.
Iowa.—Shores Co v Iowa Chemical Co., 268 N.W. 581—State v Froah, 236 N.W. 525, 220 Iowa 840—Rhutasel v Rule, 65 N.W. 1013, 97 Iowa 20—Ohlquest v. Farwell & Co., 32 N.W. 277, 71 Iowa 231.
Mass.—Hale v Wheeler, 163 N.E. 178, 264 Mass. 592.
N.Y.—Tatum v. Maloney, 234 N.Y.S. 614, 226 App.Div. 62.

Okl.—Neil v Union Nat. Bank of Chandler, 178 P. 659, 72 Okl. 116
R.I.—McLyman v Miller, 161 A. 111, 52 R.I. 374
S.C.—Peterson v Atlantic Coast Line R. Co., 98 S.E. 848, 112 S.C. 89.
6 C.J. p. 641 note 88

Determination of whether trial shall be by jury or not is within scope of attorney's authority.
Iowa.—Shores Co v Iowa Chemical Co., 268 N.W. 581
Mass.—Hale v Wheeler, 163 N.E. 178, 264 Mass. 592
Okl.—Neil v Union Nat. Bank of Chandler, 178 P. 659, 72 Okl. 116
R.I.—McLyman v. Miller, 161 A. 111, 52 R.I. 374.
S.C.—Peterson v. Atlantic Coast Line R. Co., 98 S.E. 848, 112 S.C. 89

9. Cal.—Anglo California Trust Co v Kelly, 272 P. 1080, 95 Cal.App. 390
Okl.—Neil v. Union Nat. Bank of Chandler, 178 P. 659, 72 Okl. 116.

10. Cal.—Johnson v. Johnson, 3 P. (2d) 587, 117 Cal.App. 145
Ill.—Gaines v Chicago Rys. Co., 255 Ill.App. 90
Ky.—Trevillian v Boswell, 43 S.W. (2d) 715, 241 Ky. 237—Sayre v Commonwealth, 238 S.W. 737, 194 Ky. 338, 24 A.L.R. 1017
Mass.—Bennett v Thomson, 126 N.E. 795, 235 Mass. 463
N.Y.—Humphries v. Shapiro, 175 N.Y.S. 426, 187 App.Div. 96

11. Cal.—Carter v. Holt, 154 P. 37, 28 Cal.App. 796

Ky.—Trevillian v. Boswell, 43 S.W. (2d) 715, 241 Ky. 237.

12. Fla.—Henderson v. State, 113 So 689, 94 Fla. 318.

Ky.—Trevillian v Boswell, 43 S.W. (2d) 715, 241 Ky 237—Kentucky & West Virginia Power Co v Saulsbury, 22 S.W.(2d) 281, 231 Ky 788.

Improper argument
In making his arguments to the jury, whether proper or improper, the attorney is acting within the scope of his apparent authority so as to bind the client.—Henderson v. State, 113 So 689, 94 Fla 318—Kentucky & West Virginia Power Co v. Saulsbury, 22 S.W.(2d) 281, 231 Ky. 788

13. James v Commonwealth, 247 S.W. 945, 197 Ky 577

14. Jacobs v. State, 213 S.W. 628, 85 Tex.Cr. 505.

15. Katzenberg v. Sats, 221 N.Y.S. 105, 129 Misc. 213.

16. Cal.—Johnson v Johnson, 3 P. (2d) 587, 117 Cal.App. 145
Mass.—Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592

17. Carter v. Holt, 154 P. 37, 28 Cal. App. 796.

18. Anglo California Trust Co. v Kelly, 272 P. 1080, 95 Cal.App. 390

19. Anglo California Trust Co v. Kelly, supra

20. Carter v. Holt, 154 P. 37, 28 Cal. App. 796

21. Harris v Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396

22. O'Malley v. Carrick, 212 P. 45, 60 Cal.App. 48.

23. Goodrich Rubber Co v Holland, 131 So. 882, 159 Miss. 346

24. Goodrich Rubber Co. v. Holland, supra.

have authority to do so (supra § 73), he does not in fact have the power or authority to bind by his appearance a party or person who has not actually employed him or authorized him to act in the cause,[25] and such a party or person is not concluded by the appearance but may dispute or rebut the presumption of authority by showing that the appearance was without authority in fact (see supra § 73), and is, therefore, void and of no effect as to him under the rules stated in the title Appearances § 25.

On the other hand, an attorney who has been specifically authorized and requested to enter an appearance for a party has authority to do so,[26] and it is well settled that the employment or retainer of an attorney to prosecute or defend litigation gives him the general implied or apparent authority to bind the client or party by or for whom he was employed by the entry of a general appearance in the cause;[27] no specific authority to enter a general appearance is necessary;[28] and a client may be bound as if a general appearance were authorized, although the authority actually granted was to make only a special appearance,[29] or the attorney was, by uncommunicated instructions, told to defend only if the client was brought before the court by legal process.[30]

The authority of an attorney, however, to make an appearance must be based on an employment in the particular suit or matter in which the appearance is entered.[31] A general retainer confers on the attorney no authority to enter an appearance in any particular suit or proceeding;[32] and an employment for one suit or proceeding gives the attorney no authority to appear in other litigation totally disconnected therewith.[33] Moreover, an employment merely to settle a pending suit gives the attorney no authority to enter an appearance therein,[34] and after defendant and his attorney have settled the action with the understanding that it will be dismissed, the attorney has no authority to appear in a subsequent proceeding attempted by plaintiff to obtain a judgment against defendant.[35]

An attorney has no implied authority to enter an appearance in a suit in which he has an interest antagonistic to that of the client.[36]

An attorney appointed by the court to represent certain interests can thereby acquire no authority to enter a personal appearance for parties over whom the court has no jurisdiction.[37]

25. U S.—Hatfield v. King, (W.Va.) 22 S Ct 477, 184 U S. 162, 46 L Ed. 481.
Ark.—Stewart v. Budd, 275 S W. 748, 169 Ark 363.
Fla.—St. Lucie Estates v. Palm Beach Plumbing Supply Co., 133 So. 841, 101 Fla 205—Tidwill v. Witherspoon, 18 Fla. 282.
Iowa.—Fuehr v Ewert & Richter Express & Storage Co., 163 N W. 347, 180 Iowa 518
Mass.—Haynes v. Flavio, 125 N E. 612, 234 Mass. 320.
N Y.—Howard v. Smith, 35 N.Y.Super. 131
Okl.—Griffin v Galbraith, 247 P. 339, 114 Okl 208—Hatfield v. Lewis, 236 P 611, 110 Okl. 98.
Tex.—Watson Co., Builders v. Bleeker, (Civ App.) 285 S W. 637—Hurd v Inglehart, (Civ App.) 140 S W 119
Voidability of judgment because of attorney's unauthorized appearance see Judgments § 26 [33 C.J. p 1096 note 95].

Defendants by whom no authority given.
An attorney employed by some of several defendants has no authority to appear for other defendants.—Hanzes v. Flavio, 125 N.E. 612, 234 Mass. 320

28. N.Y.—Ledwith v. Rosalsky, 155 N E. 688, 244 N Y. 406, reversing 216 N.Y S. 411, 217 App Div. 749, motion denied 157 N.E. 858, 245 N Y 563.
Okl.—Phelan v Stockyards Bank, 32 P.(2d) 270, 168 Okl. 232.

Authorization by duly authorized agent of party sufficient.—Phelan v. Stockyards Bank, 32 P.(2d) 270, 168 Okl 232.

27. D C.—Olney v. Butte Creek Consol. Dredging Co., 51 App D.C. 8, 273 F 736.
Iowa.—Hoskins v. Hotel Randolph Co., 211 N.W. 423, 203 Iowa 1152, 65 A L R 1135, certiorari denied Otis Elevator Co v Hoskins, 48 S Ct 122, 275 U S 566, 72 L Ed 429—Fuehr v. Ewert & Richter Express & Storage Co., 163 N.W. 347, 180 Iowa 518
Ky.—Johnson v. Holt's Adm'r, 31 S. W (2d) 895, 235 Ky. 518—King Const. Co v. Mary Helen Coal Corporation, 239 S W 799, 194 Ky 435.
Mo.—National Union Fire Ins Co v. Nevils, 274 S.W. 503, 217 Mo App. 630
N Y.—People ex rel. Bellanca v. Moran, 257 N Y S 9, 235 App Div. 317—Tatum v. Maloney, 234 N Y S. 614, 226 App Div 62—Daley v. Dennis, 242 N.Y.S 408, 137 Misc 1.
Tex.—Sparks v. Summers, (Civ.App.) 239 S W. 714.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.

Either before or after process
"To appear in court, either after or before service of process on defendant, is within the scope of an attorney's employment as such."—Fuehr v. Ewert & Richter Express & Storage Co., 163 N W. 347, 349, 180 Iowa 518
Appearance of married woman by attorney see Husband and Wife § 428 [30 C J. p 998 note 60—p 999 note 68].

29. Union Guardian Trust Co. v. Grevnin, 249 N.W. 889, 264 Mich. 358
29. Nev.—Rahn v. Searchlight Mercantile Co., 49 P.(2d) 353.
N.Y.—Tatum v Maloney, 234 N.Y S. 614, 226 App.Div. 62
30. Johnson v. Holt's Admnr., 31 S W (2d) 895, 235 Ky 518.
31. King Const Co. v Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky. 435
32. Ky.—King Const. Co. v. Mary Helen Coal Corporation, supra
Mo.—McPike Drug Co. v. Wilson, (App.) 237 S W. 1044.
33. Hatfield v. King, (W.Va.) 22 S. Ct. 477, 184 U S 162, 46 L Ed. 481.
34. Fuehr v. Ewert & Richter Express & Storage Co., 163 N.W. 347, 180 Iowa 518.
35. Stewart v. Budd, 275 S.W. 748, 169 Ark. 363.
36. King Const. Co. v. Mary Helen Coal Corporation, 239 S.W. 799, 194 Ky 435
37. Traders' Trust Co. v. Davidson, 178 N.W. 735, 146 Minn. 224.

Amicus curiæ appearance. Although, as noted in the title Amicus Curiæ § 3 c, the activities of an amicus curiæ who has been properly authorized to act as such by the court cannot be treated as an appearance by a party, a purported amicus curiæ appearance by an attorney without permission of the court will be treated as within the authority granted by the party whom he represents and binding on the latter.[38]

§ 83. —— Process, Notices, and Service

a. Power to receive, accept, or waive
b. Power to issue or serve

a. Power to Receive, Accept, or Waive

Although there appears to be some difference of opinion as to whether an employment to defend of itself gives the attorney authority to act in this respect, it is well settled that, before the attorney has appeared as attorney of record and jurisdiction has been acquired over his client, the attorney has no power to receive, accept, or waive the original process or notice by which personal jurisdiction is acquired, unless he has in some manner been sufficiently authorized to do so; but, thereafter, as the attorney of record, he ordinarily has authority to receive and accept all papers and notices required to be served during the subsequent progress of the cause

If he has not, in some manner, been authorized to act for the party in this respect, an attorney has no power to accept, acknowledge, or waive service of a process or notice by which the court acquires jurisdiction over a party in a suit or proceeding against him,[39] and, although it has been held otherwise, where there is a statute giving an attorney authority to bind his client in any of the proceedings in an action or suit by his agreement filed with the clerk or entered on the journal of the court,[40] a general retainer is ordinarily held to give an attorney no authority in this connection.[41] Moreover, many cases are to be found which express the view that an attorney has no authority to receive, accept, acknowledge, or waive, service of the original process or notice by which jurisdiction is obtained over his client, unless such power has been specifically and specially conferred.[42] There is other authority, however, to the effect that the apparent authority which an attorney acquires to take such steps as he deems proper in his clients, by reason of his employment or retainer to defend a particular suit, includes the power to accept or waive service of process or notice for that suit, so as to confer personal jurisdiction over his client,[43] although the client has by uncommunicated instructions sought to limit the attorney's authority by giving him power to represent the client only in event that the latter was brought before the court by a valid service of process.[44]

At any rate, an attorney has no authority to accept service of process for his client in a suit other than that for which he is employed,[45] and an attorney employed for the specific and limited purpose of enjoining a foreclosure by advertisement has no authority to accept service of process in a subsequent court proceeding for foreclosure.[46]

Where he does not appear as attorney of record in pending litigation at the time, an attorney has no authority to receive notices or demands relating to matters with respect to which he has not been employed.[47] Hence, a demand for arbitration, required by the contract subsequently sued on to be made as a condition precedent to suit, cannot be made by service thereof on the attorney of the opposite party, who has no general authority to act but has been employed merely for the purpose of seeking a settlement of the differences between the parties.[48]

Unless by statute or rule of court such notices are required to be given to the party himself,[49] after jurisdiction of the client's person has been acquired, and an attorney has appeared in court on his behalf so as to become his attorney of rec-

38. Thomas v. Driver, (Tex.Civ. App.) 55 S.W.(2d) 137—Flinn v Krotz, (Tex.Civ.App.) 293 S.W. 625—Olcott v Reese, (Tex.Civ.App.) 291 S.W. 261.

39. Colo.—Goodrich v Union Oil Co of California, 274 P. 935.
Ga.—Rooke v. Day, 167 S.E. 762, 46 Ga.App. 379
Hawaii—Aki v. Aki, 20 Hawaii 623
Iowa.—Fuehr v. Ewert & Richter Express & Storage Co., 163 N.W. 347, 180 Iowa 518
Ky.—Carter v Capshaw, 60 S.W.(2d) 959, 249 Ky. 483.
La.—Powell v. Larance, 155 So. 13, 179 La. 751.
Mass.—Hanses v. Flavio, 125 N.E. 612, 234 Mass. 320.
N.H.—Dolber v. Young, 123 A. 218, 81 N.H. 157
N.D.—Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253.

40. Multnomah Lumber Co. v. Weston Basket Co., 99 P. 1046, 102 P. 1, 54 Or. 22, 27.

41. McPike Drug Co. v. Wilson, (Mo. App.) 237 S.W. 1044—6 C.J. p. 644 note 17.

General retainer to conduct business of client before institution of suit gives the attorney no authority to accept or waive service of process in that suit, although it relates to and concerns the subject matter of the attorney's general employment.—

McPike Drug Co. v. Wilson, (Mo. App.) 237 S.W. 1044.

42. Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253—6 C.J. p. 644 note 17.

43. Johnson v Holt's Adm'r, 31 S.W.(2d) 895, 235 Ky. 513.

44. Johnson v. Holt's Adm'r, supra.

45. Aki v. Aki, 20 Hawaii 623.

46. Taylor v Oulie, 212 N.W. 931, 55 N.D. 253.

47. Atchison, etc., R. Co. v. Benton, 22 P. 698, 42 Kan. 698.

48. McNeff v. Capistran, 208 P. 41, 120 Wash. 498

49. Nash v. Gilkeson, 5 Serg. & R. (Pa.) 352.

ord, the attorney has the authority, as long as he continues to appear and act as the attorney of record, to receive, accept, and waive service of all subsequent papers, notices, and processes required to be served during the progress of the cause, either on the party or his attorney,[50] notwithstanding that he has been discharged in fact,[51] or there is some secret agreement between his client and himself limiting his authority.[52] The only attorney on whom such notices or papers can be served under this rule is the client's attorney of record.[53] An attorney who has merely engaged in the trial of the case, but is not the party's attorney of record, has no implied authority to accept or waive service of notice,[54] and an attorney who has appeared only specially to object to the court's jurisdiction has no authority to accept service of papers relating to the merits of the case.[55] If the counsel of record be deceased, the service cannot be made on his partner or his personal representative;[56] but where one partner removes from the state, service of notice on the remaining partner is good.[57]

A statute, requiring notices to be given during the course of legal proceedings to be served on the party rather than his attorney, applies only to notices during the pendency of the proceedings and does not prevent a notice of dismissal from being served on defendant rather than his attorney.[58]

b. Power to Issue or Serve

An attorney, ordinarily, has the authority to issue or give any notice or process that is necessary to the accomplishment of the purpose of his employment, unless the notice or process is required by law to be issued, served, or given by some other person or officer.

An attorney employed to prosecute or commence a legal proceeding ordinarily has the power to issue and sign a process or writ by which the proceeding is inaugurated,[59] if, under the law of the particular jurisdiction, it may be issued and signed by plaintiff or his attorney, as shown in the title Process §§ 6, 19 [50 C.J. p 450 note 74, p 461 note 25–p 462 note 26]; and where the attorney of record is regarded as having exclusive control over the conduct of legal proceedings (supra § 80 b), it has been held that if an attorney has been retained to represent a party litigant, all statutory notices required to be directed to the adverse party must be signed or inaugurated by the attorney of record alone.[60] However, an attorney having no authority to commence an action cannot affect the rights of his client by causing the issuance of a summons therefor;[61] and the attorney himself should not serve a notice which is required by law to be served by some other person or officer.[62]

A duly authorized attorney may ordinarily, give any notice affecting the substantial rights of his client that his client himself can give, in so far as the same is necessary to accomplish the purpose of the attorney's employment, and those affected by the notice must take notice thereof.[63] It has been held, however, that authority to give notice to an adverse party of the termination of his agency for another, at least before the commencement of an action, is not among the express or implied powers of an attorney, as such notice must come from the principal and not from an employee, unless he is specially authorized for that purpose.[64]

50. Ga.—Black v. Black, 104 S.E. 775, 150 Ga. 672—Rooke v. Day, 167 S.E. 762, 46 Ga.App. 379.
Iowa—State v. Froah, 263 N.W. 525, 220 Iowa 840.
Ky.—Kammerer v. Brown, 27 S.W. (2d) 959, 234 Ky. 199.
Mass.—Kalbritan v. Padover, 161 N.E. 893, 264 Mass. 26.
Mont.—Caterpillar Tractor Co. v. Johnson, 43 P.(2d) 670, 99 Mont. 269.
N.Y.—Ohlquist v. Nordstrom, 257 N.Y.S. 711, 143 Misc. 502, affirmed 261 N.Y.S. 1039, 238 App.Div. 766, affirmed 183 N.E. 125, 262 N.Y. 696.
Pa.—Goodell v. Ehresman, 11 Pa.Co. 400—Dunkin v. Calbraith, 1 Browne 18.
6 C.J. p 645 note 19.

Notice of motion for contribution from joint tort-feasor

Under a statute giving one joint tort-feasor, who has been compelled to pay the entire judgment, the right to obtain contribution from his co-defendant where they have both appeared in the action by motion on notice, the notice of the motion for contribution may be served on co-defendant's attorney of record in the action, who has authority to receive the same, although after the judgment co-defendant discharged him and removed from the state.—Ohlquist v. Nordstrom, 257 N.Y.S. 711, 143 Misc. 502, affirmed 261 N.Y.S. 1039, 238 App.Div. 766, affirmed 183 N.E. 125, 262 N.Y. 696.

51. Ga.—Rooke v. Day, 167 S.E. 762, 46 Ga.App. 379.
Ky.—Kammerer v. Brown, 27 S.W. (2d) 959, 234 Ky. 199.
N.Y.—Ohlquist v. Nordstrom, 257 N.Y.S. 711, 143 Misc. 502, affirmed 261 N.Y.S. 1039, 238 App.Div. 766, affirmed 183 N.E. 125, 262 N.Y. 696.
6 C.J. p 645 note 22.
52. Rooke v. Day, 167 S.E. 762, 46 Ga.App. 379.
53. Kalbritan v. Padover, 161 N.E. 893, 264 Mass. 26—6 C.J. p 645 note 22.
54. Kalbritan v. Padover, supra.
55. Melvin v. Scowley, 104 So. 817, 213 Ala. 414.
56. Bacon v. Hart, 1 Black (U.S.) 38, 17 L.Ed. 52.
57. De Vall v. De Vall, 109 P. 755, 110 P. 705, 57 Or. 128.
58. Gibson v. Nelson, 126 N.W. 731, 111 Minn. 183, 137 Am.S.R. 549, 31 L.R.A.(N.S.) 523—6 C.J. p 645 note 25.
59. Chadwick v. Upton, 3 Pick. (Mass.) 442—6 C.J. p 647 note 47.
60. McMahon v. Thomas, 46 P. 732, 114 Cal. 588—Harris v. Minnesota Inv. Co., 265 P. 306, 89 Cal.App. 396—Jansson v. National Steamship Co., 168 P. 151, 34 Cal.App. 483.
61. Peplinsky v. Billings, 252 N.W. 342, 213 Wis. 651.
62. Phillips v. Phillips, 26 Pa.Dist. 1102.
63. Rohling v. Thole, 100 N.E. 138, 256 Ill. 425—6 C.J. p 652 note 21.
64. Tingley v. Parshall, 9 N.W. 571, 11 Neb. 443.

§ 84. Interlocutory Proceedings in General

By reason of his general implied or apparent authority over procedural and remedial matters, an attorney employed for purposes of litigation usually has the power to take such steps with respect to interlocutory matters or proceedings as do not affect the subject matter of the litigation.

By reason of his general implied or apparent authority to conduct and control the litigation (supra § 80), and to take and handle all ordinarily procedural steps or legal proceedings before judgment (supra § 81), an attorney employed for purposes of litigation is usually regarded as having the authority to take such steps as he deems proper with respect to interlocutory matters or proceedings which do not affect the cause of action or subject matter of the litigation.[65]

§ 85. —— Change of Venue

An attorney employed to prosecute or defend an action has implied authority to change the venue

The implied or apparent authority of an attorney over interlocutory proceedings or matters (supra § 84) gives him the power, without any special authority, to change the venue of an action[66] or to agree not to take a change of venue (infra § 100), since that is a right affecting the remedy, and not the cause, of action.

§ 86. —— Confession of or Consent to Judgment

An attorney of record, employed to represent a party in litigation, may confess, or consent to, judgment for or against his client if he has been expressly authorized to do so; and, although there are some decisions to the contrary, it is generally held that the attorney has implied or apparent authority to take such action, if he acts in good faith and without fraud or collusion.

Although some sufficient grant of authority is essential,[67] an attorney employed to represent a party in litigation may usually confess, or consent to, judgment against his client if he has been expressly authorized to do so;[68] and, according to many decisions, he has, merely by reason of his employment, the implied or apparent authority to take such action if he acts in good faith and without fraud or collusion,[69] even in inferior courts not courts of record,[70] and even though the judgment is based on, or is in effect, a compromise or settlement of the client's rights or cause of action,[71] unless there is fraud or a violation of the express instructions or wishes of the client to the knowledge of the adverse party or his counsel.[72] Likewise, it has

65. Ky—De Charette v St Matthews Bank & Trust Co, 283 S W. 410, 214 Ky 400, 50 A L R 34
N Y.—American Rattan & Reed Mfg Co v. Handel-Maatschappij Moraux & Co, 185 N Y S 480, 194 App Div 90.

66. Shaft v Phoenix Mut. L Ins Co, 67 N Y 544, 23 Am R 138—6 C J. p 645 note 26
Execution by attorney of affidavit for change of venue see Venue § 176 [67 C J. p 181 note 13–p 182 note 17]
Necessity that attorney of record make demand for change of venue see Venue § 154 [67 C J p 168 note 25]
Sufficiency of verification of application for change of venue when signed by counsel see Venue § 171 [67 C J. p 178 note 29]

67. Deits v Bolch, 183 S E 384, 209 N.C. 202.

68. U S—Utah Power & Light Co. v U S, (Ct.Cl) 42 F (2d) 304
Ariz—Smith v Washburn & Condon, 297 P. 879, 38 Ariz. 149.
N C.—Alston v. Southern Ry Co, 176 S E 292, 207 N C. 114—Southern Chemical Co v. Bass, 95 S E. 766, 175 N C 426
Pa—Finance & Guaranty Co. v. Mittleman, 93 Pa Super. 277.
34 C J p 132 note 10
Confession of judgment under warrant or power of attorney see Judgments §§ 152–157 [34 C.J. p 104 note 82–p 114 note 58].

69. U S—In re Level Club, (D C N Y) 46 F (2d) 1002—Glover v Bradley, (S C) 233 F 721, 147 C C.A 487, Ann Cas 1917A 921—U. S v. Zucca & Co, 11 Cust App 167.
Ark—Wood v Wood, 27 S W 641, 59 Ark 441, 28 L R A 157
Ga—Brannan v. Mobley, 150 S E 76, 169 Ga 243—Childs v State Bank of Chicago, 121 S E 254, 31 Ga App 533—Coweta Fertilizer Co v Johnson, 106 S E 610, 26 Ga App 528
Ill—Chicago & Vicinity Hungarian Benev Soc v. Chicago & Suburb Hungarian Aid Soc., 118 N E 1012, 283 Ill 99.
Ky—De Charette v St. Matthews Bank & Trust Co, 283 S W. 410, 214 Ky 400, 50 A L R. 34.
Miss—Hurst v Gulf States Creosoting Co, 141 So 346, 163 Miss. 346
Mo—Parr v Chicago, B & Q R. Co., 184 S W. 1169, 194 Mo App 416.
Tex—Dunlap v. Villareal, (Civ App) 91 S W.(2d) 1124.
6 C J p 645 note 30.

Offer of judgment to avoid costs

Defendant's attorney has implied authority to make a written offer to allow judgment in a certain sum in order to avoid costs, as such an instrument is not a release or compromise of a claim or cause of action which counsel has no implied authority to make—Parr v. Chicago, B & Q. R. Co, 184 S W. 1169, 194 Mo App 416.

70. Lowellville Coal Min. Co. v. Zappio, 89 N E 97, 80 Ohio St 458—6 C J p 646 note 33

71. Ga—Brannan v Mobley, 150 S. E. 76, 169 Ga 243
N H—Belliveau v Amoskeag Manufacturing Co, 40 A 734, 68 N H 225, 44 L R A 167, 73 Am S R 577.

Compromise verdict and judgment

(1) "Where an attorney at law consents to the taking of a compromise verdict and judgment in a case in which he is employed, such verdict and judgment are binding on his client, if there was no fraud and no violation of express direction given by the client to the attorney and known to the adverse party or his attorney"—Brannan v Mobley, 150 S E 76, 77, 169 Ga 243

(2) In accordance with this, it has been held, notwithstanding a statute providing that an attorney cannot receive anything in discharge of his client's claim but the full amount in cash unless specially authorized, that, where a settlement of a suit is made by an attorney accepting less than the full amount of the claim in cash, the agreement binds the client, if the settlement is carried out by a consent verdict and judgment and the settlement was made without fraud on the part of the attorney or without any instruction of the client to the contrary—Coweta Fertilizer Co. v. Johnson, 106 S E. 610, 26 Ga App 528.

72. Evans v Brooke, (Ga) 184 S E 800—Patterson v. Georgia Gravel

been held that an attorney has authority to accept a confession of judgment by the opposing party.[73]

Other cases, however, have held that there is no implied authority to confess, or consent to, judgment and that such authority exists only when expressly granted,[74] at least, where the judgment is sought to be based on a compromise or settlement which has not been expressly authorized by the client and impairs his substantial right,[75] or the consent judgment is in its scope outside of any matter set out in the pleadings.[76] Moreover, an attorney has no implied or apparent authority to consent to judgment against his client, where he represents antagonistic interests which will be benefited thereby,[77] or after his authority has been terminated by his withdrawal from the case by agreement with his client[78] and an attorney appointed by the court in a proceeding in rem to defend the interests of a nonresident defendant, over whom no personal jurisdiction has been acquired, has no authority to consent to judgment against defendant.[79] In any event, an attorney has no power to consent to a judgment which is not in conformity with the law, but in violation of it.[80]

If, under the rule above stated, the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, the sole remedy of the client in such a case being against the attorney,[81] unless the circumstances are such that the lack of authority furnishes grounds for opening or vacating the judgment under the rules stated in the title Judgment §§ 323, 330 [34 C.J. p 410 note 19, p 420 note 81].

Where the attorney's management and control of litigation is regarded as exclusive (supra § 80 b), it has been held that the client himself has no power to stipulate for judgment against him if he is represented in court by his attorney of record.[82]

§ 87. —— Dismissal, Discontinuance or Nonsuit

a. By attorney
b. By client

a. By Attorney

In the absence of statute, an attorney can enter a dismissal, discontinuance, or retraxit, which terminates the case on its merits, only where he has been expressly authorized to do so; but it is generally held that an attorney has implied authority to enter or take a dismissal, discontinuance, or nonsuit, which does not bar the bringing of another suit on the same cause of action.

Unless such power has been conferred by statute[83] an attorney employed for purposes of litigation can dismiss or discontinue the case on its mer-

Co., 108 S.E. 237, 151 Ga. 813—Davis v. First National Bank of Blakely, 78 S.E. 190, 139 Ga. 702, 46 L.R.A.(N.S.) 750.

73. Brannan v Mobley, 150 S.E. 76, 169 Ga. 243—Adkins v Bryant, 66 S.E. 21, 132 Ga. 465, 134 Am.S.R. 211—Coweta Fertilizer Co v Johnson, 106 S.E. 610, 26 Ga.App. 528—6 C.J. p 646 note 38.

74. Nothem v Vonderharr, 175 N.W. 967, 189 Iowa 43—6 C.J. p 645 note 29.

75. Ala.—National Bread Co v. Bird, 145 So. 462, 226 Ala. 40.
Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149
Colo.—Lewis v Vache, 20 P.(2d) 554, 92 Colo. 358.
Ill.—Village of Dolton v. S. Ellen Dolton Estate, 162 N.E. 214, 331 Ill. 88.
Iowa.—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 43.
Mass.—Precious v O'Rourke, 170 N.E. 110, 270 Mass. 305—Dalton v West End St. Ry., 34 N.E. 261, 159 Mass. 221, 38 Am.S.R. 410.
Minn.—Seifert v. Gallet, 198 N.W. 664, 159 Minn. 131.
N.Y.—Sherman & Sons Co v Princess Shirt Waist Mfg. Co., 210 N.Y.S. 100, 213 App.Div. 140.
N.C.—Deitz v Bolch, 183 S.E. 384, 209 N.C. 202—Bissell v. Auto & Tire Equipment Co., 108 S.E. 439, 182 N.C. 98—Bank of Glade Spring v McElwen, 76 S.E. 222, 160 N.C. 411, Ann.Cas.1914C 542
6 C.J. p 646 note 31, p 660 note 43 [a], p 661 note 50.

Consent to, or approval of, form of decree, where no settlement or compromise of the client's rights is involved, is within the scope of the attorney's implied authority.—Vaughan v. District Court of Jasper County, (Iowa) 226 N.W. 49.

Mistaken belief of attorney

Where an attorney employed to defend a contest of a will entered into a stipulation of settlement under the mistaken belief that his client had agreed to the settlement, the stipulation was a constructive fraud on the court, and vitiated a judgment entered thereon.—Nothem v Vonderharr, 175 N.W. 967, 189 Iowa 43.

Lack of implied authority to compromise or settle client's cause of action see infra § 105

76. Hoell v White, 86 S.E. 569, 570, 169 N.C. 640
"While courts go far to sustain judgments taken in ordinary course with the assent of counsel, there cannot be a consent judgment entered by counsel without the knowledge or consent of the client which in its scope is outside of any matter set out in the pleadings."—Hoell v. White, supra.

77. Glover v. Bradley, (S.C.) 233 F. 721, 147 C.C.A. 487, Ann.Cas.1917A 921.

78. Emerson-Brantingham Implement Co v. Olson, 227 N.W. 567, 56 S.D. 132.

79. Lepp v. Ward County Water Improvement Dist. No. 2, (Tex.Civ.App.) 257 S.W. 916.

80. Tuppery v. Hertung, 46 Mo. 135—6 C.J. p 646 note 34.

81. U.S.—In re Level Club, (D.C.N.Y.) 46 F.(2d) 1002.
Ill.—Chicago & Vicinity Hungarian Benev. Soc. v. Chicago & Suburb Hungarian Aid Soc., 118 N.E. 1012, 283 Ill. 99.
Miss.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512—Cocke v. Wilson, 134 So. 686, 161 Miss. 1.
6 C.J. p 646 notes 35, 36.

82. Crescent Canal Co. v. Montgomery, 56 P. 797, 124 Cal. 134.

83. Bogardus v. O'Dea, 287 P. 149, 105 Cal.App. 189—Lamb v. Herndon, 275 P. 503, 97 Cal.App. 397.

its only where his client has specially authorized him to do so;[84] and an attorney who has not in any way been employed or retained with reference to a suit has no authority to dismiss the same.[85] Also, it has been stated generally that the general employment of an attorney to prosecute an action gives him no authority to dismiss it without his client's consent,[86] or at least, over his objection,[87] but usually it is held that an employment for purposes of the litigation gives the attorney of record the implied authority to enter or take a dismissal, discontinuance, or nonsuit, which does not prejudice the client's substantial rights nor bar the bringing of another suit on the same cause of action,[88] or to discontinue against one of several defendants.[89] After appeal by defendant from a justice's judgment against him, plaintiff's attorney has authority to dismiss the action, on payment of the amount due on the judgment, for the same result could be accomplished without plaintiff's consent by a formal dismissal of the appeal.[90] However, a discontinuance which affects the client's substantial rights, because of the running of the statute of limitations, has been held not binding on him.[91]

Retraxit. The entry of a retraxit, which operates as a perpetual bar to the cause of action, must, ordinarily, be made by plaintiff in person, as stated in the title Dismissal and Nonsuit § 5 [18 C.J. p 1148 notes 38-42], and his attorney has no implied or apparent authority to take such action but can do so only where he has been specially authorized by his client,[92] unless there is a statute vesting a party's attorney of record with such power.[93]

Reinstatement after dismissal. In the absence of permission from his client, counsel cannot consent to reinstatement of a cause after dismissal.[94]

b. By Client

Although it has been held otherwise where the attorney of record is regarded as having exclusive control of the case, it is generally held that the client has full power to dismiss or discontinue his case, as he desires, without the knowledge or consent of the attorney, or over the latter's objection.

Where an attorney of record is regarded as having exclusive control over the management of the litigation (supra § 80 b), it has been held that the client has no power to dismiss or discontinue the action without the assent of the attorney,[95] even on the merits.[96] It is generally held, however, that the client has full power to dismiss or discontinue the action as he sees fit without his attorney's knowledge or consent or over his objections,[97] or without first discharging the attorney,[98] and that the court will carry out the party's wishes in this

84. Seymour State Bank v. Rettler, 160 N.W. 1084, 164 Wis. 619

85. Southern Grocery Stores v Cain, 173 S.E. 256, 48 Ga.App. 557

86. Iowa—Nothem v Vonderharr, 175 N.W. 967, 189 Iowa 43
La.—Rogers v Blitz, (App.) 161 So. 613
6 C.J. p 646 note 40.

87. Steinkamp v Gaebel, 95 N.W. 634, 1 Neb.(Unoff.) 430

88. Ga.—Lovelace v Lovelace, 177 S.E. 685, 179 Ga. 822—Stone Mountain Confederate Monumental Ass'n v Smith, 153 S.E. 209, 170 Ga. 515.
Ind.—Cory v Howard, 164 N.E. 639, 88 Ind.App. 503.
N.Y.—Burmester v. De Lucia, 261 N.Y.S. 203, 237 App.Div. 149, motion denied Burmester v Maryland Casualty Co., 188 N.E. 99, 262 N.Y. 637, and reversed on other grounds in part Burmester v. De Lucia, 189 N.E. 231, 263 N.Y. 315.
N.D.—Bacon v. Mitchell, 106 N.W. 129, 14 N.D. 454, 4 L.R.A.(N.S.) 244.
Tex.—Dyer v. Johnson, (Civ.App.) 19 S.W.(2d) 421.
6 C.J. p 646 note 42.

89. Fling v Trafton, 13 Me. 295—6 C.J. p 647 note 43.

90. Wilmott v Koller, 158 N.W. 257, 34 N.D. 306

91. Martin v Lehigh Valley R. Co., 176 A. 665, 114 N.J.Law 243

92. U.S.—Glover v. Bradley, (S.C.) 233 F. 721, 147 C.C.A. 487, Ann.Cas. 1917A. 921.
Ariz.—Smith v Washburn & Condon, 297 P. 879, 38 Ariz. 149
Ga.—Lovelace v Lovelace, 177 S.E. 685, 179 Ga. 822—Stone Mountain Confederate Monumental Association v. Smith, 153 S.E. 209, 170 Ga. 515.
N.Y.—Kellogg v. Gilbert, 10 Johns. 220, 6 Am.D. 335
Or.—Hill v. Wilson, 250 P. 840, 119 Or. 636
Wis.—Seymour State Bank v Rettler, 160 N.W. 1084, 164 Wis. 619.
6 C.J. p 647 notes 44, 45.

93. Cal.—Chase v. Van Camp Sea Food Co., 292 P. 179, 109 Cal.App. 32—Bogardus v O'Dea, 287 P. 149, 105 Cal.App. 189—Lamb v. Herndon, 275 P. 503, 97 Cal.App. 397.
Ind.—Bernard v Daggett, 68 Ind. 305

94. Owens v. Cocroft, 80 S.E. 906, 14 Ga.App. 322.

95. Johnson v. Antonopoulos, 210 N.Y.S. 589, 213 App.Div. 324—6 C.J. p 643 note 7.

96. Bogardus v O'Dea, 287 P. 149, 105 Cal.App. 189

97. Ala.—Bell v. Bell, 108 So. 375, 214 Ala. 572, 45 A.L.R. 935.
Ark.—Purvis v. Walls, 44 S.W.(2d) 353, 184 Ark. 887.
Md.—Boyd v Johnson, 125 A. 697, 145 Md. 385
Miss.—Zerkowsky v. Zerkowsky, 131 So. 647, 160 Miss. 278
N.J.—Sternberg v. Vineland Trust Co., 152 A. 370, 107 N.J.Eq. 255.
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
Wash.—Sacajawea Lumber & Shingle Co. v. Skookum Lumber Co., 198 P. 1114, 116 Wash. 699—Sacajawea Lumber & Shingle Co. v. Skookum Lumber Co., 198 P. 1112, 116 Wash. 75
6 C.J. p 643 note 13.

Client agent for others

This rule has been applied even in proceedings for the recall of certain public officers, where the client, as relator, was acting as agent for a specified number of petitioning electors.—Du Bois v. Woodward, 151 A. 366, 8 N.J.Misc. 645.

98. Zerkowsky v. Zerkowsky, 131 So. 647, 648, 160 Miss. 278
"The appellant is seeking, over the objection of his attorneys, not to proceed with the trial of his case, but to dismiss it, and to require him to first discharge his attorneys before he can do this would be a useless formality."—Zerkowsky v. Zerkowsky, supra.
In an earlier Mississippi case, how-

respect without the intervention or presence of the attorney,[99] although it may, under some circumstances, grant the dismissal or discontinuance only on payment of costs incurred by the attorney.[1]

§ 88. —— Attachment

The general employment of an attorney to prosecute a suit for the collection of a claim gives him implied authority to issue an attachment and to control and manage such proceedings.

The general employment of an attorney to prosecute or manage a suit for the collection of a claim vests him with the implied authority to issue or take out an attachment for its enforcement;[2] execute an attachment bond (infra § 103); control and manage the minor details of such proceeding;[3] direct a stay of the attachment;[4] consent to the use of the attached property,[5] or its sale if perishable;[6] and to release the attachment (see infra § 105 b). Plaintiff's attorney, however, has no authority to alter a bond which has been given by defendant to obtain a release of the attached property.[7]

§ 89. —— Affidavits

An attorney ordinarily has the implied authority to make affidavits necessary to the conduct of the proceedings or the accomplishment of the purpose for which he was employed.

An attorney usually has the implied authority to make such affidavits as are necessary to the conduct of the proceedings or the accomplishment of the purpose for which he was employed, provided, of course, he has the necessary information to enable him to make them.[8]

§ 90. —— Reviving Suit

An attorney has implied authority to consent to a revival where it is merely a matter of procedure.

Where revival is merely a matter of procedure, an attorney has implied authority to consent to a revival, as after the death of a party,[9] or after a nonsuit.[10]

§ 91. —— Arbitration

Unless such power has been expressly conferred, an attorney has no general authority to submit his client's affairs to arbitration; but it is often held that an attorney employed to prosecute or defend a case has the implied authority to submit the pending cause to arbitration, provided it is by a formal submission in open court which is made a rule of court and entered of record.

Unless there is a statute or express restriction otherwise,[11] it is often held that an attorney employed to bring or defend a cause has the implied power to submit a pending suit to arbitration or reference[12] with the understanding that the findings or award will be final and conclusive,[13] provided the client's title to real estate will not thereby be affected.[14] A retainer or employment in an action, however, gives an attorney no general authority to submit his client's affairs to arbitration.[15] The

ever, it was said: "An attorney of record is entitled to the highest consideration at the hands of the court. He is something more than an agent. He is a sworn officer of the court and has the entire management and control of the pending case so long as the relationship of attorney and client exists, and his rights should not be ignored and a case dismissed over his protest until he has withdrawn from it or until the court, upon petition of the party, has removed him, or has terminated the relation of attorney and client"—De Armond v. Fine, 72 So. 145, 146, 111 Miss. 737.

99. Ala.—Johnson v. Gerald, 113 So. 447, 216 Ala. 581, 59 A.L.R. 348.
Colo.—Gooding v. Lyon, 166 P. 564, 63 Colo. 328.
N.J.—Du Bois v. Woodward, 151 A. 366, 8 N.J.Misc. 645.
N.D.—Hauser v. Security Credit Co., 266 N.W. 104.
W.Va.—State v. Ryan, 96 S.E. 791, 793, 82 W.Va. 490.

1. Pilger v. Gou, 21 How.Pr.(N.Y.) 155.

2. American Rattan & Reed Mfg. Co. v. Handel-Maatschappij Moraux & Co., 185 N.Y.S. 480, 194 App.Div. 90—6 C.J. p. 647 note 48, p. 671 note 43.
Liability of client for wrongful attachment see supra § 68.

3. N.Y.—American Rattan & Reed Mfg. Co. v. Handel-Maatschappij Moraux & Co., supra.
Tex.—Callihan v. Montrief, (Civ.App.) 71 S.W.(2d) 564, error refused.
6 C.J. p. 647 note 50.

4. Ward v. George, 6 Ky.Op. 263.

5. Callihan v. Montrief, (Tex.Civ.App.) 71 S.W.(2d) 564, error refused.

6. Luce v. Foster, 60 N.W. 1027, 42 Neb. 813—6 C.J. p. 642 note 90.

7. Central California Creditors' Ass'n v. Seeley, 267 P. 138, 91 Cal.App. 327.

8. Wright v. Parks, 10 Iowa 342—6 C.J. p. 647 note 51.
Right of authorized attorney to make affidavits generally see Affidavits § 6.

9. Clark v. Parish, 1 Bibb (Ky.) 547—6 C.J. p. 647 note 52.

10. Reinholdt v. Alberti, 1 Binn. (Pa.) 469.

11. King v. King, 29 So. 205, 104 La. 420—6 C.J. p. 650 note 6.

12. Mass.—Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592.
Or.—Maroulas v. State Industrial Accident Commission, 244 P. 317, 117 Or. 406.
Utah.—Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 53 Utah 601.
6 C.J. p. 651 notes 7, 15, 16.
Reasons for rule.
"An attorney in a pending case, because of the nature of his relations to party, court, and subject-matter, and because arbitration is a recognised method of fair and lawful trial, is held by many respectable decisions to have authority, by virtue of his general employment to conduct the case, to submit the matter to arbitration"—Bivans v. Utah Lake Land, Water & Power Co., 174 P. 1126, 1131, 53 Utah 601.

13. Hale v. Wheeler, 163 N.E. 178, 264 Mass. 592—6 C.J. p. 651 note 10.

14. Naglee v. Ingersoll, 7 Pa. 185—6 C.J. p. 651 note 8.
Submissibility of controversies with respect to real property see Arbitration and Award § 11.

15. Ky.—Jenkins v. Weeks, 2 Ky. Op. 118.
N.Y.—Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis

implied authority can exist only with reference to a pending suit which the attorney has been employed to manage,[16] and extends only to matters which are involved in that suit and could properly be determined therein.[17] Even if there is a pending cause, the only implied authority is to make a formal submission in open court,[18] which is made a rule of court and placed of record, so that the arbitration is an accepted method of trying issues and a part of the proceedings which may result in a judgment in the cause.[19] There is no implied authority to make a submission in pais with which the court has nothing to do,[20] a statutory submission which is required to be made by a formal instrument in writing executed and acknowledged like a deed,[21] or a common-law submission which will not justify the entry of judgment on the award,[22] although authority to enter into such a submission may be expressly granted.[23]

Since he cannot make a submission in pais, after a cause has been submitted by him, an attorney cannot by act in pais materially alter or change the terms of the submission without express authority.[24]

Attorneys for corporations may have express or implied authority to bind them by submissions to arbitration, although no special authority has been granted by instrument under seal.[25]

§ 92. —— Submission of Controversy without Action

Under authority, express or implied, an attorney may submit a controversy without action.

While it may not be within the general scope of an attorney's authority to submit a controversy which is not in action,[26] he may agree to such a submission under authority, express or implied, to do so.[27]

§ 93. Judgment and Proceedings Thereafter in General

a. In general
b. Alteration or modification of judgment
c. Assignment or disposition of judgment

a. In General

On the termination of the litigation for which an attorney was employed, by the rendition or entry of judgment, the general implied powers of the attorney cease, and his only authority, if greater powers have not been expressly conferred, is to take such steps or proceedings as are necessary to make it fully effective or to sustain or enforce it or to relieve his client from its effect if it is adverse.

As noted in section 116 infra, while there are many authorities which state broadly that the rendition and entry of final judgment in the controversy or litigation for which an attorney was employed terminates the employment and the relation of attorney and client, so that in the absence of a new or other employment the authority of the attorney to act for his client ceases, this rule has been subjected to many modifications and exceptions. From the sections immediately following it will be seen that the courts have often held, although with some difference of opinion, that an attorney retains the implied authority to act with reference to such

Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.
6 C.J. p. 651 note 13.

16. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480—6 C.J. p. 651 note 13.

17. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.

18. O. J. Morrison Stores Co. v. Duncan, 158 S.E. 174, 110 W.Va. 289—6 C.J. p. 651 note 17.

19. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480—6 C.J. p. 651 note 14.

"In retaining an attorney to prosecute or defend an action, a client may hardly be presumed to have intended to vest the attorney with authority to remove the controversy from the courts into a forum of his own creation."—Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 769, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.

Recital in award signed by attorneys.

The fact that an award which recites that there has been a submission has been signed by the attorneys of both parties is not enough, if the submission does not formally appear of record.—King v. King, 29 So. 205, 104 La. 420.

20. O. J. Morrison Stores Co. v. Duncan, 158 S.E. 174, 110 W.Va. 289.

"An attorney at law, as such, has no authority before or after the institution of a suit to make an agreement in pais, to submit his clients' cause to arbitrators."—O. J. Morrison Stores Co. v. Duncan, supra.

21. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.

22. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.

23. Louis Michel, Inc. v. Whitecourt Const. Co., 189 N.E. 767, 264 N.Y. 23, reversing In re Louis Michel, Inc., 265 N.Y.S. 165, 238 App.Div. 480.

24. O. J. Morrison Stores Co. v. Duncan, 158 S.E. 174, 110 W.Va. 289—6 C.J. p. 651 note 12.

25. Alexandria Canal Co. v. Swann, (D.C.) 5 How.(U.S.) 83, 12 L.Ed. 60—6 C.J. p. 652 note 13.

26. Steinerville & B. Stone Co. v. White, 54 N.Y.S. 577, 25 Misc. 314.

27. Steinerville & B. Stone Co. v. White, supra—60 C.J. p. 680 note 43.

Amicable action.—Cook v. Gilbert, 3 Serg. & R.(Pa.) 567—60 C.J. p. 680 note 43.

proceedings and steps as are usually and ordinarily taken for the purpose of sustaining or enforcing the judgment, or seeking to have it set aside or reversed. Usually, however, if no further powers have been expressly conferred, this is regarded as the extent of an attorney's authority after the rendition and entry of final judgment in the cause, for his general, broad implied powers are thereby divested.[28]

b. Alteration or Modification of Judgment

An attorney, employed in litigation in which final judgment is rendered, has no implied authority to alter or modify it in a material particular or to appear and act in proceedings brought for that purpose.

After a final judgment has been rendered for or against his client, an attorney, who has been employed merely for purposes of the litigation, has no implied authority to alter or modify the judgment in a material particular,[29] or to act or appear in proceedings which have been brought to obtain such an alteration or modification,[30] even though the alteration appears to be beneficial to his client, where the legal effect would be to destroy the judgment in the latter's favor.[31] It has been held, however, that he may assent to the correction of a clerical error in a judgment or decree, although such a correction may materially reduce the amount to be recovered by his client.[32]

c. Assignment or Disposition of Judgment

In the absence of special authority an attorney ordinarily has no power to assign, sell, or otherwise dispose of, a judgment in favor of his client.

An attorney has no implied authority to assign, sell, or otherwise dispose of, a judgment in favor of his client, and, in the absence of special authority, cannot validly do so,[33] unless the transfer is a proper method of accomplishing the purpose for which the attorney was retained and the full amount of the judgment is paid,[34] but equity will treat an assignee for full value as the lawful owner of the judgment as against everyone but the client, who is the only one that can question the attorney's lack of authority to make the assignment.[35]

§ 94. Opening and Vacating Judgment

Except with respect to default judgments, an attorney has no implied authority to vacate, open, or set aside, a final judgment which has been rendered in favor of the client in the cause in which the attorney was employed.

An attorney may open a default which has been taken, whether properly or improperly, against the opposite party, and may vacate the judgment entirely, even against the instructions of his client.[36] Apart from this, however, it is generally held that, in the absence of express authority, an attorney has no power to open, vacate, or set aside, a final judgment rendered in favor of the client in the cause in which the attorney was employed,[37] although notice of a motion to vacate may sometimes be served on him, as stated in the title Judgments § 294 [34 C.J. p 352 notes 41–45].

§ 95. Appeal or Other Proceeding for Review

An attorney for the defeated party ordinarily has the power to conduct appellate proceedings only where such authority has been expressly conferred or its exercise is necessary to carry out the purposes of his employment; but the attorney for the successful party may, without a new grant of authority, oppose, and act with reference to, such proceedings as are taken within a reasonable time to reverse the judgment in favor of his client.

An attorney may bring proceedings to review a judgment against his client where he has been expressly authorized to do so,[38] or where the terms of the employment or retainer are so broad as to indicate an intention on the part of the client to permit the attorney to conduct appellate proceedings

28. Cal.—Spencer v. Barnes, 43 P. (2d) 847, 6 Cal.App.(2d) 35.
Iowa.—Dugan v. Midwest Cap Co., 239 N.W. 697, 218 Iowa 751—Scott v. Scott, 156 N.W. 834, 174 Iowa 740
Tex.—Rupert v. Brook Mays & Co., (Civ.App.) 299 S.W. 474—McCarthy v. Houston Oil Co., of Texas, (Civ.App.) 221 S.W. 307, reversed on other grounds (Com.App.) 245 S.W. 651.
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.
6 C.J. p 672 note 60.

29. Scott v. Scott, 156 N.W. 834, 174 Iowa 740—6 C.J. p 652 note 36.

30. Iowa.—Scott v. Scott, supra
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.

31. David v. Claude First Nat. Bank, (Tex.Civ.App.) 172 S.W. 579.

32. Hill v. Bowyer, 18 Gratt. (59 Va.) 864—6 C.J. p 653 note 38.

33. Ala.—McFry v. Stewart, 121 So. 517, 219 Ala. 216.
Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309
Okl.—Holiday Oil Co. v. Fidelity & Deposit Co. of Maryland, 19 P. (2d) 335, 162 Okl. 192
Pa.—Williams v. Cook, 137 A. 232, 289 Pa. 207—Bosler v. Searight, 24 A. 303, 149 Pa. 241.
S.C.—Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458.
6 C.J. p 653 note 40.

34. Painter v. Gibson, 55 N.W. 84, 88 Iowa 120—6 C.J. p 653 notes 41, 42.

35. McFry v. Stewart, 121 So. 517, 219 Ala. 216

36. Read v. French, 28 N.Y. 285—6 C.J. p 654 note 56

37. Ky.—Lawson v. Wright, 3 Ky. Op. 352.
R.I.—Stratton v. Mancini, 95 A. 1050, 38 R.I. 368.
Tex.—Rupert v. Brook Mays & Co., (Civ.App.) 299 S.W. 474.
6 C.J. p 654 notes 57–59.

38. Wis.—Hegel v. George, 259 N.W. 862, 218 Wis. 327, rehearing denied and mandate amended 261 N.W. 14, 218 Wis. 327.
Wyo.—Heyer v. Hines, 252 P. 1028, 36 Wyo. 53.

should they prove necessary to procure a favorable determination of the controversy[39] but, although there may be a presumption in favor of the attorney's authority to take such action (supra § 73), and the contrary has been held with respect to a counsel assigned by the court under statute to defend the accused in a criminal case,[40] a mere employment or retainer to prosecute or defend an action in the trial court generally gives the attorney no implied authority to conduct a proceeding for appellate review of a judgment rendered against his client.[41] Moreover, an attorney, who has been so employed, cannot prosecute an appellate proceeding against the wishes or consent of his client;[42] and, of course, an attorney who has no authority whatsoever to represent a party in a cause has no power to seek an appellate review of the judgment therein.[43]

It has been suggested, however, that a distinction should be taken between the authority of an attorney who has been employed to try a litigated issue and one who has been employed to collect a debt, in that the latter has the implied authority to prosecute an appellate proceeding from a judgment adverse to his client without a new retainer.[44] Also, the attorney of the party in whose favor the judgment is rendered in the lower court has been regarded as having the authority to admit or waive service of notice or citation for the appellate proceedings,[45] and to oppose any steps that might be taken within a reasonable time by the defeated party to reverse the judgment;[46] but he cannot, without special authority, permit the latter to take appellate proceedings which could not otherwise be taken because of lapse of time.[47]

A corresponding attorney, appointed by the court to defend the interests of nonresident defendants in a proceeding in rem, has been held to have no authority to prosecute an appeal in their behalf, in view of statutory provisions providing that no act of such an attorney shall constitute an appearance of such defendants and giving them a considerable length of time in which to have the case retried;[48] but an attorney appointed to represent unknown heirs has been held to have the right to appeal from the decision of the trial court,[49] or to move for a new trial.[50]

An attorney authorized to take appellate proceedings cannot abandon or withdraw the same after they have been taken,[51] but he has general implied power to grant extensions of time,[52] and to manage and take care of the various details of the proceedings;[53] and it has been held that, in

39. Ky.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773
N.Y.—Lowrey v. Bates, 56 N.Y.S. 197, 26 Misc. 407.

Intention to appeal presumed
Where attorneys are employed by a county to defend certain enumerated suits on county bonds and any other suit that might be brought against the county thereon, the attorneys to receive a percentage on any amount of bonds which they might save to the county, or which might be controlled and settled by decisions rendered in enumerated cases, the authority of the attorneys does not terminate when the decision is rendered by trial court, but continues on appeal.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773.

40. People v. Price, 187 N.E. 298, 262 N.Y. 410.

41. Ariz.—Morgan v. Krook, 283 P. 287, 36 Ariz. 133.
Ky.—Massingale v. Parker, 230 S.W. 932, 191 Ky. 515.
Mo.—Crews v. Bogy, (App.) 285 S.W. 549.
Mont.—Union Bank & Trust Co. of Helena v. Penwell, 42 P.(2d) 457, 99 Mont. 255
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 621
Wis.—Fidelity & Deposit Co. of Maryland v. Madson, 231 N.W. 170, 201 Wis. 609, 70 A.L.R. 832.
6 C.J. p. 653 note 44.
Power to bind client for expenses of appellate proceedings see infra § 103
Right of attorney to maintain appeal in own name see Appeal and Error § 184

42. Iowa.—Tetsloff v. May, 172 N.W. 446, 186 Iowa 520
La.—Planters' Lumber Co. v. Sugar Cane By-Products Co., 110 So. 172, 162 La. 123
Tex.—Ex parte Wood, (Cr.) 87 S.W. (2d) 487.—Ex parte Maple, 33 S.W. (2d) 734, 116 Tex.Cr. 383
Wis.—Fidelity & Deposit Co. of Maryland v. Madson, 231 N.W. 170, 201 Wis. 609, 70 A.L.R. 832

43. In re Sullivan, 244 P. 347, 198 Cal. 195.—Sullivan v. Dunne, 244 P. 343, 198 Cal. 183.

44. Tobler v. Nevitt, 100 P. 416, 45 Colo. 231, 132 Am.S.R. 142, 23 L.R.A.(N.S.) 702, 16 Ann.Cas. 925

45. Vance v. Davis, 140 N.E. 588, 107 Ohio St. 577.—6 C.J. p. 652 note 34.

46. Brown v. Arnold, (Mo.) 131 F. 723, 67 C.C.A. 125

47. Stratton v. Mancini, 95 A. 1050, 38 R.I. 368

48. Massingale v. Parker, 230 S.W. 932, 191 Ky. 515.

49. Russell v. Randolph, 11 Tex. 460, 462

50. McCarthy v. Houston Oil Co. of Texas, (Tex.Com.App.) 245 S.W. 651, reversing (Civ.App.) 221 S.W. 307.

51. N.J.—In re Koehler's Estate, 140 A. 15, 102 N.J.Eq. 133.
Tex.—Ex parte Maple, 33 S.W.(2d) 734, 116 Tex.Cr. 784.
6 C.J. p. 654 note 51.
Waiver of right to appeal by attorney see infra § 100

52. Hoffenberth v. Muller, 12 Abb.Pr.N.S.(N.Y.) 221.—6 C.J. p. 654 note 52.

53. Cal.—Armstrong v. Brown, (App.) 54 P.(2d) 1118.
Iowa.—Wehrman v. Moore, 159 N.W. 213, 177 Iowa 542.
Wyo.—Heyer v. Hines, 252 P. 1028, 36 Wyo. 53.
6 C.J. p. 654 note 53
Authority to execute appeal or stay bond see infra § 103.

Stay bond
An attorney authorized to act in appellate proceedings has the authority to issue instructions with reference to a stay bond without the specific sanction of his client, as the stay bond is a mere matter of procedure incident to the appellate proceedings.—Armstrong v. Brown, (Cal.App.) 54 P.(2d) 1118.

the absence of fraud or collusion, counsel may dismiss or withdraw a motion for a new trial[54]

Where an attorney's control is regarded as exclusive (see supra § 80 b), if appellant is represented by an attorney of record, he has no legal authority to appear and file points and authorities or control the proceedings on appeal in his own behalf,[55] but elsewhere appellant has been held entitled to appear in person and dismiss the appeal over the objections of his attorney and without first discharging him[56]

§ 96. Proceedings for Collection

After judgment has been rendered in an action, the attorney for the successful party has the implied authority to take such proceedings as are usually necessary and proper to enforce the judgment, and the attorney for the defeated party has similar authority to defend such proceedings.

Although he cannot take such proceedings against the wishes or consent of his client,[57] an attorney for the successful party may, after judgment, ordinarily take such steps or proceedings as are usually necessary and proper to secure the enforcement of the judgment or its payment and satisfaction,[58] and the attorney for the defeated party has, in some cases, been regarded as having the implied authority to defend against such proceedings.[59] However, after the usual legal proceedings for enforcing a judgment have been exhausted, the attorney for the judgment creditor has no implied authority to bring other actions or proceedings in an effort to reach other property of the debtor or enforce his liability,[60] and after satisfaction of a judgment against him defendant's attorney has no implied authority to receive service of notice of a motion to set aside the satisfaction and issue execution.[61]

An attorney, with whom a judgment has been placed for collection, is not authorized on his own motion to commence affirmative proceedings to keep the judgment alive.[62]

§ 97. —— Execution and Sale

An attorney for a plaintiff who has recovered judgment in a cause has implied authority to issue execution, give direction with respect thereto, and receive payment thereon.

While he cannot do so against the wishes of his client,[63] an attorney for a party who has recovered a judgment in a cause ordinarily has the implied power to issue execution on the judgment,[64] and bind his client by his receipt of payment thereon[65] He cannot, however, discharge an execution on payment of less than the full amount;[66] and if a client receives the execution into his own hands, and pays his attorney his costs, the power of the attorney is at an end, and he will no longer be authorized to receive the money due on the execution[67]

Also, it is ordinarily within the scope of the general authority of an attorney for a judgment cred-

54. Abney v State, 169 S E 539, 47 Ga App 40

55. Electric Utilities Co v Smallpage, 31 P (2d) 412, 137 Cal App 640.

56. Zerkowsky v Zerkowsky, 131 So 647, 160 Miss 278

57. Erickson v Foote, 153 A 853, 112 Conn 662

58. Ark—Lake v Wilson, 38 S W. (2d) 25, 183 Ark 180—Lake v Wilson, 35 S W (2d) 597, 183 Ark 180
Cal.—Spencer v. Barnes, 43 P.(2d) 847, 6 Cal App (2d) 35.
N Y—Larkin v Frazier, 121 N E 105, 224 N Y 421, reversing 156 N Y S 1130, 172 App Div. 912—Shuler v. Maxwell, 38 Hun 240.
Pa.—Netter v Logan, 169 A. 245, 111 Pa Super. 143
S C—Foxworth v Murchison Nat. Bank, 134 S E. 428, 136 S C 458
Tex—Hamilton v. Hamilton, (Civ. App.) 235 S.W 69, dismissed for want of jurisdiction.
6 C J p 655 notes 72, 73 [a].

The true rule is that for all purposes of collecting the judgment . . . the power of the attorney of record continues with the presumed assent of his client until some affirmative steps are taken by the client to dismiss him from the case—Lusk v Hastings, 1 Hill (N Y) 656

Supplemental proceedings

An attorney is authorized to institute proceedings supplemental to execution on the judgment—Larkin v. Frazier, 121 N E 105, 224 N.Y. 421, reversing 156 N.Y S 1130, 172 App Div 912

59. Ohlquist v Nordstrom, 257 N.Y S 711, 143 Misc 502, affirmed 261 N Y S 1039, 238 App Div 766, affirmed 188 N E. 125, 262 N Y. 696.

Attorney for joint defendant has been held to have authority to defend against proceedings by motion in the cause brought by the other joint judgment defendant to obtain contribution and to receive notice of such proceedings.—Ohlquist v. Nordstrom, 257 N Y S. 711, 143 Misc. 502, affirmed 261 N Y S 1039, 238 App Div. 766, affirmed 188 N.E. 125, 262 N.Y. 696.

60. Lamb v. Wilson, 97 N.W. 325, 3 Neb (Unoff) 505, rehearing denied 98 N.W. 37, 70 Neb. 739—6 C.J. p 655 note 73.

61. Spencer v Barnes, 43 P (2d) 847, 6 Cal App.(2d) 35

62. Cullison v. Lindsay, 78 N.W. 347, 103 Iowa 124.

63. Erickson v Foote, 153 A. 853, 112 Conn. 662

64. N Y—Larkin v. Frazier, 121 N E 105, 224 N Y. 421, reversing 156 N Y S 1130, 172 App Div 913
La—Durbridge v. Wentzel, 17 La. Ann 20.
Tex—Richardson v Jankofsky, (Civ App) 23 S W 815.
6 C J p 671 note 47
Liability of client for wrongful execution directed by his attorney see Executions § 456 [23 C J. p 974 notes 65–68].

65. N Y—Larkin v. Frazier, 121 N. E 105, 224 N Y. 421, reversing 156 N Y S 1130, 172 App Div 913
Pa.—Loudon v Borough, 12 Pa.Dist & Co 266.
6 C.J p 655 note 74.

66. Cowgill & Son v. Boseman, 79 So. 305, 202 Ala 7—6 C J. p 656 note 75.

67. Parker v. Downing, 13 Mass. 465.

itor to give directions with respect to the service of, and the time and manner of enforcing, an execution,[68] and the return thereof;[69] but it has been held that, in the absence of express authority, the attorney has no power to bind his client by giving directions as to the particular property or goods which shall be seized or levied on.[70]

It seems that an attorney has no power to release property which has been levied on (infra § 105), to appoint an appraiser,[71] or to agree that the proceeds of an execution be paid to a surety.[72] It has further been held that an attorney cannot grant a stay of execution, unless authority therefor has been expressly granted,[73] but there is other authority holding the grant of a moderate stay of execution to be within an attorney's general powers.[74]

§ 98. —— Judicial Sale

An attorney having authority to cause a judicial sale or represent a party with respect to the same may give directions and make stipulations concerning the sale and receive the proceeds thereof; but he cannot bid in the property at the sale, unless he has been expressly authorized to do so.

An attorney who has authority to cause a judicial sale to enforce his client's judgment, or to represent the interests of the judgment debtor, under the rules stated in sections 96-97, has the power to procure an order of sale,[75] give binding directions as to the manner and conduct of the sale,[76] and enter into reasonable agreements or stipulations regarding the same;[77] but improper arrangements regarding the manner of sale will not be binding on a client.[78]

The proceeds of a judicial sale, in so far as is necessary to satisfy the judgment, may, without express authority, be paid to the attorney for the judgment creditor, who has recovered the judgment and caused the sale to be had.[79] It has also been held that any surplus remaining after satisfaction of the creditor's claim may be paid to the attorney who represented the defendant in the action in which the judgment was recovered,[80] and that the attorney for the execution debtor has authority to stipulate that the amount realized from the execution sale in excess of the sum needed to satisfy the execution should be allocated to other designated judgments, in order to save the expense of levying execution thereon,[81] but, in other cases, the attorney for defendant, after the suit has been lost, has been held to have no authority to receive from the sheriff the proceeds of the execution sale remaining after the satisfaction of plaintiff's demand.[82]

Although it has been suggested that a different rule might apply with respect to mortgage foreclosure sales,[83] it is generally held that, unless he has been expressly empowered to take such action,[84] an attorney at law has no authority to purchase for his client the latter's property sold under execution in the proceedings in which the attorney is employed.[85] The attorney for the judgment creditor may properly purchase the property for his client, where he has been authorized to do so,[86] but it has been held that the attorney cannot buy for only one where he represents several joint parties.[87]

§ 99. Payment or Satisfaction of Judgment

An attorney who has recovered judgment generally has the authority to bind his client by receiving payment of the judgment and satisfying it, unless the defendant has notice or knowledge of the lack of such authority.

Unless the judgment or decree is by its terms

68. Erwin v. Blake, (Tenn.) 8 Pet. (U.S.) 18, 8 L.Ed. 852—6 C.J. p. 656 note 77, p. 671 note 47.

69. McClure v. Colclough, 5 Ala. 65—6 C.J. p. 656 note 78.

70. Goebel v. Clark, 275 N.Y.S. 43, 242 App.Div. 408—6 C.J. p. 671 note 48.

71. Dodge v. Prince, 4 Vt. 191.

72. Luce v. Foster, 60 N.W. 1027, 42 Neb. 818.

73. Doe v. Ingersoll, 19 Miss. 249, 49 Am.D. 57—6 C.J. p. 656 note 82.

74. Wieland v. White, 109 Mass. 392—6 C.J. p. 656 note 83.

75. Vaughn v. Fisher, 32 Mo.App. 29.

76. Evans v. Power County, 1 P.(2d) 614, 50 Idaho 690—6 C.J. p. 656 note 84.

77. Evans v. Power County, supra—6 C.J. p. 656 note 86.

Statute requiring trial agreements to be filed or entered on minutes.

A statute, requiring that stipulations or agreements of an attorney, as to steps in an action or proceeding, be filed with the clerk or entered on the minutes of the court in order to be binding on the client, has no application to an agreement with respect to a sale under execution, since it is not a step in the action.—Evans v. Power County, 1 P.(2d) 614, 50 Idaho 690.

78. Philadelphia Fire Assoc. v. Ruby, 79 N.W. 723, 58 Neb. 730—6 C.J. p. 656 note 87.

79. Ill.—Monacelli v. Traeger, 239 Ill.App. 30.
Mo.—Clelland v. Clelland, 235 S.W. 816, 291 Mo. 312.

Payment by check to order of client delivered to attorney held good.—Monacelli v. Traeger, 239 Ill.App. 30.

80. Bury v. Bury, 223 P. 502, 69 Mont. 570.

81. Evans v. Power County, 1 P.(2d) 614, 50 Idaho 690.

82. Germaine v. Mallerich, 31 La.Ann. 371—6 C.J. p. 642 note 99.

83. Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458.

84. Foxworth v. Murchison Nat. Bank, supra.

85. Savery v. Sypher, (Iowa) 6 Wall. (U.S.) 157, 18 L.Ed. 822—6 C.J. p. 656 note 88.

86. Fabel v. Boykin, 55 Ala. 383—6 C.J. p. 656 note 89.

87. Leisenring v. Black, 5 Watts (Pa.) 303, 30 Am.D. 323.

expressly made payable to plaintiff by name,[88] or defendant has notice or knowledge that the attorney lacks such authority in fact,[89] an attorney who has recovered a judgment for his client has, merely by virtue of his employment or retainer in the action, the general implied or apparent authority to receive payment of the money due on the judgment and thereupon satisfy or discharge it;[90] and, until defendant has notice of a revocation of such authority, he will be entitled to credit for all payments made to such attorney,[91] for the revocation of an attorney's authority after judgment has been rendered, but before payment or an assignment of the judgment, will not affect the debtor who pays to the attorney in good faith, relying on his authority to receive the payment, unless it appears that the debtor had notice of the revocation or was chargeable with such notice.[92]

Where two attorneys have been employed jointly, either has the authority to receive payment and enter satisfaction.[93]

It is always open to the client to enjoin or prevent the attorney's collection of a judgment,[94] and an assignment of the judgment terminates the attorney's authority in this respect.[95]

The implied or apparent authority of an attorney gives him no power to accept or enter satisfaction of the judgment without payment,[96] or on payment of less than the full amount of the judgment (infra § 106); nor does he have the authority to accept anything but money in payment of a judgment,[97] except where the judgment is for the possession of chattels or other property.[98]

Where a guardian ad litem or next friend, who has recovered judgment on behalf of an infant plaintiff, has no authority to receive the amount due or satisfy the judgment, as will be shown in the title Infants § 124 [31 C.J. p 1174 note 89–p 1175 notes 90, 92], the attorney of record of such guardian or next friend has no authority to do so,[99] except in so far as the payment is in satisfaction of the attorney's interest in the judgment for his fees,[1] but if the guardian or next friend has such authority, as will appear in the title Infants § 124

88. Roland v. Roland, 78 S.E. 249, 139 Ga. 825.

89. Ky.—Davis v. Gott, 113 S.W. 826, 130 Ky. 486
Wash.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297.

After notice of substitution of attorneys has been given, a payment to plaintiff's first attorney, who recovered the judgment, cannot operate as a valid payment on the judgment.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297—6 C.J. p 666 note 90 [c].

90. Ark.—Lake v. Wilson, 38 S.W. (2d) 25, 183 Ark. 180—Lake v. Wilson, 35 S.W. (2d) 597, 183 Ark. 180
Ga.—Roland v. Roland, 78 S.E. 249, 139 Ga. 825
Iowa.—Hough v. First Nat. Bank, 155 N.W. 163, 173 Iowa 48.
Ky.—Combs' Adm'r v. Virginia Iron, Coal & Coke Co., 33 S.W. (2d) 649, 236 Ky. 521—Davis v. Gott, 113 S.W. 826, 130 Ky. 486
La.—Succession of Czarnowski, 105 So. 76, 158 La. 1093.
Mo.—McCully v. Kelley-Dempsey Co., 57 S.W. (2d) 784, 227 Mo. App. 775.
N.Y.—Larkin v. Frazier, 121 N.E. 105, 224 N.Y. 421, reversing 156 N.Y.S. 1130, 172 App.Div. 912.
Okl.—Vance v. Jones, 219 P. 375, 106 Okl. 110
Or.—Geanakapulas v. Zographos, 208 P. 585, 104 Or. 430—Davidhizar v. Elgin Forwarding Co., 173 P. 893, 89 Or. 89.
Pa.—In re Lancaster Trust Co., 186 A. 367, 323 Pa. 107—Netter v. Logan, 169 A. 245, 111 Pa. Super. 143—Zephus' Estate, 18 Pa. Dist. & Co. 168.
Wis.—La Marche v. Schoenrock, 247 N.W. 852, 211 Wis. 300
6 C.J. p 654 note 61
Authority to receive payment on execution or proceeds of judicial sale see supra §§ 97, 98.

91. Ky.—Combs' Adm'r v. Virginia Iron, Coal & Coke Co., 33 S.W. (2d) 649, 236 Ky. 524.
Mo.—McCully v. Kelley-Dempsey Co., 57 S.W. (2d) 784, 227 Mo. App. 775
6 C.J. p 655 note 62.

92. Pa.—Loudon v. Borough, 12 Pa. Dist. & Co. 266.
Wash.—Nuessler v. Bergman, 251 P. 578, 141 Wash. 297.
6 C.J. p 666 note 90

93. Lake v. Wilson, 38 S.W. (2d) 25, 183 Ark. 180—Lake v. Wilson, 35 S.W. (2d) 597, 183 Ark. 180

94. O'Neal v. Spalding, 66 S.W. 11, 23 Ky.L. 1729

95. Ely v. Lamb, 10 Pa. Co. 209—6 C.J. p 655 note 63, p 673 note 67.
Termination of relation by assignment or transfer of subject matter generally see infra § 109.

96. Seitovitz v. London, 229 N.W. 590, 249 Mich. 567—6 C.J. p 655 note 65.

97. Mo.—McCully v. Kelley-Dempsey Co., 57 S.W. (2d) 784, 227 Mo. App. 775—Ladd v. McColl, (App.) 209 S.W. 578
Pa.—Huston v. Mitchell, 14 Serg. & R. 307, 16 Am.R. 506
6 C.J. p 655 note 70, p 660 note 41.

Acceptance and collection of check
(1) In the absence of any authority to that effect, the acceptance by plaintiff's attorney of a check does not amount to a payment of a judgment by a judgment debtor; but the attorney has implied authority to indorse a check, when received, for the purpose of collecting the same, and when the check has thus been collected and paid to the attorney, that constitutes a payment on the judgment binding on the client.—McCully v. Kelley-Dempsey Co., 57 S.W. (2d) 784, 227 Mo. App. 775.
(2) Power to transfer or indorse negotiable paper generally see infra § 104.

Attorney's acceptance of land in satisfaction of judgment is beyond the scope of his authority, in the absence of express authorization.—Ladd v. McColl, (Mo.App.) 209 S.W. 578—6 C.J. p 660 note 41.
Mode or form of payment to attorney generally see infra § 106

98. Ely v. Luscomb, 140 P. 1086, 24 Cal.App. 224.

99. U.S.—Southern Ry. Co. v. McKinney, (C.C.A.Ala.) 276 F. 772.
Ga.—Betts v. Hancock, 107 S.E. 377, 27 Ga.App. 63.
Ill.—Paskewis v. East St. L. & S. Ry. Co., 117 N.E. 1035, 281 Ill. 385, L.R.A.1918C 52, reversing 206 Ill.App. 131.
N.Y.—Greenburg v. New York Cent. R. Co., 104 N.E. 931, 210 N.Y. 505
6 C.J. p 654 note 61 [a] (3)—31 C.J. p 1175 note 91.
L. U.S.—Southern Ry. Co. v. McKinney, (C.C.A.Ala.) 276 F. 772.
Tenn.—Oody v. Roane Iron Co., 58 S.W. 850, 105 Tenn. 515, affirming 53 S.W. 1002.

[31 C.J. p 1175 note 97], his attorney of record is likewise vested with that power, in accordance with the general rule above stated [2]

There is no implied or apparent authority to receive payment and satisfy a judgment in favor of an attorney who has not been employed or retained to represent the creditor in securing the judgment;[3] and, of course, an attorney for the judgment debtor cannot receive payment or make satisfaction for the creditor unless he has been expressly authorized to do so.[4]

It has been held that the implied power of an attorney to receive payment of, and satisfy, a judgment exists only where it has been recovered in legal proceedings in a court of record, and that an attorney who has obtained an award before a workmen's compensation commission or board has no implied authority to receive payment of the award;[5] but there is other authority to the contrary.[6]

§ 100. Admissions, Stipulations and Waivers

a. Stipulations and agreements
b. Statements and admissions
c. Waiver

a. Stipulations and Agreements

(1) In general
(2) Particular stipulations or agreements

(1) In General

Stipulations or agreements with respect to remedial or procedural matters are generally within the implied or apparent authority of an attorney who has been employed or retained for purposes of litigation.

Although an attorney has no power to bind his client by an agreement or stipulation which he has not been expressly, impliedly, or apparently, authorized to make,[7] it is generally held, particularly where there is a statutory provision to that effect,[8] that an attorney employed for purposes of litigation has, by virtue of his broad powers over the conduct and control thereof (supra § 80), the general implied or apparent authority to enter into or make such agreements or stipulations, with respect to procedural or remedial matters, as appear, in the progress of the cause, to be necessary or expedient for the advancement of his client's interests or to accomplishment of the purpose for which the attorney was employed,[9] without regard to the client's actual knowledge or con-

2. State v Ballinger, 82 P. 1018, 41 Wash 23, 3 L R A (N S) 72—6 C J p 654 note 61 [a] (1), (2)—31 C J p 1175 note 98.

3. Pa—Goll v. Ziegler, 61 Pa Super 616.
Tex—Morrison v. Hammack, (Civ. App) 152 S W 494

4. Minn—First State Bank of Mountain Lake v C E Stevens Land Co, 143 N W 355, 123 Minn. 218
Pa—Goll v. Ziegler, 61 Pa Super. 616

5. Dacus v. Maryland Casualty Co., 55 P (2d) 663, 40 N M 110

6. Mo—McCully v Kelley-Dempsey Co, 57 S W (2d) 784, 227 Mo App 775
Okl—Washita County Gin Co. v. Colbert, 54 P (2d) 640

7. Krug v. Roberts Cone Mfg. Co, 250 S W 621, 213 Mo App 628

8. Cal—People v. Garvey, 269 P. 702, 93 Cal.App 497—Clemens v Gregg, 167 P. 294, 34 Cal App 245
Idaho—Storey v. United States Fidelity & Guaranty Co of Baltimore, Md, 133 P 990, 32 Idaho 388
6 C J. p 648 note 60.

Statute applicable only when suit pending

Comp L § 3998 subd 1, authorizing an attorney to bind his client by his agreement filed with the clerk or entered upon the minutes of the court refers to stipulations and agreements as to conduct of an action pending when the stipulation is made.—Storey v. United States Fidelity & Guaranty Co of Baltimore, Md, 133 P 990, 32 Idaho 388

9. U S—Equitable Trust Co of New York v Washington-Idaho Water, Light & Power Co, (D C Wash) 300 F 601—Christy v. Atchison, T. & S F Ry Co, (Colo) 233 F 255, 147 C C A 261, affirming (D C.) 214 F 1016—U S v. Zucca & Co, 11 Cust App 167.
Ala—Blackwood v Maryland Casualty Co, 150 So. 130, 227 Ala. 343
Ill—American Car & Foundry Co v. Industrial Commission, 167 N E 80, 335 Ill 322—Lyman v Kaul, 113 N E 944, 275 Ill 11—Heinze v Industrial Commission, 123 N E 598, 228 Ill 342—Keithley v Clark County, 206 Ill App 500
Ind—Ft Wayne Checker Cab Co v Davis, 168 N E 41, 90 Ind App 30, denying rehearing 165 N E 764, 90 Ind App 30—Cory v. Howard, 164 N E 639, 88 Ind App 503
Iowa—Hefferman v. Burt, 7 Iowa 320, 71 Am D 445
Ky.—Kammerer v Brown, 27 S W (2d) 959, 234 Ky 199—De Charette v St Matthews Bank & Trust Co, 233 S W. 410, 214 Ky 400, 50 A L R. 84—Conrad's Executor v. Conrad, 160 S W 937, 156 Ky. 231.
Mass—See v Norris, 125 N E. 619, 234 Mass 345.
Mich.—Madden v. Madden, 192 N.W. 665, 222 Mich. 404
Miss—Noxubee County v. Long, 106 So 83, 141 Miss. 72.
Mo—National Union Fire Ins. Co v. Nevils, 274 S W 503, 217 Mo.App. 630—Krug v. Roberts Cone Mfg. Co, 250 S W. 621, 213 Mo App. 628
Mont—United States Fidelity & Guaranty Co v Bourdeau, 208 P. 917, 64 Mont 60
N J—Hygrade Cut Fabric Co. v. U. S Stores Corporation, 144 A. 605, 105 N J.Law 324—Olympic Silk Mills v Washington Piece Dyeing & Finishing Co, 147 A. 47, 7 N J. Misc 680
N.Y—Humphries v Shapiro, 175 N.Y S 426, 187 App Div 96—Daley v. Donnis, 242 N Y.S 408, 137 Misc 1—Federal Fuel Co v. Macy, 223 N Y S 710, 130 Misc. 192—In re Callahan, 174 N Y.S 268, 106 Misc 202, affirmed 175 N Y S 896, 188 App Div 944—Szunyog v. Kiss, 182 N Y.S 893.
N C—Deitz v Bolch, 183 S E 334, 209 N C 202—Bissell v. Auto Tire & Equipment Co, 108 S E 439, 182 N C 98
Ohio—Industrial Commission of Ohio v. Kauffman, 164 N E 510, 119 Ohio St 494—Gottschalk v Brown, 19 Ohio Cir Ct (N.S) 15.
Okl—Voightlander v State ex rel. Barnett, 52 P (2d) 60—Home State Bank of Arcadia v Haynes, 290 P 338, 144 Okl 190
Pa—Cole v National Casket Co, 101 Pa.Super 207
S C—Poore v Poore, 89 S.E. 569, 105 S C 206.
S D—In re Fleming's Estate, 173 N. W. 836, 42 S.D. 193.

sent.[10] Moreover where an attorney's control of procedural matters is regarded as exclusive (supra § 80 b), it is often held that the power of the attorney to make stipulations and agreements with respect to the management of purely procedural matters in a pending cause is exclusive and the client himself cannot do so without the attorney's consent,[11] unless the validity of such a stipulation is recognized by statute or rule of court.[12]

An attorney employed in anticipation of suit may enter into a stipulation with reference thereto prior to the commencement of the action,[13] but after an action is pending no attorney other than the party's attorney of record has the implied or apparent authority to bind him by a stipulation or agreement with reference to the conduct of the cause,[14] although it may be presumed that another attorney who has purported to sign a stipulation for a party has authority to do so (see supra § 73). An attorney who has not entered his appearance as his client's attorney of record has the power to bind his client by a stipulation made in open court if he has been expressly authorized to do so by the client and has been engaged to act by the attorney of record.[15]

Where a suit is brought on the relation of a private party, so that he is a coplaintiff with the state, and they have joint control over the litigation, an attorney for the private party has the authority to make a stipulation binding on the state without the concurrence or consent of the state's attorney.[16]

The lack of implied or apparent authority over the substantial rights of the client (supra § 79), or the subject matter of the cause of action or defense (supra § 80), precludes the attorney from having the power, in the absence of express authority, to make stipulations or agreements which result in a waiver of the client's substantial legal rights (subsection c infra), a compromise or settlement of the client's cause of action (infra § 105), or the imposition of a new substantive contractual liability on the client (infra § 103). If, however, the stipulation or agreement relates to a matter which is regarded as being remedial or procedural in its essence it may be within the implied or apparent authority of the attorney although the rights of the client are thereby materially affected;[17] and the fact that a stipulation deals in part with matters which are nonprocedural in nature does not prevent the stipulation from being binding with respect to the other matters which are procedural.[18]

The implied or apparent power of an attorney extends only to such stipulations or agreements as are ordinarily made by attorneys with respect to procedural matters,[19] and he cannot stipulate with reference to matters which are collateral to, or not necessary to the conduct of, the cause or purpose for which he was employed,[20] unless his client has expressly authorized him to do so.[21] Nor can an attorney make stipulations which his client cannot

Tenn—Fuller v. Jackson, 62 S.W 274—Utley v. Railroad, 61 S W 84, 106 Tenn 242—Hammon v. Miller, 13 Tenn App 458—Brady & Edmondson v Lambert, 7 Tenn App 494.
Tex—Commonwealth Bonding & Casualty Ins Co v. Brannin, (Civ App) 186 S W. 862, error refused—Commonwealth Bonding & Casualty Ins Co v Beavers, (Civ App.) 186 S W 859
W Va—Board of Commissioners of Ohio County v Clemens, 100 S E. 680, 85 W Va. 11, 7 A L R 373.
6 C J p 647 note 58

10. McConkey v McConkey, (Tex Civ App) 187 S W 1100, dismissed for want of jurisdiction.

11. Cal—Sieck v. Hall, 84 P (2d) 844, 139 Cal App 279
Ohio—Rogers v State, 14 Ohio Cir Ct (N S) 177.
6 C J p 643 notes 10, 11, p 648 note 59—60 C J. p 47 note 23.

Stipulations of client denied recognition

(1) A stipulation granting time to file a statement on a motion for a new trial—Mott v. Foster, 45 Cal 72

(2) A stipulation extending the time within which to answer.—Bonnifield v Thorp, (D C Alaska) 71 F 924, appeal dismissed 83 F 1022, 27 C C A. 686—6 C J p 648 note 10

(3) A stipulation for a continuance.—Nighungale v Oregon Cent R Co, (C C Or) 18 F Cas No 10,264, 2 Sawy 338

12. Braisted v. Johnson, 7 N Y Super 671—60 C J p 47 note 24

13. Hefferman v. Burt, 7 Iowa 320, 71 Am D. 445

14. Ill—American Car & Foundry Co v Industrial Commission, 167 N.E 80, 335 Ill 322.
S D—Carlton v Saville, 213 N.W. 509, 51 S D 282
6 C J. p 648 note 62

Defendant's attorney cannot bind intervener

Where a defendant and intervener in a cause have different attorneys of record the attorney for defendant cannot bind the intervener or his attorney by making stipulations as to a particular matter on the supposition that he might be asked to act for the intervener with respect thereto because of the intervener's attorney being resident at a distance—Carlton v. Saville, 213 N W. 509, 51 S D. 282.

15. Dutrowska v. Landolfo, 238 N. W. 207, 255 Mich 377.

16. State v. Mart, 283 P. 23, 295 P. 459, 135 Or. 603

17. Kissick v Hunter, 39 A 83, 184 Pa 174—Reinholdt v Alberti, 1 Binn (Pa) 469—6 C J. p 641 note 82

18. Equitable Trust Co of New York v Washington-Idaho Water, Light & Power Co, (D C Wash) 300 F 601.

19. Rothberg v Hebron, 157 N.Y S 788, 94 Misc 225
Contracts creating new substantive rights against client see infra § 103.

20. Mass—See v Norris, 125 N E. 619, 234 Mass 345
Mo—Krug v Roberts Cone Mfg Co, 250 S W. 621, 213 Mo App 628
N Y—Hallow v Hallow, 193 N.Y S. 460, 200 App Div. 642
6 C J p 649 notes 88, 92

21. Cal.—Clemens v Gregg, 167 P. 294, 34 Cal App 245
Mass—See v Norris, 125 N.E. 619, 234 Mass 345.
Minn—National Council of Knights and Ladies of Security v Scheiber, 169 N.W. 272, 141 Minn. 41.

make,[22] or which interfere with the legitimate powers of the court;[23] but, if when a stipulation is filed the parties have the power through their attorneys to make it, it is immaterial that the power did not exist when the stipulation was tentatively formulated and agreed to.[24]

Setting aside or vacating stipulation or agreement. Under the rules stated in the title Stipulations §§ 34–37 [60 C.J. p 94 note 34–p 100 note 14], stipulations and agreements made by attorneys concerning the conduct of a cause are not legal contracts, but are under the discretion and control of the court, and may be denied enforcement or vacated and set aside if entered into as a result of fraud or collusion or without authority.

(2) Particular Stipulations or Agreements

The general rule that an attorney has implied authority to stipulate or agree with reference to procedural or remedial matters has been applied to a wide variety of stipulations and agreements, including those to abide event of another suit involving the same issues and questions and in which the attorney is also employed.

Within the attorney's implied or apparent authority, under the foregoing general rule, are stipulations or agreements relating to the conduct of the trial generally,[25] the pleadings,[26] and amendments thereof;[27] the evidence;[28] the venue or place of trial;[29] the time,[30] manner,[31] and scope,[32] of trial; the examination of witnesses,[33] and the mode of taking their testimony and the effect thereof.[34]

Accordingly an attorney may usually make arrangements for continuances,[35] or for extending[36] or limiting[37] the time within which to file pleadings, the time for giving instructions,[38] or for rendering judgment,[39] and he may enter into an agreement for an amicable action,[40] or stipulate that the decision of a demurrer shall be final.[41]

Likewise it is within an attorney's general authority to stipulate that one judge may give the decision of the court,[42] or that the presiding judge who is disqualified, shall call in another designated judge to try the case.[43]

A stipulation by the insured's attorney, that an insurer by assisting in the defense of a suit against the insured would not thereby waive its right to rely upon lack of cooperation as a defense to liability on the policy, has been held within the scope of the attorney's authority.[44]

Stipulation of facts. A general employment or retainer in a cause is usually regarded as giving to an attorney the implied authority to bind his client by a stipulation as to the ultimate facts in the

N Y—Hallow v. Hallow, 193 N.Y.S. 460, 200 App Div 642.
6 C J p 649 note 89.

22. In re Carpenter's Estate, 231 N W. 376, 210 Iowa 553—6 C J. p 649 note 90.

23. In re Hansen's Estate, 184 P 197, 55 Utah 23—6 C J. p 649 note 91.

24. People v Spring Lake Drain, etc, Dist., 97 N E. 1042, 253 Ill 479

25. Humphries v. Shapiro, 175 N Y. S. 426, 187 App Div 96.

26. O'Brien v. Lashar, (C C A Conn) 273 F. 520—6 C J. p 649 note 75.

27. Cal—Coonan v Loewenthal, 61 P 940, 129 Cal. 197
Mich—Madden v Madden, 192 N.W. 665, 222 Mich 404
6 C J. p 649 note 76.

Amendment of prayer to ask divorce rather than separate maintenance
An attorney as solicitor for defendant in a divorce action, where the prayer was for separate maintenance, has been held empowered to stipulate that the petition might be amended to contain a prayer for absolute divorce rather than separate maintenance—Madden v. Madden, 192 N.W. 665, 222 Mich. 404.

28. N Y.—In re Roos' Estate, 230 N. Y S. 330, 132 Misc. 749.
Ohio.—Industrial Commission of Ohio v Kauffman, 164 N E 510, 119 Ohio St 494
6 C.J p 648 note 74.

Inadmissible evidence
An attorney may stipulate for the admission of evidence which would otherwise be inadmissible—Industrial Commission of Ohio v. Kauffman, 164 N E 510, 119 Ohio St 494

Time evidence regarded as taken
Attorney appearing in accounting proceeding for adults could stipulate that evidence taken should be considered as though taken after his appearance—In re Roos' Estate, 230 N Y S 330, 132 Misc 749

29. Terre Haute Brewing Co v. Ward, 102 N E 395, 56 Ind App. 155.
Authority of attorney to bind client by stipulation for change of venue see Venue § 137 [67 C J p 146 note 72]
Sufficiency of stipulation for change of venue signed by attorneys only see Venue § 137 [67 C.J p 146 note 71]

30. Mont—Davenport v Davenport, 222 P 422, 69 Mont 405.
Okl—Neil v. Union Nat. Bank of Chandler, 178 P 659, 72 Okl. 116.

31. N Y—Federal Fuel Co. v. Macy, 223 N Y.S 710, 130 Misc. 192
Okl.—Voightlander v. State, 52 P (2d) 60

32. Hammon v Miller, 13 Tenn.App. 453—6 C J. p 649 note 79.

33. Conrad v Conrad, 160 S.W. 937, 156 Ky. 231.

34. Conrad v. Conrad, supra.

35. Mont—State v. Turlok, 248 P. 169, 76 Mont. 549
W Va—Board of Com'rs of Ohio County v Clemens, 100 S E. 680, 85 W Va 11, 7 A L R. 373
6 C J p 648 note 73.

36. U S—O'Brien v Lashar, (C C A Conn) 273 F 520
Nev—Rahn v Searchlight Mercantile Co, 49 P (2d) 353.
6 C J p 648 note 66

37. Wadsworth v. Montgomery First Nat Bank, 27 So 460, 134 Ala. 440.

38. Jacobs v. State, 213 S W 628, 85 Tex Cr 505.

39. Beardsley v. Pope, 34 N Y S 816, 88 Hun 560, reversing 32 N.Y S 936, 11 Misc 117—6 C J p 648 note 68.

40. Kissick v Hunter, 39 A 83, 184 Pa 174—6 C J p 649 note 77.

41. Monk v. R Co., 150 S W. 1083, 166 Mo App. 692—6 C.J. p 649 note 81.

42. Walker v. Rogan, 1 Wis. 597.

43. Washoe Copper Co v. Hickey, 128 P. 584, 46 Mont. 362.

44. Blackwood v. Maryland Casualty Co., 150 So. 180, 227 Ala. 343, denying certiorari 150 So. 179, 25 Ala. App. 303.

case,[45] although the facts so stipulated may control the result of the suit,[46] but an attorney for defendant cannot himself bind plaintiff by stipulating the essential fact upon which defendant relies for a defense.[47]

To abide event of another suit. An attorney employed in several different suits by or against the same or different parties, but all involving the same issues, and the interest of his client being of the same character in all, may stipulate that the trial and decision in one shall be determinative of the issues in all the others;[48] and such agreements by counsel are favored by the courts as they ordinarily tend to prevent multiplicity of trials, long drawn out and costly litigation, and hasten the dispatch of the court's business.[49] In order for the attorney to have implied authority to make such a stipulation, however, the other suit or suits must be actually pending, and not merely in contemplation;[50] the issues must be precisely alike,[51] and the attorney must also be employed in the case in which the determinative decision is to be rendered, as he has no implied authority to agree to let his client's case abide the decision in another case in which he is not employed.[52]

Stipulations as to fees. An attorney employed in litigation has the implied power to bind his client by stipulations in regard to the fees to be paid to a commissioner to take evidence,[53] or to a referee[54] or receiver,[55] or in regard to attorney's fees.[56]

b. Statements and Admissions

Statements or admissions of fact made by an attorney, while taking some step or proceeding on behalf of his client properly designed to accomplish the purpose of his employment, and having some relevant relation to the subject-matter thereof, are generally within the implied or apparent authority of the attorney to bind his client.

Statements[57] or admissions[58] of fact, made by an attorney while taking some step or proceeding properly designed to accomplish the purpose of his employment, and having some relevant relation to the subject-matter thereof, are often regarded as within the attorney's implied authority to bind his client, and may be admissible in evidence against the latter in accordance with the rules stated in Evidence § 361 [22 C.J. p 393 note 2–p 396 note 49].

45. U S—Christy v. Atchison, T. & S F. Ry Co, (Colo) 233 F. 255, 147 C C A 261, affirming (D C.) 214 F. 1016—Pacific Trading Co. v. U. S., 19 Cust. & Pat.App. 361
Ill—Heinze v. Industrial Commission, 123 N E. 598, 288 Ill. 342
Tex—Richmond v. Sangster, (Civ App) 217 S W. 723, error refused
6 C.J p 649 note 78
Stipulations as to facts generally see Stipulations §§ 10, 25 [60 C J p 58 note 72–p 59 note 84, p 83 note 62–p 86 note 3].

46. Christy v Atchison, T. & S. F Ry Co, (Colo) 233 F 255, 147 C C A. 261, affirming (D C.) 214 F. 1016.

47. Chapman v. Farris, 242 S W. 359, 195 Ky. 362.

48. U S.—Stone v. Bank of Commerce, (Ky) 19 S Ct 747, 174 U. S. 412, 43 L Ed 1028.
Ga—Bryant v. Elberton & E Ry Co, 93 S E. 219, 20 Ga App 586
Minn—National Council of Knights and Ladies of Security v. Scheiber, 169 N.W 272, 141 Minn 41—Rodgers v. U S & D Life Ins Co, 149 N W 671, 127 Minn. 435—Lieberknecht v. Great Northern Ry. Co., 126 N.W. 71, 110 Minn. 457.
Ohio.—Rogers v. State, 14 Ohio Cir. Ct.(N.S) 177.
Tex—State Life Ins. Co. v. Duke, (Civ App.) 69 S W.(2d) 791, error refused—Savage v. Dorn, (Civ App) 60 S.W (2d) 312, error refused—Commonwealth Bonding & Casualty Ins Co v. Beavers, (Civ App) 186 S W. 359.
6 C J p 648 note 63.
Decision on appeal in similar case
A stipulation made by attorney of record of insurer to have insurer abide by decision on appeal in another similar case in which such attorney represented another insurer is binding upon insurer—State Life Ins. Co v Duke, (Tex Civ App.) 69 S W (2d) 791, error refused.
Validity of such stipulations generally see Stipulations § 19 [60 C.J. p 51 note 75].

49. Savage v. Dorn, (Tex Civ App) 60 S W.(2d) 312, error refused

50. Stone v. Bank of Commerce, (Ky) 19 S Ct. 747, 174 U.S. 412, 43 L.Ed 1028.

51. National Council of Knights and Ladies of Security v. Scheiber, 169 N W. 272, 141 Minn. 41—6 C J. p 648 note 65

52. State Life Ins. Co v. Duke, (Tex Civ App.) 69 S W (2d) 791, error refused.

53. Fairchild v Michigan Cent R Co, 8 Ill App. 591.

54. Bottome v. Neeley, 104 N.Y S. 429, 54 Misc. 258—Keeler v. Bell, 95 N Y S 841, 48 Misc 427—6 C.J. p 649 note 85.

55. Matter of Maxwell, 21 N.Y.S. 209, 66 Hun 151.

56. Callahan v. Callahan, 192 P. 600, 33 Idaho 241—6 C J. p 649 note 87.
Allowance of fees on attorney's statement alone
Counsel in a divorce action may stipulate that trial court shall fix amount of fees and suit money to be allowed the wife, without expert testimony as to value of attorney's services in her behalf, and without evidence as to amount of suit money expended or for what purpose, other than a statement filed by her attorney—Callahan v. Callahan, 192 P. 600, 33 Idaho 241.

57. Idaho—Quirk v. Bedal, 248 P. 447, 42 Idaho 567.
Minn.—Independent School Dist No. 22, Winona County v. School Dist No 19, Winona County, 153 N.W. 113, 130 Minn. 19
Mo—McNatt v. Wabash Ry Co, 74 S W.(2d) 625, 335 Mo. 999—Cole v St Louis-San Francisco Ry Co, 61 S.W (2d) 344, 332 Mo 999—Eaton v. Curtis, 4 S W (2d) 819, 319 Mo 660—Hampe v. Versen, 32 S W (2d) 793, 224 Mo App 1144
Or—Oregon-Washington R. & Nav. Co v. Reed, 169 P 342, 87 Or 398, rehearing denied 170 P. 300, 87 Or. 398
S C—Moore v. Atlantic Coast Line R Co, 135 S E 473, 137 S C 319

58. D C—Berry v Littlefield, Alvord & Co, 54 App D.C. 195, 296 F. 235.
N C—Reynolds v Reynolds, 182 S. E 341, 208 N C. 578
Married woman bound by the admissions of her attorney see Husband and Wife § 428 [30 C.J. p 999 note 69].

An attorney employed to prosecute or defend a particular cause is usually held to have the implied power to bind his client by statements and admissions in the pleadings,[59] or in the opening statement;[60] or by any admission or statement of fact deliberately made in good faith in open court during the progress of the case for the purpose of dispensing with testimony or facilitating the trial of the cause,[61] unless the admission or statement is one which is expressly required by statute to be made or signed by the client personally.[62]

Without regard to the pendency of a suit an attorney may have implied authority to make statements or admissions which properly or apparently tend to accomplish the purposes of his employment and relate to the subject matter thereof.[63] Other cases, however, have indicated that apart from pending proceedings an attorney has no implied or apparent authority to make admissions binding on his client;[64] and, at any rate, statements or admissions having no proper tendency to accomplish the purpose of the attorney's employment,[65] or not relating to the subject matter thereof,[66] are not within the scope of an attorney's implied authority. An attorney has no power to bind his client by statements or admissions to strangers with respect to matters with which the client has no dealings with the attorney.[67] An attorney for collection has implied authority to state to the debtor what the claim is,[68] but not to make admissions as to the facts on which the claim is founded.[69]

During the pendency of a cause the implied power of an attorney ordinarily extends only to admissions or statements which are distinctly and formally made in open court for the purpose of dispensing with formal proof of a fact at the trial,[70] and are relevant to the issues involved in the particular cause in which the attorney is employed.[71]

59. U S —Kungllg Jarnvagsstyrelsen v Dexter & Carpenter, (C C A N.Y.) 32 F.(2d) 195, certiorari denied 50 S Ct. 32, 280 U S 579, 74 L Ed 629.
Ill —Smith v. Fidelity Trust Co, 231 Ill.App. 488.
Iowa.—Gilmore v Shearer, 197 N W. 631, 197 Iowa 506, 32 A L.R. 733.
Mass —Butter v. Sovrensky, 175 N. E 173, 275 Mass 88.
N Y —Standard Oil Co. of New York v Siraco, 235 N Y.S 1, 226 App. Div. 266.

60. McNatt v. Wabash Ry. Co., 74 S W.(2d) 625, 335 Mo. 999—McGuire v. Springfield Traction Co, (Mo App) 30 S W (2d) 794—64 C. J. p 238 notes 90, 91.

61. U S.—Shanley v. Bowers, (C.C. A N Y) 31 F.(2d) 13
Ill.—Deffler v. Loudenback, 241 Ill. App. 214. See Midland Oil Co v. Packers Motor Transport, 277 Ill. App. 451—Hughes v. Eldorado Coal & Mining Co, 197 Ill App. 259.
Iowa —Gilmore v Shearer, 197 N W. 631, 197 Iowa 506, 32 A.L.R. 733.
Kan —In re Hoover's Estate, 180 P. 275, 104 Kan. 635.
Ky —Bell County Board of Education v. Howard, 59 S W (2d) 932, 248 Ky. 766—National Life & Accident Ins Co v. Braswell, 272 S W. 413, 209 Ky. 165.
La —Kinchen v Ligamari, 130 So. 228, 14 La App. 497.
Mass —Brocklesby v. City of Newton, 200 N E. 351—Mercier v. Union Street Railway Co, 119 N E 764, 230 Mass. 397—McMahon v. Lynn & Boston R R. Co., 77 N E 826, 191 Mass. 295—Boston Electric Co v. Cambridge, 39 N E. 737, 163 Mass 64—Loomis v. New York, etc, Railroad Co, 34 N E 82, 159 Mass 39—Savage v. Blanchard, 19 N E. 396, 148 Mass. 348.
Minn —Independent School Dist. No. 22, Winona County, v. School Dist. No 19, Winona County, 153 N W. 113, 130 Minn 19.
Miss.—Noxubee County v. Long, 106 So. 33, 141 Miss. 72.
Mo —Cantrell v Knight, (App.) 72 S W (2d) 196—Mannion v. John Hancock Mut. Life Ins Co of Boston, Mass (App) 273 S W. 201—Illinois Glass Co. v Ingraham, 264 S W 43, 215 Mo App 12—Robertson v Johnson, 243 S.W. 215, 210 Mo App 585—Probst v St Louis Basket & Box Co, 207 S W. 391, 200 Mo App 568.
N Y —Standard Oil Co of New York v Siraco, 235 N.Y.S 1, 226 App Div. 266
Okl —Mid-Co. Gasoline Co. v. Back, 217 P. 1041, 95 Okl 29.
Or —Oregon-Washington R & Nav. Co. v Reed, 169 P. 342, 87 Or 398, rehearing denied 170 P 300, 87 Or. 398—Metzler-Hegsted Lumber Co v Farmers' Union Warehouse & Mercantile Co, 153 P 56, 78 Or 551.
Pa —Bechtold, to Use of Heating Service Co, v Murray Ohio Mfg Co, 184 A. 49—Collins v Rosenberg, 161 A. 530, 106 Pa.Super 269
R I —McLyman v Miller, 161 A 111, 52 R I 374—Scotti v. District Court of Tenth Judicial Dist., 109 A. 207, 42 R I 556.
S C —Hall v. Benefit Ass'n of Ry Employees, 161 S E. 867, 164 S C 80—Southern Ry Co v. Swift & Co., 155 S E 429, 158 S C. 307
Tenn —Howard v. Bishop, 7 Tenn App 347
Tex.—Republic Ins Co. v. O'Donnell Motor Co, (Civ App) 289 S W. 1064.
6 C J p 649 note 96

62. Crowinshield Shipbuilding Co. v. Jackson, 186 N E. 87, 283 Mass. 21—Butter v. Sovrensky, 175 N.E. 173, 275 Mass 88.

63. Brown v. Hebb, 175 A. 602, 167 Md 535, 97 A.L R. 366—6 C.J. p 650 notes 97, 99 [a].

64. N.Y.—In re Larney's Estate, 266 N.Y S 564, 148 Misc. 871.
Or.—Welch v. Johnson, 184 P. 280, 93 Or 591, denying rehearing 183 P 776, 93 Or 591.
S C —Hall v. Benefit Ass'n of Ry. Employees, 161 S E. 867, 164 S C. 80.

65. Md —Milkton v. French, 150 A. 28, 159 Md. 126
Mass —Goldstein v. Tucker, 119 N. E 693, 230 Mass. 259.
6 C J. p 650 note 99.

66. In re Larney's Estate, 266 N Y. S. 564, 148 Misc 871.

67. Goldstein v Tucker, 119 N.E. 693, 230 Mass 259.

68. James v Boston El. R Co., 87 N E. 474, 201 Mass. 263—6 C.J. p 650 note 99 [a].

69. Hall v. Benefit Ass'n of Ry. Employees, 161 S E. 867, 164 S C. 80

70. Cal —Morrell v. Caldow, 278 P 247, 99 Cal App 159—Adelstein v. Greenberg, 247 P. 520, 77 Cal.App 548.
Iowa —Dugan v. Midwest Cap Co, 239 N W. 697, 213 Iowa 751.
La —Stevens v. Gaude, 130 So 79, 9 La App 664.
Mo —Robertson v. Johnson, 243 S W 215, 210 Mo.App 585.
Okl —Mid-Co Gasoline Co. v. Back, 217 P 1041, 95 Okl 29
Pa —Plummer v Hillside Coal & Iron Co, 96 Pa Super. 130.
6 C.J. p 650 note 98.

71. U.S —Catalin Corporation of America v. Catalasuli Mfg. Co., (C

Improvident or erroneous statements or admissions resulting from unguarded expressions or mistake,[72] or mere casual remarks, statements, or conversations,[73] are not usually treated as coming within the scope of the attorney's authority, nor are statements made in the course of negotiating or bargaining for a settlement,[74] unless the attorney has been expressly authorized to enter into such negotiations.[75]

Whether he is acting in or out of court an attorney generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client,[76] unless such an admission is clearly a proper step in accomplishing the purpose for which the attorney was employed.[77]

Obviously, an attorney has no authority to make admissions or statements which will bind a party or person by whom he has not been employed, or whom he does not represent at the time the statements or admissions are made;[78] and an attorney for two persons in separate suits has no right to make a statement in one suit which will bind his client in the other.[79]

Only statements or admissions of fact are within the authority of an attorney, and neither his client nor the court are bound by his statements or admissions as to matters of law or legal conclusions.[80]

c. Waiver

The employment or retainer of an attorney ordinarily gives him the implied or apparent authority to waive mere informalities and technicalities, and procedural and remedial matters, but not the substantial legal rights of the client.

As he acquires no implied power with respect thereto (see supra §§ 79, 80), in the absence of express authority, an attorney generally has no power, by stipulation, agreement, or otherwise, to waive or surrender the substantial legal rights of his client;[81] but merely by virtue of his retainer or employment, he acquires the authority to waive

C A N Y) 79 F (2d) 593, affirming (D C) 11 F Supp 603

Ky—Bell County Board of Education v Howard, 59 S.W (2d) 982, 248 Ky 766—National Life & Accident Ins Co v. Braswell, 272 S W 412, 209 Ky 165—Talbot v. McGee, 4 T B Mon. 375.

Md—Brown v. Hebb, 175 A. 602, 167 Md 535, 97 A L R. 366

72. Cal—Merced Irr. Dist. v. San Joaquin Light & Power Corporation, 281 P 415, 101 Cal App 153

La—Federal Land Bank of New Orleans v Succession of Lacour, (App) 157 So 792.

N J—Elmora West End Building & Loan Ass'n v. Strede, (Ch.) 100 A. 344

N Y.—Willat Film Corporation v. Central Union Trust Co of New York, 222 N Y S 671, 221 App Div. 180, reversing 217 N Y S 409, 127 Misc 534

S C—Moore v. Atlantic Coast Line R. Co, 135 S.E. 473, 137 S C. 319

6 C J p 650 note 2

73. D C—Berry v Littlefield, Alvord & Co, 54 App D C 195, 296 F. 285.

Iowa—Dugan v. Midwest Cap Co., 239 N W 697, 213 Iowa 751

Pa—Plummer v Hillside Coal & Iron Co, 96 Pa Super. 180.

6 C J p 650 note 98

74. Vogt Instant Freezers v. New York Eskimo Pie Corporation, (D C N Y) 59 F (2d) 99, affirmed (C C.A) 69 F.(2d) 84.

75. Ill—Bond v. Duntley Mfg Co, 195 Ill App 576

Md—Brown v Hebb, 175 A. 602, 167 Md 535, 97 A L R 366.

76. Robert R Sizer & Co. v. Chiarello Bros, (D C N Y) 32 F (2d) 333.

Admission against interest of estate.—In re Larney's Estate, 266 N Y S 564, 148 Misc 871—Witt v Carlton Dress Goods Co, 156 N Y S. 693—Welch v. Johnson, 184 P. 280, 93 Or 591, denying rehearing 183 P. 776, 93 Or 591—6 C J. p 650 note 99

Admission of no cause of action in favor of plaintiff is not within the scope of the implied or apparent authority of his attorney.—Lytle v. Crawford, 74 N Y S 660, 69 App Div. 273—Welch v. Johnson, 184 P. 280, 93 Or 591, denying rehearing 183 P 776, 93 Or 591

Admission of liability on part of defendant is not within scope of his attorney's authority in the absence of express authorization—Witt v Carlton Dress Goods Co., 156 N.Y S. 693.

77. Brown v Hebb, 175 A. 602, 167 Md 535, 97 A L R 366.

Admission of liability in compromise negotiations which attorney was employed to conduct for defendant held within the scope of attorney's authority—Brown v. Hebb, 175 A 602, 167 Md 535, 97 A L R 366.

78. Conn—Farley-Harvey Co v. Madden, 136 A. 586, 105 Conn 679—Hillhouse v. Duca, 125 A. 367, 101 Conn 92.

Miss—Planters' Mfg Co v. Greenwood Agency Co, 152 So. 476, 168 Miss 892

N Y.—Yonkers Builders' Supply Co. v. Petro Luciano & Son, 199 N E 45, 269 N Y. 171, reversing 277 N.Y S 648, 243 App Div 783.

However, where both counsel for joint defendants admitted there was negligence on the part of one of defendants but each disclaimed liability on the part of his client, it was held that both defendants were bound by the concession that there was negligence on the part of one of them—Mettie v De Baghian, (N J.) 134 A 738, reversing 126 A 419, 2 N.J Misc 990

Limitation of issues by counsel for one party

Counsel for one party cannot by his own statement not concurred in by counsel for the other party limit the issues as raised by the pleadings of both parties—McCloskey v. Toledo Pressed Steel Co, (C.C.A. Ohio) 30 F (2d) 12, certiorari denied 50 S Ct. 16, 280 U S 536, 74 L. Ed 612.

79. U S—Delaware County Commissioners v. Diebold, (Ind) 10 S Ct. 399, 133 U S 473, 33 L Ed 674.

D C—Berry v Littlefield, Alvord & Co, 54 App D C 195, 296 F 285

6 C J p 650 note 4

80. Cal—Adelstein v Greenberg, 247 P. 520, 77 Cal App 518

Conn—Farley-Harvey Co. v Madden, 136 A 586, 105 Conn 679

Minn—Haydsy v Hammermill Paper Co, 237 N W. 600, 184 Minn 8.

N J—Bankers' Trust Co. of New York v Lobdell, 173 A. 918, 116 N. J Eq 368.

Tex—Reynolds v. McMan Oil & Gas Co, (Com App) 11 S W (2d) 778, reversing (Civ App) 279 S W 939, and rehearing denied (Com App) 14 S.W.(2d) 819.

Utah—In re Hansen's Estate, 184 P 197, 55 Utah 23.

6 C J. p 650 note 2 [b].

81. Ala—Indemnity Co of America v. Bollas, 135 So 174, 223 Ala. 239—Blackwood v Maryland Casualty Co, 137 So 467, 24 Ala App 527.

Cal—Hasman v Canman, 28 P.(2d) 372, 136 Cal App. 91.

mere informalities, technicalities, or irregularities in practice,[82] such as a verification,[83] formal notice of proceedings in a case,[84] the taking of oath by arbitrators,[85] a change of venue,[86] objections to evidence or the manner of taking it,[87] the giving of particular instructions,[88] the making of findings,[89] or an undertaking on appeal.[90] It has also been held that an attorney may waive all but one of several defenses,[91] or some of several grounds of a motion for a new trial,[92] or agree that a certain point shall not be raised at the trial.[93]

The right to a trial by jury in civil cases is usually regarded as a procedural or remedial right which an attorney has the authority to waive under his general employment,[94] unless his client expressly and openly objects to such waiver.[95]

Likewise, it has been held that an attorney has implied authority to waive the right of appeal,[96] but there is other authority to the effect that an attorney has no power to surrender a right of his client so substantial as the right to appeal, unless authority to do so has been expressly conferred,[97] and that he cannot waive errors committed by the court to the prejudice of his client.[98]

§ 101. Matters Not Immediately Connected with Litigation

An employment for matters not immediately connected with litigation gives an attorney only those powers expressly conferred or necessary to the accomplishment of the particular purpose for which he was employed.

Where an attorney is employed for a special or particular purpose, apart from litigation in court, his implied powers are limited to those necessary for the accomplishment of the particular purpose, and are not nearly so broad as those implied from a general retainer to commence, prosecute, and control, a cause until judgment is rendered.[99] Hence the employment of an attorney at law to advise a client in regard to questions of law which may arise in a business transaction, or to handle legal matters, gives the attorney no authority to transact the business of the client generally, or his business in the particular transaction, except as the attorney is specifically authorized to act.[1] An attor-

Ga—National Finance Corporation v Eicholz, 142 S E 134, 165 Ga 799
Ill—Lyman v. Kaul, 113 N.E 944, 275 Ill 11.
Ky—Chapman v. Farris, 242 S W. 359, 195 Ky. 362.
Mo—Krug v Roberts Cone Mfg Co., 250 S W 621, 213 Mo App 628.
N J—Klein v. Boylan, 179 A. 688, 115 N J Law 295—Martin v. Lehigh Valley R Co, 176 A. 665, 114 N J Law 242—Hygrade Cut Fabric Co v U S Stores Corporation, 144 A 605, 105 N.J Law 324—Strauss v Rabe, 127 A 188, 97 N J Eq 208, affirmed 130 A 920, 98 N J Eq 700.
N Y—Hallow v. Hallow, 193 N.Y.S. 460, 200 App Div. 642—Bills v. Baker, 165 N Y S. 171, 178 App Div 480—In re Callahan, 174 N.Y.S. 268, 106 Misc. 202, affirmed 175 N Y.S 896, 188 App Div 944.
N.C—Bizzell v. Auto Tire & Equipment Co, 108 S E 439, 182 N.C. 98
Pa—In re Quest's Estate, 188 A. 137, 324 Pa. 230
Porto Rico.—Bank of San Juan v. Dist Court of San Juan, 32 Porto Rico 774
Tex—Reynolds v. McMan Oil & Gas Co, (Com App.) 11 S.W (2d) 778, reversing (Civ App) 279 S W 939, and rehearing denied (Com.App) 14 S W (2d) 819—Bourland v. Huffhines, (Civ.App) 269 S.W. 184—Sullivan v. State, 204 S.W. 1169, 83 Tex Cr. 477.
Wash—Wagner v. Peshastin Lumber Co, 270 P 1032, 149 Wash. 328
6 C.J. p 647 note 57, p 652 note 29.

82. U.S—Equitable Trust Co. of New York v. Washington-Idaho Water, Light & Power Co, (D C. Wash) 300 F 601.
Ind—Evansville Improvement Co of Vanderburgh County v. Gardner, 128 N E 471, 75 Ind App. 401.
Ky—James v Commonwealth, 247 S.W 945, 197 Ky 577
Ohio—Industrial Commission of Ohio v Kauffman, 164 N.E 510, 119 Ohio St 494
Tex—Jacobs v. State, 213 S.W 628, 85 Tex Cr. 505
6 C J p 641 note 82, p 648 note 69, p 652 note 23

83. Smith v. Mulliken, 2 Minn. 319—6 C J p 648 note 70

84. Kalbritan v Padover, 161 N E 898, 264 Mass 26—6 C J p 652 note 25.

85. Bridgeman v. Gondek, 256 N.Y S 491, 235 App.Div. 129.

86. Terre Haute Brewing Co. v. Ward, 102 N E 395, 56 Ind App 155.

87. Industrial Commission of Ohio v. Kauffman, 164 N E 510, 119 Ohio St. 494—6 C J. p 652 note 26

88. James v. Commonwealth, 247 S. W. 945, 197 Ky 577

89. Johnson v Johnson, 3 P.(2d) 537, 117 Cal App 145

90. Hoffman v. Owens, 103 P. 414, 104 P 241, 31 Nev 481, Ann Cas 1912A 603, overruling Marx v. Lewis, 53 P. 600, 24 Nev 306

91. Bennett v. Thomson, 126 N E. 795, 235 Mass. 462—6 C J. p 652 note 27.

92. O'Malley v. Carrick, 212 P. 45, 60 Cal App. 48.

93. Hammon v. Miller, 13 Tenn.App. 458—6 C J p 649 note 79.

94. Iowa—Shores Co. v Iowa Chemical Co, 268 N W 581
N.Y.—Federal Fuel Co. v. Macy, 223 N Y S. 710, 130 Misc 193
Okl—Voightlander v State ex rel Barnett, 52 P (2d) 60—Neil v. Union Nat Bank of Chandler, 178 P. 659, 72 Okl. 116.
R I—McLyman v. Miller, 161 A. 111, 52 R I 374.
S C—Peterson v. Atlantic Coast Line R. Co, 98 S E 848, 112 S C 89
6 C J. p 648 note 71, p 652 note 28

95. Lyman v. Kaul, 113 N E. 944, 275 Ill 11

96. Cal—Clemens v Gregg, 167 P. 294, 34 Cal App 245.
N Y—In re Brown, 165 N Y S. 736, 178 App Div. 558.
6 C J. p 654 note 54

97. Keoughan v. Equitable Oil Co, 41 So 88, 116 La. 772—6 C J p 654 note 55

98. U S v. Newman, (D C Wash.) 25 F (2d) 337, reversed on other grounds Caldwell v. U. S, (C C A) 28 F.(2d) 634

99. U S—United States v. Sloat, (D. C.N J.) 56 F (2d) 434.
N J—Strauss v Rabe, 130 A. 920, 98 N J Eq 700, affirming 127 A. 188, 97 N J Eq. 208.
N M—Dacus v. Maryland Casualty Co., 55 P (2d) 663
Tex—Bourland v. Huffhines, (Civ App) 269 S W. 184, affirmed Huffhines v Bourland, (Com App) 280 S.W. 561

1. Ill—Lanski v. Chicago Title & Trust Co., 155 N E 296, 324 Ill. 367.

ney employed to advise the vendor in a real estate transaction has no implied or apparent authority to receive the purchase money, accept a deed or mortgage, waive any condition or requirement of the contract, or do any other thing to affect the interest of the client,[2] and an attorney employed by the purchaser to examine abstracts and express his opinion as to the title or to draw a bond and mortgage has no implied authority to waive a stipulation in the contract for merchantable title,[3] or its tender or transfer on a certain date,[4] or to prepare or pass on the sufficiency of a deed,[5] or consent to the inclusion in the deed of a clause whereby his client assumes the payment of an outstanding mortgage.[6]

The relationship of attorney and client for the purpose of having the attorney prepare a contract for the sale of the client's property does not give rise to apparent authority in the attorney to make representations to the purchaser as to the condition of the property to be sold;[7] but he acts within his apparent authority in reporting to the purchaser statements purported to have been made by the client with reference to the premises in a telephone conversation with the attorney.[8]

§ 102. —— Acknowledging Client's Indebtedness

Generally, an attorney has no implied or apparent authority to acknowledge the existence of an indebtedness on the part of his client.

In accordance with the general rule that an attorney has no implied or apparent authority to do acts which will fix a new liability on his client (supra § 79), or to make admissions conceding the latter's liability (supra § 100 b), it is usually held that an attorney has no implied power to bind his client by acknowledging a debt,[9] or the present existence of an indebtedness so as to take a case out of the statute of limitations,[10] or to permit the maintenance of an action on a debt previously discharged in insolvency or bankruptcy.[11] However, an attorney employed to conduct negotiations for a compromise has been held to have the power in such negotiations to acknowledge the existence of the indebtedness so as to avoid the bar of the statute of limitations.[12]

§ 103. —— Binding Client by Contract

An attorney has no implied or apparent authority to enter into a contract imposing a new substantive liability or obligation on his client, except in so far as the contract is necessary, and one ordinarily made by attorneys, to accomplish the purpose of the employment.

Although an attorney of record may make proper stipulations and agreements with respect to procedural matters in the conduct of the suit (supra § 100), the general employment of an attorney for litigation or ordinary legal matters usually gives him no implied or apparent authority to bind his client by a contract imposing a new substantive liability or obligation on the client,[13] except in so far as the contract is reasonably necessary to accom-

Mich—Raridan v. Bick, 242 N.W. 886, 259 Mich. 200.

2. Ill—Lanski v. Chicago Title & Trust Co., 155 N.E. 296, 324 Ill. 367
Md—Stern v. Shapiro, 114 A. 587, 138 Md. 615—Abrams v. Eckenrode, 110 A. 468, 136 Md. 244.
N.J—Strauss v. Rabe, 130 A. 920, 98 N.J.Eq. 700, affirming 127 A. 138, 97 N.J.Eq. 208

3. Bourland v. Huffhines, (Tex.Civ. App.) 269 S.W. 184, affirmed Huffhines v. Bourland, (Com.App.) 280 S.W. 561.

4. Ga.—National Finance Corporation v. Eicholz, 142 S.E. 134, 165 Ga. 799.
N.J.—Rapps v. Tulenko, 140 A. 244, 102 N.J.Eq. 207.
N.Y.—Nichtern v. Johnston, 192 N.Y.S. 784, 200 App.Div. 185.

5. Bourland v. Huffhines, (Tex.Civ. App.) 244 S.W. 347.

6. Stead v. Sampson, (Iowa) 155 N.W. 978.

7. Milkton v. French, 150 A. 28, 159 Md. 126

8. Milkton v. French, supra.

9. U.S.—Robert R. Sizer & Co. v. Chiarello Bros., (D.C.N.Y.) 32 F.(2d) 333
N.D.—McLain v. Nurnberg, 112 N.W. 243, 16 N.D. 144
S.D.—Fulford v. Cleveland, 226 N.W. 789, 55 S.D. 509
6 C.J. p. 656 note 91

10. Butler v. Fechner, (Tex.Civ. App.) 200 S.W. 1126—6 C.J. p. 657 note 92.

11. Houghton v. Ellis, 73 P. 752, 19 Colo.App. 125.

12. Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366

13. U.S.—Northern Pacific Ry. Co. v. Clarke, (Wash.) 106 F. 794, 45 C.C.A. 635
Cal.—Davis v. Mackay, 194 P. 738, 50 Cal.App. 251.
Conn.—Gagner v. Petrauskas, 152 A. 145, 112 Conn. 307.
Del.—Pyle v. Yarowsky, 146 A. 296, 16 Del.Ch. 280
Ill.—Looker v. Buente, 156 N.E. 385, 325 Ill. 402—Makarewicz v. Hoyt Metal Co., 262 Ill.App. 327
Mass.—See v. Norris, 125 N.E. 619, 234 Mass. 345—Smith v. Abbott, 109 N.E. 190, 221 Mass. 326.
Mich.—Raridan v. Bick, 242 N.W. 886, 259 Mich. 200
Nev.—Moore v. De Bernardi, 213 P. 1041, 47 Nev. 33, rehearing denied 220 P. 544, 47 Nev. 33
N.J.—Bentley v. Fidelity & Deposit Co., 69 A. 202, 75 N.J.Law 328, 127 Am.S.R. 837, 15 Ann.Cas. 1178—Callaway v. Equitable Trust Co., 50 A. 900, 67 N.J.Law 44—Falkenstein v. Gibson, 154 A. 876, 108 N.J.Eq. 251, 76 A.L.R. 1457
N.Y.—Rotberg v. Hebron, 157 N.Y.S. 788, 94 Misc. 235
Pa.—Gravle v. Snyder, 159 A. 74, 104 Pa.Super. 253.
Porto Rico—Bank of San Juan v. Dist. Court of San Juan, 32 Porto Rico 774
S.D.—Fulford v. Cleveland, 226 N.W. 739, 55 S.D. 509
Tex.—Anderson v. Oldham, 13 S.W. 557, 82 Tex. 228—Lynch v. Johnson, (Civ.App.) 59 S.W.(2d) 256—Commercial Credit Co. v. Crone, (Civ.App.) 270 S.W. 209—Price v. Logue, (Civ.App.) 164 S.W. 1049—Taylor v. Evans, (Civ.App.) 29 S.W. 172
Wash.—Wagner v. Peshastin Lumber Co., 270 P. 1032, 149 Wash. 328.
6 C.J. p. 657 note 94.

plish the purpose of the employment;[14] and he, of course, has no implied power to bind his client by an agreement collateral to and independent of the subject-matter of his employment.[15] Nor may an attorney, without express authority, alter, modify, or supplement, a contract which has been entered into by the client,[16] although the attorney has been employed to prepare the contract or attend to its fulfillment,[17] unless the client has by his acts or conduct vested the attorney with apparent authority to take such action.[18]

Except where he has been employed for that purpose or has been expressly authorized to do so,[19] an attorney has no authority to bid or contract to purchase property for his client,[20] and employment or authorization to purchase property from a certain person gives the attorney no authority to negotiate for a purchase from another.[21]

Similarly, special authority is generally necessary to entitle the attorney to make contracts or agreements with relation to the client's property,[22] although he has been employed in litigation with respect thereto.[23] In the absence of such authority he cannot sell or contract to sell his client's land,[24] make a lease of the same,[25] or employ a broker to make a sale;[26] but he may agree that, if a foreclosure sale is had pending an appeal, the proceeds shall be deposited in court subject to the final determination of the case.[27]

On the other hand, the employment or retainer of itself gives the attorney the implied or apparent authority to bind the client for the payment of such expenses and services as are properly and reasonably incurred by the attorney in conducting the case or accomplishing the purpose of his employment, although he has not been expressly authorized to charge his client with the amount thereof.[28] In accordance with this, an attorney has been held empowered to bind his client for the payment of the expenses or services of referees,[29] stenographers

Acceptance of deed with assumption clause

A client's instruction to an attorney to draw a deed to property to the client, without specifying the terms which shall be included does not authorize the attorney to draw and accept the execution and delivery to the client of a deed in which the client assumes and agrees to pay an outstanding mortgage on the property—Gagner v Petrauskas, 152 A. 145, 112 Conn. 307.

14. Cal.—Dewing v Chow, 19 P (2d) 12, 129 Cal.App. 441.
Ky—Herfurth v. Horine, 98 S W (2d) 21, 266 Ky 19—Anglo-American Mill Co v Phillips, 32 S W. (2d) 994, 236 Ky 245.
N J—Remington v Lauter Co, 177 A. 359, 13 N J.Misc 209

15. Moore v. De Bernardi, 213 P 1041, 47 Nev 33, rehearing denied 220 P. 544, 47 Nev. 33

16. Iowa—Stead v. Sampson, 155 N.W 973.
Md—Stern v. Shapiro, 114 A. 537, 133 Md 615.
N J—Falkenstein v. Gibson, 154 A 876, 108 N J Eq. 251, 76 A L R. 1457
Tex—Bourland v Huffhines, (Civ App) 269 S W. 134, affirmed Huffhines v Bourland, (Com.App) 280 S.W 561
Wash—Wagner v. Peshastin Lumber Co, 270 P. 1032, 149 Wash. 328

17. Abrams v. Eckenrode, 110 A. 468, 136 Md 244.

18. Fuld v Adams, 156 A. 833, 108 N J.Law 373.

19. Blanton v. Jonesboro Bldg. & Loan Ass'n, 3 S W (2d) 964, 176 Ark 315.

20. N J—Wechsler v. Clarke, 146 A. 786, 7 N J Misc 627.
N Y—McNeill v. Fradus, 157 N Y S 59
6 C.J. p 657 note 95
Authority to bid at judicial sale see supra § 93.

21. McNeill v. Fradus, 157 N Y S 59.

22. Cal—Woerner v Woerner, 152 P. 919, 171 Cal. 298.
Del.—Pyle v Yarowsky, 146 A. 296, 16 Del Ch. 280
Md—Brown v Hogan, 113 A 756, 133 Md 257—Abrams v Eckenrode, 110 A 468, 136 Md 244—Lyon v. Hires, 46 A 935, 91 Md 411.
Neb—Carter v. Miller, 260 N W. 393, 128 Neb 853.
N J.—Rapps v. Tulenko, 140 A. 244, 102 N J Eq. 207.
N.Y—Nichtern v. Johnson, 192 N Y.S. 784, 200 App.Div. 185
Or—Neilson v. Title Guaranty & Surety Co, 199 P. 948, 101 Or. 262
Pa—Irwin Savings & Trust Co v. Sanner, 185 A 876, 123 Pa Super. 70
6 C.J. p 657 note 96.

23. Clark v. Deupree, 7 S.W.(2d) 1, 177 Ark 384

24. Ark—Clark v. Deupree, 7 S.W. (2d) 1, 177 Ark 384.
Cal.—Woerner v. Woerner, 152 P. 919, 171 Cal 298
La—Blythe v. Hall, 126 So. 679, 169 La. 1120
Md—Brown v. Hogan, 113 A. 756, 133 Md 257
Nev—Moore v. De Bernardi, 213 P. 1041, 47 Nev 33, rehearing denied 220 P 544, 47 Nev. 33
Or.—Bliss v. Miller, 250 P 218, 119 Or. 573, rehearing denied 250 P. 763, 119 Or. 573.

Pa—Zellner v Murdoch, 148 A. 109, 298 Pa 208
6 C J p 657 note 97

Attorney to collect rents for landowner, does not have apparent authority to contract to convey her property—Bliss v Miller, 250 P 218, 119 Or. 573, rehearing denied 250 P. 763, 119 Or. 573

25. Carter v. Miller, 260 N.W. 393, 128 Neb 853

26. Gross v. Kincaid, 33 Pa.Super. 514.

27. Halliday v Stuart, (Ark) 14 S. Ct 302, 151 U S 229, 38 L.Ed. 141—6 C.J p 642 note 92

28. Ga—Brady v. Sappington, 151 S E 525, 40 Ga App 781.
Ky—Herfurth v Horine, 98 S W.(2d) 21, 266 Ky. 19—Anglo-American Mill Co v Phillips, 32 S W.(2d) 994, 236 Ky 245.
N J—Klein v. Boyland, 179 A 638, 115 N.J Law 295—Remington v. Lauter Co, 177 A. 359, 13 N.J.Misc. 209.
Pa—Messenger Pub. Co. v. Walkinshaw, 157 A. 13, 102 Pa Super 445—Moxey v. Goldstein, 156 A. 589, 102 Pa Super. 168—Huntzinger v. Devlin, 80 Pa Super 187.
S D.—Fox v William Deering & Co., 64 N W 520, 7 S D 443
Tex—Kersee v Aultman, (Civ.App) 291 S.W 293—McConkey v McConkey, (Civ App) 187 S W 1100, dismissed for want of jurisdiction
Wyo—Kimball Co. v. Payne, 64 P. 673, 9 Wyo 441.
6 C.J. p 642 note 91, p 657 note 99, p 658 note 6.
Personal liability of attorney for expenses see supra § 52.

29. Huntzinger v Devlin, 80 Pa.Super. 187—6 C.J. p 657 note 1.

or reporters,[30] expert witnesses,[31] an accountant,[32] or bookkeeper,[33] the printing of briefs,[34] although not required by rule of court,[35] and the expenses of storing[36] or removing[37] replevied property. The expenses of an authorized appeal are also included within this power of an attorney,[38] but if appellate proceedings have not been expressly authorized, an attorney employed to try a case in the trial court has no power to bind his client to defray the expenses of such proceedings,[39] as he has no authority to maintain them (supra § 95). Moreover a contract for the employment of a private detective has been held beyond the authority of an attorney of record,[40] and the attorney for the petitioner in a proceeding to establish a drainage district has been held to have no implied authority to employ an engineer.[41]

As between the parties the authority of an attorney to bind his client for expenses may be limited by an express contract or agreement providing that they shall be paid by the attorney;[42] but secret limitations do not restrict the attorney's authority as to third persons who furnish services or property in reliance on the attorney's apparent authority to bind his client therefor.[43]

Contracts of indemnity. It has been held that, where a client resides at a distance, an attorney employed to collect debts has implied authority to indemnify an officer.[44] However, it has been held that there is no implied authority to make an indemnity contract, at least where it is practicable for an attorney to consult his client and obtain special directions;[45] and an attorney employed to eject a lessee has no implied authority to agree that the lessee will be indemnified against liability to subtenants if he surrenders the lease.[46]

Bonds. Particularly where there is a statute vesting him with such power,[47] an attorney has often been held to have the implied or apparent authority to bind his client by signing or executing such bonds as the law requires or authorizes in the court of the proceedings which the attorney has been employed to conduct or manage.[48] Accordingly, one empowered to collect a debt has been held to have implied power to execute an attachment bond,[49] and employment to conduct appellate proceedings has been held to give the attorney implied or apparent authority to execute, sign and file a supersedeas or appeal bond.[50]

Other cases, however, have held that the execution of bonds does not fall within the scope of an attorney's implied or apparent authority to bind his client.[51] Hence, unless he has been given express authority to do so by an instrument of equal rank with the bond,[52] an attorney has been held

30. Cal.—Dewing v. Chow, 19 P.(2d) 12, 129 Cal.App. 441
N.J.—Klein v. Boylan, 179 A. 638, 115 N.J.Law 295
Pa.—Huntzinger v. Devlin, 80 Pa.Super. 187
6 C.J. p. 657 note 2.

31. Ga.—Brady v. Sappington, 151 S.E. 525, 40 Ga.App. 781
Ky.—Herfurth v. Horine, 98 S.W.(2d) 21, 266 Ky. 19
N.J.—Klein v. Boylan, 179 A. 638, 115 N.J.Law 295—Klein v. Boylan, 184 A. 736, 14 N.J.Misc. 323.
Pa.—Huntzinger v. Devlin, 80 Pa.Super. 187
6 C.J. p. 657 note 2.

Medical witness in will contest
An attorney employed to conduct a will contest on the ground of lack of mental capacity has apparent authority to employ medical witnesses as such witnesses are usually employed in such cases.—Herfurth v. Horine, 98 S.W.(2d) 21, 266 Ky. 19.

32. Moxey v. Goldstein, 156 A. 539, 102 Pa.Super. 168.

33. Huntzinger v. Devlin, 80 Pa.Super. 187—6 C.J. p. 657 note 4.

34. Mo.—Inland Printing & Binding Co. v. Elam, (App.) 240 S.W. 822—Mendenhall v. Sherman, 187 S.W. 271, 193 Mo.App. 684.
Pa.—Messenger Publishing Co. v. Walkinshaw, 157 A. 18, 102 Pa.Super. 415—Huntzinger v. Devlin, 80 Pa.Super. 187
6 C.J. p. 657 note 5.

35. N.J.—Klein v. Boylan, 179 A. 638, 115 N.J.Law 295
Pa.—Huntzinger v. Devlin, 80 Pa.Super. 187
6 C.J. p. 657 note 5.

36. Anglo-American Mill Co. v. Phillips, 32 S.W.(2d) 994, 236 Ky. 245.

37. Fox v. William Deering & Co., 64 N.W. 520, 7 S.D. 443.

38. Granier v. Louisiana Western R. Co., 8 So. 614, 42 La.Ann. 880.

39. Morgan v. Krook, 283 P. 287, 36 Ariz. 133—6 C.J. p. 653 note 45.

Fees for preparation of transcript
Under the rule of the text, the attorney cannot bind his client to pay stenographer's or reporter's fees for services rendered at the instance of the attorney in preparing a transcript to be used in the appellate court.—Morgan v. Krook, 283 P. 287, 36 Ariz. 133—6 C.J. p. 653 note 45.

40. Davis v. Mackay, 194 P. 738, 50 Cal.App. 251.

41. Looker v. Buente, 156 N.E. 385, 325 Ill. 402.

42. Forbes v. Chicago, etc., R. Co., 129 N.W. 810, 150 Iowa 177, Ann.Cas.1912D 311.

43. Ga.—Brady v. Sappington, 151 S.E. 525, 40 Ga.App. 781
Ky.—Herfurth v. Horine, 98 S.W.(2d) 21, 266 Ky. 19.

44. Schoregge v. Gordon, 13 N.W. 194, 29 Minn. 367—6 C.J. p. 658 note 11.

45. Fidelity & Deposit Co. of Maryland v. Burden, (C.C.A.N.Y.) 30 F.(2d) 610, certiorari denied 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 616—6 C.J. p. 658 note 12.

46. Smith v. Abbott, 109 N.E. 190, 221 Mass. 326.

47. Ramsay v. Tacoma Land Co., 71 P. 1024, 31 Wash. 351—6 C.J. p. 658 note 25.

48. Heyer v. Hines, 252 P. 1028, 36 Wyo. 53.

49. Fornes v. Wright, 59 N.W. 51, 91 Iowa 392—6 C.J. p. 169 note 30, p. 658 note 23.

50. Heyer v. Hines, 252 P. 1028, 36 Wyo. 53—6 C.J. p. 658 note 14.

51. Fidelity & Deposit Co. of Maryland v. Burden, (C.C.A.N.Y.) 30 F.(2d) 610, certiorari denied 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 616—6 C.J. p. 169 note 31 [b], p. 658 note 15.

52. U. S. Fidelity, etc., Co. v. Etten-

to lack the authority to sign or execute on behalf of his client a replevin,[53] injunction,[54] stay,[55] indemnity,[56] or appeal or supersedeas,[57] bond.

§ 104. —— Disposition of Client's Money or Other Property

Without express authority an attorney generally has no power to dispose of, or transfer, his client's money or other property.

Unless he has been specially authorized or employed to make some other disposition of it,[58] an attorney generally has no authority to dispose of his client's money in any other way than by turning it over to the client.[59] Nor has he any implied authority to assign a judgment (supra § 93), or to transfer or dispose of other property or rights of the client;[60] and express authority to transfer or dispose of the client's property gives him no power to do so except upon receipt of the full purchase price or consideration to be given therefor.[61]

Accordingly, it is usually held that an attorney having charge of a claim, obligation, or security, of his client, for purposes of collection or enforcement has no power to sell, transfer, or assign, it to another,[62] whether for a consideration received for the benefit of the client,[63] or in payment of the attorney's own personal debt,[64] although, as noted elsewhere, he may receive payment on the claim or obligation (infra § 106) or on a judgment which has been recovered thereon (supra § 99). Moreover, a power of attorney giving an attorney authority to bring suit on a note, execute a cost bond in the name of the client, and do other acts necessary, gives the attorney no authority to sell the note to a third person at a discount.[65]

An assignment of the client's property for the benefit of creditors may be made by the attorney where he has been expressly authorized to do so,[66] unless the statute under which the assignment is made requires it to be done by the debtor personally.[67]

An exchange of securities held by the client for other securities is not within the implied or apparent authority of an attorney employed to collect or enforce the debt secured.[68]

heimer, 99 N.W. 652, 70 Neb. 147, 113 Am.S.R. 783—6 C.J. p. 169 note 31 [d] (2), p. 658 note 17.

53. Narragaugus v. Wentworth, 36 Me. 339.

54. Gauthier v. Gardenal, 11 So. 463, 44 La.Ann. 884—6 C.J. p. 658 note 20.

55. Anderson v. Hendrickson, 95 N.W. 844, 1 Neb.(Unoff.) 610.

56. Fidelity & Deposit Co. of Maryland v. Burden, (C.C.A.N.Y.) 30 F.(2d) 610, certiorari denied 50 S.Ct. 19, 280 U.S. 562, 74 L.Ed. 616—6 C.J. p. 658 note 22.

57. Fidelity & Deposit Co. of Maryland v. Burden, supra—6 C.J. p. 658 note 16.

58. Mass.—Inhabitants of Town of Wayland v. Child, 157 N.E. 615, 260 Mass. 469.

N.Y.—Adams v. Garsillo, 279 N.Y.S. 398, 155 Misc. 358.

59. Gordon v. Harrison, 161 A. 608, 105 Pa.Super. 513—6 C.J. p. 658 note 26.

Duty of attorney to account for moneys received and to pay such moneys see infra § 133.

Liability of attorney for commingling or depositing funds collected but not paid over see infra § 139.

60. Cal.—Woerner v. Woerner, 152 P. 919, 171 Cal. 398—Wilkinson v. Zumwalt, 297 P. 94, 112 Cal.App. 416.

La.—G. A. Wiegand & Co. v. Villemeur, 136 So. 105, 17 La.App. 457.

Md.—Shirk v. Cornell, 111 A. 217, 136 Md. 390.

N.Y.—Elmhorst v. Mazuroff, 157 N.Y.S. 578, 93 Misc. 656, reversed 161 N.Y.S. 1029, 176 App.Div. 145.

Or.—Neilson v. Title Guaranty & Surety Co., 199 P. 948, 101 Or. 262

Pa.—Williams v. Cook, 137 A. 232, 289 Pa. 207—In re Berberich's Estate, 101 A. 461, 257 Pa. 181—Harvey v. Schuylkill Ins., etc., Co., 24 Pa.Co. 593.

6 C.J. p. 657 note 98—p. 658 note 28.

Bond and mortgage obtained by fraud

An attorney has no authority to sell a bond and mortgage which he has obtained from his client by fraudulent representations, even to an innocent purchaser.—Elmhorst v. Mazuroff, 157 N.Y.S. 578, 93 Misc. 656, reversed 161 N.Y.S. 1029, 176 App. Div. 145.

Power to contract for sale of client's property see supra § 103.

61. Ky.—Harding v. Kentucky River Hardwood Co., 265 S.W. 429, 205 Ky. 1.

R.I.—Hale v. McGauley, 147 A. 389.

Delivering deeds without payment

An attorney in whose hands have been placed the sale of real estate and the management of the proceeds of such sale has no authority to deliver deeds to said real estate without receipt of the full purchase price therefor.—Hale v. McGauley, (R.I.) 147 A. 389.

Sale of note at greater discount than expressly authorized is without the scope of the attorney's authority.—Harding v. Kentucky River Hardwood Co., 265 S.W. 429, 205 Ky. 1.

62. Ky.—Harding v. Kentucky River Hardwood Co., supra.

Md.—Shirk v. Cornell, 111 A. 217, 136 Md. 390.

N.J.—Leithoff v. Dennis, 98 A. 242, 86 N.J.Eq. 316—Brewster v. Entz, 97 A. 156, 85 N.J.Eq. 469, affirmed 98 A. 1084, 86 N.J.Eq. 342.

Pa.—Williams v. Cook, 137 A. 232, 289 Pa. 207.

6 C.J. p. 657 note 98, p. 658 note 29.

Bonds and mortgages.—Leithoff v. Dennis, 98 A. 242, 86 N.J.Eq. 316—Brewster v. Entz, 97 A. 156, 85 N.J.Eq. 469, affirmed 98 A. 1084, 86 N.J.Eq. 342—Williams v. Cook, 137 A. 232, 289 Pa. 207.

Leaving papers or securities in hands of attorney as negligence estopping client from asserting lack of authority as against transferee see Estoppel § 106 [21 C.J. p. 1178 note 17 [b] (4)].

63. McClintock v. Helberg, 48 N.E. 145, 168 Ill. 384, affirming 64 Ill.App. 190—6 C.J. p. 658 note 29.

64. Craig v. Ely, 5 Stew. & P.(Ala.) 354—6 C.J. p. 659 note 30.

65. Harding v. Kentucky River Hardwood Co., 265 S.W. 429, 205 Ky. 1.

66. Lowenstein v. Flauraud, 82 N.Y. 494—5 C.J. p. 1050 note 45.

67. Minneapolis Trust Co. v. School Dist. No. 5, 71 N.W. 679, 68 Minn. 414.

68. Commercial Credit Co. v. Crone, (Tex.Civ.App.) 270 S.W. 209—6 C.J. p. 659 note 36.

Indorsement of negotiable instruments. As a general rule an attorney can indorse his client's name to negotiable instruments payable to the order of his client only when he has been expressly authorized to do so.[69] Under this rule, it has even been held that the authority of an attorney to collect or receive payment on a claim or judgment gives him no implied power to indorse and cash a check received from the debtor and payable to the order of the client,[70] although the attorney is a joint payee of the check,[71] or he has the right to retain his commissions or fees from the proceeds of the check,[72] and, of course, an attorney has no implied authority to indorse a check payable to the order of his client which has been given in payment of a debt or obligation the attorney has no authority to collect.[73] In some cases, however, the power to make an indorsement has been implied where it is a mere matter of form to enable the attorney to effect the purpose for which he was employed by the client;[74] and, where an attorney having authority to obtain payment of a claim or judgment receives from the debtor a check payable to the order of the client, which the attorney has no authority to accept in payment of the debt (infra § 106), it is frequently held that the attorney has implied authority to indorse the check in order to collect the same and thereby obtain an ultimate payment in cash which is within his authority and will bind the client.[75]

If an attorney has authority to indorse a check payable to his client he has apparent authority to deposit the proceeds thereof either in his individual account or his account as attorney.[76]

§ 105. —— Settlement, Compromise and Release

a. Compromise or settlement
b. Release

a. Compromise or Settlement

Although the client himself may practically always do so, ordinarily an attorney can settle or compromise his client's rights, claims, or cause of action, only when he has been expressly authorized, unless the client by acts or conduct beyond the mere employment or retainer has conferred apparent authority upon the attorney, or a case of emergency is presented in which prompt action is necessary to protect the interests of the client.

As the implied or apparent authority of an attorney ordinarily does not extend to the client's substantial rights or the subject matter of the cause of action (supra §§ 79, 80), it is a well settled general rule that the ordinary employment or retainer of an attorney to represent a client with respect to litigation or other matters does not of itself give the attorney the implied or apparent authority to bind his client by a settlement or compromise of the cause of action, claim, or other matter or right, with respect to which he was employed, and that in the absence of express authority he cannot do so.[77] Originally, however, there was some doubt

69. U.S—U. S. v. Sloat, (D C N J.) 56 F (2d) 434.
Ill—Crahe v Mercantile Trust & Savings Bank, 129 N E 120, 295 Ill. 375, 12 A L R 92.
Md—Forest Hill Permanent Bldg Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666
Minn—Rosacker v. Commercial State Bank, 254 N W. 824, 91 Minn. 553, 94 A L R. 551.
Vt—Nason v Addison County Trust Co, 157 A. 821, 104 Vt. 183.
6 C.J. p 659 note 32.

Authority to indorse draft in payment of compensation award expressly conferred.—Washita County Gin Co v. Colbert, (Okl) 54 P.(2d) 640.

Check given for loan

An attorney authorized to obtain a loan has no implied authority to indorse and collect a check drawn to the client's order for the loan—Forest Hill Permanent Bldg. Ass'n of Harford County v. Fisher, 118 A. 164, 140 Md. 666.

70. Ill.—Crahe v. Mercantile Trust & Savings Bank, 129 N.E. 120, 295 Ill. 375, 12 A.L.R. 92.
Minn.—Rosacker v. Commercial State Bank, 254 N W. 824, 91 Minn. 553, 94 A.L.R. 551.
Vt—Nason v. Addison County Trust Co., 157 A. 821, 104 Vt. 183.

Express authority always necessary

"In the past some attorneys have acted upon the assumption that the general employment of an attorney in a particular matter authorises him to indorse his client's signature on checks made payable to the order of the client which are received by him in the course of his client's business, and to cash the same. This assumption is not warranted. . . . His general employment does not authorize him to indorse his client's signature on checks which are so received, that is an act which requires special authorization"—Nason v Addison County Trust Co., 157 A. 821, 823, 104 Vt 183.

71. Crahe v. Mercantile Trust & Savings Bank, 129 N.E. 120, 295 Ill. 375, 12 A.L.R. 92.

72. Ill.—Crahe v. Mercantile Trust & Savings Bank, supra
Minn.—Rosacker v. Commercial State Bank, 254 N W. 824, 91 Minn. 553, 94 A.L.R 551.
Vt—Nason v. Addison County Trust Co., 157 A. 821, 104 Vt. 183.

73. Dacus v. Maryland Casualty Co., (N M.) 55 P.(2d) 663.

74. Ill—North End Paper Co. v. State Bank of Chicago, 198 Ill App 242
Ind.—Brown v. Grimes, 129 N E 483, 74 Ind App. 655.
Mo—McCully v Kelley-Dempsey Co., 57 S W (2d) 784, 227 Mo.App 775
6 C J. p 659 note 34.

75. U S—Bailey v. U. S, (C C A Ariz) 13 F (2d) 825, 827.
Ga.—Patterson v. Southern Ry. Co, 151 S E. 818, 41 Ga App. 94
Ind.—Brown v Grimes, 129 N E 483, 74 Ind App. 655.
Mo—McCully v. Kelley-Dempsey Co, 57 S.W.(2d) 784, 227 Mo.App 775.
6 C J p 659 note 34.

"The plaintiff in error was employed as an attorney to collect certain claims against the government; he had undoubted authority to receive payment in cash or money, and, having received instead a check payable to his client, under the great weight of authority he had implied authority to indorse and cash the check."—Bailey v. U. S, supra.

76. Charleston Paint Co. v. Exchange Banking & Trust Co., (S C.) 123 S E. 830, 129 S.E. 290.

77. U S.—U. S. v. Beebe, (Ala.) 21 S.Ct. 371, 180 U.S. 343, 45 L.Ed. 563,

as to this rule in a few jurisdictions,[78] and, as shown in § 86 supra, there still is some difference of opinion as to the power of the attorney to bind his client where a compromise or settlement made without express authority in the conduct of legal proceedings has resulted in an order or judgment of the court.

The attorney's lack of authority to make a compromise or settlement even more clearly and affirmatively appears where the client has expressly denied him such authority and the court or the adverse party has notice or knowledge of that fact;[79] or where the attempted compromise or settlement relates to a suit or matter which is col-

132 Am S R 163 note, 76 Am D 261 note—Hilditch v American Bumper Corporation, (D C N Y) 15 F (2d) 451—Farmers Bank & Trust Co v Public Service Co of Indiana, (D C Ky) 13 F Supp 548—Barber-Colman Co. v. Magnano Corporation, (C C A Mass) 299 F 401—General Electric Co. v Brite-Lite Lamp Co, (D C R I) 290 F. 967.

Ala.—National Bread Co. v Bird, 145 So 462, 226 Ala 40—Craft v. Standard Accident Ins Co, 123 So 271, 220 Ala 6, granting certiorari 123 So 265, 23 Ala App 246—Cowgill & Son v. Bozeman, 79 So 305, 202 Ala 7—Lockhart v. Wyatt, 10 Ala. 231, 44 Am D 481.

Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz 149—Southern Surety Co v. City of Prescott, 221 P 834, 26 Ariz 66

Cal.—Woerner v Woerner, 153 P 919, 171 Cal 298—Jones v Noble, 39 P (2d) 486, 3 Cal.App (2d) 316—Burns v. McCain, 290 P. 623, 107 Cal App 291.

Colo.—Lewis v. Vache, 20 P (2d) 554, 92 Colo 358.

Idaho.—Evans v Power County, 1 P (2d) 614, 50 Idaho 690—Storey v. United States Fidelity & Guaranty Co of Baltimore, Md, 183 P. 990, 32 Idaho 388.

Ill.—Village of Dolton v S Ellen Dolton Estate, 162 N E 214, 331 Ill 88—Allinson v. Pierson, 120 N. E 779, 285 Ill 387—Treece v Reinhart-Smith Grocer Co, 197 Ill App 40

Iowa.—Vaughan v. District Court of Jasper County, 226 N.W. 49—Nothem v. Vonderharr, 175 N W 967, 189 Iowa 43

Ky.—Jenkins v City of Bowling Green, 88 S W.(2d) 692, 261 Ky 679—Louisville & N R. Co v. King, 288 S.W. 733, 216 Ky. 736—Mason v. Cook, 218 S W. 740, 187 Ky. 260—Sowards v. Hereford, 7 Ky.Op 475—Lawson v. Wright, 3 Ky Op. 352

La.—Milburn v. Wemple, 101 So. 132, 156 La 759—Rogers v. Blitz, (App) 161 So. 613—Van Vleet Mansfield Drug Co v. Anders, (App.) 157 So 166—Phillips-Jones Corporation v. Caskey, 128 So 553, 14 La App 26—Phillips-Jones Corp v Caskey, 127 So. 46, 13 La App. 675—Hotard v. Perrilloux, 8 La. App. 476.

Mass.—Precious v. O'Rourke, 170 N. E. 110, 270 Mass. 305.

Mich.—People's State Bank for Savings v Bloch, 227 N.W. 778, 249 Mich 99

Minn.—Hernlund v Town & Country Motors, 198 N.W 662, 159 Minn. 125—Matteson v Blaisdell, 182 N. W. 442, 148 Minn 352

Mo.—Shank v St. Louis-San Francisco Ry Co, (App) 11 S W (2d) 1063—Parr v Chicago, B & Q R Co., 184 S W 1169, 194 Mo App. 416

N J.—Hygrade Cut Fabric Co v U. S Stores Corporation, 141 A 605, 105 N J Law 334—Superior Finance Corporation v John A McCrane Motors, 168 A. 774, 11 N J Misc 857, affirmed 174 A 891, 113 N.J Law 514

N Y.—Appleton v Greenfield, 278 N. Y S 367, 244 App Div 732—Countryman v Breen, 271 N Y S. 744, 241 App Div 892, reversing 268 N Y S 609, 147 Misc 246, affirmed 198 N E 536, 268 N Y 643—Schneider v Abrams, 238 N Y S 351, 228 App. Div 1—Sherman & Sons Co v Princess Shirt Waist Mfg Co, 210 N Y S 100, 213 App Div 140—City of Syracuse v Standard Accident Ins Co of Detroit, Mich, 205 N.Y. S 437, 210 App Div 165—In re Strandburg's Estate, 247 N.Y S 194, 138 Misc 732, modified on other grounds 248 N Y S 164, 138 Misc 870—Curran v F & M Schaefer Brewing Co, 154 N Y S 199, 91 Misc 29

N C.—Deitz v Bolch, 183 S E 884, 209 N C 202—Bissell v Auto Tire & Equipment Co, 108 S E. 439, 182 N C 98—Chemical Co v Bass, 95 S E 766, 175 N C. 426—Chavis v. Brown, 93 S E 471, 147 N C 122

N D.—Business Service Collection Bureau v Yegen, 269 N W 46

Okl.—Walker v Gulf Pipe Line Co, 226 P. 1046, 102 Okl 7—Bush v. Missouri State Life Ins. Co., 224 P. 331, 98 Okl 110—Incorporated Town of Wainwright v. Eureka Fire Hose Mfg Co, 218 P. 306, 92 Okl. 75—Vinson v Davis, 183 P. 902, 76 Okl 43—Massachusetts Bonding & Ins Co v. Vance, 180 P. 693, 74 Okl 261, 15 A L R 981—First State Bank of Indiahoma v. Carr, 180 P 856, 72 Okl 262—Hamberger v White, 154 P 576, 54 Okl. 736—Scott v Moore, 152 P 823, 52 Okl 200.

Or.—Hill v Wilson, 250 P. 340, 119 Or. 636—Seaweard v. De Armond, 198 P. 916, 101 Or. 30.

Pa.—In re Quest's Estate, 188 A. 137, 324 Pa 230—McLaughlin v. Monaghan, 138 A 79, 290 Pa 74—Ramsdell Packing Co. v. Cohen, 14 Pa. Dist & Co. 791.

S C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E 867, 164 S C. 80

Tex.—Dunlap v Villareal, (Civ App) 91 S W.(2d) 1124—McMillan v. McMillan, (Civ App) 72 S W (2d) 611—State Life Ins Co v. Duke, (Civ. App.) 69 S W (2d) 791, error refused—Kreis v Kreis, (Civ.App) 57 S W (2d) 1107.

Utah.—Bivans v Utah Lake Land, Water & Power Co, 174 P. 1126, 53 Utah 601

Va.—Dawson v Hotchkiss, 169 S E 564, 160 Va. 577—Singer Sewing Mach Co v Ferrell, 132 S E. 312, 144 Va. 395.

Wash.—Barton v Tombari, 207 P 239, 120 Wash. 331

W Va.—Dwight v. Haslett, 147 S E 877, 107 W Va 192, 66 A L R 102

Wyo.—State v Young, 7 P (2d) 216, 44 Wyo 6, 81 A L R 114

1 C J p 539 notes 69, 70—6 C J. p 643 note 5, p 659 note 40, p 660 note 41.

"The great weight of authority throughout the United States is to the effect that an attorney cannot settle a suit and conclude his client in relation to the subject in litigation without the client's consent"—U. S. v Beebe, (Ala) 21 S.Ct. 371, 180 U S 343, 345, 352, 45 L Ed 563, 132 Am. S R 163 note, 76 Am D 261 note

Acceptance of less than full amount or something other than money in full satisfaction of debt see infra § 106

Authority of city attorney or corporation counsel to compromise a pending action see Municipal Corporations § 2197 [44 C J p 1460 notes 35, 36].

78. Brewer v. Casey, 82 N E. 45, 196 Mass 334—6 C J. p 659 note 39

79. Cal.—Broecker v. Moxley, 28 P (2d) 409, 136 Cal App. 248—Burns v McCain, 290 P. 623, 107 Cal App 291.

Ga.—Evans v. Brooke, 184 S.E 800—Patterson v Georgia Gravel Co, 108 S E 237, 151 Ga. 813—Davis v First National Bank of Blakely, 78 S E. 190, 139 Ga. 702, 46 L.R.A. (N S.) 750.

Tex.—McMillan v. McMillan, (Civ. App) 72 S W (2d) 611—Lane v. Mitchell, (Civ.App) 289 S.W. 195

lateral to, or not within the scope of, the attorney's employment.[80]

If the attorney has attempted to make a compromise or settlement without express authority the client may usually ignore the same, in so far as the client's claim has not actually been paid in full by payment to the attorney thereunder, and proceed as if it had never been made,[81] or else have the same set aside in proper proceedings,[82] unless he has ratified the attorney's unauthorized act or acquiesced therein for an undue length of time, as noted in § 71 supra.

No authority for an attorney to make a compromise or settlement is to be derived from the fact that it is the wisest or most expedient course to pursue,[83] or that the failure to compromise will entail considerable expense to the client;[84] and it is in no way incumbent upon the client to show that the settlement was improvident.[85]

In emergency. Notwithstanding the general rule above stated, a number of cases have recognized an exception thereto which permits an attorney to compromise or settle without express authority when he is confronted by an emergency, which requires prompt action to protect the interests of the client, and the situation is such that consultation with the latter is impossible.[86] This exception, however, cannot be availed of to vest the attorney with power to compromise or settle where no emergency exists in fact,[87] where the client has given the attorney express instructions not to compromise,[88] where the settlement is not necessary for the protection of the client's interests,[89] or where there is time and opportunity to consult with the client.[90]

Executory agreements to compromise a case fall within the general rule that an attorney cannot bind his client by contract or a compromise or settlement without express authority.[91]

80. U.S.—Barber-Colman Co. v. Magnano Corporation, (C.C.A.Mass.) 299 F. 401—Miocene Ditch Co. v. Moore, (Alaska) 150 F. 433, 80 C.C.A. 301.
Idaho—Storey v. United States Fidelity & Guaranty Co. of Baltimore, Md., 183 P. 990, 32 Idaho 388.
Ill.—Allinson v. Pierson, 120 N.E. 779, 285 Ill. 387.
6 C.J. p. 660 note 44.

81. Cal.—Jones v. Noble, 39 P.(2d) 486, 3 Cal.App.(2d) 316.
Iowa.—Nothem v. Vonderhaar, 175 N.W. 967, 189 Iowa 43.
La.—Phillips-Jones Corporation v. Caskey, 128 So. 553, 14 La.App. 26, denying rehearing 127 So. 46, 13 La.App. 675.
N.Y.—Sherman & Sons Co. v. Princess Shirt Waist Mfg. Co., 210 N.Y.S. 100, 213 App.Div. 140.
Okl.—Incorporated Town of Wainwright v. Eureka Fire Hose Mfg. Co., 218 P. 306, 92 Okl. 75—Hamberger v. White, 154 P. 576, 54 Okl. 736.
Or.—Seaweard v. De Armond, 198 P. 916, 101 Or. 30.
Va.—Dawson v. Hotchkiss, 169 S.E. 564, 160 Va. 577.
Wyo.—State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114.
6 C.J. p. 660 note 42.

82. Ala.—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40.
Cal.—Jones v. Noble, 39 P.(2d) 486, 3 Cal.App.(2d) 316—Faias v. Superior Court, 24 P.(2d) 567, 133 Cal.App. 525.
Colo.—Lewis v. Vache, 20 P.(2d) 554, 92 Colo. 358.
Ga.—Patterson v. Georgia Gravel Co., 103 S.E. 237, 151 Ga. 813.
Ky.—Melton v. Kemp, 273 S.W. 488, 209 Ky. 672.
Mass.—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305.
Minn.—Seifert v. Gallet, 198 N.W. 664, 159 Minn. 131—Hernlund v. Town & Country Motors, Inc., 198 N.W. 662, 159 Minn. 125.
Mont.—McGinley v. Maryland Casualty Co. of Baltimore, 277 P. 414, 85 Mont. 1.
N.J.—Hygrade Cut Fabric Co. v. U.S. Stores Corporation, 144 A. 605, 105 N.J.Law 324.
N.Y.—Schneider v. Abrams, 238 N.Y.S. 351, 228 App.Div. 1—In re Strandburg's Estate, 247 N.Y.S. 194, 138 Misc. 732, modified on other grounds 248 N.Y.S. 164, 138 Misc. 859.
N.C.—Bissell v. Auto & Tire Equipment Co., 108 S.E. 439, 182 N.C. 93.
Okl.—Walker v. Gulf Pipe Line Co., 226 P. 1046, 103 Okl. 7—Turner v. Fleming, 130 P. 551, 37 Okl. 75, 45 L.R.A.(N.S.) 265, Ann.Cas.1915B 831.
Tenn.—Memphis Cotton Press & Storage Co. v. Hanson, 4 Tenn.App. 293.
Tex.—McMillan v. McMillan, (Civ.App.) 72 S.W.(2d) 611.
Va.—Dawson v. Hotchkiss, 169 S.E. 564, 160 Va. 577.
W.Va.—Dwight v. Haslett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.
6 C.J. p. 660 note 43.
Setting aside of consent judgment based on unauthorized compromise of attorney see Judgments § 330 [34 C.J. p. 420 note 81].

83. Seifert v. Gallet, 198 N.W. 664, 159 Minn. 131.

84. Lewis v. Vache, 20 P.(2d) 554, 92 Colo. 358.

85. Seifert v. Gallet, 198 N.W. 664, 159 Minn. 131.

86. Colo.—Lewis v. Vache, 20 P.(2d) 554, 92 Colo. 358.
Ky.—Jenkins v. City of Bowling Green, 88 S.W.(2d) 692, 261 Ky. 679.
Minn.—Matteson v. Blaisdell, 182 N.W. 442, 148 Minn. 352.
6 C.J. p. 660 note 46.

87. Colo.—Lewis v. Vache, 20 P.(2d) 554, 92 Colo. 358.
Ky.—Jenkins v. City of Bowling Green, 88 S.W.(2d) 692, 261 Ky. 679.
Court's abuse of discretion in denying continuance to which client is justly entitled does not present an emergency entitling the attorney to compromise without express authority.—Lewis v. Vache, 20 P.(2d) 554, 92 Colo. 358.

88. Lewis v. Vache, supra.

89. Gibson v. Nelson, 126 N.W. 731, 111 Minn. 183, 137 Am.S.R. 549, 31 L.R.A.(N.S.) 533—6 C.J. p. 660 note 46 [a].

90. Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63—6 C.J. p. 660 note 46 [b].

91. Cal.—Burns v. McCain, 290 P. 623, 107 Cal.App. 291.
Ky.—Melton v. Kamp, 273 S.W. 488, 209 Ky. 672.
Va.—Dawson v. Hotchkiss, 169 S.E. 564, 160 Va. 577.
6 C.J. p. 660 note 45.
Specific performance of compromise agreements generally see Specific Performance § 88 [12 C.J. p. 861 note 80—p. 862 note 85].

The giving of consent to an assignment for benefit of creditors, when it is in the nature of a compromise, is ordinarily not within the authority of a creditor's attorney,[92] unless he has been expressly authorized to take such action.[93]

An employment for the purpose of adjusting or settling the affairs of the client in its nature gives the attorney the implied authority to enter into a compromise or settlement binding upon his client.[94]

Apparent authority. If there has been nothing beyond a mere employment or retainer of the attorney to represent the client in a cause the attorney, as noted above, thereby acquires no apparent authority to make a compromise or settlement, and if the attorney seeks to do so it is incumbent upon the opposing party to ascertain at his peril whether actual authority to take such action has been conferred upon the attorney.[95] In other words, if the client has not held his attorney out to the opposing party as having any other or greater power than an attorney authorized to take charge of litigation for a client commonly has, such other party is charged with knowledge that agreements of compromise or settlement do not come within the implied authority of the attorney;[96] and it is open to the client to show any restrictions or limitations that may have been placed on the attorney's authority to compromise.[97] Nevertheless, if the client has, by acts or conduct beyond an ordinary employment or retainer, held his attorney as having the power to compromise or settle the attorney thereby acquires the apparent authority to bind the client by any compromise or settlement which is not fraudulent or intrinsically unfair;[98] and this, although the attorney has in fact exceeded limitations or restrictions upon his authority which were not communicated or made known to the opposing party or his attorney,[99] unless the compromise is still an uncompleted executory agreement which has not been acted on by the opposing party so that he will in no way be prejudiced by the assertion of the secret limitation.[1]

Special or express authority. An attorney who has been expressly authorized to take such action has the power to bind his client by a compromise or settlement if it is not fraudulent or grossly unfair;[2] and even fraud of the attorney does not lessen his authority to bind the client if it is unknown to the adverse party.[3]

However, the intent to permit the attorney to enter into a compromise or settlement must be clearly apparent from the terms of the authority granted,[4] and any limitations or restrictions which have expressly been placed upon the power to compromise or settle are operative and must be observed,[5] unless, as previously noted above, the restrictions or limitations are secret ones and the client has vested the attorney with apparent au-

92. Doyle v. Barnes, 4 Gill (Md.) 1—6 C.J. p 659 note 40 [b] (1).

93. Hewitt v. Darlington Phosphate Co., 20 S.E. 804, 43 S.C. 5—5 C.J. p 1064 note 17—6 C.J. p 659 note 40 [b] (2).

94. Waterproof Paper & Board Co. v. Van Buren, 197 N.W. 338, 182 Wis. 640—6 C.J. p 661 note 47.

95. Mass.—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305.
Minn.—Gibson v. Nelson, 126 N.W. 731, 111 Minn. 183, 137 Am.S.R. 519, 31 L.R.A.(N.S.) 523.
Okl.—Hamberger v. White, 154 P. 576, 54 Okl. 736.
Tex.—Commercial Credit Co. v. Crone, (Civ.App.) 270 S.W. 209.

96. Mass.—Precious v. O'Rourke, 170 N.E. 110, 270 Mass. 305.
N.Y.—City of Syracuse v. Standard Accident Ins. Co. of Detroit, Mich., 205 N.Y.S. 437, 210 App.Div. 165.

97. Cal.—Burns v. McCain, 290 P. 623, 107 Cal.App. 291.
N.Y.—City of Syracuse v. Standard Accident Ins. Co. of Detroit, Mich., 205 N.Y.S. 437, 210 App.Div. 165.
Okl.—Hamberger v. White, 154 P. 576, 54 Okl. 736.

98. Ga.—Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94.
Va.—Singer Sewing Mach. Co. v. Ferrell, 132 S.E. 312, 144 Va. 395—Lysle Milling Co. v. Holt & Co., 95 S.E. 414, 122 Va. 565.
6 C.J. p 661 note 49—p 662 note 52.

99. N.Y.—Curran v. F. & M. Schaefer Brewing Co., 154 N.Y.S. 199, 91 Misc. 29.
Va.—Singer Sewing Machine Co. v. Ferrell, 132 S.E. 312, 144 Va. 395.
6 C.J. p 662 note 52.

1. Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

2. U.S.—Utah Power & Light Co. v. U. S., (C.C.A.) 42 F.(2d) 304.
Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149.
Cal.—Jones v. Noble, 39 P.(2d) 486, 3 Cal.App.(2d) 316.
Fla.—Johnston v. Cox, 154 So. 208, 114 Fla. 248.
Ga.—Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94.
Ind.—Loeser v. Loeser, 183 N.E. 540, 98 Ind.App. 150.
Iowa—Ft. Dodge Lumber Co. v. Rogusch, 187 N.W. 189, 178 Iowa 475.
Mich.—Butrowska v. Landolfo, 238 N.W. 207, 255 Mich. 377.
Mo.—Allen v. Fewel, 87 S.W.(2d) 142—Shultz v. Jones, 9 S.W.(2d) 248, 223 Mo.App. 142.
Tex.—Edge v. Business Men's Assur. Co. of America, (Civ.App.) 15 S.W.(2d) 44—Republic Ins. Co. v. O'Donnell Motor Co., (Civ.App.) 289 S.W. 1064.
Utah.—Hinkins v. U. S. Fuel Co., 199 P. 150, 58 Utah 327.
W.Va.—Rust Engineering Co. v. Randolph Smokeless Coal Co., 141 S.E. 518, 105 W.Va. 111.
Wis.—Marche v. Schoenrock, 247 N.W. 852, 211 Wis. 300—Waterproof Paper & Board Co. v. Van Buren, 197 N.W. 338, 182 Wis. 640.
Wyo.—State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114.
6 C.J. p 661 note 51.

3. Curran v. F. & M. Schaefer Brewing Co., 154 N.Y.S. 199, 91 Misc. 29.

4. Southern Surety Co. v. City of Prescott, 281 P. 834, 36 Ariz. 66.

Authority to compromise held not granted

A grant of authority to an attorney to leave certain disputed bonds of a defendant city with the latter until the dispute should be judicially determined gives no authority to effect a compromise by relinquishing all claim to the bonds.—Southern Surety Co. v. City of Prescott, 281 P. 834, 36 Ariz. 66.

5. Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

thority in excess thereof. A grant of authority to compromise and settle, conditioned upon the happening of a certain contingency, is sufficient if the contingency has happened,[6] but not otherwise;[7] and where authority is expressly given to compromise certain claims, it is to be construed as confined strictly to those claims, and does not include other claims in the attorney's hands, or claims which he may afterward receive.[8]

An express grant of authority to an attorney to enter into a compromise or settlement is revocable by the client at will at any time before it has been executed,[9] but not thereafter.[10]

By client. While the employment of an attorney of record is sometimes held to exclude the right of the client to interfere with the control of legal proceedings (supra § 80 b), it is well settled that, so long as the attorney has acquired no vested interest in the subject matter of the cause, the client may settle or compromise his litigation or claims with the opposing party at any stage of the suit without the knowledge or consent of the attorney or, even over the latter's objections,[11] and such settlements are favored and encouraged where there is no intention to take advantage of the attorneys, but they are honestly made for the simple purpose of ending the litigation,[12] although under proper circumstances the attorney may be entitled to have his right to compensation or a lien therefor protected (infra § 231).

So strongly favored is the client's right to compromise or settle, that a contract of employment or retainer which seeks to exclude it by providing that the client shall not settle or dismiss the proceedings prior to the rendition of a judgment or a decree therein is often regarded against public policy and therefore void.[13]

b. Release

Express authority is generally essential to give an attorney the power to release the client's cause of action or substantial rights other than upon full payment of the indebtedness or the amount claimed.

In accordance with the general rule that an attorney cannot surrender or waive his client's substantial rights without express authority (supra § 100), it is usually held that an attorney has no implied or apparent authority to release or discharge his client's cause of action or substantial rights other than upon a full payment of the indebtedness or the amount claimed, which he is authorized to receive under the rules stated in § 106 infra,[14] although the object of the release is to ben-

6. Smith v Washburn & Condon, 297 P 879, 38 Ariz 149

7. Burns v. McCain, 290 P. 623, 107 Cal App 291.

8. Melcher v Exchange Bank, 85 Mo 362—6 C.J. p 662 note 54.

9. Wimberly v Tanner, 129 S E. 306, 34 Ga App 313—6 C J p 662 note 55.

10 Foot v. Smythe, 78 P. 619, 20 Colo.App. 320.

11 U S—The Golden Star, (C C A. Cal) 82 F (2d) 687, affirming (D C) 9 F Supp 172
Ark—Purvis v. Walls, 44 S W (2d) 353, 184 Ark 887
La—Russ v. Union Oil Co, 36 So 937, 113 La 196—Smith v. Vicksburg, S & P. Ry. Co., 36 So. 826, 112 La 985.
Md—Boyd v Johnson, 125 A. 697, 145 Md 385.
Mass—Herbits v. Constitution Indemnity Co of Philadelphia, 181 N E. 723, 279 Mass. 539
Minn.—Wildung v. Security Mortgage Co. of America, 173 N W 429, 143 Minn. 251—Southworth v Rosendahl, 158 N.W. 717, 133 Minn. 447—Boogren v. St Paul City Ry. Co., 106 N.W. 104, 97 Minn 51, 114 Am. S R. 691, 8 L R.A (N S) 379.
Miss—Zerkowsky v Zerkowsky, 131 So 647, 160 Miss 278
N.Y.—Lurie v. New Amsterdam Casualty Co, 1 N E (2d) 472, 270 N Y 379
N D—Hauser v. Security Credit Co, 266 N W 104—Paulson v Lyson, 97 N W. 533, 12 N D 354, 1 Ann Cas 245
Or—Snow v Beard, 162 P 258, 82 Or 518.
Wash—Sacajawea Lumber & Shingle Co v Skookum Lumber Co, 198 P 1112, 116 Wash 75, Id. 198 P. 1114, 116 Wash 699
6 C J p 643 note 13
"The great weight of authority sustains the right of a client, at any time before judgment, if acting in good faith, to compromise, settle, or dismiss his cause of action, without his attorney's intervention, knowledge, or consent The attorney in such case, under mere contract of employment, acquires no vested interest in the suit, and his authority is revocable at the will of the client"—Boyd v Johnson, 125 A. 697, 698, 699, 145 Md. 385
This rule applies in tort cases in admiralty.—The Golden Star, (C C A Cal) 82 F (2d) 687, affirming (D C) 9 F Supp 172.
Dismissal of proceedings by client see supra § 87.

12. Gooding v. Lyon, 166 P 564, 63 Colo. 328—Nichols v Orr, 166 P 561, 63 Colo. 333, 2 A L.R. 449—6 C J. p 789 note 43.

13. Nichols v. Orr, supra—6 C J. p 789 note 44

14. U S—McFarland v Curtin, (W. Va) 233 F 738, 147 C C A. 494—Glover v Bradley, (C C A S C) 233 F 721.
Ark—Laird v Byrd, 9 S W.(2d) 571, 177 Ark 1114
Idaho—Evans v Power County, 1 P. (2d) 614, 50 Idaho 690—Storey v. U S Fidelity, etc, Co, 183 P. 990, 32 Idaho 388.
Iowa—In re Carpenter's Estate, 231 N.W 376, 210 Iowa 553
Mass—De Santis v. Massachusetts Bonding & Insurance Co, 194 N E. 136, 289 Mass 315—Friedberg v Jablon, 192 N E. 49, 287 Mass 510
Mich—People's State Bank for Savings v Bloch, 227 N.W. 778, 249 Mich 99.
Mo—Parr v. Chicago, B. & Q. R. Co., 184 S W. 1169, 194 Mo App. 416.
Mont—United States Fidelity & Guaranty Co v. Bourdeau, 208 P. 947, 64 Mont 60.
N C.—Bank of Franklin v. Trotter, 177 S E. 825, 207 N.C. 412
Or—Union Central Life Ins. Co. v. Toliver, 52 P.(2d) 1129.
Pa—McLaughlin v. Monaghan, 138 A. 79, 290 Pa 74
Porto Rico.—Bank of San Juan v. Dist. Court of San Juan, 32 Porto Rico 774.
S C.—Virginia-Carolina Chemical Cor-

efit the client by rendering the debtor competent to testify as a witness.[15] The client himself may ordinarily release or waive the fruits of litigation without regard to the wishes or consent of the attorney.[16]

Discharge or release from arrest Where a debtor has been arrested on body execution the plaintiff's attorney cannot, without express authority, do any act which will discharge the debtor so as to satisfy the debt or judgment without its having been paid in full.[17]

Extension of time. An attorney employed to collect a debt has no general implied power to partially release the debtor from his obligations or impair the rights of his client by granting an extension of time.[18]

Injunction bond An attorney who has recovered judgment on a claim given him for collection may release an injunction bond given in a subsequent injunction suit brought by a garnishee to have the judgment set aside as to him, as in releasing the bond the attorney neither diminishes the original claim or extinguishes any security which has accrued to his client in the litigation with the debtor.[19]

Liens. As a general rule, an attorney cannot without express authority release a contractual lien existing in favor of his client,[20] particularly where the contract, on its face, denies him authority in this respect,[21] nor may he release the property of a judgment debtor from the lien of an execution or judgment or from any similar lien securing his client's claim, except upon such security or conditions as the client may himself approve.[22] A distinction, however, is taken between a judgment lien or lien which belongs to the original demand and the lien of an attachment or other ancillary mesne process, it being held that the attorney's general power over procedural matters gives him the implied authority to release a lien of the latter character whenever it may appear advisable for the interests of his client.[23]

Release of surety, guarantor, or indemnitor. An attorney has no implied or apparent authority to do any act which will release a person under obligation to his client as a surety,[24] guarantor,[25] or indemnitor.[26]

Reduction or remission of judgment or verdict. Ordinarily an attorney cannot release his client's substantial rights by consenting to the reduction of a judgment which has been recovered in the latter's favor;[27] but an attorney employed in litigation has implied authority to consent to a remittitur which the trial judge has adjudged essential in order to obtain or sustain an excessive verdict or judgment in favor of the attorney's client.[28]

The client himself may consent to the reduction

poration v. Tweed-Lumber Co., 178 S.E. 131, 174 S.C. 497.
6 C.J. p 663 note 66

Authority to take care of case not sufficient.—De Fantis v. Massachusetts Bonding & Insurance Co., 194 N.E. 136, 289 Mass. 315.

15. Hall v. State Bank, 8 Ala. 590, 42 Am.D. 649- 6 C.J. p 664 note 70.

16. Erickson v. Foote, 153 A. 853, 112 Conn. 662.

17. Mc Pomeroy v. Prescott, 76 A. 898, 106 Me. 491, 138 Am.S.R. 317, 21 Ann.Cas. 574.
Mass.—Hahn v. Loker, 118 N.E. 661, 229 Mass. 363, L.R.A.1918D 807.
Mich.—Schlovitz v. London, 229 N.W. 590, 249 Mich. 567—McGill v. Coleman, 182 N.W. 76, 214 Mich. 60
6 C.J. p 663 note 68.

Inducing debtor to go beyond bail limits

Where a judgment debtor had been arrested and released on bail, the act of plaintiff's attorney in inducing the debtor to go beyond the limits of his bail if not authorized by or known to plaintiff, does not establish assent by plaintiff to the debtor's escape so as to discharge him, since the attorney general's authority does not extend to discharging a debtor without receiving payment.—McGill v. Coleman, 182 N.W. 76, 214 Mich. 60

18. Ark.—Laird v. Byrd, 9 S.W.(2d) 571, 177 Ark. 1114.
Md.—Stern v. Shapiro, 114 A. 537, 138 Md. 615.
N.C.—Bank of Franklin v. Trotter, 177 S.E. 325, 207 N.C. 442.
6 C.J. p 659 note 34.

19. Levy v. Brown, 56 Miss. 83.

20. Knoche v. Whiteman, 86 Mo. App. 568.

21. Union Central Life Ins. Co. v. Tolliver, (Or.) 52 P.(2d) 1129.

22. Burton v. Burton Mfg. Co., 79 So. 664, 202 Ala. 180—Cowgill & Son v. Boseman, 79 So. 805, 202 Ala. 7—6 C.J. p 656 note 75 p 663 note 67.

Taking unauthorized security

A special grant of authority to release an execution levy upon the receipt of security of a prescribed character gives the attorney no power to take security with different characteristics.—Roberts v. Rumley, 12 N.W. 323, 58 Iowa 301

23. Mass.—Hahn v. Loker, 118 N.E. 661, 229 Mass. 363, L.R.A.1918D 807.
N.Y.—American Rattan & Reed Mfg. Co. v. Handel-Maatschappij Moraux & Co., 185 N.Y.S. 480, 194 App.Div. 90
6 C.J. p 664 notes 71–73.

24. Ark.—Laird v. Byrd, 9 S.W.(2d) 571, 177 Ark. 114.
Idaho.—Storey v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 183 P. 990, 32 Idaho 388.
N.C.—Bank of Franklin v. Trotter, 177 S.E. 325, 207 N.C. 442.
6 C.J. p 664 note 69.

Extension of time

An attorney employed to collect a debt has no authority to make an extension of time which will release the sureties thereon.—Laird v. Byrd, 9 S.W.(2d) 571, 177 Ark 114- Bank of Franklin v. Trotter, 177 S.E. 325, 207 N.C. 442—6 C.J. p 659 note 38, p 664 note 69 [a].

25. Superior Finance Corporation v. John A. McCrane Motors, 168 A. 774, 11 N.J.Misc. 857, affirmed 174 A. 891, 113 N.J.Law 514.

26. U. S. Fidelity & Guaranty Co. v. Bourdeau, 208 P. 947, 64 Mont. 60.

27. Hallow v. Hallow, 193 N.Y.S. 460, 200 App.Div 642.

28. Morris v. Standard Oil Co., 219 P. 998, 192 Cal. 343, 30 A.L.R. 1103—6 C.J. p 655 note 69.

of a judgment in his favor without the knowledge and consent of the attorney notwithstanding the latter's power to enforce the judgment (supra § 96) or receive payment thereon (supra § 99).[29]

§ 106. —— Receiving and Making Payments

a. In general
b. Acceptance of partial or compromise payment
c. Mode or form of payment

a. In General

An attorney employed to collect or enforce a money claim or demand has the general implied or apparent authority to receive payment thereon; but an attorney employed for some other special or limited purpose has no such authority; and, after money has been collected, the only authority of the attorney is to turn it over to the client unless he has been directed otherwise.

Especially where there is a statutory provision to that effect,[30] an attorney who has been employed or retained to collect or enforce a money claim or demand has the general implied or apparent authority to receive payment thereon so that a payment[31] or tender[32] to the attorney is equally effective as payment or tender to the client, unless there are special circumstances which make it essential that the payment or tender be made to the client personally;[33] and, as noted in § 99 supra, if the attorney has prosecuted the claim to judgment he may receive payment and make satisfaction of the same until notice of revocation of his authority has been given defendant. Such authority permits the attorney not only to receive payment from the debtor but also to receive money paid to a clerk of court in behalf of his client,[34] and no order of court is necessary.[35]

Likewise, an attorney employed to sell property for his client has been held authorized to receive the purchase price thereof;[36] but an attorney having no authority to sell his client's property cannot bind the latter by receiving the purchase price therefor from a person to whom the attorney has attempted to make a sale.[37]

However, the employment or authorization of an attorney to collect the interest on a debt gives him no power or authority to receive payment of the principal thereof.[38]

Furthermore an attorney employed for a special or limited purpose not involving the collection of money as necessary for its accomplishment has no authority to receive money in payment of his client's rights,[39] and a debtor dealing with such an attorney is bound to take notice of the extent of his author-

29. Homans v. Tyng, 67 N.Y.S. 792, 56 App.Div. 383.

30. Washita County Gin Co v. Colbert, (Okl.) 54 P.(2d) 640—Baker v. Vadder, 200 P 994, 83 Okl 140—6 C.J. p 665 note 77.

31. U S—Escanaba Traction Co. v. Burns, (Mich.) 257 F. 898, 169 C C A. 48.
Ga.—Patterson v Southern Ry. Co, 151 S E 818, 41 Ga App. 94.
Ill—Allinson v Pierson, 130 N E 779, 285 Ill 387—Ruckman v. Alwood, 44 Ill 183
Ky—Combs' Adm'r v Virginia Iron, Coal & Coke Co, 33 S.W (2d) 649, 236 Ky. 524.
La—Liquidators of Joseph David Co. v Berthelot Bros, 42 So 971, 118 La. 383—Mayor v. Hennen, 18 La. 430—Spengler v Drouet, 6 La. App. 624—McGloughry v. Habans, 9 La.App.(Orleans) 225.
Me—Wilson v Russ, 20 Me. 421.
Mich.—City of Wakefield v. Tuttle, 221 N W. 185, 244 Mich 237
Miss.—Pace v. Reid, 130 So. 294, 158 Miss 145.
N.M.—Dacus v. Maryland Casualty Co, 55 P (2d) 663.
Pa—Williams v Cook, 137 A. 232, 289 Pa 207—Hopkins v. Ketterer, 85 A. 421, 237 Pa. 285, Ann Cas. 1914B 558—Netter v. Logan, 169 A. 245, 111 Pa Super. 143—Loudon v. Borough, 12 Pa.Dist. & Co. 268.
Va—Smith v. Lamberts, 7 Gratt (48 Va.) 138.
6 C J. p 664 note 75.

Implication of authority from dependency of compensation on amount recovered

An agreement that the attorney's compensation shall depend on the amount recovered through his services impliedly authorizes him to collect any sum adjudged by court—Combs' Adm'r v Virginia Iron, Coal & Coke Co., 33 S.W.(2d) 649, 236 Ky 524

Joint attorneys

Where several attorneys have been employed to act jointly either may receive payment—Lake v Wilson, 33 S W.(2d) 25, 183 Ark 180—Lake v. Wilson, 35 S W.(2d) 597, 183 Ark. 180.

Payment to attorney of administrator is binding on the client under the rule of the text and he is liable to the estate although the attorney does not actually turn over the payment received—Pace v. Reid, 130 So. 294, 158 Miss. 145.

32. Gustin v. Barney, 250 Ill.App. 209—6 C J. p 665 note 76.

33. Stratton v. Graham, 149 N.Y.S 662, 164 App.Div. 348, affirming 140 N Y S. 869.

34. Baker v Vadder, 200 P. 994, 83 Okl. 140—6 C J. p 665 note 80.

35. Cauthen v. Cauthen, 56 S.E. 978, 76 S C 226.

36. City of Wakefield v. Tuttle, 221 N W. 185, 244 Mich. 237.

37. Wilkinson v. Zumwalt, 297 P. 94, 112 Cal.App. 416.

38. N J—Dorman v. West Jersey Title & Guar. Co, 105 A. 195, 92 N J Law 487—Workman v. Eyler, 121 A. 515, 94 N J Eq. 526.
Pa—Williams v. Cook, 137 A. 232, 289 Pa. 207—Browne v. Hockstra, 123 A 861, 279 Pa. 413—Burkhart v. Falco, 176 A. 844, 116 Pa Super. 263—Zimmer, to Use of Hammer v. Zaigmond, 167 A. 405, 109 Pa. Super. 322—Plunkett v. Raniszewski, (Super) 165 A. 529—Borland v. Wible, 94 Pa.Super. 41—Mynick v. Bickings, 30 Pa.Super. 401.
6 C J. p 666 note 92 [b].

"The position of an investor would be most precarious if the fact that he employs an attorney from time to time when making loans and authorizes him to make collections of interest, and in special cases of the principal due on securities, is sufficient to warrant a finding of authority generally to collect the principal of all his client's mortgages and that, too, when the latter keeps possession of his obligations."—Mynick v. Bickings, 30 Pa.Super. 401.

39. Ill—Lanski v. Chicago Title & Trust Co., 155 N.E. 296, 324 Ill.

ity,[40] and any payment made to such an attorney is made at the debtor's peril.[41] Hence an attorney who has merely been employed to negotiate or handle a loan for the creditor thereby acquires no authority to receive payment of the debt when it comes due,[42] and this although the instrument given for the debt specifies the office of the attorney as the place of payment,[43] unless, as noted subsequently, the attorney has been permitted to retain possession of the evidence of, or security for, the debt so as to acquire apparent authority.

According to some authority, the employment of an attorney to present or prosecute a workmen's compensation claim before an administrative board or commission gives the attorney no implied or apparent authority to receive payment of the claim as he would have were he conducting proceedings in a court of record,[44] but there is other authority to the contrary;[45] and a workmen's compensation claim may be paid to the employee's attorney where he has been given express authority to receive payment, although it is provided by statute that "compensation benefits shall be paid only to employees."[46]

The grant to an attorney of authority to collect an investment or loan he has made for his client gives him no power to modify the terms of the contract and collect payment of the obligation before it is due;[47] and after the client has acquired fixed rights under a contract by reason of the debtor's failure to make payment within the time required the attorney has no implied authority to waive the creditor's rights by subsequently accepting payment.[48]

Of course, an attorney who has in no way been employed or retained by the payee ordinarily has no power or authority to bind the latter by a receipt of payment.[49] The payee may, however, by his acts or conduct create an apparent agency in favor of the attorney,[50] and an attorney representing both the insured and the insurer in an action against the former on a liability for which the latter is liable has power to bind the insured by receiving payment on the policy where he has been expressly authorized and acts for the insured in so doing.[51]

Possession of evidence or security for debt. In accordance with the general rules stated in the title Agency § 317 c, it is often held that an attorney's possession of the written evidence of, or security for, a debt owing to the client creates a sufficient presumption of the attorney's authority to warrant payment to him.[52] Moreover, it has been held, although there is some authority to the contrary,[53] that, if a creditor who has negotiated a loan through an attorney permits the latter to retain possession of the written evidence of, or security for, the debt, the attorney thereby acquires the apparent authority, so long as he retains such possession, to bind the client by a payment made to the attorney by the debtor with knowledge of such possession and in reliance on the apparent authority thus afforded.[54] Apparent authority can be thus created only in favor of the attorney who originally negotiated the loan for the creditor;[55] and there can be no presumed or apparent authority in this connection after the attorney has ceased to have possession of the written evidence or security,[56] and if they are not in his possession when a payment is received he cannot bind the client thereby unless actual authority has been conferred regardless of such possession.[57]

887—Allinson v. Pierson, 120 N.E. 779, 285 Ill. 387.
Iowa.—Nothem v. Vonderharr, 175 N. W. 967, 189 Iowa 43.
N.M.—Dacus v. Maryland Casualty Co., 55 P.(2d) 662.

Will contest

The employment of an attorney to represent parties to a will contest gives him no authority to accept money for his client's rights and interests.—Allinson v. Pierson, 120 N. E. 779, 285 Ill. 387—Nothem v. Vonderharr, 175 N.W. 967, 189 Iowa 43.

40. Dacus v. Maryland Casualty Co., (N.M.) 55 P.(2d) 662—6 C.J. p 666 note 91.

41. Dacus v. Maryland Casualty Co., supra—6 C.J. p 666 note 92.

42. Burkhart v. Falco, 176 A. 844, 116 Pa.Super. 263—Zimmer, to Use of Hammer v. Zaigmond, 167 A. 405, 109 Pa.Super. 322.

43. Zimmer, to Use of Hammer v. Zaigmond, supra.

44. Dacus v. Maryland Casualty Co., (N.M.) 55 P.(2d) 662.

45. McCully v. Kelley-Dempsey Co., 57 S.W.(2d) 784, 227 Mo.App. 775.

46. Washita County Gin Co. v. Colbert, (Okl.) 54 P.(2d) 640.

47. Smith v. Kidd, 68 N.Y. 130, 23 Am.R. 157—6 C.J. p 665 note 82.

48. Stern v. Shapiro, 114 A. 587, 138 Md. 615—6 C.J. p 665 note 83.

49. Va.—Willis v. Correll, 47 S.E. 826, 102 Va. 746—Wooding v. Bradley, 76 Va. 614.
Wis.—Pikey v. City of Seymour, 172 N.W. 138, 169 Wis. 223.
6 C.J. p 666 note 93.

50. Baurhenn v. Fidelity & Deposit Co. of Maryland, 176 A. 137, 114 N.J.Law 99.

51. Murphy v. Belt Automobile Indemnity Ass'n, 145 A. 127, 295 Pa. 244.

52. Green v. Johnson, 167 A. 142, 53 R.I. 432—6 C.J. p 665 note 84.

53. Workman v. Eyler, 121 A. 515, 94 N.J.Eq. 526.

54. N.Y.—Crane v. Gruenewald, 120 N.Y. 274, 24 N.E. 456, 17 Am.S.R. 643.
Pa.—Williams v. Cook, 137 A. 232, 289 Pa. 207.

55. Central Trust Co. v. Folsom, 49 N.Y.S. 670, 26 App.Div. 40, 45—6 C.J. p 665 note 85.

56. Pore v. Duke, 154 A. 797, 303 Pa. 538—Browne v. Hockstra, 123 A. 861, 279 Pa. 418—Burkhart v. Falco, 176 A. 844, 116 Pa.Super. 263—Zimmer, to Use of Hammer v. Zaigmond, 167 A. 405, 109 Pa.Super. 322—6 C.J. p 665 note 86.

Debtor's failure to insist on production of documents throws the risk of the payment on him rather than on the client.—Burkhart v. Falco, 176 A. 844, 116 Pa.Super. 263.

57. Orient Ins. Co. v. Hayes, 55 N. W. 57, 61 Neb. 173.

The intrusting of an attorney with a signed receipt may, under proper circumstances, be regarded as conferring apparent authority to receive payment of the debt for which the receipt is to be given.[58]

Secret limitations or restrictions on the general apparent authority of an attorney who has been employed to collect or prosecute a claim are ineffective to prevent the client from being bound by payment to the attorney, unless it is shown that the debtor had knowledge or notice thereof before he made the payment.[59]

Revocation of the authority of an attorney who has general apparent authority to receive payment of a claim will not affect the debtor paying to the attorney in good faith, relying on his authority to receive the payment, unless it appears that the debtor had notice of the revocation or was chargeable with such notice.[60]

Authority to demand payment. Authority to receive payment implies authority to demand it, so that a demand by an attorney on a debtor, or on an officer in charge of an execution, is equivalent to a demand by the creditor himself.[61]

Payment or disposition. As noted in § 104 supra, an attorney ordinarily has no authority to make any other disposition of money that he has collected or received for his client than to turn it over to the latter, unless he has received express instructions otherwise. Where, however, an attorney, having the claims of several creditors against the same debtor for collection, receives from the debtor a sum of money without any directions as to which claim the money shall be applied, the attorney may in his discretion apply the money to either of the claims before he has received notice otherwise from the debtor.[62]

b. Acceptance of Partial or Compromise Payment

An attorney having authority to receive payment of a debt or claim also has the implied or apparent power to accept partial payments in pro tanto satisfaction thereof; but, without express authority, he cannot take in full satisfaction and discharge any sum less than the full amount due on the face of the claim.

The authority or power of an attorney to receive payment of a debt or a claim generally includes the power to accept or receive partial payments in pro tanto satisfaction thereof.[63] The rule against an attorney's power to compromise (supra § 105), however, prohibits his taking, in full satisfaction and discharge, any sum less than the full amount due on the face of a claim,[64] or his accepting in satisfaction of a judgment or decree secured by him for his client any sum less than the full amount of such judgment or decree,[65] unless the

58. Baurhenn v. Fidelity & Deposit Co of Maryland, 176 A. 137, 114 N. J Law 99.

59. State v Hawkins, 28 Mo. 366—6 C J p 666 note 89.

60. Pa.—Loudon v. Borough, 12 Pa. Dist & Co. 266.
Wash.—Nuessler v Bergman, 251 P. 578, 141 Wash 297.
6 C J. p 666 note 90.

61. Heard v Lodge, 20 Pick (Mass) 53, 32 Am.D 197—6 C J p 666 note 96

62. N H.—Carpenter v. Goin, 19 N H. 479.
S C.—Marshall v. Nagel, 17 S.C L 308.

63. Ga.—Crouch v. Fisher, 159 S E. 746, 43 Ga.App. 484.
Minn.—Hernlund v. Town & County Motors, Inc., 198 N W. 662, 159 Minn 125.
Pa.—Loudon v. Juniata Borough, 12 Pa Dist. & Co. 266
6 C J. p 665 notes 78, 79.

64. U S.—Glover v Bradley, (S C.) 233 F. 721, 147 C C A. 487, Ann.Cas 1917A 921.
Ala.—Craft v. Standard Accident Ins. Co., 123 So 271, 220 Ala. 6, granting certiorari 123 So. 265, 23 Ala. App 246—Barton v. Burton Mfg. Co., 79 So. 664, 202 Ala. 180.
Cal.—Broecker v. Moxley, 28 P.(2d) 409, 136 Cal App 240
Ill.—Danziger v. Pittsfield Shoe Co., 68 N E 534, 204 Ill 145—Lochenmeyer v. Fogarty, 112 Ill. 572—Treece v Reinhart-Smith Grocer Co., 197 Ill App. 40.
Ind.—Jennings v. South Whitley Hoop Co., (App) 98 N E 194
La.—Van Vleet Mansfield Drug Co v Anders, (App) 157 So 166—Phillips-Jones Corporation v. Caskey, 127 So 46, 13 La App 675, rehearing denied 128 So. 553, 14 La.App 26.
Mass.—Vaughn v. Robbins, 149 N.E. 677, 254 Mass 35, 41 A.L R 1488
Mich.—People's State Bank for Savings v. Bloch, 227 N.W. 778, 249 Mich 99
N J.—Hygrade Cut Fabric Co. v. U. S. Stores Corporation, 144 A. 605, 105 N J Law 224.
Okl.—Massachusetts Bonding & Ins Co v. Vance, 180 P. 693, 74 Okl 261, 15 A L R. 981—Hamberger v White, 154 P. 576, 54 Okl. 736
S C.—Gilliland v. Gasque, 6 S C 406
1 C J. p 539 notes 69, 70—6 C.J. p 662 note 58.

Tender of less sum conditioned on its being full payment and satisfaction

It has been held, however, without specific discussion of the attorney's authority, that where the amount due is in dispute and the debtor tenders the attorney for plaintiff a sum less than the face of the claim on condition that it be accepted in full payment, the attorney's acceptance and retention of the money works an accord and satisfaction as the payment to the attorney was a payment to the client.—Northern Bank & Trust Co. v. Harmon, 217 P. 8, 126 Wash. 25.

Under statute in Georgia an attorney cannot, without special authority, receive anything, in discharge of his client's claim, but the full amount in cash.—Evans v. Atlantic Nat Bank of Jacksonville, Fla., 95 S E. 219, 147 Ga. 621—High v Hollis, 132 S.E. 260, 35 Ga 195—Burnett v. Johnston, 165 S E. 857, 45 Ga App 667—Crouch v. Fisher, 159 S E 746, 43 Ga App. 484—Patterson v. Southern Ry. Co., 151 S E 813, 41 Ga App 94—Rawls v. Heath, 136 S E 322, 36 Ga App 372—Johnson v Star Piano Co., 108 S.E. 811, 27 Ga App. 425—6 C J p 662 note 58 [a].

65. Ga.—Betts v. Hancock, 107 S.E. 377, 27 Ga App. 63
Mass.—Hahn v Loker, 113 N.E. 661, 229 Mass 363, L R A 1918D 807—Shattuck v. Bill, 7 N.E. 39, 142 Mass. 56.

client has expressly authorized the attorney to take such action,[66] and even then any special instructions must be followed.[67]

If an attorney has attempted, without authority, to completely satisfy or discharge a claim or judgment for less than its full amount, the client may treat the payment as a nullity for that purpose and recover from the debtor such amount as still remains due upon the whole demand, for the latter is chargeable with notice of the limitations upon the attorney's authority.[68] In case the consideration or amount paid to the attorney has not actually been received by the client, some authorities go even further and hold the debtor chargeable for the full amount without deduction or credit for the sum or sums paid the attorney on the ground that, as the debtor must be held to know that the compromise or settlement is not within the attorney's powers, he must be regarded as having made the payment on the chance that it might appear later that the client was not bound by the settlement.[69] Generally, however, it is held that as the attorney would have power to accept the partial payment in pro tanto satisfaction of the claim the debtor is entitled to credit for any payment he has actually made to the attorney in good faith pursuant to an invalid attempt to satisfy the claim for less than its full amount.[70]

c. Mode or Form of Payment

Unless expressly authorized, an attorney has no right or power to accept anything other than cash or money in payment of a debt or claim which he has been employed to collect or enforce.

An attorney having authority to collect, or receive payment of, a debt or claim has no right or power to accept anything other than cash or money in payment thereof,[71] unless he has been expressly authorized to do so,[72] as such action would amount to a compromise or settlement for which express authority is generally necessary under the rules stated in § 105 supra. The client, however, is the only person who can object on account of the fact that the attorney has received something other than money in payment.[73]

In accordance with the foregoing, an attorney has been held without authority to receive payment

N D —Business Service Collection Bureau v Yegen, 269 N W 46
Okl —Hamberger v. White, 154 P 576, 54 Okl 736
Or —Seaweard v. De Armond, 198 P 916, 101 Or. 30
Tex —Kreis v Kreis, (Civ App) 57 S W (2d) 1107.
6 C J p 662 note 59

Judgment assigned attorney as security

Even where an attorney holds a judgment by assignment as security for debts due from his client, his satisfaction without full payment is good for only the amount of his interest therein —Beers v. Hendrickson, 45 N Y. 665

Statute authorizing satisfaction by attorney

A statute authorizing an attorney of record to satisfy a judgment presupposes that he will receive full payment for his client of the debt represented by the judgment, and does not authorize him to satisfy a judgment for less than is due thereon without the consent of his client. —Business Service Collection Bureau v. Yegen, (N D) 269 N.W. 46
Authority of attorney to make satisfaction of judgment upon payment in full see supra § 99.

66. Ill —Central Trust Co. of Illinois v. Hagen, 249 Ill App 507, reversed on other grounds 171 N E 531, 339 Ill 384
Utah —Hinkins v. U. S. Fuel Co, 199 P. 150, 58 Utah 327.
Wis —La Marche v. Schoenrock, 247 N W. 852, 211 Wis. 309.
1 C J. p 539 note 70 [a]—6 C J p 663 note 62

67. Harrow v. Farrow, 7 B Mon (Ky) 126, 45 Am D. 60

68. Ga —Patterson v Georgia Gravel Co, 108 S E. 237, 151 Ga 813—Evans v Atlantic National Bank of Jacksonville, Fla, 95 S E 219, 147 Ga 621—Kaiser v. Hancock, 32 S E 123, 106 Ga. 217—Burnett v. Johnson, 165 S E. 857, 45 Ga App 667—Johnson v. Starr Piano Co, 108 S E 811, 27 Ga App. 425
N J —Hygrade Cut Fabric Co. v U S Stores Corporation, 144 A. 605, 105 N J Law 324.
Okl —Hamburger v. White, 154 P 576, 54 Okl 736
Or —Seaweard v De Armond, 198 P. 916, 101 Or 30.
6 C J. p 663 note 61.

69. Precious v. O'Rourke, 170 N E 110, 270 Mass 305.

70. Ala —Cowgill & Son v. Boseman, 79 So 305, 202 Ala 7.
Ga.—Burnett v Johnson, 165 S E 857, 45 Ga App. 667—Crouch v Fisher, 159 N E 746, 43 Ga App 484—Patterson v. Southern Ry. Co, 151 S. E. 818, 41 Ga App 94
Mich.—People's State Bank for Savings v Bloch, 227 N.W. 778, 249 Mich 99.
Minn —Seifert v. Gallet, 198 N W. 664, 159 Minn 131—Hernlund v. Town & County Motors Inc, 198 N. W. 662, 159 Minn 125.
Okl —Incorporated Town of Wainwright v Eureka Fire Hose Mfg Co., 218 P. 306, 92 Okl 75—Hamborger v. White, 154 P. 576, 54 Okl 736
Or —Hill v Wilson, 250 P. 840, 119 Or 636—Seaweard v. De Armond, 198 P 916, 101 Or 30.
6 C J. p 663 note 65.

71. Ala —Hoover v. Miller, 73 So. 817, 198 Ala 499
Colo —McCaffrey v Mitchell, 56 P (2d) 926—Garrison v. Kansas City Life Ins Co., 46 P.(2d) 902, 97 Colo. 149—Richardson Drug Co v Dunagan, 46 P 227, 8 Colo App 308
Ga —Lynchburg Shoe Co. v. Gladney 90 S E. 1044, 19 Ga App. 96
Ill.—Treece v Reinhart-Smith Grocer Co, 197 Ill App 40
Ind —Brown v. Grimes, 129 N.E. 488, 74 Ind App 655.
La —Williams v. Bank, 3 La App (Orleans) 471.
Mo —McCully v Kelley-Dempsey Co. 57 S W (2d) 784, 327 Mo.App 775
Tex —Scott v. Atchinson, 38 Tex 334 —Portis v Ennis, 27 Tex. 575—Commercial Credit Co. v Crone, (Civ App) 270 S.W. 209—Cook v Greenberg, (Civ App) 34 S W. 687
Va —Willis v. Gorrell, 47 S E 826, 103 Va. 746
6 C.J. p 666 note 97.

Receipt of Confederate money by an attorney in payment of his client's claim does not extinguish the debt —Scott v Atchinson, 38 Tex. 334—6 C J p 666 note 97 [b].

72. Washita County Gin Co v. Colbert, (Okl.) 54 P.(2d) 640

73. Hirsch v. Fleming, 3 S E. 9, 77 Ga. 594.

in the form of property,[74] such as, land;[75] or in the form of choses in action,[76] such as, accounts receivable,[77] notes,[78] bonds,[79] warrants,[80] due bills,[81] bills of sale,[82] or acknowledgments of indebtedness.[83] Nor can an attorney by attempted arrangements with the debtor substitute his personal debt for that of the debtor to the client,[84] except to the extent that the attorney has an interest in the claim for his fees.[85]

A check or draft cannot be accepted in payment,[86] unless it has been certified,[87] or the attorney has been expressly authorized to take payment in this form;[88] but where an attorney, after receiving a check which he has no authority to accept in payment, proceeds to collect the same, and obtains the cash thereon, an authorized payment in money is thereby effected.[89]

Without express authority, the attorney cannot accept collateral securities held by the debtor in payment of the client's claim,[90] nor can he bind his client by an agreement on his part to take notes, bonds, or other securities which the debtor holds against third persons, to collect them, and to pay over the proceeds to the creditor, his client.[91] It has been held, however, that where an attorney receives the money upon any of the securities so held by him, the sum he receives operates pro tanto to extinguish the debt, since the attorney is authorized to receive payment in money, and the money, when received, is by the agreement applied eo instanti to the debt. A payment to the attorney is thus a valid payment by the debtor, although the money never reaches the creditor.[92] On the other hand, it has been held that the creditor is not bound to recognize such payment as made to him, in the absence at least of a specific application by the attorney or the debtor of the money received to the satisfaction of the judgment, and that amounts collected by the attorney, but not paid over, do not operate as payment.[93] Of course, where the money from the securities is collected by the attorney and is paid over to his client who receives it without objection, this is a satisfaction.[94]

If a debtor pays to the creditor's attorney a part of the debt in money and the remainder in securities running to the attorney, the creditor may accept the cash in payment pro tanto, and may repudiate the other alleged payment and recover the balance due by suit.[95]

Where the attorney has been directed to obtain security for the debt rather than making an immediate collection, and no particular security has been specified, the security to be taken is left to the attorney's discretion and the client is bound thereby.[96]

§ 107. Delegation of Authority and Employment of Assistants

Ordinarily, an attorney cannot delegate his authority or employ assistants so as to bind the client, unless the client has consented thereto or acquiesced therein.

As an attorney is chosen with particular reference to his fitness and capacity, and the employment involves the reposing of a personal trust and confidence, it is generally held, in accordance with the well established agency maxim, Delegatus non potest delegare, that an attorney has no power to delegate the authority which has been conferred upon him without the consent of his client.[97] This

74. Ladd v. McColl, (Mo.App.) 209 S.W. 578

75. Ladd v. McColl, supra—6 C.J. p 660 note 41, p 667 note 6
Acceptance of land in satisfaction of judgment see supra § 99.

76. Ala.—Hoover v. Miller, 72 So. 817, 198 Ala. 499.
Colo.—McCaffrey v. Mitchell, 56 P. (2d) 926
Tex.—Commercial Credit Co. v. Crone, (Civ.App.) 270 S.W. 209.

77. Hoover v. Miller, 72 So. 817, 198 Ala. 499.

78. Willis v. Gorrell, 47 S.E. 826, 102 Va. 746—Smith's Ex'r v. Powell, 26 S.E. 522, 93 Va. 431—6 C.J. p 667 note 99.

79. Smock v. Dade, 5 Rand (26 Va.) 639, 16 Am.D. 780—6 C.J. p 667 note 1.

80. Herriman v. Shomon, 24 Kan. 387, 36 Am.R. 261.

81. Biddle v. Bogert, 10 Kulp (Pa.) 434.

82. Hartman Steel Co. v. Hoag, 73 N.W. 611, 104 Iowa 269.

83. McCaffrey v. Mitchell, (Colo.) 56 P.(2d) 926—6 C.J. p 667 note 5.

84. Lynchburg Shoe Co. v. Gladney, 90 S.E. 1044, 19 Ga.App. 96—6 C.J. p 667 note 7.

85. Williams v. Bank, 3 La.App.(Orleans) 471.

86. McCully v. Kelley-Dempsey Co., 57 S.W.(2d) 784, 227 Mo.App. 775—6 C.J. p 667 note 8.

87. Lesher v. Radel, (C.C.R.I.) 170 F. 723.

88. Ga.—Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94.
Okl.—Washita County Gin Co. v. Colbert, 54 P.(2d) 640.

89. Ga.—Patterson v. Southern Ry. Co., 151 S.E. 818, 41 Ga.App. 94
Ind.—Brown v. Grimes, 129 N.E. 483, 74 Ind.App. 655
Mo.—McCully v. Kelley-Dempsey Co., 57 S.W.(2d) 784, 227 Mo.App. 775.
Authority of attorney to indorse and collect check payable to client see supra § 104

90. Wiley v. Mahood, 10 W.Va. 206—6 C.J. p 659 note 35

91. Black v. Drake, 2 Colo. 330—6 C.J. p 667 note 10

92. Black v. Drake, supra—6 C.J. p 667 note 11.

93. Jewett v. Wadleigh, 32 Me. 110—6 C.J. p 667 note 12.

94. Baldwin v. Merrill, 8 Humphr. (Tenn.) 132.

95. Lesher v. Radel, (C.C.R.I.) 170 F. 723—6 C.J. p 668 note 14.

96. Rice v. Wilkins, 21 Me. 556.

97. Ill.—Sabath v. Vacek, 204 Ill. App. 396.
Iowa.—Fuehr v. Ewert & Richter Express & Storage Co., 163 N.W. 347, 180 Iowa 518.
Mo.—Lamport v. Aetna Life Ins. Co., 199 S.W. 1020
Nev.—Page v. Walser, 213 P. 107, 46 Nev. 390.

rule precludes the delegation to another attorney of the authority of an attorney who has been employed to prosecute or conduct litigation,[98] or to collect a claim or demand.[99]

In addition an attorney cannot, without the client's consent, employ substitutes, associates, or assistants, so as to bind the client for the expense thereof,[1] or for the acts or conduct of the associate or assistant so employed.[2] With this limitation, however, an attorney is at liberty to employ as many assistants in a case as he chooses to pay for,[3] and to charge his client with a reasonable amount for the entire service.[4] Moreover, an attorney has been held to have authority to authorize another attorney to enter an appearance for the client;[5] and authority to make a binding employment of an associate counsel or assistant will be implied or inferred, where the attorney is a general counsel or agent having charge of the legal business of the client,[6] or the circumstances are such as to make the employment necessary or proper to accomplish the purpose of the attorney's employment.[7] Hence, where the case or matter is one which must necessarily be conducted at a distant place, the attorney has implied authority to employ local counsel in that place to assist him;[8] but an attorney by employing another attorney in a distant place may not confer authority in excess of that possessed by himself.[9]

If he has been expressly authorized to do so, an attorney may, of course, employ an associate or assistant;[10] but express authority, where it is in issue, must be proved as a distinct fact by proper evidence;[11] and such authority is revoked by the death of the client.[12]

An associate or clerk in the office of an attorney, who is not a member of the latter's firm and to whom no authority has been delegated with reference to a particular case or matter, has no power to bind the client by his action with respect thereto.[13]

Acquiescence or ratification. The unauthorized act of an attorney, in employing, or delegating authority to, an associate or assistant, may be rendered binding on the client by reason of the latter's acquiescence therein or ratification thereof.[14]

Pa.—Pore v. Duke, 154 A. 797, 303 Pa. 528
6 C.J. p 668 note 19.

Reasons for rule

"The relation of attorney and client is a close personal relation. It involves the element of personal selection, and one attorney so selected by his client may not bind that client by selecting other attorneys for him without the client's consent. . . . While the rule is general that one agent may not ordinarily delegate to another his authority to act for his principal without that principal's consent, the rule in this behalf as to attorney and client is far stronger against such delegation than it is in the ordinary case. This is for the reason that attorneys are selected on account of their special fitness through their learning or probity for the work in hand"—Lamport v. Aetna Life Ins. Co., (Mo.) 199 S.W. 1020, 1023.

98. Iowa—Fuehr v. Ewert & Richter Express & Storage Co., 163 N. W. 347, 180 Iowa 513.
Mo.—Lamport v. Aetna Life Ins. Co., 199 S.W. 1020.
Nev.—Page v. Walser, 213 P. 107, 46 Nev. 390.
6 C.J. p 668 note 19.

99. Ariz.—Millsap v. Sparks, 188 P. 135, 21 Ariz. 317.
Pa.—Pore v. Duke, 154 A. 797, 303 Pa. 528.
6 C.J. p 668 note 20.

1. Ark.—Young v. Fowler, 200 S.W. 313, 132 Ark. 145.
Ariz.—Millsap v. Sparks, 188 P. 135, 21 Ariz. 317.
Cal.—Cormac v. Murphy, 208 P. 360, 58 Cal.App. 366—Davis v. Mackay, (App.) 194 P. 738.
Iowa.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258.
Ky.—Snyder v. Howard's Adm'x, 65 S.W.(2d) 477, 251 Ky. 592.
Md.—Drury v. Brightwood Sanitarium Co., 133 A. 314, 150 Md. 585.
Mo.—Young v. Crawford, 23 Mo.App. 432.
Or.—Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.
6 C.J. p 668 note 21, p 747 note 37.

Attorney on contingent fee basis

"The rule is well settled that where a lawyer takes a case on a conditional fee he cannot employ other counsel and charge this to his client without the client's consent"—Snyder v. Howard's Adm'x, 65 S.W.(2d) 477, 479, 251 Ky. 592.

2. Mass.—Kalbritan v. Padover, 161 N.E. 898, 264 Mass. 26.
Mo.—Lamport v. Aetna Life Ins. Co., 199 S.W. 1020.
Tex.—State Life Ins. Co. v. Duke, (Civ.App.) 69 S.W.(2d) 791, error refused.

3. Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.

4. Kingsbury v. Joseph, 68 S.W. 93, 94 Mo.App. 298—6 C.J. p 668 note 22.

5. Panty v. Panty, 129 N.E. 283, 74 Ind.App. 485—6 C.J. p 668 note 23.

6. Northern Pac. R. Co. v. Clarke, (Wash.) 106 F. 794, 45 C.C.A. 635—6 C.J. p 668 note 24.

7. Conn.—Rowell v. Ross, 101 A. 333, 91 Conn. 702.
Iowa.—Hornish v. McConnell, 182 N. W. 406, 191 Iowa 308.
6 C.J. p 668 note 25.

8. Ind.—Panty v. Panty, 129 N.E. 283, 74 Ind.App. 485.
Iowa.—Hornish v. McConnell, 182 N. W. 406, 191 Iowa 308.

9. Fuehr v. Ewert & Richter Express & Storage Co., 163 N.W. 347, 180 Iowa 513.

10. Minn.—Olmstead v. Firth, 61 N. W. 1017, 60 Minn. 126.
Va.—Culbert v. Hutton & Hutton, 123 S.E. 367, 133 Va. 477.
6 C.J. p 669 note 30.

11. Cormac v. Murphy, 208 P. 360, 58 Cal.App. 366—6 C.J. p 669 note 30.

12. Watt v. Watt, 2 Barb.Ch. (N.Y.) 371.

13. Southern Grocery Stores v. Cain, 173 S.E. 256, 48 Ga.App. 557.

14. Ariz.—Journal-Miner Pub. Co. v. Curley, 252 P. 187, 31 Ariz. 280.
Iowa.—Hornish v. McConnell, 182 N. W. 406, 191 Iowa 308.
Tex.—State Life Ins. Co. v. Duke, (Civ.App.) 69 S.W.(2d) 791, error refused.
6 C.J. p 668 note 26.
See Bond v. Duntley Mfg. Co., 195 Ill. App. 576.

Accordingly, it is often held that if a client, with full knowledge of all the circumstances and with the understanding that he is to be charged with the fees of extra counsel, makes no objection and accepts the services, it is too late for him to do so after the case is ended and the services have all been rendered.[15] Similarly, the employment of a substitute to conduct the prosecution or defense of a case, where the original attorney becomes unable for any reason to discharge the duty, is not necessarily void or illegal; and if a client stands by and fails to make objection he cannot afterward object that the substitution was unauthorized.[16] In order, however, for the acts of the client to operate as an acquiescence or ratification, he must have knowledge that the services are rendered by an assistant or associate employed by the original attorney;[17] but such knowledge is not of itself sufficient, where the fact of such assistance is consistent with the employment of the associate or assistant to assist the counsel at the latter's expense,[18] or on behalf of another party interested in the litigation;[19] nor is mere silence sufficient for this purpose,[20] unless long continued to the prejudice of the adverse party.[21]

E. TERMINATION OF RELATION

§ 108. In General

Although it may be sooner terminated by intervening cause, in the absence thereof, the relationship of attorney and client ordinarily continues until the accomplishment, fulfillment, or end of the object, suit, or business for which the attorney was employed, and thereupon the relation and employment terminates and comes to an end.

Unless the relation has been sooner terminated by act of the parties (infra §§ 109, 110), by operation of law (infra §§ 111–115), or by virtue of other causes (infra § 117), the relationship of attorney and client, and the rights, powers, and obligations resulting therefrom, ordinarily continue until there has been a complete and final accomplishment, fulfillment, or end of the particular object, suit, or business for which the attorney has been employed,[22] and thereupon the relation or employment terminates and comes to an end,[23] although as noted in sections 125, 132 infra, the confidential relationship will often be treated as existing beyond this time, in order to hold the attorney to the performance of the confidential and fiduciary duties which have devolved on him by reason of the relationship, and if, in a particular case, the continuance of the relationship is left in doubt, it may become a question of fact for the jury.[24]

§ 109. Act of Parties

The relation and employment of an attorney may always be terminated by agreement with his client, or by the client either with or without cause; but the right of an attorney to withdraw or terminate the relation other than for sufficient cause is considerably restricted.

The relation or employment of an attorney may always be terminated by agreement with his client,[25] and, because of the peculiar nature of the relation of attorney and client, the law goes even further and permits the termination thereof in a manner not recognized with respect to other contracts.[26] Either party may dissolve the relation

15. Ariz.—Journal-Miner Pub. Co v. Curley, 252 P. 187, 31 Ariz. 280
Conn.—Rowell v. Ross, 101 A. 333, 91 Conn. 702
Iowa.—Hornish v. McConnell, 182 N.W. 406, 191 Iowa 308.
6 C.J. p. 668 note 26

16. Fenno v. English, 22 Ark. 170—6 C.J. p. 669 note 27.

17. Cal.—Cormac v. Murphy, 208 P. 360, 58 Cal.App. 366.
Iowa.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258.
6 C.J. p. 668 note 26 [a].

18. Mass.—Kalbritan v. Padover, 161 N.E. 898, 264 Mass. 26.
Or.—Davis v. Liverpool & London & Globe Ins. Co., 166 P. 534, 85 Or. 141.
6 C.J. p. 669 note 28.

19. Young v. Fowler, 200 S.W. 813, 132 Ark. 145.

20. Cormac v. Murphy, 208 P. 360, 58 Cal.App. 366—6 C.J. p. 669 note 29

21. State Life Ins. Co. v. Duke, (Tex.Civ.App.) 69 S.W.(2d) 791, error refused.

22. Me.—Mayo v. Purinton, 94 A. 935, 113 Me. 452.
Mo.—Noell v. Chicago & E.I. Ry. Co., (App.) 21 S.W.(2d) 937, certiorari denied 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.
Va.—Lockard v. Whitenack, 144 S.E. 606, 151 Va. 143.
6 C.J. p. 669 note 32, p. 672 note 57.

23. Iowa.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 90 A.L.R. 258—Dugan v. Midwest Cap Co., 239 N.W. 697, 213 Iowa 751—Scott v. Scott, 156 N.W. 834, 174 Iowa 740
Ky.—Hay v. Cole, 11 B.Mon. 70.
Miss.—Dennis v. Jones, 31 Miss. 609
Okl.—Calloway v. State, 246 P. 873, 117 Okl. 43
Tex.—Hamilton v. Hamilton, (Civ.App.) 225 S.W. 69
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.
6 C.J. p. 672 note 58.

24. Jinks v. Moppin, (Tex.Civ.App.) 80 S.W. 390.

25. Ark.—Poe v. Walker, 87 S.W. (2d) 866, 183 Ark. 659.
S.D.—Emerson-Brantingham Instrument Co. v. Olson, 227 N.W. 567, 56 S.D. 132.

26. Minn.—Lawler v. Dunn, 176 N.W. 989, 145 Minn. 281.
N.Y.—Matter of Lydig's Will, 187 N.E. 298, 262 N.Y. 408—Application of Krooks, 178 N.E. 548, 257 N.Y. 329—Hausvater v. Wikler & Diamont, Inc., 277 N.Y.S. 810, 154 Misc. 555
Tenn.—Spofford v. Rose, 237 S.W. 63, 145 Tenn. 583
6 C.J. p. 673 note 69.

for cause;[27] and the client has the absolute right to discharge the attorney and terminate the relation at any time even without cause,[28] no matter how arbitrary his action may seem,[29] although the question of whether the revocation or termination was with or without cause may have a material bearing on the client's liability for fees or damages (infra § 169). In the case of a corporate client, however, the revocation or discharge may be ineffective because it is not legally voted or passed;[30] and the

27. U S—Woodbury v. Andrew Jergens Co, (C C A N Y.) 69 F (2d) 49—Central Loan Co v. Russell, (C C A Tex) 16 F (2d) 35
Cal—Brydonjack v Rieck, 42 P.(2d) 336, 5 Cal App (2d) 219
N Y—Lewy v Union Ry Co of New York City, 272 N Y S 123, 151 Misc 724
R I—Lake v Winfield Fuller Co, 173 A. 119, 54 R I. 358
Tenn—Spofford v Rose, 237 S W. 68, 145 Tenn 583
6 C J p 673 note 70, p 676 note 24.

Demands by attorney as sufficient cause

If attorneys attempt to introduce new terms into their written contract governing their employment and compensation or to discontinue their services, the clients would be justified in taking them at their word and in discharging them, although, if they merely present a tentative settlement and notified their clients as to the basis on which their claim would be made at the conclusion of their services, without making its acceptance a condition to their continued services, it would not justify a discharge, if in fact they were still ready and willing to go on with the litigation—Teiser v. Barlow, 192 P. 394, 97 Or. 410.

Gross negligence unnecessary

A client's right to discharge his attorney is not restricted to cases of gross negligence of the attorney, but the client has a right to discharge his attorney for failing to prosecute the client's claim with reasonable diligence.—Johnson v. Missouri Pac. R. Co., 233 S W. 699, 149 Ark 418.

Lack of confidence in attorney

The relation between attorney and client is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity, the judgment, or the capacity of the attorney
Cal—In re Casaurang's Estate, 36 P. (2d) 1069, 1 Cal.(2d) 712
Fla—United States Savings Bank v. Pittman, 86 So 567, 80 Fla. 423.
Ill.—Conlan v. Sullivan, 280 Ill.App 332
Okl.—White v. American Law Book Co, 233 P. 426, 106 Okl. 166.
Tenn—Spofford v Rose, 237 S W. 68, 145 Tenn 583.
Wis—Fidelity & Deposit Co. of Maryland v. Madson, 231 N W. 170, 201 Wis 609, 70 A L R 832.
6 C.J. p 677 note 27.

Nonadmission to practice in other jurisdiction

Where an attorney admitted to practice in the courts of Oregon, both state and federal, but not in Alaska, contracted to perform legal services, the contract expressly providing for the employment of local counsel in Alaska if the attorney should deem advisable, the client could not discharge the attorney on the ground that the attorney was not entitled to practice in Alaska, especially as comity would permit the attorney to appear in Alaskan courts—Tuppela v. Mathison, (C C A Alaska) 291 F. 723.

Nonperformance by attorney.—Brydonjack v Rieck, 42 P (2d) 336, 5 Cal App (2d) 219

28. U S—Lewis v Canadian Pac Ry. Co, (C C A Ill) 39 F (2d) 334, certiorari denied 51 S Ct. 76, 282 U. S 869, 75 L Ed 768—U. S. v McMurtry, (D C N Y) 24 F.(2d) 145—Flagler v Spellman, (C.C A N Y) 15 F (2d) 292—The Flush, (C C A. N Y) 277 F 25, certiorari denied Bulk Oil Transports v Thompson, 42 S Ct. 184, 257 U S 657, 66 L Ed. 421.
Ark—Johnson v Missouri Pac R. Co, 233 S W. 699, 149 Ark. 418—St L, I M & S Ry. Co. v. Hays & Ward, 195 S W. 28, 128 Ark. 471—St L, I M & S. Ry. Co. v. Blaycock, 175 S.W 1170, 117 Ark 504, Ann Cas 1917A 563
Cal.—In re Hardenberg's Estate, 57 P (2d) 914—Kirk v. Culley, 261 P. 994, 202 Cal 501—Atchison v. Hulse, 290 P 916, 107 Cal App 640—McKelley v Turner, 273 P. 1101, 96 Cal App 292
Fla—U. S Savings Bank v. Pittman, 86 So 567, 80 Fla 423
Ill—Conlan v Sullivan, 280 Ill App. 332
Ky—Hubbard v. Goffinett, 70 S W. (2d) 671, 253 Ky 779—Bright v Turner, 265 S W. 627, 205 Ky 138—Gordon v. Morrow, 218 S W. 258, 186 Ky 713
La—Foster, Hall, Barret & Smith v. Haley, 142 So. 251, 174 La. 1019—Schiro v. Macaluso, 126 So 244, 13 La App 88—Succession of Le Blanc, 2 La App. 364
Minn—Lawler v Dunn, 176 N.W. 989, 145 Minn. 281.
Mo—Allen v. Fewel, 87 S W (2d) 142.
N Y—Lurie v. New Amsterdam Casualty Co, 1 N E (2d) 472, 270 N Y. 379, affirming 281 N Y.S. 988, 245 App Div 710—In re Lydig's Will, 187 N E 298, 262 N Y 408—Tillman v. Komar, 181 N.E. 75, 259 N.Y. 133, reversing In re Tillman, 254 N Y S 918, 234 App Div. 752—Application of Krooks, 178 N E. 548, 257 N.Y 329—Robinson v. Rogers, 143 N E 647, 237 N.Y 467, reversing Robinson v Ferguson, 201 N Y.S 941, 207 App.Div 802, and motion denied 143 N E 738, 237 N Y 525—In re Montgomery's Estate, 284 N Y S 5, 246 App Div. 495, reversing 282 N Y S. 741, 156 Misc 583—McAvoy v. Schramme, 264 N.Y.S. 181, 238 App Div 225, affirmed 187 N.E. 691, 263 N.Y. 548—Conklin v. Conklin, 194 N.Y S. 685, 201 App Div 170—Hausvater v Wikler & Diamont, Inc, 277 N. Y S. 810, 154 Misc. 555—Bloom v Irving Trust Co, 272 N.Y S 637, 152 Misc 50—Lewy v. Union Ry. Co. of New York City, 272 N.Y S 123, 151 Misc 724—In re Makames, 265 N Y S 511, 148 Misc 759, reversed on other grounds 265 N Y S 515, 238 App Div. 534—Eisenberg v. Brand, 259 N.Y.S 57, 144 Misc 878—Selesnow v Shub, 240 N.Y.S 829, 136 Misc. 865—In re Driscoll, 228 N Y S 335, 131 Misc. 613—In re Pollen's Estate, 211 N Y S 626, 125 Misc 354—Hofman v. New York & Queens Electric Light & Power Co, 236 N Y.S. 685.
Okl—White v. American Law Book Co, 233 P. 426, 106 Okl 166.
Porto Rico—Bank of San Juan v. Dist. Court of San Juan, 32 Porto Rico 774.
R.I.—Lake v. Winfield Fuller Co, 173 A 119, 54 R I. 358.
Tenn—Spofford v. Rose, 237 S W. 68, 145 Tenn 583.
Wash—Hamlin v. Case & Case, 61 P (2d) 1287.
Wis—Fidelity & Deposit Co. of Maryland v Madson, 231 N W. 170, 201 Wis 609, 70 A L R 832
6 C J p 673 note 71, p 677 note 25.

Attorneys from other states, practicing in New York, are subject to the law of that state, entitling client to dismiss attorney at any time—Flagler v. Spellman, (C C A N.Y) 15 F (2d) 292
Discharge of attorney employed to represent state see States § 224 [59 C.J. p 324 note 11].

29. Application of Krooks, 178 N.E. 548, 257 N Y 329, reversing In re Krooks, 245 N.Y S. 773, 230 App. Div. 826—In re Montgomery's Estate, 284 N Y S. 5, 246 App.Div. 495, reversing 282 N Y S. 741, 156 Misc. 583—Bloom v. Irving Trust Co, 272 N Y.S 637, 152 Misc. 50.

30. Davis v. Haverill, 43 N H 381.

revocation or discharge must in all cases be definite and unequivocal.[31] Also, a revocation or discharge may not be effective as to the court or third persons until they have received notice thereof;[32] and, if a change is sought to be made in an attorney of record, there must usually be not only notice (infra § 123), but also an order of the court (infra § 121); but, if no proceeding is pending in court, the client is free to discharge the attorney without making application to, or obtaining an order of, the court.[33]

The right or power of a client to discharge an attorney or revoke his authority is not affected by the fact that the contract of employment provides for the payment of a contingent fee,[34] or expressly provides that it is one coupled with an interest in the subject matter or shall be irrevocable;[35] nor is the client prevented from discharging an attorney because the attorney has rendered valuable services,[36] or the client is indebted to him for services rendered or money advanced,[37] although, as noted in section 169 infra, the premature termination by act of the parties may not deprive the attorney of his right to compensation, and, if the contract of employment is for a fixed term, the client may not revoke it without cause or in a manner not permitted by the contract without being guilty of a breach thereof.[38] Moreover, if the attorney has in fact been granted or acquired a specific, present, and coexisting interest in the subject matter of the litigation on which his power is to be exercised, he has a power or authority coupled with an interest which cannot be revoked by the client;[39] but, in a number of cases, an assignment or transfer to the attorney of an interest in the money or property to be recovered, to secure or pay his fees, has been held insufficient to create a power coupled with an interest.[40]

It has been said that the client has not only the right but also the duty to discharge an attorney where the latter has been guilty of unprofessional conduct.[41]

After the client has terminated the relation by discharging the attorney, the relation is not revived

31. Atchison v. Hulse, 290 P. 916, 107 Cal.App. 640.

Letter merely denying relationship held insufficient to constitute a discharge terminating relationship.—Atchison v. Hulse, 290 P. 916, 107 Cal App 640.

32. Hendricks v. Town of Cherryville, 153 S.E. 113, 198 N.C. 659.

33. In re Dix's Estate, 259 N.Y.S. 449, 144 Misc. 494.

34. U.S.—Lewis v Canadian Pac. Ry. Co, (C.C.A.Ill.) 39 F.(2d) 334, certiorari denied 51 S.Ct. 76, 282 U.S 869, 75 L.Ed. 768.

Cal.—In re Scott, 271 P. 906, 205 Cal. 525—Kirk v. Culley, 261 P. 994, 202 Cal 501—Todd v. Superior Court, 184 P. 684, 181 Cal. 406, 7 A.L.R 938—Gage v. Atwater, 68 P. 581, 136 Cal. 170—Cassetta v. Del Frate, 2 P.(2d) 533, 116 Cal. App 255—Ayres v. Lipschultz, 228 P. 720, 68 Cal.App. 134.

Ill.—Regan v Chicago, M. & St. P. Ry. Co, 204 Ill.App 115.

Ky.—Gordon v. Morrow, 218 S.W. 258, 186 Ky 713

N.Y.—In re Weitling, 194 N.E 401, 266 N.Y 184, reversing 275 N.Y.S. 973, 242 App.Div 832—Application of Krooks, 178 N.E 548, 257 N.Y. 329, reversing In re Krooks, 245 N.Y.S. 773, 230 App.Div. 836—Bloom v. Irving Trust Co, 272 N.Y.S 637, 152 Misc 50

Wash.—Hamlin v. Case & Case, 61 P.(2d) 1287

6 C.J. p 677 note 32.

35. Cal.—O'Connell v. Superior Court in and for City and County of San Francisco, 41 P.(2d) 334, 2 Cal.(2d) 418, 97 A.L.R. 918—In re Casaurang's Estate, 36 P.(2d) 1069, 1 Cal.(2d) 712—Todd v. Superior Court of California in and for City and County of San Francisco, 184 P. 684, 181 Cal 406, 7 A.L.R 938

Ill.—Conlan v. Sullivan, 280 Ill.App. 332.

Wash.—Hamlin v. Case & Case, 61 P. (2d) 1287.

6 C.J. p 677 note 33.

36. Cal.—O'Connell v. Superior Court in and for City and County of San Francisco, 41 P.(2d) 334, 2 Cal.(2d) 418, 97 A.L.R 918—In re Casaurang's Estate, 36 P.(2d) 1069, 1 Cal.(2d) 712—Todd v. Superior Court, 184 P. 684, 181 Cal 406, 7 A.L.R 938.

Ill.—Conlan v. Sullivan, 280 Ill.App. 332.

Wis.—Fidelity & Deposit Co of Maryland v. Madson, 231 N.W 170, 201 Wis 609, 70 A.L.R. 832.

6 C.J. p 678 note 34.

37. Cal.—O'Connell v. Superior Court in and for City and County of San Francisco, 41 P.(2d) 334, 2 Cal.(2d) 418, 97 A.L.R 918—In re Scott, 271 P 906, 205 Cal 525—Todd v. Superior Court, 184 P. 684, 181 Cal. 406, 7 A.L.R. 938.

Ill.—Conlan v. Sullivan, 280 Ill.App 332.

Wis.—Fidelity & Deposit Co of Maryland, 231 N.W 170, 201 Wis 609, 70 A.L.R. 832

6 C.J p 678 note 35.

38. U.S.—Flagler v. Spellman, (C.C.A.N.Y.) 15 F.(2d) 292—Gilman v. Lamson Co, (Mass.) 234 F. 507, 148 C.C.A. 273.

N.Y.—Greenberg v. Remick, 129 N.E. 211, 230 N.Y. 70

39. O'Connell v. Superior Court in and for City and County of San Francisco, 41 P.(2d) 334, 2 Cal. (2d) 418, 97 A.L.R. 918—6 C.J. p 678 note 36

Estoppel to deny lack of interest

The fact that the client, a laywoman, has represented to an attorney, subsequently associating with the original attorney, that the latter had an interest in the subject matter of the litigation under a contingent fee contract prepared by him does not estop the client from discharging the attorneys, where the actual legal effect of the contract is not to give a power coupled with an interest.—In re Scott, 271 P. 906, 205 Cal. 525.

40. Cal.—O'Connell v. Superior Court in and for City and County of San Francisco, 41 P.(2d) 334, 2 Cal.(2d) 418, 97 A.L.R 918—In re Casaurang's Estate, 36 P.(2d) 1069, 1 Cal.(2d) 712—Todd v. Superior Court, 184 P. 684, 181 Cal. 406, 7 A.L.R 938—Cassetta v Del Frate, 2 P.(2d) 533, 116 Cal.App 255.

Wash.—Hamlin v. Case & Case, 61 P.(2d) 1287.

41. Duffy v. Colonial Trust Co, 135 A. 204, 287 Pa. 348, 49 A.L.R. 406, certiorari denied 47 S.Ct. 570, 273 U.S 765, 71 L.Ed. 880

Suggestion that witness simulate illness

Client, having ascertained that an attorney suggested that a witness simulate illness to obtain a continuance, has the duty to discharge him.

or kept alive by reason of the fact that the client makes use of evidence or witnesses employed or obtained by the attorney or that the attorney was present at the trial.[42]

As will appear from section 110 infra, the right of an attorney to withdraw from a case and terminate the relation on his own initiative is greatly restricted and limited.

§ 110. —— Withdrawal of Attorney

An attorney may not, in the absence of the client's consent, withdraw from a case without justifiable cause; and then only after proper notice to his client, and on leave of the court.

When an attorney accepts a retainer to conduct a legal proceeding, he enters into an entire contract to conduct the proceeding to a conclusion, and he may not abandon his relation without justifiable cause,[43] or the consent of his client.[44] If he does so he may forfeit his right to compensation (infra § 169) or a lien (infra § 220) or render himself liable to an action for damages on account of his neglect (infra § 140).

If a firm of attorneys has been retained, no member thereof can withdraw or be released merely by some act or agreement among themselves.[45]

For justifiable and lawful cause, however, the attorney may, after giving proper notice and obtaining leave of court, withdraw from a case at any stage in the proceedings.[46] The determination of what constitutes a sufficient cause for withdrawal must depend to a great extent on the particular facts of each case, for, as has been judicially noted, no rule of universal application has been formulated with respect to what facts or conditions justify an attorney in withdrawing.[47] Usually, however, the attorney is justified in withdrawing on account of any conduct on the part of the client, during the progress of the litigation, which tends to degrade or humiliate the attorney,[48] lower the standard of professional ethics,[49] or destroy the reciprocal confidence required between attorney and client.[50] Also, an attorney is ordinarily justified in withdrawing while the suit is pending if his client insists on employing associate counsel with whom he cannot cordially coöperate and with whom he objects to having personal or professional relations,[51] or if the client fails or refuses to pay or secure the proper fees or expenses of the attorney after being seasonably requested to do so.[52] On the other hand, it has been held that an attorney is not justified in withdrawing from a case because

—Duffy v. Colonial Trust Co., 135 A. 204, 287 Pa. 343, 49 A.L.R. 406, certiorari denied 47 S.Ct. 570, 273 U.S. 765, 71 L.Ed. 880.

42. In re Driscoll, 228 N.Y.S. 335, 131 Misc. 613.

43. Ala.—Howard v. McCarson, 110 So. 296, 215 Ala. 251.
Ariz.—Fogal v. State, 3 P.(2d) 1053, 39 Ariz. 55, (first case), followed in 3 P.(2d) 1053, 39 Ariz. 57, (second case) and Johnson v. State, 3 P.(2d) 1054, 39 Ariz. 57.
Cal.—De Recat Corporation v. Dunn, 242 P. 936, 197 Cal. 737, 42 A.L.R. 1342—Larimer v. Smith, 19 P.(2d) 835, 130 Cal.App. 93.
Mo.—State v. Bersch, 207 S.W. 309, 276 Mo. 397.
N.Y.—Eisenberg v. Brand, 259 N.Y.S. 57, 144 Misc. 378—Selesnow v. Shub, 240 N.Y.S. 329, 136 Misc. 365
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.
Okl.—McLaughlin v. Nettleton, 148 P. 987, 47 Okl. 407.
Pa.—Green v. Shils, 18 Pa.Dist. & Co. 10.
6 C.J. p 673 note 73, p 674 note 76.

Rule held inapplicable because the person involved was simply a layman who had acquired an interest of the attorney under the employment contract of the attorney and his client, with knowledge of their relations—Page v. Walser, 213 P. 107, 46 Nev. 390.

44. Ala.—Howard v. McCarson, 110 So. 296, 215 Ala. 251.
Ill.—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141, reversing 249 Ill. App. 479.
6 C.J. p 673 note 74.

45. Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773—6 C.J. p 629 note 32

46. Ala.—Shannon v. Lunsford, 111 So. 22, 215 Ala. 465.
Iowa.—In re Coffin's Estate, 179 N.W. 123, 189 Iowa 862.
Mo.—State v. Bersch, 207 S.W. 309, 276 Mo. 397.
N.Y.—Bailey v. Coventry, 224 N.Y.S. 17, 130 Misc. 269.
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.
6 C.J. p 674 note 77.

47. Gosnell v. Hilliard, supra—6 C.J. p 674 note 78

48. State v. Bersch, 207 S.W. 309, 276 Mo. 397—6 C.J. p 674 note 79.

Attempt to sustain case by unlawful means
The attempt of a client's relative to bribe a juror has been held to justify a withdrawal—State v. Bersch, 207 S.W. 309, 276 Mo. 397.

49. Ala.—Shannon v. Lunsford, 111 So. 22, 215 Ala. 465.
Mo.—Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 9 A.L.R. 1076—State v. Bersch, 207 S.W. 309, 276 Mo. 397.
6 C.J. p 674 note 80.

Discovery that perjury is necessary to establish case
Where an attorney, suing for injuries to an alleged passenger, discovered before trial that his client was not on defendant's car as alleged, and that the case had no foundation in fact and could not be successfully maintained without perjury, he had a right to withdraw at once from the case—Gebhardt v. United Rys. Co. of St. Louis, (Mo.) 220 S.W. 677, 9 A.L.R. 1076.

Repudiation of counsel's agreement
The client's repudiation of an agreement made in good faith by counsel with the opposing side is a just cause for counsel's withdrawal from the case—Shannon v. Lunsford, 111 So. 22, 215 Ala. 465

50. Gebhardt v. United Rys. Co. of St. Louis, (Mo.) 220 S.W. 677, 9 A.L.R. 1076—6 C.J. p 674 note 81.

51. In re Dunn, 93 N.E. 914, 205 N.Y. 393, Ann.Cas.1913E 536—6 C.J. p 674 note 82.

52. N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297
Pa.—Spector v. Greenstein, 35 Pa.Super. 177
Tex.—Thomas v. Morrison, (Civ.App.) 46 S.W. 46.
6 C.J. p 674 note 83.

of the client's refusal to accept the attorney's advice to compromise,[53] or because his client refuses to pay some demand pertaining to another proceeding[54] or a balance for services which is disputed by the client.[55]

It is not only the right, but also the duty, of an attorney to withdraw if at any time he acquires interests adverse or hostile to those of his client,[56] if it becomes apparent that his employment is unnecessary and that no substantial services are being rendered for the compensation received,[57] or if he becomes aware of the fact that the claim which he is urging for his client is fraudulent and fictitious.[58]

If a resignation or withdrawal of an attorney is accepted or assented to by the client, a rescission of the contract of employment is thereby effected,[59] and thereafter the attorney by his own act cannot resume or revive the relationship,[60] but a threatened or attempted withdrawal by an attorney for cause is ineffective to terminate the relationship where the attorney thereafter continues in the case with the consent of the client either under the original contract or under what purports to be a new contract of employment.[61]

Notice, and relief by other attorney. Although justifiable cause for withdrawal may exist, it is generally held that an attorney is not entitled to withdraw from a case until the client has been given due and reasonable warning or notice,[62] and has had opportunity to obtain a substitute to relieve the withdrawing attorney.[63] Even then, it has been said that the attorney cannot quit without losing the benefits of the relation until he has actually been relieved by placing the case and all the information he has concerning it with another attorney chosen by the client.[64]

Application and order of court. An attorney who has appeared as attorney of record in a cause cannot effectively terminate the relation by withdrawal until he has made application to the court and obtained leave to make a formal withdrawal of record;[65] and, if this is not done, the relation continues until the end of the litigation, at least, so far as the court and the opposing party are concerned.[66] Even where sufficient cause exists, the attorney has no unqualified right to withdraw of record and the court in its discretion may refuse

53. Van Gieson v. Magoon, 20 Hawaii 146

54. Cairo, etc., R. Co. v. Koerner, 3 Ill.App. 248.

55. State of Ohio v. Shay, 3 Ohio N.P.(N.S.) 657—6 C.J. p. 674 note 86

56. Fla.—U. S. Savings Bank v. Pittman, 86 So. 567, 80 Fla. 423
Mo.—State v. Bersch, 207 S.W. 809, 276 Mo. 397.

57. In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E. 332, 351 Ill. 206.

58. In re Wendel's Estate, 287 N.Y.S. 893, 159 Misc. 443.

59. Poe v. Walker, 37 S.W.(2d) 866, 183 Ark. 659

60. Poe v. Walker, supra.

61. Okl.—Haunstein v. McCallister, 46 P.(2d) 552.
Wash.—Roche v. Madar, 175 P. 314, 104 Wash. 21, affirmed 181 P. 857, 104 Wash. 21.

62. Iowa.—In re Coffin's Estate, 179 N.W. 123, 189 Iowa 862.
Mo.—State v. Bersch, 207 S.W. 809, 276 Mo. 397.
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.—Gooch v. Peebles, 11 S.E. 415, 105 N.C. 411.
Okl.—McLaughlin v. Nettleton, 183 P. 416, 69 Okl. 74.—McLaughlin v. Nettleton, 148 P. 987, 47 Okl. 407.
Pa.—Spector v. Greenstein, 85 Pa. Super. 177.

Demand for fees and expenses insufficient notice

A demand for fees and expense money to which the attorney is entitled is not of itself sufficient notice of an intention to withdraw in case the fees are not arranged for.—In re Coffin's Estate, 179 N.W. 123, 189 Iowa 862.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.

63. In re Coffin's Estate, 179 N.W. 123, 189 Iowa 862.

64. Eisenberg v. Brand, 259 N.Y.S. 57, 144 Misc. 878.

Reasons for rule

"The office of a lawyer is one of great importance. He is schooled in the substantive law, has studied the intricate rules of practice, and is familiar with the pitfalls made in this complex world for the uninitiated. He has the power of expression and is skilled in argument. The road he travels is technical, but he knows the turns—others get lost. One of the reasons why he represents people is that they could not find the way without his help. In the course of litigation he may disagree with his client, may lose faith in him, may even be humiliated by him. Nevertheless, he should remain at his side. The profession demands of him that he stand by under most trying conditions—lest, unprotected, his client fall down harder than justice requires. It may be that he should make no move against the other party, nor raise a defense to the charge projected, but, by the same token, he should not desert in the midst of the battle. The relation of attorney and client, is a sacred one, and it binds the lawyer, although not the client, to continue to represent him until he is properly relieved."—Eisenberg v. Brand, 259 N.Y.S. 57, 58, 144 Misc. 878

65. U.S.—Tripp v. Santa Rosa Street R. R. Co., (Cal.) 12 S.Ct. 655, 144 U.S. 126, 36 L.Ed. 371.—U. S. v. McMurtry, (D.C.N.Y.) 24 F.(2d) 145.
Cal.—De Recat Corporation v. Dunn, 242 P. 936, 197 Cal. 787, 42 A.L.R. 1342.
Ill.—Jacobson v. Ashkinaze, 168 N.E. 647, 337 Ill. 141, reversing 249 Ill. App. 479.—Hollan v. Kepner, 130 N.E. 699, 297 Ill. 332.
Mo.—Desino v. William S. Drozda Realty Co., (App.) 13 S.W.(2d) 659
N.Y.—Seleznow v. Shub, 240 N.Y.S. 829, 136 Misc. 365.—Bailey v. Coventry, 224 N.Y.S. 17, 130 Misc. 269
N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.—Ladd v. Teague, 36 S.E. 45, 126 N.C. 544.
Pa.—Spector v. Greenstein, 85 Pa. Super. 177
R.I.—Dooley v. Slavit, 165 A. 771, 53 R.I. 264.
Vt.—In re O'Brien, 107 A. 487, 93 Vt. 194.
6 C.J. p. 674 note 87.

66. Ill.—Hollan v. Kepner, 130 N.E. 699, 297 Ill. 332
R.I.—Dooley v. Slavit, 165 A. 771, 53 R.I. 264.
6 C.J. p. 674 note 88.

the withdrawal,[67] particularly where it is sought so close to the time the case is set for trial that it must necessarily result in a continuance to the prejudice of the other party.[68] Moreover, the court cannot properly grant an attorney leave to withdraw in the absence of the client and without his being given notice and an opportunity to be heard;[69] but the action of the court in permitting a withdrawal without notice has been sustained where the client was in no way harmed because of a continuance and his being granted ample time to engage other counsel.[70]

§ 111. Disbarment of Attorney

Disbarment of an attorney operates to terminate the relation of attorney and client, or to give the client cause for revoking the employment.

Apparently, an attorney's inability to perform the services for which he was retained by reason of his disbarment annuls the contract of employment and terminates the relationship of attorney and client;[71] and it, at least, affords the client good cause for revoking a power of attorney which is by its terms irrevocable.[72]

§ 112. Death of Attorney

The death of the attorney terminates the contract of employment, unless the deceased attorney was a member of a firm and the contract did not call for his personal attention.

A contract for legal services being personal in its nature, the death of the attorney, rendering performance impossible, terminates the contract,[73] and his representatives cannot lawfully employ anyone to perform the services which the attorney was employed to render.[74] This is true, although the deceased attorney was a member of a firm, if it was understood that he was to give the matter his personal attention.[75] If, however, the employment or retainer was of the firm itself, rather than the deceased partner personally, the death of the latter does not of itself terminate the contract of employment nor relieve the survivor or survivors of the duty of completing its performance;[76] but, as a client engaging a firm of lawyers is entitled to the personal services, skill, and ability of all members, the death of one gives the client the option of terminating the contract and employing other counsel on paying for services rendered up to that time.[77]

§ 113. Death of Client

Death or dissolution of the client terminates the relation of attorney and client and the attorney's authority to act by virtue thereof, unless the power of the attorney is coupled with an interest or the employment by its terms is to extend beyond the happening of such event.

Although the attorney has received no notice thereof,[78] the death of the client,[79] or, in the case of a corporation or partnership, its dissolution,[80] ordinarily terminates the relation of attorney and client and the powers and duties which the attorney

67. Cal.—Linn v. Superior Court in and for Los Angeles County, 250 P. 880, 79 Cal.App. 721.
N.Y.—In re Wellington's Estate, 289 N.Y.S. 1005, 160 Misc. 383, denying modification 276 N.Y.S. 946, 154 Misc. 271

68. Linn v. Superior Court in and for Los Angeles County, 250 P. 880, 79 Cal.App. 721.

69. N.C.—Gosnell v. Hilliard, 171 S.E. 52, 205 N.C. 297.
Pa.—Spector v. Greenstein, 85 Pa. Super. 177—Newmann v. Goldhammer, 24 Pa.Dist. 402.

70. State v. Bersch, 207 S.W. 809, 276 Mo. 397

71. Schafer's Estate, 39 Pa.Super. 384—6 C.J. p. 676 note 12

72. Brownlow v. Payne, 2 Tenn.App. 154

73. Ky.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773
N.Y.—In re Levy's Will, 201 N.Y.S. 818, 207 App.Div. 183.
6 C.J. p. 675 note 89.

74. Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773—6 C.J. p. 675 note 90

75. Ark.—Smith v. Hill, 13 Ark. 173.
N.Y.—In re Levy's Will, 201 N.Y.S. 818, 207 App.Div. 183.
6 C.J. p. 675 note 91

76. Ark.—Smith v. Hill, 13 Ark. 173.
Ky.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773—Green County v. Lewis, 163 S.W. 489, 157 Ky. 490
6 C.J. p. 675 note 92

77. Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773—6 C.J. p. 675 note 93

78. In re Levine's Estate, 286 N.Y.S. 513, 247 App.Div. 19, affirming 278 N.Y.S. 36, 154 Misc. 700

79. U.S.—Lewis v. Canadian Pac. Ry. Co., (C.C.A.Ill.) 39 F.(2d) 834.
Ala.—McDonald v. Womack, 107 So. 813, 214 Ala. 309
Cal.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 242—In re Baker's Estate, 150 P. 989, 170 Cal. 578—Benning v. Nevis, 204 P. 866, 56 Cal.App. 192
Conn.—Hennessy v. Denihan, 149 A. 250, 110 Conn. 646
Fla.—Bickell v. McCaskill, 106 So. 470, 90 Fla. 441
Ind.—Rainey v. Lafayette Loan & Trust Co., 173 N.E. 128, 92 Ind.App. 344—Elliott v. Kern, 169 N.E. 46, 90 Ind.App. 453, denying transfer 161 N.E. 663, 90 Ind.App. 453
Ky.—Slack v. Rowlhac, 5 Ky.Op. 101
Mass.—Barnes v. Barnes, 196 N.E. 917
Miss.—Clifton v. Clark, 36 So. 251, 83 Miss. 446, 66 L.R.A. 821, 102 Am.S.R. 453, 1 Ann.Cas. 396.
N.Y.—In re Levine's Estate, 286 N.Y.S. 513, 247 App.Div. 19, affirming 278 N.Y.S. 36, 154 Misc. 700—O'Brien v. Flynn, 239 N.Y.S. 59, 228 App.Div. 704.
Okl.—Huddleston v. Wallow, 246 P. 585, 117 Okl. 259
Pa.—Scranton Bldg. Assoc. v. Ranck, 5 Pa.Co. 449
S.C.—Bunch v. Dunning, 91 S.E. 331, 106 S.C. 300.
Tex.—Loden v. Fish, (Civ.App.) 20 S.W.(2d) 208
Wash.—In re Mallory's Estate, 278 P. 433, 154 Wash. 181
6 C.J. p. 675 note 95

80. N.Y.—Sinnott v. Hanan, 141 N.Y.S. 505, 156 App.Div. 323—Wamsley v. Horton & Co., 34 N.Y.S. 306, 87 Hun 347—In re Norwood, 32 Hun 196.
Wash.—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.(2d) 133.
6 C.J. p. 675 note 96.

would otherwise have by reason of the employment. Accordingly, it has been held that after the death or dissolution of his client the attorney has no power to admit a previous mistake,[81] remit part of a verdict,[82] move to dismiss a pending action,[83] or revive a pending suit for the heirs or personal representatives without authority from them;[84] nor can he receive money in satisfaction of a judgment,[85] take any step or action with reference to appellate proceedings or the perfection thereof,[86] file a petition for the rehearing of a case determined against a deceased client,[87] or take any further steps in regard to the litigation proper.[88]

Nevertheless, the death of the client does not terminate the relation or revoke the authority of the attorney where the contract of employment is by its terms to continue thereafter;[89] where the attorney is specifically retained to conduct the case to judgment or conclusion;[90] where the client does not retain the control and direction of the attorney in the performance of his services, and neither the terms of the contract not its subject matter requires the aid or presence of the client to enable the attorney to give the required services;[91] or where his authority is coupled with an interest.[92] Although a contract for a contingent fee payable out of the proceeds of the recovery has been held insufficient to give the attorney an interest for this purpose,[93] if the contract is an entire one to prosecute a claim to final adjudication for an exclusively contingent fee, the employment is not revoked by the death of the client.[94]

Notwithstanding the dissolution of a corporation client which he is representing, the attorney has the power to suggest to the court, at the proper time and place, the fact that his client has been dissolved,[95] and it has been stated generally that the courts will pass on the questions submitted and hear suggestions as to their merits from an attorney who is an officer of the court, although his client has died.[96]

The death of a third person who was responsible for the employment of the attorney does not dissolve the relation.[97]

81. Cook v. Parham, 62 Ala. 456.

82. Rundles v. Jones, 3 Ind. 35.

83. O'Brien v. Flynn, 239 N.Y.S. 59, 228 App Div. 704

84. Prior v. Kiso, 9 S.W. 898, 96 Mo. 303—6 C.J. p 675 note 99

85. Farrand v. Land, etc, Imp Co., (Wis) 86 F. 393, 30 C.C.A. 128—6 C.J. p 675 note 1

Necessity of notice of revocation to debtor before his payment of judgment to attorney see supra § 99.

86. Ala.—McDonald v. Womack, 107 So 812, 214 Ala 309

Cal.—In re Baker's Estate, 150 P. 989, 170 Cal 578.

Conn.—Hennessy v. Denihan, 149 A. 250, 110 Conn 646—Barton v New Haven, 52 A. 403, 74 Conn 729

Okl.—Huddleston v. Wallow, 246 P. 585, 117 Okl 259.

6 C.J. p 675 note 2.

Accepting service of case-made

Where a successful party in joint judgment dies before service of case-made, service on attorneys who represented him at the trial is a nullity, and case-made thereafter settled and filed confers no jurisdiction on the supreme court, where neither administrator nor heirs were brought in by proceedings to revive.—Huddleston v. Wallow, 246 P. 585, 117 Okl. 259

Motion to affirm

The death of a litigant revokes all agency of his attorney to appear for him and make motion in the appellate court to affirm in his name.—McDonald v. Womack, 107 So. 812, 214 Ala. 309.

87. Elliott v. Kern, 169 N.E. 46, 90 Ind.App 453.

88. N.Y.—In re Norwood, 32 Hun 196.

Okl.—Huddleston v. Wallow, 246 P. 585, 117 Okl. 259

Pa.—Scranton Building Association v. Ranck, 5 Pa.Co. 449.

6 C.J. p 675 note 3.

Stipulations

Attorneys for an insurance company which was dissolved by act of law had no authority to enter into any stipulations with reference to pending litigation after the act of dissolution had occurred.—In re Norwood, 32 Hun (N.Y.) 196.

89. Lewis v. Braun, 191 N.E. 56, 356 Ill. 467.

Employment to obtain transfer of stock and payment of dividends

(1) A contract authorizing an attorney to take such steps as may be necessary to obtain a transfer of stock and secure dividends due thereon, and providing that, in the event of death of the client, the attorney should thereafter take such course with reference to the stock or money as should be prescribed by will or written directions left by the client, permits the relation and authority of the attorney to continue after the death of the client.—Lewis v. Braun, 191 N.E. 56, 356 Ill. 467.

(2) The failure of the client to leave any will or written directions as mentioned in such a contract does not show an intent on the part of the client to revoke the contract or make it terminable on his death.—Lewis v. Braun, supra.

(3) Moreover, the failure of the client's wife, who has been appointed administratrix after his death, to permit the attorney to use her name in conducting litigation to obtain the stock or dividends in no way revokes the attorney's authority to act under the contract.—Lewis v Braun, supra

90. Cal.—In re Mallory's Estate, 278 P. 488, 99 Cal App 96

Ind.—Rainey v. Lafayette Loan & Trust & Co., 172 N.E. 128, 92 Ind App 344.

Tex.—Loden v. Fish, (Civ.App.) 20 S.W (2d) 208.

6 C.J. p 675 note 4.

91. Ind.—Rainey v Lafayette Loan & Trust Co, 172 N.E. 128, 92 Ind App 344.

Okl.—Spurr v. Pryor & Stokes, 230 P. 267, 104 Okl. 68.

Tex.—Loden v. Fish, (Civ.App.) 20 S.W (2d) 208.

92. Okl.—Spurr v. Pryor & Stokes, 230 P. 267, 104 Okl 68.

Pa.—Scranton Building Association v. Ranck, 5 Pa.Co. 449.

6 C.J. p 676 note 5

93. Lewis v. Canadian Pac. Ry. Co, (C.C.A.Ill.) 39 F.(2d) 834—6 C.J. p 676 note 6.

94. In re Agee's Estate, 252 P. 891, 69 Utah 130, 50 A.L.R. 641.

95. State ex rel National Surety Co. v. Superior Court of King County, (Wash.) 41 P.(2d) 133.

96. Le Baron v. Moni, 167 A. 103, 53 R.I. 385.

97. Ind.—Rainey v. Lafayette Loan & Trust Co., 172 N.E. 128, 92 Ind. App. 344.

§ 114. Dissolution of Partnership

Dissolution of a firm or partnership of lawyers does not terminate the relation and obligation of the partners to clients who have previously engaged the partnership to represent them.

The dissolution of a law firm does not terminate the relation or obligation of the partners to pre-existing firm clients, and the latter may look to either one or all of the partners for the performance of the duties growing out of the relation of attorney and client.[98] Such dissolution has reference to new business to be undertaken and does not affect engagements already made, at least so far as their clients are concerned.[99]

The client, however, is entitled to select the partner he desires to continue his suit, as long as the lien of the firm is preserved,[1] and, if the dissolution results in the formation of a new firm composed in part of the old members, the client is not bound to go on with the new firm,[2] but, in such a case, it becomes incumbent on the client to give notice of his intention to make a change, if he wishes to avoid liability for services thereafter rendered by the new firm.[3]

§ 115. Insanity

Insanity either of the client or the attorney is usually held to terminate the relation of attorney and client.

The insanity of a client operates to terminate the relation of attorney and client;[4] and the mere fact that a party becomes insane while he is indebted to the attorney who was at the time representing him with respect to his property interests does not give that attorney the right per se to appear as such for the guardian or administrator appointed who, by reason of such appointment, becomes responsible for the estate and the proper conduct of its affairs.[5] However, in the absence of any other adjudication of insanity than commitment to a hospital, there being no guardian, it has been held that the relation continues in full force as to all matters included in the original contract.[6]

Insanity of the attorney rendering him unable to perform the services required of him terminates the relation.[7]

§ 116. Termination of Controversy

In the absence of the client's acquiescence to a further continuance of the relation, the relation of attorney and client is terminated by a final termination on its merits of the controversy or litigation in which the attorney was acting, if the purpose or object of the employment is thereby completely accomplished or ended; but, if it is not, the relation may continue thereafter in so far as is necessary.

If it completely accomplishes or ends the object or purpose of the attorney's employment, the relation of attorney and client and the authority of the attorney are terminated by a final determination on its merits of the controversy or litigation in which the attorney was acting,[8] unless the client has consented to, or acquiesced in, a further continuance of the relation.[9] Hence, in particular cases the relation of attorney and client and the authority of an attorney have been held terminated by an executed compromise or settlement,[10] the reconciliation and resumption of marital relations by the parties to a divorce suit,[11] or a dismissal,[12] or a

Okl—Spurr v Pryor & Stokes, 230 P. 267, 104 Okl. 68.
6 C J p 676 note 7.

Person employing attorney for another's defense.—Spurr v Pryor & Stokes, 230 P. 267, 104 Okl. 68.

98. Ky.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky 773
Mo—Powell v. Roberts, 92 S W. 752, 116 Mo.App 629
6 C J p 629 note 32, p 676 note 8.

Responsibility for collections after dissolution

Where a firm of attorneys took a note for collection, and obtained judgment on the note, and dissolved partnership before collecting the judgment, one member of the firm was liable to the client for the amount collected on the note after the dissolution of the partnership by the other member and converted by the latter to his own use—Powell v. Roberts, 92 S.W. 752, 116 Mo.App. 629.

Dissolution of partnership client see supra § 113.

99. Ky—Macpherson v. Bacon's Ex'r, 203 S W. 744, 180 Ky 773
Pa—McConnell v. Hall, 61 Pa Super 583.
6 C J. p 676 note 9.

1. Little v. Caldwell, 36 P 107, 101 Cal. 553, 40 Am S R. 89—6 C.J. p 676 note 10

2. McConnell v. Hall, 61 Pa Super 583.

3. McConnell v. Hall, 61 Pa Super 583—McConnell v. Hall, 61 Pa Super. 583.

4. Cal—Sullivan v. Dunne, 244 P. 343, 198 Cal 183.
Ill.—Joost v. Racher, 148 Ill App. 543.
N Y—Merritt v Merritt, 50 N.Y.S 604, 27 App Div 208.
6 C J. p 676 note 16.

5. State v. Second Judicial Dist. Ct., 75 P 516, 30 Mont. 8.

6. McKenna v. Garvey, 77 N.E. 782, 191 Mass. 96.

7. Corson v. Lewis, 109 N.W. 735, 77 Neb. 446.

8. Ariz.—Morgan v. Krook, 283 P. 287, 36 Ariz 133
Iowa.—Orwig v. Chicago, R I & P. Ry. Co, 250 N.W. 148, 217 Iowa 521, 90 A L R 258
Tex—Hamilton v. Hamilton, (Civ App) 225 S W. 69, dismissed for want of jurisdiction.
Utah—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L R 630.
6 C J p 673 note 66.

9. Ill—Watson v. Trinz, 274 Ill App. 379
Iowa—Orwig v. Chicago, R I & P. Ry Co, 250 N W. 148, 217 Iowa 521, 90 A.L R 258.

10. Dooley v. Dooley, 9 Lea (Tenn.) 306.

11. Ala—Bell v Bell, 108 So. 375, 214 Ala 573, 45 A L R. 935.
N Y.—Conklin v Conklin, 194 N.Y.S. 685, 201 App Div. 170.

12. Johnson v. Gerald, 113 So 447, 216 Ala 581, 59 A L.R. 348—Bell v. Bell, 108 So. 375, 214 Ala. 573, 45 A L.R. 935—6 C.J. p 673 note 64.

Dismissal or abandonment of suit

nonsuit.[13]

The mere determination of the controversy or litigation does not of itself, however, bring an end to the relation of attorney and client if there has not been a final determination on the merits,[14] or the purpose or object of the employment has not been completely accomplished or brought to an end.[15] Accordingly, it has been held that a dismissal of the case other than on its merits does not terminate the relation, where the attorney has been employed to attain a final adjudication on the merits.[16]

Rendition and entry of judgment. On the assumption or presumption that an attorney employed for purposes of litigation is usually employed to conduct it to judgment and no further, it has often been laid down, as a general common-law rule, that the relation of attorney and client and the authority and powers of the attorney cease or terminate on the rendition and entry of final judgment in the suit.[17] This rule, however, is usually held not to prevent the relation from continuing during the period after the judgment is rendered but before it becomes final;[18] and in actual practice or application the rule is much modified or disregarded in that it is ordinarily applied only where the judgment has the effect of fully accomplishing or ending the purpose or object of the attorney's employment.[19]

Consequently, while there is no doubt but that the rendition and entry of final judgment terminates the relationship of attorney and client and the authority of the former where the purpose or object of the employment is thereby accomplished and nothing further remains to be done,[20] it is equally well settled, as will be seen in sections 93-99 supra, that the mere rendition and entry of judgment does not of itself terminate the relation, so as to preclude the attorney from thereafter taking such steps or action as may still remain necessary to accomplish the purpose or object of the employment. As a defense attorney, generally, has no further steps to take after final judgment in order to accomplish the purpose of his employment, there are many cases which have said or held that his situation is to be distinguished from that of plaintiff's attorney, who has recovered a favorable judgment which he may enforce or collect (supra §§ 96, 99), and that the relation and authority of a defense attorney always terminates on the rendition and entry of final judgment.[21] Even the re-

by client terminates the relation of attorney and client and the attorney's authority—Johnson v. Gerald, 113 So. 447, 216 Ala. 581, 59 A.L.R. 348.

13. Hoffman v. Cage, 31 Tex. 595.

14. Cal.—Carpenter v. State Bar of California, 292 P. 450, 210 Cal. 520.
Mo.—Noell v. Chicago & E. I. Ry. Co., (App.) 21 S.W.(2d) 937, certiorari denied Chicago & E. I. Ry. Co. v. Noell, 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.

15. Kan.—Todd v. Rhodes, 103 P. 894, 108 Kan. 64, 16 A.L.R. 423.
Ky.—Macpherson v. Bacon's Ex'r, 208 S.W. 744, 180 Ky. 773.
Wis.—Hegel v. George, 259 N.W. 862, 218 Wis. 327, rehearing denied and mandate amended 261 N.W. 14, 218 Wis. 327.

16. Kan.—Todd v. Rhodes, 103 P. 894, 108 Kan. 64, 16 A.L.R. 423.
Mo.—Noell v. Chicago & E. I. Ry. Co., (App.) 21 S.W.(2d) 937, certiorari denied Chicago & E. I. Ry. Co. v. Noell, 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.

Dismissal due to neglect or illness of attorney

"If an attorney is employed to endeavor to attain a certain result and through some accident or inadvertence, or even through neglect or oversight on his part, an order is made dismissing an action brought by him for the purpose, it cannot be said that a new employment is necessary to authorize him to ask for its reinstatement."—Todd v. Rhodes, 103 P. 894, 895, 108 Kan. 64, 16 A.L.R. 423.

17. Cal.—Spencer v. Barnes, 43 P. (2d) 847, 6 Cal.App. (2d) 35.
Iowa.—Dugan v. Midwest Cap Co., 239 N.W. 697, 213 Iowa 751—Scott v. Scott, 156 N.W. 834, 174 Iowa 740.
Kan.—Todd v. Rhodes, 103 P. 894, 108 Kan. 64, 16 A.L.R. 423.
Miss.—Dennis v. Jones, 31 Miss. 606.
N.Y.—Weiner v. Jones, 279 N.Y.S. 799, 245 App.Div. 17—Kalmanowitz v. Kalmanowitz, 95 N.Y.S. 627, 108 App.Div. 296—Ohlquist v. Nordstrom, 257 N.Y.S. 711, 143 Misc. 502, affirmed 261 N.Y.S. 1039, 238 App.Div. 766, affirmed 188 N.E. 125, 262 N.Y. 696.
Ohio.—Boldt v. Baker, 13 Ohio App. 125—Reynolds v. Reynolds, 12 Ohio App. 63.
Okl.—Okmulgee Northern Ry. Co. v. Oklahoma Salvage & Supply Co., 271 P. 167, 133 Okl. 64.
S.C.—Foxworth v. Murchison Nat. Bank, 134 S.E. 428, 136 S.C. 458.
S.D.—Sohn v. Flavin, 244 N.W. 349, 60 S.D. 305.
Tex.—Rupert v. Brook Mays & Co., (Civ.App.) 299 S.W. 474—Hamilton v. Hamilton, (Civ.App.) 225 S.W. 69, dismissed for want of jurisdiction—Kentz v. Kentz, (Civ.App.) 209 S.W. 200.
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.
6 C.J. p. 652 note 30, p. 672 note 60.

18. Cal.—Carpenter v. State Bar of California, 292 P. 450, 210 Cal. 520.
Mo.—Southern Surety Co. v. Young, 198 S.W. 476, 197 Mo.App. 640.
Tex.—Kentz v. Kentz, (Civ.App.) 209 S.W. 200.

Before expiration of time for rehearing

An attorney representing plaintiff, on an appeal from a judgment in the latter's favor, continues to have authority to represent plaintiff after affirmance until such order has become final by the expiration of the time for a rehearing—Carpenter v. State Bar of California, 292 P. 450, 210 Cal. 520.

19. Ohlquist v. Nordstrom, 257 N.Y.S. 711, 143 Misc. 502, affirmed 261 N.Y.S. 1039, 238 App.Div. 766, affirmed 188 N.E. 125, 262 N.Y. 696—6 C.J. p. 652 note 31.

20. Iowa.—Scott v. Scott, 156 N.W. 834, 174 Iowa 740.
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.

Divorce decree awarding custody of child terminates the employment of plaintiff's counsel, where plaintiff already has possession of the child and nothing further remains to be done to carry out the decree.—Scott v. Scott, 156 N.W. 834, 174 Iowa 740.

21. Iowa.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258—Dugan v. Midwest Cap Co., 239 N.W. 697, 213 Iowa 751—Owen v. Smith, 136 N.W. 119, 155 Iowa 463.

lation of such an attorney, however, has been held to continue past the rendition of judgment to the extent deemed necessary to accomplish the purpose of the employment.[22]

While the authority and relation of an attorney can always be extended after final judgment with the consent or acquiescence of the client,[23] a re-employment of the attorney with respect to a different matter does not extend his relation with respect to the litigation in which final judgment has been rendered, although the subject matter of the two cases bears some apparent relation to each other.[24]

§ 117. Termination for Other Reasons

Practically any circumstance or event which puts an end to the subject matter of the employment, including a transfer or disposition thereof, or which renders it impossible for the attorney properly or ably to serve his client, terminates the relation of attorney and client.

Practically any circumstance or event which puts an end to the subject matter of the employment,[25] or which renders it impossible for the attorney properly and ably to serve his client or discharge his duties,[26] terminates the relation of attorney and client.

Accordingly, the relation has been held terminated by the transfer or disposition of the subject matter of the employment,[27] or the attorney's acquisition of an interest or position which causes his interests or duties to be adverse to, or in conflict with, the interests of the client,[28] and the attorney's permanent removal from the state also has this effect,[29] although, it seems, not without an order of substitution.[30]

§ 118. Notice to Appoint Another Attorney

Under statutory provisions to that effect, if an attorney representing a party to a pending cause dies, is disabled, or ceases to act as such, it may be necessary to give such party notice to appoint another attorney or appear in person before further proceedings can be taken in the cause.

Under statutory provisions to that effect, if an attorney representing a party to a pending cause dies, is disabled, or ceases to act as such, it may be necessary to give such party notice to appoint another attorney or else appear in person before further proceedings can be taken in the cause;[31] and if there are several parties represented by the deceased or disabled attorney, each must be notified.[32] Such statutes do not, however, embrace a case where an attorney merely withdraws or resigns, and refuses to proceed further with the litigation, as the words "ceases to act as such" do not cover such a situation;[33] and notice to appoint is clearly unnecessary where the party enters his appearance in person at the same time the attorney enters his withdrawal.[34] Also, there is no disability requiring the giving of notice to appoint another attorney simply because the insurance company which has engaged the attorney to represent insured defendant has been placed in liquidation, as the attorney is not thereby removed or relieved of his duty to continue to represent defendant.[35]

If after due notice has been given to appoint a new attorney the party neglects to do so, it has been held that notice of any subsequent proceedings in the action may properly be given such party personally.[36]

Ky.—Macpherson v. Bacon's Ex'r, 203 S.W. 744, 180 Ky. 773
Mo.—Crews v. Bogy, (App.) 285 S.W. 549
N.Y.—International Ry. Co. v. Pickarski, 186 N.Y.S. 319, 114 Misc. 349, affirmed International Ry. Co. v. Piekarski, 191 N.Y.S. 932, 199 App. Div. 953
Okl.—Okmulgee Northern Ry. Co. v. Oklahoma Salvage & Supply Co., 271 P. 167, 133 Okl. 64
Tex.—Rupert v. Brook Mays & Co., (Civ.App.) 299 S.W. 474
Utah.—Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.
6 C.J. p. 673 note 61.

22. Kissick v. Hunter, 39 A. 83, 184 Pa. 174

23. Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 253.

24. Sandall v. Sandall, 193 P. 1093, 57 Utah 150, 15 A.L.R. 620.

25. Pierson v. Lloyds First Mortg. Co., 263 N.Y.S. 611, 239 App. Div. 790—6 C.J. p. 673 note 66.

26. United States Savings Bank v. Pittman, 86 So. 567, 80 Fla. 423—6 C.J. p. 676 note 11

27. Pierson v. Lloyds First Mortg. Co., 263 N.Y.S. 611, 239 App. Div. 790—6 C.J. p. 655 note 63, p. 673 notes 67, 68

Appointment of a receiver for a judgment creditor appearing of record revokes the power and authority of the creditor's attorney of record to satisfy the judgment.—Pierson v. Lloyds First Mortg. Co., 263 N.Y.S. 611, 239 App. Div. 790.

28. Fla.—United States Savings Bank v. Pittman, 86 So. 567, 80 Fla. 423.
Mo.—State v. Bersch, 207 S.W. 809, 276 Mo. 397.
6 C.J. p. 676 note 13.

29. Hommedieu v. Stowell, 18 Abb. Pr. (N.Y.) 336—6 C.J. p. 676 note 14.

30. Faughnan v. Elizabeth, 33 A. 212, 58 N.J.Law 309

31. Cal.—Unwin v. Barstow-San Antonio Oil Co., 172 P. 622, 36 Cal. App. 503
N.Y.—Heller v. Alter, 255 N.Y.S. 627, 143 Misc. 10, reversed on other grounds 257 N.Y.S. 391, 143 Misc. 783
6 C.J. p. 676 note 20

32. Hickox v. Weaver, 15 Hun (N.Y.) 375.

33. Cal.—De Recat Corporation v. Dunn, 242 P. 936, 42 A.L.R. 1343, 197 Cal. 787
Utah.—Van Cott v. Wall, 178 P. 42, 53 Utah 282.
Wash.—McInnes v. Sutton, 77 P. 736, 35 Wash. 384.
6 C.J. p. 676 note 22.

34. Unwin v. Barstow-San Antonio Oil Co., 172 P. 622, 36 Cal. App. 503.

35. Heller v. Alter, 257 N.Y.S. 391, 143 Misc. 783, reversing 255 N.Y.S. 627, 143 Misc. 10

36. Hoffman v. Rowley, 13 Abb. Pr. (N.Y.) 399.

F. CHANGE AND SUBSTITUTION OF ATTORNEYS

§ 119. Right to Change Attorney

The client ordinarily has the right to make a change or substitution of attorneys at any stage of the proceedings, unless it will unduly prejudice the other party or interfere with the administration of justice, and, where the attorney has become deceased or disabled, it may be his duty to do so.

The right of a client at any time to discharge an attorney so as to revoke his authority and terminate the relation (see supra § 109) includes the right to make a change or substitution of attorneys at any stage of the proceedings,[37] either with,[38] or without,[39] cause, and although the client may have been improperly influenced in taking the action by the attorney whom he wishes to substitute.[40] This right, however, is not so absolute that its exercise may not be denied where it will unduly prejudice the other party or interfere with the administration of justice.[41]

On the death, withdrawal, or discharge of his attorney of record a litigant must promptly engage another unless excused therefrom by ignorance of the facts requiring it, in which case he must act promptly on discovery of the facts.[42]

As shown in § 109, supra, a contingent fee contract ordinarily does not prevent a client from discharging the attorney in order to substitute a new one; and even where there is a statute mak-

37. In re Hardenberg's Estate, (Cal) 57 P.(2d) 914—Cassetta v Del Frate, 2 P.(2d) 533, 116 Cal. App 255.

After briefs are on file and case is ready for calendar.—In re Hardenberg's Estate, (Cal) 57 P.(2d) 914.

38. U.S.—Woodbury v. Andrew Jergens Co., (C C A N Y.) 69 F.(2d) 49—Woodbury v Andrew Jergens Co, (D C N.Y.) 37 F (2d) 749.
Cal.—In re Scott, 271 P. 906, 205 Cal. 525—Kirk v. Culley, 261 P. 994, 202 Cal 501.
Fla.—Wilhelm v South Indian River Co, 124 So 729, 98 Fla 970—U S. Savings Bank v. Pittman, 86 So. 567, 80 Fla 423.
Ill.—Conlan v Sullivan, 280 Ill App. 332—Regan v. Chicago, M. & St P. Ry Co, 204 Ill App 115.
Ky.—Hubbard v. Goffinet, 70 S W. (2d) 671, 253 Ky. 779—Bright v. Turner, 265 S W. 627, 205 Ky 188—Gordon v. Morrow, 218 S.W. 258, 186 Ky. 713
Minn.—Lawler v. Dunn, 176 N.W. 989, 145 Minn 281.
Mo.—Allen v. Fewel, 87 S.W.(2d) 142.
N Y.—Matter of Lydig's Will, 187 N. E 298, 262 N Y. 408—Application of Krooks, 178 N.E. 548, 257 N.Y. 329—Robinson v. Rogers, 143 N E. 647, 237 N.Y. 467—Martin v. Camp, 114 N E. 46, 219 N.Y. 170, L R A. 1917F 402—McAvoy v. Schramme, 264 N Y S. 181, 238 App Div. 225, affirmed 187 N.E. 691, 263 N.Y. 548—Lynn v. Agnew, 166 N.Y S. 274, 179 App Div 305—Bloom v. Irving Trust Co, 272 N Y S 637, 152 Misc. 50—Lewy v Union Ry. Co. of New York City, 272 N.Y.S. 123, 151 Misc. 724—In re Makames, 265 N Y S. 511, 148 Misc. 759, reversed on other grounds 265 N.Y S. 515, 238 App Div. 534—In re Driscoll, 228 N Y.S 335, 131 Misc. 613—Title Guaranty & Trust Co. v Uniform Fibrous Talc Co, 215 N Y S 437, 127 Misc 183—Friedman v Mindlin, 155 N.Y.S 295, 91 Misc. 473.
Or.—Teiser v. Barlow, 192 P. 394, 97 Or. 410.
R I.—Lake v Winfield Fuller Co, 173 A. 119, 54 R I. 358
Tenn.—Spofford v. Rose, 237 S W. 68, 145 Tenn. 583.
Wis.—Fidelity & Deposit Co. of Maryland v Madson, 231 N W. 170, 201 Wis 609, 70 A.L R 832.
6 C.J. p 676 note 24.

39. U.S.—Woodbury v. Andrew Jergens Co, (C C A N Y.) 61 F (2d) 736, certiorari denied Berenson v. Woodbury, 52 S Ct. 659, 289 U.S. 740, 77 L Ed. 1487—Cooper v. McNair, (D C.Fla.) 49 F (2d) 778—Binsfield v. Johnson, (D C Mont.) 6 F Supp 29—Everett, Clarke & Benedict v. Alpha Portland Cement Co., (N Y.) 225 F. 931, 141 C C.A. 55
Ark.—Johnson v. Missouri Pac R. Co., 233 S W 699, 149 Ark. 418—St. L, I M & S. Ry Co. v. Hays & Ward, 195 S.W. 28, 128 Ark 471—St. L, I M. & S Ry. Co. v. Blaycock, 175 S W. 1170, 117 Ark 504, Ann.Cas 1917A 563
Cal.—O'Connell v. Superior Court in and for City and County of San Francisco, 41 P (2d) 334, 2 Cal (2d) 418, 97 A.L R. 918—In re Casaurang's Estate, 36 P (2d) 1069, 1 Cal.(2d) 712—Scott v. Superior Court, 271 P. 906, 205 Cal. 525—Kelly v Smith, 268 P. 1057, 204 Cal. 496—Kirk v Culley, 261 P. 994, 202 Cal 501—Todd v. Superior Court, 184 P. 684, 181 Cal 406, 7 A.L R 933—Gill v. Southern Pac. Co, 161 P. 1153, 174 Cal. 84—Casseta v. Del Frate, 298 P. 55, 113 Cal App 297—Atchison v. Hulse, 290 P 916, 107 Cal App. 640—McKelley v. Turner, 273 P. 1101, 96 Cal App. 292—McMunn v. Lehrke, 155 P 473, 29 Cal.App 298.
Fla.—United States Savings Bank v. Pittman, 86 So. 567, 80 Fla 423.
Ill.—Conlan v Sullivan, 280 Ill App. 332—Regan v. Chicago, M & St. P. Ry. Co, 204 Ill App. 115
Ky.—Hubbard v Goffinet, 70 S.W. (2d) 671, 253 Ky 779—Gordon v. Morrow, 218 S W 258, 186 Ky 713
Minn.—Lawler v. Dunn, 176 N.W. 989, 145 Minn 281.
Mo.—Anderson v. Taylor, 227 S.W. 84.
N Y.—In re Weitling, 194 N E 401, 266 N Y. 134, reversing 275 N Y. S. 973, 242 App Div. 823—Matter of Lydig's Will, 187 N.E 298, 262 N Y. 408—McAvoy v. Schramme, 264 N.Y S 181, 238 App Div. 225, affirmed 187 N E 691, 263 N Y. 548—In re Liebergall, 178 N Y.S. 857, 189 App Div. 681—Lynn v. Agnew, 166 N.Y S 274, 179 App.Div. 305—In re Montgomery's Estate, 282 N. Y S. 741, 156 Misc. 583—In re Dix's Estate, 259 N Y.S 449, 144 Misc. 494—Title Guaranty & Trust Co. v. Uniform Fibrous Talc Co., 215 N Y S. 437, 127 Misc 183—Friedman v Mindlin, 155 N Y S 295, 91 Misc 473—Hoffman v. New York & Queens Electric Light & Power Co, 286 N.Y S. 685—In re Timmerscheidt's Estate, 180 N.Y S. 269.
Okl.—White v. American Law Book Co, 233 P 426, 106 Okl. 166
Tenn.—Spofford v. Rose, 237 S W. 68, 145 Tenn. 583.
Wis.—Fidelity & Deposit Co. of Maryland v. Madson, 231 N W. 170, 201 Wis. 609, 70 A.L R 832.
6 C.J. p 677 note 25.

40. In re Hardenberg's Estate, (Cal) 57 P (2d) 914.

41. U S.—Binsfield v. Johnson, (D C. Mont) 6 F Supp 29
Cal.—Flynn v. Fink, 213 P. 716, 60 Cal App 670

Where change would require continuance

Litigants have not an absolute right to insist on a change of counsel where such a change requires a continuance in order that the case may be properly prepared for trial. —Flynn v. Fink, 213 P. 716, 60 Cal. App. 670.

42. Davis v. Cox, (Tex Civ App.) 4 S W (2d) 1003.

ing it lawful to enter into a contract giving the attorney an interest in the subject matter of the suit as his fee and providing that neither party shall compromise or dispose of the suit without the consent of the other, such a contract does not prevent the client from employing a new attorney to prosecute the suit where the original attorney dies or fails or refuses to act.[43]

§ 120. Consent of Attorney and Client

A change or substitution of attorneys can be effected by the mutual consent of both attorney and client; but the consent of the client is always necessary.

Where both the attorney and client have consented to a substitution or change of attorneys, the change can be effected without a formal adjudication by a record entry or order showing the consent and substitution,[44] particularly where a statute provides that an attorney may be changed on consent of both client and attorney filed with the clerk or entered on the minutes,[45] and for many purposes the substitution and appointment of a new attorney has been regarded as complete and effective from the date the parties actually consented thereto, although it was not filed of record until some subsequent time.[46]

A change or substitution of attorneys can be made only with the consent of the client;[47] and if the attorney has been engaged to represent several clients or parties they all must acquiesce or consent in order to effect the change,[48] even if it is sought only to the extent of having a new attorney to represent the interests of the one party who desires it.[49] It has also been held that, after a client has assigned his interest in the subject matter, he cannot obtain a change of attorneys against the wishes and opposition of his assignee;[50] and, after the real party in interest has been substituted in place of the person who originally commenced the action, the latter has been held not entitled to a substitution of the attorney employed by him;[51] but the original client has been held entitled to make a substitution, notwithstanding its resistance by a person claiming to be the assignee of the interests of such party, where there is a controversy as to such assignment.[52]

§ 121. Application and Order of Court

Although an order of substitution is unnecessary where the attorney has not appeared in a cause pending in court, or the new attorney is appointed for a new or different proceeding independent from that for which the original attorney was employed, ordinarily, if the substitution of an attorney of record in a pending cause, for the purpose of further proceedings therein, cannot be accomplished by consent, application must be made to the court and a formal order of substitution obtained.

Although a court order is neither necessary nor proper where there is no court proceeding pending in which the attorney appears as attorney of record,[53] ordinarily, if the parties do not consent thereto, a change or substitution of an attorney of record in a pending cause can be fully and effectually accomplished for all purposes only by an order of substitution obtained on proper application to the court in which the proceeding is pending;[54] and notice to the original attorney that he has been discharged and another been appointed is not, without a court order, sufficient to remove the old, and substitute the new, attorney as attorney of record.[55] This rule is not an absolute one, however, and the necessity for a formal substitution may be dispensed with, where the authority of the new attorney has been recognized by all concerned and he has been

43. Nix v. Lancaster & Wight, 3 La. App 402.

44. U S—In re Goldstein, (C C A N Y) 43 F (2d) 698, certiorari denied Goldstein v Klayes, 75 L Ed 776
Fla—Wilhelm v. South Indian River Co, 124 So. 729, 98 Fla. 970
6 C J p 678 note 37.

45. Sedarovich v. Paul, (Cal App.) 60 P.(2d) 371—6 C J. p 678 note 37 [a].

46. Sedarovich v. Paul, supra.

47. Jacobson v. Ashkinase, 168 N E 647, 337 Ill. 141, reversing 249 Ill. App. 479—6 C.J. p 677 note 30.

48. Cal.—Scott v. Donahue, 269 P. 774, 93 Cal App. 256
N Y—Chappotin v Corcoran Realty Co, 165 N.Y.S 734.
6 C J p 677 note 31.

49. Chappotin v. Corcoran Realty Co., supra.

50. Scott v. Donahue, 269 P. 774, 93 Cal App 256.

51. Fratessa v. Superior Court in and for Los Angeles County, 13 P. (2d) 544, 125 Cal App. 372.

52. Spofford v. Rose, 237 S.W 68, 145 Tenn. 583—6 C J. p 677 note 26.

53. In re Liebergall, 178 N Y S 857, 189 App Div. 681—In re Dix' Estate, 259 N Y S. 449, 144 Misc 494—In re Mandelkorn's Estate, 165 N. Y.S. 404, 99 Misc 168.

54. U S—U. S v McMurtry, (D.C. N Y) 24 F.(2d) 145—The Flush, (C C A.N.Y) 277 F 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S.Ct. 184, 257 U.S 657, 66 L Ed. 421.
D C—Kellogg v Winchell, 51 App.D C. 17, 273 F. 745, 16 A.L R. 1159
Wash—State v. Superior Court for Pierce County, 7 P.(2d) 604, 166 Wash. 502.
Wis—Fidelity & Deposit Co. of Maryland v Madson, 231 N.W. 170, 201 Wis. 609, 70 A.L.R. 332.
6 C J. p 678 note 39

Appearance by new attorney without order unethical.—State v Superior Court for Pierce County, 7 P. (2d) 604, 166 Wash. 502.

Reason for rule
"An order of court is requisite . . . because of the great confusion which would arise from permitting a party to change his attorney at will, so that the court could never know when the cause was legitimately before it."—U. S. v. McMurtry, (D.C N.Y.) 24 F.(2d) 145, 146.

55. U.S.—U. S. v. McMurtry, supra.
Wash—State v. Superior Court for Pierce County, 7 P.(2d) 604, 166 Wash 502.
6 C.J. p 678 note 40.

permitted to appear without objection,[56] or where the attorney of record has abandoned the case[57] or become unable to act;[58] and for the purpose of binding the parties, the authority of the old attorney is often treated as terminated, and that of the new attorney as commencing, before a formal substitution has been effected.[59]

An application for a substitution of attorneys is properly made by way of motion on behalf of the client.[60] However, the attorney himself may make such a motion where he has been notified of his discharge by the client but the latter has failed to follow his notice by a motion for substitution;[61] and where the attorney who has appeared for a party is legally incapacitated to do so, but the appearance is not void, the court of its own motion may compel a substitution of attorneys.[62]

While an attorney of record who has abandoned the case need not be notified of the substitution of a new attorney,[63] a party making application for an order substituting an attorney must, ordinarily, give notice thereof to his attorney of record,[64] although no special method of giving notice is required as long as a reasonable notice is given,[65] and the necessity for such notice may be waived by the original attorney's presence and participation in the proceedings on the motion for substitution.[66] The attorney of record is the only one who can object to the substitution because of lack of notice, and the party himself cannot avoid responsibility for the acts of his new attorney on the ground that the original attorney was not notified of the motion for substitution.[67]

Where proper application has been made and notice given, the application is, ordinarily, allowed and a substitution ordered as a matter of course,[68] unless it appears that some good reason exists which justifies the court in refusing to make the order.[69] Mere delay resulting in no prejudice to the attorney is not such laches as precludes the client from obtaining an order of substitution.[70]

Court entitled to order change. An order substituting one attorney for another is merely an incident in the progress of a cause, and no such order can be made by a court in which no cause or proceeding is pending to which such order can relate;[71] but, where there is pending in the court a proceeding which is a mere continuation of another proceeding, the court may properly entitle an order of substitution in the prior proceeding.[72] If an appellate proceeding is pending, the appellate court is the proper forum in which to obtain an order of substitution for the purposes of the proceedings in that court;[73] but if the substitution relates to matters not involved in the appeal, the order must be sought from the court in which such matters are pending,[74] and the appellate court may deny a motion for substitution without prejudice to its renewal in the trial court, where the cause is to be reversed and the matter can better be determined in the court below.[75] Also, it has been

56. U S—In re Goldstein, (C C A. N.Y.) 43 F (2d) 698, certiorari denied Goldstein v. Klayes, 51 S.Ct 83, 282 U S 879, 75 L Ed 776
Cal—In re Morgan's Estate, 271 P 762, 94 Cal.App 617.
N Y—Doerle v. Doerle, 159 N.Y.S. 637, 96 Misc. 72

57. Corbin v. Howard, 215 P. 920, 61 Cal App 715.

58. Wilhelm v. South Indian River Co, 124 So 729, 98 Fla 970

59. In re Goldstein, (C.C A N Y.) 43 F (2d) 698, certiorari denied Goldstein v. Klayes, 51 S Ct 83, 282 U S. 879, 75 L Ed. 776—6 C.J p 678 note 41

60. U.S—John Griffiths & Son Co. v. U S, (C C A Ill) 72 F (2d) 466
N Y—In re Ajello's Estate, 175 N Y S 729
6 C.J p 679 note 52.

61. U S v McMurtry, (D.C N Y.) 24 F (2d) 145

62. Ledwith v. Rosalsky, 155 N E 688, 244 N Y. 406, reversing 216 N Y S 411, 217 App Div. 749, motion denied 157 N E 858, 245 N.Y. 563.

63. Corbin v Howard, 215 P 920, 61 Cal App 715.

64. U S—John Griffiths & Son Co v. U. S, (C C A.Ill) 72 F (2d) 466
Cal—Gill v. Southern Pac. Co., 161 P 1153, 174 Cal 84
Wash—State v. Superior Court for Pierce County, 7 P.(2d) 604, 166 Wash 502
6 C J p 679 note 53.

65. Schultheis v. Nash, 67 P. 707, 27 Wash. 250.

66. People v Sherwin, 188 N E 484, 354 Ill 371.

67. Gill v Southern Pac Co, 161 P 1153, 174 Cal 84.

68. D C—Kellogg v. Winchell, 51 App D C. 17, 273 F 745, 16 A.L.R 1159
Ky—Gordon v Morrow, 218 S.W 258, 186 Ky 713
N Y—Bailey v. Coventry, 224 N.Y.S. 17, 130 Misc 269
Wis—Fidelity & Deposit Co. of Maryland v. Madson, 231 N W. 170, 201 Wis. 609, 70 A L R 832.
6 C J. p 677 note 28.

69. U S—Tuppela v Mathison, (C C A Alaska) 291 F 728.

Cal.—Flynn v Fink, 213 P 716, 60 Cal App. 670.
Tenn—Spofford v. Rose, 237 S W 68, 145 Tenn 583
6 C.J p 677 note 29.

70. In re Scott, 271 P 906, 205 Cal 525.

71. Cal—In re Casaurang's Estate, 36 P.(2d) 1069, 1 Cal (2d) 712
N Y—People v Price, 187 N E 298, 262 N Y 410—In re Cilento's Estate, 268 N Y S. 714, 149 Misc 547—In re Dix' Estate, 259 N Y S 449, 144 Misc 494—In re Mandelkorn's Estate, 165 N.Y S 404, 99 Misc 168.
6 C J. p 678 note 42—15 C.J. p 1018 26 [a].

72. In re Brown, 165 N Y S 736, 178 App Div. 558

73. Cal—In re Casaurang's Estate, 36 P (2d) 1069, 1 Cal (2d) 712—Jacobus v. Jacobus, 282 P. 796, 208 Cal. 562.
N Y—People v. Price, 187 N E 298, 262 N Y. 410

74. In re Casaurang's Estate, 36 P. (2d) 1069, 1 Cal.(2d) 712

75. Whitten v. Dabney, 154 P. 812, 171 Cal. 621.

held that an order to compel the attorney to turn over papers to the substituted attorney must be made in the court of original jurisdiction rather than in the appellate court.[76]

Independent and subsequent proceedings. No order of substitution is necessary to entitle the client to engage a new or different attorney for an action or proceeding which is entirely independent and separate from one for which the original attorney was employed;[77] and after the proceeding for which the original attorney was employed has terminated, resulting in a termination of his authority (supra § 116), the client may engage or appoint a new attorney for independent or subsequent proceedings without obtaining an order of substitution.[78] Consequently, where the authority of an attorney of record in the original suit terminates with the judgment, it is often held that the requirement of a formal substitution of attorneys applies only to changes and substitutions made before, and not to those made after, judgment,[79] and, therefore, that a party may employ a new attorney to issue execution on a judgment, or to take any other proceedings for its enforcement, without a formal substitution of attorney.[80] It has also been said that, as a scire facias is a new action requiring a new warrant of attorney, if an attorney different from the one in the original suit issues it, a rule and notice to change the attorney are not necessary.[81]

Appellate proceedings are often regarded as new proceedings entitling a new attorney to appear therein without a formal order of substitution,[82] but there are a few cases which appear to be the other way;[83] and if the original attorney has taken an appeal in accordance with his authority to do so, he cannot be changed in the appellate court without an order of substitution.[84] Moreover, although a party may be entitled to take appellate proceedings by a new attorney without an order of substitution, it is proper and the better practice to have such an order made to avoid uncertainty.[85]

Reconsideration of motion. After a motion for substitution has been granted, it cannot be reconsidered by a judge other than the one who granted it,[86] but, if the judge who granted the order has subsequently resigned, he himself cannot reconsider it.[87]

Withdrawal of application. A party may, without an order of court, withdraw a motion to substitute attorneys where he offers the opposite party his costs.[88] This is said to be true, although the application for substitution has been referred, and a report has been made by the referee that a certain amount is due,[89] but the contrary has also been held;[90] and it has been held that the trial court may, in its discretion, refuse to permit the withdrawal of an application for substitution.[91]

§ 122. Terms, Compensation and Lien

Although the order of substitution may be granted absolutely, particularly if the attorney has been guilty of misconduct, and it may contain a provision requiring the delivery of papers and property of the client to the latter or the substitute attorney, the court may in its discretion subject the grant of the order to proper terms and conditions where necessary to protect the interests of an attorney who has been guilty of no misconduct.

Under proper circumstances, the court may, in its discretion, make the grant of an order of substitution subject to such terms and conditions as are reasonable and just;[92] but if the attorney has no lien or claim for services, the client is, ordinarily, entitled to an absolute order of substitution at will;[93] and even where the attorney has a lien or a claim for fees or expenses, an unconditional substitution may be directed if the application for sub-

76. In re Lydig's Will, 187 N.E. 295, 262 N.Y. 403.

77. Hastings v. Hastings, 233 N.Y.S. 179, 225 App.Div. 897

78. In re Mandelkorn's Estate, 165 N.Y.S. 404, 99 Misc. 163—6 C.J. p 678 note 45.

79. Title Guaranty & Trust Co. v. Uniform Fibrous Talc Co., 215 N.Y.S. 437, 127 Misc. 183—6 C.J. p 679 note 46.

Void judgment
This is true, even though the entry of judgment is void—Ward v. Sands, 10 Abb.N.Cas.(N.Y.) 60.

80. State v. Gulick, 17 N.J.Law 435—6 C.J. p 679 note 47.

81. Fidelity & Deposit Co. of Maryland v. Madson, 231 N.W. 170, 201 Wis. 609, 70 A.L.R. 332—6 C.J. p 679 note 51.

82. Fidelity & Deposit Co. of Maryland v. Madson, supra—6 C.J. p 679 note 50

83. Shuler v. Maxwell, 38 Hun 240, appeal dismissed 101 N.Y. 657—6 C.J. p 679 note 49

84. Kellogg v. Winchell, 51 App.D.C. 17, 273 F. 745, 16 A.L.R. 1159

85. Fidelity & Deposit Co. of Maryland v. Madson, 231 N.W. 170, 201 Wis. 609, 70 A.L.R. 332.

86. Dinkin v. Stern, 265 N.Y.S. 133, 147 Misc. 827

87. Dinkin v. Stern, supra.

88. Simers v. Great Eastern Clay Products Co., 143 N.Y.S. 1020, 82 Misc. 422.

89. Gardiner v. Tyler, 36 How.Pr. (N.Y.) 63, affirmed 5 Abb.Pr.(N.S.) 33

90. Matter of Davis, 7 Daly (N.Y.) 1.

91. Hudson v. Brown, 35 P.(2d) 756, 179 Wash. 32

92. U.S.—U.S. v. McMurtry, (D.C.N.Y.) 24 F.(2d) 145
D.C.—Kellogg v. Winchell, 51 App.D.C. 17, 273 F. 745, 16 A.L.R. 1159
N.Y.—Robinson v. Rogers, 143 N.E. 647, 237 N.Y. 467, reversing Robinson v. Ferguson, 201 N.Y.S. 941, 207 App.Div. 802, and motion denied Robinson v. Rodgers, 143 N.E. 728, 237 N.Y. 525
6 C.J. p 679 note 53.

93. In re Exposition Catering Co., (C.C.A.N.Y.) 285 F. 333.

stitution is based on misconduct of the attorney which justifies the client in discharging him.[94] Where both parties are to blame the discretion lodged in the court is even greater.[95] If, however, the attorney has a lien or a claim for fees or expenses, and the client brings no charges of misconduct against the attorney, but merely elects to exercise his absolute right to have a substitution, the court, before granting the substitution, may and should impose such terms and conditions as justice requires to protect the attorney.[96] Under such circumstances, it is usually regarded as necessary and proper that the substitution be conditioned on some adequate and proper provision for the payment or securing of the displaced attorney's fees[97] or expenses,[98] or the preservation of any lien to which he may be entitled,[99] even though the lien is for a general balance of account for services rendered in other cases as well as the one in which the substitution is sought.[1]

If payment of fees is impossible in any given case, it will not be required,[2] but this fact must be shown by the party moving the discharge and substitution, and then it should appear that justice to the client or attorney demands the change.[3]

Surrender or delivery of client's papers or property. Although the order of substitution may and should include an order for delivery of the pleadings and papers in the case to the substituted attorneys, if the displaced attorney is thereby protected in his rights,[4] yet, if the retaining lien of the orig-

94. U S —The Flush, (C C A N Y) 277 F 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S. Ct. 184, 257 U.S 657, 66 L.Ed 421.
N.Y —Matter of Dunn, 98 N E 914, 205 N Y. 398, Ann Cas 1913E 536—Hausvater v. Wikler & Diamont, Inc, 277 N.Y.S. 810, 154 Misc. 555
6 C J. p 679 note 59

95. Tuck v. Manning, 6 N.Y.S 140, 53 Hun 455, 17 N Y Civ Proc 175

96. U.S —Woodbury v Andrew Jergens Co, (C C A N.Y.) 69 F (2d) 49 —Cooper v McNair, (D C Fla) 49 F.(2d) 778—U S v McMurtry, (D C N Y) 24 F (2d) 145—The Flush, (C C.A N Y) 277 F 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S Ct. 184, 257 U.S 657, 66 L.Ed 421—Everett, Clarke & Benedict v. Alpha Portland Cement Co., (N.Y.) 225 F. 931, 141 C C.A. 55.
D C —Kellogg v. Winchell, 51 App D C 17, 273 F. 745, 16 A.L R. 1159.
Ky.—Gordon v. Morrow, 218 S W. 258, 186 Ky 713.
N J —Marshall v. Romano, 158 A. 751, 10 N.J Misc 113.
N Y —Title Guaranty & Trust Co v. Uniform Fibrous Talc Co., 215 N. Y S. 437, 127 Misc. 183—Friedman v. Mindlin, 155 N.Y.S 295, 91 Misc 473—In re Timmerscheidt's Estate, 180 N.Y.S 269.
Wash.—Hudson v. Brown, 35 P.(2d) 756, 179 Wash 32.
6 C.J. p 680 note 60

97. U S —John Griffith & Son Co. v. U S., (C C A Ill) 72 F (2d) 466—Woodbury v. Andrew Jergens Co., (C C A N Y) 69 F.(2d) 49—Woodbury v. Andrew Jergens Co, (D C. N Y) 37 F (2d) 749—U S v. McMurtry, (D C N Y) 24 F (2d) 145 —U. S. v 1,572 Cases of Liquor, (D C N.Y) 9 F Supp. 862—Everett, Clarke & Benedict v. Alpha Portland Cement Co., (N.Y.) 225 F. 931, 141 C C A 55
D C.—Kellogg v. Winchell, 51 App. D.C. 17, 273 F. 745, 16 A.L.R 1159.
Fla —Vosges Syndicate v. Everglades Club Co, 164 So. 881.
Ky —Gordon v. Morrow, 218 S W. 258, 186 Ky 713.
Mich —Horvath v. Vasvary, 224 N.W. 365, 246 Mich 231—Kellogg v. Reid, 200 N W. 976, 229 Mich 150.
N.Y —In re Weitling, 194 N.E 401, 266 N.Y. 184, reversing 275 N Y S 973, 242 App Div. 822—Application of Krooks, 178 N E 548, 257 N Y. 329, reversing In re Krooks, 245 N. Y S 773, 230 App Div. 836—Hausvater v. Wikler & Diamont, Inc, 277 N Y S. 810, 154 Misc. 555—Bloom v Irving Trust Co., 272 N Y. S 637, 152 Misc 50
Tenn —Spofford v. Rose, 237 S.W. 68, 145 Tenn 533.
6 C J. p 680 note 61.

Provision for present payment of contingent fee improper

Where the attorney was employed on a contingent fee basis, he is not entitled to an order directing present payment, but only to an order that he shall be entitled to a lien on the proceeds of the action, and to payment therefrom, in an amount equal to the reasonable value of his services as of the date he was superseded by the new attorney —Bernstein v Suchoff, 274 N.Y.S. 586, 242 App. Div. 784—Bloom v. Irving Trust Co., 272 N.Y.S. 637, 152 Misc. 50.

98. U S.—The Flush, (C.C.A N Y) 277 F. 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S. Ct 184, 257 U S. 657, 66 L Ed 421 —Everett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F 931, 141 C C A 55
N.Y —Hofmann v. New York & Queens Electric Light & Power Co, 286 N Y S 685
6 C J p 680 note 62.

99. U S —Cooper v. McNair, (D C. Fla) 49 F (2d) 778—The Flush, (C C A N Y.) 277 F. 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S Ct. 184, 257 U S. 657, 66 L Ed. 421—Everett, Clark & Benedict v Alpha Portland Cement Co, (N Y) 225 F 931, 141 C C.A. 55.
Ky —Hubbard v. Goffinett, 70 S W. (2d) 671.
Mich —Horvath v. Vasvary, 224 N.W. 365, 246 Mich 231
N Y —Bernstein v Suchoff, 274 N Y. S 586, 242 App Div 784—Robinson v Rogers, 257 N Y S 737, 236 App Div 1, motion denied 258 N Y S 1022, 236 App Div 782—In re Liebergall, 178 N Y S 857, 189 App. Div 681—Lewy v. Union Ry. Co. of New York City, 272 N Y S 123, 151 Misc. 724—Progressive Merchants' Co v. Elkat Realty Co., 244 N Y S 17, 136 Misc 682—Hofmann v. New York & Queens Electric Light & Power Co, 286 N Y.S. 685 —In re Timmerscheidt's Estate, 180 N Y S. 269—In re Ajello's Estate, 175 N Y S. 729.
6 C.J. p 678 note 44, p 680 note 63.

Attorney's failure to object to substitution

Only if the attorney objects to substitution will the court impress a lien in his favor, and, if the attorney does not object to substitution but objects to having the value of his services determined on a motion to substitute, the motion will be granted and the attorney's lien will be regarded as waived —In re Ajello's Estate, 175 N Y.S 729.

1. Hudson v. Brown, 35 P (2d) 756, 179 Wash. 32.

2. Bryant v Brooklyn Heights R. Co, 72 N.Y S 308, 64 App Div. 542.

3. Curtis v. Richards, 40 P. 57, 4 Idaho 434, 95 Am S R. 134.

4. N.J —Marshall v. Romano, 158 A. 751, 10 N J Misc. 113.
N Y —Hausvater v. Wikler & Diamont, Inc, 277 N.Y S 810, 154 Misc. 555—Friedman v. Mindlin, 155 N. Y.S 295, 91 Misc 473—Hofmann v. New York & Queens Electric Light & Power Co., 286 N.Y.S 685.
6 C.J. p 678 note 43.

inal attorney on the papers, pleadings, and property of the client is not properly satisfied or preserved and he is guilty of no misconduct, he is under no obligation, and cannot be required, to surrender them to the client or substitute attorney;[5] nor can the order of substitution properly provide for the inspection of such papers by the substitute attorney while they are in the hands of the original attorney.[6] An appellate court, in which an order for the surrender of property or papers cannot properly be made, may make an order of substitution without prejudice to, or interference with, any lien the attorney may have on the property or papers of his client.[7]

Determination of issues and fixing compensation or lien. Although, where the attorney objects thereto, the validity of a power of attorney and assignment to the attorney will not be determined on motion for the substitution of attorneys,[8] ordinarily, if, on a motion for the substitution of attorneys, a dispute or issue is raised as to facts which are essential to an ascertainment of what terms or conditions, if any, shall be imposed on the granting of the order, the court itself may determine such facts in a summary manner.[9]

Hence, if the fact of the attorney's misconduct is in dispute, the court may determine the matter in the proceedings for substitution.[10] However, if the charges made by the client in an affidavit filed in support of his motion are denied in detail by the attorney, the issue should not be determined on conflicting affidavits alone, but the witnesses should be produced in court;[11] and, if this is not done, a finding of misconduct as a basis for compelling the attorney to surrender papers and property of the client without satisfaction or security for his lien is unjustified.[12]

Similarly, where the amount due the original attorneys is disputed, or the existence of their lien is controverted, the court may determine these issues in a summary manner,[13] or a reference to determine the amount may be ordered;[14] and the aid of a jury is not necessary, nor can it be demanded as a matter of right.[15] Not only may the court determine the amount due for services rendered in the action in which the substitution is sought, but, if it is sought to have the attorney surrender papers on which he has a general retaining lien for all services rendered, the court may fix the amount due for any services in other proceedings or matters and require its payment before the papers are surrendered.[16] However, the court has no power to fix the fees of an attorney for a receiver and order their payment, where the substitution is sought in private litigation other than the equity receivership proceedings.[17]

The substitution may be made before the fees are determined and paid, if proper provision is made for their subsequent ascertainment and the enforcement of payment when ascertained;[18] and if the attorney, after notice, has failed to appear at the hearing on the motion for substitution, the grant of the motion without fixing the attorney's fees is not error, if the court retains jurisdiction of the matter and eventually determines the attorney's

5. In re Weitling, 194 N.E. 401, 266 N.Y. 184, reversing 275 N.Y.S. 973, 242 App.Div. 823—Robinson v. Rogers, 143 N.E. 647, 237 N.Y. 467—Hausvater v. Wikler & Diamont, Inc., 277 N.Y.S. 810, 154 Misc. 555—Bloom v. Irving Trust Co., 272 N.Y.S. 637, 152 Misc. 50—In re Makames, 265 N.Y.S. 511, 148 Misc. 759, reversing 265 N.Y.S. 515, 238 App.Div. 534—In re Ackerman's Estate, 166 N.Y.S. 1080—6 C.J. p. 680 note 64.

Insufficient security or preservation

(1) An attorney's lien on papers in his possession is not sufficiently protected by an order giving him a lien on the proceeds of the litigation, if any.—The Flush, (C.C.A.N.Y.) 277 F. 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S.Ct. 184, 257 U.S. 657, 66 L.Ed. 421—In re Makames, 265 N.Y.S. 515, 238 App.Div. 534, reversing 265 N.Y.S. 511, 148 Misc. 759.

(2) If the attorney has a retaining lien for services in other causes as well as the one in which the substitution is sought, he cannot be ordered to deliver up papers on which he has a retaining lien for all his charges on receiving security for only his charges in the particular action in which the substitution is made.—Robinson v. Rogers, 143 N.E. 647, 237 N.Y. 467.

6. The Flush, (C.C.A.N.Y.) 277 F. 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S.Ct. 184, 257 U.S. 657, 66 L.Ed. 421.

7. In re Lydig's Will, 187 N.E. 293, 262 N.Y. 403.

8. In re Ajello's Estate, 175 N.Y.S. 729.

9. Woodbury v. Andrew Jergens Co., (C.C.A.N.Y.) 69 F.(2d) 49.

10. Woodbury v. Andrew Jergens Co., supra.

11. In re Weitling, 194 N.E. 401, 266 N.Y. 184, reversing 275 N.Y.S. 973, 242 App.Div. 823.

12. In re Weitling, supra.

13. U.S.—John Griffiths & Son Co. v. U. S., (C.C.A.Ill.) 72 F.(2d) 466.

Mich.—Horvath v. Vasvary, 224 N.W. 365, 246 Mich. 231.

N.Y.—Yocus v. Southern Pac. Co., 199 N.Y.S. 116, 120 Misc. 554, affirmed 201 N.Y.S. 959, 207 App.Div. 836, and 202 N.Y.S. 959, 208 App.Div. 709.

Wash.—State ex rel. W. W. Robinson Co. v. Gilliam, 161 P. 1194, 94 Wash. 243.

6 C.J. p. 680 note 63.

14. U.S.—U. S. v. 1572 Cases of Liquor, (D.C.N.Y.) 9 F.Supp. 863.

N.Y.—In re Ackerman's Estate, 166 N.Y.S. 1080.

6 C.J. p. 681 note 69.

15. Yuengling v. Betz, 68 N.Y.S. 574, 58 App.Div. 8.

16. Hudson v. Brown, 35 P.(2d) 756, 179 Wash. 32.

17. Klein v. Acco Products, (D.C. N.Y.) 13 F.Supp. 894.

18. U.S.—U. S. v. McMurtry, (D.C. N.Y.) 24 F.(2d) 145.

N.J.—Marshall v. Romano, 158 A. 751, 10 N.J.Misc. 113.

N.Y.—In re Ackerman's Estate, 166 N.Y.S. 1080.

claim for services and expenses before finally denying it on the merits.[19] Also, an appellate court, in which a motion for substitution is made, may make the substitution without determining or fixing the fees of the attorney, where the court does not wish to assume the burden of considerable research into the facts.[20] If, however, the amount of the attorney's fees and lien are in dispute, the court cannot ignore these issues entirely and, without determining the same, direct the substitution, on the client's giving a bond in an amount arbitrarily fixed by the court.[21]

In fixing the amount of the attorney's fees or lien the court should not act on affidavits alone;[22] and it cannot properly fix or prescribe an amount which is unreasonably large or in excess of the sum to which the attorney is legally entitled,[23] or which is unreasonably small or less than that to which the attorney is legally entitled.[24] A statute, permitting the court to determine, not only the fairness and reasonableness of an agreement made by a personal representative for the payment of attorney's fees, but also the reasonable value of the services, entitles the court on an order of substitution, where the attorney's compensation and lien are fixed by agreement with the client who is a personal representative, to fix the compensation of the attorney in accordance with the reasonable value of the services rendered, although the agreement may bind the share of the representative if he is interested in the estate.[25]

If both the original and successor attorney are acting on a contingent fee basis, it may be necessary or proper for the court, in granting the substitution, to fix a fair and reasonable fee for the entire case and apportion it between them in proportion to their services,[26] or according to the equities of the case;[27] and, where the substitution is granted on the express condition that the court reserve the right to later pass on the fees to be allowed to the new counsel, the allowance subsequently made to such counsel is binding on him, although it is less than provided in a contingent fee contract he had with the client.[28]

§ 123. Notice to Adverse Party

Unless such notice has been waived, notice of a substitution of attorneys must be given to the adverse party to make it effective as to him.

Although the client himself cannot avoid the effect of the substitution by his own failure to give such notice,[29] a change or substitution of attorneys is, ordinarily, not effective as to the adverse party until he or his attorney has been notified thereof.[30] Prior to such notice, the attorney substituted cannot legally move in the cause,[31] and the adverse party will be justified in dealing only with the original attorney of record,[32] and in disregarding acts of the new attorney.[33]

After the adverse party has been notified of the substitution, however, he is affected thereby and is no longer justified in dealing with the original attorney.[34] Written notice is sufficient, and it is not necessary that a copy of the order of substitution be served.[35] Sufficient notice of the retainer of a new attorney to prosecute an appeal is given by the service by him on the adverse party of the

19. John Griffiths & Son Co. v. U S, (C C A Ill) 72 F (2d) 466.

20. Vosges Syndicate v Everglades Club Co, (Fla) 164 So. 881.

21. Lederer v. Goldston, 117 N.Y.S. 151, 63 Misc 322

22. Yocus v Southern Pac. Co, 199 N Y S 116, 120 Misc. 554, affirmed 201 N Y S. 959, 207 App Div. 836, 202 N Y.S 959, 208 App Div. 709

23. Rich v. Railway Express Agency, 287 N.Y S 865, 248 App Div. 594—Kaplowitz v. Brooklyn Bus Corporation, 275 N.Y S. 101, 242 App Div 840.

24. O'Brien v Mulcahy, 244 N.Y S. 701, 230 App Div 790.

Amount held unreasonable

Order fixing the original attorney's compensation at five hundred dollars on substitution was held unreasonable, where such attorney was to receive twenty-five per cent of plaintiff's recovery, and the action was thereafter settled for fifteen thousand dollars—O'Brien v Mulcahy, 244 N.Y S. 701, 230 App Div. 790.

25. Yocus v. Southern Pac. Co, 199 N Y S 116, 120 Misc. 554, affirmed 201 N Y S 959, 207 App.Div. 836, and 202 N Y.S. 959, 208 App Div. 709.

26. Boston v. Lamport & Holt, 228 N Y S 279, 228 App Div. 385—6 C. J. p 754 note 68.

27. Hepp v. Petrie, 200 N.W. 857, 185 Wis 350.

Misrepresentations and misconduct of substitute attorney

Where the substitute attorney obtains his employment and substitution by making misrepresentations to the client that he can obtain a considerably larger recovery than the original attorney, but he in fact recovers very little more than had been offered by the original attorney by way of a settlement which he had recommended to his client, the court need not apportion the fee among the attorneys according to the amount of time expended by them in the case, but should give the original attorney the full contingent fee to which he would have been entitled had the amount offered in settlement been accepted—Hepp v. Petrie, 200 N.W 857, 185 Wis 350.

28. Rubekeil v Director General of Railroads, 176 N W 854, 171 Wis. 128.

29. Anderson v. City Ry Co, 48 P. (2d) 969, 9 Cal App (2d) 205.

30. Hendricks v Town of Cherryville, 153 S E 112, 198 N C. 659—6 C J. p 681 note 72

31. Kelley v Alcona County Cir. Judge, 44 N W. 925, 79 Mich. 392—6 C J p 681 note 73

32. Beliveau v. Amoskeag Mfg. Co, 40 A 734, 68 N H. 225, 73 Am S R 577, 44 L R.A. 167—6 C.J. p 681 note 74.

33. Felt v. Nichols, 47 N Y S. 951, 21 Misc 404—6 C J p 681 note 75.

34. Nuessler v Bergman, 251 P. 578, 141 Wash 297.

35. Bogardus v. Richtmeyer, 3 Abb. Pr (N Y.) 179—Dorlon v. Lewis, 7 How.Pr.(N.Y.) 132,

notice of appeal and the undertaking to perfect the appeal.[36]

Waiver. The requirement that notice of a change of attorneys must be served on the adverse party is for the benefit of such adverse party, and it may be waived by him or by his attorney.[37] Such a waiver is effected by acknowledging and dealing with the new attorney.[38]

§ 124. Effect of Substitution

A substitution of an attorney vests in the new attorney all of the powers and authority of his predecessor, who is thereby deprived of further power to act.

The effect of a substitution is to preclude the original attorney from acting further in the cause,[39] and to vest in the substituted attorney all the rights and powers, and to impose on him all the duties, of his predecessor.[40] However, the substituted attorney and the client remain bound by the agreements with regard to the suit lawfully and properly made by the first attorney.[41]

A change or substitution in no way appearing of record is ineffective as to the court or its officers who may still deal with the original attorney of record;[42] but, for the purpose of holding the client bound by the acts of the new attorney, his appointment may be given effect from the date it is made, although it is not filed of record until later.[43]

IV. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT

§ 125. General Rules Stated

Not only must an attorney exercise reasonable care and diligence and possess the legal skill and knowledge ordinarily possessed by members of the profession, but he is bound to conduct himself as a fiduciary occupying a position of the highest trust and confidence, so that, in all his relations and dealings with his client, it is his duty to exercise the utmost honesty, good faith, fairness, integrity, and fidelity, and if he does not he is strictly liable or accountable to his client.

In advising his client and conducting the latter's affairs, an attorney is bound to exercise that reasonable care and diligence which is usually exercised by lawyers and must possess and employ the ordinary legal knowledge and skill which is common to the members of his profession (see infra §§ 140–146). This, however, is not the full extent of a lawyer's duties or obligations to his client; he is, in addition, bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence, so that, in all his relations with his client, it is his duty to exercise and maintain the utmost good faith, honesty, integrity, fairness, and fidelity.[44] As a corollary of this, it has

36. Magnolia Metal Co v. Sterlingworth Railway-Supply Co., 56 N.Y.S. 16, 37 App.Div. 366.

37. Cal.—Anderson v City Ry. Co., 48 P.(2d) 969, 9 Cal.App.(2d) 205
N.Y.—Doerle v Doerle, 159 N.Y.S. 637, 96 Misc. 72
6 C.J. p. 681 note 78.

38. Doerle v Doerle, supra—6 C.J. p. 681 note 79.

39. Nuessler v. Bergman, 251 P. 578, 141 Wash. 297—6 C.J. p. 681 note 80.

40. Drummond v. West, 300 P. 823, 212 Cal. 766—6 C.J. p. 681 note 81.

41. Home State Bank of Arcadia v. Haynes, 290 P. 338, 144 Okl. 190—6 C.J. p. 681 note 82

42. David v. David, 130 A. 861, 47 R.I. 122.

Delivery of copy of decisions to original attorney

Where prior to a decision in an action, defendant changes attorneys, but the new attorneys fail to enter appearance, and the old attorneys fail to file withdrawal, the delivery by the clerk of a copy of the decision to the original attorney of record is proper.—David v. David, 130 A. 861, 47 R.I. 122.

43. Drummond v. West, 300 P. 823, 212 Cal. 766.

44. U.S.—Commonwealth Finance Corporation v McHarg, (C.C.A.N.Y.) 282 F. 560—Parkerson v. Borst, (C.C.A.La.) 264 F. 761, certiorari denied Putnam v Borst, 41 S.Ct. 8, 254 U.S. 634, 65 L.Ed. 449.
Ark.—Goode v King, 76 S.W.(2d) 300, 189 Ark. 1093—Norfleet v Stewart, 20 S.W.(2d) 868, 180 Ark. 161—Powell v Griffin, 13 S.W.(2d) 18, 178 Ark. 788—Swaim v. Martin, 251 S.W. 26, 158 Ark. 469.
Cal.—Anderson v Eaton, 293 P. 788, 211 Cal. 113—Tomblin v Hill, 275 P. 941, 206 Cal. 689—Larimer v. Smith, 19 P.(2d) 825, 130 Cal.App. 98—Blattman v Gadd, 296 P. 681, 112 Cal.App. 76—Rieck v. Chapman, 257 P. 168, 83 Cal.App. 735—Stieglitz v Settle, 233 P. 350, 70 Cal.App. 351
Colo.—Mutter v Burgess, 290 P. 269, 87 Colo. 530—Enyart v. Orr, 238 P. 29, 78 Colo. 6
Conn.—McKnight v. Gisse, 140 A. 116, 107 Conn. 229
D.C.—Goodrum v Clement, 51 App.D.C. 184, 279 F. 304—Goodrum v. Clement, 51 App.D.C. 184, 277 F. 536.
Fla.—In re Clifton, 155 So. 324, 115 Fla. 168—U.S. Savings Bank v. Pittman, 86 So. 567, 80 Fla. 423
Ill.—People v. Kwasigroch, 180 N.E. 344, 296 Ill. 542—People v. Charone, 123 N.E. 291, 288 Ill. 220—Olson v. North, 276 Ill.App. 457—Morrow v. Compton, 215 Ill.App. 524.
Iowa.—Reeder v. Lund, 236 N.W. 40, 213 Iowa 300—Cavanagh v. O'Connor, 169 N.W. 747, 186 Iowa 257—Healy v Gray, 168 N.W. 222, 184 Iowa 111
Kan.—Wigton v Donnelly, 253 P. 400, 122 Kan. 796
La.—Le Blanc v Cristina, 140 So. 149, 19 La.App. 397
Mass.—In re Opinion of the Justices, 194 N.E. 313—Tarr v. Tucker, 172 N.E. 257, 272 Mass. 150—Coffey v. Rady, 166 N.E. 333, 267 Mass. 301—Berman v. Coakley, 137 N.E. 667, 243 Mass. 348—Lanigan v. Scharton, 131 N.E. 223, 238 Mass. 468—Dunne v Cunningham, 125 N.E. 560, 234 Mass. 332.
Miss.—Gwin v. Fountain, 136 So. 18, 159 Miss. 619, suggestion of error sustained 132 So. 559, 159 Miss. 619
Mo.—Addison v Cope, 243 S.W. 212, 210 Mo.App. 569
Mont.—In re Lunke, 182 P. 126, 56 Mont. 226
Neb.—Diedrichs v Stephenson, 163 N.W. 153, 101 Neb. 366
N.J.—Proff v. Shirvanian, 160 A. 844, 110 N.J.Eq. 629
N.M.—In re Barth, 189 P. 499, 26 N.M. 93.
N.Y.—In re Mahan, 262 N.Y.S. 702, 237 App.Div. 664—People v. People's Trust Co., 167 N.Y.S. 767, 180 App.Div. 494, 36 N.Y.Cr. 203—In re Strandburg's Estate, 247 N.Y.S. 194,

been said that the client must likewise deal with the attorney in a fair and equitable manner;[45] and an attorney has been accorded the right to retain such papers and documents of the client as are necessary to protect him from an unwarranted and vicious assault made by the client upon his professional integrity and reputation.[46]

The fiduciary or trust relationship and the duties flowing therefrom preclude the attorney from having any personal interests antagonistic to those of the client with reference to the subject matter of the relation,[47] or from obtaining any personal advantage or profit out of the relationship,[48] without the knowledge or consent of the client. In this latter connection it may be said, as a general proposition, that no rule is better settled than that an attorney cannot make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit.[49]

138 Misc 732, modified on other grounds 248 N.Y.S. 164, 138 Misc. 859.
N.C.—Mebane v. Broadnax, 111 S.E 627, 183 N.C 333.
Okl.—Wolfe v. Bass Furniture & Carpet Co., 3 P.(2d) 895, 152 Okl. 125, certiorari denied Wolf v. Bass Furniture & Carpet Co., 54 S.W (2d) 79.
Pa.—In re Rossiter's Adjudication, 34 Pa.Super. 193.
S.D.—In re Rempfer, 216 N.W 355, 51 S.D 393, 55 A.L.R. 1346
Tenn.—Young v. Wigga, 13 Tenn.App. 522—Harris v. Marshall, 8 Tenn App. 509.
Tex.—Bryant v. Lewis, (Civ App.) 27 S.W.(2d) 604—Nugent v. Moody, (Civ.App.) 271 S.W. 266—Laybourne v. Bray, (Civ.App.) 190 S.W 1159.
Va.—Stein v. Morris, 91 S.E 177, 120 Va 390.
Wash.—State v. Mitchell, 34 P.(2d) 903, 178 Wash 196, appeal dismissed and certiorari denied Mitchell v. State of Washington, 55 S.Ct. 349, 293 U.S 533, 79 L.Ed 641.
Wis.—Petition of Board of Law Examiners, Examination of 1926, 210 N.W. 710, 191 Wis 359
6 C.J. p 682 notes 84, 87, p 686 note 19.

Rule founded on dependency of client

(1) "The relationship of attorney and client is an unusual one With the ever-increasing multiplicity of laws, and the growing complexity of our economic and civil relationships, the field of service of the attorney becomes increasingly important, and the necessity for the average layman to depend upon his attorney increases in like degree He owes his client the utmost good faith in his dealings with him."—Bryant v Lewis, (Tex. Civ.App.) 27 S.W.(2d) 604, 607

(2) The extent of the attorney's duty in this regard is measured in terms of the client's dependency.—In re Sullivan, 261 N.Y.S. 664, 237 App.Div. 551, motion denied 264 N.Y. S 914.

(3) The fiduciary relationship and corresponding duty are intensified if the attorney is, in addition, the son of the client upon whom the latter is dependent generally—Wallach v Rabinowitz, 200 N.W 646, 185 Wis 115

Attorney charged with knowledge of duty

An attorney, by reason of his training, is charged with knowledge that his clients, whether individuals or municipal corporations, have a right to rely on his good faith—In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N.E 332, 351 Ill. 206.

Client's violation of law does not relieve an attorney of his duty in this respect.—Hale v. McGauley, (R.I.) 147 A. 389.

45. U.S.—Laredo Nat. Bank v. Gordon, (C.C.A.Tex.) 61 F.(2d) 966, certiorari denied 53 S.Ct. 524, 289 U.S. 726, 77 L.Ed. 1476
N.Y.—In re Abrusso's Estate, 249 N.Y.S 72, 139 Misc 559.

Duty to furnish information

It is the duty of a client to inform her attorney of the real facts of her case in preparing the pleading—Levy v. Nelson, 279 S.W. 620 212 Ky. 444

46. Painter v Merchants & Manufacturers Bank of Milwaukee, 277 Ill.App 208

47. Ky.—Williams v. Wilson, 7 Ky. Op 322.
Nev.—Martin v Dixon, 241 P. 213, 49 Nev 161—Page v. Walser, 213 P 107, 46 Nev 390
N.M.—In re Barth, 189 P. 499, 26 N.M. 93
N.D.—Moran v. Simpson, 178 N.W. 769, 42 N.D. 575
Or.—State v Goldstein, 220 P. 565, 109 Or. 497.

Interest held not adverse.—Busey v. Perkins, 176 A 474, 168 Md 19.

Separate compromise of harmonious interest

Where an attorney had a proprietary as well as a professional interest in the subject matter of his client's litigation which is harmonious with, but severable from, that of his client, the duty which he owes his client does not extend to prohibit him from compromising with the adversary with respect to his own interest, where in so doing the only prejudice to the client is the supposed abatement of zeal on the part of the attorney. In such a case the duty to continue to fight zealously for the client is not relaxed by the departure of the personal proprietary interest—Holman v Gulf Refining Co. of Louisiana, (C.C.A.La.) 76 F. (2d) 94, certiorari denied 56 S.Ct. 102, 296 U.S 590, 80 L.Ed 417, rehearing denied 56 S.Ct. 305, 296 U.S. 664, 80 L.Ed 474.

Right of attorney to represent adverse interests see supra § 47.

48. U.S.—Parkerson v. Borst, (C.C.A.La.) 264 F 761, certiorari denied Putnam v Borst, 41 S.Ct. 8, 254 U.S 634, 65 L.Ed 449.
Ala.—Scott v Hardyman, 119 So 224, 218 Ala 515
Ill.—Youngquist v. Hunter, 227 Ill App 152
Mass.—Robertson v. Hirsh, 177 N.E 676, 276 Mass. 452—Tarr v. Tucker, 172 N.E. 257, 272 Mass 150—Lanigan v. Scharton, 131 N.E 223, 238 Mass. 468—Dunne v Cunningham, 125 N.E 560, 234 Mass 332
Miss.—Gwin v. Fountain, 126 So 18, 159 Miss 619, suggestion of error sustained 132 So 559, 159 Miss. 619.
Wis.—Armstrong v. Morrow, 163 N.W 179, 166 Wis 1, Ann.Cas 1918E 1156
6 C.J. p 682 notes 89, 91 [c].

49. Ark.—Swain v. Martin, 251 S.W. 26, 158 Ark 469.
D.C.—Goodrum v Clement, 51 App D.C. 184, 279 F. 304—Goodrum v Clement, 51 App.D.C 184, 277 F 536—Baumgardner v Hudson, 51 App.D.C. 150, 277 F. 552
Iowa.—Healy v. Gray, 168 N.W. 222, 225, 184 Iowa 111.
6 C.J. p 683 note 92.

"The relation is in the highest degree confidential, and a client does not assume any risk in communicating freely with his attorneys concerning the subject-matter of the employment. . . . The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship. Every consideration of personal advantage or profit must be subordinated to the interest and welfare of the client, and information derived from the close and intimate relationship necessarily existing should not be used to promote personal interests or

This has, however, been limited to information or knowledge of a confidential character, and it has been held that nonconfidential information given to the attorney to be made known to the public generally may be used by the attorney for his own profit.[50]

It is not only the duty of an attorney to inform the client of any personal interest he may have with respect to the matter intrusted,[51] but also to make a clear, complete, and accurate disclosure of all material information or facts concerning the subject matter of the employment,[52] together with the legal consequence of the state of facts disclosed.[53]

An attorney is held to strict accountability for the performance and observance of these professional duties,[54] and for a breach or violation thereof the client may hold the attorney liable or accountable,[55] or may, in a proper case, procure the intervention of a court of equity to compel the performance of the fiduciary duties on principles of equity and public policy.[56]

Nonexistence or termination of relation. The foregoing duties are dependent on the existence of an attorney and client relationship and are in no way owed by the attorney to one who never occupied that relation or position.[57] Once the relationship has been created, however, the duty of fairness, good faith, and fidelity is a continuing one which may extend beyond the continuance of the relationship itself, so long as the influence arising from the relationship exists or there is a possibility of the attorney using confidential knowledge or information at the expense of the client.[58]

for personal gain."—Healy v. Gray, supra

Use of confidential knowledge or information to acquire adverse interest see infra § 126

50. Stein v. Morris, 91 S.E. 177, 120 Va. 390

51. La.—Le Blanc v. Cristina, 140 So. 149, 19 La.App. 397.
N.Y.—Moller v. Pickard, 232 N.Y. 271, 133 N.E. 887, reversing 188 N.Y.S. 791, 197 App.Div. 333.
Wash.—Cameron v. Hurn, 266 P. 179, 147 Wash. 434.
6 C.J. p. 682 note 86

An attorney acting for an executrix in settlement of an estate had the duty to give full information and advice regarding the estate, so as to enable her to act freely and with an understanding as one dealing at arm's length with another.—State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County, (Mont.) 57 P.(2d) 809.

Nondisclosure held not shown.—Cameron v. Hurn, 266 P. 179, 147 Wash. 434.

52. U.S.—Graeber v. McMullin, (C.C.A.Colo.) 56 F.(2d) 497, certiorari denied McMullin v. Graeber, 53 S.Ct. 9, 287 U.S. 603, 77 L.Ed. 525—Orr v. Waldorf-Astoria Hotel Co., (C.C.A.Minn.) 291 F. 343.
Ark.—Norfleet v. Stewart, 20 S.W.(2d) 868, 180 Ark. 161.
Cal.—Blattman v. Gadd, 296 P. 681, 113 Cal.App. 76.
Ill.—Catherwood v. Morris, 196 N.E. 519, 360 Ill. 473.
N.J.—Turnley v. Nixon, 163 A. 800, 113 N.J.Eq. 116.
N.M.—In re Barth, 189 P. 499, 26 N.M. 93.
S.C.—Hawley v. Jennings, 145 S.E. 697, 148 S.C. 140.
S.D.—Kickland v. Egan, 155 N.W. 192, 36 S.D. 428.
Tex.—Ivey v. Neyland, (Com.App.) 25 S.W.(2d) 313, reversing (Civ.App.) 11 S.W.(2d) 608—Bryant v. Lewis, (Civ.App.) 27 S.W.(2d) 604.

Dealing through agent

Where an attorney dealt with his client through an agent, the duty to disclose material facts was the same as though he dealt directly with the client.—Ivey v. Neyland, (Tex.Com.App.) 25 S.W.(2d) 313, reversing (Civ.App.) 11 S.W.(2d) 608.

Status of case

It is the duty of the attorney to keep the client fairly and accurately informed as to the exact status or progress of the case or matter with reference to which he is employed.—In re Babcock, 243 N.Y.S. 489, 230 App.App. 323—Laybourne v. Bray & Shifflett, (Tex.Civ.App.) 190 S.W. 1159.

Nondisclosure as constructive fraud see infra § 133.

53. U.S.—Graeber v. McMullin, (C.C.A.Colo.) 56 F.(2d) 497, certiorari denied McMullin v. Graeber, 53 S.Ct. 9, 287 U.S. 603, 77 L.Ed. 525
Tex.—Bryant v. Lewis, (Civ.App.) 27 S.W.(2d) 604.

54. Mo.—Addison v. Cope, 243 S.W. 212, 210 Mo.App. 569
Wis.—Armstrong v. Morrow, 163 N.W. 179, 166 Wis. 1, Ann.Cas.1918E 1156.

"The disability of the attorney arises when some duty or obligation to his client is involved, and the courts are strict in enforcing a rigid adherence to such duty and a recognition of such obligations."—Minton v. Roberts, 247 P. 662, 664, 119 Okl. 32.

55. Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709—6 C.J. p. 682 note 85.

Liability for:

Acts of others see infra §§ 149, 150.
Fraud see infra § 133.
Negligence see infra §§ 140–146
Unauthorized acts see infra §§ 147, 148

Right of client to compel accounting or payment see infra §§ 132–137

56. Ark.—Swaim v. Martin, 251 S.W. 26, 158 Ark. 469
Iowa.—Healy v. Gray, 168 N.W. 122, 184 Iowa 111.
Nev.—Martin v. Dixon, 241 P. 213, 49 Nev. 161
N.J.—Proff v. Shirvanian, 160 A. 844, 110 N.J.Eq. 639.
6 C.J. p. 682 note 89

Summary remedies of client see infra § 158

57. Iowa.—Kock v. Burgess, 166 N.W. 275, 158 N.W. 535, 156 N.W. 174, 176 Iowa 493.
Ky.—Bazzell v. Bennett, 191 S.W. 876, 174 Ky. 164
Md.—Parks v. Skipper, 165 A. 319, 164 Md. 338.
Mo.—Hancock v. York, 210 S.W. 62.

Duty is only to own client

(1) A lawyer owes no fiduciary duty to his client's adversary who is represented by another lawyer.—Hancock v. York, (Mo.) 210 S.W. 63, 67.

(2) "While the relation of attorney and client is a fiduciary one of the most confidential character demanding the utmost good faith on the part of the lawyer in all matters pertaining to the employment, we have searched in vain through the many authorities by which this wholesome doctrine is buttressed, for even slight intimation that it extends the same watchful protection from the other man's lawyer."—Hancock v. York, supra.

Creation of relation generally see supra § 65

58. Ala.—Jones v. Caraway, 87 So. 820, 205 Ala. 327
Ill.—Youngquist v. Hunter, 227 Ill.App. 152

§ 126. Acquiring Interest Adverse to Client

a. In general
b. Purchase of interest in property or claim
c. After termination of relationship

a. In General

It is ordinarily a breach of duty for an attorney to acquire an interest adverse to that of his client without the latter's knowledge or consent; and, if he does so, the client may elect to treat him as constructive trustee of such interest for the benefit of the client.

In accordance with the rules that an attorney cannot, without the knowledge or consent of the client, have antagonistic interests or obtain a personal advantage or profit out of the relationship (see supra § 125), an attorney cannot, without his client's consent, acquire and hold, otherwise than in trust, any adverse interest or title touching the subject matter of his employment,[59] particularly where such interest is acquired as the result of knowledge or information obtained by the attorney in his relations or dealings with his client.[60]

Any transaction by which an attorney has taken a position, or acquired an interest, antagonistic to that of his client will be closely scrutinized by the courts,[61] and may in many instances be avoided or invalidated irrespective of its merits, fairness, or good faith or whether or not it is in fact injurious to the client;[62] and even where the existence of good faith and lack of injury to the client, or other facts, will exonerate him it is always incumbent upon the attorney to show such facts to the satisfaction of the court.[63]

While an attorney may be entitled to reimbursement before the client can hold him accountable for the adverse interest as constructive trustee (see infra § 134), the attorney cannot affirmatively assert

Minn—Sandford v Flint, 122 N.W. 315, 108 Minn. 399
Nev—Martin v. Dixon, 241 P. 213, 49 Nev. 161.
Wash—Conner v Hodgdon, 207 P. 675, 120 Wash 426
6 C.J. p 683 note 94, p 685 note 15, p 689 note 40.
Dealings with client after termination of relation see infra § 132.
Purchase of adverse interest after termination of relation see infra § 126 b (2)

59. U.S—Tracy v. Willys Corporation, (C.C.A.Ohio) 45 F.(2d) 485.
Cal—McArthur v. Goodwin, 160 P. 679, 173 Cal 499
Md.—Parks v Skipper, 165 A. 319, 164 Md 388.
Nev—Martin v. Dixon, 241 P. 213, 49 Nev 161
N.C—Mebane v Broadnax, 111 S.E 627, 183 N.C 333
Okl—Board of Com'rs of Okfuskee County v Haslewood, 192 P. 217, 79 Okl. 185, 11 A.L.R 709
6 C.J p 682 note 91, p 684 note 6.

Incapacity absolute

"There is no incapacity for dealing with a client, but there is absolute incapacity of an attorney to deal for his own interest in the subject matter of the litigation without his client's knowledge or consent."—Board of Com'rs of Okfuskee County v. Haslewood, 192 P. 217, 219, 79 Okl. 185, 11 A.L.R. 709.

Attorney as constructive trustee generally see Trusts § 151 [65 C.J. p 484 note 81]
Right of client to elect to hold attorney accountable for personal interest or profit acquired by latter see infra § 134.

60. Goodrum v. Clement, 51 App.D.C 184, 279 F 304—Goodrum v. Clement, 51 App.D.C. 184, 277 F. 586—Baumgardner v. Hudson, 51 App.D.C 150, 277 F 552—6 C.J p 682 note 91, p 683 note 92

Procurement of conflicting patent

(1) A patent attorney cannot file a patent application of his own relating to the same general subject matter to which his client's invention relates.—Goodrum v Clement, 51 App.D.C. 184, 279 F. 304—Goodrum v. Clement, 51 App.D.C. 184, 277 F. 586.

(2) This is so although the information which the attorney has received from the client does not amount to a full disclosure of the invention—Baumgardner v. Hudson, 51 App.D.C. 150, 277 F. 552

Use of information to impeach client's title

(1) An attorney will not be allowed to set up an adverse title and impeach that of his former client with information gained by virtue of the relation—Downard v. Hadley, 18 N.E. 457, 116 Ind 131—Davis v. Kline, 9 S.W. 724, 96 Mo. 401, 2 L.R.A. 78—6 C.J. p 683 note 93.

(2) This is especially true where the defect in the client's title was occasioned by the neglect or nondisclosure of the attorney—Phillips v. Blair, 33 Iowa 649—Briggs v Hodgdon, 7 A. 387, 78 Me. 514—Hatch v. Fogerty, 38 N.Y.Super 166, 10 Abb. Pr.(N.S.) 147, 40 How.Pr. 492.

61. U.S—Reusch v Fischer, (Cust. & Pat.App.) 49 F.(2d) 818, rehearing denied Reusch v Fisher, 53 F. (2d) 270
D.C—Goodrum v. Clement, 51 App.D.C 184, 279 F 304—Goodrum v. Clement, 51 App.D.C 184, 277 F. 586—Baumgardner v. Hudson, 51 App.D.C 150, 277 F 552.
Okl—Minton v. Roberts, 247 P. 662, 119 Okl. 32.
Tex—Sherwood v South, (Civ.App.) 29 S.W.(2d) 805

62. U.S—Parkerson v Borst, (C.C.A.La.) 264 F 761, certiorari denied Putnam v Borst, 41 S.Ct. 8, 254 U.S 634, 65 L.Ed 449
Iowa—Healy v. Gray, 168 N.W. 222, 184 Iowa 111.
Nev—Martin v. Dixon, 241 P. 213, 49 Nev. 161.
N.C—Mebane v. Broadnax, 111 S.E 627, 183 N.C 333
Okl—Board of Com'rs of Okfuskee County v. Haslewood, 192 P. 217, 79 Okl. 185, 11 A.L.R 709.

"The door is shut to all investigation"

"On the principle that a man cannot serve two masters, especially where self-interest is involved, the transaction is vitiated by the law, irrespective of its merits, fairness, or good faith; and whether it is injurious to the client is immaterial The law does not stop to speculate upon the probabilities that the attorney resisted temptation, it removes the temptation by proclaiming in advance that he shall not deal for himself, without the knowledge and consent of his client, with the subject-matter intrusted to him and involved in his representation as attorney."—Board of Com'rs of Okfuskee County v. Haslewood, 192 P. 217, 219, 79 Okl 185, 11 A.L.R. 709.

63. D.C—Goodrum v. Clement, 51 App.D.C 184, 279 F. 304—Goodrum v Clement, 51 App.D.C. 184, 277 F. 586—Baumgardner v. Hudson, 51 App.D.C 150, 277 F. 552.
Md—Parks v. Skipper, 165 A. 319, 164 Md 388.
Nev—Martin v Dixon, 241 P. 213, 49 Nev 161.
N.Y—Moller v. Pickard, 133 N.E 887, 232 N.Y. 271, reversing 133 N.Y.S. 791, 197 App.Div. 333.

such interest or title against the client whether or not he has been reimbursed.[64]

b. Purchase of Interest in Property or Claim

(1) In general
(2) Ratification, waiver, and laches
(3) Rights and liabilities of purchasers and assigns of parties

(1) In General

Unless the client has knowledge thereof or consented thereto, an attorney generally cannot make a valid purchase of an interest in the client's property or property which is involved in, or connected with, the litigation or transaction being handled or conducted on behalf of the client, nor can he purchase an outstanding claim or title against the client.

The general rules, above stated, against the attorney's acquisition of interests antagonistic to those of his client are usually held to invalidate a purchase by an attorney, without the client's consent, of any interest in, or the title to, property of the client which is being sold at a judicial[65] or tax[66] sale to which the employment of the attorney bears some relation; property which is involved in, or connected with, litigation or a transaction as to which the employment relates or the attorney has a special advantage or knowledge because of his relations with the client;[67] an outstanding claim against the client or the client's estate,[68] or an outstanding adverse title to land with reference to which the attorney is employed for the purpose of drawing a deed or examining title, or similar employment, even though the client has his title in contemplation only and has not yet purchased.[69] A purchase may be invalid, within this rule, although it is not actually made by the attorney but by a third person, if the attorney is to derive any benefit or profit therefrom.[70]

Although there are indications that the attorney's disability in this connection is absolute,[71] and purchases such as above mentioned have been characterized as void,[72] there are numerous cases which appear to support the view that the rule against purchases by an attorney is not inexorable and that under proper circumstances such a purchase may be sustained where the attorney has not violated any confidence reposed in him nor breach his duty of fidelity.[73] Hence, the purchase may be sustained where the attorney can satisfactorily show that he has acted with his client's consent and that the

64. Strever v. Sinclier, 213 P 253, 66 Mont 258

65. Pa—Hemminger v. Leidigh, 21 Pa Dist & Co 287.
Tex—Sherwood v. South, (Civ.App.) 29 S.W (2d) 805
6 C J p 683 note 2

Purchase for grossly inadequate price
Where the execution sale was by direction of the plaintiff's attorney held on a stormy day so that no one but the attorney attended, and he purchased at a grossly inadequate price, it was held that the attorney took the title in trust not only for his client but also for the execution debtor, as any other result would warrant an inference of fraud—Howell v. Baker, 4 Johns Ch (N.Y.) 118
Purchases direct from client see infra § 128

66. Cal—McArthur v. Goodwin, 160 P 679, 173 Cal 499.
La—Chesnut v Snell, 2 La App 746
6 C J. p 684 note 5—61 C J. p 1201 note 26, p 1202 note 37.

67. U S—Tracy v Willys Corporation, (C C A Ohio) 45 F (2d) 485
Cal—McArthur v. Goodwin, 160 P 679, 173 Cal 499
Md—Parks v Skipper, 165 A. 319, 164 Md. 388.
Nev.—Martin v. Dixon, 241 P. 213, 49 Nev. 161.
N C—Melane v Broadnax, 111 S E 627, 183 N.C. 333.
6 C J. p 682 note 91.

Interest in estate against which client's claim is asserted
An attorney whose client is engaged in litigation to enforce a claim against a decedent's estate may not purchase the residuary share of the estate, since he cannot acquire an interest adverse to his client, and the purchase will not be upheld as against the client, although the latter was subsequently defeated in the litigation—Stephens v Dubois, 76 A. 656, 31 R I 138, 140 Am S.R. 741

68. Cal—McArthur v. Goodwin, 160 P 679, 173 Cal. 499
Ill—McDowell v Milroy, 69 Ill 493
Mo.—Addison v Cope, 243 S W. 212, 210 Mo App 569
Mont—Strever v. Sinclier, 213 P. 253, 66 Mont 258
N D—White Earth Creamery Co. v. Edwardson, 191 N.W. 622, 49 N.D. 394
Pa—Third National Bank of Philadelphia v Hunsicker, 8 Pa Co 635.
Tex—Sherwood v South, (Civ App.) 29 S W (2d) 805
6 C J. p 685 note 13.

Judgment against estate
A purchase of a judgment against an estate by the attorney for the administrator was held to be in trust for the estate, although there was no actual conflict of interests and the estate was in fact greatly benefited—Succession of Hoss, 8 So. 833, 42 La Ann. 1022

Note executed on attorney's advice
Where an attorney, who was also in the business of lending money and discounting notes, purchased a note executed by a client on his advice at less than its face value without disclosing the possibility of such settlement to the client, he was not entitled to compensation for the risk he took, but held the note as trustee—Addison v. Cope, 243 S W. 212, 210 Mo.App. 569

Purchase of note and mortgage against a client, without the latter's knowledge and consent, and for the purpose of defrauding him has been held void—McArthur v. Goodwin, 160 P 679, 173 Cal. 499.

69. Baker v Humphrey, (C C Mich.) 101 U S 494, 25 L Ed. 1065—6 C J p 685 note 14.

70. Davitt v. O'Connor, (C.C A N Y.) 73 F (2d) 43, certiorari denied O'Connor v Davitt, 55 S Ct 217, 293 U S 621, 79 L Ed 709—6 C J p 684 note 3

71. Newcomb v. Brooks, 16 W Va. 32

72. McArthur v. Goodwin, 160 P 679, 173 Cal. 499.

73. Mass—Dunne v Cunningham, 125 N E. 560, 234 Mass. 332.
Miss—Bowers v. Virden, 56 Miss. 595
Okl—Minton v. Roberts, 247 P. 662, 119 Okl 32—Watts v. Jackson, 182 P 508, 75 Okl. 123.
6 C.J. p 684 note 7 [c].

transaction was in every way fair and not to the client's prejudice or disadvantage.[74] Also it has been held that the rule does not preclude a good-faith purchase by the attorney from a third person of a title which has previously belonged to the client,[75] and it has sometimes been held that if an attorney, who has been consulted as to the title of property which the client is planning to purchase, gives correct advice as to the state of the title and the client refuses to buy, the attorney may thereafter do so without committing any breach of duty.[76] As previously noted, however, such transactions are carefully scrutinized and it is always incumbent upon the attorney to show to the satisfaction of the court the good faith or other facts which are necessary to exonerate him.

As the attorney's duties are founded upon the existence of the attorney and client relationship (see supra § 125), he is not precluded from purchasing an interest, title or claim as against a person who never actually occupied the position of a client.[77] Moreover, the relation or employment must ordinarily in some way relate to or result in the purchase of the property, interest, or claim involved.[78]

(2) Ratification, Waiver, and Laches

A purchase by an attorney, which the client has the right to invalidate or claim for his benefit, may be sustained in the attorney's favor because it has been ratified by the client or he has precluded himself from asserting his rights by waiver, estoppel, or laches.

Although an attorney has made a purchase which the client has a right to invalidate or claim for his benefit, under the rules stated in the preceding section, the purchase will usually be sustained in the attorney's favor if the client has by his acts or conduct ratified the same or waived his rights or estopped himself from questioning the attorney's title.[79] A client wishing to assail or claim the benefit of a purchase made by an attorney must do so within a reasonable time after notice thereof or else be deemed to have waived his rights or be barred by laches;[80] and this is particularly true where there has been no moral turpitude involved in the conduct of the attorney or where the delay in the assertion of the client's rights has affected the position of the parties to the transaction, or the value of the property.[81]

(3) Rights and Liabilities of Purchasers and Assigns of Parties

Where an attorney has purchased a title, interest, or

74. Ark.—Goode v. King, 76 S.W. (2d) 300, 189 Ark. 1093
Md.—McLean v. Maloy, 111 A. 91, 136 Md. 467.
N.Y.—Moller v. Pickard, 133 N.E. 887, 232 N.Y. 271, reversing 188 N.Y.S. 791, 197 App.Div. 333.
Okl.—Minton v. Roberts, 247 P. 662, 119 Okl. 32—Watts v. Jackson, 182 P. 508, 509, 75 Okl. 123.
6 C.J. p. 684 note 7.

"There are a few cases holding that an attorney is under an absolute disability to purchase the subject-matter of his retainer or pending or prospective litigation of his client; but the weight of authority is that such purchases are not absolutely void, but will only be upheld in cases where the purchase is made in the utmost good faith and fairness for an adequate consideration, and where it is shown that the attorney fully informed the client of all the material facts and gave the same disinterested advice he would have given had the sale been made to a stranger"—Watts v. Jackson, supra.

Small profit by attorney does not invalidate his purchase at a judicial sale where there has been the utmost good faith and fairness and the client has consented thereto—Watts v. Jackson, 182 P. 508, 75 Okl. 123

75. Okl.—Harrison v. Murphey, 135 P. 1137, 39 Okl. 548, 49 L.R.A.(N.S.) 1059.
W.Va.—Butcher v. Chidester, 68 S.E. 1009, 68 W.Va. 488.
6 C.J. p. 685 note 8.

76. Mich.—Humphrey v. Hurd, 31 Mich. 436.
N.J.—Kauder v. Lautman, 172 A. 565, 116 N.J.Eq. 145, affirming 168 A. 660, 114 N.J.Eq. 197.
Pa.—Dobbins v. Stevens, 17 Serg. & R. 13
6 C.J. p. 686 note 17.

77. Colo.—Webber v. Wannemaker, 89 P. 780, 39 Colo. 425
Ind.—Moore v. Millar, 137 N.E. 351, 98 Ind.App. 69.
Iowa.—Kock v. Burgess, 166 N.W. 275, 158 N.W. 535, 156 N.W. 174, 176 Iowa 493.
Ky.—Bassell v. Bennett, 191 S.W. 876, 174 Ky. 164.
Md.—Parks v. Skipper, 165 A. 319, 164 Md. 333.
6 C.J. p. 683 note 95, p. 685 note 12.

Purchase of title against client's adversary is not prohibited although the attorney acts on information obtained while assisting his client to furnish to the adversary a satisfactory abstract of title—Hancock v. York, (Mo.) 210 S.W. 63.
Existence of relation in general see supra § 65

78. Ark.—Pack v. Crawford, 29 Ark. 489.
Iowa.—Baker v. Davis, 35 Iowa 184.
Minn.—Sandford v. Flint, 122 N.W. 315, 108 Minn. 399
Miss.—Bowers v. Virden, 56 Miss. 595
W.Va.—Jackson v. Strader, 56 S.E. 177, 61 W.Va. 161.
6 C.J. p. 683 note 96

79. Cal.—Tomblin v. Hill, 275 P. 941, 206 Cal. 689
Md.—McLean v. Maloy, 111 A. 91, 136 Md. 467
Mass.—Davidson v. Zieman, 186 N.E. 651, 283 Mass. 492.
Tex.—Ivey v. Teichman, (Civ.App.) 201 S.W. 695, dismissed for want of jurisdiction.
6 C.J. p. 685 note 9.

80. Tomblin v. Hill, 275 P. 941, 206 Cal. 689—6 C.J. p. 685 note 10.

Mere delay of sixteen months, where a prejudicial change of situation is not shown, does not constitute laches—Stephens v. Dubois, 76 A. 656, 31 R.I. 138, 140 Am.S.R. 741.

Notice necessary
Neither the statute of limitations nor the doctrine of laches will operate to defeat an action by a client against an attorney wherein the former asserts a constructive trust in his favor until discovery of the breach of confidence—Hemminger v. Leidigh, 21 Pa.Dist. & Co. 287.

81. Tomblin v. Hill, 275 P. 941, 206 Cal. 689—6 C.J. p. 685 note 11.

claim in violation of his duties to his client, subsequent purchasers and assigns of the attorney, other than bona fide ones for value and without notice, take subject to the rights and equities of the client, while innocent purchasers and assigns of the client are entitled to assert the client's rights and equities.

Where an attorney has purchased a title, interest, or claim in violation of his duties to his client a subsequent purchaser or assign of the attorney takes the title or interest subject to the equities in the client's favor,[82] unless the purchaser or assign has taken in good faith, for value and without notice.[83]

The right to hold the attorney as trustee in such cases does not extend to one purchasing from the client with full knowledge of the facts;[84] but an innocent purchaser from the client is entitled to assert the latter's rights and equities.[85]

c. After Termination of Relationship

Even after the relationship of attorney and client has terminated, the attorney cannot purchase or acquire an adverse title or interest where such action involves a breach of confidence or the use by the attorney, to the client's disadvantage, of information or knowledge obtained by reason of the relationship; but otherwise the termination of the relation leaves the attorney free to acquire or purchase an interest, title, or claim against his former client.

As an attorney's obligation of fidelity may continue beyond the continuance of the relationship between the parties (supra § 125), an attorney is ordinarily precluded from purchasing or acquiring an adverse title, interest, or claim to the disadvantage of his former client, even after the relationship has terminated, if it involves a breach of confidence or the use of knowledge or information obtained through his professional relationship.[86] So long, however, as there is no breach of confidence or use of information or knowledge previously acquired in his professional relations, and no unfair advantage is taken of the client, the termination of the relationship of attorney and client leaves the attorney free to acquire or purchase property previously belonging to the client or an adverse title, interest, or claim.[87] Hence the courts in many instances have sustained an attorney's purchase of a former client's property at a judicial[88] or tax[89] sale, or his purchase of outstanding claims against his former client;[90] and an attorney may, after the relationship has terminated, buy the title to property with reference to which he was previously consulted by the client where the client refused to buy the property after receiving correct advice and the attorney's purchase is not the result of confidential knowledge previously acquired.[91]

§ 127. Dealings between Attorney and Client

a. Validity and propriety in general
b. Matters or circumstances affecting validity of dealing or burden of attorney

82. Henry v. Raiman, 25 Pa. 354, 64 Am D 703—Hemminger v. Leidigh, 21 Pa Dist. & Co 237.

83. Charles v. Roxana Petroleum Corporation, (C C A Okl.) 282 F. 983, certiorari denied 43 S Ct. 361, 261 U S 614, 67 L Ed. 827.

Notice of violation held not shown

Where the purchase is first made through a third person, knowledge of the fact that a person subsequently acquiring the title was previously an attorney for the former owner of the property does not put a subsequent purchaser on notice of fraud or a violation of duty on the part of the attorney—Charles v. Roxana Petroleum Corporation, (C.C.A Okl.) 282 F. 983, certiorari denied (1923) 43 S Ct. 361, 261 U S. 614, 67 L Ed 827.

84. Weaver v. Drake, 193 P. 45, 79 Okl 277—6 C J. p 683 note 97.

85. Ind.—Downard v. Hadley, 13 N. E. 457, 116 Ind 131.
Pa.—Henry v. Raiman, 25 Pa. 354, 64 Am.D. 703.

86. D C.—Baumgardner v. Hudson, 51 App.D.C. 150, 277 F. 552.
Me.—Briggs v. Hodgdon, 7 A. 387, 78 Me. 514.
Nev.—Martin v Dixon, 241 P. 213, 216, 49 Nev 161
Wash.—Conner v Hodgdon, 207 P. 675, 120 Wash. 426.
6 C J p 683 note 94, p 685 note 15
"The authorities are uniform in holding that, whether during the time an attorney is acting as such or after such relations have ceased, and whether with his client's money or with his own money he purchases or acquires an interest in the property, in any way the subject of litigation, a court of equity will decree that he holds such interest as trustee for the client"—Martin v. Dixon, supra.
Right of attorney to deal with client after termination of relation see infra § 132.
Termination of relationship generally see supra § 108 et seq.

87. U S.—Charles v. Roxana Petroleum Corporation, (C.C.A Okl.) 282 F 983, certiorari denied 43 S.Ct. 361, 261 U S. 614, 67 L Ed. 827
Ky.—Smith v. Craft, 58 S W. 500, 22 Ky L 643
N J.—Kauder v. Lautman, 168 A 660, 114 N J Eq 197, affirmed 172 A 565, 116 N J.Eq 145.
Okl.—Harrison v Murphey, 135 P. 1137, 1140, 39 Okl 548, 49 L R A. (N S.) 1059
Or.—Crim v Thompson, 229 P. 916, 112 Or 399—Crim v Thompson, 193 P. 448, 98 Or. 599—Smith v. Boothe, 176 P. 793, 90 Or 360, affirming 175 P 709, 90 Or. 360
"It cannot be the law that an attorney, in the absence of fraud or an abuse of confidence in some way, is forever debarred from acquiring property, honestly and in good faith, solely because it had formerly belonged to a person who at some time in the past had been his client"—Harrison v Murphey, supra.

88. Miss.—Bowers v. Virden, 56 Miss 595.
Okl.—Harrison v. Murphey, 135 P. 1137, 39 Okl. 548, 49 L.R.A (N.S.) 1059.
Or.—Crim v Thompson, 229 P. 916, 112 Or. 399—Crim v. Thompson, 193 P. 448, 98 Or 599.

89. Baker v. Davis, 35 Iowa 134.

90. Smith v. Boothe, 176 P. 793, 90 Or. 360, affirming 175 P. 709, 90 Or. 360—6 C J. p 686 note 16

91. Kauder v. Lautman, 168 A. 660, 114 N J.Eq 197, affirmed 172 A. 565, 116 N J Eq. 145.

c. Construction and operation of contracts between attorney and client
d. Avoidance by client and ratification

a. Validity and Propriety in General

While an attorney is under no absolute incapacity to deal with his client, all such transactions are subject to suspicion and close scrutiny, and will be sustained only where they are characterized by the utmost fairness and honesty and the attorney clearly shows that no undue influence was exercised and that the client received the same benefits and advantages as if he had been dealing with a stranger.

Although a few of the cases contain some suggestions that business dealings between attorney and client after the relation has been created are always void or voidable,[92] it is generally held that an attorney is under no absolute incapacity to deal with his client,[93] but that in order for a transaction or dealing between them to be sustained it must be characterized by the utmost honesty and good faith.[94] In other words, such a transaction may be upheld if it is obviously fair and just;[95] but because of the confidential and fiduciary nature of the lawyer's relationship (supra § 125), and his opportunities to exert undue influence over his client,[96] the "arm's length rule," which permits the parties to an ordinary business or mercantile transaction to outtrade or outmaneuver the other and obtain an advantage at the expense of candor and ingeniousness, is entirely inapplicable to business dealings or transactions between the attorney and his client after the employment has been undertaken.[97] Rather, all such transactions or dealings are regarded with suspicion and disfavor,[98] are discouraged by the policy of the law,[99] and will be closely scrutinized by the courts which will lean against the attorney;[1] and if it appears that the

92. Fla.—Halstead v. Florence Citrus Growers' Ass'n, 139 So. 132, 104 Fla. 21
N D—Moran v. Simpson, 173 N.W. 769, 42 N.D 575
6 C J p 687 note 25.
Gifts regarded as void see infra § 129
Purchase of interest in litigated property as void see infra § 128

93. Ark.—Goode v. King, 76 S.W. (2d) 800, 189 Ark 1093.
Cal—Stieglitz v. Settle, 165 P. 436, 175 Cal 131
Fla—Pilkington v. Rose, 102 So 751, 88 Fla 547
Kan—Yeamans v. James, 27 Kan 195
Ky—Pilant v. Davis, 2 Ky Op. 40.
Md—McLean v. Maloy, 111 A 91, 136 Md 467.
Mass.—Mitchell v. Wright, 125 N E 638, 234 Mass 458
Okl—Bilby v. Stevenson, 13 P (2d) 112, 158 Okl 193—Board of Com'rs of Okfuskee County v Hazlewood, 192 P. 217, 79 Okl. 185, 11 A L R. 709.
Or—Kirchoff v. Bernstein, 181 P. 746, 92 Or. 378
6 C J p 687 note 26.

94. Ariz—Holbridge v Southwest Cotton Co, 281 P 202, 35 Ariz 496
Cal—McNeal v Foreman, 8 P (2d) 533, 117 Cal App 155—Stieglitz v Settle, 195 P 705, 50 Cal.App 581
Fla—Halstead v. Florence Citrus Growers' Ass'n, 139 So 132, 101 Fla. 21—Pilkington v. Rose, 102 So. 751, 88 Fla. 547
Ill—In re Kolb, 199 N.E. 92, 362 Ill 190—Thompson v Knight, 3 N. E (2d) 114, 284 Ill.App 656
Mass—Israel v. Sommer, 197 N E 442.
Minn—Svendsgaard v. Grimes, 162 N.W. 298, 136 Minn. 469
Mo—Bybee v. S'Renco, 291 S.W. 459, 316 Mo. 517.
Or—Kirchoff v. Bernstein, 181 P. 746, 92 Or 378
Tex—Rhoton v Texas Land & Mortgage Co, (Civ App) 80 S W (2d) 763, error refused
Va—Bruce v. Bibb, 105 S E. 570, 129 Va. 45
6 C J p 686 note 20
Express contracts for compensation see infra §§ 131–190.

95. Ark—Goode v. King, 76 S W (2d) 800, 189 Ark 1093
Fla—Pilkington v. Rose, 102 So. 751, 88 Fla 547
Ind—City of Rochester v. Campbell, 111 N E 420, 184 Ind 421.
Mass—Mitchell v Wright, 125 N E 638, 234 Mass 458
Minn—Mercer v McHie, 169 N.W 531, 141 Minn 144
Okl—Bilby v Stevenson, 13 P.(2d) 112, 158 Okl 193
6 C J p 687 note 26.

96. Fla—Williams v. Bailey, 67 So 877, 69 Fla 225
Ill—Elmore v Johnson, 32 N E 413, 143 Ill 513, 36 Am S R 401, 21 L R A. 366.
Kan—Yeamans v. James, 27 Kan. 195.
Me—Mayo v Purinton, 94 A 935, 113 Me. 452.
Mass—Israel v. Sommer, 197 N E 442.
Miss.—Gwin v Fountain, 126 So 18, 22, 159 Miss 619, suggestion of error sustained 132 So 559, 159 Miss 619
N J—Proff v Shirvanian, 160 A 844, 110 N J Eq. 639.
Va—Thomas v. Turner, 12 S.E. 149, 87 Va 1.
"The situation of an attorney with reference to his client puts it in his power to avail himself, not only of the necessities of his client, but of his liberality and credulity. The law not only carefully watches over all transactions between attorney and client to see that no advantage is taken of the client by his attorney, but often goes further, and holds such transactions void which between other persons would be valid"—Gwin v. Fountain, supra.

97. Fla—Halstead v Florence Citrus Growers' Ass'n, 139 So 132, 104 Fla 21—Gould v State, 127 So. 309, 99 Fla 662, 69 A L R 699
Me—Mayo v Purinton, 94 A. 935, 113 Me 452
Mass—Smith v. Weeks, 147 N.E. 676, 252 Mass 244.
N Y—In re Leopold, 175 N Y.S. 183, 186 App Div 872, affirmed 123 N E 876, 226 N.Y 602
Pa—Nevin v State Bank of Elizabeth, 174 A. 618, 115 Pa Super 92.

98. Cal—Stieglitz v. Settle, 195 P. 705, 50 Cal App 581
Iowa—Haman v. Preston, 173 N W. 894, 186 Iowa 1292
Nev—Moore v Rochester Weaver Mining Co, 174 P. 1017, 42 Nev. 164, 19 A L R 830

99. Tarr v. Tucker, 172 N E 257, 272 Mass 150

1. Cal—Stieglitz v. Settle, 195 P. 705, 50 Cal App 581
Fla—Halstead v Florence Citrus Growers' Ass'n, 139 So. 132, 104 Fla 21
Md—McLean v. Maloy, 111 A. 91, 136 Md 467
Mass.—Mitchell v. Wright, 125 N E 638, 234 Mass 458
Mo—Bybee v. S'Renco, 291 S W. 459, 316 Mo. 517.
Nev—Moore v Rochester Weaver Mining Co, 174 P. 1017, 42 Nev. 164, 19 A L R. 830
N.J—In re Romaine's Will, 170 A 16, 115 N J Eq 172 (first case) affirming 167 A 683, 113 N J Eq 477—In re Romaine's Will, 170 A 16, 115 N J Eq 173 (second case) affirming 167 A. 683, 113 N J.Eq

transaction is unfair or that the client has been overreached or unduly influenced it may be avoided at his election,[2] either in courts of law,[3] or in courts of equity on the principles that govern the conduct and dealings of trustees or fiduciaries generally.[4]

Indeed it is often stated with great strictness, at least where the attorney has seemingly profited at the expense of the client, that all transactions and dealings between attorney and client are, as against the attorney, prima facie fraudulent or presumed to have been obtained by undue influence;[5] and that to sustain such a transaction it is incumbent upon the attorney to show, by clear and satisfactory evidence, not only that there was a sufficient consideration moving to the client and that there was no undue influence or unfairness, but also that his client had all the information and advice that it would have been the duty of the attorney to give had he not been interested, and that the transaction was as beneficial to the client as if the latter had dealt with a stranger.[6] Should

477—Dwyer v Anderson, 166 A 293, 113 N J Eq 210—Proff v Shirvanian, 160 A 844, 110 N J Eq 639—Raimondi v Bianchi, 134 A 866, 100 N J Eq 238—Perkins v Deal Beach Realty Co, 114 A 853, 92 N J Eq 536, affirmed Perkins v Robertson, 114 A 856, 92 N J Eq 692

Ohio—Mechling v Duetiger, 20 Ohio N P (N S) 278

Tenn—Hutchinson v. Crowder, 8 Tenn Civ App 114

Tex—Sherwood v South, (Civ App) 29 S W (2d) 805

Va—Bruce v Bibb, 105 S E 570, 129 Va 45

Wis—State v Barto, 232 N W 553, 202 Wis. 329

6 C J p 686 note 21.

2. Fla—Halstead v Florence Citrus Growers' Ass'n, 139 So. 132, 104 Fla 21

Iowa—Reeder v. Lund, 236 N W. 40, 213 Iowa 300

Or—De Yulio v Brownell, 215 P. 576, 107 Or 651

Va—Bruce v Bibb, 105 S E 570, 129 Va 45

Undue influence by reason of confidential relationship of attorney and client as affecting validity of trust instrument see Trusts § 76 [65 C J p 332 notes 28, 32]

3. Stieglitz v Settle, 195 P 705, 50 Cal App 581—6 C J p 688 note 30

4. Miss—Gwin v Fountain, 126 So 18, 159 Miss 619, suggestion of error sustained 132 So 559, 159 Miss 619

Or—De Yulio v Brownell, 215 P 576, 107 Or 651

Wash—Cann v Hodgdon, 207 P 675, 120 Wash 426.

Wis—State v Barto, 232 N W. 553, 202 Wis 329

6 C J p 688 note 29

Transactions between attorney and client as creating express trust see Trusts § 58 [65 C J p 304 note 11 [a]].

5. Cal—Zeller v. Knapp, 1 P.(2d) 1071, 115 Cal App 486

Fla.—Halstead v. Florence Citrus Growers' Ass'n, 139 So 132, 104 Fla 21.

Ind.—City of Rochester v Campbell, 111 N.E. 420, 184 Ind 421.

Iowa—Reeder v. Lund, 236 N W. 40, 213 Iowa 300.

Ky—Pilant v Davis, 2 Ky Op 40

Miss—Gwin v Fountain, 126 So 18, 159 Miss 619, suggestion of error sustained 132 So 559, 159 Miss. 619

Mo—Bybee v S'Renco, 291 S W. 459, 316 Mo. 517.

Nev—Moore v Rochester Weaver Mining Co, 174 P 1017, 42 Nev 164, 19 A L R 830

N J—Brotherhood of Railroad Trainmen v Van Etten, 110 A. 121, 90 N J Eq 612

Okl—Haunstein v McCalister, 46 P (2d) 552—Hunter v. Battiest, 192 P 575, 79 Okl 248

Pa—Maguire v Wheeler, 150 A 882, 300 Pa 513

Tenn—Hutchinson v. Crowder, 8 Tenn Civ App 114

Tex—Bell v Ramirez, (Civ App) 299 S W 655

Utah—Omega Inv Co v Woolley, 271 P 797, 72 Utah 474.

6 C J p 686 note 22

Statute as to trustees applicable

A statute providing that transactions between a trustee and his beneficiary by which the trustee obtains any advantage from his beneficiary are presumed to be without consideration, and the result of undue influence, applies to the relation between an attorney and client—Magee v Brenneman, 206 P 37, 188 Cal 562

6. U S—Graeber v McMullin, (C C. A Colo) 56 F (2d) 497, certiorari denied McMullin v Graeber, 53 S Ct 9, 287 U S 602, 77 L Ed 525.

Ala—Verner v Mosely, 127 So 527, 221 Ala 36

Ariz—Holdridge v Southwest Cotton Co, 281 P 202, 35 Ariz. 496.

Ark—Norfleet v Stewart, 20 S.W. (2d) 868, 180 Ark 161.

Cal—In re Witt's Estate, 245 P 197, 198 Cal 407—Clark v Millsap, 242 P 918, 197 Cal 765—Stieglitz v Settle, 195 P. 705, 50 Cal App 581

D C—Hammer v. Gordon, 50 App D C 34, 267 F. 236.

Fla—Halstead v. Florence Citrus Growers' Ass'n, 139 So 132, 104 Fla 21.

Ill—Ankrom v. Doss, 270 Ill.App 464

Iowa—Reeder v. Lund, 236 N.W. 40, 213 Iowa 300

Me—Mayo v. Purinton, 94 A. 935, 113 Me 452

Md—McLean v. Maloy, 111 A. 91, 136 Md 467

Mass—Israel v. Sommer, 197 N E. 442.

Mo—Bybee v S'Renco, 291 S W 459, 316 Mo 517.

Nev—Moore v. Rochester Weaver Mining Co, 174 P. 1017, 42 Nev. 164, 19 A L R 830

N J—In re Romaine's Will, 170 A. 16, 115 N J Eq 172 (first case) affirming 167 A. 633, 113 N.J Eq. 477—In re Romaine's Will, 170 A 16, 115 N J Eq 173 (second case) affirming 167 A. 633, 113 N.J Eq 477—Rhodes v. Rhes, 133 A 712, 99 N. J Eq 633

N M—In re Barth, 189 P. 499, 26 N. M 93

N Y—In re Howell, 109 N E 572, 215 N Y 466, Ann Cas 1917A 527, reversing 150 N.Y S 1090, 166 App. Div 894—Feiber v Copeland, 250 N Y S 429, 232 App Div 504—In re Woolfson's Will, 287 N.Y S. 12, 158 Misc 928

Okl—Haunstein v McCalister, 46 P. (2d) 552—Roseboom v Baughman, 37 P (2d) 616, 169 Okl. 442—Harrison v Reed, 6 P (2d) 700, 154 Okl. 39—Korte v Brown, 255 P 1103, 124 Okl. 282—Board of Com'rs of Okfuskee County v. Haslewood, 192 P 217, 79 Okl. 185, 11 A L R 709.

Or—Kirchoff v. Bernstein, 181 P. 746, 92 Or. 378.

S C—Hydrick v. Hydrick, 141 S E. 156, 142 S.C. 531.

S D—Kickland v. Egan, 155 N W. 192, 36 S D 428

Tenn—Harris v Marshall, 8 Tenn. App 509—Hutchinson v Crowder, 8 Tenn Civ App. 114.

Utah—Omega Inv Co v. Woolley, 271 P 797, 72 Utah 474

Va—Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va 45.

6 C J. p 687 note 23.

Reason for rule

"The rule of equity which casts upon the attorney the burden of showing perfect fairness on his part in all his dealings with his client is based upon the consideration that the

the attorney fail to make this showing the transaction may be avoided or set aside as for constructive fraud irrespective of the intention of the attorney or whether fraud or undue influence was actually exercised,[7] and this is so although the client has not sought to rest his case solely on the presumption existing against the attorney.[8] If the attorney discharges this burden, however, the transaction will be sustained,[9] as the presumption mentioned is a rebuttable one.[10]

b. Matters or Circumstances Affecting Validity of Dealing or Burden of Attorney

(1) In general
(2) Existence and nature of relationship
(3) Nature of transaction or dealing
(4) Independent advice to client

(1) In General

The general rule that transactions between attorney and client are presumptively fraudulent or invalid so that the attorney has the burden of proving the fairness and honesty thereof, is one of equity and public policy based on the theory that a confidence reposed in the attorney was abused to the disadvantage of the client, and hence, its application may be varied according to the equities of the particular case and whether the circumstances permit or preclude the deductions or assumptions on which it is based.

Notwithstanding the absolute manner in which the general rule that all transactions or dealings between attorney and client are presumptively fraudulent and invalid is often stated, it is mainly a rule of equity or public policy which is not inflexible, but may be relaxed or varied in its application according to the circumstances.[11] Moreover, it is founded on the theory that confidence or influence was reposed in the attorney, and abused to the injury of the client or the advantage of the attorney, so that the mere relationship of attorney and client is not sufficient to invalidate a transaction without the appearance of these facts,[12] or such circumstances as will permit a deduction or assumption that they existed;[13] and if the circumstances are such as to preclude an assumption or presumption that confidence was reposed and that undue influence was exercised with respect to the matter involved the general rule does not apply.[14]

In light of the foregoing, it may be said that the validity of a dealing between an attorney and client in a particular case is dependent to a certain extent on its own circumstances, the equities of the parties, and the possibilities that the attorney had to exercise influence or fraud.[15] If the client is aged, ignorant, mentally weak, uneducated, or under similar disability, and largely dependent upon the attorney, the burden which the attorney must discharge in order to sustain a transaction by which he has profited is extremely stringent.[16] On the other

confidential relations existing between the parties is such that the attorney has it in his power to avail himself of his influence over his client and of the sense of dependence which the latter has in him and of the confidence which the relation always imposes to a greater or less extent."—Swain v. Martin, 251 S.W. 26, 27, 158 Ark. 469.

Advice to client

"Defendant before accepting the deed should have used active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject matter involved, and should have seen to it that his client had independent advice in the matter or else should have received from him such advice as he would have been expected to give had the transaction been one between his client and a stranger, and should have seen that his client was so placed as to be enabled to deal with him at arm's length without being swayed by the relation of trust and confidence which existed between them."—Webster v. Kelly, 175 N.E. 69, 71, 274 Mass. 564.

7. Ark.—Norfleet v. Stewart, 30 S.W.(2d) 868, 180 Ark. 161.
N.J.—Proff v. Shirvanian, 160 A. 844, 110 N.J.Eq. 639.
Breach of duty as constructive fraud generally see infra § 138

8. Bouton v. Stuart, 199 P. 71, 52 Cal.App. 484.

9. Ind.—City of Rochester v. Campbell, 111 N.E. 420, 184 Ind. 421.
Ky.—Williams v. Reese, 198 S.W. 27, 177 Ky. 679.
Minn.—Mercer v. McHie, 169 N.W. 531, 141 Minn. 144

10. City of Rochester v. Campbell, 111 N.E. 420, 184 Ind. 421.

11. Ariz.—Townsend v. Shipley, 239 P. 787, 29 Ariz. 96
Okl.—Bilby v. Stevenson, 13 P.(2d) 112, 158 Okl. 193
Va.—Bruce v. Bibb, 105 S.E. 570, 129 Va. 45.
6 C.J. p. 687 note 24.

Death of attorney

The rule should not be rigorously applied where, owing to the death of the attorney, it is impossible for his representatives to make full or plenary proof.—Whiting v. Davidge, 23 App.D.C. 156.—Boyd v. Daly, 83 N.Y.S. 539, 85 App.Div. 581, affirmed 68 N.E. 1114, 176 N.Y. 613.

12. Ark.—Goode v. King, 76 S.W.(2d) 300, 189 Ark. 1093
Cal.—Boardman v. Crittenden, 198 P. 1020, 52 Cal.App. 438.
Mass.—Mitchell v. Wright, 125 N.E. 638, 234 Mass. 458.
Va.—Bruce v. Bibb, 105 S.E. 570, 129 Va. 45
6 C.J. p. 688 note 27.

13. Haman v. Preston, 173 N.W. 894, 186 Iowa 1292

14. Boardman v. Crittenden, 198 P. 1020, 52 Cal.App. 438.—6 C.J. p. 688 note 33, p. 690 note 56 [a].

15. Cal.—Boardman v. Crittenden, 198 P. 1020, 52 Cal.App. 438
Okl.—Bilby v. Stevenson, 13 P.(2d) 112, 158 Okl. 193
"Each case, of course, must depend upon its particular facts. What might be sufficient evidence to turn the scale in one case might not be in another. The dominating influence of the attorney, and the weak, confiding, and submissive character of the client in one case might require far less proof than in another case, where the client was of a strong and aggressive personality, and not easily influenced by the attorney."—Armstrong v. Morrow, 163 N.W. 179, 181, 166 Wis. 1.

16. U.S.—Neuhart v. Buck, (C.C.A. Kan.) 50 F.(2d) 367.
Conn.—McKnight v. Gizzie, 140 A. 116, 107 Conn. 229
Mo.—Bybee v. S'Renco, 291 S.W. 459, 316 Mo. 517.

hand, it is frequently recognized that the beneficent protection of the general rule is not always needed as some clients may be shrewder or better positioned than some attorneys in business deals,[17] and if the case is one in which the attorney possesses no particular knowledge or influence by reason of his position or training, and the client is an intelligent and experienced businessman who is as well or better informed than the attorney with reference to the material facts and likely to exercise his own independent judgment, the transaction will often be sustained unless a breach of faith or unfair dealing on the part of the attorney is clearly shown.[18] In other words, if the parties are sui juris and deal with each other on terms of equality as between men competent to make their own contracts, the law does not deny to the attorney a right to the fruits of open dealings with his client in business matters in which the client is amply able to protect himself, at least where a breach of faith or unfair dealing on the part of the attorney is not clearly shown.[19]

Open hostility of attorney. The rule requiring the attorney to establish the fairness and honesty of the transaction does not apply where the attorney has openly assumed an attitude hostile to the client, before the transaction was entered into, so that thereafter the parties are put at arm's length and the client could not possibly have been acting under the influence of the confidence which he had reposed in the attorney.[20]

(2) Existence and Nature of Relationship

The rule that dealings between attorney and client are presumptively fraudulent does not apply to dealings entered into before the relationship of attorney and client has been created.

The rule that transactions and dealings between attorney and client are presumptively fraudulent and invalid ordinarily applies to every one who acts in the capacity of an attorney for another irrespective of how the relation was created,[21] and irrespective of whether the person so acting is actually a licensed attorney.[22] The rule has no application, however, where the relationship of attorney and client does not exist between the parties at the time of the transaction,[23] although the relation may have subsequently been established between them;[24] and hence, counsel and client may contract subject to the same rules governing other men before the relation of attorney and client begins.[25]

Although the client has acted in a representative capacity when retaining or employing the attorney, the client as an individual is entitled to the protection of the rules relative to dealings between attorney and client.[26]

(3) Nature of Transaction or Dealing

The rule that transactions and dealings between attorney and client are presumptively fraudulent may extend to transactions or contracts with reference to property or rights not directly involved in the particular transaction or proceeding with reference to which the attorney is employed, if the relationship may be pre-

N.J.—Rhodes v. Ries, 133 A. 713, 99 N.J.Eq. 638
Okl.—Barker v. Wiseman, 151 P. 1047, 51 Okl. 645

17. Bilby v. Stevenson, 13 P.(2d) 113, 158 Okl. 193

18. Cal.—Boardman v. Crittenden, 198 P. 1020, 52 Cal.App. 438.
N.J.—Koller-Vesper v. Wilderotter, (Ch.) 119 A. 375.
Okl.—Bilby v. Stevenson, 13 P.(2d) 113, 158 Okl. 193
See Ryan v. Hayes, 190 Ill.App. 208
"In this inquiry, the jealousy with which the law views such a contract is ready to lend its aid in support of perhaps trivial circumstances tending to bring the case within the rule. But the danger to which the client is exposed, from the supposed influence which his attorney has over him, is the reason on which it proceeds, and the inquiry, is whether he has or has not used it to his prejudice; and if it should appear that the client was as well, or better, advised than his attorney on all matters connected with the contract—which without disparagement to the profession, does frequently happen—and has received a full and adequate price, where, I would ask, is the hardship or injustice of sustaining such a contract, although one of the parties should capriciously ask to be absolved from it? Surely there is none, and the rule never could have been intended to operate on such a case."—Miles v. Ervin, 6 S.C.Eq. 524, 548, 16 Am.D. 623.

19. Pilkington v. Rose, 102 So. 751, 88 Fla. 547.

20. Cal.—Boardman v. Crittenden, 198 P. 1020, 52 Cal.App. 438.
N.J.—Koller-Vesper v. Wilderotter, (Ch.) 119 A. 375
Tex.—McGary v. Campbell, (Civ.App.) 245 S.W. 106.
6 C.J. p. 688 note 34

21. Ala.—Scott v. Hardyman, 119 So. 224, 218 Ala. 515
D.C.—Hammer v. Gordon, 50 App.D.C. 34, 267 F. 336
Mass.—Israel v. Sommer, 197 N.E. 442
Mo.—Bybee v. S'Ronco, 291 S.W. 459, 316 Mo. 517.
Utah.—Omega Inv. Co. v. Woolley, 271 P. 797, 72 Utah 474.
6 C.J. p. 688 note 31

22. Pomeroy v. Collins, 243 P. 657, 198 Cal. 46

23. Ky.—Williams v. Reese, 198 S.W. 27, 177 Ky. 679.
Md.—Smith v. Martin, 140 A. 593, 154 Md. 462
N.J.—Losee v. Cale, 145 A. 468, 7 N.J.Misc. 321.
N.Y.—Colton v. Oshrin, 285 N.Y.S. 433, 246 App.Div. 237
Pa.—Goodbread's Est., 24 Pa.Co. 427.
Va.—Bruce v. Bibb, 105 S.E. 570, 129 Va. 45
6 C.J. p. 688 notes 32, 33
Effect of termination of relation see infra § 132.

24. Bonelli v. Conrad, 37 P.(2d) 137, 1 Cal.App.(2d) 660—6 C.J. p. 688 note 32

25. Ky.—Williams v. Reese, 198 S.W. 27, 177 Ky. 679
Va.—Bruce v. Bibb, 105 S.E. 570, 129 Va. 45.
Contracts creating relationship see infra subdivision (3)

26. Magee v. Bronneman, 206 P. 37, 188 Cal. 562.

sumed to give the attorney some advantage over the client; but the rule does not apply to those transactions which are so totally unrelated to the relationship that it cannot be presumed to have any influence therein, nor to the contract in which the relation has its inception.

The rule that dealings between attorney and client are presumptively fraudulent is not restricted to contracts or dealings with respect to the rights or property involved in the particular transaction or proceeding in which the attorney is acting for the client, but it may extend to other transactions and contracts, where the relationship may be presumed to give the attorney some advantage over the client.[27] The rule does not apply, however, if the transaction is so totally unrelated to the attorney and client relationship that it cannot be presumed to have given the attorney any influence or advantage with reference to the deal.[28] Moreover, as stated in the preceding section, the relationship of attorney and client must ordinarily exist at the time of the transaction, and hence it is usually held that the rule does not apply to contracts by which the relationship is established, but with respect to these the parties will be regarded as dealing at arms' length.[29]

(4) Independent Advice to Client

A showing that the client had adequate independent legal advice with respect to the transaction may discharge the attorney's burden and cause the transaction to be sustained as fair and just; but it is not absolutely essential to the validity of the transaction that it be shown that the client had the benefit of such advice where it can otherwise be established that the transaction was fair and just.

Unless the advice is biased or insufficient,[30] an attorney may often discharge his burden, and cause a transaction with his client to be sustained as fair and honest, by showing that the client had independent legal advice with respect thereto.[31] Independent legal advice for the client is not, however, absolutely essential to the validity of the transaction where the client is fully informed and competent to act without such advice,[32] or it can be otherwise shown that the transaction was fair and that the client acted voluntarily and with full knowledge and understanding.[33]

c. Construction and Operation of Contracts between Attorney and Client

A contract which an attorney has made with his client will be construed most strongly against the attorney, and he is estopped from asserting that a part or provision of the contract is legally insufficient or invalid.

Where there is any doubt or question as to the interpretation to be given to a contract that has been made by a lawyer with his client, that construction which tends most strongly against the lawyer in the deal should be given;[34] but where it is admitted that the contract is fair and just it has been held that the construction of the contract is not to be strained in the interests of the client.[35]

An attorney who has drawn a contract between himself and his client is equitably estopped from asserting that a part or provision thereof is invalid or insufficient.[36]

d. Avoidance by Client and Ratification

A client's right to avoid or set aside a transaction with, or transfer to, his attorney may be conditioned upon the client's restoration of the status quo or payment of the attorney's fees and expenses, and may be lost by reason of laches or ratification or a transfer to a bona fide purchaser for value and without notice.

As noted in §§ 127 a and 128 a, when a transaction with, or transfer to, an attorney is regarded as unfair or constructively fraudulent the client has the right to avoid the same either by an affirmative suit in equity to set the same aside, or by

27. Swaim v Martin, 251 S W. 26, 158 Ark. 469.

28. Cal—Stieglitz v. Settle, 165 P. 436, 175 Cal 131.
Mich—Wilson v White, 194 N.W. 593, 223 Mich 497.
N J—Losee v. Cale, 145 A. 468, 7 N J Misc 321.

29. Cal—Bonelli v. Conrad, 37 P (2d) 137, 1 Cal.App (2d) 660
Okl—Tillman v. Gazaway, 261 P 935, 128 Okl. 182.
Tex—White v. Burch, (Civ App.) 19 S W (2d) 404.
6 C J p 688 notes 35, 36.
Contracts for compensation see infra §§ 181–189.

30. Ala—Verner v. Mosely, 127 So. 527, 221 Ala 36.
Mass—Israel v. Sommer, 197 N E 442, 447—Webster v. Kelly, 175 N. E 69, 274 Mass 564.
Utah—Omega Inv Co v. Woolley, 271 P 797, 72 Utah 474.
"Independent legal advice which is incompetent, or perfunctory, or given without adequate knowledge of the situation will not suffice."—Israel v. Sommer, supra.

31. U S—In re Duntley, (Ill) 227 F 331, 142 C C A. 77
Okl—Bilby v. Stevenson, 13 P (2d) 112, 158 Okl 192.

32. Boardman v. Crittenden, 198 P. 1030, 52 Cal App. 438.

33. Scott v. Hardyman, 119 So. 224, 226, 218 Ala 515.
"The presumption of undue influence, resulting from a transaction inter vivos, between persons occupying confidential relations, whereby the dominant party gets an advantage, may be overcome by evidence of other facts than independent advice, if sufficient to show that the act was voluntary, fair, and well understood It is not necessary to prove this one fact in order to overturn the presumption, although it is usually done in this manner."—Scott v Hardyman, supra.

34. U S—In re Boone, (C.C.Cal.) 33 F. 944
Okl—Barker v. Wiseman, 151 P. 1047, 51 Okl. 645
Or.—Security Savings & Trust Co. v. Gilbert, 250 P. 749, 120 Or. 327.

35. Willoughby v. Mackall, 1 App. D C. 411.

36. Holdridge v. Southwest Cotton Co., 281 P. 202, 35 Ariz. 496.

asserting the fraud or confidential relationship in defense to any attempt by the attorney to enforce his rights under the transaction If the client does not make timely application, however, he may be barred from obtaining relief by the equitable doctrine of laches[37] or by the statute of limitations,[38] and a client who, with full information, has acquiesced in or ratified a transaction with, or transfer to, his attorney cannot thereafter avoid the same.[39] Delay or laches will not, however, preclude the client from defending on the ground of confidential relationship at any time during the period the attorney can enforce his rights under the transfer or transaction.[40] Moreover, it has been said that the defense of laches based on mere delay is not favored in suits to set aside such transactions;[41] and mere delay does not amount to laches which will preclude the client from setting the transaction aside where there was nothing to arouse the suspicions of the client or move him to action.[42]

The client's right to avoid the transaction may often be conditioned upon the client's restoration of the status quo,[43] or payment of the fees and disbursements of the attorney.[44]

Against purchasers or assigns of attorney If he has not acquired the same in good faith and for value, a purchaser or assignee of property or a right, which an attorney has acquired by reason of a transaction with his client, takes subject to the same burden and right of avoidance as the attorney;[45] but a client cannot set aside a transfer to his attorney as against subsequent purchasers for value and without notice.[46]

§ 128. —— Conveyances, Mortgages, and Assignments

a. In general
b. Transfer of subject matter of suit
c. Fraudulent transfers

a. In General

Although a conveyance, mortgage, or assignment by a client to his attorney, or vice versa, may be sustained if it appears that the transfer is fair and honest or that no improper influence has been exercised, such a transaction is ordinarily regarded as presumptively fraudulent or the result of undue influence, and subject to avoidance on that ground, unless the attorney clearly proves that the transfer was fair, honest, and equitable, for an adequate consideration, and that the client fully understood the nature and effect of the transaction.

In accordance with the rules stated in § 127, a conveyance, mortgage or assignment by a client to his attorney is not necessarily invalid if it clearly appears to be fair and equitable or in no way improperly influenced by the superior position of the attorney or the confidence reposed in him,[47] as where the transfer or assignment constitutes but a fair payment or satisfaction of the reasonable costs or fees of the attorney.[48] The general rule that all transactions and dealings between attorney and client are subject to close scrutiny and pre-

37. Johnson v Johnson, 206 P 205, 85 Okl 274—6 C J p 688 note 28, p 691 note 59.

38. Friend v McComb, (Tex Civ. App) 87 S W.(2d) 767.

39. McLean v Maloy, 111 A 91, 136 Md 467—6 C J p 691 note 60.

Lack of full knowledge or advice and continuance of attorney's influence may preclude the client's conduct from being held a ratification — Verner v. Mosely, 127 So 527, 221 Ala 36—Turnley v Nixon, 163 A. 800, 112 N J Eq. 116.

40. Magee v. Brenneman, 206 P. 37, 188 Cal 562

41. Turnley v. Nixon, 163 A. 800, 804, 112 N J.Eq 116.
"Where bills are filed to set aside contracts or deeds between parties standing in a confidential relation to each other, the defense of laches is not usually regarded with favor. It has been said that 'length of time weighs less in such a case than in any other,' and that it is 'extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer' Elmore v. Johnson, 32 N.H. 413, 419, 143 Ill 513, 21 L R A. 366, 36 Am S R 401: citing and quoting Wood v Downes, 18 Ves Jr 120"—Turnley v. Nixon, supra

42. Ala —Verner v. Mosely, 127 So 527, 221 Ala 36.
Wis —Armstrong v. Morrow, 163 N W 179, 166 Wis 1.
Continuance of confidential relationship and position of undue influence until a short time before the bringing of the action may preclude the client from being charged with laches —Verner v Mosely, 127 So 527, 221 Ala. 36—Armstrong v Morrow, 163 N W. 179, 166 Wis 1

43. Head v. Moore, (Tex Civ App) 232 S W 362, dismissed for want of jurisdiction

44. Mass —Webster v. Kelly, 175 N. E 69, 274 Mass 564.
Minn —Delasca v Grimes, 174 N.W 523, 144 Minn 67.

45. Ark —Powell v. Griffin, 13 S W. (2d) 18, 178 Ark 788
Cal —Magee v Brenneman, 206 P. 37, 188 Cal 562.

46. Bucher v Hohl, 97 S.W. 922, 199 Mo 320, 116 Am S R. 492—6 C J p 691 notes 61, 65

47. Cal.—Bailey v. Security Trust Co, 177 P 444, 179 Cal 540, 177 P 449, 179 Cal 815
Ill —Morrison v Smith, 28 N E 241, 130 Ill 304
Mo —Lanneman v. Henry, 291 S W. 109, 316 Mo 674
S D —Howard v. Potts, 233 N.W. 909, 57 S D 469
6 C J p 690 note 56 [a].

Trust deed for benefit of client's creditors
A trust deed to the attorney for the debtor cannot be avoided as fraudulent because the attorney is to receive a fair compensation for his services as trustee or on the ground that because of his dealings as trustee with the creditors or his enforcement of the provisions of the trust deed against the debtor he thereby represents adverse interests, where the debtor made the deed with full comprehension of the nature and effect of his acts.—Busey v. Perkins, 176 A 474, 168 Md. 19.

48 Cal —McGown v Dalsell, 236 P 941, 72 Cal App. 197.
La.—Beattie v Dimitry, 121 So 581, 168 La 81
Wash —Wallace v. Town, 35 P. 1080, 8 Wash 244
6 C J p 690 note 57.

sumptively fraudulent or the result of undue influence applies with full force, however, to any purchase or acquisition by an attorney of his client's property.[49] Hence, a transfer, conveyance, or assignment of property by a client to an attorney is subject to avoidance and being set aside as constructively fraudulent or the result of undue influence, except to the extent that it operates as a payment of reasonable and proper fees,[50] if the attorney fails to discharge his burden by showing that the transaction was fair, equitable, and honest, for an adequate consideration, and that the client had the benefit of impartial advice or was fully informed of the nature and effect of his act so that he was in the same position as if he had dealt with a stranger,[51] provided the client acts promptly and does not ratify the transaction or wait until the property has been retransferred to a bona fide purchaser (see supra § 127 d). These rules apply to transfers to third persons for the attorney's benefit[52] or to a corporation of which he is the principal stockholder,[53] and to conveyances or transfers of all kinds of property, whether real or personal,[54] even though not involved in the litigation or transaction in which the attorney is acting for the client,[55] to mortgages[56] and deeds of trust,[57] and to assignments of rights and claims,[58] such as mortgages,[59] judgments,[60] or causes of action.[61]

Transfers from attorney to client. In case of an assignment by an attorney to his client, the client is likewise presumed to have acted under the influence of the attorney,[62] and is entitled to have the transaction annulled unless the attorney can show that he has observed the utmost good faith.[63]

b. Transfer of Subject Matter of Suit

Although some cases hold that an attorney's purchase of an interest in the subject matter of the litigation in which he is employed is absolutely void or voidable, it is generally held that such a transfer will be sustained where, and only where, it is clearly shown that the transaction was fair and honest and the client acted knowingly with full information and advice as to his rights.

A few cases have regarded the purchase by an attorney from his client of the subject matter of a suit, pendente lite, absolutely void, both on general principles and because it is champerty,[64] and other authorities have taken the view that such a purchase, although made without fraud or undue advantage and upon the payment of an adequate price, is nevertheless voidable at the option of the client;[65] but it is generally held that an assign-

49. Ala.—Verner v. Mosely, 127 So. 527, 221 Ala. 36—Scott v. Hardyman, 119 So. 224, 218 Ala. 515
Mo.—Bybee v. S'Renco, 291 S.W. 459, 316 Mo. 517
Utah—Omega Inv. Co. v. Woolley, 271 P. 797, 72 Utah 474.
6 C.J. p. 689 note 44.

50. Mass.—Webster v. Kelly, 175 N.E. 69, 274 Mass. 564
Mo.—Linneman v. Henry, 291 S.W. 109, 316 Mo. 674.
6 C.J. p. 689 note 45.

Value of services must be shown by the attorney.—Bonifacio v. Stuart, 199 P. 69, 52 Cal.App. 487.

51. Ala.—Verner v. Mosely, 127 So. 527, 221 Ala. 36—Scott v. Hardyman, 119 So. 224, 218 Ala. 515.
Ark.—Swaim v. Martin, 251 S.W. 26, 158 Ark. 469.
Cal.—Bouton v. Stuart, 199 P. 71, 52 Cal.App. 484—Bonifacio v. Stuart, 199 P. 69, 52 Cal.App. 487
D.C.—Hammer v. Gordon, 50 App.D.C. 34, 267 F. 336.
Ill.—Warner v. Flack, 116 N.E. 197, 278 Ill. 303, 2 A.L.R. 423—Morrow v. Compton, 215 Ill.App. 524.
Iowa.—Reeder v. Lund, 236 N.W. 40, 213 Iowa 300
Mass.—Webster v. Kelly, 175 N.E. 69, 274 Mass. 564.
Minn.—Delasca v. Grimes, 174 N.W. 523, 144 Minn. 67—Mercer v. McHie, 169 N.W. 531, 141 Minn. 144.
Mo.—Bybee v. S'Renco, 291 S.W. 459, 316 Mo. 517—Crooks v. Looney, 197 S.W. 125
N.J.—Povey v. Ready, 100 A. 556, 87 N.J.Eq. 199, modified on other grounds 102 A. 443, 88 N.J.Eq. 342
N.D.—Moran v. Simpson, 173 N.W. 769, 42 N.D. 575
Okl.—Hagler v. Bishop, 9 P.(2d) 766, 156 Okl. 110
Tex.—Bell v. Ramirez, (Civ.App.) 299 S.W. 655
Utah—Omega Inv. Co. v. Woolley, 271 P. 797, 72 Utah 474.
6 C.J. p. 689 notes 45, 46.

52. Delasca v. Grimes, 174 N.W. 523, 144 Minn. 67.

53. Maguire v. Wheeler, 150 A. 882, 300 Pa. 513.

54. Ala.—Verner v. Mosely, 127 So. 527, 221 Ala. 36
Ark.—Swaim v. Martin, 251 S.W. 26, 158 Ark. 469
D.C.—Hammer v. Gordon, 50 App.D.C. 34, 267 F. 336
N.J.—Povey v. Ready, 100 A. 556, 87 N.J.Eq. 199, modified on other grounds 102 A. 443, 88 N.J.Eq. 342.
N.D.—Moran v. Simpson, 173 N.W. 769, 42 N.D. 575
6 C.J. p. 689 note 47.

55. Swaim v. Martin, 251 S.W. 26, 158 Ark. 469—6 C.J. p. 689 note 48

56. Long v. Powell, 69 So. 585, 194 Ala. 438—6 C.J. p. 689 note 49.

57. Linneman v. Henry, 291 S.W. 109, 316 Mo. 674

58. Jones v. Brown, 282 P. 313, 140 Okl. 155—6 C.J. p. 690 note 52
Statutory prohibition of assignment of claim against United States to attorney for his services in prosecuting claim see United States § 158 [65 C.J. p. 1390 note 37].

59. N.Y.—Pitcher v. Sutton, 264 N.Y.S. 438, 238 App.Div. 291, amended 265 N.Y.S. 929, 240 App.Div. 754, and 265 N.Y.S. 991, 240 App.Div. 759
Wis.—Armstrong v. Morrow, 163 N.W. 179, 166 Wis. 1, Ann.Cas.1918E 1156

60. Jones v. Brown, 282 P. 313, 140 Okl. 155—6 C.J. p. 689 note 50.
Purchase of judgment by attorney as not champertous see Judgments § 514 [34 C.J. p. 638 note 2].

61. Coffey v. Quint, 28 P. 494, 799, 92 Cal. 475—6 C.J. p. 690 note 51.

62. Townsend v. Shipley, 239 P. 787, 29 Ariz. 96—6 C.J. p. 691 note 62

63. Townsend v. Shipley, supra—6 C.J. p. 691 note 63.

64. U.S.—Neihart v. Buek, (C.C.A. Kan.) 50 F.(2d) 367
N.D.—Moran v. Simpson, 173 N.W. 769, 42 N.D. 575
6 C.J. p. 690 note 53.

65. Ill.—Morrow v. Compton, 215 Ill. App. 524
W.Va.—Woodcock v. Barrick, 91 S.E. 396, 79 W.Va. 449
6 C.J. p. 690 note 54.

ment or transfer of the subject matter of litigation in which the attorney was employed may be sustained by a clear showing that it was fair and equitable and made with full understanding on the part of the client.[66] Even where this latter view is entertained, however, the transaction is always viewed with suspicion and may be avoided unless the attorney discharges the heavy burden of proving not only that there was no overreaching of the client, but that the client acted upon the fullest information and advice as to his rights.[67]

c. Fraudulent Transfers

A client may avoid or set aside a transfer to his attorney, even where it is for the declared purpose of hindering or defrauding creditors, as the client is not regarded as being in pari delicto.

A client may, under the rules stated in the preceding sections, avoid or set aside a transfer to his attorney, even where the transfer is for the declared purpose of hindering and delaying the creditors of the client, as the law does not in such a case regard the client as being in pari delicto.[68] Similarly, where the transaction is an exchange of property, the fact that the transfer from the attorney was to a third person, in secret trust for the client, in fraud of the latter's creditors, does not preclude the client from holding the attorney to account for the profit on the transaction.[69]

§ 129. —— Gifts

Although there is some authority for the view that such a transaction is absolutely void, it is generally held that a gift from a client to his attorney will be sustained if the attorney overcomes the suspicion or presumption raised against him and shows that the gift was voluntarily made with full knowledge of all the circumstances and without undue influence on the part of the attorney.

While some of the early authorities appear to hold that an attorney is absolutely precluded from accepting a gift from his client during the continuance of the relationship and that such a transaction is void and subject to be set aside although good faith is proved,[70] most of the modern cases appear to take the view that the gift is not void ipso facto but may be sustained if equitable and it is clearly proved that the client acted voluntarily with full knowledge of all the material facts and that no undue influence was exercised by the attorney.[71] As in other transactions between them, the attorney, of course, has the burden of proving these facts which are essential to sustain the validity of the gift.[72] Indeed, some of the cases take the view that gifts are to be regarded with much greater strictness or suspicion than other dealings between attorney and client, so that the presumption against the validity of the same is much stronger and the attorney's burden correspondingly heavier,[73] but other authority has pointed out that the degree of suspicion is dependent upon other circumstances than the mere fact that a gift was made from a client to an attorney.[74]

Stranger cannot exercise option of the client to avoid the transaction — Wolfson v. Estate of Martinez, 20 Philippine 340.

66. Ark —Goode v. King, 76 S W (2d) 300, 189 Ark 1093
Cal —Bailey v. Security Trust Co, 177 P 449, 179 Cal 815—Bailey v. Security Trust Co, 177 P. 444, 179 Cal 540
D C —Hammer v. Gordon, 50 App.D C 34, 267 F. 336.
La —Beattie v. Dimitry, 121 So. 581, 168 La. 81.
Md —Russum v Wanser, 53 Md 92.
Pa —Bersch v. Rust, 95 A 108, 249 Pa 512
S D —Howard v. Potts, 233 N W 909, 57 S D 469
Tex —Friend v. McComb, (Civ.App.) 87 S W.(2d) 767.
6 C J. p 690 notes 55, 56 [a], 57.

On notice to the debtor of assignment to attorney of part of the claim, the title vests absolutely in the attorney, as against collusive agreements of the assignors and the debtor —Northern Texas Traction Co. v Clark & Sweeton, (Tex Civ App) 272 S W. 564.

67. Ark —McMillan v. Brookfield, 234 S.W. 621, 150 Ark. 518.
Ill —Morrow v. Compton, 215 Ill App. 524
Tex —Baird v. Laycock, (Civ App) 94 S W.(2d) 1135, error dismissed 6 C J p 691 note 58.

Fraud question for jury

Whether a deed sought to be canceled executed by an administrator to his attorney covering the land being administered was procured by the attorney's fraud was for the jury —Baird v. Laycock, (Tex.Civ. App) 94 S.W (2d) 1135, error dismissed.

68. Clark v Millsap, 242 P. 918, 925, 197 Cal 765—6 C.J p 691 note 64
"Certainly the law will not hold a client in pari delicto with her attorney, who, acting under his influence and advice, places her property in his name and possession for purposes of concealment As between the two, the client is not, in the eyes of the law, as culpable as the legal adviser." —Clark v Millsap, supra
Conveyance between attorney and client as not fraudulent by reason of the confidential relationship see Fraudulent Conveyances § 250 [27 C J p 641 note 41].
Future legal services as sufficient consideration for transfer by debtor to his attorney see Fraudulent Conveyances § 148 [27 C J p 529 notes 69, 70]
Persons in confidential relations not in pari delicto with regard to fraudulent conveyances see Fraudulent Convoyances § 262 [27 C.J. p 652 note 66 et seq].
Transfer of property to attorney under agreement to render future services as fraudulent and void against creditors see Fraudulent Conveyances § 148 [27 C J p 530 note 76].

69. Morrow v. Compton, 215 Ill App. 524

70. Berrien v. McLane, Hoffm (N Y) 421—6 C J. p 691 note 67.

71. Rice v. Bennington County Sav. Bank, 108 A. 708, 93 Vt. 493—6 C. J. p 692 notes 68, 69

72. Mass —Israel v. Sommer, 197 N. E 442
Wis —Armstrong v. Morrow, 163 N. W. 179, 166 Wis. 1.
6 C J. p 692 note 69.

73. Shacklette v. Goodall, 151 S.W. 23, 151 Ky 20—6 C.J. p 691 note 66, p 692 note 68.

74. Rice v. Bennington County Sav. Bank, 108 A. 708, 713, 93 Vt. 493.

§ 130. —— Security for Fees and Costs

A transaction whereby the client gives the attorney security for his fees, costs, and expenses is ordinarily valid only where the transaction is fair, just, and equitable and free from the exercise of undue influence on the part of the attorney.

Although a transaction whereby the client gives collateral security for an attorney's fees and disbursements may be valid where no confidence is abused or no unfairness or undue influence is exercised,[75] security taken for the attorney's fees during the existence of the relation will not be sustained unless the attorney shows that the transaction was fair and regular and entered into by the client voluntarily with a full knowledge of the facts,[76] and security given at the beginning of the relationship to secure future fees and disbursements will be invalid if obtained by any undue influence or persuasion on the part of the attorney.[77]

In several cases a conveyance to an attorney has been sustained as an absolute one in payment of the attorney's fees and disbursements, as against the client's charges that the conveyance was intended merely as a mortgage to secure the attorney, where the transaction appeared to be fair and there was no showing of a great discrepancy between the amount of the attorney's fees and disbursements and the value of the property;[78] but it has also been held that a client claiming that an absolute conveyance to an attorney was intended as a mortgage to secure his fees and disbursements need not show by clear, unequivocal, and convincing evidence that a mortgage was intended as in ordinary cases, and that if the attorney fails to show the fairness and justness of the transaction it will be treated as a mortgage where the value of the property is considerably in excess of the amount of the fees and disbursements of the attorney.[79]

§ 131. —— Special Contracts

The general rules relative to transactions and dealings between attorney and client generally apply to all contracts of a special nature between them.

The general rules announced in § 127 supra, with respect to dealings and transactions between attorney and client, ordinarily determine the validity of all types of special contracts between them.[80]

§ 132. —— Effect of Termination of Relationship

The fact that the relationship of attorney and client has terminated does not prevent a transaction between an attorney and his former client from being regarded as presumptively fraudulent where the confidence or influence arising out of the relation still continues; but if the confidence and influence have entirely ceased the rule is otherwise.

As previously noted in § 125 supra, an attorney's duties of good faith and fidelity do not cease immediately upon the termination of the relation but continue as long as the influence arising out of the relationship exists. In accordance with this it is quite generally held that the mere fact that the relationship of attorney and client has terminated does not prevent a transaction or dealing thereafter entered into between the attorney and his former client from being regarded as presumptively fraudulent on account of the relationship where the confidence or influence arising therefrom still continues,[81] and that the cessation of such confidence or influence can be shown only by some positive

"The cases show that, where this degree of suspicion has been cast upon the transaction under consideration, something more appeared to create suspicion than the mere fact that the alleged donee was attorney for the alleged donor. The nature of the gift, its value, the wealth of the donor, and other things, are to be considered in determining the degree of suspicion. Could it be said that a trivial gift by a wealthy client should be viewed with the greatest suspicion? We think not."—Rice v. Bennington County Sav. Bank, supra.

75. Cal.—Foster v. Abrahams, 241 P. 274, 74 Cal.App. 521.
Fla.—Wharton v. Hammond, 20 Fla. 934.

Collateral security for note given third person for attorney's benefit

It has been held that collateral security given by the client to a third person as trustee for the attorney loaning money to the client to secure a note to the trustee providing that the collateral might be held for the payment of any liability due or to become due the payee or other holder of the note can be held by the attorney as transferee and holder of the note to secure the payment not only of money loaned to the client but also his reasonable fees and disbursements.—Foster v. Abrahams, 241 P. 274, 74 Cal.App. 521.

76. Magee v. Brenneman, 206 P. 37, 188 Cal. 562
Mortgage by insolvent debtor to attorneys to secure fees for future services as fraudulent and void against creditors see Fraudulent Conveyances § 148 [27 C.J. p. 530 note 77].

77. McKnight v. Gizze, 140 A. 116, 107 Conn. 229.

78. Ill.—Day v. Wright, 84 N.E. 226, 233 Ill. 218
Wash.—Wallace v. Town, 35 P. 1080, 8 Wash. 244

79. Powell v. Griffin, 13 S.W.(2d) 13, 178 Ark. 788.

80. Holdridge v. Southwest Cotton Co., 281 P. 202, 35 Ariz. 496.

Contract guaranteeing collection of debt

If an attorney promises his client to pay the amount of a debt himself if he shall fail to collect it, such promise, if supported by a sufficient consideration, is valid and binding.—Morrill v. Graham, 27 Tex. 646—Gregory v. Gleed, 33 Vt. 405
Champertous contracts see Champerty and Maintenance § 13 [11 C.J. p. 241 note 8 et seq.].
Contract to secure pardon see Contracts § 214 [13 C.J. p. 434 notes 85, 86].

81. Ala.—Jones v. Caraway, 87 So. 820, 205 Ala. 327.
Ill.—Youngquist v. Hunter, 227 Ill. App. 152.
Mo.—Bybee v. S'Renco, 291 S.W. 459, 316 Mo. 517.
Wash.—Conner v. Hodgdon, 207 P. 675, 120 Wash. 426.
6 C.J. p. 689 note 40.

act or a complete case of abandonment.[82] Hence, although the relationship is sometimes held to terminate for other purposes upon the rendition of judgment in the litigation for which the attorney was employed (see supra § 108), such fact does not, of itself, terminate the confidence and influence arising out of the relation,[83] and the attorney's settlement with his client for the fruits of the litigation is usually subject to the same rules as other dealings during the relationship.[84]

Where, however, the relation and its influence have entirely ceased so that the parties are dealing at arm's length, to avoid the transaction the former client must show that it was procured by the attorney by actual fraud.[85]

§ 133. Accounting and Payment

It is the duty of an attorney to give the client a full, detailed, and accurate account of all money and property handled by the attorney for the client, and to promptly remit or pay over to the client all sums or property to which the latter is entitled after the deduction of the attorney's proper fees and charges

An attorney is under an absolute duty to give his client a full, detailed, and accurate account of all money and property which has been received and handled by the attorney as such, and must justify all transactions and dealings concerning the same.[86] Mere general statements will not suffice,[87] and hence it is incumbent upon the attorney to keep complete and accurate books and records.[88] The attorney's duty to render an account is not affected by the fact that he may have a lien on the money in his hands,[89] or that the contract of retainer out of which the relationship springs is illegal,[90] although in the latter case the accounting is limited to the sums to which the client is legally and equitably entitled.[91]

Upon the collection or receipt of property or funds for the benefit of his client, it is the duty of the attorney to notify the client promptly thereof and, if there is no contrary understanding, to pay or remit the same to the client, less only proper fees and disbursements, as soon as reasonably possible.[92] Likewise, an attorney who has received money from the client to apply to a particular purpose must either use it for that purpose or return it to the client immediately;[93] and if the purpose requires but a temporary use of the money it must

82. Conner v Hodgdon, 207 P 675, 120 Wash 426—6 C J p 689 note 39

83. Conner v Hodgdon, supra—6 C J p 689 note 12

Transactions as to property sold under judgment

If land has been sold toward satisfaction of the judgment the relation will be deemed to continue until the expiration of the time for redemption, as far as transactions concerning that particular property are concerned—Zeigler v Hughes, 55 Ill 288—6 C J p 689 note 42.

84. Conner v Hodgdon, 207 P. 675, 120 Wash 426—6 C.J. p 689 note 41

85. Cal—Foster v. Abrahams, 241 P 274, 74 Cal App 521
Okl—Korte v Brown, 255 P 1103, 124 Okl 282
S D—Johnson v. Mound City State Bank, 237 N W 891, 58 S D. 622
6 C J p 689 note 43

86. Mich—Reeck v Polk, 257 N W. 698, 269 Mich 252
Mo—Eadie v Johnston, (App) 201 S.W 601
N Y—Haves Realty Corporation v Colton, 207 N Y.S. 720, 213 App Div. 837—In re Lahm, 167 N Y S 217, 179 App Div. 757, affirmed 119 N E 1052, 223 N Y. 573.
R I—Hale v. McGauley, 147 A. 889
Tenn—In re Woods, 13 S W (2d) 800, 158 Tenn. 383, 62 A.L R. 904
6 C.J. p 693 notes 82, 84, p 694 note 9.

Separation of lay and professional matters

When an attorney receives a commitment to perform services within the range of professional work, he takes it in his professional capacity and must account on the same basis, there being no authority to separate matters technically into lay and professional services in connection with the duty to account to the client for the client's money in the attorney's hands—Reeck v. Polk, 257 N W. 698, 269 Mich 252.

87. Poulson v. Blanchard, 6 La.App 101—6 C J p 693 note 84.

88. N Y—In re O'Neill, 240 N Y.S 183, 228 App Div 513
R I—Hale v McGauley, 147 A 889.

89. McCracken v Harned, 44 A. 959, 59 N J Eq 190

90. U. S Title Guaranty Co v. Brown, 111 N E 828, 217 N Y 628, affirming 152 N Y S. 470, 166 App Div 688, which affirms 149 N Y.S 186, 86 Misc 287—U S Title Guaranty Co v. Brown, 137 N Y S. 663, 195 App Div 738, affirmed 135 N E 961, 233 N Y 664

91. U. S Title Guaranty Co. v. Brown, supra.

92. Ala—Peters v. State, 69 So. 576, 193 Ala 598.
Cal—San Francisco Bar Ass'n v. McClellan, 181 P. 231, 40 Cal.App 630.
Ill—People v. Ladouceur, 179 N.E 890, 347 Ill 454—People v. Simmons, 173 N E 398, 341 Ill. 340—People v. Tracey, 145 N E 665, 314 Ill 434—People v Kwasigroch, 130 N E 344, 296 Ill 542—People v. Smith, 124 N E 807, 290 Ill. 241, 9 A.L R 183—People v. Ehle, 112 N E. 970, 273 Ill 424.
Mont—In re McCue, 261 P. 341, 80 Mont 537.
Neb—State ex rel Sorensen v Goldman, 255 N W. 32, 127 Neb 340.
N.J—Hoboken Trust Co v. Norton, 107 A. 67, 90 N J Eq 314
N Y.—In re Babcock, 243 N Y S 489, 230 App Div 323—In re Langfur, 238 N Y S 498, 227 App Div. 468.
Okl—State v. Cutlip, 202 P. 782, 83 Okl. 183.
S C—Hawley v Jennings, 145 S E. 697, 148 S C 140
Tenn—In re Woods, 13 S W (2d) 800, 158 Tenn 383, 62 A L R. 904.
Utah—In re Steffensen, 39 P.(2d) 722, 85 Utah 380
6 C J. p 693 notes 85, 86.

Basis is amount collected

Payment on the basis of a smaller sum than that actually collected will not, of course, discharge the attorney.—Encyclopædia Britannica Corporation v. Carville, 133 So 228, 18 La App. 196—In re McGuinness, 74 N Y.S. 1054, 69 App Div. 606.

Unlawful or improper disbursements cannot be deducted.—In re Woods, 13 S W.(2d) 800, 158 Tenn 383, 62 A L R 904.

93. In re Porcella, 272 N.Y.S. 235, 241 App Div. 344.

be returned when the purpose has been fulfilled.[94] In accordance with the rule stated infra § 139 that an attorney holds such funds as agent or trustee, it is usually held, although there is some authority to the contrary,[95] that a failure to pay or deliver funds or property to which the client is entitled after demand by him constitutes a conversion for which the attorney is liable in damages.[96] It has been said that any agreement by the client permitting the attorney to retain the money for any length of time should be evidenced by a written authorization;[97] and a temporary permission to an attorney to use or retain some sums collected does not authorize him to retain other collections not so permitted nor to refuse payment when reasonably demanded.[98]

Payment in the method or manner designated or acquiesced in by the client may discharge the attorney although the funds are thereby lost to the former.[99]

§ 134. —— Individual Interest of Attorney

A client can ordinarily hold the attorney accountable for, and demand the benefit of, any individual interest or profit that the attorney has acquired or obtained in violation of his duties, but not for sums received by the attorney in settlement of an individual interest properly held by him.

If an attorney has acquired a personal interest, profit, or advantage in violation of his duties, as set forth above in §§ 125–132, it is generally the privilege of the client to treat all such acts as being done for his benefit, to hold the attorney accountable therefor as trustee, and to compel him to transfer or pay over the profit or interest so acquired after payment or deduction of his reasonable fees, disbursements, and expenditures.[1] In such cases the attorney appears to have an absolute right to reimbursement or allowance for his services or expenditures only where he has not practiced any conscious or actual fraud, and in a number of instances such a reimbursement or allowance has been denied where there was an actual intent or purpose on the part of the attorney to defraud his client.[2]

The rule above stated in no way permits the client to hold the attorney liable or accountable for sums which the latter has properly accepted from the adverse party in settlement of the attorney's contingent fee interest in the controversy, although in excess of the fee the attorney would have received if computed as the designated percentage of the amount finally received by the client.[3]

§ 135. —— Acts and Defaults of Partner or Associate

An attorney may be liable or accountable for money of the client lost through the fault or misconduct of a clerk or associate employed by the attorney.

An attorney may be liable or accountable for money of a client lost through the fault or misconduct of an associate or clerk employed by the attorney.[4]

§ 136. —— Interest

Generally an attorney is chargeable with interest on funds retained or held for his client only after the expiration of a reasonable length of time and a demand by the client, unless the attorney has been guilty of a breach or default excusing a demand.

An attorney who holds money for his client, and who is not guilty of laches or default with regard to paying it over, is not liable for interest.[5] An

94. Gentilli v. Brennan, 233 N.W 93, 202 Wis 465.

95. Jackson v Moore, 76 N Y S. 164, 72 App Div. 217.

96. Mich —Reeck v. Polk, 257 N W. 698, 269 Mich 252.
N Y —Jackson v. Moore, 87 N Y S 1101, 94 App Div. 504, discrediting Jackson v Moore, 76 N Y.S. 164, 72 App Div 217
6 C J p 694 note 4.

97. In re Langfur, 238 N Y S 493, 227 App.Div. 468.

98. Reeck v. Polk, 257 N.W 698, 269 Mich. 252.

99. Ind —Hillegass v. Bender, 78 Ind. 225.
Miss —Grayson v. Wilkinson, 13 Miss. 268.
6 C.J. p 693 note 90 [a] (1).

1. U.S —Davitt v. O'Connor, (C C A. N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct. 217, 293 U S 621, 79 L Ed 709
Cal —Tomblin v Hill, 275 P 941, 206 Cal. 689
Iowa —Healy v. Gray, 168 N.W. 222, 184 Iowa 111.
Nev —Martin v. Dixon, 241 P. 213, 49 Nev 161
N C —Mebane v Broadnax, 111 S E. 627, 183 N C 333
Okl —Wolfe v. Bass Furniture & Carpet Co, 3 P (2d) 895, 152 Okl 125, certiorari denied Wolf v Bass Furniture & Carpet Co, 54 S.Ct 79
Tex —Sherwood v South, (Civ App) 29 S W.(2d) 805.
Wash.—Conner v Hodgdon, 207 P. 675, 120 Wash 426
Wis —Armstrong v. Morrow, 168 N. W 179, 166 Wis. 1, Ann Cas.1918E 1156.
6 C J. p 682 notes 89, 91, p 683 notes 92, 2, p 685 note 13—61 C.J. p 1202 note 38.

2. McArthur v. Goodwin, 160 P. 679, 173 Cal 499.
Held not entitled to reimbursement
In a suit by a client against his former attorney to compel a transfer of stock affected with a trust in plaintiff's favor, defendant was not entitled to claim that plaintiff should reimburse him for the money paid out to acquire the stock fraudulently, and hold it adversely to plaintiff.—Martin v Dixon, 241 P 213, 49 Nev. 161—6 C.J p 684 note 5 [a].

3. Shannon v. Stubblefield, (Tex. Civ.App) 242 S.W. 533.

4. Cal.—Ackley v Prime, 278 P. 932, 99 Cal App 534.
N Y —In re McGunness, 74 N.Y.S 1054, 69 App.Div. 606.
Liability generally for acts of associates, partners, clerks, or substitutes see infra §§ 149–150.

5. Govan v Parsons, 155 So. 241, 179 La. 834—6 C J. p 695 note 22.

attorney may, however, be chargeable with interest from the time that he has been guilty of any default or breach with respect to payment, accounting, or notifying the client,[6] as where he has appropriated the money to his own use;[7] or after the expiration of an unreasonable time;[8] but where a demand is necessary to fix the liability of the attorney interest can be charged only from the time that a proper demand was made by the client or the person entitled to receive the money.[9] If the amount claimed by the client is undetermined, or is in the nature of unliquidated damages, the attorney is chargeable with interest only from the time of the institution of proceedings against him.[10]

A statute leaving the granting of an interest in a conversion action to the discretion of the jury has been applied to an action by a client to recover sums for which his attorney has failed to account.[11]

§ 137. —— Persons Entitled

Generally the only person entitled to an accounting or payment is the client or his authorized agent; but, if the client is acting as an agent or representative, the attorney may be required to make his accounting or payment to the true owner.

Ordinarily a payment or accounting by the attorney may and must be made either to the client himself or to some one authorized to act for him,[12] and not to third persons who may claim, or appear to have, title to the funds or property,[13] at least where the client has not refused to indemnify the attorney.[14] If the client is acting merely as agent or representative of another who is the real owner of, or has legal title to, the claim collected, the attorney may discharge himself by making his accounting or payment either to the agent or to the principal or true owner,[15] unless the latter insists upon an accounting before payment has been made to the agent or representative, in which case the attorney must account to the true owner without deduction for any claims he may hold against the representative individually.[16] It has been said, however, that the custom, where one attorney receives a claim from another for collection, is to remit the sums collected to the attorney from whom the claim was received unless otherwise instructed, particularly where the latter attorney is a resident of the same city or county as the client;[17] but the collecting attorney must account and pay directly to the owner of the debt, where the latter insists;[18] and it has been held that the original attorney, although authorized to receive payment, has no right to recover in an action for money had and received against the collecting attorney unless he can prove a legal or beneficial interest in the claim.[19]

§ 138. Fraud

An attorney may be liable to his client for fraud, actual or constructive.

An attorney may be liable to his client on account of actual fraud consisting either of willful mis-

6. U.S.—Davitt v. O'Connor, (C.C.A. N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709
S.C.—Hawley v. Jennings, 145 S.E. 697, 148 S.C. 140
6 C.J. p. 695 note 24, p. 696 note 26

Unjust profit in dealing

Where an attorney made a profit through the acquisition and sale of an adverse interest in his client's land, for which he was held accountable to the client, the court held that interest should be computed from the day the attorney received the money —Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

7. Mansfield v. Wilkerson, 26 Iowa 482—6 C.J. p. 696 note 26

8. Chapman v. Burt, 77 Ill. 337—6 C.J. p. 695 note 24.

9. Govan v. Parsons, 155 So. 241, 179 La. 334—6 C.J. p. 695 note 25.

10. McMahon v. New York, etc., R. Co., 20 N.Y. 463—6 C.J. p. 696 note 27.

11. Fiegle v. Brewster, (Mo.App.) 59 S.W.(2d) 769

12. Wallace v. Peck, 12 Ala. 768

Payment to payee of note who has indorsed in blank does not discharge the attorney from liability to the client who has left the note for collection where the payee is not the true owner—Wallace v. Peck, 12 Ala. 768—Lewis v. Peck, 10 Ala. 142.

13. Dollar Savings & Trust Co. v. Bell, 70 Pa.Super. 610—6 C.J. p. 693 note 87

14. Marvin v. Ellwood, 11 Paige (N.Y.) 365.

Doubt as to client's title

"Even where there is doubt whether the securities upon which the money was collected did in fact belong to his client, all that he has any right to ask is an indemnity from his client. And if he is not satisfied with the responsibility of his client, it is his duty to tell him so, and to offer to pay him if the client is willing to give indemnity. Whether, under any circumstances, this court would sustain a bill by an attorney, against his client and a stranger, where the client was wholly irresponsible and refused to indemnify the attorney against the claim of a third person which was apparently well founded, I am not prepared to decide"—Marvin v. Ellwood, 11 Paige (N.Y.) 365, 375.

15. Mass.—Daly v. Crawford, 181 N.W. 396, 279 Mass. 262
Mont.—Buckhouse v. Parsons, 198 P. 444, 60 Mont. 156.
6 C.J. p. 693 notes 90, 92.

After attorney has fully accounted to trustee for whom he acted he is not liable to a successor trustee notwithstanding the client trustee failed to account or made improper disbursements—Daly v. Crawford, 181 N.E. 396, 279 Mass. 262.

16. Newcastle v. Bellard, 3 Me. 369

17. Tyler v. Cockrell, 107 S.W. 799, 32 Ky.L. 1126

18. Ironton Rolling Mills Co. v. Ross, 6 Bush (Ky.) 103—6 C.J. p. 695 note 20

19. N.Y.—Gunn v. Cantine, 10 Johns. 387
Tenn.—Herron v. Bullitt, 3 Sneed 497
6 C.J. p. 695 note 21.

statements of the law[20] or of existing facts,[21] made by the attorney to the client with intent to defraud and secure an advantage for himself and relied on by the client. Actual fraud in its strict sense is not, however, always essential to visit the consequences thereof upon an attorney.[22] Practically any breach or violation by an attorney of his fiduciary duties stated supra § 125 constitutes constructive fraud and is sufficient for this purpose.[23] Hence, an attorney's nondisclosure of an adverse interest,[24] or other material facts or matters as to which he has a duty to fully inform or advise his client,[25] may render him responsible as for fraud although there may be no positive misrepresentation or intention to defraud; and, as already noted in §§ 126 and 127, an attorney's acquisition of an adverse or personal interest or dealings with his client may often be attacked on the ground of constructive fraud without regard to the attorney's actual intent or purpose.

§ 139. Money Collected and Not Paid Over

Money collected by an attorney for his client and not yet paid over constitutes a trust fund, and the attorney's duties and liabilities with respect thereto are determined accordingly.

An attorney who has collected money for his client and not yet paid it over ordinarily holds the same as a trustee rather than as a debtor,[26] and his duties and liabilities with respect thereto are much the same as any other bailee, trustee, or fiduciary.[27]

The attorney is under a strict duty to keep the client's funds separate from his own,[28] in a place of reasonable safety where they will always be available for immediate payment to the client;[29] and under no circumstances should he use the

20. Ind.—Kinney v. Dodd, 101 Ind. 573
N Y—Wille v Maier, 176 N E 841, 256 N.Y. 465, affirming 248 N Y S. 904, 232 App Div. 798, and reargument denied 177 N E 196, 256 N.Y. 692—Milne v. Schneider, 240 N Y. S. 375, 136 Misc. 15.
Wis—Hubbard v. McLean, 90 N.W. 1077, 115 Wis 9.
6 C J p 693 note 97.

Misrepresentations to adverse party
"In such cases as this, the attorney who induces the adverse party to a transaction to accept his word as to the law, in order to avoid the appearance of another attorney on the scene, fails in the jealous care for his standing at the bar which he should sedulously exert, and opens himself to liability for his false representations to his adopted client."—Wille v. Maier, 176 N E 841, 843, 256 N Y. 465, affirming 248 N Y S. 904, 232 App Div. 798, and reargument denied 177 N E. 196, 256 N Y 692.

Validity of Mexican divorce
Where money to obtain a Mexican divorce is paid to the attorney upon his knowingly false misrepresentations that the divorce will be valid and permit the client to remarry in New York, the client may hold the attorney liable for the money paid in an action for fraud and deceit—Milne v. Schneider, 240 N Y S 375, 136 Misc 15.

21. U S.—Goodrich-Lockhart Co. v. Sears, (D C Ky) 270 F 971
Ind—Manley v. Felty, 45 N E. 74, 146 Ind 194.
6 C J p 693 notes 98, 99.

Value of land
False representations by an attorney to an inexperienced client, as to the value of certain land which the attorney undertakes to recover for his client, whereby the latter is induced to execute a note for an exorbitant fee for the attorney's services, constitute positive fraud—Manley v. Felty, 45 N E 74, 146 Ind. 194

22. Norfleet v. Stewart, 20 S W (2d) 868, 180 Ark. 161—6 C J p 694 note 2

23. U S—Baker v. Humphrey, (C C. Mich) 101 U S. 494, 25 L Ed 1065
Ark—Norfleet v. Stewart, 20 S W (2d) 868, 181 Ark 161.
Ky.—Palms v. Howard, 112 S W. 1110, 129 Ky. 668—Pilant v. Davis, 2 Ky Op. 40
Miss—Gwin v. Fountain, 126 So 18, 159 Miss 619, suggestion of error sustained 132 So. 559, 159 Miss. 619.
N Y—Pitcher v. Sutton, 264 N Y S. 488, 238 App Div. 291, amended 265 N Y S 929, 240 App Div 754, and 265 N.Y.S 991, 240 App Div. 759, affirmed 191 N E 603, 264 N Y 638
N C.—Mebane v. Broadnax, 111 S E 627, 188 N C 333.
6 C J p 682 note 90, p 695 note 11.

24. Ivey v Neyland, (Tex Com App) 25 S W (2d) 813, reversing (Civ App) 11 S W (2d) 608—6 C J p 693 note 1.

25. U.S—Goodrich-Lockhart Co. v. Sears, (D C Ky.) 270 F. 971.
Ark—Francis v. Turner, 67 S W.(2d) 211, 188 Ark 158
N J—Turnley v Nixon, 163 A. 800, 112 N J Eq 116
Tex—Ivey v Neyland, (Com App) 25 S W (2d) 813, reversing (Civ App) 11 S W.(2d) 608—Holland v. Brown, (Civ App) 66 S W.(2d) 1095, error refused.
6 C J p 694 note 2

Nondisclosure held not established.—Cameron v. Hurn, 266 P. 179, 147 Wash. 434.

28. Ill.—People v Ladouceur, 179 N E 890, 347 Ill 454—People v Simmons, 173 N E 393, 341 Ill 340—People v. Tracey, 145 N E 665, 314 Ill. 434.
Mont—In re Lunke, 182 P. 126, 56 Mont 226.
Neb—State ex rel Sorensen v. Goldman, 255 N W 32, 127 Neb 340
N Y—In re Powers, 257 N Y S 113, 235 App Div 382—In re Babcock, 248 N Y S 489, 230 App Div 823—In re Walsh, 217 N Y S 253, 217 App Div 437—In re Ropiecki, 282 N.Y S. 947
6 C J p 684 note 4, p 694 note 4, p 695 note 12

Property of client, not of attorney
Although an attorney was justified in refusing to turn over to his client money collected until the amount of his retaining lien was determined, he had no right to the money as his own—In re Babcock, 248 N.Y.S. 489, 230 App.Div. 823.

27. In re G. F Redmond & Co., (D. C Mass) 17 F (2d) 501—6 C J p 695 notes 12, 13.

28. Mont.—In re Lunke, 182 P. 126, 56 Mont. 226
N Y—In re Porcella, 272 N Y.S 285, 241 App Div 344—In re Yochelson, 258 N Y S. 724, 236 App Div. 807—In re Powers, 257 N Y S. 113, 235 App Div. 382—In re Babcock, 248 N Y S. 489, 230 App Div. 823—In re Dobbs, 160 N Y.S 173, 173 App Div. 605—In re Ropiecki, 282 N Y.S 947.

29. In re Wyte (formerly Weissberger), 248 N Y S. 26, 231 App. Div. 539

In safety deposit box
Keeping of funds collected for client in safety deposit box of attorney disapproved—Gordon v. Harrison, 161 A. 608, 105 Pa.Super. 513.

funds for his own purposes,[30] or lend them to others,[31] without his client's knowledge and consent. With respect to the place of keeping, it has been said that the funds should be deposited in a separate trust account in a bank or trust company of good repute,[32] and that it is improper for the attorney to put the funds in his own safe deposit vault.[33]

If the attorney has kept the client's funds separate and earmarked as trust funds he is liable for their loss only if he is negligent or fails to exercise due care,[34] and he is not liable for a loss resulting solely by reason of the default of a third person,[35] but if he commingles the funds or treats them as his own he thereby becomes absolutely liable as a debtor.[36]

Consequently, if an attorney in good faith deposits the funds in a bank or trust company of good standing, the deposit being made in the name of the client or else clearly earmarked as a trust account, the attorney is not liable for a loss resulting from a failure of the depositary.[37] Nevertheless, although a mere good faith deposit by an attorney of his client's funds in his private banking account does not of itself constitute a conversion where the balance at all times exceeds the amount of the deposit,[38] it is generally held that an attorney who wishes to place the client's funds in a bank and escape liability for loss resulting from a failure of the bank must either make the deposit in the client's name or have it some way indicated on the books of the bank that it is the client's money.[39] If the attorney deposits the client's funds in an account in the attorney's name, and there is nothing in the account or the records of the bank to indicate the trust nature of the fund, the attorney is absolutely liable for a loss resulting from a failure of the bank irrespective of the attorney's good faith or whether the private funds of the attorney are actually commingled in the account.[40] A deposit in the attorney's name has been held, however, not to render the attorney liable for a subsequent failure of the bank where it was made with the express or implied consent of the client,[41] or the client was guilty of negligence in not withdrawing the funds after being notified that they were in the bank at his disposal and the bank was that of the client in which the attorney kept no deposit other than of the client's funds.[42]

§ 140. Negligence in General

An attorney is liable in damages to his client for injury sustained as a proximate consequence of the attorney's negligence in accordance with rules stated hereunder.

An attorney is liable in damages to his client for injury sustained by him as a proximate result of

30. Mont.—In re Lunke, 182 P 126, 56 Mont. 226
N Y—In re Simons, 208 N Y S 51, 211 App Div 659—In re Coleman, 165 N Y S 685, 178 App Div 580.
Liability for conversion
(1) If the attorney does use the funds for his own purposes he is liable for conversion—Cotton v. Sharpstein, 14 Wis 226
(2) Liability for conversion for failure to pay on demand see supra § 133

31. In re Simons, 208 N.Y.S 51, 211 App Div. 659

32. In re Langfur, 238 N.Y.S. 498, 227 App Div. 468.

33. In re Langfur, supra

34. N Y—Mahler v. Hyman, 17 N.Y S 588
Va—Pidgeon v. Williams, 21 Gratt (62 Va) 251
6 C J. p 695 note 12.

35. Ga—Rogers v. Hopkins, 70 Ga. 454.
Va—Pidgeon v. Williams, 21 Gratt. (62 Va) 251.
Misappropriation by third person
An attorney is not liable for moneys passing through his hands as a mere intermediary and subsequently misappropriated by a third person selected by the client to receive the same—Missouri, etc, R Co v Ferris, (Tex Civ App) 99 S.W. 896

36. Okl—Hummer v Wagner Supply Co, 280 P 1103, 139 Okl 24.
Pa—Falconi v Magee, 47 Pa Super. 560
Deposit in own account
If an attorney deposits the fund in his own account he thereby destroys its identity and becomes absolutely liable in assumpsit as a debtor, and is not relieved therefrom by reason of the fact that a check drawn on the account and mailed to the client in accordance with the latter's directions is misappropriated by a third person and collected on a forged indorsement—Falconi v. Magee, 47 Pa. Super. 560

37. Pidgeon v Williams, 21 Gratt. (62 Va) 251—6 C J p 695 note 14.

38. Peirce v Palmer, 77 A. 201, 31 R I 432, Ann Cas 1912B 181

39. Ind—Naltner v Dolan, 8 N E 289, 108 Ind 500, 58 Am R 61.
Okl—Hummer v Wagner Supply Co, 280 P 1103, 139 Okl 24

40. Ind—Naltner v. Dolan, 8 N E. 289, 108 Ind. 500, 58 Am R 61
Okl—Hummer v Wagner Supply Co., 280 P 1103, 139 Okl 24.
Reasons for rule
"Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the cestui que trust has election either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such a manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee or legal representative, to claim it as the fund of the depositor, the cestui que trust has the option to do likewise In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate, in some way, that it is the principal's money If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal"—Naltner v Dolan, 8 N E. 289, 291, 108 Ind 500, 58 Am R 61.

41. Matter of Shanley, 107 N.Y S 913, 57 Misc 8, affirmed 109 N.Y.S 434, 124 App Div. 935, distinguished in Hummer v Wagner Supply Co, 280 P 1103, 139 Okl 24

42. Rogers v. Hopkins, 70 Ga 454

the attorney's negligence.[43] On the other hand, where an attorney acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be responsible.[44] Especially is an attorney not liable for a mere error of judgment, when he consults his client, and the latter, after being informed of the legal status of the case, approves the course the attorney proposes to pursue;[45] nor may liability on the ground of negligence toward a client be imposed on an attorney for a client's loss which results from his own free and voluntary act as to a matter wherein the attorney is deprived of control,[46] or where whatever loss has been suffered is due solely to the client's own individual default.[47] Moreover, where the matter, as to which an attorney is employed to represent a client, has been properly disposed of, he may not be permitted to charge the attorney with liability on the ground of negligence.[48]

Estoppel. A client who is a lawyer is estopped to plead the negligence of his attorney when his acquiescence in the latter's course is the result of a personal examination of the authorities, and of his individual knowledge and superior skill as a lawyer.[49]

Liability determined by employment. Although the liability of an attorney on the ground of negligence is ordinarily enforced by an action on the case for negligence in the discharge of his professional duties (see infra § 155), the liability in reality rests on the attorney's employment by the client and is contractual in its nature.[50] Hence, before the attorney can be made liable, it must appear that the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment.[51] Moreover an attorney is liable for negligence in the conduct of his professional duties to his client alone, that is, to the one between

43. Ala.—Howard v. McCarson, 110 So. 296, 215 Ala. 351
Fla.—Weekley v. Knight, 156 So. 625, 116 Fla. 721
Ill.—Olson v. North, 276 Ill.App. 457
Kan.—Shouse, Doolittle & Morelock v. Consolidated Flour Mills Co., 294 P. 657, 132 Kan. 108
Ky.—Duffin v. Commonwealth, 271 S.W. 555, 208 Ky. 452
Mass.—McLellan v. Fuller, 115 N.E. 481, 226 Mass. 374.
Nev.—In re Miller, 38 P.(2d) 972, 55 Nev. 414
6 C.J. p. 682 note 85, p. 696 note 28.

Each case determined by own facts
"What may be a want of skill in any particular case, or what may be ordinary neglect, must be decided by the facts and circumstances of the case which may be under consideration. It is exceedingly difficult, if not utterly impossible, to lay down any general rule which should control the measure of liability in all cases. Good faith must exist on the part of the attorney towards his client, and when this is shown, the absence or presence of reasonable skill and diligence must in each case be determined by its own facts."—O'Barr v. Alexander, 37 Ga. 195, 201.

Liability of physicians and surgeons
(1) Rules of law governing liability for negligence of physicians and surgeons toward their patients also govern the liability of attorneys for negligence toward their clients.—Olson v. North, 276 Ill.App. 457.—6 C.J. p. 696 note 28 [c]

(2) Negligence of physician see Physicians and Surgeons § 40 [48 C.J. p. 1113 notes 43, 44].

Attorney acting gratuitously
This liability exists, even though the attorney acts gratuitously.—Stephens v. White, 2 Wash. (2 Va.) 203.—6 C.J. p. 696 note 29

Falsely representing self as attorney
One who falsely represents himself as an attorney is accountable to his client with the same strictness as though he were an attorney.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46, reversing 168 A. 772, 11 N.J.Misc. 866.—6 C.J. p. 696 note 30.

Determined by law at time of acts
Such liability is to be determined by the law at the time of the acts which are asserted to be negligent.—Montrose v. Daggott, 146 N.Y.S. 649, 161 App.Div. 494
Liability of client for negligent acts of attorney see supra § 68 [6 C.J. p. 672 note 51]

44. Citizens' Loan, etc., Assoc. v. Friedley, 23 N.E. 1075, 123 Ind. 143, 18 Am.S.R. 320, 7 L.R.A. 669.—6 C.J. p. 696 note 32.

45. Hinckley v. Krug, (Cal.) 34 P. 118

46. **Executrix acting with others interested in estate**
Where an executrix and others interested in an estate without an order of court divided the property by deeds and assignments, and the executrix got a note as part of her share, and the property was taken from the hands and control of the attorneys for the executrix, the executrix could not recover the amount of such note from the attorneys by reason of the collection of the note becoming barred by limitations six months after the division.—Wilmot v. Moody, 190 P. 639, 47 Cal.App. 156.

47. **Failure to communicate facts**
A client, having an opportunity to settle a case, but not communicating that fact, nor other facts, to its attorneys, is not entitled to hold such attorneys responsible for its own default.—Maryland Casualty Co. v. Price, Smith, Spilman & Clay, (D.C.W.Va.) 224 F. 271, affirmed Maryland Casualty Co. v. Price, 231 F. 397, 145 C.C.A. 391

Failure to make payment or tender
Where the loss suffered by a client was due to his own failure to make a payment or tender necessary under a contract which he employed an attorney to enforce, liability could not be imposed on such attorney for the loss.—Bayly v. Lee, 162 P. 96, 174 Cal. 137.

Failure to furnish merchantable title
Attorneys employed by clients to secure a loan could not be held for damages arising out of failure to obtain the loan where clients failed to furnish a merchantable title to land to be mortgaged.—McCulloch v. Von Zellen, 187 N.W. 350, 218 Mich. 278

48. **Where property properly distributed**
Where the property of an estate was properly distributed, no recovery may be had for an attorney's supposed negligence in representing those claiming an interest in such estate.—McMillan v. Greer, 259 P. 995, 85 Cal.App. 558.

49. Carr v. Glover, 70 Mo.App. 242

50. Morris v. Muller, 172 A. 63, 113 N.J.Law 46, reversing 168 A. 772, 11 N.J.Misc. 866.

51. Watson v. Calvert Bldg., etc. Assoc., 45 A. 879, 91 Md. 25.—6 C.J. p. 697 note 35.

whom and the attorney the contract of employment and service existed, and not to third parties.[52]

§ 141. —— Care and Skill Required

An attorney is required, as respects his client, to exercise such skill, care, and diligence as are common in such matters of professional employment, but by some authority is liable only for gross negligence.

Ordinarily an attorney is not bound to possess or exercise the highest degree of skill, care, and diligence; nor is he an insurer or guarantor of the results of his work, but rather he is required, as respects his client, to exercise such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.[53] The rule as announced in many of the cases, however, is that an attorney is liable only on proof of "gross negligence."[54]

§ 142. —— Ignorance of Law

An attorney is required to have such knowledge of law as is ordinarily possessed by other attorneys, and is liable for loss resulting from ignorance thereof.

In addition to the care and skill which an attorney is required to exercise on behalf of his client (see supra § 141), an attorney is required to possess such a reasonable knowledge of the law as is ordinarily possessed by other attorneys.[55] Accordingly, an attorney must be acquainted with the statutes and the settled rules of law and practice prevailing in the courts in the locality wherein he practices, and is responsible for loss to his client resulting from ignorance thereof,[56] but he is not to be charged with

52. Buckley v. Gray, 42 P. 900, 110 Cal. 339, 52 Am S R. 88, 31 L R A. 862—6 C J p 697 note 36

Person deprived of interest under will

It has been held that an attorney employed to draw a will is not liable to a person who, through the attorney's ignorance or negligence in the discharge of his professional duties, is deprived of the portion of the estate which the testator instructed the attorney should be given such person by the will—Buckley v Gray, 42 P. 900, 110 Cal 339, 52 Am S R. 88, 31 L R A 862—6 C J. p 698 note 37.

53. Ark—Hampel-Lawson Mercantile Co v. Poe, 277 S W. 29, 169 Ark 840
Ill—Olson v North, 276 Ill App 457 See Sanitary Hair Goods Co v. Elliott, 191 Ill App 563.
Nev—In re Miller, 38 P (2d) 972, 55 Nev. 444—In re Hegarty's Estate, 222 P. 793, 47 Nev 369
Or—Ex parte Eastman, 62 P (2d) 27.
Pa.—In re Rossiter's Adjudication, 84 Pa Super. 193
Tenn—In re Woods, 13 S W (2d) 800, 158 Tenn. 383, 62 A.L.R 904.
6 C J. p 682 notes 84, 87, p 698 note 42.

Implied by law

It is implied by law that an attorney who undertakes the practice of law thereby undertakes to exercise reasonable care and skill in matters intrusted to him by clients.—In re Miller, 38 P.(2d) 972, 55 Nev. 444—Morris v. Muller, 172 A. 63, 113 N J Law 46, reversing 168 A. 772, 11 N J Misc. 866—McCullough v. Sullivan, 133 A. 102, 102 N.J Law 331, 48 A L.R. 928.

Skill and care by physicians and surgeons

(1) In accordance with the rule that attorneys are liable for their negligence toward their clients in the same manner as physicians and surgeons are liable to their patients (see supra § 140), attorneys are required to exercise that degree of skill and diligence in their profession which physicians and surgeons are required to exercise in theirs—Olson v. North, 276 Ill App. 457—6 C J. p 696 note 28 [c]

(2) Requirements of skill and care by physicians and surgeons see Physicians and Surgeons §§ 41–47 [48 C J. p 1113 note 46–p 1131 note 18]

Reasonable or ordinary care and skill

(1) The true measure of an attorney's duty and liability to his client has been held to turn on the question whether the attorney used reasonable care and skill—Good v Walker, 30 Ala 482, 68 Am D 134—Evans v. Watrous, 2 Port (Ala.) 205.

(2) Similarly it has been held that an attorney is liable only for want of ordinary care and skill.—Holmes v. Peck, 1 R I. 242

No guaranty of infallibility

"Attorneys do not guaranty that their judgment is infallible"—Mecartney v. Wallace, 214 Ill.App. 618, 624.

Lending client's money

(1) It has been held that an attorney, in whose hands money of a client was left to be loaned, although not insurer of such funds, had the duty to exercise the care of a reasonably prudent person in dealing with trust property—Shockney v. Marsh, 147 N E 292, 82 Ind App. 407.

(2) Similarly, where an attorney was authorized to lend a clients' money on a mortgage, it was held that such attorney was not liable as an insurer, but only for using due care and average skill—Weinberg v Needleman, 234 N.Y S. 49, 226 App. Div 3, affirmed 170 N E 167, 252 N. Y 622.

54. Pennington v Yell, 11 Ark 212, 52 Am D 262—6 C J. p 698 note 40.

As want of ordinary or reasonable care and skill

(1) Want of ordinary care and skill in an attorney has been held to amount to "gross negligence."—Holmes v. Peck, 1 R I. 242, 245.

(2) In another case where it was stated that an attorney was liable only for "gross negligence," these words were shown by other language in the opinion to be equivalent to want of "reasonable care and skill."—Evans v. Watrous, 2 Port (Ala.) 205

(3) Thus explained, the phrase "gross negligence" has been held to indicate the true measure of the attorney's duty and liability—Goodman v. Walker, 30 Ala 482, 68 Am D 134—Evans v Watrous, 2 Port (Ala.) 205

Degrees of negligence generally see Bailments §§ 26–29 [6 C J. p 1113 note 37–p 1123 note 33]; Negligence §§ 3, 9 [45 C J. p 664 note 64–p 680 note 11].

55. Morris v Muller, 172 A. 63, 113 N J Law 46, reversing 168 A. 772, 11 N.J.Misc. 866

56. In re Woods, 13 S W (2d) 800, 158 Tenn 383, 62 A L.R. 901—6 C. J. p 698 note 43

Degree of knowledge as to well settled rules

"While an attorney does not guarantee the accuracy of all he does, he is bound to exercise reasonable skill and diligence in attending to business intrusted to his care, and he is bound to possess such reasonable knowledge of well-settled rules of law as will enable him to perform the duties he undertakes."—In re Woods, 13 S.W.(2d) 800, 802, 158 Tenn. 383, 62 A.L.R. 904.

negligence where he accepts, as a correct exposition of the law, a decision of the supreme court of his own state,[57] although it is subsequently overruled;[58] nor is an attorney liable for being in error as to a question of law on which reasonable doubt may be entertained by well informed lawyers, or for error in judgment on points of new occurrence, or of nice or doubtful construction.[59]

§ 143. —— Giving Improper or Erroneous Advice

An attorney is liable for giving improper or erroneous advice only where an attorney of reasonable knowledge or skill would have avoided the error.

An attorney is liable for all damage resulting to his client by reason of improper or erroneous advice where an attorney of reasonable knowledge and professional capacity, exercising ordinary care under the circumstances, would have avoided the error.[60] On the other hand, the mere giving of erroneous advice to a client does not necessarily impose liability for negligence on the attorney so advising.[61] Moreover, in order that erroneous advice may impose liability such advice must be the proximate cause of the loss.[62]

With respect to titles and securities. An attorney is not a guarantor that the titles which he certifies are perfect; he is liable only for negligence or misconduct in their examination.[63] Thus it is actionable negligence for an attorney in examining a title to land to overlook prior liens thereon;[64] but his good faith may not be impeached by a mistake or an error of judgment, either as to the law or its application to the concrete facts.[65] An attorney who certifies that a security is a good one thereby warrants that the title to the property constituting the security will not only be found good at the end of a contested litigation, but that the title is also free from any grave doubt or serious question as to its validity.[66] An attorney does not, however, undertake, except by special agreement, to pass on the value of security, even though he may have full knowledge of the amount his client expects to loan on it.[67] With respect to loss suffered by a client in consequence of his attorney's erroneous advice as to the validity of securities,

Circuit court rules and construction thereof

Attorneys owe to their clients the duty of familiarizing themselves with the rules of the circuit court and construction placed thereon by the supreme court—Michigan Cent R Co v. Morgan, 198 N.W. 967, 227 Mich. 491

Paying money of infant into court

Where an attorney, in disregard of statutes clearly indicating the procedure to be followed in case a guardian is unable to furnish a sufficient bond, paid money of an infant client into the county court, because he did not regard the guardian's bond as strong, he was liable to the infant for the loss of such money—In re Woods, 13 S W (2d) 800, 158 Tenn. 333, 62 A L R 904

57. Citizens' Loan, etc, Assoc. v. Friedley, 23 N.E 1075, 123 Ind 143, 18 Am S R. 320, 7 L R A. 669—6 C. J. p 699 note 44.

58. Marsh v. Whitmore, (Me) 21 Wall (U S) 178, 22 L.Ed 482, affirming (C.C) 16 F Cas No 9,122, 1 Hask. 391—6 C J. p 699 note 45.

59. Citizens' Loan, etc, Assoc. v. Friedley, 23 N.E. 1075, 123 Ind 143, 18 Am S R 320, 7 L R A. 669—6 C. J p 699 note 46.

Discovering and questioning finality of decisions

"Attorneys . . . are not necessarily negligent because they do not discover all decisions on a subject, or may question their finality."—Mecartney v. Wallace, 214 Ill App 618, 624.

60. Fabry v. Jay, 141 A. 780, 104 N. J Law 617—6 C J. p 699 note 48.

Enforceability of instrument

An attorney negligently assuring clients that a land contract which they proposed to take by assignment was enforceable was liable for resulting damages—Fabry v. Jay, 141 A. 780, 104 N J Law 617.

61. Parker-Smith v Prince Mfg Co., 158 N Y S. 346, 172 App Div 302.

Loss of remedy

The loss of a remedy through negligent advice is not necessarily actionable negligence, for there may be another remedy equally efficacious.—Parker-Smith v. Prince Mfg Co., 158 N Y S. 346, 172 App Div. 302.

Statute of limitations

Erroneous advice as to the application of the statute of limitations is not necessarily negligence, for there may be a question whether the error indicates lack of due professional care and skill—Parker-Smith v. Prince Mfg. Co, 158 N.Y.S. 346, 172 App Div. 302.

Expression of opinion

A mere expression of opinion not involving the exercise of legal knowledge does not subject an attorney to liability—Reumping v Wharton, 76 N W 1076, 56 Neb 536.

62. Cochrane v. Little, 18 A. 698, 71 Md. 323.

63. Priddy v. Mackenzie, 103 S W 968, 205 Mo. 181—6 C J. p 699 note 50.

Negligence in conduct of litigation compared

"In determining the question of negligence on the part of an attorney in examining a title, it is necessary to bear in mind the marked difference between proper conduct in that employment and in a litigation In a litigation a lawyer is well warranted in taking chances. To some extent litigation is a game of chance. The conduct of a lawsuit involves questions of judgment and discretion as to which even the most distinguished members of the profession may differ They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment for which he is not liable. But passing titles, as a rule, is of an entirely different nature A purchaser of real estate is entitled not only to a good, but to a marketable title, that is, a title free from reasonable doubt"—Byrnes v. Palmer, 45 N.Y S 479, 18 App Div. 1, 4, affirmed 55 N.E 1093, 160 N Y. 699.

64. Lawall v. Groman, 37 A. 98, 180 Pa 532, 57 Am S R 662—6 C.J. p 699 note 51

65. Sellers v. Knight, 64 So. 329, 185 Ala 96.

66. Page v. Trutch, (C.C Or.) 18 F Cas No 10,668. 3 N Y.Wkly Dig. 167, 1 Cinc L Bul. 224

67. Md—Watson v Calvert Bldg., etc, Assoc, 45 A. 879, 91 Md 25 N.Y—Cohn v Heusner, 30 N.Y.S 244, 9 Misc. 482.

the client's right of action accrues immediately, and he may recover the difference between the value of the security that his attorney actually obtained for him and of that which he undertook to obtain under his contract of employment.[68] At all events, in accordance with the rule that an attorney is liable for negligence only to his client (see supra § 140), an attorney employed by a mortgagee to examine the security and who gives his client a certificate of title is not liable to an assignee of the mortgagee for loss by reason of error in the certificate.[69]

§ 144. —— Making Collections

An attorney employed to collect a claim is liable for damage resulting from a failure to use proper care and diligence in making such collection.

An attorney employed to collect a debt is liable for all damages resulting to his client from his failure to exercise proper care or to use due diligence in making such collection,[70] and his good faith in the matter is immaterial.[71] This is true, although the debtor lives in a county where the attorney does not practice.[72] An attorney is liable for negligence not only in failing to collect, but also in failing to guard against contingencies which may injuriously affect his client's debt.[73] He is also liable where, by his negligence, he embarrasses his client in obtaining payment of his claim, although the debtor is solvent and able to pay the debt.[74] An attorney who prosecuted a claim for half of recovery and assigned his interest in judgment to an officer of the corporation sued was held not authorized in ethics or law to collect his own part and abandon all efforts to collect his client's part.[75]

On the other hand, an attorney may not be held liable for the value of claims placed in his hands on a simple failure to account on demand,[76] nor may an attorney be charged with the collection of particular moneys on a mere showing of outstanding receipts without corresponding credits in books where they should have been entered.[77] Moreover, an attorney employed to collect a debt on which an action has been pending may not be liable for negligence on dismissal of the action.[78]

Duty to pursue remedies before and after judgment. An attorney is liable whether a failure to collect is due to his failure to secure judgment on the debt because of his want of care, skill, or diligence,[79] or to his failure to take prompt and proper steps after judgment has been obtained;[80] in the absence of an understanding or agreement with

68. N Y—Fay v McGuire, 47 N Y S 286, 20 App Div 569, affirmed 57 N. E 1109, 162 N Y 644
Pa—Lawall v Groman, 37 A 98, 180 Pa 532, 57 Am S R 662—Miller v Wilson, 24 Pa 114.

69. Dundee Mortg, etc, Co. v. Hughes, (C C Or) 20 F. 39

70. Woods v Mitchell, 6 Ky Op. 513—6 C J. p 700 note 57.

Duty to receive payment

(1) It has been held that the fact that an attorney is authorized to receive payment of claims due to his client and placed in his hands for collection is said to impose no duty on him to do so—Poole v. Gist, 15 S C L. 259

(2) But from the holdings of other cases in this section the correctness of this opinion is questionable, and it seems that an attorney refusing to accept a valid tender of money due on a claim left with him for collection would be liable as for a failure to collect.

Collection of note

Attorneys undertaking collection of a note were bound to exercise reasonable care, skill, and diligence, and put forth all reasonable and proper effort to collect the money, advise their client of the situation and steps necessary to be taken, and utilize the procedure and processes generally known to the profession—Orr v. Waldorf-Astoria Hotel Co., (C C.A Minn) 291 F 343

Realizing highest price in sale of pledge

Attorneys who had control of the sale of a decedent's corporate stock for a mortgagee holding such stock as pledge on a mortgage of the corporation had a duty to secure the highest possible price—Chiswell v. Campbell, 150 A 90, 300 Pa 68

71. Miller v Prescott, 146 N W 1124, 157 Wis 264

72. Riddle v Poorman, 3 Penr. & W (Pa) 224

73. Wain v Beaver, 29 A 114, 493, 161 Pa 605—6 C J p 700 note 60

74. Wilson v Coffin, 2 Cush (Mass) 316.

75. In re Lahm, 167 N Y S 217, 179 App Div 757, affirmed 119 N E 1032, 223 N Y 573

76. Bougher v. Scobey, 23 Ind. 583.

77. Tennison v Quinn, 282 S.W. 20, 170 Ark. 1194

Delinquent taxes

An attorney retained by an improvement district was not chargeable with delinquent collections of taxes on a mere showing of outstanding tax receipts without corresponding credits on tax books—Tennison v Quinn, 282 S.W 20, 170 Ark. 1194.

78. **In absence of knowledge and before agreement to try case**

An attorney employed to collect a debt after action had been three years pending was not liable for negligence, where subsequent dismissal of the action for want of prosecution was had without his knowledge and before he agreed to try the case—Lawson v. Sigfrid, 262 P 1018, 83 Colo 116

79. Miss—Fitch v Scott, 4 Miss 314, 34 Am D. 86
Tex—Fox v Jones, (App.) 14 S W. 1007
6 C J p 701 note 63.

80. Orr v. Waldorf-Astoria Hotel Co, (C C A Minn.) 291 F 343—6 C J p 701 note 64.

No defense that client could collect from another

Where attorneys employed to collect a note and obtain judgment against the maker, which could have been collected in the exercise of reasonable care and skill, neglected their duty, and the note became uncollectable, they cannot defend on the ground that their client could collect the note from an indorser.—Orr v. Waldorf-Astoria Hotel Co, (C.C.A. Minn) 291 F. 343.

Collection from officer levying execution

Where attorneys were employed to collect on a note, brought suit there-

his client, he is bound to sue out all processes necessary to the collection of a demand, unless he requests specific instructions from his client[81] or is influenced by a prudent regard for the interest of the creditor;[82] but, although it is his duty thus to pursue his client's cause through all its stages, he is not bound to institute new collateral suits without special instructions so to do, such as actions against a sheriff or a clerk for any failure of their duty in the issuance or service of process.[83] He should pursue bail, however, and those who may have become bound with defendant, either before or after the judgment, in the progress of the suit.[84] It is not the duty of an attorney who has a claim for collection to file it as a claim against the estate of a debtor afterward declared insolvent.[85]

Where an attorney is given full discretion to pursue any such course to secure the collection of a debt as he may deem best, he is not liable for adopting a course that he may consider proper under the circumstances, although the debt may be thereby lost, unless it is shown that his error of judgment was due to a lack of knowledge of plain and elementary principles which every attorney should know.[86]

Effect of attorney's receipt "for collection" Where an attorney, on receiving a claim for collection, executes his receipt therefor indicating that it has been received "for collection," he binds himself personally to use proper care, skill, and diligence to collect it, and becomes liable for the negligence or default of his agent or representative to whom he turns the claim over for collection.[87]

Client's receipt for part of proceeds. The receipt by a client from his attorney of a part of the proceeds of his claim, when more might have been collected by the employment of ordinary care and skill, is neither an accord and satisfaction nor an estoppel.[88]

§ 145. —— Preparing and Recording Contracts or Conveyances

Attorneys employed to prepare documents of conveyance are under a duty to draw them properly, but may not, in the absence of a special contract, be under a duty to record documents which they have been employed to prepare.

An attorney who is employed to prepare documents of conveyance has the duty to see that they are properly drawn,[89] but, if he is merely asked to draw a contract of sale and to give certain advice, he is not, in the absence of anything wrong with the papers drawn or the advice, liable to his client for failure of the other party to carry out the agreement.[90]

Recording. An attorney employed to prepare deeds, contracts, or other papers which are required to be registered in order to be effective as to third parties is not bound, in the absence of a special contract, to file such papers for recordation, or to see that they are recorded; that is no part of his duty as attorney unless he has especially undertaken it.[91] He may be liable, however, in cases where he has expressly contracted to attend to their being recorded, or where the special circumstances are such as to raise the implication of such a contract.[92]

§ 146. —— Conduct of Litigation

An attorney must exercise reasonable care, skill, and knowledge in the conduct of litigation on behalf of a client and must be properly diligent in the prosecution of the case.

An attorney who undertakes to perform services for a client in the conduct of litigation impliedly contracts to exercise due care, skill, and knowledge of the law in the conduct of his client's business, and his negligence in that regard is a breach of his undertaking.[93] Moreover, an attorney who undertakes to conduct litigation is under a duty to pros-

on, recovered judgment, and procured execution, they were held liable to the judgment creditors for negligence in failing to collect from the officer who executed the judgment resulting in loss to such judgment creditors as clients—Woods v. Mitchell, 6 Ky Op 513.

81. Dearborn v. Dearborn, 15 Mass 316—6 C.J. p 701 note 65.

Omissions and conduct amounting to negligence

Attorneys receiving a note for collection, but failing to fasten a lien on the debtor's interest in certain land until time for redemption from a mortgage foreclosure had expired, or to have a second writ of garnishment issued on alias execution, although knowing that mineral royalties were due the debtor, but instead, without the client's knowledge, redeeming the land themselves under judgment owned by them, and attempting to collect the royalties for themselves, were held to be guilty of a neglect of duty—Orr v. Waldorf-Astoria Hotel Co., (C.C.A.Minn.) 391 F. 343.

82. Pennington v. Yell, 11 Ark. 212, 52 Am.D. 262—6 C.J. p 701 note 66

83. Pennington v. Yell, 11 Ark. 212, 52 Am.D. 262.

84. Pennington v. Yell, supra—6 C.J. p 701 note 68.

85. Moore v. Winston, 66 Ala. 296—Stubbs v. Beene, 87 Ala. 627

86. Ark.—Pennington v. Yell, 11 Ark. 212, 52 Am.D. 262.

Iowa.—Bennett v. Phillips, 10 N.W. 828, 57 Iowa 174

Tex.—Morgan v. Giddings, 1 S.W. 369.

6 C.J. p 701 note 70

87. Cummins v. Heald, 24 Kan. 600, 36 Am.R. 264—6 C.J. p 701 note 71.

88. Goodman v. Walker, 30 Ala. 482, 68 Am.D. 134.

89. Dale v. Dale, 262 P. 339, 87 Cal. App. 359.

90. Harkness v. Caven, 48 A. 1030, 199 Pa. 267.

91. Fenaille v. Coudert, 44 N.J.Law 286—6 C.J. p 702 note 76

92. Miller v. Wilson, 24 Pa. 114—6 C.J. p 702 notes 77, 78.

93. Roehl v. Ralph, (Mo.App.) 84 S.W.(2d) 405—6 C.J. p 702 note 79.

ecute the same with reasonable diligence,[94] and to keep advised of the situation and proceedings had therein.[95] Further, it is his duty to adopt all honorable means of advancing his client's cause,[96] but he is under no obligation to maintain positions which do not accord with his own notions of law and justice simply because they tend to his client's advantage.[97] An attorney is not liable for negligence in the conduct of litigation where, notwithstanding such negligence in the prosecution[98] or defense[99] of a suit, the client has no cause of action or meritorious defense as the case may be. Similarly, where other conduct of an attorney with respect to litigation results in no damage to his client, the attorney is not liable.[1] Of course an attorney employed to conduct litigation cannot be held liable for acts of a third person with respect to matters which are outside the scope of the attorney's duties.[2]

Attorney acting without authority. A recovery may be had against an attorney for negligently and improperly defending an action, even though he appeared therein without authority.[3]

Collateral matters or suits. Although an attorney is not bound to institute collateral suits without special instructions so to do,[4] if he undertakes something outside his strict professional duty and does it so negligently that his client is injured, he is liable.[5]

Fraud is not essential to render an attorney liable to his client for the mismanagement of a suit.[6]

Personal attention. Notwithstanding the right of a person to the personal services of an attorney whom he employs, as discussed previously in this Title (see supra §§ 56, 107), it is not a part of the attorney's duty, in the absence of special agreement, to attend in person to the management of every detail of the case.[7] Where the client en-

Verbal agreement with unreliable practitioner

It was negligence for an attorney employed to conduct litigation to take a verbal agreement from an admittedly unreliable practitioner who repudiated the same when it was sought to be made effective, thereby causing inconvenience and trouble to rectify.—Jeger v. Julius Kessler & Co., 218 Ill.App. 39.

94. In re Babcock, 243 N.Y.S. 489, 230 App.Div. 323

Inadequacy of compensation immaterial

An attorney agreeing to secure a divorce for a specified sum, and taking the client's money therefor, was required to prosecute the action with reasonable diligence, even if the sum agreed on was too small.—In re Babcock, 243 N.Y.S. 489, 230 App.Div. 323

Where contract required immediate suit

An attorney, not suing within a reasonable time, was held to be guilty of a breach of a contract requiring immediate suit and to be liable in damages.—Buchanan v. Huson, 148 S.E. 345, 39 Ga.App. 774.

Delay of more than four years

That an attorney, instructed by his client to push a suit speedily to judgment, delayed it more than four years, it being dismissed for lack of diligent prosecution, establishes negligence making the attorney liable.—Lally v. Kuster, 171 P. 961, 177 Cal. 783.

No liability for delay caused by plaintiff

Where an infant plaintiff failed to sign papers for the appointment of a guardian ad litem, it was held that attorneys were not liable for delay in instituting suit.—Zeitlin v. Morrison, 152 N.Y.S. 1000, 167 App.Div. 220.

95. Vincent v. Kelly, 249 P. 942, 121 Okl. 302

Mode of keeping advised

Counsel are required to examine the records of cases in which they are interested, and, notwithstanding the custom of making inquiries regarding cases of office clerks, an attorney who relies thereon does so at his own risk.—In re Trottier, (D.C.Mass.) 32 F.(2d) 1010

96. Strobhar v. State, 47 So. 4, 55 Fla. 167.—6 C.J. p. 702 note 80.

97. Mich.—Sprague v. Moore, 99 N.W. 377, 136 Mich. 426
N.Y.—Matter of Hardenbrook, 131 N.Y.S. 250, 135 App.Div. 634, affirmed 92 N.E. 1086, 199 N.Y. 539.
6 C.J. p. 702 note 81.

98. Milton v. Hare, 280 P. 511, 130 Or. 590.

99. Frost v. Hanscome, 246 P. 53, 198 Cal. 500

Failure to defend action

(1) A client could not recover damages for failure of an attorney employed to defend an action against the client to set up an unavailing defense.—Roehl v. Ralph, (Mo.App.) 84 S.W.(2d) 405.—Utterback-Gleason Co. v. Standard Accident Ins. Co. of Detroit, Mich., 184 N.Y.S. 862, 193 App.Div. 646, affirming 179 N.Y.S. 836, and affirmed 135 N.E. 913, 233 N.Y. 549.

(2) Accordingly, a client could not recover for an attorney's failure to defend an action against the client on a note where the client had no defense to the note which the court could have submitted to the jury in an action on the note.—Roehl v. Ralph, supra.

(3) At all events, a failure to defend a suit resulting in a judgment against a client does not render the attorney liable for the full amount of the judgment unless he was informed by the client as to the nature of the defense he was expected to make.—Western, etc., Ins. Co. v. Selzer, 23 Ohio Cir.Ct.(N.S.) 104

1. Russell v. Makanai, 31 Hawaii 517

Failure to join unborn child as party

An attorney's failure to join an unborn child in a partition suit on behalf of a client is not the cause of damage to the client, although the child was later adjudged owner of the fee, where the client's title is decreed merely a life estate.—Russell v. Makanai, 31 Hawaii 517

2. In re Hegarty's Estate, 222 P. 793, 47 Nev. 369.

Notice of hearing

An attorney in the absence of knowledge in the matter is not chargeable with the negligence of the clerk of the court in giving an insufficient notice of the hearing of the application for the probate of a will, in view of the plain requirements of Rev.L. § 5866, that the clerk of the court shall give such notice.—In re Hegarty's Estate, 222 P. 793, 47 Nev. 369

3. O'Hara v. Brophy, 24 How.Pr.(N.Y.) 379

4. Pennington v. Yell, 11 Ark. 212, 52 Am.D. 262.—6 C.J. p. 703 note 88

5. Walker v. Goodman, 21 Ala. 647.

6. Breedlove v. Turner, 9 Mart.(La.) 353.—6 C.J. p. 703 note 91.

7. U.S.—Williams v. Reed, (C.C.Me.) 29 F.Cas.No.17,733, 3 Mason 405.
Ky.—Rust v. Larue, 4 Litt. 411, 14 Am.D. 172
6 C.J. p. 703 note 86 [a].

gages additional counsel to take charge of a particular part of the litigation to the exclusion of the original attorney, the latter is not chargeable with negligence in retiring from the case to this extent.[8]

Process, pleadings, and taking necessary steps. An attorney may be liable in damages to his client for failure to procure proper service of process.[9] An attorney must, likewise, prepare and file all pleadings necessary in the proper conduct of a cause and take such other steps as may be required in the progress of the case; if, by his failure to do so or by his delay, his client's rights are prejudiced, he must reimburse the latter to the extent of the injury suffered in consequence.[10] He does not, however, guarantee the sufficiency of every pleading prepared by him or under his direction; but he is responsible to his client only for those mistakes as a pleader which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners of ordinary skill and capacity,[11] nor is he liable for the improper conduct of a cause due to pleadings filed before he was retained in the case or had any connection with it.[12]

Presenting case to court. An attorney who undertakes to represent his client is under a duty to be present in court for that purpose when the client's case is reached[13] and not to withdraw from the case without adequate cause.[14] Moreover, an attorney who undertakes to represent a client in conducting litigation is under a duty to present the claims of the client to the court unless the attorney knows they are false,[15] and, when representing a defendant, an attorney has the duty to insist that his client be proceeded against by the rules of legal procedure.[16] Further it is the duty of an attorney to his client to see that only competent evidence is introduced against him,[17] but an attorney is also required to see that no evidence is introduced on behalf of his own client for an improper purpose.[18] Of course an attorney who undertakes the conduct of litigation is required to see that the interests of his client are protected as respects findings,[19] judgments and orders,[20] and appeal.[21]

8. Phillips v. Edsall, 20 N E 801, 127 Ill. 535—6 C J p 703 note 87

9. Wilson v. Carroll, 250 P. 555, 80 Colo 234

Affidavit of publication

An attorney for plaintiff in a foreclosure suit was held liable for negligence in filing an affidavit of publication, without showing that affiant was competent to state statutory facts—Wilson v. Carroll, 250 P. 555, 80 Colo. 234.

Ignorance, incompetency, or inattention

Whether the attorney's neglect in this respect is due to his ignorance, incompetency, or inattention is immaterial to the question of his liability—Wilson v. Carroll, 250 P 555, 80 Colo 234

10. Roehl v. Ralph, (Mo App) 84 S.W (2d) 405—6 C J. p 702 note 82

11. Rapuzzi v. Stetson, 145 N Y S 455, 160 App Div. 150—6 C J. p 703 note 83

12. Thompson v. Dickinson, 84 N E 262, 159 Mass. 210—6 C J. p 703 note 84 [a].

13. **Court not obliged to waive presence**

"He is expected to be present when he undertakes to represent his client in term, and if he is not the court is under no obligation to waive his presence."—Waddell v. Aycock, 142 S E 10, 195 N C 268

When important matter disposed of

An attorney owes a duty to appear in court for his client when any important matter concerning the case is being disposed of—Atlas Assur Co of London v Fairchild, 43 P (2d) 482, 171 Okl 609

14. Rohr v Chicago, N S. & M R R, 190 N W 827, 179 Wis 106

Improper withdrawal

Plaintiff's attorney's withdrawal from case because of dissatisfaction with an adverse ruling of court was held to be improper, as his duty to his client and to the court required him to proceed with the case and to obtain a review of such ruling by an appellate court—Rohr v Chicago, N S & M. R. R., 190 N.W. 827, 179 Wis 106.

15. Shapiro v Frankel, 276 N Y.S 530, 243 App Div 618

16. Dunn v. Bradley, 7 Ky Op. 282

17. McMahan v City of Abilene, (Tex Civ App) 8 S W (2d) 554

18. Watson v. Trinz, 274 Ill App 379

After advising client evidence not to be used

Attorneys are not liable to clients for failure to make use of certain evidence, where, after a study of the law on the subject, they advise clients before the action is tried that they will not use such evidence—Utterback-Gleason Co v Standard Accident Ins Co of Detroit, Mich, 184 N Y S 862, 193 App Div. 646, affirming 179 N.Y S 836, and affirmed 135 N E 913, 233 N Y 549

19. Armstrong v Adams, 283 P 871, 102 Cal.App 677

Including amount of client's loss

Failure of an attorney to include in findings the amount of loss sustained by his client was held to be actionable negligence—Armstrong v Adams, 283 P 871, 102 Cal App 677

Liability notwithstanding adoption of findings

An attorney could not escape liability to his client for negligence in drawing up a finding on the ground that the findings were adopted by the judge—Armstrong v. Adams, 283 P. 871, 102 Cal App 677.

20. Fla.—Atlantic Coast Line R Co v. Holliday, 74 So. 479, 73 Fla. 269.

Tenn.—Whittaker v. Tenn. Central Ry. Co, 3 Tenn App. 185

Entry of judgment

It is duty of an attorney at law to take all necessary steps for the due entry and enrollment of a judgment to which his client is entitled, and the neglect of such duty may render the attorney liable for any loss to the client—Atlantic Coast Line R Co v. Holliday, 74 So. 479, 73 Fla. 269

21. Okl.—In re Opinion of Judges, 231 P. 1041, 26 Okl Cr. 41.

Wis.—Rohr v Chicago N S. & M. R R, 190 N W 827, 179 Wis 106

Appeal from death sentence

The right of appeal is a constitutional right, and counsel representing a defendant sentenced to death fails to fulfill his duty as an attorney if he either neglects or refuses to take an appeal from such a judgment—In re Opinion of the Judges, 221 P. 1041, 26 Okl Cr. 41.

§ 147. Unauthorized Acts in General

An attorney is liable in damages to his client for injuries which result from the attorney's unauthorized acts.

An attorney, who is without authority to take certain steps in regard to his client's matters (see supra §§ 79–107), may be liable for injury suffered by the client as a result of the attorney's taking such steps.[22] Thus, where an attorney, without authority, enters an appearance for a party,[23] dismisses a suit,[24] compromises his client's debt,[25] or withdraws[26] or enters satisfaction of a judgment without full payment thereof,[27] he is liable to his client for the damage suffered. So, where an attorney, without authority, appears and confesses judgment, the remedy is against him.[28] Likewise, an attorney who consents to vacate a regular judgment without the knowledge of his client acts at the peril of being held responsible for any loss which may be shown to have necessarily resulted from that act.[29]

Damage must be shown. In these, as in other cases, a client must show that he has suffered actual damage in consequence of the unauthorized acts of his attorney.[30]

§ 148. —— Violation of Instructions

An attorney is liable to his client for injury resulting from the attorney's violation of his client's instructions.

In accordance with rules governing the liability of agents toward their principals for violations of instructions (see Agency §§ 147–154), an attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matters of detail connected with the conduct of the suit, and he is liable for all losses resulting from his failure to follow such instructions with reasonable promptness and care.[31] Thus, if an attorney is instructed by his client to bring suit on a note placed in his hands, it is not discretionary with him to bring suit or not to bring it; but he will be liable for any loss due to his neglect, although he acted in good faith and did what he honestly supposed to be for the interest of his client.[32] Similarly, where a client specifically instructs his attorney to procure a writ of garnishment his failure to do so may render him liable for any loss resulting therefrom to the client.[33] Conversely, where an attorney is instructed to pursue a particular course of action, and he does so, he cannot be held liable for negligence in not pursuing another course which might have proved more beneficial to his client.[34] At all events, where acts of an attorney in violation of his client's instruction are ratified by the client, he cannot recover for loss resulting from such violation.[35]

22. Chatfield v. Simonson, 92 N.Y. 209—6 C.J. p. 703 notes 93, 94

23. Reynolds v. Fleming, 1 P. 61, 30 Kan. 106, 46 Am.R. 86—6 C.J. p. 703 note 95.

24. Coopwood v. Baldwin, 25 Miss. 129

25. La.—Woodrow v. Hennen, 6 Mart. 156
Miss.—Fitch v. Scott, 4 Miss. 314, 34 Am.D. 86—Lombard v. Whiting, 1 Miss. 229.

26. Howard v. McCarson, 110 So. 396, 215 Ala. 251

Unjustifiably abandoning conduct of litigation

Attorney unjustifiably abandoning conduct of litigation without client's consent is liable for damages.—Howard v. McCarson, 110 So. 396, 215 Ala. 251.

Withdrawal on request of client's agent

Attorney's liability for withdrawal from the case without the client's consent, on the request of the client's agent employing the attorney, depends on the propriety of such withdrawal and the agent's authority to dismiss the attorney.—Howard v. McCarson, 110 So. 396, 215 Ala. 251.

27. People v. Cole, 84 Ill. 327.

28. N.Y.—Denton v. Noyes, 6 Johns. 296, 5 Am.D. 237
Pa.—Cyphert v. McClune, 22 Pa. 195
Tenn.—Jones v. Williamson, 5 Coldw. 371.

29. Clussman v. Merkel, 16 N.Y.Super. 402.

30. Vooth v. McEachen, 73 N.E. 488, 181 N.Y. 28, 2 Ann.Cas. 601—6 C.J. p. 704 note 2

31. Cal.—Lally v. Kuster, 171 P. 961, 177 Cal. 783
Md.—Caltrider v. Weant, 128 A. 72, 147 Md. 338.
S.C.—McCoy v. Hydrick, 141 S.E. 174, 143 S.C. 135, 56 A.L.R. 953.
6 C.J. p. 704 note 3

Presumed to follow instructions

It is a fair presumption that an attorney acts according to the instructions of his client, unless in a case of such negligence that a violation may be inferred.—Holmes v. Peck, 1 R.I. 242.

32. Cox v. Livingston, 2 Watts & S. (Pa.) 103, 37 Am.D. 486.

33. W. L. Douglas Shoe Co. v. Rollwage, 63 S.W.(2d) 841, 187 Ark. 1084.

Attorney's erroneous belief immaterial

An attorney's erroneous belief that the law prohibited garnishment before judgment did not excuse his failure to follow a client's positive instructions to institute suit and to obtain a writ of garnishment.—W. L. Douglas Shoe Co. v. Rollwage, 63 S.W.(2d) 841, 187 Ark. 1084.

Debtor's promise to pay immaterial

An attorney, failing to follow a client's instructions to bring suit and to obtain a writ of garnishment for fire insurance moneys due debtor before judgment, became liable for resulting loss to a client, although the debtor promised to pay the claim on receipt of insurance moneys.—W. L. Douglas Shoe Co. v. Rollwage, 63 S.W.(2d) 841, 187 Ark. 1084.

34. Lord v. Hamilton, 56 P. 525, 34 Or. 443—6 C.J. p. 704 note 5.

35. **Bidding on foreclosure sale**

A mortgagee, who instructed his attorney to bid, but not to exceed a certain sum, on the mortgaged property at the foreclosure sale, and, when the attorney bid in the property for a greater sum, accepted the sheriff's deed and paid the purchase price by permitting the amount of the bid to be credited as a satisfaction pro tanto of the foreclosure decree, thereby ratified his agent's act, and he cannot recover from the latter the difference between the authorized bid and the amount at which

§ 149. Acts of Associates or Substitutes

An attorney may be liable to a client for loss resulting from negligence or wrongdoing on the part of an associate or substitute attorney.

Since, as previously observed in section 107, an attorney has, in general, no authority to employ another attorney to attend to the matters in which the first attorney has been retained, it follows that, if he does intrust to another the performance or prosecution of matters intrusted to him, he becomes liable to his client for any negligence or wrongdoing on the part of the substitute employed by him.[36] However, where the client is informed of the necessity and reason for his attorney's retaining another lawyer for certain purposes and the client approves of such employment, he cannot recover from the original attorney for the negligence of such associate.[37] At all events, an attorney entering employment as associate counsel with another attorney at the request of a client is not disqualified from continuing to represent such client, notwithstanding the other attorney has disqualified himself from continuing to represent the client.[38]

§ 150. Acts of Partners and Clerks

An attorney may be liable to a client for the acts of the attorney's partners and for the acts of the attorney's clerks.

As the employment of a member of a firm of attorneys is that of the entire firm, an attorney is liable to a client for the negligence, lack of skill, or wrongful acts of a partner, even though he himself may have had no participation in, or knowledge of, the transaction.[39] Such acts, however, in order to make the attorney liable, must be done while the relation of attorney and client subsists between the firm and the client.[40]

Accordingly, law partners are not liable to a client of the firm, for the acts of one of the partners, after dissolution of the firm, which are not connected with the partnership business.[41] On the other hand, where a claim is placed in the hands of attorneys who are partners, and before the money has been collected the partnership is dissolved, and afterward one of them receives the money and neglects to pay it over to plaintiff, both attorneys are liable as copartners.[42]

Clerks. An attorney who has a clerk or quasi associate in his office is, as respects a client, bound by the clerk's acts and declarations made within the apparent scope of his authority.[43] During an attorney's absence his clerk represents him, as to all ordinary business of the office, so as to bind the attorney.[44] However, an attorney's clerk, no matter how extensive his general powers may be, cannot, without the consent of his principal, settle[45] or discontinue[46] an action, or waive a notice which he has authority to receive;[47] nor can such a clerk bind the attorney's client by a discharge, without satisfaction, of a debt due such client.[48] Of course, an act beyond the authority of a clerk may be ratified and adopted by the attorney.[49]

§ 151. Acting for Party Adversely Interested

An attorney representing adverse interests may be liable to one of the parties for loss due to the attorney's failure to disclose a material fact.

In accordance with the rule that an attorney is by virtue of his office disqualified from representing adverse interests in the sense that they are in con-

the property was sold, although he was thereby barred from recovering from the mortgagor the deficiency for which the latter would otherwise have been liable—Sproul v. Lloyd, 115 A. 667, 96 N.J.Law 314.

36. Smallwood v. Norton, 20 Me. 83, 37 Am.D. 39—6 C.J. p. 704 note 7.

37. **Negligence of foreign attorney**
A New York attorney, who with due care retained an attorney in another state to conduct procedural matters in such state, was not liable for the foreign attorney's negligence, where the client was informed of the necessity and reason for retainer and approved the choice—Wildermann v. Wachtell, 267 N.Y.S. 840, 149 Misc. 623, affirmed 271 N.Y.S. 954, 241 App.Div. 812.

38. Bryant v. Lewis, (Tex.Civ.App.) 27 S.W.(2d) 604.

39. Model Building & Loan Ass'n of Mott Haven v. Reeves, 194 N.Y.S. 383, 201 App.Div. 320, reversing 186 N.Y.S. 759, 114 Misc. 137—Lichtenheld v. Bersen, 285 N.Y.S. 585—6 C.J. p. 704 note 8.

Money collected for client
A member of a law partnership is liable for money another partner has collected for a client of the firm.—Whitaker v. Kesler, 3 Ky.Op. 236.

On guilty attorney's withdrawal from firm
It was the legal duty of a firm of attorneys employed by testamentary trustees to disclose misappropriations by an attorney who withdrew from the firm and continued to handle the estate's business, and failure to do so gave the trustees an action for damages—Camp v. Reeves, 205 N.Y.S. 259, 209 App.Div. 488, affirmed 148 N.E. 753, 240 N.Y. 672, reargument denied 150 N.E. 532, 241 N.Y. 508.

40. Ayrault v. Chamberlin, 26 Barb. (N.Y.) 83.

41. Holton v. American Pastry Products Corporation, 174 N.E. 663, 274 Mass. 268.

42. Smyth v. Harvie, 31 Ill. 62, 83 Am.D. 202—6 C.J. p. 705 note 11.

43. McGuinness v. Manhattan R. Co., 74 N.Y.S. 1054, 69 App.Div. 606—6 C.J. p. 629 note 35, p. 705 note 12.

44. Mahoney v. Middlesex County, 11 N.E. 689, 144 Mass. 459—6 C.J. p. 639 note 35.

45. Alterman v. Weil, 142 N.Y.S. 465.

46. Irvine v. Spring, 30 N.Y.Super. 293—6 C.J. p. 629 note 37.

47. Page v. San Francisco Super. Ct., 54 P. 730, 122 Cal. 209.

48. Carter v. Talcott, 10 Vt. 471.

49. Johnson v. Sprague, 66 N.E. 422, 183 Mass. 102.

flict (see supra §§ 47, 48), an attorney who, with the consent of the interested parties, represents such adverse interests may be liable for loss sustained by one of such parties, due to the attorney's failure to disclose a material fact.[50]

§ 152. Actions for Money Collected and for Accounting

The liability of an attorney to pay over to his client money collected for him and to account for a client's money (see supra §§ 133–137), may be enforced by an appropriate action brought for that purpose (see infra § 154).

§ 153. —— Defenses

In a client's action against an attorney for money collected and for an accounting, the attorney is entitled to certain defenses as noted hereunder.

Where money is applied by an attorney, in good faith and in accordance with an agreement entered into between his clients, this act is a defense in an action against the attorney, although there was a failure of consideration among the clients.[51] In an action against an attorney for money collected, it is a defense that, before he had an opportunity to account, the money was garnished by a creditor of the client,[52] but a mere notice to the attorney to hold the money until the respective rights can be tested will not afford him any excuse, if other parties claim the fund, nothing but an injunction will justify the attorney in withholding payment.[53] A summary proceeding by a client to compel an attorney to pay over money collected is no bar to a recovery in an ordinary action against the attorney for money collected.[54]

Estoppel. An attorney who has collected money for his client is estopped to deny that he is an attorney,[55] that plaintiff is a corporation when it sues in the same name used by him in obtaining the judgment,[56] or to claim that the client has no title to the moneys collected,[57] and he may be estopped by his own laches from setting up an equitable defense.[58]

Limitations and laches. An attorney is not debarred from the provisions of the statute of limitations, in an action against him for money collected, because of the relationship existing between him and his client,[59] but the operation of the statute is prevented by payment by the attorney of either principal or interest.[60]

The defense of laches is not available to an attorney when sued by his client for an accounting, unless he is guilty of an unreasonable delay in bringing suit.[61]

Set-off and counterclaim. An attorney, when sued by his client for money collected for the latter, may set up by way of counterclaim a demand for services, and he is entitled to set off other claims which he may have against his client,[62]

50. Johnston v. Andrade, (Tex.Civ.App.) 54 S.W.(2d) 1029

Duty to disclose settlement

An attorney representing the owners of a contract to buy an oil interest owed the owner selling his interest to another owner the duty to fully disclose the situation respecting the pending settlement of litigation affecting the value of such oil interest.—Johnston v. Andrade, (Tex.Civ.App.) 54 S.W.(2d) 1029

51. Guthrie's App., 92 Pa. 269—Strohecker v. Hoffman, 19 Pa. 223

52. Ewing v. Freeman, 30 S.E. 637, 103 Ga. 811.

53. Dunn v. Vannerson, 8 Miss. 579

54. Minn.—Burgraf v. Byrnes, 103 N.W. 315, 94 Minn. 413.
Miss.—Coopwood v. Baldwin, 25 Miss. 129

55. McFarland v. Crary, 8 Cow.(N.Y.) 253, affirmed 6 Wend. 297.

56. McMath v. Com., 12 Ky.L. 251

57. Mich.—Case v. Ranney, 140 N.W. 943, 174 Mich. 673
N.Y.—Fogerty v. Jordan, 25 N.Y. Super. 319
6 C.J. p. 707 note 55.

58. Cannon v. Sanford, 20 Mo.App. 590.

59. Cook v. Rivers, 21 Miss. 328, 53 Am.D. 88—6 C.J. p. 707 note 48.

60. Torrence v. Strong, 4 Or. 39.

61. **No laches**

Where in 1917 an attorney took a client's assignment of a realty mortgage absolute in form and gave a separate writing to reassign on the discharge of his liability on an accommodation indorsement, and acquired, for a nominal consideration, in 1918, through his brother, the mortgagor's equity at a bankruptcy sale and, in 1919, her realty, in partial satisfaction of a mortgage debt, before the accommodation note matured and without foreclosing the rights of his client, who was without other representation during the foreclosure of the realty mortgage, and where the attorney, without notice, substituted his own note for his client's and sold the realty at a profit in 1926, the client, who was without knowledge of the adverse claim until the attorney refused to account for the proceeds of the sale, was not barred by laches from the right to an accounting.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

62. U.S.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.
Tex.—Henry v. Boedker, (Civ.App.) 141 S.W. 811.
6 C.J. p. 707 note 51.

Counterclaim on note properly allowed

Where a client sued an attorney for an accounting, a counterclaim by the attorney on a note given by the client for services and disbursements in another matter was held to be proper.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

Interest

In a client's suit against an attorney for an accounting, where the attorney filed a counterclaim for fees and disbursements, the attorney was entitled to interest on his counterclaims from the time they were due.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

Counterclaim held excessive

Where a client sued his attorney for an accounting, an allowance of

although there exists authority to the effect that an attorney's refusal to pay over money collected or render an account deprives him of any right to counterclaim for compensation for his services.[63] Where collection is made after a client's death, it has been held in an administrator's suit to recover the money that an attorney cannot set off the sum due for his services before the client's death, but that he may do so for the sum due for those rendered afterward.[64]

§ 154. —— Proceedings and Relief

a. In general
b. Conditions precedent
c. Time to sue
d. Persons entitled to sue; parties
e. Pleading
f. Evidence
g. Trial
h. Amount of recovery

a. In General

Actions at law or in equity may be available to a client whose attorney withholds money collected or refuses to account therefor.

In addition to the summary remedies which a client may have to compel an attorney to pay over money collected (see infra §§ 158, 159), where an attorney wrongfully withholds money which he has collected, his client may bring an action at law against him for the amount so withheld.[65] Moreover, an attorney may be compelled to account to a client by a suit in equity.[66] Indeed, where moneys come into the hands of attorneys in the course of their business, and they have a lien on said moneys as security for their services and disbursements, an action for conversion will not lie against them until after there has been an accounting.[67] Further, where an attorney collects money belonging jointly to several persons, one may not sue alone and recover his share, an accounting and adjustment to determine plaintiff's share being necessary.[68] However, except in those cases where a client is entitled to compel an accounting (see supra §§ 133–137), a bill in equity will not lie, unless for some particular reason the remedy at law is not adequate and its appears that the power of a court of equity is necessary to complainant's remedy.[69]

eight hundred thirty-eight dollars and sixty-seven cents on the attorney's obviously padded counterclaim for miscellaneous services was held to be excessive for all over two hundred seventy-two dollars and sixty-seven cents—Davitt v O'Connor, (C C A N Y) 73 F (2d) 43, certiorari denied O'Connor v Davitt, 55 S Ct. 217, 293 U S 621, 79 L Ed 709.

Items not allowable

(1) Where a client sued his attorney for an accounting, an allowance on the attorney's counterclaim of three hundred eighty dollars, or any other sum, for the settlement of suit, where the attorney reimbursed himself for expenses and retained one hundred nineteen dollars and ninety-one cents for services, which according to the ledger balanced the account, was error Davitt v. O'Connor, (C C.A N Y) 73 F.(2d) 43, certiorari denied O'Connor v Davitt, 55 S.Ct 217, 293 U S 621, 79 L Ed 709.

(2) Where a client sued his attorney for an accounting and the attorney counterclaimed for settling an earlier suit for fifty dollars, which he retained, but for which he never presented a bill and had no record of any additional charge, an allowance of two hundred dollars or any other sum for such services was error—Davitt v O'Connor, (C C.A N Y) 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct 217, 293 U S. 621, 79 L Ed 709

63. Bredin v. Kingland, 4 Watts (Pa.) 420.

64. Lewis v. Kinealy, 2 Mo App 33

65. Palmer v. Thomson, 38 S C L 607—6 C J. p 705 note 17

Where the professional relation involves a series of acts and duties, an attorney is not suable until the relation has been dissolved—Glenn v. Cuttle, 2 Grant (Pa.) 273.

Recovery of percentage on supersedeas bond

Where an attorney agreed to collect claims on conditional fee and agreed with assignees of claims to collect and receive a percentage of their profits, and appeal in the original case by defendants was unsuccessful, assignees of claims were held entitled to a percentage of damages on supersedeas bond—Snyder v Howard's Adm'x, 65 S.W (2d) 477, 251 Ky. 592.

66. Delasca v. Grimes, 174 N W. 523, 144 Minn 67—6 C J. p 684 note 4 Accounting generally see supra § 133

In action to set aside deed and for accounting

On setting aside a deed obtained by an attorney from his client, in an action brought by him to have such deed set aside and for an accounting, there should be an accounting, in which the client should be credited with the rents and profits and charged with taxes, interest, and other proper expenditures made by the grantees—Delasca v. Grimes, 174 N W. 523, 144 Minn. 67.

Purchase of client's land as basis

Attorney's purchase from a client of the land in litigation constitutes sufficient ground for equitable jurisdiction on the client's bill against the attorney for an accounting—Morrow v. Compton, 215 Ill App 524

67. Rose v Whiteman, 101 N Y S. 1024, 52 Misc 210

68. Jackson v Moore, 76 N Y.S 164, 72 App Div 217

69. Crothers v Lee, 29 Ala 337—6 C J p 705 note 19

Attorney and client relation insufficient

While the relation of attorney and client is fiduciary, yet, if there is no complexity or difficulty in an account between such parties the fact alone of the relationship does not present a case for equity jurisdiction—Smith v. Lineville Nat Bank, 106 So 54, 21 Ala App 65, certiorari denied Ex parte Smith, 106 So. 55, 213 Ala 699

Debtor and creditor relation remediable at law

When a member of a law firm, acting as counsel and director for a loan association, received checks drawn by the association and also checks from debtors to the association, failure to pay over such funds results in the relation of debtor and creditor between the counsel and the association, remediable at law, but not in equity—Model Building & Loan Ass'n of Mott Haven v. Reeves, 140 N E 715, 236 N Y 331, reversing 194 N.Y S 383, 201 App Div. 329, which reversed 186 N Y S 759, 114 Misc. 137, followed in Mears v. Cooper, 264 N Y S 899.

Penal proceedings. Under applicable statutory provisions, where an attorney retains money which he has collected and should pay over to his client, not only may a suit be brought as for other debts, but also the attorney may be subject to proceedings to compel him to pay as a forfeiture five times the interest of the money which he has unreasonably neglected to pay over.[70] Under such statutes, he may also be subject to arrest on execution and forbidden to take the oath for the relief of poor debtors.[71]

Form of action at law. With reference to the form of the action at law it has been held that assumpsit,[72] case,[73] and account render[74] will lie against an attorney who fails to pay over money collected by him. On the other hand, it has been held that book account was not the proper form of action for a client to compel an attorney to pay over the difference between a judgment recovered on behalf of the client and the sum actually received by him from the attorney.[75]

b. Conditions Precedent

In order to maintain an action to compel an attorney to pay over money collected or withheld, it may be necessary that a demand be made by the client and a refusal be given by the attorney. Under some circumstances the giving of a release by a client may be a condition precedent. However, a bond may not be required as a condition precedent; nor is restoration or offer to restore benefits required, where such benefits came from one other than the attorney.

In order for a client to maintain any proceeding against his attorney to compel the payment of money collected by the latter and not paid over, the general rule is that there must be a demand by the client and a refusal by the attorney,[76] unless demand has been waived or there are circumstances which excuse it,[77] as where the attorney has collected money and has failed to notify his client of that fact,[78] or where the act of receiving the money was wrongful.[79] Moreover, a demand for money may be excused where it is retained under a void contract,[80] or where it has been collected a long time and its retention is unexplained;[81] where a trust relation exists between the parties;[82] where the attorney has agreed to pay over moneys when collected and has failed to do so;[83] or where he denies his liability[84] and converts the money to his own use.[85] On the other hand, there exists authority to the effect that a demand and refusal does not in any event constitute a condition precedent to an action to compel an attorney to pay over money collected,[86] or that the commencement of the action itself is a sufficient demand.[87]

Bond A bond, required by statute to be given in cases where it is sought to obtain the release of property from an attorney's lien, is not required as a condition precedent to cases whenever it is sought merely to recover moneys collected by an attorney and withheld from his client.[88]

Release Where an administrator turns over the balance in his hands to the attorney for the distributees, with directions to hold it in trust for them, but not to pay it to them until they have duly and properly signed a release, they cannot

70. Griffiths v. Powers, 103 N.E. 468, 216 Mass 169—Goss Printing Press Co v. Todd, 88 N.E. 780, 202 Mass 185.

71. Goss Printing Press Co v Todd, supra.

72. Cameron v. Clarke, 11 Ala. 259—6 C.J. p 705 note 20.

Profit

Assumpsit may lie against an attorney to recover a profit which he should have paid over to his client —Mecnen v. Negley, 93 Pa.Super 591

Liability for improper compromise of client's claims

An attorney may be held liable in an action of assumpsit for money had and received, where he accepts in payment of a client's claim debts due by himself to others.—Houx v. Russell, 10 Mo 246

To maintain assumpsit against an attorney for money had and received, it must appear that the attorney had received money due to plaintiff, or something which he had received as money and instead of it, or which he had actually or presumptively converted into money before suit was brought—Peay v Ringo, 22 Ark 68—6 C.J. p 694 note 8

73. Tinkham v Heyworth, 31 Ill 519—6 C.J. p 705 note 21.

Lease may lie where an attorney settles a suit by his client and receives in payment of his client's claim defendant's claims on third parties—Coopwood v. Baldwin, 25 Miss 129.

74. Bredin v. Kingland, 4 Watts (Pa.) 420

75. Smalley v Soragen, 30 Vt. 2—6 C.J. p 705 note 22 [a]

76. Wood v. Claiborne, 102 S.W. 219, 82 Ark. 514, 521, 11 L.R.A.(N.S.) 913, 18 Am.St.R. 89—6 C.J. p 706 note 28.

77. Black v. Hersch, 18 Ind 342, 81 Am.D. 362—6 C.J. p 706 note 29

78. Ark.—Jett v Hempstead, 25 Ark 462—Denton v. Embury, 10 Ark 228.

Pa.—Glenn v. Cuttle, 2 Grant 272.

79. Mowery v Webb, 6 Ky.L. 360—6 C.J. p 706 note 31.

80. Jordan v Westerman, 28 N.W. 826, 62 Mich 170, 4 Am.St.R. 836—6 C.J. p 706 note 32.

81. Chapman v. Burt, 77 Ill. 337.

82. Metz v. Abney, 42 S.E. 103, 64 S.C. 254

83. Mardis v. Shackleford, 4 Ala. 493

84. Cal.—Cox v. Delmas, 33 P. 836, 99 Cal 104

N.Y.—Walradt v. Maynard, 3 Barb. 584

Wash.—Burrows v McCalley, 49 P. 508, 17 Wash 269.

85. Ga.—Nisbet v Lawson, 1 Ga. 275

Ill.—Chapman v. Burt, 77 Ill. 337

86. Ott v. Hood, 139 N.W. 762, 152 Wis. 97, 99, 44 L.R.A.(N.S.) 524, Ann.Cas.1914C 636—6 C.J. p 706 note 39

87. Hollenbeck v. Stanberry, 33 Iowa 325

88. Armitage v Sullivan, 39 N.W. 399, 69 Iowa 426.

maintain an action against the attorney to recover their respective shares without first tendering the release, as a compliance with the condition precedent which the administrator has placed on its payment [89]

Restoration of benefits. A rule requiring that an aggrieved party restore, or offer to restore, benefits which he has received as a condition precedent to bringing suit does not apply to an action by a client against an attorney to recover money from an attorney, where the benefits received by the client came from the adverse party rather than from the attorney.[90]

c. Time to Sue

Actions to compel an attorney to pay over money collected and for an accounting must be brought within the proper time.

Where by the terms of a contract existing between a client and his attorney he is not required to repay certain money until a time specified in such contract, an action brought to compel him to account prior to such time is premature.[91] In order to invoke the aid of equity, however, a client who seeks to compel an attorney to account for money claimed by the client must proceed with reasonable promptness.[92]

d. Persons Entitled to Sue; Parties

The assignee of a client may be entitled to sue for money collected; but it may be necessary to sue in the name of the real party in interest.

The assignee of a client may be entitled to bring an action to recover money which has been collected by an attorney and not paid over [93]

Where the complaint shows a breach of contract on the part of an attorney to pay over money collected by him, as such, the liability is on the contract, and the suit must be in the name of the real party in interest [94] On the other hand, the attorney who is sought to be compelled to pay over money collected is the proper party defendant.[95]

e. Pleading

General rules govern pleading in actions against attorneys for money collected and for an accounting.

In accordance with rules governing pleading in civil actions generally, see Pleading §§ 69–86 [49 C.J. p 132 note 12–p 154 note 70], the pleading of a client, who sues to recover from an attorney money collected and withheld by him, must state facts sufficient to constitute a cause of action.[96] Moreover, where, in accordance with rules discussed in a previous paragraph of this section, a demand and refusal is a condition precedent to an

89. Matter of Smyley, 19 N.Y.S 266

90. Mann v Showalter, 88 S.E 968, 145 Ga. 268

91. Jerome v. Carr, 193 N.Y.S 564

Money payable on termination of controversy

Where a client sought to recover the balance due on an account advanced to his attorney for prosecuting a claim which was still pending, under an agreement whereby the attorney was to receive one-fourth of the recovery for his services and disbursements, and the amount advanced was to be repaid on termination of the controversy, the action was prematurely brought.—Jerome v Carr, 193 N.Y.S 564

92. **Paying fees and acquiescing in settlement**

A client, voluntarily paying excessive attorney's fees and acquiescing in a settlement for more than two years, cannot invoke the aid of equity.—Ingram v Wesley, (C.C.A.Tex.) 37 F.(2d) 201, certiorari denied 51 S. Ct. 26, 282 U.S. 843, 75 L.Ed. 747

93. Young v. Miller, (Mo.App.) 182 S.W. 822

Assignee consenting to settlement

An assignee of a contestant of a will consenting to a settlement by defendant, the attorney for the other contestant, and to defendant's agreement to pay him his share, was held to be entitled to recover from defendant. Young v. Miller, (Mo.App.) 182 S.W. 822.

94. Allen v. Alston, 41 So. 159, 147 Ala. 609.—6 C.J. p 707 note 53

Original claimants not necessary parties

Where an attorney agreed to collect claims on a conditional fee, and agreed with the assignees of the claims to collect them and to receive a percentage of the profits, original claimants were not necessary parties to the assignees' action against the attorney for their part of the money collected.—Snyder v. Howard's Adm'x, 65 S.W.(2d) 477, 251 Ky. 592.

95. Young v. Miller, (Mo.App.) 182 S.W. 822.

In suit by assignee

In a suit by the assignee of a contestant of a will to recover his share of the proceeds of a settlement in the hands of an attorney and of another contestant, the attorney was held to be a proper party defendant.—Young v. Miller, (Mo.App.) 182 S.W. 822

Bringing in new parties

In a proceeding against an attorney for funds withheld from a client, orders denying the attorney's motion to bring in a former partner and another as codefendants were held to be proper or not erroneous.—Hazlett v Sebring, 275 N.Y.S 260, 242 App.Div. 892.

96. Hill v. Pinder, 133 A. 134, 150 Md. 397.—6 C.J. p 707 note 60 [a].

Bill, complaint, or petition sufficient or not demurrable

(1) A bill against an attorney was held to state a cause of suit for both a discovery and an accounting for the value of land conveyed to defendant in excess of the quantity agreed and profits from the sale thereof to an innocent purchaser for value.—Hill v. Pinder, 133 A. 134, 150 Md. 397.

(2) A complaint against an attorney to recover a balance of money deposited by a client, from which certain expenditures were to be made, was held to state a cause of action.—Grant v Hallam, 276 P. 687, 139 Or. 321, certiorari denied Hallam v Grant, 50 S.Ct. 32, 280 U.S. 522, 74 L.Ed. 591

(3) Petition in a client's action to recover the amount received by her attorneys on the settlement of another suit, less the percentage which they agreed to accept in urging her to make such settlement, was held not demurrable.—Hill & Adams v. West, 117 S.E. 774, 30 Ga.App. 286.

(4) An amended petition, alleging attorney retained a sum in excess of a reasonable fee, was held to state a cause of action in contract.—Meyer v Glick, 295 S.W. 844, 221 Mo.App. 1046.

action against an attorney for money collected, plaintiff must aver such demand and refusal.[97] The complaint however, need not aver that defendant had been retained for reward;[98] that defendant promised to account for the moneys which he collected,[99] or that the latter fraudulently embezzled, misapplied, or converted the money,[1] neither is it necessary for him to state the particulars of the account or to furnish a bill of particulars, unless under a special order.[2]

Issues, proof, and variance. Rules relating to issues, proof, and variance in civil actions generally, see Pleading §§ 512-546 [49 C.J. p 780 note 50-p 818 note 81] are applicable to questions of issues, proof, and variance in actions by clients against attorneys for money collected.[3]

f. Evidence

General rules govern questions relating to presumptions, burden of proof, the admissibility of evidence, and the weight and sufficiency of evidence in actions against attorneys for money collected or for an accounting.

In actions for money withheld from his client by an attorney or for accountings, general rules of evidence apply.

Presumptions and burden of proof. Where it is shown by evidence that the attorney has collected a judgment owned by plaintiff, the presumption is that he owned all of the money.[4] Moreover, in the absence of proof, the presumption is that an attorney gave notice of the collection of the money, and that his client made demand therefor within a reasonable time.[5] Otherwise, the burden of proof is on plaintiff to establish, on all the evidence, his right to recover,[6] but where the relationship and the receipt of the funds have been shown, the burden is on the attorney to account therefor,[7]

(5) A petition, alleging that defendant was plaintiffs' attorney in a suit to quiet title to plaintiffs' lands, that defendant settled the suit without plaintiffs' consent and received money, which money plaintiffs now seek to recover, stated a cause of action.—Fliegle v. Brewster, (Mo App.) 59 S W (2d) 769.

(6) A petition of a client, who engaged attorneys to recover for a death, setting out that the attorneys' compensation was to be fifty per cent in case of suit, thirty three and a third per cent in case of compromise, and that the attorneys represented that a friendly suit, desired by defendant to establish plaintiff's status as wife, would not affect her net return, but nevertheless, treated it as authorizing them to retain half the proceeds of the settlement, was held to state a good cause of action for money had and received.—Heller v McGilvray, (Mo App) 223 S W 970

Bill, complaint, or petition insufficient or demurrable

(1) A bill against an attorney for an accounting was held to be demurrable for lack of allegations showing a cause of action or meeting the apparent defenses of limitations and laches.—Drury v. Poor, 182 N E 817, 280 Mass 564.

(2) A complaint against attorneys and another, averring that "defendants or some one or more of them" collected the amount of the judgment, was held to be fatally defective in not alleging the other defendants' duty to see that the one collecting the money paid it over.—Howard v. McCarson, 110 So. 296, 215 Ala. 251

(3) Where money is rightfully in possession of a firm of attorneys entitled to a lien for services, a complaint to recover the money is demurrable, in the absence of an allegation that a sum previously paid was in full for services, or that the lien had been adjusted.—Young v. Bijur, 182 N Y S. 803

(4) A petition in a client's action against an attorney for a part of an amount collected, showing an agreement authorizing an attorney to make an adjustment, including a settlement with himself, under which the client was to receive a certain amount, stated no cause of action, unless by virtue of its allegations of fraud.—Orozem v. McNeill, 176 P 106, 103 Kan. 694, denying rehearing 175 P. 633, 103 Kan 429.

Evidence inadmissible on demurrer

In a proceeding to recover cash bail deposited with attorneys, records showing that the attorneys performed services for accused, a third person, were properly excluded as immaterial in a hearing on a demurrer to the complaint.—Gentilli v. Brennan, 233 N W. 98, 202 Wis. 465

97. Madden v Watts, 37 S E 209, 59 S C. 81.—6 C J p 707 note 62.

98. Nisbet v. Lawson, 1 Ga. 275.—6 C J p 707 note 63.

99. Nisbet v. Lawson, supra.

1. Grinnell v. Sherman, 14 N Y S. 544, 60 Hun 578, 38 N Y St 587

2. West v Brewster, 8 N Y Super. 647.—6 C.J p 707 note 66.

3. Caples v. Ditchburn, 169 P. 510, 87 Or 264

Proof not required

(1) The answer of an attorney sued for money collected, claiming part of it, and justifying the possession and detention of the remainder, makes it unnecessary for plaintiff to prove demand of payment.—Caples v. Ditchburn, 169 P. 510, 87 Or. 264.

(2) Proof of actual fraud as between an attorney and client is not requisite to the maintenance of an action for moneys intrusted to the attorney.—Zeller v Knapp, 1 P (2d) 1071, 115 Cal.App. 486.

What may be shown under general issue

Where an attorney is sued for money in his hands and on which he has a lien, he may show that in his defense, under the general issue, and he is not obliged to plead his claim in offset.—Patrick v. Hazen, 10 Vt. 183.

No variance

In a particular action of assumpsit to recover money in the hands of defendant, who was plaintiff's attorney, it was held that there was no substantial variance.—Meenen v. Negley, 93 Pa Super 591.

4. Caples v Ditchburn, 169 P 510, 87 Or. 264

5. Voss v. Bachop, 5 Kan 59

6. Mass.—Ross v. Gerrish, 8 Allen 147.

Neb.—Prusa v Everett, 135 N W. 1076, 86 Neb 456

6 C J p 707 note 69.

7. Shepherd v Crawford, 71 Ga. 458.—6 C J p 707 note 70

Law firm's burden of showing accounting

In a suit against a surviving member of an alleged law firm and executors of deceased member for the recovery of money shown to have been collected by deceased partner, the burden was on defendants to show an accounting, and not on plaintiffs to show that defendants had not accounted for the money.—Edwards v. Wall, 114 S E. 63, 29 Ga. App 107, conforming to answers to certified questions 113 S E. 190, 153 Ga. 776.

and to show that his dealings with his client have been fair and just.[8] Similarly, an attorney, sued for money collected by him and not paid over, has the burden of proving that his use of the money collected was in good faith and in accordance with instructions,[9] that plaintiff is not entitled to all of the money collected by the attorney,[10] or a postponement of plaintiff's right.[11] Further, the attorney has the burden of establishing other defenses, such as limitations,[12] accord and satisfaction,[13] or set-off or counterclaim.[14] If an attorney defends on the ground that the amount retained is due him for legal services, the burden is on him to prove the services and their value.[15]

Admissibility. Rules governing the weight and sufficiency of evidence in civil actions generally (see Evidence §§ 158–1015 [22 C.J. p. 158 note 51–p 1295 note 98]) are applicable to the question of admissibility of evidence in actions by clients against attorneys for money collected.[16]

Weight and sufficiency. Rules governing the admissibility of evidence in civil actions generally (see Evidence §§ 1016–1050 [23 C.J. p 8 note 99–p 58 note 80]) govern questions of the weight and sufficiency of evidence in actions by clients against attorneys for money collected or for an accounting.[17]

8. Clark v Millsap, 242 P. 918, 197 Cal 765—6 C J. p 707 note 71.

Burden not met

In a particular case, where an attorney sustained a double trust relation to his client, it was held that, on the evidence, such attorney, as trustee, gaining an advantage from his client, the beneficiary, failed to meet the burden imposed on him of showing that the transaction was fair.—Clark v. Millsap, 242 P 918, 197 Cal 765.

9. **Money received by attorney for settlement**

Where certain money was alleged to have been paid by a client, under threat of criminal prosecution by a husband, to an attorney to settle with such husband, whose wife frequented the client's hotel for immoral purposes, the burden was on the attorney, when sued for an accounting, to prove his use thereof was in good faith and in accordance with instructions.—Berman v Coakley, 153 N E. 463, 257 Mass 159

10. Caples v. Ditchburn, 169 P. 510, 87 Or 264.

11. Caples v. Ditchburn, supra.

12. **Burden not met**

Where an attorney died six years and three months after collecting money for a client, and without paying it over, it was held that, in the absence of a showing that a reasonable time for payment in addition to the statutory six-year period had elapsed thirty days before the attorney's death, the burden on defendant of establishing the bar of limitations was not met—Goodyear Metallic Rubber Shoe Co v. Baker's Estate, 69 A. 160, 81 Vt. 39.

13. **Fairness of amount retained for services**

In an action to recover alimony collected and retained by defendants who were attorneys for plaintiff in a divorce suit, where the defense was an accord and satisfaction, defendants had the burden of proving that the amount retained was a fair and just remuneration for services rendered—Farrell v Betts & Betts, 81 So 138, 16 Ala App 668.

14. Brock v. Brock, 47 Pa Super 321

Reliance on contract for percentage

If the attorney alleges a contract for a certain percentage of the amount collected, the burden is on him to prove such contract—Brock v Brock, 47 Pa Super 321.

Burden not met

Where an attorney, acting for a client, makes expenditures in carrying out his client's business, but fails to obtain vouchers of such expenditures and to turn them over to his client with his accounts, he fails to meet the burden of proof resting on him to show that he is entitled to a set-off against money of his client in his hands—Newman v. Newby, 221 P 386, 64 Cal App 279

15. Iowa—Youngerman v Pugh, 125 N W 321—Stanton v. Clinton, 2 N. W. 1027, 52 Iowa 109.

N Y.—Weber v. Werner, 122 N.Y S. 943, 138 App Div. 127.

16. Hettleman v. Frank, 110 A. 715, 136 Md 351

Evidence admissible

(1) In an action by a nondeclarant alien to recover from his attorney sums paid to secure a release from draft, the alien's testimony that he was first given deferred classification and then reclassified, but that he never received a notice of call into the service, was admissible—Hettleman v. Frank, 110 A. 715, 136 Md. 351.

(2) In an action by an executor against an attorney for failure to pay over the proceeds of a satisfied mortgage, evidence of another mortgage to the attorney's client was admissible to show reinvestment—Jobe v. Mondereau, 67 Pa Super. 311.

(3) Where an issue existed as to the amount of money an attorney paid a client in a bank, testimony of the client's husband that the client on coming out of the bank counted the money, and that the sum was only a specified number of dollars was not objectionable as outside of the issues—Hatfield v. Krueger, 187 N E 895, 98 Ind App 377.

Evidence inadmissible

(1) In a client's action to recover a balance of money deposited with an attorney, which the attorney claimed was paid as a fee, letters from plaintiff to defendant while defendant represented plaintiff were held to be immaterial—Grant v. Hallam, 276 P. 687, 129 Or 321, certiorari denied Hallam v. Grant, 50 S Ct. 82, 280 U S. 522, 74 L Ed 591.

(2) A circular letter written by the adjutant general of the state of New York, wherein a nondeclarant alien had registered, was inadmissible in an action by such alien against a Maryland attorney to recover moneys paid such attorney to secure a release from a war-time draft, where it appeared that the alien, after being given a deferred classification, was reclassified, etc—Hettleman v. Frank, 110 A 715, 136 Md 351

17. Kirchoff v. Bernstein, 181 P. 746, 92 Or 378

Evidence sufficient

(1) Evidence in a particular action by a client against her attorney was held to require a dismissal of a bill against the attorney for an accounting—Gard v. Gould, 238 N.W. 187, 255 Mich. 570.

(2) Evidence held to warrant a judgment requiring an attorney to account for the difference between the amount actually paid for a client's land and the amount represented by the attorney to have been paid—Hawley v. Jennings, 145 S E. 697, 148 S C. 140.

(3) In an action for an accounting by the administrator of a deceased beneficiary under another's will against attorneys who represented such beneficiary in procuring his share under the will, the evidence was held to show that defendants, in securing a compromise of a bona fide contest of the will, acted in good

g. Trial

General rules relating to the trial of civil actions govern in the trial of actions against attorneys for money collected and for an accounting.

Rules relating to the trial of civil actions generally (see Trial §§ 55–156 [64 C.J. p 110 note 72–p 232 note 84], §§ 203–448 [64 C.J. p 296 note 48–p 1008 note 99], §§ 485–573 [64 C.J. p 1053 note 53–p 1189 note 61]) govern the trial of actions by clients against attorneys for money collected and for an accounting, as respects the reception of evidence,[18] taking of case or question from the jury,[19]

faith in accordance with instructions from the beneficiary and that the beneficiary was not deceived about defendants acting as attorneys for the executors of the will, as well as for such beneficiary—Kirchoff v. Bernstein, 181 P. 746, 92 Or 378

(4) In an action by a client to recover of an attorney a sum paid for services and a sum delivered to the attorney to provide cash bail, but which was unused for that purpose, evidence was held to be sufficient to sustain a verdict for plaintiff—Miller v. Ginsberg, 159 N.W. 950, 134 Minn. 397

(5) In a client's action to recover an amount deposited with an attorney, evidence supported a finding that the client had agreed that a claim for the attorney's fees would offset the client's claim—Thomas v. Armstrong, (La.App.) 146 So. 795

(6) In a client's suit to recover from his attorney a balance in the attorney's hands after a settlement of a claim against his client, the evidence supported a finding that there was no understanding fixing in advance the fee of the attorney—Smith v. Fisher, (La.App.) 150 So. 55

(7) Evidence in an accounting action was held to be sufficient to support a conclusion that an attorney was indebted to his client—Rieck v. Chapman, 257 P. 108, 88 Cal.App. 735

(8) Evidence warranted the recovery of money intrusted to an attorney for investment on the ground of his false misrepresentation respecting business—Zeller v. Knapp, 1 P.(2d) 1071, 115 Cal.App. 486

(9) Evidence sustained a finding that a negro Creek freedman voluntarily paid the attorney's fees and acquiesced in the settlement for more than two years, and that fraud, duress, and undue influence was not shown—Ingram v. Wesley, (C.C.A.Tex.) 37 F.(2d) 201, certiorari denied 51 S.Ct. 26, 282 U.S. 842, 75 L.Ed. 747

(10) In a client's action against an attorney for a portion of recovery unjustifiably retained by an attorney, the evidence was held to be sufficient to sustain a verdict for the client—Peters v. White, 38 P.(2d) 523, 169 Okl. 640

(11) Evidence and subsequent conduct of parties was held sufficient to show that an attorney, who was also a real estate broker and who sold land for plaintiffs, agreed, in consideration of receiving whole commission from down payments, to perform collection and legal services incident to mortgages and property without cost—Reeck v. Polk, 257 N.W. 698, 269 Mich. 252

(12) In an action against attorneys to recover alimony collected for plaintiff, the evidence was held to show that the amount retained by defendants was a fair and just remuneration for services rendered—Farrell v. Betts & Betts, 81 So. 188, 16 Ala.App. 668

(13) Evidence justified the trial court in sustaining an attorney's plea of payment to a client of part of the money collected—Encyclopædia Britannica Corporation v. Carville, 138 So. 238, 18 La.App. 196

Probative value of accounts stated

Signed accounts stated for attorney's services were of controlling probative value in proceedings against attorneys for repayment—Sasson v. Ferris, 248 N.Y.S. 125, 231 App.Div. 524

Prima facie case

Evidence presented prima facie case that a client signed documents at an attorney's request, with the understanding that they were merely formalities, requiring the attorney to go forward with proofs establishing his individual rights—Farber v. Copeland, 250 N.Y.S. 439, 232 App.Div. 504

18. Helton v. Johnson, 36 S.W.(2d) 362, 227 Ky. 783

Assuming facts and refusal to admit evidence

In a client's action against an attorney to recover the amount of a check given to the attorney, the court's assumption of, and refusal to admit, testimony concerning the controverted facts constituting the issue were error.—Helton v. Johnson, 36 S.W.(2d) 362, 227 Ky. 783

19. Bosson v. Brash, 114 N.E. 6, 63 Ind.App. 86

Questions of fact or for jury

(1) It is for the jury to determine the question of fact as to what portion of the moneys the respective parties should have—Bosson v. Brash, 114 N.E. 6, 63 Ind.App. 86—6 C.J. p. 708 note 74.

(2) Whether an attorney, employed to examine title, prepare title papers, and disburse first advance of the purchase money, acted beyond his authority in making payments for the purchaser, as client, was held to be a question of fact—Coon v. Wilson, (C.C.A.Pa.) 41 F.(2d) 648.

(3) In a client's action against an attorney to recover money left in his hands, whether a receipt tendered in evidence by the plaintiff was a receipt referred to in a power of attorney, and whether it was a part of the contract, was held to be for the jury—Wessinger v. Duncan, 102 S.E. 6, 113 S.C. 205

(4) Whether an attorney paid to his client one-half of the proceeds derived from a settlement of a case was held to be a question for the jury.—Hatfield v. Krueger, 187 N.E. 895, 98 Ind.App. 377

Cases requiring submission to jury

(1) In clients' action to recover money allegedly received by an attorney in a quiet title suit, and not paid to such clients, evidence was held to present a case for the jury—Flogle v. Brewster, (Mo.App.) 59 S.W.(2d) 769.

(2) In a client's action against attorneys for withholding a greater amount of moneys collected than the agreed fee, the evidence was held to present a question for the jury—Kukura v. Wright, 253 P. 800, 142 Wash. 563

(3) In a client's action for a balance of money deposited with an attorney, the case was held to be one for the jury—Grant v. Hallam, 276 P. 687, 129 Or. 121, certiorari denied Hallam v. Grant, 50 S.Ct. 83, 280 U.S. 523, 74 L.Ed. 591

(4) Where a nondeclarant alien, who had been transferred from deferred classification under a citizens' draft statute, paid defendant an attorney, two hundred dollars to obtain deferred classification, and a receipt for one hundred dollars declared that the amount specified was to be applied for expenses and costs, and if a release was not obtained it should be returned, it was held that where there was no evidence of any court costs or expenses, and there was evidence that the reclassification was due to the alien's own efforts, the question as to the amount the alien was entitled to recover was for the jury—Hettleman v. Frank, 110 A. 715, 136 Md. 351.

(5) In a client's action against an attorney to recover money left in his hands, the court erred in withdrawing from the consideration of the

instructions,[20] and verdict and findings.[21] Similarly, general rules relating to the trial of an action by the court in a civil action (see Trial §§ 574–657 [64 C.J. p. 1189 note 62–p. 1288 note 82]) govern the trial of an action to compel an attorney to account for money collected, where a jury is waived.[22]

b. Amount of Recovery

A client may be entitled to collect the amount of money which has been withheld together with interest and, under applicable statutes, may recover a penalty.

The measure of damages in an action against an attorney by a client is, ordinarily, the amount of money collected, with interest from the time it was demanded; or, if the attorney fails to give notice to his client or willfully misappropriates the money or applies it to his own use, it is the amount collected with interest from the date of its reception.[23] However, statutes which impose a penalty on attorneys who withhold money collected apply to actions, as well as proceedings, by rule.[24] At all events, damages resulting from an unauthorized appearance in an independent action cannot be recovered in an action solely for money alleged to have been collected by defendants.[25]

§ 155. Actions for Negligence or Wrongful Act

Actions for negligence or wrongful acts of attorneys are available to clients in accordance with rules stated hereunder.

A client who has suffered damages as the result of his attorney's negligence or misconduct may recover therefor, in an action at law.[26] Moreover,

jury evidence of defendant that he had a contract for the collection of certain disputed claims, and that plaintiff wrongfully settled with the debtors without his consent, and that defendant was withholding part of the money left with him as compensation for his services.—Wessinger v. Duncan, 102 S.E. 6, 113 S.C. 205.

Cases not requiring submission to jury

(1) In a client's action to recover a balance of money deposited with an attorney, the evidence was held to be insufficient to take to the jury the question of duress in obtaining such deposit.—Grant v. Hallam, 276 P. 687, 129 Or. 321, certiorari denied Hallam v. Grant, 50 S.Ct. 82, 280 U.S. 522, 74 L.Ed. 591.

(2) In an action against an attorney to recover a sum retained as fees for further services under an employment at a specified fee, submission of an issue as respects the reasonable amount of a fee, without submitting an issue as to whether additional services were gratuitous, was held to be erroneous.—Richmond Guano Co. v. Bennett, 87 S.E. 102, 170 N.C. 343.

20. Jordan v. Davis, 72 S.W. 686, 172 Mo. 599.

Conformity to issues

The instructions should be confined to the issues as made by the pleadings and the evidence.—Jordan v. Davis, 72 S.W. 686, 172 Mo. 599.—Jenkins v. Clopton, 121 S.W. 759, 141 Mo.App. 74.

Instructions properly refused

(1) An instruction which ignores facts in evidence is properly refused.—Jenkins v. Clopton, 121 S.W. 759, 141 Mo.App. 74.

(2) It is, likewise, proper to refuse an instruction which instructs the jury to ignore a material issue.—Fargo Gas Light, etc., Co. v. Greer, 18 Ohio Cir.Ct. 589, 10 Ohio Cir.Dec. 164.—6 C.J. p. 708 note 78.

(3) Moreover, an instruction which is covered by other instructions given is properly refused.—Jenkins v. Clopton, supra.

(4) Further, an instruction fixing an erroneous measure of damages should be refused.—Jordan v. Davis, 72 S.W. 686, 172 Mo. 599.

(5) In a client's action for a balance due from an attorney, an instruction that the client was bound by, and in absence of fraud could not contradict, a receipt which she gave to the attorney was held to be properly refused under the evidence.—Hatfield v. Krueger, 137 N.E. 895, 98 Ind.App. 377.

21. Harris v. Drenning, 168 P. 1106, 101 Kan. 711.

Verdict as finding exonerating attorney

In a client's action against an attorney for a balance of money collected by him, alleging misrepresentation as to the amount collected, in view of instructions as to his deduction of fees, a verdict for plaintiff, allowing fees, amounted to a finding that the attorney was not guilty of fraud or misrepresentation.—Harris v. Drenning, 168 P. 1106, 101 Kan. 711.

Findings sustained by evidence

(1) In an action to compel an accounting for rent collected by an attorney from a client's premises, the record sustained a finding of a balance due the attorney for his services.—Clark v. Miller, (Iowa) 233 N.W. 32.

(2) In a petition by a client for an accounting by an attorney for moneys collected, a finding as to the amount of compensation due the attorney was held to be sustained by the evidence.—Carney v. Powers, 161 N.Y.S. 663, 175 App.Div. 201, affirmed In re Pratt, 116 N.E. 1071, 220 N.Y. 676.

22. Coon v. Wilson, (C.C.A.Pa.) 41 F.(2d) 648.

Matters to be considered

The court, in determining an attorney's authority to apply the proceeds of a purchaser's check, should consider other circumstances and the conduct of the parties as well as a letter containing such check.—Coon v. Wilson, (C.C.A.Pa.) 41 F.(2d) 648.

23. U.S.—Davitt v. O'Connor, (N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.
Mo.—Fiegle v. Brewster, (App.) 59 S.W.(2d) 769.
S.C.—Hawley v. Jennings, 145 S.E. 697, 148 S.C. 140.
6 C.J. p. 708 note 81.

24. Edwards v. Wall, 113 S.E. 190, 153 Ga. 776, answers to certified questions conformed to 114 S.E. 63, 29 Ga.App. 107.

25. Scott v. Kirschbaum, 66 N.W. 443, 47 Neb. 331.

26. Weekley v. Knight, 156 So. 625, 116 Fla. 721.—6 C.J. p. 708 notes 83, 84.

If the attorney acts without authority from his client, the remedy of the client is against his counsel.—Village of Dolton v. S. Ellen Dolton Estate, 162 N.E. 214, 331 Ill. 88.—Chicago Hungarian Benevolent Society v. Chicago Hungarian Aid Society, 118 N.E. 1012, 283 Ill. 99.

Repudiation or affirmance of contract

The remedy of a client with reference to contracts with his attorney, although no fraud is shown, is the same as in cases of fraud, namely, to repudiate the contract and put parties in statu quo, or to af-

if the attorney has been guilty of any fraud or collusion, for the deliberate purpose of injuring his client, equity will grant relief to the client on application, if made within a reasonable time[27] Further, where an attorney retains a profit which he should pay over to his client equity will grant the client relief[28] However, a bill in equity will not lie against an attorney for damages for mere negligence, since there is an adequate remedy at law.[29] Also, equity will not entertain a client's complaint based on the supposed wrongful conduct of his attorney, where it appears that the conduct complained of is in fact not wrongful[30] Similarly, a client cannot maintain an action at law based on the wrongful conduct of his attorney, unless such wrongful conduct shall appear.[31]

Form of action at law. Since a client, in case of negligence or misconduct of his attorney, has a choice of remedies either in contract or tort (see Actions § 49), a client may in such case bring an action at law, either in assumpsit for breach of the implied promise, or in case for the neglect of duty.[32]

Under particular statutes. A statute trebling damages in a client's action against an attorney for deceit does not create a new cause of action.[33] Moreover, an action by a client against an attorney to require the performance of an agreement between them cannot be predicated on a statute authorizing a client to bring summary proceedings against his attorney for other relief.[34] Similarly, an action for a supposed wrongful act of an attorney cannot be predicated on a statute providing for summary proceedings against attorneys.[35]

firm the contract and recover damages—Townsend v. Shipley, 239 P 787, 29 Ariz 96

Disclosure of confidential communication

The remedy of a client for the disclosure by his attorney of information imparted to him in confidence, to the client's injury, is by an action at law for damages rather than by suit in equity—Universal Sav Corp v Morris Plan Co of New York, (D C S D) 234 F. 382.

27. N J—Dwyer v. Anderson, 166 A. 293, 113 N J Eq 210
Tenn—Harris v. Marshall, 8 Tenn App 501
6 C J. p 708 note 87.

28. Ill—Youngquist v. Hunter, 227 Ill App 152
N J—Sun Building & Loan Ass'n of Newark v. Rashkes, 183 A. 274, 119 N J Eq 443
Pa—Meenan v. Negley, 93 Pa.Super 591.

29. Nancrede v. Voorhis, 32 N.J Eq 524—6 C J. p 708 note 88.

30. **Bill properly dismissed**

A bill to compel the reconveyance of realty, conveyed by plaintiff to his attorney for services, was properly dismissed, where the fraud relied on was but an inference drawn from the fact that the realty was worth more than the services—Bersch v. Rust, 95 A. 108, 249 Pa. 512.

Cross complaint properly dismissed

A cross complaint to cancel conveyance of mortgaged land by the grantee of a purchaser at a foreclosure sale to the mortgagor's attorney, who advanced the money to pay the judgment under which the sale was ordered, on the ground of his infidelity and corruption, was held to be properly dismissed for want of equity—Goode v. King, 76 S.W.(2d) 300, 189 Ark 1093.

31. **Action based on mortgage notes**

It has been held that a client suing an attorney could not recover the difference between the par value and the real value of certain mortgage notes bought from the client by the attorney where the client had signed a document evidencing a sale and produced no evidence to show that the price paid by the attorney was inadequate—Govan v. Parsons, 155 So 241, 179 La 834

32. Currey v. Butcher, 61 P 631, 37 Or. 330—6 C J. p 708 note 85.

Cause of action ex contractu

A client has a cause of action ex contractu against an attorney who neglects to perform the services he agrees to perform when he accepts employment by the client—Weekley v. Knight, 156 So 625, 116 Fla 721

Action on case

The liability of an attorney for negligence is, ordinarily, enforced by an action on the case for negligence in the discharge of his professional duties—Morris v. Muller, 172 A. 63, 113 N J Law 46, reversing 168 A. 772, 11 N.J Misc. 866—6 C.J. p 697 note 34.

Basis for assumpsit

"Why will assumpsit lie against attornies, &c., for neglect? It is because the law implies an undertaking on the part of persons using these avocations for a livelihood, to be careful and diligent in the discharge of their business On this implied promise, the action of assumpsit may be sustained"—Ellis v. Henry, 5 J.J.Marsh (Ky.) 247, 248.

Where suit in assumpsit voluntarily dismissed

The fact that a client has instituted a suit in assumpsit and voluntarily dismissed it does not estop him to sue in tort—Broholm v. Anderson, 178 Ill App 628.

Trover

An action of trover, or for conversion, may be brought by a client against his attorney when he refuses to turn over to the client, on demand, money which has come into the attorney's hands while acting in the fiduciary relation of attorney and client—Jackson v. Moore, 87 N. Y.S. 1101, 94 App Div. 504, discrediting Jackson v. Moore, 76 N.Y S. 164, 72 App Div 217—Cotton v. Sharpstein, 14 Wis. 226.

33. Smith v Chaffee, 232 N.W. 515, 181 Minn. 322

34. In re Bradford's Guardianship, (Iowa) 241 N.W. 420

Contract to protect client from loss

A statute, providing for summary proceedings by a client against an attorney for the recovery of money or property collected or for damages, was held not to authorize an action to require performance of a contract between an attorney and his client to protect her from loss in a particular transaction—In re Bradford's Guardianship, 241 N.W. 420, 214 Iowa 130.

35. King v. Yundt, (Ind.) 199 N.E. 236

Absence of jurisdiction

Under a statute relating to attorneys who withhold money or papers, and authorizing summary relief by the court in which an action is pending, a circuit court was held to be without jurisdiction of defendant attorney in an action by the clients' relative, who alleged that defendant wrongfully withheld funds received while acting as attorney in other causes pending in the circuit court of another county—King v. Yundt, (Ind.) 199 N.E. 236.

§ 156. —— Defenses

Defenses available to attorneys when sued for negligence or wrongful act are noted hereunder.

An attorney, when sued for failure to collect a claim, may show in defense that the client himself prevented the collection of the debt,[36] or that he has still a valid and subsisting remedy by which it may be collected.[37] Moreover, where the negligence charged against an attorney is his failure to attend to the defense of a case which he was retained to conduct, he may show in defense, as a cause for his failure, that the client neglected to instruct him as to what defense could be made, and such a defense, if made out, will relieve him from all liability.[38] Further, where the alleged negligence consists in a failure to institute suit to recover a debt, it is a complete defense to an attorney that he was not retained in the cause in season to institute it,[39] or that, at the time when he was retained, the debt was not due to the client but to a third person.[40] On the other hand, it is no defense to an attorney who is sued for negligence for failure to move for the return of replevied property, on nonsuit of his client's adversary, that he was the real owner of the property in question,[41] nor may the happening of subsequent events resulting in profit to the client constitute a defense to the attorney sued for negligence.[42] Moreover, a defense that the loss sustained by a client was due to his failure to take an appeal from a dismissal is not sustained, where the dismissal under the particular circumstances was proper.[43] An action against his father to recover the proceeds of a judgment in an action prosecuted by such father as plaintiff's next friend, paid to the father by plaintiff's attorney during plaintiff's minority, did not bar plaintiff from suing the attorney for the unauthorized payment to the father, plaintiff being unable to collect the judgment against the father.[44]

The assertion of an attorney's lien, or instruments sought to be canceled because of alleged fraud and failure of consideration, may constitute a substantial defense.[45]

Champerty. An attorney sued by his client for negligence and unskillfulness cannot set up champerty in the contract as a defense to the suit.[46]

Release. A release of all liability executed by the client, in the absence of fraud, is a good defense.[47]

Limitations and laches. It is a good defense that the client's right of action is barred by the statute of limitations.[48]

Only in case of unreasonable delay by the client in bringing suit is the defense of laches available to an attorney when sued by his client to recover for wrongful conduct.[49]

36. Miss—Ransom v. Cothran, 14 Miss 167
NJ—Fenville v. Coudert, 44 NJ Law 286

37. Huntington v. Rumnill, 3 Day (Conn) 390

38. Mass—Salisbury v. Gourgas, 10 Metc 412
Mo—Denton v. Craig, 2 Mo 198

39. Stephens v. White, 2 Wash (2 Va) 203

40. Jackson v. Tilghman, 1 Miles (Pa) 31.

41. Smallwood v. Norton, 20 Me. 83, 37 Am D. 39

42. Ninth Ave & Forty-Second St Corporation v Zimmerman, 217 N Y S 123, 217 App Div 498.

Negligence in representations as to lease

Liability of an attorney, negligently representing that the seller of a lease had a marketable title, was not affected by subsequent transactions and subleases resulting in profit to the client.—Ninth Avenue & Forty-Second St. Corporation v Zimmerman, 217 N Y S. 123, 217 App Div. 498.

43. Lally v. Kuster, 171 Pa. 961, 177 Cal. 783.

Dismissal for want of prosecution

In an action by a client for his attorney's negligence in permitting the dismissal of a foreclosure suit for want of prosecution, the defense that the proximate cause of loss was the client's failure to appeal from such dismissal is not sustained, where such dismissal was proper—Lally v. Kuster, 171 P. 961, 177 Cal 753.

44. Wood v. Claiborne, 102 S W 219, 82 Ark 514, 118 Am S R 89, 11 L R A (N S) 913

45. Osmundsen v Hammond, 236 P 562, 135 Wash. 17.

Lien on note and mortgage as defense

In a suit against an attorney to cancel a note and mortgage executed by plaintiff to effect a property settlement in a divorce action, between him and coplaintiff, his wife, based on alleged fraud of defendant and failure of consideration, defendant's affirmative allegations, setting up a lien on such note and mortgage for services rendered the wife, were held to state a substantial defense—Osmundsen v. Hammond, 236 P 562, 135 Wash. 17.

46. Goodman v. Walker, 30 Ala. 482, 68 Am.D. 134.

47. Derrickson v. Cady, 7 Pa. 27.

48. Cal—Hays v. Ewing, 11 P 602, 70 Cal 127
Pa—Rhines v. Evans, 66 Pa 192, 5 Am R 364
S C—Thomas v. Ervin, 25 S C L 22, 34 Am D 586.

49. No laches

(1) Where clients discovered the fraud of their attorney, in making an investment for them, in the summer of 1931, a suit for cancellation, instituted in November, 1931, was held not barred by laches—Turnley v Nixon, 163 A. 800, 112 N.J.Eq. 116.

(2) Where there was no evidence that clients had knowledge of their attorney's fraud for a substantial time before suit, the defense of laches was not available to the attorney—Hemminger v. Leidigh, 21 Pa Dist & Co. 287

(3) Suit by the liquidator of a building and loan association to require an attorney to account for a secret profit allegedly made in purchasing realty for the association, which was commenced approximately nine years after the transaction had occurred, was not barred by laches, where the liquidator, on taking over the books and records of

§ 157. —— Proceedings and Relief

a. Persons entitled to sue; parties
b. Pleading
c. Evidence
d. Trial
e. Judgment or decree
f. Damages

a. Persons Entitled to Sue; Parties

Only clients or those claiming under them may sue an attorney for his negligence or wrongful act

The assignee as well as the client of an attorney may sue to recover for his wrongful act.[50] Moreover both assignor and assignee of a claim may be proper parties plaintiff in a suit against an attorney for negligence in the collection of a claim.[51] On the other hand persons who are not clients and who do not claim under them are not proper parties and are not entitled to sue for secret profits retained by an attorney.[52]

Joinder of parties. Where an attorney accepts compensation from a client with whom he agrees to prosecute certain actions on behalf of such client and others the client paying the compensation may maintain an action against the attorney for breach of contract without joining the others as parties plaintiff.[53] On the other hand in an action against an attorney for conversion of money collected by him, his partner need not be joined as defendant.[54]

b. Pleading

General rules govern as to pleadings in actions against attorneys for negligence or wrongful act

As in the case of civil actions generally, the declaration, complaint or petition in an action against an attorney for negligence or wrongful act must allege facts sufficient to constitute a cause of action.[55] Moreover in an action against an attorney, based on the theory that he has given improper

the association, first discovered the record of the transaction and immediately instituted suit—Sun Building & Loan Ass'n of Newark v Rashkes, 183 A 274, 119 N J Eq 443

50. Blackey v Alexander, 195 N W 455, 156 Minn 478

Client or assignee

If an attorney, guilty of fraud on his client as principal, has been paid or has retained compensation from the moneys of such principal, it may be recovered by the principal as client or by his assignee—Blackey v Alexander, 195 N.W. 455, 156 Minn 478

Divorced wife

A divorced wife, who entered into an agreement with her attorney, entitling the attorney to retain forty per cent of the alimony collected by such attorney, where such agreement was void because against public policy, could recover the amount so collected and retained by the attorney—Wolles v Brown, 198 N W 180, 226 Mich. 657

One paying to stifle pretended criminal prosecutions

Client paying money to attorney on representations that money must be paid to stifle certain pretended criminal prosecutions, was entitled to sue for accounting—Berman v Coakley, 137 N E 667, 243 Mass 348

51. Noziska v. Aten, 152 N W 694, 35 S D. 451, Ann Cas 1916C 589

Where both signed attachment bond

Where a claim was assigned to one who had another claim against the same debtor, so that one suit could be brought for both, and both claimants signed the attachment bond, both are proper parties plaintiff in an action against the attorney for negligence—Noziska v. Aten, 152 N W 694, 35 S D 451, Ann Cas 1916C 589

52. Bruntsch v. Sales, 240 P 43, 74 Cal App 310

In action by part owners of property

In an action by part owners of property to recover secret profits of attorney negotiating a lease for them, other owners of such property were not proper parties and not entitled to recover, where there was no evidence that attorney acted as their agent—Bruntsch v. Sales, 240 P. 43, 74 Cal App 310

53. Fellbaum v Mitchell, (Tex.Civ App.) 277 S W 175.

54. Pratt v. Brewster, 52 Conn. 65

55. **Test of sufficiency**

(1) In a suit against an attorney for negligence, the test of the sufficiency of the declaration is whether its allegations if proved would make out a case—Maryland Casualty Co v Price, (W Va) 231 F 397, 145 C C A 391, Ann Cas 1917B 50, affirming (D C) Maryland Casualty Co v Price, Smith, Spilman & Clay, 224 F 271

(2) In an action on the case based on wrongful acts of attorneys there should be such a statement of the facts that the court may be able to construe them and to determine whether the conclusions drawn by plaintiff are correct or not—National Hollow Brake Beam Co v. Bakewell, 123 S W 561, 224 Mo. 203

In action on statute, the complaint must allege every fact necessary to state a cause of action under the provisions thereof—Jones v Winsor, 118 N.W. 716, 22 S D. 480—6 C J. p 707 note 67.

Fraud

Fraud in procuring contract fixing attorney fees need not be alleged eo nomine, if facts constituting fraud are alleged—Saunders v Guinn, (Tex Civ App.) 1 S W.(2d) 363

Complaint construed

Bankruptcy trustee's complaint against attorneys was construed to be one seeking damages for negligent advice causing the removal of plaintiff as trustee, producing nervous shock, disgrace, and financial loss, and injuring his credit and reputation for honesty—McGregor v Wright, 8 P (2d) 624, 117 Cal App 186

Bill not wholly insufficient

A bill to set aside an assignment by client, to attorneys, of a one-half interest to the proceeds of a settlement of a claim for personal injuries, was held not wholly insufficient—Halstead v. Florence Citrus Growers' Ass'n, 139 So. 132, 104 Fla. 21.

Complaint, declaration or petition sufficient

(1) A complaint, alleging that an infant met his death from a fall from roof because of a landlord's failure to provide a proper railing, stated a good cause of action, so as to sustain recovery against an attorney for his failure to proceed to trial with the action for infant's fall—Hamilton v. Dannenberg, 267 N.Y.S. 156, 239 App Div. 155

(2) A complaint in a client's action against attorneys alleging that plaintiffs employed defendants for specified purposes, that defendants entered upon employment as attorneys and acted so unskillfully, negligently, and in such bad faith as to

advice, it must be clearly alleged that a professional relation existed between the parties litigant.[56] However, in an action against an attorney for negligence it may be sufficient for plaintiff to aver generally that defendant has been retained as attorney,[57] without stating the consideration,[58] or that it has been paid.[59] Further, in actions based on negligence, a general averment thereof without a statement of specific facts, is good as against a general demurrer.[60] An averment that the negligence was not due to an excusable mistake of law may also be unnecessary.[61] Neither is it necessary for plaintiff to show that he was without fault.[62] On the other hand, where the action is for failure to collect a note, plaintiff must allege his title to the note.[63] Moreover in a client's action at law to recover from an attorney for his negligence in collecting a claim it must be alleged not only that such claim was valid but also that the debtor was solvent.[64] Further, in a client's action against an attorney for negligence in prosecuting a claim of the client, he must allege facts sufficient to show

cause plaintiffs damage, was held to be sufficient to state a cause of action in tort—Franceschi v. De Tord, (C C A Porto Rico) 71 F (2d) 95

(3) Complaint alleging that plaintiff had cause of action for fraud against a debtor, that defendant, employed as counsel to prosecute claim, understood that such debtor would obtain a discharge in bankruptcy unless judgment was obtained against him on the ground of fraud which is not dischargeable, and that the proceeding resulted in a verdict for plaintiff which was lost by defendant's negligence, was sufficient, although not directly alleging that the verdict was based on contract instead of fraud, or that the debtor actually received a discharge—Ziegler v. Gray, 172 N W 884, 143 Minn 45

(4) A petition, alleging that an attorney employed to recover capital stock wrongfully converted the property to his own use, was held to state a cause of action in conversion—Meyer v Glick, 295 S W 844, 221 Mo.App 1046

(5) A petition against attorneys employed in a suit by a mother and her children against her husband and their father, to set aside a decree of divorce and for a return of part of the consideration paid for such attorneys' services, was held to be sufficient to state a cause of action on behalf of the mother—Mann v Showalter, 88 S E 968, 145 Ga 268

(6) Count in declaration, supplemented by a detailed bill of particulars, and alleging that an attorney received money belonging to his client while employed by such client and wrongfully deprived the client of such money by refusing to give it up to client upon demand, was held to state a cause of action for conversion—Ritzer v. Hagerman, 254 N W. 470, 266 Mich 677.

(7) Petition by a former client against an attorney, alleging that defendant hypothecated notes given him for the purpose of settlement of an action against such client was held not to be subject to a general exception—Padgett v. Hines, (Tex Civ App) 192 S W. 1122, dismissed for want of jurisdiction

Complaint, declaration or petition insufficient

(1) A complaint by a client against his attorney for failure to disclose the illegality of a particular transaction was held to be insufficient for failure to show the attorney's duty under the specific retainer—Burr v Hays, 240 N Y.S 83, 136 Misc. 369

(2) Complaint of a client demanding an assignment of certain notes purchased by the attorney was held to be insufficient in not alleging a tender by the client of consideration paid by the attorney—Martin v Hood, 264 P. 478, 203 Cal. 351.

(3) Petition charging attorney with conversion of assets of estate was held to be defective for not pleading the terms of a will, and in failing to show that all persons legally or beneficially interested were joined as parties.—Repetto v. Walton, 281 S W. 411, 313 Mo 182.

(4) A petition against attorneys, employed in a suit by a mother and her children against a husband and father to set aside a decree of divorce, for a return of part of the consideration paid for their services, was held not to state a cause of action on behalf of the children—Mann v. Showalter, 88 S E 968, 145 Ga 268—6 C J p 709 note 6 [b]

Right to waive the tort and sue in contract in the case of a contract between attorney and client see Actions § 50

56. Martin v. Hood, (Cal) 264 P 478

Complaint held uncertain

Complaint of client seeking assignment of notes from attorneys and damages based on such attorneys' improper advice and acts was held to be too uncertain in alleging professional relation and in alleging the date of attorneys' advice relied on to sustain recovery—Martin v Hood, (Cal.) 264 P 478.

57. N Y—Gardner v Wood, 74 N Y. S 750, 37 Misc 93—Guttman v. Rasquin, 133 N Y S 431.

Or—Currey v Butcher, 61 P 631, 37 Or 330.

General employment sufficiently shown

In a liability insurer's action against their regularly retained attorneys for neglecting to defend an action against a policy holder, a declaration was held sufficiently to show the attorneys' employment by plaintiff—Maryland Casualty Co. v. Price, (W Va) 231 F. 397, 145 C C A 391, Ann Cas 1917B 50, affirming (D C) Maryland Casualty Co v Price, Smith, Spilman & Clay, 224 F. 271

58. Stephens v. White, 2 Wash.(2 Va) 203

59. Ky—Eccles v. Stephenson, 3 Bibb 517

N J—French v. Armstrong, 76 A. 336, 80 N J Law 152.

60. Burnette v. Elliott, 84 P. 374, 72 Kan. 624—6 C J. p 709 note 6

Averment of gross negligence

Under the rule that an attorney is liable only for gross negligence (see supra § 141) an averment that an attorney commenced a suit and improperly dismissed it, contrary to his duty, is a sufficient charge of gross neglect—Evans v. Watrous, 2 Port (Ala) 205

61. Humboldt Bldg Assoc v. Duckers, 64 S W. 671, 111 Ky. 759, 23 Ky L 1073.

62. Jones v. White, 90 Ind 255

63. Ark—Sevier v. Holliday, 2 Ark. 512

Ky—Baker v. McArthur, 5 Ky L. 185

64. Jones v. Wright, 91 S E 265, 19 Ga.App. 242

Petition properly dismissed.

A petition against an attorney for actual and punitive damages for negligent advice and conduct resulting in the loss of plaintiff's claim was properly stricken on demurrer in the absence of an allegation that the claim was valid and that the debtor was solvent—Jones v. Wright, 91 S E. 265, 19 Ga.App. 242.

that the client had a good cause of action against whom the claim was asserted.[65] On the other hand, where an attorney's negligence in defending an action is relied on by the client he must allege that he had a defense.[66] Where it is alleged that an attorney was retained in consideration of certain fees but no time is stated as agreed upon for the payment of such fees, it has been held that payment of such fees must be alleged.[67]

Damages. It must be made to appear by allegation that plaintiff has sustained some damage.[68]

c. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

In actions against attorneys for negligence or wrongful act they are presumed to have discharged their duties towards their clients, who accordingly have the burden of establishing the liability of their attorneys.

There is no presumption that an attorney has been guilty of a want of care, arising merely from his failure to be successful in an undertaking, on the contrary, he is always entitled to the benefit of the rule that every one is presumed to have discharged his duty, whether legal or moral, until the contrary has been made to appear.[69] Therefore, a client who sues an attorney for negligence must prove the attorney's employment, his negligence, and that it proximately caused the loss complained of.[70] More specifically the cases hold that the client must prove the attorney's employment,[71] his negligence,[72] that damages were suffered by reason thereof,[73] that the loss claimed as damages was a proximate result of such negligence,[74] and that it was the sole cause of the loss.[75] On the other hand, where a prima facie

65. Schmitt v McMillan, 162 N Y S. 437, 175 App Div. 799

66. Martin v. Nichols, 188 P. 519, 110 Wash. 451

Defense not sufficiently shown

(1) In a liability insurer's action against its attorneys for negligence, a declaration failing to allege the existence of a defense to action against a policy holder was held insufficient, although a default judgment paid by such insurer was for more than its limited liability—Maryland Casualty Co v Price, (W. Va) 231 F. 397, 145 C C A 391, Ann Cas 1917B 50, affirming (D C) Maryland Casualty Co. v. Price, Smith, Spilman & Clay, 224 F. 271.

(2) In an action for legal services rendered, a counterclaim that plaintiff had been retained to interpose an answer in a suit brought against defendant, but had failed to do so, whereby a judgment was rendered against defendant, thus injuring him in the amount of the judgment, was insufficient and properly stricken as failing to allege that a defense to such action existed—Martin v Nichols, 188 P 519, 110 Wash 451

67. Cavillaud v. Yale, 3 Cal 108, 58 Am.D 388.

68. Martin v. Hood, 264 P 478, 203 Cal. 351—6 C J p 709 note 10

Damages sufficiently alleged

Allegation, in an action for the negligence of an attorney, that client had lost the interest which accrued on a judgment up to the time of the reversal thereof, was held to be a sufficient allegation of damages. —Armstrong v. Adams, 283 P. 871, 102 Cal App 677.

Damages not sufficiently alleged

(1) Complaint of a client alleging attorneys' advice and acts and demanding damages was held to be insufficient for failure to show damage—Martin v Hood, 264 P 478, 203 Cal 351

(2) Pleas that a client spent a large sum of money in purchasing mortgages to protect a mortgage which would have been a first lien had an attorney not breached his duty to record it, but which failed to state that property upon which the client held the mortgages was not worth their aggregate or did not realize the amount represented by the mortgages on foreclosure, were held to be insufficient as pleas of set-off—Weekly v. Knight, 156 So. 625, 116 Fla 721.

69. Olson v North, 276 Ill.App 457—6 C J. p 709 note 11

Attorney retained by administratrices

It will not be presumed that an attorney, retained by administratrices to act in procuring letters and generally in the administration, acted for the special furtherance of some individual distributees, to the neglect or harm of others—In re Rabell, 162 N.Y S. 218, 175 App Div. 345.

70. U S.—Maryland Casualty Co v. Price, (W Va) 231 F 397, 145 C C A 391, Ann Cas 1917B 50, affirming (D C) Maryland Casualty Co v. Price, Smith, Spilman & Clay, 224 F. 271
Cal.—McGregor v. Wright, 3 P.(2d) 624, 117 Cal App 186.

71. McGregor v. Wright, supra—6 C J p 709 note 12

72. Cal—McGregor v. Wright, 3 P. (2d) 624, 117 Cal App 186.
Ill—Piper v. Green, 216 Ill App 590
Mass—McLellan v. Fuller, 115 N.E 481, 226 Mass. 374.
Okl—Sutton v Whiteside, 222 P. 974, 101 Okl 79

73. Slade v Harris, 135 A 570, 105 Conn 436—6 C J. p 710 note 14.

Prima facie proof of damage

In an action by a client against an attorney for damages for negligence on account of a defective mortgage drawn by the attorney, certain evidence was held to be sufficient prima facie proof of damage. —Degen v Steinbrink, 195 N Y S. 810, 202 App Div. 477

74. Sutton v. Whiteside, 222 P. 974, 101 Okl 79

Attorney employed to defend action

(1) A client suing his attorney who was employed to defend an action against the client for damages for attorney's negligence must prove that the attorney's negligence proximately caused the loss sustained by the client—Roehl v. Ralph, (Mo. App) 84 S W.(2d) 405.

(2) Accordingly a client suing his attorney who was employed to defend action against client for damages for the attorney's negligence in failing to file an answer setting up a purported defense must prove that the client had a valid defense —Roehl v. Ralph, supra

(3) A liability insurer suing its attorneys for a failure to defend an action against a policy holder, was held to have the burden of showing that the party suing did not have a valid claim for the amount recovered—Maryland Casualty Co v. Price, (W.Va) 231 F 397, 145 C C A 391, Ann.Cas 1917B 50, affirming (D C) Maryland Casualty Co v. Price, Smith, Spilman & Clay, 224 F. 271.

75. Cal—McGregor v. Wright, 3 P. (2d) 624, 117 Cal App. 186
Ill—Olson v North, 276 Ill.App 457. 6 C J p 709 note 13.

case of negligence is shown, the burden of proving adequate excuse, is on the attorney.[76]

In action for negligence in collecting claim. In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability.[77] He must allege and prove that the claim was turned over to the attorney for collection,[78] that there was a failure to collect,[79] that this failure was due to the culpable neglect of the attorney,[80] and that, but for such negligence, the debt could, or would, have been collected.[81] Hence, where a claim is alleged to have been lost by an attorney's negligence, in order to recover more than nominal damages it must be shown that it was a valid subsisting debt,[82] and that the debtor was solvent.[83]

In action for fraud or misconduct. In an action against an attorney for fraud or misconduct where the relation of attorney and client is shown to exist, and the question of the bona fides of a transaction between the parties is involved, the burden is on the attorney to show the fairness and honesty of the transaction.[84] Moreover, in a client's action against an attorney for damages resulting from his violation of the client's instruction, the attorney has the burden of proving matters of defense.[85] Nevertheless in a client's action against his attorney based on his conduct in fraud of the client's rights, it has been held that denials in the answer may require that plaintiff prove the allegations relied on by him.[86] Of course in the absence of any showing of such relationship the person suing an attorney on the theory of his unfairness has the burden of establishing such unfairness.[87]

(2) Admissibility

General rules of evidence apply to questions relating to the admissibility of evidence in actions by clients against attorneys for their negligence or wrongful act.

Rules governing the admissibility of evidence in civil actions generally, are applicable to questions relating to the admissibility of evidence in actions by clients against attorneys for negligence or wrongful act.[88]

76. Moorman v. Wood, 19 N.E. 739, 117 Ind. 144. See Luster v. Steingard, 191 Ill.App. 573.

77. **In collection of mortgage**
The burden rests upon a client suing his attorney for negligent failure to collect a mortgage to allege and prove every fact necessary to establish such liability.—Lally v. Kuster, 171 P. 961, 177 Cal. 783.

Receipt as prima facie evidence
An attorney's receipt for a claim placed in his hands for collection is prima facie evidence of the genuineness and justness of the securities described in the receipt in an action based on the attorney's negligence in the collection of the claim.—Hair v. Glover, 14 Ala. 500.

78. Smallwood v. Norton, 20 Me. 83, 37 Am.D. 39.—6 C.J. p. 710 note 18.

79. Ark.—Palmer v. Ashley, 3 Ark. 75.
La.—Spiller v. Davidson, 4 La.Ann. 171.

80. Ark.—Palmer v. Ashley, 3 Ark. 75.
Ga.—Nisbet v. Lawson, 1 Ga. 275.
La.—Spiller v. Davidson, 4 La.Ann. 171.
Va.—Staples v. Staples, 7 S.E. 199, 85 Va. 76.

81. Schmitt v. McMillan, 162 N.Y.S. 437, 175 App.Div. 799.—6 C.J. p. 710 note 21.

82. Piper v. Green, 216 Ill.App. 590.—6 C.J. p. 710 note 22.

83. Ga.—Jones v. Wright, 91 S.E. 265, 19 Ga.App. 242.
Ill.—Piper v. Green, 216 Ill.App. 590.
6 C.J. p. 710 note 23.

84. Dwyer v. Anderson, 166 A. 203, 113 N.J.Eq. 210.—6 C.J. p. 710 note 17.

In procuring purchaser or exploiting invention
Where an inventor makes an agreement with an attorney to procure a purchaser for his invention or to organize a company for its exploitation, and the attorney takes charge of the situation, reducing the agreement to writing and characterizing himself therein as the inventor's attorney, and their correspondence shows that fiduciary relations exist between them, the burden is on the attorney to prove good faith toward the inventor and that he kept him informed of all facts material to his interest, if it appears that the attorney has reaped a special benefit from the relationship.—Overholt v. Matthews, 48 App.D.C. 482.

Burden not met
Evidence failed to sustain attorney's burden of showing good faith in transactions wherein attorney obtained bonds and notes of client.—Reeder v. Lund, 236 N.W. 40, 213 Iowa 300.

86. Werthy Fabric Co. v. Marvin, 239 N.Y.S. 682, 135 Misc. 803.

87. **In suit to cancel note and mortgage**
In a suit against an attorney at law to cancel a note and mortgage, executed by plaintiff to effect a property settlement in a divorce action between him and his coplaintiff wife, based on a reconciliation, fraud of defendant, and failure of consideration of note and mortgage, denials in the answer were held to be sufficient to put plaintiffs upon proof.—Osmundsen v. Hammond, 236 P. 562, 135 Wash. 17.

88. Tobin, Tobin & Tobin v. Budd, 251 N.W. 720, 217 Iowa 904. See Sanitary Hair Goods Co. v. Elliott, 191 Ill.App. 563.
Cal.—Bouton v. Stuart, 199 P. 71, 52 Cal.App. 484.
Okl.—Sutton v. Whiteside, 222 P. 974, 101 Okl. 79.

Declarations of the attorney made at the time of the alleged negligence are admissible to show, not the truth of the facts stated, but the circumstances which occurred at such time.—Salisbury v. Gourgas, 10 Metc. (Mass.) 442.

Other evidence admissible
(1) In an action against an attorney for negligently failing to file an appeal as agreed, defendant may, under a general denial, introduce evidence to rebut negligence.—Tishomingo Electric Light & Power Co. v. Gullett, 152 P. 849, 52 Okl. 180.

(2) The record of the suit on the claim, as to which an attorney is charged with negligence, is admissible against the attorney to prove the final determination of that suit, although it was conducted by him in the name of another attorney.—Goodman v. Walker, 30 Ala. 482, 68 Am.D. 134.

(3) An attorney's receipt for a claim placed in his hands for collection is admissible to prove the relation of attorney and client.—Good-

(3) Weight and Sufficiency

Rules of evidence in civil actions generally apply to questions on weight and sufficiency of evidence in actions by client against attorneys for negligence or wrongful act.

Rules governing the weight and sufficiency of evidence in civil actions generally are applicable to questions on the weight and sufficiency of evidence in actions by clients against attorneys for negligence or wrongful act [89]

man v. Walker, supra—6 C.J. p 710 note 24

(4) In a suit against an attorney to recover an amount realized by him in wrongfully dealing with notes entrusted to him by clients, defendants in a former suit, for purposes of settlement, an instrument, signed by plaintiff in such former suit, which purported to "give, grant, and will" the notes in question to defendant in the former suit, and plaintiff in the suit against the attorney is admissible—Padgett v Hines, (Tex Civ App) 192 S.W 1122, dismissed for want of jurisdiction

(5) In an action against an attorney for negligence for failing to perfect an appeal, a transcript of the evidence and record in such case is admissible in evidence for the purpose of determining whether the case would have been reversed on appeal—Sutton v. Whiteside, 223 P 974, 101 Okl. 79

(6) Orders of a referee in bankruptcy and of federal courts holding a mortgage invalid were held to be admissible in client's action against his attorney for damages for such attorney's negligent drawing of such mortgage—McCullough v Sullivan, 132 A 102, 102 N J Law 381, 43 A L R 928

(7) In a client's action for negligence of his attorney in failing to file a mortgage for future advances properly, testimony of witness that payment of note covered by mortgage was accepted with the understanding that the mortgage was to be fully satisfied was relevant on the issue of damages—Hampel-Lawson Mercantile Co v Poe, 277 S W 29, 169 Ark. 840

(8) In a client's action against an attorney to set aside conveyances of portions of a tract of land to attorney in payment for services, testimony as to the value of the tract was held to be admissible—Bouton v. Stuart, 199 P 71, 52 Cal App 484

(9) In an action against an attorney for a negligent failure to perfect a materialman's lien, where he claimed to have mailed papers to be recorded, a refusal to allow a clerk of court to testify as to a practice of sending a bill for filing fees, was held to be error, since a failure to receive a bill might be regarded by the jury as sufficient to put an attorney on inquiry—Caltrider v. Weant, 128 A. 72, 147 Md 338.

Other evidence inadmissible

(1) A receipt given to plaintiff by an attorney for a described note was held to be inadmissible in an action against the attorney for failure to collect the note, where the declaration did not show title to such note in the plaintiff who did not appear as a party to the note in any capacity—Sevier v Holliday, 2 Ark 512

(2) In an action by a client against an attorney for a negligent failure to perfect a materialman's lien, evidence that material was actually used in a house on which the lien is claimed was held to be immaterial—Caltrider v. Weant, 128 A 72, 147 Md 338.

89. Iowa—Reeder v Lund, 236 N W 40, 213 Iowa 800.
Mich—Cornelisson v Ort, 93 N.W 617, 132 Mich 294

In actions to recover secret profits

(1) In action to recover secret profits in lease of property owned by plaintiffs and wife of defendant attorney, evidence was held to show that defendant acted as attorney for all plaintiffs—Bruntsch v. Sales, 240 P 43, 74 Cal App 310

(2) In an action to recover secret profits of an attorney in negotiating a lease of plaintiff's property for plaintiffs, evidence was held sufficient to justify a finding that such attorney was acting sui juris, and not solely in behalf of his wife, who was also his client, in obtaining the lease—Bruntsch v Sales, supra.

(3) The evidence in an action by a client against the personal representative of an attorney was held to be sufficient to show that the deceased attorney made a secret profit at the expense of such client—Robertson v Hirsh, 177 N.E 676, 276 Mass. 452

(4) The evidence entitled the liquidator of building and loan association to recover secret profit made by the attorney in purchasing realty for the association and attorney's fee charged the association in the transaction—Sun Building & Loan Ass'n of Newark v. Rashkes, 133 A. 274, 119 N J.Eq. 443.

(5) In an action to recover secret profits of attorney negotiating a lease for plaintiffs of their property, a claim that the attorney's wife, a part owner of the property, was his principal was held not to be sustained by evidence showing that the attorney and the agent of the lessor were the only principals at the beginning of the deal, and that in subsequent negotiations the wife was a principal only in the sense in which the other owners were—Bruntsch v. Sales, supra.

Evidence in other actions sufficient

(1) Evidence established that the attorney committed fraud in investing the client's funds in stock of the corporation in which the attorney was an officer, hence the attorney was liable to the client for the funds—Dwyer v. Anderson, 166 A. 293, 113 N J Eq 210.

(2) Evidence in a suit to recover sums paid under an option to purchase corporation stock was held to show that plaintiff dealt with defendant on a confidential basis as plaintiff's attorney and friend and looked to defendant to write a contract fully effectuating their agreement—Holland v. Brown, (Tex Civ App) 66 S. W (2d) 1095, error refused

(3) In action by a client against his attorney for a negligent failure to perfect a materialman's lien, under Code Pub Gen L. art 63 § 23, evidence was held to be sufficient for the jury to infer that the client served notice of his intention to claim a lien, within the time required under § 11, as against a contention that there was no showing that the claim was not lost by client's own negligence—Caltrider v Weant, 128 A. 72, 147 Md 338

(4) Evidence showed the attorneys were not employed by the bankruptcy trustee, except for special purposes about which the trustee made no complaint, and gave him no advice precluding recovery for alleged negligence—McGregor v Wright, 3 P (2d) 624, 117 Cal App 186

(5) Evidence in a particular action by a client against her attorney was held to require a dismissal of a bill against the attorney for a discovery, and cancellation of a mortgage—Gard v. Gould, 238 N.W. 187, 255 Mich 570

(6) A lessee, contracting to assign a lease, in reliance on fraudulent legal advice, was held entitled, under the evidence, to recover counsel fees in defending an action for specific performance, and the amount paid in settling a broker's action for commission—Wille v. Maier, 176 N E 841, 256 N Y. 465, affirming 248 N Y S 904, 232 App Div. 798, and reargument denied 177 N.E 196, 256 N Y. 692.

d. Trial

Rules relating to trials of civil actions generally apply to trials of actions by clients against attorneys for negligence or wrongful act.

Rules relating to the trial of civil actions generally apply to the trial of actions by clients against attorneys for negligence or wrongful act, as respects taking the case or questions from the jury[90] and instructions[91] Further, the rules relating to the

Evidence in other actions insufficient

(1) In an action by a client to recover for an attorney's negligence it was held that the evidence was insufficient to establish the client's case—Piper v. Green, 216 Ill App 590.

(2) In a client's action against an attorney for damages for his alleged negligence in conducting certain litigation, the evidence was held to be insufficient to show his negligence—Ziegler v Cray, 182 N.W. 616, 148 Minn 447

(3) Evidence was held to be insufficient for jury in action against attorney for fraud in connection with plaintiff's agreement with third person for a transfer of certain properties to a corporation for joint management—Berkman v. Cohn, 168 A 290, 111 N J Law 229

(4) Evidence was held insufficient to show that an attorney supplied with funds applicable to a judgment converted them to other uses—Crim v. Thompson, 193 P 448, 98 Or 599

(5) Evidence in a suit by a client against an attorney for negligence in permitting a foreclosure suit to be dismissed for want of prosecution was held to be insufficient to sustain a finding that plaintiff could not have secured a judgment of foreclosure—Lally v. Kuster, 171 P 961, 177 Cal 783

(6) Where the owner of certain corporation stock gave his attorney an option, an assignment and an agreement to pay the attorney a commission for performing certain services, evidence in an action by the owner wherein the attorney intervened as party, was held insufficient to show that the attorney obtained such documents by misrepresentation—Bailey v. Security Trust Co, 177 P. 444, 179 Cal 540, 177 P 449, 179 Cal 815

(7) Evidence was insufficient to show that an attorney for a bankrupt, in connection with execution of certain notes to take up prior notes on which bankrupt claimed he was not personally liable, was derelict in his duty to his client—In re Duntley, (Ill) 227 F 381, 142 C.C.A 77

(8) Evidence failed to show consideration was given for note obtained by attorney from client—Reeder v. Lund, 236 N.W. 40, 213 Iowa 300

Membership of firm

In an action against an attorney for conversion of funds of his client, evidence was held to warrant a finding that attorney, sued for conversion of the client's money, was a member of the firm engaged to defend damage suits for specified fee so as not to be entitled to the converted money as a fee—Norfleet v. Stewart, 20 S.W.(2d) 868, 180 Ark 161

90. Sherwood v. South, (Tex Civ App) 29 S.W (2d) 805

Questions of fact or for jury

(1) Whether or not particular conduct is negligent may be a question of fact for the jury where the circumstances are in doubt—O'Neill v Gray, (C.C.A.N.Y.) 30 F (2d) 776, certiorari denied 49 S.Ct 430, 279 U S. 865, 73 L.Ed 1003—6 C.J. p 710 note 31.

(2) Accordingly in an action against an attorney for the negligent prosecution of a death action, whether the conduct of the litigation was reasonably skillful, was held to be a question for the jury—O'Neill v Gray, supra

(3) Moreover whether an attorney was negligent in drawing a chattel mortgage was held to be a question for the jury in the client's action for damages—McCullough v. Sullivan, 132 A 102, 102 N J Law 381, 43 A.L.R. 928.

(4) But where the facts have been ascertained, the question of negligence or of want of skill is a question of law for the court—Gambert v. Hart, 44 Cal 542—Casiner v. Gray, 131 P. 404, 54 Colo 551

(5) Where there is evidence tending to show, but not conclusively showing, the continuance of the relation of attorney and client between parties, the question of such relationship is for the jury—Kreatz v McDonald, 143 N.W. 975, 123 Minn 353—O'Donnell v Breck, 7 Pa Super 24—Jinks v. Moppin, (Tex Civ App) 30 S.W. 390

(6) Where a bank holding a vendor's lien notes as collateral security delivered them to the owner's attorney for collection for the bank's benefit, whether the bank waived or abandoned the relationship of attorney and client between it and the owner's attorney by engaging other attorneys to represent it in a suit to enforce vendor's lien was for the jury—Buckhannon Bank v. O'Brien & Hall, (W.Va) 180 S.E. 258.

(7) In an action against an attorney for negligently failing to perfect an appeal, the question whether plaintiff was entitled to recover money expended for costs is one for the jury where the evidence is conflicting—Rosebud Min, etc, Co v. Hughes, 121 P. 674, 21 Colo.App 247.

(8) Whether one dealing with a pledgor's attorney in possession of a note for a special purpose was authorized to rely on an attorney's ostensible authority was held to be a fact question—First Nat Bank v. Broder, 141 A 861, 107 Conn 574

(9) The amount which would have been received from certain fire insurance companies in satisfaction of insured's debt had his creditor's attorney promptly followed his client's instructions to bring suit and to obtain a writ of garnishment was held to be a question for the jury, in the client's action against the attorney for resulting loss—W. L. Douglas Shoe Co v. Rollwage, 63 S.W (2d) 841, 187 Ark. 1084.

(10) Jury question of fraud and damages is presented where an attorney willfully and improperly advises his client and colludes with the opposing attorney in permitting a judgment against the client—Sherwood v South, (Tex.Civ.App) 29 S.W.(2d) 805.

(11) In an action by a client against an attorney for conversion of money paid to him under an alleged agreement to speculate in real estate it was held that on the facts, the question whether such attorney converted funds of the client to his own use should have been submitted to the jury.—Amsterdam v. Apfel, 123 N.E. 69, 226 N.Y. 158, reversing 165 N.Y.S. 60, 178 App Div. 71.

Dismissal not plainly wrong under evidence

In a client's suit for accounting for money paid, a former attorney alleged to have conspired with another to defraud the client in connection with the suppression of a criminal charge against plaintiff, dismissal of suit as without equity, because of lack of credibility of plaintiff's witnesses, was held, under the evidence reported, not to be plainly wrong.—Berman v Coakley, 153 N.E. 463, 257 Mass. 159

91. Almeida v. Cassidy, (R.I.) 147 A. 620

Omission of statute in absence of request

In the absence of any request to instruct the jury with reference to a particular statute, failure to call the jury's attention to such statute having no direct hearing on the case in a client's action for attorney's

trial of civil actions generally apply as respects the verdict and findings [92]

e. Judgment or Decree

General rules apply to judgments or decrees in actions by clients against attorneys for their wrongful acts.

General rules, discussed in the title Equity § 584 [21 C J. p 646 note 99], apply to judgments or decrees in actions by clients against their attorneys for their wrongful acts.[93]

f. Damages

Damages recoverable against attorneys guilty of negligence or wrongful act are determined in accordance with rules stated hereunder.

The measure of damages, in an action against an attorney for negligence, is the amount of loss actually sustained as a proximate result of such negligence.[94] Moreover an attorney who by his negligence causes his client to lose his cause of action is liable for the actual, as well as for the

negligence in accepting forged attachment release bond is not error. —Almeida v. Cassidy, (R I) 147 A 620.

Invalidity of mortgage

Where the trial court in its instruction fairly and impartially indicated to the jury that the main question for their determination, in a client's action against his attorney for negligence in drafting a mortgage, was whether the attorney had exercised the reasonable care, and skill the law required of him in drafting the paper, that the court also charges that the mortgage in question was invalid which was an undisputed fact does not render the instruction improper—McCullough v Sullivan, 132 A. 102, 102 N J Law 381, 43 A L R 928

92. Almeida v. Cassidy, (R I) 147 A 620

Verdict supported by evidence

Verdict for attorney in client's action for negligence in accepting a forged attachment release bond from a financially irresponsible surety was held to be supported by the evidence—Almeida v. Cassidy, (R I) 147 A. 620.

Verdict unsupported by or against evidence

(1) In an action by a client as plaintiff to recover profits of a real estate purchase from his attorney at one hundred ten dollars per acre, where plaintiff submitted no evidence on his allegation that the land was worth only seventy five dollars per acre, but defendant's witnesses showed land to be worth one hundred dollars and from one hundred twenty dollars to one hundred fifty dollars per acre, a verdict based on value of the land at seventy five dollars per acre will be reversed, as not justified by the evidence—Townsend v. Shipley, 239 P. 787, 29 Ariz 96

(2) Where an attorney foreclosing mortgages for a bank failed to secure a proper allocation of taxes on real estate covered by mortgage but directed a tax collector to turn in all taxes against the mortgagors' real estate, causing the bank to pay taxes assessed against other property of the mortgagors, some of which was subsequently purchased by the attorney on his own foreclosure proceeding, a verdict for fees for such foreclosure which failed to charge against the attorney taxes unjustly collected from the bank was held to be against the evidence—Nevin v State Bank of Elizabeth, 174 A 618, 115 Pa Super 92

Verdict construed as finding of exoneration

Verdict for a client against an attorney for money collected allowing fees was held to be a finding that the attorney was not guilty of misrepresenting the amount collected—Harris v. Drenning, 168 P 1106, 101 Kan 711.

Interrogatory unwarranted by evidence

In a client's action to recover from his attorney an interest in an estate on the ground of the invalidity of his assignment and conveyance of his interest to the attorney, the form of interrogatory was held to be unwarranted by the evidence—Kickland v. Egan, 155 N W. 192, 36 S D 428

93. Webster v. Kelly, 175 N E 69, 274 Mass 564.

Decree conditioned on client's payment

A decree ordering a reconveyance by an attorney to a client was held to be properly conditioned on the client's payment of the amount due the attorney under the circumstances—Webster v. Kelly, 175 N E 69, 274 Mass 564.

Judgment in tort warranted

In an action against an attorney who was also a real estate broker to recover money collected for plaintiffs and held by defendant, the entry of judgment in tort was held not to be error, where the record showed defendant did not act in good faith, as against a contention that collections involved both lay and professional services and for lay collections trover would lie only if defendant had duty to pay identical moneys—Reeck v. Polk, 257 N W 698, 269 Mich. 252

94. Ga.—Hill v Cloud, 173 S E 190, 48 Ga App. 506
Or.—Milton v. Hare, 280 P. 511, 130 Or. 590.

6 C J. p 696 note 28, p 711 notes 35, 36.

Costs on appeal

Costs incurred on appeal may be recovered from an attorney who negligently failed to perfect the appeal—Rosebud Min, etc, Co v Hughes, 121 P 674, 21 Colo App. 247

Permitting dismissal of foreclosure suit

The measure of damages to client for loss caused by attorney's negligence in permitting the dismissal of foreclosure suit is the amount that could have been recovered, less the actual value, if any, to the client of the note and mortgage barred by limitations, to be determined from the evidence—Lally v. Kuster, 171 P. 961, 177 Cal 783.

Failing to give statutory notice

(1) In an action by a client against an attorney for failure to give statutory notice of a personal injury action, the court's ruling that the sole question was whether the client could have recovered in any event was correct—McLellan v. Fuller, 115 N.E. 481, 226 Mass 374.

(2) Accordingly where an attorney in a personal injury action neglected to give notice required by Rev L c 106 § 75, whereby a client suing as an employee was defeated, notwithstanding the client's only loss was the expense in preparing for trial, the measure of damages for negligence in conducting the personal injury cases is the amount plaintiff could have recovered, with interest.—McLellan v. Fuller, supra.

Assuring client that contract was enforceable

Clients' damages for an attorney's negligent assurance that a land contract of which they proposed to take an assignment was enforceable was the consideration paid for such assignment.—Fabry v. Jay, 141 A. 780, 104 N J Law 617.

Examining title to property

(1) Where attorney negligently omits to report a judgment lien against realty, the title to which he was employed to investigate, and his client buys without knowledge of such lien, the measure of damages is the amount paid by the client to remove the lien, although the cli-

exemplary, damages he might reasonably have recovered in an action thereon.[95] On the other hand where the items of loss sustained by a client are not attributable to his attorney's negligence such items are not recoverable by the client in an action based on the negligence of his attorney.[96] Nor is he liable for interest on debts lost through his negligence.[97]

An attorney may, however, be liable for the actual loss sustained by his client with interest where the attorney is guilty of a wrongful act.[98] At any rate, in a client's action against an attorney for damages resulting from his violation of the client's instruction, the client may recover the amount of loss actually sustained.[99] However, a client is not entitled to recover any sum in excess of his actual damages in a suit against his attorney for violation of the client's instructions.[1]

Nominal damages. Where a client suing his attorney for negligence has suffered no special damages, it has been held that he may nevertheless be entitled, to nominal damages,[2] but this has been denied.[3]

Exemplary damages. Exemplary damages may be allowed in a proper case against an attorney for misconduct in dealing with a client,[4] and proof of actual damages may be unnecessary to a recovery of exemplary damages.[5] However, there exists authority to the effect that there can be no

ent subsequently sells for more than the total cost of the property including the discharge of the lien—Jacobsen v Peterson, 103 A. 983, 91 N J Law 404, affirmed 105 A. 894, 92 N J Law 631.

(2) Client taking up lien on property on which he had a lien in reliance on the attorney's report, based on examination wherein the attorney negligently overlooked a prior lien, was entitled to recover the value of the property, where it was within the amount of the lien overlooked—Hill v Cloud, 173 S E 190, 48 Ga App 506.

(3) A client who sues his attorney for his negligence in certifying that the client's title to certain property is good and marketable may recover as damages a broker's commission and title examination fees incurred by the client on attempting to resell the property but cannot recover expected profits or costs incurred by unreasonably litigating the title with a prospective purchaser—Trimboli v. Kinkel, 123 N E 205, 226 N Y 147, 5 A L R. 1385, affirming 162 N Y S 1147, 176 App Div 895.

95. Patterson v Frazer, (Civ App) 93 S W 146, reversed on other grounds 94 S W. 824, 100 Tex 103—Patterson v Frazer, (Tex Civ App) 79 S W 1077—6 C J. p 711 note 37.

96. Lawson v. Sigfrid, 262 P 1018, 83 Colo 116—6 C J. p 711 note 36 [a].

Damages too speculative

Alleged damages involving financial loss, together with impaired credit and reputation for honesty, caused by plaintiff's removal as bankruptcy trustee on defendant attorneys' petition, was held to be too speculative in character and amount to be allowable in an action against such attorneys for their negligence—McGregor v Wright, 8 P.(2d) 624, 117 Cal App 186.

Insolvency of debtor

(1) Where the loss sustained by a client as a creditor is due to his debtor's insolvency rather than to an attorney's negligence the client suffers no loss which he can recover in an action against his attorney—Jones v Wright, 91 S.E 265, 19 Ga. App 242.

(2) Accordingly a creditor cannot recover costs and expenses of an action against an insolvent debtor from a negligent attorney—Lawson v. Sigfrid, 262 P. 1018, 83 Colo 116.

Effectiveness of client's defense

To entitle a client to recover more than nominal damages for his attorney's negligence in representing the client as a defendant in an action, it must appear that the defense relied on by the client would have availed—The Western & Southern Life Ins Co v. Selzer, 23 Ohio Cir Ct (N S) 104.

97. Rootes v. Stone, 2 Leigh (29 Va) 650—6 C.J. p 711 note 35 [a].

98. Robertson v Hirsh, 177 N E 676, 276 Mass 452.

Secret profit

Where an attorney made a secret profit at a client's expense, the client was held to be entitled to a repayment thereof with interest—Robertson v Hirsh, 177 N E 676, 276 Mass 452.

Client purchasing property from attorney

A client, purchasing property from attorney, and choosing to ratify the contract of purchase, can only recover such damages as he has sustained, which is the difference between the contract price and the value of the land at the time of the purchase, not the difference between the contract price and the amount paid by the attorney—Townsend v. Shipley, 239 P. 787, 29 Ariz. 96.

99. **Market value of property lost**

Where defendant's failure to comply with his client's instructions with reference to a suit to recover for property sold under a conditional sale contract operated to deprive the client of title to the property, the measure of defendant's liability was the market value of the property at the time of bringing the suit which deprived him of that right.—Whitney v Abbott, 77 N E. 524, 191 Mass. 59.

Value of draft

Indebtedness on a draft is presumably its value in computing damages against an attorney violating instructions for collecting such draft—Werthy Fabric Co. v. Marvin, 239 N Y S. 682, 135 Misc. 808.

1. **Financial responsibility of mortgagor**

A mortgagee, who instructed his attorney to bid in the mortgaged premises at not to exceed a certain sum, but, when the attorney bid them in at a greater sum, accepted the sheriff's deed and paid the purchase price by permitting the amount of the bid to be credited as a satisfaction pro tanto of the foreclosure decree, cannot recover from the attorney the difference between the bid originally authorized and the amount of a judgment for the deficiency which he could otherwise have recovered against the mortgagor, in the absence of proof that the latter could pay such judgment since it is impossible for the jury to say whether the loss sustained by plaintiff was more than merely nominal—Sproul v Lloyd, 115 A. 667, 96 N.J Law 314.

2. Ga—Lilly v. Boyd, 72 Ga 83
N Y—Arnold v. Robertson, 3 Daly 298.
Tenn—Read v. Patterson, 11 Lea 430.

3. Lawson v Sigfrid, 262 P. 1018 83 Colo. 116—6 C J. p 711 note 39.

4. Hill v. Montgomery, 84 Ill App. 300, affirmed 56 N.E. 320, 184 Ill. 220—6 C.J. p 711 note 40.

5. Harmening v. Howland, 141 N W. 131, 25 N D. 38—6 C J. p 711 note 41.

recovery of exemplary damages where there has been no actual damage sustained by the party who sues.[6] Moreover under a particular statute it has been held that for exemplary damages to be recovered the misconduct of the attorney must impede or prejudice the rights or remedies of the injured parties.[7] Further, a statute authorizing exemplary damages for an attorney's misconduct has been held to refer to the direct actual damages suffered by the client in the action where the misconduct occurs rather than some consequential indirect expenditures for attorneys' fees and expenses in another law suit.[8]

§ 158. Summary Remedies of Client

Clients are entitled to various summary remedies against their attorneys as indicated hereunder.

An attorney is subject to the summary jurisdiction of the court for any dereliction of the duty which such attorney owes to his client.[9] Accordingly, in addition to the summary remedies which a client may have to compel his attorney to pay over money, as noted in § 159 infra, the courts may intervene summarily in a proper case to protect a client from the effects of his attorney's negligence, ignorance or carelessness.[10] Moreover the summary jurisdiction of the courts over attorneys embraces authority to compel them to do whatever other specific acts it may be incumbent upon them in their capacity of attorneys to perform.[11] Thus jurisdiction extends to compelling an attorney to perform his undertakings.[12] Further an attorney may, by summary proceedings, be compelled to show the circumstances under which he has procured a client's papers on which judgment in favor of the attorney has been rendered.[13] However, a statute authorizing summary proceedings to compel an attorney to deliver over papers and moneys of his client, is not applicable to a situation wherein a client has delivered an article to his attorney as payment or security for his fees.[14]

Delivery or inspection of client's papers. An attorney may, by summary proceedings, be compelled to deliver up documents or securities belonging to his client, which he retains without authority.[15] On the other hand, since the papers of a client

6. Clark Bros v Anderson & Perry, 234 N W 844, 211 Iowa 920

Treble damages

Under a statute making attorneys liable for treble damages for deceit or collusion, it was held that such damages could not be recovered where there were no actual damages since it is impossible to treble damages which do not exist.—Clark Bros v Anderson & Perry, 234 N.W. 844, 211 Iowa 920

7. Franzone v Tumminelli, 123 N Y S 455 67 Misc 549—6 C J. p 711 note 40 [a]

8. Smith v Chaffee, 232 N.W. 515, 181 Minn 322

9. Chatham Lumber Co. v. Parsons Lumber Co., 90 S E 241, 172 N C 320

10. Meacham v. Dudley, 6 Wend (N Y) 514.

General principles of equity and policy

The court, from general principles of equity and policy, will always look into the dealings between attorneys and their clients, and guard the latter from any undue consequences resulting from a situation in which they may stand unequal.—Starr v. Vanderheyden, 9 Johns.(N Y.) 253, 6 Am D 275.

Relief where attorney is insolvent

Where it appears that an attorney is insolvent and unable to answer to his client for his default, the court will not compel the client to suffer where the defect can be remedied, and will set aside a default in pleading due to the attorney's negligence and allow proper pleadings to be filed.—Meacham v Dudley, 6 Wend (N Y) 514—Denton v Noyes, 6 Johns (N Y) 296, 5 Am D. 237—6 C J. p 708 note 89.

Setting aside judgments by default

The equitable power of the court to set aside judgments by default will be exercised to prevent an injustice to the client, about to result from his attorney's ignorance or carelessness, where there will be occasioned to the opposite party no practical harm other than that of compelling him to try the case on its merits.—Milton v. Hare, 250 P 511, 130 Or. 590—6 C J p 708 note 90

11. In re Evans, 62 P. 913, 22 Utah 366, 83 Am S R 794, 53 L R A. 952—6 C J. p 718 note 32.

12. Fulor v Beery, 8 Ohio S. & C P. 306, 6 Ohio N.P 290.

13. Starr v. Vanderheyden, 9 Johns (N Y) 253, 6 Am D. 275.

With respect to notes given by client

On motion by a client for relief against judgments in favor of his attorney entered by confession on bonds and warrants of attorney it was held that the judgment must only stand as security for what is actually due, and under a rule directed by the court the attorney was required to prove consideration for notes attached to the bonds, and to show for what causes and under what circumstances the notes were given.—Starr v. Vanderheyden, 9 Johns.(N.Y.) 253, 6 Am.D. 275.

14. Golden v. Hyde, 202 P 272, 117 Wash 677.

Issue triable by jury at law

The summary proceeding under Remington Code (1915) §§ 137, 138, is only for those moneys or papers which an attorney may have received in trust for his client, and not for an article which was delivered to the attorney not to be used in his client's interest, but, as claimed by the client, as security for fees, or, as claimed by the attorney, in payment of fees, especially where no fraud or overreaching is charged, since the issue under their contentions is triable in an action at law, in which either party may demand a jury.—Golden v. Hyde, 202 P. 272, 117 Wash 677.

15. N Y.—In re Buschman, 200 N Y. S 874.

Ohio.—Mulholland v. Groot, 24 Ohio Cir Ct (N S.) 582.

6 C J. p 718 note 33.

Power to fix attorney's fees

In a summary proceeding against an attorney for the return of client's papers, the court has power to fix the attorney's fees.—In re Buschman, 200 N Y S. 874.

Notice

In summary proceedings against an attorney for return of client's papers, the court properly permitted the service of an order to show cause giving respondent less than eight days' notice.—In re Buschman, 200 N Y S 874.

Discretion

In a summary proceeding by a cli-

may be retained by an attorney with a retaining lien thereon until such lien is satisfied (see infra § 225), he cannot ordinarily be required to deliver up a client's papers where he retains them under a bona fide claim of a lien for compensation due him for services.[16] Nor may he under such circumstances be compelled to permit an inspection thereof.[17] Moreover, an attorney cannot be compelled in a summary proceeding to determine at his peril conflicting claims by delivering papers to one of the conflicting claimants.[18] Nevertheless where a client has a pressing necessity for papers in the possession of an attorney the court may order the papers to be delivered over,[19] or to allow an inspection and copy of them.[20] However, one who seeks by summary proceedings to

ent against her attorney to compel him to deliver certain papers, whether the relief asked is to be granted is entirely a matter of discretion—In re Goode, 174 N Y S 72.

16. In re Weitling, 285 N Y S. 550—6 C J p 718 note 39, p 786 note 5

On ineffective order of substitution

Court in attorney's special proceeding to determine and enforce a statutory lien was held to be without power to require attorney to turn over papers in case to another attorney under ineffective order of substitution prior to determination and payment of petitioner's claim for compensation—McNally v. Youngs, 262 N Y.S 828, 237 App Div 787, appeal dismissed 188 N E 49, 262 N Y. 526

Order to return books and papers to client held erroneous

It is error, on a rule to show cause, to order an attorney to return forthwith to his client books and papers in the former's possession, where allegation in the answer to the rule, to the effect that the attorney has a retaining lien on the papers, is not denied—Pitts v Newlin Haines Co, 48 App D C. 167.

After discharge of attorney

(1) Attorneys could not after discharge be compelled to turn over papers in their possession without payment for services then rendered—Phillips v. Hodgson, 237 N.Y S 32, 227 App Div. 754

(2) Attorney who is discharged during pendency of litigation has a retaining lien for his services upon papers pertaining to the action, and cannot be compelled to surrender the papers, in the absence of unprofessional conduct—In re Weitling, 194 N E 401, 266 N Y 184, reversing 275 N.Y S. 973, 242 App Div 823.

Subpœna duces tecum

A client cannot by summoning his attorney as a witness in a suit end by subpœna duces tecum compel him to produce the client's papers on which a lien is claimed—Davis v. Davis, (C C.Mass.) 90 F 791.

17. Pennsylvania Finance Co v Charleston, C. & C R. Co, 48 F. 45—6 C.J. p 786 note 6.

Where permitting client to inspect papers would in effect defeat lien

A client, who has discharged his attorney without cause and without paying him for the services rendered, has no right to inspect the papers held by the attorney under his attorney's lien, since to permit such inspection would be in effect to defeat the lien—The Flush, (C C A N Y) 277 F. 25, certiorari denied Bulk Oil Transports v Thompson, 42 S Ct 184, 257 U.S. 657, 66 L Ed 421

18. In re Kaplan, 234 N Y S 711, 226 App Div 176.

Status of attorney in transaction

Where applicants for an order to compel an attorney to deliver over certain stock certificates given to him by the applicants, claimed that such certificates were deposited with the attorney at his suggestion with a view to the sale of the stock evidenced by such certificate, while the attorney claimed that he was an escrow agent who was to hand over the certificates to the purchaser on the payment of the balance of the purchase price; summary remedy was not available against such attorney—In re Kaplan, 234 N Y S 711, 226 App Div. 176

19. In re Badger, (C C A.N Y.) 9 F (2d) 560—6 C J. p 786 notes 8, 9

On giving security to attorney

(1) A court may compel an attorney, on receiving proper security for his compensation, to deliver up the papers of his client—In re Badger, (C C A.N Y) 9 F (2d) 560—In re Makames, 265 N Y S 515, 238 App Div 534, reversing 265 N Y S 511, 148 Misc 759—6 C J. p 786 note 5 [a], [b]

(2) This power of the court is based on the court's control of its own officers, and power to compel attorneys to act equitably toward clients—In re Badger, supra—Robinson v Rogers, 143 N E 647, 237 N Y 467, reversing Robinson v Ferguson, 201 N Y S 941, 207 App Div 802, and motion denied 143 N.E. 728, 237 N. Y. 525

(3) Hence the relationship of attorney and client is necessary to the existence of such power in the court—Elverett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F. 931, 141 C C A. 55.

(4) Discharged attorney, on client's cancellation of retainer contract, is required to deliver up papers in his possession belonging to the client, where necessity exists therefor, on furnishing such security as the court deems proper, although the retaining lien is thereby destroyed—Bloom v Irving Trust Co, 272 N Y.S. 637, 152 Misc 50

(5) While the court may compel discharged attorney to deliver up the client's papers or property before payment of his fee, on receiving bond or other security, notwithstanding a general retaining lien, it may not thus destroy charging lien on proceeds of judgment or settlement under Judiciary L. § 475—Robinson v Rogers, 143 N E 647, 237 N Y 467, reversing Robinson v Ferguson, 201 N Y S 941, 207 App Div 802, and motion denied 143 N E 728, 237 N Y. 525

(6) Though the court cannot compel discharged attorney to deliver up client's papers, etc, on security securing only his charges in particular action, nor substitute bond for charging lien on proceeds of settlement of the client's suit to redeem property held as security for loans, it may, to enable the client to borrow money necessary to pay the amount of settlement, compel execution of subordination agreement by the attorney—Robinson v Rogers, 143 N E 647, 237 N Y. 467, reversing Robinson v. Ferguson, 201 N.Y S 941, 207 App Div. 802, and motion denied 143 N E 728, 237 N Y. 525.

(7) Under Remington & B Code §§ 137, 138, an order requiring an attorney to deliver instruments to clients under the penalty of commitment for contempt upon the clients filing a bond for the payment of any attorney's liens is properly entered without determining the amount of the attorney's fee—In re Eighth Ave, 144 P. 533, 82 Wash. 398.

Papers of value to client as defendant in murder prosecution

Attorney who had a lien for fees on certain papers in his possession which he received while employed by a certain client was ordered to deliver up for the use of such client any of such papers as would be of value to him in defense of murder charge against him—In re Hauptmann, 277 N Y S 631, 243 App Div. 616, modifying Hauptman v Fawcett, 276 N Y S. 523, 243 App Div. 613.

20. Pennsylvania Finance Co v. Charleston, C & C. R. Co., (C.C. S C) 48 F. 45.

compel an attorney to deliver over papers on which he claims a lien must invoke the jurisdiction of the proper court by proper pleading.[21] At all events where the relation between an attorney and another is merely that of a hired employee rather than strictly that of attorney and client, such attorney may be compelled to deliver up to his employer papers which have come into the possession of the attorney by reason of such employment.[22] In the absence of compliance with the provisions of a contract, between an attorney and client, specifically stating the conditions under which the attorney shall be paid for his services, he may be compelled by summary proceedings to deliver up the client's papers.[23]

§ 159. —— To Compel Payment Over of Money

a. In general
b. Necessity for existence of relation
c. Defenses
d. Procedure

a. In General

An attorney may be compelled to pay over money, by summary proceedings, subject to the limitations stated hereunder.

Either by virtue of the peculiar power of control which every court has over the attorneys practicing before it, or by reason of applicable statutory provisions conferring such power, a client may, by summary proceedings against his attorney, compel him to pay over money received for and belonging to the client.[24] This summary remedy by motion against an attorney can, however, only be sustained where he has actually collected the money and refuses to pay it over.[25] Moreover the misconduct for which the summary proceeding is authorized is the retaining of a client's money without legal grounds.[26] In accordance with this rule some courts have expressed the view that if no dishonesty on the part of the attorney appears the summary proceeding should be dismissed, and the client left to his action at law.[27] Similarly it has been held that where a client's right to have

21. City of Hackensack v. Winne, 172 A. 601, 116 N.J.Eq. 87.

No jurisdiction in chancery court

A chancery court in New Jersey cannot take summary action against attorney on the client's petition complaining that attorney refuses to surrender papers in pending certiorari action in the supreme court, jurisdiction being exclusively in supreme court by petition.—City of Hackensack v. Winne, 172 A. 601, 116 N.J.Eq. 87.

22. City of Memphis v. Byrne, 9 Tenn.App. 379.

23. In re Goode, 174 N.Y.S. 72.

Where payment conditioned on recovery

An attorney who neither collected anything nor produced any result, so as to comply with an understanding that he be paid for his services only in case he realised on the claims of the client, was compelled on summary proceedings to deliver to the client papers received from her notwithstanding a claim to a lien thereon.—In re Goode, 174 N.Y.S. 72.

24. Ala.—Roquemore v. Sovereign Camp W. O. W., 146 So. 619, 226 Ala. 279
Ill.—Durre v. Sturgeon, 122 N.E. 341, 69 Ind.App. 500
Minn.—Charest v. Bishop, 162 N.W. 1063, 137 Minn. 102
N.Y.—Rokohl v. Attorney at Law, 258 N.Y.S. 903, 144 Misc. 66
6 C.J. p. 711 note 42—p. 712 notes 43, 44.

"There is nothing unreasonable or unjust in compelling the attorney, as an officer of the court, to answer summarily as to money collected for his client."—Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 434, 115 Iowa 695

Basis of remedy

(1) "The basis of the statute as well as of the rule at common law is found in the fact that attorneys are officers of the court where they practice, forming a part of the machinery of the law for the administration of justice and as such subject to the disciplinary authority of the court and to its orders and directions in respect to their relations to the court as well as to their clients."—Charest v. Bishop, 162 N.W. 1063, 1064, 137 Minn. 102.

(2) "This remedy has for its basis the retention of money by the attorney that justly belongs to his client."—Bailey v. Rutherford, 151 N.E. 213, 242 N.Y. 220, modifying 209 N.Y.S. 791, 213 App.Div. 858, and reargument denied 152 N.E. 431, 242 N.Y. 570, and motion denied 154 N.E. 618, 243 N.Y. 591

Statutory provisions declaratory of common law

Statutory provisions authorising such summary proceedings are assumed to be declaratory of the common law.—Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 115 Iowa 695.—In re H——, 87 N.Y. 521

25. Ala.—Macdonald v. State, 39 So. 257, 143 Ala. 101.
Miss.—Banks v. Cage, 2 Miss. 293.

26. Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 115 Iowa 695.—6 C.J. p. 713 note 54.

Available to same extent as against sheriffs

(1) Under statutes providing for a rule or order to show cause in favor of clients where their attorneys refuse on demand to pay over money in their hands, it is held that the specified form of proceeding may be available to the same extent as such rule or order is permitted against sheriffs.—Commins v. Ross, (Ga.App.) 160 S.E. 679.—West v. Hill & Adams, 99 S.E. 155, 23 Ga.App. 636.—Clark v. Hilliard, 91 S.E. 926, 19 Ga.App. 514

(2) Rule or order to show cause as remedy against sheriffs generally see Sheriffs and Constables § 170 [57 C.J. p. 984 note 66—p. 986 note 91].

Refusal to return money received for special purpose

Where a client delivered to an attorney employed to sue on a note secured by deed to land a sum of money to discharge a claim against the land, the attorney having failed to return the money on demand by his client, was held to be subject to rule under Civ.Code (1910) § 4954.—Moore v. Garrett, 93 S.E. 112, 20 Ga.App. 474.

27. In re Pohs, 276 N.Y.S. 914, 243 App.Div. 709.—In re Messiter, 179 N.Y.S. 935.—6 C.J. p. 713 note 53.

What is dishonesty

False, exorbitant, and unreasonable charges made by an attorney constitute such dishonest, oppressive, and illegal conduct as will authorize summary proceedings against him.—Tate v. Field, 46 A. 952, 60 N.J.Eq. 42, reversed on other grounds 48 A. 995, 62 N.J.Eq. 795.

Elements of good or bad faith considered

(1) "An attorney should not be

a summary order can be reasonably questioned he must be referred to his ordinary remedies [28] Nor is the summary remedy available where there appears to be a real issue of fact between the parties or a substantial defense to the proceeding.[29] Further the summary remedy is not intended to be employed where under all the proper pleadings the question at issue is not the dereliction of the attorney in wrongfully withholding the funds of his client but is the proper construction of an ambiguous contract,[30] or where under the construction of an admitted contract the attorney might have a valid and just claim to the funds sought to be recovered.[31] On the other hand where the attorney's right to retain money of his client is based on an unconscionable contract a summary remedy to recover such money may lie in favor of the client [32] In accordance with the rule, that summary remedies against attorneys are available only where they refuse to pay over money which they have actually collected, as indicated previously in this section it has been held that an attorney cannot be charged in this mode of proceeding for mere misfeasance,[33] or negligence.[34] Nor will the remedy lie to compel the return of fees voluntarily paid to an attorney for services rendered [35]

Existence or pursuit of other remedy. The fact that the client has a legal remedy for the recovery of the money does not affect the right of the court to see that its own officer does not act contrary to his duty [36] However, proceeding by action on

subjected to this drastic remedy, except in a plain case where he has violated his professional duty; that is really acted in bad faith If the matter is one of doubtful right upon the part of the parties, the client should . . . be left to an assertion of that right in an ordinary action."—Gross v. Vogel, 187 N.Y.S 660, 661, 196 App Div 858

(2) "Summary process shall not be transformed into a quasi judgment, where . . . bad faith is not charged, but good faith conceded."—Newcomb v. Krueger, 173 N.E. 246, 248, 36 Ohio App 469

(3) Where an attorney distributed money, which he received in settlement of litigation, in apparent good faith and according to his understanding as to its proper apportionment, a summary proceeding by a dissatisfied party to compel the attorney to pay a further sum to him out of a portion retained as fees was held not a proper remedy, since there was, at most, a misunderstanding among the parties respecting the division of the money.—In re Pohs, 276 N.Y.S. 914, 243 App Div. 709.

(4) A rule to show cause why money retained should not be paid over to client will be dismissed, where from the attorney's answer it is evident that the attorney got money in good faith believing it to be no more than honest compensation and his client will be remanded to an action at law—Defoy v. Dever, 17 Pa Dist 546—Chedorska v. Moran, 43 Pa Co. 559.

28. Lynde v. Lynde, 52 A. 694, 64 N J Eq 736, 97 Am S R. 692, 58 L R A 471, reversing (Ch) 50 A 659—6 C.J p 712 note 52

"In all cases the client has relief in the ordinary tribunals for the determination of legal controversies, and, where his right to have a summary order can be reasonably questioned, he must be referred to the ordinary remedies"—Bailey v Rutherford, 151 N.E. 213, 242 N Y 220, modifying 209 N.Y S 791, 213 App Div 858, and reargument denied 152 N E 431, 242 N Y. 570, and motion denied 154 N E 618, 243 N Y 591

29. Shackleford v Ford, 290 S W. 43, 44, 172 Ark. 527.

"In other words, if it is made to appear to the court that the matters of defense set up in the answer are genuine, and that a substantial issue of fact is thereby created, the parties are entitled to trial in the regular way in which suits between adversary parties are tried and decided and a summary judgment is improper."—Shackleford v. Ford, supra.

30. Felton v. Smith, (Ga App) 183 S E 634, 636.

"In other words, such a rule will lie only where an attorney either seeks, in opposition to the explicit terms of his agreement, knowingly and fraudulently to withhold a sum not authorized thereby, or in withholding such funds acts in ignorance or misapprehension of facts which his duty to his client obligates him to know."—Felton v. Smith, supra.

31. West v. Hill & Adams, 99 S E 155, 23 Ga App 636

32. In re Bucken, 196 N.Y.S. 769, 203 App Div. 717.

Testing fairness of contract

"While ordinarily the court will not entertain a summary proceeding to test the fairness of a contract, but will remit the petitioner to his remedy at law . . yet this power unquestionably does exist in the court."—In re Bucken, 196 N.Y S 769, 203 App Div 717

Services on charge of disorderly conduct

Summary proceedings were held to lie to recover a fee of five hundred fifty dollars paid by a laborer as a client for legal services in connection with a charge of disorderly conduct, to which the client pleaded guilty and was fined ten dollars—In re Bucken, 196 N Y S 769, 203 App Div 717

33. **Unauthorized compromise**

Where attorneys without any express authority from their clients entered into a settlement with the adverse party for part of the client's claim, a summary proceeding to compel payment over of the full amount of the claim was not available to such clients for the attorneys' misfeasance but were relegated to an action at law in case—Lombard v. Whiting, 1 Miss 229

Unauthorized form of payment

The summary remedy for payment over of money will not lie against an attorney where he has exceeded his authority by taking notes and other claims in satisfaction of his client's debt—Banks v. Cage, 2 Miss. 293.

34. Weinberg v. Needleman, 234 N Y.S 49, 226 App Div. 3, affirmed 170 N E 167, 252 N Y. 622.

Care and skill in advancing money

Whether an attorney advanced a client's money on a mortgage with due care and skill could not be summarily determined, but required a trial—Weinberg v Needleman, 234 N Y.S. 49, 226 App Div. 3, affirmed 170 N E 167, 252 N Y 622.

35. Application of Secrest, 222 N Y.S. 622, 129 Misc. 793—6 C.J. p 712 note 48

Absence of misconduct

Where a client's dismissal of her attorneys obviously prevented their performing the very services for which they were retained and they were guilty of no misconduct or unethical conduct the client could not, by summary proceedings, recover money paid to such attorneys for professional services—Application of Secrest, 222 N Y S 622, 129 Misc 793

36 D C—Diggs v. Thurston, 39 App. D C. 267.

the part of a client for the money collected may be considered as a waiver of the right to the summary relief.[37] Hence if such an action has been commenced, the client may first discontinue before proceeding summarily,[38] and, if the client has proceeded to judgment in an ordinary action for money collected, it ordinarily operates as a merger of the relation of attorney and client into that of debtor and creditor and is a bar to the summary proceeding for enforcement of payment.[39] Nevertheless there exists authority to the effect that where a client's judgment against an attorney has been returned unsatisfied, the fact that the client has pursued an action against the attorney for money paid to him by the client does not preclude his pursuit of the summary remedy to compel payment of the money.[40]

Nature of remedy and construction of statutes Summary remedies of clients to compel attorneys to pay over money in possession of such attorneys are penal in character,[41] and statutes granting such remedies must be strictly construed.[42] Further the statutory remedy by summary proceeding against an attorney to compel the payment over of money received by him for his client, is not intended as a substitute for the ordinary action for money had and received.[43]

Jurisdiction and venue. Where the money, which is sought to be recovered from an attorney by summary proceedings, is received with reference to some proceeding in court, the court in which that proceeding is pending has exclusive jurisdiction to entertain the application for summary proceedings,[44] and where a proceeding of this character is instituted for breach of duty by the attorney not connected with any proceeding in court, it should be instituted in the county of his residence.[45] Nevertheless a court may require its own attorney to do his duty, although the transaction in question arose in litigation in another court.[46] The same is true in the case of an attorney of another court practicing in the court which exercises the summary jurisdiction.[47] Further a state court may require an attorney who resides within the territorial jurisdiction of the court to respond to summary proceedings brought to compel him to pay over to a client money wrongfully withheld from him, notwithstanding the money was paid to the attorney in connection with the client's supposed violation of a federal statute,[48] but it has been held that a state court has no jurisdiction to compel an attorney to pay over money collected by him under process of a federal court.[49] Moreover it has been held, that in the absence of fraud or misconduct, a court having jurisdiction of proceedings relating to a decedent's estate cannot entertain summary proceedings to compel an attorney for a claimant to pay over money received from him.[50] At all events where a particular court is given juris-

Iowa—Union Bldg, etc, Assoc. v. Soderquist, 87 N W 433, 115 Iowa 695.

37. Butchers' Union Slaughter-House, etc, Co v Crescent City Live-Stock Landing, etc, Co, 6 So 508, 41 La Ann 355—6 C J p 715 note 74

38. Butchers' Union Slaughter-House, etc, Co v Crescent City Live-Stock Landing, etc, Co, supra

39. Windsor v. Brown, 9 A 135, 15 R I 182, 2 Am S R. 892—6 C J p 715 note 76.

40. Gabriel v Schillinger Fire Proof Cement, etc, Co, 52 N Y.S. 1137, 24 Misc. 313.

41. Felton v Smith, (Ga App) 183 S E 634—West v Hill & Adams, 99 S E 155, 23 Ga App 636

42. Ark—Davies & Davies v Patterson, 201 S W 504, 132 Ark 484 L R A 1918D 825

Ga—Commins v Ross, (App) 160 S E 679—Clark v Hilliard, 91 S E 926, 19 Ga App 514

43. Davies & Davies v. Patterson, 201 S W 504, 132 Ark. 484, L R A 1918D 825

44. Emanuel v Cooper, 133 N W 1064, 153 Iowa 572—6 C J p 715 note 81

45. Emanuel v. Cooper, supra—Union Bldg, etc, Assoc v Soderquist, 87 N W 433, 115 Iowa 695

46. N J—Lynde v Lynde, 52 A 694, 64 N J Eq 736, 97 Am S R 692, 58 L R A. 471, reversing (Ch) 50 A 659

N Y—Batterson v Osborne, 18 N Y S 431

6 C J p 715 note 83

47. Lynde v Lynde, 52 A 694, 64 N J Eq 736, 97 Am S R 693, 58 L R A 471, reversing (Ch) 50 A 659

48. Misenich v. Nelson, 181 N W 319, 148 Minn 479

Jurisdiction of district court of state

Where an alien who had been arrested for failure to register under the federal Draft Law, in order to obtain his liberty employed an attorney and paid him a sum of money but was released from custody without requiring the services of the attorney who contended, on summary proceedings by the client to recover the money paid, that a district court of a state had no jurisdiction by summary proceedings since the client was in custody for violation of a federal statute, it was held that the district court of the state had undoubted jurisdiction to inquire into the conduct of attorneys towards their clients not only in respect to actions there pending, but also in respect to other legal business, no matter what such business may have been, provided the attorney resides in the county of the district court whose authority is appealed to—Misenich v Nelson, 181 N.W 319, 148 Minn 479.

49. Thomas v. Roberts, 5 Dana (Ky) 189—6 C J. p 715 note 85

50. In re Murphy's Estate, 101 A. 935, 258 Pa. 38

Money retained as compensation

Where there was no averment of fraud or misconduct, it was held, that an orphans' court was without jurisdiction to order an attorney to pay over to his client, who received payment from the executor, a sum of money retained by the attorney as compensation for his services in connection with urging claim against deceased's estate—In re Murphy's Estate, 101 A. 935, 258 Pa 38.

diction of the proceeding by statute, summary proceedings must be instituted in accordance therewith.[51]

The question of jurisdiction necessarily depends to some extent at least upon what the duties are which are assumed by the attorney.[52]

Notwithstanding the rule that the relation of attorney and client must exist in order that summary proceedings to compel an attorney to pay over money shall be available, as noted in a subsequent subdivision of this section, the fact that there is a controversy as to whether the relation of client and attorney existed when the money was received does not deprive the court of jurisdiction in the summary proceeding;[53] but where in such a case it is found that the relation does not exist, the court may summarily proceed no further, and the petitioner must be left to his remedy by action.[54] Consent cannot confer jurisdiction where the relationship of attorney and client does not in fact exist.[55]

Discretion. Whether in a particular case a client who seeks to recover money claimed by him in the hands of his attorney shall be permitted to enforce such claim by summary proceedings or shall be put to his remedy by an action at law rests in the sound judgment and discretion of the trial court.[56]

b. Necessity for Existence of Relation

Ordinarily summary remedies to compel an attorney to pay over money are available only to persons sustaining the relation of client to such attorney.

In order that summary remedies to compel attorney to pay over money shall be available it is ordinarily regarded as essential that the relation of attorney and client should exist between the parties in relation to the matter which is the ground for the application,[57] although there exists some authority to the effect that the attorney-client relation need not necessarily exist between the parties to such summary proceedings.[58]

Professional character of relation. Not only must the relation of attorney and client have existed between the parties, but this relation must also have been professional in character.[59] The

51. Macdonald v. State, 39 So 257, 143 Ala. 101.

52. Emanuel v Cooper, 133 N.W. 1064, 153 Iowa 572

53. Union Bldg, etc, Assoc v. Soderquist, 87 N W 433, 115 Iowa 695 —State v Morgan, 45 N.W. 1070, 80 Iowa 413.

54. Matter of Ney Co., 99 N.Y.S 983, 114 App Div 467.

55. In re Langslow, 60 N.E. 590, 167 N.Y. 314

56 Minn —Charest v. Bishop, 162 N W 1063, 137 Minn 103.
N Y —Cross v. Vogel, 187 N.Y.S 660, 156 App Div 358—Application of Secrest, 222 N.Y.S. 622, 129 Misc 793.
6 C J p 712 note 50.

Prudence and caution in exercise of power

"It has been said that this power should always be exercised with great prudence and caution and a sedulous regard for the rights of the client on the one hand and of the attorney on the other"—Schell v New York, 27 N E 957, 128 N Y 67, 68—Application of Secrest, 222 N.Y.S 622, 623, 129 Misc 793

Refusal not denial of legal right

Refusal to permit a client to proceed against an attorney by summary proceeding to compel payment over of money is not the denial of any legal right —Schell v New York, 27 N E 957, 128 N Y. 67

57. Ga —Breen v Phillips, 149 S E 565, 169 Ga 13—Smith v International Lawyers, 132 S.E. 245, 35 Ga App 158—Knight v. Rogers, 95 S E. 997, 22 Ga App 308
Ill —People v Finnegan, 182 N.E 792, 350 Ill 109
Mich —De Keyzer v. Misner, 241 N W 848, 258 Mich 208
N Y —Application of J W Rowe Co, 181 N Y S 87, 191 App Div. 179.
6 C J p 713 note 55.

Basis of rule

"The rule has its basis in the right of an attorney except where the relation of attorney and client exists, to have his liabilities established in the ordinary channels of legal procedure"—People v Finnegan, 182 N. E 792, 793, 350 Ill 109

Acceptance of worthless paper

The client's acceptance of worthless paper of the attorney does not alter the relation of attorney and client so as to affect his right to proceed against the attorney by summary proceedings to compel him to pay over money received from the client —Papa v Rini, 157 N Y S 1079, 171 App Div. 796, affirmed 114 N E 1076, 219 N.Y 575.

58. State v Carey, 187 N W. 710, 151 Minn. 517—6 C J p 714 note 65.

"Conventional relation of attorney and client need not necessarily exist in order that one who has paid money to an attorney for a certain purpose may compel its return in a summary manner"—State v. Carey, 187 N W. 710, 151 Minn. 517.

Bail

An attorney who, while acting as such, receives the money or property of another to deposit as bail for an accused, may be summarily dealt with as an officer of the court under Gen St (1913) § 4956, if he attempts to deprive the true owner of his property —State v Carey, 187 N.W 710, 151 Minn 517.

Money obtained by order procured fraudulently

An attorney who by fraud procures from the court an order by which he obtains money from a party may be proceeded against summarily, even though such party is not his client —Wilmerdings v Fowler, 14 Abb Pr.(N.S) 249, modified 55 N Y 641

Court's power to remedy breaches of discipline

The court has power to make disciplinary orders to remedy breaches of professional duty, independent of the rights of clients and others —Hess v. Conway, 142 P. 253, 92 Kan 787—6 C.J. p 714 note 67

59. Ala —Roquemore v. Sovereign Camp, W. O. W., 146 So. 619, 226 Ala 279
N Y.—Application of J W. Rowe Co, 181 N Y S 87, 191 App Div. 179—In re King, 161 N.Y.S. 233, 175 App Div. 196.
6 C J. p 714 note 68.

Classic rule stated

(1) "When an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him But where the employment is so connect-

courts will not, by a summary proceeding, enforce ordinary contractual or business obligations,[60] such as might be performed by an agent who is not an attorney or counselor.[61] Similarly it has been held that the courts will not, on such application, compel an attorney to pay money in satisfaction of an ordinary debt.[62] This summary jurisdiction is not confined to matters arising out of litigation, but extends to any case where the employment is so connected with professional character as to afford the presumption that that character formed the ground of employment by the client.[63]

Adversary of client. The summary remedy to compel an attorney to pay over money is not available to his client's adversary.[64]

Assignee or other successor in interest. This proceeding being highly penal and quasi criminal, it has been held that it may not be resorted to by an assignee of the claim,[65] or by an administrator de bonis non, although the money constituted assets of the deceased,[66] or by a receiver for the client,[67] but this disability of an assignee or other successor in interest has been denied,[68] and where the relation of attorney and client has been created between such assignee and the attorney, there is of course no question as to his right to maintain the proceeding.[69]

Creditor. The creditor of one who has made a transfer in trust of his stock of goods for the benefit of his creditors cannot proceed summarily against an attorney for the trustee to compel such attorney to pay over money received from the trustee out of the proceeds of the goods.[70]

Guarantor of attorney. The summary remedy authorized by a statute to compel an attorney to pay over money collected for his client may not be available to one who guarantees that the attorney will pay over money collected.[71]

Persons procuring clients. The necessary relation of attorney and client does not exist within the meaning of the rule between a collection agency

ed with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction" —Matter of Aitkin, 4 B & Ald 47, 49, 6 E C L 384, 106 Reprint 855

(2) "This statement has been quoted and approved so often as to become a classic"—Roquemore v Sovereign Camp, W O W, 146 So. 619, 621, 226 Ala 279.

60. In re King, 161 N.Y S 238, 175 App Div. 196—6 C J. p 714 note 69

Improvident investment

Where certain moneys were recovered by an attorney for his client in court proceeding, but at the client's request that such attorney should invest the moneys on her behalf and were later invested improvidently by him pursuant to such authority, such money could not be collected from him in a summary proceeding—In re King, 161 N Y S 238, 175 App Div 196.

61. In re King, supra—6 C J. p 714 note 70.

Collection agency

Correspondence between an attorney of one state, conducting a collection agency in other states, where he was not authorized to practice law, and one sending a claim for collection, to one of the collection agency offices in a city of one of those states where the attorney was not authorized to practice law, was held to show that the relation of attorney and client did not exist, so as to authorize a summary proceeding to compel him to pay over money collected—Application of J W Rowe Co, 181 N Y S 87, 191 App Div 179

62. N J—Koenig v. Harned, (Ch) 13 A 236
N Y—Matter of Neville, 75 N Y S 588, 71 App Div 102.
6 C J p 714 note 71.

63. Roquemore v. Sovereign Camp, W O W, 146 So 619, 226 Ala 279—6 C J. p 715 note 72.

Money paid for use in client's business

(1) Summary remedy lies against attorney converting money paid him by a client for use in the client's business which the attorney was employed because of his professional character to transact.—Roquemore v Sovereign Camp, W. O. W, 146 So 619, 226 Ala 279.

(2) Thus a summary remedy lies against an attorney for money attorney collected for a fraternal association, which the association left with the attorney to settle a policy, and which the attorney converted to his own use—Roquemore v Sovereign Camp, W. O. W., supra.

64. **Husband paying money to attorney**

Notwithstanding an attorney for a wife suing for divorce received money from her husband, no relation of attorney and client existed between such attorney and the husband so as to justify his recovery of such funds by summary proceedings against the attorney—People v. Finnegan, 182 N. E. 792, 350 Ill. 109.

65. White v. Ward, 47 So 166, 157 Ala. 345, 18 L R A.(N.S) 568—6 C J. p 713 note 60.

66. White v. Ward, supra—6 C J. p 713 note 61.

67. Newcomb v. Krueger, 173 N E. 246, 36 Ohio App 469

68. Schell v New York, 27 N E 957, 128 N.Y 67—6 C J p 713 note 62

69. In re Lahm, 167 N Y S 217, 179 App Div 757, affirmed 119 N E. 1052, 223 N Y. 573—6 C J. p 714 note 63.

Assignment pending action

The relation of attorney and client, entitling client to summary proceeding under Judiciary L § 475, for collection by attorney, was held to exist between one to whom a claim was assigned, pending an action thereon, and the attorney, then prosecuting and continuing to prosecute it—In re Lahm, 167 N Y S 217, 179 App Div. 757, affirmed 119 N E. 1052, 223 N.Y. 573

70. In re Schwartsberg, 239 N Y.S. 513, 228 App Div 174.

71. **Surety company**

Company which guaranteed that a certain lawyer would turn over moneys collected, on account of such lawyer's failure to pay over a collection to a collecting agency or to the owner of an account, whereby the company was cast in judgment, was not entitled to invoke against such lawyer Vernon's Sayles Civ St Annot. (1914) art 332, providing that an attorney who fails to pay over money may be proceeded against on motion of the party injured or of his attorney, since the company was neither the client nor his legal representative or assign—United States Fidelity & Guaranty Co v Huffmaster, (Tex Civ App) 204 S.W. 337.

which procured clients to forward claims to attorneys for collection so as to entitle such agency to a summary remedy against such attorneys to compel them to pay over money.[72]

Associate attorneys. The relation of attorney and client does not exist between attorneys associated in the conduct of litigation so as to justify a summary proceeding to enforce a division of fees or costs.[73] Nor may a client require one attorney to pay over money collected, and retained by, another attorney who has been employed with the client's consent.[74]

One who has ceased to be an attorney. One who has been an attorney remains liable to the summary jurisdiction of the courts for his conduct while he was an attorney, although he may have been disbarred or may have taken his name off the rolls and ceased to be an attorney at the time the jurisdiction of the court is exercised against him.[75]

c. Defenses

Defenses available to attorneys in ordinary actions at law are available to them also in summary proceedings to compel payment over of money

Being a mere substitute for the ordinary action at law, a summary proceeding is subject to all the defenses which might be made to an ordinary action in regard to the same matter.[76] Thus an attorney may plead as a defense that he did not receive or collect the money demanded,[77] or that it had been garnished in his hands by a creditor of the client.[78] Pleas of set-off in an action are also available to the attorney.[79] On the other hand the assertion of a lien by the attorney,[80] or the refusal of the client to give a receipt[81] has been held to be no answer to a summary application to compel the payment of such money.

Limitations and laches The special proceeding is intended to take the place of, and afford a more sure and speedy remedy than, the ordinary action at law, and it is barred by the statute of limitations if the action at law is barred.[82] On the other hand the right to pursue the summary proceedings will not be barred by laches where it does not appear that the party entitled to enforce such proceedings was guilty of an unreasonable delay.[83]

d. Procedure

(1) In general
(2) Nature and form of proceedings; application and traverse
(3) Hearing, determination and relief
(4) Judgment or order, costs

(1) In General

Summary remedies to compel an attorney to pay over money must be invoked in the proceeding wherein

72. Smith v International Lawyers, 132 S.E. 245, 35 Ga.App. 158.

73. Haden v. Lovett, 65 S.E. 853, 133 Ga. 388, 18 Ann.Cas. 114—6 C.J. p. 714 note 64.

74. **Attorney in another state**
An attorney who has obtained a judgment in favor of a client and employs an attorney in another jurisdiction to enforce the judgment on assets there located, cannot be held accountable to the client in summary proceeding for fee retained by other attorney employed by client's authority to collect the judgment—Bailey v. Rutherford, 151 N.E. 213, 242 N.Y. 220, modifying 209 N.Y.S. 791, 213 App.Div. 853, reargument denied 152 N.E. 431, 242 N.Y. 570, and motion denied 154 N.E. 618, 243 N.Y. 591.

75. Matter of Burnham, 109 N.Y.S. 988, 58 Misc. 576.

76. Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 115 Iowa 695—6 C.J. p. 716 note 99.

Defenses available in assumpsit
In summary statutory proceedings to compel an attorney to pay over to his client money collected for him every defense is open to the attorney which would be open to him in an equitable action of assumpsit against him—Bush v. Bumgardner, 102 So. 629, 212 Ala. 456

Paying money into court
It is not necessary to pay the money into court as preliminary to the allowance of a defense on the merits—White v. Ward, 47 So. 166, 157 Ala. 345, 18 L.R.A.(N.S.) 568, overruling Macdonald v. State, 39 So. 257, 143 Ala. 101.

77. Macdonald v. State, 39 So. 257, 143 Ala. 101.

Estoppel to plead such defense
Where an attorney assumed control over money payable to his client under a judgment, but, instead of taking the money into his possession, directed the actual custodian of the fund to pay it to a third person for the client's benefit, he cannot claim, in opposition to a summary proceeding to compel him to pay over such money, that he did not receive it.—Kent v. Rockwell, 34 N.Y.S. 1041, 89 Hun 88.

78. Ewing v. Freeman, 30 S.E. 637, 103 Ga. 811

79. Ala.—Bush v. Bumgardner, 102 So. 629, 212 Ala. 456
Iowa.—Union Bldg., etc., Ass'n v. Soderquist, 87 N.W. 433, 115 Iowa 695
6 C.J. p. 716 note 99 [a].

Available under general issue
Plea of payment and satisfaction as set-off is available to attorney under general issue in summary proceeding by client against attorney—Bush v. Bumgardner, 102 So. 629, 212 Ala. 456

80. Matter of Fincke, 6 Daly (N.Y.) 111—Gillespie v. Mulholland, 33 N.Y.S. 33, 12 Misc. 40.

81. Longworth v. Handy, 2 Disn. (Ohio) 75—6 C.J. p. 716 note 6

82. People v. Brotherson, 36 Barb. (N.Y.) 662—Van Tassel v. Van Tassel, 31 Barb. (N.Y.) 439

83. **Knowledge of illegality of contract not appearing**
Where plaintiff's decedent had paid fees under a contingent contract with her attorneys to procure a divorce, which was illegal as against public policy, that she had made no attempt to secure restoration of the money paid, during the three years she lived thereafter, did not show that the claim was so stale as to bar summary proceedings by her personal representatives against the attorneys to procure such restoration where it did not appear that she knew that the contract was illegal—In re Sylvester's Estate, 192 N.W. 442, 195 Iowa 1329, 30 A.L.R. 180.

alleged misconduct occurred. Demand for the money is a condition precedent but security, in the absence of statute requiring it, is not a condition precedent. The client and the withholding attorney or attorneys are proper and necessary parties, and so, too, are the persons holding liens on the fund in the attorney's hands.

The summary power of the court must be invoked by application in the action in which the alleged misconduct was committed, and not in an action against the attorney to recover for such misconduct,[84] but the papers should not be entitled in the action, the application being dehors the action and in no sense a step or proceeding in the action.[85]

Money collected by an attorney for his client must be demanded before the client can move for an attachment for its nonpayment.[86] The proper demand is for the gross sum collected by, and in the hands of, the attorney, although he is entitled on a settlement to retain a part as compensation.[87]

Unless required by statute no security is necessary before commencing summary proceedings[88]

Parties. In accordance with the rule, stated earlier in this section, that an attorney and client relationship must exist before summary proceedings to compel an attorney to pay over money shall be available, the client is a necessary party to such proceedings[89] and they cannot be maintained by one other than a client[90] Moreover the client is a proper party petitioner notwithstanding the money in question has been furnished by a third person at the request of such client.[91] Where a single member of a firm of attorneys is summarily proceeded against for moneys belonging to a client, the other members of the firm are proper,[92] but not necessary,[93] parties. Persons holding liens upon the fund in the attorney's hands are, however, necessary parties.[94]

Joinder of parties. Where an attorney has collected separate claims belonging to different persons, they cannot unite in one summary proceeding against him.[95]

(2) Nature and Form of Proceedings; Application and Traverse

The nature and form of the proceedings to compel an attorney to pay over money to his client, including the application, answer and traverse, may be and usually are regulated by statute

The summary proceedings provided for by statute are held to be special statutory proceedings, as distinguished from ordinary common-law actions or ordinary civil actions under a code of civil procedure.[96] However, the summary proceedings authorized by statute are distinguishable from criminal proceedings.[97]

The particular form of summary proceeding whereby a client may compel his attorney to pay over money of the client is generally regulated by statute, and it may be attachment for contempt,[98]

84. Grangier v Hughes, 8 N Y S 828, 56 N Y Super 346

85. Hess v. Joseph, 30 N Y Super 609

86. Roquemore v Sovereign Camp, W O W, 146 So 619, 226 Ala 279—6 C J p 716 note 96.

Money left with attorney to pay policy

Fraternal association's right to summary remedy against an attorney for converting to his own use money left with him by the association to pay a policy did not accrue until association's demand therefor and attorney's refusal—Roquemore v. Sovereign Camp, W O. W., 146 So 619, 226 Ala 279

Delay not constituting laches

Client's delay in making a demand on its attorney for money collected, actively caused by attorney's conduct, was held not laches so as to prevent summary remedy—Roquemore v. Sovereign Camp, W O W, 146 So. 619, 226 Ala 279

87. Macdonald v State, 39 So 257, 143 Ala 101

88. Union Bldg, etc, Assoc v. Soderquist, 87 N.W 433, 115 Iowa 695.

89. Mich—De Keyzer v Misner, 241 N W 848, 258 Mich 208

Miss—Brown v. Pool, 90 So 179, 127 Miss 488.

90. De Keyzer v Misner, 241 N W 848, 258 Mich 208

Wife of client

Where a father, as administrator of an infant son, employed an attorney, who recovered damages for the wrongful death of the son, and paid to such administrator fifty per cent, in accordance with the agreement, the wife of the administrator could not maintain a summary proceeding against the attorney to compel him to pay her a share of the recovery as next of kin, where the relationship of attorney and client did not exist between them, and the wife disclaimed that she employed the attorney—Application of Fellinni, 185 N Y.S. 330, 194 App Div 449

91. Charest v Bishop, 162 N.W. 1063, 137 Minn. 102.

Money paid by daughter of client

Where the money sought to be recovered by summary proceedings had been paid to the attorney by the daughter of the client at his instance and request and for his benefit, it was held that the client could properly maintain the proceedings to require the attorney to return such money to the real owner, the daughter of the client—Charest v Bishop, 162 N W. 1063, 137 Minn 102

92. Nodine v Hannum, 1 Alaska 302

93. Matter of Wolf, 4 N Y S 239, 51 Hun 407.

94. Matter of Forster, 1 N Y S 619, 49 Hun 114—6 C J p 716 note 11.

95. Matter of Forster, supra

96. Davies & Davies v Patterson, 201 S W. 504, 132 Ark 484, L R A 1918D 825—6 C J. p 717 note 26.

"Suit" under code of procedure

A client's statutory proceeding by rule against an attorney to compel him to pay over money in his possession is held to be a 'suit" within the meaning of a general code governing procedure—Commins v Ross, (Ga App) 160 S E 679—Clark v Hilliard, 91 S E 926, 19 Ga App 514.

97. Commins v. Ross, (Ga App.) 160 S E 679.

98. Heffren v Jayne, 39 Ind 463, 13 Am R. 281—6 C.J. p 716 note 90.

disbarment,[99] or execution against the property.[1]

Moreover the proceeding may be begun by affidavit or petition and order to show cause.[2]

Applications for summary remedies to compel attorneys to pay over money are governed by liberal rules as regards form, requisites and sufficiency.[3] Accordingly technical precision and accuracy in pleading is not required in summary statutory proceedings by a client against an attorney to compel him to pay over money belonging to the client.[4]

The petition should be signed and verified by the petitioners themselves, when this is possible.[5]

A traverse of an attorney's answer to a money rule may be filed at any time before the rule is discharged.[6]

(3) Hearing, Determination and Relief

General rules govern questions relating to hearing, determination and relief in summary proceedings to compel the payment over of money.

As in the case of motions generally, applications for summary remedies against attorneys to compel them to pay over money should ordinarily be heard by the court.[7] Under particular statutes author-

99. Jeffries v. Laurie, (C C Mo.) 23 F. 786—6 C.J. p. 716 note 91
Disbarment generally see supra §§ 17–41.

1. Smith v. Bush, 58 Ga. 131.

2. Maigille v. Leonard, 92 N.Y.S. 656, 102 App.Div. 367, affirmed 74 N.E. 1120, 181 N.Y. 553—6 C.J. p. 716 note 93.

3. Bush v. Bumgardner, 102 So. 629, 212 Ala. 456

Applications held sufficient or not demurrable

(1) Pleading of client against attorney, although bearing many of the earmarks of a declaration in assumpsit, was nevertheless held to be a substantial compliance with Code (1906) § 225, as a summary motion against the attorney to pay over money collected for client—Spivey v. Rodgers, 75 So. 444, 114 Miss. 639.

(2) A petition in a proceeding against an attorney for withholding money collected on petitioner's claim, asking an order to require payment over to petitioner, showing that he had used attorney's check, without acceding to his demand for a larger fee, was not demurrable as showing on its face a complete accord and satisfaction—Alfred Struck Co. v. Slicer, 97 S.E. 455, 23 Ga.App. 52

(3) Where a petition by a client for a rule against attorneys alleged that they were employed by petitioners to collect a certain claim, that there was an award thereon, execution issued, collection of money on account thereof, and the attorneys satisfied the execution of record without authority from petitioners to settle for less than the full amount of the execution and cost, and that such attorneys refused on request to account for any collection, it was held that the petition was sufficient in law and not demurrable—Commins v. Ross, (Ga.App.) 160 S.E. 679

(4) Petition by a client for a money rule against attorneys was held not generally demurrable as showing a mere controversy over the proper amount of fees deductible from collection or over disputed rights and credits, so as to require remand of petitioner to his ordinary remedies at law, where the petition alleged that the attorneys collected a stated sum for petitioner, that their fees had been fixed at a stated amount, and that the attorneys refused petitioner's demand to pay over the difference between the stated amount collected and the stated fees fixed—Felton v. Smith, (Ga.App.) 183 S.E. 634.

(5) Petition by a client for a money rule against attorneys was held not demurrable because of a showing that moneys collected were actually paid over in another state, wherein most of litigation resulting in the collection of moneys was had, where the petition alleged that the moneys in question were being held in state and county of suit and that part of the litigation incident to their collection was prosecuted in county of suit—Felton v. Smith, supra.

Applications held insufficient

(1) A petition against an attorney for a rule to pay money to the purchaser of an execution which had been collected by the attorney prior to such purchase, is demurrable, where it shows that the relation of attorney and client did not exist at the time of the collection—Knight v. Rogers, 95 S.E. 997, 22 Ga.App. 308.

(2) A petition alleging that a collection agency procured clients to forward claims to attorneys for collection was held not to show the relation of attorney and client authorizing a rule against attorney for payment—Smith v. International Lawyers, 132 S.E. 245, 35 Ga.App. 158

Amendments

(1) Where a client's original petition for rule nisi against attorneys alleged that attorneys had collected a stated amount and wrongfully withheld, after demand, stated amount remaining after allowance of specified "obligated" fee, an amendment alleging an agreement that amount of fee be fixed by client and that client had actually fixed such fee by subsequent agreement with the attorneys was held not objectionable as introducing new contract and new cause of action—Felton v. Smith, (Ga.App.) 183 S.E. 634

(2) Moreover an amendment to a client's petition for a money rule against attorneys was held not objectionable because alleging that only one of two attorneys who composed law partnership agreed to fix the fee of associates at a specified maximum, in view of allegations showing that the attorney was acting for the partnership in entering the agreement and that the other partner was present and participated in the alleged agreement—Felton v. Smith, supra

(3) On the other hand in a summary proceeding under Civ.Code (1910) §§ 4954, 5346, 5347, to compel an attorney to pay over money wrongfully withheld from his client, it was not error to refuse to allow movant to amend her petition so as to add to or vary by parol the terms of an unambiguous written contract under which defendant claimed the funds—West v. Hill & Adams, 99 S.E. 155, 23 Ga.App. 636

4. Bush v. Bumgardner, 102 So. 629, 212 Ala. 456.

Reason for rule

The object of such statutory proceedings is in some measure to divest them of the forms and technicalities which incumber the common-law action and to substitute in its place a less formal and more expeditious remedy—Bush v. Bumgardner, 102 So. 629, 212 Ala. 456

5. Matter of Curtis, 64 N.Y.S. 691, 51 App.Div. 434—6 C.J. p. 716 note 95.

6. Lane v. Brinson, 78 S.E. 725, 12 Ga.App. 760.

7. Shackleford v. Ford, 290 S.W. 43, 172 Ark. 527.

Proper submission to court

On conflicting evidence client's proceeding for summary judgment against attorney was properly submitted to the court sitting as jury.—

izing summary proceedings against attorneys to compel them to pay over money in their possession, it is held that proceedings by way of rule may be heard and disposed of at the term to which the rule is made returnable.[8]

Evidence or proof. In summary proceedings by a client to compel his attorney to pay over money claimed by the client on the introduction of evidence that the money in question came into the hands of the attorney, he has the burden of accounting for such funds.[9]

The evidence on the hearing must be such as is admissible in civil actions;[10] hence ex parte affidavits are inadmissible.[11] The answer of an attorney to a rule against him for money collected is not evidence for him except so far as it is responsive to the rule.[12]

The evidence on hearings of applications for summary remedies to compel attorneys to pay over money, may be regarded as sufficient to support the findings of the trial court, provided that on appeal the court cannot say that such findings are clearly and palpably, or manifestly, against the evidence.[13]

Shackleford v. Ford, 290 S.W. 43, 172 Ark. 527

Conclusions of court and verdict

(1) In proceedings by a client for summary judgment against attorneys for money collected, on evidence given ore tenus, the judge's conclusions correspond to the verdict of a jury—Wilson v. Monette, 139 So. 264, 224 Ala. 106

(2) In a particular case a verdict for client on the theory that defendant-attorney withheld money collected from client's debtor was held to be unauthorized under the evidence—Stanfield v. Gramling, Spalding & Collingsworth, 165 S.E. 776, 45 Ga. App. 665.

(3) On the other hand where in a rule to require an attorney to pay over certain money collected on a note forwarded to such attorney by a client and on the trial all the evidence showed that such attorney's answer was false, a verdict finding the answer to be false was held to be a necessary result of the evidence—Wright v. Schofield, 17 S.E. 929, 92 Ga. 537.

8. Screven Oil Mill v. Guyton, 162 S.E. 920, 44 Ga.App. 820

Reinstatement of rule

(1) Where the court at the first term hears and discharges a rule against an attorney upon verified and untraversed answer, movant cannot file a traverse and demand that rule be reinstated—Screven Oil Mill v. Guyton, 162 S.E. 920, 44 Ga.App. 820

(2) At all events the refusal of the trial court to reinstate the rule under the circumstances of a particular case was held not to be an abuse of discretion, assuming that the matter was within its discretion—Screven Oil Mill v. Guyton, supra.

9. Answer by attorney

An answer filed by an attorney setting up affirmative matter, does not cast any additional burden on the complainant—State v. Morgan, 45 N.W. 1070, 80 Iowa 413.

Debtor's payment to attorney

(1) Where a debtor testified he paid a claim to defendant-attorney, retained to collect such claim, defendant had the burden to account for the proceeds to plaintiff-client—Stanfield v. Gramling, Spalding & Collingsworth, 165 S.E. 776, 45 Ga. App. 665

(2) However, where the attorney on his own behalf testified that he paid over the amount received to his client and introduced documentary evidence in support of such testimony, and no evidence in rebuttal was offered by the client, it was held that the burden on the attorney was sustained—Stanfield v. Gramling, Spalding & Collingsworth, supra

10. Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 115 Iowa 695—6 C.J. p. 717 note 13

Evidence admissible

(1) In summary proceeding against attorney under Code (1923) §§ 10267, 10268, an attorney was properly permitted to show legal services rendered a decedent as client and to prove the reasonable value of such services—Bush v. Bumgardner, 102 So. 639, 212 Ala. 456

(2) Similarly in summary proceedings against an attorney under such statute it was held that the attorney was properly permitted to testify that a certain mortgage was not included in an item paid to plaintiff, and that a stated balance included interest up to the time of a partial settlement.—Bush v. Bumgardner, supra

11. Union Bldg., etc., Assoc. v. Soderquist, 87 N.W. 433, 115 Iowa 695

12. Foster v. Reid, 58 Ga. 221.

Admissions by failure to reply

The averments of the answer are not to be regarded as admitted because no reply was filed thereto—State v. Morgan, 45 N.W. 1070, 80 Iowa 413

13. Charest v. Bishop, 162 N.W. 1063, 137 Minn. 102.

Evidence sufficient

(1) In a client's proceeding to compel his attorney to pay over money received by him the evidence was held to sustain a district court's finding that the money had been received to obtain bail, and not as payment of attorney's services.—Charest v. Bishop, 162 N.W. 1063, 137 Minn. 102

(2) Evidence was held to warrant a finding that an attorney owed his client nothing on account of money collected by the attorney on mortgages belonging to the client—Bush v. Bumgardner, 102 So. 629, 212 Ala. 456.

(3) In summary proceedings against an attorney, evidence was held to support a finding that the attorney had certain moneys, the property of client, in his possession—Gerlich v. Richter, 233 N.W. 640, 184 Minn. 346

(4) Evidence was held to be sufficient to show that an attorney wrongfully and in bad faith kept nine hundred fifty-nine dollars and seventy-one cents of his client's moneys and attempted to justify his conduct by crediting the amount upon services when client owed him only thirty-five dollars, so that the trial court was justified in disposing of the matter summarily—Lemington Building & Loan Ass'n v. Weddell, 174 A. 673, 115 Pa.Super. 114

Evidence insufficient

(1) Evidence, on a petition for an order directing an attorney to pay over money to a former client, that money was received by the attorney from a sale of stock belonging to two individuals, and paid over by the attorney to one of those individuals, who claimed it under an oral agreement with the other, was held not to show such bad faith by the attorney, as would entitle petitioner to the relief sought—Gross v. Vogel, 187 N.Y.S. 660, 196 App.Div. 358.

(2) In proceedings, by a client who recovered judgment, to compel his attorney to turn over half the proceeds thereof, the evidence was held to be insufficient to show that the attorney discharged his duty to his client when the attorney paid over, to the client's assignee and his own clerk, the client's half of the judgment, or that the attorney could relieve himself of liability for not tak-

Reference. The court may direct a reference to hear and report on the questions arising on a summary application to compel an attorney to pay over money collected,[14] such as the value of the attorney's services,[15] the amount due to the client,[16] and the character of the employment.[17] On the other hand where the matter in dispute can be decided readily and properly by the court, there is no occasion for a reference.[18] On motion to require an attorney to prosecute an action, an order of reference to determine the amount to which the attorney is entitled as fees should not be made, this matter being properly the subject of a separate motion.[19] In a proceeding of this character the court must determine the controversy, and it may order a reference only for the purpose of assistance to itself in that regard. It cannot shift the whole matter to a referee.[20] If a reference is ordered the matter must come back to the court on the report of the referee for final determination, and the report may be adopted or disregarded and a different decision made on the facts.[21]

Matters determinable and relief awarded. Relief to which a client is clearly shown to be entitled will be granted to him,[22] but, if his right is not manifest, his complaint will be dismissed without prejudice to his right to prosecute his claim in the ordinary way.[23] Further in the summary mode of proceeding a client is not entitled to relief requiring that an attorney shall pay over more than the sum actually collected.[24] Accordingly he cannot be made liable for failing through negligence or other cause to recover judgment for the full amount due to his client.[25]

In a summary proceeding the court has the power to adjust any set-off which an attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands.[26] This power

ing steps to see that the interests of his client were protected.—In re Driscoll, 161 N.Y.S. 872, 175 App.Div. 375.

(3) In a client's proceedings against an attorney the evidence was held not to make out a case of the attorney's having received money for which a summary judgment may be recovered.—State v. Rogers, 191 S.W. 125, 136 Tenn. 578.

14. In re Von Polheim, 162 N.Y.S. 498, 175 App.Div. 819—6 C.J. p. 717 note 18.

15. Matter of Ernst, 66 N.Y.S. 620, 54 App.Div. 362—Matter of Keen, 79 N.Y.S. 857, 39 Misc. 374—6 C.J. p. 717 note 19.

16. Matter of Raby, 51 N.Y.S. 552, 29 App.Div. 225.

17. In re Hammann, 75 N.Y.S. 775, 37 Misc. 417.

18. Matter of Borkstrom, 71 N.Y.S. 451, 63 App.Div. 7, affirmed 61 N.E. 1127, 168 N.Y. 639—Waterbury v. Eldridge, 5 N.Y.S. 324—6 C.J. p. 717 note 22.

19. Lulkert v. Lulkert, 92 N.Y.S. 97, 102 App.Div. 53.

20. Carter v. Spooner, 103 N.Y.S. 505, 118 App.Div. 342.

Reference to committee of bar

In summary proceedings against an attorney referred by the court to a committee of the bar, such committee is simply a body created by the court to assist it in the investigation, and the court cannot delegate any of its own powers to such committee, and cannot empower it to compel the attendance of parties or witnesses, nor to administer an oath to those who do appear before it, and the report of such committee can never be used as the basis of an order against the attorney either for the payment of money or for his discipline, but its only proper use is as a report of a preliminary investigation made to determine if the matter calls for a hearing before the court.—Peirce v. Palmer, 77 A. 201, 31 R.I. 432, Ann.Cas.1912B 181.

21. Carter v. Spooner, 103 N.Y.S. 505, 118 App.Div. 342—Jones v. Gilbert, 102 N.Y.S. 983, 117 App.Div. 775.

Hearing of report

Where, upon the return of an order requiring an attorney to show cause why he should not be punished as for a contempt because of his failure to pay over to his client moneys collected for him, a reference is ordered, the court may, upon the coming in of the report, appoint a day for the hearing thereon, and direct that an attachment issue against the attorney, returnable upon the day of the hearing, for the purpose of securing his presence thereon.—Matter of Steinert, 24 Hun (N.Y.) 246.

22. Peirce v. Palmer, 77 A. 201, 31 R.I. 432, Ann.Cas.1912B 181.

23. West v. Hill & Adams, 99 S.E. 155, 24 Ga.App. 636—6 C.J. p. 717 note 28.

Dismissal not improper

In summary proceedings under Civ.Code (1910) §§ 4954, 5346, 5347, to compel an attorney to pay over money wrongfully withheld from his client, where there was no issue for determination by the jury whereby the attorney could be held liable under the requested rule unless the contract relied on by the attorney should be construed adversely to the attorney's reasonable contention, it was not error to dismiss without prejudice to the right to sue in any court having jurisdiction.—West v. Hill & Adams, 99 S.E. 155, 23 Ga.App. 636.

24. Ga.—Langmade v. Glenn, 57 Ga. 525.

N.Y.—In re McIntosh, 112 N.Y.S. 513.

Tex.—Croft v. Hicks, 26 Tex. 383.

6 C.J. p. 718 note 30.

Allowance of interest

Where a judgment recovered for a client by a firm of attorneys is paid to one member of the firm who appropriates the proceeds to his own use, and the amount which the client owes the firm for legal services is disputed, the order finding the amount due the client and directing its payment should allow interest only from the commencement of the proceedings.—Matter of Wolf, 4 N.Y.S. 239, 51 Hun 407.

25. Croft v. Hicks, 26 Tex. 383.

26. Emanuel v. Cooper, 133 N.W. 1064, 153 Iowa 572—6 C.J. p. 717 note 16.

Discharged attorney

Refusing in summary proceedings to require attorney, discharged from plaintiff's employment, to return money paid for services by a third person and not a party to the main proceedings, was not error where it appeared that the money sought to be recovered had been paid for services which had been rendered up to the time the attorney was discharged.—Seibert v. Seibert, 243 N.W. 59, 186 Minn. 274.

will not be exercised, however, where the attorney offered no evidence as to the value of his services [27]

(4) Judgment or Order; Costs

The determination of summary proceedings to compel an attorney to pay over money should be by order rather than by formal judgment.

Since, as noted in a previous subdivision of this section, summary proceedings to compel an attorney to pay over money are special proceedings rather than an action, no formal judgment can be entered thereon,[28] but on a proper showing an order may be made.[29] Under a statute providing that if an attorney shall retain in his hands money received for a client after being ordered by the court to pay over such money, he shall be stricken from the list of attorneys, it was not improper for a court in summary proceedings brought against an attorney to enter an order reciting that on his failure to pay a certain sum within a designated time his name should be stricken from the roll of attorneys.[30] An order requiring an attorney to pay over money in his hands to petitioner in particular summary proceedings is improper while a pending petition by the client to have such money paid to another remains undetermined.[31]

Costs. As between an attorney and his client in summary proceedings to compel the attorney to pay over certain money, the attorney should not be charged with costs when he has been successful in the main question involved in the proceedings.[32]

V. COMPENSATION OF ATTORNEY

§ 160. Right to Compensation in General

In this country an attorney is entitled to compensation for legal services unless they were rendered under circumstances showing he did not intend to charge for them

Although under the common law, as enforced in England and some parts of Canada, counselors, advocates, and barristers, as distinguished from attorneys, conveyancers, and special pleaders below the bar, had no right to charge and enforce the payment of compensation for their services,[33] in the United States members of all branches of the legal profession are entitled to fair compensation for services rendered on a contract express or implied,[34] and they can enforce this right by action.[35] Even in jurisdictions where it was held

27. Emanuel v Cooper, 133 N W 1064, 153 Iowa 572

28. Cartier v Spooner, 103 N.Y S 505, 118 App Div 342

Imposition of fine

Provision of Code (1931) 30-2-13, so far as providing that an attorney who fails to pay over money collected shall be deemed guilty of a misdemeanor and fined, etc, presupposes an indictment and conviction, so that such fine cannot be imposed in a summary proceeding against the attorney—Hall v Eary, 170 S.E. 904, 114 W Va 82

29. Peirce v Palmer, 77 A 201, 31 R I 432, Ann Cas 1912B 181

Final determination of attorney's rights

An order in a client's favor will be a final determination of the attorney's rights—Peirce v Palmer, 77 A 201, 31 R I 432, Ann Cas 1912B 181

Provision that order shall not be bar

An order dismissing the proceedings should provide that it shall not be a bar to any action by the client against the attorney to recover the money—Shanley v McManus, 109 N Y S 434, 124 App Div 935, modifying 107 N Y S 913, 57 Misc 8

Conclusiveness of decision in summary proceeding by a client against an attorney to recover money or property collected by the attorney see Judgments § 611 [34 C.J. p 763 note 36].

30. **On entry of rule absolute**

Where a rule nisi was issued requiring an attorney to account for a client's moneys and the attorney filed an unresponsive unverified answer which did not demand a jury trial, and the undisputed testimony on hearing, not objected to, supported the petition as to the attorney's receipt and retention of money and failure to render services for the total amount thereof, the court properly entered a rule absolute, without a jury, requiring the attorney to pay over the excess over the value for his services within ten days or be stricken from the roll of attorneys, notwithstanding the answer was untraversed—Wilkins v Jordan, 177 S E 344, 50 Ga App 119

31. People v Finnegan, 182 N E 792, 350 Ill 109

Directing payment to client's husband

An order directing an attorney for a wife, suing for divorce, to return money paid by her husband to him before the determination of the wife's petition to require the attorney to pay it to the court clerk, was held to be improper—People v Finnegan, 182 N E 792, 350 Ill 109

32. In re Von Polheim, 162 N Y S. 498, 175 App Div 819

Attorney's right to any fee

Where the attorney retained sums collected for the client, who contended in summary proceedings that the attorney should have no fee, but a part of his claim was allowed the attorney, he should not have been taxed with costs in the proceeding to require payment—In re Von Polheim, 162 N Y S 498, 175 App Div 819

33. Mowat v Brown, (C C Minn.) 19 F 87.

34. Fla.—U S Savings Bank v Pittman, 86 So 567, 80 Fla 423
La.—Thigpen & Herold v Slattery, 73 So 780, 140 La 708.
N J.—Cicalese v. Fortunato, 112 A 508, 92 N J Eq 329.
6 C J p 719 note 49.
"The compensation of an attorney for his services is governed by agreement, express or implied, which is not restrained by law Judiciary Law (Consol Laws, c. 30) § 474 The rules of the old common law and of the civil law relating to the employment of an attorney at law and as to his compensation were never adopted in this state"—Greenberg v. Jerome H Remick & Co, 129 N E 211, 230 N Y 70, reversing 181 N.Y S. 937, 191 App Div. 947.

35. Fla.—U S Savings Bank v Pittman, 86 So 567, 80 Fla 423.
Ill.—Crozier v. Freeman Coal Mining Co, 2 N E (2d) 293, 363 Ill 362
La.—Thigpen & Herold v. Slattery, 73 So 780, 140 La 708
N Y.—Haight v Lloyd Royal Belge Société Anonyme, 217 N Y S 239,

that a counselor at law could not recover a fee for services rendered, an action would lie upon a bill of exchange, promissory note, or other obligation given in consideration of his services.[36]

Gratuitous services. Where an attorney renders services voluntarily, or in such a way as to authorize the inference that he did not intend to charge therefor, such services, no matter how beneficial they may be, will be supposed to be gratuitous, and he is not entitled to recover,[37] especially where the services were rendered without knowledge or consent,[38] unless compensation is expressly stipulated for.[39]

Services rendered brother attorney. Although there is a rule of courtesy among the members of the bar, agreeably to which each will render services to the others without expectation of reward, other than such as may come by way of similar service, the courtesy of the profession is not to be strained to meet the demand of one who, having practically withdrawn from the profession and thereby disabled himself from reciprocating in kind, demands the courtesy as an aid to the accumulation of wealth in another pursuit,[40] and the rule of courtesy becomes inapplicable the moment the parties, from any cause whatever, stand on their rights.[41]

§ 161. Statutory Regulations

a. In general
b. Fees in bill of costs

a. In General

Valid statutes regulating the compensation of attorneys are controlling as to amount and mode of recovery thereof.

Where the legislature by a special act adjusts the claims of attorneys employed in some particular proceeding, it withdraws from the court the question of reasonable value, and it also supersedes an express contract to pay.[42] So, where the legislature has fixed one definite and certain mode of payment, no other is permissible.[43]

Where a statute fixing the basis of liability to an attorney on the part of an adverse party who settles the controversy without notice to the attorney is amended, the rights and remedies of an attorney under a contract made with his client before the amendment became effective are not affected by the amendment,[44] and it has been held that,

217 App Div 656—Field v Moore, 178 N Y S 842, 189 App Div. 709
6 C J p 719 note 50.

36. U S.—Mowat v. Brown, (C C Minn.) 19 F 87
Pa.—Mooney v. Lloyd, 5 Serg & R 412

37. Iowa—In re Lear's Estate, 213 N W 240, 204 Iowa 346
Md.—Drury v. Brightwood Sanitarium Co, 133 A. 314, 150 Md 585
Wyo.—Cadle v. Black, 154 P 997, 24 Wyo 43.
6 C J p 719 note 53, p 730 note 64.

38. Philippine—Orozco v. Hernaez, 1 Philippine 77
Tex.—Landman v State, (Civ App.) 97 S W.(2d) 264, error refused

39. Cicotte v. St Anne's Church Corp, 27 N W 682, 60 Mich 552—6 C J p 719 note 54.

40. Thigpen & Herold v Slattery, 73 So 780, 140 La 708
"A member of the bar, who is no longer engaged in the active practice of his profession and has accumulated wealth in other pursuits, has no right to avail himself of the services of an active practitioner, in a long litigation, involving valuable property, upon the assumption that the services will be rendered gratuitously, by reason of a custom, supposed to prevail at the bar of the city in which he lives, since no such custom, applicable to the case stated, is shown to prevail"—Thigpen & Herold v Slattery, supra

41. Graydon v. Stokes, 24 S C 483—6 C J p 731 note 72 [b]

42. Herrick v Barzee, 190 P 141, 96 Or. 357—6 C J p 753 notes 52, 53
Purpose of statute
The purpose of the statute entitling an attorney to a reasonable fee for services in actions on notes, mortgages, or other instruments, and providing fees not to exceed five per cent of the amount decreed for principal and interest, is to impose upon the debtor some part of the expense of collecting the debt evidenced by the obligation, if legal action should become necessary, and to set at rest doubt that a provision in the obligation authorizing inclusion of counsel fee is void as against public policy—Petitions of Warrington, (Del. Super.) 179 A. 505
Contract with revenue collector
A contract between a revenue collector and an attorney approved by the county court, regarding the attorney's fees for delinquent tax suits, imposed no liability on the state, county, or collector where the amount of such fees is fixed by statute—State ex rel McKittrick v. Bair, 63 S.W (2d) 64, 333 Mo 1

43. State ex rel McKittrick v Bair, supra
Delinquent tax proceedings
When the legislature fixed one definite mode of payment for attorney's fees in delinquent tax suits, as where the statute provides that the right to the fees accrues as a whole after collection made or judgment rendered, no other mode of payment is permissible—State ex rel McKittrick v. Bair, 63 S W (2d) 64, 333 Mo. 1.
Home Owners' Loan Act
A statute prohibiting the collection of fees from persons applying to the Home Owners' Loan Corporation for a property loan has been held not to bar attorneys employed by an applicant from recovering for services rendered before acceptance of the application in negotiations with mortgagees for reduction in interest, to prevent foreclosure, to eliminate a receiver, and to induce the mortgagees to accept the corporation's bonds, nor does the act prevent attorneys employed by applicant from recovering reasonable fees for services rendered subsequent to acceptance of the application, where the services consisted in negotiations whereby the mortgagees consented to reduce their claims against applicant's property. The statute is not concerned with a contract made by the borrower with lawyers or other persons for services not connected with appraisal, examination of title, and closing of the loan—Romano v. Magliulo, 278 N Y.S 936

44. Fry v Wolfe, 234 P 191, 106 Okl 289—Allen v. Shepherd, 169 P. 1115, 69 Okl 47—Culver v Diamond, 167 P. 228, 64 Okl 271.

where the statute was amended after such settlement but before submission of the case in the attorney's action for compensation thereunder, the statute in effect when the contract of settlement was made is applicable.[45]

Statutes regulating the compensation of counsel assigned by the court to indigent litigants are hereinafter considered in § 172 of this title; and statutory provisions as to attorney's fees for services in connection with claims against the United States are treated in the title United States § 155 [65 C.J. p 1397 note 34–p 1398 note 43].

b. Fees in Bill of Costs

Statutes regulating the amount awarded attorneys in bills of costs and fixing penalties for illegal charges govern as to such costs but do not affect the attorneys' rights as against their clients.

General acts specifying certain amounts to be taxed as attorney's fees against the losing party to a lawsuit do not limit the amount of an attorney's recovery on a quantum meruit, and an attorney is entitled to a reasonable compensation for his services regardless of the amount fixed by statute.[46] The limitation of the legal fee is for the purpose of regulating the costs for counsel fees between the parties, and not the compensation to be allowed between attorney and client.[47] In other words, the clerk of the court cannot tax against the losing party in a suit fees other than those prescribed by statute; but contracts, express or implied, made between an attorney and his client for fees, are not limited as to amount, and may be enforced in the same way as other contracts.[48]

Where the rate of compensation for attorneys and counselors is changed by the legislature during the progress of a suit, the costs of such suit are to be taxed according to the statute in force at its termination.[49]

Illegal fees. It is generally made a misdemeanor subject to penalty for an attorney to charge and receive illegal fees in a bill of costs. It is held that the act of receiving illegal fees is one of official misconduct;[50] but only one penalty can be exacted for several unlawful charges in the same bill.[51] These rules apply only to charges for such items as are fixed by statute,[52] and, where the statute exacts no penalty, the illegal fees cannot be recovered back.[53]

§ 162. Retaining Fee

A retaining fee is a preliminary fee given to secure an attorney's services and remunerate him for being deprived of the opportunity to act for adverse parties Express contracts for retaining fees are always enforceable, and generally contracts therefor will in a proper case be implied.

A retaining fee is a preliminary fee given to an attorney or counsel to insure and secure his future services, and induce him to act for the client[54] It is intended to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services to the other and of receiving pay from him,[55] and the payment of such fee, in the absence of an express understanding to the contrary, is neither made nor received in payment of the services contemplated;[56] its payment has no relation to the obligation of the client to pay his attorney for the services which he has retained him to perform.[57] On the other hand, such a fee is not intended to swell the amount of the bill which accrues for services rendered in pursuance of the employment.[58] It may be fixed and definite as to amount, time of employment, and time of payment.[59]

45. McDougal v Black Panther Oil & Gas Co, (C C A Okl) 277 F 701

46. Strong v. Mundy, 31 A. 611, 52 N J Eq 833, reversing 30 A 332, 52 N J Eq 744—6 C J p 753 note 54.

47. N J—Strong v. Mundy, 31 A 611, 52 N J Eq 833, reversing 30 A 332, 52 N J Eq 744
N Y—Adams v. Stevens, 26 Wend 451
Pa—Foster v. Jack, 4 Watts 334.
6 C J p 754 note 55

48. Yates v Robertson, 80 Va 475

49. Onondaga v. Briggs, 3 Den (N Y) 173

50. Waters v. Whittemore, 22 Barb (N Y) 593

51. Tanner v. Croxall, 17 N J.Law 332.

52. State v. Andrews, 51 N H. 582—6 C J p 754 note 60

53. Rawson v. Porter, 9 Me 119.

54. Pickens Co v. Thomas, 111 S E. 27, 152 Ga. 648, 21 A L R 1438, answers to certified questions conformed to 111 S E 739, 28 Ga.App 434

Other definitions

(1) "The ordinary present definition of a retaining fee . . . is a payment in advance, to cover future services and disbursements until further provision is made."—Severance v Bizallion, 121 N.Y S 627, 629, 67 Misc 103

(2) "A 'retaining fee' is 'a fee given to counsel on being consulted, in order to insure his future services'"—Bouvier L D, quoted in Blair v. Columbia Fire Proofing Co., 77 N E 762, 763, 191 Mass 333

(3) "A retaining fee is an engagement fee; that is, a fee to engage and hold an attorney to render services to a client in a particular case, or generally, as occasion may arise."—Saulsbury v. American Vulcanized Fibre Co, 91 A. 536, 541, 5 Boyce (Del) 182—Bright v Turner, 265 S W 627, 628, 205 Ky 188.

55. Ga.—Pickens Co v. Thomas, 111 S E 27, 152 Ga 648, 21 A L R 1438, answers to certified questions conformed to 111 S E 739, 28 Ga. App 434.
N J.—Conover v West Jersey Mortg. Co, 126 A 855, 96 N J Eq 441.
6 C J p 720 note 60

56. Conover v West Jersey Mortg Co, supra—6 C J p 720 note 61.

57. Bright v. Turner, 265 S W. 627, 205 Ky 188—6 C J. p 630 note 51

58. Pickens Co. v Thomas, 111 S E 27, 152 Ga. 648, 21 A.L R. 1438, answers to certified questions conformed to 111 S E. 739, 28 Ga.App 434.

59. Bright v. Turner, 265 S.W. 627, 205 Ky. 188.

Right of recovery. While a contract to pay a retaining fee is valid and enforceable although the contemplated services are not rendered,[60] the decisions are in conflict on the question whether an agreement to pay a retaining fee is implied; in some states the right to charge a retaining fee is limited to cases of express stipulation therefor,[61] but the generally prevailing rule is that an attorney is entitled to recover a retaining fee in every case in which he is retained, although no such fee has been specially contracted for,[62] and although he has not been called upon to perform any service in the case.[63] An agreement for a retainer is not necessarily implied, however, where all the particular services performed by the attorney are fully paid for.[64] Accordingly it has been held that when an attorney is generally retained and is employed by the client in all his cases, and is paid in full for services rendered in such cases, he gets all that he is entitled to under such general retainer, and should not be permitted to recover, in addition to the sum so paid for such services, an additional amount as a retaining fee.[65]

An attorney can charge only one retaining fee in a single case, although if many attorneys are employed in one litigation each may stipulate for his retaining fee.[66]

Apart from the technical retaining fee, an attorney may always claim and receive reasonable compensation in advance.[67] He may also demand that costs be paid or secured,[68] and, in some instances, he may refuse to proceed with pending actions unless past services are paid for.[69]

§ 163. Statutory Fees and Taxed Costs

In the absence of statute or agreement to the contrary a judgment for costs and fees is the property of the client, and not of the attorney

A judgment for costs is a judgment in favor of the party, not of the attorney, and the money represented by the costs is ordinarily the property of the party,[70] and so the allowance in a judgment of at-

60. Ga.—Pickens Co. v. Thomas, 111 S.E. 27, 152 Ga. 648, 21 A.L.R. 1438, answers to certified questions conformed to 111 S.E. 739, 28 Ga.App. 434
Ky.—Bright v. Turner, 265 S.W. 627, 205 Ky. 188

61. Windett v. Union Mut. L. Ins. Co. of Maine, (Ill.) 12 S.Ct. 751, 144 U.S. 581, 584, 36 L.Ed. 551, affirming (C.C.) 36 F. 838—6 C.J. p. 720 note 57

62. Roche v. Baldwin, 76 P. 956, 143 Cal. 186—6 C.J. p. 720 note 58

63. Union Surety, etc., Co. v. Tenney, 65 N.E. 688, 200 Ill. 349, affirming 102 Ill.App. 95—6 C.J. p. 720 note 59

64. Pickens Co. v. Thomas, 111 S.E. 27, 152 Ga. 648, 21 A.L.R. 1438, answers to certified questions conformed to 111 S.E. 739, 28 Ga.App. 434—6 C.J. p. 720 note 62

65. Pickens Co. v. Thomas, supra

General counsel of corporation

"When an attorney is employed by a corporation as its general counsel for one year, without a fixed salary, but the attorney is to be paid a separate fee for each specific service rendered the corporation, and there is no agreement between the attorney and client as to the payment of a retaining fee, such attorney is not entitled, as a matter of right, at the end of his year's employment, to a retaining fee in addition to the fees paid for his specific services rendered the corporation. The agreement by which the attorney is to be paid a separate fee for every specific legal service rendered the corporation excludes any implied agreement to pay him in addition to a retainer fee."—Pickens Co. v. Thomas, 111 S.E. 27, 28, 152 Ga. 648, 21 A.L.R. 1438, answers to certified questions conformed to 111 S.E. 739, 28 Ga.App. 434

66. Ill.—Schnell v. Schlernitzauer, 82 Ill. 439
N.Y.—Morton v. Croghan, 1 Cow. 233

67. Young v. Lansnar, 112 S.W. 17, 133 Mo.App. 130—Reed v. Mellor, 5 Mo.App. 567.

68. Hall v. Crouse, 13 Hun (N.Y.) 557—Gleason v. Clark, 9 Cow. (N.Y.) 57—Castro v. Bennet, 2 Johns. (N.Y.) 296

69. Avery v. Jacob, 15 N.Y.S. 564—6 C.J. p. 720 note 66.

70. Ark.—Vaughan v. Humphreys, 239 S.W. 730, 153 Ark. 140, 22 A.L.R. 1301
Conn.—Erickson v. Foote, 153 A. 853, 112 Conn. 662
Mass.—Boynton v. Tarbell, 172 N.E. 340, 272 Mass. 142.
Minn.—In re Skoll, 81 N.W. 210, 78 Minn. 408, 79 Am.S.R. 400
Mont.—In re Maury, 34 P.(2d) 380, 97 Mont. 316
N.Y.—In re Howell, 109 N.E. 572, 215 N.Y. 466, Ann.Cas.1917A. 527, reversing 150 N.Y.S. 1090, 166 App.Div. 894—Baumwald v. Two Star Laundry Service, 255 N.Y.S. 174, 234 App.Div. 392, affirmed 184 N.E. 33, 260 N.Y. 538—In re Tinney, 176 N.Y.S. 102, 187 App.Div. 569.
6 C.J. p. 720 note 68.

"A judgment for costs and disbursements is the property of the party recovering it, and not of his attorney,—subject, however, to the lien of the latter for his services."—In re Skoll, 81 N.W. 210, 78 Minn. 408, 79 Am.S.R. 400.

In New Jersey

(1) Costs, including counsel fees taxed as costs, are recovered by the party to reimburse him for money necessarily spent in the prosecution or defense of the suit, and the judgment or decree is in his favor, and not in favor of the attorney or solicitor—Eufemio v. McKeown, 159 A. 796, 10 N.J.Misc. 549

(2) In fact, however, the client has seldom paid such expenses, but in practice most of them have been paid by the solicitor or attorney, and that officer has frequently received nothing from his client, so that as between the party and his solicitor it generally or frequently happens that the latter is entitled to all of the costs recovered.—Hoboken Trust Co. v. Norton, 107 A. 67, 90 N.J.Eq. 314.

(3) Hence it has come to be a common expression to say that the costs belong to the solicitor or attorney.—Klein v. Journal Square Bank Bldg. Co., 169 A. 827, 114 N.J.Eq. 510—Columbia Ins. Co. v. Artale, 164 A. 864, 112 N.J.Eq. 505, affirmed 168 A. 304, 114 N.J.Eq. 268—Cicalese v. Fortunato, 112 A. 508, 92 N.J.Eq. 329—Ely v. Peet, 29 A. 817, 52 N.J.Eq. 734.

(4) But this does not alter the intrinsic character of the affair, which is a recovery by the successful party against the defeated party of certain payments which he has made, or become liable to make, to his solicitor, counsel, and others.—Ely v. Peet, supra.

(5) The matter of costs is adjustable between solicitors and clients; and, where costs are not awarded in favor of one party as against the other, they are taxable as between

torney's fees gives the attorneys no interest and ownership in the judgment to the extent of the amount of the fee allowed, but the judgment in its entirety is the property of the client[71] Attorneys are entitled to the taxed costs, however, where the right thereto is given them by statute,[72] and, as shown infra § 181, it is competent for the client to stipulate that the attorney shall have the costs in addition to other compensation. The amount awarded as attorney's fees does not necessarily determine the amount payable by the client to counsel or preclude the latter from recovering a reasonable compensation for his services,[73] and, as has been shown supra § 161, the fact that the amount so awarded is regulated by statute does not alter the rule

Allowance paid by adverse party An attorney's contract of employment limiting him to a certain sum to be paid proportionately by his clients does not prohibit him from receiving in addition the allowance made in litigation which is paid by the adverse party[74]

§ 164. Circumstances Affecting Right

The attorney's right to compensation earned by him is not defeated by matters not affecting the value of his services

Errors of the attorney not injuring the client will not defeat his right to compensation;[75] nor is his right affected by the fact that after the compensation was earned the client discharged him[76] or disputed the amount of the fee[77] The fact that the attorney held public office is a matter of no consequence so long as it does not disqualify him to act as an attorney and to appear in that capacity in the proceeding in question for which services he is seeking recovery[78] Where attorneys at the request of other stockholders without litigation successfully attacked a combination of stockholders of a corporation, the fact that the combination may have been illegal does not defeat the attorneys' right to compensation.[79]

Diversion of funds set aside for payment. The fact that money appropriated by a township to pay for the services of an attorney employed by it was diverted to other uses does not affect his right to compensation[80]

Solicitation of third person. An attorney is not to be deprived of his fee because some person, without his knowledge, connivance, or consent, makes representations with reference to the attorney or to advantages to the client that may accrue by reason of the employment of the attorney, if the attorney had no knowledge of such statements or representations.[81]

Nonperformance or breach of contract, as shown

solicitor and client—Hoboken Trust Co v Norton, supra

(6) An attorney who had agreed to foreclose mortgages for a stipulated fee was not entitled, in addition to such fee, to the extra allowances for counsel fees allowed by the chancellor in the taxed costs—Perkins v Deal Beach Realty Co, 114 A 853, 92 N J Eq 526, affirmed Perkins v Robertson, 114 A. 856, 92 N J.Eq 692

71. Ind—Berry v State Bank of Otterbein, 193 N E 922, 99 Ind App 655

Mass—Boynton v. Tarbell, 172 N E 340, 272 Mass 142.

Agreement in note

(1) An agreement to pay attorney's fees in promissory notes is ordinarily held to be in the nature of liquidated damages which inure to the benefit of the plaintiff, and is not a provision for the benefit of the attorney at law who brings suit on the notes to recover judgment for the plaintiff for the principal, interest, and attorney's fees due on the note—Spence v. Phillips, 158 S E. 797, 172 Ga 782—In re Maury, 34 P (2d) 880, 97 Mont. 316

(2) This view has, however, been disapproved in Louisiana where the court said "The only sense in which it can be said that the attorney's fee stipulated in a promissory note belongs to the owner of the note is that the owner of the note may sue for and recover the fee in his own name when he sues on the note"—Foundation Finance Co. v Robbins, 153 So 833, 836, 179 La 259, reversing (App) 149 So 166 Contra Foundation Finance Co v Robbins, (La App) 144 So 293

72. Union Mut L Ins Co v Buchanan, 100 Ind 63—6 C J. p 720 note 69

73. Mass—Boynton v Tarbell, 172 N E 340, 272 Mass 142

Mo—Leahy v Lemp, (App) 214 S W. 228

74. Matter of Shanley, 107 N Y S 913, 57 Misc 8, modified on other grounds 109 N Y S 434, 124 App Div 935.

75. O'Day v. Spencer, 189 P 394, 96 Or 73

Erroneously holding sale valid

Where it appeared that defendant received a large sum of money as the result of litigation, and there was no showing that the attorney's fee was to be contingent, the fact that the attorney erroneously represented that a sheriff's sale was valid will not, where there was no showing that defendant relied on it or was injured, prevent recovery of compensation—O'Day v. Spencer, 189 P. 394, 96 Or. 73.

76. Ky.—Sharp v Culton, 89 S.W. (2d) 869, 262 Ky 84

N Y—Bermant v. Keveney, 150 N Y S 949, 88 Misc 537

Tex—Chandler v Harrison, (Civ. App) 4 S W (2d) 604

77. Fleming v. Phinizy, 134 S E 814, 35 Ga App 792

Estoppel of client

Defendants were estopped to assert that when they contracted with complainant to recover an estate for them he made no disclosure as to its extent and nature, where, after they were fully informed, they acquiesced in his further work and expenditure for them in the matter—Adams v Schmidtt, 60 A 345, 68 N J Eq 168

78. Cooke v. Embry, 123 So 27, 219 Ala 623

79. Willingham, Wright & Covington v. Glover, 111 S.E. 296, 28 Ga.App. 394.

80. Union School Tp of St Joseph County v Moon, 137 N.E 332, 205 Ind 514

81. Lamar Hardwood Co. v. Case, 107 So 868, 870, 142 Miss 277

"The attorney is not required to answer for the sins of other persons, unless he has done something to cause or promote such delinquencies or sins"—Lamar Hardwood Co. v. Case, supra.

infra § 183, may, however, defeat the attorney's right to compensation.

§ 165. —— Acting without License

Only duly licensed attorneys are entitled to compensation for legal services.

No one is entitled to recover compensation for services as an attorney at law unless he has been duly admitted to practice before the court, or within the jurisdiction in which the services were rendered, and is an attorney in good standing at the time.[82] This has been held to be true, although recovery is sought for services rendered as agent.[83] It is not enough that the attorney is a practicing lawyer; it must appear further that he has all the qualifications prescribed by the statute, including the taking of the oath of office, payment of the privilege tax, and similar requirements;[84] but it has been held that on failure to pay his professional tax an attorney may charge for services rendered until proper entry of nulla bona has been made on the execution for such tax,[85] and that a failure to pay an occupation tax does not bar the right of an attorney to recover on a cause of action assigned to him as compensation for his services.[86]

Further, the fact that the attorney has been duly admitted to practice law in other states does not affect the application of the general rule above stated,[87] although recovery has been allowed in the case of an attorney licensed to practice in a sister state who has not offended the spirit or intention of the statutes regulating the right to practice, where the circumstances call for application of the rule of comity, discussed supra § 7, permitting such attorneys to practice in particular cases without the formality of an admission and license.[88]

Partners; one of them not duly admitted. Although one may be associated with a licensed attorney, a joint action cannot be maintained for the services of either or both where they act as partners.[89]

Services not rendered as attorney. An unlicensed person may recover for services not performed in a court of record, and of a character the performance of which would not constitute the practice of law.[90]

82. Ind.—Harris v. Clark, 142 N.E. 881, 81 Ind.App. 494
La.—Foundation Finance Co. v. Robbins, 153 So. 833, 179 La. 259, reversing (App.) 149 So. 166.
N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46, reversing 168 A. 772, 11 N.J.Misc. 866.
Wyo.—Harriman v. Strahan, 33 P.(2d) 1067, 47 Wyo. 208.
6 C.J. p. 721 note 72.

Accountant

(1) An accountant who informed a taxpayer of its right to a tax refund and obtained an agreement to receive half of any refund obtained was not entitled to recover where the taxpayer proceeded through its own legal department, since the accountant performed no work, and in supplying information was "practicing law" without a license.—Mandelbaum v. Gilbert & Barker Mfg. Co., 290 N.Y.S. 462, 160 Misc. 656.

(2) An accountant may not recover on a contract, express or implied, for rendering an opinion as to the law, the meaning of a statute, or the giving of information as to what judicial or quasi judicial tribunals are deciding.—Mandelbaum v. Gilbert & Barker Mfg. Co., supra.

Splitting fees with layman

An attorney cannot make an agreement with the holder of a note stipulating for the payment of attorney's fees to collect from the maker the stipulated fee and divide it with the holder, without violating the ethics of the profession, if the holder is not licensed to practice law.—Foundation Finance Co. v. Robbins, 153 So. 833, 179 La. 259, reversing (App.) 149 So. 166.

83. Tedrick v. Hiner, 61 Ill. 139.—6 C.J. p. 721 note 73.

84. Wash.—Smith v. Kneisley, 49 P.(2d) 916, followed in 49 P.(2d) 918.
Wyo.—Harriman v. Strahan, 33 P.(2d) 1067, 47 Wyo. 208.
6 C.J. p. 721 note 74.

Suspended attorney

An attorney who failed to register and to pay the statutory registration fee and was therefore deemed suspended and not entitled to practice law, under the terms of the act could not recover from a client for legal services performed while the fee remained unpaid, notwithstanding the fee went into the public treasury.—Smith v. Kneisley, 49 P.(2d) 916, followed in 49 P.(2d) 918.

85. Williams v. Ivey, 169 S.E. 366, 177 Ga. 77.

86. Ft. Worth, etc., R. Co. v. Carlock, 75 S.W. 931, 33 Tex.Civ.App. 203.

87. Harriman v. Strahan, 33 P.(2d) 1067, 47 Wyo. 208.

In Massachusetts

(1) Under the old statute (St. [1785] c. 23), a person could not lawfully practice as an attorney in any court of justice within the state who was not admitted as an attorney conformably to that statute, although he was an attorney regularly admitted in the courts of another state, and afterward removed into Massachusetts and permanently resided there. Such person therefore could not recover compensation for services rendered as an attorney in the courts of Massachusetts prior to 1836, when the Revised Statutes took effect, altering the rule as to the right of attorneys from other states.—Ames v. Gilman, 10 Metc. 239.

(2) Subsequently, however, it was held that an attorney licensed to practice in another jurisdiction, who at defendant's request performed legal services in Massachusetts, employing local counsel, could recover reasonable compensation despite Rev.L. c. 165 § 45, as amended by St.(1914) c. 432, having informed defendant he was not admitted in Massachusetts and that local counsel was necessary to which defendant agreed.—Brooks v. Volunteer Harbor, No. 4, American Ass'n of Masters, Mates, and Pilots, 123 N.E. 511, 233 Mass. 168, 4 A.L.R. 1086.

88. Freeling v. Tucker, 289 P. 85, 49 Idaho 475.

89. Colo.—Hittson v. Browne, 3 Colo. 304, disapproving Harland v. Lilienthal, 53 N.Y. 438.
Mass.—Browne v. Phelps, 97 N.E. 762, 211 Mass. 376.

90. Schroeder v. Wheeler, 14 P.(2d) 903, 126 Cal.App. 367.—6 C.J. p. 721 note 76.

Claim adjuster

A claim adjuster, who illegally contracted to enforce, secure, settle, adjust, or compromise parents' claim for death of their minor child through dynamite torch of railroad,

Estoppel. That the client knew of the attorney's disqualification and that valuable services were rendered do not estop him from setting up the disqualification,[91] although it has been held that where plaintiffs were partners, one of whom had been duly admitted, and the other, although entitled to admission had not formally enrolled, it was held that in the absence of a statute or rule forbidding recovery, defendant could not set up the disqualification[92]

§ 166. —— Absence of Benefit to Client

An attorney may recover for services rendered in good faith although little or no benefit resulted to the client, but the rule is otherwise where the services were unskillfully or negligently rendered or were detrimental to the client.

One who employs an attorney is presumed to contemplate payment of a fee, and such fee may be earned regardless of the attorney's success in the undertaking, unless there is an agreement to the contrary.[93] As a general rule, the right of an attorney to compensation is not lost because his services may have been of no benefit to his client, if they have been faithfully and intelligently rendered,[94] in such circumstances, the attorney does not lose his right to compensation because he was not successful in what he undertook to do for his client,[95] or because his services were unnecessary, provided they were rendered in good faith[96] So, it is not necessary that a lawyer must be successful in litigation and actually recover or preserve property for a client before he may become entitled to the value of his services on a quantum meruit.[97] However, it has been held that a solicitor, who through an action on behalf of all members of a class of interested parties was successful in realizing a fund for distribution to members of that class, was not entitled to an allowance for services, when it was shown that prior liens would absorb all the money available and no money was made available to members of the class for which the proceeding was brought,[98] and that a statute, authorizing reasonable counsel fees in actions for enforcement of a note, bond, mortgage, or other instrument of writing, but limiting the amount recoverable to five per cent of the amount decreed for principal and interest, contemplated that the creditor's attorney should be paid the reasonable value of the service rendered by him, and did not contemplate an allowance when there was no service or need for service of an attorney.[99]

On the other hand, if through ignorance, want of skill, or negligence, however, the attorney takes steps and renders services that are unnecessary and entirely useless, he cannot recover therefor,[1] and the same is true where services are rendered, not for the benefit of the client, but actually to his detriment[2] Moreover, where the services are of little or no value because of the failure of the attorney to fulfill his part of the contract, he is not entitled to recover.[3]

was not entitled to recover for services rendered on the ground that the parents had received all of the benefits, where the contract limited the attorney's fee to twenty-five per cent of the judgment obtained, and offended the court's sense of propriety and good morals—Meunier v. Bernich, (La App) 170 So 567

91. Harriman v Strahan, 33 P.(2d) 1067, 47 Wyo 208

92. Harland v. Lilienthal, 53 N Y 438—6 C J. p 721 note 72 [d]

93. Levin v. Suffrin, (La App) 167 So 911.

94. Trimble v Guardian Trust Co, 148 S W 934, 244 Mo 228—6 C J p 721 note 77.

95. Kan—Shouse, Doolittle & Morelock v Consolidated Flour Mills Co, 294 P 657, 132 Kan 108
La.—Stumpf v. Lopes, (App) 154 So 496
N Y—Strong v. Dutcher, 174 N.Y S 352, 186 App Div. 307.
6 C J. p 721 note 78.

96. Tinney v. Pierrepont, 45 N Y.S 977.

97. Cal—Cullinan v. McColgan, 263 P. 353, 87 Cal App. 684.
N Y—In re People, by Beha, 242 N Y S 100, 136 Misc. 715.
6 C J p 721 note 78.

98. American S S Co v. Wickwire Spencer Steel Co, (D C N Y) 14 F Supp 941, affirmed (C C A.) 82 F (2d) 999

99. Petitions of Warrington, (Del. Super) 179 A 505

1. Shouse, Doolittle & Morelock v. Consolidated Flour Mills Co., 294 P. 657, 132 Kan. 108—6 C J p 722 note 80.

Knowingly continuing wrongful contract

"Where his salary is not to be paid by the individual who employs him, but paid from the public treasury or a trust fund, and little or no services are rendered, and it appearing to him, upon reasonable reflection, that no substantial services will, under the circumstances, be required of him, the common conscience is sufficient to set up a standard of ethics and to warn the recipient of such salary that he is taking that to which he is not entitled and [which he] cannot honestly accept, no matter what may be his contract An attorney under such circumstances may not plead the shortcomings of the individuals or officials who thus wrongfully contracted with him, for he must be held to realize that, if he knowingly continues in such wrongful contract, he becomes a party to the wrong Particularly is this true with the lawyer, since his understanding and training prompt him to an earlier inquiry and aid him in more quickly detecting the wrong" —In re Information to Discipline Certain Attorneys of Sanitary Dist. of Chicago, 184 N E 332, 339, 351 Ill 206

Fraud or misconduct generally see infra § 167

2. U.S—Baxter v. Lowe, (Minn) 93 F 358, 35 C C A. 344
Ky.—Mercer County Bd of Education v Rankin, 134 S W. 157, 142 Ky. 324
6 C J p 722 note 81

3. Perkins v Deal Beach Realty Co, 114 A. 853, 92 N J Eq 526, affirmed Perkins v Robertson, 114 A. 856, 92 N.J Eq. 692.

Failure to advance funds

Where the attorney led his client to believe that he would advance the money necessary for the completion of buildings by the client, but failed to furnish the additional funds, and

§ 167. —— Conduct of Attorney

a. Absence from trial
b. Acting for other parties
c. Fraud or misconduct
d. Negligence

a. Absence from Trial

Temporary absence from the trial or absence with the consent of the client does not affect an attorney's right to compensation

An attorney's presence at the trial is usually required, and his wrongful act in staying away will defeat his claim for compensation; but, if from any cause he is relieved from attendance, his absence will not then affect his right to recover for his services.[4] The client waives a full performance of the contract on the part of his attorney if he still continues to recognize him as his attorney, and avails himself of his services.[5] Where an attorney actually attends court, on the hearing of a cause, he is entitled to his fee, although he is only present a part of the time,[6] or is not actually present in the court room at the moment the decree is obtained or the cause is argued.[7]

b. Acting for Other Parties

That an attorney acts for several parties whose interests are not conflicting does not defeat his right to compensation. However, an attorney representing adverse parties is not entitled to compensation from both, except in some cases where he did so with the knowledge and consent of both parties.

The mere fact that an attorney acts for several parties will not affect his right to compensation from all of them, if their interests are not adverse, conflicting or opposing.[8]

Adverse party. Since counsel fees are earned only by fidelity to, and activity for, a client and his interests,[9] and since, as has been shown supra § 47, an attorney cannot serve conflicting interests, he can claim pay for his services from only one side,[10] notwithstanding that he may have been innocent of any intentional wrongdoing in representing adverse interests.[11] Hence, an attorney employed by a corporation to free it from receivers forfeits his claim to compensation from the corporation by performing services for the receivers, and accepting pay from them,[12] and an attorney employed by a city is not entitled to compensation for services in prosecuting a claim against the city.[13] The fact, however, that an attorney had previously and in an entirely different matter represented one whose interests were adverse to his client in the case for which compensation is presently sought will not defeat his right.[14]

An attorney who was himself one of the adverse parties to his client cannot recover compensation from the latter.[15]

thereby placed her in a position where the advance made by him was of very little value to her, the attorney could not recover from the client for services rendered in connection with the construction of a building, since such services were of little or no value to the client, in view of his failure to advance additional funds after leading the client to believe that he would do so—Perkins v Deal Beach Realty Co, 114 A 853, 92 N J Eq 526, affirmed Perkins v Robertson, 114 A. 856, 92 N.J. Eq 692.

4. Douglass v Eason, 86 Ala 687—Pearson v Darrington, 32 Ala. 227

5. Ballard v. Carr, 48 Cal. 74.

6. Wendell v. Lewis, 8 Paige (N. Y) 613.

7. Frost v. Frost, 1 Barb Ch.(N.Y.) 492

8. Cal—In re Kafitz's Estate, 196 P. 790, 51 Cal App 325
Mo—Remmers v Bromschwig, (App) 18 S W (2d) 115.
N Y—Field v Moore, 178 N.Y.S. 842, 189 App Div 709
6 C J p 722 note 89.

Services beneficial to both

An attorney's right to compensation for services rendered his client in receivership proceedings was not defeated by acceptance of a fee from the attorney for the receiver, where the interests were not conflicting and particularly where the amount the client received was materially increased by the attorney's efforts—Remmers v. Bromschwig (Mo App) 18 S W.(2d) 115

Parties seeking same relief

The mere fact that an attorney also represented other clients seeking the same relief, and was paid by them, is no defense to a claim for services rendered a client—In re Campbell, 224 N Y S. 263, 130 Misc 511—6 C J. p 722 note 89 [a].

9. Hoboken Trust Co v. Norton, 107 A. 67, 90 N J Eq. 314.

10. U S—U S. v. Apple, (C C.A. Kan) 292 F 935.
Ill—McGlasson v Durand-McNeil-Horner Co., 272 Ill App 101—Wright v. Clark, 212 Ill App 289. See Gary v. Beadles, 202 Ill.App 58.
6 C J p 722 note 87.

11. Bryant v. Lewis, (Tex Civ.App) 27 S W.(2d) 604.

Unknown adverse interests

An attorney, although not guilty of any intentional wrongdoing, not being aware of any disagreement between his clients, cannot recover for services to a client discharging him, where he, also, at the same time represented another whose interests conflicted with the interest of the client discharging him—Bryant v. Lewis, (Tex Civ App) 27 S W (2d) 604

12. Ill—Strong v International Bldg, etc, Union, 55 N E 675, 183 Ill 97, 47 L.R.A. 792, affirming 82 Ill App 426
Mo—Trimble v. Guardian Trust Co, 148 S W 934, 244 Mo 228

13. Loew v. Gillespie, 153 N Y S 830, 90 Misc 616, affirmed 157 N.Y.S 1113

Claim in different department

An attorney is not entitled to compensation for services under a retainer to sue the board of education, obtained while employed as a law clerk in the city department of finance, since a judgment against the board of education is payable by the city. While there was no actual conflict between the attorney's duties in the finance department and under the retainer, his act in accepting the retainer was adverse to the interests of his employer, the city.—Loew v. Gillespie, 153 N.Y S 830, 90 Misc. 616, affirmed 157 N Y.S 1133

14. Jackson v. Thomas, 141 S.E. 320, 37 Ga App 670.

15. Foxworthy v. Trimble, 5 Ky.Op. 659.

Consent or acquiescence. While it is improper for an attorney to occupy inconsistent positions in a suit without the consent of the parties, yet a party who has consented thereto cannot refuse to pay for the services rendered for him.[16] Similarly, a client who accepts and profits by the services of an attorney with knowledge that the attorney has previously acted as an attorney for another party or for adverse interests cannot dispute the attorney's right to a fee on the ground of his previous employment.[17]

Where an attorney represents two parties whose interests are conflicting, but no conflicting duties are imposed on him, his chief duty being to furnish a channel of communication between the parties, and where he discloses to each party his relation to the other and acts with the consent of both, he is entitled to compensation;[18] but, where the employment for each is to protect the respective and conflicting interests as they may arise in the litigation, it has been held to be against public policy to allow a recovery of compensation, even though the representation was with the consent of both.[19]

c. Fraud or Misconduct

An attorney's right to compensation may be defeated by fraud or misconduct on his part.

Fraud or unfairness on the part of the attorney may prevent him from recovering for services rendered,[20] unless the client is estopped to raise the

16. Haight v. Lloyd Royal Belge Société Anonyme, 217 N.Y.S. 239, 217 App.Div. 656—6 C.J. p. 722 note 90.

Technical conflict of interest

Notwithstanding that there may technically have been a conflict of interest, where defendant employed attorneys to obtain a reduction in the contract price of ships bought from the United States Shipping Board, and the attorneys worked in defendant's best interests and obtained a large reduction, the attorneys' right to compensation was not defeated because they had previously, to the knowledge of defendant, represented the firm through which the government sold the vessels, and had an interest in having such firm paid its commission, particularly, in view of the fact that it was of paramount interest to all concerned to insure payment by defendant by lifting a substantial part of the burden resulting in part from changing conditions—Haight v. Lloyd Royal Belge Société Anonyme, 217 N.Y.S. 239, 217 App.Div. 656

Adverse interest of attorney

An attorney obtaining, with the consent of the client, an interest in property adverse to the interest of the client is entitled to compensation for his services on being compelled to surrender the property acquired—Moller v. Pickard, 188 N.Y.S. 791, 197 App.Div. 333, reversed on other grounds 133 N.E. 887, 232 N.Y. 271.

17. Patterson v. Fleenor, 89 S.W. 705, 28 Ky.L. 582

Employment by other claimant

While an attorney cannot assume a position adverse to his client without the client's consent, attorneys employed by a widow to represent her in matters connected with her husband's estate, with knowledge of their previous employment in another suit by claimant of her husband's estate, could recover for services rendered—Grauberger v. Light, 16 P.(2d) 188, 127 Cal.App. 576

18. West v. Mohr, 194 Ill.App. 496

19. Ill.—Wright v. Clark, 212 Ill.App. 289.
Tex.—Norman v. Wilson, (Civ.App.) 41 S.W.(2d) 331
6 C.J. p. 722 note 92.

20. Cal.—Clark v. Millsap, 242 P. 918, 197 Cal. 765
Minn.—Faber v. Enkema, 231 N.W. 410, 180 Minn. 493—Blackey v. Alexander, 195 N.W. 455, 156 Minn. 478
6 C.J. p. 723 note 93

Failure to disclose facts

(1) It is an attorney's duty to communicate to his client whatever information he obtains that may affect the latter's interests with respect to the matters intrusted to him as attorney, and if guilty of actual fraud or bad faith in the conduct of his client's business, he is not entitled to compensation—Selover v. Hedwall, 184 N.W. 180, 149 Minn. 302.

(2) Where, however, an attorney discloses all facts which he honestly conceives to be material to his employment, and without fraud fails to disclose some fact which by the court may be deemed material to such employment, he is not, by reason of such concealment, barred from receiving compensation for his services, where the services rendered during the time of his employment are rendered with exclusive devotion to the cause confided to him, and to no other interest—Hunter v. Troup, 146 N.E. 321, 315 Ill. 293.

(3) An attorney's possession as trustee of an invalid deed from a testator, without disclosure thereof to the executors, does not preclude recovery of compensation for services rendered to the executors.—Hunter v. Troup, supra.

Secret profit

(1) An attorney making a secret profit at the expense of his client will not be allowed to retain charges for services during the period of such unfaithful conduct—Robertson v. Hirsh, (Mass.) 177 N.E. 676, 276 Mass. 452

(2) So, an attorney procuring a loan for his client and profiting on the investment of his funds, in the absence of an express agreement, is not entitled to attorney's fees—Voisin v. Morales, 127 So. 758, 13 La.App. 318.

Acts held not mala fide

(1) In attorneys' action for fees, allegations that the directors of an investment company had authorized its attorneys to dismiss the action against defendant if by doing so they could procure the dismissal of six actions brought by other parties in which the company was directly or indirectly defendant, and that plaintiffs knew that such authority had been given, but failed to inform defendant thereof, are not sufficient to constitute a defense or counterclaim on the ground of fraud or bad faith, so that evidence offered thereunder was properly refused—Selover v. Hedwall, 184 N.W. 180, 149 Minn. 302.

(2) The fact that an attorney, employed by a township in connection with the construction of a school building, induced the contractors to contribute a sum to the purchasers of bonds issued to pay for the building, so as to enable the bonds to be sold above par, does not defeat his right to compensation—Union School Tp. of St. Joseph County v. Moon, 137 N.E. 332, 205 Ind. 514.

(3) Where the treasurer of a county gave attorneys a duebill for two hundred fifty dollars for their fee in foreclosure proceedings under a mortgage given by bank officers to secure the indebtedness due by the bank to the county, the treasurer was liable thereon, although the attorneys had agreed to act in the foreclosure proceedings free of cost to him, and although they had threatened to block the settlement unless the due-

question;[21] and so will acts in violation or excess of authority,[22] and acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties.[23] Accordingly, where counsel for a receiver is interested as a purchaser of property sold by the receiver, he cannot have from the estate any compensation for his services in bringing about the sale.[24] An immaterial false statement in an affidavit, however, particularly where it was subsequently corrected, is not such misconduct as will forfeit the right to compensation,[25] and neither is the institution of vexatious suits on the cause of action in another jurisdiction;[26] and misconduct in regard to one matter will not prevent recovery for work done in a different employment, except, perhaps, so far as the client may avail himself of some right of set-off,[27] although where the amount claimed was a bulk charge covering all services rendered the client, including the service tainted by fraud, the attorney cannot recover for any part of the services.[28]

Failure to pay over money collected. Where an attorney collects money for his client, and in bad faith or without legal reason retains it and refuses to pay it over, whereby the client is forced to resort to legal proceedings against him, involving the employment of another attorney, the collecting attorney loses his right to compensation for the collection of the funds,[29] although he may recover actual disbursements in behalf of the client.[30] This rule can be applied only where the attorney withholds in bad faith or without legal reason the moneys collected,[31] the validity of his reasons being for the

bill was given, which was not "duress, a species of fraud"—Craig v Frauenthal, 224 S.W. 434, 145 Ark 185

Purchase of client's note

Where the maker of a note, executed on the advice of his attorney, who purchased it from the payee at less than its face value without disclosing the possibility of such settlement to his client, paid him all the fees he asked for all his services in all matters in which he was representing him, he was not entitled to compensation for services in the matter of an account, in payment of which the note was executed, in addition to the amount paid therefor—Addison v Cope, 243 S W. 212, 210 Mo App 569

21. Nugent v. Moody, (Tex.Civ App.) 271 S W 266

Accepting further services

Where plaintiff, after being informed of the existence of a will in her favor, permitted defendants to continue to act for her in pending proceedings, she was estopped to deny liability for the reasonable value of services performed and expenses incurred, although defendants had concealed the existence of the will until they procured the contract whereby plaintiff agreed to give them one half of the property recovered, and the client's statement to the attorneys that, since they refused to discuss the fairness of the contract with her, she would find some one with whom they would discuss the matter, was not notice that she would not accept further services from the attorneys in probating the will and defending its contest—Nugent v. Moody, (Tex Civ App.) 271 S.W. 266

22. Chatfield v. Simonson, 92 N.Y. 209—6 C J p 723 note 94.

23 Ingersoll v Coal Creek Coal Co, 98 S W. 178, 117 Tenn. 262, 119 Am. S R 1003, 9 L R A (N S) 282, 10 Ann Cas 829—6 C J p 723 note 95.

"Clients are not alone concerned in the conduct of their solicitors, but also the court and public, when the clients have been injured by the conduct of their solicitors contrary to the character of the legal profession and opposed to sound public policy and a proper and decorous administration of the law"—Hoboken Trust Co. v. Norton, 107 A. 67, 90 N J.Eq 314

Suggesting simulation of illness

That an attorney suggested that a witness simulate illness to obtain a continuance shows bad faith to the court and client, as a matter of law—Duffy v. Colonial Trust Co, 135 A. 204, 287 Pa 348, 49 A L R 406, certiorari denied 47 S Ct 570, 273 U S 765, 71 L Ed 880

24. Tracy v. Willys Corporation, (C. C A Ohio) 45 F (2d) 485

25. Rodgers v. Bromberg, (C C A. Tex.) 53 F (2d) 723, certiorari denied 52 S Ct. 314, 285 U S 542, 76 L Ed 934

As to authority of attorney

Where attorneys filing a bankruptcy petition for foreign corporations were properly authorized to do so, but falsely swore that they had powers of attorney from the petitioning creditors, which statement was deemed subsequently corrected by affidavits of authority omitting reference to any power of attorney, they did not forfeit their right to compensation—Rodgers v. Bromberg, (C C. A Tex.) 53 F (2d) 723, certiorari denied 52 S Ct 314, 285 U.S 542, 76 L. Ed 934.

26. Hornish v. McConnell, 182 N.W. 406, 191 Iowa 308.

27. Mich.—Richardson v. Richardson, 59 N.W. 178, 100 Mich 364
N Y.—Currie v. Cowles, 19 N Y.Super. 452—Smith v Hoctor, 99 N.Y.S. 843, 51 Misc. 649
Vt.—Davis v Smith, 48 Vt. 52
6 C J p 723 note 96

28 Duffy v Colonial Trust Co, 135 A 204, 287 Pa 348

29. N J.—Hoboken Trust Co. v. Norton, 107 A. 67, 90 N J Eq 314.
Pa.—Osterling v. Pose, 133 A. 374, 286 Pa 263.
W Va.—Bailey Lumber Co v. Dunn, 156 S E 79, 109 W.Va. 725.
6 C J p 753 note 97.

Appropriating funds

An attorney appropriating clients' funds in his possession on a claim for services rendered, instead of keeping the fund intact until a determination of the claim, estops himself from retaining or successfully claiming in a subsequent equitable action any part of the money for services rendered as attorney—Bull v. Pendock Co., 267 N Y.S 783, 239 App Div 590

Incurring statutory penalty

Attorney who incurs the statutory penalty for failing to pay over money received by him for his client should not be allowed compensation for the collection of such funds—Bailey Lumber Co v. Dunn, 156 S.E 79, 109 W Va. 725

30. Hoboken Trust Co v. Norton, 107 A. 67, 90 N J Eq 314

31. Zuckernik v. Jordan Marsh Co, (Mass.) 194 N.E. 332—6 C J. p 723 note 98

Honest mistake

Where an honest mistake resulted in an attorney's wrongful refusal to account to his client for profits realized on the eventual sale of the property acquired on the foreclosure of a mortgage which had been assigned to the attorney only as security, the attorney is entitled to a reasonable compensation for his managerial and legal services—Da-

court and jury to determine on the law and facts of the case.[32] Accordingly, in a suit against an attorney to recover money collected, where his good faith is apparent, the attorney will not be deprived of his fees as damages for retention of the money,[33] although the court may compel him to pay over the whole amount in his hands and leave the recovery of the fee to a subsequent action against the client.[34]

d. Negligence

Uncondoned culpable negligence or ignorance of an attorney resulting in damage to the client may bar recovery of compensation by the former.

As a general rule, an attorney's culpable negligence or ignorance in the discharge of his duties, resulting in damage to the client, is a valid defense to an action for compensation,[35] unless such negligence or mistake has been condoned by the client.[36] To entitle himself to this defense, the client must show that he suffered damages consequent on the attorney's negligence.[37]

Not every mistake or negligent act on the part of an attorney is a defense to his claim for compensation; thus, a mistake which reasonable care would not prevent does not bar recovery;[38] nor would neglect of an unimportant matter defeat the right to recover for important services rendered without fault.[39] Where there is a failure to make out the alleged negligence of the attorney, the dissatisfaction of the client with the result of the suit will not affect the attorney's right to his pay.[40]

§ 168. Premature Termination of Employment

An attorney is entitled to the reasonable value of his services on premature termination of his employment.

Where performance is made impossible on the part of an attorney, he may still recover the reasonable value of his services on a quantum meruit; and this is so, regardless of whether the impossibility of performance was brought about by the dismissal by the adversary of his client of the proceedings in which he was engaged to act,[41] or, as shown in the succeeding sections, by the act of the client or the combined act of attorney and client, by operation of law, or by the death or disability of the client or attorney.

§ 169. —— By Act of Parties

a. By act of client
b. By act of attorney
c. By combined act of attorney and client

a. By Act of Client

(1) General rule
(2) Discharge without cause
(3) Discharge for cause

(1) General Rule

Although full performance is rendered impossible by the acts of the client, an attorney is entitled to compensation for services actually rendered, and in some cases, to damages.

Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the act of his client, the attorney may, as a general rule, recover on a quantum meruit for the services actually rendered;[42] and in some states

vitt v. O'Connor, (C C A N.Y.) 73 F. (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct. 217, 293 U S 621, 79 L Ed. 709

32. Gray v. Conyers, 70 Ga 349

33. Soper v Manning, 16 N E 752, 147 Mass 126—6 C J. p 723 note 99

34. Walton v. Dickerson, 7 Pa 376.

35. N Y—Parker-Smith v. Prince Mfg. Co, 158 N.Y S. 346, 172 App. Div. 302.
Ohio—Western & Southern L Ins Co v. Selzer, 23 Ohio Cir Ct. (N S) 104.
6 C.J. p 723 note 1.

Allegations in pleading

Where a complaint seeking the cancellation of a land contract alleged false and fraudulent misrepresentations concerning the value of the land, its productiveness, and its condition with respect to drainage, the mere fact that it contained allegations with respect to false representations concerning the value of the land did not show such negligence of the attorneys in the preparation of the complaint as would defeat compensation, such an allegation, even if not sufficient in itself to constitute ground for cancellation of the contract, not being an inappropriate allegation in connection with the other allegations—Munsell v. Yerger, 244 S W 465, 155 Ark. 385

Failure to demand payment

Where no demand for payment is made before execution is issued on a judgment note providing for an attorney's commission for collection, and defendant pays into court the debt interest and costs, no commission will be allowed—Johnson v Marsh, 4 Walk (Pa.) 136, 21 Wkly. N Cas 570.

Failure to sue

An attorney, who, in compliance with a request by an heir, examined into an estate and interviewed the administrator and reported that an action would be necessary to enforce the heir's rights, cannot be held negligent in not instituting an action where he was not directed to do so—Hamlin v Flick, 226 P. 484, 130 Wash. 126—6 C J. p 723 note 1 [a].

36. Gleason v. Kellogg, 52 Vt. 14.

37. Cal.—Hinckley v. Krug, 34 P. 118.
Mo—Gabbert v. Evans, 166 S W 635, 184 Mo.App. 283
6 C J. p 723 note 3.

38. La—Herwig's Succ, 53 So. 466, 127 La 127
Tenn—Fulton v. Davidson, 3 Heisk. 614.

39. Mason v. Ring, 2 Abb.Pr N S. (N. Y) 322—6 C J. p 723 note 6.

40. Hennen v. Bourgeat, 12 Rob. (La.) 522—6 C J p 724 note 7.

41. In re Boardwalk Amusement Co, 236 N Y S 449.

42. U.S.—In re Badger, (C C A.N.Y.) 9 F.(2d) 560
Ky—Baxter v. Hubbard, 47 S.W.(2d) 743, 242 Ky. 751.
Minn—Lawler v. Dunn, 176 N.W. 939, 145 Minn 231
N.Y.—Tillman v. Komar, 181 N.E.

he may have an action for damages[43] or, where he remains in readiness to render complete performance, recover the entire stipulated compensation as though he had fully performed,[44] although, in the latter case, the court may deduct a sum sufficient to pay another attorney for completing performance, particularly where the first attorney consents thereto.[45] On the other hand, where an attorney has fully performed his contract before discharge by the client, the attorney may stand on his contract and recover the agreed value of services as damages;[46] and where an attorney has not been dismissed during the pendency of the proceeding for which he was retained, he will not be relegated to a quantum meruit for recovery of his fee.[47]

Provided the contingency has taken place, the fact that the agreement was for a contingent fee, does not deprive the attorney of his right to recover the stipulated compensation.[48]

Where an attorney, employed by several clients to oppose the appointment of an administrator, was discharged by one of them who joined in asking the appointment, the fact that the attorney continued to contest it in behalf of the others does not prevent him from recovering compensation of his former client for services rendered before his discharge.[49]

(2) Discharge without Cause

An attorney discharged without cause may generally recover the reasonable value of the services rendered by him to the date of the discharge. In some jurisdictions such a discharge gives rise to an action for breach of contract in which the damages are ordinarily held to be the agreed contract price, but under other authorities such discharge does not subject the client to such an action for damages, but confines his liability to the reasonable value of services rendered prior to the date of discharge.

Where an attorney has been discharged by his client without cause, the attorney may treat the contract of employment as rescinded and recover on a quantum meruit for services rendered up to the date of his discharge;[50] and it has been held that he is limited to the reasonable value of his services to the date of the termination of the employment,[51]

75, 259 N.Y. 133, reversing In re Tillman, 254 N.Y.S. 918, 234 App. Div. 752—McAvoy v. Schramme, 264 N.Y.S. 181, 238 App.Div. 225, affirmed 189 N.E. 691, 263 N.Y. 548—Hausvater v. Wikler & Diamont, Inc., 277 N.Y.S. 810, 154 Misc. 555—Badger v. Mayer, 28 N.Y.S. 765, 8 Misc. 533

Tex.—Bryant v. Lewis, (Civ.App.) 27 S.W.(2d) 604

6 C.J. p. 724 note 8

See O'Hair v. Watson, 202 Ill.App. 439

Employment of retiring partner

A client, discharging a law firm after recovery of judgment and employing a retiring junior member of the firm to represent such client in the supreme court in the same lawsuit, is liable to the firm for reasonable value of services rendered until its discharge, notwithstanding the retiring junior partner had performed most of the legal services, and notwithstanding the client had permitted such partner to pay himself out of collections made on the judgment after such partner had ceased, with knowledge of the client, to be a member of the firm.—Cox v. Trousdale, 27 P.(2d) 298, 138 Kan. 633.

Refusal to agree on fee

A client refusing to agree on the fee for an attorney's services became liable for compensation, whether the attorney then quit or was discharged by the client.—Baxter v. Hubbard, 47 S.W.(2d) 743, 242 Ky. 751.

43. Ind.—French v. Cunningham, 49 N.E. 797, 149 Ind. 632
N.C.—Johnston v. Cutchin, 45 S.E. 522, 128 N.C. 119.

44. La.—D'Avricourt v. Seeger, 125 So. 735, 169 La. 620
Mo.—Neeper v. Heinbach, (App.) 249 S.W. 440—Thompson v. Stearns, 234 S.W. 1059, 208 Mo.App. 338
S.C.—Bonham v. Farmer, 148 S.E. 878, 151 S.C. 246
Tenn.—Bright v. Taylor, 4 Sneed 159
Tex.—Stroud v. Toland, (Civ.App.) 279 S.W. 609.
6 C.J. p. 724 note 10.

45. Bonham v. Farmer, 148 S.E. 878, 151 S.C. 246.

46. McAvoy v. Schramme, 264 N.Y.S. 181, 238 App.Div. 225, affirmed 189 N.E. 691, 263 N.Y. 548

47. In re Liebergall, 178 N.Y.S. 857, 189 App.Div. 681.

48. Kan.—Carter v. Dunham, 177 P. 533, 104 Kan. 59.
N.Y.—Parker-Smith v. Prince Mfg. Co., 158 N.Y.S. 346, 172 App.Div. 302.
Ohio—Roberts v. Montgomery, 154 N.E. 740, 115 Ohio St. 502
Okl.—White v. American Law Book Co., 233 P. 426, 106 Okl. 166
Or.—Dolph v. Speckart, 186 P. 32, 94 Or. 550
S.C.—Bonham v. Farmer, 148 S.E. 878, 151 S.C. 246.
6 C.J. p. 724 note 11

49. Pauchet v. Bujac, (C.C.A.N.M.) 281 F. 962.

50. U.S.—Woodbury v. Andrew Jergens Co., (C.C.A.N.Y.) 69 F.(2d) 49—Marquam v. Vachon, (C.C.A.Alaska) 7 F.(2d) 607.
Cal.—Lessing v. Gibbons, (App.) 45 P.(2d) 258
Ill.—Bunge v. Downers Grove Sanitary Dist., 191 N.E. 78, 356 Ill. 531, certiorari denied Downers Grove Sanitary Dist. v. Bunge, 55 S.Ct. 117, 293 U.S. 601, 79 L.Ed. 693
Kan.—Shouse, Doolittle & Morelock v. Consolidated Flour Mills Co., 294 P. 657, 132 Kan. 108
Ky.—Hubbard v. Goffinett, 70 S.W.(2d) 671, 253 Ky. 779
Mo.—Mills v. Metropolitan St. Ry. Co., 221 S.W. 1, 282 Mo. 118
N.Y.—Tillman v. Komar, 181 N.E. 75, 259 N.Y. 133, reversing In re Tillman, 254 N.Y.S. 918, 234 App.Div. 752
R.I.—Lake v. Winfield Fuller Co., 172 A. 119, 54 R.I. 358.
Tenn.—Brownlow v. Payne, 2 Tenn.App. 154
6 C.J. p. 724 note 13

Recovery of usual charge

Where a client, who had agreed to let an attorney do all his legal business in a county, in consideration of which the attorney agreed to charge only half his regular rates, abandoned his contract by giving most of such business to another, the attorney was entitled to recover the full amount of his usual fees for the client's business which he handled.—Noble v. Bellows, 53 Vt. 527.

51. Ky.—Hubbard v. Goffinett, 70 S.W.(2d) 671, 253 Ky. 779
La.—Louque v. Dejan, 56 So. 427, 129 La. 520—Succession of Le Blanc, 2 La.App. 364
N.Y.—Lurie v. New Amsterdam Casualty Co., 1 N.E.(2d) 472, 270 N.Y. 379, affirming 281 N.Y.S. 988, 245 App.Div. 710—In re Weitling, 194 N.E. 401, 266 N.Y. 184, reversing 275 N.Y.S. 973, 242 App.Div. 823—Application of Krooks, 178 N.E. 548, 257 N.Y. 329—Johnson v. Ravitch, 99 N.Y.S. 1059, 113 App.Div.

although, as pointed out hereinafter, in some jurisdictions he is entitled to damages for breach of contract.

Failure of the attorney to perform the contract after discharge without cause does not defeat his right to recover reasonable fees for services rendered before the discharge [52]

In a quantum meruit action the attorney's compensation is not limited or governed by the agreed price fixed by the terms of the contract previously terminated [53] Together with other elements they may, however, be taken into consideration as a guide for ascertaining quantum meruit [54]

Where a contract fixing no period of service provided for a specified retainer for each case and for specified compensation for each day that the attorney was actually engaged in trying the case and for each appeal, the discharge of such attorney is not a breach, and he is not entitled to compensation for pending cases on the basis of quantum meruit, but his compensation is governed by the contract.[55]

Contingent fee contract. Where the compensation of an attorney is to be paid to him contingently on the successful prosecution of the suit, the measure of the attorney's recovery on his discharge by the client before the happening of the contingency is not the contingent fee agreed on, but a reasonable compensation for the services actually rendered;[56] but the contract and the ultimate result should not be ignored in fixing the reasonable value of the services, and it has been held that the determination thereof should be deferred until the fixing of damages in the suit.[57] In the absence of evidence showing what was the reasonable value of the services rendered by the attorney up to the time of his discharge, there can be no recovery.[58]

Where the attorneys are discharged after judgment and pending appeal therefrom, it has been said that they have the option, either to treat the contract as rescinded and sue for the reasonable value

810—Carey v. Gnant, 59 Barb. 574 Contra Friedman v. Mindlin, 155 N Y S 295, 91 Misc 473

From retainer to discharge

The quantum meruit of an attorney's services was limited to actual services rendered from the date of retainer until his discharge—In re Driscoll, 228 N.Y S. 335, 131 Misc 613.

Future costs

An attorney, sought to be displaced, is not entitled to future costs as part of compensation in an action not tried—Progressive Merchants' Co v Elkat Realty Co, 244 N Y S. 17, 136 Misc 682.

Where there is no contract governing the amount of an attorney's fees, and he is wrongfully discharged before the contemplated services have been fully rendered, he is entitled to recover only reasonable compensation for the services performed—Gamewell v. Killion, (Tex.Civ App.) 282 S W. 873

52. Pierce v Rilovich, 29 P.(2d) 228, 136 Cal App 611

53. Cal—Leesing v Gibbons, (App) 45 P (2d) 258
N Y—Tillman v. Komar, 181 N E 75, 259 N Y 133, reversing In re Tillman, 254 N Y S 918, 234 App Div 752—In re Montgomery's Estate, 284 N.Y S 5, 246 App Div. 495, reversing 282 N Y S 741, 156 Misc 583—In re Montgomery's Estate, 287 N Y S 136, 158 Misc 412—In re Driscoll, 228 N Y S. 335, 131 Misc 613. Contra Grant v. Langley, 68 N.Y.S 820, 34 Misc. 776.
Tex—Thompson v. Smith, (Com App) 248 S W. 1070, reversing Smith v. Thompson, (Civ.App) 238 S W. 876.

Value exceeding contract price

An attorney, discharged without cause after completion of five sixths of the work agreed to be done for five thousand dollars, was held entitled to thirteen thousand dollars, where that was the reasonable value thereof, notwithstanding the contract.—In re Montgomery's Estate, 287 N. Y.S. 136, 158 Misc 412.

54. U S—Shattuck v. Pennsylvania R. Co, (D C N Y) 48 F (2d) 346
N Y—Tillman v Komar, 181 N E 75, 259 N Y. 133, reversing In re Tillman, 254 N Y S 918, 234 App Div 752—In re Montgomery's Estate, 284 N Y S 2, 246 App.Div 495, reversing 282 N Y S 741, 156 Misc 583—In re Montgomery's Estate, 287 N Y S. 136, 158 Misc. 412—Bloom v Irving Trust Co, 272 N Y S 637, 152 Misc 50.
S D—Ritz v Carpenter, 178 N.W. 877, 43 S D. 236, 19 A.L R. 340

55. In re Sachs, 218 P. 209, 126 Wash. 343

56. U S—Woodbury v Andrew Jergens Co, (C C A N Y) 69 F.(2d) 49—Shattuck v. Pennsylvania R Co, (D C N Y) 48 F.(2d) 346—Spellman v Bankers' Trust Co., (C C A N Y.) 6 F (2d) 799
Ala—Owens v. Bolt, 118 So 590, 218 Ala. 344
N Y—In re Rosedale and St. Lawrence Avenues in City of New York, 114 N.E 49, 219 N Y 192, reversing In re City of New York, 159 N Y S. 1105, 174 App Div. 853, and reargument denied In re Rosedale Ave. in City of New York, 114 N E 1082, 218 N.Y. 626—Bloom v. Irving Trust Co, 272 N Y S 637, 152 Misc 50—Lewy v. Union Ry. Co of New York City, 272 N Y S. 123, 151 Misc 724.
Tex—Thompson v Smith, (Com App) 248 S W 1070, reversing Smith v Thompson, (Civ App.) 238 S.W 876.
Wash—Hamlin v Case & Case, 61 P (2d) 1287—Cavers v. Old Nat. Bank & Union Trust Co, 7 P.(2d) 23, 166 Wash 449—Wright v. Johanson, 233 P. 16, 132 Wash 682, affirmed 236 P 807, 135 Wash 696—Ramey v Graves, 191 P. 801, 112 Wash 88
W Va—Clayton v Martin, 151 S.E. 855, 108 W.Va 571.
6 C J p 725 note 19.

Remedy

Where a client repudiated her contract to give an attorney a specified per cent of her share of real estate of an estate, the attorney was entitled to a personal judgment against the client for the value of his services according to such contract, to be impressed on her interest in the real estate and deducted from the proceeds thereof if sold—Beck v Boucher, 195 P. 996, 114 Wash 574—6 C. J. p 740 note 6 [a]

57. Shattuck v. Pennsylvania R Co, (D C N Y) 48 F.(2d) 346

58. N Y—In re Rosedale and St. Lawrence Avenues in City of New York, 114 N.E 49, 219 N Y. 192, reversing In re City of New York, 159 N Y S 1105, 174 App Div 853, and reargument denied In re Rosedale Ave in City of New York, 114 N E. 1082, 218 N Y. 626.
Wash.—Ramey v. Graves, 191 P 801, 112 Wash 88
W Va.—Clayton v Martin, 151 S.E. 855, 108 W Va. 571.

for the services, or to treat the cause of action as liquidated by its reduction to judgment, subject to the results of the appeal.[59]

Damages for breach of contract. In some jurisdictions it is held that, where the attorney is employed to perform services for an agreed sum and is discharged without cause and thereby prevented from performance, he may treat the contract as continuing, although broken by the client, and may recover damages for the breach,[60] the measure of damages ordinarily being the full contract price,[61] unless some other sum has been agreed on,[62] provided, however, if the employment is for a term of years and the action is brought before the expiration of the term, the probabilities as to the attorney's living until the termination of the term and remaining capable of performing his part of the contract must be considered.[63] On the other hand, according to some decisions the measure of recovery is the contract price abated by such sum as is reasonably represented by the unperformed part of the service.[64] The general rule that the measure of damages in case of an employer's breach of a contract for personal employment is the difference between what the employee received or might have received from others and the price agreed on does not generally apply to breach of a contract for attorney's services,[65] but this rule was held not to apply to a contract for the employment of an attorney to prosecute an appeal, which was broken by renunciation before anything was done under it and before performance became due.[66]

Nevertheless, since a client has the implied right to terminate the contract at any time, the view has been taken that he cannot be held in damages for exercising that right; in such a case, the attorney may recover the reasonable value of the services which he has rendered to the date of discharge, but he cannot recover for damages for the breach of contract.[67]

The rule does not apply, however, where by the

59. Barthels v Garrels, 227 S.W. 910, 206 Mo.App. 199

60. Mo.—Mills v Metropolitan St. Ry. Co., 221 S.W. 1, 282 Mo. 113.
Tenn.—Brownlow v. Payne, 2 Tenn. App. 154.
Tex.—White v Burch, (Civ.App.) 19 S.W.(2d) 404.
6 C.J. p. 724 note 14.

Alternative remedies
On being summarily discharged by his client, with whom he had a percentage contract, an attorney has an option to wait until the cause of action of the client was liquidated by judgment or settlement, and then to sue for his fee according to the contract, or to treat the contract as rescinded and to sue for the reasonable value of his services.—Mills v. Metropolitan St. Ry. Co., 221 S.W. 1, 282 Mo. 113.

61. Cal.—Ellcomn v Yalen, 282 P. 791, 208 Cal. 546—Kirk v Culley, 261 P. 994, 202 Cal. 501—McCully v Gano, 3 P.(2d) 348, 116 Cal.App. 695.
Mo.—Miles v Metropolitan St. Ry. Co., 221 S.W. 1, 282 Mo. 113.
Neb.—Dorshimer v Herndon, 153 N.W. 496, 98 Neb. 421, affirmed 154 N.W. 207, 98 Neb. 425.
Okl.—Okmulgee Building & Loan Ass'n v Cutler, 51 P.(2d) 709, 174 Okl. 614—White v American Law Book Co., 233 P. 426, 106 Okl. 166.
Or.—Dolph v. Speckart, 186 P. 32, 94 Or. 550.
Tenn.—Brownlow v Payne, 2 Tenn. App. 154.
Tex.—White v Burch, (Civ.App.) 19 S.W.(2d) 404.
6 C.J. p. 724 note 15.

Ignorance of employment
An attorney for a building and loan association discharged without cause on change of management of the association was held entitled to recover the compensation named in his contract as against the contention that the new management did not know of plaintiff's claim to act as attorney for the association until other counsel had been employed, where the attorney turned over to the association and new counsel all the files relating to uncompleted cases and the attorney's work was utilized by new counsel.—Okmulgee Building & Loan Ass'n v. Cutler, 51 P.(2d) 709, 174 Okl. 614.

Contingent fee contract
Where a client breached a contingent fee contract under which he employed an attorney to obtain or recover part of the estate of decedent claimed by him, and employed other counsel, who brought an action wherein it was stipulated that the client was at least entitled to certain corporate stock, which was then given to such client, damages for breach of the contract with the attorney should be based on the value of the corporate stock at the time it was issued or given to the client.—Dolph v Speckart, 186 P. 32, 94 Or. 550.

Nominal damages
An attorney employed for a definite time and wrongfully dismissed before its expiration is entitled at least to nominal damages.—Dixon v. Volunteer Co-op. Bank, 100 N.E. 655, 213 Mass. 345.

62. Millard v Jordan, 42 N.W. 1085, 76 Mich. 131.

Agreed reduction
Attorneys, discharged without their fault, are entitled to recover from their clients the contract price, less an agreed reduction for unperformed services.—Searson v. Sams, 141 S.E. 107, 142 S.C. 558.

63. Lakewood v Shaver, 16 Ohio Cir.Ct.(N.S.) 413.

64. Bowser v Patrick, (Ky.) 65 S.W. 824.—Goodin v. Hays, 88 S.W. 1101, 28 Ky.L. 112.—6 C.J. p. 725 note 18.

65. U.S.—Kikuchi v. Ritchie, (Alaska) 202 F. 857, 121 C.C.A. 215.
Mass.—Dixon v Volunteer Co.-op. Bank, 100 N.E. 655, 213 Mass. 345.

66. Kikuchi v Ritchie, (Alaska) 202 F. 857, 121 C.C.A. 215.—6 C.J. p. 725 note 21.

67. U.S.—Marquam v. Vachon, (C.C.A.Alaska) 7 F.(2d) 607. Contra, Tuppela v Mathison, (C.C.A.Alaska) 291 F. 723.
La.—Louque v. Dejan, 56 So. 427, 129 La. 520.
Minn.—Lawler v Dunn, 176 N.W. 989, 990, 145 Minn. 281, overruling Moyer v. Cantieny, 42 N.W. 1060, 41 Minn. 242.
N.Y.—Martin v Camp, 114 N.E. 46, 219 N.Y. 170, L.R.A.1917F 402, reversing 146 N.Y.S. 1041, 161 App.Div. 610, and reargument denied 114 N.E. 1072, 219 N.Y. 627, motion granted 115 N.E. 1044, 220 N.Y. 653, and reargument denied 116 N.E. 1060, 221 N.Y. 631.—In re Montgomery's Estate, 284 N.Y.S. 5, 246 App.Div. 495, reversing 282 N.Y.S. 741, 156 Misc. 583.—In re Board of Water Supply of City of New York, 167 N.Y.S. 531, 179 App.Div. 877.—Corcoran v. George Kellogg

express terms of the contract, or otherwise, it appears that a different rule was intended by the parties, as where an attorney is employed under a general retainer for a fixed period to perform legal services in relation to matters that may arise during the period of the contract, since such a contract is more in the nature of an ordinary contract between master and servant than one for professional services, and, in such a case, the discharge of the attorney without cause makes the employer liable for a breach of contract.[68] The incurring of expense by the attorney prior to the notification of his discharge, however, would not keep alive the contract after such discharge, nor give the attorney a cause of action for a breach thereof.[69]

(3) Discharge for Cause

Ordinarily, an attorney discharged for cause cannot recover compensation.

Where the attorney has been retained on a specific contract and is discharged for good and justifiable cause, the prevailing rule is that he may not recover compensation either in an action on the contract or on a quantum meruit,[70] although it has been held that a recovery may be had on a quantum meruit.[71]

b. By Act of Attorney

Where an attorney for good cause abandons his employment, he is entitled, at least, to compensation for services actually rendered; but when he prematurely terminates the employment without just cause, he forfeits all right to compensation.

Where an attorney withdraws from a case or otherwise abandons his employment for a justifiable cause, the client is liable for the services actually rendered,[72] although such withdrawal or abandonment was without his consent or that of the court,[73] and where the withdrawal resulted from conduct of the client equivalent to dismissal without cause, it has been held that the attorney is entitled to recover the full amount contracted for.[74]

On the other hand, if an attorney, without just cause, abandons his client before the proceeding for which he was retained generally has been conducted to its termination, according to the prevailing doctrine he forfeits all right to payment for any services which he has rendered,[75] and he may not

Structural Co, 166 N.Y.S 269, 179 App Div. 396—Lynn v Agnew, 166 N Y S 274, 179 App Div 305, affirmed Lynn v. McCann, 123 N E 877, 226 N Y. 654—Bloom v. Irving Trust Co, 272 N Y S 637, 152 Misc 50—Boehm v. United Power Laundries, 229 N Y S 430, 132 Misc 1—In re Pollen's Estate, 211 N Y S 626, 125 Misc 354.

S D —Ritz v. Carpenter, 178 N W. 877, 43 S D 236, 19 A L R 840

Wyo —Enos v Keating, 271 P 6, 39 Wyo 217, 67 A L R 430, rehearing denied 275 P. 131, 39 Wyo 217, 67 A L R. 430

In Washington

(1) In conformity with the rule of the text, it has been held that a client discharging an attorney, employed under a contingent fee contract, is not liable to him in damages as for breach of contract, but is liable only on quantum meruit for services rendered before discharge — Wright v. Johnson, 233 P 16, 132 Wash 682, affirmed 236 P. 807, 135 Wash 696

(2) It has been held, however, that, where an attorney is employed to conduct a suit at an agreed compensation, and fully performs his agreement until discharged without cause, the measure of damages is the unpaid balance of the contract amount —Sessions v. Warwick, 89 P. 482, 46 Wash. 165

Under contract for share of recovery

Under the law of New York, an attorney, although having a contract for a share of any recovery, may be discharged by his client at any time without cause, in which case he is entitled only to the reasonable value of his services rendered —The Johnson Lighterage Co No 24, (D C.N J.) 240 F 435, modified on other grounds 248 F. 74, 160 C C A 214

68. Greenberg v Jerome H Remick & Co, 129 N E 211, 230 N Y. 70, reversing 181 N.Y.S. 937, 191 App Div 947

Change of position

Where an attorney, by contract, enters the general employment of his client, thereby changing his position by giving up other clients and incurring expenses, and is discharged by his client without reasonable cause, such attorney may recover damages for loss of fees provided by the contract—Roxana Petroleum Co of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.

69. In re Driscoll, 228 N.Y.S. 335, 131 Misc. 613

70. U S.—In re Badger, (C C A.N Y) 9 F.(2d) 560
N Y.—Bloom v Irving Trust Co., 272 N Y S 637, 152 Misc 50.
6 C J p 725 notes 23, 24.

Contingent fee contract

An attorney, who for more than two years unsuccessfully endeavored to increase the client's interest in a particular estate, pursuant to a contract providing for a contingent fee, was not entitled, on the client's termination of the contract, to recover on quantum meruit for services rendered, nor for traveling and living expenses incurred —Fletcher v. Kellogg, 55 App D C. 351, 6 F (2d) 476, 40 A L R 1525, certiorari denied 46 S Ct 18, 269 U S 555, 70 L Ed 409

71. Goodin v. Hays, 88 S.W. 1101, 28 Ky L 112

72. Dowling v Peyroux, 126 So 270, 12 La App. 551—6 C J. p 725 note 26.

Refusal to pay fee

An attorney withdrawing from litigation during the pendency of an appeal without injuring the client, following unsuccessful efforts to collect his fee, could recover on the basis of quantum meruit for services rendered —Dowling v. Peyroux, 126 So 270, 12 La App. 551

73. Powers v Manning, 28 N E 290, 154 Mass 370, 13 L R A. 258.

74. Mutter v. Burgess, 290 P. 269, 87 Colo 580

Accusation of dishonesty

As regards the right to contract fee, a client's falsely accusing his attorneys of dishonesty, resulting in their withdrawal, was equivalent to discharging them without cause — Mutter v. Burgess, 290 P. 269, 87 Colo. 580

75. Ala —Howard v. McCarson, 110 So 296, 215 Ala. 251—Amason v. Harton, 89 So 37, 205 Ala 681.
Ark.—Beaumont v. J H Hamlen & Son, 81 S W.(2d) 24, 190 Ark. 630.

recover either on the contract or on the quantum meruit.[76] It has been held, however, that the attorney in such case may recover the reasonable value of his services, less the damage the client may have suffered on account of the abandonment.[77]

c. By Combined Act of Attorney and Client

An attorney is entitled to compensation for services rendered where the employment is terminated by the combined act of attorney and client.

If the employment is terminated by the combined act of the attorney and the client, the attorney may recover, in an amount not exceeding the contract price, for services actually rendered,[78] unless, at the time of his withdrawal, the attorney waives his claim to compensation.[79] Where the attorney accepts an amount less than that required by the contract in consideration of being relieved from performance of further services thereunder, he is not entitled to recover the balance due under the contract.[80]

§ 170. —— By Operation of Law

Incapacity of an attorney to continue his services arising by operation of law does not defeat his right to compensation for services rendered.

The incapacity of an attorney to continue his services, arising by operation of law, will not prevent him from recovering for services already rendered.[81] Thus, where an attorney becomes a judge, and in consequence is prohibited by law from appearing as an attorney in any court of record in the state, he will, nevertheless, be entitled to compensation for services rendered in a case up to the time of his incapacity.[82] A contract to defend an expected charge of murder is not rendered impossible of performance, however, within the rule fixing the amount of recovery in case of impossibility of performance merely because no indictment has ever been found, since no law of limitation for indictment and prosecution therefor exists.[83]

§ 171. —— By Death or Disability

a. Of attorney
b. Of client

a. Of Attorney

Where the contract is terminated by the death or disability of the attorney, the client is not ordinarily liable under the contract, but only on a quantum meruit.

In accordance with the general rule that contracts for personal services requiring skill, which can be performed only by the person named, are subject to the implied condition that the person designated shall be able to perform, if an attorney dies before he has prosecuted to a judgment or settlement a litigation which he has undertaken to conduct for a certain compensation, his contract is at an end; and the compensation agreed on cannot be recovered by his representative under the agreement because he did not, and his representative cannot, carry out his agreement.[84] The extent of the recovery permitted his representative is the reasonable value of the services rendered under the contract,[85] not exceeding, however, the sum or the rate fixed by it.[86]

The same result follows where an attorney is prevented from completing his contract by reason of physical disability.[87]

If the contract is not entire, but severable, and the death of the attorney occurs before complete performance, his representative may recover for the part performed and is not limited to recovery on a quantum meruit.[88]

Where the fee has been paid in advance, the client may, as pointed out infra § 192, recover the unearned portion thereof.

Mo—Mills v Metropolitan St Ry. Co, 221 S W 1, 282 Mo 118
6 C J p 673 note 75, p 726 note 28.

76. Woodbury v. Andrew Jergens Co, (C C A.N.Y) 61 F (2d) 736, certiorari denied Berenson v Woodbury, 53 S Ct. 659, 289 U S. 740, 77 L Ed 1487

77. Morgan v. Roberts, 38 Ill. 65—6 C J. p 726 note 29.

78. Ownbey v. Silverstein, 194 P 607, 69 Colo. 325—6 C.J. p 726 note 30

Both parties at fault
The rule of the text has been applied where both parties were at fault.—Scobey v. Ross, 5 Ind. 445—Price v. Western Loan, etc, Co, 100 P. 677, 35 Utah 379, 19 Ann Cas 589

79. Coopwood v. Wallace, 12 Ala. 790.

80. Champion v. Ferguson, 34 S.W. (2d) 957, 237 Ky. 115.

81. Ky—Warren Deposit Bank v. Barclay, 60 S W. 853, 22 Ky L 1555.
Tex—Baird v. Ratcliff, 10 Tex 81.
6 C.J p 726 note 33

82. Ind—Justice v. Lairy, 49 N E 459, 19 Ind App. 272, 65 Am.S R. 405.
Tex—Baird v. Ratcliff, 10 Tex 81.

83. White v. Burch, (Tex Civ.App) 33 S W.(2d) 512.

84. In re Lichtblau, 261 N Y.S. 863, 146 Misc 278—6 C J p 727 notes 37, 38

85. Ariz—Neale v. Hinchcliffe, 189 P 1116, 21 Ariz 452
N Y—In re Levy's Will, 201 N Y S 818, 207 App Div. 182—In re Lichtblau, 261 N Y S. 863, 146 Misc. 278
6 C.J. p 727 note 39.

86. Ind—Coe v. Smith, 4 Ind. 79, 58 Am D. 618.
N Y—Sargent v. McLeod, 103 N.E 164, 209 N.Y. 360, 52 L R A (N S) 330.

87. Lewis v. Omaha, etc., R. Co, (Neb) 114 N.W. 231.

88. Boyd v. Daily, 33 N Y.S. 539, 85 App Div. 581, affirmed 68 N.E 1114, 176 N.Y. 556, 613.

The effect of the death, before complete performance, of an attorney employed on a contingent fee basis is discussed infra § 188.

Death of one of two attorneys. When one agrees to pay a certain compensation for the services in a specified matter of two attorneys named, the contract is not performed and the compensation cannot be recovered, when one of them dies before the agreement is substantially performed; the contract is one of personal trust and confidence, and its terms are not fulfilled, although the surviving attorney associates with himself others of equal or greater ability, and carries the litigation to a successful conclusion.[89] If the contract is with a firm and the client changes his attorneys after the death of one partner, however, as stated infra § 184, he is liable for the reasonable value of the services already rendered. The effect of death or disability on the rights of the attorneys under a contract to divide fees is discussed infra § 174.

b. Of Client

Where the contract does not require the attorney to perform notwithstanding the event, the death of the client precludes recovery for services performed thereafter.

Where there is no special contract between an attorney and his client in regard to the duty of the attorney to proceed with the cause in which he is employed until its final determination, the death of the client terminates the relation, and the attorney is entitled to compensation only for services rendered up to the time of the client's death,[90] but, when the attorney is acting under an express contract, the death of the client does not affect the right to fees.[91] The effect of the death of the client on the attorney's right to recover under a contingent fee contract is treated infra § 188 b

§ 172. Services under Assignment as Counsel by Court

a. In criminal cases
b. In civil cases

a. In Criminal Cases

(1) In general
(2) Statutes providing for compensation

(1) In General

Ordinarily, in the absence of controlling statutes, an attorney assigned to defend an indigent accused must serve without compensation; and statutes requiring such gratuitous service are generally held constitutional.

As stated supra § 54, it is a part of the general duty of members of the bar to act as counsel for persons accused of crime and destitute of means, on appointment by the court, when such service is not inconsistent with their duties to others. In such cases they must look alone to the possible future ability of the accused to pay for their compensation, where no provision for compensation is made by statute; no implied liability ordinarily arises on the part of the county or state to pay for such services.[92] Furthermore, in the absence of statutes so providing, courts are without authority to order payment for such services by the county, and the fact that no appeal was taken from a void order of this character does not give the attorney the right to recover thereon in proceedings against the county.[93]

A statute authorizing courts of record to appoint counsel for persons accused in criminal proceedings, and requiring attorneys so appointed to act without compensation, is not unconstitutional, it being merely a recognition of a power already existing; it cannot be attacked as taking the attorney's time and labor, his property, without compensation, since such a duty is one of those impliedly assumed on his being admitted as an attorney and officer of the court,[94] nor does the requirement by the court of such service, for which no compensation is permitted by law, deprive him of a constitutional right.[95]

A different doctrine prevails, however, in some jurisdictions, where it is held that the courts cannot require an attorney to render gratuitously serv-

89. Baxter v. Billings, (Colo.) 83 F 790, 28 C C A 85

90. Matter of Robbins, 112 N Y S 1032, 61 Misc 114—Avery v Jacob, 15 N Y S 564—6 C.J p 727 note 46

91. Headley v Good, 24 Tex 232—6 C J. p 727 note 47

92. N Y—People v Thompson, 199 N.Y S 868, 205 App Div. 851—People ex rel Whedon v. Board of Sup'rs Washington County, 183 N Y S 438, 192 App Div. 705
Pa.—Commonwealth v Henderson, 173 A 868, 113 Pa Super 348.
6 C.J p 727 note 51.
"At common law service as assigned counsel was given without pay"—Reilly v. Berry, 166 N E 165, 166, 250 N Y 456, reversing People v. Lee, 231 N Y S 844, 225 App Div. 698

93. Commonwealth v Henderson, 173 A. 868, 113 Pa Super. 348
Taxable as costs see Costs § 456 [15 C J. p 335 note 42-p 337 note 91]

94. Presby v. Klickitat County, 31 P. 876, 5 Wash. 329—6 C J. p 728 note 52.
In Iowa
(1) A statute requiring the services of an attorney without compensation has been held not unconstitutional—Brown v. Warren County, 135 N W. 4, 156 Iowa 20, 137 N W. 474, 42 L R A.(N S.) 527, 529, Ann Cas 1915B 185
(2) An attorney, however, has been allowed compensation in such a case on the ground of implied liability, where the statute was silent on the subject—Hyatt v. Hamilton County, 96 N W. 855, 121 Iowa 292, 100 Am S R 354, 63 L R.A. 614, affirming 90 N W. 508—Hall v. Washington County, 2 Greene 473.

95. People ex rel. Whedon v. Board of Sup'rs of Washington County 183 N Y.S 438, 192 App.Div. 705.

ices in behalf of an indigent criminal; the courts have abundant power to appoint attorneys to defend such persons and to require them to serve, but on such appointment an implied promise arises on the part of the county or the state to pay a reasonable compensation for such services[96] There is even authority to the effect that a statute requiring gratuitous services in such a case is unconstitutional;[97] but, if the attorney accepts the appointment without protest, he must be held to have done so under the terms of the statute, and the plea of unconstitutionality is not available.[98] A statute imposing restrictions on the power of courts to bind the county by contract does not, however, unlawfully deprive the courts of any inherent powers or compel the rendition of legal services without just compensation.[99]

(2) Statutes Providing for Compensation
- (a) In general
- (b) Amount of compensation in general
- (c) Personal and incidental expenses
- (d) Services on appeal

(a) In General

While the statutory right to recover compensation depends on the validity of the assignment and substantial compliance with the statutory requirements, the result of the prosecution is immaterial

In a number of the states statutes have been passed providing for compensation to attorneys appointed by the court to defend destitute persons accused of crime,[1] and the right to compensation thereunder depends on the validity of the appointment.[2] While an attorney showing that the statute has been complied with is entitled to recover for his services,[3] unless the statute is substantially complied with, no such allowance is permissible.[4] Thus, where an affidavit showing that accused is wholly destitute of means is required, there can be no allowance if such affidavit is wanting.[5]

Where the statutes authorize compensation only in cases of a certain class or character, the attorney cannot recover for his services in a case not included within the class, and, where the statutes authorize payment for services rendered in behalf of one under indictment for a certain crime, services by counsel assigned for a person held by a magistrate on a charge of the designated crime, but not under indictment, are not compensable,[6] and neither are services in behalf of accused charged with another crime.[7]

The disbursing officer can treat as a nullity an order allowing fees which was made without jurisdiction by the court.[8] The certificate of the court that the claim has been examined and allowed, while prima facie evidence that the amount allowed is correct, is not conclusive on the county commissioners, who may reexamine the account and allow so much as they may think just.[9]

Where the statute requires the allowance to be on a certificate of the judge who disposed of the indictment, a certificate of a judge who merely took a plea not disposing thereof will not support the allowance,[10] nor can compensation be had for services at a commissioner's hearing where accused was found insane and the indictment was consequently not disposed of.[11]

Some statutes provide that, if accused appear for arraignment without counsel, he must be asked if he desire the aid of counsel and, if he does, counsel must be assigned; under such statutes, when counsel is assigned at the arraignment or thereafter and acts in the case, he is entitled to compensation, and the fact that accused was represented on arraignment by counsel is immaterial; the facts that accused did not, after arraignment, appear without counsel and that he was not formally asked if he desired counsel do not affect the case, where the jurisdictional facts are sufficiently brought to the attention of the court.[12]

96. Board of Com'rs of Vigo County v. Moore, 166 N.E. 779, 93 Ind App 180—6 C.J. p 728 note 58

97. Dane County v Smith, 13 Wis 585, 80 Am D 754—Carpenter v. Dane County, 9 Wis. 274.

98. Ind.—Miami County Comrs. v. Mowbray, 66 N.E. 46, 160 Ind. 10—Howard County Comrs. v. Pollard, 55 N.E. 87, 153 Ind 371.
Iowa.—Brown v. Warren County, 135 N.W. 4, 137 N.W. 474, 156 Iowa 30, 42 L.R.A.(N.S.) 527, 529, Ann Cas 1915B 185

99. Board of Com'rs of Vigo County v. Moore, 166 N.E. 779, 93 Ind App 180.

1. Korf v. Jasper County, 108 N.W. 1031, 132 Iowa 682—15 C.J. p 567 note 39.

2. People ex rel Perry v. Berry, 231 N.Y.S. 267, 224 App.Div. 426, reversed on other grounds 166 N.E. 163, 250 N.Y. 452

3. Houk v Montgomery County Com'rs, 41 N.E. 1068, 14 Ind.App. 662.

4. People v Foster, 193 N.Y.S. 345, 200 App.Div. 710—6 C.J. p 728 note 58 [1] (2).

5. People v. Foster, supra.

6. People v. Foster, supra.

7. People ex rel Whedon v. Board of Sup'rs of Washington County, 183 N.Y.S. 433, 192 App.Div. 705.

8. People ex rel Perry v Berry, 231 N.Y.S. 267, 224 App.Div. 426, reversed on other grounds 166 N.E. 163, 250 N.Y. 452.

9. Boone County v. Armstrong, 37 N.W. 626, 23 Neb 764

10. People v. Ferri, 155 N.Y.S. 180, 170 App.Div. 944.

11. People v Coler, 61 App.Div. 538, 70 N.Y.S. 639, 10 N.Y.Ann.Cas. 105, 15 N.Y.Cr. 460.

12. People ex rel. Perry v. Berry, 166 N.E. 163, 250 N.Y. 452, reversing 231 N.Y.S. 267, 224 App.Div. 426—6 C.J. p 728 note 58 [1] (1).

Result of prosecution. In the absence of provision to the contrary, the right to compensation does not depend on the result of the prosecution.[13]

After a change of venue the county from which the venue was taken is liable for the compensation allowed under statutes so providing,[14] but the right of the attorney is subject to such restrictions as other statutes may place on the power of the court to bind a county.[15]

(b) Amount of Compensation in General

Where statutes provide for compensation to attorneys appointed to represent accused indigent persons, the attorney must act for whatever compensation the court may allow him within the statutory limits.

An attorney, being an officer of the court, may be required to defend an accused person and accept such compensation, within the limits of the statute, as the court may allow.[16] The fee allowed by the court must represent the exclusive compensation of the attorney, and he has no right to contract with other persons for fees.[17]

The amount allowed must not exceed the statutory limit, but, where there are several trials of the case, it has been held that the maximum amount may be allowed for services in each trial[18] and the attorney need not again be assigned to the case to be entitled to pay for his services on trials after the first trial.[19] Where two defendants jointly indicted received separate trials, an attorney assigned for each may be allowed compensation for his services to each, although the aggregate amount exceeds the statutory limit.[20] Where the statute provides that only one fee can be allowed in any one case, an attorney appointed to defend several defendants tried together is entitled to but one fee.[21] Notwithstanding a provision that only one attorney in any one case shall receive such compensation, however, it has been held that, where an attorney has been appointed to defend two persons jointly indicted and jointly tried, he is entitled to the statutory fee for each.[22]

Where the court is empowered to appoint more than one attorney and does so, each is entitled to compensation for his services,[23] but it has been held that, where several attorneys are assigned to the case, the aggregate amount allowed to them may not exceed the statutory limit.[24]

Under a statute limiting the compensation to a stated amount for each day actually spent in the trial, no compensation can be allowed for time spent out of court in preparation for the trial.[25]

Where the power of the courts to bind the county for attorney's fees is limited to the amount of the existing appropriation for that purpose, the recovery cannot exceed the amount on hand therefor at the time of the appointment.[26]

Appeal from amount fixed. Where the amount of the fee is required to be fixed by the county board, in the absence of statutes sanctioning such practice, no right of appeal lies on behalf of an attorney dissatisfied with the amount allowed.[27]

(c) Personal and Incidental Expenses

Under statutes authorizing payment of such ex-

13. Mobile Com'rs Ct v Turner, 45 Ala 199—6 C J. p 728 note 58 [a], [i] (6)

14. Board of Com'rs of Vigo County v Moore, 166 N E 779, 93 Ind App 180—6 C J p 728 note 58 [c] (3)

15. Board of Com'rs of Vigo County v. Moore, supra

16. Iowa—Samuels v. Dubuque County, 13 Iowa 536
Neb—Moran v Otoe County, 146 N W 956, 95 Neb 658

17. Commonwealth v Wormsley, 144 A 428, 294 Pa. 495—6 C J. p 728 note 58 [d] (4).

18. Iowa—Tomlinson v. Monroe County, 112 N W. 100, 134 Iowa 608
Nev—Washoe County v. Humboldt County, 14 Nev 123
6 C J p 728 note 58 [i] (9).

Effect of partial acquittal

Under a statute providing that an attorney appointed by the court to defend a person "indicted for homicide or any offense the punishment of which may be life imprisonment" shall receive certain pay from the county for his services, he is entitled to such pay for defending one indicted for homicide, although a prior trial amounted to an acquittal of all degrees of homicide, except manslaughter, which is not punishable by life imprisonment—Tomlinson v Monroe County, 112 N W. 100, 134 Iowa 608

19. Tomlinson v Monroe County, supra.

20. People v McElvaney, 73 N Y.S. 639, 36 Misc 316, 10 N Y Ann Cas. 316

21. Washington County v. Murray, 100 P. 588, 45 Colo. 115

22. Clark v Osceola County, 78 N. W. 198, 199, 107 Iowa 502.
"We understand the words 'in any one case' to mean an indictment against any one person; for that is, in legal contemplation, a case."—Clark v. Osceola County, supra.

23. Huntington v. Yellowstone County, 257 P. 1041, 80 Mont. 20—6 C J. p 728 note 58 [c] (2).

24. People v. Haiselbetz, 51 N Y S 685, 30 App Div 199, 13 N Y Cr 223, appeal dismissed 55 N Y.S. 4, 26 Misc 100, 5 N.Y Ann Cas. 165, 13 N Y Cr 470

In Maine it has been held that where two or more persons are jointly indicted for a capital offense and by order of the court are tried jointly, and, on application therefor, the court assigns separate counsel for each, the presiding judge has authority, under the statute, to allow a sum not exceeding one hundred and fifty dollars in all for the services of counsel for anyone on trial, including services on appeal or on exceptions before the law court.—Anonymous, 76 Me. 207.

25. Green Lake County v. Waupaca County, 89 N W. 549, 113 Wis. 425—6 C J. p 728 note 58 [k] (2).

26. Board of Com'rs of Vigo County v Moore, 166 N.E. 779, 93 Ind App 180—6 C J. p. 728 note 58 [c] (4).

27. Geauga County v. Ranney, 13 Ohio St 388.

penses, personal and incidental expenses incurred by the assigned attorney are expenses incurred by him on his personal account.

Personal and incidental expenses, within the meaning of a statute authorizing the allowance of such expenses incurred by the attorney assigned to the case, are such as relate to those incurred by counsel on his personal account,[28] such as traveling expenses incurred in attendance at the court, or printing charges for the preparation of a brief in accordance with the rules. They do not include payments to detectives employed to investigate and report as to the character of a witness, even though made by counsel himself;[29] payments to additional counsel employed to investigate the facts,[30] or to consultants employed to advise as to the defense;[31] payments for a copy of testimony taken at the coroner's inquest, which was not used at the trial;[32] payments for traveling expenses of a witness to the attorney's office before trial to assist in preparation for trial,[33] or payments for fees or expenses of an expert witness.[34] Where the statute authorizes an allowance of the fees for expert witnesses employed for accused in a number not exceeding the number sworn, or to be sworn, for the prosecution, the attorney is not entitled to such allowance where the state did not have expert witnesses, or where the statutory proceedings for the employment of such witnesses have not been followed.[35]

(d) Services on Appeal

Services rendered on appeal by an attorney assigned to defend an indigent accused are generally compensable within the statutory limits.

Under a statute providing for compensation to be allowed by the court, the court can in its discretion allow counsel fees for services on appeal;[36] but the allowance cannot exceed the amount limited by statute,[37] and it has been held that an order of the court directing an appeal is necessary, in order that an attorney may recover extra compensation for such services under a statute authorizing enlarged compensation therefor.[38] A statute limiting compensation for services rendered at the trial and in preparation therefor does not, however, apply to the prosecution of an appeal or writ of error in the appellate court.[39]

Where provision is made for payment by the state of the expenses of stenographic service and of printing the briefs on appeal, an attorney who has not complied with the statutory requirements has no proper claim against the state or county for reimbursement of moneys spent by him for such purposes.[40]

It has been said to be the duty of the trial court, and not of the appellate court, to determine whether the attorney's claim for services on appeal is reasonable,[41] and where the statute vests the power to fix the amount of such compensation sole-

28. N.Y.—Reilly v. Berry, 166 N.E. 165, 250 N.Y. 456, reversing People v. Lee, 231 N.Y.S. 844, 225 App.Div. 698.
Pa.—Com. v. Endrukat, 35 Pa.Co. 637.
6 C.J. p. 728 note 58 [1] (10).

29. Reilly v. Berry, 166 N.E. 165, 250 N.Y. 456, reversing People v. Lee, 231 N.Y.S. 844, 225 App.Div. 698.

30. Kraushaar v. Berry, 237 N.Y.S. 594, 227 App.Div. 395—Matter of Waldheimer, 82 N.Y.S. 916, 17 N.Y.Cr. 381, 84 App.Div. 366.

31. People ex rel. Van Zandt v. Prendergast, 142 N.Y.S. 611, 157 App.Div. 486, reversing 141 N.Y.S. 255, 80 Misc. 321.

32. People ex rel. Van Zandt v. Prendergast, supra.
But the expense of such a copy has been allowed in a case where it did not appear whether or not the copy was actually used at the trial—Commonwealth v. Endrukat, 35 Pa.Co. 637.

33. People ex rel. Van Zandt v. Prendergast, 142 N.Y.S. 611, 157 App.Div. 486, reversing 141 N.Y.S. 255, 80 Misc. 321.
Witness from outside state
Expenditures to secure the attendance of witness from outside the state are not "personal and incidental expenses" of counsel—Kraushaar v. Berry, 237 N.Y.S. 594, 227 App.Div. 395.

34. N.Y.—Reilly v. Berry, 166 N.E. 165, 250 N.Y. 456, reversing People v. Lee, 231 N.Y.S. 844, 225 App.Div. 698—Cantwell v. Coler, 70 N.Y.S. 755, 61 App.Div. 598, affirmed People v. Coler, 61 N.E. 1132, 168 N.Y. 643.
Pa.—Commonwealth v. Endrukat, 35 Pa.Co. 637.
6 C.J. p. 728 note 58 [1] (12).

35. Reilly v. Berry, 166 N.E. 165, 250 N.Y. 456, reversing People v. Lee, 231 N.Y.S. 844, 225 App.Div. 698.

36. State v. Hudson, (R.I.) 179 A. 130—6 C.J. p. 728 note 58 [h], [1] (7).

37. Leidigh v. Otoe County, 146 N.W. 957, 95 Neb. 661—Moran v. Otoe County, 146 N.W. 956, 95 Neb. 658.

38. De Long v. Muskegon County, 69 N.W. 1115, 111 Mich. 568.

39. John v. Municipal Court of Milwaukee County, (Wis.) 264 N.W. 829.
Reasons for rule
"It can hardly be said that the preparation of a case and briefs in this court, followed by oral argument here, constitute a trial. The process is not a trial process, but a process of review of a trial already had"—John v. Municipal Court of Milwaukee County, 264 N.W. 829, 830, 220 Wis. 334.
Time expended in preparation
Attorney appointed to prosecute writ of error in the supreme court on behalf of indigent defendant was held entitled to compensation at the statutory rate of fifteen dollars per day for whatever time was necessarily expended in preparation of the case and brief, notwithstanding the statute limits the pay for preparation for trial to five days.—John v. Municipal Court of Milwaukee County, 264 N.W. 829, 220 Wis. 334.

40. John v. Municipal Court of Milwaukee County, (Wis.) 264 N.W. 829.

41. John v. Municipal Court of Milwaukee County, supra—6 C.J. p. 728 note 58 [g] (1), [k] (3).

ly in the county board of supervisors, the appellate court has no power to allow the claim.[42]

Delay in bringing a case on for argument on appeal without applying for an extension under statutes so providing has been held to defeat the attorney's right to compensation for his services on appeal,[43] although he may be allowed his personal and incidental expenses notwithstanding such delay, such expenses not constituting "compensation" within the meaning of the statute.[44]

b. In Civil Cases

In some jurisdictions attorneys can be compelled to serve for persons unable to pay in civil cases; but, under statutes in other jurisdictions, compensation is allowed in such cases where there is a compliance with the statutory provisions

In some jurisdictions the court has a right to command the services of counsel for persons unable to pay in civil as well as in criminal cases,[45] and even where it is held that an attorney cannot be compelled to give his services gratuitously, if he voluntarily undertakes the employment he has no ground for a claim to compensation.[46]

Provision is sometimes made by statute for compensation in such cases, thus, under a federal statute authorizing the court to request any attorney to represent a poor plaintiff in a cause worthy of trial, it has been held that the fee of such attorney will be contingent on success, and in the event of success the fee, payable out of the fund recovered, will not be larger than the quantum meruit.[47] Under a statute authorizing the appointment of an attorney by the court in probate proceedings to defend the interests of minor or absent devisees, legatees, heirs, or creditors of decedent, and providing that the attorney is to be allowed a fee to be paid as necessary cost of administration and on distribution charged to the person represented, attorneys so appointed are entitled to reasonable compensation for their services.[48] Before the appointment can be made, however, the court must be satisfied that the class of persons named in the statute exists, and the order must designate who they are, or otherwise the fee allowed cannot be charged to the person represented; and when an attorney has been appointed to represent a claimant, nothing should be paid to such an attorney from the estate if the claim of such person is not substantiated.[49] The court making the appointment should fix a reasonable allowance for the services where the statute so requires; and this rule obtains whether the services were rendered in the trial, or in the appellate, court.[50] On his part, the attorney should observe requirements as to preparing and filing a statement of what he has done in the case.[51]

Representing officer of court. In order to recover compensation as counsel for an officer of court, an attorney in seeking the appointment owes the duty of complete disclosure of all facts bearing on his eligibility for such appointment, and if that duty is neglected, however innocently, he stands in no better position than if it had been performed.[52]

§ 173. Persons Entitled in General

An attorney to whom his associates assigned their rights can recover for legal services performed by himself and the others.

An attorney is entitled to recover for services performed by himself and his associates who, without objection by the client at the time, withdrew from the case and assigned their interests to such attorney, and the client cannot raise objections thereto for the first time in the attorney's action for compensation.[53] As has been shown supra § 165, however, only duly licensed attorneys are entitled to compensation for legal services. Two attorneys associated together under an arrangement whereby one paid the other's salary and all office and business

42. People v Hanifan, 59 N W 611, 99 Mich 516, overruling Springer v. Wayne County Auditors, 53 N.W. 471, 99 Mich 513

43. People v Mummiani, 180 N.E. 673, 259 N Y 8—People v Cowan, 157 N.E 816, 245 N.Y. 532—People v Chapman, 122 N E 240, 225 N. Y. 700—6 C J. p 728 note 58 [1] (8).

Circumstances not excusing delay

Where counsel for defendant convicted of first degree murder failed to bring the appeal on for argument within six months, as required by Code Cr.Proc. § 536, he was entitled to no compensation on appeal under section 308a, although the clerk did not cause the record to be printed within the time prescribed by section 485, and although the six months from the taking of the appeal expired during recess, and notwithstanding the stipulation for adjournment of the argument to the day after the expiration of such six months, no application for extension being made, and the appeal not being brought to argument until nine days after the expiration of the recess—People v. Chapman, 122 N E 240, 225 N Y 700

44. People v. Mummiani, 180 N.E. 673, 259 N.Y. 8—People v. Chapman, 122 N.E. 240, 225 N.Y. 700.

45. N.J.—Todd v. Todd, 9 N J.L J. 342
Tenn—House v Whitis, 5 Baxt. 690.
6 C J p 729 note 60

46. Howard County v. Pollard, 55 N.E. 87, 153 Ind. 371.

47. Whelan v. Manhattan R. Co, (C C.N Y) 86 F. 219

48. Lee v. San Joaquin County Super Ct., 44 P 666, 112 Cal 354

49. In re Lux, 66 P. 30, 134 Cal 3.

50. Cochran v. Lee, 87 S W 769, 27 Ky.L. 1038.

51. Jackson v. McElroy, 2 Bush (Ky.) 132

52. In re Rogers-Pyatt Shellac Co, (C.C A N Y.) 51 F (2d) 988, affirming (D C.) 43 F (2d) 863.
Compensation of attorneys appointed to represent absentees in actions see the title Absentees § 9

53. Johnston v. Cox, 154 So. 206, 114 Fla. 243 But see Sabath v. Vacek, 204 Ill.App. 396.

expenses, who held themselves out as partners and had a partnership name on the door and on letterheads and billheads, were held not entitled to maintain an action as joint plaintiffs for services rendered defendant, where the firm name had never been registered nor a return made, as required by statute of a person doing business under any name other than his own.[54]

§ 174. Division of Fees and Apportionment

a. In general
b. Express contracts

a. In General

In the absence of any agreement or custom to the contrary, attorneys jointly undertaking to render legal services are entitled to share equally in the compensation, and an attorney collecting the entire fee is liable to his associate for his proper share. Attorneys employed severally are entitled to recover the reasonable value of their respective services in the absence of a different contract.

Attorneys who jointly undertake to prosecute or to defend a lawsuit are entitled, in the absence of any agreement to the contrary, to share equally in the compensation,[55] and it is immaterial which attorney furnishes the most labor or skill,[56] neither can charge the other for extra services,[57] and mere neglect by one of them to discharge his duties will not be an abandonment of the contract, nor will it extinguish his claim to one half the proceeds.[58]

So, where an attorney retained in a case employs or procures the employment of another to assist him, as regards the division of fee, the agreement constitutes a joint adventure or special partnership,[59] and although it has been held that the employed attorneys should receive only reasonable compensation,[60] in the absence of any agreement to the contrary, there is an implied agreement that, although one performs more work than the other, they should share equally.[61] This principle may be varied by a subsequent agreement between the parties, however, and where it is agreed that one of the attorneys shall take no further steps in the case and that another shall receive extra compensation for carrying on the litigation, the latter is entitled to a reasonable sum for his additional services, and the former, only to the reasonable value of his services up to the time of the agreement.[62]

An attorney is not to be deprived of his compensation because he expressed an opinion inconsistent with the opinion of his associate on questions arising in the course of litigation or because his associate who received the fee failed to avail himself of his services to the fullest extent,[63] or because he was not admitted to practice in the jurisdiction in which the contract was made at the time it was made, when he was then entitled to be admitted and was admitted thereafter.[64]

Where one of two attorneys jointly employed collects the entire fee, he is liable to the other unless he accounts to the client therefor, and where he pays

54. Amey v. Vermont Products Co., 177 A 197, 107 Vt. 178

55. Cal.—Ford v. Freeman, 180 P. 545, 40 Cal.App. 221
Ky.—Underwood v. Overstreet, 223 S.W. 152, 188 Ky. 562, 10 A.L.R. 1352.
6 C.J. p 754 note 62.

56. Underwood v. Overstreet, supra.

57. Henry v. Bassett, 75 Mo. 89.

58. Henry v. Bassett, supra

59. Ky.—Harris v. Flournoy & Flournoy, 38 S.W.(2d) 10, 238 Ky. 329—Underwood v. Overstreet, 223 S.W. 152, 188 Ky. 562, 10 A.L.R. 1352
Neb.—Langdon v. Kennedy, Holland, Delacy & McLaughlin, 224 N.W. 292, 118 Neb. 290, 63 A.L.R. 896.
Okl.—Bailey v. Griggs, 49 P.(2d) 695.
S.D.—Egan v. Waggoner, 170 N.W. 142, 41 S.D. 239
33 C.J. p. 845 note 53.

Voluntary services

Where plaintiff's brother employed defendants, a competent law firm, to conduct litigation, and plaintiff, an attorney, aided in the case, there was no implied promise on the part of defendants to pay plaintiff for the services rendered.—Gugel v. Olin, 170 N.W. 261, 168 Wis. 321

Apportionment of fees between partners in a law firm during the existence and after dissolution of the firm see supra § 56.

60. Harris v. Flournoy & Flournoy, 38 S.W.(2d) 10, 238 Ky. 329

Equal division among attorneys

Where a firm of two attorneys employed two individual attorneys to assist in a will contest, each attorney was held entitled to one fourth of the attorneys' fee allowed by the court.—Harris v. Flournoy & Flournoy, 38 S.W.(2d) 10, 238 Ky. 329

61. Iowa.—Gill v. Mayne, 162 N.W. 24
Neb.—Langdon v. Kennedy, Holland, Delacy & McLaughlin, 224 N.W. 292, 118 Neb. 290, 63 A.L.R. 896.—Jones v. Thomas, 184 N.W. 151, 106 Neb. 635.
Okl.—Bailey v. Griggs, 49 P.(2d) 695

62. Jones v. Thomas, 184 N.W. 151, 106 Neb. 635.

63. Fried v. Cahn, 267 N.Y.S. 182, 239 App.Div. 213, motion granted 191 N.E. 520, 264 N.Y. 471.

64. White v. Little, 268 P. 221, 131 Okl. 132

Contract not against public policy

A contract between a lawyer from another jurisdiction and a local lawyer who was not a member of the local bar, engaging the latter to prepare and file the necessary petitions in certain legal proceedings, was not invalid as being against public policy where the local lawyer was in good standing in other courts, and in view of the general practice to permit members of the bar in other jurisdictions to appear as counsel in special causes when associated with a qualified local lawyer.—Cochran v. Burdick, 63 App.D.C. 150, 70 F.(2d) 754, certiorari denied Burdick v. Cochran, 55 S.Ct. 73, 293 U.S. 561, 79 L.Ed. 661.

Failure to enroll

That an Indian Territory attorney eligible to admission to practice in the Oklahoma supreme court had not been enrolled when he contracted with a client did not preclude him from recovering from his associate counsel his share of a fee collected by such counsel.—Martindale v. Shaha, 151 P. 1019, 51 Okl. 670.

part of the agreed fee to the client, the client is liable to the other attorney for so much of the fee paid to him as the attorney is entitled to under the joint contract.[65]

Several employment. Where two attorneys are severally employed in a cause, each is entitled to recover for the reasonable value of his own services, in the absence of any different contract; one is not entitled in such a case to recover severally one half of the value of the services of both attorneys; in such a case the court will not undertake accurately to separate the services performed by each counsel, but will determine from all the facts and circumstances what is the fair value of the services sued for.[66]

Substitution of attorneys and the effect thereof on their compensation is discussed in § 122 of this Title.

Different proceedings for same relief. Where suits seeking the same relief were instituted by different parties represented by different attorneys in state and federal courts successively and the latter suit, through the cooperation of all parties, was prosecuted to a successful conclusion, the decree providing for an apportionment among the various solicitors of a fund set aside for the purpose, the counsel who first protested the action of defendants and brought suit in the state court are entitled to compensation from the fund for their services in connection with that suit.[67]

Existence of a general custom as to division of fees under certain circumstances may be shown,[68] but a custom to divide fees equally between the firms involved is not applicable in a controversy involving only one firm and several individual attorneys.[69]

b. Express Contracts

Express contracts to divide fees are, subject to the general rules of contract, valid, the rights of the parties being governed by the terms of the contract.

It is neither unethical nor illegal for an attorney to make an arrangement for dividing fees with an attorney whom he may retain as counsel in behalf of his clients.[70] Such a contract is subject to the rules applicable to contracts generally,[71] and is voidable for nondisclosure of material conditions.[72] To be enforceable it must express the intention of the parties with reasonable certainty; and an agreement to make an "equitable division" of fees without furnishing any rule by which the equitable division is to be made is too vague and indefinite to form the basis of an action.[73] An attorney accepting a written contract prepared by himself providing for the fee he was to receive for services rendered to another attorney is bound thereby and precluded from setting up a verbal agreement as expressing the true intention of the parties.[74]

The terms of the contract determine the right to claim a division of the fees,[75] and where the right was to accrue on the happening of a certain event, which happened, counsel is entitled to his share unless he abandoned the contract, or declined, refused, or failed without excuse to perform.[76] The fact that one does more than his proportionate share of the work will not entitle him to more than the agreed proportion of the compensation, where the other is ready and willing to serve whenever called on.[77] So it is immaterial whether the client knew of the contract between the attorneys or not, or whether he had any connection with it,[78] and a discharge of one attorney by the client cannot affect the rights of the latter to recover from the other attorney his agreed share of the fees.[79] If an attorney employed on a

65. Lake v. Wilson, 88 S W (2d) 25, 183 Ark 180—Lake v Wilson, 35 S W (2d) 597, 183 Ark. 180.

66. Chicago Junction Ry. Co. v. Leitch, 215 Ill.App. 67—6 C J. p 754 notes 66, 67.

67. Thompson v Bomar, (Mo) 258 F. 339, 169 C C A 355

68. Parker v. Gartside, 178 Ill App 634

69. Harris v. Flournoy & Flournoy, 38 S W (2d) 10, 238 Ky. 329—6 C. J. p 754 note 74.

70. In re Allen St. in City of New York, 266 N Y S 277, 148 Misc. 488
Agreement between attorney and notary for division of fees was held enforceable as not in violation of professional ethics where the notary was also an attorney and his services in drawing up the deeds partook largely of the services of an attorney.
—Macaluso v. Succession of Marinoni, 168 So 296, 184 La 1052

71. In re Evans, 130 P. 217, 42 Utah 282, reversing 62 P. 913, 22 Utah 366, 88 Am S R 794, 53 L.R.A. 952 —6 C J p 754 note 69.

72. Berenson v. French, 159 N.E. 909, 262 Mass. 247.

73. Barker v. O'Grady, 168 N.Y S 594

74. Garland v. Dimitry, 119 So. 42, 167 La 262

75. Ariz—Neale v Hinchcliffe, 189 P. 1116, 21 Ariz 452
Ga—Robinson v. Guerry, 148 S.E 745, 40 Ga App. 26
6 C J p 754 note 70

76. Smith v Waldrop, 77 So 331, 201 Ala 37 See Alexander v. Case, 206 Ill App. 69.
Taking of appeal
Where attorneys employed by another firm as associate counsel were to have one half of fees if the case went to the supreme court, and the case went to such court, the associates, if not in default, are entitled to their half—Smith v. Waldrop, 77 So 331, 201 Ala. 37.

77. Robinson v. Guerry, 148 S E 745, 40 Ga App 26—6 C J. p 754 note 71

78. Smith v. Waldrop, 77 So 331, 201 Ala. 37—6 C J p 754 note 72.

79. Jackson v Gensberger, (D.C. Mont) 5 F Supp. 187
Administration proceedings
Where an attorney for an executor in California procured a Montana attorney to secure the appointment there of an administrator, on the Montana attorney's agreement that the attorneys' fees be divided equally, the administrator thus appointed, although entitled to discharge the California attorney, could not abro-

contingent fee agrees to pay other attorneys out of his share, the client is not liable for the fees of the other attorneys,[80] and if the client stipulates for and exercises the option of engaging another attorney who should share the first attorney's compensation, the latter is entitled to only half of the percentage of recovery originally agreed on.[81]

Such an agreement to divide fees establishes a trust arrangement between the attorneys respecting the fees collected, in which both are entitled to share, imposing on each a duty to disclose to the other and account to him for his share of fees collected;[82] and an attorney who repudiates his obligation to divide the fees may be subject to action and constrained to account.[83] It is immaterial that the order fixing the fee allowed it as for services rendered solely by one attorney, where the other was not a party to the arrangement under which the fee was allowed or collected.[84]

Agreements against public policy. There can be no recovery where the agreement is against public policy,[85] as where attorneys for a trustee in bankruptcy agree to divide fees with an attorney for the creditors of the bankrupt;[86] and a contract to divide a contingent fee with third parties, not lawyers or an agreement by which a person procuring such a contract from another is to be compensated for the services rendered, which is prohibited by statute, renders the contract of retainer void,[87] although, if the statute is directed against the attorney alone, and does not prohibit a layman from entering into such contract, such a layman may recover thereunder.[88] The fact that a contract between an attorney and client was made at the suggestion of a layman does not render it invalid, however, in the absence of a showing that the layman had an interest in the fee.[89]

Withdrawal from contract. An attorney is justified in withdrawing from an agreement to divide fees by acts of other attorneys detrimental to his client and himself.[90]

Breach of contract and waiver. By continuing to recognize the contract after breach by his associate, regardless of his motive for so doing, an attorney waives the breach,[91] but notwithstanding such waiver, the guilty attorney is not entitled to a division of the fees accruing after his actual discharge from the proceedings.[92]

Effect of death or disbarment. Where several attorneys are jointly prosecuting a claim on a contingent fee basis under an agreement to divide the fee, and one of them dies after judgment has been

gate the agreement for the division of the fees, nor could the Montana attorney avoid the obligation to divide the fees by claiming he was employed by the administrator.—Jackson v. Genzberger, (D.C.Mont.) 5 F.Supp. 187.

80. Denson v. Caddell, 77 So. 720, 201 Ala. 194.

81. Donovan v. Jenkins, 155 P. 972, 52 Mont. 124.

82. Ala.—Acuff v. Rice, 139 So. 91, 224 Ala. 54.
D.C.—Columbus v. Sheehy, 43 App. D.C. 462.

Accounting when not available

Where compensation for services rendered by three attorneys in settlement of an estate had been equally divided between them pursuant to an agreement, two of the attorneys were held not entitled to an accounting against the third attorney, who received additional compensation for additional services rendered to the estate under a separate retainer, on the ground that the attorneys were engaged in a joint venture as to such additional services.—Baylis v. Wood, 287 N.Y.S. 372, 248 App.Div. 585.

83. U.S.—Jackson v. Genzberger, (D.C.Mont.) 5 F.Supp. 187.
Ga.—Robinson v. Guerry, 148 S.E. 745, 40 Ga.App. 26.

84. Robinson v. Guerry, supra.

85. Weil v. Neary, (N.Y.) 49 S.Ct. 144, 278 U.S. 160, 73 L.Ed. 243, reversing (C.C.A.) 22 F.(2d) 893, certiorari granted 48 S.Ct. 338, 276 U.S. 613, 72 L.Ed. 732.—6 C.J. p. 754 note 69 [a].

Right of assignee

One accepting employment as a government attorney thereby abandoned a claim to compensation for past services under an agreement with a fellow attorney for splitting a contingent fee on a claim against the government, and a supplemental agreement between the attorneys regarding the division of such contingent fee and an agreement of the retiring attorney to assign his interest in return for advances are void, precluding the assignee's recovery of the compensation assigned.—Case v. Helwig, 62 App.D.C. 98, 65 F.(2d) 186.

86. Weil v. Neary (C.C.A.N.Y.) 22 F.(2d) 893, certiorari granted 48 S.Ct. 338, 276 U.S. 613, 72 L.Ed. 732, and reversed on other grounds 49 S.Ct. 144, 278 U.S. 160, 73 L.Ed. 243.

87. Matter of Welch, 141 N.Y.S. 331, 156 App.Div. 470.

88. Irwin v. Curie, 64 N.E. 161, 171 N.Y. 409, 58 L.R.A. 830.

89. Mytton v. Missouri Pac. R. Co., (Mo.App.) 211 S.W. 111.

Former client and employee of attorney

Where a client injured while in the employ of a railway company became, while in the hospital, acquainted with a former client of a firm of attorneys, who recommended such firm to the person injured and at the latter's request caused them to send an employee with a contract for him to sign, in the absence of evidence that either the firm's employee or the former client had an interest in the fee, the contract is not made unlawful by a statute relating to division of attorney's fees.—Mytton v. Missouri Pac. R. Co., (Mo.App.) 211 S.W. 111.

90. Chance v. Commercial Credit Co., 118 S.E. 465, 30 Ga.App. 543.

Reducing fund for distribution

An attorney, agreeing with attorneys for other clients to pool their fees in a certain matter, owed allegiance, not only to his original client, but to those of the other attorneys, and, if he participated in an effort to reduce the fund for distribution, which was insufficient to satisfy all the claims, by the allowance of unfair fees to the auditor and the auditor's attorney, another of the attorneys, whose client was thereby detrimentally affected, was justified in withdrawing from the agreement.—Chance v. Commercial Credit Co., 118 S.E. 465, 30 Ga.App. 543.

91. Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115.

92. Wilson v. Nugent, supra.

obtained in the trial court, but before affirmance on appeal, his representative is entitled to his share of the fee without diminution,[93] but where the attorney does not die but is disbarred at that stage of the proceedings the rule is otherwise; the disbarment annuls every contract of employment and places the attorney in the position of one who has willfully and wrongfully abandoned his contract, and, accordingly, the other attorneys are not liable for any fees subsequently earned by them,[94] and since no fees accrued until the affirmance on appeal subsequent to the wrongful abandonment of the enterprise, he is not entitled to recover for his share of the services rendered up to the date he ceased to act.[95]

§ 175. Necessity of Contract of Employment

A contract of employment is necessary to render one liable for the services of an attorney; but it need not be an express contract, it may be implied from acts of recognition or acceptance of the benefits of such service.

An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest on a contract of employment, express or implied, made with the person sought to be charged or with his agent.[96] No one can legally claim compensation for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed,[97] or, as has been shown supra § 160, for services voluntarily rendered.

No formal contract is necessary, however, to create the relationship of attorney and client or the obligation on the part of the latter,[98] and the absence of an express promise on a client's part to pay will not prejudice recovery, if the employment is fairly made out from all the attendant circumstances;[99] neither is it necessary that the parties agree on a definite fee,[1] the promise to pay a reasonable sum

93. Senneff v. Healy, 135 N.W. 27, 155 Iowa 82, 39 L.R.A.(N.S.) 219.

94. Davenport v. Waggoner, 207 N.W. 972, 49 S.D. 592, 45 A.L.R. 1126—Egan v. Waggoner, 170 N.W. 142, 41 S.D. 239

95. Davenport v. Waggoner, 207 N.W. 972, 49 S.D. 592, 45 A.L.R. 1126.

Quantum meruit

An attorney, contracting with other attorneys for a contingent fee, cannot, after failure fully to perform because of disbarment, on quantum meruit, recover a greater amount than he could have recovered under the contract—Davenport v. Waggoner, 207 N.W. 972, 49 S.D. 592, 45 A.L.R. 1126.

96. Ala.—Tyson & Arrington v. Thompson, 70 So. 649, 195 Ala. 230.
Cal.—Tracy v. Ringole, 262 P. 73, 87 Cal.App. 549.
Iowa—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258
Ky.—O'Doherty & Yonts v. Bickel, 179 S.W. 848, 166 Ky. 708, Ann. Cas. 1917A 419.
La.—Levin v. Suffrin, (App.) 167 So. 911.
Md.—Drury v. Brightwood Sanitarium Co., 133 A. 314, 150 Md. 585—Barry v. Carroll, 123 A. 453, 143 Md. 688.
Minn.—Lowell v. Connolly, 223 N.W. 786, 176 Minn. 498
Mont.—In re Baxter's Estate, 22 P.(2d) 182, 94 Mont. 257
N.Y.—Lynn v. Agnew, 166 N.Y.S. 274, 179 App.Div. 805, affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654
Or.—Fields v. Fields, 7 P.(2d) 975, 139 Or. 41, denying rehearing 3 P.(2d) 771, 139 Or. 41—In re Gratton's Estate, 293 P. 231, 136 Or. 224, 79 A.L.R. 517—In re Faling's Estate, 228 P. 821, 113 Or. 6, modified on other grounds 231 P. 143, 113 Or. 6.
Wis.—Gugel v. Olin, 170 N.W. 261, 168 Wis. 321.
6 C.J. p. 730 note 63
See Ryden v. Hastings, 209 Ill.App. 367.

Circumstances not establishing contract

(1) Statements of a fraternal benefit society's secretary to an attorney after its general counsel's refusal of the attorney's offers to disclose information concerning a fraudulent death claim for stated sums that the general counsel would do what was fair and the secretary would see that the attorney received a reasonable fee, if he disclosed the information, was held not to establish an employment contract entitling the attorney to recover his fee—Modern Woodmen of America v. Arnkens, 192 N.E. 706, 99 Ind.App. 344

(2) An attorney, employed by a company as auditor prior to his admission to the bar, was not entitled to recover an attorney's fee from a stockholder for advice given to the stockholder subsequent to his admission to the bar, where such stockholder had not contemplated employing the attorney as such apart from his services as an auditor—Levin v. Suffrin, (La.App.) 167 So. 911.

Nonpayment by employer

In an action for attorney's fees, plaintiff defending a patent suit must recover, if at all, under a contract with defendant, and not solely because he was not paid by the party who defended the suit for defendant and who employed him—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258.

Stipulation by heirs of client

Where a party died, pending an appeal by her from an adverse order in guardianship proceedings, a stipulation by her heirs in full settlement of all controversies among themselves except such appeal, which was to be submitted on its merits, will not obligate the heirs to pay an attorney, who was not a party to the stipulation, for services rendered in the appeal—Kratz v. Wolff, 182 N.W. 173, 191 Iowa 328.

97. Ky.—O'Doherty & Yonts v. Bickel, 179 S.W. 848, 166 Ky. 708, Ann. Cas. 1917A 419
Md.—Bregel v. Cooper, 157 A. 719, 161 Md. 416.
Mo.—Gilliam v. Gibney, (App.) 204 S.W. 41
Neb.—In re Kierstead's Estate, 237 N.W. 299, 121 Neb. 423
N.Y.—Lynn v. Agnew, 166 N.Y.S. 274, 179 App.Div. 805, affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654
Pa.—Dickinson's Estate, 8 Pa.Dist. & Co. 75.
6 C.J. p. 730 note 66

98. Cal.—Brydonjack v. Rieck, 42 P.(2d) 336, 5 Cal.App.(2d) 219—Blattman v. Gadd, 296 P. 681, 112 Cal.App. 76
Iowa.—Cahill v. Murray, 194 N.W. 61, 196 Iowa 33.
"It is not necessary to effect that relationship that there should be a general retainer or express contract to that specific end."—Blattman v. Gadd, 296 P. 681, 687, 112 Cal.App. 76

99. Iowa.—Cahill v. Murray, 194 N.W. 61, 196 Iowa 33.
Md.—Barry v. Carroll, 123 A. 453, 143 Md. 688.
6 C.J. p. 730 note 67.

1. Pulaski County v. Shofner, (Ark.) 92 S.W.(2d) 217

being, as shown infra § 190, implied in the absence of any express agreement as to the amount. Where an attorney undertakes to represent one person and to collect his fee from another, however, he should make certain that the latter understands the situation.[2]

Acts of recognition or acceptance are in general equivalent to a prior engagement, thus, acquiescence by a client in his attorney's conduct may supply the place of a request to act, provided the case was such that the client might reasonably know that he would be expected to pay for the service,[3] and, where a person, with knowledge that a suit has been instituted in his behalf, prevents the attorney from proceeding further therein but himself prosecutes the suit to judgment, such person, by such conduct, ratifies the prior act of the attorney and is liable for the services rendered.[4] The same would be true where a client by his acts induced his attorney to believe that his services were desired.[5] Unless the circumstances show that the services were intended to be gratuitous,[6] where services are rendered by an attorney at the request of another, or where the benefits of such services are knowingly accepted, a promise to pay therefor will be presumed,[7] particularly where it would be inequitable for the party benefited to share the benefit without contributing to the expense.[8] Thus, where there is even slight proof of an employment of the attorney by the client, the fact that the latter stood by without objection and allowed the attorney to render valuable services in his behalf will estop him to deny the fact of employment.[9] The acquiescence must be such as presumes volition on the part of the person sought to be charged, however, and there is no acquiescence where he has no choice but to avail himself of the efforts made by the attorney.[10]

On the other hand, it does not always follow that, because one receives the benefit, directly or indirectly, of the services of another, the law implies a contract to pay therefor.[11] Thus, where the attorney, in carrying on the action does so for his own benefit and not for the nominal party to the action, the fact that such nominal party knows of his course and does not object will not make him liable for fees,[12] nor does a tacit acceptance of an attorney's services raise a promise to pay therefor, when the services were rendered after the distinct refusal of defendant to avail himself of, or pay for, such services.[13] So, where one of several parties, all of whom are equal-

2. Landry v White, (La App) 148 So 104, affirming 146 So 509

3. Iowa—Cahill v Murray, 194 N W. 61, 196 Iowa 38
Md—Barry v Carroll, 123 A 453, 143 Md 688.
6 C J p 730 notes 68, 69.

4. Shippen v Walker, 105 S E 853, 26 Ga App 280

5. Crawford v Wiedemann, 164 S W 981, 158 Ky 333, 336—6 C J. p 730 note 70.

6. Taussig v St Louis, etc, R Co, 65 S W 969, 166 Mo 28, 89 Am S R 674—6 C J p 731 note 72

7. Ala—Martin v Henderson, 68 So 478, 12 Ala App 564
Ark—Morning Star Mining Co v Williams, 333 S W 354, 171 Ark 187.
Md.—Barry v. Carroll, 123 A. 453, 143 Md 688
6 C J. p 731 note 71

Enforcement of lower gas rates
Domestic consumers of gas, in whose behalf a city employed attorneys to defend an ordinance lowering the gas rates, and who, without objection, accepted the attorney's services, are liable for reasonable counsel fees—Haynie, Parks & Westfall v Camden Gas Corporation, 56 S W (2d) 419, 186 Ark. 842.

Equitable owner of judgment is liable for reasonable attorney's fees in procuring judgment thereon in a sister state, and in obtaining a compromise settlement of the judgment procured, notwithstanding the action is prosecuted in the name of the legal holder, where the equitable owner has knowledge of, and acquiesces in, such action, and consents to, and accepts avails of the settlement—Hultman v Hanley, 248 N W 81, 134 Neb. 757.

8. Clarke v Hot Springs Electric Light & Power Co, (C C A Wyo) 76 F (2d) 918, certiorari denied 56 S Ct 147, 296 U S 624, 80 L Ed 443.

9. Trimble v. Texarkana, etc, R Co, 97 S W 164, 199 Mo. 44—6 C J p 731 note 73

10. O'Doherty & Yonts v Bickel, 179 S W 843, 166 Ky. 708, Ann Cas 1917A 419

Benefits necessarily arising
Attorneys, representing certain stockholders in a suit to recover on a contract for the sale of stock, are not entitled to recover compensation as against other stockholders who had been benefited by their services, on the theory that they acquiesced in the services, where they had previously declined an offer to avail themselves of the services and the success of the attorney on behalf of the other stockholders of necessity benefited them, since on the success of the litigation defendant therein would have no incentive to resist the claims of the nonjoining stockholders—O'Doherty & Yonts v. Bickel, 179 S W. 843, 166 Ky 708, Ann Cas 1917A 419.

11. O'Doherty & Yonts v. Bickel, supra—6 C J p 731 note 74.

Insurer's interest in tort action
The facts that a compensation insurance carrier which paid compensation permitted an injured employee to sue a third party tort-feasor for damages, and accepted benefits to the extent of the compensation paid, do not create the implied contract that insurer would pay attorneys' fees to the employee's attorneys out of its share of the recovery, and such attorneys are not entitled to attorneys' fees from such insurer's share, on the theory that the employee and insurer were jointly interested, and that one party in interest prosecuted the action for the benefit of the others, neither is the insurance carrier estopped to question the right of the attorneys to assert such claim—Spinner v Fidelity & Casualty Co of New York, 53 S W.(2d) 946, 245 Ky. 519.

12. Me—Wright v Fairbrother, 16 A. 330, 81 Me. 38.
Vt—Smith v Dougherty, 37 Vt. 530
6 C.J. p 731 note 75.

13. Ark—Caldwell v. Missouri State Life Ins. Co., 230 S W 566, 148 Ark 474
Ky—O'Doherty & Yonts v. Bickel, 179 S.W 843, 166 Ky. 708, Ann Cas 1917A 419
6 C.J. p 731 note 76.

ly interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees.[14] In such case it is held that liability cannot be imposed on the theory of unjust enrichment.[15] These rules are particularly applicable where the other parties benefited are minors.[16] If, however, the parties not directly employing the attorney, after becoming aware that he looks to them for his compensation, fail to make objection or to declare their nonliability, they are liable.[17]

§ 176. Nature and Extent of Liability

The attorney, ordinarily, looks to his employer for compensation, but the parties may agree to payment out of a fund.

Generally, in the absence of a contract providing otherwise, each client should pay his own attorney,[18] and one litigant cannot be compelled to pay the attorneys' fees of another.[19] The person to be looked to for compensation is not of necessity the one benefited, but is the employer,[20] and where the attorney is employed by two parties to perform the same service, he has a right of action against each until paid by one.[21] A party joining in the employment of an attorney is liable for his share of the fees when he was intentionally included in the litigation, although after investigation the adversary discovered that he was not a proper party and voluntarily dismissed the suit as to him.[22]

Where two attorneys are employed by the client, one of them cannot be deprived of his right of compensation by anything that happens thereafter between the associate attorney and the client, nor in such case is an attorney writing a letter reciting that the client had not employed other attorneys estopped from recovering his share of the compensation.[23]

Payment out of fund. The employer's liability is personal, and he cannot defend by alleging that it is customary for the attorney to be paid out of the money collected.[24] There is no objection, however, to an agreement that the attorney shall look to a fund for compensation, and not to the personal liability of the client.[25] In some cases the right to be paid out of a fund is preferable to the personal claim, and sometimes such payment can be obtained by an attorney.[26]

Joint and several liability. If parties voluntarily and with knowledge avail themselves of an attorney's services, they become jointly and severally liable for the value of such services.[27] On the other hand, it has been held that, wherever a joint lia-

14. Ky.—O'Doherty & Yonts v Bickel, supra
Pa.—Dickinson's Estate, 8 Pa Dist & Co. 75.
6 C.J. p 732 note 77

15. Aronstam v All-Russian Central Union of Consumers' Societies, (C.C.A.N.Y.) 270 F. 460.

16. Tull v. Nash, (Wash.) 141 F. 557, 73 C.C.A. 29

17. Cincinnati Sav. Bank v. Benton, 2 Metc. (Ky.) 240—6 C.J. p. 732 note 79.

18. U.S.—General Finance Corporation v. New York State Rys., (D.C.N.Y.) 3 F. Supp. 975.
Md.—Barry v. Carroll, 123 A. 453, 143 Md. 688.

19. Ky.—Howard v. Carmichael, 85 S.W. (2d) 852, 237 Ky. 462—Gilliam v. Gibney, (App.) 204 S.W. 41.
Mo.—Johnson v. United Rys. Co. of St. Louis, 152 S.W. 362, 367, 247 Mo. 326.

20. Ansley v. Concrete Construction & Contracting Co., 77 So. 774, 142 La. 871—6 C.J. p. 732 note 80.

Employment by partnership

Where a claim of an international banking firm against the Chilean government was rejected by a joint commission created by the governments of the United States and Chile to consider claims of the citizens of each against the other, because the firm was a Chilean concern, but the claim was subsequently presented in the names of the partners, one of whom was an American citizen, to an arbitrator who made an award in favor of the American claimants, the firm's attorneys were held to have no contractual relation with the heirs of the American partner, and were not entitled to fees from the amount received by them.—In re McCall's Estate, 109 A. 637, 266 Pa. 379

Recovery from opponent

"Where, after a protracted litigation, in which money and securities to a large amount are tied up, the litigants desire to effect a compromise and the attorney of the one stands in the way and another attorney is employed, through whom negotiations are concluded, to the knowledge of the first attorney, which lead to the compromise, and where, in such case, the one litigant makes a claim against the other to be indemnified for the indebtedness incurred by him for his attorney's fees, and an amount is paid in compromise of such claim, the attorney in question, who has in the meanwhile taken no steps for his own protection, has no standing to recover his fees from the litigant making such payment."—Ansley v. Concrete Construction & Contracting Co., 77 So. 774, 142 La. 871

21. Ala.—Martin v. Henderson, 68 So. 478, 12 Ala. App. 564.
Mo.—Walker v. Whitten, (App.) 33 S.W.(2d) 480

22. Caillouet & Caillouet v. Bouvier, 135 So. 273, 17 La. App. 41

23. Kline v. Blackwell, (C.C.A.Fla.) 63 F.(2d) 397, certiorari denied 54 S.Ct. 54, 290 U.S. 636, 78 L.Ed. 553

24. Bodfish v. Fox, 23 Me. 90, 39 Am. D. 611—6 C.J. p. 732 note 81.

25. N.Y.—Leavitt v. Dodge, 16 N.Y.S. 309.
Tenn.—Rogers v. O'Mary, 32 S.W. 462, 95 Tenn. 514

26. Hand v. Savannah, etc., R. Co., 21 S.C. 162—6 C.J. p. 732 note 83.

Protection of fund

Where one party has employed an attorney whose services have protected or raised a common fund for administration or distribution under the direction of the court, that fund is liable for the counsel fees so incurred for the benefit of all parties in interest.—Smyth's Estate, 14 Pa. Dist. & Co. 773

27. Robert v. Goldman, (Mo. App.) 299 S.W. 55—Lawson v. Bufton, (Mo. App.) 199 S.W. 268—6 C.J. p. 732 note 84.

bility for attorney's fees is sought to be established, it must be made to appear clearly that the contract of employment was joint on the part of defendants, and not several, the mere fact that several parties similarly interested employ the same attorney does not fix their liability as joint.[28]

§ 177. —— Attorney Employed by Agent

a. In general
b. Employment by attorney

a. In General

The principal is liable for services of an attorney employed by an authorized agent; and the agent is liable if his act was unauthorized or if he also binds himself individually.

Where an agent has authority to employ an attorney and bind the principal to pay for his services, the principal is liable for the services of an attorney so employed,[29] and his liability to the attorney is not affected by an agreement between the principal and agent, of which the attorney had no notice, that the agent shall pay for such services,[30] but where an agent in employing an attorney acted beyond the scope of his authority, the principal is not liable[31] unless he accepted the services knowing that they were performed for him.[32] The principal cannot be held liable for the compensation of an attorney who is the agent of the original agent, and not of the principal.[33]

Liability of agent. An agent may render himself personally liable if the circumstances are such that his principal is not bound,[34] and where he has bound himself individually as well as in the capacity of agent for another, he cannot avoid liability on the ground that he was not a party to the litigation in which the services were rendered.[35] Where, however, the alleged agent had no authority to bind the principal and did not purport to bind himself, he is not liable personally on the contract.[36]

Scope of authority. The question whether an agent has authority to bind the principal in the employment of an attorney is treated in the title Agency § 105 d (1).

b. Employment by Attorney

Although the employing attorney may be personally liable for services rendered by counsel employed by him, his client is not liable therefor unless he authorized or ratified such employment.

As an attorney has, under the rule stated supra § 107, no implied power, under a general retainer, to employ associate counsel, the client is not liable to counsel so employed,[37] unless he has authorized the

Contract apportioning costs

Under a contract whereby the owners of property along a residential street agreed to retain counsel to bring an injunction suit against the operation of a funeral parlor, and to pay attorney's fees and costs, defendants, sued for the balance of the attorney's fees incurred on the employment of the attorney and prosecution of the injunction suit, are jointly and severally liable for the attorney's services and expenditures, notwithstanding the contract provided a method of assessing the costs as between the signers—Robert v Goldman, (Mo App) 299 S W. 55.

28. Adriatic F Ins Co v. Treadwell, (N Y) 2 S Ct 722, 108 U S 361, 27 L Ed. 754—6 C J. p 732 note 85.

Employment through single request

Employment of an attorney, through a single request to represent three baseball clubs with separate interests, did not create a joint liability for his services.—Hindman v Pittsburgh Trust Co, 109 A. 876, 266 Pa. 204.

29. Harms v. Wolf, 89 S W. 1037, 114 Mo App 387—2 C J p 661 note 4 [a]—6 C J. p 732 notes 86 [a], 87.

Employment by administrator's agent

An administrator requesting another's aid in the settlement of the estate is liable for reasonable compensation to the attorney selected by such other and accepted by the administrator—Harms v Wolf, 89 S W 1037, 114 Mo App 387.

Apparent officer of corporation

An attorney honestly rendering services for the apparent officers of a corporation in bringing and defending suits, without knowledge that the corporation was not benefited thereby, is not required to return the money received as compensation for such services.—General Mortgage & Loan Corporation v. Guaranty Mortgage & Securities Corporation, 162 N E. 319, 264 Mass. 253

30. New York Life Ins. Co. v. Smith, 147 S.E. 126, 39 Ga.App. 160.

31. Bush v. Southern Brewing Co, 13 So. 856, 69 Miss. 200

32. Knights of Pythias v. Reinberger, 269 S W. 41, 168 Ark. 77.

Implied contract

Where the officers of a fraternal association attended a hearing before the attorney general, and there saw an attorney appear on behalf of the organization, and where such attorney subsequently appeared for the organization in an action brought by the attorney general to dissolve it, there was at least an implied contract between the organization and the attorney which would sustain a recovery by him of compensation, although the officer directly employing him may have been without authority so to act—Knights of Pythias v. Reinberger, 269 S.W. 41, 168 Ark 77.

33. Mussey v. Vanstone, 82 Mo App 353—2 C J. p 662 note 6.

34. Brennan-Love Co. v. McIntosh, 87 N W. 327, 62 Neb 522—6 C J. p 733 note 88.

35. Winslow v. Atz, 177 A. 272, 168 Md 230.

36. Orr v. Brown, (Miss) 74 F 1004, 21 C C A. 195.

37. Kan—Orosem v. McNeill, 176 P 106, 103 Kan. 694, denying rehearing 175 P. 633, 103 Kan 429
N Y—In re Carney, 158 N Y S. 585, 93 Misc 600.
6 C J. p 733 note 90.

Discovery of want of authority

Where a patent attorney was employed by a railroad attorney to defend certain patent suits and discovered that the railroad attorney had no power to employ him, and thereafter the first suits were dismissed, and new suits instituted in defense of which the patent attorney was retained by one who sold the patented article to the railroad, no employment of the patent attorney by the railroad to defend the latter suits could be implied—Orr g v

employment,[38] or has ratified the act of the original attorney in employing assistance, with full knowledge of the facts.[39] In such cases, the assistant employed will not be affected by a secret agreement between the attorney and his client that the former shall pay for the extra service,[40] or by anything that happens between the other attorney and the client after the employment.[41]

The ratification by the client need not be express, but may be implied from circumstances, as from his failure to repudiate the employment on becoming aware that the assistant counselor looked to him for his fees, coupled with an acceptance of the benefit of his services.[42] Thus, if an emergency makes it necessary for a substitute attorney to conduct part of the proceedings, the client cannot accept the services and later deny his liability to pay for them.[43] Where, however, the fact of the recognition of the assistant counsel may be explained on the ground that the client supposed that the assistant was looking to the original attorney for his fees, the assistant cannot hold the client responsible for compensation.[44] So, where the client accepting the services of the second attorney understood that he was rendering them at the request of the first one to fulfill the latter's contract with the client, the client is not liable;[45] and, where a client is unaware of such services until after they have been rendered, he cannot be made liable therefor on the ground of acquiescence or ratification.[46]

Liability of attorney. An attorney employing associate counsel to aid him is himself liable for the latter's fees, unless the circumstances are such as to make the client liable.[47]

§ 178. —— Attorney Employed by One Joint Defendant

A defendant not ratifying the employment is not liable for services of an attorney employed by a joint defendant.

One of several joint defendants has no authority, as agent, to employ counsel to act for all, and the others are not liable for the value of the attorney's services,[48] unless, by subsequent acquiescence, they ratify the employment.[49]

§ 179. —— Attorney Employed by Trustees, Personal Representatives, and Beneficiaries

The general rule, stated supra § 176, that the attorney must look to his employer for compensation has been applied particularly in cases of employment by fiduciaries. Thus, as appears in the title Trusts § 284 [65 C.J. p 719 note 62], an attorney employed by a trustee must, ordinarily, look to the trustee himself, and not to the trust estate, for payment; and the same rule applies, as is shown in the title Executors and Administrators § 199 [24 C.J p 66 note 26–p 68 note 31], in the case of an executor or administrator, although under certain circumstances the attorney is given the right by statute to look to the estate. Similarly, with some exceptions, as will be shown in the titles Executors and Administrators § 199 [6 C.J. p 734 notes 5–7] and Trusts § 284 [65 C J p 722 note 3–p 723 note 13], the attorney cannot look to the estate for services rendered at the request of a beneficiary.

Chicago R I & P Ry Co, 250 N W. 148, 217 Iowa 521, 90 A L R 258

Employment by unauthorized attorney

Where the chairman of a political committee, without authority, employed an attorney to conduct an election contest, who in turn employed plaintiff, there was no liability on the part of the individual members of the committee for plaintiff's services —Owen v. Hadley, 171 S W. 973, 186 Mo App 1.

38. Cummings v. National Shawmut Bank of Boston, 188 N E 489, 284 Mass. 562—6 C.J p 733 note 91.

39. Kneedy v. Kaiser, 168 N W. 715, 41 S D 15—6 C.J. p 733 note 92.

40. Emblem v. Bicksler, 83 P. 636, 34 Colo. 496—6 C J. p 733 note 93.

41. Kline v. Blackwell, (C C.A.Fla.) 63 F (2d) 897, certiorari denied 54 S Ct 54, 290 U S 636, 78 L Ed 553

42. Aldrich v. Brown, 103 Mass. 527 —6 C J. p 733 note 94

43. Ark —Fenno v. English, 22 Ark 170

Ky.—Rust v Larue, 4 Litt 411, 14 Am D 172.

Mich —Eggleston v. Boardman, 37 Mich 14.

Pa —Henderson v. Montgomery, 21 Pa Dist. 413.

Tex —Allcorn v. Butler, 9 Tex. 56

44. Fraser v Haggerty, 49 N W 616, 86 Mich 521—6 C J p 734 note 96

45. Martin v Henderson, 68 So. 478, 12 Ala.App 564.

46. Gilliland v. Brantner, 121 N.W. 1047, 145 Iowa 275.

47. Mo—Kersey v. O'Day, 73 S W 481, 173 Mo 560.

Vt—Scott v. Hoxsie, 13 Vt. 50.

Contingent fee contract

Where an attorney agreed to institute requisite proceedings to establish the right of his clients in decedent's estate and to loan them any amount of money required for disbursements, which they agreed to repay with fifty per cent of any recovery, any sum paid to another attorney for legal services should come out of the share of the attorney originally employed, not from the share of the clients —In re Carney, 158 N Y S. 535, 93 Misc. 600.

48. Roselius v Delachaise, 5 La. Ann. 481, 52 Am D. 597—6 C J. p 734 note 99.

49. Laughlin v Newman, (Mo.App) 61 S W.(2d) 218—6 C J. p 734 note 1.

§ 180. —— Reimbursement for Expenses

In the absence of a contract or custom to the contrary, the attorney may recover disbursements made by him which were usual and reasonably necessary to carry out his employment

Where an attorney having general authority over the subject of his employment, makes expenditures in the professional undertaking which are usual and reasonably necessary, under all the circumstances, to carry out the object of the employment, such disbursements may be recovered from the client.[50] In some cases, however, the right to reimbursement may depend on custom or usage;[51] and where the contract between attorney and client limits the implied authority of the former to incur expenses, or the parties agree as to who shall pay the expenses, the provisions of the contract control.[52] So, where the contract expressly limited the recovery of expenses to "court costs," the attorney is not entitled to reimbursement for other expenses of the litigation,[53] but where it is agreed that the attorney shall be reimbursed out of the proceeds of a judicial sale, and the client in bad faith obstructs the proceedings so that the sale does not take place, the attorney may recover his disbursements from the client.[54]

Disbursements need not necessarily be expressly authorized by the client in order to be a proper charge against him;[55] but the attorney must furnish proof as to the actual disbursements made.[56] An attorney has no legal claim to be reimbursed for unauthorized expenses[57] or for expenditures which were not usual or reasonably necessary,[58] or such as are made necessary by his own wrongful acts.[59] So, in the absence of special agreement he may not recover fees paid to additional counsel employed by him.[60]

50. Cal—Tasker v Cochrane, 271 P 503, 94 Cal App 361
La—McClendon v Chrysoverges, 130 So 520, 10 La App 639
Mo—Lawson v Bufton, (App) 199 S.W 268
N Y—MacDonald v Johns, 115 N.Y S 695
6 C J p 734 note 9.

Contingent fee contract

Where an agreement between an attorney and client for rendition of services on a contingent fee basis did not provide who should be ultimately liable for costs and expenses of suit, the client is liable, and, in such case, where the attorney consulted his client with regard to extraordinary expenses, the client was charged with notice of his ultimate liability—Hampton v Rosenheim, 155 N Y S 361, 92 Misc 207

Reimbursement of proportionate share

On an accounting by an attorney employed to establish the right of several clients in decedent's estate, he is entitled to reimbursement of the proportionate share belonging to the parties asking the accounting of moneys disbursed by him for expenses—In re Carney, 158 N Y S 585, 93 Misc 600

Advancement to client

Where an attorney advanced his client two hundred dollars to settle litigation with one to whom she had leased a farm under a sharing agreement, and she received the fruits of the settlement and still retains them, the client cannot avoid repaying the attorney's advances on any claim of fraudulent misstatement of law by him inducing the settlement—Wadleigh v Stewart, 169 N W 559, 168 Wis 235

51. Clark v. Ellsworth, 73 N.W 1023, 104 Iowa 442—6 C J. p 734 note 11.

52. City of Wakefield v. Tuttle, 221 N W 155, 244 Mich 237—6 C J p 734 note 10

Expense of recording decree

Where an attorney, who was employed on a contingent fee basis, agreed to pay all expenses incurred in the prosecution of the case, the recording of the decree is part of the expense of the litigation to be borne by him—Mann v. Day, 165 N.W. 643, 199 Mich. 88.

Contingent fee contract

An attorney, who for more than two years unsuccessfully endeavored to increase his client's interest in a particular estate, pursuant to a contract providing for a contingent fee, was not entitled on the client's termination of the contract, to recover for traveling and living expenses incurred, where such expenses were not chargeable to the client under the contract—Fletcher v Kellogg, 55 App D C 351, 6 F (2d) 476, 40 A L R 1325, certiorari denied 46 S Ct 18, 269 U S. 555, 70 L Ed 409

Without cost to client

A written agreement of an attorney under a contingent fee contract to conduct an appeal without cost to the client is an unambiguous contract, which, standing alone, should be construed as requiring the attorney to pay the costs and disbursements of the appeal—Lloyd W Casner, Inc v Hartshorne, 177 A 890, 13 N J Misc 295

53. Zuckernik v Jordan Marsh Co, (Mass) 194 N E 892

Expenditures not recoverable

Where an oral agreement between a store owner and an attorney for collection of accounts receivable entitled the attorney to an agreed commission plus reimbursement for "court costs" actually paid by the attorney but no other expenses, the attorney is not entitled to allowance for traveling expenses and the expense of obtaining descriptions from the registry of deeds of real estate owned by the store owner's debtors, nor for advances to attorneys in other cities in cases which the attorney could not well handle personally—Zuckernik v. Jordan Marsh Co, (Mass) 194 N.E 892

54. Hildreth v. Honsinger, 171 N W. 332, 41 N D. 485.

55. Iowa—Forbes v Chicago, etc, R. Co, 129 N W 810, 150 Iowa 177, Ann Cas 1912D 311.
Kan—Haseltine v. Mahan, 55 P. 467, 8 Kan App. 857

56. Tasker v. Cochrane, 271 P 503, 94 Cal App. 361—6 C J p 734 note 13.

57. Mich—Gray v. Emmons, 7 Mich. 533.
N Y—Townsend v. Meyers, 127 N Y. S 451, 142 App Div 851—People v. Lockwood, 9 Daly 68.

Payment to adverse attorney

Where the attorney collected part of the amount of a judgment for his client, the judgment creditor, such attorney is chargeable with the amount he paid out, without his client's consent, as attorney's fees to the adverse attorney.—Hoy v Nichols, 170 Minn. 191, 212 N W. 530.

58. Cal—Tasker v Cochrane, 271 P. 503, 94 Cal App 361.
Md—Winslow v. Ats, 177 A 272, 168 Md. 220.

59. Ill.—Hughes v. Zeigler, 69 Ill. 38
Mass—French v. Meyer, 107 N.E. 956, 220 Mass 451
6 C.J. p 734 note 16.

60. Tasker v Cochrane, 271 P. 503, 94 Cal App. 361.

Advances. It is proper for an attorney to ask from time to time for advances to pay the expenses of litigation and to apply on account [61]

Traveling expenses. Some cases having to do with the expenditures by counsel draw a line of demarcation between costs of the litigation such as clerk's fees, filing fees, witness fees, jury fees, and the like, and the personal and traveling expenses of attorneys; such traveling expenses, it has been held, can be recovered only when there is a special or express agreement that counsel may be reimbursed therefor;[62] but it has been held that an attorney is entitled to a reasonable allowance for traveling expenses necessary to the performance of legal services, even though he had agreed to make no charge for the services in connection with which the disbursements were made.[63] Where the claim for traveling expenses is a proper one, they will be allowed only from the place of the attorney's residence to the place where the client's business calls him [64]

§ 181. Express Agreements in General

a. General principles
b. Contracts made after relation established
a. General Principles
(1) Requisites and validity in general
(2) Fraud or undue influence
(3) Illegality

(1) Requisites and Validity in General

An enforceable contract between attorney and client for legal services must conform to the requirements of other valid contracts.

Apart from the consideration of questions relating to contracts for retaining fees (supra § 162), express contracts for division and apportionment of fees (supra § 174), and the validity of agreements between attorney and client as to compensation for services in connection with divorce which will be discussed in the title Contracts § 235 [13 C.J. p 464 notes 78, 80, 82], an attorney may make an enforceable contract with one about to become his client for the payment of compensation for services to be rendered,[65] and the principles of law applicable thereto do not differ materially from those applicable to other contracts of employment.[66] Such a contract is not subject to the particular scrutiny of the court,[67] for the client is regarded as competent to judge for himself what is a proper sum to pay for services,[68] and it cannot be repudiated merely because of the

61. Young v. Lonznar, 112 S W 17, 133 Mo App 130

62. Cal—Cooley v Miller & Lux, 105 P 981, 156 Cal 510—Tasker v Cochrane, 271 P. 503, 94 Cal App 361.
N Y—Stiles v Annabel, 235 N Y S 508, 226 App Div 268

Employed in income tax matter
An attorney, employed to represent a client in an income tax matter "as in the past," during which he was paid traveling, hotel, and other incidental expenses, as well as for services in a similar case before the internal revenue department, was entitled to recover hotel and traveling expenses, incidental to preparation and presentation of the case, from the client—Darnell v Woodruff, (Cal App) 58 P (2d) 975

63. In re Barreiro's Estate, 14 P. (2d) 786, 125 Cal App 752

64. Isham v. Parker, 29 P. 835, 3 Wash 755—6 C J. p 734 note 14

65. Cal—Thornley v Jones, 274 P 93, 96 Cal App 219—Tracy v Ringole, 262 P 73, 87 Cal App 549—Bonelli v Conrad, 37 P (2d) 137, 1 Cal App (2d) 660
Ill.—Dietz v. Van Speybroeck, 225 Ill App. 133.
Ky—Chreste v. Louisville Ry Co, 180 S W 49, 167 Ky 75, L.R.A. 1917B 1123, Ann Cas 1917C 867
La—Levin v. Suffrin, (App) 167 So 911.
Mich—Gates v. McLaulin, 165 N W. 614, 199 Mich 438
Mont—Coleman v Sisson, 230 P. 582, 71 Mont 435
N Y—Rodkinson v. Haecker, 162 N E 493, 248 N Y 480, affirming Marks v Haecker, 227 N Y S 849, 223 App Div 710—Ward v Orsini, 152 N E 696, 243 N Y 123, modifying 213 N Y S 932, 215 App Div 795 which affirmed 211 N Y S 249, 125 Misc 407—In re Woolfson's Will, 287 N Y S 12, 158 Misc 928
Or—Hansel v. Norblad, 151 P. 962, 78 Or 38
Wash—Beck v Boucher, 195 P 996, 114 Wash 574—Roche v Madar, 175 P 314, 104 Wash 21, affirmed 181 P 857, 104 Wash 21
W Va—Hubbard v. George, 94 S E 974, 81 W Va 538, L R A 1918C 835
6 C J p 735 note 28
"Prior to assuming the relation of attorney and client a lawyer may bargain for his services with one proposing to employ him and may deal with him at arm's length"—Boldt v Baker, 13 Ohio App 125.

Contract for liquidated damages
A statute providing for an attorney's lien and the manner of enforcing the same against clients' property does not take from the parties their right to make a contract for a stipulated sum intended as liquidated damages in case the clients shall breach the employment contract and a mortgage given to secure it—Sierzek v. Smith, 206 P 611, 86 Okl. 79.

66. Cal—Tracy v Ringole, 262 P. 73, 87 Cal App 549
Fla—Halstead v Florence Citrus Growers' Ass'n, 139 So 132, 104 Fla 21
Or—Hansel v. Norblad, 151 P 962, 78 Or 38.
Wash—Beck v. Boucher, 195 P. 996, 114 Wash 574

Offer and acceptance
(1) No contract as to fees results from a qualified acceptance of the attorney's proposal as to the amount to be paid, nor does such a qualified acceptance constitute a counter offer—Remmers v. Bromschwig, (Mo. App) 18 S W (2d) 115

(2) The act of an attorney in rendering services after receiving the client's proposal as to the fees to be paid constitutes an acceptance thereof—Vellenoweth v. General Motors Bldg Corporation, 225 N W. 522, 247 Mich 274

(3) And the acceptance of the fee provided for in a proposed contract amounts to an acceptance of the terms of the contract—Townsend v Water and Sewer Improvement Dist No. 1 of Gurdon, 25 S.W.(2d) 755, 181 Ark. 324

67. Thornley v Jones, 274 P 93, 96 Cal App 219—6 C J. p 735 note 28

68. Hansel v. Norblad, 151 P 962, 78 Or. 38—6 C.J. p 735 note 29.

subsequent confidential relation.[69]

As in the case of other contracts to be enforceable, the promise to pay must be supported by a valid consideration[70] and the agreement must specify the terms or set up some standard or furnish some data by which the extent of the client's undertaking may be measured and ascertained with reasonable certainty.[71] The validity of the contract does not, however, depend on the value of the services rendered,[72] and it has been held that the objection of want of mutuality cannot be sustained in such contracts.[73] A valid contract between attorney and client for retainer fees is not abrogated by an attempt to merge it in a void contract.[74]

The contract is not enforceable against the client where it is entered into under a mutual mistake of fact,[75] or is dependent upon a condition which is not performed.[76]

Partial invalidity. A contract containing an invalid clause is not invalid in its entirety where that clause is severable from the remainder of the contract,[77] and in such case recovery can be had on so much of the contract as is valid.[78]

69. Hansel v. Norblad, supra.

Confidential relationship does not arise until contract between them is made, and in agreeing upon its terms parties deal at arm's length—Lee v Gump, (Cal.App.) 58 P (2d) 941.

70. Redwine v. Cummins, 233 P 413, 108 Okl. 39.

Consideration held sufficient

(1) Promise of employer to pay attorney for services rendered employee in obtaining his release from jail is supported by consideration—Walker v. Whitten, (Mo App) 38 S W.(2d) 480.

(2) So where plaintiff, attorney at law, who, as guardian of a ward's estate, was authorized by a court order to bring an action against a railroad company to determine the latter's water rights affecting a certain ranch in which the ward and defendant each owned a parcel of land, by reason of which defendant was interested in the action, plaintiff was not, as an attorney at law, under duty to render any professional services in that action, so that his promise to render such services on behalf of the ward, in consideration of defendant's promise to pay a stipulated fee, was supported by a sufficient consideration—Boardman v. Christin, 224 P 97, 65 Cal App 413

(3) A contract of employment of an attorney pursuant to an agreement between property owners desiring the prosecution of an injunction suit to remove an undertaking establishment was held not without consideration as to defendant property owner, who signed the subscription contract after the attorney's employment, but before the major part of the attorney's services had been rendered, and who received the benefit of the services and expenses incurred—Robert v. Goldman, (Mo App.) 299 S W. 55.

Failure of consideration

(1) "Where a promissory note is delivered to an attorney at law pursuant to a contract of employment by the makers, wherein the attorney agrees to render his services to the makers in defending them upon a criminal charge, provided they are indicted by a grand jury, and the makers of the note are never indicted, and no services are rendered to the makers of the note, in an action by the payee, where the makers of the note plead failure of consideration, held, the plea is valid"—Redwine v. Cummins, 233 P. 413, 108 Okl. 39.

(2) A three party agreement whereby certain property was to be transferred to defendants, who undertook to pay certain attorney's fees owing to plaintiffs by another party to the agreement, was not, however, rendered invalid because of failure of consideration as to defendants' promise to pay the fees because the identical deed made to defendants was not recorded, where by a second deed more property than had originally been agreed upon was conveyed to the executors of plaintiffs' client, and from them passed to defendants—Hart v. Bogle, 152 P. 1010, 88 Wash. 125

Setting contract aside

Where a client agrees to give an attorney one-half of twenty five thousand dollars recovered, though he knows that a recovery can be had with the expenditure of little effort or time, and later repudiates the contract, the court may set it aside on the principle that the excess was a gift without consideration—In re Hahn, 94 A. 953, 84 N. J Eq 523, motion denied 96 A. 589, 85 N J. 510, Ann Cas.1918B 830

71. Ky—Keser v. Jarvis, 25 S W (2d) 721, 233 Ky 316
N.Y.—Boehm v United Power Laundries, 229 N Y S 430, 132 Misc. 1

Contract sufficiently certain

A contract of the client to pay her attorney for bringing suit for land and personal property, "as fee for his services one-fourth of the land which he may recover for her, and one-fourth of all other property he may recover for her, by suit or settlement of her claims by litigation," is not so vague or uncertain as to prevent recovery thereon—Amick v. Henman, (Mo App) 241 S. W 988.

Contracts held too indefinite

(1) Where an attorney had represented a city in a number of condemnation proceedings, such proceedings differing in amount involved, proof necessary, and in object sought to be attained, a contract whereby his compensation for services during certain proceedings is to be at same rate at which he had been paid in other similar proceedings is too indefinite for recovery thereon.—Dykman v. City of New York, 171 N Y S. 870, 183 App Div. 859.

(2) So a promise by a third person to help a client pay the attorney's fee is too vague and uncertain to render such third person liable—Keser v. Jarvis, 25 S W (2d) 721, 233 Ky. 316.

72. Ala—Fuller v. Stevens, 39 So. 623.
Kan—Topeka Water-Supply Co. v. Root, 42 P 715, 56 Kan 187.
N Y—Rogers v Polytechnic Inst., 84 N Y S. 12, 87 App.Div. 81.
6 C J. p 735 note 30.

73. Franklin County v. Layman, 88 N E 1094, 145 Ill. 138.

Invalidity for lack of mutuality

It has been held that a contract to employ an attorney exclusively, so long as he owns a single share of defendant's stock, was unenforceable for lack of mutuality—Boehm v. United Power Laundries, 229 N. Y S 430, 132 Misc. 1.

74. McCurdy v. Dillon, 98 N.W. 746, 135 Mich 673.

75. Kelsey v. Mackay, 117 P. 714, 65 Wash 116.

76. Boyd v. Boyce, (Tex Civ.App) 53 S W. 720

77. Ark—Sizer v Midland Valley R Co, 217 S W 6, 141 Ark 369
Mont—Downey v. Northern Pac. Ry. Co, 232 P 531, 72 Mont 166.
6 C J p 735 note 35.

78. Miss—Martin v. First Nat. Bank, 164 So 396
Okl—Allen v. Shepherd, 169 P. 1115,

Ratification. A party ratifying a contract of employment made between the attorney and others is himself bound by the terms thereof.[79]

Contract for costs. An agreement is unobjectionable which allows the attorney the costs recovered,[80] or costs plus a reasonable counsel fee.[81]

(2) Fraud or Undue Influence

Contracts induced by fraud or undue influence on the part of the attorney or providing for extortionate charges for services will not be enforced.

The power of the court to reform[82] or cancel[83] contracts between attorney and client is limited to the duty of protecting the latter against the undue influence of the former. Accordingly, where the parties have come to an agreement touching the fees, and it appears that the agreement was arrived at after complete disclosure and full consideration, and that there was no fraudulent or unfair conduct on the part of the attorney, and that, as to the client, the agreement is fair, that agreement ought not to be disturbed by the court, but the parties should be left where they have placed themselves.[84] If any fraud or undue influence on the part of the attorney induces the contract, however, it will not be enforced,[85] and the same is true where the terms are so indefinite as to be susceptible of unconscionable advantage on the part of the attorney,[86] or where such an advantage is discernible in a stipulation for compensation in excess of the fair value of the services to be performed.[87]

The reasonableness of the contract price for the services is determinable from the viewpoint of the reasonableness when the contract was made, rather than the reasonableness for the services actually rendered.[88] In determining the question, the status of the parties, the nature of the controversy, and the work involved may be considered;[89] and it is also proper to consider the results of the attorney's services.[90] Prima facie the charge will be regarded as

69 Okl 47—Culver v Diamond, 167 P. 223, 64 Okl. 271.

Alternative promise

Where a guardian employing an attorney to recover property for minors, agreed in the alternative to pay the attorney one-quarter of the value of the property recovered, or to convey an undivided one-quarter interest in such property, the fact that the promise to convey was unenforceable does not invalidate promise to pay—Berryhill v. Spillers, 232 P. 376, 105 Okl 255.

79. Robert v. Goldman, (Mo App) 299 S W. 55.

Signing subscription contract

A property owner signing a subscription contract, which provided for retaining an attorney to prosecute an injunction suit after the attorney had been actually employed, thereby ratifies the contract of employment and accepts its terms—Robert v Goldman, (Mo App) 299 S W 55

80. Gotham Music Service v. Denton & Haskins Music Pub Co, 260 N Y S 312, 237 App Div. 78—6 C J p 721 note 70, p 735 note 37.

81. Zogbaum v Parker, 55 N.Y. 120—6 C J p 735 note 38.

82. Lewis v. Yale, 4 Fla. 413.

83. Cooley v. Buie, (Tex Com App) 291 S W. 876, reversing (Civ App) 284 S W. 702.

Duress

Where attorney for bankrupt handling bankruptcy proceeding agreed to have exempt property set aside, deed to portion thereof secured by threat to abandon contest over property held invalid on account of duress.—Cooley v. Buie, (Tex.Civ.App) 284 S W. 702, reversed (Com.App) 291 S W. 876

Inequitable conduct

"A contract for a fixed compensation may be avoided, as between the parties, only on allegation and proof of inequitable conduct in its procurement"—In re Woolfson's Will, 287 N Y S 12, 158 Misc 928

84. N J—Grimm v. Franklin, 140 A 236, 102 N J.Eq 198, affirmed (Err & App) Grim v. Franklin, 146 A 914

N Y—Friedman v. Mindlin, 155 N.Y S. 295, 91 Misc 473

Absence of undue influence

A contract employing an attorney was made after due deliberation between parties dealing at arm's length, where, after the attorney stated what he would charge for the contemplated services, it was suggested that the client talk with her family and friends and come back the next day, and she returned the next day and expressed a desire to employ the attorney, but stated she wanted to talk to two men and did see one of them, the other being out of town, before the contract was signed—White v. Burch, (Tex Civ. App) 33 S W.(2d) 512.

In action by client to annul note given in payment of an alleged balance due for attorney's fees, evidence was held sufficient to show that the client made a contract by which the attorney, for consideration of five thousand dollars agreed to defend him under an indictment for assault with intent to kill, through all possible exigencies of the case, with his eyes open and was not deceived by reason of his ignorance, or by any misunderstanding of the circumstances—Barber v. Jetmore, 227 P. 523, 111 Or 545.

85. Barnett v. Gross, 216 P. 153, 91 Okl. 162—6 C.J p 737 note 56

Duty of fair dealing

It is attorney's duty to deal fairly with his client in matter of fees.—Waugh v. Q. & C. Co., (C C.A.Ill.) 16 F (2d) 363

Concealment of facts

Contract for attorneys' fees for services in obtaining higher mail rates for short line railroads is void and unenforceable, because of fraud and concealment of facts notwithstanding the attorneys obtained increase in rates, where the salaried officers of association of short line railroads violated their trust by entering an arrangement among themselves by which some of the officers would be employed as attorneys by member roads and receive large fees, to be divided among the officers, and where such facts were concealed from member roads and contract for attorneys' fees was entered into pursuant to an arrangement of the officers—East Tennessee & Western North Carolina Ry Co. v. Robinson, (Tenn App) 36 S W.(2d) 433.

86. Planters' Bank v. Hornberger, 4 Coldw (Tenn) 531.

87. Bruce's Ex'x v. Bibb's Ex'x, 105 S E 570, 129 Va. 45—6 C.J. p 737 note 58

88. Wright v. Wright, 237 N.W. 896, 58 S D 612

89. Blattman v. Gadd, 296 P. 681, 112 Cal App 76

90. Grimm v. Franklin, 140 A. 236, 102 N.J Eq. 198, affirmed (Err & App) Grim v. Franklin, 146 A 914.

reasonable;[91] it may be said to be extortionate only when it is an oppressive or illegal exaction, and a charge made in good faith, in compliance with the terms of a contract which is not illegal, cannot be said to be extortionate.[92]

If the contract is void because unconscionable, it cannot be made effective by ratification.[93]

Who may object. Ordinarily, any agreement for services, made by the client, cannot be objected to on the part of his creditors.[94]

(3) Illegality

Contracts of an attorney to render services in violation of a statute or of public policy or good morals are not enforceable

An attorney cannot recover any compensation under a contract to render services, where the contract is in violation of public policy or good morals.[95] In this rule are embraced all contracts expressly prohibited by statute;[96] contracts for legal services by persons not licensed to practice law;[97] contracts tending to interfere with the proper and unbiased discharge of duty on the part of an attorney,[98] such as contracts which tend to place the attorney in a false light before the court by placing him in a position inconsistent with the performance of his full duty to his client;[99] contracts for lobbying services;[1] contracts to defend a party in case he is indicted for a crime, where the attorney instigated the commission of the crime;[2] contracts to influence unduly the action of public officers in the discharge of public duty;[3] contracts to collect illegal claims for a percentage of the amount recovered,[4] promises on the part of the client to pay for advising him how to make fraudulent conveyances;[5] and, as shown infra § 186, provisions that neither the attorney nor client can settle the contemplated suit without consent of the other party.

A contract leaving the amount of the fee to be fixed by a third person or a judge is not contrary to public policy or good morals, however,[6] and neither is a contract to render services to an alien not subject to compulsory military service, to secure exemption therefrom under the war-time Selective Service Act,[7] and, although there is authority to the con-

91. Petitions of Warrington, (Del Super.) 179 A 505

92. Grievance Committee v Ennis, 80 A 767, 84 Conn 594—6 C J. p 737 note 59.

Charges held not unreasonable or unconscionable.—Board of Improvement of Paving Improvement Dist No 28 v. Matheney, 76 S.W (2d) 81, 189 Ark. 957—Barber v Jetmore, 227 P 528, 111 Or 545—Hansel v Norblad, 151 P. 962, 78 Or 38—6 C J p 737 note 60 [a].

93. Blattman v. Gadd, 296 P 631, 112 Cal App 76.

Concealment of facts

Contract for attorneys' fees for services in obtaining higher mail rates for short line railroads was not ratified by the failure of railroads belonging to the association of short line railroads to object to the employment of attorneys promptly after receiving resolution of committee of association whereby attorneys were employed or until the attorneys had completed their work, where the attorneys, who were salaried officers of the association, purposely concealed material facts from member railroads, in violation of duty to exercise utmost good faith in imparting material facts to members.—East Tennessee & Western North Carolina Ry Co v Robinson, (Tenn App) 86 S W (3d) 433

94. U S.—Jenkins v Einstein, (C C Ill) 13 F Cas No 7,265, 3 Biss 128
Mo.—Reed v Mellor, 5 Mo App 567
Pa.—Mumma's Appeal, 18 A. 6, 127 Pa 474
6 C.J. p 737 note 61.

95. Cal.—Theisen v Keough, 1 P (2d) 1015, 115 Cal App 353
Mont.—Spaulding v Maillet, 188 P 377, 57 Mont 313
Utah.—Gillette v Newhouse Realty Co, 282 P. 776, 75 Utah 13
6 C J. p 737 note 63

Vitiation of whole contract

Although an attorney may in representing his client render services perfectly legal and proper, yet if such services are intermingled with others that tend to suppress legal investigations of crime, or to defeat the finding of an indictment by a grand jury, the contract for services as a whole is vitiated.—Bradley v Gilliam, (Tex Civ App) 260 S W. 289

96. Ludwig v Raydure, 157 N E 816, 25 Ohio App 293, certiorari denied 48 S Ct 84, 275 U S. 545, 72 L Ed 413.

97. Woodward v Prairie Oil & Gas Co, 243 P. 940, 116 Okl 166

But it has been held that a contract between an attorney and client for services, signed by the attorney in connection with a law student not licensed to practice, was not void.—St Louis Southwestern Ry. Co v. Terral, 11 S W (2d) 763, 178 Ark 475
Acting without license generally see supra § 165.

98. Steger v. Hume, 79 S.W 19, 97 Tex. 324, certified from 79 S W 19, 33 Tex Civ App 401

99. Gillette v. Newhouse Realty Co, 282 P 776, 75 Utah 13.

Inducing attorney to aid adversary

Where a hotel company was sued with the elevator manufacturer for injuries resulting from the fall of an elevator in the hotel, an employment contract, whereby the hotel company agreed to pay its attorney ten per cent of all moneys paid on judgments or compromises by the elevator company to hotel guests injured in the elevator accident, without regard to whether the hotel company recovered anything from the elevator company or vice versa, is void, as against public policy, especially in view of the possibility, expressed by the attorney, that hotel company might ultimately have to pay judgments against the elevator company.—Gillette v. Newhouse Realty Co, 282 P 776, 75 Utah 13

1. McBratney v Chandler, 22 Kan 693, 31 Am R 213—6 C J p 737 note 64

2. Treat v. Jones, 23 Conn 334—6 C J. p 738 note 65

3. Colo.—Mulligan v. Smith, 76 P 1033, 33 Colo 404.
Tenn.—Newman v. Davenport, 9 Baxt 538
6 C J p 738 note 66.

4. Delahunty v Canfield, 103 N Y S 939, 118 App Div. 883—6 C J p 738 note 67

5. Dunn v Bradley, 7 Ky Op 282—Dunn v. Bradley, 6 Ky Op. 241

6. Fitzgerald v. Eisenhauer, 206 P. 685, 62 Mont. 582.

7. Spaulding v. Lambros, 193 P. 565, 58 Mont. 536.

trary,[8] an agreement between an attorney and a private person to pay the attorney for assisting the district attorney in matters pertaining to the prosecution of a criminal case is not illegal.[9] A contract for legal services in connection with a sale and exchange of property to a school board is valid, although part of services performed by the attorney was in endeavoring to secure the exchange.[10]

Prosecuting claims against government. An attorney may lawfully contract to render services in prosecuting for a client a claim against the government before a commission authorized by statute to pass on such claims, or pending in one of the executive departments of the government, for claimants in such cases have as much right to the benefit of legal counsel as in cases pending before ordinary courts.[11] Where the attorney is disqualified by statute, however, to prosecute the claim, he may not recover for services rendered under such a contract.[12]

b. Contracts Made after Relation Established

Contracts made during the existence of the relation, although closely scrutinized, will be enforced in the absence of fraud or overreaching Contracts for additional compensation are ordinarily enforceable only if made without fraud and supported by a valuable consideration An attorney employed for a fixed salary may contract for a special fee in a special case. An attorney employed in one matter may make a contract for services in other matters. Contracts made after the relationship has terminated are enforceable like other contracts.

An attorney is not prohibited from contracting with his client respecting his fees,[13] and a contract thus made after the commencement of the relation of attorney and client is not per se void,[14] but it will, by reason of the confidential nature of the relation, be closely scrutinized by the courts.[15] Such contracts are often declared to be voidable when they would be deemed unobjectionable between parties not sustaining the relation of attorney and client,[16] but the question whether a particular contract is void depends in each instance on the facts of the case.[17]

No undue advantage can be taken of the relationship of attorney and client in order to procure

8. Rock v. Ekern, 156 N W 197, 162 Wis 291, L R A 1916D 459.

Acquiescence of all parties

A contract with the complaining witness in a prosecution whereby an attorney agreed to assist the district attorney therein was void as against public policy, and the attorney could not recover for services rendered thereunder on preliminary examination of the accused, although the court, district attorney, and accused acquiesced —Rock v. Ekern, 156 N. W. 197, 162 Wis. 291, L R A 1916D 459

9. Willett v. Schiff, 203 N Y S. 900, 208 App Div 616.

Subsequent official appointment

A contract employing an attorney to assist in a prosecution was not void because the attorney was thereafter appointed deputy prosecutor in the case involved —Ramey v Lafayette Loan & Trust Co, 172 N E 128, 92 Ind App 344

10. Rumbaugh v. Morriss, (Tex Civ App) 264 S W. 198

11. Taylor v. Bemiss, (D C) 110 U. S 42, 3 S Ct. 441, 28 L Ed 64— Stanton v. Embry, (D C) 93 U S 548, 23 L Ed 983—Wright v. Tebbitts, (D.C.) 91 U S. 252, 23 L Ed 320.

12. Ludwig v. Raydure, 157 N E 816, 25 Ohio App. 293, certiorari denied 48 S Ct. 84, 275 U S 545, 72 L Ed 418

Former employee of department

Under 5 U S C.A. §§ 99, 261 (U.S. Comp St. §§ 272, 385), authorizing the secretary of treasury to require attorneys representing claimants before the department to show their competency, and making it unlawful for an officer or employee of the department within two years after terminating employment to aid in the prosecution of a claim, plaintiffs, employed to formulate a plan acceptable to the internal revenue department by which to measure the depletion of oil wells, who were not enrolled as attorneys in the treasury department at the time of entering into the contract, and who were within two years prior to the employment in the employ of the internal revenue department as agents, inspectors, or clerks, are not entitled to recover for services rendered — Ludwig v Raydure, 157 N E 816, 25 Ohio App 293, certiorari denied 48 S Ct 84, 275 U S 545, 72 L Ed 418.

13. Ky —Chreste v. Louisville Ry Co, 190 S W 49, 167 Ky. 75, L R A. 1917B 1123

Or —Kirchoff v Bernstein, 181 P. 746, 92 Or 378.

14. U S —Ridge v. Healy, (Mo) 251 F 798, 164 C C A 32

Cal —Preston v. Hermínghaus, 292 P 953, 211 Cal. 1—Thornley v Jones, 274 P. 93, 96 Cal App 219

Okl —Spaulding v. Beidleman, 160 P 1120, 60 Okl 183.

S D —McFarland v. Hiltsley, 166 N W. 141, 39 S D 618

Tex —Cooley v. Buie, (Com App) 291 S W 876, reversing (Civ App) 284 S.W 702.

6 C.J. p 735 note 39.

Consideration

Contract of woman seeking divorce from her husband, to pay attorney's fees in return for services, made after the wife had called in the attorney and he had tried to settle the differences between husband and wife, was supported by a consideration —Boyles v. Leonardo, 224 P. 115, 65 Cal App 315.

15. U S —Ridge v. Healy, (Mo) 251 F. 798, 164 C C A. 32.

Fla —F. L. Stitt & Co. v. Powell, 114 So 375, 94 Fla. 550.

Ky.—Chreste v. Louisville Ry. Co, 190 S.W. 49, 167 Ky. 75, L R A 1917B 1123.

Nev —Moore v. Rochester Weaver Mining Co., 174 P. 1017, 42 Nev. 164, 19 A L R 830.

N Y —Petition of Raymond, 212 N Y S 577, 214 App Div. 622, motion granted In re Raymond, 153 N.E 415, 242 N.Y. 534

Okl —Spaulding v. Beidleman, 160 P 1120, 60 Okl 183.

Or —Kirchoff v. Bernstein, 181 P 746, 92 Or. 378.

Tex —Laybourn v Dray & Shifflet, (Civ App) 214 S.W 630, error refused.

W Va —Vance v. Ellison, 85 S E 776, 76 W Va. 592.

16. Chreste v. Louisville Ry Co, 190 S W 49, 167 Ky. 75, L R.A 1917B 1123

17. McFarland v Hiltsley, 166 N.W. 141, 39 S D. 618

Right to retain part of fund

Written consent of client to retention by attorney of one thousand eight hundred dollars for services and expenses out of three thousand five hundred dollars received in compromise of claim in condemnation proceeding did not bind the client — Ryder v. Warren, (Mass) 3 N E (2d) 231.

such a contract;[18] but where the parties are free to contract, their agreement should not be set aside or the agreed compensation withheld unless fraud has been perpetrated, undue influence exerted, material facts affecting the subject matter misrepresented or suppressed, or advantage taken of a position of confidence and trust to obtain an unconscionable advantage over the party,[19] in which case a court of equity may grant relief from such oppression,[20] and the attorney will be confined to a reasonable charge for compensation without regard to the attempted fixation of the value of his services;[21] the same principles apply here as in other classes of contracts between attorney and client, although they are enforced with a less degree of strictness.[22]

Contracts for additional compensation. The rule holding a person in a fiduciary capacity to the strictest accountability applies to agreements for increased compensation after the confidential relationship is commenced;[23] and although it has been held that a contract of employment between attorney and client is not invalidated by the mere fact that the amount which the attorney was to receive was increased by agreement after partial performance by the attorney,[24] where no additional services by the attorney are contemplated, such an agreement is, in the absence of peculiar facts, ordinarily held without consideration and invalid,[25] especially where

18. Rodkinson v. Haecker, 162 N.E. 493, 248 N.Y. 480, affirming Marks v. Haecker, 227 N.Y.S. 849, 223 App.Div. 710.

19. Cal.—McNeal v. Foreman, 3 P.(2d) 583, 117 Cal.App. 155—In re Mallory's Estate, 278 P. 488, 99 Cal.App. 96—Boyles v. Leonardo, 224 P. 115, 65 Cal.App. 315—Countryman v. California Trona Co., 170 P. 1069, 35 Cal.App. 728.
Ill.—Comerford v. Loewenbein, 227 Ill.App. 321.
La.—McElrath v. Dupuy, 2 La.Ann. 520.
N.Y.—Rodkinson v. Haecker, 162 N.E. 493, 248 N.Y. 480, affirming Marks v. Haecker, 227 N.Y.S. 849, 223 App.Div. 710.
Okl.—Spaulding v. Beidleman, 160 P. 1120, 60 Okl. 183.
Or.—Kirchoff v. Bernstein, 131 P. 746, 92 Or. 378—Hansel v. Norblad, 151 P. 962, 78 Or. 38.
Tex.—Cooley v. Buie, (Com.App.) 291 S.W. 876, reversing (Civ.App.) 284 S.W. 702—Laybourn v. Bray & Shifflet, (Civ.App.) 214 S.W. 630, error refused.
Wash.—Albert v. Munter, 239 P. 210, 136 Wash. 164.
6 C.J. p. 736 note 40.

"The rule that, where the relation of attorney and client already exists, when a contract is made concerning attorney's fees, the attorney is precluded from recovering more than a reasonable sum without regard to the attempted fixation of the value of such services by the agreement, is applicable only in special cases, as where special relations of confidence exist or where the client had no other independent adviser, or where the attorney failed to make full disclosure or secured assurance of compensation greater than was previously agreed upon.—Countryman v. California Trona Co., 170 P. 1069, 35 Cal.App. 728, In re Estate of Mallory, 278 P. 488, 99 Cal.App. 96."—McNeal v. Foreman, 3 P.(2d) 583, 584, 117 Cal.App. 155.

Merger of contracts

A valid contract to issue fully paid-up stock as compensation for legal services cannot be avoided by a prior agreement, since anything taking place prior would be merged into or changed by the subsequent contract.—Dissette v. W. J. Cutler Co., 163 N.E. 53, 29 Ohio App. 88.

Failure to read contract

A valid contract to issue fully paid-up stock as compensation for legal services cannot be avoided by a plea that, although the president of the company signed the contract, he was unaware of its contents, because an able business man cannot evade his responsibility by saying that he did not read a contract which he signed.—Dissette v. W. J. Cutler Co., 163 N.E. 53, 29 Ohio App. 88.

Coercion by one attorney unknown to another attorney of the client was held not to affect the latter attorney's rights under the contract.—Lombard v. Lufkin, 179 N.E. 632, 278 Mass. 263.

20. Woodcock v. Barrick, 91 S.E. 396, 79 W.Va. 449—6 C.J. p. 736 note 41.

21. N.C.—Stern & Swift v. Hyman Bros., 109 S.E. 79, 182 N.C. 422, 19 A.L.R. 844.
Okl.—Haunstein v. McCalister, 46 P.(2d) 552.
6 C.J. p. 736 note 41.

22. Cooley v. Buie, (Tex.Com.App.) 291 S.W. 876, reversing (Civ.App.) 284 S.W. 702—6 C.J. p. 736 note 42.

23. Ark.—Norfleet v. Stewart, 20 S.W.(2d) 868, 180 Ark. 161.
Fla.—F. L. Stitt & Co. v. Powell, 114 So. 375, 94 Fla. 550.
Idaho.—In re Burns, 40 P.(2d) 105, 55 Idaho 190.
6 C.J. p. 737 note 49.

Failure to advise of rights

Where an attorney was retained and paid a fee to appear at a preliminary trial in a criminal case, and, while the relation of attorney and client existed after preliminary trial, a contract was entered into for further compensation for services to be rendered in the case, such contract was absolutely void, where the attorney did not advise the client of his rights in relation to contracting with one already his attorney.—Ritz v. Carpenter, 178 N.W. 877, 43 S.D. 236, 19 A.L.R. 840.

24. Minn.—Anker v. Chicago Great Western Ry. Co., 174 N.W. 841, 144 Minn. 216.
Nev.—Moore v. Rochester Weaver Mining Co., 174 P. 1017, 42 Nev. 164, 19 A.L.R. 830.
N.D.—Moran v. Simpson, 178 N.W. 769, 42 N.D. 575.

25. Ark.—Norfleet v. Stewart, 20 S.W.(2d) 868, 180 Ark. 161.
Fla.—F. L. Stitt & Co. v. Powell, 114 So. 375, 94 Fla. 550.
Neb.—Thurston v. Travelers' Ins. Co., 258 N.W. 66, 128 Neb. 141.
N.Y.—Petition of Raymond, 212 N.Y.S. 577, 214 App.Div. 622, motion granted In re Raymond, 152 N.E. 415, 242 N.Y. 534.
N.C.—Stern & Swift v. Hyman Bros., 109 S.E. 79, 182 N.C. 422, 19 A.L.R. 844.
Or.—Muir v. Morris, 154 P. 117, 80 Or. 378, rehearing denied 157 P. 785, 80 Or. 378.
Tex.—Coon v. Ewing, (Civ.App.) 275 S.W. 481.
6 C.J. p. 737 note 50.

Peculiar facts justifying agreement

Attorney misled and induced to accept stated fee by representation, recklessly made without knowledge of facts, or mistakenly made as opinion, by client's leading attorney, that there was no real controversy over the fact that a much greater part of the value claimed by plaintiffs in the action against client to try title to oil land and recover the value of oil extracted therefrom was in adjoining survey, is entitled to recover additional compensation for assisting in the defense, under a contract made on the eve of trial, if reasonable, just, and fair to the client, no undue advantage was taken of him, and he was fully advised by

an attempt is made to cover an expense account, including fictitious items.[26] To uphold such an agreement the best of reasons are required,[27] and in a proper case a court of equity will interfere to prevent the enforcement of the contract.[28]

A contract may be abrogated by mutual consent while the employment continues, and a new contract may be made whereby the rights, duties, and obligations of the parties are mutually changed, and the rights of the parties are controlled thereby if the new contract is supported by a valuable consideration[29] and there is no fraud perpetrated or undue influence exercised by the attorney;[30] but unless new duties are assumed by the counsel, and the client secures additional advantages and fully understands his rights under the original agreement as well as under the new contract, it is not binding upon him.[31] The rule requiring close scrutiny does not apply, however, where the attorney contracting for additional compensation is not dealing with the client but with another attorney of the client having no personal interest in the increased compensation.[32]

After a contract for extra services has been executed and the services rendered, the contract will stand according to its terms whether supported by a consideration or not.[33]

Effect of statutory provisions. In some states statutes have been passed especially authorizing contracts between a client and his attorney as to fees; and under these statutes the contract will be upheld when it appears to be fair and honest.[34] Such statutes are held to confer upon the parties the right to change the terms of an existing contract by mutual agreement or to abrogate the contract entirely and make a new one,[35] and if the modification be free from fraud or unfairness it is not void and the courts are bound to respect it.[36] In view of the fiduciary relation between the parties, however, a court of equity may inquire into the good faith of a written agreement between them for compensation, notwithstanding such a statute;[37] but the amount contracted for will not be reviewed by the court unless it is so excessive as to evince a purpose on the part of the attorney to obtain an

the leading attorney and fully understood his rights in making it, although the jury found that the leading attorney did not make such false representation as a fact—Coon v Ewing, (Tex Civ App) 275 S W 481

26. Maires' Case, 7 Pa Dist 297

27. Moore v. Rochester Weaver Mining Co, 174 P. 1017, 42 Nev 164, 19 A L R 830

28. Vance v. Ellison, 85 S.E. 776, 76 W.Va 592

29. S D—McFarland v. Hiltsley, 166 N W 141, 39 S D 618
Tex—Cooley v. Buie, (Com App) 291 S W 876, reversing (Civ App) 284 S W 702

Services not originally contemplated

(1) Reasonable, just, and fair agreement, understandingly made by client, with advice and consent of his leading attorney, to pay additional compensation for services of another attorney theretofore employed to assist in defense of the suit, involving difficulties and burdens much greater and more onerous than contemplated at time of original contract of employment, is supported by sufficient legal consideration—Coon v. Ewing, (Tex Civ.App) 275 S.W. 481

(2) Where agreement between attorneys and husband in divorce action contemplated only nominal services, subsequent agreement between husband's father and attorneys on discovering new facts requiring additional services, providing for additional compensation and father's becoming primarily liable, held supported by valid consideration—Lee v. Gump, (Cal.App) 58 P (2d) 941.

Changing basis of computation

Where attorneys agreed on a sum certain in a divorce action, and such other allowances as the court should allow, and prior to trial returned what had been paid and agreed to take a sum contingent on the amount obtained in a property settlement, such agreement was not an alteration of the old contract, but was entered into after a mutual abandonment of the old, and is supported by a valuable consideration because if a property settlement is entered into, there are no more allowances allowed by the court—McFarland v Hiltsley, 166 N W 141, 39 S D 618

30. Coon v Ewing, (Tex Civ App) 275 S W 481—Laybourn v Bray & Shifflet, (Tex Civ App) 214 S W 630, error refused.

Expressions of opinions by attorneys as to probability of judgment secured by them being reversed on appeal, even if mistaken, are not ordinarily such false representations as will entitle the client to avoid for fraud a contract for increased compensation based thereon—Laybourne v Bray & Shifflett, (Tex Civ App) 190 S W. 1159

31. Cooley v. Buie, (Tex Com App) 291 S W. 876, reversing (Civ.App.) 284 S W. 702—6 C J. p 737 note 52.

Assuming new duties

Where a written agreement between attorney and client provided for a fee contingent upon the outcome of the action, but contained no provision that he should prosecute an appeal, a further oral agreement to prosecute the appeal on the basis of quantum meruit, was valid—In re Wise, 158 N.Y S 793, 172 App Div. 491.

32. Boyle v. Waters, 173 N.W. 519, 206 Mich. 515

33. Gorrell v. Payson, 48 N E. 433, 170 Ill 213, reversing on other grounds 68 Ill App 641

34. De Yulio v. Brownell, 215 P. 576, 107 Or 651—6 C J. p 736 note 45

35. Mich—Eriksson v. Boyum, 184 N.W 961, 150 Minn. 192.
N.D—Moran v Simpson, 173 N.W. 769, 42 N D 575.

36. Eriksson v Boyum, 184 N.W. 961, 150 Minn. 192

Amount of compensation and determination

A contract between attorney and client entered into during the existence of the relation, changing a prior agreement for attorney's compensation at a stipulated amount to one for reasonable value of services rendered, is not void, in the absence of fraud; nor is a stipulation in the contract to submit the question of the value of the attorney's services to the court at the conclusion of the action which the attorney was retained to bring for the client—Eriksson v. Boyum, 184 N W. 961, 150 Minn 192.

37. Ransom v. Ransom, 133 N Y S. 173, 147 App Div 835, reversing 127 N.Y.S. 1027, 70 Misc. 30.

undue advantage of the client.[38]

Employment in other matters. Employment in one suit does not deprive an attorney, while it is pending, of the right to make a contract for compensation for services in another, or for any other professional business with the same client.[39] It is proper for an attorney to contract with a corporation for a special fee in a special case, although he is employed by the same corporation for a fixed salary.[40]

After the relationship has terminated, the parties deal at arm's length[41] and the client is liable on any agreement as to compensation which may then be made by the parties;[42] nor will equity interfere with any valid agreements made after the litigation is over and the relation is at an end.[43]

§ 182. —— Construction and Operation

a. Construction in general
b. Operation and effect
c. What law governs

a. Construction in General

General rules apply in construing contracts for compensation of an attorney.

The construction of special contracts between attorneys and their clients as to compensation is to be governed by the usual rules relating to the construction of agreements generally, regard always being had to the character of the relation between the parties,[44] and the context of the agreement and the surrounding facts and circumstances may be considered in determining the meaning of terms used

38. In re Fitzsimons, 66 N.E. 554, 174 N.Y. 15, 23—6 C.J. p. 736 note 48

39. Kidd v. Williams, 31 So. 458, 132 Ala. 140, 56 L.R.A. 879—Lecatt v. Sallee, 3 Port. (Ala.) 115, 29 Am. D. 249

Defending claim of illegitimate offspring

Attorney who after agreeing to act without pay for executors of the succession of his deceased brother-in-law informed executors that he could not represent them in defense of claim against estate by alleged legitimate offspring of deceased, without fee, held entitled to fee on quantum meruit basis for services rendered estate in defeating such claim—Succession of Marinoni, 169 So. 562, 185 La. 527.

Suit between same parties

Where suit which attorney had agreed to prosecute for his client who was plaintiff therein was abandoned by mutual agreement, the attorney was not required to defend the client in an action brought against him by the adverse party, and a contract to so do for a stipulated fee was based on a good consideration—Laybourn v. Bray & Shifflet, (Tex.Civ.App.) 214 S.W. 630, error refused

40. Bartlett v. Odd Fellows' Sav. Bank, 21 P. 743, 79 Cal. 218, 12 Am.S.R. 139

41. Bonelli v. Conrad, 37 P.(2d) 137, 1 Cal.App.(2d) 660

42. Dennis v. Cowan, 292 P. 659, 109 Cal.App. 248

After settlement of litigation

Agreement of attorneys with client for whom attorneys had been working under contract on contingent basis, made after settlement of litigation instituted by the attorneys, which brought forward and restated the original agreement of the parties and contained additional provisions was held sufficiently supported by consideration, under the facts.—Hynd v. Sandler, (Tex.Civ.App.) 95 S.W.(2d) 165, error dismissed

Discharge by client

Client discharging attorney was liable on an agreement entered into at such time to pay for services rendered in lieu of compensation under original employment—Dennis v. Cowan, 292 P. 659, 109 Cal.App. 248

Reinstatement of contract

Where one of the attorneys who entered upon a contract of employment for a specified fee withdrew from the agreement, it was competent for the parties to reinstate the contract, and, having done so, it again became obligatory upon all the parties—Roche v. Madar, 175 P. 314, 104 Wash. 21, affirmed 181 P. 857, 104 Wash. 21.

43. Ellis v. Poindexter, 137 S.E. 595, 193 N.C. 565—6 C.J. p. 736 note 43.

44. U.S.—Maynard v. Reynolds, (Mo.) 251 F. 784, 164 C.C.A. 18, certiorari denied 39 S.Ct. 19, 248 U.S. 578, 63 L.Ed. 429
Cal.—Tracy v. Ringole, 262 P. 73, 87 Cal.App. 549
Idaho—Federal Land Bank of Spokane v. Elliott, 281 P. 378, 48 Idaho 263
Ill.—Lyon v. Oliver, 227 Ill.App. 511, reversed on other grounds 147 N.E. 251, 316 Ill. 292
Or.—Dunlway v. Hadley, 178 P. 942, 91 Or. 343
6 C.J. p. 738 note 76

Particular provisions construed

(1) Agreement by a bank to pay plaintiff attorney's fees for foreclosure against a third party, if the bank collected the full amount on foreclosure—People's Sav. Bank v. Marrs, (Tex.Civ.App.) 206 S.W. 347.

(2) Agreement to pay attorney's expenses in recovering client's separate estate and dower and alimony—Hoskins v. Adkins, 41 S.W.(2d) 753, 184 Ark. 124

(3) Provision for payment of attorney on date action was "settled"—Setzer v. Moore, 260 P. 550, 202 Cal. 333, 55 A.L.R. 423.

(4) Provision that consultant counsel's name should appear of record and on the brief—McGovern v. Hitt, 62 App.D.C. 33, 64 F.(2d) 156, certiorari denied 54 S.Ct. 54, 290 U.S. 637, 78 L.Ed. 554.

(5) Contract of employment conveying land to attorneys for services "rendered and to be rendered" was held conveyance of present interest, not executory contract—Terry v. Baskin, (Tex.Civ.App.) 27 S.W.(2d) 857, reversed (Com.App.) 44 S.W.(2d) 929, 78 A.L.R. 1067, motion denied 46 S.W.(2d) 290, 78 A.L.R. 1067

(6) Recital in contract of employment conveying land to attorneys for services "rendered and to be rendered" was covenant, not condition, future breach being ground for only partial avoidance—Terry v. Baskin, supra.

(7) The words "perpetual right" in attorney's contract for compensation for securing permit from the department of the interior to flood certain acreage.—Crane v. Washington Water Power Co., 165 P. 892, 97 Wash. 7.

Term of employment

(1) Under letter to attorney stating he had been employed for year at annual salary specified, the attorney was employed by year—Poe v. Walker, 37 S.W.(2d) 866, 183 Ark. 659.

(2) A contract of "permanent" employment between oil company and attorneys, as long as the company operated in two states and the services of attorney were satisfactory, meant employment as long as

which have not acquired a well defined meaning.[45] A subsequent contract, which embraces the entire subject matter of a prior one being the last act of the parties, will be presumed to contain and express the true meaning.[46]

While, in construing contracts between attorneys and clients concerning compensation in which there is any ambiguity, it is the general rule to adopt such construction as is most favorable to the client[47] and to resolve doubts against the attorney,[48] this

the company should be in business in those states, if services were satisfactory.—Roxana Petroleum Co of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.

(3) The words "final completion," in a resolution appearing in the record book of a drainage district, "It was moved and seconded that S be retained as counsel for the drainage district until its final completion, including such litigation as may arise," referred to the district, and not to the drainage system, and the attorney was entitled to his compensation where he brought about the organization of the district and brought action to confirm the proceeding and obtained a decree to that effect.—San Luis Valley Drainage Dist No. 1 v. Stanley, 189 P. 855, 68 Colo. 393.

(4) Where a corporation employed an attorney to defend all actions against it for a specified retainer for each case and specified compensation for each day that he was actually engaged in trying cases, and for every appeal to the supreme court, the contract was to handle all litigation that might arise, and was not an individual contract as to each action, and since the original contract fixed no period of service, the corporation had the right to discharge the attorney at any time, and a resolution of the board of trustees of the corporation, which continued the employment of the attorney on all cases pending on or before a certain date, did not operate as a new contract, where the effect of the resolution was simply to continue the employment of the attorney under the terms fixed by the original contract.—Sachs v. Mutual Union Ins. Co., 218 P. 209, 126 Wash 313

Entire or divisible contract

(1) A contract of employment as attorney to render all legal advice to client, represent her in matters "now or hereafter" pending in state courts, and render all legal services reasonably required by her during four-year period for "retainer fee" of stated monthly sum and percentage of client's net earnings as actress, is an entire contract and not a divisible or apportionable one.—Lessing v. Gibbons, (Cal.App.) 45 P. (2d) 258.

(2) A contract whereby defendant agreed to pay plaintiff, as attorney at law, one thousand dollars for services rendered by him in the prosecution of an action, as authorized by a court order, on behalf of a minor who was defendant's brother, to determine a railway company's water rights on a certain ranch in which the minor and defendant each owned parcels of land, the contract reading, "I am interested with said minor in procuring a judgment determining the rights aforesaid," is an entire contract requiring full performance and a prosecution of the action to judgment by plaintiff.—Boardman v Christin, 224 P. 97, 65 Cal.App 413

Joint contract

Where a client originally employed one attorney, who with the client's consent employed another, but after decision to appeal from an unsatisfactory judgment, a new contract was made whereby the client agreed to pay the two attorneys five thousand dollars from the proceeds if judgment was obtained for the full amount sued for, and a pro rata fee if the judgment was cut down, the contract between the client and the two attorneys was a joint contract.—Lake v. Wilson, 35 S W (2d) 597, 183 Ark 180, Id., 38 S W (2d) 25, 183 Ark 180.

Severable contract

Under an agreement providing that each attorney employed was to receive a certain retainer and that on modification or reversal of a decree each was to be allowed reasonable compensation for his services, the rights of the attorneys employed were severable.—McGraw v Lake Tp., 253 N W 207, 266 Mich 38.

Right to fix amount

Where a letter from the attorney to the client with reference to a contract stipulates a basis upon which the contract is to be made and provides, "I shall be in conference in Washington next Tuesday and will straighten out the matter of fee to your entire satisfaction I am sure you will find me fair in the matter"—the quoted clause is not to be used alone but is to be construed with other parts of the correspondence, and the agreement arrived at from a consideration of the whole, and, so considered, the correspondence in this case does not authorize the client to whom the correspondence is addressed, alone to fix the amount of the fee.—Barry v. Gulfport Building & Loan Ass'n, 128 So 569, 158 Miss 163

Purported conveyance

Plaintiffs, attorneys, at Valdez, on January 12, 1911, agreed with defendants to act for them in pending litigation in consideration for 7½ per cent interest in certain mining claims Defendants agreed to deed to plaintiffs their interest as soon as the case was decided, "and in case the said parties of the first part are unable to or refuse to execute said deed as above, then and in that case this instrument shall be understood to be, and it is hereby agreed to be, a conveyance, and the said parties of the first part hereby give and grant unto the said parties of the second part, their heirs, executors, administrators, and assigns, the said undivided seven and one-half one-hundredths interest in and to the said above-described lode mining claims" Defendants failed and refused to perform, and on suit by plaintiffs, the agreement was held to be a contract for attorney's fees.—Donohoe v. Tjosevig, 6 Alaska 139.

45. Cal.—Setzer v. Moore, 260 P. 550, 202 Cal. 333, 55 A.L.R. 423
Mo.—Mecartney v. Guardian Trust Co., 202 S.W. 1131, 274 Mo. 224

46. Brown v. Curtis, 82 N.W. 945, 111 Iowa 542.

47. U.S.—Waugh v Q. & C. Co., (C.C.A.Ill.) 16 F.(2d) 363.
Cal.—Jackson v. Campbell, 8 P.(2d) 845, 215 Cal 103.—Miller v Wing, 50 P.(2d) 470, 9 Cal.App.(2d) 483.—Boardman v Christin, 224 P. 97, 65 Cal.App. 413.
Neb.—Falloon v Miles, 170 N.W. 191, 102 Neb. 343
N.Y.—Newcomb v. Whitehouse, 162 N.Y.S. 249
6 C.J. p. 739 note 77.

48. U.S.—Vans Agnew v Fort Myers Drainage Dist., (C.C.A.Fla.) 69 F.(2d) 244, certiorari denied 54 S.Ct. 776, 293 U.S. 643, 78 L.Ed. 1494
Cal.—Hollingsworth v. Lewis, 269 P. 709, 93 Cal.App. 526
N.Y.—In re Howell, 109 N.E. 572, 215 N.Y. 466, Ann.Cas.1917A 527, reversing 150 N.Y.S. 1090, 166 App.Div. 894.—Petition of Raymond, 212 N.Y.S. 577, 214 App.Div. 622 motion granted In re Raymond, 152 N.E. 415, 242 N.Y. 534.
6 C.J. p. 739 note 77 [a].

After establishment of relation

A contract for compensation of an attorney, made after the relation of attorney and client was established, will be construed most strongly against the attorney.—Ridge v. Healy, (Mo.) 251 F. 798, 164 C.C.A. 32.—Preston v. Herminghaus, 292 P. 963, 211 Cal. 1.

rule may not be invoked to perpetrate a palpable injustice[49] or to frustrate the obvious intent of the parties,[50] nor does it call for a construction of such contract beyond the express covenants of the parties.[51]

A contract providing that the compensation shall not exceed certain limits leaves the amount to be determined on a quantum meruit within such limits;[52] but a mere estimate of the lawyer as to what the amount his fee in a protracted litigation would be does not limit him to the amount named.[53]

Construction by parties. Where the parties to such a contract have placed a particular interpretation upon it, this will generally be adopted.[54]

b. Operation and Effect

(1) In general
(2) As to extra compensation

(1) In General

Both attorney and client are bound by a valid existing agreement fixing the amount of the attorney's compensation. Where the contract leaves the compensation to be fixed by the client or a third person, in the absence of bad faith no more than the amount fixed is recoverable.

An attorney is bound by his contracts exactly as any other person,[55] and, so long as he observes good faith, he will likewise be protected in his contractual rights.[56] Accordingly, where there is a valid agreement fixing the compensation, that alone fixes the rights of the parties and the rate of compensation which the attorney is entitled to receive for services rendered regardless of the value of such services,[57] the court is not concerned with the reasonableness of the fees,[58] the attorney in such case is entitled to recover the amount agreed on.[59] If the creditor and attorney agree in advance upon the attorney's fee, such, if not excessive, is the measure of fee chargeable against the debtor, notwithstanding the contract out of which the debt arose stipulated a specific amount as a reasonable attorney's fee, since such contract is one of indemnity merely, to protect the creditor against attorney's fees to amount stipulated.[60]

On the other hand, the attorney is limited to the amount stated in his contract,[61] even though he

49. Pinto v Seely, 135 P 43, 22 Cal App. 318—6 C J p 739 note 78

50. Preston v. Herminghaus, 292 P 953, 211 Cal. 1.

51. Pinto v. Seely, 135 P. 43, 22 Cal App. 318.

52. Russell v. Young, (Ohio) 94 F. 45, 36 C.C.A. 71—6 C.J. p 739 note 81.

53. Mecartney v Guardian Trust Co, 202 S.W. 1131, 274 Mo 224.

54. Colo.—Chase v. Collins, 225 P. 355, 75 Colo 156.
La.—Liverman v. Hungerbeeler, 100 So 425, 156 La. 279.
Minn.—O'Brien v Liberty Mining Co., 204 N.W. 625, 164 Minn 186.
Ohio—Trustees of Southern Ry. v. Porter, 12 Ohio N.P.(N.S.) 353.
Okl.—Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl 108.
6 C.J. p 739 note 80.

Receipts

Written receipts given by the attorney for client's payments, although not new contracts, are properly considered in determining the terms of a supplemental oral agreement as to time for payment.—Williams v Bevis, 278 P 193, 152 Wash. 469, followed in 279 P. 1119, 152 Wash. 701.

55. Alaska.—Grigsby v. Dickinson, 7 Alaska 457
Cal.—Preston v. Herminghaus, 292 P. 953, 211 Cal. 1.
Neb.—Thurston v. Travelers' Ins. Co., 258 N.W. 66, 128 Neb. 141.
Or.—Dunlway v. Hadley, 178 P. 942, 91 Or. 343.
Wash.—In re Sachs, 218 P. 209, 126 Wash. 343
6 C.J. p 738 note 72.

56. Friedman v. Mindlin, 155 N.Y.S. 295, 91 Misc 473.

57. N.Y.—In re Carney, 158 N.Y.S. 585, 93 Misc 600.
Tex.—Saunders v. Gunn, (Civ App.) 1 S.W.(2d) 362.

Conclusiveness of agreement

Where one employs an attorney and makes an express valid contract, stipulating for the compensation which the attorney is to receive for his services, such contract is generally speaking conclusive as to the amount of such compensation.—Dolph v. Speckart, 186 P. 32, 94 Or. 550—White v Burch, (Tex.Civ.App.) 33 S.W.(2d) 512.

58. Iowa.—Ayers v. Brown, 196 N.W. 1002, 197 Iowa 1151
Ky.—Sharp v. Culton, 89 S.W.(2d) 869, 262 Ky 84
Mich.—Burnett v. King, 248 N.W. 540, 263 Mich. 33
S.D.—Wright v. Wright, 237 N.W. 896, 58 S.D. 612.

Agreement to offset claims

Where client agreed that claim for amount deposited with attorney would be offset by claim for attorney's fee, the client could not raise question whether the fee charged was exorbitant.—Thomas v. Armstrong, (La.App.) 146 So. 795.

59. N.J.—Creditors' Holding Co. v Perkins, 130 A. 279, 98 N.J.Eq. 11.
N.Y.—Friedman v. Mindlin, 155 N.Y.S. 295, 91 Misc. 473.

60. Hamilton v. Burgess, (Ala.) 170 So 348, reversing (App.) 170 So 346.

61. Ark.—Terral v. Poe, 79 S.W.(2d) 69, 190 Ark 346—Townsend v Water and Sewer Improvement Dist No 1 of Gurdon, 25 S.W.(2d) 755, 181 Ark 324.
Fla.—Baruch v. Giblin, 164 So 831
Idaho.—In re Burns, 40 P.(2d) 105, 55 Idaho 190
Ky.—Boyd County v. Cisco, 35 S.W.(2d) 849, 237 Ky. 534
La.—Bullis v Town of Jackson, (App.) 162 So. 82, setting aside 157 So 780
Neb.—Thurston v. Travelers' Ins. Co., 258 N.W. 66, 128 Neb 141.
Ohio.—Trustees of Southern Ry. v. Porter, 12 Ohio N.P.(N.S.) 353.
S.D.—Wright v. Wright, 237 N.W. 896, 58 S.D. 612.
Tex.—Smith v. Thompson, (Civ.App.) 233 S.W. 876, reversed on other grounds Thompson v. Smith, (Com. App.) 248 S.W. 1070.
6 C.J. p 747 note 94.

Quantum meruit not recoverable

An attorney at law, who makes a contract with his client for a stipulated amount as his fee for attending to a litigation, cannot afterwards recover on a quantum meruit, but can only claim such sum as he is entitled to under the contract with the client.—Walker v. Bietry, 24 La.Ann. 349—Melin v Fritz, 243 N.W. 400, 186 Minn. 379.

agrees to act for an inadequate amount,[62] or for no fee at all,[63] unless such agreement is made under a mistake of fact,[64] or unless payment in accordance with the agreement is rendered impossible by an act of the client and a third person.[65]

Compensation to be fixed by client or third person. The parties are bound by a contract which leaves the right to fix the compensation to the client[66] or to a third person,[67] and while such provisions are held not to confer plenary power, but only the power to fix a reasonable fee in good faith,[68] in the absence of bad faith no more than the amount so fixed can be recovered.[69] Where the contract leaves the fee to the determination of the client, he must put a reasonable value on the services and must exercise his right at the completion of the services or at least when called upon to do so and on his failure to fix the amount, the attorney may recover the reasonable value of the services.[70] A statement while making payment that it was subject to settlement of any differences in regard to the fees is not a surrender of the right to make the final decision in the matters.[71]

Superseded contract. A contract superseded by a subsequent contract covering the same subject matter is no longer binding on the parties.[72]

Voidable agreements. The parties are not bound by the amount stipulated as attorney's fees in a voidable contract.[73]

Allowance paid by adverse party. An attorney's contract of employment, limiting him to a certain sum to be paid proportionately by his clients, does not prohibit him from receiving in addition, in conformity with an understanding between attorney and clients, the allowance made in litigation which is paid by the adverse party.[74]

(2) As to Extra Compensation

The right to extra compensation may be controlled by the agreement. No extra compensation is ordinarily recoverable for services incidental to the proper conduct of the specific legal matters intrusted to the attorney. While an attorney may be entitled to extra compensation for services not contemplated as probable or necessary at the time of making the agreement, in doubtful cases such services are usually held within the contract

Whether an attorney may charge any extra compensation for his services is dependent upon the fact as to whether or not the agreement measured the whole amount, for the whole service, that he was entitled to receive.[75]

Incidental services. An agreement by which an at-

62. Idaho—In re Burns, 40 P (2d) 105, 55 Idaho 190
Neb—Thurston v Travelers' Ins. Co, 258 N W 66, 128 Neb 141
6 C J p 738 note 73

63. Nance v Pace, (N C) 179 S E 890—6 C J. p 738 note 74.

64. Pickett v Gore, (Tenn Ch App) 58 S W. 402—6 C J p 738 note 75

65. Union Central Life Ins Co v. Wilson, 161 S E 237, 157 Va. 454

Payment out of proceeds of sale

Where the attorney and client contemplate that the attorney's fees shall be paid out of the proceeds of a sale, but the client and a third person render that impossible by abandoning the sale, the client is liable for the reasonable value of the services rendered by the attorney—Union Central Life Ins Co. v. Wilson, 161 S E 237, 157 Va 454

66. Pattison v Chicago & Northwestern Ry Co, 254 Ill.App. 398—6 C J p 739 note 82

67. Fitzgerald v Ehsenhauer, 206 P. 685, 62 Mont. 582

Comptroller of the currency

An agreement that the decision of the comptroller of the currency would be final regarding fees of attorney employed by national bank receiver is binding upon the attorney in the absence of fraud or bad faith. —Crichlow v Doepke, (C C.A Fla.) 56 F.(2d) 599

Court

Where attorney agreed to render services to client for compensation to be fixed by the court in a case in which services were rendered, the attorney was bound by amount fixed by court in that case, even though the amount so fixed was inadequate. —Thurston v Travelers' Ins Co, 258 N W 66, 128 Neb 141.

68. Foster v. Young, 156 P. 476, 172 Cal 317.

69. U S—Crichlow v Doepke, (C.C. A Fla) 56 F (2d) 599
Ill—Pattison v Chicago & Northwestern Ry Co, 254 Ill App 398.
Neb.—Thurston v Travelers' Ins. Co, 258 N W. 66, 128 Neb. 141.
Ohio—Trustees of Southern Ry v. Porter, 12 Ohio N P (N S) 353.
6 C J p 739 note 82.

70. Nave v. Taugher, 193 P. 508, 49 Cal App 308

71. Crichlow v. Doepke, (C C A.Fla) 56 F (2d) 599.

72. Woodward v. Prairie Oil & Gas Co, 243 P 940, 116 Okl. 166.

Settlement agreement

Where a settlement agreement provided that in the absence of a written contract therefor, the attorney should render no further services, except in specified matters then pending, the attorney could not recover for services in matter then pending, but not specified in the contract, on the ground of inadvertent omission, where the parties thereafter attempted to agree on the contract for such matter, but were unable to do so—John Griffiths & Son Co. v. U. S, (C. C A Ill) 72 F (2d) 466

73. Bruce's Ex'x v. Bibb's Ex'x, 105 S E 570, 129 Va 45

Bond for fees, excessive

Where in an action by a client's executrix against an attorney's executrix to set aside a bond which must be held voidable because in excess of the reasonable value of attorney's services shown, equity and good conscience require that the attorney's estate should have a substantial recovery for retainer and services, the court may make such allowance—Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va. 45.

74. Matter of Shanley, 107 N Y S. 913, 57 Misc. 8, modified on other grounds 109 N Y.S 434, 124 App. Div 935

75. Matter of Martin, 77 N Y S 193, 73 App Div. 505.

Agreement to draw all documents

Work of preparing assessment roll and other documents, for drainage district and necessary advice, comes within the attorney's agreement to draw all documents for stipulated salary, precluding recovery of additional compensation, and although the contract provided for extra compensation to be paid for court work, the attorney is not entitled to such extra compensation for drawing amended or supplemental rolls to

torney undertakes, for a specific compensation, to conduct the prosecution or defense of a case or other matter intrusted to him contemplates that the amount fixed is to cover compensation for all services which are ordinarily or necessarily incidental to the proper conduct of such case, and the attorney cannot recover extra compensation for the performance of any such services[76] Within this rule, a new trial on the ground of newly discovered evidence is a statutory remedy, which the attorney may reasonably contemplate in contracting, for a specific fee, to protect the interests of his client in a pending litigation.[77]

Unexpected services. Where an attorney agrees to do a certain piece of work for a stated fee, he is bound by that fee, notwithstanding the amount of work may be greater than was anticipated.[78]

Services not within original agreement. Where an attorney renders services clearly not contemplated as probable or necessary at the time of making the agreement, but made necessary by subsequent unexpected and unusual developments in the progress of the cause, he is entitled to extra compensation on the ground that the original agreement did not cover the services performed[79] Consistently with the general rules of construction, however, the courts are unwilling to find that services were not included in the contract,[80] and in doubtful cases will usually decide the point against the attorney,[81] particularly where the client did not request the services or understand that they were outside the contract.[82]

On the question of whether the particular services, for which extra compensation is asked, were or were not contemplated by the original agreement, it is held that ordinarily the prosecution of an action includes the commencement thereof as well as the pursuit of the remedy thereafter,[83] although it may refer to proceedings after the suit has been begun[84] So an agreement to defend a suit has been held to include

comply with rulings of court—Neal v Drainage Dist No 2 of Ada County, 248 P. 22, 42 Idaho 624.

76. Trustees of Southern Ry. v. Porter, 12 Ohio N P.(N S) 353—6 C J. p 739 note 86.

"Necessary litigation"

Where an attorney employed by the executor of an estate in litigation pending to recover property which the deceased had transferred shortly before his death advised that recovery could be had in a creditor's suit, and it was begun and prosecuted to a successful determination, the attorney's agreement that a stipulated fee should cover "the necessary litigation" in the superior court of the county included litigation not then pending and as well a creditors' suit, which was necessary to recover the property—In re Prather's Estate, 191 P 521, 183 Cal. 314.

Retainer construed to require plaintiffs' attorneys to render services in taking depositions necessitated by defendant's counterclaim—Woodbury v Andrew Jergens Co, (C C A.N Y) 61 F (2d) 736, certiorari denied Berenson v. Woodbury, 53 S Ct. 659, 289 U S 740, 77 L Ed. 1487.

77. Falloon v. Miles, 170 N W. 191, 102 Neb 843.

78. U S—Woodbury v. Andrew Jergens Co, (C C A N Y) 61 F.(2d) 736, certiorari denied Berenson v Woodbury, 53 S Ct. 659, 289 U S 740, 77 L Ed 1487.

Ohio—Trustees of Southern Ry v. Porter, 12 Ohio N P (N S.) 353.

6 C J p 739 note 87.

Subsequent law requiring work

A supplemental assessment roll for a drainage district, provided for by legislation subsequent to attorney's contract to prepare legal documents for stipulated salary, comes within such agreement and he is not entitled to extra compensation for services in preparing such roll—Neal v Drainage Dist No 2 of Ada County, 248 P 22, 42 Idaho 624

79. Colo—Ownbey v Silverstein, 194 P. 607, 69 Colo 325

La—C T Patterson Co. v. Porte Barre Lumber Co., 66 So. 418, 136 La 60

Or—Dunway v. Hadley, 178 P. 942, 91 Or. 343

Tex—Cooley v. Buie, (Com App.) 291 S W. 876, reversing (Civ App) 284 S W. 702.

6 C J p 739 note 88

"The jealous regard that the law rightfully exercises in protecting the interest of the client in his dealings with his attorney should not be allowed to operate so far as to work a rank injustice to the attorney in matters where it is apparent there could have been no possible design on the attorney's part to overreach his client in entering into the contract."—Isham v. Parker, 29 P. 835, 839, 3 Wash 755.

Services not contemplated

(1) A contract employing attorneys to defend the interests of a county before a city council and its committee, in proceedings to annex territory to the city, did not cover services in procuring the passage, by the general assembly, of an act amending the annexation laws—Campbell County v. Howard, 112 S E 876, 133 Va. 19.

(2) The fact that plaintiffs, a broker and an attorney, were to receive specified payments out of the sale of certain property was not inconsistent with their claim for special services rendered as to the property at the express request of defendant, who was interested in the sale, where plaintiffs were not parties to the contract as to the disposition of the proceeds of the sale, nor interested in the profits, but were merely beneficiaries to the extent of receiving money acknowledged to be due them, together with a commission on the sale of the property, and a charge by them for extra compensation for services rendered in procuring from an electric light company the payment of four thousand dollars for the right to erect a pole line on property for the sale of which they were to receive a commission was proper if agreed on, the services not being in any manner connected with the sale—Cochran v. Stevenson, 113 A. 65, 270 Pa. 125.

80. Trustees of Southern Ry. v. Porter, 12 Ohio N P (N.S) 353—6 C J p 740 note 89

Salaried attorney

An attorney employed by a corporation at a salary will not be allowed extra compensation for extraordinary services coming within the line of his duty—Trustees of Southern Ry. v Porter, 12 Ohio N P (N S) 353—6 C J. p 740 note 89 [a] (1).

81. Trustees of Southern Ry v. Porter, supra—6 C.J p 740 note 90.

82. Gabrielson v. Gorin, 159 P. 387, 92 Wash 408

83. Clinton v Heagney, 55 N.E 894, 175 Mass. 134.

84. Iowa.—Cheshire v. Des Moines City R. Co., 133 N.W. 324, 153 Iowa 88.

N J—Buecker v. Carr, 47 A. 34, 60 N.J.Eq 300.

the filing of a counterclaim[85] or cross petition[86] and the preparation for trial.[87]

An agreement for a stipulated fee for the trial of a case contemplates the conduct of a hearing on a cross petition after dismissal of the petition in the case,[88] and an agreement to render services in any suit involving distribution of trust funds contemplates proceedings for final accounting as well as actions;[89] but there is no rule that a general employment for an agreed sum continues till the final disposition of the case in the court of last resort,[90] and an agreement to attend to cases during the balance of the year does not oblige the attorney to attend to business uncompleted at the end of that time.[91]

Services in another matter. Under a contract by which one undertakes to pay to an attorney a certain sum for professional services rendered in a particular matter, such attorney is not entitled to recover for services rendered by him to the same person in another and entirely different matter, the recovery in such case being upon the quantum meruit.[92] So a contract for services in a civil action does not include services rendered in criminal proceedings, although the former is dependent upon the result of the latter.[93]

c. What Law Governs

Contract provisions as to charges are governed by the law of the place where the contract was made or to be performed.

As to the charges for services, a contract between an attorney and client is governed not by the law of the place where enforcement thereof is sought but by the law of the place where it was made[94] or where it was to be performed.[95]

§ 183. —— Performance

a. In general
b Impossibility of performance

a. In General

An attorney who has fully performed his contract is entitled to the stipulated fee notwithstanding acts or omissions of the attorney, client, or third persons not affecting the character or quality of the attorney's performance. Unexcused nonperformance or breach of his contract by an attorney defeats his right to compensation. The contract itself and all the surrounding facts must be considered in determining whether there has been a breach.

Where the contract between an attorney and client is an entire one, full performance on the attorney's part is a condition precedent to his right to recover the stipulated compensation in an action on the contract,[96] and where the attorney has fully performed, he is entitled to recover the agreed compensation[97] notwithstanding voluntary acts of the client

85. Payne v. Davis County, 129 N.W. 823, 150 Iowa 597—Lindsay v Carpenter, 58 N.W. 900, 90 Iowa 529.

86. Bryant v. Mundorf, 179 N.W 125, 189 Iowa 882

87. Cordes v Bailey, 78 N.E. 678, 1060, 39 Ind.App. 83.

88. Bryant v. Mundorf, 179 N.W 125, 189 Iowa 882

89. In re Pollen's Estate, 211 N.Y.S 626, 125 Misc. 354.

90. Cal.—Pinto v. Seely, 135 P. 43, 22 Cal.App. 318
Ill.—Sanders v. Seelye, 21 N.E. 601, 128 Ill. 631.
Ind.—Bartholomew v. Langsdale, 35 Ind. 278.
6 C.J. p 740 note 95.

91. State Bank v. Martin, 4 Ala. 615.

92. Wells v. Haynes, 28 S.E. 968, 101 Ga. 841.

93. Gorrell v Payson, 48 N.E 433, 170 Ill. 213, reversing 68 Ill.App 641.

94. U.S.—Shattuck v Pennsylvania R. Co, (D.C.N.Y.) 48 F.(2d) 346—Spellman v Bankers' Trust Co, (C.C.A.N.Y.) 6 F.(2d) 799.
Mich.—Dawson v. Peterson, 68 N.W 246, 110 Mich. 431.
6 C.J. p 753 note 52 [c].

95. Sizer v. Midland Valley R. Co, 217 S.W. 6, 141 Ark. 369.

96. U.S.—Swift v. Jackson, (C.C.A. Okl.) 37 F.(2d) 237, certiorari denied 50 S.Ct. 351, 281 U.S. 745, 74 L.Ed 1158
Cal.—Platnauer v. Forni, 21 P.(2d) 638, 131 Cal.App. 393—Boardman v. Christin, 224 P. 97, 65 Cal.App 413
Va.—Union Cent. Life Ins. Co. v. Wilson, 161 S.E. 237, 157 Va. 454

Agreement to defeat claims

Where an attorney entered upon a contract by which for a given sum he was to save the estate harmless from certain claims, upon which judgments were subsequently rendered against the estate, and payments made, the agreed fee was not earned.—In re Lyons, 173 N.Y.S. 590, 186 App.Div. 161, affirmed 124 N.E. 899, 227 N.Y. 564.

Abandonment of case

(1) Where attorney, having agreed to fight case to final determination, abandons case by dismissing it on demurrer before rendition of judgment thereon, he is not entitled to recover compensation for services Where, however, the attorney dismissed suit before judgment on second demurrer was formally entered, after having alleged in petition all facts he had or was furnished with, and after having made effort to secure overruling of demurrer upon intimation by court that it was about to sustain demurrer, such dismissal was not an abandonment of the case within the contract.—King v. Mann, (Mo.App.) 207 S.W. 836.

(2) An attorney employed by a road improvement district, who was to receive as compensation two per cent. of all bonds issued, and who under such agreement had received one payment of five thousand dollars, was held not entitled to recover any additional amount where it appeared that disagreements had arisen, and he had offered to resign, retaining the five thousand dollars as payment for services to that time, notwithstanding that his resignation was not accepted until several months thereafter, during which time he rendered further but unimportant services, and the commissioners being as a matter of law without power to make any contract for a greater payment in view of the actual benefit received by the district.—Vaughan v. Woodruff-Prairie Road Imp. Dist. No. 6, 250 S.W. 870, 158 Ark. 236.

97. Ark.—Board of Improvement of Paving Improvement Dist. No. 23 v. Matheney, 76 S.W.(2d) 81, 189 Ark. 957.
Mo.—King v. Mann, (App.) 207 S.W. 836.
N.Y.—McAvoy v. Schramme, 264 N.Y.S. 181, 238 App.Div. 225, affirmed 189 N.E. 691, 263 N.Y. 548.

which may affect the practical value to the client of the services rendered.[98] Thus the right of the attorney in such case is not affected by the fact that the client settled a collectible judgment obtained by the attorney in his favor for less than the amount of the judgment,[99] or by the fact that the client through his own fault sustained a loss in the case[1] Moreover the fact that further steps which the attorney was neither authorized nor empowered to take were necessary before the client could fully realize on his claim does not defeat the attorney's right,[2] and neither does the fact that an attorney while on a mission for his client transacted other business of his own not in any way reacting to the injury of the client.[3] Where an attorney is employed to perform all matters necessary to defend against and defeat a certain claim "in the courts or otherwise," he is entitled to recover for any services by which the claim was finally defeated, as where, because of his services, the claim was outlawed by the statute of limitations.[4]

Nonperformance or breach. The attorney is not entitled to his stipulated fee where he fails to perform his contract,[5] and if the attorney commits a material breach of his contract, he may thereby forfeit all right to compensation[6] unless it appears that the client was willing that the attorney should fail to perform[7]

What constitutes performance or breach Whether the contract was fully performed within the rules stated in the preceding paragraphs must be determined by interpretation of the contract, particularly with respect to the intention of the parties as dis-

Right to assert failure of consideration

The client is precluded from setting up a failure of consideration for notes given attorneys in a settlement as to the fee, in a transaction in which attorneys took a judgment of dismissal in an action against the client for the fees, since the consideration for such notes was the dismissal of the former action —Stephenson v Gaines, (Tex Civ App) 291 S W. 602, reversed on other grounds (Com App) 298 S W 401

98. Osmundsen v. Hammond, 236 P 562, 135 Wash 17.

Incurring new obligations

Where one interested in a corporation which was in financial difficulties employed attorneys to do everything they could to save his good name and save the business, obligations voluntarily incurred by him to raise the money used in settling with creditors did not impair the contract rights of the attorneys —Jablonski v Rojcewicz, 141 N E. 77, 246 Mass 336

Reconciliation of parties to divorce

That husband and wife effected reconciliation does not of itself avoid a note given in, and all transactions leading to, a settlement of costs of divorce action and wife's attorney's fees —Osmundsen v Hammond, 236 P 562, 135 Wash 17.

99. Botts v. Arkansas County, 57 S W.(2d) 563, 186 Ark 981.

Percentage of "settlements" and "adjustments"

An attorney who has obtained a collectible judgment has performed his contract entitling him to a percentage of all "settlements" and "adjustments" made notwithstanding the client subsequently, and without the consent of the attorney, settled for less than the amount of the judgment obtained —Botts v. Arkansas County, 57 S W.(2d) 563, 186 Ark 981

1. Union Central Life Ins Co. v. Wilson, 161 S E 237, 157 Va 454

Causing litigation

Where a client inadvertently caused litigation despite attorney's advice and the attorney was employed to defend the client's interest, the client was liable for services —Union Central Life Ins. Co. v. Wilson, 161 S E 237, 157 Va 454.

Delaying sale

Where attorney expressed opinion that land would sell for enough to satisfy debt, but the client delayed sale until years later, the insufficiency of the proceeds was no defense to the attorney's claim for fees —Union Central Life Ins Co v. Wilson, 161 S.E 237, 157 Va 454.

2. McAvoy v. Schramme, 264 N.Y S 181, 238 App Div 225, affirmed 189 N.E 691, 263 N Y. 548

Further acts of third party

Executrix of attorney, retained by a minority stockholder to realize on the latter's holdings in a corporation owning land which the attorney induced the city to include in a park, was held entitled to recover agreed fee for full performance of contract, although further steps on the part of the corporation were necessary before the corporation received cash awarded in condemnation proceeding, the corporation disavowing any right of such attorney to act for it —McAvoy v. Schramme, 264 N Y S 181, 238 App Div. 225, affirmed 189 N E. 691, 263 N Y. 548

3. Wheeler, etc, Co. v. Dahms, 50 Ill App. 531.

4. Johnson County v. Patterson, 267 S W. 783, 167 Ark 287.

Procuring cancellation of warrants

Attorney, correctly advising county judge of jurisdiction to order cancellation of certain road warrants, and thereafter allowing matter of claims thereon to rest in order that the payee might not be stirred to take an appeal or bring suit before expiration of the statute of limitation, is entitled to his fee, after warrants were barred, under contract with county judge to perform all matters necessary to defeat claim — Johnson County v Patterson, 267 S. W 783, 167 Ark 287

5. Tunison v Guthrie, (W.Va.) 252 F 526, 164 C C A 442

Incomplete performance

A contract by which defendant agreed to pay plaintiff attorney twenty-five thousand dollars on his securing a permit from the department of the interior to flood certain acreage, and further to pay twenty-five thousand dollars if within three years he secured and caused to be vested in defendant the perpetual right to flood such acreage, did not entitle the attorney to payment of the second twenty-five thousand dollars upon his securing a permit under Act Congr Febr 15, 1901, c 372, 31 Stat. 790 (U S Comp St [1916] § 4946) authorizing the secretary of the interior to permit the use of public lands, but providing that any permission so given may be revoked in his discretion —Crane v. Washington Water Power Co, 165 P. 892, 97 Wash 7.

6. Beaumont v. J. H Hamlen & Son, 81 S W (2d) 24, 190 Ark 630.

Appearance for adversary

Where an attorney, under employment to perform all legal business of certain persons, appeared for defendants in a suit brought by such persons, he broke the contract, and could not recover on the contract for services, no claim being made on quantum meruit —U S. v. Apple, (C C A Kan) 292 F 935

7. McCall v. Atchley, (Mo App.) 194 S.W. 714.

closed by its terms in the light of surrounding facts and circumstances.[8] An agreement to handle certain litigation is not one to perform certain specific services but is to do generally all that is necessary to a successful handling of the litigation, and the fact that the attorney stated his intention to do specific things in furtherance of the litigation does not make a failure to do them a breach of the contract if they were not necessary to a successful handling of the litigation.[9] So where an attorney agreed to render such assistance as he considers necessary to the trial attorney, it is no breach that he was out of town during the trial of defendant's case.[10] The fact that part of the work contracted for was done by employees of another attorney is not sufficient to constitute a breach of the contract,[11] nor, where the attorney is employed to collect delinquent taxes, is his failure to collect the penalty therefor, it not appearing customary to collect penalties under the circumstances under which the taxes were collected.[12] Where the contract provides that the fee should attach on the filing of a suit, the fee is not earned if the case is settled by the parties without filing suit;[13] but a contract for fees payable when the matter was disposed of in the court is fully performed by the attorneys when the client peremptorily orders dismissal of the suit for his own purpose on the eve of its hearing.[14]

The fact that the client has been guilty of criminal conduct will not excuse performance by the attorney of his agreement to return part of the fee paid him in the event that he is unsuccessful in performing the services for which he was employed.[15]

b. Impossibility of Performance

Attorneys are entitled to compensation where complete performance of services is prevented by acts of their client or third persons.

When complete performance by an attorney of his contract of employment becomes impossible without fault on the part of either party, the attorney may recover in quantum meruit the value of the services actually rendered by him.[16] Where complete performance is rendered impossible by the act of the client, the attorney may recover the entire fee if he remains ready to render complete performance,[17] where attorneys had performed their agreement to prosecute a claim so far as they were permitted to do so by their client, the fact that on the death of the client before the collection of the claim, they failed to tender their services to his executor, who was unwilling for them to perform, does not defeat their right to compensation.[18] However an

8. Ill.—Chicago Junction Ry Co v. Leitch, 215 Ill App 67.
N Y.—McAvoy v Schramme, 264 N Y S 181, 238 App Div 225, affirmed 189 N E 691, 263 N Y. 548

Duties under contract

Where the offer of an appointment as attorney for a railroad stated the practice of the client to require bills to be made out at least quarterly, it was the duty of the attorney accepting the employment to report from time to time as to the work he was doing, and the compensation he was claiming.—Pattison v Chicago & Northwestern Ry Co, 254 Ill App 398

9. Allen v Brooke, 102 S E. 832, 25 Ga App 122

10. Strong v. Eckert, 167 N.Y.S 1069, 180 App Div 526.

11. Anderson v Rindge Co., 270 P. 262, 93 Cal App 725

12. Tennison v. Quinn, 282 S W 20, 170 Ark 1194

13. Mammoth Cave Nat Park Ass'n v. Whittle & Demunbrum, 70 S W (2d) 990, 254 Ky 63

14. Maynard v Reynolds, (Mo) 251 F 784, 164 C C A 18, certiorari denied 39 S Ct. 19, 248 U S. 578, 63 L Ed 429

15. People v. Loeff, 126 N E. 577, 292 Ill 55.

Forgery

Where attorney received three hundred dollars, and agreed to obtain apprentice certificate for client from state board of pharmacy, which was then in their possession, and to return two hundred dollars if he failed to do so, that client had fraudulently and by forgery obtained the certificate did not justify the attorney in refusing to perform agreement and to return the two hundred dollars on failure to procure certificate.—People v Loeff, 126 N E 577, 292 Ill 55

16. Boardman v. Christin, 224 P 97, 65 Cal App 413

An attorney employed at a fixed fee to perform certain services cannot be deprived of his compensation by his client preventing the performance of such services by settlement.—U S Savings Bank v Pittman, 86 So. 567, 80 Fla 423

Act of third party

Where plaintiff, attorney at law, who agreed to prosecute an action on behalf of a minor, in consideration of defendant's promise to pay a stipulated fee, was prevented from fully performing his contract, without fault of either himself or defendant, by reason of the minor's selection, upon attaining his majority, of another attorney, while plaintiff was not entitled to recover the stipulated sum, he was entitled to recover in quantum meruit the reasonable value of services actually performed under the contract.—Boardman v. Christin, 224 P 97, 65 Cal App 413.

Amount of compensation

An attorney employed to represent a road improvement district at a compensation of two per cent of all bonds issued, who on this basis has received a commission of five thousand dollars on one issue, was held not entitled to any compensation based on a second issue of two hundred thousand dollars, which was sold at a discount of twenty-four thousand dollars, where it appeared that only one-half of the proceeds had been received and placed in a local bank, which soon thereafter closed its doors, and the remaining half was unpaid and involved in litigation concerning the buyer's estate.—Vaughan v. Woodruff-Prairie Road Imp. Dist. No. 6, 250 S W. 870, 158 Ark 236

17. Allen v. Brooke, 102 S E 832, 25 Ga App. 122

Settlement before trial

Where an attorney at law agrees for a stipulated fee to handle litigation, and the complete performance of such service is rendered impossible by the client's settlement before trial, the attorney may recover the entire fee, where he remains ready to render complete performance.—Allen v. Brooke, 102 S E. 832, 25 Ga. App. 122.

18. McGowan v. Parish, 35 S Ct. 543.

attorney is not entitled to compensation on the theory that the client prevented him from performing where there was in fact no interference with his attempt to perform.[19]

§ 184. —— Contract with Partnership

Where the contract is with a firm of attorneys, services of any partner pro tanto fulfill the contract; but where the contract is with an individual, the client is not obligated to pay for services of a partner. Formation or dissolution of a firm of attorneys does not affect contracts as to compensation, although in the latter case a partner acting alone may sue alone. Where death causes a change in a firm of attorneys, the surviving partners are entitled at least to the reasonable value of services performed and, if they complete performance, to the stipulated fee.

Where a client contracts with a firm of attorneys, whatever is done by any one in behalf of all and under their joint engagement is, if properly done, a fulfillment to that extent of their contract;[20] and payment to one member of the firm is payment to the firm.[21] Where, however, the client contracts with one partner, it has been held that there is no implied agreement to pay for services rendered by another partner.[22]

Effect of changes in firm In the absence of a particular agreement on the part of a client, the formation of a partnership by his attorney does not alter the previous terms of employment.[23] Where a firm dissolves, as shown supra § 56, there is still a joint employment, and all of the attorneys constituting the firm are under the same obligation to a client as if the partnership continued; but where the remaining partner alone acts, he may sue alone[24] When one member of a firm dies and a client exercises his privilege of changing his attorneys, the client is liable for the reasonable value of the services already rendered,[25] and he is liable for the full amount if he allows the remaining members of the firm to complete the business.[26] In an action by a copartnership for professional services as patent attorneys, a contention that defendant did not employ plaintiffs, but employed another copartnership to which they succeeded, could not be sustained, when it appeared that defendant had actual notice of the change in the firm by the addition to it of two other attorneys, and continued to avail itself of the services of such firm.[27]

§ 185. —— Employment of Additional Counsel

Employment of additional counsel by the client does not affect the right of the original attorney to compensation, but a substituted attorney having notice of the contract of his predecessor may be bound by it.

When there is an express agreement between an attorney and his client that the pay for services shall be a certain fixed sum, the right of the attorney to the full amount agreed upon is not affected by the client's act in employing additional counsel to assist in the work,[28] and a mere suggestion by the attorney that aid be called in does not affect this rule.[29]

Where an attorney employed to take a case turns it over to his associate or successor, the latter is bound by the contract of his predecessor, and he may not claim fees in excess of those for which the first attorney agreed to conduct the case;[30] it is otherwise, however, where the second attorney is employed by the client and is not aware of any prior contract.[31]

§ 186. Contingent Fee Contracts

a. In general
b. Requisites and validity

a. In General

A contingent fee is one depending on the success of the services to be performed. A contingent fee contract is a bilateral, entire agreement, speculative in nature, providing for conditional compensation of an attorney.

237 U.S. 285, 59 L.Ed 955, reversing Parish v McGowan, 39 App D.C. 184.

19. Crane v. Washington Water Power Co., 165 P. 892, 97 Wash. 7

Employment of another attorney

Under a contract by which defendant agreed to pay plaintiff attorney a certain amount on his securing a permit from the department of the interior to flood certain acreage, and a further sum if he caused to be vested in defendant the perpetual right to flood such acreage, where the secretary of the interior granted a permit but later revoked it and defendant employed another attorney to secure a reversal of the revoking order, the plaintiff attorney was not entitled to compensation on the theory that defendant had prevented his performing, since proceedings as to the original permit could in no way interfere with his attempting to secure the perpetual right—Crane v Washington Water Power Co., 165 P 892, 97 Wash 7.

20. Phillips v Edsall, 20 N.E. 801, 127 Ill. 535—6 C.J. p 746 note 78.

21. Williams v. More, 63 Cal. 50

22. Evans v Mohr, 42 Ill.App 225, affirmed 39 N.E. 1083, 153 Ill. 561

23. Ostrander v. Capital Inv., etc., Assoc., 89 N.W. 964, 130 Mich 312—6 C.J. p 746 note 80

24. Webster v Loeb, 86 S.W. 463, 112 Mo.App. 139

25. Ky.—McGill v. McGill, 2 Metc. 258
Tex.—Landa v Shook, 30 S.W 536, 31 S.W. 57, 87 Tex 608

26. Smith v Hill, 13 Ark 173—6 C.J. p 747 note 84.

27. Rector v Duntley Mfg. Co., 189 Ill.App 562

28. Lipscomb v. Castleman, 145 S.W. 753, 147 Ky. 741—6 C.J. p 747 note 85

29. Townsend v. Rhea, 38 S.W. 865, 18 Ky.L. 901.

30. Ennis v. Hultz, 46 Iowa 76.

31. Iowa.—Gates v. McClenahan, 103 N.W 969
Neb.—Cowles v. Thompson, 48 N.W. 145, 31 Neb. 479.

Payment of contingent fees depends on express contract therefor.

A contingent fee is a fee stipulated to be paid to an attorney for his services in conducting a suit or other forensic proceeding only in case he wins it;[32] that is, a fee which is made to depend upon the success or failure in the effort to enforce a supposed right, whether doubtful or not.[33] It may be a percentage of the amount recovered.[34]

An agreement with an attorney for a contingent fee provides for conditional compensation of the attorney,[35] but is not to be regarded in the nature of or analogous to an unconditional promissory note, nor as an agreement payable unqualifiedly upon the happening of a certain contingency.[36] It is speculative in nature, and entire and not divisible.[37] Although signed by only one person, when accepted by the other it becomes a bilateral, not a unilateral contract, presupposing something to be done in the future by both sides.[38]

An attorney is not entitled to a percentage of the amount recovered by his client in the absence of an express contract to that effect;[39] and the payment of contingent fees cannot be provided for by the court, no matter how great and peculiar their merit may be.[40]

b. Requisites and Validity

(1) In general
(2) Contracts affecting right to settle
(3) Contract to convey land

(1) In General

Contingent fee agreements, although closely scrutinized by the courts are valid if fair to the client and reasonable.

While, as a general proposition, agreements between attorney and client for contingent fees are not looked upon with favor by the courts[41] and will be closely scrutinized,[42] in the absence of fraud or imposition, where they are fair and reasonable as to the client, such agreements are valid and binding upon the parties, and will be enforced at law according to their terms.[43] A contingent fee is per-

32. Black L. D quoted in Gray v Stern, 149 P. 26, 29, 85 Wash. 645, 651.

33. Adair v First Nat Bank, 137 S. E 192, 139 S C 1, 51 A L R 1269—6 C J p 740 note 1.

34. Black L. D quoted in Gray v. Stern, 149 P 26, 29, 85 Wash 645, 651

35. Byrd v Clark, 153 S E. 737, 170 Ga 669, rehearing denied 154 S E 881, 170 Ga 912

36. Galligan v. Bua, 236 P. 1016, 77 Colo 386.

37. Davenport v. Waggoner, 307 N. W. 972, 49 S D 592, 45 A L R 1126

38. Galligan v. Bua, 236 P. 1016, 77 Colo. 386.

39. Thurston v. Travelers' Ins Co, 258 N.W. 66, 128 Neb. 141—6 C J. p 741 note 14.

Contract not shown

Where services were rendered without any agreement whatever as to the amount or terms of compensation, the attorney is not acting under a contract for a contingent fee, and a letter by the attorney to the client stating that a certain sum would be a reasonable amount to charge for his services and adding that a rate of not less than five per cent nor more than ten would be reasonable and customary does not convert the original agreement into a contract for a contingent fee.—Fleming v. Phinizy, 134 S E. 814, 35 Ga App. 792.

Abrogated contract

Where attorney released his client from contingent fee contract, the mere fact that the client knew that suit was later filed by the attorney was not sufficient to reinstate the contract.—Miller v Barnes, 205 S.W. 549, 181 Ky 473.

40. Crumlish v Shenandoah Valley R Co, 22 S E 90, 40 W Va. 627.

41. N J.—Grimm v. Franklin, 140 A. 236, 102 N J Eq 198, affirmed (Err & App) Grim v. Franklin, 146 A 914—Soper v Bilder, 100 A. 858, 87 N J Eq 564

Tenn.—Moyers v. City of Memphis, 186 S W 105, 135 Tenn. 263

"Contracts which provide that an attorney should receive a certain proportion of the proceeds of litigation where, as in this case, the amount to be received cannot be approximated, and in case of failure should receive nothing, are to be most strongly, in my opinion, condemned, and I think that it is immaterial whether the agreement was made before or after the technical relation of attorney and client began . . . The evils to which such contracts lead far outweigh any advantage which there may be in permitting them The moment an attorney enters into a contract of this kind he ceases to be in a position where it can be said that he can in all cases properly advise his client . . . There is no one thing that has more strongly tended to get the bar in disrepute with the general public than this class of contracts"—Soper v Bilder, 100 A. 858, 860, 87 N J.Eq. 564, per Lane, V. C.

42. Conn.—Gruskay v. Simenauskas, 140 A 724, 107 Conn. 380

Mich.—Hext v Moriarty, 244 N W. 170, 259 Mich 590—Neudeck v Horvath, 222 N W. 106, 244 Mich. 685.

N.J.—Soper v. Bilder, 100 A. 858, 87 N J.Eq 564

Reason for rule

"Plaintiffs who are poor, or helpless, or in distress of body or mind, may be imposed upon, or yield too easily to unjust professional demands"—Gruskay v. Simenauskas, 140 A. 724, 727, 107 Conn. 380.

43. U.S.—U S v Call, (C.C A.Fla.) 287 F 520—De Hay v. Cline, (D C. Tex.) 5 F Supp. 630.

Ark.—Hoskins v Adkins, 41 S W. (2d) 753, 184 Ark 124—McClain v. McFarlane, 206 S W. 38, 135 Ark. 602.

Ga.—Kimball v. Casey, 151 S E. 372, 169 Ga. 631.

Idaho.—Savic v. Kramlich, 12 P (2d) 260, 52 Idaho 156

Iowa.—In re Sylvester's Estate, 193 N W. 442, 195 Iowa 1329, 30 A L. R 180

Mich.—Neudeck v Horvath, 222 N W. 106, 244 Mich. 685—Gates v. McLaulin, 165 N.W 614, 199 Mich 438

Minn.—Parker v Fryberger, 214 N. W 276, 171 Minn 384

Miss.—Lamar Hardwood Co v Case, 107 So 868, 143 Miss 277

Mont.—Haley v. Hollenback, 165 P. 459, 53 Mont. 494.

N J.—Grimm v. Franklin, 140 A. 236, 102 N J Eq. 198, affirmed (Err & App.) Grim v Franklin, 146 A 914—Soper v. Bilder, 100 A 858, 87 N. J Eq. 564.

N Y.—In re Meng, 135 N E 508, 227 N Y. 264, reversing 176 N.Y.S. 290,

mitted to attorneys only as a reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, however, and it is not allowed for the rendition of merely minor services which any layman or inexperienced attorney might perform.[44]

An agreement of this kind is not objectionable for want of mutuality,[45] or for uncertainty[46] or, ordinarily, on the ground of public policy[47] although in particular instances it may be, as where the contract prohibits compromise or settlement by the client, as stated infra § 186 d (2), or in the case of a contract by an attorney to assist in the prosecution of a criminal case for a contingent fee, dependent on the conviction of the accused[48] or, as shown in the title Contracts § 235 [13 C.J. p 464 note 81] in the case of litigation between husband and wife, where the attorney is to take a certain percentage of alimony or community property recovered for his client.

The contract must be made in good faith, however, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client.[49] If the contract is shown

188 App Div 69, which affirmed 159 N Y S 535, 96 Misc 126, and reargument denied 126 N E 914, 227 N Y 669—Sasson v. Ferris, 248 N Y S 125, 231 App Div. 524—In re Liebergall, 178 N.Y S 857, 189 App Div. 651—In re Carpenter's Estate, 276 N Y S 754, 154 Misc 143—Smith v First Nat Bank, 170 N Y S 137, 103 Misc 274, modified on other grounds 172 N Y S 595, 184 App Div 719

N C—High Point Casket Co v. Wheeler, 109 S E 378, 182 N C 459, 19 A L R 391.

Okl—Lashley v Moore, 240 P 704, 112 Okl 198—Allen v Shepherd, 169 P 1115, 69 Okl 47—Culver v. Diamond, 167 P 223, 64 Okl. 271.

Pa—Gross' Est, 14 Pa Dist 137—Hagemann's Est, 5 Pa Co 576

S C.—Adair v First Nat Bank, 137 S E. 192, 139 S C 1, 51 A L R 1269.

Tenn—Moyers v City of Memphis, 186 S W 105, 135 Tenn 263

Tex—White v. Burch, (Civ App) 19 S W (2d) 404—Saunders v Guinn, (Civ App) 1 S W (2d) 363

Wash—Hamlin v Case & Case, 61 P. (2d) 1287—Hardman v. Brown, 279 P 91, 153 Wash 85.

6 C.J p 740 note 2.

Reason for rule

"A contract of this character is often the only way by which the poor and helpless can have their rights vindicated and upheld and the injuries they have suffered redressed"—Gruskay v Simenauskas, 140 A. 724, 727, 107 Conn 380.

"Catching bargain"

An attorneys' contract for professional services to heirs of realty for a contingent fee of twenty per cent of the value of the realty received by the heirs on the death of their mother, terminating her dower right, is not invalid as a "catching bargain."—Edler v. Frazier, 156 N.W 182, 174 Iowa 46

Not contract for part of res

An agreement to pay attorney an amount equal to whatever amount in excess of one thousand dollars might be collected on a group insurance policy is not contract for a fee as part of the thing in litigation—Sharp v. Culton, 89 S W.(2d) 869, 262 Ky. 84

Fees held reasonable

(1) Twenty per cent. contingent fee to attorneys prosecuting suits to recover from bondsmen certain county deposit in closed banks—Barnard v. Young, 251 P. 1054, 43 Idaho 382

(2) Fee of twenty per cent. of value of real property to be received by heirs after death of their mother—Edler v. Frazier, (Iowa) 156 N W. 182

(3) Twenty-five per cent of heirs' share for enforcing heirs' interests—Hext v. Moriarty, 244 N.W. 170, 259 Mich 590.

(4) Fee of twenty-five per cent. of amount recovered by tenants in condemnation proceeding by city, where landlord denied tenants' right to any compensation, and technical questions were involved—In re Allen St in City of New York, 266 N. Y.S. 277, 148 Misc. 488

(5) Fee of twenty-five per cent. of amount saved by defense of action—Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl. 108.

(6) Fee of one-third of recovery—High Point Casket Co. v. Wheeler, 109 S E 378, 182 N C. 459, 19 A L R 391—Saunders v. Guinn, (Tex Civ App) 1 S W (2d) 363.

(7) Fee of one-third for representing claimant in receivership proceeding, notwithstanding desired end was reached more easily than anticipated—State v. American Bonding & Casualty Co, 237 N.W. 360, 212 Iowa 1052

(8) Fee of forty per cent. of the damages recovered—In re D'Adamo's Estate, 157 N.Y S. 374, 94 Misc 1, 16 Mills Surr. 213.

(9) Two thousand five hundred dollars fee for attorney's services, if the client should marry man who breached promise of marriage and obtain $10,000 property settlement.—Wright v. Wright, 237 N.W. 896, 58 S D. 612.

44. High Point Casket Co. v. Wheeler, 109 S E 378, 182 N C. 459, 19 A L R 391—6 C J. p 741 note 13.

45. Gorrell v. Payson, 48 N.E. 433, 170 Ill. 213.

46. Smith v. Brown-Crummer Inv. Co, 210 P. 477, 112 Kan. 201.

47. Kan—Sedbrook v. McCue, 180 P. 787, 104 Kan. 813.

Ky—Manning v. Edwards, 265 S.W. 492, 205 Ky. 158.

Tenn—Moyers v. City of Memphis, 186 S W. 105, 135 Tenn. 263.

Solicited contract

A contract between an attorney and his client obtained by solicitation by the attorney's agent, and providing for a contingent fee, was not unenforceable as against public policy merely because it had been obtained by solicitation.—Chreste v. Louisville Ry. Co, 180 S W. 49, 167 Ky 75, L R A.1917B 1123, Ann.Cas. 1917C 867.

48. Baca v. Padilla, 190 P. 730, 26 N M 223, 11 A L R. 1183—6 C.J. p 741 note 13 [a].

49. U S—Ridge v. Healy, (Mo) 251 F 793, 164 C.C.A. 32

N.C—High Point Casket Co. v. Wheeler, 109 S E. 378, 182 N C 459, 19 A L R. 391.

Okl—McArthur v. Lotridge, 58 P (2d) 326—Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl. 108.

6 C J. p 741 note 7.

"The question of the reasonableness of the fee always remains open, though the fact of contingency often determines the controversy."—Blattman v. Gadd, 296 P. 681, 687, 112 Cal. App. 76.

Duty to explain contract

An attorney, concluding a contingent fee contract with his client, is bound to explain to her the distinction between a contingent fee in cases where any recovery at all is doubtful and in cases where at least

to have been obtained by fraud, mistake, or undue influence, or if it is so excessive in proportion to the services to be rendered as to be in fact oppressive to the extent of extortion, it will not be upheld [50]

The test is the fairness and reasonableness of the contract as applied to the client,[51] and the question depends upon the circumstances of each case [52] The words "unjust or unconscionable," as applied to these contracts mean nothing more than that the amount of the fee contracted for, standing alone and unexplained, would be sufficient to show that an unfair advantage had been taken of the client, or that a legal fraud had been perpetrated upon him.[53] To be unconscionable the contract must be such as no man in his senses and not under a delusion would make on the one hand, and no honest and fair man would accept on the other [54] The fact that the clients had never had any lawsuits and were not skilled in estimating attorneys' services is no reason for holding the contract void,[55] and the contract cannot be condemned solely because the proportion of the claim to be retained by the attorney was very large, if it was deliberately entered into, was free from fraud, and showed no purpose to obtain undue advantage,[56] since one may very properly demand a larger compensation, if it is to be contingent, not certain.[57] Accordingly, the mere fact that the attorney is to receive one half of the recovery does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for is so excessive as to evince a purpose to obtain an improper or undue advantage,[58] particularly where the attorney is obligated for the costs and the case is contested,[59] although under the particular circumstances of the case, a fee of fifty per cent or a smaller percentage may be unreasonable and extortionate [60] Whether particular contracts between attorney and client for contingent fees constitute

a forty per cent. recovery is assured by reason of a compromise offered by the adverse party; and where the effect of the contract is to make the fee payable and an interest-bearing obligation upon conclusion of a compromise, he is bound to explain to his client such effect of the contract—Ridge v Healy, (Mo) 251 F 798, 164 C C A 32

Fraud not shown

Fraud or bad faith in agreement by surviving partner and agent to pay attorney's fee of twenty-five per cent. of recovery cannot be predicated upon the fact that the attorney advising the agreement and a party to it was the son-in-law of the partner and agent—In re Allen St in City of New York, 266 N Y S 277, 148 Misc. 488.

50. Cal—Jackson v. Campbell, 8 P (2d) 845, 215 Cal 102—Blattman v Gadd, 296 P. 681, 112 Cal App 76

N C—High Point Casket Co v Wheeler, 109 S E 378, 182 N C 459, 19 A L R 391

Pa—Sloan's Est, 14 Pa Co. 359.

6 C J p 741 note 8

'The members of the bar are in a certain sense officers of the court, and their contracts for professional services on a contingent fee basis in cases such as the instant one may not as a matter of law be regarded as not subject to inquiry and correction by the courts if found unreasonable, greatly in excess of the value of the services rendered, and beyond the ability of the client to pay"—Husk v Blancand, 99 So 610, 612, 155 La 816

Fee of sixty per cent

A contingent fee contract allowing attorney sixty per cent. of client's recovery is extortionate and void—Gruskay v Simenauskas, 140 A 724, 107 Conn 380

51. Grimm v. Franklin, 140 A 236, 102 N J Eq 198, affirmed (Err & App) Grim v. Franklin, 146 A. 914

52. In re Allen St in City of New York, 266 N Y S 277, 148 Misc 488

53. N Y—In re Allen St in City of New York, 266 N Y S. 277, 148 Misc 488

N C—High Point Casket Co. v Wheeler, 109 S E 378, 182 N C 459, 19 A L R 391

54. Board of Education of Oklahoma City v Thurman, 247 P 996, 121 Okl 108

55. Jones v Jones, 63 S W (2d) 146, 333 Mo 478, 90 A L R 219

56. High Point Casket Co. v. Wheeler, 109 S E 378, 182 N C 459, 19 A L R 391—6 C J p 741 note 9

57. High Point Casket Co. v Wheeler, supra—6 C J. p 741 note 12.

"In this connection it must be remembered that an attorney who takes a case upon such a basis may receive nothing as well as much, and that he, as well as others who assume hazards, is entitled to be compensated for his risk"—Friedman v Mindlin, 155 N Y S 295, 300, 91 Misc 473

58. Idaho—Savic v. Kramlich, 12 P (2d) 260, 52 Idaho 156.

La—Taft Mercantile Co. v. Blouin Co, 7 La App 190

N Y—Race v Harris, 286 N Y S 168, 246 App Div 867—In re Reisfeld, 175 N Y S 365, 187 App Div. 223, modified 124 N E 725, 227 N Y 137—Campbell v. Tunnicliff, 173 N Y S 242, 185 App Div 506, motion denied 125 N E. 913, 227 N Y. 628—In re Levine's Estate, 278 N.Y S 36, 154 Misc. 700, affirmed 286 N Y S 513, 247 App Div 19—In re Uravic's Estate, 255 N Y S 638, 142 Misc 775—In re Carney, 158 N Y S 585, 93 Misc 600—Friedman v Mindlin, 155 N Y S 295, 91 Misc 473

Tenn—Moyers v City of Memphis, 186 S W 105, 135 Tenn 263

Wash—Hardman v. Brown, 279 P 91, 153 Wash 85.

6 C J p 741 note 10.

59. Husk v Blancand, 99 So. 610, 155 La 816.

60. In re Kraus, 185 A. 737, 322 Pa 362.

Contracts held unconscionable or unfair

(1) Contract calling for a fee of one third of the benefits collected under an insurance policy where the claim was not contested and the services of the attorney were not onerous and did not call for the exercise of unusual professional skill, where all the services required could have been performed free of charge by an association to which the client belonged, and where the client was a stranger somewhat unfamiliar with the language who had been told that the fee would be a fixed amount—Berkos v. Ætna Life Ins Co., 279 Ill App. 243.

(2) Agreement of widow and sole heir, to pay attorney one third of the amount collected for the estate, where the services rendered took only a short time and were not of unusual character—In re Mellick 158 N Y S. 689, 112 App Div. 538, affirmed 114 N E. 1072, 219 N Y. 557.

champerty is fully discussed in the title Champerty and Maintenance §§ 17–21 [11 C.J. p 241 note 8–p 246 note 34].

Who may object. Parties who have no interest in the proceeds of a claim[61] or interested parties whose conduct has estopped them[62] cannot ordinarily question the reasonableness of a contingent fee contract for prosecution and collection of such claim. An adverse party who settles with the client and agrees to pay the attorney's compensation may, however, attack the agreement between attorney and client as unconscionable and invalid.[63]

Binding effect on others. A contract for a contingent fee of fifty per cent, made by a mother and sole next of kin of a decedent, is not binding upon her descendants, nor upon an estate toward which she stood in no other relation than that of distributee.[64] Nor is an attorney bound by such a contract entered into by his colleague, unless he knew of it before he performed the service.[65]

(2) Contracts Affecting Right to Settle

A contingent fee contract prohibiting a settlement by the client is void.

Any contingent fee contract providing that the client shall not compromise the suit without the consent of, or consultation with, his attorney is generally considered void as against public policy,[66] unless permitted by statute.[67] So where such a void provision is inserted in the contract, it has been held to avoid a further provision stipulating the amount of fees which the attorney would receive under the contract,[68] although the view has been taken that such an invalid provision is severable and does not invalidate the whole contract.[69] Under some authorities, an agreement of this kind may or may not be condemned as against public policy, according to the circumstances of the case.[70]

A contract which does not prevent settlement by the client and provides for the payment to the attorney of an agreed amount in the case of such settlement is valid,[71] but the rule of fairness and reasonableness should be applied to such provisions.[72]

(3) Agreement to pay attorney fifty per cent recovery on life policy, signed by beneficiary subsequently adjudged incompetent, where, after investigation, the insurance company, before any action was brought, paid—In re Cupid, 245 N.Y.S. 554, 230 App.Div. 677

61. Lay v Lay, 79 So 291, 118 Miss. 549, affirmed 39 S.Ct 13, 248 U.S. 24, 63 L.Ed 103

Devisee of property which had been previously deeded to attorney by client pursuant to a contingent fee contract cannot question such a completely executed transaction in the absence of evidence of fraud—Soper v. Bilder, 100 A. 858, 87 N.J. Eq 564

62. Beck v. Boucher, 195 P. 996, 114 Wash 574.

Permitting performance by attorney

Client having permitted attorney to perform services and spend money under contract giving the attorney a one fifth interest of whatever share of an estate the attorney succeeded in procuring for the client, and having executed a deed conveying a one fifth interest in land acquired for her to the attorney, although deed was not in fact delivered, was estopped from denying the validity of the contract.—Beck v. Boucher, 195 P. 996, 114 Wash 574

63. Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, modifying 213 N.Y.S. 932, 215 App.Div. 795, which affirmed 211 N.Y.S. 249, 125 Misc 407.

64. Sloan's Est., 28 A. 1084, 161 Pa. 237.

65. Bissell v Zorn, 99 S.W. 458, 122 Mo.App. 688

66. N.D.—Simon v. Chicago Milwaukee & St P Ry Co., 177 N.W. 107, 45 N.D. 251—Moran v Simpson, 173 N.W. 769, 42 N.D 575
Pa.—Murray's Est., 13 Pa.Co. 70
6 C.J. p 743 notes 31, 32, p 739 note 44.

67. Stiles v. Bruton, 64 So 399, 134 La 523.

68. Moran v Simpson, 173 N.W. 769, 42 N.D 575

69. Ark.—Sizer v. Midland Valley R Co., 217 S.W. 6, 141 Ark 369.
Mont.—Downey v. Northern Pac Ry Co., 232 P. 531, 72 Mont. 166.

70. Lipscomb v Adams, 91 S.W. 1046, 193 Mo. 530, 112 Am.S.R. 500—6 C.J. p 743 note 34.

71. Cal.—Klein v. Lange, 267 P. 130, 91 Cal.App. 400
N.Y.—Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, modifying 213 N.Y.S. 932, 215 App.Div. 795, which affirmed 211 N.Y.S. 249, 125 Misc 407

Contract not abridging right

A contract employing an attorney to settle a claim or sue for damages which provides that in making settlement, either before or after suit brought, the attorney is not to act until he has submitted the offer of settlement to the client and obtained his consent, and that the attorney is to have entire control of the settlement and suit, if one is brought, does not abridge the clients' right to settle, and is not void as against public policy—McClain v. McFarlane, 206 S.W. 38, 135 Ark. 602.

72. Ward v Orsini, 152 N.E. 696, 243 N.Y. 123, modifying 213 N.Y.S. 932, 215 App.Div. 795, which affirmed 211 N.Y.S. 249, 125 Misc. 407.

Fee equal to amount paid

A contract that the attorney's compensation in a personal injury action equal the amount received by the client if the client settle without the attorney's consent is not within the condemnation of contracts seeking absolutely to prevent settlements without the attorney's consent when the result is reasonable, because intended to safeguard the attorney against settlements for small sums, whereby he would be deprived of compensation Accordingly an agreement that the compensation of the attorney for plaintiff in a personal injury action equal the amount paid the client, and that the attorney have his taxable costs and disbursements if the client settle without the attorney's consent, is not unreasonable nor invalid, where the client settled for three hundred dollars. But such an agreement would be unconscionable if the total sum to be paid to attorney and client exceeded the amount demanded in the complaint—Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, modifying 213 N.Y.S. 932, 215 App.Div. 795, which affirmed 211 N.Y.S. 249, 125 Misc. 407.

(3) Contract to Convey Land

Contingent fee agreements to convey land are enforceable.

A contingent agreement to convey a portion of the land recovered by suit to the attorney for his fee will be specifically enforced,[73] even though the land has greatly increased in value.[74] If the property has been sold, the attorney is entitled to his due share of the amount thereby realized.[75]

§ 187. —— Construction and Operation

a. Construction

b. Operation and effect

a. Construction

General rules as to the construction of contracts are applied to contingent fee contracts.

In construing contracts providing for the payment of contingent fees the rules of construction of express agreements for compensation discussed supra § 182 are applicable.[76] Accordingly in the absence of a showing of a contrary intent, words used in the contract will be given the meaning usually expressed by those words[77] and uncertainties will be resolved in favor of the client and against the attorney.[78] An agreement for a proportion of the amount recovered in a suit necessarily means the amount realized in

73. Okl.—Lashley v. Moore, 240 P. 704, 112 Okl. 198
Wash.—Beck v. Boucher, 195 P. 996, 114 Wash. 574.
6 C.J. p 740 note 4.

Reasonableness of contract

A contract to convey one hundred and eighty acres of land to attorney, as a contingent fee for defending, at his own expense, a will contest involving one thousand one hundred fifty-eight acres of land, was held not unconscionable, although the contestants defaulted.—Jones v. Jones, 63 S.W.(2d) 146, 333 Mo. 478, 90 A.L.R. 219.

74. Chester v. Jumel, 26 N.E. 297, 125 N.Y. 237, reversing 5 N.Y.S. 809, 2 Silv.Sup. 159

75. Pa.—In re Shoenberger, 60 A. 502, 211 Pa. 99
S.C.—Hand v. Savannah, etc., R. Co., 21 S.C. 162.

76. Alternative promise

Contract of guardian to pay attorney for legal services for minors in recovering property, providing that guardian "agrees to pay and convey" to attorney one quarter of property recovered, is an alternative promise to pay one quarter of value of property recovered or to convey an undivided one quarter interest in such property.—Berryhill v. Spillers, 232 P. 376, 105 Okl. 255.

Personal liability of client

Children who employed attorneys to institute proceedings for the interdiction of their mother for five per cent. of the total amount of the inventory if successful were held not to have incurred any personal liability for the attorney's fees.—Lazarus, Michel & Lazarus v. Veazey, 92 So. 338, 151 La. 790.

Costs

A contract by heirs employing an attorney to recover their respective interests in decedent's property, and providing that the heirs should pay the attorney an amount equal to fifty per cent. of the recovery, and that if nothing was recovered the heirs should not be liable in any amount for costs advanced or services rendered, means that the attorney should pay all costs if no recovery was had, but if recovery was had the costs and expenses should be paid out of the property recovered, and the heirs should then get fifty per cent and the attorney fifty per cent of balance.—Brown v. Furlong, 127 So. 731, 170 La. 802

77. "Bond issue"

Executrix of will of attorney, agreeing to handle drainage district's legal work "for 2% of the Bond Issue," is not entitled to recover more than unpaid retainer fee, where the district never had any funds, did no work on the drainage project, and canceled the contract for sale of bonds on purchaser's default, the words "bond issue" covering delivery of bonds to purchaser.—Vans Agnew v. Fort Myers Drainage Dist., (C.C.A.Fla.) 67 F.(2d) 244, certiorari denied 54 S.Ct. 776, 292 U.S. 643, 78 L.Ed. 1494

"Cause of action"

The employment of attorneys to perform all legal services incident or pertaining to a described "cause of action" pending in the district court for a contingent fee did not refer only to the action in the district court, especially where the attorneys, after an adverse judgment in the district court, took the matter to the supreme court without further contract, and the client requested them to advance costs for that purpose and repaid the costs.—Lane v. Gooding, 193 P. 670, 69 Colo. 216.

"For the period of one year"

Agreement with client was held to entitle attorneys to one third of oil leasehold recovered by settlement of litigation, as against the contention that provision in the agreement that attorneys receive "for the period of one year" one third of all moneys and settlements received by the client limited the attorneys to one third of revenues of leasehold for one year, since attending circumstances showed that such provision was made in lieu of a cash retainer and in addition to provision for a fee of one third of everything recovered.—Hynd v. Sandler, (Tex.Civ.App.) 95 S.W.(2d) 165, error dismissed.

"Inheritance"

"An action to set aside a divorce having been successful, and the wife having obtained in an attack on the will of the husband, who had died, a half interest in a future estate limited by the will to vest upon the death of their child under age, her attorneys being entitled under their contract with her to one-half of whatever might be recovered for her, an agreement in settlement in terms binding her to convey to them one-half of whatever might come to her by inheritance from the child, interpreted in a normal and popular sense, would create an obligation to convey to them a half interest in the future estate if and when it might become vested, the word 'inheritance' being ambiguous in normal and popular usage, and the circumstances surrounding the parties and their situation at the time of making the settlement contract clearly indicating the intended sense of the word 'inheritance'."—Higby v. Martin, 28 P.(2d) 1097, 167 Okl. 10

78. Race v. Harris, 286 N.Y.S. 168, 246 App.Div. 367.

Fees allowed in action

Under a contract between attorneys and client relating to attorney's compensation in an action to partition land and for an accounting, providing that the attorneys "shall receive as their compensation 10 per cent. of whatever is recovered, either by litigation or settlement, excepting that if the court makes an allowance for an attorney's fee in said partition suit or other suits then such fee shall belong to said law firm, exclusive of the said 10 per cent. so to be paid by" the client, the attorneys were not entitled to ten per cent. of the land set apart to the client in addition to a fee allowed, but were only entitled to such

money or property, and not a mere interest in the judgment.[79]

b. Operation and Effect

(1) In general
(2) As assignment
(3) On client's power to dismiss or compromise

(1) In General

The rights of the parties as to the measure of an attorney's contingent fee and the medium of payment are controlled by the contract. Contingent fee contracts ordinarily contemplate performance of all services necessary to collect the claim, but particular agreements may give the attorney the right to extra compensation.

In determining the measure of the attorney's compensation under an agreement for a contingent fee, the contract of the parties is controlling,[80] and the client cannot impair or destroy the attorney's rights to the stipulated fee.[81] An agreement to prosecute a claim for a percentage of the recovery entitles the attorney to the stipulated portion of any amount collected under the judgment;[82] and where a set-off having no connection with the claim which the attorney agreed to prosecute is allowed against the judgment, the attorney is entitled to compensation on the basis of the full judgment obtained on the main cause of action undiminished by the amount of the set-off.[83] An amount paid to the attorney by the adverse party to cover the attorney's expenses in settling the claim is "money received by compromise by reason of the injury" within the meaning of a contract requiring division between the attorney and client of such money.[84]

An agreement by the client to compensate the attorney if he recovered the difference between the actual value and the purchase price of certain bonds contemplates that as regards the right to compensation, the question of the difference should be settled by the verdict and judgment in the action for recovery, and the client cannot in a subsequent action between attorney and client raise the question of whether the amount recovered in the prior action was in fact such difference.[85]

Medium of payment. Where the contract clearly indicates that the parties had in mind the collection of the claim in money, the attorney is entitled to his fee in money although in fact the judgment was paid not in money but in property. In such case the attorney is not to be deprived of his right to compensation or compelled to accept an interest in the property recovered but is entitled to the agreed percentage of the fair cash value of such property.[86] Where, however, the

fee, as far as the partition suit was concerned, and ten per cent of the amount recovered in the accounting —Bennett v. Potter, 183 P. 156, 180 Cal 736

79. McCall v Atchley, 164 S W. 593, 256 Mo. 39—Schempp v Davis, 211 S W 728, 201 Mo App 430

80. Graeber v. McMullin, (C C A Colo) 56 F (2d) 497, certiorari denied McMullin v. Graeber, 53 S Ct 9, 287 U S 603, 77 L Ed 525

Unexpectedly large amount realized without suit

Where an attorney, employed, on a contingent fee of one-half the recovery, to recover for criminal conversation, unexpectedly secures twenty-five thousand dollars without suit, he should renounce the contract and turn over to his client all but reasonable compensation for his services —In re Hahn, 94 A 953, 84 N.J Eq 522, motion denied 96 A 589, 85 N J Eq. 510, Ann Cas 1918B 830.

81. Ex parte Wilkinson, 126 So 102, 220 Ala. 529

82. In re Lahm, 167 N.Y S 217, 179 App Div. 757, affirmed 119 N.E 1052, 223 N Y. 573

Fee provided for in note

Where the payee of a note calling for ten per cent. attorney's fees agreed to pay the attorney seventy five dollars for collection of the note, but that ten per cent provided for in note would be in lieu of seventy five dollars fee if judgment on the note included attorney's fees, on reduction of note to judgment including attorney's fees provided for in note, the attorney was entitled to a fee of ten per cent of amount actually collected on the judgment —Stegall v. Edwards, (Ga App) 181 S E 502.

Recovery in creditor's suit

In a creditor's suit to subject to judgment a fund from a personal injury case, the attorney for the judgment debtor was entitled to the percentage of the fund which was due him under his contract of employment in the negligence case —Kittinger Witt Co v. Brookins, 172 N E 197, 35 Ohio App 266.

Recovery in foreclosure suit

Under an agreement with defendant providing that the attorney for prosecuting foreclosure suits would be paid whatever actual fee could be thereafter realized from foreclosure, the attorney was held entitled to amount of fee included in foreclosure decree, where defendant, after purchasing the mortgaged property on foreclosure, sold it subsequent to expiration of redemption period for an amount in excess of its mortgage debt and costs, as against the contention that the attorney was entitled to a fee only to the extent that it was actually collected prior to expiration of redemption period —Henry v. Federal Land Bank of St Louis, (Ill App) 8 N E (2d) 972.

83. In re Choate, (Okl.) 50 P.(2d) 706

84. Sanders v. Cotton, 206 S.W. 313, 136 Ark 212.

85. Steiner, Crum & Weil v. Smith Sons Lumbor Co, 93 So. 399, 207 Ala 442, overruling in effect Smith Sons Lumber Co v. Steiner, Crum & Weil, 85 So 758, 204 Ala 306.

86. Graeber v. McMullin, (C C A. Colo) 56 F (2d) 497, certiorari denied McMullin v. Graeber, 53 S Ct. 9, 287 U S 603, 77 L Ed 525.

Percentage of "sum" recovered

Where attorneys agreed to accept as compensation for services in foreclosing a mortgage one half of such sum as defendant might recover, they are entitled to compensation in money and cannot be required to accept an interest in the land. The word "sum" used in the contract to define the character of the attorney's compensation refers to money and not to an interest in real property — Donovan v. Jenkins, 155 P. 972, 52 Mont. 124.

Recovery of mining claims

Where judgment was not collected in cash but by transferring mining

parties agreed that the attorney was to receive a certain percentage of whatever may be collected for the client, and the client took realty instead of cash, the attorney is entitled to the stipulated portion of the realty.[87]

Services contemplated. An attorney's agreement to conduct a case for a contingent fee based on the amount recovered ordinarily includes all work necessary, whether contemplated at the time or not, to carry the cases through to a finish, until judgment is obtained and the judgment collected,[88] but an attorney who accepts a claim on a contingent fee for collection without suit is not thereby required to appear at a contested trial of the claim against a decedent's estate, where his client has evaded his requests for an additional fee.[89] If the circumstances warrant the attorney in demanding a new contract because of the necessity of additional unexpected work, he must act within a reasonable time after discovery thereof.[90]

(2) As Assignment

An executory agreement that an attorney shall receive a certain portion of what is recovered ordinarily does not prior to judgment give him any interest in the claim, although on recovery of judgment, provided there has been a proper appropriation, it operates as an equitable assignment pro tanto.

Whether in a given case the agreement between attorney and client constitutes an assignment is dependent upon the intent of the parties, as evidenced by the terms of the agreement, in the light of all the surrounding circumstances.[91]

An executory agreement that the attorney shall receive a certain portion of what is recovered will not, ordinarily give him any legal or equitable interest in the cause of action or claim prior to reduction to judgment[92] unless there is an express stipulation to that effect or unless an intention to assign an interest in the cause of action plainly appears,[93] and, where a right of action is not assignable, it is not possible to assign to an attorney any right in a future judgment.[94]

claims, attorney negotiating settlement of judgment was entitled to agreed percentage of fair cash value of claims as fee—Graeber v McMullin, (C C A Colo.) 56 F (2d) 497, certiorari denied McMullin v Graeber, 53 S Ct. 9, 287 U S 603, 77 L Ed 525

87. O'Byrne v McNeill, 7 P (2d) 956, 90 Colo 226

88. Creason v. Deatherage, 30 S W. (2d) 1, 325 Mo 661

Extra services not required

An attorney having one tenth interest in an invention obtained for the seller was entitled to a fair compensation for his services before being required to execute the documents necessary to clear the purchaser's title—U S Colloid Mill Corporation v Myers, (D.C N.Y.) 6 F Supp 283

89. In re Coffin's Estate, 179 N.W 123, 189 Iowa 862

90. Roper v Alamosa Nat. Bank, 203 P 663, 70 Colo. 580.

Delay held unreasonable

An attorney who had agreed to make collection for specified percentage of amount collected could not, on discovery that the client's debtor was demanding an accounting and making large counterclaims, making additional labor on attorney's part necessary, continue to perform the work in connection with the case and to prosecute negotiations and proceed with the litigation, without insisting upon a new contract for additional compensation until a few days prior to the trial—Roper v. Alamosa Nat Bank, 203 P 663, 70 Colo 580

91. Stearns v Wollenberg, 92 P 1079, 51 Or 88, 93, 14 L R A (N S) 1095—6 C J p 743 note 30

92. U S—Woodbury v Andrew Jergens Co, (C C A N Y) 69 F (2d) 49—Spellman v Bankers' Trust Co, (C C A N Y) 6 F (2d) 799

Cal—In re Scott, 271 P 906, 205 Cal 525—Kelly v. Smith, 268 P 1057, 204 Cal 496

S C—Perry v. Atlantic Coast Life Ins Co, 164 S E. 753, 166 S C 270

Tex—Besteiro v Besteiro, (Civ App) 7 S.W (2d) 124

Wyo—Enos v Keating, 271 P 6, 39 Wyo 217, 67 A L R 430, rehearing denied 275 P 131, 39 Wyo 217, 67 A L R 430

6 C J p 742 note 20

Mere assignment of fund collected

Where the attorney of an injured servant suing for damages was assigned one half the amount which might be recovered, the transfer being made before the filing of the petition, the attorney's interest was contingent upon collection, and was a mere assignment of funds to be collected—Chicago, R I & G. Ry. Co v. Cosio, (Tex Civ App) 132 S W 83

Recovered, or received on compromise

Agreement that attorneys were "to have one-third of any sum of money or property, or both, or either, that may be recovered or paid as a compromise of said suit," was held not a present sale or conveyance of interest in plaintiff's cause of action entitling the attorneys to intervene after attempted dismissal by the client and prosecute to judgment on their own account the client's suit—Wheeler v. Fronhoff, (Tex.Civ. App) 270 S W. 887

93. Gibson v. Texas Pac. Coal Co., (Tex Com App) 266 S.W. 137—6 C J p 742 note 21

Particular contracts construed

(1) Contract whereby client, in consideration of services to be performed by attorney in prosecution of personal injury claim, "assigns" to attorney "one-third of any and all sums which may be realized either by suit or by compromise," constituted transfer to attorney of interest in cause of action—Gibson v. Texas Pac Coal Co, (Tex Com App) 266 S W. 137, reversing (Civ App) Gibson v. Texas Pacific Coal Co, 252 S W. 874.

(2) A contract between attorney and client, "in order to secure the services as attorneys in the case of the death of my husband, * * * I hereby set over to said attorneys one-third of same against all parties," etc, did not provide for a contingent fee, but was an assignment of a one-third interest in the case, rather than any amount or judgment which might be recovered by prosecuting the litigation—Wichita Falls Electric Co. v. Chancellor & Bryan, (Tex Civ App) 229 S W. 649, error refused.

(3) A conveyance to attorney in consideration of services of two-thirds interest in lands, estate, and property recovered was held effective as present conveyance of realty, but not to convey oil theretofore extracted from the lands—Broadway v. Stone, (Tex Com App) 15 S W.(2d) 230, modifying (Civ.App) Stone v. Broadway, 6 S.W (2d) 197, and rehearing denied (Com.App) Broadway v Stone, 17 S W.(2d) 86

94. Lynde v. Lynde, 52 A. 694, 64 N.J Eq. 736, 97 Am S R. 692, 58 L.

An agreement with an attorney that he shall have as compensation a specific sum,[95] or a stipulated percentage,[96] to be paid out of the amount recovered will, however, on the recovery of judgment, operate as an equitable assignment pro tanto; and this has been so held where the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable.[97]

Necessity of appropriation. In order that an agreement for a contingent fee may operate as an equitable assignment, there must be in effect a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client.[98] A mere covenant by a client to pay from a specified fund after that fund has reached his hands does not operate as an equitable assignment of the fund,[99] and a clause binding the client to pay "an amount equal to" a certain percentage "of the amount recovered" merely fixes the amount to be paid and does not convey an interest in the property eventually recovered.[1] In some jurisdictions there must be an actual appropriation of some designated proportion or per cent of the judgment,[2] but in others it is not indispensable that the portion or amount of the fund sought to be assigned should be precisely ascertained and stated in the assignment, it being sufficient that the transaction affords evidence as to the part of the fund on which the assignment was intended to operate.[3]

(3) On Client's Power to Dismiss or Compromise

The client's power to dismiss or compromise his suit is not affected by a valid contingent fee contract.

A valid agreement for the payment to the attorney of a proportion of the sum recovered in case of success does not give the attorney such an interest in the cause of action as to prevent the suitor without consulting his attorney, from dismissing the suit[4] or compromising it;[5] and where

R.A. 471, reversing (Ch.) 50 A. 659—6 C.J. p. 742 note 22

95. Cal.—McGown v. Dalzell, 236 P. 941, 72 Cal.App. 197
D.C.—Sanborn v. Maxwell, 18 App. D.C. 245
N.Y.—Lynch v. Conger, 168 N.Y.S. 855, 181 App.Div. 221
Tex.—Ives v. Culton, (Com.App.) 229 S.W. 321, affirming (Civ.App.) 197 S.W. 619

96. N.Y.—La Fetra v. Hudson Trust Co., 197 N.Y.S. 332, 203 App.Div. 729, affirmed 142 N.E. 272, 236 N.Y. 533
N.C.—High Point Casket Co. v. Wheeler, 109 S.E. 378, 182 N.C. 459, 19 A.L.R. 391.
Ohio.—Healy v. Robinson, 11 Ohio N.P.(N.S.) 329—Smith v. Baltimore & Ohio R. Co., 11 Ohio N.P.(N.S.) 65—Bailey v. Toledo & Ohio Central Ry. Co., 3 Ohio N.P.(N.S.) 366
Pa.—Cramer v. Equitable Gas Co., 14 Pa.Dist. & Co. 153.
Tex.—Bowles v. Bryan, (Civ.App.) 277 S.W. 760—Northern Texas Traction Co. v. Clark & Sweeton, (Civ.App.) 272 S.W. 564—C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson, (Civ.App.) 196 S.W. 262, error refused
6 C.J. p. 742 note 24

Creation of trust relation

Where defendants employed attorneys to protect their title to certain mining claims, agreeing to deed them seven and one half per cent. of the claims or the proceeds left after judgment, and to do the necessary annual assessment work on the mining claims for them, it was held that defendants became trustees for the interests of their attorneys—Donohoe v. Tjosevig, 6 Alaska 139

Assignment of legacy

Retainer agreement executed by legatee, specifying that an attorney should receive twenty-five per cent. of legacy, to extent of such twenty-five per cent amounted to an equitable assignment of the legacy—In re Kitching's Will, 253 N.Y.S. 112, 141 Misc. 704.

Conveyance of land

(1) "An attorney agreed to conduct litigation for quieting title to his client's real estate, and the client agreed as compensation 'to make, execute, and deliver to said second party (attorney) a good and sufficient warranty deed conveying an undivided one-half interest in and to said lands above described.' Held that, the agreement constituted an equitable, conditional assignment to the attorney of an interest in the subject of litigation"—Lashley v. Moore, 240 P. 704, 112 Okl. 198.

(2) So a client's agreement to give his attorney one-half of tract of land for services rendered in recovering possession thereof from the client's divorced wife manifested intention to convey to attorney an interest in such land—Oliver v. Howie, 281 S.W. 17, 170 Ark. 758

97. Pa.—Cramer v. Equitable Gas Co., 14 Pa.Dist. & Co. 153
Tex.—Gibson v. Texas Pac. Coal Co., (Com.App.) 266 S.W. 137, reversing (Civ.App.) Gibson v. Texas Pacific Coal Co., 252 S.W. 874.
6 C.J. p. 742 note 25.

98. Holmes v. Evans, 29 N.E. 233, 129 N.Y. 140—6 C.J. p. 742 note 26.

99. Holmes v. Bell, 124 N.Y.S. 301, 139 App.Div. 455, affirmed 94 N.E. 1094 mem., 200 N.Y. 536 mem.—6 C.J. p. 742 note 27.

1. Brown v. Furlong, 117 So. 533, 166 La. 537.

2. Story v. Hull, 32 N.E. 265, 143 Ill. 506—6 C.J. p. 743 note 28.

Fixed compensation or percentage

The agreement must provide for a fixed compensation or specify the percentage of recovery—In re Kitching's Will, 253 N.Y.S. 112, 141 Misc. 704.

3. Milmo Nat. Bank v. Convery, 27 S.W. 328, 8 Tex.Civ.App. 131.

4. Zerkowsky v. Zerkowsky, 131 So. 647, 160 Miss. 278

5. Minn.—Southworth v. Rosendahl, 158 N.W. 717, 133 Minn. 447.
Miss.—Lamar County v. Tally & Mayson, 77 So. 299, 116 Miss. 538
6 C.J. p. 743 note 31.

In Texas

Where injured person assigned interest in cause of action to his attorney, without reservation of right to determine whether the claim should be compromised after commencement of suit, the injured person, after judgment in his favor had been affirmed by the court of civil appeals, and pending application to supreme court for writ of error, could not compromise his attorney's interest in the judgment by a settlement with defendant who had actual notice of the attorney's rights, and the attorney, notwithstanding such attempted compromise, on the district court's receipt of mandate from court of civil appeals, was entitled to execution for the amount due him.

the adverse party obtains a judgment, the client is under no obligation to his attorney, by reason of such contract, to bring writ of error.[6]

§ 188. —— Performance

a. In general
b. Effect of death of parties
c. Nonperformance or breach

a. In General

An attorney's right to recover under a contingent fee contract depends on the happening of the contingency.

Where there is an agreement for a contingent fee, and the contingency has happened, the attorney is entitled to recover the fee stipulated in his contract.[7] The happening of the contingency is a condition precedent to the right to recover for his services, however,[8] and the precise event which

—Gibson v Texas Pac Coal Co., (Tex Com App) 266 S W. 137, reversing (Civ App) Gibson v Texas Pacific Coal Co, 252 S W. 874

Liability of county

County is not liable to an attorney assigned a fifty per cent interest in a suit on compromise with plaintiff who had accepted a consideration for right of way for road—Grantham v Lamar County, 114 So. 33, 148 Miss. 148.

6. State v. Miller, 96 S.E. 791, 82 W.Va. 490

7. U S—Waugh v. Q & C Co., (C C A Ill) 16 F (2d) 363
Ark—Reeves v Singfield, 292 S W. 365, 177 Ark. 1195
Ky—Sharp v. Culton, 89 S W (2d) 869, 262 Ky 84
La—Morrison v. Antoine, 124 So 318, 11 La App 526
Tex—Chandler v Harrison, (Civ App) 4 S W (2d) 604.
6 C J p 743 note 35 [a].

Final determination

Where an attorney was retained to bring suit and to fight it in good faith to a final determination, the compensation to be at a fixed amount if he lost, and at an increased amount if he won, sustaining a demurrer to the petition was a "final determination" of the cause of action in the circuit court, entitling the attorney to his fee, and if he filed an amended petition by leave of court, and subsequently withdrew it because no new facts were stated therein, such final determination was not thereby affected and the client could not resist payment on the ground that the attorney had voluntarily abandoned his case—King v Mann, 235 S W. 506, 208 Mo App. 642, affirmed (Sup) 236 S W. 100.

Partial recovery

An attorney employed to recover two parcels of land for an amount equal to half of the value of the property recovered was entitled to agreed compensation, where he recovered only one parcel, in the absence of a showing that he failed to do anything he should have done. —Stowers v. Runyon, 267 S W. 554, 206 Ky. 479.

Realization of holdings

An attorney's cash remuneration under contract for payment to him in cash of twenty-five per cent of the amount realized "whether by way of sale, mortgage, hypothecation, exchange, or any other manner" by the client from his holdings of stock in a corporation, was not dependent on the client's receipt of cash therefor after payment to the corporation of the amount awarded in condemnation proceedings—McAvoy v Schramme, 264 N Y S 181, 238 App Div. 225, affirmed 189 N E 691, 263 N Y 548.

Settlement

A suit for divorce is not settled within the meaning of an attorney's contract, entitling him only to one-half the stated fee if the case was settled, where plaintiff dismissed her petition without prejudice, but the attorney secured a divorce for defendant on his cross-petition, since "settled" implies that there has been an agreement by the parties—Bryant v. Mundorf, 179 N W. 125, 189 Iowa 882

Straightening out title

Where the contract provides that an attorney is to have a one-third interest in property conveyed to him as a contingent fee for straightening out title thereto, his right accrues and he is entitled to a conveyance when making the title good and marketable and furnishing counsel's opinion accordingly.—Johnston v Cox, 154 So 206, 114 Fla. 243

Successful defense of action

Under a written agreement to defend an action for a contingent fee, a final favorable judgment by the appellate division on the evidence entitled the attorney to receive the amount stipulated for the successful outcome of the suit—In re Wise, 158 N Y S. 793, 172 App Div. 491.

Matters not defeating right

Where a school district claimed interest in tax funds collected by the county, the fact that before the contract of the district with an attorney for a contingent fee to aid in defending claims of taxpayers for taxes paid under protest the county treasurer had disbursed some of the money did not excuse the district from payment of a portion of such sum under a contingent fee contract. —Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl 108.

8. U S—Swift v Jackson, (C C A. Okl) 37 F (2d) 237, certiorari denied 50 S Ct. 351, 281 U S 745, 74 L Ed 1158.
Ga—Byrd v. Clark, 153 S E 737, 170 Ga 669, rehearing denied 154 S E 881, 170 Ga 912—Stephens v Fulford, 112 S E 894, 153 Ga 637, answers to certified questions conformed to, 113 S E 95, 28 Ga.App 790—Gower v. Roberts, 132 S.E 796, 32 Ga App 164.
Mass—Zuckernik v. Jordan Marsh Co., 194 N E 892
N.Y—Catts v. Harft, 208 N Y S. 446, 124 Misc 519.
Okl.—Gilbert v. Gaines, 35 P (2d) 911, 169 Okl 5—Jones v Merfeldt, 30 P (2d) 924, 167 Okl 530—Fisher v. Grider, 234 P. 570, 109 Okl 23, error dismissed 47 S Ct 342, 273 U S 655, 744, 71 L Ed 824, which denied rehearing 46 S Ct. 105, 269 U S 579, 70 L Ed 422—Snell v Canard, 218 P. 813, 95 Okl 145, error dismissed Canard v. Snell, 45 S Ct. 350, 267 U S. 578, 596, 69 L Ed 797.
Pa—In re McCall, 28 Pa Dist 433
Tex—Butler v King, (Civ App) 91 S W (2d) 862—Sanford v. Weller, (Civ App) 189 S.W. 1011, error refused
6 C J p 743 note 35, p 745 note 58 [a].

Foreclosure of mortgage

Where plaintiffs agreed to foreclose defendant's mortgage for a percentage of the recovery, they became entitled to compensation only on the date when defendant's lien was adjudged superior to the claim of a third person—Donovan v. Jenkins, 155 P 972, 52 Mont 124.

Institution of receivership proceeding

Where an attorney investigating the advisability of a receivership proceeding worked with the understanding that he should not receive any fee if a receivership was not asked for, and a receivership proceeding was not instituted, the attorney was not entitled to recover reasonable compensation for services rendered on the theory that he was ready to perform the contract by instituting a receivership suit and his

was contemplated must happen,[9] although it is immaterial that the client is not benefited by the success of the suit.[10]

In determining whether the contingency has happened, the contract of employment should receive a fair and reasonable construction[11] Unless specifically provided, the manner in which the attorney accomplishes the desired result is not material,[12] if he has not previously abandoned the suit,[13] and it is not a valid objection to the attorney's claim that the result was brought about in some unforeseen manner, even though the duties of the attorney are rendered much less burdensome thereby[14] Thus a contract, giving the attorney a certain contingent fee if the case was "tried" in the supreme court and affirmed, covers a situation where the appeal was defeated in the supreme court, although the case was not contested there on its merits.[15]

Compromise or settlement. Where a recovery by settlement as well as by suit is contemplated by the contract, the attorney is entitled to recover the stipulated amount in the case of a settlement,[16]

client abandoned the proceeding.—Spears v. Polk, 69 S.W.(2d) 239, 17 Tenn App. 556.

9. Ga.—Byrd v. Clark, 153 S.E. 737, 170 Ga. 669, rehearing denied 154 S.E. 881, 170 Ga. 912.
Ill.—Dietz v. Van Speybroeck, 225 Ill App. 133
La.—Putnam v. Pons, 103 So. 254, 157 La. 895
6 C.J. p 743 note 36.

Collection of claim

(1) An attorney agreeing to collect money for a percentage of the sum collected cannot recover fees for obtaining a judgment, but must collect the money—Byrd v. Clark, 153 S.E. 737, 170 Ga. 669, rehearing denied 154 S.E. 881, 170 Ga. 912

(2) So the attorney for plaintiff in a separation action under an agreement by which plaintiff agreed to pay him fifty per cent of any sum collected in the action was not entitled to fifty per cent of the amount which had accrued, where the action was abandoned and alimony was not paid.—Wien v Wien, 273 N.Y.S. 636, 241 App Div. 526.

(3) Where money garnished was never applied to plaintiff's claim, it was never "collected," within the meaning of an attorney's contract for fees providing, "No fees for legal services unless collection is made." —Mountain States Supply Co v Nuttall-Allen Co., 225 P. 811, 63 Utah 384.

Damages for breach of promise

Under a contract providing that the attorney should receive half of the money which his client should recover or obtain for the breach of a contract of marriage, whether obtained "on execution, or by settlement, compromise, or agreement" the attorney was not entitled to any part of the property acquired by the client by operation of law when she married the adverse party, nor could he recover any part of the value of such marriage—Crow v. Mitchell, 192 S.W. 417, 269 Mo. 697, L.R.A. 1917D 912.

Interdiction in supreme court

A contract by which an attorney for a contingent fee undertook to secure a judgment of interdiction in the supreme court, while the case was then pending on appeal from judgment of dismissal, was not complied with, where he merely secured a remand there.—Putnam v. Pons, 103 So. 254, 157 La. 895.

"Procuring" money

An attorney for a former administrator who obtained from opposing counsel a stipulation not binding on the opposing party for distribution of the estate's assets in settlement of conflicting claims "procured" no money for his client within a contract providing payment of one half the amount "procured" for his client—In re Strandburg's Estate, 247 N.Y.S. 194, 138 Misc 732, modified on other grounds 248 N.Y.S. 164, 138 Misc 859.

Redemption of land

Where an attorney agreed with a mortgagee to foreclose a second mortgage on land, subject to a large first mortgage, rendering the second mortgage of little value, for a fee of two hundred dollars, with a further understanding that he should receive three hundred dollars additional if the premises were redeemed, he was entitled only to two hundred dollars, where the premises were not redeemed, although the mortgagee bid in the land at foreclosure for the full amount, including five hundred dollars attorney's fees awarded by the court—Baldwin v. McClaine, 244 P. 256, 138 Wash. 79.

Securing probate of will

In an action for an attorney's fee under a contract whereby plaintiff with other attorneys undertook to secure the probate of a will and they were to be paid a stipulated amount and also an additional fee of twenty-five thousand dollars if and when the will should be probated by final decree after appeal, where it appeared the client had entered into a compromise terminating the litigation then pending on appeal, plaintiff was not entitled to his share of the twenty-five thousand dollars, since the judgment of the county court denying probate had become final when the cause was dismissed on appeal because of failure to file an appeal bond as required by statute—Robertson v. National Spiritualists' Ass'n of United States of America, (Tex Civ App) 25 S W (2d) 889.

10. Hudson v. Sanders, 19 Ohio Cir. Ct 615, 10 Ohio Cir Dec. 342

11. Ingersoll v. Coram, (C C Mass) 127 F. 418—6 C J p 744 note 38

Amount receivable under Employers Liability Law

A contingent agreement by an attorney that he was to receive nothing unless the client should receive at least the amount she would receive under the "Employers' Liability Law" meant the full amount she could receive under such law, and not an amount previously offered by the employer under such law where such previous offer was not mentioned in the contract—Nichols v. Waters, 167 N W. 1, 201 Mich. 27.

12. Cal.—Mullia v. Mayer, 17 P.(2d) 705, 217 Cal. 209.
Ill.—Dietz v. Van Speybroeck, 225 Ill. App 133.
6 C.J. p 744 note 39.

Suit not originally contemplated

A lawyer whose client contracted to pay him twenty-five per cent of the proceeds of any suit, settlement, or compromise, of the client's claim to certain property or damages, and who recovered money and property for such client through joining in a suit not originally contemplated, could recover his share of the proceeds—Thomas v Scougale, 155 P. 847, 90 Wash 162.

13. U S.—Frink v. McComb, (C C. Del) 60 F. 486
Ala.—Cheney v. Kelly, 10 So. 664, 95 Ala. 168.
Ill.—Scoville v. School Trustees, 65 Ill. 523
Ky.—Simrall v. Morton, 12 S W. 135, 12 Ky L. 21.
6 C J p 744 note 41.

14. Clancy v Kelly, 166 N W. 583, 182 Iowa 1207—6 C J. p 744 note 40

15. Clancy v Kelly, 166 N W. 583, 182 Iowa 1207.

16. McCall v. Atchley, (Mo App) 194 S.W. 714.

Secret compromise by client

Under a contract providing that

and the court cannot disregard the contract and allow a lesser compensation, on the ground that the attorney's labor in procuring a settlement was presumably less than that which would have been required by a trial,[17] nor, where a compromise of the suit was brought about, is the attorney's right to the stipulated compensation defeated by his failure to subpœna witnesses when requested by the client not to do so.[18] Although the contract is not literally performed, if the client, as the result of a compromise, receives all that he would have received in the event of a literal performance the attorney is entitled to the agreed compensation,[19] but where the contract provides that the attorney is to have a percentage of whatever is recovered by compromise or otherwise in the litigation, if no such compromise is effected he is not entitled to recover where the client, by reason of an independent claim, receives in settlement substantially what he could have received in the litigation, the attorney taking no part in such settlement.[20] Where the contract provides for a certain percentage of the recovery if settlement is made out of court and a larger percentage in case suit is brought, where a just settlement is effected without litigation and suit is then instituted as a mere formality for the convenience of an adverse party, the attorney is entitled only to the smaller amount of compensation, it being his duty to select the method of recovery which is least burdensome to his client.[21]

b. Effect of Death of Parties

The rule that the contingency must happen to entitle the attorney to his fee applies notwithstanding the death of the parties.

The death of either attorney or client does not affect the requirement that the contingency must happen before the fees become payable.[22]

Death of attorney. The estate of a deceased lawyer employed on a contingent fee basis has no enforceable claim where the contract was not performed at the time of his death;[23] and an attorney prosecuting a claim upon a contingent fee, who performed every act proper and necessary to promote the interest of his client but died before the case came to trial, cannot be held to have performed his contract so as to entitle his estate to the stipulated fee.[24] So where the right to compensation is contingent upon success, and the death of the attorney occurs before any recovery is had, and nothing is thereafter recovered, his personal representatives are entitled to no compensation for his services.[25] Where the contract has been fully performed by the attorney, however, his death does not abrogate the right of his estate to the contingent fee owing to him;[26] and where an attorney who is employed under a contract for a contingent fee substitutes another attorney in his stead who prosecutes the suit with the consent of the client, the death of the original attorney does not defeat the right of the substituted attorney to recover the agreed compensation for such services.[27]

Death of client. Where a contract was made with an attorney for the prosecution of a claim for a contingent fee out of the amount recovered, and the contract was substantially performed by the attorney before the death of the client, as where the claim was tried before his death, but favorable decision was rendered on it thereafter, the fees became vested prior to the client's death, and the

attorneys are to receive one fourth of whatever is recovered by them for their client "in said action" by compromise or otherwise, the attorneys are entitled to recover, although the client obtains a secret voluntary compromise while the action is pending, an objection that the compromise on the client's part was not a recovery "in said action" being untenable.—McCall v. Atchley, (Mo App.) 194 S.W. 714

17. Murray v Waring Hat Mfg Co., 127 N.Y.S. 78, 142 App.Div. 514—In re Summerville, 129 N.Y.S. 1148 See Malmquist v Belden Mfg Co., 202 Ill.App. 319.

18. McCall v Atchley, (Mo App.) 194 S.W. 714.

19. Webster v. Rhodes, 112 P. 324, 49 Colo. 202—6 C.J. p. 744 note 43

20. McCall v Atchley, (Mo App.) 194 S.W. 714

21. Saunders v Gunn, (Tex.Civ.App.) 1 S.W.(2d) 363.

Suit to establish party's status

There was a compromise of the claim of plaintiff whose husband was killed in a railroad accident within the meaning of the word as used in her contract with her attorneys, where the road settled the claim, although it required a friendly suit to be brought against it to establish plaintiff's status as the wife of deceased.—Heller v. McGilvray, (Mo.App.) 223 S.W. 970

22. Ky.—Triplett v. Mockbees, 5 J.J.Marsh. 219
N.Y.—Badger v. Celler, 58 N.Y.S. 653, 41 App.Div. 599

23. Mulqueen v. Commissioner of Internal Revenue, (C.C.A.) 65 F.(2d) 365, cert. den. 54 S.Ct. 62, 290 U.S. 644, 78 L.Ed. 559

24. Sargent v. McLeod, 103 N.E. 164, 209 N.Y. 360, 52 L.R.A.(N.S.) 350

25. Badger v. Celler, 58 N.Y.S. 653, 41 App.Div. 599—6 C.J. p. 744 note 49.

26. O'Brien v. Liberty Mining Co., 204 N.W. 625, 164 Minn. 186

Royalties under mining lease

Where a landowner contracted with an attorney to assign one tenth of the royalties payable under a lease which he might succeed in putting the land under, and the attorney effected the lease after the death of the landowner, whose heirs assigned the attorney one tenth of the royalties payable thereunder, the landowner's promise to assign part of the royalties was dependent only on the success of the attorney's promised efforts to procure the lease, and the death of the attorney did not abrogate the assignment of part of royalties to him.—O'Brien v. Liberty Mining Co., 204 N.W. 625, 164 Minn. 186

27. Reese v. Resburgh, 66 N.Y.S. 633, 54 App.Div. 378.

attorney is entitled to them.[28] So when the attorney rendering services to the date of the client's death was dismissed by the client's administrator, who afterward recovered on the claim, it was held that the death of the client did not dissolve the contract, but that the compensation remained a lien upon the money when recovered;[29] and it has been held that an agreement for a percentage of the sum recovered is such an interest as will prevent the death of the client from revoking the attorney's authority.[30] An agreement between attorney and client in consideration of legal services in a pending action for land conveying to the former an interest in the land sought to be recovered is not revoked by the death of the client;[31] but where an attorney undertook the prosecution of a suit for compensation conditioned on success, and, upon the death of the client, the suit was dismissed or compromised by the client's personal representatives, thereby preventing success, it was held that the attorney was not entitled to the entire contingent fee agreed on.[32]

c. Nonperformance or Breach

An attorney breaching his contingent fee contract is entitled to no compensation and may be liable in damages. The attorney cannot recover where performance becomes impossible through the happening of a collateral event, but the rule is otherwise where the client prevents performance.

The attorney is not entitled to recover his compensation under a contingent fee contract where before the happening of the contingency he abandons the case[33] or refuses to complete his contract without extra compensation,[34] even though his services may have been of benefit to the parties,[35] and he is liable for damages proximately caused by his failure to perform.[36]

Where the attorney obtained a settlement pursuant to his contract of employment, and that settlement was almost immediately attacked from the source from whence it came, it is the attorney's duty to defend such attack, and if he refuses to do so and the client is therefore compelled to employ other counsel, such employment must be held to be at the expense of the first attorney.[37]

Impossibility of performance. The attorney is not entitled to recover under a contingent fee contract when the attainment of the desired object becomes impossible through the happening of a collateral event.[38] Where the client prevents proper performance by the attorney, however, the latter is entitled to the reasonable value of the services rendered in part performance,[39] and, where the attorney has fully performed by bringing about a settlement to which the parties agreed but the client refuses to execute the agreement, the attorney is entitled to the agreed contingent compensation;[40] but the attorney cannot recover where the happening of the contingency is prevented by the wrongful conduct of the person for whose benefit the services were engaged and with the sub-

28. In re Levine's Estate, 286 N Y S 513, 247 App Div 19, affirming 278 N Y S. 36, 154 Misc 700.

29. Wylie v Coxe, (D C) 15 How (U S) 415, 14 L Ed. 753—6 C J. p 727 note 43

30. Dupree v Bridgers, 84 S E 696, 168 N C 424—6 C J p 744 note 51.

31. Dupree v. Bridgers, supra

32. Campbell v Kincaid, 3 T B Mon (Ky.) 63—6 C J p 727 note 49.

33. U S—In re Woodworth, (D C N Y) 15 F Supp 291, affirmed (C C A) 85 F (2d) 50

Ark—Young v. Fowler, 200 S W. 813, 132 Ark. 145

6 C J p 744 note 45

34. Douglass v. Downend, 30 Ohio Cir Ct. 649

35. Young v Fowler, 200 S W. 813, 132 Ark. 145

36. Page v. Walser, 213 P 107, 46 Nev. 390.

Loss of interest in corporation

An attorney is liable for damages proximately caused by his failure to perform his contract to establish by litigation or otherwise the client's interest in a named corporation in return for the assignment to him by the client of a portion of such interest, and where the attorney so manipulated plaintiff's interest in such corporation that it was transferred into stock of another corporation, which was later sold on execution and wholly lost to plaintiff, the fact that the stock became in contemplation of law the sole property of such other corporation does not preclude plaintiff from maintaining an action to recover such damages—Page v Walser, 213 P. 107, 46 Nev 390

37. Hoskins v Adkins, 41 S W (2d) 753, 184 Ark 124.

38. Ky—Fisk v. Snyder, 4 Ky L 716, 11 Ky Op 928

Tenn—Moyers v. Graham, 15 Lea 57.

Disbarment

The rule permitting an attorney's recovery for the reasonable value of services performed is based on quasi contract and is confined to instances where the attorney is prevented from earning the agreed contingent fee without fault, as by illness, death, or discharge without fair cause, and is inapplicable where the attorney is disbarred or unjustifiably abandons the case—In re Woodworth, (D C N Y) 15 F Supp 291, affirmed (C C A) 85 F (2d) 50.

39. Ala—Lanthrip v. Ivey, 114 So 12, 22 Ala App 190

N D—Hildreth v Honsinger, 171 N W 332, 41 N D 485

Wash—Smith v. Saulsberry, 288 P 927, 157 Wash 270—Ramey v Graves, 191 P. 801, 112 Wash 88

Acceptance of consent judgment

Where the client, after employing the attorney to collect a claim and agreeing to pay one half of the amount collected, by his neglect prevented the attorney from properly presenting the claim and compelled him to accept a consent judgment, and where the attorney's services were reasonably worth the full amount of the consent judgment, the client was not entitled to one half of the amount so collected—Lanthrip v. Ivey, 114 So. 12, 22 Ala. App. 190

40. Iowa—Coughlon v. Pedelty, 233 N W 63, 211 Iowa 138

N J—Levy v. Gollin, 138 A. 308, 5 N J Misc. 786.

sequent continuing passive acquiescence of the client.[41]

§ 189. —— Effect of Premature Termination or Settlement of Action

Although the client may dismiss the action or compromise without his attorney's consent, by so doing he cannot defeat the attorney's right to contingent compensation.

Since ordinarily an agreement for a contingent fee, as has been shown supra § 187, does not give the attorney any interest in the subject matter of the litigation, any disposition of the case the client chooses to make is, in the absence of fraud or collusion, binding on the attorney.[42] However, a compromise or settlement by the client may not deprive the attorney of his right to proper compensation for his professional services, especially where the employment contract contains a stipulation against compromise or settlement.[43] General-

41. Stephens v Fulford, 112 S E 894, 153 Ga 637, answers to certified questions conformed to 113 S E 95, 28 Ga App 790

Employment to obtain pardon

Where the father of a convict engaged an attorney on a contingent fee basis to obtain a pardon for his son, and the attorney obtained from the trial judge, the solicitor general, and each of the trial jurors, and from various other persons, a recommendation for a pardon and obtained a confession of perjury from the state's main witness in the criminal case and a recommendation from the commission to the governor for a full pardon which was transmitted to the governor, and where the son of the client escaped from the penitentiary while such favorable recommendation was awaiting the governor's consideration so that the pardon could not be granted, the convict being a technical fugitive from justice, and where the client knew the whereabouts of his son and refused to return him to the custody of the state authorities, the attorney could not recover either on a quantum meruit or on the contract. In such case, as pointed out by the court, the question of whether recovery could be had where the client himself prevented, by his wrongful conduct, a successful result of the attorney's services was not presented and could not be decided—Stephens v Fulford, 112 S E 894, 153 Ga. 637, answers to certified questions conformed to 113 S E 95, 28 Ga App 790.

42. La—Succession of Rice, 86 So 282, 147 La 834—Succession of Carbajal, 71 So. 774, 139 La 481
Miss—New Orleans & N E R Co v. Tally & Mayson, 69 So 136, 109 Miss 393.
Mo—Miller v. St. Louis Car Co., (App) 14 S W.(2d) 464.
N Y—Corcoran v. George Kellogg Structural Co., 166 N Y.S 269, 179 App Div. 396
Tex—Robertson v National Spiritualists' Ass'n of United States of America, (Civ App) 25 S W (2d) 889—Kelly v. Gross, (Civ App) 4 S W (2d) 296.
6 C J p 745 notes 53, 54.
Effect on attorney's lien see infra § 231.

Contract held not binding

Where the attorneys of plaintiff had a contract with him for one third of the amount recovered in a suit for personal injuries and plaintiff without their knowledge by a settlement contract with defendant received an amount in satisfaction of his own part of the judgment, a written agreement, part of such contract, that defendant was to pay plaintiff's attorneys' fees, not exceeding a certain amount, was not binding on such attorneys, and defendant, under Rev St (1909) § 964, is liable, for plaintiff's attorneys' fees, for an amount equal to one half of plaintiff's part of the judgment—Kaemmerer v St Louis Electric Terminal Ry Co., 211 S W. 687, 201 Mo App 305.

Right of attorney to intervene

(1) An attorney rendering services for a contingent fee, based on a percentage of real property recovered, could not intervene or restrain his client's settlement through other attorneys—Bestairo v. Bestairo, (Tex Civ App) 7 S W.(2d) 124.

(2) Attorneys having a contingent interest in community property recovered by the wife in the event of divorce cannot intervene in and prosecute a divorce suit after the parties' reconciliation and prayer for dismissal—Kelly v. Gross, (Tex Civ.App) 293 S W. 325

43. Miss—Lamar Hardwood Co v Case, 107 So 868, 143 Miss 277
N Y—In re Carney, 158 N.Y S. 585, 93 Misc 600
Or—Snow v. Beard, 162 P. 253, 82 Or 518
Tex—Kelly v. Gross, (Civ.App) 4 S W (2d) 296
Wyo—Enos v. Keating, 271 P. 6, 39 Wyo 217, 67 A L R 430, rehearing denied 275 P. 131, 39 Wyo. 217, 67 A L R. 430

Client cannot waive his attorney's contingent interest in recovery, but an attorney having such interest may recover in the client's name against the person liable having prior notice of the attorney's interest.—Groves-Barnes Lumber Co v. Freeman, (Tex Civ App.) 33 S W (2d) 218.

Compromise of suit to cancel oil lease

(1) If an oil lease was an absolute nullity, a breach of the agreement by the lessors, husband and wife, with their attorney, employed under a contingent fee contract, not to compromise suit to cancel the lease without the consent of the attorney, entitled him to judgment against the husband for damages if a compromise was made with intent to deprive the attorney of his fee—Finkelstein v. Roberts, (Tex.Civ App) 220 S W 401, dismissed for want of jurisdiction

(2) In a suit to cancel an oil lease executed by plaintiffs, husband and wife, wherein plaintiffs' attorney intervened to enforce his contract with them, declaring on an agreement made by plaintiffs with defendant lessees, defendants cannot be held on such agreement except in accordance with its terms, including their stipulation to pay all claims as attorneys established against plaintiffs by suit or compromise, the compromise having established nothing against plaintiffs—Finkelstein v. Roberts, supra.

Quantum meruit

(1) Where a contract between attorney and client for a contingent fee contains no stipulation against compromise or discontinuance, the client may compromise or discontinue at will, leaving the attorney to his remedy by an action on quantum meruit—Succession of Carbajal, 71 So 774, 139 La 481

(2) A client, discharging attorneys employed on a contingent fee of two thousand dollars and settling the case, was at least liable on quantum meruit, if not on the contract, having put it out of the attorneys' power to complete the contract—Lane v. Gooding, 193 P. 670, 69 Colo 216.

(3) Where the consideration received by plaintiff for the cause of action was so intermingled in the settlement agreement that it was impossible to say how much plaintiff gained from the cause of action, an attorney who was to receive one fourth of the amount recovered on the cause of action was entitled to payment on the basis of what his services were fairly and reasonably worth—Nic Projector Corporation v. Movie-Jecktor Co., (D.C N.Y) 16 F Supp 605.

Liability of third person

(1) Defendant in a suit owes plain-

ly, where an attorney is employed upon a contingent fee, and the matter is compromised, with or without his consent, if the result arrived at, no matter what its form, is in effect substantially the same as that upon which his contract fee is based, he may recover the full compensation fixed in the agreement, but, if it differs materially, he is limited to a quantum meruit.[44]

If the party compromises the suit or dismisses it without receiving any consideration, the attorney is entitled to nothing under the contract,[45] his remedy being an action for damages,[46] or an action upon a quantum meruit for the value of the services actually rendered.[47]

Where the client compromises for less than the face of his claim, the stipulated method of computing the compensation to be paid the attorney for his services must control, even though the suit is settled without his consent,[48] unless the agreement contains a void clause prohibiting settlement,[49] and it has been held that the entire compensation stipulated for may be recovered in such

tiff's attorneys no duty to see that plaintiff complies with his contract for contingent fees, and, if plaintiff wrongfully compromises the suit to the injury of his attorneys, their remedy, if any, is a suit against plaintiff, and not against defendant. —Wheeler v Fronhoff, (Tex Civ.App.) 270 S W. 887.

(2) Husband and wife, suing to cancel their oil lease, had power to compromise the suit without consent of their attorney, although they had contracted with him not to do so, and defendant lessees were not liable to the attorney for such breach of contract by his clients unless in compromising defendants acted with a wrongful purpose—Finkelstein v Roberts, (Tex Civ App) 220 S W 401, dismissed for want of jurisdiction.

(3) However, where an attorney to bring action against a railroad for a contingent fee was dismissed before suit and action was commenced by other attorneys, who, after conducting litigation for four years, made a settlement with the railroad, which acted in good faith, the attorney's claim, if any, was not against the railroad but against the client—Rawlings v. Louisville & N. R. Co., 205 S W 681, 181 Ky 610.

Nonprofessional services

Objections by plaintiff's attorneys to dismissal of an employee's action against a railroad for personal injuries, on the ground that they were employed on a contingent basis, and had received no compensation for services rendered, and had advanced plaintiffs six hundred dollars to seven hundred dollars, in addition to retaining doctors to give him medical treatment, corroborated charges of improper conduct by attorneys, and to disclose that their relation to plaintiff had ceased to be merely professional—Weinard v Chicago, M. & St. P Ry. Co., (D C Minn) 298 F. 977.

44. Walker v. Wright, 236 P. 710, 28 Ariz 235

Substantial compliance

Where defendant client in writing agreed with plaintiff attorneys that, in the event he secured one half the money belonging to his wife as his sole property, or all of it passed into his control as community property, whether by court action or otherwise, the fee agreed to be paid plaintiffs should then become due, a compromise of the matter by defendant with his wife, without consent of plaintiffs, and which in effect irrevocably branded the money as community property, and secured to defendant a one-half interest therein beyond the power of the wife to dispose of, while not a literal compliance, was a substantial compliance with the contract, entitling plaintiffs to the agreed fee—Walker v. Wright, 236 P. 710, 28 Ariz 235

45. Colo—McPhail v. Spore, 162 P 151, 62 Colo 307.
Minn—Southworth v. Rosendahl, 158 N W. 717, 133 Minn 447
Miss—Lamar County v Tally & Mayson, 77 So 299, 116 Miss 588
Tex—Kelly v Gross, (Civ App) 4 S.W (2d) 296.
Wyo—Enos v Keating, 271 P 6, 39 Wyo 217, 67 A L R 430, rehearing denied 275 P 131, 39 Wyo. 217, 67 A L R 430
6 C.J. p 745 note 55.

Will contest

Where, after having plaintiff file a caveat in a will contest, and contracting to pay him one fourth of anything recovered, defendant, without plaintiff's authority, dismissed the action, which however, proceeded as to other caveators, plaintiff was not entitled to one fourth of the estate gained for defendant by the setting aside of the will—Boyd v. Johnson, 125 A 697, 145 Md 385.

46. Johnston v. Cutchin, 45 S E 522, 133 N C. 119.

47. U.S—Marquam v Vachon, (C C A Alaska) 7 F (2d) 607.
Cal—Ayres v. Lipschutz, 228 P 720, 68 Cal App 134—Hall v. Orloff, 194 P. 296, 49 Cal App 745.
Minn—Southworth v Rosendahl, 158 N W 717, 133 Minn 447
Tex—Kelly v. Gross, (Civ App) 4 S.W (2d) 296
Wyo—Enos v. Keating, 271 P 6, 39 Wyo. 217, 67 A L R. 430, rehearing denied 275 P. 131, 39 Wyo 217, 67 A L R 430
6 C J. p 745 note 57.

Discharge of attorney and settlement

A client may at any time, for any reason satisfactory to him, however arbitrary, discharge his attorney, and his settlement of a case without consulting his attorney is not a breach of the contract; but the attorney is limited to recovery of the reasonable value of services rendered—Marquam v Vachon, (C C.A Alaska) 7 F (2d) 607.

48. Ark—Davies & Davies v Patterson, 205 S W 118, 135 Ark 22
Kan—Carter v. Dunham, 177 P. 533, 104 Kan 59.
N Y—Lefkowitz v. Leblang, 187 N Y S. 520
6 C J. p 745 note 59.

Substantial performance

Where a contract between attorney and client provided for a certain contingent percentage of recovery, if by settlement without trial, and a higher percentage of recovery if by final judgment, and after reversal in the federal court the attorney dismissed, and sued in the state court, on compromise by client for the same amount for which judgment had once been procured, the attorney had substantially performed the contract, and was entitled to his fee based on the percentage for recovery by final judgment—Quinette v. Mitschrich, 235 P. 530, 109 Okl 281.

Agreed lump sum payment

An attorney holding a contract for a contingent fee is entitled to the lesser fee which his client procured him to name in case of settlement where the client, without replying, settled the case, thereby impliedly assenting to the attorney's offer to forego his contingent fee and receive instead the lump sum payment which he named—Laredo Nat Bank v Gordon, (C C A Tex) 61 F (2d) 906, certiorari denied 53 S Ct. 524, 289 U S 726, 77 L Ed 1476.

49. In re Snyder, 82 N E 742, 190 N.Y. 66, 123 Am S R 533, 14 L R A (N S) 1101, 13 Ann Cas. 441—6 C J. p 745 note 60.

a case,[50] although a contrary view has been taken.[51] The question as to the amount on which the percentage is reckoned in case of compromise or settlement is discussed infra § 191.

Settlement advised by attorney. Where an attorney advises his client to settle, he thereby waives his right to claim a contingent fee payable in the event the claim is prosecuted to final judgment.[52]

Proof of damages. Since an action by an attorney against his client for compromising a claim without notice is an action for damages, he must prove the damages that he sustained by such compromise,[53] which necessarily include proof that the suit would have been successful if no compromise had been made,[54] and that the claim if reduced to judgment would have been collectable.[55]

§ 190. Implied Agreements

a. In general
b Services covered

a. In General

Where the contract of employment contains no special agreement for compensation, there is an implied agreement to pay for the attorney's services, on the other hand a contract for compensation will not be implied in the face of an express contract therefor, but where the latter is void, or is nullified by mutual consent or act of the client, a contract may be implied

In the absence of special agreement and on the assumption that there is a valid retainer, there arises an implied agreement on the part of a client to pay a reasonable sum for the services of his attorney,[56] and, as shown supra § 162, contracts to pay retaining fees will be implied in some jurisdictions The question of what constitutes an employment sufficient to support an implied promise to pay for the services is discussed supra § 175.

Existence of express contract. The existence of an express contract for the payment of attorney's fees prevents the arising of a contract by implication;[57] and where one person is bound by an express contract to pay for services rendered, the law generally does not impose the same obligation on another by implication,[58] especially where such other is represented by his own counsel.[59] The attorney alone has no right to rescind an express contract,[60] but, where both parties assent to the abandonment thereof, an implied contract arises,[61] and in case the client sets aside the contract or procures it by misrepresentation, the attorney may resort to an implied contract on the part of the client to pay a fair amount as a fee.[62]

Void contract Where a contract between an attorney and a client is void, but not inherently malum in se or malum prohibitum, the attorney may recover a reasonable compensation for his services on a quantum meruit.[63] Accordingly, where the

50. Hill v Cunningham, 25 Tex. 25—6 C J p 745 note 62.

51. Ellwood v Wilson, 21 Iowa 523

Settlement pending happening of contingency

Where an attorney obtained judgment for the client and the adverse party appealed, whereupon pending the appeal the client and the adverse party, without the knowledge of the attorney, compromised, and subsequently the attorney procured an affirmance of the judgment, he was not entitled to recover the full amount specified in his contract as his fee in the event of an affirmance, but his remedy, if any, was on the quantum meruit for the value of his services up to the time of notice of the settlement—Ellwood v. Wilson, 21 Iowa 523

52. Robertson v National Spiritualists' Ass'n of United States of America, (Tex Civ App.) 25 S.W (2d) 339

53. Lynch v Munson, (Tex Civ.App) 61 S W 140

54. Merchants Nat Bank v Eustis, 28 S W 227, 8 Tex Civ App 350—6 C J p 745 note 64

55. Wilbur v Lane, 115 S W 298, 53 Tex Civ App 249—Lynch v. Munson, (Tex Civ.App) 61 S W. 140.

56. Fla—McGill v. Cockrell, 101 So. 199, 88 Fla 54
Ga—Fleming v Phinizy, 134 S E 814, 35 Ga App 792
La—Levin v Suffrin, (App) 167 So 911
Minn—Eriksson v Boyum, 184 N W 961, 150 Minn 192
Mo—Schaper v Sayman, (App) 61 S W (2d) 379—Leahy v. Lemp, (App) 214 S W 228
N Y—Evans v Princes Bay Oyster Co, 177 N Y S. 276—McDonald v Johns, 115 N Y S 695
Ohio—O'Brien v. Hackett, 20 Ohio N P (N S) 367
Vt—Paddock v. Kittredge, 31 Vt 378
6 C J p 747 note 89

Fee stipulated in note

It is implied that the attorney will be paid the fee stipulated in the note sued on or collected—Guilbeau v Marget Bros Co, 1 La App 357.

Dissension as to amount

A statement in a client's letter that she could pay the sum named for services in obtaining a divorce shows a mere dissension as to the amount of the fee and not a repudiation of liability for the reasonable value of the services; and the attorney could thereafter continue to perform services and recover the reasonable value thereof—Fleming v Phinizy, 134 S. E 814, 35 Ga App. 792

57. Wilmington v Bryan, 54 S E 543, 141 N C 666—6 C J p 747 note 90. See Keelin v. Moist, 192 Ill. App 520

58. Hill v. Childress, 10 Yerg (Tenn) 514

59. O'Brien v Hackett, 20 Ohio N P (N S) 367

60. Ga—Johnson v. Clarke, 22 Ga 541
Mo—White v. Wright, 16 Mo App 551

61. Holladay's Case, (C C Or) 27 F 830—6 C J p 747 note 95

62. Thompson v. Smith, (Tex Com App) 248 S W 1070, reversing Smith v. Thompson, (Civ App) 233 S W 876—6 C J p 747 note 96

63. Cal—Wiley v Silsbee, 36 P (2d) 354, 1 Cal App (2d) 520
Ill—Papineau v. White, 117 Ill.App. 51.
Neb—Hawood v Carter, 222 P. 280, 47 Neb 334.
N M—Baca v. Padilla, 190 P. 730, 26 N M 228, 11 A L R. 1188
N D—Simon v. Chicago, Milwaukee & St. P. Ry Co., 177 N.W. 107, 45

illegality was not in what the attorney was to do but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit for the reasonable value of his services; but when the illegality, either in whole or in part, is in the thing which he was to do, there can be no recovery upon a quantum meruit.[64]

b. Services Covered

Generally an attorney can recover for any lawful services he was requested to perform.

Provided an attorney's act is neither illegal nor criminal,[65] he may generally recover for rendering any services he has been requested to perform.[66] He may recover for advising with a sheriff about the levy of an execution,[67] for attendance at a hearing although the hearing is defaulted[68] or although the officer conducting the hearing was irregularly appointed,[69] for attendance at the taking of depositions, although the depositions were unnecessary,[70] for avoiding impending litigation,[71] for conducting a negotiation,[72] or for time spent in court while waiting for trial,[73] but where an attorney is detained over Sunday, he may not charge for attendance, because testimony may not legally be taken on that day.[74]

He may not recover for doing an act which he knows is useless[75] unless it was demanded by the client,[76] nor is he entitled to compensation both as broker and as attorney,[77] but business matters incidentally appropriate to his employment are included therein,[78] and it has been held that compensation for the reasonable value of services as attorney in fact may be recovered, although plaintiff also acted as attorney at law for defendant.[79] Disclosure to a fraternal benefit society of information concerning a fraudulent death claim paid by it is not the performance of "legal services;"[80] and an attorney cannot recover for assuming liability as an indorser of notes where there was no such arrangement in advance.[81]

§ 191. Value of Services and Amount of Compensation

a. Under implied agreement
b. Amount on which percentage reckoned
c. Right to interest
d. Power and discretion in determining amount of fee

a. Under Implied Agreement

(1) In general
(2) Facts and circumstances for consideration

N.D. 251—Moran v. Simpson, 173 N W 769, 42 N D 575
Wis—Stevens v. Felker, 28 Wis 594.
6 C J. p 747 note 97.

Indefinite contract

Indefiniteness of the original contract employing attorneys does not relieve the client of liability on quantum meruit after the attorneys' services had been rendered—Universal Oil Products Co v. Standard Oil Co of Indiana, (D C Mo) 1 F Supp. 612

Contract inherently malum in se

Where plaintiff and another person had prepared and caused to be circulated, for signatures, initiative petitions ostensibly for the purpose of having them filed with the secretary of state so that they could go upon the ballot, but actually for the purpose of extorting money for having them suppressed from parties who would be injuriously affected should the proposed legislation be enacted, and not filed with the secretary of state, and, to enable plaintiff to carry out his fraudulent purpose, he entered into an agreement with defendant that he would perform for defendant all legal services that he might require for four years without charge, if defendant would make a proposal to persons interested therein that plaintiff would withdraw such petitions from circulation and prevent the proposed measure from going upon the ballot if they would pay him the sum of twenty-five thousand dollars for doing so, and pursuant to such illegal agreement defendant made such proposals, it was held that the agreement was void as against public policy, and the attorney could not recover on the quantum meruit for services performed thereunder—Eastham v. Bechtel, 275 P. 670, 128 Or 673.

64. Baca v Podilla, 190 P. 730, 26 N M. 223, 11 A L R. 1188

65. Minn—Gammons v Johnson, 78 N W. 1035, 76 Minn 76
Tex—Arrington v Sneed, 18 Tex. 135.
6 C J. p 747 note 98

66. Ellwood v. Wilson, 21 Iowa 523—Hopkins v. Mallard, 1 Greene (Iowa) 117.

67. People's Nat Bank v. Geisthardt, 75 N W. 582, 55 Neb 232

68. Otis v. Forman, 1 Barb Ch (N Y) 30.

69. Taft v. Thomajan, 144 N E. 228, 249 Mass. 299

70. Kentucky Seminary v. Wallace, 15 B Mon.(Ky) 25.

71. McLean's Est, 5 Kulp (Pa.) 170

72. Breen v. Union R Co, 41 N Y.S 164, 9 App Div 122, affirmed 45 N E 1131, 151 N Y 645

73. Crowell v Truax, 54 N W. 384, 94 Mich 535

74. Frost v. Frost, 1 Barb Ch (N. Y.) 492.

75. N Y—Stockholm v. Robbins, 24 Wend 109.
S C—Gay v Capers, 5 S C L. 283, 6 S C L. 198

76. Tinney v. Pierrepont, 45 N Y S 977, 18 App.Div. 627—6 C J. p 748 note 9.

77. Walker v. American Nat Bank, 49 N Y 659.

78. Slade v. Harris, 135 A. 570, 573, 105 Conn. 436—6 C J. p 747 note 99 [a].
"The lawyer is, as was stated, 'something more than a mere loudspeaker for the law books' "—Slade v. Harris, supra.

79. Creely v. Cohen, 170 P 643, 35 Cal App 642.

80. Modern Woodmen of America v. Arnkens, 192 N E. 706, 99 Ind App. 344.

81. Davitt v. O'Connor, (C C.A N Y.) 73 F (2d) 43, certiorari denied O'Connor v Davitt, 55 S Ct. 217, 293 U S. 621, 79 L Ed. 709.

(1) In General

In the absence of an express agreement as to the amount of an attorney's compensation, an implied agreement arises, under which he is entitled to a reasonable compensation, measured by the reasonable value of his services.

An attorney is entitled to fees which are fair and just and will adequately compensate him for his services.[82] In the absence of an express agreement between him and his client, as to the amount of his compensation, an implied agreement arises with regard thereto, which stands on the same footing as like agreements between other parties,[83] and accordingly it is a well-settled rule that, when an attorney renders services, upon request or employment, without any agreement as to his fee, he is entitled to a fair, just, and reasonable compensation, which is measured by the reasonable value of the services rendered to the client,[84] and, according to the character and extent of the services rendered, this may exceed or fall short of the amount of taxable costs.[85] The general rule applies to special services performed by an attorney outside of his usual retainer.[86]

The reasonable value of an attorney's services cannot be determined by any fixed formula or regular measure of value;[87] and the fact that an at-

82. N J—In re Hahn, 94 A. 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas.1918B 830
Pa—In re Crawford's Estate, 160 A. 585, 307 Pa. 102.
Attorney's fees as to claims against United States see United States § 155 [65 C J p 1397 notes 34, 36]
Right of special attorney employed by alien property custodian without agreement as to compensation to recover reasonable value of services see War § 26 [67 C.J. p 398 note 17].

83. U S—Kline v. Blackwell, (C C A Fla.) 63 F.(2d) 897, certiorari denied 54 S Ct. 54, 290 U.S. 636, 78 L Ed 553
Cal—Young v Bruere, 243 P 801, 78 Cal App. 127—Batcheller v. Whittier, 107 P. 141, 12 Cal App 262
Ga—Fleming v. Phinizy, 134 S E 814, 35 Ga App 792
Vt—Platt v. Shields, 119 A. 520, 96 Vt 257.
6 C J p 748 note 16.

On election to office of attorney of an association, to which no salary is attached, the law implies a contract to pay a reasonable compensation and that emoluments pertaining to the office will be paid, in default of which the association is liable to the attorney—Ramsey v Brooke County Building & Loan Ass'n, 135 S E. 249, 102 W Va 119, 49 A L R 668
Operation and effect of express provision for compensation see supra § 182.

84. U S—Kline v. Blackwell, (C.C A Fla.) 63 F (2d) 897, certiorari denied 54 S Ct 54, 290 U.S. 636, 78 L Ed 553.
Ala—Bush v Bumgardner, 102 So 629, 212 Ala. 456—Martin v. Henderson, 68 So 478, 12 Ala App 564.
Ark—Terral v. Poe, 79 S W (2d) 69, 190 Ark. 346—White & Black Rivers Bridge Co v. Vaughan, 36 S.W. (2d) 672, 183 Ark. 450—Bayou Meto Drainage Dist v. Chapline, 220 S W. 307, 143 Ark. 446.
Cal—Elconin v Yalen, 282 P 791, 203 Cal 546—Batcheller v. Whittier, 107 P. 141, 12 Cal App 262
Fla—Munroe v. Birdsey, 136 So. 886, 102 Fla. 544, reversing 133 So 80, 102 Fla 543—F L Stitt & Co. v Powell, 114 So 375, 94 Fla. 550—U S Savings Bank v. Pittman, 86 So 567, 80 Fla 423.
Ga—O'Neal v. Spivey, 145 S E. 71, 167 Ga 176—Fleming v. Phinizy, 134 S E 814, 35 Ga App 792.
Ill—Crocker v. Boening, 247 Ill App 466
La—Russell v Simmons & Simmons, 155 So 441, 179 La 937—Gosserand v. Monteleone, 113 So 389, 164 La 397—Maloney v. Schulingkamp, 91 So 852, 151 La. 497.
Md.—Penrose v Page, 125 A 549, 145 Md 1
Mo—Mecartney v. Guardian Trust Co, 202 S W. 1131, 274 Mo. 224
N Y—In re Levy's Will, 201 N Y S 818, 207 App Div. 183—Brooklyn Heights R Co v Brooklyn City R Co, 109 N Y S 31, 124 App Div 896, affirmed 89 N E 1096, 196 N Y 502—In re Van Cortlandt's Estate, 193 N Y S 767, 118 Misc. 539
Ohio—Huling v. City of Columbus, 13 Ohio N P (N S) 409
Okl.—Maxwell v Yancy, 28 P.(2d) 989, 167 Okl 158—In re Pitman's Guardianship, 250 P. 1015, 120 Okl 199.
Va—Campbell County v. Howard, 112 S.E 876, 133 Va 19.
6 C.J. p 748 note 17

Similar statement of rule
"Where one employs an attorney at law to perform legal services, whether in a regular court procedure or otherwise, and there is not, at the time of such employment or subsequent thereto, an express agreement between the parties as to the amount the attorney is to be paid for his services, the law, under such circumstances, implies a contract upon the part of the one employing such attorney to pay him a reasonable compensation for such services"—F L Stitt & Co. v. Powell, 114 So. 375, 94 Fla. 550.

Assisting attorney
An attorney who, at the request of the principal attorney, performs services in the prosecution of the case is entitled, in the absence of any agreement for a particular fee or percentage of the fee, to the reasonable value of his services—Terral v. Poe, 79 S W (2d) 69, 190 Ark. 346.

Agreement to fix fees
An agreement between highway commissioners and attorneys employed by them to conduct a suit that the commissioners should fix the attorney's compensation on termination of the litigation requires the sum fixed to be reasonable and fairly commensurate with the services rendered—Miller v Washington County, 226 S W. 199, 143 Tenn. 488.

Compensation for collecting rents and making sales of realty should approach the basis of commissions payable to an agent—Davitt v O'Connor, (C.C A N Y) 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct 217, 293 U S 621, 79 L Ed 709

85. Smith v. Davis, 45 N H. 566—6 C J p 748 note 17 [e]

86. Shackleford v Arkansas Baptist College, 26 S W (2d) 124, 181 Ark 363

Not entitled to contingent fee
Where no agreement is entered into between attorney and client regarding the fee the attorney should be paid for special services coming outside of his usual retainer, he is not entitled to a contingent fee, but only to the reasonable value of the services rendered.—Shackleford v Arkansas Baptist College, 26 S W (2d) 124, 181 Ark 363.

87. Ark—Rachels v. Garrett, 240 S W. 1071, 153 Ark. 343
Del—Petitions of Warrington (Super) 179 A 505
La—Stumpf v. Lopez, (App) 154 So. 496
Vt—Platt v. Shields, 119 A. 520, 96 Vt. 257.
6 C.J p 750 note 19.
"There is no law and no absolute

torney is an officer of the court does not justify setting up the salaries paid by the state to its officials as a standard or limit of the amount of compensation to be paid to the attorney.[88] The measure of compensation is the reasonable value of the services rendered in themselves, and not the benefits to the client,[89] although, as noted in subdivision (2) hereof, the benefits or results secured may be considered as bearing on the efficiency of the services and thus on their reasonable value. It has been held, that an attorney is generally entitled to recover what he could have obtained under a contract made in advance.[90] Where the services are of a general nature the amount of compensation may be based on a monthly valuation of such services.[91]

As fixed by unaccepted offer. A client who accepts services rendered under an offer containing alternative propositions, neither of which was accepted by the client, must pay the reasonable value of the services, determined by the standard of compensation fixed by the propositions.[92]

Fee stipulated in note. Where an attorney arranges for the collection of a note, which provides for a specified fee, an agreement is implied that he will be paid the fee stipulated in the note,[93] and the fact that he sends a bill to his client for a minimum fee does not estop him from claiming the full amount due under such agreement.[94]

What law governs. The reasonableness of an attorney's fee is to be determined at the place where the attorney resides and practices, and not at the place where the services are rendered.[95]

(2) Facts and Circumstances for Consideration

(a) In general

(b) As to amount of retainer

(a) In General

The reasonableness of an attorney's fee, in a particular case, depends on the facts and circumstances thereof. Various factors are to be considered, among others the amount and character of the services rendered, the nature and character of the fee, the customary charge, and the financial ability or prominence of the client.

The reasonableness of the fee charged or allowed must be determined like any other fact in issue in a judicial proceeding, and in making such determination all the facts and circumstances of the particular case, including so far as applicable those enumerated herein below, must be taken into consideration.[96]

In determining what is a reasonable attorney's fee or allowance for legal services rendered, many and varied elements or factors are to be considered.[97] Among the principal elements or factors

rule fixing the value of attorney's fees"—Titche v. Hiller, 5 La.App. 375, 377

For services in collecting debt

"A reasonable counsel fee is such as would be proper for a litigant to pay his attorney for his services in collecting a debt"—Petitions of Warrington, (Del.Super.) 179 A. 505, 507

88. Hyde v. Moxie Nerve-Food Co., 36 N.E. 585, 160 Mass. 559.

89. N.Y.—People v. Delaware County, 45 N.Y. 196

Va.—Campbell County v. Howard, 112 S.E. 876, 133 Va. 19

90. Middleton v. Bankers' & Merchants' Tel. Co., (C.C.Pa.) 32 F. 524

91. Greater Savannah Co. v. Oliver & Oliver, 109 S.E. 166, 27 Ga.App. 496

Monthly salary

An attorney for a special deputy banking commissioner as liquidating agent in charge of an insolvent bank may be entitled to the regular compensation of one hundred fifty dollars monthly, rather than to separate fees for distinct services—Smith v. Kash, 69 S.W.(2d) 980, 253 Ky. 447

92. Scott v. New York Filling Co., 75 A. 772, 79 N.J.Law 231.

93. La.—Guilbeau v. Marget Bros. Co., 1 La.App. 357

Okl.—Geeslin v. Farney, 254 P. 45, 124 Okl. 120

94. Guilbeau v. Marget Bros. Co., 1 La.App. 357.

95. Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6

Iowa.—Stanbery v. Dickerson, 35 Iowa 493.

American standard of reasonable value of legal services as modified by the fact that the services were rendered in Paris, and not the Paris standard alone, is the standard which must govern in determining the fee of an American attorney who chooses to sue therefor in America, where the cause in which the services are rendered is pending—Griffin v. McCarthy, 24 P.(2d) 595, 174 Wash. 74, certiorari denied 54 S.Ct. 561, 291 U.S. 653, 78 L.Ed. 1047

96. Ark.—Bayou Meto Drainage Dist. v. Chapline, 220 S.W. 807, 143 Ark. 446.

Cal.—Matthiesen v. Smith, (App.) 60 P.(2d) 873—Deberry v. Cavalier, 297 P. 611, 113 Cal.App. 30.

Ky.—Garrigus v. Gilbert, 4 Ky.L. 1001.

La.—Gosserand v. Monteleone, 113 So. 889, 164 La. 397—Stumpf v. Lopez, (App.) 154 So. 496.

Ohio.—Trustees of Cincinnati Southern Ry. v. Porter, 21 Ohio N.P.(N.S.) 441.

Va.—Bruce's Ex'x v. Bibb's Ex'x, 105 S.E. 570, 129 Va. 45.

6 C.J. p. 748 note 17.

Continuation of litigation after settlement

Where one sued for death by an executrix who had employed an attorney on a contingent fee of one half the proceeds, settled with the sole beneficiary, conceding liability for the attorney's fees up to notice of release, pleaded the release in bar and demanded dismissal and the executrix continued the action and established liability, fees payable to the attorney were not to be measured by the value of his services rendered before notice of defense and plaintiff might recover one half of damages as compensation for attorney and taxable costs—Davis v. New York Cent. & H.R.R. Co., 135 N.E. 277, 233 N.Y. 242, reversing 167 N.Y.S. 868, 181 App.Div. 223

97. U.S.—Blackhurst v. Johnson, (C.C.A.Mo.) 72 F.(2d) 644—Irwin v. Swinney, (D.C.Mo.) 45 F.(2d) 890—Straus v. Victor Talking Mach. Co., (C.C.A.N.Y.) 297 F. 791.

Ala.—Dent v. Foy, 107 So. 210, 214 Ala. 243—T. S. Faulk & Co. v.

to be considered are the amount and character of the services rendered, the nature, and importance of the litigation or business in which the services were rendered, the degree of responsibility imposed on, or incurred by, the attorney, the amount of money or the value of the property affected by the controversy, or involved in the employment, the degree of professional ability, skill, and experience called for and exercised in the performance of the services, and the professional character, qualifications, and standing of the attorney,[98] and also the amount recovered.[99]

Hobbie Grocery Co, 59 So 450, 178 Ala. 254.

Cal—City of Los Angeles v. Los Angeles-Inyo Farms Co, 25 P.(2d) 224, 134 Cal App 268

Fla—Munroe v. Birdsey, 136 So 886, 102 Fla 544, reversing 133 So 80, 102 Fla 543

Mass—Cummings v National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563

Mich—Baxter v. Szucs, 227 N W 666, 248 Mich 672

Miss—Brandon v Zerkowsky, 148 So 797, 167 Miss 186

S D—Wright v Wright, 237 N W 896, 899, 58 S D 612

98. U S—Blackhurst v Johnson, (C. C A Mo) 72 F.(2d) 644—Taylor v. Scarborough, (C C A N Y) 66 F (2d) 589—In re Osofsky, (D C N. Y) 50 F (2d) 925—Lewys v O'Neill, (D C N Y) 49 F (2d) 603—Shattuck v Pennsylvania R Co, (D C N Y) 48 F (2d) 346—Irwin v Swinney (D C Mo) 45 F (2d) 890—Straus v Victor Talking Mach Co, (C C A N Y) 297 F 791

Ala—Dent v. Foy, 107 So. 210, 214 Ala 243—T S. Faulk & Co. v Hobbie Grocery Co, 59 So 450, 178 Ala 254

Ark—Martin v Marsh & Marsh, 76 S W (2d) 965, 189 Ark 1157—Rachels v Garrett, 240 S W. 1071, 153 Ark 343—Valley Oil Company v Ready, 199 S W. 915, 131 Ark 531—Sain v Bogle, 182 S W 515, 122 Ark 14

Cal—In re Duffill's Estate, 206 P 42, 188 Cal 536—Matthiesen v Smith, (App) 60 P (2d) 873—Collins v Welsh, 37 P (2d) 505, 2 Cal App (2d) 103—City of Los Angeles v Los Angeles-Inyo Farms Co, 25 P (2d) 224, 134 Cal App 268—Deberry v Cavalier, 297 P 611, 113 Cal App 30.

Del—Petitions of Warrington, (Super) 179 A 505

Fla—Baruch v Giblin, 164 So 831—Munroe v Birdsey, 136 So 886, 102 Fla 544, reversing 133 So 80, 102 Fla 543—F L Stitt & Co v. Powell, 114 So 375, 94 Fla 550

Ga—Greyling Realty Corporation v. Lawson, 175 S E 453, 179 Ga 188

Ill—La Salle County Electric R. Co v Wylie, 196 Ill App 113

Iowa—Kelly, Shuttleworth & McManus v. Central Nat Bank & Trust Co of Des Moines, 218 N W 9, supplemented 250 N W 171

Kan.—Epp v Hinton, 170 P 987, 102 Kan. 435.

Ky—Baxter v. Hubbard, 47 S W (2d) 743, 243 Ky 751—Daly v. Power, 33 S W (2d) 305, 236 Ky. 426—Moore v Stanfill, 31 S W (2d) 610, 235 Ky 372—Axton v. Vance, 269 S.W. 534, 207 Ky 580—Irvine v. Stevenson, 209 S W. 7, 10, 183 Ky 305.

La—Naef v Miller-Goll Mfg Co, 147 So 52, 176 La. 979—Peltier v Thibodaux, 144 So. 903, 175 La. 1026—Gosserand v. Monteleone, 113 So 889, 164 La. 397—Succession of Percival, 70 So. 505, 138 La 543—Tannenbaum v. Horn, (App) 160 So 462—Adams v Simon, (App) 144 So 73—Titche v Hiller, 5 La. App 375

Md—McClusky v. Kalben, 175 A 449, 167 Md. 479—Knapp v. Knapp, 134 A 24, 151 Md 131—Page v Penrose, 127 A. 748, 147 Md 225—Fletcher v. Ellosser, 94 A. 776, 126 Md. 244

Mass—Cummings v. National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563

Mich—Behr v. Baker, 238 N W. 473, 255 Mich 607—Baxter v Szucs, 227 N W 666, 248 Mich 642—Fry v Montague, 218 N W 691, 242 Mich 391.

Miss—Brandon v Zerkowsky, 148 So 797, 167 Miss 186.

Neb—In re Moore's Estate, 225 N W 705, 118 Neb 568

N Y—Apfel v Auditoire, 228 N.Y.S 489, 223 App Div 457, affirmed 166 N E 339, 250 N Y 600—Bank of Manhattan Trust Co v Ellda Corporation, 265 N Y S 115, 147 Misc 374, reversed on other grounds Jewett v Commonwealth Bond Corporation, 271 N Y S 522, 241 App Div 131, motion granted 196 N E 576, 267 N Y. 554—In re People, by Beha, 242 N Y S 100, 136 Misc 715—In re Van Cortlandt's Estate, 193 N.Y S 767, 118 Misc 539

N D—Nelson v Auch, 245 N W 819, 62 N D 594

Ohio—Trustees of Cincinnati Southern Ry v. Porter, 21 Ohio N P (N S) 441.

Or—Schmals v. Arnwine, 246 P. 718, 118 Or 300.

Pa—Hanley v. Waxman, 80 Pa Super 274—Smith's Estate, 6 Pa Dist & Co 793.

R I—Page v. Avila, 177 A 541

S D—Wright v Wright, 237 N W 896, 58 S D. 612.

Tex—Brand v. Denson, (Civ App) 81 S W.(2d) 111—Texon Oil & Land Co of Delaware v. Hanszen, (Civ App.) 292 S W. 563.

Vt—Platt v Shields, 119 A. 520, 535, 96 Vt 257.

Va—Campbell County v Howard, 112 S E 876, 133 Va. 19—Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va 45

Wash—Donworth & Todd v. Benton County, 174 P 441, 103 Wash 382

W Va—Stafford v Bishop, 127 S E 501, 98 W.Va 625.

6 C J p 750 note 21, p 751 notes 23–27.

After discharge

The amount in controversy is properly considered in ascertaining a reasonable fee for an attorney entitled to a quantum meruit compensation after discharge from a contingent employment contract.—Bryant v Browning, (Tex.Civ App) 48 S W (2d) 798

Appearance merely nominal

Where the lien of an estate against the land involved in an action by a purchaser against his vendor was not contested, so that the appearance for the estate in the action was merely nominal, an allowance of four hundred eleven dollars to the attorneys of the estate, will be set aside—McClellan v. Morris, 206 P. 575, 71 Colo 304

Increased care and responsibility, arising from the amount in controversy, is an element that may be considered in fixing the reasonable value of an attorney's services—Van Fleet v O'Neil, 192 P. 384, 44 Nev 216—6 C J p 751 note 24 [a].

Reasonable necessity for services

(1) Performance of services by an attorney does not entitle him to a quantum meruit remuneration, unless they were reasonably necessary to protect the client's rights—In re Spanier's Estate, 266 N Y S 541, 148 Misc 879, affirmed 269 N Y S 916, 241 App Div 615

(2) Under a contract to draw legal documents, with additional compensation for court work, court services in securing the approval of a roll are to be considered in determining the reasonable value of the services, although approval was not required by statute—Neal v Drainage Dist No. 2 of Ada County, 248 P. 22, 42 Idaho 624

99. Ark—Stuart v Barron, 230 S W 569, 148 Ark 380.

N J—In re Hahn, 94 A 953, 84 N J Eq 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830

The amount of recovery is im-

The labor, time, and trouble involved and expended by the attorney, are also elements to be considered,[1] although it has been held that the element of time is of minor importance, and standing alone is not a basis for compensation.[2] Time, in this connection, means the length of time employed by the attorney in preparation for, and trial of, the case, and not the length of the time the litigation has been permitted to remain in court.[3]

The benefit or result secured for the client is also an important element to be considered in determining the value of an attorney's services,[4]

portant and should be used as a basis for decision, taking into consideration the ability of counsel, the nature and extent of the services rendered, and the result obtained—Marlin v Marsh & Marsh, 76 S.W.(2d) 965, 189 Ark 1157

1. U S—Blackhurst v. Johnson, (C C A Mo) 72 F (2d) 644—Taylor v Scarborough, (C C A N Y.) 66 F. (2d) 589—In re Osofsky, (D C N Y.) 50 F (2d) 925—Irwin v. Swinney, (D C Mo) 45 F.(2d) 890—Straus v Victor Talking Mach Co, (C.C A N Y.) 297 F 791.
Ala—Dent v. Foy, 107 So. 210, 214 Ala 243.
Ark—Rachels v. Garrett, 240 S W. 1071, 153 Ark 343—Valley Oil Company v Ready, 199 S W. 915, 131 Ark. 531—Sain v Bogle, 182 S W 515, 122 Ark 14
Cal—In re Duffill's Estate, 206 P. 42, 188 Cal 536—Matthiesen v. Smith, (App) 60 P (2d) 873.
Del.—Petitions of Warrington, (Super) 179 A. 505
Fla—Baruch v. Giblin, 164 So 831.
Ga—Greyling Realty Corporation v Lawson, 175 S E. 453, 179 Ga. 133
Ill.—La Salle County Electric R Co. v Wylie, 196 Ill App 113.
Iowa.—Kelly, Shuttleworth & McManus v. Central Nat Bank & Trust Co. of Des Moines, 248 N W 9, supplemented 250 N W 171.
Ky—Baxter v. Hubbard, 47 S W. (2d) 743, 243 Ky 751—Daly v Power, 33 S W.(2d) 305, 236 Ky 426—Axton v. Vance, 269 S W. 534, 207 Ky 580—Irvine v Stevenson, 209 S W 7, 10, 183 Ky 305
La—Gilmore v. Gasquet, 151 So 763, 178 La 437—Nasf v. Miller-Goll Mfg. Co, 147 So 52, 176 La 979—Succession of Percival, 70 So 505, 138 La 343
Mass.—Cummings v National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563
Mich—Baxter v Szucs, 227 N W 666, 248 Mich 672—Fry v Montague, 218 N W 691, 242 Mich 391
N Y—Bank of Manhattan Trust Co v Ellda Corporation, 265 N Y S 115, 147 Misc 374, reversed on other grounds Jewett v. Commonwealth Bond Corporation, 271 N Y S 522, 241 App Div 131, motion granted 196 N E 576, 267 N Y 554—In re People, by Beha, 242 N Y S 100, 136 Misc 715—In re Van Cortlandt's Estate, 193 N Y S. 767, 113 Misc 539
N D—Nelson v Auch, 245 N W. 819, 62 N.D. 594.
Ohio—Trustees of Cincinnati Southern Ry v Porter, 21 Ohio N P (N S) 441
Or—Schmalz v. Arnwine, 246 P 718, 118 Or 300
Pa—Scott v Bergdoll, 113 A 355, 270 Pa 324—Hanley v Waxman, 80 Pa Super 274—Hutchinson Machinery Co v Kazimer, 9 Pa Dist & Co 465—Smith's Estate, 6 Pa Dist & Co 793
S D—Wright v Wright, 237 N W 896, 58 S.D 612
Tex—Brand v Denson, (Civ App) 81 S W (2d) 111
Vt—Platt v. Shields, 119 A. 520, 525, 96 Vt 257
Va—Campbell County v. Howard, 112 S E 876, 133 Va 19
Wash—Donworth & Todd v Benton County, 174 P 441, 103 Wash 382
W Va—Stafford v Bishop, 127 S E 501, 93 W Va 625
6 C J. p 750 note 22

The intricacies of the facts and the law of the case may be considered—Deberry v Cavalier, 297 P 611, 113 Cal App 30

2. Mo—Trimble v Kansas City, etc, R Co, 100 S W. 7, 201 Mo 372
N J—In re Hahn, 94 A 953, 84 N J Eq. 523, motion denied 96 A 589, 85 N J Eq 510, Ann Cas 1918B 830

Time or labor alone is not sufficient in measuring the value of a lawyer's services.—Woodbury v Andrew Jergens Co, (D C N Y) 37 F (2d) 749.

3. Stucky v. Smith, 146 S W. 1128, 148 Ky 401, 405

Time necessary for services

"Certainly the time spent by an attorney in rendering legal services should be considered in determining what is a reasonable allowance for those services. In that connection, however, one must consider also what time was reasonably necessary for the services required"—Irwin v Swinney, (D C Mo) 45 F (2d) 890, 893

4. U.S—Blackhurst v Johnson, (C C A Mo) 72 F (2d) 644—Taylor v. Scarborough, (C C A N Y) 66 F (2d) 589—In re Osofsky, (D C N. Y) 50 F (2d) 925—Lewys v O'Neill, (D C N Y) 49 F (2d) 603—Shattuck v Pennsylvania R Co, (D C N Y) 48 F (2d) 346—Woodbury v Andrew Jergens Co, (D C N Y) 37 F (2d) 749—Straus v Victor Talking Mach Co, (C C A N Y) 297 F 791.
Ala—Dent v. Foy, 107 So. 210, 214 Ala 243.
Fla—Baruch v Giblin, 164 So 831—F L Stitt & Co v Powell, 114 So. 375, 94 Fla 550
Iowa—Kelly, Shuttleworth & McManus v. Central Nat Bank & Trust Co. of Des Moines, 248 N. W. 9, supplemented 250 N W 171.
Kan—Epp v. Hinton, 170 P 987, 102 Kan 435
Ky—Baxter v. Hubbard, 47 S W (2d) 743, 243 Ky. 751—Moore v Stanfill, 31 S W (2d) 610, 235 Ky 372—Axton v. Vance, 269 S W. 534, 207 Ky 580
La—Tannenbaum v. Horn, (App) 160 So 462—Adams v. Simon, (App) 144 So 73.
Md—Fletcher v. Hlosser, 94 A 776, 126 Md 241
Mass—Cummings v. National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563
Mich—Behr v Baker, 238 N.W 473, 255 Mich 607—Baxter v Szucs, 227 N W 666, 248 Mich 672—Fry v. Montague, 218 N W. 691, 242 Mich. 391.
N.Y—Bank of Manhattan Trust Co. v. Ellda Corporation, 265 N.Y S. 115, 147 Misc 374, reversed on other grounds Jewett v. Commonwealth Bond Corporation, 271 N.Y. S 522, 241 App Div 131, motion granted 196 N E 576, 267 N Y. 554—In re Campbell, 234 N Y S. 263, 130 Misc 511.
N D—Nelson v. Auch, 245 N.W. 819, 62 N D 594
Ohio—Trustees of Cincinnati Southern Ry v. Porter, 21 Ohio N P (N. S) 441
Okl—Cornelius v Smith, 175 P. 754, 73 Okl 217, 9 A L R 233
Or—Schmalz v. Arnwine, 246 P. 718, 118 Or 300
Pa—Hanley v. Waxman, 80 Pa Super. 274—Smith's Estate, 6 Pa Dist. & Co. 793
R I—Page v Avila, 177 A 541.
S D—Wright v Wright, 237 N W. 896, 58 S D 612
Tex—Brand v. Denson, (Civ App) 81 S W (2d) 111—Texon Oil & Land Co of Delaware v. Hanszen, (Civ. App) 292 S W 563
Vt—Platt v Shields, 119 A. 520, 525, 96 Vt 257
Va—Campbell County v. Howard, 112 S E 876, 133 Va 19—Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va 45
W Va—Stafford v Bishop, 127 S E. 501, 93 W Va. 625.
6 C J. p 752 note 28.

As material element

"The results accomplished by an

although other things besides material gain are involved,[5] but, it has been held that prospective benefits cannot be considered for such purpose.[6]

Other facts that may be considered include the cost of the attorney's reasonable traveling expenses,[7] the demand for his services by others,[8] the expenses incurred in following the case from court to court,[9] the overhead expenses of the attorney in maintaining his office,[10] the reasonableness and regularity of the employment,[11] the relationship between the parties,[12] and whether the attorney has been otherwise compensated than by the allowance he may receive.[13]

The value of one attorney's services, however, is not measured by the result attained by another attorney;[14] and compensation to an attorney cannot be based on a settlement between his client and third parties beyond the results factored by the suit wherein the attorney is engaged;[15] nor is the value of his services affected by the fact that the client, under the attorney's direction, worked up facts which enabled the attorney to win the case,[16] nor by the fact that the client employs other counsel to assist, after the regular attorney has substantially completed the transaction.[17]

The success or failure of an attorney's services for his client is not a test of the value of his fees,[18] but may be considered as a factor in determining such value.[19]

Services rendered to incompetent. The court has the power to fix the compensation of an attorney for an incompetent, based on the reasonable value of the services rendered.[20] Where services are rendered in behalf of an infant as guardian ad

attorney for his client constitute a material element in the value of the legal services"—McDougal v. Black Panther Oil & Gas Co., (C.C.A.Okl.) 277 F. 701, 707—6 C.J. p. 752 note 28 [a].

Services incidental to sustaining trust

In determining the reasonable amount of fees to be allowed attorneys for trustees whose services resulted in preserving the trust estate, the services rendered by the attorneys in connection with controversies as to certain features of the trust, as to which they were unsuccessful except to the extent of securing a decision that those features did not invalidate the entire trust, may be considered.—In re Duffill's Estate, 206 P. 42, 188 Cal. 536.

Skill, diligence, and legal knowledge of counsel in a lawsuit, as affecting his right to recover compensation, should be measured in a large degree by the result of the litigation, and not by the number of pleadings filed, or their length, or the number of times counsel appeared in court, or the number of hours consumed in oral argument.—Cornelius v. Smith, 175 P. 754, 73 Okl. 217, 9 A.L.R. 233.

5. Terriberry, Rice & Young v. Stewart, 120 So. 70, 71, 9 La.App. 708.

"Other things besides material gain influence clients in the employment of professional services. Motives of anger, an outraged sense of justice, or sentimental considerations, influence human conduct in this regard as in all other forms of activity."—Terriberry, Rice & Young v. Stewart, supra.

6. Scheinesohn v. Lemonek, 95 N.E. 913, 84 Ohio St. 424, Ann.Cas.1912C 737—6 C.J. p. 752 note 28 [c].

7. Tasker v. Cochrane, 271 P. 503, 94 Cal.App. 361—6 C.J. p. 748 note 17 [c] (2), p. 750 note 22 [e].

8. Cummings v. National Shawmut Bank of Boston, 188 N.E. 489, 284 Mass. 563.

9. Epp v. Hinton, 170 P. 987, 102 Kan. 435.

10. Cal.—Tasker v. Cochrane, 271 P. 503, 94 Cal.App. 361.

Mich.—Reichert v. Metropolitan Trust Co., 253 N.W. 313, 266 Mich. 322.

N.Y.—In re Plimpton's Estate, 186 N.Y.S. 257.

Exclusive employment

"Ordinarily, an attorney's office expense is absorbed in the charge for services. However, when he gives his entire time almost exclusively to a particular retainer for a considerable period, so that his office facilities are devoted in a large degree to such employment, and when no extra charge is made for disbursements, the cost of maintaining his office should be considered in fixing the fee. Office expenses, commonly termed overhead, absorb so large a part of the gross fees of a professional man that, when his entire time is given to one client, such expenses must be considered in fixing the compensation"—Reichert v. Metropolitan Trust Co., 253 N.W. 313, 317, 266 Mich. 322.

11. Ark.—Rachels v. Garrett, 240 S.W. 1071, 153 Ark. 343.

Ky.—Smith v. Kash, 69 S.W.(2d) 980, 253 Ky. 447.

"An attorney who is regularly employed, and whose time is largely taken up with the work of a particular client, [should not be allowed] the same fees that are usually allowed for specific services rendered at different times, and under different employments"—Smith v. Kash, 69 S.W.(2d) 980, 981, 253 Ky. 447.

12. Rachels v. Garrett, 240 S.W. 1071, 153 Ark. 343.

13. Irwin v. Swinney, (D.C.Mo.) 45 F.(2d) 890.

14. Tillman v. Komar, 181 N.E. 75, 259 N.Y. 133, reversing In re Tillman, 254 N.Y.S. 918, 234 App.Div. 752.

15. Behr v. Baker, 233 N.W. 473, 255 Mich. 607.

16. Axton v. Vance, 269 S.W. 534, 207 Ky. 580.

Reason for rule

"In honorable practice the lawyer is not supposed to furnish the facts for his client, or the witnesses to prove them. The lawyer's function is to develop the issue and present to the court the evidence supplied or secured by the client"—Axton v. Vance, 269 S.W. 534, 537, 207 Ky. 580.

17. Child v. Mastin, 204 N.W. 947, 164 Minn. 217.

In connection with sale

Where defendant owner of a farm agreed to pay plaintiff, his attorney, for services, one half of the sum it sold for over a specified amount, and later employed other counsel, who, after an exchange of the property in question for other property, performed services in connection with the transaction, defendant was not entitled to charge for such attorney's services in an accounting with the regular attorney.—Child v. Mastin, 204 N.W. 947, 164 Minn. 217.

18. Titche v. Hiller, 5 La.App. 375.

19. U.S.—Irwin v. Swinney, (D.C.Mo.) 45 F.(2d) 890.

Cal.—In re Duffill's Estate, 206 P. 42, 188 Cal. 536—Collins v. Welsh, 37 P.(2d) 505, 2 Cal.App.(2d) 103—City of Los Angeles v. Los Angeles-Inyo Farms Co., 25 P.(2d) 234, 134 Cal.App. 268.

20. In re Campbell, 224 N.Y.S. 263, 130 Misc. 511.

As required by statute

Under a statute authorizing an at-

litem, or otherwise, the attorney is entitled to have the compensation therefor fixed as for similar services rendered to an adult,[21] except that where he acts as guardian ad litem for an infant having no estate, his fees are taxed as part of the costs, and are little more than nominal fees.[22]

Services to trust or charity. Compensation for services rendered by an attorney to a public trust or charity must be moderate, more so perhaps than if rendered to an individual or private concern.[23]

Services of different character. It has been held that where an attorney is employed to render both legal and clerical services he should be compensated for the clerical work on the basis of clerical services.[24] On the other hand, it has been held that where he is required by his employment to devote his entire time to services not strictly legal, it is just that he should be compensated at the same rate as for legal services,[25] as where, under an employment by a bank, he is required to devote his entire time to the affairs of the bank to rescue it from financial straits.[26] An attorney employed to abstract and examine the title to land is not restricted in his fee therefor to what is usually charged by professional abstracters for such service.[27] Merely clerical services of an attorney's employees are not compensable at the same rate as services by a duly admitted attorney.[28]

Character of fee. It being a recognized rule that an attorney may properly charge a much larger fee when it is to be contingent than when it is not, the character of the compensation, as whether the fee is absolute or contingent, is an element to be considered in determining the reasonableness of the fee,[29] although there is authority to the contrary.[30] Whether a contingent fee is excessive cannot be determined by the sum ultimately due thereunder, as such sum depends on the amount the client receives.[31]

Customary or usual charges. The customary charges or fees, if any, for similar services is an important element to be considered in determining the reasonable value of services rendered by an attorney,[32] and not what the attorney thinks is reasonable;[33] and speaking generally, in the absence of a special contract, an attorney is entitled to the amount that is reasonable and customary in the same vicinity for services of like kind, per-

torney to contract with an infant's guardian to prosecute any claim for the benefit of the infant on a contingency basis, but requiring the court, on recovery of a judgment or on the compromise and settlement of the claim, to fix the attorney's compensation, the court must in every such case determine the attorney's reasonable compensation before the attorney has any right to any pecuniary return for his services—In re Jeromer, 239 N.Y.S. 304, 228 App. Div. 123.

21. Ark—Stuart v. Barron, 230 S. W. 569, 148 Ark 380
Ky—Irvine v Stevenson, 209 S.W. 7, 183 Ky 305
Tenn—Roberts v. Vaughn, 219 S.W. 1034, 142 Tenn 361, 9 A.L.R. 1528
6 C.J. p 752 note 37

Amount of recovery

The court in fixing the amount of fees of attorneys for infants may properly take into consideration the amount recovered by the infants in the proceedings—Stuart v. Barron, 230 S.W. 569, 148 Ark. 380

22. Yourie v Nelson, 1 Tenn Ch. 614

23. Ohio—Trustees of Cincinnati Southern Ry. v. Porter, 21 Ohio N.P. (N.S.) 441
Pa—In re Crawford's Estate, 160 A. 585, 307 Pa. 102

Attorneys engaged in the administration of estates in courts of the United States and in litigations affecting property within the jurisdiction of such courts should be awarded only a moderate compensation—In re New York Investors, (C.C.A.N.Y.) 79 F.(2d) 182

24. Vaughan v Woodruff-Prairie Road Imp. Dist. No. 6, 250 S.W. 870, 158 Ark. 236

25. Page v Penrose, 127 A. 748, 147 Md. 225

26. Page v Penrose, supra.

Reason for rule

"Because it was not such work as ordinarily required the services of a lawyer, it must have been contemplated both by him and the bank that his employment as a lawyer covered not only such legal services as might be required, but also such services as a bank executive might be required and expected to give, and the compensation for his services as a lawyer would also cover such executive services as he might be called upon to render in an effort to save the bank from failure."—Page v Penrose, 127 A. 748, 749, 147 Md. 225

27. Wright v. Union Cent. Life Ins. Co., 11 Ohio S. & C. P. 131, 8 Ohio N.P. 232

28. In re Spanier's Estate, 266 N.Y.S. 541, 148 Misc. 879, affirmed 269 N.Y.S. 916, 241 App.Div. 615.

29. U.S—Irwin v. Swinney, (D.C.Mo.) 45 F.(2d) 890.
Kan—Epp v. Hinton, 170 P. 987, 102 Kan. 435
Minn—McCaughey v. Wilson, 153 N.W. 310, 130 Minn. 196.
N.Y—In re Campbell, 224 N.Y.S. 263, 130 Misc. 511
S.D—Wright v. Wright, 237 N.W. 896, 58 S.D. 612
Tex—Texon Oil & Land Co. of Delaware v. Hanszen, (Civ.App.) 292 S.W. 563.
Vt—Platt v. Shields, 119 A. 520, 525, 96 Vt. 257.
Va—Campbell County v. Howard, 112 S.E. 876, 133 Va. 19.
6 C.J. p 752 note 29

A reasonable fee is "such a fee as would be reasonable for a litigant himself to pay his own attorney for prosecuting the case, and not a speculative or contingent fee based upon the uncertainty of the litigation"—Southland Life Ins. Co. v. Norton, (Tex.Com.App.) 5 S.W.(2d) 767, 768—City of Eastland v. Owen, (Tex.Civ.App.) 49 S.W.(2d) 531, 535, reversed on other grounds (Com.App.) 78 S.W.(2d) 178

30. Mich—Walbridge v. Barrett, 76 N.W. 973, 118 Mich. 433
N.Y—O'Neill v. Crane, 72 N.Y.S. 812, 65 App.Div. 358

31. Waugh v. Q. & C. Co., (C.C.A.Ill.) 16 F.(2d) 363.

32. Conn—Slade v. Harris, 135 A. 570, 105 Conn. 436
Ill—People v. Gilbert, 104 N.E. 1083, 263 Ill. 85
Ky—Baxter v. Hubbard, 47 S.W.(2d) 743, 243 Ky. 751.
6 C.J. p. 750 note 18.

33. Reynolds v. McMillan, 63 Ill. 46.

formed under like conditions and circumstances.[34] Employment of an attorney with knowledge of his rate of charges, without stipulating as to price, may be regarded as evidence of a contract to pay at such rate;[35] but the fact that the client, when informed, during the pendency of a suit, of the charges his attorney is making, fails to express dissatisfaction, is not an acquiescence in those charges, and does not bind him to pay at such rate for future services in the same suit.[36] An unentered order fixing the compensation of an attorney for services rendered cannot control the amount of recovery in a subsequent action for such services.[37]

Bar association schedule of charges. In determining the reasonableness of an attorney's fee, the schedule of minimum fees prescribed by the local bar association is persuasive, but not conclusive, of the reasonable value of the services;[38] and in the absence of a special or implied agreement, a client is not necessarily bound to pay according to the rates prescribed by the rules and regulations of the bar association.[39]

Itemized services and charges. Where the services all relate to one subject matter, it forms no just measure of the value of the services to separate the transaction into parts and have the attorney state what charge he made for each separate part.[40] Where the trial court has before it a detailed statement as to the extent of the services rendered, it is the court's province to use its own experience and judgment as to the reasonable value thereof.[41]

Joint employment. Where a number of attorneys are associated they are entitled to a reasonable fee for all of them, and one of them cannot, by accepting from the joint client less than a reasonable fee, deprive the other attorneys of such a fee,[42] nor can one attorney by putting in a claim for a specified fee, without the acquiescence of the other, limit the right of the latter to recover a different fee.[43] So, where an attorney is employed by several parties in the same case, all but one of whom agree to pay him a fixed fee, the other party is not bound by such agreement, and the attorney may charge him only the reasonable value of his services.[44]

Financial ability or prominence of client. The financial ability of a client may be taken into consideration, not for the purpose of enhancing the amount above a reasonable compensation,[45] but for the purpose of determining whether or not he is able to pay a fair and just compensation for the services rendered,[46] and as a factor in determining the value of the attorney's services,[47] or as an incident in ascertaining the importance and

34. U S —Irwin v Swinney, (D C. Mo) 45 F (2d) 890
Fla —Baruch v Giblin, 164 So 831—Munroe v Birdsey, 136 So 886, 102 Fla 544, reversing 133 So 80, 102 Fla 543
Ga.—Greater Savannah Co v. Oliver & Oliver, 109 S E 166, 27 Ga App 496
Ill.—Hirtzel v Ball, 205 Ill App 244
Mass —Cummings v National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563
N C —Forester v Betts, 103 S E. 209, 179 N C 681
Vt —Platt v Shields, 119 A. 520, 525, 96 Vt. 257
W Va —Stafford v Bishop, 127 S E 501, 98 W Va 625
"An attorney is entitled to receive for his professional services what he reasonably deserves for the same in accordance with the charges for any given type of work prevailing in the community in which the services are rendered"—Page v Avila, (R I) 177 A. 541, 542.

35. Vilas v Downer, 21 Vt 419.

36. Vilas v. Downer, supra.

37. Naumer v. Gray, 58 N Y S 476, 41 App Div 361.

38. Ala —Dent v. Fry, 107 So. 213, 214 Ala 251.
La —Succession of Roger, 139 So. 8, 173 La 925

39. Boylan v Holt, 45 Miss 277

40. Cal —Cullinan v. McColgan, 263 P 353, 87 Cal App 684
Wash —Moore v Scharnikow, 94 P 117, 48 Wash 564

41. Clarke v Angelus Memorial Ass'n, (Cal App) 58 P (2d) 974.

42. Snell v Frank Snell Sawmill Co, (D C Ga) 271 F 696, affirmed (C C A.) Turner Lumber Co v Wilson & Bennett and J C Reynolds & Rogers, 283 F 1021, and affirmed Snell v Frank Snell Sawmill Co, 284 F 847, certiorari denied 43 S Ct 364, 261 U S. 619, 67 L Ed 830

43. Barrow v Milling, Godchaux, Saal & Milling, 146 So. 475, 176 La 703

44. West v Meillmier, 289 S W. 321, 172 Ark 485.

Nephew and nieces not bound by uncle's contract
Nephew and nieces who agreed with their uncle to pay one half the reasonable value of services of attorney employed by the uncle to obtain settlement from an estate in which all were interested were not bound by the uncle's contract retaining attorneys on a fifty per cent contingent fee basis, but were liable for only one half of the reasonable fee of attorneys —In re Dugan's Estate, 264 N Y S 683, 147 Misc. 776.

45. Stevens v Ellsworth, 63 N W 683, 95 Iowa 231—6 C J. p 752 note 31.

46. U S —Ward v Kohn, (Ark.) 58 F 462, 7 C C.A 314
Tenn —Greggory v Greggory, 1 Tenn. App 570.

In making his charge an attorney should consider the client's financial standing, and where the client is without means and ability to earn more than ordinary wages the charge should be small, compared with that usually charged for similar services —People v. Pio, 139 N E 45, 308 Ill 128

47. Fla.—Baruch v. Giblin, 164 So. 831.
La —Adams v Simon, (App) 144 So 73.
Mo —Schaper v. Sayman, (App) 61 S W (2d) 879
Mont.—Walker v Hill, 300 P 260, 90 Mont. 111.
N Y —French v Robert S Abbott Pub Co, 228 N Y S 62, 223 App. Div 276, affirmed 168 N E. 437, 251 N Y 586.

gravity of the interests involved in the litigation.[48] The prominence of a litigant is ordinarily entitled to no consideration in fixing the value of his attorney's services, although it may sometimes be taken into consideration in fixing the value of the legal services rendered.[49]

Sustaining, setting aside, or reducing or increasing fee. A particular fee or allowance for legal services rendered will be sustained, if on a consideration of all the facts and circumstances, in accordance with the rules stated above, the amount thereof is determined to be sufficient, and reasonable and proper,[50] or not so excessive as to re-

Pa—Hanley v Waxman, 80 Pa Super. 274.
W Va—Garden v Riley, 183 S E 46. 6 C J p 752 note 30

Services for inmate of asylum

An attorney's fee for services in procuring the release of an inmate of an insane asylum is not to be measured by the client's wealth or by the blessing of freedom—Goldbacher v Cooley, 5 Pa Dist & Co. 34.

Wealth of husband

Lawyers testifying with respect to the value of the services of an attorney in effecting a reconciliation between husband and wife may properly take into consideration the wealth of the husband—Walker v. Hill, 300 P. 260, 90 Mont 111.

In North Dakota, it has been said that "the ability or inability of the defendant has nothing to do with the lawyer's right to recover He is entitled to a judgment for the reasonable value of his services, regardless of the ability or inability of his client to pay, and his financial condition cannot be considered in determining such reasonable value"—Nelson v Auch, 245 N W. 819, 822, 62 N D 594.

48. Clark v. Ellsworth, 73 N W. 1023, 104 Iowa 442.

49. Fla—Baruch v. Giblin, 164 So. 831
Iowa—Graham v Dubuque Specialty Mach Works, 114 N W 619, 138 Iowa 456, 15 L R A (N S) 729

50. U S—Blackhurst v Johnson, (C C A Mo) 72 F (2d) 644—Taylor v Scarborough, (C C A N Y) 66 F (2d) 589—In re Diamond Drilling & Exploration Co, (D C Pa) 44 F (2d) 416—Grant v. Fletcher, (D C Mich) 283 F. 243
Ark—Marlin v Marsh & Marsh, 76 S W.(2d) 965, 189 Ark 1157—Kerby v Feild, 38 S W (2d) 308, 183 Ark 714—St. Paul Fire & Marine Ins Co v Green, 29 S.W (2d) 304, 181 Ark 1096—Federal Land Bank of St Louis v Gladish, 2 S W (2d) 696, 176 Ark 267—West v Meillmier, 289 S W 321, 172 Ark 485
Cal—City of Los Angeles v Los Angeles-Inyo Farms Co., 25 P (2d) 224, 134 Cal App. 268—Adams v. Christopher, 5 P (2d) 948, 119 Cal App. 40—Campbell v Hanford, 227 P 234, 67 Cal App 155.
Colo—Albertson v. Clark, 197 P. 757, 70 Colo 129
Fla—Baruch v. Giblin, 164 So. 831—F L Stitt & Co v Powell, 114 So 375, 94 Fla. 550
Ill—Chicago Assets Co v Watrous, 262 Ill App 251—Western Iron Co v. Brittain, 206 Ill App 14—Meers v. Daley, 203 Ill App 515
Ky.—Axton v Vance, 269 S W. 534, 207 Ky 580
La.—J S Abercrombie Co v. Lehulu Oil Co, 160 So 126, 181 La 644—Succession of Marinoni, 169 So 562, 185 La 527—Gilmore v. Gasquet, 151 So 763, 178 La. 437—Naef v. Miller-Goll Mfg Co, 147 So 52, 176 La 979—Barrow v Milling, Godchaux, Saal & Milling, 146 So. 475, 176 La 703—Peltier v Thibodaux, 144 So 903, 175 La 1026—Succession of Roger, 139 So 8, 173 La 925—Succession of Pons, 77 So 515, 142 La 721, Ann Cas 1918D 939—Smith v Fisher, (App) 150 So 55—Dowling v Peyroux, 126 So 270, 12 La App 551—Terriberry, Rice & Young v Stewart, 120 So. 70, 9 La App 708—Kennedy v Consumers' Ice Co, 7 La App. 446
Mass—Shapiro v Bailen, 199 N E 315—Cummings v National Shawmut Bank of Boston, 188 N E 489, 284 Mass 563
Mich—McGraw v Lake Tp, 253 N. W 207, 266 Mich 38—Nahikian v. Mattingly, 251 N W 421, 265 Mich 138—Fry v. Montague, 218 N W. 691, 242 Mich 391
Minn—McCaughey v. Wilson, 153 N. W 310, 130 Minn 196
Neb—Blatchford v Palmer, 241 N.W. 757, 123 Neb 8
Nev—Harwood v. Carter, 222 P. 280, 47 Nev 334
N J—In re New Jersey Refrigerating Co, 142 A. 176, 103 N J Eq 5.
N M—Merrick v Deering, 236 P. 735, 30 N M 431.
N Y—Ward v Orsini, 152 N E 696, 243 N Y. 123, modifying 213 N.Y S 932, 215 App Div 795, which affirmed 211 N Y S 249, 125 Misc 407—Prager v. New Jersey Fidelity & Plate Glass Ins Co. of Newark, N J., 216 N Y S 400, 217 App Div. 630, modified on other grounds 156 N E 76, 245 N Y. 1, 52 A.L R 193—Griswold v. Herron, 212 N.Y S 16, 214 App Div 286—Petition of Ketchum, 191 N Y S 396, 199 App Div. 244—In re Lane's Estate, 265 N Y S 1037, 240 App Div. 763, modifying 264 N Y.S 438, 147 Misc. 138—In re Abruzzo's Estate, 249 N Y S 72, 139 Misc. 559
Okl—Testerman v Burt, 289 P. 315, 143 Okl 220—In re Pitman's Guardianship, 250 P 1015, 120 Okl 199—Key v. Hill, 219 P. 308, 93 Okl 64.
Or—Kirchoff v. Bernstein, 181 P. 746, 92 Or 378
Pa—Scott v Bergdoll, 113 A 355, 270 Pa 321—Carroll v Howlett, 12 Pa Dist & Co 361—Cameron v City Bank of York, 9 Pa Dist. & Co 347
R I—Lambert v. Rogester, 175 A 835
S C—South Carolina Nat Bank of Columbia v. Bates, 178 S E 611, 175 S C 168—Standard Oil Co of New Jersey v Powell Paving & Contracting Co., 138 S E 184, 139 S C 411, rehearing denied 138 S E 544, 140 S C 39
Tenn—Miller v Washington County, 226 S W. 199, 143 Tenn. 488—Greggory v. Greggory, 1 Tenn App 570
Tex—Bryant v. Browning, (Civ. App) 48 S W (2d) 793—Texas Co v Schluewer, (Civ App) 38 S W (2d) 141, modified on other grounds Smith v Texas Co, (Com App) 53 S W (2d) 774, followed in Smith v G. B Johnson Hardware Co, 53 S W (2d) 779 and Smith v. Jacksboro Stone Products Co, 53 S W (2d) 780, affirming (Civ App) 41 S W (2d) 347—Texon Oil & Land Co. of Delaware v. Hanssen, (Civ App) 292 S W. 563
Wash—Oakley v. Davis, 253 P 648, 142 Wash 432—Rummens v Hillman, 228 P. 593, 130 Wash 562
Wis—Hollingworth v Shannon, 167 N.W. 248, 167 Wis 224.
6 C J. p 748 note 17 [k]

Fees held sufficient and reasonable and proper

(1) Twenty dollars for several days spent handling litigation involving one hundred dollars—Boyd v Guinn, (Tex Civ App) 44 S W (2d) 1112.

(2) Forty dollars per hour, and twenty dollars per hour for assistants, for services in opposing liquidation of an insurance company—In re People, by Beha, 242 N Y S 100, 136 Misc 715

(3) Fifty dollars for services on appeal to the supreme court—McClendon v Chryssoverges, 120 So. 520, 10 La App. 639

(4) One hundred dollars for recovering two hundred and fifty dollars in a suit on an accident policy tried in justice and circuit courts—Commercial Casualty Ins. Co. v. McCulley, 48

S W (2d) 225, 185 Ark 1188, certiorari granted 58 S Ct 85, 287 U S 587, 77 L Ed 513, certiorari dismissed 58 S Ct 316, 288 U S 587, 77 L Ed 967

(5) One hundred dollars for recovering six hundred twenty-five dollars and seventy-seven cents, as client's share of proceeds of a judgment, from the attorney of record in the case—In re Sebring, 264 N Y S 379, 238 App Div 281

(6) One hundred dollars for services rendered in advising client concerning shifting of bank deposits for better protection, which advice was adopted—Alpha v. Aucoin, (La App) 167 So 835

(7) One hundred dollars for services rendered in preparation of a writ of habeas corpus to procure release of husband from custody of persons illegally restraining him.—Alpha v. Aucoin, supra

(8) One hundred dollars a day under a general employment with a bank as special counsel to rescue it from serious financial difficulties—Page v. Penrose, 127 A. 748, 147 Md. 225

(9) One hundred and fifty dollars for successfully defending a suit involving client's business reputation and integrity—Marx v. Lande, 122 So 907, 11 La App 61.

(10) One hundred and fifty dollars for services in a criminal case wherein the attorney procured the release of accused on probation, after a plea of guilty—Tannenbaum v. Horn, (La. App) 160 So 462

(11) Two hundred and fifty dollars dissolving a provisional seizure on a stock of merchandise—Terzia v The Grand Leader, 145 So 363, 176 La 151

(12) Two hundred and fifty dollars in a suit on a conditional contract for the sale of an electric refrigerator, wherein a cross complaint was filed—Deberry v Cavalier, 297 P. 611, 113 Cal App 30

(13) Two hundred and fifty dollars for making an investigation and preparing answer in a suit for false imprisonment that never came to trial—Davitt v O'Connor, (C C A N Y) 73 F (2d) 43, certiorari denied O'Connor v Davitt, 55 S Ct 217, 293 U.S 631, 79 L Ed 709.

(14) Three hundred and fifty dollars for procuring dissolution of a writ of sequestration levied on property exceeding three thousand dollars in value—Orange Nat Bank v Goodman & Beer Co., (La App) 150 So 676

(15) Three hundred and fifty dollars for legal services rendered the wife of defendant, who was a man of moderate income and little property, in his wife's separation suit, never tried—Adams v. Simon, (La App) 144 So 73.

(16) Four hundred dollars to an attorney employed to collect a claim for two thousand eight hundred dollars, and who was discharged without cause after he had had numerous conferences with the debtor's attorney and had started preparation for trial—Lake v Winfield Fuller Co, 173 A 119, 54 R I 358

(17) Five hundred dollars for services rendered over a period of many years, principally with relation to a trial ultimately decided in the client's favor—Crocker v. Boening, 247 Ill App 466

(18) Seven hundred and fifty dollars for recovery of devise under a will and settlement of an estate involving approximately three thousand four hundred dollars—Erdman's Adm'r v Erdman's Adm'r, 21 S W (2d) 258, 231 Ky 219.

(19) Seven hundred and fifty dollars in administration of succession, in which the client's interest amounted to eight thousand one hundred ninety-eight dollars and fourteen cents—Stumpf v. Lopes, (La App.) 154 So. 496

(20) One thousand dollars for services and expenses, notwithstanding no witness appraised the value of such services and expenses at such amount—Ryder v. Warren, (Mass) 3 N E (2d) 221

(21) One thousand dollars to an attorney representing a one thousand nine hundred dollar claim, but payable out of an eight thousand dollar fund involved in the suit—Porter v Stewart, 137 S E 28, 163 Ga 655

(22) Twelve hundred and fifty dollars rather than one thousand five hundred dollars for counsel employed by an oil well contractor's surety to deal with materialmen's claims exceeding fifteen thousand dollars and asserted against fund of six thousand eight hundred fifty dollars, where an appeal was taken to the supreme court and the attorney's attention was frequently required over a two-year period—Conway v Union Indemnity Co, 169 So 73, 185 La 240

(23) Fifteen hundred dollars to an American attorney practicing in France, for preparing for, and participating in, the taking of his client's depositions in Paris for use in a cause pending in America—Griffin v McCarthy, 24 P (2d) 595, 174 Wash 74, certiorari denied 54 S Ct 561, 291 U S 653, 78 L Ed 1047.

(24) Fifteen hundred dollars for four trials and two appeals involving separation and partition of community of less than fifteen thousand dollars—Schoeffner v Schoeffner, 118 So. 890, 167 La 208

(25) Twenty-five hundred dollars for attorneys securing an injunction enjoining the parent organization of a labor union from arbitrary interference with the local labor union's management of its local affairs, property, and rights—Local No. 373 of International Ass'n of Bridge Structural and Ornamental Ironworkers v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, 184 A. 531, 120 N J Eq. 220.

(26) Thirty-five hundred dollars for securing an injunction against modification of a street improvement contract—Kellogg v Sherrill, 156 N. E 418, 24 Ohio App 169.

(27) Three thousand seven hundred fifty dollars in a suit involving approximately one hundred fifty thousand dollars—Chappuis & Chappuis v. Kaplan, 129 So 156, 170 La. 763.

(28) Four thousand dollars for services rendered in recovering sixty-five thousand dollars for the client.—Maxwell v. Yancy, 28 P (2d) 989, 167 Okl. 158.

(29) Four thousand dollars for obtaining an award of over fifty-three thousand dollars for land condemned after six days' trial—Baxter v Hubbard, 47 S W (2d) 743, 242 Ky 751

(30) Four thousand five hundred dollars for services performed in effecting a trade of property worth fifty thousand dollars to a school board for property worth sixty-one thousand dollars and in addition thirty-five thousand dollars in cash.—Rumbaugh v. Morriss, (Tex.Civ. App) 264 S W 198.

(31) Seven thousand five hundred dollars for attorneys who spent one hundred ninety-six days on a case involving more than fifty-four thousand dollars, and were successful on appeal—Kelly, Shuttleworth & McManus v. Central Nat Bank & Trust Co of Des Moines, 248 N W 9, supplemented 250 N W 171.

(32) Ten thousand dollars for services in representing the client in litigation and business transactions involving property of value of over five hundred thousand dollars—Donovan v. Root, 299 P 568, 114 Cal App 114

(33) Twenty thousand dollars where sixty-four days were consumed in trial of suit on five hundred eighteen thousand three hundred dollar note providing that if suit were commenced to collect it, the makers would pay such additional sum as the court found reasonable as attorneys' fees—Hayward v Widmann, 23 P.(2d) 762, 133 Cal App 184

(34) Twenty-one thousand dollars in litigation involving trust property, where the estate was valued above two million seven hundred thirty thousand dollars—Butler v Butler, 235 N.W 918, 183 Minn 218.

(35) Twenty-four thousand dollars for services performed and expenses incurred in preparing and presenting

quire a reversal.[51] On the other hand, the allowance of a particular fee may be set aside or, in a proper case, the amount thereof be reduced if it is determined to be unreasonable or excessive,[52]

the income tax case of the client, for whom he obtained a promise by the internal revenue department to recommend a compromise settlement of claim for delinquent taxes, penalties, and interest, originally amounting to over four hundred fifty thousand dollars, for eighty thousand dollars, in addition to saving the client from civil penalty and possible criminal prosecution for willful failure to make returns—Darnell v. Woodruff, (Cal App) 58 P (2d) 975

(36) Twenty-five thousand dollars to attorney who performed all the services in connection with an estate of two million five hundred thousand dollars, consisting largely of personalty.—In re Myers' Estate, 93 A. 694, 253 Pa. 537.

(37) Sixty thousand dollars to attorneys for taxpayers who prosecuted six suits involving a great amount of work in investigating and gathering evidence, in which litigation occurred numerous motions and demurrers and appeals on demurrers, and which litigation occupied two years, and resulted in a saving to the state of over three hundred ninety thousand dollars—Regan v. Babcock, (Minn) 264 N.W. 803

(38) Three per cent of the amount recovered in the original action where the bulk of services consisted of consultations with clients and preparation of petition and order to show cause, and there was no trial or argument—Faile v. Clyburn, 168 S.E. 732, 169 N.C. 355

As supported by evidence

Attorneys who were successful in setting aside, on the ground of fraud, a bond issue of one hundred twenty-five thousand dollars, and a one hundred thousand dollar courthouse contract after litigation in both the superior and supreme courts, necessitating legal ability of a high order and effecting a considerable saving to the county, are entitled to compensation of two thousand dollars, where the county in a resolution admitted such amount to be reasonable and three disinterested attorneys each testified that a reasonable charge was an amount greater than two thousand dollars—Donworth & Todd v. Benton County, 174 P. 441, 103 Wash. 382.

Representing separate parties

Where ten separate actions are brought against contractors and a city to set aside special assessments, and the contractors' attorney is employed by the city to represent the city in such actions, and where the attorney, in addition to representing the city in the trial of one of the actions and making the necessary preparation therefor, advises the city authorities in the making of the reassessment, a charge of five hundred dollars against both contractors and city, and the apportionment of one-half thereof to the city is not unreasonable—Macleod v. City of Washburn, 190 N.W. 124, 178 Wis. 379

Double recovery for services of an attorney in establishing title to community property did not result by awarding judgment for a percentage thereof in accordance with contract and an additional fee for securing partition of property thereafter becoming necessary after a divorce proceeding—McLaughlin v. Goucher, 28 P (2d) 31, 136 Cal App 87

51. Libby v. Kipp, 262 P. 68, 87 Cal App. 538

In action for death

In an action by a client to recover from her attorney a portion of the five thousand dollars retained by the attorney as fee for services in recovering a judgment of twenty-three thousand five hundred dollars in a United States district court for the death of plaintiff's husband, and securing an affirmance thereof by the circuit court of appeals, the trial court's finding that the charge was not excessive was not without reasonable foundation, and the charge was not so excessive as to require reversal of a judgment for the attorney—Platt v. Shields, 119 A. 520, 96 Vt. 257.

52. U.S.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709—Parker v. New England Oil Corporation, (D.C.Mass.) 13 F (2d) 158, motion denied (C.C.A.) Hart v. Wiltsee, 16 F (2d) 838, certiorari denied Wiltsie v. Hart, 48 S.Ct. 119, 275 U.S. 559, 72 L.Ed. 426 Vacated Hart v. Wiltsie, 19 F.(2d) 903, certiorari denied Wiltsie v. Hart, 48 S.Ct. 119, 275 U.S. 559, 72 L.Ed. 426—Brown v. Pennsylvania R. Co., (Pa.) 250 F. 513, 162 C.C.A. 529, modifying (D.C.) Brown v. Pennsylvania Canal Co., 244 F. 980, and certiorari denied Pennsylvania R. Co. v. Brown, 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 420.

Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6

Del.—Petitions of Warrington, (Super.) 179 A. 505

La.—Rivet v. Battistella, 120 So. 289, 167 La. 766.

Md.—McClusky v. Kalben, 175 A. 449, 167 Md. 479

Minn.—Eriksson v. Boyum, 184 N.W. 961, 150 Minn. 192.

N.Y.—Claude Neon Lights v. Federal Electric Co., 265 N.Y.S. 457, 238 App. Div. 576—In re Bunker, 199 N.Y.S. 435, 205 App. Div. 237—Petition of Ketcham, 191 N.Y.S. 396, 199 App. Div. 244—Andalman v. Behrens, 214 N.Y.S. 49, 126 Misc. 588

R.I.—Page v. Avila, 177 A. 541—Sullivan v. Carter, 152 A. 797

Tex.—Brand v. Denson, (Civ. App.) 81 S.W.(2d) 111, error dismissed

Wash.—Holmes v. Radford, 255 P. 1039, 143 Wash. 644.

6 C.J. p. 748 note 17 [1]

Fees reduced or held excessive

(1) Two hundred and fifty dollars reduced to two hundred in administering an estate of about one thousand dollars—Succession of Lawson, 120 So. 538, 10 La. App. 52

(2) Four hundred and fifty dollars reduced to two hundred and twenty-five where half of the work was performed after others were employed to dismiss the suit—Murphy v. Stennett, 4 S.W. (2d) 932, 176 Ark. 1205

(3) Twenty-five hundred dollars excessive, where verdict was for five thousand dollars, and the case was not exceptionally difficult and other attorneys retried the case and recovered a verdict—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380

(4) Three thousand dollars reduced to twelve hundred, for defense on charges of arson and burning, with intent to defraud—Raimondi v. Bianchi, 136 A. 320, 100 N.J.Eq. 448, reversed on other grounds 140 A. 584, 102 N.J.Eq. 254

(5) Three thousand dollars reduced to one thousand for settling a twenty thousand dollar federal income tax claim against the client out of court for two hundred fifty dollars—Peltier v. Thibodaux, 144 So. 903, 175 La. 1026

(6) Forty-five hundred dollars reduced to twenty-five hundred for preparing a brief of twenty-three pages, presenting a fact question, and arguing the cause on appeal—Fannon v. Le Beau, 232 N.W. 115, 245 Mich. 162.

(7) Six thousand dollars, reduced to four thousand as compensation for attorneys who organized a drainage district resulting in the sale of bonds in the sum of three hundred forty-five thousand dollars—Bayou Meto Drainage Dist. v. Chapline, 220 S.W. 807, 143 Ark. 446

(8) Fifteen thousand dollars reduced to five thousand dollars for services of an attorney who took assignment of a mortgage as security, foreclosed the mortgage, collected rents, and sold the realty some seven years later at a large profit—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F (2d)

unless, although excessive, it was determined in accordance with an agreement between the parties,[53] or it may be set aside or, in a proper case, the amount be increased if it is determined to be insufficient or inadequate.[54] The fee of an attorney, who drew a will, for successfully defending a contest of the will should not be reduced merely because the heirs contested the will.[55]

(b) As to Amount of Retainer

An attorney, in the absence of an express agreement, is entitled to a reasonable retainer fee, to be determined from the facts of the particular case

In the absence of an express agreement, an attorney is entitled to a reasonable amount as a retainer.[56] This amount may depend on the facts and circumstances of each particular case,[57] such as on the ability and standing of the attorney,[58] the extent of his practice,[59] the probability of the retainer interfering with his relations to, or accepting business from, other persons,[60] the magnitude and nature of the business,[61] and the probability of the business bringing him a large remuneration from the client.[62]

If his retainer is general, including all business of the client for a stated period, the pertinent considerations are different from those resulting from an employment for a single case.[63]

b. Amount on Which Percentage Reckoned

A contingent fee is generally reckoned on the net amount actually recovered by the client through the efforts of the attorney, or through a proper settlement by the client.

Under a contract for a contingent fee, the percentage to which the attorney is entitled and the amount or property on which it is to be based depend on a fair and reasonable construction of the terms of the agreement;[64] and such fee generally is recoverable only on the property or funds, with-

48. certiorari denied O'Connor v. Davitt, 55 S Ct. 217, 293 U S 621, 79 L Ed 709.

(9) One hundred thousand dollars reduced to fifty thousand in a suit to set aside a five hundred and fifty thousand dollar gift—U S v. Equitable Trust Co of New York, (N.Y.) 51 S Ct 629, 283 U S 738, 75 L Ed 1379, modifying (C C A.) Barnet v Equitable Trust Co of New York, 34 F (2d) 916, certiorari granted U S v Equitable Trust Co. of New York, 50 S Ct. 160, 280 U S. 550, 74 L Ed 609

As shocking conscience

A fee of two thousand dollars for representing a client in a suit in the nature of an interpleader, where the issues were simple and no great time in preparation was required, has been held to be so excessive as to "shock the conscience" of the appellate court, unless a twelve hundred and fifty dollar remittitur was filed, notwithstanding the trial court's finding that two thousand dollars was a reasonable fee was supported by testimony.—Ligon v Greenwall, (Tex Civ. App.) 1 S W (2d) 325, reversed on other grounds Greenwal v. Ligon, (Com App.) 14 S W.(2d) 829.

Obtaining pardon

Where an attorney by proper presentation of the facts concerning a homicide case secures a pardon of one convicted, his services in submitting the matter to the Governor do not entitle him to a fee of over five hundred dollars, and a fee of one thousand dollars is excessive—Newbold v McCrorey, 87 S.E. 542, 103 S. C 299, modified on other grounds 87 S E 1102, 103 S C 299.

Sending bill

The fact that the attorney sends a bill for a given amount and estimates the value of his services at this amount in a verified complaint, may render excessive and call for a reduction of, a larger amount as allowed by the court—Prager v. New Jersey Fidelity & Plate Glass Ins. Co of Newark, N J, 156 N E 76, 245 N Y 1, 52 A L R 193, modifying 216 N Y S 400, 217 App Div. 630.

53. Fitzgerald v Eisenhauer, 206 P. 685, 62 Mont 532

54. U S—Wallace v Frans, (C C A. Mo.) 66 F (2d) 457, certiorari denied 54 S Ct 208, 290 U S 699, 78 L. Ed 601—Tracy v Spitzer-Rorick Trust & Savings Bank, (C C A Ark.) 12 F (2d) 755, followed in 12 F (2d) 758

Minn—Leonard v Rosendahl, 158 N. W. 419, 133 Minn 320

Fees held insufficient or inadequate, or increased

(1) Seven hundred dollars for services in procuring the marriage of client to a man who breached a promise to marry her, and securing a ten thousand dollar property settlement—Wright v Wright, 237 N.W. 896, 58 S.D 612

(2) Two hundred and seventy dollars increased to three hundred and fifty for making abstracts of title—Pelletier v. Standard Oil Co., 4 La. App. 37.

(3) Two thousand dollars increased to five thousand where the client agreed to pay attorneys one third of the amount to be recovered from suit in accounting of an alleged partnership between the client and his brother and who, when he became beneficiary under the brother's will, dismissed appeal from dismissal of the accounting suit without the attorney's consent—Brandon v. Zerkowsky, 148 So. 797, 167 Miss. 186.

(4) Three thousand dollars increased by fifteen hundred for recovering the difference between a fee-simple and life estate in property worth fifty thousand dollars—Daly v. Power, 33 S W (2d) 305, 236 Ky 426.

55. In re Crawford's Estate, 160 A. 585, 307 Pa. 102

56. Roche v Baldwin, 76 P 956, 142 Cal 136—Clements v. Watson, 93 P 385, 7 Cal App 74

57. Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va. 45.

58. Mass—Blair v. Columbian Fireproofing Co., 77 N E. 762, 191 Mass 333

Va—Bruce's Ex'x v. Bibb's Ex'x, 105 S E 570, 129 Va. 45.

59. Blair v Columbian Fireproofing Co., 77 N E 762, 191 Mass 333

60. Mich—Kelley v. Richardson, 87 N W 514, 69 Mich 430

Va—Bruce's Ex'x v Bibb's Ex'x, 105 S E 570, 129 Va. 45.

6 C J. p 753 note 41

61. Blair v Columbian Fireproofing Co., 77 N E 762, 191 Mass 333

62. Blair v Columbian Fireproofing Co., supra.

63. Blair v. Columbian Fireproofing Co., supra.

An annual counsel fee cannot be charged under a general retainer—Yates v. Shepardson, 27 Wis. 238

64. U S.—Waugh v. Q & C. Co., (C. C A.Ill.) 16 F (2d) 363

Ala—Denson v. Caddell, 77 So. 720, 201 Ala 194.

Cal—Jackson v. Campbell, 8 P.(2d) 845, 215 Cal. 102—Preston v. Herminghaus, 292 P. 953, 211 Cal. 1.

Ky—Champion v Ferguson, 43 S.W. (2d) 719, 241 Ky. 362.

in the terms of the contract, which are recovered by reason of the attorney's efforts,[65] and, therefore, is not recoverable on uncontested claims[66] or sums voluntarily paid.[67]

The percentage coming to the attorney is usually reckoned on the amount actually recovered by the client,[68] and not on the amount of the judgment,[69] unless the language of the contract is such as to justify such an interpretation.[70] The amount actually recovered, within the meaning of this rule, is the net amount recovered, that is, the amount allowed by the judgment less the amount of any claim, expense, or offset that may properly be deducted therefrom;[71] and where the attorney negotiates a settlement for less than the amount of the judgment and seven months after the expiration of the redemption period sold the property for more than was due it at the time of the decree—Henry v. Federal Land Bank of St Louis, 4 N E (2d) 664, 284 Ill App 656

Minn—Child v. Mastin, 204 N W. 947, 164 Minn 217.

N.Y.—Petition of Raymond, 212 N.Y S 577, 214 App Div. 622, motion granted In re Raymond, 152 N E 415, 242 N Y. 534

Okl—Higby v. Martin, 28 P.(2d) 1097, 167 Okl 10

Contest or settlement

Under a contract providing that, in the event of a successful contest and breaking of a will, the attorney is to receive one half of any increase over the amount the client would have received under the will, but only one quarter if the increase is obtained by settlement, the attorney is not entitled to one half where the contract is settled by stipulation—Petition of Raymond, 212 N.Y.S 577, 214 App Div. 622, motion granted In re Raymond, 152 N E 415, 242 N Y. 534.

Division of proceeds of sale

Where the owner of a farm agreed that his attorney should have one half of the amount for which the farm sold in excess of an amount fixed, and the farm was exchanged for the interest of a vendor in a farm which he had sold, on which payments were owing but not due, and an amount in cash not sufficient to pay the sum agreed for defendant's farm, the owner is entitled to the value agreed on between himself and the attorney, with interest from the date of the exchange, and the amounts paid by him in completing the transaction, with interest, against which there should be charged all cash received by him as of the date of receipt; and, on receipt of enough to pay the owner the sum fixed as the value of his farm, the balance should be divided equally between the parties.—Child v. Mastin, 204 N W 947, 164 Minn. 217

On different amounts

Under a contingent fee contract for attorney's services, providing for five per cent of the amount realized of the sum shown to be due on the face of the contract, believed to be about thirty thousand dollars, plus fifty per cent of all moneys collected in excess of such amount, the attorney is entitled to fifty per cent of a recovery in excess of thirty thousand dollars—Carter v. Marvel Carburetor Co, 256 N W. 608, 269 Mich. 21.

Real and personal property

A contract, providing for the payment to an attorney of twenty per cent of the share in an estate that might be found to belong to the client, entitles the attorney to twenty per cent of the client's share of both real and personal property—Beck v. Boucher, 195 P. 996, 114 Wash. 574.

With or without "trial"

Under a contract by which a client agrees to pay an attorney one half the amount collected "if trial of cause is had," but in the event of a compromise without trial "to pay one-third of the recovery," the word "trial," in its broader sense, meaning on the merits and not a trial of the issues of law only, where there is no trial on the merits, the attorney is entitled to one third only—Denson v. Caddell, 77 So. 720, 201 Ala 194.

Property or income

Under a contract whereby the attorneys were to receive one fourth of the property which the client, as surviving wife, might receive as community property, and the value of one fourth of the property distributed by the executor to the trustee above the amount shown in the executor's final account to be so distributable, the attorneys are not entitled to one fourth of a sum of money paid to the client as income from the entire estate from the date of her husband's death—Miller v. Wing, 50 P.(2d) 470, 9 Cal App (2d) 483.

Proceeds of another suit

Under an agreement that the attorneys for plaintiff in two patent infringement suits should receive seven and one-half per cent of amount received from defendant in one of the suits pending in Connecticut, the attorneys were entitled to compensation only from the proceeds derived from the Connecticut suit, and hence were not entitled to establish a statutory lien on the proceeds derived from the suit pending in New York.—Nic Projector Corporation v Movie-Jecktor Co., (D C N.Y.) 16 F.Supp. 605

Sum realized subsequent to foreclosure

A mortgagee, agreeing to pay an attorney for services in a foreclosure suit fifty dollars and whatever additional amount of the four hundred fifty dollar fee proved in the suit could be realized from the foreclosure, was not liable for an additional fee where such mortgagee purchased the property at the foreclosure sale for less than the amount of the judgment and seven months after the expiration of the redemption period sold the property for more than was due it at the time of the decree—Henry v. Federal Land Bank of St Louis, 4 N E (2d) 664, 284 Ill App 656

Special sum for the payment of debts, allowed to the client, should be included in the amount on which the attorney's percentage is to be computed, under a contract for a certain percentage of the amount awarded to the client—Chadwick v. Walsh, 28 N.W. 602, 70 Mich. 627.

Percentage on all collections of assessments of benefits due a paving district includes the collection of a former collector's shortage—Board of Improvement of Paving Improvement Dist. No 23 v. Matheney, 76 S. W (2d) 81, 189 Ark. 957.

Payment in realty

Under a contract for half of the amount recovered, the attorney is entitled to half of the realty paid for by the client with the judgment.—Robertson v. Pettery, 170 S E 901, 114 W.Va. 78.

65. Robertson v. Pettery, supra—6 C J. p 745 note 66.

70. Funk v. Mohr, 57 N E. 2, 185 Ill. 395, affirming 85 Ill App. 97.

71. Ky.—Wooldridge v. Bradbury, 215 S.W. 406, 185 Ky. 587.

Mont.—Donovan v. Jenkins, 155 P. 972, 52 Mont 124.

Tex—Kerzee v. Aultman, (Civ.App.) 291 S.W 293

6 C J. p 745 note 66 [a], [b], [d].

tiates a settlement whereby the amount allowed the adverse party as a set-off is larger than the amount allowed his client, on his claim, he is entitled to no fee.[72] If the amount recovered includes a sum for an attorney's fee, he is entitled only to the specified percentage of such fee, and not to the entire fee.[73]

The amount recovered includes an amount secured, but not presently available,[74] and an amount from which the client was released from liability by the judgment.[75]

In case of compromise or settlement. In case of a proper compromise by the client in good faith, the percentage is based on the value of the property or sum actually received or accepted in settlement,[76] and the same rule applies where the compromise is negotiated by the attorney.[77] Where, on such settlement, the adverse party agrees to pay the attorney, it has been held that the attorney's fee or percentage is based on the amount received by the client in settlement;[78] but, on the other hand, it has been held that, under such an

Compensation of attorney in fact

An attorney, contracting with an attorney in fact of persons claiming shares of an estate as heirs to collect and distribute such shares after the deduction of a fixed compensation for the attorney in fact and one half the amount of the net recovery as compensation for the attorney, was not entitled to retain more than one half the amount collected for the heirs, notwithstanding the negligence of the heirs in failing to collect the full amount owing them as proceeds of the settlement by the attorney in fact—Hyden v Combs, 98 S W (2d) 293, 266 Ky. 140

Rents collected from the property after foreclosure should be deducted from the percentage the attorney is to receive, under a contract to foreclose a mortgage for a percentage of the recovery—Donovan v. Jenkins, 155 P 972, 52 Mont. 124.

Stock assessment

A stockholder, agreeing to pay her attorney from the proceeds of sale of corporate property, is liable only on the amount received after deducting assessments levied on the stock—Williams v. Bevis, 278 P. 193, 152 Wash. 469, followed in 279 P. 1119, 153 Wash. 701.

Inheritance tax not deductible

Where an attorney has agreed to recover an estate for the heirs at law on a contingent fee basis, the inheritance tax is not one of the expenses under the contract to be shared by both, but is due alone from heirs and cannot be deducted before paying the attorney—Brown v. Furlong, 127 So. 731, 170 La. 302

72. Underwood v. Rich, 173 S.E. 224, 48 Ga.App. 550

73. Vaughan v. Humphreys, 239 S W 730, 153 Ark. 140, 22 A.L.R. 1201.

In suit on insurance policy

Where an attorney's contract gave him forty per cent of the recovery from an insurance company, and he recovered from the company, in addition to the amount of the policy with interest and penalty, a sum for an attorney's fee, he is entitled only to the stated percentage of the attorney's fee, and not to the entire fee, and his percentage on the balance of the recovery.—Vaughan v. Humphreys, 239 S W. 730, 153 Ark. 140, 22 A.L.R. 1201.

74. Iowa—Crosby v. Hatch, 135 N. W. 1079, 155 Iowa 312
Minn—Gray v. Bemis, 151 N.W. 135, 128 Minn. 392.

75. Saulsbury v. American Vulcanized Fibre Co., (Del.) 91 A. 536—6 C.J. p. 746 note 72.

76. Ark.—St. Louis, I. M. & S. Ry. Co. v. Freeman, 179 S.W. 648, 120 Ark. 389
Ky.—Woodheck v. Roll, 208 S.W. 768, 183 Ky. 128
Minn.—Dell v. Marckel, 238 N.W. 1, 184 Minn. 147—Miner v. Payne, 184 N.W. 673, 150 Minn. 103—Davis & Michael v. Great Northern Ry. Co., 151 N.W. 128, 128 Minn. 354
Mo.—Whitecotton v. St. Louis, etc., R. Co., 157 S.W. 776, 250 Mo. 624—Hale v. Terminal R. R. Ass'n of St. Louis, (App.) 12 S.W.(2d) 941.
N.Y.—Lefkowitz v. Leblang, 187 N.Y.S. 520
Ohio—Roberts v. Montgomery, 154 N.E. 740, 115 Ohio St. 502.
Tex.—Texas & N. O. R. Co. v. Marshall & Marshall, (Civ.App.) 184 S.W. 643.
Utah—Ashton v. Skeen, 39 P.(2d) 1073, 85 Utah 489, rehearing denied 44 P.(2d) 688, 85 Utah 508.
6 C.J. p. 745 note 58, p. 746 note 68.

Amount client sees fit to accept

Where the contract between an attorney and client provides that the former shall receive fifty per cent of the amount of a claim, whether obtained by suit or compromise, the attorney cannot recover from defendant more than half the sum the client sees fit to accept.—Nichols v. Orr, 166 P. 561, 63 Colo. 333, 2 A.L.R. 449.

Settlement of condemnation proceedings

(1) An attorney who defends a suit to condemn water rights, under a contract for a percentage of the amount received on a sale of riparian lands, is entitled, where a power company purchases the riparian lands in settlement of the condemnation proceedings, to his percentage on the amount received for the entire property, but not on the value of the water rights.—Preston v. Herminghaus, 292 P. 952, 211 Cal. 1.

(2) A loss resulting from the failure of the clients in selling riparian land to a power company to allocate the value of water rights should be borne by the clients themselves, and not by the attorneys who contracted for a percentage of the amount received.—Preston v. Herminghaus, supra.

(3) A sale of the entire riparian property to a power company after the commencement of condemnation suits amounts to a "compromise" of all the condemnation proceedings, within a contract allowing attorneys a percentage of the damages collected.—Preston v. Herminghaus, supra.

Realization by compromise or otherwise

Under a contract for the services of an attorney providing for payment to the attorney of twenty five per cent of the moneys received by plaintiff from defendant by settlement or otherwise, the attorney was entitled to twenty five per cent of everything realized by the client from the cause of action against defendant—Nic Projector Corporation v. Movie-Jecktor Co., (D.C.N.Y.) 16 F.Supp. 605

77. Bogle & Sharp v. Walker, 202 S. W. 478, 133 Ark. 294.

Amount received in settlement by the client, under negotiations previously commenced and dropped before the attorney was retained, but reopened and successfully concluded with his aid, is a proper matter for consideration of the jury in finding the value of the attorney's services.—Anderson v. Rindge Co., 270 P. 262, 93 Cal.App. 725.

Contract value of land, the proceeds of the settlement of the litigation, must be taken as the basis of the settlement of the litigation for the purpose of fixing the amount due the attorneys who negotiated the settlement.—Bogle & Sharp v. Walker, 202 S.W. 478, 133 Ark. 294.

78. Ky.—McCormack v. Louisville,

agreement, the payment to the attorney is in addition to the payment to the client, that the amount of the latter payment does not constitute the full amount of the settlement, and that the attorney's fee is based on the amount to be paid the client plus the amount due the attorney under his contract.[79]

Costs and interest. The amount recovered, on which the attorney's percentage is to be reckoned, has been held to include costs,[80] unless the agreement is to the contrary.[81] Accrued interest should also be included in the amount recovered,[82] and the fact that the attorney agrees that, if the award is made on a certain basis, he would accept a certain percentage as his fee does not preclude him from sharing interest recovered on a different basis.[83] However, the attorney is not entitled to a percentage of interest which accrues after the recovery;[84] and, under a contract to secure refunds, the attorney cannot participate in interest ordered to be paid to the client, since it is not a refund,[85] and a contract for a percentage of the claims adjudged the client does not include interest on the claims, nor interest on interest on the claims[86]

On value of property taken in satisfaction. Where property is taken in part satisfaction of the judgment obtained, the attorney is entitled to his percentage computed on the fair value of the property, without regard to the price at which it was taken.[87] If the property recovered increases in value, the attorney is entitled to his proportion of the larger amount,[88] but not to rents accruing before the successful result was obtained.[89]

c. Right to Interest

An attorney generally is not entitled to interest on an unliquidated demand for compensation, but is entitled to interest on a liquidated demand therefor from the time it is due or a demand of payment is made.

An attorney suing to collect compensation for services cannot recover interest on unliquidated demands either for fees or costs,[90] interest running in such cases only from the date when the attorney's claim for compensation has been reduced to judgment.[91] It has been held, however, that the allowance of interest in such a case is discretionary,[92] and interest will be allowed on money due where the client was able to determine the amount, although the attorney may have claimed a greater sum than was actually due[93]

When the amounts are liquidated, interest on the fee runs from the time the same becomes due or from the time of demand for payment, and on disbursements from the time when the money was paid out[94] The fact that the contract recog-

etc, R Co., 161 S W 518, 156 Ky 465—Schmitz v South Covington, etc., R Co, 114 S W 1197, 131 Ky 207, 22 L R A.N S 776, 18 Ann Cas 1114

N Y—Ward v. Donovan, 139 N.E 254, 235 N Y. 240, reversing 194 N Y S 273, 203 App Div 65—Pilkington v Brooklyn Heights R Co, 63 N Y.S. 211, 49 App Div 22

Amount reserved for attorney

Where, after judgment, the client settled for less than the judgment without consulting his attorney, employed on a contingent fee, and the adversary retained enough to pay the stipulated portion to the attorney, and there was no evidence of fraud, the attorney could recover nothing from the client in excess of amount reserved—Corcoran v George Kellogg Structural Co., 166 N.Y.S 269, 179 App Div. 396

79. Ark.—Arkansas Foundry Co. v Poe, 26 S W (2d) 584, 181 Ark 497
Mo—Curtis v. Metropolitan St R Co., 102 S.W. 62, 125 Mo.App. 369

Reimbursement

Where the adverse party, in addition to paying the amount of the settlement, agrees to reimburse the client for any sum he should be compelled to pay his attorney, the attorney's percentage is based on the amount of the settlement plus the sum the attorney would be entitled to under his contract—Johnson v Great Northern Ry Co, 151 N W 125, 128 Minn. 365, L R A 1917B 1140

80. McIlvaine v Steinson, 85 N.Y.S 889, 90 App Div. 77—6 C J. p 746 note 69

81. Donovan v. Jenkins, 155 P. 972, 52 Mont 124.

Costs deductible

Where an attorney agrees to foreclose a mortgage for a percentage of the mortgagee's recovery, but agrees that any costs or charges the mortgagee has advanced shall be subtracted from the recovery before division, and that expenses incurred by the attorney in making trips shall not be borne by the mortgagee, the only expenses to be paid by her being such actual cash money as it may be necessary for her to pay out by order of court, the costs which the mortgagee may deduct before division are only the actual court costs—Donovan v. Jenkins, 155 P. 972, 52 Mont. 124

82. Smith v. Whitman, 150 A 856, 159 Md 478—6 C J. p 746 note 70

83. Smith v. Whitman, supra.

84. In re Bassford, 74 N.Y S 397, 36 Misc 732.

85. Hollingsworth v Lewis, 269 P 709, 93 Cal App 526.

86. Champion v Ferguson, 43 S W (2d) 719, 241 Ky. 303.

87. U.S—Barcus v. Gates, (C C Va) 130 F 364, affirmed 136 F 184, 69 C C A 200.
Mont—Myers v. Bender, 129 P. 330, 46 Mont. 497

88. Chester v Jumel, 5 N Y S 809, 2 Silv Sup. 159, reversed on other grounds 26 N E 297, 125 N.Y 237

89. Rector v Rose, 36 S W. 898, 62 Ark. 279.

90. N Y—Prager v. New Jersey Fidelity & Plate Glass Ins Co of Newark, N. J, 216 N Y S 400, 217 App Div. 630 modified on other grounds 156 N E 76, 245 N Y 1, 52 A L R 195
Tenn—Brownlow v. Payne, 2 Tenn. App. 154.
Wash—Smith v. Saulsberry, 288 P. 927, 157 Wash 270.
6 C J. p 753 note 45

91. Smith v. Saulsberry, 288 P 927, 157 Wash. 270—6 C J. p 753 note 46

92. Brownlow v Payne, 2 Tenn App. 154—6 C J p 753 note 47

93. Council v. Hixon, 76 S E 603, 11 Ga App 818

94. N Y—Rexford v. Comstock, 3 N Y S 876
Pa—Stephens v. Hartley, 5 Pa Dist. & Co 639
6 C J. p 753 note 49.

nized that the parties might not by agreement be able to arrive at a sum certain, and provided a method for fixing the amount in case of disagreement, makes the sum none the less certain in legal contemplation [95]

On the termination of the relation of attorney and client the former at once becomes entitled to be paid for his services, and in default thereof interest accrues from that date.[96]

d. Power and Discretion in Determining Amount of Fee

The determination of a reasonable attorney's fee for services rendered, in case of a controversy in regard thereto, is largely within the discretionary power of the court; and it may be fixed either with or without the aid of expert testimony as to value

Where there is a controversy as to an attorney's fee, the determination of the amount thereof is within the discretionary power of the trial court,[97] or on appeal, of the appellate court [98] Judicial determination of the value of an attorney's services, however, must be strictly kept within the limitations fixed by authority,[99] and in making such determination, the court should exercise care and caution, to the end that only reasonable fees for services rendered be allowed;[1] and neither the trial court nor the appellate court can, in adjusting such fee, arbitrarily ignore the undisputed evidence and the findings based thereon.[2]

While expert testimony, as to the value of an attorney's services, is admissible and should be given due weight,[3] it is not conclusive either on the jury or the court, or, in case of appeal, on the appellate court,[4] since the court, either trial or appellate, is itself an expert on the question, and may consider its own knowledge and experience concerning reasonable and proper fees,[5] and, in the light of such knowledge and experience, the court may form an independent judgment, from the facts or evidence before it, as to the nature and extent of the services rendered, and make an appraisal of such services and determine the rea-

Interest for detention

In an action to recover the reasonable value of services rendered by an attorney where the services have been completed and demand made for payment which is refused, plaintiff is entitled to interest for the detention of the money due.—Branham v Hallam, (Tex Civ App) 191 S W 158, error refused

95. Council v Hixon, 76 S E 603, 11 Ga App 818

96. Com v Terry, 11 Pa Super 547

97. Ala.—Dent v. Foy, 107 So 210, 214 Ala 243
Cal.—People v Thompson, 43 P (2d) 606, 5 Cal App (2d) 668—City of Los Angeles v Los Angeles-Inyo Farms Co, 25 P (2d) 224, 134 Cal App 268
Ga.—Greyling Realty Corporation v Lawson, 175 S E 453, 179 Ga 188
Miss.—McLeod v Barnes, 156 So 517, 170 Miss 880
Pa.—Commonwealth v Traders' & Mechanics' Bank of Pittsburgh, 113 A 186, 268 Pa 526
S D.—Wright v Wright, 237 N.W. 896, 58 S D. 612

Client, if not satisfied with attorney's fee, should submit the matter to the court for determination of the value of the services.—Johnson v Mound City State Bank, 237 N.W 891, 58 S.D 622.

Orphans' court

"When the fees of counsel come before the orphans' court, it is a function of the court to decide what is a reasonable and just compensation under all the circumstances."—In re Crawford's Estate, 160 A. 585, 588, 307 Pa 102

Right of compensation board or commission or court to fix amount of fees attorney may obtain for services in workmen's compensation matters see Workmen's Compensation Acts § 820

98. Ala.—Dent v Foy, 107 So 210, 214 Ala 243
Miss.—McLeod v Barnes, 156 So 517, 170 Miss 880

99. Bank of Manhattan Trust Co v Ellida Corporation, 265 N.Y S 115, 147 Misc 374, reversed on other grounds Jewett v. Commonwealth Bond Corporation, 271 N Y S. 522, 241 App Div 131, motion granted 196 N E 576, 267 N Y. 554.

1. Evors v Bryan, 81 So 513, 77 Fla 399—Purvis v. Frink, 49 So 1023, 57 Fla 519

Value of services rendered should be determined as nearly as possible, and the fee fixed accordingly.—Naef v Miller-Goll Mfg Co, 147 So 52, 176 La 979—Peltier v Thibodaux, 144 So 903, 175 La. 1026

2. Commonwealth v Traders' & Mechanics' Bank of Pittsburgh, 113 A. 186, 268 Pa 526

3. Faulk v Hobbie Grocery Co, 59 So 450, 178 Ala 254—6 C J. p 762 note 26

Need not be excluded

While the testimony of other attorneys as experts, as to reasonable fees for services rendered by attorneys is not binding on the court, which has power to fix the amount to be allowed independent of such testimony, the court need not wholly exclude the testimony from its consideration.—In re Duffill's Estate, 206 P 42, 188 Cal. 536

4. Blackhurst v Johnson, (C C A. Mo.) 72 F.(2d) 644—Merchants' & Manufacturers' Securities Co v. Johnson, (C C.A Mo.) 69 F (2d) 940, certiorari denied Johnson v Merchants & Mfrs Securities Co, 55 S Ct. 80, 293 U S. 569, 79 L Ed 668—In re Associated Towel & Linen Supply Co, (D C Cal) 7 F. Supp 699, 700—6 C J p 762 notes 24, 25.

"It is not binding upon the jury, for they may apply to the testimony their own experience and knowledge of the character of such services"—In re Associated Towel & Linen Supply Co, (D C.Cal.) 7 F Supp 699, 700

5. U S.—Carbon Steel Co v. Slayback, (C C.A W Va.) 31 F (2d) 702—Jones v Alton & S R Co, (D C Ill.) 6 F Supp 807—McDougal v Black Panther Oil & Gas Co, (C. C A Okl.) 277 F. 701.
Ark.—Ætna Life Ins Co. v Heiden, 42 S.W (2d) 392, 184 Ark 291—Rachels v. Garrett, 240 S W. 1071, 153 Ark 343.
Cal.—Elconin v. Yalen, 282 P. 791, 208 Cal 546.
Colo.—Enyart v. Orr, 238 P. 29, 78 Colo 6.
Ind.—Dunn v. Deutschel, 169 N E 529.
Miss.—Johnson v. Howard, 141 So 573, 167 Miss 475.
S D.—Wright v. Wright, 237 N.W. 896, 58 S D 612.
Tex.—Tinch v. Fain-Townsend Co, (Civ.App.) 59 S W.(2d) 293.

sonable value thereof, either with or without the aid of the testimony of witnesses as to value.[6] In such a case the trial court or a referee may refuse to hear expert testimony as to the value of the services,[7] and need not award all the fees asked for by the attorney merely because he is the only one who testifies on the subject.[8]

§ 192. Payment and Recovery Back by Client

The general rules as to the recovery back of payments made apply to the recovery by a client of fees paid by him to his attorney.

The general rule, stated in the title Payment § 157 [48 C.J. p 759 note 82], that a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, applies to payments of fees made by a client to his attorney, under a mistake or want of knowledge as to the fact that the attorney had failed to exercise the skill, diligence, and good faith required in rendering the services for which payment was made.[9] A client may also recover fees which he has paid under false representations made by the attorney,[10] or which he has paid to an attorney who wrongfully assigned the contract for services to another attorney;[11] or which he has paid to a judge for services rendered as attorney in violation of statute, since the parties are not in pari delicto.[12]

A client may also recover back the unearned portion of the fee where the attorney died[13] or was

6. U S—Tracy v. Spitzer-Rorick Trust & Savings Bank, (C C A Ark.) 12 F.(2d) 755, followed in 12 F (2d) 758—In re Associated Towel & Linen Supply Co., (D C Cal.) 7 F Supp. 699
Ala—Dent v. Foy, 97 So. 627, 210 Ala. 160.
Cal—Kirk v Culley, 261 P 994, 202 Cal 501—In re Duffill's Estate, 206 P. 42, 188 Cal 536—People v Thompson, 43 P (2d) 606, 5 Cal App (2d) 668—City of Los Angeles v Los Angeles-Inyo Farms Co., 25 P.(2d) 224, 134 Cal App 268—Theisen v Keough, 1 P (2d) 1015, 115 Cal App 353—Bowman v Maryland Casualty Co., 263 P. 826, 88 Cal App. 481
Ill.—La Salle County Electric R Co v. Wylie, 196 Ill.App. 113
Ind—In re Davis, 183 N E 547, 204 Ind 227.
Ky—Roederer v Schmitt, 80 S W (2d) 35, 258 Ky 393
Okl—Testerman v. Burt, 289 P 315, 143 Okl 220.
Or—Fisher v Fred W German Co., 44 P (2d) 1076.
Vt—Platt v. Shields, 119 A. 520, 96 Vt 257
Wis—Rubekeil v. Director General of Railroads, 176 N W 854, 171 Wis. 123
6 C J p 752 note 36—p 760 note 93
"The value of an attorney's services is a matter with which a judge must necessarily be familiar When the court is informed of the extent and the nature of such services, its own experience furnishes it with every element necessary to fix their value Consequently, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law."—In re Associated Towel & Linen Supply Co., (D C Cal.) 7 F Supp. 699, 700.

The trier of the fact, whether it be a jury or the court, knows something of the value of legal services, and may apply its experience and knowledge, and exercise its independent judgment, irrespective of the opinion of witnesses who may claim to have peculiar knowledge on the subject—In re Sebring, 264 N.Y S 379, 238 App Div. 281.

In a partition suit, the court may fix the amount of compensation to be paid complainants' counsel out of the common fund, on a consideration of the whole case as developed on the record, without being bound to accept the opinion of the witnesses—Dent v. Foy, 97 So. 627, 210 Ala 160.

On appeal, in a client's suit for an accounting against an attorney who counterclaims for fees, the appellate court is not bound by the testimony of the attorney's witnesses and a finding of the master as to the value of the attorney's services, but can make its own estimates, since the matter is within the special acquaintance of the court as much as within that of other members of the bar—Davitt v O'Connor, 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct. 217, 293 U.S 621, 79 L.Ed. 709.

7. In re Associated Towel & Linen Supply Co., (D C Cal.) 7 F Supp 699

8. Bowman v Maryland Casualty Co., 263 P. 826, 88 Cal.App 481.

9. Ill.—McGlasson v. Durand-McNeil-Horner Co., 273 Ill App 101
Iowa—Donaldson v Eaton, 114 N.W 19, 136 Iowa 650, 125 Am S R 275, 14 L R A (N S.) 1168
Mass—Robertson v. Hirsh, 177 N.E 676, 276 Mass. 452
Minn—Faber v. Enkema, 231 N.W. 410, 180 Minn 493.
N Y—In re Woolfson's Will, 287 N. Y.S 12, 158 Misc. 928—In re Strandburg's Estate, 247 N.Y S 194, 138 Misc 732, modified on other grounds 248 N.Y.S. 164, 138 Misc 859
6 C J. p 735 note 18.

Failure to procure divorce in time
Where the retainer contract provides that the attorney within four months will obtain a Mexican divorce, and that, if for any reason the divorce does not go through and no decree is obtained, the fee shall be returned, the attorney's failure to procure the divorce decree within the time stipulated obligates him to return the fee received under the retainer—Application of Geller, 251 N. Y S 125, 232 App Div. 573, motion denied In re Geller, 181 N E 589, 258 N Y 603, and affirmed 182 N.E. 178, 259 N Y. 544

Prima facie laches
Where an executrix who is sole legatee waits almost four years before seeking avoidance of an agreement with an attorney as to fees for services, she prima facie is chargeable with laches and cannot compel the attorney to refund, where no exculpatory reference to laches is made in her petition—In re Woolfson's Will, 287 N Y S 12, 158 Misc. 928.

Wrongfully compromising case
A client is entitled to a return of fees paid, where the attorney compromised a case which he had been employed to prosecute to a final judgment, with an explicit agreement not to compromise without the client's consent—Lane v. Mitchell, (Tex.Civ App.) 289 S W. 195.

10. Milne v. Schneider, 240 N.Y S. 375, 136 Misc 15.

11. Hilton v. Crooker, 47 N.W. 3, 30 Neb. 707

12. Evans v. Funk, 38 N E. 230, 151 Ill. 650.

13. Mo—Callahan v. Shotwell, 60 Mo. 398
Ohio—McCammon v. Peck, 9 Ohio Cir Ct. 589, 6 Ohio Cir.Dec. 504.

rightfully discharged[14] before the services were completed, or where the fee was unreasonable and oppressive[15]

An abandonment of the action by the client, however,[16] or the wrongful discharge of the attorney,[17] or the dismissal or settlement of the case in a manner involving less work than was anticipated[18] will not entitle the client to recover back fees paid, even though the attorney told him the fee would be nominal if the case was settled.[19] A client, also, cannot recover a fee, voluntarily paid, for services fully performed, the beneficial results of which he has received and accepted;[20] nor can he recover fees paid, which were included in a settlement between him and the attorney and which he entered into on his own judgment with full knowledge of the facts,[21] although the amount thereof was more than was formerly agreed on;[22] nor can he recover back a contingent fee by alleging that the contract was champertous.[23]

§ 193. Funds Subject to Payment of Compensation

a. In general
b. Funds in custody or control of court

a. In General

An attorney, generally, may retain the amount due him for fees from funds in his hands belonging to the client.

As a general rule, an attorney has the right, which in some states has the status of a retaining lien (infra § 225), to deduct and retain the unpaid balance due him for fees, from funds in his hands which belong to the client,[24] and this is so, although it is claimed that he is not entitled to fees

14. Mesa County Nat Bank v. Berry, 135 P 129, 24 Colo App 487

15. Ark.—Pindall v. Waterman, 106 S.W. 964, 84 Ark. 575, 120 Am.S.R. 87.
Okl.—Haunstein v. McCalister, 46 P (2d) 552.
Evidence
In an action to recover part of a fee retained by an attorney for foreclosing a land contract, on the ground of the fee being excessive, it is not error to exclude a letter from the adverse party to plaintiff offering to settle, where it has not been shown to have been brought to the attention of the attorney.—Hollingworth v. Shannon, 167 N.W. 248, 167 Wis. 224

16. Riehl v. Levy, 90 N.Y.S. 441, 45 Misc. 425, reversing 86 N.Y.S. 464, 43 Misc. 59

17. Schmidt v. Curtiss, 130 P. 89, 72 Wash. 211.

18. Cal.—Mahoney v. Bergin, 41 Cal. 423
Ohio.—Boldt v. Baker, 13 Ohio App. 125, 22 Ohio N.P.(N.S.) 145.
Dismissal of divorce action
Where after an attorney, employed by defendant in a divorce case, and paid in advance, had prepared and filed an answer, represented his client in the taking of a deposition, and performed other services extending over a period of nine months, plaintiff dismissed the case, the attorney had fully performed the services required of him by the contract, and no part of the money paid could be recovered, notwithstanding less labor was performed than would have been had there been a trial on the merits.—Boldt v. Baker, 13 Ohio App. 125, 22 Ohio N.P.(N.S.) 145.

19. Rogers v. Nee, 186 S.W. 566, 194 Mo. 163.

20. Govan v. Parsons, 155 So. 241, 179 La. 834.
Defense of attack on will
An attorney is not required to return a fee paid for successfully defending an attack on a will of the client's ancestor on the theory that the fee was chargeable against the succession, where the client accepted the succession, and all the money left by the ancestor would ultimately belong to the client.—Govan v. Parsons, 155 So. 241, 179 La. 834.

21. Ala.—Wilson v. Monette, 139 So. 264, 224 Ala. 106.
La.—Govan v. Parsons, 155 So. 241, 179 La. 834.

22. Wilson v. Monette, 139 So. 264, 224 Ala. 106.

23. Reese v. Resburgh, 66 N.Y.S. 633, 54 App. Div. 378

24. U.S.—In re G. F. Redmond & Co., (D.C.Mass.) 17 F.(2d) 501.
Ill.—People v. Kwasigrock, 130 N.E. 344, 296 Ill. 542.
Mass.—Blake v. Corcoran, 97 N.E. 1002, 211 Mass. 406.
Pa.—In re Lancaster Trust Co., 186 A. 367, 323 Pa. 107.—In re Kraus, 185 A. 737, 322 Pa. 362.—In re Murphy's Estate, 101 A. 935, 253 Pa. 33.—Balsbaugh v. Frazer, 19 Pa. 95.—Lemington Building & Loan Ass'n v. Weddell, 174 A. 673, 115 Pa. Super. 114
Tex.—Doran v. Campbell, (Civ.App.) 194 S.W. 674.
6 C.J. p. 694 note 6.
However, it has been held that the total sum of money collected by an attorney for his client, and not the balance after deducting the attorney's fee, belongs to the client.—Peters v. State, 69 So. 576, 193 Ala. 598.—Macdonald v. State, 39 So. 257, 143 Ala. 109

Attorney may apply money collected for his client to the payment of any valid subsisting claim for fees he has against the client.—Doran v. Campbell, (Tex.Civ.App.) 194 S.W. 674, error refused.—Blair v. Blanton, (Tex.Civ.App.) 54 S.W. 321

Attorneys who obtained judgment for trust company before the trust company closed were entitled to deduct their fee from the final payment made to them in settlement of the judgment, notwithstanding that such final payment was made after the liquidating trustees had taken charge of the trust company and that the attorneys did not represent the trustees, since the trustees were in substance the trust company in winding up its affairs.—In re Lancaster Trust Co., 186 A. 367, 323 Pa. 107.

In case of discharge
(1) An attorney engaged on a percentage basis, who is discharged after the judgment has been obtained, but before the judgment has been entirely satisfied, is entitled to retain sufficient of the client's money in his hands to compensate himself for the unpaid balance due him for his services.—In re Choate, (Okl.) 50 P.(2d) 706.

(2) Discharged attorney who had been employed on contingent fee basis, was not entitled to recover, from the client's alleged creditor, contingent interest in amount of the client's claim where the attorney had not created the fund from which his contingent fee was to be paid and showed no certainty of doing so.—Hamlin v. Case & Case, (Wash.) 61 P.(2d) 1287.

Reasonable fee to associate counsel may also be paid out of money collected.—Moscarelli v. Wakefield, 54 Pa. Super. 368

Balance of the fund, after such

or to the amount of fees claimed by him.[25] Money intrusted to an attorney and a member of a committee of promoters by the committee was held properly treated as the money of the committee, which the attorney was not required to pay over while fees for his services and expenses remained unpaid.[26]

An attorney cannot, however, retain his fee out of funds of his client, which have come into his hands for a special purpose,[27] such as for the purposes of a special trust,[28] or which have already been assigned to another, of which assignment the attorney had notice.[29]

If the client is dissatisfied with the amount retained, he may have his remedy therefor against the attorney.[30]

b. Funds in Custody or Control of Court

(1) In general

(2) Where number of persons interested

(1) In General

Where a fund is brought into a court of equity through the efforts of an attorney who looks to such fund for his compensation, the court may award him a reasonable compensation to be paid out of the fund.

Although, strictly speaking, an attorney has no lien for his compensation on any fund in the custody and control of the court (infra § 228), yet, where a fund is brought into a court of equity through the services of an attorney who looks to such fund alone for his compensation, or from which alone he is entitled to compensation, he is regarded as the equitable owner of the fund to the extent of the reasonable value of his services, and the court administering the fund will intervene for his protection and award him a reasonable compensation to be paid out of the fund.[31] This rule applies only to a court of equity, or to a proceeding in an orphans' court, and not to a common-law action, or to money in the hands of a sheriff under a writ of execution.[32]

deduction, is all that may be lawfully demanded by the client—In re Lancaster Trust Co, 186 A. 867, 323 Pa. 107—Gordon v Harrison, 161 A 608, 105 Pa Super 513.

25. People v. Kwasigroch, 180 N.E 344, 296 Ill. 542.

26. In re Marvin, 168 N.Y.S 555, 180 App Div. 778

27. Henry v Becker, (La App) 150 So. 678—Ruffo v Marcotte, 3 La App. 352, set aside 108 So 316, 161 La 147.

28. Bonner v. Goodloe, 266 S W. 62, 205 Ky. 555

Attorneys, employed by an administrator of a decedent's estate, have no legal or equitable right to apply trust money in their possession to the payment of their general claim against the administrator for attorneys' fees and should turn over such money intact to the administrator's successor—Tomlinson v. Flanagan, 190 N E 785, 287 Mass. 38.

For support of children

Moneys collected of a guilty parent for the support of children constitute a trust fund, which neither the parent having the custody of the children nor the supervisor of the parents may burden with an attorney's fee expended in enforcing payment—Bonner v. Goodloe, 266 S W. 62, 205 Ky 555.

29. Southern Nat Bank v. O'Brien, 95 S.E. 546, 175 N C. 338

Assignment of building contract

Where an attorney collects moneys for his client on the latter's building contract, and retains a part thereof as compensation for his services, a prior assignee of the contract makes out a prima facie case against the attorney by showing the assignment of the contract to himself, the amount of the indebtedness, and that the attorney acted with notice of his claim, and the burden is then on the attorney to show, in an action by the assignee against him, the value of his services and his right to retain the amount thereof—Southern Nat. Bank v. O'Brien, 95 S E 546, 175 N.C 338

30. Lemington Building & Loan Ass'n v. Weddell, 174 A. 673, 115 Pa Super 114.

In Pennsylvania, if the client is dissatisfied with the amount retained, he may either bring an action against the attorney or take a rule on him. When the latter remedy is invoked, the court will consider whether the sum was held back in good faith and is no more than just compensation, and if so, the rule will be discharged and the parties sent to a jury, but, if otherwise, the court will compel immediate justice—Lemington Building & Loan Ass'n v Weddell, 174 A. 673, 115 Pa. Super. 114

31. U.S—Wallace v. Fiske, (C C. A Mo.) 80 F (2d) 897—Swift v. Jackson, (C C A Okl) 87 F (2d) 237, certiorari denied 50 S Ct. 351, 281 U S. 745, 74 L Ed 1158—Carbon Steel Co. v Slayback, (C C.A W Va) 31 F (2d) 702—Grant v. Fletcher, (D C Mich) 283 F 243—Turner v. Woodard, (Mass) 259 F. 737, 170 C C.A. 537.

Ark—Terral v. Poe, 79 S.W.(2d) 69, 190 Ark. 346.

Ga—Johnston v. Higdon, 161 S.E 382, 44 Ga.App. 313

Iowa—Hornish v. McConnell, 182 N. W 406, 191 Iowa 308.

Ohio—State v Council of Village of Bedford, 174 N E 601, 37 Ohio App. 265, affirmed Council of Village of Bedford v. State, 175 N E. 607, 123 Ohio St. 413

Pa—Zinsser v. Zinsser, 33 Pa Super. 461.

6 C.J. p 782 note 71.

Attorney for guardian and ward

An attorney, whose claim to a third of royalties as a fee for representing a guardian and ward in suits affecting the latter's title to land was allowed by the guardian and approved by the probate court, has an equitable interest in a royalty fund impounded by a bill of interpleader—Bolton v. Baldwin, (Tex. Civ App) 57 S W.(2d) 957.

Funds recovered or preserved for corporation

(1) Where, through a breach of duty by the officers or attorneys of a corporation, its rights are imperiled and stockholders are justified in intervening for their protection, a reasonable fee is properly allowable to the corporation's attorney from funds recovered for the corporation—Mecartney v. Guardian Trust Co, (C C A.Mo) 280 F. 64.

(2) Where the services of attorneys retained by trustees, appointed by a court for the benefit of creditors and stockholders of a corporation whose charter has lapsed, preserve property, their fees, exclusive of one's services as secretary, should be paid from the fund in the hands of court.—State v Wayne County Agr. Soc., 163 N W. 764, 101 Neb. 427.

32. Zinsser v. Zinsser, 33 Pa Super. 461.

The power of the court to award such compensation out of the fund, is impersonal, and acts only on the res, when within the custody and control of the court.[33] The allowance of the fee out of the fund is within the judicial discretion of the court,[34] and it may, either of itself or through an auditor, determine and fix the amount of the fee without a reference to a jury,[35] and order it to be paid direct to the attorney;[36] but it has been held that the attorney cannot, without the knowledge or authority of his client, file a written order with the court directing it to mark to his use a certain amount of the principal of a judgment obtained by him.[37] The court may also protect the client against being required to pay the same bill for fees twice out of such funds.[38]

The court cannot allow an attorney's claim for procuring an appropriation statute, from the funds created thereby, where the statute expressly limits the amount appropriated, as a trust fund, to particular purposes.[39]

Necessity of fund being secured by services

An attorney is entitled to have such an allowance of his fees, only where his services are properly authorized and operate to secure or collect, and bring into the custody and control of the court, the fund out of which he claims to be paid;[40] and, therefore, an allowance out of the fund cannot be made to an attorney whose services were performed in behalf of adverse interests, and in opposition to the fund.[41]

Against public policy

Public policy forbids courts, in the absence of statutory mandate or consent of an attorney's client, to adjudge and decree the attorney a part of the proceeds of a judgment recovered by him for his client—Board of Com'rs of Okfuskee County v. Haslewood, 192 P 217, 79 Okl 185, 11 A L R 709

Agreement as to bail money

Where a wife of one in jail deposited twenty-five dollars bail, and agreed that her husband's attorney should receive the amount remaining out of the bail money after payment of the fine, and the husband was fined ten dollars, and such fine was suspended and the attorney collected all the bail money, he was entitled at least to retain the fifteen dollars remaining, and the wife was not entitled to the other ten dollars, as the judge had no authority to suspend payment of the fine for more than twenty-four hours, under St § 2918, the wrongful payment thereof to the attorney by the clerk not reinvesting the title thereto in the wife—Hardin v. Pugh, 254 S W. 756, 200 Ky 252

33. U S—Davidson v. American Blower Co, (D C.N.Y.) 245 F. 773
Mo—Rumsey v. Peoples R. Co, 84 Mo App 508
Tenn—Rawlings v. New Memphis Gaslight Co, 60 S W. 206, 105 Tenn 268, 80 Am S R 880.

Before the fund comes into the court's control, it cannot, in the exercise of its equitable powers, declare an allowance of attorney's fees and payment out of a fund resulting from a taxpayer's suit against a county treasurer for failure to turn over taxes—People v Holten, 136 N E. 738, 304 Ill 394, 24 A L R. 929, affirming 222 Ill App 427

34. Carbon Steel Co. v. Slayback, (C C A W Va) 31 F.(2d) 702.

35. Swift v. Jackson, (C C A Okl) 37 F (2d) 237, certiorari denied 50 S Ct 351, 281 U S. 745, 74 L Ed 1158—Carbon Steel Co. v. Slayback, (C C A.W.Va) 31 F.(2d) 702—6 C J p 782 note 72

36. U S—Wallace v. Fiske, (C.C A Mo) 80 F (2d) 397.
Minn—Regan v. Babcock, 264 N W. 803

37. Zinsser v. Zinsser, 83 Pa Super 461

38. Campbell v. Lederer Realty Corporation, 142 A 332, 49 R I 276.

To assignee

Where a fund obtained for a client is paid into the registry of the court in compliance with a decree to protect the client, and the attorney does nothing to bring about a sequestration of the funds, the court will protect the client as to such funds against being required, after once paying the attorney from funds which the court has authorized the client to withdraw for such purpose, to pay the same bill again to the attorney's assignee.—Campbell v. Lederer Realty Corporation, 142 A. 332, 49 R I. 276

39. In re Gage, 226 N W. 64, 208 Iowa 603

40. U S—Holland Banking Co v Continental Nat. Bank of Jackson County, Kansas City, Mo., (D C Mo) 9 F Supp 986, set aside (C C A) Edwards v. Holland Banking Co, 75 F (2d) 713—McKinney v Black Panther Oil & Gas Co, (C. C A Okl) 280 F. 486, appeal dismissed Houts v. McKinney, 43 S. Ct 363, 261 U S. 628, 67 L Ed 834
D C—Fletcher v Coomes, 52 App D C 159, 285 F. 893, certiorari denied 43 S Ct 363, 261 U S 619, 67 L Ed 830.
Minn—Merrick v. Bonness, 68 N.W. 850, 66 Minn 135.
6 C J p 783 note 74

Fees in other cases, cannot be allowed out of such fund—Terral v Poe, 79 S W (2d) 69, 190 Ark 346

Unauthorized suit

Where an action on a public contractor's bond executed for the protection of laborers and materialmen is brought for the benefit of such laborers and materialmen by the contractor's receiver instead of by claimants themselves, or by the school board for their benefit, the solicitors for the receiver are not entitled to their fee out of the funds in the hands of the school board which the court ordered paid into court—Cass v. Smith, 240 S.W. 778, 146 Tenn 218

41. U S—Holland Banking Co. v. Continental Nat Bank of Jackson County, Kansas City, Mo, (D C Mo) 9 F Supp 986, set aside (C C A) Edwards v. Holland Banking Co, 75 F (2d) 713—Brown v. Pennsylvania R Co., (Pa.) 250 F 513, 162 C C A. 539, modifying (D C) Brown v Pennsylvania Canal Co, 244 F 980, and certiorari denied Pennsylvania R. Co. v. Brown, 39 S Ct. 6, 248 U S 558, 63 L Ed 420
Cal—Scott v Superior Court in and for City and County of San Francisco, 281 P. 55, 208 Cal 803.
La—Brown v. Furlong, 127 So. 731 170 La 302
Md—Baltimore, etc, R Co. v Brown, 29 A 524, 79 Md 442
Pa—Com v Order of Solon, 43 A 1084, 192 Pa. 487.
S C—Standard Oil Co of New Jersey v. Powell Paving & Contracting Co., 138 S E. 184, 139 S C 411, rehearing denied 138 S E. 544, 140 S C. 39.
6 C J p 783 note 80.

As creditor

An attorney for defendants, in an action in which subscriptions to stock were canceled as fraudulently induced by defendants, is not entitled to reimbursement for services

On appeal. On an appeal, the appellate court may fix an attorney's fees for services rendered, pending the appeal, and may direct the payment thereof out of a fund in the custody and control of the appellate court [42]

(2) Where Number of Persons Interested

An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund If he acts only for particular interests, his right to an allowance, ordinarily, extends only to the part of the fund which belongs to those whom he represents.

Where a number of persons are interested in the fund, as in the case of an estate or fund with a number of beneficiaries, compensation for legal services, as a general rule, can be imposed on the estate or fund, as a whole, only where such services are rendered on behalf of, and are beneficial to, the common estate or fund.[43] If the attorney's services are rendered in presenting or preserving the interests of only some of the parties or beneficiaries interested, his right to an allowance out of the fund, ordinarily, extends only to that part of the estate or fund which belongs to those whose interests he has represented in the suit.[44] For example, in a proceeding to wind up the affairs of an insolvent corporation, the attorneys who file a general creditors' bill, whereby creditors come in and file their claims, are entitled to compensation for such services out of the fund thus produced;[45] but solicitors representing only petitioning creditors must be paid by their clients out of the portion of the fund decreed to them; they cannot look to the general fund.[46]

If, however, the attorney's services, although employed by a part only of the persons interested, are for the benefit of all and have protected or preserved the whole estate or fund, his compensation may be allowed therefrom, where the other persons interested have stood by without counsel and will

as a creditor out of the subscription fund—Matteson v Weaver, 207 N W 838, 234 Mich. 92

Opposition to estate

Where an attorney had appeared for his client both as an administrator and as an individual, in an action to establish a debt due him by the estate and for a sale of lands of the estate to pay the same, and for the distribution of any surplus among the heirs, a court of equity has no power to fix his fee, except by the consent of parties, which is not given by an order of reference by consent to fix such fee, even though the suit has resulted in bringing the land and proceeds of sale under the control of the court of equity—Cauthen v. Cauthen, 56 S E 978, 76 S C. 226

Presenting claims against fund

Attorney's fees for presenting and securing the allowance of labor and material claims against a surety and funds in the hands of a city after a breach of a paving contract, should be paid by the parties for whose benefit the services were rendered, and not be deducted from the fund in hand, and then be collected back against the surety—Standard Oil Co. of New Jersey v Powell Paving & Contracting Co, 188 S E 184, 189 S C. 411, rehearing denied 188 S E 544, 140 S C 39

Resisting assessments

An attorney employed by policyholders of an insurance company to contest the validity of assessments laid on them by enjoining the company from doing business is not entitled to be paid for his services out of the funds in the hands of the receiver of the company subsequently appointed—Com v. Mechanics' Mut F. Ins Co, 122 Mass 421.

42. Swift v. Jackson, (C C A Okl) 37 F (2d) 237, certiorari denied 50 S Ct. 351, 281 U S 745, 74 L Ed 1158

43. Ala.—Coker v. Coker, 94 So 308, 208 Ala 239.
Ark.—Marlin v Marsh & Marsh, 76 S W (2d) 965, 189 Ark 1157.
Cal—Scott v. Superior Court in and for City and County of San Francisco, 281 P. 55, 208 Cal. 303.
Fla—Lewis v. Gaillard, 69 So 797, 70 Fla. 172—State v Florida Cent R Co, 16 Fla 703.
N Y—Irish Free State v. Guaranty Safe Deposit Co, 266 N Y S 8, 148 Misc 256, affirmed 271 N.Y S. 1071, 242 App Div 612.
14a C J. p 940 note 31 [c], [e].

Attorney who, in representing an executor or administrator, as client, renders services on behalf of the estate, in recovering or preserving the estate, is entitled to have his compensation paid out of the estate— Coker v. Coker, 94 So. 308, 208 Ala. 239

Common understanding of all parties

Where a controversy involved the question of priorities, and all parties understood that ultimately the fund would be awarded to supply claimants on the one hand or to noteholders on the other, to the complete exclusion of the other class of creditors, and the noteholders ultimately prevailed, the attorneys' fees could not be awarded to plaintiff supply claimants out of the fund involved.—First Nat Bank v Southern Cotton Oil Co, (C C A Ga) 86 F.(2d) 23

44. Ala.—Coker v. Coker, 94 So 308, 208 Ala 239.
Ga.—Carey v Hardy, 117 S E. 118, 30 Ga App. 102
6 C J. p 782 note 73, p 783 note 80.

Intervention by individual bondholders of a corporation in a receivership, not resulting in an increase in funds in the hands of receivers or in subjection of additional property to receivership, does not require an allowance to interveners of fees from general funds subjected to receivership before intervention, although the interveners successfully and alone argue against the approval of the proposed sale of bonds.— Christian Women's Benev. Ass'n v. Atlanta Trust Co., 183 S E. 551, 181 Ga 576.

Services not creating fund for benefit of others

Where a partition suit is for the sale of property in esse and in hand, and for the division of the proceeds of the sale, plaintiff's attorney is not entitled to compensation from defendants, on the theory that his services created a fund of which they received the benefit—Fletcher v Coomes, 52 App D C 159, 285 F. 893, certiorari denied 43 S.Ct. 363, 261 U S 619, 67 L Ed. 830

45. U S—Carbon Steel Co. v Slayback, (C C A.W Va) 31 F (2d) 702
Ill—Milliman v. Seed, 206 Ill App. 362.
6 C.J. p 783 note 76.

46. Rives v. Patty, 20 So. 862, 74 Miss 381, 60 Am S R. 510—6 C.J. p 783 note 77.

reap the benefits of such services;[47] or, in such a case, the attorney may be compensated by proportional contributions from the portions of persons who, notwithstanding their opposition, either expressly or impliedly accept the benefits of the attorney's services,[48] and the mere fact that some of the persons interested have employed counsel and opposed the suit which has benefited them, will not prevent their interests from being subjected to the payment of reasonable compensation to counsel who has succeeded in recovering or preserving the fund which is brought into the custody of the court.[49]

In accordance with these rules, an attorney's fees may be ordered to be paid out of a trust fund or estate, where his services have aided in creating, preserving, or protecting the fund or estate,[50] although some of the parties benefited opposed the suit, if they have accepted the benefits thereof.[51] On a creditors' bill or on a bill filed by a cestui que trust, to rescue trust property, the fees of the solicitor for complainant, accruing in the preparation and conduct of the suit to a decree of condemnation, or of rescue and restoration, will generally be charged on the fund, since, to this extent, the others having similar interests proportionally avail themselves of his labor and skill in discov-

47. U S—Burden Cent Sugar-Refining Co. v Ferris Sugar-Mfg Co, (La.) 87 F. 810, 31 C C A. 233.
W Va—Woods v McLain, 166 S E 279, 112 W Va 612.
6 C.J. p 784 note 88.

In a suit to set aside a fraudulent conveyance, in which other creditors intervene and secure benefits from the litigation, the court, having the fund in its control for distribution will award a sum therefrom in payment of complainant's solicitors—Adams v. Kehlor Milling Co., (C C Mo) 38 F. 281.

Services rendered after appointment of receiver

Attorney for a creditor who obtains an adjudication of insolvency against the corporation and the appointment of a receiver is entitled to an allowance for services rendered in the protection of the fund, even after the appointment of the receiver—Bowker v. Haight, etc, Co, (N Y.) 170 F. 67, 95 C C A 343—Burden Cent. Sugar-Refining Co. v Ferris Sugar-Mfg Co, (La) 87 F 810, 31 C.C A. 233.

48. U.S—Wallace v. Fiske, (C C A Mo.) 80 F (2d) 897.
Va—Howard v. Charleston First Nat. Bank, 27 S E 492.

As between remaindermen

Where a plaintiff remainderman procures a favorable decree in a federal court to determine and quiet title to his interest in trust property, defendant remaindermen, who seek distribution of their interests on the basis of the decree, and who on review question the court's refusal to protect their rights thereunder, and rely on such rights in a state court in resisting inheritance taxes, will be held to have accepted the benefits of the services of plaintiff's attorney, as regards the assessment of counsel fees against defendant remaindermen's interests—Wallace v. Fiske, (C.C.A.Mo.) 80 F (2d) 897.

As class suit

A remainderman's suit against fellow remaindermen and others to determine and quiet title to plaintiff's interest in trust property, although not starting as a class suit, becomes substantially a class suit by defendant remaindermen's accepting and claiming the benefits thereof, as regards the assessment of fees for plaintiff's attorney against defendant remaindermen's interests—Wallace v Fiske, (C C A Mo) 80 F (2d) 897.

Distinct from claim of client

An allowance to an attorney from the portions of other persons interested, who have accepted and enjoyed the benefits of his services, belongs to the attorney alone, and is a right which he may enforce directly and independently of his client—Wallace v. Fiske, (C C.A Mo.) 80 F. (2d) 897.

49. Wallace v. Fiske, supra.

Reason for rule

"The mere fact that a large percentage of those interested may have employed counsel, and may have opposed the suit whose institution has benefited them, will not prevent their interests from being subjected to the payment of reasonable compensation to counsel who have succeeded in recovering or preserving a fund which is brought into the custody of the court; for, 'if the class of persons among whom the fund will be distributed has been benefited by the suit, it makes no difference that some of them may have contested it; for it is the benefit conferred, and not the fact that all the beneficiaries may have agreed as to what was beneficial, that entitles counsel to compensation'".—Wallace v. Fiske, (C C.A Mo.) 80 F. (2d) 897, 907—Buford v. Tobacco Growers' Co-op Ass'n (C.C.A N.C.) 42 F.(2d) 791, 792.

50. U S—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, Mo, (D C. Mo) 9 F Supp. 986, set aside (C C A) Edwards v. Holland Banking Co, 75 F (2d) 713
N Y—In re Abruzzo's Estate, 249 N. Y S. 72, 139 Misc. 559.
6 C J. p 784 note 89.

"Such an allowance is made on the theory that the estate has been benefited and thereby the beneficiaries of the trust"—Holland Banking Co. v Continental Nat Bank of Jackson County, Kansas City, Mo, (D C Mo) 9 F Supp 986, 987, set aside (C C A) Edwards v. Holland Banking Co., 75 F.(2d) 713.

Attorney for beneficiary of charitable trust

The fact that attorney's services, rendered for the beneficiaries of a charitable trust, are not for the benefit of the estate does not preclude the court from enforcing the payment of reasonable attorney's fees therefor, since, although any benefits to the estate therefrom are incidental to the attorney's primary duty to his clients and for the purpose of increasing the general corpus of the estate which passes to the clients as residuary legatees, payment of such fees from the estate funds inevitably comes from the residue to which the beneficiaries are entitled, and is solely from the clients' interest in the estate.—In re Abruzzo's Estate, 249 N Y.S. 72, 139 Misc 559.

51. Wallace v. Fiske, (C C.A.Mo) 80 F (2d) 897
"Allowances of this kind, if made with moderation and jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice".—Wallace v. Fiske, (C C.A Mo) 80 F (2d) 897, 908—Tevander v. Ruysdael, (C. C.A Ill) 299 F 746, 748.

Other party taking advantage of decree

An attorney cannot be denied counsel fees for services in a suit to quiet title of remaindermen in properties of trust on the ground that he brought no fund into court which could be subjected to his demands against those remaindermen who asserted no rights in such suit, where the properties were in the hands of trustees and such remaindermen sought to take advantage of the decree—Wallace v. Fiske, (C.C. A Mo.) 80 F.(2d) 897.

ering and making it available.[52]

Counsel for a beneficiary cannot claim payment out of the estate,[53] although he may be paid out of his client's share,[54] unless it has been appropriated to a particular purpose,[55] or he may be paid from the portions of those beneficiaries who have joined in the proceedings, or who have acquiesced in the attorney's services.[56]

Allowance of an attorney's claim for compensation for services rendered to an estate will be considered in the title Executors and Administrators § 386, as will also the allowance of attorney's fees as expenses of administration in the same title § 388.

Individual contests. After the fund or property has been brought in and made available by the decree of the court, and nothing remains but its proper administration and distribution, contests which may arise between claimants, in respect to priorities or the right to share in the fund, are individual matters involving antagonistic interests, and the counsel fees of those conducting such contests cannot, therefore, be made a charge on the fund or on the property, but must be paid by the parties themselves.[57]

§ 194. Summary Remedies to Compel Payment

A summary remedy to compel the payment of an attorney's fees, ordinarily, is not available, except where there is a stipulation in the contract for such a remedy, where the amount of the fee is liquidated, or where a fund or property, subject to the payment of the fee, is in the custody and control of the court.

Since, ordinarily, as stated hereinafter, the recovery of an attorney's fee must be by an action (infra § 195), as in the case of any other contract, or by a suit in equity to enforce his attorney's lien (infra § 236), an attorney cannot generally have relief to compel payment of his fees by a summary proceeding or order in the cause in which the fees are earned,[58] and an application for summary relief, as between the attorney and client, can be resorted to, by way of exception to the general rule, only to quiet collateral controversies impeding the progress of the actual course of the litigation.[59] The amount of the compensation, generally, must be settled in a separate action or proceeding at law, and not in a summary proceeding in the action or suit in which the services are rendered,[60] except where power to do so is conferred on the court by a stipulation in the contract between the attorney and client,[61] or where, as has been considered

52. Strong v. Taylor, 2 So 760, 82 Ala 213.

53. In re Gingrich, 9 Pa Co 16—6 C. J. p 783 note 82.

54. In re Lyons, 173 N Y S 590, 186 App Div. 161, affirmed 227 N Y 564, 124 N E. 899—6 C J p 783 note 83

55. Gentile v. Plasencia, 10 La Ann. 203

Attorney appointed by the court to represent the interest of minors who were legatees under a will which the executor and the other heirs at law had sued to set aside cannot be paid his fees out of the legacy to the minors, which, by the terms of the will, was specifically appropriated to certain designated purposes for their benefit—Gentile v. Plasencia, 10 La. Ann. 203

56. U.S—Wallace v. Fiske, (C C A Mo) 80 F (2d) 897
Va.—Howard v. Charleston First Nat Bank, 27 S E. 492.
6 C J p 784 note 84.

57. U S—Wallace v. Fiske, (C C A. Mo) 80 F (2d) 897.
Ala.—Strang v. Taylor, 2 So. 760, 82 Ala. 713.
6 C J. p 784 note 91.

58. U.S—Universal Oil Products Co v Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C A.) German v Universal Oil Products Co., 77 F.(2d) 70.
N Y—Schmidt v. Massapequa Co., 268 N Y S 543, 240 App Div 1011, 241 App Div. 618—In re People, by Phillips, 216 N.Y S 256 217 App Div 681, reversed on other grounds 155 N E 735, 244 N Y. 443
6 C.J p 755 note 75.

Ex parte petition
The remedy of attorneys, seeking a recovery of fees for successfully defending the claim of a county and its treasurer to another county's notes, pledged by a bank as security for the former county's deposit as against the county issuing them and the bank's receivers, is by action at law, in which the clients are entitled to a jury trial, and not by an ex parte petition to fix the fees in an equity suit wherein the receivers were appointed.—Wessinger v Sturkie, (C C A S C) 77 F (2d) 751

That an attorney is an officer of the court does not entitle him to a summary judgment, for services rendered, against his client, who has settled with the adverse party and dismissed the action—Universal Products Co v. Standard Oil Co of Indiana, (D C.Mo) 6 F Supp 37, affirmed (C.C A.) German v Universal Oil Products Co., 77 F.(2d) 70

59. Selesnow v. Shub, 240 N Y.S 329, 136 Misc. 365.

60. U S—Wessinger v Sturkie, (C C A S C.) 77 F (2d) 751—Universal Oil Products Co v. Standard Oil Co, of Indiana, (D C Mo) 6 F. Supp 37, affirmed (C C.A.) German v Universal Oil Products Co, 77 F (2d) 70
N Y—In re People, by Phillips, 216 N Y S 256, 217 App Div. 681, reversed on other grounds 155 N E. 735, 244 N Y. 443—Brown v. New York, 9 Hun 587.
S C—D P O'Connor & Co. v. Keiser, 67 S E 737, 85 S C. 522.
6 C J p 755 note 76.

Appeal
Where the court, on a motion therefor, makes an order fixing an attorney's compensation for services in an action for death, the remedy of the guardian of the intestate's children is not by an independent motion to vacate the order, but by direct appeal—In re Atterbury, 113 N E 858, 222 N Y 355, reversing 167 N Y S. 88, 179 App Div. 643.

Court in which a suit is pending has no jurisdiction on intervention, petition, or motion of the attorney to determine what compensation the attorney has earned and to give judgment therefor against his client. —Universal Oil Products Co. v Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C.A) German v Universal Oil Products Co, 77 F.(2d) 70.

61. Eriksson v. Boyum, 184 N.W. 961, 150 Minn. 192.

heretofore (supra § 193), the attorney's services have brought a fund into the custody and control of a court of equity, in which case the court may in an ancillary proceeding award him a reasonable compensation, to be paid out of such fund,[62] and in such a case the application for such an allowance or award may be made either by the attorney himself or by the client for his benefit.[63]

An attorney may also resort to a summary remedy for his compensation, where the amount of his fee is liquidated,[64] or, where he has a lien on some article of value within the control of the court.[65]

This summary remedy, however, is discretionary, is always a subsidiary proceeding in the principal cause, and must be instituted while that cause is still pending.[66] In other words, an attorney may claim his fees out of money secured through his services only when the money has come into his possession, or when it has come within the grasp of the court.[67]

Generally, a claim for the allowance of counsel fees, in a case where such an allowance is proper, is presented informally by petition or motion, and without process or notice,[68] unless notice is required by statute.[69] There must, however, be adequate proof of the services and defenses,[70] and the court should take proof, or appoint an official referee to do so, of the nature of the services and their value and fix the compensation therefor.[71]

Validity and effect of stipulation

A stipulation in the contract to submit the question of the value of the attorney's services to the court at the conclusion of the action is valid and confers on the court by a supplemental proceeding in the action jurisdiction to hear and determine the matter—Eriksson v Boyum, 184 N.W. 961, 150 Minn 192

62. U.S.—Wallace v Fiske, (C.C.A. Mo.) 80 F.(2d) 897
Ark.—McClintock v. Lankford, 234 S.W. 633, 149 Ark. 670

In liquidation proceeding

An attorney's application to have the liquidator of an insolvent insurance company pay the attorney his percentage fee on claims allowed in the liquidation proceeding should be made in the proceeding in which the liquidator was appointed, and leave to make such application granted—In re Finkelstein, 267 N.Y.S. 471, 149 Misc. 101.

Laches

Where a decree was procured in 1927 through the efforts of plaintiff remainderman's attorney in a suit to determine and quiet title to interest in trust property, an ancillary petition by the attorney in 1934 for the assessment of counsel fees against defendant remaindermen's interests is not barred by laches, where the petition was filed within six months after the supreme court's decision reviewing the decision of the circuit court of appeals in 1932, whereby potential concrete benefits to defendant remaindermen under the 1927 decree were first made apparent—Wallace v. Fiske, (C.C.A.Mo.) 80 F.(2d) 897.

Parties

Where an entire trust fund is brought into a court of equity and the chancellor is clothed with power to make orders incidental to its administration, the parties are not misjoined in an ancillary proceeding for counsel fees against remaindermen, notwithstanding their interests are in some respects distinct and separate—Wallace v. Fiske, (C.C.A.Mo.) 80 F.(2d) 897.

63. Wallace v. Fiske, supra

Against funds in hands of receiver

A petition for an allowance out of funds in the hands of the receiver for the fees of the attorneys for plaintiff, in an action by a creditor to wind up an insolvent corporation, may be made either by the plaintiff, in such action, or by the attorneys themselves—Bradshaw v. Little Rock Bank, 89 S.W. 816, 76 Ark. 501

Against persons accepting benefits

An application for an allowance of attorney's fees against persons accepting the benefits of his services in creating a fund, may be made by his client for the benefit of the attorney—Wallace v. Fiske, (C.C.A. Mo.) 80 F.(2d) 897

Jurisdiction

In a suit to determine and quiet title to plaintiff's remainder interest in the trust property, where the court's order directed the trustees to deliver to a life tenant's executor the property representing defendant remaindermen's interests, and to deliver into the court's registry cash or property in a specified amount, and reserved jurisdiction thereover to protect tax liability and solicitor's lien, the court is not divested of jurisdiction over the fund subject to assessment of counsel fees for services of plaintiff's attorney beneficial to defendant remaindermen—Wallace v. Fiske, (C.C.A. Mo.) 80 F.(2d) 897

64. Goddard v Stiles, 90 N.Y. 199—6 C.J. p. 755 note 77.

65. Brown v. New York, 9 Hun (N.Y.) 537.

66. Nolan v. Taylor, 12 La.Ann. 201.

67. Seybert v. Salem Tp., 22 Pa.Super. 459.

68. Jacobs v Jacobs, 131 S.E. 455, 100 W.Va. 612

Intervening petition

An intervening petition by an attorney for defendant in a proceeding which was not for the purpose of establishing a lien for the amount claimed to be a reasonable fee, but was a suit between the attorney and the client to recover a reasonable amount for services, was dismissible—Hitchcock v. Hitchcock, (Ill.App.) 2 N.E.(2d) 575.

69. Mann v. Bradshaw's Adm'r, 118 S.E. 326, 136 Va. 351.

Notice to interested parties

(1) Under a statute forbidding any allowance of counsel fees from money or property under the control of the court, unless claim therefor be stated in the bill, petition, or other proceeding of which the interested parties shall have due notice, or unless due notice of application therefor be first given, an order for compensation to an attorney for the administrator, who was also attorney for certain creditors, in a creditors' suit against the estate, was unauthorized where the required notice was not given—Mann v Bradshaw's Adm'r, 118 S.E. 326, 136 Va. 351

(2) An attorney's application to have the liquidator of an insolvent insurance company pay the attorney his percentage fee on claims allowed in a liquidation proceeding could not be adjudicated, in the absence of notice to claimants, notwithstanding the attorney's alleged ignorance of claimants' whereabouts—In re Finkelstein, 267 N.Y.S. 471, 149 Misc. 101.

70. In re Pelgram's Estate, 265 N.Y.S. 626, 239 App.Div. 18.

71. In re Cupid, 245 N.Y.S. 554, 230 App.Div. 677.

Jurisdiction to order reference

In an action involving the question whether a will created a trust, a judge, holding court in a circuit other than the one in which the cause was pending, has no jurisdiction, in the absence of the executors' consent,

Against associate attorney. One attorney is not entitled on a summary application to compel the payment to him by another attorney of a portion of the fees or of the costs received in an action.[72]

Against defendant. A summary proceeding will not lie to enforce an agreement whereby a defendant, as part of a compromise, promised to pay plaintiff's attorney his costs and fee.[73]

After termination of relation. The termination by an attorney, without sufficient cause, of the relation of attorney and client relegates him to ordinary remedies to compel payment for his services; and the court may not secure payment by application of any remedy dependent on the relation of attorney and client.[74]

§ 195. Actions for Compensation

An attorney may by action sue to recover his compensation and fees.

Attorneys may sue to recover their fees.[75] As will be noticed hereinafter, the proper form of procedure for an attorney to compel payment of his compensation is, generally, by an action at law on the contract of employment (infra § 197), or by a suit in equity to enforce the attorney's lien (infra § 236). He may state a cause of action for a money judgment on account of services rendered and money advanced, although the purpose is to foreclose an attorney's lien, the existence of which is open to doubt or denial;[76] he may bring an action against his client for fees earned in the trial of a former action, and may obtain a judgment and collect the same by execution, levy, and the sale of property to pay the judgment.[77] If he is discharged without cause, as a general rule, he may recover on a quantum meruit the reasonable value of his services or he may sue for damages for the breach of contract (supra § 169); and, where plaintiff's statements show either that defendant has made it impossible for plaintiff to perform his contract, or that plaintiff was improperly discharged, an action to recover as for performance of the contract may be dismissed.[78]

Against adverse party. Where an attorney seeks to recover his compensation from the adverse party after a settlement has been made without his knowledge, the proper procedure is for him to file a petition, and have a trial in open court, or by reference in the usual way, of the issues raised by the adverse party's answer.[79]

§ 196. —— Defenses

A client, when sued for his attorney's compensation, may set up defenses which show that the attorney has not earned, or otherwise is not entitled to, the compensation sued for.

In an action by an attorney for compensation for services rendered, it is a good defense that the attorney also acted for the adverse party, who had conflicting interests in the subject matter (supra § 167); that the contract, under which the services were performed, was illegal, as being contrary to public policy or good morals (supra § 181); that the attorney was guilty of culpable negligence in the discharge of his duties (supra § 167); and in an action on a quantum meruit, that the services rendered were of no value to defendant,[80] or that he had been paid his compensation in full, as fixed by contract, and that no additional services had been rendered.[81] In an action for attorney's fees

to order a reference to determine the compensation due the executors' attorneys for services rendered in that action, the executors not being bound by the consent of their attorneys—Harter v. Johnston, 119 S.E. 169, 127 S.C. 64

72. Seybert v. Salem Tp., 22 Pa.Super 459—6 C.J. p 755 note 81

73. Schriever v. Brooklyn Heights R. Co., 63 N.Y.S. 217, 49 App.Div. 629, modifying 61 N.Y.S. 644, 890, 30 Misc. 145, 30 N.Y.Civ.Proc. 67.

74. Barnum v. Burlingame, 138 N.Y.S. 829, 154 App.Div. 897.

On withdrawal

An attorney, whose notice to his client to retain another attorney is disregarded, is not entitled to an order fixing his compensation and permitting him to withdraw—Seleznow v. Shub, 240 N.Y.S. 829, 136 Misc. 365.

75. Levin v. Suffrin, (La.App.) 167 So. 911, 913.

"We have come a long way since the conception of lawyers' fees as gifts by grateful clients. Perhaps, the struggle for place and power under modern conditions has dulled the finer sensibilities responsive to moral obligations, or it may be that the modern lawyer requires more of that which 'makes the mare go' than his predecessor and insists upon more certain revenues, for individuals, like Republics, are frequently ungrateful. However that may be, lawyers may now sue for their fees with impunity."—Levin v. Suffrin, supra.

76. English v. Jenks, 169 P. 727, 54 Mont. 295.

77. Holle v. Forbes, 256 N.W. 157, 64 N.D. 696.

78. Ky.—Henry v. Vance, 63 S.W. 273, 111 Ky. 72, 23 Ky.L. 491.
N.Y.—Copp v. Colorado Coal & Iron Co., 67 N.Y.S. 970, 33 Misc. 773.

79. Freedman v. Kahn, 172 N.Y.S. 93.

80. Freerks v. Nurnberg, 157 N.W. 119, 33 N.D. 587.

Services under invalid contract

Where, in an action by an attorney to recover on a quantum meruit for services rendered at the request of defendant, it was alleged, as a defense, that a portion of such services were performed under a special contract, by the terms of which plaintiff agreed to commence and to prosecute at his own expense certain actions for defendant on a contingent fee basis, and that, in the event he should be unsuccessful, he should receive no compensation for his services, and that he was unsuccessful in such litigation, on the trial it was error to strike, on plaintiff's motion, such defense from the answer and reject proof of the matters thus pleaded—Freerks v. Nurnberg, 157 N.W. 119, 33 N.D. 587.

81. Miller v. Wing, 50 P.(2d) 470, 9 Cal.App.(2d) 483.

for services in obtaining a sheriff's deed, the fact that the client in a prior action to quiet title had relied on a judgment requiring the execution of such a deed, does not preclude him from setting up that the judgment was later vacated.[82] Where the attorney's compensation is to be a certain per cent of the property recovered, a failure to assert his interest in the property in the action in which it is recovered does not preclude his subsequent recovery for services rendered under the contract.[83] However, where a husband devised a homestead to his wife, in a jurisdiction permitting such a devise, and otherwise provided for her, the wife's attorney, who, intending to contest the validity of the devise of the homestead, contracted to accept one half of the amount recovered for the wife above the amount received by her under the will, could not recover from the wife of the testator's son on the ground that the wife by deeding the homestead to the son prevented the attorney's recovery for the wife.[84]

It is no defense to an action by an attorney for services rendered, that he has failed to perform some service which is not within his contractual duties;[85] and in an action on a quantum meruit for the value of services rendered, the contract under which the attorney was employed having been repudiated by the client, it is no defense that services called for by the contract had not been performed.[86] Where the action is on an express contract, it is no defense that defendant has been required to make payments which are not germane to the contract.[87] It is no defense to an attorney's claim for his fees for protecting his client's interest in a trust fund, invested in property on which there is a mortgage in which the trustee is interested, that a foreclosure action is still pending.[88] One who employs the services of an attorney in the subject matter of which others are interested cannot avoid or apportion his personal liability unless he discloses their names, although he may have informed the attorney that others were interested.[89] The fact that the attorney has successfully established his client's title to property does not estop him from asserting an interest therein pursuant to the contract of employment, by which he was to have a certain percentage of whatever property might be recovered.[90] An attorney was held not precluded from the collection of a fee due from a client on the ground that the attorney was enriched by fees paid him for defending the client in a conspiracy proceeding, which prevented the client from responding in full under an accounting to persons resisting the payment of the fees, where the attorney was not a party to the proceeding assailed and had earned the fees for which the claim was made under the contract with the client.[91]

§ 197. —— Form of Action

An attorney, seeking to recover the fees or compensation due him, should proceed, generally, by an action at law; and not by a suit in equity, unless special circumstances give a court of equity jurisdiction.

As an attorney's claim for fees arises ex contractu, the proper form of action by which to enforce payment, generally, is by an action at law on the contract,[92] such as by an action of assumpsit,[93]

82. Scott v Bartholomew, 236 P 825, 36 Ariz. 451.

83. McLaughlin v Goucher, 28 P. (2d) 31, 136 Cal App 87.

84. Winslow v. Becker, (Or) 58 P. (2d) 620

85. Hamme v. Lineberger, 154 S E. 313, 199 N C. 342

86. Bunge v. Downers Grove Sanitary Dist., 191 N E 73, 356 Ill 531, certiorari denied Downers Grove Sanitary Dist v. Bunge, 55 S Ct. 117, 293 U.S. 601, 79 L Ed. 693.

87. Campbell v. House, 176 P. 913, 74 Okl. 35.

Contract as to location of depot

In an action for attorney's fees, under a contract for services in advising a client in securing the location of a depot by order of the state corporation commission, it is no defense that defendant contributed to the purchase of the site on which the depot was located—Campbell v. House, 176 P. 913, 74 Okl. 35.

88. Strong v. Dutcher, 174 N.Y.S. 352, 186 App Div. 307.

89. Willingham, Wright & Covington v Glover, 111 S E. 206, 28 Ga App 394.

90. McLaughlin v. Goucher, 28 P. (2d) 31, 136 Cal App. 87.

91. Crosier v Freeman Coal Mining Co., 2 N E (2d) 293, 363 Ill. 362.

92. U S—Wessinger v. Sturkie, (C. C A S C) 77 F (2d) 751—Universal Oil Products Co v Standard Oil Co. of Indiana, (D C Mo.) 6 F.Supp. 87, affirmed (C C A.) German v Universal Oil Products Co., 77 F. (2d) 70.

Mo—Baur v. Dirhold, (App.) 82 S W (2d) 133.

N Y.—Seleznow v. Shub, 240 N.Y S 829, 136 Misc 365—In re Albrecht, Maguire & Mills, 230 N.Y.S 543, 132 Misc. 713, affirmed 233 N Y.S 883, 225 App Div 423, affirmed 171 N.E. 772, 253 N Y. 537.

R I—Campbell v. Lederer Realty Corporation, 142 A. 332, 49 R I 276.

S C—D. P O'Connor & Co. v. Kaiser, 67 S E. 737, 85 S C 522.

Wis—Velte v. Zeh, 206 N W. 197, 188 Wis 401.

Wyo—Enos v Keating, 271 P 6, 39 Wyo. 217, 67 A.L.R 430, rehearing denied 275 P. 131, 39 Wyo. 217, 67 A.L R 430.

Book account has been held a proper remedy for an attorney to employ to recover his charges for services rendered—Territt v. Woodruff, 19 Vt. 182—Strong v. McConnel, 5 Vt. 328—Bell v. McLeran, 2 Vt. 135.

Dispute as to amount of fees

Where the client advanced the attorney various sums of money on the understanding that such sums were to be paid from fees allotted to the attorney from a fund paid into the registry of the court for the client, and a dispute arose as to the amount of the fees, the attorney should resort to an action at law to determine whether he has a claim for services against the client and the amount due therefor—Campbell v. Lederer Realty Corporation, 142 A. 332, 49 R.I 276.

93. Mecartney v. Wallace, 214 Ill. App. 613—6 C.J. p 755 note 84.

or, where the action is to recover the reasonable value of his services, by an action of assumpsit with an indebitatus assumpsit or a quantum meruit count [94]

Money had and received. Where moneys to which the attorney is equitably entitled have come into the hands of the client, the former may sue as for money had and received;[95] but there can be no recovery on the ground of money had and received by one attorney for the use of another attorney, where the money was paid and received as the money of the attorney receiving it.[96]

Suit in equity. Except in case of the enforcement of an attorney's lien (infra § 236), a suit in equity is available to enforce payment of an attorney's compensation, only where special circumstances are present which give a court of equity jurisdiction,[97] as where the agreement between the parties amounts to an equitable assignment,[98] or where the cause of action for compensation is consolidated with other chancery causes,[99] or where an accounting is contemplated or involved.[1]

An attorney who contracts to receive, as his compensation, a certain part of the property or thing recovered, or a certain amount of specified property, and who has no adequate remedy at law, such as for damages for the breach of the contract, may sue for specific performance of the contract, to recover the property or thing specified, as his compensation.[2]

Counterclaim. An attorney may also recover his compensation by setting up his claim therefor by a counterclaim in an action against him by his client for an accounting.[3]

Attorney appointed by court. Under a statute authorizing the judge to fix the compensation of an

94. Ill.—Mecartney v. Wallace, supra.
La.—D'Avricourt v. Seeger, 125 So. 735, 169 La. 620—Modisette v. Griffin, (App.) 150 So. 400.
Mo.—Woodruff v. Rusk, (App.) 76 S.W.(2d) 709.
W.Va.—Newman v. Levi, 81 S.E. 1036, 74 W.Va. 223.
Attorney's remedy of action on a quantum meruit for value of services actually rendered where a party prematurely terminates or settles the action as to which attorney was engaged by contingent fee contract see supra § 189.

Partial performance

Where an attorney's services are performed under an entire contract which has not been completely performed, he may sue on a quantum meruit and recover the reasonable value of the services rendered, subject to set-off for breach of contract.—Hamilton v. Blakeney, 165 P. 141, 65 Okl. 154.

95. Union Mut. L. Ins. Co. v. Buchanan, 100 Ind. 63—6 C.J. p. 755 note 89.

96. Miner v. McIntyre, 172 Ill.App. 282.

97. Cochran v. Burdick, 63 App.D.C. 150, 70 F.(2d) 754, certiorari denied Burdick v. Cochran, 55 S.Ct. 73, 293 U.S. 561, 79 L.Ed. 661—6 C.J. p. 755 note 86.
Specific performance of contract for services between attorney and client see Specific Performance § 82 [6 C.J. p. 755 note 86 [c] (1), (2), 58 C.J. p. 1058 note 40].

98. Deering v. Schreyer, 64 N.E. 179, 171 N.Y. 451, modifying 68 N.Y.S. 1015, 58 App.Div. 322—Bennett v. Donovan, 82 N.Y.S. 506, 83 App.Div. 95.

99. Lyon v. Oliver, 227 Ill.App. 511, reversed on other grounds 147 N.E. 251, 316 Ill. 292.

Regardless of purely legal questions involved, a court of equity has jurisdiction of an attorney's suit for compensation for legal services, where such suit was consolidated in the lower court with two other purely chancery causes involving the same parties, without any objection thereto by any of the parties interested.—Lyon v. Oliver, 227 Ill.App. 511, reversed on other grounds 147 N.E. 251, 316 Ill. 292.

1. Bennett v. Donovan, 82 N.Y.S. 506, 83 App.Div. 95.

Suit by attorney for share of fees

A suit for an accounting and recovery of a share of the legal fees received, based on a joint contract between plaintiff and a third party and defendant, is maintainable in equity, on the theory that one of two joint obligees cannot bring an action at law.—Cochran v. Burdick, 63 App.D.C. 150, 70 F.(2d) 754, certiorari denied Burdick v. Cochran, 55 S.Ct. 73, 293 U.S. 561, 79 L.Ed. 661.

Special partnership between attorneys

A contract between a New York lawyer and a local lawyer, under which the latter was engaged to prepare and file necessary petitions in certain legal proceedings in consideration of a share in the fees collected, is in the nature of a special partnership, and, therefore, a suit for an accounting of fees collected is maintainable in equity.—Cochran v. Burdick, 63 App.D.C. 150, 70 F.(2d) 754, certiorari denied Burdick v. Cochran, 55 S.Ct. 73, 293 U.S. 561, 79 L.Ed. 661.

2. Mich.—Gates v. McLaulin, 165 N.W. 614, 199 Mich. 438.
Wash.—Roche v. Madar, 175 P. 314, 104 Wash. 21, affirmed 181 P. 857, 104 Wash. 21.
6 C.J. p. 755 note 86 [c].

Dispute as to value of property

Where the value of the property recovered is disputed and no provision is made to determine it, an attorney who has contracted to receive one third of whatever should be recovered has no adequate remedy at law which would defeat his right to specific performance.—Gates v. McLaulin, 165 N.W. 614, 199 Mich. 438.

Suggestion of reason for inadequacy of law remedy

An attorney is not entitled to specific performance of a contract to convey an interest in land as a contingent fee for its recovery without suggesting some reason why a recovery of damages for breach of the contract would not give adequate relief.—McCall v. Atchley, 164 S.W. 593, 256 Mo. 39.

3. Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

Counterclaim for fees and disbursements

Where, in a client's action against his attorney for an accounting, the attorney files a counterclaim for fees and disbursements, he is entitled to payment of notes given for services for an amount allowed by court, but not to payment of a claim for additional compensation not made until after the client's action or claim for further alleged disbursements.—Davitt v. O'Connor, (C.C.A.N.Y.) 73 F.(2d) 43, certiorari denied O'Connor v. Davitt, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

attorney appointed by him to render services to a pauper defendant in a criminal case, the attorney cannot recover on a formal complaint against the county for such services as on a contract.[4]

§ 198. —— Conditions Precedent

A claim or demand by an attorney for his fees and charges, and, when required by statute, the service of a bill therefor on the client, are generally conditions precedent to the bringing of an action for such fees and charges.

Before bringing an action for his fees, charges, and disbursements, an attorney, in the absence of a statutory provision otherwise, must make a claim or demand therefor,[5] and, when required by statute, he must serve a copy of his bill for such fees, charges, and disbursements on his client.[6] The requirement of the service of such a bill, however, has been held not to apply to charges for services rendered in a foreign state by an attorney of that state to a client residing in the local state, where recovery is sought,[7] or to charges for services not connected with the conduct of litigation,[8] such as for conveyancing only;[9] and although the service of the bill is nugatory as to services connected with litigation, recovery may be had for other items contained therein.[10]

An action against a trustee on his independent obligation to pay the reasonable value of the attorney's services to the client, may be maintained without any claim having been made against the client's estate.[11]

A statute requiring the officers of an association to secure the approval of a specified commissioner before paying a claim against it, does not require an attorney to secure such approval before suing such association for his bill for services rendered to it.[12]

§ 199. —— Time to Sue and Limitations

An attorney's right of action for fees or compensation, generally, accrues on his performance of the services contemplated by his contract, the happening of the contingency on which the compensation is to be paid, or on the premature termination of the relation, and is barred by his failure to sue within the time limited by statute.

An attorney's right of action for compensation, generally, accrues at the time the services contemplated by his contract of employment have been substantially performed,[13] or, where the compensation is to be paid on a certain contingency, on the happening of the contingency[14] If the attorney acts under a general retainer, the contract is generally considered an entire one, and the right of action for compensation does not arise until the proceedings have been brought to some conclusion, and the relation of attorney and client has been terminated,[15] or, where it is stipulated that the

4. Board of Com'rs of Vigo County v Moore, 166 N E. 779, 93 Ind App 180

Reason for rule

"If counsel appointed to defend should be permitted to file a formal complaint against the county and recover for the services rendered upon the theory of a contract to pay such sum as the services rendered were reasonably worth, the above statute would be entirely nullified"—Board of Com'rs of Vigo County v Moore, 166 N E. 779, 782, 93 Ind App 180

5. Ga.—Winkle Terra Cotta Co v Butler, 117 So 134, 166 Ga 241. R I.—Page v. Avila, 177 A 541.

Stenographic charges

An attorney, bringing an action for legal services and disbursements, cannot recover for stenographic charges unless he has previously made a claim therefor against the client.—Page v. Avila, (R I) 177 A 541.

6. Le Duc v. Williams, 145 A. 325, 7 N J Misc 342, affirmed 148 A 919, 106 N J.Law 247—6 C J. p 756 notes 1–7.

In New Jersey

(1) Under Pract Act (1903) § 9 (3 Comp St [1910] p 4054), as amended by P L (1911) p 412 (2 Comp St Suppl [1924] p 2793 § 163—9), an advocate or counselor has the right to sue on an implied contract for the reasonable value of services rendered after giving his client a copy of his bill for such fees, charges, and disbursements.—Le Duc v. Williams, 145 A 325, 7 N J Misc 342, affirmed 148 A 919, 106 N J Law 247.

(2) Under this statute, as it read before amendment, the attorney was required, as a condition precedent, to serve a copy of the taxed bill of such fees, charges, and disbursements to the party to be charged, and, on application of such party to the proper judge and on his submission to pay the sum found due on taxation, the same was referred to the proper taxing officer, and the amount found by him bound the parties.—Brown v Harriot, 80 A. 479, 81 N J Law 484—6 C J p 756 note 7.

7. Clock v Donnelly, 109 A 362, 94 N J Law 124

8. Brown v Harriot, 80 A. 479, 81 N J Law 484—6 C J. p 756 notes 9, 10

9. Brown v. Harriot, supra

10. Brown v. Harriot, supra.

11. Hart v Bogle, 152 P 1010, 88 Wash 125

12. Kolars v. Delnik, (Minn.) 266 N.W. 705.

13. Sessions v Palmeter, 26 N Y.S 1076, 75 Hun 268

14. Kult v Nelson, 55 N Y S 56, 25 Misc 238, modifying 53 N Y S 95, 24 Misc 20.

15. Walbridge v. Barrett, 76 N W 978, 118 Mich 433—6 C J. p 755 note 92

Settlement

(1) Plaintiff attorney's cause of action under his contract to sue for property, whereby defendant contracted to pay him for his services one fourth of what might be recovered by suit or settlement, arose when defendant by herself settled the suit, receiving a certain amount of money, so that plaintiff need not show when defendant's interest would have been recovered.—Amick v. Henman, (Mo App.) 241 S W. 983

(2) An attorney may enforce by independent suit for breach of contract, as against his client, a claim for compensation for legal services rendered in a case begun in court, partially prosecuted, and settled before final judgment or decree.—Universal Oil Products Co v Standard Oil Co of Indiana, (D C Mo.) 6 F. Supp 37, affirmed (C.C.A.) German v Universal Oil Products Co., 77 F. (2d) 70.

attorney shall collect the judgment, until the collection has been made[16]

Unless he has contracted for a fixed sum for conducting the proceedings to the termination, however, he may be entitled to compensation, from time to time, for services rendered,[17] and where the separate steps of a single proceeding are taken under separate contracts, the cause of action is complete as soon as each contract has been performed.[18] A demand note for fees may be sued on before the termination of the proceedings in which the services were agreed to be rendered.[19]

Premature termination of relation. Where there is no special agreement which prevents the death of either party from terminating the relation, the right of action accrues at once on the death of either attorney or client,[20] or where unforeseen circumstances arise which render it impossible for the attorney to carry out his agreement[21] So, also, a cause of action in favor of the attorney accrues at once where the contract of employment is violated by the client,[22] as by the wrongful discharge of the attorney,[23] and the fact that the attorney does not await the final results of efforts of other counsel, and possibly the running of the statute of limitations, to demand compensation for work accomplished does not bar his suit for reasonable fees.[24]

Premature action. An action for an attorney's fees, under a contract making the payment thereof dependent on a favorable outcome of the action in which the services are rendered, is premature if brought pending an appeal[25] Premature commencement of suit, however, will not bar a subsequent action.[26]

Limitation. An attorney's right of action for compensation may be barred by his failure to bring it within the time prescribed therefor by statute.[27]

§ 200. —— Jurisdiction and Venue

Except in so far as regulated by special statutory provision, the rules which control in other civil actions, as considered in other articles in this work, apply as to the jurisdiction, see Courts § 41 [15 C.J. p 739 notes 38–41], and as to the venue see Venue § 14 [67 C.J. p 36 notes 82–89], of an action by an attorney for the recovery of his compensation.

§ 201. —— Process and Appearance

In the absence of special statutory provisions, the rules which govern in other civil actions on contracts, as considered in other articles in this work, apply in reference to the process (see Process) and appearance (see Appearances) in an action by an attorney to recover his fees or compensation.

§ 202. —— Parties

As in other civil cases, a person is a proper or necessary party to an action for services rendered by an attorney, according to his being a party to the contract of employment, or having a remedial interest in the cause of action or matter of defense.

Two attorneys, not partners, employed by the same client under separate contracts, cannot jointly sue for their services.[28] This rule, however, does not apply where one attorney is employed by the principal attorney under authority from his client,[29] and where one member of a partnership renders services without an understanding as to whether he alone, or the firm of which he is a

16. Morgan v. Brown, 12 La.Ann 159.

17. Sessions v Palmeter, 26 N Y S 1076, 75 Hun 268—6 C.J. p 756 note 92½.

18. Ennis v. Pullman Palace Car Co, 46 N E 439, 165 Ill. 161, affirming 60 Ill App 398—6 C.J p 756 note 93.

19. Burke v. Dorey, 94 N.E 291, 208 Mass. 45.

20. Pa.—Campbell v. Maple, 105 Pa. 304.
Tex.—Stark v Hart, 55 S.W. 378, 22 Tex Civ.App 543.

21. Warren Deposit Bank v. Barclay, 60 S.W. 853, 22 Ky L. 1555.

22. Watson v Columbia Min. Co., 45 S E. 460, 118 Ga. 603.

23. Cal.—Pierce v. Rilovich, 29 P (2d) 228, 136 Cal.App. 611.
Ohio—Lakewood v. Shaver, 16 Ohio Cir Ct (N S) 413
6 C J. p 756 note 96.
For reasonable value of services
On a client's termination of a contingent retainer contract, a cause of action for the reasonable value of his services immediately accrues to the attorney—Tillman v. Komar, 181 N E. 75, 259 N Y. 133, reversing In re Tillman, 254 N Y S 918, 234 App Div 752—Bloom v Irving Trust Co, 272 N.Y.S. 637, 152 Misc. 50.

24. Pierce v. Rilovich, 29 P.(2d) 228, 136 Cal App 611.

25. Cuneo v. Davis, 171 P. 1079, 36 Cal.App 351.
Action by the assignee of an attorney's claim for services in defending an action, under a contract for payment if the attorney should defeat the action and prevent recovery, or if as a result of the action a lesser amount should be recovered than that claimed, is prematurely brought pending an appeal in the action from a judgment for defendant; for until a final judgment on appeal has been obtained in favor of defendant, or until the case is otherwise finally determined in his favor, or a judgment has become final for a lesser amount than that prayed for in the action, the attorney has not defeated the action or prevented a recovery.—Cuneo v. Davis, 171 P. 1079, 36 Cal.App. 351.

26. Porter v. Ruckman, 38 N Y 210

27. Succession of Spann, 125 So 289, 169 La. 412—37 C.J. p 749 notes 17 18.

28. Starrett v. Gault, 46 N.E. 220, 165 Ill. 99, reversing 62 Ill App 209.

29. Rourke v. Beckley, 49 Pa Super 76.

member, is retained, it seems that suit may be brought either in the name of the individual partner,[30] or in the names of all the partners composing the firm of which the individual attorney so retained is a member.[31] One member of a firm of attorneys, who have an agreement between themselves that claims for moneys laid out for expenses in and about the business of firm clients shall not be a partnership asset, but shall remain the individual property of the partner making the expenditure, may maintain an action in his own name for such expenditures, in the absence of a showing by the client of some injury which would thereby result to him.[32] A surviving partner who continues practice under the same firm name, after the death of his copartner, may sue for services rendered under a contract made by the firm before such death.[33] In an action by a firm of attorneys, another attorney who is in partnership with plaintiffs in another firm, is not a necessary or proper party.[34]

Intervention. An attorney, employed by the principal attorney to assist in litigation for a share of the compensation under an agreement giving him an interest in the subject matter, may intervene as a party in an action by the principal attorney for his compensation.[35]

Defendant. Ordinarily, the employer or employers if there are more than one, should be made party or parties defendant to the suit.[36] Where several guardians assume the position successively, however, only the last need be made a party, although when the services are rendered, the earlier ones have charge of the estate.[37] The fact that the instrument on which the original action was brought was signed by the client for himself and others does not make another a necessary party to the attorney's suit against his client for his fees.[38] Where an attorney seeks to recover his compensation out of a fund which has been pledged to another, the pledgee is a proper party to the action,[39] but creditors, whom the attorney was to pay out of funds secured by him for his client, are not necessary parties to the attorney's suit against the client for services rendered in connection with the funds.[40]

§ 203. —— Pleading

a. Complaint, declaration, or petition
b. Plea or answer
c. Issues, proof, and variance

a. Complaint, Declaration, or Petition

A complaint, declaration, or petition by an attorney for fees or compensation must allege all facts necessary to constitute his cause of action, including the fact and nature of the contract of employment, and that plaintiff performed, or was excused from performance of, the obligations or services therein assumed.

The complaint, declaration, or petition in an action by an attorney to recover for services rendered must show a necessary party defendant,[41] and must allege all the facts necessary to constitute his cause of action, that is, all facts necessary to show defendant's liability to him for the fees or services in question.[42] It should allege facts show-

30. Ostrander v Capitol Inv, etc, Loan Assoc, 89 N.W 964, 130 Mich 312—6 C J p 757 note 15

31. French v. Cunningham, 49 N E 797, 149 Ind. 632—6 C J. p 757 note 16.

32. In re Cardoner's Estate, 206 P. 1070, 28 N M 114.

33. Briesen v. A Certain Fund, 55 App D C. 182, 2 F.(2d) 509.

34. Grisso v. Crump, 160 P. 453, 61 Okl 83.

35. Barnes v. Shattuck, 114 P 952, 13 Ariz. 338, affirmed Barnes v. Alexander, 34 S Ct. 276, 232 U.S. 117, 58 L Ed. 530.

In action for accounting

Where attorneys are employed under an agreement whereby they are to receive one fourth of the money and property recovered in a litigation, an attorney, employed by them to assist in such litigation for an equal share with them in the money and property received through the litigation, is entitled to intervene as a party in an action for an accounting by the principal attorneys against the client; particularly, under a statutory provision that any person who has an interest in the subject matter of a suit which can be affected by judgment may, on leave, intervene in such suit or proceeding at any time before the trial—Barnes v Shattuck, 114 P. 952, 13 Ariz 338, affirmed Barnes v. Alexander, 34 S Ct. 276, 232 U S. 117, 58 L Ed. 530

36. Harrison v. Murphy, 80 S W. 724, 106 Mo App. 465.

37. Fillmore v. Wells, 15 P. 343, 10 Colo 228, 3 Am S R 567.

38. Chappuis & Chappuis v Kaplan, 129 So. 156, 170 La. 763.

39. Healy v. Robinson, 11 Ohio N. P.(N.S) 329.

40. Smith v. Weeks, 147 N.E. 676, 252 Mass. 244.

41. Cal—Platnauer v. Forni, 21 P. (2d) 638, 131 Cal App. 393
Ga—Chance v. Commercial Credit Co, 118 S E 465, 30 Ga App 543
Mass.—Smith v. Weeks, 147 N E 676, 252 Mass 244
Mont.—Fitzgerald v. Eisenhauer, 206 P 685, 62 Mont. 532
N J—Brenner v Calabrese, 150 A. 410, 106 N.J.Eq 202
Or—Teiser v Barlow, 192 P. 394, 97 Or. 410.
Tex—Stroud v. Toland, (Civ App) 279 S W. 609.
Utah—Van Cott v. Wall, 178 P. 42, 53 Utah 282.
6 C J. p 757 note 19.

Accounting between attorneys

A bill by a lawyer against another lawyer formerly employed by plaintiff, stating facts involving a joint venture or quasi partnership in the practice of law, and hence showing that a fiduciary relation existed, and seeking an accounting by defendant as to cases the fees for which he was to share with plaintiff, and seeking to have liens impressed on certain matters and cases which defend-

42. Cal—Platnauer v. Forni, 21 P. (2d) 638, 131 Cal App. 393
Ga—Chance v. Commercial Credit Co, 118 S E 465, 30 Ga App 543
Mass.—Smith v. Weeks, 147 N E 676, 252 Mass 244
Mont.—Fitzgerald v. Eisenhauer, 206 P 685, 62 Mont. 532
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ing a valid contract of employment, and the nature thereof,[43] the subject matter to which it was related or limited,[44] the performance of any conditions precedent,[45] and that plaintiff performed, or was excused from performance of, the obligations or services therein assumed,[46] or that he performed other services in lieu of or in substitution thereof, with the agreement and understanding on the part of defendant that they should take the place of those contracted for and be compensated for in the same manner.[47]

It is not necessary that the facts be alleged in detail or according to strict rules of pleading, but only that they be stated in ordinary and concise language and in such a manner as to enable what was intended to be understood.[48] If the action

ant took away with him, states a case for an equitable accounting—O'Brien v. Mackey, (D.C.N.Y.) 36 F.(2d) 39.

Against intervener

Allegations that plaintiff had performed services as counsel in cases in which defendant had intervened, thereby engaging his services and availing themselves of his previous services, and that thereafter defendants received payment in full of the judgment in favor of their testator, which had given them their status as interveners, thereby becoming indebted to plaintiff for the reasonable value of his services, is subject to general demurrer as not stating a cause of action, since there was no averment that defendants received payment of their judgment in consequence of their intervention, or out of the fund which plaintiff had been the means of securing—Gilliam v. Pirkey, 175 S.W. 216, 189 Mo.App. 691.

When action against client's opponent

In an action against defendant to recover one third of the amount paid by defendant to the client by attorneys, who had been assigned a one third interest in a cause of action against defendant in order to secure their services, it was not necessary to plead and prove all the facts which would have been necessary in the original action to entitle their client to recover—Wichita Falls Electric Co. v. Chancellor & Bryan, (Tex.Civ.App.) 229 S.W. 649, error refused.

Allegations held sufficient to state cause of action

(1) In an action for attorney fees from a corporation in which the attorney was a stockholder—Merchants' Ice Co. v. Scott & Dodson, (Tex.Civ.App.) 186 S.W. 418, error refused.

(2) In a suit alleging a contract with defendant's authorized agent, in performance of which plaintiff rendered certain services of certain alleged value, which were accepted by defendant—Knights of the Ku Klux Klan v. Terrell, 123 S.E. 906, 32 Ga.App. 476.

(3) In a suit for the reasonable value of services in a divorce suit and negotiating alimony settlement, not to show that the services were gratuitous and voluntary—Fleming v. Phinizy, 134 S.E. 814, 35 Ga.App. 792.

Bill on assignment of interest in estate

A bill in an attorney's action on an assignment of part of an estate which alleges that the assignment had been made in consideration of services rendered and to be rendered in the matter of the estate, and in further consideration of plaintiff's agreement to pay out of the fund assigned certain debts of the assignor, is not demurrable—Smith v. Weeks, 147 N.E. 676, 252 Mass. 244.

For breach of exclusive employment

A complaint alleging that defendant agreed to employ plaintiff, and no one else, as attorney and counsel on all legal matters affecting the business of defendant and all subsidiary corporations owned by it, as long as plaintiff owns a single share of defendant's stock, and to pay him a fair and reasonable compensation for all services "if, when, and as rendered," and that defendant employed another to perform some of such services, does not state a cause of action, in the absence of an allegation that he changed his position, or incurred expense, or was employed under a general retainer for a definite period—Boehm v. United Power Laundries, 229 N.Y.S. 430, 132 Misc. 1.

43. Union School Tp. of St. Joseph County v. Moon, 187 N.E. 332, 205 Ind. 514.

Services for corporation

An attorney's allegation that the legal services were in connection with the corporation's organization and operation indicated in itself that the employment was for the corporation, not a stockholder personally—Massey v. Murray, 135 So. 738, 17 La.App. 319.

44. Union School Tp. of St. Joseph County v. Moon, 187 N.E. 332, 205 Ind. 514.

45. Roysdon v. Sumner, 2 Ark. 465—6 C.J. p. 757 note 22.

46. D.C.—Sloan v. Thompson, 58 App.D.C. 318, 30 F.(2d) 560.
Ky.—Cooper's Adm'x v. McCoy, 272 S.W. 428, 209 Ky. 205.
Tex.—Stroud v. Toland, (Civ.App.) 279 S.W. 609.

As real estate broker

A petition for the recovery of an amount claimed to be due for services rendered as an attorney, alleging that plaintiff in connection with a sale of land was to render professional services in clearing title and finding a purchaser therefor, does not show that he rendered the services as a real estate broker or salesman within the meaning of a statute requiring a license therefor, and is not subject to such objection.—Layne v. Henderson, 121 So. 313, 9 La.App. 452.

Complaint held insufficient

(1) As not showing that the attorney gave his client such full information and advice as to enable her to act understandingly and freely.—Coleman v. Sisson, 230 P. 582, 71 Mont. 435.

(2) For want of particularity as to the time and character of the services. Austin v. Conner & McRae, (Tex.Civ.App.) 288 S.W. 552.

"Instrumental" service

A petition in an action for fees under a contract whereby the attorney agreed with a guardian to bring suit to obtain a sale of the ward's land offered to a veteran's hospital board, which averred that the title was obtained by condemnation and did not allege that the attorney did anything except that he was "instrumental" in procuring a favorable price, does not state a cause of action—Cooper's Adm'x v. McCoy, 272 S.W. 428, 209 Ky. 205.

Securing benefits

In an action on a contract for a percentage of any benefits secured by or resulting from the attorney's services, from a residuary legatee or her estate, whether by legacy or otherwise, a declaration not averring that a legacy received by defendant was actually secured by plaintiff's efforts is defective, notwithstanding a contract provision that any benefit in the form of a legacy or otherwise should be construed to be from plaintiff's efforts—Sloan v. Thompson, 58 App.D.C. 318, 30 F.(2d) 560.

47. Cooper's Adm'x v. McCoy, 272 S.W. 428, 209 Ky. 205.

48. Ind.—Union School Tp. of St. Joseph County v. Moon, 187 N.E. 332, 205 Ind. 514.

is for reasonable fees, after a discharge or prevention of full performance by the client, the complaint need not allege that plaintiff had duly performed all conditions, but is sufficient if it alleges the services that have been performed and the fact of the discharge;[49] and, in such a case, such prevention of performance should be alleged,[50] and in some states the attorney need not allege the reasonable value of the services he was not permitted to perform, but may count on the contract.[51]

If the attorney sues on an express contract, he should set out the contract, at least in substance, in his pleading and not merely as an exhibit.[52] In the absence of an express agreement he should allege that the services were rendered at defendant's request,[53] that defendant ratified his acts, or that the services rendered without the latter's knowledge were necessary, stating facts showing such necessity.[54]

Statement of charges. With respect to the statement of charges, it is sufficient for the complaint to show the dates of the different services,[55] or the reasonable value[56] and nonpayment thereof,[57] even though it does not allege when the amount claimed fell due,[58] and it may be unnecessary to allege a demand for payment[59] or a promise to pay.[60] If the attorney, under a general retainer, advises his client or performs services in a number of distinct matters, he may be required to itemize his charges;[61] but if the services all relate to one subject matter he need not separate the transaction into parts and state what charge he makes for each separate part,[62] although he may be required to state separately amounts charged as expenses.[63]

License of attorney. Plaintiff need not allege that he was licensed to practice law in the state as a prerequisite to the right to recover for services rendered.[64]

An attorney of another state, seeking to recover for services rendered in such state, must allege and prove that under the law thereof an action can be maintained for such services.[65]

b. Plea or Answer

The plea or answer must either deny the facts pleaded by the attorney, or specifically set up facts showing an affirmative defense.

The plea, answer, or affidavit of defense must contain either an express denial of the state of facts pleaded by plaintiff,[66] or it must specifically allege facts showing an affirmative defense.[67] Allegations that the attorney's services were not satisfactory must be specific and show wherein there was any want of skill or any mismanagement to the detriment of defendant,[68] and an averment, in an affidavit of defense, that the attorney's services were not worth the amount asked is insufficient where no at-

Tex—Oster v Heuman, (Civ App) 24 S W (2d) 794
6 C J. p 757 note 19 [e].

49. Pierce v Rilovich, 29 P (2d) 228, 136 Cal App 611

50. Neeper v Heinbach, (Mo App) 249 S W. 440

51. Countryman v California Trona Co, 170 P 1069, 35 Cal App 723

52. Ohio—Smith v Baltimore & Ohio R Co, 11 Ohio N P (N S) 65
Tex—Stroud v Toland, (Civ App) 279 S W 609

53. Gabbert v. Penfield, 102 S W. 627, 125 Mo App 436—6 C J. p 757 note 20.

54. Cleveland, etc, R Co v Shrum, 55 N E. 515, 24 Ind App 96.

55. MacMahon v. Duffy, 59 P 184, 36 Or 150—6 C J. p 757 note 23

56. Prince v Kennedy, 85 P 859, 3 Cal App 404—6 C J. p 757 note 24

57. Harlan v Lambert, 125 P 1079, 19 Cal App 349

58. MacMahon v. Duffy, 59 P. 184, 36 Or. 150.

59. Gibbs v. Davis, 3 P. 677, 11 Or. 288.

60. Cusick v. Boyne, 82 P. 985, 1 Cal.App. 642.

61. Cullinan v McColgan, 263 P 353, 87 Cal App 684—6 C.J. p 757 note 24 [a], [b]

As stating cause of action

A complaint alleging that plaintiff's intestate rendered legal services for defendant under an agreement that defendant should fix and determine the reasonable value of the services, that defendant fixed the value at the sum of two hundred dollars, and that such sum was not the reasonable value, but that the reasonable value was four thousand five hundred dollars, states a cause of action—Nave v. Taugher, 193 P 508, 49 Cal App 308

62. Cal—Cullinan v McColgan, 263 P 353, 87 Cal App 684
Wash—Moore v Scharnikow, 94 P. 117, 48 Wash 564
6 C J. p 757 note 24 [a].

63. Willingham, Wright & Covington v Glover, 111 S E. 206, 28 Ga App 394

64. Ill—Beckers v City of Kankakee, 213 Ill App. 538.
Tex—Hawkins v Black, (Civ App) 23 S W (2d) 755
6 C J p 757 note 29

65. Williams v Dodge, 28 N.Y S 739, 8 Misc. 317

66. D C—Whiting v. Davidge, 23 App D C 156
Fla—Croker v Powell, 156 So. 146, 115 Fla 733.
6 C J. p 757 note 30.

Plea or answer held insufficient

In an action by an attorney to secure an equal division of a contingent fee with another lawyer assisting in the litigation—Langdon v Kennedy, Holland, Delacy & McLaughlin, 234 N.W 292, 118 Neb 290, 63 A L R 896

67. Colo—Enyart v. Orr, 238 P 29, 78 Colo 6
N Y—In re Woolfson's Will, 287 N Y S 12, 158 Misc 928.
Pa—Kratz v. Marvin, 62 Pa Super 2
6 C J. p 757 note 31.

Plea of attorneys' fraud in procuring a note from a client on the representation that the litigation would probably be appealed was insufficient, in an action by the attorney on the note, where there was no allegation that the attorneys knew their services in appellate courts would be unnecessary—Tyre v. Price, (Ga App) 183 S E 843

68. Kratz v. Marvin, 62 Pa Super. 2.

tempt is made to aver how much they were actually worth.[69]

The defense of the discharge of the attorney must be pleaded by confession and avoidance, and cannot be set up under an answer denying the contract of employment.[70]

A partial defense must be pleaded as such and not as a complete defense;[71] and where matter is set up as a counterclaim or set-off it must be specially pleaded,[72] and must be specific and precise as to the source, character, and amount of the set-offs.[73]

Consistency of defenses. An averment in the answer that defendant had paid plaintiff in full is not inconsistent with a general denial also contained therein;[74] and an answer setting up payment and waiver of lien is not redundant, and, although setting up matters accruing after the suit is brought, may be allowed to stand.[75]

Amendment. The answer may be amended provided it does not change the defense.[76]

c. Issues, Proof, and Variance

(1) In general
(2) Under general denial
(3) Variance

(1) In General

In an action for the recovery of an attorney's fees or compensation, such matters only may be considered and evidence admitted thereon as are put in issue by the pleadings.

In an action for the recovery of an attorney's fees or compensation such matters only may be considered as to the cause of action or matter of defense, as the case may be, and the evidence admitted, as are put in issue by the pleadings.[77]

If the attorney declares on an express contract for a specified fee, no recovery can be predicated

69. Archbald v. Stone, 91 Pa Super 368

70. Hornish v Overton, 221 N W. 483, 206 Iowa 780

71. Butler v General Acc Assur. Corp, 92 N.Y S 1035, 103 App Div 273, 16 N.Y.Ann Cas 201.

72. Martin v Nichols, 188 P. 519, 110 Wash 451

Counterclaim held insufficient

A counterclaim for a premium paid for an unnecessary bond, which the attorney had erroneously induced defendant to execute, and for the attorney's fee, paid for having such bond quashed, is properly dismissed where the counterclaim does not allege that the attorney acted fraudulently or that he had received any benefits except his commission as the bonding company's agent—Cooper's Adm'x v. McCoy, 272 S W. 428, 209 Ky 205

Money paid for answer not interposed

In an action for legal services, wherein defendant alleged as a counterclaim that he had retained plaintiff to interpose an answer in a certain lawsuit and had paid him five dollars therefor, and that plaintiff had failed to interpose such answer, whereby judgment was entered against defendant, such answer constituted a sufficient counterclaim for the five dollars paid, although not as to the amount for which judgment was rendered—Martin v. Nichols, 188 P 519, 110 Wash 451.

73. Kratz v. Marvin, 62 Pa Super. 2.

74. Steenerson v. Waterbury, 53 N W 1146, 52 Minn 211

75. Lansing v. Ensign, 62 How.Pr (N.Y) 363.

76. Dickerson v. Hamby & Haynie, 131 S W 674, 96 Ark 163.

Alleging fraud

Where, in an action on notes given attorneys for contemplated services, defendants' answer alleging no consideration was demurred to, a proposed amendment alleging that plaintiffs perpetrated a fraud on defendants in inducing them to execute the notes and were also guilty of undue influence does not constitute a departure, and should be allowed, under a statute providing that, if the court sustains a demurrer, the party may amend and under the general rule permitting parties to amend after the sustaining of a demurrer almost as a matter of course—Dickerson v. Hamby & Haynie, 131 S W. 674, 96 Ark. 163.

77. Ala.—Ex parte Yarbrough, 118 So. 670, 218 Ala 461, granting certiorari Massey v Yarbrough, 118 So. 668, 22 Ala.App 607
Ind—Modern Woodmen of America v Arnkens, 192 N E 706, 99 Ind. App 344
Ky—Daly v. Power, 33 S W (2d) 305, 236 Ky 426
Md—Winslow v Atz, 177 A. 272, 168 Md 230
Okl—Nichlos v Melton & Melton, 284 P 642, 141 Okl 216
Wis—Wheelan v. United States Fidelity & Guaranty Co, 162 N.W. 444, 165 Wis 394.
6 C J. p 758 note 84.

Action between attorneys

Where plaintiff and defendant, attorneys, were employed in an action to recover land, and the client was to pay one quarter of the value of the land recovered, and, after recovery, conveyed one quarter of the land to defendant, and plaintiff sued to recover a one-half interest therein, wherein defendant denied plaintiff's interest, defendant's evidence that the land was conveyed for services rendered by him, and not under a contract of employment, was within the issues and competent, and its exclusion was prejudicial error—Lamb v. Alexander, 179 P. 587, 74 Okl 250.

Client's mental condition

In an action by attorneys against a railroad company to recover fees agreed to be paid by the railroad company in a release to their client, where there was no issue in the pleadings as to the client's mental condition when he executed the release, it was not error to exclude the answer to a question of a physician as to the client's mental condition at such time—Mytton v Missouri Pac. R. Co, (Mo App) 211 S W. 111.

Contingent fee issue

Where the complaint alleges that the fees were in part agreed on and asks for a reasonable value of the balance, an answer generally denying the allegations of the complaint "except as hereinafter alleged," and then alleging that the services were rendered on a contingent fee and no damages were recovered, is sufficient to raise the issue that plaintiff was employed on a contingent fee contract—Oliver v. Crane, 161 P. 254, 82 Or. 166.

Evidence held not within issues.—Hannon v. Goucher, 4 P (2d) 239, 117 Cal App. 455—Modern Woodmen of America v Arnkens, 192 N E. 706, 99 Ind App. 344—Winslow v Atz, 177 A 272, 168 Md 230—Wright v. Joyce, 253 P. 810, 142 Wash. 486.

on the reasonable value of services, and evidence of such value is immaterial and inadmissible,[78] unless the complaint is amended to cover such theory;[79] and the theory of the complaint, in such a case, is not changed to a quantum meruit by an added allegation that the amount specified is a reasonable fee for such services.[80] So, also, under such a declaration proof is not admissible of a contract for a contingent fee, a wrongful discharge, and the happening of the contingency.[81]

On the other hand, if the pleadings are on the theory of the reasonable value of the attorney's services, recovery cannot be predicated on an express contract between the attorney and client, and evidence of such a contract is generally inadmissible;[82] and, where the case proceeds on the theory that plaintiff was employed without any definite amount being fixed as compensation, that he states in his complaint the contract of employment and gives in detail all the circumstances relating thereto does not deprive him of a recovery in quantum meruit.[83]

Where reasonable value is in issue, the attorney may, in proving such value, include the amount of a reasonable retainer, although no charge for retainer is pleaded,[84] in which case, the bill of items not being objected to, evidence of services rendered as affecting such value would not be improper.[85] Where there is a dispute as to whether the services were within the terms of the attorney's employment, evidence may be admitted as to the value of the services under both views of the question,[86]

Exorbitant and excessive charges

In a suit by attorneys, on an account stated, to recover for professional services performed, the client may be permitted to prove that the charges are exorbitant and excessive, are not warranted by custom and usage, and are otherwise unfair and unreasonable—Henry v. Le Moyne, 219 Ill App 313.

Full performance prevented

(1) In an action by an attorney to recover on a contract, full performance of which has been prevented by his client, recovery should be sought on that theory, rather than on the theory of full performance—Neeper v Heinbach, (Mo App) 249 S W. 440

(2) Where a written contract for attorney's services and his compensation therefor was abandoned by the parties before the service was completely rendered, evidence of the value of the services which had been rendered is admissible—Ownbey v Silverstein, 194 P 607, 69 Colo 325

Proof of expenditures by the attorney, in an action by him employed on a contingent fee and discharged by the client, does not support a recovery, where the case is tried on the theory that plaintiff can recover on the contract, and it is expressly stated that plaintiff is not seeking to collect such expenditures as special damages—Ramey v. Graves, 191 P. 801, 112 Wash 88.

Rights of third person

In an action by an attorney for services rendered in connection with foreclosing mortgages and selling real estate covered thereby, rights of the mortgagor in such foreclosure and to any equities that may have resulted therefrom in the execution of the court's decree are not litigable issues—Ex parte Yarbrough, 118 So. 670, 218 Ala. 461, granting certiorari Massey v. Yarbrough, 118 So 668, 22 Ala App. 607.

78. Ark—Sparks v Forrest, 108 S W 835, 85 Ark 425
Cal—Boardman v Christin, 224 P 97, 65 Cal App 413
Colo—Galligan v. Bua, 236 P. 1016, 77 Colo 386
Ill—Sutton v. Chicago R. Co, 174 Ill App 316
La—Foster, Hall, Barret & Smith v. Haley, 142 So 351, 174 La. 1019
Okl—Nichlos v Melton & Melton, 284 P 642, 141 Okl 210
Utah—Ashton v. Skeen, 39 P (2d) 1073, 85 Utah 489, rehearing denied 44 P (2d) 688, 85 Utah 508.
6 C J p 758 note 35.

For contingent fee

Where the complaint pleads only an express agreement for a contingent fee, and contains no quantum meruit count, plaintiff's right to recover is limited to the agreement, and no recovery can be predicated on the value of the services—Galligan v. Bua, 236 P. 1016, 77 Colo. 386

79. Boardman v. Christin, 224 P. 97, 65 Cal App 413

80. Indianapolis Real Estate Board v Willson, 187 N E 400, 98 Ind App 72

81. Kirk v. Culley, 261 P. 994, 202 Cal 501.

Reason for rule

"To plead a specific contract of employment calling for legal services at a fixed price and fully performed, then undertake to sustain it by proof of a contract for a contingent fee, a wrongful discharge of the attorney, and the later happening of the contingency, is to substitute an entirely new issue for the one pleaded, and such action, if allowed, would in all probability work an injustice to the defendant by prejudicing his right to defend against the extraneous issue"—Kirk v Culley, 261 P. 994, 996, 202 Cal 501.

82. La.—First Nat Bank v. Corcil, (App) 149 So 326, amending 145 So. 395
Pa—Crawford v Taylor, 172 A. 121, 314 Pa 564
Tex—G R Scott, Boone & Pope v Willis, (Civ App) 194 S W 220

Allegations permitting recovery on quantum meruit

Under an answer alleging that the fee was to be a reasonable amount fixed by the client, it was the duty of the client to fix a reasonable sum in good faith, and a verdict for plaintiff as on a quantum meruit because of the bad faith of the client in fixing the fee is not invalid on the ground that, having failed to allege fraud, plaintiff could not recover therefor, since under the presumed denial by plaintiff of the new matter set up in the answer, bad faith could be established—Foster v. Young, 156 P 476, 172 Cal. 317

Under a statement of claim for attorney's fees on the basis of quantum meruit, the attorney cannot recover on an express oral contract with the client—Crawford v. Taylor, 172 A. 121, 314 Pa 564

83. Mecartney v Guardian Trust Co, 202 S W 1131, 274 Mo 224.

84. Clements v Watson, 93 P. 385, 7 Cal App. 74—6 C.J. p 758 note 37.

85. Clements v Watson, 93 P 385, 7 Cal.App. 74.

86. Adams Express Co v. James, 175 S W 1012, 164 Ky. 484

Within or without express terms

Where there is a dispute as to whether or not the services claimed to have been rendered were within the express terms of the attorney's employment, evidence of qualified persons as to the reasonable value of plaintiff's services, on the hypothesis that he was employed to and did perform all the services claimed by him, and also on the hypothesis that he was employed to render only such

or, where the different parties contend for the admission of evidence on the value of services on different theories, the court may sustain the admission of evidence on the theory it decides to be correct and overrule it on the other.[87]

Where the action is based on a contingent fee contract, evidence is admissible to show that the services were to be gratuitous unless a certain result was obtained.[88]

Extra services. Where in an action for services performed under a contract, the performance of extra services is alleged, recovery may be had therefor, and is not limited to the services contemplated by the contract.[89]

Under admission in answer. An admission in the answer that the alleged services were rendered, accompanied by a denial of their value as claimed, does not entitle plaintiff to a judgment for the amount claimed by him.[90]

(2) Under General Denial

Under a general denial defendant may show the illegality of the contract of employment, the nonperformance or improper performance of the services sued for, and matter in mitigation, or diminution of the amount of recovery.

Under a general denial defendant may show that the contract sued on was illegal,[91] that the services were rendered by another attorney,[92] and, as has been held, that they had been paid for.[93] Matter in mitigation of damages may also be shown under a general denial.[94] Defendant, however, cannot show that after the performance of the services it was agreed that plaintiff's compensation should be a certain amount, this being new affirmative matter.[95]

Bad faith. Bad faith on the part of an attorney as a defense in an action for his fees is unavailable unless specially pleaded.[96]

Negligence. As a general rule, negligence on the part of the attorney may be set up as a defense under the general issue,[97] although it has been held that negligence of the attorney in the course of his employment is the subject of a cross action merely, unless such negligence entirely frustrated the object for which he was employed, in which latter case only could it be shown under a plea of general denial,[98] and that if it is set up merely in mitigation or diminution of the value of the attorney's services, notice must be given with the general issue.[99] Where plaintiff was employed to render assistance as he should consider necessary to defendant's trial attorney, defendant cannot under a plea of nonperformance show that plaintiff was absent during the trial, although plaintiff must prove that he rendered all services that he in good faith considered necessary.[1]

(3) Variance

Unless the facts introduced in evidence by plaintiff substantially sustain the facts alleged as constituting his cause of action for compensation, there is a variance.

Proof of a contract for a specific fee is a variance, where the issue is the value of the services,[2] and proof of breach of contract by the client by which the attorney was prevented from rendering service is a variance from a petition demanding compensation for services rendered.[3] There is no variance, however, where the attorney's cause of action is substantially proved as alleged,[4] and it has been held that the fact that an attorney in

services as he was directed by defendant to perform, is admissible—Adams Express Co v. James, 175 S. W. 1012, 164 Ky 484.

87. Boyles v Leonardo, 224 P. 115, 65 Cal.App 315.

88. Oxborough v St Martin, 210 N W 854, 169 Minn 72, 49 A.L.R 1115

89. Mecartney v. Guardian Trust Co, 202 S W. 1131, 274 Mo. 224

Other cases and controversies

In an attorney's action for compensation, an allegation that there were several other court cases and controversies which grew out of the litigation for which he was hired, in which plaintiff rendered various legal services, being an allegation of the performance of extra work, did not limit his recovery to the actual service in contemplation at the time the contract was entered into—Mecartney v. Guardian Trust Co, 202 S W. 1131, 274 Mo 224.

90. Templin v. Henkle, 50 Iowa 95.

91. Cary v Western Union Tel Co, 47 Hun (N Y) 610.

92. Cooper v. Stinson, 5 Minn 201.

93. St Louis, etc, R Co v Grove, 18 P 953, 39 Kan. 731—6 C.J. p 758 note 50

94. Blizzard v. Applegate, 61 Ind. 368.

95. Stringer v. Breen, 34 N E 1015, 7 Ind App 557

96. Cal—Prince v. Kennedy, 86 P. 609, 3 Cal App 498

N Y—Ditmus v. Hitchings, 29 N Y. S 776

97. Lindsay v. Carpenter, 58 N W 900, 90 Iowa 529—6 C J. p 758 note 48

98. Gleason v. Clark, 9 Cow (N.Y) 57—6 C J. p 758 note 47

99. Gleason v. Clark, supra

1. Strong v. Eckert, 167 N Y S 1069, 180 App.Div. 526.

2. Roche v Baldwin, 65 P. 459, 67 P 903, 135 Cal 522

3. Scheinesohn v Lemonek, 95 N E 913, 84 Ohio St 424, Ann Cas 1912C 737.

4. Kan—Long v Kansas City, M & O R. Co, 164 P. 175, 100 Kan 361

Mo.—Walker v. Whitten, (App) 38 S W (2d) 480

Or—Wheelock v. Richardson, 178 P. 377, 91 Or. 87.

As to agreement on price

Where the attorneys in their complaint did not rely specifically upon an original contract to pay one hundred dollars for professional services, but upon a general allegation that they performed services between two dates at the agreed price of one hundred dollars, it was unnecessary in order to sustain the complaint that the price should have been agreed upon beforehand for the services actually rendered or

an action for services declared on his contract of employment, and recovered as upon a quantum meruit, is not a material variance, unless the client was thereby misled to his prejudice;[5] nor does any variance exist between a contract declared on and one offered in evidence not as the basis of recovery but merely to show performance of services.[6]

§ 204. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(1) In general
(2) As to agreements during relationship

(1) In General

(a) As to plaintiff
(b) As to defendant

(a) As to Plaintiff

The burden is on plaintiff attorney to prove the substantial allegations of his complaint, declaration, or petition by a fair preponderance of evidence.

In an action by an attorney to recover compensation for professional services, the burden of proof is on him to make out his case, and establish the substantial allegations of his complaint, declaration, or petition by a fair preponderance of competent evidence.[7] A presumption of employment does not arise from the fact that plaintiff is a licensed attorney,[8] and the burden is on him of proving a contract with defendant to render the services for which he is suing,[9] or, in an action for the reasonable value of his services, to establish the absence of an express agreement as to the amount of compensation,[10] that the services were rendered at defendant's request or by his authority,[11] and that defendant is liable or has promised to pay therefor,[12] and where it is necessary for the attorney to allege nonpayment, the burden of proving the same is on him[13] He is

that the entire one hundred dollars should be agreed upon at one time, and if the original contract was to pay one hundred dollars for certain specific services, and afterward that contract was modified, so that a part of the services were waived, and defendant still agreed to pay the one hundred dollars for services already performed, that would be sufficient to sustain allegations of the complaint—Wheelock v. Richardson, 178 P 377, 91 Or. 87.

5. N Y—Skinner v. Busse, 77 N Y S 560, 38 Misc. 265, 11 N.Y Ann Cas. 156—Yuells v. Hyman, 84 N. Y S 460.
Or—West v. Eley, 65 P. 798, 39 Or 461

6. Hughes v. Ferriman, 119 Ill App. 169

7. Ala—Denson v. Middleton, 84 So 473, 17 Ala App 266, certiorari denied Ex parte Middleton, 85 So 923, 204 Ala 699.
Conn—Slade v Harris, 135 A. 570, 105 Conn. 436
Ky—Loomis v. Mullins, 100 S.W. 913, 31 Ky L 231
La—Delahoussaye v Lasalle, (App) 158 So. 696—Massey v Murray, 135 So 738, 17 La App 319
Mass—Holton v Denaro, 179 N E 595, 278 Mass 261
Mich—Hightower v Detroit Edison Co, 247 N W 97, 262 Mich 1, 86 A L R 509—Behr v. Baker, 238 N. W 473, 255 Mich 607—Boyle v. Waters, 173 N.W. 519, 206 Mich 515.
See Rieman v. Morrison, 207 Ill App. 394.

Costs and expenditures

In order that an attorney may recover court costs necessarily incurred and the reasonable value of expenditures authorized or ratified by the client, he must prove such facts by a preponderance of evidence—Tasker v. Cochrane, 271 P. 503, 94 Cal App. 361.

8. Cormac v. Murphy, 208 P. 360, 58 Cal App 366

9. Cal—Cormac v. Murphy, supra
Mo—Barthels v. Garrels, 227 S W 910, 206 Mo App 199.
See Rector v Duntley Mfg. Co., 189 Ill App 562.

For services rendered to a third person

An attorney suing for his fee for services rendered defendant's brother has the burden of proving by a preponderance of evidence that he was employed by defendant and not by his brother.—Landry v. White, (La App) 146 So. 509, affirmed 148 So. 104.

10. Greenwood v. Senter, (Tex Com App) 61 S W (2d) 812, affirming in part and reversing in part (Civ. App) 44 S W (2d) 504.

11. Cormac v. Murphy, 208 P. 360, 58 Cal App. 366—6 C J. p 759 note 61.

If there is shown a lack of authority on the part of one of the contracting parties, there is no valid contract.—Cormac v Murphy, 208 P. 360, 58 Cal App 366.

Presumption of authority of collection agency

A presumption obtains that a client placing a claim in the hands of a collection agency knows that the agency will employ a local attorney to collect the claim—Stiles v. Cooter Gin Co, (Mo App) 74 S.W (2d) 1092.

Services to agent

In an action by an attorney to recover for services to an agent of corporate stockholders, plaintiff has the burden of proving defendant's authorization or promise to pay for such services—Burden v Robertson, (C C A.N.Y.) 7 F (2d) 266.

12. Closson v Seaboard Sand & Gravel Corp, 265 N.Y S. 160, 238 App Div 584, motion denied 189 N. E 701, 263 N.Y 568.

Implied promise

An attorney suing for services under a contract implied from conduct has the burden to prove a promise to pay, or circumstances implying a promise to pay, therefor.—Hirtsgaard v. Bowen, 237 N.W. 1, 183 Minn. 339

Understanding of payment

To support a recovery for services rendered by an attorney on quantum meruit, there must be evidence showing that the services were rendered with some understanding or expectation by both parties that compensation was to be made—In re Mumford's Estate, 160 P. 667, 173 Cal. 511.

13. Harlan v Lambert, 135 P. 1079, 19 Cal App 349.

not required to go further and disprove facts brought out by defendant.[14]

He, also, has the burden of proving the nature and extent of the services rendered by him,[15] the value of such services,[16] and the reasonableness of his charge.[17]

If the action is on an express contract, the burden of proof is on plaintiff to prove the contract described and relied on in his complaint;[18] and under a statute making a contract for a contingent fee void if the employment was induced by solicitation by, or on behalf of, the attorney, without such services having been first sought by the client, it is incumbent on plaintiff, in an action on a contract for such a fee, to show that it was made in good faith.[19]

If the attorney has undertaken to conduct litigation, he must show a termination of the litigation or an excuse for nonperformance of the contract.[20]

If such an undertaking is for a contingent fee, the presumption is that he has contracted to carry the case through until judgment is obtained and the amount thereof collected;[21] and if he has been discharged before he has rendered any services, the burden is on him to show his readiness to proceed with diligence.[22]

Where one is a member of a law firm, his legal services are presumed to be in the firm's behalf; and if he is acting in his individual capacity the burden is on him to show that fact.[23]

Admission to practice. Where that question is raised, the attorney has the burden of proving that he was duly admitted to practice law, as required by statute,[24] and he is not relieved from such burden on the theory that he is an officer of the court and that the court will take judicial notice of his status as such.[25]

Assisting attorney. Where plaintiff rendered legal services at the request of defendant's principal attorney, the burden is on him to prove that the attorney had authority to employ assistants at the expense of defendant;[26] but he is not required

14. Ver Straten v. Leftwich, 177 P 139, 65 Colo 468

For percentage of recovery

An attorney, suing on a contract providing for his compensation as half of the recovery, need not disprove a contention by defendant that one half of the recovery was to be paid only in case defendant's brother consented to the contract, and that suit be first brought—Ver Straten v. Leftwich, 177 P. 139, 65 Colo 468

15. Ariz.—Ives v. Lessing, 168 P. 506, 19 Ariz 208
Colo—Enyart v. Orr, 238 P. 29, 78 Colo 6.
Conn—Slade v. Harris, 135 A. 570, 105 Conn. 436
Minn—Leonard v. Schall, 157 N.W 723, 132 Minn. 446.
N Y—Closson v Seaboard Sand & Gravel Corporation, 265 N.Y S 160, 238 App Div 584, motion denied 189 N E 701, 263 N.Y. 568.
6 C J p 759 note 59.

16. Conn—Slade v. Harris, 135 A 570, 105 Conn. 436
N Y—Closson v. Seaboard Sand & Gravel Corporation, 265 N Y S. 160, 238 App Div. 584, motion denied 189 N E 701, 263 N Y 568.
N C—Southern Nat. Bank v. O'Brien, 95 S E. 546, 175 N C 338
O.—Schmalz v. Arnwine, 246 P. 718, 118 Or 300.
6 C J. p 759 note 60.

Rule of court

Where a fee bill adopted in a county fixes counsel fees for an estate not exceeding a certain amount, but allows a larger sum under exceptional circumstances, when an accountant claims the larger amount for his counsel, the burden is on him to prove the value of the services—Mitakus's Estate, 13 Pa Dist. & Co 387

Where an attorney has been discharged, without fault on his part, from further services in a suit just begun under a contract for payment contingent on successful prosecution of the suit, his measure of damages is not the contingent fee agreed on, but the value of the services rendered, and, in the absence of evidence of the reasonable value of such services, no recovery can be had—Clayton v. Martin, 151 S E. 855, 108 W. Va 571.

17. Butcher v. Janssen, 242 N.Y S 643, 137 Misc 42

Savings bank attorney

Under a statutory provision that an attorney for a savings bank may recover reasonable compensation for his services, such an attorney is not entitled to recover against a borrower, in the absence of proof of the reasonableness of the charge—Butcher v Janssen, 242 N Y S. 643, 137 Misc. 42.

18. Colo—Ver Straten v. Leftwich, 177 P 139, 65 Colo 468
Mo—Shepard v. Pullum, (App) 218 S W. 975.
Neb.—Thurston v Travelers' Ins Co, 258 N W 66, 128 Neb. 141.

Defense that contract was on different terms

Where, in an attorney's suit on an express contract to pay twenty-five dollars for legal services, the defense is that an entirely different contract was made, that is, one to pay only in the event the litigation was successful, such defense is merely a denial of the contract contended for by plaintiff attorney, and the burden of proof is always on him to carry, apart from any presumption that he was to receive pay for his services, inapplicable in the presence of direct evidence on the issue—Shepard v. Pullum, (Mo. App) 218 S W 975.

19. Myers v. Solomon, 262 N W. 309, 272 Mich. 588

Fifty per cent of recovery

There is said to be a presumption against the propriety of a contingent fee of fifty per cent of the recovery—Eysaman v. Nelson, 140 N. Y S 133, 79 Misc 304

20. Mahony v. Haines, 226 P. 620, 66 Cal App. 456

21. Creason v. Deatherage, 30 S W. (2d) 1, 325 Mo 661.

22. Parish v. McGowan, 39 App.D C. 184

Presumption

In assumpsit for legal services a license to practice law is presumed at least until the question is raised in the trial court—Beckers v. City of Kankakee, 213 Ill.App. 538

23. Shirts v. Rooker, 52 N E 629, 21 Ind App 420.

24. Ind—Harris v. Clark, 142 N E. 831, 81 Ind App. 494
Me—Perkins v. McDuffee, 63 Me. 181.

25. Harris v. Clark, 142 N E. 831, 81 Ind App. 494.

26. Cormac v Murphy, 208 P. 360, 58 Cal App 366.

to prove that defendant knew of the efforts he was making in the matter [27]

Extra compensation. If a contract on a salary basis for legal services is shown, the burden is on claimant to show that certain services rendered were not rendered under the salary arrangement before extra compensation can be obtained therefor.[28]

Fee allowed in another action. In an action to recover an attorney's fee allowed in another action, the presumption is that it was fair and reasonable,[29] and that there was a contract of employment.[30]

Renewal of contract. Where an attorney, employed by the year, is permitted to enter on a second year without an additional employment contract, the presumption is that he does so under a renewal of the original contract.[31]

(b) As to Defendant

Defendant client has the burden of introducing proof to establish matters of affirmative defense set up by him.

The burden is on defendant client of establishing any matter of affirmative defense set up by him;[32] and as an attorney is presumed to have discharged his duty, whether legal or moral, until the contrary is shown,[33] the burden is on defendant, where he relies on the misconduct or negligence of his attorney as a matter of defense, to prove such fact.[34] The burden is also on defendant to prove, as a matter of defense, the fact that the attorney's services were agreed to be rendered for a very small fee,[35] or were to be gratuitous,[36] as one employing an attorney at law is presumed to contemplate payment of a fee.[37] The burden is also on him of proving the defense that the contract of employment was procured by fraud or undue influence,[38] or was unreasonable [39]

The burden is on defendant to prove, as pleaded by him, that there had been a settlement;[40] and if a compromise and settlement is made with the same result as that authorized by the contract of employment, the presumption arises that it was made in pursuance of such contract and the burden of proving the contrary is on defendant.[41]

Joint liability. Although the attorney sues on a quantum meruit, if his allegations show that the employment was express and specific and the simultaneous act of the several defendants in furtherance of a common purpose and for a benefit common to all, the obligation must be presumed to be

27. Graeser v. Jones, 261 N.W. 439, 220 Iowa 354.

28. Willard v. Pittsburgh, etc., R Co., 155 Ill App 410.

29. Ramage v. Littlejohn, 49 P. 486, 17 Wash 386.

30. Ramage v. Littlejohn, supra.

31. Poe v Walker, 37 S W.(2d) 866, 183 Ark 659.

32. U S —Texas Co. of Mexico, S A., v. Ross, (C C A Tex.) 43 F (2d) 1, certiorari denied Roos v. Texas Co of Mexico, S A., 51 S Ct. 216, 282 U S 902, 75 L Ed 794.

Ill.—Priest v. Dodsworth, 85 N E 940, 235 Ill 613, 14 Ann Cas. 340

Iowa—McFarlin v Quegg, 192 N.W. 401, 195 Iowa 624.

Mo—Beagles v. Robertson, 115 S W. 1042, 135 Mo App. 306.

Pa—Goldbacher v. United Automobile Service Corporation of Pa., 100 Pa Super. 18.

Tenn—Spears v. Polk, 69 S W.(2d) 239, 17 Tenn App. 556.

Contract with one member of law firm

In an action by a firm for the balance due for services, a client, asserting a contract of employment with one member of a firm of attorneys only, has the burden of proving such fact.—Scott v. Moon, 130 S E 241, 143 Va. 425.

Divided liability

In an attorney's action against a client for his fee, the defense that defendant's liability was a divided liability to be shared by another was a special defense, under which defendant had the burden of proof.—Danziger v. Kaplan, 129 So. 673, 171 La. 73.

Modification of contract

The burden of proving a modification of the alleged contract for services of an attorney by an agreement that certain services were not to be paid for is on defendant in an action for compensation under an alleged contract.—Leonard v. Schall, 157 N W. 723, 132 Minn. 446.

Special contract

In an attorney's action for fees for services performed, defendant is required to establish a special defense of special contract only by a preponderance of evidence.—Berry v. Maywood Mut. Water Co. No. 1, (Cal App.) 53 P (2d) 1032.

33. Slade v. Harris, 135 A. 570, 105 Conn. 436.

34. Slade v. Harris, supra.—6 C.J. p 759 note 64.

35. McClendon v. Chryssoverges, 120 So. 520, 10 La App. 639.

36. Brady v. New York, 3 N Y.Super. 569.—6 C.J. p 759 note 65.

Presumption

The fact that plaintiff attorney did legal work for defendant's father and company in which the father was interested at the time plaintiff commenced rendering services for defendant does not create a presumption that his services to defendant were gratuitous.—Leahy v. Lemp, (Mo App.) 214 S W 228

37. Levin v. Suffrin, (La.App.) 167 So. 911.—Dowling v Peyroux, 126 So 270, 12 La App. 551.

38. Ark.—Weil v. Fineran, 93 S W. 568, 78 Ark. 87.

Iowa—State v. American Bonding & Casualty Co., 237 N W. 360, 212 Iowa 1052.—Edler v. Frazier, 156 N W 182, 174 Iowa 46

Mo—Beagles v. Robertson, 115 S W 1042, 135 Mo App. 306.

Contract for retainer

Where, in an attorney's action for his retainer, the client concedes execution of the contract, but claims that the attorney had misrepresented that the instruments the client had signed were mere letters to another attorney, the burden of proving such fraud is on the client.—Hayden v. Purcell, 182 N Y S 293.

39. Tabet v. Powell, (Tex Civ App.) 78 S W 997.—6 C.J p 759 note 67.

40. Hitchcock v Davis, 49 N.W. 912, 87 Mich 629.

41. Ga.—Coker v. Oliver, 62 S E. 433, 4 Ga App. 728, 730.

Mo—McCall v. Atchley, (App.) 194 S.W. 714.

joint, notwithstanding the interests of the beneficiaries of the contract are disproportionate.[42] The fact, however, that an attorney's services are as beneficial to a third party as to the client will not raise a presumption that the third party is liable therefor, unless the services are accepted by him and it is understood that he is to be liable also.[43]

Payment. Where payment is pleaded by defendant, as an affirmative defense, the burden is on him of introducing proof thereof.[44]

Rebuttal of presumption. The presumption arising, in the absence of an express contract, from the acceptance of an attorney's services, that there is an obligation to pay what the services are reasonably worth, may be rebutted by proof of facts and circumstances showing that the parties otherwise intended.[45]

(2) As to Agreements during Relationship

With respect to compensation agreements made during the existence of the relationship of attorney and client, presumptions and burden of proof as to the fairness and validity of a particular agreement depend on the circumstances of the case.

Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, such as for additional compensation without additional services being contemplated, a presumption of fraud or undue influence on the part of the attorney arises, and the burden is on him to prove that the agreement was fairly and openly made, was supported by an adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement,[46] and that the services to be performed were reasonably worth the amount stated in the agreement,[47] and where in such a case the attorney sues in equity on the contract, he must show that his claim, independent of the express terms of the contract, is so fair and equitable that a court of equity will not hesitate to enforce it.[48] This rule has been held to apply even though the contract was authorized by statute.[49]

Mere negative conduct of the attorney in failing to ask the client to pay an excessive fee tendered to him is not sufficient to overcome the presumption of fraud in such a case,[50] the attorney must go further and show that he gave the client the information which, under similar circumstances, a disinterested legal adviser would have given.[51]

Generally speaking, however, the general rule does not apply with the same stringency to contracts by which the relation is inaugurated,[52] and the burden is not on the attorney of proving good faith where the confidential relationship of attorney and client did not exist between the parties before the contract was entered into,[53] nor where the

42. Willingham, Wright & Covington v. Glover, 111 S.E. 206, 28 Ga. App. 394.

43. In re Baxter's Estate, 22 P.(2d) 182, 94 Mont. 257

44. Cal.—Wakeman v. Green, 276 P. 387, 93 Cal.App. 50.
Tex.—Greenwood v. Senter, (Civ. App.) 44 S.W.(2d) 504, affirmed in part and reversed on other grounds in part (Com.App.) 61 S.W.(2d) 812
6 C.J. p. 759 note 69.

45. Tyson & Arrington v. Thompson, 70 So. 649, 195 Ala. 230

46. U.S.—Ridge v. Healy, (Mo.) 251 F. 798, 164 C.C.A. 32.
Ala.—Wilson v. Monette, 139 So. 264, 224 Ala. 106
Ark.—White & Black Rivers Bridge Co. v. Vaughan, 36 S.W.(2d) 672, 183 Ark. 450
Cal.—Brydonjack v. Rieck, 42 P.(2d) 336, 5 Cal.App.(2d) 219—Bonelli v. Conrad, 37 P.(2d) 137, 1 Cal.App.(2d) 660—Thornley v. Jones, 274 P. 93, 96 Cal.App. 219
Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6
Fla.—Halstead v. Florence Citrus Growers' Ass'n, 139 So. 132, 104 Fla. 21.
Iowa.—Edler v. Frazier, 156 N.W. 132, 174 Iowa 46
Mo.—Barthels v. Garrels, 227 S.W. 910, 206 Mo.App. 199
Mont.—Coleman v. Sisson, 230 P. 582, 71 Mont. 435
Tex.—Cooley v. Buie, (Com.App.) 291 S.W. 876, reversing (Civ.App.) 284 S.W. 702—Coon v. Ewing, (Civ.App.) 275 S.W. 481—Laybourne v. Bray & Shifflett, (Civ.App.) 190 S.W. 1159.
Wash.—Albert v. Munter, 239 P. 210, 136 Wash. 164
6 C.J. p. 735 note 39, p. 737 note 53, p. 759 note 71.

Fee increased

Where the stipulated amount of an attorney's fee is increased by a contract during litigation, the burden is on the attorney to show that the client acted voluntarily, knowing the effect of the contract.—Wilson v. Monette, 139 So. 264, 224 Ala. 106

47. Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6
N.J.—Raimondi v. Bianchi, 136 A. 320, 100 N.J.Eq. 448, reversed on other grounds 140 A. 584, 102 N.J.Eq. 254.

48. Ridge v. Healy, (Mo.) 251 F. 798, 164 C.C.A. 32.

Most convincing proof of the utmost good faith on the part of the attorney, and of full knowledge of the terms of the settlement and entire freedom of action on the part of his client, will be required, where an agreement as to compensation is made after the terms of a settlement of a suit begun by an attorney for his client has been agreed on, before a court of equity will sanction a retention by the attorney of a large part of the amount recovered.—Etzel v. Duncan, 76 A. 493, 112 Md. 346

49. Albert v. Munter, 239 P. 210, 136 Wash. 164—6 C.J. p. 736 note 46

50. Thornley v. Jones, 274 P. 93, 96 Cal.App. 219.

51. Thornley v. Jones, supra.

52. Edler v. Frazier, 156 N.W. 132, 174 Iowa 46.

53. Ark.—White & Black Rivers Bridge Co. v. Vaughan, 36 S.W.(2d) 672, 183 Ark. 450
Iowa.—State v. American Bonding & Casualty Co., 237 N.W. 360, 212 Iowa 1052—Coughlon v. Pedelty, 233 N.W. 63, 211 Iowa 138—Edler v. Frazier, 156 N.W. 132, 174 Iowa 46.

parties otherwise deal at arm's length;[54] nor where it is apparent that there could have been no possible design on the part of the attorney to overreach his client in entering into the contract,[55] nor where the transaction between attorney and client was merely the giving of a note in payment of services performed.[56] It has been held that a contract for compensation, between an attorney and client, which is is not unreasonable on its face, is presumed to be fair.[57]

b. Admissibility

(1) In general
(2) As to employment
(3) As to nature and extent of services
(4) As to value of services or amount of compensation
(5) As to performance

(1) In General

Competent evidence, relevant and material to the issues raised, is admissible in an action by an attorney for his compensation.

As in other civil actions, such evidence only is admissible in an action by an attorney for his fees or compensation, as is relevant, material, and competent to prove or disprove the issues in the case.[58] Evidence is not admissible as to a matter or transaction which is not shown to have been connected with the attorney's services,[59] such as to the time a third party spent on the litigation,[60] as to defendant being satisfied with a decree in a certain other case conducted by plaintiff for him,[61] or as to defendant having secured other counsel because of plaintiff's hostile attitude, where there is no evidence by defendant showing that he was embarrassed by any act of plaintiff, or that he lost

Mont—Coleman v Sisson, 230 P 582, 71 Mont 435
Tex—Laybourn v Bray & Shifflet, (Civ App) 214 S W 630, error refused—Laybourne v Bray & Shifflett, (Civ App) 190 S W 1159.
6 C J p 759 note 72

54. Ark—White & Black Rivers Bridge Co v Vaughan, 36 S W (2d) 672, 183 Ark 450
Mo—Blodgett v. Koenig, 284 S W 505, 314 Mo 262

Contingent fee contract between a client and his attorney, at a time when the relationship of attorney and client existed between them, is not presumably the result of undue influence, in the absence of a showing of damage resulting to the client—In re Mallory's Estate, 278 P 488, 99 Cal App 96

As to fairness of fee

Where defendant, in his answer and testimony, denies he ever employed plaintiff as attorney, and the evidence shows that in employing plaintiff the parties dealt at arm's length, an instruction requiring plaintiff to prove that the contract for the attorney's fees sued on was fair and equitable, if it was executed after the relationship of attorney and client existed, and that the amount agreed to be paid was reasonable, imposes a greater duty on plaintiff than the law requires—Blodgett v Koenig, 284 S.W. 505, 314 Mo 262.

55. Isham v. Parker, 29 P. 825, 2 Wash 755

56. Ward v Yancey, 78 Ill App 368

57. Rodkinson v Haecker, 162 N E 493, 248 N Y 480, affirming Marks v Haecker, 227 N.Y.S 849, 223 App Div 710—In re Woolfson's Will, 287 N.Y S 12, 158 Misc. 928

58. Colo—Expansion Gold Mining & Leasing Co. v. Campbell, 168 P 968, 62 Colo. 410.
Mich—Behr v Baker, 238 N W 473, 255 Mich 607
N Y—Closson v Seaboard Sand & Gravel Corporation, 265 N Y S 160, 238 App Div 584, motion denied 189 N E 701, 263 N Y 568
R I—Moore v Budlong, 143 A 602, 49 R I 392—Pettine v. Arter, 136 A 8
Va—Carpenter v Smithey, 88 S E 321, 118 Va 533
See Shope v. Laughlin, 191 Ill App 88

Client's reason for desiring to drop suit

Where an attorney seeking to recover for services testifies that the client desired to drop the suit, testimony concerning the client's reasons therefor is immaterial—Willis & Conner v. Turner, (Tex Civ App) 25 S.W (2d) 642.

Copies of newspaper

Where the action for legal services is defended on the ground that the services were performed under an illegal contract, copies of a newspaper shown to be facsimiles of those exhibited to defendant by plaintiff in explaining the illegal transaction are admissible—Eastham v. Bechtel, 275 P. 670, 128 Or 673

Corroborative testimony

In an attorney's action for services rendered defendants, in connection with their contract to install plumbing, heating, and ventilating in a building, the original contract and specifications and the record of the main contractor's suit against the owner, alleging damages from defendants' failure to perform their contract, may properly be admitted as corroborating plaintiff's testimony and giving the jury a better understanding of the facts—Haughney v Gannon, 118 A 427, 274 Pa. 443.

59. Expansion Gold Mining & Leasing Co. v Campbell, 168 P. 968, 62 Colo 410.

In case of attorney for corporation

In an action for the fees of an attorney for a corporation, the stock certificate stub book is irrelevant as to the employment or amount of compensation, where there is no testimony that the attorney had been consulted in regard to issuing the stock or had anything to do with it.—Expansion Gold Mining & Leasing Co v Campbell, 168 P. 968, 62 Colo. 410

Letter from defendant's attorney, written nearly two years after the beginning of the alleged services, and one year after the ending thereof, and which in no way refers to the services claimed to have been rendered by plaintiff, but contains merely a reference to lawyer's fees in general, is inadmissible on the grounds that it is after the fact, incompetent, immaterial, and not binding on defendant—Baright v. Walska, 209 N Y S. 157, 212 App Div. 500

Papers pertaining to a settlement, which the client himself made after refusing to accept a settlement recommended by the attorney, may properly be rejected in an action by the attorney on a contract for his services—Coughlon v. Pedelty, 233 N W. 68, 211 Iowa 138.

Receipt

In an action for legal services in a certain proceeding, the exclusion of a receipt bearing date a year before the proceedings commenced is not error—Pollak v Winter, 72 So 336, 197 Ala 173.

60. Lang v. Leith, 77 So. 445, 16 Ala App 295.

61. Shepherd v Inman-Poulsen Lumber Co, 168 P. 601, 86 Or 652.

any rights to a fair trial.[62]

On the question of the attorney's good faith in making a contract increasing his compensation after the establishment of the relation of attorney and client, evidence is admissible of his expression of an opinion regarding the probability of a reversal of the judgment secured by him,[63] and where the question is as to the good faith of assisting counsel, letters from him to defendant's leading attorney which tend to refute allegations of his bad faith are admissible.[64]

(2) As to Employment

Competent evidence which tends to show the fact and terms of the contract of employment is admissible for such purpose.

Each of the parties, in support of his claim, is entitled to prove the facts and circumstances surrounding the employment;[65] and subject to the usual limitations of relevancy, materiality, and competency, any evidence is admissible which tends to show the contract of employment.[66] Such evidence may consist of correspondence and telegrams respecting the matter, and showing the terms and conditions of the employment,[67] of bills presented by the attorney and canceled checks in payment thereof;[68] of consultations just before the bringing of the suit for defendant,[69] and of the fact of a previous employment.[70] The records and pleadings in the action in which the services were rendered are usually admissible as tending to show an employment.[71] A draft of a contract of employment, which the client had refused to sign, is not admissible as evidence of the fact of employment.[72]

Testimony of the attorney himself is admissible for the purpose of showing his employment,[73] and where a witness has testified as to his authority to employ plaintiff as attorney for defendant, for the purpose of showing the terms of the employment, plaintiff may testify as to what such witness said to him at the time of the employment.[74]

Coercion. Testimony of defendant that he was coerced into signing the contract of employment by defendant's attorney other than plaintiff is not admissible, in the absence of proof, or offer of proof, tending to show that plaintiff attorney had knowledge of such coercion.[75]

Declarations. The employment of an attorney may be proved by the declaration of an agent of

62. Snow v. Beard, 162 P. 258, 82 Or 518

63. Laybourne v Bray & Shifflett, (Tex Civ App) 190 S W. 1159.

64. Coon v Ewing, (Tex Civ App) 275 S W 481.

65. Cooke v. Embry, 123 So. 27, 219 Ala 622—6 C J p 759 note 76

As to written contract being superseded by oral one

Where the attorney claims that a written contract fixing fees had been superseded by an oral agreement for a reasonable fee, testimony that, when the fees were discussed, the attorney read from the contract the amount he was to receive, is admissible—Ashton v. Skeen, 39 P. (2d) 1073, 85 Utah 489, rehearing denied 44 P (2d) 688, 85 Utah 508

Book entries

Where defendant introduced an entry in plaintiff's book showing that defendant's wife was a party to the action involved, plaintiff may introduce a further entry indicating his employment by defendant—Lang v. Leith, 77 So. 445, 16 Ala App 295.

66. Erhardt v City of Rosedale, 201 P 1108, 109 Kan. 688.

Interest of defendant in employment

In an action by an attorney to recover for services before a state highway commission to secure the relocation of a proposed highway, admission of testimony showing the situation of defendant's property in relation to the highway as tending to show that defendant had a legitimate interest in the employment of the attorney representing him before the commission, is proper—Cooke v Embry, 123 So. 27, 219 Ala 622

Minutes of city council

Attorney, employed by a city to defend claims against it, in the matter of his compensation, is not bound by proceedings of council to which he is not a party, although minutes thereof are admissible in an action by him for such compensation to show the preliminary action taken in the matter of his employment and the city's action with reference to the settlement on the basis recommended by him—City of South Norfolk v. Wolcott, 125 S E. 637, 140 Va 611.

Settlement with third person

In an attorney's action against a city for services in obtaining options on land and for reimbursements, evidence that plaintiff had settled with the company from whom the options were purchased is competent to show plaintiff's relation to the city, the matter having been raised by the answer—Erhardt v. City of Rosedale, 201 P. 1108, 109 Kan. 688

67. Ariz—Scott v Bartholomew, 236 P 825, 36 Ariz 451.
Ky—Asher v. Golden, 50 S.W.(2d) 3, 244 Ky. 56

Letter of other attorney

In an action to recover for legal services furnished to another attorney and defendants, a letter written by the other attorney, reciting that they would win the case and that the person entitled to credit would be plaintiff, is admissible as bearing on plaintiff's relationship to the other attorney and the services rendered in connection with the litigation, although the statement regarding the efficiency of plaintiff's work should be excluded—Rodkinson v Haecker, 162 N E. 493, 248 N.Y. 480, affirming Marks v. Haecker, 227 N Y S. 849, 223 App Div. 710.

68. Austin v. Conner & McRae, (Tex Civ.App) 288 S W. 552

69. Mass—Taft v. Shaw, 35 N E 88, 159 Mass. 592
N Y—Welti v Cohen, 141 N Y S. 670, 157 App Div. 65

70. Mabry v. Cheadle, (Iowa) 80 N. W. 312.

71. Stringer v. Breen, 34 N E 1015, 7 Ind App. 557—6 C J. p 759 note 73.

72. Bernard v. Crowell, (Tex Civ. App.) 46 S W.(2d) 329.

73. Chamberlain v. Rodgers, 44 N W. 598, 79 Mich. 219—6 C J. p 760 note 84.

74. Henshall v. Coburn, 169 P. 1014, 177 Cal 50.

75. Lombard v. Lufkin, 179 N.E. 632, 278 Mass. 262.

the client, provided there is evidence of his authority to employ an attorney;[76] but not where there is no evidence of such authority.[77] Self-serving statements made by the client, in the absence of the attorney, as to his giving the attorney business without any intention of paying therefor, are inadmissible under the hearsay rule.[78]

Nonemployment or discharge. Any legitimate evidence tending to disprove the employment of plaintiff[79] or to establish his discharge[80] is admissible on behalf of defendant. The best evidence, however, procurable under the circumstances must be produced;[81] and whether the attorney was discharged for a justifiable cause should be determined on the testimony with an opportunity for cross-examination, and not on the affidavits alone.[82] Where defendant conclusively admits signing the contract and knowing what he was doing, testimony that he was sick at the time is inadmissible.[83]

(3) As to Nature and Extent of Services

Competent evidence is admissible which tends to show the nature and extent of the services rendered by the attorney, for which he demands compensation.

In an action by an attorney for compensation, it is proper to show the nature and extent of the employment or services in connection with which the charge is made;[84] and where there is a dispute as to the terms of the contract, evidence as to the nature and value of the attorney's services and negotiations prior to the contract should be admitted.[85]

Evidence of services rendered in another matter,[86] prior to the making of the contract sued on,[87] is generally inadmissible However, it has been held that a judgment roll in a former case, in which plaintiff had represented defendant, is admissible to show that plaintiff had gone over the same ground and did not have to labor so hard as he represents in the litigation for which he demands compensation.[88] In an action on a

76. Fowler v. Iowa Land Co., 99 N W. 1095, 18 S D 131.

77. Southern Home Bldg, etc, Assoc. v. Butt, 28 So. 725, 77 Miss 944.

78. Tiffany v. Morgan, (R I) 78 A. 465.

79. Fairchild v. Whitmore, 91 P 336, 6 Cal.App 52—6 C J. p 760 note 81.

80. Maine v Rittenmeyer, 151 N.W 499, 169 Iowa 675

81. Fulton v. Western Stove Mfg Co, (Tex Civ App) 45 S W 1035

82. In re Badger, (C C A.N.Y.) 9 F (2d) 560.

83. McCall v. Atchley, (Mo App) 194 S W. 714.

84. Colo—Bolles v. O'Brien, 151 P. 450, 59 Colo 261
Wash—Levine v. Barry, 195 P 1003, 114 Wash 623—Hart v. Bogle, 152 P. 1010, 88 Wash 125
6 C J. p 760 note 88.
See Lepine v Chicago Waste Co, 211 Ill App 507.

As affecting defendant's credibility

Plaintiff may prove his services in defending criminal prosecutions, in which the indictments were defective and new indictments returned, despite the claim that this proof magnified the offenses, so as to affect defendant's credibility as a witness, especially as there were only two cases—Schmalz v. Arnwine, 246 P. 718, 118 Or 300.

Attorney's conversations as to the transaction involved, with an emissary of defendant, is admissible to show the nature of his services and as tending to show that his efforts brought about the desired result—Stockbridge v Mixer, 116 N E. 877, 227 Mass. 501

Checks signed by the attorney, in payment of court costs and expenses incurred in the client's behalf, are competent to show the nature and extent of the attorney's employment—Asher v. Golden, 50 S W.(2d) 3, 244 Ky 56.

Collection of dividends

In an attorney's action for compensation for services rendered claimant in a bankruptcy proceeding, evidence that he had collected dividends on the claim, and as to its amount, is admissible—Paxson v Gast, 215 S W 515, 202 Mo App 610

Disagreement between defendant and third party

Testimony concerning a disagreement between defendant and a third party over a contract in reference to a land deal is proper as disclosing the services of the attorney in connection therewith—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

Magnitude of the enterprise, in which the attorney's services are retained, and the results attained are proper factors in determining the measure of compensation to be allowed the attorney, and evidence tending to show these facts is admissible—Bolles v. O'Brien, 151 P 450, 59 Colo. 261.

Procuring order of reviver

In an action under an oral contract making the amount of attorney's fees contingent on success, evidence of an order of reviver made by plaintiff on the death of a party not represented by him is competent on the issue as to the character of his services—Cornelius v. Smith, 175 P. 754, 73 Okl. 217, 9 A L R. 233.

Testimony as to difficulty of services

In an action by an attorney for services in securing an increase in a condemnation award, a former city attorney's testimony to the effect that it was easy to get a reduction, but difficult to get an increase, in the price of condemned property is immaterial—Graeser v. Jones, 251 N W. 162, 217 Iowa 499.

Value of client's holdings

In an attorney's action for services rendered in connection with a land deal, plaintiff may show the market value of his client's holdings, which were purchased and partially disposed of during plaintiff's employment, when he acted as counsel in all matters pertaining to the purchase, title, and manipulation of the disposition of the land, etc, as tending to show the magnitude of the enterprises which plaintiff was employed to look after, this having a bearing on the question of his compensation—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

Parol evidence is admissible for this purpose—Brewer v. Cook, 11 La Ann 637.

85. Freeman v. Hartfield, 158 N Y S 350, 172 App.Div 164

86. Callender v. Turpin, (Tenn Ch. A.) 61 S W. 1057

87. Bolles v. O'Brien, 151 P 450, 59 Colo. 261—Mulligan v. Smith, 76 P. 1063, 32 Colo. 404

88. Shepherd v Inman-Poulsen Lumber Co., 168 P. 601, 86 Or 652.

quantum meruit for compensation for conducting certain litigation, the proceedings and record on an appeal subsequent to the termination of plaintiff's contract are admissible for the purpose of showing the soundness of plaintiff's theories in the conduct of the litigation for which he was hired and the opposition of his client.[89] In an action to recover an attorney's fees from a former client, the court files of the criminal cases having interlocking features with the civil cases in which plaintiff was representing the client, and which served to help explain the nature and extent of plaintiff's services, were admitted.[90]

(4) As to Value of Services or Amount of Compensation

Competent evidence of pertinent facts and circumstances which tend to show the value of the attorney's services is admissible for such purpose, such as the contract between the parties, if any, the amount usually charged for such services, and the financial ability of the client.

In the absence of a contract for a specified fee, the proper method of establishing the amount of an attorney's fees is by showing a reasonable compensation;[91] and except where the question of value is not in issue (supra § 203), or where the court is competent to exercise its own judgment in fixing the value (supra § 191), any competent relevant or material evidence is admissible which tends to prove pertinent facts and circumstances which, as above stated (supra § 191), may be considered in determining the value of the services rendered by the attorney,[92] such as the nature and importance of the litigation and the amount of money or the value of the property involved,[93] and such evidence is not necessarily confined to the date of the rendition of the services, but the value at the time of the trial may also be shown.[94] Similarly, evidence is admissible as to the labor and length of time plaintiff spent on the case,[95] the care and diligence exhibited,[96] the expenses incurred by him,[97] the experience, skill, ability, character, and standing of the attorney,[98] and that defendant knew of these qualities,[99] and evidence also is admissible as to the kind of services rendered in a business capacity, incidental to legal services,[1] and the beneficial results secured by de-

89. Mecartney v. Guardian Trust Co., 202 S.W. 1131, 274 Mo. 224

90. Holbrook v. Moore, (Okl.) 58 P (2d) 865

91. Rosenthal v. Heft, 142 A. 598, 155 Md. 410.

92. Colo.—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.
Ill.—Bunge v. Downers Groves Sanitary Dist., 191 N.E. 73, 356 Ill. 531, certiorari denied Downers Grove Sanitary Dist. v. Bunge, 55 S.Ct. 117, 293 U.S. 601, 79 L.Ed. 693
Iowa.—Coughlon v. Pedelty, 233 N.W. 63, 211 Iowa 138
Md.—Winslow v. Atz, 177 A. 272, 168 Md. 230.
Or.—Schmalz v. Arnwine, 246 P. 718, 118 Or. 300
6 C.J. p. 760 note 94.

A letter written by one of the attorneys, who has since died, is admissible to show knowledge by him of the matters therein referred to, where the pertinency of those matters is not questioned.—Platt v. Shields, 119 A. 520, 96 Vt. 257

As to keeping books
Plaintiff's evidence that he kept no books, and giving his reasons therefor, is competent.—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

When not within issue made
In a suit by attorneys to recover for professional services based on an account stated, the refusal of evidence as to the reasonable value of the attorneys' services was not error, since the sole question was whether there was an agreement as to the amount of the charges.—Bengoechea Macias v. De La Torre & Ramirez, (C.C.A. Porto Rico) 84 F. (2d) 894.

Admissibility of expert testimony of value of attorney's services see Evidence § 545

93. Lang v. Leith, 77 So. 445, 16 Ala.App. 295.—6 C.J. p. 760 note 95

As showing amount of responsibility
In an attorney's action for work and labor, evidence regarding the amount involved in the controversy for which the charge was made is competent, in fixing the reasonable value of his services to establish the amount of responsibility assumed by plaintiff.—Lang v. Leith, 77 So. 445, 16 Ala.App. 295.

Value of defendant's property
In an attorneys' action for services in defending, for defendant's wife, his cross-action for divorce, the value of his property at the time the divorce action was pending and tried is admissible to aid in ascertaining the importance of the interests involved in the litigation in which the services were rendered.—Reynolds & Heitsman v. Henry, 135 N.W. 67, 193 Iowa 164

94. Gilmore v. McBride, (Alaska) 156 F. 464, 84 C.C.A. 274.—6 C.J. p. 761 note 96.

95. Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.—6 C.J. p. 761 note 98

96. Stark v. Hill, 31 Mo.App. 101.—6 C.J. p. 761 note 99

97. Humphreys v. Commerce Trust Co., 1 P.(2d) 263, 133 Kan. 498.

Cost of assistants and office force
Where in an attorney's action for the value of services, the attorney, in rendering the services, had been required to employ other attorneys and maintain a large office force, defendant has the right to inquire as to the cost of the assistants and office force, such facts being pertinent in determining the compensation to be allowed.—Dykman v. City of New York, 171 N.Y.S. 370, 183 App.Div. 859

98. Colo.—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261
Wash.—Levine v. Barry, 195 P. 1003, 114 Wash. 623.
6 C.J. p. 761 note 1.

99. Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

Ignorance of standing of attorney
It is not competent for defendant, in order to sustain his version of the contract, to prove that plaintiff was a lawyer of limited practice and experience, when there is nothing to indicate that, at the time the contract was entered into, defendant knew anything about plaintiff's qualifications, but rather that he did not.—Shakespeare v. Baughman, 71 N.W. 374, 113 Mich. 551.

1. Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

In land deal
In an attorney's action for services in connection with a land deal, plaintiff may show the kind of services rendered, as claimed by defendant client, in a business capacity,

fendant through plaintiff's services.[2]

Evidence is not admissible, however, as to the prospective benefits which may accrue in the future;[3] nor is it competent to show the profits made by defendant, through plaintiff's services, in another similar transaction;[4] nor is it competent for defendant to show that he could have compromised the suit, in respect of which plaintiff's services were rendered, for a nominal sum after the retainer.[5]

The record and pleadings in the action wherein the alleged services were rendered are admissible to show their nature and value,[6] and whether plaintiff was the sole attorney in the cause or not,[7] but evidence as to the truth or falsity of charges in the pleadings in such action is immaterial;[8] and it is improper for plaintiff to read in evidence the opinion of the court, giving the reasons for its decisions.[9]

A bill or account rendered by the attorney,[10] and an offer of pay by the client,[11] are admissible as evidence of their own estimates of what such services are worth.

Evidence as to the time the amount in controversy, or a part thereof, fell due is admissible as affecting the interest to be assessed in the event of recovery.[12]

Attorney as witness. The attorney himself is a competent witness to prove the value of his services.[13]

Contract as to compensation. In an action on a quantum meruit, as in the case of a discharge, although a contract as to compensation is not in itself a criterion of the value of the services rendered, it is admissible on that issue as evidence of what the parties themselves considered a reasonable charge for the services contemplated,[14] unless the contract is invalid;[15] and where, although discharged, the attorney's services were such that he was entitled to receive the entire amount stipulated in the contract, it may be resorted to as a basis for calculating the compensation.[16] In an action against a banking commissioner for attorney's fees which the commissioner is authorized to fix, his agreement as to legal fees may be shown, and if reasonable and approved by the court, as required by statute, is binding.[17]

and not as an ordinary attorney, since business services rendered by an attorney in connection with professional employment should not be separated, but should be considered and allowed for in fixing his compensation.—Bolles v. O'Brien, 151 P. 450, 59 Colo 261.

2. Fla.—F L Stitt & Co v. Powell, 114 So 375, 94 Fla 550
Iowa.—Maine v Rittenmeyer, 151 N. W. 499
Okl.—Cornelius v. Smith, 175 P. 754, 73 Okl 217, 9 A L R 233
Vt.—Platt v Shields, 119 A. 520, 96 Vt 257
Wash.—Levine v. Barry, 195 P. 1003, 114 Wash 623.

Settlement contract between a husband and wife as a direct result of the attorney's services in connection with their reconciliation is properly admitted in the attorney's action to recover therefor against the husband.—Walker v. Hill, 300 P. 260, 90 Mont. 111.

Services in suit to restrain unfair competition

In a suit for compensation as attorneys in defendant company's suit to restrain unfair trade competition by another firm, plaintiffs' evidence of the amount of business done by defendant company in the United States generally is properly admitted not to show defendant's ability to pay, but as bearing on the results obtained by the litigation.—Coco-Cola Co. v. Moore, (C C A.Ark.) 256 F. 640, 168 C C.A. 34.

3. Scheinesohn v Lemonek, 95 N E 913, 84 Ohio St 424, Ann Cas 1912C 737.—6 C J. p 761 note 97.

4. Bolles v. O'Brien, 151 P. 450, 59 Colo 261

5. Scales v Wynne & Wynne, (Tex Civ App) 242 S W 515

6. Ind.—Stringer v Breen, 34 N E 1015, 7 Ind App 557
Minn.—Jensen v. Chicago, M. & St. P Ry. Co, 199 N W 579, 160 Minn 122
Tex.—George v Wright, (Civ App.) 286 S W 656
6 C J. p 761 note 3

Bill of complaint filed against defendant, in reference to which advice was given and services rendered by the attorney, may properly be admitted in the evidence.—Wingert v. Bowie, 128 A 274, 147 Md 610

7. Thorp v Ramsey, 99 P. 584, 51 Wash. 530.

8. George v. Wright, (Tex Civ App) 286 S.W. 656.

9. Warren v Boston Nat. Bank, 147 N E 887, 252 Mass 523.—6 C.J p 761 note 5.

Reason for rejecting agreement

Where the plan devised by an attorney for a national bank to purchase assets of a trust company, as submitted to a justice of the supreme judicial court, is not illegal and there is no taint of moral turpitude to prevent recovery for the value of plaintiff attorney's services, there is no error in excluding what the justice said as his reason for not approving the agreement submitted.—Warren v Boston Nat Bank, 147 N E 887, 252 Mass 523

10. Webster v. Loeb, 86 S W. 463, 112 Mo App. 139.—6 C J. p 761 note 7.

11. Randall v Packard, 20 N Y S 716, 1 Misc 344, affirmed 36 N E 823, 142 N Y. 47.

12. Cooke v Embry, 123 So 27, 219 Ala 623

13. Ellis v Warfield, 48 N W 1058, 82 Iowa 659.—6 C J p 761 note 6

14. Bryant v Browning, (Tex.Civ. App) 48 S W.(2d) 793

15. Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

Partnership contract

In an attorney's action for compensation, after his partnership agreement with his client, whereby he was to have a certain interest in the business as his compensation, was judicially declared invalid, evidence of plaintiff's wife, as to conversations with the client as to the substance of the partnership contract and the actions of the parties supposedly thereunder, is incompetent on the question of the value of the attorney's services on a quantum meruit basis.—Bolles v. O'Brien, 151 P. 450, 59 Colo. 261.

16. McGowan v. Parish, 35 S Ct. 543, 237 U.S. 285, 59 L Ed 955, reversing Parish v. McGowan, 39 App D.C. 184.

17. Austin v. Conner & McRae, (Tex.Civ.App.) 288 S.W. 552.

Customary charges; fees of others. In determining the value of an attorney's services it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession, in the same vicinity, and practicing in the same court.[18] It has been held, however, that a local usage as to fees is not competent to show the value of services rendered in another state or county,[19] and that, in any case, such evidence is not essential, inasmuch as the court itself is competent to judge with respect to the value of such services.[20]

Evidence of what another attorney received in the same case or in other particular cases, generally, is not admissible in determining the value of the services performed.[21] It has been held, however, that the amount paid to an associate counsel, which is not questioned and the fairness of which is unchallenged, is proper evidence to be considered as to the reasonableness of a contingent fee agreed on, and the value of the services of the attorney who claims the contingent fee.[22]

Testimony that another person, such as a notary, would have performed a certain service for a specified amount, is not admissible to show that the same service is not more valuable when rendered by the attorney;[23] and evidence as to the reasonable value of a broker's commission for procuring bank discounts is not admissible in an action for an attorney's services in procuring such discounts, where the latter's services were not altogether the same.[24]

Value of services or fees in other actions. On the question of the value of an attorney's services in a particular action, evidence is not admissible as to the value of services rendered by him in another action,[25] or as to amounts received from other clients, especially where the circumstances are dissimilar.[26] It has been held that evidence of what plaintiff had charged for services rendered to defendant prior to those in question is not admissible, as such evidence is irrelevant as tending to raise an outside issue;[27] but, on the other hand, it has been held that evidence of other similar proceedings in which plaintiff represented defendant, and his compensation therefor, is admissible as bearing on the question of the value of the services for which the action is brought.[28]

Financial ability of client. Since the financial ability or wealth of the client is an element to be considered in determining the reasonable value of the attorney's services to him (supra § 191), evidence is admissible on such question which tends to show the financial ability or value of the estate of defendant.[29] Such evidence is admissible, however, only to show the nature of the litigation in which the client has been involved and his financial ability to have responded to any judgment which might have been rendered against him, and is not admissible to draw a distinction between a rich and a poor man or to prejudice the client's rights,[30] and it has been held inadmissible in an action by the client against the attorney on a note, wherein the attorney sets up that the note is merely evidence of an advance on a fee due him and prays judgment on a counterclaim for fees in excess of the amount of the note.[31]

18. Stanton v. Embry, (D C) 93 U S. 548, 23 L Ed. 983—6 C J p 761 note 10.

19. Gaither v Dougherty, 38 S.W 2, 18 Ky L 709—6 C J. p 761 note 10 [b]

20. In re Freund, 171 Ill App 570—Kadison v Fortune Bros. Brewing Co, 163 Ill App 276.

21. Playford v Hutchinson, 19 A 1019, 135 Pa 426—6 C.J. p 762 note 14.

In foreclosure proceeding

In an action for fees by an attorney authorized to represent defendants in a foreclosure proceeding, evidence as to charges of the mortgagee's attorneys was properly excluded, since such charges might have been fixed by contract—Winslow v. Atz, 177 A. 272, 168 Md. 230.

22. Ridge v. Healy, (C C A Mo.) 251 F 798, 164 C.C A 32.

23. Paxson v. Gast, 215 S.W. 515, 518, 202 Mo App 610.

"The fact that one man charges a certain amount for one thing, does not necessarily prove that that is its value or that the services rendered by another, particularly an attorney, are not of more value than those of a mere scrivener."—Paxson v Gast, supra.

24. Goldsmith v. St. Louis Candy Co, 85 Mo.App 595.

25. Davis v. Walker, 31 So 554, 131 Ala. 204—6 C J. p 762 note 12.

26. Ill—Bruce v. Dicker, 6 N E. 435, 116 Ill 527

Pa.—Hindman v. Pittsburgh Trust Co, 109 A. 876, 266 Pa 204

Representing several parties

Where the employment of an attorney, through a single request to represent three baseball clubs with separate interests, does not create a joint liability for his services, in his action against one of them, the court may properly exclude evidence tending to show the amount he had received from the others—Hindman v. Pittsburgh Trust Co, 109 A. 876, 266 Pa. 204.

27. Ala.—Fuller v. Stevens, 39 So. 623.

N J—Brown v. Harriot, 80 A. 479, 81 N J Law 484.

Letters relating to disputed fees in other cases claimed from a corporation in which the client was the principal stockholder, but containing no reference to the case in litigation, are irrelevant—Kline v Blackwell, (C C A Fla.) 63 F (2d) 897, certiorari denied 54 S Ct. 54, 290 U S 636, 78 L Ed. 553.

28. Dykman v. City of New York, 171 N Y.S. 870, 183 App Div. 859.

29. Mont—Fitzgerald v. Eisenhauer, 206 P. 685, 62 Mont. 582

N Y—French v. Robert S Abbott Pub. Co, 228 N Y S 62, 223 App. Div. 276, affirmed 168 N E 437, 251 N.Y. 586.

30. Scales v. Wynne & Wynne, (Tex Civ.App) 242 S W. 515.

31. Crowley v. Rogers, (Mo App) 181 S.W. 434.

(5) As to Performance

On the question of performance competent evidence is admissible which tends to show whether the plaintiff had or had not performed services in accordance with the terms of his contract of employment.

In an attorney's action for compensation, evidence is admissible on behalf of plaintiff which tends to show performance by him of the services for which he was employed,[32] and, on behalf of defendant, which tends to show a failure on the part of plaintiff properly to perform the contract[33] Where defendant claims a set-off of payments made, plaintiff may show that such payments, in accordance with the agreement with defendant, had been used to pay clerical help hired for defendant.[34]

c. Weight and Sufficiency

The rules governing the weight and sufficiency of evidence in civil actions generally apply in determining the weight and sufficiency of the evidence in an action by an attorney for compensation; and these rules apply not only to the sufficiency of evidence to support the verdict or judgment generally, but also to the weight and sufficiency of the evidence to prove particular facts, such as the nature and terms of the attorney's contract of employment, the value of his services, and the amount of his compensation.

The weight and sufficiency of the evidence in an action by an attorney for the recovery of compensation is governed by the rules applicable to the weight and sufficiency of evidence in civil actions in general. In accordance with these rules, the evidence on plaintiff's behalf must be of such weight and sufficiency as to discharge his burden of proof and establish the facts and issues alleged and relied on by him to constitute his cause of action;[35] and, on behalf of defendant, in order to entitle him to defeat a recovery or otherwise succeed in his matter of defense, the evidence must be of such weight and sufficiency as to establish matters of defense set up by him.[36] Evidence of the retaining of plaintiff, of the services rendered by him and the value thereof, or an agreed fee, makes out a prima facie case for plaintiff,[37] and he may recover a reasonable sum in the absence of evidence preponderating in favor of the client's special defense that the attorney had agreed to render the services for a specified amount.[38]

Support of verdict or judgment. The general rule that a preponderance of the evidence is necessary and sufficient is applicable in determining the sufficiency of the evidence to support a verdict or judgment for plaintiff in an action by an attorney for a fee or compensation for services rendered[39] or to support a verdict or judgment for

32. Ala.—Lang v. Leith, 77 So. 445, 16 Ala.App. 295.
Iowa.—Hornish v. Overton, 221 N.W. 483, 206 Iowa 780.

Decree in another action

In an action to recover for services under an oral contract to pay the attorney one half of the recovery in another action, the decree in such other action is admissible to show performance of the contract by the attorney.—Hornish v. Overton, 221 N.W. 483, 206 Iowa 780

Evidence of conferences and the effect and purport thereof by the attorney on behalf of the client may be shown, as shedding light on the good faith of, and the action for the client by, the attorney, if within the scope of the agency and that for which the attorney was employed and engaged in the execution thereof.—Ex parte Yarbrough, 118 So. 670, 218 Ala. 461, granting certiorari Massey v. Yarbrough, 118 So. 668, 22 Ala.App. 607—Lang v. Leith, 77 So. 445, 16 Ala.App. 295.

33. Hille v. Johnston, 259 P. 341, 85 Cal.App. 273.

Failure to collect

In an assignee's action on a contract for attorney's fees, in which the answer set up a breach of contract through the attorney's failure to collect the judgment and his compromising the case without the consent of defendant, it is error to exclude defendant's testimony as to a conversation with the attorney, after obtaining the judgment, as to what he should do about collecting the money.—Hille v. Johnston, 259 P. 341, 85 Cal.App. 273.

34. Lindhout v. City of Chicago Heights, 205 Ill.App. 511.

35. Ala.—Denson v. Middleton, 84 So. 473, 17 Ala.App. 266, certiorari denied Ex parte Middleton, 85 So. 923, 204 Ala. 699
Cal.—Hannon v. Goucher, 4 P.(2d) 239, 117 Cal.App. 455

Direct and convincing testimony as to legal services for a decedent, given by the attorney, corroborated by testimony by the executor, is not overcome by negative testimony by interested persons testifying that they had no knowledge of the services.—In re Campbell, 1 Ohio App. 413.

Evidence held to preponderate in favor of plaintiffs, who claimed a contract for retainer and the subsequent ascertainment of the reasonable value of their services in several suits, where defendant claimed employment for one transaction only, and that payment was made therefor.—Martin v. Manning, Emerson & Morris, 186 S.W. 302, 124 Ark. 74.

36. Ark.—Pace v. Richardson, 202 S.W. 852, 133 Ark. 422.
Iowa.—State v. American Bonding & Casualty Co., 237 N.W. 360, 212 Iowa 1052

Evidence held insufficient to sustain plea of non est factum.—Parkey v. Brock, 299 S.W. 1061, 222 Ky. 34.

37. Ill.—Hunter v. Troup, 146 N.E. 321, 315 Ill. 293.
N.Y.—McAvoy v. Schramme, 264 N.Y.S. 131, 238 App.Div. 225, affirmed 189 N.E. 691, 263 N.Y. 548.

38. McClendon v. Chryssoverges, 120 So. 520, 10 La.App. 639.

39. **Evidence held sufficient**

(1) To sustain verdict or judgment for plaintiff
U.S.—Mason & Hanger Co. v. Burnam, (C.C.A.Ky.) 36 F.(2d) 330
Ark.—Pulaski County v. Shofner, 92 S.W.(2d) 217.
Cal.—Platnauer v. Forni, 21 P.(2d) 638, 131 Cal.App. 393—Linney v. Challacombe, 4 P.(2d) 789, 118 Cal.App. 95—Grass v. Rindge Co., 253 P. 673, 84 Cal.App. 750—Campbell v. Hanford, 227 P. 234, 67 Cal.App. 155
Ill.—Cratty v. Buker, 195 Ill.App. 506—Loomis v. Board, 192 Ill.App. 600.
Mo.—Mecartney v. Guardian Trust Co., 202 S.W. 1131, 274 Mo. 224—Schaper v. Sayman, (App.) 61 S.W.(2d) 379—Tibbe v. Sayman, (App.) 61 S.W.(2d) 376—Young v. Olson, (App.) 16 S.W.(2d) 674
Neb.—Tidd v. Stull, 259 N.W. 369, 128 Neb. 506.

defendant in such action [40]

Particular facts or issues in general. The rules governing the weight and sufficiency of the evidence in civil actions generally, and especially the rule that a preponderance of the evidence is necessary and sufficient, apply in determining the weight and sufficiency of the evidence as to particular facts or issues,[41] such as to plaintiff's performance of services and his right to his fee or compensation,[42] his fraud, bad faith, or negligence in performing

N D—Hildreth v. Honsinger, 171 N. W. 332, 41 N.D. 485
Okl—James v. White, 300 P. 630, 150 Okl. 63—Fry v. Wolfe, 284 P. 191, 106 Okl 289.
Or—Wheelock v. Richardson, 178 P 377, 91 Or. 87.
Pa—O'Malley v. Borough of Dickson City, 80 Pa Super 542
R I—Downing v. Grady, 157 A. 573, 52 R I. 83.
W.Va—Hoge v. Blair, 141 S.E. 444, 105 W.Va 29.

(2) To sustain judgment for plaintiff in the absence of testimony that he failed to perform his contract for legal services.—Goldbacher v. United Automobile Service Corporation of Pa., 100 Pa Super 18

(3) To sustain verdict for attorney against client that the contract of employment had not been canceled—Asher v. Golden, 50 S.W (2d) 3, 244 Ky. 56.

(4) To justify verdict for plaintiff under the evidence that the fees charged by a reputable, able attorney were half what the service was worth—Union Central Life Ins Co. v. Wilson, 161 S E 237, 157 Va. 457

Proof beyond substantial controversy

In an attorney's action for services performed by him under a contract, in which the defense was that no services were performed, it is not error to render judgment for the attorney, where his evidence proves beyond substantial controversy that the services were performed by him—Clark v. Pratt, 225 P. 1063, 116 Kan. 33.

40. Evidence held sufficient to sustain verdict or judgment for defendant

Cal—Gribel v. Burr Creamery Corporation, 276 P. 354, 98 Cal App 17.
Kan—Courtright v. Cavert, 262 P. 587, 125 Kan. 66—Erhardt v City of Rosedale, 201 P. 1103, 109 Kan. 688
Mich—Freeman v. Millen, 205 N W 122, 232 Mich 271
Okl—Mitchell v Vogele, 256 P. 906, 125 Okl 176.
R I.—Crafts v. Mechanics' Sav. Bank, 102 A. 516.
Tex.—Merchants' Ice Co. v. Scott & Dodson, (Civ.App) 186 S W. 418, error refused.
See Wolf v. Gloor, 191 Ill App. 62.

Verdict against attorney held against weight of evidence—Braunberg v. Schlechter, 169 N Y S 68.

41. Cal.—Bonelli v. Conrad, 37 P. (2d) 137, 1 Cal.App (2d) 660—Curtin v. Black Oak Development Co, 168 P 1157, 35 Cal App 1.
Ill—Sabath v. Vacek, 204 Ill App 396
Mich—Nichols v. Waters, 167 N.W. 1, 201 Mich. 27
Mo—Lawson v. Bufton, (App) 199 S W 268
Tenn—Roberts v. Vaughn, 219 S W 1034, 142 Tenn 361, 9 A.L R. 1528
Wash—Langford v Pringle, 177 P 731, 105 Wash 277.

Evidence held sufficient to show

(1) Client's knowledge that a patent attorney was not an attorney at law—Schroeder v. Wheeler, 14 P. (2d) 903, 126 Cal App 367

(2) That attorney's agreement to pay the court costs was made after, and was distinct from, the contract for compensation, although both agreements were made during the same conversation with the client—Clancy v. Kelly, 166 N W 583, 182 Iowa 1207.

(3) That defendant client peremptorily ordered the dismissal of the suit for his own purpose on the eve of its hearing—Maynard v. Reynolds, (C C A Mo) 251 F 734, 164 C C A 18, certiorari denied 39 S Ct 19, 248 U S 578, 63 L Ed 429

(4) That the services sued for were not covered by the contract—Shull, Gill, Sammis & Stilwell v. McCrum, 162 N W. 759, 179 Iowa 1232

Evidence held insufficient to show

(1) That defendant had agreed to pay the attorney's fee for the real client—Young v United States Bank & Trust Co, 148 P. 919, 27 Colo App. 331.

(2) That notes given for an attorney's fee were procured by fraud—Radford v. Gaukler, 162 N W. 1021, 196 Mich. 94

(3) That the parties contemplated reducing the contract to writing, so that a failure to do so entitled the attorney to recover on a quantum meruit.—Modisette v. Griffin, (La App) 150 So. 400

(4) That the parties were mistaken concerning the work required by attorneys representing a client as claimant in a receivership proceedings when entering into a contingent fee contract.—State v. American Bonding & Casualty Co., 237 N.W 360, 212 Iowa 1052

Rejection of settlement

Evidence that an offer of settlement for the death of plaintiff's husband was discussed by plaintiff's attorney with her son, who was a lawyer, and who urged an acceptance of the offer, and that, at an interview with another attorney, plaintiff's attorney opposed the settlement while the son favored it, and that the offer was subsequently rejected, sustains a finding that the attorney acted on his own judgment in declining the offer—Platt v Shields, 119 A. 520, 96 Vt. 257.

42. Rogers v. Fremder, (Mo) 261 S W. 105.

Evidence held sufficient to show

(1) Performance, so as to be entitled to fee or compensation.
U S—Russell v Shippen Bros Lumber Co, (D C Ga.) 229 F. 461
Ind—State Exchange Bank v. Paul, 108 N E 532, 58 Ind App 487
Ky—Charles v. Whitt, 218 S W. 994, 187 Ky 77
La—Bullis v. Town of Jackson, (App) 162 So. 82, setting aside 157 So 780
Minn—McCaughey v. Wilson, 153 N W 310, 130 Minn 196
N Y—In re People, by Beha, 242 N Y S. 100, 136 Misc 715
Wash—Langford v Pringle, 177 P 731, 105 Wash 277
6 C J p 763 note 28 [a].

(2) Right to fee based on quantum meruit, where testimony was conflicting as to employment—Russell v. Simmons & Simmons, 155 So 441, 179 La 937.

(3) Right to fee for performing substantial services, notwithstanding services rendered the client's opponent in another action—Wright v Webb, 278 S W 355, 169 Ark 1145

(4) Right to fee in an action compromised and settled by plaintiff without attorney's knowledge after recovery of a judgment in a larger sum—Woodruff v. Rusk, (Mo App) 76 S.W (2d) 709

(5) That attorneys abandoned the case, as respects their right to compensation—Woodbury v. Andrew Jergens Co, (C C A N Y) 61 F (2d) 736, certiorari denied Berenson v. Woodbury, 53 S Ct 659, 289 U S. 740, 77 L Ed 1487

(6) Valid claim for services, by a representative of a lawyer to recover attorneys' fees and costs due decedent—Carter v. Canty, 186 P. 346, 181 Cal 749.

(7) To show, in an action by attorneys against opponent of their client, who fraudulently compromis-

services;[43] the happening of contingencies on which fee depended;[44] the agreement of defendant to pay plaintiff's attorney's fees, on settlement of the controversy,[45] the payment for legal services;[46] and the mode of payment[47]

Division of fees. The weight and sufficiency of the evidence to establish an agreement between associate counsel for a division of fees, the nature and extent of such agreement, and the attorneys' rights thereunder,[48] is controlled by the general

ed with their client, that defendant had actual notice of plaintiffs' one-third interest in their client's cause of action—Wichita Falls Electric Co v. Chancellor & Bryan, (Tex Civ App) 229 S W 649, error refused

Evidence held insufficient to show performance and right to compensation.—Egins v Taylor, 165 N Y S 448—6 C J p 763 note 28 [b]

43. Radetsky v Montgomery, 80 P (2d) 858, 94 Colo 411. See Gary v. Beadles, 202 Ill App 58.

Evidence held insufficient to show

(1) Fraud, bad faith, or negligence of attorney

Colo—Radetsky v. Montgomery, 80 P (2d) 858, 94 Colo 411—Wilson v Carroll, 250 P 555, 80 Colo 234

Ill—Crocker v. Boening, 247 Ill App 466

Tenn—Brownlow v Payne, 2 Tenn App. 154.

Tex—Morales v Cline, (Civ App) 202 S W 754, dismissed for want of jurisdiction

Va—Scott v. Moon, 130 S E. 241, 143 Va 425.

Wis—Wadleigh v. Stewart, 169 N W 559, 168 Wis 235

(2) Lack of good faith of attorney in accepting employment from another whose claim conflicted with his client's—Bryant v Lewis, (Tex Civ App) 27 S W (2d) 604.

(3) Malpractice sufficient to deprive attorney of his right to compensation—Dyrenforth v Palmer Pneumatic Tire Co, 145 Ill App 62—Smith v. Hoctor, 99 N Y S 843, 51 Misc 649

(4) Negligence in delaying commencement of the suit, justifying attorney's discharge—Tuppela v Mathison, (C C A Alaska) 291 F 728

(5) Plaintiff attorney's violation of ethics of his profession in rendering services—Crocker v. Boening, 247 Ill App 466

44. Robertson v National Spiritualists' Ass'n of United States of America, (Tex.Civ App) 25 S.W (2d) 889.

In action by assistant attorney

Where, in an action by one attorney against another to recover for services performed at the latter's request for defendant's client, defendant testifies that there was no legal basis for the litigation or claims of his client, and that the compromise in question was dictated by sentimental reasons, but where the terms of the compromise required the client to release all claims and dismiss all pending claims against the estate, and both were done, and defendant attorney received his compensation out of the sum paid in compromise, it might well be found that there was a happening of all the contingencies on which plaintiff's claim to a fee depended—Mecartney v. Wallace, 214 Ill App 618

45. Mytton v Missouri Pac R. Co, (Mo App) 211 S W. 111.

46. Wheelan v United States Fidelity & Guaranty Co, 162 N W. 444, 165 Wis 394

Evidence held sufficient to show that payment for legal services was made and received on the understanding that it was in full to date—Hart v Farmers' Mut Fire & Lightning Ins Ass'n of Winneshiek County, Iowa, 226 N.W 777, 208 Iowa 1020

Evidence held insufficient to show payment.—Burnham v Dickinson, 191 Ill App 558—Roberts v Vaughn, 219 S W 1034, 142 Tenn. 361, 9 A L R 1528

47. Schulz v. Bowers, (Mo) 223 S W 725

Evidence held sufficient to show that bonds were accepted by plaintiff in satisfaction of debt sued on—Favrot v Chappuis, 104 So 732, 158 La 332

Evidence held insufficient to show as a matter of law that the sum deposited with the attorneys as indemnity for bonds was not for payment of legal services—O'Fiel v Redell, (Tex Civ App) 298 S W. 142, affirmed Redell v O'Fiel, (Com App) 6 S.W (2d) 92

Mortgage and note for fees

In a suit to foreclose a mortgage securing a note given for an attorney's fees, the evidence was sufficient to support a finding that the amount of the note was an unreasonable charge, and that the note and the mortgage securing it were not executed and delivered voluntarily, and, also, to support a finding that payments of interest on the note were made while the relation of attorney and client existed between the parties, and were not made voluntarily—Magee v Brenneman, 206 P. 37, 188 Cal. 562.

Payment, and accord and satisfaction

Evidence of an agreement by the president, attorney, and other officers and directors of a corporation that the corporation would credit the president with a stated sum on his indebtedness to it and charge such amount against its indebtedness to the attorney for legal services in full accord and satisfaction of the moneys advanced to the latter by the president on a note sued on was insufficient to establish defenses of payment and accord and satisfaction in the absence of evidence that the parties to such arrangement could bind the corporation to carry out the agreement between the president and the attorney or that the purported arrangement was consummated—Ballard v. Trainor, 2 N E (2d) 875, 285 Ill App 509.

48. **Evidence held sufficient**

(1) To show, under the undisputed evidence, that plaintiff, cross complainant, and defendants were associated together as attorneys of record for one client from the inception of his action until the termination thereof, and that each performed such services as were required of him—Ford v Freeman, 180 P. 545, 40 Cal App 221.

(2) To support a finding that plaintiff, in an action to recover his share of a fee collected by other attorneys associated in the case, was employed and was entitled to a specified fee on a quantum meruit—Stuckey v. Norwood, 182 S W. 528, 122 Ark. 131.

(3) To sustain a finding that an agreement was made between plaintiff and defendant, as joint attorneys in a suit, for an equal division of any fees which should be awarded to them in the suit.—Hereford v. Meserve, (C C A.Cal) 272 F 353, certiorari denied 42 S Ct. 48, 257 U S. 636, 66 L Ed 409

(4) To sustain a finding that plaintiff on a good consideration waived a part of the agreement for a division of fees—Berenson v. French, 159 N E. 909, 262 Mass 247.

Evidence held insufficient

(1) To discharge plaintiff's burden of proof, in a suit by an attorney against a member of a firm in which he was associated in litigation to recover his share of a fee earned, that defendant was indebted to him.—Denson v Middleton, 84 So 473, 17 Ala.App. 266, certiorari denied Ex parte Middleton, 85 So. 923, 204 Ala. 699

(2) To preponderate against a finding that after the dissolution of a law firm the fees were divisible among the partners in the former

rules governing the weight and sufficiency of evidence in other civil cases.

Fact of employment. The general rules of evidence apply as to the weight and sufficiency of the evidence to prove the fact, nature, and terms of a contract of employment, establishing the relation of attorney and client, between plaintiff and defendant,[49] including the employment of assistant attorneys;[50] the employment by, or liability of, a particular person for the services,[51] or as to an agreement between an attorney and client as to compensation, after the relation has been established, being fair and free from fraud and undue influence,[52] or, where the relationship did not

ratio—Williams v. Danson, 262 P. 930, 146 Wash 358.

(3) To show any agreement that a contingent fee should be divided other than equally between the parties. —Gill v. Mayne, (Iowa) 162 N.W. 24.

49. Evidence held sufficient to show
(1) Employment
Ark—State v. Sikes, 47 S.W.(2d) 590, 185 Ark 370—Arkansas Foundry Co v Poe, 26 S.W.(2d) 584, 181 Ark 497—St. Louis Southwestern Ry. Co v Terral, 11 S.W.(2d) 763, 178 Ark 475
Cal.—Henshall v Coburn, 169 P. 1014, 177 Cal 50—Cohen v Berman, 297 P. 968, 113 Cal.App 132
Iowa—Myerly v Lowery, 186 N.W. 881, 194 Iowa 139
La.—Danziger v. Kaplan, 129 So. 673, 171 La. 73.
Mich—Freeman v. Miller, 196 N.W. 200, 225 Mich. 271
Okl.—Okmulgee Building & Loan Ass'n v. Cutler, 51 P.(2d) 709, 174 Okl. 614
S.D.—Smith v. McKee, 226 N.W. 766, 55 S.D. 572.
6 C.J. p. 759 note 76 [b].

(2) Employment by two defendants jointly—Rounds v Strang, 180 S.W. 1069, 192 Mo.App. 568

(3) Employment of two firms of attorneys jointly—J. S. Schofield's Sons Co v Mabry, 165 S.E. 890, 45 Ga.App. 695

(4) That employment was solicited, in violation of statute, making the contract void—Myers v. Solomon, 262 N.W. 309, 272 Mich. 588.

(5) That plaintiff was employed as a member of a firm of attorneys, and not as an individual attorney—Scott v. Moon, 130 S.E. 241, 143 Va. 425

Evidence held insufficient
(1) To show employment
Ark—Young v. Fowler, 200 S.W. 813, 132 Ark. 145
Cal.—Bonelli v. Conrad, 37 P.(2d) 137, 1 Cal.App.(2d) 660
Ind.—Modern Woodmen of America v. Arnkens, 192 N.E. 706, 99 Ind.App. 344.
Ky.—Moore v. Stanfill, 31 S.W.(2d) 610, 235 Ky. 272
La.—Landry v. White, (App.) 146 So. 509, affirmed 148 So. 104—Schaefer v Burias Transp Co, 118 So. 334, 9 La.App. 6.
Md.—Drury v. Brightwood Sanitarium Co, 133 A. 314, 150 Md. 585
Minn.—O'Brien v. Blindman, 268 N.W. 546
N.Y.—In re Carpenter, 165 N.Y.S. 10, 178 App.Div. 165—Loew v Gillespie, 153 N.Y.S. 820, 90 Misc. 616, affirmed 157 N.Y.S. 1133.
Wash.—Steffen v Walton, 12 P.(2d) 927, 168 Wash. 521.
6 C.J. p. 759 note 76 [c].

(2) To make out a prima facie case as to employment—Loughran v. Barker, 151 P. 475, 77 Or. 337.

(3) To show continuance of a contract with a law firm after the death of the member of the firm who was to try the case—In re Levy's Will, 201 N.Y.S. 818, 207 App.Div. 183.

(4) To show two separate contracts of employment of plaintiff, and an agreement that plaintiff's compensation should be divided and paid for separately by two defendants—Wheeler v Houston, Gore & Loy, 174 P. 121, 37 Cal.App. 407.

By member of syndicate
Evidence that an attorney, at the request of one member of a syndicate, had rendered services in the formation of the syndicate and the purchase of property for it, is sufficient to sustain a verdict authorizing recovery for such services against the member requesting them, although the attorney testified the services were rendered for the syndicate, while defendant's testimony showed that the member requesting the services had no authority from the other members of the syndicate to do so—Sands v McNeill, 52 App.D.C. 85, 281 F. 589

Employment to collect deceased husband's insurance
In an action by an attorney for services rendered to a widow in collecting her deceased husband's insurance, evidence was held to establish that the widow did not employ the attorney, did not knowingly permit him to act, and did not knowingly accept the benefit of any services he might have rendered—Smith v. Kneisley, (Wash.) 60 P.(2d) 14.

50. Evidence held sufficient
(1) To sustain a finding that the regular attorney agreed only to employ assistant attorneys, and not to employ a named attorney—Jones v. Jones, 63 S.W.(2d) 146, 333 Mo. 478, 90 A.L.R. 219.

(2) To show that the solicitor had no authority to employ plaintiffs at the expense of defendant—Cormac v Murphy, 208 P. 360, 58 Cal.App. 366

Evidence held insufficient to show that the attorney's written contract for compensation for employment by another attorney did not express the true agreement of the parties—Garland v. Dimitry, 119 So. 42, 167 La. 262

51. Mass.—Storey v. Bickford, 129 N.E. 714, 237 Mass. 284
Tenn.—Spears v Polk, 69 S.W.(2d) 239, 17 Tenn.App. 556

Evidence held sufficient to show
(1) That plaintiff performed the services for defendants, and not for a third person with whom defendants had contracted—Freeman v. Millen, 196 N.W. 200, 225 Mich. 271.

(2) That a stockholder did not agree to be personally liable for legal services in connection with the corporation's organization and operation—Massey v. Murray, 135 So. 738, 17 La.App. 319

52. Nugent v Moody, (Tex.Civ.App.) 271 S.W. 266

Evidence held sufficient.—Waugh v. Q. & C. Co., (C.C.A.Ill.) 16 F.(2d) 363—Jones v. Jones, 63 S.W.(2d) 146, 333 Mo. 478, 90 A.L.R. 219—Barthels v Garrels, 227 S.W. 910, 206 Mo.App. 199—Soper v. Bilder, 100 A. 858, 87 N.J.Eq. 564—Coon v. Ewing, (Tex.Civ.App.) 275 S.W. 481. See Ryan v. Hayes, 190 Ill.App. 298.

Evidence held insufficient.—Brydonjack v Rieck, 42 P.(2d) 336, 5 Cal.App.(2d) 219—Coleman v. Sisson, 230 P. 532, 71 Mont. 435.

Evidence held to show that relation of attorney and client existed at the time the contract was procured, so as to render the contract presumptively invalid—Brydonjack v. Rieck, 42 P.(2d) 336, 5 Cal.App.(2d) 219.

Attorney for incompetent
The mere fact that an incompetent person, of whom the trial court found attorney had taken advantage in procuring a contract for excessive compensation, testified that the attorney had not previously acted for her does not prevent a finding on the evidence to the contrary that the relation of attorney and client existed at the time the contract was

previously exist, as to sustaining defendant's burden of proving that the contract was obtained by fraud or undue influence;[53] or as to the discharge or other termination of the employment of the attorney.[54]

In determining an attorney's employment the court may draw reasonable inferences from the conduct of the parties.[55] A written request to an attorney for his opinion has been held sufficient evidence to show employment.[56]

Value of services and amount of compensation. The general rules of evidence control in determining the weight and sufficiency of the evidence as to the amount and nature of the compensation or fee agreed on,[57] or as to the fact that the services were to be gratuitous,[58] or, in case of the absence of an agreement as to the amount of the fee, as to the reasonable value of the services rendered by the attorney.[59] A statement sent to the client for a certain sum on account of past and future

procured—Brydonjack v. Rieck, 42 P.(2d) 336, 5 Cal.App.(2d) 219

Evidence held of little probative value

Where an attorney concluded a contingent fee contract with his client, which recited the refusal of an attempted compromise by his client, and called for the immediate payment of his fee on any compromise contract acknowledging as his due the sum of fifty thousand dollars, a statement estimating the value of the property, an order on trustees to pay the amount of the fee to the attorney, and a promissory note for the amount of the fee were of little probative value for the purpose of establishing that the client understood the contingent fee contract—Ridge v. Healy, (Mo.) 251 F. 798, 164 C.C.A. 32.

53. Evidence held sufficient to show that an attorney imposed on the client in procuring the contract—Roseboom v. Baughman, 37 P.(2d) 616, 169 Okl. 442.

Evidence held insufficient.—State v. American Bonding & Casualty Co., 237 N.W. 360, 212 Iowa 1052—Edler v. Frazier, 156 N.W. 182, 174 Iowa 46—Hansel v. Norblad, 151 P. 962, 78 Or. 38

54. Campbell v. Hanford, 227 P. 234, 67 Cal.App. 155

Evidence held sufficient to show

(1) Abandonment of written contract—Dey v. Hill, 181 P. 462, 20 Ariz. 466.

(2) Cancellation of the contract before services were rendered—Rogers v. Fremder, (Mo.) 261 S.W. 105.

(3) Discharge without cause or justification—Lessing v. Gibbons, (Cal.App.) 45 P.(2d) 258.

(4) Justifiable discharge—Kenner v. Williams, 133 So. 171, 172 La. 1.

(5) That an oral contract employing attorney was not terminated—Hornish v. Overton, 221 N.W. 483, 206 Iowa 780.

55. Ga.—Alexander v. Richardson, 140 S.E. 638, 37 Ga.App. 407

Mo.—Woodruff v. Rusk, (App.) 76 S.W.(2d) 709.

N.Y.—Evans v. Princes Bay Oyster Co., 177 N.Y.S. 276.

Inference not warranted

The fact that trustees, who delivered a trust deed and check for the amount of a loan secured to a title company with instructions to deliver the check when the mortgagor showed good title, were personally interested in the consummation of the loan to the extent of a large bonus does not warrant the inference that the trustees were employing the title company to examine the title, so as to entitle the attorney, employed by it on the mortgagor's behalf to bring suit for specific performance, to allowance of his fee from the proceeds of a foreclosure sale—Drury v. Brightwood Sanitarium Co., 133 A. 314, 150 Md. 585.

56. Jameson v. Butler, 1 Neb. 115.

57. Evidence held sufficient

(1) To show agreement as to amount of fee or compensation.

Cal.—Young v. Bruere, 248 P. 301, 78 Cal.App. 127—Bacon v. Meserve, 195 P. 949, 50 Cal.App. 738—Henning v. Clark, 189 P. 714, 46 Cal.App. 551.

Ind.—Carter v. Drake, 156 N.E. 594, 88 Ind.App. 176.

Iowa.—Ayers v. Brown, 196 N.W. 1002, 197 Iowa 1151

La.—Husk v. Blancand, 99 So. 610, 155 La. 816

Pa.—In re Myers' Estate, 98 A. 694, 253 Pa. 537

Wash.—Schulze v. Jones & Riddell, 175 P. 811, 103 Wash. 664

(2) To show that the contract was not contingent, but that the client agreed to pay a specified sum regardless of the outcome—Dymond & Levy v. Giordano, 130 So. 364, 14 La.App. 583

(3) To show that the services rendered by attorneys under a contingent fee contract were of such value that the contract was not unconscionable—Wood-Hick v. Roll, 208 S.W. 768, 183 Ky. 128

(4) To sustain a verdict for plaintiff for a particular amount—Crane v. Stansbury, 161 P. 7, 173 Cal. 631—Adams v. Ginn, 107 S.E. 603, 27 Ga.App. 222—Schradski v. Warren, (Ill.App.) 4 N.E.(2d) 646—Levin v. Suffrin, (La.App.) 168 So. 790

(5) To sustain a judgment for the amount of attorneys' fees originally sued for, rather than the increased amount claimed in a supplemental petition—Modisette & Adams v. Lorenze, 112 So. 397, 163 La. 505.

Evidence held insufficient to show

(1) Agreement for a particular fee—Delahoussaye v. Lasalle, (La.App.) 158 So. 696—McClendon v. Chrysoverges, 120 So. 520, 10 La.App. 639—Terriberry, Rice & Young v. Stewart, 120 So. 70, 9 La.App. 708.

(2) Contract, so as to deprive attorney of reasonable compensation.—Kelly, Shuttleworth & McManus v. Central Nat. Bank & Trust Co. of Des Moines, (Iowa) 248 N.W. 9, supplemented 250 N.W. 171.

(3) Contract to give an attorney, engaged in connection with a suit to recover land and afterward collecting royalties from the lands recovered, an interest in the land, rather than a percentage of the moneys collected—Parkerson v. Ogden, 97 So. 404, 154 La. 208.

Correspondence

An attorney who corresponded with an assistant general solicitor of a railroad cannot in an action for fees contend that there is no evidence that the general solicitor acted on the bill and reduced the fee—Pattison v. Chicago & Northwestern Ry. Co., 254 Ill.App. 393

58. Ill.—Alexander v. Stern, 252 Ill.App. 286.

Iowa.—In re Cutler & Horgan, 212 N.W. 573, 204 Iowa 739, 54 A.L.R. 527, rehearing denied and modified on other grounds 217 N.W. 448, 204 Iowa 739, 54 A.L.R. 527

Md.—Penrose v. Page, 125 A. 549, 145 Md. 1

Wyo.—Cadle v. Black, 154 P. 997, 24 Wyo. 43.

59. Evidence held sufficient

U.S.—Tracy v. Spitzer-Rorick Trust & Savings Bank, (C.C.A.Ark.) 12 F.(2d) 755, followed in 12 F.(2d) 758

Ark.—Board of Education of Lonoke County v. Lonoke County, 29 S.W.(2d) 268, 181 Ark. 1046—Western Clay Drainage Dist. v. Day, 210 S.W. 338, 138 Ark. 181—Martin v. Manning, Emerson & Morris, 186 S.W. 302, 124 Ark. 74.

Cal.—Stuart v. Preston, 28 P.(2d)

services does not limit the amount of the compensation;[60] and an attorney's bill taxed ex parte is not conclusive proof of the services or disbursements charged.[61]

Abstract statements of witnesses as to the reputed worth of the client or what constitutes a reasonable fee are not sufficient to support a verdict on a quantum meruit, their opinions must be supported by tangible evidence of something expended, done, or accomplished in behalf of the client.[62]

As to value of services exceeding sum paid. In a suit by an attorney for the value of services and for a certain sum contracted to be paid by defendant for such services, plaintiff is not entitled to recover, where the evidence does not show that the value of the services exceeded money already paid to the attorney on account of the services rendered, and it appears that the sum paid exceeded the percentage of a settlement due the attorney under the contract.[63]

§ 205. —— Trial

a. In general
b. Questions of law and fact
c. Demurrer to evidence, dismissal, or direction of verdict
d Instructions
e. Verdict and findings

a. In General

The issues relative to an attorney's fees or compensation may be left to the court or a jury, or they may be referred to an auditor or referee.

155, 2 Cal App.(2d) 310, reh den 39 P (2d) 441.
Ill—Catherwood v. Morris, 196 N E 519, 360 Ill 478
Iowa—Maddy v. Park, 262 N.W. 796, 220 Iowa 899
Kan—Epp v. Hinton, 170 P. 987, 102 Kan 435
Mo—Young v. Levine, 81 S W (2d) 978, 326 Mo 593—Tibbe v Sayman, (App) 61 S.W (2d) 376
N C—Forester v. Betts, 103 S E 209, 179 N C 681
Tex—Southland Life Ins. Co v Norton, (Civ App) 297 S W. 1083, reversed on other grounds (Com App) 5 S W.(2d) 767, conformed to 9 S W (2d) 752—Nugent v. Moody, (Civ App) 271 S.W. 266.

Evidence held insufficient

(1) To sustain a verdict or judgment for the amount allowed the attorney.—Ridge v. Healy, (C C A Mo) 251 F 798, 164 C C A. 32—Jeger v. Julius Kessler & Co., 218 Ill App 39—Kephart v. Horvath, 248 N.W. 598, 263 Mich 211—Dykman v City of New York, 171 N Y S. 370, 183 App Div 859—Goldstein v Coronum Equipment Co, 169 N Y S. 42.

(2) To justify a verdict allowing extra compensation promised by the client for work which the attorney was already bound to do—F L Stitt & Co. v. Powell, 114 So. 875, 94 Fla 550.

(3) To show that the amount allowed was not excessive—Cornelius v. Smith, 175 P 754, 73 Okl. 217, 9 A L R 283—Montana Coal & Iron Co v. Hoskins, 172 P. 118, 88 Or 523

(4) To sustain a finding that the value of a discharged attorney's services in condemnation proceedings was the same as the amount stipulated in the contract for the entire proceedings—In re Driscoll, 228 N.Y.S. 335, 131 Misc. 613.

Agreed fee as evidence of value

Where a husband, under a contract to pay attorneys a certain fee for securing a divorce by default and a contingent fee dependent on success in case of contest, dismissed the action without the attorneys' consent, the agreed fee for default is some evidence of the reasonable value of the services of the attorneys down to their discharge, sustaining a judgment for that sum, less payments against the husband—Ayres v. Lipschutz, 228 P. 720, 68 Cal App 134.

Case settled on rules of opponent

A claim that services rendered by an attorney for several counties, in actions against public utility companies, were of greater value than those performed by others interested in formulating rules for settlement of the action, in determining the amount due by the public utility companies to the counties, is not sustained by evidence showing that the case was settled on rules formulated by technical and legal representatives of the public utility companies, and not by rules suggested by the attorney—Tulare County v. City of Dinuba, 270 P. 201, 205 Cal. 111.

Excluding services of other attorney

A judgment for the reasonable value of an attorney's services, based on testimony in response to a hypothetical question which excludes services rendered by other attorneys, who conducted a second trial of the case and won a verdict, is erroneous, since the reasonable compensation could be determined only by considering the services of the other attorneys—Gruskay v. Simenauskas, 140 A. 724, 107 Conn. 380.

Evidence of three attorneys as to the value of legal services may be considered correct as against the testimony of another attorney.—Levy v. Dehan, 8 La App. 754.

Filing lien

Where there was a controversy as to the agreement concerning compensation, the attorney's filing of a lien for the amount allowed as attorney's fees shows that he was not entitled to any more—Gust v. Judd, 153 P. 309, 88 Wash. 536.

Prima facie case

Evidence indicating the balance due an attorney for payment of the usual fees makes a prima facie case as to reasonableness of the charge—Butcher v. Janssen, 242 N.Y.S. 643, 137 Misc. 42.

Remarks of court as to unnecessarily large record

That the record in a case, wherein an attorney suing for compensation represented defendant, was unnecessarily large, as stated in the supreme court's opinion, does not show that the verdict for plaintiff was too large, the supreme court's remark being directed to the opposing counsel, and the matters which defendant contended should have been omitted being the ones that won the case for him—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.

Resolution not conclusive

A resolution of a board of commissioners of an improvement district fixing the fee of an attorney employed by them is proper for consideration in determining the amount of the fee, but is not conclusive—Tennison v. Quinn, 282 S W. 20, 170 Ark 1194.

60. Behr v. Baker, 238 N.W. 473, 255 Mich. 607.
61. Cook v. Stilson, 3 Barb.(N.Y.) 337.
62. Baruch v. Giblin, (Fla.) 164 So 831.
63. Terrell v Brandt, 142 S E. 460, 37 Ga.App. 760.

After the issues between an attorney and his client have been properly framed, the selection of a tribunal depends largely on the nature of the case and the wishes of the parties concerned, and the determination of the issues may be left to a jury[64] or to the court,[65] or the matter may be referred to an auditor or referee to decide,[66] and such court or tribunal may exercise its own judgment in fixing the amount of the attorney's fees or compensation (supra § 191). The parties, however, may not be required to submit to the determination of committees, or other bodies extrajudicial in character, the amount that shall be allowed as attorney's fees.[67] Whether an attorney's cause of action against his client for compensation may be engrafted on the client's cause of action against another is a question of jurisdiction which may be passed on by a succeeding judge, notwithstanding a prior judge passed thereon.[68]

b. Questions of Law and Fact

(1) In general

(2) Value of services and amount of compensation

(1) In General

Disputed questions of fact relative to an attorney's compensation, on which the evidence is conflicting or of a doubtful nature, are to be determined by the jury; but a question of law or a question of fact, on which the evidence is clear and undisputed, is for the court alone to determine.

Where the evidence on material issues of fact in respect of an attorney's claim to compensation is of sufficient weight and sufficiency to be submitted to the jury,[69] and is conflicting, or, if undisputed, is such that reasonable minds might reach different conclusions therefrom, it is the province of the jury to decide such issues, and they should be submitted to the jury.[70] In accordance with this rule, where the evidence is conflicting or of a doubtful nature, it is usually a question of fact for the jury to decide as to the existence of the relation of attorney and client, and whether the contract of employment was made by, or with the authority

64. Ga.—Smith v. Goode, 29 Ga. 185
Or.—Bowles v. Doble, 5 P. 918, 11 Or. 474.

65. In re Kaufman, 113 N.Y.S. 525—6 C.J. p. 764 note 30

66. In re Cutting's Estate, 169 N.Y.S. 205—6 C.J. p. 764 note 31.

Numerous items and details

Where the attorney claims that the reasonable value of the services rendered an executor is three times that conceded by the executor, the matter may be referred to a referee to pass on the numerous items and details.—In re Cutting's Estate, 169 N.Y.S. 205

67. McMullen v. Reynolds, 70 N.E. 1041, 209 Ill. App. 504, reversing 105 Ill. App. 386

68. Universal Oil Products Co. v. Standard Oil Co. of Indiana, (D.C. Mo.) 6 F. Supp. 37, affirmed (C.C.A.) German v. Universal Oil Products Co., 77 F.(2d) 70

69. Or.—Shepherd v. Inman-Poulsen Lumber Co., 168 P. 601, 86 Or. 652
Wash.—McDermont v. Bateman, 203 P. 66, 118 Wash. 230.

Evidence held sufficient to be submitted to jury

(1) On issue of implied contract.—Moore & Farrar v. Wyatt, (Mo. App.) 8 S.W.(2d) 1020.

(2) On issue of reasonable value of services.—Tidd v. Stull, 259 N.W. 869, 128 Neb. 506

(3) On issue whether services were completed.—City of South Norfolk v. Wolcott, 125 S.E. 687, 140 Va. 611.

(4) On question of negligence of attorney.—Parker-Smith v. Prince Mfg. Co., 158 N.Y.S. 346, 172 App. Div. 302

Evidence held insufficient to be submitted to jury.—Orwig v. Chicago, R. I. & P. Ry. Co., 250 N.W. 148, 217 Iowa 521, 90 A.L.R. 258—Clarke & Simmons v. Rule, 199 N.W. 89, 159 Minn. 406

70. Ga.—Willingham, Wright & Covington v. Glover, 111 S.E. 206, 28 Ga. App. 394
Ill.—Baker v. Ayers, 223 Ill. App. 460.—Hanecy v. Read, 207 Ill. App. 197.—Shope v. Laughlin, 191 Ill. App. 38
Iowa.—Graeser v. Jones, 261 N.W. 439, 220 Iowa 354
Kan.—Dana v. Kansas Natural Gas Co., 190 P. 610, 107 Kan. 98
Ky.—Snyder v. Howard's Adm'x, 65 S.W.(2d) 477, 251 Ky. 592
Mich.—McCulloch v. Von Zellen, 187 N.W. 250, 218 Mich. 278
Neb.—Gillis v. Paddock's Estate, 109 N.W. 734, 77 Neb. 504
N.J.—Sylvester v. Koehler, 170 A. 811, 12 N.J. Misc. 184
N.C.—Southern Nat. Bank v. O'Brien, 95 S.E. 546, 175 N.C. 338
Okl.—Opperud v. Twedell, 51 P.(2d) 799
Or.—Schmalz v. Arnwine, 246 P. 718, 118 Or. 300.—Teiser v. Barlow, 192 P. 394, 97 Or. 410.—Dolph v. Speckart, 186 P. 32, 94 Or. 550
Pa.—Hanley v. Waxman, 80 Pa. Super. 274
Tex.—Cooley v. Buie, (Civ. App.) 284 S.W. 702, reversed on other grounds (Com. App.) 291 S.W. 876.—Peerless Fire Ins. Co. v. Barcus, (Civ. App.) 227 S.W. 368.—Laybourne v. Bray & Shifflett, (Civ. App.) 190 S.W. 1159
Wash.—Smith v. Saulsberry, 288 P. 927, 157 Wash. 270

Particular questions held for jury

(1) Whether a settlement secured by co-counsel was in satisfaction of a judgment previously secured by attorneys on a contingent fee basis.—Shultz v. Jones, 9 S.W.(2d) 248, 223 Mo.App. 142

(2) Whether the services were rendered for defendants or for a corporation in which defendants were interested.—Lewin v. Moody, 228 N.Y.S. 281, 131 Misc. 833.

(3) Whether under similar circumstances an attorney of reasonable professional capacity would have done as plaintiff did.—Slade v. Harris, 135 A. 570, 105 Conn. 436.

An action for recovery of money

A suit for an attorney's fee of a specified amount is an action for the recovery of money, within the meaning of a statutory provision that issues of fact arising in such an action shall be tried by a jury, unless a jury trial is waived or a reference is ordered.—Wolfe v. Campbell, 230 P. 506, 107 Okl. 112.

In an action by a client against his attorney to recover an alleged excessive fee retained by the attorney, where plaintiff testifies to a specific contract, and defendant denies its existence and claims compensation on a quantum meruit, the case may properly be submitted to the jury.—Gietzen v. Campbell, 220 N.W. 338, 247 Mich. 560.

of, defendant,[71] and, if so, whether the latter agreed to pay,[72] or is liable, for the services rendered;[73] whether, in an action on a quantum meruit, there was an express contract;[74] and as to whether the relationship of attorney and client existed at the time the contract of employment was entered into,[75] and, if so, whether the contract was fair, and free from fraud or undue influence.[76]

It is, also, usually a question of fact for the jury, under the evidence, as to what were the terms of the contract;[77] whether the specific services claimed were covered by the contract and rendered;[78] whether, at the time in question, the attorney was acting individually or as a member of a firm;[79] whether he had committed a material breach of the contract of employment,[80] and as to the fact of payment of the fee or compensation.[81]

71. Cal.—Pierce v. Rilovich, 29 P. (2d) 228, 136 Cal.App. 611
Iowa.—Rinniker v. McHugh, 183 N.W. 465
Kan.—Austin v. Prudential Trust Co., 212 P. 77, 112 Kan. 545
Ky.—Moore v. Stanfill, 31 S.W.(2d) 610, 235 Ky. 372
Mo.—Becker v. National Refining Co., (App.) 50 S.W.(2d) 670
Neb.—Gillis v. Paddock's Estate, 109 N.W. 734, 77 Neb. 504
N.Y.—Pendleton v. Johnston, 59 N.Y. Super. 331, affirmed 31 N.E. 626, 133 N.Y. 678.
N.C.—Francis v. Mortgage Sec. Corporation of America, 153 S.E. 317, 198 N.C. 734.
Okl.—Opperud v. Twedell, 51 P.(2d) 799
6 C.J. p. 764 note 33

Questions held for jury

(1) Whether attorney was employed jointly by a corporation and its president and chief stockholder.—Unger v. Noxon Chemical Products Co., 165 A. 731, 11 N.J.Misc. 323

(2) Whether an attorney suing his client for his fee had an independent contract with the client, and the nature of a contract between the attorney and another attorney representing the client.—Baruch v. Giblin, (Fla.) 164 So. 831

(3) Whether defendant requested attorney's services.—Pettine v. Arter, (R.I.) 136 A. 8

(4) Whether an oral contract was entered into by an attorney and property owner for the attorney's services in procuring an increase in the condemnation award.—Graeser v. Jones, 251 N.W. 162, 217 Iowa 499.

(5) Whether the secretary and officers of a corporation which was sued for the attorney's fees had authority to employ the attorney to represent the corporation.—Becker v. National Refining Co., 50 S.W.(2d) 670

72. Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.—6 C.J. p. 764 note 34

Trustee as defendant

In an attorney's suit for fees for the administration of an estate, whether defendant a trustee and beneficiary of testator's property, expressly agreed to pay the reasonable value of plaintiff's services, is a question of fact for the jury.—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243.

Whether an employer had agreed to pay the attorney for services rendered an employee, if the employee should work for the employer, is a question for the jury.—Walker v. Whitten, (Mo.App.) 38 S.W.(2d) 480

73. Ala.—Tyson & Arrington v. Thompson, 70 So. 649, 195 Ala. 230
N.Y.—Lewin v. Moody, 228 N.Y.S. 281, 131 Misc. 833
R.I.—Pettine v. Arter, 136 A. 8.

Securing H. O. L. C. loan

Liability of clients to an attorney for the attorney's fees for allegedly representing them in refinancing indebtedness, including the securing of a Home Owner's Loan Corporation loan, was for jury.—Werdell v. Reczek, (Ill.App.) 3 N.E.(2d) 159

Whether defendant is liable for services of attorney employed by principal attorney.—Ryan v. Bullion, 161 N.W. 167, 100 Neb. 705

74. Stuart v. Preston, 38 P.(2d) 155, 2 Cal.App.(2d) 310, rehearing denied 39 P.(2d) 441.

75. Bonelli v. Conrad, 37 P.(2d) 137, 1 Cal.App.(2d) 660.

76. Laybourne v. Bray & Shiffett, (Tex.Civ.App.) 190 S.W. 1159.

Fraud in obtaining expenses

Where there is no evidence that the attorney acted otherwise than in good faith and in the exercise of her best judgment as to the interests of her clients in representing that it was necessary for her to attend a trial in a distant state, and, although she visited relatives en route, she did so at her own expense, the question of fraud in obtaining expenses of such trip from the clients should not have been submitted to jury.—Leibold v. Grosenbaugh, 218 P. 258, 126 Wash. 502.

Whether contract was unconscionable.—In re Weber, 170 N.Y.S. 293, 102 Misc. 635.—Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl. 108

77. King v. Mann, 286 S.W. 100, 315 Mo. 318, affirming 285 S.W. 506, 208 Mo.App. 642.—6 C.J. p. 764 note 35.

78. Cal.—Pierce v. Rilovich, 29 P. (2d) 228, 136 Cal.App. 611.
Iowa.—Graeser v. Jones, 261 N.W. 439, 220 Iowa 354.—Wilson v. Manville, 188 N.W. 932, 194 Iowa 26
Mo.—King v. Mann, 286 S.W. 100, 315 Mo. 318, affirming 285 S.W. 506, 208 Mo.App. 642.—King v. Mann, (App.) 207 S.W. 836
S.C.—Graydon v. Stokes, 24 S.C. 483
Tex.—Jones v. Baldwin, (Civ.App.) 10 S.W.(2d) 388, affirmed (Com.App.) 23 S.W.(2d) 308

Whether attorney fully performed his contract with his client.—King v. Mann, (Mo.App.) 207 S.W. 836.

Whether services were covered by express contract.—Blackwell v. Finlay, 187 N.Y.S. 880, 196 App.Div. 436, modified on other grounds 135 N.E. 600, 233 N.Y. 361

79. Shirts v. Rooker, 52 N.E. 629, 21 Ind.App. 420

80. Beaumont v. J. H. Hamlen & Son, 31 S.W.(2d) 24, 190 Ark. 630

Disobeying instructions

In a suit to recover attorney's fees under an express contract, the question whether plaintiffs disobeyed instructions of defendant client is properly submitted to the jury, where there is ample evidence to sustain a finding that plaintiffs did not.—Maynard v. Reynolds, (Mo.) 251 F. 734, 164 C.C.A. 18, certiorari denied 39 S.Ct. 19, 248 U.S. 578, 63 L.Ed. 429

In an action to recover fees from the adverse party who made a settlement with the client, where the evidence tends to show that the attorney failed or refused to pay the material witnesses their attendance fees or mileage while attending the client's case in a federal court, and for such reason the witnesses would not voluntarily attend the trial in the state court, the question whether the attorney had abandoned the client's case or had committed a material breach of contract of employment is for the jury.—Beaumont v. J. H. Hamlen & Son, 31 S.W.(2d) 24, 190 Ark. 630.

81. Dockery v. Johnston, (Tex.Civ. App.) 299 S.W. 505.

Whether payment was made in full.—Grass v. Rundge Co., 258 P. 673, 84 Cal.App. 750.—Greenwood v. Senter, (Tex.Civ.App.) 44 S.W.(2d) 504, affirmed in part and reversed on

Termination of employment. Where the facts are disputed and the evidence is conflicting or of a doubtful character, it is a question for the jury as to whether the attorney was justified in abandoning his employment or withdrawing from the case,[82] whether there was a mutual rescission of the contract,[83] or whether the attorney had been discharged.[84]

Questions of law. Where the evidence on the issues of fact is legally insufficient, or is undisputed and clear and free from doubt, such issues should not be submitted to the jury, but should be determined by the court alone,[85] and this rule applies as to the legal effect of the contract of employment[86] and the question of negligence or want of skill.[87]

A promise or offer to pay the attorney extra compensation for services which he is already bound to perform constitutes no actionable obligation on the part of the client, and it is error to submit it to the jury as an item of the attorney's claim.[88]

(2) Value of Services and Amount of Compensation

Questions relative to the value of services rendered by the attorney and the amount of compensation due him are usually questions of fact for the jury, where the evidence thereon is conflicting or doubtful.

Where the facts are disputed and the evidence is conflicting or of a doubtful character, it is a question for the jury as to whether the amount of the attorney's fee has been fixed by agreement or whether he is entitled to a reasonable fee;[89] as to what the nature and amount of his fee is;[90] whether the fee charged or agreed on is reasonable;[91] and as to the amount of the fee, if any, which plaintiff should recover;[92] and where the contract leaves the amount of the compensation to be fixed by defendant, there is an implied agreement that in case of a difference of opinion in regard to the proper amount it should be submitted to a jury.[93] The reasonable value of the services rendered by the attorney, when in issue, is usually a question of fact for the jury to determine where the facts are disputed,[94] and it has been held that,

other grounds in part (Com App) 61 S W (2d) 812.

82. Ky.—Baxter v. Hubbard, 47 S W (2d) 743, 242 Ky. 751.
Mo—King v Mann, 286 S.W. 100, 315 Mo. 318, affirming 235 S W 506, 208 Mo App 642
6 C J p 764 note 38

83. Nunn v Veale, (Tex Civ App) 150 S W. 604

As shown by conduct

Whether, in a suit by a corporation's general counsel for fees for administering the estate of a stockholder, plaintiff's whole conduct in conducting the corporation's affairs showed an abandonment and rescission by both parties of his employment contract which required the rendition of services to stockholders, leaving counsel free to contract for the administration of a stockholder's estate for extra compensations, is a question for the jury—Treadwell v. Nickel, 228 P. 25, 194 Cal. 243

84. Tuppela v. Mathison, (C.C.A. Alaska) 291 F. 728.

85. Colo—Webster v. Rhodes, 112 P. 324, 49 Colo 203
Ga.—Willingham, Wright & Covington v. Glover, 111 S E. 206, 28 Ga App 394.
Tex—Boyd v. Gunn, (Civ App) 44 S.W.(2d) 1112.

Issue on counterclaim

Where defendant files a counterclaim for plaintiff's failure to perform his duty in unrelated matters, the issue on the counterclaim is properly taken from the jury, where no showing is made of any damage to defendant—Webster v. Rhodes, 112 P 324, 49 Colo. 203

86. Brown v Quinton, 122 P 116, 86 Kan. 658, Ann Cas 1913C 392

87. Gabbert v Evans, 166 S W. 635, 184 Mo App 283

88. F. L Stitt & Co. v. Powell, 114 So 375, 94 Fla. 550.

89. Cal—Nave v Taugher, 193 P 503, 49 Cal App. 303
Mich—Behr v Baker, 288 N W. 473, 255 Mich 607
Mo—Schaper v. Sayman, (App) 61 S W (2d) 379—Leahy v. Lemp, (App) 214 S W 228.

90. Kan—Reed v. Root, 204 P 527, 110 Kan 514
Ky—Baxter v. Hubbard, 47 S W (2d) 743, 242 Ky. 751.

Question held for jury

Whether the attorney agreed to take nothing for his services, unless successful, and to accept a fee fixed by the client, if successful—Baxter v Hubbard, 47 S W.(2d) 743, 242 Ky 751.

91. Ark—Sain v. Bogle, 182 S W. 515, 122 Ark 14.
Neb—Gillis v Paddock's Estate, 109 N W 734, 77 Neb 504
Okl—Wolfe v Campbell, 230 P. 506, 107 Okl 112
Vt—Platt v Shields, 119 A. 520, 96 Vt 257.

Excessiveness of fee held for jury.

—Smith v. Saulsberry, 288 P. 927, 157 Wash 270.

Where the only testimony is opinion, the question of a reasonable attorney's fee is for the jury, since the jury are not bound by such testimony—Officer v. Cummings, 272 P 273, 127 Or 320.

92. Kan—Humphreys v Commerce Trust Co, 1 P (2d) 263, 133 Kan 493.
Ky—Roederer v. Schmitt, 80 S W (2d) 35, 258 Ky. 393
Neb—Gillis v. Paddock's Estate, 109 N W 734, 77 Neb. 504

93. Nave v Taugher, 193 P 503, 49 Cal App 303.

Compensation of associate attorney

Where defendant, an attorney, engaged another attorney to render legal services under an agreement that he should fix the value of such services, the fact that the attorney employed, in a letter to defendant, stated that he did not question defendant's good faith in fixing the value of the services is not conclusive in an action for their reasonable value, so as to restrict the recovery to the amount fixed, and the matter should be submitted to the jury—Nave v. Taugher, 193 P 503, 49 Cal App 303.

94. Iowa—Wilson v. Manville, 188 N W 932, 194 Iowa 26.
Ky—Rudd v. Weisinger, 5 Ky Op. 567.
Mo.—King v. Mann, 286 S W 100, 315 Mo 318, affirming 235 S.W. 506, 208 Mo App 642
N.Y.—Weaver v. Scripture, 211 N.Y. S 593, 125 Misc. 741, affirmed 211 N.Y.S. 940, 214 App.Div 852.
N C.—Forester v. Betts, 103 S.E. 209, 179 N.C 681.
Okl.—Maxwell v. Yancy, 28 P.(2d) 989, 167 Okl. 158
Tex.—Dockery v. Johnston, (Civ.

even where the rendition of the services is undisputed and plaintiff's testimony on the question of value is to be regarded as true, the value of the services is a question of fact for the jury.[95]

The reasonable value of legal services, however, has been held to be a question for the court to determine, where it has full information of what the services consisted,[96] as where the services have been performed in its presence.[97] In a suit to foreclose a mortgage securing a note given for an attorney's fee, where plaintiff failed to rebut the presumption arising from the execution of the note and mortgage, while the relation of attorney and client existed between the parties, that the note was executed under undue influence, the contract evidenced by the note was voidable at the instance of defendants, and the court had power to find what was a reasonable fee.[98]

The construction of stipulations and orders in another action concerning amount due the attorney is a question for the court.[99]

Effect of claiming lien. Where issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding plaintiff may pray that an equitable lien be decreed against defendant's property.[1]

c. Demurrer to Evidence, Dismissal, or Direction of Verdict

As in the trial of other civil cases, where it is justified by the evidence, the court may grant a demurrer to the evidence or a dismissal or nonsuit, or it may direct a verdict for one of the parties.

Where the facts established by the evidence, in an attorney's action for compensation, are those alleged in the petition and prove a cause of action against defendant, a demurrer to the evidence will be overruled.[2] On the other hand, where the attorney intervenes in an action, in which evidence regarding fraud on his part in fixing his fee does not substantiate the claim of such fraud, his demurrer to the evidence will be sustained.[3]

Dismissal or nonsuit. In some states a dismissal or nonsuit may be granted for lack of evidence to sustain the attorney's complaint;[4] but where the defense applies only to a part of plaintiff's claim, the court cannot nonsuit or direct a verdict for defendant as to the entire claim.[5]

Direction of verdict. Where questions of fact are presented by the evidence which requires the case to be submitted to the jury, it is proper to deny, and error to direct, a verdict for plaintiff[6]

App) 299 S W. 505—Merchants' Ice Co v. Scott & Dodson, (Civ App) 186 S W 418, error refused Wash—Wick v Baldwin, 275 P. 545, 151 Wash. 259
6 C J p 764 note 87.

More experienced witnesses
The fact that the testimony of defendant's witnesses, as to the value of the attorney's services sued for, came from more experienced witnesses made a conflict in the testimony for the jury—Klass v Iowa Mut Liability Ins. Co, 230 N W. 314, 210 Iowa 78

Reasonable value of opinion obtained from the attorney held for the jury—Tasker v. Cochrane, 271 P. 503, 94 Cal App 361.

Weight of defendant's attorney's testimony regarding the value of plaintiff's legal services, where defendant's attorney had been associated with plaintiff in some of the actions wherein the services were rendered for which suit is brought, is held a question for the jury—Crary v. Coffin, 268 P. 881, 148 Wash. 237.

95. Everitt v. Mitchell, 202 N.Y S 260—6 C J p 764 note 41.

Where defendant offers no evidence
Where, in an action to recover attorney's fees, plaintiff introduced evidence of his professional services rendered and the reasonable value thereof, although defendant offered no evidence tending to disprove that the specific services were rendered as claimed by plaintiff, or that the amounts sought to be recovered were the reasonable value thereof, these were, nevertheless, jury questions—Wilson v. Manville, 188 N W. 932, 194 Iowa 26

96. In re Associated Towel & Linen Supply Co., (D C Cal) 7 F Supp 699

97. Rabasse's Succ., 25 So 826, 51 La Ann 590

98. Magee v. Brenneman, 206 P. 87, 188 Cal 562

99. Dolph v. Speckart, 186 P 82, 94 Or. 550

1. Wolfe v. Campbell, 230 P. 506, 107 Okl 112

Notice of lien as admission of value
In an action by an attorney to recover a reasonable fee for services rendered in conducting an action, the fact that plaintiff filed a notice claiming a lien in such action is not a conclusive admission on his part that the value of his services did not exceed the sum claimed in such notice, but the question of the weight to be given to such notice as an admission is one for the exclusive determination of the jury under all the evidence in the case—Gilmore v McBride, (Alaska) 156 F. 464, 84 C C A. 274

2. Long v. Kansas City, M & O. R Co, 164 P. 175, 100 Kan. 361

3. Jander v. McNeill, 43 P.(2d) 1022, 169 Okl 433.

4. Cal—Knight v Carlin, 281 P. 712, 101 Cal App 453
N Y—McAvoy v. Schramme, 264 N Y S 181, 233 App Div 225, affirmed 189 N E 691, 263 N Y. 543.

Unauthorized contract
A complaint in an action for compensation for legal services rendered under a contract with a stockholder may properly be dismissed as to a corporation, in the absence of evidence that it was the stockholder's undisclosed principal or that it adopted or ratified the contract—McAvoy v. Schramme, 264 N Y S 181, 233 App Div. 225, affirmed 189 N E 691, 263 N.Y. 543.

5. Ziegener v. Daeche, 103 A. 82, 91 N J Law 634

6. Haden v. Troy, 46 So. 753, 155 Ala. 270—6 C J. p 765 note 56

It is error to give a general charge for plaintiff
(1) Where the evidence is conflicting as to the nature of the employment, and as to whether plaintiff had abandoned the case—Haden v. Troy, 46 So. 753, 155 Ala. 270.

(2) In an action by a firm of attorneys to recover a fee, the evidence did not justify the submission of an instruction asking for a di-

or defendant,[7] as the case may be.

A verdict may be directed for the attorney, where the evidence is clear and conclusive, or is uncontradicted, that he performed the services under his contract and is entitled to his compensation;[8] and where the evidence shows plaintiff entitled to some compensation, not merely nominal, it is error to refuse a general affirmative charge, with hypothesis, not specifying any amount of plaintiff's recovery.[9] The mere fact, however, that there is no evidence offered in opposition to plaintiff's testimony as to the value of his services is not conclusive and does not justify the direction of a verdict for him.[10] On the other hand if the evidence clearly shows that a finding for plaintiff is not warranted, and that, if the jury should make such a finding, defendant would be entitled to a new trial, an instruction for defendant, or not to render a verdict finding for plaintiff, is proper.[11]

d. Instructions

The instructions as to the attorney's right to, and the amount of, his compensation should, without invading the province of the jury, clearly, fully, and accurately state the law applicable to the issues and the evidence.

On the question of an attorney's right to, and the amount of, his compensation, the court may, and should, give instructions covering the different contentions or theories of the parties.[12] These instructions are governed as to their form, requisites, and sufficiency by the general rules applicable in other civil actions;[13] and should protect attorneys who act to the best of their knowledge and skill, even though they are mistaken.[14] They

rected verdict, based on the claim that defendant hired one member of the firm as an individual and not the firm, of which he was a partner—Scott v. Moon, 130 S E 241, 142 Va 435

7. U S—Tuppela v Mathison, (C C A Alaska) 291 F 728
Or—Snow v Beard, 162 P 253, 82 Or 518
Tex—Merchants' Ice Co v Scott & Dodson, (Civ App) 186 S W 418, error refused

Denial of motion justified

Where an attorney's action for a fee was defended on the ground of the attorney's misconduct or bad faith, and the evidence relative thereto was uncontradicted, but did not show conduct which, as a matter of law, would preclude recovery, denying motion for a directed verdict against plaintiff, based solely on such alleged misconduct, was not error—Taft v Davidson, (Okl) 45 P (2d) 738

Where dispute as to withdrawal or discharge

In an action for legal services rendered in prosecution of a damage suit, it is error to instruct a verdict for defendant, where plaintiff withdrew from the damage suit after he had completed its preparation, but before the trial, there being a dispute as to whether plaintiff was discharged from further representing defendant in the suit, or whether he withdrew voluntarily, in which event, under the contract, he would not be entitled to recover for the services previously rendered—Ivins v Elbinger Shoe Mfg Co., 14 Ohio App 289

8. Ga.—Copeland v Eubanks, 165 S E 3, 175 Ga 193
Iowa.—Hunt, Hill & Betts v Moore, 239 N W. 112, 213 Iowa 1323.

9. Riddle v. Street, 117 So 653, 218 Ala 97

10. Steele v. Hammond, 121 N.Y.S 589, 136 App Div 667—McDonald v. De Vito, 103 N Y S 508, 118 App Div 566

11. Senter v Western Union Telegraph Co., (C C A Tex) 16 F.(2d) 120

For defendants who had paid

Where, plaintiffs' testimony showed that two defendants had paid their share of the fee, a verdict was properly directed for such defendants—Kappler v Storm, 153 P 1142, 54 Okl 493

12. Colo—Enyart v. Orr, 238 P 29, 78 Colo 6
Ill—Mecartney v. Wallace, 214 Ill. App 618
Or—Dunlway v. Hadley, 178 P. 942, 91 Or 343
6 C J p 765 note 52.

In an action by one attorney against another to recover for services performed at the latter's request, an instruction, setting up defendant's theory that, if there was an express contract as to what services plaintiff was to perform and what his compensation was to be, then the evidence as to the usual, reasonable, and customary value of the same should be disregarded, should be given, where there is some evidence tending to support the contention—Mecartney v. Wallace, 214 Ill App 618.

Inconsistent theories

In an action by one attorney against another to recover for services performed at the latter's request, an instruction for plaintiff is erroneous which, after properly presenting the theory of plaintiff's right to recover for his services on the happening of stated contingencies, improperly presents also the theory of his right to a reasonable fee without any contingency—a theory not only inconsistent with the evidence of both parties, but with that on which plaintiff finally submitted his case—Mecartney v. Wallace, 214 Ill App. 618

Instructions on the relation of attorney and client should be given when requested—Enyart v. Orr, 238 P. 29, 78 Colo 6

Liability for reasonable value of services

In an attorney's action for the reasonable value of services performed, tried on the theory that the client was indebted therefor, instead of on a written contract entered into between the parties specifying compensation, where there is evidence tending to show that such contract had been abandoned and a new contract entered into, the court does not err in submitting the case on the theory that the client is liable for the reasonable value of the services.—Dey v. Hill, 181 P. 462, 20 Ariz. 466

Services outside employment

Where the court instructs that the jury should find for plaintiff a sum to compensate him reasonably for services performed under his employment, the jury should also have been told, for any services outside of those his employment required him to render, he could not recover—Adams Express Co v. James, 175 S W 1012, 164 Ky 484.

13. Cal—Stuart v Preston, 38 P. (2d) 155, 2 Cal.App.(2d) 310, rehearing denied 39 P (2d) 441
Kan—Courtright v. Cavert, 262 P. 587, 125 Kan 66
Wyo—Cadle v Black, 154 P. 897, 24 Wyo. 42.
6 C J p 764 note 45

14. Lindsay v. Carpenter, 58 N W. 900, 90 Iowa 529.

should give a full and accurate statement of the law applicable and confined to the facts put in issue by the pleadings and supported by the evidence in the case,[15] and must not be confusing or misleading to the jury,[16] place an undue burden of

15. U S—Tuppela v. Mathison, (C C A Alaska) 291 F 728.
Cal—Stuart v Preston, 38 P (2d) 155, 2 Cal App (2d) 310, rehearing denied 39 P (2d) 441—Grass v. Rindge Co, 258 P. 673, 84 Cal App 750
Ill.—O'Hair v. Watson, 202 Ill App. 439—Peirce v. Sholtey, 190 Ill App. 341
Iowa—Klass v. Iowa Mut Liability Ins. Co, 230 N W. 314, 210 Iowa 78.
Kan—Erhardt v City of Rosedale, 201 P 1108, 109 Kan 688.
Md—Winslow v. Atz, 177 A. 272, 168 Md 230
Mo—Schaper v. Sayman, (App) 61 S W (2d) 879—Tibbe v. Sayman, (App) 61 S W (2d) 876.
Or.—Snow v. Beard, 162 P. 258, 82 Or. 518
R I—Brown v. Campbell, 155 A 403
Va—Culbert v Hutton & Hutton, 188 S E 867, 188 Va. 677—Campbell County v. Howard, 112 S E 876, 133 Va. 19
Wyo—Cadle v. Black, 154 P 997, 24 Wyo 43
6 C.J. p 764 notes 45, 46.

Instructions held proper or not erroneous as to

(1) Acts operating as discharge of attorney—Tuppela v. Mathison, (C C A Alaska) 291 F 728.

(2) Attorney's duties toward his client and his liability for failure to exercise reasonable care—Slade v. Harris, 135 A 570, 105 Conn 486

(3) Burden of proof—Grass v Rindge Co, 258 P. 673, 84 Cal App 750

(4) Final termination of case—Dale v. Board of Education of City of Guthrie, 152 P. 116, 51 Okl. 592.

(5) Great weight being given to bill rendered by attorney as evidence of value of services.—Gunning v Rosen, 139 A. 790, 49 R I. 59.

(6) Increased care and responsibility from amount involved being an element to be considered in fixing the reasonable value of attorney's services—Van Fleet v. O'Neil, 192 P 884, 44 Nev. 216

(7) Interpretation and effect of a letter—Mason & Hanger Co v. Burnam, (C C A Ky.) 86 F.(2d) 330

(8) Permitting jury to consider, in fixing attorney's fee, the nature and importance of the litigation, and whether the fee was to be absolute or contingent—F. L. Stitt & Co. v. Powell, 114 So. 375, 94 Fla. 550.

(9) Presumption of fee being fair and reasonable.—Smith v. Saulsbery, 288 P. 927, 157 Wash. 270.

(10) Recovery on basis of reasonable value of services—Christopher v. Almond, 169 S E 899, 177 Ga 211.

Instructions held erroneous or properly refused as to

(1) Amount of verdict—Albertson v. Clark, 185 P 256, 67 Colo. 477

(2) Contracts between attorney and client relative to costs being presumptively void—Tasker v. Cochrane, 271 P 503, 94 Cal App 361.

(3) Finding for the attorney, if husband employed the attorney to defend husband's wife, where attorney alleged that the husband promised to help pay the wife's attorney's fees—Keser v. Jarvis, 25 S W (2d) 721, 233 Ky. 316

(4) Proper measure of recovery—Campbell County v. Howard, 112 S E 876, 133 Va 19.

"Advice" as covered by "services"

An instruction, in an attorney's suit for services, reciting "services performed and advice given" is not erroneous in using the word "advice," because of its not being used in the petition, as the term "services" is broad enough to cover "advice"—Klass v. Iowa Mut Liability Ins. Co., 230 N.W. 314, 210 Iowa 78

As to payment

(1) An instruction that defendant must show to the reasonable satisfaction of the jury that any payments claimed as credits were made on the claim asserted in this case, and not for services in other matters, is not erroneous where it is shown that other services were rendered to defendant—Pollak v Winter, 72 So 386, 197 Ala 173

(2) Testimony to the effect that defendant's officer called on plaintiff attorney for a bill for his services, which, a bill being furnished, defendant paid, is sufficient to justify the instruction that, if there was a settlement and defendant paid all that was required of it, plaintiff is not entitled to recover for such period—Shepherd v Inman-Poulsen Lumber Co, 168 P. 601, 86 Or. 652.

Effect of settlement

An instruction that the attorneys could not be deprived of their rights to the stipulated fee by the clients' settling the case is not error, where there is no allegation in the answer of damages from the refusal of plaintiffs to proceed with the litigation and thereby compelling settlement—Snow v. Beard, 162 P. 258, 82 Or 518

Permitting other than contract measure of compensation

Instructions telling the jury in effect that, if services rendered a county by attorneys were rendered under a certain contract, they were entitled to such compensation as would be fair and just, in view of benefits received by the county, are erroneous, where the contract in question fixed the amount of compensation, as permitting a recovery measured otherwise than by the provisions of the contract—Campbell County v. Howard, 112 S E. 876, 133 Va. 19.

16. Ala—Cooke v. Embry, 123 So. 27, 219 Ala 623
Cal—Treadwell v. Nickel, 228 P. 25, 194 Cal 243.
Ill—Peirce v. Sholtey, 190 Ill App 341
Ind—Union School Tp of St. Joseph County v Moon, 187 N E 332, 205 Ind 514
Mo—Holloway v. Bradshaw, (App) 223 S W. 968.
N Y.—Freeman v Hartfield, 158 N Y. S 350, 172 App Div 164
Or—Snow v. Beard, 162 P. 258, 82 Or 518
6 C J p 765 note 47.

Instructions held misleading

(1) An instruction that an attorney could not recover for services in securing the location of a highway in case the parties contemplated the use of personal influence is misleading in that it assumes all personal solicitation to be improper, ignores evidence tending to show a proper presentation to the commission and its engineers of the merits of the location desired, and would have deprived plaintiff and defendant of an opportunity to influence the judgment of the commission, or its engineers, by proper and lawful means—Cooke v Embry, 123 So. 27, 219 Ala 623.

(2) Where, in an attorney's action against an optionee for examining an abstract, there is evidence that plaintiff's services were to be paid for by the owner, an instruction that, if the services were rendered for defendant and accepted by him, plaintiff is entitled to recover, is misleading—Tyson & Arrington v Thompson, 70 So. 649, 195 Ala. 230.

(3) Where the issue is as to what the terms of the contract are, not whether those terms are reasonable, an instruction that the law requires the utmost good faith on the part of an attorney to his client is inapplicable to the issues, and likely to mislead and prejudice the jury—Freeman v. Hartfield, 158 N.Y S. 350, 172 App Div. 164

(4) In an attorney's action to recover for services rendered to de-

proof on one of the parties,[17] assume the existence of disputed facts,[18] ignore or omit to charge on any matter of evidence or fact in issue,[19] give special prominence to particular parts of the evidence,[20] or exclude material parts thereof from the consideration of the jury,[21] or take from them the determination of essential questions of fact[22]

Where the action is on a written contract of service, the question as to what plaintiff was employed to do should not be submitted, by instructions, hypothetically to the jury.[23]

Financial standing of client. It has been held that an instruction that the measure of plaintiff's compensation depends on defendant's financial standing and plaintiff's knowledge thereof, is erroneous;[24] but it has also been held that it is proper to instruct the jury that such financial standing is a matter to be considered.[25]

Cautionary instruction. It is proper to caution the jury to refrain from entertaining any unjust hostility to lawyers which would prevent them from rendering a verdict according to the law and the evidence;[26] but the trial judge goes beyond his province in referring disparagingly to plaintiff or to the value of his services.[27]

e. Verdict and Findings

General rules control the necessity for, and the form, requisites, and construction of, the verdict or findings.

The general rules which apply to verdicts and findings in civil actions in general control the verdict and findings in an action or proceeding by an attorney for the recovery of compensation, such as with regard to the necessity for, and the requisites and sufficiency of, a verdict or findings, on material issues raised by the pleading and evidence,

fendant, a requested instruction that plaintiff would not be bound by any statements as to the charge of his services, made to a third party acting in the interest of the defendant, is misleading—Cadle v. Black, 154 P. 997, 24 Wyo. 43.

17. Cal—Berry v. Maywood Mut Water Co No. 1, (App.) 53 P.(2d) 1032.
Iowa—Hornish v. Overton, 221 N W 483, 206 Iowa 780

Requiring "unequivocal" proof
Where defendant interposes the defense of a special contract, an instruction that his proof of such contract must be clear and "unequivocal" is erroneous as placing an undue burden on defendant—Berry v. Maywood Mut Water Co, No. 1, (Cal App.) 53 P.(2d) 1032.

Failure of authority
Where an action by attorneys for an insurance company, against attorneys of another company for services in securing reduction of a claim against the latter company by settlement, was submitted on the erroneous theory that liability depended on defendant's lack of authority to bind their principal, an instruction that the burden was not on plaintiffs to prove failure of authority, but on defendants to disprove it, was error—Bailey, Oot & Ryan v. Butcher, Tanner & Foster, 148 N.E. 537, 240 N.Y. 323, reversing Bailey v Butcher, 205 N.Y.S. 910, 210 App Div. 812.

18. Cal—Roche v. Baldwin, 65 P. 459, 67 P. 903, 135 Cal 522
Ohio—Scheinesohn v Lemonek, 95 N.E. 913, 84 Ohio St 424, Ann Cas. 1912C 737

19. Ala—Cooke v. Embry, 123 So 27, 219 Ala. 623.

Va—Campbell County v Howard, 112 S.E. 876, 133 Va. 19.
6 C.J. p 765 note 49.

Abandonment of contract
An instruction that the burden is on the attorney to establish by a preponderance of the evidence his right to recover under an alleged oral contract to pay him a percentage of the recovery, and that plaintiff is entitled to recover, if the jury find that the contract was entered into between plaintiff and defendant's assignor, and that the terms of the contract were carried out by plaintiff, is correct and is not objectionable as failing to cover the question of abandonment of the contract by plaintiff, as it necessarily covers that proposition—Hornish v Overton, 221 N.W. 483, 206 Iowa 780

Letter accompanying statement
In an action to recover for professional services, it is error to instruct the jury that they may disregard plaintiffs' act in sending defendant a statement of their charges, and that plaintiffs were not bound by such act, without including in such instruction any reference to plaintiffs' letter accompanying the statement, as the effect of the account and the letter was a question of law for the court—Jeger v Julius Kessler & Co, 218 Ill.App. 39.

20. Cal—Stuart v Preston, 39 P.(2d) 441, denying rehearing 38 P.(2d) 155, 2 Cal.App.(2d) 310
Ill—Jeger v Julius Kessler & Co, 218 Ill.App. 39
6 C.J. p 765 note 50

21. Jeger v Julius Kessler & Co., supra—6 C.J. p 765 note 51.

22. Cal.—Stuart v Preston, 38 P.(2d) 155, 2 Cal.App.(2d) 310, rehearing denied 39 P.(2d) 411
N.Y.—Freeman v. Hartfield, 158 N.Y.S. 350, 172 App.Div. 164.

Withdrawing issue
(1) In a suit for fees for administering an estate, an instruction that plaintiff cannot recover for ordinary services to a trust estate, as distinguished from the estate, and, if entitled to recover at all, can only be allowed a specified amount, as provided by statute, for handling the small estate, may properly be refused where the bulk of the estate passes under a deed of trust, since it withdraws the issue whether fees for both estates, on the basis regarded by the legislature as reasonable in ordinary probate matters, are reasonable—Treadwell v. Nickel, 228 P. 25, 194 Cal 243

(2) Where plaintiff testified that he refused to sign the memorandum of agreement because it omitted a provision for additional compensation, while defendant testified that plaintiff wrote the memorandum himself, that defendant signed it and left it, and that it contained the whole agreement, a charge that, plaintiff having written the agreement and presented it to defendant for signature, it became a binding contract when defendant signed it, without further acceptance by plaintiff, is erroneous, as taking from the jury the determination of a contested issue—Freeman v Hartfield, 158 N.Y.S. 350, 172 App.Div. 164

23. Hutchinson v. Dunham, 41 Ill App 107.

24. Winslow v. Atz, 177 A. 272, 168 Md 230

25. Walker v. Hill, 300 P. 260, 90 Mont. 111

26. Blizzard v. Applegate, 77 Ind 516

27. Baldwin v. Clock, 35 N.W. 904, 68 Mich. 201.

to support a judgment,[28] the submission of special issues,[29] and the construction and effect of the verdict or findings,[30] it being a rule that the findings must be so construed as to support the judgment where such construction is reasonable.[31] Special findings must be consistent with the general verdict.[32]

Where several causes of action are united in the same petition, a verdict must be found and damages awarded on each count separately, and a general verdict will be arrested if the error is called to the attention of the trial court by appropriate motion.[33] Where, in an action by associated counsel for services rendered, it appears that one of the counsel, by reason of disqualification, is not entitled to any compensation, defendant is entitled to a finding of the value of the services of the counsel not disqualified, independent of the services rendered by the disqualified associate.[34]

§ 206. —— Judgment, Enforcement Thereof and Review

The rules governing judgments in civil actions, generally, apply to the judgment in an action for an attorney's compensation.

The rules applicable to judgments in civil actions

28. Williams v. Bevis, 278 P. 193, 152 Wash. 469, followed in 279 P. 1119, 153 Wash. 701—6 C.J. p. 765 notes 59, 60.

Exact language or form not required

"Of course there ought to be findings on the material issues raised by the pleadings and evidence; but, if it appears that there are in substance such findings, it is not necessary that they should be in the exact language of the pleadings, or in any particular form."—Harlan v. Lambert, 125 P. 1079, 1081, 19 Cal. App. 349.

As to payment from proceeds

The court's finding that the attorney's compensation is payable only from the proceeds of sale of a corporation's mine is not erroneous as an arbitrary construction of a written contract contrary to its express terms, in view of a supplementary oral agreement—Williams v. Bevis, 278 P. 193, 152 Wash. 469, followed in 279 P. 1119, 153 Wash. 701.

Excessiveness of fee

In the absence of testimony that the fee is unreasonable or excessive, the court may not determine that a contingent fee expressed in a contract is so excessive as to be unconscionable—Board of Education of Oklahoma City v. Thurman, 247 P. 996, 121 Okl. 108.

Findings held sufficient to show implied promise of client to pay reasonable compensation for attorney's services.—Webster v. Kelly, 175 N.E. 69, 274 Mass. 564.

In a suit on an oral contract for the payment of fees, the trial court, in construing the contract to the effect that payment was dependent on the sufficiency of the proceeds of a mortgage sale, improperly denies recovery without finding that the proceeds were insufficient to pay such amount—Rieger v. Smith, (Tex.Civ. App.) 2 S.W.(2d) 883.

Necessity

In a suit to foreclose a mortgage securing a note given by defendants for an attorney's fee in a will contest, where it was alleged the note was given as the result of the undue influence of the attorney, the determination by the court of a reasonable fee in the will contest was necessary to show whether the contract between the attorney and defendants was fair and regular.—Magee v. Brenneman, 206 P. 37, 188 Cal. 562.

29. Greenwood v. Senter, (Tex.Civ. App.) 44 S.W.(2d) 504, affirmed in part and reversed on other grounds in part (Com.App.) 61 S.W.(2d) 812.

As to reasonable value of services

It is proper to ask the jury to find what, if anything, is the reasonable value of the services for which the attorney is suing, where the jury are also asked to find whether the parties had agreed on a fee as claimed by the client.—Greenwood v. Senter, (Tex.Civ.App.) 44 S.W.(2d) 504, affirmed in part and reversed on other grounds in part (Com.App.) 61 S.W.(2d) 812.

30. Mo.—Blodgett v. Koenig, 284 S.W. 505, 314 Mo. 262.

Va.—City of South Norfolk v. Wolcott, 125 S.E. 687, 140 Va. 611.

Alternative finding

Where the trial judge made the alternative finding that the attorney who was sued by the client could not recover for rent, which finding was to take effect only if the trial judge was in error in ruling that the attorney could not pursue set-off, a finding that there was no merit in the attorney's claim for rent became effective, since the trial judge was in error in ruling that there could be no set-off—Ryder v. Warren, (Mass.) 3 N.E.(2d) 221.

As recovery on contract

Where an attorney sues on an express contract for fees, and the court instructs a finding for defendant if he did not agree, to pay the sum claimed, a finding for plaintiff on the issues is a recovery on the contract, and not on a quantum meruit, notwithstanding the verdict is for much less than the contract price—Blodgett v. Koenig, 284 S.W. 505, 314 Mo. 262.

Conclusiveness

In an action for the reasonable value of services, a finding that the services were of the reasonable value of a specified amount and a judgment for that amount is conclusive of the principal amount plaintiff is entitled to recover—Shellenberger v. Baker, 281 P. 1102, 101 Cal.App. 615.

Implied finding

In an action by an attorney to recover a fee under an express contract, the trial court's finding that the attorney had effected a settlement for the client entitling the attorney to the contingent fee agreed on implied a finding that the attorney was reasonably diligent in pressing the client's claim—Foster v. Graham, 59 P.(2d) 293, 186 Wash. 701.

Jury's answer, "No", to a special interrogatory, "Did defendant in fixing plaintiff's fee act in good faith, and upon consideration and advice," does not mean that defendant in fixing the fee did not act in good faith, in that he did not give the matter consideration or take advice, but is a general finding that defendant acted in bad faith—Foster v. Young, 156 P. 476, 172 Cal. 317.

31. Merrill v. Gunnison, 79 P. 67, 145 Cal. 544—6 C.J. p. 765 note 60.

32. Ind.—Hauss v. Niblack, 80 Ind. 407.

Iowa.—Cullison v. Lindsay, 78 N.W. 847, 108 Iowa 124.

Special finding and general verdict held not inconsistent

Special jury finding that the attorney's fee was fixed by contract, and a general verdict allowing less than the contract sum, are not inconsistent, since the jury doubtless considered the contract champertous and attorney's service reasonably worth only the amount allowed by the general verdict—Clancy v. Kelly, 166 N.W. 583, 182 Iowa 1207.

33. Shuck v. Pfenninghausen, 74 S.W. 881, 101 Mo.App. 697.

34. Bryant v. Lewis, (Tex.Civ.App.) 27 S.W.(2d) 604.

in general apply to the judgment in an action or proceeding for the recovery of an attorney's compensation.[35] Where in an action for a specified attorney's fee, and to have a lien declared on defendant's land, the jury return a verdict on an issue of what is a reasonable fee, the court may render a judgment for the amount of the verdict,[36] and, in the exercise of its equity powers, decree a lien against defendant's land for the satisfaction thereof.[37] In a suit in equity by an attorney against several defendants to recover his fee out of certain funds, he is entitled to a decree only against the defendant who is shown to have possession of such funds.[38]

Where the jury fixes the reasonable value of the services for which the attorney is suing at less than the amount the client has already paid, the client is entitled to recover a judgment for the difference.[39]

VI. LIEN OF ATTORNEY

§ 207. Nature of and Right to Lien

a. Nature of lien
b. Right to lien
c. Client's remedy against imposition

a. Nature of Lien

Attorneys' liens are of two kinds; one is called a general, retaining, or possessory lien; the other is called a special, particular, or charging lien.

An attorney's lien is of two kinds; one is called the general, retaining, or possessory lien, and the other the special, particular, or charging lien[40] These liens are clearly distinguishable as may be observed by comparing their respective natures as hereinafter specifically discussed in §§ 210, 211, and this distinction has been specifically adverted to by the courts in particular cases.[41] Moreover, in noticing such distinction, it has also been observed that rules applicable to one of these two types of liens are not necessarily applicable to the other type.[42]

b. Right to Lien

Right to a lien may exist in the absence of an agreement therefor, but cannot be created by the mere fact that the attorney is entitled to be paid or by the fact that his status is that of attorney, nor may a lien based on a statute be extended beyond the fair intendment thereof.

Aside from whatever right an attorney may have to a particular type of lien, or his right to assert a lien under particular circumstances, all of which rights are considered in more detail in subsequent sections of this Title, it should be observed generally that the relationship of attorney and client is the foundation of the right to an attorney's lien,[43] and that, although a lien may be asserted by an attorney in the absence of an agreement with his client that there should be a lien,[44] an attorney's right to a lien for his services cannot be based on the mere fact that he is entitled to payment for such services,[45] or merely by reason of his status as an attorney at law.[46] Moreover,

35. Child v Mastin, 204 N.W. 947, 164 Minn 217

Accounting judgment

Where defendant, owner of a farm, agreed to give plaintiff, his attorney, one half of the amount for which the farm sold in excess of a fixed sum, on an accounting defendant should have the value agreed on between himself and plaintiff for his farm, with interest, etc, and neither the fact that defendant procured papers relating to the transaction, nor the employment by him of other counsel, justified an accounting judgment fixing the profits at the difference between the agreed value of defendant's farm and the value fixed for a farm for which it was exchanged—Child v. Mastin, 204 N.W. 947, 164 Minn. 217.

Allowance of fee in suit to foreclose trust deed

Where, in a suit by a bank against attorneys to foreclose a trust deed given to secure notes executed by them, it appears that the attorneys had recovered judgment against the bank for a certain fee, and, as a means of collecting the fee, had caused the land which they had recovered to be sold at an execution sale and they became the purchasers thereat, the court may treat the title as being in the bank and allow the fee as a credit, thus, in effect, treating the judgment and sale thereunder as a nullity—Poe v Walker, 37 S W (2d) 866, 183 Ark 659.

36. Wolfe v Campbell, 230 P. 506, 107 Okl 112

37. Wolfe v Campbell, supra.

38. Bank of Collins v Miller, 71 So 12, 110 Miss 371.

39. Lee v Woolsey, 246 N W 25, 187 Minn 659

40. Ala—Hale v. Tyson, 79 So. 499, 202 Ala 107
Del—Royal Ins Co v Simon, 174 A 444, 20 Del Ch 297
N.Y—In re Sebring, 264 N Y S 379, 238 App Div 281—In re Darch, 265 N.Y.S 86, 147 Misc. 836.
6 C J p 765 note 67.

At common law "both of these liens existed"—In re Sebring, 264 N Y S 379, 385, 238 App.Div 281.

Both liens recognized.—Webster v. Sweat, (C C A Miss) 65 F.(2d) 109

41. U S—Everett, Clarke & Benedict v Alpha Portland Cement Co., (N Y) 235 F 931, 141 C C A 55.
Del—Royal Ins Co v. Simon, 174 A 444, 20 Del Ch 297
N Y.—Bloom v Irving Trust Co, 272 N.Y S 637, 152 Misc 50—Application of H C. Roberts Electric Supply Co., 226 N Y S 211, 131 Misc. 119.
6 C.J p 766 note 68

42. Everett, Clarke & Benedict v. Alpha Portland Cement Co, (N.Y) 225 F. 931, 141 C C A 55

43. Matter of Fourteenth St, 142 N Y S. 943, 158 App Div. 587

44. Cohen v Goldberger, 141 N E. 656, 109 Ohio St 22

45. In re Sebring, 264 N Y.S 379, 238 App Div 281

46. Stansell v Roach, 246 S W 520, 147 Tenn 183, 29 A L R. 143.

Obtaining appropriations by congress

An attorney obtaining on a contingent basis appropriations by congress

where an attorney's right to a lien exists by virtue of a statute, such right cannot be extended beyond the fair intendment of such statute.[47] Nevertheless, where a statute authorizes an attorney's lien, such lien is cumulative, rather than exclusive of preëxisting rights or remedies which an attorney may have to collect compensation,[48] and it has been held that an attorney's lien on papers in a suit arises under common law rather than by statute.[49]

Scope of lien restricted by relation. Attorneys' liens apply solely to the personal relation existing between an attorney and his client, and may not be extended to or affect the rights of other persons who may be interested in the litigation but who have not employed such attorney.[50]

What law governs. The laws of the state in which an attorney is employed and in which suit is brought control as to whether a lien exists in favor of such attorney.[51]

c. Client's Remedy against Imposition

A client may in a proper case be entitled to relief from the imposition of a lien.

A client may be entitled to appropriate relief from an improperly imposed attorney's lien.[52]

to contractors who had lost money in government work was not entitled to a lien on the funds appropriated merely by reason of his relation as an attorney at law—Stansell v Roach, 246 S.W. 520, 147 Tenn. 183, 29 A.L.R. 143.

Principal basis for allowance

"A principal basis for allowing a lien to an attorney at law is that it is deemed both natural and wise that the lawyer be secured in the fruits of his professional labor, since the proper administration of justice is essential to the well-being of the public which cannot be secured without an intelligent and prosperous bar"—Stansell v Roach, 246 S.W. 520, 527, 147 Tenn. 183, 29 A.L.R. 143.

47. Ala.—King v Acuff, 119 So. 833, 218 Ala. 619—Hale v Tyson, 79 So. 499, 202 Ala. 107.
Ill.—Dreyfuss v Freud, 209 Ill.App. 345.
Ky.—Charles v. Whitt, 218 S.W. 994, 187 Ky. 77.
6 C.J. p. 769 note 92.

Security of attorney's rights

In a suit by a client and grantees against an attorney to quiet title, the attorney's rights have been held to be as secure without a statutory attorney's lien as with one—Graeber v. McMullin, (C.C.A.Colo.) 56 F.(2d) 497, certiorari denied McMullin v Graeber, 53 S.Ct. 9, 287 U.S. 603, 77 L.Ed. 525.

Lien in action to recover land

The lien created by St. § 107, for plaintiff's attorney in an action for the recovery of lands, to secure payment of fee in the absence of contract, being purely statutory, should not be given a wider scope than is provided by the statute—Charles v. Whitt, 218 S.W. 994, 187 Ky. 77.

48. In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

49. In re Woodworth, (C.C.A.N.Y.) 85 F.(2d) 50, affirming (D.C.) 15 F.Supp. 291.

50. In re Gillaspie, (D.C.W.Va.) 190 F. 88.

51. Lehigh & N. E. R. Co. v. Finnerty, (C.C.A.N.J.) 61 F.(2d) 289, certiorari denied 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576.

Lien on plaintiff's cause of action

Laws of the state in which an attorney was employed and suit was brought were held to be controlling on the question of an attorney's lien on plaintiff's cause of action.—Lehigh & N. E. R. Co. v. Finnerty, (C.C.A.N.J.) 61 F.(2d) 289, certiorari denied 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576.

Making agreement in state

An attorney could not claim a lien on a death action, under Ky.St. § 107, because the agreement was made in Kentucky, when deceased had lived in West Virginia, which was the situs of claim for death—Davis v. Whitt, 277 S.W. 311, 211 Ky. 142.

Injury and signing of contract outside state

In an action under the Attorneys' Lien Act of Illinois, the question at issue is not affected by the fact that the injury, constituting the basis of the suit in which the attorney's services were to be rendered was suffered in Indiana, and the contract between the parties that there should be an attorney's lien was signed in Indiana.—Smith v. American Bridge Co., 194 Ill.App. 500.

Under Employers' Liability Act

(1) A state statute providing for an attorney's lien to secure attorney's fees is applicable to cases brought under the Federal Employers' Liability Act.—Noell v Missouri Pac. R. Co., 74 S.W.(2d) 7, 335 Mo. 687, 94 A.L.R. 684, followed in 74 S.W.(2d) 14—Mytton v Missouri Pac. R. Co., (Mo.App.) 211 S.W. 111.

(2) Accordingly, where a cause of action under the Federal Employers' Liability Act arose in Arkansas, bringing of action in Missouri caused a lien of a Missouri attorney to attach to the cause of action.—Noell v. Missouri Pac. R. Co., supra.

(3) Further, as the Federal Employers' Liability Act authorizes actions in state courts and makes state practice applicable, Minn.Gen.St. (1913) § 4955, giving attorneys a lien on a cause of action of their clients, is properly applied to an action brought in courts of Minnesota under such federal act where defendant settled the claim with the client.—Dickinson v Stiles, 38 S.Ct. 415, 246 U.S. 631, 62 L.Ed. 908, affirming Holloway v. Dickinson, 163 N.W. 791, 137 Minn. 410.

Lien by local law only recognized by federal courts

The federal courts recognize no lien at common law in behalf of an attorney beyond that given by the local law.—Sun Life Assur. Co. of Canada v. Casanova, (C.C.A.Porto Rico) 260 F. 449—6 C.J. p. 766 note 73.

War-time control statutes and orders thereunder

Neither federal statutes under which the government took over railroads for war purposes nor an order of the president or director general thereunder suspended a state law authorizing an attorney's lien in a railway employee's personal injury action—Stephens v. Davis, 36 P.(2d) 316, 140 Kan. 220, certiorari denied Morganthau v. Stephens, 55 S.Ct. 542, 294 U.S. 720, 79 L.Ed. 1252, time within which to file petition for rehearing extended 55 S.Ct. 652.

52. U.S.—Flagler v. Spellman, (C.C.A.N.Y.) 15 F.(2d) 292.
Ind.—Vivian Collieries Co. v. Cahall, 110 N.E. 672, 184 Ind. 473—Clarke v Harris, 132 N.E. 6, 76 Ind.App. 185.

Equity court of original jurisdiction may on proper showing cancel an attorney's lien.—Vivian Collieries Co. v. Cahall, 110 N.E. 672, 184 Ind. 473.

Decree freeing estate from, and injunction against, lien

A client was held to be entitled to a decree declaring interest in an estate free from an attorney's lien, and to an injunction against assertion of such lien—Flagler v Spellman, (C.C.A.N.Y.) 15 F.(2d) 292.

§ 208. Statutory Provisions

Questions relating to the validity, construction, and effect of statutory provisions authorizing attorneys' liens have been passed on as indicated hereunder.

The validity of statutes securing an attorney's lien has been generally affirmed by the courts in states where such acts have been adopted,[53] unless they operate as a restriction on the exercise of vested rights or the right of freedom of contract.[54]

Construction. Although statutes securing an attorney's lien are ordinarily regarded as remedial in character and should be construed liberally in aid of the object sought by the legislature, which was to furnish security to attorneys by giving them a lien on the subject of the action,[55] and other statutes may be considered in determining whether an attorney is entitled to a lien,[56] there is authority for the view that attorney's lien statutes are to be strictly construed.[57] At any rate, in the absence of some legislative expression to the contrary, such a statute will be construed prospectively only and will not be given a retroactive operation or effect.[58]

Operation and effect. Although the liability of a party, against whom an attorney proceeds on behalf of his own client, is not affected by the provisions of an attorney's lien statute,[59] and a statute providing for an attorney's lien to secure payment of his compensation does not preclude an attorney and his client from making any contract they may see fit regarding such compensation,[60] a statute creating an attorney's lien has been held to repeal an earlier statute giving an attorney a right of action for his fees against his client.[61]

Domicile of decedent governing suit to enjoin

A suit to enjoin an attorney from asserting a lien, under an alleged champertous contract, on an estate, was held to be controlled by the law of the state where the testator was domiciled, and where the personal estate had its situs—Flagler v Spellman, (C C A N Y.) 15 F.(2d) 292.

Removal of lien as cloud on judgment

(1) In the absence of statutory provision for the removal of an attorney's lien as a cloud on a judgment, courts must exercise their equitable jurisdiction to give relief from unwarranted claims under such liens—Clarke v. Harris, 132 N E 6, 76 Ind App. 185.

(2) Moreover, such relief may be given in a summary manner on reasonable notice by petition, filed in the cause in which the judgment was rendered, by either the attorney or his client, so long as the judgment remains unsatisfied, or the proceeds thereof are in transitu—Clarke v. Harris, supra.

Jurisdiction of motion to strike lien claim

When attorneys file a lien claim and notice of the asserted lien is served on opposing counsel, the court before which a cause is pending has jurisdiction to determine motion to strike the lien claim—Oppenud v. Bussey, (Okl.) 46 P.(2d) 319.

53. Catherwood v. Morris, 196 N E 519, 360 Ill. 472—6 C J. p 768 note 89

Statute giving lien from time summons issued

Crawford & M. Dig § 628, giving an attorney a lien from issuance of summons and before summons is served, is valid.—Union Sawmill Co v. Pace, Campbell & Davis, 260 S W 428, 163 Ark 598

Not contrary to public policy favoring settlement

A statute providing for an attorney's lien on a client's cause of action was held not unconstitutional as being against public policy of favoring settlement—Noell v Missouri Pac R Co, 74 S W.(2d) 7, 335 Mo 687, 94 A L R 684, followed in 74 S W (2d) 14.

54. Strahlendorf v. Long Island R Co., 147 N Y S 806, 162 App Div 358—6 C J. p 768 note 90.

55. Ark—St Louis, I. M & So Ry Co. v. Hays & Ward, 195 S W. 28, 128 Ark 471.

Mo—Brookshire v. Metropolitan Life Ins Co, (App.) 56 S W (2d) 817

N Y—Swartz, Inc, v City of Utica, 228 N Y S 660, 223 App Div 506, motion granted 170 N E 148, 252 N Y. 573, and affirmed 173 N E 864, 254 N Y. 555

R I—Cawley v. Burke, 110 A. 609, 43 R I. 188.

6 C J. p 768 note 91.

56. Renfro v. Nixon, (Idaho) 45 P. (2d) 595

Proceeding for compensation "action" within statute

An attorney for an employee in a proceeding under the Workmen's Compensation Act was held not deprived of an attorney's lien on the ground that the judgment was not based on an "action" within a statute providing for an attorney's lien on a judgment arises from commencement of an action, in view of another statute giving the judgment based on an award of the industrial accident board the same effect as any other judgment—Renfro v. Nixon, (Idaho) 45 P.(2d) 595.

57. Mayer v. Yellow Cab Co, 247 Ill.App. 42.

58. Ala—Hartley v Hand, 135 So 316, 223 Ala 201

Ill—Lyon v Oliver, 237 Ill App 511, reversed on other grounds 147 N E 251, 316 Ill 292

Pa.—Smyth v. Goebel, 63 Pa Super 585

6 C J p 769 note 93.

Statute extending lien to suits for recovery of realty

(1) A statute extending an attorney's lien to suits for recovery of realty is not remedial and does not apply to past transactions—Hartley v. Hand, 135 So. 316, 223 Ala. 201

(2) An attorney's petition to intervene in a suit, brought by a client before the statute extending attorneys' liens to realty became effective, to enforce a lien on complainant's interest in decedent's realty, was accordingly held to be properly dismissed—Hartley v. Hand, supra.

59. Smith v. American Bridge Co, 194 Ill App 500.

Distribution of sum paid to client

The attorneys' lien act merely affects the distribution of the sum paid to plaintiffs' client by defendant, and does not increase or diminish the liability of defendant.—Smith v American Bridge Co, 194 Ill.App 500

60. McDougal v. Black Panther Oil & Gas Co, (C.C.A Okl.) 277 F. 701.

61. St. Louis, I. M. & S. Ry. Co v. Freeman, 179 S W. 648, 120 Ark. 389.

Where client compromises

Kirby Dig. § 4457, giving a right of action to attorneys against litigants for a reasonable fee, where the client compromises, was held to be repealed by Act May 31, 1909 (L. [1909] p 893), creating lien upon cause of action.—St. Louis, I M. & S Ry Co v. Freeman, 179 S W. 648, 120 Ark. 389.

Moreover, a statute giving an attorney a lien on the subject matter of a suit has been held to change a previously existing public policy in so far as such statute deprives a party of control over lawsuits.[62]

§ 209. Person Entitled

Attorney's liens exist only in favor of licensed attorneys employed under a valid contract, but may in proper cases be claimed by licensed attorneys of record or by attorneys not of record.

An attorney's lien exists only in favor of a regularly licensed attorney,[63] employed under a valid contract, express or implied.[64] On the other hand, a lien cannot exist in favor of an attorney whose employment is tainted with illegality.[65] Nevertheless, that one stood in the relation of a stockholder as well as attorney to his client may not preclude the assertion of a charging lien.[66]

Attorneys of record, not of record, or of counsel. An attorney of record in the particular action in which judgment or recovery is had may be entitled to a charging lien.[67] Moreover, under particular statutes it has been held that an attorney not of record in a particular action may nevertheless be entitled to a lien for his services.[68] Further an assistant counsel may claim a lien when his employment is authorized by the client,[69] un-

62. Bell v. Bell, 108 So. 375, 214 Ala 573, 45 A.L.R 935

63. Sadden v. Sebring, 182 N.Y.S. 1 —6 C.J. p 787 note 17.

Layman furnishing attorney

A layman, furnishing an attorney to recover damages prior to the passage of Penal L. § 270, under a contract whereby he was to receive a percentage of the proceeds of the suit, is not entitled to a lien against such proceeds, under Judiciary L. § 475, or otherwise—Sadden v. Sebring, 182 N.Y.S. 1

64. Brahan v National Life & Accident Ins. Co., 87 So. 7, 124 Miss 160—6 C.J. p 787 note 18.

Attorney generally has no lien on judgment procured by his professional services in the absence of an express agreement for lien—City of Los Angeles v Knapp, (Cal.) 60 P. (2d) 127.

Attorney not employed by judgment creditor

The attorney has no lien on a judgment for services securing it where he was not employed by the judgment creditor—Brahan v National Life & Accident Ins. Co., 87 So. 7, 124 Miss 160

Employment on contingent basis

Attorneys employed by tenants on a contingent basis in condemnation by a city were held to be entitled to a lien on an award—In re Allen St. in City of New York, 266 N.Y.S. 277, 148 Misc. 488

Employment by customs broker under importer's authority

An attorney employed by a customs broker, as authorized by an importer to secure a refund of excessive customs duties, and to prosecute a protest by proceeding in the United States customs court, was held to be entitled to a statutory lien.—Brooks v. Mandel-Witte Co., (C.C.A.N.Y.) 54 F.(2d) 992, certiorari denied Mandel-Witte Co. v. Brooks, 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

Attorney for administrator

An attorney for the plaintiff administrator, in an action for wrongful death, was held to have a lien for his compensation, as provided by Gen. St. (1913) § 4955 (Rev. L. [1905] § 2288)—Castigliano v. Great Northern Ry. Co., 152 N.W. 413, 129 Minn. 279.

Employment for services on behalf of attorney

Fellow attorney employed by an attorney filing creditors' bill to bring application for the employing attorney's fees had a lien on a consent judgment awarding compensation to the employing attorney who, with respect to the particular transaction, was a client of the attorney employed—Barge v. Ownby, 153 S.E. 49, 170 Ga. 440

65. Hightower v Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509.

Selection by solicitor of personal injury claim

Attorney selected by a solicitor of a personal injury claim to try a case was held to be chargeable with knowledge of the arrangements under which the solicitor acted, and hence was not entitled to a lien for fees, since the solicitation was illegal.—Hightower v. Detroit Edison Co., 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509

Agreement to split fees

Substituted attorneys' agreement to divide contingent fee with disbarred attorney, in consideration of receiving case, destroyed lien for compensation—Dudar v. Milef Realty Corporation, 237 N.Y.S. 499, 227 App. Div. 279.

66. Putnam v. Liquidators of State Nat. Bank, 106 So. 386, 159 La. 936.

Lien not defeated by receivership statute

An attorney's lien for services against the assets of a national bank in liquidation, under U.S.Rev.St. § 5220, is not defeated by reason of his being a stockholder in the bank, notwithstanding Act June 30, 1876, § 3, as amended by Act March 2, 1897 (U.S.Comp.St. § 9827), providing that creditors who are also stockholders in a bank in receivership shall not be paid until all expenses of the receivership have been paid—Putnam v. Liquidators of State Nat. Bank, 106 So. 386, 159 La. 936.

67. Fannon v. Le Beau, 222 N.W. 115, 245 Mich. 162

Acts constituting one attorney of record

An attorney who caused a brief to be prepared, and argued a cause on appeal, was acting as attorney of record, and was entitled to a lien—Fannon v. Le Beau, 222 N.W. 115, 245 Mich. 162.

Lien claimed under written retainer

Under Judiciary L. § 475, a lien claimed by an attorney under a written retainer was held to be not a possessory or retaining lien, but a charging lien on the cause of action, given only to the attorney of record—Weinstein v. Seidmann, 159 N.Y.S. 371, 173 App. Div. 219.

Attorney of record in action in which fund recovered

Where a fund sought to be charged with an attorney's charging lien is out of his possession, only the attorney of record in the particular action in which the fund was recovered is entitled to a charging lien—Labaudy v. Carnegie Trust Co., 165 N.Y.S. 566, 178 App. Div. 614.

68. Meacham v. Ballard & Co., 240 N.W. 540, 184 Minn. 607.

69. Johnson v. Fidelity & Deposit Co. of Maryland, 247 N.W. 794, 61 S.D. 207—6 C.J. p. 787 note 20

Employment of associate ratified or authorized by client

Associate counsel whose employment is ratified or authorized by client is entitled to a lien on the client's judgment—Johnson v. Fidelity & Deposit Co. of Maryland, 247 N.W. 794, 61 S.D. 207.

less the statute confines the lien to the attorney of record.[70] At all events, where an attorney employs associate counsel on his own account such associate counsel has no lien on the results of the action.[71]

§ 210. Retaining Lien

A retaining lien is the right of the attorney to retain possession of a client's documents, money, or other property which comes into the hands of the attorney professionally, until a general balance due him for professional services is paid.

The general or retaining lien of an attorney is his right to retain possession of all documents, money, or other property of his client coming into his hands professionally until a general balance due him for professional services is paid.[72]

While some question has been raised as to the correctness of the term "lien" so applied,[73] the right itself has never been denied.[74]

Limitation to interest of client. A retaining lien is commensurate with the right which the client delivering the property has in it.[75]

Possession essential. In order that a retaining lien may exist, it is essential that the attorney claiming such lien have possession of something to which such lien can attach.[76]

70. U S—Underhill v Jacob Doll & Sons, (C C A N Y) 69 F (2d) 519—Nic Projector Corporation v Movie-Jecktor Co, (D C N Y.) 16 F Supp 605.
N Y—In re Sebring, 264 N.Y S 379, 238 App Div 281
6 C J p 787 note 21.

"Attorney who appears for party"
A statute giving a lien only "to the attorney who appears for a party" is not broad enough to include counsel but is confined to the attorney of record—In re Sebring, 264 N Y S 379, 238 App Div 281

Contingent fee contract
Where plaintiff agreed to pay his attorneys, one of whom was not an attorney of record, a third of the amount recovered, it was held that such attorney had no charging lien—Woodbury v. Andrew Jergens Co, (C C A N Y) 69 F (2d) 49

Signing petition not constituting one attorney of record
Where an attorney was dismissed before suit, his unauthorized signing of his name to the petition, in an action brought by other attorneys, did not make him an attorney of record or add to his rights in regard to an attorney's lien—Rawlings v Louisville & N. R Co, 205 S W 681, 181 Ky 610

71. Goodwin Film & Camera Co. v Eastman Kodak Co, (N Y) 222 F. 249, 138 C C A 71, affirming (D C) 216 F 831—6 C J. p 787 note 22.

Counsel's connection with case immaterial
Counsel retained by solicitor was held to have no charging lien, notwithstanding his part in the conduct of the case, and although he signed the bill under Equity Rules, old rule 24—Goodwin Film & Camera Co v. Eastman Kodak Co, (N Y) 222 F 249, 138 C C A 71, affirming (D C) 216 F. 831

72. U S—Webster v. Sweat, (C C A Miss.) 65 F (2d) 109—Everett, Clarke & Benedict v. Alpha Portland Cement Co, (N Y) 225 F. 931, 141 C.C.A. 55.
Neb—Reynolds v Warner, 258 N W 462, 128 Neb 804, 97 A L R 1128
N M—Prichard v. Fulmer, 159 P. 39, 22 N M 134, 2 A L R 474
N Y—In re Sebring, 264 N Y S 379, 238 App Div 281—Application of H C Roberts Electric Supply Co, 226 N Y S 211, 131 Misc 119
Okl—In re Choate, 50 P (2d) 706—Burns v Pratt, 31 P (2d) 106, 167 Okl. 546
Pa—Lemington Building & Loan Ass'n v Weddell, 174 A. 673, 115 Pa Super 114
6 C J p 766 note 74

Both at common law and under statute, general or retaining lien of attorney is right to retain possession of all documents, money, or other property of his client coming into his hands professionally until the general balance due him for professional services is paid—Roxana Petroleum Co of Oklahoma v. Rice, 235 P 502, 109 Okl 161

73. Zinsser v Zinsser, 83 Pa Super 461—6 C J p 766 note 77

Right to defalcate rather than lien
The so-called lien on a fund in the possession of an attorney is rather in the nature of a right to defalcate—Zinsser v Zinsser, 83 Pa Super 461

74. Neb—Sayre v Thompson, 24 N. W 383, 18 Neb 33
N Y—Rooney v Second Ave R Co, 18 N Y 368
6 C J p 766 note 78

Origin, basis and antiquity
(1) An attorney's retaining lien has its origin in the inherent power of courts over the relations between attorneys and their clients—Everett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F. 931, 935, 141 C C A. 55

(2) Moreover, such lien is said to have its origin partly in custom and partly in the prevention of circuity of action—Weed Sewing Mach Co. v. Boutelle, 56 Vt 570, 48 Am R. 821.

(3) At all events, retaining liens of attorneys have been recognized from an early date—Everett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F 931, 141 C C. A 55—Prichard v. Fulmer, 159 P. 39, 22 N M 134, 2 A L R. 474—6 C.J. p 766 note 75

(4) Retaining liens are of common-law origin and the statutes providing for them and for their enforcement are merely declaratory of the common-law rule—In re Stronge & Warner Millinery Co., (D C.Minn) 33 F (2d) 1001
6 C J p 766 note 79

75. Everett, Clarke & Benedict v. Alpha Portland Cement Co, (N Y) 225 F 931, 141 C C A. 55—6 C.J. p 770 note 10, p 785 note 96
"The general lien which an attorney has upon his client's papers is commensurate with the client's right and title to them"—Everett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F. 931, 937, 141 C C A. 55

Papers of insured
Attorneys for an indemnity company, dissolved by a state court pending an action against insured, which they were defending, were held to have no lien on the papers of insured—Everett, Clarke & Benedict v Alpha Portland Cement Co, (N Y) 225 F 931, 141 C C.A 55

76. N Y.—In re Makarnes, 265 N Y S 515, 238 App Div 534, reversing 265 N Y S 511, 148 Misc 759—In re Sebring, 264 N Y.S 379, 238 App Div 281—McNally v. Youngs, 262 N Y S 828, 237 App Div 787, appeal dismissed 188 N E 49, 262 N Y 526.
Pa—Appeal of Harris, 186 A. 92, 322 Pa 124—McGookin's Estate, 21 Pa. Dist. & Co 123
"The very name, 'retaining lien,' indicates that the property must be in the attorney's possession, or else he could not retain it"—In re Sebring, 264 N Y S 379, 385, 238 App Div. 281.

Client's property must actually come into attorney's hands
(1) Attorney's common-law retaining lien does not attach unless cli-

§ 211. Charging Lien

a. In general
b. Agreement for lien

a. In General

A charging lien is the equitable right of an attorney to have fees and costs due him for services in a particular suit secured by the judgment or recovery in such suit, is based on equitable considerations, and differs from ordinary liens in that possession is not essential to the charging lien.

The special or charging lien of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit.[77]

The lien is based on the natural equity that plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.[78]

Since possession, which is essential to ordinary liens, as noted in the title Liens § 8 [37 C J p 325 note 76], is not essential to the existence of an attorney's charging lien,[79] such lien, strictly speaking, did not exist at common law.[80] In fact the use of the term "lien" in this connection has been criticized as inaccurate, and the right of the attorney has been said to be merely a claim to the equitable interference of the court.[81]

In some jurisdictions there are cases holding that the charging lien of an attorney does not exist,[82] although such lien now exists in most jurisdictions either by statute or by virtue of judicial decision.[83]

ent's property comes into such attorney's hands—Pennsylvania Fire Ins Co v Rinaolo, 154 A. 528, 108 N J Eq 167

(2) Accordingly attorneys for plaintiff in a separation action, not in possession of any papers or property belonging to plaintiff, were not entitled to any retaining lien—Hastings v Hastings, 233 N Y S 179, 225 App Div 897

Subject matter of retaining lien restricted to papers or property in actual possession see infra § 225

77. U S.—Webster v Sweat, (C C A Miss) 65 F (2d) 109
N J—In re McCormick's Estate, 182 A. 485, 14 N J Misc. 73.
N Y—In re Abruzzo's Estate, 249 N Y S 72, 139 Misc. 559—Application of H C. Roberts Electric Supply Co, 226 N.Y S 211, 131 Misc 119
6 C J p 766 note 80

To secure payment of the reasonable value of his services, an attorney has "charging lien" for services rendered in a particular action or proceeding on the client's cause of action—Bloom v. Irving Trust Co, 272 N Y S. 637, 152 Misc. 50

Origin of lien obscure

"The origin of such lien may be somewhat obscure, but it seems to have arisen by analogy to other cases of lien—Cowell v. Simpson, 16 Ves Jr. 275 and note, 33 Reprint 989"—Brown v Morgan, (C C Iowa) 163 F. 395, 397

Peculiar nature of lien

"An attorney's [charging] lien is a peculiar lien . . . It is not like any other lien known to the law"—Application of H C Roberts Electric Supply Co., 226 N Y S. 211, 213, 131 Misc. 119.

Lien merely in nature of security

An attorney's lien for services under a contract of employment is merely in the nature of security.—In re Schneller, 240 N Y S 440, 136 Misc 84, affirmed Schneller v. Rogers, 243 N.Y S 875, 230 App Div 710

78. Graeber v. McMullin, (C C A Colo) 56 F (2d) 497, certiorari denied McMullin v. Graeber, 53 S Ct 9, 287 U S 603, 77 L Ed 525—6 C J p 767 note 82.

Lien upheld on theory that attorney's services and skill created fund

The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, although usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund—Cohen v Goldberger, 141 N E 656, 109 Ohio St 22.

Protection against dishonesty or knavery

(1) "The charging lien binds the award or judgment which has been obtained through the attorney's efforts, and prevents a dishonest client from receiving the fruits of his attorney's labors without compensating him for his services"—In re Sebring, 264 N Y.S. 379, 385, 238 App. Div 281

(2) An attorney's charging lien is created for the protection of attorneys against the knavery of their clients—In re Rosentover, 286 N Y. S 752—In re Albrecht, Maguire & Mills, 230 N Y.S. 543, 132 Misc. 713, affirmed 233 N Y S 883, 235 App Div 423, affirmed 171 N E 772, 253 N Y. 537.

79. N M—Prichard v. Fulmer, 159 P. 39, 22 N.M 134, 2 A L R. 474.
N.Y—In re Sebring, 264 N Y S. 379, 238 App Div. 281—In re Heinsheimer, 149 N Y S. 631, 164 App Div. 265
6 C.J. p 767 note 83.

"The very reason for its existence was to save the attorney's rights where he had been unable to get possession"—In re Heinsheimer, 108 N E 636, 637, 214 N Y 361, Ann Cas. 1916E 884, modifying 149 N Y.S 631, 164 App Div. 265

Lien of attorneys having no funds in their possession is "charging" lien

Lien of attorneys having no funds in their possession is "charging" lien—In re Falk, 220 N Y S 224, 128 Misc 856

80. Utah—Victor Gold, etc., Min. Co. v. Republic Nat Bank, 55 P. 72, 18 Utah 87, 72 Am S R 767
Wash—Plummer v Great Northern R Co, 110 P 989, 60 Wash 214, 31 L R A.(N S) 1215
6 C.J. p 767 note 84

81. Prichard v. Fulmer, 159 P. 39, 22 N M. 134, 2 A L R 474—6 C J. p. 767 note 85.

Distinction of no consequence

"Whether this right on the part of the attorney is, strictly speaking a 'right to a lien' or the right to the equitable interference of a court of equity . . . is of no consequence"—Prichard v. Fulmer, 159 P. 39, 40, 22 N M 134, 2 A L R 474

82. Hawaii—Matter of S Ah Mi, 3 Hawaii Fed. 176—In re Austin, 2 Hawaii Fed 210
Ohio—Diehl v. Friester, 37 Ohio St. 473—Villhauer v Toledo, 5 Ohio S. & C P. 8, 32 Cinc L Bul 154
Tex.—Dutton v Mason, 52 S W. 651, 21 Tex Civ App 389

83. U S—Graeber v. McMullin, (C. C.A.Colo) 56 F (2d) 497, certiorari denied McMullin v. Graeber, 53 S Ct. 9, 287 U S. 603, 77 L Ed 525.
Miss—Chattanooga Sewer Pipe Works v. Dumler, 120 So. 450, 153 Miss 276, 62 A.L.R. 999
Mo—Cell v. Robinson, (App.) 79 S. W.(2d) 489
6 C J. p 768 note 87.

Of course, where a charging lien is created by statute the right to the lien exists only in cases specifically provided for by such statute.[84] Moreover, an attorney's right to a charging lien will not be recognized when to do so would be in violation of well-settled legal principles.[85] On the other

Aside from statute, the attorney is entitled to assert and enforce the charging lien—Royal Ins Co v. Simon, 174 A 444, 20 Del Ch 297

Statute supplementing equitable assignment or lien

A statute (Ala Code § 6262), giving attorneys liens on money judgments for fees, was held to supplement, not to exclude, equitable assignments or liens—U S. Fidelity & Guaranty Co v. Levy, (C C.A. Ala.) 77 F (2d) 972

Statute virtually superseding common-law lien

"The statute has not only enlarged, but has virtually superseded and taken the place of the old common-law charging lien, so that now, when we speak of a charging lien, we refer to the statutory lien"—In re Sebring, 264 N Y S. 379, 385, 238 App Div. 281.

Client's liability to pay for services not altered

L (1909) p 97, giving an attorney a lien on all claims and causes of action on which the action has been brought, for the amount of the fees, does not alter the relation of attorney and client, and primarily the client is liable for his services—Case v Emerson-Brantingham Co, 109 N E 671, 269 Ill 94.

"One charging lien cannot extend to two actions, though there may be a distinct lien in each action"—In re Eno's Estate, 182 N Y.S. 571, 572, 112 Misc 45

34. Berkemeier v. Dormuralt Motor Sales, 263 Ill App 211 See Tuohy v. Chicago & Joliet Electric Ry. Co, 200 Ill App. 446

Statute not extended to include persons not named

The Attorney's Lien Act, (Cahill Rev St [1931] c 13 par 13) providing that the attorney shall have a lien on notice on the party against whom their clients may have suits, claims, or causes of action, cannot be extended so as to include other persons than those expressly named therein—Berkemeier v Dormuralt Motor Sales, 263 Ill App 211.

No lien arising from commissioner's action

American mixed claims commissioner's action in fixing the amount of attorneys' fees for securing a war claim settlement gave them no lien on their client's funds in the treasury—Mellon v Jones, 60 App.D C 269, 51 F (2d) 431, certiorari denied Jones v Mellon, 52 S Ct. 22, 284 U.S. 641, 76 L Ed. 545.

Lien irrespective of whether compensation will be paid

By legislative enactment attorneys may have a lien on a cause of action to secure the payment of fees, irrespective of whether the compensation will be paid if the client does not recover—State v. Merrill, 161 N W. 375, 165 Wis 138.

Compensation of attorney and no claim for client

Attorneys for plaintiff in a separation action were held not entitled to a charging lien, where they were compensated for their services and there was no claim attaching to the verdict, judgment, or order in the client's favor—Hastings v. Hastings, 233 N.Y S. 179, 225 App Div 897.

Where attorney opposes decree of fund to client

(1) An attorney could not enforce a statutory lien on a fund, ownership of which was decreed against his opposition—Campbell v. Lederer Realty Corporation, (R I) 140 A 777.

(2) Accordingly, an attorney at law could not enforce an attorney's lien against a fund adjudged to a former client, who was not notified of such attorney's withdrawal nor against such attorney's opposition—Campbell v. Lederer Realty Corporation, supra

Contract of client capable of controlling fund

(1) Under Hurd Rev St (1921) c 32 § 55, a lien must be based on some contract for fees entered into by clients capable of so controlling the fund as to subject it to a lien—People v Holten, 136 N E 738, 304 Ill 394, 24 A L R. 929, affirming 222 Ill.App 427.

(2) Accordingly, under the statute, no lien arises in favor of an attorney for services on behalf of a taxpayer in a suit against a public officer to compel him to account for, and turn over, taxes collected by him, since the taxpayer, client, had no authority to contract for the disposition of public funds which might be recovered in the suit in question—People v. Holten, supra.

Restriction to client's cause of action, claim, or counterclaim

Under particular statutes a charging lien may be allowed only on a client's cause of action, claim, or counterclaim—Irish Free State v Guaranty Safe Deposit Co, 266 N.Y. S. 8, 142 Misc 256, affirmed 271 N Y S 1071, 242 App Div. 612—Steuart v. D'Esterre, 170 N.Y S. 936, affirmed Steuart v. Ineal, 174 N.Y.S. 922, 187 App Div. 935

Service of process

Under Code (1907) §§ 3011, 3092, 4853, an attorney's lien on the suit is not dependent on service of process, since the filing of the complaint at law or the bill in chancery is commencement of the suit—Denson v Alabama Fuel & Iron Co, 73 So 525, 198 Ala 333

35. Fenn v. Hart Dairy Co., (Mo. App) 33 S.W.(2d) 120.

Services for minor's benefit not necessaries

(1) An attorney is not entitled to a lien on a settlement for injuries to a minor client, where the attorney was not employed by the guardian or curator under the direction of the probate court, and where the attorney's services were not shown to be "necessaries" within the meaning of the law relating to minors.—Fenn v. Hart Dairy Co, (Mo App) 33 S W (2d) 120, 126, 127.

(2) "The next friend and the attorney for the next friend of a minor may consider it advisable and in the interest of the minor to bring a suit in his behalf as soon as possible after the cause of action in his favor arises, but in so far as the legal necessity for so doing is concerned, we believe it cannot properly and accurately be said that there is any such necessity as would authorize a court to disregard all the law enacted for the protection of minors and hold them to be bound by contracts for attorney's fees made by their next friends."—Fenn v Hart Dairy Co, supra

(3) "We believe that 'the laborer is worthy of his hire,' but the policy of the law of this state is so clearly defined that when an attorney undertakes to represent a minor plaintiff in the bringing of a suit and wishes to secure for himself the benefits of the attorney's lien statutes to protect his fee for services, he must clearly plead facts showing that his employment was necessary to protect the rights of the minor, or he must show that he was employed by a duly appointed guardian or curator of such minor under the direction and authority of the probate court"—Fenn v. Hart Dairy Co, supra.

Where retainer contract void

(1) Where a contract retaining attorneys to defend a proceeding and action against the Tonawanda Indian Nation was void because not approved by the secretary of the interior and the commissioner of In-

hand, a lien on the proceeds of litigation should be declared in favor of an attorney in a cause where equitable considerations require that such lien be recognized [86]

Existence of subject matter as prerequisite. In order that a valid charging lien may exist, it is essential, that there exist some subject matter to which such lien may attach.[87] Moreover, in the

dian affairs, the attorneys were not entitled to have an attorney's lien declared and enforced on the basis of quantum meruit.—In re Darch, 265 N.Y.S. 86, 147 Misc. 836

(2) Where an attorney performed services in the prosecution of a personal injury claim, which was later settled without his knowledge, his claim for compensation cannot be presented as a lien on the amount of the settlement, where his contingent fee contract with claimant is void, but must be presented on the basis of quantum meruit.—Filipiak v Zintak, 264 Ill.App. 392.

86. Ark.—Haynie, Parks & Westfall v. Camden Gas Corporation, 56 S.W.(2d) 419, 186 Ark. 842

N.Y.—Schoenherr v. Van Meter, 109 N.E. 625, 626, 215 N.Y. 548, reversing 143 N.Y.S. 1143, 158 App.Div. 907.

Where persons benefited refuse to pay for services

On refusal of domestic consumers of gas to pay attorneys employed by the city to defend a suit to enjoin an ordinance lowering gas rates, the court should declare a lien in the attorneys' favor on the fruits of the litigation.—Haynie, Parks & Westfall v Camden Gas Corporation, 56 S.W.(2d) 419, 186 Ark. 842.

Attorney engaged by director of corporation to recover for misappropriation of officer

Where, under the law of private corporations, a director had the right to maintain an action against an officer of a corporation to compel him to account for corporation property or funds misappropriated by him, an attorney engaged by a director of a corporation to sue to recover property of the corporation misappropriated by an officer was entitled to an equitable lien on the property recovered.—Schoenherr v Van Meter, 109 N.E. 625, 215 N.Y. 548, reversing 143 N.Y.S. 1143, 158 App.Div. 907.

Money distributed as result of attorney's services

In proceedings for an accounting against an attorney employed to establish clients' rights in decedent's estate, the attorney was held to be entitled to a lien on moneys to be distributed as a result of his services.—In re Carney, 158 N.Y.S. 585, 93 Misc. 600

87. U.S.—Cooper v. McNair, (D.C.Fla.) 49 F.(2d) 778.

Ky.—Irvine v. Stevenson, 209 S.W. 7, 183 Ky. 305

N.Y.—In re Albrecht, Maguire & Mills, 230 N.Y.S. 543, 132 Misc. 713, affirmed 233 N.Y.S. 383, 225 App.Div. 423, affirmed 171 N.E. 772, 253 N.Y. 537

6 C.J. p. 778 note 23.

Attorney's statutory lien cannot arise without something to which it can attach.—Petition of Albrecht, 233 N.Y.S. 383, 225 App.Div. 423, affirming In re Albrecht, Maguire & Mills, 230 N.Y.S. 543, 132 Misc. 713, and affirmed In re Albrecht, 171 N.E. 772, 253 N.Y. 537

Judgment, final order, report or decision

In the absence of a judgment or final order, report, or decision in the client's favor on the bond, the attorneys' charging lien did not attach.—Anderson v U.S. Fidelity & Guaranty Co., 263 N.Y.S. 333, 238 App.Div. 48

Dismissal

An attorney's lien for services rendered to plaintiff does not attach to an order of dismissal of action, notwithstanding the order is a judgment subject to the control of the court, since it is not a judgment in favor of plaintiff nor one which has a pecuniary value to plaintiff.—Universal Oil Products Co. v Standard Oil Co. of Indiana, (D.C.Mo.) 6 F.Supp. 37, affirmed (C.C.A.) German v. Universal Oil Products Co., 77 F.(2d) 70

Proceeds

(1) No lien may arise where there have been no "proceeds".—Matter of Hasbrouck, 138 N.Y.S. 620, 153 App.Div. 394.—Matter of Ely, 139 N.Y.S. 729, 79 Misc. 118.—6 C.J. p. 780 note 52

(2) A decree granting letters of administration, but not determining the right of the petitioner to any part of the decedent's estate, but merely his right to act as administrator, does not constitute proceeds to which the lien of petitioner's attorney can attach.—In re Nocton's Estate, 162 N.Y.S. 215

Defendant held to have no interest to which lien could attach

In an action by a coal company to declare a trust in property purchased by defendant from funds received as secret rebates while defendant was plaintiff's sales manager, defendant's interest in the property having been exhausted by the transfer of title from defendant to plaintiff, no interest therein remained in him to which a lien could attach in favor of his attorneys.—Stover v Atlantic Ice & Coal Corporation, 125 S.E. 837, 159 Ga. 357.

Lien exists only against money or property acquired by services of attorney

An attorney's lien exists and is enforceable only against moneys or personal property acquired by services rendered in a particular action or proceeding by which the money or property is produced.—Johnson v. Riddle & Ellis, 85 So. 701, 204 Ala. 408.

No lien attaches to property of estate incidentally delivered to attorney

An attorney employed to procure letters of administration of an estate, the property of which belonged to all the next of kin, subject to administration, had no lien under Judiciary L. § 475, on property of the estate incidentally delivered to him, such property not being property recovered by him, and possession thereof not being necessary to draw the papers and attend to the details of procuring letters of administration, and a decree appointing an administrator not determining that any one has a right to own property of the estate.—In re Dawson's Estate, 180 N.Y.S. 271, 110 Misc. 472.

Funds held on interpleader

No attorney's lien can attach to funds held on interpleader in favor of the attorney of claimant prior to a judgment finding such claimant entitled to them.—Remelin v Butterworth, 152 N.E. 193, 20 Ohio App. 356.

Where nothing collected

Where an attorney was retained by a temporary administratrix to collect moneys on deposit belonging to the estate, but collected nothing in the actions he brought, which did not come to trial, there was nothing to which a charging lien could attach.—In re Farmers' Loan & Trust Co., 188 N.Y.S. 373, 196 App.Div. 639.

Mutual indebtedness between client and adversary

(1) Attorneys for one partner adjudged to be indebted to the other could have lien only to the extent that their client had something coming to him from partnership funds on final settlement.—Dunn v. Bleeck, 286 N.Y.S. 402, 246 App.Div. 382

(2) Where defendant, in an equitable suit to offset mutual judgments, owed plaintiff on certain notes at the time defendant obtained judgment against plaintiff, and plaintiff later obtained a judgment on such notes, defendant's attorneys, in the action to offset the mutual judgments, could not have a lien for their fees

absence of some statutory provision providing that an attorney's charging lien may exist on a cause of action, such lien cannot arise on the naked cause of action of his client.[88] Further, a statute providing for a charging lien on a client's cause of action, claim, or counterclaim does not authorize such lien where there is no cause of action, claim, or counterclaim.[89]

Attorney regarded as equitable assignee. An attorney who has a charging lien for his services is, to the extent of such services, to be regarded as an equitable assignee of the judgment or funds produced by his efforts.[90]

Notice to client that lien may be claimed. An attorney's right to assert a lien to secure payment of compensation does not require that he should have notified his client that such lien might be claimed.[91]

Attorney's authority to begin suit as condition precedent to lien. The existence of a charging lien on a cause of action depends on the attorney's authority to begin the suit.[92]

Where action does not reach verdict, report, decision, or judgment. Where attorneys are given a charging lien on the cause of action of their clients, such lien may arise, notwithstanding the action never reaches a verdict, report, decision, or judgment.[93] On the other hand, a statute giving a charging lien to attorneys "on all judgments obtained by them" does not confer a lien on an attorney, where proceedings brought by him on behalf of his client do not result in a judgment.[94]

Right to retaining lien not condition precedent to right to charging lien. That an attorney could not claim a retaining lien may not preclude his asserting a charging lien.[95]

established—McIntosh v. McIntosh, 234 N.W. 234, 211 Iowa 750

88. St. Louis, I. M. & S. Ry. Co. v. Blaylock, 175 S.W. 1170, 117 Ark. 504, Ann. Cas. 1917A, 563—6 C.J. p. 778 note 28

No lien on cause of action

Under Acts (1909) p. 892, Kirby Dig. §§ 4458, 4462, an attorney has no interest in the cause of action itself—St. Louis, I. M. & S. Ry. Co. v. Blaylock, 175 S.W. 1170, 117 Ark. 504, Ann. Cas. 1917A, 563

Lien not created by notice thereof

Service of notice of a lien by attorneys did not create a legal lien on a cause of action or subject matter—Enos v. Keating, 271 P. 6, 39 Wyo. 217, 67 A.L.R. 430, rehearing denied 275 P. 131, 39 Wyo. 217, 67 A.L.R. 430.

89. Merritt v. Metropolitan Life Ins. Co., (Mo.App.) 66 S.W.(2d) 967—6 C.J. p. 779 note 38

Where no cause of action in client

(1) Where a deceased wife's life policies were payable to executor or administrator and her surviving husband was neither, the alleged provision that insured could choose to pay another person equitably entitled to the policy benefits was held not to give the husband a cause of action, as respects his attorney's lien, where the husband settled the suit with insurer—Merritt v. Metropolitan Life Ins. Co., (Mo.App.) 66 S.W.(2d) 967

(2) Where a client had no right of action, the client's contract with the attorney to bring suit was held not to confer a lien for the attorney's fee, although the suit was settled by payment of a certain sum to the client—Merritt v. Metropolitan Life Ins. Co., supra.

Where no counterclaim filed

In actions by a husband against a wife involving their property, the wife's attorney had no charging lien, where no counterclaim was filed—Ekelman v. Marano, 167 N.E. 211, 251 N.Y. 173, reversing 230 N.Y.S. 331, 224 App.Div. 761.

Statute broad enough to include all civil actions

Comp.St. § 6576, giving an attorney a lien on his client's cause of action or counterclaim, is broad enough to include all civil actions—Taylor v. Taylor, 196 P. 211, 33 Idaho 445

90. Kan.—Epp v. Hinton, 170 P. 987, 102 Kan. 435

N.J.—In re McCormick's Estate, 182 A. 485, 14 N.J.Misc. 73

N.D.—Jacobsen v. Miller, 198 N.W. 349, 50 N.D. 828, 34 A.L.R. 317.

Pa.—Smith v. Keener, 113 A. 912, 270 Pa. 578

6 C.J. p. 766 note 81.

Equitable owner of fund produced by labor

An attorney is regarded as the equitable owner of a fund he brought into court with respect to his right to reasonable value for his services in bringing it—In re Lear's Estate, 213 N.W. 240, 204 Iowa 346.

Express contract

In the absence of an express contract, out of which an equitable assignment arises, an attorney has no lien for his compensation on a judgment or decree rendered in a suit prosecuted by him, nor on real estate, moneys, fund, or other property recovered by means of his exertion and labors—People v. Holten, 222 Ill.App. 427, affirmed 126 N.E. 738, 304 Ill. 394, 24 A.L.R. 929.

Before adoption of the code, the attorney had a lien on the judgment obtained by his assistance, and he is, to extent of his services, with certain limitations, regarded as an equitable assignee of the judgment.—Anderson v. Star-Bair Oil Co., 243 P. 394, 34 Wyo. 332

91. Catherwood v. Morris, 196 N.E. 519, 360 Ill. 473.

Neither duty as attorney nor statute requires such notice

Neither an attorney's duty nor a statute (Smith-Hurd St.Annot. c. 13 § 14) authorizing a lien imposes on him any obligation to reveal to his clients that he may claim a lien for fees on the proceeds of the litigation or any compromise or settlement thereof—Catherwood v. Morris, 196 N.E. 519, 360 Ill. 473.

Attorney not estopped

Deceased complainant's attorney was not estopped to set up a lien for fees on property acquired by substituted complainants in the parties' settlement of the litigation by failure to inform them that he had, or was claiming, a lien before the giving of notice thereof to defendant or the entry of a decree approving the settlement, even if it was his duty to notify them of his intention to claim a lien—Catherwood v. Morris, 196 N.E. 519, 360 Ill. 473.

Notice as requirement of proceedings to perfect attorney's lien see infra § 214.

92. Ga.—Suwanee Turpentine Co. v. Baxter, 85 S.E. 142, 109 Ga. 597.

N.Y.—Mitchell v. Mitchell, 127 N.Y.S. 1065, 143 App.Div. 172—Kelly v. New York City R. Co., 106 N.Y.S. 894, 122 App.Div. 467.

6 C.J. p. 778 note 30.

93. Conkling v. Austin, 86 S.W. 911, 111 Mo.App. 292.

94. Madonia v. Meyer & Wetmore, 119 So. 96, 9 La.App. 71.

95. In re Levine's Estate, 278 N.Y.S. 36, 154 Misc. 700, affirmed 286 N.Y.S. 513, 247 App.Div. 19.

Solvency of client immaterial to validity of lien. The validity of an attorney's charging lien created by statute does not depend on the solvency or insolvency of the client.[96]

Statute conferring charging lien as not abolishing common-law remedies. A statute conferring an attorney's charging lien does not abolish previously existing common-law remedies of an attorney for realizing fees for his services.[97]

Against whom lien may be charged. An attorney's charging lien may be valid as against both the client and his attaching creditors,[98] and such lien may be charged against the receiver of a client for whom the attorney has performed services.[99] Moreover, that an allowance has been made for counsel fees to be paid by a third person may not affect the lien of an attorney as against his own client.[1] However, an attorney with notice of an innocent third person's interest in specific property may not be permitted, as against such third person, to assert a charging lien in conflict with such interest;[2] nor may the mere fact that one benefits by the services of an attorney on behalf of his client render the person so incidentally benefited liable to a lien by such attorney.[3] At all events, a charging lien authorized by statute, may be asserted only against persons contemplated by the particular statute,[4] and a state is not bound by a charging lien of an attorney who recovers a judgment for the state under a statute which does not expressly bind the state.[5]

b. Agreement for Lien

A valid agreement between a client and his attorney may, in accordance with rules discussed hereunder, give rise to a charging lien.

An agreement between attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien[6] and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered.[7] Moreover, a charging lien

Attorneys never in possession of funds

Attorneys may assert a charging lien on any fund recovered through their efforts in an action or special proceeding, even though they cannot assert a possessory or retaining lien because they have never been in possession of the funds—In re Levine's Estate, 273 N Y S 36, 154 Misc. 700, affirmed 286 N.Y.S. 513, 247 App Div 19.

Lien on client's cause of action

An attorney's charging lien on his client's cause of action is independent of, and in addition to, his common-law or retaining lien on any property of his client which may come into his possession in the course of his employment—Matter of Heinsheimer, 143 N Y S. 895, 159 App Div. 33.

96. Kubu v Kabes, 172 N W. 496, 142 Minn. 433

97. In re Sebring, 264 N Y S. 379, 238 App Div 281.

98. Royal Ins Co. v Simon, 174 A. 444, 20 Del Ch 297

Contingent retainer immaterial

An attorney is entitled to enforce a charging lien both against the client and the client's attaching creditors, even though retainer was on a contingent basis—Royal Ins Co v. Simon, 174 A. 444, 20 Del Ch 297.

99. Webster v. Sweat, (C C A Miss) 65 F (2d) 109

Discretion

In a controversy between an attorney and his client's receiver concerning liens for an attorney's fees, a judge had the right, in the exercise of a sound discretion, to see that the receiver did not obtain the benefit of the attorney's services without paying therefor in full—Webster v. Sweat, (C C A Miss) 65 F (2d) 109

1. In re McCormick's Estate, 182 A. 485, 14 N J Misc 73

Fee to be paid by accountant

An attorney for an heir filing exceptions to administratrix' final account had a right in the client's distributive share for fees agreed on with the client, notwithstanding an allowance on an accounting of counsel fee to be paid by the accountant personally—In re McCormick's Estate, 182 A. 485, 14 N J Misc 73

2. Henderson v Elam, (Mo) 232 S W 469

Notice of understanding between client and third person

Where plaintiff, after arranging that a creditor should recover lands of which plaintiff was the beneficial owner, paid the creditor the amount of his expenses, together with a reasonable attorney's fee, the attorney who induced the creditor to give him a contract for one half the lands, as a contingent fee, cannot, being at least chargeable with knowledge of the relations between the parties, subject the land to his lien—Henderson v. Elam, (Mo) 232 S W. 469

3. Grossberg v. Knight, 266 Ill App. 183

Benefit to sister of client

Where services of attorneys on behalf of their client inured also to the benefit of the client's sister, who had not retained such attorneys, she was not liable to a lien in favor of such attorneys—Grossberg v. Knight, 266 Ill App 183.

4. Appeal of Elliott, (Mo App.) 234 S W 526

No lien against director general of railroads

An attorney who was not employed to sue the director general of railroads, and who brought action for injuries against the railroad without joining the director general, was not entitled to a lien against the director general under the Attorney's Lien Act—Appeal of Elliott, (Mo App) 234 S W. 526

5. State v National Surety Co, 161 P. 1026, 29 Idaho 670.

No equitable lien

Where the constitution and statutes provide the method for payment of claims against the state, an attorney recovering a judgment for the benefit of the state has no equitable lien on the recovery—State v National Surety Co, 161 P. 1026, 29 Idaho 670

6. U S—U. S Fidelity & Guaranty Co. v. Levy, (C C A Ala) 77 F (2d) 972

Cal—Tracy v. Ringole, 262 P. 73, 87 Cal App 549

6 C J p 769 note 94.

Administrator's contract

In an action by an administrator for damages for wrongful death a contract by the administrator as to counsel fees was held to fall within the attorney's lien statute, and the attorney has an enforceable lien—Johnson v. Missouri Pac R Co, 222 S.W. 734, 144 Ark. 469.

7. Terney v. Wilson, 45 N J Law 282

Oral agreement to assign to third party the amount to be recovered in

may arise out of an agreement between a client and his attorney that he is to receive a portion of the judgment recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds is to be looked to for security.[8] Similarly, a charging lien may arise from an agreement whereby the cause of action[9] or a specified fund[10] is made liable for

a law action to be brought by the assignor and a recital thereof in a written assignment to the attorney in payment of the attorney's fees were held to create an equitable lien against the judgment obtained—Armour Fertilizer Works v. Newbern, 185 S E 471, 210 N C 9

8. Alyea v. Hampton, 150 So. 242, 112 Fla 61—6 C J. p 769 notes 96 [a], [b], 97.

Express or implied agreement for payment

"A charging lien cannot exist, unless it is an element, express or implied, of the agreement that the lawyer is to be paid out of the fruits of the judgment."—In re Heinsheimer, 108 N E 636, 638, 214 N.Y. 361, Ann Cas 1916E 384, modifying 149 N. Y.S 631, 164 App.Div. 265.

Agreement constituting equitable lien, not assignment

(1) An agreement between an attorney and client that the former shall have a share of the fruits of the action is not an assignment of such share, but merely creates an equitable lien on the amount received by the client—Nichols v Orr 166 P 561, 63 Colo 333, 2 A L R. 449

(2) Contract between an attorney and a client for the payment of the attorney out of the judgment recovered or to be recovered as an equitable assignment of the fund pro tanto see supra § 187.

(3) Where a widow retained an attorney to institute legal proceedings to obtain more property than the widow received under the testator's will, the agreement being that the attorney should receive one-half of the property recovered in such proceeding above the amount widow received under the will, and where deceased's son procured a transfer by quitclaim deed from the widow rendering it impossible for the attorney to prosecute the contemplated proceedings, the attorney could assert an equitable lien for his interest in the transferred property arising from the contract with the widow—Winslow v. Becker, (Or) 58 P.(2d) 620.

General retainer executed by a legatee gave rise only to an attorney's lien which, on ordinary principles, is for the reasonable value of the services rendered.—In re Kitching's Will, 253 N.Y.S. 113, 141 Misc. 704.

Particular contracts held to create lien

(1) Where the administratrix of decedent employed attorneys, agreeing that they should receive one half of the recovery, it was held that, although signed by the administratrix as an individual, yet, as she could maintain an action only in her representative capacity, such contract gave the attorneys a lien under the attorneys' lien statute, and might be enforced against defendant company which made settlement with the administratrix independent of her attorneys—Johnson v Missouri Pac R Co., 222 S.W. 734, 144 Ark. 469.

(2) A contract between an attorney and a client for fifty per cent of the amount recovered and half the attorney's expenses is a contract including expenses as part of the fee, so that they come within the attorney's lien statute (Acts [1909] p 892)—Midland Valley R Co v. Johnson, 215 S W. 665, 140 Ark. 174, 7 A L R 1007.

(3) Where a sole heir retained attorneys to represent her in proceedings to remove her as temporary administratrix and to have another made permanent administrator, under an agreement whereby the attorneys were to receive ten per cent of any war insurance paid over to her and she made a settlement with adversary parties, in her subsequent suit to set aside the settlement, where the insurance funds were impounded, the attorneys were held to be entitled on intervention to a lien for their fees, since the temporary administratrix employed the attorneys in her individual, as well as administrative, capacity—Pharr v McDonald, 180 S E 344, 180 Ga. 777

(4) A contract for an attorney's fee for one third of the amount recovered in a workmen's compensation law case gives the attorney a privilege on the judgment recovered under the Workmen's Compensation Act of (1914) § 21 subsec 2, as amended, and Act (1906) No. 124—Burton v. Kaucher, Hodges & Co, 3 La App 74.

(5) Attorneys had a paramount lien on an amount recovered for a client under a disability provision of an insurance policy pursuant to a contingent fee contract—Chattanooga Sewer Pipe Works v. Dumler, 120 So. 450, 153 Miss. 276, 62 A.L.R. 999.

(6) Under L (1917) c 1515 § 1, where an attorney agreed with his client that in the event of a settlement he should receive fifty per cent of the amount received by the client and he in good faith subsequently settled the cause of action, the attorney was bound by his agreement, and the amount of his lien was dependent on the contract he had made—Cawley v. Burke, 110 A. 609, 43 R I. 188.

(7) An attorney for decedent and administrator, suing for insurance on a contingent fee contract, had a lien on the amount recovered—In re Agee's Estate, 252 P. 891, 69 Utah 130, 50 A L R. 641.

9. Lewis v. Braun, 191 N.E. 56, 356 Ill. 467.

Equitable lien implied from contract

(1) A contract between an attorney and a client, containing no personal covenant of the client to pay the attorney and imposing compensation directly onto the cause of action, implied an equitable lien to the attorney.—Lewis v Braun, 191 N.E. 56, 356 Ill 467.

(2) Accordingly, a contingent fee contract between an attorney and a client, imposing a duty on the attorney to perform services, accomplish the desired result, in consideration of the client's holding the cause of action subject to the services of the attorney and his right to share in the proceeds, and to convert the cause of action into the proceeds and divide them with the attorney was held not a power of attorney terminable at the client's death but a bilateral contract creating an equitable lien in favor of the attorney.—Lewis v. Braun, supra.

10. Strong v. Dutcher, 174 N Y S. 352, 186 App.Div 307.

Agreement with beneficiary of trust

Where a life beneficiary's interest was jeopardized by an investment in a mortgage on property in which a trustee was interested, endangering a loss through litigation with such trustee, an attorney, who rendered services protecting the beneficiary's interest under an agreement with the beneficiary whereby he was to be reimbursed out of a trust fund, was held to be entitled to a lien on the trust fund.—Strong v. Dutcher, 174 N.Y.S. 352, 186 App. Div 307

Stipulation for attorney's fees on note

An attorney's fees, stipulated in a note, constitute a lien on the dividend declared on a claim against

the payment of an attorney's fees. On the other hand, there exists authority to the effect that no charging lien can exist in the absence of an express agreement out of which an equitable assignment can arise[11] and a mere naked promise to pay an attorney out of a particular fund, unaccompanied by any words of transfer or the giving of any power or authority over the fund, may not operate to create a lien thereon.[12] At any rate, a charging lien which is not authorized by the terms of a contract existing between attorney and client may not be recognized where such contract is relied on by the attorney.[13] Ultimately the question whether or not a particular agreement creates a lien is a matter of construction.[14] A charging lien may not be inferred from mere silence.[15]

The contract must, of course, be valid in order to give rise to a lien.[16]

§ 212. Assignment of Lien

The general or retaining lien of an attorney is not assignable, although a claim for services or a lien for services on a sum collected may be assigned under certain circumstances.

An attorney's possessory lien is not assignable and is lost by an attempt at assignment.[17] More-

a bankrupt, presented by the attorney—Central Loan Co. v Russell, (C C A Tex) 16 F (2d) 35

11. Dougherty v. Hughes, 46 N E 229, 165 Ill. 384—Story v. Hull, 32 N E 265, 143 Ill 506—Black v Bevan, 193 Ill App 584.

12. U S—Spellman v. Bankers' Trust Co., (C C A N.Y.) 6 F (2d) 799.
Cal—McGown v Dalzell, 236 P. 941, 72 Cal App. 197
D.C—Taylor v. Wharton, 43 App D C 104, certiorari denied 35 S Ct. 793, 238 U S 631, 59 L Ed 1498
N.Y—Weinstein v Seidmann, 159 N. Y S 371, 173 App Div 219—Flanagan v. Conners, 204 N Y S 823, 123 Misc. 236
Tex—Kelly v Kelly, (Civ.App.) 257 S W. 992.
6 C J. p 769 note 98.

Particular contracts held not to create lien

(1) A contract, providing merely for a contingent fee for legal services in an action for, and which results in, money damages for his client, gives the attorney no lien or interest in the judgment, in the absence of terms constituting in legal effect a transfer of part of the claim or judgment—McGown v. Dalzell, 236 P. 941, 72 Cal App 197.

(2) A contract whereby a client agrees to pay his attorney a "further fee of 15 per cent. upon the amount recovered" does not give the attorney an equitable lien on the fund when recovered.—Taylor v. Wharton, 43 App D C. 104, certiorari denied 35 S Ct. 793, 238 U S. 631, 59 L Ed 1498

(3) Where a wife brought an action to set aside a settlement, and discontinued the action and conveyed the property in controversy to her husband, the court was not empowered to establish a lien on the land in favor of the wife's attorneys under the wife's contract to give the attorneys a portion of her interest in the property for their services, in the absence of a showing of conveyance to the attorneys of such interest—Kelly v. Kelly, (Tex Civ App) 257 S W. 992.

(4) A client's agreement to pay an attorney one thousand five hundred dollars for services in obtaining a return of six thousand five hundred dollars forfeited to a city for failure to perform a contract, to be paid out of the six thousand five hundred dollars, if and when returned, was not an equitable assignment, nor did it give the attorney an equitable lien.—Flanagan v. Conners, 204 N.Y.S. 823, 123 Misc. 236

(5) A particular retainer agreement in an action for personal injury was held not to purport to give a lien, and not to constitute an assignment of part of the fund, but was at most an agreement to pay plaintiff out of the recovery—Weinstein v Seidmann, 159 N.Y.S. 371, 173 App Div. 219

(6) A contingent fee contract for services of counsel did not create an equitable lien on the cause of action—Enos v Keating, 271 P 6, 39 Wyo. 217, 67 A L R 430, rehearing denied 275 P. 131, 39 Wyo 217, 67 A.L.R. 430.

(7) An agreement by a client to pay an attorney a stated percentage of any amount recovered from the estate of a testator above what was left her by the will did not constitute a legal or equitable assignment of any part of her interest in the estate to such attorney.—Spellman v. Bankers' Trust Co, (C C A N.Y.) 6 F (2d) 799.

(8) An agreement between the president of a corporation against whom bankruptcy proceedings were instituted, and its attorney, that the attorney should be compensated out of the alleged bankrupt's estate, could not affect the rights of the purchaser of all the assets of the company, under a contract made with the assistance of the attorney and not preserving his rights—In re Exposition Catering Co, (C C A N. Y.) 285 F. 328.

13. Taylor v. Integrity Mut. Casualty Co, 265 S W. 881, 216 Mo. App 599

Where attorney cannot bring suit required by contract

Where an attorney contracted with an employee, injured in another state, to bring a common-law action against the employer for such injury, which action resulted in a judgment for defendant, after which the employee filed a claim under the Workmen's Compensation Act of such state, and received a lump settlement, it was held that, since the employee and employer were deemed to have accepted the provisions of the compensation act of such state by their failure to be exempted therefrom, under Rev St (1919) § 1162, the attorney, being without right to bring suit at common law, could not acquire a lien for his services under the contract—Taylor v. Integrity Mut. Casualty Co., 265 S. W 881, 216 Mo App 599

Where no collection made as contemplated by contract

An attorney's lien, under Smith-Hurd St Annot. c 13 § 14 (Cahill Rev St [1933] c 13 par 13), cannot be based on an agreement to pay an attorney a sum equal to one third of any amount "collected" from a claim on an insurance policy and assigning him one third of any judgment thereafter recovered in the case, which employment was for the purpose of obtaining the benefits for the insured, during his lifetime, where the evidence shows that no judgment has been recovered and, while the insurer had agreed to settle, no collection had been made before the death of insured—Berkos v Ætna Life Ins Co, 279 Ill App 243

14. Ingersoll v. Coram, (C.C Mass) 127 F 418

15. Wright v. Rensens, 21 N Y S. 435

16. Davis v. Sharron, 15 B Mon (Ky) 64.

17. In re Leopold, 175 N Y S 188, 186 App Div 872, affirmed 123 N E 876, 226 N Y. 672—6 C J p 770 note 4.

over, where an attorney who prosecutes a suit has no lien for his fees or disbursements until after a final judgment has been entered (infra § 216), he cannot protect himself for the amount of his fee by an assignment.[18] The rule is held to be otherwise, however, as to assignment of a claim for services or of the lien for such services on the sum collected,[19] where the assignment carries with it no breach of the attorney's duty to preserve his client's confidence inviolate.[20]

Partial assignment. An assignment by an attorney of a portion of an indivisible claim is invalid and the assignee obtains no interest therein.[21]

§ 213. Services and Fees Covered

a. Under retaining lien
b. Under charging lien

a. Under Retaining Lien

A retaining lien secures not only the costs and charges of a particular case, but also extends to a general balance due the attorney by his client.

An attorney's retaining lien extends, under most of the modern decisions, to property in the attorney's hands, not only so as to cover costs and charges in the particular case in which the money was collected, but also to the extent of the general balance due to the attorney from the client,[22] and the fact that the services rendered are in behalf of an executor or administrator is generally held immaterial.[23]

b. Under Charging Lien

A charging lien secures only fees and costs due for services in the particular suit in which a judgment is rendered

In accord with the definition of this lien (supra § 211) a charging lien of an attorney is confined strictly to fees and costs due for services in the particular suit in which the judgment is rendered,[24] and such lien may cover an attorney's fees and dis-

18. Herbits v Constitution Indemnity Co of Philadelphia, 181 N E 723, 279 Mass 539

In suit for personal injury

An attorney, on bringing a personal injury suit for client, cannot protect himself for the amount of his fee by assignment, since the right of action is not assignable before judgment—Herbits v Constitution Indemnity Co of Philadelphia, 181 N E 723, 279 Mass 539

19. Sibley v. Pine County, 17 N.W. 337, 31 Minn. 201—6 C.J. p 770 note 5

Reimbursement in absence of right to enforce lien

(1) Where a member of a firm of attorneys, four years after he had made an agreement with an assignee of a cause of action to continue litigation for one third of the amount recovered, bought the claim of such law firm for services rendered by the firm in the action prior to its assignment, it was held that he could not enforce the assigned lien for services.—In re Leopold, 175 N Y S 138, 186 App Div. 872, affirmed 123 N E 876, 226 N Y 672.

(2) However, he was entitled to reimburse himself for disbursements of his firm—In re Leopold, supra.

(3) Nature and extent of liability for reimbursement for expenses generally see supra § 180.

20. Leask v. Hoagland, 118 N Y S 1035, 64 Misc 156, reversed on other grounds 121 N Y S 197, 136 App Div. 658—6 C J. p 770 note 6

21. Mulford v. Hodges, 10 Hun (N Y) 79—6 C J p 770 note 7.

22. U S—Everett, Clarke & Benedict v. Alpha Portland Cement Co, (N Y) 225 F. 931, 141 C C A 55

N J—Marshall v. Romano, 158 A 751, 10 N J Misc 113

N Y.—In re Babcock, 243 N Y S 489, 230 App Div 323—Bloom v Irving Trust Co, 272 N Y S. 637, 152 Misc. 50—Application of H. C Roberts Electrical Supply Co, 226 N.Y S 211, 131 Misc 119

Ohio—Newcomb v Krueger, 173 N E. 246, 36 Ohio App 469

Okl—In re Choate, 50 P (2d) 706—Burns v. Pratt, 31 P (2d) 106, 167 Okl 546—Roxana Petroleum Co of Oklahoma v. Rice, 235 P 502, 109 Okl 16

6 C J p 770 note 9

Reasonable value of services

(1) The extent of attorneys' retaining lien on papers coming into their possession is measured by the value of the services rendered—In re Makames, 265 N Y S 515, 238 App Div. 534, reversing 265 N Y S 511, 148 Misc. 759—In re Sebring, 264 N Y S 379, 238 App Div. 281—In re Babcock, 243 N.Y.S. 489, 230 App Div. 323.

(2) In a particular case, attorneys retained on a contingent fee were held to have a lien on the client's papers to secure them for payment of the reasonable value of their services rendered as attorneys in an action—In re Weitling, 194 N E 401, 266 N Y 184, reversing 275 N Y S. 973, 242 App Div. 823.

Particular matter or action and all others

(1) An attorney's right to retain a client's documents, money, or property coming into his hands professionally until he is paid for services extends to any general balance due to the attorney for professional services, either in the particular matter in connection with which he came into possession of the things retained or in any other matter.—In re McCormick's Estate, 132 A. 485, 14 N J Misc 73

(2) A general or retaining lien of an attorney may extend to any number of actions, providing the attorney has moneys, papers, or securities belonging to his client, which came into his possession in the course of his professional employment—In re Eno's Estate, 182 N Y. S. 571, 112 Misc 45

(3) Accordingly, an attorney's services for the benefit of a corporation, in resisting an action by the state to annul the corporation's existence before the appointment of a receiver, is covered by a retaining lien in favor of the attorney.—People v Community Live Poultry Corporation, 216 N Y S. 302, 127 Misc. 396

23. Hurlbert v Brigham, 56 Vt. 368—6 C J p 785 note 95

24. U S—Everett, Clarke & Benedict v. Alpha Portland Cement Co, (N Y.) 225 F. 931, 141 C C A 55

Ala—Johnson v Riddle & Ellis, 85 So 701, 204 Ala. 408

Colo—Collins v. Thuringer, 21 P. (2d) 709, 92 Colo 433

Ill—Clarke v Lake Erie & W. R Co, 234 Ill App 98, affirmed Bremer v. Lake Erie & W R Co, 113 N E 241, 317 Ill 580—Chicago Junction Ry. Co v. Leitch, 215 Ill. App 67.

Neb—Reynolds v. Warner, 258 N W 462, 128 Neb 304, 97 A L R 1128.

N Y—In re Sebring, 264 N.Y.S 379, 238 App Div. 281—Neier v. Droesch

bursements only to the extent allowed by applicable statutory provisions in the absence of a special agreement providing otherwise.[25] Moreover, where a statute authorizing a charging lien specifies the type of proceeding with respect to which the lien shall attach, it is essential that the services sought to be secured by such lien, be performed in the type of proceeding so specified.[26] However, where

Realty Corporation, 250 N Y S 535, 233 App Div 534, affirmed 178 N E 790, 257 N Y 550—In re Leopold, 175 N Y S 188, 186 App Div 872, affirmed 128 N E 876, 226 N. Y. 692—Lebaudy v Carnegie Trust Co, 165 N Y S 566, 178 App Div 614—In re Craig, 157 N.Y.S 310, 171 App Div 218, appeal dismissed 112 N E 1056, 218 N Y 639, and affirmed, 115 N E. 1036—In re Madison's Estate, 270 N.Y.S. 621, 151 Misc 85

N D—Jacobsen v Miller, 198 N.W. 349, 50 N D 828, 34 A L R 317.

6 C J p 770 note 14

Operation of law

An attorney has, by operation of law, an equitable lien on a judgment, when rendered, for his services and disbursements in that action—Rayworth v. Henry, 158 N W. 57, 163 Wis. 404.

Subsequently rendered services

(1) Attorneys may not be entitled to a charging lien for services rendered subsequent to the action with respect to which such attorneys are employed—Hastings v. Hastings, 233 N Y.S 179, 225 App Div. 897.

(2) Accordingly, attorneys for plaintiff in a separation action were held not entitled to a lien for services rendered subsequent to such action.—Hastings v. Hastings, supra

(3) Similarly, an attorney for plaintiff is not entitled to a lien for his services as respects a judgment which was obtained against defendant after the dismissal of such attorney—Lust v Atchison, T. & S F. Ry. Co, 267 Ill App 60.

Restriction to fees for services in court proceedings

"Usually where the services of an attorney have been recognized as an equitable lien, the services have been performed in connection with court proceedings and judgment has been obtained in favor of his client"—Stansell v. Roach, 246 S W. 520, 527, 147 Tenn 133, 29 A L R. 143

On claim presented against bankrupt

An attorney has no lien for services in other cases on a dividend declared on a claim presented by the attorney for a corporation against a bankrupt—Central Loan Co v Russell, (C C A Tex.) 16 F (2d) 35

As respects third person ultimately entitled to money

An attorney collecting moneys for a construction firm's receiver was held not entitled to a lien thereon to secure a claim against another ultimately entitled to the moneys—Hackett v White, 59 App D C. 211, 37 F (2d) 1007.

Personal injury and wrongful death actions

An attorney, retained by decedent to prosecute a personal injury action and substituted under a stipulation reserving the right to share in the proceeds of the action, had no lien on the proceeds of an action brought by administratrix of decedent for his wrongful death arising from the same injury, since the action for wrongful death was independent of the personal injury action—In re Madison's Estate, 270 N Y S. 621, 151 Misc 85

Ejectment and action to foreclose mortgage

Where a client repudiated a settlement agreement entered into in an action in ejectment, and employed another attorney to foreclose a mortgage on the same land as that involved in the ejectment action, the attorney who represented her in the ejectment action could not, in the absence of allegation of fraud, intervene in the foreclosure action and enforce a lien for services rendered in the action in ejectment, although the money paid into the registry in the foreclosure action was in part the same money that would have been paid to perform the settlement agreement in the ejectment action—Johnson v Riddle & Ellis, 85 So. 701, 204 Ala 408

25. Check v Kaplan, 182 N E 305, 280 Mass 170.

"Compensation" as including expenses of litigation

Expenses incurred by attorneys in litigation were held to be included within the term "compensation" used in the attorney's lien statute—Byram v Miner, (C C A Minn) 47 F (2d) 112 certiorari denied 51 S Ct. 648, 283 U S 854, 75 L Ed. 1461.

Liquidation and distribution of bank funds

Under U S Rev St § 5230, attorneys for a national bank in liquidation have a lien on assets of the bank for services rendered in the process of its liquidation and the distribution of its funds, as being a necessary expense in the administration of the assets of the bank—Putnam v. Liquidators of State Nat Bank, 106 So. 336, 159 La. 936.

Restriction to services in collecting money

A statutory lien to which an attorney would have been entitled for services in collecting money from another attorney would give him a lien on an order in such a proceeding, but not for his services generally—In re Sebring, 264 N Y S. 379, 238 App Div. 281.

Services in condemnation proceedings

The only attorney's fees which the court could consider in the matter of an attorney's petition for a lien on money deposited in court after the abandonment of condemnation proceedings by a railway against the clients of such attorney, were those for which the railway company could be compelled to indemnify respondents under the provisions of the Eminent Domain Act, and, therefore, an allowance for services performed on the question of establishing a "way of necessity" and other matters was improper.—Chicago Junction Ry Co. v. Leitch, 215 Ill. App 67.

26. U S—In re Pyrocolor Corporation, (D C N Y) 46 F (2d) 554.

N Y—Petition of Albrecht, 233 N Y S 383, 225 App Div. 423, affirming In re Albrecht, Maguire & Mills, 230 N Y S. 543, 132 Misc 713, and affirmed In re Albrecht, 171 N E 772, 253 N Y 537—Swartz, Inc v. City of Utica, 228 N Y S 660, 228 App Div. 506, motion granted 170 N E 148, 252 N Y. 573, and affirmed 173 N E. 864, 254 N Y. 555—In re Levine's Estate, 278 N.Y.S. 36, 154 Misc 700, affirmed 286 N Y S. 513, 247 App.Div. 19

Action or special proceeding

(1) A "charging lien" of an attorney may exist only for services rendered in an action or special proceeding—Irish Free State v. Guaranty Safe Deposit Co, 266 N Y S 8, 148 Misc 256, affirmed 271 N Y.S. 1071, 242 App Div 612.

(2) Attorneys were held to have a lien on moneys recovered for a client in special proceedings in the United States customs court as against the contention that such litigation was not an "action or special proceeding" within the statute relating to attorneys' liens—In re Levine's Estate, 278 N Y S 36, 154 Misc 700, affirmed 286 N.Y.S. 513, 247 App Div. 19.

(3) Condemnation proceedings constitute a "special proceeding" for services in which attorneys were entitled to enforce a lien against an award—Swartz, Inc. v. City of Utica, 228 N Y.S. 660, 228 App Div. 506, motion granted 170 N E. 148, 252 N Y 573, and affirmed 173 N.E. 864, 254 N.Y. 555.

the services are performed in the type of proceeding contemplated by such statute, the charging lien of an attorney may be broad enough to cover his services in all proceedings leading to a judgment or decree.[27] Moreover, irrespective of statute, a charging lien may extend to fees in suits arising from, and incidental to, the main cause,[28] and it is not essential, that all the services for which a lien is claimed shall have been rendered before the same court.[29] Nevertheless, a lien properly allowable, by statute, for services rendered in proceedings subsequent to the main proceedings, in which a judgment was recovered, may not be extended so as to cover services rendered in the main proceedings.[30]

At all events, a mere general debt due to an attorney cannot be protected by a charging lien.[31] Accordingly, a charging lien cannot cover a general balance due for professional services rendered in other cases,[32] unless authorized by an applicable

(4) Attorneys employed by tenants on a contingent fee basis in a condemnation proceeding by a city were held to be entitled to a lien on the award, including both principal and interest.—In re Allen St in City of New York, 266 N.Y.S. 277, 148 Misc. 488

(5) Proceedings against an estate in bankruptcy are special proceedings, within Code Civ Proc § 3334, defining special proceedings, to which an attorney's lien attaches to his client's cause of action.—In re Flower, 167 N.Y.S. 778.

(6) Attorneys employed to obtain a federal income tax refund could not assert the statutory lien against the refund, where all the proceedings in which such attorneys appeared were before officials and boards rather than in an "action or special proceeding," as specified in a statute authorizing a charging lien.—Petition of Albrecht, 233 N.Y.S. 333, 225 App.Div. 423, affirming In re Albrecht, Maguire & Mills, 230 N.Y.S. 543, 132 Misc. 713, and affirmed In re Albrecht, 171 N.E. 772, 253 N.Y. 537.

(7) An attorney, who participated in conferences and arguments before government department heads, and secured adjustment of corporation's tax liabilities, was held to be entitled to a charging lien, under Judiciary L. § 475, although no legal or judicial action or proceeding was instituted, and although he did not obtain actual possession or custody of any fund recovered.—Cunningham v. Sizer Steel Corporation, (D.C.N.Y.) 1 F.(2d) 653

(8) An attorney for a committee of certificate holders was not entitled to a "charging lien" on bond certificates in possession of receivers, for services rendered in obtaining "through diplomatic channels" a promise by officials of a foreign government to pay the balances due on bond certificates.—Irish Free State v. Guaranty Safe Deposit Co., 266 N.Y.S. 8, 148 Misc. 256, affirmed 271 N.Y.S. 1071, 242 App.Div. 612.

Proceeding in general land office

Under Nev.Rev.L. § 5376, an attorney representing a corporation in a proceeding in the general land office does not have a lien on the land obtained for the benefit of the corporation.—Gates v. Columbia-Knickerbocker Trust Co., (C.C.A.Nev.) 238 F. 359, 147 C.C.A. 295

Actions in surrogate's court

(1) Under Judiciary L. § 475, giving attorneys' liens on the recovery, etc., the surrogate's court is in the same position as any other tribunal as regards the limitation of an attorney's lien to one action.—In re Eno's Estate, 182 N.Y.S. 571, 112 Misc. 45.

(2) Accordingly, where an attorney first contested the probate of one will, and after denial sought probate of another will under which his clients took greater interests, the statutory lien given by Judiciary L. § 475, on the recovery, etc., cannot be spread over the two actions, and any lien for the services in the contest is separate from that for services in securing the probate of the other will.—In re Eno's Estate, supra

(3) Moreover, the contention that two proceedings for the probate of different wills are to be considered as a single employment for the accomplishment of the ultimate result of securing legacies of clients under the first executed will and that contest proceedings against the second will should be regarded merely as a "preliminary step" for the purpose of putting the clients in a position to proceed with the probate of the first will is unavailable to the attorney who seeks to impress a lien for services in both probate proceedings.—In re Eno's Estate, supra

Attorney for creditors in prior bankruptcy proceedings

An attorney for creditors in a prior bankruptcy proceeding which was dismissed was held not entitled to a lien on dividends awarded creditors in a second bankruptcy proceeding for services rendered in the original proceeding.—In re Pyrocolor Corporation, (D.C.N.Y.) 46 F.(2d) 554.

Foreclosure proceeding under power of sale was held not "suit" for recovery of property forming basis for attorney's lien, within Code (1923) § 6262 subd. 3.—Albright v. W. D. Wood Lumber Co., 108 So. 738, 214 Ala. 636

27. In re Abruzzo's Estate, 249 N.Y.S. 72, 139 Misc. 559

Attorneys for trust beneficiaries in accounting

Attorneys for beneficiaries of a charitable trust were held to be entitled, in an accounting proceeding, to a charging lien coextensive with services in all proceedings leading to a decree.—In re Abruzzo's Estate, 249 N.Y.S. 72, 139 Misc. 559

Proceeding in which fund arises

An attorney's lien under New York law must be limited to a proceeding, or at least connected with a proceeding, in which a particular fund arises.—In re Pyrocolor Corporation, (D.C.N.Y.) 46 F.(2d) 554.

28. Blair v. Harrison, (Ill.) 57 F. 257, 6 C.C.A. 326, affirming (C.C.) 51 F. 693.—6 C.J. p. 771 note 19

29. Weaver v. Cooper, 73 Ala. 313.—6 C.J. p. 770 note 18

30. In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281

Lien for services in action against attorney of record

An attorney who recovered for a client, from an attorney of record, the client's share of proceeds of judgment, could not, under the statute, impress a lien on such share for services as counsel in an action in which judgment was rendered.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281

31. Albright v. W. D. Wood Lumber Co., 108 So. 738, 214 Ala. 636

32. Klampe v. Klampe, 163 N.W. 295, 137 Minn. 227.—6 C.J. p. 770 note 15

Where money received on judgment in divorce action

When an attorney in a divorce action serves notice of claim of lien for his fees on the adverse party, and receives money thereunder to apply on the judgment, he cannot withhold the same from his client under a contract for fees in another matter.—Klampe v. Klampe, 163 N.W. 295, 137 Minn. 227.

statute,[33] or by agreement.[34] Moreover, the mere fact that a number of separate suits involve the same questions and are argued and determined together does not subject the fruits of one to a lien for services rendered in the others.[35]

Services rendered for affirmative purpose. The charging lien of an attorney may be restricted to services which he performs on behalf of a client who asserts affirmatively a cause of action, claim, or counterclaim, as distinguished from services rendered for a negative purpose, such as to defeat a cause of action, or claim, set up by a client's adversary.[36] In pursuance of this rule, it is held that where no affirmative relief is claimed no lien exists, except as to a judgment for costs.[37] At any rate, in order to give rise to a lien for an attorney's services on behalf of a client who has filed a counterclaim, it may be necessary that the action result in an affirmative judgment for defendant.[38]

Amount of lien generally; capacity in which services are performed. As regards the amount of a charging lien, it is held that such lien is to be measured by the value of the attorney's services.[39] Therefore, where the terms of a contract between an attorney and his client fix the value

Amount of fee not shown

A lien for attorney's fees on a judgment under Crawford & M Dig § 6304, with proof that the fees applied to various suits, but without showing the fee for the particular litigation cannot prevail—Rachels v Russell, 242 S W. 809, 154 Ark 418

33. Reynolds v. Warner, 258 N.W. 462, 128 Neb 304, 97 A L R 1128—6 C J. p 770 note 16

General balance covered under particular statute

Under a particular statute it was held that an attorney had a lien for the general balance of compensation on money in the hands of the adverse party in an action or proceeding in which the attorney was employed.—Reynolds v Warner, 258 N W 462, 128 Neb 304, 97 A.L R 1128.

34. Cooke v. Thresher, 51 Conn. 105.

35. Massachusetts, etc, Constr. Co v Gill's Creek, (C C.S C) 48 F 145, appeal dismissed 154 U S 521 14 S Ct 1154, 38 L Ed 1073—6 C J. p 771 note 20.

36. U S—Wessinger v. Sturkie, (C C A S C) 77 F (2d) 751.
Ky—Hatfield v Richmond, 197 S W 654, 177 Ky 183.
N Y—In re Darch, 265 N Y S 86, 147 Misc 836—In re Eno's Estate, 182 N Y S 571, 112 Misc 45.
Okl—Bruce v. Calloway, 46 P.(2d) 446—Holloway v Wright, 215 P. 937, 91 Okl 57—Elliott v. Orton, 171 P 1110, 69 Okl 233, L.R A. 1918E 103
6 C J. p 779 note 34.

Contest of will

Under Judiciary L. § 475, giving an attorney a lien on his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, decision, judgment, or final order, an attorney who successfully contested the probate of one will, and thereby paved the way for his clients to secure a large share of the estate, has no lien because of such proceeding, for the judgment denying the will probate was not a recovery in favor of the contestants, and a setting aside of the same, even, would not allow the attorney to collect for his services—In re Eno's Estate, 182 N Y S 571, 112 Misc 45.

Protection of existing right or title

An attorney's statutory lien extends only to a client's affirmative cause of action, and cannot be extended to services which merely protect the existing right or title of the client's property—Bruce v. Calloway, (Okl) 46 P (2d) 446

Counterclaim in divorce action

The Attorneys' Lien Act does not include services rendered under counterclaim filed on behalf of husband defendant in a divorce action seeking return of property in possession of complainant wife—McCarthy v McCarthy, 174 A. 751, 117 N J Eq 22.

Defeating claim or recovery by client's adversary

(1) An attorney merely defeating recovery against his client as defendant is not entitled to a lien on property involved in litigation for fees—Wessinger v Sturkie, (C.C A S.C.) 77 F (2d) 751.

(2) An attorney retained to defend a petition filed in the probate court against the executor of an estate to compel him to inventory a deposit in a bank as assets of the estate has, on securing a dismissal of the petition on the ground that the deposit was a survivorship account, and, therefore, not a part of the estate, no lien on the deposit for his services, such services not being on any "claims, demands and causes of action" for suit or collection, and the defeat of the petition not being a recovery of any "property or money" within the meaning of the attorney's lien statute—Grossberg v. Knight, 266 Ill.App 183

Canceling conveyance and recovery of land

While, under Acts (1909) p 893, an attorney has no lien for services in merely defending a suit, services rendered in canceling a conveyance for fraud and recovering the land are such services as to entitle the attorney to a lien—Baxter County Bank v Davis, 208 S W. 797, 137 Ark. 459.

37. Agricultural Ins Co v. Smith, 93 N Y S 347, 112 App Div 840—Bevins v Albro, 33 N Y S 1079, 86 Hun 590—6 C J p 779 note 35

38. Harlan v Bennett, 106 S W. 287, 127 Ky 572, 32 Ky L 473, 128 Am S R 360—6 C J p 779 note 33

Lien held to exist

Where an attorney was employed to defend a suit, and his client had him file therein a counterclaim, which was sustained, the attorney had a lien on the judgment, under St § 107—Hatfield v. Richmond, 197 S W. 654, 177 Ky. 183

39. Application of H. C Roberts Electric Supply Co, 226 N.Y S. 211, 131 Misc. 119

Services in producing money or property

The amount of an attorney's charging lien is limited to the price or value of the services rendered in a particular action or proceeding to produce the money or personal property which has been recovered by the client—Johnson v. Riddle & Ellis, 85 So. 701, 204 Ala. 408

Time at which value of services considered

(1) In determining the amount secured by an attorney's charging lien, the court may determine the value of services before, at the time of, and after commencement of an action on which the lien is based—Application of H. C. Roberts Electric Supply Co., 226 N.Y.S. 211, 131 Misc. 119.

(2) Time when lien attaches generally see infra § 216.

Limitation to claims placed in attorney's hand

An attorney's statutory lien may be limited to claims placed in the attorney's hand for suit or collec-

of the attorney's services, his lien may be measured by such contract.[40] In the absence of such agreement, the reasonable value of the services rendered is to be considered in determining the amount of an attorney's charging lien.[41] At all events, the lien extends only so far as to embrace an amount actually due, or in good faith believed to be due,[42] and is limited to compensation for professional services.[43] Moreover, the lien of an attorney entitles him to recover for his own personal services only, and not for the services of another employed by him to assist,[44] unless the client con-

tion—Rice v. Kelly, 10 S.W.(2d) 1112, 226 Ky 347.

Deduction

The amount collected by the executor on a mortgage bequeathed to decedent's widow, for which amount the executor had not accounted, must be deducted from an additional amount received by the widow from the estate in determining the right of the widow's attorney to a lien under a retainer contract giving him a contingent fee on the widow's additional recovery due to renouncing the will—Race v Harris, 236 N Y S. 169, 246 App Div 367.

40. U S—Lehigh & N E. R. Co v Finnerty, (C C A N J) 61 F (2d) 289, certiorari denied 53 S Ct. 292, 287 U S 668, 77 L Ed 576

Ark—St Louis, I M & So Ry. Co v Hays & Ward, 195 S W 28, 128 Ark 471

Minn—Wildung v. Security Mortgage Co of America, 173 N.W. 429, 143 Minn 251.

6 C J p 769 note 94.

Unless inequitable, an attorney's lien must be enforced in the amount fixed by contract—Lehigh & N E R Co. v. Finnerty, (C C A N J) 61 F (2d) 289, certiorari denied 53 S Ct. 292, 287 U S 668, 77 L Ed 576

Percentage

(1) An attorney has a statutory lien on his client's cause of action for the percentage of the amount recovered to which he is entitled under his contract with client—Vaughan v. Hill, 242 S.W. 826, 154 Ark 528.

(2) The lien of an attorney agreeing to prosecute his client's cause of action for a sum equal to one third of all sums which may be recovered attaches only to the amount actually recovered.—Devine v Pyanhunkah, 39 P (2d) 132, 170 Okl. 178

(3) Under Acts (1909) p 892, an attorney has a lien for that percentage of the proceeds of judgment or settlement which his contract with his client entitled him to receive.—St Louis, I. M & So Ry. Co. v. Hays & Ward, 195 S W 28, 128 Ark 471.

(4) An attorney's contract with a surety on a road contractor's bond to bring suit against a surety on a subcontractor's bond in consideration of twenty per cent of the amount found due to the contractor's surety and performance of contract fixed an equitable charge in the attorney's favor on cause of action—U S Fidelity & Guaranty Co v Levy, (C C A Ala.) 77 F (2d) 972

(5) Agreement entitling an attorney to ten per cent for reduction of note to judgment, including ten per cent attorney's fees provided for note, did not entitle the attorney to a lien for ten per cent of the amount of the judgment, where the judgment was declared a special lien on land securing payment of note and land was sold to the payee of the note on execution for less than amount of the judgment, but entitled the attorney to a lien for ten per cent of the proceeds of the sale—Stegall v. Edwards, (Ga App) 181 S E. 502

Requiring all interested persons to be bound

An advance agreement is ineffective to fix the extent of a lien of an attorney on a fund to be recovered, unless all persons interested in the fund are privy to the contract or bound by principles of agency or estoppel—In re Dugan's Estate, 264 N Y S 683, 147 Misc. 776.

Procuring exemptions for widow

Where an attorney was retained to represent and protect the interests of a widow in the estate of her deceased husband, it was held that the attorney's services in obtaining the widow's exemption as to certain property were within a contract whereby the attorney was to receive half of the additional amount obtained from the estate by the widow's renouncing will, and a payment to the attorney for his services in procuring such exemptions must be deducted in determining his right to an attorney's lien—Race v Harris, 236 N Y.S. 168, 246 App Div. 367.

Services rather than contract as basis

Where an agreement between a client and his attorney provides that he shall have a certain share of the recovery, a charging lien is allowed only for services rendered and not for a share of the recovery stipulated for in the contract of retainer.—Kauffman v Phillip, 134 N.W. 575, 154 Iowa 542—Gibson v. Chicago, etc., R. Co., 98 N.W. 474, 122 Iowa 565.

41. Minn.—Klampe v. Klampe, 162 N.W. 295, 137 Minn. 227.

N Y—In re Kitching's Will, 253 N. Y S 112, 141 Misc. 704.

42. Robinson v Hawes, 22 N.W. 222, 56 Mich. 135

43. Davitt v. O'Connor, (C C A N. Y) 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct. 217, 293 U.S 621, 79 L Ed 709—Elliott v Nowata Oil & Refining Co, (C. C A Okl.) 37 F (2d) 76, modifying (D C) Nowata Oil & Refining Co v. Elliott, 32 F (2d) 349—6 C J. p 771 note 22

Taking title to facilitate handling

The mere fact that one acting as president of a corporation happened to be an attorney did not entitle him to a lien for services in taking title to a certain lease in the name of himself and another for the purpose of advantageously handling the transaction—Elliott v. Nowata Oil & Refining Co, (C C A Okl) 37 F. (2d) 76, modifying (D C) Nowata Oil & Refining Co. v. Elliott, 32 F. (2d) 349

Caring for property

In a client's suit for accounting against an attorney who filed counterclaim for services and disbursements, the attorney was held not entitled to a lien for certain services, including those for caring for certain mortgaged property involved in litigation wherein such care was exercised.—Davitt v O'Connor, (C C A N Y) 73 F (2d) 43, certiorari denied O'Connor v. Davitt, 55 S Ct. 217. 293 U S. 621, 79 L Ed 709.

Services in connection with condemnation

Attorneys for a bankrupt, who rendered services in connection with the condemnation by the United States of property, title to which stood in the bankrupt's name, both before and after bankruptcy, and whose services resulted in the obtaining of a sum considerably greater than that which the government originally offered to pay, were not entitled to collect for their services and disbursements on the theory of analogy to the case where one of several persons interested in trust property or a fund brings a suit for its preservation or administration, in which case the court will order him to be reimbursed—Turner v. Woodard, (Mass.) 259 F. 737, 170 C.C.A 537.

44. Gibson v. Chicago, etc, R. Co., 98 N.W. 474, 122 Iowa 565.

sents or agrees to be responsible for the fees of assistants[45] Also, an attorney is not entitled to a lien on a judgment where the procuring cause is the employment of other attorneys;[46] but, for actual services rendered while the employment continued, the attorney has a lien, even though the recovery is secured as the result of another action brought by other attorneys[47] and in a different court[48] Further, an attorney who brings suit on behalf of one under disability may have a lien for services rendered in such suit.[49]

Whether limited to fees taxable as costs. Where the practice of taxing attorneys' fees as costs has been abolished, the charging lien has been extended, under appropriate statutory provisions or by judicial decision, to cover the fees due to an attorney by contract or under a quantum meruit.[50] Of course, when the law prohibits an attorney from contracting for or recovering on a quantum meruit more than the attorney's fees taxed in the costs, the attorney's lien may not exceed the attorney's fee so taxed.[51]

Particular items of expense, claim, or disbursement Subject to rules previously discussed in this section, an attorney is entitled to a lien for any legitimate expense incurred by him in the prosecution of an action,[52] and this is not necessarily limited to taxable items of costs and disbursements, but may include any expenditure which may properly be made in furtherance of the prosecution of an action,[53] and may include claims which have been actually paid by him.[54] However, an attorney's charging lien may not embrace a claim for unpaid salary.[55]

45. Louisville, etc., R Co v Procter, 21 Ky L. 447, 51 S W. 591

Counsel employed without consent of client

An attorney has no lien for services of counsel employed by him without the client's consent—In re Albrecht, Maguire & Mills, 230 N Y S 543, 132 Misc 713, affirmed 233 N Y S. 933, 225 App Div. 423, affirmed 171 N E. 772, 253 N.Y. 537.

46. Raley v. Hancock, (Tex Civ App) 77 S W. 658

Lien on payments up to time of attorney's discharge

An attorney, who was employed under contracts whereby he was to receive fifty per cent of any amount of back or future alimony he collected for his client, who later discharged such attorney and employed another, was entitled to a lien on alimony payments for the value of his services up to the time of his discharge and not to a lien for his contract fee—Hubbard v Goffinett, 70 S W (2d) 671, 253 Ky. 779.

47. Brown v. Erwin, 108 S E. 605, 89 W Va. 113—6 C J. p 771 note 26 See Rinaker v American Bond & Mortgage Co, 198 Ill App. 252.

Attorney procuring decree

An attorney procuring a decree has a lien on a fund arising from enforcement of the decree, in a suit prosecuted for plaintiff by another attorney—Brown v. Erwin, 108 S. E. 605, 89 W.Va. 113.

48. Gibson v. Chicago, etc, R. Co, 98 N.W. 474, 122 Iowa 565

Protecting costs awarded in lower court

Although attorneys for defendants were not such until after the appellate division of New York had rendered judgment for costs for defendants, having been retained to represent defendants in the appeal taken by plaintiffs to the New York court of appeals, since the attorneys were protecting the judgment for costs awarded by the appellate division, their lien extended to such costs, while they clearly had a lien on the costs awarded by the court of appeals—In re Hughes, (D C N Y) 257 F. 986.

49. Williams v. Gaither, 202 S.W 917, 139 Tenn. 587.

Suit for insane person

Attorneys who properly brought suit for an insane person by his next friend have a lien on the cause of action for their fees—Williams v. Gaither, 202 S W. 917, 139 Tenn 587.

50. Weed Sewing Mach. Co. v Boutelle, 56 Vt 570, 48 Am R 821—6 C.J. p 771 note 31.

English practice

(1) The English practice that an attorney's lien on a judgment was confined to his costs and to disbursements actually taxed therein was at one time adopted in some of the states of this country—Blake v Corcoran, 97 N E 1002, 211 Mass. 406—6 C J p 771 note 29.

(2) The practice, however, was never adopted in other states—Blake v. Corcoran, 97 N.E. 1002, 211 Mass. 406—Tyler v. Superior Ct., 78 A 467, 30 R I 107, 23 L R A.(N S.) 1045.

51. Renick v. Ludington, 16 W.Va. 378.

Limitation to fees allowed in bill of costs

Mass Rev L c 165 § 48, giving an attorney who had prosecuted a suit to final judgment a lien thereon for the amount of his fees and disbursements, covers only attorney's fees allowed in the bill of costs, thus distinguishing attorney's fees from counsel fees—Turner v. Woodard, (Mass) 259 F. 737, 170 C C A. 537

52. U S—McDougall v Hazelton Tripod-Boiler Co, (Tenn) 88 F. 217, 31 C C A. 487

Minn—Davis v Great Northern R Co. 151 N W. 128, 128 Minn. 354 6 C J. p 772 note 33.

53. Davis v. Great Northern R Co, supra See Western Iron Co. v. Brittain, 206 Ill App 14

Lien for fees "on account" of proceedings

Under a statute allowing an attorney's lien only on such fees as may have been rendered "on account" of a suit, claim, judgment, or cause of action in which the judgment or allowance for fees is rendered, on the abandonment of a petition for condemnation filed by a railway company, and the consequent allowance to respondents of a stated sum for costs and attorney's fees, the attorney for respondents was entitled to a lien on such fund for his fees for such services as he had rendered respondents in their defense and in the presentation of their claim for their costs and attorney's fees following the abandonment of the petition—Chicago Junction Ry. Co. v. Leitch, 215 Ill.App. 67.

54. Renfro v. Nixon, (Idaho) 45 P. (2d) 595.

Costs paid out by attorney

Costs paid by an attorney were held to be properly included in an attorney's lien—Renfro v. Nixon, (Idaho) 45 P (2d) 595

Claims incurred but not paid

An attorney is held not entitled to a lien on a client's judgment for claims incurred by him, but not yet paid—Gust v. Judd, 153 P. 309, 88 Wash. 536

55. In re Heinsheimer, 108 N E 636, 214 N.Y. 361, Ann Cas 1916E 384,

§ 214. Proceedings to Perfect

Requirements for the perfection of attorneys' liens must be met in order that such liens shall be available.

Statutes prescribing the manner in which attorneys' liens shall be perfected must be complied with in every particular.[56] Moreover, it has been held, without reference to statute, that an attorney who claims a lien must demand recognition thereof in order that such lien may be made available to him[57]

§ 215. —— Notice

a. Necessity
b. By whom and to whom given
c. Requisites and sufficiency
d Service
e Operation and effect
f. Vacating pending adjudication of right to lien

a. Necessity

While no notice is required to render a retaining lien complete and effective, notice may be necessary to the perfection of a charging lien. However, it has been held that notice to the assignee of the judgment or to the creditors of the client is not necessary.

A retaining lien is complete and effective without notice to anyone.[58] Moreover, under particular statutes an attorney may not be required to give notice of a charging lien in order that it may be effective.[59] As a general rule, however, a charging lien is not perfected until notice has been given to the person against whom such lien is asserted,[60] unless such person has actual knowledge of the claim,[61] or has notice of facts sufficient to put a prudent person on inquiry.[62] There exists, however, authority to the effect that no express notice need be given, in a case where a suit is pending, to render such a lien effective, the pendency of the suit being regarded as sufficient notice.[63]

Where judgment is given only for costs. It has

modifying 149 N.Y.S. 631, 164 App Div. 265

As to judgment recovered after general employment

Under common-law rule and Judiciary L. § 475, an attorney employed at an annual salary has no lien for unpaid salary on proceeds of a judgment procured by him after his general employment had terminated—In re Heinsheimer, 108 N.E. 636, 214 N.Y. 361, Ann.Cas.1916E 334, modifying 149 N.Y.S. 631, 164 App Div. 265.

56. Ill.—Mayer v. Yellow Cab Co., 247 Ill.App. 42.
Iowa—Hemingway v. Adrian State Bank, of Adrian, Minn., 221 N.W. 920, 206 Iowa 1308.
Neb.—Vanderlip v. Barnes, 163 N.W. 856, 101 Neb 573.
Okl.—Cherry v. Erwin & Erwin, 49 P.(2d) 788.
See Borg v. Kawin & Co., 190 Ill. App. 62.

Adjudication

An attorney's lien claim against judgment must be adjudicated by appropriate judicial proceeding before becoming finally effective—Keyes v. Ahrenstedt, 1 P.(2d) 843, 164 Wash. 106

57. Strickland v. Livingston Bank, 3 La.App. 667.

58. Cones v. Brooks, 84 N.W. 85, 60 Neb 698.

59. Walsh v. Hoskins, 162 P. 950, 53 Mont. 198.

Statute as notice

Under Rev.Codes § 6422, giving an attorney his lien, it is unnecessary that the attorney give notice of his lien or claim, the statute itself being notice to the world of the lien, and not requiring notice—Walsh v. Hoskins, 162 P. 960, 53 Mont. 198

World must take notice of lien in special proceeding

The world must take notice of an attorney's lien attaching in a special proceeding to the client's cause of action—In re Flower, 167 N.Y.S. 778

60. Ill.—Fornoff v. Smith, 281 Ill App 232
Or.—Townsend v. Chamberlain, 158 P. 664, 81 Or. 163.
Tenn.—Mungovan v. Clay, 9 Tenn App 13
6 C.J. p. 772 note 36.

Affecting enforcement but not existence of lien

Notice to a judgment debtor or other person dealing with judgment is not a requisite of an attorney's lien, although want of notice may preclude enforcement—Shank v. Lippman, 227 N.W. 710, 249 Mich 22

Where no lien expressly given by statute

Notice of the lien is necessary where no lien is expressly given by statute—Lablache v. Kirkpatrick, 8 N.Y.Civ.Proc. 256

No lien prior to service of summons

Under Acts (1899) c. 243 §§ 1, 2, and in view of Shannon Code §§ 4445, 4518, plaintiff's counsel is held not to have a lien on the cause of action until service of summons, where defendant was not in some way notified of the institution of the action—Memphis Steel Const. Co. v. Walker, 185 S.W. 715, 135 Tenn. 55.

Notice of attachment

Under St. § 2358 a, requiring filing of notice of attachment or execution to affect subsequent purchasers, an attorney for plaintiff wife in a divorce action, in which defendant's land was attached to preserve, as against subsequent bona fide purchasers, his attorney's lien, accruing under § 107, on the land, was required to file notice of the attachment—Daugherty v. Pond Creek Coal Co., 188 S.W. 624, 171 Ky. 604.

Depending on kind and time of agreement

Under Rev.St.(1909) §§ 964, 965, as to an attorney's lien for compensation, the adverse party is required to take notice of an agreement of plaintiff and his attorney for fees made when the action was brought; but to be chargeable with notice of the agreement after judgment increasing compensation he must be given actual notice.—Miller v. Henderson, 213 S.W. 887, 203 Mo App 233

61. Clark v. O'Donnell, 187 P. 534, 68 Colo. 279—6 C.J. p. 772 note 37

Knowledge as estoppel

That a party defendant has actual knowledge of an attorney's claim for a lien does not estop it from objecting that the attorney has not given the statutory notice.—Mayer v. Yellow Cab Co., 247 Ill.App. 42 See Dreyfuss v. Freud, 209 Ill.App. 345

62. Davidson v. La Plata County, 59 P. 46, 26 Colo. 549—6 C.J. p. 772 note 38.

63. Brooks v. Mandel-Witte Co., (C.C.A.N.Y.) 54 F.(2d) 992, certiorari denied Mandel-White Co. v. Brooks, 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292—6 C.J. p. 772 note 39.

been held that, if the judgment is only for costs, the record is, of itself, notice to the judgment debtor of the attorney's lien thereon;[64] but this rule is not supported in some jurisdictions.[65]

Where there is a settlement. Notice to the adversary of a client may not be required where a settlement is made after commencement of suit.[66] Further, it is not necessary to show notice, where it appears that the settlement between the parties was a collusive one, made with the deliberate design of defeating the attorney's claim.[67]

As between attorney and assignees of judgment. To make the lien of an attorney for his fees on a judgment in favor of his client perfect against an assignee of his client no notice of the existence of such lien need be given to the assignee.[68]

As between attorney and creditors of client It has been held that an attorney's lien on a judgment will prevail over an attachment by trustee process without notice to the attaching creditor, it being presumed that the attaching creditor has knowledge of such lien.[69]

Where pendency of suit regarded as notice. Where it has been decided that the pendency of a suit is itself notice to a creditor of the existence of an attorney's lien pending the suit, it is held that, in order to preserve the lien thereafter, the notice must be extended by stating the existence of the lien in the judgment or decree.[70]

b. By Whom and to Whom Given

Notice of liens when required may be given by a third person, and should be given personally to the person entitled to notice or to his agent

It is usual for notice of an attorney's lien to be given personally by the attorney claiming the lien, or by some one acting at his request; it has been held that proof that notice had been given gratuitously by a third person was sufficient to bind the judgment debtor.[71] When notice of an attorney's lien is required, such notice should be given to the adverse party personally, or to some authorized agent.[72]

c. Requisites and Sufficiency

While the form of notice of an attorney's lien should be in conformity with applicable statutes, it is ordinarily sufficient when the form is such as will protect the judgment creditor

Notice of an attorney's lien should be given in

64. Victor Gold, etc., Min Co v National Bank of Republic, 55 P 72, 18 Utah 87, 72 Am S R 767—6 C.J. p 773 note 42.

65. Minn—Dodd v Brott, 1 Minn 270, 66 Am D. 541
R I—Horton v. Champlin, 12 R I 550, 34 Am R 722

66. Petition of Elliott, 234 S W 520, 208 Mo App 348, certiorari granted Wabash R. Co v Elliott 42 S Ct. 185, 257 U.S. 632, 66 L Ed 407, and reversed on other grounds Wabash Ry Co. v. Elliott, 43 S Ct. 406, 261 U S 457, 67 L.Ed 743.

Notice to defendant not required

Notice to defendant of lien of plaintiff's attorney is not required where defendant made settlement with plaintiff after commencement of suit—Petition of Elliott, 234 S W 520, 208 Mo App. 348, certiorari granted Wabash R Co. v Elliott, 42 S Ct. 185, 257 U S 632, 66 L Ed 407, and reversed on other grounds Wabash Ry Co. v. Elliott, 43 S Ct. 406, 261 U.S 457, 67 L Ed 743.

Compromise binding in absence of notice

In the absence of any collusion on the part of a client and his adversary, a compromise whereby such adversary, a judgment debtor, conveyed land in settlement of judgment, claimed to have been satisfied, was binding, although entered into without knowledge of the debtor's attorney who had not given notice of lien—Hemingway v Adrian State Bank, of Adrian, Minn., 221 N.W 920, 206 Iowa 1308

Parties to settlement required to take notice—Wildung v Security Mortgage Co of America, 173 N.W 429, 143 Minn 251

67. Minor v Fick, 196 N W. 194, 235 Mich. 325—6 C J p 773 note 41

68. Bent v. Lipscomb, 31 S E 907, 45 W Va 188, 72 Am S R. 815—6 C J. p 773 note 44

69. Weed Sewing Mach Co v Boutelle, 56 Vt. 570, 48 Am R 821—6 C.J p 773 note 45

70. Hunt v McClanahan, 1 Heisk (Tenn.) 503—Brown v. Bigley, 3 Tenn Ch 618.

71. Lake v Ingham, 3 Vt. 158—6 C J p 773 note 47.

72. Ill.—Moore v. New York, C. & St L R Co, 245 Ill App 8
N Y—Ætna Life Ins Co. v. Kaufman, 290 N Y S 669.
6 C J. p 773 note 48

Service on one signing as agent

Service of notice of attorney's lien on one signing as an agent is valid—Moore v. New York, C. & St. L R Co, 245 Ill App 8.

Corporate defendant

(1) Service of notice on a corporate defendant of attorney's claim for lien must be personal—Mayer v. Yellow Cab Co, 247 Ill App. 42

(2) Service of notice on a corporate defendant of attorney's claim for lien is not properly made under an applicable statute by leaving a copy with the person in charge of the office—Mayer v. Yellow Cab Co, supra.

(3) Service of notice of attorney's lien on attorney for a corporation is insufficient—Moore v New York, C & St L R. Co, 245 Ill App 8.

Service on attorneys for defendant

Service of a notice for a lien on the attorneys for defendant does not comply with Hurd Rev St (1915-1916) c 32 § 55, Jones & A St Annot (1913) par 611, providing that attorneys claiming a lien on claims, demands, and causes of action placed in their hands for suit or collection by their clients shall "serve notice in writing upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien," etc—Reynolds v. Alton, Granite & St Louis Traction Co, 211 Ill App 153

Service on one neither attorney in fact nor of record

Serving notice of attorney's lien in a workman's compensation case on a person who was not defendants' attorney in fact or of record was ineffective—Polensek v Sheridan Coal Co., 253 P. 605, 122 Kan. 725.

accordance with applicable statutory provision;[73] but, unless expressly required, no special form of notice is necessary; nor need it be given or served in any particular manner, the object of the notice is to protect the judgment debtor, and any notice which serves that purpose will be held sufficient.[74] All that is actually required is that the notice shall contain a general statement of the amount claimed,[75] and of the services for which it was rendered.[76] The notice must, however, be sufficiently definite to enable the party who is adverse to the client to protect himself in dealing with the client,[77] and must indicate that a lien is claimed[78] and that payment to the attorney will be required.[79] On the other hand, the terms of the contract of employment between the attorney and his client need not be stated.[80]

Notice in writing. Under statute in some states it has been held that notice of a lien must be in writing,[81] but this is unnecessary unless a writ-

73. Mayer v. Yellow Cab Co, 247 Ill App 42.

74. Bouchey v Gillilan, 26 P (2d) 451, 38 Kan. 404—6 C J p 774 note 51

Another statement of rule

"All that is necessary is that the adverse party may have sufficient information that he may protect himself"—Bouchey v Gillilan, 26 P (2d) 451, 452, 138 Kan 404

Notice not technically construed

"The notice of lien is not to be technically construed"—Bouchey v Gillilan, 26 P (2d) 451, 452, 138 Kan 404.

Actual notice sufficient

(1) Where notice is actually received by a judgment debtor, there is sufficient compliance with a statute requiring personal service—Smith v. American Bridge Co, 191 Ill App 500

(2) Accordingly, defendant's actual notice of plaintiff's attorney's interest in the cause of action, transferred to the attorney in consideration for services, protected the attorney's interest as against defendant as effectively as statutory notice would have done—Gibson v Texas Pac Coal Co, (Tex Com App) 266 S W 137, reversing Gibson v Texas Pacific Coal Co, (Civ App) 252 S W. 874.

75. Crosby v Hatch, 135 N W 1079, 155 Iowa 312—6 C J p 774 note 52 See Malmquist v Belden Mfg Co, 202 Ill App 319

76. Cheshire v Des Moines City R Co, 133 N W 331, 153 Iowa 88—6 C J p 774 note 53.

77. Carter v Dunham, 177 P 533, 104 Kan 59—6 C.J. p 774 note 54 [a]-[c]

Notice enabling person served to protect himself

(1) Notice of an attorney's lien, under Gen St (1915) § 484, duly served is adequate if it gives information sufficiently definite to enable the adverse party served to protect himself in dealing with the attorney's client—Carter v. Dunham, 177 P 533, 104 Kan. 59.

(2) Accordingly, under Gen St (1915) § 484, notice of an attorney's lien on moneys in the adverse party's hands belonging to plaintiff, or which may be adjudged to her or paid in settlement, was held to be sufficient—Carter v. Dunham, supra

Letter from attorney claiming lien

Where a proper demand served on a lender, notifying him that, in the event of his failure to repay usurious interest, action would be instituted for double that amount, attorney's fees, and court costs, was accompanied by a letter of the borrower's attorney notifying the lender that an attorney had been retained to represent the borrower and that such attorney claimed a lien, the lender was held to be sufficiently notified of the attorney's claim for fee—Goldberg's Loan Office v Evans, 37 P (2d) 286, 169 Okl 397

78. Elliott v Atkins, 42 N W 403, 26 Neb 403—6 C J p 774 note 55

Notice not stating interest in action

An attorney's notice of a claim for a lien not stating the interest which the attorneys have in the action is defective—Mayer v. Yellow Cab Co, 247 Ill App 42.

79. Connell v Brumback, 18 Ohio Cir Ct 503, 10 Ohio Cir Dec. 149—6 C J p 774 note 56

80. Kan—Trinkle v McCue, 216 P 263, 113 Kan 623
Mo—Barthels v Garrels, 227 S.W 910, 206 Mo App 199

Contingent fee contract

Attorneys having a contingent fee contract need not serve a notice of its existence and terms on defendant in order to maintain their lien, under Rev St (1909) § 964—Barthels v Garrels, 227 S W. 910, 206 Mo. App 199

81. Kan—Ahalt v. Gatewood, 198 P 970, 109 Kan 328
Okl—Cherry v. Erwin & Erwin, 49 P (2d) 788
6 C J p 774 note 58

Statute superseding common law

Gen St (1915) § 484, concerning attorneys' liens, supersedes the common law and furnishes the only means and remedy for securing such liens on a judgment procured by an attorney for his client, and a written notice thereof is essential—Ahalt v Gatewood, 198 P. 970, 109 Kan 328.

Writing insufficient

Where the summons in an action on notes providing for attorneys' fees in case of suit had indorsed thereon certain amounts with interest, and the name of an attorney below the clerk's signature, it was held that the indorsement was not a sufficient notice of an attorney's lien, under Gen St (1915) § 484—Ahalt v. Gatewood, 198 P. 970, 109 Kan 328.

Service of written notice insufficient

(1) Attorneys having a lien for their services on a judgment may make such lien effective by giving written notice to the adverse party of the lien claim—Cherry v. Erwin & Erwin, (Okl) 49 P (2d) 788

(2) Under Gen St (1915) § 484, amending Gen St (1901) § 395, the service of a written notice of an attorney's lien on attorneys of record for the adverse party is sufficient—Alexander v Clarkson, 164 P. 294, 100 Kan 294, L R A 1917F 1006.

(3) Where attorneys handed a copy of a written compensation contract to defendant, there was a sufficient compliance with Rev St.(1909) § 965, requiring written notice of an attorney's interest in his client's cause of action—Simpson v. Federal Lead Co, (Mo App) 187 S W. 1123

Objection unavailable to client

Where, on the dismissal of condemnation proceedings, an order was entered allowing costs and attorney's fees to respondents, and part of the amount allowed was paid respondents and the remainder deposited with the clerk, and subsequently a petition for an attorney's lien was filed by one of the attorneys for respondents, and thereafter, without objection by respondents, such order was amended so as to provide that said deposit with the clerk should abide the event of any order made on the petition for a lien, respondents were precluded from raising the objection, on appeal, of a lack of the written notice required by Hurd Rev St.(1917) c 82 § 55 (Jones & A St.Annot [1918] par 611), creating attorney's liens—Chicago Junction Ry. Co. v. Leitch, 215 Ill App. 67.

ing is expressly required or necessarily implied by the terms of the statute.[82]

Filing, indorsement, or entry of record. Under applicable statutes one claiming an attorney's lien on a judgment may proceed to perfect or establish such lien by placing the lien on record, as by entering it on the docket,[83] or by the indorsement of the lien claim on the pleadings,[84] or by filing it with the clerk,[85] or by registration of the lien in a place required by statute.[86] These statutes must be strictly complied with,[87] although there need not be compliance with inapplicable provisions of a statute requiring recording and notice of an attorney's claim in specified cases other than those in which a lien is claimed.[88] Of course, where there is no statute providing for notice by filing with the clerk, such filing is ineffectual,[89] unless the party affected has actual notice of it.[90] At any rate, as against the client, filing of a notice with a clerk of court may not be required as a prerequisite to the effectiveness of an attorney's lien.[91]

d. Service

While constructive service of notice has been held to be sufficient, it has been held that, where a statutory provision for notice is silent as to the mode of service, the service must be personal.

Although there exists authority to the effect that

82. Cones v. Brooks, 84 N.W. 85, 60 Neb 698.

83. Cherry v. Erwin & Erwin, (Okl.) 49 P.(2d) 788—6 C.J. p 774 note 60

Entry in judgment docket

(1) Attorneys having liens on judgments obtained for payment of their services may make such liens effective by entering them in the judgment docket opposite the entry of judgment at any time before the rights of third persons intervene—Cherry v. Erwin & Erwin, (Okl.) 49 P.(2d) 788

(2) The requirements of Comp.L. (1913) § 6875 subd. 4, providing that the entering of an attorney's lien in the judgment docket, opposite the entry of judgment, shall make the entry effective as against the judgment debtor and as to him shall constitute sufficient notice, are intended as a substitute for personal notice required by subd. 3—Jacobsen v. Miller, 198 N.W. 349, 50 N.D. 828, 34 A.L.R. 317

84. Smith v. Westgate Oil Co., (Okl.) 53 P.(2d) 1090—Cherry v. Erwin & Erwin, (Okl.) 49 P.(2d) 788.

Indorsement of words "lien claimed"

A charging lien on a client's claim may attach to any verdict, decision, or judgment in the client's favor, provided notice of the lien claim is given to the adverse party or the words "lien claimed" are indorsed on the pleadings—Devine v. Pyanhunkah, 39 P.(2d) 132, 170 Okl. 178

85. Ark.—Porter v. Hanson, 36 Ark. 591
Neb.—Elliott v. Atkins, 42 N.W. 403, 26 Neb. 403
Wash.—Wooding v. Crain, 39 P. 442, 11 Wash. 207
6 C.J. p 774 note 61.

Purpose of statute

The principal purpose of Rev.St. (1908) § 242, providing that an attorney may file a notice of his lien with the clerk of the court where a judgment is rendered, is to protect innocent purchasers of the fruits of a judgment—Clark v. O'Donnell, 187 P. 534, 68 Colo. 279

86. Assumption Ice & Cold Storage Co. v. John Dalton Co., 119 So. 570, 10 La.App. 531, rehearing denied 120 So. 637, 10 La.App. 531.

Failure to register in parish where property situated

A lien for an attorney's fees was properly denied, where a claim for such lien was not registered in the parish where the property sought to be impressed with such lien was situated—Assumption Ice & Cold Storage Co. v. John Dalton Co., 119 So. 570, 10 La.App. 531, rehearing denied 120 So. 637, 10 La.App. 531.

87. Bland v. Robinson, 127 S.W. 614, 148 Mo.App. 164—6 C.J. p. 775 note 62.

88. Davis Finance & Securities Co. v. O'Neal, (La.App.) 160 So. 463

Special privilege not required to be recorded

The word "provided," within a statute conferring a special privilege upon attorneys for the amount of fees on a judgment and the property recovered by the judgment, and providing that, by a written contract signed by the client, the attorneys may acquire an interest in the subject matter of the suit if the written contract is recorded with the clerk of the court and a copy served on the opposing party, was held not to make the privilege granted conditional on compliance with the formalities required with regard to the recording of the contract, since "provided" was used in the sense of "provided also," and the two paragraphs were separate and distinct and related to each other in so far only as each intended to secure the attorney in the payment of his fees—Davis Finance & Securities Co. v. O'Neal, (La.App.) 160 So. 463

Effect of garnishment and absence of recorded contract

An attorney who, under a contract, was entitled to fifty per cent of the amount to be recovered by intervener in the suit, was held to be entitled to a prior lien on an amount which was decreed to belong to intervener, notwithstanding the attorney did not sign a written contract or record it with the clerk of court, or serve copy on the opposing party, and notwithstanding the third party obtained judgment against intervener and garnisheed such amount—Davis Finance & Securities Co. v. O'Neal, (La.App.) 160 So. 463.

Recording of conveyance sufficient

Recording of a conveyance to an attorney of an interest in mineral rights, in consideration of his services to be rendered in protecting those rights, protects the interest of the attorney against a subsequent conveyance to the adverse party without his giving notice to the adverse party under Act (1906) No. 124, relating to perfecting lien of attorneys, since the conveyance to the attorney was a present one, operative under registry laws regardless of the lien statute—McClung v. Atlas Oil Co., 87 So. 515, 148 La. 674

89. State Bank v. Davidson, 42 P. 687, 7 Colo.App. 91.

90. Colo.—Davidson v. La Plata County, 59 P. 46, 26 Colo. 549.
Neb.—Cones v. Brooks, 84 N.W. 85, 60 Neb. 698

91. Collins v. Thuringer, 21 P.(2d) 709, 93 Colo. 433—Clark v. O'Donnell, 187 P. 534, 68 Colo. 279.

Prior to enforcement of lien

As between an attorney and a client, nothing need be done by the attorney prior to enforcement of his lien against fruits of a judgment in his client's favor, and it is not necessary for the attorney to file any formal notice with the clerk of the court where the action was pending—Clark v. O'Donnell, 187 P. 534, 68 Colo. 279.

constructive notice of an attorney's lien is sufficient,[92] where a statute directing notice of an attorney's lien to be given is silent as to the manner of giving it, personal service is necessary, and service by mail is insufficient[93]

Signing contract of employment as condition precedent to service of notice. Signing of the attorney's contract of employment is not necessarily a condition precedent to a valid service of notice of an attorney's lien[94]

Time to give notice. Although an attorney for plaintiff cannot enforce a lien against a judgment debtor who has in good faith satisfied a judgment before notice of such attorney's lien,[95] notice of an attorney's lien claim may be in time when given before judgment.[96] While it has been held that notice prior to settlement is necessary in order to perfect an attorney's lien,[97] there exists authority to the effect that the proceeds of litigation may be bound by such lien, notwithstanding notice thereof has not been given prior to a settlement or a judgment confirming the same.[98]

e. Operation and Effect

Notice of attorney's charging lien may obviate the necessity of establishing the lien by action. It also has been said to bear some analogy to an assignment of an interest in the judgment or proceeds realized.

Notice of an attorney's lien may dispense with the necessity of bringing an action to establish such lien[99]

Fraudulent or erroneous notice. If the notice is fraudulent, no rights can be based on it in a court of equity.[1] That notice of an attorney's lien states that claimant is entitled to a greater proportion of a sum recovered than is actually due him, does not affect the validity of such lien for the amount which actually is due.[2]

92. U S—Byram v Miner, (C C A Minn) 47 F (2d) 112, certiorari denied 51 S Ct. 648, 283 U S 854, 75 L Ed 1461
Idaho—Renfro v. Nixon, 45 P (2d) 595.
N Y—Hamilton v. Rauber, 201 N Y S 101, 121 Misc. 379

As to purchaser of cause of action
One purchasing a client's cause of action at a sale thereof under judgment against the client is charged with constructive notice of the attorney's lien, under Judiciary L. § 475, and buys subject thereto, although not notified by the attorney of the existence of the lien—Hamilton v Rauber, 201 N Y S. 101, 121 Misc. 379

Bringing suit as notice
Where suit is brought on a petition signed by the attorney, no further notice to defendant of the attorney's right to the lien or claim for services is required—Stiles v Cooter Gin Co., (Mo App.) 74 S W. (2d) 1092

Intervention in divorce action as notice
An attorney's intervention in a divorce action claiming a lien on the proceeds for services in collecting a group insurance policy for the husband which the wife had garnished was sufficient notice to the wife to entitle an attorney to a lien—Sharp v Culton, 84 S W.(2d) 869, 262 Ky. 84.

Registered mail plus petition
Giving of notice to defendant of complainants' attorney's lien for fees by registered mail on the day of entry of the decree confirming the parties' settlement of the litigation and again about two months later and the filing of a petition to establish such lien were sufficient notice to all parties, although the original notice was not received until a day after such decree was entered—Catherwood v Morris, 196 N E 519, 360 Ill 473 See Limbach v. Vihon, 210 Ill App 73

Defects in service waived
Where notice of an attorney's claim to a lien for compensation was served on defendant's claim agent, who was authorized to settle the case, and he afterward attempted to do so with the attorneys, it was held that defendant waived any defects in the manner of service—Simpson v Federal Lead Co, (Mo. App) 187 S.W. 1123.

Amending return to show service
After final judgment in an action, a sheriff's return on notice of an attorney's lien given at the commencement of the action may, on the sheriff's application, be amended so as to make it speak the truth as to the service of notice—McPherson v. Harvey, 167 P 1070, 101 Kan 550

93. Haj v American Bottle Co, 103 N E 1000, 261 Ill. 362—6 C J. p 774 notes 49, 50 See Tuohy v. Chicago & Joliet Electric Ry Co. 200 Ill App 446—Burns v Illinois Cent R Co., 190 Ill.App 191

94. Moore v. New York, C. & St. L R Co, 245 Ill App 8.

Attorney's acting on employment contract obviates the necessity of signing before serving notice of lien on defendant to client's action—Moore v. New York, C & St. L. R Co, 245 Ill App. 8

95. Townsend v. Chamberlain, 158 P 664, 81 Or 163

96. Smith v. Nicholson, 289 S W 349, 221 Mo App 428, certiorari quashed State ex rel. Bradley v. Trimble, 289 S.W 922, 316 Mo 97.

97. Iowa—Hemingway v Adrian State Bank, of Adrian, Minn., 221 N.W. 920, 206 Iowa 1308
Okl—Smith v. Westgate Oil Co., 53 P (2d) 1090.

Failure to serve notice prior to settlement
(1) An attorney was not entitled to recover an attorney's fee against his clients' adversaries, who settled with clients, where the attorney did not perfect the lien on the clients' cause of action by serving notice to the adversaries prior to the settlement—Smith v Westgate Oil Co, (Okl) 53 P.(2d) 1090.

(2) An attorney who served no notice of a lien on a bank selling a client's real estate under execution, before the bank's settlement direct with the client by taking conveyance, had no lien on the real estate—Hemingway v Adrian State Bank, of Adrian, Minn., 221 N W. 920, 206 Iowa 1308

(3) An attorney had no lien as against the adverse party on a cash payment to a client in settlement, where notice of the lien followed payment—Hemingway v Adrian State Bank, of Adrian, Minn, supra

98. Catherwood v Morris, 196 N E. 519, 360 Ill 473.

99. **Lien attaching as soon as notice given**
A statutory lien for attorneys' services attaches without the bringing of an action, since the lien attaches as soon as notice is given.—State ex rel Richardson v. Mueller, (Mo App) 90 S W.(2d) 171.

1. Steele v. Lamb, 184 Ill App. 577.
2. Ryan v. Chicago, M., St. P. &

Analogy to assignment. Service of a notice claiming an attorney's statutory lien has the same effect as an assignment to the attorney of an interest in the judgment that may be rendered, or the proceeds of the settlement that may be made by the debtor with the client, and constitutes an assignment which the debtor must respect.[3]

f. Vacating Pending Adjudication of Right to Lien

Notice of an attorney's lien may not be vacated on motion, where there is a pending action to adjudicate the right to such a lien.

Notice of an attorney's lien may not be vacated on motion, where there is a pending action to adjudicate the right to a lien.[4]

§ 216. Time When Lien Attaches

Ordinarily, charging liens do not attach until recovery of judgment, or general liens until the proceeds of the judgment are in the hands of the attorney.

A charging lien does not usually attach until the recovery of judgment,[5] and there exists authority to the effect that an attorney's general lien does not attach until the proceeds of the action on which the claim is based are collected and in the hands of the attorney.[6] A charging lien may, however, attach prior to the recovery of judgment by reason of applicable statutes[7] or by agree-

P R Co, 259 Ill App 472 See Dreyfuss v. Freud, 209 Ill.App 345

On settlement

Notice of a lien stating that an attorney was to receive one third of the amount recovered, whereas in fact the contract provided for only twenty-five per cent recovery if settlement was made without suit, was held not to invalidate the attorney's lien for such 25 per cent of the amount received by the client on a direct settlement—Ryan v Chicago, M, St P. & P. R Co., 259 Ill App 472.

3. Cohen v Kirchheimer, (Ill App) 2 N E (2d) 592

4. Hoffstaetter v. Schinkel, 153 N Y S. 768, 168 App Div 36.

Pending action to adjudicate right to lien

Where there was pending an action between the parties to adjudicate the right to a lien of respondent, for whom another attorney had been substituted, it was held that his notice of the lien would not be vacated on motion—Hoffstaetter v. Schinkel, 153 N.Y S 768, 168 App Div 36

5. U S—Webster v Sweat, (C.C A. Miss.) 65 F.(2d) 109

Mass—Check v. Kaplan, 182 N.E. 805, 280 Mass. 170—Herbits v. Constitution Indemnity Co. of Philadelphia, 181 N E. 723, 279 Mass. 539

N.Y.—Beecher v. Peter A. Vogt Mfg. Co, 135 N E 831, 227 N Y 468, affirming 170 N Y S 1068, 184 App Div 962.

6 C J. p 775 note 67.

Recovery in favor of client

An attorney's lien cannot attach until some recovery is had for the client—Lewis v. Canadian Pac. Ry Co., (C C A Ill) 39 F (2d) 834, certiorari denied 51 S Ct. 76, 282 U.S 869, 75 L Ed 768.

Death of attorney prior to completion of cases

Where a lawyer died before full performance of a contract with a client involving contingent fees, a lien for compensation to the extent deceased performed services arose in favor of the estate on successful completion of the cases—Mulqueen v Commissioner of Internal Revenue, (C C.A.) 65 F (2d) 365, certiorari denied 54 S Ct. 62, 290 U S 644, 78 L Ed 559

6. Finkelstein v. Roberts, (Tex Civ App.) 220 S W. 401, dismissed for want of jurisdiction.

7. In re Heinsheimer, 108 N E 636, 214 N Y. 361, Ann Cas.1916E 384, modifying 149 N Y S. 631, 164 App Div 265—Application of H. C Roberts Electric Supply Co, 226 N Y.S 211, 131 Misc 119.

Time notice is given

There exists authority to the effect that an attorney's lien conferred by statute attaches at the time notice of such lien is given—Patrick v. Leach, (C C Neb) 12 F 661, 2 McCrary 635—Ward v Sherbondy, 65 N W. 413, 96 Iowa 477—Day v. Larsen, 47 P. 101, 30 Or 247.

Filing lien

The lien of an attorney has been held to attach from the time of the filing of his lien—Jacobsen v. Miller, 198 N.W. 349, 50 N.D. 828, 34 A L R. 317.

Commencement of action or filing of pleading

(1) Under statutes providing that attorneys shall have charging liens on the causes of action or counterclaims of their clients, a charging lien may attach from the commencement of the action or from the filing of an answer containing a counterclaim, depending on whether the attorney claiming such lien acts on behalf of plaintiff, petitioner, or complainant on the one hand or defendant or respondent on the other—Devine v. Pyanhunkah, 39 P.(2d) 132, 170 Okl 178—6 C.J p 779 notes 31, 32.

(2) Accordingly, it has been held that the statutory lien of the attorney for the party who sues exists from the institution of the suit or proceeding—Midland Valley R. Co. v Johnson, 215 S W. 665, 140 Ark. 174, 7 A L R 1007—Steuart v D'Esterre, 170 N.Y S 936, affirmed Steuart v D'Esterre, 174 N Y S 922, 187 App Div. 935—Smith v. First Nat. Bank, 170 N Y S. 127, 103 Misc 274, modified on other grounds 173 N Y S. 595, 184 App Div. 719—Mack v. Hugger Bros Const. Co., 10 Tenn.App. 102—6 C J p 775 note 68.

(3) Hence, under Comp L.(1907) § 135, as to attorney's lien, an attorney has a lien on a cause of action, not from the time when employed, but "from the commencement of an action."—Broadbent v. Denver & R G. Ry. Co, 160 P. 1185, 48 Utah 598.

(4) Moreover, it has been held that the lien of an attorney, on a suit given by Code (1907) § 3011, attaches on the filing of the client's complaint, although service of the summons has not been perfected such filing being, under §§ 3092, 4853, commencement of the suit—Alabama Fuel & Iron Co. v. Denson, 94 So. 311, 208 Ala. 337.

(5) Similarly, the lien of an attorney at law on his client's cause of action attaches, under Crawford & M Dig § 628, when complaint is filed and summons issued, "commencement of action" in such section being used in the sense defined by § 1049, which applies without exception to all civil cases—Union Sawmill Co v. Pace, Campbell & Davis, 260 S W. 428, 163 Ark. 598.

(6) Further, under Rev Codes § 6422, declaring that an attorney's lien attaches in favor of counsel for plaintiff from the commencement of the action, an attorney can assert his lien, prior to judgment or settlement, independently of his client.—Walsh v. Hoskins, 162 P. 960, 53 Mont. 198.

(7) Where an attorney instituting a suit to enforce a client's right has

ment[8] Under other statutes an attorney's lien on a judgment is not effective until the judgment has been perfected by entry in the judgment docket.[9] At any rate, where a statute confers a lien on claims and demands, the lien exists during the preliminary stages and before suit or action is brought[10]

A contingent judgment will not be subject to the lien until the contingency is satisfied[11]

§ 217. Duration and Termination of Lien in General

A retaining lien exists as long as the attorney retains possession of the subject matter Otherwise an attorney's lien for compensation generally exists until satisfied or released

Where possession of the res impressed with an attorney's lien is essential to the existence thereof (supra § 210), such lien may continue to exist so long as the attorney retains possession of such res[12] Otherwise an attorney's lien for compensation generally continues to exist until satisfied or released[13] The lien likewise survives where the judgment becomes dormant and is subsequently revived by other attorneys.[14]

Appeal. Although there exists authority to the effect that an attorney's lien is not superseded by an appeal,[15] and this particularly where the appeal does not operate to vacate the judgment,[16] there exists other authority to the effect that an appeal from a judgment suspends the lien.[17] Similarly it has been held that an attorney's lien which arises in the original action may survive the reversal of judgment under some circumstances,[18] while there

a lien on a cause of action from the commencement of the action, he is not restricted to the cause of action in so far only as it may be enforced in a court, but the lien exists even when the cause of action is prosecuted by private negotiation —Universal Oil Products Co v Standard Oil Co. of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C A) German v Universal Oil Products Co, 77 F (2d) 70

(8) Gen.St (1913) § 4955 subd 3, providing that an attorney shall have a lien for his compensation on the cause of action from the time of the service of the summons therein, applies to an action in tort as well as to an action on the contract —Kubu v Kabes, 172 N W 496, 142 Minn 433

(9) Attorneys have liens for services on property recovered which are not perfect on the property until after recovery, but are perfect at once on suit —Byrd v Clark, 153 S E 737, 170 Ga 669, rehearing denied 154 S E 881, 170 Ga 912

(10) Attorney's statutory lien arises on his employment and is perfected by ultimate recovery of judgment for his client —Molloy v. Hubbard, 173 S E 877, 48 Ga App 820 Validity of statute giving lien from time summons is served see supra § 208

8. Lewis v Braun, 191 N E 56, 356 Ill 467—6 C J p 775 note 66

Contract held to create present lien

A contract of an attorney and a client for a contingent fee imposed on the recovery of certain money or things creates, by implication, a present lien on the existing res for the security of the attorney —Lewis v Braun, 191 N.E 56, 356 Ill. 467

Prior to recovery against corporation

A contract of an attorney to secure transfer of stock certificates to his client and to collect dividends declared on the stock for contingent fee created an equitable lien of the attorney on the stock certificates before recovery against corporation — Lewis v. Braun, 191 N.E 56, 356 Ill 467.

9. Grimes Sav Bank v. McHarg, 251 N W. 51, 217 Iowa 636

Equitable assignment

An attorney's lien for services on a judgment recovered for his client operates as an equitable assignment to the attorney of interest in the judgment from the time the lien is perfected by entry in the judgment docket in which the judgment is entered —Grimes Sav Bank v. McHarg, 251 N W 51, 217 Iowa 636.

10. Anderson v Baker, 175 Ill App. 254, affirmed 101 N.E. 587, 258 Ill. 418.

11. Usry v. Usry, 64 Ga. 579.

12. Abernethy v. Savage, 141 So 329, 163 Miss 789

Funds

Attorney's lien applies so long as attorney has funds recovered in his possession —Abernethy v. Savage, 141 So 329, 163 Miss 789

Money on deposit in bank

Where money recovered by attorney for client was deposited in bank to credit of client on condition that no check on deposit would be good until countersigned by attorney, the fund was in the possession of the attorney as regards the right to a lien —Abernethy v Savage, 141 So 329, 163 Miss 789

Loss of lien by relinquishment of possession see infra § 224

13. Byram v Miner, (C C A Minn) 47 F (2d) 112, certiorari denied 51 S Ct 648, 283 U S. 854, 75 L.Ed 1461—6 C J. p 775 note 72.

Retaining lien

Retaining lien of attorneys on papers of client coming into their possession continues until bill for services is fully paid —In re Makames, 265 N Y S. 515, 238 App Div. 534, reversing 265 N.Y S. 511, 148 Misc 759

Charging lien

Attorney's charging lien, attaching to realty as proceeds of judgment procured for client, remains a lien until paid or discharged, or until the property passes to an innocent purchaser without notice, or unless a ten-year presumption of payment arises —Miller v. Monroe, 300 P 362, 50 Idaho 726.

14. Jenkins v Stephens, 60 Ga. 216

Motion to strike properly overruled

Where, after recovery of judgment by a receiver and substitution of new receiver and attorney, the attorneys for the first receiver filed a lien on the judgment, a motion to strike the lien for invalidity was properly overruled where all parties affected by the judgment were not before the court.—State v. Superior Court for King County, 154 P. 603, 89 Wash 342.

15. Barthels v. Garrels, 227 S.W 910, 206 Mo.App 199.

Appeal without bond

The lien of plaintiff's attorneys on the judgment rendered for the amount of their contingent fee was not superseded by defendant's appeal without bond —Barthels v. Garrels, 227 S W. 910, 206 Mo App 199

16. Covington v. Bass, 12 S W. 1033 88 Tenn 496

17. Ky —Bell v Wood, 7 Ky L 516 N Y —Pulver v. Harris, 52 N Y 73— Sweet v Bartlett, 6 N Y Super 661 6 C J p 775 note 78

18. Bouchey v. Gillilan, 26 P.(2d) 451, 138 Kan. 404.

also exists authority to the effect that a reversal of the judgment annuls the lien.[19]

Death or disability of attorney or client. An attorney's lien, being a contractual right, ordinarily survives the death or disability of the client[20] or of the attorney,[21] provided it attached previous to such death or disability.[22] However, the lien of an attorney for services in a suit for personal injuries does not survive the death of the injured person so as to be impressed on the proceeds of an action brought to recover for such death.[23]

Merger of lien into judgment. The lien of an attorney on a fund produced by his services may be terminated by the merger of such lien in a judgment rendered for the attorney claiming the lien.[24]

Appointment of receiver. The appointment of a receiver to take charge of the assets of a client does not terminate his attorney's lien for services.[25]

Termination of client's interest in subject matter Inasmuch as an attorney's retaining lien cannot extend beyond the interest of the client in the subject matter (§ 210), when the interest of the client terminates, of necessity the lien of the attorney terminates.[26]

Termination of supporting contract. Under particular statutory provisions it has been held that an attorney's lien may terminate with the contract on which such lien is based.[27]

§ 218. Waiver, Loss, or Discharge in General

An attorney's lien may be waived or lost, as under circumstances set forth hereunder.

If an attorney agrees to a waiver, either expressly or by some act inconsistent with the existence of the lien, his lien is lost.[28] Accordingly the lien may be lost by failure to assert it in the prop-

Judgment for same amount on partial new trial

Where, after attorney, obtaining a judgment for his client, had perfected lien for fee, the judgment was reversed, but at a subsequent partial new trial judgment was again recovered for the same amount, the attorney's lien continued to exist from time notice of lien was first given—Bouchey v Gillilan, 26 P (2d) 451, 138 Kan 404

19. Ky.—Skaggs v. Hines, 5 Ky L 106.
Me—Dunlap v Burnham, 38 Me 112

20. In re Levine's Estate, 278 N.Y S 36, 154 Misc. 700, affirmed 286 N.Y S 513, 247 App.Div. 19—6 C.J. p 775 note 73.

Death of client before judgment

Death of deceased before his attorneys obtained judgment did not affect their attorneys' lien which came into existence when special proceedings in customs court were instituted by them for deceased—In re Levine's Estate, 278 N.Y S. 36, 154 Misc 700, affirmed 286 N Y S. 513, 247 App Div. 19.

In action for wrongful death

Where a decedent's widow, as administratrix, brought action for his wrongful death, her share in the recovery vested at the time of his death, and an attorney's lien on the widow's share for services in prosecuting the action was unaffected by her subsequent death—Yocus v Southern Pac Co., 199 N.Y.S 116, 120 Misc 554, affirmed 201 N Y S 959, 207 App Div. 836, and 202 N.Y. S. 959, 208 App Div 709.

Insanity of client

The appointment of a guardian or administrator for an insane client does not divest the attorney of any lien or security which he at the time had to secure him in the amount due—State v. Second Judicial Dist. Ct., 75 P 516, 30 Mont. 8

21. Lawson v. Missouri, etc., Tel Co., 164 S W. 138, 178 Mo.App. 124

22. Matter of Robbins, 112 N Y S 1032, 61 Misc. 114, affirmed 116 N Y S. 1146, 132 App Div 905.

23. In re Madison's Estate, 270 N Y S. 621, 151 Misc 85

Substitution of decedent's attorney

Attorney retained by decedent to prosecute a personal injury action and substituted under stipulation reserving right to share in the proceeds of the action had no lien on proceeds of action brought by administratrix of decedent for his wrongful death arising from the same injury, since the lien terminated on the death of decedent and the action for wrongful death was independent of the personal injury action—In re Madison's Estate, 270 N Y.S 621, 151 Misc 85.

24. B.——— v. Emmett, 22 Ohio N P (N S) 425

25. Bowling Green Sav. Bank v Todd, 64 Barb. 146, affirmed 52 N Y. 489

Receiver of mortgagee

The appointment of a receiver of a mortgagee pending foreclosure proceedings does not affect the attorney's lien for services in the foreclosure process.—Bowling Green Sav Bank v. Todd, 64 Barb. 146, affirmed 52 N Y 489

26. Jackson v American Cigar Box Co., 126 N Y S. 58, 141 App Div 195.

27. Jennings v. Canady, (C.C.A Okl.) 13 F (2d) 356, certiorari denied 47 S Ct. 239, 273 U S. 728, 71 L Ed. 862.

On ward's attaining majority

Attorney's lien under Okl Comp St (1921) § 4100, based on contract of employment with guardian, does not attach after infant's reaching majority and compromising action since the contract had ended, and the lien ceased when the contract ended—Jennings v Canady, (C C A Okl) 13 F (2d) 356, certiorari denied 47 S Ct 239, 273 U S 728, 71 L Ed 862

28. Old Colony Trust Co v. National Non-Theatrical Motion Picture Bureau, 174 N E 723, 274 Mass. 377—6 C J p 776 note 86

Written consent not required

An attorney may waive or abandon his claim in other ways than by executing a written consent—Griffith v Walesby, (Mo App) 91 S W. (2d) 232

As regards benefits of lien statute

(1) Attorney may waive benefits of lien statute, and, when waived, attorney is estopped from asserting claim—Wolf v. Shulz Folding Box Co., (Mo App) 44 S W (2d) 866

(2) A statute providing for an attorney's lien is solely for the protection of the attorney, and he may waive the benefits of the statute, but cannot be deprived thereof without his consent.—McDougal v. Black Panther Oil & Gas Co., (C.C.A Okl.) 277 F. 701

Accepting assignment from client

(1) Where a judgment creditor, having obtained execution, assigned such claim to his attorney for legal services, the attorney's acceptance thereof was a waiver of lien for expenses and fees.—Old Colony Trust Co. v National Non-Theatrical Motion Picture Bureau, 174 N E 723, 274 Mass. 377.

(2) Where an attorney, otherwise entitled to a charging lien on a judg-

er way,[29] or within a reasonable time.[30] There must, however, exist some element either of a waiver or of an intention to waive.[31] Moreover an attorney's lien may not be superseded by the right of a third person to be subrogated to the rights of the client for certain purposes.[32] Nor is such lien lost or destroyed while the property or money of a client remains in the hands, or under the con-

ment recovered, takes an assignment to himself of the entire judgment, he abandons or waives the lien—Jernigan Bros. v. Hart, 202 S W 68, 139 Tenn. 515

Assisting in drafting contract of sale

Even if an attorney for the alleged bankrupt was entitled to a lien on the estate assets for his services, his right thereto was defeated by a contract for the purchase of all the assets of the alleged bankrupt, made with the assistance of the attorney, which expressly stated the sale was to be free and clear of all debts, and in which the attorney made no attempt to preserve his lien—In re Exposition Catering Co, (C C A N Y) 285 F. 328.

Acquiescence in purchase by client

Attorney's lien on judgment in foreclosure is waived where he permits his client to purchase the property, and court without objection confirms the sale and approves the deed to client, and the attorney's lien does not follow the land—Prichard v. Fulmer, 159 P. 39, 22 N. M 134, 2 A L R 474

Waiver to extent of mortgagee's indebtedness

Mortgagee's attorney, agreeing to foreclose without expense to assignee of mortgagee, waived a lien on the mortgage to the extent of the mortgagee's indebtedness to the assignee, retaining a lien on the balance—Progressive Merchants' Co v Elkat Realty Co., 244 N.Y S 17, 136 Misc 682.

Bringing suit on third person's promise

Attorneys, by bringing suit on client's contract with third parties, requiring third parties to pay attorney's fees, accepted the contract and waived the right to the lien provided for by the statute—McDougal v Black Panther Oil & Gas Co, (C.C A Okl) 277 F. 701.

Consenting to appointment of receiver

Stockholder of corporation stipulating for appointment of trustee to collect its assets, without reserving his lien as attorney for collecting claim given by Remington & B. Code § 136, was held to have waived his right thereto—Jensen v. Kohler, 159 P. 978, 93 Wash. 8.

Loss of retaining lien by attempt at assignment see supra § 212.

29. Williams v. New England Securities Co, 278 S W 961, 170 Ark 139—6 C J. p 776 note 88

Proctor, if he ever had a maritime lien for fee, lost it by failure to present and prove it before the commissioner—Gray v Hopkins-Carter Hardware Co, (C C A Fla) 32 F (2d) 876

30. Williams v New England Securities Co, 278 S W 961, 170 Ark 139—6 C J p 776 note 89.

31. In re King, 60 N E 1054, 168 N Y 53, modifying 70 N Y S 356, 61 App Div 152—6 C J. p 776 note 87.

With respect to bankrupt estate or proceeding

(1) Attorney filing a claim for the amount of a note in bankruptcy proceeding and attaching note does not release the lien on the note or proceeds thereof—State v Dyer, 259 P 212, 126 Okl 260

(2) Attorneys' deducting fees from dividend of bankrupt estate paid on a note and remitting remainder to client is not a conversion releasing his lien—State v. Dyer, supra.

Promise by client to pay fee already due

Attorney's lien is not lost by the client's unkept promise to pay the fee already due by crediting attorney's note—Hansbrough v D W Standrod & Co, 249 P 897, 43 Idaho 119

Advancement of costs and loans

That an attorney advanced the costs of commencing suit with the expectation of being reimbursed and the making of loans to the client out of sympathy and to prevent his being forced to make an inadequate settlement was held not to forfeit the attorney's lien—Ryan v. Pennsylvania R Co, 268 Ill App 364

Refusal to proceed until reimbursed or payments made

Attorney waives no rights by refusal to proceed until reimbursed for necessary disbursements in preparation for trial, or, if not on contingency, till reasonable payments are made on account of services rendered—Marshall v Romano, 158 A 751, 10 N J Misc 113

Substitution of attorneys

(1) Attorneys did not lose their attorneys' lien because of substitution of new attorney in their stead with the client's consent—In re Burroughs & Brown, 263 N.Y S 772, 239 App Div. 794.

(2) Where, during the pendency of an action, an order substituting attorneys was made, all duty and obligation of the withdrawn attorney as to the cause was terminated, and anything he did thereafter did not constitute an abandonment, so as to affect the lien provided for in the order—Yocus v Southern Pac Co, 199 N Y S 116, 120 Misc. 554, affirmed 201 N Y S 959, 207 App Div 836, and 202 N Y S 959, 208 App Div 709

Acquiring possession of money deposited in escrow

Attorney's acquiring of possession of money deposited in escrow on a settlement to cover an attorney's lien, without notice to client, was held not to constitute a conversion waiving such lien—Johnson v Mound City State Bank, 237 N.W 891, 58 S D 622.

Failure to obtain relief specifically sought

Failure of an attorney to obtain the relief specifically sought in a suit in equity, and the necessity of his taking alternative relief, under the prayer for general relief, do not deprive him of his right to a lien on the decree actually obtained—Brown v Erwin, 108 S E. 605, 89 W Va 113.

Paying proceeds of judgment to associate

That one attorney receiving proceeds of judgment paid it over to another attorney, who was his associate, did not, as contended by a judgment creditor of client, have the effect of placing it beyond the reach of any lien that the attorneys might have on the fund for services rendered—Smith v. Keener, 113 A. 912, 270 Pa. 578.

Delivering subject matter under court order

An attorney having a retaining lien on certain books and papers of a client is not deemed to have waived his lien or rights to such subject matter because he delivers up the same on order of court for the temporary purpose of assisting the client to make his defense in a murder prosecution—In re Hauptmann, 277 N Y S. 631, 243 App Div. 616, modifying Hauptmann v. Fawcett, 276 N Y. S. 523, 243 App Div. 613.

32. Branch & Howard v. Georgia Casualty Co., 147 S.E. 144, 39 Ga App 319.

On payment of workmen's compensation

Attorney's lien is not superseded by the right of a person paying compensation to collect compensation from a fund recovered by an employee against a tort-feasor.—Branch & Howard v. Georgia Casualty Co, 147 S E. 144, 39 Ga App. 319.

trol, of the attorney.[33] Further, an attorney's lien is not lost by reason of the fraudulent act of one other than the attorney.[34] Nor is such lien lost where the action, in which the attorney's services have been rendered, is dismissed at the request of his client and another action is brought by other attorneys in another court.[35] Further the purchase of a judgment procured by an attorney cannot be made the instrument of depriving such attorney of a lien to which he is rightfully entitled.[36] An attorney's lien may, however, be discharged after payment of the amount of such lien into court.[37]

As affected by statute of limitations. The lien on the judgment is destroyed when an attorney's claim for services is barred by the statute of limitations.[38] The statute does not, however, run against an attorney's bill for fees until the dissolution of the relation between him and his client.[39]

§ 219. Discharge of Attorney

The lien of an attorney is not lost by his discharge.

A client cannot, by discharging an attorney, deprive him of his lien, unless the discharge is for good cause.[40]

§ 220. Withdrawal by Attorney

Although the voluntary withdrawal of an attorney does not destroy his retaining lien, whether a charging lien is lost may depend on whether the withdrawal was for good cause.

An attorney who withdraws from a suit without cause loses his inchoate right to a lien on the ultimate recovery,[41] although an existing lien on papers is preserved.[42] But where an attorney is

33. State v. Dyer, 259 P. 212, 126 Okl 260

Control of attorney's agent

The general possessory or retaining lien of an attorney on the property or money of his client is not lost while the money is under the control of the attorney's agent—American Nat. Bank of Stigler v Funk, 172 P. 1078, 68 Okl 169, L R.A 1918F 1137.

Payment by client and application by attorney

An attorney's lien on the printed cases on appeal and other papers is not discharged by the client merely making a payment on account of disbursements and by the attorney applying that amount to the expense of printing the cases—In re Hollins, 90 N.E. 997, 197 N.Y. 361, reversing 120 N.Y.S. 1113, 136 App Div. 929.

34. Neb—Blatchford v. Palmer, 241 N.W. 757, 123 Neb. 8

N.Y—In re Sebring, 264 N.Y.S 379, 238 App Div. 281.

Fraud of one owning property subject to lien

Retaining lien of attorney cannot be defeated by fraud of owner of property to which lien attaches—In re Sebring, 264 N.Y.S. 379, 238 App Div. 281

Release obtained by fraud

Purported release of an attorney's lien, when obtained by fraud and without consideration, is held not to defeat the attorney's lien.—Blatchford v. Palmer, 241 N.W. 757, 123 Neb 8.

35. Gibson v. Chicago, M. & St P Ry Co, 98 N.W. 474, 122 Iowa 565

If a proper notice has been given, an attorney has a lien for services actually rendered in a case which has thereafter been dismissed at the request of the client, and this is so notwithstanding a recovery is secured as the result of another action brought by other attorneys, and in a different court—Gibson v Chicago, etc, R Co, 98 N.W 474, 122 Iowa 565

36. Hogue v Sparks, 225 S.W. 291, 146 Ark. 174

Officer of corporation purchasing judgment

While an officer of a corporation to which a judgment debtor had conveyed property may purchase the judgment in good faith to protect the corporation against a claim of fraudulent conveyance, he cannot make such purchase for the purpose of so handling the litigation to enforce the judgment as to prevent the attorney for the judgment creditor from collecting the portion of the judgment to which he is entitled—Hogue v. Sparks, 225 S.W 291, 146 Ark. 174

37. Application of H C Roberts Electric Supply Co., 226 N.Y.S 211, 131 Misc. 119

Refusal to accept payment

On an attorney's refusing to accept payment of his lien for services, the court may direct payment of the amount of such lien into court and may thereby discharge such lien—Application of H C Roberts Electric Supply Co, 226 N.Y.S 211, 131 Misc 119

38. Reavy v. Clark, 9 N.Y.S 216, 18 N.Y Civ Proc 272.

39. Lichty v. Hugus, 55 Pa. 434.

40. U.S—Woodbury v. Andrew Jergens Co., (C.C.A N.Y.) 69 F.(2d) 49.

Ill—Cohen v. Kirchheimer, (App.) 2 N.E.(2d) 592—Tulka v. Chicago City Ry. Co, 259 Ill App 234

N.Y.—In re Levine's Estate, 278 N.Y.S 36, 154 Misc. 700, affirmed 286 N.Y.S. 513, 247 App Div. 19.

6 C.J. p 775 note 81

Neither lien lost nor assignment annulled

Client's discharge of his attorneys without cause does not annul assignment of part of his claim in consideration of services theretofore rendered, nor deprive attorneys of their lien for such services—In re Board of Water Supply of City of New York, 167 N.Y.S 531, 179 App Div. 877.

Conduct of client not depriving attorneys of lien

Owner of claims filed through plaintiffs as his attorneys, who has assigned them part of his claims for services, cannot, by discharging them, consolidating the claims under another number, and obtaining order, without plaintiffs' knowledge, dismissing claims filed by them, deprive them of their lien—In re Board of Water Supply of City of New York, 167 N.Y.S 531, 179 App Div. 877.

Both general and charging liens survive discharge

Discharged attorney has a general lien for a balance of account for services on his client's papers or securities, or moneys in his possession, and charging lien on client's cause of action—In re Badger, (C.C.A.N.Y.) 9 F.(2d) 560—Robinson v. Rogers, 143 N.E. 647, 237 N.Y. 467, reversing Robinson v Ferguson, 201 N.Y.S 941, 207 App Div. 802, and motion denied 143 N.E. 728, 237 N.Y. 525.

41. Eisenberg v. Brand, 259 N.Y.S 57, 144 Misc. 878—6 C.J. p 776 note 83

Demand for new counsel and withdrawal

Attorney's conduct in demanding that client get new counsel and in withdrawing from case himself was held to work a forfeiture of the attorney's lien—Eisenberg v. Brand, 259 N.Y.S. 57, 144 Misc. 878.

42. Hektograph Co. v. Fourl, (C.C. N.Y.) 11 F. 844.

justified in refusing to continue in a case, he does not forfeit his lien for services already rendered.[43]

§ 221. Satisfaction and Release of Judgment

Satisfaction and release of judgment may under circumstances referred to hereunder operate to discharge an attorney's lien

An attorney waives his lien by releasing the lien of the judgment on which it exists,[44] or by procuring satisfaction of such judgment.[45] So, where he consents to the payment of the judgment to his client, he thereby waives his lien,[46] but the lien of an attorney cannot be discharged by a release of the judgment by the client.[47] Moreover, under appropriate statutory provisions the lien of an attorney may survive satisfaction of his client's judgment.[48] Although there exists authority to the effect that payment of a judgment to one of several attorneys jointly employed operates to extinguish their lien for services,[49] there also exists authority to the effect that the payment of a judgment to a co-attorney will not operate to defeat the lien of the principal attorney thereon,[50] unless such co-attorney was his agent to receive payment.[51]

§ 222. Taking Security

The lien of an attorney may be lost by his taking of security under circumstances referred to hereunder.

The right to pursue and claim the benefit of the lien may be waived by taking, or agreeing to take, other security,[52] or by accepting payment under security previously given.[53] The acceptance by an attorney of his client's note in payment of his fee may not, however, constitute a waiver of the attorney's statutory lien,[54] unless it appears that the note was accepted in discharge of the obligation.[55] Moreover a mortgage given to an attorney as additional security for fees may not estop him from asserting his lien.[56] Further, that an attorney takes an assignment of stock may not operate to deprive him of his lien for services in connection with such stock.[57]

Bond. In some jurisdictions it is provided that

43. In re Dunn, 98 N E 914, 205 N Y 398, Ann Cas 1913E 536, modifying 125 N Y S 1118, 110 App Div 944—6 C J p 776 note 85

44. Holbrook v McKee, 266 P 187, 147 Wash 386—6 C J p 776 note 93

45. Holbrook v McKee, supra—6 C J p 776 note 94

Presence and participation in satisfaction of judgment

Attorney present in case and participating in the satisfaction of a judgment was held to have waived his lien—Holbrook v. McKee, 266 P 187, 147 Wash. 386

46. Iowa—Barnabee v Holmes, 88 N W 1098, 115 Iowa 581
N Y—Goodrich v. McDonald, 19 N E 649, 112 N Y. 157.
6 C J p 776 note 95

47. Shanklin v Manville, 184 P. 983, 105 Kan 457—6 C J p 776 note 96

On payment of judgment

Where a judgment debtor and creditor went to the clerk of a court in which the judgment had been rendered and debtor paid costs and his money to amount of judgment was taken and retained by creditor, who executed a full release on the record, though the attorneys, had a lien on the judgment for fees in obtaining it, the judgment debtor did not relieve himself from the lien, because the clerk did not receive the money so as to render applicable a rule that payment of a judgment to such clerk releases the judgment debtor from all liability including the judgment creditor's attorney's lien, and the judgment debtor was a party to the act preventing an application of part of money to the lien—Shanklin v Manville, 184 P. 983, 105 Kan 457

48. English v Jenks, 169 P. 727, 54 Mont 295

Distinguished from common-law rule

At common law, attorney's lien on judgment secured for client ends when judgment is satisfied, but, under Rev Codes § 6422, the lien extends to the proceeds of judgment, "in whose ever hands they may come"—English v Jenks, 169 P. 727, 54 Mont. 295

49. Lake v. Wilson, 35 S W (2d) 597, 183 Ark 180, Id., 38 S W (2d) 25, 183 Ark 180

Payment to one of attorneys of record

Payment of the fee to one of the attorneys of record will discharge the client and the party recovered from as to all liability, on a charging lien even though formal notice of lien is served upon them—Schiefer v Freygang, 125 N Y S 1037, 141 App Div. 236

50. Ala—Fuller v Clemmons, 48 So 101, 158 Ala 340
Mo—Lawson v Missouri, etc, Tel. Co, 164 S W 138, 178 Mo App 124

51. Compher v Missouri, etc, Tel. Co, 119 S W. 493, 137 Mo App 89—Thompson v Missouri, etc, R Co., 113 S W 1142, 134 Mo App. 591.

52. Stearns v. Wollenberg, 92 P. 1079, 51 Or. 88, 14 L R A (N S) 1095—6 C J p 777 note 99.

53. Orwig v. Dixon, 247 P. 47, 121 Okl. 36.

Payment of mortgage as estoppel

Where an attorney, with a lien for services on an entire tract of land, has a mortgage for additional consideration on a portion of the same tract, and a third party pays him the mortgage indebtedness under an agreement that it discharges all liens and claims against land, the attorney is estopped from setting up his former lien against the land—Orwig v. Dixon, 247 P. 47, 121 Okl 36.

54. Ga—Davis v. Jackson, 12 S E 299, 86 Ga 138.
Miss—Pope v. Armstrong, 11 Miss 214.
N J—Johnson v. Johnson R. Signal Co, 40 A 193, 57 N J Eq. 79.
W Va—Renick v. Ludington, 16 W Va 378.

55. Ga—Walker v O'Neill Mfg Co, 58 S E. 475, 128 Ga. 331.
N H—Dennett v. Cutts, 11 N H. 163
6 C J. p 777 note 2.

56. Faulk v. Wise, 166 So. 47, 231 Ala 535.

As against prior mortgagee not changing position

Execution of mortgage to attorneys, who had valid statutory attorneys' lien, on land as additional security for their fees, was held not to amount to a waiver of a lien or to estop attorneys from claiming lien as against prior mortgagee, who did not thereby change his position—Faulk v. Wise, 166 So 47, 231 Ala 535

57. Savic v. Kramlich, 12 P.(2d) 260, 52 Idaho 156.

In procuring issuance of stock

Attorney taking assignment of

any person interested may release an attorney's lien by executing a bond in a sum double the amount claimed, payable to the attorney, with security to be approved by the clerk.[58] The giving of such a bond releases the lien, and the court may not properly deny or limit its effect to that end.[59]

§ 223. Suit for Compensation

By suing a client on a claim for services and recovery of judgment an attorney waives his lien as to the client although the lien may thereafter be enforced against the adverse party.

As a rule an attorney waives his lien by suing his client on his claim for services, and recovering judgment.[60] But it has been held that, after judgment against a client, an attorney may still enforce his lien as against the adverse party.[61]

Suit on other claims. An attorney's lien is not lost by suing a client on other claims.[62]

§ 224. Relinquishment of Possession

An attorney who voluntarily relinquishes possession of the subject matter of a retaining lien loses the same, although such lien may not be lost when possession is delivered for a special purpose.

As a possessory or retaining lien depends upon possession, it will be lost if possession is voluntarily relinquished.[63] Thus by turning over to his client the full sum collected an attorney waives his lien thereon,[64] although he retains the debt secured by that lien.[65] So where an attorney pays over a balance, over and above the amount claimed for fees, his lien attaches only to the amount retained.[66] But where the delivery is to the client for a temporary or special purpose,[67] or to a receiver of the client under order of court,[68] the lien is preserved.

§ 225. Subject Matter of Retaining Lien

Papers, securities, or other property delivered to an attorney by a client in the course of the attorney's professional employment may constitute the subject matter of a retaining lien.

Ordinarily papers, securities, or other property delivered to an attorney by his client in the course of, and with reference to, such attorney's professional employment may constitute the subject matter of a retaining lien.[69] More specifically the retaining lien includes ordinary legal documents of

stock to secure his fee for procuring issuance of stock certificate did not lose his statutory lien—Savic v Kramlich, 12 P (2d) 260, 52 Idaho 156

58. Mosteller v Holborn, 114 N W. 698, 21 S D 547—6 C J p 777 note 4

59. Jamison v. Ranck, 119 N W. 76, 140 Iowa 635.

60. Wipfler v Warren, 128 N W 178, 163 Mich. 189—6 C J p 777 note 6

61. Hubbard v Ellithorpe, 112 N W. 796, 135 Iowa 259, 124 Am.S R 271—6 C J. p 777 note 7.

62. Commercial Telegram Co. v. Smith, 10 N Y S 433, 57 Hun 176, 19 N Y Civ Proc 32—6 C J. p 777 note 8

63. Ky—Rice v. Kelly, 10 S W.(2d) 1112, 226 Ky. 347
N Y—McNally v. Youngs, 262 N Y S 828, 237 App Div 787, appeal dismissed 188 N E 49, 262 N Y. 526
6 C J. p 777 note 9

In absence of contrary statute or agreement

Essence of attorney's retaining lien is retention of possession, and relinquishment thereof would terminate lien, in the absence of statute or agreement of parties to the contrary.—Marshall v. Romano, 158 A. 751, 10 N J Misc. 113.

Surrender of notes and stock

Attorney's lien on notes given client and stock assigned to it as collateral was held lost as to notes but not as to the stock by surrender of both with his consent and issuance of certificates for same stock direct to client—Hansbrough v. D W Standrod & Co, 249 P 897, 43 Idaho 119

Filing papers to procure judgment

Where attorney files papers in his possession in court for the purpose of procuring judgment he surrenders his right to a possessory lien—Reynolds v. Warner, 258 N W. 462, 128 Neb 304, 97 A L R 1128

64. German v. Browne, 34 So 985, 137 Ala 429

Avails of litigation

Solicitor voluntarily turning over avails of litigation to client waives claim to attorney's lien.—McCarthy v McCarthy, 174 A. 751, 117 N J Eq 22

65. Davis v. Farwell, 67 A. 129, 80 Vt. 166

66. Wolfe v Mack, 142 N Y S. 433, 81 Misc. 185

67. Clark v. O'Donnell, 187 P 534, 68 Colo 279—6 C J p 777 note 14

Relinquishment of stock certificate to trustee

Where plaintiff recovered for his client seven hundred thousand shares of stock, which was represented by a certificate placed in the registry of the court and delivered to the attorney, on payment by his client, and others who became interested with him in the stock, of a certain sum of money, he did not lose his lien on his client's interest in the certificate of stock by parting with possession thereof and sending it to a trustee, who was to hold it for the benefit of his client and the other interested persons, where he notified such trustee, at the time of parting with possession of the certificate of stock, of his claim of lien on his client's interest for services rendered in recovering the stock.—Clark v O'Donnell, 187 P. 534, 68 Colo 279.

68. Cory v Harte, 13 Daly (N.Y.) 147—6 C J. p 777 note 15.

Receiver's right to gain possession as measured by client's right

(1) Where a client himself could not procure possession of papers from his attorney in violation of the attorney's right to retain possession of such papers in order to secure payment of his fees, a receiver of such client could not obtain the property from the attorney contrary to the lien rights of the attorney—Ex parte Wilkinson, 126 So 102, 220 Ala 529

(2) Accordingly where a client was not entitled to acquire possession of his insurance policies from his attorney the client's receiver was not entitled to procure possession of such policies in violation of the lien rights of such attorney.—Ex parte Wilkinson, supra.

69. U S.—Underhill v. Jacob Doll & Sons, (C C A N Y.) 69 F (2d) 519—Webster v. Sweat, (C C A Miss.) 65 F (2d) 109—The Flush, (C C A N Y.) 277 F. 25, certiorari denied Bulk

the client in the possession of the attorney,[70] as well as notes,[71] and bonds.[72] Further, the retain-

Oil Transports v Thompson, 42 S Ct 184, 257 U S 657, 66 L Ed 421
Colo—Clark v O'Donnell, 187 P. 534, 68 Colo 279
Idaho—Miller v Monroe, 300 P 362, 50 Idaho 726
Ill—Needham v. Volva, 191 Ill App 256
Neb—Reynolds v Warner, 258 N W 462, 128 Neb 304, 97 A L R 1128
N M—Prichard v Fulmer, 159 P 39, 22 N M 134, 2 A L R 474
N Y—In re Makames, 205 N Y S 515, 238 App Div 534, reversing 265 N Y S 511, 148 Misc 759—Bloom v Irving Trust Co, 272 N Y S 637, 152 Misc 50—Irish Free State v Guaranty Safe Deposit Co, 266 N Y S 8, 148 Misc 256, affirmed 271 N Y S 1071, 242 App Div 612—In re Dawson's Estate, 180 N Y S. 271, 110 Misc 472
Ohio—Newcomb v. Krueger, 178 N E 246, 36 Ohio App 469
Okl—State v Dyer, 259 P 212, 126 Okl 260—American Nat. Bank of Stigler v Funk, 172 P 1078, 68 Okl 169, L R A 1918F 1137
Pa—Appeal of Harris, 186 A. 92, 323 Pa 124
6 C J p 784 note 92.

Stock certificate

Where an attorney was employed to recover shares of capital stock of a corporation under a contract giving the client an option to purchase, and there was a decree for plaintiff, and a certificate was issued and lodged in the registry of the court, and stood in the name of the client, who, in order to obtain the stock, entered into an agreement with other persons in order to raise the necessary money, the client and the other persons to have each a certain interest in the stock, and on payment of the money the stock was turned over to the attorney for transmission and lodgment with a trust company, the attorney had a lien on his client's interest in the certificate while in his hands—Clark v O'Donnell, 187 P. 534, 68 Colo 279

Title papers

An attorney employed to perfect title to land could retain title papers on client's refusal to pay him money expended in procuring them, under his agreement to so do—Smith v Thompson, (Tex Civ App) 233 S W 876, reversed on other grounds (Com App) Thompson v. Smith, 248 S W 1070

On substitution or discharge of attorney

(1) Upon substitution of attorneys, former attorneys were entitled to a general lien on any papers in their possession as security for payment of fee—Klein v. Acco Products, (D C N Y.) 13 F.Supp 894.

(2) Similarly an attorney who is discharged during the pendency of litigation has a retaining lien for his services on papers pertaining to such action—In re Weitling, 194 N E 401, 266 N Y 184, reversing 275 N Y S 973, 242 App Div 823

That no action or proceeding is commenced or pending is immaterial

The rule stated in the text is not affected by the fact that no action or proceeding is commenced or pending—Matter of Edward Ney Co, 99 N Y S 982, 114 App Div 467—Mathot v Triebel, 90 N Y S 903, 98 App Div 328

Necessity for actual possession

(1) Since the attorney's possession of something to which a retaining lien can attach is essential to the existence of such lien, as noted in § 210, it necessarily follows that the subject matter itself, in order to be such, must be in the actual possession of the attorney claiming such lien—Reynolds v Warner, 258 N.W 462, 128 Neb 304, 97 A L R 1128—In re Sebring, 264 N Y S 379, 238 App Div 281—In re Farmers Loan & Trust Co, 188 N.Y S 373, 196 App Div 639—Zinsser v. Zinsser, 82 Pa Super 461

(2) Accordingly an attorney has no general lien, for services rendered an executor, on estate's assets which were not in the attorney's possession—In re Cutting's Estate, 169 N Y S 205

(3) On the other hand money cannot become the subject matter of a retaining lien until such money is actually collected and paid to the attorney—Anderson v Brackeleer, 55 N Y S 721, 28 N Y Civ Proc 306

(4) Therefore a retaining lien does not extend to a judgment until the money is paid to the attorney—Anderson v Brackeleer, supra

Necessity for acquiring possession in course of professional employment

(1) In order that papers, securities, or other property delivered to an attorney may constitute the subject matter of a retaining lien it is essential that the particular subject matter come into the possession of the attorney in the course of his professional employment—Underhill v. Jacob Doll & Sons, (C C A N Y.) 69 F (2d) 519—City of Memphis v Byrne, 9 Tenn App 379—6 C J. p 770 note 11, p 785 note 93.

(2) At common law an attorney had a retaining lien on moneys belonging to his client which came into his possession in the course of his professional employment—In re Dawson's Estate, 180 N.Y S. 271, 110 Misc 472.

(3) Under New York law a general lien attaches to every species of property belonging to client and coming into attorney's possession in the course of employment—In re Pyrocolor Corporation, (D.C N Y) 46 F (2d) 554.

(4) Both at common law and under statute general or retaining lien of attorney includes all documents, property, or money for fees due in the general employ of client as well as documents, property, or money coming into the attorney's hands in a particular case in which he is representing the client—Roxana Petroleum Co of Oklahoma v. Rice, 235 P 502, 109 Okl 161

(5) Corporation's attorneys were held not entitled to retaining liens on checks, received by them after the appointment of receivers for corporation, for amounts recovered by the corporation from the debtor—Underhill v. Jacob Doll & Sons, supra.

70. Ill—Needham v. Volva, 191 Ill App 256
N Y—Progressive Merchants' Co v Elkat Realty Co, 244 N Y S. 17, 136 Misc 682.
6 C J p 785 note 97

Certificate of evidence

Attorneys were entitled to a lien on a certificate of evidence loaned them by a clerk of the court, but not surrendered, owing to nonpayment of court fees—McCracken v City of Joliet, 111 N E 131, 271 Ill 270, Ann Cas 1917D 144

Documents of corporation

Attorney's lien for services to corporation in resisting action by state to annul corporation's existence, completed before appointment of receiver, was a valid lien on documents of the corporation in his possession—People v. Community Live Poultry Corporation, 216 N Y S 302, 127 Misc 396

71. Stewart v. Flowers, 44 Miss. 513, 7 Am R. 707—6 C.J p 785 note 98

Note assigned as collateral

Where a client assigned a note to an attorney as collateral for a specified indebtedness, and not for collection, or to secure payment of fees for services rendered, there was no attorney's lien on the note for such services—Thomson v Findlater Hardware Co, 205 S.W 831, 109 Tex 235, 2 A L R 1486, answering certified questions (Civ.App) 156 S W 301.

72. Progressive Merchants' Co v Elkat Realty Co, 244 N Y S 17, 136 Misc. 682—6 C.J p 785 note 99.

Bond certificates

Attorney for certificate holders' committee was held to be entitled

ing lien includes mortgages[73] and insurance policies[74] The retaining lien extends also to property attached for the client in the progress of the suit,[75] and such lien may include money collected by the attorney.[76] A retaining lien cannot be claimed, however, on a will,[77] on documents evidencing a debt due to a client who was not actually entitled to payment thereof;[78] on papers belonging to third persons when such papers were not deposited by such persons with a client who delivers such papers into the possession of the attorney who claims the lien,[79] on land or the proceeds thereof,[80] or on public records of any kind[81] Moreover an attorney for defendant in an action involving a controversy over specific property may have no retaining lien thereon[82]

Property procured by fraud or theft. If the possession of the property was procured by fraud[83] or theft[84] no lien exists thereon.

Rights and liabilities of attorney with respect to subject matter. With respect to the subject matter of a retaining lien an attorney has merely a passive right to hold such subject matter until his claim is satisfied.[85] He is, therefore, liable for

to a retaining lien upon all bond certificates filed by committee with receivers, for the reasonable value of such attorney's services in inducing the government which issued such certificates to pay the balance thereon—Irish Free State v. Guaranty Safe Deposit Co, 266 N Y S 8, 148 Misc 256, affirmed 271 N.Y S 1071, 242 App Div. 612.

73. Progressive Merchants' Co. v. Elkat Realty Co., 244 N.Y.S. 17, 136 Misc. 682.

74. In re Luber, (D C Pa.) 261 F. 221

Fire insurance policy

Where an insured, who had suffered a loss, engaged an attorney to collect the proceeds of fire policies, delivering the policies to the attorney, the attorney has a lien on the policies for his compensation—In re Luber, (D C Pa.) 261 F. 221.

Lien on policy rather than on proceeds thereof

(1) Beneficiary's attorney, if possessed of retaining lien on policy of his possession for services, does not, by reason thereof, possess lien on proceeds of policy deposited in court by insurer pending determination of party entitled thereto, since retaining lien on policy is merely a passive right to hold the policy, and confers no right to fund represented thereby.—Modern Woodmen of America v. Cummins, 268 S W. 383, 216 Mo App. 404.

(2) A common-law lien of an attorney employed to collect an indebtedness was on the evidence of indebtedness in the hands of the attorney and not on the debt itself, and hence in an action in equity by an attorney against his client to have his lien fixed on proceeds of insurance policy, complaint did not state facts which would confer a lien, where it did not allege that the policy or other evidence, if any, was in the possession of the attorney—Cosby v. Hurst, 231 S.W. 194, 149 Ark. 11.

75. Gist v. Hanly, 33 Ark. 233.

76. Needham v. Voliva, 191 Ill App. 256—6 C J p 785 note 1

Defendant's attorney's possession of funds absent counterclaim

Even if contract retaining attorneys to defend action and special proceeding against Tonawanda Indian Nation was valid, the attorneys could assert attorney's lien only on funds coming into their possession where there was no counterclaim—In re Darch, 265 N.Y S 86, 147 Misc 336.

Money proceeds of decedent's estate

Attorneys for an administratrix, who procured her appointment as temporary administratrix and later as administratrix with will annexed and procured a surety company to furnish bond, and assisted in converting the estate of decedent into cash, has a lien on the money of the estate in the hands of such attorney—In re O'Connor's Estate, 162 N Y S 957, reversed 164 N Y S 574, 177 App Div. 616, reversing 162 N.Y.S. 957.

77. In re Bracher, 51 A. 63, 60 N.J Eq. 350—6 C.J. p 786 note 3

78. Mott v. Guardian Building & Loan Ass'n, 14 P (2d) 447, 140 Or 489

No consideration paid for debentures recovered

Attorney had no lien on debentures of building and loan association in liquidation, recovered for client who paid no consideration for the debentures—Mott v. Guardian Building & Loan Ass'n, 14 P.(2d) 447, 140 Or 489.

79. Irish Free State v. Guaranty Safe Deposit Co., 266 N Y S. 8, 148 Misc 256 affirmed 271 N Y S. 1071, 242 App Div 612

Bond certificates filed with receivers

Attorney for certificate holders' committee was not entitled to a retaining lien for services as to bond certificates filed with receivers by bondholders who did not in first instance deposit such certificates with the committee—Irish Free State v Guaranty Safe Deposit Co., 266 N Y S 8, 148 Misc 256, affirmed 271 N Y S 1071, 242 App Div. 612

80. Jacobs v. Jacobs, 131 S E 455, 100 W Va 612.

Decedent's land

Attorney employed by executor or administrator to prosecute a suit to subject realty of decedent to payment of debts of estate was held to have no retaining lien on such land or the proceeds thereof—Jacobs v Jacobs, 131 S E. 455, 100 W Va 612

81. Wright v. Cobleigh, 21 N H 331—6 C J. p 786 note 4

82. Gray v. Hopkins-Carter Hardware Co., (C C A Fla.) 32 F (2d) 876, 879

"An attorney . . . has no lien on property involved in the litigation in which he acts as attorney for party defendant."—Gray v. Hopkins-Carter Hardware Co, supra

In admiralty libel against vessel

Where a vessel was proceeded against in admiralty by a libel to enforce certain liens, and was decreed to be sold after a proctor appeared on behalf of the owner of the vessel seeking to release her, it was held that such proctor had no lien against the vessel or the proceeds of her sale for his services as attorney.—Gray v. Hopkins-Carter Hardware Co., (C C A Fla.) 32 F.(2d) 876

83. Heyward v. Maynard, 103 N.Y S. 1028, 119 App Div. 66.

84. Newton v Porter, 5 Lans. 416, affirmed 69 N Y 133, 25 Am R 152—6 C J. p 786 note 13.

85. U S—Webster v. Sweat, (C C A. Miss.) 65 F (2d) 109—Cooper v McNair, (D C Fla.) 49 F (2d) 773 Ill—Needham v. Voliva, 191 Ill App. 256

Mo—Modern Woodmen of America v Cummins, 268 S.W. 383, 216 Mo. App 404.

N.Y.—In re Sebring, 264 N Y S. 379, 238 App.Div. 231—In re Abruzzo's Estate, 249 N.Y S. 72, 139 Misc. 559.

Vt—Nason v. Addison County Trust Co., 157 A. 821, 104 Vt. 133.

6 C J. p 803 note 16.

his acts in unlawfully dealing with such subject matter as if it were his own property.[86] On the other hand he may not, as previously noted in § 158 be compelled to deliver up or permit inspection of papers on which he claims a retaining lien in the absence of good cause therefor.

§ 226. —— Property Delivered for Special Purpose

Property or funds delivered for a special purpose cannot become the subject matter of an attorney's retaining lien.

Property or funds delivered for a special purpose by a client to his attorney cannot constitute the subject matter of a retaining lien in favor of such attorney[87] For example an attorney has no lien on property placed in his hands for a special purpose under such circumstances that a trust arises which is inconsistent with, or adverse to, the claim of a lien.[88]

§ 227. —— Property Delivered in Representative Capacity

Property delivered to an attorney by a client who acts in a representative capacity may be the subject matter of a retaining lien.

An attorney may claim a lien on property belonging to an estate, placed in his hands by the representative of that estate in his representative capacity, for services rendered him in such capacity.[89]

§ 228. Subject Matter of Charging Lien

a. In general
b. With respect to particular causes of action or proceedings
c. With respect to particular interests or kinds of property

a. In General

Although the judgment recovered by an attorney's efforts is primarily the subject matter of a charging lien it is generally held that such lien extends also to the proceeds of the judgment.

The judgment, which has been procured by the efforts of an attorney while acting on behalf of his client, is, primarily, the subject matter of a charging lien in favor of such attorney.[90] However, under applicable statutes or by judicial decision it is quite generally held that a charging lien applies to both the judgment and the proceeds thereof, in whatsoever form they may assume, and in whosesoever hands they may come[91] Accordingly the effect of statutes providing that, an attor-

86. In re Brown, 165 N Y S 736, 178 App Div 558.

Fraud

An attorney's use of funds on which he had a charging lien, was held to render him guilty of conversion.—In re Brown, 165 N Y S 736, 178 App Div 558.

Effect of lien on attorney's duty to account see supra § 134.

87 La.—Ruffo v. Marcotte, 3 La App. 352, set aside on other grounds 103 So 316

N Y.—Anderson v Brackeleer, 55 N. Y S 721, 28 N Y.Civ Proc 306.

Special funds

Attorney has no lien for payment of fees on special funds given to him by client—Ruffo v Marcotte, 3 La App 352, set aside on other grounds 108 So 316

88. La.—Wuerpel v. Sinnott, 86 So. 558, 147 La. 1099

N J.—Ideal Tile Corporation v N T Inv. Co, 162 A. 111, 111 N J Eq 241

6 C J p 786 note 14.

Money received for trust purposes

(1) Where an attorney receives a sum of money with the understanding between the depositor and himself that it is to be held in trust and intact for the benefit of certain creditors of the depositor, he cannot appropriate it, or any part of it, to the payment of a fee alleged to be due to him by such depositor—Wuerpel v. Sinnott, 86 So 558, 147 La 1099

(2) Attorney receiving proceeds of fund constituting a special trust for creditors of a defunct corporation is not entitled to a lien thereon for services rendered—Ideal Tile Corporation v N T Inv. Co, 162 A 111, 111 N.J Eq 241

89. Matter of Knapp, 85 N Y 284—6 C J p 787 note 16

90. U S.—Cooper v McNair, (D C Fla.) 49 F (2d) 778—U. S v Call, (C C A Fla.) 287 F 520

Idaho.—Miller v Monroe, 300 P 362, 50 Idaho 726

Mich.—Fraam v Kelley, 256 N W 552, 268 Mich 573—Shank v Lippman, 235 N W 216, 253 Mich 451—Shank v Lippman, 227 N W 710, 249 Mich 22—Minor v Fick, 196 N.W. 194, 225 Mich 325

S D.—Johnson v Fidelity & Deposit Co of Maryland, 247 N W 794, 61 S D 207

"There can be no question in this state of the equitable right of an attorney to have his fee secured out of a judgment or recovery he has obtained for his client"—Robertson v Pettery, 170 S E 901, 902, 114 W Va 78.

Effect of contract

The legal effect of a contract between a creditor and an attorney, whereby the attorney for suing the debtor was to have a portion of the amount recovered, was to create a lien on the judgment—Millsap v. Sparks, 188 P 135, 21 Ariz 317

91. Ark.—Lake v Wilson, 35 S W. (2d) 597, 183 Ark 180, Id., 38 S. W (2d) 25, 183 Ark 180.

Ga.—Barge v Ownby, 153 S E 49, 170 Ga 440

Idaho.—Miller v Monroe, 300 P. 362, 50 Idaho 726

Ill.—Catherwood v. Morris, 196 N E 519, 360 Ill 473

Agreement creating lien on amount recovered

(1) Agreement to pay counsel percentage of amount recovered by suit or settlement, and that assignment should be lien on judgment or amount recovered, was held to be merely an assignment of the proceeds of a judgment or settlement, creating a lien on the fund recovered—Cassetta v Del Frate, 2 P. (2d) 533, 116 Cal App. 255.

(2) Attorney who, under agreement that he should receive one half of amount obtained, was retained by party entitled to one half of fund constituting an award by the court of claims for land appropriated, to effect distribution of such fund, was held entitled to an allowance of one half of the share of his client only, such allowance constituting a charge solely upon such share.—In re

ney shall have a lien upon his client's cause of action, claim, or counterclaim, is that such lien attaches to a verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof, in whatever form they may assume and in whosesoever hands they may be.[92] Moreover under applicable statutes or otherwise it is held that a charging lien applies to any process incident to the enforcement of the judgment,[93] to any bond or undertaking given to secure the payment of the judgment[94] or to anything on which the judgment itself is a lien.[95]

Manner in which subject matter realized immaterial The charging lien of an attorney may attach to the fruits of his labor in whatever manner they may be realized so long as they result from his exertions.[96]

What judgments embraced. An attorney's charging lien may attach to money judgments or to

Loomis' Estate, 238 N Y S 54, 247 App Div 411, motion granted 290 N Y S 846

Fund in court

(1) Attorney has charging lien on fund in court or otherwise applicable for distribution on equitable principles, which his services primarily aided in producing and to which he agreed with client to look for compensation—Appeal of Harris, 186 A. 92, 323 Pa. 124

(2) Attorney's equitable right to compensation for his services from fund created thereby will be sustained, where the client stands on equal footing with other claimants to fund, or the latter derive their rights through the owner of property which gave rise thereto—Appeal of Harris, supra.

(3) Insolvent property owner's attorney, conducting entire litigation, resulting in award of compensation for property condemned by city, without assistance from the bank holding mortgages thereon for a larger sum than that awarded, under agreement with the client to accept compensation out of such fund, the entire amount of which was awarded to the bank, was held entitled to payment of agreed percentage of award as fee and reasonable costs and expenses of conducting the litigation from such fund—Appeal of Harris, supra.

92. Ark—Oliver v. Howie, 281 S W 17, 170 Ark 758
Ga—Thomas v Travelers Ins. Co, 185 S E 932, 53 Ga App 404.
N Y—In re Sebring, 264 N Y S. 379, 238 App Div. 231—Smith v First Nat. Bank, 170 N Y S 127, 103 Misc. 274, modified on other grounds 173 N Y S 595, 184 App Div 719—Steuart v. D'Esterre, 170 N Y S 936, affirmed Steuart v Ineal, 174 N Y S. 932, 187 App Div 935—In re Flower, 167 N Y S 778
Okl.—Devine v Pyanhunkah, 39 P. (2d) 132, 170 Okl 178
6 C.J. p 778 note 29, p 779 notes 31, 32, p 780 note 46.

Existence of tangible object held unnecessary

(1) The lien of plaintiff's attorney on his client's cause of action, given by the Attorney's Lien Act of 1914, exists although there was nothing tangible to which it could be attached—Ferraro v. City Hall Garage, 109 A. 358, 94 N J Law 209

(2) Accordingly an attorney who instituted a suit for plaintiff, furnished defendant with bill of particulars, and made a motion to strike out part of defendant's answer had a statutory lien on the client's cause of action, which attached even if there was nothing tangible upon which to impress the lien at the time—Wertheim v Burns Bros, 174 A 238, 12 N J Misc 676

Claim or cause of action merged into judgment

(1) If the client's claim or cause of action is merged in a judgment, there is nothing for the lien to attach to except the judgment or its proceeds—Matter of Jones, 136 N Y S 819, 76 Misc 331.

(2) After judgment, the cause of action is merged in the judgment, and the attorney's lien accordingly attaches to the judgment—Noell v Missouri Pac R Co, 74 S W (2d) 7, 335 Mo 687, 94 A L R 684, followed in 74 S W (2d) 14

Lien attaching in special proceeding

The lien of an attorney attaching in a special proceeding to the client's cause of action attaches to the proceeds into whosesoever hands they may come—In re Flower, 167 N Y S 778.

Without regard to settlement

Such a statute creates a lien in favor of an attorney on his client's cause of action in whatever form it may assume in the course of the litigation and enables him to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment—Barry v Third Ave R Co, 84 N Y S 830, 87 App Div. 548—Matter of Tierney, 151 N Y S 972, 83 Misc 347

View that lien attaches only to objects named in statute

Attorney's lien under attorney's lien statute of Missouri is only upon cause of action and attaches only to objects expressly named, on principle of expressio unius exclusio alterius est—Universal Oil Products Co v Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C A) German v Universal Oil Products Co, 77 F (2d) 70

No general lien on all money of client

The statutes referred to in the text statement do not operate so as to give to an attorney a general lien upon all moneys belonging to his client—Matter of Rowland, 66 N Y S 1121, 55 App Div 66, affirmed 60 N E 1130, 166 N Y 641

93. Newbert v Cunningham, 50 Me 231, 79 Am D 612—6 C J p 778 note 20

94. Mont—Coombe v. Knox, 72 P. 641, 28 Mont 202
N D—Clark v Sullivan, 55 N.W 733, 3 N D 280.
Appellee's attorney filing attorney's lien thereby obtained an interest in the judgment and also in a cause of action on a supersedeas bond—Johnson v Fidelity & Deposit Co of Maryland, 247 N W 794, 61 S D. 207

95. Gray v Graziani, 178 S W. 1070, 165 Ky 771—6 C J p 778 note 22

96. U S—In re Pyrocolor Corporation, (D C N Y) 46 F (2d) 554
Ga—Middleton v Westmoreland, 138 S E 852, 164 Ga 324—Camp v U S Fidelity & Guaranty Co, 157 S E 209, 42 Ga App 653
N M—Prichard v. Fulmer, 159 P 39, 22 N M 134, 2 A L R 474
6 C J. p 777 notes 16, 17, p 778 note 18

Award

The charging lien of an attorney may attach to the proceeds of an award—Wooten v Denmark, 11 S E 861, 85 Ga. 578—Hutchinson v Howard, 15 Vt 544—6 C J. p 777 note 17

Judgment or compromise

Attorney's lien attaches to proceeds that are recovered by virtue of suit brought by him whether recovered by judgment or by compromise—Cell v Robinson, (Mo App) 79 S W (2d) 489.

Judgment or decree

A statute giving an attorney a lien on a judgment he has recovered confers a lien on the money or property so recovered, whether realized by judgment or decree—Hubbard v. Ellithorpe, 112 N W. 796, 135 Iowa

judgments relating to real or personal property,[97] and may attach to judgments rendered in supplementary proceedings.[98] A charging lien may also attach to judgments for costs and disbursements as well as judgments for damages,[99] but a judgment for attorneys' fees rendered for defendant upon abandonment of a condemnation suit is not an ordinary judgment in favor of a successful party to an action, as regards an attorney's claim upon a judgment, since the allowance is made to reimburse defendant for fees paid or to indemnify defendant for fees not paid but incurred.[1] Moreover the lien of an attorney may attach to a judgment obtained by other attorneys in another state,[2] and to a judgment rendered in a federal court for a particular state.[3] An attorney's charging lien may likewise attach to the decrees of courts in proceedings relating to decedent estates.[4] On the other hand a judgment recovered on behalf of a state may not be subject to a charging lien.[5] Further the charging lien of an attorney is con-

259, 124 Am S R 271—Northup v Hayward, 113 N W 701, 102 Minn 307, 12 Ann Cas 341—6 C J p 777 note 16

Settlement

(1) Upon a settlement the lien follows and attaches to the fund produced by the settlement—Hansbrough v D W Standrod & Co, 249 P 897, 43 Idaho 119—Conklin v Conklin, 194 N Y S 685, 201 App Div 170—6 C J p 790 note 50

(2) In equity, attorney's lien extends to proceeds of causes of action intrusted to him for collection, on the parties' settlement of the litigation—Catherwood v. Morris, 196 N E 519, 360 Ill 473.

(3) Money paid in settlement or compromise is considered as "recovered" within the lien statutes—Standidge v Chicago R. Co, 98 N E 963, 254 Ill. 524, 40 L R A (N S) 529, Ann Cas 1913C 65—Beckwith v Corn Belt Land, etc, Co, (Iowa) 151 N W. 433

(4) Under an attorney's contingent fee contract giving attorney a lien on cause of action and judgment, the attorney had a lien on money received in settlement by substituted attorney—Tracy v Ringole, 262 P. 73, 87 Cal App. 549.

(5) The lien of an attorney, under Jones & A St Annot (1913) par 611, Hurd Rev St.(1915-1916) c 32 § 55, attaches only to the amount paid under a direct settlement with the client, and not to the amount of the judgment recovered, where pending an appeal by defendant a settlement was effected directly with the client and without the attorney's knowledge or consent.—Foy v. India Rubber Tire Co, 211 Ill App 252.

(6) Under Rev St (1909) § 964, giving an attorney a lien on his client's cause of action, an attorney, who instituted and prosecuted an action to set aside fraudulent divorce decree, wherein his client had been divested of her real estate, and procured the vesting of title again in her, had a lien upon such land for his agreed compensation, and when the land was subsequently attached by a judgment creditor of the client and her former husband, and sold, the lien attached to the proceeds of such sale—Schempp v Davis, 211 S W 728, 201 Mo App 430

97. Mo—Young v Levine, 31 S W (2d) 978, 326 Mo 593
N Y—In re Falk, 220 N Y S 224, 128 Misc 856

98. **Attorneys for successful defendant**

Attorneys for successful defendant, who sued on undertaking in supplementary proceedings and recovered judgment, including attorney's fees in first action, were held to be entitled to payment for services out of second recovery—In re Falk, 220 N Y S 224, 128 Misc 856

99. Dwyer v Ellis, 94 N E 286, 208 Mass 195, 21 Ann Cas 1042—6 C J p 778 note 19

Costs and disbursements

(1) Lien of defendant's attorney was held to attach to the proceeds of judgment for defendant for costs and disbursements—Gotham Music Service v. Denton & Haskins Music Pub Co, 260 N Y S. 312, 237 App Div. 78

(2) Irrespective of statute, an attorney for defendant, against whom a complaint was dismissed, with costs, who had not been paid for his services had a lien upon such costs, deposited with the clerk of court, and, as against any third party, a clear right to such costs—Fliashnick v. Burke, 162 N.Y S 867, 176 App Div 367.

(3) Where attorneys collected on a judgment three hundred dollars of costs which had been advanced by their clients to pay expenses, a lien for their services attached thereto—Snow v. Beard, 162 P. 258, 82 Or 513.

(4) In the absence of an agreement to the contrary, the attorney as regards costs awarded to his client has merely a lien for the agreed or reasonable compensation for his services—In re Tinney, 176 N Y.S 102, 187 App Div 569.

Not limited to costs

Charging lien of attorney under statutes attaches to proceeds of action, and is not limited to costs—Application of H C Roberts Electric Supply Co, 226 N Y S 211, 131 Misc 119.

1. City of Los Angeles v. Knapp, (Cal) 60 P (2d) 127

2. Noell v. Missouri Pac R Co, 74 S W.(2d) 7, 335 Mo 637, 94 A L R. 684, followed in 74 S W (2d) 14

Judgments under Employers' Liability Act

Attorney bringing suit in Missouri under Federal Employers' Liability Act had a lien on cause of action of client who later obtained other attorneys and brought suit in Arkansas, which lien attached to a judgment obtained there—Noell v Missouri Pac R Co, 74 S W (2d) 7, 335 Mo 637, 94 A L R 684, followed in 74 S W (2d) 14.

3. Laughlin v. Union Pac Ry Co, 196 S W 393, 196 Mo App 541, error dismissed Union Pac R Co. v Laughlin, 38 S Ct. 436, 247 U S. 204, 62 L Ed 1073

4. In re Abruzzo's Estate, 249 N Y. S. 72, 139 Misc 559

Surrogate's court

Attorney's charging lien, under common law and under statute, extends to a decree in a surrogate's court—In re Abruzzo's Estate, 249 N Y S. 72, 139 Misc 559.

Decree granting letters of administration

The lien of an attorney for services rendered an administrator upon his application for letters of administration attaches to a decree granting such letters, but no lien for services rendered subsequently to issuance of such letters can attach to the decree granting them—In re Nocton's Estate, 162 N Y S 215

5. State v National Surety Co, 161 P 1026, 29 Idaho 670

Under provisions for payment of claims

Under Const art 4, § 18, Rev. Codes, § 146, as amended by L (1913) c 15, providing for payment of claims against state, an attorney recovering judgment for benefit of state cannot charge judgment with lien for services rendered—State v National Surety Co., 161 P. 1026, 29 Idaho 670.

fined to judgments rendered by courts of record. Accordingly, a lien may not attach to a judgment of a probate,[6] municipal,[7] or justice's court,[8] unless such court is a court of record.[9] Under a particular statute providing for attorney's liens it has been held that there is nothing to which a lien can attach where there is only an interlocutory judgment in the case.[10]

Money in hands of particular persons. Subject to rules stated previously in this section to the effect that a charging lien may under certain circumstances attach to the judgment recovered by an attorney and the proceeds in whatever form and in whosesoever hands they may be, such lien may not extend to money in the hands of a third person.[11] However, under appropriate statutory provisions an attorney's lien may attach to money due his client in the hands of his adversary,[12] and funds in the hands of executors or administrators have been held to constitute the subject matter of an attorney's charging lien.[13] A mortgagor's attorneys who had secured reversal of foreclosure decree in the supreme court were held entitled to a lien for their services upon the fund received by the mortgagee through sale of the mortgaged premises had prior to service of notice of appeal.[14] Further an attorney's charging lien has been held to follow and attach to, funds in the hands of a garnisher.[15] Notwithstanding it has been held that funds in the hands of a receiver may be the subject of an attorney's lien,[16] it has also been held that such funds do not constitute a proper subject of such liens within the language of a statute providing for a lien on money in the hands of an "adverse party."[17]

b. With Respect to Particular Causes of Action or Proceedings

Subject to certain exceptions noted hereunder it seems that causes of action or proceedings of any type may constitute the subject matter of charging liens.

Where the statute provides for an attorney's lien, without specifically confining it to causes of action arising ex contractu, it seems that the lien exists upon a cause of action arising ex delicto, and for unliquidated damages, as well as in other cases.[18] It has been held, however, by some decisions based upon the common-law doctrine of the nonassignability of causes of action for injuries to the person, and others upon the language of the particular statute under which the charging lien is claimed that an attorney's charging lien cannot attach to causes of action arising ex delicto.[19] More specifically it has been held that a judgment in favor of the prosecutrix in bastardy proceedings is subject to the lien of her attorneys for professional services in obtaining such judg-

6. Ala.—McCan v. Grant, 43 Ala 262
N Y.—Devin v Patchin, 26 N Y 441
6 C J p 778 note 24

7. Drago v Smith, 36 N Y S 975, 92 Hun 536—People v Fitzpatrick, 71 N Y S. 191, 35 Misc 456

8. Read v Joselyn, Sheld (N Y) 60

9. In re Williams, 79 N E 1019, 187 N Y 286, reversing 95 N Y S 1166 107 App Div. 637—6 C J p 778 note 27.

10. Dunn v. Bleeck, 286 N Y.S. 402, 246 App Div 382

In action between partners

In an action between partners, where only one interlocutory judgment was entered adjudging that one partner was indebted to the other, there was no cause of action, judgment, or final order in favor of the indebted partner to which his attorneys' lien could attach.—Dunn v Bleeck, 286 N Y.S 402, 246 App Div 382.

11. Neb.—Phillips v. Hogue, 88 N. W. 180, 63 Neb 192
Pa.—Quakertown, etc, R Co. v Guarantors', etc, Indemn. Co, 55 A 1033, 206 Pa 350.
6 C J. p 782 note 67

12. Gordon v. Hennings, 131 N.W. 238, 89 Neb 252—6 C J p 781 note 66.

13. In re Levine's Estate, 286 N.Y S 513, 247 App Div 19, affirming 278 N Y S. 36, 154 Misc. 700—Matter of Tierney, 151 N.Y S 972, 88 Misc 347

Fund in possession of executors

A fund in possession of executors recovered solely as a result of the attorneys' efforts could be impressed with the attorneys' lien for fees.—In re Levine's Estate, 286 N Y S 513, 247 App Div 19, affirming 278 N Y S 36, 154 Misc 700

Money in hands of administrator

Money in the hands of an administrator applicable to a judgment recovered against the deceased may constitute the subject matter of an attorney's lien as money in the hands of a third person to which the lien of an attorney recovering such judgment attaches.—Matter of Tierney, 151 N.Y S. 972, 88 Misc 347.

14. Niedermeyer, Inc, v. Fehl, (Or) 57 P (2d) 1086.

15. Lundy v. Cappuccio, 181 P. 165, 54 Utah 420

Garnishment creditors of client

The lien of attorneys for compensation on recovery of a judgment was held to follow the proceeds of the judgment into the hands of garnishment creditors of their client, to whom the judgment debtor paid the amount of the judgment.—Lundy v. Cappuccio, 181 P. 165, 54 Utah 420

16. Fannon v. Le Beau, 222 N W 115, 245 Mich 162.

Equity courts have power to protect attorney by giving lien for compensation on funds in receiver's hands.—Fannon v. Le Beau, 222 N W 115, 245 Mich 162.

17. Culhane v. Anderson, (C C A Neb) 17 F (2d) 559

Federal receiver was held not an "adverse party" to defendant, within a statute giving an attorney a lien for services on money in hands of adverse party.—Culhane v Anderson, (C C A Neb) 17 F (2d) 559

18. Kubu v. Kabes, 172 N W. 496, 142 Minn. 433—6 C J. p 779 note 40

19. Minn.—Boogren v St Paul City R Co, 106 N W 104, 97 Minn 51, 114 Am S R 691, 3 L R A (N S) 379—Hunt v. Conrad, 50 N W 614, 47 Minn 557, 14 L R A 512
N J.—Weller v. Jersey City, etc, R Co, 57 A. 730, 66 N J Eq 11, affirmed 61 A. 459, 68 N J Eq. 659, 6 Ann Cas 442
6 C J. p 779 note 41.

ment,[20] and a cause of action under the Federal Employers' Liability Act may be the subject of an attorneys' lien.[21] Moreover there is nothing in the nature of an action for malicious prosecution which prevents it from being the subject of an equitable assignment under an attorney's lien statute.[22] Further a charging lien may attach to actions for divorce.[23] However, under the theory that alimony directed to be paid for the support and maintenance of the wife and children may not be appropriated to the payment of debts and liabilities disconnected from necessary support and maintenance, there exists authority to the effect that sums awarded as alimony may not be appropriated by an attorney in payment for legal services or disbursements connected therewith.[24] In the absence of a specific provision prohibiting such lien, proceedings to procure workmen's compensation may constitute the subject matter of an attorney's lien,[25] but under statutes specifically providing that payments of compensation shall not be subject to any lien such payments cannot constitute the subject matter of an attorney's charging lien.[26]

c. With Respect to Particular Interests or Kinds of Property

Subject to certain exceptions noted hereunder any property may properly be the subject matter of an attorney's charging lien.

Subject to the provisions of applicable statutes under which specific interests or kinds of property may be regarded as properly the subject matter of attorneys' charging liens,[27] any property recov-

20. State v O'Brien, 109 S E 830, 89 Va 634—6 C J p 780 note 44

Agreement for interest in recovery

An attorney, who prosecutes or assists in the prosecution of a bastardy proceeding to final judgment in favor of the mother of the child, upon an agreement with her or her next friend for an interest in the amount of the recovery, has a lien on the judgment for fees for services rendered by him in her behalf —State v O'Brien, 109 S E 830, 89 W Va 634

21. Halloway v Dickinson, 163 N W 791, 137 Minn 410, affirmed Dickinson v Stiles, 38 S Ct. 415, 246 U S 631, 62 L Ed 908

Where action instituted in state court

Attorney for plaintiff has a lien upon a cause of action under Federal Employers' Liability Act instituted in state courts, where congress has not attempted to regulate the dealings between the employee injured in interstate commerce and his attorney —Halloway v Dickinson, 163 N W. 791, 137 Minn 410, affirmed Dickinson v Stiles, 38 S Ct 415, 246 U S 631, 62 L Ed 908

22. Dankwardt v Kermode, 187 P 519, 68 Colo 225

23. Iowa —Hubbard v Ellithorpe, 112 N W 796, 135 Iowa 259, 124 Am S R 271.

Utah —Hampton v. Hampton, 39 P (2d) 703, 85 Utah 338

Lien statute

Attorney's lien statute applies to all cases, including a divorce action in which alimony is payable in monthly or other designated installments —Hampton v Hampton, 39 P. (2d) 703, 85 Utah 338

Final division of property

Where the decree of the court makes a final division of the property, awarding to the party obtaining the divorce specific property or, in lieu thereof a money judgment representing such party's interest in the property of the adverse party, the attorney is entitled to a lien thereon —Hubbard v Ellithorpe, 112 N W 796, 135 Iowa 259, 124 Am S R 271

24. Mo —Sanner v Sanner, (App) 46 S W (2d) 936—Hilleary v Hilleary, 175 S W 282, 189 Mo App 704

N Y —In re Brown, 165 N Y S 736, 178 App Div 558

6 C J p 779 note 42

That attorney was substituted attorney in the action is immaterial —In re Brown, 165 N Y S 736, 178 App Div 558

Partial success in another state immaterial

An attorney, as judgment creditor, is not entitled to reach his judgment debtor's alimony, accrued or to accrue, to satisfy his judgment for an attorney's fee, even though his efforts were partly successful in collecting the alimony in another state. —Indell v Tabor, 185 N Y S 873.

Suit governed by lien statute

Suit for a lien for attorney's fee on wife's judgment for alimony and child's support was held to be governed by statutes giving attorneys lien upon the client's cause of action —Sanner v Sanner, (Mo App) 46 S W (2d) 936

25. Camp v. U S Fidelity & Guaranty Co, 157 S E 209, 42 Ga App 653

Proceedings before commission or board

(1) Lien of attorney representing claimant attaches to proceeding before industrial commission brought to obtain compensation award — Camp v U S Fidelity & Guaranty Co, 157 S E 209, 42 Ga App 653

(2) Statute providing for attorney's lien was held to give a lien on a judgment based upon an award of an industrial accident board — Renfro v. Nixon, (Idaho) 45 P.(2d) 595

26. Lasley v Tazewell Coal Co, 223 Ill App 462

No lien under particular provisions

Workmen's Compensation Act § 21 precludes an attorney from obtaining a lien on payments due to a workman, for professional services rendered in prosecuting the claim under the act —Lasley v. Tazewell Coal Co, 223 Ill App 462

27. St Louis, I M & So. Ry Co. v Hays & Ward, 195 S W. 28, 128 Ark 471

Dividends on creditor's claim

Attorney, who files proof of claim for creditor in bankruptcy proceeding and procures allowance of claim, has an attorney's lien on dividends declared and paid on claim — In re United Cigar Stores Co. of America, (D C N Y) 9 F Supp 149.

Funds deposited in special account

Where a sum sufficient to cover attorney's lien was set aside and deposited in special account subject to further order of court, the court could enforce the attorney's lien thereon —Brooks v Mandel-Witte Co, (C C A N Y) 54 F (2d) 992, certiorari denied Mandel-Witte Co v Brooks, 52 S Ct 641, 286 U.S 559, 76 L Ed 1292

Legatee's interest in estate

Under Judiciary L § 475, attorneys procuring probate of will for legatee and her appointment as administratrix with the will annexed were held to have a lien for their services on her interest in the estate —In re Wood, 156 N Y S 810, 170 App Div. 533, 16 Mills Surr 64.

Money due clients in action prosecuted to judgment by attorney

Attorney has a lien for his serv-

ered on behalf of a client may be the subject matter of a charging lien.[28] Moreover any property right which the judgment secured or protected or enforced may be called the proceeds of the judgment and may accordingly be subject to the lien[29] On the other hand the charging lien of an attorney covers only the interest of the client in the property charged,[30] and of course an attorney cannot assert a lien against the claim of a third person.[31] At all events an attorney's charging lien may not extend to property not involved in litigation[32] or to money collected in excess of the amount required to pay the fees of the attorney.[33] In the absence of statute, the lien of an attorney on a judgment obtained by him for his client does not extend to the money paid to the client with the consent of the attorney or to property thereafter purchased with that money and transferred to another.[34]

Land and interests therein. In the absence of statute or of special agreement, the general rule is that an attorney has no lien on the land of his client, notwithstanding such attorney has, with respect to the land in question, successfully prosecuted a suit to establish the title of his client thereto,[35] recovered title or possession in a suit prosecuted by such client,[36] or defended success-

ices on money due his clients in action prosecuted by him and in which judgment has been recovered—Grimes Sav Bank v McHarg, 251 N W 51, 217 Iowa 636

Proceeds of disability group insurance policies

(1) Where the evidence showed that an insurer's payment of certain group insurance money to the widow of insured on his death was based on insured's disability rather than as death benefit rights of such widow, the lien of the attorney employed to establish the disability rights pursuant to a contract with insured followed the fund—Brookshire v Metropolitan Life Ins. Co, (Mo App) 56 S W.(2d) 817.

(2) Attorney's lien attached to insured's permanent and total disability group insurance, the right to which the attorney established under a contract with insured, notwithstanding payments were not due at insured's death—Brookshire v Metropolitan Life Ins. Co., supra.

Roadbed and equipment of railroad

Under Acts (1909) p 892, and Kirby Dig § 6661, where persons suing railroad for personal injuries settled their claim, their attorneys, entitled to a lien on cause of action for their contingent fee, were entitled to charge roadbed and equipments of road with lien to secure their judgment in special proceeding against road to enforce lien.—St Louis, I M. & So. Ry. Co v Hays & Ward, 195 S W. 28, 128 Ark 471.

28. Scott v Kirtley, 152 So. 721, 113 Fla. 637, 93 A L R 661.

Fund not in possession

The fund, not being in petitioner's hands, is subject only to charging lien of attorney of record in action in which the fund was recovered—Lebaudy v. Carnegie Trust Co, 165 N Y S 566, 178 App Div. 614.

Property acquired in settlement

Attorney's statutory lien for fees on causes of action intrusted to him for collection was impressed on property acquired by complainants through the parties' settlement of litigation, such property representing complainants' claims—Catherwood v Morris, 196 N E 519, 360 Ill. 473

In view of understanding

Attorney who undertook to recover property with understanding that he should be paid reasonable fee from property was held to be entitled to have an equitable lien declared on such property which he recovered for his client—Scott v Kirtley, 152 So. 721, 113 Fla 637, 93 A L R 661.

29. Matter of Jones, 136 N.Y S 819, 76 Misc. 331

30. In re Albrecht, Maguire & Mills, 230 N.Y S 543, 132 Misc 713, affirmed 233 N Y.S 383, 225 App Div 423, affirmed 171 N E 772, 253 N.Y 537—6 C.J. p 737 note 24

Decedent's property where representative is client

An attorney employed by an executor or administrator to prosecute a suit to subject the realty of a decedent to the payment of debts of his estate was held to have no charging lien on either such realty or the proceeds thereof—Jacobs v. Jacobs, 131 S E 455, 100 Va 612

Distributive shares of administratrices

Attorney retained by administratrices was without a charging lien on their distributive shares in the decedent's estate, under Judiciary L. § 475, creating attorney's lien—In re Rabell, 162 N Y.S. 218, 175 App Div. 345.

Trust fund not subject to lien where trustee is client

Where a trustee employs an attorney in the execution of his trust, such attorney must look to the person employing him individually for his payment, and can have no claim on the trust fund—Austin v. Prudential Trust Co, 212 P. 77, 113 Kan. 545.

Tax refund where taxpayer client

(1) An attorney employed by taxpayers to recover funds collected by a collector of taxes has no lien upon the fund for his services by virtue of the Attorney's Lien Act (Cahill St c 13 par 13)—People v Holten, 222 Ill App 427, affirmed 136 N E 738, 304 Ill 394, 24 A L R 929

(2) Attorneys employed by respondent to obtain refund of income taxes collected from respondent and others could not assert attorney's lien against refund to others than respondent—In re Albrecht, Maguire & Mills, 230 N Y S 543, 132 Misc. 713, affirmed 233 N Y S 383, 225 App. Div 423, affirmed 171 N E 772, 253 N Y. 537

31. Matter of Fourteenth St., 143 N. Y S 943, 158 App Div 537.

32. Adcock v. Bennett, 235 P 229, 109 Okl. 114

33. Conyers v Gray, 67 Ga 329—6 C.J. p 694 note 6

34. Goodrich v McDonald, 19 N E. 649, 112 N Y. 157, reversing 41 Hun 235—Reavy v Clark, 9 N.Y.S. 216, 18 N Y Civ Proc. 272—6 C J. p 780 note 45.

35. N Y—Grigg v McNulty, 25 N. Y S 504, 5 Misc 334

Or—Stearns v Wollenberg, 92 P. 1079, 51 Or. 88, 94, 14 L R A.(N S) 1095.

6 C J. p 780 note 55

No lien on minerals

Attorney employed to vindicate a client's right to certain minerals under land acquired no lien on the minerals.—Alpha v. Rose, 132 So. 222, 171 La. 753.

Property rights not involved in suit

In a suit to cancel of record oil and gas mining lease on the ground that lessee had not complied with the terms thereof, the attorneys did not acquire a lien upon royalty rights which were not involved in the suit—Adcock v. Bennett, 235 P. 229, 109 Okl. 114.

36. U S.—Webster v. Sweat, (C.C.A. Miss.) 65 F.(2d) 109.

fully such client's right and title against an unjust claim or an unwarranted attack.[37] However, there exists a line of authority, particularly under applicable statutory provisions, to the effect that an attorney's charging lien may, in an appropriate case, exist as well against land as against other property.[38] Of course a charging lien may attach to land by reason of a special agreement.[39] On the other hand an attorney's charging lien may not attach to an interest in land in violation of an agreement between the attorney and client.[40] At all events statutes providing a lien only on "re-

Ala—Ex parte McLendon, 102 So 696 212 Ala 403—W T Rawleigh Co v Timmerman, 87 So 372, 205 Ala 213—Hale v Tyson, 79 So 499, 202 Ala 107—Harton v Amason, 71 So 180, 195 Ala 594
Ark—Oliver v Howie, 281 S W 17, 170 Ark 758
Fla—Guthrie v Home Building & Loan Co, 156 So 882, 116 Fla 822
6 C J p 781 note 56

No compromise verdict or final order

Attorney was not entitled to a lien on land for services rendered in a suit to recover possession thereof, where there was no compromise, verdict, or final order—Oliver v. Howie, 281 S W 17, 170 Ark 758

Title recovered in foreclosure proceedings

Attorney had no lien for fees against land which client acquired by reason of attorney's services in foreclosure proceeding—Guthrie v Home Building & Loan Co, 156 So 882, 116 Fla 822

37. Ky—Avey v Via, 7 S W (2d) 1057, 225 Ky 155
Tenn—Butler v Givens, 193 S W 1063, 137 Tenn 438
6 C J p 781 note 57.

Lawyer cannot assert statutory lien against land for services in defending title—Avey v Via, 7 S W (2d) 1057, 225 Ky 155

In absence of contract therefor, solicitor is not entitled to lien for services on his client's land, successfully defended by him against attack—Butler v Givens, 193 S W 1063, 137 Tenn. 438.

38. Ala—Owens v. Bolt, 118 So 590, 218 Ala 344
Ky—Getaz v Eversole, 27 S.W (2d) 688, 234 Ky 164
6 C J. p 781 notes 58, 62.

In city's condemnation proceeding, money deposited by city with the county treasurer was held properly ordered by the county court to be given to landowner's attorneys who had obtained a decree in the superior court granting attorneys lien on condemned land for services rendered to the landowner, since the sum paid for the land stood in place of land condemned—City of Chicago v Chicago & N W R Co., (Ill.App.) 3 N E.(2d) 340 (second case).

In suit for sale of land for division

Attorney's lien under statute relating to suits for recovery of property attaches to land in a suit for the sale of lands for division—Owens v. Bolt, 118 So. 590, 218 Ala 344

Interest in establishing will as "proceeds of litigation"

Where a client, by reason of the establishment of a will, has acquired an interest in real estate, such interest constitutes the "proceeds of the litigation" to establish the will, within the meaning of Attorney's Lien L (Rev St [1919] § 690), and, in an action by an attorney to recover his compensation, a judgment for him may be made a lien upon such interest—Neeper v Heinbach, (Mo App.) 249 S.W. 440

Defense of action to subject land to payment of debts

Attorneys successfully defending action to subject lands to payment of debts were held to be entitled to a lien on such lands for services—Dyal v Watson, 162 S E. 682, 174 Ga 330.

Revesting of title divested by divorce decree

Under Rev St (1909) § 964, giving an attorney a lien on his client's cause of action, an attorney who instituted and prosecuted an action to set aside fraudulent divorce decree, wherein his client had been divested of her real estate, and procured the vesting of title again in her, had a lien upon such land for his agreed compensation—Schempp v Davis, 211 S W 728, 201 Mo App 430

Timber involved in suit

Under Acts (1909) p 893 § 1, attorneys for plaintiff, in action to set aside conveyance from father to son on the ground it was voluntary and made to defeat plaintiff's right under the father's unacknowledged timber deed to him, after decree for plaintiff had a lien on the timber involved in the suit—McDonald v Norton, 185 S W. 791, 1199, 123 Ark 473, 616

Widow's acquisition by devise and settlement

Land devised widow and received by her under a settlement of estate by her attorneys was held to be property recovered by attorneys on which attorneys have lien for fee—Middleton v. Westmoreland, 138 S E 852, 164 Ga. 324

Attorney having fractional interest in judgment

An attorney who had a one-third interest in a judgment obtained under an equitable assignment was held also to have a lien pro tanto on land of the defendant—High Point Casket Co v. Wheeler, 109 S.E 378, 182 N C 459, 19 A L R 891

Purchaser taking with notice of fee

Attorneys' fee attached to land involved in litigation, where a purchaser took such land with notice that such fee was outstanding, and retained only one hundred dollars from the purchase price, without learning the actual amount of the attorney's fee—Getaz v Eversole, 27 S W.(2d) 688, 234 Ky. 164.

Reversal of judgment cancelling deed

In an action to cancel certain deeds from plaintiff to one defendant and from such defendant to others, where attorney employed by defendant to list the property for taxation had secured a judgment and a lien for his fee, such lien was enforceable against the land, although the deeds were set aside, the court on appeal having reversed the judgment canceling the deeds—Morse v Duryea, 192 S W 477, 174 Ky. 234

After mortgage foreclosure sale

An attorney's lien attached to land after mortgage foreclosure sale and purchase by administratrix who was the judgment creditor and sole legatee—Miller v. Monroe, 300 P 362, 50 Idaho 726

39. Ill—Smith v. Young, 62 Ill 310
Mich—Kilbourne v Wiley, 83 N W 99, 124 Mich 370
Porto Rico—Pettingill v. Rios, 4 Porto Rico Fed 549.
6 C J p 780 note 54.

40. Finkelstein v. Roberts, (Tex Civ App) 220 S W. 401, dismissed for want of jurisdiction.

No vested interest in leasehold

In a suit to cancel an oil lease executed by plaintiffs, husband and wife, wherein their attorney intervened to enforce a lien on the leasehold in the hands of defendants, a declaration of equitable lien on leasehold interest of a defendant in favor of attorney was held to be erroneous in view of a contract between such attorney and plaintiffs, contemplating that the attorney should acquire no vested interest prior to the forfeiture of the lease and the execution of a second lease for the best price obtainable—Finkelstein v Roberts, (Tex Civ App) 220 S W. 401, dismissed for want of jurisdiction.

covery" may not render land, which has been defended for a client, subject to an attorney's lien.[41] Even where a lien against land is recognized, it is said that an attorney has no lien upon a debtor's real estate until it is sold and the sale confirmed for his client's benefit.[42] If a judgment or decree for money has been rendered in a cause, and real estate has been condemned to a sale for its satisfaction, a lien may be declared on the decree, and made operative on the proceeds of the sale of the land.[43] Moreover a court of equity will follow such a fund as far as it can be traced, and enforce the attorney's lien against any property in which it may have been invested.[44] The lien of an attorney who assists a client in procuring his share of rent from certain property may not extend to the property from which such rent is derived.[45] On the other hand the lien of an attorney who procures, for his client, a judgment for the possession of certain property, may not attach to the rents accruing after the client acquires title to the property from which such rents are derived.[46]

Exempt property or funds. Although it has been held that exempt as well as nonexempt property or funds may constitute the subject of an attorney's lien,[47] money in the hands of the government cannot be subjected to such lien.[48]

§ 229. Priorities

Cases wherein the rights of an attorney under his lien are, or are not, entitled to priority over rights of other persons are noted hereunder.

An attorney's lien is subject to any rights in the property which are valid against the client at the time the lien attaches.[49] It is also subject

41. Ark.—Greer v. Ferguson, 19 S.W. 966, 56 Ark. 324
Or.—Stearns v. Wollenberg, 92 P. 1079, 51 Or. 38, 94, 14 L.R.A.(N.S.) 1095.
6 C.J. p. 781 note 63.

42. Perkins v. Perkins, 9 Heisk. (Tenn.) 95—6 C.J. p. 781 note 59

43. Ala.—Higley v. White, 15 So. 141, 102 Ala. 604
Tex.—Chapman v. Sneed, 17 Tex. 428
6 C.J. p. 781 note 60.

44. N.Y.—Skinner v. Busse, 77 N.Y.S. 560, 38 Misc. 265, 11 N.Y.Ann. Cas. 156
Utah.—Loofbourow v. Hicks, 66 P. 602, 24 Utah 49, 55 L.R.A. 874
Va.—Fitzgerald v. Irby, 37 S.E. 777, 99 Va. 81.

45. Ekelman v. Marano, 167 N.E. 211, 251 N.Y. 173, reversing 230 N.Y.S. 831, 224 App.Div. 761

Assisting wife in procuring accounting

In a wife's action against her husband for accounting of rents from jointly owned property, the wife's attorney's lien did not attach to the property.—Ekelman v. Marano, 167 N.E. 211, 251 N.Y. 173, reversing 230 N.Y.S. 831, 224 App.Div. 761.

46. Young v. Levine, 31 S.W.(2d) 973, 326 Mo. 593.

47. Abernethy v. Savage, 141 So. 329, 163 Miss. 789.

Funds

Attorney's lien on funds recovered for client applies alike to exempt, as well as nonexempt, funds.—Abernethy v. Savage, 141 So. 329, 163 Miss. 789.

Property exempt from execution

The fact that property is exempt from execution does not relieve it from the lien.—Strohecker v. Irvine, 76 Ga. 639, 2 Am.S.R. 62.

48. In re Albrecht, Maguire & Mills, 230 N.Y.S. 543, 132 Misc. 713, affirmed 233 N.Y.S. 883, 225 App.Div. 423, affirmed 171 N.E. 772, 253 N.Y. 537—6 C.J. p. 778 note 23 [b].

49. Columbia Ins. Co. v. Artale, 168 A. 304, 114 N.J.Eq. 268, affirming 164 A. 864, 112 N.J.Eq. 505—6 C.J. p. 787 note 24

Subject to existing and known equities

(1) Statutory lien given attorney on client's interest in judgment is acquired subject to existing and known equities.—Columbia Ins. Co. v. Artale, 168 A. 304, 114 N.J.Eq. 268, affirming 164 A. 864, 112 N.J.Eq. 505

(2) Accordingly a hospital's lien attaching to the right of action of an injured person treated at such hospital against the person causing injury was held prior to the lien of the attorney for the injured person having notice of hospital lien.—Elizabeth General Hospital and Dispensary v. Longobardi, 166 A. 471, 11 N.J.Misc. 394

(3) Hence part of proceeds of settlement for injuries retained by attorney for injured person continued subject pro tanto to the hospital's lien, where attorney with notice of lien, paid the proceeds of settlement, less attorney's share, to the injured person, and the hospital could not collect from the injured person.—Elizabeth General Hospital and Dispensary v. Longobardi, supra.

(4) In a suit involving priority between a prior unrecorded deed and a judgment lien, it was held that plaintiff attorney, who knew of the conveyance, did not acquire a lien for payment of his interest on such judgment superior to the rights of the grantee under such unrecorded deed.—Ives v. Culton, (Tex.Civ.App.) 197 S.W. 619, affirmed (Com.App.) 229 S.W. 321

Subject to rights of certain creditors

(1) The lien created by decedent's heir on decedent's lands to an attorney for services in defending a suit brought by creditors of the estate is inferior to the preexisting rights of such creditors.—Gray v. Graziani, 178 S.W. 1070, 165 Ky. 771.

(2) Where an insolvent corporation improperly gave a corporate officer a preference by transferring notes to such officer in payment of money due such officer from the corporation, and such officer placed the notes in the hands of an attorney for collection on a contingent basis of one-third, the lien of the attorney was subordinate to the rights of the creditors of the insolvent corporation, the attorney having knowledge of all the facts.—Armstrong v. Ellerslie Planting Co., 83 So. 830, 146 La. 559

(3) Insured's judgment creditor who levied on the proceeds of fire policy was entitled to prior payment, with insured's solicitor, to whom the surplus would be payable, entitled thereafter to enforce the solicitor's lien.—Pennsylvania Fire Ins. Co. v. Rinaolo, 154 A. 528, 108 N.J.Eq. 167.

Claim based on purchase of decree

Where an attorney for defendant in a divorce action purchased from plaintiff the alimony decree rendered, which was made a lien on defendant's land, such attorney's claim against defendant for attorney's fees was inferior to, rather than concurrent with, the lien based on the decree purchased from plaintiff.—Misner v. Stange, 169 N.W. 938, 203 Mich. 411.

to administration and funeral expenses,[50] and to claims for advances of money to carry on the necessary litigation.[51] On the other hand there exists authority to support the general proposition that an attorney's lien is paramount[52] and under statutes conferring a lien on attorneys it is held that the lien created is a first lien.[53] It is at least entitled to as much protection as any other lien having a similar status.[54] At any rate an attorney's lien is paramount to the rights of the client and his creditors,[55] even a creditor in whose favor execution has been levied,[56] or who has acquired a lien in supplementary proceedings[57] or in garnishment proceedings.[58] Moreover an attorney's lien

Rights of client's partner

Where one partner was adjudged to be indebted to the other on final settlement of partnership fund, he was not entitled to any part of the distributable fund until the other partner had been paid in full, and the lien of the attorneys for the indebted partner was subordinate to rights of the other partner—Dunn v Bleeck, 286 N.Y.S. 402, 246 App Div. 382

50. Matter of Tierney, 151 N.Y.S 972, 88 Misc. 347.

51. De Chambrun v. Cox, (N.Y.) 60 F 471, 9 C.C.A. 86

52. Abernethy v Savage, 141 So 329, 163 Miss. 789

On funds recovered

Attorney has paramount lien on funds recovered for client—Abernethy v. Savage, 141 So 329, 163 Miss 789.

53. Dankwardt v. Kermode, 187 P. 519, 68 Colo. 225.

Under particular statute

Under Rev St (1908) § 242, giving attorneys a lien on claims and demands in suit for their fees and on any judgment obtained, a contract between attorney and client, providing that the attorney shall receive a specified percentage of anything recovered, operates as an equitable assignment of the demand against defendant to the extent of giving the attorney a first lien on the judgment to the amount of the agreed compensation—Dankwardt v. Kermode, 187 P. 519, 68 Colo 225

54. Hansbrough v. D. W Standrod & Co., 286 P 923, 49 Idaho 216

Not inferior to set-off by assignee of judgment debtor

An attorney's lien on a judgment for tort is not inferior to a set-off by an assignee of the judgment debtor of a claim against the judgment creditor growing out of contract—Kansas City Rapid Motor & Transp Co. v Young, 175 S.W. 95, 188 Mo App 289

Appropriation of fund pro tanto

Only where there has been an appropriation of a fund pro tanto are prior equities superior to an attorney's lien on a cause of action and judgment—Smith v. First Nat Bank, 170 N.Y.S 127, 103 Misc Rep 274, modified 172 N.Y.S. 595, 184 App.Div. 719.

On notice to debtor of assignment to attorneys of part of claim, title vests absolutely in attorneys, as against attaching creditors of assignors, or collusive agreements of assignors and debtor.—Northern Texas Traction Co v. Clark & Sweeton, (Tex Civ App) 272 S.W. 564

Proctor's costs and disbursements

(1) The costs and disbursements of a seaman's proctor prosecuting his libel for wages come ahead of the seaman's wage lien—The John Gully, (D.C.N.Y.) 20 F.(2d) 211.

(2) But the costs of a proctor representing a claim inferior to that of the seaman are postponed to the seaman's wage lien—The John Gully, supra.

55. Royal Ins. Co v. Simon, 174 A. 444, 20 Del.Ch. 297—6 C.J. p 788 note 27.

Filing, recording or enforcement of foreclosure

Attorney's statutory lien as between attorney and other creditors of client, is valid without filing, recording, or enforcement by foreclosure—Molloy v Hubbard, 173 S.E. 877, 48 Ga App 820

General creditors of partner or firm

Where attorneys recovered for a partner his share of certain partnership funds, their right to be paid for their services out of such fund was prior to claims of general creditors of the partner recovering the judgment, and superior to the general creditors of the partnership, who sought to obtain the proceeds of the judgment as assets of the partnership—Cohen v. Goldberger, 141 N.E. 656, 109 Ohio St. 22.

Attorneys for contractors

(1) It has been held that the lien of an attorney for prosecuting a suit by the contractor against the owner is entitled to be satisfied prior to the liens of claimants who served stop notices on the owner—Brunetti v. Grandi, 104 A. 139, 89 N.J.Eq 116.

(2) Where an attorney employed by certain contractors explained to the holder of order from such contractors that the claim of the contractors against an improvement district was unliquidated, and that his fee must be paid before anything was paid on the order, and the holder of order filed it with him for payment when the claim was collected, and let him proceed with the adjustment of the claim, the relation between them was that of attorney and client, and the attorney's claim for services was entitled to priority—Coston v. Kealy, 265 S.W. 347, 165 Ark. 594.

Lien creditor, such as mortgagee, whose interest in fund realized solely through the efforts of the property owner's attorney, who agreed to look for compensation to such fund, is substantially identical with that of the owner, primarily entitled to collect the fund, must yield his claim to attorney's reasonable claim for compensation and payment of legal costs, though superior to the owner's claim on the property—Appeal of Harris, 186 A. 92, 323 Pa 124

Assignment of judgment as inferior to attorney's lien see infra § 230

Priority of attorney's lien as to lien of assignee for benefit of creditors see Assignments for Benefit of Creditors § 363.

56. Henry v. Traynor, 44 N.W. 11, 42 Minn. 234.

As against client's creditor levying prior to notice

An attorney's lien on a judgment he has secured for his client is superior to the claim of a creditor of the client who levies on the judgment before the giving of notice of the claim for the lien, and this notwithstanding the lien was asserted by two attorneys, one of whom was not a resident of the state and not recognized to practice in its courts, but who assisted in the trial, under Gen St (1913) § 4947—Barnes v Verry, 191 N.W. 589, 154 Minn. 252, 31 A.L.R. 707.

57. Dienst v. McCaffrey, 32 N.Y.S. 818.

58. Colo—Collins v. Thurlinger, 21 P.(2d) 709, 92 Colo 433

Utah—Lundy v Cappuccio, 181 P. 165, 54 Utah 420

6 C.J. p 788 note 30.

Filing notice immaterial

Attorney's lien on judgment for procuring judgment is prior to the right of a judgment creditor of the client acquired against such judgment in garnishment proceeding, although the attorney filed no notice of lien—Collins v. Thurlinger, 21 P.(2d) 709, 92 Colo. 433.

upon the fund or property recovered is superior to the rights of the heirs of plaintiff,[59] or to the rights of a surety for the adverse party.[60]

Claims subsequently attaching. A lien for attorney's services relates back and takes effect from the time of the commencement of the services,[61] and is superior to claims of creditors subsequently attaching on the interest of the client in the property involved in the action.[62] Accordingly an attorney's lien may be superior to the rights of a subsequent judgment creditor[63] or of a subsequently employed attorney.[64] Moreover such lien may be superior to rights under leases executed by a client after the lien has attached.[65] On the other hand the lien of an attorney has been held to be subject to the rights of a garnishing creditor where the garnishee summons is served prior to notice of such lien.[66]

Rights of client. A client is entitled to the amount recovered by an attorney subject to a lien for his fees.[67]

§ 230. Protection against Assignment by Client

Attorneys' liens are entitled to protection against assignments by clients, and the attorneys' right to such protection may be enforced by appropriate remedies.

The assignee of a judgment takes it subject to a lien in favor of the attorney through whose services it was secured.[68] Similarly the assignee of

Attorney for client in collection of insurance

Where client agreed to pay attorney an amount equal to whatever amount in excess of one thousand dollars might be collected on group policy, the attorney had a lien on proceeds of policy for an amount equal to the sum paid thereon in excess of one thousand dollars, as against the wife of the client who in divorce action garnished the insurer for amount of policy—Sharp v Culton, 89 S W (2d) 869, 262 Ky 84

Attorney for client in mortgage foreclosure

Attorney who foreclosed client's chattel mortgage, lodged mortgage fi fa with sheriff and petitioned for rule to have proceeds of sale of mortgaged property, under common-law fi. fa issued against the mortgagor, turned over to his client in preference to the holder of common-law fi fa, before client's creditor instituted garnishment proceedings, was entitled to have his lien for services satisfied before turning the proceeds of sale over to the garnishing creditor, who held common-law fi fa. against the client—Molloy v Hubbard, 173 S E 877, 48 Ga App 820

59. Porter v. Hanson, 86 Ark 591

60. In re United Cigar Stores Co of America, (D C N Y.) 9 F Supp 149.

Attorney for creditor lessor as against surety for lessee

Attorneys who filed proof of claim for creditor lessor against bankrupt estate of lessee and secured allowance of claim on lease and for tax which lessee had agreed to pay and had furnished surety bond to cover were held to be entitled to an attorney's lien on dividends declared on a portion of a claim for a tax, as against a surety which paid such portion of claim to the creditor and became owner of it by "subrogation," which is a substitution or assignment by operation of law, since the attorney's lien adhered to the whole claim and could be satisfied ratably out of all dividends paid and this particularly where attorneys' services were advantageous in establishing the whole claim—In re United Cigar Stores Co of America, (D C N Y) 9 F Supp. 149

61. Harlan v Bennett, 106 S.W 287, 127 Ky. 572, 32 Ky L. 473, 128 Am S R. 360.

62. Harlan v Bennett, supra—6 C. J p 788 note 34.

63. Morrison v. Ponder, 45 Ga. 167.

Under particular statute

Under Code § 1979, declaring that the attorney's lien shall be superior to all other liens upon property recovered by his services, the lien is superior to the lien of a subsequent judgment creditor.—Morrison v. Ponder, 45 Ga 167

Lien on fund superior to judgment

Attorney's lien on a fund under a retainer was held to be superior to a judgment subsequently recovered on a contract to pay the judgment creditor out of such fund—Bacon v. Schlesinger, 157 N Y S 649, 171 App. Div 503, affirmed 121 N E. 854, 224 N Y 690

64. Brown v Erwin, 108 S E. 605, 89 W Va. 113

Decree procured by one attorney enforced by another

An attorney procuring a decree has a lien on a fund arising from the enforcement of such decree by another attorney, prior to the lien of such subsequently employed attorney, unless the lawyer who obtained the decree has expressly or impliedly assented to such subsequent employment or, in some way, relinquished his right further to represent his client in the matter, or, by negligence or other misconduct warranting his discharge, has lost it—Brown v. Erwin, 108 S E. 605, 89 W Va 113.

65. Gust v. Van Court, 178 P 683, 74 Okl. 81.

As against lease executed pending suit

Where an attorney's contract to bring an action for land in adverse possession of another gives the attorney a percentage of the land in the event of a recovery or a compromise, and he sues claiming a lien under Rev L (1910) §§ 247, 248, such lien is prior to an oil and gas lease executed by the client pending suit; moreover, where on a compromise part of the land is conveyed to the attorney to satisfy the lien, the land so conveyed is not subject to such lease—Gust v. Van Court, 178 P. 683, 74 Okl 81.

66. Fornoff v. Smith, 281 Ill App. 232

67. Central Loan Co. v. Russell, (C. C A Tex) 16 F (2d) 35

After termination of contract with attorney

Corporation, after terminating contract with attorney to collect a claim against a bankrupt, was entitled to a dividend subject to the attorney's lien for fees—Central Loan Co v Russell, (C C A Tex) 16 F (2d) 35.

Closing of bank no basis for recovery

That, after attorneys' lien on funds recovered for client was discharged by payment, bank in which the undistributed balance was deposited closed, was not basis for recovery of part paid to attorneys—Abernethy v Savage, 141 So. 329, 168 Miss 789

68. Ky—Gray v. Graziani, 178 S.W. 1070, 165 Ky 771

Pa—McCauley v. Mayer, 14 Pa Dist. 216

6 C J p 788 note 35.

Taking for value and without notice

(1) The rule stated in the text is

a cause of action or of the subject matter of the litigation takes subject to the attorney's lien thereon,[69] except in jurisdictions where no lien exists until judgment is entered.[70] At all events the lien will not become effective against a sale of the judgment made in good faith prior to the perfecting of the lien.[71]

Marshaling assets. An attorney's lien for services should be satisfied out of property subject thereto in the inverse order of alienation, in case of conveyance by the client.[72]

Remedies. An attorney may prevent or set aside assignments made in fraud of his lien,[73] and may proceed against one who has accepted a pledge of certain paper to which the attorney's lien has attached.[74] Where award is made to defendant upon

applicable even where the assignee takes for value and without notice—Guliano v. Whitenack, 30 N Y S 415, 9 Misc. 562, 24 N Y Civ Proc 5o, 1 N Y Ann Cas. 75

(2) Accordingly the lien of an attorney on a judgment was held to be binding on the assignee thereof, without statutory notice—Anderson v Stai-Bair Oil Co, 243 P. 394, 34 Wyo 332

Taking by assignment or subrogation

Attorney's lien is not merely to protect attorney against settlements made by defendant directly with plaintiff, but it also serves to protect the attorney against subsequent assignees of the client and against persons taking by subrogation—In re United Cigar Stores Co of America, (D C N Y) 9 F Supp 149.

Particular liens superior to claims under subsequent assignments

(1) Counsel, retained by defendant, who, with his wife, assigned interest in residuary estate of grandfather, to defend action by assignee, was held to have a lien on fund remaining after the payment of the assignee's claim, despite a subsequent assignment to a trust company and an individual—Steuart v D'Esterre, 170 N Y S 936, affirmed Steuart v Ineal, 174 N Y S 922, 187 App Div 935

(2) Agreement to pay a stated sum out of any moneys received from a closed bank to an attorney in consideration of his services in the prosecution of a claim against a bank in respect of moneys on deposit was operative as an assignment pro tanto or lien from date thereof and superior to an assignment thereafter made—Bank of Aurora v. Aurora Co-op Fruit Growing & Marketing Ass'n, (Mo.App) 91 S. W (2d) 177.

(3) Claims of assignees of a condemnation award were subject to a prior contract claim of attorneys representing tenants in condemnation proceeding—Swartz, Inc, v. City of Utica, 228 N Y S 660, 223 App Div. 506, motion granted 170 N E. 148, 252 N Y. 573, and affirmed 173 N E. 864, 254 N.Y. 555.

(4) Rights of attorney asserting claim to fund allowed as attorneys' fees in abandoned condemnation suit and relying on instrument whereby defendants agreed to divide the fund with the attorney should be superior to the rights of lay assignee of judgment, even if the instrument constituted only an agreement for compensation and not assignment—City of Los Angeles v. Knapp, (Cal) 60 P (2d) 127.

Oral agreement to assign to third party amount to be recovered in a law action to be brought by the assignor and recital thereof in written assignment to attorney in payment of attorney's fees was held to create an equitable lien against the judgment obtained, which was valid against the attack of assignor's creditor who thereafter obtained a judgment against the assignor—Armour Fertilizer Works v Newbern, 185 S E 471, 210 N C 9

69. In re Leopold, 175 N Y S 188, 186 App Div. 872, affirmed 123 N E 876, 226 N Y. 692—6 C J p 788 note 38.

Attorney's charging lien is unaffected by assignment of cause of action—In re Leopold, 175 N Y S 188, 186 App Div 872, affirmed 123 N E 876, 226 N Y 692

Client's prevention of recovery by sale or conveyance

(1) Where defendant in ejectment procured a deed from plaintiff precluding recovery, an attorney, for plaintiff having a lien, was nevertheless entitled to recover one-third value of land—Simpson v. Baker, 252 P. 334, 123 Okl 118

(2) Attorney's lien in partition suit is not defeated by client's sale of property pending suit to purchaser with notice—Owens v. Bolt, 118 So 590, 218 Ala 344

(3) Where complainants in a partition suit defeated recovery by selling to one standing in no better position, neither may question actual recovery, and complainants' attorney may take proper steps to enforce his lien—Owens v Bolt, supra

70. Ill.—La Framboise v. Grow, 56 Ill. 197.
Me—Potter v. Mayo, 3 Me. 34, 14 Am.D. 211.

71. Ind—Alderman v. Nelson, 12 N E 394, 111 Ind 255
Wash—Humptulips Driving Co. v. Cross, 118 P 827, 65 Wash 636, 37 L R A (N S) 226 and note.

Absence of filing or notice until after assignment

Where an attorney's lien lies only under Comp L (1913) § 1574, requiring notice, where an attorney for a creditor of a bankrupt gave the referee in bankruptcy no notice, and did not file his lien and give notice until long after the creditor of the bankrupt had assigned the fund to another in good faith, the attorney's lien did not attach—In re Winston's Lien, 6 Alaska 482.

72. Butts v Carey, 128 N Y S 533, 143 App Div 356, appeal dismissed 100 N E 1125, 207 N Y 667.

73. Prichard v Fulmer, 159 P. 39, 22 N M 134, 2 A L R. 474.

Charging lien

An attorney having a charging lien may prevent or set aside assignments made in fraud of his rights—Prichard v. Fulmer, 159 P 39, 22 N M. 134, 2 A L R 474.

74. Hansbrough v. D W. Standrod & Co, 286 P 923, 49 Idaho 216.

Laches and estoppel

(1) Holder of attorney's lien on certain notes and corporate stock was not barred by laches from prosecuting an action for destroying lien, against one with whom the attorney's client had pledged such paper, although the attorney failed to assert his lien until the pledgee had accepted the pledge—Hansbrough v D W Standrod & Co., 286 P 923, 49 Idaho 216

(2) That a holder of attorney's lien suing for the destruction thereof did not assert such lien until the property on which such lien was claimed was in the hands of a pledgee did not estop such holder from asserting lien, the pledgee not having changed its position—Hansbrough v. D W Standrod & Co, supra

Pleading and proof

In a suit for the destruction of an attorney's lien by pledgee who sold stock subject to such lien, the value of such stock had to be alleged and proved—Hansbrough v. D W Standrod & Co, 286 P. 923, 49 Idaho 216.

Assignment of interest in judgment

Holder of attorney's lien could sue the pledgee of the subject matter.

abandonment of condemnation suit for fees of attorney employed but not paid, attorney's right to sum is superior to claim of ordinary assignee of judgment for costs and attorneys' fees, whether assignee claims under assignment prior or subsequent to judgment, and, even if attorney's right is not a lien, attorney is entitled to equitable interference to protect priority.[75] Moreover one of several attorneys may proceed against the others who have taken a conveyance of the subject matter of a suit in which all of such attorneys rendered services.[76] Enforcement of attorney's lien generally see infra this Title §§ 234-238.

§ 231. Protection against Settlement between Parties

a. In general

b Remedies of attorney

c. Proceedings

a. In General

An attorney's lien cannot interfere with the absolute right of a client to settle, however, a settlement by a client after an attorney's lien has attached will not be permitted to interfere with such lien.

In accordance with rules governing the right of attorneys to recover compensation under contingent fee contracts on settlement between the parties to an action (supra § 189) the lien of an attorney, whether on the cause of action or on the judgment, does not operate so as to interfere with the absolute right of the client to settle.[77] Moreover, in the absence of a legislative enactment regulating the matter, the rule is quite general that prior to

on such lien although the attorney who sues had assigned an interest in a judgment granting a lien on the general assets of the pledgor—Hansbrough v. D W Standrod & Co, 286 P. 923, 49 Idaho 216

75. City of Los Angeles v. Knapp, (Cal) 60 P (2d) 127.

76. Charles v. Whitt, 218 S W. 994, 187 Ky 77

Conveyance to two attorneys subject to claims of third

Where two of the three attorneys who represented the plaintiffs in an action for the recovery of certain lands received a conveyance of one-half of the minerals under the lands, and the clients conveyed the surface of the lands to a bona fide purchaser, it was held that the third attorney was entitled to subject to his claim the minerals conveyed to the other two attorneys in accordance with stated proportions—Charles v Whitt, 218 S W. 994, 187 Ky. 77.

77. U S—The Golden Star, (D C Cal) 9 F Supp 172, affirmed (C C A) 82 F (2d) 687

Ark—Davies & Davies v. Patterson, 205 S W. 118, 135 Ark 22—St Louis, I M. & S. Ry Co. v. Freeman, 179 S W 648, 120 Ark. 389—St Louis, I M & S Ry. Co v. Blaylock, 175 S W 1170, 117 Ark 504, Ann Cas 1917A 563

Colo—Nichols v Orr, 166 P. 561, 63 Colo. 333, 2 A L R 449

6 C J p 789 note 46, p 791 note 62

Client's duty to inform attorney on making settlement

Client on making settlement of cause of action has been held to be under duty to inform attorney thereof and of terms of escrow agreement covering the attorney's lien—Johnson v. Mound City State Bank, 287 N W 891, 58 S D. 622

Stipulation to dismiss

That attorney has lien for fees does not preclude parties from stipulating to dismiss suit—Miller v Miller, 163 N E 343, 332 Ill 177.

No compromise in particular case

Where an attorney was employed by a husband to institute and prosecute an action for the cancellation of wife's conveyance, but instructed not to file such action until authorized, and thereafter the husband and wife made a new deed, and the balance of the price due for such conveyance was paid, it was held that there was no compromise entitling attorney to a lien, under Comp St.(1921) § 4102—Evans v. Irby, 227 P. 433, 100 Okl 60.

Settlement subject to statutory lien

Under Minnesota statute, notwithstanding existence of attorney's lien on cause of action, plaintiff and defendant could settle the case subject to the lien—Byram v. Miner, (C C A Minn) 47 F (2d) 112, certiorari denied 51 S Ct. 648, 283 U.S 854, 75 L Ed 1461.

Tort case in admiralty

(1) Parties to lawsuit may compromise their litigation without consulting counsel in tort case in admiralty as in other cases, and, in absence of statute giving attorney lien for fees, the courts will not intervene, unless there has been an attempt to defraud the attorney by collusion between the parties—The Golden Star, (C C A.Cal) 82 F (2d) 687, affirming (D.C.) 9 F Supp. 172

(2) Accordingly where a settlement of a tort case in admiralty was made wholly upon the initiative of libelant, without knowledge of counsel on either side, and libelant had informed his proctor of such settlement asking him for a bill, such proctor was not entitled to recover from defendants for fees, costs, and disbursements and moneys advanced to libelant.—The Golden Star, (D C Cal) 9 F Supp. 172, affirmed (C C A) 82 F (2d) 687.

Time when settlement may be made

(1) A client's right to settle a case regardless of his attorney's interest is absolute at any stage of the litigation—Knipe v. Wheelehan, 160 N Y S 1012

(2) The Attorney's Lien Act does not deprive the client of the right to settle his claim at any stage of the proceedings, even after an appeal has been taken—Foy v India Rubber Tire Co, 211 Ill App 252

Good faith

(1) Settlement of litigation where attorney is entitled to lien must be made in good faith and without purpose to defeat the attorney's claim—Nichols v Orr, 166 P. 561, 63 Colo. 333, 2 A L R 449

(2) A client may, without the consent of his attorney, settle and compromise with his adversary all matters in litigation in such manner and upon such terms as he may deem necessary for the protection of his interests notwithstanding the existence of an attorney's lien where the settlement is made in good faith and without a purpose to defeat the lien of attorney—Millsap v. Sparks, 188 P. 135, 21 Ariz 317.

(3) Cause of action is property of client, and not of attorney, and attorney's lien is mere charge on it, subject to the client's right to settle the action in good faith, without regard to attorney's wishes—Conklin v Conklin, 194 N Y S 685, 201 App. Div 170—Ward v. Orsini, 211 N.Y S. 249, 125 Misc. 407.

(4 Where, after judgment, the client settled for less than the judgment without consulting his attorney, employed on a contingent fee, and the adversary retained enough to pay a stipulated portion to the attorney, and there was no evidence

securing a judgment or a decree in his favor a party may, without the knowledge or consent of his attorney, compromise the dispute involved, thereby preventing an attorney's lien from attaching, in the first instance, to the money or property received by the client in settlement.[78] However, a settlement made without the consent of an attorney will not be permitted to affect the existing lien of such attorney,[79] and a defendant who settles with a plaintiff without his attorney's

of fraud, the attorney could recover nothing from the adversary in excess of the amount so reserved notwithstanding a statute conferring attorneys' liens—Corcoran v. George Kellogg Structural Co, 166 N.Y.S 269, 179 App Div 396

78. Mass—Herbits v Constitution Indemnity Co of Philadelphia, 181 N E 723, 279 Mass 539

Or—Campbell's Automatic Safety Gas Burner Co v Hammer, 153 P 475, 78 Or 612

6 C J p 788 note 42.

View that lien precluding settlement cannot be acquired prior to judgment

(1) Before judgment, attorney cannot acquire, even by contract, any lien that will prevent the client from compromising and releasing his claim without the attorney's consent—Olczak v. Marchelewicz, 188 N E 790, 98 Ind App 244.

(2) Accordingly where the client compromised and settled the claim before judgment without his attorney's consent, the attorney had no enforceable lien on money paid to the client—Olczak v Marchelewicz, supra.

No lien on proceeds

At common law there was no enforceable lien in favor of an attorney on the proceeds of a settlement out of court made by his client—Levy v. Public Service Ry Co, (N J) 98 A 847, affirmed 103 A. 171, 91 N J Law 183

Adverse party not liable unless guilty of fraud

An attorney having no lien prior to judgment, the cause of action may be compromised without his consent, and the adverse party is not liable unless guilty of fraud—Campbell's Automatic Safety Gas Burner Co v Hammer, 153 P. 475, 78 Or 612

Settlement by director general of railroads

Where a claim for the death of a railroad employee while the railroad was being operated by the federal director general of railroads was settled by him without reference to the railroad company it was not liable to a lien of attorney for claimant under a state statute authorizing attorney's liens.—Wabash Ry Co v. Elliott, 43 S Ct 406, 261 U.S. 457, 67 L Ed 743, reversing Petition of Elliott, 234 S W 520, 208 Mo App 348, certiorari granted Wabash R Co v Elliott, 42 S.Ct. 185, 257 U S 632, 66 L.Ed. 407.

79. U S—Woodbury v Andrew Jergens Co, (C C A N Y) 69 F (2d) 49—Lehigh & N E R Co v Finnerty, (C C A N J) 61 F (2d) 289, certiorari denied 53 S Ct 292, 287 U S 668, 77 L Ed 576—Byram v Miner, (C C A Minn) 47 F (2d) 112, certiorari denied 51 S Ct 648, 283 U S 854, 75 L Ed 1461—In re Badger, (C C A N Y) 9 F (2d) 560—Universal Oil Products Co v Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C A) German v Universal Oil Products Co, 77 F (2d) 70

Ark—Botts v Arkansas County, 57 S W (2d) 563, 186 Ark. 931—Warren & S R R Co v Wilson, 50 S W (2d) 976, 185 Ark 1063—Vaughan v Hill, 242 S W 826, 154 Ark. 528—Midland Valley R Co v. Johnson, 215 S W 665, 140 Ark 174, 7 A L R 1007—St Louis, I M & S Ry Co v Hays & Ward, 195 S W. 28, 128 Ark. 471—St Louis, I M & S Ry. Co v Blaylock, 175 S W 1170, 117 Ark 504, Ann Cas 1917A 563

Minn—Wildung v Security Mortgage Co of America, 173 N W. 429, 143 Minn 251—Kubu v Kabes, 172 N W. 496, 142 Minn 433

Mo—Noell v. Missouri Pac R Co, 74 S W (2d) 7, 335 Mo 687, 94 A L R 684, followed in 74 S W (2d) 14—Cell v Robinson, (App) 79 S W (2d) 489—Barthels v. Garrels, 227 S W. 910, 206 Mo App 199

Mont—Walsh v Hoskins, 162 P 960, 53 Mont 198

N Y—Beecher v Peter A. Vogt Mfg Co, 125 N E 831, 227 N Y 669, affirming 170 N Y S 1068, 184 App Div 962—In re Reisfeld, 175 N Y S 865, 187 App Div 223, order modified on other grounds 124 N E 725, 227 N Y 137—In re Levine's Estate, 278 N Y S 36, 154 Misc 700, 286 N Y S 513, 247 App Div 19—Knipe v Wheelehan, 160 N.Y S 1012

Okl—Mathews v Smith, 39 P (2d) 48, 169 Okl 518—Goldberg's Loan Office v Evans, 37 P (2d) 286, 167 Okl 397—Boulding v Slick, 17 P (2d) 391, 161 Okl 189—Fry v Wolfe, 234 P 191, 106 Okl 259—Allen v. Shepherd, 169 P. 1115, 69 Okl 47

6 C J p 790 note 47.

"Settlement" or "compromise" within lien statute

Any arrangement between litigants or any conduct of one seeking affirmative relief, done at the instance of his adversary, which deprives the litigant of his asserted right against his adversary, constitutes a "settlement" or "compromise" of the cause of action or claim within the statute giving the attorney a lien for fees against the party who settles or compromises with the attorney's client—Smith v Westgate Oil Co, (Okl) 53 P (2d) 1010

As depending on consent of attorney

Litigant who compromises cause of action with client without approval or consent of client's attorney having lien is liable to the attorney for fee, but, if the attorney approves of or consents to the settlement, the litigant is not liable to the attorney—Mathews v. Smith, 39 P (2d) 48, 169 Okl 518

Perpetration or instrumentality of defendant

(1) Under Comp St (1921) §§ 4100–4103, inclusive, defendant is not liable to plaintiffs' attorney for attorney's fee or for lien securing such fee, unless such defendant is the party who perpetrates a compromise or settlement of plaintiffs' cause of action, or is instrumental in doing so without notifying the attorney—Holley & Means v. Foster, 230 P. 879, 104 Okl 196

(2) In an action to recover real estate, notice by defendant to his warrantor, pursuant to Comp St (1921) § 5263, does not as matter of law constitute such warrantor defendant's agent, so as to make him liable to plaintiffs' attorney for conduct of such warrantor in procuring dismissal of plaintiffs' action, without the attorney's consent, where defendant has no part in dismissal—Holley & Means v. Foster, supra.

Necessity for voluntary acts of defendant

(1) Where defendant was liable on a cause of action under Federal Employers' Liability Act, its voluntary agreement with plaintiff as to amount of damages without payment of such amount to plaintiff did not render defendant liable to plaintiff's attorney for destruction of his lien on cause of action, since only payment could destroy the lien—Noell v. Missouri Pac. R Co., 74 S W (2d) 7, 335 Mo 687, 94 A.L.R. 684, followed in 74 S W (2d) 14.

(2) Where the railway against which judgment was obtained in Arkansas notified plaintiff's attorney who had previously begun action in Missouri on the same cause of action to protect his lien, and had

knowledge does so at his own risk as to the attorney's lien,[80] especially where a cause of action actually existed between the parties to the cause and there was notice of the attorney's lien,[81]

funds impounded in Arkansas and held for a reasonable time, attorney who failed to contest the disposition of impounded funds could not recover the value of the lien from the railway, since the railway did not destroy the lien by its voluntary acts.—Noell v. Missouri Pac. R. Co., supra.

Dismissal of one suit and settlement of second

Where attorney for plaintiff had a contract for a percentage of recovery by suit or compromise, and served notice of his lien on defendant and plaintiff dismissed without his consent and began a second suit by another attorney, which was settled by a payment to plaintiff, the dismissal of the first suit did not abate the former attorney's lien.—Carter v. Dunham, 177 P. 533, 104 Kan. 59.

Ignorance of amount of lien immaterial

The mere fact that defendant in negligence case did not know amount of lien of plaintiff's attorney on cause of action did not permit defendant to disregard such lien and make a settlement with plaintiff since it was incumbent upon defendant to ascertain the amount of the lien, where he knew that there was a lien.—In re Reisfeld, 175 N.Y.S. 365, 187 App.Div. 223, modified on other grounds 124 N.E. 725, 227 N.Y. 137.

Settlement or compromise with adverse party or stranger

Under L.(1909) c. 4 art. 1 § 1, and generally under common law, no compromise or settlement by client could affect or abrogate an attorneys' lien, regardless of whether the settlement or compromise was with the adverse party to the litigation or with a stranger to the action.—Fry v. Wolfe, 234 P. 191, 106 Okl. 289.

Debtor's property in state; violation of agent's instructions

That debtor, who settles with creditor without the consent of the latter's attorney, has no property in the state is wholly immaterial, under Ky.St. § 107, as to lien, and it is also immaterial that the agent who made the settlement violated his instructions in paying the whole claim to the creditor.—Manning v. Edwards, 265 S.W. 492, 205 Ky. 158.

Resignation and appointment of administratrix

That administratrix had resigned and another been appointed, who was not substituted as a party, did not affect the attorney's lien in an action for death of deceased, and settlement with such latter administratrix with knowledge of lien did not defeat the lien.—Leary v. New York Cent. R. Co., 170 N.Y.S. 366, 183 App.Div. 334.

Inability of attorney to prevent settlement

Though statutory attorney's lien does not permit plaintiff's attorney to prevent settlement, it gives him a lien for a percentage of the proceeds which the contract with client called for.—Warren & S. R. R. Co. v. Wilson, 50 S.W.(2d) 976, 185 Ark. 1063.

Burden of justifying settlement on defendant

The burden is on a judgment debtor to justify his settlement with the creditor for less than the face of the judgment in derogation of the lien of plaintiff's attorneys.—Barthels v. Garrels, 227 S.W. 910, 206 Mo.App. 199.

Settlement effective as judgment as regards lien

Settlement made by client has the effect of a judgment on his cause of action for all purposes of attorneys' lien on cause of action under contract for contingent fees, notwithstanding an invalid provision of contract prohibiting client's settlement without attorneys' consent.—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166.

Settlement before or after judgment

Attorney's lien on any judgment and proceeds thereof cannot be affected by any settlement by the parties before or after judgment.—Renfro v. Nixon, (Idaho) 45 P.(2d) 595.

Secret agreement on arbitration by parties

Attorney who instituted suit for client, furnished defendant with bill of particulars, and moved to strike out portion of defendant's answer, pending which client and defendant secretly agreed upon arbitration and discontinuance of such suit, was held entitled to a lien upon client's cause of action irrespective of whether any decision, decree, award, judgment, or final order had been entered in such suit.—Wertheim v. Burns Bros., 174 A. 238, 12 N.J.Misc. 676.

Attorney-client contract as lien basis

Contract between widow individually and as administratrix, for employment of attorney to prosecute death action, may serve as basis for attorney's lien upon settlement direct with wrongdoer, though settlement was without authority from probate court.—Ryan v. Chicago, M., St. P. & P. R. Co., 259 Ill.App. 472.

Payment made in settlement of suit

Payment by defendant to administrator of four thousand dollars was held to be made in settlement of a suit brought under Federal Employers' Liability Act, for the death of a railway employee and not to preclude the claim of attorneys representing administrator for services.—Noell v. Chicago & E. I. Ry. Co., (Mo.App.) 21 S.W.(2d) 937, certiorari denied Chicago & E. I. Ry. Co. v. Noell, 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.

Cause of action against client

That attorney has a cause of action against his client does not exonerate adverse parties who wrongfully induced breach of contract of retainer.—Lurie v. New Amsterdam Casualty Co., 1 N.E.(2d) 472, 270 N.Y. 379, affirming 281 N.Y.S. 988, 245 App.Div. 710.

Several adverse parties

(1) Where a party, whose interest is actually adverse to client, does not settle or compromise cause of action, such adverse party does not become liable for the attorney's fees under a lien statute.—Boulding v. Slick, 17 P.(2d) 391, 161 Okl. 189.

(2) Moreover the fact that a settlement or compromise with a client by one adverse party to an action inures to the benefit of another, does not render such other liable for attorney's fees.—Boulding v. Slick, supra.

(3) In an attorney's suit for reasonable compensation for services in a former suit against the parties who were defendants therein, for the reason that they had compromised and procured a dismissal of said suit with the attorney's client without notice or consent of plaintiff attorney, and upon the trial the undisputed evidence showed that three of defendants had nothing to do with the settlement, the attorney cannot assign such dismissal as error where judgment was given in favor of the attorney for full compensation and against defendant who secured the dismissal, since, under Rev.L.(1910) § 249, the party settling or compromising is the one liable for the attorney's compensation.—Chowning v. Ledbetter, 208 P. 329, 86 Okl. 269.

Money or property produced by settlement as subject matter of charging lien see supra § 228.

80. Sutton v. Chicago R. Cos., 101 N.E. 940, 258 Ill. 551.—6 C.J. p. 790 note 48.

81. Ga.—Camp v. U. S. Fidelity & Guaranty Co., 157 S.E. 209, 42 Ga.App. 653.

Ill.—Cohen v. Kirchheimer, (App.) 2 N.E.(2d) 592.

Knowledge of pending suit is only

and the rule has been applied even though no express notice has been given to him, or to his attorney, of the existence of such lien.[82] Further it is particularly true that after judgment and after the lien has been properly perfected by notice or otherwise, a compromise cannot prejudice the attorney's right to enforce the judgment to the extent of the lien.[83]

Where settlement provides for lien. Of course a settlement which provides for the lien will be upheld.[84]

Fraudulent or collusive settlements. The lien of an attorney will be protected against a collusive settlement of litigation in fraud of such lien.[85] Where a settlement is made collusively and with the purpose of depriving the attorneys of their compensation, the court will withhold its sanction of the adjustment in suits to enforce attorneys' liens, although ordinarily anxious to ratify the honest settlement of a pending action.[86] While it has been held that a settlement is presumed to have been made in good faith,[87] yet a settlement made at the instigation of the attorneys for defendant, without the knowledge of the attorneys for plaintiff, and without making suitable and sure provision for their compensation, is viewed with suspicion,[88] the mere fact that an action is settled without the consent of plaintiff's attorney, and with no adequate consideration for the settlement, being considered evidence of bad faith.[89]

notice necessary of attorney's lien on suit and proceeds for fees—Camp v. U S Fidelity & Guaranty Co, 157 S E 209, 42 Ga App 653

Employer and insurance carrier, having notice of attorney's relation in proceeding to recover compensation, cannot satisfy award until attorney's lien is satisfied—Camp v U. S. Fidelity & Guaranty Co, 157 S E 209, 42 Ga App 653

Adverse party having actual notice

Where attorneys were retained under a written agreement, and performed services under the agreement, and the adverse party had actual notice that they claimed a lien upon the cause of action and settled the action without attorneys' knowledge and while they were still acting as attorneys, such adverse party is liable to the attorneys for amount of lien—In re Reisfeld, 175 N.Y.S 365, 187 App Div 233, modified on other grounds 124 N.E. 725, 227 N Y. 137

Settlement by defendant without notice of pending suit

The lien given an attorney on a suit by Code (1907) § 3011, is not affected by settlement with attorney's client, the plaintiff, by defendant without knowledge of pendency of the suit—Alabama Fuel & Iron Co v. Denson, 94 So 311, 208 Ala 337.

Client's success condition to recovery by attorney

Under Comp L (1909) §§ 276, 277, where attorney files a lien claim and the case is compromised by the client without his consent, he may recover fee from the party settling with client if his client should have prevailed, but not otherwise—Crump v Guyer, 157 P. 321, 60 Okl 232, 2 A.L.R 331.

82. Peri v. New York Cent, etc., R. Co, 46 N.E. 849, 152 N.Y. 521

83. Hammond, W. & E C. Ry. Co v. Kaput, 110 N E 109, 61 Ind App 543—6 C.J. p 791 note 63.

Dismissal merged in judgment

Under Rev St (1909) §§ 964, 965, where it appears that litigation is such that it would, if successful, result in judgment on which counsel would have a lien for fees earned in the case, plaintiff cannot, over the attorney's objection, withdraw an appeal or writ of error, much less dismiss his cause of action, after it has become merged in the judgment—Argeropoulos v Kansas City Rys Co, 212 S.W. 369, 201 Mo App 287

Client's right to settle after judgment absent fraudulent intent

Even after judgment, it has been held that a client has a right to settle with defendant for a less sum, if the settlement is not intended to defraud his attorney—Machcinski v Lehigh Valley R. Co, (C.C.A.N.Y.) 272 F 920

Settlement pending appeal

(1) Where plaintiff, pending defendant's appeal, accepted a lesser amount in full settlement, and also stipulated for a dismissal of the appeal, without the knowledge of his attorney, whose lien, of which defendant had notice, was on file when judgment was rendered, the settlement and agreement to dismiss could not deprive attorney of right to enforce lien on entire amount of judgment—Griggs v Chicago, R. I. & P Ry Co, 177 N.W. 135, 104 Neb 301

(2) Where litigation, if successful, would result in a recovery of property on which the counsel of plaintiff in error would have a lien for fees, plaintiff in error cannot withdraw his writ of error over his counsel's objection—Corbin v. McCrary, 96 S E 445, 22 Ga App 472.

84. Levy v Grand Central Wicker Shop, 163 N E 244, 249 N Y 163, affirming 228 N Y S 836, 223 App Div 871—6 C J p 790 note 54.

85. Ariz—Millsap v. Sparks, 188 P 135, 21 Ariz 317.

Ind—Hammond, W & E C Ry Co v Kaput, 110 N E 109, 61 Ind App. 543

N Y—In re Podell, 245 N Y S 27, 138 Misc 428

Settlement of bastardy proceedings

Where a lien for the fees of an attorney who prosecutes or assists in the prosecution of a bastardy proceeding attaches to a final judgment of conviction against the putative father of the child, and for the payment of money for its support for a specific term of years, the mother, in person or by her next friend, and the accused cannot, by a fraudulent agreement after judgment, deprive the attorney of fees for the services so rendered by him—State v O'Brien, 109 S E 830, 89 W Va 634.

Settlement after judgment as constructive fraud

Settlement between parties after judgment for plaintiff without knowledge or consent of plaintiff's attorneys, who had a lien on the judgment, has been held to be a constructive fraud on attorneys—Hammond, W & E C Ry. Co v. Kaput, 110 N E 109, 61 Ind App. 543

Absence of attorney not rendering settlement fraudulent

A settlement of litigation made between defendant's attorney of record and plaintiff, at latter's instance, and recognizing lien of plaintiff's attorney for half of amount paid, is not fraudulent because made in his absence—Nichols v Orr, 106 P 561, 63 Colo. 333, 2 A.L.R 449

86. Desrnan v. Butler, 136 N W 747, 118 Minn 198, Ann Cas 1913D 642—6 C J p 791 note 58

87. Plummer v Great Northern R Co, 110 P. 989, 60 Wash 214, 31 L.R.A.N.S 1215.

88. Falconio v Larsen, 48 P 703, 31 Or 137, 37 L.R.A. 251—6 C.J. p 791 note 60.

89. Jackson v Stearns, 84 P. 798, 48 Or 25, 5 L.R.A.N.S 390.

Where fund in hands of court; proceedings in rem. Where a fund in the hands of the court has been impounded and placed there through the services of plaintiff's attorney, the lien of the attorney thereon cannot be defeated by a subsequent settlement between the parties and the dismissal of the suit [90] The same is true, it seems, where the suit is in the nature of a proceeding in rem wherein the attorney's lien after attaching at the commencement of the suit cannot be defeated by a compromise and a settlement between the parties.[91]

Necessity of final judgment. Where a judgment has been obtained which has not become a finality, for instance, where a motion for a new trial is pending and undisposed of, or where an appeal has been granted, a compromise settlement in which plaintiff's attorney is ignored and to which he does not assent does not destroy his lien [92] In such case, however, the amount of the value of the lien is controlled by the settlement made by the client, provided it is an honest settlement, and is not necessarily controlled by the amount of the judgment itself [93] If an appeal is taken on which the judgment is reversed, and thereafter the parties settle the case by compromise, the attorney's lien does not attach to the amount of the compromise unless it can be clearly shown that defendant had notice of it,[94] or unless by statute lien rights are conferred upon the cause of action or upon money in the hands of the adverse party.[95]

When judgment considered in existence for purposes of lien. It has been held that, while the judgment does not properly exist until it has been duly rendered and entered, yet, so far as the question of the attorney's lien in this connection is concerned, it exists from the time the judgment is ordered to be entered [96] Other cases hold that, where the parties settle the suit before judgment is actually entered, the attorney for plaintiff can claim no lien.[97]

Fee payable out of proceeds of suit. Where an attorney's fee is payable, by special contract, out of the proceeds of the suit, the attorney has an inchoate lien upon the property for his fee as soon as the action is commenced; and the client cannot defeat such lien by dismissing the action before trial, over the attorney's objection, without first paying, or properly securing, the attorney's fees [98]

Satisfaction of claim or judgment in disregard of attorney's lien. Plaintiff's attorney cannot be deprived of his lien by defendant's satisfaction of plaintiff's claim in disregard of such lien.[99] Similarly if defendant satisfies the judgment against himself without reference to such lien, after notice of it, he does so at his peril.[1] Moreover the lien of an attorney for a judgment creditor cannot be defeated by the judgment debtor's unconditional payment of the amount of the judgment to the clerk of the court.[2] Further a release of all claims given by plaintiff cannot operate in such cases to affect the attorney's right to a lien on the judgment.[3]

90. Pleasants v Kortrecht, 5 Heisk (Tenn) 694—Hunt v. McClanahan, 1 Heisk (Tenn) 503—6 C J p 791 note 56

91. Hunt v. McClanahan, supra.

92. Mo —Wait v Atchison, etc, R Co, 103 S W 60, 204 Mo. 491.
Tenn —Covington v. Bass, 12 S W. 1038, 88 Tenn 496.
6 C.J p 792 note 67

93. Wait v Atchison, etc, R. Co. 103 S W 60, 204 Mo 491—6 C J. p 792 note 68

94. Ky —McCormack v. Louisville, etc, R Co, 161 S W 518, 156 Ky. 465
Me —Dunlap v. Burnham, 88 Me. 112.
Miss —Mosly v. Jamison, 14 So 529, 71 Miss 456
N Y —Pulver v Harris, 62 Barb. 500, affirmed 52 N.Y. 73
6 C J. p 792 note 69.

95. Wallace v Chicago, etc., R. Co., 84 N W 662, 112 Iowa 565—6 C J. p 792 note 70

96. Young v. Dearborn, 27 N.H 324

97. Me.—Potter v. Mayo, 3 Me. 34, 14 Am.D. 211.
Wash —Cline Piano Co. v Sherwood, 106 P. 742, 57 Wash 239
6 C J. p 793 note 72

98. Mich —Grand Rapids, etc, R Co v Cheboygan Cir. Judge, 123 N W 56, 161 Mich 131, 137 Am S R 495.
Minn.—Boogren v St Paul City R Co, 106 N W. 104, 97 Minn 51, 114 Am S R 691, 3 L.R A (N S) 379.
6 C J p 791 note 55

99. Sizer v. Midland Valley R. Co, 217 S W. 6, 141 Ark. 369.

Voluntary payment

An attorney's interest in his client's cause of action under the Attorney's Lien Act is such that it cannot be defeated or satisfied by a voluntary payment to the client without the attorney's consent.—Sizer v. Midland Valley R Co, 217 S W 6, 141 Ark. 369

1. Renfro v Nixon, (Idaho) 45 P. (2d) 595—6 C J. p 792 note 64.

Statute as notice

Judgment debtor, who paid without ascertaining if attorney's lien had been discharged, paid at his peril, since statute providing for attorney's lien carries notice to every litigant that attorney has lien on cause of action, verdict report, or judgment and proceeds thereof—Renfro v. Nixon, (Idaho) 45 P.(2d) 595

Absence of actual notice

Attorney's lien can only be discharged by payment, and is not lost as against judgment debtor, notwithstanding he pays judgment having no actual notice of lien —Renfro v. Nixon, (Idaho) 45 P.(2d) 595.

Acceptance and reliance on client's representations

Attorney for plaintiff is entitled to enforce his lien under Gen St (1913) § 4955, against defendant, although defendant had accepted plaintiff's statement that another was his attorney, and accepted plaintiff's version of the contract between himself and his attorney.—Georgian v. Minneapolis & St. L. R. Co., 154 N W. 962, 131 Minn. 102.

2. Fisher v. Oskaloosa, 28 Iowa 381

3. Bickford v. Ellis, 50 Me 121.

Release or payment of judgment does not deprive attorney or assignee of right to enforce lien for

b. Remedies of Attorney

(1) In general
(2) Summary remedies
(3) Continuing original suit
(4) Independent action

(1) In General

Attorneys have appropriate remedies for the enforcement of their liens notwithstanding settlements between their clients and adverse parties.

Notwithstanding the settlement of a case in disregard of an attorney's lien, it may be enforced by appropriate remedies.[4] An attorney cannot, however, sue on an agreement, not made for his benefit, between his client and a third person.[5]

Bill of discovery. Where a client settles a case in violation of the rights of his attorney he may, on a proper case shown, be entitled to the aid of a bill of discovery to enforce his rights under a lien statute.[6]

Dismissal of appeal. The lien of an attorney may be protected by the dismissal of an appeal where a settlement is made pending such appeal.[7]

attorney fees—Shultz v Jones, 9 S W (2d) 248, 223 Mo App 142

4. Ky—Getaz v Eversole, 27 S W (2d) 688, 234 Ky 164
Okl—Owens v Wilson, 18 P (2d) 880, 161 Okl 46

Election between independent action and intervention

Where an attorney has a lien for his services upon a cause of action under Gen St (1913) § 4955, and the action is settled by the parties before trial, the attorney may elect to enforce his lien rights by an independent action against the defendant or by intervention in the original action.—Middelstadt v. City of Minneapolis, 179 N W 890, 147 Minn 186

Under statute making adverse parties liable for fees

(1) Statute providing for attorney's liens and making the adverse party liable to attorney for fee under contract for settling or compromising cause of action is held not to abrogate or limit the common-law rights of attorney against his client on the contract of employment—Callahan v Cowley & Riddle, 245 P 48, 117 Okl 58

(2) The statutory right of the attorney to hold the adverse party liable for fee is remedy additional or concurrent with that provided at the common law against his client—Callahan v Cowley & Riddle, supra.

(3) Accordingly it has been held under the statute in question that an attorney, on a secret compromise with his client, may pursue a remedy against the adverse party for payment of the fees or against the client, or against both, on the attorney's one cause of action, until his judgment is extinguished by one satisfaction.—Callahan v Cowley & Riddle, supra

(4) Moreover under such statutory provisions where parties to a judgment in the trial court settle their controversy after an appeal to the supreme court, the appeal will be dismissed, notwithstanding the attorneys for defendants have a contract for a contingent fee and the settlement was without their consent—Ingram v Johnson, 176 P. 241, 71 Okl 171

Surreptitious and collusive settlement after notice

Where an attorney having a contract for a percentage of the proceeds of a client's cause of action notifies the adverse litigant of a lien claimed, surreptitious and collusive settlement of claim gives attorney cause of action against adverse litigant for fee—Goldberg's Loan Office v Evans, 37 P (2d) 286, 169 Okl 397

Release of adverse party by client pending second trial

Under Code (1907) § 3011, subd 2, attorney of plaintiff in action for personal injuries against railroad, who secured judgment which was reversed, could enforce plaintiff's right of action to secure his charges for procuring judgment, although plaintiff, without attorney's consent, and to defraud him, gave defendant a release pending second trial—Lowery v. Illinois Cent R Co, 69 So 954, 195 Ala 144

Establishment of lien by attorney not of record

Attorney, though not attorney of record, may establish lien for services, where the client effects settlement direct—Tulka v. Chicago Ry Co, 259 Ill App 234

Inducement to breach contract by agents of insurance company

Attorney, who was retained by client who had been injured by automobile owned by one who had been insured, had a cause of action against an insurance company whose agents unlawfully induced the client to breach contract of retainer by threatening client that unless he repudiated contract the client would receive no compensation—Lurie v New Amsterdam Casualty Co, 1 N E (2d) 472, 270 N Y 379, affirming 281 N Y S 988, 245 App Div. 710.

Employer and compensation insurance carrier

Attorney representing a workmen's compensation claimant and having a lien for compensation may after settlement without the attorney's consent, recover the amount of such lien as fees against the employer and an insurance carrier by seeking in superior court judgment, on award, for his fees—Camp v U. S Fidelity & Guaranty Co., 157 S E 209, 42 Ga App 653

Prevention of payment by judgment debtor

An attorney having a charging lien has the right to have the court interfere to prevent payment by the judgment debtor—Prichard v Fulmer, 159 P. 39, 22 N M 134, 2 A L R 474

Enforcement of attorneys' liens generally see infra §§ 233–238

5. Leary v New York Cent. R Co, 209 N Y S 575 212 App Div 689

Agreement intended solely as indemnity to client

Attorneys could not sue on an agreement executed by one making a settlement with client, to save the client harmless from liability on attorney's lien for services, as agreement was not for the attorneys' benefit, but intended solely as indemnity to the client—Leary v New York Cent. R. Co, 209 N Y S 575, 212 App Div 689

6. Carroll v C I Hayes, Inc, (R I) 184 A 181

Attorney showing right to information from parties

Where a controversy in dispute is settled without the knowledge of an attorney while the relation of attorney and client continues if attorney shows right to necessary information from parties, the court may, through a bill of discovery, assist the attorney in establishing a statutory lien—Carroll v C I. Hayes, Inc, (R.I) 184 A 181.

7. Hammond, W & E C Ry Co v. Kaput, 110 N.E 109, 61 Ind App 513

Settlement in fraud of attorneys

(1) Where settlement is made by parties in fraud of plaintiff's attorneys during pendency of appeal, the appeal will be dismissed as a protection to the attorney's lien on the

Procedure after compromise and settlement by parties. In order that an attorney, having a lien for services, may proceed in the original suit for the purpose of recovering his fees, it is usually necessary for him to have the stipulation of settlement and discontinuance set aside or stricken from the files[8] This is not necessary in all cases, however;[9] as, for instance, where there has been no obstacle to the continuance of the action put upon the record, but only an agreement of compromise or of release between the parties.[10] In most jurisdictions the case must then be sent to trial upon the merits, and the attorney must establish plaintiff's right to recover on the facts independently of the question of fees[11] In Iowa this is not necessary.[12] A motion for leave to prosecute after a settlement and to vacate a satisfaction should be made in the attorney's name, but the suit should proceed in the client's name.[13]

(2) Summary Remedies

Ordinarily an attorney may be entitled to enforce his lien by summary remedies after a settlement in fraud of his lien.

Ordinarily a satisfaction of the judgment in fraud of the lien may be vacated on motion and the attorney will be allowed to enforce the judgment for the amount of his lien,[14] although there exists authority to the effect that after settlement an attorney's lien rights cannot be enforced by summary proceedings[15] At all events the satisfaction will not be set aside unless it is in effect

judgment—Hammond, W. & E C Ry Co. v. Kaput, 110 N.E. 109, 61 Ind App 543.

(2) An attorney who instituted an action for his clients as payees against the maker of a note may prosecute the original suit to recover his fees under Civ Code (1910) § 3864, where it was settled out of court without his authority—Glennville Inv Co. v Jordan & Rogers, 85 S.E. 1049, 144 Ga. 14.

8. Grand Rapids, etc, R Co. v. Cheboygan Cir. Judge, 126 N.W 56, 161 Mich 181, 137 Am.S.R. 495—Potter v. Hunt, 86 N.W. 58, 68 Mich 242—Kittridge v. Toledo etc, R. Co, 19 N.W 32, 53 Mich 354

9. Wilber v. Baker, 24 Hun (N.Y.) 24—Kehoe v Miller, 10 Abb N.Cas (N.Y.) 393 note—McCabe v. Fogg, 60 How Pr (N.Y.) 488.

10. Pickard v. Yencer, 21 Hun (N Y.) 403

11. Ga.—Atlanta R, etc, Co v Owens, 47 S.E 213, 119 Ga 833—Rodgers v. Furse, 9 S.E 669, 83 Ga. 115—Coleman v Ryan, 58 Ga 132—Twiggs v. Chambers, 56 Ga 279—Jones v. Morgan, 39 Ga 310, 99 Am D. 458—Gray v. Lawson, 36 Ga 629.

N.Y.—Casucci v. Allegany, etc., R Co, 20 N.Y.S 843, 65 Hun 452—Pickard v. Yencer, 21 Hun 403—Whittaker v. New York, etc., R. Co., 54 N.Y Super. 8—Albert Palmer Co v. Van Orden, 49 N.Y. Super. 89—Gallison, etc., Co. v Rawak, 3 N.Y.S 802—Deutsch v. Webb, 10 Abb N Cas. 393 note—Smith v. Baum, 67 How Pr 267—Tullis v Bushnell, 65 How Pr. 465—McCabe v Fogg, 60 How.Pr 488

Wis.—Smelker v Chicago, etc, R. Co, 81 N.W. 994, 106 Wis. 135.

12. Barthell v. Chicago, etc, Co, 116 N.W 813, 138 Iowa 688—Parsons v. Hawley, 60 N.W. 520, 92 Iowa 175—Larned v. Dubuque, 53 N.W 105, 86 Iowa 166—Smith v Chicago, etc., R Co, 10 N.W. 244, 56 Iowa 720

13. Murray v. Jibson, 22 Hun (N Y) 386

14. U.S.—Byram v. Miner, (C.C.A. Minn) 47 F.(2d) 112, certiorari denied 51 S.Ct. 648, 283 U.S. 854, 75 L.Ed 1461

Idaho—Renfro v. Nixon, 45 P.(2d) 595

Ill.—Brook v. Smerling, 204 Ill App 250

Ind.—Kennedy v. Eder, 139 N.E 373, 79 Ind App 644.

N.Y.—Neier v. Droesch Realty Corporation, 250 N.Y.S 535, 232 App Div 534, affirmed 178 N.E 790, 257 N.Y 550

6 C.J. p 798 note 37.

Satisfaction of judgment entered without consideration

Where plaintiff entered satisfaction of the judgment without consideration, a motion by his attorneys to have the satisfaction set aside to the extent of the lien for their contingent fee is the proper method of procedure—Barthels v Garrels, 227 S.W 910, 206 Mo App. 199

Setting aside satisfied judgment to extent of lien

Where judgment for plaintiff was satisfied, without satisfying the lien of plaintiff's attorney upon the judgment, the satisfaction of the judgment will be set aside to the extent of the attorney's lien.—Weitzel v. Schmitt, 178 N.Y.S. 429

Setting aside satisfaction of judgment justified

Where plaintiff, who had agreed to give his attorneys one-third of the amount recovered, summarily discharged them because they properly refused to represent him against another client of theirs, and thereafter filed a satisfaction of the judgment for the stated reason that he was tired of litigation, although he was then engaging in other litigation, and shortly thereafter accepted employment under defendants, the trial court was justified in setting aside the satisfaction of the judgment to the extent of the attorneys' lien—Barthels v. Garrels, 227 S.W. 910, 206 Mo App 199.

Reinstatement of satisfied judgment proper

Reinstating satisfied judgment to extent of amount due plaintiff's attorney for services and costs was held to be proper—Balluff v Balluff, 211 N.W. 462, 169 Minn 266

Judgment for plaintiff's attorney properly allowed

Where plaintiff's attorney had a contract for one-half of recovery, and, under Gen St (1913) § 4955, was entitled to a lien for his agreed compensation, and the parties settled before trial without his consent, he was properly allowed judgment against defendant—Nelson v. Berkner, 167 N.W 423, 140 Minn 504.

Jurisdictional necessity for reinstatement of cause

Attorney may have dismissal of action by client without protecting his interests set aside and cause reinstated to enforce ancillary remedy, but such reinstatement is a jurisdictional prerequisite to power of court to determine and allow the attorney's fee on motion in the original action—Wood v. Hines, 245 P. 846, 117 Okl 86.

15. Levy v. Public Service Ry. Co, 103 A. 171, 91 N.J.Law 183, affirming 98 A. 847.

As against adverse party

Under Attorney's Lien Act, an attorney's compensation as against the party with whom his client has settled cannot be determined in a summary proceeding—Levy v Public Service Ry. Co, 103 A 171, 91 N. J.Law 183, affirming 98 A. 847.

in fraud of the lien, and such course is necessary in order to protect the attorney.[16]

Cancellation of undertaking given to stay execution. An attorney may be entitled to have canceled an undertaking given to stay the execution of the judgment;[17] but he is not entitled to have an undertaking canceled in which he has no interest and upon which he has no lien.[18]

Vacation of satisfaction before issuance of execution. Where summary remedies are available to the attorney on settlement the satisfaction must be vacated before execution can issue[19] except where it does not appear that the alleged satisfaction piece was ever filed and the judgment satisfied of record.[20]

(3) Continuing Original Suit

It has been both affirmed and denied that an attorney may enforce his lien by continuing a suit which has been settled in disregard of his lien.

Where an attorney can show that a settlement has resulted in depriving him of his lien for fees or costs, he may be entitled to prosecute the action to trial and final judgment in the name of his client with a view to the protection of such attorney's rights therein.[21] There exists, however, authority to the contrary effect.[22] At all events since the

16. Millsap v. Sparks, 188 P 135, 21 Ariz 317—6 C J p 798 note 42

Judgment alone to be looked to in absence of fraud

Where judgment debtor, when a compromise of the judgment was made, did not know of contract with attorney creating lien on judgment, the attorney is not entitled to have such satisfaction of judgment set aside, but must look to the judgment creditor alone for compensation since there was no fraud in the compromise—Millsap v Sparks, 188 P. 135, 21 Ariz 317.

17. Knickerbocker Inv Co v. Voorhees, 112 N Y S 842, 128 App Div 639, appeal dismissed 88 N E 1122, 195 N Y. 569.

18. Knickerbocker Inv. Co v. Voorhees, supra—6 C J p 798 note 41.

19. Rooney v Second Ave R Co., 18 N Y 368—Crotty v. McKenzie, 42 N.Y Super. 192—Ward v Wordsworth, 1 E D.Smith (N.Y) 598, 9 How Pr. 16—Ackerman v. Ackerman, 14 Abb Pr.(N Y) 229—6 C J p 798 note 38.

20. Bloch v. Bloch, 121 N.Y S 475, 136 App Div 770.

21. Ga—Halbert v. Allred, 102 S E 192, 24 Ga App 727.
Minn—Miner v Chicago, B & Q R Co., 179 N W. 483, 147 Minn. 21.
6 C J. p 798 note 44.

Champerty in contract executed after settlement

Right of plaintiff's attorney to enforce his lien under Code (1907) § 3011, on the suit after it had been settled by the parties, is unaffected by any champerty in contract between plaintiff and the attorney after the settlement whereby they should divide whatever sum the attorney should recover in proceeding to enforce his lien, since this was not the contract out of which the lien originally arose.—Alabama Fuel & Iron Co. v. Denson, 94 So. 311, 208 Ala. 337.

Refusal of discontinuance

(1) Courts have inherent powers to refuse discontinuance of a cause, when thereby the lien rights of attorneys under their contracts with their clients would be defeated, if the attempted discontinuance is intended to defraud the attorneys, in which case the court will permit the litigation to be continued by the attorney—Frear v. Lewis, 195 N.Y. S 3, 201 App.Div. 660

(2) The statutory remedies given an attorney by Judiciary L. § 475, are not exclusive, but are cumulative of the remedy under the inherent power of the court to prevent a discontinuance in fraud of the attorney's lien rights; and such discontinuance can be prevented where the client is insolvent and there is no showing he received any compensation for the discontinuance to which the statutory lien could attach—Frear v Lewis, supra.

Subrogation to original cause of action

Under Gen St (1913) § 4955, as amended by L.(1917) c 98 (Gen St Supp [1917] § 4955), an attorney has a lien for his compensation upon his client's cause of action under the Federal Employers' Liability Act, and in enforcing it in the original action, after a settlement made without his consent, he proceeds as one subrogated to the original cause of action, so far as necessary to protect his rights—Miner v. Chicago, B & Q R. Co., 179 N W. 483, 147 Minn 21.

Remedy upheld notwithstanding criticism

While this remedy has been severely criticized as illogical and clumsy, yet it has been upheld—Miedreich v. Rank, 82 N.E. 117, 119, 40 Ind App 393—Fischer-Hansen v Brooklyn Heights R. Co, 66 N E 395, 173 N Y 492, 499, reversing 71 N Y S. 513, 63 App Div. 356—6 C.J. p 799 note 45.

Leave of court

As a general rule, the attorney must first obtain leave of court to prosecute the suit after settlement—Coughlin v. New York Cent., etc, R. Co, 71 N Y 443, 27 Am R. 75—6 C J p 799 note 47

Discretion of court

Whether or not the remedy shall be allowed in a particular case rests in the discretion of the court.—Howard v. Ward, 139 N.W 771, 31 S D. 114—Gowran v. Lennon, 143 N.W. 678, 154 Wis. 566

Control and duty of court

"When a case is made permitting the attorney to proceed in the action, notwithstanding the settlement between the parties and their stipulation to discontinue, it is the duty of the court to direct as to the time and manner of the future prosecution of the action, and to watch the proceedings and doings of the attorney so as to fully protect the rights of both parties, and not unnecessarily annoy or embarrass the defendant when he has acted in good faith. . . It would be manifestly unjust and inequitable to compel the defendants to pay the costs of the plaintiff's attorney until the latter has made every reasonable effort, and failed therein, to secure their payment from the plaintiff, or out of the fund on which he has a lien, and which is also in equity primarily liable therefor as between the parties to the action As the fund is ample, he should be required to pursue it, with due diligence and promptness, and fail in a reasonable effort to reach the same, before the court should allow him to prosecute the action and compel the defendants to pay his costs."—Quinlan v. Birge, 43 Hun (N.Y.) 483, 485.

22. Ind.—Gerdink v. Meginnis, 126 N E. 499, 73 Ind App 39
Mo.—Mills v. Metropolitan St. Ry. Co., 221 S.W. 1, 282 Mo. 118.
6 C J p 799 note 48.

In absence of fraud or collusion, a settlement made by an attorney's client extinguishes the cause of action, which, of course, cannot thereafter be enforced by the attorney to

ceedings, except as noted hereafter in this paragraph, general rules are applicable as respects parties[43] and process.[44] Further, as respects or relating to juris-

defense that attorneys other than the attorney of record were parties to the employment contract with plaintiff, and that on record attorney's recovery he would be required to account to such other attorneys —Gulf States Steel Co. v Justice, 87 So 211, 204 Ala. 577.

(2) Petitioner attorney, who was employed on a contingent fee basis by the mother of a minor to prosecute a claim for the minor's personal injuries, who gave notice to defendants by registered mail of his claim of lien (Smith-Hurd Rev St [1933] c 13 § 14), and who thereafter was supplanted by other counsel who settled the claim, was entitled to the enforcement of his lien, as against defendants' contentions that petitioner's contract of employment was not a contract with the mother and next friend of the minor, that the contract did not purport to be made on behalf of the minor and was therefor void, and that the notice of lien was not based on the contract, for the reason that the notice stated, contrary to fact, that petitioner was employed by the minor, etc., and regardless of whether defendants retained out of the settlement an amount sufficient to satisfy the lien —Caruso v. Pelling, 271 Ill App. 318.

(3) Defendants in a personal injury action, brought in the circuit court and eventually settled other than through petitioner attorney who originally was employed to prosecute the claim and who served on defendants his notice of lien (Smith-Hurd Rev St [1933] c 13 § 14), was not in a position to invoke, for the purpose of defeating petitioner's right to the thirty-three and one-third per cent fee agreed on in petitioner's contract of employment, the probate court's rule whereby not more than twenty-five per cent. of a settlement for personal injuries will be allowed for attorney's fees —Caruso v. Pelling, supra.

(4) In a suit by one of the regional counsel for the brotherhood of railway trainmen against a railroad company to enforce against respondent a lien, claimed under the attorneys' lien law, pursuant to a contingent fee contract with one of respondent's injured employees who was a member of the brotherhood and with whom respondent, without petitioner's consent or knowledge, made a settlement after suit for damages had been brought and after respondent had been served with the statutory notice of petitioner's lien, it was held that respondent could not successfully contend that the alleged fact that petitioner had, at the request of the brotherhood's general counsel, paid half of the salary of a brotherhood inspector, was a circumstance which tended to support respondent's charge that petitioner had been guilty of unethical and unlawful conduct which defeated his right to recover against respondent, where the evidence showed that the salary payment was in the nature of an advancement to the brotherhood and that petitioner had been reimbursed therefor before the settlement between respondent and petitioner's client was made —Ryan v Pennsylvania R. Co., 268 Ill App 364

(5) Pleas of accord and satisfaction in personal injury action were not responsive to right of recovery by intervening attorneys claiming a statutory lien and settlement without their consent —Alabama Produce Co v. Smith, 150 So. 148, 227 Ala 330

43. U.S —Byram v Miner, (C C A Minn.) 47 F (2d) 112, certiorari denied 51 S Ct. 648, 283 U S 854, 75 L Ed 1461.
Okl —Oklahoma Coal Co v. Hays, 176 P 931, 71 Okl. 248.

Client as party

In attorney's suit under Rev.L (1910) § 249, to recover the amount of a lien securing his fee against an adverse litigant, the attorney's client, whose action has been compromised and settled, is not a necessary party —Oklahoma Coal Co. v. Hays, 176 P. 931, 71 Okl. 248

Attorney as party

(1) After settlement of the original action is disregard of the lien of an attorney he may be permitted to enforce his lien by intervening as a party in the original suit — Byram v. Miner, (C C A Minn.) 47 F (2d) 112, certiorari denied 51 S. Ct. 648, 283 U S 854, 75 L Ed 1461

(2) Accordingly where plaintiff, without consent of her attorney, hired on contract contingent on success, settled the suit, the attorney could intervene in the suit and have a lien declared on subject-matter of suit for the reasonable value of his services —Schutt v. Bush, 178 N.W 48, 210 Mich 495

(3) However, the right of attorney to intervene in client's action should be limited to actions in which the attorney is given a specific present interest in the subject-matter of the litigation —Kelly v. Smith, 268 P 1057, 204 Cal 496.

(4) Moreover the right of an attorney to intervene and assert his attorney's lien under Code (1907) § 3011, on a settlement by client without such attorney's consent, is available only to attorney of record at the time of the settlement, although other attorneys were, together with such attorney of record, parties to the contract of employment, and the names of such other attorneys were omitted from the complaint by inadvertence —Gulf States Steel Co v. Justice, 87 So. 211, 204 Ala. 577

(5) Under Code (1907) § 3011, subd 2, giving attorneys at law liens upon suits, judgments, and decrees, the attorney of record of an administrator, in administrator's action for death of his intestate, could assert and enforce his lien by intervention on administrator's settlement of suit without the knowledge and consent of the attorney, in view of §§ 6085–6088, relating to the administration of trust estates —Gulf States Steel Co. v Justice, supra

(6) Proceeding, by intervention of plaintiff's attorney in suit settled by parties, to enforce his lien thereon, given by Code (1907) § 3011, amounts to a continuation of the original suit for the attorney's benefit, and his petition for intervention becomes in substance a part of the complaint, and any essential allegation of either, if questioned, must be proved by him —Alabama Fuel & Iron Co. v Denson, 94 So. 311, 208 Ala 337

(7) Intervention by motion or petition by attorneys showing their rights is necessary in order to render an accord and satisfaction unavailing as a bar to the further prosecution of a suit by counsel for the enforcement of a lien on the suit by the collection in judgment of their fees, a demurrer to the plea of accord and satisfaction being insufficient —Wilson v Gulf States Steel Co., 81 So 581, 202 Ala. 639

44. Ark —St Louis, I M & S. Ry. Co v Hays & Ward, 195 S W. 28, 128 Ark 471.
N Y —Entenberg v. Goodman, 274 N. Y S 443, 153 Misc 205, affirmed Fischel v. Boardman, 275 N.Y S. 974.

Service of process

(1) In proceeding by intervention by attorneys against railroad to enforce their lien, under Acts (1909) p 892, on proceeds of settlement made by railroad with their clients, it was not necessary that the railroad should again be served with process since the attorneys became parties to the original action by force of statute.—St. Louis, I M & S Ry. Co v Hays & Ward, 195 S W. 28, 128 Ark. 471.

diction,[45] and pleading and proof,[46] general rules | are applicable in such proceedings to enforce lien.

(2) In proceeding by attorney to fix lien for services for plaintiff rendered in action allegedly surreptitiously settled, service of petition and notice on attorney who appeared for defendant in the action instead of service on such defendant in person was held to be insufficient—Entenberg v Goodman, 274 N Y S 443, 153 Misc 205, affirmed Fischel v Boardman, 275 N Y S 974

45. Minn—Scharmann v. Union Pac Ry Co., 175 N W. 554, 144 Minn 290.
U S—German v. Universal Oil Products Co, (C C A Mo) 77 F (2d) 70, affirming (D.C) Universal Oil Products Co v. Standard Oil Co of Indiana, 6 F Supp 37
Okl—Boulding v. Slick, 17 P (2d) 391, 161 Okl 189.

Equitable jurisdiction

(1) Independent actions by attorneys to enforce their liens after settlement by the parties to the original action in disregard of such liens are held to fall within the jurisdiction of equity—Boulding v Slick, 17 P (2d) 391, 161 Okl 189—Jones v Ralls, 8 P.(2d) 665, 152 Okl 95—Simpson v. Baker, 252 P. 834, 123 Okl 118.

(2) Moreover it has been held that, unless an action at law is expressly authorized by statute, a court of equity is the only court having jurisdiction to enforce such liens—Standidge v Chicago R Co, 98 N E 963, 254 Ill 524, 40 L R A (N S) 529, Ann Cas 1913C 65—Pennsylvania Co v Thatcher, 85 N E 55, 78 Ohio St 175—Werner v George Zehler Provision Co, 31 Ohio Cir Ct. 632.

(3) At any rate the enforcement of a lien of plaintiff's attorney in an action at law against defendant, after settlement of case without his knowledge must be by suit in equity under state statute (Judiciary L § 475)—Albright v. Baltimore & O R. Co., (D C N Y.) 22 F (2d) 832

(4) Attorney may enforce, as against his client, claim for compensation for legal services rendered in case begun in court, partially prosecuted and settled before final judgment or decree, by independent suit in equity to foreclose attorney's lien.—Universal Oil Products Co v Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, affirmed (C C A) German v. Universal Oil Products Co, 77 F (2d) 70.

Federal court

(1) Federal court had no jurisdiction to grant relief, demanded in an intervening bill of plaintiff's attorney for recovery of compensation from amount received by plaintiff in settlement of litigation before entry of judgment or decree, where there was no property in the court's custody—German v Universal Oil Products Co, (C C A Mo) 77 F (2d) 70, affirming (D C) Universal Oil Products Co v Standard Oil Co of Indiana, 6 F Supp 37.

(2) Federal court, having no jurisdiction to grant relief demanded in intervening bill of plaintiff's attorney to recover compensation from amount received by plaintiff in settlement of litigation, cannot aid attorney as court officer, though disposed to protect such officers in collection of their fees and compensation—German v. Universal Oil Products Co, supra.

State court

(1) A state court has jurisdiction of an action by an attorney to enforce his lien on the proceeds of a settlement made by the parties to an action brought by him as attorney in a court of the state, although before the settlement the action had been removed to a federal court—Oishei v Pennsylvania R Co, 102 N Y S 368, 117 App Div. 110, 116, affirmed 85 N E 1113, 191 N Y. 544—6 C J p 801 note 72

(2) Where an attorney has a lien on a cause of action arising under the Federal Employers' Liability Act for his services, upon settlement of the action by the parties without payment of his fees, he may enforce his lien in an action in a state court—Scharmann v. Union Pac Ry Co., 175 N W. 554, 144 Minn 290.

(3) Circuit court had jurisdiction of all parties to, as well as subject-matter of, proceeding for enforcement of attorney's lien on interest of deceased complainant's surviving husband and two sons, substituted as complainants in chancery suit, wherein record showed service of summons on minor son, where notice of lien was given defendant by registered mail on day of entry of decree confirming parties' settlement of litigation and again about two months later—Catherwood v Morris, 196 N E 519, 360 Ill. 473.

46. Perry v Atlantic Coast Life Ins Co, 164 S E 753, 166 S C. 270.

Complaint or petition held sufficient

(1) Complaint against a client and defendants in a slander action, wherein an attorney was employed on retainer and contingent basis for a joint tortious agreement settling claims, and preventing the attorney from receiving compensation, secured by lien was held not to state a cause of action—Perry v. Atlantic Coast Life Ins. Co., 164 S E. 753, 166 S C 270.

(2) Petition by attorney to enforce a lien and to recover damages for an unauthorized settlement by defendant with client, thus depriving the attorney of a contingent fee, was held to have stated a cause of action without any allegation of fraud—Hale v Terminal R R Ass'n of St. Louis, (Mo App) 12 S W (2d) 941.

(3) Petition to recover attorney's fees, based on defendant's fraud in obtaining postponement of suit against him and settling direct with plaintiff's client, was sufficient under a lien statute—Stone v Sullivan, 293 P 232, 146 Okl. 113

(4) In an attorney's action for being deprived of his lien, a petition alleging that the attorney "had and still has" a lien was sufficient—Wolf v Shulz Folding Box Co, (Mo App) 44 S W.(2d) 866

Issues

(1) Where the original plaintiffs accepted settlement, and their attorney filed a petition in intervention to prosecute the suit to collect the amount of a lien securing his fee, the question of liability must be determined as it would have been in the prosecution of the original suit.—Fail v Gulf States Steel Co, 87 So 612, 205 Ala 148.

(2) In an attorney's suit against a client and the adverse party for the amount of a lien securing the attorney's fee, the question to be determined is whether the client and the adverse party, without notice to attorney, compromised the litigation—Bruce v Anderson, 18 P (2d) 877, 161 Okl 248

(3) In determining the value of an attorney's services, his ability, standing, experience, and reputation as an attorney in the prosecution of such actions, also the nature of the controversy, the questions involved, necessity of his services, importance of the litigation, and value of property involved, and time and labor expended under contract of employment, together with investigations of legal questions involved, should be considered in an attorney's action to recover the amount of his lien securing his fees as against a party compromising and settling an action without such attorney's consent, in view of Rev L. (1910) § 249—Chowning v Ledbetter, 208 P. 329, 86 Okl 269.

(4) Where an attorney has furnished assistance to a needy client and a resultant charge of unethical conduct becomes a material issue in a case, wherein such attorney seeks to enforce his lien after a settlement by the parties, the pertinent

inquiry is whether the assistance was rendered only with the intent of subserving the ends of justice.—Ryan v. Pennsylvania R Co, 268 Ill App. 364

(5) Attorney suing for being deprived of lien by defendants' settlement with client without attorney's consent could not claim that issue of waiver and abandonment was not in case because not pleaded, where the answer consisted of a general denial and statement that attorney "abandoned" any representation of his client.—Griffith v Walesby, (Mo App) 91 S W (2d) 212

(6) In an attorney's suit against a client and the adverse party for attorney's fee, the question is whether the client and adverse party without notice perfected the arrangement depriving client of right against adverse party.—Western States Oil & Land Co v Helms, 288 P. 964, 143 Okl 206, 72 A L R 857

Pleading and proof required

(1) Attorney suing to enforce liability for contingent fee imposed by L (1909) c 4 p 117, against an adverse party who had compromised with the attorney's client such attorney must establish his client's meritorious cause of action and the amount client would have been entitled to recover.—Culver v. Diamond, 167 P. 223, 64 Okl 271.

(2) In an action under Comp L. (1909) §§ 274–277, relating to attorneys' liens to recover an attorney fee from an adverse litigant, plaintiff must show that the litigation was compromised without notice or opportunity to him to be present and establish his client's rights.—Whitehead v. Spriggs, 158 P. 439, 58 Okl. 42.

(3) Where, on plaintiffs' accepting settlement in the original suit, their attorney petitioned to intervene to prosecute the suit to recover his fee, the petition of intervention should show settlement of the original suit.—Fail v Gulf States Steel Co, 87 So. 612, 205 Ala 148

(4) In an action by an attorney under Comp St (1921) § 4103, against adverse party settling with the attorney's client without such attorney's knowledge or consent it devolves on the attorney to show the extent of the probable recovery in the client's action to the end that the attorney's fee secured by lien may be properly fixed.—Orwig v. Emerick, 231 P 234, 107 Okl 134.

(5) In proceeding to establish attorneys' lien, where action for injuries was settled without attorneys' knowledge or consent, for one-third of probable recovery, the amount of such probable recovery was controlled by the extent of injuries, and proof of such injuries from which the trial court might reasonably determine their extent must be offered.—Sterling Milk Products Co v. Brown, (Okl) 49 P.(2d) 68.

(6) Attorney seeking to establish a lien against defendant after compromise without such attorney's knowledge may prove the amount which the suit might have recovered in case of trial, and thus establish his lien under his contingent fee contract on his probable recovery.—Sterling Milk Products Co. v Brown, 294 P. 117, 146 Okl 302.

(7) Attorney, seeking to have costs awarded his client on a dismissal of a suit against it applied to the satisfaction of his lien thereon, was not bound to prove that he could not otherwise collect his charges.—Flashnick v Burke, 162 N.Y S 867, 176 App Div 867

(8) Attorney is not required to resort to allegations or proof of fraud in order to set aside satisfaction of judgment to enforce attorney's lien.—Renfro v. Nixon, (Idaho) 45 P (2d) 595

(9) Where an attorney was employed to bring suit, and it was compromised without notice to him, and he sues the adverse party under Rev L (1910) § 249, for the amount of his lien securing compensation for services, the attorney need not show the merits of his client's cause, but merely the employment, a suit, compliance with a lien statute, a compromise by the adverse litigant without notice, and the value of the services rendered.—Oklahoma Coal Co. v. Hays, 176 P. 981, 71 Okl 248

(10) In an action under Comp St. (1921) § 4102, to recover an attorney's fee from adverse litigant, on the theory that the attorney has been deprived of the protection of his lien, it is necessary for plaintiff to show that the litigation has been compromised and settled without notice or opportunity for him to be present and present his client's cause on its merits.—Cooper v Jackson, 231 P. 223, 104 Okl. 277.

(11) In an action for deforcement of attorneys' lien after settlement with client, the attorneys need not prove that the client's claim was meritorious.—Noell v. Chicago & E. I Ry Co, (Mo App) 81 S W (2d) 937, certiorari denied Chicago & E. I Ry Co v Noell, 50 S Ct 465, 281 U S 766, 74 L Ed 1174

(12) Where a defendant settles with plaintiff without the consent of plaintiff's attorney, and the latter is permitted to continue the action to assert his lien and recover his fees, before he may recover he must put in such proof as would be required if the action was proceeding for the benefit of his client.—Holbert v Allred, 102 S E. 192, 24 Ga. App. 727.

(13) The mere fact that the defendant in settlement without the consent of plaintiff's attorney pays less than the full amount is at most an admission in the nature of a compromise, and would not prove that any liability in fact existed.—Holbert v Allred, supra

(14) Attorney, suing for unauthorized settlement, was held to have established a case for nominal recovery, although not showing the value of settlement whereby the client was restored to his job.—Hale v Terminal R R Ass'n of St. Louis, (Mo App) 12 S W (2d) 941.

(15) Where defendant, without knowledge or consent of plaintiff's attorney, settled action to recover realty, such attorney may be entitled to recover the amount of his lien from defendant without proof of the client's right to recover, in the action settled or defendant's liability therein.—Jones v. Ralls, 8 P (2d) 665, 152 Okl 95

(16) On the other hand under particular statutory provisions an attorney suing to enforce liability on a lien for a contingent fee, imposed by L (1909) c 4, against adverse party who had compromised with his client, must show the client's meritorious cause of action, and what the client would have been entitled to receive.—Allen v. Shepherd, 169 P 1115, 69 Okl. 47.

Immaterial allegation

Under Rev Codes § 6422, giving an attorney's lien, in attorney's action to foreclose lien, allegation in complaint that payment of final installment of amount agreed to be paid for settlement of actions which plaintiff instituted was made in city out of state to deprive plaintiff of his lien was held to be immaterial.—Walsh v. Hoskins, 162 P. 960, 53 Mont 198.

Variance

(1) An attorney suing for damages on account of a settlement between his client, plaintiff in a suit, and defendant, which rendered his lien valueless, did not set out to a certainty the amount of damage in accordance with the allegations regarding his contract with his client as required by correct pleading, where he merely alleged value of cause of action of client was thirty thousand dollars, and he was damaged fifteen thousand dollars.—Cawley v Burke, 110 A. 609, 43 R I. 188.

(2) Even if allegation of attorney's petition for intervention for enforcement of attorney's lien on the suit—that defendant with knowledge of pendency of the suit settled it with plaintiff, without satisfying the attorney's lien—be material, not-

general rules are applicable in such proceedings to enforce lien. Further, as respects evidence,[47] gen-

withstanding prior statement of facts authorizing the attorney to further prosecute the suit despite the settlement, there is substantial conformity of proof thereto, by showing, not actual knowledge, but such knowledge as could be imputed by reason of the actual knowledge of facts which would have led an ordinary person to knowledge, the legal effect being the same in either case—Alabama Fuel & Iron Co. v Denson, 94 So 311, 208 Ala 337

(3) Where defendants, moved against by plaintiff's attorney, denied the existence of an alleged contract of employment pleaded by him, and consequently the existence of an alleged lien thereof, on issues so joined of contract or no contract they could not be called upon to meet proof of any other contract and lien, as an amount due attorney not on express contract but on quantum meruit—Mills v Metropolitan St Ry Co, 221 S W. 1, 282 Mo. 118

47. Minn—Holloway v Dickinson, 163 N W. 791, 137 Minn 410, affirmed Dickinson v Stiles, 38 S Ct 415, 246 U S 631, 62 L Ed 908, Ann Cas 1918E 601

N Y—McKennell v. Payne, 189 N Y S 7, 197 App Div 340.

Presumptions and burden of proof

(1) A settlement by a client of a claim in suit as to the attorney's right to fees will be presumed to have been made in good faith in the absence of a showing of fraudulent intent—Plummer v Great Northern R Co, 110 P 989, 60 Wash 214, 31 L R A (N S) 1315

(2) Accordingly the burden is on the client to justify his action in settling—Matter of Salant, 143 N Y S 870, 158 App Div 697, affirmed 104 N.E 1140, 210 N Y 622

(3) An attorney who claims the benefit of a lien on a judgment in bastardy has the burden of showing the fraudulent procurement of a release of the judgment—State v O'Brien, 109 S E 830, 89 W.Va 634

(4) In an action by an attorney to foreclose a lien on a settlement made by his client with the director general of railroads for damages for the death of her husband, the defendant must conclusively be presumed to have retained in his actual possession enough of the settlement fund to discharge the attorney's lien—McKennell v Payne, 189 N Y S 7, 197 App Div. 340.

(5) An attorney, in a suit to establish a lien on a payment direct to his client in a settlement, was held not to sustain the burden of proving that payment of the settlement followed notice of lien—Hemingway v. Adrian State Bank, of Adrian, Minn., 221 N.W. 920, 206 Iowa 1308

(6) In a suit by one of the regional counsel for the brotherhood of railway trainmen against a railroad company to enforce against respondent a lien, claimed under the attorneys' lien law, pursuant to a twenty per cent contingent fee contract with one of respondent's injured employees who was a member of the brotherhood and with whom respondent, without petitioner's consent or knowledge, made a settlement after suit for damages had been brought and after respondent had been served with the statutory notice of petitioner's lien, which lien suit was defended on the ground of unethical conduct on the part of petitioner in procuring his retainer, etc, it was held that respondent had the burden of proving its contention that the arrangement between the brotherhood and petitioner, whereby a twenty per cent contract was to net petitioner only fourteen per cent of the amount recovered and six per cent of such amount was to be remitted to the brotherhood to be applied on the costs of the brotherhood's investigation work in connection with injuries to its members, was a "fee-splitting device" and contrary to public policy—Ryan v Pennsylvania R Co, 268 Ill App 364

Admissibility of evidence

(1) On intervention to enforce an attorney's lien proof of settlement is admissible only to show acquittance to the extent of the client's interest—Donson v Alabama Fuel & Iron Co, 73 So 525, 198 Ala 383

(2) In attorney's action to enforce a lien for fees against defendant who settled a claim with the attorney's client which claim had been forwarded to attorney through a collection agency, admitting a law list showing fees to be charged was not error, where the list was used by the attorney and the agency in determining the fees to be paid, and was proof of an implied contract between attorney and his client—Stiles v. Cooter Gin Co, (Mo App.) 74 S W (2d) 1092.

(3) At the trial of an attorney's action for his fee of which he was deprived by collusive settlement with client, the attorney may introduce evidence establishing the merits of client's cause of action and the amount the attorney would have been entitled to receive, if the action had been prosecuted to judgment—Goldberg's Loan Office v Evans, 37 P (2d) 286, 169 Okl. 397.

(4) In an attorney's action to enforce his lien for compensation against a tort feasor who had settled with the attorney's client, evidence that the client had admitted the employment of attorney was held not inadmissible merely because admission was made before the contract of employment was signed—Illinois Cent. R Co. v. Moran, 14 S W (2d) 141, 227 Ky 820.

(5) In an attorney's action against a railroad for fraudulently and maliciously inducing plaintiffs' client in another action against railroad for false imprisonment to make an unauthorized settlement, in disregard of the attorney's lien, evidence of letters written from such client and his parents to plaintiffs, relative to the effect of incarceration upon him, was held to be immaterial and irrelevant—Downey v Northern Pac Ry Co, 232 P. 531, 72 Mont 166

(6) In attorney's action for being deprived of his lien, excluding evidence that attorney waived right to fee after being informed of impending settlement was held to be error—Wolf v Shulz Folding Box Co, (Mo App.) 44 S W.(2d) 866

(7) In proceedings by attorney to establish a lien claim against defendant, based on probable recovery had a case been tried instead of being compromised without such attorney's knowledge, the exclusion of evidence offered to establish a defense in the principal action, was held to be error.—Sterling Milk Products Co. v. Brown, 294 P. 117, 146 Okl. 302.

(8) In intervention proceedings by attorney for plaintiff to enforce his lien, exclusion of evidence offered to show intervener's solicitation of personal injury cases was held not an abuse of trial court's discretion—Holloway v. Dickinson, 163 N W 791, 137 Minn. 410, affirmed Dickinson v. Stiles, 38 S Ct. 415, 246 U.S 631, 62 L Ed 908, Ann Cas 1918E 601.

Weight and sufficiency of evidence

(1) Evidence was held to establish right of attorney for plaintiff in personal injury suit to lien against proceeds of settlement on the ground that plaintiff had ratified contract for services of attorney executed by plaintiff's wife and attorney had given notice of lien to defendant prior to settlement—Cohen v Kirchheimer, (Ill.App.) 2 N E (2d) 592.

(2) Testimony of client, settling case without attorneys' knowledge or consent and stipulating for nonpayment of attorney fees, was held not entitled to credibility—King v Chicago, R. & Q. R. Co., 235 Ill App 401.

eral rules are applicable in such proceedings to enforce lien. Further, as respects trial,[48] general rules are applicable in such proceedings to enforce lien.

(3) Evidence in a suit to enforce an attorney's lien against an adverse party who settled with a client without the consent of his attorney, was held not to show an improper solicitation of business by the attorney so as to defeat his lien—King v. Chicago, B & Q R Co, supra.

(4) In a suit by attorney under Rev L (1910) § 249, to recover the amount of a lien securing his fee against an adverse litigant who has compromised the action without notice to attorney, the evidence was held to be sufficient to sustain a judgment for such attorney.—Oklahoma Coal Co v. Hays, 176 P. 931, 71 Okl 248

(5) In proceedings by an attorney to recover fees secured by a lien it was held that evidence as to the value of an oil and gas lease was sufficient to support a judgment for such attorney for his contingent fee—Callahan v Cowley & Riddle, 245 P 48, 117 Okl. 58.

(6) Attorney who proved commencement of suit and indorsement of claim of attorney's lien on petition and compromise without his knowledge, made a prima facie case to establish a lien against defendant for amount contracted for, not to exceed one-third of sums paid in compromise—Sterling Milk Products Co. v. Brown, 294 P. 117, 146 Okl. 302.

(7) In an attorney's action to enforce a statutory lien, evidence was held to support a finding that defendants, who were adverse parties, did not effect a settlement or a compromise of particular litigation, precluding liability for attorneys' fees—Boulding v. Slick, 17 P.(2d) 391, 161 Okl 189

(8) In attorneys' suit against a client and an adverse party it was held that the evidence established that the attorneys were entitled to have a lien enforced on the ground client and adverse party compromised the litigation without notice to such attorneys—Bruce v. Anderson, 18 P (2d) 877, 161 Okl 248.

(9) Evidence established that attorney approved of and consented to a compromise and settlement of an action between client and adverse parties so that the adverse parties were not liable to attorney for fee for which he had lien—Mathews v Smith, 39 P.(2d) 48, 169 Okl 518.

(10) Evidence in a proceeding to enforce an attorney's lien after his client's consent to a discontinuance of the original action that plaintiff had contracted to give his attorney one-fourth of the amount recovered by the judgment, that the attorney had rendered services of value and importance in prosecuting the action, that plaintiff had also assigned other interests in the judgment to his creditors, subject to a sequestration in support of plaintiff's wife's claim for alimony, and that plaintiff thereafter signed a consent to discontinuance of the action, stating to one of his assignees his purpose was to defeat his attorney's right to any compensation, was held to show that the consent to discontinuance was in fraud of the rights of the attorney and of the assignees—Frear v Lewis, 195 N Y S 3, 201 App Div. 660

(11) In a servant's personal injury action against a railroad, in which there was a direct settlement and plaintiff's attorney intervened in order to enforce his lien the evidence was held not to require a finding that an amended complaint had been so framed as to set forth falsely the circumstances of the injury with intent to fabricate a cause of action—Miner v Payne, 184 N W 673, 150 Minn 103

(12) Evidence, in an intervention by plaintiff's attorney, after plaintiff's settlement with defendant without attorney's knowledge or payment of his fees, to have his right to a lien on cause of action and amount thereof determined, was held to be sufficient to sustain jury's finding that action was not procured by attorney by solicitation of a layman for hire—Anker v. Chicago Great Western Ry Co, 174 N W 841, 144 Minn 216

(13) On a petition by an attorney to intervene in order to enforce his lien in a suit settled without his consent, the evidence was held to establish that his contract with plaintiff was for the reasonable value of his services contingent on success—Schutt v Bush, 178 N W 48, 210 Mich 495

(14) In proceedings to enforce an attorney's lien in a suit attempted to be dismissed by a client, the evidence was held to sustain a finding as to the compensation clients had agreed to pay attorneys—Wild v Mehaffy, Donham & Mehaffy, 234 S W. 979, 149 Ark 670.

(15) Evidence supported judgment denying claim of proctor against defendants for fees, costs, and disbursements advanced to libelant based on contention that defendants settled case with libelant without knowledge of proctor to defraud proctor of his fees—The Golden Star, (C C A Cal) 82 F (2d) 687, affirming (D C) 9 F Supp 172.

48. Downey v. Northern Pac Ry. Co, 232 P 531, 72 Mont. 166.

Conduct of trial or hearing generally

Action to enforce attorney's lien, based on defendant's compromise of litigation with such attorney's client without notice to such attorney, is triable as an equity suit—Sterling Milk Products Co v. Brown, 294 P 117, 146 Okl 302

Reception of evidence

Offer of proof of attorneys' misconduct is improper on second hearing, where opportunity was had therefor at first hearing—King v Chicago, B & Q. R Co, 235 Ill. App 401.

Submission or refusal to submit issues

(1) In an attorneys' action against a railroad for fraudulently inducing a client in another action to make an unauthorized settlement, where there was evidence that such client was a minor at the time he employed plaintiffs, and had disaffirmed his contract before the settlement, the court did not err, in view of the conflict in evidence on the question of minority, in refusing to direct a verdict for defendant—Downey v Northern Pac. Ry. Co, 232 P. 531, 72 Mont 166

(2) In an attorney's action to enforce his lien for compensation against tort-feasor making a settlement with a client, refusal to submit the issue whether the attorney had solicited employment was not error—Illinois Cent. R Co v Moran, 14 S W (2d) 141, 227 Ky 830

(3) Similarly in attorney's action for such compensation against a tort-feasor settling with client, refusal to submit issue of attorney's employment was held not error—Illinois Cent R. Co. v Moran, supra.

Instructions held proper or improper

(1) In an attorney's action against a railroad for fraudulently inducing his client to make an unauthorized settlement the court did not err in giving an instruction based on Rev Codes (1921) § 8993 relative to an attorney's lien on his client's cause of action—Downey v Northern Pac Ry Co, 232 P 531, 72 Mont 166

(2) In attorney's action for being deprived of lien by defendants' settlement with client without attorney's consent, giving unnecessary instruction as to statutory attorney's lien, and erroneous instruction that attorney had five years from accrual of cause of action within which to institute suit thereon, whereas statute of limitations was not involved, was reversible error—Griffith v Walesby, (Mo App) 91 S W.(2d) 232

(3) Where defendant railroad, sued for fraudulently inducing plaintiffs' client in another action to make an unauthorized settlement, alleged

Further, as respects judgment or decree,[49] general rules are applicable in such proceedings to enforce lien. Further, as respects damages and amount of recovery,[50] general rules are applicable in such

that the client was a minor when he employed plaintiffs and had disaffirmed the contract of employment before making a settlement, an instruction permitting plaintiffs to recover the reasonable value of services rendered, notwithstanding the defense of minority, was improper—Downey v. Northern Pac. Ry Co, supra

(4) In attorney's action for being deprived of lien by defendants' settlement with client without attorney's consent, instruction reciting statute giving attorney's lien should not have been given where the jury was clearly and fully instructed upon the question of abandonment and waiver of lien—Griffith v. Walesby, supra

Questions for jury

(1) In proceeding by an attorney to enforce a lien for fee in personal injury action, the question of whether the client signed the alleged contract with the attorney was held to be for the jury—Buckeye Cotton Oil Co v. Winn, 229 S.W. 734, 148 Ark 654.

(2) In a proceeding in intervention by attorney under Crawford & M Dig § 628, to enforce an attorney's lien, it was held that whether the client, plaintiff in the action, approved or ratified its institution, and whether the attorney was negligent in failing to prosecute the client's claim with proper diligence so as to justify his discharge, were questions for the jury—Johnson v Missouri Pac R. Co., 233 S W. 699, 149 Ark 413.

(3) In an attorney's action for compensation against a tort-feasor who made a settlement with the attorney's client in disregard of the attorney's lien, the question of attorney's discharge before tort-feasor's settlement with client was held to be for the jury—Illinois Cent. R Co v. Moran, 14 S W.(2d) 141, 227 Ky 820.

(4) Whether an implied contract of employment existed between attorney and client placing his claim in the hands of a collection agency which forwarded the claim to the attorney so as to permit attorney to recover fees from defendant settling with client or collection agency direct was held to be for the jury.—Stiles v. Cooter Gin Co., (Mo App) 74 S W.(2d) 1092.

(5) Any competent evidence of arrangement between client and adverse party defeating client's right creates jury question of compromise, as respects attorney's right to fee and lien therefor.—Western States Oil & Land Co. v. Helms, 288 P 964, 148 Okl. 206, 72 A.L.R. 357.

49. Allen v Shepherd, 169 P. 1115, 69 Okl. 47.

Judgment outside issues

In an action by an attorney to recover the amount of a lien to the value of an undivided one-half interest of land, and based on the theory that the adverse party to an action settled the same without giving the attorney an opportunity to be present, not alleging any damage from exclusion from possession, judgment for one-half the rental value was without the issues and erroneous—Allen v Shepherd, 169 P. 1115, 69 Okl 47.

Entry of judgment for attorney of record and assistant held not error

In proceedings under Gen St (1913) § 4955, to enforce attorney's lien, after settlement of an action it was held that an entry of judgment for attorney of record and counsel assisting him was not error, where the attorney of record joined his assistant with him in the motion papers, and the amount recovered did not exceed the agreed fee—Georgian v Minneapolis & St L. R Co, 154 N W 962, 131 Minn 102

Decree against insurer unauthorized

In a suit to enforce an attorneys' lien against an automobile insurance company and its insured, which had settled a personal injury suit against the insured with complainant attorney's client, without the attorney's knowledge, after service of notice of lien upon them, a decree against the insurer was not justified where there was nothing in the record showing the terms of the policy, nor anything to show upon what the liability of the insurer was predicated except the bare fact that it had conducted the proceedings which resulted in a settlement, and there being nothing to justify the decree against the insurer, a joint decree against the insured and insurer could not stand, although there was sufficient evidence in the record to justify a decree against the insured alone—Berkemeier v Dornbralt Motor Sales, 263 Ill App 211.

50. Ala—Gulf States Steel Co. v. Justice, 87 So. 211, 204 Ala 577
Okl—Callahan v Cowley & Riddle, 245 P 48, 117 Okl. 58
R.I—Jacobs v. United Electric Rys. Co, 125 A. 286, 46 R I 230

Measured by settlement or contract of employment

(1) Where a settlement has been entered into in disregard of an attorney's lien the measure of the attorney's recovery on his lien as against the settling defendant is ordinarily the attorney's contractual percentage of the compromise sum actually received by the litigant, regardless of a contract to the effect that the attorney is to receive a certain part of the judgment as his compensation
U S—Machcinski v Lehigh Valley R. Co, (C C A N.Y.) 272 F 920
Ala—Gulf States Steel Co v Justice, 87 So 211, 204 Ala 577
N Y—Leary v. Sanzone, 180 N Y S. 149.
Okl.—Western States Oil & Land Co. v. Helms, 288 P 964, 148 Okl. 206, 72 A L R 357—Orwig v. Emerick, 231 P 234, 107 Okl 134—Pearson v Evans, 219 P 328, 93 Okl 28—Holloway v Wright, 215 P. 937, 91 Okl 57—Gulf, C & S F Ry Co v. Williams, 152 P 395, 49 Okl 126
Wash—McRea v Warehime, 94 P. 924, 49 Wash 191
6 C J. p 790 notes 52, 53

(2) This is particularly so where the settlement of an action by client, without knowledge or consent of attorneys having contract for contingent fee, is reasonable, the amount paid in the settlement must be taken as basis upon which to compute amount of attorneys' lien—Downey v Northern Pac Ry Co, 233 P 531, 72 Mont. 166.

(3) Accordingly under a contingent fee contract whereby an attorney was to receive one half, or an equivalent percentage, of the amount recovered, the measure of his recovery on settlement of the original action by the parties in disregard of his lien is one half of the amount of settlement.
Ark—Johnson v Missouri Pac R Co, 214 S W 17, 139 Ark 507.
Ill—Case v Emerson-Brantingham Co., 195 Ill App 209
Ky—Chreste v. Louisville Ry Co, 180 S W. 49, 167 Ky 75, L R A. 1917B 1123, Ann Cas 1917C 867
Mo—Gillespie v American Car & Foundry Co, (App) 194 S W. 1064.
N J—Levy v. Public Service Ry Co, 98 A. 847, affirmed 103 A 171, 91 N J.Law 183.
N Y—Leary v. Sanzone, 180 N.Y S. 149

(4) Hence under L (1909) p 97 defendant, having notice of attorney's contract for one half the damages recovered, and of his claim of lien, and who thereafter settled with the client for one hundred sixty dollars, was liable to pay one half the amount over again to the attorney—Case v Emerson-Brantingham Co., 109 N E 671, 269 Ill. 94.

(5) Plaintiffs' contract being on a fifty per cent. basis, where defendant settled with plaintiffs' client without plaintiffs' knowledge, paying client four thousand dollars and

agreeing to pay attorney's fees, plaintiffs are not limited to fifty per cent. of four thousand dollars—Mytton v New York, C & St. L R Co, (Mo App) 198 S W 189

(6) Where attorneys were employed on terms they should have half of amount recovered or saved to the client, after settlement attorneys were entitled to lien against land which was proceeds of litigation for half its value, less amount of incumbrance, and additional judgment for half of the client's account to defendant, payment of which had been saved the client by settlement—Bogle & Sharp v. Walker, 202 S W 478, 133 Ark 294.

(7) Where attorney for plaintiff had a contract for percentage of recovery by suit or compromise and served notice on defendant of his lien, and action was dismissed and second suit commenced by another attorney which plaintiff settled the settlement prima facie established the amount due to the first attorney from defendant—Carter v. Dunham, 177 P. 533, 104 Kan 59

(8) Under attorney's lien statute, where value of land, proceeds of settlement of litigation, was two thousand five hundred fifty-five dollars and twenty cents, subject to a mortgage for one thousand two hundred fifty dollars, leaving a net recovery of one thousand three hundred five dollars and twenty cents the attorneys who negotiated the settlement had a lien against the land for one half of such net recovery pursuant to their contract with the client—Bogle & Sharp v Walker, supra

(9) In case of settlement after judgment, without any intent on the part of the client to defraud his attorney, the attorney is held to be entitled to a lien for the agreed percentage of the settlement only—Machcinski v Lehigh Valley R Co, (C C A N Y) 272 F. 920

(10) However, there are cases which hold that after settlement without the consent of an attorney he may enforce his lien for the full amount specified in the contract of employment—Alabama Produce Co v. Smith, 150 So 148, 227 Ala 330—Caruso v Pelling, 271 Ill App 318.

(11) In accordance with such view it is held that where an attorney has perfected a lien for fees and is prevented from performing duties for which he was employed by a compromise between his client and the adverse party, without notice to the attorney, the measure of his compensation in an action against the client is the compensation named in the contract of employment notwithstanding such contract was for a contingent fee—Callahan v Cowley & Riddle, 245 P. 48, 117 Okl. 58

(12) Where before the time of settlement the client's adversary had notice of an express contract between the client and his attorney he may be entitled to a lien for the amount specified in such contract—Jacobs v United Electric Rys. Co, 125 A 286, 46 R.I. 230.

(13) On intervention by plaintiff's attorney to enforce his lien on the suit given by Code (1907) § 3011, after the parties had made a settlement, the damages are to be estimated as though there had been no settlement—Alabama Fuel & Iron Co. v. Denson, 94 So. 311, 208 Ala. 337.

(14) In an intervening petition by an attorney against a client who was one of the parties to the principal proceeding and who had agreed to a compromise of the controversy without the knowledge or consent of the attorney, to determine whether the attorney should be paid for his services in conformity with his express contract or be paid such other sum as might be found to be the reasonable value of his services, and to have a lien declared, the express contract was controlling, and such attorney was therefore entitled to one-third of the net amount to be received upon the consummation of said proposed settlement and no more—Barnes v. Barnes, 225 Ill App 68

(15) At any rate an attorneys' lien statute giving a lien on a client's cause of action does not authorize an attorney to recover a sum in excess of the amount for which such cause of action is compromised by a client—Levy v Public Service Ry Co, 103 A 171, 91 N J Law 183, affirming 98 A. 847

Recovery not limited by arrangement between attorney and labor organization

In a suit by one of the regional counsel for the brotherhood of railway trainmen against a railroad company to enforce against respondent a lien, claimed under the attorneys' lien law, pursuant to a twenty per cent contingent fee contract with one of respondent's injured employees who was a member of the brotherhood and with whom respondent, without petitioner's consent or knowledge, made a settlement after suit for damages had been brought and after respondent had been served with the statutory notice of petitioner's lien, it was held that, notwithstanding the arrangement between the brotherhood and petitioner whereby a twenty per cent. contract was to net petitioner only fourteen per cent. of the amount recovered and six per cent. of such amount was to be remitted to the brotherhood to be applied on the costs of the brotherhood's investigation work in connection with injuries to its members, which arrangement was known and agreed to by petitioner's client and was valid, petitioner was not limited in the amount of his recovery against respondent to fourteen per cent. of the sum for which respondent settled with petitioner's client, but was entitled to recover the full twenty per cent. of such sum—Ryan v. Pennsylvania R Co, 268 Ill App. 364.

One of several attorneys entitled only to proportionate share

Where respondents in a condemnation case brought by a railroad company had two attorneys, and, on the abandonment of the case and the consequent allowance of attorneys' fees by the court to such respondents, a petition for a lien on the fund was filed by one of such attorneys, and where both attorneys had appeared in court and stated that they had agreed with the railroad attorneys that a stated sum was a reasonable sum to be paid to the respondents to reimburse them for attorneys' fees, the lien petitioner was estopped from claiming more of such fund than his proportionate share of it, considering the fees earned or services rendered by both counsel, although the other attorney was not a party in the appellate court—Chicago Junction Ry. Co. v. Leitch, 215 Ill App 67.

Where amount of settlement not disclosed

Although the amount for which a suit was settled by client and defendant was not disclosed, the attorneys were entitled to nominal damages against defendant for deforcement of lien—Noell v Chicago & E I Ry. Co, (Mo App) 21 S W (2d) 937, certiorari denied Chicago & E I Ry Co v Noell, 50 S Ct. 465, 281 U S. 766, 74 L Ed. 1174.

Disbursements and costs not recoverable

Where attorneys for a widow, whose husband had been killed by a railroad, had an agreement with her for payment of a sum equal to fifty per cent. of any recovery, either by judgment or settlement, with disbursements and taxable costs, and a new administratrix, substituted for the widow, in settlement with the railroad, did not recover disbursements and costs, the attorneys may not recover them from the railroad in an action to enforce their lien on the settlement.—Leary v. Sanzone, 180 N.Y S 149.

Interest from date payment of fee due

Under New York law, a decree establishing an attorney's lien on the proceeds of settlement of litigation

proceedings to enforce lien General rules are applicable as well to questions relating to the review of such proceedings [51]

§ 232. Protection against Set-Off between Parties

a. In general
b Judgment against judgment
c Assignment of judgment

a. In General

That an attorney's lien is entitled to protection against a set-off by his client's adversary has been both affirmed and denied

According to one line of authority an attorney's charging lien is superior to the rights of the adverse party under the statute of set-off,[52] while according to another line of authority such lien is subject to the right of the opposing party to a set-off [53] At all events an attorney's lien will not be suspended for the purpose of allowing the adverse party to put his unliquidated demand in shape for a set-off.[54]

Set-off acquired after lien attaches. The attorney's lien will prevail over a set-off acquired by the adverse party after the lien attached [55]

b. Judgment against Judgment

An attorney's lien is superior to the right of the parties to set off judgments recovered by them respectively, except as noted hereunder.

Except where the right of setting off one judgment against another is authorized under the terms of an applicable statute,[56] it is well settled that an attorney's lien is superior to the right of the parties to set off judgments recovered by them respectively against each other in different actions.[57] The same rule prevails where the judgments are rendered by

should include interest from date on which payment of fee was due—Taylor v Scarborough, (C C A N Y) 66 F (2d) 589

Deduction of expenditures by defendant

In computing attorneys' lien on a judgment for client as plaintiff in a personal injury action, the amount expended by defendant for plaintiff before contract for services must be excluded—King v Chicago, B. & Q R. Co, 235 Ill App 401

51. Idaho—Renfro v Nixon, 45 P (2d) 595
Okl—Estes v. Hartshorne, 214 P 698, 90 Okl 40

Dismissal

Appeal by attorney for employee in a proceeding under Workmen's Compensation Act from an order denying a vacation of a satisfaction of judgment was held not dismissible because the attorney was not a party to the original action, where the attorney whose fees had not been paid was sufficiently identified with the litigation to appeal to protect his lien—Renfro v Nixon, (Idaho) 45 P (2d) 595

Reversal and grounds thereof

(1) Where an attorney made application in a suit pending in the district court for allowance for his attorney's fees, and for a lien adjudged against a judgment procured by him as attorney for plaintiff, and the evidence clearly showed that such attorney had performed services for plaintiff, that they were reasonably worth not less than a certain sum, nor more than a named sum, and the services were reasonably worth the amount claimed, and the attorney had filed notice of his lien in the cause, and that he was entitled to have the amount of the attorney's fee ordered paid out of the judgment, and the trial court rendered judgment denying such attorney's fee, it was held that the judgment was without any evidence to support it, and should be reversed and remanded, with directions to fix the amount of the attorney's fee and order it paid out of the judgment—Estes v Hartshorne, 214 P. 698, 90 Okl 40

(2) Where, on the hearing of a petition for an attorney's lien on the fund which had been deposited in a condemnation proceeding upon the abandonment of the proceeding, as attorney's fees for the respondents, the finding for petitioner was reversed because the record showed that the allowance included items not rendered "on account of" the condemnation proceedings, and it did not appear what those charges amounted to—Chicago Junction Ry Co v. Leitch, 215 Ill App 67.

52. Puett v Beard, 86 Ind 172, 44 Am R. 280—6 C J. p 793 note 73

53. Ala—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala 10
Mass—Goldman v Noxon Chemical Products Co, 175 N E 67, 274 Mass 536
Minn—Wildung v. Security Mortgage Co of America, 173 N W 429, 143 Minn 251
N D—Jacobsen v Miller, 198 N W 349, 50 N D 828, 34 A L R. 317
6 C J p 793 note 74

Set-offs in judgment debtor at time judgment rendered

Attorney's lien on judgment under a particular statute was held to be subject to all set-offs held by the judgment debtor at the time of the judgment's rendition—Adams v. Alabama Lime & Stone Corporation, 127 So. 544, 221 Ala 10.

54. McDonald v Napier, 14 Ga 89—6 C J. p 793 note 75

55. U.S—U S. Fidelity & Guaranty Co v. Levy, (C.C.A Ala.) 77 F (2d) 972
Ala—Ex parte Cooper, 103 So. 474, 212 Ala 501
6 C J p 793 note 76.

Rule applicable regardless of statute

The principle that a right of set-off against a lien judgment acquired after the lien of attorneys has attached is subordinate to the latter lien is applicable, regardless of Code (1923) § 6262—Ex parte Cooper, 103 So. 474, 212 Ala 501

Under statutes of Alabama, attorneys' liens for fees attach to cause of action or claim from which fruits of recovery, including lands, spring, as well as such fruits themselves, and are superior to offsets acquired against suit after liens have attached thereto—U S. Fidelity & Guaranty Co v Levy, (C C.A Ala.) 77 F. (2d) 972

56. Ga—Smith v Evans, 35 S.E. 633, 110 Ga. 536—Langston v. Roby, 68 Ga 406
Iowa—Hurst v. Sheets, 21 Iowa 501

57. N.J—Seaman v Mann, 168 A. 833, 114 N J Eq 408
N Y—Beecher v Peter A Vogt Mfg Co, 125 N E 831, 227 N Y 468, affirming 170 N Y S 1068, 184 App Div. 962
Okl—Cherry v. Erwin & Erwin, 49 P (2d) 788
6 C J. p 793 note 78.

Reasons for rule

(1) One reason for the rule stated in the text is that if the set-off were allowed the judgment to which the lien has attached would thereby be destroyed—Webb v. Parker, 114 N. Y S 439, 130 App.Div. 92.

(2) Attorneys' lien on a judgment

different courts in the same action.[58] So the right to a lien which as the statutes usually say cannot be affected by any settlement between the parties before or after the judgment is superior to the right of the parties to agree to set off one judgment or award against another when the effect of such a set-off will be to prevent the entry of a judgment to which the lien might attach.[59] But where the several judgments asked to be set off against each other were entered in the same action, the equities of the parties are superior to the lien of the attorney[60] which attaches only to the clear balance due to his client after all the equities arising out of that particular litigation are settled.[61] Similarly the right of set-off, when the judgments sought to be set off are rendered in actions growing out of the same subject matter, is superior to the right of an attorney under his lien.[62] Where an attorney agrees not to assert a lien, in case a judgment of the adverse party is set off against a judgment entered for the client of such attorney, he shall not, of course, be permitted to assert a lien in violation of such agreement.[63]

Pending appeal. One judgment cannot be set off against another, pending an appeal from either, until the rights of the parties are fixed, and the judgment becomes final.[64]

Discretion of court. Even though a set-off may

obtained for services rendered was also held to be superior to the right of a judgment debtor to set off another judgment obtained against the judgment creditor since the right to set off judgments rests on equitable principles, which right will be allowed only to promote justice.—Cherry v. Erwin & Erwin, (Okl.) 49 P.(2d) 788

One action in contract and one in tort

Judgments may not be set off to the exclusion of prior attorney's lien, where one action was on contract and other in tort.—Johnson v. Johnston, 254 P. 494, 123 Okl. 203.

Filing notice prior to entry setting aside judgment

An attorney filing notice of his lien prior to the entry of an order setting off his client's judgment against the judgment debtor's judgment against such attorney's client was held to be entitled to have such lien protected.—Spokane Sec Finance Co v. Bevan, 20 P.(2d) 31, 172 Wash 418.

Lien under contingent fee contracts

The lien of attorneys, under a contract giving them a percentage of any amount that might be recovered for prosecuting an unliquidated claim, was superior to the right of defendant to set off judgments obtained by him against plaintiff after the making of such contract.—Dankwardt v. Kermode, 187 P. 519, 68 Colo. 225

Prior existence of claim as imparting priority

The fact that plaintiff's judgment against defendant was founded on debt which antedated defendant's judgment against plaintiff did not impart to it priority over attorney's lien on defendant's judgment, mere existence of plaintiff's claim giving him no such right, it not being available under Code (1923) § 10175, whatever remedy he may have had in equity on proper showing.—Ex parte Cooper, 103 So. 474, 212 Ala. 501

Fact that plaintiff's judgment against defendant was founded on debt included in defendant's judgment against plaintiff did not impart to it priority over attorney's lien on judgment, status of plaintiff's judgment not being improved by the fact that a debt claim on which it was founded bore some relation to a detinue suit in which a lien judgment was recovered against him.—Ex parte Cooper, 103 So. 474, 212 Ala. 501

Judgment for costs

(1) The lien of an attorney on a judgment for costs is superior to the right of the parties to an action to set off such judgment for costs against another judgment.

D.C.—Barrick v. Geyer, 5 Mackey 32

Kan.—Leavenson v. Lafontaine, 3 Kan. 523

Me.—Harrington v. Bean, 47 A. 147, 94 Me. 208.—Howe v. Klein, 36 A. 620, 89 Me. 376

Mass.—Barrett v. Barrett, 8 Pick. 342.—Baker v. Cook, 11 Mass. 236

Minn.—Morton v. Urquhart, 82 N.W. 653, 79 Minn. 390

N.J.—Hendricksen v. Brown, 39 N.J. Law 239

N.Y.—Ainslie v. Boynton, 2 Barb. 258.—Purchase v. Bellows, 22 N.Y. Super. 642.—Jaeger v. Koenig, 67 N.Y.S. 172, 33 Misc. 82.—Linderman v. Foote, 5 N.Y. Civ. Proc. 154.—Dunkin v. Vandenbergh, 1 Paige 622.—Nicoll v. Nicoll, 2 Edw. 574.

Ohio.—Diehl v. Friester, 37 Ohio St. 473

Pa.—Higgins v. Dunkleberger, 23 Pa. Co. 291.

(2) Accordingly it was held that the liens of defendant's attorney on judgments of the appellate division of New York and the court of appeals in favor of defendant for costs were superior to the right claimed by plaintiffs to set off a judgment held by their firm against defendant.—In re Hughes, (D.C.N.Y.) 257 F. 936.

(3) On the other hand the right to set off judgments for costs is superior to an attorney's lien thereon where proceedings for the set-off were begun without notice of the attorney's claims.—Hill v. Brinkley, 10 Ind. 102.—Morton v. Urquhart, 82 N.W. 653, 79 Minn. 390.—Sweeney v. Bailey, 64 N.W. 183, 7 S.D. 404.

58. Smith v. Cayuga Lake Cement Co., 95 N.Y.S. 236, 107 App. Div. 524

59. Webb v. Parker, 114 N.Y.S. 439, 130 App. Div. 92

60. Field v. Maxwell, 63 N.W. 62, 44 Neb. 900.—6 C.J. p. 794 note 82

61. Wildung v. Security Mortgage Co. of America, 173 N.W. 429, 143 Minn. 251.—6 C.J. p. 794 note 83.

62. Rayworth v. Henry, 158 N.W. 57, 163 Wis. 404

Judgments in accounting and in replevin

Right to set off a judgment for plaintiff in an accounting action against a former judgment against plaintiff in her replevin action, growing out of the same subject-matter, was superior to the claim of the attorneys for defendant to a lien in the former action.—Rayworth v. Henry, 158 N.W. 57, 163 Wis. 404.

63. Rachels v. Russell, 242 S.W. 809, 154 Ark. 418.

Agreement as condition to consent to judgment

Where consent to a judgment was given by the debtor on the express condition that a judgment for the debtor against the creditors be set off against the consent judgment, attorneys for the creditor, who agreed to the condition, cannot dispute the right to set off under Crawford & M. Dig. § 6323, nor assert a lien under § 6304, or assignment in conflict therewith.—Rachels v. Russell, 242 S.W. 809, 154 Ark. 418.

64. Lindholm v. Itasca Lumber Co., 65 N.W. 931, 64 Minn. 46.

legally be made, yet if in the exercise of its discretion the court can see that an injustice will be done by granting the set-off, it will be refused.[65]

c. Assignment of Judgment

A client's assignment of a judgment to his attorney will defeat a subsequently attempted set-off by the adverse party but where a set-off existed at the time of assignment the rule is otherwise.

An assignment of a judgment by a client to his attorney prior to an attempt at set-off made by the adverse party will defeat such set-off.[66] It is otherwise, however, as to a set-off which existed at the time of the assignment.[67]

§ 233. Enforcement of Retaining Lien

Generally a retaining lien cannot be actively enforced, although, under circumstances noted hereunder, such lien may be enforced as an incident to a proceeding brought for another purpose.

Since as noted in § 225 supra, the rights of an attorney with respect to the subject matter of a general or retaining lien is merely the passive right to hold such subject matter until his claim is satisfied, a retaining lien cannot be actively enforced.[68] More specifically a general or retaining lien cannot be enforced by judicial proceedings brought for that purpose,[69] nor may an attorney who has a lien on the papers of his client sell said papers under process to foreclose his lien, as may a pledgee or a mortgagee in other cases.[70] On the other hand where the attorney is brought into court, upon application of his client, to compel the attorney to turn over money or papers upon which he claims a lien,[71] or in a suit by the attorney to recover his compensation,[72] the court may ascertain the extent of the lien and enforce it. Moreover, if such suit is not brought by the attorney within a time limited, or is not then diligently prosecuted, the court may order the papers to be given up.[73] However, except by consent the question in dispute cannot be determined by the court in a summary way.[74]

65. Lundberg v. Davidson, 71 N.W. 395, 72 N.W. 71, 68 Minn. 328—6 C.J. p. 794 note 85

66. Ripley v. Bull, 19 Conn. 53—6 C.J. p. 794 note 86

67. Marshall v. Cooper, 43 Md. 46—6 C.J. p. 794 note 87

68. In re Makames, 265 N.Y.S. 515, 238 App. Div. 534, reversing 265 N.Y.S. 511, 148 Misc. 759—6 C.J. p. 803 note 16

Must be respected

A retaining lien in favor of attorney, although it generally cannot be actively enforced, constitutes a right which must be respected.—In re Makames, 265 N.Y.S. 515, 238 App. Div. 534, reversing 265 N.Y.S. 511, 148 Misc. 759.

69. U.S.—Webster v. Sweat, (C.C.A. Miss.) 65 F.(2d) 109—Cooper v. McNair, (D.C.Fla.) 49 F.(2d) 778

Ill.—Needham v. Voliva, 191 Ill. App. 256

N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App. Div. 281.

Equity has no jurisdiction to adjudicate an attorney's possessory or retaining lien.—Needham v. Voliva, 191 Ill. App. 256.

Statute inapplicable

The Attorney's Lien Act of 1909 was not intended to apply to the establishment of attorney's liens upon papers or securities belonging to their clients which come into their possession in the ordinary course of business.—Needham v. Voliva, 191 Ill. App. 256.

Complaint insufficient in action to fix lien

(1) A common-law lien of an attorney employed to collect an indebtedness was on the evidence of indebtedness in the hands of the attorney, and not on the debt itself, and hence, in an action in equity by an attorney against his client to have his lien fixed on proceeds of insurance policy, the complaint did not state facts which would confer a lien, where it did not allege that the policy or other evidence, if any, was in the possession of the attorney.—Cosby v. Hurst, 231 S.W. 194, 149 Ark. 11.

(2) Further an amendment to the complaint alleging that defendant delivered to plaintiff, and the latter still had in his possession, all of the papers, proof, etc., necessary in the settlement of the claim, was insufficient, as not alleging possession of the policy, there being no lien on proofs of death and papers of that character, as such papers do not evidence the debt sought to be enforced.—Hurst v. Cosby, 242 S.W. 570, 154 Ark. 300.

Adjudication in absence of appropriate pleadings

Adjudication of attorney's retaining or possessory lien for expenses incurred and fees due him, where issues involved were not raised by appropriate pleadings, was held to be erroneous.—Burns v. Pratt, 31 P.(2d) 106, 167 Okl. 546

Determining value of services

If the value of attorney's services constituting basis of retaining lien cannot be agreed on by the parties, it must be fixed by the court.—In re Babcock, 243 N.Y.S. 489, 230 App. Div. 323.

70. McCarty v. Goodsman, 167 N.W. 503, 39 N.D. 389, L.R.A.1918F 160—6 C.J. p. 803 note 17

Not authorized by statute

Comp.L. (1913) § 6878, providing for the enforcement of liens was construed not to authorize the foreclosure of an attorney's lien, on papers of a client in the attorney's possession, by advertisement under the provision of § 8135, governing the foreclosure of chattel mortgages by advertisement.—McCarty v. Goodsman, 167 N.W. 503, 39 N.D. 389, L.R.A.1918F 160

71. State v. Gilliam, 161 P. 1194, 94 Wash. 243—6 C.J. p. 803 note 18

In New York, attorney's lien on papers is subject to summary order of court of which the attorney is or was an officer.—In re Woodworth, (D.C.N.Y.) 15 F.Supp. 291, affirmed (C.C.A.) 85 F.(2d) 50

Determining amount of lien and fixing amount of bond

Under Remington Code (1915) §§ 137, 138, the court, on client's petition that attorney deliver papers, etc., on which he claimed a lien, should have summarily determined the amount of the lien, or fixed the amount of bond to be given by the client as a condition of delivery of the papers.—State v. Gilliam, 161 P. 1194, 94 Wash. 243.

72. Leszynsky v. Merritt, (C.C.N.Y.) 9 F. 688

73. Leszynsky v. Merritt, supra.

74. Leszynsky v. Merritt, supra.—6 C.J. p. 803 note 21.

§ 234. Enforcement of Charging Lien

a In general
b Who may enforce and against whom enforced
c Defenses

a. In General

In accordance with its peculiar nature, an attorney's charging lien may be enforced by peculiar methods.

Not only is an attorney's charging lien peculiar, as has been noticed in § 211 supra, but such lien is to be enforced by peculiar methods.[75] However, attorneys may not be permitted to enforce collection of a charging lien by withholding the papers of a client in violation of a contract of retainer,[76] nor may an attorney enforce a lien by action or a note or other obligation to pay.[77] At any rate, an application to establish a lien may not operate in such manner as to require the payment of an additional amount of attorney's fees.[78] Moreover, an attorneys' lien statute does not authorize the enforcing of a lien for a sum in excess of the total value of the claim that is made the subject of the lien.[79]

Solvency of client. The enforcement of a charging lien is not affected by the solvency of a client.[80]

Collection of judgment Since, as previously noted in § 211, ordinarily, the attorney is regarded as an equitable assignee of the judgment to the extent of his lien, it is proper practice, to enforce such lien, for the attorney to proceed to the collection of the judgment to the extent of his lien in the name of the client,[81] and for this purpose it has been held that the attorney has the same power over the

75. Application of H. C. Roberts Electric Supply Co, 226 N Y S 211, 131 Misc 119

Statute for benefit of attorney and client

The provision of the Judiciary Law § 475, relative to enforcing an attorney's lien, inures to the benefit of both attorney and client.—Application of H. C. Roberts Electric Supply Co., 226 N Y S 211, 131 Misc 119

Method determined by particular facts

In determining the method of enforcing an attorney's lien, the nature of the right and the particular facts of each case must determine —State ex rel Anderson v. Roehrig, 8 S W (2d) 998, 320 Mo 870, followed in 8 S W (2d) 1001—Woodruff v. Rusk, (Mo App) 76 S W.(2d) 709.

Lien for services in particular action or special proceedings

(1) A proceeding to enforce an attorney's lien is confined to the lien for services in a particular action or a special proceeding in which the lien is claimed —In re Dutcher Bros, 268 N.Y.S 149, 241 App Div. 793

(2) Accordingly, attorneys for the wife in a separation action against the husband were not entitled to file a petition in an action to enforce a lien for services rendered in an extrajudicial proceeding or informal arbitration involving property rights or for services rendered in matters wholly unconnected with the separation action—In re Dutcher Bros, supra

(3) Further, where attorneys for a wife in a separation action made no claim for services and the judgment in such action had no pecuniary value, the separation action was held to afford no basis for a proceeding by the attorneys to enforce a lien for services rendered in a collateral matter.—In re Dutcher Bros, supra.

Conflict

"In cases where attorneys are entitled to a lien on the recovery . . there is a conflict of authority as to how such lien may be enforced"—Johnston v. Stephens, 266 S W 881, 883, 206 Ky. 83

76. In re Rosentover, 286 N Y S 752

Insurance policies

Attorneys, procuring settlement with insurer of claim for disability benefits and receiving fifty per cent of the money due and twenty-five per cent of all payments subsequently received under retainer, were required to turn over policies to client without receiving charging lien on future payments after insurer refused to continue payments, where the retainer provided that attorneys' service should be complete when the client received disability payments and no further proceeding had been commenced against insurer—In re Rosentover, 286 N Y S 752

77. Reynolds v. Warner, 258 N W. 462, 128 Neb 804, 97 A L R 1128.

Reason for rule

An attorney cannot enforce a lien by an action on a note or other obligation to pay because the lien attaches only to the evidence of debt and not to money in the hands of the debtor—Reynolds v Warner, 258 N W. 462, 128 Neb. 804, 97 A L R 1128

78. Allen v General Ins Co of America, (D C Idaho) 42 F (2d) 901.

Lien on judgment

Attorneys' application for a lien on a judgment does not bind defendant to payment of the additional amount of an attorney's fee—Allen v General Ins Co of America, (D C Idaho) 42 F (2d) 901

79. Levy v. Public Service Ry. Co, 103 A 171, 91 N J Law 183, affirming 98 A. 847

Reason for rule

"A lien being in its essence a right to retain something, the notion that it can be more extensive than the thing that is to be retained belongs to a topsy turvy world where streams rise higher than their sources, and a part is greater than the whole"—Levy v. Public Service Ry Co, 103 A 171, 172, 91 N J Law 183, affirming 98 A 847.

80. Kubu v Kabes, 172 N W 496, 142 Minn 433

Lien created by statute

The enforcement of an attorney's lien created by statute does not depend on the solvency or insolvency of the client—Kubu v. Kabes, 172 N W 496, 142 Minn 433.

Representative's solvency immaterial

Attorneys prosecuting a claim against the United States for a percentage of the award may invoke the jurisdiction of equity to establish their lien on the fund to pay the claim, where claimant's representatives are insolvent—McGowan v. Parish, 35 S Ct. 543, 237 U S 285, 59 L.Ed. 955, reversing Parish v. McGowan, 39 App D C 184.

81. Albert Palmer Co. v. Van Orden, 64 How.Pr (N Y.) 79—6 C J p 796 note 15

What law governs

The charging lien of an attorney is to be enforced according to the law of the state where the lien attached, and not according to the law of the state where the judgment is sought to be collected—In re Austin, 2 Hawaii Fed 210—Citizens Nat Bank v. Culver, 54 N H 327, 20 Am R 134—Plummer v. Great Northern R Co, 110 P. 989, 60 Wash 214, 31 L R A.(N S) 1215—6 C J. p 801 note 74.

Execution

(1) The attorney may, accordingly, enforce his lien against the judgment defendant by issuing execution

judgment and execution that the client himself has [82]

Appeal. In some jurisdictions an attorney has the right to appeal from a judgment against his client in order to obtain a more favorable judgment and a chance to enforce his lien [83] On the other hand, it has been held that an attorney may not prosecute an appeal for the purpose of reversing a verdict or judgment and so obtaining a lien,[84] at least against the consent of his client [85] His proper remedy is with the court below [86] If, however, the client is insolvent, or acts fraudulently or in bad faith, or, without sufficient reason, refuses to apply for compensation for his attorney, the latter may apply to the court to be allowed to proceed in his own right and in his own name or in the name of his client, for compensation out of a fund in court; and, in such a case, the attorney may appeal if unsuccessful [87]

b. Who May Enforce and against Whom Enforced

In the absence of a statute providing otherwise, an attorney's charging lien can be enforced only by the attorney or his assignee. The charging lien may be enforced against the judgment debtor, his assignee, or both, against an associate attorney, or against his client's adversary litigant, as the case may be.

In the absence of statute otherwise providing, an attorney's charging lien can be enforced only by the attorney,[88] or his assignee.[89] The client cannot institute the proceeding on behalf of his attorney,[90] but, under an appropriate statute, an attorney's charging lien may be determined and enforced by the court on the petition of either the attorney or the client.[91]

Against whom enforced. An attorney may enforce his charging lien against the judgment debtor,[92] or his assignee,[93] or both [94] He may, likewise, in a proper case, enforce the lien against an associate attorney,[95] or against defendant in the litigation in which professional services were rendered as the basis of the lien [96] It has been held that the attorney cannot compel the adverse party to pay him until he has exhausted his remedy against his client, or has

on the judgment—Application of H C Roberts Electric Supply Co, 236 N Y S 211, 131 Misc. 119—6 C J p 796 note 17

(3) Thus, a substituted attorney may, under applicable statutory provisions, enforce his lien for services by execution, on refusal of the petitioner for substitution of attorneys to discharge the lien—Application of H C Roberts Electric Supply Co, supra

(3) Execution, however, may not be had, it would seem, without first obtaining leave of court—McDonald v Napier, 14 Ga. 89—6 C J. p 796 note 18

(4) Moreover, such leave will not be granted unless it appears to be necessary to the protection of the attorney's claims—Publishers' Printing Co v. Gillin Printing Co, 38 N Y S 784, 16 Misc 558
6 C J p 796 note 19

Supplementary proceedings

(1) The attorney may be permitted to maintain supplementary proceedings on the judgment for the purpose of enforcing his lien—Merchant v Sessions, 5 N Y Civ Proc 24

(2) He may, however, be required first to obtain leave of court—Moore v Taylor, 2 How Pr N S (N Y) 313, affirmed 40 Hun 56
6 C J p 796 note 21

Provisional remedies and securities

(1) The attorney may, likewise, enforce all provisional remedies and securities given after the commencement of the action for the enforcement of judgment—Newbert v Cunningham, 50 Me 231, 79 Am D 612—6 C.J. p 796 note 22

(2) Thus, he may maintain an action in his client's name on a bail bond, appeal bond, replevin bond, or other securities given in the cause—Heavenrich v Kelley, 69 N W 226, 111 Mich 163—6 C J p 796 note 23

(3) Moreover, where the client has become bankrupt, an attorney's charging lien may be enforced by a petition in bankruptcy proceedings—In re Wilson, (D C N Y) 12 F 235

Court order requiring payment to clerk

Where plaintiff in a divorce action did not intend to compensate her attorney, although in law obligated to do so, and the attorney under statute had a lien on the judgment and proceeds thereof, his procurement of a court order without knowledge or consent of plaintiff requiring defendant to pay alimony into the clerk's office, and permitting plaintiff or the attorney of record to withdraw it, was justified in aid of his lien—Hampton v Hampton, 39 P (2d) 703, 85 Utah 338

Order staying collection of judgment

Attorneys claiming a lien against a judgment could not have an order staying the proceedings looking to the collection of the client's judgment reversed, where the lien was unadjudicated—Keyes v Ahrenstedt, 1 P (2d) 843, 164 Wash 106

82. Newbert v Cunningham, 50 Me 231, 79 Am D 612—6 C J p 796 note 16

83. Counsman v. Modern Woodmen of America, 96 N W 672, 98 N W 414, 69 Neb 710—6 C J. p 796 note 25.

84. Davis v Swedish-American Nat Bank, 80 N W 953, 81 N W 210, 78 Minn 408, 79 Am S R 400—6 C J p 796 note 26

85. Nixon v Ossenbeck, 112 S W 645, 129 Ky 588

86. Fla—Atlantic, etc, Canal, etc. Co v. Kinsman, 10 So 535, 29 Fla 332
N Y—Brown v. Comstock, 10 Barb 67

87. Davis v Swedish-American Nat Bank, 80 N W 953, 81 N W 210, 78 Minn 408, 79 Am S R 400

88. Wehle v Conner, 83 N Y 231—6 C J p 801 note 75

89. N Y—Fenlon v. Paillard, 93 N. Y S 1101, 46 Misc 151
Tenn—Vinson v Cantrell, (Ch A) 56 S W 1034
W Va—Fisher v Mylius, 57 S E 276, 62 W Va 19
6 C J p 801 note 76

90. Avery v Avery, 24 N Y S 737, 5 Misc 75—6 C J p 802 note 77.

91. Matter of Edward Ney Co, 99 N Y S 982, 114 App Div 407—6 C J p 802 note 78

92. Davidson v. La Plata County, 59 P 46, 26 Colo 549

93. Ark—Sexton v Pike, 13 Ark 193
Colo—Davidson v La Plata County, 59 P 46, 26 Colo 549.

94. Davidson v. La Plata County, supra

95. Smith v Goode, 29 Ga 185.

96. Oishei v Metropolitan St. R Co, 97 N Y.S. 447, 110 App Div 709.

shown that he is insolvent and that it would be useless to pursue his claim against him,[97] but it has been held, also, that the attorney may proceed immediately against both without first exhausting his remedy against the client.[98]

c. Defenses

An action to enforce an attorneys' charging lien is open to any defense which tends to defeat such lien.

An action to enforce an attorney's charging lien is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of plaintiff, or was waived or forfeited by his misconduct or neglect.[99] Thus, it may be shown in defense that the attorney had no authority to institute the suit claimed to give rise to the lien,[1] or that he acted under a void contract of employment;[2] but, in a proceeding to enforce an attorney's lien on a judgment, neither the judgment debtor nor an assignee of the judgment can impeach it for lack of authority on the part of the attorney to prosecute the action in which the judgment was rendered.[3]

In proceeding against sheriff. Where an attorney is permitted to enforce his lien by proceeding summarily against a sheriff who has collected money on execution, a settlement between the parties is a good defense to the sheriff,[4] unless the attorney sets up notice.[5]

§ 235. —— Summary Proceedings

The right of an attorney to enforce his lien by summary proceedings is acknowledged by some authorities, but denied by others.

Until a judgment is fully executed, it is ordinarily held that the court retains jurisdiction of the subject matter and the parties for the purpose of hearing any motion affecting such judgment, and that if the attorney desires to have his lien established and declared against such judgment he may apply to the court for that purpose.[6] There are, however, cases which hold that summary remedies are not available

97. Webb v. Parker, 114 N.Y.S. 489, 130 App.Div. 92—6 C.J. p 802 note 94.

98. Oishei v Metropolitan St R Co., 97 N.Y.S 447, 110 App Div 709.

99. Ga.—Hall v Lockerman, 56 S.E 759, 127 Ga 537
N.Y.—Fischer-Hansen v. Brooklyn Heights R. Co., 66 N.E 395, 173 N Y 492
See Heron v. Roberts, 192 Ill.App 516

Equitable defenses
Where an attorney's proceeding to enforce a lien is regarded as a special proceeding, it has been held that the party proceeded against may interpose any defense available in an equitable action.—In re Schneller, 240 N.Y.S 440, 136 Misc. 84, affirmed Schneller v Rogers, 243 N.Y.S. 875, 230 App Div. 710

Set-off
Where a decree for plaintiff was reduced on defendant's appeal, and defendant was decreed costs, whereupon defendant's counsel asserted a lien on the decree for costs, took an assignment from defendant, and had execution issued, plaintiff could not set off the execution for the amount of the decree in his favor against that part of the attorney's execution due the attorney for his taxable fees and disbursements, but could set off his execution against any remaining part of the attorney's execution.—Fraam v Kelley, 256 N.W 552, 268 Mich 573.
Protection against set-off see supra § 232

1. Herman v. New York City R Co., 106 N.Y.S 896, 122 App Div 469—Kelly v. New York City R Co., 106 N.Y.S. 894, 122 App Div. 467.

2. Ingersoll v. Coal Creek Coal Co., 98 S.W. 178, 117 Tenn. 263, 119 Am.S.R 1003, 9 L.R.A.(N.S.) 282, 10 Ann Cas 829

3. Guliano v Whitenack, 30 N.Y.S 415, 9 Misc 562, 24 N.Y.Civ Proc 55, 1 N.Y.Ann Cas. 75.

4. Haynes v Perry, 76 Ga 33.

5. Gray v Maxwell, 50 Ga 103

6. Kan.—Epp v. Hinton, 170 P. 987, 102 Kan 435
Ky.—Johnston v Stephens, 266 S.W 881, 206 Ky 83.
6 C.J. p 794 note 88.

Application to court in case wherein judgment rendered
(1) The attorney's lien on a judgment may be established and enforced on an application to the court in the case wherein the judgment was rendered.—Epp v. Hinton, 170 P 987, 102 Kan. 435—Artale v. Columbia Ins. Co., 162 A 585, 109 N.J.Law 463, reversing 157 A. 157, 108 N.J.Law 240—6 C.J. p 794 note 89

(2) Accordingly, the statutory lien of an attorney attaching to a cause of action, may be enforceable by petition to the same court in which the action was brought.—Artale v. Columbia Ins. Co., supra.

Motion proper remedy
Ordinarily, a motion in the cause is the proper remedy.—Weicher v Cargill, 90 N.W 402, 86 Minn 271—Goodrich v McDonald, 19 N.E 649, 112 N.Y 157—Guild v. Borner, 7 Baxt.(Tenn.) 266—6 C.J. p 794 note 90.

Where money of client in attorney's hands
(1) In New York, an attorney with money in his hands belonging to his client has an absolute right to a summary determination by the court of the existence and amount of his lien.—In re King, 60 N.E 1054, 168 N.Y. 53—6 C.J. p 795 note 94

(2) The summary proceeding thus authorized is applicable only to disputes between attorney and client If the attorney seeks to enforce his lien against a third party, except when the amount due is beyond dispute, he must proceed to foreclose his lien otherwise.—Matter of Salant, 143 N.Y.S 870, 158 App Div 697, affirmed 104 N.E 1140, 210 N.Y. 632—6 C.J. p 795 note 95.

Notice and opportunity to be heard
(1) Enforcement of an attorney's lien by motion in the original action, requires notice and an opportunity to be heard.—Johnston v. Stephens, 266 S.W. 881, 206 Ky. 83

(2) Accordingly, where an attorney enforces his lien by motion in the original action after proper notice, a judgment without pleadings, summons, or entrance of appearance is in rem only and will not authorize an execution.—Johnston v. Stephens, supra.

Noting of record
In cases where attorneys are entitled to a lien on the recovery, that fact may on motion be noted of record.—Johnston v. Stephens, 266 S.W. 881, 206 Ky. 83.

Application for substitution of attorneys
Where a party to an action makes an application to have his attorneys

to an attorney for the enforcement of his lien.[7] At any rate, summary remedies provided by statute for the enforcement of attorneys' liens are available in only such cases as properly fall within the terms of the particular statute[8]

Against associate counsel. Where a lien exists in favor of associate counsel it is held that such lien may be enforced by motion against money collected by a coattorney.[9]

Against sheriff. An attorney may proceed summarily against a sheriff who has collected money on the execution.[10]

Against specific fund. If there is a specific fund, an attorney may, by motion and order, get that set apart to satisfy his lien,[11] and in a proper case may be entitled to an injunction pendente lite with respect to such fund.[12]

Taking judgment by default. Where defendant is in default for want of an answer, plaintiff's attorney has the right to enter judgment for the amount claimed and to enforce it to the extent of his lien[13]

Intervention in proceedings to revive judgment. An attorney at law, having a lien on a judgment, may intervene in proceedings to revive such judgment, and is entitled to a reviver thereof in his own name to the extent of his lien[14]

§ 236. —— Independent Action

An attorney may be permitted to enforce his lien by an independent action.

It has been held that an attorney's lien on a judgment or the proceeds thereof may be enforced by him by an original suit in equity in his own name[15]

of record substituted by other attorneys, the lien of the substituted attorneys may be established and enforced in the proceedings on such application—Application of H C Roberts Electric Supply Co, 226 N.Y.S 211, 131 Misc 119

Application for order restraining payment to client

Plaintiff's attorney may be protected on application to the court for an order restraining the judgment debtor from paying the money to plaintiff until the attorney's lien is satisfied—Stewart v Flowers, 44 Miss 513, 7 Am.R. 707—6 C.J. p 794 note 93

7. Ala.—Adams v. Alabama Lime & Stone Corporation, 137 So 544, 221 Ala. 10

N.J.—Ariale v. Columbia Ins Co, 162 A 585, 109 N.J.Law 463, reversing 157 A 157, 108 N.J.Law 240

Statutory lien

The proceeding for the enforcement of a statutory lien of an attorney is not summary—Ariale v Columbia Ins Co, 162 A 585, 109 N.J. Law 463, reversing 157 A. 157, 108 N.J.Law 240.

8. Westerlund v. Peterson, 197 N.W. 110, 157 Minn. 379.

Availability of remedy under particular subdivisions

Under Gen.St.(1913) § 4955, as amended by L.(1917) c 98 § 1 (Gen St Suppl [1917] § 4955), where an attorney claims a lien under subd 1 or 2, on money or property of his client in his possession and control, and corresponding to the retaining lien at common law, he cannot resort to the summary proceedings furnished by subd 6, for the enforcement of charging liens arising under subds. 3, 4, 5.—Westerlund v Peterson, 197 N.W. 110, 157 Minn 379

Where there had been a settlement between an attorney and a client, the former retaining from the moneys of the client with the latter's consent the amount of his fee, the attorney cannot thereafter force the client into court by the summary proceedings, under Gen St (1913) § 4955, as amended by L (1917) c 98 § 1 (Gen St Supp [1917] § 4955), for the enforcement of attorney's liens to have the settlement confirmed or the amount of his fee determined anew by the court—Westerlund v Peterson, 197 N.W 110, 157 Minn 379

Statute applicable only to disputes between attorney and client

Summary proceeding to determine the amount of an attorney's lien, under Judiciary L § 475, cannot be maintained against a party other than the client, except when the amount due is beyond dispute, such statute being applicable only to disputes between attorney and client—Maier v Maze Realty Co, 178 N.Y.S 502, 189 App.Div 339.

In lieu of suit in equity

Action of the trial court in fixing an attorney's fee and enforcing a lien in a summary proceeding, in lieu of a suit in equity, was held to be authorized in a particular case—State ex rel Anderson v Roehrig, 8 S.W (2d) 998, 320 Mo 870, followed in 8 S.W.(2d) 1001

9. Smith v. Goode, 29 Ga. 185—6 C.J. p 787 note 23.

10. Sweeley v Sieman, 98 N.W. 571, 123 Iowa 183—6 C.J. p 795 note 4

11. Davis v Swedish American Nat Bank, 80 N.W 953, 81 N.W 210, 78 Minn. 408, 79 Am.S.R. 400—6 C.J. p 795 note 8.

12. In re Podell, 245 N.Y.S 27, 138 Misc. 428

Fund represented by deposit

An injunction pendente lite was decreed on a motion by an attorney to restrain the transfer or disposition of a specific fund represented by a deposit, in order to await the disposition of the attorney's claim for services—In re Podell, 245 N.Y.S 27, 138 Misc 428

13. Gallison, etc, Co. v. Rawak, 8 N.Y.S 802

Opening default

(1) Where an attorney has thus taken judgment, the default will not be opened unless the attorney's fees are paid—Gallison, etc, Co v Rawak, 8 N.Y.S 802—Custer v Greenpoint Ferry Co, 5 N.Y.Civ.Proc 146, affirmed 98 N.Y 660

(2) Also, the default will not be opened unless it appears that there was no fraud or collusion between the parties and that the attorney's lien is not necessary for his protection—Publishers' Printing Co v Gillin Printing Co, 38 N.Y.S 784, 16 Misc 558

14. Greek v McDaniel, 94 N.W 518, 68 Neb 569

15. Walcutt v Huling, 5 Ohio App. 326, affirmed 112 N.E 1097, 93 Ohio St 518—6 C.J. p 797 note 30

Necessity for fixing amount of fee

The amount of an attorney's fee must be fixed, either by agreement between the parties or by action at law, before the lien therefor can be enforced by equitable proceedings under N.Y.Judiciary L § 475—Machcinski v. Lehigh Valley R. Co., (C.C.A.N.Y.) 272 F 920

On payment to garnishing creditors of client

Attorneys who, under Comp.L (1917) § 346, had a lien on a judgment recovered for their client, may, the judgment debtor having paid the amount thereof to garnishing creditors of their client, enforce their lien by an independent action, and are not restricted to intervention in the original action—Lundy v Cappuccio, 181 P. 165, 54 Utah 420.

Moreover, where statutes provide a remedy for the enforcement of attorneys' charging liens, it has been held that they may be enforced either by the statutory proceedings or by a suit in equity.[16] On the other hand, where an attorney has an ample remedy in the original suit, he may not be permitted to assert his lien in an independent suit.[17] At any rate, an attorney who claims an interest in a certain fund for his services in procuring the same is not entitled to enjoin an act which does not affect his rights.[18] Where the amount of a decree is paid into the registry of the court, it has been held that the more orderly procedure by an attorney to enforce a lien thereon is by a petition to the chancellor instead of by an original bill.[19] A remedy provided by statute by means of a petition is not, on the other hand, exclusive, but cumulative, for a court of equity always has power to ascertain and enforce liens.[20]

§ 237. —— Action on Judgment

Attorneys have been permitted to enforce their liens by bringing an action on the judgments recovered by their efforts.

An attorney may maintain an action on the judgment in the name of his client for the purpose of enforcing his lien,[21] but not, it has been held, without the client's consent.[22] It has been held, also, that a judgment for costs only belongs entirely to the attorney as equitable assignee.[23]

§ 238. —— Proceedings for Enforcement

a. In general
b. Nature, form, and scope
c. Time to sue
d Jurisdiction and venue
e. Parties
f. Process and notice
g Pleading
h Evidence
i. Trial
j. Allowance of lien, judgment or decree, and review

a. In General

Where the procedure is not specified by statute, proceedings for the enforcement of attorneys' liens should follow the practice of the court wherein such proceedings are brought.

Where an attorneys' lien statute does not specify the procedure for the enforcement of such lien, the practice of the court wherein the proceeding is had should be followed.[24]

Determination of amount due. While it is not necessary to the existence of the lien that the amount due the attorney should be liquidated, yet the exact amount of the claim should be determined before the lien can be enforced.[25]

16. Middleton v. Westmoreland, 138 S E 852, 164 Ga 324.

Liens on real estate

(1) Attorneys' liens on real estate may be foreclosed either by statutory proceedings for foreclosing mortgages or by suit in equity—Middleton v. Westmoreland, 138 S E 852, 164 Ga 324

(2) It has also been held, however, that proceedings to foreclose an attorney's lien on real property are to be brought as proceedings to foreclose a mortgage on land—Moss v Strickland, 75 S E 622, 138 Ga 539

17. Prichard v. Fulmer, 159 P. 39, 22 N M 134, 2 A L R 474

18. Early County v Chipstead, 119 S E 598, 156 Ga 445.

County funds

Where an attorney has acted for a county tax collector in recovering certain county funds from the sheriff, and the board of commissioners of roads and revenues issues an execution against the collector, the attorney cannot enjoin the enforcement of the execution on the ground that he is interested in the funds to the extent of his fees since payment to the county cannot affect his rights against the county—Early County v. Chipstead, 119 S.E. 598, 156 Ga. 445.

19. Fuller v Clemmons, 48 So 101, 158 Ala 340

20. Fischer-Hansen v Brooklyn Heights R Co, 66 N E 895, 173 N Y 432—6 C J. p 797 note 82

21. Me—Gammon v. Chandler, 30 Me 152—Stone v. Hyde, 22 Me 318

Mass—Woods v. Verry, 4 Gray 357

N Y.—Kipp v. Rapp, 7 N Y Civ Proc 316.

22. Horton v. Champlin, 12 R I. 550, 34 Am R 722—6 C J. p 797 note 34

23. Brown v Comstock, 10 Barb (N Y) 67—Wilkins v. Batterman, 4 Barb (N Y.) 47.

24. In re Eno's Estate, 180 N Y S 889, 111 Misc 69

Proceedings to protect or enforce lien after settlement between parties see supra § 231.

25. Jones v Duff Grain Co., 95 N W. 1, 69 Neb 91—Smith v Acker Process Co, 92 N Y S 351, 102 App Div. 170—6 C.J. p 795 note 96.

On summary proceedings against sheriff

Where an attorney is permitted to enforce his lien by proceeding summarily against a sheriff who has collected money on execution, the attorney's fees should be previously determined—Pugh v. Boyd, 38 Miss. 326—6 C J p 795 note 5.

On application for substitution of attorneys

The value of services of an attorney, for whom another was substituted, as determined by an application for substitution when the attorney's lien was established, will be conclusive on the parties in any subsequent action—Application of H C Roberts Electric Supply Co., 226 N. Y S 211, 131 Misc. 119.

How determined

(1) Ordinarily, the amount of the attorney's fee and the question as to how much has been paid by the client thereon cannot be determined summarily on motion and affidavits, but should be ascertained on a reference—Corbit v. Watson, 85 N Y S 125, 88 App Div. 467—6 C J. p 795 note 97.

(2) However, while the court may refer the matter to a referee to take evidence, or even an account, and to report the same with his opinion to assist the court in deciding the questions arising, it cannot delegate the entire matter to the referee for final determination—Sullivan v McCann, 108 N Y S. 909, 124 App Div 126—Matter of Edward Ney Co, 99 N Y S 982, 114 App Div. 467.

b. Nature, Form, and Scope

Proceedings to enforce attorneys' charging liens have been held to be proceedings in rem and special proceedings and have also been held to open for adjudication the whole extent and character of the lien in question.

Proceedings to enforce attorneys' charging liens have been held to be proceedings in rem.[26] Moreover, proceedings for the enforcement of such liens have been held to be special proceedings.[27] Other cases have held that proceedings provided for by statute for the enforcement of attorneys' liens are statutory as distinguished from equitable proceedings.[28] On the other hand proceedings brought by attorneys as preliminary to the enforcement of their lien have been held to be equitable.[29] At any rate, the whole extent and character of an attorney's lien may be open for adjudication in proceedings to enforce such liens;[30] but a client who would otherwise be entitled to a trial by jury cannot be deprived of such right by his attorney's proceedings to impress a lien on certain property.[31] Further, on proceedings to set aside satisfaction of a judgment to the extent of an attorney's lien, the court cannot determine the amount for which such judgment shall be restored.[32]

c. Time to Sue

Proceedings to enforce attorneys' charging liens must not be premature but may be brought at any time within the statutory period of limitations.

A proceeding to enforce an attorney's charging lien must not be brought prematurely.[33] Such lien may, however, be enforced at any time within the period prescribed by applicable statutes of limitations.[34]

(3) Moreover where a reference is authorized to determine the amount due under an agreement, the referee cannot ignore the agreement and ascertain the amount due on a quantum meruit—In re Public Works Dept., 60 N.E. 781, 167 N.Y. 501 modifying 60 N.Y.S. 413, 58 App.Div. 459.

(4) Where the facts are disputed, however, the court may find the value of the attorney's services from the facts before it—In re Kaufman, 113 N.Y.S. 525.

(5) In Tennessee, it has been held that where the client is sui juris the amount of the lien should be determined by contract or proper legal proceedings—Illinois Cent. R. Co. v. Wells, 59 S.W. 1041, 104 Tenn. 706—Perkins v. Perkins, 9 Heisk. (Tenn.) 95.

(6) Where the client is under a disability, however, a reference should be allowed and the matter determined—Perkins v. Perkins, supra—6 C.J. p. 795 note 3.

26. In re Levine's Estate, 278 N.Y.S. 36, 154 Misc. 700, affirmed 286 N.Y.S. 513, 247 App.Div. 19.

27. In re Schneller, 240 N.Y.S. 440, 136 Misc. 84, affirmed Schneller v. Rogers, 243 N.Y.S. 875, 230 App.Div. 710.

28. Berkemeier v. Dormuralt Motor Sales, 263 Ill.App. 211.

29. Hyers v. Western & Southern Life Ins. Co., 169 N.E. 577, 33 Ohio App. 331.

Fixing amount due from client on fund in possession of third person

Suit by attorneys to fix the amount due from a client as a lien on a fund possessed by a third party was held to be an equitable action—Hyers v. Western & Southern Life Ins. Co., 169 N.E. 577, 33 Ohio App. 331.

30. Bloom v. Irving Trust Co., 272 N.Y.S. 637, 152 Misc. 50.

Under particular order

An order reversing special term's order giving a discharged attorney a lien on any settlement or judgment to the extent of twenty-five per cent. thereof, with directions to determine the value of such attorney's services and to fix the amount of his lien, was held not to limit the special term solely to a consideration of the reasonable value of the attorney's services, but the order of substitution remained, leaving the extent and the character of the attorney's lien open for adjudication—Bloom v. Irving Trust Co., 272 N.Y.S. 637, 152 Misc. 50.

Determination of amount due attorney

(1) Ascertainment as to the amount due complainants was within a prayer for general relief in a suit by attorneys prosecuting a lien claim against the United States under contracts for a percentage of the award to establish their lien—McGowan v. Parish, 35 S.Ct. 543, 237 U.S. 285, 59 L.Ed. 955, reversing Parish v. McGowan, 39 App.D.C. 184.

(2) An attorney was held to be entitled to have the amount of his lien determined in a special proceeding, where a substitution of attorneys had been attempted in the main action—McNally v. Youngs, 262 N.Y.S. 838, 237 App.Div. 787, appeal dismissed, 188 N.E. 49, 262 N.Y. 526.

Limitation to ground of recovery pleaded

Where an attorney, having a lien on a judgment recovered for his client, sought to enforce such lien by an action against the judgment debtor, and merely alleged his lien as the basis for recovery, he was bound thereby and limited, in right of recovery, to the ground pleaded—Fornoff v. Smith, 231 Ill.App. 232.

31. In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

Right to retain check

An attorney's right to recover possession of a check which his client obtained from him could not be determined in a proceeding by the attorney to impress a lien on the check since the client was entitled to have his right to retain such check determined by a jury—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

32. Weitzel v. Schmitt, 178 N.Y.S. 429.

Amount of lien determined by subsequent proceeding

On a petition to set aside a satisfaction of judgment to the extent of an unsatisfied attorney's lien, the court in setting aside satisfaction has no authority to determine the amount for which judgment will be restored, but will merely set aside satisfaction to the extent of the attorney's lien, leaving the amount thereof to be determined thereafter in an appropriate proceeding—Weitzel v. Schmitt, 178 N.Y.S. 429.

33. Bremer v. Lake Erie & W. R. Co., 148 N.E. 241, 317 Ill. 580, affirming Clark v. Lake Erie & W. R. Co., 234 Ill.App. 98.

Prior to performance of service

A petition for an order to establish an attorney's charging lien was held to be premature when such petition was filed before the attorney had performed any service contributing to the successful prosecution of the client's claim—Bremer v. Lake Erie & W. R. Co., 148 N.E. 241, 317 Ill. 580, affirming Clark v. Lake, 234 Ill.App. 98.

34. Hansbrough v. D. W. Standrod & Co., 249 P. 897, 43 Idaho 119.

d. Jurisdiction and Venue

Jurisdiction to enforce charging liens is determined by rules stated hereunder.

In the absence of statutory provisions requiring the enforcement of charging liens in the courts where the client's cause of action is prosecuted, an attorney is not obliged to enforce his lien in the same court where his client's cause of action may proceed;[35] but he may begin in any court having jurisdiction to enforce such a lien.[36] However, where the forum is designated by statute and proceedings to enforce attorneys' liens are purely statutory, such proceedings must be brought in the forum so designated.[37] Further, as between trial

Full period of limitations

So long as no one is injured by the delay, an attorney is entitled to the full period of limitations for asserting his lien without losing it by laches.—Hansbrough v D W. Standrod & Co, 249 P 897, 43 Idaho 119

35. In re Levine's Estate, 278 N Y. S 36, 154 Misc 700, affirmed 286 N Y S 513, 247 App.Div. 19—6 C J. p 801 note 70.

Equity

(1) A court of chancery has general jurisdiction to enforce an attorney's lien for compensation on the property recovered by him for his infant client.—Pace v. Richardson, 202 S W 852, 133 Ark 422

(2) However, the right of an attorney to have his fee paid by the client and to enforce a lien, at common law or under Code (1907) § 3011, against her share of the estate, does not require intervention of equity, where such lien is regarded as following the client's portion of the funds into whatever court administration is pending.—Ex parte McLendon, 102 So 696, 212 Ala 403.

(3) An attorney could not maintain a suit in equity to establish a lien on certain property for services as attorney, in a suit theretofore prosecuted, where the legal remedy was adequate.—Smith v Tydings, 131 So 319, 100 Fla. 1414.

(4) Chancery had jurisdiction of an action by attorneys against a drainage district to have fixed their compensation for organizing the district and to obtain a lien on funds on deposit in a bank, the district having no other funds, the commissioners not being individually liable, and the funds not being within reach of garnishment at law.—Bayou Meto Drainage Dist v. Chapline, 220 S W 807, 143 Ark. 446

(5) Where plaintiffs, attorneys who had rendered services pursuant to express oral contract, gave notice after judgment for their client of their lien as provided by Code (1897) § 321, and cash sufficient to pay plaintiffs' claim was later deposited with the clerk of the district court by a referee, the lien attached to the fund, and equity has jurisdiction to determine the amount due on the contract and to enforce the lien.—Senneff, Bliss, Witwer & Senneff v. Sharpe, 174 N.W 491, 187 Iowa 790

(6) A consent decree rendered in a suit in equity brought by attorneys against the United States to enforce a lien on a certain fund, a portion of which was paid into court to determine the amount due the attorneys, constitutes a waiver of jurisdictional objections and renders irrelevant all questions as to the effect of contracts in creating a lien, and the effect of Rev St § 3477, as an obstacle to such lien, as well as the right to an injunction.—McGowan v Parish, 35 S Ct 543, 237 U S 285, 59 L Ed. 955, reversing Parish v. McGowan, 39 App D C 184.

Particular courts

(1) In Arkansas, under Act May 31, 1909 (L [1909] p 892), the circuit court cannot enforce a lien against damages recovered for the benefit of an estate of decedent in favor of an attorney who entered into a contract with the administrator, the proceeding must be in the probate court.—Carpenter v. Hazel, 194 S W 225, 128 Ark 416.

(2) In New York, surrogate's court has jurisdiction to determine and enforce the lien of an attorney for services rendered in the settlement and distribution of decedent's estate.—In re White, 166 N Y.S 158, 100 Misc. 56.

(3) Moreover, the surrogate's court's jurisdiction to enforce against executors a lien claimed by decedent's attorneys cannot be defeated on the theory that the attorneys' services were not rendered in such court, nor in relation to the administration of the estate, where the applicable lien statute affords equitable relief and is remedial in nature, and should be liberally construed.—In re Levine's Estate, 278 N Y.S 36, 154 Misc 700, affirmed 286 N Y S 513, 247 App Div 19

(4) Further, an attorney was entitled to have the amount of his attorney's lien on a certified draft in an attorney's possession, which was payable to his client and was drawn on funds obtained from the estate of the client's husband, determined in the supreme court, which obtained jurisdiction before the client filed a petition seeking to have the lien fixed in the surrogate's court.—Race v. Harris, 281 N Y.S. 47, 245 App Div 168.

(5) It has also been held that the Municipal Court of New York City has no power to enforce an attorney's lien.—Van der Beek v Thomason, 99 N Y S 538, 50 Misc 524.—Peo. v Fitzpatrick, 71 N Y S 191, 35 Misc 456

(6) Moreover, it has been held, under Judiciary L § 475, that the municipal court has no jurisdiction, on a motion of an attorney for plaintiff, to cancel a satisfaction of plaintiff's judgment, determine the extent of an attorney's lien, and issue an execution therefor against defendant.—Duringshoff v O B. Coates & Co, 157 N.Y S 230, 93 Misc. 485

(7) On the other hand, under Judiciary L §§ 474, 475, in part, it is held, that an attorney procuring judgment in the municipal court of New York City has a lien enforceable in the supreme court.—Duringshoff v. O. B Coates & Co, supra.

36. In re Levine's Estate, 278 N Y. S 36, 154 Misc 700, affirmed 286 N Y S 513, 247 App Div. 19—6 C J. p 801 note 71. See Borg v. Kawin & Co, 190 Ill App 62

Jurisdiction over fund

Jurisdiction over a fund against which an attorneys' lien is sought to be enforced empowers the court to entertain proceedings to enforce the lien.—In re Levine's Estate, 278 N.Y S. 36, 154 Misc 700, affirmed 286 N Y S 513, 247 App Div 19

Cause prosecuted by private negotiation

The court has no jurisdiction to enforce an attorney's lien on a cause of action prosecuted by private negotiation.—Universal Oil Products Co v. Standard Oil Co of Indiana, (D C Mo) 6 F Supp 37, aff (C C A) German v. Universal Oil Products Co. 77 F (2d) 70.

Application conferring jurisdiction

An application to the supreme court, by one who has filed claims with a board of water supply, through plaintiffs as his attorneys, and who has assigned the attorneys part of his claims for services rendered, for an order canceling the lien on the award and directing the comptroller to pay him the aggregate of awards, confers upon the supreme court jurisdiction to determine the amount of the lien.—In re Board of Water Supply of City of New York, 167 N.Y.S 531, 179 App. Div. 877.

37. Ark.—Carpenter v. Hazel, 194 S. W. 225, 128 Ark. 416.

or appellate courts, the granting and enforcement of charging liens is ordinarily an exercise of original jurisdiction,[38] and hence, is not within the power of a court having only appellate jurisdiction.[39]

Moreover, where two separate suits were commenced on the same cause of action in different counties, on the compromise of one suit on the merits and dismissal of both suits, an attorney for plaintiff should enforce a charging lien in the county where the suit was compromised and dismissed on the merits.[40]

e. Parties

Ordinary rules govern questions relating to parties in proceedings to enforce charging liens.

In a proceeding to enforce an attorney's lien, all persons interested are not only proper,[41] but necessary,[42] parties. However, where an attorney, entitled under a contract with his client to a percentage of the judgment recovered in an action by the client, sues to recover his fee, he need only make the judgment debtor a party,[43] and it is not necessary to make the judgment creditor,[44] or an equitable claimant thereof under the judgment creditor,[45] a party. Further, in a suit by an attorney for services in procuring a divorce for a wife, and to establish a lien on funds paid to the clerk of the court by the husband to satisfy a money judgment rendered against him, the husband is not a necessary party.[46] Where the parties to

N J—Simon v. Globe Indemnity Co., 154 A. 238, 9 N.J.Misc. 392.

Striking statement of demand

An attorney's statement of demand in an action to establish a lien for compensation or cause of action brought in another court was held to be properly stricken—Simon v. Globe Indemnity Co., 154 A. 238, 9 N.J. Misc. 392.

38. Ark.—Carpenter v. Hazel, 194 S.W. 325, 128 Ark. 416.

Wash.—State v. Superior Court for King County, 154 P. 603.

Jurisdiction held to be in trial court

Where local attorneys contracted with nonresident beneficiaries of policies to collect the proceeds thereof from a foreign insurance company and attorneys gave the company statutory notice of a lien for services and statutory service was had on the company and beneficiaries, the trial court had jurisdiction to entertain the attorneys' action to enforce their lien for services—State ex rel. Richardson v. Mueller, (Mo.App.) 90 S.W.(2d) 171.

39. Colo.—Nichols v. Kaires, 140 P. 792, 57 Colo. 471—Lane v. Lyon, 140 P. 197, 57 Colo. 166.

Iowa—Preston v. Daniels, 2 Greene 536.

40. Johnson v. Missouri Pacific R. Co., 215 S.W. 884, 140 Ark. 587.

In widow's suit for death of husband

Under Acts (1909) p. 892, giving an attorney a lien on his client's cause of action, where a widow by her attorney instituted an action for death of her husband against a railroad in one county, and thereafter instituted another action in another county, but compromised the case with the railroad, and dismissed the action pending in the second county, her attorney, to enforce his lien, should have resorted to the court in which the action, by dismissal after compromise, was settled on its merits, and cannot have his lien adjudicated in the court where action was first instituted—Johnson v. Missouri Pac. R. Co., 215 S.W. 884, 140 Ark. 587.

Venue of proceeding to enforce attorney's lien on real estate see the title Venue § 28 [67 C.J. p. 57 notes 10, 11].

41. Coombe v. Knox, 72 P. 641, 28 Mont. 202—6 C.J. p. 802 note 92.

Assignment of note

Attorneys who took an assignment of a note as security for the indebtedness of their client to them for legal services and, therefore, had a lien on such note were held to be the proper parties to sue thereon—Roberts v. Allen, 50 S.W.(2d) 965, 244 Ky. 353.

Attorney prosecuting appeal in own name

In a suit in equity, where forms may be disregarded, an attorney who took an appeal in his client's name may, if he so desires, prosecute the appeal on his own behalf after the client sought to dismiss it, in order to protect his lien interest in the cause of action arising from his contingent fee contract—Kellogg v. Winchell, 51 App.D.C. 17, 273 F. 745, 16 A.L.R. 1159.

42. Clarke v. Ratcliffe, 8 Misc. 162.

Client or plaintiff in main action

(1) In a proceeding by an attorney for the determination of a statutory lien on a cause of action, plaintiff in the main action, whose claim is still open, is a necessary party—Artale v. Columbia Ins. Co., 162 A. 585, 109 N.J.Law 463, reversing 157 A. 157, 108 N.J.Law 240.

(2) To a suit by an attorney having a contract for a contingent fee to enforce his right against property or a fund, the client is a necessary party—Spellman v. Bankers' Trust Co., (C.C.A.N.Y.) 6 F.(2d) 799.

In proceedings to set aside a consent judgment, the circuit court was without jurisdiction to declare a lien on the causes of action in favor of plaintiffs' former attorney who was not made a party—National Bread Co. v. Bird, 145 So. 462, 226 Ala. 40.

In action on undertaking on appeal

Where an attorney procures for his client a judgment for costs, an action on the undertaking which was given on appeal should be prosecuted in the name of the attorney as the real party in interest.—Delaney v. Miller, 32 N.Y.S. 505, 84 Hun 244—Kipp v. Rapp, 2 How.Pr.(N.S.) (N.Y.) 109.

After garnishment

Where attorneys, who recovered judgment for their client, had no agreement as to compensation, and, although informed of the garnishment of the proceeds of the judgment by other creditors of the client, took no steps to protect their rights, it has been held, although payment of the amount of the judgment to the garnishing creditors did not satisfy the same, and destroy the lien of such attorneys given by Comp.L. (1917) § 846, yet, such attorneys, as they could follow the proceeds into the hands of garnishing creditors, will not be allowed to enforce their lien solely against the judgment debtor, and should be compelled to bring in all of the parties, either in an independent proceeding or by intervention in the original proceeding.—Lundy v. Cappuccio, 181 P. 165, 54 Utah 420.

43. Bell v. Lake County, 141 P. 861, 26 Colo.App. 192.

44. Colo.—Bell v. Lake County, supra.

Kan.—Kansas Pac. R. Co. v. Thacher, 17 Kan. 92.

Ky.—Proctor Coal Co. v. Tye, 96 S.W. 512, 123 Ky. 381, 29 Ky.L. 804. 6 C.J. p. 802 note 95.

45. Bell v. Lake County, 141 P. 861, 26 Colo.App. 192.

46. Hubbard v. Ellithorpe, 112 N.W. 796, 135 Iowa 259, 124 Am.S.R. 271.

an action settle the cause of action, plaintiff therein is a necessary party to an action by his attorney to enforce his lien against the fund arising from the settlement.[47] Of course, persons whose interests cannot be affected by the decision in the case are neither necessary nor proper parties.[48]

Intervention. When such action is necessary in order to protect and enforce the lien of an attorney, he may be permitted to intervene as a party in the original action.[49]

f. Process and Notice

Process and notices in proceedings to enforce charging liens must comply with the practice of the particular jurisdiction.

In the absence of a statutory requirement, it is unnecessary that the copies of process served in proceedings to enforce an attorney's charging lien be certified.[50] Notice to a receiver, in whom has vested the subject matter of the lien, may be required.[51]

g. Pleading

Ordinary rules govern pleadings in proceedings to enforce charging liens of attorneys

In a proceeding to enforce a charging lien every fact essential to the existence thereof must be stated in the bill, complaint, or petition.[52] It is not necessary to state that the action is brought under a certain statute; it is sufficient if the pe-

47. Adams v Fox, 40 N Y 577—6 C J. p 802 note 98

48. Ingersoll v. Coram, (C C.Mass.) 127 F. 418—6 C J. p 802 note 99

49. U.S.—Universal Oil Products Co v. Standard Oil Co of Indiana, (D C Mo.) 1 F Supp 612.
D C.—Kellogg v Winchell, 273 F 745, 51 App D C 17, 16 A L R 1150
6 C J p 794 note 91
Intervention in summary proceedings to revive judgment see supra § 235

Attorney instituting suit

An attorney, who instituted a suit under a contract with his client whereby he was to receive a percentage of the fund recovered, is vested with a lien interest in the cause of action which entitles him to intervene in the suit to protect it.—Kellogg v. Winchell, 51 App D C 17, 273 F. 745, 16 A L R 1159

Intervention in creditors' suit

Fellow attorney employed to obtain compensation for employing attorney in creditors' suit could, by intervention in such creditors' suit, have a lien on a judgment awarding compensation established and paid.—Barge v. Ownby, 153 S E 49, 170 Ga 440

Determination of liability

On intervention to enforce an attorney's lien, liability will be determined as in the original suit.—Denson v Alabama Fuel & Iron Co., 73 So. 525, 198 Ala. 383.

Overruling motion to dismiss

In a judgment creditor's action against a debtor to set aside certain deeds, a motion to dismiss an intervening petition of the creditor's attorney who recorded an attorney's lien for his services was held properly to be overruled, since such lien operated as an assignment of interest in the judgment making the attorney the proper party.—Grimes Sav. Bank v McHarg, 251 N W 51, 217 Iowa 636.

Sale of interest pending suit

(1) Where complainants in a partition suit sold interest pending the suit, an attorney's lien could, nevertheless, be enforced in an intervention proceeding.—Owens v. Bolt, 118 So. 590, 218 Ala. 344

(2) Moreover, the purchaser of complainants' interest pending the partition suit could be made a party to the intervention proceeding to enforce complainants' attorney's lien.—Owens v Bolt, supra

(3) However, the attorney cannot force the suit to a decree against the wishes of the other parties, but his rights are merely to enforce his lien to a decree in order to recover his fees.—Owens v Bolt, supra

Refusal of intervention

A refusal to permit an attorney to intervene in a suit is held not to prejudice his lien against the judgment.—Anderson v Star-Barr Oil Co., 243 P 394, 34 Wyo. 332

50. York v. Edwards, (Ga App.) 133 S E 339.

Lien on land

In statutory proceedings to foreclose an attorney's lien on land, service of an ordinary, instead of a certified, copy of rule nisi did not render the service and proceedings void.—York v. Edwards, (Ga App.) 133 S E 339

51. Ætna Life Ins. Co. v. Kaufman, 290 N Y S 669

Notice to receiver

An attorney's lien against a cause of action for foreclosure of a mechanic's lien which vested in the receiver appointed for plaintiff in the lien foreclosure action must be determined and enforced in proper application to the court, on notice to the receiver as prescribed by statute.—Ætna Life Ins. Co v. Kaufman, 290 N Y S 669

52. Gooding v Lyon, 166 P 564, 63 Colo. 328—6 C J p 802 note 1.

Principles of equity pleading not controlling

A proceeding to enforce the attorneys' liens provided for by statute has been held not to be controlled by principles of equity pleading.—Berkemeier v Dormuralt Motor Sales, 263 Ill App 211.

Amount due

(1) The amount due must be alleged either by stating a contract fixing the amount, or by averring the value of the services charged for.—Coombe v Knox, 72 P 641, 28 Mont 202, 205—6 C J p 803 note 2

(2) However, where a petition for the foreclosure of an attorney's lien and the lien, made part of the petition, fully set forth the nature of the cause and of the litigation in which the legal services were rendered on an implied contract or quantum meruit, stating a specific charge for each item of services was held to be unnecessary.—York v. Edwards, (Ga App.) 133 S E 339.

Service of notice of contract

(1) A petition setting out a compensation contract between plaintiff attorneys and their client, and alleging that a copy thereof was duly served in writing on defendant, sufficiently alleges a notice to defendant, under Rev St (1909) § 965, requiring written notice of the attorney's claim to be served.—Simpson v Federal Lead Co., (Mo App.) 187 S W 1123

(2) Where a petition claiming an attorney's lien alleged that defendant was served with process in a suit filed against it by plaintiff as attorney, it was not necessary to allege that written notice of plaintiff's contract with the client was given to defendant.—Fenn v Hart Dairy Co., (Mo App.) 83 S W (2d) 120

Complaint, bill, or petition sufficient

(1) A complaint alleging that an attorney made advances under an express agreement that he should reimburse himself out of collections

tition sets forth such facts as bring it within the statute,[53] and, if the pleader sets forth more than is necessary to state his cause of action under the statute, such additional statements may be considered as surplusage.[54]

On intervention Where an attorney in order to protect his charging lien is permitted to intervene as a party, in the action in which he has performed services it is proper practice for the attorney, on being admitted as a party, to file a petition in his own name against both plaintiff and defendant, setting forth the particulars of his claim and lien, so that if disputed by them answers could be filed, and the issues made up, as in other cases.[55]

Answer. Affirmative defenses, such as waiver or laches, must be pleaded in the answer.[56]

Cross bill. An attorney's lien may in a proper case be set up in a cross bill.[57]

h. Evidence

General rules of evidence are applicable to questions of evidence in proceedings to enforce attorneys' charging liens.

General rules of evidence, which are discussed in the title Evidence in this work, are applicable to evidence in proceedings brought to enforce attorneys' charging liens. For example, general rules of evidence are applicable to such proceedings as respects presumptions and burden of proof,[58] ad-

made, and praying to have a lien declared on collections in his hands, was held to state a cause of action of which the chancery court had jurisdiction—Arnold v Oliver, 237 S W. 425, 152 Ark 47

(2) A bill to impress a lien in favor of an attorney on assets of a banking corporation in possession of defendants, who are protective committee of depositors who retained the attorney to furnish a plan to recapture assets from receiver under an agreement that the attorney should be paid from the assets when recaptured, was held to state a cause of action as against a motion to dismiss, since the assets recaptured were a sufficient "identifiable fund" and the agreement alleged may create a lien—Walker v Hartford Realization Co, (C C A Conn) 74 F (2d) 56

(3) A petition was held to sufficiently allege an agreement whereby an attorney rendered services in protecting and preserving the life beneficiary's interest in a trust fund, for which he was to be paid out of her interest in the trust fund—Strong v Dutcher, 174 N Y S 352, 186 App Div 307.

Complaint, bill, or petition insufficient

(1) A complaint alleging service of notice of an attorney's lien was held not to state a cause of action—Keith v Schuetzbeim, 230 N W 858, 53 S D. 421.

(2) A bill was held not to state facts entitling attorneys to a lien on a client's funds in the treasury for services in securing a war claim settlement under the Settlement of War Claims Act (1928) § 9—Mellon v. Jones, 60 App D C 269, 51 F (2d) 431, certiorari denied Jones v Mellon, 52 S Ct. 22, 284 U S 641, 76 L Ed 545

(3) A petition to enforce an attorney's lien in a workman's compensation case, notice of which was not served on defendant's attorney, was held to be bad on demurrer—Polensek v Sheridan Coal Co, 253 P. 605, 122 Kan 725

(4) A petition to establish a lien for an attorney's services on a fund, not alleging the amount that was payable from a fund secured for defendant, was held to be insufficient—Ilyers v Western & Southern Life Ins Co, 169 N E 577, 33 Ohio App 331

Filing of papers

(1) A stenographer's minutes need not be filed with other papers in proceedings for the substitution of attorneys and to determine an attorney's lien—Application of H C Roberts Electric Supply Co, 226 N.Y S 211, 131 Misc 119

(2) Certified copies of an order in proceedings for substitution of attorneys and to determine an attorney's lien may, however, be filed in the county clerk's office—Application of H C Roberts Electric Supply Co, supra

Complaint brought to recover statutory lien

A complaint by attorneys against a circuit court clerk, to recover fees from a judgment secured for their client, was held to be brought to recover their statutory attorneys' lien, and not under Burns St Annot.(1914) § 1003, empowering attorneys to receive their client's money under certain circumstances—State v. Blecke, 116 N E. 2, 171 Ind App 23

Not demurrable

(1) A cross bill in a suit to foreclose a mortgage containing covenants of warranty which set up a statutory attorneys' lien on such land claimed by attorneys for the prosecution of pending litigation in behalf of a deceased party, whose heir conveyed such land to the mortgagor by deed in escrow to be delivered on payment by the mortgagor of the attorneys' fee which had not been paid, was held not demurrable for want of equity—Faulk v. Wise, 166 So. 47, 231 Ala 535

(2) A cross bill setting up a valid claim to a statutory attorneys' lien on land was not demurrable because it also sought cancellation of the mortgage on the land which was not warranted under the circumstances—Faulk v Wise, supra

Presumptions

(1) Where there is no proof as to the amount of an attorney's lien for services, it cannot be presumed that it equals or exceeds the amount of the judgment. If there is any presumption, it is to the contrary—Bloch v Bloch, 131 N.Y S. 475, 136 App Div. 770

(2) Where efforts of an attorney under a contingent fee contract were prevented by opposition of the client, the presumption arose in an action brought by the attorney to establish and enforce a lien that the attorney's efforts would have been successful in the absence of such opposition.—Lewis v. Braun, 191 N E 56, 356 Ill 467.

Burden of proof

(1) The burden of proof is on plaintiff to show that he comes within the lien statute by establishing the facts alleged in his complaint—

53. Taylor v St Louis Merchants' Bridge Terminal R Co, 105 S W 740, 207 Mo 495

54. Taylor v. St Louis Merchants' Bridge Terminal R Co, 105 S W 740, 207 Mo. 495,
6 C J p 802 note 4.

55. Reynolds v. Reynolds, 7 N W 322, 10 Neb 574.

56. Loofbourow v Hicks, 66 P. 602, 24 Utah 49, 55 L R A 874.

57. Faulk v. Wise, 166 So. 47, 231 Ala 535.

58. Colo—Gooding v. Lyon, 166 P. 564, 63 Colo 328
Mo—Thompson v Stearns, (App) 195 S W 47—Thompson v Stearns, 195 S W 43, 197 Mo App 344
N Y—Bloch v Bloch, 131 N Y S. 475, 136 App Div 770

missibility,[59] and the weight and sufficiency[60] of | evidence.

Gooding v. Lyon, 166 P. 564, 68 Colo 328,
6 C J. p 803 note 6

(2) More specifically, an attorney seeking to establish a lien on a fund recovered must produce evidence respecting the services performed, where his contract right is not established—In re Dugan's Estate, 264 N Y S. 683, 147 Misc. 776.

(3) In an attorneys' action to establish and enforce an attorneys' lien based on a specific contract made while the relation of attorney and client existed, plaintiffs have the burden of showing the sum sued for is a reasonable fee, although Rev St (1909) § 964 provides that attorneys' fees are not restrained by law, and § 965 authorizes percentage agreements for compensation—Thompson v. Stearns, (Mo App) 195 S W 47—Thompson v. Stearns, 195 S W. 43, 197 Mo App 344

(4) As to affirmative defenses set up in a suit to enforce a lien the burden of proof is on defendant—Lawson v Missouri, etc, Tel. Co., 164 S W 138, 178 Mo App 124.

(5) If a judgment debtor pays an attorney the amount of his claim of lien, without the consent of the owner of the judgment, the burden is on the judgment debtor as against the owner of the judgment to prove the validity of the attorney's lien—Hume v Peterson, 135 N W. 1013, 91 Neb 347.

(6) In an action to enforce an attorney's lien, it was held that delivery by deceased employee's group insurer of insurance check to a former employer presumptively constituted such employer the insurer's agent, casting on such insurer the burden of showing that the employer was the beneficiary's agent—Brookshire v Metropolitan Life Ins. Co., (Mo App) 56 S W.(2d) 817.

59. Ga—Dyal v Watson, 162 S E 682, 174 Ga 330
Minn—Heuser v Chicago, B & Q R Co, 164 N W 984, 138 Minn 286.

Evidence admissible

(1) The admission of prior proceedings to support an attorney's lien was authorized, notwithstanding an apparent lapse of time, where the evidence indicated that the date given as the termination of the suit was a typographical error—Dyal v. Watson, 162 S E 682, 174 Ga 330

(2) In an intervention to enforce an attorney's lien, proof of plaintiff's ratification of deceased husband's contract, employing an attorney to prosecute the claim for injuries, was held to be competent, where plaintiff's acts after the husband's death were alleged in the intervention—St. Louis Southwestern Ry. Co. v. Terral, 11 S.W (2d) 768, 178 Ark 475

Evidence inadmissible

(1) In an action for personal injuries with intervention by plaintiff's attorney to have his right to an attorney's lien determined, an offer to prove that the case came to the attorney through the solicitation by a layman was held not admissible under the answer—Heuser v Chicago, B & Q R. Co, 164 N W. 984, 138 Minn 286

(2) In an intervention to establish an attorney's lien, a transcript of the proceedings in the district court of another state, where defendant claimed the contract forming the basis of a cause of action was adjudicated, was held properly to be rejected on the ground that the court of such other state did not pass on the same contract—Heuser v. Chicago, B & Q R Co, supra.

Affidavits permitted

An application, under Gen St (1915) § 485, for distribution of funds against which several attorneys' liens are claimed, is a motion within § 7460 (Code Civ Proc § 556), on which § 7254 (Code Civ Proc § 350) expressly permits the use of affidavits at a hearing—Ricardo v. Central Coal & Coke Co, 171 P 351, 102 Kan. 170.

60. Cell v Robinson, (Mo App) 79 S W (2d) 489—Smith v Nicholson, 289 S W 349, 221 Mo App. 428, certiorari quashed State ex rel Bradley v Trimble, 289 S.W. 922, 316 Mo 97.

Evidence sufficient

(1) Evidence was held to support the judgment establishing attorney's lien—Smith v Nicholson, 289 S W 349, 221 Mo.App 428, certiorari quashed State ex rel Bradley v Trimble, 289 S.W 922, 316 Mo 97

(2) Evidence was held to establish that an attorney performed a contract for services in association with another attorney, to whom the unsuccessful litigant paid judgment, from which he deducted percentage as a fee, entitling the associate to an equitable lien for his share of the fee withheld from him—Fried v Cahn, 267 N Y S 182, 239 App Div 213, motion granted 191 N E 520, 264 N.Y. 471

(3) Evidence in an action to enforce an attorney's statutory lien was held to be sufficient to show that a letter alleged to have been written by attorneys to client, even if genuine, did not constitute a contract as to the attorneys' compensation for legal services to be rendered—Lyon v Oliver, 147 N E 251, 316 Ill 292, reversing 227 Ill App 511.

(4) Evidence in an action to enforce an attorney's lien was held to warrant a finding that a typewritten letter, purporting to state the terms under which the attorneys would undertake a litigation for a client, was forgery—Lyon v. Oliver, supra

(5) In an action against a railroad for personal injury with intervention by plaintiff's attorney to establish his lien, evidence was held to be sufficient to warrant a directed verdict for the intervener—Heuser v Chicago, B. & Q R Co, 164 N.W 984, 138 Minn 286

(6) In an attorney's action against a client and an opposing party to collect a contingent fee and to enforce an attorney's lien therefor, where it was stipulated that definite sum had been offered and refused by client as settlement and the court found that later, without the attorney's knowledge, settlement was made by collusion to defraud attorney, the amount offered and refused was the proper basis for computing the contingent fee and lien when no other amount was shown in the evidence—Sowers v Robertson, 58 P (2d) 1105, 144 Kan. 273

Evidence insufficient

(1) Evidence was held not to show that money paid by the trustee of a trust estate, in the administration thereof and under the control of the circuit court wherein the trust estate was pending, resulted or arose out of a suit that was filed and dismissed in another county, so as to authorize the enforcement of a lien by an attorney for fees in a suit which was dismissed—Cell v Robinson, (Mo App) 79 S W.(2d) 489.

(2) In equitable proceedings to enforce an attorney's lien against a judgment after the client had entered satisfaction thereof, evidence by the client and a witness that they had perjured themselves at the trial under the inducement of the attorney was held insufficient to sustain the court's finding that the attorney was guilty of the fraud charged, so as to have lost his lien against defendant.—Machcinski v Lehigh Valley R Co, (C C A N Y.) 272 F 920

(3) Where an attorney had performed services for his client, and rendered an itemized statement thereof, which was approved by the client, and advanced her money to take up a loan, she agreeing to secure that and other advancements, also the charges for services, by a pledge of stock owned by her, evidence in an action to enforce the lien was held insufficient to show that the attorney should secure a further loan to protect her property about to be sold for taxes—Van Doren v Mackenzie, 180 N.Y S 778, 190 App Div. 847.

(4) In proceedings to fix the lien of

i. Trial

Ordinary rules govern the trial of proceedings for the enforcement of attorneys' charging liens.

Ordinary rules governing the trial of civil cases, as considered in the title Trial elsewhere in this work, are applicable to the trial of proceedings for the enforcement of an attorney's charging lien.[61]

j. Allowance of Lien, Judgment or Decree, and Review

In the allowance of charging liens, the judgments or decrees of enforcement, and the proceedings for review thereof are governed by ordinary rules in civil actions generally, in so far as such rules may be applicable.

In proceedings to enforce an attorney's charging lien, the lien to which the attorney is properly entitled may be allowed in accordance with his case as established.[62]

Judgment or decree. The rules applicable to judgments in civil actions generally apply to judgments in actions brought to enforce charging liens of attorneys.[63] The judgment should conform to

an applicant's attorney, employed to secure his reinstatement as a clerk in the park department of the city of New York, the evidence was held to be insufficient to sustain the court's determination that the attorney's conduct had been such as would vitiate his contract for half the back pay recovered by him—In re Liebergall, 178 N.Y.S. 857, 189 App.Div. 681. See Heron v. Roberts, 192 Ill.App. 516.

(5) Conflicting evidence supported a judgment refusing to enforce a lien for fees claimed by an attorney for plaintiff in an action for injuries, on the ground that the attorney acted in bad faith in accepting the contract from plaintiff when he was aware of the existence of the contract held by other attorneys and that they had not been discharged by plaintiff—McArthur v. Lotridge, (Okl.) 58 P.(2d) 326.

61. Ala.—Denson v. Alabama Fuel & Iron Co., 73 So. 525, 198 Ala. 383.
Mich.—Boyle v. Waters, 173 N.W. 519, 206 Mich. 515.
N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

Hearing and notice thereof

(1) A proceeding to enforce an attorney's statutory lien may be heard in a court of equity, but it may also be heard in a court of law—Berkemeier v. Dormuralt Motor Sales, 263 Ill.App. 211.

(2) Notice of hearing need not be given former client on an attorney's petition to establish a lien—Tulka v. Chicago City Ry. Co., 259 Ill.App. 234.

Finding not supported by evidence

(1) In a proceeding by an attorney to impress a lien on a check, a finding to the effect that the client stole the check or obtained it by force or fraud was held not supported by the evidence—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 281.

(2) In summary proceedings to establish an attorney's lien, a finding that a retainer was signed by plaintiff as client was held to be against the weight of the evidence.—Tricano v. Coney Island & B. R. Co., 210 N.Y.S. 201, 213 App.Div. 268.

Question of fact or for jury

(1) In proceedings to establish an attorney's lien, conflicting evidence was held to present a question of fact as to the existence or waiver of the lien.—Denson v. Alabama Fuel & Iron Co., 73 So. 525, 198 Ala. 383.

(2) In a proceeding by attorneys to establish a lien on a judgment, the question whether an attorney, who was the brother of the client and who represented her, etc., contracted to pay petitioners the amount claimed was held to be one of fact—Boyle v. Waters, 173 N.W. 519, 206 Mich. 515.

(3) In an action to enforce an attorney's lien, whether insurer received notice of the attorney's employment by the beneficiary before paying the insurance was held to be a question for the jury—Brookshire v. Metropolitan Life Ins. Co., (Mo.App.) 56 S.W.(2d) 817.

(4) In an action to enforce an attorney's lien, whether a former employer, to whom insured delivered an insurance check before receiving notice of plaintiff's employment by the beneficiary, was the agent of insurer or the beneficiary was held to be a question for the jury—Brookshire v. Metropolitan Life Ins. Co., supra.

(5) Where the evidence, in an action brought to enforce an attorney's statutory lien, whether an attorney was retained in a personal injury action was conflicting, the matter was for the jury and not for the trial court to determine—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.

(6) In an action to enforce an attorney's lien, the reasonable value of services performed as the measure of the attorney's lien is a question for the jury—Jacobs v. United Electric Rys. Co., 125 A. 286, 46 R.I. 230.

(7) In an action to enforce a lien for the prosecution of a minor's personal injury action, whether it was necessary for the minor to have an attorney was a question for the jury—Jacobs v. United Electric Rys. Co., supra.

Order of reference not reviewable

An order of reference to take testimony respecting an attorney's services in proceedings to enforce an attorney's lien cannot be reviewed on a motion to have the fact issues tried by a jury—In re Podell, 245 N.Y.S. 28, 138 Misc. 6.

62. Lehigh & N.E.R. Co. v. Finnerty, (C.C.A.N.J.) 61 F.(2d) 289, certiorari denied 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576.

On cause of action

An attorney's motion for the enforcement of an attorney's lien in accordance with law was held to be a sufficient basis for the allowance of a lien on a client's cause of action, payable by defendant, although the notice claimed a lien on the sum paid the client—Lehigh & N.E.R. Co. v. Finnerty, 61 F.(2d) 289, certiorari denied 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576.

63. Castigliano v. Great Northern Ry. Co., 163 N.W. 741, 137 Minn. 335.

Decree for specific performance

A decree declaring a lien in an attorney's favor for defending a suit, on a client's failure to convey an agreed oil interest on certain land for services, was held to be one for specific performance—Perritt v. Saxon, 292 S.W. 139, 173 Ark. 359.

Qualification to preclude bar of new suit

A decree finally dismissing a bill claiming a lien for an attorney's fee against a client's land acquired on a foreclosure proceeding through the attorney's services should be qualified so as not to bar a new suit on the appropriate equitable basis, where the attorney might have equity for payment of such fees on the client's resale of such land because of the trust relationship between the parties—Guthrie v. Home Building & Loan Co., 156 So. 882, 116 Fla. 822.

Judgment declaring certain sum as lien on recovered property held proper

Where an attorney employed by an unrestricted Creek freedman, while a minor over eighteen, through his guardian, procured a judgment for such minor, canceling his pretended deed to his former attorney, and

the proofs.[64] Moreover, where statutes provide for the enforcement of attorneys' liens, only judgments in conformity with the terms of such statutes are valid.[65] In a proceeding by an attorney to enforce his lien against the parties to the action, he may get an absolute judgment against his client for the amount he is entitled to, and an alternative judgment against the other defendant that he pay the amount covered by the lien if such amount is not collectable out of the client.[66] The judgment need not, however, provide that execution shall first issue against his client, although all the proceeds of the settlement had been paid to him, where it is expressly found that he did not appear, that he was without the jurisdiction of the court, and that he was financially irresponsible.[67] No judgment can be entered in favor of an attorney in a proceeding which is determinable on the entry of a final order.[68]

Review. On the review of proceedings brought to enforce an attorney's charging lien, the decision rendered by the lower court is to be regarded as a judgment.[69]

the minor, after majority and pending the former attorney's appeal to the supreme court, agreed to pay the subsequently employed attorney a contingent fee, and gave a lien on the land recovered, and where the former attorney, with notice, procured a deed from the minor and dismissed the appeal, a judgment for the subsequently employed attorney, declaring the sum of one thousand two hundred dollars to be a first lien on the land, was properly rendered—Smith v. Smith, 184 P 82, 80 Okl. 136.

Money judgment instead of order for revivor

The fact that the court enters a money judgment against the judgment debtor for the amount of the lien, instead of an order for revivor, goes to the form and not to the substance—Greek v McDaniel, 94 N W 518, 68 Neb 569

In absence of demand for recognition judgment allowable only for fees proved

In a case where an attorney does not demand recognition of a lien on a judgment, the court can allow a judgment only for the attorney's fees proved.—Strickland v. Livingston Bank, 3 La App 667.

Provision adjudging lien on cause of action and proceeds

A provision adjudging plaintiffs' attorney to have a lien on the cause of action and any proceeds recovered was held improperly to be included in the judgment—Kolb v Mortimer, 155 N Y S 644, 171 App Div 901.

Consolidation of several liens

The consolidation of several liens into one suit constitutes, at most, merely an irregularity or error which does not render the judgment void—Suwannee Turpentine Co. v. Baxter, 35 S E. 142, 109 Ga 597.

Matters considered on objection to decision on merits

Where, on the return day of a rule to show cause based on an attorney's petition that the court determine an attorney's right to a lien and the amount thereof, parties proceeded to a hearing on the merits and exception was taken only to a decision on the merits, questions with respect to the answer and the framing of the issue were held to be waived—Di Furia v. Arnoul, 177 A. 437, 13 N J Misc. 217.

64. Castigliano v Great Northern Ry Co, 163 N W. 741, 137 Minn. 385

Judgment unsupported

In an action by an intervener to enforce a lien for attorney's services, it was held, that the judgment entered was not supported by the proofs—Castigliano v. Great Northern Ry. Co., 163 N.W. 741, 137 Minn. 385

65. Wellman v. Lipkind, 234 N.Y.S 661, 226 App Div. 106.

Personal judgment

A statute authorizing a court to determine and enforce an attorney's lien does not authorize a personal judgment—Wellman v Lipkind, 234 N Y S 661, 226 App Div 106.

66. Dolliver v. American Swan Boat Co, 65 N Y S 978, 32 Misc 264

67. Oishei v. Pennsylvania R Co, 102 N Y S 368, 117 App Div 110, affirmed 85 N E 1113, 191 N Y 544

68. Application of H C Roberts Electric Supply Co, 226 N.Y S 211, 131 Misc 119

In special proceeding for substitution of attorneys

Judgment cannot be entered for an attorney, establishing a lien, in a special proceeding, for the substitution of attorneys, determinable on the entry of a final order—Application of H C Roberts Electric Supply Co, 226 N Y S 211, 131 Misc 119.

69. Berkemeier v Dormuralt Motor Sales, 263 Ill App 211.

Where proceeding below heard before chancellor

Notwithstanding the proceeding in the lower court to enforce an attorney's lien was heard before a chancellor on a bill and answer, and the order appealed from is entitled a decree, it has been held that the decision is to be treated on appeal as a judgment—Berkemeier v Dormuralt Motor Sales, 263 Ill App 211.

ATTORNEY GENERAL

This Title includes the chief law officer in the government of the United States and of each state; his appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of the attorney general, his assistants, deputies, etc., in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definition and history—p 1213
2. Appointment, qualification, and tenure—p 1214
3. Deputies, assistants, and substitutes—p 1214
4. Compensation—p 1220
5. Powers and duties in general—p 1222
6. Furnishing opinions—p 1224
7. Representing state or United States—p 1225
8. —— In civil actions and proceedings—p 1226
9. —— In criminal prosecutions—p 1234
10. —— In disbarment proceedings—p 1236
11. Liabilities—p 1236
12. —— Costs and officer's fees—p 1236
13. —— Actions and proceedings against attorney general—p 1236
14. Privileges and disabilities—p 1237

§ 1. Definition and History

The attorney general is the chief law officer of the state government or of the federal government, as the case may be.

An attorney general is the chief law officer of a state government[1] or of the federal government,[2] as the case may be. His office as well as his designation or title is one which is derived from the common law of England where from an early date the attorney general has been the chief legal representative of the sovereign whose duty it is to represent the crown in civil and criminal matters in the courts.[3] In the United States the office is one which is provided for by the constitutional and statutory provisions of the various states and, with reference to the federal government, is established by act of congress [Rev St. § 346, U.S.C.A. tit 5 c 5 § 291], wherein provision is made for an executive department to be known as the department of justice and an attorney general who shall be the head thereof.[4]

Distinguished from prosecuting attorney. The office of attorney general is not to be confused with that of prosecuting, county, or district attorney, where the two functions have been separated by law, the office of the latter being to represent the state, county, or district in the lower courts in the locality for which he is appointed or elected.[5]

1. Cal—Pierce v. Superior Court in and for Los Angeles County, 37 P (2d) 460, 1 Cal (2d) 759, 96 A.L.R. 1020
Fla—State v. Love, 126 So 874, 99 Fla 333.
Ill—Saxby v. Sonnemann, 149 N.E 526, 318 Ill. 600.
Kan—State v. Finch, 280 P. 910, 128 Kan 665, 66 A.L.R 1369.
Mass—Commonwealth v Kozlowsky, 131 N E 207, 238 Mass 379
N J—Board of Public Utility Com'rs of New Jersey v Lehigh Valley R Co, 149 A. 263, 106 N J Law 411.
6 C J. p 805 notes 9, 10

The word "attorney-general" is also defined as meaning "a general attorney, one who is authorized to appear in all suits and causes, and in all courts, or in all suits at a particular circuit, or for a specified period of time"—Burrill L D.

2. U S. v. San Jacinto Tin Co, 8 S Ct 850, 125 U.S. 850, 31 L.Ed 747

3. Kan—State v. Finch, 280 P. 910, 128 Kan 665, 66 A.L.R 1369
Me—Withee v Lane & Libby Fisheries Co, 113 A 22, 120 Me 121
N J—Board of Public Utility Com'rs of New Jersey v Lehigh Valley R Co, 149 A 263, 106 N J Law 411
6 C J p 805 notes 1–5, 9

Under the colonial government, the attorney general received his appointment from the governor of the colony, and exercised his duties under the common law, but later he was commissioned by the crown—Peo. v Kramer, 68 N Y.S 333, 33 Misc. 209.

4. U S. v. San Jacinto Tin Co, (Cal.) 8 S Ct. 850, 125 U S 273, 31 L Ed. 747—6 C J. p 805 note 6.

5. State v. Finch, 280 P. 910, 128 Kan. 665, 66 A.L.R. 1369.
District and prosecuting attorneys defined see District and Prosecuting Attorneys § 1 [18 C J p 1296 notes 2–7]
Duties in general see District and Prosecuting Attorneys § 10 [18 C. J. p 1306 note 47–p 1309 note 63].

"The business, once pertaining actually as well as theoretically to the office of Attorney General, has been divided between the two offices for

§ 2. Appointment, Qualification, and Tenure

The appointment, qualification, and tenure of attorneys general are controlled by constitutional and statutory provisions.

General rules as to the appointment, qualification, and tenure of public officers which are considered in detail in the title Officers §§ 27–72 [46 C.J. page 950 note 22–page 1006 note 86], and, more particularly, with reference to state officers in the title States §§ 68–79 [59 C.J. page 125 note 68–page 136 note 31], and with reference to federal officers in the title United States §§ 36 and 37 [65 C.J. page 1275 note 39–page 1276 note 71], have, where not limited by express constitutional or statutory provisions, been applied with reference to the office of attorney general, as to his eligibility to office,[6] as to the right of the governor to appoint upon the failure of the state legislature to exercise a power vested in it,[7] as to whether an appointee to fill a vacancy holds for the unexpired term or until the next general election,[8] and as to the recognition of an officer in possession of the office as a de facto officer.[9]

§ 3. Deputies, Assistants, and Substitutes

a. State officers
b. Federal officers

a. State Officers

An attorney general, both at common law and under constitutional and statutory authority, may be accorded such necessary deputies and assistants as he may require for the performance of his duties, such assistants being, with regard to their appointment, qualifications, authorities, and duties, controlled by the principles applicable to other public officers and employees.

Where the office of attorney general is created by the constitutional provisions of the state and without express enumeration thereof, he is required to perform such duties as may be prescribed by law, he has been held of necessity to have power to appoint the necessary deputies and assistants required to aid him in carrying out such duties,[10] and as a rule statutory provision is made for their appointment.[11] Where such specific provision is made, it would seem to exclude the inference of an authority in the attorney general to appoint and employ assistants in cases not within the statute,[12] although it has been held under a statute authorizing the attorney general to take charge of the opposition to claims against the estates of intestates leaving no heirs that he has authority to appoint attorneys, other than those appointed as assistant attorneys general by reason of specific provisions of the statutes, as his assistants to aid him in making inquiries and examinations provided for by the statute.[13]

Right to appoint or employ special assistants or counsel. Unless authorized by statute, an attorney general has no authority to appoint special counsel to act generally for him in actions or proceedings in which the state is interested, so as to charge the state with the value of their services.[14] Therefore, it has been held that attorney general has no authority to procure the opinion of counsel at the expense of the state,[15] to employ the assistance of counsel to resist the enactment of a law,[16] or to defend an action brought against the state,[17] to employ an expert to assist him in the defense of an action against the state;[18] or to employ a district attorney to perform services in his own district, on behalf of the government but not pertaining to his office.[19]

The attorney general may, in the absence of statutory inhibition, be represented by special private

purposes of convenience. We may say the office of prosecuting attorney has been carved out of that of Attorney General and made an independent office, having exclusive control, to some extent, of business of the state, arising within the county"—State v. Ehrlick, 64 S.E. 935, 936, 65 W.Va. 700, 38 L.R.A. (N.S.) 691.

6. State v. Hostetter, 39 S.W. 270, 137 Mo. 636, 59 Am.St.R. 515, 38 L.R.A. 208—6 C.J. p. 806 note 17 [a].

An absolute resignation, to take effect immediately, written and deposited in the mail the day before the state election by a federal district attorney and directed to the president of the United States, the proper officer to receive his resignation, vacates his office and renders him eligible to be chosen as attorney general of the state at the election held upon the following day notwithstanding a constitutional provision that no person holding any lucrative office under the government of the United States shall be eligible to any civil office of profit in the state—State v. Clarke, 3 Nev. 566.

7. Collins v. State, 8 Ind. 344—6 C.J. p. 806 note 17 [c].

8. Baker v. Payne, 29 P. 787, 22 Or. 335—6 C.J. p. 806 note 17 [d].

9. In re Attorney General, 9 P. 249, 3 N.M. 304—6 C.J. p. 806 note 17 [e].

10. Saxby v. Sonnemann, 149 N.E. 526, 318 Ill. 500.

11. Attorney General v. Continental Life Ins. Co., 88 N.Y. 571—6 C.J. p. 806 note 18.

Stenographers

A constitutional prohibition against clerk hire in the office of the attorney general does not preclude a provision for a stenographer.—In re Appropriations For Deputies, etc., 41 N.W. 643, 25 Neb. 662, 667.

12. Attorney General v. Continental Life Ins. Co., 88 N.Y. 571.

13. Hauser v. Doyle's Estate, 59 P. (2d) 674, 144 Kan. 1, denying rehearing 56 P.(2d) 1217, 143 Kan. 719.

14. People v. Talmage, 6 Cal. 256—6 C.J. p. 806 note 21.

15. People v. Talmage, supra.

16. Julian v. State, 39 N.E. 923, 140 Ind. 581.

17. Bradford v. State, 7 Neb. 109.

18. Ritchie v. State, 85 P. 417, 42 Wash. 653.

19. Smith v. U. S., 26 Ct.Cl. 568.

counsel in civil actions or proceedings instituted in his name, notwithstanding he may not obligate the state to pay for their services,[20] although he cannot delegate to another the power he is authorized to exercise and deprive himself of the right to control the action.[21] So, in civil cases in which the attorney general of a state is a party, he may be represented by attorneys procured and paid by relators or other private parties who have a special interest in the maintenance of the rights in question,[22] but a different rule has been applied in the case of criminal prosecutions and a private prosecutor, it has been held, cannot retain counsel to aid the law officers of the government[23] although it would also appear that a counselor may, at the request of the attorney general, be admitted to aid him in the prosecution and without any pecuniary consideration being paid to him or any other consideration which may be supposed to influence him except a disinterested regard for the public good.[24]

When authorized by statute, the attorney general may, of course, appoint another attorney to assist in a criminal prosecution or to conduct the prosecution alone;[25] and he may employ counsel to assist him in any suit where the state is a party.[26] Such statutes are strictly construed.[27]

Term of employment. A contract hiring a special assistant for a term extending beyond the attorney general's period of office is binding until attacked by some one in a position to do so, as by his successor in office,[28] and there is nothing to prevent a ratification of such agreement by such successor in office.[29] So where the litigation in which special counsel is employed extends beyond the term of office of the attorney general his successor may ratify the agreement made by him and continue the employment of such counsel notwithstanding no specific appropriation for his payment has been made.[30]

Status, eligibility, and qualification of deputies or assistants. Deputy or special assistant attorneys general appointed under statutes conferring upon them a definite term of office and particular duties and authorities are state officers[31] and their offices are civil offices.[32] From this it follows that they must possess the qualifications and are subject to the disabilities of other appointees to civil offices of the state.[33] Hence a member of the state

20. Ky.—Commonwealth v. Roberta Coal Co., 216 S.W. 584, 186 Ky. 394. Miss.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.
6 C.J. p. 807 note 26.

Attorney general also appearing
The attorney general is not forbidden to associate with him in the prosecution of a suit in behalf of the state a duly licensed attorney at law, who is not by statute an assistant attorney general, and an appeal by the state will not be dismissed because of the appearance of such attorney, especially where the appearance of the attorney general was also entered of record.—Taylor v. Allen, 91 So. 635, 151 La. 82.

Tax appeal cases
Where the attorney general is given a fifteen per cent commission on all increased taxes he secures by a tax appeal, although he may not bind the state for the hire of additional counsel for such cases he may employ them at his own expense where the pressure of official duties warrants it just as any citizen may employ counsel to represent him.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss. 560.

21. Peo. v. Mutual Union Tel. Co., 2 McCarty Civ. Proc. (N.Y.) 295.—6 C.J. p. 807 note 27.

22. McQuesten v. Attorney General, 72 N.E. 965, 187 Mass. 185.

Statutory powers to employ additional assistance do not limit his right to appear through an unofficial attorney at law authorized to represent him.—McQuesten v. Attorney General, 72 N.E. 965, 187 Mass. 185.

23. McQuesten v. Attorney General, supra.—Commonwealth v. Knapp, 10 Pick. (Mass.) 477, 20 Am.D. 534.

24. Commonwealth v. Knapp, supra.

25. State v. Bolitho, 136 A. 164, 103 N.J.Law 246, affirmed 146 A. 927, 104 N.J.Law 446.—6 C.J. p. 807 note 28.

26. Gordon v. Morrow, 218 S.W. 258, 186 Ky. 713.—6 C.J. p. 807 note 29.

Emergency
(1) Under a statute permitting the employment of counsel other than the attorney general in case an emergency arises which, in the opinion of the attorney general, requires such employment in order properly to protect the interests of the commonwealth, the governor may employ special counsel when requested to do so by the attorney general where the interest of the commonwealth is affected although there is no statute making it the duty of the attorney general to represent the commonwealth in the action, proceeding, prosecution, or matter concerning which special counsel are employed.—Gordon v. Morrow, 218 S.W. 258, 186 Ky. 713.

(2) Where, in a proceeding against an estate for the purpose of collecting inheritance taxes, investigations must be made outside of the state, special counsel may properly be employed.—Gordon v. Morrow, supra.

(3) Whether an emergency exists that will warrant employment of special counsel to institute suits to recover property as escheated is to be determined by the attorney general, and when his request falls within reasonable bounds the court will not interfere with the employment if it is legally made by the governor.—Commonwealth v. Roberta Coal Co., 216 S.W. 584, 186 Ky. 394.

(4) The emergency must arise with respect to some particularly named suit or proceeding, prosecution or thing, and does not contemplate the general employment of special counsel to perform general legal services although such services in the opinion of the attorney general might be of benefit to the state.—Commonwealth v. Roberta Coal Co., supra.

27. Julian v. State, 23 N.E. 690, 122 Ind. 68.—6 C.J. p. 807 note 30.

28. Moore v. Frohmiller, (Ariz.) 52 P.(2d) 854.

29. Moore v. Frohmiller, supra.

30. Kirby v. State, 125 N.Y.S. 742, 68 Misc. 626.

31. Advisory Opinion to the Governor, 113 So. 913, 94 Fla. 620.

32. Advisory Opinion to the Governor, supra.

33. Ariz.—Moore v. Frohmiller, 52 P.(2d) 854.

legislature may be disqualified to an appointment to an office created during his term in the legislature[34] or a member of the legislature may be disqualified from becoming a deputy or assistant attorney general by reason of a constitutional provision that an officer in one branch, legislative, executive, or judicial, of the state government shall not exercise powers belonging to either of the other branches.[35] Whether counsel employed by the attorney general under authority of a resolution of a state commission is in the status of an officer or a mere agent or employee depends on the powers given to him rather than the name given to him by the resolution,[36] and when he is not a public officer he need not possess the statutory qualifications for public office.[37]

It would seem that a deputy attorney general appointed for the purpose of conducting a specific investigation may be disqualified by reason of his interest in the investigation[38] although he will not necessarily be disqualified by his public utterances where they are consistent with his duties as an examining officer.[39]

A constitutional requirement of competitive civil service examinations where practicable renders invalid a statute arbitrarily exempting all positions in connection with a particular bureau in the attorney general's department from civil service examinations,[40] and the fact that appointments already made could not have been based on an examination, and therefore were properly exempted, is not material if the statute authorizes the attorney general to create new positions, determine their duties, and make appointments without examination.[41] Moreover, although the constitution permits exemption from examination where none is practicable, the statute granting exemption must show a bona fide attempt to classify positions, and, if some position subsequently created may well be based on examination, suitable provision must be made therefor.[42]

Presumptions and proof of appointment or authority. It has been held that state courts will not take judicial notice of the official character

Fla.—Advisory Opinion to the Governor, 113 So. 913, 94 Fla. 620.

Incumbency of two offices

Under a statute conferring power upon the attorney general to designate assistants to represent him for the prosecution of the criminal business of the state, he may designate one who is at the time the prosecutor of the pleas for the particular county.—State v. Bolitho, 136 A. 164, 103 N.J. Law 246, affirmed 146 A. 927, 104 N.J. Law 446.

Investigation of bank

A witness subpoenaed to testify in a bank investigation cannot assert as a ground for quashing the subpoena that the deputy attorney general in charge of the investigation holds dual offices with incompatible duties where he is acting as deputy attorney general and also as assistant district attorney.—In re Marcus, 248 N.Y.S. 219, 139 Misc. 675, affirmed 247 N.Y.S. 1008, 232 App. Div. 731, motion granted 175 N.E. 344, 255 N.Y. 630.

Previous official position

Where a special assistant attorney general resigned from his office before accepting a contract for legal services with the Colorado River Commission and the attorney general as an assistant to the attorney general, he no longer had any official relation to the state or the state's attorney and, like any other attorney, was privileged to accept the employment by the commission and the attorney general.—Moore v. Frohmiller, (Ariz.) 53 P.(2d) 854.

34. Advisory Opinion to the Governor, 113 So. 913, 94 Fla. 630.

35. Saxby v. Sonnemann, 149 N.E. 526, 318 Ill. 600.

36. State v. Frohmiller, (Ariz.) 52 P.(2d) 483.

Representation of state

Where a resolution of employment authorizes the attorney general to employ counsel as his assistant to represent "the state," such counsel is an official of the state and an assistant attorney general, but where he has only advisory powers and does not represent the state, he is a mere employee or agent.—State v. Frohmiller, (Ariz.) 52 P.(2d) 483.

37. Moore v. Frohmiller, (Ariz.) 53 P.(2d) 854.

38. In re Marcus, 248 N.Y.S. 219, 139 Misc. 675, affirmed 247 N.Y.S. 1008, 232 App. Div. 731, motion granted 175 N.E. 344, 255 N.Y. 630.

Matters not showing disqualification

(1) One who is appointed deputy attorney general in charge of an investigation of an insolvent bank is not disqualified by his former relationship with litigations representing interests as to the bank where it appeared that the connection was sufficiently remote to remove suspicion of prejudice and that the attorney on his appointment severed his connection with the pending litigation.—In re Marcus, 248 N.Y.S. 219, 139 Misc. 675, affirmed 247 N.Y.S. 1008, 232 App. Div. 731, motion granted 175 N.E. 344, 255 N.Y. 630.

(2) A deputy attorney general in charge of the investigation of an insolvent bank is not disqualified by the fact that attorneys associated as counsel for a group of the bank depositors and stockholders are associated with him, since there can be no conflict of interests between the investigation into the affairs and practices of bank officials for the purpose of safeguarding the public from fraudulent practices and the recovery of all available assets for the depositors and stockholders.—In re Marcus, supra.

39. In re Marcus, supra.

Investigation of bank

Public utterances of a deputy attorney general in charge of the investigation of an insolvent bank, showing an intention to make a thorough investigation and prosecute if evidence of misfeasance of persons in control of the bank's affairs was found, did not show prejudice disqualifying him.—In re Marcus, 248 N.Y.S. 219, 139 Misc. 675, affirmed 247 N.Y.S. 1008, 232 App. Div. 731, motion granted 175 N.E. 344, 255 N.Y. 630.

40. Ottinger v. Civil Service Commission, 148 N.E. 627, 240 N.Y. 435, reversing In re Ottinger, 209 N.Y.S. 890, 214 App. Div. 749.

41. Ottinger v. Civil Service Commission, 148 N.E. 627, 240 N.Y. 435, reversing In re Ottinger, 209 N.Y.S. 890, 214 App. Div. 749.

42. Ottinger v. Civil Service Commission, 148 N.E. 627, 240 N.Y. 435, reversing In re Ottinger, 209 N.Y.S. 890, 214 App. Div. 749.

of the deputies or assistants of the attorney general,[43] but one challenging the authority of an assistant must establish want of authority at the trial like any other fact.[44]

It has also been held that the authority of an assistant may not be collaterally questioned.[45]

The appointment of an assistant will be presumed to have been made regularly and according to law.[46] Where the authority of the assistant or deputy is challenged, it may be established by proof as any other fact may be proved,[47] and production of a certificate of appointment,[48] or of a writing signed by those having authority to appoint such assistant,[49] will be sufficient prima facie to establish his right to act as an assistant. Immaterial inaccuracies in the instrument of appointment will not render the appointment invalid.[50] Moreover a certified copy of the entry of the oath of a special assistant attorney general on the records of the executive council of the state imports a proper appointment where the original record is not attacked.[51]

Where the attorney general directs the solicitor of one district to prosecute cases in another, no written order is required to show the authority of such visiting solicitor.[52]

Termination of employment. Where there is no statutory provision to the contrary, an assistant attorney general may be discharged with the same freedom that a private client may exercise in such a matter,[53] subject, of course, to the right of such counsel to compensation;[54] but, where a special assistant attorney general has brought suit, it has been held that he cannot be supplanted as counsel of record until a written notice has been filed and the consent of the court obtained.[55]

Authority and powers. Where special counsel are lawfully employed, they may use the attorney general's name in connection with all litigation,[56] and all things done under such employment are to be considered as the act of the attorney general.[57] Moreover, it has been held that, since an assistant attorney general is merely the agent of the attorney general, he can act only in the name of his principal.[58]

Under a statute authorizing the deputy attorney general to serve instead of the attorney general on all boards and commissions of which the latter is an ex officio member, the deputy attorney general may serve on the state loan board.[59]

43. Crawford v. State, 57 N.E. 931, 155 Ind 692.

44. Crawford v. State, supra.

45. State v Bolitho, 136 A 164, 103 N J Law 246, affirmed 146 A. 927, 104 N J Law 446

Trial of title to office

Where, in proceedings to collect the costs arising in certain prosecutions under the Liquor Law, plaintiff alleges he was assistant attorney general, the legality of his appointment and his title to office cannot be determined in such case — Mikosoll v. Wilson County, 108 P. 829, 82 Kan 503—In re Gilson, 9 P 768, 34 Kan 641

46. State v Hunter, 92 P. 603, 77 Kan 850—State v Jepson, 92 P 600, 76 Kan 644

47. Crawford v State, 57 N.E 931, 155 Ind 692

48. State v Hunter, 92 P. 603, 77 Kan 850—State v. Jepson, 92 P. 600, 76 Kan 644

49. Chesapeake & O Ry. Co. v. Commonwealth, 225 S.W. 145, 189 Ky. 465

50. People ex rel Osborne v Board of Sup'rs of Westchester County, 154 N.Y.S. 266, 168 App.Div. 765, 33 N.Y.Cr 369

Misdescription of office

That the relator, who claimed compensation from the county as a deputy attorney general, was in the appointment described as a special deputy attorney general, does not affect his rights.—People ex rel Osborne v Board of Sup'rs of Westchester County, 154 N.Y.S 266, 168 App Div 765, 33 N.Y.Cr 369.

51. Commonwealth v. Kozlowsky, 131 N.E 207, 238 Mass 379

52. Jones v State, 75 So 830, 16 Ala App 154

53. Gordon v Morrow, 218 S.W 258, 186 Ky 713

Authority necessarily implied from power to appoint

The attorney general has ample authority to appoint special counsel indefinitely, or for a limited time, or for a particular purpose, or a designated proceeding, and with any restrictions or limitations which he may see fit to impose as to the manner of service or compensation to be paid, and it necessarily follows that he may dismiss or discontinue the service of any such special appointees.—State v. Crabbe, 143 N.E 189, 109 Ohio St 623.

54. Gordon v Morrow, 218 S.W. 258, 186 Ky 713

55. Gordon v. Morrow, supra.

Procedure to obtain discharge

If the governor, after notice to special counsel employed by the state, moves the court to permit him to dismiss them and substitute other attorneys in their place, the court, upon the request of the attorneys sought to be dismissed, should, before entering the motion of the governor, put him upon terms to consent of record that the compensation to which the attorneys are entitled for services rendered may be determined by the court with the assistance of a jury if one is demanded, and that the judgment of the court entered shall be treated as approved by the governor, and, when there is a final judgment, the attorneys may demand of the state auditor the compensation awarded.—Gordon v Morrow, 218 S.W. 258, 186 Ky. 713

56. Commonwealth v Roberts Coal Co, 216 S.W. 584, 186 Ky. 394.

57. Commonwealth v. Roberts Coal Co, supra—6 C.J. p 807 note 33

58. Kan.—State v Shearman, 33 P 455, 51 Kan 686

Miss.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 144 Miss 560.

Neb.—Lower v State, 184 N.W. 174, 106 Neb 666

59. Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673.

"Ex officio services," which the deputy attorney general may perform in place of the attorney general, are services imposed by law on a public officer by virtue of his office and relating to the public interests or business of the county or state.

An admission of service and appearance of the attorney general by a deputy will be deemed sufficient, even where unauthorized, on the ground of public policy.[60]

The duties of an assistant attorney general are, where so limited by statute, confined to the county in which he is appointed.[61]

Effect of representation by unauthorized counsel. Suits brought by special counsel who are not duly authorized should be dismissed.[62] Where, however, the suit is brought by the attorney general, but prosecuted by unauthorized counsel, this does not warrant dismissal, because counsel may voluntarily serve the state without expense to it.[63]

Substitutes. When so provided by law, a substitute may be appointed to act in the absence or disqualification of the attorney-general.[64]

b. Federal Officers

Under the federal statute, provision is made for deputies and assistants to the attorney general and for their appointment and qualification.

The office of solicitor general in the department of justice is created by federal statute [Rev.St. § 347; U.S.C.A. tit 5 c 5 § 293], and it is provided that in case of a vacancy in the office of attorney general or of his absence or disability the solicitor general shall have power to exercise all the duties of that office.[65] Provision is also made by the federal statutes [Rev.St. § 348; U.S.C.A. tit 5 c 5 § 295], for the appointment by the president with the advice and consent of the senate of officers designated "assistant attorneys general" who shall assist the attorney general and solicitor general in the performance of their duties,[66] and also by the Act of Congress of March 3, 1903, chapter 1006 [U S C A. tit 5 c 5 § 294] for the appointment of an assistant to the attorney general and by the Act of Congress of June 10, 1890 [U.S.C.A. tit 5 c 5 § 296] for an assistant attorney general in charge of customs matters, these officers likewise being appointed by the president with the advice and consent of the senate. As will be seen in the title District and Prosecuting Attorneys § 27 [18 C J. p 1336 notes 32–34], provision is also made for the appointment of special assistants to any of the district attorneys.

Appointment. The statute conferring upon the attorney general the power to appoint special assistants does not require that the appointment shall in all cases be signed by the attorney general himself but the power may be exercised personally or through his lawful assistants when duly authorized for that purpose,[67] and where the special attorney bases his authority to act as such upon a letter signed by the assistant attorney general for the attorney general, and purporting upon its face to have been from the department of justice and from the attorney general, the special assistant is in the status of a de facto officer acting under color of authority.[68] It is not necessary that an appointment of a special assistant shall be drawn up with the technical accuracy required in pleadings and other legal documents,[69] and it has been held that the designation of a special assistant to a federal district attorney by one who was solicitor general, but who signed the commission as acting attorney general, is sufficient because of the fact that the solicitor general is authorized to act as attorney general in the absence of such official.[70] However, in view of the provision that special assistants "may, when thereunto specifically directed by the attorney general" conduct certain proceedings, the letter of appointment must state the specific proceedings which the assistant is authorized to prosecute.[71] A direction is sufficiently specific where it directs proceedings against named persons for infractions of specified statutes, although the interrelation of the parties is not revealed.[72]

The authorization of a special federal assistant need not be for one district, but may be for two or more.[73]

—Chemical Bank & Trust Co v. Oakland County, 251 N.W. 395, 264 Mich. 673.

60. Townsend v. Oneonta, etc., R Co, 84 N Y S 117, 41 Misc 295, affirmed 88 N.Y.S. 1034, 86 App. Div 604

"This is so upon grounds of public policy; otherwise the court would never know when jurisdiction was obtained, unless the present practice of recognizing the authority of counsel, upon his appearance in court, should be superseded by a rule requiring all attorneys to furnish, under oath, satisfactory and sufficient evidence of authority"—Townsend v. Oneonta, C. & R S Ry Co, 84 N Y S. 117, 118, 41 Misc. 295.

61. State v. Shearman, 35 P. 455, 51 Kan 686.

62. Commonwealth v Roberts Coal Co, 216 S W 534, 186 Ky 394

63. Commonwealth v. Roberts Coal Co, supra.

64. Harris v State, 45 S W 438, 100 Tenn. 287—6 C J. p 808 note 37.

65. U. S v. Twining, (D.C.N J.) 132 F. 129.

66. May v U S, (Mo) 236 F. 495, 149 C C A 547.

67. May v U. S, supra.

68. May v. U. S., supra.

69. U S. v. Twining, (D C N J) 132 F. 129.

70. U. S. v. Twining, supra.

71. U. S v. Morse, (D C N Y.) 292 F. 273—U. S v. Philadelphia & R. Ry. Co, (D C Pa) 221 F. 682.

72. U. S. v. Morse, (D.C N Y.) 292 F. 273.

73. U. S v. Morse, supra.

Eligibility and qualifications. The authorization to appoint "any attorney or counselor" as special assistant to the attorney general permits the appointment of one admitted to the county bar of a state, although he is not a member of the bar of the supreme court of that state or of the United States,[74] and, if the appointee is a member of the bar of one state, he may be appointed to act in another state.[75]

Counsel representing another branch of the government and receiving compensation solely from such other branch of government are not thereby rendered ineligible as special assistants to the attorney general.[76]

Where private as well as public rights are involved, the employment of counsel, who has previously represented the private interests, as an assistant to the attorney general of the United States, is discretionary with the attorney general.[77] If the object of the United States and that of the private party are one and the same, there is no objection to such appointment.[78] On the other hand, if the name and authority of the United States are likely to be perverted to the promotion of an exclusively private interest, the appointment of such private counsel may be improper.[79]

Where a claim prosecuted below by another was assigned to the United States pending appeal, counsel for the assignor may be appointed special assistants to the attorney general of the United States for the purposes of appeal in the same case.[80]

Evidence and proof of authority. The appointment of an assistant will be presumed to have been made regularly and according to law.[81] The presumption will be that where an act is done by the solicitor general as "acting attorney general" that it was done in the absence of the attorney general[82] and the fact that a writing evidencing his act is signed as "acting attorney general" and not as "solicitor general" is not material.[83] Where an assistant attorney general signs a communication for and on behalf of the attorney general, it must be presumed that he was acting lawfully and not usurping authority.[84]

The federal courts will take judicial notice of the incumbent of the office of the solicitor general of the United States.[85] A specially appointed assistant to the attorney general who is not a resident of the federal district wherein a prosecution is pending should present duly certified copies of his appointment and oath of office to any court in which he is called upon to act in order that the same may be placed upon the records of the court.[86]

Authority. It is essential that every suit be brought with the attorney general's approval,[87] and, where an action is instituted by an assistant

74. U. S. v. Philadelphia & R. Ry. Co., (D.C.Pa.) 221 F. 633.

75. May v. U. S., (Mo.) 236 F. 495, 149 C.C.A. 547.

76. U. S. v. Morse, (D.C.N.Y.) 292 F. 273.

Counsel for the Emergency Fleet Corporation

(1) The facts that the special federal assistant was counsel for the Emergency Fleet Corporation, was paid as such, and received no additional compensation for his new duties, does not render him ineligible as a special assistant—Yaselli v. Goff, (C.C.A.N.Y.) 12 F.(2d) 396, 56 A.L.R. 1239, affirming (D.C.) 8 F.(2d) 161, certiorari granted 47 S.Ct. 101, 273 U.S. 677, 71 L.Ed. 835, and affirmed 48 S.Ct. 155, 275 U.S. 503, 72 L.Ed. 395—U. S. v. Morse, (D.C.N.Y.) 292 F. 273, 277.

(2) "There is no provision of law requiring a Special Assistant to the Attorney General to be paid out of funds appropriated for the Department of Justice. Even if he was paid out of the funds of the Emergency Fleet Corporation, those funds belonged in equity to the United States, and his employment and pay cannot be regarded as by a private corporation. That corporation, though not exempt, like the United States, from liability except by virtue of special statutes, is in a substantial sense a governmental agency, and its property under the Merchant Marine Act of 1920 (41 Stat. 988), was transferred to the government. While by the decision in United States v. Strang, 41 S.Ct. 165, 254 U.S. 494, 65 L.Ed. 368, an employee of the Emergency Fleet Corporation was held not to be an officer of the United States, so as to subject him to a criminal statute, such a case did not in my opinion involve the conclusion that the Emergency Fleet Corporation is so absolutely a private corporation that its funds, though belonging to the United States, could not be used to pay an Assistant Attorney General for prosecuting crimes alleged to have arisen out of transactions affecting its operations."—U. S. v. Morse, supra.

77. U. S. v. Chandler-Dunbar Water Power Co., (C.C.A.Mich.) 152 F. 25, 81 C.C.A. 221, affirmed 28 S.Ct. 579, 209 U.S. 447, 52 L.Ed. 881.

78. U. S. v. Chandler-Dunbar Water Power Co., supra.

79. U. S. v. Chandler-Dunbar Water Power Co., supra.

80. State of Russia v. National City Bank of New York, (C.C.A.) 69 F.(2d) 44.

81. Garter v. U. S., 31 Ct.Cl. 344, affirmed 18 S.Ct. 703, 170 U.S. 527, 42 L.Ed. 1133—6 C.J. p. 807 note 32.

82. U. S. v. Twining, (D.C.N.J.) 132 F. 129.

83. U. S. v. Twining, supra.

84. May v. U. S., (Mo.) 236 F. 495, 149 C.C.A. 547.

85. U. S. v. Twining, (D.C.N.J.) 132 F. 129.

86. May v. U. S., (Mo.) 236 F. 495, 149 C.C.A. 547.

Certified copy of letter

Where a suit by the United States was argued on appeal by an assistant attorney general, who filed a certified copy of a letter from the attorney general authorizing its institution, it was held that the sanction of the attorney general sufficiently appeared.—Causey v. U. S., (La.) 36 S.Ct. 365, 240 U.S. 399, 60 L.Ed. 711, affirming 203 F. 1022, 121 C.C.A. 663.

87. Causey v. U. S., supra.

and it is not brought in the name of, and is not signed by, the attorney general, the pleadings should ordinarily state that the action is authorized by the attorney general, although this may be a matter of proof.[88]

In view of the statutory provision that special assistants to the attorney general of the United States may, when thereunto specifically directed, conduct certain proceedings, the assistant may conduct any proceeding named in the instrument of appointment, but no other.[89]

Stenographers. The attorney-general of the United States has power to authorize the employment by the district attorney of a stenographer to assist in preparing indictments.[90]

§ 4. Compensation

a. Of attorney general
b. Of assistants

a. Of Attorney General

The attorney general's compensation is to be determined in accordance with applicable constitutional and statutory provisions.

The compensation of an attorney general is now almost universally regulated by statute Where a salary is prescribed, it may, in the absence of any constitutional limitation, be made smaller during his term.[91] However, where the constitution provides that the attorney general shall receive such compensation as is provided by the legislature, it may be that the court can require a suitable compensation,[92] and it is certain that, where a salary is prescribed by the legislature, it cannot thereafter be withheld by the legislature for a debt due the state,[93] especially where the attorney general is deprived of the right to a trial by jury to determine the amount of the alleged indebtedness.[94]

If the statutes so provide, the compensation of the attorney general may consist of a salary,[95] commissions on amounts collected,[96] or fees,[97] or salary and fees,[98] but he is not entitled to fees in addition to a salary where only a salary is permitted by law.[99]

Assuming that a statute giving the attorney general a commission on increases in taxes compelled by him is constitutional, the attorney general cannot be allowed such commissions by an order in the action brought to secure an increase in such taxes where he is not a party to the suit, and where the pleadings fail to request allowance of such commissions,[1] and it has been held that the interests of the attorney general and of the state and county are inconsistent, and that therefore a judgment awarding such compensation could not be entered, even if he were a party to the action.[2] Where there are several tax claims, and they have been compromised by reducing some and increasing others, the commissions are based on the net increase obtained by the attorney general after deducting the total reductions from the total increases.[3]

Extra services. Where, at the bidding of the legislature, the attorney general performs services not incumbent on him by virtue of his office, the legislature may give him additional compensation therefor.[4]

88. Causey v. U. S, supra

89. U S v. Cohen, (D C Mass) 273 F 620—U S v Philadelphia & R Ry Co., (D C Pa) 221 F 682

90. U S v Denison, (Colo) 80 F 370, 25 C C.A 496

91. Field v. Marye, 3 S E 707, 83 Va. 882.

92. Fant v. Gibbs, 54 Miss 396.

93. Blair v Marye, 80 Va 485.

Salary not liable to set off or legal process

"The salary of the attorney-general is of constitutional grant and of public official right, and the doctrine of offset cannot be applied to it, as the auditor asserts a right to do in this case. It is not liable to attachment nor to be garnisheed, nor to assignment in bankruptcy, and, upon principles of public policy, it has absolute immunity from detention for debt or counter-claim" —Blair v. Marye, 80 Va 485, 497.

94. Blair v. Marye, supra.

95. State ex rel Barrett v Boeckeler Lumber Co, 257 S W 453, 302 Mo 187—6 C J p 808 note 39

96. Jefferson Davis County v Berry, 120 So 572, 152 Miss 578—6 C J p 808 note 41

97. Martin v. State, 1 Harr. & J (Md) 721—6 C J p 808 note 42.

98. Com. v. Field, 3 S E 882, 84 Va 26—Thon v Com, 77 Va 289

99. State ex rel Barrett v. Boeckeler Lumber Co, 257 S W 453, 302 Mo 187—6 C J p 808 note 44

1. Knox v Jefferson Davis County, 137 So 783, 162 Miss 9.

2. Knox v. Jefferson Davis County, supra

3. Jefferson Davis County v. Berry, 120 So 572, 15 Miss 578

4. Taylor v. Davis, 102 So. 433, 212 Ala 282, 40 A.L R 1052—6 C J. p 808 note 45.

Duties for which salary allowed

(1) Even if duty which the anti-trust statute purports to impose on the attorney general is not identical with duty which he already possessed at common law, it is of the same general character, and therefore within the scope of the services which "may be prescribed by law," within Const. art 5, § 1, providing the services he shall perform, and for the performance of which § 24 provides he shall be allowed a salary, and no other compensation; so that the provision of the anti-trust statute for his having fees cannot be sustained on the theory that his duties under that statute in no way pertain to the office of attorney general—State ex rel Barrett v Boeckeler Lumber Co., 257 S.W. 453, 302 Mo 187.

(2) 6 C.J p 808 note 45 [a].

Furnishing opinions

A statute providing extra compensation for the attorney general for extra duties of furnishing opinions to county officers, thereby imposed on him is valid as against the objection that the constitution forbids

Reimbursement for expenditures. When the attorney general is provided quarters in the capitol building and he rents quarters elsewhere, he is not entitled to reimbursement for such expenditure.[5]

b. Of Assistants

Special assistant attorney generals or other assistants to the attorney general are entitled to compensation only as prescribed by law.

Special assistants employed by the attorney general are entitled to compensation only under the conditions prescribed by law,[6] and they are entitled to no compensation where their employment was unauthorized,[7] unless the same is subsequently ratified.[8] Such an assistant is not entitled to receive compensation for his services prior to the date of his appointment,[9] nor can an appointment be made retroactive so as to cover a period of service not embraced in the original appointment.[10]

Agreement for retainer. Under a constitutional provision that state officers must be paid salaries and not fees, it is illegal to pay an assistant attorney general a retainer of a fixed sum payable regardless of whether any services are actually performed by the officer and in addition to a regular periodical salary and expenses;[11] but an assistant attorney general who is a state officer may resign his position and thereafter be employed as an assistant to the attorney general and as such may be paid a retainer or fee,[12] and the fact that the contract of employment runs beyond the attorney general's term of office is no defense to an action for that part of the retainer due for services which may be performed during the term of office.[13]

Quantum meruit. The fair and reasonable value of his services may be awarded to an assistant or counsel employed for a specific purpose in the absence of an express contract or legislative appropriation fixing the amount thereof.[14]

increasing or diminishing an official's salary during an officer's term of office—Taylor v Davis, 102 So. 433, 212 Ala 282, 40 A L R 1052.

New office

Where the constitution limits the attorney general's compensation to a stated salary, a statute granting him compensation as a member of the securities commission is not unconstitutional, the two offices being distinct—State v. Reeves, 184 N W 1007, 44 S D 612.

5. Territory v Grant, 21 P. 693, 3 Wyo 241

6. Davis v. State, 113 So. 580, 216 Ala 526—6 C J p 808 note 46.

Allowance for expenses

(1) Under a statute permitting the attorney general to supersede a county attorney in contesting claims and preventing waste of the estate of an intestate leaving no known heirs, it was held that the special assistants appointed to contest claims against the estate of the intestate were entitled to an allowance for expenses although the statute did not expressly so provide—Hauser v. Doyle's Estate, (Kan.) 56 P (2d) 1217.

(2) In such case it is the duty of the attorney general so to conduct inquiries and examination required of him by the statute that expense may be kept at a minimum—Hauser v Doyle's Estate, 59 P (2d) 674, 144 Kan 1, denying rehearing 56 P (2d) 1217, 143 Kan 719

Compensation from funds in court

Notwithstanding, under L §§ 2769–2779 (L [1921] p 476), the attorney general is not required to represent the state in proceedings relating to a public charity, in view of L § 2773, imposing on the attorney general powers incident to that office at common law, among which is the enforcement of public charities and L (1921) p 476, authorizing him to appoint assistants at annual salaries only, which under § 2978 shall be in lieu of all other salaries and fees, such statutes and acts prohibit an allowance, out of funds in court, of fees to a special attorney appointed by the attorney general to intervene and represent the public interest in a suit between private litigants involving the ownership of the property included in a charitable trust—Wemme v First Church of Christ, Scientist, of Portland, 223 P 250, 110 Or 179, denying motion 219 P. 618, 110 Or 179

Statute held not retroactive

Where a deputy was granted an increase in salary by statute, but an appropriation was made in the general appropriation bill for an entire year, a portion of which had elapsed prior to the enactment of the statute granting the increase, it was held that such increase was not retroactive merely because of the appropriation—State v Eggers, 33 N W. 535, 112 P 699

Stipulation by attorney general

Under a statute providing that the attorney general may stipulate the amount of compensation to be paid to special assistants, the amount fixed by him is conclusive—Garter v U. S., 31 Ct Cl. 334, affirmed U S v Garter, 18 S Ct. 703, 170 U S 527, 42 L Ed. 1133

7. Edward Hines Yellow Pine Trustees v. Knox, 108 So 907, 144 Miss. 560—6 C J p 809 note 47.

8. Kirby v. State, 125 N Y S 712, 68 Misc 626—Carroll v. State, 124 N Y.S. 888, 68 Misc 41.

9. Lee v. U S., 45 Ct Cl 57.

10. Lee v U S, supra

11. State ex rel Colorado River Commission v Frohmiller, (Ariz.) 52 P (2d) 483

12. Moore v Frohmiller, (Ariz.) 58 P.(2d) 854

13. Moore v Frohmiller, supra.

14. State v. Crabbe, 143 N E 189, 109 Ohio St. 623.

On discharge of counsel before duties performed in full

(1) Where the governor of the state discharges special counsel employed on a contingent basis, the measure of compensation to which the attorneys are entitled should be on a quantum meruit basis and should be the value of the services rendered from the date of the contract until their discharge—Gordon v. Morrow, 218 S W. 258, 186 Ky. 713.

(2) Where the attorney general appointed a special counsel for the director of public welfare in a proceeding for the removal of a matron of a girls' industrial school, expressly stating that the appointment was merely for the purpose of allowing counsel to represent the director, and, after counsel had entered on his duties, informed the director that the state would not be liable for fees, it was held that counsel, having theretofore performed services, was entitled to be paid the fair and reasonable value thereof—State v Crabbe, 143 N E 189, 109 Ohio St 623

Special deputies in New York

The allowance by the attorney general of compensation for a special deputy to conduct prosecutions in the supreme court is final where there has been a legislative appropriation therefor; but where the ap-

Performance of services. Under a statute providing a monthly salary and contemplating actual rendition of service, an assistant attorney general is not entitled to compensation where his cases have been continued for a year by agreement.[15]

Enforcing payment. Special assistants have no attorney's lien on funds recovered for the state to secure their compensation, by reason of the general statute providing a lien for attorneys at law,[16] but they must pay the money into the treasury and resort to legal process to recover their compensation.[17] If special counsel are discharged without cause, they need not appeal to the legislature for permission to sue the state for their compensation[18] but may request the trial judge to award a reasonable fee on the state's motion to substitute counsel.[19]

Recovery of unauthorized payment. Compensation paid a disqualified assistant who is not a de facto officer may be recovered by the state notwithstanding the actual, faithful, and effective rendition of services.[20]

§ 5. Powers and Duties in General

The powers and duties of attorneys general are primarily executive and administrative and consist in those expressly or impliedly conferred by constitutional or statutory provisions together with, in the absence of express exclusion thereof, the powers attached to the office at common law.

The office of attorney general has existed from an early period, both in England and in this country, and is vested by the common law with a great variety of duties in the administration of the government.[21] The duties are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt specifically to enumerate them; and where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto under the common law.[22] Conversely, where the constitution and statutes do not require certain duties, and the duty was unknown at common law, the attorney general has no duty to perform acts for the state merely because they require legal skill.[23] A grant by statute of the same or other powers does not operate to deprive the attorney general of those belonging to the office under the common law,[24] unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred.[25] As the chief law officer of the state, the attorney general may, in the absence of some

propriation does not cover this item the city comptroller may audit the claim and reject it if excessive—People ex rel Smyth v Craig, 132 N E 894, 231 N Y. 575, reversing 186 N Y S. 876, 195 App Div. 857—People ex rel Rand v. Craig, 131 N E 894, 231 N Y. 216, reversing 186 N Y S. 870, 195 App Div. 850.

15. Davis v. State, 113 So. 580, 216 Ala. 526.

16. Gordon v Morrow, 218 S.W. 258, 186 Ky 713.

17. Hendrick v. Posey, 45 S W 525, 104 Ky. 8, 46 S.W 402, 20 Ky L 359

18. Gordon v. Morrow, 218 S.W. 258, 186 Ky 713.

19. Gordon v. Morrow, supra.

20. Saxby v. Sonnemann, 149 N E 526, 318 Ill 600.

Member of legislature, exercising any power properly belonging to attorney general's office, while acting as assistant attorney general in enforcement of a statute which imposes duty on attorney general to issue permits to sell intoxicating liquor for certain purposes in proper cases, determination of which requires investigation, must account for any compensation received, whether as employee or officer of executive department—Saxby v Sonnemann, 149 N.E. 526, 318 Ill. 600.

Pleading held sufficient

Bill for accounting and repayment of compensation received by member of legislature as assistant attorney general in enforcement of Search and Seizure Act of July 1, 1919—Saxby v. Sonnemann, 149 N.E. 526, 318 Ill. 600.

21. Me—Withee v. Lane & Libby Fisheries Co, 118 A 22, 120 Me 121.

Mass—Commonwealth v. Kozlowsky, 131 N E 207, 238 Mass. 379.

6 C.J. p 809 note 52.

Abolition and revival of office

Although the office of attorney general was abolished in 1843, the revival of this office in 1849 restored its former common-law powers—Commonwealth v. Kozlowsky, 131 N. E 207, 238 Mass 379.

22. Me—Withee v. Lane & Libby Fisheries Co, 118 A 22, 120 Me 121.

Mass.—Commonwealth v Kozlowsky, 131 N E 207, 238 Mass 379

Mich.—Mundy v McDonald, 185 N W. 877, 216 Mich 444, 20 A L R 392.

Mo—State ex rel. Barrett v. Boeckeler Lumber Co., 257 S W. 453, 302 Mo. 187.

Nev—State v. Moore, 207 P. 75, 46 Nev 65, 22 A L R 1101.

N.J.—Board of Public Utility Com'rs of New Jersey v. Lehigh Valley R. Co, 149 A. 263, 106 N J Law, 411

6 C J. p 810 note 53.

Statute conferring common-law powers

A statute which purported to confer common-law powers on the attorney general and district attorneys is effective to confer on the attorney general common-law powers, although ineffective as to district attorneys, there being no such powers.—Capitol Stages v. State, 128 So. 750, 157 Miss 576.

23. State v Porter, 189 P. 619, 57 Mont 539—State v. Porter, 189 P. 618, 57 Mont 535.

Preparing digest of laws

The common-law duties of the attorney general do not in the silence of the constitution and statutes of the state include the preparing, for the state efficiency and trade commission, of a survey of the offices, boards, bureaus, and commissions through which the state's business is conducted, and a digest of the laws governing them—State v Porter, 189 P 619, 57 Mont 539—State v. Porter, 189 P 618, 57 Mont 535.

24. State ex rel Barrett v. Boeckeler Lumber Co, 257 S W. 453, 302 Mo. 187—6 C.J. p 810 note 54.

25. State ex rel Barrett v. Boeckeler Lumber Co., supra—6 C J. p 810 note 55.

express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require.[26]

On the other hand, it is to be noted that in some states the office is regarded as of statutory origin, and that the rights and duties attendant thereto are conferred, defined, and described by statute,[27] and where the constitution provides that the treasurer of state, secretary of state, auditor of state, and attorney general shall perform such duties as may be prescribed by law, it has been held that the attorney general has no power in the absence of a statute.[28]

Nature of duties or powers. The attorney general of a state, being regarded as its chief law officer, is, as such, subject only to the direction of the governor and of the legislature.[29] Duties of the attorney general pertain to the executive or administrative branch of the government,[30] and, since the functions of the executive, legislative, and judicial departments must be exercised separately by the appropriate division of government, the attorney general cannot exercise any power or possess any function essentially judicial in nature.[31] However, in the exercise of the functions incident to his office, an attorney general is endowed with a large discretion over matters of public concern[32] and the exercise of such discretion is in its nature a judicial act over which the courts have no control[33] although the courts may control him as to the exercise of his mandatory duties.[34]

Delegation of duties or powers. While it has been stated broadly that any duties which the attorney general may perform personally may be performed by his regularly authorized assistants,[35] this rule would seem to be qualified by the rule that duties involving the exercise of discretion and judgment for the public good cannot be delegated but must be performed in person[36] although the qualifying rule requires only that the official shall exercise some judgment and discretion on matters which are committed to him for determination and does not inhibit his use of assistants when the act to be done requires examination or inspection of documents or physical objects[37] or prohibit the official from arriving at a conclusion of fact which is based on the report of an assistant.[38]

Alteration of duties or powers. Subject to constitutional limitations, it is within the power of the legislature to increase, alter, or abridge the powers and duties of the attorney-general,[39] and a constitutional requirement that the attorney general shall have such duties as are prescribed by law in no way prohibits the legislature from adding to his duties from time to time.[40]

26. Me.—Withee v. Lane & Libby Fisheries Co., 113 A. 22, 120 Me. 121
Wash.—State v. Gattavara, 47 P.(2d) 18
6 C.J. p. 810 note 56.

27. N.M.—State v. Davidson, 275 P. 373, 33 N.M. 664.
Wis.—State v. Industrial Commission, 179 N.W. 579, 172 Wis. 415
6 C.J. p. 810 note 55 [b]

28. Railroad Tax Cases, (C.C.Ark.) 136 F. 233

29. State v. Finch, 280 P. 910, 128 Kan. 665, 66 A.L.R. 1369

30. N.Y.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 App.Div. 723
N.D.—Mountrail County v. Farmers State Bank, 208 N.W. 380, 53 N.D. 739

Preparing bonds

Where he prepares forms of bonds for depositaries of public funds, the attorney general acts in an administrative capacity.—Mountrail County v. Farmers' State Bank, 208 N.W. 380, 53 N.D. 739.

31. Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 App.Div. 723.

Grand jury function not judicial

The power of the attorney general to call a special grand jury and to act as prosecuting attorney in developing a case for the jury is not judicial in nature.—State v. Price, 128 N.E. 173, 101 Ohio St. 50

32. State v. Bryan, 39 So. 929, 50 Fla. 293.—6 C.J. p. 817 note 41.

33. Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189
Wyo.—State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114.
6 C.J. p. 817 note 41

Annulling contracts

The attorney general is officer authorized to protect interests of state and to determine whether suit shall be brought to test validity of its contracts or to annul them, and his discretion cannot be controlled by other authority.—Charles Scribner's Sons v. Marrs, 262 S.W. 722, 114 Tex. 11

In handling of inheritance tax litigation, attorney general acts in both an executive and a judicial capacity.—State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114

34. Cheetham v. McCormick, 35 A. 681, 178 Pa. 186.—6 C.J. p. 817 note 40.

35. State v. Heiser, 127 N.W. 72, 20 N.D. 357.
Powers and duties of assistants or deputies see supra § 3.

36. Inhabitants of Town of West Springfield v. Mayo, 168 N.E. 653, 265 Mass. 41

37. Inhabitants of Town of West Springfield v. Mayo, supra.

38. Inhabitants of Town of West Springfield v. Mayo, supra.

Approval of zoning law

To approve a town zoning by-law, it was not necessary that the attorney general personally approve a map separate and apart therefrom, nor that it be physically before him or personally examined and boundaries of various zones traced by him, but it is sufficient that it was examined for him, with the by-law, by one of his legal assistants, and that he approved the by-law on his own judgment after receiving the assistant's report.—Inhabitants of Town of West Springfield v. Mayo, 168 N.E. 653, 265 Mass. 41.

39. La.—Saint v. Allen, 134 So. 246, 172 La. 350
N.J.—Board of Public Utility Com'rs of New Jersey v. Lehigh Valley R. Co., 149 A. 263, 106 N.J.Law, 411.
Ohio.—State v. Price, 128 N.E. 173, 101 Ohio St. 50.—State of Ohio v. Fassig, 26 Ohio Cir.Ct.(N.S.) 81
6 C.J. p. 810 note 58, p. 812 note 82 [b].—59 C.J. p. 322 note 80

40. La.—State v. Major, 160 So. 425, 181 La. 822.

Powers conferred by positive provisions of statute cannot be varied or enlarged by usage[41]

Powers after expiration of term. The authority of the attorney-general terminates with his term of office,[42] and any duty pertaining to the office, and not to the person who claims to be the incumbent, devolves upon his successor[43] who may act without causing himself to be substituted on the record.[44]

Power to bind successor. The attorney-general has not such authority as will enable him to bind a succeeding attorney general not to bring an action,[45] or not to take an appeal,[46] where the latter believes it to be for the interest of the state so to do.

Attorney general of United States. The attorney general of the United States has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States and to give advice to the president and the heads of the other departments of the government[47] He acts as the head of one of the executive departments representing the authority of the president in the class of subjects within the domain of that department and under his control[48]

§ 6. Furnishing Opinions

The attorney general is bound, both at common law and under the statutes, to render advice and opinions as to questions of law arising with relation to matters affecting the executive departments of the government.

In many of the states it is made the duty of the attorney general to advise, upon request, the governor of the state and the various state department heads and other officers as to legal questions concerning their official conduct,[49] and as a rule the giving of opinions will be refused except as provided for by constitutional or statutory requirements[50] Under the federal statutes [Rev St. §§ 354, 356–358, 383; U S C.A. tit 5 c 5 §§ 303–308], it is made the duty of the attorney general to give his advice and opinion upon questions of law whenever required by the president and to the heads of any executive department on questions of law arising in the administration of their departments, and in general the attorney general is not required to give opinions in other cases.[51] Further provision is made for the publication of such opinions and for the giving of legal advice to the war and navy departments and for the reference of questions to subordinates.

Under some statutes it is made the duty of state officers or departments, boards, or commissions of the state government, where they require legal advice concerning their conduct or operation or when any legal difficulty or dispute has arisen or litiga-

S C—Cathcart v. City of Columbia, 170 S E 435, 170 S C 362.

Attorney general as bond commissioner

Although the constitution requires the duties of the attorney general to be specified by law, this does not prevent the legislature from adding to those specified the duty of acting as ex officio bond commissioner of the state—Cathcart v. City of Columbia, 170 S E 435, 170 S C. 362—6 C J p 810 note 58 [b]

41. Hord v. State, 79 N E 916, 167 Ind 622

42. Hendrick v. Posey, 45 S W 525, 46 S W 702, 104 Ky 8, 20 Ky L 359—6 C J. p 817 note 34

43. Nance v. People, 54 P. 631, 25 Colo 252.

44. People v. Carson, 28 N Y S. 619, 78 Hun 544.

45. People v McClellan, 103 N Y S 146, 118 App Div 177, affirmed 81 N E. 1171, 188 N Y 618

46. State v. Graham, 25 La Ann. 433

47. U. S v San Jacinto Tin Co, (Cal) 8 S Ct. 850, 125 U S 273, 31 L Ed. 747—6 C J. p 809 note 51.

48. U S. v. San Jacinto Tin Co, supra

49. Ark—State ex rel Smith v. Leonard, 95 S.W.(2d) 86.

N J—In re Washington Casualty Ins Co., 158 A. 331, 109 N J Eq 483

Pa—In re Persons, 15 Pa Dist. 627. 6 C J p 810 notes 62, 63.

Police commissioners

Under a statute making it the duty of the attorney general to advise all state boards and commissions, it was held that the attorney general must advise a local board of police commissioners appointed by the governor with the advice and consent of the senate, the court saying, "when the mob rages in the streets, when the incendiary and the assassin are at work, they do not offend against the city, but against the state When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the state, and, when they are tried and convicted, it is by officers representing the state and her sovereign power . . . It must be conceded that the words 'state boards and commissions' are broad enough to include the board in question, nor could the contrary contention be successfully maintained Undoubtedly the specific question which arises here was not before the legislature when chapter 17, Gen Laws, was enacted, for this police commission was not then in existence, but it would be difficult to frame an expression more comprehensive in its terms than 'all state boards and commissions' if it had been then in existence"—In re Police Com'rs, 49 A. 36, 37, 22 R I 654.

Heads of departments

It is the rule to give opinions only to the heads of the departments of the state government and not to the employees—In re Retirement of State Employees, 28 Pa Dist. 393.

Settlement of claim

Under a general statute requiring the attorney general to give his opinion to the executive and to the heads of the several executive departments on constitutional or other legal questions that may concern the official actions of such officers, he may advise the state treasurer to make a settlement of the state's claim against an insolvent bank—State ex rel. Smith v. Leonard, (Ark.) 95 S W. (2d) 86.

50. In re Atty-Gen, 33 Pa Co. 97.

Purely local matters

Opinions will not be given as to purely local matters.—In re Atty.-Gen., 33 Pa Co. 97.

51. 2 Op Atty.-Gen. 531—6 C J. p 810 notes 60, 61, 64, p 811 notes 65–72, p 812 notes 73–79.

tion has been commenced, to refer the matter to the attorney general, and when any such officer or board has requested and received legal advice concerning an official duty, he is required to follow the same and, if he has done so, is absolved from liability for so doing.[52] Such a statute is not unconstitutional in so far as it may change the powers and duties of other state officers which are subject to legislative control.[53] It is not applicable to questions which involve the constitutionality of a statute affecting an officer's official duties[54] and is confined to administrative questions of a legal nature affecting the harmony which should exist between two or more of the executive departments of the state, or doubtful legal questions not theretofore passed upon by the courts or the attorney general which affect any state officer's performance of his official duties, or proceedings which have resulted, or likely will result, in litigation in which the state is interested,[55] but as to matters within its scope it is compulsory.[56]

An officer who has sought an opinion from the attorney general should, it would seem, even though not compelled to do so by statute, follow the advice which is given to him,[57] and when he does so in good faith, he is not, according to some authorities, personally liable to the state[58] and the sureties upon his official bond are also absolved.[59] However, it has been held to the contrary that the officer and the sureties upon his official bond are not protected by the fact that the officer's act was in accordance with an official opinion of the attorney general.[60]

§ 7. Representing State or United States

The attorney general is the chief representative in legal proceedings of the state or of the United States, as the case may be.

As has been seen in § 1, the office of attorney general in the United States, both under the federal and the state governments, has its counterpart in English law, under which the attorney general is the chief legal representative of the crown. Hence, as will be considered more in detail in the following sections, the attorney general of the state appears for and in behalf of the state in all suits or prosecutions, criminal or civil, in which the state may be a party or interested,[61] and, although the federal statutes providing for the duties of the attorney general of the United States are very general in their terms, he is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States and of the litigation which is necessary to establish the rights of the government.[62] Where such an officer appears before the court, he appears as an officer discharging his duty of representing the state or a public body before the court; he does not appear as an attorney at law or as an attorney employed in the case but is exercising the functions imposed on him by law.[63]

The attorney general cannot assent to,[64] or ratify,[65] anything which lies within the exclusive province of the legislature.

Testing constitutionality of statute. Where an attempt is made to sue the state under a statute purporting to waive the immunity of a state government or of an agency which forms a component part thereof from suit, the attorney general may, by an application for a writ of prohibition, raise the question of the constitutionality of the statute.[66] Further, where an adjudication of the unconstitutionality of a statute which is sought by a private relator will seriously affect the general public, it is proper for the attorney general to appear therein as the representative of the people, who in the ag-

52. Commonwealth ex rel Woodruff v. Lewis, 127 A. 828, 282 Pa. 306

53. Commonwealth ex rel. Woodruff v Lewis, supra

54. Commonwealth ex rel. Woodruff v Lewis, supra

55. Commonwealth ex rel Woodruff v. Lewis, supra

56. Commonwealth ex rel. Woodruff v Lewis, supra

Refusal to pay requisitions

The auditor general, in refusing to pay requisitions drawn by proper state officers on the ground that payment was unlawful, is required to submit the matter to the attorney general for his advice and to follow the advice given.—Commonwealth ex rel Woodruff v. Lewis, 127 A. 828, 282 Pa. 306.

57. Rasure v. Sparks, 138 P 495, 75 Okl 181

58. State ex rel Smith v Leonard, (Ark.) 95 S.W.(2d) 86—State ex rel Atty.-Gen v Broadway, (Ark.) 93 S.W.(2d) 1248—State v Fidelity & Deposit Co of Maryland, 53 S.W.(2d) 696, 187 Ark. 4.

59. State v Fidelity & Deposit Co of Maryland, supra

60. Dodd v State, 18 Ind 56.

61. State v. Gleason, 12 Fla 190.

62. U S v San Jacinto Tin Co., (Cal.) 3 S.Ct. 350, 125 U.S. 273, 31 L.Ed. 747.

63. State v Standard Oil Co of Louisiana, 118 So. 867, 164 La. 334

64. New Orleans, etc., R Co v New Orleans, 34 La.Ann. 429.

Assent to claim under statute

Where a claim is made under a statute which may extend the life of a railroad charter, the attorney general cannot intervene and assent to the claim of extension, the extended life of the railroad depending solely on the will of the legislature.—New Orleans, etc., R. Co. v. New Orleans, 34 La.Ann. 429.

65. Van Dyke v. State, 24 Ala. 81

Payment to unauthorized agent

Where a payment of taxes was made to the comptroller rather than the treasurer, the attorney general could not ratify the payment by bringing suit against the comptroller, the sole right being in the legislature to designate an agent to receive taxes.—Van Dyke v State, 21 Ala. 81.

66. State v. Love, 126 So. 374, 99 Fla. 338.

gregate constitute the state.[67] The attorney general, notwithstanding the legislature has called upon him to bring an action to test the constitutionality of a statute, has, however, been held to have no standing in court to do so where he is in effect seeking a merely declaratory judgment not within the jurisdiction of the court,[68] although where an action to determine the validity of a statute is brought under a declaratory judgment statute the attorney general of the state is properly made a party.[69]

Investigations. Under a statute conferring the right upon the attorney general with the approval and direction of the governor to inquire into matters concerning the public peace, safety, and justice, it does not authorize a special investigation against an individual for the purpose of obtaining evidence that he was guilty of a specific crime[70] although such an investigation may be authorized where it is for the purpose of advising executive action on the part of the governor.[71]

Settlement or compromise of claims. It has been held that the attorney general has power to compromise and settle a suit when the rights of the state are in doubt and are in honest dispute,[72] especially when he acts with the approval of the executive head of the department having charge of the matter involved in litigation;[73] but it has also been held that there is no common-law power to settle for less than the face value of a tax execution,[74] and that an execution on a judgment which has become final cannot be compromised by accepting less than the amount awarded.[75]

§ 8. —— In Civil Actions and Proceedings

a. In general
b. Conflicting interests
c. Exclusiveness of right
d. Conduct and management of cause
e. Informations in civil cases

a. In General

The attorney general, as the chief legal representative of the state, may institute all legal proceedings necessary to protect the interests of the state, and may defend all actions affecting the public interest.

As the chief law officer of the state, the attorney general may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws, the preservation of order, and the protection of public rights.[76] He is also generally charged by

67. Parker v. State, 31 N.E. 1114, 132 Ind. 419.

68. State v. Executive Council of State of Iowa, 223 N.W. 737, 207 Iowa 933.

69. Peters v. O'Brien, 278 S.W. 660, 152 Tenn. 466.

70. Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 App. Div. 723.

Conviction of homicide

Where a person was found dead, and one of the plaintiffs, through his counsel, admitted that he had killed decedent in self-defense, but a prosecution against him had been dismissed because of insufficient evidence, an investigation by the attorney general by direction of the governor, for the purpose of securing evidence to break down that plaintiff's claim of justifiable homicide did not affect the "public peace, public safety, and public justice," within Executive L. § 62 subd. 8, added by L. (1917) c. 595, authorizing the attorney general, with the approval of the governor, to inquire into matters concerning the public peace, public safety, and public justice, by subpœnaing and examining witnesses, hence such an investigation was unauthorized, in view of Const. art. 1, § 6, and Code Cr.Proc. §§ 183, 189, 190, 196, 205, 245, 256, 264, 265, 266, 952-p.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 App. Div. 723.

Superseding district attorney

Where an indictment for murder was dismissed because of lack of evidence, but there was no proof that the district attorney had failed to perform his duty, an investigation of the crime by the attorney general, pursuant to governor's directions, to secure evidence against defendant, cannot be upheld on the theory that it was carried on for the purpose of furnishing the governor with information, so that he might properly be advised whether to use his executive power to supersede the district attorney and designate the attorney general in his place to prosecute before the grand jury.—Ward Baking Co. v. Western Union Telegraph Co., 200 N.Y.S. 865, 205 App. Div. 723.

71. Ward Baking Co. v. Western Union Telegraph Co., supra.

72. State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114.

Acceptance of deed

The attorney general has power under the common law, if not under Executive L. § 62, to settle an action to compel conveyance of lands to the state by accepting a deed reserving the right to remove timber thereon for ten years.—People v. Finch, Pruyn & Co., 202 N.Y.S. 582, 207 App. Div. 76, affirmed 144 N.E. 902, 238 N.Y. 584.

73. State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A.L.R. 114.

74. State v. Southwestern R. Co., 66 Ga. 403.

75. Commonwealth v. Humston, 9 Ky.Op. 525.

76. Cal.—Pierce v. Superior Court in and for Los Angeles County, 37 P.(2d) 460, 1 Cal.(2d) 759, 96 A.L.R. 1020.
Fla.—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 139.
Ill.—People v. Continental Beneficial Ass'n, 204 Ill.App. 501, 510.
La.—State ex rel. Porterie v. Smith, 162 So. 413, 182 La. 662.—State ex rel. Porterie v. Walmsley, 160 So. 91, 181 La. 597.
Me.—Withee v. Lane & Libby Fisheries Co., 113 A. 22, 120 Me. 121.
Ohio.—Wolfe v. Fulton, 30 Ohio N.P. (N.S.) 238.
Pa.—Repsher's Est., 42 Pa.Co. 467.
Wash.—State v. Gattavara, 47 P.(2d) 18.
6 C.J. p. 812 note 81.

"A broad discretion is vested in this officer in determining what matters may, or may not, be of interest to the people generally."—Mundy v. McDonald, 185 N.W. 877, 880, 216 Mich. 444.

law with the duty of representing the people of the state in all cases in which the state is a party or is interested,[77] or in which the wrong or injury complained of affects the public generally.[78] He may maintain an action in such case, even though he is not required to do so unless other officers whose duty it is to sue have not done so.[79]

He is ordinarily neither authorized nor required to sue or to defend on behalf of a municipality,[80] or county.[81]

He may not maintain an action solely for the vindication of private rights or for the redress of private grievances in which the public has no interest,[82] but in a case involving the public as well as a private interest, the attorney general may maintain or defend an action or proceeding with respect to the public interest.[83]

Limitation of right. In some states the duties of the attorney general are limited by statute to state cases pending or instituted in the supreme court, and in such case he is not obliged to appear in inferior courts unless required to do so by the governor or legislature.[84]

Statutes requiring the attorney general to pros-

Statute authorizing governor to cause suits to be brought for recovery of public funds does not conflict with statute authorizing attorney general to institute suits for protection of rights of state—Montgomery v Sparks, 142 So 769, 225 Ala 343

Representing agencies of state

(1) The constitutional duty of the attorney general to represent the interest of the state does not extend to a duty to represent the state highway commission or a levee district where they may sue in their own name and are separate corporate entities, but extends only to the interest of the state where it may sue or be sued in its own name—Saint v. Allen, 134 So. 246, 172 La. 350

(2) A resolution authorizing the attorney general to investigate a matter and report to the governor cannot be construed as authorizing a suit in the name of the state where the true party is a levee district—State v Standard Oil Co of Louisiana, 113 So 867, 164 La 334

(3) A right to sue in the name of the state on state causes of action, or to sue in the name of a levee board on their causes of action does not give the attorney general the right to sue in the name of the state on a levee board's cause of action—State v Standard Oil Co of Louisiana, supra.

Director of trade and commerce appointed as liquidator for insurance company does not act as administrative officer of state so as to require attorney general to represent him.—People v Marquette Nat Fire Ins Co, 184 N.E. 800, 351 Ill. 516.

Suit for recovery of common school fund

A suit by the state to recover a part of its common school fund is properly brought on the relation of the attorney general—Tippecanoe County v. State, 92 Ind 353.

77. Ky.—Commonwealth v Roberts Coal Co., 216 S.W. 584, 186 Ky 394.
Me—Withee v. Lane & Libby Fisheries Co, 113 A 22, 120 Me. 121.
N M—State v Davidson, 275 P. 373, 33 N M 664
6 C J p 812 note 82

A proceeding to obtain a license not being a suit against a state, the attorney general need not be admitted in opposition to the granting of such license under a statute requiring him to defend actions against the state—State v Gorman, 171 Ind 58, 85 N E 762.

Liquidation of insurance company

Where proceedings are instituted by director of trade and commerce for liquidation of insurance company, and director is appointed liquidator, state was not so interested as to require attorney general to appear as counsel for liquidator—People v Marquette Nat Fire Ins Co., 184 N E 800, 351 Ill. 516

78. Fla—State ex rel. Crim v Juvenal, 159 So 668, 118 Fla 487
Tenn—State v. Anderson, 6 Tenn Civ A 1
6 C J p 812 note 83.

Actions involving public officers

(1) Under a statute making it the duty of the attorney general to enforce the proper application of funds appropriated to the public institutions of the state, he has authority to institute a proceeding for the enforcement of an act which is intended to provide funds for the carrying on of state institutions—State v. State Board of Equalization, 249 P. 996, 140 Wash. 433.

(2) Under a statutory provision requiring the attorney general to institute and prosecute actions which may be necessary to the execution of the duties of any state officer, when it has been made the duty of a particular state board to levy certain taxes, it would seem that it is the duty of the attorney general to institute and prosecute such actions as may be necessary to see that those duties are properly performed—State v State Board of Equalization, supra.

(3) Other illustrations—6 C J. p 812 note 83 [a].

Duty to protect state's property and revenue

The attorney general has the duty to prosecute all actions necessary to protect the state's property and revenue—State ex rel Landis v. S H Kress & Co, 155 So 823, 115 Fla. 189

Limited portion of community

It is the province of an attorney general to represent the general public, where the rights of the entire community are involved, and not those only of a limited portion thereof as, for example, a school district.—King County, Wash, v Seattle School Dist No. 1, (C C A Wash) 278 F 46, reversed on other grounds 44 S Ct. 127, 263 U S 361, 68 L.Ed 339.

79. Carr v. State, 81 Ind 342—6 C. J. p 813 note 84.

80. La—State v. Desforges, 5 Rob. 253
N Y.—People v Equity Gas Light Co, 36 N E. 194, 141 N Y. 232—People v. Booth, 32 N Y 397.

81. Mich—Atty.-Gen v. Molitor, 26 Mich. 444.
N Y—People v. Ingersoll, 58 N.Y. 1, 17 Am.R 178, affirming 67 Barb. 472.
6 C.J. p 813 note 86.

82. Ill—People v. Marquette Nat. Fire Ins Co, 184 N E. 800, 351 Ill. 516
La—State ex rel. Porterie v. Walmsley, 160 So. 91, 181 La 597.
6 C.J. p 813 note 87.

83. Mundy v. McDonald, 185 N W. 877, 216 Mich 444, 20 A.L R 393—6 C.J. p 814 note 88.

Defending judge in libel suit

Where a judge made findings in an investigation of corruption in office, and was sued for libel based on such findings, the attorney general may properly defend the private suit because the public interest is necessarily involved—Mundy v. McDonald, 185 N W. 877, 216 Mich. 444, 20 A L R. 393

84. U.S—Railroad Tax Cases, (C.C. Ark.) 136 F. 233.

ecute cases in the lower courts "when" requested by the governor mean "if" or "in case" so requested,[85] and refer to both civil and criminal cases.[86]

The fact that a suit in the name of the state is instituted or conducted by the attorney general is generally sufficient to show that the suit is authorized by the state,[87] even though the attorney general is prohibited from bringing the particular suit unless advised to do so by certain other officers.[88]

Power to bind state. In the absence of statutory authority the attorney-general has no power to enter the appearance of the state for the purpose of bringing it in as a party defendant to a pending action;[89] and, where he is specially authorized to bring certain actions, he can bind the state only in cases similar to those so authorized.[90]

The fact that a statute authorizes the attorney general to appear for the state and defend in any court any cause or matter in which the state may be a party or interested has been held not to authorize him to waive immunity to suit and appear for the state in a suit against it in the federal courts,[91] but a similar statute has also been held to constitute "a waiver of the rights of the state not to be sued without its consent" so that the attorney general was authorized to appear, not merely to object to jurisdiction, but to defend the action on its merits,[92] and it has also been held that the action of the attorney general in trying a case at the instance of the auditor general, and appealing and arguing the same before the supreme court of the United States constituted a waiver by the state of immunity.[93]

The attorney general cannot bind the state by oral stipulations where a statute provides that an attorney may bind his client in a case by an agreement filed with the clerk or entered on the minutes but not otherwise,[94]

Attorney general of the United States. While there is no express authority empowering the attorney general to bring suits generally in the name of the United States, such power is to be inferred from the intent of the entire chapter relating to the department of justice,[95] so, although the act creating circuit courts of appeal is silent, the control of cases in them comes within the general jurisdiction of the attorney general as head of that department.[96]

The initiation and control of a suit by the United States to set aside a patent for land issued on the ground that it was obtained by fraud or mistake lie with the attorney general as the head of one of the executive departments.[97]

If it appears that substantial rights of the United States may be impaired in a suit between states, but that the United States cannot properly become a party to the suit, the attorney general may be permitted to appear and intervene on motion for the purpose of adducing evidence and making an argument, without attempting to make the United States a party subject to orders of court, but he will not be permitted to interfere in the pleadings, evidence, or admissions of the states.[98]

The United States attorney general is not authorized to make the United States a party defendant in any court,[99] and counsel for the United States cannot waive any right inherent in sovereignty.[1]

Colo—Atchison, etc., R Co v People, 5 Colo 60.
La—State v Carondelet Canal, etc, Co, 56 So 137, 129 La 279.

85. State v. Huston, 97 P 982, 21 Okl 752

86. Ex parte Kelly, 146 P. 444, 45 Okl 577.

87. Kan—Esley v. People of State of Illinois, 23 Kan. 510.
Tenn—State v Hirsch, 16 Lea 40
59 C J. p 822 note 79.

88. State v. Thompson, 64 Tex 690.

89. U S—Railroad Tax Cases, (C C. Ark) 136 F. 233
S C—Ex parte Dunn, 8 S C 207—Public Account Commissioners v. Rose, 1 S C Eq 461.
6 C J p 816 note 23—59 C J. p 802 note 88 [a], p 823 note 4.

90. Ex parte Dunn, 8 S C. 207.

91. O'Connor v Slaker, (C C A Neb) 22 F (2d) 147, appeal dismissed 49 S Ct. 158, 278 U S 188, 73 L Ed 258—Adams v Bradley, (C C Nev) 1 F Cas No 48, 5 Sawy 217

92. People v Detroit, G H & M Ry Co., 121 N W. 814, 820, 157 Mich 144.

93. People v Detroit, G H & M Ry Co, supra.

94. McClellan v State, 6 P (2d) 994, 119 Cal App 535, certiorari denied McClellan v. State of California, 53 S Ct. 14, 287 U S. 611, 77 L Ed 531

95. U S—U. S. v. San Jacinto Tin Co, (Cal) 8 S.Ct 850, 125 U S 273, 31 L Ed 747
Alaska—U S v. Lynch, 7 Alaska 568
D C—Cohen v. U S, 38 App D C. 123

Representing federal farm board

The attorney general is authorized to initiate suit by the United States to foreclose a mortgage given by a cooperative association to the federal farm board under the Agricultural Marketing Act although the act does not expressly so provide—North Dakota-Montana Wheat Growers' Ass'n v. U. S, (C C A Minn) 66 F. (2d) 573, certiorari denied 54 S Ct. 457, 291 U S. 672, 78 L Ed 1061

96. U S v. Garter, 18 S Ct. 703, 170 U S 527, 42 L Ed 1133, affirming Garter v. U. S, 31 Ct Cl. 344.

97. U S. v San Jacinto Tin Co., (Cal) 8 S Ct. 850, 125 U S 273, 31 L Ed 747.

98. State of Florida v. State of Georgia, 17 How (U.S) 478, 15 L. Ed 181.

99. Stanley v. Schwalby, (Tex) 16 S.Ct 754, 162 U S. 255, 40 L Ed 960

1. U. S. v. Crary, (D C Va.) 2 F Supp. 870—U. S v. Crary, (D C Va.) 1 F Supp. 406.

Consent to taxation of costs

It is a prerogative of the United States not to be bound for costs, and the consent of the attorney general to an order to pay the costs of printing the transcript will not bind

b. Conflicting Interests

Between conflicting duties and interests the attorney general should choose that duty or interest most closely identified with the public good

While it has been held that, where the action to be entertained to determine the validity of a statute must be brought against one of the departments of the state of which the attorney general is legal adviser as well as of the legislature, for the legislature to require him to maintain the action would be to place him in a position repugnant to his other official duties,[2] where the attorney general is charged with the duty of requiring performance by state officials or bodies of their duties, this duty is not overcome by a conflicting requirement that he shall represent such officials or bodies in court proceedings, but the duty to prosecute overcomes the duty to represent[3] Where it is provided by statute that an injured employee shall be represented in the supreme court by the attorney general in a proceeding for workmen's compensation, but the attorney general also represents the state treasurer in all cases, it has been held that the compensation claimant's right to the services of the attorney general must yield to the state treasurer's right where the two interests are in conflict[4]

Where there is a conflict of authority between the attorney general and the state auditor, the rule is that, where the determinative factor is a question of law, the attorney general has jurisdiction, whereas a mere question of fact may be settled or judicially determined at the instance of the auditor without recourse to the attorney general[5]

Where an application to prohibit wrongful acts would ordinarily be made by the attorney general, but he is alleged to be the wrongdoer, the court may entertain the petition of parties interested without the consent of such attorney general.[6]

c. Exclusiveness of Right

The exclusiveness of the authority of the attorney general depends on the particular constitutional or statutory provision involved.

As a general rule the authority of the attorney general under constitutional and statutory provisions to represent the state with regard to matters of public interest is exclusive[7] although in the absence of a constitutional restriction the legislature may provide special counsel for the state or any of its boards or officers who may act independently and not under the control of the attorney general.[8]

It is also held that, in the absence of a statute, the right to defend a state officer is not exclusive with the attorney general, and such officer may be represented by other counsel;[9] but where a statute makes it unlawful to employ counsel for the state without the written approval of the attorney general, it has been held that, while the employment of private counsel by the officers is proper for the purpose of presenting their views,[10] they cannot file an appearance or control the litigation.[11]

A statute requiring representation of the state or county in cases in which they are interested by the attorney general or person authorized by the court refers only to court cases, and does not bar the appointment of special counsel as advisers by an executive department[12]

Supervision of judgments. Under a statute providing that in actions of a certain class no judgment or final order shall be entered until the entry shall have been submitted to the attorney general, a judgment entered without such submission is

the United States as a losing party —U S v. Chemical Foundation, 47 S Ct 1, 272 U S 1, 71 L Ed. 131.

2. State v. Executive Council of State of Iowa, 223 N W. 737, 207 Iowa 923

3. State v State Board of Equalization, 249 P 996, 140 Wash 433.

4. Marsh v. Aljoe, 282 P. 1055, 41 Wyo 119.

5. White v. Lowry, 139 So. 874, 162 Miss 751

Misfeasance of state officer

Insurance commissioner's appointment of disqualified person as deputy fire marshal, would constitute "misfeasance" involving more than the ascertainment of a debt due; hence, attorney general, and not auditor, was proper party to sue commissioner to recover payments to disqualified person —White v. Lowry, 139 So. 874, 162 Miss. 751.

6. State v. Langer, 177 N.W 408, 46 N D 462.

7. Ala —State v. Butler, 142 So 531, 225 Ala 191
Fla —State ex rel Crim v Juvenal, 159 So 663, 118 Fla. 437
Miss —Capitol Stages v. State, 128 So. 759, 157 Miss 576
Wash —State v Gattavara, 47 P.(2d) 18

Implied repeal

Act creating state highway commission does not repeal statute empowering attorney general to represent commonwealth or departments thereof where it recognizes the general provisions of such statute —Montgomery v. Gayle, 288 S.W. 323, 216 Ky. 567

8. N J.—Board of Public Utility Com'rs of New Jersey v. Lehigh Valley R Co., 149 A 263, 106 N J. Law 411.
N M —State ex rel Clancy v. Hall, 168 P. 715, 23 N M 422.
6 C J p 814 note 89

9. Casey v. Wait, 118 N E 297, 229 Mass 200—59 C J. p 323 note 99

Representing judge in mandamus suit

Although attorney general may appear for justice of superior court against whom mandamus was brought, commanding him to allow petitioner to act as counsel in suit, attorney general was not required to act as counsel, and an appearance by other counsel is proper —Casey v Wait, 118 N E 297, 229 Mass 200.

10. Piccirilli Bros. v. Lewis, 127 A. 832, 282 Pa. 328.

11. Piccirilli Bros. v. Lewis, supra

12. State v. Davidson, 275 P. 373, 33 N M. 664.

voidable but not void,[13] although it has been also held that the requirement is mandatory and, if ignored and judgment is entered, it cannot be reviewed.[14]

d. Conduct and Management of Cause

The attorney general ordinarily exercises complete control over all litigation conducted in his name.

In the absence of explicit legislative expression to the contrary, the attorney general possesses entire dominion over every suit instituted by him in his official capacity whether or not there is a relator.[15]

It has been held that, when the state has no direct interest in the event of the suit, the attorney general, as such, has no power to control the conduct thereof,[16] or to withdraw his consent, given to the parties interested, to the use of the name of the state and of his name in bringing an action when such withdrawal would prejudice the parties interested.[17] However, where a suit by a private party against the attorney general and another was consolidated with a suit on the relation of such other against the private party relating to the same subject matter, the attorney general could stipulate, as a defendant, that the effective date of a decree in the consolidated action should be postponed, although the relator in the other suit failed to assent thereto, where his interest was the same as the public interest.[18]

The correlative of the rule that the attorney general may conduct the litigation of a state as may counsel for a private litigant is that the state is bound by the neglect or default of the attorney general to the same extent as a private party.[19]

Appearance. In the United States supreme court it is the uniform practice of the clerk to enter the appearance of the attorney general of the United States in cases in which the United States is a party at the first term to which any writ of error or appeal is returnable. This practice is not conclusive against the attorney general if, at the first term, he withdraws his appearance or moves to strike it off; but, if he lets it pass for one term, it is conclusive upon him as to an appearance.[20]

Dismissal, discontinuance, or disposition. As an incident of his control, the attorney general has power to dismiss or to discontinue suits brought by him,[21] either with or without a stipulation by the other party,[22] and to make any disposition of such suits that he deems best for the interest of the state.[23]

The United States attorney general may absolutely dismiss or discontinue suits in which the government is interested.[24] A fortiori, he may terminate the same upon terms at any stage by way of compromise or settlement.[25]

13. Lynch v. Board of Education of City School District of City of Lakewood, 156 N.E. 188, 116 Ohio St. 361.

Action for recovery of public money illegally expended.—Lynch v Board of Education of City School District of City of Lakewood, 156 N E. 188, 116 Ohio St. 361.

14. City of Cincinnati v Bell, 187 N E. 373, 45 Ohio App 524.

15. Pa.—In re Taxpayers' League's Petition, 34 Pa Co. 9
Wyo.—State v Young, 7 P (2d) 216, 44 Wyo 6, 81 A L R 114.
6 C J p 814 notes 98, 99.

Customs litigation

(1) Tariff Act (1909) subs 30 § 28 (Comp St § 519), creating the office of the assistant attorney general in charge of customs litigation, confers upon him authority to stipulate with counsel for the importers that a protest be sustained in part and overruled in part.—U S. v. Zucca & Co, 11 Ct Cust App 167.

(2) A stipulation between assistant attorney general and importer's counsel that protest might be deemed submitted, is authorized, where ten per cent additional duty was imposed by collector because of failure to mark containers in which paraffin wax was imported.—Smith & Nichols v. U S, 18 Ct Cust & Pat App 16.

16. Cal.—Peo v. North San Francisco Homestead, etc, Assoc, 38 Cal 564—Peo v Jacob, 12 P 222, 2 Cal. Unrep Cas 672.
Ky.—Atty.-Gen. v. Wallace, 7 B Mon 611
N.Y.—Mechanics' F. Ins Co.'s Case, 5 Abb Pr. 444
6 C J p 815 note 4

17. People v Clark, 13 P 858, 72 Cal 289—People v. North San Francisco Homestead, etc, Assoc, 38 Cal 564—People v. Jacob, 12 P. 222, 2 Cal Unrep Cas 672

18. Spring Lake Drainage & Levee Dist. v Stead, 104 N E 1014, 263 Ill. 247.

19. People v. Kings County Development Co, 191 P. 1004, 48 Cal App 72.

20. Farrar v. U. S., 3 Pet (U S.) 459, 7 L Ed 741.

21. State v. Young, 7 P.(2d) 216, 44 Wyo. 6, 81 A L R. 114—6 C J. p 815 note 1

Effect of bad faith

The attorney general, although acting in bad faith, can dismiss suit brought by state.—People v Sterling, 192 N E 229, 357 Ill 354, followed in People v. Small, 192 N E 235, 357 Ill. 388

22. State v Young, 7 P (2d) 216, 44 Wyo. 6, 81 A L R 114—6 C J. p 815 note 2

23. Kan.—State v Finch, 280 P. 910, 128 Kan 665, 66 A L R 1369
Wyo.—State v. Young, 7 P (2d) 216, 44 Wyo 6, 81 A L R 114
6 C J p 815 note 3

Presumptions of good faith and cause to act

The attorney general is presumed, in filing a disclaimer in the land court on behalf of the territory, to act in good faith and with cause.—In re American Sugar Co's Application, 29 Hawaii 820

Effect of concession

A concession made by the attorney general at the close of the evidence on the first hearing in an action by the people was not material or binding on the people, where the case was thereafter opened and further evidence taken, disclosing that the court and the attorneys recognized that the concession was abandoned.—People v. Pulver, 235 N.Y.S. 655, 226 App.Div. 416.

24. 22 Op Atty.-Gen. 507—22 Op Atty.-Gen 491.

25. People of State of New York v

Pleadings and parties. Where an action is brought by the attorney general on the relation of another, the latter need not be joined as plaintiff unless the action is substantially for his benefit.[26] Where the consent of the court to the maintenance of an action by the people by the attorney general is necessary, the consent is a condition precedent, and must be alleged and proved.[27]

Appeal. Unless otherwise provided by statute, the attorney general is the only person who is authorized by law to appear for the people in the supreme court,[28] and no other attorney appearing without his consent will be recognized.[29] Where the state has instituted an action on the relation of citizens, and the attorney has thereafter intervened to protect the state's interest in the same subject matter, the attorney general's failure to take an appeal cannot prejudice the rights of the relators to an appeal, their interests being direct and the state's incidental.[30]

Termination of authority. Special counsel appointed by the attorney general and the attorney general himself have the right to proceed with cases pending at the time of passage of an act transferring cases of a particular class to the control of another specified state officer where, by a general statute, it is provided that no pending action shall be affected by the repeal of a statute but shall proceed as if the statute had not been repealed.[31]

Effect of election of new attorney general. The election of a new attorney general pending the trial of a case does not require the successor to be substituted as counsel of record, and consequently does not justify the court in striking a cause from the calendar a cause noticed for trial by the successor.[32]

e. Informations in Civil Cases

(1) At law
(2) In equity

(1) At Law

An information in a civil case at law is an ancient form of practice whereby the sovereign sues for damages or debts due him.

An information in civil cases is an ancient form of practice whereby a suit was filed by the attorney general, or other proper officer, on behalf of the government to recover money or other charges, or to obtain satisfaction in damages for any personal wrong committed on the lands or other possessions of the government.[33] An "information" and a "complaint" are regarded as synonymous,[34] a complaint preferred on behalf of the state in a civil action being usually termed an "information."[35]

One form of this remedy is an information in debt upon any contract for moneys due to the government or for any forfeit due to the government from the breach of a penal statute.[36]

(2) In Equity

(a) Definition and nature
(b) Information and bill
(c) When information will lie
(d) Mode of procedure
(e) Amendment
(f) Conduct and control of proceedings

(a) Definition and Nature

A proceeding in equity by the state on its behalf or on behalf of one under the protection of the state is begun by information and not by petition and prayer.

Where a suit in equity is instituted by the attorney general or other proper officer on behalf of the government, state or national, or of those who partake of its prerogative, or whose rights are under

State of New Jersey, 41 S Ct 492, 256 U.S 296, 65 L.Ed 937—6 C J. p 815 note 7.

Retirement on terms

Where the United States government intervened in a suit to enjoin the discharge of sewage into New York Bay, it was within the power of the attorney general, under the power to control and conduct litigation, conferred upon him by act of congress, to stipulate for the retirement of the United States from the case on terms stated in the stipulation and approved by the secretary of war, and afterward embodied in a permit for the construction of the sewer—People of State of New York v. State of New Jersey, 41 S.Ct. 492, 256 U.S. 296, 65 L.Ed. 937.

26. N Y—People v Metropolitan Bank, 7 How Pr 144
Wis—State v Cunningham, 51 N W 724, 81 Wis 440, 15 L R A. 561.
6 C J. p 815 note 10

27. People v. Bleecker St, etc., R. Co, 135 N Y S 1045, 140 App Div 611, affirmed 95 N E 1136, 201 N.Y. 594

28. Cal—People v. Pacheco, 29 Cal. 210
Mich—People v. Navarre, 22 Mich. 1.

Representing county

Under a statute providing that the attorney general shall represent the county on appeal in the absence of a conflict between state and county interests, the attorney general must be regarded by the adverse party as counsel on appeal in the absence of such conflict—Corker v. Elmore County, 84 P. 509, 11 Idaho 787.

29. Frey v. Michie, 36 N W. 134, 68 Mich 323—Babcock v Hanselman, 22 N.W. 99, 56 Mich. 27—6 C J. p 816 note 13

30. State v. Benton, 178 N W 1, 190 Iowa 216, rehearing denied 180 N. W 166, 190 Iowa 216.

31. State v Lane, 203 S W. 17, 134 Ark 71.

32. People v. Carson, 29 N.Y.S. 619, 78 Hun 544

33. 3 Blackstone Comm. p 261.

34. People v. McClellan, 105 N.Y.S. 844, 54 Misc. 130.

35. People v. McClellan, supra.

36. U S v. One Stephens Automobile, (D C Or.) 272 F. 188.

its protection, such as the objects of public charities, as considered in the title Charities § 60 [11 C.J. p 368 note 66], the matter of complaint is offered to the court, not by way of petition, but by way of information by the attorney general or other proper law officer of such government.[37] It is a legal proceeding in chancery, older than the court of equity, whose equitable powers, when acquired, were termed extraordinary to distinguish them from its ordinary or legal jurisdiction.[38]

By such information the attorney general as official representative of the government undertakes to put the court in possession of facts which when communicated in proper form, through the right official channel, imposes upon the court determinate duties.[39] The attorney general does not take the attitude nor hold the language of an ordinary suitor; he is not a complainant, nor does he petition.[40]

The function of an information is the same as a bill in equity, and it in every respect follows the nature of a bill except as to name and form.[41]

(b) Information and Bill

Where an individual has an interest in the subject matter of the information, he may have his bill joined with such information, and they form what is known as "an information and bill."

Where a private individual has an interest in the matter in dispute in connection with the government, of an injury to which interest he has a right to complain, apart from the government, he may have his personal complaint or bill joined to, and incorporated with, the information of the attorney general, and they form together an information and bill.[42] In a suit by information and bill, unless the bill is not incorporated with the information, the relator sustains both the character of plaintiff and relator,[43] and, if he dies pending the action, no further proceedings can be had thereon until a new relator is made a party to the record.[44]

An information and bill cannot be supported unless the relator has some individual interest in the subject matter of the suit,[45] and, if it should afterward appear that he has no interest to be subserved, the bill may be dismissed with costs and the information retained.[46] However, a pleading filed as an information, although having many of the features of a bill, cannot be retained as a bill when dismissed as an information,[47] as the attorney-general cannot, where he fails to make out a case on behalf of the public by his information, bring forward the relator as orator at the hearing.[48]

(c) When Information Will Lie

An information will lie only where a public interest is involved.

An information in equity by the attorney-general or other proper officer can be maintained only where it is brought in the interests of the public,[49] a public grievance must be the basis of the information,[50] and it cannot be brought in the name of the attorney general at the relation of an individual merely for the protection of the latter's private interests.[51] Among other grounds, an information in equity will lie: To assert the government's right to interest in certain property,[52] to establish and enforce the execution of a public trust;[53] or to prevent the misappropriation and misapplication of funds or property raised or held for public use.[54]

37. Mo—State v. Vandalia, 94 S.W. 1009, 119 Mo.App. 406
NJ—Wilson v. State Water Supply Commission, 93 A. 732, 84 N.J.Eq. 150—Fraser v. Fraser, 75 A. 979, 77 N.J.Eq. 205, affirmed 81 A. 433, 78 N.J.Eq. 296—MacKenzie v. Jersey City Presbytery, 61 A. 1027, 67 N.J.Eq. 652, 3 L.R.A.(N.S.) 227.
Or—State v. Lord, 43 P. 471, 28 Or. 498, 31 L.R.A. 473.

38. Wilson v. State Water Supply Commission, 93 A. 732, 84 N.J.Eq. 150—31 C.J. p 1189 note 19

39. Atty.-Gen. v. Moliter, 26 Mich. 444

40. Atty.-Gen. v. Moliter, supra.

41. Cal.—People v. Stratton, 25 Cal. 242
Mo—State v. Vandalia, 94 S.W. 1009, 119 Mo.App. 406.

42. Atty.-Gen. v. Central R. Co., 43 A. 347, 61 N.J.Eq. 259—31 C.J. p 1189 note 25.

43. Atty.-Gen. v. Parker, 126 Mass. 216.

44. People v. Stratton, 25 Cal. 242.

45. People v. Stratton, 25 Cal. 242

46. Atty.-Gen. v. Parker, 126 Mass. 216—31 C.J. p 1189 note 29.

47. Atty.-Gen. v. Evart Booming Co., 34 Mich. 462

48. Atty.-Gen. v. Evart Booming Co., supra.

49. Cal.—People v. Stratton, 25 Cal. 242
Mass.—Kenney v. Consumers' Gas Co., 8 N.E. 138, 142 Mass. 417—Atty.-Gen. v. Tutor Ice Co., 104 Mass. 239, 6 Am.R. 227—Parker v. May, 5 Cush. 336.
NJ—Wilson v. State Water Supply Commission, 93 A. 732, 84 N.J.Eq. 150
Or.—State v. Shively, 10 Or. 267.

50. Atty.-Gen. v. Evart Booming Co., 34 Mich. 462—31 C.J. p 1190 note 32.

51. Ill.—People v. General Electric R. Co., 50 N.E. 158, 172 Ill. 129
Mass.—Kenney v. Consumers' Gas Co., 8 N.E. 138, 142 Mass. 417
Mo—State v. Vandalia, 94 S.W. 1009, 119 Mo.App. 406.
31 C.J. p 1190 note 34.

52. Benton v. Woolsey, (N.Y.) 12 Pet.(U.S.) 27, 9 L.Ed. 987—31 C.J. p 1190 note 35.

53. N.J.—MacKenzie v. Jersey City Presbytery, 61 A. 1027, 67 N.J.Eq. 652, 3 L.R.A.(N.S.) 227.
N.Y.—People v. Ingersoll, 58 N.Y. 1, 17 Am.R. 178.
Or.—State v. Lord, 43 P. 471, 28 Or. 498, 31 L.R.A. 473.

54. People v. Ingersoll, 58 N.Y. 1, 17 Am.R. 178.

(d) Mode of Procedure

aa. In general

bb. With or without relator

aa. In General

An information is commonly brought in the name of the attorney general.

The common form of instituting an information in equity is in the name of the attorney general or other proper law officer on behalf of the government,[55] although it is sometimes brought in the name of the government upon the relation of the attorney-general,[56] or of a private citizen,[57] but in any case the information should show on its face in no uncertain manner that the attorney general is the officer instituting and prosecuting the suit and the sole person responsible for its inception and maintenance.[58]

It has been held that, in the absence of statutory authority to do otherwise, an information by the United States should be filed, not in the name of the attorney-general, but in the name and behalf of the United States.[59]

Leave of court. A statute providing that an attorney general can bring an information on complaint of any private party on leave granted by a circuit judge requires permission of the court only in cases instituted in the circuit court, and has no application to proceedings in the supreme court.[60]

bb. With or without Relator

Where the suit affects sovereign rights, no relator is necessary, but where the action does not affect primarily the public interest it is ordinarily upon relation.

Where the suit immediately concerns the rights of the government alone, the attorney general usually proceeds by way of information without a relator,[61] and, if there is a private relator, it need not appear that he has any special interest in the subject matter or in the relief sought.[62] Where, however, the suit is one that does not immediately concern the rights of the government, it is the more common practice for the attorney general to depend upon the relation of some person whose name is inserted in the information as the relator, in order that there may be someone liable for the costs of the information in case it should turn out that it is improperly filed or improperly conducted,[63] in which case it is called an information ex relatione;[64] but it is not essential even in such cases, that there should be a relator.[65]

Who may be relator. A relator within the rule that the attorney general may insert the name of one in an information as relator, when the suit is one that does not immediately concern the rights of the government, is usually some person interested in the subject matter of the suit and whose private rights may be protected by the decree which is sought mainly on the ground of public injury.[66] It has been held that such a relator may be a private person,[67] the inhabitants of a public corporation,[68] a public board,[69] or the officers of a private institution, such as a church.[70]

55. Hunt v Chicago Horse, etc, R Co, 13 N E 176, 121 Ill 638, affirming 20 Ill App. 282—31 C.J p 1190 note 46

56. Revell v. People, 52 N E 1052, 177 Ill. 468, 69 Am S R 257, 43 L. R A. 790—31 C J p 1190 note 47

57. State v. Cunningham, 51 N W. 1133, 82 Wis 39.

58. U S.—Mullan v. U. S, (Cal) 16 S Ct. 1041, 118 U S 271, 30 L Ed 170—U S v. Throckmorton, (Cal.) 98 U S 61, 25 L Ed 93—Pennsylvania v. Wheeling, etc., Bridge Co, 13 How.(U S) 518, 14 L Ed 249
Or.—State v. Lord, 43 P 471, 28 Or. 498, 31 L R A 473
31 C J p 1190 note 49.

59. Atty-Gen v Rumford Chemical Works, (C C R I) 32 F 603—U. S v Doughty, (C C N Y.) 25 F Cas. No 14,986, 7 Blatchf 424

60. State v. Sanders, 110 S.E 803, 118 S C. 493

61. State v Cunningham, 51 N W 724, 81 Wis 440, 15 L R A 561—31 C J p 1191 note 53

62. N J.—MacKenzie v. Jersey City Presbytery, 61 A 1027, 67 N.J Eq 652, 3 L R A (N S) 227
Wis.—State v Cunningham, 51 N W. 1133, 82 Wis 39—State v Cunningham, 51 N W 724, 81 Wis 440, 15 L R A 561
31 C J p 1191 note 54.

63. State v Lord, 43 P 471, 28 Or. 498, 31 L R A 473—31 C J. p 1191 note 55

64. MacKenzie v Jersey City Presbytery, 61 A 1027, 67 N J Eq 652, 3 L R A (N S) 227

65. State v. Lord, 43 P 471, 28 Or 498, 31 L R A 473—31 C.J p 1191 note 57

Reason stated

"It was the general practice, where suits immediately concerned the right of the crown, for the crown officers to proceed without a relator; yet by reason of a prerogative of the crown not to pay costs to a subject, except in certain cases, sometimes, through the tenderness of the officers towards the defendant, the interposition of a relator was required, against whom the costs were taxed in case it appeared that the suit was improperly instituted or prosecuted. The introduction of a relator was a mere act of favor on the part of the crown and its officers"—State v Lord, 43 P. 471, 474, 28 Or. 498, 31 L R A. 473

66. Dist Atty v Lynn, etc., R. Co, 16 Gray (Mass) 242.

67. Dist Atty v Lynn, etc, R Co, supra—Atty-Gen. v Boston Wharf Co, 12 Gray (Mass) 553

68. Atty-Gen. v. Tarr, 19 N.E 358, 148 Mass 309, 2 L R A. 87—Atty.-Gen v. Butler, 123 Mass. 304

69. Atty-Gen. v. Parker, 126 Mass. 216—Atty.-Gen. v. Boston, etc, R. Co, 118 Mass 345—Atty-Gen. v Bay State Brick Co, 115 Mass. 431—Atty-Gen. v Woods, 108 Mass 436, 11 Am R 380—Dist Atty. v. Lynn, etc, R Co, 16 Gray (Mass.) 242

70. Mass.—Atty-Gen. v Merrimack Mfg Co, 14 Gray 586
S C.—Atty-Gen. v Society for Relief Elderly Widows, etc., 29 S C Eq 190

(e) Amendment

An information may be amended as any other pleading.

In a proper case leave may be granted to amend an information so as to make it a technical bill in equity,[71] or to amend a bill by making it either a bill and information or an information.[72]

(f) Conduct and Control of Proceedings

As a general rule the attorney general has exclusive control of information proceedings affecting a public interest, but, where only a private interest is involved, the relator may control the action.

As a general rule the attorney general has entire control of the proceedings, whether the information is filed ex officio or at the instance of a relator; and the suit must be prosecuted by his sanction and be guided and controlled by his judgment.[73] Where the proceeding is by information purely, a relator when joined is not a party in the case except so far as he may be said to be such in the sense that he is directly chargeable with costs,[74] and he cannot be heard by counsel, nor in person,[75] nor can he take any steps in the cause in his own name and independent of the attorney general.[76]

Where the suit does not immediately concern the rights of the government, and is instituted in the name of the state, by the permission of the attorney general upon the relation of the real party in interest, seeking relief, and the state has no direct interest in the event of the suit, the attorney general, as such, has no power to control the conduct of the suit,[77] or to withdraw his consent to the use of the name of the people, to the prejudice of the relator.[78] The suit is then carried on under the direction of the relator and he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it; and if the suit appears to have been improperly instituted or improperly conducted he may be held responsible for the costs.[79]

Dismissal. Ordinarily the attorney general may dismiss the proceedings if he thinks proper in the discharge of his official duty,[80] and the relator has no right to move to set aside such dismissal.[81] It has been held, however, that, where the rights of the government are not immediately concerned, and the information is filed with the attorney general's consent on the relation of another, the attorney general cannot dismiss to the prejudice of the relator.[82]

§ 9. —— In Criminal Prosecutions

The attorney general may conduct criminal trials in a proper case where authorized by statute, and has the exclusive right to represent the state on appeal.

Although it is not generally the duty of the attorney general to conduct criminal trials in the court below,[83] he may ordinarily assist the prosecutor whenever he desires to do so, in states where the attorney general exercises common-law powers.[84]

71. Thompson v. Thompson, 11 Del 225—31 C.J. p 1191 note 67

72. Oxford Union Cong. Soc v West Cong Soc., 55 N H 463—Atty-Gen v. Dublin, 38 N H 459—31 C J. p 1191 note 69

73. Mass—Parker v. May, 5 Cush 336
Mich.—Atty-Gen v. Moliter, 26 Mich 444
31 C J. p 1191 note 70.

74. Mass—Atty-Gen v Parker, 126 Mass 216—Parker v. May, 5 Cush. 336.
Mich—Atty.-Gen v. Moliter, 26 Mich. 444.

75. Atty-Gen. v Parker, 126 Mass 216—Parker v. May, 5 Cush (Mass) 33—31 C.J p 1192 note 72

76. U.S—Atty-Gen. v. Rumford Chemical Works, (C.C.R I) 32 F 608.
Ill—Hesing v. Atty-Gen, 104 Ill 292.
Mass—Parker v May, 5 Cush. 337
Mo.—State v Vandalia, 94 S W. 1009, 119 Mo App. 406

77. Cal—People v Clark, 13 P 858, 72 Cal 289—People v North San Francisco Homestead, etc, Co, 38 Cal 564—People v Jacob, 12 P. 222, 2 Cal.Unrep Cas. 672.
Ky—Atty-Gen. v Wallace, 7 B Mon 611.

78. People v Clark, 13 P 858, 72 Cal 289—People v North San Francisco Homestead, etc, Assoc, 38 Cal. 564—People v Jacob, 12 P 222, 2 Cal.Unrep Cas 672

79. Mich—Atty-Gen v. Moliter, 26 Mich 444
Wis—State v Cunningham, 51 N.W. 724, 81 Wis 440, 15 L R A 561.

80. Ill—Hesing v. Atty-Gen, 104 Ill 292.
Mo—State v Vandalia, 94 S.W. 1009, 119 Mo App 406

81. Ill—Hesing v. Atty-Gen, 104 Ill. 292.
Mo—State v Vandalia, 94 S W. 1009, 119 Mo App 406.
31 C J p 1192 note 82.

82. Cal—People v Jacob, 12 P. 222, 2 Cal Unrep Cas 672
Ky—Atty-Gen v. Wallace, 7 B Mon. 611.

83. Ky—Sharp v. Kirkendall, 2 J.J Marsh 150
Tenn—Temple v. State, 155 S.W 388, 127 Tenn. 429.
6 C J p 816 note 26

84. Ill—People v. Looney, 145 N.E 365, 314 Ill 150
Mass—Commonwealth v Kozlowsky, 131 N E 207, 238 Mass. 379—Com v Tuck, 20 Pick. 356.
6 C J p 816 note 27

Right to appear before grand jury

(1) Since the statutes expressly authorize attorney general, when in his judgment people's interest requires it, to attend trial and assist in prosecution of crime, defendant cannot object to appearance of attorney general before the grand jury after return of indictment, the word "trial" also including all preliminary and subsequent proceedings in case —People v. Looney, 145 N E 365, 314 Ill 150

(2) While by statute the functions of a prosecuting officer are ordinarily performed by district attorneys, the attorney general is not excluded therefrom where public welfare in his opinion requires his intervention —Commonwealth v. Kozlowsky, 131 N.E 207, 238 Mass 379

(3) A statute providing that the attorney general shall consult with and advise district attorneys and that, if, in his judgment, the public interest so requires, he shall assist them in attending the grand jury, does not impliedly restrict his general authority to intervene whenever

The legislature has the constitutional power to confer upon the attorney general the right in his discretion to supplant states' attorneys or to assist them in the institution and prosecution of criminal cases,[85] and this duty of responding to the call of the governor or legislature is usually regarded as mandatory.[86]

Under statutes requiring the attorney general, when duly requested, to institute or prosecute criminal actions, he is invested with full control over the prosecution, and has all the rights and powers of a prosecuting attorney,[87] although this power in the attorney general is not exclusive of the county attorney where the attorney general is authorized to assist, but not to supplant, the district attorney.[88] The duty imposed by such statute requires no specification by the governor or legislature as to the persons guilty, the witnesses to be called, and the subject matter, but any reasonable request to investigate crime in general, or a certain type of crime in a specified locality is sufficient,[89] and the attorney general may be required to summon and question specified witnesses and to institute criminal proceedings,[90] the attorney general having no discretion as to whether he shall prosecute, or as to whether an examination personally and not before a grand jury shows want of probable cause.[91]

The attorney general cannot suspend the operation of any statute, as by an agreement of immunity to prosecution pending a test of the constitutionality of a statute,[92] but where the attorney general must defend a state official for an act done in the course of his duties, he may direct the solicitor not to bring the action.[93]

Granting immunity to witnesses. Where an attorney general is given general superintendence of prosecutions which he desires to undertake, or which the governor or legislature directs him to undertake, this gives him complete control of the case and all its incidents, so that where the attorney general has promised immunity, or, not having promised it, seeks to grant it, to facilitate investigations, the county attorney cannot prosecute the witness where the attorney general appears and moves to discontinue the action.[94]

Designation of place of confinement. Under statutes authorizing the attorney general of the United States to designate a penitentiary outside the state where a criminal was convicted if the penitentiary in the state of conviction is unsuitable, the attorney general may direct the marshal to remove the prisoner to the designated penitentiary,[95] or he may make a uniform designation for the guidance of the courts in pronouncing sentences in the future.[96]

Appeal. The attorney general may appeal on behalf of the state in cases where an appeal is allowable,[97] but a statute giving the attorney general the right to represent the state on appeal does not prevent the county attorney from taking the appeal.[98]

It is, in the absence of any constitutional or statutory provision to the contrary, the duty of the attorney general to represent the state on criminal appeals,[99] and such cause is under the exclusive control of the attorney general,[1] notwithstanding a stat-

he deems it advisable—Commonwealth v Kozlowsky, supra.

Murder case

The attorney general may assist the prosecuting attorney, at the latter's request and by consent of court, in a prosecution for murder, without stating whether he appears in his official capacity or as hired counsel—State v Hays, 23 Mo 287

85. State v. Major, 160 So 425, 181 La. 822—6 C.J. p 816 note 28

86. Kan—State v. Dawson, 119 P 360, 86 Kan. 180, 39 L.R.A.(N.S.) 993
N.Y.—People v. Kramer, 63 N.Y.S. 383, 33 Misc 209, 15 N.Y.Cr 257.
Wis—Emery v. State, 73 N.W. 145, 101 Wis. 627.
6 C.J. p 816 note 29

87. Colo—People v. Gibson, 125 P. 531, 53 Colo 231, Ann Cas.1914B 138.
Kan—State v. Finch, 280 P 910, 128 Kan. 665, 66 A.L.R. 1369—State v Bowles, 79 P. 726, 70 Kan. 821, 69 L.R.A. 176.
6 C.J. p 816 note 30.

Signing information

"The Attorney General undoubtedly had the same power to appear, present, and sign an information, when requested by the Governor or either branch of the Legislature, as had the county attorney."—Luther v. State, 197 P. 533, 534, 18 Okl.Cr. 664.

Authority to act on appeal

The attorney general's authority is not terminated by an appeal where he has been directed by the governor to enter a county and try cases in the circuit court of that county or of any county to which the cause should be transferred, and his right to appear in the appellate court is not dependent on the governor's order or request to do so—State v. Fehl, (Or.) 52 P.(2d) 1118.

Liquor law enforcement

Attorney general is law enforcement head of state intoxicating liquor law, with authority to enforce its provisions in any county.—State v Finch, 280 P. 910, 128 Kan. 665, 66 A.L.R. 1369.

88. Dupree v. State, 171 P. 489, 14 Okl.Cr. 369, L.R.A.1918D 365.

89. State v. Dawson, 119 P 360, 86 Kan 180, 39 L.R.A.(N.S.) 993

90. State v. Dawson, supra.

91. State v. Dawson, supra.

92. Eastman Oil Mills v. State, 93 So 484, 130 Miss 63

93. State v. Cooper, 96 S.E. 393, 110 S.C. 256.

94. State v. Finch, 280 P 910, 128 Kan 655, 66 A.L.R 1369

95. Ex parte Karstendick, (La.) 93 U.S. 396, 23 L.Ed 889

96. Ex parte Karstendick, supra.

97. State v. Key, 46 So. 75, 93 Miss. 115

98. State v. McDonald, 203 N.W. 311, 48 S.D. 167

99. Ark—St. Louis-San Francisco Ry. Co. v. State, 38 S.W.(2d) 554, 183 Ark. 733
Fla—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189

1. State v. McDonald, 203 N.W. 311, 48 S.D. 167—6 C.J. p 817 note 32.

Appeal taken by county attorney

The attorney general may prose-

ute making it the duty of a prosecuting attorney to conduct such cause with the advice and assistance of the attorney general.[2]

§ 10. —— In Disbarment Proceedings

In some states the attorney general may institute disbarment proceedings.

In some jurisdictions the attorney general has power to institute disbarment or suspension proceedings.[3]

§ 11. Liabilities

The liability of the attorney general for costs is discussed in § 12, and his liability to civil suit is discussed in § 13.

§ 12. —— Costs and Officer's Fees

An attorney general is not ordinarily liable for costs.

Applying the general rule that a sovereign is not liable for costs, the attorney general, acting in an official capacity as relator for the sovereign, is not liable for costs,[4] and a statute providing that costs will be awarded against the relator in suits instituted in the name of the state does not apply to the attorney general acting ex officio.[5] On the other hand, it has been held, under a similar statute providing that "when the state is plaintiff, the relator only shall be liable," that judgment could be entered against the attorney general, as relator, but that costs so taxed should be paid by the state,[6] and also that the court had a discretion to refuse to render judgment for costs where the suit was against a municipal corporation concerning the distribution of public funds.[7]

§ 13. —— Actions and Proceedings against Attorney General

The attorney general is liable personally in a suit to restrain the enforcement of an unconstitutional statute, but he is not liable for malicious prosecution or abuse of process.

An action to prevent the enforcement of an unconstitutional statute is brought against the attorney general as an individual and not as an officer, on the theory that the act is a personal and not an official act, and that he is personally liable therefor.[8]

Malicious prosecution. The fact that the attorney general or his assistant institutes a criminal proceeding maliciously and without probable cause does not render him personally liable to the person injured, where the act is done in the course of duty;[9] and

cute an appeal taken by the county attorney in a criminal proceeding—State v. McDonald, 202 N.W. 211, 48 S.D. 167.

Effect of appointment of special county attorney

Where it is by statute the duty of attorney general to represent state in all actions in criminal court of appeals, an order of district court, directing one appointed temporarily in lieu of regular county attorney to represent state in prosecution of case in such court, is void—Board of Com'rs of Comanche County v. Fain, 166 P. 896, 66 Okl. 13—6 C.J. p. 817 note 32 [a].

2. People v. Bussey, 45 N.W. 594, 80 Mich. 501

Construction of statutes

Although a statute makes it the duty of the prosecuting attorney to appear on appeals in cases he has tried below, this does not affect the exclusive control of the attorney general in view of the fact that the statute giving him control of litigation was not repealed, and in view of other sections requiring notice to the attorney general of application for writ of error, of the issuance of writs of error and certiorari, of the filing of bills of exceptions, and of assignments of errors; but the duties of the parties will be adjusted so that the prosecutor must prepare a brief and argue the case under the direction of the attorney general—People v. Bussey, 45 N.W. 594, 80 Mich. 501

3. Wilson v. Popham, 15 S.W. 859, 91 Ky. 327, 12 Ky.L. 904—6 C.J. p. 812 note 50.

4. Ill.—Attorney General v. Illinois Agricultural College, 85 Ill. 516
Minn.—State v. Dover, 130 N.W. 539, 113 Minn. 452.

5. State v. Dover, supra

6. Henderson v. State, 96 Ind. 437.

7. State v. Marian County, 85 Ind. 489

8. Ex parte La Prade, 53 S.Ct. 682, 289 U.S. 444, 77 L.Ed. 1311, vacating Atchison, T. & S.F. Ry. Co. v. La Prade, (D.C.Ariz.) 2 F.Supp. 855.

Reasons stated

(1) "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"—Ex parte Young, (Minn.) 28 S.Ct. 441, 454, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.(N.S.) 932, 14 Ann.Cas. 764

(2) "It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity"—Ex parte Young, supra.

9. Semmes v. Collins, 82 So. 145, 120 Miss. 265.

Public policy

"In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case."—Yaselli v. Goff, (C.C.A.N.Y.) 12 F.(2d) 396, 406, 56 A.L.R. 1239, affirming (D.C.) 8 F.(2d) 161, certiorari granted 47 S.Ct. 101, 273 U.S. 677, 71 L.Ed. 835, and affirmed 48 S.Ct. 155, 275 U.S. 503, 72 L.Ed. 395.

this is true even where the attorney maliciously conspired to secure the appointment as prosecutor.[10]

In summary proceedings by intervention of third persons in a criminal action to regain possession of documents retained by the attorney general after their production under a subpœna duces tecum, procedural questions may be disregarded where substantial justice can be done.[11]

§ 14. Privileges and Disabilities

a. Practicing privately
b. Precedence

a. Practicing Privately

In the absence of a statute to the contrary the attorney general may practice law privately.

In the absence of constitutional or statutory inhibition the attorney general may engage in private practice during his term of office;[12] and it has been held that he may appear against the state in cases where it is not his official duty to represent the state.[13]

b. Precedence

The attorney general's cases have no precedence.

It has been held that a cause in which the attorney general is concerned has no preference at the sittings or circuits.[14]

ATTORNEYSHIP. The office of an agent or attorney.[1]

ATTORNMENT. "Attornment," as the word is used in the law of landlord and tenant, will be defined in the title Landlord and Tenant §§ 277–279 [35 C.J. p 1247 note 97–p 1249 note 40]. It has been said that the term is a relic of the old common law, and has been defined as meaning an act of a feudatory, vassal, or tenant, by which he consents, upon the alienation of an estate, to receive a new lord or superior, and transfers to him his homage and service;[2] a turning over or transfer by a lord of the services of his tenant to the grantee of his seigniory.[3]

Phrases "Attornment made . . . in consequence of some judgment at law,"[4] "attornment to . . . a mortgagee,"[5] "attornment . . . to a stranger,"[6] "conveyance under seal with attornment,"[7] and "tenancy arising out of an attornment."[8]

ATTRACTION. Act, property, or power of attracting[9]; also that which attracts or draws; a pleasing or alluring object.[10]

Phrase: "Two attractions each afternoon and evening"[11]

ATTRACTIVE NUISANCE. See Negligence § 29 [45 C.J. p 758 note 12–p 786 note 36].

AU. Law French, at, to, for, until, in case of.[12]

10. Yaselli v. Goff, supra
Reason stated
"The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. The one charge is as much to be feared as the other, and is equally derogatory to his public character and usefulness in the office."—Yaselli v. Goff, (C.C.A.N.Y.) 12 F.(2d) 396, 407, 56 A.L.R. 1239, affirming (D.C.) 8 F.(2d) 161, certiorari granted 47 S.Ct. 101, 273 U.S. 677, 71 L.Ed. 835, and affirmed 48 S.Ct. 155, 275 U.S. 503, 72 L.Ed. 395.

11. State v. Smithmeyer, 202 P. 638, 110 Kan. 172

12. Masten v. Indiana Car, etc., Co., 57 N.E. 148, 25 Ind.App. 175

13. Sharp v. Kirkendall, 2 J.J. Marsh. (Ky.) 150.

14. Anonymous, 2 Cai. (N.Y.) 246 Col. & C.Cas. 399

1. Black L.D.

2. Snyder v. Bernstein Bros., 208 N.W. 503, 504, 201 Iowa 931, quoting Webster New Int. D.
See also Attorn ante

3. Black L.D.
Origin of doctrine, and application in this country
(1) The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law, and the reasons for the rule never had any existence in this country, and is inconsistent with our laws, customs and institutions. Beyond its application to estop a tenant from denying the title of his landlord, it can serve but little, if any, useful purpose.—Black L.D., citing Perrin v. Lepper, 34 Mich. 292, 295

(2) "Although the word 'attornment' is still occasionally used in judicial opinions, it is very doubtful whether the thing itself, in the sense in which it existed at common law, survives in this state."—Commonwealth Mortgage Co. v. De Walthoff, 119 N.Y.S. 781, 782, 135 App.Div. 33, reversing 115 N.Y.S. 1090, 1091, 62 Misc. 639, 1 N.Y.Civ.Proc.(N.S.) 349

4. Del-New Co. v. James, 167 A. 747, 748, 111 N.J.Law 157.

5. Hemminger v. Klaprath, 189 A. 363, 364, 15 N.J.Misc. 163

6. Snyder v. Bernstein Bros., 208 N.W. 503, 504, 201 Iowa 931

7. Hankins v. Smith, 138 So. 494, 496, 103 Fla. 892
"Livery of seisin" equivalent.—Hankins v. Smith, 138 So. 494, 496, 103 Fla. 892.

8. New York Rys. Corporation v. Savoy Associates, 268 N.Y.S. 131, 135, 239 App.Div. 504

9. Webster New Int. D.

10. Radcliffe v. Query, 150 S.E. 352, 153 S.C. 76.

11. Radcliffe v. Query, supra.

12. Adams Gloss.
Au amore—for alms or charity.—Adams Gloss. Au besoin—in case of need.—Adams Gloss. Words used in the direction of bills of exchange, pointing out certain persons who, in case of a refusal or failure of the drawee,

AUCTIO. Latin, an increasing; increase[13] Also a public sale or auction, which has been said to be the classic signification of the word.[14]

AUCTION. "Auction" is defined in the title Auctions and Auctioneers, § 1.

Phrases: "Dutch auction,"[15] and "sale . . . at public auction."[16]

AUCTIONALIA. Catalogs of auction sales.[17]

AUCTIONARIÆ. Catalogs of goods for public sale or auction.[18]

AUCTION POOL. See Gaming § 1 [27 C.J. p 975 note 52–p 976 note 63].

are to be applied to, that they may honor and pay the bill—Black L D

Au bon droit—to the just right—Adams Gloss

Au bout de compte—at the end of the account, after all—Adams Gloss.

Au bout de son Latin—at the end of his Latin, that is, to the extent of his knowledge—Adams Gloss

Au ceo temps—until this time—Adams Gloss

Au contraire—on the contrary.—Adams Gloss

Au d'espoir—in despair.—Adams Gloss.

Au fait—well instructed; expert; in fact, indeed, in point of fact, in point; to the fact—Adams Gloss

Au fil d'el ewe (eau)—to the thread of the stream—Adams Gloss

Au grand besoin—in great need; in case of absolute necessity, in an emergency—Adams Gloss

Au pis aller—at the most—Adams Gloss

Au plus—at most—Adams Gloss.

Au quel—to whom or which—Adams Gloss

Au reste—as for the rest—Adams Gloss

Au revoir—until we meet again—Adams Gloss

13. Adams Gloss

Auctio dierum—an increase of days—Adams Gloss

14. Adams Gloss

15. Black L D, citing Crandall v. State of Ohio, 28 Ohio St 479, 482.

This method consists in the public offer of the property at a price beyond its value, and then gradually lowering the price until someone becomes the purchaser—Crandall v State of Ohio, 28 Ohio St. 479, 482

16. Cal—Witter v Bank of Milpitas, 269 P 614, 619, 204 Cal 570

Mont—State v Miller, 160 P 513, 515, 52 Mont 562

N Y—Manhattan Taxi Service Corporation v Checker Cab Mfg Corporation, 171 N E. 705, 706, 253 N Y. 455

"Public sale" synonymous.—In re Newbrough, 236 N.W. 233, 235, 254 Mich. 170

17. Adams Gloss.

18. Black L. D.

AUCTIONS AND AUCTIONEERS

This Title includes the regulation and conduct of sales by auction, and rights, duties, and liabilities of auctioneers and of sellers and buyers at auctions in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definitions—p 1239
2. Regulations in general—p 1241
3. Persons subject to regulation—p 1245
4. Public auctioneers—p 1245
5. Licenses and taxes—p 1245
6. Agency of auctioneer—p 1246
7. Conduct and validity of sale—p 1249
8. Rights and liabilities of buyer and seller—p 1260
9. Rights of auctioneer in general—p 1265
10. Indemnity for expenses—p 1265
11. Compensation—p 1265
12. Lien—p 1267
13. Liabilities of auctioneer and clerk—p 1268
14. Actions by or against auctioneers in general—p 1271
15. Penalties for violation of regulations—p 1272
16 Bonds of auctioneers and actions thereon—p 1272
17. Offenses by auctioneers—p 1273

§ 1. Definitions

a. Auction
b. Auctioneer
c. Bid, bidder

a. Auction

An auction is a public sale of property to the highest bidder, by one licensed and authorized for that purpose

An auction is a public sale of property to the highest bidder,[1] by one licensed and authorized for that

1. NY—Russell v Miner, 5 Lans 537, 539, 61 Barb 331
Or—Kine v. Turner, 41 P. 664, 27 Or. 356
6 C.J. p 821 note 1.

Other definitions

(1) "A sale by consecutive bidding intended to reach the highest price of the article by exciting competition for it"—Pike v State Land Comrs., 113 P. 447, 19 Idaho 268, 288, Ann Cas 1912B 1344—Hibler v. Hoag, 1 Watts & S (Pa.) 552, 553

(2) "A public competitive sale"—Crandall v. State, 23 Ohio St. 479, 481.

Origin

(1) "Auctions have been a method of carrying on and conducting the business of sale of goods for many centuries."—Robinson v Wood, 196 N.Y.S 209, 211, 119 Misc. 299.

(2) "The business of auctioneering is as old as the law of sale"—Balesh v City of Hot Springs, 293 S.W. 14, 15, 173 Ark. 661.

(3) "The practice of conducting auctions is of ancient origin. We find that it originated with the Romans in the disposition of military spoils, and the auction was conducted 'under the spear.' On such occasions the spear was stuck in the ground. This practice has passed away as to the spear, but the method of sale by auction continues Later another mode of sale by auction came into practice, called the 'sale by the candle' or 'by the inch of candle' This arose from the use of candles as a means of measuring time. It was declared the goods could be continued to be offered to bidders for so long a time only as would suffice for the burning of one inch of candle When the measure was wasted to that extent, the highest bidder was then declared to be the purchaser."—Korber v. City of Portland, 295 P. 203, 204, 135 Or 233
6 C.J. p 821 note 1 [b].

Dutch auction

"There is another method of auction called a 'Dutch' auction, indicating the origin of the practice, and this consists in the public offer of the property at a price beyond its value, and then gradually lowering the price until some one becomes a purchaser."—Korber v. City of Portland, 295 P. 203, 204, 135 Or. 233—6 C.J. p 821 note 1 [c].

"Forced sale" not synonymous

"A forced sale is not necessarily an auction sale, an auction sale is not necessarily a forced sale."—Dickison v Reynolds, 12 N.W. 24, 43 Mich. 158, 162.

purpose.[2] The main purpose of auction sales is to obtain the best financial returns for the owner of the property sold,[3] and they are based on the purpose and policy of obtaining the worth of property by free and fair competition among the bidders;[4] and hence competition among a number of bidders is a necessary element[5]

Announcement of sale. An announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received[6]

b. Auctioneer

An auctioneer is a person who conducts a public sale of property at auction.

An auctioneer is one who sells goods at public auction for another on commission, or for a recompense;[7] one who conducts a public sale or auction,[8] whether the goods sold are his own or those of another person who employs him.[9]

Other occupations distinguished Auctioneers differ from brokers in that the latter may both buy and sell, whereas auctioneers can only sell[10]

An auctioneer differs from a jobber in that he does not purchase goods at all, but sells the goods of others for a commission, whereas a jobber is a merchant who purchases goods and sells to retailers.[11]

The business of an auctioneer and that of a pawnbroker differ essentially; that of an auctioneer is to sell by public outcry the property of others on an agreement, express or implied that he shall receive compensation for his labor and skill, whereas the business of a pawnbroker consists in the loaning of money on interest[12]

The business of an auctioneer and that of a peddler have been distinguished in that an auctioneer in making a sale at auction acts primarily as the agent of the seller.[13]

c. Bid; Bidder

A bid is an offer to pay a designated price for property at auction; a bidder is one who makes the offer

A bid is an offer by an intending purchaser to pay a designated price for property which is to be sold at auction[14]

2. Russell v Miner, 5 Lans (N Y) 537, 539, 61 Barb 534
Necessity for license see infra § 5c

3. Hawaii—Terr. v. Toyota, 19 Hawaii 651.
Or.—Kine v. Turner, 41 P. 664, 27 Or. 356

Time and conditions of sale
Although an "auction" is defined as a sale by consecutive bidding intended to reach the highest price of the article by exciting competition for it, property may be sold at public auction to the highest bidder and for the "maximum possible amount," although a like public auction under other conditions and at other times might bring many times more, and consequently a much higher "maximum possible amount."—Pike v State Land Comrs, 113 P 447, 19 Idaho 268, Ann Cas 1912B 1344

4. Nash v Elizabeth City Hospital Co, 104 S.E 33, 180 N C. 59.

5. Hawaii.—Territory v. Toyota, 19 Hawaii 651
Ohio—Crandall v. State, 28 Ohio St 479.
6 C J. p 822 note 4.

6. Minn.—Anderson v. Wisconsin Cent. R Co, 120 N W. 39, 46, 107 Minn 296, 131 Am S R 462, 20 L R A.(N S.) 1133, 16 Ann Cas 379
N H—Wheeler v. Slocinski, 131 A. 593, 82 N H 211.

7. Ky.—Thomas v. Kerr, 3 Bush 619, 621, 96 Am.D. 262.

Ohio—Crandall v. State, 28 Ohio St 479, 457
6 C J. p 822 note 5.

Other definitions
(1) "A person who is authorized to sell goods or merchandise at public auction or sale for recompense"—City of Chicago v. Ornstein, 154 N E 100, 323 Ill 258, quoting Burrill L. D.—6 C J p 822 note 5 [a] (4)

(2) "A licensed agent appointed to sell property and to conduct sales or auctions"—City of Chicago v Ornstein, supra, quoting Wharton L D.—6 C J p 822 note 5 [a] (2)

(3) "A person who sells or makes a business of selling by auction"—City of Chicago v Ornstein, supra, quoting Webster New Int D

(4) "One who conducts a sale by auction"—City of Chicago v. Ornstein, supra, quoting Standard D

(5) "One whose business is to offer property for sale by auction, one who invites bids at public auction"—City of Chicago v. Ornstein, supra, quoting Worcester D
6 C J p 822 note 5 [a].

Substance of definitions
"A number of definitions of 'auctioneer' may be found in 1 Words and Phrases, First Series, 638, but the substance of all of them is that an auctioneer is a person who sells property at auction"—State v Balesh, 21 S W.(2d) 162, 164, 180 Ark. 204.

Crier
(1) The word "auctioneer" is sometimes used to designate the crier who simply calls for bids and strikes the bargain at an auction sale, his connection with the sale may begin with calling for bids and end with striking the bargain—White v. Dahlquist Mfg. Co, 60 N E 791, 179 Mass 427

(2) In Ohio a crier of tobacco is held to be an auctioneer—State v. Withers, 4 Ohio S & C P 262, 3 Ohio N P 63
Public auctioneer see infra § 4.
Who are auctioneers within statute requiring auctioneers to have licenses see infra § 5 c

8. City of Chicago v. Ornstein, 154 N E 100, 323 Ill 258, quoting Bouvier L D—6 C J p 822 note 6

9. City of Chicago v Ornstein, supra—6 C J p 822 note 7
But it has been said that "the auctioneer does not sell his own goods"—Wright v. May, 149 N W 9, 10, 127 Minn 150, L R A 1915B 151.

10. McMechen v. Baltimore, 3 Harr & J.(Md) 534.

11. Steward v Winters, 4 Sandf Ch (N Y) 587, 590

12. Ky.—Thomas v Kerr, 3 Bush 619, 621, 96 Am D 262
Pa.—Hunt v. Philadelphia, 35 Pa St 277, 278

13. Wright v May, 149 N.W 9, 127 Minn 150, L R A 1915B 151.

14. Black L D—Eppes v. Mississippi, etc, R Co, 35 Ala 33, 56
As requiring acceptance see infra § 7 e (1).
Manner of making bid see infra § 7 e (2).

A bidder is one who makes an offer for property on sale at auction.[15]

§ 2. Regulations in General

Conducting auctions is a legitimate business, which cannot be prohibited, but which may be reasonably regulated by state and municipal authority.

Selling goods or any property at public auction has been declared legitimate and a common right,[16] and the business of conducting auctions or acting as an auctioneer has been declared a lawful and legitimate one,[17] not subject to arbitrary interference,[18] and a common right.[19] However, the right to sell goods at public auction is not an absolute one,[20] but is rather a special privilege, which can be withheld unless reasonable regulations are complied with,[21] and the business of an auctioneer is affected with a public interest[22] and subject to legislative restriction[23] and regulation,[24] in order to prevent abuses and frauds;[25] thus, a state legislature may impose such limitations or regulations upon the acts of an auctioneer or the conduct of auction sales as may be reasonable, that is, not wholly arbitrary,[26] reasonable regulations being within the police pow-

15. Abbott L. D.

16. Miller v. City of Greenville, 132 S.E. 591, 592, 134 S.C. 314, 46 A.L.R. 155
"Any citizen has a right to sell any property he owns, either by person, agent, or auctioneer"—Miller v. City of Greenville, supra.

17. Fla.—Dusenbury v. Chesney, 121 So. 567, 97 Fla. 468
Ind.—Gordon v. City of Indianapolis, 183 N.E. 124, 204 Ind. 79
Mich.—Saigh v. Common Council of City of Petoskey, 231 N.W. 107, 251 Mich. 77—People v. Gibbs, 152 N.W. 1053, 186 Mich. 127, Ann.Cas. 1917B 830
Minn.—Wright v. May, 149 N.W. 9, 127 Minn. 150, L.R.A.1915B 151.
N.Y.—Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766—Empire Home Furnishers v. White, 258 N.Y.S. 3, 235 App.Div. 522, affirming 256 N.Y.S. 451, 143 Misc. 285—Robinson v. Wood, 196 N.Y.S. 209, 119 Misc. 299
Or.—Korber v. City of Portland, 295 P. 203, 135 Or. 233
Pa.—Bartikowsky v. Hart, 19 Pa. Dist. & Co. 333
Tex.—Sam's Loan Office v. City of Beaumont, (Com.App.) 49 S.W.(2d) 1039, reversing City of Beaumont v. Sam's Loan Office, (Civ.App.) 31 S.W.(2d) 882—City of San Antonio v. South Trunk Co., (Civ. App.) 13 S.W.(2d) 401
Wash.—Dornberg v. City of Spokane, 215 P. 518, 125 Wash. 72, 31 A.L.R. 295.
"The business of an auctioneer is a lawful and useful one, from time immemorial it has been recognized as such"—Miller v. City of Greenville, 132 S.E. 591, 592, 134 S.C. 314, 46 A.L.R. 155.
"Auctioneering rightly conducted is a business within the legitimate scope of trade, traffic, or merchandising."—Balesh v. City of Hot Springs, 293 S.W. 14, 15, 173 Ark. 661

Effect of regulation
"The fact that the state has during its whole history undertaken to license and regulate the business or profession of an auctioneer does not classify such business or profession other than a legitimate one"—Robinson v. Wood, 196 N.Y.S. 209, 212, 119 Misc. 299

18. Gordon v. City of Indianapolis, 183 N.E. 124, 204 Ind. 79.

19. Miller v. City of Greenville, 132 S.E. 591, 134 S.C. 314, 46 A.L.R. 155

20. Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244.

21. Carlton v. City of Watertown, supra.

22. Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766
However, "auction sales of ordinary commodities of trade do not involve the public health or morals"—Empire Home Furnishers v. White, 258 N.Y.S. 3, 5, 235 App.Div. 522, affirming 256 N.Y.S. 451, 143 Misc. 285

23. N.Y.—Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244
Pa.—Bartikowsky v. Hart, 19 Pa. Dist. & Co. 333.

"Registration is made a condition precedent to the right to engage in the auction business" under Gen.Bus.L. § 23—Preiser v. Solomon, 170 N.Y.S. 307.

24. Fla.—Dusenbury v. Chesney, 121 So. 567, 97 Fla. 468
Ill.—City of Chicago v. Ornstein, 154 N.E. 100, 323 Ill. 258, 52 A.L.R. 489
Ky.—Commonwealth v. Loeb, 54 S.W.(2d) 373, 245 Ky. 843
Mich.—Saigh v. Common Council of City of Petoskey, 231 N.W. 107, 251 Mich. 77.
Minn.—Wright v. May, 149 N.W. 9, 127 Minn. 150, L.R.A.1915B 151
N.Y.—In re Colmes, 268 N.Y.S. 292, 239 App.Div. 587, affirmed Colmes v. Fisher, 189 N.E. 783, 264 N.Y. 65—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244—Robinson v. Wood, 196 N.Y.S. 209, 119 Misc. 299.
Wash.—Dornberg v. City of Spokane, 215 P. 518, 125 Wash. 72, 31 A.L.R. 295.

"The question in each case is whether or not the regulations provided by the state or municipality are reasonable"—Commonwealth v. Loeb, 54 S.W.(2d) 373, 374, 245 Ky. 843.

"Regulate" defined
As used in a statute authorizing ordinances to regulate sales at auction, "the word 'regulate' . . . may be defined as authority reasonably to control or restrain by invoking the conditions under which sales of property at auction may be made."—Gordon v. City of Indianapolis, 183 N.E. 124, 125, 204 Ind. 79.

Provision imposing "duty" not repealed
"The provisions of Act No. 46 of 1904, imposing a so-called duty on auction sales, for the benefit of the Charity Hospital in New Orleans, are not contrary to or inconsistent with any of the provisions of Act No. 163 of 1910, and were not repealed by the section of the latter statute repealing all laws or parts of laws contrary to or inconsistent therewith"—Board of Administrators of Charity Hospital v. Richhart, 71 So. 735, 139 La. 446.

25. Mich.—Saigh v. Common Council of City of Petoskey, 231 N.W. 107, 108, 251 Mich. 77
N.Y.—Robinson v. Wood, 196 N.Y.S. 209, 119 Misc. 299.
"It is everywhere recognized that auction sales of merchandise are attended with greater risk of fraud and loss to the public than sales in the usual way by merchants"—Saigh v. Common Council of City of Petoskey, supra.

26. Ark.—Balesh v. City of Hot Springs, 293 S.W. 14, 173 Ark. 661.
Ky.—Commonwealth v. Loeb, 54 S.W.(2d) 373, 245 Ky. 843.
N.Y.—Biddles, Inc. v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244.
6 C.J. p. 823 note 12.

er,[27] and reasonable ordinances adopted by municipalities for such purpose are likewise valid,[28] under the police power[29] granted to municipalities by the state.[30]

27. Ark.—Balesh v. City of Hot Springs, 293 S.W. 14, 173 Ark 661.
Ky.—Commonwealth v. Loeb, 54 S. W.(2d) 373, 245 Ky. 843.
N.Y.—Empire Home Furnishers v. White, 258 N.Y.S. 8, 235 App.Div. 522, affirming 256 N.Y.S. 451, 143 Misc. 285—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244.

28. Fla.—Adams v. Isler, 134 So. 535, 101 Fla. 457.
Ga.—Clein v. City of Atlanta, 139 S. E. 46, 164 Ga. 529, 53 A.L.R. 933.
Ill.—City of Chicago v. Ornstein, 154 N.E. 100, 323 Ill. 253, 52 A.L.R. 489.
Ind.—Gordon v. City of Indianapolis, 183 N.E. 124, 204 Ind. 79.
Ky.—Commonwealth v. Loeb, 54 S.W. (2d) 373, 245 Ky. 843.
N.Y.—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244—Robinson v. Wood, 196 N.Y.S. 209, 119 Misc. 299.
Tex.—City of San Antonio v. South Trunk Co., (Civ.App.) 13 S.W.(2d) 401.
Wash.—Dornberg v. City of Spokane, 215 P. 518, 125 Wash. 72, 31 A.L.R. 295.

Presumption of validity

(1) "The presumption exists that the ordinance as adopted is constitutional and valid."—Robinson v. Wood, 196 N.Y.S. 209, 217, 119 Misc. 299.

(2) "A reasonable regulation of such business by cities, sanctioned by the state, will be presumed valid unless upon its face the contrary appears. This is upon the principle of safeguarding customers against fraud, a matter of general public welfare."—Gordon v. City of Indianapolis, 183 N.E. 124, 126, 204 Ind. 79.

(3) "Where, as here, the subject-matter of the ordinance is within the police power of the city and the ordinance is adopted by the proper legislative body of the city, the presumption is (until the contrary be shown) that the ordinance is reasonable."—Wagman v. City of Trenton, 134 A. 115, 102 N.J.Law 492.
To same effect People v. Gibbs, 152 N.W. 1053, 1055, 186 Mich. 127, Ann.Cas.1917B 830.

Reasonableness as question of fact

"The question of reasonableness is a question of fact, and the burden of proof is upon the prosecutor who attacks the ordinance to show its unreasonableness."—Wagman v. City of Trenton, 134 A. 115, 102 N.J.Law 492.

City commission's determination

that the passage of a regulating ordinance was necessary upon the facts found by it "was conclusive and binding upon all interested parties except upon an affirmative showing . . . that . . . [it] grossly erred in finding these facts."—City of Beaumont v. Sam's Loan Office, (Tex.Civ.App.) 31 S.W.(2d) 882, 886, reversed on other grounds Sam's Loan Office v. City of Beaumont, (Com.App.) 49 S.W.(2d) 1089.

Construction of charter

A charter provision governing auctions and auctioneers should be given natural meaning when construed with declared object (Baltimore City Charter 1927, §§ 235-273).—Billig v. State, 145 A. 492, 157 Md. 185.

Ordinances held valid

(1) Ordinance requiring an auctioneer to give bond, "payable to the city, and conditioned to pay the city, or any one suing in its name for their use, any damages sustained on account of dishonest or fraudulent conduct of said business."—Clein v. City of Atlanta, 139 S.E. 46, 51, 164 Ga. 529, 53 A.L.R. 933.

(2) Ordinance prohibiting sale by auctioneers at public auction of personal property except household goods and live stock unless the property consists of whole or part of stock of goods of a person, firm, or corporation continuously engaged in the city in dealing in such goods for at least one year preceding the sale.—In re Colmes, 268 N.Y.S. 292, 239 App.Div. 587, affirmed Colmes v. Fisher, 189 N.E. 783, 264 N.Y. 65.

(3) Ordinance requiring auctioneers to keep sales book, to be signed by the purchaser at the time of purchase and before any other article is put up for sale, and providing that, if a sale is declared and no purchaser comes forward, the next highest bidder shall have right to sign the book and demand the article.—Carlton v. City of Watertown, 207 N.Y.S. 339, 124 Misc. 244.

(4) Ordinance regulating the sale of precious stones and jewelry at public auction was held not void as an unlawful exercise of the police power and "an undue, and unwarranted and unjustifiable regulation of and interference with the business of petitioners."—Clein & Ellman v. City of Atlanta, 124 S.E. 882, 159 Ga. 121.

(5) Ordinance prohibiting auction of certain metal wares, clocks, and jewelry under certain circumstances was held not unconstitutional as unreasonable or arbitrary.—Gordon v. City of Indianapolis, 183 N.E. 124, 204 Ind. 79.

(6) Other ordinances
Cal.—Ex parte West, 243 P. 55, 75 Cal.App. 591.
Fla.—Adams v. Isler, 134 So. 535, 101 Fla. 457.
Ill.—City of Chicago v. Ornstein, 154 N.E. 100, 323 Ill. 253, 52 A.L.R. 489.
Mich.—Saigh v. Common Council of City of Petoskey, 231 N.W. 107, 251 Mich. 77.
Ohio.—Holsman v. Thomas, 147 N.E. 750, 112 Ohio St. 397, 39 A.L.R. 760.
6 C.J. p. 823 note 19 [c].

Ordinances or provisions held invalid

(1) Provision in an ordinance that an auction sale must be conducted in a place where the merchant shall have been in business for at least ninety days preceding the sale.—Commonwealth v. Loeb, 54 S.W.(2d) 373, 245 Ky. 843.

(2) Provision that a merchant must have been engaged in business in the city for at least one year before he could sell or offer for sale his goods or any part thereof at public auction.—Commonwealth v. Loeb, supra.

(3) Provision in an ordinance absolutely forbidding any public auctions within a certain district of the city.—Bartikowsky v. Hart, 19 Pa. Dist. & Co. 338—Dornberg v. City of Spokane, 215 P. 518, 125 Wash. 72, 31 A.L.R. 295.

(4) Ordinance providing that "the crying of goods, wares or merchandise for sale by auction, or auctioneering, in or on any public place, building or land, the customary or usual passageway into which place, building or land opens or extends immediately into any street or other public way . . . is hereby declared unlawful and is hereby positively prohibited," was held, if deemed to prohibit the holding of an auction in a private building opening on a street, an unreasonable limitation on the use of private property.—Ex parte Manor, 258 S.W. 1063, 96 Tex.Cr. 552.

(5) Other ordinance.—Sam's Loan Office v. City of Beaumont, (Tex.Com.App.) 49 S.W.(2d) 1089, reversing City of Beaumont v. Sam's Loan Office, (Civ.App.) 31 S.W.(2d) 882.

29. Ga.—Clein v. City of Atlanta, 139 S.E. 46, 164 Ga. 529, 53 A.L.R. 933.
Ky.—Commonwealth v. Loeb, 54 S.W.(2d) 373, 245 Ky. 843.
Mich.—People v. Gibbs, 152 N.W. 1053, 186 Mich. 127, Ann.Cas.1917B 830.

30. Fla.—Adams v. Isler, 134 So. 535, 101 Fla. 457.
Ind.—Gordon v. City of Indianapolis, 183 N.E. 124, 204 Ind. 79.
Tex.—City of San Antonio v. South

On the other hand, auctioneering being, as previously stated, a lawful business, neither the legislature of a state[31] nor that of a municipality[32] has the power to prohibit such business; the right to regulate and license the business does not include the right to prohibit it, directly or in effect,[33] or to adopt unreasonable and unfair regulations,[34] or such regulations as would be oppressive or highly injurious

Trunk Co., (Civ App) 13 S W (2d) 401
Wash.—Dornberg v City of Spokane, 215 P 518, 125 Wash 72, 31 A.L.R 295

No power in absence of grant

"The power to regulate the sale of merchandise at public auction is not one of the incidents to a municipal corporation, and such powers can be exercised only when it has [they have] been conferred on a municipal corporation by the Legislature"—Miller v. City of Greenville, 132 S E 591, 592, 134 S C 314, 46 A L R 155 To same effect Carlton v City of Watertown, 207 N.Y.S. 339, 341, 124 Misc 244.

Power held conferred

(1) Power was held conferred expressly and by implication from a clause of a "Home Rule Act," empowering municipalities to pass ordinances for the protection of "persons and property, and for the preservation of the public health, safety and prosperity of the municipality and its inhabitants"—Wagman v City of Trenton, 134 A 115, 102 N J Law 492

(2) City charter provision authorizing ordinances not repugnant to the constitution or laws of the state for any local purpose, pertaining to the preservation of order, health, safety, and welfare, was held to authorize an ordinance regulating auctions in private places—Carlton v City of Watertown, 207 N.Y.S. 339, 124 Misc. 244

(3) City charter provision authorizing regulation of auction sales on streets and in public places of a city was held to include sales in stores—Carlton v. City of Watertown, supra

(4) Legislative authority to adopt an ordinance prohibiting persons conducting the business of selling diamonds, watches, jewelry, etc., at public auction to conduct such business between 6 P M and 8 A M is conferred on a municipality by charter powers of regulation given under a general welfare clause in the charter, unless the ordinance is unreasonable, as denying the equal protection of the laws, guaranteed by U S Const Amendm 14—City of Roanoke v. Fisher, 119 S E 259, 137 Va. 75.

31. Ark.—Baleah v. City of Hot Springs, 293 S W. 14, 173 Ark 661.
N.Y.—Empire Home Furnishers v. White, 258 N.Y S 3, 235 App Div. 522, affirming 256 N.Y.S. 451, 143 Misc. 285.
However, a statute making it unlawful for any person to sell jewelry at public auction, but providing that it should not apply to judicial sales nor to sales of stock on hand of any person that shall have been continuously in business one year next preceding such sale as a retail or wholesale jewelry merchant has been held not void as being an arbitrary discrimination—Davidson v. Phelps, 107 So 86, 214 Ala 236

Act empowering cities held unconstitutional

Act permitting cities of the first class to prohibit the sale of merchandise by auction was held unconstitutional—Balesh v City of Hot Springs, 293 S W. 14, 173 Ark. 661.

32. N Y—Empire Home Furnishers v. White, 258 N Y S 3, 235 App Div 522, affirming 255 N Y S. 451, 143 Misc 285
Or—Korber v City of Portland, 295 P 203, 135 Or 233
Tex—Sam's Loan Office v. City of Beaumont, (Com App) 49 S W (2d) 1039, reversing City of Beaumont v Sam's Loan Office, (Civ App) 31 S W (2d) 882—Ex parte Manor, 258 S W 1063, 96 Tex Cr 552
Wash—Dornberg v City of Spokane, 215 P 518, 125 Wash 72, 31 A L R 295
6 C J p 823 note 18.

Ordinance prohibiting sale of jewelry at public auction

(1) Held invalid—Korber v. City of Portland, 295 P 203, 135 Or 233

(2) Ordinance prohibiting auction sales of jewelry but providing that it should not apply to judicial sales nor to the sale of stock on hand of any person that shall have been continuously in business one year next preceding such sale, as a wholesale or retail jewelry merchant, was held valid—Mogul v. Gaither, 121 A. 32, 142 Md 380

Regulation rather than prohibition

Ordinance prohibiting auction sales of linen, laces, etc, except by merchants in business in the city for one year and certain others, was held not prohibitive, but merely regulatory—Saigh v. Common Council of City of Petoskey, 231 N.W. 107, 251 Mich. 77.

Prohibition rather than regulation

Ordinance providing that "the crying of goods, wares or merchandise for sale by auction, or auctioneering, in or on any public place, building or land, the customary or usual passageway into which place, building or land opens or extends immediately into any street or other public way, . . . is hereby declared unlawful and is hereby positively prohibited," was held, if deemed to prohibit the holding of an auction in a private building opening upon a street, an unauthorized prohibition of the business of auctioneers, rather than a regulation thereof, as authorized by statute—Ex parte Manor, 258 S W. 1063, 96 Tex.Cr. 552

'Regulate" not synonymous with "prohibited"

As used in a statute authorizing ordinances to regulate sales at auction, "the word 'regulate,' strictly interpreted, is not synonymous with 'prohibit,' in that it implies the continued existence of the subject-matter to be regulated"—Gordon v City of Indianapolis, 182 N E 124, 125, 204 Ind 79.

Rule limited

"Unless the character of the goods sold or the method or circumstances under which an auction sale is conducted are such as to justify its restraint on that account in the proper exercise of the police power, there is no reasonable justification for its suppression"—Dusenbury v. Chesney, 121 So. 567, 568, 97 Fla. 468

33. Fla.—Dusenbury v Chesney, supra—Levy v. Stone, 121 So. 565, 97 Fla 458.
Ga.—Clein v City of Atlanta, 139 S E 46, 164 Ga 529, 53 A.L.R 933
Minn.—Wright v. May, 149 N.W. 9, 127 Minn 150, L.R.A 1915B 151.
Tex.—Sam's Loan Office v. City of Beaumont, (Com App) 49 S W (2d) 1039, reversing City of Beaumont v. Sam's Loan Office, (Civ.App) 31 S.W (2d) 882.
6 C J p 823 note 18

Limitation to six days

An ordinance limiting auction sales to six days in the year has been held void as virtually prohibiting such sales.—Miller v. City of Greenville, 132 S E. 591, 134 S C. 314, 46 A L.R 155.

Incidental prohibition

"While the power to 'regulate' does not authorize prohibition in the general sense, a qualified or limited prohibition or restriction is sometimes incidental and indispensible to effective regulation, such, for instance, as to reasonably confine certain classes of business to certain hours of the day, or to certain localities, forbidding it at other hours or in other localities"—Levy v Stone, 121 So. 565, 97 Fla. 458.

34. Robinson v. Wood, 196 N.Y.S. 209, 119 Misc. 209.

to the business [35]

Regulation of time of sale. A state statute providing that sales of goods by public auction in a named city shall be made only in the daytime, with stated exceptions, has been held valid and not unconstitutional,[36] likewise, on the ground that it is a proper exercise of the police power,[37] a state statute prohibiting the sale of jewelry and similar goods at auction during specified hours has been held valid and constitutional,[38] and ordinances similarly prohibiting auction sales of jewelry and similar goods during specified hours, generally the hours of darkness, have been so held,[39] as a reasonable and legitimate exercise of the police power,[40] and as not prohibiting sale at auction [41] However, ordinances prohibiting the holding of auction sales during speci-

35. Sam's Loan Office v. City of Beaumont, (Tex Com App.) 49 S W. (2d) 1089, reversing City of Beaumont v Sam's Loan Office, (Civ App.) 31 S W (2d) 882—6 C J. p 823 note 19

36. Biddles, Inc v Enright, 146 N. E 625, 239 N Y 354, 39 A L R 766, affirming 203 N Y S 920, 208 App Div 790

Reasons for holding

(1) "To say that because the candle and the lamp light have been succeeded by the electric light, deception and fraud cannot be perpetrated, as customers may readily examine all articles by present day artificial light, may not be true to fact With the improvements in science and in manufacture, imitation jewelry and precious stones are much more like the real article than ever before To detect the imitation is now much more difficult. In the examination of jewelry and precious stones, silks, fabrics, and the like, too much artificial light, or the nature of the artificial light, may be as deceiving as the candle or the lamp. The glare may be as obscuring as the darkness. Colors too, as we well known, may take on a different shade altogether, according to the quality or coloring of the light. Manipulations of the lights upon the stage have made it common knowledge that the eye may be readily mistaken as to the actual nature of the thing observed Without any actual intent to defraud, purchasers may be deceived as to the nature and quality of the article they are buying where there is no opportunity to examine it by daylight. The many kinds of light now in use, together with the degree of brilliancy, may make it much easier for a purchaser to be deceived, than by the use of candle or lamp, where the dimness at least was to be anticipated"—Biddles v. Enright, 146 N E 625, 628, 239 N.Y 354, 39 A L R 766, affirming 203 N.Y S 920, 208 App Div. 790

(2) "Another very good reason why the Legislature might be justified in passing such an act is the prevention of the gathering of a crowd at night in or about the streets of New York, where jewelry and precious articles are being sold"—Biddles v. Enright, supra.

Enactment held "attempt to meet present-day conditions and not a mere continuance through ignorance or mistake of dead legislation."—Biddles, Inc v Enright, 146 N E 625, 627, 239 N Y 354, 39 A L R 766, affirming 203 N.Y.S 920, 208 App Div 790.

37. Doering v Swoboda, 253 N.W 657, 214 Wis 481

38. Doering v Swoboda, supra

39. Cal—Ex parte West, 243 P 55, 75 Cal App 591.
Fla—Levy v. Stone, 121 So. 565, 97 Fla. 458
Ga—Clein v. City of Atlanta, 139 S E. 46, 164 Ga. 529, 53 A L R 933
Ind—Gordon v City of Indianapolis, 133 N E 124, 204 Ind. 79.
Miss—Matheny v Simmons, 139 So 172, 165 Miss 429.
N J—Wagman v City of Trenton, 134 A 115, 102 N J Law 492.
N Y.—Alexander v Enright, 206 N Y S. 785, 211 App Div 146
Va—City of Roanoke v. Fisher, 119 S E 259, 137 Va 75
6 C J p 823 note 19 [d].

Weight of authority

"There is some diversity of opinion amongst the courts upon the validity of a municipal regulation limiting the conduct of auction sales of jewelry and the like to daylight hours. . . . The substantial weight of authority, however, and in our opinion the better reasoning, supports the validity of such a regulation when confined to auction sales of the class of merchandise enumerated in the ordinance under consideration."—Levy v. Stone, 121 So 565, 566, 97 Fla. 458—Matheny v Simmons, 139 So 172, 173, 165 Miss. 429

Reason for rule

"It is a matter of common knowledge that in the sale of merchandise of the character affected by this ordinance the public is more readily deceived and becomes an easy prey to fraud, and that auction sales of such merchandise are therefore attended with greater risk to the public. Such sales afford peculiar opportunity to impose upon, defraud, and cheat the public, because the public generally is unskilled in the art of determining the purity, quality, and value of merchandise of this character, to determine which deliberate care and often scientific tests are necessary It is further a matter of common knowledge that fraud and irreparable injury to the public are more likely to occur in auction sales of merchandise of the character here under consideration when the same are conducted after nightfall and by artificial light, and in the excitement of competitive bidding, when little or no opportunity is offered for careful inspection, than in the case of other classes of goods, or in the sale of the character of goods under consideration held during the daytime in the ordinary course of business The rapid sale of such articles at public auction at night, when purchasers must buy at a glance under artificial lights and under the stimulus of competitive bidding, exposes many persons to deception and unscrupulous practices against which this character of regulation might protect them. Similar opportunities for practicing fraud and deception upon the public do not ordinarily attend auction sales of other commodities the quality and value of which are readily ascertainable by the ordinary person The circumstances just stated, and others, furnish practical reasons for the imposition of regulations of this nature upon the sale at auction and at night of jewelry, precious stones, glassware, and the like, which reasons do not exist with respect to auction sales in other lines of business The regulation in question therefore bears a reasonable and practical relation to the object sought to be accomplished by it, namely, the prevention of fraud and deception upon the public"—Levy v. Stone, 121 So 565, 566, 97 Fla 458—Matheny v. Simmons, 139 So 172, 173, 165 Miss 429 To same effect Ex parte West, 243 P 55, 60, 75 Cal. App 591—City of Roanoke v Fisher, 119 S E 259, 262, 137 Va 75

40. Fla—Levy v. Stone, 121 So 565, 97 Fla 458
Ga—Clein v City of Atlanta, 139 S. E 46, 164 Ga. 529, 53 A L R 933
Miss—Matheny v Simmons, 139 So. 172, 165 Miss. 429.
N J—Wagman v. City of Trenton, 134 A. 115, 102 N J Law 492.

41. Clein v. City of Atlanta, 139 S. E. 46, 164 Ga. 529, 53 A L R. 933.

fied evening and early morning hours have been held invalid and unconstitutional.[42]

§ 3. Persons Subject to Regulation

Examine Pocket Parts for later cases.

§ 4. Public Auctioneers

Apart from statute, anyone may act as auctioneer. One who holds himself out as ready to sell at auction is a "public auctioneer."

Apart from statute, anyone may act as an auctioneer,[43] and a person who holds himself out to the public as being ready and willing to sell property at auction is a "public auctioneer"[44] Under a valid applicable statute, a town auctioneer has been held a holder of a civil office, and must be a qualified elector for that office.[45]

§ 5. Licenses and Taxes

a. Licenses
b. Taxes

a. Licenses

Statutes requiring auctioneers to procure a prescribed license have been upheld and applied. The proper officer may in his discretion refuse a license. Anyone coming within the ordinary definition of an auctioneer is within a statute requiring a license. Under proper regulations a license may be revoked or forfeited.

Authorities have upheld and applied statutes enacted in many states of the Union, requiring auctioneers to procure a prescribed license,[46] on the payment of a certain fee,[47] and prescribing a penalty for a violation of such provisions[48] A license usually confines the authority of the auctioneer to a particular town or county, or to other particular territory[49]

Power to license or tax generally is discussed in Licenses §§ 4–11 [37 C J p 173 note 73–p 184 note 50]

Right to obtain license. Under the provisions of a municipal charter requiring auctioneers to give a bond and obtain a license, and empowering the mayor, or other officer, to grant such licenses and to revoke them for misconduct of the licensees, it is within the discretion of the mayor, or other officer, to refuse a license, even though a proper bond is tendered,[50] but the discretion must be exercised im-

42. Mich —People v Gibbs, 152 N W 1053, 186 Mich. 127, Ann Cas 1917B 830
N Y —Robinson v Wood, 196 N Y S 209, 119 Misc 299

Reason for holding

"With all the safeguards thrown around the business of sale by auction, the question suggests itself What is the true purpose of the provision of the ordinance forbidding auction sales after sundown? It is not an offense or evil, because it is a legitimate method of doing business It is hard to conceive that the conduct of an auction after sundown would affect the health, morals, safety, or welfare of the community If the ordinance were established for the purpose of stifling competition, then it was not a proper exercise of the delegated police power of the state, granted to the city to license and regulate auctions and auctioneers To justify the state or a municipality the roof to interpose its authority in behalf of the public, it must appear, not only that the interests of the public generally, as distinguished from those of a particular class, require such interference, but also that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals Lawful occupations cannot be arbitrarily interfered with by unusual and unnecessary restrictions established under the guise of protecting public interests . . . It could be urged as an objection to auction sales after sundown that noises and disturbances might be caused thereby, which would unreasonably interfere with the quietness of the neighborhood The statutes of the state do not lack in any particular proper safeguards for the peace and quiet of the community The provisions of law in relation to disorderly conduct and disorderly assemblies and interference with streets and highways would apply to public auctions in the daytime as well as nighttime, and would apply to all public meetings The law as to nuisances, both public and private, would protect the neighborhood from being unreasonably imposed upon In fact, it is hard to conceive how a public auction, conducted in a reasonable and orderly manner, would cause any more disturbance than any other public meeting or gathering"—Robinson v Wood, 196 N Y S 209, 212, 119 Misc 299

43. Gorman v Berg, 141 A 179, denying reargument 140 A 779, 49 R I 125—6 C J p 832 note 11

44. State v. Mattar, 21 S W (2d) 167, 180 Ark. 1168—State v Balesh, 21 S W (2d) 163, 180 Ark 204.

In Louisiana, under statute, only a citizen and voter may be an auctioneer—Lyon v. Stern, 34 S E 641, 110 La 473
Right to obtain license see infra § 5 b.

45. In re Harrington, 117 A. 273, 44 R I 288.

46. Ark—Balesh v City of Hot Springs, 293 S W. 14, 173 Ark 661.
Pa—Com v. Crall, 2 Pa Co. 240.
6 C J. p 823 note 12.

By whom issued

Licenses must be issued by the county treasurer and not by the governor in some jurisdictions—Auctioneers' Licenses, 29 Pa Dist 1027

License fee from owner of goods and auctioneer

A statute or ordinance providing that no person shall sell goods at auction without taking out a license, and a statute requiring all persons to take out licenses before exercising the calling of auctioneer, are independent, and do not apply to the same matter The former requires a license fee from the owner of the goods, the latter from the auctioneer—Fretwell v. Troy, 18 Kan 271

47. Terr v Tovota, 19 Hawaii 651—6 C J p 823 note 13

48. Com v Crall, 2 Pa Co 240—6 C J p 823 note 14.

49. Me—Waterhouse v Dorr, 4 Me 333
Mass—Robinson v Green, 3 Metc 159.
Pa—Wood v. Com, 12 Serg. & R. 213.
6 C J p 823 note 16

State and city licenses

An auctioneer may be required to take out a license, both from the state and from the municipality wherein he does business.—Simpson v. Savage, 1 Mo 359

50. People v Grant, 27 N E 964, 126 N Y. 473—People v Scully, 53 N Y. S 125, 23 Misc. 733—6 C J. p 824 note 21.

Mandamus will not lie in such case to compel the mayor to grant a

partially and in the public interest.[51]

A corporation may be included within the term "auctioneer" in a statute providing that a city clerk may grant a license to a "person" carrying on the business of auctioneer.[52]

Necessity for license. A provision requiring an auctioneer to procure a license applies usually to anyone who comes within the ordinary definition of "auctioneer,"[53] although he conducts a sale without compensation.[54] There is authority both for[55] and against[56] the proposition that one selling his own goods is within a requirement that auctioneers be licensed.

Under a statute imposing a license charge upon auctioneers doing business in cities and towns, a person selling at public outcry outside of any city or town is not liable.[57]

Validity of sale by an unlicensed auctioneer, see infra § 7 j.

Revocation of license. A municipal corporation vested by its charter with power to regulate and license auctioneers may, by ordinance, empower the mayor, or some other public officer, to revoke a license for cause;[58] and under at least one statute an auctioneer's license may be forfeited in a criminal prosecution, although not in a civil suit, for unfair dealing in his business.[59]

Revocation of license generally is discussed in § 44 of the title Licenses [37 C.J. p 246 note 79–p 249 note 26].

b. Taxes

Statutes provide in some jurisdictions that the auction sales shall be subject to a tax or duty.

Statutes requiring an auctioneer to pay a certain duty or tax on the amount of the sale have been applied in several cases.[60] A statute providing that property sold at public auction shall be subject to an auction duty or tax every time it is struck off imposes the tax only on consummated sales and not on ineffectual efforts to sell.[61]

§ 6. Agency of Auctioneer

a. In general
b. Requirement of writing
c. Authority to warrant
d. Authority to receive payment
e. Authority to sell at private sale
f. Delegation of authority
g. Termination of authority

license—People v Grant, 27 N E 964, 126 N Y. 473

51. Empire Home Furnishers v White, 256 N Y S 451, 143 Misc 285, affirmed 258 N.Y S 3, 235 App Div. 532

52. People v Scully, 53 N Y S. 125, 23 Misc 732

53. Com. v Rosencrans, 9 Pa Co 393—Com. v Crall, 2 Pa.Co. 240—6 C J. p 824 note 23

One who is no more than an employee in conducting a sale is not subject to prosecution under an auction license law—Cincinnati v Withers, 5 Ohio S & C P 570

An isolated act in the conduct of the business of a retail jeweler was held not the engaging in the business of "selling at auction" so as to require a license therefor—Karthaus v. State, 95 So. 563, 19 Ala App. 136

Exempted sale by executor

Sale by an executor being for the purpose of settling a decedent's estate, it is unnecessary that the advertisement of sale be signed by him as executor to bring him within the exemptions of an act requiring a license—Karthaus v. State, 95 So. 563, 19 Ala App 136.

Dutch auction

Putting up property for sale at a high price, and then lowering the price until some one accepts it as a bidder, is a sale at auction within an ordinance requiring auctioneers to obtain a license—Deposit v. Pitts, 18 Hun (N Y) 475

Sale at fixed price

An offer of property to anyone who will take it at a given price is not an offer to sell the property at auction, within the meaning of a statute imposing a penalty on peddlers for selling goods at public auction—Hibler v. Hoag, 1 Watts & S (Pa) 552

54. State v. Rucker, 24 Mo 557.

55. City of Chicago v Ornstein, 154 N E 100, 323 Ill 253, 52 A.L R 489—6 C J p 824 note 24.

Reason for rule

"The object of the regulation [requiring a license] is to promote the general welfare by protecting the public from fraudulent sales, and this protection is needed as much, if not more, where the auctioneer is selling his own goods as where he is selling the goods of another"—City of Chicago v. Ornstein, 154 N.E 100, 101, 323 Ill. 253, 52 A L R. 489

56. Ark—State v. Mattar, 21 S.W (2d) 167, 180 Ark 1168—State v Balesh, 21 S W.(2d) 163, 180 Ark 204.
Ohio—Crandall v. State, 23 Ohio St. 479.

Application to "public" auctioneers

The word "public," as used in a statute requiring a public auctioneer to have a license, is an adjective, and modifies and limits the word "auctioneer"—State v. Mattar, 21 S. W (2d) 167, 180 Ark. 1168—State v. Balesh, 21 S W (2d) 163, 180 Ark. 204

57. State v. Pearce, 75 So. 275, 16 Ala App 69

58. Ill—Wiggins v. Chicago, 68 Ill 372.
N.Y—Rosenthal v. McGowan, 113 N. Y S 241, 133 App Div. 733.
6 C J. p 824 note 23.

Final order of appellate division confirming a revocation of licenses as public auctioneers by a city director of licenses will not be disturbed where the making of false representations contrary to ordinance was a question of fact and the alleged unconstitutionality of a part of the ordinance would not require reversal—Colmes v. Fisher, 139 N E 733, 264 N Y. 65, affirming In re Colmes, 208 N.Y S. 292, 239 App Div. 587.

59. Gilly v. Hirsh, 48 So. 422, 122 La. 966, 20 L R A (N S) 972.

60. Bruning v. Walmsley, 126 So. 88, 12 La.App. 422—6 C.J. p 824 note 30.

61. State v. Hoboken Second Nat Bank, 35 A 889, 84 Md 325—6 C J. p 824 note 31.

Hospital fee to be paid from the proceeds of an auction sale should be paid only on the actual amount of consummated sales—Bruning v Walmsley, 126 So. 88, 12 La.App. 422
Collection of auction duty by auctioneer see infra § 13 c (4).

a. In General

An auctioneer, while primarily the agent of the seller in making the sale, is for some purposes the agent of both parties. His authority may be by implication or ratification, as well as express.

The auctioneer represents a class of agency,[62] and is, for some purposes, and in some respects,[63] the agent of both parties to the sale.[64] An auctioneer, in making a sale, whether of personalty or realty is, by virtue of his employment to make the sale, primarily the agent of the seller,[65] and has been declared to be the agent of the seller alone until the fall of the hammer,[66] he must act in good faith and in the interest of his principal,[67] and the sale must be made in accordance with the latter's instructions.[68] When, however, the property is struck off, the auctioneer is also made the agent of the purchaser, to the extent of binding the parties by his memorandum of sale, by the act of the purchaser in giving him his bid and receiving from him, without objection, the announcement that the property is knocked off to him as purchaser, or by otherwise expressly or impliedly assenting thereto.[69] Authority of an auctioneer to make a memorandum satisfying the statute of frauds is considered in § 171 [27 C.J. p. 265 note 14] and § 211 [27 C.J. p. 293 note 75–p. 294 note 85] of the title Frauds, Statute of.

An auctioneer's authority, when based upon an express contract or instrument, is governed by its terms.[70] Authority may be by implication, as where

62. Iowa.—McKey v. Erbes, 174 N.W. 372, 187 Iowa 609.
La.—Ingram v. Canal Bank & Trust Co., 127 So. 462, 13 La. App. 651.
N.Y.—Levy Bros. & Adler, Rochester v. Karp, 209 N.Y.S. 720, 124 Misc. 901.

63. Ga.—Talley v. Southern Real Estate & Inv. Co., 109 S.E. 497, 152 Ga. 277.—Holtzinger v. Beverly, 186 S.E. 776, 53 Ga. App. 614.—Lummus Real Estate Auction Co. v. Brown, 176 S.E. 693, 49 Ga. App. 592.
Ky.—Thomas v. Kerr, 3 Bush 619, 96 Am.D. 262.

64. Ga.—Lummus Real Estate Auction Co. v. Brown, 176 S.E. 693, 49 Ga. App. 592.
Iowa.—Wohlers v. Peterson, 192 N.W. 837, 195 Iowa 853.
Ky.—Melhoiser v. Central Trust Co., 36 S.W.(2d) 377, 237 Ky. 757.—Gossage v. Waddle, 18 S.W.(2d) 975, 230 Ky. 148.—Martin v. Mathis, 211 S.W. 198, 184 Ky. 20.
Mass.—White v. Dahlquist Mfg. Co., 60 N.E. 791, 179 Mass. 427.
N.Y.—Bleeker v. Graham, 2 Edw. 647.
N.C.—Love v. Harris, 72 S.E. 150, 156 N.C. 88, 36 L.R.A.(N.S.) 927, Ann. Cas. 1913D. 1065.
R.I.—Sweeney v. Brow, 86 A. 115, 35 R.I. 227, Ann. Cas. 1915C. 1075.

Nature of double agency.
While an auctioneer is an agent of both seller and purchaser for signing a contract of sale, it does not follow that his agency for the one is coextensive in its nature and duration with that for the other. His agency for the purchaser is usually conferred when the bid is accepted and begins at the fall of the hammer. Such an authority must be exercised contemporaneously with the sale, but his agency for the seller is generally more extensive, and may cover time both before and after the sale.—White v. Dahlquist Mfg. Co., 60 N.E. 791, 179 Mass. 427.

Distinction as respects termination see infra § 6 g.

65. Ky.—Becker v. Crabb, 4 S.W.(2d) 370, 223 Ky. 549.—Hoadley v. Vandergrift, 7 Ky. Op. 85.
Minn.—Wright v. May, 149 N.W. 9, 127 Minn. 150, L.R.A.1915B. 151.
N.Y.—City of New York v. Union News Co., 154 N.Y.S. 638, 169 App. Div. 278, affirmed 118 N.E. 635, 222 N.Y. 263.
Tenn.—Green v. Crye, 11 S.W.(2d) 869, 158 Tenn. 109.
6 C.J. p. 824 note 33.
"The auctioneer, for the purposes of the sale, represents the owner, and his acts are those of the owner."—Cerreta v. Costello, 209 N.Y.S. 257, 258, 212 App. Div. 687.

Auctioneer's acceptance of a bid is binding on the vendor.—City of New York v. Union News Co., 154 N.Y.S. 638, 169 App. Div. 278, affirmed 118 N.E. 635, 222 N.Y. 263.

Representations by the auctioneer as to the title or character of the goods sold bind the principal.—Hoadley v. Vandergrift, 7 Ky. Op. 85.

Clerk.
(1) A clerk at an auction sale is the agent of the owners of the property.—Andrew v. Northwest Davenport Sav. Bank, 253 N.W. 133, 217 Iowa 780.

(2) However, a clerk has been held not to be the vendor's agent for the purpose of receiving notice of rescission from the purchaser.—Pugh v. Dexheimer, 185 N.W. 299, 45 S.D. 55.

Agency coupled with interest.
Where auctioneers by contract assumed full control of the property in advance of sale for the purpose of assortment and preparation, and bound themselves to collect the purchase money, and to pay the same to the use of the owner within ten days, and became guarantors to a creditor of the owner, they were agents of the owner, but their agency was coupled with an interest, and a purchaser at the auction sale had a right to rely upon the auctioneers' personal offer of credit and to make bids accordingly and acquire title, especially where the auctioneers, pursuant to their contract, accounted for the purchases with cash.—McKey v. Erbes, 174 N.W. 372, 187 Iowa 609.

66. Perkins v. Applegate, 35 S.W. 723, 27 Ky.L. 522.

67. Becker v. Crabb, 4 S.W.(2d) 370, 223 Ky. 549.

Fraud in obtaining employment.
Charge of fraud on the part of the auctioneer in obtaining a contract of employment requiring confirmation of the sale regardless of price was held not sustained.—Carr v. Melone, 13 S.W.(2d) 1031, 227 Ky. 719.

68. Kelly v. Pelt, (Tex. Civ. App.) 220 S.W. 199.

69. Minn.—Wright v. May, 149 N.W. 9, 127 Minn. 150, L.R.A.1915B. 151.
N.C.—Love v. Harris, 72 S.E. 150, 156 N.C. 88, 36 L.R.A.(N.S.) 927, Ann. Cas. 1912D. 1065.
Tenn.—Green v. Crye, 11 S.W.(2d) 869, 158 Tenn. 109.
6 C.J. p. 825 note 36.

Authority of mere crier.
"When the seller is himself present, directing and controlling the sale, and engages a crier simply to cry the property and knock it off to the best bidder, the seller himself standing by and doing everything else except simply crying the bids, . . . the crier is merely an agent, with no other authority but that of receiving the bids and reporting the result to the seller. He has not the authority of an auctioneer—in the proper sense of the term—as applied to sales by auctions."—Adams v. Scales, 1 Baxt.(Tenn.) 337, 340, 25 Am.R. 772.

70. **Writ in succession.**
A public auctioneer's authority in

goods are sent to an auction room,[71] and a lack of authority may, as in other cases of agency, be supplied by ratification.[72]

An auctioneer is a special agent, and without further authority than that which comes from his position as auctioneer he cannot bind the parties by any contract other than that which is actually made,[73] and a contract which is beyond his authority is not binding on the owner.[74]

Announcement binding seller and buyer. Both seller and buyer are bound by the announcement of the auctioneer as to the identity of the property, the terms, and the conditions of sale.[75]

b. Requirement of Writing

Apart from statute, authority to auction land need not be written.

The authority of an auctioneer to sell land at auction need not be in writing,[76] unless written authority is required by statute.[77]

c. Authority to Warrant

An auctioneer has no authority to warrant except by instruction or by statute.

An auctioneer has no authority to bind the seller by a warranty of the quality or the title of the goods sold, unless specially instructed so to do,[78] or unless authorized by statute;[79] but an auctioneer selling goods "as are" impliedly warrants the existence of the goods in form and substance as advertised.[80]

d. Authority to Receive Payment

The particular conditions of sale may govern the amount, kinds, and time of a payment which an auctioneer has authority to receive on making a sale.

If the conditions of sale merely provide for the deposit to be paid to the auctioneer, it seems that this fact excludes him from receiving the whole price.[81] An auctioneer may receive the deposit or amount to be paid down on a day subsequent to that of the sale.[82] Authorization to sell personal

selling by virtue of a writ issued in succession is limited by the terms of the writ—Anderson v. Thomas, 117 So. 573, 166 La. 512

Sale between dates set by contract

An auctioneer may advertise and sell the property at any time between the dates set by the contract between him and the owner, and the owner will be bound to make deeds to the purchasers—Andrews v. Hampton, 94 S.E. 112, 108 S.C. 290.

71. Morgan v. Darragh, 39 Tex. 171.

72. Ala.—West v. Holman, 134 So. 667, 223 Ala. 114
N.D.—Steen v. Neva, 163 N.W. 272, 37 N.D. 40
Wyo.—Waisner v. Hasbrouck, 241 P. 730, 34 Wyo. 61
6 C.J. p. 825 note 35.

Presumption from suit

An owner's ratification of the acts of an auctioneer will be presumed from his suit for the amount agreed to be paid by the purchaser—Steen v. Neva, 163 N.W. 272, 37 N.D. 40.

73. Md.—Cherry v. Stein, 11 Md. 1.
N.J.—J. B. & S. Realty Corporation v. William Kennelly, Inc., 163 A. 665, 112 N.J.Eq. 91, affirming 157 A. 849, 109 N.J.Eq. 337.
6 C.J. p. 825 note 37

74. J. B. & S. Realty Corporation v. William Kennelly, Inc., 163 A. 665, 112 N.J.Eq. 91, affirming 157 A. 849, 109 N.J.Eq. 337

75. Iowa.—Wohlers v. Peterson, 192 N.W. 837, 195 Iowa 853
Ky.—Martin v. Mathis, 211 S.W. 193, 184 Ky. 20.

76. Doty v. Wilder, 15 Ill. 407, 60 Am.D. 756—6 C.J. p. 825 note 39
Authority by implication see supra § 6 a.

77. Silverstein v. Koppel, 118 So. 224, 166 La. 1075—Harang v. Gheens Realty Co., 98 So. 760, 155 La. 68—Sizeler v. Cloney & Egan, 2 La.App. 289—Cronan v. McDonogh, 12 La.Ann. 269—6 C.J. p. 825 note 39.

Owner and adjudicatee are not bound where the auctioneer did not have written authority to sell—Silverstein v. Koppel, 118 So. 224, 166 La. 1075.

An owner is not divested of title by an adjudication following an auction sale of property to satisfy his creditors, where it does not appear that the auctioneer had written authority to offer the property at auction—Harang v. Gheens Realty Co., 98 So. 760, 155 La. 68.

Recitals held insufficient

(1) Mere recital in auctioneer's procès verbal that the sale was by the owner's instructions—Silverstein v. Koppel, 118 So. 224, 166 La. 1075

(2) Where an owner of property agreed to sell it and distribute the proceeds for the benefit of his creditors, and the property was sold at auction, and part of the proceeds distributed, recitals in the notarial act of distribution and in a deed to part of the land that the debtor caused his property to be offered at auction, were insufficient as written evidence of the auctioneer's authority to offer another part, in the absence of a showing that the claimed purchaser had accepted title, he not even being a party to such instruments.—Harang v. Gheens Realty Co., 98 So. 760, 155 La. 68.

Lack of written authority as defense; onus of proof

(1) An owner seeking to enforce adjudications at auction sale has the onus of proving written authority in the hands of the auctioneer at the time of the sale, under penalty of the nullity of the adjudications—Silverstein v. Koppel, 118 So. 224, 166 La. 1075.

(2) An adjudicatee's defense that an auctioneer did not have written authority is peremptory, and may be pleaded in answer or raised under general issue—Silverstein v. Koppel, supra.

Effect of statute of frauds

An auctioneer selling land is not impliedly the agent for the purchaser where the statute of frauds requires the authority of an agent to be in writing in order to bind his principal on a contract for the sale of land—Dunham v. Hartman, 55 S.W. 233, 153 Mo. 625, 77 Am.S.R. 741

78. Bice v. Siver, 152 N.W. 493, 170 Iowa 255—6 C.J. p. 826 note 40
Auctioneer's liability for warranty see infra § 13 b (1).

79. Cysewski v. Fried, 139 N.W. 104, 24 N.D. 152, Ann.Cas.1915C 579—6 C.J. p. 826 note 41.

Purchaser may rely on the warranty made on sale by an auctioneer where he did not have actual or constructive notice of any restrictions on his power to warrant.—Cysewski v. Fried, 139 N.W. 104, 24 N.D. 152, Ann.Cas.1915C 579.

80. Ruben v. Lewis, 46 N.Y.S. 426, 20 Misc. 583.

81. La.—Johnson v. Barkley, 16 So. 659, 47 La.Ann. 98.
Mass.—Thompson v. Kelly, 101 Mass. 291, 3 Am.R. 353.

82. Pinckney v. Hagadorn, 8 N.Y. Super. 89.

property for "cash or good secured bankable notes" gives no authority to accept the owner's outstanding unpaid notes for the purchase price,[83] and, if the terms of an auction sale require a cash payment, the auctioneer has no authority to accept a check drawn on a bank in which the drawer has at the time no funds.[84]

e. Authority to Sell at Private Sale

Private sales by an auctioneer are generally not allowed.

Private sales by an auctioneer are generally not allowed, since the law will not tolerate any fraudulent, unfair, or deceitful conduct in auction sales,[85] although it seems that a private sale may be sustained where all efforts to dispose of the property at public sale have proved abortive.[86]

f. Delegation of Authority

While an auctioneer may delegate ministerial duties and hire necessary assistance, he cannot without special authority delegate his power to sell.

An auctioneer cannot, without special authority, delegate to another his power to sell by auction,[87] since he is selected because of the personal confidence and trust reposed in him.[88] He may, however, delegate ministerial duties, such as using the hammer and making the outcry under his immediate direction and supervision,[89] and may hire such assistance as is reasonably necessary to the performance of his duties.[90]

Delegation of authority by agents generally is considered in §§ 134–137 of the title Agency.

g. Termination of Authority

An auctioneer's agency for the purchaser ends with the sale, while that for the seller may continue thereafter. Unless coupled with an interest, his authority to sell may be revoked by the seller at any time before the sale.

An auctioneer's agency for the purchaser ends with the sale, while his agency for the seller ends with the sale only if he is a mere crier calling for bids, and extends beyond the sale so as to enable him to bind the vendor by a memorandum signed within a reasonable time, if he is given authority to make all the necessary arrangements for carrying the sale into effect.[91] An auctioneer's authority is ordinarily at an end when the sale is completed and the purchase price collected; unless specially authorized, he cannot, after sale, vary the contract of sale or the terms on which title is to be given.[92]

Revocation. An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale,[93] unless it is coupled with an interest in the subject matter;[94] and a receipt, signed by a representative of the auctioneer and given to the purchaser at a sale made after revocation of the agency, is not binding on the vendor.[95]

§ 7. Conduct and Validity of Sale

a. In general
b. Conditions of sale
c. Catalogue or particulars of sale
d. Right to withdraw property
e. Bidding
f. Deposit
g. Disturbance of sale
h. Inclusion of property of third person
i. Purchase by auctioneer
j. Sale by unlicensed auctioneer
k. Sale of several lots
l. Sale without authorization

83. Rindles v. Bordewyk, 139 N.W. 113, 30 S.D. 439.

84. Broughton v. Silloway, 114 Mass. 71, 19 Am.R. 312.

Vendor is not bound, even though he fails to notify the drawer that he rescinds the contract—Broughton v. Silloway, 114 Mass. 71, 19 Am.R. 312.

85. Robenson v. Yann, 5 S.W.(2d) 271, 224 Ky. 56.

Contract with another after sale

Auctioneers employed to sell land upon specific terms fixed by the owner have no right, after a sale pursuant to such terms, to make a contract with a different person than the purchaser, and upon different terms. —Muffatt v. Gott, 42 N.W. 149, 74 Mich. 672.

86. Tyson v. Mickle, 2 Gill (Md.) 376.

87. Snow v. Warwick Sav. Inst., 20 A. 94, 17 R.I. 66—6 C.J. p. 826 note 47.

88. Mass.—Com. v. Harnden, 19 Pick. 482.

Mo.—Stone v. State, 12 Mo. 400.

89. La.—Poree v. Bonneval, 6 La. Ann. 336

Mass.—Com. v. Harnden, 19 Pick. 482

Mo.—Stone v. State, 12 Mo. 400.

R.I.—Snow v. Warwick Sav. Inst., 20 A. 94, 17 R.I. 66.

6 C.J. p. 826 note 50.

90. Bodine v. Exchange F. Ins. Co., 51 N.Y. 117, 10 Am.R. 566—6 C.J. p. 826 note 51.

Clerks and servants

An auctioneer "may employ all necessary and proper clerks and servants."—Com. v. Harnden, 19 Pick. (Mass.) 482, 484.

91. Martin v. Mathis, 211 S.W. 193, 184 Ky. 20—6 C.J. p. 824 note 33 [a]

Duration and termination of agency generally see Agency §§ 68–90.

92. Muffat v. Gott, 42 N.W. 149, 74 Mich. 672—6 C.J. p. 827 note 58.

93. Jacob v. McDuell, 134 A. 191, 99 N.J.Eq. 652—6 C.J. p. 827 note 54.

Revocation or repudiation of agency generally see Agency §§ 73–80

Right of owner to withdraw property from sale see infra § 7 d.

94. Iowa.—McKay v. Erbes, 174 N.W. 372, 187 Iowa 609.

N.J.—Jacob v. McDuell, 134 A. 191, 99 N.J.Eq. 652.

Interest held not shown.—Jacob v. McDuell, 134 A. 191, 99 N.J.Eq. 652.

Revocation of agency coupled with interest generally see Agency § 75.

95. Jacob v. McDuell, supra.

a. In General

The owner of the property has the right to control the sale until legally made. The particulars and conditions of sale constitute its terms, but an auction sale is not governed by the strict rules applicable to formal contracts

It has been declared that public sales by auction are precisely what the contracts of the parties make them,[96] but the owner of property sold at auction has the right to control the sale until legally made.[97] The particulars or catalogue and the conditions of sale together constitute the terms of the contract of sale;[98] and the making of the contract, or meeting of minds, occurs at the time the goods are knocked down to the purchaser.[99] A sale by auction is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire.[1] While, in conducting the sale, it is part of the auctioneer's duty to invite and excite the competition of bidding,[2] and to dispose of the property to the highest bidder[3] and for the highest price that he can obtain,[4] and some measure of discretion is vested in him as to the precise methods to be pursued in attaining that object,[5] the sale should be made in accordance with the laws governing public sales.[6]

To complete an auction sale there must be a bidder, the property must be struck off or knocked down, and the person to whom it is struck off must complete his purchase by complying with the terms of the sale,[7] but a sale has been said to be complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner.[8]

Presence of property; inspection. Upon a sale of personal property at public auction, the property must generally be at hand and within the view of those attending,[9] but if it is too bulky to be present in the auction room, and inspection will be of use, the notice of sale must state where the chattel is located, and give opportunity to view it.[10]

Memorandum of sale. It has been said to be a well-settled custom for the auctioneer, when property is knocked off, to make and sign a memorandum of sale.[11]

b. Conditions of Sale

(1) In general
(2) Printed conditions
(3) Knowledge or notice of conditions
(4) Reservation of right to resell
(5) Sale on approved security

96. Rittenburg v. Freeman, 16 Pa. Dist. 8, 33 Pa Co 467

Contract signed only by purchaser

A contract for the sale of land sold at auction was unilateral and unenforceable where it was signed only by the purchaser and not by the owner or auctioneer.—Talley v. Southern Real Estate & Inv. Co., 109 S.E. 497, 152 Ga. 277.

97. Kelly v. Pelt, (Tex.Civ App.) 220 S.W. 199.

Advertisement as statement of fair conduct

"When . . . [the owner of property] elects to advertise it for sale at public auction to the highest bidder, it is an invitation to all persons to attend and bid therefor on equal terms and is equivalent to a public statement on the seller's part that the sale will be conducted openly, fairly, and in good faith toward all parties."—Edmunds v. Gwynn, 159 S.E. 205, 207, 157 Va. 528, reversed on other grounds 161 S.E. 393, 157 Va. 528.

98. Navarette v. Travis-Ziegler Co., 194 N.Y.S. 332.

99. Richardson v. Landreth, (Mo App.) 260 S.W. 128.

1. Josephy v. Golden, 184 N.Y.S. 549, 113 Misc 284—6 C.J. p 827 note 61.

Lands subject to unusual and unreasonable restrictions

"Where a person bids in at auction lands subject to unusual and unreasonable restrictions, he must be given both time and opportunity to ascertain what the nature of the restrictions is. This is so, even though the bidder is advised, before he signed a memorandum of sale, that there were restrictions as to buildings."—Josephy v. Golden, 184 N.Y.S. 549, 550, 113 Misc 284.

2. Crandall v. State, 28 Ohio St. 479

3. Ragusa v. Greco, 131 So. 849, 171 La. 686—6 C.J. p 827 note 58

Even where property is sold without appraisement, the text rule applies.—Ragusa v. Greco, 131 So. 849, 171 La. 686.

Effect of sale to owner's agent

There is no contract of purchase and sale with the highest bona fide bidder, where the property is knocked down and declared sold to an agent of the owner making a higher bid.—Freeman v. Poole, 94 A. 152, denying motion 93 A. 786, 87 R.I. 489, L.R.A. 1917A 63

4. Ragusa v. Greco, 131 So. 849, 171 La. 686

5. Terr. v. Toyota, 19 Hawaii 651—6 C.J. p 827 note 59.

6. Reinach v. Jung, 48 So. 124, 122 La. 610—6 C.J. p 827 note 60.

7. D.C.—U. S. v. Meyer, 37 App. D. C. 282.

N.Y.—Sherwood v. Reade, 7 Hill 431

Execution and recording of deed to land sold at auction and transfer by the purchaser has been held prima facie proof of the consummation of the sale.—Stewart v. Cummings, 165 A. 544, 109 Pa. Super. 57

When title passes see infra § 8 a.

8. Forbes v. Hunter, 223 Ill. App. 400—Russell v. Sammons, 217 Ill. App. 607

"An adjudication at public auction completes the sale and vests in the adjudicatee the ownership of the property adjudicated."—Sizeler v. Cloney & Egan, 2 La. App. 289.

Statute as stating prior law

St. (1917) § 1654t21 subd. 2, providing when a sale by auction is complete, "simply states the law as it was prior to its enactment."—Keske v. Boeder, 170 N.W. 247, 248, 168 Wis. 369

9. Manhattan Taxi Service Corporation v. Checker Cab Mfg. Corporation, 171 N.E. 705, 253 N.Y. 455, 69 A.L.R. 1190, modifying 236 N.Y.S. 559, 226 App. Div. 624, and 237 N.Y.S. 832, 228 App. Div. 638.

Physical presence of conditionally sold property at resale see Sales § 600 [55 C.J. p. 1278 notes 44, 45].

10. Manhattan Taxi Service Corporation v. Checker Cab Mfg. Corporation, supra.

11. Melheuser v. Central Trust Co. of Owensboro, 36 S.W.(2d) 377, 227 Ky. 757.

(1) In General

The owner may prescribe the conditions of sale, but may waive them. In the absence of such prescription, the auctioneer has discretion as to the terms or manner of sale.

The owner of property offered for sale at auction has the right to prescribe the manner, conditions, and terms of sale,[12] although he may waive compliance by the purchaser with the conditions,[13] and the purchaser is entitled to rely on the terms prescribed,[14] and on the announcement made by the auctioneer at the time and place of the sale as to the identity of the property, the terms, and the conditions of sale.[15] In the absence of conditions prescribed by the seller, an auctioneer has much discretion in prescribing such terms of sale as will exclude puffers and fraudulent bidders, and secure the confidence of honest purchasers,[16] and may conduct the sale in such manner as seems to him best calculated to secure the upset price fixed by the seller,[17] and he may postpone the sale.[18]

(2) Printed Conditions

Printed conditions are binding on the parties, and the auctioneer cannot verbally vary, although he may explain, them at the sale.

Printed conditions under which an auction sale proceeds are binding on both buyer[19] and seller,[20] and cannot be varied by verbal statements of the auctioneer made at the time of the sale,[21] although they may be so explained.[22] Thus, an auctioneer may, at the time of the sale, explain the meaning of advertisements published before the sale;[23] but advertisements of the sale have been held no part of the conditions thereof, unless expressly made such.[24]

(3) Knowledge or Notice of Conditions

Conditions of sale announced by the auctioneer are binding on the purchaser whether he knew or understood them or not.

The conditions of a public sale, announced by the auctioneer at the time and place of the sale, are binding on a purchaser, whether or not he knew or heard them,[25] and although he may not have un-

12. Tenn.—Whitfield v. May, 89 S.W. (2d) 764
Va.—Edmunds v. Gwynn, 159 S.E. 205, 157 Va. 528, reversed on other grounds 161 S.E. 892, 157 Va. 528. 6 C.J. p. 827 note 62.

Bankable paper

(1) Where a condition of an auction sale was that bankable paper should be given, and the purchaser withdrew the settlement note from the auctioneer and gave two notes not acceptable to the seller, the seller is entitled to possession of articles sold, and it is immaterial that other remedies are available to him. —Schafer v. Hoch, 168 N.W. 107, 184 Iowa 23

(2) Under such a condition, whether the purchase of five different articles was a single transaction was a matter of the intent of the parties as the acceptance of a bid did not complete a purchase, settlement being necessary.—Schafer v. Hoch, supra.

Conditions not limited to those relating to payment.—Keske v. Boeder, 170 N.W. 247, 168 Wis. 369.
Deposit as condition of sale see infra § 7 f.

13. Hilligoss v. Thorpe, 141 N.E. 797, 80 Ind. App. 614

14. Ivanhoe v. City Real Estate Co., 194 N.Y.S. 81, 118 Misc. 556.

Sale free from liens

Where the terms of an auction sale of land provided for allowance out of purchase money of the amount of liens, if the purchaser previous to the delivery of the deed should produce proof of such liens and duplicate receipts for payment thereof, and that existence of unpaid tax or assessment should not be deemed an objection to the title if the amount thereof was so allowed, and further provided for conveyance of the property "with good title in fee simple free from all incumbrances," with certain exceptions, not including tax lien, the purchaser was entitled to conveyance free from tax lien which attached between the sale and the execution of the deed.—Ivanhoe v. City Real Estate Co., 194 N.Y.S. 81, 118 Misc. 556.

15. Wohlers v. Peterson, 192 N.W. 837, 195 Iowa 853

16. U.S.—Blossom v. Milwaukee, etc., R. Co., 3 Wall. 196, 18 L.Ed. 43.
Ind.—Wright v. Yetts, 30 Ind. 185
N.J.—Metropolis Nat. Bank v. Sprague, 20 N.J.Eq. 159

17. Gorman v. Berg, 140 A. 779, 49 R.I. 125, reargument denied 141 A. 179

18. Southern Boulevard R. Co. v. North New York City Tract. Co., 39 N.Y.S. 266, 16 Misc. 263, affirmed 39 N.Y.S. 266, 5 App. Div. 330.

19. U.S.—U.S. v. Atlanta Wrecking Co., (D.C.Ga.) 8 F.(2d) 542
Pa.—Solomon v. Loy, 82 Pa. Super. 99
Tenn.—Whitfield v. May, (App.) 89 S.W.(2d) 764
6 C.J. p. 827 note 65

20. Whitfield v. May, supra—6 C.J. p. 827 note 66.

21. Whitfield v. May, supra—6 C.J. p. 827 note 67.

But it has been held that formal written terms of a public sale, distributed prior to the sale, may be modified or added to by the auctioneer at the beginning of the sale.—Kennell v. Boyer, 122 N.W. 941, 144 Iowa 303, 24 L.R.A.(N.S.) 488, Ann. Cas. 1912A 1127.

Statute forbidding oral modification of written or printed conditions is not violated by the act of an auctioneer in requiring a certain part of the purchase price to be paid to a third party when the advertisement of the sale contained no such condition.—Steen v. Neva, 163 N.W. 272, 37 N.D. 40

22. Whitfield v. May, (Tenn.App.) 89 S.W.(2d) 764—6 C.J. p. 828 note 68

23. Satterfield v. Smith, 33 N.C. 60—6 C.J. p. 828 note 69

24. Aschom v. Smith, 2 Penr. & W. (Pa.) 211, 21 Am.D. 437.

25. Neb.—Bockelman v. Spires, 193 N.W. 334, 110 Neb. 234.
N.Y.—Burling v. Brinn, 189 N.Y.S. 707, 116 Misc. 130—Navarette v. Travis-Ziegler Co., 194 N.Y.S. 832.
Ohio.—Richardson v. Kennedy, 21 Ohio N.P.(N.S.) 539.
Tenn.—Whitfield v. May, (App.) 89 S.W.(2d) 764
Va.—Definite Contract Building & Loan Ass'n v. Tumin, 164 S.E. 562, 158 Va. 771.
Wis.—Clarke v. Maisch, 177 N.W. 11, 171 Wis. 225—Keske v. Boeder, 170 N.W. 247, 168 Wis. 369.
6 C.J. p. 828 note 70.

Goods not advertised in catalogue

Bidders on goods put up for sale, which they knew were not advertised in the catalogue, were liable on their bids, although they were not present when the terms on which such goods were to be sold were published, and although such goods were put up for bids immediately after the catalogue

derstood them[26] So, also, where it is the custom to post up the conditions in the auctioneer's room, and the auctioneer announces that the conditions are as usual, a purchaser is bound by the conditions, whether he sees them or not.[27] The auctioneer of goods advertised in a catalogue may change the terms of sale at any time during the progress of the sale, if done publicly and in the hearing of all the bidders present.[28]

(4) Reservation of Right to Resell

Where the auctioneer reserved the right to resell in case of mistake, whether or not a mistake was made must be determined from all the circumstances.

Where an auctioneer announced that he reserved the right to resell any property in case of a mistake, whether or not a mistake was made must be determined on a consideration of all the circumstances[29] Where it was announced at the beginning of an auction that the auctioneer reserved the right to make a resale of any property over which a dispute arose, there is no right to resell property sold as to which no dispute arose, but which the owner desired to be sold differently.[30]

(5) Sale on Approved Security

A condition that a note with approved sureties be given is complied with by tendering a note signed by sureties justly entitled to approval.

A condition in the terms of a sale that a purchaser shall give a note with approved sureties is complied with when he tenders a note duly executed, signed by good and solvent sureties justly entitled to approval, and the seller may not arbitrarily reject such note[31] In case of question as to the character of the note tendered, however, the purchaser is bound to prove either that the seller knew the note to be good or that he had the means of conveniently ascertaining the fact.[32]

c. Catalogue or Particulars of Sale

(1) Warranty
(2) Description of Property

(1) Warranty

In the absence of agreement otherwise, a seller is bound, on entry of an auctioneer's memorandum, by a warranty in a catalogue.

In the absence of agreement or understanding to the contrary, a seller is bound, on the entry of an auctioneer's memorandum of sale, by a warranty contained in a catalogue.[33]

(2) Description of Property

A description of the property should be clear and unambiguous; and a material misdescription, unless cured or corrected, may be ground for avoiding the contract, although slight variations between an estate and a description will not be.

It is usual, in cases where property of considerable value is offered for sale. to reduce a description of it to writing,[34] such description when relating to real estate is called "particulars of sale," the office of which is to describe the subject matter of the contract.[35] The particulars should contain a faithful description of property offered for sale, in language so clear and unambiguous that persons of ordinary understanding will not be deceived as to either its character or identity.[36]

A misdescription, in a material matter, on which the purchaser might reasonably rely and did rely to his damage, is ground for avoidance of the contract,[37] and this is so even though the conditions of sale provide that errors and misdescription shall not avoid the contract.[38]

Slight variations, however, between an estate and a description of it are not grounds for the avoidance of the sale,[39] but, ordinarily, will be cause for

goods under different terms, of which the bidders present were informed—Burling v. Brinn, 189 N Y S. 707, 116 Misc 130

26. Definite Contract Building & Loan Ass'n v. Tumin, 164 S E 562, 158 Va. 771.

27. Whitfield v. May, (Tenn App) 89 S W.(2d) 764.

28. Burling v. Brinn, 189 N Y S 707, 116 Misc. 130

29. Keske v Boeder, 170 N.W. 247, 168 Wis 369

"The declaration of the auctioneer as to his mental processes cannot be conclusive upon the parties"—Keske v. Boeder, 170 N W 247, 248, 168 Wis. 369.

30. Forbes v. Hunter, 223 Ill App 400.

31. Pa—Guier v. Page, 4 Serg. & R 1
Tenn—Sweeney v Vaughn, 29 S.W 903, 94 Tenn 534
6 C J. p 838 note 75

32. Mills v Hunt, 20 Wend (N Y) 431—Hicks v. Whitmore, 12 Wend (N Y) 548.

33. Dugan v Phillips, 246 P. 566, 77 Cal App 268

34. Rittenburg v. Freeman, 16 Pa. Dist 8, 33 Pa Co 467.

35. Rittenburg v. Freeman, supra.

36. Rittenburg v. Freeman, supra—6 C J p 828 notes 74, 79.

Description construed

A statement in an advertisement of a sale by auction of several lots of land, describing the buildings on one as being in good repair, "with running water to house and barns," does not necessarily imply that the source of the supply belonged to the vendor, although the memorandum of sale thereof also included "100 or more rods of lead pipe conveying water to the house."—Wells v. Day, 124 Mass. 38.

37. U S—U S v. Koplin, (D C Ga) 24 F (2d) 840.
Pa—Rittenburg v. Freeman, 16 Pa. Dist. 8, 33 Pa Co 467.
6 C J. p 828 note 75

Brick and frame building described as brick.—Rittenburg v. Freeman, 16 Pa Dist 8, 33 Pa Co 467.

38. Rittenburg v. Freeman, supra

39. King v Bardeau, 6 Johns Ch (N. Y) 38, 10 Am D. 312—6 C J. p 828 note 77.

compensation;[40] and where the general description shows an intent to convey an entire property, and its frontage is a few inches longer than as stated in the advertisement, the purchaser has been held entitled to the entire property, and not restricted to the length stated.[41]

Qualifying phrases, such as "more or less," "thereabouts," and "estimated to contain," will cure slight deficiencies and inaccuracies, but they will not protect the vendor against the consequences of intentional misstatements or gross carelessness.[42]

Correction of error. An error in the description of property in an advertisement may be corrected and explained when the property is offered for bids,[43] and where it was made in good faith, and is thus corrected and explained, a purchaser who relied wholly on the printed advertisement and was not present at the opening of the sale is not relieved of his contract by such error.[44]

d. Right to Withdraw Property

Until a bid is accepted, the seller may withdraw his property from sale, and he may withdraw it before any bidding.

Until the hammer falls and a bid is accepted, a locus penitentiæ remains, and the seller may withdraw his property from sale,[45] and he may withdraw it before any bidding,[46] even where the sale is without reserve.[47]

e. Bidding

(1) In general
(2) Manner of making bid
(3) Manner of accepting bid
(4) Right to reject bid
(5) Right to withdraw bid
(6) Dispute as to bid
(7) Chilling the bidding
(8) Puffing or by-bidding

(1) In General

A bid requires acceptance to create an obligation in the bidder or the owner.

A bid at an auction sale is only an offer for the property,[48] requiring acceptance to create an obligation on the part of the bidder[49] or the owner,[50] it is but an offer to purchase, and not the acceptance of an offer.[51]

(2) Manner of Making Bid

A bid may be made in any mode whereby the bidder signifies his willingness to give a particular sum for the property, but secret signs between the bidder and the auctioneer should not be allowed.

A bid may be made in any mode by which the bidder signifies his willingness and intention to give a particular sum or price for the property offered for sale,[52] thus, it may be made orally,[53] as by words uttered aloud in the hearing of the bystanders,[54] or spoken privately to the auctioneer,[55]

40. King v Bardeau, supra

41. Gough v Williamson, 50 A. 323, 62 N.J Eq 526.

42. Ala.—Davis v. Evans, 62 Ala. 401.
N.Y.—Dennerlein v Dennerlein, 46 Hun 561, appeal dismissed 19 N E 85, 111 N.Y. 518
Va.—Foley v. M'Keown, 4 Leigh (31 Va.) 627.
6 C.J. p 829 note 80

43. Thompson v. Kelly, 101 Mass. 291, 3 Am R. 353

44. Thompson v. Kully, supra.

45. Becker v Crabb, 4 S W (2d) 370, 223 Ky 549—6 C.J p 830 note 97.
Reason for rule
(1) A bid is an offer to purchase at the price named, and until accepted no contract exists—Anderson v Wisconsin Cent R Co., 120 N.W. 39, 107 Minn 296, 131 Am S R. 462, 20 L R A.(N.S.) 1133, 16 Ann Cas 379.
(2) Requirement of acceptance generally see infra § 7 e (1)
Auctioneer passing to other articles
If the auctioneer adjourns the sale of the particular article and passes to something else without the express assent of the bidder, it is tantamount to a rejection of the preceding bid, which is thereby annulled—Donaldson v Kerr, 6 Pa 486
Agreement with auctioneer to confirm regardless of price
Where property was selling unreasonably below its market value and at a ruinous sacrifice, the seller had the right to stop the sale before the property was knocked down, although his agreement with the auctioneer provided that the property should be sold, and that "the highest price obtainable on sale day is to be confirmed by the owner, regardless of what that price may be"—Becker v. Crabb, 4 S W.(2d) 370, 223 Ky 549.

46. Benjamin v. First Citizens Bank & Trust Co of Utica, 237 N.Y.S 947, 248 App Div 610.

47. Benjamin v First Citizens Bank & Trust Co of Utica, supra Contra Forbes v. Hunter, 223 Ill App 400

48. Mass.—Conway Sav Bank v Vinick, 192 N E 31, 287 Mass 448
R I—Gorman v Berg, 140 A. 779, 49 R.I. 125, reargument denied 141 A 179.

49. Conway Sav. Bank v. Vinick, 192 N E. 31, 33, 287 Mass. 448—6 C J. p 830 note 98 [a].
"A bidder at an auction sale in effect makes an offer to purchase the property in accordance with the terms of the sale, for the amount of his bid Until the auctioneer in words or by appropriate acts signifies the acceptance of the amount offered by the bidder no legal obligation of the bidder arises."—Conway Sav. Bank v. Vinick, supra.

50. Anderson v Wisconsin Cent. R. Co., 120 N W 39, 107 Minn. 297, 131 Am S R. 462, 20 L.R.A.(N S.) 1133, 16 Ann Cas. 379.

51. Freeman v. Poole, 93 A. 786, 37 R I. 489, L R A 1917A 63, motion denied 94 A. 152.

52. State v. State Board of School Land Com'rs of Wyoming, 191 P. 1073, 27 Wyo. 54, 11 A.L.R. 539—6 C.J. p 829 note 84

53. State v State Board of School Land Com'rs of Wyoming, supra.

54. Millingar v. Daly, 56 Pa. 245

55. State v. State Board of School Land Com'rs of Wyoming, 191 P. 1073, 27 Wyo. 54, 11 A.L.R. 539—6 C.J. p 829 note 83.

or by a wink or a nod,[56] or by writing[57] in words or figures,[58] or by letter.[59]

Secret signs between the bidder and the auctioneer should not be allowed, because all of the bidders would not be on equal terms [60]

(3) Manner of Accepting Bid

A bid is accepted when the auctioneer signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of sale.

A bid is accepted when the auctioneer, by the fall of his hammer or by any other audible or visible means, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale,[61] thus, acceptance may be in words or by appropriate acts.[62]

(4) Right to Reject Bid

An auctioneer may reject a bid on various grounds, as where it is coupled with terms or conditions other than those of the sale, or is below the minimum announced by the owner.

In the absence of instructions or limitations to the contrary, it seems that the auctioneer, ordinarily, should accept all bids [63] However, he is not bound to accept all bids as a matter of course,[64] thus, he may refuse a bid which will manifestly frustrate the object and purpose of the sale,[65] or acceptance of which would be a virtual sacrifice of the property;[66] and he may refuse to accept bids from minors,[67] from insolvents,[68] from drunkards or other persons irresponsible either financially or mentally,[69] from persons offering their bids in bad faith,[70] or from a person making but a trifling advance in his bid over the bid last announced [71] Where the right is reserved to reject any or all bids, the right must be exercised before the acceptance of any bid [72]

Specific terms; minimum bid. If the terms of sale are specific, the auctioneer need not notice a bid that is coupled with different terms or conditions.[73] Likewise, where the owner of the property to be sold publicly announces that no bid less than a designated amount will be received, the auctioneer may reject a bid that falls below that amount [74]

(5) Right to Withdraw Bid

Until a bid is accepted, the bidder may withdraw it.

Until the hammer falls and a bid is accepted, a locus penitentiæ remains, and the bidder may withdraw his bid,[75] even though the conditions of sale provide that bids shall not be withdrawn.[76] The withdrawal of a bid, in order to be effective, must be open and loud enough to be heard by the auctioneer.[77] In all sales which come within the operation of the statute of frauds, it is probable that a bidder may withdraw his bid before the signing of a sufficient memorandum in writing.[78]

56. State v State Board of School Land Com'rs of Wyoming, supra—6 C J. p 829 note 83

57. State v State Board of School Land Com'rs of Wyoming, supra.

58. Millingar v Daly, 56 Pa 245

59. State v State Board of School Land Com'rs of Wyoming, 191 P 1073, 27 Wyo. 54, 11 A L R 539—6 C J p 829 note 84 [a]

60. Conover v Walling, 15 N J Eq. 173—6 C J p 829 note 85.

61. State v State Board of School Land Com'rs of Wyoming, 191 P. 1073, 27 Wyo 54, 11 A L R 539—6 C J p 829 note 86
When title passes see infra § 8 a.

62. Conway Sav Bank v Vinick, 192 N E 81, 287 Mass. 448

63. Ricks v. Battle, 29 N C. 269—6 C J. p 829 note 87.

64. Md—Gray v Veirs, 33 Md 18
Wash—McPherson Co v. Okanogan County, 88 P. 199, 45 Wash. 285, 9 L R A (N S.) 748
6 C J p 829 note 88.

65. Gray v. Veirs, 33 Md 18.

66. McPherson Co. v Okanogan County, 88 P 199, 45 Wash. 285, 9 L R A (N S) 748.

67. Hawaii—Terr. v. Toyota, 19 Hawaii 651.
N Y.—Kinney v. Showdy, 1 Hill 544

68. Hawaii—Terr. v. Toyota, 19 Hawaii, 651
N Y—Taylor v Harnett, 55 N.Y.S 988, 26 Misc 862.

69. Terr v Toyota, 19 Hawaii 651—6 C J. p 829 note 91.

70. Hawaii—Terr. v. Toyota, 19 Hawaii 651
Wash—McPherson Co. v. Okanogan County, 88 P. 199, 45 Wash 285, 9 L R A (N S.) 748.

71. Terr v. Toyota, 19 Hawaii 651—6 C J. p 829 note 93.

72. City of New York v Union News Co, 154 N Y S. 633, 169 App Div. 278, affirmed 118 N E 635, 222 N Y 263

73. Moore v. Owsley, 37 Tex 603

74. Farr v. John, 23 Iowa 286, 92 Am D. 426—6 C J. p 829 note 95

Effect of failure to direct or announce minimum

(1) The failure of an auctioneer to announce publicly a minimum price before the auction does not render a sale over the upset price invalid as to an owner who failed to direct such public announcement—Gorman v. Berg, 140 A 779, 49 R I. 125, reargument denied 141 A 179.

(2) Where a bid exceeding the upset price is accepted, neither the seller nor the purchaser can object to the validity of the sale for failure to announce the upset price—Gorman v. Berg, supra.

75. Ky—Becker v. Crabb, 4 S W. (2d) 370, 223 Ky 549
Mass—Conway Sav Bank v. Vinick, 192 N E 81, 287 Mass. 448.
6 C J p 830 note 98.

Reason for rule

(1) "A bidder at an auction sale in effect makes an offer to purchase the property in accordance with the terms of the sale, for the amount of his bid Until the auctioneer . signifies the acceptance of the amount offered . . no legal obligation of the bidder arises"—Conway Sav Bank v Vinick 192 N E. 81, 83, 287 Mass. 448

(2) Requirement of acceptance generally see supra 7 a (1).

76. Becker v Crabb, 4 S W (2d) 370, 223 Ky 549—6 C J p 830 note 99.

77. Becker v Crabb, supra.

78. Sargent v Bryan, 189 N W. 935, 153 Minn 198—6 C J. p 830 note 2.
Application of statute of frauds to

(6) Dispute as to Bid

If a bid is claimed by two or more, the property may be put up again at the price and bid of the competitor whom the auctioneer may declare entitled. A bidder's evidence is competent as to the price bid by the person to whom the property was knocked down.

If a bid is claimed by two or more persons, it is the usual practice to put the property up again at the price and at the bid of such one of the competitors as the auctioneer may declare, in his judgment, entitled to it.[79] On the issue as to the price bid at a sale, evidence of one bidder as to his understanding of the price bid by the person to whom the property was knocked down is competent.[80]

(7) Chilling the Bidding

Any act of auctioneer, seller, or purchaser which diminishes competition and stifles or chills the sale vitiates the sale. An unsuccessful attempt to prevent another from bidding will not invalidate the sale. Combinations of interests or agreements not to bid are voidable or not according to whether or not the parties' object is to chill the sale.

Generally, it may be said that any act of the auctioneer, or of the party selling, or of third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes competition and stifles or chills the sale, is contrary to public policy and vitiates the sale.[81] Thus, a sale will be set aside where a person, desirous of purchasing, prevents others by his improper conduct from bidding against him,[82] but a mere attempt of a purchaser to prevent another person from bidding will not render the sale invalid, if such attempt has not been successful.[83]

Agreements not to bid. It has been broadly held that prospective bidders at a public sale cannot fraudulently agree to refrain from bidding one against the other,[84] and that to do so renders the sale to any one of the confederates void.[85] More particularly, sales which are affected by combinations of interests or agreements not to bid are voidable by the seller, if the purpose thereof is to chill the sale and purchase property for less than its market value,[86] although the fact that a combination has been formed to prevent a sale to others will not affect a purchase by one not a party to the combination.[87] If, on the other hand, the agreement is made without any design to commit a fraud, but to enable the parties to the agreement to purchase conveniently, or if the agreement is for any honest purpose, the sale will be valid,[88] as

auctions generally see Frauds, Statute of § 141 [27 C.J. p. 236 note 28].

79. Conover v. Walling, 15 N.J.Eq. 173—6 C.J. p. 830 note 3.

80. Whitfield v. May, (Tenn.App.) 89 S.W.(2d) 704—6 C.J. p. 830 note 3 [b].

81. Ky.—Robenson v. Yann, 5 S.W.(2d) 271, 224 Ky. 56.
N.C.—Nash v. Elizabeth City Hospital Co., 104 S.E. 33, 180 N.C. 59.
6 C.J. p. 830 note 4.

Reason for rule

"A sale at public auction is based upon the purpose and policy of obtaining the worth of property by free and fair competition among the bidders."—Nash v. Elizabeth City Hospital Co., 104 S.E. 33, 35, 180 N.C. 59.

Allegations of stifling competition held sufficient

(1) A complaint, alleging that defendant purchased property at an auction sale at less than its value by secretly instructing one who had been bidding for an organization to procure the property for a charitable hospital to continue bidding for defendant as an individual after the charitable organization's limit was reached, whereby competition was stifled by the unwillingness of other bidders to hinder the charitable project, states a cause of action, entitling plaintiffs to have the deed given as a result of the sale set aside.—Nash v. Elizabeth City Hospital Co., 104 S.E. 33, 180 N.C. 59.

(2) In such a complaint, a general allegation that defendant had unlawfully and inequitably procured a deed for the property purchased, and induced the inclusion therein of property not offered at the sale, is only an addendum to the principal cause of action, and is sufficient by way of forestalling a possible defense of ratification.—Nash v. Elizabeth City Hospital Co., supra.

Evidence was held to sustain a finding that the auctioneer did not fraudulently stifle the bidding.—Carr v. Melone, 13 S.W.(2d) 1031, 227 Ky. 719.

That winning bid was only twenty-five cents higher than the preceding bid of ten thousand one hundred twelve dollars is not of itself sufficient to impute fraud on the part of the auctioneer in stifling bidding, or to raise a suspicion of sharp practice.—Carr v. Melone, 13 S.W.(2d) 1031, 227 Ky. 719.

Secret arrangement giving a bidder a lot for less than his bid could not affect bidders on lots subsequently sold, where there was a good-faith bid by another bidder for a trifle less than his bid.—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., 281 S.W. 500, 213 Ky. 533, 46 A.L.R. 117.

82. Swofford v. Garmon, 51 Miss. 348—6 C.J. p. 831 note 5.

83. Haynes v. Crutchfield, 7 Ala. 189.

84. Fulgham v. Burnett, 117 So. 514, 151 Miss. 111.

Contracts in fraud of sellers and bidders generally see Contracts § 197 [13 C.J. p. 415 notes 39–40].

85. Fulgham v. Burnett, supra.

86. Kearney v. Taylor, (N.J.) 15 How.(U.S.) 494, 14 L.Ed. 787—6 C.J. p. 831 note 10.

Agreement not carried into effect

Where the members of a corporation selling its land at public auction entered into an agreement by which any of them might bid for land and take it or not, as they chose, but the agreement was not carried into effect, it was held that the sale was not invalid.—Buckley v. Briggs, 30 Mo. 452.

Question for jury

Whether an agreement or combination existed which tended to stifle competition is a question of fact for the jury.—Hunt v. Elliott, 80 Ind. 245, 41 Am.R. 794—Pike v. Balch, 38 Me. 302, 61 Am.D. 248—Hopkins v. Ensign, 25 N.E. 306, 122 N.Y. 144, 9 L.R.A. 781—6 C.J. p. 831 note 10 [d].

87. Case v. Dean, 16 Mich. 12.

88. Kearney v. Taylor, 15 How.(U.S.) 494, 520, 14 L.Ed. 787—6 C.J. p. 831 note 11.

"It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that

where persons, neither of whom is able to purchase, or desires to own, the whole property, unite for the purpose of making a bid among themselves.[89]

(8) Puffing or By-Bidding

A puffer cannot recover compensation; and the courts will not give relief to any party to a fake sale on a sham bid By the weight of authority, sales induced by actual puffing or by bidding are void or, at the purchaser's option, voidable, whether the purchaser must show resulting prejudice is in dispute However, the seller may reserve the right to bid or to employ another to bid for him, if he gives fair notice.

A puffer, in the strictest meaning of the word, is a person who, without having any intention to purchase, is employed by the seller at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the seller that he shall not be bound by his bids,[90] and "by-bidder" has been defined in practically the same terms.[91] One who bids at a public sale not because of any desire to purchase, but merely for the purpose, either in his own interest or that of another, of running up the price, is not a puffer if, in case his bid is the last and highest, he can be compelled to take and pay for the property.[92]

Rights and liabilities of puffer. A puffer cannot recover compensation for his services.[93] The courts will refuse to give relief to any party to a fake sale made on a sham bid,[94] and will not hold the bidder to the pretended sale on the suit of the owner,[95] nor allow the seller to avoid the sale by alleging the fraudulent agreement for running up the price.[96]

Effect on the sale in general. While it has been said that there is some conflict in the cases as to the effect of by-bidding or puffing at auction sales,[97] and that on authority the question is not entirely free from doubt,[98] and there are some cases not in harmony with the more generally accepted rule,[99] it has been broadly declared that puffing[1] or by-bidding[2] is forbidden by law, and that contracts induced by puffing or by-bidding are void or voidable,[3] as against public policy,[4] and it is clear,

if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all."—Kearney v. Taylor, supra.

89. Holmes v. Holmes, 24 S.C.Eq. 61.

90. Peck v. List, 23 W Va 338, 375, 48 Am R. 398

91. Osborn v. Apperson Lodge, Free and Accepted Masons, No 195, of Louisa, Ky, 231 S W 500, 213 Ky 533, 46 A L R 117.

92. McMillan v. Harris, 35 S E 334, 110 Ga 72, 78 Am S R 93, 48 L R A 345—6 C J p 832 note 12 [a]

93. Dealey v. East San Mateo Land Co., 130 P. 1066, 21 Cal App 39.

94. Haley v Bloomquist, 268 P. 365, 204 Cal 253

Evidence held sufficient to sustain a finding

(1) That chattel mortgagors were parties to an agreement that an auction sale to the mortgagee should be faked —Haley v. Bloomquist, 268 P. 365, 204 Cal. 253

(2) That the bid of a chattel mortgagee was sham and made solely to protect the mortgagor's interest and prevent sale at an inadequate price —Haley v. Bloomquist, supra.

(3) That the pretended purchase by a chattel mortgagee at auction of chattels was without consideration —Haley v. Bloomquist, supra.

95. Haley v. Bloomquist, supra.

96. Troughton v. Johnston, 3 N C 328. 2 Am D. 626.

97. Burdon v. Seitz, 267 S W. 219, 206 Ky. 336.

Historical

"The law courts of England in an early day held that, no matter what the purpose was in employing by-bidders, the purchaser could reject the sale and refuse to comply with it. The English chancery courts adopted a different rule and held that if the employment of by-bidders was only to prevent a sacrifice of the property, and that the vendor acted in good faith and the purchaser was not required to pay more than the reasonable value of the property, he could not repudiate his contract, but would be required to perform Later an act of Parliament repealed the rule promulgated by the chancery courts. Some American opinions have followed the rule announced by the chancery courts of England, but the great majority of American jurisdictions adopt the rule announced by the English common-law courts, and hold that the purchaser at an auction sale purporting to be without reserve may repudiate the contract and decline to perform it if the vendor of the property or his agent for whose acts he was responsible employed by-bidders or puffers, who actually bid upon the property with the understanding that they were not to take it if it should be knocked off to them"—Burdon v. Seitz, 267 S W 219, 220, 206 Ky. 336—6 C.J. p 832 notes 16–18.

98. Bowman v McClenahan, 46 N.Y. S. 945, 20 App Div. 346

99. S C.—Jenkins v. Hogg, 7 S C L 321.

Tenn —Williams v. Bradley, 7 Heisk 54.

Tex —Reynolds v. Dechaums, 24 Tex 174, 76 Am D. 101.

By-bidding as not puffing or fraud

The mere bidding on property sold at public auction by by-bidders who are agents of the owner is not sufficient, when alleged in a pleading, to show that the owner was undertaking to "puff" the property, and thereby commit fraud upon the purchaser —Beasley v Burton, 124 S E 368, 32 Ga App 727

1. Robenson v. Yann, 5 S W.(2d) 271, 224 Ky. 56

2. Freeman v. Poole, 93 A. 786, 37 R I 489, L R A 1917A 63, Ann Cas 1918A 841, motion denied 94 A. 152

3. Cal —Haley v. Bloomquist, 268 P 365, 204 Cal 253—Dealey v. East San Mateo Land Co, 130 P. 1066, 21 Cal App 39.

N Y —Cerreta v. Costello, 209 N.Y S 257, 212 App Div 687—Bowman v McClenahan, 46 N.Y.S. 945, 20 App Div. 346

Va —Edmunds v. Gwynn, 161 S E 892, 157 Va. 528, reversing 159 S E 205, 157 Va. 528

But it has been held that the sale is not void, but "voidable at the election of the purchaser only"—Gregory v U S Fidelity, etc., Co., 91 N Y S 595, 45 Misc. 112.

"One who has shown that puffers or by-bidders are employed has made out a case" of fraud—Edmunds v Gwynn, 161 S E. 892, 894, 157 Va. 528, reversing 159 S E. 205, 157 Va. 528.

4. Cal —Haley v. Bloomquist, 268 P. 365, 204 Cal. 253—Dealey v. East

both on principle and the weight of the authorities, that, where a sale is advertised or stated to be without reserve, there is an implied guaranty that the property is to be sold to the highest bidder, and each bidder has the right to assume that all previous bids are genuine, and the seller in substance so assures him; and hence, the secret employment, by the seller, of a puffer or by-bidder is equivalent to a false representation, and renders the sale voidable at the option of the purchaser,[5] at least if there is an actual bid by the puffer or by-bidder.[6] In order to avoid the sale on this ground, the purchaser has been required to show that he was prejudiced by the puffing,[7] but other opinion is to the contrary;[8] thus, the fact that no

San Mateo Land Co., 130 P. 1066, 21 Cal.App. 39.

Va.—Edmunds v. Gwynn, 161 S.E. 892, 157 Va. 528, reversing 159 S.E. 205, 157 Va. 528.

5. Burdon v. Seitz, 267 S.W. 219, 206 Ky. 336—6 C.J. p. 833 note 19.

Reasons for rule

(1) "The reason given for the majority rule is that the employment of by-bidders is not only against the soundest principles of public policy, but is a fraud upon the purchaser, and that such secret arrangements are offensive to fair dealing, which it is the purpose and intent of the law to administer between litigants" —Burdon v. Seitz, 267 S.W. 219, 220, 206 Ky. 336.

(2) "It is well known that bidders at auction sales are influenced to a considerable extent by the number of other bidders, the amounts offered by them and the apparent anxiety they show to become the owners of the property, and if these conditions are affected by a private arrangement between the auctioneer and the owner, as the result of which persons who were not in reality intending to buy are allowed to appear as genuine competitors, it holds out to those who are real bidders false inducements, and makes false representations to them as to the desirability of the property and the demand for it, which in fact operate as a fraud upon them. For this reason it would seem, upon principle, that the private employment of a puffer by an owner at an auction sale rendered the sale void, and relieved the person to whom the property was struck off from the necessity of performing his contract"—Bowman v. McClenahan, 46 N.Y.S. 945, 946, 20 App.Div. 346.

Puffing or by-bidding held shown

(1) Evidence is held sufficient to show that there was a by-bidder at a sale—Burdon v. Seitz, 267 S.W. 219, 206 Ky. 336.

(2) Evidence held sufficient to show that a sale was tainted by puffing or by-bidding—Edmunds v. Gwynn, 161 S.E. 892, 157 Va. 528, reversing 159 S.E. 205, 157 Va. 528.

By-bidding held not shown

(1) Evidence is held to sustain a finding that a person bidding against plaintiff at a sale was not a by-bidder—Newman v. Woolley, 255 S.W. 1050, 201 Ky. 139.

(2) A purchaser of a lot having a secret arrangement for a price below the amount of his bid is held not a by-bidder, so as to relieve the bidder on another lot—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., 281 S.W. 500, 213 Ky. 533, 46 A.L.R. 117.

(3) Where one of three joint owners of land sold at public auction entered into an agreement with a bidder, to which the other joint owners did not consent, to purchase land jointly with the bidder for a price not in excess of a certain amount, the bidding by such bidder was not such by-bidding as to invalidate a sale to another bidder—Manuel v. Haselden, 268 S.W. 554, 206 Ky. 796.

Effect of subsequent arrangement

A purchaser of a lot at auction cannot be said to have been influenced in bidding by a subsequent private arrangement with the purchaser of another lot by which the latter procured a lot for a sum less than his bid—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., 281 S.W. 500, 213 Ky. 533, 46 A.L.R. 117.

Puffer employed by person interested in proceeds of sale

The rule that the employment of puffers by the owner of the property sold vitiates the sale does not apply where the person interested in the proceeds of the sale employs a third person to bid for the purpose of enhancing the price—McMillan v. Harris, 35 S.E. 334, 110 Ga. 72, 78 Am.S.R. 93, 48 L.R.A. 345.

Bid by or for lodge member

(1) A member of a lodge is not precluded from bidding at an auction sale of land owned by the lodge—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., 281 S.W. 500, 213 Ky. 533, 46 A.L.R. 117.

(2) A purchaser at an auction sale by a lodge cannot complain that the property was run up by a person bidding in good faith for a member of the lodge—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., supra.

6. Burdon v. Seitz, 267 S.W. 219, 206 Ky. 336—Newman v. Woolley, 255 S.W. 1050, 1052, 201 Ky. 139.

"The very basis of the right of a purchaser at such a sale to refuse to comply with his bid because of a by-bid or puffer's bid is that such a bid was made whereby he, in the excitement, was induced to bid still more; but it is difficult to understand how he could have been so induced when there was no bid by such by-bidder or puffer. The very language in which the text-writers state the proposition shows clearly there must be an actual bid by the by-bidder before the purchaser may take advantage of it"—Newman v. Woolley, supra.

7. Curtis v. Aspinwall, 114 Mass. 187, 19 Am.R. 332—6 C.J. p. 833 note 20.

Cases criticized

"The cases . . . in support of . . . [the text holding] are the few ones that follow the ancient English chancery rule upon the subject" —Burdon v. Seitz, 267 S.W. 219, 220, 206 Ky. 336.

Presumption as to effect of by-bidding

(1) "Where there is only a single parcel offered at a sale held without reserve, if there is secret by-bidding the purchaser has the absolute right to repudiate the contract, and the presumption that he has been imposed upon is absolute . . . But in a sale of lots in a subdivision, where the by-bidding is upon lots sold before the one knocked off to the complainant, it is only a prima facie presumption which may be rebutted"—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., 281 S.W. 500, 502, 213 Ky. 533, 46 A.L.R. 117.

(2) Evidence is held to rebut the presumption that the buyer of a lot at auction was influenced by fictitious bids on other lots—Osborn v. Apperson Lodge, Free and Accepted Masons, No. 195, of Louisa, Ky., supra.

8. Ky.—Burdon v. Seitz, 267 S.W. 219, 206 Ky. 336.
N.Y.—Bowman v. McClenahan, 46 N.Y.S. 945, 20 App.Div. 346.

Burden of proof on seller; presumption

(1) "If the fact that no harm resulted is material at all . . . the burden of proving it should be upon the person who has employed the puffers to bid up the price of his

harm resulted has been held immaterial,[9] and the general rule has been held to apply, even though the price was not increased by the puffing,[10] or though the purchaser did not bid more than the property was worth,[11] and the question whether or not the price paid was fair has been held immaterial.[12] The buyer, in order to avoid a sale, is required to return, or offer to return, the property purchased,[13] and he must not be guilty of laches in exercising his option.[14] It is competent, however, for a seller to fix a minimum price, or to reserve to himself the right to bid, or to employ another to bid for him, if he gives fair notice of such fact;[15] and the owner of property may bid on it and thus prevent a sale for less than its value without thereby becoming a puffer and fraudulently inducing the purchaser at the sale to pay more than the property is worth.[16]

Employment of puffer without owner's knowledge. The fact that a puffer is employed by the auctioneer without the knowledge of the owner of the property does not alter the application of the rule that puffing avoids the sale.[17] The fact that one mistakenly acts as a puffer at a sale does not render the sale void as to the purchaser of the property, if the auctioneer and the owner of the property had no knowledge of such person's conduct.[18]

f. Deposit

A deposit is not a mere pledge, but a part payment of the purchase price. Absent facts showing that he is only the seller's agent, the auctioneer holds the money as a stakeholder, with the duty to retain it until the party to whom it is due is ascertained.

A deposit required from a bidder is not a mere pledge, but a part payment of the purchase price,[19] and, on the vendor's passing good title, it becomes his property, less the auctioneer's charges and commissions.[20] The deposit is usually made payable to the auctioneer,[21] who, in the absence of facts which indicate that he acts as the agent of the vendor alone,[22] is a stakeholder,[23] with the

property."—Bowman v. McClenahan, 46 N.Y.S. 945, 949, 20 App.Div. 346.

(2) "He who seeks to uphold a contract . . . tainted [by the employment of puffers or by-bidders] has upon him the burden of showing that by-bidding did not actually affect the sale"—Edmunds v. Gwynn, 161 S.E. 892, 894, 157 Va. 528, reversing 159 S.E. 205, 157 Va. 528.

(3) In cases where puffing is practiced, the presumption that real bidders on the same property are influenced and misled by it is very strong, if not conclusive. The buyer, therefore, may avoid the sale, without further proof that he has been influenced and injured, if there is no evidence tending to control or rebut such presumption.—Curtis v. Aspinwall, 114 Mass. 187, 19 Am.R. 333.

9. Bowman v. McClenahan, 46 N.Y.S. 945, 20 App.Div. 346.

10. Rafferty v. Norris, 12 Pa.Super. 450—6 C.J. p. 833 note 23

11. Ky.—Burdon v. Seitz, 267 S.W. 219, 206 Ky. 336
Va.—Edmunds v. Gwynn, 161 S.E. 892, 157 Va. 528, reversing 159 S.E. 205, 157 Va. 528.

Reason for rule

"The purchaser . . . was entitled to free, fair, open, and actual competition in his bidding, and to procure it for only the price that such character of bidding would result in"—Burdon v. Seitz, 267 S.W. 219, 220, 206 Ky. 336.

12. Edmunds v. Gwynn, 161 S.E. 892, 157 Va. 528, reversing 159 S.E. 205, 157 Va. 528.

13. Minturn v. Main, 7 N.Y. 220—6 C.J. p. 833 note 21.

14. McDowell v. Simms, 45 N.C. 130, 57 Am.D. 595—6 C.J. p. 833 note 23

15. N.Y.—Bowman v. McClenahan, 46 N.Y.S. 945, 20 App.Div. 346
R.I.—Freeman v. Poole, 93 A. 786, 37 R.I. 489, L.R.A.1917A. 63, Ann.Cas. 1918A. 841, motion denied 94 A. 152
Va.—Edmunds v. Gwynn, 159 S.E. 205, 157 Va. 528, reversed on other grounds 161 S.E. 892, 157 Va. 528
6 C.J. p. 833 note 24.

16. Beasley v. Burton, 124 S.E. 368, 32 Ga.App. 727

17. Cerreta v. Costello, 209 N.Y.S. 257, 212 App.Div. 687.

Reason for rule

"Such knowledge is immaterial. The auctioneer, for the purpose of the sale, represents the owner, and his acts are those of the owner. Any fraud perpetrated by him is chargeable to the owner"—Cerreta v. Costello, 209 N.Y.S. 257, 258, 212 App.Div. 687.

18. Locke v. Willingham, 25 S.E. 693, 99 Ga. 297

19. Rittenburg v. Freeman, 16 Pa.Dist. 8, 33 Pa.Co. 467—6 C.J. p. 834 note 27.

20. Montgomery v. Pacific Coast Land Bureau, 29 P. 640, 94 Cal. 284, 28 Am.S.R. 122—Cohn v. Valentine, 263 P. 846, 88 Cal.App. 430

21. Mass.—Pope v. Burrage, 115 Mass. 282
N.Y.—Hewlett v. Davis, 3 Edw. 338

Clerk of sale at a public sale of debtor's property is not presumed to have a right to deposit money.—Cameron v. Brittingham, (C.C.A.Ill.) 42 F.(2d) 735

In Louisiana

(1) An auctioneer's customary discretion in the matter of exacting deposits at conventional sales of movables will not be questioned except for clear abuse.—Bruning v. Walmsley, 126 So. 88, 12 La.App. 423

(2) Although an advertisement for an auction sale specified that a deposit would be required, the auctioneer, not having been instructed to exact a deposit in each case, was held not required to do so.—Bruning v. Walmsley, supra

22. Merritt v. Archer, 148 N.Y.S. 1008, 163 App.Div. 648, reversing 143 N.Y.S. 925, 82 Misc. 515

23. Cal.—Montgomery v. Pacific Coast Land Bureau, 29 P. 640, 94 Cal. 284, 28 Am.S.R. 122—Cohn v. Valentine, 263 P. 846, 88 Cal.App. 430
Ky.—Gossage v. Waddle, 18 S.W. (3d) 975, 230 Ky. 148
N.Y.—Millfield Realty Co. v. Joseph P. Day, Inc., 176 N.E. 830, 256 N.Y. 435, modifying Millfield Realty Co. v. Catena, 245 N.Y.S. 926, 231 App.Div. 833—Gelman v. Joseph P. Day, Inc., 235 N.Y.S. 211, 227 App.Div. 607.
Pa.—Rittenburg v. Freeman, 16 Pa.Dist. 8
6 C.J. p. 834 note 29, p. 843 note 31.

In Louisiana, an auctioneer who sells property under an order of the court, and who receives the price, is not a stakeholder. He is not obliged to return the purchase money to the purchaser, where the latter refuses to take the goods, if any one claims the money.—Lara v. Nash, 24 La.Ann. 310.

duty, as such, to retain this money until, by the completion or rescission of the contract of sale, the party to whom it is due is ascertained,[24] or good title is found to have passed,[25] and neither party can, without the consent of the other, revoke his authority[26]

g. Disturbance of Sale

A bidder may be liable for disturbing the sale.

An action lies against a bidder at a sale for a disturbance of the sale[27]

h. Inclusion of Property of Third Person

Property of one person should not be sold along with that of another without notice.

Where property has been advertised as belonging to a certain person, and the property of another is sold along with it, this fact should be announced, as it may amount to a fraud to sell property as belonging to one person when it really belongs to another.[28] Where another's property is included with the knowledge and consent of all concerned, and a note and mortgage for the price are executed by the purchaser and accepted by the original seller, title and right of possession pass to the purchaser.[29]

i. Purchase by Auctioneer

An auctioneer cannot bid on, or purchase, or be interested in the purchase of, the property he is selling, although an agency to bid a particular sum for a purchaser is not necessarily inconsistent with his duty.

Since, as appears in § 6 a, an auctioneer is primarily the agent of the seller until the property is struck off, and, as such, cannot act inconsistently with the interest of his principal, an auctioneer cannot bid on, or be the purchaser of, or be interested in the purchase of, the property which he is selling, either for himself,[30] or for another.[31] It has been held, however, that an agency simply to bid a particular sum for a purchaser is not necessarily inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale.[32]

j. Sale by Unlicensed Auctioneer

An auction sale is not invalid because conducted by one not licensed as an auctioneer.

A sale at auction is not invalid because it was conducted by a person not licensed as an auctioneer, even though the act of selling subjects such person to a penalty.[33]

k. Sale of Several Lots

The purchase of several lots by one purchaser constitutes one entire contract, but, where several lots are put up separately and are separately struck off to the same purchaser, there is an independent contract as to each.

It has been held that the purchase of several lots of property by the same purchaser constitutes but one entire contract,[34] and that it will make no difference if the sale continues several days, and the bids are made on different days[35] On the other hand, it has been held that, if several lots are put up separately, and are separately struck off to the same purchaser, and on each occasion the auctioneer writes down the name of the purchaser, there is in point of law a distinct and independent contract as to each lot, although the purchaser afterward signs one memorandum that he has bought the several lots.[36]

l. Sale without Authorization

An auction sale without the owner's knowledge or authorization is void

A sale of property at auction without the knowl-

24. N Y—Millfield Realty Co v Joseph P Day, Inc, 176 N E 830, 256 N Y. 435, modifying Millfield Realty Co. v Catena, 245 N Y S 926, 231 App Div 832—Gelman v. Joseph P Day, Inc, 235 N Y.S 211, 227 App Div 607—Merritt v Archer, 148 N Y S. 1008, 163 App Div 648, reversing 143 N.Y S 925, 82 Misc 515
Pa.—Rittenburg v. Freeman, 16 Pa. Dist 8, 33 Pa Co 467.
Return of deposit to purchaser:
By auctioneer see infra § 13 b (2).
By seller see infra § 8 g.

25. Montgomery v. Pacific Coast Land Bureau, 29 P. 640, 94 Cal 284, 28 Am S R. 122—Cohn v Valentine, 263 P. 846, 88 Cal.App. 430.

26. Ellison v. Kerr, 86 Ill. 427.

27. Furness v Anderson, 1 Pa L J R 324.

28. Thomas v Kerr, 3 Bush (Ky) 619, 96 Am D 262

29. Brochers v. Nickel, 130 P. 138, 35 Okl 473.

30. Cerreta v. Costello, 209 N.Y S 257, 212 App Div. 687—6 C.J. p 334 note 36

Who may question
A purchase by the auctioneer for himself at a sale made by him on behalf of his principal is not void, but is voidable by the principal Third persons cannot question the sale—Veazie v Williams, (C C Me.) 28 F.Cas.No.16,907, 3 Story 611.

31. Robeson & Weaver v. Ramsey, 245 S W 413, 47 Tenn 25—6 C J p 334 note 37.

32. Richards v Holmes, (D C) 18 How (U.S) 143, 15 L Ed 304—6 C J. p 335 note 38

33. Gorman v. Berg, 141 A. 179, denying reargument 140 A 779, 49 R I 125—6 C J p 335 note 39.
License of auctioneers generally see supra § 5.

34. Jenness v. Wendell, 51 N H 63, 12 Am R. 48—6 C.J. p 335 note 42

35. Jenness v. Wendell, 51 N H 63, 12 Am.R. 48

36. Mass.—Wells v. Day, 124 Mass. 38—Robinson v. Green, 3 Metc 159.
Mo.—McManus v. Gregory, 7 S W. 423, 94 Mo. 370, affirming 16 Mo. App. 375.

edge, consent, or authorization of the owner is void and conveys no title to the purchaser[37]

§ 8. Rights and Liabilities of Buyer and Seller

a. When title and possession pass
b. Purchase by agent for undisclosed principal
c. Remedies of buyer
d. Lien and remedies of seller
e. Rights as to deposit or partial payment

a. When Title and Possession Pass

Under a sale without conditions, title passes to the bidder when the property is knocked down, but, where terms or conditions are imposed, title passes when there has been a compliance therewith or waiver thereof. Unless other terms are announced, the bidder is entitled to possession when he pays or tenders the amount bid, or delivers or tenders the note or obligation required.

Under a sale without conditions, the rule is that the title passes to the bidder when the property is knocked down to him[38] The failure to furnish pedigrees of animals sold does not defeat the passing of title or render the sale without consideration;[39] so the fact that there was an outstanding mortgage on the property, which may have constituted a breach of an implied warranty, would not of itself defeat the passing of title to the purchaser,[40] nor does the fact that the purchaser failed to furnish the price on the day at which he stated he would prevent the passing of title[41] A successful bidder's ownership is not affected by the seller's claim that the auctioneer retained a larger commission than was due him, where the bidder is not chargeable with notice of breach of contract or excess of authority on the auctioneer's part.[42]

Where terms or conditions are imposed on the sale, the title does not pass until there has been a compliance with the terms or conditions,[43] or until they have been waived;[44] and it is held that if there has been no actual delivery, the title will not pass to the purchaser until the amount of his bid is paid or tendered,[45] or, if the sale is on credit, until he delivers or tenders such a note or obligation as the terms of the sale require.[46]

Time for completing purchase. It is usual to provide in the conditions of sale a time for the completion of the purchase, in which case time will be of the essence of the contract where the parties intended it to be so.[47]

When possession passes. Unless other terms have been announced,[48] the successful bidder receives, or is entitled to, possession when he pays or tenders the amount of his bid,[49] or, if the sale is on credit, when he delivers or tenders such a note or obligation as the terms of the sale require.[50]

b. Purchase by Agent for Undisclosed Principal

One bidding for another is personally liable as purchaser if he does not disclose his principal's name, but not if he does.

A person bidding at an auction as the agent of another need not disclose to other bidders the name of the person for whom he is bidding, unless the person for whom he acts is the vendor.[51] Where one bids for another, but does not disclose the

37. New Orleans Public Service v Stewart, 119 So. 435, 9 La App 519

38. U S—In re Packard Press, (C C A N Y) 3 F.(2d) 232
Iowa—Stanhope State Bank v. Peterson, 218 N.W. 262, 205 Iowa 578
Mo—Richardson v. Landreth, (App) 260 S W 128
N Y.—Jawitz v Reitman, 217 N Y S 480, 128 Misc 20
6 C J p 835 note 46.

Loss of property by fire, after the passage of title, is on the purchaser—Stanhope State Bank v Peterson, 218 N.W. 262, 205 Iowa 578—6 C J p 836 note 50 [a].
Completion of sale see supra § 7 a

39. Stanhope State Bank v. Peterson, 218 N.W. 262, 205 Iowa 578.

40. Stanhope State Bank v. Peterson, supra.

Waiver of any lien held by third party under the mortgage is evidential only in an action on a note given for the purchase price, and need not be pleaded—Stanhope State Bank v Peterson, 218 N W 262, 205 Iowa 578.

41. Russell v. Sammons, 217 Ill App. 607.

42. McKey v Erbes, 174 N.W 872 187 Iowa 609

43. Daly v. Crawford, 131 N Y S 220, 72 Misc. 272—6 C.J p 835 note 47

Warranty not made a condition of sale.—Pugh v Wilson, 180 N W. 781, 43 S.D 478

44. Burt v. Kennedy, 3 Pennyp (Pa) 238—6 C J p 835 note 48

45. Hand v. Matthews, 57 A 351, 208 Pa. 149—6 C J p 836 note 52

Cash sale presumed; check
(1) Cash sale is generally presumed to have been contemplated, in the absence of a special provision or understanding to the contrary—Hand v Matthews, 57 A. 351, 208 Pa. 149.
(2) However, the fact that, after the property has been knocked down to a bidder, he gives the owner a check for the purchase price does not prevent the passage of title—Richardson v Landreth, (Mo App) 260 S W 128.

46. Daly v Crawford, 131 N Y.S 220, 72 Misc 272

47. Sirk v Emery, 67 N E 668, 184 Mass 32—6 C J. p 835 note 49.

48. In re Packard Press, (C C A N Y) 3 F (2d) 232

49. U S.—In re Packard Press, supra
Ill—Russell v. Sammons, 217 Ill App 607
N Y—Jawitz v Reitman, 217 N Y S. 480, 128 Misc 20
6 C J. p 836 note 52

50. Ind—Wainscott v Smith, 68 Ind 312
N Y—Daly v Crawford, 131 N Y S 220, 72 Misc 272

51. National F Ins Co v. Loomis, 11 Paige (N.Y.) 431.

name of his principal either to the owner or to the auctioneer, he is personally liable as purchaser.[52] Where, however, a person successfully bids on an article, and immediately informs the auctioneer's clerk that he had bid on the article for a principal whom he names, and directs the clerk to charge the article to the principal named, and the clerk does so, the bidder cannot subsequently be held personally liable for the price of the article.[53]

c. Remedies of Buyer

(1) Rescission of contract
(2) Other remedies

(1) Rescission of Contract

A buyer may have the sale set aside for fraud, or for false or mistaken representation, as to a material matter, by which he was misled and on which he relied to his damage, or for the seller's failure to give good title, or for total failure of consideration.

A contract of sale entered into at an auction may be rescinded by the buyer where the proper grounds exist.[54] Thus, as a general rule, where there has been fraud on the part of the auctioneer,[55] or false or mistaken representation by the seller or the auctioneer as to a material matter,[56] such as the identity[57] or quality[58] of the property sold, or a failure of the seller to give good title,[59] or a total failure of consideration,[60] as where the property sold was of no value,[61] the buyer may be relieved of his purchase and is entitled to have the contract of sale set aside, but he is not so entitled if he was not misled by the misrepresentation,[62] as where he had knowledge of the true state of facts,[63] or if he did not rely on it in making his purchase,[64] as where he was ignorant of it,[65] or if he was not damaged,[66] or if a mistake was due to his own inexcusable neglect.[67]

52. Bell v Borders, 265 S.W. 514, 205 Ky 181—6 C.J. p 836 note 55

53. Bell v Borders, supra—6 C.J. p 836 note 56

54. Welcome State Bank v Martens, 190 N.W. 185, 153 Minn 264

55. Whitfield v May, (Tenn App.) 89 S.W.(2d) 764—6 C.J. p 836 note 58

56. Md.—Kleiman v Needle, 117 A. 3, 140 Md 107—Needle v Cover, 114 A. 698, 138 Md 646
Minn.—Welcome State Bank v Martens, 190 N.W. 185, 153 Minn 264
Pa.—Rittenburg v Freeman, 16 Pa. Dist. 8, 33 Pa.Co. 467
Tenn.—Whitfield v May, (App.) 89 S.W.(2d) 761
6 C.J. p 836 note 59

Court of equity has jurisdiction of a suit to annul a sale of land at an auction sale and to recover a deposit made to secure the bargain on the ground of fraudulent representations made by the auctioneer.—Kleiman v Needle, 117 A. 3, 140 Md 107—Needle v. Cover, 114 A. 698, 138 Md 646

Misrepresentations held material

(1) As to the duration of the term of a lease.—Needle v Cover, 114 A. 698, 138 Md 646

(2) Misrepresentation as to the amount of annual rental received for the property at the time of the sale was held to be material and sufficient to warrant the setting aside of the sale, although the rentals were increased to the stated amount before the time arrived for the conveyance to the purchaser.—Kleiman v. Needle, 117 A. 3, 140 Md. 107.

57. Clay v. Kagelmacher, 26 S.E. 493, 98 Ga. 149—6 C.J. p 836 note 59 [a].

Question held for jury was whether there was such a mutual mistake between the seller and the buyer of a lot at auction, as to the description of the property, as would avoid the contract of purchase.—Freeman v Cohen, 89 Pa.Super. 431

58. Welcome State Bank v. Martens, 190 N.W. 185, 153 Minn 264

Prescriptive statute inapplicable

A statute providing that "purchasers of horses, mules, mares, vehicles and harness at [auction] sales . . shall have the right within forty-eight hours succeeding said sales of personally inspected adjudications made the night previous, and of satisfying themselves of the stipulations made by the auctioneer crying such sale," on which a plea of prescription was based in defense to a call in warranty, "has no application whatever to cattle."—Maestri v. Mailhos, 124 So. 318, 319, 11 La.App. 527.

59. Gormley v. Kyle, 137 Mass 189—6 C.J. p 837 note 60.

Implied warranty of title

On an auction sale of chattels, a seller impliedly warrants the title of the goods.—Gray v. Walton, 52 N.Y.Super. 534.

Advice of counsel as to title

A purchaser of land is not justified in refusing to accept a conveyance merely because of the opinion of counsel, given in good faith, that the title is not safe, if the opinion is erroneous and the record title is, in fact, perfect.—Montgomery v. Pacific Coast Land Bureau, 29 P. 640, 94 Cal. 284, 28 Am.S.R. 122.

Denial of obligation by buyer; putting in default

(1) Where, however, a party, after adjudication of property to him at an auction, notifies the seller's attorneys that he cannot comply with her bid, and his position is that there was no valid adjudication of the property and no obligation upon his part to comply with the bid, it is not necessary to put him in default by tendering a clear and unencumbered title, since the law does not contemplate the doing of a vain thing.—Spellman v. Bradley, 115 So. 403, 165 La. 106.

(2) A purchaser, in such situation, refusing to take the property on the ground that there was not tendered her a clear and unencumbered title should set up and establish the defects in the title or encumbrances on the property.—Spellman v. Bradley, supra.

60. Aulick v. Edwards, 3 Ky.Op. 606

61. Aulick v Edwards, supra

62. Ga.—Clay v Kagelmacher, 26 S.E. 493, 98 Ga. 149
Md.—Needle v Cover, 114 A. 698, 138 Md 646

63. Whitfield v. May, (Tenn.App.) 89 S.W.(2d) 764—6 C.J. p 837 note 61.

64. Caperton v. Clarke, 261 S.W. 1098, 203 Ky. 191—6 C.J. p 837 note 61 [b].

65. Nick v Bautovitch, 44 So. 880, 119 La. 1039—6 C.J. p 837 note 62

66. Caperton v. Clarke, 261 S.W. 1098, 203 Ky. 191

Damage held sufficiently alleged.—Needle v Cover, 114 A. 698, 138 Md. 646.

67. Graham v. Healy, 138 N.Y.S. 611, 154 App.Div. 76

Two persons bidding for purchaser

Where two persons were bidding for the account of the purchaser, neither of them knowing for whom

A purchaser cannot claim title where he himself has rescinded the settlement on which his claim rests.[68]

Rescission of the contract of sale because of the employment of puffers or by-bidders is considered supra § 7 e (8), and because of misdescription of the property supra § 7 c (2).

Statements of opinion or in praise of property offered for sale are not causes for avoiding a sale unless they amount to misrepresentation or suppression of a material fact.[69]

Loose and indefinite expressions which should put a buyer on his guard are not grounds for having a sale set aside.[70]

Sale by interested auctioneer. The fact that an auctioneer, unknown to the bidders, is interested in the property sold renders the sale voidable at the option of the purchaser, although no actual fraud or bad faith is shown.[71]

(2) Other Remedies

The rule of caveat emptor has been applied to auction sale of personalty, but not of realty. In proper circumstances, a purchaser may recover for the seller's failure to comply with the terms of sale, for a partial failure of goods to meet the contract of sale, or for the auctioneer's misrepresentation; or he may bring replevin or compel a conveyance.

The rule of caveat emptor has been held to apply in the sale of personal property at public auction,[72] and it has likewise been broadly said to be the rule at a public sale,[73] but the rule has been held inapplicable, in particular circumstances, to an auction sale of realty.[74]

Where the purchaser has complied with the terms of the sale, but the seller fails to comply on his part, as by failing to deliver the property, the purchaser is entitled to recover whatever damages he may have sustained thereby,[75] and, on duly tendering the purchase price of goods not in his possession, but of which he is the owner, may bring replevin therefor against the seller.[76] The purchaser may recover for a partial failure of the goods to meet the contract of sale,[77] and a misrepresentation by the auctioneer may give the purchaser a good cause of action against the vendor.[78] A successful bidder may compel a conveyance of realty provided the memorandum is sufficient under the statute of frauds.[79]

the other was bidding, the purchaser cannot be relieved from the contract on that ground, if the error was brought about solely by his own carelessness, particularly if the price was not, as he claimed it was, thereby enhanced beyond the real value of the property—Spellman v Bradley, 115 So 403, 165 La 106.

68. Schafer v Hoch, 168 N.W. 107, 184 Iowa 23

Substitution of notes as rescission

Where a purchaser bought five articles, one single note being given in settlement, the withdrawal of such note from the auctioneer and the giving in place thereof of two notes, one a conditional note, and the other equal to the amount of the bids for the four articles, such notes being refused by the owner, was a rescission by the purchaser of the settlement, and the owner was entitled to have possession of all five articles, and it was immaterial that the auctioneer had no authority to assent to a rescission—Schafer v Hoch, 168 N.W. 107, 184 Iowa 23.

69. Del—Dietrich v. Badders, 90 A 47, 27 Del 499

D C—Anderson v White, 2 App (D C) 408

N.Y—Taylor v. Fleet, 4 Barb. 95. 6 C.J. p 837 note 64.

70. Wells v. Day, 124 Mass 38.

71. Mass—Bent v. Cobb, 9 Gray 397, 69 Am.D. 295.

N.Y.—Smith v Harrigan, 15 N.Y.S. 852, 27 Abb N Cas 322

Interest as stockholder

The fact that the auctioneer who sells land of a corporation is a stockholder of such corporation does not affect the validity of the sale—Dupuy v Delaware Ins. Co., (C C Va.) 63 F. 680.

72. Wohlers v Peterson, 192 N.W. 837, 195 Iowa 853

73. U. S. v Atlanta Wrecking Co., (D C Ga.) 8 F (2d) 542.

Authority to sell; public property

"This rule, as respects the authority of persons selling, is particularly applicable to sales of public property."—U. S. v. Atlanta Wrecking Co., (D C Ga.) 8 F (2d) 542, 543

74. Needle v. Cover, 114 A. 698, 138 Md. 646.

However, an announcement by an auctioneer that a clear title would be conveyed, and that an abstract of title of the lots was at the bank for use of all purchasers if they desired to examine the title, implies that purchasers are not to be furnished abstracts with their deeds; the doctrine of caveat emptor requires a purchaser to satisfy himself as to title—Clarke v Maisch, 177 N.W. 11, 171 Wis 225

75. Forbes v Hunter, 223 Ill.App. 400—6 C.J. p 837 note 63

Implied contract to deliver.—Gruell v. Clark, 54 A. 955, 20 Del 321.

76. Jawitz v. Reitman, 217 N.Y.S. 480, 128 Misc 20

77. Lewitus v. Independent Fruit Auction Corporation, 219 N.Y.S. 5, 128 Misc 384.

Provision for quantity "more or less" as stated

The buyer of a carload of fruit at an auction sale without warranty can recover for the deficiency, where one third of the boxes were filled with sawdust, despite a provision in the terms of sale that the quantity might be "more or less" as stated—Lewitus v Independent Fruit Auction Corporation, 219 N.Y.S. 5, 128 Misc 384

78. Hermann v. Moss Estate, 177 N.Y.S. 164

Expenses incident to street opening

"Representation that all the usual expenses incident to the opening of streets, for which assessments are customarily laid, had been paid or otherwise provided for"—Hermann v Moss Estate, 177 N.Y.S. 164.

79. Gorman v Berg, 140 A. 779, 49 R.I. 125, reargument denied 141 A. 179

Specific performance by seller's grantee

(1) A successful bidder may compel the seller's grantee, who had notice of the bidder's prior purchase, specifically to perform the agreement of sale by conveying the property—Carr v. Melone, 13 S.W.(2d) 1031, 227 Ky 719.

d. Lien and Remedies of Seller

(1) Lien of seller
(2) Rescission of contract
(3) Action for damages or price
(4) Resale

(1) Lien of Seller

The seller has a lien on the property until the price is paid or tendered.

Until the purchase price is paid, or a tender thereof made, the seller has a lien on the property sold.[80]

(2) Rescission of Contract

On proper grounds, a seller may rescind a contract of sale; and, on the purchaser's failure to comply with the conditions of a sale, he may treat the contract as abandoned.

A contract of sale entered into at an auction may be rescinded by the seller where the proper grounds exist.[81] On the failure of a purchaser to comply with the conditions of a sale, the seller may treat the contract as abandoned.[82] The taking of bids from "the air" by the auctioneer cannot furnish the seller a basis for repudiating a sale, where the buyers seek to have it completed.[83]

Agreements not to bid as avoiding the sale are considered in § 7 e (7) (b).

(3) Action for Damages or Price

A seller may sue, for damages or for the purchase price, a purchaser who refuses to comply with his bid or the terms of sale.

Where personal or real property is sold at public auction and the purchaser refuses to comply with his bid or with the terms of sale, the vendor may maintain an action against him for damages[84] or for the purchase price.[85]

(4) Resale

On a buyer's noncompliance with the terms of sale, the seller may resell the property, the buyer being liable, under some authorities, for the difference between the original purchase price and the sum received at the resale, and, under others, for the difference between the bid at the first sale and the value at the time of the second. The resale must be fair and after reasonable notice, and on terms not more onerous than those of the first sale, and should ordinarily be by auction.

If a buyer does not comply with the terms of sale, the seller may, after giving him reasonable notice, resell the property at auction at the risk of the buyer.[86] In such a case, a buyer who, without

(2) Evidence held to sustain a finding that a vendor's grantee had notice of plaintiff's prior purchase—Carr v Melone, supra

80. Jawitz v Reitman, 217 N Y S 480, 128 Misc 20—6 C J. p 836 note 54

81. Welcome State Bank v. Martens, 190 N W. 185, 153 Minn 264

82. Schafer v Hoch, 168 N.W 107, 184 Iowa 23—6 C J p 838 note 67

83. Gorman v Berg, 140 A 779, 49 R I. 125, reargument denied 141 A 179

84. Ansley v. Green, 7 S E 921, 82 Ga 181—6 C J p 839 note 78

Evidence held insufficient, in an action against a buyer for breach of contract, to show such fraud as to third persons or illegality in the contract as would relieve the buyer of her contract—Faucett v. Currier, 115 Mass 20

85. Sargent v. Bryan, 189 N W 935, 153 Minn. 198—6 C J. p 839 note 78 [b], [c] (2), [e]

Time of action; sale on credit

Where a bidder at an auction was entitled to ninety days' credit on giving good security, and, after having purchased an anvil and removed it a little distance from the auction room, refused to take it or to give security, indebitatus assumpsit could not be maintained for the price until after the expiration of ninety days—Parker v Mitchell, 5 N H 165.

Defenses

(1) The purchaser of an automobile guaranteed by the auctioneer to be in running order is under no obligation to pay the price if it cannot be made to run without extensive repairs—Rosca v. Patorno, 2 La App 292.

(2) Where a buyer at auction agrees to pay part of the purchase price to a third party to whom the seller owes money, he cannot, in the seller's action for breach of the promise, set up defenses which the seller might have had against the third party's claim—Sleen v. Neva, 163 N.W. 272, 37 N D 40

(3) Failure of title to pass as defense see supra § 8 a

Burden of proof is on a buyer alleging, in defense of an action for the balance of the purchase price, that the auctioneer had falsely stated that the hogs purchased had been doubly vaccinated, to show the untruthfulness of the statement, and, on his failure to prove such defense, he will be held liable—Co-operative Sales Co. v Van der Beek, 259 N.W. 586, 219 Iowa 974

Sufficiency of evidence

(1) In an action for the purchase price, evidence was held sufficient to sustain a finding that an animal sold at auction was delivered to the purchaser—Sargent v. Bryan, 207 N W 178, 166 Minn 45

(2) Evidence in such action was held not to require a finding that, by the agreement of the parties, the sale was abrogated and the seller retained the animal—Sargent v Bryan, supra

Issues for jury

(1) In an action to recover the purchase price of an animal sold at auction, the issues as to whether the animal was delivered to the purchaser and whether the sale was abrogated by the parties, the seller retaining the animal, are for the jury—Sargent v Bryan, 207 N W. 178, 166 Minn 45

(2) In such action, evidence was held such as not to justify direction of a verdict for the seller—Sargent v. Bryan, 189 N W. 935, 153 Minn 198.

86. Ga—Green v Ansley, 19 S E 53, 92 Ga. 647, 44 Am S R 110
Mo—Anderson v. Truitt, 53 Mo App 591.
6 C.J p 839 note 79.

Notice of the time and place of the resale need not be given—Green v Ansley, 19 S E. 53, 92 Ga. 647, 44 Am.S R. 110.

Time of resale

Upon refusal of purchaser at an auction sale to comply with his bid, the property may be resold before the bidders disperse without a new

legal justification, has failed to take property sold to him is not liable to the seller for the full purchase price,[87] but is liable for the difference between the original purchase price and the sum received at the resale,[88] together with the reasonable expenses of the sale,[89] but other authority holds that such difference, while it affords a good criterion as to the damages sustained by the vendor, is not binding on the jury,[90] and that the true measure of damages is the difference between the price bid at the first sale and the value,[91] more particularly the market value, not the actual cash value,[92] at the time of the second sale. The seller may deduct the loss from any deposit which he may have in his hands arising from the first sale.[93]

Conduct of resale. In order to hold the first buyer liable for a deficiency in price caused by the second sale, the conditions of the resale must be the same or not more onerous than those of the first sale.[94] The resale must be conducted fairly and after reasonable notice,[95] and ordinarily should be by auction,[96] although it has been said that it is not absolutely necessary that the property should be resold at auction or that the first buyer should be notified thereof,[97] since all that he is entitled to is that the second sale shall be fair and honest in every way and that the seller shall take all reasonable means to get the most he can for the property.[98]

e. Rights as to Deposit or Partial Payment

A buyer causing the sale to fail through, or, at least where it is so stipulated, failing to comply with his contract, cannot recover his deposit or partial payment, but, where the sale fails through without his fault, he may recover the deposit or payment from the seller.

Where it is stipulated that the deposit shall be forfeited if the purchaser does not comply with his contract, the deposit, in such an event, may not be recovered back either at law or in equity,[99] likewise, a partial payment cannot be recovered where the sale falls through on account of the purchaser's fault,[1] although it has been held that there will be no forfeiture of the deposit in the absence of express stipulation.[2]

However, if the contract of sale falls through without fault on the part of the purchaser,[3] as because of the failure of the vendor to convey a good title as agreed,[4] or because of some fraud or

advertisement, or it may thereafter be resold if it is newly advertised —Love v. Harris, 72 S E 150, 156 N C 88, 36 L R A.(N S.) 927, Ann Cas 1912D 1065.

87. Sargent v. Bryan, 189 N.W 935, 153 Minn 198.

88. La.—Spellman v. Bradley, 115 So. 403, 165 La. 106.
Mass.—Croak v. Owens, 121 Mass 28
6 C.J p 839 note 80.

89. Ky.—McBrayer v. Cohen, 18 S W. 123, 92 Ky. 479, 13 Ky L 667
La.—Spellman v Bradley, 115 So 403, 165 La. 106.
6 C J. p 839 note 80.

Commissions on resale

However, one who buys goods at auction and fails to pay therefor may not be charged with the commissions on a resale—Van Praag v Weinberg, 114 N Y S 223, 63 Misc 324.

90. Adams v McMillan, 7 Port. (Ala.) 73—6 C J. p 839 note 81.

91. Gull v West, 19 N Y S 757, 65 Hun 1.

92. Anderson v. Truitt, 53 Mo App 591.

93. McKiernan v. Valleau, 51 A 102, 23 R I. 501.

94. Mo.—Anderson v. Truitt, 53 Mo App 591
N.Y.—Gull v. West, 19 N.Y S 757, 65 Hun 1.
6 C J p 839 note 82.

95. Anderson v. Truitt, 53 Mo App 591—6 C J. p 840 note 84.

Purchase by original seller

(1) An owner cannot bid in property at a resale in order to charge the first purchaser with the difference in price—Banks v. Hyde, 15 La. 391.

(2) Under a statute providing that, where notice has not been given that an auction sale is subject to the seller's right to bid, it shall be unlawful for him to do so, the holder of a title-retaining note who repossesses the property because of alleged default in payment cannot directly or indirectly purchase it at a public auction sale, unless he reserves the right to purchase in the notice of sale—Cranston v. Western Idaho Lumber & Building Co., 233 P. 528, 41 Idaho 141

Evidence as to original sale inadmissible

Where, in an action for failure to pay for purchases at an auction sale, defendant's attorney claims only that the resale by plaintiff was not in good faith, and expressly states that he does not claim the original sale was fraudulent, testimony as to irregularities and dishonest acts by plaintiff in connection with the original sale is improperly admitted—Shongut v. Meyers, 168 N Y S 2.

96. McKiernan v. Valleau, 51 A 102, 23 R I 501—6 C J. p 840 note 85.

Resale not conducted by licensed auctioneer

(1) Where the buyer of goods at auction failed to pay therefor, the fact that the resale was not conducted by a licensed auctioneer would not relieve the buyer from the obligation on his bid at the original sale—Van Praag v Weinberg, 117 N Y S 223, 63 Misc. 324.

(2) Sale by unlicensed auctioneer generally see supra § 7 j.

97. McKiernan v. Valleau, 51 A. 102, 23 R I 501

98. McKiernan v. Valleau, supra.

99. Donahue v Parkman, 37 N E 205, 161 Mass. 412, 42 Am S R. 415—6 C J. p 838 note 69

1. Ky.—Robenson v Yann, 5 S W (2d) 271, 224 Ky. 56.
Ohio—Mondschein v. The William Finke Stores Co., 27 Ohio N P.(N. S.) 433
6 C.J p 838 note 72

2. Bleeker v. Graham, 2 Edw (N.Y.) 647.

3. Gossage v. Waddle, 18 S W (2d) 975, 230 Ky. 148

4. Warner v Doscher, 210 N Y S 83, 213 App Div 117, affirmed 150 N E. 574, 241 N Y. 605—6 C J p 838 note 70

Advice of counsel as to title

A purchaser of land is not justified in demanding back a deposit paid by him on account of the purchase money merely because of the opinion of counsel, given in good

misrepresentation on the part of the vendor or the auctioneer,[5] the deposit may be recovered from the vendor; and a partial payment of the purchase price may be recovered where the sale falls through because of some failure or fault of the vendor or the auctioneer.[6]

If a sale is abandoned by mutual consent, and the purchaser forbids the auctioneer to pay over the deposit money to the vendor, and thus prevents him from doing so, the vendor is not responsible for its return, the remedy of the purchaser in such case being against the auctioneer.[7]

Deposit generally is considered in § 7 f supra, and the auctioneer's liability to the purchaser for the deposit, in § 13 b (2) infra.

Interest on deposit. On the failure of a vendor to convey a perfect title as agreed, a purchaser is entitled to interest on the deposit from the time of the demand for the deposit and the refusal to pay.[8]

§ 9. Rights of Auctioneer in General

See infra this title §§ 10–12. Examine Pocket Parts for later cases.

§ 10. Indemnity for Expenses

Subject to specific terms of contract, an auctioneer may recover from his principal moneys properly expended or advanced.

An auctioneer may recover from his principal all moneys that he may have expended or advanced in the proper discharge of his duties,[9] provided the seller is given the benefit of any discount or rebate received by the auctioneer;[10] but if, by the terms of the contract, a specified sum is due for expenses only in the event that the property is sold, the auctioneer is not entitled to such sum if there is no sale.[11] An auctioneer whose authority is revoked before sale may recover what he has properly expended.[12]

§ 11. Compensation

a. In general
b. Compensation from seller
c. Compensation from buyer
d. Amount of compensation

a. In General

An auctioneer's commissions are payable by the party employing him.

An auctioneer's commissions are to be paid by the party who employed him and agreed to pay him[13]

b. Compensation from Seller

An auctioneer is entitled to commissions if he is the procuring cause of a sale, even if, without his fault, it is not carried out; but he is not so entitled where no sale is made because of his improper conduct of the auction, or where he is guilty of fraud or bad faith toward the seller, or fails to make sufficient memoranda, or where another makes the sale.

faith, that the title is not safe, if the opinion is erroneous and the record title is, in fact, perfect—Montgomery v Pacific Coast Land Bureau, 29 P 640, 94 Cal 284, 28 Am S R 122

Tender of balance not required

If the parties to a sale of land by auction meet on the day fixed for the performance of the contract, and the seller, without waiting for a formal request by the buyer, tenders a deed of the land which is insufficient to convey a good title, and the buyer refuses to accept it upon that ground, no formal tender by the buyer of the balance of the purchase money, or offer to perform on his part, or request to the seller for performance, is necessary, if the buyer is ready to perform, in order to entitle him to maintain an action against the seller for the portion of the purchase money paid at the sale—Gormley v. Kyle, 137 Mass 189

Contract provision not affecting owner's liability

Where the owner of land and the auction company employed a clerk of sale, and the auction company signed a contract providing for the refunding of the earnest money if title was not good or could not be made good in the owner, and the owner and purchaser accepted its terms in writing, the money paid by the purchaser to the clerk was in effect payment to the owner, and on failure of title, a provision in the contract relieving the auction company of all liabilities except for the return of the purchase money did not affect the owner's liability—Bondhus v Swenson, 204 N.W. 26, 163 Minn. 362

5. Kleiman v Needle, 117 A. 3, 140 Md 107—Needle v Cover, 114 A 698, 138 Md 646—6 C J p 838 note 71

Particular misrepresentations

(1) As to the amount of the annual rental from the property—Kleiman v. Needle, 117 A. 3, 140 Md 107

(2) As to the duration of the term of a lease—Needle v Cover, 114 A. 698, 138 Md 646

6. Robenson v Yann, 5 S W (2d) 271, 224 Ky. 56

7. Robinson v. Trofitter, 11 Allen (Mass.) 339

8. Cockcroft v. Muller, 71 N Y 367

9. Union Refining, etc, Co v Pentecost, 79 Pa. 491—6 C J. p 841 note 98 [c]

Statutory provisions regulating amount of compensation an auctioneer is to receive do not affect this rule—Russell v Miner, 25 Hun (N.Y.) 114—Russell v. Miner, 5 Lans (N.Y.) 537, 61 Barb. 534—6 C. J. p 841 note 99.

Petition held to state cause of action for expenses—Crane v Massey, 183 S E 59, 181 Ga 482

Where owner elected to stop sale to prevent sacrifice, his liability to the auctioneer was limited to reasonable expenses incurred, in addition to compensation—Becker v Crabb, 4 S W (2d) 370, 223 Ky 549.

10. La.—Friedrichs v. Friedrichs, 52 So 996, 126 La 689
Pa.—Union Refining, etc, Co v. Pentecost, 79 Pa Super. 491

11. Horney v. Mills, 138 S E. 324, 189 N C 724

12. Jacob v McDuell, 134 A. 191, 99 N J Eq 652—6 C J. p 841 note 1.

13. Holtsinger v Beverly, 186 S E 776, 53 Ga App 614.

An auctioneer intrusted with the sale of property is entitled to his commissions if he is the procuring cause of a sale,[14] even though, through the act or default of the seller, without any fault on the auctioneer's part, the contract of sale is rescinded[15] or abandoned,[16] or though, through no fault of the auctioneer, the seller cannot perform.[17] Likewise, where an owner contracts with an auctioneer for his services, the owner cannot escape liability by putting the sale off, with the intent of preventing it, until the stipulated time limit has expired,[18] and if the sale is begun and not completed, without fault on the part of the auctioneer, because the owner refused to allow it to proceed, the auctioneer may recover as for a completed sale, according to the terms of his contract.[19]

On the other hand, an auctioneer is not entitled to commission where, because of his negligent and improper conduct of the auction, no sale is made,[20] or where the contract makes commissions payable only for full and final performance, and no sale is made,[21] nor is he entitled to compensation on sales made by another without any assistance from him,[22] or where he is guilty of fraud or bad faith toward the seller,[23] as where he modifies the terms of sale without the seller's consent[24] or without informing him of the modification,[25] unless the fraud is waived,[26] or where the memoranda which he makes are insufficient under the statute of frauds to show a binding contract between the owner and the bidder.[27]

After an owner has confirmed a sale, he cannot defeat the right to commissions by subsequently promising to pay them on a condition not provided for in the contract.[28]

A contract, drawn by an auctioneer, and requiring the owner to accept the highest price obtainable, will not be construed in such a way as

14. Friedrichs v. Friedrichs, 52 So 996, 126 La 689—6 C.J. p 840 note 88.

Petition held to state cause of action for fees—Crane v. Massey, 183 S E 59, 181 Ga 482

Effect of failure to pay tax or register

An auctioneer may recover his fee for auctioning property, although he has not paid the occupation tax or registered, as provided by statute—Davis v Boyd Co, 85 S E 752, 143 Ga 600

Where a sale is adjourned, the auctioneer is not entitled to fees for services on the day of adjournment, he must sell to earn his fees—Ward v. James, 8 Hun (N.Y.) 526

Procurement; auctioneer's prospect

(1) Where a contract provides for a commission to the auctioneer if the property is sold "to one of your own prospects and not to one with whom the present trustee has been negotiating," it "excludes from the auctioneer's claim of procurement . . . any one whom the trustee had been endeavoring to interest"—Gerth Realty Experts v Ward, (C.C.A.Fla.) 57 F.(2d) 524, 525

(2) Whether the purchaser was one of the auctioneer's own prospects is held a question of fact—Gerth Realty Experts v. Ward, supra

(3) Evidence held to sustain a finding that "the purchaser was, within the meaning of the contract, one with whom the trustee had been negotiating, and that he was not one of the auctioneer's own prospects, that is, one whom the auctioneer's efforts had procured to purchase"—Gerth Realty Experts v Ward, supra.

15. Benner's Est., 7 Phila.(Pa.) 333—6 C.J. p 840 note 89

Purchaser's equities superior

Where a purchaser made a payment to an auction company and the vendor refused to perform, the auction company has no claim to commission on the purchase price superior to the equities of the purchaser—West v. Holman, 134 So 667, 223 Ala. 114

16. Linkous v Harris, 113 S.E. 831, 134 Va 63

Evidence held admissible to show the making of private sales by the seller, after previously expressing himself as satisfied with the auction sales and abandoning them—Linkous v. Harris, 113 S.E. 831, 134 Va. 63

17. Horney v Price, 128 S.E. 321, 189 N.C. 320

18. Andrews v. Hampton, 94 S.E. 112, 108 S.C. 290

Question for jury

Question of the owner's breach by putting the auctioneer off until the time limit for sales had expired, with the intent to break up the sale, was held for the jury—Andrews v Hampton, 94 S.E. 112, 108 S.C. 290

19. Felker v Johnson, 186 S.E. 144, 53 Ga.App. 390

Petition to recover balance due on a contract for an auctioneer's services held to state a cause of action, as against contentions that the contract terms were insufficiently set out, that there was no meeting of the minds, and that the obligations allegedly assumed were too indefinite for enforcement.—Felker v. Johnson, 186 S.E. 144, 53 Ga.App. 390

20. Perlman v. Zeabelle, 137 A. 412, 5 N.J.Misc. 569—6 C.J. p 840 note 91.

21. Horney v. Mills, 128 S.E. 324, 189 N.C. 724.

22. Snow v Warwick Sav. Inst., 20 A. 94, 17 R.I. 66.

23. Butler Cotton Oil Co. v. Millican, 113 So. 529, 216 Ala. 472

Evidence held insufficient to show misrepresentation by the auctioneer of a purchasing partner's financial condition—Swinebroad v. Hester, 289 S.W. 233, 217 Ky. 284.

Instructions were held erroneous as permitting the jury to find against an auctioneer if they thought the seller had been deceived, without informing the jury in what respect he must have been deceived or misled—Swinebroad v. Hester, 289 S.W. 233, 217 Ky. 284.

24. Holtsinger v. Beverly, 186 S.E. 776, 53 Ga.App. 614.

25. Swinebroad v Hester, 289 S.W. 233, 217 Ky. 284.

Peremptory instruction for auctioneer held properly denied, where such modification was shown—Swinebroad v. Hester, 289 S.W. 233, 217 Ky. 284.

26. Swinebroad v. Hester, supra.

27. Butler Cotton Oil Co. v. Millican, 113 So. 529, 216 Ala. 472.

28. Linkous v. Harris, 113 S.E. 831, 134 Va. 63.

Knowledge of purchasers' identity

Evidence was held to warrant a jury finding that one defendant had been fully informed who all the purchasers were before he announced his satisfaction and confirmed the sale by consenting to pay commissions—Linkous v. Harris, 113 S.E. 831, 134 Va. 63.

to give the auctioneer an unfair and unreasonable advantage in claiming compensation.[29]

c. Compensation from Buyer

An auctioneer cannot recover damages to the extent of his commission from a purchaser who rejects the deed; nor is a bidder who induces him to depart from the terms of sale, so that the seller calls it off, liable for his fee.

Auctioneers employed to sell land by the owner thereof cannot recover damages to the extent of their commission from one who purchased the land at the auction, but who subsequently refused to accept the deeds, there being no privity of contract between the auctioneers and such purchaser,[30] particularly where the owner voluntarily released such purchaser from the contract of purchase, so that whatever obligations were incurred by the latter's bid were at an end.[31] A successful bidder does not become liable for the auctioneer's fee by reason of inducing him to depart from the terms of sale, with the result that the sale is called off by the seller.[32]

d. Amount of Compensation

A statute or special contract fixing an auctioneer's compensation controls; in the absence thereof, he is entitled to reasonable compensation, determinable from the circumstances.

Where the compensation of an auctioneer is fixed by statute at a certain per cent of the amount of the sales, such amount will be the remuneration to which he is entitled,[33] unless there is a special contract in writing, permitted by statute, fixing it otherwise.[34] If the amount is fixed neither by agreement nor by statute, he is entitled to reasonable compensation, and what is reasonable should be determined from the circumstances.[35] An auctioneer has been held entitled to commission only on such articles as were actually sold, paid for, and delivered.[36]

§ 12. Lien

An auctioneer has a lien on the property for his commissions and charges of sale. It may be relinquished by agreement, is satisfied by his being paid, and is lost by a delivery of the property.

An auctioneer has a lien on property which he is employed to sell for all sums due to him for his commissions and charges of sale.[37] The lien may

29. Becker v. Crabb, 4 S.W.(2d) 370, 223 Ky. 549.

30. Gibson Land Auction Co. v. Brittian, 110 S.E. 82, 183 N.C. 676, 20 A.L.R. 211.

31. Gibson Land Auction Co. v. Brittian, supra.

32. Holtsinger v. Beverly, 186 S.E. 776, 53 Ga.App. 614.

33. Barry v. American White Lead, etc., Works, 31 So. 733, 107 La. 236—6 C.J. p. 840 note 95.

Commission at a conventional sale is not limited by law.—Bruning v. Walmsley, 126 So. 88, 12 La.App. 423.

Several advertisements and adjudications

An auctioneer is entitled to but one commission, when an actual sale has been consummated, despite the fact that he advertised and adjudicated it three different times, and that the statute allows a stated commission on "each adjudication".—Larroux v. Larroux's Heirs, 126 So. 462, 12 La.App. 498, transferred 117 So. 727, 166 La. 585.

Sale of succession property; judicial sale

(1) Under a statute providing that "'on sales of succession property' the compensation of an auctioneer shall be 'a commission on each adjudication of not more than two per cent. on the first $10,000, and one per cent on the excess,' and that on judicial sales of real estate made under order of court it shall not be more than 2½ per cent on the amount of each adjudication," while "all sales of succession property are judicial sales . . . special provisions in a statute must be read as exceptions to the general provisions of the statute, hence the rule provided by this statute for sales of succession property must be taken to be an exception to the rule provided for judicial sales in general".—Succession of Blumberg, 88 So. 297, 299, 148 La. 1030.

(2) Under such statute, the term "succession property" can mean only property belonging to, or depending on, a succession.—Succession of Blumberg, supra.

(3) Under such statute, "property is succession property while in transit from the decedent to those who are to succeed him in the ownership and possession of it".—Succession of Blumberg, supra.

(4) Within such statute, sale was held not a sale of succession property, but an ordinary judicial sale.—Succession of Blumberg, supra.

34. Carpenter v. Le Count, 93 N.Y. 562.

Signing of writing by auctioneer held not absolutely required by statute.—Carpenter v. Le Count, 93 N.Y. 562.

35. Ala.—Andrews v. Frierson, 39 So. 512, 144 Ala. 470.
D.C.—Smith v. Olcott, 19 App.D.C. 61.
6 C.J. p. 840 note 97.

Ten per cent of three hundred three dollars, the amount of the cash actually collected on bids totalling seven hundred twenty-two dollars and seventy-five cents, held not excessive, where the auctioneer was required to list all the articles, prepare the advertisement, and order the sign, and the sale probably required almost the entire day.—Bruning v. Walmsley, 126 So. 88, 12 La.App. 423.

Where owner elected to stop sale to prevent sacrifice, his liability to the auctioneer was limited to reasonable compensation for the latter's services in addition to expenses.—Becker v. Crabb, 4 S.W.(2d) 370, 223 Ky. 549.

36. Bruning v. Walmsley, 126 So. 88, 12 La.App. 423.

37. Lewis v. Mason, 5 S.W. 911, 8 S.W. 735, 94 Mo. 551—6 C.J. p. 841 note 2.

Priority

(1) Advances made by an auctioneer on goods received by him for sale and deducted from the proceeds after sale are in law a part of such proceeds, and not loans, so far as affects the rights of a lienholder who is entitled to the net proceeds, and who received the benefit of the advances.—Goepel v. Hamburg American Packet Co., (D.C.N.Y.) 191 F. 744.

(2) Where an assignment for the benefit of creditors is fraudulent, an auctioneer to whom the assignees have intrusted the effects to be sold has no lien upon the moneys realized from the sale, as against judgment creditors of the assignor, since the auctioneer himself is a creditor, and has agreed to the assignment.—Bone

be relinquished by agreement,[38] and if the auctioneer is fully paid for his services, it is satisfied.[39] Such lien is lost by a delivery of the property;[40] likewise, an auctioneer who surrenders possession of cash deposits is not entitled to a common-law lien thereon,[41] although he may be entitled to a contract lien thereon[42]

A suit to establish and satisfy a lien contemplates the filing of appropriate pleadings in an action in which the claimant is a party.[43]

§ 13. Liabilities of Auctioneer and Clerk

a. To seller
b. To buyer
c. To persons other than buyer and seller at auction

a. To Seller

An auctioneer is liable for loss from his negligence, unless the damage is speculative; and when he fails to obey his principal's instructions he is liable for resulting loss. An auctioneer is liable for money paid him by purchasers, and may be liable for interest, and when sued for the proceeds of sale cannot set up title in himself. The seller must accept unsold property, and cannot claim the value thereof instead.

Since an auctioneer assumes an obligation to his employer to perform the services confided to him with ordinary care, diligence, and skill, he is responsible for loss arising from his negligence in failing to do so,[44] but he is not liable for a loss of which his negligence is not the proximate cause,[45] nor where the damage resulting from his alleged negligence or unskillfulness is speculative,[46] nor for a loss arising from his mistake upon a doubtful point of law, or upon a point recently decided[47]

Obedience of instructions. It is the duty of an auctioneer, like other agents, strictly to observe and obey instructions from his principal, and if he fails so to do he is liable for a resulting loss.[48] Thus, if he is directed not to sell goods below a certain price, he must put them up at such price, and he cannot sell them if they do not bring it,[49] and if they perish because they do not bring such price the loss falls on the owner.[50]

Accounting for money received. An auctioneer is liable to the seller for money paid him by purchasers[51] Where the portion of the deposit to which the seller was entitled was readily ascertainable, an auctioneer refusing to pay it over on the ground that he was not paid for his services has been held liable for interest, on a finding against him[52]

Attorney's fees will not be allowed a seller suing for the value of property not accounted for by the auctioneer, but awarded less than the full amount prayed for, under a statute providing for the recovery of attorney's fees only where the full amount claimed is recovered.[53]

Estoppel to assert title. An auctioneer sued for the proceeds of goods sold by him cannot set up

v Henriques, 13 Wend (N Y) 240, 27 Am D 204.

38. White v White, (App) 54 P (2d) 482, hearing denied (Cal) 56 P (2d) 202

39. White v White, supra

40. Blum v Torre, 22 S C L 153
Loss of lien by parting with possession generally see Liens § 17 [37 C J. p 336 note 38 p 338 note 70]

41. McFerran v Louisville Title Co's Receiver, 71 S W (2d) 655, 254 Ky 362

42. McFerran v. Louisville Title Co's Receiver, supra.

43. White v White, (App) 54 P (2d) 482 hearing denied (Cal) 56 P.(2d) 202

Establishment or satisfaction of lien held properly denied—White v White, (App) 54 P (2d) 482, hearing denied (Cal) 56 P (2d) 202.

44. Ky—Dorsey v. Clarke, 4 S.W. (2d) 748, 223 Ky 619.
Minn—Wright v May, 149 N W. 9, 127 Minn 150, L R A 1915B 151.
6 C J. p 842 notes 11, 12, 15, 16, 18.

Failure to ascertain bidder.—Townsend v Van Tassel, 8 Daly (N Y) 261

Unauthorized acceptance of buyer's rescission.—Gardiner v D P. S. Nichol Co, 48 Pa Super 510.

45. Dranow v MacDonald, 69 A 1009, 76 N J.Law 259—6 C J. p 842 notes 13 [a], 17.

Matters not elements of damages
In an action against an auctioneer, in that the refusal of the bidder to take title was because of the auctioneer's misdescription of the property on the sale, the loss of rent and the damage to the property resulting from the moving out of plaintiff's tenant were improperly considered as elements of damage—Dranow v. MacDonald, 69 A. 1009, 76 N J Law 259

46. Dorsey v. Clarke, 4 S.W.(2d) 748, 223 Ky 619.

47. U S—Marsh v. Whitmore, (C C. Me) 21 Wall. 178, 22 L Ed 482.
Mass—Mechanics' Bank v. Merchants' Bank, 6 Metc 13.
N Y—Hicks v. Minturn, 19 Wend. 550

48. Wright v. May, 149 N.W. 9, 127 Minn 150, L R A.1915B 151—6 C.J. p 842 note 19

Clerk of an auction sale held not liable for violation of instructions and breach of duty—Posey v Stutsman County Bank, 189 N W 315, 48 N D 1099

49. U S—Williams v. Poor, (D C) 29 F Cas No 17,732, 3 Cranch C C 251
N Y—Hasul v. Dunham, 1 N Y Super 655

Nature of liability
An auctioneer who sells goods at auction for a smaller price than that agreed upon is not guilty of a conversion, but at most is liable in another form of action for damages—Lustgarten v. Hecht, 134 N.Y S. 567.

50. Williams v. Poor, (D C) 29 F. Cas No 17,732, 3 Cranch C C. 251.

51. Wright v. May, 149 N W 9, 127 Minn. 150, L R A 1915B 151—6 C J. p 843 notes 22–24, p 845 note 47

52. Cohn v Valentine, 263 P. 846, 88 Cal App 430.

53. Steckler v Spicuzza, 132 So. 282, 15 La App. 485.

title in himself either as a defense to the action or in reduction of damages.[54]

Unsold property A seller is required to accept from an auctioneer the return of unsold property, and cannot claim the value thereof instead, even though he was unable to secure its return for a long period.[55]

b. To Buyer

(1) In general
(2) Liability for deposit
(3) Sale for undisclosed principal

(1) In General

An auctioneer may make himself personally liable by going beyond his agency, as where he warrants property without authority, and he may be liable for a failure to deliver goods, for conversion, for his fraud or false representation, or for money received through the seller's fraud.

Generally speaking, an auctioneer is not personally liable to third persons where his principal is disclosed,[56] but he must keep within the limits of his agency, and, like any other agent, may make himself personally liable by expressly pledging his own responsibility.[57] If without authority, express or implied, from his principal, an auctioneer warrants property, he makes the warranty personally and is liable thereon.[58] If he assumes the delivery of goods sold by him, he is liable for a failure to deliver them;[59] and he may be liable for conversion.[60] He is also liable for any fraud or false representation committed by him upon the buyer,[61] and may be required to account to the purchaser for money received as the fruits of the seller's fraud.[62]

An auctioneer's promise, made after the sale, to procure from the owner a written obligation to convey the premises to a bidder has been held entirely voluntary and without consideration.[63]

Counsel fees and expenses of sale cannot be recovered from an auctioneer by a purchaser recovering a deposit from him for a defect in the title.[64]

(2) Liability for Deposit

An auctioneer is responsible to the buyer for a deposit if the seller refuses or fails to complete the sale, if there is a defect in his title, or if the trade's failure of consummation is without the buyer's fault, or where the auctioneer materially misrepresented the property.

An auctioneer is responsible, as stakeholder, to the purchaser for money paid as a deposit, according to the terms of the sale, if the vendor refuses or fails to complete the conveyance or sale,[65] or

54. Del.—Hutchinson v. Gordon, 2 Del. 179
Mass.—Osgood v. Nichols, 5 Gray 420

55. Steckler v. Speuzza, 133 So. 382, 15 La. App. 485

56. Ingram v. Canal Bank & Trust Co., 127 So. 462, 13 La. App. 651.

57. Ingram v. Canal Bank & Trust Co., supra

58. Hayes v. D. P. S. Nichols Co., 64 Pa. Super. 273—6 C.J. p. 843 note 28

Implied warranty

Although the sale of goods by an auctioneer "as are" relieves him from any responsibility by way of warranty or for any defects in the condition of the thing sold, it nevertheless implies the existence of the thing sold in some condition and does not protect him if the subject of the sale is wholly different from what it is represented to be.—Ruben v. Lewis, 46 N.Y.S. 426, 20 Misc. 583

"Dealers' talk"

Owing to the nature of the circumstances under which auction sales occur, the rule that mere "dealers' talk" will not be construed as a warranty applies with peculiar force.—McGrew v. Forsythe, 31 Iowa 179

Representation held not warranty surviving acceptance.—Lewitus v. Brown & Seccomb, 239 N.Y.S. 261, 228 App. Div. 146.

Warranty by clerk

Where one was acting as a clerk of an auction sale, the fact of his employment and the exercise of the duties incidental thereto do not constitute him a warrantor of the title or ownership of the property sold at the sale.—Corn Lands Farms Co. v. Barcus, 182 N.W. 487, 105 Neb. 869, 23 A.L.R. 119
Authority to warrant see supra § 5 c

59. Ellson v. Wulff, 26 Ill. App. 616

60. Smith v. Hurley, 72 A. 705, 29 R.I. 489

61. Cal.—Spaulding v. O'Connor, 261 P. 766, 87 Cal. App. 82
La.—Ingram v. Canal Bank & Trust Co., 127 So. 462, 13 La. App. 651
Tenn.—Green v. Crye, 11 S.W. (2d) 869, 158 Tenn. 109
6 C.J. p. 843 note 30

Bill for misrepresentation as to title held not demurrable.—Green v. Crye, 11 S.W. (2d) 869, 158 Tenn. 109

Fraud not shown by reason of absence of cooking facilities in apartment building sold.—Millfield Realty Co. v. Joseph P. Day, Inc., 176 N.E. 330, 256 N.Y. 435, modifying Millfield Realty Co. v. Catena, 245 N.Y.S. 926, 231 App. Div. 832.

62. Gallagher v. Conner, 70 So. 539, 138 La. 633.

Liability for price of stolen property sold

When the clerk of an auction sale receives, as such clerk, money from the purchaser of stolen property sold at said sale, and pays the money to the person who offered and procured the sale of the same, believing him to be the true owner, and the purchaser, previous to the sale, knew who offered the articles for sale, and that he purported to be the owner thereof, the clerk was not liable to the purchaser for the amount so paid.—Corn Lands Farms Co. v. Barcus, 182 N.W. 487, 105 Neb. 869, 23 A.L.R. 119

63. Lee v. Clement, 135 A. 798, 103 N.J. Law 400

64. Millfield Realty Co. v. Joseph P. Day, Inc., 176 N.E. 330, 256 N.Y. 435, modifying Millfield Realty Co. v. Catena, 245 N.Y.S. 926, 231 App. Div. 832

65. Ga.—Lummus Real Estate Auction Co. v. Brown, 176 S.E. 693, 49 Ga. App. 592
Ky.—Noble v. Clarke, 283 S.W. 975, 214 Ky. 569
N.Y.—Gelman v. Joseph P. Day, Inc., 235 N.Y.S. 211, 227 App. Div. 607
Pa.—Rittenburg v. Freeman, 16 Pa. Dist. 8, 33 Pa. Co. 467.
6 C.J. p. 843 note 31

Bill of interpleader

If adverse claims arise as to the deposit money received by an auctioneer, one party insisting upon its return and the other on its being paid over, the auctioneer may file a

if there is a defect in the title of the vendor,[66] or if the failure of the trade to be consummated is without fault of the purchaser,[67] or where the auctioneer materially misrepresented the property sold.[68] However, if the purchaser pays to the auctioneer, in accordance with the terms of sale, a sum which is not a temporary deposit or an earnest to be forfeited on his failure to comply with the terms of the contract, but a portion of the purchase price, and which is immediately turned over to the seller, the purchaser cannot recover such sum from the auctioneer;[69] nor can he recover from the auctioneer, as a deposit, money paid not to him but to the seller, and turned over by the seller to the auctioneer in payment of his services.[70]

(3) Sale for Undisclosed Principal

An auctioneer failing to disclose the name of his principal is personally responsible as vendor, provided the contract would be valid as against the principal if authorized.

An auctioneer is personally responsible as vendor, unless at the time of the sale he discloses the name of his principal, since his general employment as auctioneer is not per se notice that he acts as agent.[71] To make the auctioneer liable, the unauthorized contract must be one which the law would enforce against the principal if it had been authorized by him.[72]

c. To Persons Other than Buyer and Seller at Auction

An auctioneer selling property for one without title is liable to the real owner for conversion, even where he acts in good faith and without knowledge of the lack of title. An auctioneer dealing as a purchaser without disclosing his principal is personally bound, even though known as an auctioneer. Statutes requiring auctioneers to collect duty on auction sales have been applied and construed.

Since, as stated in § 6 supra, an auctioneer is an agent, and as such is subject to the general rules relating to the liability of an agent for wrongful acts to third persons,[73] an auctioneer who sells property for one who has no title and pays over to his principal the proceeds is liable to the real owner for the conversion, even though such auctioneer acts in good faith, and without knowledge of the lack of title,[74] and must look to his principal

bill of interpleader—Bleeker v Graham, 2 Edw (N.Y.) 647

Delay in bringing suit

The fact that the successful bidder at an auction sale delays several years after the vendor's default before bringing suit against the auctioneer for the deposit made at the time of the sale does not estop him from recovering same—Merritt v Archer, 148 N.Y.S. 1008, 163 App.Div. 648, reversing 143 N.Y.S. 935, 82 Misc. 515

Retention of money as commission

The rule stated in the text applies "notwithstanding the auctioneer has retained the money, with the consent of the owner, as a payment upon the auctioneer's commission"—Lummus Real Estate Auction Co. v Brown, 176 S.E. 693, 694, 49 Ga.App. 592

Allowing seller default judgment

The auctioneer is accountable for allowing a default judgment against him in an action brought by the seller after the purchaser notified the auctioneer to hold the deposit as stakeholder on the seller's inability to deliver a proper deed—Gelman v Joseph P. Day, Inc., 235 N.Y.S. 211, 227 App.Div. 607

Auctioneer as stakeholder with respect to deposit see supra § 7 f.

Rights as to deposit generally see supra § 8 g

68. Millfield Realty Co. v Joseph P. Day, Inc., 176 N.E. 830, 256 N.Y. 435, modifying Millfield Realty Co. v Catena, 245 N.Y.S. 926, 231 App.Div. 832.

Auctioneer's knowledge of defect

"When the purchaser at an auction sale deposits with the auctioneer a sum of money, to be applied on the purchase price, and the auctioneer has knowledge or information of a defect in the title of the seller which will prevent him from completing the sale, the auctioneer is liable to the purchaser for the return of the deposit, even though, prior to demand and suit, he has delivered the deposit to the seller for whom he was acting as agent"—Green v Crye, 11 S.W. (2d) 869, 870, 158 Tenn. 109

Guaranty of title by auctioneer

A statement in an advertisement that "the purchaser makes the price, the owner makes the deed," held a mere slogan to confirm the sale as one in which the highest bid would be accepted, and not a guaranty that a good and sufficient deed will be made—Noble v Clarke, 283 S.W. 975, 214 Ky. 569.

67. Gossage v. Waddle, 18 S.W. (2d) 975, 230 Ky. 148.

68. Kassoy v Freeman, 16 Pa.Dist. 16, 33 Pa.Co. 470—Rittenburg v Freeman, 16 Pa.Dist. 8, 33 Pa.Co. 467

Particular misrepresentations

(1) As to the material of which a building was constructed—Rittenburg v Freeman, 16 Pa.Dist. 8, 33 Pa.Co. 467.

(2) As to the number of rooms in the property sold—Kassoy v Freeman, 16 Pa.Dist. 16, 33 Pa.Co. 470.

69. Gossage v. Waddle, 18 S.W. (2d) 975, 230 Ky. 148.

70. Noble v Clarke, 283 S.W. 975, 214 Ky. 569

71. N.Y.—Held v Bryan L. Kennelly, Inc., 208 N.Y.S. 503, 124 Misc. 547

Pa.—Hayes v. D. P. S. Nichols Co., 64 Pa.Super. 273

6 C.J. p. 844 note 33

Auctioneer as "seller" within statute

An auctioneer not revealing the name of owner or disclosing the fact that goods were not his own, and billing goods in his own name, was a "seller," within a statute, regulating the seller's duty in shipping for the buyer, and in shipping, as authorized by the buyer, was required to exercise the care required of any vendor so authorized—Rich v. Karp, 179 N.Y.S. 583, 110 Misc. 344

Where an auctioneer discloses the fact of his agency and his principal, the law presumes that he has not contracted on his own behalf, but for the principal—Mercer v Leihy, 102 N.W. 972, 139 Mich. 447

72. Baltzen v Nicolay, 53 N.Y. 467

73. Levy Bros. & Adler, Rochester v Karp, 209 N.Y.S. 720, 124 Misc. 901

74. Levy Bros. & Adler, Rochester v. Karp, supra—6 C.J. p. 844 note 36

Reason for rule

"The principal had no title to the property and could confer none upon the auctioneer, nor authority to sell the goods. Both were without

for indemnity [75] Of course, an auctioneer is liable to the true owner for the proceeds of a sale if he sells with knowledge, or under circumstances which charge him with knowledge, that the property does not belong to his principal,[76] but if he has advanced money upon goods obtained fraudulently, without notice of the fraud, he may retain the goods as against both the vendor and his creditors [77]

An auctioneer selling goods by order of a sheriff and receiving the money for the same, is accountable only to the sheriff and cannot be held as the trustee of those who may have claims on the sheriff for the proceeds.[78]

An auctioneer employed by the assignee of a chattel mortgage to conduct a foreclosure sale owed the duty to conduct a proper sale, and, having given notice to the mortgagor as required by the mortgage, he breached no legal duty he owed the mortgagor.[79]

Auctioneer as purchaser. An auctioneer dealing in his own name as a purchaser, without disclosing the name of his principal, is personally bound by his contract, even though he is known to the other party as an auctioneer, who is usually employed in selling property as the agent of others [80]

Collection of auction duty. State statutes imposing a duty on auction sales, and making the auctioneer responsible to the state for the collection of such duties, have been applied or construed in several cases [81]

§ 14. Actions by or against Auctioneers in General

An auctioneer may ordinarily sue for personal property or the purchase price thereof, or for his fees, but is not ordinarily entitled to recover the price of real estate. In varying circumstances, he may or may not sue for a deposit.

Since, as appears in § 13 a supra, an auctioneer is liable to the seller for money paid him by purchasers, and, as appears in § 12 supra, has a lien on the property for his commissions and charges of sale, he may, ordinarily, in the case of personal property, maintain an action in his own name for the purchase price thereof,[82] or for the property itself,[83] even though the owner of the property is known. In the case of real estate, however, an auctioneer is not ordinarily entitled to recover the price,[84] nor may he sue in his own name to recover a deposit to be held by him as security against loss, where no loss or damage is shown;[85] but when the terms of his employment and of the authorized sale contemplate the payment of a deposit into his hands at the time of the auction, he may sue for the deposit in his own name, whenever an action for the deposit, separate from the other purchase money, may become necessary [86]

Set-off against price A purchaser at auction may set off against the auctioneer, suing for the price, a debt due to him by the owner of the goods [87]

Fees. An auctioneer may sue in his own name for fees which the terms of sale require to be paid him by the purchaser,[88] but his right to recover

authority, and the act of the auctioneer was a wrongful one He cannot hide behind his agency This neither increases nor decreases his liability nor varies the rule of law that every tort-feasor is liable jointly and severally for his act The claim that he acted in good faith is no excuse, nor that he acted in the usual course of business or innocently. . . . His intent does not vary the rule of liability An auctioneer must be on his guard against selling personal property for one merely having possession and not being the rightful owner"—Levy Bros & Adler, Rochester v Karp, 209 N Y S. 720, 721, 124 Misc 901.

75. Levy Bros & Adler, Rochester v Karp, supra

76. U S—Morrow Shoe Mfg Co v New England Shoe Co. (Ill) 57 F 635, 6 C C A 508, 24 L R A 417.
Md—Higgins v. Lodge, 11 A. 846, 68 Md 229, 6 Am S R. 437.
6 C J. p 844 note 38.

77. Md—Higgins v Lodge, 11 A. 846, 68 Md. 229, 6 Am.S R. 437.
Mo—Lewis v Mason. 8 S W 735, 5 S W 911, 94 Mo 551.
6 C J p 844 note 39

78. Penniman v Ruggles. 6 Mass 166—6 C J p 845 note 40.

79. Freed v Rosenthal, 121 N E 72, 231 Mass 357

80. Held v Bryan L Kennelly Inc, 208 N Y S 503, 124 Misc 547

81. Cal—State v. Poulteier, 16 Cal 514
La—State v. Girardey, 34 La Ann 620
Mass—Sewall v Jones, 9 Pick. 412
N Y—People v. Wilmerding, 136 N Y 363, 32 N E 1099
Pa—Dallas v. Chaloner, 3 Dall. 500, 1 L Ed 696.
6 C J p 845 note 41.
Taxes see supra § 5 e.

82. Progress Blue Ribbon Farms v. Chicago Horse Sales Co, 140 N W 1132, 153 Wis 249—6 C.J. p 841 note 6

Right subordinate to that of principal

It has been held that the auctioneer's authority to sue is subject to the right of the principal to take the collection into his own hands and to sue in his own name—Girard v Taggart, 5 Serg & R (Pa) 19, 9 Am D 327

83. Thompson v Kelly, 101 Mass 291, 3 Am R. 353—6 C J. p 841 note 7

Replevin

An auctioneer who sells and delivers goods on a condition which is not complied with may maintain replevin therefor—Tyler v Freeman, 3 Cush (Mass) 261

84. Mass—Thompson v. Kelly, 101 Mass 291, 3 Am R 353
Pa—Freeman v. Tabas, 140 A. 147, 291 Pa 448

85. Freeman v Tabas, supra

86. Mass—Thompson v. Kelly, 101 Mass 291, 3 Am R 353
Pa—Freeman v. Lieberman, 52 Pa Super 426
6 C J p 842 note 8.

87. Blum v Torre, 22 S C L. 153—6 C J p 838 note 77.

88. N J—Johnson v. Buck, 35 N J. Law 338, 10 Am R 243.

will depend on the validity of the contract to purchase as between buyer and seller.[89]

§ 15. Penalties for Violation of Regulations

Penalty for violation of license requirements see supra § 5 a Penalty for sale by unlicensed auctioneer see supra § 7 j. Examine Pocket Parts for later cases.

§ 16. Bonds of Auctioneers and Actions Thereon

a. In general
b. Action on bond

a. In General

Statutes or ordinances requiring bonds of auctioneers have been applied and interpreted A surety's liability on an auctioneer's bond depends on its condition, and a surety may be liable to an auctioneer's employer for proceeds which he fails to pay over.

Statutes or ordinances requiring an auctioneer to give a bond, with one or more sureties, conditioned upon the faithful performance of his duty, have been applied and interpreted in several cases.[90] Such bond must conform in its provisions to the ordinance or statute governing it.[91]

Liabilities on bond. The liability of a surety on a bond required of an auctioneer depends upon the condition of the bond; it is never more extensive than the obligation which it imposes.[92] Such bonds are usually available to protect the government against violations of its regulations concerning auctioneers, and to protect individuals who have intrusted property to an auctioneer for sale,[93] they have no relation to the purchase and sale of property by an auctioneer on his own account.[94] Since, however, as appears in § 13 a supra, it is the duty of an auctioneer to account to his employer for the proceeds of a sale made by him, sureties on his bond which is conditioned that he will do whatsoever the law requires are liable to his employer for the proceeds of a sale which he wrongfully fails to pay over,[95] which liability accrues immediately upon the auctioneer's default in failing to pay over the proceeds.[96]

Sureties on such bonds have been held discharged in some circumstances[97] and not in others[98]

N Y—Muller v. Maxwell, 15 N Y Super. 355—Bleecker v. Franklin, 2 E.D Smith 93

89. Johnson v. Buck, 35 N J Law 338, 10 Am R 243

90. Preiser v Solomon, 170 N.Y S 307—6 C J p 845 note 42.

Part of affirmative case

Under a statute providing that no person shall act as auctioneer of personal property in any city until a bond is filed and a certificate of appointment as such auctioneer obtained, one suing for breach of a contract of hiring as auctioneer is under the duty of pleading and proving such registration as part of his affirmative case, and it is immaterial that the point was not raised upon the trial—Preiser v Solomon, 170 N.Y S 307.

91. Georgetown v. Baker, (D C) 10 F Cas No 5,342, 2 Cranch C C. 291—6 C J. p 845 note 43

92. Charleston v. Paterson, 18 S C L. 165.

93. Moser v Bankers' Surety Co, 95 N Y S 609, 109 App Div 172—6 C J. p 845 note 49 [a]

94. Moser v. Bankers' Surety Co, supra—6 C J p 845 note 46

95. Saul v U S Fidelity, etc, Co, 75 N Y S 615, 71 App.Div. 77—6 C J. p 845 note 47.

Bond against fraud

A bond, however, designed by the provisions of a statute as security against frauds and fraudulent practices committed upon purchasers at auction sales, does not embrace the fraud of an auctioneer in converting to his own use the proceeds of goods consigned to him for sale—Viadero v. Stacom, 12 N Y St. 114, 14 Daly 345.

Defenses

(1) Where an owner of personal property sold at auction had a secret agreement with the auctioneer that the property should not be sold except for a bid satisfactory to the owner, and it was not disputed that the property was actually sold to the highest bidder, and there was no claim that the owner made use of a "puffer" to raise the price of the property, such agreement is no defense to an action by the owner of the property on the auctioneer's bond to recover the proceeds of the sale which the auctioneer has not turned over to the owner—Gregory v. U S Fidelity, etc., Co, 91 N Y. S 595, 45 Misc 112

(2) A surety cannot object that the bond was invalid in that the principal had not taken out a license as required by statute—State v Blohm, 26 La Ann. 538—6 C.J. p 845 note 47 [d] (2).

(3) A corporation and the surety on its bond as auctioneer are estopped to set up the defense, in an action on the bond, that the corporation could not lawfully become an auctioneer—Lyon v. Stern, 34 So. 641, 110 La 473.

96. Plummer v. Bankers' Surety Co, 101 N Y S 529, 52 Misc. 97—6 C J. p 845 note 48.

Duration of liability

The liability of an auctioneer commissioned for one year, and of his sureties under a bond to perform, etc, "during the period he shall continue to act as an auctioneer under the commission that may be granted to him," continues while he acts as auctioneer, and does not expire in one year—Daly v Commonwealth, 75 Pa. 331, 333—6 C J. p 845 note 48 [a].

97. **Sureties held discharged**

(1) Where an auctioneer's license is void because not under the corporate seal, as required by ordinance, a surety on the bond given before the issuance of the license is not liable, although the auctioneer continued to act as such throughout the year—Georgetown v Baker, (D C) 10 F.Cas No 5,342, 2 Cranch C C. 291

(2) Where goods had been sold by the auctioneer for cash, and the owner, with the consent of the auctioneer's sureties, accepted the purchaser's notes in payment, the sureties were discharged—Mouton v. Noble, 1 La Ann. 192

98. **Sureties held not discharged**

(1) The neglect of a city treasurer to call on an auctioneer to render an account of his sales does not discharge the auctioneer's sureties from their liability—Charleston v. Paterson, 18 S C L. 165

(2) A discharge in bankruptcy of an auctioneer does not discharge the sureties on his official bond.—Jones v. Russell, 44 Ga. 460.

b. Action on Bond

The party first bringing suit on an auctioneer's bond is entitled to priority of payment. In such actions, the sufficiency of a complaint and of evidence have been adjudged, and the bond and license held presumed to have been given the same day.

A person who intrusts an auctioneer with the sale of goods, and who has a claim against him for money arising from the sale, may apply for and direct a suit on the auctioneer's bond even though the ordinance requiring the bond did not authorize any person in particular to sue upon it.[99] The party first bringing suit on the bond is entitled to priority of payment, although he may not obtain judgment first.[1]

Particular complaints in an action against a surety on an auctioneer's bond have been held to sufficiently aver that the auctioneer was licensed for a particular year,[2] and, in such an action, evidence has been held insufficient to show a sale of goods by the auctioneer at auction,[3] and it has been held to be presumed, in the absence of evidence to the contrary, that the bond and license were given the same day, the execution of the former preceding the granting of the latter.[4]

§ 17. Offenses by Auctioneers

A count for violating an ordinance must charge facts bringing the accused within its purview. The admissibility of evidence has been adjudged under a particular ordinance.

A count for the violation of an ordinance regulating jewelry auctions, in that the auctioneer failed to make and file affidavit and report, is demurrable if it fails to charge facts bringing the accused within the purview of the ordinance.[5] Under the language of a particular ordinance, it has been held that evidence showing that an auction had been carried on continuously at the accused's auction rooms for more than thirty days would be admissible if followed up with other proof to show that such continuous sale was a sale of the goods of the same merchant.[6]

Sale by unlicensed auctioneers is considered in § 7 j supra.

AUCTOR. He who promotes the prosperity, increase, or existence of any object, whether he first originates, makes, or creates it, or by his efforts gives greater permanence or continuance to it. Translated into English according to the object, for example, creator, maker, author, inventor, producer, father, founder, teacher, composer, cause, voucher, principal, leader, head, etc.[1]

In the civil law, a principal; a vendor, grantor, assignor, since he gives security for his ownership of an object to be sold, granted, or assigned, and transfers it to the purchaser.[2]

In the Roman law, an auctioneer.[3]

In old French law, a plaintiff.[4]

AUCTORES DICUNTUR A QUIBUS JUS IN NOS TRANSIIT.[5]

AUCTORITAS. The quality of "auctor;" and hence it takes the various significations of that word.[6] In the civil law, authority.[7] In the Roman and civil law, right of possession.[8] In old European law, a diploma, or royal charter.[9]

AUCTORITATES PHILOSOPHORUM, MEDICORUM ET POETARUM SUNT IN CAUSIS ALLEGANDÆ ET TENENDÆ.[10]

99. McMechen v. Baltimore, 2 Harr & J (Md.) 41

1. McKean v. Shannon, 1 Binn. (Pa.) 370—6 C J p 846 note 50

2. Saul v. U. S. Fidelity, etc., Co., 75 N Y S 615, 71 App Div 77.

3. Walker v U S Fidelity & Guaranty Co., 280 P. 387, 100 Cal App 531

4. McMechen v Baltimore, 2 Harr & J (Md.) 41.

5. Billig v. State, 145 A. 492, 157 Md 185.

6. Billig v State, supra.

1. Adams Gloss.

2. Adams Gloss.

Auctor in rem suam—a judge, an adviser, a principal in his own affairs; one who gives authority, or grants any deed, etc., for his own behoof.—Adams Gloss

"Auctor 'primus' and 'secundus'"

Sometimes the jurists make a distinction between an "auctor primus" and "auctor secundus," the former is the seller himself, the latter the bail, security, whom the former brings.—Adams Gloss.

3. Black L. D.

4. Black L. D.

5. A maxim meaning, "They are called principals (or grantors) from whom a right is transferred in us."—Adams Gloss.

Also translated "They from whom a right has passed over in us are called (or named) 'auctores,' i. e. principals or grantors."—Adams Gloss., citing Broom Max. p 450 note 2

6. Adams Gloss.

7. Black L. D.

Auctoritas populi—the authority of the people, the popular will or decision.—Adams Gloss.

Auctoritas prudentum—the authority of jurists or jurisconsults.—Adams Gloss.

Auctoritas tutoris—the authority of a tutor.—Adams Gloss., citing Mackeldey Civ.L. (1883 ed.) § 629.

8. Adams Gloss.

9. Black L. D.

10. A maxim meaning "The opinions of philosophers, physicians, and poets are to be alleged and received in causes."—Bouvier L. D.

AUCUPIA VERBORUM SUNT JUDICE INDIGNA.[11]

AUDI ALTERAM PARTEM.[12]

AUDIBLE. Capable of being heard; actually heard,[13] as in the phrase "suitable and audible signal."[14]

AUDIENCE. In international law, a hearing; interview with the sovereign.[15]

AUDIENCE COURT. A court belonging to the Archbishop of Canterbury, having jurisdiction of matters of form only, as the confirmation of bishops and the like This court has the same authority with the court of arches, but is of inferior dignity and antiquity.[16]

AUDIENCIA. In Spanish law a term used in several senses. (1) The superior court of one or more provinces representing the king in the administration of justice and reviewing causes from the inferior courts of the territory included. Sometimes, especially in the colonies, it has exercised administrative as well as judicial functions, for example, conducting examinations for clerks of courts.[17] Causes determined by an audiencia are reviewable by the tribunal supremo in Madrid. A report is required from each as to the number and character of causes determined and as to the state of judicial business.[18] (2) The place or building where the sessions of the audiencia are held.[19] (3) The sessions of the audiencia.[20] (4) The territorial jurisdiction of the audiencia.[21]

Audiencia plena refers to the group of justices composing court.[22]

AUDIENDO ET TERMINANDO. A writ or commission to certain persons to appease and punish any insurrection or great riot [23]

AUDION. Since 1916, a trade mark name for radio telephones and telegraph apparatus. Prior to that time, it was a word of quite common use, defined as meaning a small vacuum tube used to detect wireless waves [24] The art, however, has given the word a somewhat more definite meaning, and, as so used, it is understood to mean a highly evacuated glass tube containing a cathode, usually a filament, capable of being heated by electric current, an anode or plate, to receive the current from the cathode, and an intervening grid or shutter, all of which are capable of connections outside the bulbs.[25]

Phrase: "Oscillator of the audion type."[26]

AUDIT.

As Noun

It has been said that the true meaning of the word in a particular case is to be ascertained from the context, all surrounding facts, and the purpose to be accomplished, that sometimes it is restricted in meaning to a check-up of the correctness of the account or claim and excludes any element of discretion on the part of the auditor;[27] that, at other times, it may embrace not only an examination of accounts and a comparison of charges with vouchers, but also an allowance or rejection of charges and a statement of balance for the purpose of determining the amount, if any, to be paid thereon,[28] involving an exer-

11. A maxim meaning "Catching at words is unworthy of a judge" —Bouvier L D.
Applied in State v. Flemming, 66 Me 142, 151, 22 Am R 552

12. A maxim meaning.
(1) "Hear the other side."—Peloubet Leg Max
(2) "No man should be condemned unheard"—Broom Leg Max
Applied in State ex rel Graff v N. O Lighting Co, 2 La App (Orleans) 269, 272—6 C J p 846 note 3 [a]

13. Swinkels v. Wisconsin Michigan Power Co, (Wis) 267 N W 1, 4, quoting Webster New Int D

14. Swinkels v. Wisconsin Michigan Power Co, supra.

15. Black L. D
The king or other chief executive of a country grants an audience to a foreign minister who comes to him duly accredited, and, after the recall of a minister, an "audience of leave" ordinarily is accorded to him —Black L. D.

16. Black L D
The dean of the arches is the official auditor of the audience court The Archbishop of York has also his audience court—Black L D

17. Novisima Recopilación lib IV tit I ley 1, lib V tit I ley 10, lib XI tit XX leyes 8, 10, 15
See also Escriche Diccionario; U S v Padilla, 4 Philippine 511, 516.
So the audiencia of Manila, organized in 1583, was for a time vested with the executive and legislative power in the Philippines—Barrows Hist Philippines.

18. Reglamento Provisional art 85—Escriche Diccionario.

19. Escriche Diccionario.
In Manila
For example, the court building in Manila is still known as the "Audiencia," although the court itself has been superseded—Escriche Diccionario

20. Escriche Diccionario.

21. Escriche Diccionario.

22. Escriche Diccionario.

23. Black L D, citing Fitzherbert Nat Brev. p 110.

24. Arnold v Langmuir, (Cust. & Pat App) 36 F (2d) 834, 837, quoting New Standard D
In 1916, L. De Forest used the name in his application for the basic patent on vacuum tube oscillators—Arnold v. Langmuir, (Cust & Pat. App) 36 F (2d) 834, 837.

25. Arnold v. Langmuir, supra

26. Arnold v. Langmuir, supra

27. Ala—Adams v Adams, 159 So 80, 83, 229 Ala. 588
N Y—Brennan v. Berry, 222 N Y S. 355, 358, 129 Misc 671.
Wis—Rinder v City of Madison, 158 N W 302, 305, 163 Wis. 525

28. Ala—Adams v. Adams, 159 So. 80, 82, 229 Ala 588
N D—State v Kositzky, 166 N W 534, 537, 38 N D. 616, L R A 1918D 237.

cise of discretion by the auditing officer or board;[29] and that, under other circumstances, it may imply distinct functions and duties and their vesting in different auditing officials or boards, being used, when applied to one, in the sense of inquiring into, hearing evidence upon, adjusting, correcting, and settling details, determining the correctness of charges made, and certifying the correct result to another official or board, and, when applied to this official or board, in the sense of determining and designating the fund against which the charges should be made and upon which warrants for their payment should be drawn.[30] The term necessarily implies the auditor's knowledge of the audited claim and its presentation to him for audit,[31] its examination, and the consideration of facts relative thereto by him.[32]

The noun has been defined as meaning an examination into accounts or dealings with money or property, especially an examination by proper officers or persons appointed for that purpose who compare the charges with the vouchers, examine witnesses, and state the results; an official verification of accounts or claims;[33] a hearing, a hearing on examination;[34] an adjustment;[35] an audience;[36] an investigation;[37] an official examination of the account, comparing the vouchers with the charges and fixing the balance.[38]

Balance-sheet audit. An audit in which the accountant strikes a general balance of the assets and liabilities of the business as reflected from the inventories, the books, and bank and other accounts kept by the regular officers and employees of that business, all of which he assumes to be correct.[39]

Other phrases: "Audit and payment,"[40] "audit of the board of education,"[41] "audit of the books,"[42] "audit refused for lack of jurisdiction,"[43] "complete audit,"[44] "detailed audit,"[45] "for final audit, approval, and payment,"[46] "inspection and audit,"[47] "submitted by law . . . for audit,"[48] and "to a special master for audit and report."[49]

As Verb

While the term is infrequently used to denote a mere mathematical process of verifying figures and making computations—the work of a mere accountant,[50] it is generally extended to include the investi-

29. State v. Kositzky, supra.

Where amount is fixed by law an exercise of discretion by the auditor is not involved.—State v Kositzky, 166 N.W. 534, 537, 38 N.D. 616, L.R.A.1918D 237—McCoy v Handlin, 153 N.W. 361, 369, 35 S.D. 487, L.R.A. 1915E 358, Ann.Cas.1917A 1016.

30. State v Thompson, (Mo.) 85 S.W.(2d) 594, 599

31. Lupfer v State, 194 N.Y.S. 171, 174, 118 Misc. 601

32. Rio Grande County v Bloom, 59 P. 417, 419, 14 Colo.App. 187.

33. Byrne's Case, 34 Pa.Co. 513, 521, quoting Century D.

Similar definitions

(1) "A formal or official examination and authentication of accounts, with witnesses, vouchers, etc."—Green-Boots Const. Co v State Highway Commission, 25 P.(2d) 783, 785, 165 Okl. 233, quoting Webster D.

(2) "An examination and allowance of accounts."—People v Green, 5 Daly (N.Y.) 194, 200—State v Morris, 45 S.E. 178, 183, 67 S.C. 153

(3) "An examination of accounts."—Clement v. Lewiston, 53 A. 984, 985, 97 Me. 93

6 C.J. p. 846 note 15.

"Examination" compared

"An audit is more comprehensive, yet an audit includes an examination."—Judith Basin County v. Livingston, 293 P. 356, 358, 89 Mont. 438.

Loose use

It has been said that "audit" is sometimes used loosely as the equivalent of authentication or approval.—People ex rel. Desiderio v Connolly, 144 N.E. 629, 631, 238 N.Y. 326.

34. N.Y.—People v Bd. of Town Auditors, 26 N.Y.S. 122, 124, 74 Hun 83.

Wyo.—Territory v. Grant, 21 P. 693, 3 Wyo. 241.

35. People v. Bd. of Town Auditors, 26 N.Y.S. 122, 124, 74 Hun 83—6 C.J. p. 846 note 14

Adjustment based on compromise

"Audit" may imply an adjustment based on compromise necessarily involving an approximation of the amount justly due where the claim is unliquidated.—Brennan v Berry, 222 N.Y.S. 355, 357, 129 Misc. 671.

36. Green-Boots Constr. Co v State Highway Commission, 25 P.(2d) 783, 165 Okl. 233, quoting Webster D.

37. Travelers' Ins. Co. v Pierce Engine Co., 123 N.W. 643, 644, 141 Wis. 103.

38. Iowa.—Fuller & Miller Hardware Co. v. Shannon & Willfong, 215 N.W. 611, 613, 205 Iowa 104

Tex.—Williams v Tompkins, (Civ. App.) 42 S.W.(2d) 106, 110.

39. Ronaldson v Moss Watkins, Inc., 127 So. 467, 470, 13 La.App. 350

"Detailed or complete audit" distinguished

The "detailed or complete audit" requires the accountant to make his own independent investigation into the physical property and assets as well as all papers, books, accounts, etc., of the business. In making it, he takes nothing for granted.—Ronaldson v Moss Watkins, Inc., 127 So. 467, 470, 13 La.App. 350.

40. Lupfer v State, 194 N.Y.S. 171, 174, 118 Misc. 601

41. Brennan v. Berry, 222 N.Y.S. 355, 357, 129 Misc. 671

42. Adams v Adams, 159 So. 80, 82, 229 Ala. 583

43. O'Neil v State, 119 N.E. 95, 96, 223 N.Y. 40

"Claim submitted, audited and rejected" distinguished.—O'Neil v. State, 119 N.E. 95, 96, 223 N.Y. 40.

44. Ronaldson v Moss Watkins, Inc., 127 So. 467, 470, 13 La.App. 350.

45. Ronaldson v. Moss Watkins, Inc., supra

46. Fuller & Miller Hardware Co v. Shannon & Willfong, 215 N.W. 611, 613, 205 Iowa 104

47. U. S. v. A. Bentley & Sons Co., (D.C.Ohio) 293 F. 229, 239

The phrase necessarily implies the right to inspect books, records, and papers for the purpose of checking up and verifying the transactions in question.—U. S. v. A. Bentley & Sons Co., (D.C.Ohio) 293 F. 229, 240.

48. O'Neil v. State, 119 N.E. 95, 96, 223 N.Y. 40.—Lupfer v State, 194 N.Y.S. 171, 173, 118 Misc. 601.

49. Conover v. West Jersey Mortg. Co., 126 A. 855, 861, 96 N.J.Eq. 441.

50. Ind.—Elsold v. Board of Com'rs of Huntington County, 141 N.E. 617, 620, 82 Ind.App. 655.

gation, weighing of evidence, and deciding whether items should or should not be included,[51] or, as applied to a claim, whether it should be allowed or disallowed in toto or in part,[52] and it has been held that the word, as generally used, implies an official examination,[53] usually a hearing,[54] the exercise of judicial discretion,[55] and jurisdiction vested in the auditing official.[56]

The verb has been specifically defined as meaning to compare charges with vouchers, to examine accounts, or to examine in general;[57] to adjust, to allow or reject, to ascertain, to decide, to determine, to pass upon, or to settle;[58] to digest, to examine and adjust, to examine and adjust an account, to examine and digest, to examine and verify, or to verify;[59] to examine, settle, and adjust accounts—to verify the accuracy of the statement submitted to the auditing officer or body;[60] to hear, to hear and examine,[61] to hear, and upon the hearing to adjust, allow or reject or otherwise decide according to the nature of the claim, or to hear, examine, adjust, pass upon and settle an account and then allow or reject it.[62] In actual practice, therefore, to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit; and then, after the debit and credit are thus made up, to ascertain the balance remaining in his hands;[63] to examine an account, compare it with the vouchers, adjust the same, and to state the balance, by persons legally authorized for the purpose.[64]

Phrases: "Audit, adjust and settle all accounts,"[65] "audit or allow,"[66] "duty to 'audit' such claims,"[67] "hear, audit and determine,"[68] "neither audit nor allow,"[69] "neither audit nor allow any private claim,"[70] "power to audit,"[71] "prayer . . . that the commissioners audit the demand,"[72] "shall audit all accounts,"[73] "shall audit and allow all just claims,"[74] "shall audit and state the accounts,"[75] "shall not

N.Y.—Brennan v Berry, 222 N.Y.S 355, 358, 129 Misc 671
Wis.—Travelers' Ins Co. v. Pierce Engine Co., 123 N.W 643, 644, 141 Wis 103.

51. N.Y.—Brennan v Berry, 222 N Y.S 355, 358, 129 Misc 671
Wis.—Travelers' Ins Co. v Pierce Engine Co., 123 N.W. 643, 644, 141 Wis. 103
6 C.J. p 848 note 50.

52. U.S.—U S v A Bentley & Sons Co., (D C Ohio) 293 F 229, 240.
Ind.—Etsold v Board of Com'rs of Huntington County, 141 N.E 617, 620, 82 Ind App 655
N.Y.—Colbert v Delaney, 291 N.Y.S 801, 809, 249 App Div. 209
Okl.—Green-Boots Const Co v State Highway Commission, 25 P (2d) 783, 785, 165 Okl 288
Wash.—State v. Wheeler, 263 P. 946, 948, 146 Wash 513.
6 C.J. p 847 note 47.

What constitutes

"The examination and consideration of all the items of a claim constitutes an audit, though some items may be allowed and others rejected"—U. S. v A Bentley & Sons Co., (D C. Ohio) 293 F 229, 240

53. Williams v. Tompkins, (Tex Civ. App.) 42 S.W.(2d) 106, 110.

54. U. S v. A Bentley & Sons Co., (D C Ohio) 293 F 229, 240

55. Ind.—Etzold v Board of Com'rs of Huntington County, 141 N.E 617, 620, 82 Ind.App 655
N.Y.—Brennan v Berry, 222 N.Y.S 355, 358, 129 Misc 671.
6 C.J. p 848 note 48.

56. Williams v. Tompkins, (Tex.Civ. App.) 42 S.W.(2d) 106, 110.

57. Me.—Clement v Lewiston, 53 A 984, 985, 97 Me 95.
N.Y.—Colbert v. Delaney, 291 N.Y.S. 801, 809, 249 App Div 209.
6 C.J. p 846 note 27, p 847 note 31

58. Ind.—Etsold v. Board of Com'rs of Huntington County, 141 N.E 617, 620, 82 Ind App 655
Wash.—State v Wheeler, 263 P. 946, 948, 146 Wash 513
6 C.J. p 846 notes 24, 25, 26, 28, 29, p 847 notes 42, 44.

Similar definition

"To pass upon and adjust."—In re Murphy, 24 Hun 592, 594, affirmed 86 N.Y. 627.

59. U.S.—U S. v. A Bentley & Sons Co., (D C Ohio) 293 F 229, 240
N.J.—In re Heath, 33 A. 46, 47, 52 N.J Eq 807.
N.Y.—Brennan v. Berry, 222 N.Y.S 355, 358, 129 Misc 671.
Wash.—State v. Wheeler, 263 P. 946, 948, 146 Wash. 513
6 C.J. p 847 notes 32, 33, 45.

60. Ford v. Springer Land Assoc., 41 P. 541, 550, 8 N.M 37, affirmed 18 S.Ct 170, 168 U.S 513, 42 L.Ed 562—6 C.J. p 847 note 35.

61. McGuire v. Iowa County, 111 N.W 34, 36, 133 Iowa 636—6 C.J p 847 notes 37, 38.

62. N.Y.—O'Neil v. State, 119 N.E 95, 96, 228 N.Y 40—Colbert v. Delaney, 291 N.Y.S. 801, 809, 249 App Div 209—Lupfer v State, 194 N.Y S 171, 174, 118 Misc 601
Wash.—State v Wheeler, 263 P. 946, 948, 142 Wash 513
6 C.J. p 847 notes 39, 40.

Similarly expressed

(1) "To hear and examine, and thereupon to allow or reject."—People ex rel Desiderio v. Conolly, 144 N.E. 629, 631, 238 N.Y. 326.

(2) "To hear, determine, and adjust or certify"—Williams v Tompkins, (Tex Civ App.) 42 S.W (2d) 106, 110

(3) "To hear, examine, and adjust, or certify."—Fuller & Hiller Hardware Co v Shannon & Willfong, 215 N.W. 611, 613, 205 Iowa 104

63. Conover v West Jersey Mortg Co., 126 A 855, 861, 96 N.J Eq 441—In re Heath, 35 A. 46, 47, 52 N.J Eq 807.

64. Machias River Co v. Pope, 35 Me 19, 22.

65. State v Thompson, (Mo.) 85 S. W (2d) 594, 599

66. Munro v State, 168 N.Y.S 61, 62, 181 App Div. 30

67. Rinder v. City of Madison, 158 N.W. 302, 305, 162 Wis 525.

68. Munro v State, 168 N.Y.S. 61, 62, 181 App Div. 30

69. Munro v. State, supra.

70. People's Gas & Electric Co. v City of Oswego, 202 N.Y.S. 243, 244, 207 App Div 134.

"Require a release of all outstanding claims" distinguished.—People's Gas & Electric Co v City of Oswego, 202 N.Y.S. 243, 248, 207 App Div. 134.

71. People ex rel Desiderio v. Conolly, 144 N.E 629, 631, 238 N.Y. 326

72. People ex rel. Desiderio v. Conolly, supra

73. Williams v Tompkins, (Tex.Civ. App.) 42 S.W (2d) 106, 109.

74. Green v. Spencer, 25 N.W. 681, 67 Iowa 410.

75. Conover v. West Jersey Mortg.

audit . . unless an appropriation . . has been made,"[76] and "shall regulate and audit,"[77] also "all such claims . . . shall be audited,"[78] "audited and allowed according to law,"[79] "audited and allowed by the board of supervisors,"[80] "audited by the company,"[81] audited by the comptroller,"[82] "audited by the county board of health,"[83] "certified, audited and paid,"[84] "his necessary expenses . . . shall be audited and paid,"[85] "to be audited and allowed,"[86] and "until . . . audited or examined and allowed;"[87] and also "for auditing and reporting."[88]

Co, 126 A. 855, 861, 96 N J Eq 441.

76. O'Neil v State, 119 N E 95, 96, 223 N Y 40.

77. Clement v. Lewiston, 53 A. 984, 985, 97 Me 95

78. Green-Boots Const Co v. State Highway Commission, 25 P.(2d) 783, 785, 165 Okl. 283

79. Munro v State, 163 N Y S 61, 62, 181 App.Div. 30.

80. People v Oneida County, 24 Hun (N Y) 413, 419

81. Ford v. Springer Land Assoc, 41 P 541, 550, 8 N M 37, 67, affirmed 18 S Ct 170, 168 U S 513, 42 L Ed 562

82. In re Murphy, 60 How.Pr (N Y) 258, 260

83. Cooke v Custer County, 73 P 270, 272, 13 Okl 11

84. Etzold v Board of Com'rs of Huntington County, 141 N E 617, 620, 82 Ind.App 655

85. Sanborn v U S, (Mass) 10 S Ct 812, 816, 135 U S 271, 284, 34 L Ed 112

86. Shields v Durham, 24 S E 794, 113 N C 450, 452, 36 L R A 293

87. People v Barnes, 20 N E 609, 610, 21 N E 739, 114 N.Y 317

88. In re Heath, 33 A 46, 47, 52 N J. Eq 807

AUDITA QUERELA

This Title includes relief of judgment debtors against judgments and executions on grounds of defense or discharge subsequently arising, by independent proceedings therefor, nature and scope of the remedy in general, in what cases and as to what judgments and executions it is allowed; grounds for, jurisdiction to grant and proceedings to obtain writs of audita querela; requisites, issuance, and effect of such writs; proceedings thereon, hearing and determination thereof, and effect of decisions thereon; review of the proceedings, and costs on proceedings by audita querela.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Nature and scope of remedy—p 1278
2. Judgments and executions subject to review—p 1279
3. Grounds for review—p 1280
4. Proceedings for writ—p 1281
5. —— Time of making application—p 1281
6. —— Jurisdiction—p 1281
7. —— Parties—p 1281
8 —— Application for and granting writ—p 1282
9. Writ, service, and effect thereof—p 1282
10 Appearance of defendant—p 1283
11 Pleading—p 1283
12 Evidence—p 1284
13 Trial or hearing—p 1284
14. Judgment—p 1284
15. Review—p 1285
16 Costs—p 1285
17. Liabilities on bonds or recognizances—p 1285

§ 1. Nature and Scope of Remedy

The writ of audita querela is a common-law writ to afford relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution. Generally, the use of the writ of audita querela has been superseded by a more summary mode of relief; but the common-law remedy is not taken away by the mere establishment of a concurrent remedy.

Audita querela is a common-law writ,[1] issued on the application of a judgment or execution debtor, designed to afford relief from the consequences of a judgment or an execution on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or issue of the execution,[2] or for the relief, in like manner, of conusors in recognizances and statutes merchant and staple.[3] As pointed out in section 3 infra, the writ is not for the purpose of authorizing a court to review or revise its opinions, neither can it be made a substitute for an appeal or writ of error. The writ is of a remedial nature, and is said to have been invented principally to relieve a party who has a good defense, but is too late to make it in the ordinary form of proceeding.[4]

Under modern practice the process sometimes acts directly on the judgment by setting it aside,[5] yet more often it acts on the execution issued on such judgment,[6] and there is also authority that at common law it did not extend to the judgment.[7]

Present status of remedy. While the writ is still used in a few states in this country, in most of the

1. Ala.—Ex parte Brichell, 86 So 1, 204 Ala 411—Lockhart v McElroy, 4 Ala 572
Ill.—Handley v. Moburg, 266 Ill.App 356
Mo.—Kelley v Kelley, (App.) 290 S W. 624
6 C.J. p 850 note 2.

2. Ill.—Handley v. Moburg, 266 Ill App 356, 361
Mo.—Kelley v Kelley, (App.) 290 S W 624
6 C J p 850 note 1, 3, 6

3. Hadlock v Clement, 12 N.H. 68—6 C J p 850 note 4

4. Handley v Moburg, 266 Ill App 356—6 C.J. p 850 note 5.

5. Walter v. Foss, 32 A 643, 67 Vt. 591—6 C J. p 852 note 27

6. Poultney v State Treasurer, 25 Vt 168—Alexander v. Abbott, 21 Vt. 476.

7. Mass.—Thatcher v. Gammon, 12 Mass 268.
Vt.—Sutton v. Tyrrell, 10 Vt. 87.

states it has been superseded by the more summary mode of application to the court for relief by petition or motion,[8] as by motion for new trial or for relief against judgment,[9] by certiorari, supersedeas, or bill in equity,[10] or by affidavit of illegality.[11]

However, the proceeding, being a common-law remedy, is not taken away or abolished by the mere establishment of a concurrent remedy suitable to the particular case,[12] and it has been held that the writ may issue after a refusal of summary relief on motion.[13] If the facts are not clear or the case presents any difficulty, the court may either order an issue for trial by jury, in which event the same mode of trial as in audita querela should prevail,[14] or it may deny the motion and put the party to his remedy by audita querela.[15]

§ 2. Judgments and Executions Subject to Review

Judgments against which the judgment debtor has had no opportunity to defend, as well as judgments rendered in the various specific situations hereunder discussed, may be set aside by a writ of audita querela. Audita querela is a proper remedy to set aside an execution when its issue was irregular or its use unlawful, or when the levy or return was irregular or void. Audita querela, where used, is a proper remedy to avoid an execution where the judgment has been released, satisfied, or otherwise discharged.

A judgment may be vacated by writ of audita querela when defendant had no opportunity to defend the suit because not served with process,[16] or when, although he had due notice of the suit, he was prevented from making his defense by his adversary's fraud.[17] Where, however, the officer's return shows personal service, the writ cannot be maintained to set aside, for want of notice, a judgment by default, the return being conclusive between the parties.[18]

The writ will also lie to vacate a judgment rendered against either an infant[19] or an insane person[20] who was not represented by a guardian; to obtain relief against a judgment in a secondary or collateral action when the original action has been barred, reversed, or set aside,[21] to set aside a judgment irregularly entered after a discontinuance or entered in contravention of an agreement for a continuance,[22] to set aside a judgment from which an appeal was wrongfully denied by the inferior court,[23] provided the suit was appealable on its face[24] and the party fully complied with all the requirements of the law with regard to the perfecting of his appeal.[25] The writ will also lie to set aside the judgment of a justice of the peace when he had no jurisdiction over the subject matter,[26] or when the justice did some act which he had no legal right to do, or omitted to do some act which it was his duty to do.[27] However, the writ will not lie to set aside an erroneous judgment of a justice of the peace when he had complete jurisdiction,[28] or to set aside a release of a judgment on satisfaction.[29] Particular grounds as bases for audita querela generally see infra this Title § 3.

When issue of execution, levy, or return irregular or void. Audita querela lies to set aside an execution which is irregular in some particular or void,[30] which was irregularly issued[31] or unlawfully used,[32] under which an irregular levy was made,[33] or on

8. Cal.—Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 28 P.(2d) 709, 136 Cal.App. 261—Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 28 P.(2d) 708, 136 Cal.App. 195
Colo.—Johnson v. Johnson, 240 P. 944, 78 Colo. 187
6 C.J. p. 851 note 15.

9. Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 28 P.(2d) 709, 136 Cal.App. 261—Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 28 P.(2d) 708, 136 Cal.App. 195

10. Ex parte Brickell, 86 So. 1, 204 Ala. 441—Lockhart v. McElroy, 4 Ala. 572—6 C.J. p. 851 note 16

11. Manning v. Phillips, 65 Ga. 548—Hill v. De Launay, 34 Ga. 427.

12. Deal v. Powell, 92 A. 648, 88 Vt. 404—6 C.J. p. 851 note 18.

13. Emery v. Patton, 9 Phila.(Pa.) 135—Schott v. McFarland, 1 Phila.(Pa.) 53.

14. Handley v. Moburg, 266 Ill.App. 356—6 C.J. p. 851 note 20

15. Hunt v. Brooks, 18 Johns.(N.Y.) 5—6 C.J. p. 851 note 21.

16. Foss v. Witham, 9 Allen (Mass.) 572—6 C.J. p. 854 note 53

17. Mass.—Lovejoy v. Webber, 10 Mass. 101
Vt.—Walker v. Foss, 32 A. 643, 67 Vt. 591
6 C.J. p. 854 note 54

18. Witherell v. Goss, 26 Vt. 718—Hawks v. Baldwin, Brayt. (Vt.) 85.

19. Miller v. Potter, 54 Vt. 267—6 C.J. p. 854 note 56

20. Lincoln v. Flint, 18 Vt. 217

21. Wilson v. Watson, (C.C.Pa.) 30 F.Cas.No. 17,847, Pet.S.C. 269—6 C.J. p. 854 note 58.

22. Kimball v. Randall, 56 Vt. 553—6 C.J. p. 854 note 59.

23. Edwards v. Osgood, 33 Vt. 224—6 C.J. p. 854 note 60

24. Scott v. Darling, 29 A. 993, 66 Vt. 510—6 C.J. p. 854 note 61.

25. Harriman v. Swift, 31 Vt. 385—Finney v. Hill, 13 Vt. 255.

26. Burlington, etc., R. Co. v. Brush, 57 Vt. 472—6 C.J. p. 855 note 63

27. Hinman v. Swift, 13 Vt. 315—6 C.J. p. 855 note 64

28. Perry v. Morse, 57 Vt. 509

29. Kelley v. Kelley, (Mo.App.) 290 S.W. 624.

30. Stone v. Chamberlain, 7 Gray (Mass.) 206—6 C.J. p. 852 note 35.

31. Dingman v. Myers, 13 Gray (Mass.) 1—6 C.J. p. 852 note 36

Mistake no defense

Although, as pointed out in § 2 supra, there is authority that the writ may not be used to correct the mistakes of the clerk, it has also been held that the fact that an execution is irregularly issued by a mistake of the clerk or an attorney is no defense to the audita querela.—Phelps v. Slade, 13 Vt. 195.

32. Fairbanks v. Devereaux, 48 Vt. 550

33. Hopkins v. Haywood, 36 Vt. 318,

which the officer made a false return.[34] It also lies to supersede an alias execution when satisfaction has been made wholly or in part on a prior execution.[35] The writ lies as well after the levy of an execution is begun as before.[36]

Particular grounds as bases for audita querela generally see infra this Title § 3.

When judgment released, satisfied, or otherwise discharged The writ of audita querela has also long been recognized as the proper remedy to avoid an execution which has been sued out after the judgment has been released,[37] paid,[38] or satisfied on a prior execution,[39] or where any other matter has occurred which operated as a discharge of the judgment.[40]

Even the tender of the amount due on an execution and a refusal to receive it may entitle the debtor to relief by audita querela, when the tender is kept good and is properly pleaded,[41] but it has also been held that, where a petition for the writ averred an agreement to accept a certain sum in compromise of a larger judgment and an actual receipt of the greater part with a tender of the balance, it was not error to refuse the writ, as in order to discharge the judgment the agreement must be fully executed.[42]

Likewise, when two suits are brought at the same time for the same cause of action and proceed pari passu to judgment and execution, a satisfaction of either judgment may be shown on audita querela in discharge of the other.[43]

The writ is also a proper method of obtaining relief when the debtor, after judgment, has obtained a discharge in bankruptcy,[44] when the debt is attached in the debtor's hands by a judgment creditor of plaintiff,[45] or where the legality of a debtor's imprisonment is affected by matter of discharge occurring after the judgment.[46]

Particular grounds as basis for audita querela generally see infra this Title § 3.

§ 3. Grounds for Review

Audita querela lies when the party suing it out is injured or is in danger of injury because of the fraud, oppression, or other misconduct of the opposite party. The writ will not lie where the party desiring it had a legal opportunity to avail himself of the matter of his complaint, or where his injury is attributable to his own neglect, or where the matter of his complaint is a subject for a writ of error

A function and purpose of a writ of audita querela is to relieve the party suing it out from the fraud, oppression, or other misconduct of the opposite party.[47] The misconduct complained of need not be intentional; it may be legal misconduct merely,[48] or permissive, not actual, misconduct.[49] Injury, or danger of injury, seems to be essential to the maintenance of the action.[50] If the matter complained of is simply nugatory and void, the party has no need of the process.[51] However, it is not necessary that the party suing it out shall be actually in execution or that an execution shall have actually issued; it is sufficient that he is exposed to, and is threatened with, execution.[52] After suing out a writ plaintiff in the audita querela proceeding is justified in pursuing it until he knows that he is in no danger from the execution, although the execution was not in the officer's hands at the time the writ issued.[53]

Although the proceeding is authorized and the forms are prescribed by statute, the rules of the common law determine the cases in which audita querela is a suitable remedy[54] and also the principles by which the suit is to be governed.[55]

On the other hand, a party is not entitled to relief by audita querela when he has had a legal opportunity to avail himself of the matters of defense set forth in his complaint, or when the injury of which he complains is attributable to his own neg-

affirming 34 Vt. 474—6 C.J. p. 853 note 38

34. Hopkins v. Hayward, 34 Vt. 474, affirmed 36 Vt. 318.

35. Brackett v. Winslow, 17 Mass. 153—6 C.J. p. 853 note 40.

36. Lothrop v. Bennet, Kirby (Conn.) 185

37. Bryant v. Johnson, 24 Me. 304—6 C.J. p. 853 note 42.

38. Pyle v. Crebs, 112 Ill. App. 480—6 C.J. p. 853 note 43.

39. Parker v. Jones, 53 N.C. 276, 75 Am.D. 441—6 C.J. p. 853 note 44.

40. Merchants' Ins. Co. v. De Wolf, 33 Pa. 45, 75 Am.D. 577—6 C.J. p. 853 note 45.

41. Perry v. Ward, 20 Vt. 92—6 C.J. p. 853 note 46

42. Keen v. Vaughan, 43 Pa. 477.

43. Humphreys v. Leggett, (Miss.) 9 How.(U.S.) 296, 13 L.Ed. 145—6 C.J. p. 853 note 47

44. Gordonier v. Billings, 77 Pa. 498—Williams v. Butcher, 1 Wkly. N.C. (Pa.) 304—6 C.J. p. 853 note 50

45. Bridley v. Harraden, 14 Mass. 497—6 C.J. p. 854 note 51.

46. Com. v. Whitney, 10 Pick. (Mass.) 434—6 C.J. p. 854 note 52

47. Barker v. Walsh, 14 Allen (Mass.) 172—6 C.J. p. 852 note 22 Nature and scope of remedy in general see supra § 1.

48. Kimball v. Randall, 56 Vt. 558

49. Comstock v. Grout, 17 Vt. 512

50. Bryant v. Johnson, 24 Me. 304—6 C.J. p. 852 note 30.

51. French v. White, 62 A. 35, 78 Vt. 89, 2 L.R.A.(N.S.) 804, 6 Ann. Cas. 479—6 C.J. p. 852 notes 31, 32

52. White v. Clapp, 8 Allen (Mass.) 283—Dingman v. Myers, 13 Gray (Mass.) 1—Coffin v. Ewer, 5 Metc. (Mass.) 228—6 C.J. p. 852 note 33.

53. Phelps v. Slade, 13 Vt. 195.

54. Radclyffe v. Barton, 37 N.E. 373, 161 Mass. 327—6 C.J. p. 852 note 25

55. Mass.—Brackett v. Winslow, 17 Mass. 153.
Vt.—Johnson v. Plimpton, 30 Vt. 420

lect,[56] or to that of his agent or codefendant.[57] The writ bears solely on the acts of the opposite party,[58] and it may not be used to correct the fraud or misconduct of the court,[59] the mistakes of the clerk,[60] or an erroneous taxation of costs,[61] even though procured by the fraud of the opposite party.[62] The writ, it has been held, will not lie where the matter of the complaint is a proper subject for a writ of error,[63] although such remedy is taken away by statute.[64] Likewise, the writ cannot be used for mere irregularities not going to the absolute validity of the process or to the substantive merits of the controversy,[65] and neither may purely equitable defenses, not cognizable at law, be set up by audita querela.[66]

§ 4. Proceedings for Writ

Audita querela, being of common-law origin, the proceedings for the writ follow the rules of procedure at common law.

Although the writ may be authorized by statute, the writ of audita querela is derived from the common law and is governed by common-law rules of practice.[67] The proceeding is a regular suit or action[68] in which parties may plead and take issue, either in law or in fact,[69] and in which a regular judgment must be pronounced.[70] While the complaint generally sounds in tort,[71] the proceeding is in the nature of a bill in equity.[72]

§ 5. —— Time of Making Application

A party is not limited to a specific time within which he may sue out his writ of audita querela.

Since the party injured may neither know of a judgment or execution in the former proceeding nor the manner of procuring the same until some time after the rendition of the judgment or the issue of the execution therein, it has been held that he is not limited to a specific time within which he must sue out his writ of audita querela.[73]

§ 6. —— Jurisdiction

Audita querela is directed only to the court in which judgment was rendered and where the record remains.

Audita querela is a judicial writ founded on the record, and on common principles is directed only to the court in which judgment was rendered and where the record remains.[74] It has been said that the writ issues from a court of law only.[75]

§ 7. —— Parties

The audita querela plaintiff must be an injured defendant in the former proceeding, and all parties who were benefited therein should be made parties defendant. Where a joint judgment was rendered, all defendants thereto must be joined as parties plaintiff, unless their complaints are different, or the judgment against those not joined is good, or the object is to get relief from execution against only one of them.

An audita querela, being a judicial writ, must be between the parties to the former proceeding and their legal representatives only.[76] Although it may be authorized by statute, audita querela is governed by the common law as to misjoinder of parties.[77]

Parties plaintiff. With respect to the parties plaintiff in audita querela, it is held that the person suing out the writ must be one injured in the former proceeding,[78] and ordinarily a defendant therein;[79] and hence, one in whose favor the judgment had been rendered merely for the purpose of aiding in its enforcement by setting aside its release or satisfaction was held not a proper party plaintiff,[80] but defendant to a set-off, although plaintiff in the former proceeding, may sue out a writ of audita querela.[81]

56. State ex rel Gary Realty Co v. Hall, 17 S W (2d) 935, 322 Mo 1113—6 C J p 855 note 66

57. Walter v Foss, 32 A 643, 67 Vt. 591—6 C.J. p 855 note 67.

58. Kimball v. Randall, 56 Vt 553.

59. Titlemore v. Wainwright, 16 Vt. 173.

60. Edmondson v. King, 1 Overt (Tenn.) 425—6 C J p 855 note 73.

61. Goodrich v. Willard, 11 Gray (Mass.) 380—6 C J. p 855 note 74.

62. Mass.—Goodrich v. Willard, supra.
Vt.—Clough v Brown, 38 Vt. 179.

63. Little v Cook, 1 Alk (Vt.) 363, 15 Am D. 693—6 C J. p 855 note 68.

64. Perry v Morse, 57 Vt. 509—6 C J p 855 note 69

65. Lamson v Bradley, 42 Vt. 165—6 C J p 855 note 70.

66. Darker v. Walsh, 14 Allen (Mass.) 172—6 C J. p 855 note 76

67. Mass.—Parker v. Murphy, 102 N.E 85, 215 Mass 72
Vt.—Johnson v Plimpton, 30 Vt 420

68. Longworth v Screven, 20 S C L 298, 27 Am D 381—6 C J. p 850 note 8.

69. U S.—U S v One Trunk, (D.C. N Y.) 155 F 651.
Ala.—Edwards v. Lewis, 16 Ala. 813
S C.—Longworth v. Screven, 20 S.C L. 398, 27 Am D. 381.

70. Longworth v. Screven, supra.

71. Hadlock v. Clement, 12 N.H. 68—6 C.J. p 851 note 11.

72. Bryant v. Johnson, 24 Me. 304—6 C.J. p 851 note 12.

73. Vt.—Stone v. Seaver, 5 Vt. 549.
Va.—Lowenbach v Kelley, 69 S.E. 352, 111 Va. 439, 443.

74. Eureka Casualty Co v Municipal Court of City of Los Angeles, 28 P (2d) 709, 136 Cal App. 261—Eureka Casualty Co v Municipal Court of City of Los Angeles, 28 P (2d) 708, 136 Cal App 195—6 C J p 856 note 77.

75. Garfield v State Univ, 10 Vt 536—6 C J p 856 note 78

76. Gleason v. Peck, 12 Vt 56, 36 Am D. 329—6 C J. p 856 note 79.

77. Mass.—Parker v Murphy, 102 N E. 85, 215 Mass 72
Vt.—Johnson v. Plimpton, 30 Vt. 420
6 C J. p 856 note 80

78. Wilson v. Fleming, 16 Vt. 649, 42 Am.D 531—6 C J p 856 note 80.

79. Johnson v. Johnson, 240 P. 944, 78 Colo. 187.

80. Kelley v. Kelley, (Mo App.) 290 S.W. 624.

81. Walter v. Foss, 32 A. 643, 67 Vt. 591—6 C J. p 856 note 81 [a].

When the basis of the writ is altogether personal, it will die with the person and not survive to his representatives,[82] but when the writ goes to the foundation of the judgment it may be prosecuted by an executor or an administrator.[83]

Where there was more than one defendant in the original proceeding and a joint judgment was rendered affecting all of them, the writ must be sued out in the name of all,[84] unless their grounds of complaint are wholly different[85] or the judgment complained of is admitted to be good as to some, in which case it has been held that the writ may be brought in the name of defendant for whose benefit the proceeding is instituted,[86] or unless the object is to obtain relief against an execution affecting only one defendant.[87] The rule is not altered by the fact that one of the defendants was a party to the fraud which vitiates the judgment; he must still join in the writ.[88]

Parties defendant. All persons benefited by the judgment or execution complained of, if parties thereto, or the legal representatives of such persons, should be made parties defendant to an audita querela.[89] The writ will not lie against the state[90] or the United States.[91]

§ 8. —— Application for and Granting Writ

a. In general
b. Dismissal or discontinuance

a. In General

Application for the writ is generally made on notice by motion or petition stating the grounds for relief with such certainty as to be good against demurrer, and verification of the stated facts is usually required.

While it has been said that the injured party may be entitled to the writ as a matter of right and without petition or motion,[92] the better rule is that a writ of audita querela can be awarded only on motion or petition,[93] setting forth the grounds of relief with such certainty as would be good on demurrer.[94] Since, as is pointed out in section 2 supra, the proceedings on the writ take the form of a suit at law, it would seem that notice of the application should be had, and the practice is to grant an order to show cause.[95]

An affidavit to the truth of the facts set forth in the writ is generally required.[96] Such affidavit may be made by any other competent person as well as by defendant.[97] It is not necessary that the affidavit should be annexed to the writ, or become part of the process.[98]

An appeal lies from a refusal to allow the application.[99]

b. Dismissal or Discontinuance

An application for audita querela may be dismissed where the court has no jurisdiction, and, likewise, for other good reasons. Any one of several plaintiffs may release or discharge the suit without the concurrence of the others.

A motion to dismiss a writ of audita querela lies where the court has no jurisdiction to entertain the writ;[1] where a statutory requirement as to security is not complied with,[2] unless such noncompliance was due to the fault of the court and not of plaintiff in the audita querela application;[3] where process is not served on all the defendants;[4] or where there is an improper joinder of plaintiffs.[5] Where a writ is turned into a writ of audita querela by means of an amendment, a motion to dismiss, made promptly thereafter is in time.[6]

Where there are two or more audita querela plaintiffs, either of them may release or discharge the suit without the concurrence of the others.[7]

§ 9. Writ, Service, and Effect Thereof

The writ has been considered judicial in character,

82. Connecticut, etc, R. Co. v. Bliss, 24 Vt. 411

83. Connecticut, etc, R Co v. Bliss, supra

84. Gleason v. Peck, 13 Vt. 56, 36 Am D 329—6 C.J p 856 note 84

85. Johnson v Plimpton, 30 Vt. 420

86. Chase v. Scott, 14 Vt. 77.

87. Starbird v. Moore, 21 Vt 529.

88. Titlemore v. Wainwright, 16 Vt. 173.

89. Gleason v. Peck, 13 Vt. 56, 36 Am D 329.

Death of defendant while suit pending

If the audita querela is to recover damages for the wrongful act of defendant, and defendant dies while the suit is pending, and commissioners are appointed on his estate, the suit must be discontinued and the claim for damages presented before the commissioners—Warner v. Crane, 16 Vt. 79

90. Com. v. Berger, 8 Phila.(Pa.) 237.

91. Avery v. U S., (Tenn) 12 Wall (U S) 304, 20 L Ed 405.

92. Lovejoy v. Webber, 10 Mass. 101—6 C J p 856 note 94.

93. Newhart v Wolfe, 102 Pa. 561—6 C J p 856 note 95.

94. Schott v. McFarland, 1 Phila (Pa) 58

Form of petition for writ.—Newhart v. Wolfe, 102 Pa 561

95. Newhart v. Wolfe, supra—6 C.J p 857 note 97.

96. Burns v. St. Albans First Nat. Bank, 45 Vt. 269—Hinman v. Swift, 18 Vt. 315—6 C J p 857 note 98.

97. Md—Job v. Walker, 3 Md 129. Vt.—Hinman v. Swift, 18 Vt. 315.

98. Hinman v. Swift, supra.

99. Newhart v. Wolfe, 102 Pa. 561—Keen v. Vaughan, 48 Pa. 477.

1. Poultney v. State Treasurer, 25 Vt. 168.

2. Sisco v. Hurlburt, 17 Vt. 118.

3. Kidder v. Hadley, 25 Vt. 544.

4. Clark v. Freeman, 5 Vt. 122.

5. Worsley v. Charnock, Cro Eliz. 473, 78 Reprint 725

6. Burns v St. Albans First Nat. Bank, 45 Vt. 269.

7. Braynard v. Burpee, 27 Vt. 616—6 C.J. p 859 note 69.

and, by virtue of statute, may issue either as a summons or as an attachment, or in a proper case as a venire facias or a scire facias. The writ must be served on all parties made defendants to it. The issue of the writ does not operate as a supersedeas, but a supersedeas may be granted when necessary.

The writ is sometimes regarded as judicial.[8] By virtue of statute, the writ may issue either as a summons or as an attachment,[9] or, in a proper case, the process may be either in the form of a scire facias or of a venire facias.[10]

Service of writ. The writ of audita querela must be served on all the parties made defendants to it.[11] Service on a corporation is effected in the same manner as in the case of any other writ.[12]

Effect of issuance. The issue of the writ does not of itself operate as a supersedeas which may be granted or not, according to the requirements of justice.[13] However, all statutory requirements must be complied with before a supersedeas is granted.[14]

§ 10. Appearance of Defendant

The defendant in audita querela must enter an appearance. Judgment by default is not proper, the procedure being for the plaintiff to enter a common appearance for the defendant where he fails to appear.

Defendant in audita querela must, of course, enter an appearance as in other cases.[15] Judgment by default for want of appearance is not proper, but plaintiff may enter a common appearance for defendant who may then be ruled to plead as in other cases.[16]

§ 11. Pleading

a. Declaration
b. Answer or plea

a. Declaration

The declaration should show the record of the former proceeding and a sufficient cause of complaint. The grounds of objection to the previous proceeding must be specially averred.

The declaration in audita querela should either set out the whole record of the recovery in the former proceeding, or recite it generally, and should show a sufficient gravamen, or cause of complaint.[17]

The ground of objection to the proceeding attacked must be specifically averred.[18] However, the plaintiff need not aver that he had a good defense to the original action.[19]

Where a tender of the sum due defendant on the execution complained of is alleged as a ground of relief, it is not sufficient to allege the bare fact of tender, but a readiness to pay must appear affirmatively by the declaration.[20] Specific or general relief for the act complained of should be prayed or indicated in the declaration.[21]

A declaration in an audita querela may, in a proper case, be amended.[22]

Demurrer to declaration. A demurrer is proper where the matter alleged as the cause of complaint might have been pleaded in bar of the original action,[23] where plaintiff's remedy is not by audita querela, but by some other form of proceeding;[24] where there is a want of necessary parties;[25] or where the declaration fails generally to show a good cause of action.[26]

b. Answer or Plea

A plea or motion in abatement is proper where the writ has not been served on all defendants, or where proper security has not been taken. The usual plea in

8. Warner v. Crane, 16 Vt. 79—Gleason v. Peck, 12 Vt. 56, 36 Am.D. 329—6 C.J. p. 857 note 14.

9. Sisco v. Hurlburt, 17 Vt. 118.

10. Waddington v. Vredenbergh, 2 Johns. Cas. (N.Y.) 227—6 C.J. p. 857 note 17.

Venire facias is proper where the audita querela is grounded on matter of fact, where the party is not in custody, or where he sues quia timet.—Waddington v. Vredenbergh, 2 Johns. Cas. (N.Y.) 227.

11. King v. Jeffrey, 77 Me. 106—6 C.J. p. 857 note 30.

12. Clark v. National Hydraulic Co., 12 Vt. 435—Clark v. Freeman, 5 Vt. 122.

13. Hunt v. Brooks, 13 Johns. (N.Y.) 5—6 C.J. p. 857 note 10.

14. State Treasurer v. Wells, 27 Vt. 276—Clark v. National Hydraulic Co., 12 Vt. 435.

15. Ala.—Edwards v. Lewis, 16 Ala. 813.
Pa.—Com. v. Berger, 8 Phila. 237.

16. Com. v. Berger, supra.

In the English practice, the remedy for the nonappearance of defendant was by distress infinite.—Com. v. Berger, 8 Phila. (Pa.) 237.

17. King v. Jeffrey, 77 Me. 106.
For forms of declaration.—Staniford v. Barry, 1 Aik. (Vt.) 331, 15 Am.D. 692—6 C.J. p. 858 note 26.
Sufficient declarations.—6 C.J. p. 858 note 26 [b].

18. Ala.—Edwards v. Lewis, 16 Ala. 813.
Vt.—Oakes v. Eden School Dist. No. 9, 33 Vt. 155—Stone v. Seaver, 5 Vt. 549.

Fraud and deceit, if relied on, must, it seems, be alleged in the declaration.—Lovejoy v. Webber, 10 Mass. 101—Walter v. Foss, 32 A. 643, 67 Vt. 591—Stone v. Seaver, 5 Vt. 549.

Proof and variance.
Plaintiff must confine his proof to the grounds for avoiding the judgment or execution complained of alleged in his declaration.—Oakes v. Eden School Dist. No. 9, 33 Vt. 155—Underwood v. Hart, 23 Vt. 120.

19. Eddy v. Cochran, 1 Aik. (Vt.) 359.

20. Perry v. Ward, 20 Vt. 92—Jenney v. Glynn, 12 Vt. 480.

21. Clough v. Brown, 38 Vt. 179—6 C.J. p. 858 note 33.

22. Stone v. Chamberlain, 7 Gray (Mass.) 206.

23. Lovejoy v. Webber, 10 Mass. 101.

24. Goodrich v. Willard, 11 Gray (Mass.) 330—6 C.J. p. 858 note 36.

25. Miss.—Melton v. Howard, 8 Miss. 103.
Vt.—Herrick v. Orange County Bank, 27 Vt. 584.

26. King v. Jeffrey, 77 Me. 106—6 C.J. p. 858 note 38.

bar is "not guilty," although the practice has also been to traverse some decisive fact or to use a general and express denial of all the facts alleged

A plea in abatement, or a motion to that effect, is proper where the writ has not been served on all the defendants,[27] or where proper security has not been taken.[28]

The plea in bar in audita querela usually is "not guilty";[29] but this has been said to be rather a matter of convenience and choice than the result of any established principle of pleading,[30] and the practice has sometimes been different, as by traversing some decisive fact in the complaint, or by a general and express denial of all the facts alleged[31] A prior judgment in audita querela on the same cause of action may be pleaded in estoppel.[32] No one plea, however, may be double[33]

Demurrer to plea. Where a special plea in audita querela is insufficient, a demurrer to the plea is proper.[34]

§ 12. Evidence

The proceedings and judgment complained of are presumed to be regular, and the burden is on the plaintiff to overcome this presumption. Generally, this may be done by parol evidence The pleadings in the former action are admissible to show that the issues in the audita querela were involved therein.

When a record of a judgment is produced, the presumption is in favor of the regularity of the judgment; it will be presumed that all things were rightly done, and a party seeking to avoid the judgment by audita querela must, by his evidence, overcome this presumption[35]

Pleadings in the action in which the judgment complained of was rendered are admissible to prove that the issues in the audita querela were involved in the former proceeding.[36] Parol evidence generally is admissible to show that the proceedings and judgment complained of are invalid and ineffectual against plaintiff, notwithstanding the record is sufficient on its face, the whole object of the audita querela being to question, invalidate, and annul the record[37] However, if the record is not sufficient on its face, it cannot be eked out by parol evidence[38]

§ 13. Trial or Hearing

On the hearing of an application for audita querela common-law rules apply Where an issue of fact is presented, either party may demand a jury trial, unless it can be tried by the record.

The common-law rules of practice are applicable in the hearing on an application for audita querela, although the nature of the remedy is equitable[39] Where an issue of fact is presented, either party may demand trial by jury unless it can be tried by the record, or the parties may agree to submit the issues of fact to the court alone for trial.[40]

§ 14. Judgment

Common-law rules govern as to judgments in audita querela A favorable decision for the plaintiff in audita querela prevents further proceedings on the judgment, and entitles him to damages for the wrongful act. The court in rendering decision for the defendant cannot order further proceedings in the former action.

In rendering judgments in audita querela the court is governed by common-law rules of practice[41] Either plaintiff in audita querela prevails in whole or in part, and recovers judgment to the extent to which he is entitled to it, or there is a judgment for defendant, and this is the whole scope and effect of the audita querela[42]

The decision, if in favor of plaintiff in audita querela, puts an end to the judgment, so that no further proceedings can be taken on it,[43] and it is improper to make an order bringing forward the original action on the docket.[44] Moreover, plaintiff may recover of the opposite party his damages for the wrongful act complained of.[45]

When defendant in audita querela is successful, there is simply a "judgment for defendant," and the court cannot order further proceedings in the former action.[46]

Where in an audita querela a verdict is found for

27. Clark v National Hydraulic Co 13 Vt 435—Clark v Freeman, 5 Vt 122
28. Hiecock v. Hiecock, 1 D Chipm (Vt) 133
29. Brackett v Winslow, 17 Mass 153—6 C J p 859 note 47.
30. Shrewsbury v. Stong, 10 Vt. 591
31. Ala.—Edwards v. Lewis, 16 Ala 813
Vt.—Shrewsbury v. Stong, 10 Vt 591. 6 C.J. p 859 note 49
32. Mussey v. White, 3 A 319, 58 Vt. 45—Susco v. Parkhurst, 23 Vt 537.
33. Spaulding v Swift, 13 Vt. 214
34. Godfrey v. Downer, 47 Vt. 599—6 C J p 859 note 55.
35. Underwood v Hart 23 Vt. 120
36 Radclyffe v. Barton, 37 N E 373, 161 Mass 327
37. Hill v. Warren, 54 Vt 73—6 C.J p 859 note 64
38. Hill v. Warren, 54 Vt. 73—Pike v. Hill, 15 Vt. 183—6 C J p 859 note 65
39. Parker v. Murphy, 102 N E 85, 215 Mass. 72
40. Bruce v. Barnes, 20 Ala. 219.
41. Parker v. Murphy, 102 N.E 85, 215 Mass. 72
42. Foss v. Witham, (Mass) 9 Allen 573.
43. Little v Cook, 1 Aik (Vt) 363, 15 Am D 698—6 C J p 860 note 71
44. Mason v Pearson, 118 Mass 61, distinguished Marshall v Merritt, 103 Mass 45—Foss v. Witham, 9 Allen (Mass) 572.
45. Foss v Witham, supra—6 C J. p 860 note 73.
46. Foss v Witham, supra—6 C.J. p 860 note 74.

plaintiff, the court cannot render judgment for defendant, notwithstanding the verdict.[47]

§ 15. Review

The proceedings under the writ are subject to review.

The proceedings under the writ may be reviewed by appeal,[48] or by writ of error.[49]

§ 16. Costs

The successful party in audita querela is entitled to costs. The plaintiff must give sufficient security where such security would be required in ordinary action.

Costs are recoverable by the successful party in audita querela.[50] Where nonsuit is entered by plaintiff, defendant is entitled to costs.[51]

Security for costs. Plaintiff in audita querela must give security for costs in those cases where such security would be required in ordinary actions,[52] and the security must be of such a nature as to secure redelivery of the body or the estate, where either of them has been taken in execution,[53] and payment of intervening damages.[54] A statute expressly requiring a recognizance must be strictly complied with[55] or the suit may be dismissed (supra § 8 b).

§ 17. Liabilities on Bonds or Recognizances

a. In general
b. Action

a. In General

Recovery on the audita querela plaintiff's bond or recognizance for costs can only be had where the court had jurisdiction of the writ. Where the basis of the writ is personal the liability of the principal is personal and does not extend to the executor or administrator of decedent principal.

No recovery can be had on audita querela plaintiff's bond or recognizance for costs where the court in which the audita querela was brought had no jurisdiction,[56] where, however, the court had jurisdiction, a breach of condition of the bond creates a liability in accordance with the condition.[57] The liability of the principal is personal where the basis of the audita querela is personal, and in such case an executor or administrator of a decedent principal is not liable.[58] Where the writ is refused, the interest on the judgment accumulated during the delay of execution caused by the writ is not recoverable on plaintiff's bond.[59]

b. Action

Debt lies on the recognizance, although not returned into court, and the record of the recognizance is conclusive of the consent of the obligor. A minute of the recognizance signed by the judge cannot be contradicted by parol.

Debt lies on a recognizance taken on the issue of an audita querela, even though the recognizance is not returned into court,[60] the record of the recognizance being conclusive evidence in an action thereon that it was entered with the consent of defendant.[61] Parol evidence is not admissible to contradict a minute of recognizance signed by the judge and appended to the writ of audita querela.[62]

AUDITOR. The term is used in different senses, depending on the nature of duties imposed.[1] As used in the law relating to county administration, the word is defined and the subject matter treated in the title Counties §§ 116, 132, 140 [15 C.J. p 500 note 81–p 501 note 95, p 512 note 48–p 513 note 67, p 517 note 64–p 518 note 74]; similarly with relation to municipal administration in the title Municipal Corporations §§ 2176–2180 [44 C.J. p 1443 note 67–p 1449 note 33]; and with relation to state administration in the title States § 63 [59 C.J. p 115 note 51–p 116 note 65].

47. French v. Steele, 14 Vt. 479.

48. White v. Clapp, 8 Allen (Mass.) 283—6 C.J. p 860 note 84.

49. Gordonier v. Billings, 77 Pa. 498—6 C.J. p 860 note 85.

50. Hill v. Warren, 54 Vt. 73—6 C.J. p 860 note 82.

51. Essex Min. Co. v. Bullard, 43 Vt. 238—6 C.J. p 860 note 83.

52. Sisco v. Hurlburt, 17 Vt. 118—6 C.J. p 857 note 4.

53. Sisco v. Hurlburt, supra.

54. State Treasurer v. Wells, 27 Vt. 276—Sisco v. Hurlburt, 17 Vt. 118.

55. Sisco v. Hurlburt, supra—Hiecock v. Hiecock, 1 D.Chipm.(Vt.) 133.

Sufficient minute of such recognizance must appear on the writ.—Sisco v. Hurlburt, 17 Vt. 118—6 C.J. p 857 note 7.

56. State Treasurer v. Wells, 27 Vt. 276.

57. Hubbell v. Dodge, 4 Vt. 56.

Payment of all intervening damages and costs

A recognizance conditioned for the payment of all intervening damages and costs, taken in a case where no levy was made on the body or estate of the debtor, does not create a liability for the amount of the debt and costs.—State Treasurer v. Wells, 27 Vt. 276—6 C.J. p 860 note 87.

58. Connecticut, etc., R. Co. v. Bliss, 24 Vt. 411.

59. Smith v. Canfield, 1 Root (Conn.) 372.

60. Anonymous, Brayt.(Vt.) 214.

61. Beech v. Rich, 13 Vt. 595.

62. Hinman v. Swift, 18 Vt. 315.

1. See State v. Wheeler, 263 P. 946, 948, 142 Wash. 513.

In Spanish law, the judge who, in conjunction with the commanding general of an army or province, hears military causes in the first instance.—Escriche Diccionario—6 C.J. p 861 notes 16–18.

In its more general applications, the word "auditor" has been defined as meaning an officer or person whose business or function is to examine and verify the accounts of persons intrusted with moneys, to examine an account or accounts, compare the charges with the vouchers, examine the parties and witnesses, allow or reject charges and state the balance,[2] more particularly to examine, verify, and approve or report accounts of persons who have had the disbursement of government money or have furnished supplies for government use.[3] In a particular connection, the word connotes a ministerial officer whose duty it is to make computations and mathematical examinations of claims for presentation to another officer or board with quasi judicial functions and duties of passing finally upon the claims, and, so used, negatives the existence of any discretionary power.[4]

Analogously, when used to designate certain judicial officers, the word has been defined as meaning an agent or officer of a court, either of law or equity, appointed to examine and digest accounts for decision and to prepare materials on which an order, judgment, or decree may be made,[5] or to state the items of debt and credit between parties, and to exhibit the balance,[6] a person appointed in an action at law in cases where a preliminary or tentative investigation becomes necessary;[7] and in a slightly different sense, in the same connection, an instrument of the court by which the law is administered,[8] an officer of the court,[9] an officer of the court appointed to hear the parties and their evidence, to find the facts and report the same to the court,[10] one who hears judicially;[11] also a person called in by the court to hear matters of detail which the court has not time to hear, and to inform the conscience of the court as to facts which are essential to be known before a particular judgment or decree can be pronounced.[12] "Auditor" has been held synonymous with "comptroller" or "controller;"[13] and has been distinguished from "accountant,"[14] "arbitrator" (see Arbitration and Award § 1), "auditor in action of account,"[15] and "master."[16]

Auditor of the imprest. Any of several officers in the English exchequer, who formerly had the charge of auditing the accounts of the customs, naval and military expenses, etc., now performed by the commissioners for auditing public accounts.[17]

Auditor of the receipts. An officer of the English exchequer.[18]

Other phrases: "Auditor in action of account,"[19] "auditor of public accounts,"[20] and "report of the auditor shall be verified,"[21] also "auditors in chancery" see Equity § 514 [21 C.J. p 601 note 90], and "reference to auditors."[22]

2. N Y—Peo. v. Oneida County, 24 Hun 413, 419.
S D—Sawyer v. Mayhew, 71 N.W. 141, 142, 10 S D 18, quoting Webster D

Similar definition

'A person appointed to settle and adjust accounts, and to state or certify the result"—State v. Brown, 10 Or 215, 222, quoting Burrill L D

3. State v. Brown, 10 Or. 215, 222, quoting Abbott L D.

Similar definition

"An officer whose duty it is to examine and verify the accounts of persons intrusted with the receipt and disbursement of public moneys"—State v Hastings, 10 Wis. 525, 530

Historical note

"Originally it meant an officer of the king, whose duty it was, at stated periods of the year, to examine the accounts of inferior officers and certify to their correctness (Blount's Dictionary of 1681, Cotgrove's Dictionary of 1632, Rastall's Termes de la Ley, Defoe's English Dictionary of 1732), and was afterwards used to designate those officers of the Court of Exchequer whose duty, according to Coke, was to take the accounts of the receivers of the king's revenue and 'audit and perfect them,' without, however, putting in any changes, their office being only to audit the accounts—that is, ascertain their correctness (4 Coke's Inst. 107)"—Peo. v. Green, 5 Daly (N.Y.) 194, 200

4. State v. Wheeler, 263 P. 946, 948, 146 Wash 513.

5. U S—Field v. Holland, (Ga.) 6 Cranch (U S) 8, 21, 3 L Ed. 136
Vt—Read v. Barlow, 1 Aik. 145, 147.
6 C J p 861 note 9.

6. Chapman v Chapman, 113 N E 359, 224 Mass 427, L R A 1916F 528—6 C J. p 861 note 6.

7. Fenno v Primrose, (Mass.) 119 F 801, 804, 56 C C.A. 313

8. Read v. Barlow, 1 Aik (Vt.) 145, 147

9. Hale v. Owensby, 66 S E 781, 782, 133 Ga 631.

10. Chapman v. Chapman, 113 N E 359, 224 Mass. 427, L R A 1916F 528—Locke v Bennett, 7 Cush (Mass.) 445, 449, 451

11. Sawyer v Mayhew, 71 N W 141, 112, 10 S D. 18, quoting Webster D.

12. Miller's App., 30 Pa 478, 490—Martin's Estate, 20 Pa Dist & Co. 470, 471—6 C J. p 861 note 13.

"He becomes the officer of the court for such purpose"—Martin's Estate, 20 Pa Dist. & Co 470, 471.

13. Beneficial Loan Soc. of New Orleans v. Strauss, (La App.) 148 So 85, 87—6 C.J. p 861 note 5 [b]

14. Etsold v. Board of Com'rs of Huntington County, 141 N.E. 617, 620, 82 Ind App 655.

15. Locke v Bennett, 7 Cush. (Mass.) 445, 449, 451.

16. Fenno v. Primrose, (Mass.) 119 F. 801, 804, 56 C C A 312—6 C J. p 860 note 2 [c]

"Master," the more accurate term

"The decisive factor is not a designation given to an appointee of the court, but the nature of the duties imposed on him and the character of the work performed by him The reference . . . appropriately describes the duties of a master. It would have been more accurate to have described him as a master"—Chapman v. Chapman, 113 N E 359, 224 Mass 427, L R A 1916F 528.

17. Black L. D

18. Black L D.

19. Locke v Bennett, 7 Cush (Mass.) 445, 449, 451

20. State v. Brown, 10 Or 215, 222.

21. Garrison Tie & Timber Co v. Parrott, (Tex.Civ.App.) 293 S.W. 701, 703.

22. Field v. Holland, (Ga.) 6 Cranch (U S) 8, 21, 3 L Ed. 136.

AUDITORIUM. A hall of audience; in a church, theater, public hall, or the like, the space allotted to the hearers or audience,[23] room of large capacity capable of accommodating a large assemblage of people.[24]

AUG. An abbreviation of August. See Abbreviations 1 C.J.S. p 276 note 5.

AUGMENT. To enlarge in size; to increase; to swell.[25]

AUGMENTATION. The act of increasing or making larger by addition, expansion, or dilation; the act of adding to or enlarging; the state or condition of being made larger;[26] and hence an addition[27] or betterment;[28] or an enlargement by addition.[29] In particular connections, the word has been specifically defined as an increase of the assets of an insolvent estate by the commingling with it of a trust fund in such an appreciable and tangible way as to entitle the trust creditor to preference although the trust fund is incapable of identification or tracing,[30] a share of the great tithes temporarily granted to the vicars by the appropriators;[31] the increase of the crown's revenues from the suppression of religious houses and the appropriation of their lands and revenues;[32] also the name of a court, now abolished, created by 27 Hen. VIII, to determine suits and controversies relating to monasteries and abbey lands. The court was dissolved in the reign of Mary, but the office of augmentations remained long after.[33]

Phrases: "Augmentation of assets,"[34] "augmentation or betterment of the estate,"[35] and "augmentation theory."[36]

AUGUSTA LEGIBUS SOLUTA NON EST.[37]

AULA. In old English law, a hall, or court; the court of a baron, or manor; a court baron.[38]

AULIC. Pertaining to a royal court.[39]

AUMEEN. In Indian law, trustee; commissioner; a temporary collector or supervisor, appointed to the charge of a country on the removal of a zemindar, or for any other particular purpose of local investigation or arrangement.[40]

"Reference to arbiters" distinguished.—Field v Holland, (Ga.) 6 Cranch (U.S.) 8, 21, 3 L.Ed 136

22. Denver v. Hallett, 83 P 1066, 31 Colo. 393, 403, quoting Century D—6 C.J. p 862 note 20

24. Heald v City of Cleveland, 19 Ohio N.P. (N.S.) 305, 321

25. Mo.—Mathew v Wabash R. Co., 78 S.W. 271, 115 Mo.App. 468, 472, 81 S.W. 646

Tex.—Harlan v. Haynie, 9 Tex. 459, 464, quoting Webster D—Groesbeck v. Golden, 7 S.W. 362, 364

26. Vejar v. Mound City Land, etc., Assoc., 32 P. 713, 97 Cal. 659, 663, quoting Century D.

27. Meyering v Miller, 51 S.W.(2d) 65, 330 Mo. 885.

28. Russell v Bank of Nampa, 169 P. 180, 181, 31 Idaho 59

29. Harlan v Haynie, 9 Tex. 459, 464, quoting Webster D—Groesbeck v. Golden, (Tex.) 7 S.W. 362, 364

30. Black L. D., citing Russell v. Bank of Nampa, 169 P. 180, 181, 31 Idaho 59 See Leach v Iowa State Sav. Bank of Sioux City, 215 N.W. 728, 729, 204 Iowa 497—State ex rel. Sorensen v Nebraska State Sav. Bank, 257 N.W. 64, 65, 127 Neb. 832.

31. Black L. D.

32. Black L. D.

33. Black L. D.

34. Iowa.—Leach v. Iowa State Sav. Bank of Sioux City, 215 N.W. 728, 729, 204 Iowa 497.

Neb.—State ex rel Sorensen v Nebraska State Sav. Bank, 257 N.W. 64, 65, 127 Neb. 832

What constitutes

"By augmentation of assets is surely meant an increased amount in possession of the debtor bank for the satisfaction of its creditors. Where the total amount due its creditors is increased to the same extent as its assets, no augmentation of the latter is apparent."—State ex rel. Sorensen v Nebraska State Sav. Bank, 257 N.W. 64, 65, 127 Neb. 832

"Payment of debts is not an 'augmentation of assets'"—Leach v. Iowa State Sav. Bank of Sioux City, 215 N.W. 728, 729, 204 Iowa 497

35. Russell v. Bank of Nampa, 169 P. 180, 181, 31 Idaho 59.

Held not to constitute

"The mere saving of the estate by the discharge of general indebtedness, otherwise payable out of it, or by the payment of the current expenses of the business, is not an 'augmentation or betterment of the estate'"—Russell v. Bank of Nampa, 169 P. 180, 181, 31 Idaho 59

36. Leach v Iowa State Sav. Bank of Sioux City, 215 N.W. 728, 729, 204 Iowa 497.

37. A maxim meaning "The wife of the king is not exempted from the laws."—Peloubet Leg. Max.

Similarly expressed

Augusta licet legibus soluta non est—the queen is not freed from the laws; the empress or queen is not privileged or exempted from subjection to the laws.—Adams Gloss., citing 1 Blackstone Comm., p. 219.

38. Black L. D.

Mediæval use

This word was employed in mediæval England along with "curia," it was used of the meetings of the lord's men held there in the same way that the word "court" was used. —Black L. D., citing McIlwain High Ct. of Parl. p. 30.

Aula ecclesiæ

A nave or body of a church where temporal courts were anciently held —Black L. D.

Aula regis (also Aula regia)

The king's hall or palace. The chief court of England in early Norman times. It was established by William the Conqueror in his own hall. It was composed of the great officers of state, resident in the palace, and followed the king's household in all his expeditions.—Black L. D.

39. Black L. D.

Aulic council

In the old German empire, the personal council of the emperor, and one of the two supreme courts of the empire which decided without appeal. It was instituted about 1502, was modified in 1654, and ceased to exist on the extinction of the German Empire in 1806. The title was also given to the council of state of the former Empire of Austria.—Black L. D.

40. Black L. D.

AUMIL. In Indian law, agent; officer, native collector of revenue; superintendent of a district or division of a country, either on the part of the government zemindar or renter.[41]

AUMILDAR. In Indian law, agent; the holder of an office; an intendant and collector of the revenue, uniting civil, military, and financial powers under the Mohammedan government.[42]

AUMONE, SERVICE IN. Where lands are given in alms to some church or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul.[43]

AUNCEL WEIGHT. In English law, an ancient mode of weighing, described by Cowell as "a kind of weight with scales hanging, or hooks fastened to each end of a staff, which a man, lifting up upon his forefinger or hand, discerneth the quality or difference between the weight and the thing weighed."[44]

AUNT. The sister of one's father or mother, and a relative in the third degree, correlative to niece or nephew.[45]

AURA EPILEPTICA. The sensation of a cold vapor frequently experienced by epileptics before the loss of consciousness occurs in an epileptic fit.[46]

AURES. A Saxon punishment by cutting off the ears, inflicted on those who robbed churches, or were guilty of any other theft.[47]

AURES MINUS FIDÆ EXISTUNT, QUAM OCULI.[48]

AURICULAR FIBRILLATION. A condition in which there is irregular heart action, due to failure or improper impulses coming from the upper portion of the heart not getting to the lower portion, improper in the normal rotation of the heart beats, which happens most frequently in mitral stenosis.[49]

AURICULARUM SCISSIO. Law Latin, cutting or cropping of the ears.[50]

AURUM REGINÆ. Queen's gold; a royal revenue belonging to every queen consort during her marriage with the king.[51]

AUSENCIA. Spanish, literally "absence."[52] In Spanish law, the word is used in several senses. In one sense a person is absent when he takes no part in some act or transaction which requires his concurrence; in another sense, one is absent when not found in the place of his ordinary residence or domicile; and finally one is considered absent when he has disappeared from his domicile and his whereabouts are unknown.[53]

AUSGEGEBEN. German, literally "having been given out," hence published or publication, as in the phrase "'ausgegeben' date," which has been held to mean the "publication date."[54]

AUSIS TALIBUS ISTIS NON JURA SUBSERVIUNT.[55]

AUSSI, AUXI or AUXY. Law French, also; in like manner; in addition to; too, further, likewise.[56]

AUSTRALIAN. Of, or pertaining to, Australia or its inhabitants.[57]

Phrases: "Australian ballot laws" see Elections § 149 [20 C.J. p 140 notes 59–61], and "Australian wool."[58]

AUTER. Law French, another; other. See Autre post.

AUTHENTIC. Genuine; true; having the character and authority of an original; duly vested with all necessary formalities and legally attested; competent, credible, and reliable as evidence.[59]

41. Black L. D.
42. Black L. D.
43. Black L. D.
44. Black L. D.
45. Black L. D.
46. Aurentz v. Anderson, 3 Pittsb (Pa.) 310, 311.
47. Black L. D.
48. A maxim meaning, "The ears bring forth less faith than the eyes"—Adams Gloss., citing Pufendorf de Jur Nat et Gent v 13 § 9.
49. U. S. v. Nickle, (C.C.A.Mo.) 70 F.(2d) 873, 877.
50. Adams Gloss.
51. Black L. D.
52. Velázquez Spanish-English D.
53. Escriche Diccionario—6 C.J. p 862 notes 31–38.
After a certain time has elapsed from the receipt of the last news of the absentee, or longer in case he shall have left some one in charge of his property, his absence may be judicially declared.—Ablang v. Fernandez, 25 Philippine 33, 34.
54. Merrell-Soule Co. v. Powdered Milk Co. of America, (N.Y.) 222 F. 911, 912, 138 C.C.A. 391—Queen & Co. v. R. Friedlander & Co., (C.C.Ill.) 149 F. 771, 775.
55. A maxim meaning, "The laws will not assist in such daring purposes"—Adams Gloss.
56. Adams Gloss.
57. Webster New Int. D. See Federal Trade Commission v. Winsted Hosiery Co., (N.Y.) 42 S.Ct. 384, 385, 258 U.S. 483, 66 L.Ed. 729.
58. Federal Trade Commission v. Winsted Hosiery Co., (N.Y.) 42 S.Ct. 384, 385, 258 U.S. 483, 66 L.Ed. 729.
59. Black L. D., citing Downing v. Brown, 3 Colo. 571, 590.
Similar definition
"Authentic, in legal parlance, means 'vested with all due formalities and legally attested'"—Downing v. Brown, 3 Colo. 571, 591, quoting Webster D.

Authentic act. In the civil law, an act which has been executed before a notary or public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register.[60]

Other phrases: "[Authentic] interpretation of laws,"[61] "authentic matter of a public nature,"[62] and "authentic sources."[63]

AUTHENTICATE. It has been said that to "authenticate" is an official act and that the word has no reference to requirements as to the execution of an instrument but only those for its registration;[64] and while it has been said that it does not always have a sufficiently definite signification,[65] it has been specifically defined as meaning to give verity and thereby impart to an instrument its validity or operative effect;[66] to render authentic, or to give authority to by the proof, attestation, or formalities required by law, or sufficient to entitle to credit.[67]

In the past tense, acknowledged or proved for record;[68] attested;[69] and also, sometimes, executed[70]

Phrases: "Authenticate an instrument;"[71] also "authenticated as required by law,"[72] "authenticated as required by statute,"[73] "authenticated by the proper officer,"[74] "authenticated by the signature of the judge presiding,"[75] "authenticated copies,"[76] "authenticated copy thereof,"[77] "authenticated report,"[78] "duly authenticated,"[79] "legally authenticated,"[80] "properly authenticated,"[81] and "signed and duly authenticated or acknowledged."[82]

60. Black L D, citing Codex Justinianus 7, 52, 6, 4, 21—Digest of Justinian 22, 4—Novellæ p 73 c 2

Statutory definition

"The authentic act, as relates to contracts, is that which has been executed before a notary public or other officer authorized to execute such functions, in the presence of two witnesses, free, male, and aged at least fourteen years, or of three witnesses, if the party be blind"—La Rev Civ Code art 2234, as amended and reenacted by Act (1908) No 67, quoted in West Louisiana Bank v Dawson, 98 So 262, 154 La 830.

What constitutes

(1) "An act, to be authentic, must show on its face that it was passed before a notary or other officer authorized to execute such functions and two competent witnesses"—Baker v. Baker, 52 So. 115, 117, 125 La 969

(2) All "procès verbals" of sales of succession property, signed by the sheriff or other person making the same, by the purchaser and two witnesses, are authentic acts—Black L D, citing La.Rev.Civ.Code art 2234, as amended and reenacted by Act (1908) No 67 and Act (1918) No 192 § 1—West Louisiana Bank v. Dawson, 98 So 262, 263, 154 La 830

Held not "authentic act"

(1) A deed of gift under private signature, attested by two witnesses and acknowledged by the donor before a notary public in another state, is not such an authentic act as will evidence a donation of immovables, Civ Code art 2234, providing that such an act must show on its face that it was passed before a notary or other officer authorized to execute such functions and two competent witnesses—Baker v. Baker, 125 La 969, 52 So. 115, 117.

(2) A mortgage, which begins as if passed before a notary and two witnesses and so reads until the end, but is not signed by the notary, who merely signed the certificate that the mortgagor was the person who had signed the instrument, that he had appeared before him and acknowledged that he had signed it, held not to be an "authentic act."—West Louisiana Bank v. Dawson, 98 So 262, 263, 154 La 830.

61. **Meaning of Phrase**

"In Spanish jurisprudence, the interpretation of laws is divided into the authentic, the customary, and the doctrinal The authentic is that given by the legislator himself, who alone has the authority to resolve the doubts, and fix the sense of words, and whose decision is obligatory on citizens and tribunals, and must be obeyed both within and without courts of justice"—Houston v Robertson, 2 Tex 1, 26, citing Diccionario de Legislación p 316

"'Customary' interpretation of laws" distinguished—Houston v. Robertson, 2 Tex. 1, 26

"'Doctrinal' interpretation of laws" distinguished—Houston v Robertson, 2 Tex 1, 26

62. Downing v. Brown, 3 Colo 571, 590.

63. Johnson v. Ferguson, (Tex Civ App) 55 S W.(2d) 153, 159

64. Bell v Thomsen, 273 S W. 1109, 1110, 116 Tex 325

65. U. S v Potter, (C C Mass) 56 F. 83, 92.

66. Hartley v. Ferrell, 9 Fla 374, 380

67. U S—In re Fowler, (C C N Y.) 4 F 303, 310, 18 Blatchf. 430.
Ark—Damon v Hammonds, 84 S W 796, 73 Ark. 608, 609.

Similar definition

"To prove authentic"—In re Fowler, (C C N Y) 4 F 303, 310, 18 Blatchf 430, quoting Worcester D

68. Bell v. Thomsen, 273 S.W. 1109, 1110, 116 Tex 325.

69. Ill—Goss, etc, Co. v. People, 4 Ill App 510, 515.
Ont—In re Weir, 14 Ont. 389, 394
"Attested" compared see Attest ante p 692 note 33.

70. Hartley v. Ferrell, 9 Fla. 374, 379.

71. Bell v. Thomsen, 273 S W. 1109, 1110, 116 Tex 325.

72. New Era Milling Co. v Thompson, 230 P 486, 487, 107 Okl. 114

73. Ala—Trainum v. State, (App) 167 So 801
Kan—Ayres v Doering, 90 P 794, 76 Kan 149, 150

74. Ex parte Davis, 62 S W (2d) 1036, 1038, 333 Mo 262, 89 A L R 589.

75. Trainum v State, (Ala App) 167 So. 801

76. Collette v. Hanson, 174 A. 466, 467, 133 Me. 146—6 C J. p 863 note 48 [a] (3).

77. New Era Milling Co. v Thompson, 230 P 486, 487, 107 Okl. 114

78. State ex rel Sullivan v. Price, (Ariz) 63 P (2d) 653, 654.

79. Mayfield v. Prosser, 32 N E 1129, 133 Ind 699—Mayfield v Sears, 32 N E 316, 133 Ind. 86, 88.

80. Bell v Thomsen, 273 S W. 1109, 1110, 116 Tex 325

"Acknowledged" distinguished

"In this state the authentication of deeds has always been accomplished either by official certificate of acknowledgment or of proof by attesting witnesses . . . a deed may be legally authenticated although it is not acknowledged at all, if it is properly proved by attesting witnesses before the right official"—Bell v Thomsen, 273 S W 1109, 1110, 116 Tex 325

81. Collette v Hanson, 174 A. 466, 467, 133 Me 146

82. Bell v Thomsen, 273 S.W. 1109, 1110, 116 Tex 325.

AUTHENTICATION. Acts done with the view of causing an instrument to be known and identified;[83] an attestation made by a proper officer by which he certifies that a record is in due form of law, and that the person who certifies it is the officer appointed so to do,[84] more specifically, the act or mode of giving legal authority to a statute, record, or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence;[85] also that which is certified concerning any document by the proper certifying officer or officers.[86]

Phrases: "Authentication of any document,"[87] "authentication of deeds,"[88] and "written authentication."[89]

AUTHENTICS. In the civil law, a Latin translation of the Novels of Justinian by an anonymous author;[90] also a collection of extracts made from the Novels by a lawyer named Irnier, which he inserted in the code at the places to which they refer.[91]

AUTHENTICUM. In the civil law, an original instrument or writing, the original of a will or other instrument, as distinguished from a copy.[92]

AUTHOR. The beginner, former, or first mover of anything, the efficient cause of a thing, one who produces, creates, or brings into being;[93] he to whom anything owes its origin, the inventor, maker, or originator.[94] The term is appropriately applied to one who composes or writes a book, and in a more general sense to one whose occupation is to compose and write books or writings,[95] and in this sense, the word has been specifically defined as a literary man who writes a book and prepares it for publication,[96] one who, by his own intellectual labor applied to the materials of his composition, produces an arrangement or compilation new in itself;[97] one who completes a work of science or literature;[98] the person by whom a composition is primarily developed.[99]

AUTHORITY. In its broad general sense, the word has been defined as meaning control over;[1] jurisdiction;[2] power,[3] power to act, whether original or delegated.[4] The word is frequently used to express

82. In re Fowler, (C C N Y) 4 F. 303, 310, 18 Blatchf 430, quoting Bouvier L D

Verification of judgments, as what they purport to be, is an act of authentication—Collette v. Hanson, 174 A. 466, 467, 133 Me 146

Writing may or may not be required.—In re Fowler, (C C N Y) 4 F 303, 311, 18 Blatchf 430.

Held not "authentication"

"The fact that the 'intended' bill of exceptions bears the indorsement that it was 'presented' to the trial judge cannot be considered an 'authentication' "—Trainum v. State, (Ala App) 167 So. 801.

84. Black L D

85. In re Fowler, (C C N Y.) 4 F 303, 310, 18 Blatchf. 430, quoting Burrill L. D

See Voloshin v Ridenour, (C C A Canal Zone) 299 F. 134, 139, cited in Black L. D.

Similar definition

"Official attestation that will render a written instrument legally admissible in evidence.—Mayfield v Sears, 32 N E 816, 133 Ind. 86, 88—New Era Milling Co v. Thompson, 230 P 486, 487, 107 Okl 114

86. Okl—New Era Milling Co. v. Thompson, 230 P. 486, 487, 107 Okl. 114

Wis—Ordway v Conroe, 4 Wis. 45, 50.

87. New Era Milling Co v. Thompson, 230 P. 486, 487, 107 Okl 114

88. Bell v Thomsen, 273 S.W. 1109, 1110, 116 Tex. 325.

89. In re Fowler, (C C N Y) 4 F 303, 311, 18 Blatchf 430

90. Black L D

Reason for the name

So called because the Novels were translated entire, in order to distinguish it from the epitome made by Julian—Black L. D.

91. Black L D.

Accuracy doubtful

These extracts have the reputation of not being correct—Black L D, citing Merlin Répert. Authentique

92. Black L D.

93. Leidersdorf v. Flint, (C C Wis) 15 F Cas No 8,219, 8 Biss 327, 329 To like effect Gray v Russell, (C C Mass) 10 F Cas No 5,728, 1 Story 11, 17.

94. Burrow-Giles Lithographic Co v Sarony, (N Y.) 4 S Ct 279, 111 U S 53, 58, 28 L.Ed. 349.

Connotes originating

(1) An author may be said to be the creator or inventor both of the ideas contained in his book, and the combination of words to represent them—Stowe v Thomas, (C C Pa.) 23 F Cas No 13,514, 2 Wall Jr. 547.

(2) "In my opinion, 'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph"—Courier Lithographing Co. v Donaldson Lithographing Co., (Ky) 104 F 993, 995, 44 C C A. 296—6 C.J p 863 note 61.

"Inventor" synonymous.—Shepherd v Conquest, 17 C B 427, 443, 84 E C. L. 427, 139 Reprint 1140

95. Leidersdorf v Flint, (C C Wis) 15 F Cas No 8,219, 8 Biss 327, 329.

96. De Witt v. Brooks, 7 F Cas No. 3,851

97. Atwill v Ferrett, (C C N Y.) 2 F. Cas No 640, 2 Blatchf. 39, 46—6 C. J p 863 note 66

98. Burrow-Giles Lithographic Co v. Sarony, (N Y) 111 U S 53, 58, 4 S Ct. 279, 28 L Ed 349

99. Keene v Wheatley, (C C Pa.) 14 F Cas No 7,644

1. State v. Home Brewing Co., 105 N E 909, 182 Ind 75, 97.

2. Ala—Lee v. State, 39 So. 366, 143 Ala 93, 95.

Ind—State v Home Brewing Co, 105 N E 909, 182 Ind 75

3. Tex—Newburn v. Durham, 32 S. W. 113, 10 Tex Civ App. 655, 662.

Wyo—State v District Court of Eighth Judicial Dist in and for Natrona County, 238 P. 545, 548, 33 Wyo 281

"Absolute power."—State v Home Brewing Co, 105 N E. 909, 182 Ind 75, 97

"Discretionary power."—Brown v. Mead, 133 A. 27, 35, 121 Conn 1.

"Legal or rightful power."—Blevins v. Morledge, 47 P. 1068, 5 Okl 141, 144, quoting Webster D—Superior Steel Corporation v. Commonwealth, 136 S E. 666, 667, 147 Va 202

4. Or—Martin v. Oregon R., etc., Co, 113 P 16, 58 Or. 198, 206, quoting Century D.

a derivative power,[5] and in this sense, the word may be used as meaning instructions,[6] permission,[7] power delegated by one person to another,[8] the result of the manifestation by the former to the latter of the former's consent that the latter shall act for him,[9] authority in this sense being more fully discussed in the titles Agency § 91 et seq., Attorney and Client § 72 et seq, and Brokers §§ 18–22 [9 C J. p 524 note 28–p 534 note 1]. The word is sometimes used also in the sense of a duty and obligation.[10]

In governmental law, the term has been defined as meaning legal power, a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties;[11] hence in the English law relating to public administration, an authority is a body having jurisdiction in certain matters of a public nature;[12] and in the laws of at least one state, it has been similarly used as designating or meaning an agency for the purpose of carrying out a state duty or function;[13] some one to whom by law a power has been given.[14]

In a derived, but entirely different, sense, a clear and definite decision upon a question actually before the court for decision, a precedent.[15]

Phrases: "Agent of an authority,"[16] "Albany Light, Heat, and Power Authority Act,"[17] "attempt upon an authority,"[18] "authority coupled with the legal title,"[19] "authority exercised under the United States,"[20] "authority hereinbefore conferred,"[21] "'authority' may finance the construction,"[22] "authority of law,"[23] "authority of" statutes,[24] "authority of the brakeman,"[25] "authority of The City,"[26] "authority or agency,"[27] "authority there-

Wis.—State v Railroad Commn., 117 N.W. 846, 137 Wis. 80, 86

5. Martin v Oregon R., etc., Co., 113 P. 16, 58 Or 198, 206.

6. Mo.—Graham v St Louis & S F Ry Co., (App.) 273 S.W. 221, 226

"Instructions" distinguished.—Weatherford, etc., R Co v Crutcher, (Tex Civ App.) 141 S.W 137, 143

7. Black L. D., citing People v Howard, 160 P 697, 701, 31 Cal App 358

8. N.J.—Clark v Griffin, 113 A. 234, 235, 95 N.J Law 508, cited in Black L. D

Okl.—Rucks-Brandt Const Co v Price, 23 P (2d) 690, 692, 165 Okl 178, quoting Bouvier L. D

9. U.S.—Berryhill v. Elliott, (C.C.A. Okl.) 64 F (2d) 253, 255

Wis.—Weil-McLain Co v Maryland Casualty Co., 258 N.W 175, 176, 217 Wis. 126.

10. U. S.—State of Maryland v Miller, (Md.) 194 F 775, 781, 114 C. C.A 495

Ariz.—Palmcroft Development Co v. City of Phoenix, 49 P (2d) 626, 629.

"It is thus evident that an obligation may contain an authority."—Rucks-Brandt Const Co v Price, 23 P (2d) 690, 692, 165 Okl. 178—6 C.J. p 864 note 87.

11. Black L. D.

12. Black L. D.

13. Gaynor v. Marohn, 198 N.E 13, 16, 268 N.Y. 417. See New York Edison Co v. City of New York, 198 N.E 550, 551, 268 N.Y 669—Tierney v Cohen, 198 N.E 225, 229, 268 N.Y. 464

Various statutes creating "authorities"

L (1921) c 154, creating the Port of New York Authority; L (1932) c 548, as amended by L.(1933) c 67, creating the New York State Bridge Authority, L (1933) c 68, creating the Pelham-Portchester Parkway Authority, L (1933) c 70, creating the Jones Beach State Parkway Authority, L (1933) c 115, creating the Triborough Bridge Authority, L (1933) c 208, creating the Saratoga Springs Authority, L (1933) c 209, creating the Thousand Islands Bridge Authority, L (1933) c 214, creating the American Museum of Natural History Planetarium Authority, L (1933, Extra Sess.) c 831, creating the Buffalo and Fort Erie Public Bridge Authority, L (1933) c 232, as amended by L (1935) cc 846, 847, creating the Central New York Regional Market Authority, L.(1933) c 231, as amended by L.(1935) cc 844, 845, creating the Lower Hudson Regional Market Authority, L (1933) c 316, as amended by L (1934) c 304, creating the Industrial Exhibit Authority, L (1933, Extra Sess.) c 801, creating the Bethpage Park Authority, L (1934) c 4, creating the Municipal Housing Authorities; L (1934) c 138, creating the Henry Hudson Parkway Authority, L (1934) c 162, creating the Marine Parkway Authority, L (1934, Extra Sess.) c 819, creating the New York State World War Memorial Authority; L (1935) c 349, creating the Buffalo Sewer Authority; L (1935) c 681, relating to the creation of the Queens-Midtown Tunnel Authority, L (1935) c 843, creating the Albany Regional Market Authority, L (1935) c 869, creating the Rockland-Westchester Hudson River Crossing Authority—Tierney v Cohen, 198 N.E 225, 229, 268 N.Y. 464—Gaynor v. Marohn, 198 N.E. 13, 15, 268 N.Y. 417.

14. New Era Milling Co v Thompson, 230 P. 486, 487, 107 Okl. 114.

15. Grand Lodge A. O U. W. v Furman, 52 P. 932, 6 Okl. 649, 658—Blevins v. Moiledge, 47 P. 1068, 1069, 5 Okl 141, quoting Webster D

16. U S v Taylor, 6 Philippine 162, 163

17. Gaynor v. Marohn, 198 N.E. 13, 16, 268 N.Y. 417

18. U S v Taylor, 6 Philippine 162, 163

19. Den v McCann, 3 N.J Law 31, 34, 4 Am.D 384—Unger v Newlin Haines Co., 120 A 331, 335, 94 N. J.Eq 458.

20. Croswill v. Grand Lodge K. P of Georgia, (Ga.) 32 S.Ct 822, 225 U.S 246, 258, 56 L.Ed 1074—6 C.J p 865 note 88

21. Brown v. Mead, 183 A. 27, 35, 121 Conn 1.

22. Tierney v. Cohen, 198 N.E. 225, 228, 268 N.Y 464.

23. Ky.—Connelly v American Bonding, etc., Co., 69 S.W. 959, 113 Ky. 903, 908.

Neb.—Reineman v Covington, etc., R. Co., 7 Neb. 310, 313

N.Y.—People v. Peck, 21 N.Y.S. 741, 66 Hun 531, 537

"Due process of law" distinguished.—Peo. v Camp, 21 N.Y.S. 741, 66 Hun 531, 537

24. Independent School Dist. of Steam-Boat Rock v. Stone, (Iowa) 1 S.Ct. 84, 106 U.S 183, 187, 27 L. Ed. 90.

25. Graham v. St. Louis & S. F. Ry Co., (Mo.App.) 273 S.W. 221, 224.

26. Richards v. Citizens' Water Supply Co., 125 N.Y.S. 116, 140 App. Div. 206, 226.

27. New York Edison Co. v. City of New York, 198 N.E 550, 268 N.Y 669—Tierney v. Cohen, 198 N.E. 225, 229, 268 N.Y. 464.

of [the United States],"[28] "authority to expel trespassers,"[29] "authority to hear and determine,"[30] "authority to issue bonds,"[31] "authority to raise money by [bond issue],"[32] "authority to sell,"[33] "bare naked authority,"[34] "board or the authority,"[35] "by authority,"[36] "joint authority,"[37] "judicial authority,"[38] "members of the 'Authority,'"[39] "method or authority or agency,"[40] "not given 'authority' but merely 'permission,'"[41] "power and authority,"[42] "scope of authority,"[43] and "some one in authority."[44]

Authorities

The plural, in its derived sense referred to above in note 15, has been defined as meaning citations of, or references to, statutes, adjudged cases, and the opinions of text-writers, made on the argument of causes or questions before a court as grounds of the points or propositions contended for,[45] and in its governmental sense, indicated above in notes 11-14, as meaning a person or persons, or a body, exercising power or command;[46] the body or persons exercising power or command,[47] those upon whom the people have conferred authority.[48]

The authorities of an office are the powers and prerogatives with which the officer is clothed connected with the discharge of his duties, and include not only such powers as are necessary to enable him to do his duties properly, but the right and power to demand and receive the emoluments attached by law to his office.[49]

Other phrases: "Authorities thereof,"[50] "competent authorities,"[51] "corporate authorities,"[52] "lawful authorities,"[53] and "local authorities."[54]

AUTHORIZE.

In General

It has been said that the word has different meanings, dependent upon the connection and circumstances of its use,[55] and that ordinarily it means: To clothe with authority;[56] to empower or to give a right to act,[57] to give legal power to;[58] to invest

28. Baldwin v Franks, (Cal) 7 S Ct 656, 120 U S 678, 692, 30 L Ed 766

29. Graham v St. Louis & S F Ry Co., (Mo App) 273 S W 231, 236

30. Blevins v Morledge, 47 P 1068, 1069, 5 Okl 141.

31. State ex rel. William R Compton & Co. v Walter, 23 S W (2d) 167, 172, 324 Mo 290

Meaning of phrase

"Authority to issue bonds means authority to raise money by that means."—State ex rel William R Compton Co v Walter, 23 S W (2d) 167, 172, 324 Mo. 290.

32. State ex rel William R Compton & Co v Walter, supra.

33. Ark.—Bonnell v. Roane, 20 Ark 114, 121
Kan—Sullivant v. Jahren, 79 P 1071, 71 Kan. 137, 133
N J—Clark v. Griffin, 113 A 234, 235, 95 N J Law 503

34. Den v. McCann, 3 N J Law 31, 34, 4 Am D. 384—Unger v Newlin Haines Co, 120 A. 331, 335, 94 N J Eq. 458.

35. Gaynor v. Marohn, 193 N E. 13, 17, 268 N Y. 417.

36. Blaisard v. Cincinnati, etc, R. Co, 17 N E. 183, 115 Ind 1, 4

37. Blevins v. Morledge, 47 P 1068, 1069, 5 Okl 141.

38. State v Judges, 34 La Ann 1114, 1115, 1116

39. New York Edison Co v. City of New York, 193 N E 550, 551, 268 N Y 669

40. Tierney v Cohen, 193 N.E. 225, 229, 268 N.Y 464.

41. People v. Howard, 160 P. 697, 701, 31 Cal.App 358.

42. Ariz—Palmcroft Development Co v City of Phoenix, 49 P (2d) 626, 629
Md—Baltimore v Marriott, 9 Md 160, 174, 66 Am D 326
"May be construed 'duty and obligation.'"—Palmcroft Development Co v City of Phoenix, (Ariz) 49 P (2d) 626, 629—Baltimore v Marriott 9 Md 160, 174, 66 Am D 326

43. Penas v. Chicago, etc, R Co, 127 N W 926, 113 Minn 203, 221, 140 Am S R 470, 30 L R A (N S) 627

44. New Era Milling Co v Thompson, 230 P. 486, 487, 107 Okl. 114

45. Burrill L. D

46. Rathbone v Wirth, 40 N Y S 535, 556, 6 App Div 277, quoting Century D, and Imperial D

47. Rathbone v Wirth, supra, quoting Murray Eng D

48. Rathbone v. Wirth, supra.

49. Merriam v Clinch, (C C N Y.) 17 F.Cas No 9,460, 6 Blatchf 5, 9

50. Cole v Black River Falls, 14 N W. 906, 57 Wis 110, 116, 118

51. U. S v. Clarke, (Fla) 8 Pet (U S) 436, 449, 8 L Ed 1001

"Lawful authorities" equivalent.—U S v Clarke, (Fla) 8 Pet (U S) 436, 449, 8 L Ed 1001

52. **Meaning of phrase**

"Corporate authorities" held to be those municipal officers who are either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent—Hessler v. Drainage Comrs, 53 Ill 105, 113—Harward v. St Clair, etc., Levee, etc. Co, 51 Ill. 130, 136

53. U. S v. Clarke, (Fla) 8 Pet (U S) 436, 449, 8 L Ed. 1001.

54. Rathbone v. Wirth, 40 N Y S 535, 6 App Div. 277, 310

55. Quality Building & Securities Co v Bledsoe, 14 P.(2d) 128, 132, 125 Cal App 493

56. U S—Blair v. Chicago, (Ill) 26 S Ct 427, 201 U S. 400, 457, 50 L Ed 801
Mo—Dickensheet v. Chouteau Mining Co, 202 S W. 624, 626, 200 Mo App 150
Wash—Finos v. Netherlands American Mtg Bank, 265 P. 167, 171, 147 Wash 86

Similar definition

"To clothe with authority, warrant or legal power"—Quality Building & Securities Co v. Bledsoe, 14 P (2d) 128, 132, 125 Cal App 493.

Affirmative grant of power

"In this sense implies an affirmative grant of power The person so clothed is authorized."—Doherty v Kansas City Star Co., 57 P (2d) 43, 45, 143 Kan. 802

57. Cal—Quality Building & Securities Co v Bledsoe, 14 P (2d) 128, 132, 125 Cal App. 493
Kan—Board of Com'rs of Sedgwick County v Toland, 245 P. 1019, 1021, 121 Kan 109—State v Franklin County, 114 P. 247, 84 Kan. 404, 406
Mo—Dickensheet v Chouteau Mining Co, 202 S W. 624, 626, 200 Mo App. 150
Tex—Cox, Inc, v. Humble Oil & Refining Co, (Civ.App.) 16 S W.(2d) 285, 286.
Wash—Finos v. Netherland American Mtg Bank, 265 P. 167, 171, 147 Wash 86
6 C J p 865 note 99.

58. U S—Blair v. Chicago, (Ill) 26 S Ct 427, 201 U S 400, 457, 50 L.Ed. 801, quoting Century D.

with power to do a thing;[59] to permit;[60] to permit a thing to be done in the future;[61] and, in slightly different senses, to approve of; to sanction formally,[62] to warrant; to justify; to furnish a ground for.[63] In these senses, "authorize" has been distinguished from: "Approve,"[64] "instruct,"[65] "obligate," and "require."[66] It has been said, however, that the word may be used as having a mandatory effect or meaning, implying a direction to act, used in the sense of "to require."[67]

Phrases "Authorize and empower,"[68] "'authorize' that the damages . . . be diminished,"[69] "authorize the board . . . to contract,"[70] "authorize the city . . . to buy, etc,"[71] "'authorize' the commissioners,"[72] "'authorize' them to pay a suitable and reasonable amount,"[73] "authorize to be operated,"[74] and "would not authorize a verdict;"[75] also "authorizes loans and grants,"[76] "authorizes the commissioner to refund,"[77] "authorizes the jury to find for plaintiff,"[78] and "'authorizes' the jury to make this deduction;"[79] and also "'authorizing' public officers to do an act,"[80] and "authorizing sale."[81]

Authorized

In the past tense, or as the past participle, "authorized" has been defined as meaning clothed with authority, warrant, or legal power;[82] directed;[83] empowered;[84] empowered and directed;[85] entitled;[86] permitted;[87] possessed of, or endowed with, authority;[88] sanctioned or approved by authority.[89]

Mo—Dickensheet v Chouteau Mining Co, 202 S W 624, 626, 200 Mo App 150

59. In re McKeown, 85 A 1085, 1087, 237 Pa 626

60. Crecelius v Chicago, M & St P Ry. Co, 205 S W 181, 186, 274 Mo. 671

61. Gray v Gill, 210 N Y S. 658, 660, 125 Misc. 70

62. Hubbard v. Fort, (C C N J) 188 F 987, 997.

63. Crecelius v Chicago, M & St P Ry Co., 205 S W 181, 186, 274 Mo 671, quoting Webster D

64. Hubbard v. Fort, (C C N J) 188 F 987, 997

"Approve" broader

"The word 'approve' has a broader significance than 'authorize' To 'approve' is to ratify or confirm a thing already done, or to sanction a thing that may be done in future, but to 'authorize' is to permit a thing to be done in future"—Gray v. Gill, 210 N Y S 658, 660, 125 Misc 70.

65. Quality Building & Securities Co v Bledsoe, 14 P (2d) 128, 132, 125 Cal App 493

66. Finos v. Netherland American Mtg Bank, 265 P. 167, 171, 147 Wash 86

67. Cal—Quality Building & Securities Co v Bledsoe, 14 P (2d) 128, 132, 125 Cal App 493

N Y—In re Borden's Will, 288 N.Y S 957, 961, 159 Misc. 766

Wash—Finos v Netherland American Mtg Bank, 265 P 167, 171, 147 Wash. 86

68. Ariz—Palmcroft Development Co v. City of Phoenix, 49 P.(2d) 626, 628.

N Y—In re Borden's Will, 288 N.Y. S 957, 961, 159 Misc. 766.

N.C—Jones v. Madison County, 50 S E 391, 137 N C 579, 590

Pa—Seeds v Burk, 87 A. 511, 181 Pa 281, 290

69. Crecelius v. Chicago, M & St P Ry Co, 205 S W 181, 186, 274 Mo 671

70. Sobol v Common Council, etc, of City of Rome, 251 N Y S 274, 279, 233 App Div 158

71. Ward v McDonald, 77 So. 827, 832, 201 Ala 237.

72. In re McKeown, 85 A. 1085, 1087, 237 Pa 626

73. In re Borden's Will, 288 N Y S 957, 961, 159 Misc 766

74. Schinzel v Best, 92 N Y.S 754, 48 Misc 234, 227

75. Crecelius v Chicago, M & St P Ry Co, 205 S W 181, 186, 274 Mo 671

76. Kansas Gas & Electric Co v City of Independence, Kan, (C C A Kan) 79 F (2d) 32, 42

77. Braun v U S, (Ct Cl) 8 F Supp 860, 864

78. Graham v St Louis & S F Ry Co, (Mo App) 272 S W. 231, 225

79. Crecelius v Chicago, M & St P Ry Co, 205 S W 181, 186, 274 Mo 671.

80. Walsh v Farrington, 165 A 914, 915, 105 Vt 269

81. In re Desotelle's Estate, 258 N Y S. 119, 122, 143 Misc 732

Order "confirming sale" held to mean order "authorizing sale."—In re Desotelle's Estate, 258 N Y S. 119, 122, 143 Misc 732.

82. Ark—Arkansas & Memphis Ry. Bridge & Terminal Co v. State, 295 S W. 378, 380, 174 Ark. 420

Tex—Cox, Inc, v. Humble Oil & Refining Co, (Civ App) 16 S W. (2d) 285, 286.

83. U. S Sugar Equalization Board v. P. De Ronde & Co, (C.C.A. Del.) 7 F.(2d) 981, 986

84. Cal—Bacon v. Davis, 98 P. 71, 9 Cal App 83, 97.

Mo—Dickensheet v Chouteau Mining Co, 202 S W. 624, 626, 200 Mo App 150.

Tex—Cox, Inc, v Humble Oil & Refining Co., (Civ App) 16 S W.(2d) 285, 286

Wyo—State v District Court of Eighth Judicial Dist. in and for Natrona County, 238 P 545, 548, 33 Wyo 281

85. Kansas Gas & Electric Co v City of Independence, Kan, (C C A Kan) 79 F (2d) 32, 43

86. Wabash, St L & P R. Co. v Rector, 104 Ill 296, 303.

"Entitled" nearly equivalent—Mansur-Tebbetts Implement Co v Smith, 65 Ill App 319, 324—Dickensheet v Chouteau Mining Co, 202 S W 624, 626, 200 Mo App 150

87. Ward v. McDonald, 77 So 827, 833, 201 Ala. 237

88. Ala—National Surety Co. v. City of Huntsville, 68 So 373, 375, 193 Ala 82, quoting Webster New Int D

Neb—LeDarron v City of Harvard, 262 N W 26, 30, 257 N W. 261, 127 Neb 899

Similarly expressed

(1) "According to Mr Webster, one is 'authorized' when he possesses the authority to act"—Superior Steel Corporation v. Commonwealth, 136 S E 666, 667, 147 Va 202

(2) "Possessed of authority, that is possessed of legal or rightful power, the synonym of which is 'competency.'"—Doherty v. Kansas City Star Co, 57 P (2d) 43, 45, 143 Kan. 802, citing Webster New Int D

Grant of power not implied

"The word 'authorized,' however, need not have any implication of a grantor or a grantee of power."—Doherty v. Kansas City Star Co., 57 P (2d) 43, 45, 143 Kan 802.

Authority need not be expressly conferred.—Ferris v. McArdle, 106 A. 460, 462, 92 N J.Law 580.

89. National Surety Co. v. City of

It has been said that as used in orders, statutes, and the like,[90] and taken always according to the purposes and intent of the order, or statute, under consideration,[91] the word is equivocal, since it may be either discretionary and permissive or imperative and mandatory.[92] Ordinarily it is said to be permissive merely,[93] not being on its face mandatory,[94] but being given its natural significance of a grant of power rather than an imposition of a duty,[95] and implying either a discretionary or permissive power.[96] When, however, the word is used in a statute providing for the doing of some act required by public duty or justice or where the rights of a citizen are concerned, it has been held that the word is to be construed as mandatory;[97] and that it may imply an imposition of a duty,[98] the giving of a definite direction,[99] or even a positive command,[1] in the absence of specific words rendering it discretionary.[2] "Authorized" has been said to be distinguished generally from "directed,"[3] "instructed,"[4] and "required."[5]

Phrases: "Authorized agent,"[6] "authorized and directed,"[7] "authorized and empowered."[8] "authorized and lawful charges,"[9] "'authorized' and 'permitted,'"[10] "authorized and required,"[11] "authorized a verdict,"[12] "authorized by express or implied consent,"[13] "authorized by law,"[14] "authorized by law to be issued,"[15] "authorized by this ar-

Huntsville, 68 So 373, 375, 192 Ala 82, quoting Webster New Int. D

90. Conn—Brown v Mead, 183 A 27, 35, 121 Conn 1
Mo.—Crecelius v Chicago, M & St P Ry Co, 205 S W 181, 186, 274 Mo. 671
6 C J. p 865 note 7.

91. U S—State of Oklahoma v State of Texas, 44 S Ct 607, 264 U S 490, 491, 68 L Ed 1116—Braun v U. S, (Ct Cl) 8 F Supp 860, 864.
Kan.—Board of Com'rs of Sedgwick County v. Toland, 245 P 1019, 1021, 121 Kan 109.
6 C J p 866 note 9

92. Dickensheet v Chouteau Mining Co, 202 S W. 624, 626, 200 Mo App. 150.

93. Walsh v. Farrington, 165 A. 914, 915, 105 Vt 269

94. Klinck v. Pounds, 163 N Y S. 1008, 1009.

95. Brown v. Mead, 183 A. 27, 35, 121 Conn. 1

96. State of Oklahoma v State of Texas, 44 S Ct 607, 264 U S 490, 491, 68 L Ed 1116—U S v Cornell Steamboat Co, (N Y) 26 S Ct. 648, 202 U S. 184, 192, 50 L Ed 987—Braun v U S, (Ct Cl) 8 F Supp. 860, 864
Ark—Arkansas & Memphis Ry. Bridge & Terminal Co v State, 295 S W. 378, 380, 174 Ark 420—Pittman v. Road Improvement Dist No 1, 227 S.W 4, 5, 147 Ark 87
Kan—Board of Com'rs of Sedgwick County v Toland, 245 P. 1019, 1021, 121 Kan 109
Mo—Crecelius v. Chicago, M & St P. Ry Co, 205 S W. 181, 186, 274 Mo 671.
R I—McLyman v. Holt, 151 A. 1, 3, 51 R I 96
6 C J. p 865 note 7.

97. Or—Berridge v. Nickell, 178 P 353, 91 Or. 51.
Vt—Walsh v Farrington, 165 A 914, 915, 105 Vt 269.

98. U S—U. S Sugar Equalization Board v. P. DeRonde & Co, (C C A Del) 7 F (2d) 981, 986—Chase v U S, (C C A Neb) 261 F 833, 837—Atchison, T & S F Ry Co v U. S, 52 Ct Cl 338, 355
Vt.—Walsh v Farrington, 165 A 914, 915, 105 Vt 269

99. Kansas Gas & Electric Co v City of Independence, Kan, (C C A Kan) 79 F (2d) 32, 43—Quality Building & Securities Co v Bledsoe, 14 P (2d) 128, 132, 125 Cal App. 493

1. Palmcroft Development Co v City of Phœnix, (Ariz) 49 P (2d) 626, 630—6 C J p 865 note 8

2. Chase v. U. S, (C C A Neb.) 261 F 833, 837.

3. Klinck v. Pounds, 163 N.Y S 1008, 1009.

4. Quality Building & Securities Co v. Bledsoe, 14 P (2d) 128, 132, 125 Cal App. 493

5. Ala—National Surety Co v. City of Huntsville, 68 So 373, 374, 192 Ala 82
Ark—Arkansas & Memphis Ry Bridge & Terminal Co v. State, 295 S W 378, 380, 174 Ark 420
N Y—Klinck v. Pounds, 163 N Y.S 1008, 1009.
Pa—Lehigh County v Hoffort, 9 A 177, 116 Pa 119, 127, 128, 2 Am S R 587.

6. U S—Duncan v. Ashwander, (D C La) 16 F Supp 829, 831
Ala—National Surety Co v City of Huntsville, 68 So. 373, 375, 192 Ala 82
S C.—Bellamy v. Conway, etc, R. Co, 67 S E. 545, 85 S C 450, 454
Tex—Cox, Inc v Humble Oil & Refining Co, (Civ App) 16 S W (2d) 285, 286.

"Registered agent" equivalent.—Security Trust & Safe Deposit Co v. Walls, (Del Super.) 183 A. 513, 516

7. U S—U. S Sugar Equalization Board v P DeRonde & Co, (C C A Del.) 7 F (2d) 981, 985, 987.
Ariz—Palmcroft Development Co v. City of Phœnix, 49 P (2d) 626, 628

8. U S—Kansas Gas & Electric Co v City of Independence, Kan., (C C. A Kan) 79 F (2d) 32, 43
N Y—Armstrong v Murphy, 72 N Y S. 473, 65 App Div 133, 124.

Permissive or mandatory
'The words 'authorized and empowered' are usually words of permission merely and generally have that sense when used in contracts and private affairs, but when used in statutes they are frequently mandatory and imperative"—Dickensheet v. Chouteau Mining Co, 202 S W 624, 626, 200 Mo App 150—People v. Pierce, 119 N Y S 21, 64 Misc. 627, 633.

Words held mandatory.—Palmcroft Development Co v City of Phœnix, (Ariz) 49 P (2d) 626, 630—Berridge v. Nickell, 178 P. 353, 91 Or. 51.

9. Anderson v. St Paul City Ry. Co, 188 N W. 286, 288, 152 Minn. 213.

10. Barron County v Beckwith, 124 N W. 1030, 142 Wis 519, 534, 135 Am S R 1079, 30 L R A (N S) 810.

11. Klinck v. Pounds, 163 N Y S. 1008, 1009.

12. Graham v. St Louis & S F. Ry Co., (Mo App) 273 S W. 221, 226.

13. Travelers Ins Co v. Greenough, (N H) 190 A. 129, 130

14. U S—Patterson v U. S, (Or) 202 F 208, 210, 120 C C.A. 650—15 Op Atty-Gen 235, 239
Wyo—State v District Court of Eighth Judicial Dist in and for Natrona County, 238 P. 545, 548, 33 Wyo 231
6 C J p 866 note 11.

15. Ward v. McDonald, 77 So. 827, 833, 201 Ala 237.

ticle,"[16] "'authorized' by the named assured,"[17] "authorized by writing,"[18] "authorized capital,"[19] "authorized capital stock,"[20] "authorized depository for mail matter,"[21] "authorized deputy,"[22] "authorized emergency vehicle,"[23] "authorized employee,"[24] "authorized, empowered, and directed,"[25] "authorized, in his discretion,"[26] "authorized in writing,"[27] "authorized issue,"[28] "authorized maximum capital stock,"[29] "authorized or required by law to be filed or recorded,"[30] "authorized so to do by the commission,"[31] "authorized . . . to abate or refund . . . duties,"[32] "authorized to act,"[33] "authorized to add to the compensation,"[34] "authorized to appoint,"[35] "authorized to become indebted,"[36] "authorized to be levied,"[37] "authorized to bring and maintain an action,"[38] "authorized to charge,"[39] "authorized to collect,"[40] "authorized to construct, maintain, and operate a bridge,"[41] "authorized to create a Federal Emergency Administration,"[42] "authorized to discredit the whole of the testimony,"[43] "authorized to do business,"[44] "authorized to find punitive damages,"[45] "authorized to foreclose,"[46] "authorized to issue,"[47] "'authorized' to make . . . payments,"[48] "authorized to make said repair,"[49] "'authorized' to 'pay' for the erection of a suitable mausoleum,"[50] "authorized to receive money,"[51] "authorized . . . to sell,"[52] "'authorized' upon production of satisfactory proof,"[53] "authorized use,"[54] "'authorized' with discretion,"[55] "bonds not having been 'authoriz-

16. State ex inf Gentry v. Long-Bell Lumber Co., 12 S.W.(2d) 64, 80, 321 Mo 461

17. Travelers Ins Co v Greenough, (N H) 190 A. 129, 130

18. Murphy v Brown, 100 P. 801, 804, 12 Ariz 268

"Lawfully authorized" compared and distinguished—Murphy v Brown, 100 P 801, 804, 12 Ariz 268

19. Del—State v R H Perry & Co., 140 A. 474, 476, 3 W.W Harr 530

Fla—Stemple v Bruin, 49 So. 151, 57 Fla 173, 179

Minn—McLaren v Wold, 210 N.W 29, 30, 168 Minn 234

Tex—Staples v Kirby Petroleum Co., (Civ App) 250 S.W. 293, 295

20. Del—State v. R H Perry & Co., 140 A. 474, 476, 3 W W Harr 530

Minn—McLaren v Wold, 210 N.W 29, 30, 168 Minn 234

Tex—American Refining Co. v. Staples, (Com App) 249 S W 420, 421—American Refining Co v Staples, (Civ App) 250 S.W. 614, 616—Staples v. Kirby Petroleum Co., (Civ App) 250 S W. 293, 295

"Stock actually issued" contrasted.—Armstrong v. Emmerson, 132 N E. 768, 770, 300 Ill. 54, 18 A.L.R 693

21. Rosen v. U. S., (N.Y) 38 Sup Ct. 148, 150, 245 U S 467, 62 L Ed 406—Niemeyer v. U S, (C C A Ill) 84 F.(2d) 919, 920—U. S v Herzig, (D C N.Y.) 26 F.(2d) 487, 488

22. Buchanan v. Chapman, 146 So. 585, 587, 108 Fla 280

23. Tuten v Town of Emeryville, 35 P (2d) 195, 196, 139 Cal.App. 745

24. Duncan v. Ashwander, (D C La) 16 F Supp 829, 831.

25. Crane Co v. Columbus State Bank, 91 N.W. 532, 3 Neb (Unoff) 339.

26. State of Oklahoma v. State of Texas, 44 S Ct. 607, 264 U S. 490, 491, 68 L Ed 1116—U. S Sugar Equalization Board v. P DeRonde & Co., (C C A Del) 7 F (2d) 981, 986—Chase v U. S., (C C A Neb) 261 F. 833, 837

27. Ariz—Murphy v Brown, 100 P. 801, 804, 12 Ariz 268

Mo—Haskins v City of De Soto, (App) 35 S W (2d) 964, 967

"Legally authorized" compared and distinguished.—Murphy v Brown, 100 P 801, 804, 12 Ariz 268

28. State v. R H Perry & Co., 140 A. 474, 476, 3 W W Harr (Del) 530

29. Del—State v. R H. Perry & Co., supra

Va—Superior Steel Corporation v Commonwealth of Virginia, 136 S E 666, 667, 147 Va 202

30. New Era Milling Co v. Thompson, 230 P 486, 487, 107 Okl 114

31. Gray v Gill, 210 N.Y S 658, 661, 125 Misc. 70

32. U. S v. Cornell Steamboat Co., (N.Y) 137 F. 455, 457, 461, 69 C C A. 603

33. Campbell v. Fayette Co., 17 A 882, 127 Pa. 86, 88.

34. Atchison, T. & S. F. Ry. Co. v. U. S., 52 Ct Cl 338, 349

35. Board of Com'rs of Sedgwick County v Toland, 245 P. 1019, 1021, 121 Kan 109

36. Ward v. McDonald, 77 So. 827, 833, 201 Ala. 237.

37. LeBarron v City of Harvard, 257 N.W 261, 262 N W 26, 29, 127 Neb 899—O. M Campbell Co. v. City of Harvard, 243 N.W. 653, 654, 123 Neb 539

38. Doherty v. Kansas City Star Co., 57 P.(2d) 43, 45, 143 Kan. 802.

39. Anderson v. St Paul City Ry. Co., 188 N.W. 286, 288, 152 Minn 213

40. Anderson v. St. Paul City Ry. Co., supra.

41. Arkansas & Memphis Ry Bridge & Terminal Co v. State, 295 S W 378, 380, 174 Ark 420.

42. National Industrial Recovery Act tit 2 § 201 [40 U S C A. § 401], quoted in Kansas Gas & Electric Co v City of Independence, Kan., (C C A Kan) 79 F.(2d) 32, 36.

43. Paulette v Brown, 40 Mo. 52, 57—Dickensheet v Chouteau Mining Co., 202 S W 624, 626, 200 Mo App. 150.

44. Doherty v. Kansas City Star Co., 57 P.(2d) 43, 45, 143 Kan 802

45. Mo—Dickensheet v. Chouteau Mining Co., 202 S.W 624, 626, 200 Mo App 150

S C—Calder v Southern Ry Co., 71 S E 841 842, 89 S C. 237, Ann Cas. 1913A 394.

46. Cromartie v. Weaver, 73 S E 504, 137 Ga 452, 453

47. American Refining Co. v Staples, (Tex Civ App.) 250 S W. 614, 616

48. Brown v. Mead, 183 A. 27, 35, 121 Conn 1.

49. National Surety Co v. City of Huntsville, 68 So. 373, 375, 192 Ala. 33.

50. In re Borden's Will, 288 N.Y S. 957, 961, 159 Misc 766.

51. People v Howard, 160 P. 697, 701, 31 Cal App 358

52. Schlarb v Castaing, 97 P. 269, 50 Wash 331, 337.

53. U. S. v. Cornell Steamboat Co., (N Y) 26 S Ct 648, 203 U S 184, 193, 50 L Ed 987—Atchison, T & S. F Ry Co. v. U. S., 52 Ct Cl 338, 351.

54. Travelers Ins Co. v. Greenough, (N H.) 190 A 129, 130.

55. In re Borden's Will, 288 N.Y.S. 957, 962, 159 Misc. 766.

ed,'"[56] "city . . . is authorized to erect,"[57] "duly authorized agent,"[58] "lawfully authorized,"[59] "not only 'authorized' but 'instructed,'"[60] "now authorized to be issued,"[61] "person authorized,"[62] "President is authorized to require,"[63] "route authorized by the master,"[64] and "selectmen are hereby authorized."[65]

AUTHORSHIP. Generally speaking, authorship has been said to imply that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author as well as the thought of others; and would not have found existence in the form presented but for the distinctive individuality of mind from which it sprang.[66]

AUTO.

English Word

A colloquial contraction of "automobile."[67]

Auto livery service. The business of furnishing for hire an automobile with a chauffeur, the car to be driven where the hirer directs, also the business of leasing driverless cars.[68]

Auto stage. A motor vehicle used for the purpose of carrying passengers, baggage, or freight on a regular schedule of time and rates.[69]

Other phrases: "Auto bus,"[70] "auto tours,"[71] and "auto transportation company."[72]

Spanish Word

In Spanish law, a judicial order either interlocutory, "auto interlocutorio," called also "providencia," or final, "auto definitivo," called also "sentencia."[73] In the plural, the term is used in the sense of the pleadings, or the record of a cause, or the combination of the papers which compose it.[74]

AUTOCRACY. The name of an unlimited monarchical government; a government at the will of one man, called an "autocrat," unchecked by constitutional restrictions or limitations.[75]

AUTOGRAPH. One's handwriting.[76]

AUTOGRAPHIC. The term has been characterized as a word in common use in the English language to describe a certain type of registering devices, and is defined as self-writing or self-recording.[77]

Phrases: "Autographic ink,"[78] "autographic paper,"[79] "autographic press,"[80] "autographic registering apparatus,"[81] and "autographic telegraph."[82]

AUTOMATIC. Self-acting,[83] or the elimination of human agency or volition, which results in the saving of labor and increases certainty and uniformity of operation;[84] having an inherent power of action or motion, self-acting or self-regulating, not

56. State v. Thatcher, 178 N.E. 843, 846, 124 Ohio St 382.

57. Klinck v. Pounds, 163 N.Y.S. 1003, 1009.

58. Cox, Inc. v. Humble Oil & Refining Co., (Tex.Civ.App.) 16 S.W. (2d) 285, 286

59. Ariz.—Murphy v. Brown, 100 P. 801, 804, 12 Ariz. 268
Wash.—Schlarb v. Castaing, 97 P. 289, 50 Wash. 331, 337.

60. Quality Building & Securities Co. v. Bledsoe, 14 P.(2d) 128, 132, 125 Cal.App. 493.

61. Ward v. McDonald, 77 So. 827, 333, 201 Ala. 237.

62. Hurley v. South Thomaston, 74 A. 734, 105 Me. 301, 306

63. U. S. Sugar Equalization Board v. P. DeRonde & Co., (C.C.A.Del.) 7 F.(2d) 981, 983, 989

64. Ferris v. McArdle, 106 A. 460, 462, 92 N.J.Law 550
Authority need not be expressly conferred.—Ferris v. McArdle, 106 A. 460, 462, 92 N.J.Law 550

65. Walsh v. Farrington, 165 A. 914, 915, 105 Vt. 269.

66. National Tel. News Co. v. Western Union Tel. Co., (Ill.) 119 F. 294, 297, 298, 56 C.C.A. 198, 60 L.R.A. 805.

67. Webster New Int. D.
"Automobile" defined see Motor Vehicles § 1 [42 C.J. p. 609 notes 13–13].

68. Black L. D. See Rodenburg v. Clinton Auto & Garage Co., 87 A. 71, 84 N.J.Law 545—Collette v. Page, 114 A. 136, 138, 44 R.I. 26, 18 A.L.R. 74

69. Black L. D., citing State v. Ferry Line Auto Bus Co., 168 P. 893, 894, 99 Wash. 64
"Automobile for hire" distinguished.—State v. Ferry Line Auto Bus Co., 168 P. 893, 894, 99 Wash. 64

70. Nutley-Times Square Service v. Board of Public Utility Com'rs, 162 A. 124, 126, 109 N.J.Law 289—Zelber v. Commonwealth Casualty Co., 150 A. 243, 244, 106 N.J.Law 611—Doskovitch v. Board of Public Utility Com'rs, 138 A. 110, 103 N.J.Law 570.

71. Davis v. California Highway Indemnity Exchange, 5 P.(2d) 447, 449, 118 Cal.App. 403.

72. Lawrence v. Goddard, 168 So. 13, 15, 124 Fla. 250—Central Truck Lines v. Railroad Commission, 160 So. 26, 31, 118 Fla. 555.

73. Escriche Diccionario.

74. Escriche Diccionario.

Auto acordado
An order emanating from some superior tribunal, promulgated in the name and by the authority of the sovereign.—Black L. D., citing Schmidt Civ.L.

Auto de fe
The judgment of Spanish Inquisition.—Escriche Diccionario.

Autos del juicio
The record of the cause, or action.—Escriche Diccionario.

75. Black L. D.

76. Black L. D.

77. In re Autographic Register Co. (Cust. & Pat.App.) 39 F.(2d) 718, 719, quoting Webster New Int. D.

78. In re Autographic Register Co., supra.

79. In re Autographic Register Co., supra.

80. In re Autographic Register Co., supra.

81. In re Autographic Register Co., supra.

82. In re Autographic Register Co., supra, quoting Imperial D.

83. Cleveland Target Co. v. Empire Target Co., (C.C.N.J.) 97 F. 44, 74.

84. Tripp Giant Leveler Co. v. Rogers, (C.C.Mass.) 61 F. 289, 290—6 C.J. p. 867 note 23.
Human intervention must be absent
(1) The word cannot be properly applied to describe a method of

voluntary, not depending on the will, mechanical.[85]

Phrases: "Action is automatic,"[86] "automatic amplification control,"[87] "automatic award of insurance,"[88] "automatic bell ringing device,"[89] "automatic couplers,"[90] "automatic devices,"[91] "automatic insurance,"[92] "automatic pistol,"[93] "automatic sampling of ore,"[94] "automatic slot-device vending machines,"[95] "automatic slot-vending machine,"[96] "automatic tax,"[97] "automatic volume control,"[98] and "automatic weighing scales."[99]

AUTOMATICALLY. Acting without the continued application of human agency or volition, that is, as opposed to acting rationally or volitionally;[1] of its own accord;[2] self-acting.[3]

Phrases: "Automatically actuated,"[4] "automatically detachable,"[5] "automatically disengaged,"[6] and "coupling automatically by impact."[7]

AUTOMATISM. In medical jurisprudence, this term is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part; a condition sometimes observed in persons who, without being actually insane, suffer from an obscuration of the mental faculties, loss of volition or of memory, or kindred affections.[8]

Ambulatory automatism This term describes the pathological impulse to purposeless and irresponsible wanderings from place to place often characteristic of patients suffering from loss of memory with disassociation of personality.[9]

AUTOMOBILE. See the title Motor Vehicles § 1 [42 C.J. p 609 notes 13–18].

Phrases: "Automobile accessory" (see Accessory 1 C.J.S. p 424 notes 13, 19), "automobile accessory business,"[10] "automobile body building,"[11] "automobile dealer demonstrating,"[12] "automobile guest,"[13]

throwing out the hooks of a car coupler by means of a rod connecting therewith and running to the side of the car and there turned by the application of physical force by a brakeman—Gould Coupler Co v Trojan Car Coupler Co, (N.Y.) 74 F 794, 796, 21 C.C.A. 97.

(2) "This machine was automatic, in the sense that when once set in motion it did all its work without further intervention of the operator"—Tripp Giant Leveler Co v. Rogers, (C.C.Mass.) 61 F. 289, 290

85. Estes v Edgar Zinc Co., 136 P 910, 911, 91 Kan. 138, quoting Webster New Int. D.

86. Bright v State, 252 N.W. 386, 387, 125 Neb 817

87. Hazeltine Corporation v. Abrams, (D.C.N.Y.) 7 F.Supp. 908, 912.

88. U. S. v. Preece, (C.C.A.Utah) 85 F.(2d) 952, 953

89. State v Louisville & N. R. Co., 96 N.E. 340, 344, 177 Ind 553, 561, Ann.Cas.1914D 1284

90. U.S.—Johnson v Southern Pac. Co., (Utah) 25 S.Ct. 158, 161, 196 U.S. 1, 49 L.Ed. 363

Minn.—Kowalski v. Chicago & N. W. Ry. Co., 199 N.W. 178, 180, 159 Minn 388.

Tex.—St. Louis Southwestern Ry. Co. of Texas v Powell, (Civ.App.) 252 S.W. 268, 269.

91. State v Louisville & N. R. Co., 96 N.E. 340, 344, 177 Ind 553, Ann.Cas.1914D 1284.

92. U. S. v Preece, (C.C.A.Utah) 85 F.(2d) 952, 954

93. Bright v State, 252 N.W. 386, 387, 125 Neb 817

94. Le Roi Co. v Northport Smelting, etc., Co., 10 B.C. 138, 147.

"Hand sampling" distinguished.—Le Roi Co. v. Northport Smelting, etc., Co., 10 B.C. 138, 147

95. McCaughn v American Meter Co., (C.C.A.Pa.) 72 F.(2d) 871, 872—American Meter Co. v McCaughn, (D.C.Pa.) 1 F.Supp. 753, 754

96. McCaughn v. American Meter Co., (C.C.A.Pa.) 67 F.(2d) 148

97. Woolley v Hendrickson, 62 A. 278, 279, 73 N.J.Law 14.

What constitutes

An automatic tax held to be one which is operative without the annual approval of the voter—Woolley v Hendrickson, 62 A. 278, 279, 73 N.J.Law 14, 17

98. Hazeltine Corporation v Abrams, (D.C.N.Y.) 7 F.Supp. 908, 911

As defined by Standardization Committee of the Institute of Radio Engineers

"A self-acting device which maintains the output constant within relatively narrow limits while the input voltage varies over a wide range"—Hazeltine Corporation v Abrams, (D.C.N.Y.) 7 F.Supp. 908, 911.

99. Toledo Scale Co. v Hill, 269 S.W. 25, 26, 151 Tenn 312.

"'Automatic' or 'computing' weighing scale" held not "adding machine."—Toledo Scale Co. v Hill, 269 S.W. 25, 26, 151 Tenn 312

1. State v Louisville & N. R. Co., 96 N.E. 340, 344, Ann.Cas.1914D 1284—6 C.J. p 867 note 25

2. Estes v Edgar Zinc Co., 136 P 910, 911, 91 Kan 138.

3. U.S.—American Roll Gold Leaf Co. v. W. H. Coe Mfg. Co., (R.I.) 212 F. 720, 724, 129 C.C.A. 330, reversing W. H. Coe Mfg. Co. v American Roll Gold Leaf Co., (D.C.) 199 F. 435, 438

Kan.—Estes v. Edgar Zinc Co., 136 P. 910, 91 Kan. 138

4. Cleveland Target Co. v Empire Target Co., (C.C.N.J.) 97 F. 44, 73

5. Doyden Power-Brake Co. v Westinghouse, (Md.) 18 S.Ct. 707, 711, 170 U.S. 537, 42 L.Ed. 1136—Cleveland Target Co. v Empire Target Co., (C.C.N.J.) 97 F. 44, 74

6. Cleveland Target Co. v. Empire Target Co., supra.

7. U.S.—Johnson v Southern Pac. Co., (Utah) 25 S.Ct. 158, 162, 196 U.S. 1, 13, 49 L.Ed. 363

Minn.—Kowalski v Chicago & N. W. Ry. Co., 199 N.W. 178, 180, 159 Minn 388.

Tex.—St. Louis Southwestern Ry. Co. of Texas v Powell, (Civ.App.) 252 S.W. 268, 269

8. Black L. D.

9. Black L. D.

10. Dornbusch v. Board of Adjustment of City of Newark, 180 A. 552, 553, 18 N.J.Misc. 779

11. H. B. Shontz Co. v. Laffay, 229 N.Y.S. 17, 18, 19, 131 Misc. 791

"Automobile painting" compared.—H. B. Shontz Co. v Laffay, 229 N.Y.S. 17, 18, 131 Misc. 791

12. Warren v Globe Indemnity Co. of New York, 176 N.W. 73, 74, 170 Wis. 600.

13. Chanson v. Morgan's Louisiana & T. R. & S. S. Co., 136 So. 647, 649, 18 La.App. 602 See also Motor Vehicles §§ 399, 400 [42 C.J. p 1055 note 35—p 1057 note 60].

"automobile herein described and the equipment usually attached thereto,"[14] "automobile insurance" see Insurance §§ 910–912 [42 C J. p 787 note 13–p 813 note 92], "automobile or self-propelled vehicle,"[15] "automobile painting,"[16] "automobile parts,"[17] "automobile parts or accessories,"[18] "automobile repairer,"[19] "automobile repair shop,"[20] "automobile signals,"[21] "automobile truck" see Motor Vehicles § 4 [42 C J p 611 notes 44, 45], "automobile used or kept for the purpose of carrying on debtor's trade or business,"[22] "automobile wagons,"[23] and "private automobile of the pleasure car type."[24]

AUTONOMY. The political independence of a nation, the right, and condition, of self-government; the negation of a state of political influence from without or from foreign powers.[25]

AUTOPSY. An examination of a dead body by dissection,[26] to ascertain the cause of death;[27] a dissection of a dead body to determine the cause, seat, or nature of the disease; a post mortem examination.[28] As used in a particular statute permitting the attendance of the medical representative of a private party at certain autopsies, the term has been held to apply only to "official" autopsies and hence not to include a post mortem examination by a privaie party or his representative.[29]

AUTOPTIC PROFERENCE. A term said to have been coined by Wigmore in his treatise on Evidence as a substitute for the older term, "real evidence,"[30] and has been held applicable to cases of view by the jury of the locale of a crime.[31]

AUTOR. In Spanish civil law, one who has composed a literary work.[32] In another sense, a grantor or source of title, although the "autor" in this sense

14. Sanks v St. Paul Fire & Marine Ins Co, (Neb) 267 N W 454, 458

15. Independence Indemnity Co. v W J Jones & Son, (C C A Or) 64 F (2d) 312, 314

16. H B Shontz Co v Laffay, 239 N Y S 17, 19, 131 Misc 791

17. U S v Tutnill Spring Co, (D C Ill) 55 F (2d) 415, 416—Rochester Woven Belting Corporation v U. S, (Ct Cl) 43 F (2d) 264.

18. Routzahn v Willard Storage Battery Co., (C C A Ohio) 65 F (2d) 89, 92—Kamco, Inc, v U S, (Ct Cl) 10 F Supp. 588 591—Laher Auto Spring Co v U S, (Ct Cl) 5 F Supp 38, 40—Jefferson Electric Mfg Co v U S, (Ct Cl) 2 F Supp 778, 780

19. Coutts v. Clark, 164 P 714, 84 Or. 179.

20. Brower, to Use of Brower, v Employers' Liability Assur. Co, Limited, of London, England, 177 A. 826, 830, 318 Pa 440

21. Sidenstricker v Bean, 300 P 306, 868, 89 Colo. 104.

22. Julius v Druckrey, 254 N W 358, 360, 214 Wis 643

23. American-La France Fire Engine Co v Riordan, (C C A N Y) 6 F (2d) 964, 966—American-La France Fire Engine Co v Riordan, (D C. N Y) 294 F. 567, 568

"Automobile trucks" compared.—American-La France Fire Engine Co v. Riordan, (D C N Y) 294 F. 567, 568

24. Lloyd v. Columbus Mut Life Ins Co, 158 S E. 386, 387, 200 N C 722

"Automobile truck" contrasted.—Lloyd v Columbus Mut Life Ins Co, 158 S.E 386, 387, 200 N C 722.

25. Black L D.

26. Sudduth v Travelers' Ins. Co, (C C Ky) 106 F 832, 833

"Examination" distinguished.—Sudduth v Travelers' Ins Co, (C C Ky) 106 F 832, 833—Wehle v U S Mutual Acc Ass'n, 31 N Y S 865, 866, 11 Misc 38, affirmed 47 N E 35, 153 N Y 116, 60 Am S R 598

27. Wehle v U. S Mutual Acc Ass'n, supra

28. E O. Painter Fertilizer Co v Boyd, 114 So. 444, 445, 93 Fla 354.

"Post mortem examination" contrasted

"'Post-mortem examination' means an examination of a body after death and does not necessarily imply an autopsy"—Wehle v U S Mutual Acc Ass'n, 31 N Y S 865, 866, 11 Misc 36, 38, affirmed 47 N E 35, 153 N Y. 116, 60 Am S R 598.

29. Application of Wnuk, 193 N Y S 353, 354, 200 App Div. 731.

"Examination of portion of the viscera by private person" contrasted.—Application of Wnuk, 193 N.Y S 353, 355, 200 App Div. 731

30. Morse v State, 72 S E 534, 535, 10 Ga App 61

Philology criticized but use upheld

Discussing an objection that an instruction, "Evidence may be autoptic proference" was incorrect, the court said. "As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, § 1150 et seq If philological incorrectness is referred to, the objection is more tenable, for, while 'autoptic' is a good word, with pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, § 1150, note 1) Despite all this, we cannot brand the statement as reversible error . . . During the progress of the trial, certain bottles and their contents had been introduced in evidence and were given to the jury for their consideration, and the necessity was upon the judge of explaining to the jurors what use they could make of this class of testimony As to such evidence, the older writers used the phrase 'real evidence,' but Professor Wigmore in his wonderful treatise has pointed out that this is not an accurate expression, and has coined a new phrase, 'autoptic proference' to express it. Following Wigmore, Judge Felton, [the trial judge], used this expression, and then most clearly explained and illustrated to the jury, in plain, simple, homely language, just what the big words meant"—Morse v State, 72 S E. 534, 535, 10 Ga App 61

31. Yeager v. State, 278 P. 665, 669, 43 Okl Cr 318

Held not reception of evidence

A view of the premises by the jury in a criminal case, as provided for in Comp St (1921) § 2714, is not a receiving of evidence by the jury, in the sense as used in the constitution and statutes of this state It is a special kind of evidence, generally referred to as "autoptic proference," and permitted to go to the jury in the special manner provided by the statute for the purpose of enabling the jury to understand and apply the evidence introduced in the ordinary manner—Yeager v State, 278 P 665, 669, 43 Okl Cr. 318.

32. Escriche Diccionario.

is more commonly called "causante."[33] Formerly the plaintiff, "actor," in an action or proceeding was called "autor."[34] In Spanish criminal law the principal or author in the commission of a crime, including: (1) One who takes a direct part in the commission of the act, (2) one who directly forces or induces others to commit it, and (3) one who cooperates in the commission of the act by another act without which it would not have been accomplished.[35]

AUTO TRUCK. See Motor Vehicles § 4 [42 C.J. p 611 notes 44, 45].

AUTRE, AUTRY, AUTRI, or AUTER. Law French, other, another, different, else.[36]

Autre action pendant. Literally "Another action pending."[37] A species of plea in abatement,[38] and in particular cases, it has been characterized as a plea in bar.[39]

Autre (or auter) droit. Literally "Another's right."[40] Hence, in right of another; in another's right.[41]

Autre (or auter) vie. Literally "Another's life."[42]

AUTREFOIS, AUTREFOITS, AUTREFOITZ, or AUTREFEZ. Law French, at another time; formerly; before; heretofore;[43] of former times or of times past.[44]

Autrefois acquit. Literally "Formerly acquitted"[45] A plea made by a defendant indicted for a crime or misdemeanor that he has formerly been tried and acquitted of the same offense;[46] the name of a plea in bar in a criminal action that defendant has been already indicted, tried, and acquitted.[47]

Autrefois attaint. Literally "Formerly attainted." A plea of former attainder in bar to an indictment, whether for the same or any other felony.[48]

33. Escriche Diccionario.

34. Escriche Diccionario. See also Actor 1 C J S p 1431 note 31, p 1432 notes 33, 35

35. Spain—Sentence Supl Trib Nov 26, 1875, 13 Jur Cr 360—Sentence Supl Trib Febr 9, 1885, 34 Jur Cr 216
Philippine—U S v Reoglion, 22 Philippine 127, 128, 10 Off Gaz 711—U S v Macuti, 26 Philippine 170, 177, 11 Off Gaz 2250—U S v Laserna, 21 Philippine 168, 172, 10 Off Gaz 75—U S v Magcomot, 13 Philippine 386, 390, 7 Off Gaz 711—U S v. Valencia, 5 Philippine 352, 356, 4 Off Gaz 325—U S v Balisacan, 4 Philippine 545, 547, 4 Off Gaz 169—U S v Ramos, 2 Philippine 434, 435, 1 Off Gaz 958 (665)—U S v. Dinsing, 1 Philippine 738, 739, 1 Off Gaz 432 (143)
6 C J p 868 notes 48–53, p 869 notes 54–61, p 870 notes 62–72.

36. Adams Gloss.

37. Black L D

Another form of the phrase
Autre action pendant or pendente—another action pending—Adams Gloss

38. Black L. D., citing 1 Chitty Pl p 454.
Another action pending generally see Abatement and Revival § 17 et seq

39. **When a good plea in bar**
"In Anderson v. Barry, 2 J.J Marsh (Ky.) 265, 281, which was an action on a penal bond, the court said. "'Autre action pendant, is a good plea, in bar to a popular action; or a qui tam action, for a penalty; because, by bringing the first suit, the plaintiff in it, is entitled, exclusively to the penalty; and, consequently, no other person can ever have any right' The same rule was laid down in Massachusetts in Commonwealth v Churchill, 5 Mass 174, 176, where Chief Justice Parsons said· 'It is very well known that a man cannot bring a second action for the same cause, for which he has a prior action pending The same rule extends to qui tam actions, where the plaintiffs are different, if the cause of the two actions is the same' This rule seems to be of very ancient origin"—Johnson v Commonwealth, 97 S W 749, 750, 30 Ky L 148—6 C J. p 870 note 74

40. Anderson L D.

41. Adams Gloss.

Acting "per autre droit"
A prochein amy sues in right of an infant A trustee holds trust property in right of his cestui que trust or fidei commissarius—Adams Gloss

42. Adams Gloss, citing 2 Blackstone Comm p 120—Litt. § 56.

"Pur autre vie"
A person holding an estate for or during the life of another is called a tenant "pur autre vie," or "pur terme d'autre vie"—Black L D, citing 2 Blackstone Comm p 120—Litt. § 56

43. Black L D.

44. Adams Gloss.

45. Bouvier L D

46. Colo.—Henwood v. People, 143 P 373, 376, 57 Colo. 544, 550, Ann Cas 1916A 1111
S C—State v. Bilton, 153 S.E 269, 272, 156 S.C. 324.
6 C J. p 870 note 77.

47. U S—U. S. v. Gilbert, (C C Mass) 25 F Cas No.15,204, 2 Sumn 19, 39
Cal—People v Brannon, 233 P 88, 92, 70 Cal App 225
Fla—Potter v State, 109 So 91, 92, 91 Fla 938—Strobhar v State, 47 So 4, 8, 55 Fla 167—O'Brien v State, 47 So 11, 12, 55 Fla 146
S C—State v Bilton, 153 S E 269, 272, 156 S C 324
Tex—Simco v State, 9 Tex App 338, 348
See generally Criminal Law §§ 238–299 [16 C J p 232 note 76—p 286 note 73]

"Former jeopardy" equivalent in result
"The effect of the sustaining by the court of a plea of former jeopardy is equivalent in one great respect to the effect of upholding a plea of autrefois acquit since the result is to prevent the defendant's trial again for the offense"—State v. Bilton, 153 S E 269, 272, 156 S C. 321

"Autrefois convict" distinguished
"There is a marked difference in modern practice between the rules which govern the two pleas of autrefois acquit and autrefois convict, notwithstanding the immense amount of dictum and loose expression to the contrary found in the books Autrefois acquit is only available in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof These two elements must combine, and are both sine qua non to the sufficiency of the plea Autrefois convict only requires that the transaction, or the facts constituting it, be the same"—Simco v. State, 9 Tex.App. 338, 348.

48. 4 Blackstone Comm. p 336.

Autrefois convict. Literally "Formerly convicted."[49] A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same;[50] a plea in criminal law that defendant has formerly had a regular trial for the same offense and that a verdict of guilty has been returned against him, or that he has confessed his guilt on a sufficient indictment.[51]

AUTRESI BIEN. Law French, as well as; likewise.[52]

AUTRUI. Someone else, or a third person; a person not party to the contract.[53]

AUT STABIT APPELLUM AUT CADET, SECUNDUM QUOD SECTA SUFFICIENTER FACTA FUIT VEL MINUS RITE VEL SECUNDUM QUOD VARIATUM FUERIT VEL NON VARIATUM.[54]

AUXIBIEN or AUXYBIEN. Law French, as well[55]

AUXILIADOR. A Spanish and Portuguese word meaning "helper."[56] In Spanish law one who aids in the commission of a crime.[57]

AUXILIA FIUNT DE GRATIA, ET NON DE JURE, CUM DEPENDEANT EX GRATIA TENENTIUM, ET NON AD VOLUNTATEM DOMINORUM.[58]

AUXILIARY. As a noun the word has been defined as meaning helper or assistant,[59] and as an adjective, as meaning additional, adjunct, ancillary, subsidiary; additional,[60] or conferring aid or help.[61]

Phrases: "Auxiliary administration,"[62] "auxiliary channels,"[63] "auxiliary [electric] service,"[64] "auxiliary to, and in connection with,"[65] and "auxiliary writ."[66]

AUXILIATOR. A Latin word, meaning "helper or assistant," and is closely related to the English noun "auxiliary."[67]

Phrase. "Esta Water Auxiliator."[68]

AUXILIO A LA JUSTICIA. In Spanish law, aid and assistance to those administering justice which it is a criminal offense to refuse.[69]

AUXILIUM or AUXILII. Latin, help, aid, assistance, support, or succor.[70]

In feudal and old English law, aid; compulsory aid, hence a tax or tribute; a kind of tribute paid by the vassal to his lord, being one of the incidents of the tenure by knight's service.[71]

49. Bouvier L. D.—1 Chitty Cr. L. 463, cited in Coleman v. Tennessee, (Tenn.) 97 U.S. 509, 530, 24 L.Ed. 1113.

50. U. S. v. Olsen, (D.C.Cal.) 57 F. 579, 582.

51. Cal.—People v. Brannon, 233 P. 88, 93, 70 Cal.App. 235.
N.Y.—Shepherd v. Peo., 25 N.Y. 406, 420.
See generally Criminal Law §§ 283–299 [16 C.J. p. 232 note 76—p. 286 note 73].

52. Adams Gloss.

53. Allen, etc. Mfg. Co. v. Shreveport Waterworks Co., 37 So. 980, 113 La. 1091, 1095, 104 Am.S.R. 525, 68 L.R.A. 650, 2 Ann.Cas. 471.
Stipulation "pour autrui"
"A person can become a party to a contract in only one of two ways. First, by entering into it himself, either directly or through an agent, or, secondly, by accepting a stipulation made in his favor by the contractants, he remaining a third person and stranger to it until by accepting the stipulation he becomes a party. Such a stipulation is called in the civil law a 'stipulation pour autrui.'"—Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 37 So. 980, 113 La. 1091, 1094, 104 Am.S.R. 525, 68 L.R.A. 650, 2 Ann.Cas. 471.

54. A maxim meaning, "An appeal shall either stand or fall, according as the suit has been sufficiently or ineffectively prosecuted, or according as there has been a variation or no variation"—Adams Gloss., citing 3 Bracton tr. 2 c. 20 § 4 fol. 140b.

55. Adams Gloss., citing Litt. § 200.

56. Esta Co. v. Burke, (D.C.Pa.) 257 F. 743, 746.

57. Escriche Diccionario.

58. A maxim meaning, "Aids are made of favor, and not of right, as they depend on the affection of the tenants, and not upon the will of the lord (of the fee)"—Adams Gloss., citing 2 Blackstone Comm. p. 63 (q)—Bracton lib. II. tr. 1 c. 16 § 8.

59. Esta Co. v. Burke, (D.C.Pa.) 257 F. 743, 746.

60. Ill.—Judge v. Bergman, 101 N.E. 574, 577, 258 Ill. 246—Chicago v. Green, 87 N.E. 417, 422, 238 Ill. 258.
Mo.—First Nat. Bank of Brush, Colo. v. Blessing, (App.) 98 S.W. (2d) 149, 151.

61. Bowman v. Stark, (Tex.Civ.App.) 185 S.W. 921, 925.

62. First Nat. Bank of Brush, Colo. v. Blessing, (Mo.App.) 98 S.W. (2d) 149, 151.
"Domiciliary administration" contrasted.—First Nat. Bank of Brush, Colo. v. Blessing, (Mo.App.) 98 S.W. (2d) 149, 151.

63. People ex rel. Bailey v. Downers Grove Sanitary Dist., 195 N.E. 465, 468, 359 Ill. 601—Judge v. Bergman, 101 N.E. 574, 577, 258 Ill. 246—Chicago v. Green, 87 N.E. 417, 422, 238 Ill. 258.

64. People v. Public Service Commission for First District, 181 N.Y.S. 259, 261, 191 App.Div. 237.

65. Bowman v. Stark, (Tex.Civ.App.) 185 S.W. 921, 925.

66. Farmers' Nat. Bank of Stephenville v. Daggett, (Tex.Com.App.) 2 S.W.(2d) 834, 838.

67. Esta Co. v. Burke, (D.C.Pa.) 257 F. 743, 746.

68. Esta Co. v. Burke, supra.

69. Pen.Code arts. 279, 282.

70. Adams Gloss.
Auxilium ab alto—help from on high—Adams Gloss.
Auxilium argentarium—aid of money, pecuniary assistance—Adams Gloss.
Auxilium curiæ—aid, assistance of the court—Adams Gloss.
Auxilium expetere—to seek after aid—Adams Gloss.
Auxilium petere—to pray aid—Adams Gloss.
Auxilium vicecomiti—assistance, support of the sheriff—Adams Gloss.

71. Black L. D., citing Fitzherbert Nat. Brev. p. 62—Spelman.

AUXILIUM AD FILIUM MILITEM FACIENDUM ET FILIAM MARITANDAM. An ancient writ which was addressed to the sheriff to levy compulsorily an aid toward the knighting of a son and the marrying of a daughter of the tenants in capite of the crown.[72]

AVAIL.

As Noun

In the plural, the word "avails" has been judicially defined to mean cash or securities, the representatives of money;[73] money realized from sales of property;[74] profits or proceeds;[75] the proceeds of property sold after deducting expenses.[76] "Avails" has been held synonymous with "proceeds," "profits," and "use,"[77] and has been distinguished from "recoveries."[78]

Avail of marriage. In feudal law, the right of marriage, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony.[79] In Scotch law, a certain sum due by the heir of a deceased ward vassal, when the heir became of marriageable age.[80]

Other phrases: "Avail or recovery;"[81] also "avails of a life insurance policy,"[82] "avails of any sales,"[83] "avails of a sale or action,"[84] "avails of the cotton,"[85] "avails of the property of any bank,"[86] "'avails' of the 'real estate,'"[87] "'avails' of the sale of wood,"[88] and "avails or recoveries."[89]

As Verb

To have efficacy, force, use, or value; also to take or draw advantage; make use or profit,[90] as in the phrase "avail oneself of."[91]

AVAILABILITY. Quality of being available.[92]

Phrases: "'Availability' of a witness,"[93] and "availability to the respective parties."[94]

AVAILABLE. Accessible;[95] at one's disposal;[96] capable of availing or capable of being used to accomplish a purpose,[97] capable of being taken and

Auxilium regis—a subsidy paid to the king—Black L D, citing Spelman

72. Black L D.

73. Cal—Cordes v Harding, 150 P 650, 652, 27 Cal App. 474
N.Y—Allen v De Witt, 3 N.Y. 276, 278

74. Hall v Appel, 35 A 524, 526, 67 Conn 585

Previous sales not included

In a will by which testator gave his real estate to his wife during life and ordered that at her decease the real estate should be sold, and after paying all debts the balance of the avails should be divided among certain persons named, "avails" meant only the proceeds of real estate which the widow took on testator's death, and did not include proceeds of lands previously sold by testator—McNaughton v McNaughton, 34 N Y 201, 205.

75. Cordes v Harding, 150 P 650, 652, 27 Cal App 474, quoting Century D

76. U S—McCoy v. Lamar, (C C N Y) 12 F 367, 371, 20 Blatchf 471
Cal—Cordes v. Harding, 150 P. 650, 652, 27 Cal App 474.
6 C J p 872 note 1

Similarly expressed

(1) "The proceeds of property after liens have been satisfied and all securities subject to liens have been used for that purpose"—Evans v New Haven Bank, N B. A., (C C A. Conn) 72 F (2d) 664, 667.

(2) The profits or proceeds of the sale of property after deducting expenses—Cordes v Harding, 150 P. 650, 652, 27 Cal App. 474.

77. In re Coughlin's Estate, 205 N W 14, 16, 53 N D 188, quoting Webster New Int D.

78. Cordes v Harding, 150 P. 650, 652, 27 Cal App 474.

79. Black L D
A guardian in socage had also the same right, but not attended with the same advantage—Black L D, citing 2 Blackstone Comm p 88

80. Black L. D., citing Erskine Inst 2, 5, 18

81. Cordes v. Harding, 150 P. 650, 651, 27 Cal App 474

82. In re Coughlin's Estate, 205 N W. 14, 16, 53 N D 188

83. Watson v King, 26 N Y S 177, 179, 73 Hun 340

84. Cordes v. Harding, 150 P 650, 652, 27 Cal App 474, quoting Century D.

85. McCay v Lamar, (C C N Y) 12 F 367, 370, 20 Blatchf 474

As net proceeds

The "avails" of cotton seized and confiscated by the government are the amount received for the cotton after deducting the charges and expenses of their recovery—McCay v Lamar, (C C N Y) 12 F 367, 371, 20 Blatchf. 474.

86. Evans v New Haven Bank, N. B A., (C C A Conn) 72 F.(2d) 664, 667.

87. McNaughton v. McNaughton, 34 N Y. 201, 205

88. Hall v. Appel, 35 A 524, 525, 67 Conn. 585.

89. Cordes v. Harding, 150 P. 650, 651, 27 Cal App. 474.

90. Century D.

91. Woodley Petroleum Co v. Arkansas Louisiana Pipeline Co, 153 So. 539, 542, 179 La 136

92. Webster New Int. D.

93. Huskey v Metropolitan Life Ins. Co, (Mo App) 94 S W (2d) 1075, 1078

"Availability" exemplified

"Perhaps the most common illustration of such 'availability' in its true legal sense is to be found in the case where an employer is called upon to respond in damages for an alleged wrong committed by one of his employés, who, in the very nature of things, if he were actually not at fault, would be expected to take the stand and say so, not only for the purpose of aiding in his employer's defense, but also to the end that he himself might be exculpated of the charge made against him even though not a party to the cause"—Cooper v. Metropolitan Life Ins Co, (Mo App) 94 S W (2d) 1070, 1073

94. Huskey v. Metropolitan Life Ins. Co, (Mo App) 94 S W (2d) 1075, 1078.

95. Huskey v. Metropolitan Life Ins Co, (Mo App) 94 S W (2d) 1075, 1078.

96. Schwabacher Hardware Co. v A. W Miller Sawmill Co, 155 P 767, 768, 90 Wash. 193, Ann Cas 1918A 940

97. La—Woodley Petroleum Co v Arkansas Louisiana Pipeline Co, 153 So 539, 542, 179 La. 136, quoting Webster D.
Mich—Bay City Dredge Works v. Fox, 222 N W. 747, 748, 245 Mich. 523.
Mont—State v. Hoblitt, 288 P. 181, 185, 87 Mont. 403.

used advantageously;[98] salable;[99] such as one may avail oneself of;[1] suitable;[2] usable[3] As used in a contract for the furnishing of a certain commodity, "available" has been held to mean procurable by the party who was to furnish it, and capable of being appropriated to the contract.[4] In a somewhat different sense, the word has been defined as having sufficient power, force, or efficiency for the object, effectual or serviceable;[5] and also convertible into a resource[6]

Available assets. Property that can be sold or turned into cash with which to pay debts within a reasonable time.[7]

Available capital Any assets that can be readily converted into money.[8]

Available means. Anything which can be readily converted into money, but not necessarily or primarily money itself.[9]

Available use. In the law of eminent domain a possible use, not a use contingent on the abandonment of the use of adjoining property engaged by another in the public service of the state or on a condition remote, uncertain, and speculative[10]

Other phrases: "All the available Austrian peas,"[11] "any moneys . . . that may be available,"[12] "as equally available to defendant as to plaintiff,"[13] "available and merchantable coal,"[14] "available assets and resources,"[15] "available coal,"[16] "available earth and gravel,"[17] "'available' for any purpose,"[18] "available for service as jurors,"[19] "available for the fiscal year,"[20] "available for the payment of drain orders,"[21] "available funds,"[22]

Similarly expressed

(1) "Capable of being used"—Hyde v Connecticut Co., 188 A 266, 268, 122 Conn. 236, quoting Bouvier L. D

(2) "Capable of being used, given potentiality for use"—Ferguson v Johnson, (Tex Civ App) 57 S W.(2d) 372, 375

98. Mineral Park Land Co v. Howard, 156 P 458, 459, 172 Cal 289, L R A 1916F 1.

Similar definition

"Capable of being used to advantage"—Hamilton v Menominee Falls Quarry Co, 81 N W 876, 106 Wis 352, 359—6 C J. p 871 note 90

99. Clark v. Adams, 55 N Y Super 560.

1. Woodley Petroleum Co. v Arkansas Louisiana Pipeline Co, 153 So 539, 542, 179 La. 136, quoting Webster D

2. Lively v. American Zinc Co. of Tennessee, 191 S W 975, 979, 137 Tenn 261.

3. Conn—Hyde v Connecticut Co, 188 A 266, 268, 122 Conn. 236, quoting Bouvier L D

La—Woodley Petroleum Co. v. Arkansas Louisiana Pipeline Co, 153 So 539, 542, 179 La 136, quoting Webster D

Mich—Bay City Dredge Works v Fox, 222 N W. 747, 748, 245 Mich 523.

Tenn—Lively v. American Zinc Co of Tennessee, 191 S W. 975, 978, 137 Tenn 261

Wis—Hamilton v. Menominee Falls Quarry Co, 81 N W 876, 106 Wis 352, 359

4. Wagner v. Alabama Farm Bureau Federation, 143 So 909, 910, 225 Ala 513

5. Woodley Petroleum Co v. Arkansas Louisiana Pipeline Co, 153 So. 539, 542, 179 La. 136, quoting Webster D.

Similar definition

"Having sufficient force or efficacy for the object, effectual"—Pittsburgh, etc, R Co v Broderick, 102 N E 887, 891, 56 Ind App 58

6. Woodley Petroleum Co v. Arkansas Louisiana Pipeline Co, 153 So 539, 542, 179 La 136, quoting Webster D.

7. Hamilton v. Menominee Falls Quarry Co, 81 N.W. 876, 106 Wis 352, 359

Held not available asset

An account that depends for collection upon the will of the debtor and his hope of future advantage cannot be counted as an available asset in determining the solvency of a firm—Baily v Hornthal, 49 N E 56, 154 N Y. 648, 659, 61 Am S R 645

8. McFadden v. Leeka, 28 N E 874, 48 Ohio St 513, 528.

"Available means" synonymous.—McFadden v Leeka, 28 N E 874, 48 Ohio St 513, 528

9. N.Y—Brigham v Tillinghast, 13 N Y 215, 219 See Benedict v Huntington, 32 N Y 219, 224

Ohio—McFadden v Leeka, 28 N E 874, 48 Ohio St 513, 528

Acceptance in payment

"Available means" cannot, in law, be regarded as money or its equivalent. Creditors are not bound to accept available means in payment—Benedict v. Huntington, 32 N Y 219, 224.

10. Grays Harbor Boom Co v Lownsdale, 102 P. 1041, 104 P 267, 54 Wash 88, 91.

11. Wagner v Alabama Farm Bureau Federation, 143 So. 909, 225 Ala. 513

12. Bay City Dredge Works v Fox, 222 N W. 747 748, 245 Mich. 523.

13. Cooper v. Metropolitan Life Ins. Co, (Mo App) 94 S W (2d) 1070, 1073—Smith v Kansas City Public Service Co, 56 S W (2d) 838, 841, 227 Mo App 675

14. Va—Big Vein Pocahontas Co v. Browning, 120 S E 247, 253, 137 Va 34

W Va—Flavelle v Red Jacket Consol Coal & Coke Co, 96 S E 600, 602, 82 W.Va 295

15. Rice v. Milwaukee, 76 N W. 341, 100 Wis. 516, 521

16. **What phrase includes**

(1) Within a lease of coal lands on royalty, providing for removal of all available and merchantable coal, "'available' coal includes all coal recoverable as a practical and reasonable mining proposition, considering actual conditions, cost, and all the surrounding circumstances"—Big Vein Pocahontas Co v. Browning, 120 S E 247, 253, 137 Va. 34

(2) Within the meaning of a contract referring to certain unmined coal, "available coal" held to include coal under a creek and under a railroad which could be mined by leaving proper supports at a greatly enhanced cost—In re Redstone Oil, etc, Co, 56 A 355, 207 Pa 125, 130

17. Mineral Park Land Co. v Howard 156 P 458, 459, 172 Cal 289, L.R.A.1916F 1.

18. Bay City Dredge Works v Fox, 222 N W 747, 748, 245 Mich 523

19. Hoebrecht v State, 72 S W (2d) 1100, 1101, 126 Tex Cr 648—Wright v. State, 36 S W (2d) 511, 512, 117 Tex Cr. 93.

20. Mushel v. Schuls, 166 N W. 179, 180, 139 Minn. 284

21. Bay City Dredge Works v. Fox, 222 N.W. 747, 748, 245 Mich. 523.

22. U S—Brown-Crummer Inv. Co. v. City of Burbank, (D C Cal.) 17 F Supp. 469, 473.

"available funds in the [city] treasury,"[23] "available gravel,"[24] "available market,"[25] "available or accessible for the service of a subpœna,"[26] "available phosphoric acid,"[27] "available roadway,"[28] "available school fund,"[29] "available stocks,"[30] "available supply of peas,"[31] "available to drawer,"[32] "available tonnage,"[33] "available to the defendant,"[34] "'available' to the settler,"[35] "available, workable and merchantable coal,"[36] "equally available to defendants."[37] "equally available to either party,"[38] "funds available,"[39] "made available,"[40] "make water 'available,'"[41] "most profitable use it was available for,"[42] "most valuable use for which the land is available,"[43] "peculiarly 'available,'"[44] "safe and available,"[45] and

Tex—Clark v W L Pearson & Co, (Civ App) 26 S W (2d) 332, 336

What constitutes

(1) Money proposed to be raised by taxation for the purpose of financing the cost of an improvement held to be "available funds"—Guaranty Mortg Co v Hendricks, (Tex Civ App) 59 S W (2d) 275, 276

(2) Where one agreed to teach the school of a township, and the commissioners agreed to remunerate him with the "available funds for one year," the quoted expression was held to mean the profits available from the capital during that time whether or not received by the commissioners before the end of that period—Section Sixteen Com'rs v Criswell, 6 Ala 565, 571

Held not to constitute such funds

Mere credit balances of the city's funds in the bank where the money of the municipality was deposited, without taking into account the city's outstanding obligations, held not to constitute "available funds" within the meaning of an act authorizing a city to use such funds in meeting bond delinquencies—Brown-Crummer Inv Co v City of Burbank (D C Cal) 17 F Supp 469, 478, 479.

23. Brown-Crummer Inv Co v. City of Burbank, supra

24. Mineral Park Land Co v Howard, 156 P 458, 159, 172 Cal 289 L R A 1916F 1

25. U S—Weed v. Lyons Petroleum Co, (D C Del) 294 F 725, 731
Vt—Breding v Champlain Marine & Realty Co, 172 A 625, 627, 106 Vt 288

Described as "one 'in which the purchaser can supply himself'"—Weed v Lyons Petroleum Co, (D C Del) 294 F 725, 734—Wilmoth v Hamilton, (Pa.) 127 F 48, 53, 61 C C A 584

26. Huskey v Metropolitan Life Ins Co, (Mo App) 94 S W.(2d) 1075, 1078

27. Clark v. Adams, 55 N.Y Super. 560

28. Hyde v. Connecticut Co., 188 A. 266, 268, 122 Conn 236.

Meaning of phrase

Construing a rule of the public service commission providing that "For taking on or discharging passengers a motor bus shall be stopped at the extreme right of the available roadway," the court said "The rule . . requires that the bus be stopped at the extreme right of the available roadway, meaning such part of the roadway as is usable—capable of being used"—Hyde v Connecticut Co, 188 A 266, 268, 122 Conn 236

"Traveled portion of the highway" contrasted.—Hyde v. Connecticut Co, 188 A 266, 268, 122 Conn 236

29. Mumme v. Marrs, 40 S W.(2d) 31, 33, 120 Tex. 383—Marrs v Mumme, (Tex Civ App) 25 S W (2d) 215, 218

30. **Meaning of phrase**

"Available stocks," as used in a will by which testatrix bequeathed one tenth of all she possessed to charitable objects, and the rest or nine tenths of her available stocks to another person, means all testatrix' personal estate not otherwise specifically disposed of, to the extent of nine tenths of the whole, excluding worthless mining stocks possessed by her—In re Sweitzer, 31 A 835, 142 Pa 541, 548

31. Wagner v Alabama Farm Bureau Federation, 143 So 909, 910, 225 Ala. 513

32. Schwabacher Hardware Co v A W Miller Sawmill Co, 155 P 767, 90 Wash 193, Ann Cas 1918A 940

33. Wagner v. Alabama Farm Bureau Federation, 143 So. 909, 910, 225 Ala 513

34. Woodley Petroleum Co. v. Arkansas Louisiana Pipeline Co, 153 So. 539, 541, 179 La 136.

35. Collins v Twin Falls North Side Land & Water Co, 152 P 200, 202, 28 Idaho 1

36. Flavelle v. Red Jacket Consol Coal & Coke Co, 96 S.E 600, 605, 82 W Va 295.

37. Donet v Prudential Ins Co of America, (Mo App) 23 S W.(2d) 1104, 1107

Not merely equally subject to process

"It is true that in a sense . . . the physicians and pictures were equally available to the defendants, if we mean by this that they were equally subject to process issued at defendant's request, and equally competent to testify and be put in evidence as a part of defendants' case But the term 'available' means more than this It also means that the particular evidence must be equally within the knowledge and power of the opposite party, and as reasonably expected to be favorable to him"—Smith v. Kansas City Public Service Co, 56 S W (2d) 838, 842, 227 Mo App. 675—Donet v. Prudential Ins Co of America, (Mo App) 23 S. W (2d) 1104, 1107.

38. Huskey v Metropolitan Life Ins Co, (Mo App) 94 S W (2d) 1075, 1078—Cooper v Metropolitan Life Ins Co, (Mo App) 94 S W.(2d) 1070, 1072

39. Ferguson v. Johnson, (Tex.Civ. App) 57 S W (2d) 372, 375

Not limited to funds actually deposited

Construing the text phrase as used in a statute governing highway construction, improvement and maintenance, the court said: "'Funds available' as marking the bounds of the commission's contractual liability creating authority for 'highway improvement,' . . . can, we think, mean but one thing, namely, funds made available for that purpose by the Legislature through appropriation"—Ferguson v Johnson, (Tex. Civ App) 57 S W (2d) 372, 375.

Different meaning in different connections

"There is an essential difference between 'funds available' when applied to proceeds of a bond issue voted for a specific purpose, and 'funds available' when applied to current revenues allocated to the support of a governmental department engaged continuously in the improvement and maintenance of an entire 'correlated' system of state highways"—Ferguson v Johnson, (Tex Civ App) 57 S W (2d) 372, 375

40. Ferguson v Johnson, supra.

41. Collins v. Twin Falls North Side Land & Water Co., 152 P. 200, 202, 28 Idaho 1.

42. Illinois Power & Light Corporation v Parks, 153 N E. 483, 487, 322 Ill 313

43. State v. Hoblitt, 288 P. 131, 136, 87 Mont. 403.

44. Huskey v. Metropolitan Life Ins Co, (Mo App) 94 S W.(2d) 1075, 1078.

45. Lively v. American Zinc Co of Tennessee, 191 S W. 975, 978, 137 Tenn 261.

"when same become available."[46]

AVAL. French, literally, at the foot or bottom.[47] A term used in French commercial law and a form of liability now adopted by statute in English law;[48] in Canadian law, the act of subscribing one's signature at the bottom of a promissory note or of a bill of exchange; properly an act of suretyship, by the party signing, in favor of the party to whom the note or bill is given.[49] In French law, the guaranty of a bill of exchange; so called because usually placed at the foot or bottom (aval) of the bill.[50] In Spanish law, the guaranty of a bill of exchange by a stranger.[51]

AVANTAGIUM. Law Latin, advantage; profit.[52]

AVANTURE or AVENTURE. Law French, chance; hazard; mischance.[53]

AVARIA. Law Latin, in maritime law, average or contribution.[54] The loss and damage suffered in the course of a navigation.[55]

AVAUNT. Law French, before; forthcoming.[56]

AVEC DEPENS. Literally "With costs"[57]

AVECINDARSE. In Spanish law, to take up one's domicile in a certain place with the intention of remaining there.[58]

AVENAGE. A certain quantity of oats paid by a tenant to his landlord as rent, or in lieu of some other duties.[59]

AVENENCIA. In Spanish law, an agreement or concert especially with a view to avoiding litigation.[60]

AVENIDA. In Spanish law, the sudden or violent increase of riparian land by the action of the water.[61]

AVENTURE or AVENTURA. Law French, a mischance or accident by which the death of a man is suddenly occasioned without felony.[62]

AVENUE. Any broad passageway bordered on each side by trees;[63] a passage, a way or opening for entrance into a place or an opening or passage by which a thing is or may be introduced or approached;[64] a public highway, in a village, town, or city;[65] a public street;[66] a roadway;[67] a street;[68] a wide street.[69] "Avenue" has been held to be equivalent to, or synonymous with, "parkway,"[70] "street;"[71] and distinguished from "alley" (see Alley 3 C.J.S. p. 886 note 9), "boulevard,"[72] "park" or "parkway,"[73]

46. Schwabacher Hardware Co. v. A. W. Miller Sawmill Co., 155 P. 767, 90 Wash. 193, Ann. Cas. 1918A, 940.

47. Adams Gloss.

48. Robinson v. Mann, 31 Can. S.C. 484, 486.

49. Black L. D.

50. Black L. D.

51. Escriche Diccionario.

52. Adams Gloss.

53. Adams Gloss.
D'aventure—perchance; perhaps—Adams Gloss.
En aventure—for fear, lest there should be occasion for.—Adams Gloss.

54. Adams Gloss.

55. Black L. D., citing Pothier Mar. Louage p. 105.

56. Adams Gloss.
Avaunt dit—before said—Adams Gloss.
Avaunt meyr—beforehand—Adams Gloss.
Plus avaunt—more fully—Adams Gloss.

57. Gugy v. Brown, 5 Can. App. Cas. 66, 78.

58. Escriche Diccionario.

59. Black L. D.

60. Escriche Diccionario.

61. Escriche Diccionario.

62. Adams Gloss., citing Britton c. 7—Coke Litt. p. 391.

63. Greene v. Helme, 111 A. 557, 559, 94 Vt. 392, quoting Webster New Int. D.

64. St. Louis Southwestern R. Co. v. Underwood, 85 S.W. 804, 74 Ark. 610, 614, quoting Century D.

65. Mo.—City of St. Louis v. Breuer, 223 S.W. 108, 110.
Wash.—Murphy v. King County, 88 P. 1115, 1116, 45 Wash. 587.
Loose use of word
"An examination of the authorities will show that the terms street, avenue, road, public road, county road, etc., are used loosely and indiscriminately in legislation and judicial decisions relating to public highways, and little reliance can be placed on the particular term used to describe any given way. Undoubtedly the term 'street' or 'avenue' commonly applies to a public highway in a village, town or city, and the term 'road' to suburban highways. But there may be roads in a city or town and streets and avenues in the country."—City of Spokane v. Spokane County, 86 P. (2d) 311, 313, 179 Wash. 130—Murphy v. King County, 88 P. 1115, 1116, 45 Wash. 587.

66. People v. Underhill, 39 N.E. 333, 144 N.Y. 316, 323—6 C.J. p. 872 note 11 [b].

67. St. Louis Southwestern R. Co. v. Underwood, 85 S.W. 804, 74 Ark. 610, 614, quoting Century D.

68. Ark.—St. Louis Southwestern R. Co. v. Underwood, supra, quoting Century D.
Wash.—City of Spokane v. Spokane County, 86 P. (2d) 311, 313, 179 Wash. 130—Murphy v. King County, 88 P. 1115, 1116, 45 Wash. 587.
Does not have general meaning
"The word 'avenue' does not have a general meaning applying to both street and boulevard, but would have to be identified with one or the other."—City of St. Louis v. Breuer, (Mo.) 223 S.W. 108, 110.

69. City of St. Louis v. Breuer, supra.
Similar definition
"A broad street."—St. Louis Southwestern R. Co. v. Underwood, 86 S.W. 804, 74 Ark. 610, 614, quoting Webster D.

70. Newbold v. Brotzge, 272 S.W. 755, 757, 209 Ky. 218.

71. City of St. Louis v. Breuer, (Mo.) 223 S.W. 108, 110.

72. Ky.—Newbold v. Brotzge, 272 S.W. 755, 757, 209 Ky. 218.
Mo.—City of St. Louis v. Breuer, 223 S.W. 108, 110.

73. In re Westchester County, 158 N.E. 881, 883, 246 N.Y. 314.

"road,"[74] and "woodland trail."[75]

Phrases "Balsam Avenue,"[76] "Lafayette Avenue,"[77] "Maple Avenue,"[78] "street, avenue, highway or road,"[79] "street or avenue,"[80] and "Wherry Avenue,"[81] and also "all the existing avenues on the premises."[82]

AVER.

Modern Use

It has been said that the term is a compound of the intensive syllable "a" or "ad" and "verus," true,[83] and signifies to allege or assert;[84] to bear testimony to the truth, or to express the truth of a declaration unequivocally;[85] to set out.[86] "Aver" has been distinguished from "prove"[87] and "show."[88]

Phrases "'Aver' . . . facts and circumstances,"[89] and "aver or prove;"[90] also "averring and showing a just defense."[91]

In Old English and French

——As Noun. As a noun, in old English and French, property; substance, estate, and particularly live stock or cattle; hence a working beast; a horse or bullock.[92]

——As Verb. In law French, as a verb, to have.[93]

——As Adjective. The word, used adjectively, with meanings akin to those of the noun, above indicated, occurs in several old phrases.[94]

AVERA. A day's work of a plowman, formerly valued at eight pence.[95]

AVERAGE.

Noun

Arithmetical mean;[96] a mean proportion, medial sum or quantity, made out of unequal sums or quantities;[97] a middle point between two extremes;[98] an intermediate amount, number, or quantity between two extremes;[99] the mean between two or more quantities or measures or numbers;[1] the sum total of various quantities divided by the number of such quantities;[2] also conformity to prevailing standards.[3]

74. City of Spokane v. Spokane County, 36 P.(2d) 311, 313, 179 Wash. 130—Murphy v. King County, 88 P. 1115, 1116, 45 Wash. 587

75. Greene v. Helme, 111 A. 557, 558, 559, 94 Vt. 392

76. Greene v. Helme, supra.

77. People v. Underhill, 39 N.E. 333, 144 N.Y. 316, 323.

78. Greene v. Helme, 111 A. 557, 558, 94 Vt. 392

79. In re Westchester County, 158 N.E. 881, 882, 246 N.Y. 314

"County parkway" not included.—In re Westchester County, 158 N.E. 881, 882, 246 N.Y. 314

80. McAbee v. French, 274 P. 713, 714, 150 Wash. 646

81. City of St. Louis v. Breuer, (Mo.) 223 S.W. 108, 110.

82. Greene v. Helme, 111 A. 557, 559, 94 Vt. 392

83. Hirschfelder v. State, 19 Ala. 534, 539

84. Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92

85. Ala.—Hirschfelder v. State, 19 Ala. 534, 539

Pa.—Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92.

86. U.S.—U. S. v. Watkins, (C.C.D. C.) 28 F.Cas.No.16,649, 3 Cranch C. C. 441

Or.—Powder Valley State Bank v. Hudelson, 144 P. 494, 74 Or. 191, 201, quoting Black L.D.

87. Hirschfelder v. State, 19 Ala. 534, 538, 539

88. Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92

89. U.S.—U. S. v. Watkins, (C.C.D. C.) 28 F.Cas.No.16,649, 3 Cranch C. C. 441

Or.—Powder Valley State Bank v. Hudelson, 144 P. 494, 74 Or. 191, 201

90. Hirschfelder v. State, 19 Ala. 534, 539

91. Continental Illustrating Co. v. City Transfer Co., 10 Pa.Dist. & Co. 91, 92

92. Black L.D.

93. Black L.D.

Aver et tener—in old conveyancing, to have and to hold.—Black L.D.

94. Aver corn—a rent reserved to religious houses, to be paid in corn, also corn drawn by the tenant's cattle.—Black L.D.

Aver land—in feudal law, land plowed by the tenant for the proper use of the lord of the soil.—Black L.D.

Aver penny—money paid toward the king's averages or carriages, and so to be freed thereof.—Black L.D.

Aver silver—a custom or rent formerly so called.—Black L.D., citing Cowell.

95. Black L.D.

96. Talbot v. Anderson, 15 P.(2d) 350, 352, 80 Utah 436

97. Ariz.—Brisendine v. Skousen Bros., 62 P.(2d) 326, 329.

N.M.—Stevens v. Black, Sivalls & Bryson, 42 P.(2d) 189, 190, 39 N.M. 124.

98. New York Edison Co. v. Malthie, 279 N.Y.S. 949, 960, 244 App.Div. 436.

Similar definition

"The mean between extremes."—Hight v. York Mfg. Co., 100 A. 9, 10, 116 Me. 81, L.R.A.1917E. 277

99. Swift & Co. v. Board of Assessors, 38 So. 1006, 1007, 115 La. 321.

1. Long v. Ottumwa R. & Light Co., 142 N.W. 1008, 1015, 162 Iowa 11.

Mathematically expressed

"It . . . is usually mathematically expressed by the quotient of the sum of the quantities, measures, or numbers which are being compared, divided by the number of items used in the comparison."—Long v. Ottumwa Ry. & Light Co., 142 N.W. 1008, 1015, 162 Iowa 11.

More than one factor required

"An average cannot be computed by means of a single factor. The ordinary meaning of the word implies that more than one factor must be considered."—Brisendine v. Skousen Bros., (Ariz.) 62 P.(2d) 326, 329

2. Jones v. Mann, 263 S.W. 570, 574, 114 Tex. 62.

Similarly expressed

(1) The result obtained by adding various amounts or quantities and dividing the sum by the number of such amounts or quantities taken.—Talbot v. Anderson, 15 P.(2d) 350, 352, 80 Utah 436. See In re Bartoni, 114 N.E. 663, 664, 225 Mass. 349, L.R.A.1917E. 765.

(2) The result "obtained by calculating the mean of several amounts, numbers, or quantities."—Swift & Co. v. Board of Assessors, 38 So. 1006, 1007, 115 La. 321, quoting Standard D.

3. New York Edison Co. v. Malthie,

Phrases: "Average of prices,"[4] "average of purchases,"[5] "average of the capital invested,"[6] "earned on the average,"[7] "fair average,"[8] "fair average on the capital employed,"[9] "general average" see Admiralty § 32, Insurance § 947, and Shipping §§ 224–238 [58 C.J p 607 note 54–p 633 note 92], "lowest average,"[10] and "weekly average."[11]

Verb

To divide among a number proportionally; to find the arithmetical mean of; to reduce to a mean[12]

Phrases: "'Average' the returns;"[13] and also "lowest averaged price"[14]

Adjective

Conforming to prevailing standards,[15] made at a mean rate;[16] mean;[17] of the ordinary or usual type;[18] ordinary, reasonable, or usual.[19] "Average", as an adjective, has been distinguished from "adequate" (see Adequate 1 C.J.S. p 1463 note 27), and "good fair."[20]

Phrases: "Average accident [or accidents],"[21] "average amount contributed weekly,"[22] "average amount of insurance,"[23] "average amount of stock, money, rights, credits, etc.,"[24] "average annual earning capacity,"[25] "average annual earnings,"[26] "average annual railway operating revenue,"[27] "average attendance upon the schools,"[28] "average capital,"[29] "average charges,"[30] "average daily balance,"[31] "average daily earning,"[32] "average daily wage or salary,"[33] "average daily wage [or wages],"[34] "aver-

279 N.Y.S. 949, 960, 244 App Div 436

As applied to returns on investment
Discussing what is meant by the statutory requirement that public utility rates must be such as to yield a "reasonable average return," the court said "'Average' means . . . not the highest rate of return nor yet the lowest, but a return that is in keeping with the common run of returns of the period involved."—New York Edison Co v Maltbie, 279 N.Y.S 949, 960, 244 App Div 436

4. Cal—Page v Fowler, 39 Cal. 412, 423, 2 Am R 462.
N.Y.—Smith v Griffith, 3 Hill 333, 338, 38 Am D. 639.

5. Central Granaries Co. v. Lancaster County, 113 N.W. 199, 200, 77 Neb 319.

6. Central Granaries Co. v. Lancaster County, supra

7. Allis-Chalmers Mfg. Co v. Industrial Commission, 255 N.W 887, 890, 215 Wis. 616

8. Swift & Co v Board of Assessors, 38 So 1006, 1007, 115 La. 321.

9. Swift & Co v. Board of Assessors, supra

10. City of Cincinnati v Cincinnati Gas Light & Coke Co, 41 N.E 239, 241, 53 Ohio St 278

11. In re Barton, 114 N.E 663, 664, 225 Mass 349, L.R.A 1917E 765

12. Century D See New York Edison Co v Maltbie, 279 N.Y.S 949, 960, 244 App Div 436

13. New York Edison Co v. Maltbie, 279 N.Y.S 949, 960, 244 App Div. 436

14. City of Cincinnati v. Cincinnati Gas Light & Coke Co, 41 N.E 239, 241, 53 Ohio St 278

15. Cal—Sims v. Weeks, (App.) 45 P (2d) 350, 357
N.Y—New York Edison Co v Maltbie, 279 N.Y.S. 949, 960, 244 App Div. 436.
See Say v Barber, 262 P 312, 313, 202 Cal 679

16. Hersh v Northern Cent R Co, 74 Pa. 181, 190

17. Long v Ottumwa Ry & Light Co., 142 N.W. 1008, 1015, 162 Iowa 11.

18. Long v Ottumwa Ry & Light Co., supra.

19. Cal—Sim v. Weeks, (App.) 45 P (2d) 350, 357.
Iowa—Long v Ottumwa Ry. & Light Co, 142 N.W 1008, 1016, 162 Iowa 11—Whitesell v. Hill, 66 N W. 894, 895.

20. **Gist of distinction**
"The words 'good fair' and 'average,' [used as descriptive of cotton] in their primary signification, are not precisely the same but that quality indicated by the former is a shade above what the latter describes"—Waddell v. Glassell, 18 Ala 561, 565, 54 Am D 170.

21. The Terne, (C.C.A.N.Y.) 64 F. (2d) 502, 505—Barker v Moore & McCormack Co, (C.C.A.N.Y.) 40 F (2d) 410, 411—The Terne, (D.C.N.Y.) 1 F Supp. 546, 547

22. Indian Creek Coal & Mining Co v Kutter, 131 N.E 413, 414, 76 Ind App 52.

23. Swift & Co v. Board of Assessors, 38 So 1006, 1007, 115 La. 321.

24. Swift & Co. v Board of Assessors, supra

25. Allis-Chalmers Mfg Co v Industrial Commission, 255 N.W 887, 890, 215 Wis 616

26. Cal—Ford Motor Co v Industrial Accident Commission, 261 P 463, 468, 203 Cal 459
Mich—Andriejwski v. Wolverine Coal Co, 148 N.W 684, 182 Mich 298 301
N.Y—Damm v. Schreier Contracting Co, 257 N.Y.S 705, 708, 235 App Div 478
Wis—Allis-Chalmers Mfg Co. v. Industrial Commission, 255 N.W 887, 888, 215 Wis 616

27. "This is a technical expression, having a definite meaning in railroad accounting. It embraces results of railway operation, as distinguished from income from other sources and is . . . gross 'operating revenue' . . . decreased by 'operating expenses'"—Westbrook v. Director General of Railroads, (D.C. Ga.) 262 F 211, 215

"Gross 'operating revenue'" contrasted.—Westbrook v Director General of Railroads, (D.C.Ga.) 262 F. 211, 215.

28. Town of Needham v. Town of Wellesley, 31 N.E 732, 733, 139 Mass. 372.

"Average number of scholars in the public schools" contrasted.—Town of Needham v. Town of Wellesley, 31 N.E 732, 733, 139 Mass. 372.

29. Central Granaries Co v. Lancaster County, 113 N.W. 199, 77 Neb. 319, 320

30. Hersh v Northern Cent. R. Co., 74 Pa. 181, 190

31. **Phrase defined**
"The sum of . . . daily balances divided by the number of days in the interest period"—Jones v. Marrs, 263 S.W. 570, 574, 114 Tex 62

"Daily balances" compared.—Jones v Marrs, 263 S.W. 570, 574, 114 Tex. 62.

32. Franklin v. J. P. Floria & Co, (La App.) 158 So 591, 594.

33. Allis-Chalmers Mfg Co v. Industrial Commission, 255 N.W. 887, 888, 215 Wis. 616.

34. Me—Hight v. York Mfg Co, 100 A 9, 10, 116 Me. 81, L.R.A. 1917E 277.
Wis—Allis-Chalmers Mfg Co v. Industrial Commission, 255 N.W. 887, 889, 215 Wis 616—Builders' Mut Casualty Co v. Schultz, 251 N.W. 446, 213 Wis. 246.

age daily wages, earnings or salary,"[35] "average degree of skill, learning and ability,"[36] "average earning capacity,"[37] "average man,"[38] "'average' member of his profession in good standing,"[39] "average 'membership of the public schools',"[40] "average number of scholars in the public schools,"[41] "average or mean rate of speed,"[42] "average price,"[43] "average quality with,"[44] "'average' value of stock on hand,"[45] "average wages,"[46] "average water delivery,"[47] "average weekly amount,"[48] "average weekly earnings,"[49] "average weekly wage,"[50] "average weekly wage . . . at the time of the injury,"[51] "average weekly wages,"[52] "average weekly wages,

35. Hight v York Mfg Co, 100 A 9, 10, 116 Me 81, L R A 1917E 277

36. Whitesell v. Hill, (Iowa) 66 N W 894, 895.

37. Allis-Chalmers Mfg Co v Industrial Commission, 255 N W 887, 889, 215 Wis 616

38. Phrase defined

"We mean by the 'average man' one of fair and ordinary intelligence, such as a legislature or town council might be composed of, but not one who looks at everything from a technical or scientific standpoint"—Frederick Electric Light & Power Co v Frederick City, 36 A 863, 84 Md 599, 601, 36 L R A 130

39. Say v Barber, 262 P 312, 313, 202 Cal 679—Sims v Weeks, (Cal App) 45 P (2d) 350, 357.

40. Town of Needham v Town of Wellesley, 31 N E 732, 733, 139 Mass 372

41. Town of Needham v. Town of Wellesley, supra

42. Long v Ottumwa Ry & Light Co, 142 N W. 1008, 1015, 162 Iowa 11.

43. Long v Ottumwa Ry & Light Co, supra

44. Butterfield v Herren, 49 N W. 826, 827, 80 Wis 240.

"Proportionate quantity" contrasted

Where a firm of lumber dealers contracted to sell one million feet of strips out of the strips then in pile in their yard, "to be of average quality with the six cars heretofore shipped" to the purchasers "as sample of the strips hereby sold," and the sample cars contained varying quantities of five different grades of strips, it was held that the words "to be of average quality," etc, did not mean that the proportionate quantity of each grade as contained in the sample cars should be delivered under the contract, but merely that the strips should be so assorted or culled that those delivered should equal in quality those contained in the sample cars, without reference to the proportionate quantity of each grade—Butterfield v Herren, 49 N.W. 826, 828, 80 Wis 240.

45. Swift v. Board of Assessors, 28 So. 1006, 1007, 115 La. 321

46. Bragg's Quarry v. Smith, 34 S. W.(2d) 714, 161 Tenn 682.

47. Talbot v. Anderson, 15 P (2d) 350, 352, 80 Utah 436

48. Norman's Case, 180 N E 238, 239, 278 Mass 464, 82 A L R 885—O'Loughlin's Case, 169 N E 907, 908, 270 Mass 326—In re Rice, 118 N E 674, 676, 229 Mass 325, Ann Cas 1918E 1052

49. Ariz—Brisendine v. Skousen Bros, 62 P (2d) 326, 329
La—Franklin v J P Floria & Co, (App) 158 So 591, 594
Mass—In re Bartoni, 114 N.E 663, 664, 225 Mass 319, L R A 1917E 765
N Y—Damm v Schreier Contracting Co, 257 N Y S 705, 708, 235 App Div. 478
Utah—State Road Commission v. Industrial Commission of Utah, 190 P. 544, 547, 56 Utah 252.
6 C J p 873 note 28

Difference implied

"'Average' weekly earnings implies that the earnings in some weeks have been greater or less than in others"—Stevens v. Black, Sivalls & Bryson, 42 P (2d) 189, 190, 39 N.M 124

"Weekly earnings" distinguished.—Stevens v Black, Sivalls & Bryson, 42 P (2d) 189, 190, 39 N M. 124.

50. Md—Stevenson v Hill, 189 A. 910, 912—Merrill v State Military Department, 136 A. 897, 898, 152 Md 474—Picanardi v. Emerson Hotel Co, 108 A 483, 484, 135 Md 95
Mass—Powers' Case, 176 N E 621, 623, 275 Mass. 515, 75 A L R 1220
N.M—Stevens v Black, Sivalls & Bryson, 42 P (2d) 189, 190, 39 N M 124
Ohio—State ex rel Smith v Industrial Commission of Ohio, 187 N E 768, 769, 127 Ohio St 217
Tenn—Bragg's Quarry v. Smith, 34 S W (2d) 714, 161 Tenn 682.
Utah—State Road Commission v. Industrial Commission of Utah, 190 P 544, 546, 56 Utah 252

"Full weekly wage" distinguished.—State ex rel Kildow v. Industrial Commission of Ohio, 192 N E 873, 875, 128 Ohio St. 573.

51. Ariz—Brisendine v. Skousen Bros., 62 P.(2d) 326, 329.
Ohio—State ex rel Smith v. Industrial Commission of Ohio, 187 N.E 768, 769, 127 Ohio St 217.
Utah.—State Road Commission v. Industrial Commission of Utah, 190 P. 544, 546, 56 Utah 252.

"Average weekly wage" contrasted.—State ex rel. Kildow v. Industrial Commission of Ohio, 192 N E 873, 876, 128 Ohio St 573.

52. Ind—Miller v. Binkley Min. Co., 190 N E 886, 887, 99 Ind App 257—Indian Creek Coal & Mining Co. v Kutter, 131 N.E. 413, 414, 76 Ind App 52.
Ky—Jones v Davis, 54 S W (2d) 681, 683, 246 Ky. 293
La—Franklin v J P Floria & Co, (App) 158 So 591, 594
Me—Hight v York Mfg. Co, 100 A. 9, 10, 116 Me 81, L R A 1917E 277.
Md—Merrill v State Military Department, 136 A 897, 899, 152 Md. 474
Mass—Federico's Case, 186 N E 599, 600, 283 Mass 430, 88 A L R 630—Norman's Case, 180 N E 238, 239, 278 Mass 464, 82 A L R. 885—O'Loughlin's Case, 169 N E 907, 270 Mass 326—Snow's Case, 147 N E 877, 252 Mass 426—In re Rice, 118 N E 674, 676, 229 Mass 325, Ann Cas 1918E 1052—In re Bartoni, 114 N E 663, 664, 225 Mass. 349, L R A 1917E 765—In re Gillen, 102 N E 346, 215 Mass. 96, 97
Ohio—State ex rel Kildow v. Industrial Commission of Ohio, 192 N. E. 873, 875, 128 Ohio St 573—State ex rel Smith v. Industrial Commission of Ohio, 187 N E 768, 769, 127 Ohio St 217.
Tenn—Bragg's Quarry v. Smith, 33 S W (2d) 87, 88, 161 Tenn. 682

Limited to money value

"'Average weekly wages' . . . means wages in money or other things which have been given a fixed money value at the outset."—Picanardi v. Emerson Hotel Co, 108 A. 483, 484, 135 Md. 95.

Tips included

"The finding of the [compensation] board to the effect that the tips [received by a waitress] constituted a part of the average weekly wage cannot be pronounced unwarranted in law"—Powers' Case, 176 N E. 621, 275 Mass. 515, 75 A L R. 1220.

When board included

Value of board furnished by employer to employee as part of his compensation for services held not to be included in calculating his "average weekly wages" unless its money value was fixed by the parties at the time of the hiring.—Picanardi v. Emerson Hotel Co., 108 A. 483, 484, 135 Md. 95.

earnings or salary,"[53] "cotton 'of an average quality',"[54] and "reasonable average return."[55]

A VERBIS LEGIS NON EST RECEDENDUM.[56]

AVERÍA. As a technical term in Spanish maritime law, it has acquired a meaning analogous to the English word "average" used in a like connection[57]

AVERIA. Law Latin, live beasts; work beasts or working animals; cattle;[58] also property, goods, chattels, etc[59]

AVERIIS CAPTIS IN WITHERNAM. A writ granted to one whose cattle were unlawfully distrained by another and driven out of the county in which they were taken, so that they could not be replevied by the sheriff.[60]

AVERMENT. A direct and positive allegation of a fact, made in a manner capable of being traversed,[61] a positive statement of facts in opposition to argument or inference.[62] In old pleading, a verification.[63] As a technical term in various pleadings, the word is more fully discussed in the titles Equity §§ 217–225 [21 C.J. p 389 note 78–p 397 note 82], Indictments and Information §§ 109–126 [31 C.J. p 668 note 10–p 689 note 17], and Pleading §§ 13–44 [49 C.J. p 43 note 97–p 102 note 40]. The word has been distinguished from "colloquium" and "innuendo."[64]

AVERRARE. In feudal law, a duty required from some customary tenants, to carry goods in a wagon or upon loaded horses.[65]

AVERSIO. In the civil law, an averting or turning away, a term applied to a species of sale in gross or bulk; letting a house altogether, instead of in chambers.[66]

AVERT. To avoid; to overcome,[67] to turn aside or away; to ward off or prevent the occurrence or effect of[68] The word has been distinguished from "escape"[69]

Phrases: "Avert the danger real, or to the defendant apparent;"[70] also "averted or avoided the danger."[71]

AVET. A term used in the Scotch law, signifying to abet or assist.[72]

AVIA. In the civil law, a grandmother.[73]

AVIADOR. In Mexico, the person with whose money or substance the work of developing mining properties is carried out; also a person who finances, or lends monetary assistance to, the development of an agricultural or cattle grazing hacienda.[74]

AVIATICUS. In the civil law, a grandson.[75]

AVIATION. As the art or science of traveling through the air the word is defined in the title Aerial Navigation § 2.

Phrases: "Aviation operation,"[76] "engaged in aviation,"[77] "engaged in aviation or aeronautics,"[78] "engaging or participating . . . in aviation or

53. Hight v. York Mfg. Co., 100 A. 9, 10, 116 Me. 81, L.R.A.1917E. 277

54. Waddell v. Glassell, 18 Ala. 561, 564, 54 Am.D. 170

"Good fair cotton" distinguished.—Waddell v. Glassell, 18 Ala. 561, 564, 54 Am.D. 170

55. New York Edison Co. v. Maltbie, 279 N.Y.S. 949, 960, 244 App.Div. 436.

56. A maxim meaning "From the words of the law there must be no departure."—Burrill L.D. Applied in Forrest v. Forrest, 10 Barb. (N.Y.) 46, 48, 5 How.Pr. 125, 3 Code Rep. 141, 2 Edm.Sel.Cas. 171, 9 N.Y.Leg.Obs. 89—Deckman v. Herald Printing & Publishing Co., 17 Pa.Co. 507, 509—Godbe v. Salt Lake City, 1 Utah 68, 77.

57. Escriche Diccionario—6 C.J. p. 874 note 31.

58. Adams Gloss.

Averia carrucæ—beasts of the plow—Black L.D., citing 3 Blackstone Comm. p. 9

Averia elongata—cattle eloigned, that is, carried to places unknown.—Adams Gloss.

Averia otiosa—idle, unemployed beasts, cattle—Adams Gloss.

59. Adams Gloss.

60. Black L.D., citing Reg. Orig. p. 82

61. Laughlin v. Flood, 3 Munf. (17 Va.) 256, 262—6 C.J. p. 874 note 33

62. Ala.—Prigmore v. Thompson, Minor 420

N.C.—Starnes v. Erwin, 22 N.C. 226, 228

Pa.—Hakun v. Metropolitan Life Ins. Co., 182 A. 702, 703, 120 Pa.Super. 460.

63. Burrill L.D.

64. Van Vechten v. Hopkins, 5 Johns. (N.Y.) 211, 220, 4 Am.D. 339—6 C.J. p. 874 note 33 [b]

65. Black L.D.

66. Black L.D., citing 4 Kent Comm. p. 517.

Avermo periculi—a turning away of peril. Used of a contract of insurance.—Black L.D., citing 3 Kent Comm. p. 263.

67. Jarrel v. Commonwealth, 43 S.W. (2d) 177, 178, 240 Ky. 845

"Avoiding" compared with "averting."—Cook v. Commonwealth, 72 S.W. 283, 284, 24 Ky.L. 1731

68. Barnes v. Commonwealth, 61 S.W. 733, 110 Ky. 348, 351, 22 Ky.L. 1802, quoting Webster D.

69. Jarrel v. Commonwealth, 43 S.W. (2d) 177, 178, 240 Ky. 845—Barnes v. Com., 61 S.W. 733, 110 Ky. 348, 351, 22 Ky.L. 1802—Utterback v. Com., 59 S.W. 515, 516, 60 S.W. 15, 22 Ky.L. 1011.

70. Jarrel v. Commonwealth, 43 S.W. (2d) 177, 178, 240 Ky. 845

71. Cook v. Commonwealth, 72 S.W. 283, 284, 24 Ky.L. 1731.

72. Black L.D.

73. Black L.D.

74. Escriche Diccionario.

75. Black L.D.

76. Irwin v. Prudential Ins. Co. of America, (D.C.Mich.) 5 F.Supp. 382, 383.

77. Masonic Acc. Ins. Co. v. Jackson, 164 N.E. 628, 630, 200 Ind. 472, 61 A.L.R. 840

78. Goldsmith v. New York Life Ins. Co., (C.C.A.Mo.) 69 F.(2d) 273, 275, 276.

aeronautics,"[79] "participation . . . in aviation or aeronautics,"[80] and "participation in aviation or submarine operations."[81]

AVIO. In Mexican law, the money or provisions which are supplied to prospector by the aviador to develop a mine or "prospect;" the equivalent of "stake" in the mining parlance of western America, including any contract, frequently a lease, for the development of mining properties.[82] Also applied to similar financial aid in the development or working of agricultural or cattle lands.[83]

AVISAMENTUM. Law Latin, in old English law, advice, counsel.[84]

AVISARE. Law Latin, in old English law, to advise.[85]

AVISEMENT. Law French, advisement; consideration, consultation.[86]

AVISER. Law French, in old English law, to advise; to deliberate; to consult.[87]

AVIZANDUM. Law Latin, advisement; deliberation.[88] In Scotch law, to make "avizandum" with a process is to take it from the public court to the private consideration of the judge.[89]

AVOCACIÓN. In Spanish law, the act of a superior court or judge in taking jurisdiction of a cause pending before an inferior one without an appeal or other proceeding which would ordinarily confer such jurisdiction.[90]

AVOCAT. French, an advocate; a barrister.[91]

AVOCATION. The primary meaning of the word is a calling away, a diversion,[92] or something that calls one away from other work,[93] suggesting, it has been said, the idea of the smaller affairs of life, or occasional employments, as distinguished from one's ordinary or principal occupation.[94] Subordinate or occasional occupation;[95] such acts or business as may be performed on days of the week usually devoted to secular business in the pursuit of a lawful employment.[96] In a derived sense, particularly in the plural, the word has been defined as occupation, usual employment, or vocation;[97] but it has also been compared with, and distinguished from, "occupation,"[98] and "vocation."[99]

Phrases: "Business, avocation, or employment,"[1] "habitually engages in any avocation or employment,"[2] "regular business or habitual avocation,"[3] and "usual avocation."[4]

AVOID. In one sense, to avert,[5] evade or escape,[6] not necessarily implying any artifice or subterfuge

79. Blonski v Bankers Life Co, 243 N W 410, 209 Wis 5.

80. Head v New York Life Ins Co, (C C A Okl) 43 F (2d) 517, 519.

81. Missouri State Life Ins Co v Martin, 69 S W.(2d) 1081, 1082, 188 Ark 907

82. Escriche Diccionario.

As lease

"Padre McNamara brought with him the contract of lease or avio, which had been concluded between him, as the agent of José Castro, and Alexander Forbes."—Castillero v. U. S, (Cal) 2 Black (U.S.) 17, 203, 17 L Ed 360

83. Escriche Diccionario.

84. Adams Gloss.

85. Adams Gloss.

86. Adams Gloss.

87. Adams Gloss.

88. Adams Gloss.

89. Black L D.

90. Escriche Diccionario.

91. Black L D.

92. Del—Bullitt v. Delaware Bus Co, (Super) 180 A. 519, 522.
Ind—Ross v. State, 36 N E 167, 168, 9 Ind App 35, quoting Webster Int. D.

93. Miller v. Stevens, 195 N.W. 481, 482, 224 Mich. 626, 631, quoting Fernald Eng Synonyms, Antonyms and Prepositions

94. Bullitt v Delaware Bus Co, (Del Super) 180 A. 519, 522.

95. Mutual Life Ins Co of New York v. Enecks, 154 S E 198, 199, 41 Ga App 644.

96. State v. Conger, 14 Ind 396, 397.
Held to be or not to be "avocations"
(1) The selling of liquors on Sunday has been held an avocation—Vogleson v. State, 9 Ind. 113, 113.

(2) Gaming held not an avocation within the prohibition of the Sunday law—State v. Conger, 14 Ind 396, 397 To same effect Western, etc, R Co v Young, 10 S E 197, 83 Ga 512, 516.

97. Ind—Stellhorn v. Board of Com'rs of Allen County, 110 N E 89, 91, 60 Ind App 14—Ross v. State, 36 N E 167, 168, 9 Ind App. 35, 36
Mo—State v. Canton, 43 Mo. 48, 51
Neb—Dodge v. Guidinger, 127 N W. 122, 87 Neb 349, 350, 138 Am S R 494.
Tex—Peters v. State, (Cr.) 23 S.W. 683

98. Del—Bullitt v. Delaware Bus Co., (Super) 180 A 519, 522.
Ind—Ross v State, 36 N.E 167, 168, 9 Ind App 35

99. Ga—Mutual Life Ins. Co of New York v Enecks, 154 S E 198, 199, 41 Ga App 644
Ind—Ross v State, 36 N E 167, 168, 9 Ind App 35.
Mich—Miller v Stevens, 195 N W. 481, 482, 234 Mich 626
Tex—Peters v State, (Cr.) 23 S.W. 683.

1. National Bank of Baltimore v. Steele, 122 A 633, 634, 143 Md. 484.

2. National Bank of Baltimore v. Steele, supra

3. National Bank of Baltimore v. Steele, supra.

4. Ga—Mutual Life Ins Co of New York v Enecks, 154 S E 198, 199, 41 Ga App 644.
Ind—Stellhorn v Board of Com'rs of Allen County, 110 N E 89, 91, 60 Ind App 14—Ross v. State, 36 N. E 167, 168, 9 Ind App 35.

5. Jarrel v. Commonwealth, 43 S.W. (2d) 177, 178, 240 Ky. 845

6. Burrill L. D—Graves v. Apt, 124 N.E 432, 433, 233 Mass. 587.
"Escape" distinguished.—Jarrel v. Commonwealth, 43 S W (2d) 177, 178, 240 Ky 845
"Evade" distinguished.—Booth v. Scott, 205 S W. 633, 639, 276 Mo. 1.

in escape.[7] In another sense, to render void [8]

Phrases: "'Avoid' such danger,"[9] "avoid the commission of a wrong,"[10] "'avoid' the laws of this state,"[11] "'avoid' the threatened, actual, or apparent danger,"[12] "avoid the will,"[13] "shall not avoid,"[14] and "when the principal shall avoid;"[15] also "collateral questions are to be 'avoided;'"[16] and also "'avoiding' impending danger,"[17] "avoiding the laws of this state,"[18] and "avoiding the results of injury."[19]

AVOIDABLE. Capable of being avoided, shunned, escaped, or prevented.[20]

Phrases: "Avoidable accident,"[21] and "avoidable consequences."[22]

AVOIDANCE. In a general sense, a making void, useless, or empty.[23] In technical application, some admission in effect of the existence, prima facie, of a cause of action in the complainant at some time, and some fact supervenient which avoids it in favor of defendant;[24] the introduction of new or special matter, which, admitting the premises of the opposite party, avoids or repels his conclusions.[25]

Phrases: "Avoidance of the policy,"[26] "avoidance of the principal,"[27] "contest and avoidance of the will,"[28] and "matter in avoidance."[29]

AVOIR or AVOYER. Law French, property, estate, wealth, money, substance, means, ability, effects, goods, chattels; having those or either of them.[30]

AVOIRDUPOIS. As the name of a system of weights, the term will be defined in the title Weights and Measures.

AVOUCHER. The calling upon a warrantor of lands to fulfill his undertaking.[31]

AVOUÉ. In French and Canadian law, a barrister, advocate, solicitor, or attorney; an officer charged with representing and defending parties before the tribunal to which he is attached [32]

AVOUTERIE. Law French, adultery.[33]

AVOW. To acknowledge and justify an act done; to make an avowry [34]

Phrases: "Avowed object of claiming it,"[35] and "avowed object or intention."[36]

AVOWAL. In a particular or technical application in trial procedure, an "avowal" has been described as a declaration or statement by counsel the purpose of which is to enable the court to know what a witness would have stated in answer to the question propounded, and to inform the court what the interrogator would prove contrary to the testimony given at the trial.[37]

AVOWANT. One who makes an avowry.[38]

7. Booth v. Scott, 205 S W. 633, 639, 276 Mo. 1.

8. Burrill L D—6 C J. p 874 note 45

9. Jarrel v Commonwealth, 43 S W (2d) 177, 178, 240 Ky 845

10. Booth v Scott, 205 S.W 633, 639, 276 Mo 1

"Evade its punishment" contrasted.—Booth v. Scott, 205 S.W. 633, 639, 276 Mo 1

11. Booth v Scott, supra

12. Jarrel v Commonwealth, 43 S W (2d) 177, 178, 240 Ky 845

13. Whitmore v Smith, 221 P. 775, 777, 94 Okl 90.

14. Graves v Apt, 124 N E 432, 433, 233 Mass 587

15. Graves v Apt, supra

16. Moody v Peirano, 88 P. 380, 4 Cal App 411, 417

Absolute exclusion not implied

'The direction in this section [of a statute] that collateral questions are to be 'avoided' indicates that they are not absolutely excluded from consideration"—Moody v Peirano, 88 P 380, 4 Cal App 411, 417

17. Cook v Commonwealth, 72 S W 283, 284, 24 Ky L 1731.

18. Booth v. Scott, 205 S W. 633, 638, 276 Mo 1.

19. Dippold v Cathlamet Timber Co, 225 P 202, 205, 111 Or. 199

20. Century D

"Unavoidable" distinguished

"The distinction between 'avoidable' and 'unavoidable' . . . is the distinction between volition, will, purpose, design, or intent on the one hand, and chance, uncontrollableness, compelling necessity, and involuntariness on the other"—American Stores Co v. Herman, 171 A. 54, 59, 166 Md 312.

21. American Stores Co. v. Herman, 171 A. 54, 59, 166 Md. 312

22. Rosenberg v. Stone, 168 S E 436, 437, 160 Va. 381.

"Contributory negligence" contrasted.—Dippold v Cathlamet Timber Co, 225 P 202, 205, 111 Or 199

23. Bouvier L D.

24. Uri v Hirsch, (C C Mo) 128 F. 568, 570

25. Mahaiwe Bank v. Douglass, 31 Conn 170, 177, quoting Bouvier L D—6 C J p 875 note 48.

26. U S.—Hanson v Royal Ins. Co, (Tenn) 257 F. 715, 717, 169 C.C A 3.

Pa.—Davison v. London, etc, F. Ins Co, 42 A. 2, 3, 189 Pa. 132.

"Cancellation of the policy" distinguished.—Hanson v Royal Ins Co, (Tenn) 257 F 715, 717, 169 C. C.A. 3—Davison v. London, etc., Fire Ins Co, 42 A. 2, 3, 189 Pa 132.

27. Graves v Apt, 124 N E 432, 433, 233 Mass 587

28. Whitmore v Smith, 221 P. 775, 777, 94 Okl. 90.

29. Cooper v. Tappan, 9 Wis 361, 367—6 C J. p 875 note 49 [a].

30. Adams Gloss.

31. Black L D.

32. Black L D

33. Adams Gloss.

34. Black L D—Newell Universal Mill Co v Muxlow, 21 N E 1048, 115 N Y 170, 174

35. Hood v. Hood, 25 Pa. 417, 423.

36. Hood v. Hood, supra.

37. Fennell v. Frisch's Adm'r, 234 S W. 198, 200, 192 Ky 535.

38. Black L D—L. A. W. Acceptance Corporation v Chernick, 143 A. 783, 784, 49 R I. 434.

AVOWEE. In ecclesiastical law, an advocate of a church benefice.[39]

AVOWRY or ADVOWRY. Originally at common law, a pleading by which a landlord avowed [admitted] the taking of a tenant's chattels and sought to justify the taking.[40] Its use appears in some cases to have been extended;[41] and it has been defined as the setting forth, as in a declaration, the nature and merits of defendant's case, showing that the distress taken by him was lawful, which must be done with such sufficient certainty as will entitle him to a "retorno habendo;"[42] also as a cause of action, a declaration, or a separate count;[43] a determination of an election before any judgment given.[44] "Avowry" has been distinguished from "cognizance"[45] and "justification."[46]

AVOWTERER. In English law, an adulterer with whom a married woman continues in adultery.[47]

AVOWTRY. In old English law, adultery.[48]

AVULSION. See the titles Navigable Waters § 86 [45 C.J. p 530 note 2–p 533 note 32] and Waters § 79 [67 C.J. p 828 notes 62–69].

AVUNCULUS. In the civil law, a mother's brother.[49]

AVUS. In the civil law, a grandfather.[50]

AWAIT. While "await" is given as one of the definitions of "abide" (see Abide 1 C.J.S. p 307 note 26), it has also been distinguished therefrom.[51]

Phrases: "Await the action of the Court of Appeals,"[52] also in its participial form in phrases such as "awaiting delivery,"[53] "awaiting further conveyance,"[54] and "awaiting trial."[55]

AWARD.

Noun

In a general sense, a judgment, sentence, or final decision.[56] In its technical sense of a decision of a tribunal, other than a court, to whom the parties to a controversy submit their differences, the term is defined and the subject matter is fully treated in Arbitration and Award § 71 et seq. In other particular connections, it has been said that the noun "award," as used in legal parlance, is synonymous with "decision," "determination," "judgment,"[57] and "report,"[58] and has been distinguished from "agreement" and "release."[59]

Phrases: "After an award has been made,"[60] "agreement for or award of compensation,"[61] "agreement . . . has not become an award,"[62] "agreement or award,"[63] "appeal from the award,"[64] "award for partial disability,"[65] "award made by the In-

39. Black L. D.

40. L. A. W. Acceptance Corporation v. Chernick, 143 A. 783, 784, 49 R. I. 434.

41. L. A. W. Acceptance Corporation v. Chernick, supra.

42. N.J.—Brown v. Bissett, 21 N.J. Law 267, 274.
N.Y.—Hill v. Stocking, 6 Hill 277, 284.
6 C.J. p. 875 note 55.
As used in the action of replevin see Replevin §§ 160–163 [54 C.J. p. 517 note 20–p. 520 note 67].

43. Newell Universal Mill Co. v. Muxlow, 21 N.E. 1018, 115 N.Y. 170, 175.
Strictly speaking an avowry is in the nature of an action or declaration, and by it the avowant makes title to the caption of the property of another.—Brown v. Bissett, 21 N.J. Law 267, 274—Equitable Co-op. Fdy. Co. v. Horsee, 33 Hun (N.Y.) 169, 177—6 C.J. p. 876 note 59.

44. Equitable Co-operative Fdy. Co. v. Horsee, 33 Hun (N.Y.) 169, 177.

45. Brown v. Bissett, 21 N.J. Law 46, 49.

46. Black L. D., citing 2 Jones, Sir William, p. 25.

47. Black L. D., citing Termes de la Ley.

48. Black L. D., citing Termes de la Ley.

49. Black L. D., citing 2 Blackstone Comm. p. 230.
Avunculus magnus—a grandmother's brother (avus frater), great uncle.—Adams Gloss.
Avunculus major—a brother of the great grandmother, great grand uncle (proavus frater).—Adams Gloss.
Avunculus maximus—a brother of the great-great grandmother (abavus frater).—Adams Gloss.

50. Black L. D.

51. Wilson v. State, 7 Tex. App. 38, 39.

52. Wilson v. State, supra.
"Abide the judgment of the Court of Appeals" held not equivalent.—Wilson v. State, 7 Tex. App. 38, 39.

53. Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., (Conn.) 16 Wall. (U.S.) 318, 327, 21 L.Ed. 297—6 C.J. p. 876 note 65 [a].

54. Texas & Pacific Ry. Co. v. Reiss, (N.Y.) 22 S.Ct. 253, 183 U.S. 621, 627, 46 L.Ed. 358.

55. State v. Fleming, 126 N.W. 565, 20 N.D. 105, 108.

56. Higginbotham v. State, 101 So. 166, 20 Ala. App. 159, quoting Webster D.

57. Minn.—Rosenquist v. O'Neil & Preston, 215 N.W. 621, 623, 187 Minn. 375.
Okl.—Murch Bros. Const. Co. v. Cupp, 57 P. (2d) 852, 855—Olentine v. Calloway, 295 P. 608, 610, 147 Okl. 137.

58. Fornance v. Montgomery County, 166 A. 231, 232, 311 Pa. 18.

59. Odrowski v. Swift & Co., 162 P. 268, 269, 99 Kan. 163.

60. Rosenquist v. O'Neil & Preston, 245 N.W. 621, 622, 187 Minn. 375.

61. Odrowski v. Swift & Co., 162 P. 268, 269, 99 Kan. 163.

62. Bruce v. Stutz Motor Car Co. of America, 148 N.E. 161, 163, 83 Ind. App. 257.

63. Ill.—Donk Bros. Coal & Coke Co. v. Industrial Commission, 156 N.E. 344, 345, 325 Ill. 195.—Simpson Constr. Co. v. Industrial Board of Illinois, 114 N.E. 138, 139, 275 Ill. 366.
Kan.—Odrowski v. Swift & Co., 162 P. 268, 269, 99 Kan. 163.

64. Ga.—Davis v. Ætna Life Ins. Co., 151 S.E. 812, 813, 41 Ga. App. 113.
Pa.—Fornance v. Montgomery County, 166 A. 231, 232, 311 Pa. 18.

65. Davis v. Ætna Life Ins. Co., 151 S.E. 812, 813, 41 Ga. App. 113.

dustrial Commission,"[66] "award of compensation,"[67] "award of damages,"[68] "award of the board,"[69] "'award' of the viewers,"[70] "award on agreement,"[71] "award or decision,"[72] "award providing for compensation in installments,"[73] "award was . . . entered,"[74] "closed on previous award,"[75] "definitive 'award,'"[76] "denial rather than 'award,'"[77] "final award,"[78] "final 'award,' 'order,' 'judgment,' or 'decision,'"[79] "proceedings or an award,"[80] and "settlement agreement and award of compensation based thereon;"[81] and also "awards of compensation."[82]

Verb

To adjudge, to give, or assign by sentence or judicial determination;[83] to grant, concede, or adjudge to.[84] The verb "award" has been distinguished from "allow" (see Allow 3 C.J.S. p 889 note 94).

Phrases: "A court 'awards' an injunction,"[85] "a jury 'awards' damages,"[86] "awards compensation,"[87] "one 'awards' a contract to a bidder,"[88] and "the court awards the following punishment;"[89] also "after the contract has been awarded,"[90] "all costs which may be awarded,"[91] "awarded a contract,"[92] "'awarded' against the appealing party,"[93] "awarded him by the arbitrators,"[94] "awarded to such highest bidder,"[95] "compensation be awarded,"[96] "compensation previously awarded,"[97] "contract was awarded,"[98] "contract was awarded as aforesaid,"[99] and "was duly awarded to this plaintiff."[1]

Adjective

The word has also been used adjectively, as in the phrase, "award judgment sentence."[2]

AWARE. "Apprised, cognizant, or conscious;[3] informed.[4] The word in its ordinary meaning presupposes or requires actual knowledge.[5]

Phrase "Become aware that such corporation is insolvent."[6]

AWAY. From this or that place; apart; remote, removed[7]

66. Davis v. Ætna Life Ins. Co., supra
67. Murch Bros Const Co v. Cupp, (Okl.) 57 P.(2d) 852, 855
68. State v. Lear, 186 N.W. 1014, 1015, 176 Wis. 406
"May include an agreement as to damages."—State v. Lear, 186 N.W. 1014, 1015, 176 Wis. 406
69. Ind.—Frankfort General Ins. Co. v. Conduitt, 127 N.E. 212, 214, 74 Ind.App. 584
Ky.—Black Mountain Corporation v. Middleton, 49 S.W.(2d) 318, 319, 243 Ky. 527.
70. Fornance v. Montgomery County, 166 A. 231, 232, 311 Pa. 18
71. Dewey v. Union Electric Light & Power Co., (Mo.App.) 83 S.W.(2d) 203, 206
72. N.Y.—Speiduto v. New York City Interborough Ry. Co., 123 N.E. 207, 208, 226 N.Y. 73—Kraemer v. Mergenthaler Linotype Co., 189 N.Y.S. 193, 194, 198 App.Div. 60—Freedman v. Northwestern Casualty & Surety Co., 233 N.Y.S. 330, 331, 133 Misc. 713
Okl.—Olentine v. Calloway, 295 P. 608, 611, 147 Okl. 137
73. Donk Bros. Coal & Coke Co. v. Industrial Commission, 156 N.E. 344, 345, 346, 325 Ill. 193
74. Donk Bros. Coal & Coke Co. v. Industrial Commission, supra.
75. Kraemer v. Mergenthaler Linotype Co., 189 N.Y.S. 193, 194, 198 App.Div. 60.
76. Higgins v. Commonwealth Coal & Coke Co., 161 A. 745, 747, 106 Pa.Super. 1.
77. Rosenquist v. O'Neil & Preston, 245 N.W. 621, 623, 187 Minn. 375
78. Youngstown Sheet & Tube Co. v. Torrez, 174 N.E. 296, 297, 92 Ind.App. 83
79. Southern Surety Co. of New York v. Elliott, 161 S.E. 679, 44 Ga.App. 376.
80. Lunzer v. W. F. Buth & Co., (Minn.) 261 N.W. 477
81. Texas Employers Ins. Ass'n v. Watkins, (Tex.Civ.App.) 90 S.W.(2d) 622, 623
Held not "award of compensation" under statute.—Texas Employers' Ins. Ass'n v. Watkins, (Tex.Civ.App.) 90 S.W.(2d) 622, 623
82. Martin v. Rudolph Wurlitzer Co., 293 N.Y.S. 105, 108, 249 App.Div. 321
83. Cal.—Hobson v. Superior Court of Tulare County, 230 P. 456, 458, 69 Cal.App. 60, cited in Black L. D.
Minn.—Starkey v. City of Minneapolis, 19 Minn. 203, 19 Gilf. 166, 169.
84. Black L. D.
85. Black L. D. See Starkey v. Minneapolis, 19 Minn. 203, 19 Gilf. 166, 169
86. Black L. D. See Starkey v. Minneapolis, supra.
87. Davis v. Ætna Life Ins. Co., 151 S.E. 812, 813, 41 Ga.App. 113.
88. Black L. D.
See Jackson v. State, 142 N.E. 1, 2, 194 Ind. 130—Starkey v. City of Minneapolis, 19 Minn. 203, 19 Gilf. 166, 169
89. Higginbotham v. State, 101 So. 166, 20 Ala.App. 159.
90. Town of Winnfield v. Collins, 78 So. 747, 749, 143 La. 493
91. Hobson v. Superior Court of Tulare County, 230 P. 456, 458, 69 Cal.App. 60.
92. Starkey v. City of Minneapolis, 19 Minn. 203, 19 Gilf. 166, 169
93. Hobson v. Superior Court of Tulare County, 230 P. 456, 458, 69 Cal.App. 60.
94. Lehrman v. Prague, 162 A. 15, 16, 115 Conn. 484.
95. Jackson v. State, 142 N.E. 1, 2, 194 Ind. 130
96. Davis v. Ætna Life Ins. Co., 151 S.E. 812, 41 Ga.App. 113.
97. Olentine v. Calloway, 295 P. 608, 610, 147 Okl. 137.
98. Jackson v. State, 142 N.E. 1, 2, 194 Ind. 130.
99. Starkey v. City of Minneapolis, 19 Minn. 203, 19 Gilf. 166, 169
1. Starkey v. City of Minneapolis, supra.
2. Higginbotham v. State, 101 So. 166, 20 Ala.App. 159.
3. Daniels v. Berry, 146 S.E. 420, 425, 148 S.C. 446, quoting Webster D.
4. Anniston Electric & Gas Co. v. Rosen, 48 So. 798, 801, 159 Ala. 195, 203, 133 Am.S.R. 32.
5. Daniels v. Berry, 146 S.E. 420, 425, 148 S.C. 446.
6. Daniels v. Berry, 146 S.E. 420, 425, 148 S.C. 446.
7. Century D.

Phrases "Away from,"[8] "away from the plant,"[9] and "away-going crop," see Landlord and Tenant § 349 [36 C J. p 104 note 3–p 107 note 45].

AWE. Profound reverence; oftenest used with reference to the Deity; but it likewise may be applied to things or beings regarded as sublime.[10]

Phrase: "Subjugate or restrain by awe."[11]

AWFUL. While primarily and in correct usage, the word has been defined as meaning striking or inspiring awe, filling with dread, or dread mingled with profound reverence; hence appalling, causing fear or horror, of a dreadful character, or terrible;[12] and also excessive, extraordinary, preposterous, very great, or having some character in an extreme or noticeable degree,[13] it has been said that "awful," and words of similar import, are very often, in common use, mere exaggerations of speech and when inquired into are found not to mean severe and unexpected.[14]

Phrase: "An awful jerk."[15]

AWM. In old English statutes, a measure of wine, or vessel containing forty gallons.[16]

AWN-HINDE. By the laws of Edward the Confessor, one who had remained three nights or longer in an inn; a domestic.[17]

AWNING. A movable, roof-like covering of canvas or other cloth, spread over any place, or in front of a window, door, etc., as a protection or shelter from the sun, rain, or wind.[18] "Awning" has been distinguished from the "frame" or "support" thereof.[19]

AX. A mechanical tool, rather than a weapon.[20]

AXIOM. In logic, a self-evident truth; an indisputable truth.[21]

AXLE BOXES. Bushings for hubs, whose duty is to take the wear incident to revolving on the spindle of the axle.[22]

AXMINSTER. The trade name of a certain kind of rug. The term now generally includes the machine-made product as well as the handmade.[23]

AYANT CAUSE. In French law, and also in Louisiana, this term signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee.[24]

AYLE, AYEL, AIEL, or AILE. The name of a writ which lay when a man's grandfather or grandmother was seised of lands in fee simple on the day of his or her death; and a stranger entered on that day, and abated, or dispossessed the heir of his inheritance.[25]

AYLOURS. Law French, besides; otherwise; elsewhere.[26]

AYRE. In old Scotch law, eyre; a circuit or iter.[27]

AYSIAMENTUM. Law Latin, easement.[28]

AYUDANTE. In Spanish law, assistant, as "ayudante de policia," assistant of police.[29]

AYUNTAMIENTO. In Spanish law, literally a league or confederation of persons for defensive or offensive purposes.[30] More commonly the municipal council or board of a town consisting of the alcalde, regidores, and others,[31] and hence, by metonymy, the municipal government or even the municipality itself.[32]

8. Wirth v Jersey City, 27 A. 1065, 56 N J Law 216, 218
"Back from" equivalent.—Wirth v. Jersey City, 27 A. 1065, 56 N J Law 216, 218.

9. Burns v. Johns, 216 P. 2, 4, 125 Wash 387—Diblasio v. Hunter, 213 P. 470, 471, 124 Wash. 98.

10. Collum v State, 107 So. 35, 21 Ala.App 220.

11. Collum v. State, supra.
As meaning "overawe."—Collum v. State, 107 So. 35, 21 Ala.App. 220.

12. Century D.

13. Century D

14. Markowitz v. Milwaukee Electric Railway & Light Co., (Wis.) 271 N.W. 380, 381, 382.

15. Markowitz v Milwaukee Electric Railway & Light Co., supra.

16. Black L. D.

17. Black L. D, sub verbo Third-Night-Awn-Hinde.

18. State v Clarke, 37 A 975, 69 Conn. 371, 373, 61 Am.S R. 45, 39 L R A. 670.

19. State v. Clarke, 37 A. 975, 69 Conn 371, 373, 61 Am.S R. 45, 39 L R A. 670.

20. Pike v. Witt, 104 Mass. 595, 598.

21. Black L. D.

22. Ives v. Hartford Spring & Axle Co, (C C.Conn.) 11 F. 510, 511, 20 Blatchf. 333, citing Knight Mechanical D.

23. Black L. D., citing Beuttell & Sons v. U. S., 8 Ct.Cust.App. 409, 412.

24. Black L. D.
"Heir" distinguished
An ayant cause differs from an heir who acquires the right by inheritance—Black L. D.

25. Burrill L D.

26. Adams Gloss.

27. Black L. D.

28. Adams Gloss.

29. Escriche Diccionario.

30. Escriche Diccionario.

31. Escriche Diccionario Suplemento, pp 85–88. See Castillero v. U. S, (Cal) 2 Black (U.S.) 17, 194, 17 L.Ed. 360.
6 C.J. p 877 note 80.

32. U. S. v. Dangga, (Philippine) 12 Off Gaz. 1124—Aguado v. Manila, 9 Philippine 513, 525.

AZAR. Spanish, literally "Hazard," "chance." The Spanish law treats games of chance, luck, or hazard, "suerte, envite, ó azar," as prohibited, and, on a principle analogous to the common-law maxim, "In pari delicto potior est conditio possidentis," withholds its aid from those who have either won or lost at such games.[33]

AZO COMPOUNDS. Certain aniline colors derived from coal tar.[34]

AZOTES. In Spanish law, corporal punishment by whipping.[35]

AZOTIZATION. A chemical process used in the creation or development of coal tar colors.[36]

AZURE. A term used in heraldry, signifying blue.[37]

B. The second letter of the English alphabet; it is used to denote the second of a series of pages, notes, etc.; the subsequent letters, the third and following numbers.[38] The letter occurs in various abbreviations, see Abbreviations 1 C.J.S. p 276 note 5.

BABBITT. As a noun, a composition of lead and antimony, cheaper than yellow brass and which melts at a much lower temperature.[39] As a verb, to line or furnish with babbitt metal.[40]

Babbitting jig. A melting box in which bearings or bearing brasses are placed while being babbitted.[41]

Babbitt metal. A soft white antifriction metal, of varying compositions; any of several alloys similarly used.[42]

Other phrases. Both the noun, and various parts of the verb, occur in other phrases which have received judicial interpretation, such as "babbitt lining,"[43] "babbitted boxes,"[44] "babbitted or unbabbitted,"[45] "free of babbitt,"[46] and "pulleys needed 'babbitting'."[47]

BABORD. A French nautical term meaning "port."[48]

BABY ACT. A plea of infancy, interposed for the purpose of defeating an action upon a contract made while the person was a minor, is vulgarly called "pleading the baby act;" and by extension, the term is applied to a plea of the statute of limitations.[49]

BACBARENDA; also BACBAREND, BACKBERIND, BACKBERYNDE. Saxon, bearing or carrying upon the back, or about the person; an open or manifest robber or thief.[50]

BACHELERIA. In old records, commonalty or yeomanry, in contradistinction to baronage.[51]

BACHELOR. Primarily, a man who has never been married.[52] In a somewhat different sense, one who has taken the first degree, baccalaureate, in the liberal arts and sciences, or in law, medicine, or divinity,

33. Azada v Martinez, 15 Philippine 527, 530—Sparrevohn v Bachrach, 7 Philippine 194, 195—Lichauco v Martinez, 6 Philippine 594, 597—Reyes v. Martinez, 5 Philippine 402, 404—Vasquez v. Florence, 5 Philippine 183, 184—Conchegull v. Hyams, 2 Philippine 51, 53—6 C.J. p 877 notes 83–97.

34. Matheson v. Campbell, (C C.N Y) 69 F 597, 600, 78 F 910, 912, 24 C C A 384

Derivation of term

The word "azo" is derived from "azote," or "nitrogen," being used to show that these compounds contain nitrogen in the form of nitrous acid.—Matheson v. Campbell, (C C N Y) 69 F 597, 600, 78 F. 910, 912, 24 C C.A. 384.

35. Escriche Diccionario—6 C.J. p 878 note 2.

36. Matheson v. Campbell, (C C N Y) 69 F. 597, 600, 78 F 910, 912, 24 C C.A 384.

Process described

"To azotize such a color is to treat it with nitrogen. To diazotize is to unite two nitrogen atoms to a hydrocarbon radical, and to form a diazo compound. A repetition of the process, or rediazotization, forms a diazo compound The general formula, 'R(SO$_3$H)x—N-N—C$_{10}$H$_6$NH$_2$ (a),' includes the sulpho acids of any radical—a group comprising a great number and variety of colors."—Matheson v Campbell, (C C N Y) 69 F. 597, 600, 78 F. 910, 912, 24 C C A. 384.

37. Black L. D.

38. Black L. D.

39. Deutsch v. Pratt, 21 N E 1072, 1074, 149 Mass. 415.

40. Ingersol v. National Sash & Door Factory, 63 So 609, 610, 134 La 19, quoting Webster D.

41. Ingersol v. National Sash & Door Factory, supra, quoting Webster D.

Manner of use

"A short section of shaft is placed inside the bearing or between the brasses to mold the inside correctly."—Ingersol v. National Sash & Door Factory, 63 So 609, 610, 134 La. 19, 22, quoting Webster D

42. Ingersol v. National Sash & Door Factory, supra, quoting Webster D.

Varying composition

"As of four parts of copper, eight parts of antimony, and twenty-four or ninety-six of tin (the alloy with the smaller proportion of tin being called 'hardening,' that with the greater, 'lining')"—Ingersol v. National Sash & Door Factory, 63 So 609, 610, 134 La. 19, quoting Webster D.

"Also called 'Babbitt's metal' after Isaac Babbitt of Massachusetts, inventor of the method of using soft metals for journal boxes"—Webster New Int D.

43. Deutsch v. Pratt, 21 N.E. 1072, 1074, 149 Mass. 415

44. Deutsch v. Pratt, supra.

45. Deutsch v. Pratt, supra.

46. Deutsch v. Pratt, supra

47. Ingersol v. National Sash & Door Factory, 63 So. 609, 610, 134 La. 19.

48. The Charles Tiberghien, (D C. N Y.) 143 F 676.

49. Black L. D.

50. Adams Gloss., citing Spelman.

51. Black L D.

52. Black L. D.

in a college or university;[53] also a kind of inferior knight; an esquire.[54]

BACK.

Noun

The part opposite to, or most remote from, that which fronts the speaker or actor; the part out of sight or not generally seen.[55] In human beings, the hinder part of the body, extending from the neck to the end of the spine.[56]

Phrases: "Back of the execution,"[57] "injury to the back,"[58] and "spraining his back."[59]

Verb

Generally, to indorse;[60] more particularly, to sign on the back, or to sign generally by way of acceptance or approval.[61] Derivatively, to advance money on account.[62] In another sense, to cause to move backward, to propel backward, or to reverse the action of; also intransitively, to move in the reverse direction; to move or go backward.[63]

Backing. An entry made upon the back of a writ or warrant;[64] indorsement; indorsement by a magistrate.[65]

Back up signal. In railroad parlance, a signal meaning that the engineer shall back up the train, distinguished from a "kick signal."[66]

Adjective

Being at the back or in the rear; also being in arrear or overdue.[67]

Back bond. A bond of indemnification given to a surety. In Scotch law, a deed attaching a qualification or condition to the terms of a conveyance or other instrument.[68]

Back-seat driver. A term usually applied to a highly nervous passenger, whether sitting in the rear or by the driver, who by unwarranted advice and warnings interferes with the careful operation of the car.[69]

Other phrases: "Back flow,"[70] "back lands,"[71] "back line,"[72] "back road,"[73] "back tax book,"[74] and "back taxes."[75]

Adverb

As an adverb, to the rear; backward; in a reverse direction.[76]

Back carry or *Back bear.* In forest law, carrying on the back; the crime of having, on the back, game unlawfully killed.[77]

Other phrases: "Back-firing,"[78] "back from,"[79] and "held back."[80]

BACKADATION. See Backwardation post.

53. Black L D
54. Black L D
55. Webster New Int. D.
56. Ft. Worth & D C. Ry Co v. Rogers, 53 S W. 366, 21 Tex Civ App 605, 606, quoting Webster D
57. Hall v. Staples, 74 Me 178, 180
58. Ft Worth & D C Ry. Co. v Rogers, 53 S W. 366, 21 Tex Civ. App. 605, 606—6 C J p 878 note 17
59. Ft Worth & D. C. Ry. Co. v Rogers, supra.
60. Abbott L D.
61. Black L D.

Colloquial use

Indorser of a note or bill is colloquially said to "back" it—Black L D, citing Scabury v. Hungerford, 2 Hill (N.Y.) 80.

62. Miles v. Columbia Packers' Assoc., 69 P. 827, 41 Or. 617, 621.
63. Century D.
64. Gondas v. Gondas, 134 A. 615, 617, 99 N J Eq 473, cited in Black L. D.
65. Gondas v. Gondas, 134 A 615, 617, 99 N.J Eq. 473, citing Black L. D.

66. Gist of distinction

There is a difference between a "back up signal" and a "kick signal." A back up signal means that the engineer shall back the train A kick signal means that the speed shall be sufficiently increased to throw the cut off car into the side track by the force of the increased momentum without following the car into the switch with the rest of the train.—Gulf, etc, R Co v. Hill, 70 S.W. 103, 29 Tex Civ App 12, 15.

67. Webster New Int. D.
68. Black L D.

Similarly expressed

"In Scotch law and conveyancing, an instrument equivalent to a declaration of trust in English conveyancing, a deed which, in conjunction with an absolute disposition, constitutes a trust."—Burrill L D

69. Winters v York Motor Express Co, 176 A. 813, 815, 116 Pa Super. 421.

"Not restricted to one sitting in the rear seat."—Winters v. York Motor Express Co., 176 A. 813, 815, 116 Pa.Super. 421.

70. Chambers v. Kyle, 87 Ind 83, 85. See also Backwater post
71. Ryerss v. Wheeler, 22 Wend. (N.Y.) 148, 150
72. Morse v Williams, (Tex Civ. App.) 142 S W 1136, 1139.
73. Blackburn v. Sanderson, [1902] 1 K B 794, 798
74. State ex rel. Davidson v. St Louis-San Francisco Ry Co, 66 S. W.(2d) 149, 150, 334 Mo 127.
75. Ky—Commonwealth v Louisville Water Co, 116 S W. 712, 132 Ky. 305, 309
Tenn—Gaines v. Galbreath, 14 Lea 359, 363

"Delinquent taxes" compared and distinguished.—State ex rel Davidson v St Louis-San Francisco Ry Co, 66 S W (2d) 149, 151, 334 Mo 127

Held not to include taxes not due.—Fears v State Bank of Naylor, 31 S W (2d) 94, 96, 224 Mo App 632

Taxes for the current year not included.—Methodist Episcopal Church South v. New Orleans, 32 So. 101, 107 La 611, 613.

76. Black L. D.
77. Black L. D.
78. Templeman Bros. Lumber Co v. Fairbanks, 57 So 309, 129 La. 983, 995
79. Wirth v Jersey City, 27 A. 1065, 56 N.J.Law 216, 218.

Equivalent to "off" and "away from."—Wirth v. Jersey City, 27 A. 1065, 56 N.J Law 216, 218.

80. Webster v North Poudre Irr. Co, 223 P. 36, 37, 74 Colo. 565.

BACKBEREND. Saxon, bearing upon the back or about the person. Applied to a thief taken with the stolen property in his immediate possession.[81]

BACKER. One who backs or supports, or who aids and abets, another in an undertaking;[82] also an indorser.[83]

BACKGAMMON. See Gaming § 1 [27 C.J. p 969 note 29].

BACKSIDE. In English law, a term formerly used in conveyances and also in pleading; it imports a yard at the back part of or behind a house, and belonging thereto.[84]

BACKWARD or BACKWARDS. Directed to or toward the original starting point; reversed; returning.[85] The correlative of "forward" or "forwards," as in the phrase "forwards and backwards."[86]

BACKWARDATION. The premium paid by a seller of stock for the privilege of postponing his delivery of such stock from and to a specified date.[87]

BACKWATER. The flow of a stream which is retarded and returned in an opposite direction from that in which the stream flows, caused by some natural or artificial obstruction from the channel, as a dam, etc.;[88] water prevented from flowing by reason of an obstruction in its course;[89] also, in a somewhat different sense, water caused to flow backward from a steam vessel by reason of the action of its wheels or screw.[90]

Phrase: "Damage 'on account of backwater.'"[91]

BACTERIA. Living organisms, being among the smallest and simplest forms of vegetable life and having an average diameter of one twenty-five thousandth of an inch.[92]

Phrases: "Aerobic bacteria,"[93] "anaerobic bacteria,"[94] "heat-resisting bacteria,"[95] and "yeast or bacteria."[96]

BACTERIAL. Pertaining to, consisting of, resulting from, or caused by, bacteria.[97]

Phrase: "Bacterial infection."[98]

BACTERIOLOGY. The science which investigates bacteria and other microbes, especially their life, history, and agency in the production of diseases.[99]

BACULUS. A rod, staff, or wand, used in old English practice in making livery of seisin where no building stood on the land.[1]

Baculo et annulo. Literally, "With staff and ring." The insignia of a Roman Catholic bishop.[2]

Baculus nunciatorius. The proclaiming wand or staff; a warning or summoning stick.[3]

BAD. In ordinary use, a term of comparison,[4] whose meaning is to be determined from the context or

81. Black L. D., citing Bracton 1, 3, tr 2 c 32

Used with "handhabend," having in the hand.—Black L. D.

82. Century D.

83. Seabury v. Hungerford, 2 Hill (N.Y.) 80, 81.

84. Black L. D.

85. Century D.

86. Salvador v. Hopkins, 3 Burr 1707, 1712, 97 Reprint 1057—Grant v. Paxton, 1 Taunt 463, 476, 127 Reprint 914.

87. Dos Passos Stock-Brokers p 270 note 1.

Also called "Backadation."—Black L. D.

88. Hodges v. Raymond, 9 Mass 316, 318.

89. Colo.—Webster v. North Poudre Irr. Co., 223 P. 36, 38, 74 Colo 565

Ind.—Chambers v. Kyle, 87 Ind. 83, 85.

90. Black L. D.

91. Webster v. North Poudre Irr. Co., 223 P. 36, 38, 74 Colo 565

92. Guaranty Trust Co. of New York v. Union Solvents Corporation, (D.C.Del.) 54 F.(2d) 400, 403.

Characteristics and classification

"They multiply by dividing transversely in half. Bacteria may be divided into two classes, aerobic and anaerobic. Aerobic bacteria grow, multiply, and perform their functions best when free oxygen is present. The smallest trace of oxygen prevents the growth, multiplication, or functioning of anaerobic bacteria. When surrounding conditions become unfavorable to growth, bacteria pass into what may be called a hibernating stage and are called 'spores' or 'in spore form'. They may continue in this state for a long time and will resist injurious influences such as excessive heat, cold, and chemicals. Under proper temperature with food present they will again come into the vegetative form and will grow, multiply, and carry on their life work."—Guaranty Trust Co. of New York v. Union Solvents Corporation, (D.C.Del.) 54 F.(2d) 400, 403. See also Aerobes 2 C.J.S. p 916 note 2, and Anaerobes 2 C.J.S. p 1060 note 99.

93. Guaranty Trust Co. of New York v. Union Solvents Corporation, (D.C.Del.) 54 F.(2d) 400, 403.

94. Guaranty Trust Co. of New York v. Union Solvents Corporation, supra.

95. Guaranty Trust Co. of New York v. Union Solvents Corporation, supra.

96. Guaranty Trust Co. of New York v. Union Solvents Corporation, supra.

97. McIntyre v. Equitable Life Assur. Soc. of United States, 188 A. 172, 174, 324 Pa. 417.

98. McIntyre v. Equitable Life Assur. Soc. of United States, supra.

"Pneumonia . . . is a 'bacterial infection.'"—McIntyre v. Equitable Life Assur. Soc. of United States, 188 A. 172, 174, 324 Pa. 417.

99. State v. Duncan, 50 So. 265, 266, 162 Ala. 196, 199.

1. Black L. D., citing Bracton p 40.

2. Adams Gloss.

3. Adams Gloss.

Frequently used by criers of courts.—Adams Gloss.

4. Tobias v. Harland, 4 Wend. (N.Y.) 537, 541.

the connection in which it is used.[5] It is sometimes employed in a privative sense, frequently implying little more than the defect or absence of good qualities, or lack of value.[6] Specifically used in pleading, it has been defined as materially defective.[7] It has been compared with, and distinguished from, "evil," "ill," and "wicked."[8]

Bad debt. Generally speaking, one which is uncollectable;[9] one which is wholly worthless and has been charged off.[10] Technically the word may have a more precise meaning.[11] In revenue statutes, debts found to be worthless and charged off during the taxable year;[12] and, in this latter connection, it has been contrasted with, or distinguished from "loss."[13]

Bad faith. It has been said that "bad faith" cannot be defined with mathematical precision,[14] and is not a technical term used only in actions of deceit,[15] but that it is a term of variable significance and rather broad application,[16] and that its ultimate definition would depend upon the facts and circumstances of a given controversy.[17] Although the term has been said to be an indefinite one,[18] it has been described as one of those terms which carries its own meaning,[19] or as an ordinary expression, the meaning of which is not doubtful;[20] and the various courts have held that it contains the element of intent to do wrong in some degree, actual or necessarily inferable,[21] embraces and connotes deceit, fraud, dishonesty, one-sidedness of intention or purpose,[22] implies a false motive or a false purpose, and hence a species of fraudulent conduct,[23] implies or presupposes knowledge, actual or clearly implied, and not mere suspicion of a defect affecting a contemplated transaction,[24] in-

5. Mass.—Riddell v. Thayer, 127 Mass. 487, 490—Snell v. Snow, 13 Metc. 278, 282, 46 Am.D. 730
N.Y.—Upton v. Upton, 4 N.Y.S. 936, 51 Hun 134, 136

6. Cornell v. Mason, 268 P. 8, 12, 46 Idaho 112

7. Anderson L. D.

8. "Webster's New International Dictionary [in defining the word "bad"] says, with reference to the words 'bad, evil, ill, wicked' 'Of these words, "bad" alone is now used in a privative sense, frequently implying little more than the defect or absence of good qualities, or lack of value.'"—Cornell v. Mason, 268 P. 8, 12, 46 Idaho 112

9. Black L. D.

10. U. S. v. Klausner, (C.C.A.N.Y.) 25 F.(2d) 603, 611.

11. Black L. D.

In Louisiana, bad debts are those which have been prescribed against, barred by limitations, and those due by bankrupts who have not surrendered any property to be divided among their creditors.—Black L.D., citing La.Civ.Code art. 1043.

In North Dakota, as applied to the management of banking associations, the term means all debts due to the association on which the interest is past due and unpaid for a period of six months, unless the same are well secured and in process of collection.—Black L. D., citing N.D.Rev.Codes (1899) § 3240 (Comp.L. [1913] § 5165)

12. U. S. v. Klausner, (C.C.A.N.Y.) 25 F.(2d) 603, 611—American Cigarette & Cigar Co. v. Bowers, (D.C. N.Y.) 17 F.Supp. 931, 932

13. U. S. v. Klausner, (C.C.A.N.Y.) 25 F.(2d) 603, 611.

14. Polikoff v. Finance Service Co., 172 S.E. 356, 358, 205 N.C. 631—Bundy v. Commercial Credit Co., 163 S.E. 676, 677, 202 N.C. 604.

15. Johnson v. Hardware Mut. Casualty Co., (Vt.) 187 A. 788, 796.

16. Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kan., 235 N.W. 413, 414, 204 Wis. 1.

17. Polikoff v. Finance Service Co., 172 S.E. 356, 358, 205 N.C. 631—Bundy v. Commercial Credit Co., 163 S.E. 676, 677, 202 N.C. 604

18. U.S.—Browning v. Fidelity Trust Co., (N.J.) 250 F. 321, 325, 162 C.C.A. 391
Ky.—Warfield Natural Gas Co. v. Allen, 59 S.W.(2d) 534, 538, 248 Ky. 646, 91 A.L.R. 890.
N.J.—New Amsterdam Casualty Co. v. National Newark & Essex Banking Co., 175 A. 609, 616, 117 N.J. Eq. 264
Pa.—Rineer v. Collins, 27 A. 28, 156 Pa. 342, 350—Harris v. Harris, 70 Pa. 170, 174.

19. Warfield Natural Gas Co. v. Allen, 59 S.W.(2d) 534, 538, 248 Ky. 646, 91 A.L.R. 890.

20. Johnson v. Hardware Mut. Casualty Co., (Vt.) 187 A. 788, 796

21. U.S.—Browning v. Fidelity Trust Co., (N.J.) 250 F. 321, 325, 162 C.C.A. 391
N.J.—New Amsterdam Casualty Co. v. National Newark & Essex Banking Co., 175 A. 609, 616, 117 N.J. Eq. 264.

22. Koukly v. Canavan, 277 N.Y.S. 28, 35, 154 Misc. 343

23. Polikoff v. Finance Service Co., 172 S.E. 356, 358, 205 N.C. 631—Bundy v. Commercial Credit Co., 163 S.E. 676, 677, 202 N.C. 604.

Similarly expressed

Bad faith "implies or involves actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty, or contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive."—Bundy v. Commercial Credit Co., 163 S.E. 676, 677, 202 N.C. 604—State v. Shipman, 163 S.E. 657, 669, 202 N.C. 518—State v. Griffin, 84 S.E. 876, 877, 100 S.C. 331, quoting Black L. D.

24. Conn.—First Nat. Bank v. Fairfield Auto Co., 99 A. 577, 91 Conn. 260
Ky.—Kentucky Rock Asphalt Co. v. Mazza's Adm'r, 94 S.W.(2d) 316, 319, 264 Ky. 158.
N.J.—New Amsterdam Casualty Co. v. National Newark & Essex Banking Co., 175 A. 609, 616, 117 N.J. Eq. 264.
N.Y.—Karpas v. Bandler, 228 N.Y.S. 241, 244, 223 App.Div. 306
Tex.—Fenner v. American Surety Co. of New York, (Civ.App.) 37 S.W.(2d) 741, 745

Similarly expressed

"'Bad faith' . . . means actual knowledge of such facts and circumstances as would charge a reasonably prudent business man with . . . dishonest motives."—Hess v. Iowa Bankers' Mortgage Co., 201 N.W. 91, 92, 198 Iowa 1365.

Full knowledge not required

Knowledge, not surmise, suspicion, or fear, held necessary to impute "bad faith," although knowledge of less than whole truth may suffice to impute notice of defects.—Gerseta Corporation v. Wessex-Campbell Silk Co., (C.C.A.N.Y.) 3 F.(2d) 236, 238—Bergheim v. McRae, 252 N.W. 332, 334, 190 Minn. 571.

Not mere failure to inquire

"It is not the failure to inquire but the dishonest purpose which establishes bad faith."—Hartford Nat. Bank & Trust Co. v. Credenza, 177 A. 132, 132, 119 Conn. 368.

Willful or negligent failure to inquire where the law imposes the du-

volves the elements of dishonesty,[25] fraud, deceit, duress, or some such act, and is a state of mind;[26] may involve merely the absence of a proper motive,[27] and refers to an actual state of mind capable of both direct and circumstantial proof.[28] In particular connections the term has been specifically defined as meaning or employed as denoting absence of fidelity to the obligations of morals and honor,[29] actual intent to mislead or deceive another,[30] being recreant to one's duty or obligation;[31] dishonesty,[32] failure to perform a duly imposed duty;[33] faithlessness;[34] fraud;[35] infidelity or perfidy; intentional tort of an active and affirmative nature,[36] "mala fides;"[37] participation in a fraud;[38] purpose to obtain without payment a benefit or profit from another or from another's efforts;[39] the opposite of good faith;[40] thing done when it is in fact done dishonestly;[41] unfair dealing;[42] unfairness.[43] "Bad faith" has been contrasted with, or distinguished from, "actual fraud,"[44] "bad judgment,"[45] "bona fide,"[46] "corruptly,"[47] "fraud,"[48] "good faith,"[49]

ty to inquire held to constitute bad faith—Twitchell v. Nelson, 155 N W 621, 624, 131 Minn. 375—Everding & Farrell v. Toft, 160 P. 1160, 1164, 32 Or 1.

25. Bank of California Nat Ass'n v Portland Hide & Wool Co., 282 P. 99, 104, 131 Or. 123.

Similarly expressed

"Bad faith . . . always carries with it the suggestion of dishonesty."—Fenner v. American Surety Co. of New York, (Tex Civ App.) 97 S W.(2d) 741, 745.

26. Ga.—Copeland v Dunehoo, 138 S E. 267, 270, 36 Ga App 817

N C.—Bundy v Commercial Credit Co., 163 S E. 676, 677, 202 N C 604.

27. Cornell v Mason, 268 P. 8, 12, 46 Idaho 112.

28. U S.—Penn Mut. L Ins. Co. v. Mechanics' Sav Bank & Trust Co, (Tenn.) 73 F. 653, 654, 19 C.C.A. 316, 38 L R.A. 33, 70

Vt.—Johnson v. Hardware Mut. Casualty Co, 187 A. 788, 796.

29. Gerseta Corporation v. Wessex-Campbell Silk Co., (C.C A N.Y.) 3 F (2d) 236, 238

30. U S—Penn Mut Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co, (Tenn.) 73 F 653, 654, 19 C.C A 316, 38 L R A 33, 70

N C—Bundy v. Commercial Credit Co, 163 S E 676, 677, 202 N C 604.

Vt—Johnson v. Hardware Mut. Casualty Co, 187 A. 788, 796.

31. Hilker v Western Automobile Ins Co of Ft Scott, Kan, 235 N W. 413, 414, 204 Wis 1

32. U S—Gerseta Corporation v. Wessex-Campbell Silk Co., (C C A. N Y) 3 F (2d) 236, 238

Ky—Commonwealth v Smith, 46 S. W.(2d) 474, 478, 242 Ky 365.

Or—Bank of California Nat. Ass'n v Portland Hide & Wool Co., 282 P 99, 104, 131 Or. 123.

33. In re Hackett, Hoff & Thiermann, (C C.A Wis.) 70 F (2d) 815, 817

Similarly expressed

"A conscious and willful neglect of duty, not prompted by any justifiable motive, must necessarily be committed in bad faith"—Cornell v Mason, 268 P 8, 12, 46 Idaho 112.

34. Joiner v Joiner, (Tex.Civ App) 87 S W (2d) 903, 915

35. Kan—Gigoux v Moore, 184 P 637, 640, 105 Kan 361.

Ky—Warfield Natural Gas Co v Allen, 59 S W (2d) 534, 538, 248 Ky 646, 91 A L R 890—Commonwealth v. Smith, 46 S.W (2d) 474, 478, 242 Ky 365

N J.—New Amsterdam Casualty Co. v. National Newark & Essex Banking Co, 175 A. 609, 616, 117 N.J Eq. 264

N C—Polikoff v. Finance Service Co, 172 S E 356, 358, 205 N C 631—Bundy v. Commercial Credit Co., 163 S.E 676, 677, 202 N C. 604—State v. Shipman, 163 S E 657, 669, 202 N C 518.

Or.—Bank of California Nat. Ass'n v. Portland Hide & Wool Co, 282 P. 99, 104, 131 Or. 123.

Tex.—Joiner v Joiner, (Civ.App) 87 S.W (2d) 903, 914.

6 C.J. p 880 note 58.

Bad faith will not be imputed unless there is something in the particular transaction which is equivalent to fraud, actual or constructive. —Morton v. New Orleans, etc, R Co., etc, Assoc., 79 Ala 590, 617.

36. Johnson v. Hardware Mut. Casualty Co., (Vt.) 187 A. 788, 796

37. Hankins v. Farmers' & Merchants' Bank, 170 P. 890, 891, 892, 69 Okl 136.

38. Hankins v. Farmers' & Merchants' Bank, supra

39. Brooks v. Gregory, 189 N E 195, 198, 285 Mass 197.

40. U S—Gerseta Corporation v. Wessex-Campbell Silk Co., (C.C.A N Y.) 3 F.(2d) 236, 238

Ga.—Copeland v. Dunehoo, 138 S E 267, 270, 36 Ga App 817

Iowa—Hess v Iowa Bankers' Mortgage Co., 201 N.W. 91, 92, 198 Iowa 1365.

Kan.—Gigoux v Moore, 184 P. 637, 640, 105 Kan 361.

Ky—Warfield Natural Gas Co. v. Allen, 59 S.W (2d) 534, 538, 248 Ky. 646, 91 A L R. 890

N J—New Amsterdam Casualty Co v. National Newark & Essex Banking Co, 175 A. 609, 616, 117 N J. Eq 264

N C—Bundy v. Commercial Credit Co, 163 S E 676, 677, 202 N C 604—State v. Shipman, 163 S E. 657, 669, 202 N C 518

S C—State v Griffin, 84 S.E. 876, 877, 100 S C. 331

Tex—Fenner v American Surety Co. of New York, (Civ.App.) 97 S W. (2d) 741, 745

6 C J p 881 note 59.

41. New Amsterdam Casualty Co v. National Newark & Essex Banking Co., 175 A. 609, 616, 117 N J. Eq 264.

42. Koukly v. Canavan, 277 N Y S 28, 35, 154 Misc. 342—6 C.J. p 881 notes 62, 63.

43. Joiner v. Joiner, (Tex Civ.App) 87 S W.(2d) 903, 915.

44. Life and Casualty Ins. Co. of Tennessee v Smith, 179 S E. 744, 51 Ga App 122—Sentinel Fire Ins Co v McRoberts, 179 S E 256, 263, 50 Ga App 732—Metropolitan Life Ins. Co. v. Lovett, 179 S E. 253, 256, 50 Ga App. 763

45. Balducci v Strough, 239 N.Y S. 611, 615, 135 Misc. 346.

46. U.S—M Lowenstein & Sons v. British-American Mfg Co, (C C.A. Conn) 7 F (2d) 51, 53.

Iowa—Appanoose County Farm Bureau v. Board of Sup'rs of Appanoose County, 256 N W. 687, 689, 218 Iowa 945

Ohio—Wolfe v Wolfe, 187 N E. 86, 87, 45 Ohio App. 309.

47. Cornell v. Mason, 268 P. 8, 12, 46 Idaho 112

48. Polikoff v. Finance Service Co, 172 S E 356, 358, 205 N C 631—Bundy v Commercial Credit Co, 163 S E. 676, 677, 202 N C. 604.

49. U S—Gerseta Corporation v. Wessex-Campbell Silk Co., (C C A N Y) 3 F.(2d) 236, 238.

Ill—Coleman v. Billings, 89 Ill 183, 190

Okl—Hankins v. Farmers' & Merchants' Bank, 170 P. 890, 891, 892, 69 Okl 136

Gist of distinction

'Generally speaking, good faith means being faithful to one's duty or obligation, bad faith means be-

"gross negligence,"[50] "honest belief,"[51] "mere failure to inquire,"[52] and "negligence."[53]

Other phrases: "Bad [article],"[54] "bad behavior,"[55] "'bad' blood,"[56] "bad business habits,"[57] "bad character,"[58] "bad character, a loose character,"[59] "bad character and general reputation,"[60] "bad disease,"[61] "bad egg,"[62] "bad feeling,"[63] "bad girl,"[64] "bad habits or improper conduct,"[65] "bad house,"[66] "bad in quality,"[67] "bad judgment,"[68] "bad moral character,"[69] "'bad order' cars,"[70] "bad place,"[71] "bad reputation for 'honesty and fair dealing,'"[72] "bad reputation for truth and veracity,"[73] "bad title,"[74] "bad weather,"[75] "bad woman,"[76] "fraud or bad faith,"[77] "in bad faith,"[78] and "very bad girl."[79]

BADGE. A mark or cognizance worn to show the relation of the wearer to any person or thing; the token of anything; the distinctive mark of office or service.[80]

Badges of fraud see Fraudulent Conveyances §§ 79–98 [27 C.J. p 483 note 28–p 497 note 88].

BADGER. In old English law, one who made a practice of buying corn or victuals in one place, and carrying them to another to sell and make profit by them.[81]

BAG. A sack or satchel; also a certain and customary quantity of goods and merchandise in a sack; an uncertain quantity of goods and merchandise, from three to four hundred.[82]

BAGA. In English law, a bag or purse.[83]

ing recreant thereto"—Hilker v. Western Automobile Ins Co of Ft Scott, Kan., 235 N.W. 413, 414, 204 Wis. 1.

50. Browning v. Fidelity Trust Co., (N.J.) 250 F. 321, 325, 162 C.C.A. 391—6 C.J. p 880 note 58 [f]

As evidence of "bad faith"

(1) "Gross negligence is surely evidence of bad faith"—Kentucky Rock Asphalt Co. v. Mazza's Adm'r., 94 S.W. (2d) 316, 319, 264 Ky. 158.

(2) "They are sometimes confused because gross negligence may properly constitute evidence from which bad faith may be inferred"—Browning v. Fidelity Trust Co., (N.J.) 250 F. 321, 325, 162 C.C.A. 391

51. Penn Mut. L. Ins Co. v. Mechanics' Sav. Bank & Trust Co., (Tenn.) 73 F. 653, 654, 19 C.C.A. 316, 38 L.R.A. 33, 70—6 C.J. p 880 note 57 [a]

52. Conn.—Hartford Nat. Bank & Trust Co v. Credenza, 177 A. 132, 133, 119 Conn. 368.
Minn.—Bergheim v. McRae, 252 N.W. 833, 834, 190 Minn. 571.

53. Minn.—Bergheim v. McRea, 252 N.W. 833, 834, 190 Minn. 571.
Or.—Everding & Farrell v. Toft, 160 P. 1160, 1164, 82 Or. 1.

Gist of distinction

"Bad faith . . . differs from the negative idea of negligence, in that it contemplates a state of mind affirmatively operating with a furtive design, or some motive of interest or ill will"—Browning v. Fidelity Trust Co., (N.J.) 250 F. 321, 325, 162 C.C.A. 391—Warfield Natural Gas Co. v. Allen, 59 S.W. (2d) 534, 538, 248 Ky. 646, 91 A.L.R. 390—New Amsterdam Casualty Co. v. National Newark & Essex Banking Co., 175 A. 609, 616, 117 N.J.Eq. 264.

54. Tobias v. Harland, 4 Wend. (N.Y.) 537, 540.

55. State v. Hardin, 112 S.E. 593, 594, 183 N.C. 815—6 C.J. p 879 note 40

Held to mean "conduct such as the law will punish"—In re Spenser, (C.C.Or.) 22 F.Cas.No.13,234—U.S. v. Hrasky, 88 N.E. 1031, 240 Ill. 560, 564, 130 Am.St.R. 288, 16 Ann.Cas. 279—State v. Hardin, 112 S.E. 593, 594, 183 N.C. 815

"Good behavior" contrasted.—U.S. v. Hrasky, 88 N.E. 1031, 1033, 240 Ill. 560, 130 Am.St.R. 288, 16 Ann.Cas. 279—State v. Hardin, 112 S.E. 593, 594, 183 N.C. 815

56. Jenkins v. State, 51 S.E. 598, 600, 123 Ga. 523

"Hot' blood" contrasted.—Jenkins v. State, 51 S.E. 598, 600, 123 Ga. 523

57. Rorick v. Gilbert, 186 N.E. 756, 758, 45 Ohio App. 96

58. Iowa.—Carter v. Cavenaugh, 1 Greene 171, 175.
Mo.—State v. Scott, 58 S.W. (2d) 275, 279, 332 Mo. 255, 90 A.L.R. 860

59. Krodelivansky v. Niebaum, 11 P. 64, 70 Cal. 216, 219

60. O'Brien v. Fresier, 1 A. 465, 47 N.J.Law 349, 356, 54 Am.R. 170.

61. Upton v. Upton, 4 N.Y.S. 936, 51 Hun 184, 186

62. Pfitzinger v. Dubs, (Ill.) 64 F. 690, 702, 12 C.C.A. 399.

63. Holmes v. State, 14 So. 864, 100 Ala. 80, 83—Polk v. State, 62 Ala. 237, 239

64. Snell v. Snow, 13 Metc. (Mass.) 278, 279, 282, 46 Am.D. 730

65. Rorick v. Gilbert, 186 N.E. 756, 758, 45 Ohio App. 96.

66. Md.—Peterson v. Sentman, 37 Md. 140, 153, 11 Am.R. 534
R.I.—Blake v. Smith, 34 A. 995, 19 R.I. 476, 479.

67. The Edward R. West, (D.C. Wash.) 212 F. 287, 289

68. Balducci v. Strough, 239 N.Y.S. 611, 615, 135 Misc. 346.

69. State v. Scott, 58 S.W. (2d) 275, 279, 332 Mo. 255, 90 A.L.R. 860.

70. Cato v. Atlantic & C.A.L. Ry. Co., 162 S.E. 239, 241, 164 S.C. 123

71. W. G. Duncan Coal Co. v. Thompson, 162 S.W. 1139, 157 Ky. 304, 306.

72. State v. Scott, 58 S.W. (2d) 275, 279, 280, 332 Mo. 255, 90 A.L.R. 860.

73. State v. Scott, supra.

74. Heller v. Cohen, 36 N.Y.S. 668, 15 Misc. 378, 383, quoting Bouvier L.D. See Vendor and Purchaser § 191 [66 C.J. p 860 note 73–p 870 note 48]

75. The Ocean Prince, (D.C.N.Y.) 50 F. 115.

76. Mass.—Riddell v. Thayer, 127 Mass. 487, 490.
Ont.—Paladino v. Gustin, 17 Ont.Pr. 553, 556

77. Balducci v. Strough, 239 N.Y.S. 611, 615, 135 Misc. 346.

78. U.S.—Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & Trust Co., (Tenn.) 73 F. 653, 654, 19 C.C.A. 316, 38 L.R.A. 33.
N.C.—Bundy v. Commercial Credit Co., 163 S.E. 676, 677, 202 N.C. 804

79. Snell v. Snow, 13 Metc. (Mass.) 278, 279, 282, 46 Am.D. 730.

80. Black L.D.

Similar definition

"A mark, sign, or token, an indication, a distinctive mark."—Burrill L.D.

81. Black L.D.

82. Black L.D.

83. Black L.D.

Thus there is the petty-bag-office in the common-law jurisdiction of the court of chancery, because all original writs relating to the business of the crown were formerly kept

BAGASSE. The waste of sugar mills, the residue which remains after the stalks of sugar cane have been passed through the crushers and hydraulic rollers that squeeze out the sugar bearing juices, leaving the cane substantially fibrated and shredded into short lengths.[84]

BAGATELLE. See Gaming § 1.

BAGAVEL. The citizens of Exeter had granted to them by charter from Edward I the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, toward the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called bagavel, bethugavel, and chippinggavel.[85]

BAGGAGE. This term comprises such articles of personal convenience or necessity as are usually carried by passengers for their personal use.[86] The law relating to and governing baggage, see the titles Carriers §§ 855–865 [10 C.J. p 1187 note 83–p 1199 note 5], Innkeepers § 16 [32 C.J. p 549 note 22–p 550 note 36], and Shipping §§ 196, 197 [58 C.J. p 562 note 39–p 568 note 31]. The word has been held synonymous with "luggage" see Carriers § 855 [10 C.J p 1187 note 84 a], and distinguished from "express."[87]

Baggage car. A car used for the purpose of hauling baggage.[88] It has been held that, in a particular connection, this term may include a combined baggage and passenger car, notwithstanding it carries no baggageman for a portion of the train's run and is locked during such period.[89]

Other phrases: "Baggage check" see Carriers § 866 [10 C.J. p 1199 note 6–p 1200 note 14], "combined baggage and passenger car,"[90] "found in the baggage of any person arriving in the United States,"[91] and "in his baggage."[92]

BAHADUM. A chest or coffer.[93]

in a little sack or bag, "in parva baga."—Black L. D.

84. Masonite Corporation v. Celotex Co., (D.C.Del.) 1 F.Supp. 494, 495.

85. Black L. D.

86. Black L. D.

87. Stanfield v Frank Parmelee Co., 223 Ill App 199, 207.

88. Cato v. Atlantic & C. A. L. Ry. Co., 162 S.E. 239, 243, 164 S.C. 123.

89. Pennsylvania R. Co. v. Public Service Commission, 67 Pa Super. 569, 573, cited in Black L. D.

90. Pennsylvania R. Co. v. Public Service Commission, 67 Pa Super. 569, 573.

91. U.S.—Two Hundred and Eighteen and One-Half Carats Loose Emeralds v. U. S., (N.Y.) 154 F 339, 341, 83 C.C.A. 475

Va.—Snarr v. Commonwealth, 109 S.E 590, 592, 131 Va. 814.

92. Hitt v. Commonwealth, 109 S.E 597, 599, 131 Va. 752—Snarr v. Commonwealth, 109 S.E. 590, 592, 131 Va. 814.

93. Black L. D.

WORDS AND PHRASES

AND

MAXIMS

IN THIS VOLUME

	Page
Assistance	1
Assistant	14
Assisum	16
Assisus	16
Assithment	16
Assize	16
Associate	16
Associated Press	16
Associatio	16
Association	16
Associé en nom	105
Assoile	105
Assoilzie	105
Assort	105
Assouth	105
Assume	105
Assumed	106
Assuming	107
Assumpsit	107
Assumptio	136
Assumption	136
Assurance	138
Assurantia	138
Assurare	138
Assure	138
Assured	138
Assurer	139
Assythment	139
Astipulation	139
Astipulator	139
Astitrarius hæres	139
Astitution	139
Astrachan	139
Astrarius	139
Astre	139
Astrer	139
Astrict	139
Astriction to a mill	139
Astrihiltet	139
Astrology	139
Astronomical day	139
Astrum	139
Ast si intestato moritur, cui suus heres nec extabit, agnatus proximus familiam habeto	139
A summo remedio ad inferiorem actionem non habetur regressus, neque auxilium	139
Asunto	139
Asylum	139
At	152
Atamita	166
Atavia	166
Atavunculus	166
Atavus	166
Atentado	166
Atenuación	166
Atha	166
Atheist	166
Athletic	166
Atia	167
Atilium	167
Atlantic	167
Atlas	167
Atmatertera	167
Atomize	167
Atomized	167
Atomizer	167
Atpatruus	167
Atravesados	167
Atrocious	167
Atrocity	167
Atrox injuria æstimatur aut loco, aut tempore, aut persona	167
Ats	167
Attach	167
Attaché	169
Attached	168

	Page
Awning	1313
Ax	1313
Axiom	1313
Axle boxes	1313
Axminster	1313
Ayant cause	1313
Aycl	1313
Ayle	1313
Aylours	1313
Ayre	1313
Aysiamentum	1313
Ayudante	1313
Ayuntamiento	1313
Azar	1314
Azo compounds	1314
Azotes	1314
Azotization	1314
Azure	1314
B	1314
Babbitt	1314
Babord	1314
Baby act	1314
Bacbarend	1314
Bacbarenda	1314
Bacheleria	1314
Bachelor	1314
Back	1315
Backadation	1315
Backberend	1316
Backberind	1314
Backberynde	1314
Backer	1316
Backgammon	1316
Backside	1316
Backward	1316
Backwardation	1316
Backwards	1316
Backwater	1316
Bacteria	1316
Bacterial	1316
Bacteriology	1316
Baculo et annulo	1316
Baculus	1316
Baculus nunciatorius	1316
Bad	1316
Badge	1319
Badger	1319
Bag	1319
Baga	1319
Bagasse	1320
Bagatelle	1320
Bagavel	1320
Baggage	1320
Bahadum	1320

INDEX

ASSISTANCE, WRIT OF

Admissibility of evidence in proceeding for writ, § 13
Agent, demand for possession upon as sufficient, § 7
Alias writ, issuance of, § 15
Amendment, petition, § 12
Answer, requisites of, § 13
Appeal, issuance of writ pending, § 2, n. 22
Application, necessity of, § 12
Assignee of purchaser under decree for sale, right to writ, § 3
Award of writ, collateral action, propriety not passed upon in, § 17
Chambers, issuance of writ by judge in, § 14
Clerk of court, issuance of writ by, § 14
Collateral attack, regularity of commissioner's action in connection with execution of deed and return, § 9
Collateral undertaking, proceeding for writ not appropriate one in which to try, § 13
Collusive claim of possession not preventing issuance of writ, § 4
Colorable claim of possession preventing issuance of writ, § 4
Commissioner's deed, presentation or exhibition of as condition precedent to issuance of writ, § 7
Conclusiveness of writ, § 17
Concurrent nature of remedy, § 2
Conditions precedent to issuance of writ, § 7
Conduct of trial, § 13
Confirmation of sale as condition precedent to issuance of writ, § 7
Defenses, § 9
Definitions, § 1
Delay, defense of, § 9
Demand for possession as condition precedent to issuance of writ, § 7
Discretion, laches, § 9
Discretionary character of writ, § 2
Effectual delivery of writ, necessity of, § 16
Ejectment, writ not substitute for, § 2, n. 17
Entrants pending suit, issuance of writ against, § 4
Equitable nature of writ, § 1
Estoppel, delay in proceeding to enforce decree, § 9
Evidence, admissibility and sufficiency, § 13
Execution of writ, § 16
Final adjudication, necessity of before issuance of writ, §§ 2, 7
Forcible entry and detainer, writ not substitute for, § 2, n. 17
Foreclosure, issuance of writ where land has been sold under decree of, § 2
Formal irregularities not invalidating petition, § 12
Fraud, denial of writ because of, § 2
Frivolous claim of possession not preventing issuance of writ, § 4
Grantee of purchaser under decree for sale, right to writ, § 3
Hearing on application, § 13
Impeachment, commissioner's return on deed, § 9
Independent right or title preventing issuance of writ, § 4
Injunction against execution of writ, § 16
Interlocutory proceeding, application for writ as, § 6
Intruders,
  Execution of writ against, § 16
  Issuance of writ against, § 4
Irregularities, waiver of, § 14
Issuance of writ, § 14
Judicial investigation prior to issuance of writ, § 14
Jury trial, right to, § 13
Laches, right to writ lost by, § 9
Jurisdiction,
  Inquiry as to in original cause, § 9
  Issuance of writ, § 10
  Limited jurisdiction preventing issuance of writ, § 10
Lis pendens, filing of warranting dispossession of one entering pending suit, § 4
Minutes of court, recordation of as condition precedent to issuance, § 7
Mortgage foreclosure,
  Reversal of grant of writ because of prior foreclosure, § 9
  Use of writ, § 2
Motion, application by way of, § 12
Nature of writ, § 1
Objections, manner of making, § 13
Operation of writ, § 17
Oral statements of objections, sufficiency of, § 13
Oral testimony, consideration of on application for writ, § 13
Order granting writ, requisites of, § 14
Origin, § 1
Paramount title, defense of, § 9
Parties,
  Conclusiveness of writ, § 17
  Issuance of writ against, § 4
  Right to claim issuance of writ, § 3
Pendency of other proceedings, effect of, § 2
Personal property, availability of writ to compel delivery of, § 5
Persons,
  Against whom writ may issue, § 4
  Entitled to notice, § 11
  Entitled to writ, § 3
Petition, requisites of, § 12

Possession,
Equitable equivalent to writ of, § 1
Refusal of as condition precedent to issuance of writ, § 7
Pre-existing rights, effect of execution of writ upon, § 17
Premature demand for possession, effect of, § 7
Prior adjudication warranting issuance of writ, § 2
Prior foreclosure, estoppel to inject issue of, § 9
Privies, issuance of writ against, § 4
Proceedings, §§ 6–15, pp 6–12
Property subject to writ, § 5
Purchaser under decree for sale, right to writ, § 3
Realty, availability of writ to compel delivery of, § 5
Receiver, petition for writ of assistance by, § 12
Redemption period, intervention of before issuance of writ, § 8
Representatives, issuance of writ against, § 4
Restoration to possession on vacation of writ, § 18
Restraining execution of writ, § 16
Scope of hearing on application, § 13
Seals, effect of omission of, § 14
Separate application for writ, necessity of, § 12
Setting aside writ, § 18
Sheriff's deed, admissibility in evidence in proceeding for writ, § 13
Special finding of fact, right to, § 13
Specific performance, issuance of writ for, § 5
Sufficiency of evidence in proceeding for writ, § 13
Summary proceeding, application for writ as, § 6
Tenants in common, execution of writ against, § 16, n. 57
Time of issuance of writ, § 8
Title,
Adjudication of on application for writ, § 13
Jurisdiction to try title under petition for writ, § 10
Trespasser, issuance of writ against, § 4
Unfair dealing, denial of writ because of, § 2
Unsupported claim of possession not preventing issuance of writ, § 4
Vacation, issuance of writ in, § 14
Vacation of writ, § 18
Waiver,
Amendable irregularities in form of writ, § 14
Delay in proceeding to enforce decree as, § 9
Requirement as to exhibition of copy of decree, § 7
Writ of possession distinguished, § 10

Abandonment of purpose effecting dissolution, § 9, p. 28
Acceptance of,
Bond of trustees as sufficient approval, § 19, p. 47
Resignation or withdrawal of member, necessity, § 24
Access to articles of association or constitution, necessity of, § 11
Accounting, association not indispensable complainant in suit by members for, § 37, n 32
Accusation against member prior to expulsion, necessity of, § 25, p. 62
Acquiescence in,
Corporate merger, proof of, § 8, n. 92
Departure from by-laws, proof of, § 11
Mortgage executed by trustee establishing individual liability of members of nonbusiness association, § 32, p 78, n. 86
Removal officer, effect of, § 19, p. 48
Actions,
Associations,
Actions against, § 36, pp 83–101
Actions by, § 35, pp. 82–88
Between association and members, § 37
Foreign associations, actions by and against, § 39
Statutory provisions authorizing actions against, validity of, § 2
Adjourned meetings, notice not required, § 18, p. 45
Adjournment,
Meeting, § 18, p. 44
Proceeding for expulsion of member, § 25, p. 63
Admissibility of evidence, actions against associations, § 36, p 98
Admission to membership, § 23
Advance dues, insolvency of association not affecting member's liability for, § 31
Advisory board, power in respect to election of officers, § 19, p 46, n. 22
Affidavit denying existence, application of statute providing for, § 36, p. 98
Affiliation as agreement to be bound by constitution and by-laws, § 11, n. 78
Affirmative vote at meetings, presumptions in respect to, § 18, p. 44
Agency, liability of members of noncommercial associations governed by law of, § 32, p. 77
Agent,
Appointment and election, § 19, p. 45
Foreign association, service of process on, § 39
Liability on contract entered into in behalf of association, § 20, p. 54
Right of association to bring suit by, § 35, p. 83
Service of process on in action against association in associate name, § 36, p. 95
Service of summons on in action against association, sufficiency, § 36, p 93
Agreement of association, rights and powers governed by, § 12
Aliquot share, contribution between members limited to, § 33, n. 1
Alteration of by-laws of association, § 11
Amalgamation, effect of, § 7
Amendment,
Articles of association or constitution, § 11
Pleadings,
Action against association, § 36, p. 97
Actions by association, § 35, p. 88
American Legion, effect of incorporation of, § 7, n. 76
Amusement, associations organized for purpose of not partnership, § 1, p. 22
Answer, actions by association, § 35, p. 88
Apparent scope of officer's authority, binding effect of contracts within, § 20, p. 51, n. 79
Application of property or funds, § 14, p. 40
Appointment of officers, § 19, p. 45

Apportionment of liability of members on dissolution, § 10
Approval,
Acts establishing liability of members, § 32, p. 74
Bond of trustees, § 19, p. 47
Burden of proof in respect to in actions against associations, § 36, p. 98, n. 84
Unauthorized acts of officers or agents as ratification, § 20, p. 53
Arbitrary,
Assessment against member by way of fine not recoverable, § 31
Rejection of applicant for membership, § 23
Arbitration, agreements in respect to connected with membership, § 22
Articles of association,
Action against association authorized by, § 36, p. 89
Adoption of, § 11
Compliance with in respect to notice of meeting, § 18, p 43
Contract embodied in, § 3
Power of expulsion of members conferred by, § 25, p. 59
Artificial person,
Action against association as, § 36, p. 89
Trustee for association or members, § 14, p 39
Assault, action for not maintainable against president and treasurer of association, § 36, p. 90, n. 2
Assessments, member's liability for, § 31
Assignment of property, requirements as to, § 14, p 40
Assistant secretary, service of garnishment writ on ineffective under statute permitting service on secretary, § 36, p. 94, n. 42
Associate name,
Action by association in under statute, § 35, p. 84
Service of process in action against association in, § 36, p. 94
Authority,
Burden of proof in respect to in action against associations, § 36, p. 98, n. 84
Officer, jury questions in action against association, § 36, p. 99
Authorized contracts, liability of officers on, § 20, p. 53
Auxiliary associations, individual liability of members for debts contracted by, § 32, p. 78, n. 85
Averments required in action by association, § 35, p. 87
Bad faith,
Proceedings of association subject to judicial review in case of, § 34, p. 80
Reinstatement of member suspended or expelled in, § 26
Baseball league president, power to discipline clubs or players, § 20, p. 49, n. 59
Benefits, acceptance of as ratification of unauthorized acts of officers or agents, § 20, p. 52
Benevolent purposes,
Association organized for not partnership, § 1, p. 22
Liability of association formed for on contract made by officers or committees, § 20, p. 51
Binding effect of,
Acts of officers and committees of association, § 20, p. 50
Amendments and additions to constitution and by-laws, § 11, n. 85
Board of directors,
Exercise of power of election of officers, § 19, p. 45
Power of expulsion of members vested in, § 25, p. 59
Bond,
Member's liability for breach of obligation of, § 29
Officers, § 19, p. 46
Books, officers entitled to custody of, § 20, p 49
Branch associations, liability for acts of, § 20, p 50
Breach of obligation of bond by member, liability, § 29
Breach of trust,
Individual liability of officers to associates for, § 20, p. 53
Member's liability to association for, § 30
Burden of proof,
Actions against associations, § 36, p. 98
Incorporation of association, § 8
Notice of proceeding for expulsion of member, § 25, p. 62
Withdrawal of members, § 27
Business,
Associations, restrictions of statute respecting suits in associate name, § 35, p. 85
Corporations, limitation to of statute permitting suit against association in own name, § 36, p 91
Losses, recovery of as damages for wrongful suspension or expulsion of member, § 25, p. 67, n. 56
Transacted at meetings, restrictions in respect to, § 18, p. 43
By-laws,
Compliance with in respect to notice of meeting, § 18, p 43
Election of officers in violation of, § 19, p. 45
Function of, § 11
Powers, duties and liabilities of officers governed by, § 20, p. 49
Validity of provision providing for expulsion of member for misconduct, § 25, p. 60
Calling of meeting by competent authority necessary, § 18, p. 43
Capacity, admissibility of evidence in respect to in actions against associations, § 36, p. 98
Censure, equity without jurisdiction to expunge vote of, § 34, p. 80, n. 3
Certificate of election, deposit in recorder's office as prerequisite to exercise of duties by trustees, § 19, p. 46
Cessation of object effecting dissolution, § 9, p. 28
Chairman, service of process on in action against association, § 36, p. 95
Chamber of commerce not business association within statute authorizing action against in own name, § 36, p. 91, n. 14
Change,
Governing rules, right to make, § 12
Personnel, reorganization with, § 6
Charge, preference against member prior to expulsion, § 25, p. 62

Choice of method of suing corporation as against president or treasurer or entire membership, § 36, p. 91, n. 6
Civic league, personal liability of officers contracting for entertainment, § 20, p. 54, n. 11
Civil rights, invasion of warranting interference by court with suspension or expulsion of member, § 25, p. 65
Clerk, service of process on in action against association in associate name, § 36, p. 95
Collateral attack,
Association suspending or expelling member, decision of, § 26
Governing body or established private tribunal of association, decision of, § 34, p. 80
Collective members,
Action against, § 36, p. 89
Actions by association in name of, § 35, p. 84
Commander of camp of Confederate Veterans, validity of deed to, § 14, p. 39, n. 30
Commencement of,
Member's liability for dues and assessments, § 31
Membership in association, § 23
Term of officers, § 19, p. 47
Commercial,
Associations, individual liability of members for debts contracted by, § 32, p. 76
Enterprises, authority of officers to bind association engaged in by contracts, § 20, p. 51
Purposes, association organized for, § 1, p. 23
Commissioners appointed to wind up affairs of dissolved association, authority of, § 10
Committees,
Appointment and election, § 19, p. 45
Compensation, § 21
Common interest,
Duty of officers to act for, § 20, p. 53
Members of association bound to act for promotion of, § 30
Common law,
Nature of association at, § 1, p. 22, n. 28
Right of action,
Against all members of association, statute not abrogating, § 36, p. 91
Association not abrogated by statutory provision authorizing suit against association in own name, § 36, p. 92
Trust distinguished, § 1, p 23
Trustee, validity of conveyance by, § 20, p. 50, n. 72
Common name, action against association in, § 36, p. 91
Common parliamentary rules, association governed by, § 12
Common property, demand for proportionate share of by expelled member, § 27
Companies, term used as synonymous with, § 1, p. 19
Compensation of officers and agents, § 21
Complaint,
Actions against association, § 36, p. 96
Actions by association, § 35, p. 87
Compromise of suit against association, § 15, n. 55
Conclusiveness of,
Decision,
Association tribunal suspending or expelling member, § 25, p. 64
Conclusiveness of—Continued,
Decision—Continued,
Governing body or established private tribunal of association, § 34, p. 80
Judgment obtained against association, § 36, p. 101
Conditions,
Imposition of on reinstatement of suspended members, § 26
Precedent to action against individual members, § 36, p. 96
Conduct,
Meetings, parliamentary rules governing, § 18, p. 44
Warranting expulsion of member, § 25, p. 60
Confederacy, associations signifying, § 1, p. 19
Confusing instructions, action against association, § 36, p. 99, n 98
Consent,
Departure from by-laws, proof of, § 11
Incorporation, necessity to effect dissolution, § 9, p. 29
Members, dissolution by, § 9, p. 28
Consolidation of associations, effect of, § 7
Constitution,
Compliance with in respect to notice of meeting § 18, p 43
Contract of association embodied in, § 3
Function of, § 11
Power of expulsion of members conferred by, § 25, p. 59
Powers, duties and liabilities of officers controlled by, § 20, p. 49
Venue of actions against association, applicability of provisions, § 36, p. 93
Construction of,
Articles or constitution and by-laws, § 11
Statutes authorizing,
Action against association in own name, § 36, p. 91
Suits by associations in common or distinguishing name, § 35, p. 85
Contest, election of officers, § 19, p. 46
Contracts,
Action against president or treasurer to recover on, § 36, p. 90
Authority of officers to enter into on behalf of association, § 20, p. 50
Capacity to make, § 15
Constitution and by-laws as, § 11
Members, rules and regulations governing contracts between, § 22
Personal liability of members on, § 32, p. 75
Contribution between members, § 33
Conversion into corporation, § 8
Conversion of property,
Entrusted to officer, liability for, § 16
Officers' liability to associates for, § 20, p. 53
Conveyance of property vested in trustees for use of association or members, § 14, p. 40
Conviction, necessity of for expulsion of member for infamous offense, § 25, p. 60
Corporation distinguished, § 1, p. 21
Court work, practice of law including, § 12
Creditors, rights of on dissolution, § 10
Criminal responsibility of associations, § 17

Custody of funds, books and records, officers' right to, § 20, p. 49
Damages, wrongful suspension or expulsion of member, § 25, p. 66
De facto trustee, validity of mortgage executed by, § 20, p. 50, n. 72
Death of member not causing dissolution, § 9, p. 28
Debts,
Individual liability of members for, § 32, p. 75
Liability of retiring member for, § 29
Declaration, action by association, § 35, p. 87, § 36, p. 96
Default in appearance, expulsion of member without proving charges, § 25, p. 63
Definitions, § 1, p. 19
Delegation of,
Discretionary powers of executive committee, § 20, p. 52
Power of expulsion of members, § 25, p. 59
Designated officer, service of process on in action against association in associate name, § 36, p 94
Differences among members as ground for dissolution, § 9, p. 30
Disbandment, amalgamation or consolidation resulting in, § 7
Discipline, courts not interfering with affairs to determine questions of, § 34, p 79
Discretion in respect to organization, § 3
Disposition,
Assets on dissolution, § 10
Membership privileges, § 22
Property, right of, § 14, p. 40
Disputes between members, courts not interfering so as to settle, § 34, p 79
Dissension among members as ground for dissolution, § 9, p. 30
Dissolution, § 9, pp. 27–31
Abandonment or nonuser, § 9, p. 28
Amalgamation or consolidation resulting in, § 7
Association pendente lite, effect of, § 35, p. 88
Cessation of object or purpose, § 9, p. 28
Death of members, § 9, p. 28
Incorporation, § 9, p. 29
Judicial process, § 9, p 30
Legislative action, § 9, p. 30
Merger of association and corporation, § 9, p 29
Operation and effect, § 10, pp. 31–33
Receivers, § 9, p 31
Statutory transfer of property, § 9, p. 29
Surrender or revocation of charter of subordinate or branch body, § 9, p. 29
Venue, § 9, p. 31
Withdrawal of members, § 9, p. 28
Distinctions, § 1, pp. 21–24
Distinctive name, right to adopt, § 13
Doctrine of representation,
Actions against associations, § 36, pp. 89, 93
Actions between association and members, § 37
Doubtful grounds, ousting of member on, § 25, p. 59, n. 73
Dues,
Failure to pay as terminating membership, § 24
Member's liability for, § 31
Tender of before reinstatement after expulsion for nonpayment, § 26
Duration of member's liability for dues and assessments, § 31
Duties,
Members to association, § 29
Officers, § 20, pp. 48–55
Effect of dissolution, § 10
Election of officers, § 19, p. 45
Action by members to restrain, § 37
Failure not effecting dissolution, § 9, p. 28
Emblem, adoption of, § 13
Enabling act,
Absence of,
Action by association, § 35, p 82
Parties to action against association, § 36, p 89
Actions by associations under, § 35, p. 84
Parties to action against association under, § 36, p. 90
Enforcement of judgment against association, § 36, p. 100
Entity, action against association as by virtue of statute, § 36, p 91
Equitable lien, action maintainable against association for purpose of subjecting property to, § 36, p 90
Equity,
Interference to compel reinstatement of expelled or suspended member, § 26
Resort to in case of unwarranted expulsion of member, § 25, p. 64, n. 34
Suit between association and members in, § 37
Estoppel,
Assertion of liability against individual members of association, § 32, p. 76
Denial of,
Contractual capacity, § 15
Existence, § 5
Incorporation of association, validity of, § 8
Legal entity for purpose of action against, § 36, p 89
Membership, § 22
Judgment recovered against association, § 36, p 101
Questioning validity of election of officers, § 19, p 45, n. 17
Evidence,
Actions,
Against association, § 36, p. 98
Between association and members, § 37
By association, § 35, p. 88
Proceeding for expulsion of member, § 25, p. 63
Exclusion of members, § 25, pp 58–67
Execution,
Joint property of association, enforcement of judgment by, § 36, p. 100
Powers of officers, § 20, p. 51
Executive board, amendment of by-laws by, § 11, n. 85
Executive committee, power to bind association, § 20, p. 52
Exercising rights of membership, failure as terminating membership, § 24
Exhaustion of remedies within association,
Before judicial interference, § 34, p. 81
Before resort to courts for reinstatement of suspended member, § 26
Expelled member before resort to courts, § 25, p. 65, n. 38

Existence of association, jury question in respect to, § 36, p. 99
Express trust distinguished, § 1, p 24
Expulsion of members, § 25, pp 58–67
Accusation or charge, § 25, p. 62
Adjournment of proceedings, § 25, p. 63
Constitution and by-law, § 25, p 58
Damages for wrongful expulsion, § 25, p. 66
Default in appearance, § 25, p. 63
Evidence, § 25, p. 63
Grounds, § 25, pp 59–61
Implied grounds, § 25, p. 59
Judicial interference, § 25, pp 55–64
Notice, § 25, p 61
Power of association, § 25, p. 59
Prior acquittal, § 25, p 61
Procedure, § 25, pp 61–64
Trial or hearing, § 25, p. 62
Waiver of irregularities, § 25, p 63
Wrongful expulsion, § 25, p. 66
Extent of power of officers, § 20, p. 51
Farmers' cooperative union, membership in not imposing liability for goods sold to union store, § 32, p 75, n 54
Financial secretary, jury question as to authority in action against association, § 36, p 99, n. 94
Findings, necessity of in proceeding for expulsion of member, § 25, p 63, n 12
Fines, member's liability for, § 31
Foreign associations, § 38
Actions by and against, § 39
Forfeiture of membership for default in paying dues, effect as respects liability for subsequently accruing dues and assessments, § 31
Former officer, service of process on in action against association, § 36, p. 95
Fraternal benefit society, inclusion in word association, § 1, p. 19, n. 7
Fraud,
Individual liability of officers to associates for, § 20, p 53
Member's liability to association for, § 30
Proceedings of association subject to judicial review in case of, § 34, p. 80
Profits of member belonging to association, § 30, n 29
Funds,
Majority control over, § 28
Officers entitled to custody of, § 20, p. 49
Futility of appeal within organization by expelled member as respects right to resort to courts, § 25, p. 65
Governing committee, power of expulsion of members vested in, § 25, p. 59
Governing rules, changes in, § 12
Grounds for,
Dissolution, § 9, p. 30
Expulsion of member, § 25, p. 59
Hawaiian land hui, interest of members in property, § 27
Hearing,
Opportunity for before expulsion of member, § 25, p. 62
Removal of officers for cause, § 19, p. 48
Heirs of deceased members, right to share in distribution of assets on dissolution, § 10
Holding over, officers, § 19, p. 47
Illegal expenditures, duty of officers to refuse order for, § 20, p. 53, n 4
Illegal purposes, association formed to carry out, § 4
Implied power,
Expulsion of member for misconduct, § 25, p 59
Officer, binding association by contracts, § 20, p 51
Removal of officers, § 19, p. 48
Incorporation of associations, § 8
Dissolution effected by, § 9, p 29
Members' liability for debts subsequently contracted, § 32, p. 76
Subscriber's liability for dues, § 31
Individual liability of members on contracts of association, § 32, p 75
Individual members, power to bind association, § 28
Indorsement of negotiable paper, power of officer, § 20, p. 50, n. 68
Infamous offense, expulsion or suspension of member for, § 25, p. 59
Inherent power, suspension or expulsion of member for cause, § 25, p. 59
Injunction,
Acts of unincorporated association in suit against officers alone, § 34, p. 80
Protecting association in use of name, § 13
Unwarranted suspension of member, § 25, p. 65, n 34
Insanity not relieving member from compliance with rules as respects liability to expulsion, § 25, p. 61
Insolvency, effect of as respects member's liability for dues payable in advance, § 31
Instructions, action against association, § 36, p. 99
Insurance, validity of contracts relating to, § 20, p 50, n. 74
Insurer, liability of association as, § 15, n. 55
Internal government, courts not interfering with, § 34, p. 79
Interpretation of associate laws, review by courts, § 34, p 81, n 9
Intervention, petition in name of association, § 35, p 84, n. 38
Intoxication, repeated acts of as ground for expulsion of member, § 25, p. 60, n. 78
Irregularities in conduct of election of officers, effect of, § 19, p. 45
Issues, proof and variance, actions against associations, § 36, p 97
Joinder of members with president or treasurer in action against association, effect of, § 36, p. 90
Joint action of officers authorized to negotiate sale of property, necessity, § 20, p. 52
Joint and several liability,
Bonds, trustees, § 19, p. 47
Members on contracts, commercial associations, § 32, p. 77
Wrongful suspension or expulsion of member, § 25, p 67, n. 53
Joint judgment in action against association, § 36, p. 100
Joint property, enforcement of judgment against association against, § 36, p. 99
Joint rights of members to use and enjoyment of property and funds of association, § 27
Joint stock companies distinguished, § 1, p. 22
Judgment in action against association, § 36, p. 99

Judicial interference,
Compel reinstatement of suspended member, § 26
Election of officers, § 19, p 46
Internal affairs of association, § 34, p. 79
Prevent suspension or expulsion, § 25, p. 64
Judicial process, dissolution of association by, § 9, p. 30
Jurisdiction,
Action between association and members, § 37
Actions against association, § 36, p. 93
Jury questions,
Actions against associations, § 36, p. 99
Committee's power to bind association, § 20, p 50
Liability of officer on authorized contract, § 20, p 54
Membership in association, § 23
Kissing female employee as misconduct constituting ground for expulsion of member, § 25, p 60, n. 78
Ku Klux Klan, power of state to eradicate, § 9, p 30, n. 32
Law, validity of statute prohibiting practice of, § 12
Law courts, restoration to membership of suspended member by, § 26
Laws of association, expulsion of member for violation of, § 25, p. 60
Lease, authority to enter into, § 15
Legal entity, association regarded as, § 1, p. 20
Legal right as prerequisite to action by association, § 35, p. 83
Legality of object, necessity of, § 4
Legislative action effecting dissolution, § 9, p. 30
Liabilities of officers, § 20, pp 48–55
Liability of members,
Apportionment on dissolution, § 10
To association, § 29
Libel,
Individual liability of members for, § 32, p 79, n 98
Liability for, § 16
Liberal construction of statutes relating to, § 2, n. 53
Limitation,
Liability of individual members, constitutional provisions, § 32, p. 75
Powers of officers, § 20, p. 51
List of members, validity of statute requiring, § 2
Literary purposes,
Association organized for not partnership, § 1, p 22
Liability of association formed for on contracts made by officers or committees, § 20, p. 51
Loss of members,
Expulsion, ante
Suspension, post
Withdrawal, post
Loss of property, effect of as respects dissolution, § 9, p. 28
Losses recoverable as damages for wrongful suspension or expulsion of member, § 25, p. 67
Majority,
Dissolution not effected by, § 9, p. 28
Power to bind association, § 28
Unauthorized to transfer members and property, § 7
Malice, lack of preventing recovery of damages for wrongful suspension or expulsion, § 25, p. 66
Manager, service of process on in action against association in associate name, § 36, p. 94
Managing agent, service of process on in action against association, § 36, p. 95
Mandamus,
Enforcement of legal right to membership, § 23
Restoration to membership of illegally expelled member by, § 26, n. 67
Measure of damages for wrongful suspension or expulsion of member, § 26, p. 67
Meetings, § 18, pp 43–45
Failure to hold not effecting dissolution, § 9, p. 28
Members and membership, §§ 22–33, pp 55–79
Actions by association in name of in absence of enabling act, § 35, p. 82
Admission, § 23
Allegations in respect to in action against association, § 36, p. 96
Assessments, § 31
Breach of trust, § 30
Contracts between, § 22
Contribution between members, § 33
Dues, § 31
Duties and liabilities to,
Association, § 20
Persons not members, § 32, pp. 74–79
Estoppel to deny, § 22
Expulsion, ante
Fines, § 31
Fraud, § 30
Interest in association property, § 27, pp. 69–71
Jury question in action against association, § 36, p 99
Judicial interference in disputes, § 34, pp. 79–82
Penalties, § 31
Power to bind association, § 28
Reinstatement, § 26, pp. 67–69
Suspension, post
Transfer, § 22
Withdrawal, § 24
Names inserted in final decree in action against association, § 36, p 100
Merger into corporation, § 8
Requisites of, § 9, p. 29
Method of terminating membership, § 25, p. 58
Misapplication of funds, association not indispensable complainant in suit by members to enjoin, § 37, n. 32
Misuse of property, association not indispensable complainant in suit by members to enjoin, § 37, n. 32
Mode of amendment or repeal of articles or constitution, § 11
Moral purposes,
Association organized for not partnership, § 1, p 22
Liability of association formed for on contracts made by officers or committees, § 20, p. 51
Mutual consent, dissolution by, § 9, p. 28
Mutual covenants, right of action on, § 37
Name,
Action against association by, § 36, p. 91
Right to adopt, § 13
Nature of association, § 1, p. 20
Negotiable paper, power of officer to indorse or collect, § 20, p. 50, n. 68

New name, effect of adoption of, § 6
New York Stock Exchange as voluntary association, § 1, p. 22, n. 26
Noncommercial associations,
Individual liability of members for debts contracted by, § 32, p. 76
Right of action against by members, § 37
Non-insurance association, service of process on officer insufficient to bring association into court, § 36, p. 95
Nonprofit associations, individual liability of members for debts contracted by, § 32, p. 76
Nonresident association, service of summons on, § 36, p. 95
Notice,
Intention to incorporate, necessity of, § 8
Meetings, requisites of, § 18, p. 43
Proceeding for expulsion of member, § 25, p 61
Numerical proportion of indebtedness, members' liability limited to as between themselves, § 33
Office practice of law, validity of statute forbidding, § 12
Officers,
Action,
Against as parties defendant, § 36, p 90
Association in name of designated officers under enabling act, § 35, p. 84
In own name to enforce legal title to obligation vested in, § 35, p 83
Appointment and election, § 19, p. 45
Compensation, § 21
Powers, duties and liabilities, § 20, pp. 48–55
Service of process on in action against association, § 36, p. 95, and § 36, p. 94, n. 36
Oil lease, sale of individual interest by member of association owning, § 27
Operation of dissolution, § 10
Oppression, proceedings of association subject to judicial review in case of, § 34, p 80
Optional right of creditor to sue either association as such or individuals composing it, § 36, p. 92
Organization, manner of § 3
Parliamentary rules, conduct of meetings governed by, § 18, p 44
Participation in management, failure to as termination of membership, § 24
Parties,
Action between association and members, § 37
Actions against associations, § 36, p. 88
Partnership distinguished, § 1, p. 22
Pecuniary rights, invasion of warranting interference by courts with suspension or expulsion of member, § 25, p. 65
Penalties, member's liability for, § 31
Personal liability of members,
Contract in name of association, § 32, p. 75
Contracts made by officers of association, § 15
Jury question in action against association, § 36, p. 99
Personal profit of member from contract wherein association claimed interest, § 30
Personal property, taking and holding, § 14, p. 38
Petition, actions by association, § 35, p. 87
Plate glass breakage, nature of association of merchants to share losses from, § 1, p. 23, n. 48
Pleading,
Actions,
Against associations, § 36, p. 96
Between association and members, § 37
By associations, § 35, p. 87
Policy, courts not interfering to determine questions of, § 34, p. 79
Political associations, individual liability of members on contracts, § 32, p. 78, n. 84, 85
Political purposes,
Association organized for not partnership, § 1, p. 22
Liability of association formed for on contracts made by officers or committees, § 20, p. 51
Powers, §§ 12–15, pp. 35–42
Contracts, § 15
Taking, holding and transfer of property, § 14, pp 38–41
Powers of members to bind association, § 28
Powers of officers, § 20, pp. 48–55
Practical construction of constitution or by-laws, § 11, n. 95
Practice of law, validity of statute forbidding, § 12
Preamble of constitution, effect of, § 11, n. 95
President,
Action against association in name of, § 36, p. 90
Service of process on in action against association, § 36, p. 95
Presiding officer, service of process on in action against association, § 36. p. 95
Presumptions,
Actions against associations, § 36, p. 98
Actions between association and members, § 37
Officer's authority to make contract in behalf of association, § 20, p. 51
Presence of quorum at meeting, § 18, p. 44
Regularity of procedure in election of officers, § 19, p 45
Regularity of proceedings, § 12
Prior acquittal as respects expulsion of member from association, § 25, p. 61
Prior debts, member's individual liability for, § 32, p 76
Pro rata distribution of assets on dissolution, § 10
Procedure, expulsion of member, § 25, p. 61
Process, service of,
Action against association, § 36, p. 93
On foreign association, § 39
Profit associations, liability of members for debts contracted by, § 32, p. 76
Promissory note, liability of members not personally signing, § 32, p. 77
Property, taking or holding, § 14, p. 38
Property rights,
Consolidation with other organization, § 7
Conveyance or assignment, § 14, p 40
Incorporation of existing association, § 8
Invasion of warranting interference by courts with suspension or expulsion of member, § 25, p. 65
Members, § 27
Reorganization, § 6
Proportionate individual liability of members for debts, § 32, p. 75
Public act of association establishing liability of members, § 32, p. 74
Public policy, dissolution of association as contrary to, § 9, p. 30

Quasi-contracts, liability of association on, § 20, p 51
Quasi corporation, foreign association regarded as for service of process, § 39
Quasi-judicial nature of proceeding for suspension or expulsion of member, § 25, p. 64
Quasi-partnership distinguished, § 1, p. 22
Quorum, members constituting, § 18, p. 43
Race segregation, limiting membership accordingly, § 23, n. 39
Ratification of,
  Association's contract creating individual liability of members to third person, § 32, p. 75
  Incorporation, burden of proving, § 8
  Order of expulsion made by committee, § 25, p. 59
  Unauthorized acts of officers or agents, § 20, p. 52
Receiver, appointment on dissolution of association, § 9, p. 31
Records, officers entitled to custody of, § 20, p. 49
Recreation, associations organized for purpose of not partnerships, § 1, p. 22
Recreative purposes, liability of association formed for on contracts made by officers or committees, § 20, p 51
Reformation of deed, jurisdiction of chancery court in dispute between members of camp of United Confederate Veterans, § 34, p. 81, n 8
Reimbursement of officers and agents, § 21
Reinstatement of suspended members, § 26
Remedial nature of statutory provisions, § 2, n. 52
Removal of officers, § 19, p. 48
Reorganization, effect of, § 6
Repeal, by-laws, § 11
Replevin, right to office of association not determinable in action of, § 19, p 46, n. 24
Representation, doctrine of,
  Action against association, § 36, pp. 89, 93
  Action between association and members, § 37
Representative capacity, action by members of association in, § 35, p. 86
Resident corporate treasurer, service of process on in action against foreign association, § 39
Resignation,
  Executive committee, member of, effectiveness without acceptance, § 19, p. 48
  Members, right of, § 24
Resolutions in conflict with articles of association or constitution, validity of, § 11
Restoration to membership of suspended member, § 26
Restraining incorporation, § 8
Restrictions on right of admission to membership, power to place, § 23
Retiring member, liability for debts, § 29
Return of execution,
  Condition precedent to action against individual member, § 36, p. 96
  Unsatisfied, remedy against members after, § 36, p. 100
Reversion of property on dissolution, § 10
Review of decision of association suspending or expelling member, extent of, § 26
Revocation of charter,
  Subordinate body, effect of, § 9, p 29
  Subordinate lodge, power to require surrender of funds or property to Supreme body, § 27
Rights and liabilities, §§ 12–17, pp. 35–43
Salary of officers, § 21
Scientific purposes,
  Association organized for not partnership, § 1, p. 22
  Liability of association formed for on contracts made by officers or committees, § 20, p. 51
Scope of association objects, member's liability for debts beyond, § 32, p. 76
Scrip certificate, issuance of not prerequisite to membership, § 23, n. 45
Seal, adoption of, § 13
Season's output, contract between members of association for sale of, § 22, n. 35
Secret profits,
  Member's liability to account to association for, § 30
  Officers not allowed to reap, § 20, p. 53
Service of notice of proceeding for expulsion of member, § 25, p. 62
Service of process,
  Action against association, § 36, p. 93
  Foreign association, § 39
Setting aside election of officers, power of, § 19, p. 46
Several liability, members of noncommercial associations, § 32, p. 78
Shares of stock, issuance of, § 12
Similar organizations, forfeiture of membership by joining, § 24
Social obligations, courts of equity not undertaking to regulate, § 34, p. 80, n. 3
Social purposes,
  Association organized for not partnership, § 1, p 22
  Liability of association formed for on contracts made by officers or committees, § 20, p. 51
Socialistic communities, validity of contracts by which member renounces right to private ownership in property, § 27
Society, term used as synonymous with, § 1, p. 19
Special meetings, notice of, § 18, p. 43
Status at time of suit determining right to maintain action, § 35, p. 88
Statutory provisions,
  Actions between association and members, § 37
  Authorization for suit by association, § 35, p. 83
  Service of process in action against association, effect of, § 36, p. 94
  Transfer of property, § 9, p. 29
  Validity of, § 2
Stock certificate, issuance of not prerequisite to membership, § 23, n 45
Stock Exchange seat subject of lien, § 27, n. 92
Subordinate branch, effect of suspension or dissolution, § 9, p 29
Subordinate lodge,
  Recourse to civil courts for restoration of charter, § 34, p. 80, n. 3
  Surrender of property to Supreme body on voluntary dissolution, § 27
Subordinate society, effect of change in constitution of parent society, § 6
Subsidiary associations, liability for acts of, § 20, p. 50
Substitution of parties, amendment of pleading in action against association, § 36, p 97
Succession of officers, vacancies as result of, § 19, p. 48

Sufficiency of evidence, action against association, § 36, p. 98
Summary proceedings for suspension of member, § 25, p. 61
Sureties on officers' bonds, liability, § 19, p. 47
Surrender of charter of subordinate body, effect of, § 9, p. 29
Suspension of members, § 25, pp. 58–67
  Liability for dues and assessments, § 31
  Rights and privileges of membership, § 27
Technical accuracy unnecessary in trial of proceedings for expulsion of member, § 25, p. 63
Technical grounds, ousting of member on, § 25, p. 59, n. 73
Term of officers, § 19, p. 47
Termination of,
  Connection with association by transfer of interest, § 24
  Member's liability for dues and assessments, § 31
  Membership,
    Respects member's liability of debts subsequently contracted, § 32, p. 76
    Effect as respects right to property of association, § 27
Third parties, action by association on contract with in own name, § 35, p 85, n. 42
Time of notice of proceeding for expulsion of member, § 25, p. 62
Torts,
  Action against president or treasurer to recover for, § 36, p. 90
  Individual liability of members for, § 32, p. 79
  Liability for, § 16
  Officers' liability for, § 20, p. 55
Town electors, validity of regulation restricting membership to, § 23, n. 39
Transfer,
  Individual interest of member in property and funds, § 27
  Membership, § 22
Treasurer,
  Action against association in name of, § 36, p. 90
  Service of process on in action against association, § 36, p 95
Trial, proceeding for expulsion of member, § 25, p. 62
Tribunal for hearing on expulsion of member, § 25, p. 63
Trust distinguished, § 1, p. 23
Trust property, enforcement of judgment against association against, § 36, p. 100
Trustee process, proceeding against members by to enforce judgment against association, § 36, p. 101
Trustees,
  Action against pursuant to articles of association, § 36, p. 89
  Action by association in name of, § 35, p. 86
  Bonds, § 19, p. 47
  Conveyance to for association or member, § 14, p. 39
  Service of process on in action against association in associate name, § 36, p. 94
  Suit to protect property rights of association in name of, § 35, p. 83
Ultra vires proceedings, judicial review of, § 34, p. 81
Unanimous vote, termination of membership by, § 25, p. 59
Unauthorized contracts,
  Liability of members on, § 15
  Personal liability of officers on, § 20. p 54
Uniform agreements, restricting membership to those willing to sign, § 23, n. 39
Unincorporated associations, definition of, § 1, p. 19, n. 5
Union card, right of secretary of association to sue in own name to recover from one forfeiting right thereto, § 37, n. 31
Usage,
  Acquiescence in or consent to departure from by-laws, § 11
  Consideration of in relation to meetings, § 18, p. 44
  Election of officers governed by, § 19, p. 45
  Powers, duties and liabilities of officers controlled by, § 20, p. 49
  Powers of association determined by, § 12
  Tenure of officers determinable by, § 19, p. 47
Venue,
  Action between association and members, § 37
  Actions against associations, § 36, p. 93
  Actions by associations, § 35, p. 86
  Suit for dissolution, § 9, p. 31
Void suspension of member, resort to courts without exhausting remedies within lodge, § 25, p. 65, n. 39
Voluntary donations, liability of person making for obligation incurred by association, § 32, p. 75
Voting at meetings, mode, § 18, p. 44
Wage regulation, liability of member of employer's association for breaking, § 29, n. 26
Wages, loss of recoverable as damages for wrongful suspension or expulsion of member, § 25, p. 67
Waiver,
  Irregularities in,
    Proceeding for expulsion of member, § 25, p. 63
    Removal of officer, § 19, p. 48
  Notice of meeting, § 18, p. 43
  Objection,
    As to action against association, § 36, p. 89
    That association may not sue in own name, § 35, p. 83
  Right to custody of funds, § 20, p. 49
Weight of evidence, actions against associations, § 36, p 98
Withdrawal of members, § 24
  Dissolution, § 9, p 28
  Liability of members for dues, § 31
  Meeting, withdrawal from, effect of, § 18, p. 44
  Right to associate property, § 27
Withdrawing branch, right to return of dues from main body, § 31
Workmen's union as association, § 1, p. 23, n. 39
Wrongful,
  Expulsion of member as ground for dissolution, § 9, p. 31
  Suspension of officer, damages for, § 19, p. 48
  Suspension or expulsion, damages recoverable for, § 25, p. 66
Wrongs against association, suit by members to redress, § 37

Accommodation indorser, common counts available, § 10, n. 94
Accord and satisfaction,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 130
Special plea setting up, § 23, p. 128
Account annexed, defects appearing in not rendering declaration demurrable, § 22, p 122, n. 34
Account stated, common count in general assumpsit, § 2
Accounting, assumpsit not lying to impeach for alleged fraud or mistake, § 2, n. 16
Adding parties, amendment of declaration by, § 25
Addition of counts, amendment of declaration by, § 25
Admissibility of evidence, § 28
Admissions by plea of general issue, § 23, p. 127
Affidavit of defense, requisites, § 23, p. 128
Aggravation, averments in respect to not changing declaration from one in assumpsit to one in tort, § 22, p. 122
Agreement, variance in respect to, effect of, § 26, p. 132
Amendment of pleadings, § 25
Amount due, variance in regard to immaterial, § 26, p. 132
Amount of damages, assessment of in verdict, § 32
Attorney's commissions, allowance as costs, § 35
Bankruptcy, special plea setting up, § 23, p 127
Bill of particulars,
Amendment of declaration by annexing of, § 25
Disclosures in not rendering common counts demurrable, § 22, p. 122, n. 34
Bills of exchange, allegation in respect to consideration not required in declaration, § 22, p 124
Bond, declaration on in assumpsit as simple contract, § 8
Breach of covenant, recovery of money paid in consequence of, § 8, n 48
Breach of promise, allegations in respect to in declaration, § 22, p 125
Building contract, recovery for part performance under common counts, § 0, p. 118, n. 91
Burden of proof, § 28
Capacity to sue, admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Collateral undertaking, special assumpsit required, § 10
Common count,
Allegation of sustained by proof of express contract, § 26, p. 132
General assumpsit embracing, § 2
Joinder with special counts, § 22, p. 126
Matters provable under, § 26, p. 130
Common law actions, pleading rules applicable, § 21
Complaint, sufficiency of, § 22, p. 122
Conditions precedent, § 15
Consideration,
Allegation in respect to in declaration, § 22, p. 124
Essential to support action, § 4
Proof of as laid in declaration required, § 26, p. 133
Recovery of by assumpsit on failure to perform covenants, § 8
Special plea in respect to validity of contract for want of, § 23, p. 128
Contract, necessity to support action, § 4
Conversion of personal property, assumpsit not lying for, § 12, n 99
Costs, applicable rules, § 35
Counterclaim, failure to answer preventing judgment for defect in affidavit of defense, § 23, p. 128
Counts,
Amendment of declaration by addition of, § 25
Sufficiency of, § 22, p 122
Coverture,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 130
Special plea in respect to validity of contract because of, § 23, p. 128
Cross demands, setting up under general issue, § 26, p. 131
Damages,
Allegation in respect to in declaration, § 22, p. 126
Amount recoverable, § 36
Declaration,
Amendment of, § 25
Requisites of in general, § 22, p 121
Default, jury to assess damages, § 33
Defects in pleading, cure by verdict, § 27
Defendants to action, § 19
Defenses, § 17
Defined, § 1, n. 1
Demand,
Allegation in respect to in declaration, § 22, p. 125
Condition precedent, § 15
Demands not due, § 15
Demurrer,
Count assigning several breaches, § 23, p. 127
Defect in declaration failing to show consideration taken advantage of by, § 22, p 125
Final judgment not to be rendered without writ of inquiry on overruling of, § 33
Raising defects relating to nonjoinder of parties plaintiff, § 19
Departure invalidating replication, § 24
Determination of title, assumpsit not lying, § 11
Discharge in bankruptcy,
Defense of not admissible under general issue, § 26, p. 131
Necessity of special plea, § 23, p 128
Double replication, effect of, § 24
Drunkenness, admissability of evidence of under plea of nonassumpsit, § 26, p. 130
Duress, special plea in respect to validity of contract because of, § 23, p. 128
Equitable character of general assumpsit, § 2
Equitable defenses, admissibility, § 17
Equitable estoppel enabling party to maintain assumpsit, § 4
Estoppel,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Denial of promise on which assumpsit lies, § 4, n. 31
Setting up statute providing for inquiry of damages, § 23, p. 128
Evidence, § 28
Express agreement, necessity of setting out and declaring specially on, § 22, p. 122
Express assumpsit, defined, § 1, n. 1

Express contract,
Existence of preventing recovery as on implied contract, § 9, p. 115
Special assumpsit as only remedy, § 6
Express contract or promise, special assumpsit on, § 3
Express employment, common counts as appropriate remedy, § 9, p. 114, n 54
Failure of consideration, admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Fictitious promise imposed by law, § 4
Fixed amount, allegation of not preventing proof otherwise, § 26, p. 132, n 90
Fixed claim, necessity of, § 15
Foreign attachment, special plea setting up, § 23, p. 128
Foreign attachment or garnishment, admissability of evidence of under plea of nonassumpsit, § 26, p 130
Former recovery,
Admissability of evidence of under plea of nonassumpsit, § 26, p. 130
Special plea setting up, § 23, p. 128
Fraud,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 130
Recovery of consideration paid through, § 9, p. 115
Full performance of express contract, effect of, § 9, p. 116
Gambling debt, admissibility of evidence in respect to under plea of nonassumpsit, § 26, p. 131, n. 78
General assumpsit, nature of, § 2
General issue,
Matters admissible under plea of, § 26, p. 130
Plea of, § 23, p 127
General verdict upheld if any one of several counts is good, § 32
Gift in anticipation of marriage, recovery after engagement is broken, § 9, p. 115, n. 65
Grounds and appropriate form of action, §§ 5–12, pp 112–119
Illegality, admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Immaterial variance, effect of, § 26, p. 132
Implied assumpsit, defined, § 1, n. 1
Implied contract, general assumpsit based on, § 2
Implied promises, general assumpsit as exclusive remedy, § 9, p. 113
Indebitatus assumpsit, common count in general assumpsit, § 2
Indebtedness, allegation in respect to in declaration, § 22, p. 125
Indorser, common counts not applicable in action against, § 10, n. 94
Infancy,
Admissibility of evidence of under plea of nonassumpsit, § 26, p 130
Special plea in respect to validity of contract because of, § 23, p. 128
Special plea setting up, § 23, p. 127
Inquiry of damages, waiver of, § 23, p. 128
Insanity,
Admissability of evidence of under plea of nonassumpsit, § 26, p. 130
Special plea in respect to validity of contract because of, § 23, p. 128
Insimul computassent, common count in general assumpsit, § 2
Insolvency, discharge in admissible under general issue, § 26, p. 131, n. 86
Installments already accrued, § 5
Instructions, § 31
Instruments under seal, § 8
Intent as respects assumpsit on promise implied in fact, § 9, p 114
Interest,
Immateriality of allegation in respect to in declaration, § 22, p. 124
Period for which recoverable, § 36
Issues, proof and variance, § 26, pp. 129–133
Joinder of counts in declaration, § 22, p. 126
Joint liability,
Absence of admissible under plea of nonassumpsit, § 26, p. 131
Declaration of with proof of several as variance, § 26, p. 132, n. 9
Joint promisees, joinder as parties plaintiff, § 19
Joint promisors,
Declaration against requiring proof against all served, § 26, p. 132
Joinder as defendants, § 19
Judgment, § 33
Jurisdiction, § 18
Affirmance of in declaration, § 22, p. 122
Jury questions, § 30
Letter of credit, recovery for goods obtained through, § 9, p. 115, n 65
Limitation in respect to damages recoverable, § 36
Limitations, § 16
Liquidated claim, necessity of, § 15
Liquidated damages, recovery on common counts, § 9, p. 118
Loss of profits, recovery under common counts, § 36, n 51
Measure of damages, election to sue in general assumpsit on express contract fully performed, § 36
Misfeasance of public officer, § 12, n. 1
Mistake in computing account, recovery of sum omitted, § 9, p. 115
Modification of sealed instruments, § 8
Money admittedly due, assumpsit as proper remedy, § 5, n 32
Money paid by mistake, § 9, p. 115
Mortgage, promise to give to secure money obligation, § 9, p 117
Mortgagee without right to base action on interest as such, § 13, n. 4
Motion in arrest, defect in declaration failing to allege consideration taken advantage of by, § 22, p. 125
Mutual intent to contract, § 9, p. 114
Nature of remedy, § 1
Ne unques executor, special plea setting up, § 23, p. 127
New contract, necessity of setting up in affidavit of defense, § 26, p. 129, n. 56
Nil debit, plea of not appropriate as plea of general issue, § 23, p. 127
Nominal damages, recovery of, § 36, n 51
Non est factum, plea of not appropriate as plea of general issue, § 23, p. 127

Nonassumpsit,
Matters admissible under plea of, § 26, p. 130
Plea of as plea of general issue, § 23, p. 127
Nonfeasance of public officer, § 12, n. 1
Nonjoinder of parties, effect of, § 19
Nonperformance, admissability of evidence of under plea of nonassumpsit, § 26, p. 131
Not guilty, plea of not appropriate as plea of general issue, § 23, p. 127
Nunquam indebitatus, plea of substituted for nonassumpsit as general issue, § 23, p. 127
Objection to declaration, manner of raising, § 22, p. 125
Original undertaking, recovery on under common counts, § 10
Ownership, assumpsit lying only on behalf of one claiming, § 13
Part payment, admissibility under general issue, § 26, p. 130, n. 72
Parties to action, § 19
Partnership settlement, assumpsit not lying for purpose of reviewing, § 2, n. 16
Past consideration, necessity of alleging in declaration, § 22, p. 125
Payment,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 130
Special plea setting up, § 23, p. 128
Performance,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Allegation in respect to in declaration, § 22, p. 125
Special plea setting up, § 23, p 128
Performance of express contract not in accordance with terms warranting assumpsit as on implied promise, § 9, p. 117
Personal discharge, special plea setting up, § 23, p 127
Persons liable, § 14
Place of promise,
Allegation in respect to in declaration, § 22, p. 124
Variance in regard to immaterial, § 26, p. 132
Plea,
Amendment or substitution of, § 25
Requisites of, § 23, p 126
Plea in abatement, nonjoinder of party taken advantage of by, § 19
Pleading, §§ 21–27, pp. 121–133
Premature nature of action, admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Presumptions, § 28
That promise was made to one from whom consideration proceeded, § 22, p. 124
Prevention of performance, admissibility of evidence of under plea of nonassumpsit, § 26, p. 130
Principal, assumpsit against where sealed instrument was executed by agent, § 8
Privity, necessity, § 13
Prize, assumpsit as proper remedy for recovery, § 5, n. 32
Process, § 20
Promise,
Action founded on, § 4
Defendant, allegation in respect to in declaration, § 22, p. 123
Promise—Continued,
Implied by law, § 9, p. 114
Implied in fact, § 9, p. 114
Variance in respect to, effect of, § 26, p. 132
Promissory notes, allegation in respect to consideration not required in declaration, § 22, p. 124
Proof, necessity of conforming to pleading, § 26, p. 132
Quantum meruit, common count in general assumpsit, § 2
Quantum valebant, common county in general assumpsit, § 2
Questions of law for court, § 30
Real party in interest, assumpsit to be brought in, § 13
Record, assumpsit not lying on claim of, § 7
Recoupment,
Necessity of special plea of, § 23, p. 128
Setting up under general issue, § 26, p. 131
Rejoinder, requisites of, § 24
Release,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Special plea setting up, § 23, p. 128
Repayment of expenses, promise of warranting indebitatus assumpsit, § 9, p. 117
Replication, § 24
Request, allegation in respect to in declaration, § 22, p. 125
Rescinded contract, recovery of consideration, § 9, p. 115
Rescission of contract, § 8, n. 42
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Review, § 34
Reward, assumpsit as proper remedy for recovery of, § 5, n 32
Salary of city officers, assumpsit unavailable for recovery, § 4, n. 24
Scope of remedy, § 1
Seal, instruments under, § 8
Secundum allegata et probata, recovery on, § 26, p. 132
Separate promises, necessity of averring in declaration, § 22, p. 123
Set-off,
Necessity of special plea of, § 23, p. 128
Setting up under general issue, § 26, p. 131
Settlement, assumpsit not lying to impeach for fraud or mistake, § 2, n. 16
Several special plea, authority to file, § 23, p. 127
Severance in plea, § 23, p. 127
Simple contracts, remedy for enforcement of, § 1
Special agreement, necessity of setting out in declaration, § 22, p. 122
Special assumpsit,
Amendment of declaration to make it one in general assumpsit, § 25, n. 53
Nature of remedy, § 3
Special contract, declaration on with proof of implied contract not fatal variance, § 26, p. 132
Special counts,
Joinder with common counts, § 22, p. 126
Reference to not rendering common counts demurrable, § 22, p. 122, n. 34
Special damages,
Not recoverable under common counts, § 36

Special damages—Continued,
Particular averments in respect to in declaration, § 22, p 126
Special findings, inconsistency with each other or with general verdict, § 82
Special pleas, § 23, p. 127
Specific performance, relief deniable under, § 9, p. 117, n. 76
Splitting cause of action under express contract, § 6
Statement of claim, necessity of setting out contract in totidem verbis, § 22, p. 122
Statute of frauds,
Claims arising on contracts unenforceable as within, § 9, p. 115
Necessity of special plea, § 23, p. 128
Statute of limitations,
Defense of not admissible under general issue, § 26, p. 131
Necessity of special plea setting up, § 23, p. 128
Statutory general issue, § 23, p 127
Statutory modification in respect to necessity of alleging promise in declaration, § 22, p. 123
Statutory obligations, § 9, p. 115
Statutory requirements, observation of in declaration, § 22, p. 122
Striking out parties, amendment of declaration by, § 25
Subsequent matters of defense, setting up under general issue, § 26, p. 131
Substitution of plea, § 25
Sufficiency of evidence, § 28
Surety, use of after signature on note not preventing recovery on common counts, § 10, n. 94
Surplusage not vitiating count containing sufficient averments, § 22, p. 123
Taxes, recovery of money paid under invalid tax law, § 9, p. 115
Technical defects in pleading, cure by verdict, § 27
Tender,
Defense of not admissible under general issue, § 26, p. 131
Necessity of special plea, § 23, p. 128
Termination of partly performed contract authorizing common counts, § 9, p. 118
Third person beneficiary, right of action, § 13
Time of promise,
Allegation in respect to in declaration, § 22, p. 124
Variance with regard to immaterial, § 26, p. 132
Time to sue, § 16
Title,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Land, assumpsit not proper form of action to determine, § 11
Tobacco, obligation to pay in at time tobacco passed as money, § 9, p. 117
Torts,
Necessity of alleging waiver of, § 22, p 123
Waiver of authorizing action in assumpsit, § 12
Transitory nature of action, § 18
Trial, §§ 29–32
Undertaking, action founded on, § 4
Unsigned affidavit of defense, waiver by failure to object to, § 23, p. 128
Usury, admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Variance,
Cure by failure to object, § 27
Effect of, § 26, p. 132
Venue, § 18
Verdict,
Defects in pleading cured by, § 27
Responsiveness to issues, § 32
Waiver,
Admissibility of evidence of under plea of nonassumpsit, § 26, p. 131
Torts, § 12
Waiver of tort,
Affidavit of defense not required when action is founded on, § 23, p. 128, n 32
Measure of damages, § 36, n. 51
Necessity of alleging, § 22, p. 123
Withholding money, § 9, p. 114, n 59
Writ of error, defect in declaration failing to allege consideration taken advantage of by, § 22, p. 125
Writ of inquiry, trial of issue of damages under, § 33
Wrongful detention or conversion of personal property, assumpsit not lying for, § 12, n. 99

ASYLUMS

Actions by and against, § 10
Allotment among subdivisions of state where facilities inadequate, § 8
Allowance of claim, § 5
Appointment of officers, § 6
Apprehension of inmate escaping or departing from institution without order for discharge, § 7
Appropriations, jurisdiction in respect to expenditure, § 8
Arbitrary requirements in respect to private asylums prohibited, § 5
Audit of claim, § 5
Bids for construction of buildings, § 4, p. 143
Board, management of institution, § 8
Bonds of officers, § 6
Borrowing money,
Authority of board, § 8
Personal liability of officer borrowing without authority, § 9
Breach of contract, liability for, § 9
By-laws, board of managers of private asylum empowered to make, § 5
Charitable enterprise, constitutional prohibition of state aid to asylums established by, § 3
Chiropractic license not substitute for one required of private asylum, § 5, n. 66
Classification, § 1
Clothing, maintenance of public asylum including expenses for, § 4, p. 144
Commission for establishment of state asylum, authority, § 4, p 143
Consent of legislature to actions against state asylum, § 10
Contempt, power of visiting committee to punish for, § 5
Contracts for supplies, authority to make, § 9
Conversion of sums appropriated for named purposes, § 8
Conveyance of asylum property, § 8

Counties, power in respect to establishing asylum, § 4, p. 143
Definition, § 1
Discretion of boards or officials in respect to management and control of institution, § 8
Dismissal of inmate, § 7
Duration of appointment to office, § 6
Eligibility for admission to public asylum, § 7
Embezzlement authorizing removal of superintendent of private asylum, § 6
Establishment, §§ 2–4
Execution sale, liability of property to, § 9, n. 39
Expenditures, jurisdiction in respect to, § 8
Expert assistance, securing of and powers, § 8
Expulsion of inmate, § 7
Food, maintenance of public asylum including expenses incurred for, § 4, p 144
Governmental board, concurrence or assent in dismissal of inmate, § 7
Hearing,
  Expulsion of inmate, § 7
  Removal of officer, § 6
Immorality authorizing removal of superintendent of private asylum, § 6
Infant, discharge because of removal of parents from state, § 7
Inmate at large, negligence of officers permitting, § 9, n. 49
Inmates,
  Contribution to maintenance, § 4, p. 145
  Regulations in respect to, § 7
Insubordination, expulsion of inmate by vote of board on ground of, § 7
Interim appointment to office, § 6
Investigations, authority in respect to, § 5
Judicial interference, § 5
Legislative regulation, § 5
Liabilities of proprietors, officers and employees, § 9
License, private asylums, § 5
Limitations as to number of inmates, § 8
Location of state asylum, § 4, p. 143
Maintenance, §§ 2–4
Management of institution, § 8
Ministerial functions of those in charge of institution, § 8
Money taken from inmate, officers' liability for, § 9
Notice,
  Inmate before expulsion, § 7
  Removal of officer, § 6
Officers of institutions, § 6
Orphan asylums, state aid to, § 3
Outlays for inmates, remedy for obtaining reimbursement, § 10
Ownership, §§ 2–4
Police power, regulation of private asylums under, § 5
Presumption of regularity as to acts of board or officials, § 8
Private asylum, §§ 3, 4, pp. 142–145
Private eleemosynary corporation, withdrawal of management of institution from, § 8
Public nuisance, liability in damages for creating and maintaining, § 9
Quantum meruit, public asylums answerable in, § 9
Regulation, § 5
Reimbursement,
  Outlays for inmates, remedies, § 10
  State, power in respect to, § 4, p 145
Release of inmate, officer's responsibility for, § 9, n. 49
Religious organizations, constitutional prohibition of state aid to, § 3
Removal of officer, § 6
Repairs, public asylum, § 4, p. 144
Replacements, public asylum, § 4, p. 144
Residence, right of inmate dependent on, § 7
Respondeat superior, rule of not applying, § 9
Restraining person not duly committed, officers' liability for, § 9
Return of inmate escaping or departing from institution without order for discharge, § 7
Revocation of valid election or appointment to office, § 6
Soldiers' homes as asylums, § 1, n. 7
State aid, private asylum, § 3
State asylum,
  Establishment and management, § 2
  Legislative regulation, § 5
State auditor, duty in respect to audit and allowance of claim, § 5
Status of officers or employees, § 6
Summary removal of officer, § 6
Supervision, § 5
Support of inmates, public asylum, § 4, p. 144
Tenure of officers, § 6
Termination of appointment to office, § 6
Terms of officials, § 6
Theft authorizing removal of superintendent of private asylum, § 6
Torts, liability for, § 9
Unreasonable requirements in respect to private asylums prohibited, § 5
Upkeep, public asylum, § 4, p. 144
Utmost capacity, necessity of officials receiving inmates up to, § 8
Vacancies in office, filling of, § 6
Visiting committee, limitation on powers of, § 5
Visitors, inmate's right to receive or confer with, § 7
Voluntary agreement to remain in institution, compelling compliance with, § 7

Abandonment,
Admissibility of evidence as to on motion to dissolve, § 455, p. 625, n. 48
Claim, admissibility of evidence as to in proceeding by third person claiming property attached, § 360, p. 569, n. 15
Effect, § 262, p. 441
Levy, recovery of damages accruing subsequent to in action for wrongful attachment, § 559, p 681
Liability as for wrongful attachment, § 517
Loss of lien by, § 262, p 438
Plea in abatement, § 463
Sufficiency of evidence as to in action on bond for release of property, § 317, p. 528
Abatement,
Failure to give notice in main action as ground for, § 483
Main suit, effect, § 2, p. 188
Plea in as proper method of seeking dissolution, § 434
Proceedings on plea in proceeding for dissolution of attachment, §§ 460–469, pp. 631–634
About to dispose of property within attachment statute, § 50
Absconding as grounds, § 24
Admissibility of evidence as to, § 69, p. 236
Allegations in respect to in affidavit, § 126, p. 298
Females, liability to attachment, § 21, n. 94
Positive averment as to intention in affidavit, § 114
Sufficiency of evidence as to, § 69, p. 239
Venue of proceedings, § 98
Within statute authorizing attachment, § 25
Absence,
Creditor as grounds, § 24
Debtor, admissibility of evidence as to, § 69, p. 236
Necessity of alleging in affidavit, § 126, p 301
Principal, affidavit by attorney or agent in case of, § 106
Sufficiency of evidence as to, § 69, p. 239
Abstract, reference to for description of property in order of sale, § 497, p. 635, n. 44
Acceptance of bond, § 158
Accidental destruction of bond, effect of, § 145
Accompanying,
Affidavit curing defect in notice of motion to discharge attachment in failing to state grounds, § 450, n. 62
Pleadings, affidavit, § 105
Accord and satisfaction, admissibility of evidence as to in action on bond for release of property, § 317, p 527
Account, claim of third person to property attached, § 346
Account books, admissibility to show,
Indebtedness to intervening claimants of property, § 360, p. 571
Intent, § 69, p 237
Account stated, issuance in action on, § 11, p. 196
Accounting,
Action for not supporting writ of attachment, § 8, p. 195
Auditors or trustees appointed to administer estate, § 337
Bill for in court of equity, § 501
Accounting—Continued,
Consignor's right to as subject to attachment, § 86, n. 79
Accrual of cause of action,
Bond, § 172
Wrongful attachment, §§ 522–525
Acknowledgment, bond, § 156
Acquisition of residence within attachment law, § 33
Act of God discharging liability of surety on bond of third person claiming property, § 375
Action,
Damages for dispossession of claimant to property, §§ 398–405, pp. 598–605
Establishment of title or recovery from possession by third person, §§ 349–366, pp 556–584
Proceeding by attachment as, § 1, n. 4
Receipt, § 302, pp 487–491
Violation of possession of attaching officer, § 292, pp 473–476
Wrongful attachment under,
Irregular or void process, §§ 504–515
Regular process, §§ 535–565, pp 668–687
Actual absence from jurisdiction as essential to right to attachment on ground of nonresidence, § 29
Actual damages, recovery of,
Action on bond, § 179, p 366
Wrongful attachment under regular process, § 556
Actual levy,
Burden of showing in action for wrongful attachment under regular process, § 549
Cause of action for wrongful attachment in absence of, § 519
Actual physical removal of property, necessity to justify attachment, § 53
Actual possession, necessity of in making levy, § 218, n 20, § 223, p. 399
Actual seizure, lack of as ground for dissolution, § 423, p. 610
Ad damnum, discharge of surety on bond for release of property by increase in, § 316, p. 513, n. 26
Additional affidavit, requirement as to, § 104
Additional bond, order for, § 305
Additional parties, amendment of affidavit by, § 143, p. 319
Additional security,
Failure to give as ordered, as ground for dissolution, § 423, p. 610, n. 11
Filing of, § 161
Not exonerating original sureties on dissolution bond, § 316, p 513
Additional sureties, delivery bond, § 309
Address, writ, § 186
Adequate consideration, contemplated transfer for preventing inference of fraudulent intent, § 69, p. 241
Adequate remedy at law preventing,
Equitable relief in aid of attachment, § 501
Jurisdiction of equity, § 97
Adjustment of claim,
Auditors or trustees appointed to administer estate, § 336
Defense in action for wrongful attachment under regular process, § 520
Administration, property in course of as subject to attachment, § 88, n. 93
Administrator's bond, issuance in action on, § 11, p. 198

Admissibility of Evidence. Evidence generally post
Admissions,
Admissibility in proceeding by third person claiming property attached, § 360, p. 570
Basis for affidavit on information and belief, § 115
Curing defects in affidavit, § 141, p 312, n 18
Adult, affidavit not required to specifically state that defendant is, § 120
Advancement,
Hearing of attachment issue, power of court, § 495
Heir as respects attachable interest in estate, § 84
Advertising,
Provision for in order for sale of attached property, § 325
Sign, liability to attachment, § 74, p. 247
Variance with affidavit, § 141, p 312
Advice of counsel,
Acting under as sufficient to show probable cause in action on bond, § 175, p. 363
Defense in action,
Bond, § 170, p. 351
Wrongful attachment under regular process, § 540
Evidence of acting under as proof of absence of malice in action for damages for dispossession of claimant to property, § 403
Affidavit, §§ 104–144, pp 271–325
Condition precedent to proceeding by claimant of property attached to establish right, § 352
Declaration in main action construed with, § 493, p. 649
Defense limited to grounds of in action on bond, § 170, p. 351
Effect, § 109
Failure to file as defense in action for wrongful attachment under regular process, § 540
Filing of as commencement of action, § 181
Issuance of writ without as ground for dissolution, § 423, p. 610
Lack of as defense in action on bond, § 170, p. 349
Motion or rule to show cause why attachment should not be dissolved supported by, § 433
Opposing affidavit, motion to dissolve or vacate attachment, § 453
Opposing motion to dissolve, § 453
Recital as to filing of in writ, § 189
Successive writs without filing of, § 200
Sufficiency of evidence as to filing of in action on bond for release of property, § 317, p. 527
Supporting motion to dissolve attachment, necessity of, § 452
Affidavit of defense, proceedings in main action, § 493, p. 651
Affidavit of merits,
Motion to dissolve attachment, § 452, n. 89
Necessity of in proceeding by third person claiming property attached, § 357, p. 562
Agent,
Affidavit, § 106
Information and belief by, § 115
Agent—Continued,
Affidavit—Continued,
Recitals in respect to absence of plaintiff, § 117
Allegation of authority to execute bond in action on, § 174, p. 354
Authority to sign affidavit not subject to collateral attack after judgment, § 110
Bond for release of property by, § 308
Delivery of property to by attaching officer, § 284
Execution of bond by, § 154
Notice of levy to, § 220, p. 396
Service of,
Notice of motion to dissolve upon, § 450
Process, appointment by nonresident affecting right to attachment, § 29
Setting forth facts respecting setoff or counterclaim in affidavit, § 125, p. 294
Signature to,
Affidavit, § 132
Bond for release of attachment by, § 310
Written fraudulent statements by as ground for attachment, § 63, p. 232
Agreement. Contract post
Aid of,
Attachment, proceedings in, §§ 500, 501
Pending actions, attachment in, § 8, p. 194, n. 86
Alder of,
Affidavit by pleading, § 141, p. 313
Defects, return, § 249
Alias order of publication of service, cure of defects in original order by, § 489, p 644
Alias summons, proceedings in main action, § 494
Alias writs,
Issuance, § 200
After general appearance to attachment on ground of fraud, § 491
Necessity of new affidavit, § 104
Alien,
Liability to attachment, § 21
Temporarily within country, resident not subject to attachment, § 32
Alienation of affections,
Availability in action for unliquidated damages for, § 14, n 26
Issuance in action for, § 13, n. 17
Alimony,
Liability to attachment, § 74, p 248
Priority of lien for, § 272, p. 449, n 80
Allowance of compensation for taking and keeping property, method of enforcing, § 293, p. 479
Alteration,
Authority of attaching officer to make or permit, § 282
Conclusiveness of stipulation as to in receipt, § 298
Discharge of sureties on forthcoming or dissolution bond by, § 316, p. 512
Sufficiency of evidence as to absence of in action on bond for release of property, § 317, p 527
Writ,
Discharge of sureties, § 165
Ground for postponement of lien, § 277, p. 465

Alternative, issuance of warrant against defendant sued in, § 22
Alternative conditions, bond for release of attachment, § 310, n. 25
Alternative grounds, allegation of in affidavit, § 126, p. 296
Alternative statements of grounds in writ, § 192
Ambiguity, bond for release of property, construction, § 313, p. 499
Amendment,
Affidavit, § 143, pp 316-325
After motion to dissolve, § 453
Not affecting time of commencement of lien, § 255
Bond, § 159
Release of property, § 310
Third party claimant, § 369
Complaint or declaration in main action, § 493, p 650
Defects in publication of service in main action, § 489, p. 646
Discharge of sureties by, § 165
Error in writ in respect to direction, § 186
Judgment in proceeding by third person claiming property attached, § 363, p 580
Motion to discharge attachment, § 451, n. 71
Plea in abatement, § 463
Pleadings,
Discharge of sureties on bond for release of attachment by, § 316, p 513
Main action not destroying attachment, § 268, p. 444
Proceeding by third person claiming property attached, § 357, p. 563
Record so as to include omitted affidavits, § 183, n 94
Return, § 250
Attaching inventory to, § 236
Signature to writ, § 195
Verdict in proceeding by third person claiming property attached, § 362, p 578
Warrant of attachment on motion for dissolution, § 457
Writ, § 198
Amount of claim, § 191
Defense in action against receiptor for attached property, § 302, p 489
Discharge of sureties on dissolution bond by, § 316, p. 513
Amicus curiæ, motion for dissolution of attachment, § 446
Amount,
Bond, § 149, pp 330-332
Release of property, § 311
Third party claimant, § 368
Claim, § 9
Excessive as ground for dissolution, § 419
Recital as to in writ, § 191
Statement as to in affidavit, § 125, p 290
Stating in notice of levy, § 220, p. 395, n. 37
Variance,
Affidavit and declaration as to, § 139
Writ, § 196
Compensation for care and custody of attached property, determination of, § 293, p. 479
Amount—Continued,
Damages,
Action on bond, § 179, p 375
Due,
Averments as to in complaint or declaration in main action, § 493, p 640
Jury question in proceeding by third person claiming property attached, § 362, p 576
Positive averment in respect to on knowledge required, § 114
Jury question in action for wrongful attachment under regular process, § 552
Wrongful seizure under regular process, § 562
Indebtedness, amendment of affidavit in respect to, § 143, p 320
Lien, § 259
Necessity of specifying in order for attachment, § 102
Omission of word in affidavit for attachment, § 125, p. 289, n. 19
Property,
Attached, § 235
Designation of in writ, § 193
Fraudulently transferred as respects right to attachment, § 38
Removed as respects right to attachment, § 53
To be sold on final process, § 329
Recovery,
Forthcoming or dissolution bond, § 317, p. 530
Main action, § 498
Amount in controversy, jurisdiction dependent upon, § 93
Ancillary attachment,
Defined, § 1
Dissolution as terminating main action, § 471
Ancillary nature of remedy, § 2, p. 188
Animals, levy on, § 223, p. 401
Annoyance, recovery of damage for wrongful attachment causing, § 559, p. 683, n. 48
Annulment of dissolution bond, reinstatement of attachment lien by, § 313, p. 501
Answer,
Bond, action on, § 174, p 357
Release of attached property, § 317, p. 524
Damages for dispossession of claimant to property seized, § 402
Intervention by third person claiming property attached, § 357, p. 563
Proceedings in main action, § 493, p. 651
Anti-trust law, availability of remedy in suit to recover penalty for violating, § 18, n. 55
Appeal,
Bond, action on, § 178
Third party claimant, § 391
Amendment of affidavit on, § 143, p. 323
Decision on motion to determine priorities, § 279
Intervener claiming property attached, § 364
Intervention by third party claimant on, § 344
Objection,
Attachment on, § 430
Levy for first time on, § 243

Appeal—Continued,
Order dissolving or refusing to dissolve attachment, § 478
Release of attachment on giving bond, § 268, p. 446
Third person claiming property attached, § 364
Trial of right to attached property, § 364
Wrongful attachment under,
Irregular or void process, § 514
Regular process, § 554
Appeal bonds,
Issuance in actions on, § 11, p 107
Substitute for forthcoming bond, § 314
Appearance,
Bond, action on, § 173
Bond or other security as essential, § 401
Debtor, purpose of attachment to compel, § 2, p 189
Dissolution of attachment by, §§ 268, 408, p. 443
Issuance of writ prior to as ground for dissolution, § 423, p. 610
Necessity of on motion to dissolve attachment, § 448
Not curing defect of failure of affidavit, § 104, n. 54
Waiver of defects,
Affidavit, § 141, p 314
Bond or undertaking by, § 160
Writ by, § 107
Waiver of right to move for dissolution by, § 437, n. 19
Appellate court, amendment of bond in, § 159
Application,
Addition to affidavit, necessity of, § 144
Order of publication of service in main action, § 489, p 643
Applying creditors, admission under attachment, § 341, n. 13
Appraisal of attached property, § 230
Before sale of attached property, § 324
Evidence in proceeding by third person claiming property attached, § 360, p 570
Lack of as defense to action on bond for release of property, § 317, p 520
Appraised value, limitation of liability of surety on bond, § 163, p. 343, n. 88
Appraisers, determination of perishability by before sale of attached property, § 324
Approval,
Affidavit, § 133
Bond, § 158
Nunc pro tunc indorsement of, § 143, p. 323
Redelivery or dissolution bond, § 312
Approximate damage, allegation of not justifying warrant, § 125, p. 280, n. 19
Arbitration,
Discharge of sureties on forthcoming or dissolution bond by reference to, § 316, p 512
Loss of lien by entering into general submission to, § 202, p. 430
Argumentative instructions, proceeding by third person claiming property attached, § 362, p. 577
Arrest,
Debtor on execution as discharge of sureties on dissolution bond, § 316, p. 517
Flight to escape as justifying attachment, § 24
Arrest—Continued,
Property taken from person arrested as subject to attachment, § 88, n. 93
Assault and battery,
Attachment in civil actions arising out of, § 58
Issuance in action to recover unliquidated damages for, § 13
Assessment,
Amount to which each attaching creditor is entitled, order for, § 335
Damages in main action, condition precedent to action on bond, § 169
Assets required of sureties on bond, § 153
Assignee,
Assignment for benefit of creditors as proper party in action for wrongful attachment, § 543
Bankruptcy of attachment defendant, recovery of damages for wrongful attachment by, § 529
Chose in action, right to attachment on ground debt or obligation was fraudulently incurred, § 63, p. 230
Defendant,
Attachment, action on bond by, § 168
Right to move for dissolution, § 438
Fraudulent debt, right to attachment, § 20
Intervention in proceeding, § 341
Statements in respect to nonexistence of counterclaim, § 125, p. 294
Assignment,
Bond for release of property as respects proper party plaintiff in action on, § 317, p. 522
Cause of action,
Effect of as respects,
Action on bond, § 169
Liability on bond, § 163, p 345
Ground for postponement of lien, § 277, p. 466
Effect of as respects right to attachment, § 20
Judgment,
Carrying right of action on restitution bond, § 317, p. 518
Debtor as ground for injunctive relief, § 501, n 15
Prior to levy, priority, § 273
Assignment for benefit of creditors,
Creditors in foreign state, arresting operation of attachment by reason of, § 400
Effect of as respects rights to,
Move for dissolution, § 436, n 15
Proceed by attachment, § 17, n 52
Making of as ground for attachment, § 46
Not defeating lien, § 263
Assumed name, failure to register as ground for quashal of attachment, § 416
Assumpsit,
Liability in of bailee refusing to deliver goods on demand, § 302, p 487
Trial of issue in action in before term to which writ of attachment is returnable, § 495
Attached property, effect of dissolution in respect to, § 472
Attaching creditor,
Liability for seizure of another's than debtor's property, § 396

Attaching creditor—Continued,
Necessary party to proceeding by one claiming preferred lien for services, § 356
Attaching officer, rights and duties of, §§ 282–295, pp. 470–481
Attachment defendant, recovery for wrongful attachment by, § 527
Attachment plaintiff, liability for damages for wrongful attachment, § 533
Attack on,
Attachment not barred by giving of forthcoming bond, § 313, p. 501
Order for sale of attached property, § 325
Attempted assignment of bank deposit as proof of fraudulent removal, § 69, p. 242
Attendance at court, expenses of as recoverable for wrongful attachment under regular process, § 560, n. 60
Attestation
Bond, § 156
Writ, § 195
Attorney,
Affidavit, § 106
Information and belief by, § 115
Authority to take affidavit, § 107
Bond for release of property by, § 308
Competency to act as surety on bond, § 153
Execution of bond by, § 154
Fees, sufficiency of evidence as to in action on bond, § 175, p 364
Release of lien by act of, § 262, pp. 438–441
Service of notice of,
Claim of third person to property attached on, § 345, p. 554
Motion to dissolve upon, § 450
Setting forth facts respecting setoff or counterclaim in affidavit, § 125, p. 294
Affidavit, § 132
Writ, § 195
Attorney's fees,
Action on bond, § 179, p 373
Allowance of element of damage in proceeding to try right to property attached, § 366
Consideration in determining amount of bond, § 149, p. 331
Damage for dispossession of claimant to property seized, § 405, p. 604
Evidence as to in action on bond, § 175, p. 361
Intervener's right to, § 365
Issuance in action on promissory note providing for, § 11, p. 198
Wrongful attachment under regular process, § 560
Special pleading,
Damage in action on bond, § 174, p. 356
Required to recover for in action for wrongful attachment under regular process, § 545
Taxation as costs on dissolution of attachment, § 479
Attorney's lien, priority, § 272, p. 448, n. 71
Auditors, proceedings by appointment of, §§ 336–338
Authentication,
Affidavit, § 132
Amendment of affidavit in respect to, § 143, p. 323
Formal requisite of affidavit, § 111
Authority,
Issue writ, statutory origin, § 100
Levying officer, basis, § 204
Make affidavit, showing in respect to, § 117
Automobiles. Motor vehicles, post
Auxiliary writ, distinguished from judicial writ, § 1
Bad faith, burden of proof as to in proceeding by third person claiming property attached, § 350, p. 568, n. 11
Bail,
Affidavit, applicability of rules in respect to, § 111
Appearance without in main action, § 491
Bonds, issuance in actions on, § 11, p. 197
Bailee,
Delivery of property to for safekeeping, §§ 296–302, pp 481–491
Lien, priority, § 272, p 450
Possession of property by, § 284, n. 69
Right to recover possession of property as against attaching creditor, § 72
Bailee for hire, proceeding against by attaching officer to enforce right to possession, § 292, p 475
Bailment, effect of as respects right to attach property bailed, § 72
Bank deposit, liability to attachment, § 74, p. 248
Bank notes, liability to attachment, § 74, p. 248
Bank stockholders, issuance in action to enforce individual liability of, § 12, p. 199
Bankruptcy,
Abandonment of proceedings after adjudication in as affecting liability on bond, § 163, p 344
Adjudication of as discharge of lien, § 267
Defendant,
Discharge of surety on bond of third party claimant, § 376
Effect of as respects liability on bond of third party claiming property, § 374
Discharge of receiptor on dissolution of attachment by, § 300
Filing petition in as justifying resort to attachment, § 56
Law, admissibility of evidence as to taking advantage of on question of intent, § 69, p. 235, n. 60
Barn, entering by levying officer, § 216
Basis for attachment, affidavit,
Operating as, § 109
Setting forth, necessity, § 104
Beginning of action, issuance of writ at, § 181
Best evidence, excuse for nonproduction of as ground of information and belief, § 115
Bill, proceeding in main action, § 493, p. 648
Bill of exchange,
Action on when overdue supporting attachment, § 66
Debt secured by as exempt from attachment, § 86
Issuance in action upon, § 11, p. 196
Bill of lading,
Liability to attachment of goods in transit under, § 74, p. 251
Showing of issuance of as sufficient proof of removal from state, § 69, p. 242

Bill of particulars,
Consideration of on motion to dissolve attachment, § 455, p. 625, n. 23
Failure to annex as ground for dissolution, § 423, p. 612
Motion to dissolve attachment, § 456
Blank,
Filling of in bond for release of property, § 310
Form of trustee writ, use of, § 184
Signing of bond in, § 147
Board and lodging, attachment for wages in action for, § 67, n. 38
Board, washing and lodging, statement that claim is for as sufficient, § 125, p 201, n. 34
Boast in regard to money as sufficient to establish concealment of property, § 69, p. 242
Bona fide claim, jury question in proceeding by third person claiming property attached, § 362, p 576
Bona fide purchasers, discharge of attachment as to by delivery to receiptor, § 298, n. 30
Bond, §§ 145–179, pp 326–376
Appeal as substitute for forthcoming bond, § 314
Condition precedent to proceeding by claimant of property attached, § 352
Defects in to be specifically pointed out in motion to dissolve attachment, § 451, n. 71
Enforcement of liability on, §§ 166–179, pp 346–376
Third person claiming property, §§ 377–392, pp. 589–594
Failure to give as depriving priority of lien over subsequent attaching creditor, § 277, p. 463
Giving of,
Defense in action for wrongful attachment under regular process, § 540
Release officer from making levy, § 209
Irregularities in as ground for postponement of lien, § 277, p 465
Issuance in actions on, § 11, p. 196
Issuance of writ without as ground for dissolution, § 423, p. 610
Levy on, § 223, p. 402
Liability to attachment, § 87
Prevent,
Attachment, consideration for, § 306
Levy, allegations required in action on, § 317, p. 524
Recital as to execution of filing of in writ, § 189
Release of property,
Duty of bondsman to return property, § 315, p. 506, n. 27
Effect, § 313, p. 500
Successive writs without filing of, § 200
Third party claimant, §§ 367–392, pp. 584–594
Time to file before dissolving attachment for failure to give, § 457
Vacation of attachment conditional on giving of, § 457
Bonded warehouse, property in possession of United States in as subject to attachment, § 88, n. 93
Bonding property, neglect as defense in action for wrongful attachment under regular process, § 540
Book account, action on supporting attachment, § 66
Books,
Examination of by attaching officer, § 201
Furnishing information for affidavit, production of, § 115
Books of account,
Exemption from attachment, § 74, p. 249
Levy on,
Equivalent to levy on debts charged therein, § 258, p 434
Preventing collection as element of damage in action on bond, § 179, p. 368
Proof of seizure, as proof of damages in action on bond, § 175, p 364
Boxes, opening by levying officer, § 216
Branch bank, situs of debt owed by for attachment purposes, § 92, p. 264, n. 52
Branch writ to another county, necessity of bond, § 145
Breach of conditions,
Action on bond of third party claimant in case of, § 380
Allegation as to in action on bond for release of property, § 317, p 523
Precedent to liability of obligor on bond for release of property, § 315, p. 507
Breach of contract,
Attachment in proceeding to recover compensation for, § 10
Bond of third person claiming property attached, § 374
Issuance in action for, § 11, p. 196
Setting forth facts in respect to in affidavit, § 121, n. 93
Breach of marriage promise, issuance in action for, § 11, p 198
Breach of promise to give security not fraud authorizing attachment, § 63, p. 231
Breach of recognizance, failure to prosecute as discharge of surety on release bond, § 316, p. 517
Breach of trust, action based on supporting attachment, § 57
Breach of warranty not fraud authorizing attachment, § 63, p 231
Breaking buildings, authority of levying officer, § 216
Building and loan association shares, liability to attachment, § 79, n 26
Building contract, issuance in suit for breach of, § 11, p. 197, n. 41
Bulk sales,
Fraudulent within attachment law, § 43
Sufficiency of affidavit alleging disposal of property in violation of law, § 126, p. 301, n. 44
Bulky property,
Duty of attaching officer in respect to, § 283
Levy on without taking actual possession, § 224
Recording of return in case of attachment of, § 251
Burden of proof,
Abandonment of attachment, § 262, p. 439

Burden of proof—Continued,
Bond, action on, § 175, p 359
Release of property, § 317, p. 526
Third party claimant, § 386
Damages for dispossession of claimant to property seized, § 403
Determination of priorities, § 279
Grounds, § 69, p. 234
Main action, § 494
Motion to dissolve or vacate attachment, § 455, p 624
Negligence resulting in destruction of attached property, § 281
Plea in abatement, § 466
Receipt, action on, § 302, p 490
Third person claiming property attached, § 359, p. 567
Wrongful attachment under,
Irregular or void process, § 512
Regular process, § 549
Business,
Evidence as to amount of on question of damages in action for wrongful attachment, § 550
Expenses, recovery for in action on bond, § 179, p. 368
Loss of or injury to as element of damage,
Action on bond, § 179, p. 370
Wrongful attachment under regular process, § 559, p. 682
Temporary absence for purpose of not warranting attachment, § 26
Capacity of party or affiant, amendment of affidavit in respect to, § 143, p. 319
Caption,
Affidavit, § 119
Amendment of bond as to, § 159
Bond, § 147
Care of live stock, compensation of custodian for, § 293, p. 476
Caretaker, temporary absence of as abandonment of lien, § 262, p. 440
Carrier's lien, priority, § 272, p. 450
Carrying property on person, effect of as respects right to attachment, § 74, p. 250
Case, action on,
Lying against receiptor for failure to redeliver attached property, § 302, p. 487
Maintenance of by claimant to property attached, § 350
Proper form of action,
Maliciously suing out attachment, § 538
Writ is merely irregular or voidable, § 505
Cash,
Levy on, § 228, p. 400, n. 82
Sale of attached property for, § 328
Sales, proof of failure to make return of as sufficient to establish concealment, § 69, p. 242
Cash book, failure to keep as evidence of concealment of property, § 69, p. 238
Cash deposit,
In lieu of bond, § 162
Release of property on, § 305
Cash surrender value, attachment of interest under insurance policy having, § 80
Casual visit not making person resident within attachment statute, § 32
Cause of action,
Allegation in respect to in affidavit, § 117
Amendment of affidavit in respect to, § 143, p. 319
Authorizing attachment, §§ 8–19, pp 194–208
Failure of pleading to show as ground for dissolution, § 417
Setting forth in affidavit, § 121
Certificate,
Affidavit, defect in as ground for dissolution, § 423, p 612
Authority of notary of foreign state to take affidavit, § 107, n. 4
Depository, necessity of furnishing to levying officer, § 218
Seizure of in levy on corporate stock, § 224
Stock, liability to attachment, § 79
Certification, affidavit, § 132
Certified check as written instrument supporting attachment, action on when overdue, § 66
Chamber of Commerce, membership in, liability to attachment, § 74, p. 247
Change,
Boundary after levy on land not defeating jurisdiction, § 98, n. 79
Building, authority of attaching officer to make or permit, § 282
Obligation, discharge of sureties on forthcoming or dissolution bond by, § 316, p. 512
Change of venue,
Ground for postponement of prior attachment, § 277, p. 466
Proceedings to procure attachment, § 98
Character,
Admissibility of evidence as to on question of removal from state, § 60, p 236
Proceeding, sufficiency of evidence as to on motion to dissolve, § 455, p. 627
Charges,
Care of property, § 293, pp. 476–481
Payment of as condition to receiving back property on dissolution, § 472
Charter contract, issuance in action for breach, § 11, p. 197, n. 41
Chattel mortgage,
Attachment in proceeding to foreclose, § 8, p. 195
Demand or notice of existence of lien, § 345, p. 551
Existence of on attached property as ground for dissolution, § 416, n. 56
Giving of as insufficient to prove intent to hinder or delay, § 69, p. 41, n. 54
Levy on mortgaged property, § 226
Personalty not in custodia legis preventing attachment, § 88, n. 93
Check,
Deposit in lieu of bond, § 162
Holder, effect of levy as to, § 239
Levy on, § 223, p. 402
Chip attachment,
Decedent's property, necessity of procuring permission of probate court, § 102, n. 30
Nominal attachment as sufficient compliance with statute requiring attachment by substituted service, § 488

Chose in action,
Fraudulent transfer affording ground for attachment, § 37
Liability to attachment, § 86
Christian name, amendment of affidavit to show, § 143, p. 319, n. 99
Circumstantial evidence,
Fraudulent intent, sufficiency, § 69, p. 240
Intention to remain within state, admissibility, § 69, p 236, n. 77
Sufficient to show fraud in incurring liability, § 69, p 243
Citizens, process limited to, § 20
Citizenship,
Allegations in respect to in affidavit, § 126, p. 298
Parties, allegations in respect to in affidavit, § 120
City, bond on attachment in favor of, § 145
City marshal, levy of attachment by, § 205
Civil action, enforcement of liability on bond by, § 166
Claim,
Amendment of affidavit in respect to, § 143, p 320
Showing as to in affidavit, § 125, pp. 280–295
Third persons,
Bonds or other security for possession or release of property, §§ 367–392, pp. 584–594
Damages for dispossession, §§ 393–405, pp 594–605
Presentation and determination, §§ 339–366, pp. 542–584
Claim and delivery action, property acquired in as subject to attachment, § 88
Claim bond, filing of as waiver or abandonment of lien, § 262, p. 440
Claimant's
Bond, property delivered on as subject to attachment, § 88
Delivery of property to by attaching officer, § 286
Intervention in proceeding, § 340
Judgment in main action as prejudicing rights of, § 497, p. 657
Liability on bond to secure release, § 374
Right to move for quashal of attachment, § 442
Subsequent to attachment, intervention by, § 341
Clerical errors,
Affidavit,
Amendment of affidavit in respect to, § 143, p. 316
Effect of, § 141, p. 311
Not subject to collateral attack, § 110
Amendment of return in respect to, § 250, n. 97
Bond,
Effect of, § 147
Release of attachment not invalidated by, § 310
Name of court in affidavit, effect of, § 119
Liability for wrongful attachment because of, § 517, n. 77
Clerical servant, issuance of writ by, § 102, n. 30
Clerk of attorney for party, authority to take affidavit, § 107
Clerk of court,
Authority to,
Issue writ, § 100
Take affidavit in attachment, § 107, n. 94
Bond made payable to, § 151
Discretion as to amount of bond, § 149, p. 330
Liability for damages for wrongful attachment, § 533
Property in custody of as subject to attachment, § 88, n 93
Client, liability for damages for wrongful attachment by attorney, § 534
Cloud on title, removal by court of equity, § 501
Codefendants, issuance of writ against in county of residence, § 98
Collateral attack,
Absence of affidavit warranting, § 104
Affidavit for attachment, § 110
Aider of affidavit by pleading in case of, § 141, p 313
Judgment,
Against attached property without statutory authority, § 13
Main action, § 497, p. 656
Levy, § 243
Mere irregularities not subject to in absence of objection at proper time, § 99
Order,
Directing sale of attached property, § 325
Discharging attachment, § 457
Return, § 249
Collateral proceeding,
Amendment of affidavit for attachment in, § 143, p. 318
Failure of creditor to pursue as discharge of surety on release bond, § 316, p 517
Collateral security,
Offer to give creditor as ground for dissolution of attachment, § 428
Surrender of as discharge of surety on bond for release of property, § 316, p 515
Collective sufficiency of sureties on bond, § 153
Collusion,
Admissibility of evidence in proceeding by third person claiming property attached, § 360, p. 571
Burden of proof,
Action on bond for release of property, § 317, p 526
Motion to dissolve attachment, § 455, p. 625
Proceeding by third person claiming property attached, § 359, p. 568
Collateral attack on affidavit for, § 110
Discharge of surety on bond for release of property by, § 316 p 515
Colorable transfer warranting dissolution of attachment, § 428
Command to officer, writ, § 193
Commencement of action,
Issuance of writ, § 181
Recital as to in writ, § 190
Showing as to in affidavit, § 124
Commercial notaries, authority to take affidavit, § 107, n. 94
Commingling of goods,
Duty of officer in respect to, § 213

Commingling of goods—Continued,
Effect of as respects recovery of damages for dispossession of third person claiming property, § 393
Liability to attachment, § 74, p. 248
Commitment of debtor on execution as discharge of receiptor, § 300
Common law,
Attachment as statutory proceeding in derogation of, § 2, p. 186
Remedies,
Claimant of attached property, § 330
Damages for dispossession of claimant to property, § 390
Common law auditor, auditors or trustees appointed to administer estate exercising functions of, § 337
Common law bond, consideration for, § 306, n. 93
Common law obligation,
Bond upheld as, § 148
Voluntary obligation for release of attached property, § 310
Common carrier, issuance in action for damages to, § 12, p. 199
Common counts, recovery under for breach of bond, § 167
Compensation,
Keeper in charge of property, reimbursement of attaching officer for, § 293, p 476
Services, issuance in action for, § 11, p. 196
Compensatory damages, recovery of for wrongful attachment under regular process, § 556
Competency, sureties on bond, § 153
Complaint,
Accompanying declaration, necessity, § 105
Bond, action on, § 174, p. 353
Release of property, § 317, p 522
Damages for dispossession of claimant to property seized, § 402
Filing of as commencement of action as respects issuance of writ, § 181
Proceedings in main action, § 493, p. 648
Third person claiming property attached, § 357, p 561
Wrongful attachment under regular process, § 545
Compliance with statute,
Necessity of, § 2, p. 187: § 4, p 190
Recital as to in return, § 248, p 419
Sale of attached property, § 324
Compressed air machinery, description of property as such in writ held sufficient, § 194, n. 65
Compromise,
Lien of attachment ripened by, § 254, n. 94
Special pleading of by interpleader claiming property attached, § 357, p. 506
Concealment,
Admissibility of evidence as to. § 69, pp 236, 238
Allegations as to in affidavit, § 126, p. 298
Ground, §§ 24, 51
Offer to return property as ground for dissolution of attachment, § 420, n 85
Showing in respect to in affidavit, § 126, p. 300
Sufficiency of evidence as to, § 60, pp 239, 242
Within meaning of attachment statute, §§ 27, 54
Conclusiveness,
Averment of nonresidence in affidavit for attachment, § 126, p. 303
Conclusiveness—Continued,
Inventory and appraisal of attached property, § 230
Judgment,
Main action, § 497, p. 656
Trial of right to property levied on and claimed by third person, § 363, p. 580
Order dissolving attachment on extrinsic evidence, § 457
Receipt for attached property, § 298
Return, § 252
Conditional sales,
Liability to attachment of interest under, § 80
Property sold under and remaining within state as within jurisdiction, § 92, p. 262
Right of seller to intervene in attachment, § 340, n 84
Statutory requirement of recording as respects priority over lien, § 276, p. 457
Subordination of attachment to, § 273
Conditions,
Bond, § 150
Setting out in declaration in action on bond, § 174 p 355
Redelivery of property by receiptor, § 299
Conditions precedent,
Bond, §§ 145, 109
Claimant of property attached to establish right, § 352
Conversion of attached property, § 292, p. 475
Dispossession of claimant to property, § 398
Liability,
Bond of third party claimant, § 380
Obligor on bond for release of property, § 315, p 507
Publication of service in main action, § 489, p. 643
Receipt, § 302, p. 488
Wrongful attachment under,
Irregular or void process, § 506
Regular process, § 539
Conduct of sale of attached property, § 328
Confession of judgment,
Voluntary transfer within attachment law, § 45
Waiver of defects in affidavit by, § 141, p. 314
Confirmation, sale of attached property, § 332
Conflicting instructions, proceeding by third person claiming property attached, § 362, p. 577
Conformity,
Evidence to pleading in action for wrongful attachment under regular process, § 547
Judgment to verdict, proceeding by third person claiming property attached, § 363, p. 578
Confusing instructions, proceeding by third person claiming property attached, § 362, p. 577
Consent,
Attachment creditor to disposition of property, admissibility of evidence as to, § 69, p. 238
Change of venue, effect of, § 98
Defense in action for wrongful attachment under regular process, § 540
Effect of as respects attaching creditor's liability for seizure of property not debtor's, § 396
Judgment as ground for postponement of lien, § 277, p. 465
Sale of attached property pursuant to, § 322

Consent—Continued,
Waiver of right to move for dissolution by, § 437
Consideration,
Contract of receiptor creating responsibility, § 297
Failure of,
Defense to action on bond for release of property, § 317, p 520
Issuance in action to recover money paid on contract, § 12, p 200
Forthcoming or dissolution bond, § 306
Insertion of in bond for release of attachment, § 310
Pleading want of in action on bond to release property, § 317, p 524, n 80
Sufficiency of evidence as to want of in action on bond for release of property, § 317, p 528
Want of as defense to action on bond of third party claimant, § 381
Consignee, attachment of merchandise or proceeds in hands of, § 72, n. 7
Consolidation,
Causes, effect of as respects liability of sureties, § 165
Interventions in attachment proceeding, § 362, p 575
Conspiracy to borrow money on worthless security as fraud warranting attachment, § 63, p 230
Constable,
Direction of writ to, § 186
Levy of writ by, § 205
Return by, § 245
Constitutional provisions, § 4, pp. 190–193
Construction,
Action for wrongful attachment under regular process, § 552
Bond,
Liability of surety, § 163, p 345
Release of property, § 313, p 499
Return, § 252
Statutes relating to, § 4, p. 190
Amendment to affidavit, § 143, p. 318
Delivery bond, § 305
Constructive fraud in making conveyance as ground of attachment, § 36
Constructive notice, levy, § 220, p. 395
Constructive possession, necessity of in making levy, § 218, n. 20
Constructive presence of property as sufficient for jurisdictional purposes, § 92, p 262
Constructive service of summons in main action, effect of, § 489, p 616
Constructive trust, liability to attachment, § 82, n. 50
Contempt, interference with attached property, § 202, p. 474
Contemplated fraudulent disposal of property as ground for attachment, § 50
Contemplated removal of property as ground for attachment, § 55
Contemporaneous issuance of writ, § 181
Contents, publication of service in main action, § 489, p. 644
Contest of attachment, creditors of defendant, § 440
Contingent demands, availability of remedy in action to recover on, § 16
Contingent interest, liability to attachment, §§ 72, 80
Contingent lien, purpose of attachment to secure, § 2, p. 189
Contingent nature of lien, § 256
Contingent remainder, liability to attachment, § 78
Continuance,
Motion for dissolution, § 456
Release of sureties on forthcoming or dissolution bond by, § 316, p. 512
Continuous presence of attaching officer unnecessary to maintain lien, § 264
Contract,
Attachment in actions on claims arising out of, § 8, p 194
Convey, attachment not defeating specific performance, § 273
Effect of as respects liability on bond, § 163, p. 345
Effect on main action where writ is quashed by, § 471
Forbearance preventing attachment, § 20
Interest,
Disposable as by subject to attachment, § 72
Liability to attachment, § 80
Made or payable within state, limitation of remedy to, § 11, p. 198
Nature of liability on bond, § 163, p. 342
Receipt for attached property treated as, § 298
Relation, necessity for issuance of writ, § 11, p. 196
Release of,
Lien by, § 262, p 438, n. 4
Property by attaching officer pursuant to, § 204
Receiptor by, § 300
Sale of attached property, effect of, § 238
Setting forth facts showing existence in affidavit, § 121
Wrongfully rescinded, issuance in action to recover money paid on, § 12, p. 200
Contradiction,
Return by levying officer, § 252
Statements, admissibility of evidence as to on question of fraudulent intent, § 69, p. 237
Contributions, sureties on bonds, § 164
Control of property, assumption of by officer in case of levy on personalty, § 221
Controverting pleadings, motion to vacate or discharge attachment, § 454
Controverting truth of matters contained in affidavit, § 109
Conversion,
Action for negativing existence of fraud warranting attachment, § 63, p 231
Damages recoverable in case of wrongful attachment resulting in, § 559, p. 681
Issuance in action to recover money or property converted, § 12, p. 199
Liability,
Claimant securing release under third party claim, § 366
Surety on release bond, § 315, p. 506
Maintenance of action for by attaching officer, § 292, p. 473, n. 95

Conversion—Continued,
Bond in original action, § 167
Burden of proof on in action on bond, § 175, p. 359
Damages for wrongful attachment, § 536
Enforcement by attachment, § 20
Expense of as element of damage in action on bond, § 179, p 374
Intervention by third person claiming property attached, § 357, p 363
Showing in respect to in affidavit, § 125, p. 203
Conveyance of property before,
Levy, priority, § 273
Sale under short order, necessity, § 324
Copy,
Affidavit, filing of as sufficient, § 135
Writ, failure to serve as ground for dissolution, § 423, p. 611
Copyright,
Infringement, availability of remedy in suit for, § 18, n 59
Property, liability to attachment, § 74, p. 250
Coroner, service of attachment by, § 205
Corporate officer,
Affidavit on personal knowledge of, § 114
Competent surety on corporation's attachment bond, § 153
Corporations,
Attachment bond, duty of ascertaining authority of agent executing, § 154
Liability for wrongful attachment, § 533
Motion to vacate attachment because of interest in property, § 446
Seal, necessity of on bond, § 155
Signature of on bond as sufficient, § 155
Stock,
Levy on, § 224
Liability to attachment, § 79
Situs of for purpose of attachment, § 92, p. 263
Costs,
Allowance for in determining amount of property attached, § 235
Award of against sureties on bond for release of attached property, § 317, p 531
Charges for keeping and preserving attached property, § 293, p 480
Consideration in determining amount of bond, § 149, p 331
Element of damage in action on bond, § 179, p 371
Intervention proceedings, § 365
Judgment for as lien on attached property, § 497, p 656
Liability,
Bond, § 163, p 344
Dissolution of attachment, § 479
Proceeding to determine priorities, § 279
Recovery of in action on bond of third party claimant, § 392
Wrongful attachment under regular process, § 565
Cotenant, share of crop not subject to attachment by creditor of other, § 90
Counsel fees. Attorney's fees, ante
Counseling officer's levy, effect of as respects attaching creditor's liability for seizure of another's property, § 396
Counterclaim,
Based on malicious attachment, § 516, n. 57
Prima facie evidence of in action for damages for dispossession of claimant to property seized, § 403
Receiptor or bailee of attached property, § 209
Recovery for in action on bond, § 179, p. 368
Setting forth evidence supporting allegations of in affidavit, § 121, n. 84
Counties,
Absence from as ground for attachment, § 26
Bond on attachment in favor of, § 145
Judge, authority to issue writ, § 100, n. 11
Liability in damages for wrongful attachment, § 533
Orders, liability to attachment, § 87
Residence, venue of proceedings, § 98
Warrants, seizable as res in state where found, § 92, p 262
Coupons, issuance in actions on, § 11, p. 196
Course of administration, property of decedent in as subject to attachment, § 88, n 93
Course of business, admissibility of evidence as to as bearing on question of intent, § 69, p. 235, n. 60
Course of manufacture, liability to attachment of property in, § 74, p 250
Court,
Approval of redelivery or dissolution bond, § 312
Ex mero motu, dissolution or vacation of attachment by, § 431
Return must be made, § 246
Court room door, effect of failure to affix writ of attachment on, § 488, n 84
Creation of lien, §§ 254, 255
Credible grounds, belief of affiant to be based on, § 115
Credibility of witnesses, jury question in proceeding by third person claiming property attached, § 362, p 576
Credit,
Admissibility of evidence as to injury to,
Action on bond, § 175, p 361
Question of damages in action for wrongful attachment, § 550
Arrangement as creating indebtedness subject to attachment, § 86
Injury to as element of damage,
Action on bond, § 179, p 370
Dispossession of claimant to property seized, § 405, p 604
Proceeding to try right to property attached, § 366
Wrongful attachment under regular process, § 550, p. 683
Creditor,
Defendant, right to move for dissolution, § 440
Release of lien by act of, § 262, pp 438–441
Creditors, right to process ordinarily limited to, § 20
Credits, showing in respect to in affidavit, § 125, p. 203
Criminal act, damages resulting from as ground for attachment, § 58
Criminal liability,
Availability of remedy in action to recover for, § 13
Flight to escape as justifying attachment, § 24

Crops,
Damages,
Inability to raise, recovery in action on bond, § 170, p 367
Injuries from inability to gather because of wrongful attachment, § 559, p. 681, n 20
Levy on without taking actual possession, § 223, p. 402
Liability to attachment, § 74, p. 248
Cross-action warranting attachment against property of codefendant, § 22
Cross-demand, damages for wrongful attachment, § 536, n 26
Cross-petition, enforcement by attachment, § 20
Cumbersome property, levy on, § 223, p. 401, n. 90
Cumulative remedies,
Forthcoming bond, § 317, p 519
Intervention by third party claimants, § 339
Curator ad hoc, service on nonresident by citation through, § 488, n. 79
Curing defects in affidavit, § 141, p 312
Curtesy estate, liability to attachment, § 78
Custodian, delivery of property to by attaching officer, § 284
Transferee, proceeding against by attaching officer to enforce right to possession, § 292, p. 475
Custody of law,
Attachment putting property under, § 239
Property in as subject to attachment, § 88
Custody of property, §§ 280–317, pp. 468–531
Customs duties, availability in action to recover, § 12, p. 199
Damages,
Averments as to in action,
Bond, § 174, p 356
Wrongful attachment under regular process, § 545
Bond, action, § 179, pp. 366–376
Bond of third person claiming property attached, § 392
Dispossession of third persons claiming property, §§ 393–405, pp 594–605
Dissolution of attachment, § 479
Evidence as to in action,
Bond, § 175, pp 361, 363
Wrongful attachment under regular process, § 550
Exemplary Damages, post
Instruction as to in action for wrongful attachment under regular process, § 552
Jury question in action on bond, § 176
Levy, recovery for wrongful attachment as dependent on, § 520
Nominal Damages, post
Proceeding to try right to attached property, § 366
Receipt, action on, § 302, p. 490
Right to recover authorizing claimant of property to intervene, § 343
Statements in respect to in affidavit, § 125, p. 280
Violation of possession of attaching officer, § 202, p. 476
Wrongful attachment under,
Irregular or void process, § 515
Regular process, §§ 555–564, pp 680–687
Danger of loss,
Allegation of in affidavit, § 128
Amendment of affidavit to show, § 143, p. 321
Date,
Affidavit, § 108
Bond, § 147
Correction of affidavit in respect to by amendment, § 143, p. 322
Origin, lien, § 255
Summons, inconsistency as ground for dissolution, § 423, p 611
Writ to show, § 195
Death,
Debtor, defense in action by attaching officer against receiptor, § 302, p. 489
Defendant as respects liability of sureties on forthcoming or dissolution bond, § 316, p. 515
Release of lien by, § 266
Debt,
Employment in action for, § 10
Levy on, § 223, p. 402
Levy operating as satisfaction of, § 241
Liability to attachment, § 86
Owed by third person, recovery of amount regardless of payment to judgment debtor, § 500
Presence within jurisdiction of court making attachment, § 92, p. 263
Debtor,
Attaching own property for benefit of creditors, § 20
Redelivery of property to by receiptor, § 299
Relationship, necessity of, § 21
Release of lien by act of, § 263
Right to move for dissolution, § 485
Deceased person,
Bond for release of property running to, § 308
Nonresident, attachment of property left by, § 59
Validity of attachment issued against, § 21
Deceit, availability in action in, § 13, n. 12
Declaration,
Accompanying affidavit, necessity, § 105
Bond, action on, § 174, p. 353
Release of property, § 317, p 522
Damages for dispossession of claimant to property seized, § 402
Filing of as commencement of action as respects issuance of writ, § 181
Premises, levy on realty by, § 229
Proceeding in main action, § 493, p. 648
Wrongful attachment under regular process, § 545
Declarations as evidence,
Intention of removing from jurisdiction, § 69, p 236
Proceeding by third person claiming property attached, § 360, p. 570
Decline in market value, loss due to as element of damage for dispossession of claimant to property seized, § 405, p 603, n. 22.
Decrease in,
Business as element of damage for dispossession of claimant to property seized, § 405, p. 604
Debtor's assets not justifying conclusion of making fraudulent conveyance, § 69, p. 241
Decree, reference to in attachment for amount due, § 121, n. 82

Deduction of expenses of preserving attached property from proceeds of sale, § 293, p 481
De facto officer, oath administered by, § 107
Default judgment,
Claimant intervening and failing to appear and join issue, § 363, p. 580
Time of entry in main action, § 497, p 655
Wrongful attachment under regular process, § 553
Default on mortgage, effect of as respects right to attachment, § 73, n. 21
Defects,
Affidavit, § 141, p. 311
Postponement of lien, § 277, p 465
Bond, defense in action on, § 170, p 348
Levy § 243
Proceedings, ground for dissolution, § 423, pp 600–612
Publication of service in main action, effect of, § 480, p 646
Return, § 249
Writ, effect of, § 197
Defendant,
Action on bond, § 173
Attachment, right to move for dissolution, § 435
Identification in affidavit for attachment, § 120
Notice of levy to, § 220, p 396
Defenses,
Bond, action on, § 170, pp 348–351
Release of attached property, § 317, p. 520
Third party claimant, § 381
Dispossession of claimant to property seized, § 400
Holder of lien on attached property, § 441
Proceeding by claimant of property attached to establish right, § 353
Receipt, action on, § 302, p. 489
Violation of possession by attaching officer, § 292, p. 475
Wrongful attachment under,
Irregular or void process, § 507
Regular process, § 540
Definition, § 1
Delay,
After making affidavit, effect of, § 137
Amendment of return as affected by, § 250
Between affidavit and issuance of writ, effect of, § 181
Discharging sureties on forthcoming or dissolution bond, § 316, p 512
Issuing execution, release of liability on forthcoming or dissolution bond by, § 316, p. 515
Loss of lien by, § 262, p. 438
Waiver of right to move for dissolution by, § 437
Delegation of authority to issue writ, § 101
Delivery,
Bond,
Allegation as to in action on bond for release of property, § 317, p. 523
Release of property, § 310
Sufficiency of evidence as to in action on bond for release of property, § 317, p. 527
Failure or refusal to pay on authorizing attachment, § 61
Officer as issuance of summons, § 181
Writ, time of as respects priority between successive attachments, § 277, p. 468
Delivery bond,
Effect of dissolution of attachment on, § 475
Proper office as sufficient execution therein, § 154
Property delivered to claimant on execution of as subject to attachment, § 88
Demand,
Account for amount due third person claiming property, § 346
Arising ex delicto, issuance in actions on, § 13
Authorizing attachment, §§ 8–19, pp 194–208
Claimant to property seized, § 345, pp. 551–554
Condition precedent to action,
Bond, § 169
Conversion of attached property, § 202, p 475
Dispossession of claimant to property, § 398
Receipt, § 302, p. 488
Wrongful attachment under,
Irregular or void process, § 506
Regular process, § 539
Condition precedent to liability of obligor on bond for release of property, § 315, p. 510
Damages, averment as to in action on bond, § 174, p 356
Duty of receiptor to redeliver property on, § 299
Otherwise secured, availability of remedy in actions on, § 17
Redelivery, allegation as to in action on bond for release of attached property, § 317, p. 523
Refusal, averments as to in complaint or declaration in main action, § 493, p 649
De minimis non curat lex, application of doctrine in determining sufficiency of bond, § 149, p. 331
Demurrer,
Interplea, determination of in proceeding by third person claiming property attached, § 357, p. 562
Objection to,
Affidavit, § 141, p. 315
Attachment, § 430
Defect of parties in action on bond, § 173
Sustaining of to complaint authorizing discharge of attachment, § 417, n. 67
Denial of claim, necessity of in proceeding by third person claiming property attached, § 357, p. 562
Departure, mere showing of as insufficient to establish concealment of property, § 69, p. 242
Departure from state,
Allegations as to in affidavit, § 126, p. 297
Ground for attachment, § 24
Departure from statute, effect of, § 4, p. 191
Deposit,
Amount of judgment, release of lien by, § 268, p. 445
Effect of dissolution of attachment on, § 475
Lieu of bond, § 162
Third party claimant, § 367
Vacation of attachment conditional on making of, § 457
Deposition,
Admissibility in proceeding by third person claiming property attached, § 360, p. 570, n. 22.
Costs of procuring as element of damage in action on bond, § 179, p. 372, n. 5
Motion to show cause why attachment should not be dissolved supported by, § 433

Deposition—Continued,
Officer levying attachment, admissibility in action on bond, § 175, p 359
Depository bonds, issuance in actions on, § 11, p 197
Depreciation,
Admissibility of evidence as to in action on bond for release of property, § 317, p 527
Allegations in respect to in action on redelivery bond, § 317, p 524
Damages recoverable for wrongful attachment resulting in, § 550, p 682
Jury question in proceeding by third person claiming property attached, § 362, p. 576
Recovery for in action on bond, § 179, p. 369; § 317, p. 531
Sale of property liable to, § 319
Special pleading required to recover for in action on bond, § 174, p. 356
Deputies,
Attachment of property held under process by principal, § 237
Clerk, issuance of writ by, § 101
Constable, levy of writ by, § 205
Release of receiptor to, § 300
Return by, § 245
Sheriff, levy of writ by, § 205
Description,
Cause in affidavit, § 123
Parties,
Affidavit, § 120
Writ, § 187
Proceedings in bond, necessity, § 147
Property,
Affidavit, § 130
Amendment of,
Affidavit in respect to, § 143, p. 322
Return as to, § 250, n. 97
Application for order for publication of service, § 480, p 641
Attached, return, § 248, p. 420
Complaint,
Action on bond, § 174, p. 354
Wrongful attachment under regular process, § 545
Copy of return placed on record, § 251
Motion to dissolve or vacate attachment, § 451
Notice or demand by third party claimant, § 345, p 553
Order for sale, § 497, p 655
Pleading in proceeding by third person claiming property attached, § 357, p. 562
Removed, necessity of setting out in affidavit, § 126, p. 302
Service on occupant, § 228
Verdict in main action, § 495, n. 22
Writ, § 194
Destruction of property,
Damages recoverable in case of wrongful attachment resulting in, § 550, p. 681
Discharge of surety on bond for release of property by, § 316, p. 511
Interpleader by third party claimant, § 339
Liability of attaching officer for, § 281
Liability on bond of third person claiming property, §§ 374, 375
Destruction of property—Continued,
Papers, discharge of lien by, § 262, p. 438
Recovery for in action on bond, § 179, p 368
Detention of property on dissolution, liability for, § 472
Deterioration in value, recovery for in action on bond of third party claimant, § 392
Determination,
Insufficiency of affidavit, effect of, § 142
Motion to dissolve attachment, § 456
Plea in abatement, § 468
Priorities, proceedings for, § 279
Deviations in bond from amount required by statute, effect of, § 149, p. 331
Device in bringing property within jurisdiction, effect of, § 92, p. 202
Devisees,
Interest of as subject to attachment, § 85
Liability to attachment, § 21
Diligence,
Duty to execute writ with, § 207
Effect of as respects priority between successive attachments, § 277, p. 463
Direct payment of money,
Availability in action on implied contract for, § 12, p. 199
Contract providing for, § 11, p. 197
Direction,
Levy, effect of as respects attaching creditor's liability for seizure of another's than debtor's property, § 396
Officer not to levy as ground for postponement of lien, § 277, p. 466
Parties, release of property by, § 294
Sale of property, judgment in main action, § 497, p 654
Writ, § 186
Direction of verdict,
Action on bond, § 176
Third party claimant, § 389
Proceeding,
Main action, § 495
Third person claiming property attached, § 362, p. 575, n. 2
Disability,
Exemption of persons under, § 21
Principal, affidavit by attorney or agent in case of, § 106
Disbursements, proceedings to try right to property levied on, § 365
Discharge,
Attachment,
Execution of bond by third party claimant, § 372
Motion for as proper remedy of third person claiming property, § 349
Sale of property after, § 321
Lien, §§ 261–270, pp. 437–447
Receiptor, § 300
Sureties on bond, § 165
Release of property, § 316, pp. 510–518
Third person claiming property, § 376
Disjunctive allegations, affidavit, § 126, p. 296
Disclosure,
Discharge of surety on bond for release of property by failure to make, § 316, p. 515
Power to compel defendant to make, § 500

Discontinuance,
Attachment, custody of property pending notice of, § 280
Dissolution of attachment by, § 268, p. 444
Part of defendants, effect of as respects liability of sureties on bond for release of property, § 316, p 514
Discretion,
Allowance of second motion to dissolve attachment, § 459
Amendment of complaint or declaration in main action, § 493, p 650, n. 83
Amount of bond, § 149, p. 330
Conduct of sale of attached property, § 328
Dismissal of main action on dissolution of attachment, § 471
Issuance of writ, § 100
Manner of taking evidence at hearing on motion to dissolve, § 456
Reference of motion to dissolve, § 456
Release of attached property on security, § 303
Respect to permitting intervention by third party claimants, § 339
Sale of attached property, § 319
Time for filing motion to quash attachment, § 449, n. 54
Disjunctive allegations in affidavit as ground for quashal, § 423, p. 611, n. 22
Dismissal,
Discharge of sureties, § 165
Dissolution or forthcoming bond by, § 316, p 516
Dissolution of attachment by, § 268, p. 444
Failure to give notice in main action as ground for, § 483
Liability,
Bond, § 163, p. 344
Wrongful attachment in case of, § 517
Motion for not precluded by giving of forthcoming bond, § 313, p. 501
Warrant, failure to give additional security ordered, § 161
Disposition of property or proceeds, § 335
Fraudulent as ground of attachment, § 35
Hinder or delay creditors, burden of proof, § 69, p 234
Disqualification of officer,
Defense in action on receipt, § 302, p. 489
Granting attachment, § 103
Levying attachment, interest in case, § 206
Dissolution, §§ 406–480, pp. 605–639
Averment as to in declaration in action for wrongful attachment under regular process, § 545
Bond,
Lien of attachment dissolved by, § 313, p. 500
Release of property on, § 305
Creditors of defendant, right to move for, § 440
Disposition of property or proceeds in case of, § 335
Effect of as respects liability for wrongful attachment, § 517
Expenses of procuring as element of damage in action on bond, § 170, p. 372
Forthcoming bond not accomplishing, § 313, p. 500
Dissolution—Continued,
Interpleader's motion, § 362, p 575
Intervention for sole purpose of moving for, § 340
Liability on bond, § 163, p 343
Original writ preventing issue of alias, § 200
Persons interested in property seized, § 446
Plaintiff in attachment, § 445
Precluding investigation as to rightfulness of attachment in action on bond, § 170, p 349
Recovery for wrongful attachment as dependent on, § 523
Release of receiptor by, § 300
Right of action for wrongful attachment accruing on, § 524
Right of holder of lien on property attached, § 441
Sale of property after, § 321
Sureties on replevy bond, § 443
Distinct grounds, allegation of in affidavit, § 126, p. 295
Distributees, interest of as subject to attachment, § 84
Distribution of,
Fund, motion for to determine priorities between attaching creditors, § 279
Proceeds of property sold in attachment, § 335
Dividends, lien extending to, § 258, p. 434
Docket,
Entry of issuance of writ, failure to make, § 183
Judgment in attachment proceeding, § 497, p. 657, n. 76
Necessity of inserting order on, § 102
Recording of attachment, § 251
Domestic corporation, stock subject to attachment in state of domicile, § 92, p. 263
Domicile,
Distinguished from residence, § 32
Stock of domestic corporation subject to attachment in state of, § 92, p. 263
Dominion, assumption of in case of levy on personalty, § 221
Double damages, wrongful attachment of property under regular process, § 562
Double liability of bank stockholder, issuance in action for, § 12, p 200, n. 88
Doubt, bond for release of property, construction, § 313, p 499
Dower interest, liability to attachment, § 78
Drilling equipment, inclusion in attachment lien on personal property of lessee of oil and gas lease, § 258, p. 434
Dual nature of proceeding, § 2, p 189
Due date, showing in respect to in affidavit, § 125, p. 292
Duplicate affidavit, cure of improper verification by filing of, § 143, p. 323, n. 64
Duration of,
Authority of officer levying writ, § 204
Concealment, immateriality, § 27
Lien, § 260
Duress, payment under as element of damage for dispossession of claimant to property seized, § 405, p. 603, n. 19
Duties,
Auditors or trustees appointed to administer estate, § 337

Duties—Continued,
Issue writ, § 100
Liability to attachment of imported goods held for payment of, § 74, p. 250
Make levy, §§ 207–209
Dwelling house, demand on receiptor at for return of attached property, § 302, p. 488
Earnings, execution against pursuant to judgment on constructive service and attachment of personalty, § 490, n. 92
Effective date of supplemental affidavit, § 143, p 325
Election of remedies,
Bond, action on in case of fellow attachment, § 163, p 345
Redelivery bond, § 317, p 519
Third persons claiming property attached, § 350
Wrongful attachment, § 538
Elisors, levy of attachment by, § 205
Embarrassment, injuries resulting from as element of damage in action on bond, § 179, p. 371
Embezzlement,
Fraudulently incurring liability as basis for attachment, § 63, p. 230, n 83
Issuance of in action sounding in contract for money embezzled, § 12, p 199
Employment, setting forth facts in respect to in affidavit for attachment suit to recover for services, § 121, n. 84
Encumbered property, liability to attachment, § 73
Engines of railroad corporation, liability to attachment, § 74, p 249
Entering buildings, authority of levying officer, § 216
Enticement out of state not warranting attachment, § 26
Entitling,
Affidavit, § 110
Amendment as to, § 143, p 318
Motion to quash or vacate attachment, § 451
Entry importing notice of levy, § 220, p 305, n 37
Entryman, interest of as subject to attachment, § 78
Equitable actions,
Attachment in, § 8, p 194
Construction of statute providing for attachment in, § 4, p. 192, n 66
Equitable interest in land, liability to attachment, § 81
Equitable mortgage, priority of, § 272, p. 452, n. 19, § 276 p. 460
Equitable relief,
Against attachment, § 502
Aid of attachment, § 501
Equity,
Jurisdiction of proceedings in, § 97
Remedy in against surety on bond for release of property, § 317, p. 519
Resort to,
Purpose of determining priorities, § 279
Third person claiming property attached, § 349
Equity of redemption,
Levy on, § 226
Liability to attachment, §§ 73, 77
Erasures, bond, effect of, § 147
Escrow, placing pledged stock certificates in as ground for attachment, § 64
Essential allegations, affidavit, § 117
Estoppel,
Admission by attaching creditor in answer to petition in intervention, § 357, p 565
Assertion of claim for damages for wrongful attachment, § 528
Claimant of property attached to assert title, § 342
Creditor to claim title, § 239
Dissolution,
Attachment, § 437
Bond as, § 313, p. 502
Election of remedies by claimant to property attached, § 350
Judgment in favor of intervener claiming property attached, § 363, p 581
Levy made good by, § 243
Objections to confirmation of sale, § 332
Receiptor of attached property, § 208
Recitals in bond for release of attached property, § 317, p 521
Setting up variance between affidavit and pleading, § 139, n 94
Evidence,
Attaching officer's action for violation of possession, § 292, p. 475
Authority, agent executing bond, § 154
Bond, action on § 174, p. 357; § 175, pp. 358–364
Release of property, § 317, p 526
Third party claimant, §§ 385–387
Burden of proof, ante
Damages for dispossession of claimant to property seized, §§ 402, 403
Debt, production of at time of presenting affidavit, § 136
Determination of priorities, proceeding for, § 279
Forthcoming or dissolution bond, action on, § 317, pp 525, 526
Grounds, § 65, pp 234–243
Intervention by third person claiming property attached, § 357, p 566
Main action, proceedings in, § 494
Motion to dissolve attachment, § 455, pp. 624–627
Plea in abatement, § 466
Publication of service in main action, § 489, p. 645
Receipt, action on, § 302, p 490
Return as, § 252
Service of summons in main action, § 487
Third person claiming property attached, proceedings by, § 360, pp 569, 570
Wrongful attachment under,
Irregular or void process, § 512
Regular process, §§ 547–551, pp 676–679
Evidentiary facts, setting forth in affidavit for attachment, § 121
Ex delicto, issuance in demands arising on, § 13
Ex parte affidavits, sufficiency on motion to dissolve, § 455, p 626, n. 51
Ex parte attachment, hearing on application to remove, § 456, n. 67
Examination,
Books and papers, attaching officer, § 201
Depository failing to furnish certificate, § 218
Plaintiff as prerequisite to issuance of writ, § 134
Exceptions, report of,
Auditor appointed to administer estate, § 338
Sale of attached property, § 332
Excessive claim, ground for dissolution, § 419
Excessive judgment, effect of, § 496, n. 82

Excessive levy,
Defense to action by officer on receipt, § 302, p. 489
Effect of, § 235
Ground for dissolution, § 422
Liability in damages for, § 513
Execution,
Allegations as to issuance and return unsatisfied in action on bond for release of property, § 317, p 523
Bond, § 154
Allegation as to in action on bond for release of property, § 317, p. 523
Averment as to in action on bond, § 174, p 354
Sufficiency of evidence as to in action on bond, § 175, p 362
Third party claimant, § 368
Distinguished, § 1
Funds collected by officer on as subject to attachment, § 88
Issuance and return as condition precedent to liability on bond for release of property, § 315, p. 509
Judgment in proceeding by third person claiming property attached, § 363, p. 581
Priority of lien, § 272, p. 451
Proceedings in main action, § 409
Release of attachment by failure to order, § 268, p. 446
Sale,
Loss of lien by failure to complete, § 268, p 444
Purchaser at as having attachable interest during redemption period, § 78
Executive officer, execution of writ by, § 204
Executor, liability to attachment, § 21
Executory contract, levy on purchaser's interest in realty under, § 233, n. 59
Exemplary damages,
Allegation of want of probable cause in action on bond where such damages are sought, § 174, p. 355
Amount of in action for wrongful attachment under regular process, § 502
Bankrupt's right of recovery for wrongful attachment, § 529
Bond, action, § 179, p. 366
Dispossession of third person claiming property seized, § 405, p. 605
Evidence of malice required to recover for in action for dispossession of claimant to property seized, § 403
Wrongful attachment under regular process, § 558
Exempt property,
Decree adjudging as discharge of replevy bond, § 316, p. 517
Defense in action on receipt, § 302, p. 489
Description of in affidavit, § 130
Levy on as ground for dissolution, § 427
Removal from state without liability to attachment, § 51
Transactions relating to as ground for attachment, § 49
Exemption,
Negativing in affidavit, § 130
Exhaustion of,
Indemnity before action on bond, § 169
Legal remedies, showing of in affidavit, § 126, p. 295
Personal property before levy on real estate, § 76
Existence of,
Grounds, showing in respect to in affidavit, § 126, p. 295
Lien, § 254
Suit, allegation of in affidavit, § 124
Expense,
Keeping, justifying sale of attached property, § 319
Litigation,
Bond, action on, § 179, pp. 367, 372
Dispossession of claimant to property seized, § 405, pp 602–605
Proceedings to try right to property, § 365
Wrongful attachment under regular process, § 560
Special pleading as damages in action on bond, § 174, p 356
Taking and keeping attached property, enforcement of liability, § 293, p. 479
Expiration,
Officer's term, abatement of attachment on, § 270
Term, amendment of return by attaching officer after, § 250
Explicit affidavit required, § 112
Express contracts, issuance in actions on, § 11, pp. 196–199
Express trust, lien attaching to, § 258, p 435, n. 68
Extension,
Lien, § 260
Time discharging sureties on forthcoming or dissolution bond, § 316, p. 512
Extent of liens, §§ 257–259, pp. 433–436
Extraordinary nature of remedy, § 2, p. 187
Factor, interest of secured by lien, § 83
Facts of indebtedness, setting out in affidavit, § 125, p 290
False representations,
Negligence in failing to discover truth not preventing attachment, § 70
Obtaining property on credit by as fraud warranting attachment, § 63, p. 231
False statement,
Admissibility of evidence as to on question of fraudulent intent, § 69, p. 237
Affidavit, show cause rule or motion setting up, § 433, n 91
Pleadings, averment as to in action for wrongful attachment under regular process, § 545, n 98
Security, vacation of attachment for, § 420, n 81
False swearing of surety as ground for vacating, § 423, p 611, n. 23
Family, place of residence of prima facie head, § 32
Favorable judgment, discharging sureties on bond for release of property, § 316, p. 516
Federal court,
Amendment of affidavit in, § 143, p. 318
Issuance of writ of attachment in cause of action arising under state statute, § 18
Feeding live stock, compensation of custodian, § 293, p. 476

Feelings, injury to as element of damage,
Action on bond, § 179, p 371
Wrongful attachment under regular process, § 559, p. 683
Fees,
Attorney's fees, ante
Levying officer, payment of as condition to receiving back property on dissolution of attachment, § 472
Females, exemption from process, § 21
Fiduciary capacity,
Act committed in as ground for issuance of writ, § 57
Exemption of persons in, § 21
Intervener claiming property in to set out facts, § 357, p 562, n 36
Fieri facias,
Remedy by on bond for release of property, § 317, p. 519
Waiver of lien by taking out, § 268, p. 446, n. 42
Filing,
Affidavit, § 135
Bond, §§ 145, 154
Third party claimant, § 371
Copy of writ in case of levy on realty, § 232
Notice of claim of third person to property attached, § 345, p. 554
Order on motion for dissolution of attachment, § 457
Plea in abatement for dissolution of attachment, § 461
Recitals as to in return, § 248, p 420
Filling blanks, bond for release of property, § 310
Final determination,
Allegation as to in declaration for wrongful attachment under regular process, § 545
Dissolution of attachment, § 470
Accrual of right of action for wrongful attachment, § 522
Final judgment,
Condition precedent to liability of obligor on bond for release of property, § 315, p. 507
Main action, condition precedent to right to recover damages for wrongful attachment, § 525
Financial condition,
Admissibility of evidence as to, § 69, p 235, n. 60
Statements in respect to on question of fraud in contracting debt, § 69, p. 238
False representations by debtor as to warranting attachment, § 63, p. 231
Inability to replevy property seized, admissibility of evidence as to in action on bond, § 175, p. 361
Sureties, § 153
Findings,
Bond, action on, § 176
Hearing on motion to dissolve, § 456
Main action, § 405
Third person claiming property attached, § 362, p 577
Trial of issue raised by plea in abatement, § 468
Fire loss, liability of attaching officer for, § 281
Firm name, signature,
Bond, § 155
Surety on third party claimant's bond, § 368
Firm property, attachment for firm debt as prior to attachment for personal debt of member, § 277, p. 463
Fiscal agent, liability to attachment of funds deposited with, § 82, n. 59
Fixed indebtedness, availability of remedy in action to recover, § 16
Fixtures,
Levy on, § 223, p 400, n. 90
Liability to attachment, § 74, p 248
Flight to escape criminal prosecution or arrest justifying attachment, § 24
Force, use of by levying officer, § 215
Forced premature sale of property because of attachment, recovery of damage for in action on bond, § 179, p 360
Foreclosure of mortgage, attachment in proceeding for, § 8, p. 195
Foreign,
Assignor of nonresident defendant, intervention by, § 341
County, property not subject to attachment in, § 98
Country, service in as basis for proceeding in main action by publication, § 489, p. 643, n. 88
Domicile, actual residents with not subject to attachment as nonresident, § 32
Language, use of in affidavit, § 112
Ship within state, liability to attachment, § 74, p. 249
Foreign attachment,
Burden of showing nonresidence, § 404, n. 5
Defined, § 1
Limitation to nonresidents, § 21
Quashal on proof of facts not disclosed in record, § 416
Statute, purpose of, § 2, p. 188
Foreign corporation,
Bond on attachment against, § 145
Situs of stock for purposes of attachment, § 92, p. 263
Stock, liability to attachment, § 79
Foreign judgment,
Against resident as indebtedness founded in court's jurisdiction subject to attachment, § 92, p. 264
Issuance of attachment on record of, § 136
Foreigners,
Liability to attachment, § 21
Right to process, § 20
Forfeiture of lien by failure to file indemnity bond on claim of third person to property attached, § 347
Forgery, defense to action on bond for release of property, § 317, p. 520
Form of,
Affidavit, § 111
Amendment of affidavit as to matters of, § 143, p. 317
Bond, § 147
Release of attachment, § 310
Third party claimant, § 368
Inventory of attached property, § 236
Judgment in main action, § 497, pp. 654, 655
Notice,
Demand of third party claimant, § 345, p. 552

Form of—Continued,
Notice—Continued,
Levy, § 220, p. 395
Order for attachment, § 102
Receipt for attached property, § 207
Enforcement of liability on bond, § 167
Forthcoming, release or replevy bond, § 317, p 518
Receipt, § 302, p. 487
Violation of possession, § 292, p. 474
Return, § 248, pp. 418–422
Writ, § 184
Remedy,
Formal defects,
Amendment of affidavit in respect to, § 143, p. 316
Return, waiver of, § 249
Formal requisites,
Affidavit, § 111
Amendment of bond as to, § 159
Forthcoming bond,
Effect of,
Subsequent attachment creditor, § 367
Vacation of attachment on, § 475
Estoppel of third person in possession to assert title to property by reason of giving, § 342
Giving of as validating void levy, § 243
Property delivered to claimant on execution of as subject to attachment, § 88
Release of property on, § 305
Sale of property delivered under, § 324
Foundation of belief in case of affidavit on information and belief, § 115
Fraud,
Availability in action to recover for injury in consequence of, § 13
Bringing property within jurisdiction, effect of, § 92, p 262
Burden of proof as to in,
Action on bond for release of property, § 317, p 526
Proceeding by third person claiming property attached, § 359, p 568
Collateral attack on affidavit for, § 110
Contracting debt, burden of proof, § 69, p. 234
Defense,
Action on,
Bond for release of property, § 317, p. 521
Receipt for attached goods, § 302, p. 489
Proceeding by claimant of property attached to establish right, § 353
Discharge of surety on bond for release of property by, § 316, p. 515
Evidence as to in,
Action on bond for release of property, § 317, p 527
Proceeding by third person claiming property attached, § 360, p 571
Sufficiency of evidence in proceedings by third persons claiming property attached, § 361, p. 572, n. 58
Ground for,
Postponement of lien, § 277, p. 466
Rehearing of motion to dissolve attachment, § 458
Vacating attachment, § 424
Fraud—Continued,
Incurring liability,
Admissibility of evidence on question of, § 69, p 238
Ground for attachment, § 63, pp 230–232
Showing as to in affidavit, § 126, p 299
Sufficiency of evidence as to, § 69, p 243
Intent,
Amendment of affidavit in respect to, § 143, p 321
Burden of proof, § 69, p 234
Evidence on issue of, § 69, pp. 237, 240
Removal of property with in order to warrant attachment, § 52
Setting forth facts in respect to in affidavit, § 126, p 301
Issuance on demand sounding in, § 13
Jury question in proceeding by third person claiming property attached, § 362, p. 576
Levy affected by, § 242
Pleading as defense to action on bond for release of property, § 317, p. 524, n. 80
Removal, disposition or concealment of property, setting forth facts in respect to in affidavit, § 126, p. 300
Surety as ground for vacating, § 423, p. 611, n. 23
Fraudulent transfers,
Assignment for benefit of creditors, acceptance of benefits under as waiver, as ground for attachment, § 70
Attachment in proceeding to set aside, § 8, p. 196
Defense in action for,
Dispossession of claimant to property seized, § 400
Wrongful attachment under regular process, § 540
Diligence in setting aside as respects priority between successive attachments, § 277, p. 462
Equitable relief against, § 501
Evidence on question of, § 69, pp. 236, 240
Grantee, priority of lien of attaching creditor of, § 274
Ground for attachment, §§ 35–50, pp. 219–225
Not defeating lien of attachment, § 275
Freight cars, liability to attachment, § 74, p. 249
Fruitless demand unnecessary before action on bond for release of property, § 315, p. 510
Fruitless recovery, possibility of as ground for attachment, § 23, n. 15
Further security, offering to give to creditor as ground for dissolution of attachment, § 428
Future success of business, statements as to not fraud warranting attachment, § 63, p. 231
Gambling, issuance in action,
Recover money lost at, § 13
Sounding in contract, § 12, p. 199
Garagekeeper's lien, priority, § 272, p. 450
Garnishment,
Distinguished, § 1
Garnishee,
Failure to serve as ground for dissolution, § 423, p 609, n 98
Right to plead or object to attachment, § 444

Garnishment—Continued,
Issuance in action for wrongful use of process of, § 12, p 199
Lien, priority, § 272, p. 451
General appearance,
Necessity of on motion to dissolve attachment, § 448
Personal judgment authorized after in main action, § 491
Waiver of,
Defects in bond or undertaking by, § 160
Right to move for vacation of attachment, § 437, n 19
General creditors, intervention by, § 341
General denial, issues raised by in action on forthcoming or release bond, § 317, p. 525
General issue,
Matters provable under,
Action for damages for dispossession of claimant to property seized, § 402
Plea of in action on bond, § 174, p. 358
Plea of in action for wrongful attachment under regular process, § 547
General or special, division of attachment into, § 1
General venue statute, application to action commenced by attachment, § 98
Giving up business as sufficient proof of removal of property, § 69, p. 242, n. 85
Good faith,
Defense in action,
Bond, § 170, p. 350
Wrongful attachment under regular process, § 540
Liability for wrongful attachment as affected by, § 516
Goods and chattels subject to attachment, §§ 71, 213
In transit, § 74, p 251
Not belonging to attachment debtor, levy of attachment on, § 72
Governing law, § 3
Priority of lien, § 272, p 449
Government operation of railroad, effect of as respects right to attach goods or property of railroad, § 74, p. 251, n. 89
Grammatical mistakes in bond, effect of, § 147, n. 47
Grantees,
Intervention by, § 341
Right to move for dissolution, § 438
Gratuitous transfer warranting inference of fraudulent intent, § 69, p. 242
Gross inadequacy of purchase price, denial of confirmation of sale on ground of, § 332
Gross sum, claim for damages as in action for wrongful attachment under regular process, § 545
Grounds, §§ 23–70, pp 213–243
Amendment of affidavit in respect to, § 143, p. 321
Consideration of on motion for dissolution or vacation of attachment, § 454
Dissolution or discharge of attachment, §§ 416–428, pp. 606–614
Evidence as to existence of on motion to dissolve, § 455, p. 625
Existence of as defense in action for wrongful attachment under regular process, § 540
Grounds—Continued,
Postponement of prior attachment, § 277, p. 464
Questioning materiality or existence as preventing by giving dissolution bond, § 313, p. 502
Recitals as to in writ, § 192
Showing in respect to in affidavit, § 126, pp. 295–303
Specification of in notice of motion to dissolve attachment, § 450
Growing crops, liability to attachment, § 74, p. 248
Guarantor,
Issuance in action on contract of, § 11, p. 198
Receiptor as, § 299
Guardians,
Chattels in possession of as subject to attachment, § 88, n. 93
Liability to attachment, § 21
Guaranty, setting forth evidentiary facts showing liability upon in affidavit, § 121, n. 84
Harvesting, cost of as element of damage for dispossession of claimant to property seized, § 405, p. 603, n. 21
Hay in barn, liability to attachment, § 74, p. 248
Health, temporary absence for purpose of not warranting attachment, § 26
Hearing,
Motion to dissolve attachment, § 456
Plea in abatement, § 468
Hearsay evidence, admissibility in,
Action for damages for dispossession of claimant to property seized, § 403
Proceeding by third person claiming property attached, § 360, p. 570, n. 28
Hearsay testimony, affidavit supporting allegation by, § 112
Heavy articles, levy on, § 223, p 400, n. 90
Heirs,
Defendant, as proper parties in action on bond for release of attached property, § 317, p. 522
Interest of as subject to attachment, § 84
Hiding as absconding within statute authorizing attachment, § 25
Hiding books of account, admissibility of evidence as to on question of concealment of property, § 69, p 238
Hoisting engines, description of property as such in writ, § 194, n. 65
Holder in due course, presumption of as to intervener holding draft with bill of lading attached, § 359, p. 567
Holidays, issuance of writ on, § 182
Homestead,
Averment as to in action for wrongful attachment under regular process, § 545, n 98
Claim of not defeating lien of attachment, § 263
Exemption of land as ground for vacating attachment, § 427, n. 63
Nonresident heir's interest in as subject to attachment, § 84, n 71
Sale of by bank cashier not in usual course of business, § 43, n 50
Hospital care furnished wife living with husband, issuance in action for, § 12, p. 200, n. 85

Hostile enemy, debtor leaving for purpose of joining, § 26
Humiliation,
Damages for in action for wrongful attachment under regular process, § 562, n. 81
Injuries resulting from as element of damage in action on bond, § 179, p 371
Hurried division of property as sufficient to establish concealment, § 69, p. 242
Identification of cause,
Affidavit, § 123
Recitals in writ, § 190
Identification of parties, affidavit, § 120
Identification of property,
Removed, affidavit, § 126, p. 302
Sufficiency of evidence as to in proceeding by third person claiming property attached, § 361, p. 572, n. 57
Illegality,
Claim, defense in action on bond, § 170, p. 348
Levy, effect of as respects liability on bond of third person claiming property, § 374
Performance, discharge of surety on bond for release of property by, § 316, p 511
Postponement of lien, § 277, p. 466
Illiteracy, defense to action on bond for release of attached property, § 317, p. 521, n. 31
Immaterial departure from statute, disregard of in affidavit, § 113
Immature demand,
Judgment on in main action, § 497, p. 655
Postponement of lien, § 277, p. 465
Immunity from service as respects right to attachment on ground of nonresidence, § 20, n. 68
Impairment of security as ground for attachment, § 64
Impeachment of judgment, receiptors of attached property, § 302, p. 489
Implication, liability on bond not extended by, § 163, p. 342
Implied contracts, issuance in actions on, § 12, pp. 199–201
Implied repeal of statutes relating to, § 4, p. 192
Implied waiver, defects in bond, § 160
Imported goods, liability to attachment while in custody and before payment of duty, § 74, p. 250
Impossibility of performance, discharge of sureties on bond for release of property by, § 316, p 510
Impounding bill of lading preventing transferee from vacating attachment after delivery by carrier, § 74, p. 251, n. 91
Improper levy,
Effect of, § 242
Ground for dissolution, § 422
Inadequacy of consideration rendering sale fraudulent within attachment law, § 43
Incidental expenses, allowance in determining amount of property attached, § 235
Income,
Property, lien extending to, § 258, p 434
Trust fund, levy on under warrant of attachment, § 82
Incompetent surety authorizing new bond, § 161, n. 50
Inconsistent statements as to grounds in affidavit, effect of, § 126, p. 296, n. 98
Increase of property, lien extending to, § 258, p. 434
Increased claim by amendment of declaration, new or additional undertaking covering, § 161
Increasing amount of bond, § 159
Failure to give as ground for dissolution, § 423, p. 611, n 23
Incumbrance book, entry of invalid levy in as respects liability for wrongful attachment, § 519
Incumbrancer, showing existence after giving of bond to release attached property, § 313, p. 504
Indebtedness,
Admissibility of evidence as to in proceeding by third person claiming property attached, § 360, p. 571
Allegation in respect to in affidavit, § 117
Showing as to in affidavit, § 125, pp 289–295
Statement of in notice or demand by third party claimant, § 345, p 553
Sufficiency of evidence as to in proceeding by third person claiming property attached, § 361, p. 574
Indemnification for any loss or injury resulting from attachment, § 145
Indemnity,
Failure to obtain in consequence of fraudulent conduct discharging surety on bond for release of property, § 316, p. 515
Loss of lien by failure or refusal to give, § 262, p 439
Receiptor, § 299
Sureties on bond for release of attachment, § 300
Indemnity bond,
Furnishing of as respects right to damages in proceeding to try right to property attached, § 306
Issuance in action against sureties on, § 11, p. 198
Requirement for in case of third party claim to property attached, § 347
Sale of property without, § 331
Waiver of defects in notice of third party claim by filing of, § 345, p. 552
Index, return, § 251
Indifferent persons, appointment to levy attachment, § 205
Indorsee, notice of levy to, § 220, p. 396, n. 43
Indorsement,
Application of amount for which writ shall issue, § 134
Approval of bond, § 158
Redelivery or dissolution bond, § 312
Writ, levy on realty, § 230
Indorser,
Absence from state as ground for attachment, § 24
Affidavit in attachment suit against to allege presentation and demand, § 121, n. 84
Issuance of action on contract of, § 11, p. 198
Infants,
Liability to attachment, § 21
Surety, additional bond authorized in case of, § 161, n. 55
Inference of fraudulent intent, § 69, p. 240
Informalities in affidavit, effect of, § 141, p. 311
Information and belief,
Affidavit on, § 115
Statements on in affidavit, § 114

Information of officer's act, effect of as respects attaching creditor's liability for seizure of another's than debtor's property, § 396
Initials,
Designation of defendant by in affidavit for attachment, § 120, n 09
Order for publication of service designating nonresident defendant by, § 489, p 644
Suing defendant by as ground for dissolution, § 423, p. 611
Injunction, prevention of waste by debtor, § 501
Injury,
Absence of as defense in action for damages for dispossession of claimant to property seized, § 400
Burden of proof as to in action for,
Damages for dispossession of claimant to property seized, § 403
Wrongful attachment under regular process, § 549
Damages recoverable for wrongful attachment resulting in, § 559, p. 682
Jury question in action for wrongful attachment under regular process, § 552
Necessity of to warrant attachment for fraudulent transfer, § 40
Recovery for in action on bond, § 179, p 369
Reputation or feelings, element of damage in action on bond, § 179, p 371
Injury to business,
Recovery for in action on bond, § 179, p. 370
Special pleading of for recovery in action for wrongful attachment under regular process, § 545
Injury to credit,
Admissibility of evidence as to in action on bond, § 175, p. 361
Element of damage in action on bond, § 179, p 370
General allegation of in action on bond authorizing evidence of general loss, § 174, p 358
Insane persons,
Exemption from process, § 21
Leaving state as ground for attachment, § 24
Insignificant price, contemplated transfer for as evidence of fraudulent intent, § 69, p. 242
Insolvency,
Admissibility of evidence,
Injury to credit in action for wrongful attachment, § 550
Issue of fraudulent transfer, § 60, p 237
Defense to action,
Attachment bond, § 170, p. 350
Wrongful attachment under regular process, § 540
Destruction of lien by, § 267
Discharge of receiptor on dissolution of attachment by, § 300
Justifying resort to attachment, § 56
Necessity of setting forth in affidavit, § 126, p 301
Necessity of to warrant attachment for fraudulent transfer or disposition of property, § 41
Not sufficient to authorize attachment on ground of insufficient property within state, § 65
Postponing prior attachment, § 277, p. 405
Insolvency—Continued,
Presumptions arising from showing of, § 69, p. 235
Sufficiency of evidence as to in action on bond for release of property, § 317, p. 527
Time debt was created not fraud warranting attachment, § 63, p. 231
Installments, discharge of surety on forthcoming or dissolution bond by agreement to accept, § 316, p 512
Instantaneous seizin as insufficient to constitute attachable interest, § 78
Instanter, writ made returnable, § 193
Instructions,
Bond, action on, § 176
Dispossession of claimant to property seized, § 404
Main action, § 495
Plea in abatement, § 468
Third person claiming property attached, § 362, p 576
Instrument evidencing debt, liability to attachment, § 87
Instruments for payment of money, levy on, § 223, p. 402
Insufficiency of cause of action, ground for dissolution, § 418
Insufficient property to satisfy demand,
Evidence, § 69, p 238
Ground for attachment, § 65
Positive averment as to in affidavit, § 114
Sufficiency of evidence as to, § 69, p 243
Insurance,
Evidence as to amount of on question of value in action for wrongful attachment, § 550
Liability to attachment of interest under, § 80
Proceeds, liability of surety on forthcoming bond for, § 315, p. 506, n 27
Intent,
Admissibility of evidence as to in action for wrongful attachment under regular process, § 550, n. 41
Allegation of facts as to in affidavit on information and belief, § 115
Defraud, necessity of setting out in affidavit, § 126, p 301
Departure warranting attachment, § 28
Element of ground of attachment for fraudulent transfer of property, § 36
Immateriality as respects attachment on ground of insufficient property within state to satisfy demand, § 65
Necessary element,
Concealment or absence to constitute ground for attachment, § 24
Support of attachment for fraud in incurring liability, § 63
Removal of property as ground for attachment, § 55
Residence within attachment statute, § 32
Right to attachment on ground of removal of property, § 52
Showing as to in affidavit, § 126, p 298
Transfer or disposition of property as ground for attachment, § 50

Interest,
Acquired by purchaser on sale of attached property, § 334
Allowance for in determining amount of property attached, § 235
Attached property, attaching officer, § 289
Authorizing intervention in proceeding, § 340
Bond of third party claimant, recovery of in action on, § 392
Consideration in fixing amount of bond, § 149, p 331
Contract, liability to attachment, § 80
Covered by lien, § 258, p. 435
Damages recovered in action on bond, § 179, p. 371
Disqualification of officer from levying attachment, § 206
Failure to claim in affidavit as variance, § 139
Lack of as defeating right to move for dissolution, § 436
Land, levy on, § 233
Mortgagee as respects liability of mortgaged property to attachment, § 73
Omission to state amount of in affidavit, § 125, p 200
Pledgee, liability to attachment, § 73
Proceeds of attached property, disposition of, § 335
Property attached, lack of as ground for dissolution of attachment, § 426
Receipt, recovery of in action on, § 302, p. 491
Receiptor, right to assert, § 298
Recital as to in writ, § 191, n 38
Seized property, motion for dissolution of attachment, § 446
Sureties on bond for release of attached property, recovery against, § 317, p. 531
Wrongful attachment under regular process, recovery of in action for, § 559, p. 684
Interference with possession of receiptor, action for, § 301
Interlineations in bond, effect of, § 147
Intermingled goods, designation in notice or demand by third party claimant, § 345, p. 553
Interpleader,
Attachment by defendant in, § 20
Claimant of attached property, § 442
Proceedings by third person claiming property attached, § 257, p 561
Right of third party claimants, § 339
Trial of issues made by, § 362, pp 574–578
Interval between filing affidavit and issuance of writ, § 181
Intervening claim,
Adjudication of as condition precedent to liability on bond for release of property, § 315, p. 508
Dismissal of attachment on, § 474
Incumbrancer, subordination to attachment lien, § 272, p. 448
Intervening rights preventing amendment of affidavit, § 143, p. 318
Intervention,
Petition for to determine priorities between successive attachments, § 279
Right of third party claimant, § 339
Waiver of irregularities in return, § 249
Intoxicating liquors,
Illegally kept, liability to attachment, § 74, p. 250
Liability to attachment, § 74, p 249
License, liability to attachment, § 74, p 249
Selling, availability of remedy in action to recover penalty for violation of statute relating to, § 18, n. 57
Inventory,
Admissibility,
Proceeding by third persons claiming property attached, § 360, p 570
Question of value in action for wrongful attachment under regular process, § 550
Failure to file as ground for dissolution, § 423, p 610
Goods seized, admissibility in action on bond, § 175, p. 360
Lack of as defense to action on bond for release of property, § 317, p. 520
Necessity of in case of levy on personalty, § 223, p. 400, n 86
Property attached, § 236
Irregularities,
Availability of defense in action on bond, § 170, p 349
Defense to action on bond for release of property, § 317, p. 520
Liability in damages for, § 503
Postponement of lien, § 277, p. 465
Prior to issuance of attachment not defeating lien, § 270
Irrelevant evidence, exclusion of in action for damages for dispossession of claimant to property seized, § 403
Issuance of writ, § 183
Allegation of in action on bond, § 174, p. 354
Wrongful use of process, issuance in action for, § 12, p. 199
Issues,
Action on,
Bond, action, § 174, p. 357
Forthcoming or release bond, action on, § 317, p. 523
Third party claimant, § 385
Dispossession of claimant to property seized, § 402
Main action, § 493, p 651
Motion for dissolution or vacation of attachment, § 454
Plea in abatement, § 465
Third person claiming property attached to establish right, § 357, p. 564
Wrongful attachment under regular process, action for, § 547
Itemization of damages, complaint for wrongful attachment under regular process, § 545
Items of damage,
Bond, action on, § 179, p. 367
Wrongful attachment under regular process, § 559, pp. 681–684
Joinder,
Attaching creditors in action on bond, § 173
Demand due and demand not due, § 15
Joinder of causes,
Bond, § 174, p. 356
Effect of as respects right to attachment, § 19

Joinder of parties,
Damages for dispossession of claimant to property seized, § 401
Plaintiffs,
Action on bond, § 173
Making affidavit, § 106
Joining issue, time for in intervention by third person claiming property attached, § 357, p. 565
Joint bond for release of property, parties defendant in action on, § 317, p 522
Joint debtors, attachment on ground of nonresidence, § 30
Joint debtors or codefendants, proceeding against one or more, § 22
Joint defendants, venue of proceedings against, § 98
Joint indebtedness, allegation of in affidavit, § 125, p. 290
Joint interest in property, liability to attachment, § 90
Joint liability,
Bond in case of, § 151
Damages for dispossession of claimant to property seized, § 394
Effect of as respects attachment on ground of insufficient property within state to satisfy demand, § 65
Joint obligation, sureties on bond, § 153
Joint owner,
Claim, effect of as respects right to attachment, § 20
Levy on property, § 234
Proceeding against by attaching officer to enforce right to possession, § 202, p. 475
Joint parties, affidavit on behalf of, § 125, p 290
Journal entry on motion to dissolve attachment, effect of, § 457
Judgment,
Amendment of affidavit after, § 143, p. 323
Bond, action on, § 177
Third party claimant, § 390
Condition precedent to liability on redelivery bond, § 315, p. 507
Confession of warranting attachment, § 45
Cure of defects in return by recitals in, § 249
Defendant, judgment for, dissolution of attachment by, § 268, p. 445
Entry of as curing defects in levy, § 243
Evidence,
Against claimant in trial of right of property, § 300, p. 570
Damages in action on bond, § 175, p. 361
Failure to enter as waiver of attachment lien, § 262, p 440
Fraudulent transfer of affording ground for attachment, § 37
In personam, general appearance authorizing in main action, § 401
Levy on, § 223, p. 403
Levy operating as satisfaction of, § 241
Main action, § 407, pp 653–657
Motion to quash writ after, § 449
Objection to affidavit after, § 141, p. 315
Plaintiff,
Condition precedent to action on bond, § 169
Dissolution of attachment by, § 268, p. 445
Judgment—Continued,
Plaintiff—Continued,
Right to proceed to as affected by giving of bond to release attached property, § 313, p. 503
Plea in abatement, § 469
Priorities, proceeding to determine, § 279
Release or forthcoming bond, action on, § 317, p 529
Situs of for purpose of attachment, § 92, p. 264
Sureties in principal action, failure to take as discharge of sureties on forthcoming bond, § 316, p. 517
Third person claiming property attached, proceedings by, § 363, pp 578–581
Wrongful attachment under,
Irregular or void process, § 514
Regular process, § 553
Judgment creditor,
Insolvent defendant, intervention by, § 341
Interest by levy on land as subject to attachment, § 78
Right to move for dissolution of attachment, § 440
Judgment lien, priority, § 272, p. 450
Judgment on pleadings, action on bond for release of attached property, § 317, p 525
Judicial attachment on return of ordinary process not found, § 68
Judicial proceedings, release of lien by, § 267
Judicial process, lien as affected by sale under, § 258, p 435
Judicial writ, distinguished from auxiliary writ, § 1
Junior attaching creditor,
Intervention by, § 341
Motion to vacate attachment, § 440
Objection to prior attachment, § 277, p 464
Jurat,
Affidavit, amendment, § 143, p 323, n. 59
Formal requisite of affidavit, § 111
Jurisdiction, § 91
Appeal in proceeding by third person claiming property attached, § 364
Averments as to in declaration or complaint in main action, § 493, p. 649
Bond, action on, § 171
Third party claimant, § 382
Boundaries, change of not defeating lien, § 270
Claimant of attached property, proceeding to establish right, § 354
Defects,
Amendment of bond in respect to, § 150
Postponement of lien of prior attachment because of, § 277, p 464
Determination of priorities between attaching creditors, § 279
Discharge of attachment, § 429
Dissolution of attachment, § 429
Effect of dissolution on main action where attachment is essential to, § 471
Issuance and levy of attachment as conferring, § 481
Lack of as ground for dissolution, § 421
Levy or equivalent necessary to acquisition of, § 202
Prerequisite, bond, § 145
Quashing attachment, § 420

Jurisdiction—Continued,
Requirements, bond of third party claimant, § 367
Return as necessary prerequisite, § 244
Service of notice or process as essential to in main action, § 483
Vacation of attachment, § 429
Violation of possession by attaching officer, action for, § 292, p. 475
Wrongful attachment under,
Irregular or void process, § 508
Regular process, § 541
Jury, motion to dissolve attachment, § 456
Jury questions.
Bond, action on, § 176
Redelivery or dissolution bond, § 317, p. 528
Third party claimant, § 389
Dispossession of claimant to property seized, action for, § 404
Excessive levy, § 235
Main action, § 495
Motion to dissolve attachment, § 456
Plea in abatement, § 468
Sale of attached property, § 324
Third person claiming property attached, proceeding by, § 362, p 575
Wrongful attachment under regular process, action for, § 552
Jury trial,
Plea in abatement, § 468
Right to in proceeding by third person claiming property attached, § 362, p. 575
Justification,
Sale of property, attachment as, § 318
Sureties on bond, § 157
Release of property, § 309
Surety by mistake signing name to, § 155
Justness of claim,
Amendment of affidavit to show, § 143, p. 320
Showing in respect to in affidavit, § 125, p 293
Sufficiency of allegation in respect to in affidavit, § 113, n. 50
Keeper, delivery of property to by attaching officer, § 284
Keeping of property, duty of attaching officer, § 282
Knowledge, affidavit on, § 114
Labor, failure to pay for on performance authorizing attachment, § 62
Laborer's lien, right of holder to damages for wrongful seizure and conversion, § 393
Laches,
Clerk or other officer, effect of, § 138
Dissolution, § 416
Loss of lien by, § 202, p 440
Lack of security, allegation of in affidavit, § 129
Land,
Fraudulent transfer of as ground for attachment, § 37
Levy on, § 227
Interest in, § 233
Landlord, intervention in attachment proceeding by, § 341
Landlord's lien,
Effect of as respects right to proceed by attachment, § 17
Priority, § 272, p. 450
Language of statute, affidavit following, § 113
Late delivery, defense to action on bond for release of property, § 317, p 520, n 24
Law of forum, proceedings determined by, § 3
Lease,
Interest, liability to attachment, § 80
Issuance in action for violation of, § 11, p. 19(
Right of attaching creditor as to, § 239, n. 43
Leasehold,
Estate, liability to attachment, § 80
Inclusion in description of property as land, § 258, p 433
Interest, voluntary surrender of not defeating lien attaching against, § 263
Amendment of,
Complaint or declaration in main action, § 493, p 650
Return without, § 250
Bond of third party claimant, action on, § 385
Plaintiff's action in name of sheriff to recover demand attached, § 500
Leaving property in debtor's possession, effect of, § 287
Lecture, instructions objectionable as, § 362, p. 576, n 22
Legal actions,
Attachment in, § 8, p 194
Attachment regarded as rather than equitable, § 2, p 188
Legal claim, necessity of for intervention by third person claiming property, § 343
Legal conclusions,
Statements in respect to counterclaim in affidavit, § 125, p 294
Sufficiency of affidavit alleging, § 112
Legal demand on receiptor for return of attached property, § 302, p. 488
Legal title, lien not attaching to when equitable estate is in another, § 258, p. 435
Legatees, interest of as subject to attachment, § 85
Legislative enactment, release of lien by, § 269
Legislative power in respect to, § 4, p. 190
Lessee, damages for wrongful seizure and conversion, § 393
Letters, source of information for affidavit on information and belief, § 115, n 2
Levy, §§ 201–243, pp. 388–417
After order of sale, necessity of, § 324
Allegation in action,
Bond, § 174, p. 354
Wrongful attachment under regular process, § 545
Effect, § 239
Fraud in procuring as ground for dissolution, § 424
Other attachments as defense to action on bond, § 170, p 351
Recital of in judgment in main action, § 497, p. 654, n 30
Time of as respects priority between successive attachments, § 277, p. 463
Levying officer,
Discharge of lien by act or omission of, § 264
Liability for damage in seizing property of person other than one against whom process is directed, § 395

Levying officer—Continued,
Proper party plaintiff in action on bond for release of property, § 317, p. 522
Liberal construction of statutes relating to, § 4, p 191
Lien, §§ 254–279, pp 430–468
Amendment of affidavit, effect, § 143, p. 324
Charges for keeping attached property, § 293, p 480
Claim of third person against property, § 345, p 554
Defense against attachment, § 441
Discharge by,
Execution of third party claimant's bond, § 372
Failure to make proper return, § 253
Failure of lienholder to furnish attaching officer with account of amount due on, § 344
Interest of factor secured by as subject to attachment, § 83
Intervention by lienholders, § 341
Landlord not precluding proceeding by attachment, § 17
Levy as essential to acquisition of, § 203
Repeal of statute authorizing attachment operating to divest, § 4, p 193
Sale of property, effect, § 320
Surrender of goods attached on receipt, effect, § 298
Third person, dissolution as affecting, § 470
Vacation of by dissolution of attachment, § 472
Life estate,
Levy of attachment on to pay remainderman's debts, § 75, n 99
Tenant as agent of remainderman for purpose of notice of levy, § 220, p. 396, n. 42
Limitation of liability,
Bond, § 163, p 343
Receiptor, § 299
Surety on bond for release of attached property, § 317, p 530
Limitation of recovery,
Bond, action on, § 179, p 375
Wrongful attachment under regular process, § 563
Limitations,
Bond, action on, § 172
Bond of third party claimant, § 392
Third party claimant, § 383
Pleading in action on dissolution bond, § 317, p. 524, n 80
Wrongful attachment under,
Irregular or void process, § 500
Regular process, § 542
Limited jurisdiction, proceedings to procure, § 91
Liquidated damages,
Bond on attachment on claim for, § 145
Failure to set out in complaint demand for as ground for quashal, § 417
Lis pendens,
Intervention for purpose of cancelling, § 340, n. 84
Necessity of filing as respects priority over subsequent sale, § 276, p 460
Priority of lien created by filing of, § 272, p. 450
Literal compliance with statutory requirements, necessity, § 4, p 191, n 59
Literary property, liability to attachment, § 74, p. 250
Litigation,
Expenses of as element of damage in action on bond, § 179, p. 372
Recovery of expenses of for wrongful attachment under regular process, § 560
Live stock,
Levy on without taking actual possession, § 224
Liability for expense of maintenance, § 293, p. 477
Location of personalty, showing as to in return, § 248, p. 420
Locking up property, levy on personalty, § 223, p. 399, n. 77
Log Lien Act, priority of attachment under, § 277, p. 462, n. 25
Loss of,
Business, admissibility of evidence as to on question of damages in action for wrongful attachment, § 550
Credit, special pleading of in action,
Bond, § 174, p 356
Wrongful attachment under regular process, § 545
Debt allegation of danger in affidavit, § 128
Profits, recovery for in action on bond, § 179, p. 370
Property,
Liability of attaching officer for, § 281
Recovery for in action,
Bond, § 179, p 368
Wrongful attachment resulting in, § 559, p 681
Release of attaching officer on delivery to receiptor, § 296
Without fault of receiptor, release of liability, § 300
Residence within attachment act, § 34
Right to assert grounds of attachment, § 70
Sale, allegation as to resulting damage in action for wrongful attachment under regular process, § 545, n. 14
Time, element of damage in action on bond, § 179, p 371
Use of property, recovery for in action,
Bond, § 179, p 369
Bond of third party claimant, § 392
Wrongful attachment causing, § 559, p. 682
Writ, effect of, § 200
Lots, sale of together, § 329
Lump sum, affidavit including, § 125, p 200, n 19
Lunatics, liability to attachment § 21
Machinery, recovery of damage for loss of use because of wrongful attachment, § 559, p 682, n. 33
Mail,
Copy of published notice, § 489, p. 645
Liability to attachment of property used in transportation of, § 74, p 250
Notice by in proceeding in main action, § 488
Main action,
Effect of dissolution of attachment on, § 471
Proceedings in, §§ 481–499, pp. 640–658
Recovery of damages for wrongful attachment in, § 536
Majority, writ not required to show, § 187

Malice,
Absence of as respects liability for wrongful attachment, § 516
Malice,
Admissibility of evidence as to in action,
Bond, § 175, p 360
Wrongful attachment under regular process, § 550
Averment in action,
Bond, § 174, p. 355
Dispossession of claimant to property seized, § 402
Wrongful attachment under,
Irregular or void process, § 511
Regular process, § 545
Element of damage for dispossession of person claiming property, § 393
Exemplary damages in action,
Bond requiring showing of, § 179, p. 367
Wrongful attachment under regular process in case of, § 558
Jury question in action,
Bond, § 176
Wrongful attachment under regular process, § 552
Liability in damages for, § 516
Sufficiency of evidence as to in action on bond, § 175, p 363
Malicious prosecution,
Action for negativing existence of fraud warranting attachment, § 63 p. 231
Attachment in action for damages for, § 58
Recovery of damages for in main action, § 536, n 20
Mandamus, consideration of defects in affidavit by, § 141, p. 315
Manner of,
Executing bond, § 154
Levy, in general, § 217
Recital as to in return, § 248, p 419
Publication of service in main action, § 489, p 644
Manual possession, recital as to in return, § 248, p 419, n 14
Manual seizure,
Duty of attaching officer with respect to property capable of, § 283
Levy on personality capable of, § 223, p 390
Map, reference to for description of property in order of sale, § 467, p. 655, n. 44
Marginal note that writ shall not be levied until bond is filed, insufficient to save attachment, § 146
Market price or value,
Measure of damages for dispossession of claimant to property seized, § 405, p 603
Setting forth in affidavit for damages sought as difference between contract and market price, § 125, p 291
Marriage, issuance in action for breach of promise of, § 11, p. 198
Master in partition, money in hands of pending distribution as subject to attachment, § 88, n. 93
Material facts, allegation of in affidavit, § 112
Matured insurance policy, liability to attachment, § 80
Maturity of debt,
Amendment of affidavit in respect to, § 143, p. 320
Maturity of debt—Continued,
Effect of,
Dissolution of attachment controlled by, § 471
Right to remedy, § 15
Positive averment in respect to in affidavit, § 114
Showing in respect to in affidavit, § 125, p. 292
Sufficiency of showing in respect to, § 141, p. 313
Meaning of term,
Jurisdiction in attachment cases, § 91
Showing of by supplemental affidavit, § 143, p. 325, n. 1
Means of knowledge, disclosure in affidavit, § 114
Measure of damages,
Bond for attached property, § 317, p. 530
Dispossession of claimant to property seized, § 405, p. 603
Indemnity bond indemnifying against loss from levy on mortgaged property, action on, § 347, n. 45
Instructions as to in action for wrongful attachment under regular process, § 552
Proceeding to try right to property attached, § 366
Receipt, action on, § 302, p. 490
Violation of possession of attaching officer, § 292, p. 476
Mechanic's lien,
Attachment in proceeding for foreclosure of, § 8, p. 195
Claimant, intervention by, § 341
Priority of, § 272, p. 452
Mechanic's tools, liability to attachment, § 74, p. 248
Medical care furnished wife living with husband, issuance in action for, § 12, p. 200, n. 85
Membership in Chamber of Commerce, liability to attachment, § 74, p. 247
Memorandum of filing, bond, § 154
Merchandise for sale, liability to attachment, § 74, p. 248
Merger, lien of attachment, § 260
Merits, right to judgment on as affected by adjudication of right to property attached, § 363, p. 581, n. 1
Mesne attachment, adjustment of policy of, § 4, p. 192
Mesne process, writ as rather than final, § 2, p. 188
Metes and bounds, description of realty by in return, § 248, p. 421, n. 55
Method of,
Determining compensation for taking and keeping of attached property, § 293, p 479
Enforcing liability for wrongful attachment, §§ 535–538, pp. 668–671
Military service,
Debtor leaving residence in order to enter not within attachment law, § 26
Exemption of persons in from process, § 21
Minimizing damages, duty of claimant to property seized seeking damages for dispossession, § 405, p. 604
Mining lease, issuance in action based on, § 11, p. 197, n. 41
Minister, liability to attachment, § 21

Minor deficiencies in amount of bond, effect of, § 140, p. 331
Miscalculation of amount in affidavit, effect of, § 125, p 290
Miscellaneous grounds for dissolution of attachment, § 428
Misconduct of professional man, action for negativing existence of fraud warranting attachment, § 63, p 231
Misdating return, effect of as respects release of property on bond, § 312, n. 53
Misdescription in return not avoiding attachment, § 248, p 421
Misleading instructions,
Action for wrongful attachment under regular process, § 552
Proceeding by third person claiming property attached, § 362, p 577
Misnomer of attachment defendant, defense in action on bond, § 170, p 349
Misrecital as to term of court in bond, effect of, § 147
Mistake,
Belief that property was included as security not ground for attachment, § 64
Defense to action on bond of third party claimant, § 381
Notice by publication, effect of, § 489, p 644
Principal by surety on release bond, effect of, § 315, p. 506, n 20
Mitigation of damages,
Admissibility of evidence as to failure in action on bond, § 175, p. 361
Duty of defendant in attachment, § 179, p. 374
Matters that may be shown as to in action for damages for dispossession of claimant to property seized, § 402
Wrongful attachment under,
Irregular or void process, § 507
Regular process, § 561
Mixing goods resulting in loss of lien, § 264
Mode of,
Allegation, affidavit, §§ 112–116, pp. 277–282
Amendment of bond, § 159
Objection to affidavit, § 141, p 315
Sale of attached property, § 328
Modification of writ, motion for, § 432
Monetary loss, jury question in action for wrongful attachment under regular process, § 552, n 93
Money,
Deposit of in lieu of bond, § 162
Deposit under stipulation, substitution of bond for, § 305
Liability to attachment, § 74, p. 248
Limitation to actions for recovery of, § 10
Stolen, issuance of in action sounding in contract for, § 12, p. 199
Money had and received, employment in action for, § 10
Money judgment,
Claimant intervening in attachment suit, § 363, p 580
Liability to attachment as debt, cause of action or demand, § 86
Money rule against sheriff by attaching creditor, debtor whose property was sold becoming party to, § 335
Mortgages,
Account of amount due when equity of redemption is attached, § 346
Attached property, not defeating lien, § 263
Chattel mortgages, ante
Creditor, intervention by, § 341
Damages for interference with possession, § 393
Debt, purchaser of attached property taking subject to, § 334
Demand or notice of existence of lien, § 345, p 551
Foreclosure, attachment in proceeding for, § 8, p 195
Fraudulent intent warranting attachment, § 44
Interest of mortgagee, in land, liability to attachment, § 77
Levy subject to, § 226
Liability for cost of keeping attached property, § 293, p 478
Liability of mortgaged property to attachment, §§ 73, 77
Parties to proceedings,
Mortgagee, in main action, § 402
Mortgagor to proceeding by mortgagee to establish right to property attached, § 356, n. 7
Possession of property by mortgagee, liability of property to attachment, § 73
Priority of, § 272, p. 452
Time of intervening in proceeding, § 344
Unenforceable mortgage not subject to attachment, § 77, n 4
Warning order as to sale of attached property, § 326
Mortification, recovery of damage for wrongful attachment causing, § 550, p. 683, n. 48
Motion,
Discharge attachment by claimant of attached property, § 442
Dissolution of attachment, §§ 447–459, pp. 619–631
Amendment of affidavit after, § 143, p 323
Enforcement of liability on bond of third party claimant by, § 377
New or additional bond, necessity of, § 161
Plaintiff in attachment to dissolve writ, § 445
Proper method of objecting to affidavit, § 141, p. 315
Quash, objection to affidavit by, § 141, p. 315
Show cause, dissolution of attachment by, § 433
Vacate attachment,
Junior attaching creditor, § 440
Supplemental affidavit after, § 143, p 325
Motive as respects attachment for fraudulent transfer of property, § 36, n. 22
Motor vehicles,
Civil actions arising out of unlawful operation, § 58
Permit, value of not considered in determining whether debtor had sufficient property within state, § 65, n 24
Registration, consideration of certificate on question of residence, § 69, p. 236
Repairman's lien, priority, § 272, p. 450
Municipal warrants, levy on, § 223, p. 403, n. 13
Name of,
Court, bond, § 147
Plaintiff, variance in petition and affidavit, § 139

Nature of,
Absence warranting attachment, § 26
Action, amendment of affidavit in respect to, § 143, p. 319
Claim,
Authorizing third person to intervene in proceedings, § 343
Averment as to in proceeding by third person claiming property attached, § 357, p 562
Setting forth in affidavit, § 121
Custody of property, § 280
Intervention proceeding by third party claimant § 351
Lien, § 256
Remedy, § 2, pp 186–190
Enforce liability on bond, § 167
Forthcoming, release or replevy bond, § 317, p. 518
Taking and possession of attached property, § 283
Writ, § 180
Naval service, liability of persons in to attachment, § 21
Necessaries,
Issuance in action against husband for, § 12, p. 200
Property subject to attachment on claim under judgment for, § 71, n 97
Necessary charges deductible by officer holding proceeds of sale, § 335, n. 24
Necessity of,
Affidavit, § 104
Writ, § 180
Negativing,
Exceptions in affidavit, necessity, § 112, n. 46
Exemption in affidavit, § 130
Improper motive,
Affidavit, § 127
Amendment of affidavit for purpose of, § 143, p. 322
Negligence,
Availability in action to recover for injuries to property in consequence thereof, § 13
Professional man, action for negativing existence of fraud warranting attachment, § 63, p. 231
Receiptor as equivalent to conversion, § 299
Setting out facts constituting in affidavit for attachment, § 121
Negotiable notes, debts secured by as exempt from attachment, § 86
New affidavit,
Failure to file as defense in action on bond, § 170, p. 349
Requirement as to, § 104
New bond,
Addition of new party defendant by amendment requiring, § 145
Execution of not exonerating original sureties on dissolution bond, § 316, p. 513
Order for, § 305
New counts, amendment adding to complaint or declaration in main action, § 493, p. 650
New facts, admissibility of evidence as to on motion to dissolve, § 455, p. 625
New oath, necessity for alias writ, § 200
New residence, establishment of not necessary for attachment on ground of removal out of state, § 26
New security, filing of, § 161
New trial,
Action on bond, § 176
Controverting proof of matters in affidavit by motion for, § 109
Discharge of sureties on forthcoming or dissolution bond by failure to prosecute motion for, § 316, p. 512
New verification, amendment to affidavit, § 143, p. 324
Nil debit, plea of in action on bond given to discharge attachment, § 317, p. 524
Nominal damages,
Attaching officer for violation of possession, § 292, p. 476
Bond, action on, § 179, p. 366
Third party claimant, § 392
Dispossession of third person claiming property seized, § 405, p. 605
Receiptor, § 302, p 491
Wrongful attachment under,
Irregular or void process, § 515
Regular process, § 557
Non damnificatus, plea of in action on bond, § 174, p. 357
Non est factum, plea of in action on bond, § 174, p. 357
Release property, § 317, p. 525
Nonattachable property, judgment founded on attachment of, § 407, p. 656, n. 58
Nonexistence of grounds,
Attachment as sufficient to postpone lien, § 277, p 464
Authorizing dissolution, § 420
Nonfeasance of receiptor as equivalent to conversion, § 299
Nonownership, pleading in action on bond for release of property, § 317, p. 524, n. 80
Nonpayment of damages, averment as to in action on bond, § 174, p. 356
Nonprofitable plant, recovery of damages for deprivation of use of property during period of wrongful seizure, § 556, n. 10
Nonresidence,
Admissibility of evidence on question of, § 60, p 236
Allegation in respect to in affidavit, § 120
Amendment of affidavit in respect to, § 143, p. 322
Bond on attachment against, § 145
Burden of proof, § 60, p. 234
Commissioner, affidavit taken before, § 107
Compelling appearance and litigation of right to fund involved, § 339
Creditors, availability of remedy to, § 20
Debtor temporarily within state, debt due from not attachable within state, § 92, p. 264
Defendant, venue in proceedings against, § 98
Dissolution of attachment on showing of residence in fact, § 420
Effect of as respects priorities between successive attachments, § 277, p. 462
Ground, §§ 29–34, pp 216–219
Joint debtor, showing in affidavit in respect to nonresidence of other joint debtors, § 126, p. 303

Nonresidence—Continued,
Lack of interest in property attached as ground for dissolution, § 426
Levy on property of before service on summons, § 210
Liability to attachment, § 21
Necessity of alleging in affidavit, § 126, p. 301
Positive averment in respect to in affidavit, § 114
Purpose of law authorizing attachment against property of, § 2, p. 189, n. 45
Service by publication on in main action, § 480, p. 643
Sufficiency of evidence as to, § 69, p. 239
Sureties, competency, § 153
Nonsuit,
Dissolution of attachment by, § 268, p 444
Quashing of writ of attachment as similar to, § 470, n. 83
Notary public, power to take affidavit, § 107, n. 94
Notice,
Appraisal and sale of attached property, § 326
Claim of third person to property seized, § 345, pp 551–554
Condition precedent to action on bond, § 169
Issuance of writ, § 183
Judgment against surety on bond for release of property, § 317, p 519
Levy, § 220, pp. 305–307
Realty, perfected by, § 227
Recital as to in return, § 248, p. 420
Waiver of, § 243
Motion,
Amend, discharge of sureties on bond for release of property by failure to give, § 316, p. 514
Determination of priorities, § 279
Dissolve or vacate attachment, § 450
Set aside order of publication of service in main action, § 480, p. 646
Order of distribution of proceeds of property sold, § 335
Prior chattel mortgage as respects priority over lien, § 276, p 458
Proceedings in main action, §§ 482–490, pp 640–646
Proposed amendment of return, § 250
Relinquishment of attachment as sufficient return of property on dissolution, § 472
Notoriety, necessity of in making levy, § 210
Notorious departure negativing intention necessary to constitute absconding, § 25
Number of sureties on bond, § 153
Release of property, objection as to, § 309
Nunc pro tunc,
Addition of signature to affidavit, § 143, p. 323
Indorsement of bond, § 158
Oath,
Affidavit, §§ 111, 132
Claim of third person to property attached, § 352
Objections,
Affidavit, § 141, p 314
Authority of agent to execute bond, § 154
Competency of sureties on bond, § 153
Defect of parties in action on bond, § 173
Jurisdiction of proceedings, § 99
Objections—Continued,
Levy, § 243
Number of sureties on bond for release of property, § 309
Prior attachment by junior attaching creditor, § 277, p. 464
Publication of service in main action, § 489, p. 646
Replevy bond, § 310
Report of sale of attached property, § 332
Return, § 249
Sale, by consent on failure to make, § 322
Sale, failure as defense in action for wrongful attachment under regular process, § 540
Variance between affidavit and pleading, § 139
Writ, § 197
Obligee, bond, § 151
Discharge attachment, § 308
Third party claimant, § 308
Obligor, bond, § 152
Release of property, liability, § 315, pp. 505–510
Occupant of realty, service of writ and description on, § 228
Offer,
Convey property to attaching creditor, admissibility of evidence as to, § 69, p. 237
Return property,
Defense to action on bond for release, § 317, p 521
Showing in mitigation of damages in action on bond, § 170, p. 374
Sale, inability to accept as element of damage for dispossession of claimant to property seized, § 405, p. 603, n 22
Officers,
Authorized to,
Issue writ, § 100
Take affidavit, § 107
Levying attachment, right of action on bond, § 168
Pro hac vice, duty to make levy, § 207
Official bonds, issuance in actions on, § 11, p. 198
Official capacity, act committed in as ground for issuance of writ, § 57
Offsets,
Liability for wrongful attachment under regular process, § 564
Showing in respect to in affidavit, § 125, p. 298
Oil and gas lease, right of lessee under as subject to attachment, § 80, n. 48
Oil in place, levy on oil lease attaching lien to, § 258, p. 434
Oil well cases, amount removable determining liability of surety on forthcoming bond, § 316, p. 511, n 94
Omissions,
Bond, defense in action on, § 170, p. 348
Name in caption of bond, amendment curing, § 150
Statements, amendment of affidavit by supplying, § 143, p. 320
Open departure negativing intention necessary to constitute absconding, § 25
Opening and closing,
Hearing on motion to dissolve, § 456
Proceeding by third person claiming property attached, § 362, p. 575

Openness, necessity of in making levy, § 219
Operation of,
Affidavit, § 109
Bond of third party claimant, § 372
Return, § 252
Opportunity to redeem, provision for in decreeing sale of real estate, § 328
Oppressive attachment, liability on bond, § 163, p. 343, n 95
Optional proceedings,
Sale of attached property, § 324
Third persons claiming property attached, § 370
Wrongful seizure of property under process directed against another, § 394, n 13
Oral authority of agent to execute bond in name of principal, § 154
Order,
Assessment of amount to which each attaching creditor is entitled, § 335
Attachment, § 102
Discharge or release pursuant to bond, § 312
Issuance of writs in case of several, §§ 100, 181
Issuance of writs without order directing as ground for dissolution, § 423, p. 610
Levy requiring, § 201
Making levy in case of several writs, § 211
Motion for dissolution of attachment, § 457
Proof, hearing on motion to dissolve, § 456, n 74
Publication of service in main action, § 489, p. 644
Sale of attached property,
Duty of officer in case of, § 323
Intervention by third party claimant after, § 344, n 57
Necessity, § 325
Sale or return of property, necessity of for liability on forthcoming bond, § 315, p. 508
Ordinary course of trade or business,
Evidence of sales and mortgages in, as insufficient to show intent of fraud, § 69, p 241, n 54
Sale in as fraudulent within attachment law, § 43
Origin,
Lien, § 255
Remedy, § 2, p. 186
Original process, attachment made as, § 2, p 187
Original security, sale of before putting up attached property, § 328
Other creditors, effect of dissolution of attachment on, § 473
Other processes, levy on property taken under, § 237
Outrageous battery, availability in action for, § 13, n 14
Overdue instrument,
Action on supporting attachment, § 66
Issuance in actions on, § 11, p 198
Ownership,
Admissibility of evidence as to exercise of in proceeding by third person claiming property attached, § 360, p 570, n. 22
Amendment of affidavit to show, § 143, p. 322
Averment as to in,
Action for wrongful attachment under regular process, § 545
Affidavit, § 130
Burden of proof in action,
Bond for release of property, § 317, p 526
Ownership—Continued,
Burden of proof in action—Continued,
Damages for dispossession of claimant to property seized, § 403
Claim, showing with respect to in affidavit, § 122
Conclusiveness of return as to, § 252
Defense in action on bond, § 170, p. 350
Third party claimant, § 381
Denial of by obligors on bond to release attached property, § 313, p. 504
Determination by levying officer, § 213
Fact of as bearing on right to move for dissolution, § 436
False representation regarding by debtor warranting attachment, § 63, p 232
Jury question as to in proceeding by third person claiming property attached, § 362, p 576
Presumption as to in proceeding by third person claiming property attached, § 359, p. 567
Property attached, recovery for wrongful attachment, § 530
Recital as to in return, § 248, p 422
Seized, sufficiency of evidence as to in action on bond, § 175, p. 364
Sufficiency of evidence as to in action on bond for release of property, § 317, p 527
Packages, opening for inspection by levying officer, § 216
Papers,
Examination of by attaching officers, § 291
Furnishing information for affidavit, production of, § 115
Reference to in affidavit, § 116
Paramount title, discharge of surety on forthcoming bond when property taken under, § 316, p. 512
Parol evidence,
Admissibility to show proper posting of notice in main action, § 488
Aid of return, § 249
Partial,
Disposition of property as ground for attachment, § 38
Failure of grounds as warranting dissolution, § 420, n. 82
Payment of judgment by third person, discharge of surety on bond for release of property by, § 316, p. 511
Release of attachment, excessive claim as ground for, § 410, n. 75
Sale, effect of, § 320
Vacation of attachment, § 457
Particular grounds, allegations as to in affidavit, § 126, p. 207
Particular interests in real property subject to attachment, § 78
Particulars of,
Claim, averments as to in complaint or declaration in main action, § 493, p 649
Indebtedness, setting out in affidavit, § 125, p. 290
Parties,
Amendment,
Affidavit in respect to, § 143, p. 318
Complaint or declaration striking out parties improperly joined, § 493, p. 650

Parties—Continued,
Amendment—Continued,
Name of not discharging sureties on bond for release of property, § 316, p 514
Appeal in proceeding by third person claiming property attached, § 364
Bond, action on, § 173
Release of attached property, § 317, p. 522
Third party claimant, § 384
Dispossession of claimant to property seized, § 401
Main action, § 492
Priorities, proceedings to determine, § 279
Receipts, actions on, § 302, p. 487
Wrongful attachment under,
Irregular or void process, § 510
Regular process, § 542
Partition,
Among heirs not defeating right to attachment, § 84
Lien extending to proceeds when sold under, § 258, p. 434
Partnership,
Bond,
Attachment is against, § 151
Execution of by several members, § 154
Forthcoming bond by, § 308, n 3
Signing bond in name of, § 155 *
Consent to attachment as defense in action for wrongful attachment under regular process, § 540
Debts, surety's liability for levying on for debt of individual, § 397, n 26
Disqualification as surety on attachment bond where partnership is principal, § 153
Name, signature of as security on third party claimant's bond, § 308
Property,
Amount of bond when attached, § 140, p. 332
Attachment on ground of nonresidence, § 30
Party, proceeding by claimant of attached property to establish right, § 356
Passenger cars, liability to attachment, § 74, p 249
Past conveyances, admissibility of evidence on question of contemplated conveyances, § 60, p. 236
Pasturage rents, recovery of damages for wrongful attachment resulting in loss of, § 550, p. 682, n 33
Pauper's oath,
Discharge of debtor on as discharge of attachment, § 270
In lieu of bond, § 145
Payment,
Allegation of in action on bond, § 174, p. 357
Damages, condition precedent to action on bond, § 169
Defense in action for wrongful attachment under regular process, § 540
Failure to pay,
Labor on performance, authorizing attachment, § 62
On delivery as ground for attachment, § 61
Indebtedness as defense to action on bond of third party claimant, § 381
Payment—Continued,
Judgment,
Condition precedent to liability of obligors on bond for release of property, § 315, p. 507
Discharge of,
Receiptor by, § 300
Sureties on bond to discharge attachment by, § 316, p 511
Disposition of property or proceeds in case of, § 335
Dissolution of attachment by, § 268, p. 445
Liability of surety on bond for release of property, § 315, p. 506
Presumption as to in action on bond for release of property, § 317, p. 526
Necessity of paying attorney's fees before recovery for in action on bond, § 179, p. 372
Payment into court, attaching officer, § 290
Pecuniary embarrassment of defendant, defense in action,
Bond, § 170, p. 350
Wrongful attachment under regular process, § 540
Penalty,
Bond for release of property, § 311
Named limiting liability of sureties on bond for release of attached property, § 317, p. 531
Statement as to amount of in bond, § 149, p. 332
Penalty of bond,
Damages limited to in action on bond, § 179, p. 375
Effect of insufficiency, § 149, p. 330
Pendency of action,
Issuance of writ during, § 181
Main action as respects right to recover damages for wrongful attachment, § 525
Recital as to in writ, § 190
Second action as ground for dissolution of attachment, § 425
Showing in respect to in affidavit, § 124
Pendency of appeal, liability of obligor on bond for release of property as affected by, § 315, p. 509
People, writ running in name of, § 185
Peremptory instructions, action for wrongful attachment under regular process, § 552
Performance,
Discharge of sureties on bond for release of property by, § 316, p 510
Judgment, liability of surety on bond for release of property, § 315, p 506
Period of publication of service in main action, § 489, p. 644
Perishable articles, enumeration of in inventory, § 236
Liability to attachment, § 74, p. 249
Sale of, § 319
Title acquired by purchaser on sale of, § 334
Perjury,
Ground for rehearing on motion to dissolve attachment, § 458
Necessity of being able to assign on affidavit, § 113
Permanent absence, necessity to warrant attachment, § 26
Permanent removal of property, necessity to justify attachment, § 53

Permanent residence out of county as concealment within attachment statute, § 27
Person of defendant, necessity of having jurisdiction of, § 95
Personal injuries,
Availability in action to recover for, § 13
Cause of action for not attachable as debt or chose in action, § 86
Personal judgment, liability of sureties on bond for release of property, § 315, p. 506
Personal jurisdiction, effect of general judgment rendered in main action, § 497, p. 657
Personal property and interests therein, § 72
Exhaustion of as necessary prior to seizure of realty, § 76
Levy on, §§ 221–226, pp. 397–405
Personal representative, right to move for dissolution, § 439
Personal service,
Necessity before issuance of writ, § 181
Not defeating right to attachment on ground of nonresidence, § 20
Outside state in lieu of publication, § 489, p. 645
Proceedings in main action, § 487
Recital as to in return, § 248, p. 420
Seizure of property under writ standing in place of, § 483
Showing as to in complaint or declaration in main action, § 493, p. 649
Personam, attachment as proceeding in, § 2, p. 189
Persons,
Authorized to,
Execute writ, §§ 204–206, pp. 388–390
Make return, § 245
Entitled, § 20
Intervene in proceedings, § 340
Move for dissolution, §§ 435–446, pp. 616–620
Recover for wrongful attachment, §§ 526–532
Giving bond for release of property, § 308
Liable, §§ 21, 22
Damages for dispossession of person claiming property, §§ 394–397
Expense of keeping and caring for attached property, § 293, p. 477
Interference with attached property, § 292, p. 475
Wrongful attachment, §§ 533, 534
Making levy, showing as to in return, § 248, p. 419
Petition,
Bond, action on, § 174, p 353
Damages for dispossession of claimant to property seized, § 402
Third person claiming property attached, § 357, p. 561
Physical hiding or secreting of property as necessary for attachment on ground of concealment, § 54
Physical presence of property within jurisdiction of court, sufficiency, § 92, p. 262
Place,
Abode, residence as, § 32
Business distinguished from residence, § 32
Contract, insufficiency to show fraudulent intent, § 69, p. 241
Place—Continued,
Custody, materiality, § 288
Demand on receiptor for return of attached property, § 302, p. 488
Hearing of plea in abatement, § 467
Levy,
Averment as to in action for wrongful attachment under irregular or void process, § 511
Recital as to in return, § 248, p. 419
Recording attachment, § 251
Service, levy on personalty, § 222
Plaintiff,
Affidavit for attachment by, § 106
Identification in, § 120
Liability for expense of keeping attached property, § 293, p 477
Plaintiff in attachment, motion for dissolution of writ, § 445
Plea,
Bond, action on, § 174, p 357
Release of attached property, § 317, p. 524
Damages for dispossession of claimant to property seized, § 402
Intervention by third person claiming property attached, § 357, p 503
Main action, § 493, p 651
Plea in abatement,
Amendment of affidavit after, § 143, p 323
Authority of agent to execute bond attacked by, § 154
Competency of sureties raised by, § 153
Dissolution of attachment by, § 434
Ground for dissolution or vacation of attachment, §§ 460–469, pp 631–634
Objection to affidavit by, § 141, p. 315
Waiver of defects in,
Affidavit by filing of, § 141, p. 314
Bond by filing, § 160, n 44
Plea of privilege, effect of filing as respects jurisdiction to issue writ, § 95
Plea to jurisdiction, action for wrongful attachment under regular process, § 546
Pleading,
Accompanying affidavit, necessity, § 105
Aider of affidavit by, § 141, p 313
Bond, action on, § 174, pp. 353–358
Release of attached property, § 317, p. 522
Third party claimant, § 385
Conclusiveness on motion to dissolve, § 455, p. 626
Damages for dispossession of claimant to attached property, § 402
Determination of priorities, § 279
Discharge of attachment by, § 408
Main action, § 493, pp 648–651
Merits, waiver of defects in bond or undertaking by, § 160
Motion to discharge attachment on, § 423, p. 610
Receipt, action on, § 302, p. 480
Reference to in affidavit, § 116
Third persons claiming property attached, § 357, pp 561–567
Wrongful attachment under,
Irregular or void process, § 511
Regular process, §§ 544–547, pp. 673–676
Pleasure, temporary absence for purpose of not warranting attachment, § 26

Pledge,
Attachment of pledged property by pledgee, § 73
Fraudulent intent warranting attachment, § 44
Levy on, pledged personalty, § 226
Levy subject to, § 226
Liability to attachment, § 73
Note, rights acquired by purchaser on sale of, § 334, n. 5
Statute precluding attachment in case of contracts secured by, § 17, n. 52
Plural form, use of in bond in case of two or more plaintiffs, § 147
Ponderous property, allowance of keeper's fee in case of, § 203, p. 477
Poor debtor's recognizance, simultaneous action on in connection with dissolution bond, § 317, p. 520
Possession,
Bond, condition precedent to action on, § 169
Burden of proof as to in proceeding by third person claiming property attached, § 359, p. 568
Dissolution or redelivery bond as affecting right to, § 313, p. 503
Duty of attaching officer to take, § 282
Effect of as respects recovery of damages for dispossession of third person claiming property, § 393
Failure to take as ground for dissolution, § 423, p. 612
Filing copy of return as bearing on right to, § 251
Levy of attachment,
Giving right to, § 280
Personalty, § 223, p 308
Loss of lien by failure of attaching officer to keep, § 264
Merely not rendering it subject to attachment, § 72
Purchaser of attached property as entitled to, § 334
Possibility not coupled with interest not subject to attachment, § 85, n. 75
Possible sale, loss of as element of damage in action on bond, § 179, p. 370, n. 88
Post office, transmission of money through as tending to show concealment, § 69, p. 242
Posting,
Copy of writ or order, levy on realty, § 231
Notice of levy, § 220, p. 396, n. 48
Service by in proceeding in main action, § 488
Postponement of lien, § 272, p 448
Prior attachment, power of court, § 277, p 463
Potatoes in railway car, levy on without actually laying hands upon, § 225, n. 25
Power of attorney to execute bond in name of principal, § 154
Powers,
Auditors or trustees appointed to administer estate, § 337
Levying officers, §§ 212–216
Prayer,
Affidavit, § 131
Plea in abatement for dissolution of attachment, § 462
Preemptioner, interest of as subject to attachment, § 78
Preference to creditors as fraudulent transfer justifying attachment, § 47
Preferred claim, attachment not lying to enable creditor to make obligation preferred, § 56
Premature action, § 481
Bond, § 172
Defense, § 170, p 348
Filing of complaint, § 105, n. 80; § 493 p. 649
Levy, § 210
Objection to affidavit, § 141, p. 315
Return of,
Execution not supporting action on bond for release of property, § 315, p 509
Writ as ground for dissolution, § 423, p. 611
Undertaking, effect of, § 146
Premium on bond,
Liability for on dissolution, § 479, n. 29
Replevy bond,
Element of damage in action on bond, § 170, p. 372, n. 5
Recovery of in action for wrongful attachment under regular process, § 560, n. 60
Preponderance of evidence,
Bond of third party claimant, action on, § 388
Damages for dispossession of claimant to property seized, § 403
Grounds, necessity of, § 69, p. 239
Sustaining issue by in action on bond, § 175, p. 362
Third person claiming property attached, § 361, p 571
Wrongful attachment under regular process, § 551
Prescription, cure of irregularities in sale of attached property because of defective publication, § 326
Presence of property within territorial limits, necessity for jurisdictional purposes, § 92, p. 262
Present condition of action, showing of in affidavit supporting motion to dissolve, § 452
Present right to future possession as subject to attachment, § 85, n. 75
Presentation, affidavit, § 135
Presumptions,
Actual knowledge of facts set forth in affidavit, § 114
Affidavit, § 118
Amount of bond for release of attachment, § 311, n. 41
Appeal in proceeding to try right to property, § 364
Authority of agent to execute bond, § 154
Bond,
Action on, § 175, p. 358
Release of property, § 317, p. 526
Preceding writ, § 146
Continuance of lien, § 262, p 439
Damages for dispossession of claimant to property seized, § 403
Grounds, § 69, p. 234
Indulging in support of defective affidavit, § 141, p. 312
Intent as necessary element for attachment, § 24
Judgment in action on bond, § 177
Jurisdiction in attachment, § 91
Motion to dissolve or quash attachment, § 455, p. 624

Presumptions—Continued,
Order for discharge or release of property pursuant to bond, § 312
Order of making levy, § 211
Regularity of order for attachment, § 102
Reinstatement after dissolution, § 480
Return § 249
Sufficiency of sureties on bond, § 153
Support of attachment, § 4, p 191
Third person claiming property attached, § 359, p 567
Wrongful attachment under regular process, § 549
Prevention of delivery, discharge of sureties on bond for release of property by, § 316, p. 512
Previous,
Buyer of property from attachment defendant, preferred lien on proceeds, § 335, n 27
Fraudulent transfer of property as ground for attachment, § 39
Residence not preventing attachment on ground of nonresidence, § 31
Title or ownership not subjecting property to seizure, § 72
Price of goods, issuance in action for, § 11, p. 196
Prima facie evidence,
Claimant's ownership of property attached, § 348
Return as, § 252
Proceeding by third person claiming property attached, § 361, p. 573
Principal,
Intervention in attachment proceeding against agent, § 341
Liability for wrongful issuance of attachment by agent, § 534
Principal suit,
Cost of defending as element of damage in action on bond, § 179, p. 373
Issuance from court wherein pending, § 94
Prior attachment, dissolution as ground for quashing second attachment, § 416
Prior levy,
Attachment of property held under, § 237
Property held by officer after as subject to attachment, § 88
Prior mortgage, effect of dissolution of attachment as to, § 472, n. 96
Prior process, return in attachment levied and property held by, § 248, p 420
Prior unrecorded deed, notice of as respects priority over attachment, § 276, p 459
Priority, §§ 272–279, pp. 448–468
Creditors,
Claim of by intervener claiming property attached, § 357, p. 565
Distribution of proceeds of sale in order of, § 335
Evidence as to in proceeding by third person claiming property attached, § 360, p. 569, n 15
Prisoner, property taken from person of as subject to attachment, § 88, n. 93
Private individual, execution of writ by, § 204
Private papers, exemption from attachment, § 74, p 250
Private sale of attached property, validity of, § 328
Probable cause,
Admissibility of evidence concerning in action on bond, § 175, p. 359
Probable cause—Continued,
Averment as to in action for,
Damages for dispossession of claimant to property seized, § 402
Wrongful attachment under regular process, § 545
Averment as to want of in action,
Bond, § 174, p 355
Wrongful attachment under irregular or void process, § 511
Burden of showing want of in action,
Bond, § 175, p 359
Wrongful attachment under regular process, § 549
Defense in action,
Bond, § 170, p 350
Wrongful attachment under regular process, § 520
Exemplary damages,
Recoverable where writ was sued out without, § 179, p 367
Wrongful attachment under regular process in case of want of, § 558
Jury question in action,
Bond, § 176
Wrongful attachment under regular process, § 552
Liability for suing out attachment without, § 516
Showing in mitigation of damages, § 179, p. 375
Sufficiency of evidence as to in action on bond, § 175, p 362
Want of as element of damage to claimant of property seized, § 393
Probable profits, loss of as element of damage,
Action on bond, § 179, p 370
Wrongful attachment under regular process, § 559, p. 683
Probate judge, validity of statute authorizing issuance of writ by, § 100, n. 13
Probative facts, showing of in affidavit, § 126, p. 295
Procedural character of remedy, § 1
Procedure,
Dissolution or vacation of attachment, § 430
Equitable attachment, § 97
Proceedings,
Aid of attachment, §§ 500, 501
Determination of priorities, § 279
Dissolution of attachment, §§ 447–469, pp. 619–634
Establishment of title or recovery of possession by third person, §§ 349–366, pp. 556–584
Main action, §§ 481–499, pp. 640–658
Release of lien by, § 268, pp. 443–446
Sale of attached property, § 324
Proceedings to procure, §§ 91–179, pp. 261–376
Recitals as to in writ, § 189
Proceeds,
Disposition of on dissolution of attachment, § 472
Judgment for in favor of successful claimant to property attached, § 363, p. 579
Sale,
Distribution of, § 335
Substituted for perishable property, etc., § 320
Process,
Bond, action on, § 173

Process—Continued,
Claimant of attached property to establish right, § 356
Failure to serve in main case not resulting in loss of jurisdiction over attached property, § 93
General appearance waiving defects in, § 491
Main action, §§ 482–490, pp. 640–646
Setting aside of as necessary for liability as for wrongful attachment, § 504
Showing as to inability to serve in affidavit, § 126, p 303
Writ serving as, § 180
Production of evidence of debt at time of presenting affidavit, § 136
Profits,
Admissibility of evidence as to amount of on question of damages in action for wrongful attachment, § 550
Loss of as element of damage in action on bond, § 179, p. 370
Progress of action, effect of irregularities in, § 99
Prolonged absence from state resulting in loss of residence within attachment statute, § 34
Promissory note,
Action on when overdue supporting attachment, § 66
Issuance in action on, § 11, p 196
Levy on, § 223, p 402
Liability to attachment, § 87
Power of attaching officer to sue for and collect, § 500
Proof, Evidence, ante
Property,
Covered by lien, § 258, p 433
Custody of law, liability to attachment, § 88
Defendant,
Amendment of affidavit in respect to description of, § 143, p 322
Averments as to in affidavit, § 130
Jurisdiction of as respects binding effect of judgment in main action, § 497, p 657
Not subject to attachment as ground for dissolution, § 427
Situated outside of state, fraudulent transfer affording ground for attachment, § 37
Subject to attachment, §§ 71–90, pp. 244–261
Pro rata distribution,
Sale of attached property, § 335
Successive attachments, § 277, p. 462
Proration, action on redelivery bond, § 317, p. 518, n. 93
Prospective profits,
Availability in action for recovery of, § 14, n. 25
Loss of as element of damage,
Action on bond, § 179, p 370
Wrongful attachment under regular process, § 559, p 683
Province of jury, instruction stating in action for wrongful attachment under regular process, § 552
Provisional remedy, § 2, p. 187
Publication,
Attachment proceedings, admissibility of evidence as to in proof of injury to credit in action for wrongful attachment, § 550, n. 70
Publication—Continued,
Failure to file affidavit for separately as ground for dissolution, § 423, p. 611
Issuance of action to enforce claim acquired by, § 12, p. 190
Notice of levy, § 220, p. 396
Service by in main action, §§ 486, 489, pp. 643–646
Necessity before issuance of writ § 181
Pulpwood in boom, levy on, § 223, p. 400, n. 89
Punitive damages. Exemplary damages, ante
Purchase at sale,
Estoppel to intervene and assert title by reason of, § 342
Intervention by purchaser in pending attachment suit by, § 340, n 84
Purchase money, recovery of by officer selling property under attachment, § 333
Purchase money attachment,
Procedure in action on, § 481
Property subject to levy of, § 258. p. 434
Purchase money lien, priority, § 273
Purchase of claims by intervener, effect as respects rights of other interveners, § 339
Purpose of remedy, § 2, pp 186–190
Pursuing property,
Adjoining county, § 210
Other county, right of levying officer, § 212
Qualifications, sureties on bond, § 153
Release of property, § 309
Quantity of property removed, necessity of showing in affidavit, § 126, p 302, n. 66
Quantity of property seized,
Admissibility of evidence as to in action on bond, § 175, p 360
Conclusiveness of return as to, § 252
Sufficiency of evidence as to in action on bond, § 175, p 363
Quashal of attachment, §§ 406–430, pp. 605–639
Intervener, § 442
Quashing of return, effect of, § 249
Question for court, actions on redelivery or dissolution bond, § 317, p 528
Questions of law,
Bond of third party claimant, action on, § 389
Plea in abatement, § 468
Third person claiming property attached, § 362, p. 575
Wrongful attachment under regular process, § 552
Quieting title, admissibility of evidence as to on question of removal of property, § 60, p 238
Range animals,
Levy on, § 223, p. 402
Liability for negligence in care of pending attachment, § 281
Rape,
Attachment in civil action arising out of, § 58
Issuance to recover on demand arising out of, § 13
Ratification,
Bond executed by unauthorized agent, § 154
Effect of as respects attaching creditor's liability for seizure of another's than debtor's property, § 396
Filing of affidavit by unauthorized agent, effect of, § 106

Ratification—Continued,
Prior unauthorized attachment, effect of as respects rights of intervening attachments, § 277, p. 462
Reading, service of summons in main action by, § 487, n 75
Real property and interests therein, § 75
Description of in return, § 248, p. 421
Intervention by claimant of, § 343
Levy on, §§ 227–232
Ownership of by sureties on bond, § 153
Recording of return in case of attachment of, § 251
Sale of before sale of personal property attached, § 330
Seizure of before levying on personal property, § 212
Reargument, motion to dissolve attachment. § 458
Reasonable cause for believing existence of grounds, effect of as respects dissolution of attachment, § 420
Reasonable charges for taking and keeping property, § 293, p. 477
Reasonable diligence in making levy, necessity of using, § 210
Reassortment of automobile parts as element of damage for dispossession of claimant to property seized, § 405, p. 604, n. 32
Rebuttal of grounds of attachment, allegation of in action for wrongful attachment under regular process, § 545, n. 5
Receipt for property, effect of as respects receiptor's right to assert title himself, § 342
Receiptor, delivery of property to for safe-keeping, §§ 296–302, pp 481–491
Receivers,
Amendment of affidavit in respect to authority to sue, § 143, p 319
Appointment,
After execution of forthcoming bond, § 313, p 500
Destroying lien of attachment, § 267
Distinguished, § 1, n 2
Expenses, recovery for in action on bond when made necessary by attachment, § 179, p. 368
Priority of lien, § 272, p. 454
Right to move for dissolution, § 439
Receptacles, opening by levying officer, § 216
Recitals,
Amount claimed in bond, § 149, p. 332
Judgment necessary to create liability on dissolution bond, § 315, p 509
Moving papers as evidence on motion to dissolve, § 455, p 626
Order on motion for dissolution of attachment, § 457
Return, § 248, p 419
Writ, §§ 188–192
Reclamation or irrigation district, attachment of property in possession of, § 72, n 7
Reconvention,
Damages for wrongful attachment, § 536
Admissibility of affidavit for attachment, § 69, p. 235
Plea in action for wrongful attachment under regular process, § 545
Reconvention—Continued,
Right of attaching plaintiff after intervention by third party claimant, § 349, n. 56
Record,
Admissibility in action on bond, § 175, p. 359
Affidavit as part of, § 104
Appeal in proceedings to try right to property attached, § 364
Consideration of court limited to on motion to dissolve, § 455, p 625
Copy of writ in case of levy on realty, § 232
Levy on realty perfected by, § 227
Return, § 251
Transfers or incumbrances, effect of statutory requirements as respects priority, § 276, pp 457–461
Writ, § 183
Recovery of money, attachment in proceedings for, § 8, p 194
Recurring temporary absences not making absentee nonresident, § 34
Redelivery bond,
Execution of as defense in action for wrongful attachment under regular process, § 540
Recovery of damages for wrongful attachment not precluded by giving of, § 528
Redelivery of property,
Defense in action for damages for dispossession of claimant to property seized, § 400, n 30
Directions as to in order dissolving attachment, § 457
Discharge of,
Receiptor from liability by, § 300
Sureties on redelivery bond by, § 316, p. 510
Duty of receiptor, § 299
Redemption,
Levy on equity of, § 226
Liability to attachment of equities of, § 78
Money in sheriff's possession for purpose of as subject to attachment, § 88, n. 93
Opportunity to be given debtor in decreeing sale of real estate, § 328
Right of by attaching creditor, § 272, p. 448
Reduction of amount of attachment, showing authorizing, § 432
Reference,
Main action, § 496
Motion to dissolve attachment, § 456
Return to other papers for description of property, § 248, p. 421
Pleadings or papers in affidavit, § 116
Statute, bond, § 147
Suit,
Affidavit, § 111
Writ, § 190
Reformation,
Bond for release of attached property and enforcement as reformed, § 317, p. 520
Judgment in proceeding by third person claiming property attached, § 363, p. 580
Refunding bonds, sale of attached property without, § 324
Dissolve, effect, §§ 470–480, pp. 634–639
Pay in connection with concealment of property as ground for attachment, § 54
Pay on delivery as ground for attachment, § 61

Refunding bonds, sale of attached property without—Continued,
Pay or secure debt,
Not ground for attachment, § 67
Showing in respect to in affidavit, § 126, p. 295
Registered mail, invalid service on nonresident by as ground for dissolution, § 493, p. 611
Regular process, wrongful attachment under, §§ 516–565, pp 663–687
Rehearing, motion for dissolution of attachment, § 458
Reimbursement,
Attaching officer for expenses incurred in keeping property, § 293, p. 476
Receiptor's claim for money paid out on execution against attachment debtor, § 299
Reinstatement of attachment after dissolution, § 480
Relation back,
Amended return, § 250
Amendment to affidavit, § 143, pp. 318, 324
Lien of second attachment, § 255
Sale of attached property, § 334
Relationship,
Evidence as to in proceeding by third person claiming property attached, § 360, p. 571
Transfer to as ground for attachment, § 48
Release, §§ 261–270, pp 437–447
Bond of third party claimant securing, § 367
Direction of parties, § 294
Disposition of property or proceeds in case of, § 335
Evidence as to in action for wrongful attachment under regular process, § 550, n. 40
Receiptor, § 300
Security, §§ 303–317, pp. 491–531
Filed by third person claiming property, § 373
Sureties on bond for release of attachment, § 309
Release bond,
Effect of dissolution of attachment on, § 475
Preventing actual levy, § 209
Third party's right to intervene and recover judgment against obligors on, § 344
Relief, scope and extent of on motion for dissolution of attachment, § 457
Relinquishment of attachment, notice of as sufficient return of property on dissolution, § 472
Rem, attachment as proceeding in, § 2, p. 189
Remainder interest, liability to attachment, § 78
Remedies,
Dissolution or discharge of attachment, § 430
Damages for seizure of property under writ directed against another, § 399
Surety on bond, § 164
Release of attached property, § 313, p. 505
Third persons claiming property attached, §§ 349, 350
Remittitur, effect of as respects bond insufficient in amount, § 149, p. 332
Remote possibilities, liability to attachment, § 72
Remote intention to dispose of property as ground for attachment, § 50, n. 6
Removal from state,
Admissibility of evidence as to, § 69, p. 236
Within attachment law, § 26
Removal of cause, discharge or redelivery bond by, § 316, p. 512
Removal of property,
Admissibility of evidence as to, § 69, p. 238
Affidavit as to on information and belief, § 115, n 12
Burden of proof, § 69, p. 234
Ground of attachment, § 51
Levy on personalty, § 223, p. 399
Oil after attachment of oil lease, liability to attachment creditor, § 292, p. 474, n. 96
Recital as to in return, § 248, p. 419
Requirement of attaching officer, § 288
Setting forth facts in respect to in affidavit, § 126, p. 300
State by attaching officer, effect of, § 288
Sufficiency of evidence in respect to, § 69, p. 242
Sufficient to justify attachment, § 53
Removable fixtures, liability to attachment, § 74, p. 248
Renewal,
Motion to dissolve attachment, § 459
Mortgage, estoppel to intervene in proceeding because of failure to file, § 342
Rent,
Debt for establishing debtor-creditor relationship supporting attachment, § 20, n. 63
Effect of levy on realty as to, § 240
Lien extending to, § 258, p. 434
Priority,
Attachment before foreclosure proceedings, § 272, p 454
Rent lien, § 272, p. 450
Rent notes, liability to attachment, § 74, p. 248
Repeal of statutes relating to, § 4, p. 192
Dissolution of attachment by, § 269
Replevin,
Attached property, waiver of defects in affidavit, § 141, p. 314
Attaching officer, § 292, p. 474
Claimant to property attached, § 350
Estoppel of one suing on writ of to assert title to property attached, § 342
Property taken in as subject to attachment, § 88
Receiptor becoming bailee for attached goods, § 302, p. 487
Receiptor of attached property, § 298, n. 42
Wrongfully attached property, § 538
Replevied goods as defense in action for wrongful attachment under regular process, § 540
Replevy bond,
Effect of dissolution of attachment on, § 475
Execution of as,
Condition to right to plead in main action, § 491
Defeating right to move for dissolution, § 437
Intervention and motion to dissolve attachment by sureties on bond, § 443
Premium on as element of damage in action on bond, § 179, p. 372, n. 5
Release of property on, § 305
Vacation of unwarranted attachment after giving, § 449, n. 47
Replevy, sale of property after, § 321

Replication,
Action on bond, § 174, p 356
Intervention by third person claiming property attached, § 357, p. 563
Plea in abatement, § 464
Reply,
Action on bond, § 174, p. 356
Intervention by third person claiming property attached, § 357, p 563
Reports,
Auditors or trustees appointed to administer estate, § 338
Sale of attached property, § 332
Reputation,
Admissibility of evidence as to on question of removal from jurisdiction, § 60, p 236
Attachment defendant, admissibility of evidence as to in action for wrongful attachment under regular process, § 550
Injury to as element of damage in action,
Bond, § 179, p. 371
Wrongful attachment under regular process, § 559, p. 683
Solvency, admissibility of evidence as to in action on bond, § 175, p. 360
Special pleading of injury to in action for wrongful attachment under regular process, § 545
Requisites,
Affidavit, § 111
Bond, § 147
Third party claimant, § 368
Complaint or declaration in main action, § 493, p. 649
Inventory of attached property, § 236
Motion to dissolve or vacate attachment, § 451
Notice of claim or demand of property by third person, § 345, p 552
Plea in abatement for dissolution of attachment, § 462
Process or summons in main action, § 484
Receipt for attached property, § 297
Return, § 248, pp. 418–422
Writ, § 184
Res judicata,
Defense of in proceeding by claimant of attached property to establish right, § 353
Determination of issue as to rightfulness of attachment, § 170, p. 349
Order on motion for dissolution, § 457
Rescission,
Attachment in action for, § 8, p. 195, n. 95
Contract for fraud, availability of remedy in case of, § 15
Residence,
Absconding as ground of attachment, § 24
Allegations required in respect to in affidavit, § 126, pp. 298, 302
Determination of question, § 32
Parties, necessity of showing in affidavit, § 120
Sureties on bond, § 153
Venue of proceedings governed by, § 98
Within attachment statute, § 32
Writ not required to show, § 187
Resisting attachment, construction of statute providing means for, § 4, p. 191
Resort to legal remedies, showing in respect to in affidavit, § 126, p. 295
Responsive verdict, proceeding by third person claiming property attached, § 362, p 577
Restitution, directions as to in order dissolving attachment, § 457
Restoration of lien, § 271
Restoration of property,
Allegation as to in action on bond for release of property, § 317, p 523
Liability of sureties on release bond limited to, § 315, p 506
Restricted credit as subject to attachment, § 86, n. 88
Resulting trust, lien attaching to, § 258, p. 435, n. 68
Resulting damage from levy, necessity to recover as for wrongful attachment, § 520
Reswearing, amendment to affidavit or petition, § 143, p. 324
Retention of,
Jurisdiction of equity for complete relief, § 97
Possession of attached property until payment of expenses for keeping, § 293, p. 480
Retrospective operation of statute relating to, § 4, p. 192
Restoration of attachment by, § 271
Return, §§ 244–253, pp. 417–430
Admissibility of evidence contradicting in proceeding by third person claiming property attached, § 360, p. 571
Bond, § 145
Conclusiveness as to quantity of goods seized, § 551
Direction as to in writ, § 193
Effect, § 252
Failure to make return, effect of, § 253
Insufficiency of as defense in action on receipt, § 302, p. 489
Not found on ordinary process authorizing attachment, § 68
Presumption as to in action on bond for release of property, § 317, p. 526
Sale of attached property, § 332
Return day,
Failure to comply with statute as to as ground for quashing attachment, § 423, p. 610, n. 12
Failure to enter writ on as defense to action on bond for release of property, § 317, p. 520
Return of property,
Debtor, effect of, § 287
Defense to action,
Bond, § 170, p 351
Wrongful attachment under regular process, § 540
Dissolution of attachment, § 472
Mitigation of damages for wrongful attachment under,
Irregular or void process, § 507
Regular process, § 561
Revenue stamp, bond for release of attachment, § 310
Reversal,
Judgment for defendant, revival of attachment by, § 268, p 446
Judgment of dissolution as respects liability of sureties on bond for release of property, § 316, p. 517
Reversionary interest, liability to attachment, § 78
Review. Appeal, generally, ante

Revival of action, necessity of new or additional affidavit, § 104
Revival of lien,
Lost lien, § 271
Second attachment of property not returned on dissolution of attachment, § 472
Reviver of alias writ, § 200, n. 21
Right of action,
Bond, § 168
Release of attached property, § 317, p. 518
Receipt, § 302, p 487
Subject to attachment, § 86
Rolling stock, liability to attachment, § 74, p. 249
Rule,
Enforcement of liability on third party claimant's bond by, § 377
Proceeding by third person claiming property attached, § 349
Rule to show cause, dissolution of attachment by, § 433
Safe deposit box,
Authority of levying officer to open, § 210, n. 15
Liability to attachment, § 74, p 248
Safekeeping of property,
Forthcoming bond insuring, § 313, p. 500
Liability of attaching officer, § 281
Sale of attached property, §§ 318–334, pp 531–539
Before judgment, disposition of proceeds, § 335
Intervention by third party claimant for, § 344
Release of lien by act of officer in permitting, § 264
Subsequent to seizure, effect of as respects recovery of damages by third person claiming property, § 393
Sale of property,
Before levy, priority, § 273
Evidence as to in proceeding by third person claiming property attached, § 360, p 570
Fraudulent sale supporting attachment, § 43
Issuance in actions for breach of contract, § 11, p 196
Satisfaction of debt, levy operating as, § 241
Schedule of property attached, § 230
Scrip certificates, issuance in actions on, § 11, p. 196
School district, liability of public funds belonging to, § 21, n 83
Scroll, sufficiency as seal on bond, § 155
Seal,
Affidavit, § 132
Amendment of bond supplying, § 159
Authority of agent to execute bond in name of principal, § 154
Bond, § 155
Release of attachment, § 310
Order for attachment, § 102
Writ, § 195
Sealed parcel, liability to attachment, § 74, p 248
Seaman's lien for wages, priority of, § 272, p. 454
Second appraisal, necessity of, § 236
Second attachment,
Effect of where property not returned on dissolution, § 472
Levy of by plaintiff as ground for dissolution, § 416
Lien of, § 255
Return of property by receiptor in case of, § 299
Second mortgagee, right to damages for dispossession, § 393, n. 10
Second writ, levy of as abandonment of first levy, § 262, p. 440
Secondary evidence,
Admissibility in action on bond, § 175, p. 359
Proof of writ by in statutory trial of right of property, § 360, p. 570
Secret sales justifying inference of fraudulent intent, § 43
Secret trust, liability to attachment of property covered by, § 82
Secreting as concealment within attachment statute, § 27
Secured demands,
Availability of remedy in actions on, § 17
Sale of original security before putting up attached property, § 328
Security, §§ 145–179, pp. 326–376
Amendment of affidavit as to, § 143, p. 320
Attachment of property for not affecting character of main action, § 2, p 189
Becoming valueless entitling creditor to attachment, § 60
Condition precedent to judgment for sale of attached property, § 497, p 654
False statement as to as ground for vacation, § 420, n 81
Negativing existence of in affidavit, § 129
Release of attached property on, §§ 308–317, pp. 491–531
Sufficiency of to prevent proceeding by attachment, § 17
Transfer of property as not warranting attachment, § 44
Security for costs, proceeding by third person claiming property attached, § 365
Security for possession or release of property, third party claimant, §§ 367–392, pp. 584–604
Seizure,
Before service of summons, § 210
Denial of liability by obligors on bond to secure release of attached property, § 313, p. 504
Direct levy, necessity of, § 201
Jurisdiction by virtue of, § 98
Lack of as ground for dissolution, § 423, p. 610
Levy on personalty, § 223, p. 308
Right of levying officer, § 212
Without writ, validity, § 180
Seller's right to attachment on failure to pay on delivery, § 61
Senior attachment, postponement of lien when not prosecuted to judgment, § 277, p. 463
Separate action,
Bond, enforcement of liability by, § 167
Necessity of on forthcoming, release or replevy bond, § 317, p. 518
Separate complaint, affidavit containing requisites of both affidavit and complaint, § 105
Separate grounds,
Allegation of in affidavit, § 126, p 295
Dissolution, reliance on in same proceeding, § 416
Stating in writ, § 192
Separate petition, necessity of, § 104
Separate writs, sale of property under, § 325
Servant, delivery of property to by attaching officer, § 284
Service,
Copy of inventory, § 236
Defective as ground for dissolution, § 423, p. 610

Service—Continued,
Irregularities in as ground for postponement of lien, § 277, p. 465
Notice of,
Claim of third person to property attached, § 345, p 554
Motion to dissolve or vacate attachment, § 450
Summons, condition precedent to issuance of writ § 181
Writ, levy on,
Personalty, § 222
Realty, § 228
Services, action for rendition necessary to warran recovery for counsel fees in action on bond, § 17[illegible] p. 372
Set-off,
Bond, action on, § 170, p. 376
Damages for wrongful attachment, §§ 536, 564
Debtor against creditor, defense in action on receipt, § 302, p. 489
Showing in respect to in affidavit, § 125, p. 203
Setting aside,
Default judgment in main action, § 497, p. 6[illegible]
Fraudulent transfer, attachment in proceeding to § 8, p. 196
Order dismissing attachment, § 457
Process, necessity of for liability for wrongfu attachment, § 504
Reports, auditors or trustees appointed to ad minister estate, § 238
Sale of attached property, § 324
Verdict, proceedings by third person claiming property attached, § 362, p. 577
Settlement,
Defense in proceeding by claimant of attached property to establish right, § 353
Loss of lien by, § 262, p. 439
Shares of stock,
Levy on, § 224
Liability to attachment, § 79
Situs of for purpose of attachment, § 92, p. 203
Shed, entering by levying officer, § 216
Sheriff,
Approval of redelivery or dissolution bond, § 312
Attaching property as necessary party to proceeding by one claiming preferred lien for services, § 356
Direction of writ to, § 186
Levy of attachment by, § 205
Liability for expenses of custodian appointed, § 203, p. 478
Party to action for wrongful attachment under regular process, § 543
Recovery on bond for expenses of keeping attached property, § 108
Return of attachment to by levying constable, § 246
Shifting of burden of proof, grounds, § 60, p 235
Shipment in regular course of trade as justifying attachment, § 53
Short note,
Substitute for declaration in proceeding, § 403, p. 648
Trial of case before trying validity of attachment, § 495
Short-order sale, recovery of damage because of in action on bond, § 179, p. 389
Show cause rule, dissolution or discharge of attachment by, § 433
Several defendants, attachment in action brought in alternative against, § 22
Several tort-feasors, liability for damages for dispossession of claimant to property seized, § 394
Signature,
Affidavit, § 132
Amendment of affidavit by addition of, § 143, p. 3[illegible]2
Bond, § 155
Release of attachment, § 310
Defect in not available to surety on dissolution bond, § 317, p 520, n 24
Formal requisite of affidavit, § 111
Inventory or appraisal, § 236
Return, § 248, p 422
Writ, § 195
Similiter, plea in abatement, § 464
Simulated levy, effect of, § 202
Simultaneous action, dissolution bond and poor debtor's recognizance, § 317, p 520
Simultaneous attachments, priorities between, § 278
Simultaneous writs, issuance of, § 199
Slander of title, issuance in action for, § 13, n 17
Social standing, injury to as element of damage for wrongful attachment under regular process, § 559, p 683 n 50
Soldiers, exemption from process, § 21
Sole ownership of cause of action, necessity, § 20
Solvency,
Codebtor, effect of, § 22
Effect of as respects release of lien by death of defendant, § 266
False allegations as to by debtor warranting attachment, § 63, p 231
Fraudulent transfer of property, defeating remedy for, § 41
Immateriality as respects attachment on ground of insufficient property within state, § 65, n. 22
Sureties on bond, § 153
Source of information,
Affidavit on,
Information and belief, § 115
Knowledge, § 114
Special allegations, affidavit, § 112
Special bail,
Discharge of attachment by appearing and entering, § 304
Inability to furnish as ground for opening default judgment in foreign attachment, § 497, p 650
Special damages,
Pleading in action,
Bond, § 174, p. 356
Damages for dispossession of claimant to property seized, § 402
Special findings after dissolution on merits, § 456
Special interest in attached property, attaching officer, § 289
Special jurisdiction, proceedings to procure, § 91
Special officers, levy of writ by, § 205
Special property, averment as to in proceeding by third person claiming property attached, § 357, p. 562, n. 33

Specie, liability to attachment, § 74, p. 248
Species of possession constituting legal custody of attached property, § 283
Specific affidavit, necessity of, § 111
Specific attachment, order for not regarded as general order of attachment, § 102, n. 30
Specific directions to levying officer, effect of, § 214
Specific motion to quash or vacate attachment required, § 451
Specific performance, attachment in suit for, § 8, p. 195
Specific property,
Attachment not proper remedy to recover, § 2, p. 190
Employment as means of recovering, § 10
Specification of items in affidavit, § 125, p. 291, n. 34
Speculative damages,
Attachment in action involving, § 8, p. 195, n. 1
Issuance in action for recovery of, § 14
Spendthrift trust, liability to attachment of principal or income, § 82
Spoliation of bond, discharge of sureties on forthcoming or dissolution bond by, § 316, p 512
Stabling attached live stock, compensation of custodian for, § 293, p. 476
Stage coach, liability to attachment, § 74, p. 249
State,
Bond,
Attachment in favor of, § 145
Given to, § 151
Money due from not liable to attachment, § 74, p 250
Writ running in name of, § 185
Statement as to amount claimed, amendment of complaint or declaration as to in main action, § 493, p. 650
Statute, setting out in action on bond, § 174, p. 355
Statutory provisions, § 4, pp. 190–193
Affidavit following statutory language, § 113
Amount of bond, § 149, p. 330
Authority to issue writ, § 100
Compliance with,
Affidavit with, § 111
Dissolution, vacation or quashal, § 406
Levy, § 218
Sale of attached property, § 324
Conditions, bond, § 150
Form of bond, compliance with, § 147
Grounds,
Necessity of, § 23
Showing in respect to in affidavit, § 126, p 295
Waiver of by giving discharge bond, § 313, p. 502, n. 82
Liability, availability in action to enforce, § 12, p. 200; § 18
Lien,
Declaration as to existence of in attachment judgment, § 497, p. 654
Nature of lien, § 256
Notice of levy, necessity of giving, § 220, p. 395
Recording of transfers or incumbrances, effect of as respects priority, § 276, pp 457–461
Stay bond as substitute for forthcoming bond, § 314
Stay of proceedings,
Appeal in proceeding by third person claiming property attached, § 364
Stay of proceedings—Continued,
Execution, release of liability on forthcoming or dissolution bond by, § 316, p. 515
Steamboats, liability to attachment, § 74, p 249
Stenographic expenses, element of damage for dispossession of claimant to property seized, § 405, p 604
Stevedoring company, liability to attachment of goods in custody of, § 74, p. 251, n. 91
Stipulated damages, recovery of in action on receipt, § 302, p. 490
Stipulation,
Liability on bond resting on, § 163, p. 342
Waiver of defects in bond by, § 160
Waiving appeal, discharge of sureties on forthcoming or dissolution bond by, § 316, p. 512
Stockholder,
Corporation within state not resident within attachment law, § 32, n. 92
Issuance in action to enforce liability of, § 11, p. 197
Storage of attached property, compensation for, § 293, p 477
Store, forcible entrance by levying officer, § 216
Straight bill of lading, transferee's right to intervene in proceeding, § 340, n. 84
Stranger, bond for release of property by, § 308
Stratagem resulting in bringing property within jurisdiction, effect of, § 92, p. 262
Strict construction of statutes relating to, § 4, pp. 190, 191, n. 59
Style of writ, § 185
Subject matter, necessity of having jurisdiction of, § 93
Subrogation, sureties' right of, § 164
Subscription to corporate stock, issuance in action to recover balance due on, § 11, p 197
Subsequent attaching creditor,
Intervention by, § 341
Right to object to jurisdiction, § 99
Subsequent attachment,
Discharge of receptor by, § 300
Other proceedings, not precluded by dismissal, § 476
Subsequent claims, effect of bond by intervener claiming property on, § 372
Subsequent conveyances, priority of attachment over, § 273
Subsequent levies,
Defense in action for wrongful attachment under regular process, § 540
Discharge of sureties on forthcoming or dissolution bond by, § 316, p. 517
Element of damage for wrongful attachment under regular process, § 559, p. 684
Release of property on bond as precluding seizure on, § 313, p. 504
Subsequent proceedings, recovery of damages for wrongful attachment, § 537
Subsequent seizure, showing of in defense or in mitigation of damages for wrongful attachment, § 507
Subsequently acquired property, duty of levying on, § 208
Substantial compliance with statute, necessity, § 2, p. 187
Substituted service,
Main action, § 488

Substituted service—Continued,
Validity of in case of levy on personalty, § 222
Substitution,
Bond, release of property on, § 305, n 71
Parties, amendment of complaint or declaration in main action, § 493, p 650
Security, discharge of attachment by, § 270
Sureties, delivery bond, § 309
Third party claimant's bond for attached property, § 372
Successive attachments, priority between, § 277, pp 461–466
Successive demands defeating claim of third person to property attached, § 345, p. 554
Successive levies under writ, § 238
Successive writs, issuance of, § 200
Successor in office, return by, § 245
Sufficiency of evidence,
Bond, action on, § 175, p. 362
Release of property, § 317, p 527
Third party claimant, § 388
Damages for dispossession of claimant to property seized, § 403
Grounds of attachment, § 69, p. 230
Motion to dissolve attachment, § 455, p. 625
Plea in abatement, § 466
Proceedings by third person claiming property attached, § 361, pp 571–574
Receipt, action on, § 302, p 490
Wrongful attachment under regular process, § 551
Sum certain, bond given for, § 149, p. 331
Summary forfeiture of bond of third party claimant, § 377
Summary judgment, remedy by against surety as cumulative, § 317, p. 519
Summary nature of remedy, § 2, p. 187
Summary proceedings,
Establishment of title or recovery of possession by third person, § 349
Sureties on bond to release property, defenses in, § 317, p 521
Summons,
Direction as to in writ, § 193
Irregularities in as ground for postponement of lien, § 277, p 465
Issuance of,
Commencement of action, § 181
Condition precedent to publication of service in main action, § 480, p. 643
Writ prior to as ground for dissolution, § 423, p. 610
Showing as to issuance of service in affidavit, § 124
Summons clause, inclusion in writ as sufficient issuance of summons, § 485
Sunday, issuance of writ on, § 182
Superior title, seizure of goods under as respects damages recoverable in action against receiptor for failure to return goods, § 302, p 491
Supersedeas, appeal in proceeding by third person claiming property attached, § 364
Supersedeas bond,
Execution of on release of surety from liability on bond of third party claimant, § 376
Revival of lien discharged by, § 271, n. 56
Substitute for forthcoming bond, § 314
Supplemental affidavit or complaint, § 143, p 325
Filing of after motion to dissolve, § 453
Supreme Court, authority to issue writ, § 100, n 11
Action against principal to recover amount paid on account of embezzlement not debt fraudulently contracted within attachment statute, § 63, p 231
Sureties,
Absence from state as ground, § 24
Amendment to affidavit not releasing, § 143, p 325
Bond, § 153
Liability for damages to third person whose property has been seized under writ, § 307
Release of property, § 309
Enforcement of liability, § 317, pp. 518–531
Rights and remedies, § 313, p. 505
Remedies, § 164
Replevy bond, intervention and motion for dissolution of attachment, § 443
Third person claiming property, liability, § 375
Execution of bond by, § 154
False swearing or fraud of as ground for vacating, § 423, p. 611, n. 23
Issuance in action by surety paying principal's obligation against cosurety, § 12, p. 200
Judgment in behalf of in proceeding by third person claiming property attached, § 363, p 578
Liability to attachment, § 22
Receiptor as, § 299
Right to attachment in suit against principal, § 20
Surmise, sufficiency to prove fraudulent intent, § 69, p. 240
Surplus,
Foreclosure sale, lien extending to, § 258, p. 434
Proceeds of sale, satisfaction of mortgage lien perfected thereafter out of, § 335
Property in custody of law, liability to attachment, § 88
Surplusage,
Affidavit, § 111
Allegations of claim or indebtedness in affidavit, § 125, p 290
Bond for release of attachment not invalidated by, § 310
Declaration or complaint in action on bond for release of property, § 317, p. 524
Findings, ignoring in writing judgment in proceeding by third person claiming property attached, § 363, p 578
Order for attachment, effect of, § 102
Surrender of security by creditor authorizing attachment, § 60
Survival of attachment lien, § 266
Suspicions as to intended transfer not justifying attachment, § 50
Systematic books of account, admissibility of evidence as to failure to keep on issue of fraudulent intent, § 69, p 237
Sworn application for sale of perishable property, § 325

Technical defects,
Amendment of affidavit in respect to, § 143, p. 316
Disregard of in affidavit, § 113
Telegrams,
Cost of as element of damage in action on bond, § 170, p 373, n. 16
Money forwarded to nonresident outside of state by not within jurisdiction, § 92, p 202, n. 31
Undertaking signed by agent under authority of, § 154
Telephone calls,
Cost of as element of damage in action on bond, § 170, p 373, n 16
Information transmitted by as basis for affidavit, § 115
Temporary absence,
Authorizing attachment, § 26
Evidence as to, § 69, p 236
Loss of residence, § 34
Temporary receiver in bankruptcy, dissolution of attachment as to on release of goods on receipt, § 298, n. 30
Temporary removal of property as ground for attachment, § 53
Tenants in common,
Interest in property as subject to attachment, § 90
Interest of attaching officer in property owned by, § 280
Levy on property of, § 234
Tender,
Defense to action on receipt, § 302, p. 489
Discharge of sureties on bond given to discharge attachment by, § 316, p. 511
Ground for discharge of attachment, § 428
Term of court to which attachment is returnable, § 247
Termination,
Liability of surety on bond, § 103, p. 345
Main action, accrual of right of action for wrongful attachment, § 525
Office, effect of as respects duty of attaching officer in keeping property, § 289
Original proceedings, averments in respect to in action on bond, § 174, p. 355
Terms of sale of attached property, § 328
Territorial restrictions as to levy, § 205
Teste, writ, § 195
Theory of recovery, amendment of affidavit in respect to, § 143, p 320
Third party claims,
Bond or other security for possession or release of property, §§ 307–392, pp 584–594
Damages for dispossession, §§ 393–405, pp 594–605
Effect of judgment in main action as to, § 497, p. 657
Presentation and determination, §§ 339–366, pp 542–584
Third persons,
Disclosure of names of persons from whom information for affidavit was received, § 115
Intervening rights of preventing amendment of return, § 250
Intervention to question grounds for issuance of writ, § 420
Levy on goods in possession of, § 213
Third persons—Continued,
Recovery of debt owed by regardless of payment to judgment debtor, § 500
Release of lien by act of, § 265
Threatened removal, proof of, § 69, p 242
Threatened assignment as sufficient to establish fraudulent intent, § 69, p. 242
Timber wrongfully cut and removed, issuance in action to recover value of, § 12, p. 100
Time,
Absconding, showing in respect to in affidavit, § 120, p 208
Action,
Bond, § 172
Release of property, § 317, p. 520
Third party claimant, § 383
Wrongful attachment under,
Irregular or void process, § 509
Regular process, § 542
Amendment of,
Bond, § 150
Pleadings on intervention by third party claimant, § 357, p. 563
Return, § 250
Appeal in proceeding by third person claiming property attached, § 364
Application for amendment to affidavit, § 143, p 323
Default judgment in main action, § 497, p. 655
Demand on receiptor for return of attached property, § 302, p. 488
Filing,
Affidavit, effect of failure of clerk to indorse, § 138
Plea in abatement for dissolution of attachment, § 461
Pleadings in main action, § 493, p 648
Fraudulent transfer or disposition of property as respects right to attachment, § 39
Giving bond, § 146
Giving new or additional security, § 161
Hearing of plea in abatement, § 467
Intervention by third person claiming property, § 344
Inventory and appraisal, § 236
Issuance of writ, § 181
Joinder of issue in intervention proceeding by third person claiming property, § 357, p. 565
Judgment on attachment issued on unmatured demand, § 497, p. 655
Levy, § 210
Priority between successive attachments, § 277, p. 463
Recital as to in return, § 248, p. 419
Loss of as element of damage,
Action on bond, § 170, p 371
Wrongful attachment under regular process, § 550, p. 683
Making affidavit, § 108
Motion,
Quash or vacate attachment, § 449
Reinstatement after dissolution of attachment, § 480
Nonresidence as respects attachment on ground of, § 31

Time—Continued,
Notice of,
Demand of third party claimant, § 345, p. 552
Levy, § 220, p. 396
Motion to dissolve or vacate attachment, § 450
Objections to,
Affidavit, § 141, p 315
Levy, § 243
Order for sale of attached property, § 325
Priorities, determination of, § 279
Publication of service in main action, § 489, p. 644
Redelivery or dissolution bond, § 307
Return, § 247
Sale of attached property, § 327
Sealing bond, § 155
Service,
Levy on personalty, § 222
Main action, § 486
Value of as element of damage for dispossession of claimant to property seized, § 405, p. 604, n. 33
Title,
Acquired by purchaser of attached property, § 334
Adjudication of on motion to vacate or dissolve attachment, § 454, n 18
Admissibility of evidence as to in proceeding by third person claiming property attached, § 360, p. 571
Amendment of affidavit in respect to, § 143, p. 318
Averments as to in affidavit, § 130
Effect of levy on, § 240
Establishment of by intervener claiming property attached, § 357, p. 566
Formal requisite of affidavit, § 111
Intervener's complaint to show, § 357, p. 562, n. 33
Lack of as defense in proceeding by claimant of property attached to establish right, § 353
Tobacco crop, damages recoverable for wrongful attachment before stripped, packed and put in hogsheads, § 559, p. 681, n 23
Tools, liability to attachment, § 74, p. 248
Torrens Law, registered attachment under giving superior lien to prior unregistered conveyance, § 276, p 460
Tort,
Attachment in proceeding to recover compensation for, § 10
Elements involved in claim growing out of contract, effect of, § 11, p. 197
Tort action,
Damages for dispossession of claimant to property, § 399
Statement as to amount of damages in affidavit, § 125, p. 291
Town marshal, levy of attachment by, § 205
Transcript, cost of in defending suit as element of damage in action on bond, § 179, p. 373, n. 14
Transcript of judgment, issuance of attachment on, § 136
Transfer of cause,
Discharge of sureties on bond for release of property by, § 316, p. 515
Transfer of cause—Continued,
Effect of as respects jurisdiction, § 96
Transfer of property,
Allegations in respect to intent in affidavit, § 126, p. 302
Defeat and delay attachment, action to determine fact, § 500
Effect of as respects right to move for dissolution, § 436
Fraudulent as ground for attachment, § 35
Hinder or delay creditors, burden of proof, § 69, p 234
Prior to levy, priority, § 273
Within attachment statute, § 42
Transposition of parties, amendment by filing new bond of error in respect to, § 161, n. 51
Travel expenses, element of damage in action,
Bond, § 179, p 373, n. 16
Damage for dispossession of claimant to property seized, § 405, p. 604
Traverse,
Affidavit, effect of, § 141, p. 316
Case in motion to dissolve attachment, § 452
Facts set forth in affidavit for attachment, § 100, n. 12
Treasury notes, liability to attachment, § 74, p. 248
Treble damages, wilfully concealing or withholding attached property from sheriff, § 292, p. 474
Trespass,
Ab initio, attachment plaintiff in case of void attachment, § 504
Availability in action of, § 13
Damages for dispossession of claimant to property, § 399
Maintenance of by,
Attaching officer, § 292, p. 474
Claimant to property attached, § 350
Officer failing to make return, § 253
Purchaser of attached property as liable in, § 334
Surety on bond as trespasser, § 163, p. 343
Trespass de bonis asportatis, action for damages for taking property under void attachment, § 505
Trespass on the case, availability in action of, § 13
Trial,
Bond, action on, § 176
Third party claimant, § 389
Damages for dispossession of claimant to property seized, § 404
Intervention by third party claimant after, § 344, n. 55
Main action, § 495
Redelivery or dissolution bond, § 317, p. 528
Third person claiming property attached, § 362, pp 574–578
Wrongful attachment under,
Irregular or void process, § 513
Regular process, § 552
Trial term, amendment of return at, § 250
Trivial defects, ground for dissolution, § 423, p. 610
Trover,
Attaching plaintiff, § 292, p. 474
Claimant to property attached, § 350
Damages for dispossession of claimant to property, § 399
Liability in of receiptor, § 302, p. 487
Trust deed mortgage, priority of, § 272, p. 453
Trust property, liability to attachment, § 82

Trustees,
Bankruptcy, right to move for dissolution, § 439
Exemption from process, § 21
Proceedings by appointment of, §§ 336–338
Ultimate facts, insufficiency of affidavit stating, § 112
Unassigned dower, liability to attachment, § 78
Unauthorized attachment, liability in damages for, § 503
Uncertain damages, availability in action for recovery of, § 14
Undelivered check or draft, liability to attachment, § 87
Understatement of amount due as invalidating demand by third party claimant, § 345, p. 554
Undertaking,
Deposit of cash in lieu of, § 162
Giving of preventing actual levy, § 209
Instead of bond, § 145
Issuance in actions on, § 11, p. 196
Receiptor's liability on, § 299
Seal unnecessary on, § 155
Unequivocal affidavit, necessity of, § 111
Unfair preference, giving of as ground for attachment, § 47, n. 80
Uniform Stock Transfer Act, effect of as respects place for attachment of stock, § 92, p. 263
Unincorporated associations, liability to attachment, § 21
United States,
Bond on attachment in favor of, § 145
Priority of claims of, § 272, p 449
Unknown resident warranting service by publication in main action, § 489, p. 643
Unmatured demands,
Amount of bond, § 140, p. 330, n. 88
Availability of remedy in actions on, § 15
Issuance in actions on, § 12, p 100, § 14
Recovery of amount becoming due before trial, § 408
Setting forth facts in respect to in affidavit, § 125, p. 201
Statement of facts in respect to in affidavit, § 125, p. 202
Unnecessary,
Amendment to affidavit, effect of, § 143, p. 324
Information, effect of in summons on nonresident, § 489, p 645, n. 21
Recitals, conclusiveness of return as to, § 252
Unpaid seller, priority of lien, § 273
Unrecorded,
Attachment, validity of, § 251
Conveyance, priority, § 273
Mortgage, priority of, § 272, p 452, n 19
Unsecured demands authorizing attachment, § 60
Unsuccessful attempt to conceal property sustaining attachment, § 54
Unsworn letter stating amount of mortgage on property attached, sufficiency of, § 346
Untrue ground, liability for wrongful attachment in case of, § 517, n. 68
Use of property, value of as element of damages for,
Dispossession of claimant to property seized, § 405, p. 603
Wrongful attachment under irregular or void process, § 515
Vacation of attachment, §§ 406–430, pp. 605–639
Discharge of sureties on dissolution or discharge bond by, § 316, p 516
Judgment of where intervener establishes title to property attached, § 363, p. 579
Liability on bond, § 163, p. 344
New or additional affidavit, § 104
Proceeding not barred by giving of forthcoming bond, § 313, p. 501
Vacation of court, issuance of writ in, § 182
Vacation of order for publication by service in main action, § 489, p. 643, n. 90
Valid attachment,
Necessity of to create liability on bond for release of property, § 315, p. 506
Sufficiency of evidence as to in proceeding by third person claiming property attached, § 361, p. 574
Value,
Admissibility of evidence as to in,
Action on bond for release of property, § 317, p. 527
Proceeding by third person claiming property attached, § 360, p. 571
Wrongful attachment under regular process, § 550
Allegations as to in action on bond for release of attached property, § 317, p. 523, n. 57
Assessment of in,
Judgment in proceeding by third person claiming property attached, § 363, p. 579
Verdict in proceeding by third person claiming property attached, § 362, p. 578
Conclusiveness of return as to, § 252
Designation of in writ, § 193
Determination of for purpose of fixing liability of sureties on bond for release of property, § 317, p. 531
False statement regarding by debtor warranting attachment, § 63, p. 232
Jury question in action,
Bond for release of property, § 317, p. 529
Wrongful attachment under regular process, § 552
Recital as to in return, § 248, p. 422
Seized, admissibility of evidence as to in action on bond, § 175, p. 360
Sufficiency of evidence as to in action on bond for release of property, § 317, p. 527
Advertisement and affidavit, § 141, p. 312
Affidavit and evidence, § 140
Affidavit and pleading, § 139
Amount claimed and actual indebtedness, effect of, § 125, p 200
Bond, action on, § 174, p. 358
Release of property, § 317, p. 525
Damages for dispossession of claimant to property seized, § 402
Ground for quashing attachment, § 419
Judgment on attachment writ and affidavit therefor, § 497, p. 654
Names in writ, disregard of, § 187
Third person claiming property attached to establish right, § 357, p 566
Writ and other papers, § 196
Wrongful attachment under regular process, § 547

Variation from letter of law vitiating proceedings, § 4, p. 191, n. 59
Vendee of defendant, right to move for dissolution, § 438
Vendor's lien,
Allegations in respect to in affidavit, § 118
Amendment of,
Affidavit in respect to, § 143, p 318
Complaint or declaration in main action correcting mistake as to, § 493, p. 650
Bond, § 171
Third party claimant, § 382
Claimant of attached property, proceeding by to establish right, § 354
Damages for dispossession of claimant to property seized, § 404
Effect of as respects right to proceed by attachment, § 17, n. 52
Existence of preventing attachment of property, § 73
Formal requisite of affidavit, § 111
Lack of in affidavit not subjecting it to collateral attack, § 110
Priority of, § 273
Proceedings to procure, §§ 98, 99
Wrongful attachment under,
Irregular or void process, § 508
Regular process, § 541
Verbal declaration of seizure, sufficiency in case of levy on personalty, § 223, p. 309
Verbal inaccuracies, disregard of in affidavit, § 113
Verdict,
Bond, § 176
Main action, § 495
Plea in abatement, § 468
Third person claiming property attached, § 362, p. 577
Wrongful attachment under regular process, § 552
Verification,
Affidavit, § 132
Amendment of defects in respect to in affidavit, § 143, p 323
Answer denying allegations of affidavit for attachment, § 434, n. 7
Complaint or declaration in main action, § 493, p. 650
Defect in bond cured by filing new undertaking, § 161, n 50
Exceptions to not considered on motion to dissolve, § 454, n. 19
Motion for dissolution of attachment, § 451
Objection to petition for attachment for want of, § 197
Plea,
Abatement for dissolution of attachment, § 462
Non est factum in action on bond, § 174, p 357
Pleading,
Proceeding by third person claiming property attached, § 357, p. 561
Substitute for affidavit, § 104
Return, § 248, p. 422
Vessels, liability to attachment, § 74, p 249
Vested interest under contract, liability to attachment, § 80
Vested remainder, liability to attachment, § 78
Vexatious attachment,
Liability on bond, § 163, p. 343
Recovery of damage for wrongful attachment causing, § 559, p. 683, n. 48
View, levy on personalty within, § 225
Vigilance, degree of constituting legal custody of attached property, § 283
Vindictive damages Exemplary damages, ante
Violation of possession, actions for, § 292, pp. 473–476
Void attachment, liability in damages for, § 503
Void bond, amendment under authority of statute, § 159
Voluntary abandonment or dismissal,
Damages for wrongful attachment, § 517
Effect of, § 262, p 441
Voluntary alienation of title, necessity for attachment on ground of fraudulent transfer, § 42
Voluntary bankruptcy, recovery of damage because of contribution thereto by attachment, § 179, p. 36
Voluntary concealment, necessity, § 27
Voluntary nonsuit, liability on bond, § 163, p. 344
Wager, liability for wrongful attachment based on, § 517, n 66
Wages,
Execution against pursuant to judgment on constructive service and attachment of personalty, § 490, n 92
Priority of lien for, § 272, p. 454
Waiver,
Approval of redelivery or dissolution bond, § 312
Claim for damages for wrongful attachment, § 528
Defects in,
Affidavit, § 141, p. 313
Bond, § 160
Third party claimant, § 370
Demand for account of amount due on mortgage where equity of redemption is attached, § 346
Failure to file additional affidavit to determine amount of levy, § 104
Filing of bond of third party claimant, § 371
Giving of discharge bond, § 313, p. 502
Justification of sureties on bond, § 157
Lien, § 17
Mortgage lien on personal property, effect of as respects right to attachment, § 73
Notice of third party claim to property seized, § 345, p 532
Objections to,
Jurisdiction of proceedings, § 99
Levy, § 243
Return, § 249
Writ, § 197
Plea in abatement, § 463
Release of lien by, § 262, p. 438
Right to,
Assert grounds of attachment, § 70
Move for dissolution, § 437
Security by conditional seller not entitling him to attachment, § 60
Service of copy of writ and inventory, § 286
Tort, issuance of action on implied contract, § 12, p 109
Want of jurisdiction, ground for dissolution, § 421
Want of probable cause, allegation of in action on bond, § 174, p. 355

Warehouse,
Forcible entrance by levying officer, § 216
Removal of goods to by bailee, § 299
Warning order,
Issuance of summons instead of as ground for dissolution, § 423, p. 611
Mortgagee, sale of property subject to mortgage, § 326
Warrant, §§ 180–200, pp 376–388
Warranty, issuance in breach of contracts of, § 11, p. 196
Waste,
Injunction to prevent debtor from committing, § 501
Liability of surety on release bond for, § 315, p 506
Watchman, refusal to continue paying as abandonment of lien, § 262, p. 440
Water craft, liability to attachment, § 74, p 249
Water right, attachment with land to which appurtenant, § 258, p 434
Weight of evidence,
Bond, action on, § 175, p 362
Release of property, § 317, p. 527
Third party claimant, § 388
Damages for dispossession of claimant to property seized, § 403
Ground of attachment, § 69, p 239
Motion to dissolve attachment, § 455, p 625
Plea in abatement, § 466
Third person claiming property attached, § 361, pp 571–574
Wrongful attachment under regular process, § 551
Widow's allowance, priority over lien, § 272, p. 454
Wife,
Attachment defendant, opportunity to assert rights before final distribution, § 335, n. 18
Intervention by wife of debtor, § 341
Husband's authorization as defense in action for damages for levying attachment against husband on property of wife, § 400
Will, interest disposable as by subject to attachment, § 72
Withdrawal, plea in abatement, § 463
Withholding deed or mortgage from record, admissibility of evidence as to on question of fraudulent intent, § 69, p. 237
Witnesses, inventory of attached property in presence of, § 236
Women, exemption from process, § 21
Work, failure to pay for performance authorizing attachment, § 62
Worry, damages for in action for wrongful attachment under regular process, § 562, n. 81
Writ, §§ 180–200, pp 376–388
Service of in case of levy on personalty, § 222
Writ of error, release of attachment by, § 208, p. 446
Writing,
Approval of bond in, § 158
Fraudulent statements warranting attachment, § 63, p 232
Necessity that affidavit be in, § 111
Notice of,
Claim of third party to property attached, necessity, § 345, p 554
Levy, necessity of giving, § 220, p 395
Order for attachment, necessity of, § 102
Receipt for attached property, necessity of, § 297
Wrongful attachment, §§ 503–565, pp 661–687
Allegation in action,
Bond, § 174, p 354
Wrongful attachment under regular process, § 545
Estoppel to claim by giving of dissolution bond, § 313, p 503
Jury question in action,
Bond, § 176
Wrongful attachment under regular process, § 552
Liability,
Bond, § 163, p. 343, n 95
Damages for, §§ 516, 518
Wrongful attachment under regular process dependent on, § 517
Presumption as to in action for wrongful attachment under regular process, § 549
Sufficiency of evidence as to in action on bond, § 175, p. 362

ATTORNEY AND CLIENT

Abandonment,
Actions,
Contingent fee affected by, § 188, p. 1074
Stipulated compensation affected by, § 183, p. 1059, n. 96
Unpaid fees in condemnation proceedings, § 230
Appeal,
Attorney's authority, § 95, p 913
Evidence in disbarment proceeding, § 33, p 790, n. 7
Client's interest, ground for suspension or disbarment, § 23, p. 744
Employment,
Justification for as jury question in action for compensation, § 205, p. 1131
Liability for compensation, § 160, p 1031
Order for substitution of new attorney, § 121, p. 952
Abandonment—Continued,
Plea in bar to jurisdiction in disciplinary proceedings, § 37, p. 805
Relation, § 4, p. 707, n. 34; § 110, p 943
Abeyance of judgment in disciplinary proceeding, § 36, p. 798
Abiding event of another suit, attorney's authority to stipulate, § 100, p. 920
Ability, consideration in action to recover amount of lien, § 231, p. 1191, n. 46
Absence,
Benefit to client affecting right to compensation, § 166
State, forfeiture of right to practice, § 17
Trial affecting right to compensation, § 167
Absent persons, assignment as counsel by court, § 54
Absolute right to practice, § 4, p 708
Abstract statements supporting verdict on quantum meruit for compensation, § 204, p. 1128

Abstracting court records or papers as ground for suspension or disbarment, § 23, p. 756
Abstracting title, fee for, § 191, p 1084
Abstracts of record, review of proceeding for suspension or disbarment, § 37, p 803
Abusive letter as blackmail, § 59
Acceptance,
Benefits as ratification by client of attorney's acts, § 71, pp. 870–873
Employment contract, § 65
Withdrawal or resignation of attorney, § 110, p 944
Accomplice testimony in disciplinary proceedings, § 33, p. 790
Accord and satisfaction,
Burden of proof in action against attorney for money collected, § 154, p. 992
Client's receipt for part of proceeds collected, § 144
Evidence in action for compensation, § 204, p 1125, n. 47
Account rendered, evidence in action for compensation, § 204, p. 1121
Accountants,
Practice without admission, § 16, p. 725, n. 10
Right to compensation, § 165, p 1022, n 82
Suggestions for reduction of franchise tax as practice of law, § 3, p 706, n 31
Accounting by attorney, §§ 133–137, pp. 973–975
Actions for, §§ 152–154, pp. 987–994
Bill of particulars, § 154, p 991
Burden of proof, § 154, pp 991, 992
Counterclaim for compensation, § 197, p. 1104
Defenses in action for, § 153
Disbarment or suspension for failure to account, § 23, p. 746
Evidence in action for, § 154, pp. 991, 992
Firm member to share in fees received by partner, § 56, p. 841
Laches, § 153
Presumptions in action for accounting, § 154, pp 991, 992
Time to sue for accounting, § 154, p 990
Trial in action for, § 154, pp 993, 994
Accusation in disciplinary proceeding, § 31, pp 775–779
Acknowledgment,
Client's indebtedness, attorney's authority, § 102
Suspension or disbarment for antedating, § 23, p. 756
Acquiescence,
Client in delegation of attorney's authority or employment of assistants, § 107, pp 939, 940
Inconsistent position in suit affecting right to compensation, § 167, p 1025
Acquiring interest adverse to client. Adverse Interest, post
Acquittal, bar or defense to disbarment proceeding, § 21, p. 740
Acting in different capacities, disqualification, § 49
Action on case to recover,
Money withheld by attorney, § 154, p 989
Negligence or misconduct of attorney, § 155
Actions,
Authority of attorney respecting, § 81
Brought by attorney without authority, § 64
Actions—Continued,
Care and skill required in conducting, § 146, pp. 982–984
Compensation, actions for, §§ 195–206, pp. 1102–1137
Disqualification to buy demands for suit, § 46
Establishment of attorney's lien, notice dispensing with necessity of bringing, § 215, p. 1159
Liability for failure to bring, § 148
Money collected and for accounting, §§ 152–154, pp. 987–994
Negligence or wrongful acts by attorney, §§ 155–157, pp. 994–1005
Objection to attorney's authority to bring, § 74, p. 885
Presumption of attorney's authority relating to action, § 73, pp. 876, 877, n. 16, 878
Ratification by client of attorney's bringing of action, § 71, pp. 869, 872
Right to enforce compensation, § 160
Termination of action as terminating relation of attorney and client, § 116, pp 947–949
Acts of client, liability of attorney, § 52, p. 835
Acts of member of firm, binding on firm, § 56, p. 838
Acts of parties terminating relation, § 109, pp. 940–943
Actual possession, necessity as respects attorney's retaining lien, § 225, p. 1167, n. 69
Actual practice, requirement for admission to practice in another jurisdiction, § 15, p. 721, n. 75
Additional abstract for review of suspension or disbarment proceedings, § 37, p. 804
Additional compensation,
Contingent fee contract, § 187, p. 1069
Contracts for, § 181, p. 1052
Additional counsel,
Employment affecting right to compensation, § 185
Employment under assignment by court, compensation, § 172, p. 1036
Address,
Disclosure by attorney, § 75
Suspension or disbarment for giving false address of plaintiff, § 23, p 754, n 89
Adequacy of other remedies affecting summary proceeding to compel payment over of money, § 159, p 1008
Adjustment of tax liability, lien of attorney securing, § 213, p. 1151, n. 26
Administration expenses, lien of attorney subject to, § 229
Administration of estate,
Compensation of counsel assigned by court, § 172, p. 1037
Representation of adverse interests, § 47, p. 825, n 9
Administrative boards, attorney's authority to appear before, § 80, p. 900
Administrators. Executors and Administrators, post
Admission by answer in disciplinary proceeding, § 32, p. 780
Admission to practice, §§ 4–16, pp. 706–727
Application for, § 9
Application for reinstatement, § 41, p. 817
Attorney from other jurisdiction, § 15, pp. 720–724

Admission to practice—Continued,
Burden of proof in action to recover compensation, § 204, p 1114
Capacity, §§ 7, 8, pp 712–714
Certificate of admission, § 14
Citizenship, § 7, p 713
Clerkship, § 8
Client representing himself, § 16, p. 725
Collateral attack, § 11, p. 719
Constitutional provisions, § 5, pp 709–711
Contempt in practice by one not admitted, § 16, p 726
Costs of investigation of attorney admitted from another jurisdiction, § 15, p 723
Defenses to contempt for practicing without admission, § 716, p 727
Determination of right to, § 11, pp. 716–719
Educational requirements, § 8
Eligibility, § 7, pp 712–714
Evidence in proceeding, § 11, p. 717
Ex gratia, attorneys from another jurisdiction for trial of a particular case, § 15, p. 724
Examination, § 10
Foreign country, attorney from, § 15, p. 722
Foreign state, right to compensation, § 165
Fraud in procuring as ground for suspension or disbarment, § 22
Good moral character, § 7, p. 712
Hearing on application, § 11, p 718
Instruction in preparing applicants, suspension or disbarment, § 24, p 763, n. 38
Issues, § 11, p 717
Joining resident attorney by attorney from another jurisdiction for trial of case, § 15, p 724
Jurisdiction to admit, § 6
Licenses, post
Minors, § 7, p 713
Misdemeanor, practicing without authority, § 16, p. 727
Misrepresentation of qualifications, ground for suspension or disbarment, § 22, p. 741
Modification of order admitting attorney from another jurisdiction, § 15, p 723
Moral character, § 7, p. 712; § 11, p. 717
Motion to courts of another jurisdiction, § 15, p. 721
Nature of office, § 4, pp 706–708
Nature of right to practice, § 4, p. 708
Oath, § 12
Offense in practice by one not admitted, § 16, p 726
Partners, one member not duly admitted affecting right to compensation, § 165
Practice without admission, § 16, pp. 724–727
Preliminary study, § 8
Probate judge giving advice without admission to bar as practice of law, § 3, p 704, n 30
Punishment for practicing without authority, § 16, p 727
Qualifications, §§ 7, 8, pp. 712–714
Registration, § 13
Residence, § 7, p. 713
Review of determination of right to, § 11, pp. 716–719
Revocation of order admitting attorney from another jurisdiction, § 15, p. 723
Admission to practice—Continued,
Rules of court, § 5, pp 709–711
Application for admission, § 9
Setting aside order, § 11, p 719
Statutory provisions, § 5, pp. 709–711
Application for admission, § 9
Suspension or disbarment for moving one's admission against report of examiners, § 23, p. 760
Tenure of office, § 17
Trial of particular case by attorney from another jurisdiction, § 15, p. 723
Vacation of order admitting attorney from another jurisdiction, § 15, p. 723
Waiver of objections to practice without admission, § 16, p. 725
Women, § 7, p. 713
Admissions,
Attorney's authority to make, § 100, pp 920–922
Member of firm as binding on firm, § 56, p. 838
Adultery,
Ground for suspension or disbarment, § 21, p. 737
Suspension or disbarment for securing confession of adultery, § 23, p. 743, n. 16
Advances,
Costs as forfeiture of right to lien, § 218, n. 31
Partnership to client as firm assets on dissolution, § 56, p 841
Reimbursement of advances to client, § 180
Retaining fee, § 162, p. 1019
Adverse interest,
Acquiring interest adverse to client, § 126, pp. 960–963
Acting for person adversely interested, § 151
Attorney in subject-matter, § 125, p 958
Constructive trust for benefit of client, § 126, p. 960
Costs, liability for, § 50, p 831, n. 60
Disqualification to represent, § 47, pp. 823–827
Laches barring right, § 126, p 962
Liability for nondisclosure, § 138
Notice to client affected by, § 60, p. 856
Payment of fees from funds in court to attorney representing, § 193, p 1007
Purchase of interest in property or claim, § 126, p 961
Ratification by client, § 126, p. 962
Representation as unethical conduct, § 58, p. 843, n 89
Terminating authority by acquisition, § 117
Termination of relation, § 126, p. 963
Waiver of rights, § 126, p. 962
Withdrawal of attorney acquiring adverse interest, § 110, p. 944
Adverse party,
Acting for adverse party as defense to action for compensation, § 196
Action for compensation against, § 195
Allowance paid by adverse party, § 163
Attack on contingent fee contract, § 186, p. 1066
Charging lien enforced against, § 234, p. 1201
Construction and operation of contract providing for allowance to be paid by, § 182, p. 1057
Liability for attorney's lien as concurrent remedy, § 231, p. 1185, n. 4
Liability to, by attorney, § 52, pp. 832–836

Adverse party—Continued,
Lien of attorney on moneys in hands of, § 228, p. 1172
Notice of substitution or change of attorney to, § 123
Representation affecting right to compensation, § 167, p 1024
Summary proceedings against attorney to compel payment of money to, § 159, p 1011
Advertisement,
Defense to proceeding for suspension or disbarment, § 25, p 765
Divorce business,
Criminal offense, § 59
Suspension or disbarment, § 23, p 759
Easy divorces, court's power to regulate conduct, § 58, p 843, n. 81
Services as practice of law, § 3, p. 704, n. 30, p 706, n 31
Advice,
Attorney's liability for giving improper or erroneous advice, § 142
Pleading in action for negligence, § 157, p. 998
Practicing law by giving, § 3, p. 704, n. 30
Vacation of judgment of disbarment for erroneous advice, § 36, p. 799
Advocates,
Compensation, § 160
Defined, § 3, p 702
Affidavit of defense in action for compensation, § 203, pp. 1109, 1110
Affidavits,
Application for admission to practice, § 9
Attorney's authority to make, § 89
Attorney's misconduct on application for substitution, § 122, p. 955
Authority of attorney shown by, § 76, p. 889
Clerk of an attorney as foundation of motion, § 57
Delay, affidavit for purpose as ground for suspension or disbarment, § 23, p. 755
Destitute condition, absence affecting right of attorney to compensation, § 172, p. 1034
Evidence,
Disciplinary proceedings, § 33, p. 783
Summary proceedings to compel payment over of money, § 159, p 1015
Want of attorney's authority, § 76, p. 890
False or forged affidavits as ground for suspension or disbarment, § 23, p. 754
False statement in affecting right to compensation, § 167, p 1026
Objection to attorney's authority, § 74, p. 885
Publication of process, negligence of attorney in filing, § 146, p 994, n. 9
Summary proceedings to compel payment over of money commenced by affidavit, § 159, p. 1014
Verification of charges in disbarment proceeding, § 31, p 778
Affirmative acts by client ratifying attorney's acts, § 71, p. 871
Affirmative defense, burden of proof as to in action for compensation for services, § 204, p. 1115
Affirmative purposes, lien of attorney as restricted to services rendered for, § 218, p. 1152
Aged client, validity of transaction with attorney, § 127, p. 963
Agency,
Relation of attorney and client as, § 67, pp. 850–852
Rules of agency applicable to attorney, § 67, pp. 850–852
Agent,
Accounting by attorney to client acting as agent, § 137
Attorney's agents, § 57
Evidence as to declarations to show employment, § 204, p. 1119
Liability for compensation of attorney employed by agent, § 177
Lien of attorney as lost when money is under control of, § 218, n. 33
Ratification of attorney's acts by, § 71, p. 869
Aggrieved party,
Prosecution of disbarment proceeding, § 30, p. 775, n 93
Review of suspension or disbarment proceeding, § 37, p. 799, n. 62
Agreed fee as evidence of value in action for compensation, § 204, p. 1128, n. 59
Agreements Contracts, post
Aid to court, § 4, p. 707
Alien property custodian, objection of attorney's authority to appear for, § 74, p. 883, n. 1
Aliens,
Contracts for services, § 181, p. 1050
Qualifications for admission to practice, § 7, p. 713
Securing release from military service, suspension or disbarment, § 23, p. 762
Alimony,
Agreement to take one-half of alimony as ground for suspension or disbarment, § 23, p. 745, n. 36
Charging lien as attaching to, § 228, p. 1173
Contingent fee contract for percentage of alimony, § 186, p 1064
Lien on up to time of discharge, § 218, p. 1154, n. 46
Allowance of attorney's charging lien, § 238, p 1211
Alteration of judgment, authority of attorney, § 93
Alteration of records as ground for suspension or disbarment, § 23, p. 756
Alternative findings, action by attorney to recover compensation, § 205, p. 1136, n. 30
Alternative judgment, proceedings to enforce attorney's charging lien, § 238, p. 1212
Amanuensis, preparation and assignment of judgment as practice of law, § 3, p. 706, n 31
Ambiguous instruction in disciplinary proceeding, § 34, p. 793
Ambulance chasing,
Jurisdiction to investigate charges, § 18, p. 730, n. 78
Practice of law, § 3, p. 705, n. 30
Suspension or disbarment, § 23, p 759
Unethical conduct, § 58, p. 843, n. 89
Amendment of pleadings,
Answer in action for compensation, § 203, p. 1110
Authority of attorney to file, § 81

Amendment of pleadings—Continued,
Petition in summary proceedings to compel payment over of money, § 159, p 1014, n. 3
Petition or complaint in disbarment proceeding, § 31, p. 779
Review of ruling of referee, § 37, p 805
Stipulations and agreements, attorney's authority respecting, § 100, p 919
Amicable action, attorney's authority to agree for, § 100, p 919
Amicus curiæ,
Additional abstract for review of suspension or disbarment proceeding, § 37, p 804
Appeal from proceeding for reinstatement, § 41, p 819
Appearance by attorney, § 82, p. 905
Amount due, determination of before enforcement of attorney's charging lien, § 238, p. 1204
Amount of compensation, § 191, pp 1078–1094
Evidence in action for compensation, § 204, pp. 1120, 1127
Jury question in action for compensation, § 205, p 1131
Summary proceedings, amount not determined in, § 194, p. 1100
Amount of lien of attorney, § 213, p. 1152
Amount of recovery, proceedings to enforce lien of attorney after settlement in disregard of, § 231, p. 1195
Ancillary proceedings awarding reasonable compensation, § 194, p. 1101
Answer,
Accusation in disbarment proceeding, § 32, p. 780
Charging lien, proceedings to enforce, § 238, p. 1200
Compensation, action for, § 203, pp. 1100, 1110
Admission in, § 203, p. 1112
Evidence in summary proceedings to compel payment over of money, § 159, p. 1015
Evidence of attorney's authority to withdraw, § 76, p. 893
Failure to answer in proceeding for suspension or disbarment, § 27, p. 760
False answer as ground for suspension or disbarment, § 28, p. 754
Antedating writ as ground for suspension or disbarment, § 23, p. 756
Apology,
Defense in disciplinary proceeding, § 25, p 706
Second reinstatement, § 41, p 819, n. 40
Apparent authority of attorney, § 79, pp. 896–898
Acceptance or waiver of service of process or notice, § 83
Acknowledging client's indebtedness, § 102
Admissions, authority to make, § 100, pp. 920–922
Appearance by attorney, § 82, p. 904
Bonds, authority to execute, § 103, p. 926
Change of venue, § 85
Compromise and settlement, § 105, pp 931, 932
Conduct and control of litigation, § 80, pp 898–902
Confession of judgment, § 86
Consent judgment, § 86
Contracts, authority to bind client by, § 103, pp. 924–927
Apparent authority of attorney—Continued,
Interlocutory proceedings, §§ 84–92, pp 907–911
Matters unconnected with litigation, §§ 101–106, pp 923–928
Payment, authority to receive, § 106, pp. 934–938
Judgment, § 99, pp. 916, 917
Proceedings before judgment, § 81
Release by attorney, § 105, pp. 932–934
Retraxit, authority to enter, § 87, p. 909
Satisfaction of judgment, § 99, pp. 916, 917
Statements, authority to make, § 100, pp. 920–922
Stipulations and agreements, § 100, pp. 917–920
Waiver by attorney, § 100, pp. 922, 923
Appeal,
Assignment as counsel, § 54, p 837, n. 13
Compensation of counsel assigned by court, § 172, pp. 1035, 1036
Attorney's authority respecting, § 95, pp. 912–914
Burden of proving attorney's want of authority to appeal, § 76, p. 888
Presumption of attorney's authority relating to appeals, § 73, p 881
Waive right of appeal, § 100, p 923
Attorney's duty to protect client's right to appeal, § 146, p. 984
Attorney's right of to obtain more favorable judgment and chance to enforce lien, § 234, p 1201
Authority of attorney questioned on appeal, § 74, pp 882, 883
Costs in disciplinary proceedings, § 30, p 812
Damages for negligence in perfecting, § 157, p. 1003, n 94
Death of client terminating attorney's authority to take appeal, § 113
Decision as to admission to practice, § 11, p. 719
Effect on conviction of crime as ground for disbarment, § 21, p. 739
Evidence,
Action for attorney's negligence for failure to perfect, § 157, p. 1000, n. 88, p. 1001, n 88
Attorney's authority to appeal, § 76, p. 893
Expenses, attorney's authority to contract to pay expenses of, § 103, p. 926
Fees,
Appeal from order allowing, § 194, p. 1100, n. 60
Discretion of appellate court in determining amount, § 191, p 1093
Payment of fees from funds in control of appellate court, § 193, p. 1098
Forma pauperis appeal, duty of attorney as to court, § 4, p 707, n 34
Lien of attorney as superseded by, § 217
Negligence in perfecting as question for jury, § 157, p. 1002, n. 90
Ratification by client of attorney's appeal, § 71, pp 869, 872
Reinstatement proceeding, § 41, p. 817, n. 15, p. 819
Substitution of attorney on appeal, § 121, pp. 952, 953
Determination of amount of fees by appellate court in proceedings for, § 122, p. 955
Notice to adverse party, § 123

Appeal—Continued.
Suspension and disbarment proceeding, § 37, pp. 799–806
Suspension or disbarment for failure to protect rights of client, § 23, p 744
Time of objecting to attorney's authority to take appeal, § 74, p. 884
Time to require attorney to show authority, § 74, p 883
Appeal bond,
Attorney's authority to execute, § 103, p. 926
Attorney's authority to waive, § 100, p 923
Filing worthless appeal bonds, suspension or disbarment, § 23, p. 756
Appearance,
Attorney appearing for himself after suspension or disbarment, § 40
Attorney's authority to authorize another attorney to enter, § 107, p. 939
Authority of attorney to appear, § 82, pp 903–905
Breach of contract by appearing for adversary affecting right to compensation, § 183, p. 1060, n. 6
Burden of proving want of authority to appear, § 76, pp. 886–888
Compensation, appearance in action for, § 201
Costs, liability of attorney appearing for himself, § 50, p. 832, n. 60
Damages for unauthorized appearance, § 154, p. 994
Evidence of authority, § 76, pp. 883, 889
Presumption of attorney's authority to enter appearance, § 73, p 878
Ratification by client of attorney's appearance, § 71, pp. 869, 872
Unauthorized appearance,
Damages for, § 154, p. 994
Liability for, § 147
Liability to third persons, § 52, p. 835
Appellate court,
Jurisdiction to enforce attorney's charging lien, § 238, p 1207
Costs, liability of attorney for, § 50, p. 831
Power to suspend or disbar, § 18, p 731
Punishment of lawyers improperly taking care of interests of client, § 58, p 843, n. 83
Suspension or disbarment proceeding, § 37, p 800
Application for,
Admission to practice, § 9
Allowance of fees in summary manner, § 194, pp 1100–1102
Change or substitution of attorney, § 121, pp 951–953
Order requiring attorney to pay costs, § 50, p. 832
Reinstatement, § 41, p. 817
Review of suspension or disbarment proceedings before committee or referee, § 37, p 803
Summary proceedings to compel payment over of money, § 159, pp. 1013–1017
Withdrawal of attorney, § 110, pp. 944, 945
Application of payments,
Authority of attorney, § 106, p. 936
Defense to action for money collected, § 153
Appointment by court. Assignment as counsel by court, post
Appointment of attorney not of litigant's own choice, § 63
Appraisement, suspension or disbarment for supporting claim by false appraisement, § 23, p. 756
Appropriation,
Equitable assignment under contingent fee agreement, § 187, p 1070
Funds affecting right to compensation, § 167, p 1026, n. 29
Appropriation statute, payment of fee from funds created by, § 193, p. 1097
Apportionment of fees, § 174, pp. 1038–1041
Arbitration,
Attorney's authority to submit to arbitration, § 91
Ratification by client of attorney's arbitration agreement, § 71, p 867, n. 45, p. 871, n. 70, p. 872
Service of demand on attorney, § 83
Argumentative instruction in disciplinary proceeding, § 34, p. 793
Arguments of counsel in disciplinary proceeding, § 34, p 793
Arrest,
Attorney's authority to release debtor from, § 105, p. 933
Privilege from arrest, § 44
Arson, ground for suspension or disbarment, § 31, p 737
Assault, conviction precluding admission to practice, § 7, p. 712, n 70
Assignee and maker of note, relationship of attorney and client existing between, § 65 n. 55
Assignment as counsel by court, § 54
Compensation for service, § 172, pp. 1033–1037
Action for compensation, § 197, pp. 1104, 1105
Statutory provisions as to compensation, § 161, p. 1019
Assignment for benefit of client's creditors,
Attorney's authority to assign, § 104
Attorney's authority to consent, § 105, p. 931
Assignments,
Action against attorney for money collected instituted by assignee, § 154, p. 990
Attorney's authority to assign client's property, § 104
Avoidance by client against assignee of property acquired by attorney, § 127, p. 969
Change of attorney against wishes of assignee, § 120
Charging lien by assignee, § 234, p. 1201
Claims, to resident of town for purpose of bringing suit before town justice as ground for suspension or disbarment, § 23, p. 761
Dealings between attorney and client, § 128, pp. 969–971
Interest by associates, right to compensation, § 173
Judgments,
Attorney's authority, § 93
Objection to attorney's authority to assign, § 74, p. 882, n. 86
Ratification by client of attorney's assignment, § 71, p. 868, n. 47, p. 869, n. 53, p. 873
Set-off subsequently made by adverse party defeated by assignment to attorney, § 232

Assignments—Continued,
Judgments—Continued,
Termination of attorney's authority to receive payment by assignment, § 99, p. 916
Lien of attorney, § 212
Mortgages,
Evidence of attorney's authority to assign, § 76, p. 802
Notice to assignee's attorney as notice to assignee, § 69, p. 858
Negligence of attorney, assignor and assignee as parties in action for, § 157, p. 997
Notice of,
Assignment as notice to client, § 69, p. 863, n. 97
Attorney's lien to assignee of claim, § 215, p. 1156
Priority of attorney's lien over assignment of cause of action, § 230
Protection of attorney's lien against assignment by client, § 230
Ratification by client of attorney's assignment, § 71, p 867, n 45
Service of notice of attorney's lien as analogous to, § 215, p. 1160
Summary proceedings by assignee of claim to compel payment over of money, § 159, p 1011
Suspension or disbarment on ground of assignment from client, § 23, p. 744, n. 18
Title or interest in client's property purchased by attorney, § 126, p 963
Wrongful acts, assignee as party in action for, § 157, p. 997
Assistants,
Authority to employ, § 107, pp. 938–940
Burden of proof of authority to employ assistant in action to recover compensation, § 204, p. 1114
Lien for services, § 209
Assisting another to practice law as ground for suspension or disbarment, § 23, p. 761
Associate attorney
Accounting for moneys lost through fault of, § 135
Authority to employ, § 107, p. 939
Charging lien enforced against, § 234, p. 1201
Employment affecting right to compensation, § 185
Liability of attorney for fees, § 177, p. 1045
Lien, § 209
Motion to enforce charging lien against money collected by co-attorney, § 235
Negligence of, liability for, § 149
Reasonable value of service, § 191, p. 1079, n 84
Summary proceedings against associate attorney to compel payment of fee, § 194, p 1102
Summary proceedings by or against associate counsel to compel payment over of money, § 159, p. 1012
Withdrawal of attorney on ground client insists on employing associate counsel, § 110, p 943
Association with attorney by one unauthorized to practice, § 16, p. 724, n. 6
Associations, condition precedent to action against association for compensation, § 198
Assumpsit for,
Compensation, § 197, pp. 1103, 1104
Negligence or misconduct of attorney, § 155
Assumpsit for—Continued,
Recovery of money collected by attorney, § 154, p. 989
Assumption of facts in instructions in attorney's action to recover compensation, § 205, p. 1135
Attaching creditors,
Charging lien as binding against, § 211, p 1146
Notice of attorney's lien to, § 215, p. 1156
Attachment,
Authority of attorney to issue attachment and control proceedings, § 88
Burden of proving want of attorney's authority in proceedings to dissolve, § 76, p. 886, n. 40
Contempt for nonpayment of costs, § 50, p. 832
Notice to attorney relating to attachment as notice to client, § 60, p. 859, n. 65, p 866
Remedy to compel attorney to pay over money, § 159, p. 1013
Attachment bond,
Attorney's authority to execute, § 103, p. 926
Parties in action against attorney for negligence, § 157, p 997, n. 51
Attorney at law defined, § 1
Attorney defined, § 1
Attorney general, misconduct of as ground for suspension or disbarment, § 23, p. 757
Attorney in fact,
Practicing without admission, § 16, p. 724, n. 6
Signing a notice of appeal for principal as practice of law, § 3, p. 706, n. 31
Attorney of record, § 63
Attorney not formally attorney of record, § 65, n. 54
Denial of relationship by, § 66
Notice to attorney as notice to client, § 69, p 865, n. 14
Presumption of authority to take appeal, § 73, p. 881
Recognition by court, § 72
Service of notices and papers on, § 83
Stipulations, authority to make, § 100, p 918
Auditor, reference to in attorney's action for compensation, § 205, p 1129
Authority of attorney, §§ 71–118, pp 874–949
Automobile association, practicing law, § 3, p. 705, n 31
Automobile liability insurance,
Evidence of attorney's authority to receive notice, § 76, p 892, n 3
Representation of adverse interests, § 47, p. 825, n 9
Automobiles, disqualification to represent adverse interests, § 47, p. 825, n. 9
Avoidance of transaction between attorney and client, § 127, pp 968, 969, § 128, p. 970
Award, charging lien of attorney attaching to proceeds of, § 228, p. 1170, n. 96
Bad faith,
Costs in disciplinary proceedings, § 39, p. 812
Evidence in action for compensation, § 203, p. 1112, § 204, p. 1124
Bail,
Advising client to forfeit bail as ground for suspension or disbarment, § 23, pp. 755, 760
Appropriation of deposit in lieu of bail as ground for suspension or disbarment, § 23, p. 741, n. 3

Bail—Continued,
Disqualification of attorney from acting as bail, § 45
Liability of attorney for services in procuring signer, § 52, p 834, n. 84
Negligence of collecting attorney in failing to pursue bail, § 144
Summary proceedings against attorney for return of bail § 159, p. 1010, n 58
Bank, attorney's liability on failure of bank in which client's funds were deposited, § 139
Bankruptcy,
False swearing as to authority, right to compensation, § 167, p 1026, n. 25
Lien of attorney.
Dividends declared on claim filed, § 228, p 1173, n. 27
Services in presentation of claim, § 213, p. 1150, n. 24
Suspension or disbarment for,
Connivance in violation of law, § 23, p 760
Conspiring to conceal property, § 21, p 738
Obtaining claims for purpose of filing petition in bankruptcy, § 23, p 761
Waiver of attorney's lien in respect, § 218, n 30
Bar association or committee, § 60
Appeal by association from suspension or disbarment, § 37, p. 800, n 67
Disqualification of referee in disciplinary proceedings by membership, § 34, p 795
Employment to determine qualifications of applicant for admission to practice, § 11, p 716
Recommendation as evidence on application for reinstatement, § 41, p. 819, n 40
Reference to committee of summary proceedings to compel attorney to pay over money, § 159, p 1016, n. 20
Review by committee of proceedings in suspension or disbarment proceedings, § 37, p 803
Schedule of charges determining reasonableness of fee, § 191, p 1085
Suspension or disbarment proceedings, § 18, p 732, § 30
Verification of charges in disbarment proceeding, § 31, p. 778
Bar commissioner,
Hearing on review of findings in suspension or disbarment proceeding, § 37, p. 804
Power to suspend or disbar, § 18, p 732
Preliminary examination of charges before suspension or disbarment, § 29, p 774
Proceedings before for suspension or disbarment. § 28, p 773
Suspension or disbarment for conviction of crime unconnected with practice of law, § 21, p. 736, n 25
Bar examination, relaxation of rules for admission to practice, § 8, p. 714, n. 92
Bar examiners,
Admission to practice on certificate of board, § 6, n. 64
Burden of proof on review of decision, § 11, p 718
Costs of investigation of attorney admitted from another jurisdiction, § 15, p. 723
Discretion in denial of certificate for admission, § 11, p 717
Bar examiners—Continued,
Examination by court of proceedings of examiners on application for admission to practice, § 11, p 718
Jurisdiction to reinstate disbarred attorney, § 41, p 817, n 19
Power to suspend or disbar, § 18, p 732, n 92
Procedure on denial of admission, § 11, p 717
Recommendation for admission to practice of attorney from another state, § 15, p 722
Reference of examination on reinstatement to board of examiners, § 41, p. 820, n 52
Review of proceedings in suspension or disbarment, § 37, p 803
Validity of statute relating to, § 5, p 710, n 48
Barratry as ground for suspension or disbarment, § 21, p. 737
Barristers,
Compensation, § 160
Defined, § 3, p. 702
Bastardy proceedings,
Charging lien attaching to judgment for prosecutrix, § 228, p 1172
Settlement affecting lien, § 231, p. 1183, n. 85
Beneficiary of trust, agreement with creating charging lien, § 211, p. 1147, n. 10
Benefit secured to client as factor in determining reasonableness of fee, § 191, p. 1082
Bid,
Attorney's authority, §§ 98, 103, p. 925
Instruction to bid on foreclosure sale, violation of, § 148, n 35
Bigamy, ground for suspension or disbarment, § 21, p 737
Bill in equity, liability of indorser for costs, § 50, p 832, n. 68
Bill of costs, fees, § 161 p. 1019
Bill of discovery, lien of attorney enforced by in case of settlement by client, § 231, p. 1185
Bill of exceptions,
Jurisdiction to determine attorney's authority to acknowledge service, § 74, p. 884
Review of suspension or disbarment proceeding, § 37, p. 800, n 60
Bill of particulars in action against attorney for accounting, § 154, p. 991
Bills and notes,
Attorney's authority to,
Accept note as payment, § 106, p. 938
Endorse, § 104
Sell at discount, § 104
Compensation, agreement in note affecting right, § 163, p 1021, n. 71
Demand note for fees, time to sue on, § 199
Fee stipulated in note,
Fixing amount of compensation, § 191, p 1080
Implied agreement to pay, § 190, n. 56
Implied agreement to reimburse attorney assuming liability as indorser, § 100
Instructions to bring action on note, violation of, § 148
Lien,
Subject-matter of retaining lien, § 225, p. 1167
Waived by acceptance of in payment of fee, § 222
Negligence of collecting attorney, § 144, n. 70, 80

Bills and notes—Continued,
Notice to attorney respecting as notice to client, § 69, pp 864, 865
Partner's right to bind firm as guarantor, § 56, p. 830
Percentage fee contract, § 187, p. 1068, n. 82
Pleading in action for failure to collect, § 157, p 998
Preparation as practice of law, § 3, p. 706, n. 31
Purchasing demands for suit, § 46
Ratification by client of receipt of notes by attorney, § 71, p 868, n. 45
Right of action on obligation given in consideration of service, § 100, p 1018
Bills of sale, preparation as practice of law, § 3, p. 706, n 31
Bills rendered, evidence to show employment in action for compensation, § 204, p. 1118
Blackmail,
Offense, § 59
Suspension or disbarment on ground of, § 19, p 735, n. 16, § 21, p 737, § 23, p. 760
Blood relationship between attorney and client affecting employment contract, § 65
Blue Sky Law violation, ground for suspension or disbarment, § 21, p 739
Board of commissioners. Bar Commissioners, ante
Board of examiners. Bar Examiners, ante
Board of governors,
Application for reinstatement, § 41, p. 820
Proceedings before for suspension or disbarment, § 28, p. 774
Review of action in disciplinary proceeding, § 37, p. 806
Board of tax appeals,
Action on application for admission to practice, § 11, p 717
Qualifications to practice before, § 7, p. 712, n 69
Rules as to persons who may practice before it, § 6
Body execution,
Attorney withholding money collected, § 154, p. 989
Attorney's authority to release debtor, § 105, p 933
Bona fide purchasers,
Attorney as affected by notice acquired while acting for client, § 69, p. 861
Notice to attorney for mortgagee affecting bona fides of mortgagee, § 69, p. 862
Property of client acquired by attorney, § 126, p. 963
Bona fide residence, qualifications for admission to practice, § 7, p. 713
Bond issue, contract of attorney based on percentage of bond issue, construction, § 187, p. 1067, n. 77
Bonding companies, agent executing and preparing bond as practicing law, § 3, p. 706, n. 31
Bonds,
Antedating bond as ground for suspension or disbarment, § 23, p. 756
Attorney's authority to execute, § 103, p. 926
Condition precedent to action against attorney for money collected, § 154, p 989
Fees, construction and operation, § 182, p. 1057, n. 73
Bonds—Continued,
Release of attorney's lien by executing, § 222
Securing payment of judgment, charging lien of attorney attaching to, § 228, p 1170
Subject matter of attorney's retaining lien, § 225, p. 1167
Book account,
Compelling attorney to pay over money collected, § 154, p 989
Remedy for recovery of compensation, § 197, p. 1103, n 92
Books,
Duty of attorney to keep, § 23, p. 749, n. 46, § 133
Failure to keep books as ground for suspension or disbarment, § 23, p. 759, n 56
Evidence in disbarment proceeding, § 33, p. 784, n 88
Breach of,
Confidence as to client, ground for suspension or disbarment, § 23, pp 741, 743
Contingent fee contract affecting compensation, § 188, pp 1074, 1075
Contract affecting right to stipulated fees, § 183, p. 1060
Contract of employment, jury question in action for compensation, § 205, p. 1130
Partnership contract, damages, § 56, p. 838
Trust, advising breach with design to benefit, suspension or disbarment, § 23, p. 760
Bribery,
Authority of attorney to bribe witness, § 81, n. 7
Suspension or disbarment for, § 21, p. 737, § 23, pp 753, 757, n. 36
Briefs,
Attorney's authority to contract for printing, § 103, p 926
Compensation for services on appeal under assignment by court, § 172, p. 1036
Duty to know contents of brief assigned, § 4, p. 707, n. 34
Expenses under assignment as counsel by court, compensation, § 172, p 1036
Presentation by one not admitted to practice, § 16, p 726, n. 20
Presumption of authority to prepare, § 73, p. 881
Printing, liability of attorney for, § 52, pp 833, 834, n. 84
Suspension or disbarment proceeding, § 37, p. 803
Unlicensed person preparing brief, effect, § 16, p. 725
Bringing suit as notice of attorney's lien, § 215, p. 1159, n. 92
Brokers, attorney's authority to employ, § 103, p. 925
Broker's commission, evidence as to on question of value of attorney's services, § 204, p 1122
Building permit, attorney's authority to obtain, § 80, p. 901
Burden of proof,
Accounting by attorney, § 154, pp. 991, 992
Action against attorney for money collected, § 154, pp. 991, 992
Action for attorney's negligence or wrongful acts, § 157, pp. 999, 1000
Application for reinstatement, § 41, p 818
Authority of attorney, § 76, pp. 886–888

Burden of proof—Continued,
Charging lien, proceedings to enforce, § 238, p. 1209
Compensation, action to recover, § 204, p. 1118
Disbarment proceeding, § 33, p. 781
Gift to attorney from client, burden of proving validity, § 129
Good faith of attorney in dealing with client, § 127, pp 965–968, 970, 971
Good moral character for admission to practice, § 11, p. 717
Hearing on review in suspension or disbarment proceeding, § 37, p. 804
Justifying settlement in derogation of lien of attorneys, § 231, p. 1182, n. 79
Knowledge of attorney as knowledge of client, § 69, p. 856
Lien proceedings to enforce after settlement in disregard of, § 231, p. 1193, n. 47
Member of firm to establish right to accounting, § 56, p 842
Negligence of attorney, § 157, pp. 999, 1000
Partnership services, § 56, p. 838, n. 25
Ratification by client of attorney's acts, § 71, p. 873
Summary proceedings to compel payment over of money, § 159, p. 1015
Business dealings between attorney and client, §§ 127–132, pp 963–973
Business, use of office to aid civil business as ground for suspension or disbarment, § 23, p. 757, n. 36
Cancellation of contract of employment for fraud or undue influence, § 181, p. 1049
Cancelled checks, evidence to show employment contract in action for compensation, § 204, p. 1118
Capacity to practice, §§ 7, 8 pp. 712–714
Care of property, lien of attorney for, § 213, p. 1153, n. 43
Care required of attorney, § 125, p 957, § 141
Evidence in action for compensation, § 204, p. 1120
Cartoons, disbarment for circulation concerning judge during pendency of criminal charges, § 21, p. 739, n. 79
Case-made, client's death affecting attorney's authority to accept service, § 113, n 86
Cash, collecting attorney authorized to accept, § 106, p. 937
Catching bargain, contingent fee contract, § 186, p. 1064, n. 43
Cause of action, charging lien of attorney on, § 228, p. 1170
Cautionary instructions in action by attorney to recover compensation, § 205, p 1135
Censure, punishment in disciplinary proceeding, § 38, p. 806, n 52
Certificate of,
Admission to practice, § 14
Clerkship, filing by applicant for admission to practice, § 9
Certificate as to good character of applicant, § 7, p. 713, § 11, p. 718
Judge as to allowance for compensation under assignment by court, § 172, p 1034
Certiorari,
Appeal in suspension or disbarment proceeding as in nature of certiorari, § 37, p. 801, n. 72
Certiorari—Continued,
Review of proceedings of examiners on application for admission to practice § 11, p 718
Review of suspension or disbarment proceeding, § 37, p 799, n. 62, p. 802
Chambers, suspension or disbarment of attorney, § 18, p. 729, n. 58
Champerty,
Contract executed after settlement in fraud of attorney's lien, § 231, p. 1187, n. 21
Defense to action for attorney's negligence, § 156
Disqualification to buy demands for suit, § 46
Purchase by attorney of subject-matter of suit, § 128, p. 970
Recovery back of champertous contingent fee, § 192
Unethical conduct, § 58, p 843 n. 89
Chancery Equity, post
Change of attorneys, §§ 119–124, pp 950–957
Change of venue,
Assignment as counsel, § 54, p. 837, n. 13
Attorney's authority, § 85
Attorney's authority to waive, § 100, p. 923
Compensation under assignment as counsel by court, § 172, p 1035
Changes in firm, effect on contract for compensation, § 184
Character,
Affidavit in evidence in disciplinary proceeding, § 33, p 783, n. 78
Depraved character as ground for disbarment, § 38, p 807, n 54
Evidence in action for compensation, § 204, p. 1120
Good Moral Character, post
Inquiry on admission to practice of attorney from another state, § 15, p. 722, n. 77
Previous good character,
Defense to proceeding for suspension or disbarment, § 5, p 764
Mitigating punishment in disciplinary proceeding, § 38, p 810, n 59
Punishment in disciplinary proceeding, § 38, p. 809
Want or loss of moral character ground for suspension or disbarment, § 20
Charges for suspension or disbarment, § 31, pp. 775–779
Charging lien, §§ 207, 211, pp. 1142–1148
Action on judgment to enforce, § 237
Agreement for lien, § 211, p. 1146
Appeal in proceeding for enforcement, § 234, p. 1201
Associate counsel, enforcement against, § 235
Authority to begin suit as condition precedent to lien, § 211, p 1145
Collection of judgment for enforcement, § 234
Default judgment, enforcement, § 235
Defenses to enforcement, § 234, p. 1202
Enforcement of, § 234, pp. 1200–1202, § 238, pp. 1204–1212
Evidence in proceeding to enforce, § 238, p 1209
Independent action for enforcement, § 236
Intervention in proceeding to
Enforce, § 238, p. 1208
Revive judgment, § 235

Charging lien—Continued,
Jurisdiction of proceeding to enforce, § 238, p. 1206
Nature of, § 207
Nature and form of proceedings for enforcement, § 238, p 1205
Notice, § 215, p. 1155
Notice to client that lien may be claim, § 211, p. 1145
Parties to proceeding to enforce, § 238, p 1207
Persons against whom lien may be charged, § 211, p. 1146; § 234, p. 1201
Persons who may enforce, § 234, p 1201
Pleadings to enforce, § 238, p. 1208
Process in proceeding to enforce, § 238, p. 1208
Retaining lien right as not condition precedent to charging lien, § 211, p. 1145
Services and fees covered, § 213, p 1149
Sheriff, proceeding against for enforcement, § 234, p 1202; § 235
Solvency of client affecting
Enforcement, § 234
Validity of lien, § 211, p 1146
Specific fund, enforcement against, § 235
Subject-matter, § 228, pp. 1169–1176
Summary proceedings for enforcement, § 235
Time of attaching, § 216
Time to sue to enforce, § 238, p. 1205
Trial in proceeding to enforce, § 238, p. 1211
Venue of proceedings to enforce, § 238, p. 1206
Charities,
Fees for services rendered to charitable trust, § 191, p 1084
Payment of attorney's fees from charitable trust, § 193, p 1090, n. 50
Chattel mortgages,
Mortgagee chargeable with knowledge acquired by attorney, § 69, p 863
Negligence of attorney in drawing mortgage as jury question, § 157, p. 1002, n. 90
Notice to attorney of chattel mortgage as notice to client, § 69, p 864
Checks,
Attorney's authority to,
Accept check as payment, § 106, p. 938
Endorse, § 99, p 916, n 97, § 104
Burden of proving, § 76, p 887, n 48
Passing worthless checks as ground for suspension or disbarment, § 24, p 763, n. 38
Stopping payment as ground for suspension or disbarment, § 24, p 763, n 38
Choice of attorney, right of litigant to choose, § 63
Choses of action, buying for purpose of bringing suit, § 46
Circuit court,
Jurisdiction to disbar, § 18, p 730, n 78
Jurisdiction to enforce charging lien, § 238, p. 1206, n 35
Citations, failure to inform court of unreported decision discrediting citation as ground for suspension or disbarment, § 23, p 756
Citizenship,
Admission to practice, § 7, p. 713
Correction of order for admission to practice, § 11, p. 719, n. 56
Citizen from another state, § 15, p. 722
Disbarment as not affecting, § 40, p. 814
City attorney,
Division of fees with mayor as ground for suspension or disbarment, § 23, p. 757, n. 37
Practicing law, § 3, p. 704
Claim adjuster,
Compensation affected by illegal contract to adjust, § 165, p 1022, n. 90
Practice of law, § 3, p. 705, n. 30
Representation of adverse interests after termination of relation, § 38, p 828, n. 26
Claim, charging lien of attorney on, § 228, p 1170
Class suit,
Compensation for services in absence of benefit, § 166
Payment of fees from fund recovered in, § 193, p. 1090, n. 48
Clerical errors in title of petition for suspension or disbarment, § 26, p 768
Clerical services, fees for, § 191, p. 1084
Clerks, § 57
Accounting for money lost through fault of, § 135
Employment on percentage basis as partnership, § 56, p 838, n 20
Liability of attorney for acts of, § 150
Clerks of courts,
Attorney's liability for fees, § 51
Deception of as ground for suspension or disbarment, § 23, p 754, n. 89
Inducing antedating filing of a paper, suspension or disbarment, § 23, p 756
Taxation of fees as costs, § 161, p. 1019
Clerkship for admission to practice, § 8
Client defined, § 2
Coercion,
Contract for compensation, § 181, p. 1052, n. 19
Evidence in action for compensation, § 204, p. 1118
Hearing on application for admission to practice, § 11, p 718
Collateral attack on judgment,
Burden of proving attorney's want of authority, § 76, p 887
Disbarment or suspension, § 36, p. 799
Collateral attack on license to practice, § 11, p 719
Collateral attack, presumption of attorney's authority on, § 73, p 877, n. 20
Collateral securities,
Attorney's authority to accept as payment, § 106, p. 938
Fees and costs, validity of transaction, § 130
Lien of attorney on note assigned as, § 225, p. 1167, n. 71
Collateral suits, negligence in instituting, § 146, p. 983
Collecting agencies,
Notice to attorney acting for agency as notice to client, § 69, pp. 856, 857
Practice of law, § 3, p. 705, n. 31
Presumptions in respect to employment of attorney suing for compensation, § 204, p 1113, n 11
Summary proceedings against agency to compel payment over of money, § 159, p. 1011, n. 61
Summary proceedings by agency to compel attorney to pay over money, § 159, p. 1011
Unethical conduct, § 58, p. 843, n. 89

Collection by attorney,
Action for money collected, §§ 152–154, pp. 987–994
Admissions by attorney for collection, § 100, p. 921
Authority of collecting attorney, § 104
Burden of proving negligence in collecting, § 157, p 1000
Compensation affected by failure to turn over money collected, § 167, p 1026
Contingent fee contract for collection, § 188, p. 1072, n 9
Custom to remit sum collected to attorney from whom claim was received, § 137
Defenses in action for failure to collect, § 156
Evidence of attorney's authority to collect, § 76, p 892
Fee for collecting rents, § 191, p. 1079, n. 84
Money collected and not paid over, liability for, § 139
Negligence in collecting, §§ 144, 157, pp. 997, 998, 1000
Parties in action for negligent collection, § 157, p. 997
Partner's liability for money collected by another partner, § 150, n. 39
Payment, authority of collecting attorney to receive, § 106, pp 934–938
Pleading negligent failure to collect, § 157, p. 998
Reasonable fee for collecting debt under implied agreement, § 191, p. 1080, n. 87
Collection of judgment,
Attorney's authority, §§ 96–98
Extent of attorney's lien in name of client, § 284, p. 1200
Collusion,
Deceiving court, § 59
Liability for injury to third person, § 2, p. 834
Collusive settlement, lien of attorney protected against, § 231, p. 1183
Colored persons, evidence of volunteering to defend in disbarment proceeding, § 33, p. 787, n. 5
Comity, admission of citizen from another state to practice, § 15, pp. 722, 723
Commencement of action,
Authority of attorney, § 81
Objection to attorney's authority to commence, § 74, p. 884, n 14
Suspension or disbarment for commencement without proper retainer, § 23, p. 760
Commencement of attorney's authority, § 67, p. 851
Commencement of relationship of attorney and client, § 62
Dealings between attorney and client before commencement, § 127, p. 967
Knowledge acquired before commencement imputed to client, § 69, pp 855, 856
Notice to attorney acquired before commencement respecting,
Bills and notes, § 69, p. 864
Litigation, § 69, p 866
Mortgage, § 60, p. 862
Outstanding claims of third person commencement, § 69, pp. 859, 860
Commercial paper. Bills and Notes, ante
Commingling funds as ground suspension or disbarment, § 23, p. 749, n 46
Commissioner. Bar commissioner, ante
Commissioner in chancery, fees earned after dissolution of partnership as partnership assets, § 56, p. 841, n 65
Commissioner in disciplinary proceedings, recommendation, § 34, p 796
Commissioner of patents,
Approval of revocation of powers of patent attorney, § 17
Power to suspend or disbar, § 18, p. 733
Rules and qualifications for practice before his office, § 6
Commissioner's fees, authority to stipulate as to, § 100, p. 920
Committee Bar Association or committee, ante
Common estate or fund, payment of fees from, § 193, pp 1098–1100
Common law remedy as affected by statute conferring an attorney's charging lien, § 211, p. 1146
Common plan, evidence to prove in disciplinary proceeding, § 33, p. 783
Common pleas court, jurisdiction to suspend or remove attorney, § 18, p 731, n. 78, 80
Community of client's interest affecting authority of attorney to act for all parties, § 62
Community property contingent fee contract for percentage of recovery, § 186, p. 1064
Compensation, §§ 160–206, pp. 1017–1137
Absence from trial affecting right to, § 167, p. 1024
Absence of benefit to client, § 166
Acceptance of service as equivalent to prior engagement, § 175, p. 1042
Act of attorney and client terminating employment, § 169, p. 1032
Act of attorney terminating employment, § 169, p. 1031
Acting for other parties affecting right to, § 167, p 1024
Acting without license, § 165
Actions for, §§ 195–206, pp. 1102–1137
Additional compensation, contracts for, § 181, p. 1052
Additional counsel, employment, § 185
Additional recovery as retaining fee, § 162
Advances to client, § 180
Adverse party,
Action for compensation against, § 195
Allowance paid by, § 182, p 1057
Affidavit of defense in action for, § 203, pp. 1109, 1110
Agent employing attorney, liability, § 177
Amendment of answer in action for, § 203, p. 1110
Amount of compensation, § 191, pp 1078–1094
Assignment as counsel by court, § 172, p. 1035
Summary proceedings to compel payment, amount not determined in, § 194, p. 1100
Answer in action for, § 203, pp. 1109, 1110
Admission in answer, § 203, p. 1112
Appeal from amount fixed as compensation under assignment by court, § 172, pp. 1035, 1036
Appearance in action for, § 201
Appointment of attorney by court, action for compensation by, § 197, pp. 1104, 1105
Apportionment of fees, § 174, pp. 1038–1041

Compensation—Continued,
Assignment as counsel by court, § 172, pp 1033–1037
Associate counsel, liability of attorney, § 177, p. 1045
Assumpsit for compensation, § 197, pp. 1103, 1104
Attorney employing another attorney, liability, § 177
Bar association schedule of charges determining reasonableness of fee, § 191, p 1085
Benefit secured to client as factor in determining reasonableness of fee, § 191, p 1082
Bill of costs, fees in, § 161, p 1019
Change of venue, assignment as counsel by court, § 172, p. 1035
Changes in firm contracting for services, § 184
Charging lien, ante
Circumstances affecting right, § 164
Civil cases, assignment as counsel by court, § 172, p 1037
Clerks and agents, § 57
Client, contract providing compensation to be fixed by client, § 182, p 1057
Complaint in action for, § 203, pp 1107–1109
Condition precedent to action for compensation, § 198
Conduct of attorney affecting right to, § 167, pp 1024–1027
Conflict of laws relating to reasonableness of fee, § 191, p. 1080
Consent or acquiescence to inconsistent positions in suit, § 167, p. 1025
Construction and operation of contracts, § 182, pp 1054–1059
Contingent fees, post
Contracts for additional compensation, § 181, p 1052
Contracts of employment, necessity, § 175, pp 1041–1043
Contracts made after relation established, § 181, p. 1051
Costs, contract allowing attorney costs recovered, § 181, p. 1049
Court's power to determine amount, § 191, p 1093
Criminal cases, assignment as counsel by court, § 172, pp. 1033–1037
Custodia legis, fees payable from funds in, § 193, pp 1096–1100
Customary or usual charges as determining reasonableness of fee, § 191, pp. 1084, 1085
Damages for breach of contract, § 169, p 1030
Death terminating employment, § 171
Declaration in action for, § 203, pp 1107–1109
Defenses to action for, § 196
Pleading defenses, § 203, pp 1109, 1110
Demand as condition precedent to action for, § 198
Pleading in action for, § 203, p 1109
Disability terminating employment, § 171
Discharge for cause, § 169, p. 1031
Discharge without cause, § 169, p. 1028
Discretion of court,
Allowing summary proceedings to compel payment, § 194, p. 1101
Determining amount of fees, § 191, p 1093
Diversion of funds set aside for payment, § 164
Compensation—Continued,
Division of fees, § 174, pp. 1038–1041
With mayor by city attorney, as ground for suspension or disbarment, § 23, p. 757, n. 37
Employment in other matters affecting right to contract for compensation, § 181, p. 1054
Equitable owner of fund in court for payment of fees, § 193, p 1096
Examination of title, fee under implied contract, § 191, p. 1084
Executors and administrators employing attorney, liability, § 179
Expenses,
Assignment as counsel by court, § 172, p. 1035
Element of determining reasonableness of fee, § 191, p 1083
Reimbursement for, § 180
Express agreements, § 181, pp. 1047–1054
Implied agreements affected by existence of express contract, § 190
Pleading express agreements in action for compensation, § 203, pp 1109–1111
Extra compensation, § 182, p. 1057
Pleading in action for, § 203, p. 1111
Failure to pay over money collected, § 167, p. 1026
Fiduciaries employing attorney, liability, § 179
Financial ability of client as element in determining reasonableness of fee, § 191, pp. 1085, 1086
Forfeiture by premature termination of employment by attorney, § 169, p. 1031
Fraud affecting right, § 167, p. 1025
Fraud in contract of employment, § 181, p. 1049
Fraud in procuring payment, § 192
Funds subject to payment of compensation, §§ 176, 193, pp 1095–1100
Giving legal advice for compensation as practice of law, § 3, p 704, n 30
General denial in action for, evidence admissable under, § 203, p. 1112
Gratuitous services, § 160, p. 1018
Assignment as counsel by court, § 172, p. 1033, § 173, p. 1037
Guardian ad litem, reasonable fee for services rendered to, § 191, pp 1083, 1084
Ignorance affecting right to, § 167, p. 1027
Illegal fees, § 161, p 1019
Illegality of contract for services, § 181, p. 1050
Implied agreements, § 175, pp 1041–1043, § 190
Pleading in action for compensation, § 203, pp 1109, 1111
Value of services and amount of compensation under, § 191, pp. 1078–1089
Impossibility of performance of services, § 183, p. 1061
Incidental services, contract for compensation as covering, § 182, p 1057
Incompetent persons, reasonable fee for services rendered to, § 191, pp 1083, 1084
Increase of allowance of fee, § 191, p. 1089
Infants, reasonable fee for services rendered to, § 191, pp 1083, 1084
Insane person, reasonableness of fee for services rendered to, § 191, p. 1086, n. 47

Compensation—Continued,
Interest included in amount on which percentage is reckoned in determining contingent fee, § 191, p. 1092
Interest on fees, § 191, pp. 1092, 1093
Intervention in action for, § 202
Issues in action for, § 203, pp. 1110–1112
Itemized services and charges as basis of determining reasonableness of fee, § 191, p. 1085
Joinder of parties in action for compensation, § 202
Joint and several liability, § 176
Joint attorneys, reasonableness of fees, § 191, p 1085
Joint defendants, liability, § 178
Judgment in action for, § 206
Jurisdiction of action for, § 200
Keeping first payment as fee as ground for suspension or disbarment, § 23, p. 750, n 47
Laches affecting summary remedies to compel payment of fees, § 194, p. 1101, n. 62
Law governing contract, § 182, p. 1059
License, acting without, § 165
Lien of attorney, post
Limitation of action for, § 199
Liquidated damages, contract for employment, § 181, p. 1047, n. 65
Medium of payment under contingent fee contract, § 187, p. 1068
Misconduct affecting right, § 167, p. 1025
Mistake in payment, § 192
Money had and received as form of action for compensation, § 197, p. 1104
Nature and extent of liability, §§ 176–180, pp. 1043–1047
Nature and form of action for compensation, §§ 195, 197, pp. 1103–1105
Negligence, § 167, p. 1027
Defense in action for, evidence admissible under general denial, § 203, p 1112
Nonperformance or breach of contract affecting right to, §§ 164, 183, p 1060
Offer unaccepted as fixing amount of fee, § 191, p. 1080
Officer of court, representing, § 172, p. 1037
Operation of law terminating employment, § 170
Other actions,
Evidence on question of value of services rendered, § 204, p. 1122
Presumption as to reasonableness in action to recover for services, § 204, p. 1115
Other attorneys, services rendered to, § 160, p 1018
Partial defense, pleading in action for, § 203, p. 1110
Partial invalidity of contract of employment, § 181, p. 1048
Parties,
Action for compensation, § 202
Construction of contracts by, § 182, p. 1056
Summary proceedings to compel payment of fees, § 194, p. 1101, n. 62
Terminating action, right to compensation, § 169, pp. 1027–1032
Partners,
Allowance to copartner as off-set for damages, § 56, p. 839, n. 43
Compensation—Continued,
Partners—Continued,
Contract with partnership, § 184
Member of firm, § 56, pp 838, 839
One member not duly admitted, § 165
Partner's right to bind firm to work without compensation, § 56, p 839
Payment, § 192
Defense to action for fees, § 196
Fees as element of relationship of attorney and client, § 65
Performance of contract, § 183, pp. 1059–1062
Persons entitled to, § 173
Petition in action for, § 203, pp. 1107–1109
Pleading in action for, § 203, pp 1107–1113
Plea in action for, § 203, pp. 1109, 1110
Pleading payment of fees in action for attorney's negligence, § 157, p. 909
Premature action for, § 199
Premature discharge affecting right to compensation, § 100, p. 942
Premature termination of employment, §§ 168–171, pp 1027–1033
Process in action for, § 201
Prominence of client as element in determining reasonableness of fee, § 191, pp 1085, 1086
Proof in action for, § 203, pp. 1110–1112
Quantum meruit, post
Ratification of contract of employment, § 181, p 1049
Reasonable fee under implied agreement, § 191, pp 1078–1089
Recovery back of compensation paid by client, § 192
Reduction of excessive fee, § 191, pp 1088, 1089
Reference to determine amount of compensation in summary proceedings to compel payment over of money, § 159, p 1016
Reimbursement for expenses, § 180
Requisites and validity of contract of employment, § 181
Result of prosecution affecting compensation under assignment as counsel by court, § 172, p. 1035
Retainer denoting fee, § 61
Retaining fee, § 162
Absence of express agreement, § 191, p 1089
Retention of amount due for fees from funds in attorney's hands, § 193, pp 1095, 1096
Revocation of express agreement giving rise to implied agreement to pay, § 190
Right to, § 160
Security for fees, validity of agreement between attorney and client, § 180
Service of copy of bill as condition precedent to action for compensation, § 198
Services for which fee may be recovered under implied agreement, § 190
Services in another manner not within contract, § 182, p. 1059
Services not included in original agreement, § 182, p 1058
Services not rendered as attorney by unlicensed person, § 165
Set-off and counterclaim,
Compensation as, §§ 153, 197, p 1104

Compensation—Continued,
Set-off and counterclaim—Continued,
Pleading in action for compensation, § 203, p 1110
Setting aside allowance of fee, § 191, p. 1088
Skill as element in determining reasonableness of fee, § 191, p. 1083, n. 4
Solicitation of third person affecting right, § 164
Statutory regulations, § 161
Contracts, § 181, p. 1053
Fees and taxed costs, § 163
Stipulations as to attorney's fees, authority as to, § 100, p. 920
Substitution of attorney, determination of amount in proceedings for, § 122, pp. 955, 956
Summary proceedings,
Compelling payment, § 194, pp. 1100–1102
Compelling return of fees paid, § 159, p 1008
Power to fix fees in, § 158, p 1005, n. 15
Superseded contract, construction and operation, § 182, p. 1057
Taxable as costs, lien of attorney limited to, § 213, p. 1154
Taxed costs, § 163
Termination of relation,
Contract as to compensation, § 181, p 1054
Premature termination, §§ 168–171, pp. 1027–1033
Third person, contract providing compensation to be fixed by third person, § 182, p. 1057
Time expended by attorney as element in determining reasonableness of fee, § 191, p 1082
Time to sue for compensation, § 199
Transfer or assignment by client as payment, § 128, pp 969, 970
Traveling expenses, § 180
Element in determining reasonableness of fee, § 191, p. 1083
Trustees employing attorney, liability, § 170
Undue influence affecting contract of employment, § 181, p. 1049
Unexpected services, contracts, § 182, p. 1058
Value of property involved as element in determining reasonableness of fee, § 191, p. 1081
Value of services, § 191, pp 1078–1094
Variance in action for, § 203, pp. 1112, 1113
Venue of action for, § 200
Void agreement for compensation affecting quantum meruit recovery, § 199
Voidable agreements, § 182, p 1057
Waiving lien of attorney by action for, § 223
Withdrawal of attorney on refusal of client to pay or secure payment, § 110, p. 943
Complaint,
Action against attorney for money collected, § 154, p. 991
Action for attorney's negligence or wrongful acts, § 157, pp. 997–999
Action for compensation, § 203, pp. 1107–1109
Proceedings to enforce charging lien, § 238, p. 1208
Compromise and settlement,
See also Settlement, post
Admission of liability in compromise negotiation, attorney's authority, § 100, p. 922, n. 77
Assumpsit to recover for improper compromise by attorney, § 154, p. 989, n. 72
Compromise and settlement—Continued,
Attorney's authority, § 105, pp 928–932
Costs, liability affected by, § 50, p. 831, n. 47
Burden of proof,
Attorney's authority to compromise, § 76, p. 887
Ratification of attorney's compromise, § 71, p 873
Clerk's authority to settle, § 150
Client's authority, § 105, p. 932
Contingent fee,
Administrator's settlement affecting, § 188, p. 1074
Amount on which percentage is reckoned, § 191, pp. 1091, 1092
Contract prohibited, § 186, p. 1064
Premature settlement affected by, § 189, pp. 1075–1077
Recoverable on, § 188, pp. 1072, 1073
Right of client affected by contract, § 187, p. 1070
Evidence,
Attorney's authority to compromise, § 76, p. 891
Compromise in action for compensation for services, § 204, p. 1121
Ratification by client of attorney's compromise, § 71, p. 874
Fee, recovery back of fee paid on settlement, § 192
Fees to member of firm, § 56, p. 840, n. 44
Infant's claims, evidence in disciplinary proceeding, § 33, p 787, n 5
Lien of attorney as affected by, § 231, p. 1181
Payment, attorney's authority to accept, § 106, pp 936, 937
Pleading ratification by client of attorney's settlement, § 71, p. 874
Presumption of attorney's authority to make, § 73, p. 879
Procedure after to enforce attorney's lien, § 231, p. 1186
Ratification by client of attorney's compromise and settlement, § 71, p. 867, n. 45, p. 868, n. 48, p. 869, n. 49, p. 871, n. 70, p. 872, n. 73
Summary proceeding to compel,
Payment of fees against party to compromise agreeing to pay fees, § 194, p. 1102
Payment over of full amount of claim, § 159, p 1008, n. 33
Termination of relationship of attorney and client by acceptance of compromise, § 116, p. 947
Unauthorized compromise, liability for, § 147
Withdrawal of attorney on refusal of client to accept, § 110, p. 944
Compromise verdict and judgment, authority of attorney, § 86, n 71
Comptroller of currency, agreement decision of comptroller would be final as to fees, § 182, p. 1057, n. 67
Compulsory process, proceedings for suspension or disbarment, § 27, p 770, n 30
Concealed weapons, conviction as negativing good moral character, § 7, p. 712, n. 70

Concealment,
Contract for compensation, § 181, p 1049, n. 85
Facts, contract for compensation, § 181, p. 1050, n. 93
Ground for suspension or disbarment, § 21, p. 737, § 23, p. 743, n. 15, p 760, n. 75
Revocation of order of admission of attorney from another jurisdiction, § 15, p. 723
Conclusions of referee in disciplinary proceedings, § 34, p 796
Conclusiveness,
Agreement for compensation, § 182, p. 1056, n. 57
Consent judgment by attorney, § 86
Findings in attorney's action to recover compensation, § 205, p. 1136, n. 30
Judgment or order in disbarment proceedings, § 36, p. 798
Presumption of,
Attorney's authority, § 73, pp. 877, 878
Notice to client from notice to attorney, § 69, p. 854, n 8
Verdict in suspension or disbarment proceeding on appellate court, § 37, p. 801
Condemnation proceedings,
Award, assignment subject to prior contract claim of attorney, § 230, n 68
Computation of contingent fees on settlement of proceedings, § 191, p. 1091, n. 76
Lien of attorney for services in, § 213, p. 1150, n. 25
Condition precedent,
Action against attorney for money collected, § 154, pp 989, 990
Pleading condition, § 154, pp. 990, 991
Compensation, action for, § 198
Happening of contingency as condition precedent to recovery of contingent fees, § 188, p. 1071
Summary proceedings to compel payment over of money, § 159, p. 1013
Payment of tax as condition of right to practice, § 55, p 838
Suspension and disbarment, § 20
Conditions,
Attached to right to practice, § 4, p. 707, n. 84
Imposed on substitution of attorneys, § 122, pp. 953–956
Conduct of litigation, attorney's authority, § 80, pp. 898–902
Conduct showing abandonment of employment contract, jury question in action for compensation, § 205, p. 1131, n. 83
Confederate money, receipt by attorney as discharging debt, § 106, p 937, n. 71
Confession of judgment,
Attorney's authority, § 86
Presumption of authority, § 73, p. 880
Unauthorized confession, liability for, § 147
Conflict of laws,
Adverse interest, ante
Pleading in action for compensation, § 203, p. 1109
Reasonableness of fee, § 191, p. 1080
Conflicting interests,
Disqualification to represent, § 47, pp. 823–827
Suspension or disbarment for representing, § 23, p. 746
Confronting witnesses, applicant for admission to practice, § 11, p. 719
Congressional power to prescribe,
Conditions on which attorneys may represent litigants, § 63
Qualifications for practice, § 5, p. 710
Consent,
Change or substitution of attorney, § 120
Inconsistent position in suit affecting right to compensation, § 167, p 1025
Lien of counsel employed without, § 213, p. 1154, n 45
Payment of judgment waiving lien of attorney, § 221
Consent judgment,
Attorney's authority, § 86
Burden of proving attorney's want of authority, § 76, pp. 887, 888
Contingent fee, right to fee affected by client accepting consent judgment, § 188, p. 1074, n. 30
Evidence of attorney's authority to sign, § 76, p. 893
Presumption of attorney's authority, § 73, p. 880
Ratification by client of attorney's consent decree, § 71, p 871, n. 70
Consent jurisdiction of summary proceedings to compel payment over of money, § 159, p. 1010
Consideration,
Contracts for fees made after relation established, § 181, p. 1051, n 14
Employment contract, § 181, p 1048, n 70
Failure of consideration for settlement of attorney's fees, § 183, p. 1060, n. 97
Conspiracy,
Ground for suspension or disbarment, § 21, p. 738; § 23, p. 755
Offense, conspiracy to violate law with client, § 50
Constables, disqualification to act as attorney, § 49
Constitution, oath of applicant to support, § 12
Constitutional guaranty to be heard by counsel, § 63
Constitutional provisions,
Admission to practice, § 5, pp. 709–712
Gratuitous services under assignment as counsel by court, § 172, p 1033
Constitutional right to practice, § 4, p. 708
Constitutionality of law, review in suspension or disbarment proceeding, § 37, p. 802
Construction and operation of contracts,
Between attorney and client, § 127, p. 968
Contingent fee contract, § 187, p. 1067, § 188, p. 1072
For compensation, § 182, pp. 1054–1059
Constructive notice,
Attorney's lien, § 215, p. 1159
Proceeding for suspension or disbarment, § 27, p. 768
Constructive trustee, attorney acquiring interest adverse to client as, § 126, p. 960
Consultants, employment under assignment as counsel by court, § 172, p 1036
Consultations, evidence on question of employment, § 204, p. 1118
Contempt,
Adjudication as precluding admission to practice, § 7, p. 712, n. 70

Contempt—Continued,
Attachment for contempt for nonpayment of costs, § 50, p 832
Constitutional guaranty to be heard by counsel denied by appointing in contempt proceedings, § 63
Conviction as evidence in disbarment proceedings, § 33, p 790, n. 7
Practice by one not admitted, § 16, p. 726
Remedy to compel attorney to pay over money, § 159, p. 1013
Suspension or disbarment, § 23, pp 751, 762
Power of suspension or disbarment as distinct from right to punish for contempt, § 18, p. 730
Violation of order of suspension or disbarment, § 40, p 814
Contest for funds in court, payment of fees from fund to attorneys contesting, § 193, p. 1100
Contingent fees,
Abandonment of case affecting contract, § 188, p 1074
Accounting for money received from adverse party in settlement of, § 134
Amount of fees under implied contingent fee contract, § 191, p. 1084
Amount on which percentage reckoned under implied agreement, § 191, pp. 1089–1092
Appropriation for equitable assignment under contract, § 187, p 1070
Assignment as counsel for court in civil cases, § 172, p. 1037
Assignment under agreement, § 187, p. 1069
Associate counsel, liability for fees, § 177, p. 1045, n 47
Binding effect of contract on others, § 186, p. 1066
Breach of contract, § 188, pp. 1074, 1075
Burden of proof as to good faith in action to recover compensation, § 204, p 1114
Charging lien of attorney as created by contract, § 211, p. 1147, n. 8
Compromise and settlement, ante
Construction of contract, § 187, pp. 1067, 1072
Amount on which percentage reckoned, § 191, p 1089
Contracts, §§ 186–189, pp 1062–1077
Conveyance of land, contingent fee agreements to convey, § 186, p 1067
Costs included in amount on which percentage is reckoned in determining contingent fee, § 191, p. 1092
Damages for breach of contract, § 189, p. 1030, n. 61
Death of parties affecting right to contingent fee, §§ 113, 188, p. 1073
Deductions in computing contingent fees, § 191, pp 1090, 1091
Defenses in action for fees, § 196
Discharge of attorney affecting compensation, § 109, p. 942, § 160, p. 1031, n. 70
Dismissal by client, contingent fee contract affecting right, § 187, p. 1070
Employment of assistant by attorney taking case on contingent fee, § 107, n. 1
Evidence admissable under pleadings, § 203, p. 1112
Contingent fees—Continued,
Illegal contracts of partners, § 56, p. 842
Implied agreement to pay, § 191, p. 1079, n. 86
Impossibility of performing contract, § 188, pp. 1074, 1075
Issue relating to contingent fees in action for compensation, § 203, p 1110, n. 77
Lien created by, § 216, n 8
Nonperformance of contingent fee contract affecting compensation, § 188, pp. 1074, 1075
Notice of lien as required to state existence and terms, § 215, p. 1157, n. 80
Operation and effect of contingent fee contract, § 187, pp 1068–1071
Partner's liability to dissolve partnership, § 56, p 840, n 53
Percentage, amount on which percentage reckoned under implied agreement, § 191, pp. 1089–1092
Performance of contract affecting contingent fee, § 188, pp 1071–1075
Persons who may object to contingent fee contract, § 186, p. 1036
Pleading in action for, § 203, p. 1111, n. 77
Premature termination or settlement of action affecting right to fee, § 189, pp. 1028, 1029, § 189, pp. 1075–1077
Presumption as to undue influence arising from contract, § 204, p. 1117, n. 54
Property in payment under contract, § 187, p 1068
Quantum meruit recovery of contingent fee on premature termination or settlement of action, § 189, p 1075, n. 43, p. 1076
Recovery back on ground contract was champertous, § 192
Reimbursement for expenses, § 180, n. 50, 52
Requisites and validity of contingent fee contract, § 186, pp. 1063–1067
Services contemplated, contingent fee contract, § 187, p. 1069
Substitution of another attorney affected by, § 119
Substitution of attorney employed on, determination of amount of fee on substitution, § 122, p 956
Suspension or disbarment on ground of, § 23, p. 761
Value of property taken in satisfaction of judgment, computation of percentage in determining contingent fee, § 191, p. 1092
Contingent judgment not subject to lien until contingency satisfied, § 216
Contingent payment, liability of attorney for money received by client, § 52, p. 836
Contingent retainer, effect of as respects right to enforce charging lien, § 211, p. 1146, n. 98
Continuance of relationship of attorney and client, § 108
Presumption of, § 73, pp. 880, 881
Question of fact, § 78, p. 895
Continuances,
Assignment as counsel, § 54, p. 837, n. 13
Attorney's authority to stipulate respecting, § 100, p. 919
Change of attorney requiring continuance, § 119, n. 41

Continuances—Continued,
Disciplinary proceeding, § 34, p. 791
Review of discretion, § 37, p. 801, n. 77
Suspension or disbarment on obtaining continuance for absence of witness actually present, § 23, p. 755
Continuing original suit in case of settlement depriving attorney of lien, § 231, p. 1187
Contracts,
Assignments, ante
Attorney and client relationship created by, § 63
Attorney's authority to bind client by contract, § 103, pp 924–927
Attorney's liability to third party, § 52, p. 833
Avoidance for representation of conflicting interests, § 47, p. 827, n. 24
Between attorney and client, §§ 127–132, pp. 963–973
Bills and notes, ante
Bonds, ante
Breach of, ante
Burden of establishing by clerk suing for service, § 56, p. 842
Charging lien of attorney pursuant to, § 211, p. 1146
Chattel mortgages, ante
Compensation, generally, ante
Consideration, ante
Construction and operation of contracts, ante
Contingent fees, ante
Conveyances, post
Employment contracts, post
Evidence of attorney's authority to make contract, § 76, p. 891
Implied agreement, post
Indemnity, post
Insurance, post
Lease, post
Liability insurance, post
Lien affected by contract, §§ 207, 228, p. 1169, n. 91
Litigation, attorney's authority respecting, § 100, pp. 917–920
Loans, post
Mortgages, post
Negligence of attorney in preparing and recording, § 145
Partnership, § 56, p. 838
Dissolution of firm, § 56, p. 841
Presumption of fraud or undue influence in obtaining contract by attorney, § 204, p. 1116
Ratification by client of attorney's contract, § 71, p 869
Retainer, post
Special contract, post
Termination of relation by agreement, § 109, pp. 940–943
Third persons' liability for interfering with contract of attorney and client, § 53, p. 836, n. 10
Control by courts, § 58
Control of litigation, attorney's authority, § 80, pp. 898–902
Controversy, termination of controversy as terminating relation of attorney and client, § 116, pp. 947–949
Conversations with client's emissary, evidence to show nature of services in action for compensation, § 204, p 1119, n. 84
Conversion by attorney,
Deposit of client's funds in attorney's account, § 139
Evidence, § 157, p. 1002, n. 89
Disciplinary proceeding, § 33, p. 789, n. 6
Failure to pay client, § 138
Interest in action for, § 136
Joinder of parties in action against attorney, § 157, p. 997
Money collected, action for, § 154, p 988
Question for jury, § 157, p 1002, n 90
Suspension or disbarment on ground of, § 23, pp. 746, 757, n. 36, § 24, p. 763, n. 38, § 25, p. 765
Conveyances,
Attorney's authority to accept, § 101, p 925
Between attorney and client, § 128, pp. 969–971
Changing name of grantee as ground for suspension or disbarment, § 24, p. 764, n 39
Contingent fee contract to convey, § 186, p. 1067
Drafting as practice of law, § 3, p 705, n 31
Negligence of attorney in preparing and recording, § 145
Notice of unreported deed to attorney as notice to client, § 69, p 860, n. 67
Preparation as practice of law, § 3, p. 706, n. 31
Securing payment of attorney's fees and disbursements, § 130
Conviction of crime,
Accusation for disbarment, § 31, p 776
Disbarment or suspension on ground of, § 18, p. 730, § 38, p 811
Review of proceeding, § 37, p. 800
Evidence in disciplinary proceedings, § 33, p. 788
Presumption of absence of knowledge by examining board in prosecution for misconduct, § 33, p. 781
Reinstatement, § 41, p. 816, n. 11
Revocation of admission to practice of attorney from another state, § 15, p. 723, n. 87
Corporate officer's authority to employ attorney, jury question in action for compensation, § 205, p. 1130, n. 71
Corporations,
Arbitration, authority of attorney to bind corporation by arbitration agreement, § 91
Conveyances by client to corporation of which attorney is principal stockholder, § 128, p. 970
Discharge of attorney by corporate client, § 109, p. 941
Dissolution terminating employment contract, § 113
Employment by apparent officer of corporation, liability for compensation, § 177, p. 1044, n. 29
Estoppel to deny corporate existence in action against attorney for money collected, § 153
Evidence of attorney's authority acting for corporation, § 76, p. 890
Fees paid from funds recovered or preserved for corporation, § 193, p. 1096, n. 31
Fees payable out of funds of insolvent corporation, § 193, p. 1098

Corporations—Continued,
Necessity of showing authority of attorney to represent, § 72
Personal service of notice of attorney's lien, § 215, p. 1156, n 72
Pleading in action against corporation for compensation, § 203, p. 1108, n 43
Presumption of attorney's authority to represent, § 73, p 877
Warrant of attorney, § 77
Correction of judgment, attorney's authority to consent to, § 93
Correspondence creating employment contract, § 65
Evidence to show contract of employment, § 204, p 1118
Corroboration of accomplice testifying in disciplinary proceeding, § 33, p. 790
Corruption, duty to aid court in rooting out corruption, § 4, p. 708
Costs,
Charging lien of attorney attaching to judgment for, § 228, p. 1171
Contingent fee contract, construction, § 187, p. 1067, n. 76
Contract allowing attorney costs recovered, § 181, p. 1049
Disciplinary proceedings, § 30, pp 812–814
Included in amount on which percentage is reckoned in determining contingent fee, § 191, p 1092
Investigation of misconduct of attorney admitted from another jurisdiction, § 15, p. 723
Liability for, § 50, pp. 830–832
Lien of attorney limited to fees taxable as, § 213, p. 1154
Notice of attorney's lien when judgment is given only for, § 215, p. 1155
Paid out by attorney, lien for, § 213, p. 1154, n. 54
Proof required to recover for in action for services, § 204, p. 1113, n. 7
Retaining fee for payment, § 162, p. 1019
Signature of client's name to affidavit of inability to pay costs, suspension or disbarment, § 23, p 761
Summary proceedings to compel attorney to pay over money, § 159, p 1017
Counsel defined, § 3, p. 702
Counselor,
Defined, § 3, p. 702
Right to compensation, § 160
Counterclaim. Set-off and counterclaim, post
County judge, misconduct as ground for suspension or disbarment, § 23, p. 758
County,
Liability for,
Contingent fee, § 187, p. 1071, n. 5
Costs in disciplinary proceedings, § 39, p. 812
Presumption of attorney's authority to represent, § 73, p 878
Court rules, attorney's liability for loss resulting from ignorance of, § 142, n. 56
Court official, authority of attorney representing official, § 79, p. 898
Courts,
Amount of fees determined by, § 191, p 1093
Application for reinstatement, § 41, p. 817
Courts—Continued,
Assignment as counsel by court, § 54
Statutory provisions as to compensation, § 161, p 1019
Attorney as officer of the court, § 4
Authority to suspend or disbar, § 18, p 730
Denial of right of legislature to prescribe qualifications for practice of law, § 5, p 710
Direction to assign counsel to test pleadings, § 54, p 837, n 13
Duty to uphold dignity of court, § 4, p. 708, n. 36
Entitled to order change or substitution of attorneys, § 121, pp 952, 953
Exemption from service of process while in attendance at court, § 44
Federal courts, post
Judicial proceeding for admission to practice, § 11, p. 716
Jurisdiction to admit to practice of law, § 6
Lien of attorney restricted to fees for services in, § 213, p. 1150, n. 24
Misconduct towards court as ground for suspension or disbarment, § 23, p. 751
Not of record, practice without admission, § 16, p. 725
Power to admit applicants to practice, § 6
Privilege from arrest while in attendance at court, § 44
Proceedings before court for suspension or disbarment, § 28, p. 774
Protection of rights of attorney practicing before it, § 42, p. 821
Supervision and control of professional conduct, § 58
Covenants, notice of attorney respecting as notice to client, § 69, p 857, n. 48
Creditors,
Priority as to lien of attorney defending suit by, § 229, n. 49
Summary proceedings to compel payment over of money, § 159, p. 1011
Criminal charges, disclosure by applicant for admission to practice, § 9
Criminal conduct of client affecting attorney's duty to return part of fee, § 183, p 1061
Criminal conversation, prosecution of action for to protect attorney's lien after settlement, § 231, p. 1188, n 22
Criminal court, power to suspend or disbar, § 18, p. 731
Criminal liability affecting power of court to suspend or disbar, § 19, p. 733
Criminal proceeding,
Disqualification to represent adverse interests, § 47, p 826
Duty of attorney to the court, § 4, p 708, n. 36
Threat of proceeding to enforce civil claim, suspension or disbarment, § 23, p. 760
Criticism as to amount for which action was brought, ground for suspension or disbarment, § 23, p. 751, n 63
Cross action, notice to attorney of existence as notice to client, § 69, p. 865
Cross-bill,
Exceptions in criminal case, attorney's liability for costs, § 50, p. 831, n. 45

Cross-bill—Continued,
Proceedings to enforce attorney's charging lien, § 238, p 1200
Cross-complaint, evidence of attorney's authority to dismiss, § 76 p 892
Cross-examination,
Defendant in disciplinary proceeding, § 33, p 782, n 77
Witnesses, authority of attorney, § 81
Cumulative lien of attorney, § 207
Curtesy,
Compensation for services rendered brother attorney, § 160, p. 1018
Permitting trial of particular case by attorney from another state, not a right, § 15, p. 723, n. 93
Custodia legis, payment of fees from funds in, § 193, pp. 1096–1100
Custody of client's funds, duties respecting, § 130
Custom,
Charges,
Determining reasonableness of fee, § 191, pp. 1084, 1085
Evidence as to in action for compensation, § 204, p 1122
Collecting attorney to remit to attorney from whom claim was received, § 137
Damages,
Action against attorney for money collected, § 154, p 994
Breach of contract of employment, § 169, p 1030
Client's liability for attorney's acts, § 68
Compromise of claim by client without attorney's consent, § 139, p. 1077
Negligence of attorney, § 157, pp. 1003–1005
Pleading damages in action for attorney's negligence, § 157, p. 999
Proceedings to enforce lien of attorney after settlement in disregard of, § 231, p 1195
Wrongful acts by attorney, § 157, pp. 1003–1005
Dealings between attorney and client, §§ 127–132, pp. 963–973
Death of attorney,
Contingent fee, right to fee affected by, § 188, p 1073
Dealings between attorney and client, validity affected by death, § 127, p 966, n. 11
Employment of another attorney, § 119
Fees, recovery back of unearned fee on death, § 192
Lien of attorney as affected by, § 217
Notice to appoint another attorney on death of former attorney, § 118
Terminating employment, §§ 112, 171
Time to sue for compensation accruing on, § 199
Death of client,
Compensation of attorney, § 171, p 1033
Contingent fee, right to fee affected by, § 188, p. 1073
Lien of attorney affected by, § 217
Terminating employment, §§ 113, 171
Time to sue for compensation accruing on, § 199
Death of partner,
Compensation on dissolution of firm, § 56, p. 840
Dissolution of firm, § 56, p. 839
Effect on contract for compensation, § 184
Death of third party terminating employment contract, § 113
Decedent's estate,
Authority of attorney for court official representing estate, § 79, p 898
Charging lien attaching to decree in proceedings relating to, § 228, p 1171
Deception,
Duty as to client, § 4, p 708, n 38
Other attorney as grounds for suspension or disbarment, § 23, p. 751
Decision, charging lien attaching to, § 228, p. 1170
Declaration in action for compensation, § 203, pp. 1107–1109
Declarations of,
Agent, evidence of employment in action for compensation, § 204, p. 1118
Attorney,
Evidence of authority, § 76, pp. 889, 890
Evidence of negligence, § 157, p 1000, n. 88
Clerk, liability of attorney for, § 150
Deceased person, evidence in disbarment proceeding, § 33, p. 784, n. 86
Intention to open office, necessity, § 9
Decree, Judgment, post
Deductions for disbursements as ground for suspension or disbarment, § 23, p. 745, n. 36
Deeds, Conveyances, ante
Defalcation by clerk, ground for suspension or disbarment, § 23, p 750, n. 48
Default judgments,
Disciplinary proceedings, § 36, p 797
Entry of by attorney and enforcement to extent of lien, § 235
Evidence of attorney's want of authority, § 76, p 888
Not to be taken unless intentional, § 4, p. 708, n. 36
Notice to attorney of pendency of action affecting client's right to set aside default, § 69, p. 865, n. 16
Opening or vacating, attorney's authority, § 94
Presumption of attorney's authority to move to vacate, § 73, p 876, n. 12
Ratification by client of attorney's application to set aside, § 71, p. 869
Defenses,
Accounting by attorney, § 153
Action to enforce attorney's charging lien, § 234, p 1202
Actions against attorney for money collected and for accounting, § 153
Actions for attorney's negligence or wrongful acts, § 156
Attorney's authority to waive, § 100, p. 923
Compensation, action for, § 196
Construction of contract for compensation for defense of suit, § 182, p. 1059
Negligence for failure to defend, § 146, p 983, § 156
Pleading negligence in defending action, § 157, p 999
Negligence or mistake as defense to claim for compensation, § 167, p. 1027
Pleading defenses in action for compensation, § 203, pp. 1109, 1110
Proceedings to enforce attorney's lien after settlement in disregard of, § 231, p. 1189

Defenses—Continued,
Summary proceedings to compel payment over of money, § 159, p. 1012
Suspension or disbarment, § 25, pp. 764–767
Definitions, §§ 1–3, pp. 702–705, § 162
General retainer, § 61
Retainer, § 61
Special retainer, § 61
Warrant of attorney, § 77
De jure right to practice, § 4, p 708
Delay,
Bringing litigation, liability of attorney for, § 146, p 983, n 94
Ground for suspension, or disbarment, § 23, p. 745, n 30
Instituting disbarment proceedings, mitigation of punishment, § 38, p. 809, n 59
Reargument on appeal, compensation for services under assignment by court, § 172, p 1037
Sale by client affecting attorney's right to fees, § 183, p. 1060, n. 1
Delegation of attorney's authority, § 107, pp. 938–940
Delinquent taxes,
Failure to collect penalties as breach of contract, § 183, p 1061
Negligence of attorney in collecting, § 144, n 77
Statutory provisions for attorney's fees, § 161, p. 1018, n. 43
Delivery of client's papers or property,
Substitution of attorneys, § 122, pp 954, 955
Summary proceedings to compel, § 158, pp. 1005–1007
Delivery of subject-matter under court order as affecting right to attorney's lien, § 218, n 31
Demand,
Attorney show authority, § 72
Attorney's authority to demand payment, § 106, p 936
Payment of fees, pleading in action for compensation, § 203, p. 1109
Recognition, lien of attorney, § 214
Proof of attorney's authority, § 74, pp 881–885
Demand as condition precedent to action,
Attorney for money collected, § 154, p 989
Pleading demand, § 154, pp 990, 991
Compensation, § 198
Summary proceedings to compel payment over of money, § 159, p. 1013
Demurrer,
Assigned counsel's duty, § 54, p. 837, n. 13
Attorney's authority to stipulate that decision on demurrer shall be final, § 100, p. 919
Disbarment proceeding, § 31, p. 776, n. 99, p. 779, n. 32
Raising objection to attorney's authority, § 74, p 885
Demurrer to evidence, action by attorney to recover compensation, § 205, p 1132
Deposit of client's fund in bank, § 139
Burden of proof in disciplinary proceedings, § 33, p. 781, n. 72
Notice to attorney of purpose of transfer as notice to client, § 99, p. 903, n. 97
Deposit with attorney as off-set for claim for attorney's fees, agreement, § 182, p. 1056, n. 58
Depositions,
Confronting witnesses in disciplinary proceedings, § 34, p. 792
Exemption from service of process by nonresident attorney in state to take depositions, § 44
Offering depositions contradictory to those made by same deponent in former proceedings, as ground for suspension or disbarment, § 23, p. 756
Filing sham petition to obtain taking of deposition as ground for suspension or disbarment, § 23, p 760
Implied agreement to pay compensation for taking, § 190
Presumption of attorney's authority to take, § 73, p 877, n 24
Depraved character, disbarment as punishment, § 38, p 807, n. 54
Dereliction of county attorney as ground for suspension or disbarment, § 23, p 757, n. 36
Detective agency, firm of attorneys advertising under name as ground for suspension or disbarment, § 23, p 758, n. 48
Detectives,
Assignment as counsel by court, compensation, § 172, p 1036
Attorney's authority to employ, § 103, p. 926
Deviation from duty, defense to proceeding for suspension or disbarment, § 25, p 765
Diligence required of attorney, § 141
Evidence in action for compensation, § 204, p. 1120
Diploma as evidence of qualifications for admission to practice, § 10, n. 17
Direction of verdict,
Action by attorney to recover compensation, § 205, p 1132
Authority of attorney to move for, § 81
Disciplinary proceeding, § 34, p 792
Director General of Railroads, settlement by without creating liability of railroad company for attorney's lien, § 231, p 1181, n. 78
Directories, name appearing as attorney after disbarment as contempt, § 40, p 814, n 85
Disabilities, §§ 45–49, pp. 822–830
Lien of attorney as affected by, § 217
Notice to appoint another attorney, § 118
Termination of employment, compensation, § 171
Disability group insurance, charging lien attaching to, § 228, p 1174, n. 27
Disaffirmance,
Act of unauthorized attorney, § 71, p 871
Bringing of action by attorney, § 71, p 872
Constituting ratification of attorney's acts, § 71, p 870
Disbarment. Suspension and disbarment, post
Disbursements,
Charging lien attaching to judgment for, § 228, p 1171
Collection by attorney failing to pay over money collected, § 167, p. 1026
Discharge of attorney by client, § 109, pp 940–943
Employment of another attorney after discharge, § 110
Evidence in attorney's action for compensation, § 204, pp 1110, 1127

Discharge of attorney by client—Continued,
Fees,
On discharge, §§ 164, 169, pp. 1028, 1031
Recovery back of unearned fee on discharge, § 192
Jury question in action for compensation, § 205, p. 1131
Lien as affected by, §§ 218, 219
Lien on payments of alimony prior to, § 213, p 1154, n. 46
Pleading by confession and avoidance in action for compensation, § 203, p. 1110
Quantum meruit recovery of compensation on discharge, § 195
Summary proceedings to compel return of papers after discharge, § 158, p 1006, n. 16
Time to sue for compensation affected by wrongful discharge, § 190
Discharge of client's debt, clerk's authority, § 150
Discharge of debtor, attorney's authority, § 105, p 933
Disciplinary proceedings. Suspension and Discharge, post
Disclosure,
Client's name, residence and address, § 75
Duty to disclose adverse retainer, § 47, p. 824, n 8
Inducement to employment as against former client, § 48, p 830, n. 88
Discontinuance of action,
Attorney's authority, § 87, pp 908, 909
Clerk's authority, § 150
Client's authority, § 87, pp 909, 910
Discretion of court,
Admission to practice, § 6
Compensation for services on appeal under assignment by court, § 172, p. 1036
Costs in disciplinary proceedings, § 39, p. 812
Delivery of client's papers, § 158, p 1005, n. 15
Excluding attorney from appearing against former client, § 48, p. 829, n 35
Fee, determination of amount, § 191, p 1093
Imposing liability on attorney for costs, § 50, p. 831
Interest on fees, § 191, p 1092
Payment of fees from funds in court, § 193, p. 1097
Punishment in disciplinary proceeding, § 38, p. 806
Reinstatement of attorney, § 41, p. 817
Review in suspension or disbarment proceedings, § 37, p. 801
Set-off of one judgment against another as respects right to attorney's lien, § 232
Summary proceedings to compel payment of fees, § 194, p. 1101
Summary proceedings to compel payment over of money, § 159, p. 1010
Discretion of examiners in examinations for admission to bar, § 10
Discretion of referee refusing amendment in disciplinary proceeding, § 31, p. 779
Dishonesty,
Charging lien as protection against, § 211, p. 1142
Client's liability for, § 68
Disbarment as punishment, § 38, p. 807, n. 54
Dismissal of action,
Attorney's authority, § 87, pp. 908, 909
Brought by unauthorized attorney, § 64
Client's authority, § 87, pp. 909, 910
Dismissal of action—Continued,
Compensation, action by attorney to recover, § 205, p. 1132
Contingent fee affected by dismissal, § 187, p. 1070, § 189, p. 1076
Damages for negligence in permitting dismissal, § 157, p 1003, n. 94
Disbarment proceeding, § 34, p. 792, § 37, p 800, n. 67
Judgment ordering proceedings held in abeyance § 36, p. 798
Failure of attorney to show authority as ground, § 78, p 896
Fee, recovery back on dismissal, § 192
Lien of attorney affected by, §§ 218, 231, p. 1180, n. 77
Notice of dismissal served on attorney, § 83
Objection to attorney's authority raised by motion to dismiss, § 74, p 885
Performance of contract for fees, § 183, p 1061
Person not entitled to practice dismissing suit by, § 16, p. 725
Summary proceedings to compel payment over of money, § 159, p. 1016
Termination of relation of attorney and client by dismissal, § 116, p 947
Unauthorized dismissal, liability for, § 147
Dismissal of appeal,
Client's authority to dismiss, § 95, p 914
Lien of attorney protected by in case of settlement pending, § 231, p 1185
Presumption of attorney's authority to dismiss, § 73, p 881
Review of action of board of governors in disciplinary proceedings, § 37, p. 806
Dismissal of information for disbarment, stipulation for affecting right to reinstatement, § 41, p. 815
Disobedience to court,
Advising client to disobey as ground for suspension or disbarment, § 23, p. 755
By attorney as ground for suspension or disbarment, § 23, pp. 750, 751
Disobeying instructions, jury question in action for compensation, § 205, p. 1130, n. 80
Disposition of client's money or property, attorney's authority, § 104
Disqualification of referee to act in disciplinary proceeding, § 34, p. 795
Dissolution of partnership, § 56, p. 839
Compensation in closing out business, § 56, p. 840
Distributive shares, charging lien retained by administratrix, § 228, p. 1174, n. 30
District attorney,
Contract to assist, compensation, § 181, p. 1051
Misconduct as ground for suspension or disbarment, § 23, p. 757
Preliminary examination of charges before proceeding for suspension or disbarment, § 29
Diversion of funds set aside for payment affecting right to compensation, § 164
Divided liability, burden of proving defense of in action for compensation, § 204, p. 1115, n. 82
Division of fees, § 174, pp. 1038–1041
Evidence to establish agreement for in attorney's action for compensation, § 204, p. 1125
Division of profits by members of firm, § 56, p. 839

Divorces,
Accepting retainer to obtain divorce as practice of law, § 3, p 705, n 30
Advertisement as divorce lawyer as ground for suspension or disbarment, § 23, p. 759
Advertising easy divorces, court's power to regulate conduct, § 58, p. 843, n. 81
Advertising for divorce business as offense, § 59
Affidavit showing attorney's authority, § 76, p 889
Amendment of pleadings asking divorce, authority of attorney, § 100, p. 910, n. 27
Charging lien attaching to action for, § 228, p. 1173
Conspiring to obtain on false grounds as ground for suspension or disbarment, § 23, p. 755
Continuance to protect attorney's lien after dismissal or compromise, § 231, p. 1188
Denial of custody of child as negativing good moral character, § 7, p 712, n. 70
Fee returned on failure to procure, § 192, n 9
Lien of attorney on moneys received on judgment, § 213, p. 1151, n. 32
Miscellaneous acts ground for suspension or disbarment, § 23, p. 760
Misrepresenting validity of Mexican divorce, attorney's liability for, § 138, n 20
Performance of contract to procure divorce affecting contingent fee, § 188, p. 1071, n. 7
Reconciliation affecting agreement for compensation, § 183, p. 1060, n. 98
Representation of conflicting interests after termination of relation, § 48, p. 828, n 28
Termination of relation of attorney and client
By reconciliation, § 116, p. 947
Decree awarding custody of child, § 116, p 948, n. 20
Doctors, alliance with doctors as ground for suspension or disbarment, § 23, p. 759, n 53
Docket, entering lien of attorney on, § 215, p. 1158
Documents,
See also Papers, post
Duty to know documents are true and correct, § 4, p 707, n 34
Preparation as practice of law, § 3, p. 704, n. 30
Retaining lien on, § 225
Dormant judgment, lien of attorney surviving, § 217
Drafts,
Attorney's authority to accept draft as payment, § 106, p 938
Procuring money on false drafts, suspension or disbarment, § 23, p. 761
Drainage districts,
Presumption of attorney's authority to represent, § 73, p 878
Ratification by client of attorney's signing amended articles of association, § 71, p 870, n 69
Drunkenness. Intoxication, suspension or disbarment, ante
Duels,
Accepting challenge to fight as ground for suspension or disbarment, § 23, p. 760
Ground for suspension or disbarment, § 21, p 738
Duration of lien of attorney, § 217
Duress,
Contract of employment as to compensation, § 181, p. 1049, n. 83
Duress—Continued,
Notice of attorney of duress as notice to client, § 69, p 857, n 47
Duties of attorney to client, §§ 125–159, pp. 957–1017
Ecclesiastical courts, proctor defined, § 3, p. 703
Educational requirements for admission to practice, § 8
Ejectment, written authority of attorney to commence action, § 77, n. 15
Election of remedies, enforcement of attorney's lien in case of settlement in disregard of, § 231, p. 1185, n. 4
Eligibility for admission to practice, § 7, pp. 712–714
Embezzlement,
Ground for suspension or disbarment, § 21, p. 738
Money judgment in disciplinary proceedings, § 36, p. 798
Emergency,
Attorney's authority to compromise in emergency, § 105, p. 930
Use of false testimony as ground for suspension or disbarment, § 23, p. 755, n. 93
Employment,
Acceptance of employment when busy as ground for suspension or disbarment, § 23, p. 744
Agent, liability for compensation, § 177
Agents to solicit retainers as ground for suspension or disbarment, § 23, p. 759
Assistants, attorney's authority, § 107, pp. 938–940
Attorney, liability for compensation, § 177
Attorney's lien arising on, § 216, n. 7
Disclosure as inducement to employment as against former client, § 48, p. 830, n. 38
Disqualification to represent adverse interests, § 47, pp. 823–827
Paid solicitors, evidence in disbarment proceeding, § 33, p. 783, n. 84
Partnership, liability for compensation, § 176, p. 1043, n. 20
Premature termination affecting right to compensation, §§ 168–171, pp. 1027–1033
Prerequisite to appearance, § 62
Presumption as to in action to recover for services, § 204, p. 1113
Employment contract, § 65
Contingent fee contract, §§ 186–189, pp. 1062–1077
Evidence in action for compensation, § 204, pp. 1118, 1121, 1126
Filing as condition precedent to service of notice of attorney's lien, § 215, p. 1159
Jury question in action for compensation, § 205, p 1129
Necessity of contract to render one liable for services, § 175, pp. 1041–1043
Statement of terms of in notice of attorney's lien, § 215, p. 1157
Unlicensed person, § 63
Enforcement of,
Charging lien of attorney, § 234, pp. 1200–1202, § 238, pp. 1204–1212
Liability for costs, § 50, p. 832
Retaining lien, § 233
Entire or divisible contract, § 181, p. 1055, n. 44
Contingent fee contracts, § 186, p. 1063

Entry of judgment,
Attorney's duty to enter, § 146, p. 984, n. 20
Authority of attorney after entry, § 93
Disciplinary proceeding, § 36, p 797
Presumption of continuance of attorney's authority after entry, § 73, p. 880
Terminating relation of attorney and client, § 110, pp 948, 949
Equalizing agreement as to compensation of members of firm, § 56, p. 839, n. 41
Equitable assignment,
Attorney with charging lien for services, § 211, p. 1145
Contingent fee contract, § 187, p. 1069
Equitable defense,
Action against attorney for money collected, estoppel to set up, § 153
Action to enforce attorney's charging lien, § 234, p. 1202, n 90
Equitable lien of attorney, contract giving rise to, § 211, p. 1147, n. 9
Equity,
Charging lien, enforcement in equity, § 238, pp. 1205, 1206, n. 85
Compensation, suit for, § 197, p. 1104
Disbarment proceedings, § 18, p 730, n. 75
Lien proceedings to enforce after settlement in disregard of, § 231, p. 1191, n. 45
Negligence or wrongful acts of attorney, equitable remedies for, § 155
Payment of compensation from funds in equity court, § 193, p. 1096
Proceedings against attorney for money collected, § 154, p 988
Summary proceedings to compel surrender of papers, jurisdiction of equity, § 158, p. 1007, n. 21
Solicitor defined, § 3, p. 703
Error. Writ of error, post
Error in judgment, attorney's liability for, § 140, p. 978
Errors affecting right to compensation, § 164
Escrow agreement, violation as ground for suspension or disbarment, § 23, p. 761
Espionage act, conspiracy to violate as ground for suspension or disbarment, § 21, p. 738
Estate, retaining lien of attorney on property belonging to, § 227
Estoppel,
Attorney drawing contract to assert invalidity, § 127, p 968
Attorney's lien, § 218, n 28
Defeat right to compensation, § 164, n. 77
Defense in summary proceedings to compel payment over of money, estoppel to assert defense, § 159, p. 1012, n. 77
Defense to action against attorney for money collected, § 153
Negligence, estoppel of client to assert attorney's negligence, § 140, p. 978
Partner to assert interest in fees, § 56, p. 840
Question attorney's purchase of client's property, § 126, p 962
Raising question of fraud or misconduct, right to compensation, § 167, p. 1025
Reasonable value of services performed, estoppel to deny, § 167, p. 1026, n. 21
Estoppel—Continued,
Reasonableness of contingent fee contract, § 186, p. 1066
Receipt of client for part of proceeds collected, § 144
Setting up disqualification to receive compensation, § 165
Ethics,
Canons adopted by bar association as binding on attorneys, § 58
Devotion to client's interest, § 4, p. 708, n. 38
Ground for suspension or disbarment, § 23, pp. 741–743
Lack of proper conception as precluding admission to practice, § 7, p. 712, n. 70
Unethical defense in disbarment proceeding, § 23, p. 760, n. 84
Violation in advertising, suspension or disbarment, § 23, p. 759, n. 54
Evasive answer in disciplinary proceedings, amendment, § 32, p. 780
Evidence,
Accounting by attorney, § 154, pp. 991, 992
Action against attorney for money collected, § 154, pp. 991, 992
Action for attorney's negligence or wrongful acts, § 157, pp 999–1001
Action for compensation, § 204, pp. 1113–1128
Admission to practice, § 11, p. 717
Allowance of claim for compensation under assignment by court, § 172, p. 1034
Application for reinstatement, § 41, p. 818
Attaching tags to prejudice jury as ground for suspension or disbarment, § 23, p 757, n. 36
Attorney's duty to see that competent evidence is introduced, § 146, p. 984
Authority of attorney, § 76, pp. 886–893
Burden of proof, ante
Charging lien, proceedings to enforce, § 238, p. 1209
Copartner's expenditures, § 56, p. 840, n. 46
Costs, liability of attorney for, § 50, p. 832, n. 68
Damages for compromising claim without attorney's consent, § 189, p. 1077
Disciplinary proceeding, § 33, pp. 780–790
Admissible under petition, § 31, p. 777, n. 10
Exclusion of attorney from appearing against former client, § 48, p. 829, n. 35
Expert witnesses, post
Fees, recovery back of fees paid, § 192, n. 15
Good faith of attorney in dealing with client, § 127, p. 965
Good standing of attorney from another jurisdiction seeking admission to practice, § 15, p. 722
Hearing on review in suspension or disbarment proceeding, § 37, p. 804
Instructions on weight of evidence, § 34, p. 793
Investigation of case as practice of law, § 3, p. 706, n. 31
Lien proceedings to enforce after settlement in disregard of, § 231, p. 1193
Objections to evidence, authority to waive, § 100, p 923
Offer to disclose on employment as associate counsel as ground for suspension or disbarment, § 23, p. 760

Evidence—Continued,
Offer to sell evidence to adverse attorney as ground for suspension or disbarment, § 23, p. 760
Petition to review evidence as application for reinstatement, § 41, p. 817
Practice without admission, § 16, p. 727
Preservation of, § 34, p 795
Presumptions, post
Profit subsequent to termination of partnership in action for accounting, § 56, p 841, n. 65
Ratification by client of attorney's acts, § 71, p. 873
Reference on application for reinstatement, § 41, p. 820
Reformation of applicant for reinstatement, § 41, p 815
Settlement between partners, § 56, p. 842, n. 69
Stifling or suppressing as ground for suspension or disbarment, § 23, p. 754
Stipulations and agreements, attorney's authority respecting, § 100, p. 919
Summary proceedings to compel payment,
Of fees, § 194, p. 1101
Over of money, § 159, p. 1015
Summing up false testimony as ground for suspension or disbarment, § 23, p. 754, n. 93
Taking evidence of misconduct at former proceeding as defense to suspension or disbarment, § 25, p. 766
Third persons, liability of attorney to, § 52, p. 834, n 84, 87
Examination before trial, waiver of privilege from service of process, by seeking relief from examination, § 44, p. 822, n. 88
Examination for admission to practice, § 10
Admission to practice in another jurisdiction, § 15, p. 721
Failure, § 8, p. 715
Inquiry into inability to pass examination, § 11, p 718
Permit to practice until next bar examination, § 14
Reinstatement after disbarment, § 41, p. 816, n. 12
Examination of title,
Agency of attorney, § 67, p. 850, n. 76
Authority of attorney employed to examine, § 101, p. 925
Fee for examination under implied agreement, § 191, p 1084
Negligence in examining, § 143
Damages for negligent examination, § 157, p. 1003, n. 94
Notice to attorney acquired in examining title as notice to client, § 69, pp. 858, 859, n. 63, pp. 861, 862, n. 86
Purchase of adverse title by examining attorney, § 126, p. 961
Third person's attorney examining title for purchaser, § 65, n. 66
Examination of witnesses, attorney's authority to stipulate respecting, § 100, p. 919
Exceptions,
Review of findings of board in suspension or disbarment proceeding, § 37, p. 803
Exceptions—Continued,
Rule for examination for admission to practice, § 10
Statute for admission of applicant to the bar, § 7, p 713, n. 77
Excessive claim in notice of attorney's lien, § 215, p. 1159
Excessive fees, grounds for suspension or disbarment, § 23, p. 745
Excessive zeal to circumvent adversary, imposing liability for costs, § 50, p. 831, n. 59
Exchange of client's securities, attorney's authority, § 104
Exclusive jurisdiction to,
Admit applicants to practice, § 6
Suspend or disbar, § 18, p. 730
Exclusive power of attorney to control and conduct litigation, § 80, pp. 901, 902
Excuse from protecting rights of client, suspension or disbarment, § 23, p 744, n 26
Ex delicto, charging lien attaching to causes of action arising on, § 228, p. 1172
Execution sales,
Attorney's authority respecting, § 98
Notice to attorney relating to as notice to client, § 69, p. 859, n. 64, 65
Ratification by client of attorney's directions relating to, § 71, p. 873
Executions,
Attorney's authority respecting, § 97
Implied agreement to pay fee for advice relating to, § 190
Issuance on praecipe of attorney not admitted to practice, § 16, p. 725, n. 17
Liability of attorney to third person, § 52, p. 835
Lien, attorney's authority to release, § 105, p. 933
New attorney employed to issue execution, § 121, p. 953
Substitution of attorneys to issue, § 121, p. 953
Executors and administrators,
Acting as own attorney, § 63
Charging lien attaching to moneys in hands of, § 228, p. 1172
Contingent fee, claim against client's estate for fees, § 188, pp. 1073, 1074
Employment of attorney, liability for compensation, § 177, p. 1044, n. 20
Fees for services in administration of estate, §§ 179, 191, p. 1084, n 23, § 193, p. 1098, n. 42
Impossibility of performance affecting right to compensation for services, § 183, p. 1061
Lien for services rendered in behalf of, § 213, p. 1149
Motion to require attorney to disclose address, § 75, n. 31
Payment to administrator's attorney, § 106, p. 934, n. 31
Recovery for services on death of attorney, § 171
Retaining lien of attorney for services in behalf of, § 213, p. 1149
Right to act as own attorney, § 63
Substitution of attorneys, determination of amount of compensation on substitution by, § 122, p. 956

Executors and administrators—Continued,
Summary proceedings by executor de bonis non to compel payment over of money, § 159, p. 1011
Warrant of attorney executed by administrator, § 77, n 15
Executory agreements to compromise, attorney's authority, § 105, p. 930
Exemplary damages for attorney's negligence or wrongful acts, § 157, pp. 1004, 1005
Exempt property, charging lien attaching to, § 228, p. 1176
Exemptions, §§ 42–44, pp 820–822
Existence of judgment for purposes of attorney's lien, § 231, p. 1184
Expenses,
Advancing living expenses to needy client as ground for suspension or disbarment, § 23, p. 762
Assignment as counsel by court, compensation, § 172, p 1035
Element of determining reasonableness of fee, § 191, p 1083
Firm, liability of retiring partner after dissolution, § 56, p. 841
Lien of attorney for, § 213, p. 1150, n. 25, p. 1154
Payment by adverse party to attorney affecting contingent fee contract, § 187, p. 1068
Security for, § 130
Reimbursement by client, § 180
Experience,
Consideration of in action to enforce lien, § 231, p. 1191, n 46
Evidence in action for compensation, § 204, p. 1120
Experienced witnesses, testimony by as to value of services raising jury question, § 205, p. 1132, n. 94
Expert witnesses.
Attorney's authority to contract for services, § 103, p. 926
Expenses, compensation under assignment as counsel by court, § 172, p. 1036
Value of services, § 191, pp. 1093, 1094
Express contracts,
Burden of proof in action for compensation, § 204, p. 1114
Charging lien of attorney, § 211, p. 1147, n. 8
Compensation affecting implied agreements, § 190
Extension of time, attorney's authority to,
Agree to, § 100, p. 919
Extend time relating to appeal, § 95, p. 913
Release debtor by extending time, § 105, p. 933
Extortion, as ground for suspension or disbarment, § 21, p. 738, § 23, pp. 744, 761, § 33, p. 789, n. 6
Extra compensation, § 182, p. 1057
Burden of proof in action for, § 204, p. 1115
One partner, § 56, p. 840
Facts, attorney's authority to stipulate as to facts, § 100, pp. 919, 920
Fair treatment of attorney by client, § 125, p. 958
False affidavits, ground for suspension or disbarment, § 23, p. 754
False pretenses, ground for suspension or disbarment, § 21, p. 738
False statements,
Concerning other attorneys, suspension or disbarment, § 23, p. 751
Negativing good moral character, § 7, p. 712, n. 70
False swearing in bankruptcy petition affecting right to compensation, § 167, p. 1026, n. 25
Falsification,
Bank report, ground for suspension or disbarment, § 21, p. 738
Records of court, suspension or disbarment, § 23, p. 756
Federal courts,
Admission to practice by one expressing intention to become citizen, § 7, p. 713
Appearance by attorney licensed in another state for removal of case to federal court, § 15, p. 723, n. 93
Application of statutes regulating practice of law, § 5, p. 710, n. 48
Circuit court of appeals, admission to practice, § 15, p 721, n 72
Conviction of crime involving moral turpitude, disbarment, § 38, p 811, n 65
Disbarment in state court affecting right to appear in federal court, § 40
District court, jurisdiction to suspend or disbar, § 18, p 731, n 82
Jurisdiction of proceedings to enforce lien of attorney after settlement in disregard of, § 231, p 1191, n. 45
Qualifications for admission to practice, § 7, p 712
Solicitor defined, § 3, p. 703
Federal Employers' Liability Act, charging lien of attorney attaching to cause of action under, § 228, p 1173
Federal equity rules, liability of solicitor for costs, § 50, p 832
Federal income tax refund, lien of attorney employed to obtain, § 213, p. 1151, n 26
Feeders, alliance between doctors and lawyers, suspension and disbarment, § 23, p. 759, n. 53
Fees, compensation, ante
Felony,
Indictment for as negativing good moral character, § 7, p. 712, n. 70
Suspension or disbarment, § 21, p 736, n 24
Notice of proceeding, § 27, p 769
Pending final action on judgment of conviction, § 18, p. 730
Reinstatement, § 41, p. 816, n. 11
Ferreting evidence as practice of law, § 3, p. 706, n. 31
Fictitious claims,
Collecting money from county, suspension or disbarment, § 23, p. 757, n 36
Defrauding insurance companies, suspension or disbarment, § 23, p. 760
Submitting as ground for suspension or disbarment, § 23, p. 755
Fictitious items in expense account, compensation, § 181, p 1053
Fictitious name, firm of attorneys advertising under name of detective agency, suspension or disbarment, § 23, p. 758, n. 48
Fictitious residence, inducing litigant to assume as ground for suspension or disbarment, § 23, p. 755

Fiduciary relationship, § 125, pp 957–959
Adverse interest, ante
Employment of attorney, liability for fees, § 179
Court, misconduct, suspension or disbarment, § 23, p. 757
Filing,
Authority to represent another, § 72
Lien of attorney, § 215, p 1158
Final judgment, lien of attorney as affected by settlement prior to, § 231, p 1184
Financial ability of client,
Admissibility of evidence as to in action for compensation for services, § 204, p. 1122
Element in determining reasonableness of fee, § 191, pp. 1085, 1086
Financial,
Instruction on in action for compensation, § 205, p. 1135
Financial circumstances,
Conversion of funds, suspension or disbarment, § 23, p. 749, n. 46
Mitigation of punishment in disciplinary proceedings, § 38, p. 809, n. 59
Findings,
Accounting by attorney, § 154, p 994
Attorney's duty to see that interest of client is protected respecting findings, § 146, p 984
Compensation, action to recover, § 205, p. 1135
Disciplinary proceedings, § 34, p. 794
Record on appeal, § 37, p 802
Liability of attorney to third persons, § 52, p 834, n. 84
Money collected, action for, § 154, p. 994
Negligence or wrongful acts, § 157, p 1003
Referee,
Application for reinstatement, § 41, p 820
Disciplinary proceedings, § 34, p. 796
Review on appeal from decision of petition for reinstatement, § 41, p. 820
Fine,
Disciplinary proceedings, § 36, p. 798, § 38, p. 807
Payment as bar or defense to disbarment, § 21, p 740
Fire insurance policy, retaining lien of attorney engaged to collect proceeds, § 225, p. 1168, n. 74
Firms. Partnership, post
Foreclosure, lien of attorney against land acquired by, § 228, p. 1175, n. 86
Foreclosure proceedings,
Authority of attorney to accept service of process, § 83
Lien of attorney in, § 213, p. 1151, n. 26
Sale,
Attorney purchasing at taking subject to outstanding equities, § 69, p 861
Authority respecting, § 98
Evidence of attorney's authority to bid, § 76, p 890, n. 86
Instructions to bid, violation of, § 148, n. 35
Notice to attorney of fraud as notice to client, § 69, p 863
Presumption of attorney's authority to extend time to redeem, § 73, p. 879, n. 47
Ratification by client of attorney's bid, § 71, p 873
Foreign beneficiaries of decedents' estates, soliciting representation as practice of law, § 3, p. 705, n. 30
Foreign countries, admission of attorney to practice, § 15, p. 722
Foreign states,
Admission of attorney from other jurisdiction to practice, § 15, pp. 720–724
Disbarment or suspension, operation and effect, § 40
Forfeiture of right to practice by change of residence to another jurisdiction, § 17
Negligence, liability for, § 149, n. 37
Practice of law by one admitted elsewhere, § 3, p. 705, n 30
Presumption of absence of knowledge of conviction by examining board in prosecution for misconduct, § 33, p 781
Forfeited bonds, collection of money on by county attorney, suspension or disbarment, § 23, p. 757, n. 36
Forfeiture,
Right to practice by change of residence to another jurisdiction, § 17
Withholding money collected, § 154, p. 989
Forgery,
Client, refusal of attorney to perform services, compensation, § 183, p 1061, n. 15
Conviction precluding admission to practice, § 7, p 712, n. 70
Suspension or disbarment, § 21, p 738
Affidavits, § 23, p. 754
Use of forgery of another, § 23, p 754, n. 89
Form, notice of attorney's lien, § 215, p. 1157
Fornication, ground for suspension or disbarment, § 21, p. 738
Forum,
Attorney's authority to select, § 81
Enforcement of attorney's charging lien, § 238, p. 1206
Franchise tax, accountant's suggestions for reduction of tax as practice of law, § 3, p. 706, n. 31
Franchise to practice, § 4, p. 708
Frankness of attorney in disciplinary proceedings, mitigation of punishment, § 38, p. 809, n. 59
Fraud,
Assisting client in fraudulent scheme, suspension or disbarment, § 23, p. 760
Bar examination declared void because of fraud, § 11, p. 719
Burden of proof,
Action for deceit, § 157, p. 1000
Defense of in action for compensation for services, § 204, p. 1115
Disbarment proceeding, § 33, p. 781, n. 71
Claims, withdrawal of attorney on discovery that claim is fraudulent, § 110, p. 944
Client being bound by acts of attorney, § 67, p. 852
Client's liability for fraudulent acts of attorney, § 68
Contingent fee contract, § 186, p. 1065
Contract of employment, jury question in action for compensation, § 205, p. 1130
Conveyances, mortgages and assignments between attorney and client, § 128, p 970
Duty to aid court in rooting out fraud, § 4, p. 708

Fraud—Continued,
Evidence, § 157, p 1001, n 89
Action for fraud, § 157, p 1000
Application for reinstatement, § 41, p. 819, n 40
Hearing on application for admission to practice, § 11, p 718
Knowledge of purchaser of frauds committed by attorney prior to commencement of relationship, § 60, p 860, n. 66
Laches in action for deceit, § 156, n. 49
Liability for, § 138
Injuries to third person, § 52, p 834
Nature of action for, § 155
Negligence,
Conducting litigation, fraud as element, § 147 p. 983
Person falsely representing self as attorney, § 140, p 978, n. 43
Nonpayment of money as ground for suspension or disbarment, § 23, p. 749
Notice of attorney as notice to client,
Affected by attorney's fraud, § 69, p 856
Relating to fraud, § 69, p 858
Foreclosure sale, § 69, p 863
Notice of attorney's lien, effect of, § 215, p. 1159
Payment of fees under false representations, § 192
Pleading in action for, § 157, p. 997, n. 55
Presumption of fraud in dealings between attorney and client, § 127, pp 965–968
Termination of relation, § 132
Procuring admission to bar, grounds for suspension or disbarment, § 22
Question for jury, § 157, p. 1002, n. 90
Retaining lien of attorney on property procured by, § 225, p 1168
Revocation of order of admission of attorney from another jurisdiction, § 15, p 723
Right to compensation, § 167, p 1025
Settlement, lien of attorney protected against, § 231, p. 1183
Sufficiency of evidence as to in attorney's action for compensation, § 204, p. 1124
Suspension or disbarment, § 21, p. 738, § 23, p 743
Fraud on court, § 23, pp. 742, 753
Motive ground for, § 19, p. 735
Treble damages, §§ 155, 157, p. 1005, n. 4
Withdrawal of charge by client affecting right to reinstatement, § 41, p 819, n 40
Fraudulent conveyances,
Advice in making, compensation, § 181, p. 1050
Between attorney and client for purpose of hindering creditors, § 128, p 971
Notice to attorney as notice to client, § 69, p. 861
Scheme to defraud, § 69, p 863, n 99
Free advice,
Advertising, suspension or disbarment, § 23, p 750, n 50
Liability for injuries to third person, § 52, p. 834
Friendly suit to secure settlement of claims for injuries to infants, suspension or disbarment, § 23, p 762
Fund in court,
Charging lien of attorney on, § 228, p. 1170, n. 91
Lien of attorney as affected by subsequent settlement, § 231, p. 1184
Funds,
Attorney's duties respecting client's funds, § 139
Jurisdiction over empowering court to entertain proceedings to enforce attorney's charging lien, § 238, p. 1206, n. 36
Liability for funds received for benefit of third person, § 52, p 835
Payment of compensation out of fund, § 176
Subject to payment of compensation, § 193, pp 1095–1100
Funeral expenses, lien of attorney subject to, § 229
Future costs, discharged attorney's right to future costs as part of compensation, § 169, p. 1029, n. 51
Garnishment,
Charging lien of attorney attaching to funds in hands of garnishor, § 228, p. 1172
Liability of attorney for failure to secure writ, § 148
Lien acquired in as subject to attorney's lien, § 229
Money collected by attorney as defense to action against attorney, § 153
Summary proceedings to compel payment over of money, garnishment of funds as defense, § 159, p. 1012
Gas rates, acceptance of services of attorney defending ordinance lowering rates, compensation, § 175, p 1042, n. 7
General balance for professional services, charging lien as protecting, § 213, p. 1151
General denial in action for compensation, evidence admissible under, § 203, p 1112
General issue,
Action against attorney for money collected, § 154, p 991, n. 3
Summary proceedings to compel payment over of money, § 159, p 1012
General lien of attorney, § 207
General retainer defined, § 61
Gift from client to attorney, § 129
Good faith,
Advice as to invalidity of order of court, suspension or disbarment, § 23, p. 755, n. 10
Attorney applying for admission to bar of another state, § 15, p 721, n. 72
Burden of proof in respect to agreement increasing compensation during relationship, § 204, p. 1116
Contingent fee contract, § 186, p. 1064
Contract increasing compensation during relationship, admissibility of evidence as to in action for compensation, § 204, p 1118
Dealing with client, § 125, p 957; § 127, p. 964
Purchase of client's property, § 126, p. 962
Liability for injuries to third persons, § 52, p. 834
Permitting person to testify under assumed name, suspension or disbarment, § 23, p. 755, n. 3
Settlement of litigation without purpose to defeat attorney's lien, § 231, p. 1180, n. 77
Good moral character,
Admission to practice of attorneys from other jurisdiction, § 15, p. 722
Evidence on application for reinstatement, § 41, p. 818
Failure to account to client, suspension or disbarment, § 23, p. 749, n. 46

Good moral character—Continued,
Hearing on application for admission to practice, § 11, p. 718
Misconduct evidencing lack of as ground for suspension or disbarment, § 19, p 734
Reinstatement, § 41, pp. 816, 818
Right to practice law, § 7, p. 712
Want or loss of ground for suspension or disbarment, § 20
Government, contract to prosecute claims against, compensation, § 181, p. 1051
Graduation before enactment of qualifications as to admission to practice, § 10, n. 17
Grand jury, obtaining information from suspension or disbarment, § 23, p. 761
Gratuitous notice of attorney's lien by third person, sufficiency, § 215, p 1156
Gratuitous services,
Assignment as counsel by court in criminal cases, § 172, p 1033
Creating relationship of attorney and client, § 65
Negligence of attorney acting gratuitously, § 140, p 978, n. 43
Presumption as to in action to recover compensation, § 204, p. 1115, n 36
Right to recover for, § 160, p. 1018
Grievance committee, accusation for disbarment, § 27, p. 770
Gross negligence,
Attorney's liability for, § 141
Prerequisite to discharge of attorney, § 109, p 941, n 27
Ground rent, notice of attorney respecting as notice to client, § 60, p. 857, n. 47
Guaranty,
Attorney as guarantor of results, § 141
Authority to release guarantor, § 105, p. 933
Collection of debt by attorney, § 131, n 80
Liability of attorney for costs, § 51
Partner's authority to bind firm, § 56, p. 839
Summary proceedings by guarantor of attorney to compel payment over of money, § 159, p. 1011
Title examined by attorney, § 143
Guardian ad litem,
Authority of attorney for guardian to receive payment and satisfy judgment, § 99, p 916
Reasonable fee for services rendered to, § 191, pp. 1083, 1084
Guardians,
Conducting proceedings in probate court as practice of law, § 3, p. 705, n 30
Fees paid from funds recovered for guardian, § 193, p 1096, n. 31
Insane client, attorney's power to appear as, § 115
Party in action for compensation against, § 202
Practice without admission, § 16, p. 725
Right to act as own attorney, § 63
Habeas corpus,
Evidence of procuring writ without engagement by accused, disciplinary proceedings, § 33, p. 789, n. 6
Reasonableness of fee of preparing writ, § 191, p 1087, n. 50
Habitual drunkenness,
Defense to proceeding for suspension or disbarment, § 25, p. 764
Suspension or disbarment, § 24, p. 763, n 38
Hearing,
Application for admission to practice, § 11, p. 718
Summary proceedings to compel payment over of money, § 159, pp. 1014–1017
Suspension or disbarment, § 26, p. 768; § 34, pp. 791–796
Review of proceedings, § 37, p 804
Determination of committee or referee, § 37, p 804
Heirs of plaintiff, lien of attorney as superior to rights of, § 229
Home owners' loan act, statute prohibiting collection of fees from persons applying for loan, § 161, p. 1018, n. 43
Honesty,
Client's false charge of dishonesty as discharge without cause, compensation, § 109, p. 1031, n. 74
Defense in disciplinary proceeding, § 25, p 764
Disqualification to represent adverse interests, § 47, p. 824, n. 7
Qualifications for admission to practice, § 7, p. 713
Hospital's lien, priority over lien of attorney, § 229, n. 49
Husband and wife,
Liability of attorney paying to wife money awarded to husband, § 52, p. 835, n. 2
Summary proceedings,
Compel payment over of money, wife of client as party, § 159, p 1013, n. 90
Recover payment made by wife to attorney, § 159, p. 1011, n. 64
Wife's title to realty, notice to attorney as notice to client, § 60, p. 857, n. 48
Ignorance,
Amount of attorney's lien, immateriality as respects settlement in disregard of, § 231, p. 1182, n. 79
Compensation in absence of benefit to client, § 166
Employment of attorney affecting liability for compensation, § 160, p 1030, n 61
Right to compensation, § 167, p. 1027
Ignorance of law,
Attorney's liability for loss resulting from, § 142
Defense to proceeding for suspension or disbarment, § 25, p. 765
Suspension or disbarment, § 19, p. 734
Illegal contracts, partners, § 56, p. 842
Illegal employment, lien of attorney as affected by, § 209
Illness, suggestion of simulation of illness by witness affecting attorney's right to compensation, § 167, p. 1026, n. 23
Immoral conduct, ground for suspension or disbarment, §§ 20, 24, p 763
Immunity, right to practice, § 4, p. 709
Impertinent pleadings,
Answer in disciplinary proceeding, amendment, § 32, p. 780
Liability of attorney for costs, § 50, p. 832
Implied agreement,
Charging lien of attorney, § 211, p. 1147, n. 8
Compensation, § 190
Value of services and amount of compensation under, § 191, pp. 1078–1089

Implied agreement—Continued,
Employment contract, § 65
Pleading in action for compensation, § 203, p. 1109
Implied authority in general, § 79, pp. 896–898
Acceptance or waiver of service of notice, § 88
Acknowledging client's indebtedness, § 102
Affidavits, authority to make, § 89
Admissions, authority to make, § 100, pp. 920–922
Appeal, authority to conduct, § 95, p. 913
Appearance by attorney, § 82, p. 904
Arbitration, authority to submit to, § 91
Assignment or disposition of judgment, § 93
Attachment, issuance and control of proceedings, § 88
Bonds, authority to execute, § 103, p. 926
Change of venue, § 85
Collection and enforcement of judgment, §§ 96–98
Compromise and settlement, § 105, pp. 928–932
Conduct and control of litigation, § 80, pp. 898–902
Confession of judgment, § 86
Consent judgment, § 86
Contracts, authority to bind client by, § 103, pp 924–927
Dismissal, discontinuance or nonsuit by attorney, § 87, p 909
Execution, authority respecting, § 97
Indemnity contract, § 103, p 926
Interlocutory proceedings, §§ 84–92, pp. 907–911
Judgment and proceedings thereafter, § 93
Matters unconnected with litigation, §§ 101–106, pp. 923–928
Modification or alteration of judgment, § 98
Payment, authority to receive, § 106, pp. 934–938
Judgment, § 99, pp. 916, 917
Reference, authority to submit to, § 91
Release by attorney, § 105, pp. 932–934
Retraxit, authority to enter, § 87, p. 909
Revival of action, § 90
Satisfaction of judgment, § 99, pp. 916, 917
Statements, authority to make, § 100, pp. 920–922
Stipulations and agreements, § 100, pp. 917–920
Submission of controversy without action, § 92
Waiver by attorney, § 100, pp. 922, 923
Implied findings, attorney's action to recover compensation for services, § 205, p. 1136, n 30
Implied promise, burden of proof as to in action for compensation for services, § 204, p. 1113, n. 12
Implied ratification by client of attorney's acts, § 71, pp. 870, 872
Impossibility of performance affecting compensation under contingent fee contract, § 188, pp. 1074, 1075
Impounded funds, lien of attorney as affected by subsequent settlement, § 231, p. 1184
Imprisonment, imposition in disciplinary proceedings, § 36, p. 798
In forma pauperis, duties of attorney, § 4, p. 707, n. 34
In rem, judgment in disciplinary proceeding, § 36, p. 797
Inattention to business, ground for suspension or disbarment, § 23, p. 744, n. 29
Incapacity to continue services, operation of law, right to compensation, § 170
Incidental expenses, assignment as counsel by court, compensation, § 172, p. 1035
Incidental suits, lien of attorney for services in, § 213, p. 1151
Incidents of relationship in general, §§ 66–71, pp. 850–874
Income tax,
Attempt to evade as ground for suspension or disbarment, § 21, p. 737
Refund, lien of attorney employed to obtain, § 213, p. 1151, n. 26
Reimbursement for traveling expenses, § 180, n. 62
Incompetent persons,
Infants, post
Insanity, post
Reasonable value for services rendered, § 191, pp. 1083, 1084
Increased fee, burden of proof as to voluntary action on part of client, § 204, p. 1116, n. 46
Incriminating circumstances, punishment in disciplinary proceeding, § 38, p. 810
Indebtedness, attorney's authority to acknowledge client's indebtedness, § 102
Indecent pleading, to coerce payment or settlement, suspension or disbarment, § 23, p. 756
Indecorous language, duty in presenting points, § 4, p. 708, n. 38
Indemnity,
Attorney's authority,
Make indemnity contract, § 103, p. 926
Release indemnitor, § 105, p. 933
Evidence of attorney's authority to release, § 76, p 887, n. 50; p. 892, n. 97
Independent action,
Charging lien of attorney enforced by, § 236
Lien of attorney enforced by after settlement by parties, § 231, p. 1188
Substitution or change of attorneys in, § 121, p. 953
Independent advice to client affecting validity of transaction with attorney, § 127, p. 968
Conveyance, mortgage or assignment by client to attorney, § 128, p. 970
Indictment or information,
Charges for disbarment, § 31, p. 776, n. 8
Practicing without admission to practice, § 16, p 727
Indigent persons, assignment as counsel by court, § 54
Compensation, § 172, pp. 1033–1037
Individual interest acquired in violation of duty, accounting to client for, § 134
Indorsement,
Attorney's authority, § 104
Lien of attorney, § 215, p. 1158
Original writ,
Liability for costs, § 50, p. 831
Liability for officer's fees, § 51
Ratification by client of attorney's indorsement, § 71, p 873
Industrial commission, appearance before as practice of law, § 3, p. 705, n. 30
Inequitable conduct, contract for compensation, § 181, p. 1049, n. 83

Inexperience alterations due to inexperience, suspension or disbarment, § 23, p. 756
Infants,
Assignment as counsel by court in civil cases, compensation, § 172, p. 1037
Duty to inform court of infancy of litigant, § 4, p. 708, n. 36
Evidence of compromise of infant's claim in disciplinary proceeding, § 33, p. 787, n 5
Practice without admission, by guardian or next friend, § 10, p. 725
Qualifications for admission to practice, § 7, p. 713
Reasonable fee for services rendered to, § 191, pp 1083, 1084
Settling infants' cases without order of court, suspension or disbarment, § 23, p. 762
Inference of guilt in disbarment proceeding, § 33, p 785, n. 94, 98
Information,
Attorney's duty to inform client of interest in subject-matter, § 125, p. 959
Client's duty to furnish, § 125, p. 958, n 45
Disbarment, stipulation for dismissal affecting right to reinstatement, § 41, p 815
Misconduct, § 30, p. 775
Information and belief, verification of charges in disbarment proceeding, § 31, p 778
Inheritance tax, deduction in computing contingent fee, § 191, p. 1091, n. 71
Injunction,
Acceptance of retainer against former client, § 48, p. 829, n. 37
Bond, attorney's authority to,
Execute, § 103, p 927
Release, § 105, p 933
Equivalent to conviction as affects conclusiveness in disciplinary proceedings, § 33, p 790, n. 7
Notice to attorney of continuance as notice to client, § 60, p. 866
Innocence, presumption in disbarment proceeding, § 33, p. 780
Inquest, proceeding for suspension or disbarment, § 28, p. 771
Insanity,
Lien of attorney, § 213, p. 1154, n. 49; § 217 n. 20
Reasonableness of fee for services rendered to, § 191, p. 1086, n. 47
Right to compensation under assignment as counsel by court, § 172, p. 1034
Suspension or disbarment, § 19, p. 734; § 23, p. 745
Terminating attorney's employment contract, § 115
Insolvency,
Client's remedies, § 158, p. 1005, n. 10
Collecting attorney's duty to file claim against insolvent estates, § 144
Failure to pay funds to client, suspension or disbarment, § 23, p. 750
Inspection of papers,
Substitute attorney, § 122, p. 955
Summary proceedings to compel, § 158, pp 1005–1007
Instructions,
Accounting by attorney, § 154, p. 994
Attorney's authority, § 78, p. 895; § 81
Waive particular instructions, § 100, p 923
Instructions—Continued,
Compensation, action by attorney to recover, § 205, p 1133
Disciplinary proceedings, § 34, p 793
Money collected, action against attorney for, § 154, p. 994
Negligence or wrongful acts, § 157, p 1002
Instructions to attorney,
Burden of proof in action for violation of, § 157, p. 1000
Damages for violation, § 157, p. 1004
Enforcement of lien of attorney after settlement in disregard of, § 231, p 1194, n. 48
Failure to instruct as defense in action for negligence, § 156
Liability for violation, § 148
Insurance,
Attorney's authority to receive payment of proceeds, § 106, p 935
Computation of contingent fee in action on policy, § 191, p. 1091, n. 72
Defrauding insurance company by fictitious claim, suspension or disbarment, § 23, p. 760
Fraudulent proof of loss as ground for suspension or disbarment, § 21, p. 738
Liability of insurance company inducing client to breach contract of retainer, § 53, p. 836, n. 10
Retaining lien of attorney on policy, § 225, p. 1168
Suing insurance company in supreme court instead of in municipal court, suspension or disbarment, § 23, p. 761
Insurer, attorney as insurer of results, § 141
Intemperate nature, admission to practice of attorney from another state, § 15, p. 722, n. 77
Intent,
Conversion of client's funds, suspension or disbarment, § 23, p 749, n. 47
Disqualification to represent adverse interests, § 47, p. 824, n. 7
Interest,
Adverse interest, ante
Client's right to discharge, § 109, p. 942
Counterclaim in action for money collected, § 153, n. 62
Damages for attorney's negligence or wrongful act, § 157, p. 1004
Disbursements by attorney, § 191, p. 1092
Fees, § 191, pp 1092, 1093
Included in amount on which percentage is reckoned in determining contingent fee, § 191, p 1092
Liability of attorney for, § 136
Money withheld by attorney, § 154, p. 994
Payment of principal to attorney authorized to collect, § 106, p. 934
Personal interest not to be adverse to those of client, § 4, p 708
Public in integrity of attorney, § 4, p. 707, n. 34
Refund on termination of partnership, § 56, p. 839, n 30
Substitution, right affected by, § 119
Summary proceedings to compel payment over of money, allowance of interest, § 159, p. 1016, n 24
Suspension or disbarment for representing conflicting interests, § 23, p. 746

Interference with,
Performance of contract by attorney, compensation, § 183, p. 1061
Relation, liability of third persons, § 53
Interlocutories in action for attorney's negligence, § 157, p. 1003, n. 91
Interlocutory proceedings, attorney's authority respecting, §§ 84–92, pp. 907–911
Intermeddling with clients of other attorneys, suspension or disbarment, § 23, p. 751
Intermediate appellate court, review of discretion in suspension or disbarment proceeding, § 37, p. 801, n 77
Interpleader, lien of attorney on funds held, § 211, p 1144, n. 87
Intervention,
Attorney rendering service under contingent fee contract, § 189, p. 1075, n 42
Compensation, action for, § 202
Divorce action as notice of attorney's lien, § 215, p 1159, n. 92
Original suit, enforcement of attorney's lien after settlement in disregard of, § 231, p. 1190, n. 43
Party's right to conduct own defense, § 63, n. 19
Protection of charging lien of attorney by, § 238, p 1208
Revive judgment, enforcement of attorney's charging lien by, § 235
Stipulation by defendant's attorney binding on intervener, § 100, p. 918, n 14
Intoxicating liquors, violation of law as ground for suspension or disbarment, § 21, p. 738
Intoxication, suspension or disbarment,
Appearing in court to participate in case, suspension or disbarment, § 23, p. 761
Attempt to make opposing attorney drunk, § 23, p 751
Defense to proceeding for suspension or disbarment, § 25, p. 764
Invalidity of portion of decree in disciplinary proceedings, § 36, p. 798
Investigation of,
Case, as practice of law, § 3, p. 706, n. 31
Charges for suspension or disbarment, § 27, p. 770
Misconduct of attorney admitted from another jurisdiction, cost, § 15, p. 723
Investigators, employment, suspension or disbarment, § 23, p 761
Investment, summary proceedings against attorney to recover money intrusted for investment, § 159, p. 1011, n. 60
Invited error, appeal in suspension and disbarment proceeding, § 37, p 802, n. 81
Issues on proceeding,
Admission to practice, § 11, p. 717
Compensation, § 208, pp. 1110–1112
Lien of attorney, enforcement after settlement in disregard of, § 231, p. 1191, n. 46
Money collected by attorney, § 154, p. 991
Substitute attorneys, § 122, pp. 955, 956
Itemized services and charges as basis of determining reasonableness of fee, § 191, p 1085
I. W. W., delivering address under auspices of, suspension or disbarment, § 24, p. 763, n. 38
Joinder of parties,
Action for breach of contract or conversion, § 157, p 997
Action for compensation, § 202
Attorney's authority to induce joinder, § 81
Negligence of attorney for failure to join unborn child, § 146, p 983 n. 1
Summary proceedings to compel payment over of money, § 159, p 1013
Joinder of proceedings for suspension or disbarment, § 26, p 768
Joining resident attorney by nonresident attorneys for trial of the case, § 15, p. 724
Joint attorneys,
Authority, § 70, p. 898
Payment and satisfaction of judgment by, § 99, p. 916
Payment, authority to receive, § 106, p. 934, n. 81
Reasonableness of fees, § 191, p 1085
Joint contracts, compensation, § 182, p 1055, n. 44
Joint defendants, liability for compensation of attorney employed by one defendant, § 178
Joint indictment, assignment as counsel by court, compensation, § 172, p. 1035
Joint liability, presumption in action for compensation, § 204, p. 1115
Joint parties, authority of attorney to appear for, § 62
Joint tort-feasors, notice of motion for contribution served on attorney, § 83, n. 50
Joint trial in disciplinary proceeding, § 34, p. 791
Judges,
Attorney becoming judge, termination of services affecting right to compensation, § 170
Dislike for judge not to affect duty to uphold dignity of court, § 4, p. 708, n. 36
Jurisdiction and control by state bar association, § 60
Lack of moral qualification as ground for suspension or disbarment, § 24, p. 764
Misconduct as judge as ground for suspension or disbarment, § 23, p. 756
Misconduct towards judge as ground for suspension or disbarment, § 23, p. 751
Probate judge giving advice without admission to bar as practice of law, § 3, p. 704, n. 30
Statement as reflecting on, defense to proceeding for suspension or disbarment, § 25, p. 766
Judgment debtor,
Enforcement of charging lien against, § 234, p. 1201
Party to proceedings to enforce attorney's charging lien, § 238, p. 1207
Judgment docket, entry of attorney's lien on, § 215, p. 1158, n 83
Judgment liens,
Authority of attorney to release, § 105, p. 933
Client accepting payment after assignment, liability of attorney, § 52, p 835
Lien of judgment for attorney's fee, § 206
Judgments,
Action by person not licensed to practice, validity, § 16, p. 725
Action for attorney's negligence or wrongful acts, § 157, p. 1003
Allowance of attorney's fees, interest of attorney, § 163
Alteration, attorney's authority to alter, § 93

Judgments—Continued,
Assignment of judgment,
Attorney's authority to assign, § 93
Termination of attorney's authority to receive payment by, § 99, p. 916
Attorney's authority respecting judgment and proceedings thereafter, § 93
Attorney's duty to see that interest of client is protected respecting judgment, § 146, p 984
Burden of proving attorney's want of authority in proceedings to set aside, § 76, pp. 887, n. 46, 888
Charging lien,
Attaching to judgment, § 228, pp 1160, 1170
Enforcement of lien by action on, § 237
Proceedings to enforce, § 238, p. 211
Collection and enforcement, attorney's authority, §§ 96–98
Condition precedent to charging lien, § 211, p 1143
Death of client terminating attorney's authority to receive payment of judgment, § 113
Default judgments, ante
Disciplinary proceedings, conclusiveness as to reinstatement, § 41, p 814
Equitable owner's liability for attorney's fees in procuring judgment thereon, § 175, p 1042, n. 7
Executing paper purporting to be a judgment, suspension or disbarment, § 23, p 756
False or fraudulent judgment, suspension or disbarment for procuring, § 23, p 755
Lien, proceedings to enforce lien after settlement in disregard of, § 231, p. 1195
Modification, attorney's authority to modify, § 93
Negligence of collecting attorney in securing judgment, § 144
New attorney employed to enforce judgment, § 121, p. 953
Notice of attorney's lien before, § 215, p. 1159
Notice to attorney,
After final judgment as notice to client, § 69, p. 857
Relating to judgment received after termination of authority, § 69, p 806
Opening judgment, attorney's authority, § 94
Part payment of judgment, attorney's authority to accept, § 106, pp 936, 937
Payment of judgment, attorney's authority to receive, § 99, pp. 915–917
Proceedings before judgment, attorney's authority respecting, §§ 81–83, pp 902–906
Remission or reduction of judgment, attorney's authority, § 105, p 933
Sale or disposition of judgment, attorney's authority, § 93
Satisfaction of judgment, attorney's authority respecting, § 99, pp. 915–917
Set-off against judgment protection of attorney's lien against, § 232
Settlement after creating liability to attorney for value of lien in independent action, § 231, p. 1188, n. 36
Substitution of attorneys to enforce judgment, § 121, p. 953
Summary proceedings to compel attorney to pay over money, § 159, p. 1017
Judgments—Continued,
Suspension or disbarment, § 18, p. 780, § 36, pp. 797–799
Appellate court, § 37, p 800
Termination of relation of attorney and client by rendition and entry of judgment, § 116, pp. 948, 949
Vacation, attorney's authority, § 94
Wrongful entry by attorney, client's liability for, § 68, n. 91
Judicial sales,
Attorney's authority respecting, § 93
Purchase of client's property by attorney at, § 69, p 861, § 126, pp 961, 963
Jurisdiction,
Admission to practice, § 5, pp 709–711, § 6
Bringing suit in wrong jurisdiction with corrupt motive as ground for suspension or disbarment, § 23, p. 755
Charging lien, proceedings to enforce attorney's, § 238, p. 1206
Compel payment over of money collected in federal court, § 159, p 1000
Compensation, action for, § 200
Lien, proceedings to enforce attorney's lien after settlement in disregard of, § 231, p 1190
Objection to attorney's authority, jurisdiction to determine, § 74, p. 884
Proceedings for substitution of attorney, § 121, pp 952, 953
Summary proceedings to,
Compel payment of fees, § 194, p. 1101, n. 63
Compel payment over of money, § 159, pp. 1009, 1010
Determine amount of compensation, § 194, p 1100, n 60
Jurors,
Bribing or tampering with as ground for suspension or disbarment, § 23, p 753
Conversing before jurors as to merits of case as ground for suspension or disbarment, § 23, p 760
Notice to attorney respecting jurors as notice to client, § 69, p 866
Jury service, exemption, § 42, p 821
Jury trial,
Attorney's action for compensation, § 205, p. 1120
Attorney's authority to determine whether trial shall be by jury, § 81, n 8
Attorney's authority to waive, § 100, p. 923
Deprivation of right by attorney's proceedings to impress lien on property, § 238, p. 1205
Ratification by client of attorney's waiver, § 71, p 873
Summary proceedings against attorney, § 158, p. 1005, n 14
Suspension or disbarment, § 28, p. 771
Justices of the peace,
Charging lien of attorney as attaching to judgment of, § 228, p. 1172
Defenses to contempt proceeding in practicing before justice without authority, § 16, p. 727
Misconduct as ground for suspension or disbarment, § 23, p. 757
Perfecting appeals from as practicing law, § 8, p. 704, n. 30

Justices of the peace—Continued,
Practice before without admission, § 16, p. 725, n. 9
Knavery, charging lien of attorney as protection against, § 211, p. 1142
Knowledge,
Attorney as knowledge of client, § 69, pp 853–867
Attorney's lien as estoppel to object to failure to give notice, § 215, p 1155, n. 61
Certificate as to good character of applicant to be given from personal knowledge, § 7, p. 713
Client as knowledge to attorney, § 70
Element of ratification by client of attorney's acts, § 71, pp 868, 871
Delegation of attorney's authority, § 107, p 940
Ignorance, ante
Ku Klux Klan, oath of applicant for admission to practice, § 12, p. 720, n. 63
Labor on case, evidence in action for compensation, § 204, p. 1120
Laches,
Accounting by attorney, § 153
Client in asserting invalidity of transaction between attorney and client, § 127, p 969
Negligence of attorney, action for, § 156
Preventing attorney from continuing original suit to protect lien after settlement, § 231, p. 1188
Proceeding for suspension or disbarment, § 25, p 766
Purchase of client's property by attorney, laches affecting client's rights, § 126, p. 962
Right of substitution, § 121, p 952
Summary proceedings to compel payment,
Of fees, § 194, p. 1101, n 62
Over of money, § 159, p 1012
Land, lien of attorney on, § 228, p 1174
Land office proceeding, lien of attorney participating in, § 213, p. 1151, n 26
Larceny, ground for suspension or disbarment, § 21, p. 738
Law clerks,
Burden of proof in suing for compensation, § 57
Services as practice of law, § 3, p. 704, n. 30
Law creating relationship of attorney and client, § 65
Law school, approval affecting qualifications for admission to practice, § 8, p. 714, n. 91
Lawyer defined, § 3, p. 703
Layman furnishing attorney, right to lien, § 209, n. 63
Laziness, ground for suspension or disbarment, § 23, p. 744, n. 29
Lease,
Attorney's authority to make, § 103, p. 925
Evidence of attorney's authority respecting, § 76, p. 891
Negligence of attorney in representations as to lease, § 156, n. 42
Notice to attorney of outstanding lease as notice to client, § 60, p. 859, n. 62
Leave of court,
Appeal in suspension or disbarment proceeding, § 37, p. 799, n. 62
Leave of court—Continued,
Continuance of original suit to protect lien of attorney after settlement, § 231, p. 1187, n. 21
Withdrawal of attorney, § 110, pp. 943–945
Legacy, contingent fee contract as equitable assignment of legacy, § 187, p 1070, n. 96
Legal papers,
Disbarred attorney holding himself out as competent to draw papers as violation of law, § 40, p 814
Possession of attorney, subject-matter of retaining lien, § 225, p 1166
Preparation as practice of law, § 3, p. 704, n. 30
Legatee's interest in estate, lien of attorney on, § 228, p. 1173, n 27
Legislative interference with judicial power by prescribing qualifications to practice, § 5, p. 710
Letters,
Discharge of attorney by, § 109, p. 942, n. 31
Evidence in action against attorney to recover money collected, § 154, p. 992, n. 16
Evidence on application for reinstatement, § 41, p. 818, n. 37
Notice of attorney's lien by, § 215, p. 1157, n 77
Suspension or disbarment, ground for, § 23, pp 744, 751, n 75, 753, 758, n 42, 760
Letters patent, admission to practice, § 5, p. 711, n. 61
Liabilities of attorney to,
Client, §§ 125–150, pp 957–1017
Representation of adverse interests, § 47, p. 825
Third person, § 52, p 833
Liabilities of client for attorney's acts, § 68
Liability insurance,
Attorney's authority to agree to waiver of defense, § 100, p. 919
Evidence of attorney's authority to receive notice, § 76, p. 892
Libel, ground for suspension or disbarment, § 21, p. 738, § 23, p 753
License to practice, § 14
Admission to practice, generally, ante
Cancellation Suspension and Disbarment, post
Contracts for services of persons not licensed, compensation, § 181, p. 1050
Discharge on ground of nonadmission in other jurisdiction, § 109, p. 941, n. 27
Fee, § 55
Nonpayment of annual fee as ground for suspension or disbarment, § 23, p. 761
Pleading license in action for compensation, § 203, p. 1109
Refusal of right to surrender license, § 17
Sharing compensation with unlicensed persons, suspension or disbarment, § 23, p. 759, n. 53
Temporary, license to attorney from another jurisdiction, § 15, p 722
Trial of particular case by attorney from another jurisdiction, § 15, p. 723
Lien of attorney,
Accounting by attorney, lien affecting duty, § 133
Assignment, § 212
Assistant counsel as entitled to, § 209
Associate counsel, § 209
Bastardy proceedings, § 228, p. 1172
Bond releasing, § 222

Lien of attorney—Continued,
Cancellation in equity, § 207, n. 52
Charging lien, ante
Client's remedy against imposition, § 207
Construction of statutes relating to, § 208
Contingent employment, § 209, n. 64
Cumulative, § 207
Defense to,
Action for negligence, § 156
Summary proceedings to compel payment over of money, § 159, p 1012
Discharge of attorney as affecting, § 219
Discharge of lien, § 218
Duration, § 217
Enforcement of,
Charging lien, § 234, pp 1200–1202
Retaining lien, § 233
Fees covered, § 213, pp 1149–1154
Filing of for amount allowed as sufficient to show attorney was entitled to no more, § 204, p 1128, n 59
Governing law, § 207
Layman furnishing attorney not entitled to, § 209, n 63
Local law fixing, § 207, n. 51
Loss of, § 218
Money in hands of particular persons, § 228, p. 1172
Nature, § 207
Notice, § 215, pp 1155–1161
Admission of value of services rendered, § 205, p. 1132, n 1
Partial assignment, § 212
Perfection of, §§ 214, 215, pp. 1155–1161
Persons entitled, § 209
Priority, § 220
Proceedings to perfect, §§ 214, 215, pp. 1155–1161
Protection against,
Assignment by client, § 230
Set-off between parties, § 232
Settlement between parties, § 231, pp. 1180–1197
Release of judgment as operating to discharge, § 221
Relinquishment of possession resulting in loss of, § 224
Remedies of attorney in case of settlement in disregard of lien, § 231, p. 1185
Retaining lien, § 193, p. 1095, § 210
Right to, § 207
Satisfaction of judgment as operating to discharge, § 221
Scope of as affected by relation, § 207
Security, taking of as release of lien, § 222
Service of notice, § 215, p 1158
Services covered, § 213, pp. 1149–1154
Set-off between parties, protection against, § 232
Setting aside assignments made in fraud of, § 230
Settlement between parties, protection against, § 231, pp 1180–1197
Statutory provisions, § 208
Subject-matter of,
Charging lien, § 228, pp. 1169–1176
Retaining lien, §§ 225–227, pp. 1166–1169
Substitution affected by lien, § 122, pp. 953–955
Lien of attorney—Continued,
Suit for compensation waiving lien, § 223
Summary proceedings to compel delivery of papers on which attorney has lien, § 158, p. 1006
Termination, § 217
Time of attaching, § 216
Waiver, § 218
Withdrawal from case affecting, § 220
Liens, attorney's authority to release, § 105, p. 933
Life tenant's attorney's authority to bind owner of fee simple estate, § 62, n 15
Limitations Statute of Limitations, post
Limited jurisdiction, power of courts to suspend or disbar, § 18, p 731
Liquidation of bankrupt, lien of attorney for services rendered in connection with, § 213, p. 1150, n. 25
Litigant's right to act in person or by attorney, § 63
Litigation,
Attorney's authority relating to matters not immediately connected with, §§ 101–106, pp. 923–938
Attorney's authority to conduct and control, § 80, pp 898–902
Care and skill required in conducting, § 146, pp. 982–984
Knowledge of attorney respecting litigation as knowledge of client, § 69, pp. 865–867
Loans,
Care required in lending client's money, § 141, n 53
Certificate of evidence, effect of as respects right of attorney to retaining lien, § 225, p. 1167, n 70
Client's funds by attorney, § 130
Evidence of loan to client in disciplinary proceedings, § 33, p 789, n 6
Obtaining for concealment of facts as negativing good moral character, § 7, p 712, n 70
Payment to attorney authorized to make loan, § 106, p 935
Suspension and disbarment on ground of loan to or from client, § 23, p. 745
Lobbying, compensation under contracts for services, § 181, p 1050
Local counsel, rules of court requiring employment by counsel of record, validity, § 5, p. 710
Loss of,
Attorney's lien, § 218
Client's funds, liability for, § 139
Right to object to attorney's authority, § 74, p. 883
Magistrate, misconduct as ground for suspension or disbarment, § 23, p 757
Malicious prosecution, lien of attorney attaching in action for, § 228, p. 1173
Mandatory disbarment, § 38, p 811
Marriage, misstatement in application as ground for suspension or disbarment, § 24, p. 763, n. 38
Married women, eligibility for admission to bar, § 7, p. 714
Marshaling assets, lien of attorney, § 230
Massachusetts trust, notice to attorney relating to as notice to client, § 60, p. 865
Master and servant relationship between attorney and client, § 66

Materialman's lien, evidence in action for failure to perfect, § 157, p. 1001, n. 88, 89
Mentally incompetent client, grounds for suspension or disbarment, § 23, p. 745
Merchantable title, negligence of attorney affected by client's failure to furnish, § 140, p. 978, n. 47
Merger,
Cause of action into judgment, effect of as respects attorney's charging lien, § 228, p. 1170, n 92
Contracts for compensation, § 181, p. 1052, n. 19
Lien of attorney into judgment, § 217
Mesne process, privilege from arrest, § 44
Mexican divorce,
Attorney's liability for misrepresentation as to validity, § 138, n. 20
Return of fee on failure to procure, § 192, n 9
Militia, exemption from service, § 42, p 821
Minerals, charging lien of attorney on, § 228, p. 1174, n 35
Mingling client's and attorney's funds, § 139
Mining claims, medium of payment under contingent fee contract, § 187, p. 1068, n. 86
Minors. Infants, ante
Minutes of city council, evidence of employment in action for compensation, § 204, p. 1118, n. 66
Mitigation of punishment in disciplinary proceeding, § 38, p. 809
Misappropriation,
Conversion, ante
Corporate officer, lien of attorney engaged to recover, § 211, p. 1144, n. 86
Funds of client as ground for suspension or disbarment, § 23, p. 746
Misconduct,
Admission to practice of attorney from another state, § 15, p. 722, n. 77
Action for, §§ 155–157, pp 994–1005
Attachment for contempt for nonpayment of costs, § 50, p 832
Burden of proving as defense in action for compensation, § 204, p. 1115
Compensation affected by, § 167, p. 1025
Costs liability of attorney for, § 50, p. 831
Substitution on ground of lien affected by, § 122, pp. 954, 955
Suspension and disbarment, generally, post
Misdemeanor,
Conviction as ground for suspension or disbarment, § 21, p. 736, n. 24, p. 740, n 94, p. 742
Illegal fees in bill of costs, § 161, p. 1019
Notice of proceeding for suspension or disbarment, § 27, p. 769
Practicing without admission to practice, § 16, p. 727
Misleading instructions in disciplinary proceeding, § 34, p. 793
Mistake,
Contract for attorney's fees, § 182, p. 1057
Contingent fee contract, § 186, p. 1065
Ground for suspension or disbarment, § 23, p. 744
Honest mistake affecting right to compensation, § 167, p. 1026, n. 31
Negligence, generally, ante
Misuse of court records or papers as ground for suspension or disbarment, § 23, p. 756
Modification of contract, attorney's authority, § 103, p 925
Modification of judgment,
Attorney's authority, § 93
Disbarment by reinstatement, § 41, p. 814, n. 89
Disbarment proceedings, § 36, p 798
Modification of order admitting attorney from another jurisdiction, § 15, p. 723
Money,
Action for money collected, §§ 152–154, pp. 987–994
Attorney's authority to dispose of client's money, § 104
Collected by attorney and not paid over, § 139
Retaining lien of attorney on, § 225, p. 1168
Collecting attorney authorized to accept money, § 106, p. 937
Summary proceedings to compel payment over of money, § 159, pp. 1007–1017
Money had and received as form of action for compensation, § 197, p. 1104
Money judgment, charging lien of attorney attaching to, § 228, p. 1171
Moot questions,
Reinstatement, § 41, p 815
Review in suspension or disbarment proceeding, § 37, p. 802
Moral character, issue on application for admission to practice, § 11, p. 717
Moral delinquency, ground for suspension or disbarment, § 19, p. 733
Moral turpitude,
Burden of proof in disbarment proceeding, § 33, p. 781
Conclusiveness of conviction in disciplinary proceeding, § 33, pp. 789, 790, n. 9, 10
Notice of proceeding for suspension or disbarment, § 27, p. 769
Suspension and disbarment on ground of, § 18, p. 730, § 19, p. 733, § 21, p 736, n. 24, § 23, p 742, § 38, p. 807, n. 54, p. 811
Mortgages,
Acceptance, attorney's authority to accept, § 101, p 925
Attorney as additional security for fees, estoppel to assert lien, § 222
Attorney purchasing with notice of mortgage as bona fide purchaser, § 69, p 861
Attorney to secure payment of fees and disbursements, § 130
Burden of proving,
Attorney's authority to receive payment, § 76, p 887
Negligence in collecting, § 157, p. 1000, n. 77
Contingent fee contract dependent on redemption, § 188, p. 1072, n 9
Contingent fee contract to foreclose mortgage, § 188, p. 1071, n. 8, § 191, p. 1091, n. 71
Damages for attorney's negligence in permitting dismissal of foreclosure suit, § 157, p. 1003, n. 94
Dealings between attorney and client, § 128, pp. 969–971
Evidence,
Action for negligence of attorney in failing to file, § 157, p. 1001, n. 88
Attorney's authority to assign, § 76, p. 892

Mortgages—Continued,
Evidence—Continued,
Attorney's authority to receive payment, § 76, p 892, n 98
Foreclosure by advertisement as practice of law, § 3, p 705, n. 30
Instruction in action for negligence in drafting, § 157, p 1008, n. 91
Notice to attorney as notice to,
Client, § 69, p 857, n. 47, pp 858, 864, n. 2
Person claiming under mortgage, § 69, pp. 861–863
Purchaser, § 69, p 859, n. 61
Preparation as practice of law, § 3, p. 706, n. 31
Priority of lien of attorney, § 229, n 55
Ratification by client of attorney's extension, § 71, p. 873
Retaining lien of attorney on, § 225, p. 1168
Sale by attorney, § 104, n. 60
Statutory provision for reasonable attorney's fees, § 161, p. 1018, n. 42
Waiver of attorney's lien to extent of mortgagee's indebtedness in foreclosure, § 218, n. 28
Motions,
Accuser to make rule absolute in disciplinary proceeding, § 32, p. 780
Admission to practice by attorney from another jurisdiction, § 15, pp. 721, 722, n. 81
Admission to practice on denial of recommendation by bar committee, § 11, p. 716
Charging lien enforced by, § 235, n 6
Compelling attorney to pay over money, § 159, pp 1007–1017
Disbarment for failure to answer, § 32, p. 780, n. 46
Dismissal of appeal in suspension or disbarment proceeding, § 37, p. 805
Dismissal of disciplinary proceeding, § 34, p 792
Disclose administrator's address, § 75, n. 31
Inquiry by court on its own motion of right to appear as attorney, § 16, p. 724, n 6
Institution of proceedings for suspension or disbarment by court's motion, § 30
Judgment on pleading, § 36, p 797, n. 25
Raising objection to attorney's authority, § 74, pp 884, 885
Reinstatement, § 41, pp 817, 818, n. 25
Reopening case in disciplinary proceeding, § 34, p 702
Substitution of attorney, § 121, p 952
Withdrawal of, § 121, p. 953
Suspension or disbarment, § 30, p. 775
Motive,
Bringing suit in wrong jurisdiction as ground for suspension or disbarment, § 23, p. 755
Defense to proceeding for suspension or disbarment, § 25, p. 764
Disqualification to represent adverse interests, § 47, p 824, n 7
Punishment in disciplinary proceeding, § 38, pp. 807, 809
Municipal corporations,
Negligence of counsel as binding on, § 67, p. 852, n. 86
Presumption of attorney's authority to represent, § 73, p. 878
Municipal courts,
Charging lien of attorney as attaching to judgment of, § 228, p. 1172
Power to disbar or suspend, § 18, p. 731
Municipal courts of New York City, jurisdiction to enforce attorney's lien, § 238, p. 1206, n. 85
Municipal judges,
Censure in disciplinary proceeding, § 38, p. 809, n. 58
Misconduct ground for suspension or disbarment, § 23, p. 758, n. 42
Mutual rescission of contract, jury question in action for compensation, § 205, p. 1131
Mutuality of contract of employment, § 181, p. 1048, n 73
Naked cause of action, charging lien of attorney not arising on, § 211, p. 1145
Name,
Disclosure of client's name by attorney, § 75
Liability for use of attorney's name without authority, § 53
Permitting use by unqualified persons as ground for suspension or disbarment, § 23, p. 758
Natural right to practice, § 4, p 708
Nature and form of action,
Against attorney for money collected, § 154, pp. 988, 989
Charging lien, enforcement of, § 238, p. 1205
Compensation, action for, §§ 195, 197, pp. 1103–1105
Contempt in practicing without authority, § 16, p 726
Negligence or wrongful acts of attorney, § 155
Summary proceedings to compel payment over of money, § 159, pp. 1009, 1013, 1014
Nature and form of application for reinstatement, § 41, p. 817
Nature of employment, admissibility of evidence as to in action for compensation, § 204, p. 1119
Nature of office, § 4, pp. 706–709
Nature of proceeding for admission to practice, § 11, p 716
Nature of right to practice, § 4, p. 708
Nature of transaction or dealing between attorney and client, § 127, pp. 967, 968
Negligence of attorney,
Acting without authority, § 146, p 983
Actions for, §§ 155–157, pp 994–1005
Associate or substitute attorney, liability for, § 149
Burden of proving defense in action for compensation, § 204, p. 1115
Care and skill required, § 141
Champerty as defense, § 156
Client, negligence of attorney, § 67, p. 851
Collections, § 144
Compensation, right to, §§ 166, 167, p 1027
Negligence as defense to action for, § 196
Conduct of litigation, § 146, pp. 982–984
Costs, liability of attorney for, § 50, p 831
Damages in action for, § 157, p 1003
Pleading, § 157, p 999
Proximate consequences, § 140, p. 977
Defenses to action for, § 156
Employment determining liability, § 140, p. 978
Erroneous advice, § 143
Estoppel of client to plead, § 140, p. 978

Negligence of attorney—Continued,
Evidence, in action for, § 157, p 999
Evidence in action for compensation, § 204, p. 1124
Under general issue, § 203, p. 1112
Failure to pursue remedies before and after judgment in making collections, § 144
Form of action at law, § 155
Ignorance of law, § 142
Improper advice, § 143
Judgment or decree in action for, § 157, p. 1003
Liability for, §§ 140–146, pp 977–984
Limitations and laches as defense, § 156
Nondiscovery in changes in transcript reprimand by court, § 23, p. 756, n. 19
Parties to action, § 157
Pleading, § 146, p 984; § 157, pp 997–999
Preparing contracts or conveyances, § 145
Presenting case to court, § 146, p. 984
Process, § 146, p. 984
Question of law in action for compensation, § 205, p. 1131
Receipt for collection, § 144
Recording contracts or conveyances, § 145
Release as defense, § 156
Suspension or disbarment, § 23, p. 744
Third person's right of action, § 52, p. 834
Title to property, erroneous advice, § 143
Treble damages, § 155
Negotiable instruments. Bills and Notes, ante
New attorney vested with powers of predecessor, § 124
New parties in action against attorney for money collected, § 154, p. 990, n. 95
New trial,
Assignment as counsel, duty, § 54, p. 837, n. 13
Attorney's authority to dismiss or withdraw motion, § 95, p. 914
Attorney's authority to waive grounds, § 100, p. 923
Disciplinary proceeding, § 35, p. 796
Newly discovered evidence,
Reinstatement on ground of, § 41, p. 815
Suspension or disbarment proceedings,
Record on appeal, § 37, p. 800, n. 70
Reference to take, § 37, p. 806
Reopening proceeding, § 34, p. 792, n. 36
Next friend,
Authority of attorney for next friend to receive payment and satisfy judgment, § 99, p. 916
Practice without admission, § 16, p. 725
Nolle prosequi, bar to proceeding for disbarment, § 21, p. 740
Nominal damages,
Attorney's negligence, § 157, p. 1004
Breach of contract of employment, § 169, p. 1030, n. 61
Use of attorney's name without authority, § 53, p. 837, n. 11
Nonperformance,
Contingent fee contract affecting compensation, § 188, pp 1074, 1075
Evidence in attorney's action for compensation, § 204, p. 1123
Nonprofessional misconduct, suspension or disbarment for, § 24, pp. 762–764
Nonresidents,
Appeal, authority of attorney for nonresident to take, § 95, p 913
Appointment of attorney not of nonresident litigant's own choice, § 63
Exemption from service of process, § 44
Plaintiff, liability of attorney for costs, § 50, p. 831
Striking from papers of name of nonresident attorney not admitted to practice, § 16, p. 725, n. 17
Tax on attorney, § 55, p. 837, n. 15
Nonsuit,
Action by attorney to recover compensation, § 205, p. 1132
Attorney's authority, § 87, pp. 908, 909
Termination of relation of attorney and client by nonsuit, § 116, p. 948
Notaries' fees, evidence on question of value of attorney's services, § 204, p 1122
Notary, execution of will as practice of law, § 3, p 706, n 31
Notes. Bills and Notes, ante
Notice,
Appeal,
Attorney's authority to waive, § 95, p 913
Presumption of attorney's authority to give, § 73, p. 881, n 70
Appoint another attorney on death or disability of former attorney, § 118
Arrangement for notification of accidents, suspension or disbarment, § 23, p. 759, n. 56
Attorney as notice to client, § 69, pp. 853–867
Attorney's lack of authority affecting presumption of authority, § 73, p. 879
Authority of attorney to receive, accept or waive, §§ 83, 95, p. 913, § 100, p 923
Change or substitution of attorney, to adverse party, § 123
Clerk's authority to waive notice, § 150
Charging lien, § 211, p. 1145
Notice of enforcement by motion in original action, § 235, n. 6
Client as notice to attorney, § 70
Collection or receipt of property by attorney, § 933
Suspension or disbarment for failure to give notice, § 23, p. 750
Damages for attorney's failure to give, § 157, p. 1003, n. 94
Discharge of attorney, § 109, p. 942
Evidence of attorney's authority to receive notice, § 76, p. 892
Intention to take bar examination, § 9
Lien of attorney, § 215, pp. 1155–1161
Service of as creating charging lien of attorney on cause of action, § 211, p. 1145, n. 88
Limitation of attorney's authority, § 79, pp. 897, 898
Member of partnership as notice to all, § 56, p. 839
Motion raising objection to attorney's authority, § 75, p. 885
Negligence of clerk in failing to give notice of hearing, attorney's liability for, § 146, p. 983, n. 2

Notice—Continued,
New firm of client's intention not to permit firm to conduct business, § 114
Presumption of attorney's authority to give, § 78, p 878
Presumption of giving notice of collection, § 154, p. 901
Receiver, proceedings to enforce attorney's charging lien, § 238, p. 1208
Revocation of powers, § 17
Service by attorney, § 83
Substitution of new attorney, § 121, p. 952
Summary proceedings against attorney, § 158, p. 1005, n. 15
Summary proceedings to compel payment of fees, § 104, p. 1101
Suspension or disbarment proceedings, § 27, p. 768
Withdrawal of attorney, § 110, pp 943–945
Nullity of proceedings by person not licensed to practice, § 16, p. 725
Number of attorneys of record permitted, § 63
Numerous items warranting reference to referee in attorney's action for compensation, § 205, p. 1129, n. 66
Nunc pro tunc,
Filing certificate as to education by applicant for admission to practice, § 9
Oath of applicant for admission to practice, § 12
Order of appearance of a resident attorney with attorney from another jurisdiction, § 15, p. 724
Oath,
Acquittal by oath denying charge of contempt in practicing after suspension or disbarment, § 40, p 814
Admission to practice, § 12
Antedating jurat as ground for suspension or disbarment, § 23, p 756
Showing first duty to public, § 4, p. 707, n 34
Objection to,
Attorney's authority, § 74, pp. 881–885
Representation of adverse interests, § 47, p. 827
Representation of conflicting interests by former client, § 48, p. 829
Substitution for lack of notice, § 121, p. 952
Obstructing justice as ground for suspension or disbarment, § 23, p. 753
Obtaining money by false promise of marriage as ground for suspension or disbarment, § 24, p. 763, n. 38
Occupation tax, failure to pay affecting right to compensation, § 165
Offenses,
Exercise of professional conduct, § 59
Practice after suspension or disbarment, § 40, p 814
Practice without authority, § 16, p. 726
Offer,
Element of employment contract, § 65
Unaccepted as fixing amount of fee, § 101, p 1080
Offer of judgment,
Burden of proving attorney's want of authority to make offer, § 76, p 888
Implied authority of attorney, § 86, n 69
Presumption of attorney's authority, § 73, p. 880
Office of attorney, §§ 4–60, pp. 706–844
Officer of court, compensation for representing, § 172, p. 1037
Officer's fees, liability of attorney, § 51
Oil lease, compromise of suit to cancel affecting contingent fee, § 189, p. 1075, n. 43
Open court, authority of attorney to make admissions in, § 100, p. 921
Open hostility of attorney affecting validity of transaction with client, § 127, p. 967
Opening judgment, attorney's authority, § 94
Opening statement, authority of attorney to make admissions in, § 100, p. 921
Operation of law,
Lien of attorney by, § 213, p. 1150, n. 24
Termination of employment affecting right to compensation, § 170
Opinion evidence in disciplinary proceedings, § 33, p. 782, n. 77
Opinion of court, submitting proposition to change opinion for money consideration, suspension or disbarment, § 23, p. 756
Opium, smuggling as ground for suspension or disbarment, § 21, p. 738
Order,
Delivery or surrender of client's papers or property on substitution, § 122, pp. 954, 955
Disbarment or suspension, § 36, pp. 797–799
Discharging attorney, § 109, p. 942
Investigation of charges and file accusation against attorney, § 30, p. 775, n 92
Permitting withdrawal of attorney, § 110, pp. 944, 945
Requiring attorney to show authority, § 78, pp 895, 896
Simulating to obtain possession of property, suspension or disbarment, § 23, p. 756
Substitution, § 121, pp. 951–953
Service of copy on adverse party, § 123
Summary proceedings to compel attorney to pay over money, § 150, p 1017
Order of proof in disciplinary proceedings, § 34, p. 791, n 18
Ordinances, suspension or disbarment on conviction for violation, § 21, p 737
Ordinary care and skill required by attorney, § 141, n. 53
Original jurisdiction, enforcement of charging lien as exercise of, § 238, p 1207
Orphans' courts, payment of compensation from funds in court, § 193, p 1006
Other attorneys, permitting use of name by, suspension or disbarment, § 23, p. 758
Other parties, acting for affecting right to compensation, § 167, p 1024
Outstanding claim, purchase by attorney of outstanding claim against client's property, § 126, p 961
After termination of employment, § 126, p. 963
Overpayment to attorney in settlement of estate, liability for money paid, § 52, p 836
Own attorney, right of party to act as, § 63
After appearance by counsel, § 80, pp 901, 902
Paper books, presumption of attorney's authority to print, § 73, p. 881, n. 70

Papers,
See also,
Documents, ante
Legal papers, ante
Attorney's power to retain for purpose of protecting professional integrity, § 125, p. 958
Misuse, falsification or alteration, as ground for suspension or disbarment, § 23, p. 756
Subject-matter of attorney's retaining lien, § 225, p 1166
Suspension or disbarment for refusal to deliver to client, § 23, p 744
Pardon,
Bar or defense to disbarment proceedings, § 21, p 740
Contempt proceeding for practicing law after disbarment, § 40, p. 814
Censure of judge for taking money to obtain pardon, § 38, p 809, n. 58
Evidence of reformation to secure reinstatement, § 41, p. 815
Excessive fee for procuring, § 101, p 1089, n. 51
Impossibility of performing contingent fee contract to procure pardon, § 188, p. 1075, n. 41
Reinstatement on pardon, § 41, p 815
Review by appellate court on petition for reinstatement, § 41, p. 820
Parol authority, § 77
Parol evidence,
Disciplinary proceeding, § 33, p 782, n. 77
Liability of attorney to third persons, § 52, p. 834, n. 84
Partial assignment, lien of attorney, § 212
Partial invalidity of contract of employment, § 181, p. 1048
Partial payment, attorney's authority to accept, § 100, pp. 936, 937
Partial statement of material facts as ground for suspension or disbarment, § 23, p. 755
Parties,
Action against attorney for money collected, § 154, p. 990
Action for attorney's negligence or wrongful acts, § 157, p 997
Attorney as party, § 66
Charging lien, proceedings to enforce, § 238, p. 1207
Compensation, action for, § 202
Construction of contract providing for compensation, § 182, p. 1056
Lien, proceedings to enforce after settlement in disregard of, § 231, p 1190
Premature termination of action by act of parties, right to compensation, § 169, pp 1027–1032
Privilege of attorney as party to suit, § 43
Right to act as own attorney, § 63
Summary proceedings to compel payment,
Of fees, § 194, p 1101, n. 62
Over of money, § 159, p. 1013
Suspension or disbarment proceedings, § 26, p. 768
Partition,
Allowance of fee by court, § 191, p. 1094, n 6
Representation of conflicting interests, § 47, p. 827, n. 20
Partnership, employment by, liability for compensation, § 176, p 1043, n 20
Partnership of lawyers, § 56, pp. 838–842
Accounting for money lost through fault of partner, § 135
Attorney of record, § 63
Attorney's authority to act for retired partner, § 80, p. 900, n 82
Action for compensation, § 173
Burden of proving accounting by law firm, § 154, p. 991, n 7
Contract of employment with,
One member, § 65
Firm, § 184
Death of member of firm as terminating employment contract, § 112
Defense to proceeding for suspension or disbarment, § 25, pp 765, 766
Discharge of law firm and employing retiring member, § 169, p 1028, n. 42
Dissolution of law firm,
Liability for negligence of member after dissolution, § 150
Terminating employment contract, §§ 113, 114
Member without license, right to compensation, § 185
Misappropriation by partner as ground for suspension or disbarment, § 23, p. 750
Negligence of member of firm, liability for, § 150
New firm of lawyers, client's duty to carry on with new firm, § 114
Notice of member of firm as notice to firm, § 69, p 857
Parties,
Action by partnership for compensation, § 202
Summary proceedings to compel one member to pay over money, § 159, p 1013
Retainer of one member of firm, § 65
Service of notices on partner of deceased attorney of record, § 83
Suspension or disbarment for fraudulent attempt to prevent partner from collecting share of profits, § 23, p 751
Withdrawal of member of firm retained to conduct litigation, § 110, p 943
Passion, encouraging litigation from motive of passion, as ground for suspension or disbarment, § 23, p. 761, n. 95
Passive right to hold subject-matter under retaining lien of attorney, § 225, p. 1168
Patent attorneys,
Contract to protect client's interest as practice of law, § 3, p 706, n. 31
Contract with firm for services, § 184
Discovery of want of authority to employ, liability for compensation, § 177, p. 1044, n. 37
Revocation of powers, § 17
Suspension or disbarment by commissioner of patents, § 18, p. 733
Patents,
Evidence of attorney's authority to grant license, § 76, p. 891
Notice to attorney as notice to applicant for patent, § 69, p. 867

Patents—Continued,
Representation of conflict of interests, § 47, p. 827, n. 19
Pauper's affidavit, liability of attorney for costs, § 50, p. 831
Payment,
Attorney's authority to receive and make, § 101, p 925, § 106, pp 934–938
Attorney's duty to receive, § 144, n 70
Burden of proving,
Attorney's authority to receive, § 76, p 887
Defense of in action to recover compensation for services, § 204, p. 1116
Compensation by client, § 192
Death of client terminating attorney's authority to receive payment, § 113
Demand, attorney's authority to demand payment, § 106, p 936
Evidence of,
Attorney's authority to pay debt, § 76, p. 892
Attorney's authority to receive, § 76, p 892, n. 98
Payment in action for compensation, § 204, p. 1125, n 47
Execution, attorney's authority to receive, § 97
Fees,
Defense to action for compensation, § 196
Element of relationship of attorney and client, § 65
Funds subject to payment of fees, § 193, pp 1095–1100
Summary remedies to compel payment, § 194, pp. 1100–1102
Judgment, attorney's authority to,
Enforce payment, § 96
Receive payment of, § 90, pp. 915–917
Judicial sale's proceeds, attorney's authority to receive, § 98
Liability for payment received outside of agency, § 52, p. 836
Money collected and not paid over to client, liability for, § 130
Money or property of client received by attorney, § 133
Interest for failure to pay, § 136
Person entitled to payment, § 137
Negligence of attorney affected by client's failure to make payment, § 140, p. 978, n 47
Partnership, payment to induce formation of partnership, return on dissolution of return, § 56, p 839
Presumption of attorney's authority to accept, § 73, p. 879, n 49
Question for jury,
Attorney's action for compensation, § 205, p. 1130
Attorney's authority to extend time for payment, § 78, p 895, n. 26
Recovery back of compensation paid by client, § 192
Summary proceedings to compel payment over of money, § 159, pp 1007–1017
Workmen's compensation award, attorney's authority to receive, § 99, p. 917
Payment into court,
Condition precedent to defense in summary proceedings to compel payment over of money, § 159, p. 1012, n. 76
Discharge of attorney's lien by, § 218
Penal nature of summary proceedings to compel attorney to pay over money, § 159, p 1009
Penal proceedings for recovery of money collected by attorney, § 154, p 989
Penalty,
Failure to disclose client's name, residence and address, § 75
Illegal fees in bill of costs, § 161, p. 1010
Withholding money by attorney, § 154, p. 994
Pendency of action,
Notice of attorney's lien, § 215, p 1156
Notice to attorney of pendency as notice to client, § 69, p 865
Prevention of representation of adverse interests, § 47, p 827
Suspension or disbarment for conduct tending to prejudice consideration, § 23, p. 756
Pendency of criminal proceedings as bar to disbarment proceedings, § 21, p 739
Pending appeal, set-off of one judgment against another as affecting lien of attorney, § 232
Pension law violations, ground for suspension or disbarment, § 21, p. 738
Percentage contract,
Alternative remedies on summary discharge by client, § 169, p 1030, n. 60
Amount on which percentage reckoned under implied contingent fee agreement, § 191, pp 1089, 1092
Lien of attorney, § 213, p 1153, n. 40
Performance of services, § 183, p 1060, n. 99
Percentage of net fees, § 56, p. 830, n 44
Perfection of attorney's lien, §§ 214, 215, pp. 1155–1161
Performance,
Condition to payment of fees from funds in court, § 193, p 1097
Contingent fee affected by, § 188, pp. 1071–1075
Evidence in action for compensation, § 204, pp. 1123, 1124
Perjury,
Continuing a suit based on perjured testimony, suspension or disbarment, § 23, p 755
Ground for suspension or disbarment, § 21, p 738, § 24, p. 763, n 38
Withdrawal of attorney on discovery of perjury, § 110, p. 943, n 49
Permit to practice until next bar examination, § 14
Persistence in presenting points, duty of attorney, § 4, p. 708, n. 38
Personal attention to litigation, duty of attorney to give, § 146, pp 983, 984
Personal expenses, assignment as counsel by court, § 172, p 1035
Personal injury suit, assignment of lien of attorney, § 212, n 18
Personal judgment, enforcement of attorney's lien by, § 238, p 1212, n. 65
Personal notice of attorney's lien, § 215, p. 1156
Personal property,
Charging lien of attorney attaching to judgment relating to, § 228, p. 1171

Personal property—Continued,
Notice to attorney respecting personal property as notice to client, § 69, pp. 863–865
Persons,
Engaged in practice of law defined, § 3, p. 703, n. 23
Entitled to accounting or payment by attorney, § 137
Entitled to object to attorney's authority, § 74, pp. 882–884
Entitled to prosecute suspension or disbarment, § 30
Entitled to sue,
Attorney for money collected, § 154, p 990
Attorney's negligence or wrongful acts, § 157, p 997
Who may apply for substitution of attorney, § 121, p. 952
Perverting of decision, ground for suspension or disbarment, § 23, p. 753
Petition,
Action for compensation, § 203, pp 1107–1109
Application for admission to practice, § 9
Charging lien, proceedings to enforce, § 238, p 1208
Disbarment, § 31, p. 776
Objection to attorney's authority, § 74, pp 884, 885
Reargument in disciplinary proceedings, § 34, p. 795
Rehearing at disciplinary proceeding, § 35, p 797
Reinstatement, § 41, p. 817
Review of evidence as application for reinstatement, § 41, p 817
Review order of committee in disciplinary proceeding, § 37, p 804
Summary proceedings to compel payment over of money, § 159, p 1014
Philippine Islands, citizenship as qualification to practice law, § 7, p 713, n. 75
Physical disabilities, defense to proceeding for suspension or disbarment, § 24, p 764
Physician, liability of attorney for services in giving testimony, § 52, p 834, n. 84
Plea,
Accusation in disciplinary proceeding, § 32, p 780
Action for compensation, § 203, pp. 1109, 1110
Guilty, urging plea when defendant protests his innocence, suspension or disbarment, § 23, p. 757, n 36
Nollo contendere, conclusiveness of judgment in disciplinary proceeding, § 33, p. 790, n. 11
Objection to attorney's authority, § 74, p 885
Pleadings,
Action against attorney for money collected, § 154, pp. 990, 991
Admissions in pleadings, authority of attorney to make, § 100, p 921
Amendment of pleadings ante
Attorney's authority to draw or file, § 81
Charging lien, proceedings to enforce, § 238, p. 1208
Compensation, action for, § 203, pp. 1107–1113
Contempt by, drawing pleadings after disbarment, § 40, p. 814, n. 85
Pleadings—Continued,
Evidence,
Action for compensation to show nature and value of services, § 204, p. 1121
Attorney's authority respecting, § 76, p. 892
Incorporation of misstatements as ground for suspension or disbarment, § 23, p 755
Lien, proceedings to enforce lien, § 231, p. 1191
Negligence or wrongful acts, action for, § 157, pp 997–999
Negligence of attorney in preparing or filing, § 146, p. 984
Opposition to application for reinstatement, § 41, p 818
Presumption of attorney's authority relating to, § 73, p. 879
Ratification by client of attorney's acts, § 71, p. 874
Stipulations and agreements relating to, attorney's authority, § 100, p. 919
Striking pleadings on showing attorney is appearing without authority, § 78, p. 895
Subscription by nonresident attorney, § 15, p. 724, n 97
Suspension or disbarment proceeding, § 31, p. 776
Pledge, attorney's duty to realize highest price in sale of, § 144, n. 69
Pledgee as party in action for compensation, § 202
Points and authorities, attorney's authority to file, § 95, p 914
Pooling arrangement of partners, division of fees, § 56, p. 840, n. 44
Possession,
Attorney of evidence or security for debt as authorizing payment to attorney, § 106, p 935
Charging lien of attorney as dependent on, § 211 p. 1142
Retaining lien requiring, § 210
Possession of res, lien of attorney continuing during, § 217
Possessory lien of attorney, assignability, § 212
Power coupled with interest,
Client's right to discharge attorney, § 109, p. 942
Death of client terminating attorney's authority, § 113
Practice of law defined, § 3, p. 703
Precedence,
Determination of attorney's authority, § 78, p 895
Punishment in disciplinary proceeding, § 38, p. 806
Preference. Priorities, post
Prejudice, presumption by participation by one not authorized to practice, § 16, p. 725, n. 18
Prejudicial error in suspension or disbarment proceeding, § 37, p. 802, n. 82, p 805, n. 88
Preliminary examination of charges as condition precedent to suspension or disbarment, § 29
Preliminary proceedings for suspension or disbarment, § 27, p. 769
Premature action,
Accounting, § 154, p. 990
Compensation, § 199
Premature termination of employment, compensation, §§ 168–171, pp. 1027–1033

Premature termination or settlement of action affecting right to contingent fee, § 189, pp 1075–1077
Presence of attorney in court, duty to be present, § 146, p. 984
Presentation of,
Grounds of review in suspension or disbarment proceeding, § 37, p 800
Objection to representation of adverse interest, § 47, p. 827
Representation of adverse interest, § 47, p. 827
Presumptions,
Accounting by attorney, § 154, pp 991, 992
Action against attorney withholding money collected, § 154, pp 991, 992
Action for attorney's negligence or wrongful acts, § 157, pp 999, 1000
Action to recover compensation for services, § 204, p. 1113
Admission to practice in favor of accused, § 16, p. 727
Application for reinstatement, § 41, p 817, n 20
Assignment by attorney to client, § 128, p 970
Authority of attorney, § 73, pp 875–881
Evidence to overcome presumption, § 76, p. 890, n 79
Charging lien, proceedings to enforce, § 238, p. 1200
Contemplation of compensation of attorney, § 166
Contracts for compensation, § 182, p 1055
Disbarment proceedings, § 33, p 780
Evidence to overcome presumption of attorney's authority to appeal, § 76, p 893
Fraud by attorney,
Dealing with client, § 127, pp 965–968, § 132
Taking conveyance, mortgage or assignment from client, § 128, p 970
Gift from client to attorney, validity of, § 129
Good moral character of applicant for admission to practice, § 11, p. 717
Instructions to attorney, presumption of following, § 148, n. 31
Lien, proceedings by attorney to enforce lien after settlement in disregard of, § 231, p. 1193, n 47
Notice to client from notice to attorney, § 69, p. 854
Prejudice by participation of attorney unauthorized to practice, § 16, p 725, n. 18
Promise to pay for services, § 175, p 1042
Ratification by client of attorney's act, § 71, p. 873
Review in suspension or disbarment proceeding, § 37, pp 801, 805, n 29, 30
Review of order as to admission to practice, § 11 p. 719, n 52
Services of member are in firm's behalf, § 204, p. 1114
Services rendered by member will be for benefit of firm, § 56, p 838
Termination of authority to prosecute disbarment proceeding, § 30, p 775, n 92
Prevention of representation of conflicting interests by former client, § 48, p 829
Previous convictions, necessity for suspension or disbarment, § 21, p. 739
Previous disciplinary proceedings, evidence in subsequent proceeding, § 33, p. 782, n. 77
Previous employment, evidence to show employment contract in action for compensation, § 204, p. 1118
Principal and surety. Surety, post
Printing briefs,
Compensation for services under assignment by court, § 172, p. 1036
Liability of attorney, § 52, pp. 833, 834, n. 84
Priorities,
Lien of attorney, § 229
Notice to attorney,
Outstanding rights of third persons affecting priority of client, § 69, p. 859
Priority between mortgage and other conveyance affected by, § 69, p. 862
Protection of lien against,
Assignment by client, § 230
Set-off between parties, § 232, pp. 1197–1199
Settlement between parties, § 231, pp 1180–1197
Prisoner, securing release by imposition as ground for suspension or disbarment, § 23, p. 760
Privilege tax, payment affecting right to compensation, § 165
Privileges, §§ 42–44, pp. 820–822
Operation and effect of disbarment or suspension, § 40
Right to practice, § 4, pp 708, 709
Threatening or abusive letter to collect an account, § 59
Probate courts,
Charging lien of attorney as attaching to judgment of, § 228, p. 1172
Conduct of proceedings as practice of law, § 3, p. 705, n. 30
Probate of will, contingent fee contract conditioned on securing probate, § 188, p. 1072, n. 9
Proceeds of judgment, charging lien of attorney applying to, § 228, p. 1169
Proceeds of settlement, lien in favor of attorney, § 231, p. 1181, n 78
Proceeds of suit, lien of attorney for fee payable out of as affected by dismissal, § 231, p. 1184
Process,
Action for compensation, § 201
Appellate proceedings, attorney's authority to waive, § 95, p. 913
Authority of attorney to,
Issue, § 83
Receive, accept, or waive, § 83
Charging lien,
Application to, § 228, p 1170
Proceedings to enforce, § 238, p. 1208
Liability of attorney for injuries to third person, § 52, p 835
Lien proceedings to enforce, § 231, p. 1190
Misuse as ground for suspension or disbarment, § 23, p. 756
Negligence of collecting attorney failing to sue out process, § 144
Notice of proceeding for suspension or disbarment, § 27, p 769
Privilege from service of process, § 44
Pro confesso judgment in disciplinary proceedings, § 36, p. 797

Proctor,
Advocate as another denomination of proctor, § 8, p. 702, n 11
Costs and disbursements, priority over seaman's wage lien, § 229, n. 54
Defined, § 3, p. 703
Professional delinquency, ground for suspension or disbarment, § 18, p 733
Professional employment, retaining lien of attorney depending on acquisition of possession in course of, § 225, p 1167, n 69
Professional services, lien of attorney limited to compensation for, § 213, p. 1153
Profits,
Accounting by attorney for profits obtained in violation of duties, § 134
Assumpsit to recover illegal profit from attorney, § 154, p. 989, n. 72
Attorney prohibited from making profit out of relationship, § 125, pp 958, 959
Equitable remedy to recover illegal profit obtained by attorney, § 155
Secret profits, post
Pro hac vice, introduction of attorney from another jurisdiction without joining resident attorney, § 15, p. 724
Prohibition act, conspiracy to violate as grounds for suspension or disbarment, § 21, p. 738
Prominence of client as element in determining reasonableness of fee, § 191, pp 1085, 1086
Promissory notes. Bills and Notes, this index
Proof,
Action against attorney for money collected, § 154, p 991
Action for compensation, § 203, pp 1110–1112
Amendment of petition in disbarment proceedings to conform to proof, § 31, p 779
Attorney's authority, § 74, pp 882–885
Lien proceedings to enforce lien of attorney after settlement in disregard of, § 231, p. 1191
Property,
Attorney's authority to accept property as payment, § 106, pp. 937, 938
Attorney's authority to dispose of client's property, § 104
Delivered by client as subject-matter of attorney's retaining lien, § 225, p. 1166
Not involved in litigation, charging lien of attorney not extending to, § 228, p. 1174
Right to practice, § 4, p. 709
Propria persona, § 63
Acting in person after appearance by attorney, § 80, pp. 901, 902
Prosecuting attorney, misconduct as, suspension or disbarment, § 23, p. 756
Provisional reinstatement, § 41, p. 819
Provisional remedies, enforcement of charging lien by, § 234, p. 1201, n. 81
Public funds, participation in wrongful use, defense to proceeding for suspension or disbarment, § 25, p. 765
Public hearing in disciplinary proceeding, § 26, p. 768
Public office,
Holding by attorney affecting right to compensation, § 164
Reinstatement to allow performance of duties of public office, § 41, p. 819, n. 46
Public officer, § 4, p. 706, n. 32
Attorney for client with governmental powers, § 4, p. 707, n 34
Contracts to influence, compensation, § 181, p. 1050
Disqualification to represent adverse interests, § 47, p. 824, n. 7
Representation of conflicting interests after termination of office, § 48, p. 828, n. 26
Public policy,
Contingent fee contract, § 186, pp 1064, 1066
Defense to action for compensation, § 190
Disqualification to act in different capacities, § 49
Disqualification to represent adverse interest, § 47, p. 824, n 8
Public records, retaining lien of attorney on, § 225, p. 1168
Public trust, right to practice, § 4, p. 709, n. 43
Publication,
Articles laudatory of himself and derogatory of others, suspension or disbarment, § 23, p. 760
False and malicious officer, suspension or disbarment, § 23, p. 752, n. 79
Notice of proceeding for suspension or disbarment, § 27, p. 768
Punishment,
Disciplinary proceedings, § 38, pp. 806–811
Failure to disclose client's name, residence and address, § 75
Imposing liability on attorney for costs, § 50, p 831
Practicing without admission to practice, § 16, p. 727
Purchase by attorney of,
Interest in property or claim, § 126, pp. 961–963
Subject-matter of suit, § 128, pp. 970, 971
Qualifications,
Commissioner of patents may prescribe to practice before his office, § 6
Membership in bar association, § 60
Qualifications to practice, §§ 7, 8, pp. 712–714
Employment of members of the bar to ascertain, § 11, p. 716
Power to prescribe, § 5, p 709
Quantum meruit to recover compensation, § 182, p. 1056, n. 61, §§ 196, 197, p 1104
Defenses, § 196
On discharge, § 169, pp 1028, 1031, § 195
Premature termination of employment affecting, §§ 168, 169
Contingent fee, § 189, p 1075, n 43, p 1076
Services in another manner not under contract, § 182, p 1059
Settlement by client without attorney's consent, § 231, p 1189, n. 36
Void contract, § 190
Quashing of complaint in disbarment proceeding signed by more than one attorney, § 31, p. 779
Quasi criminal proceeding for disbarment, § 33, p. 784
Quasi officer of court, objections to admission of woman to the bar, § 7, p. 714
Quasi public official, attorney for indigent, § 54, p. 837, n. 13

Questions of law or facts,
Accounting by attorney, § 154, p 993
Action against attorney for money collected, § 154, p 993
Action by attorney to recover compensation, § 205, p. 1129
Action for attorney's negligence or wrongful acts, § 157, p 1002
Action for compensation, § 205, p 1129
Authority of attorney, § 78, p 895
Continuance of relationship of attorney and client, § 108
Damages for breach of partnership contract, § 56, p. 838
Disciplinary proceeding, § 34, p. 793
Fraud by attorney procuring deed from client, § 128, p 971, n 67
Good moral character of applicant for admission to practice, § 11, p 718, n. 40
Liability of attorney to third persons, § 52, p 834, n 84
Partner's authority to manage suit, § 56, p. 840, n 46
Ratification by client of attorney's acts, § 71, p. 874
Racketeering, ground for suspension or disbarment, § 21, p. 738
Railroads,
Disqualification to represent adverse interests in suit against railroad, § 47, p 825, n. 9
Equipment, charging lien of attorney attaching to, § 228, p. 1174, n. 27
Ratification,
Assignment by client to attorney, § 128, p 970
Clerk's acts by attorney, § 150
Conveyance by client to attorney, § 128, p. 970
Client of attorney's acts, § 71, pp. 867–874
Contract of employment, compensation, § 181, p. 1049
Delegation of attorney's authority, § 107, pp 939, 940
Employment of assistants by attorney, § 107, pp 939, 940
Mortgage by client to attorney, § 128, p 970
Purchase of client's interest or claim by attorney, § 126, p 962
Transaction between attorney and client, § 127, p 969
Violation of instructions by attorney, § 148
Real estate,
Attorney's authority to contract respecting, § 103, p. 925
Charging lien of attorney on, § 228, p 1176
Judgment relating to, § 228, p 1171
Foreclosure of attorney's lien on, § 230, n. 16
Notice or knowledge of attorney affecting real property as notice to client, § 69, pp. 857–863
Payment under contingent fee contract, § 187, p. 1069
Real estate brokers, practice of law, § 3, p. 705, n 81
Reargument in disciplinary proceedings, § 34, p. 795
Reargument on appeal, compensation for services under assignment by court, § 172, p. 1037
Reasonable doubt, proof in disbarment proceeding, § 33, p. 784
Guilt of attorney charged with criminal offense, § 59
Reasonable value of services,
Burden of proof as to in action to recover compensation, § 204, p 1113
Pleading to recover, § 203, p. 1111
Reasonableness of fee,
Construction of contract, § 182, p 1056
Contingent fee contract, § 186, p. 1064, n. 43
Contract providing compensation to be fixed by client, § 182, p 1057
Implied agreement, § 191, pp. 1078–1089
Jury question in action for compensation, § 205, p. 1131
Rebuttal of defendant's assertion in disciplinary proceeding, § 3, p 782, n. 77
Rebuttal of presumption,
Attorney's authority, § 73, p. 877
Represent corporation, § 73, p. 878
Represent municipality, § 73, p. 878
Obligation to pay arising from acceptance of attorney's services, § 204, p 1116
Receipt for collection, care and skill required in collecting, § 144
Receipts,
Client for part of proceeds as accord and satisfaction, § 144
Evidence,
Action for attorney's negligence, § 157, pp 1000, n 77, 1001, n. 88
Intrusting attorney with signed receipt as authorizing payment to attorney, § 106, p 936
Payments to attorney, construction as supplemental agreements, § 182, p. 1056, n. 54
Presumptions in disbarment proceeding, § 33, p 781, n. 65, 70
Refusal to give receipt as defense in summary proceedings to compel payment over of money, § 150, p 1012
Receiver,
Appointment of as terminating lien of attorney, § 217
Charging lien of attorney,
Funds in hands of, § 228, p 1172
Receiver of client, § 211, p. 1146
Consent to appointment of as waiver of right to attorney's lien, § 218, n. 28
Fees,
Appointment prior to partnership, division, § 56, p 838, n 26
Authority to stipulate as to, § 100, p 920
Liability for attorney's fees of receiver suing attorney to recover balance due, § 52, p 835, n. 4
Payable from funds held by receiver, § 193, pp 1098, n. 44, 1099, n 47
Interest of counsel for receiver in sale affecting right to compensation, § 167, p. 1026
Mortgagee, appointment of as affecting attorney's lien for services in foreclosure, § 217, n 25
Notice to attorney respecting receivers as notice to client, § 69, p. 866

Receiver—Continued,
Presumption of attorney's authority to sign answer authorizing appointment, § 73, p. 876, n. 12
Representation of,
Adverse interests, § 47, p. 825
Receiver and creditors, § 47, p. 827, n. 21
Summary proceedings,
Client's receiver to compel payment over of money, § 159, p. 1011
Compel allowance of fees from funds in receiver's hands, § 194, p. 1101, n 63
Receiving stolen goods, ground for suspension or disbarment, § 21, p. 738
Recommendation,
Bar association as evidence on application for reinstatement, § 41, p. 819, n. 40
Suspension or disbarment proceeding,
Referee, § 34, p. 796
Review of proceedings, § 37, p. 804
Reconsideration of motion for substitution of attorney, § 121, p. 953
Record,
Another state as evidence on application for admission to practice, § 15, p. 722, n. 77
Authority, § 72
Change or substitution of attorney, § 124
Conclusiveness in scire facias as to liability for costs, § 50, p. 832, n. 68
Conviction,
Conclusive evidence of moral turpitude, punishment, § 38, p 811, n. 65
Evidence of unfitness ground for disbarment, § 21, p. 737
Entry of change or substitution of attorney, § 120
Evidence,
Action for attorney's negligence in failing to record, § 157, p. 1001, n. 88
Nature and value of services rendered, § 204, p 1121
Falsification by judge, suspension or disbarment, § 23, p. 758, n. 42
Lien of attorney, § 215, p. 1158
Misuse, falsification or alteration, suspension or disbarment, § 23, p. 756
Negligence of attorney in recording instrument, § 145
Reimbursement of attorney for expenses, § 180, n. 52
Review of suspension or disbarment proceedings before committee or referee, § 37, p 803
Secretion of public records, ground for suspension or disbarment, § 21, p 739
Record on appeal,
Excessive size affecting liability of attorney for costs, § 50, p. 832
Suspension or disbarment proceeding, § 37, p. 800
Reduction of compensation,
Excessive or unreasonable fee, § 191, pp. 1088, 1089
Right to agreed reduction on discharge without cost, § 169, p. 1030, n. 62
Reduction of term,
Clerkship for admission to practice, § 8, p. 715
Suspension, § 38, p. 810
Referees,
Application for reinstatement, § 41, p. 820
Authority to submit to reference, § 91
Contempt of attorney for nonpayment of costs, § 50, p. 832
Contract for services, attorney's authority, § 103, p. 925
Disciplinary proceedings, § 34, p. 795
Hearing on review of finding, § 37, p. 804
Fees, authority to stipulate as to, § 100, p. 920
Liability of attorney for fees, § 51
Reference to in attorney's action for compensation, § 205, p 1129
Review of proceedings in suspension and disbarment proceeding, § 37, p 803
Summary proceedings to compel payment over of money, § 159, p 1016
Reformation,
Contract of employment, fraud or undue influence, § 181, p 1049
Defense in disciplinary proceeding, § 25, pp 764, 765
Evidence of reformation of applicant for reinstatement, § 41, p 815
Proof for reinstatement, § 41, p 816, n. 14
Refund, liability of attorney paying over money to his client, § 52, pp 835, 836
Refusal,
Pay over money collected,
Offense, § 59
Right to compensation, § 167, p. 1026
Vacate order of admission to practice, § 11, p 718, n. 44
Regent's certificate, application for admission to practice, § 9, n 7
Registered mail, notice of attorney's lien by, § 215, p 1159, n. 92
Registration,
Applicant for admission to practice, § 13
Lien of attorney, § 215, p. 1158
Regret, mitigation of punishment in disciplinary proceeding, § 38, p. 809, n. 59
Regulations Rules and Regulations, post
Rehearing,
Death of client terminating attorney's authority to file petition, § 113
Disciplinary proceedings, § 35, p. 797
Review of determination of committee or referee, § 37, p. 806
Reimbursement of attorney,
Accounting for profits acquired in violation of duty, § 134
Expenses, § 180
Right to assert adverse interest, § 126, pp. 960, 961
Reinstatement,
After dismissal, attorney's authority to agree to reinstatement, § 87, p 909
Contract for compensation, § 181, p 1054, n. 42
Record in other state as evidence on application for admission to practice, § 15, p. 722, n. 78
Satisfied judgment to extent of attorney's lien, § 231, p. 1186, n. 14
Suspended or disbarred attorney, § 41, pp. 814–820

Relation back,
Client's ratification of attorney's act, § 71, p. 868, n 46
Lien for attorney's services, § 229
Reinstatement, § 41, p. 819
Relationship of attorney and client,
Adverse interest, ante
Incidents, §§ 67–71, pp 850–874
Jury question in action for compensation, § 205, p 1129
Substitution of attorneys, post
Summary proceedings to compel attorney to pay over money dependent on relation, § 159, pp. 1010–1012
Termination, §§ 108–118, pp 940–949
Release,
Authority to release, § 105, pp 932–934
Burden of proving attorney's authority to release, § 76, p. 887
Condition precedent to action against attorney for money collected, § 154, pp 989, 990
Defense in action for attorney's negligence, § 156
Evidence of attorney's authority to make, § 76, p 892
Judgment,
Discharge of attorney's lien by, § 221
Presumption of continuance of attorney's authority, § 73, p 881
Obtained by fraud not releasing attorney's lien, § 218, n 34
Property levied on, attorney's authority, § 97
Question for jury as to attorney's authority to release, § 78, p 895
Release bond, attorney's authority to alter, § 88
Relevant evidence only admissible in action for compensation, § 204, p. 1117
Relief,
Representation of adverse interest, § 47, p. 827
Withdrawing attorney by other attorney, § 110, p. 944
Relinquishment of possession, lien of attorney lost by, § 224
Remand, review of action in disciplinary proceeding, § 37, p 806
Remedies,
Enforcement of attorney's lien notwithstanding settlement in disregard of, § 231, p. 1185
Negligence of attorney,
Causing loss of remedy, § 143, n 61
Collecting attorney in pursuing remedies, § 144
Removal of,
Attorney from state as terminating relation of attorney and client, § 117
Case to federal court, appearance by attorney licensed in another state, § 15, p 723, n. 93
Rendition of services, jury question in action for compensation, § 205, p. 1130
Renewal of contract, presumption as to in action to recover compensation for services, § 204, p. 1115
Rent, fee for collecting, § 191, p. 1079, n. 84
Reopening case in disciplinary proceeding, § 34, p 792
Reopening of judgment, presumption of authority of attorney to consent to reopening, § 73, p 881
Repeal, statutes relating to attorney's lien, § 208
Replevin,
Attorney's authority to contract for storing or removing replevied property, § 103, p 926
Bond, attorney's authority to execute, § 103, p 927
Directing sheriff to take goods not described in writ, suspension or disbarment, § 23, p 760
Presumption of attorney's authority to bring proceedings, § 73, p 877, n 16
Report,
Charging lien of attorney attaching to, § 228, p 1170
Commissioner in disciplinary proceeding, § 34, p. 796
Committee in proceedings for suspension or disbarment, § 27, p. 770, n. 40
Duty to know reports are true and correct, § 4, p. 707, n. 34
Referee in summary proceedings to compel payment over of money, § 159, p. 1016
Representations,
Authority to make, § 101, p 925
Binding on client, § 67, p. 851, n. 80
Refinancing indebtedness, jury question in action for compensation, § 205, p. 1130, n. 73
Representative capacity,
Notice by attorney as notice to client, § 69, pp. 858, 859
Retaining lien of attorney as to property delivered in, § 227
Reprimand, punishment in disciplinary proceeding, § 38, p 807
Mitigating circumstance, § 38, p 810
Reputation,
Consideration of in attorney's action to enforce lien against party compromising action without consent, § 231, p 1191, n. 46
Evidence of innocence in disbarment proceeding, § 33, p 785, n 98
Qualifications to practice, § 7, p. 712, n. 7
Request to show attorney's authority, § 74, p. 882
Rescission of contract, ratification by client of attorney's rescission, § 71, p. 868 n 45
Residence,
Circuitous admission to practice by admission to practice in another jurisdiction, § 15, p. 722, n. 81
Client, disclosure by attorney, § 75
Employment as an attorney of resident admitted in another state, § 15, p 723
Forfeiture of right to practice by change of residence to another jurisdiction, § 17
Inducing litigant to assume fictitious residence as ground for suspension or disbarment, § 23, p 775
Joining resident attorney by nonresident attorneys for trial of particular case, § 15, p. 724
Qualifications for admission to practice, § 7, p. 713
Reinstatement of one no longer a bona fide resident, § 41, p 815
Resignation of attorney, §§ 17, 110, pp. 943–945
Notice to appoint another attorney, § 118
Res judicata,
Conclusiveness of conviction of crime in disciplinary proceedings, § 33, p. 790

Res judicata—Continued,
Dismissal of disbarment proceeding, presentation of defense on appeal, § 37, p 802, n 81
Judgment in disciplinary proceedings, § 36, p 799
Application for reinstatement, § 41, p 814, n. 89
Order denying reinstatement, § 41, p. 814, n. 89
Resolution of board of commissioners fixing fee, conclusiveness in action for compensation, § 204, p. 1128, n. 59
Restitution,
Evidence on application for reinstatement, § 41, p. 819, n. 40
Mitigating punishment in disciplinary proceeding, § 38, p. 809
Restoration,
Benefits as condition precedent to action against attorney for money collected, § 154, p. 990
Status quo on avoidance of transaction between attorney and client, § 127, p 969
Result of prosecution, compensation under assignment as counsel by court, § 172, p. 1035
Retainer, §§ 61–65, pp 845–849
Accounting by attorney affected by illegality of retainer, § 133
Agreement, charging lien as created by, § 211, p 1148, n. 11
Amount of retainer in absence of express agreement, § 191, p 1089
Defined, § 61
Evidence of, § 76, p 888
Evidence of making out prima facie case in action for compensation, § 204, p. 1123
Fee in absence of express agreement, § 191, p 1089
Nature of, § 61
Necessity, §§ 62–64
Pleading in action for negligence, § 157, p. 998
Unauthorized actions, effect of, § 64
What constitutes, § 65
Retaining fee, § 162
Retaining lien of attorney, § 193, p. 1095, § 207
Enforcement of, § 233
Funds delivered for special purpose, § 226
Nature of lien, § 207
Notice, § 215, p. 1155
Origin, § 210, n. 74
Property delivered in representative capacity, § 227
Property delivered for special purpose, § 226
Property procured by fraud or theft, § 225, p 1168
Relinquishment of possession resulting in loss of, § 224
Requisites, § 210
Right to as condition precedent to right to charging lien, § 211, p. 1145
Services and fees covered, § 213, p. 1149
Subject-matter, §§ 225–227, pp. 1166–1169
Retraxit, authority of attorney to enter, § 87, p. 909
Retroactive discipline, § 38, p 806, n. 52
Return,
Amendment to show service of notice of attorney's lien, § 215, p. 1159, n 92
Execution, attorney's authority respecting, § 97
Reversal,
Conviction of crime as ground for disbarment, § 21, p. 739
Reversal—Continued,
Lien of attorney surviving, § 217
Person not licensed to practice, § 16, p 725
Review,
Action of board of governors in disciplinary proceeding, § 37, p. 806
Attorney's authority respecting, § 95, pp 912–914
Charging lien, proceedings to enforce, § 238, p. 1212
Discretion of examiners, § 10
Right to admission to practice, § 11, pp 716–719
Suspension or disbarment, § 37, pp 799–806
Revival of action,
Attorney's authority to consent to revival, § 90
Death of client terminating attorney's authority to revive, § 118
Revocation,
Attorney's authority, § 100, pp 940–943
Receive payment, § 106, p 936
Contingent fee agreement on death of client, § 188, p. 1074
Express compensation agreement giving rise to implied agreement, § 190
Judgment of disbarment, § 41, p. 817, n. 21
Order admitting attorney from another jurisdiction, § 15, p 723
Order of disbarment by reinstatement, § 41, p. 810
Reward,
Bringing cases to office, suspension or disbarment, § 23, p 759
Misconduct in acceptance, suspension or disbarment, § 23, p. 757, n 36
Riot, misstatement of law to stir up riot, suspension or disbarment, § 23, p 760
Roadbed of railroad, charging lien of attorney attaching to, § 228, p. 1174, n. 27
Rule to show attorney's authority, § 78, pp 895, 896
Rule to show cause in disbarment proceeding,
Burden of proof, § 33, p. 781
Subsequent pleading, § 32, p. 780
Rules and regulations,
Admission to practice, power of courts to prescribe, § 5, p 710
Compliance with in examination for admission to practice, § 10
Professional conduct, § 58
Rules of court,
Admission to practice, § 5, pp 709–711
Application for admission, § 9
Courts of another jurisdiction, § 15, p 721
Length of study, § 8
Compliance with as prerequisite to practice, § 7, p 712
Presumption of knowledge by attorney in disbarment proceeding, § 33, p 781
Qualifications for admission to practice in federal court, § 7, p. 712
Safety deposit box, keeping funds collected in, § 139
Salary to attorney, extra compensation, § 182, p. 1058, n. 80
Sale of client's property,
Attorney's authority, §§ 88, 103, p. 925; § 104
Payment to attorney authorized to sell, § 106, p. 934
Perishable property, attorney's authority to consent, § 88

Sale of subject-matter of litigation as terminating attorney's authority, § 117
Satisfaction of claim in disregard of attorney's lien, § 231, p. 1184
Satisfaction of judgment,
Attorney's authority respecting, § 99, pp. 915–917
Discharge of attorney's lien by, § 221
Disregard of attorney's lien, effect of, § 231, p. 1184
Evidence of attorney's authority to satisfy, § 76, p 893, n. 6
Presumption of continuance of attorney's authority to satisfy, § 73, p. 881
Termination of attorney's authority to satisfy, § 117, n. 27
Unauthorized satisfaction, liability for, § 147
Savings bank attorney, burden of proof as to reasonableness of charge in action against borrower to recover compensation for services, § 204, p. 1114, n 17
Scandalous matter in briefs concerning judge, ground for suspension or disbarment, § 23, p. 753
Scandalous pleading,
Answer in disciplinary proceeding, amendment, § 32, p 780
Liability for costs, § 50, p. 832
Suspension or disbarment, § 23, p. 756
Scandalous remarks concerning other attorneys, suspension and disbarment, § 23, p. 751
School boards, contract for services, compensation, § 181, p. 1051
Schools, qualifications for admission to practice, § 8, p. 714, n 91
Scienter, evidence to prove in disciplinary proceeding, § 33, p 783
Scire facias,
Application for charge of attorney in proceedings, § 121, p 953
Enforcement of liability for costs, § 50, p. 832
Scope,
Attorney's authority, §§ 70–107, pp. 896–940
Burden of proof, § 76, pp 887, 888
Presumption of, § 73, pp 878–880
Question for jury, § 78, p 895
Third person's right to question, § 74, p. 882
Weight and sufficiency of evidence, § 76, pp 891–893
Employment, notice to attorney obtained in, § 69, p 855
Lien of attorney, § 207
Seal of court to notice of proceeding for suspension or disbarment, § 27, p 769
Seaman's wage lien, priority as to lien of proctor prosecuting libel for wages, § 229, n. 54
Second offense, punishment in disciplinary proceedings, § 38, p. 811, n. 63
Second petition for rehearing in disciplinary proceeding, § 35, p. 797, n. 14
Secret agreement on arbitration, lien of attorney as affected by, § 231, p. 1182, n. 79
Secret profits,
Damages in action to recover, § 157, p. 1004, n. 98
Evidence in action to recover, § 157, p. 1001, n. 89
Parties in action to recover, § 157, p. 997
Secretary of Interior, power to disbar attorney, § 18, p. 733, n. 97
Secretary of Treasury, power to disbar attorney, § 18, p. 733, n. 97
Securities,
Negligence in giving advice concerning, § 143
Subject-matter of retaining lien, § 225, p. 1166
Summary proceedings to compel delivery to client, § 158, pp. 1005–1007
Security,
Condition precedent to summary proceedings to compel payment over of money, § 159, p. 1013
Delivery of papers to client on receiving security for fees, § 158, p. 1006, n. 18
Taking of as release of attorney's lien, § 222
Security for costs,
Attorney's liability for costs where security is required, § 50, p 831
Duty to furnish as matter of ethics, § 58, p. 844, n. 89
Seduction, ground for suspension or disbarment, § 21, p. 738
Selective Service Act,
Contract to secure exemption, compensation, § 181, p 1050
Violation, ground for suspension or disbarment, § 21, p. 739; § 23, p. 761
Self-executing judgment or order in disciplinary proceedings, stay to obtain substitutions for client, § 36, p 798
Self-incrimination, disciplinary proceedings, § 34, p 791
Sentence, imposition in disciplinary proceedings, § 36, p. 798
Separate trials,
Assignment of counsel by court, compensation, § 172, p. 1035
Disciplinary proceedings, § 34, p. 791
Separation of jurors, notice to attorney of separation as notice to client, § 69, p. 865
Service,
Copy of bill as condition precedent to action for compensation, § 198
Disciplinary proceedings, vacation of judgment, § 36, p. 799
Execution, attorney's authority respecting, § 97
Notice,
Attorney's lien, § 215, p 1153
Authority to accept, receive or waive, § 83
By attorney, § 83
Change of attorney on adverse party, waiver of, § 123
Notice or citation for appellate proceedings, attorney's authority to waive, § 95, p. 913
Order of substitution on adverse party, § 123
Process,
Authority of attorney to receive, accept or waive, § 83
Exemption, § 44
Negligence of attorney for failure to procure, § 146, p 984
Suspension or disbarment, § 27, p. 769
Sentence, bar or defense to disbarment proceeding, § 21, p. 740
Writ, client bound by counsel's directions, § 67, p. 851, n. 81

Set-off and counterclaim,
Accounting by attorney, § 153
Action against attorney for money collected, § 153
Allowance affecting compensation under contingent fee contract, § 187, p. 1068
Burden of proving in action against attorney for money collected, § 154, p. 902
Charging lien of attorney, § 228, p. 1170
Action to enforce charging lien, § 234, p. 1202, n. 99
Compensation as counterclaim, § 197, p. 1104
Lien of attorney for services in connection with, § 213, p. 1152
Pleading in action for compensation, § 203, p. 1110
Protection of attorney's lien against, § 232
Summary proceedings to compel payment over of money, § 159, pp. 1012, 1016
Setting aside,
Allowance of fee, § 191, p. 1088
Assignment by attorney to client, § 128, p 970
Assignment made in fraud of attorney's lien, § 230
Conveyance, mortgage or assignment by client to attorney, § 128, p. 970
Fraudulent transfer between attorney and client, § 128, p. 971
Gift from client to attorney, § 129
Order for admission to practice, § 11, p. 719
Attorney from another jurisdiction, § 15, p. 723
Satisfaction of judgment to extent of attorney's lien, § 231, p. 1186, n. 14
Stipulations or agreements made by attorney, § 100, p. 919
Transaction between attorney and client, § 127, pp. 968, 969
Settled case, review of suspension or disbarment proceedings, § 37, p. 804
Settlement,
See also Compromise and Settlement, ante
Before trial, compensation of attorney under contract, § 183, p. 1061, n. 17
Burden of proving as defense in action for compensation for services, § 204, p. 1115
Charging lien of attorney on proceeds without regard to, § 228, p. 1170, n. 92
Concealment of offer in settlement as ground for suspension and disbarment, § 23, p. 743, n. 15
Construction of agreement as to compensation, § 182, p. 1057, n. 72
Contingent fee contract prohibiting settlement by client, § 186, p. 1064
Validity, § 186, p. 1066
Contract for compensation, effect, § 183, p. 1060
Duty of client to inform attorney on making, § 231, p. 1180, n 77
Estate, liability of attorney for overpayment to client, § 52, p. 836
Liability of attorney,
Contract to settle, § 52, p. 834
Money received by client subject to ratification of settlement, § 52, p. 836
Settlement—Continued,
Lien of attorney,
Interfering with right of client, § 231, p. 1180
Providing for lien of attorney, validity of, § 231, p. 1183
Notice of attorney's lien as affected by, § 215, pp. 1156, 1159
Papers, admissibility in action to recover compensation for services, § 204, p. 1117, n. 59
Partners, burden of proof in action to set aside, § 56, p. 842
Pending appeal, lien of attorney not deprived by, § 231, p 1183, n 83
Procedure after to enforce attorney's lien, § 231, p. 1186
Protection of attorney's lien against, § 231, pp. 1180–1197
Subject to statutory lien of attorney, § 231, p. 1180, n. 77
Withholding, ground for suspension or disbarment, § 23, p. 749, n 46
Severable contract, compensation, § 182, p. 1055, n. 44
Recovery for services on death of attorney, § 171
Several defendants, assignment as counsel by court, compensation, § 172, p. 1035
Sham pleading, suspension or disbarment, § 23, pp. 755, 756, 760
Shameful exposures, suggestion as ground for suspension or disbarment, § 23, p. 756, n 30
Sharing of profits by members of firm, § 56, p. 839
Sharp practice, disciplinary proceedings, § 23, p. 751, n. 65
Sheriff,
Attorney's liability for fees, § 51
Defense in proceeding against to enforce attorney's charging lien, § 234, p. 1202
Misconduct as, suspension or disbarment, § 23, p. 757
Summary proceeding against to enforce charging lien against money collected by, § 235
Shooting persons under claim of defense of property suspension or disbarment, § 24, p. 763, n. 38
Showing attorney's authority, § 74, pp. 882–885
Signature,
Charge in disbarment proceeding, § 31, p. 779
Client's name to affidavit of inability to pay costs, suspension or disbarment, § 23, p. 761
Signs, disbarred attorney, contempt, § 40, p. 814, n. 85
Silence by client as constituting ratification of attorney's acts, § 71, p. 870
Bringing of action by attorney, § 71, p. 872
Delegation of attorney's authority, § 107, p. 940
Silence, inference of charging lien of attorney from, § 211, p. 1148
Sister of client benefited by services, right of attorney to lien against, § 211, p. 1146, n. 3
Skill,
Element in determining reasonableness of fee, § 191, p. 1083, n. 4
Evidence as to in action for compensation, § 204, p 1120
Required of attorney, § 141
Want of as question of law in action for compensation, § 205, p. 1131

Slander, injunction against representation of conflicting interests by former client, § 48, p. 830, n 37
Smuggling, ground for suspension or disbarment, § 21, p. 738
Solicitation of litigation,
Contingent fee contract, § 186, p. 1064, n. 47
Suspension or disbarment, § 23, p. 758
Evidence, § 33, p. 789, n 6
Solicitor defined, § 3, p 703
Solicitor general, setting aside order of admission of attorney from another jurisdiction, § 15, p. 723
Solvency of client,
Charging lien of attorney as dependent on, § 211, p 1146
Enforcement of charging lien of attorney as affected by, § 234, p 1200
Special agent, attorney as, § 67, p. 850, n 78
Special appearances, abuse of as ground for suspension or disbarment, § 23, p. 741, n. 3
Special contract,
Burden of proving defense of in action for compensation for services, § 204, p. 1115, n 32
Charging lien attaching to land by reason of, § 228, p 1175
Validity of, § 131
Special findings, action by attorney to recover compensation for services, § 205, p 1136
Special judges, notice to attorney of method of selecting as notice to client, § 69, p 865
Special lien of attorney, § 207
Special master, subsequent appearance in suit as solicitor, § 49, p 830, n 40
Special partnership, § 56, p 838, n 19
Special plea to plea in bar to jurisdiction in disciplinary proceedings, abandonment where not argued, § 37, p. 805
Special proceedings,
Enforcement of attorney's charging lien by, § 238, p. 1205
Lien of attorney for services rendered in, § 213, p 1150, n 26
Notice of attorney's lien attaching in, § 215, p 1155, n 59
Special prominence to parts of evidence, instructions in action by attorney to recover compensation, § 205, p. 1135
Special purpose, retaining lien of attorney on property delivered for, § 226
Special retainer, § 61
Special surrogate, disqualification to act as attorney for proponent of will, § 49, p 830, n 40
Specialized practice, admission to bar of another state without examination, § 15, p 721, n 75
Specific fund, charging lien of attorney satisfied from, § 235
Specific performance, decree declaring lien in attorney's favor for defending suit, § 238, p 1211, n. 63
Spite, weight and sufficiency of evidence of in disbarment proceeding, § 33, p 785
Splitting fees,
Acting without license, § 165, p. 1022, n. 82
Agreement to as affecting right to lien of attorney, § 209, n. 65
Standing of attorney,
Admissibility of evidence as to in action for compensation, § 204, p. 1120
Standing of attorney—Continued,
Consideration of in attorney's action to recover amount of lien against party compromising action without consent, § 231, p. 1191, n. 46
State,
Attorney as officer of the state, § 4
Charging lien of attorney as attaching to judgment recovered on behalf of, § 228, p 1171
Liability for costs in disciplinary proceedings, § 39, p. 812
License to practice on creation of new state, § 14, n. 69
Presumption of attorney's authority to represent, § 73, p 878
Stipulation by private party binding on state, § 100, p 918
Statements, attorney's authority to make, § 100, pp. 920–922
Statute of limitations,
Actions against attorney for money collected, § 153
Attorney's authority to acknowledge indebtedness avoiding bar, § 102
Bar of as respects lien of attorney, § 218
Burden of proving in action against attorney for money collected, § 154, p. 992
Compensation, § 199
Defeating claims, § 183, p. 1060
Enforcement of attorney's charging lien, § 238, p 1206, n. 34
Negligence of attorney, action for, § 156
Erroneous advice relating to, § 143, n 61
Summary proceedings to compel payment over of money, § 159, p. 1012
Suspension or disbarment, § 23, p 766
Wrongful acts of attorney, actions for, § 156
Statutory provisions,
Admission to practice, § 5, pp. 709–711
Application for admission to practice, § 9
Courts of another jurisdiction, § 15, p 721
Length of study, § 8
One expressing intention of becoming citizen, § 7, p. 713
Women, § 7, p. 714
Attorney's liability for loss resulting from ignorance of statute law, § 142
Bar association, § 60
Bill of costs, attorney's fees, § 161, p. 1019
Compensation, § 161
Absence of benefit to client, § 166
Assignment as counsel by court, § 172, pp. 1034, 1037
Compliance with,
Attorney's lien, § 214
Prerequisite to practice, § 7, p. 712
Costs, liability of attorney, § 50, p. 831
Examination for admission to practice, § 10
Lien of attorney, § 208
Officer's fees, liability for, § 51
Opinion as to interpretation as practice of law, § 3, p 705, n. 30
Prohibiting buying of demands for suit, § 46
Punishment in disciplinary proceedings, § 38, p. 811
Reinstatement, § 41, p. 816
Summary proceedings to compel payment over of money, § 159, pp. 1007–1017

Statutory provisions—Continued,
Suspension or disbarment, § 18, p 728; § 28, p. 773
Stay of proceedings,
Attachment, attorney's authority to stay, § 88
Brought by attorney without authority, § 64
Execution, attorney's authority, § 97
Failure of attorney to disclose client's name, residence and address, § 75
Rule to file warrant of attorney as constituting, § 78, p 896
Stenographers,
Attorney's authority to contract for services, § 103, p. 925
Compensation for services on appeal under assignment by court. § 172, p. 1036
Drafting legal instruments, practice of law, § 3, p 705, n 30
Liability of attorney for fees, § 52, p. 833
Stifling or suppressing evidence as ground for suspension or disbarment, § 23, p 754
Stipulations,
Attorney's authority respecting, § 73, p. 879; § 100, pp 917–920
Burden of proving attorney's authority to make, § 76, p. 888
Client for attorney to have costs in addition to compensation, § 163
Contract permitting summary remedy to compel payment, § 194, p 1100
Death of client affecting attorney's authority to make, § 113, n. 88
Dismissal of information for disbarment affecting right to reinstatement, § 41, p. 815
Judicial sales, authority of attorney to stipulate respecting, § 98
Party's authority to stipulate after appearance by attorney, § 80, p 901
Presumption of attorney's authority to enter, § 73, p 879
Stirring up litigation, unethical conduct, § 58, p. 848, n 89
Stock,
Purchase as purchasing demands for suit, § 46, p 823, n. 4
Subject-matter of attorney's retaining lien, § 225, p 1167, n 69
Stockholders,
Acceptance of services affecting liability for compensation to attorney, § 175, p. 1042, n 10
Bank, disqualification to represent adverse interests, § 47, p 825
Illegal combination affecting attorney's right to compensation, § 164
Representation of conflicting interests, § 47, p. 827, n 25
Right to act as attorney for corporation, § 63
Stop notices, priority of lien of attorney over claimants serving, § 229, n. 55
Stranger's power to object to attorney's authority, § 74, p. 882
Strict construction of rules as to admission to practice, § 15, p 721, n. 72
Striking pleadings,
Evidence attorney appears without authority, § 78, p. 895
Striking pleadings—Continued,
Failure of attorney to disclose client's name, residence and address, § 75
Study, preliminary study for admission to practice, § 8
Sua sponte,
Application for substitution of attorneys, § 121, p. 952
Suspension or disbarment, § 18, p 731, n 86
Sub-agents, attorney employed by detained attorney as, § 65
Subject-matter,
Attorney's employment, § 65
Charging lien of attorney, § 228, pp 1169–1176
Existence of as prerequisite to charging lien, § 211, p. 1144
Retaining lien of attorney, §§ 225–227, pp. 1166–1169
Suit, transfer to attorney, § 128, pp 970, 971
Termination of client's interest in as affecting attorney's lien, § 217
Submission of controversy, authority of attorney, § 92
Subornation of perjury, ground for suspension or disbarment, § 21, p. 738
Subpœna, changing return date, suspension or disbarment, § 23, p. 756
Subpœna duces tecum,
Compel attorney to produce client's papers, § 158, p 1006, n. 16
Proceedings for suspension or disbarment, § 27, p. 770, n. 39
Subrogation,
Enforcement of attorney's lien after settlement in disregard of, § 231, p. 1187, n. 21
Protection of attorney's lien against, § 230, n. 68
Subscription to stock, evidence of attorney's authority to subscribe, § 76, p. 893
Subsequent claims, lien of attorney as superior to, § 229
Subsequent law, compensation for unexpected services, § 182, p 1058, n. 78
Subsequent pleading beyond answer in disciplinary proceeding, § 32, p. 780
Subsequent proceedings, substitution or change of attorneys in, § 121, p. 953
Subsequent purchaser of property of client acquired by attorney, § 126, p. 963
Avoidance of transaction against, § 127, p. 969
Subsequently rendered service, lien of attorney for, § 213, p 1150, n. 24
Substantial performance of contingent fee contract affecting compensation, § 189, p 1076, n. 48
Substituted party, presumption of attorney's authority to represent, § 73, p. 876, n. 12
Substitution of attorneys, §§ 119–124, pp 950–957
Acceptance of service affecting liability for compensation, § 177, p. 1045
Liability for negligence of, § 149
Lien for services, § 218, n 81
Payment of judgment after notice of substitution, § 99, p 916, n. 89
Prosecution of disbarment proceeding, § 30, p. 775, n 92
Success of attorney as determining reasonableness of fee, § 191, p. 1083

Summary determination,
Attorney's authority, § 78, p 895
Issues on motion to substitute attorneys, § 122, p. 954
Summary disposition of retaining lien of attorney, § 233
Summary jurisdiction of court to suspend or disbar attorney, § 18, p 728, n 54
Summary proceedings,
Against attorney, §§ 158, 159, pp 1005–1017
Enforcement of attorney's charging lien by, § 235
Enforcement of attorney's lien after settlement in fraud of, § 231, p 1186
Fees, payment compelled by, § 194, pp 1100–1102
Payment over of money collected, compelling as bar to ordinary action, § 153
Performance of agreement by attorney, compelling, § 155
Practice without license, § 16, p. 726, n 28
Wrongful acts of attorney, proceedings predicated on, § 155
Summons,
Mailing in hope debtors would take their receipt as personal service, suspension or disbarment, § 23, p. 760, n 60
Presumption of attorney's authority to acknowledge service, § 73, p 878
Superior court, jurisdiction to disbar, § 18, p 731, n. 80
Supersedeas, appeal or error in suspension or disbarment proceeding, § 37, p. 808
Supersedeas bond,
Attorney's authority to execute, § 103, p. 926
Underworld character, vouching for validity, suspension or disbarment, § 24, p 763, n. 88
Superseded contract for compensation, construction and operation, § 182, p. 1057
Supervision by courts, § 58
Supplemental proceedings,
Attorney's authority to institute, § 96, n 58
Charging lien of attorney attaching to judgments in, § 228, p. 1171
Lien acquired in as prior to attorney's lien, § 229
Judgment for purpose of enforcing lien of attorney, § 234, p 1201, n 81
Presumption of attorney's authority, § 73, p. 881
Termination of as affecting attorney's lien, § 217
Supreme Court of United States, admission of women to practice, § 7, p. 714
Surety,
Adverse party, lien of attorney as superior to rights of, § 229
Attorney's authority to release, § 105, p 933
Disqualification of attorney from acting as surety in judicial proceedings, § 45
Relief from liability as surety by disqualification to act, § 45, p 822
Surety company's right to summary proceedings to compel attorney to pay over money, § 159, p. 1011, n. 71
Surplusage in decree in disciplinary proceeding, § 36, p. 798
Surrender,
Client's papers or property on substitution of attorneys, § 122, pp 954, 955
Right to practice, § 17
Surreptitious settlement after notice giving attorney cause of action against adverse litigant for fee, § 231, p 1185, n. 4
Surrogate's court,
Charging lien of attorney attaching to decree in, § 228, p. 1171, n. 4
Jurisdiction to enforce attorney's charging lien, § 238, p 1206, n 35
Lien of attorney as to action in, § 213, p. 1151, n 26
Necessity of written authority of attorney to appear in, § 77
Suspension,
Disciplinary proceedings, § 36, p. 798
Judgment of disbarment on condition, § 38, p. 809, n. 57
Suspension and disbarment, §§ 17–41, pp. 727–820
Absence from state, § 17
Accomplice testimony, § 33, p. 790
Account, failure to account, § 23, p. 746
Admissibility of evidence, § 33, pp. 781–784
Amendment of petition, § 31, p. 779
Answer to accusation, § 32, p. 780
Appeal and error, § 37, pp. 799–806
Costs, § 39, p 812
Reinstatement proceeding, § 41, p. 819
Appearance for himself in a cause after disbarment, right to, § 40
Application for vacation of order on reversal of conviction, § 21, p. 739
Arbitrary power, § 18, p 729
Arguments of counsel, § 34, p 793
Automatic disbarment on conviction of penalty, reversal on appeal, § 21, p. 740
Bar committee or association, § 18, p. 732
Board of governors, review of action of, § 37, p. 806
Burden of proof, § 33, p. 781
Hearing on review, § 37, p. 804
Change of residence, § 17
Charges, § 31, pp. 775–779
Citizenship not affected, § 40, p 814
Collateral attack on judgment, § 36, p 799
Commissioner of patents, power, § 18, p 733
Compensation, one failing to register, § 164, p. 1022, n 84
Conclusions of referee, § 34, p. 796
Conditions precedent, § 29
Conflicting interests, representing, § 23, p. 746
Contempt, distinct from right to punish for contempt, § 18, p 730
Contingent fee contract affected by disbarment, § 188, p 1074, n. 38
Continuance, § 34, p. 701
Conviction of criminal offenses as ground for, § 21, pp. 735–740
Correction of order of admission of attorney from another jurisdiction, § 15, p. 723
Costs, § 39, pp. 812–814
Courts,
Authority of particular court, § 18, p. 730
Proceedings before, § 28, p. 774
Criminal offenses, ground for, § 21, pp. 735–740

Suspension and disbarment—Continued,
Deception of court, § 23, p. 753
Decision on review, § 37, p. 805
Defenses, § 25, pp. 764–767
Demurrer to accusation, § 32
Determination on review, § 37, p. 800
Direction of verdict, § 34, p. 792
Dismissal, § 34, p. 792
Disobedience to order requiring payment to client, § 23, p 750
Disqualification of referee to act, § 34, p. 795
Division of fees, § 174, p. 1041
Duty of attorney to court, § 4, p. 708, n. 86
Effect of appeal, § 37, p 803
Effectiveness, § 18, p 731, n. 86
Evidence, § 33, pp 780–790
Application for reinstatement, § 41, p. 818
Hearing on review, § 37, p. 804
Preservation of, § 34, p. 795
Excessive fees, § 23, p 745
Exclusive jurisdiction, § 18, p 730
Factual basis for action, § 27, p. 770
False and scandalous remarks concerning other attorneys, § 23, p. 751
Felony, conviction as ground for, § 21, p. 736, n. 24
Final judgment or order before conviction, § 21, p. 739, n 70
Findings, § 34, p 794
Referee, § 34, p 796
Foreign state, precluding admission to practice, § 7, p. 712, n. 70
Grounds, §§ 19–24, pp. 733–764
Hearing, § 34, pp. 791–796
Review, § 37, pp. 800, 804
Insolvency, failure to pay funds to client, § 23, p. 750
Instructions, § 34, p. 793
Insufficient grounds, § 23, p. 761
Intent in wrongdoing, § 19, p. 734
Intermeddling with clients of other attorneys, § 23, p. 751
Joinder of proceedings, § 26, p. 768
Joint trial, § 34, p. 791
Judge,
Misconduct as, § 23, p. 756
Misconduct toward judge, § 23, p. 751
Judgment, § 36, pp. 797–799
Judicial position, misconduct of attorney occupying, § 24, p. 764
Jurisdiction of review, § 37, p. 800
Legislative limitation of power, § 19, p. 734
Libel and slander of judge, privilege, § 23, p. 753
Limitations and laches, § 25, p. 766
Loans to and from client as ground for, § 23, p. 745
Mandatory disbarment, § 38, p. 811
Mentally incompetent client, § 23, p. 745
Misappropriation and failure to account, § 23, p. 746
Miscellaneous grounds, § 23, p. 758
Misdemeanor, § 23, p. 742
Conviction as ground for, § 21, p. 736, n. 24
Mistake as ground for, § 23, p 744
Modification of judgment or order, § 36, p. 798
Money withheld must be received in professional capacity, § 23, p. 750
Suspension and disbarment—Continued,
Moral character, want or loss of, § 20
Moral turpitude, ground for, § 21, p. 736, n. 24; § 23, p. 742
Motive in instituting disbarment proceeding against other attorney, § 23, p 751
Nature and form of application for reinstatement, § 41, p 817
Nature and form of proceeding, § 28, pp. 770–774
Negligence, § 23, p. 744
New trial, § 35, p. 796
Nonprofessional misconduct, § 24, pp. 762–764
Notice of proceedings, § 27, p 768
Obstruction of justice, § 23, p 753
Offenses, practice after suspension or disbarment, § 40, p. 814
Operation and effect, § 40
Operation and effect of reinstatement, § 41, p. 819
Opposition to application for reinstatement, § 41, p. 818
Order, § 36, pp 797–799
Summary proceedings for disbarment on failure to pay over money, § 159, p. 1017
Other attorneys, unfair dealing with, § 23, p 751
Pardon affecting right to reinstatement, § 41, p 815
Particular crimes ground for, § 21, p. 737
Parties, § 26, p. 768
Partner, misappropriation of client's money, § 23, p 750
Patent attorney, § 17
Payment after proceedings begun or threatened as defense, § 25, p 767
Pending disciplinary proceedings, § 18, p. 730
Pending litigation, conduct tending to prejudice consideration, § 23, p. 756
Persons entitled to prosecute, § 30
Place where misconduct committed, § 18, p. 730
Plea to accusation, § 32, p. 780
Power to suspend or disbar, § 18, pp. 728–733
Preliminary proceedings, § 27, p. 769
Presentation of grounds of review, § 37, p. 800
Presumptions, § 33, p. 780
Presumptions on review, § 37, p. 801
Privilege as to liability for defamatory language, § 23, p. 753
Proceedings, § 26, p. 767
Reinstatement, § 41, pp. 816–820
Professional ethics, § 23, p. 742
Professional misconduct, § 23, pp. 741–762
Prosecuting attorney, misconduct as, § 23, p. 576
Public hearing, § 26, p. 768
Punishment, § 38, pp. 806–811
Questions of law and fact, § 34, p. 793
Recommendations of referee, § 34, p. 796
Record in another state as evidence on application for admission to practice, § 15, p. 722, n. 77, 78
Record on appeal, § 37, p. 80
Records, misuse, falsification or alteration, § 23, p. 756
Reference, § 34, p. 795
Application for reinstatement, § 41, p. 820
Review of proceedings before, § 37, p. 803
Rehearing, § 35, p. 797
Review of decision of committee or referee, § 37, p. 806

Suspension and disbarment—Continued,
Reinstatement, § 41, pp 814–820
Relation to client, professional misconduct, § 23, p. 743
Relation to court, § 23, p. 751
Reopening case, § 34, p. 792
Repeal of laws providing for on conviction of offenses, § 21, p. 736, n. 24
Representation of adverse interests, § 47, p. 825
Resignation, § 17
Restitution, defense, § 25, p 767
Review, § 37, pp. 799–806
Separate trial, § 34, p. 791
Settlement with client as defense, § 25, p. 767
Signature of charges, § 31, p. 770
Statutory provisions,
Punishment not exclusive, § 38, p. 811
Reinstatement, § 41, p. 816
Subsequent pleadings beyond answer, § 32, p 780
Summary proceedings to compel disbarred attorney to pay over money, § 159, p. 1012
Supersedeas, § 37, p. 803
Surrender of certificate or resignation, § 17
Tenure of office, § 17
Termination of relationship by, § 111
Title of proceeding, § 26, p. 768
Trial de novo on appeal, § 37, p. 800
Trial or hearing, § 34, pp. 791–796
Unfitness to practice, ground for, § 21, p. 736, n. 23
Vacation of judgment or order, § 36, p. 798
Verdict or findings, § 34, p. 794
Verification of,
Answer, § 32, p. 780
Charge, § 31, p. 778
Waiver,
Defects in charge, § 31, p. 778
Irregularity of proceeding, § 30
Notice, § 27, p. 769
Want or loss of moral character, § 20
Weight and sufficiency of evidence, § 33, pp. 784–790
Witness,
Failure to call witness or to testify as evidence, § 33, p. 790
Right to confront, § 34, p 792
Syndicate, sufficiency of evidence to show employment by member of, § 204, p. 1126, n. 49
Tacking practice for admission to bar of another state, § 15, p. 721, n. 75
Talking over litigation, representation of adverse interests, § 47, p. 826, n. 11
Tampering with witnesses as ground for suspension or disbarment, § 23, p. 753
Tangible objects, existence of as essential to charging lien of attorney, § 228, p 1170, n 92
Tax collector, disqualification of attorney for tax collector to become purchaser at sale, § 49, p 830
Tax sale, purchase of client's property by attorney at, § 126, pp 961, 963
Taxes,
Attorney, § 55
Payment affecting right to compensation, § 165
Presumption of attorney's authority to bring action to recover, § 73, p. 877, n. 16
Technical defenses to suspension or disbarment proceeding, § 25, p. 764
Telegrams, evidence of employment contract in action for compensation, § 204, p. 1118
Temporary abandonment of profession as forfeiture of right to practice, § 17, p. 728, n. 45
Temporary license to practice to one from another jurisdiction, § 15, p. 722
Tender,
Attorney as binding on client, § 106, p. 934
Negligence of attorney affected by client's failure to make tender, § 140, p. 978, n. 47
Tenure of office, § 17
Term of court for hearing application to compel attorney to pay over money, § 159, p. 1015
Termination of action prematurely affecting contingent fee contract, § 180, pp 1075–1077
Termination of lien of attorney, § 217
Termination of relation, §§ 108–118, pp 940–949
Compensation affected by, § 181, p 1054
Dealings between attorney and client affected by, § 132
Death of client affecting compensation, § 171, p. 1033
Evidence as to in action for compensation, § 204, p. 1127
Good faith in fidelity of attorney after termination, § 125, p 959
Interest on fees from date of termination, § 191, p. 1093
Jury question in action for compensation, § 205, p. 1131
Notice of termination, authority of attorney to give, § 83
Notice to attorney acquired after termination as notice to client, § 69, pp. 857, 866, 867
Premature termination affecting right to compensation, §§ 168–171, pp. 1027–1033
Purchase of client's property by attorney after termination, § 126, p 963
Representation of adverse interests, § 48, pp. 827–830
Summary proceedings to compel payment of fee after termination, § 194, p. 1102
Time to sue for compensation affected by premature termination, § 190
Terms imposed on substitution of attorneys, § 122, pp. 953–956
Territory admitted to statehood, admission to practice, § 15, p. 721, n. 74
Theft,
Client's liability for attorney's theft, § 68
Retaining lien of attorney on property procured by, § 225, p. 1168
Third persons,
Accounting or payment by attorney to, § 137
Charging lien of attorney extending to money in hands of, § 228, p. 1172
Client's liability for injuries to third person from act of counsel, § 68
Contract providing compensation to be fixed by third persons, § 182, p. 1057
Death of third party terminating attorney's employment contract, § 113
Knowledge acquired by attorney acting for, § 69, p. 855
Liability of attorney to, § 52, pp. 833–836

Third persons—Continued,
Liability to attorney, § 53
Negligence, liability of attorney to, § 140, p 979
Notice to attorney,
Claims and rights of third persons as notice to purchaser, § 69, pp. 859–863
Outstanding claims or rights of third persons to personalty as notice to client, § 69, pp. 863, 864
Title acquired while acting for third person, § 69, p 857
Payment of fees as creating relation of attorney and client, § 65
Solicitation affecting right to compensation, § 164
Threats,
Criminal proceedings as ground for suspension or disbarment, § 23, p. 760, § 25, p. 765
Judge, as ground for,
Suspension or disbarment, § 23, p. 751
Letter as blackmail, § 59
Soliciting employment by threats as ground for suspension or disbarment, § 23, p 759
Timber, charging lien of attorney on, § 228, p 1173, n. 38
Time,
Answer to accusation in disciplinary proceeding, § 32, p. 780
Appointment of new attorney becomes effective, §§ 120, 124
Attorney's lien attaches, § 216
Evidence of time expended in action for compensation, § 204, p. 1120
Expended by attorney as element in determining reasonableness of fee, § 191, p. 1082
Filing petition for review of proceedings for suspension or disbarment, § 37, p. 804
Notice of attorney's lien, § 215, p. 1159
Objecting to attorney's authority or demanding proof thereof, § 74, pp. 883, 884
Rehearing on review of decision of committee or referee in disciplinary proceeding, § 37, p. 800
Time to sue,
Attorney for money collected, § 154, p. 990
Charging lien, proceedings to enforce, § 238, p. 1205
Compensation, § 199
Title,
Attorney in suit, § 66
Notice of attorney respecting as notice to client, § 69, pp. 857–864
Proceeding for suspension or disbarment, § 26, p 768
Title insurance, failure of attorney to reveal facts as binding on client, § 67, p. 851, n. 84
Title papers, subject-matter of attorney's retaining lien, § 225, p 1167, n. 69
Torts, liability of attorney to third person, § 52, p 834
Transcript of evidence,
Liability of attorney for expenses, § 52, p 834
Suspension or disbarment, right to testimony given before investigating committee, § 27, p. 779
Transcript on appeal,
Alterations as ground for suspension or disbarment, § 23, p. 756
Dismissal of appeal from suspension or disbarment proceeding for failure to file, § 37, p. 803, n 9
Traveling expenses,
Assignment as counsel by court, compensation, § 172, p. 1036
Element in determining reasonableness of fee, § 191, p. 1083
Reimbursement of attorney, § 180
Traverse of answer in summary proceedings to compel payment over of money, § 159, p. 1014
Treble damages for attorney's deceit, § 157, p. 1005, n. 4
Trespass,
Attorney's liability, § 52, p 835
Client's liability for attorney's trespass, § 68
Trial,
Accounting by attorney, § 154, pp. 993, 994
Action against attorney for money collected, § 154, pp 993, 994
Action by attorney to recover compensation, § 205, pp. 1123–1136
Action for attorney's negligence or wrongful acts, § 157, pp. 1002, 1003
Attorney's authority to conduct, § 81
Charging lien, proceedings to enforce, § 238, p. 1211
Disbarment proceeding, § 34, pp. 701–706
Lien, proceedings to enforce lien after settlement in disregard of, § 231, p. 1194
Trial court's jurisdiction to,
Enforce charging lien of attorney, § 238, p. 1207
Suspend or disbar, § 18, p. 731, n 80
Trial de novo on appeal,
Petition for reinstatement, § 41, p 820
Suspension or disbarment proceeding, § 37, p. 800
Trover against attorney to recover money, § 155, n. 32
Trust company practicing of law, § 3, p. 705, n. 31
Advertisements as practice of law, § 3, p. 706, n. 31
Trust deed to attorney for benefit of client's creditors, § 128, p. 969, n. 47
Trustees,
Accounting by attorney to trustee, § 137, n. 15
Appearance by one not authorized to practice, § 16, p 725, n 18
Attorney acquiring interest adverse to client as, § 126, p. 960
Notice to attorney,
Notice to trustee, § 69, p. 861
Trustee's personal liability as notice to client, § 69, p. 865
Trusts,
Action to establish in assets of estate of former partner, § 56, p. 841, n. 62
Condition precedent to action against trustee for compensation, § 198
Creation of relation by contingent fee contract, § 187, p. 1070, n. 96
Fees,
Liability of trustee for attorney's fee, § 179
Payable out of trust fund, § 193, p. 1099

Trusts—Continued,
Fees—Continued,
Preserving trust estate, § 101, p 1083, n 4
Services rendered to trust, § 101, p 1084
Money collected by attorney and not paid over as trust fund, § 139
Retaining lien, inconsistent with claim to, § 226
Retention of trust funds for payment of fees, § 103, p. 1096
Turbulent disposition, admission to practice of attorney from another state, § 15, p. 722, n. 77
Unassignable cause of action, proceeding with by attorney to protect lien after settlement by parties, § 231, p. 1188
Unauthorized acts of attorney,
Client not bound by, § 67, p. 852
Liability for, §§ 147, 148
Undertaking,
Procuring by attorney to relieve himself from liability for costs, § 5, p. 831
Securing payment of judgment, charging lien of attorney attaching to, § 228, p. 1170
Staying execution, cancellation of by attorney entitled to lien, § 231, p. 1187
Undue influence,
Attorney in dealing with client, § 127, pp. 964–966
Burden of proving defense of in action for compensation, § 204, p 1115
Contingent fee contract, § 186, p. 1065
Contract of employment, jury question in action for compensation, § 205, p. 1130
Evidence in attorney's action for compensation, § 204, p. 1126
Security for fees and costs obtained by, § 130
Unethical conduct, § 58
United States Supreme Court, notice of proceedings for suspension or disbarment, § 27, p. 769, n. 21
Unjust claim, prosecuting as ground for suspension or disbarment, § 23, p. 755
Unjust enrichment, liability for attorney's fees, § 175, p 1043
Unjust or unconscionable fee contract, § 186, p 1065
Unknown heirs, authority of attorney for unknown heirs to appeal, § 95, p. 913
Unliquidated damages, charging lien of attorney attaching to action for, § 228, p. 1172
Unpaid claims incurred by attorney, lien for, § 213, p. 1154, n. 54
Unprofessional conduct as ground for discharge of attorney, § 109, p 942
Unreasonableness of contract, burden of proof in action for compensation, § 204, p. 1115
Unrecorded conveyance,
Notice to attorney of unrecorded conveyance as notice to client, § 69, p. 862, n. 93, p. 864, n. 1
Priority over lien of attorney, § 229, n. 49
Use of mails to defraud as ground for suspension or disbarment, § 21, p. 739
Conclusiveness of conviction as evidence in disciplinary proceedings, § 33, p. 790, n. 8
Use of office to aid civil business, suspension or disbarment, § 23, p. 757, n. 36
Vacation,
Clerkship for admission to bar, § 8, p. 715, n. 93
Notice of attorney's lien, § 215, p. 1160
Vacation—Continued,
Satisfaction of judgment in fraud of attorney's lien, § 231, p. 1186
Stipulations or agreements made by attorney, § 100, p 919
Vacation of judgment or order,
Admission of attorney from another jurisdiction, § 15, p. 723
Admission to practice, § 11, p. 719, n. 56
Attorney's authority, § 94
Disbarment proceeding, § 36, p. 798, § 41, p. 814, n 89
Presumption of continuance of attorney's authority, § 73, p. 881
Unauthorized vacation, liability for, § 147
Value of property involved as element in determining reasonableness of fee, § 191, p. 1081
Value of property taken in satisfaction, amount on which percentage is computed in determining contingent fee, § 191, p. 1092
Value of services, § 191, pp. 1078–1094
Burden of proof in action for compensation, § 204, p. 1114
Evidence in action for compensation, § 204, pp. 1120, 1127
Expert testimony of, § 191, pp 1093, 1094
Jury question in action for compensation, § 205, p. 1131
Variance,
Action against attorney for money collected, § 154, p. 991
Action for compensation, § 203, pp. 1112, 1113
Disbarment proceeding, § 31, p. 777
Lien proceedings to enforce, § 231, p 1192, n 46
Vendor, notice to attorney as notice to vendor, § 69, pp. 858–863
Venue,
Attorney's authority to stipulate respecting, § 100, p. 919
Charging lien, proceedings to enforce, § 238, p 1206
Compensation, action for, § 200
Summary proceedings to compel payment over of money, § 159, pp. 1009, 1010
Verdict,
Accounting by attorney, § 154, p 994
Action against attorney for money collected, § 154, p. 994
Action by attorney to recover compensation, § 205, p. 1135
Action for attorney's negligence or wrongful acts, § 157, p. 1003
Charging lien of attorney attaching to, § 228, p. 1170
Disciplinary proceedings, § 34, p. 794
Remission or reduction by attorney, § 105, p. 933
After client's death, § 113
Summary proceedings to compel payment over of money, § 159, p. 1015, n. 7
Suspension or disbarment proceeding, conclusiveness on appellate court, § 37, p. 801
Verification,
Answer in disciplinary proceeding, § 32, p. 780
Application for admission to practice, § 9
Application for reinstatement, § 41, p. 817
Attorney's authority to waive, § 100, p. 923
Charge in disbarment proceeding, § 31, p. 778

Verification—Continued,
Petition in summary proceedings to compel payment over of money, § 159, p. 1014
Pleadings as evidence of authority to commence ejectment, § 77, n. 15, 19
Vexatious suit, institution affecting right to compensation, § 167, p. 1026
Village attorney, misconduct as, ground for suspension or disbarment, § 23, p 757
Voidable agreements for compensation, § 182, p. 1057
Voluntary payment to client, lien of attorney affected by, § 231, p. 1184, n. 99
Volunteer services to needy litigants, as ground for suspension or disbarment, § 23, p. 762
Waiver,
Attorney's authority to take appeal, § 74, p. 884
Attorney's authority to waive, § 100, pp. 922, 923
Condition of contract, § 101, p. 925
Attorney's lien, § 218
Clerk's authority to waive notice, § 150
Contingent fee by advising settlement, § 189, p. 1077
Defects in,
Charge in disbarment proceeding, § 31, p. 778
Notice of attorney's lien, § 215, p. 1159, n. 92
Demand as condition precedent to action against attorney for money collected, § 154, p. 989
Exemption from service of process, § 44
Full performance of contract by client affecting right to compensation, § 167, p 1024
Imputing attorney's knowledge to client as basis of waiver, § 69, p. 866
Irregularity in proceedings for suspension or disbarment, § 30
Jurisdiction of proceedings for suspension or disbarment, § 26, p. 767
Notice,
Proceedings for suspension or disbarment, § 27, p. 769
Substitution of attorneys, § 121, p. 952
Objection to,
Attorney's authority, § 74, p. 883
Representation of adverse interest, § 47, p. 827
Representation of conflicting interests by former client, § 48, p. 829
Partner of right to share in fees, § 56, p. 840
Privilege from arrest, § 44
Process or service thereof, authority of attorney, § 83
Purchase of client's property by attorney, waiver of client's right to question, § 126, p. 962
Right to confront witnesses in disciplinary proceedings, § 34, p. 792
Right to refund on formation of new partnership, § 56, p. 839, n. 39
Security for costs affecting attorney's liability for costs, § 50, p. 831
Service of,
Clerkship for admission to practice, § 8, p. 714, n. 91
Notice of change of attorney on adverse party, § 123
Notice or citation for appellate proceedings, authority of attorney, § 95, p. 913
Waiver—Continued,
Service of—Continued,
Summons in error, jurisdiction to review disbarment proceeding, § 37, p. 803, n. 5
Summary relief to compel payment over of money, § 159, p 1009
Want of skill, question of law in action for compensation, § 205, p. 1131
War claim settlement, lien of attorney on client's funds in treasury, § 211, p. 1143, n. 84
War risk insurance, notice to attorney respecting as notice to insured, § 69, p. 866, n. 33
Warrant of attorney, § 77
Rule to file, § 78, p. 896
Weight and sufficiency of evidence,
Accounting by attorney, § 154, p. 992
Action against attorney for money collected, § 154, p. 992
Actions for attorney's negligence and wrongful acts, § 157, p. 1001
Attorney's authority, § 76, pp. 889–893
Summary proceedings to compel payment over of money, § 159, p. 1015
Wills,
Contest,
Contingent fee,
Amount on which percentage is reckoned, § 191, p 1090, n. 64
Dismissal of contest affecting, § 189, p. 1076, n 45
Lien of attorney, § 213, p. 1152, n. 36
Presumption of attorney's authority to represent contestants, § 73, p 877, n. 16
Reduction of fee, § 191, p. 1089
Execution of will as practice of law, § 3, p. 706, n. 31
Retaining lien of attorney on, § 225, p. 1168
Withdrawal of,
Appeal, attorney's authority, § 95, p. 913
Application for substitution of attorney, § 121, p. 953
Withdrawal of attorney, § 110, pp. 943–945
Compensation affected by, § 169, p. 1031
Duty not to withdraw, § 146, p. 984
Employment of another attorney on withdrawal, § 119
Justification as jury question in action for compensation, § 205, p. 1131
Loss of right to lien by, § 220
Notice to client to appoint another attorney, § 118
Summary proceedings to compel payment of fees on withdrawal, § 194, p. 1102
Unauthorized withdrawal, liability for, § 147
Withdrawal of member of firm, fees for services rendered by remaining members, § 56, p. 840
Withholding papers, enforcement of attorney's charging lien by, § 234, p. 1200
Witnesses,
Abetting to conceal identity or impersonate another as ground for suspension or disbarment, § 23, p. 755
Authority of attorney respecting, § 81
Bribing or tampering with as ground for suspension or disbarment, § 23, p. 753
Confronting by applicant for admission to practice, § 11, p. 719

Witnesses—Continued,
Confronting in disciplinary proceeding, § 34, p. 792
Continuance because of absence of witnesses actually present, suspension or disbarment, § 23, p. 755
Credibility as for referee in suspension or disbarment proceeding, § 37, p. 805, n. 33
Examination as to good moral character of applicant for reinstatement, § 41, p. 818, n. 35
Expenses, compensation for under assignment as counsel by court, § 172, p. 1036
Evidence of intimidation in disciplinary proceeding, § 33, p. 789, n. 6
Failure to,
Call as evidence in disciplinary proceeding, § 33, p. 790
Testify in own behalf as evidence in disbarment proceeding, § 33, p. 790
Interrogation by judge in disciplinary proceeding, § 34, p. 791, n. 21
Fees liability for, §§ 51, 52, p. 833
Misrepresentation to discredit as ground for suspension or disbarment, § 23, p. 754, n. 80
Perjury as witness, suspension or disbarment, § 24, p 763
Permitting client to testify falsely as ground for suspension or disbarment, § 23, p. 754, n 93
Review of credibility in disbarment proceeding, § 37, p 802, n. 88
Suggestion of simulation of illness affecting attorney's right to compensation, § 167, p. 1026, n. 23
Testifying as character for known criminal as ground for suspension or disbarment, § 24, p 763, n. 38
Women, qualifications for admission to practice, § 7, p. 713
Workmen's compensation,
Assistance in submitting claim as practice of law, § 3, p. 706, n. 31
Workmen's compensation—Continued,
Charging lien of attorney, § 228, p. 1173
Denial of right to be heard by counsel, § 63
Failure of attorney to give notice and file claim as binding on client, § 67, p. 852, n. 87
Notice to attorney relating to proceedings as notice to claimant, § 60, p 867
Payment of award or claim, attorney's authority to receive, § 99, p 917, § 106, p. 935
Presumption of attorney's authority to,
Recover premiums for benefit of compensation fund, § 73, p. 878, n. 32
Represent claimant, § 73, p. 876, n. 12
Proof of attorney's authority to prosecute claim, § 74, p. 883
Workmen's compensation insurance, acceptance of benefits by insurer affecting liability for attorney's compensation, § 175, p. 1042
Writ of error,
Contingent fee contract affecting client's duty to bring writ of error, § 187, p. 1071
Evidence of attorney's authority to waive service, § 76, p. 893
Presumption of authority of attorney to waive service, § 73, p. 881
Review of suspension or disbarment proceedings, § 37, pp. 799–806
Suspension or disbarment for failure to protect rights of client, § 23, p. 744
Writs, authority of attorney to issue, § 83
Written authority of attorney, § 77
Written consent, necessity for waiver or abandonment of attorney's lien, § 218, n. 28
Written notice of attorney's lien, § 215, p. 1157
Wrongful acts of attorney,
Actions for, §§ 155–157, pp. 994–1005
Reimbursement for expenses, § 180
Zealousness as no excuse for suit in improper jurisdiction, suspension or disbarment, § 23, p. 755, n. 98

Abridgment of powers and duties, § 5
Admission of service of attorney general by deputy, § 3, p. 1218
Advice to state officers, duty to give, § 6
Allegation of duties and powers, § 5
Alteration of powers and duties, § 5
Amendment, information in suit in equity, § 8, p. 1234
Appeal,
Appearance for purpose of, § 8, p. 1231
Criminal prosecutions, § 9
Appearance,
Attorney general by deputy, § 3, p. 1218
United States Supreme Court, § 8, p. 1230
Appointment, § 2
Special assistants, § 3, p 1218
Assistants, § 3, pp. 1214–1220
Appointment of, § 3, p. 1218
Prosecutor in criminal cases, § 9
Attachment, salary as liable to, § 4, n. 93
Authority,
Special assistants, § 3, p. 1217
Suit instituted by assistant, § 3, p. 1220
Bankruptcy, salary as liable to assignment in, § 4, n. 93
Bond commissioner, acting as, § 5, n. 40
Bonds, preparation of for depositories of public funds, § 5, n. 30
Civil actions and proceedings, conduct of, § 8, pp 1226–1234
Civil service, exemption of employee from, § 3, p. 1216 1216
Collateral attack, authority of assistants, § 3, p. 1217
Commissions on amounts collected, § 4
Common law powers, statute conferring, § 5, n. 22
Common school fund, suit by state to recover, § 8, p. 1227, n. 76
Compensation, § 4
Compromise of claims, power in respect to, § 7
Conduct of civil actions and proceedings, § 8, pp. 1226, 1230
Equity, § 8, p. 1234
Conflicting interests, choice in case of, § 8, p. 1229
Constitutionality of statute, raising question, § 7
Continuance of cases defeating assistant's right to compensation, § 4
Control of proceedings in equity, § 8, p. 1234

Costs, liability for, § 12
County, suing or defending on behalf of, § 8, p. 1227
Criminal prosecutions, conduct of, § 9
Customs matters,
Assistant attorney general in charge of, § 13, p 1218
Conduct of, § 8, p 1230, n 15
De facto officers, § 3, p 1218
Declaratory judgment, power to appear, § 7
Definitions, § 1
Deputies, § 3, pp. 1214–1220
Digest of laws, preparation of, § 5, n 23
Director of Trade and Commerce, duty to represent, § 8, p 1227, n 76
Disbarment proceedings, power to institute, § 10
Discontinuance, power to, § 8, p. 1230
Discretion in respect to matters of public concern, § 5
Dismissal,
Power of, § 8, p 1230
Proceedings in equity on relation of another, § 8, p. 1234
Unauthorized service by special counsel, § 3, p 1218
Disposition of actions, power in respect to, § 8, p 1230
District attorney distinguished, § 1
Duties in general, § 5
Eligibility, § 2
Special assistants, § 3, p. 1219
Emergency, employment of other counsel, § 3, p 1215, n. 26
Emergency Fleet Corporation, counsel for as eligible as special assistant, § 3, p 1219, n 76
Enforcement of laws, civil actions for, § 8, p. 1226
Equity, information in suit in, § 8, p 1231
Exclusive right to represent state, § 8, p 1229
Expenses, allowance to assistants for, § 4, n. 6
Experts, employment of, § 3, p 1214
Extra services, compensation for, § 4
Federal Farm Board, representing, § 8, p. 1228, n 95
Federal officers, § 3, p. 1218
Fees, compensation consisting of, § 4
Furnishing opinions,
Duty in respect to, § 6
Extra compensation for, § 4, n 4
Garnishment, salary as subject to, § 4, n. 93
Government's right in property, information in equity lying to assert, § 8 p 1232
Grand jury, right to appear before, § 9, n. 84
Heads of departments, advice to by Attorney General of United States, § 5
Highway commissions, duty to represent, § 8, p. 1227, n 76
History, § 1
Immunity of state, waiver of, § 8, p. 1228
Immunity to witnesses, authority to grant, § 9
Increases in taxes, commission on, § 4
Increasing powers and duties, § 5
Inferior courts, appearance in, § 8, p. 1227
Informations, civil cases, § 8, p. 1231
Inheritance tax cases, employment of special counsel, § 3, p. 1215, n 26
Institution of civil actions and proceedings, § 8, p 1226
Investigations concerning public peace, safety, and justice, § 7
Judicial notice,
Incumbent of office of solicitor general of United States, § 3, p 1219
Official character of deputies or assistants, § 8, p. 1216
Judicial powers, exercise of, § 5
Justice, investigations into matters concerning, § 7
Leave of court, information and complaint of private party, § 8, p. 1233
Legal skill, duty of performing acts requiring, § 5
Letter of appointment, special assistants, § 3, p. 1218
Levee districts, duty to represent, § 8, p. 1227, n. 76
Liabilities, §§ 11–13
Lien, special assistants as having, § 4
Liquidation of insurance company, appearance as counsel, § 8, p. 1227, n 77
Liquor law enforcement, § 9, n 87
Lower courts, prosecution in cases in, § 8, p. 1228
Malicious prosecution, personal liability for, § 13
Management of litigation, § 8, p 1230
Misapplication of public funds, information in equity to prevent, § 8, p. 1232
Misappropriation of public fund, information in equity to prevent, § 8, p. 1232
Mode of procedure, equitable action, § 8, p. 1233
Municipality, suing or defending on behalf of, § 8, p. 1227
Murder cases, assisting in, § 9, n. 84
Navy department, legal advice to, § 6
Oath of special assistants, entry on record as importing proper appointment, § 3, p. 1217
Opinions, duty of furnishing, § 6
Opinions of counsel, authority to procure at expense of state, § 3, p. 1214
Origin of office, § 1
Parties, actions brought by attorney general on relation of another, § 8, p. 1231
Payment of compensation to special assistants, enforcement of, § 4
Pending cases, proceeding with, § 8, p 1231
Penitentiaries, designation of, § 9
Personal liability in suit to restrain enforcement of unconstitutional statute, § 13
Place of confinement, designation of, § 9
Powers in general, § 5
Special assistants, § 3, p. 1217
Precedence of cases, § 14
Preservation of order, civil actions or proceedings for, § 8, p. 1226
President, advice to by Attorney General of United States, § 5
Presumptions,
Appointment of assistants, § 3, p 1217
Regularity of appointment of assistants, § 3, p. 1219
Private counsel, representation by, § 3, p 1214
Private individuals, joinder of personal complaint or bill with information of attorney general in equity, § 8, p. 1232
Private practice, right to engage in, § 14
Private rights, action solely for vindication of, § 8, p. 1227
Proof of authority of assistants or deputies, § 3, p 1217
Special assistants, § 3, p. 1219
Prosecuting attorney distinguished, § 1

Public peace, investigation into matters concerning, § 7
Public rights, civil actions for protection of, § 8, p. 1226
Public trust, information in equity to establish and enforce, § 8, p. 1232
Qualifications, § 2
  Deputies or special assistants, § 3, p. 1215
  Special assistants, § 3, p. 1219
Quantum meruit, recovery on by assistants, § 4
Quarters, reimbursement for expenditures for, § 4
Reduction of salary during term, § 4
Relator, suits in equity, § 8, p 1233
Representing state or United States, duty in respect to, §§ 7–10, pp 1225–1236
Retainer, agreement to pay assistant attorney general, § 4
Retroactive appointment of assistants, § 4
Safety, investigations into matters concerning, § 7
Salary, § 4
Settlement of claims, power in respect to, § 7
Solicitor general, creation of office, § 3, p. 1218
Special assistants or counsel,
  Appointment or employment of, § 3, p 1214
  Compensation, § 4
State loan board, service on by deputy attorney general, § 3, p. 1217
Statutory provisions, rights and duties conferred by, § 5
Stenographers,
  District attorney authorized to employ, § 3, p. 1220
  Employment of, § 3, p 1214, n. 11
Substitutes, § 3, pp. 1214–1220
Successor, power to bind, § 5
Supervision of judgment, § 8, p. 1229
Supplanting state's attorneys in institution or prosecution of criminal cases, § 9
Survey of offices, preparation of, § 5, n 23
Suspension proceedings, power to institute, § 10
Tax appeal cases, employment of additional counsel, § 3, p 1215, n 20
Tenure, § 2
Term of employment, special assistants, § 3, p. 1215
Termination of,
  Authority, § 5
  Employment, assistants, § 3, p. 1217
Unauthorized payment to assistant, recovery by state, § 4
Usage, statutory powers varied or enlarged by, § 5
United States, power to bring suit in name of, § 8, p 1228
War department, legal advice to, § 6
Zoning laws, approval of, § 5, n. 38

Abandonment of contract of sale,
  Effect as respects commissions of auctioneer, § 11
  Seller's right to treat contract as abandoned, § 8, p. 1263
Absolute nature of right to sell goods at public auction, § 2, p 1241
Acceptance of bid by auctioneer,
  Binding effect, § 6, p. 1247, n. 65
  Necessity to create obligation on part of bidders, § 7, p. 1253
Accounting by auctioneer for moneys received, § 13, p 1268
Actions by or against auctioneers, § 14
Actions on auctioneer's bond, § 16
Adjournment of sale, effect of as respects auctioneer's right to fee, § 11, n 14
Advancements by auctioneer, recovery from principal, § 10
Advertisements of sale, explanation by auctioneer, § 7, p 1251
Advice of counsel as justification for purchaser's refusal to accept conveyance, § 8, p. 1261, n. 59
Agency of auctioneer, § 6, pp. 1246–1249
Agent for undisclosed principal, purchase by, § 8, p. 1260
Agreement not to bid, effect of, § 7, p 1255
Amount of auctioneer's compensation, § 11
Announcement of auctioneer,
  Binding seller and buyer, § 6, p. 1248
  Reliance on by purchaser, § 7, p. 1251
Announcement of sale, § 1
Annulment of sale for fraudulent representations, jurisdiction in equity, § 8, p. 1261, n. 56
Approved security, compliance with conditions for sale on, § 7, p. 1252
Arbitrary interference with business of conducting auctions, § 2, p. 1241
Attorney's fees, recovery by seller suing for value of property not accounted for by auctioneer, § 13, p 1268
Authorization of owner, sale of property at auction without, § 7, p 1259
Bad faith, effect of as respects auctioneer's right to commissions, § 11
Bid defined, § 1
Bidder, defined, § 1
Bidding, § 7, p. 1253
Bonds of auctioneers, § 16
  Validity of ordinance requiring auctioneer to give, § 2, p. 1242, n 28
Broker distinguished from auctioneer, § 1
Burden of proof, false statements of auctioneer respecting vaccination of hogs purchased, § 8, p. 1263, n 85
By-bidder, defined, § 7, p. 1256
Cash deposit, surrender of possession by auctioneer defeating right to lien thereon, § 12
Catalogue,
  Terms of contract of sale controlled by, § 7, p. 1250
  Warranty in as binding on seller, § 7, p. 1252
Caveat emptor, application of rule to auction sales, § 8, p. 1262
Changing terms of sale during progress, § 7, p. 1252
Charter provisions, construction of, § 2, p. 1242, n. 28
Check, authority of auctioneer to accept when terms require cash payment, § 6, p. 1249
Chilling the bidding, effect of, § 7, p. 1255
Clerks,
  Employment of by auctioneer, § 6, p. 1249, n. 90
  Sale, agency for owner of property, § 6, p. 1247, n. 65

Commissions of auctioneer,
Payment, § 11
Resale, liability for, § 8, p 1264, n. 89
Compelling conveyance of realty by successful bidder, § 8, p. 1262
Compensation, § 11
Puffer's right to, § 7, p 1256
Competition with bidders as necessary element of auction, § 1
Completion of sale, § 7, p. 1250
Time for, § 8, p. 1260
Conditions of sale,
Announcement of auctioneer binding seller and buyer, § 6, p. 1248
Compliance with before title passes, § 8, p. 1260
Owner's right to prescribe, § 7, p. 1251
Conduct of sale, § 7, pp. 1249–1260
Conduct of resale of property at auction, § 8, p. 1264
Consent of owner, sale of property at auction without, § 7, p. 1259
Control of sale, right of owner, § 7, p 1250
Conversion, auctioneer's liability for, § 13, p. 1269
Corporation as included in term auctioneer as respects license, § 5
Correction of error in description of property in advertisement, § 7, p. 1253
Crier defined, § 1, n. 7
Damages,
Purchaser on failure to deliver property, § 8, p 1262
Vendor's right of action for on purchaser's refusal to comply with bid, § 8, p. 1263
Daytime, validity of legislation requiring sales by public auction in, § 2, p. 1244
Dealer's talk as warranty, § 13, p. 1269, n. 58
Definitions, § 1
Delegation of authority to auctioneer, § 6, p. 1249
Deposit,
Action for in name of auctioneer, § 14
Application of, § 7, p. 1258
Auctioneer's liability to buyer for, § 13, p. 1269
Receipt of by auctioneer, § 6, p. 1248
Right of parties in respect to, § 8, p. 1264
Description of property, requisites of, § 7, p. 1252
Discharge of sureties on auctioneers' bonds, § 16
Discretion, license, § 5
Disobedience of instructions, auctioneer's liability in case of, § 13, p. 1268
Dispute as to bid, procedure in case of, § 7, p. 1255
Disturbance of sale, bidder's liability for, § 7, p. 1259
Double agency of auctioneer, § 6, p. 1247
Drunkards, refusal to accept bid from, § 7, p. 1254
Duration of lease, materiality of misrepresentation as to, § 8, p. 1261
Duration of liability, sureties on auctioneers' bonds, § 16, n. 96
Dutch auction, defined, § 1, n. 1
Duty,
Auctioneer's responsibility to state for collection of, § 13, p 1271
Imposition of on auction sales, § 2, p. 1241, n. 24
Validity of statute requiring payment of, § 5
Estoppel of auctioneer to assert title in himself, § 13, p. 1268
Evidence, prosecution for violation of ordinance, § 17
Expenditures by auctioneer, recovery from principal, § 10
Express contract governing auctioneer's authority, § 6, p. 1247
Fall of hammer, acceptance of bid by, § 7, p. 1254
False statements of auctioneer,
Burden of proof as to, § 8, p 1263, n. 85
Rescission by buyer, § 8, p 1261
Fees, auctioneer's action for in own name, § 14
Figures, making of bid in, § 7, p. 1254
Financially irresponsible persons, refusal to accept bid from, § 7, p. 1254
Fixed price, offer of sale at as offer to sell property at auction, § 5, n. 53
Forced sale distinguished, § 1, n 1
Foreclosure sale, duty of auctioneer employed by assignee of chattel mortgage to conduct, § 13, p. 1271
Forfeiture of auctioneer's license, § 5
Fraud,
Auctioneer's right to commissions, § 11
Rescission of contract by buyer, § 8, p. 1261
Hammer, fall of indicating acceptance of bid, § 7, p. 1254
Hospital fee, payment from proceeds of auction sales, § 5, n 61
Identity of property, announcement of auctioneer binding seller and buyer, § 6, p 1248
Implied authority of auctioneer, § 6, p. 1247
Implied warranty by sale of goods as are, § 6, p. 1248
Indefinite expressions as grounds for setting aside sale, § 8, p. 1262
Injurious regulations, right to adopt, § 2, p. 1243
Insolvents, refusal to accept bid from, § 7, p. 1254
Inspection of property, opportunity for, § 7, p. 1250
Interest,
Auctioneer's liability for on portion of deposit not paid over, § 13, p. 1268
Deposit on vendor's failure to convey title, § 8, p. 1265
Interest of auctioneer in sale rendering sale voidable at option of purchaser, § 8, p. 1262
Irresponsible persons, refusal to accept bid from, § 7, p. 1254
Isolated act as engaging in business of selling at auction requiring license, § 5, n. 53
Jewelry auctions, count for violation of ordinance regulating, § 17
Jobber distinguished from auctioneer, § 1
Knowledge,
Conditions of sale, immateriality, § 7, p 1251
Owner, sale of property at auction without, § 7, p. 1259
Legislative restrictions and regulation, business as subject to, § 2, p. 1241
Letter, making of bid by, § 7, p. 1254
Liabilities of,
Auctioneer, § 13, pp. 1268–1271
Buyer and seller, § 8, pp 1260–1265
Clerk, § 13, pp. 1268–1271
Licenses, § 5
Lien of,
Auctioneer, § 12
Seller until payment or tender of purchase price, § 8, p. 1263
Limitations as to time, validity of ordinance in respect to auction sales, § 2, p. 1243, n. 33

Linen, laces, etc., validity of ordinance prohibiting auction sales, § 2, p. 1243, n. 32
Loose expressions as grounds for setting aside sale on ground of misrepresentation, § 8, p. 1262
Loss of property after passing of title, § 8, p. 1260, n. 38
Manner of,
Accepting bid, § 7, p 1254
Making bids, § 7, p. 1253
Memorandum of sale, necessity of making, § 7, p. 1250
Mentally irresponsible persons, refusal to accept bid from, § 7, p. 1254
Metalware, etc., validity of ordinance prohibiting auction of, § 2, p. 1242, n. 28
Minimum price,
Fixing of by seller, § 7, p. 1258
Rejection of bid falling below, § 7, p 1254
Ministerial duties, delegation of by auctioneer, § 6, p 1249
Minors, refusal to accept bid from, § 7, p. 1254
Misdescription of property, effect of, § 7, p 1252
Mistaken representations warranting rescission by buyer, § 8, p 1261
Mode of making bids, § 7, p. 1253
Modification of terms of sale, effect of as respects auctioneer's right to commissions, § 11
Mortgage on property as defeating passing of title to purchaser, § 8, p. 1260
Municipal ordinances regulating auction sales, § 2, p. 1242
Negligence, auctioneer's liability for loss arising from, § 13, p. 1268
Nighttime, validity of ordinance prohibiting auction sales of jewelry, etc., during, § 2, p. 1244
Nod, making of bid by, § 7, p. 1254
Notice,
Conditions of sale, immateriality, § 7, p. 1251
Resale of property at auction on failure of buyer to complete purchase, § 8, p. 1264
Occupation tax, failure to pay as respects auctioneer's right to recover fee, § 11, n 14
Offenses by auctioneers, § 17
Opinion, statements of as causes for avoiding sale on ground of misrepresentation, § 8, p. 1262
Oppressive regulations, right to adopt, § 2, p. 1243
Oral bid, sufficiency of, § 7, p. 1253
Origin, § 1, n. 1
Outcry, delegation of duty of making, § 6, p. 1249
Partial payment, right of parties in respect to, § 8, p. 1264
Particulars of sale, requisites of, § 7, p. 1252
Pawnbroker distinguished from auctioneer, § 1
Payment, authority of auctioneer to receive, § 6, p 1248
Peddler distinguished from auctioneer, § 1
Pedigrees of animals, effect of failure to furnish, § 8, p. 1260
Personal liability of auctioneer, § 13, p. 1269
Police power, reasonable regulations within, § 2, p. 1241
Possession, right of purchaser to, § 8, p. 1260
Praise of property, cause for avoiding sale on ground of misrepresentation, § 8, p. 1262
Precious stones and jewelry, validity of ordinance regulating sale of, § 2, p. 1242, n. 28
Prejudice from puffing, necessity of to avoid sale, § 7, p. 1257
Presence of property at sale, necessity of, § 7, p. 1250
Presumptions,
Ratification of acts of auctioneer, § 6, p. 1248, n. 72
Validity of ordinances regulating, § 2, p. 1242, n. 28
Printed conditions, binding effect of, § 7, p 1251
Priority, lien of auctioneer, § 12, n. 87
Private sale, authority of auctioneer to make, § 6, p. 1249
Proceeds of sale, liability of sureties on auctioneers' bonds, § 16
Prohibition of business, right of state or municipality, § 2, p. 1243
Property of third persons, announcement in respect to, § 7, p. 1259
Public auctioneer, defined, § 4
Public interest, business of auctioneer as affected with, § 2, p. 1241
Puffer,
Defined, § 7, p 1256
Prescribing terms of sale excluding, § 7, p. 1251
Purchaser,
Agency of auctioneer for, § 6, p. 1247
Auctioneer, § 7, p. 1259
Liability for compensation of auctioneer, § 11
Purchase price, auctioneer's action in own name for, § 14
Qualifications, auctioneer, § 4
Qualifying phrases, cure of slight deficiencies or inaccuracies by, § 7, p. 1253
Ratification, authority of auctioneer supplied by, § 6, p 1248
Reasonable compensation of auctioneer, § 11
Registration as condition precedent to engage in business, § 2, p. 1241, n. 23
Regulate, defined, § 2, p. 1241, n 24
Regulation in general, § 2, pp 1241–1245
Rejection of bid, right of auctioneer, § 7, p. 1254
Relinquishment of auctioneer's lien, § 12
Remedies of buyer, § 8, p. 1261
Repairs, necessity of as respects obligation of purchaser to pay purchase price, § 8, p. 1263, n. 85
Replevin,
Maintenance of by,
Auctioneer, § 14, n. 83
Purchaser, § 8, p 1262
Representation by auctioneer, binding effect on principal, § 6, p. 1247, n. 65
Resale,
Request of buyer, § 8, p. 1263
Reservation of right, § 7, p. 1252
Rescission of contract,
Buyer, grounds for, § 8, p. 1261
Commissions of auctioneer, § 11
Seller, ground for, § 8, p. 1263
Reservation of right to,
Bid, seller's right to, § 7, p. 1258
Resell, § 7, p 1252
Restrictions on land, notice to bidder of, § 7, p. 1250, n. 1
Revocation of authority given to auctioneer, § 6, p. 1249
Recovery of expenditures in case of, § 10
Revocation of license, § 5
Rights of auctioneers, §§ 9–12, pp. 1265–1268

Rights of buyer and seller, § 8, pp. 1260–1265
Sales book, validity of ordinance requiring auctioneer to keep, § 2, p. 1242, n 28
Secret arrangement with bidder, effect of, § 7, p. 1255, n. 81
Seller, agency of auctioneer for, § 6, p. 1247
Set-off against auctioneer of debt to by owner of goods, § 14
Several lots, purchase of as one entire contract, § 7, p. 1259
Sham bid, fake sale made on, § 7, p. 1256
Special agent, auctioneer as, § 6, p. 1248
Specific performance by seller's grantee, compelling of, § 8, p. 1262, n. 79
Specific terms, refusal to accept bids not complying with, § 7, p. 1254
Speculative damage, auctioneer's liability for when resulting from alleged negligence or unskillfulness, § 13, p. 1268
Stakeholder, auctioneer as in respect to deposit made by bidder, § 7, p. 1258
Statute of frauds, effect of as respects sale of land by auctioneer, § 6, p 1248, n. 77
Stifling the bidding, effect of, § 7, p. 1255
Successful bidder, liability for auctioneer's fee, § 11
Succession property, compensation of auctioneer on sale of, § 11, n. 33
Sureties on auctioneers' bonds, liability, § 16
Taxes, auction sales subject to, § 5
Termination of auctioneer's authority, § 6, p. 1249
Terms of sale,
  Announcement of auctioneer binding seller and buyer, § 6, p. 1248
Terms of sale—Continued,
  Compliance with as condition to title passing, § 8, p. 1260
  Owner's right to prescribe, § 7, p. 1251
Third persons, auctioneer's personal liability to, § 13, p. 1270
Time of sale, regulation of, § 2, p. 1244
Title passing to bidder at auction sale, § 8, p. 1260
Town auctioneer, qualifications, § 4
Unauthorized sale, validity of, § 7, p 1259
Undisclosed principal, personal liability of auctioneer in case of sale for, § 13, p. 1270
Unfair dealings, forfeiture of auctioneer's license for, § 5
Unlicensed auctioneer, validity of sale conducted by, § 7, p. 1259
Unsold property, return of by auctioneer, § 13, p 1269
Validity of sale, § 7, pp. 1249–1260
Waiver, compliance by purchaser with conditions of sale, § 7, p. 1251
Warranty,
  Binding effect on seller, § 7, p. 1252
  Personal liability of auctioneer on, § 13, p. 1269
  Quality or title, authority of auctioneer to bind seller by, § 6, p. 1248
Wink, making of bid by, § 7, p. 1254
Withdrawal of,
  Bid, right of bidder, § 7, p. 1254
  Property from sale, § 7, p. 1253
Writing,
  Authority of auctioneer, necessity, § 6, p 1248
  Bids, § 7, p. 1254

Action on bonds or recognizances, § 17
Administrator, prosecution of writ by, § 7
Affidavit of illegality superseding writ, § 1
Alias execution, superseding by, § 2
Amendment, declaration, § 11
Appeal,
  Right of from refusal to allow application, § 8
  Writ as substitute for, § 1
Appearance of defendant, § 10
Application for writ, § 8
Attachment, issuance of writ as, § 9
Attachment of debt, relief in case of, § 2
Bill in equity,
  Proceeding in nature of, § 4
  Superseding writ, § 1
Bonds, liability on, § 17
Certiorari superseding writ, § 1
Collateral actions, relief against judgments in, § 2
Common appearance, entry by plaintiff for defendant, § 10
Common law rules of practice governing writ, § 4
Concurrent remedies, effect of, § 1
Continuance, setting aside judgments entered in contravention of agreement for, § 2
Corporation, service of writ on, § 9
Costs, recovery by successful party, § 16
Debt lying on recognizance taken on issue of audita querela, § 17
Declaration, requisites of, § 11
Default judgment,
  Setting aside for want of notice, § 2
Default judgment—Continued,
  Want of appearance, § 10
Demurrer to declaration, § 11
Discharge in bankruptcy, relief in case of, § 2
Discontinuance, § 8
Dismissal of application, § 8
Equitable defenses, setting up by audita querela, § 3
Estoppel, prior judgment on same cause of action pleaded in, § 11
Evidence, § 12
Executions subject to review, § 2
Executor, prosecution of writ by, § 7
Fraud, relief from, § 3
Function of writ, § 3
Grounds in general, § 3
Hearing on application, § 13
Infants, vacation of judgment rendered against, § 2
Insane persons, vacation of judgments rendered against, § 2
Joint judgment in original proceeding, effect of as respects parties, § 7
Judgment, § 14
  Vacated by writ, § 2
Jurisdiction of proceedings, § 6
Jury trial, right to, § 13
Justice of the peace, setting aside judgment of for lack of jurisdiction, § 2
Legal opportunity to avail of defense preventing relief by audita querela, § 3
Misconduct of opposite party, relief in case of, § 3

Misjoinder of parties, common law governing as to, § 7
Motion,
Necessity for, § 8
Superseding writ, § 1
Nature of remedy, § 1
New trial, motion for as superseding writ, § 1
Nonsuit, costs in case of, § 16
Oppression, relief from, § 3
Origin, § 1
Parol evidence, admissibility, § 12
Parties to proceeding, § 7
Payment of judgment, avoidance of execution in case of, § 2
Petition,
Necessity for, § 8
Superseding writ, § 1
Plea in,
Abatement, propriety of, § 11
Bar, § 11
Pleading, § 11
Presumptions, § 12
Proceedings, §§ 4–8
Purpose of writ, § 3
Recognizances, liability on, § 17
Release of judgment, avoidance of execution in case of, § 2
Remedial nature of writ, § 1
Review of proceedings, § 15
Satisfaction of judgment, avoidance of execution in case of, § 2
Scire facias, process in form of, § 9
Scope of remedy, § 1
Secondary actions, relief against judgments in, § 2
Security for costs, § 16
Service of writ, § 9
State, writ not lying against, § 7
Summons, issuance of writ as, § 9
Supersedeas,
Issuance of writ not operating as, § 9
Superseding writ, § 1
Survival to representative, § 7
Time for application, § 5
Trial, § 13
United States, writ not lying against, § 7
Venire facias, process in form of, § 9
Writ, issuance and service of, § 9
Writ of error, writ as substitute for, § 1

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